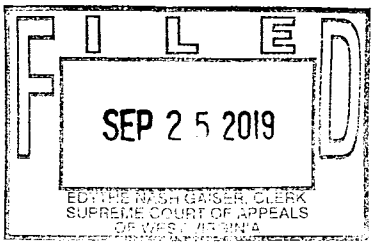

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

REPLY BRIEF OF THE PETITIONER, BURGESS AND NIPLE, INC.

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September 24, 2019

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REPLY BRIEF OF PETITIONER

Comes now the Petitioner, Burgess & Niple, Inc. (hereinafter "B&N"), by counsel Peter T. DeMasters, Michael A. Secret, and the law firm of Flaherty Sensabaugh Bonasso, PLLC, and respectfully files this Reply Brief of the Petitioner. The Respondent, J.F. Allen Corporation (hereinafter "JFA") has misstated or outright ignored B&N's arguments multiple times in its Response Brief. Furthermore, JFA has also misrepresented the facts in this matter. As such, B&N finds it necessary to file the present Reply.

STATEMENT OF THE CASE

B&N relies upon the Statement of the Case previously made within its Petition filed in this action. Furthermore, B&N relies upon much of the same documents as JFA relied upon in its Response Brief. B&N denies any "inaccuracies and omissions" claimed by the JFA in its preceding brief. In fact, throughout this Reply Brief, B&N intends to highlight the inaccurate factual representations made by JFA in its attempt to bolster its argument.

ARGUMENT IN REPLY

1. JFA Fails To Claim In Its Response That B&N Acted In Bad Faith And Misrepresents B&N's Argument In Relation To Its Duty Owed To JFA.

In its Response Brief, JFA makes the bold contention that B&N "failed in its duty to identify changes in the Contract." (See Response Brief at p. 8-9). JFA further argues that B&N's "duties owed to J.F. Allen are not created by or dependent upon its contract with the Sanitary Board or any other contract. They are a function of the common law." *Id.* at p. 9. However, while B&N does not deny that it did owe a common law duty of ordinary skill, care, and diligence to JFA as the Project Engineer, JFA in its argument completely ignores the impact of the contractual agreement that it signed with the Sanitary Board for the City of Charleston, West Virginia (hereinafter "the CSB") that further outlined B&N's duties.

In the EJCDC General Conditions Section 9.08(D), the Contractor Agreement 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). This was an agreement that was signed by JFA in entering into the Contractor Agreement with the CSB. This Court has noted previously 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***)." *Eastern Steel Constructors, Inc. v. The City of Salem*, 209 W. Va. 392, 401, 549 S.E.2d 266, 275 (2001) (emphasis added). It should be noted that JFA relies heavily on *Eastern Steel* in its Response brief but neglects to mention this point of law and instead wrongfully argues that B&N's "duty owed to J.F. Allen was independent of any contract language." (See Response Brief at p. 9). This is in direct contradiction to the proposition that JFA cites *Eastern Steel* for and *Eastern Steel* actually supports B & N's arguments and cuts against JFA's arguments.

Despite JFA's claim and the contentions that it has made against B&N, JFA has never suggested, claimed, or proven that B&N acted in bad faith in administering the contract. Indeed, this is something that JFA is unable to do because its own expert, Mr. Byron Willoughby, testified that he could not reach the conclusion that B&N acted in bad faith at any point during the length of the Project. (J.A. 2228). Despite whatever arguments are made by JFA on appeal regarding B&N's actual knowledge of JFA's actions on the Project, JFA fails to address the salient point brought up by B&N on appeal: that B&N did not act in bad faith in administering the contracts at hand. Further JFA completely ignores that in order to start the claim process, it was contractually obligated to perform certain duties that it completely disregarded and ignored. JFA failed to meet

its contractual obligations in the claims process, and never alleged that B & N acted in bad faith. JFA cannot, on one hand, agree to a certain duty owed to it via contract provision when eager to enter into a profitable construction project, and then, on the other hand, argue that the agreement has no effect on its action below or on appeal.

JFA also raises that contention that B&N had "actual notice" of the difficulties present in JFA's work on the project relating to utilities. (See Response Brief at p. 11). Although this does not address the argument relating to bad faith conduct that B&N has raised on appeal, it is important to point out that such contention of "actual notice" on behalf of B&N is extremely disingenuous. 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 many monthly meetings, JFA reported to B&N that there were "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 was welcome to begin the Claims process outlined in Section 10 of the EJCDC General Conditions if it wished to address these issues pursuant to the contracts that it signed. JFA chose not to do so. Ironically, in many of these meetings, JFA was invited to initiate Claims, but JFA refused to do so. In any event, "actual notice" is not the proper procedure under the EJCDC General Conditions, nor is "actual notice" a basis for instituting a Claim. Nowhere in section 10.05 does it relieve JFA of its obligations if the Engineer has "actual notice" of any conditions. JFA contractually agreed that it would start the claims process by initiating written claims. Per the contracts in play, all notice and substantiation must be written.

In sum, there is a clear duty between JFA and B&N established by the contracts at play between JFA and the CSB. This duty included the provision that B&N would not be held liable

for its administration of the construction contracts if it was acting in good faith. JFA has not made the contention, and much less proven, that B&N acted in bad faith and, therefore, the lower court erred in allowing the claims against B&N to continue in absence of bad faith conduct.

2. JFA Fails To Address B&N's Argument Regarding B&N's Proposed Intervening Cause Jury Instruction Was Reasonable To Present To The Jury At The Trial Of This Matter.

B&N's argument on appeal regarding its proposed intervening cause jury instruction is simple. Pursuant to Section 10.05 of the EJCDC General Conditions, "[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). 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 given in the contract documents, 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). In the case at hand, JFA completely and totally failed to follow this procedure. JFA's failure to comply with the provisions of Section 10.05 of the EJCDC General Conditions was an intervening cause. B&N never was given the opportunity during the contract period to evaluate any potential claims, because ho claims were made. Even if one believes JFA that B & N had actual notice and that actual notice superseded the written

notice requirement contained in the contract documents, B & N still could not act as there was no substantiation of the claims. B & N still can take no action unless and until JFA substantiates the claims it made, which JFA never did.

Furthermore, pursuant to Section 14.07(A)(2)(c) of the EJCDC General Conditions, JFA was to submit a Final Application for Payment that was required to include, among other things, "a list of all Claims against Owner that Contractor believes are unsettled." (J.A. 3581). It is undisputed that JFA failed to list any "unsettled Claims" in its Final Application for Payment. (J.A. 4671-77). JFA did include the other documents required to be submitted with the final pay application, just no claims. Therefore, clearly JFA, contrary to all of its testimony, had read enough of the contract to know what it had to submit with a final pay application, submitted three of the four required documents, yet did not submit any claims. This is because JFA knew it had no legitimate claims under the contract. Had JFA submitted a list of claims, 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. As this Court has made clear, "an instruction should be given only when it addresses an issue reasonably raised by the evidence." *State v. LaRock*, 196 W. Va. 294, 308, 470 S.E.2d 613, 627 (1996).

In its brief, JFA makes the argument that there was no intervening negligent cause which could have lead to a finding of negligence on its behalf. (See Response Brief at p. 12-13). However, by doing this, JFA misconstrues B&N's argument that such an instruction should have been provided to the jury in preparation for its deliberations. "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). In this case, JFA could have read

the EJCDC General Conditions at any time during the pendency of the contracts and properly began the Claims process. This process was not foreign to JFA as it had submitted and substantiated claims 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 allegedly not even reading the readily-available Contractor Agreement that it signed wherein said duty was articulated, yet it magically supplied the three other documents required with that submittal. (J.A. 3565-66).

It was reasonable to present to the jury that this negligent shirking of JFA's duties to submit claims in writing, substantiate claims, and list all claims that it believed were unsettled with the Final Pay Application by JFA severed the causal connection between the alleged improper actions of B&N and the alleged damages suffered by JFA. Therefore, the instruction should have been provided to the jury, but was not, and the decision not to do so by the lower could was improper.

3. JFA's Request for Equitable Adjustment Does Not Fall Within The Business Records Exception For Hearsay And, Therefore, Should Have Been Denied Entrance Into The Evidence In This Matter.

JFA's main argument in support of its contention that its Request for Equitable Adjustment (hereinafter "REA") was properly admitted into evidence is that "the Trial Court reviewed the evidence and the circumstances of its creation, determined it to be trustworthy, and exercised her discretion to admit it into evidence." (See Response Brief at p. 14-15). While JFA is correct that this Court reviews evidentiary rulings under an abuse of discretion standard, JFA ignores B&N's argument that the lower court did abuse its discretion in admitting the REA into evidence.

JFA now raises, for the first time, the argument that the REA falls under the business record exception to hearsay admissible found in Rule 803(6) of the West Virginia Rules of Evidence.

(See Response Brief at p. 14). However, this Court has articulated the following requirements that need to be shown to qualify a document for this hearsay exception: (1) that the record was kept in the course of a regularly conducted activity; and (2) that it was made by the regularly conducted activity as a regular practice. Syl. Pt. 3, *Crawford v. Snyder*, 228 W. Va. 304, 307, 719 S.E.2d 774, 778 (2011) (quoting Syl. Pt. 7, *Lacy v. CSX Transp. Inc.*, 205 W. Va. 630, 520 S.E.2d 418 (1999).

In the case at hand, the REA was not kept by JFA in the regularly conducted activity nor was it made by an activity that could be considered regular practice. JFA's President, Mr. Gregory Hadjis, even admits that he was not able to calculate the amount necessary for the REA himself and had to seek expertise outside of his own company to compile it. (J.A. 1621-22; 1754-56). The fact that JFA had to seek out a third-party consultant to analyze the Project and prepare the REA indicates that doing so was ***not*** in the regular course of business for JFA, which is a well-known construction company.[1] Because the REA was not prepared in JFA's regular course of business, JFA cannot avail itself of this hearsay exception and the REA should thus be considered what it is: impermissible hearsay.

It has been established 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 for 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)). That is exactly was JFA did with the REA. It was referred to by Mr. Willoughby himself as his "expert report" and the lower court even referred to the REA as a hearsay document. (J.A. 1574; 1577; 1603). Still, the lower court abused its discretion in allowing the REA to be entered into evidence despite the preceding considerations.

[1] Rule 803(6) of the West Virginia Rules of Evidence outlines the hearsay exception for business records. As this exception does not apply in this matter and JFA has brought no other argument in support of the REA on appeal, this Court should find that the REA is an inadmissible hearsay document and the lower court abused its discretion in allowing the document to be entered into evidence.

Furthermore, JFA on appeal completely fails to address B&N's argument that the REA constituted needlessly cumulative evidence that had already been thoroughly communicated to the jury through testimony on multiple occasions. (J.A. 2005; 3297). As JFA has not prepared a response to B&N's argument in the alternative, this Court should find that JFA implicitly admits its validity and that the introduction of the REA into evidence was needlessly cumulative.

4. JFA Fails To Address B&N's Argument Regarding Charles Dutill, Who Should Have Been Disqualified From Providing Expert Testimony In This Matter Because He Plainly Admits That He Is Not An Expert.

Regarding the testimony of Mr. Charles Dutill, JFA ignores the vast majority of B&N's arguments to repeat the contention that an engineer does not have to be licensed in West Virginia to provide expert testimony in West Virginia. However, even in putting forth this sole argument, JFA's position is misguided. West Virginia Code § 30-13-2(e) is clear that the "practice of engineering" consists of any service or creative work which requires engineering education, training and expertise in the application of special knowledge of the mathematical, physical and engineering sciences to such services or creative work as a consultation. A requirement for an expert to testify before the trier of fact is that the expert must be qualified. Syl. Pt. 5, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995). Logically, an engineer cannot be qualified to testify as to the standard of care for an engineer while also being prohibited by state law from doing so.

JFA attempts to rely upon this Court's ruling in *Cargill v. Balloon Works*, 185 W. Va. 142, 405 S.E.2d 642 (1991) to support its argument that Mr. Dutill's testimony was properly presented to the jury. However, JFA's reliance on *Cargill* is misguided as there are various stark differences in qualification between Mr. Dutill here and Mr. Asp in *Cargill*. In *Cargill*, a case involving negligence in design of a hot air balloon, Mr. Asp was called as an expert due to his 250 hours of

balloon flight time, his status as the manager of a hot air balloon station and a trainer of student balloon pilots, and his certifications in balloon repairs and inspections. *Id.* at 144, 405 S.E.2d at 644. There was no question that Mr. Asp's experience with balloons would qualify him as an expert. *Id.* at 147, 405 S.E.2d at 647.

In contrast, not only is Mr. Dutill not licensed in the State of West Virginia to provide engineering services such as expert testimony, he has never worked in the geographic region where the project took place, has not administered contracts such as the ones here in sixteen (16) years, and has not designed a sewer system like the one here in sixteen (16) years. (J.A. 2025; 2027-29). Importantly, Mr. Dutill has also never worked with the EJCDC General Conditions, which contains the Claims adjudication process that JFA, through Mr. Dutill, claims B&N breached the standard of care in administering. *Id.* Upon a review of Mr. Dutill's qualifications, it is clear that the lower court abused its discretion in allowing him to testify before the jury in this matter. It cannot be denied that Mr. Dutill admitted under oath that he was not an expert in the contract provisions applicable in this case, but his testimony was that B&N negligently administered said contract.

Furthermore, on appeal JFA has completely failed to address B&N's argument that Mr. Dutill should have been disqualified as he had admitted that he was not an expert in the matter at hand. (J.A. 2027-29). In West Virginia, an expert's testimony cannot be considered reliable if the expert himself admits that he would not consider himself an expert in that area. *Sneberger v. Morrison*, 235 W. Va. 654, 664, 778 S.E.2d 156, 166 (2015). That is exactly what Mr. Dutill did. Therefore, as JFA did not address this salient point on appeal, this Court should find that JFA implicitly admits its validity and also find that the lower court abused its discretion in allowing Mr. Dutill to testify as an expert in the trial of this matter.

5. JFA Fails To Address The Substance Of JFA's Argument Relating To Statements Made In JFA's Closing.

JFA argues that its counsel's remarks during closing arguments regarding B&N's lack of expert testimony were not improper. JFA provides little support for this argument aside from stating that the purpose of those comments "was to emphasize the fact that the only testimony that the jury had heard in the case regarding a professional engineer's standard of care and whether [B&N's] performance met that standard was offered by [JFA's] expert witness[.]" (See Response Brief at p. 18). However, what matters is what the jury hears and not the supposed purpose of JFA's prejudicial statements in the mind of JFA.

JFA's counsel claimed that B&N "couldn't get an expert to refute" Mr. Dutill's opinions regarding the standard of care. (J.A. 3295). These statements were inaccurate and highly prejudicial, as no evidence was presented to JFA that B&N "couldn't get" an expert to testify on its behalf. West Virginia law is clear that closing arguments are not to contain "[r]emarks or arguments that are not supported by the evidence" and that "[i]f there is room for doubt as to 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). JFA's counsel's remarks were clearly prejudicial and raises room for doubt that the jury was inappropriately prejudiced. This room for doubt is required to be resolved in favor of B&N. In fact, B&N had previously retained and disclosed an expert, but once Mr. Dutill admitted in his deposition that he was not an expert, that made the need for an expert on behalf of B&N unnecessary.

JFA also makes the argument that B&N has waived any objection that it has or might have had to statements made in its closing argument by not objecting at that time. (See Response Brief at p. 18-19). However, this Court has made it clear that it "will not consider an error which is not

preserved in the record not apparent on the face of the record." Syl. Pt. 11, *State v. McFarland*, 175 W. Va. 205, 209, 332 S.E.2d 217, 221 (1985). This Court has also held that objections to closing arguments need not be made during the actual argument, as objections at the pretrial motions stage and before closing arguments begin can be enough to preserve the record for appeal. *See Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 673, 379 S.E.2d 388, 396 (1989); *see also Doe v. Wal-Mart Stores, Inc.*, 558 S.E.2d 663, 672 (2001).

Here, B&N's objections were preserved on the record for this appeal during the post-trial motions phase. In Defendant *Burgess and Niple, Inc.'s Renewed Motion for Judgment as a Matter of Law or in the Alternative Motion for New Trial*, B&N makes this same argument regarding JFA's counsel's statements during the course of the actual closing arguments. (J.A. 1151-72). This issue was fully briefed before the lower court and the lower court has ruled upon it. (J.A. 1408-31). B&N's objection to these statements made in closing argument and its explanation for its objection have already been made and preserved in the record. Therefore, this Court should find that B&N's objection was properly preserved and that the comments made by JFA's counsel during closing arguments were unduly prejudicial and raise doubt as to whether the jury was unduly influenced.

6. JFA Is Incorrect In Its Contention That The Below Jury's Verdict Was Not Inconsistent.

JFA is correct in its assertion that the jury's award of damages should not be disturbed as long as the award is supported by competent, credible evidence going to all essential elements of the award. *Community Antenna Service, Inc. v. Charter Communications, VII, LLC*, 227 W. Va. 595, 712 S.E.2d 504 (2011). However, JFA's assertion that the jury's award of damages here was consistent or supported by competent credible evidence is laughable at best. (See Response Brief at p. 19). The weight of the evidence, the internal inconsistencies within the verdict form, and the

confusion exhibited by the jury in its deliberations evidence shows that this damages award was not properly supported, should be disregarded, and a new trial on both liability and damages is in order. As noted by the trial court below, the jury at trial was hopelessly confused in its deliberations and its decision "may not be based on law, reason, or judgment." (J.A. 3311).

In its brief, JFA makes several inaccurate and unfounded statements of both fact and law. First, it is disingenuous for JFA to claim that Mr. Willoughby testified that JFA suffered huge losses on the Project and ended the day three million dollars over budget as a result of B&N's actions. (See Response Brief at p. 20). The full testimony taken in context shows that Mr. Willoughby plainly testified that this entire loss was not caused by either CSB or by B&N, and that he did not think it would be appropriate to attribute all of the Project's losses to either:

A. – again, when you look at J.F. Allen's cost, what they spent on this job, -- and I've got cost reports showing that they've spent $7.1 million. At that time their budget was, I believe 4.8 [million], so that was 2.5 million not counting the markup they lost. So that is $3 million over budget. So there were a lot of costs incurred by J.F. Allen on this job. I think the rock was a problem for them.

Q. Well, --

A. There's a lot of things that caused them problems. I did – I did not do a total cost claim. I did not say, "Here's what they spent and here is what they should have spent. Here is the difference. I didn't do that.

Q. They knew rock was a problem because they did borings.

A. Correct.

Q. And rock wasn't really a problem because that was figured into their bid.

A. Yes.

Q. So rock really isn't a problem. It's already there calculated into their bid.

A. I think the rock slowed them down more than they expected it would.

Q. More than they expected?

A. Yes.

Q. And that is not the owner's fault.

A. That is correct. Again, that is why I do back to I did not do a total cost claim.

Q. Okay.

A. I did not say that they spent this much money, they're this much money over budget. It's all because of changed conditions or utility strikes. I didn't do that. The methodology I used separated from that. I could have done that. I didn't think it was appropriate because I knew there were other issues on the job that cost them money for which the sewer board wasn't responsible.

(J.A. 2190-91). This testimony could not possibly be construed to communicate that it was B&N's fault that JFA went over budget and was responsible for costs to JFA beyond those articulated in the REA.

Additionally, JFA is incorrect in its uncited and unsubstantiated assertion that JFA, as a corporation, is entitled to any damages for annoyance and inconvenience. In West Virginia, as well as in a number of other jurisdictions, corporations cannot be awarded damages for annoyance and inconvenience on behalf of their employees or shareholders. *See AIG Domestic Claims, Inc. v. Hess Oil Co.*, 232 W. Va. 145, 153, 751 S.E.2d 31, 39 (2013) ("[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."); *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). JFA as a

corporation is not eligible for these types of general damages and, thus, cannot claim that they are entitled to them on appeal.

It is further disingenuous on the part of JFA to claim that there is no inconsistency in the jury's findings. (See Response Brief at p. 22). "When 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 the case at hand, the breach of contract incident with the CSB 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). 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.

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 trial 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 trial 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 trial 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 trial court that they believed was correct, elsewise 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 lower 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.

In sum, one does not need to engage in speculation to see how the jury's verdict in this matter was both internally inconsistent, inconsistent with the facts present in this matter, and was spurred by confusion as to the issues in this case. As the jury clearly had a mistaken view of the facts and law presented to them, its verdict should be set aside a new trial should be instituted on both liability and damages.

7. JFA Is Incorrect In Its Contention That The Below Jury's Verdict Was Not Excessive And Was Supported By Sufficient Evidence.

JFA is correct in its assertion that this Court should give it the benefit of all reasonable inferences which may be drawn from the evidence presented in determining whether to set aside the jury's verdict. *See Rice v. Ryder*, 184 W.Va. 255, 400 S.E.2d 263 (1990). However, JFA is incorrect in its assertion that the jury's award was not excessive even in viewing all of the evidence presented in the light most favorable to it.

Once again, JFA is relies upon testimony that is taken out of context and inaccurately cited to create the illusion on appeal about the damages that it was seeking at trial. Testimony from Mr. Willoughby shows that he did not do a total cost analysis on the losses of JFA and did not make a determination that B&N was responsible for any losses aside from those alleged in the REA. (J.A. 2190-91). Despite JFA's claim that this testimony is "most compelling," this testimony taken in context does not illustrate what JFA desperately wants this Court to believe that it illustrates. (See Response Brief at p. 26). It is not reasonable to assume that the jury heard testimony from Mr. Willoughby that he did not actually say to them regarding the actual fault of B&N and the total cost of the completing the Project to JFA.

Furthermore, JFA against misconstrues the laws of West Virginia regarding annoyance and inconvenience damages for corporations, as well as damages for pain and suffering. *Id.* at p. 26-27. As stated above, these damages are not available to corporations such as JFA. *See Hess Oil Co.*, 232 W. Va. at 153, 751 S.E.2d at 39. In this argument, however, JFA attempts to support its position by citing to *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W. Va. 323, 352, S.E.2d 73 (1986). (See Response Brief at p. 27). JFA's reliance on this case is extremely misguided, as this Court has already articulated that "[t]he *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.

JFA is also incorrect in its argument that the jury's award did not constitute an impermissible double recovery. (See Response Brief at p. 27-28). 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).

In the case at hand, 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 is somehow different because two different parties contributed to the same injury. This claim by JFA flies in the fact of this Court's decision in *Harless*. 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 that JFA receiving over three times the amount of damages for a single instance violates the principles of the single recovery rule. *See Slack v. Kanawha County Hous. & Redevelopment Auth.*, 188 W. Va. 144, 156, 423 S.E.2d 547, 559 (1992).

JFA also does nothing on appeal to respond to JFA's contention that the great weight of the evidence goes against the jury's verdict to the point where the only just remedy would be to retry this matter on the issues of both damages and liability. This Court has held 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). As outlined in its petition, there are multiple facts presented to the jury that show its verdict was manifestly against the weight of the evidence. To bring these facts to the Court's attention without retreading the arguments made in its original Petition, B&N

highlights the following truncated and uncontested facts that JFA admitted to the jury during the trial of this matter,

- JFA admits that it did not follow the Claims process as outlined in Section 10 of the EJCDC General Conditions. (J.A. 1774-75).
- JFA admits that it had the burden to initiate the Claims process outlined in Section 10 of the EJCDC General Conditions and failed to do so. (J.A. 1656).
- JFA admits that, once it had submitted a Claim, it had a burden to substantiate said Claim in writing within thirty (30) days and failed to do so. (J.A. 1783-84).
- JFA admits that B&N's obligations would not be triggered until JFA initiated the Claims process outlined in Section 10 of the EJCDC General Conditions. (J.A. 1783-84).
- JFA admits that the REA is not a Claim as defined by the EJCDC General Conditions despite its prior representations to B&N that it was. (J.A. 1767).

In response to all of this evidence, the jury still awarded an amount to JFA that was three times higher than what it had repeatedly asked the jury for. This shows a fundamental misunderstanding this case on the part of the jury and also that the jury's verdict was manifestly against the weight of the evidence.

In sum, the jury's verdict should be seen as grossly excessive and an impermissible double recovery even when viewing the facts of this case in the light most favorable to JFA. Because the jury's assessment of this case resulted in a verdict that was not compatible at all with the weight of the evidence presented, this Court should order that a new trial be commenced below on the issues of both liability and damages.

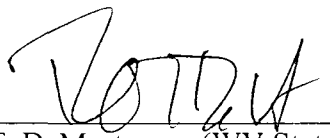
CONCLUSION

WHEREFORE, based upon the foregoing reasons, the Defendant-Below/Petitioner, Burgess & Niple, Inc., requests that this Honorable Court grant it the relief requested herein and its opening petition, and award such other relief as this Honorable Court deems just and proper.

The Respondent,

BURGESS & NIPLE, INC.,

By Counsel:



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