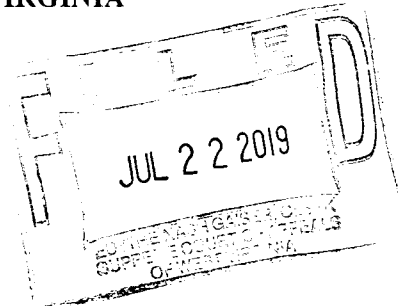


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 Brief

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ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED IN FINDING THAT THE JURY'S VERDICT WAS INCONSISTENT AS TO THE DAMAGES AWARDED AND IN VACATING THE JURY'S DAMAGES AWARDS AND ORDERING A NEW TRIAL AS TO DAMAGES ON THAT BASIS.
2. THE TRIAL COURT ERRED IN VACATING THE JURY'S DAMAGES AWARDS AND ORDERING A NEW TRIAL AS TO DAMAGES WHERE THE DAMAGES AWARDS WERE NOT EXCESSIVE AND WERE SUPPORTED BY EVIDENCE IN THE RECORD.
3. THE TRIAL ERRED IN FINDING THAT THE JURY'S DAMAGES AWARDS VIOLATED THE SINGLE-RECOVERY RULE AND BY VACATING THE JURY'S DAMAGES AWARDS AND ORDERING A NEW TRIAL AS TO DAMAGES.
4. THE TRIAL COURT ERRED BY FINDING THAT THE AMOUNT OF J.F. ALLEN'S CONTRACT CLAIM AGAINST THE SANITARY BOARD, \$1,250,392.43, WAS THE MAXIMUM POSSIBLE RECOVERY AVAILABLE.
5. THE TRIAL COURT ERRED IN FINDING THAT REMITTITUR WAS UNAVAILABLE TO RESOLVE ANY CONFLICT BETWEEN THE EVIDENCE AND THE JURY'S AWARDS AND THAT REMITTITUR WOULD HAVE REQUIRED AN APPORTIONMENT BETWEEN THE DEFENDANTS.

STATEMENT OF CASE

This case involved a series of disputes that arose during the construction of a public works construction project involving the Respondent, The Sanitary Board of the City of Charleston as Owner, the Petitioner, J.F. Allen Corporation, as Prime Contractor, and Respondent, Burgess & Niple, Inc., as Project Engineer. J.F. Allen and The Sanitary Board entered into a contract titled "Kanawha 2-Mile Creek Sewer Improvements-Sewer Replacements Sugar Creek Drive Sub-Area, Contract 10-8". By virtue of its contract to provide engineering services to The Sanitary Board, Burgess & Niple was designated as Project Engineer.¹

¹ Jt. Appendix p. 1412

The total, adjusted contract price, including agreed change orders, was \$5,555,598.00.² The work was initially to be completed during calendar year 2012 but due to a series of delay and extra work J.F. Allen did not leave the project until November of 2013.³

On June 30, 2014 J.F. Allen filed its Complaint in this action and subsequently amended its Complaint on November 13, 2015, alleging one claim against The Sanitary Board for breach of contract and one claim against Burgess & Niple for professional negligence. After a long, arduous and expensive litigation, including a prior appeal to the Supreme Court of Appeals, this case was tried to a jury over the course of eight days in January of 2018, almost four years after the filing of J.F. Allen's Complaint.⁴

At the trial of the action J.F. Allen submitted its "Request for Equitable Adjustment" as evidence for contract damages against The Sanitary Board in the amount of \$1,252,392.43.⁵ In addition, J.F. Allen submitted evidence of additional losses not covered in its Request for Equitable Adjustment. J.F. Allen's president, Greg Hadjis, testified that J.F. Allen suffered considerable losses beyond those contract damages reflected in his request for equitable adjustment.⁶ These losses include substantial periods of delay not recoverable under the terms of J.F. Allen's contract, the costs of accelerating J.F. Allen's work and extending work hours, the increased costs for home office support, management and attention, additional trips to the job site, additional surveying and additional costs of maintaining the company's safety program.

J.F. Allen also presented the testimony of construction and damages expert witness, Bryon Willoughby, whose undisputed testimony provided evidence that J.F. Allen suffered substantial additional losses that were not part of the request for equitable adjustment.⁷ Further, Mr. Willoughby testified that J.F. Allen was \$3,000,000.00 over budget for the project.⁸

² Id.

³ Jt. Appendix p. 2656

⁴ Jt. Appendix p. 1412

⁵ Jt. Appendix p. 4085

⁶ Jt. Appendix pp. 1545-1546, 1551, 1752-1753, 2286

⁷ Jt. Appendix pp. 2093-2102, 2113, 2119-2120

⁸ Jt. Appendix p. 2189

Prior to deliberations, the Trial Court instructed the jury not to award compensatory damages based on speculation or sympathy and that any assessment of compensatory damages must be based only upon the evidence presented at trial. Further, the Trial Court instructed the jury that if it found that Petitioner was entitled to recover damages, it may only award damages that will provide a single recovery, because double recovery of damages is not permitted.⁹

After trial the jury initially returned a verdict finding in favor of J.F. Allen and against the Sanitary Board for breach of contract in the amount of \$1,300,000.20. The jury also found Burgess & Niple ninety percent negligent and the Petitioner ten percent negligent. However, the space for assessment of damages against Burgess & Niple was left blank. The Trial Court returned the jury for further deliberation. The jury subsequently returned a verdict awarding damages in favor of the Petitioner and against Burgess & Niple in the amount of \$3,000,000.20.¹⁰

The trial judge subsequently directed entry of judgment upon the verdicts and judgment was entered March 1, 2018.¹¹ Respondents each filed post-trial motions renewing motions for judgment as a matter of law or for a new trial. The Trial Court found that liability against the defendants was established but that the verdict on damages was inconsistent and that the total award violated the single-recovery rule. On these grounds the Trial Court denied Respondents' Motions as to liability but granted their request for new trial as to damages only.¹²

SUMMARY OF ARGUMENTS

A. THE TRIAL COURT ERRED IN FINDING THAT THE JURY'S VERDICT ON DAMAGES WAS INCONSISTENT.

Justice Cleckley defined "inconsistency" in a jury verdict as where there is no rational, non-speculative way to reconcile two essential jury findings. *See, Cleckley Litigation Handbook*

⁹ Jt. Appendix p. 1412

¹⁰ Jt. Appendix p. 1124

¹¹ Jt. Appendix p. 1129

¹² Jt. Appendix p. 1412

on *West Virginia Rules of Civil Procedure*, 1173 (5th Ed. 2017). An example of this would be where the jury returns a verdict in favor of both the Plaintiff and Defendant, or where the jury finds no liability on the part of the Defendant but still awards damages to the Plaintiff. In such cases, an inconsistency should be resolved or a new trial awarded, prior to the entry of judgment. In this case there is no inconsistency in the jury's findings and judgment was entered upon the jury's verdicts. There is no indication of any impropriety in the verdicts rendered by the jury in this case and it would be necessary to engage in speculation to reach the conclusion that the jury did not intend two separate verdicts and awards.

J.F. Allen's claims against the two Defendants in this case are based on separate causes of action and the remedy for each is not dependent on the other. J.F. Allen's remedy for Burgess & Niple's negligence is not limited to or dependent on the damages recoverable under J.F. Allen's contract with The Sanitary Board. The fact that the jury returned awards against both Defendants in this case is neither inappropriate nor unexpected. The jury verdict form submitted to the jury contained two separate spaces for the express purpose of allowing the jury to make the award as to each Defendant that it found to be appropriate. As such, the Trial Court erred by finding that the Jury's verdicts in this case were inconsistent, vacating the jury's damages awards, and awarding a new trial as to damages.

B. THE TRIAL COURT ERRED BY VACATING THE JURY'S DAMAGES AWARDS AND GRANTING DEFENDANTS A NEW TRIAL AS TO DAMAGES WHERE THE AWARDS WERE NOT EXCESSIVE AND WERE SUPPORTED BY EVIDENCE IN THE RECORD.

The jury in this case returned verdicts against both Defendants for different amounts and upon different claims. The jury's verdicts, returned on the verdict form reviewed and agreed to by counsel and the Trial Court prior to deliberations, awarded, in the space provided for damages to be awarded against The Sanitary Board, an amount approximating the amount claimed by J.F.

Allen as its contract damages. In response to a separate interrogatory, the jury found Burgess & Niple to have breached its common law duty owed to J.F. Allen to perform its work according to the appropriate standard of care and made an additional, separate award of damages against Burgess & Niple in the separate space provided for that purpose. Since there was no inconsistency in the verdicts returned, the Trial Court should have limited its review to determining whether the verdicts were supported by the evidence and whether they represented an excessive verdict.

In determining if there is sufficient evidence to support a verdict, the Trial Court should:

- (1) Consider the evidence in the light most favorable to the prevailing party;
- (2) assume that all conflicts in the evidence were resolved in favor of the prevailing party;
- (3) assume as proved all facts which the prevailing party's evidence tends to prove; and
- (4) give the prevailing party the benefit of all reasonable inferences which may be drawn from the evidence presented.

Bowyer v. Hi-Lad, Inc., 609 S.E.2d 895, 899 W.Va. (2004); *Rice v. Ryder*, 184 W.Va. 255, 400 S.E.2d 263 (1990); *England v. Shufflebarger*, 152 W.Va. 661, 166 S.E.2d 126 (1969). When a case involving conflicting testimony and circumstances has been fairly tried under proper instructions the verdict will not be set aside unless plainly contrary to the evidence. *Neely v. Belk*, 222 W.Va. 560, 661 S.E.2d 189 (2008).

Further, “[c]ourts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly they show jury passion, particularity, prejudice, or corruption” Syl. pt. 1, *Addair v. Majestic Petroleum Company*, 160 W.Va. 105, 232 S.E.2d 821 (1977); Syl. pt. 5, *Roberts v. Stevens, Clinic Hospital, Inc.*, 176 W.Va. 492, 345 S.E.2d 791 (1986); Syl. pt. 12, *Foster v. Sakhia*, 210 W.Va. 716, 559 S.E.2d 53 (2001). Where a verdict is large but not so disproportionate to the injuries suffered as to shock the conscious or lead to the belief that the jury was influenced by improper motives, it

would be an invasion of the province of the jury and, therefore, an abuse of power on the part of the Court, to set it aside. *5C Michies, Damages Session 51, n. 693*. A verdict rendered is entitled to considerable deference and should not be disturbed so long as the award is supported by some competent, credible evidence going to all essential elements of the award. Syl. pt. 4, *Reed v. Wimmer*, 193 W.Va. 199, 465 S.E.2d 199 (1995).

In this case, sufficient evidence was presented by the Plaintiff to support separate awards of damages against the two defendants. J.F. Allen presented a claim for contract damages against the Respondent, Sanitary Board in the amount of approximately \$1,250,000.00 but also presented evidence of other substantial damages. Further, in an action based in tort, the jury may award damages for aggravation, annoyance and inconvenience for which there is no definite itemization and no rule or measure upon which they can be based. In such cases, the fixing of damages is left to the discretion of the jury and a strong presumption of correctness is assigned to a jury verdict assessing damages. *Kessel v. Leavitt*, 2005 W.Va. 95, 511 S.E.2d 720, 810 (1998). Therefore, the Trial Court in this matter erred by substituting its own judgment for that of the jury, vacating the jury's award of damages, and awarding a new trial as to damages.

C. THE TRIAL COURT ERRED BY FINDING THAT THE JURY'S DAMAGES AWARDS IN THIS CASE VIOLATED THE SINGLE-RECOVERY RULE.

As noted above, J.F. Allen's claims against The Sanitary Board and Burgess & Niple are separate causes of action based on different theories of liability. J.F. Allen's claim against The Sanitary Board consists of damages recoverable under the contract between them. The jury's verdict against The Sanitary Board represents a close approximation of J.F. Allen's damages claimed under its contract. The verdict against Burgess & Niple is based on a finding of negligence, the damages for which are indeterminate in nature and are not subject to exact calculation. The award of damages in such cases is left to the sound discretion of the jury and

should not be disturbed by the Court. The Jury in this case returned verdicts in favor of J.F. Allen against both Defendants for different amounts and upon different claims. The jury awarded, in the space provided for damages to be awarded against The Sanitary Board, in an amount approximating the amount claimed by J.F. Allen as its contract damages. In response to a separate Interrogatory, the jury found Burgess & Niple to have breached its common law duty owed to J.F. Allen to perform its work according to the appropriate standard of care and made an additional, separate award of damages against Burgess & Niple in the separate space provided for that purpose. At trial J.F. Allen presented evidence that it had suffered losses that far exceeded the contract damages sought. Further, in cases based in tort, the jury may award damages for aggravation, annoyance and inconvenience for which there is no definite itemization and no rule or measure upon which they can be based. In such cases the fixing of damages is left to the discretion of the jury.

The fact that the jury awarded damages in favor of J.F. Allen against both The Sanitary Board and Burgess & Niple in this action is not evidence of a double recovery. Any such conclusion can be based only on speculation. J.F. Allen's claims against the two Defendants were based on separate and independent causes of action and differing theories of liability. It was anticipated by all parties that the jury might make awards in favor of J.F. Allen against both Defendants and the jury was properly instructed as to the impropriety of a double recovery. For these reasons, the Trial Court erred in concluding that the jury's damages awards in this case violated the single recovery rule, by vacating the jury's damages awards, and by awarding a new trial as to damages.

D. THE TRIAL COURT ERRED BY MAKING A FACTUAL FINDING THAT THE MAXIMUM POSSIBLE RECOVERY BY J.F. ALLEN WAS THE AMOUNT OF ITS CONTRACT CLAIM AGAINST THE SANITARY BOARD IN THE AMOUNT OF \$1,250,392.43.

It is true that J.F. Allen submitted evidence that it suffered damages recoverable under its Contract with The Sanitary Board in the referenced amount. But there is no basis for the Court's conclusion that J.F. Allen's tort damages should be capped at the amount claimed as contract damages. J.F. Allen presented substantial evidence at trial that it suffered losses on the project that far exceeded that amount. Further, as noted above, J.F. Allen's claim against Burgess & Niple was in the nature of a tort claim, which may include recovery of damages for aggravation, annoyance and inconvenience for which there is no definite itemization and no rule or measure upon they can be based. These claims, and the recovery for each, are not given the same treatment under the law because of the differences in the nature of the duties imposed by the common law versus those undertaken by contract. A person who commits a tort bears a risk of all proximate consequences of his wrong but one who breaks a contract bears only the risks he could have foreseen when he undertook the duty. *5C Michies, Damages 11, n. 284*, citing *Hurxthal v. St. Lawrence Manufacturing Co.*, 53 W.Va. 87, 44 S.E. 520 (1903); *Hall v. Philadelphia Co.*, 74 W.Va. 172, 81 S.E. 727 (1914).

Therefore, the Trial Court erred by finding that the maximum possible recovery by J.F. Allen against both Defendants is capped at the amount of its claim for contract damages, \$1,250,392.43, by vacating the jury's damages awards, and by awarding a new trial as to damages.

E. THE COURT ERRED BY FINDING THAT REMITTITUR WAS UNAVAILABLE TO RESOLVE ANY CONFLICT BETWEEN THE EVIDENCE AND THE JURY'S AWARDS AND THAT REMITTITUR WOULD HAVE REQUIRED APPORTIONMENT BETWEEN THE DEFENDANTS.

As noted elsewhere, J.F. Allen's damages should not be capped at the amount of its contract damages and, therefore, it is not necessary to apportion the separate awards rendered by the jury

in this case between the two Defendants. If the Trial Court had determined that the award against The Sanitary Board was excessive because it exceeds the amount of J.F. Allen's claim for contract damages by a few thousand dollars, this would be a matter that could easily be addressed by remittitur. Further, under West Virginia law, awards for damages of an indeterminate nature may likewise be the subject of remittitur. "Even where there are no data by which the amount of excess in a jury's verdict is definitely ascertainable, entry of remittitur is permissible." Syl. pt. 6, *Roberts v. Stevens, Clinic Hospital, Inc.*, 176 W.Va. 492, 345 S.E.2d 791 (1986). Therefore, the Trial Court erred by concluding that an award of damages against the Defendants in this case should necessarily be apportioned between the two Defendants and that remittitur was not available to resolve any perceived conflict with the evidence presented, and by vacating the jury's damages awards awarding a new trial as to damages.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that oral argument is necessary under the criteria of Rule 18 of the Rules of Appellate Procedure and that the Court would benefit from oral argument in this case. The Petitioner asserts that the case is suitable for a Rule 19 argument as a case involving assignments of error in the application of settled law. The Petitioner further asserts that, as the Order appealed from involved error in the application of well settled, existing law, the matter is appropriate for a memorandum decision.

ARGUMENT

I. THE JURY'S VERDICT WAS NOT "INCONSISTENT" AND THE TRIAL COURT ERRED IN SO FINDING AND IN GRANTING DEFENDANTS A NEW TRIAL AS TO DAMAGES ON THAT BASIS.

In her Order granting, in part, Defendants' Motions for new trial by granting a new trial as to damages only, the Trial Court made the following finding:

47. Here, the Court finds that liability against Defendants was established, but the verdict on damages is inconsistent and cannot

be reconciled with the instructions by the Court with what the law requires.¹³

Inconsistency in a jury's answers to special interrogatories submitted on a jury verdict form is a matter to which Rule 49 of the West Virginia Rules of Civil Procedure applies. That Rule addresses such inconsistencies by allowing the court to return the jury for further consideration or, when necessary, order a new trial before entering Judgment. Rule 49(b) provides as follows:

General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial. *Rule 49(b) of the West Virginia Rules of Civil Procedure.*

Thus, when a jury returns a verdict with special interrogatories, Rule 49 contemplates several possible responses. Where the answers and verdict are inconsistent the trial court "shall not direct entry of judgment" but may either send the jury back for further consideration or order a new trial. Where there is no inconsistency in the answers or verdict the court "shall direct the entry of the appropriate judgment upon the verdict and answers." *Id.*

In this case, when the verdict form was initially received it did, in fact, contain an inconsistency. The jury found the defendant Burgess & Niple to have been guilty of negligence but left blank the space for assessment of damages. Recognizing this inconsistency, and in accord with Rule 49, the Trial Court returned the jury for further consideration. The jury subsequently

¹³ Jt. Appendix p. 1412

returned a verdict awarding damages against the defendant Burgess and Niple in the amount of \$3,000,000.20. The Court did not then return the jury for further consideration but, instead, finding no inconsistency, directed the entry of the judgment upon the jury's answers and verdict. It would not have been permitted under Rule 49 to do so had it concluded that there was an inconsistency that compelled it to order a new trial.

As this Court has concluded, "When jury verdicts answering several questions have no logical internal consistency and do not comport with instruction, they will be reversed and the case remanded for a new trial." Syl. pt. 1, *Reynold v. Pardee & Curtin Lumbar Co.*, 172 W.Va. 804, 310 S.E.2d 870 (1983). However, in determining whether jury verdicts are inconsistent, "such inconsistency must appear after excluding every reasonably conclusion that would authorize the verdict." *Prager v. City of Wheeling*, 91 W.Va. 597, 599, 114 S.E. 155, 156 (1922).

Justice Cleckley defined "inconsistency" in a jury verdict as where there is no rational, non-speculative way to reconcile two essential jury findings. *Cleckley, Litigation Handbook on West Virginia Rules of Civil Procedure*, 1173 (5th Ed. 2017). Here, however, there is no inconsistency in the jury's findings, nor is there any indication of any impropriety in the verdict rendered by the jury in this case. It would be necessary to engage in speculation to reach the conclusion that the jury did not intend two separate, independent awards. J. F. Allen's claims against the two Defendants were based on separate causes of action and the remedy for Defendant, Burgess & Niple's negligence is not limited to, nor was it dependent on, the damages recoverable under plaintiff's contract with the Sanitary Board. The jury was specifically instructed by the Trial Court not to duplicate awards and the Court's instruction to that effect was read to the jury twice, once prior to deliberating and again when the jury was returned for further deliberation. The Trial Court in this case has not excluded the very reasonable conclusion that the jury intended to award damages against Burgess & Niple in an amount that was larger than the Trial Court would have awarded and larger than Respondents want to pay. Thus, there is no logical inconsistency on the verdict form in this case.

An example of what is meant by an "inconsistent verdict" can be found in the case of *Hopkins v. Coen*, 431 F.2d 1055 (6th Cir. 1970). In that case, a car driven by George Hopkins and in which Terry Hopkins was a passenger collided with an escort vehicle following a wide-load. George Hopkins was killed in the accident. Mr. Hopkins' estate and Terry Hopkins filed suit against the escort vehicle company and the transport company operating trailer pulling the wide load. The defendants counterclaimed that George Hopkins negligence was the sole cause of the accident. After trial the jury returned a verdict form containing a verdict for Terry Hopkins against the defendants in the amount of \$75,000.00, a verdict against Terry Hopkins for the defendants, a verdict for the Estate of George Hopkins and against the defendants in the amount of zero dollars and a verdict against the Estate of George Hopkins for the Defendants. *Id.* at 1058. As noted by the Court in that case, all four of the verdicts returned were inconsistent with the others.

In the instant cases is no inconsistency between the finding of a breach of contract on the part of the Sanitary Board and further a finding of a breach by Burgess & Niple of its common law duty of professional negligence. There is no logical inconsistency in a verdict making separate awards upon separate claims and against separate defendants. The fact that the jury returned awards against both defendants in this case was neither inappropriate nor unexpected. The jury verdict form submitted to the jury contained two separate spaces for the express purpose of allowing the jury to make the award as to each defendant that it found to be appropriate. When the verdict form was initially returned without an award in the space provided for damages for Burgess & Niple's negligence, the Court returned the jury for the express purpose of making such an award. When that inconsistency was resolved the Court directed entry of Judgment upon the interrogatories and verdicts rendered by the jury and it would not have been permitted to do so under Rule 49 had there been inconsistency in the answers. Therefore, the Court should have limited its analysis to whether the awards were excessive or were supported by evidence in the record and erred in finding that the verdict was inconsistent and in awarding the defendants a new trial as to damages on that basis.

II. THE JURY'S DAMAGES AWARDS WERE NOT EXCESSIVE AND WERE SUPPORTED BY EVIDENCE IN THE RECORD. THEREFORE, THE TRIAL COURT ERRED BY VACATING THE AWARDS AND ORDERING A NEW TRIAL AS TO DAMAGES.

The jury in this case returned verdicts against both defendants for different amounts and upon different claims and legal theories. The jury's verdicts, returned on a verdict form reviewed and agreed to by all counsel and the Trial Court prior to deliberations, awarded, in the space provided for damages to be awarded against the Sanitary Board, an amount approximating the amount claimed by J.F. Allen as its contract damages. In response to a separate interrogatory the jury found Burgess & Niple to have breached its common law duty owed to J.F. Allen to perform its work according to the appropriate standard of care and made an additional, separate award of damages against Burgess & Niple in the separate space provided for that very purpose. As previously argued, there is no logical inconsistency in the verdicts returned. The question the Trial Court should have addressed was whether the verdicts were supported by the evidence and whether the verdicts were excessive.

In determining if there is sufficient evidence to support a verdict a trial court should: 1) consider the evidence in the light most favorable to the prevailing party; 2) assume that all conflicts in the evidence were resolved in favor of the prevailing party; 3) assume as proved all facts which the prevailing party's evidence tends to prove; and 4) give the prevailing party the benefit of all reasonable inferences which may be drawn from the evidence presented. *Bowyer v. Hi-lad, Inc.*, 609 S. E. 2d 895, 899 (W.Va. 2004); *Rice v. Ryder*, 184 W. Va. 255, 400 S. E. 2d 263 (1990); *England v. Shufflebarger*, 152 W. Va. 661, 166 S. E. 2d 126 (1969). Furthermore, the moving party bears a heavy burden when seeking a new trial. The power to grant a new trial should be used with care and a circuit judge should rarely grant a motion for new trial. *Gerver v. Benavides*, 207 W. Va. 228, 530 S. E. 2d 701 (1999), cert. den., 120 S. Ct. 2008, 529 U. S. 1131. A new trial should not be granted unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. *State ex rel Meadows v. Stephens*, 207 W. Va. 341, 532 S. E. 2d 59 (2000); *Morrison v. Sharma*, 200 W. Va. 192, 488 S. E. 2d 467 (1997). When, as here, a case involving conflicting testimony and circumstances has been fairly tried under proper

instructions, the verdict will not be set aside unless plainly contrary to the evidence. *Neely v. Belk*, 222 W. Va. 560, 668 S. E. 2d 189 (2008).

Further, “[c]ourts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, particularity, prejudice, or corruption.” Syl. Pt. 1, *Addair v. Majestic Petrollium Company*, 160 W. Va. 105, 232 S. E. 2d 821 (1977); Syl. Pt. 5, *Roberts v. Stephens Clinic Hospital, Inc.*, 176 W. Va. 492, 345 S. E. 2d 791 (1986); Syl. Pt. 12, *Foster v. Sakhai*, 210 W. Va. 716, 559 S. E. 2d 53 (2001); *Kessel v. Leavitt*, 204 W. Va. 95, 511 S. E. 2d 720 (1998).

Where a verdict is large but not so disproportionate to the injury suffered as to shock the conscience or lead to the belief that the jury was influenced by improper motives, it would be an invasion of the province of the jury and, therefore, an abuse of power on the part of the Court to set it aside. *5C Michies, Damages* § 51 n. 693. A verdict rendered is entitled to considerable deference and an appellate court should decline to disturb a trial court’s award of damages so long as the award is supported by some competent, credible evidence going to all essential elements of the award. Syl. Pt. 4, *Reed v. Wimmer*, 193 W. Va. 199, 465 S. E. 2d 199 (1995).

The law recognizes that different reasoning is applied to determine the Court’s authority to interfere with a jury’s verdict where damages are reasonably ascertainable, as in an award for contract damages, and where damages are indeterminate as may be the case in an action for negligence. “There is great difference between cases of damages which be certainly seen, and such as are ideal, as between assumpsit, trespass for goods, where the sum and value may be measured, and actions of imprisonment, malicious prosecution, slander, and other personal torts, where the damages are a matter of opinion or speculation; ...” *Addair v. Majestic Petroleum Company, Inc.*, 160 W. Va. 105, 110, 232 S. E. 2d 821, 824 (1977) (quoting *Beardmore v. Carrington*, 2 Wilson, K. B. 244, 248, 95 Eng. Rep. 790 (1764)). As the Supreme Court of Appeals noted in *Addair*, the Seventh Amendment to the United States Constitution limits a Court’s authority to reexamine a jury’s findings.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U. S. Const. Amend. VII. The prohibition is restated in Article 3, Section 13 of the West Virginia Constitution, "No fact tried by a jury shall be otherwise reexamined in any case than according to the rules of the common law." Applying the common law to these admonishments, the Supreme Court of Appeals said:

How meek and mild has become the rule since Kent first proclaimed it, using as his precedent the common law to which our federal and state constitutions refer us! We believe too much of the force has been lost from the original admonitions in the old cases and that the constitutions require us not to interfere with jury verdicts claimed to be excessive where the amount is in Kent's words a "matter of opinion", 9 Johns. at 52, unless the verdict is monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such as manifestly shows jury passion, partiality, prejudice, or corruption.

Addair v. Majestic Petroleum Co., Inc., 160 W. Va. 105, 112, 232 S. E. 2d. 821, 824-825 (1977).

This Court has recognized that the reasons for deference to a jury's damages award, even in cases where the amount awarded is more than the trial judge or appeal court would have awarded had they been sitting in the place of the jury, include the enormous cost and delay associated with litigating a case through trial and the public interest in promoting settlements. In *Roberts v. Stevens Clinic Hospital, Inc.*, 176 W.Va. 492, 345 S.E.2d 791, this Court noted as follows:

"Without the occasional jury award that is at least ten times greater than what the parties would have settled for immediately after the tragedy, there would be no incentive on the part of clients to temper the file building, anti-settlement proclivities of their lawyers by urging quick payment of just claims. Sometimes, of course, it is the clients who insist on litigation against the advice of their lawyers, and this too is more likely to be avoided when appellate courts restrain themselves in the supervision of jury awards." *Id* at 801-802.

In other words, a defendant who is determined to fight all the way through trial bears the risk that it may incur a judgment in an amount that is more than it expected.

When this case was, at long last, tried to a jury, J.F. Allen presented substantial evidence at trial supporting the losses it sustained. The award returned against The Sanitary Board was an approximation of the amount claimed as contract damages in Petitioner's Request for Equitable Adjustment. But J.F. Allen's President, Greg Hadjis, also testified that J.F. Allen had suffered a loss on the project that far exceeded the contract damages sought against the Sanitary Board.¹⁴ He and others also testified about a variety of other losses, inconveniences, and aggravations that J.F. Allen dealt with during the course of its work that were not compensable under its contract with the Sanitary Board and, therefore, were not a part of its contract damages claim.¹⁵ J.F. Allen intended to complete its work in less than one calendar year but was unable to do so as a result of the failure of Burgess & Niple to properly administer the project. J.F. Allen was eventually forced to stay on the job until nearly a year later when final completion was certified.¹⁶

The most compelling evidence to support the jury's verdict was the testimony of Bryon Willoughby in response to cross examination by Burgess & Niple's attorney, Pete DeMasters. Upon questioning relating to J.F. Allen's loss of inefficiency, lost production and other interruptions, Mr. Willoughby testified that J.F. Allen spent 3 million dollars more on this project than it had budgeted:

... Again, when you look at J.F. Allen's cost, what they spent on this job, - - and I've got cost reports showing they've spent \$7.1 million. At that time their budget was, I believe 4.8, so that was \$2.5 million not counting the markup they lost. So that is \$3 million over budget....¹⁷

¹⁴ Jt. Appendix p. 1551

¹⁵ J.F. Allen accelerated its work by adding crews and equipment and extending working hours. (Jt. Appendix pp. 1694, 2286). The extended duration of the work resulted in increased costs of home office support, management time and attention, additional trips to the site, additional surveying, and maintenance of the safety program. (Jt Appendix pp. 1752-1753, 2470), JFA sent many letters to B&N complaining about interruptions, interference and delays. See, e.g. Jt Appendix pp. 4435, 4436, 4510, 4511).

¹⁶ "We'd been there awhile and wanted to get completed and done." (Jt Appendix p. 2443); The longer you're there the more costs you have. (Jt Appendix pp. 1752-1753); "Wasn't going to profit us to hang around Sugar Creek." (Jt. Appendix p. 2286). As originally scheduled JFA would have completed its work from January 1 to December 31, 2012. (Jt. Appendix pp. 1569-1570). As built, JFA was still on-site in November of 2013. (Jt Appendix p. 2656).

¹⁷ Jt. Appendix p. 2189. Willoughby testified that there were other damages suffered by J.F. Allen relating to unmarked/mismarked utilities including having to work more slowly - hand digging and encountering the lines without breaking them. (Jt Appendix pp. 2093-2102). The lost productivity claim of 15% only dealt with utility strikes - no other interruptions including other contractors working in JFA's space, bus schedule, extended completion, etc. (Jt.

Giving J.F. Allen the benefit of all reasonable inferences, this testimony supports a damages award far exceeding the amount of J.F. Allen's contract claim.

In addition to these economic losses, damages for aggravation, annoyance and inconvenience may be awarded and such damages are in the nature of damages for pain and suffering for which there is no definite itemization and no rule or measure upon which they can be based. Damages in tort and contract damages are not given the same treatment under the law because of the differences in the nature of the duties imposed by the common law versus those voluntarily undertaken by contract. "A just rule, therefore, would put upon a person who commits a tort the risk of all proximate consequences of his wrong, but upon one who breaks a contract such risk as he could have foreseen when he undertook the duty and this appears to be the conclusion of the law." 5C Michies, *Damages* § 11 n. 284, citing *Hurxthal v. St. Lawrence Manufacturing Company*, 53 W. Va. 87, 44 S. E. 520 (1903); *Hall v. Philadelphia Co.*, 74 W. Va. 172, 81 S. E. 727 (1914).

It has been established in West Virginia that a corporation can, in an action based in tort, recover damages for aggravation, annoyance and inconvenience. No one would argue that a person is not entitled to damages for annoyance, aggravation and inconvenience under West Virginia law and it is a well-established principal of the law that corporations are treated as artificial persons. *Queen v. West Virginia University Hospitals, Inc.*, 179 W. Va. 95, 365 S. E. 2d 375, 380 (1987). The West Virginia Supreme Court of Appeals has recognized that a corporation is entitled to recover such damages in addition to any economic loss incurred. See, *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W. Va. 323, 352 S. E. 2d 73 (1986). Every witness who testified on behalf of J.F. Allen at trial clearly demonstrated the annoyance, inconvenience, and aggravation J.F. Allen faced as a result of Burgess & Niple's negligence and total lack of impartiality and, ultimately overcame at great expenses, to complete the project.

Appendix pp. 2119, 2142-2143); 15% inefficiency rate is a minimum value – Willoughby believes it was considerably higher. (Jt. Appendix pp. 2119-2120).

For these reasons, there is adequate evidence to support the jury's finding of the substantial damages awarded against Burgess & Niple. Such damages are indefinite and unliquidated and there is no rule or measure upon which they can be based. In such cases the fixing of damages is left to the discretion of the jury:

[I]n the absence of any specific rules for measuring damages, the amount to be awarded rests largely in the discretion of the jury, and courts are reluctant to interfere with such a verdict. ... This judicial hesitance stems from the strong presumption of correctness assigned to a jury verdict assessing damages.

Kessel v. Leavitt, 205 W. Va. 95, 511 S. E. 2d 720, 810 (1998) (internal citations omitted). There is no authority in such cases for a court to substitute its opinion for that of a jury. "A mere difference in opinion between the court and the jury as to the amount of recovery in such cases will not warrant the granting of a new trial. ..." Syl. pt. 2, *Richmond v. Campbell*, 148 W. Va. 595, 136 S. E. 2d 877 (1964); Syl. pt. 1, *Marsch v. American Electric Power Company*, 207 W. Va. 174, 530 S. E. 2d 173 (1999). Nor is there any basis for an argument that Petitioner's tort damages should have been capped at the amount of its contract damages asserted against the Sanitary Board. As noted above, there is evidence in the record that Petitioner suffered a loss far greater than the amount of its contract claim and was also entitled to damages for annoyance, aggravation and inconvenience in an amount to be determined in the sound discretion of the jury.

As also previously argued, Petitioner's claim against Burgess & Niple was founded in tort, not contract, and, therefore, was not subject to the same standards for the calculation. Where the law gives no specific rule of compensation, the decision of the jury upon the amount of damages is generally conclusive unless the amount is so large or small as to lead to the belief that the jury was influenced by passion, partiality, corruption, or prejudice, or was misled by some mistaken view of the case. *Bishop v. Byrne*, 265 F. Supp. 460 (S. D. W. Va. 1967); *Fortner v. Napier*, 153 W. Va. 143, 168 S. E. 2d 737 (1969). Because a jury's verdict is entitled to considerable deference the jury's award of damages should not be disturbed as long as the award is supported by some competent, credible evidence going to all essential elements of the award. *Community Antenna*

Service, Inc. v. Charter Communications VII, LLC, 227 W. Va. 595, 712 S. E. 2d 504 (2011). This Court noted in *Roberts v. Stevens Hospital* as follows:

Yet close to unbridled discretion is reposed in a jury in this jurisdiction to award such damages as it feels proper *exactly* because of the *in terrorem* effect on defendants that potentially large jury awards have as a counterweight to the *in terrorem* effect on plaintiffs that outrageous expense, incalculable, inconvenience, and inordinate delay have.

Roberts v. Stevens Clinic Hospital, Inc., 176 W.Va. 492, 504, 345 S.E.2d 791, 803 (1986).

Under the circumstances of this case, viewing the evidence in the light most favorable to J.F. Allen, giving it the benefit of all reasonable inferences, considering the large losses suffered and the inconvenience, aggravation and annoyance imposed upon it during the course of its work, damages awards of 1.3 million dollars in contract against the Sanitary Board and 3 million dollars in tort against Burgess & Niple were not “monstrous, at first blush beyond all measure, unreasonable, outrageous” and did not “manifestly show jury passion, partiality, prejudice or corruption.” This is particularly true when considered in the context of a project with an agreed contract amount plus contract claims totaling nearly 7 million dollars and where the duration of J.F. Allen’s work was extended by nearly a year, almost double its as-planned duration, together with the massive cost of the five-year course of this litigation and trial. Also, as argued above, the evidence in the case demonstrated that J.F. Allen was 3 million dollars over budget and suffered large losses that were not part of its contract claim. For these reasons, the Court erred in vacating the jury’s damages awards and in awarding Defendants a new trial as to damages.

This case is a particularly good example of the concern this Court expressed in *Roberts*. The project to which this matter relates was performed during calendar years 2012 and 2013 and the Complaint in this matter was filed in June of 2014, more than five years ago. The litigation of this matter, which has included a previous trip to the Supreme Court of Appeals, has cost all of the parties enormously in terms of money and time. Now that the matter has been fairly tried and a verdict returned, that verdict should have been treated with greater deference.

III. THE TRIAL ERRED BY FINDING THAT THE JURY'S DAMAGES AWARDS VIOLATED THE SINGLE-RECOVERY RULE. THE JURY'S VERDICTS AGAINST THE SANITARY BOARD AND BURGESS AND NIPLE ARE INDEPENDENT OF ONE ANOTHER AND DO NOT RESULT IN MULTIPLE RECOVERY.

The jury's separate verdicts against the Sanitary Board and Burgess & Niple do not represent a double recovery in this case. As noted above, J.F. Allen presented separate and independent causes of action against the Sanitary Board under contract and against Burgess & Niple under a theory of negligence and the jury was properly instructed not to duplicate awards. The fact that the jury returned verdicts against both defendants under different theories of liability does not reflect any inconsistency in the verdicts. J.F. Allen's claims against the defendants are independent of each other. Its contract was with the Sanitary Board alone and the Sanitary Board, alone, is responsible for its breach and the contract damages presented at the trial. The Sanitary Board's liability in this action is not dependent on any action or inaction of Burgess & Niple. If the Sanitary Board wished to make the argument that its breach of its obligations to J.F. Allen was due, in part, to a failure by its agent, Burgess & Niple, the Sanitary Board should have asserted a cross or third-party claim against Burgess & Niple. The Sanitary Board cannot avoid liability now, after trial, by attempting to deflect blame onto its project representative.

While it is true that J.F. Allen presented a written claim for contract damages in the amount of approximately \$1,252,000.00, it also presented testimony that it had suffered additional losses that were not included in the contract claim. Its president, Mr. Hadjis' testimony included information concerning the total loss J.F. Allen suffered on the subject project that exceeded the amount of its contract claim.¹⁸ J.F. Allen's construction and costing expert, Bryon Willoughby, who assisted in preparing the REA also testified that, in actuality, due to the acts and omissions of the Defendants, J.F. Allen expended 3 million dollars more in costs than it had anticipated.¹⁹ J.F. Allen also presented testimony concerning losses due to interference by contractors performing other work in its work area, delays resulting from an inability to have access to the site to pave

¹⁸ Mr. Hadjis testified that JFA lost a significant amount of money on the subject project, more than was included in its contract claim set out in its REA (See Fns. 13-14).

¹⁹ See Fns. 16 and 17.

because of other work being performed in the roadway, and the failure of one of the Sanitary Board's other contractors to have its portion of the new sewer line ready for tie-in.²⁰ Further, J.F. Allen presented testimony that, in order to attempt to complete the project timely, despite all of the interference by the Defendants, it put on additional crews and equipment to accelerate production. J.F. Allen's witnesses testified that these additional costs were not a part of J.F. Allen's contract claim. They do, however, support a separate award against Burgess & Niple.

In addition, as previously argued, damages for aggravation, annoyance and inconvenience, in the nature of damages for pain and suffering, may be awarded in response to a negligence claim like J.F. Allen's claim against Burgess & Niple, and are indeterminate in nature, for which there is no rule or measure upon which they can be calculated. "The amount of compensation for such injuries is left to the sound discretion of the jury, and there is no authority for a court to substitute its opinion for that of the jury. A mere difference of opinion between the court and the jury as to the amount of recovery in such cases will not warrant the granting of the new trial...." Syl. pt. 2, *Richmond v. Campbell*, 148 W. Va. 595, 136 S. E. 2d 877 (1964); Syl. pt. 11, *Marsch v. American Electric Power Company*, 207 W. Va. 174, 530 S. E. 2d 173 (1999). Courts are reluctant to interfere with a verdict in such cases because there exists a strong presumption of correctness assigned to a jury verdict assessment of damages. *Kessell v. Leavitt*, 204 W. Va. 95, 511 S. E. 2d 720, 810 (1998).

The fact that the jury awarded damages against both the Sanitary Board and Burgess & Niple in this action is not evidence that J.F. Allen was awarded a double recovery. Any such conclusion can be based only on speculation. J.F. Allen's claims asserted against the two separate defendants were based on separate and independent causes of action and differing theories of liability. As reflected by the verdict form, it was anticipated by all parties that the jury might make awards in favor of J.F. Allen and against both defendants and the jury was properly instructed as to the impropriety of a double recovery. The verdict form provided to jury in this case contained

²⁰ See Fns. 14-16

separate blanks for damages awards against each of the Defendants. Under the Trial Court's reasoning in the Order appealed from, the only proper damages award against Burgess & Niple would have been zero, so why include the blank on the form? The fact that the jury returned awards in amounts that are more than the defendants want to pay and more than the Trial Court would have awarded in their place is not evidence that the jury awarded the same damages twice.

As previously noted, there is ample evidence in the record that J.F. Allen suffered a loss far greater than the amount of its contract claim and it is also entitled to damages upon its tort claim for annoyance, aggravation, and inconvenience in an amount to be determined in the sound discretion of the jury. For these reasons the Trial Court erred in finding that the damages awards rendered by the jury in this case violated this single-recovery rule and by granting defendants a new trial on damages.

IV. THE TRIAL ERRED IN FINDING THAT THE AMOUNT OF J.F. ALLEN'S CONTRACT CLAIM WAS THE MAXIMUM POSSIBLE RECOVERY.

It is true that J.F. Allen submitted evidence at the trial of this matter that it suffered damages recoverable under its contract with the Sanitary Board in the amount of \$1,250,392.43. There is no basis, however, for the Trial Court's finding that J.F. Allen's total damages, including damages awarded under its tort claim against Burgess & Niple, should be capped at the amount claimed as contract damages. As noted throughout this brief, J.F. Allen's claims against the two defendants in this action are based on separate legal theories, one in contract and one in tort. Contract damages are circumscribed by the terms of the argument between the parties and are limited to risks of loss that could have been foreseen upon entering the contract. Tort damages are broader and include all proximate consequences resulting from the wrong committed. *Hurxthal v. St. Lawrence Manufacturing Company*, 53 W.Va. 87, 44 S.E. 520 (1903); *Hall v. Philadelphia Company*, 74 W.Va. 172, 81 S.E. 727 (1914).

At the trial of this action, J.F. Allen presented substantial evidence that it suffered losses on the project that far exceeded the amount asserted as contract damages. Further, as noted above, J.F. Allen's claim against Burgess & Niple was in the nature of a tort claim which may include

recovery of damages for aggravation, annoyance and inconvenience, losses for which there is no definite itemization and no rule or measure upon which they can be based.

Therefore, the trial court erred in finding that the maximum possible recovery available to J.F. Allen against both defendants was capped at the amount of its claim for contract damages, \$1,252,392.43, and by vacating the jury's damages awards and awarding defendants a new trial as to damages.

V. THE TRIAL ERRED BY FINDING THAT REMITTITUR WAS UNAVAILABLE TO RESOLVE ANY PERCEIVED CONFLICT BETWEEN THE EVIDENCE AND THE JURY'S AWARDS AND THAT REMITTITUR WOULD HAVE REQUIRED APPORTIONMENT OF LIABILITY BETWEEN THE DEFENDANTS.

As previously argued, J. F. Allen's total damages are not capped at the amount of its contract claim. For that reason, there is no reason to apportion the separate and independent awards rendered by the jury in this case between the two defendants.

Instead, the Court's analysis should have been limited to determining whether the verdicts, as rendered, were excessive. If so, the Court could have addressed such a finding by remittitur. The Court's authority to remit an excessive verdict was traditionally limited to cases where there was an error of calculation and was not applied in cases where damages were indeterminate in nature. However, this Court has adopted a rule that allows for awards of damages even of an indeterminate nature to be likewise the subject of remittitur. "Even where there are no data by which the amount of excess in a jury's verdict is definitely ascertainable, entry of remittitur is permissible." Syl. pt. 6, *Roberts v. Stephens Clinic Hospital, Inc.*, 176 W. Va. 492, 345 S.E.2d 791 (1986).

Thus, if the Court had determined that the award against the Sanitary Board was excessive because it exceeded the amount of J.F. Allen's contract claim by a few thousand dollars, that would have been a matter that could easily have been addressed by remittitur. Further, even the jury's award of damages in tort against Burgess & Niple could have been the subject of remittitur had the Court, upon proper analysis, determined that the award was excessive. In either case, however, the Court should interfere with the jury's domain only with extreme reluctance. "The

constitutional scribes did not repose in the bench the responsibility for finding facts, but in the peers of those seeking justice.” *Addair v. Majestic Petroleum Co., Inc.*, 160 W.Va. 105, 112, 232 S.E.2d 821, 825 (1977).

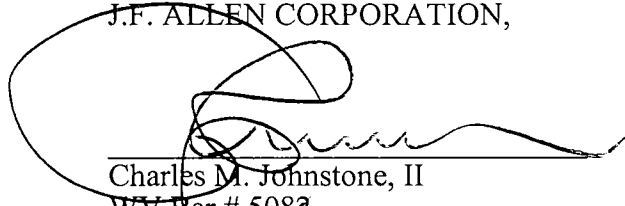
Therefore, the Court erred in finding that remittitur was unavailable and that it would have required apportionment between the defendants, and by granting the defendants a new trial as to damages on that basis.

CONCLUSION

While the Order granting the Respondent a new trial as to damages in this matter was nominally based on the Trial Court’s findings that the verdict was inconsistent and would result in a multiple recovery, ultimately, its ruling is based on the Trial Court’s erroneous conclusion that J.F. Allen’s available recovery was limited to the amount of its contract claim against the Sanitary Board. In fact, there is no logical inconsistency in the verdicts rendered by the jury, nor is there any way, in the absence of speculation, to conclude that the jury did not intend to make separate awards against the two defendants in this case. There is sufficient evidence in the record to support the award of an additional sum of damages beyond that awarded for breach of contract and by failing to respect and uphold the jury’s awards the Trial Court has impermissibly invaded the province of the jury. For these reasons, and those argued above, the Trial Court in this action erred by invalidating the jury’s damages awards and awarding the Defendants a new trial as to damages. Therefore, the Trial Court’s Order Granting Defendants a New Trial on Damages should be reversed and the matter returned to the Trial Court with direction to enter judgment in favor of Petitioner and against the Respondents upon the verdicts rendered by the jury in this case.

Respectfully Submitted,

J.F. ALLEN CORPORATION,

A large, stylized handwritten signature in black ink, appearing to read 'Charles M. Johnstone, II', is written over a horizontal line.

Charles M. Johnstone, II

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