IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0398

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY

THE SANITARY BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA,
Defendant Below, Petitioner

v.

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

PETITIONER THE SANITARY BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA'S BRIEF

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS:

The Sanitary Board of the City of Charleston, West Virginia ("Petitioner" or "CSB"), by counsel, respectfully submits its Petitioner's Brief, which challenges the Circuit Court of Kanawha County's March 1, 2018 *Judgment Order on Jury Verdict* and March 20, 2019 *Order Granting Defendants a New Trial on Damages and Denying Defendants' Motions for Renewed Judgment as a Matter of Law*. In support, CSB respectfully states as follows:

I. ASSIGNMENTS OF ERROR

A. The Circuit Court erred in denying CSB's motion for judgment as a matter of law and renewed motion for judgment as a matter of law because the undisputed evidence at trial clearly established that J.F. Allen failed to prove a *prima facie* case for breach of contract against CSB for at least two reasons: (i) J.F. Allen failed to identify any contractual duty on the part of CSB relating to Underground Facilities that was breached, and (ii) J.F. Allen failed to show it complied with the contract terms with respect to any Claim alleged, and it is undisputed that the contractual procedures for filing and preserving any Claim were neither waived nor modified.

B. The Circuit Court erred in admitting into evidence the expert report prepared by J.F. Allen's expert witness, Bryon Willoughby, which report was, in fact, considered by the jury resulting in substantial error.

C. The Circuit Court erred in allowing J.F. Allen to proffer expert testimony from Charles Dutill, who admitted he lacked the relevant expertise or experience and who is not a licensed engineer in the State of West Virginia, resulting in confusion of the issues, misleading the jury, and unfair prejudice to CSB.

D. The Circuit Court erred in entering judgment based on the jury's inconsistent and invalid verdict.

E. The Circuit Court erred in ordering a new trial on damages only, where the jury's fundamental and pervasive confusion impacted both its assessment of damages and liability.

II. STATEMENT OF THE CASE

For the convenience of the Court, a summary of the facts contained in the Circuit Court record is reproduced with citations to the Joint Appendix, as follows:

A. The Construction Agreement.

This appeal arises from a dispute involving a sanitary sewer replacement project, for work generally described as "Kanawha Two-Mile Creek Sewer Improvements—Sewer Replacements Sugar Creek Drive Sub-Area, Contract 10-8" (the "Project"). (JA 3363.) On or about December 13, 2011, J.F. Allen Corporation ("J.F. Allen"), as Contractor, entered into a standard construction contract with CSB, as Owner ("Agreement"). Burgess & Niple, Inc. ("B&N") provided professional services to CSB and was designated as the Engineer/Architect on the Project. (JA 3475.) The original contract price under the Agreement totaled $5,160,621.75, "subject to additions and deductions by Change Order and quantities actually performed." (JA 3476, ¶ 4.) [1] A total of six Change Orders and quantity adjustments increased the Contract Price in the amount of $394,977, for a final adjusted contract amount of $5,555,598. (JA 1388-1407.)

In entering into the Agreement, J.F. Allen, a seasoned contractor, agreed to the precise procedures and timeliness requirements for submitting claims within the life of the contract. For its work, J.F. Allen received from CSB full payment of the original contract amount, plus the cost of all properly submitted Change Orders and quantity adjustments, for a final adjusted contract amount of $5,555,598. Under the plain terms of the contract, J. F. Allen is entitled to no more.

[1] Capitalized terms not otherwise defined here have the same meaning as those terms are defined in the parties' Agreement.

Construction began on or about January 9, 2012. The Agreement required Substantial Completion by January 2, 2013 and required Final Completion by February 1, 2013. Actual Final Completion of the Project occurred on August 15, 2013. Thereafter, J.F. Allen submitted its request for Final Payment on or about November 4, 2013, and CSB issued Final Payment to J.F. Allen on or about November 20, 2013. The one-year correction period under the Agreement expired on June 19, 2014. (JA 1388-1407.) However, on June 30, 2014, J.F. Allen filed its original Complaint seeking—for the first time—an "equitable adjustment" of the Contract Price, a Claim never before made (or preserved) pursuant to the Agreement.

B. J.F. Allen Assumed Liability with Respect to the Underground Facilities.

As between CSB and J.F. Allen, the unambiguous terms of the parties' Agreement itself establish that J.F. Allen, not CSB, bore the risk of any of difficulties that might arise from unforeseen locations of Underground Facilities.[2] Even prior to being awarded the Project, J.F. Allen received specific instructions concerning Underground Facilities. Paragraph 4.5 of the "Instructions to Bidders," which is incorporated in the Agreement, provides as follows:

> Before submitting a Bid, each BIDDER will be responsible to obtain such additional or supplementary examinations, investigations, explorations, tests, studies, and data concerning conditions (surface, subsurface, and Underground Facilities) at or contiguous to the site or otherwise, which may affect cost, progress, performance, or furnishing of the Work or which relate to any aspect of the means, methods, techniques, sequences, or procedures of construction to be employed by BIDDER and safety precautions and programs incident thereto or which BIDDER deems necessary to determine its Bid for performing and furnishing the Work in accordance with the time, price, and other terms and conditions of the Contract Documents.

(JA 3376 ¶ 4.5.)[3] In other words, the costs were to be included in the contract bid.

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[2] The "General Conditions" define "Underground Facilities" in part as "[a]ll underground pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities . . . ." (JA 3528.)

[3] Article 8 of the Agreement defines "Contract Documents," to include Bidding Requirements including Advertisement, Bids and Instructions to BIDDERS, Supplementary Instructions, General Conditions, and Supplementary Conditions. (JA 3479.)

The "General Notes" expressly provide, in no less than four separate provisions that it was J.F. Allen's sole responsibility to locate underground utilities and structures, to provide advance notice to utilities, and if damage occurs, to repair and restore the damaged service lines, the cost of all of which will be considered as having been included in the Contract Price. (JA 0042 ¶¶ 2, 4-6.) Additionally, J.F Allen, under the contract, represented that:

> CONTRACTOR acknowledges that OWNER and ENGINEER/ARCHITECT do not assume responsibility for the accuracy or completeness of information and data shown or indicated in the Contract Documents with respect to Underground Facilities . . . .

(JA 3478 ¶ 7.4 (capitalization in original).)

Sections 4.04 of the "General Conditions," as amended in the "Supplemental Conditions," defines J.F. Allen's responsibilities with respect to Underground Facilities, whether shown or not shown on the Contract Documents, as follows:

> **4.04** ***Underground Facilities***
>
> A. *Shown or Indicated:* The information and data shown or indicated in the Contract Documents with respect to existing Underground Facilities at or contiguous to the Site is based on information and data furnished to Owner or Engineer by the owners of such Underground Facilities, including Owner, or by others. Unless it is otherwise expressly provided in the Supplementary Conditions:
>
> 1. Owner and Engineer shall not be responsible for the accuracy or completeness of any such information and data provided by others; and
> 2. ***the cost of all of the following <u>will be included in the Contract Price</u>, and Contractor shall have full responsibility for***:
>   a. ***reviewing and checking all such information and data***;
>   b. locating all Underground Facilities shown or indicated in the Contract Documents;
>   c. coordination of the Work with the owners of such Underground Facilities, including Owner, during construction; and
>   d. ***the safety and protection of all such Underground Facilities and repairing any damage thereto resulting from the Work***.
> 3. Location of Subsurface Utilities.[4]
>   a. The location of subsurface utilities is shown on the plans form information furnished by the utility owners.
>
> . . .

[4] Section 4.04 of the "Supplemental Conditions" adds ¶¶ 4.04.A.3 through 4.04.A7, immediately after ¶ 4.04.A.2 contained in the "General Conditions." (JA 3592-93.)

d. ***The CONTRACTOR shall have full responsibility for coordination of the work with owners of such underground facilities during construction, for the safety and protection thereof as provided in paragraph 6.13 and repairing any damage thereto resulting from the work, the cost of all of which will be considered as having been included in the Contract Price***.

* * * *

B. *Not Shown or Indicated:*

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 shall be responsible for the safety and protection of such Underground Facility.
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 indicated or not shown or indicated 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 such adjustment in Contract Price or Contract Times, Owner or Contractor may make a Claim therefor as provided in [¶] 10.05.

(JA 3537-38; JA 3592 (emphasis added).)

C. The Agreement Established the Procedure for Payments and Submission of Claims.

Article 12.03 of the General Conditions provides several provisions governing delays and equitable adjustments, which bar the recovery of damages for delay under certain circumstances. (JA 3571-72 § 12.03(C), § 12.03(E) ("Such an adjustment shall be Contractor's ***sole and exclusive remedy for the delays*** described in this Paragraph 12.03.C") (***"Contractor shall not be entitled to an adjustment in Contract Price or Contract Times for delays within the control of Contractor"***) (emphasis added).)

The contract provides that "[n]o Claim for an adjustment in Contract Price . . . will be valid if not submitted in accordance with [the Claims procedure of] this Paragraph 10.05." (JA 3565-66 ¶ 10.05(A)-(F); JA 3570 ¶ 12.01(A). The agreed-upon protocols for all Change Orders, progress and final payments, as well as the procedures for filing, reviewing, and ruling on any Claim are established by Article 10.05 of the contract, as follows:

> A. *Engineer's Decision Required:* All Claims, except those waived pursuant to Paragraph 14.09, shall be referred to the Engineer for decision. ***A decision by Engineer shall be required as a condition precedent to any exercise by Owner or Contractor of any rights or remedies either may otherwise have under the Contract Documents or by Laws and Regulations in respect of such Claims.***
>
> B. *Notice:* Written notice stating the general nature of each Claim shall be delivered by the claimant to Engineer and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. The responsibility to substantiate a Claim shall rest with the party making the Claim. Notice of the amount or extent of the Claim, with supporting data shall be delivered to the Engineer and the other party to the Contract within 60 days after the start of such event ***(unless Engineer allows additional time for claimant to submit additional or more accurate data in support of such Claim).*** A Claim for an adjustment in Contract Price shall be prepared in accordance with the provisions of Paragraph 12.01.B . . . .
>
> C. *Engineer's Action*: Engineer will review each Claim and, within 30 days after receipt of the last submittal of the claimant or the last submittal of the opposing party, if any, take one of the following actions in writing:
>
> 1. deny the Claim in whole or in part;
> 2. approve the Claim; or
> 3. notify the parties that the Engineer is unable to resolve the Claim if, in the Engineer's sole discretion, it would be inappropriate for the Engineer to do so. For purposes of further resolution of the Claim, such notice shall be deemed a denial.
>
> D. In the event that Engineer does not take action on a Claim within 30 days, the Claim shall be deemed denied.
>
> E. Engineer's written action under Paragraph 10.05.C or denial pursuant to 10.05.C.3 or 10.05.D will be final and binding upon Owner and Contractor, unless Owner or Contractor invoke the dispute resolution procedure set forth in Article 16 within 30 days of such action or denial.
>
> F. ***No Claim for an adjustment in Contract Price or Contract Times will be valid if not submitted in accordance with this Paragraph 10.05.***

(JA 3565-66 ¶ 10 (emphasis added).)

In particular, to comply with Paragraph 10.05, J.F. Allen was required, in part, to provide written notice of its Claim no later than thirty days after the start of the event giving rise to the Claim and to allow for B&N to render its decision. (JA 3565 ¶ 10.05.) The contract provides that Claims not timely asserted within the life of the contract are time-barred under Article 14.07. (JA 3581.) Significantly, "[t]he making and acceptance of final payment will constitute . . . a waiver of all Claims by Contractor against Owner other than those previously made in accordance with the requirements herein and expressly acknowledged by Owner in writing as still unsettled." (JA 3582 ¶ 14.09.)

D. Six Months After the Contract Expired, J.F. Allen Submitted, for the First Time, a Request for "Equitable Adjustment."

On November 4, 2013, J.F. Allen submitted its request for Final Payment pursuant to the contract. (JA 4253; JA 4683.) On November 5, 2013, B&N submitted its written recommendation to CSB for Final Payment to J.F. Allen. (JA 4673.) On November 20, 2013, CSB issued Final Payment, check no. 2068, in the amount of $146,320.43 to J.F. Allen. (JA 4681.) J.F. Allen retained in its possession but never cashed the check. (JA 1878.)

On May 7, 2014, approximately *six months* after J.F. Allen's request for Final Payment and B&N's recommendation for Final Payment had been made, J.F. Allen submitted a request to B&N for "Equitable Adjustment" under the contract. (JA 4083-4108.) On May 12, 2014, B&N returned J.F. Allen's request, noting that B&N "is no longer authorized to provide professional services for this project." (JA 4507.)

E. Litigation, Jury Trial and Verdicts, and Post-Trial Proceedings.

On June 30, 2014, J.F. Allen filed this civil action and subsequently amended its Complaint on November 13, 2014. (JA 0008-14; JA 0001.) The case was tried from January 22, 2018 to January 31, 2018 before a jury. (JA 1432-3345.) At trial, J.F. Allen presented two

distinct legal theories (breach of contract against CSB and negligence against B&N) for the possible recovery of a single injury. During closing argument at trial, J.F. Allen's counsel informed the jury and the Court that J.F. Allen sought a single recovery of $1,252,392.43 against both Defendants:

> MR. JOHNSTONE: If you answer questions 1 and 2 yes, please assess damages. . . The damages are the same that we assert against both of these entities. Okay. So of this amount, you've got to decide how much you want to put against the sanitary board and what you want to put against Burgess and Niple.

(JA 3297-98.)

During deliberations, the jury submitted handwritten notes to the Circuit Court, which shed light on the jury's general state of confusion, and the Court submitted several clarifying instructions to aid the jury. (JA 1179-85.) For example, the jury foreperson sent the Circuit Court a note questioning how and on what basis 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?" (JA 1180; JA 3315-16.)[5] The jury, twenty-five minutes later, then followed up with a note regarding the same question. Pointing to Part II, Question 3 of the verdict form, which instructed that "If the answer to question 1 and 2 are YES, please assess the breach of contract damages, if any, in dollars and cents below," the jury asked the Court, "What is this amount based on?" (JA 1183; JA 3318-19.) The jury also sent a note to the Court asking what amount it was supposed to assess for damages against Defendant B&N, "or do we come up with the $ amount?" (JA 1185; JA 3334-37.)

When the jury returned after its first round of deliberations, the Circuit Court read aloud the jury's verdict, which found $1,300,000.20 against CSB (for breach of contract) and found

[5] The trial transcript was made available on or about May 22, 2018. However, the transcript for Day 8 of trial provided to counsel was missing certain portions related to the jury's deliberation. The missing portions were transcribed and provided to counsel on August 20, 2018. For clarity, any references to the supplemented portion will be clarified with a reference to JA 3313-45.

B&N 90% negligent and J.F. Allen 10% negligent. (JA 3323-36.) Upon the jury returning after its first round of deliberations, the Jury Foreperson stated to the Court, believing that the jury had a valid verdict, "we got it right, this time," even though the verdict form was incomplete in that the jury had left the damages portion against B&N blank. (JA 3323-36.) After reading the incomplete verdict form aloud, the Circuit Court directed the jury to "return to the jury room" to permit the Court to "address some issues with counsel." (JA 3323-36.)

The Circuit Court then informed counsel that the jury left the verdict form blank as to damages against B&N after finding B&N 90% negligent and J.F. Allen 10% negligent, noting that the jury "got that they [were] supposed to give one recovery but may not have apportioned it among the defendants" and determined that what the Court needed to do was to "flesh out if it [was] their intent to assess the entire, [1.3] million dollars, to the Sanitary Board, but by virtue of the fact they have found negligence in the amount of [90%] as to [B&N], if they had intended to apportion and percentage of that to them." (JA 3323-36.) J.F. Allen's counsel agreed with the Court's concern: "Yes, your Honor. Did they intend for that to be [0] damages or was it their intention that the [1.3] million be split between the defendants." (JA 3323-36.)

The Circuit Court brought the jury back into the courtroom and polled each juror and each juror agreed that the incomplete verdict was his or her verdict. The Circuit Court then instructed the jury to go back into the jury room and focus on the blank portion of the verdict form as to whether it was their intent to award zero damages against B&N. (JA 3323-36.) After the second attempt at deliberation, the Jury Foreperson stated, referring to the current verdict at issue, "we did get it right, this time;" however, the jury filled in the blank with a damages award against B&N in the amount of $3,000,000.20. (JA 3336-43.)

Even though the maximum recovery J.F. Allen sought for its alleged injury was $1,252,392.43, the jury awarded a total verdict of $4,300,000.40, including $1,300,000.20 against CSB (for breach of contract) and $3,000,000.20 against B&N (for negligence). The jury also apportioned ten percent (10%) comparative fault to J.F. Allen on its negligence claim, resulting in damages against B&N in the amount of $2,700,000. (JA 3336-43; JA 1124-28.) After polling the jury again and then excusing the jury, the Circuit Court expressed its concern with the verdict and present sense impression as follows:

> THE COURT: I'm going to suggest strongly that I have concerns that the verdict that we had could be problematic. It may not be based on law, reason or judgment. I am going to strongly suggest that you all talk. When I say talk, I mean try to get some resolution in this case. . . .I suggest that you talk over the weekend and avail yourself the opportunity to do that. I certainly suggest this. Thank you.

(JA 3342-43.)

Judgment was subsequently entered on March 1, 2018. (JA 1129-35.) On March 14, 2018, CSB filed its *Renewed Motion for Judgment as a Matter of Law*, or, alternatively, *Motion for New Trial Pursuant to Rules 49 and 59 of the West Virginia Rules of Civil Procedure*. (JA 1151-212.) On March 20, 2019, the Circuit Court issued its *Order Granting Defendants a New Trial on Damages and Denying Defendants' Motions for Renewed Judgments as a Matter of Law*, wherein it ordered that the matter be retried as to damages only, but recognizing that as a practical matter the entire case would essentially be retried. (JA 1388-1407; JA 1403 ¶ 63.)

III. SUMMARY OF ARGUMENTS

For each of the following reasons, the judgment as entered is in error necessitating review:

First, as a matter of contract law, the Circuit Court erred in denying CSB's motions for judgment as a matter of law on J.F. Allen's breach-of-contract claim. At trial, the undisputed evidence clearly established that J.F. Allen failed to prove a *prima facie* case for breach of

contract against CSB for at least two reasons: (i) J.F. Allen failed to identify any contractual duty on the part of CSB relating to Underground Facilities that was breached, and (ii) J.F. Allen failed to show it complied with the contract terms with respect to any Claim alleged. Each failure is a complete bar to J.F. Allen's claim, and thus, CSB is entitled to judgment in its favor.

To start, J.F Allen was required at trial to show that it did all or substantially all of the significant things that the contract required it to do. However, through its own testimony, J.F. Allen admitted that it *completely failed* to comply with the parties' contract and satisfy the conditions necessary to make and preserve any Claim alleged. As evidenced on the verdict form, the jury found by a "preponderance of the evidence that *J.F. Allen Corporation was negligent in its conduct related to filing and substantiating claims in accordance with the contract.*" (JA 1127.) Similarly, J.F. Allen failed to show that CSB owed it any duty with respect to Underground Facilities. Accordingly, J.F. Allen's failure to establish CSB's duty and follow the agreed-upon protocol for submitting Claims prior to Final Payment completely bars the remedies it seeks. J.F. Allen is bound by the agreement it struck, and based on the record below, judgment should be entered in favor of CSB on the breach of contract claim.

Based on this record, affirming the lower court's liability determination here would improperly disregard established precedent and upend the cardinal rule that unambiguous contracts are to be enforced as written. It would also reward J.F. Allen with a windfall recovery to which it is not entitled, and possibly encourage other contractors to underbid projects, knowing that they will not be held to their contractual duties and obligations as plainly set forth in the agreed-upon contract for municipal utility work, at the risk of ratepayer dollars. When

faced with similar facts, other courts have not hesitated to enforce the parties' Agreement—including its requirements for submitting and preserving any Claims—as written.[6]

Second, the Circuit Court erred in certain of its evidentiary rulings which warrant reversal. For instance, the Circuit Court allowed Bryon Willoughby's expert report into evidence. The evidence at trial established that the report was prepared solely by Mr. Willoughby for litigation purposes, and at the direction of J.F. Allen's attorney. The document, which was allowed to be taken into the jury room during deliberations, contained multiple levels of hearsay and affected the outcome at trial, resulting in substantial error. In addition, the Circuit Court erred in allowing J.F. Allen to proffer expert testimony from Charles Dutill, who admitted he lacked the relevant expertise or experience and who is not a licensed engineer in West Virginia, resulting in confusion of the issues, misleading the jury, and unfair prejudice to CSB.

Third, the Circuit Court erred in entering judgment based on the jury's inconsistent and invalid verdict. After two separate attempts at re-deliberation, the jury in this case could not render a consistent and rational verdict, and the Circuit Court in error elected not to re-submit to the jury any further clarifying instructions for the jury to attempt to correct the inconsistent

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[6] *See, e.g., McNamee Constr., Corp. v. City of New Rochelle*, 60 A.D.3d 918, 919 (N.Y. 2009) (dismissing contractor's breach of construction contract claim where parties clearly contemplated the possibility of the project being delayed due to the presence of the infrastructure of underground utilities and, as here, the agreement allocated that risk of liability to the contractor); *Wrecking Corp. of Am. v. Mem'l Hosp.*, 63 A.D.2d 615, 615, 405 N.Y.S.2d 83, 85 (N.Y. App. Div. 1978) (holding that plaintiff had assumed the risk and the responsibility of subsurface conditions and dismissed plaintiff's complaint where the contract stated that the owner and architect made no representations about the character and quality of subsurface soil conditions and did not guarantee the accuracy of such conditions); *Bilotta Constr. Co. v. Village of Mamaroneck*, 199 A.D.2d 230, 604 NY.S.2d 966 (N.Y. App. Div. 1993) (contract containing numerous clauses exculpating the owner and requiring contractor to undertake its own investigation required dismissal of complaint against owner and architect). As the *Bilotta* Court observed, "***[t]he ultimate guide in determining whether or not the contractor is to be paid for extra work is the contract itself . . . [I]f the parties intended the contractor to rely upon its own investigation, no recovery for extra work may be had, absent a showing of fraud or misrepresentation as to existing conditions.***" *Id.* 199 A.D.2d at 231 (citations omitted) (emphasis added).

verdict, instead dismissing the jury and directing counsel to submit post-trial briefs. Now, the verdicts as rendered cannot be reconciled, even with a new trial on damages.

The gravamen of the problem is that it was impossible for the Circuit Court to discern that both Defendants below were liable to J.F. Allen without the Court improperly assuming the function of the jury and making additional factual findings. Essentially, it cannot be determined which defendant is liable for which damages, and whether CSB is even liable. At trial, J.F. Allen presented two distinct legal theories for the possible recovery of a *single* injury. Because CSB can only be held liable for breach of contract damages, the jury confusion in awarding $1.3 million against it—in excess of the $1.25 million total requested—calls into question CSB's liability. This is not a joint and several liability case, yet the excessive verdict rendered impermissibly awarded negligence damages against CSB, which is prohibited. *See* W. Va. Code § 29-12A-4(b)-(c). The inconsistency of the verdicts goes directly to liability and damages.

To illustrate, the jury found by a "preponderance of the evidence that Plaintiff, J.F. Allen, *did all or substantially all of the significant things that the contract required it to do*," yet it also found by a "preponderance of the evidence that *J.F. Allen Corporation was negligent in its conduct related to filing and substantiating claims in accordance with the contract.*" (JA 1125; JA 1127.) Moreover, on top of awarding $1.3 million in damages against CSB, the jury found B&N 90% responsible for $3 million in damages and J.F. Allen 10% responsible, for a verdict of $2.7 million against one particular defendant, despite the fact that J.F. Allen sought only $1,252,392.43 in total damages. *Both verdicts rendered thus exceed the amount in damages requested by J.F. Allen at trial and the percentage of the liability verdict already totals 100%.* How can CSB be liable under this verdict when J.F. Allen sought one total recovery and 100% of the liability has already been allocated?

Finally, the Circuit Court erred in ordering a new trial on damages only, where the jury's fundamental and pervasive confusion impacted both its assessment of damages and liability. Even though the Circuit Court properly determined that remittitur is impossible with this verdict and ordered a new trial on damages, it erred in preserving the jury's liability determination. Notably, the Circuit Court recognized that the entire case would need to be retried at the trial on damages regardless. (JA 1403 ¶ 63; JA 5176; JA 5184-85.) Not only was there no principled basis upon which the Circuit Court could reconcile the jury's inconsistent verdicts into a coherent judgment on liability or damages, but there is no judicial economy in conducting only a damages trial that will hear all the same evidence. Accordingly, a new trial on damages and liability is the only proper remedy if judgment as a matter of law is not entered in favor of CSB on the breach of contract claim.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

CSB believes this matter is appropriate for oral argument and decision under Rule 19 of the West Virginia Rules of Appellate Procedure for two reasons: (1) the Circuit Court erred in the application of settled law, and (2) its entry of judgment and *Order Granting Defendants a New Trial on Damages and Denying Defendants' Motions for Renewed Judgment as a Matter of Law* was against the clear weight of the evidence.

V. ARGUMENT

A. THE CIRCUIT COURT ERRED IN DENYING CSB'S MOTIONS FOR JUDGMENT AS A MATTER OF LAW.

In its first assignment of error, CSB challenges the findings of the Circuit Court on grounds that it was entitled to judgment as a matter of law. Simply put, the evidence presented at trial was insufficient for J.F. Allen to prove a *prima facie* case for breach of contract.

To recover damages for breach of contract, J.F. Allen was required to establish each of the following elements at trial: (1) the existence of a valid contract; (2) that J.F. Allen performed under its contract with CSB; (3) that CSB breached or violated its duties or obligations under the contract; and (4) that J.F. Allen was injured as a result. *Exec. Risk Indem., Inc. v. Charleston Area Med. Inc.,* 681 F.Supp.2d 694, 714 (S.D. W.Va. 2009). Even though J.F. Allen was required to prove with evidence that CSB breached the contract, it failed to prove such a breach occurred at trial with respect to any alleged claim for payment via equitable adjustment. In addition, J.F Allen was required to show at trial that it did all or substantially all of the significant things that the contract required it to do. However, J.F. Allen presented evidence that it *completely failed* to comply with the parties' contract and satisfy the conditions necessary to make and preserve any claim alleged.

The appellate standard of review for an order granting or denying a motion for judgment as a matter of law under Rule 50(a) or a renewed motion for a judgment as a matter of law after trial under Rule 50(b) is *de novo. Yates v. Univ. of West Virginia Bd. of Tr.*, 209 W.Va. 487, 493. 549 S.E.2d 681, 687 (2001); Syl. Pt. 1, *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009). This Court "has said that a judgment as a matter of law should be granted at the close of the evidence when, after considering the evidence in the light most favorable to the nonmovant, only one reasonable verdict is possible." *Yates*, 209 W.Va. at 493 (citations omitted). For the reasons discussed herein, J.F. Allen's failure to present a legally sufficient basis for a reasonable jury to find in its favor warrants judgment as a matter of law for CSB and reversal of the Circuit Court's liability determination.

1. The Circuit Court Erred in Denying CSB Judgment as a Matter of Law Because J.F. Allen Failed to Identify any Contractual Duty on the Part of CSB Related to Underground Facilities.

The overwhelming weight of the evidence at trial demonstrated that under the parties' clear and unambiguous contract, CSB owed no duty to J.F. Allen for difficulties that might arise related to Underground Facilities, and alleged "delay damages" were barred by the Agreement. At trial, J.F. Allen sought "extra costs" and delay damages from CSB based on allegedly unforeseen changes related to underground utilities. (JA 1497-98; JA 4252.) At the close of J.F. Allen's case-in-chief, CSB presented its Rule 50 motion for judgment as a matter of law. (JA 2518-44.) The Circuit Court erred by denying CSB's Rule 50 motion for judgment as a matter of law at the trial and its renewed motion for judgment as a matter of law post-trial, which would have been dispositive of J.F. Allen's claim for lack of duty on the part of CSB. (JA 1497-98; JA 1151-74; JA 1340-56.)

The evidence presented at trial indicated that *J.F Allen*, not CSB, bore the risk of any of the difficulties that might arise from unforeseen locations of Underground Facilities, and, under the parties' clear and unambiguous contract, it is clear that CSB owes no such duty to J.F. Allen. As between CSB and J.F. Allen, the parties expressly contemplated that *J.F. Allen* would bear the risk of any of the difficulties that might arise from unforeseen locations of Underground Facilities. For instance, the responsibility to investigate and discover Underground Facilities was solely J.F. Allen's duty.[7] Under "Instructions to Bidders," J.F. Allen was responsible to obtain additional examinations, investigations, tests, and data "concerning conditions (surface,

[7] *See, e.g., Acme Builders Inc. v. Facilities Dev. Corp.*, 51 N.Y.2d 833, 413 N.E.2d 1164 (N.Y. 1980) (determining that because plaintiff failed to make an inquiry, conflicting provisions of drawings and specification were resolved in favor of the owner).

subsurface, and Underground Facilities) at or contiguous to the site . . . ." (JA 3376 ¶ 4.5.)[8] Evidence presented at trial showed that CSB "do[es] not assume responsibility for the accuracy or completeness of information and data shown or indicated in the Contract Documents with respect to Underground Facilities at or contiguous to the site." (JA 3478 ¶ 7.4.)

In addition, the record shows that the parties clearly contemplated—and addressed—the possibility of construction delays and costs arising from Underground Facilities. The parties' contract placed the financial risk of encountering or repairing those Underground Facilities on J.F. Allen as the Contractor, not on CSB as the Owner.[9] Moreover, Section 4.04 of the General and Supplemental Conditions specifies the method by which J.F. Allen may obtain possible contract adjustments due to unanticipated conditions arising from an Underground Facility not indicated in the Contract Documents. (JA 3537-38; JA 3592-93.)

Under West Virginia law, "[i]t is the province of the court and not of the jury, to interpret a written contract," which must be applied according to its terms. *Stephens v. Bartlett, et al.*, 118 W.Va. 421, 191 S.E. 550, 552 (1937) (citations omitted). In a breach of contract case, the contract is the law vis-à-vis the parties and West Virginia recognizes that "[w]here parties contract lawfully and their contract is free from ambiguity or doubt, their agreement furnishes the law which governs them." *Rollyson v. Jordan*, 205 W.Va. 368, 376, 518 S.E.2d 372, 380 (1999) (citations omitted). Moreover, as "[i]t is the duty of the court to construe contracts as they

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[8] *See, e.g., Umpqua River Navigation Co. v. Crescent City Harbor Dist.*, 618 F.2d 588 (9th Cir. 1980) (holding that bidders are required to inspect documents which are brought to their attention in bidding materials).

[9] *See* JA 0042 ¶ 2 ("The exact location and protection of all utilities and structures are the responsibility of the Contractor. During construction, the Contractor shall use due diligence to protect from damage all existing utilities and structures whether shown on the plans or not."); JA 0042 ¶ 4 ("Cost for all [subsurface utilities and structures] exposed shall be incidental to the various items of work."); JA 0042 ¶ 5 ("If damage is caused, the Contractor shall be responsible for repair or restoration of the damaged service lines . . . at no extra cost to the Owner."); JA 0042 ¶ 6 ("The Contractor will be solely responsible for all costs resulting from the damage, repair, restoration, and resulting contingent damage of affected utilities.").

are made by the parties thereto and to give full force and effect to the language used," it was the province of the Circuit Court to evaluate the unambiguous contract in this case. *Id.*

Under the circumstances presented here, the Circuit Court failed to rule that there can be no recovery for delay damages when delays are specifically anticipated by the parties and contemplated in the contract. *See, e.g., Corinno Civetta Const. Corp. v. City of New York*, 67 N.Y.2d 297, 314–15, 502 N.Y.S.2d 681, 689 (N.Y. 1986) (recognizing principle that, if the owner makes a factual showing sufficient to establish as a matter of law that the delays which actually occurred were initially contemplated by the parties as potential events on the project, and the contractor does not demonstrate triable issues of fact as to whether the owner acted in bad faith or with reckless indifference to the contractor's rights, the contractor's delay claim will be subject to dismissal). When delays are contemplated in the contract, as they were here, they become reasonably foreseeable and delay damages may not be recovered. Here too, the evidence at trial demonstrated that the alleged "delay damages" are barred by the contract. As a result, J.F. Allen's breach of contract action fails as a matter of law.

2. The Circuit Court Erred in Denying CSB Judgment as a Matter of Law Because J.F. Allen Failed to Show that It Complied with the Contract Terms.

At trial, J.F Allen pointed to approximately 17 incidents involving unmarked or mismarked lines and utilities which allegedly caused the additional "delays and costs" for which it sought relief from CSB. However, J.F Allen completely failed at trial to show that it complied with the parties' Agreement and satisfied the conditions necessary to make and preserve any claim alleged. To state a single valid claim, J.F. Allen needed to show that it satisfied three prerequisites: (i) prompt written notice to both CSB and the Engineer, (ii) the Engineer's determination that a change to the contract is necessary; and (iii) the issuance of a Change Order. (JA 3537-38 ¶ 4.04(B).) The evidence on these contractual prerequisites is entirely lacking.

In addition, it was established at trial that the contract at issue provides for a limited means for possible adjustment to the contract documents. As a requirement of the contract, J.F. Allen was to submit its requests for payment, and B&N as Engineer was to review the substantiated request and recommend payment to CSB. B&N was thus required to make recommendation for payment to CSB *before* CSB could make payment to J.F. Allen. Furthermore, in order to get paid for the costs and delays of the nature alleged, J.F. Allen was required to provide written notice of its claim no later than thirty days after the start of the event giving rise to the claim and substantiate no later than sixty days, and then allow B&N to render a decision. (JA 3565-66 ¶ 10.05.)

As a preliminary matter, it is not in dispute that J.F. Allen breached the contract. In fact, J.F. Allen's counsel admitted during his opening statement at trial that J.F. Allen breached its contract with CSB by not satisfying the conditions necessary to make and preserve any claim alleged in accordance with the contract:

> Here's what you need to remember in this case . . . "All claims for extra compensation must be made in writing and submitted pursuant to a strict guideline." ***You guys, we can stop the case right now. If you hold us to that right there, we lose because we didn't follow that . . . .***

(JA 1503 (emphasis added).)

At trial, J.F. Allen only introduced evidence of occasional modification to the contract with regards to the Change Order process, and those changes were mutually agreed upon by the parties. J.F. Allen introduced no evidence at trial to support any mutual agreement or modification to the Claims process. The contract provisions with regards to the Claims process remained intact and J.F. Allen was required to follow them in order to properly submit Claims for extra compensation during the life of the contract—and J.F. Allen admits it did not do that.

Indeed, Greg Hadjis, President of J.F. Allen, admitted at trial that J.F. Allen did not provide written notice of certain alleged Claims (for which it seeks relief) to the Engineer and CSB. Mr. Hadjis further admitted that J.F. Allen waited approximately *six months* after J.F. Allen requested Final Payment and recommendation for Final Payment had been made to submit its Claim for Equitable Adjustment, and admitted that J.F. Allen did not follow the contract protocols and timing requirements in making its Request for Equitable Adjustment.[10] In fact, Mr. Hadjis did not even read the contract, despite being responsible for all roles at J.F. Allen and having access to the Contract Documents.[11]

Because of this, Mr. Hadjis admitted that he was not aware of the Claims process, so he could not be certain during the course of the work that J.F. Allen made Claims to the Engineer on time.[12] In fact, requests for Change Orders were submitted in accordance with the contract up until Alan Shreve, who was initially responsible for submitting Claims at J.F. Allen, left the company. Mr. Shreve was clear at trial that J.F. Allen submitted and filed Claims while he was still with the company due to the fact that J.F. Allen had all the necessary information in its possession to substantiate a Claim in accordance with the contract:

Q. You could do it on a monthly basis because you've got 30 days, right?
A. Right.
Q. Okay. So you don't have to -- you could just do one claim form, right?
A. Okay.
Q. Because you've got all that information right there in your hands.
A. Right.
Q. The engineer doesn't have it because he doesn't get your incident reports.

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[10] *See* JA 1776 ("I said I admit that I did not do that."); JA 1777-78 (admitting Plaintiff did not request additional time to substantiate claims); JA 1879 ("We did not provide a list of claims."); JA 1880 (admitting that the Request for Equitable Adjustment was submitted six months after Plaintiff requested final payment).

[11] *See* JA 1885 ("Q: You were asked whether or not you had read the contract before you bid. . . And your answer was? A: My answer was no."); JA 1903 ("Q: And we find ourselves here in 2018 in court and you've never made an inquiry as to who read the contract? A: Not that I recall.").

[12] *See* JA 1780 ("Q: Okay. But you weren't familiar with it [the claims process], so you couldn't make sure that [Plaintiff's team] submitted a claim on time, right? A: No.").

A. Right.
Q. The owner doesn't have it because he didn't get your incident reports, right?
A. Right.
Q. So -- and that's the reason you guys are supposed to substantiate the claims, because you've got all the information.
A. Okay.
. . . .
Q. Section 10.05 that you're familiar with tells you to give a written notice?
A. Yes.
Q. And substantiate in 60 days?
A. Yes.
Q. And you guys had the information weekly to do that; didn't you?
A. Yes.
Q. You could have done it weekly, monthly, whatever you wanted, right?
A. Yes.
Q. And you weren't shy about filing the claims because you did it at least four times, right?
A. Yes.

(JA 2313; JA 2320-21.)

However, once Mr. Hadjis became aware of the Claims process in April 2013—after Mr. Shreve left the company—he still did not submit a proper written claim.[13]

J.F. Allen's overly broad interpretation of the waiver doctrine at trial and after trial attempts to excuse J.F. Allen's noncompliance and demonstrate that it was somehow "okay" that J.F. Allen did not follow the required Claims procedures under the contract because CSB and J.F. Allen on occasion mutually agreed that Change Orders (a separate process under the contract) could be submitted after the work was completed in certain situations. The parties' occasional, separate and independent agreements as to the Change Order process—only one aspect of the contract—does not excuse J.F. Allen from complying with the contractual Claim procedures or the contract as a whole. Regardless of when the agreed-upon work is completed, the documentation must still be submitted per the contract procedure for contractor to get paid.

[13] *See* JA 1781 (admitting that once he became familiar with the claims process in April 2013, Plaintiff was still not following the claims process); *but see* JA 2333-34 ("Q: And if you need a claim for something then you file the claim, right? A: That's right.").

Under the waiver doctrine, when a construction contract contains language to the effect that its terms cannot be changed without the written consent of the parties thereto, then such written consent is required unless this condition is waived by the parties by their conduct or through circumstances that justify avoiding the requirement. Syl. Pt. 1, *Pasquale v. Ohio Power Co.*, 186 W.Va. 501, 413 S.E.2d 156 (1991). "[A]n oral contract changing the terms of a written contract must be so specific and direct that it leaves no doubt that the parties intended to change what they previously solemnized by formal contract." *Troy Mining Co. v. Itmann Coal Co.*, 176 W. Va. 599, 606, 346 S.E.2d 749 (1986) (citations omitted). The burden of proof to establish waiver of a contractual right is on the party claiming the benefit of such waiver and is never presumed. *Id.* Where an alleged waiver is implied through a party's conduct, the party asserting waiver must prove, by clear and convincing evidence, that there was a meeting of minds on the alteration. "And, even when that burden has been met, the new contract will be held to depart from the first only to the extent that its terms are inconsistent with the written document." *Id.*, 176 W. Va. at 606. ***Thus, a modification changes only the specific term(s) and leaves the remainder of the written agreement intact.***

At trial, CSB's Operations Manager, Tim Haapala, stated that in the types of construction projects like the Project here, strict compliance of the contract is sometimes not realistic and by mutual agreement certain work may be done before the work is reduced to a change order (i.e. in emergencies, by mutual agreement, etc.).[14] This, however, does not mean CSB did not follow the contract under the circumstances, nor does it mean that other provisions of the contract were altered in any way. Mr. Haapala explained that CSB treated J.F. Allen fairly when circumstances

[14] *See* JA 2738 ("In these types of projects, sometimes that occurs. The work gets done before it's reduced to this change."); JA 2739-40 ("Q: It follows - - that parties have agreed to treat each other differently, right? And they're working under that agreement, right? A: You hit it on the head, Mr. Johnstone, mutually agreed, that's correct.").

arose that warranted that the parties agree to Change Orders being submitted after the work agreed to be done was completed.[15] Similarly, B&N's Timothy Utt echoed Mr. Haapala's testimony that "there's situations during construction that the owner, the contractor, and the engineer would be unaware of and encountered that the work would be constructed and it would be not uncommon for it to be identified after the work was completed." (JA 2959.) However, those instances were to be agreed upon by the parties, which did not always occur due to the fault of J.F. Allen. (*See* JA 2968 ("I'm stating that there was work that the contractor did that was unknown at the time that was a change order and that it wasn't known until after. The parties did not have knowledge of that event occurring.").)

Overall, J.F. Allen failed to show CSB waived its right to rely on strict adherence to the formal notice or Claim provisions of the contract. The testimony at trial demonstrates that CSB's fairness towards J.F. Allen during the Change Order procedure allowed for the parties to modify specific requirements when *mutually agreed upon by the parties*.[16] Consistent with the nature of public construction contracts, however, on isolated modification does not mean the parties' overall obligations cease to exist. The parties do not just throw the contract out the window. In such a scenario, there would never been an enforceable construction contract, and ratepayer funds may freely be wasted in litigation because contractors supposedly owe no duties or obligations to owner, and vice versa, when situations arise whereby the work has to be completed before the change order or documentation can be submitted.

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[15] *See* JA 2743 ("Those two [change orders] that were presented that were *mutually agreed upon* with the engineer and the Charleston Sanitary Board were after the fact, absolutely") (emphasis added).

[16] *See* JA 2752 ("[T]here's things that occur along the way that it doesn't follow to a T. . . The parties mutually agreed with us. . . This was a major discussion in the project that J.F. Allen agreed to do and they didn't hold up on their end of it.").

Based on the record established at trial, the breach of contract claim against CSB can and should be resolved as a matter of law notwithstanding the jury's verdict.[17] J.F. Allen's theory of actual notice or waiver still did not excuse its noncompliance with mandatory contractual Claim procedures. The contractor's general notice that it expected additional compensation does not amount to Claims under the contract and does not excuse contractor from complying with the contractual Claim procedures. Accordingly, the evidence at trial in fact proved that CSB did not breach the contract and that J.F. Allen did not satisfy its burden under the contract. At trial, J.F. Allen could not prove its breach of contract claim against CSB under the plain terms of the contract, and thus, the Circuit Court erred in denying CSB judgment as a matter of law.

B. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN ITS EVIDENTIARY RULINGS.

A trial court's evidentiary and procedural rulings, as well as its application of the Rules of Evidence, are subject to appellate review under an abuse-of-discretion standard. *Sneberger v. Morrison*, 235 W.Va. 654, 776 S.E.2d 156 (2015); *State v. Kaufman*, 227 W.Va. 537, 711 S.E.2d 607 (2011). Under West Virginia Rule of Evidence 103, to warrant reversal, two elements must be shown: error and injury to the party appealing. W.Va. R. Evid. 103(a). Error is harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party

[17] In a case decided in the Eleventh Circuit, a jury found that the contractor was entitled to recover damages caused by owner's interference with the contract. The Court set aside the verdict for the contractor because the contractor failed to make a proper request for an extension of time, so it was not entitled to relief and a determination of whether the owner interfered with the contractor's performance was therefore unnecessary. *Marriott Corp. v. Dasta Const. Co.*, 26 F.3d 1057 (11th Cir. 1994); *see also State Sur. Co. v. Lamb Const. Co.*, 625 P.2d 184 (Wyo. 1981); *Allen-Howe Specialties Corp. v. U.S. Constr., Inc.*, 611 P.2d 705 (Utah 1980). Similarly, in a 2003 Washington case, a contractor sued the county for a breach of a sewer construction contract. Like the contract here, the contract provided a mandatory formal claim procedure if the protest procedures failed to provide contractor with a satisfactory resolution. The Court determined that actual notice did not excuse compliance with mandatory contractual claim procedures and that the contractor's general notice to the county that it expected additional compensation did not amount to claims under the contract and did not excuse contractor from complying with the contractual claim procedures. *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wash. 2d 375, 78 P.3d 161 (2003).

assigning it, and where it in no way affects the outcome of the trial. *Reed v. Wimmer*, 195 W.Va. 199, 465 S.E.2d 199 (1995). Here, the Circuit Court abused its discretion in (1) admitting J.F. Allen's expert report into evidence and (2) permitting one of J.F. Allen's "experts" to testify at trial. The errors were not harmless—such errors affected CSB's substantial rights and the outcome at trial.

1. The Circuit Court Erred in Admitting into Evidence the Expert Report Prepared by J.F. Allen's Expert, Bryon Willoughby, Which Report Was, in Fact, Considered by the Jury Resulting in Substantial Error.

Overruling the objections of both B&N and CSB, the Circuit Court committed reversible error by admitting the "Request for Equitable Adjustment" ("REA") document authored by J.F. Allen's expert, Byron Willoughby, into evidence as Exhibit 3. (JA 2087.) Specifically, Exhibit 3 was J.F. Allen's attempt to establish its damages in this case via the REA submitted approximately six months *after* J.F. Allen's request for Final Payment and B&N's recommendation for Final Payment had been made (i.e. when the contract was already over). For the reasons discussed below, the REA should not have been submitted to the jury as substantive evidence for consideration during deliberations.

On days one and two of the trial, CSB objected to the admission of the REA into evidence as an expert report and as a hearsay document. (JA 1574; JA 1618; JA 1622.) While the lower Court was considering B&N and CSB's objections, J.F. Allen represented that the document constituted its claim and should be admitted. (JA 1571-79; JA 1622.) J.F. Allen represented that, at the time it was prepared, the REA was not prepared by an "expert," but by a "consultant," and that it was not prepared in anticipation of litigation. (JA 1573.) Supposedly, Mr. Willoughby and J.F. Allen worked together to create the document. (JA 1572-73.)

Importantly, during day two of the trial, the Circuit Court agreed with Defendants that Exhibit 3 was "Mr. Willoughby's document." (JA 1615.) The Circuit Court also noted that J.F.

Allen's counsel did not refute that Exhibit 3 was a hearsay document. (JA 1622-23.) With these remarks, however, the Circuit Court decided to delay ruling on the admissibility of Exhibit 3 and take up the matter at a later time. (JA 1624.)

Through testimony in the case by J.F. Allen's management[18] and by Mr. Willoughby himself, it was revealed that the document was prepared solely by Mr. Willoughby in advance of litigation and at the express direction of J.F. Allen's attorney:

> Q: Okay. What did you ultimately do for J.F. Allen?
>
> A: Ultimately what I did is I reviewed the plans, I reviewed the contract. I went through their documentation . . .—and certainly had conversations with them about things they thought that could potentially—they could recover money for. . .and did an evaluation of what I thought they could recover money for. There may have been some things that I didn't believe they could recover money for. I put that together, related it to the contract, referenced the documentation, and then I did a cost evaluation, basically determining what the estimated costs was related to those issues.
>
> ...
>
> Q: What is Exhibit 3, Mr. Willoughby?
>
> A: Exhibit 3 consists of a cover letter dated May 5, 2014, from J.F. Allen to Robby Holbrooke of Burgess and Niple. Attached to that is the J.F. Allen request for equitable adjustment that I developed.
>
> ...
>
> A: ...Well, at the time I was writing the report, it was basically giving a narrative of the project and in J.F. Allen's view what had happened. I wasn't there every day. I didn't deal with these folks. I read some punch lists. I read some of the work that had to be done. I read some emails. It was just a way of showing that J.F. Allen's - - substantiating J.F. Allen's view that they were being required to do a lot more work, and it's costing more money. . . .
>
> ...
>
> Q: Did you file a Freedom of Information Act with the [CSB]?
>
> A: I filed no Freedom of Information Acts.
>
> Q: Did you talk to any of the employees of the Sanitary Board?
>
> A: No.

[18] *See* JA 1558 ("I actually had to hire a third-party expert to help me wade through [capturing the true costs].").

> Q: Did you make any attempt to talk to the employees of [B&N] about this?
>
> A: I made no attempts.
>
> . . .
>
> Q: So the ladies and gentleman of the jury can understand that you're simply repeating in your report what J.F. Allen has given you and told you? One side of the argument.
>
> A: Well, certainly, that's what I have access to was to ask them specific questions and compare that to the documentation and corroborate it. As an expert witness, I have - - in preparing this type of quantification, I typically don't have access to the adverse parties.

(JA 2084-86; JA 2236; JA 2239-40; JA 1447 ("[E]xhibit 3 was prepared by [J.F. Allen's] expert").)[19]

During Mr. Willoughby's testimony, J.F. Allen's counsel moved for Exhibit 3's admission into evidence and CSB objected again based on its previous objections. The Circuit Court, however, overruled the objections and admitted the REA without explanation despite the testimony and evidence in the record in support of non-admissibility. (JA 2087.) J.F. Allen's expert report should not have been submitted to the jury as substantive evidence. The admission of this document was highly prejudicial to the Defendants below. By admitting the expert report, the Circuit Court improperly permitted the jury to take this report of J.F. Allen's expert into the jury room for deliberations. (JA 1618.) *See* W.Va. R. Evid. 103(a), (d) ("To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.").

Additionally, the document is itself hearsay and contained within it are multiple hearsay statements from J.F. Allen—thus constituting double hearsay. (JA 1619; JA 1622.) *See* W.Va. R. Evid. 802; *see also State v. Lambert*, 236 W.Va. 80, 96, 777 S.E.2d 649, 665 (2015) ("[A] party cannot call an expert simply as a conduit for introducing hearsay under the guise that the

[19] *See also* JA 1573-74 ("You know, the expectation at the time [of the REA's preparation] was this would be litigated because of request to correct the adjustment.").

testifying expert used the hearsay as the basis for his testimony") (citations omitted). As the REA contained opinions and estimations by a third-party that were offered for their truth, the REA was inadmissible hearsay. For that independent reason, the document should not have been admitted.

Importantly, the Circuit Court's error in this regard was not harmless. It is clear that the jury consulted the document because the jury specifically asked for a portion of it during deliberations. During deliberations, the jury did not understand how to calculate breach of contract damages against CSB, and it sent notes to the Court for assistance. Counsel for J.F. Allen had previously used a demonstrative exhibit poster board listing the cost information provided by Mr. Willoughby's REA, and the jury sought clarity on how to find that information for their breach of contract damages calculation. (JA 3319-20.)

Not only did the jury actually utilize Exhibit 3, but the decision to admit the REA into evidence clearly affected the outcome of the trial. For instance, the poster board utilized by J.F. Allen for demonstrative purposes during the trial listed the amount of total damages J.F. Allen sought against both CSB and B&N—albeit under two different theories of liability—for a total amount of $1,252,392.43. (JA 3297-98.) However, the REA lists $1,309,943, and the jury awarded $1,300,000.20 against CSB alone, exceeding the total amount of damages sought against the two defendants.[20] Accordingly, the error in admitting the report into evidence was not harmless, and it clearly affected CSB's substantial rights and the outcome at trial.

2. The Circuit Court Erred in Allowing J.F. Allen to Proffer Expert Testimony from Charles Dutill, Who Admitted He Lacked the Relevant Expertise or Experience and Who Is Not a Licensed Engineer in the State of West Virginia, Resulting in Confusion of the Issues, Misleading the Jury, and Unfair Prejudice to CSB.

[20] J.F. Allen does not dispute this. *See* JA 1233 ("The jury's verdict awarding damages against the CSB . . . represents a close approximation of the amount claimed as contract damages in JFA's [REA].").

The Circuit Court erred in admitting the testimony of J.F. Allen's "expert," Charles Dutill, who is not a licensed professional engineer in West Virginia. (JA 1993; JA 2022.) At the time of the trial, Mr. Dutill had never worked in the Project's geographic region, had not designed a sewer system like the one at issue, had not administered a contract like the one at issue in over sixteen years, had never used the EJCDC General Conditions that governed this case, and, most importantly, had admitted that he does not consider himself an expert on this contract and the EJCDC general conditions. (JA 2025-73.)[21]

Pursuant to West Virginia Code § 30-13-2, "[i]t is unlawful for any person to practice or to offer to practice engineering in this state, as defined [by code] . . . unless the person has been duly registered or exempted under the provisions of this article." West Virginia Code § 30-13-3(e) has defined the practice of engineering as follows:

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

W.Va. Code § 30-13-3(e) (in part) (emphasis added).

Moreover, Rule 702 of the West Virginia Rules of Evidence states that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or

[21] CSB timely objected to Mr. Dutill serving as an expert witness. (JA 0632-42; JA 1983-84.)

to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." W.Va. R. Evid. 702(a). In determining who is an expert, a lower court should conduct the following two-step inquiry: (1) whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact; and (2) whether the proposed expert's area of expertise covers the particular opinion as to which the expert seeks to testify. Syl. Pt. 5, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

West Virginia law is clear that such testimony should be excluded when the supposed expert acknowledges that he or she is not qualified to render an opinion on a particular matter. *See Sneberger,* 776 S.E.2d at 167 ("Given Ms. Deem's admission that she is not an expert with regard to masonry issues, the circuit court did not abuse its discretion in finding she lacked the requisite education or experiential qualifications to render an opinion regarding whether the chimney construction was defective."); *see also* Harry A. Gair, 2 AMJUR TRIALS 585 § 21 (1964).

At trial, Mr. Dutill gave opinions regarding the duties of an engineer and the standard of care, which was a central issue as to B&N's involvement in the Project, and he was qualified by the Circuit Court as an expert in civil engineering with respect to sewer projects. (JA 1981; 1995-96.) He also claimed to "understand how these contracts . . . work," even though he admitted he was not an expert in the specific contract at issue. (JA 2029.) Because Mr. Dutill is not licensed in West Virginia, he was prohibited from acting as an engineer in West Virginia, including undertaking any "consulting, investigation [or] evaluation . . . of engineering works or

systems" like the sewer construction project at issue in this case. Thus, Mr. Dutill lacked the "minimal educational or experiential qualifications" required to be qualified as an expert.

Moreover, permitting Mr. Dutill to testify as an expert engineer caused undue prejudice to CSB as Mr. Dutill was testifying to the jury as an "expert" although he had no qualifications to be considered one and admitted he was not in fact an expert. He testified more directly to the actions of B&N, but in light of J.F. Allen's theory at trial that B&N was CSB's representative with regards to the Project, CSB was unduly prejudiced by his testimony. (JA 1500.) *See* W.Va. R. Evid. 403. Notably, J.F. Allen's theory at trial was that it was entitled to payment from CSB under the REA as a result of the negligence of the engineer, B&N. (JA 2021.) Thus, qualifying and permitting Mr. Dutill to testify as an expert engineer ran contrary to the West Virginia Code and the Rules promulgated by the West Virginia State Board of Engineers, and such warrants reversal.

C. THE CIRCUIT COURT ERRED IN NOT GRANTING CSB A NEW TRIAL ON BOTH LIABILITY AND DAMAGES.

1. The Circuit Court Erred in Entering Judgment Based on the Jury's Inconsistent and Invalid Verdict.

Over CSB's objections, the Circuit Court entered judgment based on the jury's inconsistent verdict that was against the clear weight of the evidence. As clearly contemplated by Rule 49 of the West Virginia Rules of Civil Procedure, when a verdict rendered by a jury is inconsistent, the circuit court may return the jury for further consideration of its answers and verdict (in an attempt to resolve the inconsistency) or the court may order a new trial. Here, the verdict rendered triggered the procedures and remedies of Rule 49. Under Rule 49, if a verdict rendered by the jury is inconsistent in that the answers to special interrogatories 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.***" W. Va. R. Civ. P. 46(b) (in part) (emphasis added). In general, a court should not direct that an inconsistent verdict be entered.

Generally, a verdict is inconsistent when there is no rational, non-speculative way to reconcile two essential jury findings. Franklin D. Cleckley, *Litigation Handbook on West Virginia Rules of Civil Procedure* 1173 (5th ed. 2017). To determine whether a conflict in the verdict can be reconciled, a trial court must ask whether the jury's answers could reflect a logical and probable decision on the relevant issues submitted. *Id.* If a trial judge concludes that an inconsistent verdict reflects jury confusion or uncertainty, the trial judge has a duty to clarify the law governing the case and resubmit the verdict for jury decision. *Jones v. Southpeak Interactive Corp. of Delaware*, 777 F.3d 658, 674 (4th Cir. 2015).

To set aside a jury verdict, the Court must find that the verdict was against the clear weight of the evidence, based on false evidence, or will result in a miscarriage of justice. Syl. Pt. 3, *In re State Public Bldg. Asbestos Litig.*, 193 W.Va. 119, 454 S.E.2d 413 (1994). A new trial should be granted where it is "reasonably clear that prejudicial error has crept into the record that substantial justice has not been done." *Sneberger,* 776 S.E.2d at 175. Moreover, "a verdict of a jury will be set aside where the amount thereof is such that, when considered in light of the proof, it is clearly shown that the jury was misled by a mistaken view of the case." Syl. Pt. 3, *Raines v. Faulkner*, 131 W.Va. 10, 48 S.E.2d 393 (1947).

Here, the jury's assessment of damages is inherently inconsistent given the facts and law in the record. As reflected in the verdict, at Part II, Question 3, the jury listed $1,300,000.20 for the breach of contract damages assessed against CSB while in Part IV, Question 3, the jury listed $3,000,000.20 against B&N for negligence. (JA 1124-28.) Because J.F. Allen sought approximately $1.25 million total in damages for its one injury under two distinct theories of

liability, there was no non-speculative way for the Circuit Court to reconcile the jury's findings between the Defendants, and a new trial was necessary. (JA 3297-98.) Moreover, the inconsistency of the verdicts goes to the jury's liability finding, not just its award of damages.

Ultimately, the jury's logically incompatible assessment of damage awards on the verdict form reveals a fundamental misunderstanding or confusion of the jury. This conclusion is supported by the jury's comments and conduct during its deliberations as well. On January 31, 2018, the jury began its deliberations after receiving the Circuit Court's instructions of law. As the jury deliberated, the jury foreperson brought notes to the Court. (JA 1179-85.) It became clear through the jury's notes and conduct that the jury was profoundly confused as to what it was supposed to do in rendering its verdicts and assessing damages. For example, the jury foreperson sent the Court a note about how to assess the breach of contract damages against CSB: "Do we assess the dollar amount for Question 3 on Part II? And, if yes, on what basis?" (JA 1179-85; JA 3315; JA 3318.) 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?" (JA 1179-85; JA 3318-19.) In addition, the jury sent a note to the Court regarding the amount in damages requested by J.F. Allen: "Mr. Johnstone had a chart that had a break-down of damages asked for. What exhibit is that?" (JA 1179-85; JA 3319-20.) 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 prematurely returned an incomplete verdict form to the Circuit Court as "complete." However, the jury left blank the amount assessed in

compensatory damages against B&N for negligence in Part IV, Question 3. (JA 3327-34.) At this point, prior to a complete verdict being rendered by the jury, counsel for CSB objected and requested the Circuit Court declare a mistrial. (JA 3327-34.) After consulting with counsel, the Circuit Court sent a note to the jury to point out its error: "Was it your intent to award 0 damages against Burgess & Niple?" (JA 1179-85; JA 3335-36.) In response, 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?" (JA 1179-85; JA 3336-37.) After originally leaving the amount in damages against B&N blank, which seemed to indicate a $0 damage award, the jury ultimately returned a shocking verdict of $3,000,000.20 against B&N. (JA 3337-38.)

The total damage award is more than three times the full amount of J.F. Allen's alleged injury. Not only is the damage award impermissibly excessive, but the verdict is clearly inconsistent as there is no rational, non-speculative way to reconcile the jury findings against the two Defendants, and calls into question the jury's liability determination as well. In fact, because of the jury confusion, it appears the verdict impermissibly awards negligence damages against CSB, which is prohibited. Under the West Virginia Governmental Tort Claims and Insurance Reform Act, CSB as a municipal utility is not liable for another party's negligence. *See* W. Va. Code § 29-12A-4(b)-(c) (recognizing limited exceptions to immunity). This is not a joint and several liability case; CSB can only be held liable for breach of contract damages, and the $1.3 million award—in excess of the $1.25 million total requested—calls into question CSB's liability. *See US ex rel Pileco, Inc. v. Slurry Systems, Inc.*, 804 F.3d 889, 892 (7th Cir. 2015) (determining that retrial of breach of contract claims was warranted, where ". . . the jury's confused responses to the damages provisions in the verdict form called into doubt the dependability of the jury's other findings"); *Wood v. Holiday Inns, Inc.,* 508 F.2d 167, 175 (5th

Cir. 1975) ("Where verdicts in the same case are inconsistent on their faces indicating that the jury was confused, a new trial is certainly appropriate and may even be required.").

There are other examples that came up during, and after, the course of the trial demonstrating juror confusion and, at a minimum, a disregard of the Circuit Court's basic instructions. For example, the Jury Foreperson, on her public Facebook page, was posting about her jury duty despite the Court's instructions not to discuss the trial with anyone or via social media. (JA 1186-91.) In addition, one of the other members of the jury appeared for jury duty for a trial that began on February 5, 2018, *only five days after* the verdict was rendered against CSB. During *voir dire*, this juror indicated that she had participated in the deliberations to decide the verdict rendered in this case, yet she could not communicate to the attorneys what this case was about, or even who won.

Courts regularly order new trials when verdicts are inconsistent and cannot be reconciled with what the instructions given by the Court or what the law requires. [22] For instance, in *US Equal Employment Opportunity Commission v. CONSOL Energy, Inc.*, the Northern District of West Virginia determined that a judge who concludes that an inconsistent verdict reflects jury confusion or uncertainty has the duty to clarify the law governing the case and resubmit the verdict for a jury decision. 2016 WL 538478, at *10 (N.D.W.Va. Feb. 9, 2016). The Court cited

[22] *See, e.g., Kosmynka v. Polaris Indus., Inc.*, 462 F.3d 74, 87 (2d Cir. 2006) (vacating a judgment because of an inconsistent verdict finding negligence but no strict liability when the court instructed the jury "negligence mandated a corollary finding of strict products liability"); *Custer v. Terex Corp.*, 196 F. App'x 733, 737-38 (11th Cir. 2006) (unpublished) (remanding for a new trial because it was inconsistent for a jury to award damages that is 30% of the stipulated amount when the defendant is more than 50% at fault under the law); *Essex v. Prince George's Cty Maryland*, 17 F. App'x 107, 117 (4th Cir. 2001) (unpublished) (granting a new trial where the court could not harmonize jury verdict reaching different outcomes on claims that hinged on the same underlying contentions); *Fox v. Dynamark Sec. Ctrs., Inc.*, 885 F.2d 864 *4 (4th Cir. 1989) (remanding for a new trial due to inconsistent verdict because "there is no theory, legal or factual" on which the inconsistent verdicts can be reconciled"); *Frain v. Andy Frain, Inc.*, 660 F. Supp. 97, 100 (N.D. Ill. 1987) (ordering new trial due to inconsistent verdict where jury reached different conclusions on three claims that required the same proof).

Jones v. Southpeak Interactive Corp. in making this determination. In *Jones*, when the jury found liability but awarded no damages, the Court agreed that the jurors "clearly were confused" and held that the district court did not err when the judge offered a supplemental jury instruction and allowed the jury to reconvene for deliberation because "[i]n the process, the court identified the source of its confusion but was careful to state that it did not wish to influence the jury's decision." 777 F.3d 658, 674 (4th Cir. 2015).

Here, after two unsuccessful attempts, the Circuit Court concluded that the source of the confusion would not be resolved and in error elected not to re-submit to the jury any further clarifying instructions for the jury to attempt to correct the inconsistent verdict. *See* W.Va. R. Civ. P. 49. Instead, it dismissed the jury and directed counsel to submit post-trial briefs. (JA 3340-43.) The resulting verdict, however, is clearly inconsistent and improperly awarded excessive damages based on sheer speculation. The jury's notes during their deliberations indicate that the jury mistakenly thought it could just "come up with" the damages amounts irrespective of the evidence. Moreover, the jury's submissions during its deliberations and resulting verdict clearly reflect that—for whatever reason—the jury did not follow the Circuit Court's instructions regarding evidence and damages. In *Hopkins v. Coen*, the Sixth Circuit determined that when faced with inconsistent verdicts, the trial court had an initial duty to send the jury back with instructions in order to attempt to alleviate the confusion. The Court determined, however, that remand for a new trial was appropriate because the judgments could not be reconciled:

> Were the errors in the verdicts merely clerical in nature, the problem would easily be remedied. [citations omitted] Were this Court able to divine that one of the judgments in these consolidated cases was intelligently rendered by the jury, we should remand only the ambiguous one for retrial. [citations omitted] ***But the error is not merely clerical: the verdicts, as returned, reflect a lack of understanding on the part of the jury.*** Because the confusion appears to have

> been general, and insofar as retrial of one of these consolidated cases will require proof of facts of the other, the judgments entered . . . against the defendants . . . must be remanded to the District Court for a new trial.

431 F.2d 1055, 1059–60 (6th Cir. 1970) (emphasis added).

A new trial is also the appropriate remedy here. Because the Circuit Court did not resubmit the final verdict before the jury was discharged, and because it is not possible now to reconcile the inconsistent verdict without additional factual findings, the verdict as a whole should be set aside and a new trial granted.

2. The Circuit Court Erred in Ordering a New Trial on Damages Only, where the Jury's Fundamental and Pervasive Confusion Impacted Both Its Assessment of Damages and Liability.

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). 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).

Moreover, "[t]he jury should not assess damages according to their fancy, or base them upon visionary estimates, probabilities or chances. The verdict must be based upon facts proven and reasonable deductions therefrom." *Pittsburgh-Wheeling Coal Co.*, 145 S.E. at 275. West Virginia courts have discussed the award of new trials because of excessive jury verdicts. The standard to assess whether a new trial should be awarded because of an excessive jury verdict is

that the "damages. . . must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption." *Addair v. Majestic Petroleum Co., Inc.* 160 W.Va. 105, 110, 232 S.E.2d 821, 824 (1977) (citations omitted).

It is clear in this case that the jury verdict cannot stand. As discussed above, J.F. Allen requested approximately $1.25 million in damages total for the overall injury alleged, yet the jury awarded J.F. Allen damages in the amount of approximately $1.3 million against CSB for breach of contract and $3 million against B&N for negligence. J.F Allen—which brought two distinct legal theories for its single injury—clearly recovered in excess of a single recovery. The contract at issue here was between CSB and J.F. Allen, yet review and recommendation by B&N for payment was necessary *before* CSB could pay J.F. Allen per requirement under the contract. As established at trial, no recommendation to CSB was made. (JA 4507.) Liability is thus called into question due to the excessive damage awards against both Defendants below allowing J.F. Allen to recover more than one complete satisfaction for the overall injury alleged, and a new trial must be granted on both liability and damages to prevent prejudice from the jury's fundamental error. Moreover, there is no evidence to support the Circuit Court's preservation of the jury's liability verdict. The excessive figure and the sequence of events that lead to it is proof that the jury was profoundly confused about both the liability and damages aspect of its deliberations and did not understand the issues of the case with respect to either.

Indeed, the Circuit Court acknowledged at the trial that the verdict rendered "could be problematic. It may not be based on law, reason, or judgment." (JA 3342-43.) The Circuit Court also acknowledged that remittitur of the verdict was impossible because the verdict was inconsistent and could not be reconciled with the instructions given by the Circuit Court during

the trial or with the law of West Virginia. (JA 1388-1431; JA 5144-93.) Despite these findings by the Circuit Court, it still elected to preserve the jury's liability determination on the inconsistent verdict and grant the Defendants a new trial on damages only. (JA 1388-1431; JA 5144-93.) While the Circuit Court properly set aside the excessive damages verdict, it erred in ruling that a new trial on damages alone should be held instead of a new trial on both damages and liability.

VI. CONCLUSION

Based on the foregoing facts and authorities, The Charleston Sanitary Board of the City of Charleston, West Virginia respectfully requests that this Honorable Court enter an Order reversing the Circuit Court's *Order Granting Defendants a New Trial on Damages and Denying Defendants' Motions for Renewed Judgment as a Matter of Law* as to its determination on judgment as a matter of law. In the alternative, CSB requests that this Honorable Court remand the matter for a new trial on both liability and damages in accordance with this Court's instructions.

Respectfully submitted,

THE CHARLESTON SANITARY BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA

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