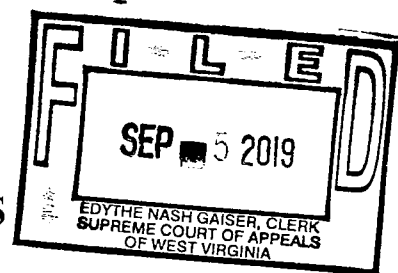


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**SUPREME COURT OF APPEALS
OF WEST VIRGINIA**



Docket No. 19-0369

ON APPEAL FROM THE
CIRCUIT COURT OF KANAWHA COUNTY

J.F. ALLEN CORPORATION,
a West Virginia corporation,
Plaintiff Below, Petitioner.

v.

BURGESS AND NIPLE, INC.,
An Ohio corporation,
Defendant Below, Respondent,

And

THE SANITARY BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA
A Municipal Utility
Defendant Below, Respondent

**BRIEF OF THE RESPONDENT,
BURGESS AND NIPLE, INC.**

Peter T. DeMasters (WV State Bar #7153)
Michael A. Secret (WV State Bar #13044)
FLAHERTY SENSABAUGH BONASSO, PLLC
48 Donley Street, Suite 501
Morgantown, WV 26501
Telephone: (304) 598-0788
Facsimile: (304) 598-0790
pdemasters@flahertylegal.com
msecret@flahertylegal.com

*Counsel for Petitioner,
Burgess & Niple, Inc.*

September 5, 2019

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STATEMENT OF THE CASE

The matter at hand arises from a contract between the Petitioner, JF Allen Corporation (hereinafter "JFA") and the Sanitary Board for the City of Charleston, West Virginia (hereinafter "the CSB"), as well as the CSB's relationship with the Respondent, Burgess & Niple, Inc. (hereinafter "B&N").

a. Sugar Creek Drive Project

In 2011, CSB was in the process of accepting bids on a sewer system upgrade in the Sugar Creek Drive area of Charleston, West Virginia (hereinafter "the Project"). (J.A. 3367-72). JFA was deemed the lowest responsible bidder and, shortly thereafter, entered into a contract with CSB to serve as the contractor for the Project. (J.A. 3473-3487). CSB had previously entered into a separate contract with B&N to have B&N act as the project engineer and provide professional design and contract administration services. (J.A. 4550-58). JFA and B&N did not enter into a contractual relationship with each other. Prior to making its bid, JFA had in hand a copy of the proposed contract documents and the location of the Project. (J.A. 3365-4082). These contract documents include the Standard General Conditions of the Construction Contract prepared by the Engineers Joint Contract Documents Committee (hereinafter "EJCDC General Conditions"), which laid out all of the conditions, the project drawings, the Claims payment process, and/or project specifications. (J.A. 3519).

Prior to submitting its bid, JFA visited the Project site and became familiar with the location. (J.A. 1553). JFA knew from the project drawings and by its site visits that approximately 250 homes were served by underground utilities and that the Project included a narrow roadway and creek bed where some of those utilities were located according to the project documents which were encapsulated in the contract between JFA and the CSB. (J.A. 1857-58). As the project

engineer per the contract documents, B&N was not responsible for the accuracy or completeness of the information regarding underground utilities and JFA was to include the cost of locating utilities through the utility companies, including Miss Utility, and repairing damage resulting from the work, if any, in its total contract price. (J.A. 1858-61; J.A. 3537). Furthermore, JFA was responsible for using due diligence to avoid damaging existing utilities whether shown on the plans provided or not. (J.A. 3537-38). During its work on the Project, JFA had some strikes on underground utilities that allegedly caused delays. (J.A. 4258-4404). At least 48 hours prior to beginning work in a particular area, it was JFA's responsibility to contact Miss Utility, a utility location service, in order to locate all utility lines so that they would not be disturbed during work. (J.A. 1641-43). That was JFA's obligation and not B&N's obligation. *Id.* While B&N was generally aware that JFA was sometimes striking underground utilities, B&N was not made aware that JFA felt that these strikes were causing significant delays to the Project. (J.A. 4715-4877). In fact, during monthly meetings, JFA reported "no delays" on the project. (J.A. 4876-77). Up until a few months prior to the original scheduled completion date for the Project, JFA represented that it would complete the project on time. (J.A. 1706-07).

JFA began work on or about January 25, 2012, and the Project was originally to be completed by January 3, 2013. (J.A. 1905). However, substantial completion of the project occurred, after change orders, on June 19, 2013, and with the Final Pay Application being submitted by JFA to the CSB on or about November 5, 2013. (J.A. 4671-77). CSB issued final payment to JFA on November 20, 2013. (J.A. 4681-87). As the project neared its scheduled completion towards November of 2012, B&N advised JFA more than once to submit any claims that it may have for payment "as soon as possible" and in accordance with the EJCDC General Conditions further explained below. (J.A. 4856). JFA, in turn, did not submit any claims. (J.A.

1774-75). When JFA did submit its Final Pay Application, it did not include any outstanding Claims that may have been incurred on the Project as was required under the contract documents and the EJCDC General Conditions that JFA had agreed to as part of the contract documents. (J.A. 4671-77). B&N recommended approval of JFA's Final Pay Application as there were no outstanding Claims. (J.A. 4681-87). With the recommended approval of the Final Pay Application, the Construction Phase of the Project concluded and so did B&N's obligations in relation to the contract between CSB and JFA. (J.A. 4594).

Seven months after B&N's services on the Project had terminated, JFA submitted its "Request for Equitable Adjustment" (hereinafter "REA") to B&N on May 5, 2014. (J.A. 4084-4108). This correspondence threatened to hold B&N "and [its] professional liability carrier liable for any professional negligence that leads to damages to J.F. Allen." (J.A. 4084). The REA even specifically asked B&N to act in "accord with [B&N's] contractual obligation" in recommending payment to JFA, even though B&N's "contractual obligation" had ended seven months prior with the conclusion of the Construction Phase. *Id.* Even at the time of the REA, JFA was attempting to remove its responsibility for its failure to submit Claims as it was contractually required to do and place the blame on B&N.

The REA sought an additional \$1,309,943.00 as a result of work done on the Project and concluded with a statement that the REA was to be considered a "Claim" pursuant to the contracts in play during the Project. (J.A. 4108). JFA did not submit any written Claims relating to the issues contained in the REA within thirty days of the occurrences, nor did it submit substantiation regarding its alleged costs or delays within sixty days of the occurrences as required by the governing contract. (J.A. 1783-84). On May 12, 2014, B&N returned the REA to JFA without review, explained via letter that its services to CSB were over and that B&N was no longer

authorized to provide professional services related to the Project. JFA then filed suit against CSB, alleging breach of contract and unjust enrichment, and alleging professional negligence against B&N.¹ (J.A. 0006-14).

b. Obligations of Parties Under the EJCDC General Conditions and Other Contracts.

There are two contracts which contain provisions that have an impact on this matter. First, there is the contract between the CSB and JFA (hereinafter “Contractor Agreement”). Second, there is the contract between the CSB and B&N (hereinafter “Engineer Agreement”). While JFA has asserted a negligence action and not a contract action against B&N, the duties that B&N had to JFA are set forth in these two contracts. JFA’s President, Gregory Hadjis (hereinafter “Mr. Hadjis”), admitted at trial that he did not actually read the contract his company signed and was working under, but instead relied on his “team” to review it. (J.A. 1559). All of his “team” that testified at trial stated that they never read the Contractor Agreement until litigation in this matter began. (J.A. 2387-88; J.A. 2462). Therefore, all executives at this company were working under a contract they claim they never read, yet JFA managed to complete the work, generally following the plans and specifications, submit monthly pay applications, and request change orders. *Id.*

i. Contractor Agreement and EJCDC General Conditions.

The Contractor Agreement was governed by the EJCDC General Conditions. (J.A. 3519). Specifically, Articles 9 and 10 of the Contractor Agreement the sets forth B&N’s duties as project engineer to the CSB and JFA during the Construction Phase of the Project. (J.A. 3561-66). Section 9.01 of this Article states that B&N’s authority to act as the CSB’s representative was limited to the time “during the construction period.” (J.A. 3561). In performing its function, B&N had to be

¹ JFA’s claims against the CSB were originally dismissed, but the matter was brought before this Court on appeal wherein this Court gave CSB the partial relief of upholding the dismissal of JFA’s unjust enrichment claim only.

impartial, and “*shall not be liable in connection with any decision rendered in good faith in such capacity.*” (J.A. 3563) (emphasis added). Specifically, Section 9.09A states as follows:

Neither Engineer’s authority or responsibility under this Article 9 or under any other provision of the Contract Documents *nor any decision made by Engineer in good faith* either to exercise or not exercise such authority or responsibility or the undertaking, exercise, or performance of any authority or responsibility by Engineer shall create, impose, or give rise to any duty in contract, tort, or otherwise owed by Engineer to Contractor, any Subcontractor, any Supplier, any other individual or entity, or to any surety for or employee or agent or any of them.

(J.A. 3563-64) (emphasis added).

A “Claim” under the EJCDC General Conditions is defined as “[a] demand or assertion by Owner [CSB] or Contractor [JFA] seeking an adjustment of Contract Price or Contract Times, or both, or other relief with respect to the terms of the Contract.” (J.A. 3525). The form to submit a Claim was supplied to JFA. (J.A. 3511-14). The process for the adjudication of Claims is laid out in Article 10 of the EJCDC General Conditions, where “[a]ll Claims, except those waived pursuant to Paragraph 14.09, shall be referred to the Engineer [B&N] for decision. (J.A. 3565). After a Claim was submitted, the party submitting the Claim was required to provide substantiation for the Claim in writing with thirty (30) days of its submission. *Id.* Upon receiving a duly submitted Claim and proper substantiation, B&N as the engineer on the Project would review said Claim and render a decision within thirty days of the its receipt of the Claim. (J.A. 3565-66). The responsibility to initiate a Claim rests with the party making the Claim, not B&N who was acting in a neutral capacity. *Id.* Pursuant to Paragraph 10.05(D), “[i]n the event that Engineer *does not take action on a Claim* within said 30 days, the Claim shall be deemed denied.” (J.A. 3566) (emphasis added). This denial would be final and binding unless the claimant requests mediation or gives written notice of its intent to file a suit within thirty (30) days of the denial. *Id.* Importantly, the EJCDC General Conditions clearly states that “[n]o Claim for an adjustment in Contract Price

or Contract Times will be valid *if not submitted in accordance with this Paragraph 10.05.*” *Id.* (emphasis added). In short, the party requesting a Claim relating to the Project must submit its Claim request to B&N pursuant to the EJCDC General Conditions or else risk waiving the ability to make the proposed change to the contract time or price. *Id.*

Article 14 of the Contractor Agreement provides for the terms of JFA’s “Final Payment.” Once all work on the Project was completed, JFA was to submit its final application for payment. (J.A. 3576). With this application, JFA was required to provide, among other things, “a list of all Claims against Owner that Contractor believes are unsettled.” (J.A. 3581). Section 14.09(A)(2) states that “[t]he making and acceptance of final payment will constitute . . . a waiver of all Claims by Contractor against Owner other than those previously made in accordance with the requirements herein and expressly acknowledged by Owner in writing as still unsettled.” (J.A. 3582). As stated above, JFA’s Final Application for Payment did not include any Claims it considered unsettled and JFA requested its final payment without mention of any unsettled Claims, therefore, said alleged “outstanding” Claims are waived. (J.A. 4671-77). Today, JFA still holds the uncashed check that it received from the Project in response to its Application for Final Payment. (J.A. 4257). JFA claims that because it has yet to cash the check for final payment, despite the fact that it was made in the amount requested by JFA and delivered to JFA in the method that JFA requested, that it has not “accepted” its final payment and any “Claims” submitted by JFA remain open. (J.A. 1804). However, as we have seen, there were no Claims submitted, all were waived.

ii. **Engineer Agreement and EJCDC Standard Form.**

The Engineer Agreement was governed by the Standard Form Agreement Between Owner and Engineer for Professional Services prepared by Engineers Joint Contract Documents

Committee (hereinafter "EJCDC Standard Form"). While the EJCDC Standard Form did not contain the exact same language as the EJCDC General Conditions, they were prepared to be used together. (J.A. 4576). In fact, "[t]heir provisions are interrelated, and a change in one may necessitate a change in the other." *Id.*

Pursuant to Paragraph A1.05(B) of the EJCDC Standard Form, which is contained in the Engineer Agreement that JFA had possession of throughout the Project, the duration of B&N's duties during the Construction Phase terminated "upon written recommendation by Engineer for final payment to Contractors." (J.A. 4594). Paragraph A2.01(A)(16) states that B&N cannot provide "Construction Phase services beyond the original date for final completion of the Work" absent written authorization from the CSB. (J.A. 4596). While B&N also contracted with CSB to provide Resident Project Representative services to this Project, Paragraph D1.01(D)(2) stated that B&N's role as Resident Project Representative shall not "[e]xceed limitations of Engineer's authority as set forth in the Agreement and Contract Documents." (J.A. 4618).

Regarding JFA's REA, Paragraph 7.01(A)(3) notes that any change proposal to the Construction Contract price must be duly submitted in accordance with the Construction Contract and the EJCDC General Conditions listed above. (J.A. 4584). Similar to the language present in the EJCDC General Conditions, Paragraph 1.05(A)(14) of the EJCDC Standard Form states as follows:

Disagreements between Owner and Contractor. Render formal written decisions on all duly submitted issues relating to the acceptability of Contractor's work or the interpretation of the requirements of the Contract Documents pertaining to the execution, performance, or progress of Contractor's Work; review each duly submitted Claim by Owner or Contractor, and in writing either deny such Claim in whole or in part, approve such Claims, or decline to resolve such Claim if Engineer in its discretion concludes that to do so would be inappropriate. In rendering such decisions, Engineer shall be fair and not show partiality to Owner or Contractor and shall not be liable in connection with any decision ***rendered in good faith in such capacity.***

(J.A. 4593) (emphasis added).

c. Trial of this Matter and Jury Deliberations

Both JFA's actions against B&N and CSB were tried together during a single trial between January 22, 2018 and January 31, 2018. (J.A. 1432-3312). Mr. Hadjis testified that there were several instances during the Project that would necessitate a Claim be instituted for a change in contract price, but he admits that he felt like he "didn't have to" submit a claim in writing pursuant to the Contractor Agreement because B&N "had actual notice, and made a report of the situation themselves." (J.A. 1656). What Mr. Hadjis is ignoring is that his testimony was also that he never read the contract or the EJCDC General Conditions at issue. (J.A. 1559). In any event, JFA waited until seven months after the Construction Phase of the Project ended, and submitted an REA. (J.A. 1880). JFA further admits that the REA is not titled "Claim" and that it does not meet the definition of a Claim under the EJCDC General Conditions. (J.A. 1767). Regarding final payment made in this matter, Mr. Hadjis testified as follows:

Q. Okay. If you look at Exhibit 9, that's a pay application; is it not?

A. Yes, it is.

Q. And up at the top it says, "Contractor's progress estimate final." Is that right?

A. Yes, it does.

Q. And that reflects what you believe is the final payment due because of balancing change orders; is that right?

A. What it reflects is the payment for the quantities that were put in. It doesn't reflect the claim that I had forthcoming.

Q. And I understand that, but where's your written notification of claim?

A. I have already addressed that.

Q. You don't have a written notification of claim; do you?

A. No, I do not.

(J.A. 1774-75). Furthermore, Mr. Hadjis testified that JFA never submitted a request to either B&N or CSB for more time to substantiate a Claim and that JFA was not familiar with the Claims process. (J.A. 1767). JFA submitted six (6) claims during the Project, but when its original project manager left, it never submitted another claim even though B&N told JFA that it should and instructed JFA on how to do so. (J.A. 2305-07).

During its closing argument, counsel for JFA clarified to the jury that \$1,252,392.43 was “the number” that it needed to award to JFA. (J.A. 3297). He also stated that “[t]he damages are the same that [JFA] assert against both of these entities . . . so of this amount, you’ve got to decide how much you want to put against the Sanitary Board and what you want to put against Burgess and Niple.” (J.A. 3298). After deciding the amount to put against the CSB, counsel for JFA instructed the jury that it should put “the rest of the money” against B&N. *Id.* Counsel for JFA even had an exhibit outlining the approximately \$1.2 million and what it was made up of that he showed to the jury to illustrate to it the maximum potential damages possible in this matter. (J.A. 5170).

The jury received clear and consistent instructions on the subject of damages. First, Part Six “Damages” of the Court’s jury charge stated “[y]ou should only award the plaintiff such sum as compensatory damages as will reasonably and fairly compensate for the injuries that have been proven by a preponderance of the evidence to have actually suffered as a result of the actions of defendant, if any.” (J.A. 3200). This same section also instructed the jury not to award compensatory damages based on speculation or sympathy and stated that any assessment of compensatory damages must be based only upon the evidence presented at trial. (J.A. 3201).

Additionally, CSB's Jury Instruction No. 12 stated that the damages must be "reasonable." (J.A. 0713). CSB's Jury Instruction No. 14 provided that "you should be careful to ensure that your award in respect to any one item is not also the subject of an award in an overlapping item, because double recovery of damages is not permitted. Therefore, if you find that [JFA] is entitled to recover damages, you may only award damages that will provide it with a single recovery." (J.A. 0714). JFA's Jury Instruction No. 12A stated that "[t]he purpose of awarding damages to [JFA] is to compensate it for all losses resulting from the negligence and breach of duties by [B&N]." (J.A. 0971-72).

JFA even provided a specific calculation of its alleged damages in this case in the amount of \$1,252,392.43. That number was quantified by JFA's expert Bryon Willoughby (hereinafter "Mr. Willoughby") who prepared the REA. (J.A. 2005). In fact, Mr. Hadjis specifically testified that he could not calculate the actual damages amount without the assistance of a retained expert. (J.A. 1621-22). That is the entirety of the evidence that JFA presented regarding its actual damages in this matter.

However, despite having this exact number in its possession as a result of the Court incorrectly admitting the REA into evidence, it became apparent that the jury did not grasp its function with respect to damages.² At 4:08 p.m. on the final day of trial, the jury presented the Court with the written question: "Do we assess the dollar amount for Ques. 3 on Part II? And if Yes, on what basis?" (J.A. 3302). Then again at 7:35 p.m., the jury asked regarding Part II, Question 3 of the Verdict Form "If the answer to question 1 and 2 are YES, please assess the

² During the jury deliberations in this matter, the lower court's bailiff noted on the record that the jury was "all over the place" during their deliberations, which is further evidence of their confusion regarding the issues in this matter. (J.A. 3316).

breach of contract damages, if any, in dollars and cents below” what amount this question was based on. (J.A. 3304).

The jury returned a verdict at approximately 8:30 p.m. on day eight of the trial and awarded \$1,300,000.20 against CSB. (J.A. 3325). There is no evidence that provides a basis for this amount. At this time, the verdict form was signed and completed, and the jury did not assign any damages against B&N. *Id.* However, the lower court believed that the form was incomplete because the line for damages against B&N was left blank. *Id.* After consulting with counsel outside of the presence of the jury, the lower court advised that it would call the jury back into the courtroom and ask “Was it your intent to award 0 damages against Burgess & Niple?” (J.A. 3336). Prior to the jury being called back into the Courtroom, B&N and CSB both moved for a mistrial on the grounds that it was clear the jury was confused, and that the result as it stood at that point was inconsistent with the instructions to the jury. (J.A. 3330-31).

The lower court overruled these objections and ordered the jury to continue its deliberations. (J.A. 3337). The jury returned for the answer at 8:45 p.m. and then left to continue to deliberate. (J.A. 3336). At 9:25 p.m., the jury submitted another written question on damages, asking “what dollar amount are we assessing for in question 3? Or do we come up with the dollar amount?” (J.A. 3336-37). Shortly after this, and before the question was answered, the jury announced that it was ready to return. Upon reentering the courtroom, the jury foreperson stated that “We got it right, this time.” (J.A. 3307).³ This statement further illustrates the jury’s confused mindset with regard to the damages issues as they were unsure as to whether they “got it right.” *Id.* This time, the jury awarded a mindboggling \$3,000,000.20 against B&N despite the fact that

³ While this statement was what was transcribed by the court reporter at the time, B&N believes that this statement in the trial transcript does not accurately portray what was said by the jury foreperson. Instead, what was said by the jury foreperson was: “If we didn’t get it right this time, we quit.”

the jury did not award any damages against B&N its first attempt. (J.A. 3308). Both counsel for B&N and counsel for the CSB objected to this verdict and moved for a mistrial on the grounds that the jury's verdict was inconsistent and excessive. (J.A. 3308-09). Upon hearing the jury's verdict and dismissing the jury from the courtroom, the lower court claimed that "it had concerns that the verdict could be problematic" and that "[i]t may not be based on law, reason or judgment." (J.A. 3311). Despite these hesitations, the lower court recorded the jury's verdict and encouraged objecting counsel to address their issues by way of post-trial motions. (J.A. 3310). The lower court then entered its *Judgment Order on Jury Verdict*. (J.A. 1129-30).

d. Post-Trial Motions and Rulings

B&N filed its *Renewed Motion for Judgment as a Matter of Law or in the Alternative Motion for New Trial* on March 14, 2018. B&N requested that a new trial be granted based on the errors encapsulated in its original brief. (J.A. 1136-1148). A hearing on post-trial motions took place on November 20, 2018. (J.A. 5144). During this hearing, the lower court observed that the jury "got tied up and bogged down in the damage equation without question" and that the verdict against B&N seemed "out of the woods." (J.A. 5165-66). In making its observation, the lower court noted that the jury "came in here and . . . gave us that verdict form and thought their work was done." (J.A. 5187).

On March 20, 2019, the lower court issued its *Order Granting Defendants a New Trial on Damages and Denying Defendants' Motions for Renewed Judgment as a Matter of Law*, wherein it ordered that the matter be retried as to damages only, recognizing that the entire case would need to be retried. (J.A. 1388-1407).⁴

⁴ Throughout this brief, B&N contends that the lower court's decision to set aside the jury's verdict in this matter was proper. However, it is B&N's position that the lower was incorrect in its decision to retry the case as to damages only and erred in denying a new trial on the issues of both liability and damages. B&N has timely appealed that portion of the lower court's *Order Granting Defendants a New Trial on*

SUMMARY OF ARGUMENT

JFA makes the argument in its brief that the damages it presented to the jury during the course of the trial were its “contract damages” and that there was another aspect of damages for negligence only that the jury was aware of the entire time. However, upon a review of the entire record, it is clear that the only damages that were presented to the jury were the damages encapsulated in its REA. Now, JFA is attempting to reframe its case to convince this Court that it presented two categories of damages to the jury when, in reality, JFA only presented one number to the jury that it intended to have assessed against both CSB and B&N. In response, the jury clearly was unable to comprehend the damages as presented to them and awarded a verdict that was (1) inconsistent, (2) overly excessive, and (3) in violation of the single recovery rule.

First, the lower court was correct in finding that the jury’s verdict was inconsistent and should be disregarded. This is demonstrated by the fact that the jury originally returned a verdict and declined to award any damages against B&N. This switch from awarding no damages against B&N to awarding over \$3 million against B&N is grossly inconsistent and speaks to the fact that the jury struggled with the legal issues that this case presented. Furthermore, the jury found in JFA’s action against the CSB that JFA followed the terms of the contract, although JFA admitted that it did not do so, but found that JFA was partially negligent in its claim against B&N which was based on B&N’s administration of the contract. The jury was asked to redeliberate and reassess its verdict multiple times and admitted that it previously was incorrect in its attempts at reaching a verdict. Because of the two vastly differing positions that the jury took both times that it announced its verdict to the lower court, it is clear that the jury was confused beyond help.

Damages and Denying Defendants’ Motions for Renewed Judgment as a Matter of Law in a separate appeal, identified by Docket No. 19-0394. By responding to specific arguments set forth by petition in this appeal, B&N does not waive its assertions contained in its brief in the separate appeal.

Taking all of these circumstances into account, the lower court was correct in finding that a new trial must be had to properly assess the damages that were presented to the jury in this matter, but given how confused the jury was, should have ordered a new trial on all issues of liability and damages.

Second, the lower court was correct in finding that the jury's verdict was overly excessive and should be disregarded. The jury was told by counsel for JFA that it only had one award of approximately \$1.25 million to give and that it should be divided up between B&N and the CSB. Instead, the jury awarded \$4.3 million in total damages against both parties combined. Additionally, this verdict is exceptionally excessive in light of the evidence presented to the jury. JFA's basis for their claim against B&N is that B&N failed to properly administer the construction contract, yet no representative of JFA could admit that they actually read the contract documents that formed the basis of the lawsuit. JFA's representatives also plainly admitted that they did not follow the contractual requirements to properly submit and perfect any "Claims" that is alleges make up the basis for the REA which contains the only amount of damages that it presented to the jury. Furthermore, JFA now requests "negligence" damages that it did not ask for at the trial of this matter, such as damages for annoyance and inconvenience against B&N despite that fact that such damages are not available to a corporation and no instruction was ever proffered for these damages. *See AIG Domestic Claims, Inc. v. Hess Oil Co.*, 232 W. Va. 145, 153, 751 S.E.2d 31, 39 (2013). Considering all of the information that was presented to the jury in the parties' closings and their cases-in-chief, the jury's verdict was shockingly excessive, and the lower court was correct in its finding of the same.

Third, the lower court was correct in finding that the jury's damages award violated the single recovery rule. The basis for JFA's claim rests with the construction contracts at issue in this

case. Both CSB's obligations and B&N's duties to JFA were enumerated under the various construction contracts presented to the jury. JFA is claiming that CSB did not meet its obligations under the contract and that B&N breached its professional duty in properly administering the contract. The action which led to the alleged damages suffered by JFA was the same regarding both the CSB and B&N: nonpayment under the contract to JFA for its work done on the Project. JFA is not permitted to recover twice for the same incident just because it sued the CSB and B&N under two separate legal theories. West Virginia has a strong public policy against a plaintiff recovering more than one complete satisfaction on their claim. Additionally, JFA's counsel specifically provided one number to the jury and asked the jury to divide this number between JFA and B&N. In response, the jury awarded JFA over three times that number in total. These damages all stemmed from B&N and the CSB allegedly failing to provide JFA with relief under the construction contract at issue. The fact that JFA received this large verdict from one factual instance that lead to one claim of damages clearly constitutes a prohibited double recovery.

Fourth, the lower court was correct in finding that the amount of JFA's "contract claim" was the maximum amount of possible recovery for JFA. JFA never presented its damages framed as "contract damages" but rather only as its damages. In its closing, JFA's counsel never presented any other damages to the jury aside from the \$1.25 million that he asked the jury to split among the parties. Furthermore, JFA's claim of negligence is based on B&N's refusal to submit the REA to the CSB after the Construction Phase of the Project ended *in accordance with the applicable construction contracts*. JFA's breach of contract claim against the CSB and its negligence claim against B&N are both based on the proposed "Claims" that were allegedly to be paid under the construction contracts in play. The lower court properly found that JFA's "contract claim" was the

maximum amount JFA could recover because that amount stemmed from the only factual basis for damages that was presented to the jury.

Fifth, the lower court was correcting in denying remitter. A remittitur must be based upon evidence before the jury prior to the verdict which shows it to be excessive in an amount that can be ascertained. Generally, the record must show the grounds relied on in support of such action, otherwise a remittitur is not permitted. JFA claims that remittitur would have been an acceptable if the lower court were to find that the jury's verdict was excessive. However, upon a review of the lower court's interaction with the verdict and as made apparent in arguments above, the jury's verdict was not only excessive, but it was inconsistent. The lower court did not have the ability to remit the damages awarded in the verdict because the jury did not correctly complete the verdict form and was woefully confused in its deliberations.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

B&N requests oral argument pursuant to W. Va. R. App. 19(a) because this case involves assignments of error in the application of settled law and because JFA's position is not supported by sufficient evidence.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE JURY'S VERDICT ON DAMAGES WAS INCONSISTENT.

It is well-established that a verdict is inconsistent when there is no rational, non-speculative way to reconcile two essential jury findings. Franklin D. Cleckley, *Litigation Handbook on West Virginia Rules of Civil Procedure* 1173 (5th ed. 2017). To determine whether a conflict in the verdict can be reconciled, a trial court must ask whether the jury's answers could reflect a logical and probable decision on the relevant issues submitted. *Id.* If a trial judge concludes that an inconsistent verdict reflects jury confusion or uncertainty, the trial judge has a duty to clarify the

law governing the case and resubmit the verdict for jury decision. *Jones v. Southpeak Interactive Corp. of Delaware*, 777 F.3d 658, 674 (4th Cir. 2015). “[I]f verdicts are genuinely inconsistent and if the evidence might support either of the ‘inconsistent’ verdicts, the appropriate remedy is ordinarily, not simply to accept one verdict and dismiss the other, but to order an entirely new trial.” *City of Los Angeles v. Heller*, 475 U.S. 796, 806 (1986); *see also Atlas Food Sys. & Servs. v. Crane Nat’l Vendors*, 99 F.3d 587, 598 (4th Cir. 1996) (“the proper remedy for an inconsistent verdict [is a] new trial[.]”).

In determining whether jury verdicts are inconsistent, this Court has observed that “such inconsistency must appear after excluding every reasonable conclusion that would authorize the verdict.” *Prager v. City of Wheeling*, 91 W. Va. 597, 599, 114 S.E. 155, 156 (1922). “To justify the setting aside of the verdict as an entirety and awarding a new trial, however, the inconsistency must be such as to wholly destroy the general verdict, and to deprive the court of right to pronounce any judgment on the verdict.” *Duckworth v. Stalnaker*, 74 W. Va. 247, 250, 81 S.E. 989, 990 (1914); *see also Hauser v. Kubalak*, 929 F.2d 1305, 1308 (8th Cir. 1991) (“The district judge, who has observed the jury during the trial, prepared the [special verdict] questions and explained them to the jury, is in the best position to determine whether the answers reflect confusion or uncertainty.”). In the case at hand, the jury’s assessment of damages with respect to the CSB and B&N is inherently inconsistent given the evidence that was presented to them. The general verdict in this matter has been rendered destroyed due to the inconsistencies and confusion that the jury engaged in to award \$4.3 million in total damages on a \$1.25 million claim. Further, for the jury to find that JFA complied with the applicable contract on the CSB claim, then apportion negligence to JFA in the negligence claim against B&N for not complying with the contract, outlines the inconsistency of this verdict.

JFA claims that “[i]t would be necessary to engage in speculation to reach the conclusion that the jury did not intend two separate, independent awards.” (See Petitioner Brief at p. 11). However, one need not engage in speculation to be able to find that the verdict at hand is not supported by any reasonable conclusion. The nature of the claims asserted by JFA both stem from the application of the Claims payment provisions of the construction contracts at play. Upon a reasonable reading of the contract clauses at hand, it is clear that the jury was inconsistent in its understanding of the case and this inconsistency could only be alleviated with an entirely new trial. The jury found that JFA complied with the contract between itself and the CSB, yet also found that JFA was partially negligent in its claim against B&N when the negligence claim was based upon the exact same EJCDC General Conditions that the claim against the CSB was based on.

This Court has noted that “[w]hen jury verdicts answering several questions have no logical internal consistency and do not comport with instructions, they will be reversed and the cause remanded for a new trial.” Syl. Pt. 5, *Modular Bldg. Consultants of W. Va., Inc. v. Poerio, Inc.*, 235 W. Va. 474, 774 S.E.2d 555 (2015). In *Poerio*, a driver was injured when his vehicle collided with a truck owned by a modular building company that was attempting to leave a contractor’s jobsite with a modular building that was being leased by the contractor. *Id.* at 477, 774 S.E.2d at 558. The driver sued the modular building company, who in turn filed a third-party complaint against the contractor for “failing to provide free and clear access for delivery and return of the Equipment by standard mobile transport vehicles” as enumerated in the modular building lease agreement. *Id.* At trial, the jury found that the contractor did not breach the modular building lease agreement, but that it was still 20% at fault for the accident. *Id.* at 478, 774 S.E.2d at 559. The modular building company filed a motion for judgment as a matter of law or, alternatively, a new trial, arguing in part that the jury’s finding that the contractor did not breach the lease agreement

was inconsistent with its finding that the contractor was negligent. *Id.* The modular building company argued that “the only possible way [the contractor] could have been negligent for the subject accident was by failing to provide free and clear access to the storage unit and that failing to provide free and clear access was a violation of the lease agreement.” *Id.*

Upon a review of the facts of the matter, this Court found that that verdict was not inconsistent because there was conflicting testimony as to whether the entrance that was blocked and that lead to the accident was the main exit from the facility. *Id.* at 479-480, 774 S.E.2d at 561. Therefore, it was reasonable for a jury to have found that the lease agreement was not breached as there were other entrances the truck could have gone through that may have been free and clear. *Id.* However, this Court found that it would still have been reasonable for the jury to hold the contractor responsible for the crash as there was supporting testimony that the contractor failed to warn the modular building company truck about the hazards of the exit and other potentially hazardous conditions on site. *Id.* at 561, 235 W. Va. at 480.

In the case at hand, and unlike in *Poerio*, the breach of contract and the incident which lead to JFA’s harm are the same thing: the alleged lack of payment to JFA for work it claims was done on the Project. The mechanism for JFA to be paid for supposed extra work on the Project was found in the EJCDC General Conditions, which dictates the terms of the Contractor Agreement that JFA accuses the CSB of breaching. (J.A. 3525; J.A. 3565-66). Unlike the situation presented to this Court in *Poerio*, there is no other avenue that JFA can claim misconduct other than the application of the contracts mentioned above. B&N could only recommend payment to JFA from the CSB through the adjudication process laid out in Article 10 of the EJCDC General Conditions. (J.A. 3565). Yet, the jury found that JFA complied with Contractor Agreement but also found that JFA was partially negligent in its claim against B&N for not complying with the exact same

EJCDC General Conditions that governed the Contractor Agreement. The jury's verdict was inconsistent in finding, on one hand, that JFA was the victim of a breach of contract to be paid for work on the Project and, on the other, that JFA was partially negligent in not requesting payment under the same contract.

The Second Circuit Court of Appeals encountered a similar issue in *Kosmyinka v. Polaris Indus.*, 462 F.3d 74 (2nd Cir. 2006). In *Kosmyinka*, the plaintiff sued a manufacturer of ATVs for negligence, strict products liability, and breach of implied warranty after one of the manufacturer's ATVs tipped backwards and paralyzed the plaintiff while being loaded onto a bed trailer. *Id.* at 77-78. At the trial, and after the district judge instructed the jury on the counts brought by the plaintiff, the jury found that the manufacturer was (1) negligent in the design of the ATV or in the failure to adequately warn of dangers in using the ATV; (2) the ATV was not defectively designed and [the manufacturer] adequately warned of the dangers of operating the ATV; and (3) the manufacturer did not breach its implied warranty to plaintiff. *Id.* at 78-79. After the verdict was read, counsel for the manufacturer informed the court that the jury's findings were inconsistent, but the court allowed judgment to be entered, declined to declare a mistrial, and denied the manufacturer's subsequent motions for judgment as a matter of law and for a new trial. *Id.* at 79.

On appeal, the Second Circuit noted that if "the jury's answers cannot be harmonized rationally, the judgment must be vacated and a new trial ordered." *Id.* at 83. After a review of the elements of the claims, the court acknowledge that a verdict is inconsistent if a jury's finding "on one claim necessarily negates an element of another cause of action." *Id.* at 86. The court held that the verdict returned by the jury was inconsistent and that a new trial was the appropriate action, finding that the jury's finding of no defect was not consistent legally with its finding that the manufacturer was negligent. *Id.* at 87.

In the case at hand, as in *Kosmyinka*, JFA has brought multiple causes of action to recover for its alleged injury. In both cases, these causes of action were tied to one injury; the ATV in *Kosmyinka* and the terms of payment under the construction contracts here. Like the jury in *Kosmyinka*, the jury here returned a verdict that was fundamentally inconsistent with itself. JFA could not have been partially negligent and still complied with the EJCDC General Conditions, just as the manufacturer in *Kosmyinka* could have not been found negligent while the ATV did not have any defects. Therefore, this Court should rule similarly to the Second Circuit and find the jury's verdict here was inconsistent and order an entirely new trial.

This inconsistency is further demonstrated by the jury's ever-present confusion that it displayed as it reached the subject verdict. As the jury deliberated, the jury foreperson sent notes to the Court. (J.A. 3313 – J.A. 3343). It became clear through the jury's notes and conduct that the jury was profoundly confused as to what it was supposed to do in rendering its verdicts and assessing damages. For example, the jury foreperson sent the Court a note about how to assess the breach of contract damages against CSB: "Do we assess the dollar amount for Question 3 on Part II? And, if yes, on what basis?" (J.A. 3304). The jury, twenty-five minutes later, then followed up with a note regarding the same question: "Part II, Question 3. 'If the answer to question 1 and 2 are YES, please assess the breach of contract damages, if any, in dollars and cents below.' What is this amount based on?" (J.A. 3325). In addition, the jury sent a note to the Court regarding the amount in damages requested by J.F. Allen: "Mr. Johnstone had a chart that had a break-down of damages asked for. What exhibit is that?" (J.A. 3320). The jury was referring to the demonstrative poster board "chalk" prepared by J.F. Allen's counsel, wherein counsel wrote in marker the sum of \$1,252,392.43, reflecting J.F. Allen's total requested damages.

Moreover, during deliberations, the jury properly returned a complete verdict form to the Circuit Court that they believed was correct, otherwise they would not have presented it to the Court. The jury knowingly left blank the amount assessed in compensatory damages against B&N for negligence in Part IV, Question 3. (J.A. 3327). After consulting with counsel, the Circuit Court sent a note to the jury to point out its supposed error: "Was it your intent to award 0 damages against Burgess & Niple?" (J.A. 3336). In response and after reflection, the jury returned a note to the Court at approximately 9:25 p.m. asking what amount it was supposed to assess for that question "or do we come up with the \$ amount?" (J.A. 3336-37). After originally leaving the amount in damages against B&N blank, which indicated a zero-dollar damage award, the jury ultimately returned a shocking verdict of \$3,000,000.20 against B&N. (J.A. 1124). These actions and missteps by the jury show an inconsistency in how they approached the issues of this case. The jury was clearly confused and this confusion lead to the inconsistent verdict which is the basis of B&N's appeal.

JFA now claims that "[t]here is no logical inconsistency in a verdict making separate awards upon separate claims against separate defendants" and that "[t]he fact that the jury returned awards against both the defendants in this case was neither inappropriate nor unexpected." (See Petitioner Brief at p. 12). However, JFA is incorrect in that there is logical inconsistency in a verdict making separate awards upon separate claims when both claims are based on the exact same factual scenario and the exact same injury. *See* Syl. Pt. 3, *Raines v. Faulkner*, 131 W.Va. 10, 48 S.E.2d 393 (1947) ("a verdict of a jury will be set aside where the amount thereof is such that, when considered in light of the proof, it is clearly shown that the jury was misled by a mistaken view of the case."). Taking the facts presented to the jury into account along with the inexplicably staggered verdict awarded by the jury, it is clear that the verdict at hand was inconsistent.

II. THE TRIAL COURT WAS CORRECT IN VACATING THE JURY'S DAMAGES AWARDS AND GRANTING B&N AND THE CSB A NEW TRIAL ON DAMAGES BECAUSE THE COURT PROPERLY FOUND THAT THE JURY'S VERDICT WAS EXCESSIVE.

In addition to properly finding that the jury's verdict was inconsistent, the lower court was also correct in finding that the verdict was also grossly excessive. A jury's verdict "will be set aside where the amount thereof is such that, when considered in light of the proof, it is clearly shown that the jury was misled by a mistaken view of the case." Syl. Pt. 3, *Raines*, 131 W. Va. 10, 48 S.E.2d 393. In that same vein, "courts 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, partiality, prejudice or corruption." Syl. Pt. 1, *Addair v. Majestic Petroleum Co., Inc.*, 160 W. Va. 105, 232 S.E.2d 821 (1997).

Here, JFA contends that a damages award of \$3 million against B&N is not "monstrous, at first blush beyond all measure, unreasonable, outrageous" because JFA claims that it was \$3 million dollars over budget "and suffered large losses that were not part of its contract claim." (See Petitioner Brief at p. 19). However, these contentions are contradicted by the specific instructions that JFA's counsel submitted to the jury, which requested that the jury apportion the \$1.25 million "number" between both B&N and CSB. (J.A. 3297-98). At no point to did counsel for JFA submit instructions to the jury to consider any other number, much less \$3 million. It is true that the jury did hear two lines of testimony in the eight-day trial from JFA witnesses that the amount of lost profits and costs may have been more than the \$1.25 million encapsulated in the REA, but this number was never presented to the jury as an actual figure for damages.⁵

⁵ The lower court noted the extremely small chance that the jury took this testimony into account when it asked counsel for JFA at the post-trial motions hearing "[a]nd you think in eight days of trial, that the jury seized upon those two lines of cross examination to come up with that \$3 million?" (J.A. 5163).

This Court has noted that an excessive verdict may be incited by “passion prejudice, partiality, *mistake* or lack of due consideration[.]” Syl. Pt. 14, *Abdulla v. Pittsburgh & Weirton Bus Co.*, 158 W. Va. 592, 213 S.E.2d 810 (1975) (emphasis added). As noted above, the jury in this matter made several mistakes before the lower court admittedly dismissed them after being convinced that it would not be able to correctly decide issues of damages in this matter. Most notably, the jury first presented its verdict form indicating that B&N was partially negligent but leaving blank the line wherein it was to award damages for negligence. (J.A. 3325). After being sent back to deliberate, the same jury ended up jumping from a blank damages line to over \$3 million awarded against B&N. (J.A. 1124). These various mistakes, culminating in a damages award that was far beyond what JFA claims it was entitled to, indicates that the jury awarded a verdict that was clearly excessive.

Furthermore, this Court has noted the following regarding a trial court’s decision to set aside a jury’s verdict:

If the trial judge finds the verdict is against *the clear weight of the evidence*, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, *even if supported by substantial evidence*, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.

Syl. Pt. 3, *In re State Pub. Bldg. Asbestos Litig.*, 193 W. Va. 119, 454 S.E.2d 413 (1994) (emphasis added); *see also St. Clair v. Jaco*, 95 W. Va. 5, 11, 120, S.E. 188, 190 (1923) (“a jury upon conflicting facts, under proper instructions, will not be disturbed unless plainly wrong, or manifestly against the weight of the evidence.”). While the award of damages does lay within the province of the jury, that does not mean that the jury is able ignore the evidence and instructions to pick the highest number that it can think of to put on a verdict form, even in a tort action. *See Syl. Pt. 2, First Nat’l Bank v. Bank of Mannington*, 76 W. Va. 356, 85 S.E. 541 (1915) (“An illegal

excess in a verdict, plainly apparent from the record, may be challenged by a motion to set aside the verdict as contrary to law and the evidence[.]”).

In examining the clear weight of the evidence, it is apparent that the jury’s verdict was extremely excessive and that a decision for a new trial was warranted. JFA plainly admitted that it did not follow the Claims process aside from the first six claims that it submitted and, furthermore, that no one JFA’s “project team” even read the contract at issue that supposedly contained the duty held by B&N in this matter to JFA regarding the Claims process. (J.A. 1559; J.A. 2387-88; J.A. 2462). It was also clear that B&N was unable to recommend payment to JFA under the construction contracts at issue because no Claim was submitted in the contract period as the Construction Phase of the Project had ended. (J.A. 1129 – 30). When the Construction Phase of the Project ended, likewise ended B&N’s involvement with the project. (J.A. 4596). There was simply no way for B&N to recommend payment to JFA without opening itself up to liability and, importantly, the CSB truthfully claimed that *it would not have provided payment to JFA even if B&N had recommended the payment of the “Claims” to the CSB as JFA requested.* (J.A. 2687-88).

Additionally, In the Contractor Agreement, EJCDC General Conditions Section 9.08(D) clearly states that “[w]hen functioning as an interpreter and judge under this Paragraph 9.08, Engineer . . . will not be liable in connection with any interpretation or decision rendered in good faith in such capacity.” (J.A. 3563). Furthermore, the EJCDC Standard Form governing the contract between the CSB and B&N states that “in rendering such decisions [regarding Claims], Engineer shall . . . not be liable in connection with any decision rendered in good faith in such capacity.” (J.A. 3563-64). Throughout the eight-day trial of the case now on appeal, no party made any allegation that B&N acted in bad faith in its dealings with JFA or in any other instance related

to the project. In fact, and specifically to the contrary, JFA's expert Mr. Willoughby could not reach the conclusion that B&N acted in bad faith at any point during the length of the Project. (J.A. 2228). Furthermore, upon a review of B&N's role in the project, B&N acted in good faith especially regarding the various contractual obligations placed upon it at the time

Despite being presented evidence of the untenable position that B&N was in, the jury still chose to award JFA with three times the amount in damages that counsel for JFA recommended be divided between the parties. (J.A. 1124). In short, there is nothing that B&N could have possibly done to ensure that JFA would be able to recover the amount in its REA even if B&N wanted to do so. Yet still, the jury found that B&N was not only negligent, but liable for three times the amount that JFA was seeking in its REA.

JFA, in an attempt to reframe the damages on appeal in a way that did not take place at trial, now claims for the first time that it suffered annoyance and inconvenience and pain and suffering as a result of B&N's alleged negligence. (See Petitioner Brief at p. 21). These damages were not presented to the jury in closing and JFA's counsel failed to make mention of them during the hearing on post-trial motions.⁶ Furthermore, no jury instructions were offered by JFA regarding annoyance and inconvenience because JFA was aware that these damages were not available to it.

In support of this position regarding general damages, JFA cites *Hayseeds, Inc. v. State Farm Fire & Cas*, 177 W. Va. 323, 352 S.E.2d 73 (1986). However, this is misleading, as *Hayseeds* dealt with suits against an insurer over property damage claims and specifically held that "when a policyholder substantially prevails in a property damage suit against an insurer, the policyholder is entitled to damages for net economic loss caused by the delay in settlement, as well as an award

⁶ The trial court even noted at the hearing on post-trial motions that "we're not talking about a situation where we're looking at pain and suffering, general damages and things right now. We're talking about basically a hard, fast number. (J.A. 5164). JFA did not disagree with this assertion, claiming only that "it's a tort case." *Id.*

for aggravation and inconvenience.” *Id.* at 331, 352 S.E.2d at 80. In fact, this Court noted that “a large corporation with an in-place, organized collective intelligence that must litigate a claim for several years may suffer substantial net economic loss but little aggravation and inconvenience.” *Id.* The *Hayseeds* commentary, offered by former Justice Neely for illustrative purposes, “was aimed at preventing duplicative damage awards, rather than designed to address whether a corporation may recover damages of a personal nature.” *Hess Oil Co.*, 232 W. Va. at 153, 751 S.E.2d at 39.

Rather, it is well-settled law that a corporation is not able to recover damages for annoyance and inconvenience. In *Hess Oil Co.*, this Court held that “[a] dissolved corporation that is asserting a claim solely in its corporate name under authority of West Virginia Code § 31D-14-1405(b)(5) (2009) may not recover damages for the personal aggravation, annoyance, and inconvenience of its non-party former shareholders.” Syl. Pt. 5, *Id.*; *See also Pak-Mor Mfg. Co. v. Brown*, 364 S.W.2d 89, 96 (Texas App. 1962) (“[t]his annoyance, inconvenience and discomfort was suffered by the officers and employees of the corporation, but not by the corporation.”); *Valley View Angus Ranch v. Duke Energy Field Servs., LP.*, 2008 U.S. Dist. LEXIS 34365, *12 (W. D. Okla. 2008) (holding that a corporation cannot recover damages for annoyance and inconvenience). Similarly, in the case at hand, a corporation is attempting to recover damages for annoyance and inconvenience. However, JFA as a corporation cannot suffer these damages, only its shareholders can and none have them have brought a claim against B&N. Syl. Pt. 5, *Hess Oil Co.*, 232 W. Va. 145, 751 S.E.2d 31. JFA was aware of this from the outset of the trial, yet only brings this issue up now on appeal, which evidences the weakness of its argument.

The only conclusion that could reasonably be reached, and that was reached by the lower court, was that the verdict needed to be disregarded and that a new trial needed to be awarded to

remedy this award that was so clearly found in contravention to the evidence presented. The sheer size of the verdict awarded compared to the evidence presented is enough to warrant a new trial. The additional factors involved with this particular jury in reaching this particular verdict, such as their apparent confusion with the issues at hand, was more than enough reason for the lower court to set aside this verdict as grossly excessive.

III. THE TRIAL COURT WAS CORRECT IN FINDING THAT JURY'S AWARD OF DAMAGES VIOLATED THE SINGLE RECOVERY RULE

In West Virginia, “[t]he assessment of damages is peculiarly the province of the jury.” *Pittsburgh-Wheeling Coal Co. v. Wheeling Pub. Serv. Co.*, 106 W.Va. 206, 145 S.E. 272, 275 (1928). However, it is generally recognized there can be only one recovery of damages for one wrong or injury. *See Savage v. Booth*, 196 W.Va. 65, 468 S.E.2d 318 (1996) (“[A]n injured plaintiff should receive but one recovery in complete satisfaction of the wrong suffered”) (citations omitted). Accordingly, double recovery of damages is not permitted and a “plaintiff may not recover damages twice for the same injury simply because he has two legal theories.” Syl. Pt. 7, *Harless v. First Nat’l Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d. 692 (1982). In fact, West Virginia evinces a “strong public policy against the plaintiff recovering more than one complete satisfaction.” *John Doe v. Hasil Pak*, 237 W.Va. 1, 4, 784 S.E.2d 328, 331 (2016).

JFA repeatedly makes the claim that it “presented separate and independent causes of action against the Sanitary Board under contract and against Burgess & Niple under a theory of negligence.” (See Petitioner Brief at p. 20). However, throughout the trial below and especially in closing arguments, JFA repeated to the jury that it was only entitled to the amount of \$1.25 million to be apportioned between the CSB and B&N. JFA’s counsel even informed the jury in closing that “[t]he damages are the same that we assert against both of these entities.” J.A. 3298. This number stemmed from the amount in the REA submitted seven months after the Construction

Phase of the Project ended and the payment for said amount is governed by the same provisions of the contract documents. (J.A. 4084 – 4108). JFA is essentially claiming that it was damaged because the CSB failed to provide this payment to JFA and that B&N failed to recommend this payment to JFA, but the root of these damages are somehow different because two different parties contributed to the same injury. This claim by JFA flies in the face of this Court's decision in *Harless*.

A similar issue was examined by this Court in *Slack v. Kanawha County Hous. & Redevelopment Auth.*, 188 W. Va. 144, 156, 423 S.E.2d 547, 559 (1992). In *Slack*, an employee of the Kanawha County Housing and Redevelopment Authority (hereinafter "the Authority") suffered an adverse employment action after complaining to the Authority that she felt like she was being watched by an unknown entity. *Id.* at 146-147, 423 S.E.2d at 550. After the employee left her job at the authority after being transferred to a lower position following her complaints, a federal investigation discovered a covert listening device in the ceiling of the employee's office while she was working for the Authority. *Id.* at 147, 423 S.E.2d at 550. The employee then filed a lawsuit against the Authority and its Executive Director for invasion of privacy, civil conspiracy, and retaliatory discharge. *Id.* At trial, the jury awarded the employee \$60,000.00 on the invasion of privacy claim, but found for the defendants on the other claim. *Id.*

The employee appealed, in part, regarding the verdict on her civil conspiracy claim. *Id.* at 155, 423 S.E.2d at 558. This Court noted that "[t]he evidence presented by the plaintiff did not differentiate in time or degree between the emotional distress and mental anguish resulting from the civil conspiracy and that resulting from the plaintiff's other causes of action." *Id.* at 155-156, 423 S.E.2d at 559. Holding that such a reward on the civil conspiracy claim would constitute a prohibited double recovery, the Court held that additional damages for the conspiracy claim would

not be permitted due to its identity of the damage claims that she asserted under her other causes of action. *Id.* at 156, 423 S.E.2d at 559.

Like the employee in *Slack*, JFA is presented to the jury identical damages which it attributed to both B&N and the CSB. *Id.* at 147, 423 S.E.2d at 550. These damages were levied against the CSB for breach of contract and against B&N for failure to administer the same contract. (J.A. 0006 – 0014). Because the damages presented by JFA “did not differentiate in time or degree” from the claim against the CSB and the claim against B&N, this Court should find similarly to its previous decision in *Slack* and hold that JFA receiving over three times the amount of damages for a single instance violates the principles of the single recovery rule. *Id.* at 155-156, 423 S.E.2d at 559. As stated previously, JFA is not legally able to recover twice for the same injury just because it brought two separate legal theories against two different entities.

Multiple other jurisdictions have held that a double recovery in situations similar to the one at hand are clearly prohibited. *See Hickson Corp. v. Norfolk S. Ry. Co.*, 260 F.3d 559 (6th Cir. 2001) (“if damages under different legal theories overlap, plaintiff [is] entitled to only one recovery”); *Tavaglione v. Billings*, 4 Cal. 4th 1150, 1159, 847 P.2d 574, 580, 17 (1993) (“[t]hus, for example, in a case in which the plaintiff’s only item of damage was loss of commissions, two awards of damages identical in amount--one for breach of contract and the other for bad faith denial of the same contract--could not be added together in computing the judgment.”); *Pope v. Craftsman Builders, Inc.*, 2013 N.J. Super. Unpub. LEXIS 53, *22 (N.J. Super. Ct. App. Div. 2013) (“[m]oreover, by charging negligence as a separate cause of action, along with breach of contract, the judge permitted the jury to find liability under both negligence and breach of contract for the same conduct, thereby permitting double recovery for plaintiffs.”).

Therefore, it should be determined that the lower court was correct in its conclusion that the jury's verdict violated the single recovery rule. JFA was allegedly injured by one instance of nonpayment, the mechanism of which was found in the construction contracts upon which JFA bases its claims against the CSB and B&N. JFA is not able to bring two legal theories to compensate itself twice for the injury that it received once.

IV. THE TRIAL COURT CORRECTLY MADE THE FACTUAL FINDING THAT THE MAXIMUM POSSIBLE RECOVERY BY JFA WAS \$1,252,392.43.

JFA claims that “[t]here 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.” (See Petitioner’s Brief at p. 22). However, as has been explained throughout this brief, JFA’s counsel only presented these “contract damages” as its total damages to the jury to consider and mentioned nothing to the jury regarding their ability to award any damages over that amount, nor was the jury ever instructed as to this. (J.A. 3297-98). The \$1.25 million figure was presented to the jury several times as “the number” to be awarded. *Id.* Furthermore, counsel for JFA even plainly stated that “[t]he savages are the same that we assert against both of these entities.” (J.A. 3298).

JFA’s counsel even specifically asked the jury to take the \$1.25 million figure and apportion it between B&N and the CSB. (J.A. 3298). This begs the question as to why JFA requested that these “contract damages” be apportioned between the CSB and B&N, who JFA was suing for negligence. If there was truly another well of damages out there that JFA envisioned could be awarded in this matter, why would it ask the jury to apportion the “contract damages” to a party that it did not have a contractual relationship with? The answer is that JFA itself believed and tried its case with the thought that \$1.25 million was the maximum limit of recovery. JFA now attempts to rewrite history and claim that it was seeking more damages all along.

As stated above, the verdict awarded by the jury was excessive, inconsistent, and in violation of the single recovery rule. The total amount of damages that JFA presented to the jury, at every turn, was \$1.25 million. The jury, after much hesitation and cajoling, returned a verdict over three times that amount. The lower court was correct in finding that the maximum amount of recovery for JFA was the \$1.25 million that it had based its case upon.

V. THE TRIAL COURT CORRECTLY FOUND THAT REMITTITUR WAS UNAVAILABLE TO RESOLVE THE CONFLICT BETWEEN THE JURY'S VERDICT AND THE OVERWHELMING WEIGHT OF THE EVIDENCE.

As outlined above, verdict returned by the jury in this case was inconsistent, excessive, and in violation of the single recovery rule. JFA claims that any issue with the verdict "could have been the subject of remittitur had the Court, upon proper analysis, determined that the award was excessive." (See Petitioner's Brief at p. 23). However, the issue with the jury's verdict against B&N was not that it was merely excessive, but the excessiveness and inconsistency of it was based on the jury's confusion and lack of understanding of the issues present in this case.

The remittitur is, in its broadest sense, the procedural process by which the verdict of a jury is diminished by subtraction. See *Earl T. Browder, Inc. v. Webster County Court*, 145 W. Va. 696, 116 S.E.2d 867 (1960). At common law, "the power to order remittitur law within the sound discretion of the trial court." 13B M.J. NEW TRIALS § 55 (2019). Remittitur may be appropriate in cases where the jury's findings are consistent, but the verdict awarded was excessive or otherwise in an incorrect amount. See *Roberts v. Stevens Clinic Hosp.*, 176 W. Va. 492, 501, 345 S.E.2d 791, 800 (1986) ("The majority rule about remittitur allows us to give the Roberts their choice of a set amount of damages or, if they believe our estimation of their case to be too niggardly, a new trial."). In this case, that is the exact verdict that the jury came back with.

Remittitur is not appropriate in regard to the verdict at hand because the base amount to be subtracted from is rooted in a fundamental misunderstanding by the jury of the evidence presented.

Additionally, and contrary to JFA's argument, remittitur is not always seen as an appropriate measure even when dealing with an excessive verdict if that excess is the result of a flawed understanding of the case. *See Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1241 (5th Cir. 1985) ("When a jury verdict results from passion or prejudice, a new trial is the proper remedy rather than remittitur. Although decisions have deviated from this rule, the better approach is to require a new trial on any issue infected by passion and prejudice and employ remittitur for those verdicts which are excessive, that is, so large as to be contrary to right reason.") (citations omitted). In the case at hand, the basis for the excessiveness of the verdict is the jury's flawed understanding of the case. Therefore, remittitur is not appropriate.

In the case at hand, the lower court was sound in its reasoning to decline remitting the jury's verdict. It would do no good to remit the verdict because it was based on inconsistencies and was decided against the clear weight of the evidence. The verdict at hand showed logical inconsistencies and violated the single recovery rule. Therefore, the lower court was correct in declining to remit the verdict amount when the verdict at whole was in violation of several above-described principles of West Virginia law regarding verdicts.

CONCLUSION

WHEREFORE, based upon the foregoing reasons, the Defendant-Below/Respondent, Burgess & Niple, Inc., requests that this Honorable Court deny the JFA's appeal, uphold the trial court's order on post-trial motions regarding damages, reverse the lower court's ruling that the liability portion of the verdict should stand, and return the case to the lower court for judgment in

B&N's favor, or, in the alternative, order a new trial on both liability and damages, and award such other relief as this Honorable Court deems just and proper.

The Respondent,

BURGESS & NIPLE, INC.,

By Counsel:



Peter T. DeMasters (WV State Bar #7153)
Michael A. Secret (WV State Bar #13044)
Flaherty Sensabaugh Bonasso, PLLC
48 Donley Street, Suite 501
Morgantown, WV 26501
Telephone: (304) 598-0788
Facsimile: (304) 598-0790
pdemasters@flahertylegal.com
msecret@flahertylegal.com

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 4th day of September, 2019, the foregoing Respondent's Brief was deposited in the U.S. Mail contained in a postage paid envelope addressed to Counsel for all other parties to this appeal as follows:

Charles M. Johnstone, Esq.
Johnson W. Gabhart, Esq.
JOHNSTONE & GABHART, LLP
P.O. Box 313
Charleston, West Virginia 25321



Peter T. DeMasters (WV State Bar #7153)
Michael A. Secret (WV State Bar #13044)
Flaherty Sensabaugh Bonasso, PLLC
48 Donley Street, Suite 501
Morgantown, WV 26501
Telephone: (304) 598-0788
Facsimile: (304) 598-0790
pdemasters@flahertylegal.com
msecret@flahertylegal.com
***Counsel for the Respondent/Defendant,
Burgess & Niple, Inc.***