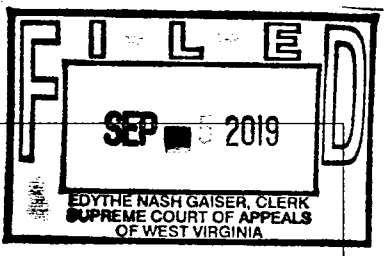
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 19-0394



BURGESS AND NIPLE, INC., an Ohio corporation, Defendant Below/Petitioner, V.) **J.F. ALLEN CORPORATION, a west Virginia Corporation,** Plaintiff Below/Respondent.	Appeal from a final order of the Circuit Court of Kanawha County (14-C-1182)

RESPONSE BRIEF OF J.F. ALLEN CORPORATION

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

This case involved a series of disputes that arose during the construction of a public works construction project involving the Sanitary Board of the City of Charleston as owner, J.F. Allen Corporation as prime contractor and Burgess & Niple, Inc., as project engineer. J.F. Allen and The Sanitary Board entered into a contract titled "Kanawha 2 – Mile Creek Sewer Improvements – Sewer Replacements Sugar Creek Drive Sub-Area Contract 10-8". By virtue of its contract to provide engineering services to The Sanitary Board, Burgess & Niple was designated as project engineer.[1] As acknowledged by Burgess & Niple in its brief there was no contractual relationship between J.F. Allen and Burgess & Niple.

At the trial of this action J.F. Allen presented independent claims against The Sanitary Board based in contract and against Burgess & Niple based in tort. J.F. Allen asserted, and proved at trial, that Burgess & Niple committed professional negligence by failing to adhere to the standard of care applicable to duties it owed to J.F. Allen under West Virginia law. J.F. Allen presented evidence that Burgess & Niple failed to investigate or initiate change orders with respect to various matters, including encountering unmarked or mismarked underground facilities, affecting J.F. Allen's work even though it had actual notice of those events. In addition, J.F. Allen showed that Burgess & Niple failed and refused to perform its duty to act as an impartial arbitrator as to matters of dispute between J.F. Allen and The Sanitary Board, including the failure to address J.F. Allen's Request for Equitable Adjustment. In short, J.F. Allen demonstrated to the jury that Burgess & Niple failed to adequately administer the project resulting in substantial losses and delays not included among the contract damages submitted in the request for equitable adjustment.

During trial, J.F. Allen offered the testimony of Charles R. Dutill, an engineering expert in the area of design and administration of public works utility construction projects, including sewer lines. Mr. Dutill testified at length, and without rebuttal, concerning the duties owed by Burgess

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[1] Jt. Appendix p. 1412

& Niple to J.F. Allen in the administration of the project at issue and offered his undisputed opinion that Burgess & Niple failed to exercise the applicable standard of care required under the circumstances of this case. Burgess & Niple offered no counter-testimony and made no effort to rebut Mr. Dutill's opinion. Specifically, Mr. Dutill testified to a reasonably degree of certainty that Burgess & Niple's conduct in the administration of the contract at issue did not meet the applicable standard of care with respect to the duties it owed to J.F. Allen.[2] Mr. Dutill further testified that Burgess & Niple's main duty was to administer the construction of the project, to manage the construction, in a way that is fair and equitable.[3]

In its statement of the case, Burgess & Niple attempts to minimize its involvement in and knowledge of the problems J.F. Allen encountered during construction of the project. However, Burgess & Niple supplied Resident Project Representatives who were onsite daily observing events as they occurred and maintaining daily written reports. J.F. Allen demonstrated at trial that Burgess & Niple was aware of problems resulting from mismarked and unmarked existing underground utilities and that these circumstances were encountered with a frequency that was far more than could have been reasonably anticipated.[4] Further, J.F. Allen presented testimony that representatives of Burgess & Niple were advised to keep good records so J.F. Allen could file an appropriate claim and that the J.F. Allen's intent to file a claim acknowledged by representatives of Burgess & Niple.[5]

J.F. Allen also presented evidence at trial showing that change orders were routinely submitted, accepted and executed in a matter in a manner that did not adhere to the strict requirements of the contract for submission of change orders or claims. The parties to public works construction projects typically do not follow the notice and claims process provisions of standard form contracts and the contractual claims process was not followed by any of the parties

[2] Jt. Appendix pp. 2073-2074
[3] Jt. Appendix p. 1999
[4] Jt. Appendix pp. 1636, 1656, 1665, 1684, 1783, 1864, 2280
[5] Jt. Appendix pp. 2278, 2281-22282, 2296-2297

on this project.[6] In fact, Burgess & Niple representative, Tim Utt, testified at trial that the change order process set forth in the contract between J.F. Allen and The Sanitary Board was not followed on this project.[7]

At the trial of this action, J.F. Allen submitted its claim document titled "Request for Equitable Adjustment" as evidence of the contract damages it sought from The Sanitary Board. In addition, J.F. Allen submitted evidence of additional losses not covered in its Request for Equitable Adjustment. J.F. Allen's President, Greg Hadjis, testified that J.F. Allen suffered considerable losses beyond those contract damages reflected in his Request for Equitable Adjustment.[8] These losses include substantial periods of delay not recoverable under the terms of J.F. Allen's contract, the costs of accelerating J.F. Allen's work and extending work hours, the increased costs for home office support, management and attention, additional trips to the job-site, additional surveying, and additional costs of maintaining the company's safety program.

J.F. Allen also presented the testimony of construction and damages expert witness, Bryon Willoughby, whose undisputed testimony provided evidence that J.F. Allen suffered substantial additional losses that were not part of the Request for Equitable Adjustment.[9] Further, Mr. Willoughby testified that J.F. Allen was $3,000,000 over budget for the project.[10] Prior to deliberations, the Trial Court instructed the jury not to award compensatory damages based on speculation or sympathy and that any assessment of compensatory damages must be based only upon the evidence presented at trial. The Trial Court also instructed the jury that if it found that Petitioner was entitled to recover damages, it may only award damages that will provide a single recovery, because double recovery of damages is not permitted.[11]

After trial the jury initially returned a verdict finding in favor of J.F. Allen and against The Sanitary Board for breach of contract in the amount of $1,300,000.20. The jury also found

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[6] Jt. Appendix pp. 1556, 1781-1782, 2287-2288, 2295-2296, 2338
[7] Jt. Appendix pp. 2959, 2968
[8] Jt. Appendix Pp. 15, 45, 1546, 1551, 1752-1753, 2286
[9] Jt. Appendix Pp. 2093-2102, 2113, 2119-2120
[10] Jt. Appendix P. 2189
[11] Jt. Appendix p. 1412

Burgess & Niple ninety percent negligent and J.F. Allen ten percent negligent. However, the space for assessment of damages against Burgess & Niple was left blank so the Trial Court returned the jury for further deliberation. The jury subsequently returned a verdict awarding damages in favor of the Petitioner and against Burgess & Niple in the amount of $3,000,000.20.[12]

The Trial Court subsequently directed entry of judgment upon the verdicts and judgment was entered March 1, 2018.[13] The Sanitary Board and Burgess & Niple each filed post-trial motions renewing motions for judgment as a matter of law or for a new trial. The Trial Court found that liability against the defendants was established but that the verdict on damages was "inconsistent" and that the total award violated the single-recovery rule. On these grounds the Trial Court denied Respondents' Motions as to liability but granted their request for new trial as to damages only.[14]

SUMMARY OF ARGUMENTS

1. As acknowledged by Burgess & Niple in its brief, there existed no contractual relationship between J.F. Allen and Burgess & Niple relating to the project at issue. Under West Virginia Law, however, a project engineer owes a duty of care to a contractor because of the special relationship that exists between those parties and the degree to which the contractor must rely on engineer to properly administer the project. The only evidence presented at the trial of this matter as to what duties were owed and whether Burgess & Niple adhered to the required standard was presented by J.F. Allen in the form of the testimony of expert witness, Charles Dutill. Mr. Dutill described Burgess & Niple's duties as project engineer and offered his opinion, to a reasonable degree of engineering certainty, that Burgess & Niple failed to adhere that standard. Therefore, under the facts and law applicable to this case there was more than adequate support for the jury's finding that Burgess & Niple was negligent in the administration of this project.

[12] Jt. Appendix p. 1124
[13] Jt. Appendix p. 1129
[14] Jt. Appendix p. 1412

2. Burgess & Niple argues that its failure in its duties was not the proximate cause of J.F. Allen's loss because the final "intervening" cause was J.F. Allen's failure to adhere to the contract claims procedures set out in its contract with The Sanitary Board. However, as noted throughout the long history of this case, the evidence supports the finding that strict adherence to the change order and claims protocols in the contract was waived by the conduct of the parties. Furthermore, Burgess & Niple had adequate notice of problems encountered by J.F. Allen during construction in the form of theactual knowledge of its on-site representatives and had an affirmative duty to investigate and address those problems. Instead, they did nothing. Further, as noted above, J.F. Allen's negligence claim against Burgess & Niple was not based on any contract that would provide for any particular form of notice.

3. Admission of J.F. Allen's Request for Equitable Adjustment into evidence was not error as it was J.F. Allen's claims document which was submitted, as anticipated by the parties, after the completion of the work. This document constitutes a business record prepared and submitted in the ordinary course of J.F. Allen's business to support its claim for an adjustment of the contract amount. Its admission does not constitute an abuse of the Trial Court's discretion.

4. J.F. Allen's expert witness, Charles Dutill, was more than adequately qualified to give opinion testimony concerning the standard of care owed by a project engineer to a contractor in the performance of its duties on a utility construction project. Mr. Dutill is an experienced engineer licensed in the state of Pennsylvania and is not required to be registered by the state of West Virginia in order to give testimony at trial in this state. The requirement for qualification of an expert witness to testify are set out in the Rules of Evidence at Rule 702 which contains no requirement that an engineer offered to give testimony be registered in the state of West Virginia. Further, as there was no contract between J.F. Allen and the project engineer, Burgess & Niple's duties are established by the common law, a matter within Mr. Dutill's experience and expertise. As such, the Trial Court's qualification of Mr. Dutill to offer opinion testimony as an expert witness in this matter was not an abuse of discretion.

5. It was not improper for J.F. Allen's counsel to comment during closing arguments that the only testimony heard by the jury regarding a professional engineer's standard of care and whether Burgess & Niple's performance of its duties met that standard was offered by J.F. Allen's expert witness. Burgess & Niple presented no testimony on these issues and J.F. Allen was within its rights to point this out to the jury. In any case, Burgess & Niple's failure to object to counsel's statements during trial constituted a waiver of the right to raise the question on appeal.

6. The verdict of the jury in this case was clear as to liability. There were no questions or confusion expressed by the jury in finding that Burgess & Niple was negligent in the administration of the subject project and the Court was correct in refusing to disturb the jury's finding on that point.

7. At the trial of this matter, J.F. Allen presented separate claims against the two defendants on differing legal theories. Its claims against The Sanitary Board were based in Contract. The jury found that The Sanitary Board breached its contract with J.F. Allen and awarded damages approximating the contract damages set out in J.F. Allen's Request for Equitable Adjustment. In addition, however, the jury heard other evidence reflecting that J.F. Allen had suffered losses far exceeding the contract damages for which it sought recovery under its contract with The Sanitary Board. In addition, tort damages include things like aggravation and annoyance that are not susceptible to mathematical calculation and must be left to the sound discretion of the jury. Given the evidence presented at trial, including that J.F. Allen was $3,000,000 over budget on the project, and given the substantial size of the contract amounts and the fact the J.F. Allen was delayed and was on the project nearly twice as long as it anticipated at the time of its bid, the jury's award in this case was not excessive, nor does it reflect any misunderstanding or confusion regarding the case or the Court's instructions.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent believes that oral argument is necessary under the criteria of Rule 18 of the Rules of Appellate Procedure and that the Court would benefit from oral argument in this case. The Respondent asserts that the case is suitable for a Rule 19 argument as a case involving

assignments of error in the application of settled law. The Respondent further asserts that, as the Order appealed from involves the application of well settled, existing law, the matter is appropriate for a memorandum decision.

ARGUMENT

I. THE JURY'S FINDING THAT BURGESS & NIPLE BREACHED DUTIES OWED TO J.F. ALLEN IS SUPPORTED BY THE EVIDENCE AND LAW APPLICABLE TO THIS CASE.

In this matter, Burgess & Niple appeals from the partial denial of its post-trial motion renewing its motion for judgment as a matter of law or for new trial. Under Rule 50 of the West Virginia Rules of Civil Procedure, a motion for judgment as a matter of law may be granted only where "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, ...". And in considering such a motion made by the defendant in an action, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirely, must be indulged in favorably to the plaintiff and the court must assume as true those facts which the jury may properly find under the evidence. *Stewart v. Johnson,* 209 W.Va. 476, 549 S.E.2d 670 (2001); *Radec, Inc. v. Mountaineer Coal Development Co.,* 210 W.Va. 1, 552 S.E.2d 377 (2000), cert. den. 121 S. Ct. 2550, 533 U.S. 929, 150 L. Ed. 2d. 717. Upon motion for directed verdict, all reasonable doubts and inferences should be resolved in favor of the party against whom the verdict is asked to be directed. *McCloud v. Salt Rock Water Public Service District,* 207 W.Va. 453, 533 S.E.2d 679 (2000). The nonmoving party on a motion for directed verdict is entitled to every reasonable and legitimate inference fairly arising from the testimony. *Akers v. Cabell Huntington Hospital, Inc.,* 215 W.Va. 346, 599 S.E.2d 769 (2004). On appeal from an order granting judgment as a matter of law, the Supreme Court of Appeals, after considering the evidence in the light most favorable to the nonmoving party, will sustain the judgment only when there is but one reasonable conclusion as to the verdict that can be reached. If reasonable minds can differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a judgment as a matter of law will be reversed. *Pipe Masters, Inc. v. Putnam County Commission,* 218 W.Va. 512, 625 S.E.2d 274 (2005); *Murphey v. Miller,* 222 W.Va. 709,

671 S.E.2d 714 (2008). Only when the Plaintiff's evidence, considered in the light most favorable to him, fails to establish a prima facie right to recovery, should the trial court grant judgment as a matter of law in favor of the defendant. *Stewart v. Johnson, supra.*; *Kessel v. Leavitt,* 204 W.Va. 95, 511 S.E.2d 720 (1998) cert. den. 119 S. Ct. 1035, 525 U. S. 1142, 143 L. Ed.2d. 43.

In this case, the witness testimony and exhibits made it clear that Burgess & Niple had contemporaneous, actual knowledge of problems encountered by J.F. Allen but did nothing to investigate or address these issues or to prevent harm to J.F. Allen.[15] In addition, the evidence showed that Burgess & Niple completely abdicated its role as impartial arbiter of claims and disputes between J.F. Allen and The Sanitary Board. Mr. Dutill, the only expert witness offered to testify on the issue, opined to a reasonable degree of certainty that Burgess & Niple's conduct in the administration of the contract at issue did not meet the applicable standard of care with respect to the duties it owed to J.F. Allen.[16] Mr. Dutill testified that Burgess & Niple's main duty was to administer the construction of the project, to manage the construction, in a way that is fair and equitable.[17] In addition to its failure to investigate and address accidents involving unmarked or mismarked utilities as to which it had actual notice and fulfill its function with respect to claims submitted by J.F. Allen, Burgess & Niple failed to address, and completely ignored letter after letter complaining about delays, interruptions, interference, and costs resulting from its lack of access to the site and inability to complete because of delay by Rover Construction, which delays are not a part of J.F. Allen's contract claims.[18] In short, Burgess & Niple failed in its duty to

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[15] Jt. Appendix pp. 4258-4404 – Strike Summary with Burgess & Niple Daily Construction Reports. Burgess & Niple representative was present on site and kept records. (Jt. Appendix p. 1636); while on site Hadjis told Burgess & Niple RPR to make sure everyone was taking good notes so J.F. Allen could file an appropriate claim. (Jt. Appendix p. 1647); Burgess & Niple representatives were on-site, saw problems and noted them in daily reports. (Jt. Appendix pp. 1656, 1665, 1684, 1783, 1864, 2280); The engineer did nothing in response (Jt. Appendix p. 1668). Shreve told representatives J.F. Allen was incurring costs that will have to be reimbursed and was advised that it would be taken care of, "We'll make you good." (Jt. Appendix pp. 2278, 2281-2282, 2296-2297).

[16] Jt. Appendix p. 2073-2074

[17] Jt. Appendix p. 1999

[18] J.F. Allen sent numerous letters to Burgess & Niple regarding delays, interruptions, and inference without any response from Burgess & Niple. (Jt. Appendix pp. 4435, 4436, 4510, 4511; 1958, 2408-2418); Goodman acknowledged knowledge of problems and receipt of letters and took no action to investigate or response. (Jt. Appendix pp. 3028, 3037-3038).

identify changes in the Contract.[19] For those reasons, there is sufficient evidence to support the jury's finding that Burgess & Niple breached duties owed to J.F. Allen.

Burgess & Niple's arguments that its duties were limited to the strict requirements of its contract with The Sanitary Board and that it had no duty to act on J.F. Allen's claim submitted after the project was completed are not consistent with logic or the law applicable to this case. Burgess & Niple'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. In West Virginia an engineer retained to work on a construction project by the owner of the project owes a duty of care to a contractor employed by the same owner because of the nature of the relationship between the designer/project representative and the builder. A contractor building a project must necessarily rely on the engineer for an adequate design and for the adequate administration of the project during construction. An engineer in such cases owes a duty to render its professional services with the ordinary skill, care and diligence commensurate with that rendered by members of his or her profession under similar circumstances. *Eastern Steel Constructors, Inc. v. City of Salem,* 209 W. Va. 392, 549 S. E. 2d 266, 276 (2001).

Burgess & Niple seeks to avoid this duty by relying on the language of J.F. Allen's contract with The Sanitary Board. It argues that J.F. Allen's claims should have been barred because it failed to strictly adhere to the contract claims procedure and submitted its claim after the work was completed. These arguments, also addressed in response to The Sanitary Board's Appeal, are not bars to J.F. Allen's claims against The Sanitary Board. They certainly cannot be relied upon by Burges & Niple who had no contract with J.F. Allen. Burgess & Niple's duty owed to J.F. Allen was independent of any contract language. Nevertheless, it should be pointed out that Burgess & Niple had actual knowledge of, or was complicit in, events throughout the course of J.F. Allen's work on the project that resulted in continued difficulties in performing its work, delay, aggravation, inconvenience, and annoyance, and increased costs and extra work that resulted in a

[19] Jt. Appendix pp. 2013-2017.

massive financial loss on the project by J.F. Allen and that this knowledge triggered a duty to act.[20] The evidence also showed that despite its knowledge, Burgess & Niple did nothing in response to the delays, costs, aggravations, inconveniences and annoyances imposed on J.F. Allen on this project. These failures, as testified by Mr. Dutill, constituted a breach of the applicable standard of care owed to J.F. Allen.

Although Burgess & Niple's duties owed to J.F. Allen are not dependent on any contract, some of the functions that should have been performed by the engineer are reflected in J.F. Allen's contract with The Sanitary Board. For example, General Conditions Section 4.04 relating to underground facilities "Not Shown or Indicated", provides as follow:

> 1. If an Underground Facility is uncovered or revealed at or contiguous to the site which was not shown or indicated, or not shown or indicated with reasonable accuracy in the Contract Documents, Contractor shall, promptly after becoming aware thereof and before further disturbing conditions affected thereby or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.16.A), identify the owner of such Underground Facility and give written notice to that owner and to Owner and Engineer. *Engineer will promptly review the Underground Facility and determine the extent, if any, to which a change is required in the contract documents to reflect and document the consequences of the existence or location of the Underground Facility.* During such time Contractor should be responsible for the safety and protection of such Underground Facility.
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> 2. *If Engineer concludes that a change in the Contract Documents is required, a Work Change Directive or a Change Order will be issued to reflect and document such consequences. An equitable adjustment shall be made in the Contract Price or Contract Times, or both, to the extent that they are attributable to the existence or location of any Underground Facility that was not shown or not shown indicted with reasonable accuracy in the Contract Documents and that Contractor did not know of and could not reasonably have been expected to be aware of or to have anticipated.* If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, Owner or Contractor may make a Claim therefore as provided in Paragraph 10.05."

General Conditions, Section 4.04 (emphasis added). There are a number of ways whereby legally sufficient notice can be given with respect to problems encountered on a construction project. On

[20] Actual notice of events triggered duties on the part of Burgess & Niple. (Jt. Appendix pp. 2002-2004).

appeal in the case the Supreme Court of Appeals acknowledged "the fact" that contemporaneous documentation of events by the Owner's on-site representative "could constitute a written notice if viewed in the light most favorable to J.F. Allen." *J.F. Allen v. Sanitary Board of the City of Charleston,* 237 W.Va. 77, 82, 785 S.E. 2d 627, 632 (2016). In this case, the evidence is clear that Burgess & Niple had actual notice each time J.F. Allen encountered an unmarked or mismarked underground utility line or other subsurface condition. Burgess & Niple retained several Resident Project Representatives who were on site during all of the work and maintained daily reports where these issues were documented.[21]

Having received actual notice of underground facilities that were "not shown or indicated" Burgess & Niple had a duty to promptly review the situation and to make a determination as to whether a change was required and, if so, cause a change order adjusting the contract times or price to be issued. So, Burgess & Niple had an affirmative duty to review and address those situations where J.F. Allen's work was affected by an underground facility that was "not shown or indicated" on the plans. It also had a duty to fairly and equitably manage the construction of the project generally and to investigate and identify changes with respect to all matters as to which it had notice.[22] Its failure to provide these services constitutes a breach of the applicable standard of care owed to J.F. Allen as the contractor relying on it to perform this function.

In addition, Burgess & Niple had a duty to render decisions on all claims reported by either the Contractor or Owner. In performing this function, Burgess & Niple had a duty to the parties including, J.F. Allen, to address those claims in an impartial manner. "When functioning as interpreter and judge under this Paragraph 9.08, Engineer will not show a partiality to Owner or Contractor and will not be liable in connection with any interpretation or decision rendered in good faith in such capacity."[23] After completion of the work, when the impact of delays and extra work could be analyzed and quantified, J.F. Allen submitted its claim for equitable adjustment to

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[21] See, Footnotes 4 and 15.
[22] Jt. Appendix pp. 1999, 2002-2003, 2013-2017.
[23] General Conditions ¶ 9.08D, Jt. Appendix p. 3563

Burgess & Niple for review and action in its role as impartial arbiter. Rather than review the merits of the claim in an impartial and good faith manner, Burgess & Niple summarily refused to address the claim and returned it to J.F. Allen without decision. In defense of its failure to perform its function as impartial arbiter, Burgess & Niple argues that its services were completed once final payment was made. However, the Contract provides that final payment acts as a bar to claims upon the issuance "and acceptance" of final payment. The Sanitary Board did issue final payment but that payment was not accepted, cashed or deposited by J.F. Allen.

The claims asserted in J.F. Allen's Request for Equitable Adjustment were issues that arose and as to which Burgess & Niple had notice during construction of the Project. It was only after completion of the work that J.F. Allen was in a position to quantify the losses it incurred as a result of the many delays incurred and the extra work required during construction of the Project. But it was not only those claims set out in J.F. Allen's Request for Equitable Adjustment as to which Burgess & Niple owed duties to J.F. Allen. Burgess & Niple owed a duty to address all of those matters as to which it had notice, written or actual, during the performance of the work and owed a continuing duty to investigate and address those matters. The evidence in the form of the unrefuted expert testimony of Charles Dutill, showed that Burgess & Niple's failure to do so constitutes a failure to adhere to the standard of care applicable to engineers in similar circumstances.

II. THERE IS NO INTERVENING CAUSE WHICH WOULD PREVENT BURGESS & NIPLE'S LIABILITY FOR ITS NEGLIGENCE IN THIS MATTER.

In support of its appeal, Burgess & Niple argues that its negligence is not the proximate cause of any loss sustained by J.F. Allen. Rather, it argues that it was J.F. Allen's own failure to adhere to the strict requirements of its contract with The Sanitary Board that was the proximate cause of its loss. This argument is not well founded for two of reasons.

First, any obligation on the part of J.F. Allen to adhere to the requirements of the change order and claims procedures set out in its contract with The Sanitary Board is, by definition, a contract issue between J.F. Allen and The Sanitary Board. In the absence of waiver, other adequate

notice, or amendment by subsequent agreement, all of which were present in this case, a failure to strictly adhere to the terms of a contract would be addressed as a question of breach of contract with reference to the relative rights and obligations of the parties to that contract.

Here, there is no contract between J.F. Allen and Burgess & Niple and the rights and duties of the parties are governed by the common law of negligence. While a victim of negligence may be found to be contributorily negligent, that negligence does not work to avoid the negligence of the tortfeasor unless the degree of negligence assigned to the claim exceeds that of the tortfeasor. While the jury in this case did find that J.F. Allen was ten percent contributorily negligent, this does not avoid Burgess & Niple liability but only serves as an offset. As such, the verdict rendered against Burgess & Niple would be reduced by ten percent to reflect the percentage of negligence assigned to J.F. Allen by the jury.

Second, J.F. Allen presented substantial evidence of waiver by The Sanitary Board of its right to require strict adherence to the change orders and claims procedures set out in its contract with J.F. Allen. Evidence was also presented as to the actual notice and knowledge of both The Sanitary Board and Burgess & Niple of the matters set out in J.F. Allen's claim and its intent to present those claims at the completion of the work. This being the case, any failure by J.F. Allen to submit its claim in strict adherence with the change orders and claims protocol set out in the contract was not improper and did not constitute a breach of its obligations under that contract and certainly would not constitute intervening negligence. It follows, then, that such a failure would not have prevented its claim against either The Sanitary Board or Burgess & Niple. A failure to adhere to a requirement of the contract which had been waived or excused would not constitute negligence that could be the proximate cause of any loss. In any case, J.F. Allen's negligence claim against Burgess & Niple is not based on any contract that would require any particular form of notice.

III. IT WAS NOT IMPROPER TO ALLOW J.F. ALLEN'S REQUEST FOR EQUITABLE ADJUSTMENT INTO EVIDENCE.

As anticipated by the parties during the course of the work, J.F. Allen prepared its claim for contract damages for submission to The Sanitary Board, through its project representative, Burgess & Niple, after the work was completed and its loss could be quantified. Because of the unique complexities in the calculation of losses relating to a delay-type claim, J.F. Allen hired a consultant, Bryan Willoughby, to assist with the calculation of extra work and lost efficiency costs in the preparation of its claim for contract damages. Greg Hadjis testified that he worked with Mr. Willoughby in the preparation of J.F. Allen's claim which was, ultimately, submitted to The Sanitary Board through its project representative, Burgess & Niple.[24] As such, the Request for Equitable Adjustment is a project document submitted for the purpose of requesting a change in the contract amount just like the series of other requests for changes submitted during the course of the work which were likewise admitted as evidence in this case. This record consists of a report or compilation concerning events and conditions on the project prepared soon after the completion of the work by or with the assistance of those with knowledge in the regular course of J.F. Allen's business and qualifies as a business record admissible under Rule 803(6) of the West Virginia Rules of Evidence.

A trial court's decision to admit or exclude evidence at the trial of an action in the exercise of its discretion will not be disturbed by an appellate court unless it appears that the trial court's action amounts to an abuse of discretion. *State v. Whitaker*, 221 W.Va. 117, 650 S.E2d 216 (2007). "The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." Syl. pt. 5, *Lacy v. CSX Transport, Inc.*, 205 W.Va. 630, 520 S.E.2d 418 (1999), quoting

[24] Joint Appendix pp. 1754-1756.

Syl. pt. 1, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995). Here, 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. For these reasons the admission of J.F. Allen's Request for Equitable Adjustment was not barred by the hearsay rule and was properly admitted into evidence.

IV. CHARLES DUTILL WAS PROPERLY QUALIFIED AS AN EXPERT CONCERNING THE STANDARD OF CARE FOR A PROFESSIONAL ENGINEER.

Burgess & Niple also again argues that J.F. Allen's standard of care expert regarding professional engineering, Charles Dutill, should not have been qualified to give opinion testimony as an expert witness because he is not registered or licensed to practice engineering in the State of West Virginia. This argument, likewise, is not supported by the law of this state. Burgess & Niple's argument is based on language of West Virginia Code Chapter 30, Article 13 which regulates the practice and registration of engineers in West Virginia. That Chapter of the Code does not, however, concern the qualification of an engineer to testify as an expert witness at trial. The requirements for qualification as an expert witness are set out in the West Virginia Rules of Evidence at Rule 702.

Rule 702 states, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact and 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." Rule 702 requires that, 1) the witness must be an expert; 2) the expert must testify to scientific, technical or specialized knowledge; and 3) the expert testimony must assist the trier of fact. This rule is also well recognized by the Supreme Court of Appeals. See, Syl. Pt. 3, *Ventura v. Winegardner,* 178 W. Va. 82, 357 S. E. 2d 764 (1987); Syl. Pt. 1, *Cargill v. Balloon Works, Inc.,* 185 W. Va. 142, 405 S. E. 2d 642 (1991). As recognized by the Court at the trial of this action, Mr. Dutill meets all three of these requirements and was, therefore, qualified to testify regarding

his opinions at the trial of this case. There is no requirement in Rule 702 that an expert be registered in West Virginia to be qualified to give expert testimony in this state.

In *Cargill v. Balloon Works, Inc.*, supra, the plaintiff sought to present the testimony of an expert regarding balloon flight, repair, maintenance, operation, training, inspection, and safety. The offered expert was not a licensed aeronautical engineer and did not have a degree in aeronautical engineering or any other field of engineering. He also did not possess expertise regarding balloon design. Nevertheless, the Supreme Court of Appeals found that he should have been allowed to testify about the cause of a hot air balloon crash that resulted in the death of its occupants. The expert's knowledge of ballooning was sufficient for the Supreme Court of Appeals to conclude that his testimony would have been helpful to the jury's understanding of the issues involved in the case. The Court said, "[W]here the evidence demonstrates as in the present case that the individual sought to be introduced as an expert witness is qualified by knowledge, skill, experience, training, or education as an expert and that the individual's specialized knowledge will assist the trier of fact, it is an abuse of the trial court's discretion to refuse to qualify that individual as an expert." *Cargill v. Balloon Works, Inc., Id.* at 646. In *Cargill,* the Supreme Court of Appeals found that the trial court had, in fact, abused its discretion by failing to qualify the plaintiff's expert despite his lack of engineering or design degree. *Id.*

Courts in other states have dealt specifically with the issue of whether an engineer could testify as an expert witness despite not being registered or licensed within the state where the testimony is to be given. In *Baggerly v. CSX Transportation, Inc.,* 370 S. C. 362, 635 S. E. 2d 97 (2006), the Supreme Court of South Carolina addressed the same argument as that posed by Burgess & Niple in this case. In addition, the engineering licensing statute in South Carolina was nearly identical to the language of West Virginia's Code, except for the fact that South Carolina's statute added the phrase "expert technical testimony" in its definition of what constitutes the practice of engineering, as ours does not. Even so, in that case the court found that the South Carolina Legislature could not have reasonably intended to prevent out-of-state engineers from giving testimony in a court of law. It found that the statute was intended to protect the citizens of

South Carolina seeking traditional professional engineering services, not to prevent otherwise qualified witnesses from assisting a jury in a civil trial.

The court in *Baggerly* also recognized that such a rule would "clearly contravene" South Carolina's Evidentiary Rule 702, which also contains language similar to West Virginia's Rule 702, and held that South Carolina's engineer licensing statute did not preclude an out-of-state professional engineering expert from testifying in the case. Id. Courts in New York Rhode Island, and Alabama have reached similar conclusions. See, *Pember v. Carlson,* 845 N. Y. S. 2d 566, 45 A. D. 3d 1092 (2007) ("The fact that he had never obtained an engineering license in this state does not preclude him as an expert if he otherwise establishes adequate qualifications, but instead goes to the weight of the evidence."); *Owens v. Payless Cashways, Inc.,* 670 A. 2d 1240 (1996) ("We find no language in Chapter 8 of Title 5 mandating registration as a prerequisite to expert witness qualification. Rule 702 would in any event trump any statutorily implied mandate.") *Federal Mogul Corporation v. Universal Construction Company,* 376 S. 2d 716 (1979).

It should also be noted that with respect to other professions it is common to allow professionals licensed in other states to give testimony as an expert witness in West Virginia. For example, nearly every medical malpractice trial involves the presentation of medical testimony from expert witnesses who are not licensed in West Virginia. In fact, the West Virginia Medical Professional Liability Act, Code Section 55-7B-7, addressing the testimony of expert witnesses on standard of care in medical malpractice cases, specifically provides that an expert witness may be qualified who has a license to practice medicine in any state, not just West Virginia.

Mr. Dutill has over 38 years in experience performing engineering services across the country. He has a Bachelor of Science in civil and environmental engineering from Cornell University and was certainly qualified to assist the jury in this case. At best, Burgess & Niple's argument that Mr. Dutill should be licensed in West Virginia goes to the weight of his testimony, not its admissibility. The West Virginia Supreme Court of Appeals has said that "disputes as to the strength of an expert's credentials, mere differences in methodology, or lack of textual authority for the opinion go to weight and not the admissibility of their testimony." *Gentry v.*

Mangum, 195 W. Va. 512, at 527, 466 S. E. 2d 171, at 186 (1995). For all these reasons, the Court properly concluded at the trial of this action that Mr. Dutill was qualified to give testimony as an expert witness notwithstanding the fact that he is not registered as an engineer in the State of West Virginia.

V. COUNSEL'S COMMENTS IN CLOSING ARGUMENT CONCERNING BURGESS & NIPLE'S LACK OF AN EXPERT WITNESS WAS NOT IMPROPER AND, IN ANY CASE, ANY OBJECTION WAS WAIVED.

Burgess & Niple also argues that comments by J.F. Allen's counsel during his closing argument to the effect that Burgess & Niple had not offered expert testimony regarding the standard of care or Burgess & Niple's performance of its duties owed to J.F. Allen was improper. The purpose of this argument 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 Burgess & Niple's performance met that standard was offered by J.F. Allen's expert witness, Charles Dutill. Burgess & Niple chose not to offer expert testimony on those issues, and it was not improper for the Plaintiff to make that point to the jury.

In any case, any objection Burgess & Niple had to Mr. Johnstone's closing argument should have been made during the argument, requesting the Court to instruct the jury to disregard the objectionable statement. Burgess & Niple made no such objection. The West Virginia Supreme Court of Appeals has recognized that "[f]ailure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court." Syl. Pt. 6, *Yuncke v. Welker,* 128 W.Va. 299, 36 S.E.2d 410 (1945). Further, "[i]n order to take advantage of remarks made during an opening statement or closing argument which are considered improper an objection must be made and counsel must request the court to instruct the jury to disregard them." *State v. Coulter,* 169 W. Va. 526, 530, 288 S. E. 2d 819, 821 (1982). See also, *Miller v. Allman,* 240 W.Va. 438, S.E.2d 91 (2018).

For these reasons, Burgess & Niple's argument is not supported by the law and does not provide a basis for its appeal in this matter.

VI. THERE IS NO INCONSISTENCY OR CONFUSION IN THE VERDICTS RENDERED BY THE JURY IN THIS CASE.

Once a breach has been found, it is up to the jury to assess the resulting damages. As also previously noted, J.F. Allen's claim against Burgess & Niple is founded in tort, not contract, and, therefore, is not subject to the same standards for the calculation. Where the law gives no specific rule of compensation, the decision of the jury upon the amount of damages is generally conclusive unless the amount is so large or small as to lead to the belief that the jury was influenced by passion, partiality, corruption, or prejudice, or was misled by some mistaken view of the case. *Bishop v. Byrne,* 265 F. Supp. 460 (S. D. W. Va. 1967); *Fortner v. Napier,* 153 W.Va. 143, 168 S.E.2d 737 (1969). Because a jury's verdict is entitled to considerable deference the jury's award of damages should not be disturbed as long as the award is supported by some competent, credible evidence going to all essential elements of the award. *Community Antenna Service, Inc. v. Charter Communications VII, LLC,* 227 W.Va. 595, 712 S.E.2d 504 (2011).

Here, J.F. Allen's President, Greg Hadjis, testified that J.F. Allen suffered considerable losses beyond those contract damages reflected in its Request for Equitable Adjustment.[25] For example, the contract damages sought by J.F. Allen did not include substantial periods of delay incurred after completion of the installation of the sewer line because those delays were not recoverable under the terms of J.F. Allen's contract with The Sanitary Board. No such limitation applies to J.F. Allen's claim against Burgess & Niple. Burgess & Niple's failure to adequately administer this project resulted in a loss to J.F. Allen on the project in an amount far exceeding the contract damages claimed against The Sanitary Board. Also, the testimony was undisputed that J.F. Allen accelerated its work by adding extra crews and extending work hours at substantial additional cost, which cost/impact was not part of its contract damages.[26] Further, J.F. Allen's

[25] Jt. Appendix p. 1551.
[26] Jt. Appendix pp. 1694-1696, 2286.

extended duration, which was solely caused by the acts and omissions of the Defendants, including Burgess & Niple, resulted in increased costs for home office support, management time and attention and additional trips to the job-site, additional surveying, and additional costs of maintaining the company's safety program.[27] The longer J.F. Allen was on the job the more it cost.[28] Again, these claims and damages were not part of the contract claim but are clearly recoverable from Burgess & Niple as a result of its negligence.

Importantly, J.F. Allen called as an expert witness, Bryon Willoughby, who was qualified as a construction and damages expert. His testimony was undisputed. He assisted J.F. Allen in preparing its Request for Equitable Adjustment and testified to a reasonable degree of certainty that there were substantial additional claims and damages caused by the acts and omissions of the Defendants, including Burgess & Niple, but which were not part of J.F. Allen's contract damages.[29] Willoughby also testified, without objection, that, due to failure of the Defendants, including Burgess & Niple, to properly identify and mark utilities, J.F. Allen was forced to deal with and work around dangerous facilities including 4-inch gas lines for which it had no reliable location information that created hazardous conditions for which no compensation was sought under contract.[30] Most importantly, however, the jury heard testimony from Mr. Willoughby that J.F. Allen incurred a huge loss on this project. The jury heard from Mr. Willoughby that J.F. Allen was three million dollars over its budget for this project.[31] Therefore, it is clear that the jury was presented with substantial evidence of additional losses that were not part of the breach of contract claim.

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[27] Jt. Appendix pp. 1752-1753.
[28] *Id.*; Jt. Appendix p. 2286; Jt. Appendix p. 4436, 4/26/13 Letter to Goodman. "We have increased cost of management and overhead."
[29] Willoughby testified that there were other damages suffered by J.F. Allen relating to unmarked/mismarked utilities including having to work more slowly - hand digging and encountering the lines without breaking them. (Jt. Appendix pp. 2093-2102); The loss productivity claim of 15% only dealt with utility strikes - no other interruptions including other contractors working in J.F. Allen's space, bus schedule, extended completion, etc. (Jt. Appendix pp. 2118-2119); 15% inefficiency rate is a minimum value – Willoughby believes it was considerably higher. (Jt. Appendix pp. 2119-2120).
[30] Jt. Appendix pp. 2113-2114.
[31] Jt. Appendix p. 2189.

Additionally, J.F. Allen is entitled to recover damages for aggravation, inconvenience and annoyance, which are not subject to ready calculation and are left to the discretion of the jury. Every witness who testified on behalf of J.F. Allen clearly demonstrated the annoyance, inconvenience, aggravation J.F. Allen faced as a result of Burgess & Niple's total lack of impartiality and recognition of conditions J.F. Allen faced and, at great expense, ultimately conquered. For these reasons, there is adequate evidence to support the jury's finding of the substantial damages awarded against Burgess & Niple.

Burgess & Niple asserts in its appeal brief that the verdict returned by the jury in this case is inconsistent and that, therefore, a new trial should be awarded. Inconsistencies in a jury's answers to special interrogatories submitted on a jury verdict form is a matter to which Rule 49 of the West Virginia Rules of Civil Procedure applies. That rule is intended to address such inconsistencies by allowing the Court to return the jury for further consideration or, when necessary, order a new trial, *before* entering judgment. Rule 49(b) provides as follows:

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

Rule 49(b) of the West Virginia Rules of Civil Procedure.

When a jury returns a verdict with special interrogatories Rule 49 contemplates several possible responses. Where answers to interrogatories are consistent with each other but one or more is inconsistent with the general verdict the Court may either 1) direct entry of judgment in

accordance with the answers notwithstanding the general verdict; 2) return the jury for further consideration of its answers and verdict; or 3) order a new trial. Where answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict the trial court shall not direct entry of judgment but may either return the jury for further consideration of its answers and verdict or order a new trial. Where there is no inconsistency in the answers or verdict the Court shall direct the entry of the appropriate judgment upon the verdict and answers. *Id.* In this case, when the verdict and answers to interrogatories were initially received, the Court, finding that one of the blanks on the verdict form was left empty after a lengthy discussion with counsel, returned the jury for further consideration as contemplated by Rule 49(b). When the jury subsequently returned the completed verdict form, there being no inconsistency, the Court accepted the verdict, did not return the jury for any further consideration and did not order a new trial. Rather, the Court entered judgment in accordance with the answers and verdicts. Once judgment was entered Rule 49 had no further application. It provides no remedy to any party after entry of judgment. Nevertheless, the Trial Court referenced inconsistency as a basis for her decision to award the Defendants a new trial as to damages.

Justice Cleckley defined "inconsistency" in a jury verdict as where there is no rational, nonspeculative way to reconcile to essential jury findings. See, *Cleckley, Litigation Handbook on West Virginia Rules of Civil Procedure, 1173 (5th Ed. 2017).* Here, however, there is no inconsistency in the jury's findings. There is no indication of any impropriety in the verdict rendered by the jury in this case. It would be necessary to engage in speculation to reach the conclusion that the jury did not intend two separate verdicts and awards. J.F. Allen's claims against the two defendants are based on separate causes of action and the remedy for each is not dependent on the other. The remedy for Burgess & Niple's negligence is not limited to or dependent on the damages recoverable under Plaintiff's Contract with The Sanitary Board. Also, the jury was specifically instructed not to duplicate awards and the Court's instruction to that affect was read to the jury twice.

An example of what is meant by an "inconsistent verdict" can be found in the case of *Hopkins v. Coen,* 431 F. 2d 1055 (6th Cir. 1970). In that case a car driven by George Hopkins and in which Terry Hopkins was a passenger collided with an escort vehicle following a wide-load. George Hopkins was killed in the accident. Mr. Hopkins's estate and Terry Hopkins filed suit against the escort vehicle company and the transport company operating the trailer pulling the wide-load. The defendants counterclaimed that George Hopkins's negligence was the sole cause of the accident. After trial the jury returned a jury verdict form containing a verdict for Terry Hopkins against the defendants in the amount of $75,000.00; a verdict against Terry Hopkins for the defendants; a verdict for the estate of George Hopkins and against the defendants in the amount of $0.00; and a verdict against the Estate of George Hopkins for the defendants. *Id.* at 1058. As noted by the Court in that case, all four of the verdicts returned were inconsistent with the others.

But here there is no inconsistency between a finding of a breach of contract on the part of The Sanitary Board and a breach of Burgess & Niple's common law duty to avoid professional negligence. There is no inconsistency in a verdict in favor of a plaintiff against separate defendants. The fact that the jury returned awards against both defendants is neither inappropriate nor should it have been unexpected. The jury verdict form submitted to the jury contained two separate spaces for the express purpose of allowing the jury to make the award as to each defendant that it found to be appropriate. When the verdict form was initially returned without an award in the space provided for damages for Burgess & Niple's negligence, the Court returned the jury for the express purpose of making such an award. The fact that the defendants disagree with the jury's damages awards does not make them inconsistent.

In any case, the Court has directed entry of judgment upon the interrogatories and verdicts and therefore Rule 49 has no further bearing. If the verdict in this case had been inconsistent the Court should have refused to enter judgment on it. The verdict and special interrogatories originally rendered by the jury that found a breach of the standard of care on the part of Burgess & Niple but failed to award damages, leaving the space for damages blank, could have been interpreted as an inconsistency in the verdict and, in response, the Court returned the jury for

further consideration whereupon it returned a verdict awarding damages for Burgess & Niple's breach. Inconsistencies in the jury verdict should be addressed prior to the entry of judgment. Burgess & Niple's true dispute with the verdict rendered by the jury in this action is that it disagrees with the amount awarded. This argument, that the jury's award was excessive, is addressed below.

VII. THE JURY'S VERDICT IN THIS CASE IS SUPPORTED BY SUFFICIENT EVIDENCE AND IS NOT EXCESSIVE.

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

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

substantial justice has not been done. *State ex rel Meadows v. Stephens,* 207 W.Va. 341, 532 S.E.2d 59 (2000); *Morrison v. Sharma,* 200 W.Va. 192, 488 S.E.2d 467 (1997). When a case involving conflicting testimony and circumstances has been fairly tried under proper instructions the verdict will not be set aside unless plainly contrary to the evidence. *Neely v. Belk,* 222 W.Va. 560, 668 S.E.2d 189 (2008).

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

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

As detailed above, J.F. Allen presented substantial evidence at trial supporting a breach of the applicable standard of care by Burgess & Niple.[32] In addition, J.F. Allen's President, Greg Hadjis, testified that J.F. Allen had suffered a loss on the project that far exceeded the contract damages sought against The Sanitary Board.[33] He and others also testified about a variety of other losses, inconveniences, and aggravations that J.F. Allen dealt with during the course of its work that were not compensable under its contract with The Sanitary Board and, therefore, were not a

[32] See, Footnotes 2, 3, 16, 17 and 19
[33] Jt. Appendix p. 1700.

part of its contract damages claim.[34] J.F. Allen intended to complete its work in less than one calendar year but was unable to do so as a result of the failure of Burgess & Niple to properly administer the project. J.F. Allen was eventually forced to stay on the job until nearly a year later when final completion was certified.[35]

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

> ... Again, when you look at J.F. Allen's cost, what they spent on this job, - - and I've got cost reports showing they've spent $7.1 million. At that time their budget was, I believe 4.8, so that was $2.5 million not counting the markup they lost. So that is $3 million over budget....[36]

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

In addition to these economic losses, damages for aggravation, annoyance and inconvenience may be awarded and such damages are in the nature of damages for pain and suffering for which there is no definite itemization and no rule or measure upon which they can be based. Damages in tort and contract damages are not given the same treatment under the law because of the differences in the nature of the duties imposed by the common law versus those voluntarily undertaken by contract. A just rule, therefore, would put upon a person who commits

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[34] J.F. Allen accelerated its work by adding crews and equipment and extending working hours. (Jt. Appendix pp. 1694, 2286). The extended duration of the work resulted in increased costs of home office support, management time and attention, additional trips to the site, additional surveying, and maintenance of the safety program. (Jt. Appendix pp. 1752-1753, 2470, ref. Trial Ex. 18 – Jt. Appendix p. 4436, "We have increased costs of management and overhead."). J.F. Allen sent many letters to Burgess & Niple complaining about interruptions, interference and delays. See, e.g. Jt. Appendix pp. 4435, 4436, 4510, 4511.

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

[36] Jt. Appendix p. 2189.

a tort the risk of all proximate consequences of his wrong, but upon one who breaks a contract such risk as he could have foreseen when he undertook the duty. 5C Michies, Damages § 11 n. 284, citing *Hurxthal v. St. Lawrence Manufacturing Company,* 53 W.Va. 87, 44 S.E. 520 (1903); *Hall v. Philadelphia Co.*, 74 W.Va. 172, 81 S.E. 727 (1914).

It has also been established in West Virginia that a corporation can, in an action based in tort, recover damages for aggravation, annoyance and inconvenience. No one would argue that a person is not entitled to damages for annoyance, aggravation and inconvenience under West Virginia law and it is a well-established principal of the law that corporations are treated as artificial persons. *Queen v. West Virginia University Hospitals, Inc.,* 179 W.Va. 95, 365 S.E.2d 375, 380 (1987). The West Virginia Supreme Court of Appeals has recognized that a corporation is entitled to recover such damages in addition to any economic loss incurred. See, *Hayseeds, Inc. v. State Farm Fire & Casualty,* 177 W.Va. 323, 352 S.E.2d 73 (1986). Such damages are indefinite and unliquidated and there is no rule or measure upon which they can be based. In such cases the fixing of damages is left to the discretion of the jury.

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

Kessel v. Leavitt, 205 W. Va. 95, 511 S. E. 2d 720, 810 (1998) (internal citations omitted). There is no authority in such cases for a court to substitute its opinion for that of a jury. "A mere difference in opinion between the court and the jury as to the amount of recovery in such cases will not warrant the granting of a new trial. ..." Syl. Pt. 2, *Richmond v. Campbell,* 148 W.Va. 595, 136 S.E.2d 877 (1964); Syl. Pt. 11, *Marsch v. American Electric Power Company,* 207 W.Va. 174, 530 S.E.2d 173 (1999).

In addition, the fact that the jury awarded damages against both The Sanitary Board and Burgess & Niple in this action is not evidence that J.F. Allen was awarded a double recovery. Any such conclusion can be based only on speculation. J.F. Allen's claims asserted against the two defendants were based on separate and independent causes of actions and differing theories of

liability. It was anticipated by all parties that the jury might make awards in favor of J.F. Allen and against both defendants and the jury was properly instructed as to the impropriety of a double recovery. This is evidenced by the fact that there were separate blanks on the verdict form for damage awards against each of the defendants. The fact that the jury returned awards in amounts that are more than the defendants want to pay is not evidence that the jury awarded the same damages twice. Nor is there any basis for an argument that J.F. Allen's tort damages should be capped at the amount of its contract damages asserted against The Sanitary Board. As noted above, there is evidence in the record that J.F. Allen suffered a loss far greater than the amount of its contract claim and it is also entitled to damages for annoyance, aggravation and inconvenience in an amount to be determined in the sound discretion of the jury.

Under these circumstances viewing the evidence in the light most favorable to J.F. Allen and giving it the benefit of all reasonable inferences, and considering the large losses suffered, and the inconvenience, aggravation and annoyance imposed upon J.F. Allen during the course of its work a damages award of three million dollars is not "monstrous, at first blush beyond all measure, unreasonable, outrageous" and does not "manifestly show jury passion, partiality, prejudice or corruption." This is particularly true when considered in context of a project with an agreed contract amount, plus contract claims, totaling nearly seven million dollars and where the duration of J.F. Allen's work was extended by nearly a year, almost double its as-planned duration. Also, as stated previously, the evidence in the case demonstrated that J.F. Allen had lost at least three million dollars for claims not part of the amount it claims as contract damages. For these reasons, Burgess & Niple's Appeal should be denied.

CONCLUSION

In conclusion, the arguments presented by Burgess & Niple do not support any abuse of discretion by the Trial Court in this matter regarding evidentiary matters nor in its decision to deny Burgess & Niple's motion for new trial as it related to liability. The jury's verdict is clear, is not inconsistent in that it makes sperate awards against each defendant upon separate claims and separate theories of liability. While the award rendered against Burgess & Niple was larger than

the parties anticipated, it was supported by evidence in the record. This being the case, it requires speculation to conclude that the jury did not intend two separate awards. Therefore, Burgess & Niple's appeal should be denied. Moreover, J.F. Allen's separate appeal should be granted and this matter should be remanded to the Circuit Court with instructions to enter judgment on the jury's verdict as rendered.

Respectfully Submitted,

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