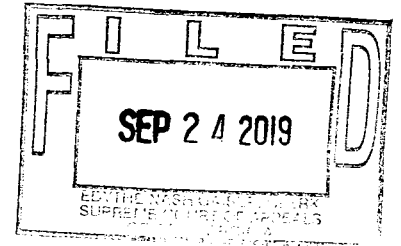


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 19-0369



**J.F. ALLEN CORPORATION,
a west Virginia Corporation,**

Plaintiff/Petitioner,

V.)

Appeal from a final order
of the Circuit Court of Kanawha
County (14-C-1182)

**THE SANITARY BOARD OF THE
CITY OF CHARLESTON, WEST
VIRGINIA a municipal utility,
and BURGESS AND NIPLE, INC.,
an Ohio Corporation,**

Defendants/Respondents,

Petitioner's Reply Brief

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STATEMENT OF CASE

In its response, Burgess & Niple acknowledges having notice of the problems J.F. Allen encountered in dealing with existing underground utilities but attempts to minimize its duties by claiming that it was not made aware that the strikes were causing delays. However, J.F. Allen's president, Greg Hadjis, testified that while he was onsite he told Burgess & Niple's resident project representative to make sure that he was taking good notes so that J.F. Allen could file an appropriate claim.¹ J.F. Allen's project manager, Alan Shreve, told Burgess & Niple's representatives that J.F. Allen was incurring costs that would have to be reimbursed and was advised, "We'll make you good".² In fact, Burgess & Niple representatives were on-site every day, saw problems and noted them in daily reports.³ In addition, J.F. Allen sent a series of letters to Burgess & Niple addressing delays, interruptions, and interference throughout the course of the project. Burgess & Niple did nothing in response.⁴ J.F. Allen's contact at Burgess & Niple, John Goodman, acknowledged receipt of J.F. Allen's letters and knowledge of the problems it was encountering but took no action to investigate or respond.⁵

Further, Mr. Shreve testified that he was assured at progress meetings that Respondents would work with J.F. Allen regarding the problems it was encountering, "We know you have a problem and we're going to work with you."⁶ In short, throughout the course of the trial of this case J.F. Allen submitted evidence reflecting informal dealings between the parties relating to problems encountered by the contractor, informal agreements about how such problems should be addressed, changes in the contract work and contract amount without adhering to contract provisions relating to changes in claims, and actual knowledge by the respondents of problems

¹ Jt. Appendix p. 1647.

² Jt. Appendix pp. 2278, 2281-2282, 2296-2297.

³ Jt. Appendix pp. 1656, 1665, 1684, 1783, 1864, 2280.

⁴ Jt. Appendix pp. 4435, 4436, 4510, 4511, 1958, 2408-2418.

⁵ Jt. Appendix pp. 3028, 3037-3038.

⁶ Jt. Appendix p. 2318.

encountered by J.F. Allen. Nevertheless, the respondents continue to argue for a strict application of the notice and claims provisions of the contract between The Sanitary Board and J.F. Allen in defense of J.F. Allen's claims.

ARGUMENT

I. THE JURY'S VERDICT WAS NOT "INCONSISTENT".

In its response Respondent conflates its argument that the jury's verdict in this case was inconsistent with arguments that the verdict was not supported by the evidence or that it was excessive. These arguments are not the same and should be addressed separately. In this case the verdict rendered was consistent on its face. It was certainly not irrational for the jury to find for J.F. Allen on liability as to both claims presented in this case and nor was it irrational for the jury to make separate awards against each defendant.

The fact that the awarded damages are in excess of those argued for in plaintiff's counsel's closing argument does not support Respondent's argument that the verdict was inconsistent. Counsel's argument did not address all of the evidence submitted to the jury during trial. Further, counsel's argument is not evidence nor is the jury bound to adhere to the suggestions of counsel made during his closing argument. The jury was entitled and, in fact, required to rely on the evidence presented during the trial and not upon argument or statement made by counsel in closing argument.

The assessment of ten percent comparative negligence against J.F. Allen with respect to its negligence claim against Burgess & Niple is likewise no indication of inconsistency in the verdict. As J.F. Allen has repeatedly argued throughout the course of this appeal, and the parallel appeals by the Respondents, J.F. Allen's claims against these two defendants were based on entirely different legal theories having different elements of proof and different potential recoveries. It is not difficult to envision a circumstance where J.F. Allen may have been to a small degree

comparatively negligent with respect to matters outside the scope of its contract claim that nevertheless fell within the scope of Burgess & Niple's common law duty regarding the administration of the project.

In any case, the above assertions by the Respondents were not the basis for the Court's conclusion that the jury verdict was inconsistent. Rather, what the Court described as inconsistency appears to have been based on a finding that the verdict either was not supported by the evidence or was excessive. The Court did not, however, address the verdict on those terms or perform a proper legal analysis of those issues. The jury's verdict in this case was not inconsistent and the Court's failure to properly address these issues, together with its award of a new trial as to damages, constituted an abuse of discretion and, for that reason, J.F. Allen's appeal should be granted.

II. THE JURY'S VERDICT WAS NOT EXCESSIVE.

First, it should be noted that the damages awarded against The Sanitary Board approximated the contract damages claimed by J.F. Allen in its Request for Equitable Adjustment submitted after completion of the work and upon which its claim of contract damages was based. It should also be noted that one who is in breach of contract is liable for all damages recoverable under the contract and which could have been foreseen when the contract was entered. These damages are not susceptible to apportionment with another party to the action who was not a party to the contract. If the Sanitary Board wished to have apportionment of an award of contract damages rendered, it should have filed a crossclaim or third-party claim against Burgess & Niple.

Again, the fact the jury made damages awards in this case that exceeded the amount that Plaintiff's counsel argued for in its closing argument is not a basis to conclude that the verdict was excessive. That issue should be addressed with reference to the evidence presented at trial, not the argument of counsel. Here, Respondent acknowledges that testimony was heard by the jury

reflecting losses that far exceeded the amount of its contract claim. In fact, the award of \$3,000,000 in damages against Burgess & Niple reflects the testimony heard by the jury that J.F. Allen suffered a loss on the project of \$3,000,000.

Also, this Court has acknowledged in *Hayseeds, Inc. v. Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986), that an award of aggravation and inconvenience can be made to a corporation, an artificial person. The few cases cited by Respondent for a contrary position are from other jurisdictions and do not reflect the law of this state. In *Hayseeds*, Justice Neely noted that a large, well organized corporation may have the capacity to engage in an activity like litigating a claim for years at a time with little aggravation or inconvenience. However, not every corporation is large, well organized, and able to withstand problems without aggravation, inconvenience and annoyance. J.F. Allen is a relatively small construction contractor that suffered significant hardship as a result of the problems it encountered including the failure of Respondent, Burgess & Niple to properly administer the project. The aggravation and annoyance suffered by J.F. Allen on the project was substantial and the award of damages for that loss should be left to the discretion of the jury.

For these reasons the jury's damages awards in this case were consistent with the evidence and were not excessive and the Trial Court's failure to evaluate the verdicts by these standards constituted an abuse of discretion. Therefore, J.F. Allen's appeal should be granted.

III. THE JURY'S VERDICTS DO NOT VIOLATE THE SINGLE RECOVERY RULE.

As previously argued, the jury is bound to follow the evidence, not comments made in closing argument. The question that should have been addressed by the Court was whether the jury's awards were sufficiently supported by evidence in the record, not whether they were consistent with suggestions or comments made during closing argument.

Respondent also misrepresents the nature of J.F. Allen's claims against Burgess & Niple by arguing that J.F. Allen asserts only that Burgess & Niple was negligent in failing to recommend payment of the claims submitted in the Request for Equitable Adjustment. Instead, J.F. Allen submitted evidence at the trial of the case that Burgess & Niple failed to meet the applicable standard of care with respect to duties owed to J.F. Allen including the duty to properly administer the construction of the project, to properly manage the construction, to recommend payments and to otherwise perform its duties in a fair, equitable and unbiased fashion.⁷

J.F. Allen submitted its Request for Equitable Adjustment as a contract claim. It was presented as a request to adjust the contract amount. J.F. Allen also presented evidence that it suffered additional losses that were not recoverable under its contract with the Sanitary Board. Its claim against Burgess & Niple was based in tort. Common law damages for negligence are broader than the damages available in tort of contract and include all losses proximately resulting from the breach. These damages are not capable of ready calculation and are of an indeterminate nature. It should have been left to the jury to assess those damages and the Court's failure to do so in this case by awarding a new trial as to damages constitutes an abuse of discretion. Therefore, J.F. Allen's appeal should be granted.

IV. THE JURY WAS NOT BOUND BY COUNSEL'S CLOSING ARGUMENT.

The jury in this case heard a week's worth of testimony and was instructed by the Court on the law applicable to the case. The jury also heard the closing arguments for each of the parties. The duty of the jury was to consider the evidence and reach a verdict consistent with that evidence and the Court's instructions on the law. The jury was expressly instructed that instructions or suggestions made by the parties' lawyers during their closing arguments were not evidence and therefore, they were not bound by anything said or not said by counsel. The failure of legal counsel

⁷ Jt. Appendix pp. 1999, 2073, 2074.

to specifically argue to the jury that it could award tort damages beyond the contract claim submitted against The Sanitary Board does not tie the hands of the jury. The jury was instructed regarding damages recoverable for J.F. Allen's claim against Burgess & Niple for professional negligence. Therefore, the jury has a duty to award damages supported by the evidence and "close to unbridled discretion is reposed in a jury in this jurisdiction to award such damages as it feels proper..." *Roberts v. Stevens Clinic Hospital, Inc.*, 176 W.Va. 492, 504, 345 S.E.2d 791, 803 (1986).

Therefore, any argument to limit or eliminate the jury's verdict based in any sense on an alleged limiting comment or argument by counsel is inappropriate and against the evidence, instructions and the law of the State of West Virginia. Therefore J.F. Allen's appeal should be granted.

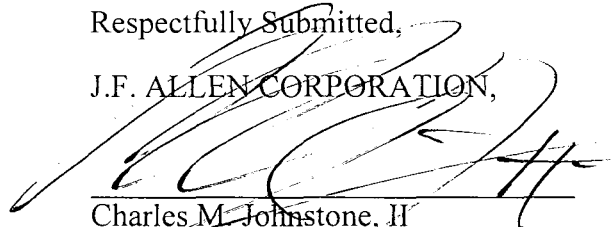
CONCLUSION

The theme of the response by Burgess & Niple is that the jury's verdict exceeds the amount Plaintiff's counsel argued for in his closing argument and therefore must be inconsistent and excessive. As stated above, closing arguments are just that, arguments. The jury in this case was instructed to follow the evidence and the law given by Court. The fact that counsel argued that both Defendants could be found responsible for the "chalkboard" damages introduced at trial in no way precludes the jury from awarding tort damages in accord with the Court's instructions. Here, the jury's verdict rendered were in the "close to unbridled discretion" with which it is clothed, rendered separate damages awards against two defendants on separate legal theories. The verdicts rendered were not inconsistent, were supported by evidence in the record, and were not excessive given the sums of money involved in the project and J.F. Allen's losses. For these reasons, and those argued previously, the Trial Court abused its discretion by invalidating the damages awards rendered by the jury and awarding Respondents a new trial as to damages.

Therefore, J.F. Allen's appeal should be granted, and this matter returned to the Trial Court with direction to enter judgment in favor of the Petitioner and against the Respondents upon the verdicts rendered by the jury.

Respectfully Submitted,

J.F. ALLEN CORPORATION,

A large, stylized handwritten signature in black ink, appearing to read 'C. M. Johnstone, II', is written over the typed name and extends upwards into the 'Respectfully Submitted' line.

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