IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0394

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY

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

v.

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

BRIEF OF THE PETITIONER, BURGESS AND NIPLE, INC.

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PETITIONER'S BRIEF ON APPEAL

Comes now, the Petitioner, Burgess & Niple, Inc., by and through its counsel, Peter T. DeMasters, Michael A. Secret, and the law firm of Flaherty Sensabaugh Bonasso, PLLC, pursuant to the West Virginia Rules of Appellate Procedure and this Court's Scheduling Order, and respectfully files this Petitioner's Brief on Appeal.

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The lower court erred in failing to find that B&N was not liable for any of JFA's damages in this case absent evidence of bad faith in B&N's role as interpreter and judge of the claims and contract.

ASSIGNMENT OF ERROR NO. 2: The lower court erred in failing to give an intervening cause instruction to the jury in the trial of this matter.

ASSIGNMENT OF ERROR NO. 3: The lower court erred in allowing JFA's expert report from Mr. Willoughby into evidence.

ASSIGNMENT OF ERROR NO. 4: The lower court erred in allowing expert testimony to be proffered from JFA expert Charles Dutill, who is not a licensed engineer in the State of West Virginia.

ASSIGNMENT OF ERROR NO. 5: The lower court erred in allowing JFA's counsel to make certain statements regarding B&N's case in its closing argument.

ASSIGNMENT OF ERROR NO. 6: The lower court erred in ordering a new trial on damages only in following the jury's inconsistent damages verdict, realizing that liability would have to be tried again also.

ASSIGNMENT OF ERROR NO. 7: The lower court erred in separating the issue of liability from the issue of damages after the jury returned its inconsistent damages verdict against the weight of the evidence presented.

STATEMENT OF CASE

This case arises from the relationship between JF Allen Corporation (hereinafter "JFA") and the Sanitary Board for the City of Charleston, West Virginia (hereinafter "CSB") and Burgess & Niple, Inc. (hereinafter "B&N").

a. Project at Issue and Actions Leading to Lawsuit.

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, it entered into a contract with CSB to serve as the contractor for the Project. (J.A. 3473-3487). CSB had previously entered into a contract with B&N to act as the project engineer and provide professional design administration services. (J.A. 4550-58). JFA and B&N never entered into a contractual relationship with each other. Prior to making its bid, JFA had in hand of the proposed contract documents and the location of the Project. (J.A. 3365-4082).

Prior to submitting its bid, JFA visited the Project site and became familiar with the location. (J.A. 1553). JFA was informed by the Project drawings and by its site visits that approximately 250 homes were served by underground water, sewer, and other underground utilities and that the Project included a narrow roadway and creek bed where some of these utilities were located. (J.A. 1857-58). As the project engineer, 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 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 to it 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, many during monthly meetings, JFA reported "no delays" on the project. (J.A. 4876-77). Up until a few months prior to the original 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. (J.A. 1905). Substantial completion of the project occurred after change orders on June 19, 2013, and with the Final Pay Application being submitted by JFA 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 completion towards November of 2012, B&N advised JFA 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). When JFA did submit its Final Pay Application, it did not include any outstanding Claims that may have been incurred on the Project. (J.A. 4671-77). B&N recommended approval of JFA's Final Pay Application. (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 untimely Claims submissions 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 Claims. 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. <u>Obligations of Parties Under the EJCDC General Conditions and Other Contracts.</u>

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,

[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.

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 either. (J.A. 2387-88; J.A. 2462). Therefore, all executives at this company were working under a contract they claim they never read. *Id.*

i. Contractor Agreement and EJCDC General Conditions.

The Contractor Agreement was governed by the Standard General Conditions of the Construction Contract prepared by the Engineers Joint Contract Documents Committee (hereinafter "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 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 contact, 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 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. A decision by Engineer [B&N] shall be required as a condition precedent to any exercise by Owner [CSB] or Contractor [JFA] of any rights or remedies either may otherwise have under the Contract Documents or by Laws and Regulations in respect of such Claims." (J.A. 3565). Upon receiving a duly submitted Claim, 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). 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 if said party wishes to see their change instituted. *Id.*

Paragraph 7.01(A)(2) states that "[i]f Owner and Contractor are unable to agree on . . . such adjustment in Contract Price or Contract Times, Owner or Contractor may make a Claim therefor as provided in Paragraph 10.05." (J.A. 3559). Paragraph 10.05(A) states that "All Claims must be referred to [B&N] for decision" and that "[a] decision by [B&N] shall be required as a condition precedent to any exercise by Owner or Contractor of any rights or remedies either may otherwise have under the Contract Documents or by Laws and Regulations. . . ." (J.A. 3565). Paragraph 10.05(B) mandates that "[w]ritten notice of said Claims must be submitted within thirty (30) days of the event giving rise to the Claims." (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.*

Once a Claim was submitted in writing and substantiated within the appropriate time period, B&N would have thirty (30) days to review the Claim. *Id.* However, 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). 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).

Article 14 of the Contract 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). JFA still holds the uncashed check that it received from the Project. (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 are no Claims to be made.

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, 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 supposedly outstanding "Claims" in the REA, Paragraph 7.01(A)(3) notes that that said 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 I 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 rending 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 Post-Trial Proceedings

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 he Project that would necessitate a Claim be instituted for a change in contract price, but the 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). Instead, 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 he never submitted a request to either B&N or CSB for more time to substantiate a Claim and that it 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. (J.A. 2305-07).

On the seventh day of trial, B&N proffered to the lower court its Jury Instruction for intervening cause. (J.A. 3119-20). The intervening cause as argued by B&N was JFA's own failure to submit its Claims to B&N before the conclusion of the Construction Phase and in accordance with the Contractor Agreement. *Id.* After hearing the arguments from counsel, the lower court ruled that it was "an appropriate instruction based on the evidence" and that it would allow said instruction to the jury over the objections of JFA's counsel. *Id.* However, on the eighth day of trial, the lower court ruled that it would not allow the intervening cause instruction because it did not see JFA's submission of a Final Pay Application as a negligent act. (J.A. 3143-44).

In closing arguments, JFA's counsel specifically asked the jury to "award this money" to JFA. Counsel also stated that '[t]he damages are the same that we assert against both entities . . . so of this [the REA] 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). Later, he stated that the jury should put "hopefully the rest of the money on which you put for Burgess and Niple." (J.A. 3298).

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 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. During its closing argument, JFA's attorney even told the jury that $1,252,392.43 was "the number" to be used when assessing the damages to JFA and was told to divide this number specifically, and no other number, between B&N and CSB. (J.A. 3227).

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 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

[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).

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). 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 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).

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 this instant 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). The lower court erroneously determined that the liability verdict stands, but then went on to say that "a new tral on damages is essentially going to be a new trial." (J.A. 5175-76). Additionally, in explaining its rationale for awarding a new trial on damages only, the lower court admitted that "it is not lost on me that a new trial on damages is, in essence, a new trial." (J.A. 5184). 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).

SUMMARY OF ARGUMENT

It is clear that when JFA submitted its application for final payment, it certified that there were no unsettled Claims. Thereafter, final payment was received by JFA. B&N's role in the Project ended when it recommended that JFA be paid the amount it requested. JFA then waited more than seven (7) months after final payment was transmitted to request additional funds via REA, blatantly failing to abide by the provisions of Paragraph 10.05 and 14.09 of the EJCDC General Conditions, as JFA admitted to at trial. JFA had waived its right to request such funds, pursuant to the explicit terms of the contract. Furthermore, even though JFA admitted at trial that it did not follow the EJCDC General Conditions with regard to the Claims process for any Claims listed in the REA and that the REA technically did not contain Claims as per the Contractor Agreement, JFA still requested that B&N recommend payment "[i]n accordance with General Conditions 10.05 Claims. B&N had no authority to review anything related to the Project after the Construction Phase of the Project had ended. B&N's hesitation proved to be well-founded, as Tim Haapala, Operations Manager for the CSB, testified the CSB would not have allowed B&N to review the REA if that had been requested.

First, the EJCDC General Conditions and the EJCDC Standard Form clearly stated that B&N would not be liable for its decisions made regarding alleged Claims or REAs made by JFA so long as said decisions were made in good faith. Therefore, the only way that B&N could be liable to JFA is if B&N acted in bad faith. JFA was unable to present any evidence throughout this matter that would indicate that B&N acted in bad faith in its duty to administer Claims pursuant to the contracts in play during the time of the Project. JFA's own expert in this matter, Mr.

Willoughby, could not testify that B&N acted in bad faith during the Project. If JFA had simply followed the procedure and time frame set forth in the EJCDC General Conditions, which it had on hand prior to submitting its bid, then B&N would have had to consider any outstanding Claims that JFA presented just as it did when JFA submitted its six (6) other Claims. B&N did not act in bad faith by choosing to not exceed its contractual authority and reviewing the REA. On the contrary, B&N would have exposed itself to liability had it done so.

Second, the lower court erred in denying B&N's requested Jury Instruction on intervening cause after previously indicated that the same Jury Instruction would be accepted. Paragraph 6.06(c) of the EJCDC General Conditions mandated that JFA was to submit its Final Application for Payment that should have included, among other things, "a list of all Claims against Owner that Contractor believes are unsettled." JFA submitted its Request for Final Payment and other items, but did not submit any unsettled Claims when it had the opportunity. That submission was a prerequisite for B&N to know that Claims may be forthcoming. JFA's negligent failure to act in accordance with the EJCDC General Conditions, which JFA had on hand and never read despite the continuous opportunity to do so, was the new effective cause of its waiver of any unsettled Claims. To reject this instruction was to reject a crucial element of B&N's defense, which is that JFA caused its own failure to receive additional payment for the Project.

Third, the lower erred in allowing Mr. Willoughby's expert report into evidence as Exhibit 3. It was represented by JFA that Mr. Willoughby worked with JFA executives to put together the report, but in reality the document was prepared solely by Mr. Willoughby, solely for litigation purposes and at the direction of JFA's attorney. The document, which was allowed to be taken into the jury room, contained multiple levels of hearsay. Furthermore, the admission of the REA, which was Mr. Willoughby's expert report, would constitute cumulative evidence.

Fourth, the lower court erred in allowing JFA's expert Charles Dutill (hereinafter "Mr. Dutill") to testify as an expert in the trial of this matter. Mr. Dutill is not a licensed professional engineer in the State of West Virginia and has never administered a contract with this version of the EJCDC General Conditions in the last 16 years. Also, Mr. Dutill admits that he is not an expert in the administration of the EJCDC General Conditions, which establishes B&N's duty in administering unsettled Claims. The central issue in this matter is whether B&N abided by the EJCDC General Conditions in administering Claims process and Mr. Dutill admitted that he was not an expert on the EJCDC General Condition's implementation and had never worked with them. Because Mr. Dutill never used the contract terms at issue, his testimony should not have been permitted as expert testimony to be heard by the jury.

Fifth, the lower court erred in allowing counsel for JFA to make statements to the jury regarding B&N's decision not to have an expert testify. These statements to the jury, made during JFA's closing argument and rebuttal, implied that B&N's liability could be demonstrated by the fact that B&N did not retain an expert in this matter while JFA did. This is not the case because JFA bore the burden of proof in this matter and B&N was not obligated provided any expert testimony. As mentioned above with respect to Mr. Dutill, JFA's expert even admitted on the stand that he was not an expert. JFA's counsel made these inaccurate and prejudicial statements to the jury in an attempt to mislead them into thinking that B&N needed an expert in this matter. Such statements made by JFA's counsel are not permissible as they have a tendency to inflame, prejudice, or mislead the jury.

Sixth, the lower court erred in ordering a new trial in this matter only on damages instead of a new trial on both the issues of damages and liability following the jury's inconsistent verdict. When a jury verdict answers several questions with no logical consistency and do not comport

with instructions, such verdict should be reversed and the cause remanded for a new trial. Here, it is clear that the jury was confused and the verdict that it returned was inconsistent with the instructions to the jury. This verdict also makes no logical sense as JFA repeatedly informed the jury that $1,252,392.43 was the maximum amount that it was entitled to in recovery both through the report and testimony of Mr. Willoughby and through statements made to the jury in closing. The lower court, in reviewing the record of this matter, ordered that a new trial be undertaken to determine damages only. However, the damages in this matter are intertwined with the liability of the parties and cannot be separated. To request the damages be retried requires that the entire trial to be retried as the jury clearly did not have a grasp on the admittedly complicated issues presented in this matter, whether they be issues relating to damages or issues relating to liability.

Seventh, the lower court erred in ordering a new trial on damages only when the jury's excessive verdict showed that a new trial on both damages and liability was warranted. A verdict of a jury is to be set aside where the amount thereof is such that, when considered in light of the proof, it is clear that the jury was misled by a mistaken view of the case. Here, there is no evidence that has been presented by any party that could support the clearly excessive verdict. The final verdict exceeded where even JFA believed that it would be at the conclusion of the Project at issue in this matter. Furthermore, the excessiveness of the verdict was entirely against the weight of the evidence presented to the jury, who were never even presented with a number near the amount that they would award to JFA.

No witness in this matter testified that JFA followed the Claims process as outlined in the EJCDC General Conditions, yet JFA threatened in its REA that B&N had to recommend payment amount "in accordance with its contractual obligations" in a contract that JFA admits that it did not read. Despite the paradoxical and hypocritical arguments and testimony brought forth by JFA

at trial, the jury found for JFA against the weight of the evidence presented by B&N. The jury's verdict and the decisions of the lower court highlighted above that lead to it were in error.

Each error outlined above was not harmless and each affected B&N's substantial rights at trial. While the lower court correctly ruled that the damages element of this case for all parties be retried, the lower court erred in holding that the issue of liability was to remain standing. To correct the errors made during the trial of this matter, the only just relief to B&N would be to order the lower court to retry this case in its entirety.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

B&N believes that the lower court's *Order Granting Defendants a New Trial on Damages and Denying Defendants' Motions for Renewed Judgment as a Matter of Law* erred in the application of settled law and was against the weight of the evidence and, as such, this matter is appropriate to be scheduled for oral argument and consideration under Rule 19 of the West Virginia Rules of Appellate Procedure.

STANDARD OF REVIEW

There are several different assignments of error presented by B&N on appeal. B&N alleges error at multiple stages of the trial of this matter, as well as in post-trial proceedings. Each assignment of error must be addressed in conjunction with the other assignments of error to provide a clear picture of the Petitioner's issues with the lower court's decisions.

An appellate court reviews questions of law under a *de novo* standard. *Sneberger v. Morrison*, 235 W. Va. 654, 776 S.E.2d 156 (2015). A trial court's evidentiary and procedural rulings are subject to appellate review under an abuse-of-discretion standard. *State v. Kaufman*, 227 W. Va. 537, 711 S.E.2d 607 (2011). To warrant reversal, two elements must be shown: error and injury to the party appealing. *Id.* Error is harmless when it is trivial, formal, or merely

academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no way affects the outcome of the trial. *Reed v. Wimmer*, 195 W. Va. 199, 465 S.E.2d 199 (1995).

This Court has also noted that "[w]e review the rulings of the circuit court concerning a new trial and its conclusions as to the existence of reversable error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995). "[A]lthough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." *Harnish v. Corra*, 237 W. Va. 609, 613, 788 S.E.2d 750, 754 (2016) (citations omitted).

ARGUMENT

1. The Lower Court Erred In Failing To Recognize That JFA's Claims Could Only Succeed If B&N Showed Bad Faith In Its Role On The Project And No Such Bad Faith Could Be Proven.

It is well established law in West Virginia that "[w]hen a special relationship exists between a design professional and a contractor, the specific parameters of the duty of care owed by the design professional must be defined on a case by case basis." Syl. Pt. 7, *Eastern Steel Constructors, Inc. v. The City of Salem*, 209 W. Va. 392, 549 S.E.2d 266 (2001). In *Eastern Steel*, The City of Salem contracted with Kanakanui Associates (hereinafter "Kanakanui") to provide engineering and architectural services for certain improvements to The City of Salem's sewer system. *Id.* at 395, 549 S.E.2d at 269. Eastern Steel Constructors, Inc. (hereinafter "Eastern"), was awarded a contract for the construction of one of the sewer lines. *Id.* Eastern claimed that Kanakanui failed to properly administer the project or provide Eastern with proper construction

plans, which caused Eastern delays in finishing the project. *Id.* Eastern proceeded to sue Kanakanui, in part, for negligence in its provision of construction engineering services, consultation, project inspection, project management, and project administration. *Id.*

In considering a design professional's duty to a construction contractor, the Court noted that "the ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised." *Id.* at 397, 549 S.E.2d at 271. In evaluating economic damages resulting from negligence, the Court opined that a design professional may owe a duty to a contractor if the parties are deemed to have a special relationship.[3] *Id.* at 400-401, 549 S.E.2d at 274-275. However, when it came to the issue of the type of duty owed between a design professional and a construction contractor, the Court held as follows:

> Having established that a design professional owes a duty of care to contractors, we endeavor to give some definition to that duty. ***We note that the exact nature of the specific duty owed by a design professional may be impacted by provisions contained in the various contracts entered among the parties (e.g. the contract between the owner and the design professional, and the contract between the owner and the contractor), provided that such contractual provisions do not conflict with the law.*** In addition, the duty of care may be further defined by rules of professional conduct promulgated by the agencies charged with overseeing the specific profession of which a defendant is a member. *See, e.g.,* West Virginia Rules of Professional Responsibility for Professional Engineers, 1A W. Va. C.S.R. § 7-1-16 et seq. (1993); West Virginia Rules of Professional Conduct for Architects, 1A W. Va. C.S.R. § 2-1-9 et seq. (1998). Consequently, we hold that when a special relationship exists between a design professional and a contractor, the specific parameters of the duty of care owed by the design professional to the contractor must be defined on a case-by-case basis. However, in general, the duty of care owed by a design professional to a contractor with whom he or she has a special relationship is to render his or her professional services with the ordinary

[3] This Court went on to explain "that the existence of a special relationship will be determined largely by the extent to which the particular plaintiff is affected differently from society in general." *Id.* at 398, 549 S.E.2d at 272; *see also Aikens v. Debow*, 208 W. Va. 486, 501, 541 S.E.2d 576, 591 (2000) (holding that an individual who sustains purely economic loss caused by another's negligence may not recover damages in the absence of physical harm to that individual's person or property, a contractual relationship with the alleged tortfeasor, or some other special relationship between the alleged tortfeasor and the individual applies strictly to plaintiffs alleging purely economic loss from an interruption in commerce caused by another's negligence.).

skill, care and diligence commensurate with that rendered by members of his or her profession in the same or similar circumstances.

Id. at 401, 549 S.E.2d at 275 (*citing Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 187, 677 P.2d 1292, 1295 ("Design professionals have a duty to use ordinary skill, care, and diligence in rendering their professional services.")).

Multiple jurisdictions have articulated, similar to this Court in *Eastern Steel*, that the duty between a design professional and a contractor rests with the various interrelated contracts in play during a construction project. *See BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72 (Colo. 2004) (holding that interrelated contracts between parties to a construction contract contain the duty of care for the project engineer); *Blake Constr. Co. v. Alley*, 233 Va. 31, 34, 353 S.E.2d 724, 726 (1987) ("[t]he architect's duties both to owner and contractor arise from and are governed by the contracts related to the construction project. While such a duty may be imposed by contract, no common-law duty requires an architect to protect the contractor from purely economic loss."); *Leis Family L.P. v. Silversword Eng'g*, 126 Haw. 532, 539, 273 P.3d 1218, 1225 (Haw. Ct. App. 2012) ("Even in the absence of privity of contract between the design professional and a project owner, the law does not impose a duty in tort if it would 'disrupt the contractual relationships between and among the various parties.'") (citations omitted).

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 rending 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). JFA admits that they had these documents on hand, but failed to read them. (J.A. 1559; J.A.

2387-88; J.A. 2462). Therefore, under the duty analysis of this Court in *Eastern Steel*, B&N is not liable to JFA for a good faith decision that it made in providing its services that JFA relied upon. *Eastern Steel Constructors, Inc.*, 209 W. Va. at 401, 549 S.E.2d at 275. In short, the only way to find B&N liable for the damages suffered by JFA in this matter is if B&N could be found to have acted in bad faith. An analysis of B&N's conduct is necessary to determine whether it acted in bad faith in its dealings with JFA.

As a general rule, a finding of negligence and a finding of bad faith are brought about by two separate causes of action and are governed by two separate standards. The "negligence standard" generally involves an analysis of whether a party breached a duty to another party while the "bad faith" requires a heightened showing of recklessness, indifference, or intentional disregard to the wellbeing of another party. *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 593, 396 S.E.2d 766, 774 (1990). While this Court has noted that "actions done in 'bad faith, wantonly or for oppressive reasons' are often difficult to define[,]" it is clear that actions in bad faith go beyond mere negligent conduct. *Yost v. Fuscaldo*, 185 W. Va. 493, 500, 408 S.E.2d 72, 79 (1991); *see also Harrison v. Harrison*, 36 W. Va. 556, 557, 15 S.E. 87, 88 (1892) ("If the conduct of the plaintiff has indicated bad faith, or a virtual abandonment of the contract, or a cancellation of the parol gift for a valuable consideration, these circumstances will deprive him of all just claim to equitable interposition.").

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.

"Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. Pt. 1, *Conkery v. Sleepy Creek Forest Owners Ass'n*, 813 S.E.2d 112, ---W. Va.--- (2018). JFA had a duty to submit and substantiate the Claims that it made to B&N in a contractually established time period. JFA alone had the information necessary to determine its own costs in working on the project. (J.A. 1783). It is undisputed that JFA failed to meet this obligation through no fault of B&N and certainly not due to any bad faith on behalf of B&N.

During trial and in the pleadings prior to trial, JFA admitted in no uncertain terms that it did not submit or substantiate its claims that would go on to make up the REA, instead submitting its REA seven months after B&N recommended final payment to JFA. (J.A. 1783). Furthermore, Mr. Hadjis admitted that he was unsure as to how the Claims process under the EJCDC General Conditions operated as he had never personally read the EJCDC General Conditions.[4] (J.A. 1559). While B&N acted as CSB's representative during the Construction Phase of the project, the Construction Phase of the project terminated "upon written recommendation by Engineer for final payment to Contractor." (J.A. 4594). JFA clearly submitted its Final Payment Application to B&N without any outstanding Claims listed. (J.A. 4671-77). B&N issued its written recommendation for final payment on or shortly after October 8, 2013. (J.A. 4681-87). At the time that the REA was submitted on May 5, 2014, B&N was no longer authorized to serve as CSB's on-site representative. (J.A. 0507-0531). If B&N had reviewed the REA, it would have done so without

[4] Despite the fact that Mr. Hadjis admitted on the stand at trial that he did not know how to institute the process under the EJCDC General Conditions for unsettled claims, he did not appear to have a problem penning a threatened letter preceding the REA to B&N wherein he claimed that B&N had a contractual obligation to satisfy the REA. (J.A. 0507). On one hand, JFA demands that B&N honor contractual obligations what had ended while, on the other hand, admits that it did not fulfill its own contractual obligations while they were still active. *Id.*

authority, and would have then risked possibly exposing itself to liability from the CSB. B&N's stated inability in recommending payment for the REA was indeed well-founded, as CSB representatives testified that they would not have allowed B&N to review the REA had B&N made such request of CSB. (J.A. 2687-88).

In short, no evidence was presented at trial of this matter that could be reasonably construed to conclude that B&N acted in bad faith while serving its functions pursuant to Paragraph 9.08 and 10.05 of the EJCDC General Conditions. To the contrary, B&N attempted at every turn to abide by the terms of the multiple contracts in play during the Project. Furthermore, JFA has admitted that it did not follow the terms of the contract with respect to the very same sections of the EJCDC General Conditions under which it demanded payment. (J.A. 1783-84). Taking B&N's situation and JFA's failure to abide by the agreed-upon contract into account, the lower court erred in finding that B&N was not immune from suit due to a lack of bad faith conduct in administering the Claims payment process after the Final Pay Application had been recommended.

Therefore, because B&N clearly adhered to its Agreement with CSB in good faith, the lower court erred in failing to find that B&N was immune from liability to JFA.

2. The Lower Court Erred In Refusing To Provide An Intervening Cause Instruction To The Jury After Having Previously Approved The Same Intervening Cause Instruction.

Regarding jury instructions, "[a]s a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988); *see also State v. LaRock*, 196 W. Va. 294, 308, 470 S.E.2d 613, 627 (1996) ("The law is clear that an instruction should be given only when it addresses an issue reasonably raised by the evidence."). In the case at hand, B&N offered to the lower court a proposed jury instruction on intervening cause. (J.A.

0585). The lower court first accepted this instruction, but later informed B&N that it would not issue the instruction on intervening cause. (J.A. 3119-20; J.A. 3143-44). The lower court's failure to issue the proposed intervening cause instruction was an error as there was sufficient evidence for a reasonable jury to find that JFA's conduct in this matter constituted an intervening cause.

To show negligence, a "plaintiff must prove that the defendant owed the plaintiff some duty of care; that by some act or omission the defendant breached that duty; and that the act or omission proximately caused some injury to the plaintiff that is compensable by damages." *Hersh v. E-T Enters., P'ship*, 232 W. Va. 305, 310, 752 S.E.2d 336, 341 (2013). Courts have noted that "[q]uestions of negligence, due care, ***proximate cause*** and concurrent negligent present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts . . . are such that reasonable men may draw different conclusions from them." Syl. Pt. 5, *Hatten v. Mason Realty Co.*, 148 W. Va. 380, 135 S.E.2d 236 (1964) (emphasis added). Questions of fact relating to the cause of negligence should be left to the jury to determine.

A possible defense available to rebut a negligence accusation is the existence of an intervening cause. *See Sydenstricker v. Mohan*, 217 W. Va. 552, 559, 618 S.E.2d 561, 568 (2005) ("The function of an intervening cause [is that of] severing the causal connection between the original improper action and the damages.") (citation omitted). This Court has held the following regarding the defense of intervening causes:

> [A]n intervening cause can be established only through the introduction of evidence by a defendant that shows the negligence of another party or a nonparty. Although it is recognized that a negligent defendant may be saved from liability by an intervening cause, such a cause only arises when the negligence of a party other than the defendant intervenes and becomes the only proximate cause of the injury. The intervening cause must be a negligent act or omission which constitutes a new effective cause and which operates independently of any other act, making it, and only it, the cause of the injury.

Landis v. Hearthmark, LLC, 232 W. Va. 64, 76-77, 750 S.E.2d 280, 292-293 (2013) (citing *Costoplos v. Piedmont Aviation, Inc.*, 184 W.Va. 72, 74, 399 S.E.2d 654, 656 (1990)).

Pursuant to Section 14.07(A)(2)(c) of the EJCDC General Conditions, JFA was to submit a Final Application for Payment that should have included "a list of all Claims against Owner that Contractor believes are unsettled." (J.A. 3581). This submission was a prerequisite for B&N's recommendation for final payment, which, in turn, was B&N's final authorized act as a representative of CSB on the Project. (J.A. 4594). It is undisputed that JFA failed to list any "unsettled Claims" in its Final Application for Payment. (J.A. 4671-77). Had JFA done this, B&N would have had to review the Claims in accordance with the contracts in play relating to the Project. JFA's failure to submit any "unsettled Claims" in its Final Application for payment was the new effective cause of the construction payment dispute that necessitated this case.

Here, JFA presented ample evidence to the trier of fact that it negligently failed to include any alleged outstanding Claims listed in its REA in its Application for Final Payment. JFA could have read the EJCDC General Conditions and properly began the Claims process which it had not done earlier in the project, but JFA negligently failed to do so to its detriment. (J.A. 1783-84). JFA had a duty to address its unsettled Claims in its Final Payment Application, yet negligently failed to do so by not even reading the readily-available Contractor Agreement that it signed wherein said duty was articulated. (J.A. 3565-66). This negligent shirking of duty by JFA severed the causal connection between the alleged improper actions of B&N and the alleged damages suffered by JFA. *Sydenstricker*, 217 W. Va. at 559, 618 S.E.2d at 568. JFA's failure to follow the Claims process operated independently of any action undertaken by B&N and, therefore, JFA's failure was an intervening cause of its damages. *Landis*, 232 W. Va. at 76-77, 750 S.E.2d at 292-293.

Therefore, the lower court erred in refusing to give B&N's proposed instruction on intervening cause to the jury even though said instruction was appropriate in light of JFA's own negligence in failing to request payment at the appropriate time.

3. The Lower Court Erred In Allowing JFA's "Request for Equitable Adjustment", Prepared By JFA's Expert Bryon Willoughby In Anticipation Of Litigation, To Be Entered Into Evidence And To Be Taken Into The Jury Room.

To establish its damages in this case, JFA retained Mr. Willoughby as an expert in "project scheduling, loss efficiency, and damages calculation." (J.A. 0644). Mr. Willoughby relied on his background as a "seasoned cost estimator" to perform this work. (J.A. 2094). His cost estimating required a detailed analysis of labor costs and equipment costs, as well as a "measured mile study." (J.A. 2185). Mr. Willoughby prepared the REA on behalf of the JFA and used it as the basis for damages that JFA was asserted against the CSB and B&N. (J.A. 2087).

Over the objections of counsel, the lower court admitted a JFA's REA into evidence as Exhibit 3. (J.A. 1615). At the time when the lower court was considering the objections to the document, JFA made the argument that the REA is a "claim document" and that it was "a document in this case that was triggered by the contract." (J.A. 1621). JFA further claimed that the document was generated by JFA and that Mr. Hadjis worked with Mr. Willoughby to put together the REA because Mr. Hadjis "had trouble calculating his claim, he needed someone to help him with his claim. He contacted Mr. Willoughby to assist him in putting his claim together." (J.A. 1621-22). However, it became clear later throughout the course of the trial that the REA was not a claim made by JFA and also that no other party helped Mr. Willoughby prepare it. (J.A. 1574). As JFA had retained Mr. Willoughby solely to provide this REA at the trial of this matter, the REA was, in fact, an expert report that cannot be entered into evidence.

Rule 801 of the West Virginia Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Generally, "out-of-court statements made by someone other than the declarant while testifying are not admissible[.]" *State v. Maynard*, 183 W. Va. 1, 4, 393 S.E.2d 221, 224 (1990) (citing Rules 803 and 804 of the West Virginia Rules of Evidence). This Court has noted that "a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony." *State v. Lambert*, 236 W. Va. 80, 96, 777 S.E.2d 649, 665 (2015) (quoting *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013)). Additionally, Rule 403 of the West Virginia Rules of Evidence provides that "a trial court may exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In the case at hand, JFA maintains that the REA prepared by Mr. Willoughby is a "Claim" pursuant to the EJCDC General Conditions and not an expert report. (J.A. 1621). However, Mr. Hadjis admits that Mr. Willoughby was the party who generated that REA with minimal from him. (J.A. 1640). The REA was produced entirely by Mr. Willoughby with little input from Mr. Hadjis, even though Mr. Hadjis signed the REA. (J.A. 0507). Therefore, as the REA contained opinions and estimations by a third-party that are being offered for their truth, the REA is inadmissible hearsay that lower court erroneously allowed to be presented as admissible evidence to the jury. Notably, the lower court even admitted that the REA was "a hearsay document" during the course of the trial. (J.A. 1577).

Furthermore, it is clear that Mr. Willoughby prepared the REA in anticipation of this pending litigation. Mr. Willoughby's invoices show that he "[w]orked on report . . . worked on a

draft report . . . reviewed plans" and the he was compensated for these tasks in preparing the REA by JFA's counsel. (J.A. 1574). JFA's counsel worked with Mr. Willoughby and admitted in depositions that "the expectation at the time [of the REA's preparation] was this would be litigation because of request to correct the adjustment." (J.A. 1573-74). On the stand, Mr. Willoughby even implied that the REA was "his expert report." (J.A. 1603). As the REA was prepared by JFA's expert at the behest of JFA's counsel and its preparation was paid for by JFA's counsel, the REA is an expert report and not a Claim pursuant to the EJCDC General Conditions. Expert reports are not substantive evidence and the lower court erred in allowing it to be taken back into the jury room.

In the alternative, the introduction of the REA should have been considered cumulative evidence prohibited by Rule 403 of the West Virginia Rules of Evidence. If JFA is to be believed, the purpose of the REA was to establish the amount of outstanding Claims still owed to JFA claims they were waived when it submitted its Final Pay Application. (J.A. 1622-23). Mr. Willoughby testified in this matter and advised the jury as to the amount allegedly owed to JFA was similar to the REA amount. (J.A. 2005). Furthermore, counsel for JFA mentioned this number to the jury on multiple occasions during its closing argument regarding this amount and how it was the totality owed to JFA. (J.A. 3297). To allow the REA to be presented to the jury as evidence when it was not prepared by JFA was needlessly cumulative, as the information has previously been thoroughly communicated to the jury through testimony on multiple occasions.

Therefore, because the REA was an expert report prepared by a third-party in anticipation of litigation that sought to present cumulative evidence to the trier of fact, the lower court erred in allowing it to be presented to the jury as evidence.

4. The Lower Court Erred In Allowing Testimony From JFA Expert Charles Dutill, Who Is Not A Licensed Engineer In The State Of West Virginia.

Pursuant to West Virginia Code § 30-13-2, "[i]t is unlawful for any person to practice or to offer to practice engineering in this state, as defined [by code] . . . unless the person has been duly registered or exempted under the provisions of this article." West Virginia Code 30-13-2(e) has defined the practice of engineering as the following:

> "Practice of engineering" means any service or creative work, the adequate performance of which requires engineering education, training and experience in the application of special knowledge of the mathematical, physical and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems; planning the use of land and water; teaching of advanced engineering subjects, engineering surveys and studies; and the review of construction for the purpose of assuring compliance with drawings and specifications any of which embraces such services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, pneumatic or thermal nature, insofar as they involve safeguarding life, health or property, and including such other professional services as may be necessary to the planning, progress and completion of any engineering services. Engineering surveys include all survey activities required to support the sound conception, planning, design, construction, maintenance and operation of engineered projects.

Rule 702 of the West Virginia Rules of Evidence states that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." In determining who is an expert, a lower could should conduct the following two-step inquiry:

> First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.

Syl. Pt. 5, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995).

West Virginia law is also clear that testimony should be excluded when the supposed expert acknowledges that he or she is not qualified to render an opinion on a particular matter. *Sneberger v. Morrison*, 235 W. Va. 654, 664, 776 S.E.2d 156, 166 (2015). In *Sneberger*, a property owner hired a contractor and a mason to build a "primitive" log cabin home in Randolph County. *Id.* at 660, 776 S.E.2d at 162. The property owner later dismissed the contractor and mason from the job and sued them for fraud, breach of contract, negligence, and breach of the implied warranties of habitability and merchantability. *Id.* at 660-661, 776 S.E.2d at 163. In support of her case, the property owner hired a masonry expert to testify as to the deficiencies in the masonry work done to the basement walls in her cabin. *Id.* at 665, 776 S.E.2d at 167. The lower court found that the masonry expert was not qualified to provide testimony as to the competency of masonry work as he did not consider himself an expert in the subject. *Id.* at 665-666, 776 S.E.2d at 168.

In the case at hand, JFA's expert Mr. Dutill is not a licensed professional engineer in the State of West Virginia. (J.A. 2021-22). Additionally, he has never worked in the geographic region where the underlying events took place, has not designed a sewer system like the one involved in this case in over sixteen (16) years, has not administered a contract like the one here in over sixteen (16) years, has never utilized the EJCDC General Conditions that governed the contract in this case, and admitted, under oath that he did not consider himself an expert on this type of contract and the EJCDC General Conditions. (J.A. 2025; J.A. 2027-29). Mr. Dutill's testimony presented to show B&N's "failing to impartially address claims and recommend payment of valid and compensable claims according to the terms of the contract and industry practice." (J.A. 0645). However, Mr. Dutill has no experience with said contract and has never worked in the georgraphic area where the parties in this case were working. (J.A. 2025; J.A. 2027-29). Therefore, he is barred by both the West Virginia Code and the Rules promulgated by the West Virginia State Board of

Registration for Professional Engineers from testifying as an expert because to do so would engage in the practice of engineering in this West Virginia, which he is not licensed to do.

The central issue as to B&N's involvement in the case was whether B&N met the standard of care requisite for a project engineer in administering the contract in this matter. Mr. Dutill was brought in by JFA to testify as to B&N's conduct, but he had no experience in the standard of care posed as he has never used the EJCDC Contract terms to administer a contract. (J.A. 2025; J.A. 2027-29). At the very most, Mr. Dutill may offer his interpretation as to what the language of the contract meant. Such testimony was not helpful as the jury had the ability to read the contract themselves. Furthermore, Mr. Dutill's testimony caused undue prejudice to B&N as Mr. Dutill was testifying to the jury as an "expert" although he had no qualifications to be considered one and admitted he was not one.

Therefore, because Mr. Dutill is not a licensed engineer in the State of West Virginia and was woefully inexperienced with the documents governing the case at hand, the lower court erred in qualifying him as an expert and allowing him to proffer his opinions to the jury in this matter.

5. The Lower Court Erred In Allowing JFA To Make Prejudicial And Misleading Statements In Its Closing Argument Regarding B&N's Lack Of Expert Testimony.

Regarding closing arguments, Courts have held that "[g]reat latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, not permit or encourage witnesses to make remarks which would have tendency to inflame, prejudice, or mislead the jury." Syl. Pt. 2, *Jones v. Sester*, 224 W. Va. 483, 686 S.E.2d 623 (2009). It is recognized that "unfair prejudice does not mean damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to [suggest a] decision on an improper basis." *State v. Donley*, 216 W.

Va. 368, 377, 607 S.E.2d 474, 483 (2004) (quoting *State v. LaRock*, 196 W.Va. 294, 312, 470 S.E.2d 613, 631 (1996)).

In its closing argument, counsel for JFA stated that B&N could not find an expert to come and testify on its behalf. His argument to the jury was as follows:

> Under the contracts for utilities, they have – have to issue equitable adjustment. They shall, they shall, they know the damages. Now, the engineer who is supposed to be the independent arbiter, again, ***we're the only person that put on an expert.*** Our expert said that for those same sections, it was negligence for the engineer not to act. It was negligent for them not to recommend payment.
>
> ***
>
> Mr. DeMasters [Counsel for B&N] doesn't like our expert, who was qualified by the Judge, and Testified – the only person who testified. ***They couldn't get an expert to refute it.*** Nobody from management – you'd think somebody – Mr. Richards or somebody would come in and say, that's wrong.

(J.A. 3235; J.A. 3295) (emphasis added).

These statements were not only inaccurate, but they were also highly prejudicial. As the Plaintiff, JFA bore the burden of proof in this matter, B&N did not have to offer any evidence and it certainly did not have any obligation to have an expert testify simply because JFA retained an expert. *See Long v. Weirton*, 158 W. Va. 741, 760, 214 S.E.2d 832, 847 (1975) ("In an action at law tried before a jury, the burden rests upon the plaintiff to establish his case by a preponderance of the evidence; and if all the evidence in the case fails to establish his claim by a preponderance of the evidence, the verdict should be for the defendant."). JFA's counsel's statement could have confused the jury regarding the burden of proof and caused them to assume the failure to present an expert amounted to a concession that the standard of care was not met by B&N. Said comments clearly stepped beyond the parameters of a closing argument, which are identified as follows:

> Closing argument presents counsel with the opportunity to comment on the evidence and the reasonable inferences to be drawn from the evidence. ***Remarks or arguments that are not supported by the evidence and are designed to arouse passion or prejudice to the extent that there is a substantial likelihood that the***

> ***jury may be misled are improper.*** "When argument spills into disparagement not based on any evidence, it is improper." Counsel is obligated to refrain from unwarranted attacks on opposing counsel, the opposing party, and the witnesses. It is the trial court's duty to see that counsel's statements are confined to proper limits and to prohibit counsel from creating an atmosphere of passion and prejudice or misleading the jury. Abusive comments directed at opposing counsel, the opposing party, and the opposing party's witnesses should not be permitted. ***If there is room for doubt about whether counsel's improper remarks may have influenced the outcome of the case, that doubt should be resolved in favor of the losing party.***

Jones v. Setser, 224 W. Va. 483, 489, 686 S.E.2d 623, 629 (2009) (*quoting Roetenberger v. Christ Hosp. & Anesthesia Assocs. of Cincinnati*, 163 Ohio App. 3d 555, 560-561, 2005-Ohio-5205, P9, 839 N.E.2d 441, 446 (2005)) (emphasis added). The comments made by JFA's counsel were not supported by any evidence that would indicate B&N was not able to retain an expert to testify on its behalf.[5] Furthermore, said comments were made to made to mislead the jury into believing that B&N was in some way obligated to put on an expert to match JFA. Neither of these statements are true, and the lower court should have found that there is more than enough room for doubt as to whether JFA's counsel's improper remarks may have influenced the outcome of the case.

Therefore, the lower court erred in allowing JFA's counsel to make the above prejudicial and untrue statements to the jury in an attempt to mislead them.

6. The Circuit Court Erred In Ordering A New Trial On The Issue of Damages Only Following The Jury's Inconsistent Verdict.

"[W]hen jury verdicts answering several questions have no logical internal consistency and do not comport with instructions, they will be reversed and the case remanded for a new trial. In determining whether jury verdicts are inconsistent, the [West Virginia Supreme Court] has observed that with respect to inconsistent verdicts, such inconsistency must appear after excluding every reasonable conclusion that would authorize the verdict." Syl. Pt. 5, *Modular Bldg.*

[5] Furthermore, the comments made by JFA's counsel were hypocritical. JFA's own expert, Mr. Dutill, admitted that he was not an expert regarding central matters in this case to which he was called to offer his opinion about. (J.A. 2025; J.A. 2027-29).

Consultants of W. Va., Inc. v. Poerio, Inc., 235 W. Va. 474, 774 S.E.2d 555 (2015); *see also* Syl. Pt. 1, *Reynolds v. Pardee & Curtin Lumber Co.*, 172 W.Va. 804, 310 S.E.2d 870 (1983).

There is no basis for this large verdict against B&N in light of the inconsistent positions of the jury prior to the final verdict. JFA requested the amount of $1,252,392.43, yet the jury awarded over three times that amount in its $4,300,000.00 in a construction payment dispute. This result bears no logical consistency to the evidence presented and there is no reasonable explanation or justification for the amount. Additionally, such a large number stands in stark contrast with the specific jury instructions in this case that (1) the jury was only supposed to compensate JFA for losses it actually incurred; (2) the jury was prohibited from awarding more than a single recovery to JFA; and (3) the jury could only rely on actual evidence present and was not to speculate. (J.A. 3200-011; J.A. 0713-14; J.A. 0971-72). The result was a verdict lacking any logical consistency based on the evidence presented.

Rule 59 of the West Virginia Rules of Civil Procedure states that new trials may be granted on the following grounds:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

This Court has previously held that verdicts which are inconsistent and cannot be reconciled with the Court's jury instructions or applicable law are grounds for ordering a new trial. Syl. Pt. 5, *Poerio*, Inc., 235 W. Va. 474, 774 S.E.2d 555. A trial court judge has "broad discretion" to determine whether a new trial should be granted. *In re State Public Bldg. Asbestos Ltg.*, 193 W. Va. 119, 454 S.E.2d 413 (1994).

Courts in other jurisdictions have noted that an inconsistent verdict is best rectified by a new trial on both the issue is damages and liability. The Second Circuit Court of Appeals has succinctly rules that "[a] new trial on damages only is not proper if there is reason to think that the verdict may represent a compromise among jurors with different views on whether defendant was liable or if for some other reason it appears that the error on the damage issue may have affected the determination of liability." *Diamond D Enterprises USA, Inc. v. Steinsvaag*, 979 F.2d 14, 17 (2nd Cir. 1992); *see also Miller v. Royal Netherlands S.S. Co.*, 508 F.2d 1103, 1106 (5th Cir. 1975) ("A finding by this court that a critical verdict was inconsistent with another would require a remand for a new trial.").

In the case at hand, the lower court did order that a new trial be had on the damages portion of the jury's verdict only. (J.A. 1388-1407). However, it is clear that the jury was confused by the admittedly complicated issues presented by this case, as the lower court noted on record that it had "concerns that the verdict that we had could be problematic. It may not be based on law, reason, or judgment." (J.A. 3311). To prove a claim of negligence, a party must show (1) a duty; (2) a breach of said duty; (3) causation; and (4) damages. *Hersh*, 232 W. Va. at 310, 752 S.E.2d at 341.The damages awarded must have been proximately caused by the breaching party. *Id.* Therefore, if the jury was confused about the damages, the jury was also confused about the actions that proximately caused said damages. A lack of understanding regarding the damages shows a lack of understanding regarding the essential elements of the claim from which the damages flow. This is especially apparent in this case, where the jury first indicated that the entire award should be taken from CSB and then hesitantly changed its mind to award an amount three times more than this amount against B&N. The verdict was a result of a fundamental misapplication of tort law which shows that the jury did not comprehend on what basis it was to award damages.

Therefore, because the inconsistent verdict in this matter was the result of the jury's misapprehension of the nature of the claims at issue, the lower court erred in awarding a new trial on the damages portion of the verdict only and not a new trial on both liability and damages.

7. The Circuit Court Erred In Separating The Issue Of Damages From Liability After The Jury's Excessive Verdict.

In addition to the jury's verdict in this matter being inconsistent, 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 v. Faulkner*, 131 W. Va. 10, 48 S.E.2d 393 (1947). 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 (1977). In regard to compensatory damages specifically, "[t]he general rules in awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been [in] if . . . the tort [had] not [been] committed." *Kessel v. Leavitt*, 204 W. Va. 95, 266, 5211 S.E.2d 720, 810 (1997). Importantly, "[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*, 169 W. Va. 673, 289 S.E.2d 692 (1982).

In the case at hand, there is simply no evidence to support the clearly excessive verdict in this matter. A $1,252,392.43 payment dispute, which was repeated to the jury several times, resulted in a verdict of over four million dollars. (J.A. 1129-30). This verdict does more that put JFA in the same position, money-wise, as it would have been if the tort had not been committed. Instead, it leaves JFA with a windfall profit that far exceeded the where even JFA believed that it would be at the conclusion of the Project. (J.A. 3297). This excessive figure and the sequence of

events that lead to it are proof that the jury did not understand the issues of the case. Rightfully, the lower court noted the issues present in the size of the verdict at issue and set it aside. (J.A. 1388-1407). However, the lower court erred in ordering that a new trial be had in this matter on the issue of damages and not on liability. *Id.*

As stated above, the damages that can be awarded for negligence must be proximately caused by the actions of a party that has breached its duty to the plaintiff. *Hersh*, 232 W. Va. at 310, 752 S.E.2d at 341. The excessiveness of the jury's verdict demonstrates that it did not understand how the actions of B&N proximately caused damages to JFA as it did not properly grasp damages issue as a baseline. "[T]he jury in a civil case is customarily compelled to hear ***all*** of the evidence, on liability as well as on damages." *Lively v. Rufus*, 207 W. Va. 436, 446, 533 S.E.2d 662, 672 (2000) (emphasis in original); *see also Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 310, 418 S.E.2d 738, 756 (1992) ("The defendant should offer instructions that advise the jury that the burden of proving the elements of damages rests on the plaintiff, and absent proof of any element, it may not be considered."). It was in error that the lower court ordered the matter to be retried only as to the damages portion because liability and damages are intertwined in this matter to the point wherein they should not be separated.

Furthermore, it is well-established that "a jury upon conflicting facts, under proper instructions, will not be disturbed ***unless plainly wrong, or manifestly against the weight of the evidence.***" *St. Clair v. Jaco*, 95 W. Va. 5, 11, 120 S.E. 188, 190 (1923) (citations omitted) (emphasis added). "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 . . . and grant a new trial." Syl. Pt. 2, *Summers v. Martin*, 199 W. Va. 565, 566, 486 S.E.2d 305, 306 (1997). Here, for the reasons listed above, the verdict was manifestly against the weight

of the evidence presented to the jury. JFA admitted that it did not do what was required under the Contractor Agreement to be paid for the amount specified by its REA, yet claims that it should be paid anyway. (J.A. 1783-84). There was no evidence presented at trial which would have warranted such a high verdict. In fact, the jury was told multiple times to award at a maximum amount four times less than the amount they actually awarded. (J.A. 3297-98). The lower court erred in only ordering a new trial on damages in this matter when the enormousness of the verdict clearly warranted a new trial on all of the issues that lead to the excessive verdict.

At the trial of this matter, JFA plainly admitted that it did not follow the Contractor Agreement or the Claim procedures of the EJCDC General Conditions. (J.A. 1783-84). Yet, the jury awarded JFA an amount four times higher than it was asking for against B&N, who was clearly unable to recommend payment to JFA under the Engineer Contract as the Construction phase of the Project had ended at that point. (J.A. 1129-30). The weight of the evidence shows that JFA should not have been awarded any amount due to its failure to follow, or even acknowledge, the contractual obligations that it had relating to the Project. The only conclusion that could reasonably be reached after examining the underlying trial is that the jury was confused as to the issues at bar and that a new trial on both damages and liability is warranted here.

Because the verdict awarded by the jury in this case was so inexplicably large, a new trial on all aspects of this case is needed to ensure the liability ***and*** damages are properly assessed. The lower court noted this during the post-trial motions hearing held on November 20, 2018, that retrying the case as to damages would entail an entirely new trial with the reintroduction of all prior evidence used previously. (J.A. 5184). The jury in this new trial that is supposedly on damages only will hear all of the same testimony and review all of the same exhibits that the jury in the original trial heard and reviewed. Therefore, this new trial should be on all the issues in this

matter, liability and damages, because all the prior evidence on both issues will be introduced again.

Therefore, because the excessive verdict in this matter was the result of the jury's misapprehension of the nature of the claims at issue, the lower court erred in awarding a new trial on the damages portion of the verdict only and not a new trial on both liability and damages.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Petitioner, Burgess & Niple, Inc., respectfully prays that the Supreme Court of Appeals of West Virginia enter an Order reversing the Circuit Court's *Order Granting Defendants a New Trial on Damages and Denying Defendants' Motions for Renewed Judgment as a Matter of Law* and that the matter be remanded for further proceedings, with directions consistent with the law of the State of West Virginia as cited within this Brief, and as requested to be considered by the Petitioner.

RESPECTFULLY SUBMITTED.

The Petitioner,

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