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 REPLY 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 Reply Brief in opposition to J.F. Allen Corporation's ("Respondent" or "J.F. Allen") Respondent Brief, as follows:

I. SUMMARY OF ARGUMENT

The Respondent Brief filed by J.F. Allen fails to defeat CSB's Assignments of Error presented in this appeal. In fact, the arguments J.F. Allen now raises on appeal should be rejected by the Court because they are defeated by J.F. Allen's own position *during the trial itself.* Moreover, there is no question that the jury failed to properly discharge its duties under West Virginia law and the fact that an error occurred is not genuinely in dispute. Instead, the question is whether the error that resulted was akin to an error that could have been fixed by the Circuit Court, or whether correction of the error would have required factual findings that are the sole province of the jury. For the reasons set forth herein, in CSB's Petitioner's Brief, and as supported by the record, the clear answer is that the verdict, as rendered, was irreconcilable, and thus could not form the basis of a valid judgment. Under these circumstances, where the resulting verdict is unreliable and cannot be cured due to the jury's fundamental and pervasive error and confusion, the proper remedy was a new trial with respect to both liability and damages.

After two separate attempts at deliberation, the jury in this case could not render a consistent and rational verdict. The jury's lack of understanding was apparent to everyone in the courtroom, and was the basis for defense counsels' immediate motions for mistrial. (JA 3327-34.) However, the Circuit Court elected not to re-submit any further clarifying instructions for the jury to attempt to correct the inconsistent verdict, and instead dismissed the jury and directed counsel

to submit post-trial briefs. Notably, after excusing the jury, the Circuit Court itself expressed its 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.

(JA 3342-43.)

Based on the verdict as rendered, it cannot be determined whether the jury, in actuality, awarded only those damages against CSB that it found to have proximately resulted from CSB's breach and awarded only those damages against B&N that it found to have proximately resulted from B&N's negligence. Based on the math alone, it is apparent that the jury's confusion impacted both its assessment of damages and liability.

At trial, J.F. Allen presented two distinct legal theories for the possible recovery of a *single* injury. While 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 then 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. Despite J.F. Allen's attempt to reconcile the jury's fundamental error as a "sum approximating the amount claimed by J.F. Allen at trial as its contract damages," the jury returned a $1.3 million verdict against CSB, which *in and of itself* constitutes error as J.F. Allen only sought approximately $1.2 million in total damages. (Resp. Brief, at 18.) In addition, the total damage award is more than *three times* the full amount of J.F. Allen's alleged injury.

In its separate appeal, J.F. Allen's only response is that the Circuit Court could have possibly addressed this issue by remittitur.[1] However, J.F. Allen did not provide <u>any</u> suggestion to

[1] *See J.F. Allen Corporation v. The Sanitary Board of the City of Charleston, West Virginia and Burgess and Niple Inc.*, West Virginia Supreme Court of Appeals Docket No. 19-0369, at Assignment of Error "V."

this Court on how the Circuit Court could have properly remitted this verdict—because it could not. The gravamen of the problem was that it was impossible for the Circuit Court to discern which of the two Defendants should have to pay (or, if apportioned, how much each would pay) if the Court had entertained a motion to remit the damages without the Circuit Court improperly assuming the function of the jury and making additional factual findings.

The beginning of the analysis—and despite J.F. Allen's attempt to present its theories on appeal as separate and independent causes of action entitled to separate verdicts—is the fact that J.F. Allen sought a *single recovery under two theories of liability at trial.* In fact, during closing argument at trial, J.F. Allen's counsel specifically informed the jury and the Circuit Court that J.F. Allen sought a single recovery against both CSB and B&N:

> 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.)[2]

Under West Virginia law, J.F. Allen is precluded from receiving a double recovery for the single injury alleged. However, with the current verdict, the Court cannot determine *which* Defendant is liable for which damages, and the Court cannot apportion or exercise remittitur without making additional factual findings. This is especially true considering that the liability determination itself is called into serious question due to the jury's general confusion. CSB can only be held liable for breach of contract damages, and the jury's confusion in awarding $1.3

[2] *See* W.Va. Tr. Ct. R. 23.04 ("Counsel may not comment upon any evidence ruled out, ***nor misquote the evidence***, nor make statements of fact dehors the record, nor contend before the jury for any theory of the case that has been overruled.").

million to J.F. Allen—in excess of the $1.25 million total requested—calls into question CSB's liability.

Even though this is not a joint and several liability case, it appears the excessive 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 cannot be liable for another party's negligence. *See* W. Va. Code § 29-12A-4(b)-(c). So, not only was CSB not sued in tort, but also under the immunity statute there is no legal basis for the Court to apportion any damages that may have arisen from B&N's negligence, if any, to CSB.

Moreover, the law of contracts and the law of torts have entirely different ramifications. *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 173 W.Va. 210, 219, 314 S.E.2d 166 (1983). In an action for breach of contract, the damages recovered must be such as will give, and only such as will give, compensation for the actual loss directly flowing from the breach of contract. On the other hand, in tort law, the loss is measured by criteria completely within the control of the party sustaining the alleged loss. *Hurxthal v. St. Lawrence Boom & Lumber Co.*, Syl. Pt. 10, 53 W.Va. 87, 44 S.E. 520 (1903); *Torbett*, 173 W.Va. at 219. Tort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation. Therefore, an action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract. *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W.Va. 609, 624, 567 S.E.2d 619 (2002). Because J.F. Allen did not sue CSB in tort, there was no legal basis for the Court to apportion damages to CSB that may have arisen from B&N's negligence, and, if any damages for breach of contract were apportioned to CSB in excess of actual loss directly flowing

from the breach of contract, those damages were unwarranted and grounds for a new trial. *Hurxthal*, 44 S.E. at 526.

To illustrate the impossibility of remittitur, on top of awarding $1.3 million in damages against CSB, the jury found B&N 90% responsible for $3 million in damages, 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 damages against both Defendants under one recovery. *Each verdict rendered thus exceeded the total amount in damages requested by J.F. Allen at trial.* So, if the Court had hypothetically remitted the damages verdict to $1.2 million, who would have been responsible for paying that $1.2 million verdict—CSB or B&N? Further, how could the Court even exercise remittitur and apportion the verdict between CSB and B&N when J.F. Allen sought a *single recovery* against *both* Defendants, yet the jury found B&N responsible for 90% of the verdict and J.F. Allen responsible for 10% of the verdict? How could CSB be apportioned even a single penny of the jury verdict when the jury already found that **100%** of the verdict should be split between B&N and J.F. Allen? Both the logic and the math are inescapable: remittitur was impossible with this verdict. To apply remittitur and apportion any part of J.F. Allen's total recovery to either of the Defendants in this case, the Circuit Court would have had to determine which damages actually resulted from CSB's breach and which damages were the proximate result of B&N's negligence considering CSB cannot be liable for B&N's negligence by law.

Similarly, the inconsistency of the verdicts goes directly to liability (the proximate cause determination) and damages. Indeed, after the jury was dismissed, the Circuit Court immediately expressed its concern with the verdict by stating "[t]he verdict that we had could be problematic" as "[i]t may not be based on law, reason or judgment." (JA 3342-43.) Now, at the appeal stage and without the benefit of specific factual findings, questions that remain cannot be answered, and

without answers, the inconsistency of the verdicts cannot be harmonized. Faced with the verdicts as rendered, there is no principled basis upon which the Court can reconcile the jury's inconsistent verdicts into a coherent judgment on both liability and damages. As a result, the Circuit Court did not err in granting CSB a new trial as to damages but did err in upholding the jury's liability determination.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

CSB hereby incorporates by reference its "Statement Regarding Oral Argument and Decision" section from its *Petitioner's Brief* in this action, as if fully restated herein.

III. ARGUMENT

A. J.F. ALLEN'S ARGUMENTS IN OPPOSITION TO CSB'S ASSIGNMENTS OF ERROR "D" AND "E" MUST FAIL BECAUSE THEY ARE BASED ON THE FALSE PREMISE THAT J.F. ALLEN SOUGHT TWO SEPARATE AND INDEPENDENT RECOVERIES AT TRIAL, IN FACT, J.F. ALLEN PRESENTED TWO LEGAL THEORIES FOR THE RECOVERY OF A SINGLE INJURY AT TRIAL.

J.F. Allen's attempt to defeat CSB's appeal must fail because it relies entirely on the fundamental—and false—premise that J.F. Allen presented two separate and independent causes of action against CSB and B&N at trial with recovery under either not dependent on the other. J.F. Allen now argues that its maximum possible recovery at trial was not approximately $1.25 million because $1.25 million only represented J.F. Allen's request for recovery against CSB under contract. Under J.F. Allen's theory on appeal, "the verdict in this case is not disproportionate to the injuries suffered and was supported by the evidence that J.F. Allen suffered a loss on the project in the range of $3,000,000.00." (Resp. Brief, at 18.) According to J.F. Allen, this distorted argument somehow excuses the jury's excessive awards against CSB and B&N as not inconsistent. (Resp. Brief, at 16-20.) J.F. Allen's argument is plainly incorrect given its own comments and case at trial, and the Court should disregard J.F. Allen's attempt to rewrite history on appeal.

First, J.F. Allen appears to speculate (for the first time on appeal) that the Circuit Court must not have found any inconsistencies in the verdict at the time of entry of judgment because Rule 49 of the West Virginia Rules of Civil Procedure would not have permitted the Circuit Court to enter an inconsistent verdict. In support of this argument, J.F. Allen mistakenly asserts that the Circuit Court did not return the jury for further consideration after the jury's second attempt at deliberation but instead, "there being no inconsistency, the Court accepted the verdict" and "entered judgment in accordance with the answers and verdict." (Resp. Brief, at 15-16.) This argument is simply false. Here, the Circuit Court returned the jury twice to work out the verdict's inconsistencies, and ultimately concluded that the source of confusion would not be resolved by a third attempt at deliberation. The Circuit Court did not, as J.F. Allen alleges, enter judgment at that time because it found no inconsistency. Instead, the Circuit Court chose in its discretion to dismiss the jury and directed counsel to submit post-trial briefing. (JA 1388-1406, ¶ 53.) In fact, the Circuit Court expressed its present sense impression and concerns with the verdict at trial:

> 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.**

(JA 3342-43 (emphasis added).) Thereafter, the Circuit Court did not enter judgment until approximately one month after the trial's conclusion, on March 1, 2018. (JA 1129-35.)

Second, J.F. Allen's arguments raised on appeal are defeated by its own words *during the trial itself.* For example, in his statements and instruction to the jury, J.F. Allen's counsel readily acknowledged that although J.F. Allen was pursuing two distinct legal theories for its alleged single injury, it would be error for the jury to award more than a single recovery. J.F. Allen's counsel also instructed that the jury was obligated to determine as a factual matter which damages, if any, were the result of breach of contract and which damages, if any, were the result of

negligence. (JA 3297-98.) While explaining the jury verdict form during closing argument at trial, J.F. Allen's counsel reiterated to the jury and the Circuit Court that J.F. Allen sought a single recovery of $1,252,392.43 against both CSB and B&N:

> 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 (emphasis added).)

Because J.F. Allen's counsel was not permitted to "misquote the evidence, nor make statements of fact dehors the record" during closing argument, these statements clearly demonstrate J.F. Allen's view of its case and the evidence presented during the trial. *See* W.Va. Tr. Ct. R. 23.04.

In addition, during the jury's deliberations, J.F. Allen's counsel again confirmed that it sought a single recovery against both CSB and B&N. 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 (emphasis added).) J.F. Allen's counsel agreed with the Court's concern: "Yes, your Honor. **Did they intend for that to be zero damages or was it their intention that the [1.3] million be split between the defendants.**" (JA 3323-36 (emphasis added).)[3]

Notably, J.F. Allen does nothing in this appeal to address its own comments to the Circuit Court and the jury during the trial itself, which make clear J.F. Allen sought recovery for a single injury under two legal theories. Furthermore, J.F. Allen does not sufficiently address why this Court on appeal should set aside the Circuit Court's findings of fact on this issue, as this Court must review the Circuit Court's findings of fact under a clearly erroneous standard. (JA 1388-1406, ¶ 13.) *See, e.g., Cantrell v. Cantrell*, 242 W.Va. 116, 829 S.E.2d 274 (2019); *Robertson v. B.A. Mullican Lumber & Mfg, Co., L.P.*, 208 W.Va. 1, 537 S.E.2d 317 (2000).

Rather than addressing the trial record directly, J.F. Allen instead attempts to utilize the layout of the parties' jury verdict form to theorize that the jury intended to make two separate awards in the "two separate spaces for the express purpose of allowing the jury to make the award as to each defendant that it found appropriate." (Resp. Brief, at 17.) It is not in dispute that the jury verdict form was organized into separate sections with interrogatories. However, the fact that the jury had "two separate spaces" on the jury verdict form to fill out is immaterial and does not alter J.F. Allen's presentation of its case or its comments to the Circuit Court and jury at trial. As reflected in the trial record, J.F. Allen's counsel specifically instructed the jury to take that jury verdict form—broken down into separate sections against CSB and B&N—and **"decide how much you want to put [of the same damages asserted against both Defendants] against the**

[3] *See also* JA 3331-JA 3332 (following the jury's first round of deliberations—and the verdict form left blank as to damages against B&N--J.F. Allen's counsel stated to the Circuit Court: "MR. JOHNSTONE: . . .All they [the jury] have not done is either decided that **they didn't understand how to split the damages** or Mr. DeMasters client has no damages. **They need to be instructed that they left off the damages on [B&N] and was that intentional or did you intend to split those damages between those two and the amounts.**").

sanitary board and what you want to put against Burgess and Niple." (JA 3297-98 (emphasis added).) J.F. Allen's appellate arguments to the contrary are unavailing.

Notably, the revisionist argument J.F. Allen raises on appeal has already been considered and rejected by the trial court. As reflected in the record, the Circuit Court did not hesitate to reject J.F. Allen's argument during the post-trial phase of this case, when J.F. Allen argued that it did not seek a single recovery under two legal theories:

> THE COURT: The instructions that went to the jury were about one single recovery with respect to dual theories.
>
> MR. JOHNSTONE: Well, no. I mean, I don't agree with that.
> ...
> THE COURT: There are two causes of action which jointly result in damages. And that's what happened. Right?
> ...
> THE COURT: . . . When you submitted the REA, let's just be honest. When you submitted the REA, you believed when you were submitting that as your damages-
>
> MR. JOHNSTONE: All the contract damages we - -
>
> THE COURT: All the damages you could.
>
> MR. JOHNSTONE: Well, contract damages. I mean.
>
> THE COURT: That's not my recollection of the way it was presented.
>
> MR. JOHNSTONE: Well, I mean, they can cite to you what - - no one ever said, even in the closing when I wrote the number down, what I said --
>
> THE COURT: You wrote the number down?
>
> MR. JOHNSTONE: Yeah. And I said, "We expect these damages. You figure out who pays what all now."
>
> THE COURT: Right. You - - figure out who pays what. This is all you can give - -
>
> MR. JOHNSTONE: No.
>
> THE COURT: - - and you got to divvy it up between these two - -

MR. JOHNSTONE: I didn't say that.[4]

. . .

THE COURT: That certainly was my - -

. . .

THE COURT: Under the law, that's one single recovery in different causes of action and alleged wrongs contributing to that recovery.

(JA 5155-60.)

In essence, J.F. Allen's claims against CSB and B&N arose from the construction contract it entered into with CSB: (1) J.F. Allen had a contract with CSB; (2) B&N was designated as Engineer, (3) J.F. Allen did not have a contract with B&N, and (4) B&N would communicate directly with and make recommendations to CSB as the impartial and unbiased "referee" during the Project (5) before CSB could take action or make payments to J.F. Allen.[5]

Clearly, the Circuit Court found no merit in J.F. Allen's post-trial argument, and this Court should also reject it on appeal. Almost two years have passed since the trial in this matter. However, it is still clear that J.F. Allen's case at trial consisted of two legal theories, and a maximum recovery of $1,252,392.43 to "be split between the defendants." (JA 3323-36.) For these reasons, the Court should reject J.F. Allen's attempt to rewrite history.

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[4] *Compare* JA 3297-98: While explaining the jury verdict form during closing argument at trial, J.F. Allen's counsel informed the jury and the Circuit Court that J.F. Allen sought a single recovery of $1,252,392.43 against both CSB and B&N:

> 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.**

[5] *See also* JA 5160-61 ("**THE COURT**: But the negligence claims against [B&N] contribute to and are the cause of the alleged breach, right? **MR. JOHNSTONE**: Well, yeah . . . **MR. JOHNSTONE**: No, it's not the cause of the breach. The breach was by CSB. But as referee - - . . . [B&N] could've said "Please pay," and they didn't. **THE COURT**: Right. So it contributes to the fact you didn't get the $1.2 million.").

B. **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.**

As discussed more fully in CSB's Petitioner Brief at Assignment of Error "B," 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 CSB below. By admitting the expert report, the Circuit Court improperly permitted the jury to take the report of J.F. Allen's expert into the jury room for deliberations. (JA 1618.) 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.) For those reasons, the document should not have been admitted.

Moreover, J.F. Allen's attempt on appeal to classify the REA as a "business record" admissible under Rule 803(6) of the West Virginia Rules of Evidence must be rejected. On appeal, J.F. Allen argues the REA was 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 and were likewise admitted as evidence in this case," but this assertion is incorrect in light of the trial record. (Resp. Brief, at 11.) In fact, the REA was <u>not</u> like any other previous request submitted by J.F. Allen. Indeed, the President of J.F. Allen, Greg Hadjis, conceded during his testimony that he "had to hire a third-party expert to help . . . wade through [capturing the true costs]." (JA 1558).

Even though the Circuit Court erred in later admitting the expert report into evidence, the Circuit Court properly noted the differences between the REA and J.F. Allen's other "claims," and acknowledged that the REA is a hearsay document:

> THE COURT: - - you're personal injury counsel, too. You write claims - - you write letters submitting claims all the time. You don't get up and waive them in

front of the jury with medical records attached to them when you're in a jury trial; do you?

. . .

THE COURT: What's different about this?

. . .

MR. JOHNSTONE: Because its - - it is - - it is a document in this case that is triggered by the contract. It's our submission of a claim the way it's - - per the contract. That is our claim. I mean, it is - - was - - when - - the testimony is going to be when Greg Hadjis had trouble calculating his claim, he needed someone to help him with his claim. He contacted Mr. Willoughby to assist him in putting his claim together. Yes, there's some expert needed to help do that, but the majority of that claim was all documents already been done. So if - - and what Mr. Willoughby is going to tell you is if I do an expert report for - - hired by an attorney, - -

THE COURT: It's a different animal. It seems somewhat of a different animal.

. . .

MR. JOHNSTONE: But what it does it it's like any other claim you're going to see in this case. It is - - J.F. Allen saying, "I was damaged in this way. Per the contract, you owe me this money." That's what every claim is. Every claim is - -

THE COURT: But he's going to testify with respect to the substance of it, to the document that you concede as a hearsay document.

MR. JOHNSTONE: I really - - with regard to Mr. Hadjis, no. It's - - it is - - it is his recitation to his client as to how I was damaged. It's a letter like any other letter where we assess - - you know, I had these - - this additional work and I want paid for it. I mean, those are job correspondence documents. It is his claim. . . .

. . .

THE COURT: - - I'm not hearing you refute that it's a hearsay document.

(JA 1621-JA 1624.)

Even though it is a seasoned contractor, J.F. Allen contacted its attorney to locate a third-party expert to formulate J.F. Allen's REA in anticipation of litigation after the contract was over and final payment had already been issued. J.F. Allen had already submitted its request for Final Payment, and the parties' contract expressly stated "[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" of the parties' contract. (JA 3582 ¶ 14.09.) CSB had already received the Engineer's recommendation for Final Payment to J.F. Allen and issued J.F. Allen a Final Payment check for $146,320.43 on November 5, 2013. (JA 4681.) On appeal, J.F.

Allen cannot reclassify the REA as any "series of other requests for changes submitted during the course of the work," because it was clearly prepared in anticipation of litigation,[6] and not submitted until May 7, 2014. Clearly, the REA was not like any other claim submitted by J.F. Allen during the course of the Project, as it was (1) not created by J.F. Allen, but by J.F. Allen's expert,[7] and (2) submitted ***six months after*** the contract was over. (JA 4083-4108.)

J.F. Allen's argument in its separate appeal further demonstrates the unreliability and inadmissibility of the REA. In J.F. Allen's contemporaneous appeal against CSB and B&N,[8] J.F. Allen, as Petitioner, argues that Mr. Willoughby's REA is "the most compelling evidence" that supports the jury's verdict in an attempt to retroactively alter J.F. Allen's theories at trial. At trial, J.F. Allen sought a single recovery under two theories of liability. With this case-strategy in mind, J.F. Allen's counsel argued that the REA was J.F. Allen's "claim" and should be admitted into evidence on that basis. (JA 1571-79; JA 1622.) However, on appeal, J.F. Allen now argues that it did not, in fact, seek a single recovery against CSB and B&N at trial.[9] In support, J.F. Allen attempts to argue that the REA was evidence of J.F. Allen's alleged contract damages against CSB only, and not evidence of J.F. Allen's alleged negligence damages against B&N. As discussed above, this argument is wholly incorrect.

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[6] *See* 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.").

[7] *See* JA 1447 ("Exhibit 3 was prepared by our expert."); JA 1577 ("THE COURT: By his own admission and by your proffer in Court, [the President of J.F. Allen] did not have an understanding of how to make a loss of productivity claim such that he hired [Willoughby] to assist in doing that . . . .").

[8] *See J.F. Allen Corporation v. The Sanitary Board of the City of Charleston, West Virginia and Burgess and Niple Inc.*, West Virginia Supreme Court of Appeals Docket No. 19-0369.

[9] *Compare* JA 3297-98: While explaining the jury verdict form during closing argument at trial, J.F. Allen's counsel informed the jury and the Circuit Court that J.F. Allen sought a single recovery of $1,252,392.43 against both CSB and B&N:

> 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.**

The Circuit Court's error in admitting the REA into evidence was not harmless, as it is clear that the jury consulted the document and specifically asked for a portion of it during deliberations. 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.

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. Moreover, the fact that J.F. Allen now attempts to use Mr. Willoughby's testimony and the REA to support its retroactive alteration of its theories presented at trial further supports its unreliability, the confusion it caused the jury during deliberations, and the prejudicial effect it had on CSB at trial.

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.

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.) 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." 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. 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.) Thus, Mr. Dutill lacked the minimal educational or experiential qualifications required to be qualified as an expert.

Moreover, to the extent J.F. Allen utilizes *Cargill v. Balloon Works, Inc.*, 185 W.Va. 142, 405 S.E.2d 642 (1991), and *Ventura v. Winegardner,* 178 W.Va. 82, 357 S.E.2d 764 (1987), in its Respondent Brief to argue that Mr. Dutill meets all the requirements for qualifying as an engineering expert in trial courts of West Virginia, those cases only get J.F. Allen so far, as the *Cargill* and *Ventura* courts did not have the current statutory framework to consider. While the West Virginia State Board of Registration for Professional Engineers was formed to oversee the licensing of engineers in West Virginia in 1921, Article 13—the part of the professional licensing chapter of the West Virginia Code that regulates Professional Engineers—was not enacted until 1992. 1992 W.Va. Laws Ch. (S.B. No. 526).

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. 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 action warrants reversal.

D. 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 AND FAILED TO SHOW THAT IT COMPLIED WITH THE CONTRACT TERMS.

As a preliminary matter, it is not in dispute that J.F. Allen breached the contract.[10] Indeed, J.F. Allen *completely failed* in its Respondent Brief to address its own failure to satisfy the conditions necessary to make and preserve the claims alleged in accordance with the parties' contract. J.F. Allen further failed to demonstrate any "actual notice" or "waiver" sufficient to overcome the clear lack of a contractual duty by CSB with respect to the delay damages alleged.

Most importantly, J.F. Allen's overly-broad application of the waiver doctrine goes much too far. For starters, it is important to note that J.F. Allen confuses the "Change Order" process with the "Claims" process throughout its Respondent Brief. To clarify, J.F. Allen only introduced evidence of occasional modification to the contract with regards to the Change Order process at trial, 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.

As discussed previously, 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

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[10] *See* JA 1503 (MR. JOHNSTONE: "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 . . . .***"). *See also* W.Va. Tr. Ct. R. 23.04 ("The opening argument of plaintiff before the jury shall be a fair statement of plaintiff's case . . . .").

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 discussed more fully in CSB's Petitioner Brief, the waiver doctrine cannot be extended to justify J.F. Allen's failure to follow the required Claims procedures under the contract. 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. However, no such agreement was made between CSB and J.F. Allen with regards to J.F. Allen's obligations to submit its Claims for payment within thirty days and substantiate those claims within sixty days. Accordingly, this failure by J.F. Allen is dispositive of its breach of contract claim against CSB as a matter of law.

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. On appeal, J.F. Allen fails to demonstrate why the contractual Claims provisions did not remain intact. Regardless of when the agreed-upon work is completed, the documentation still had to be submitted per the contract procedure for J.F. Allen to get paid.

J.F. Allen was required to properly submit Claims for extra compensation during the life of the contract—and J.F. Allen admits it did not do that. As a result, "actual notice" or "waiver" did not excuse compliance with mandatory contractual Claim procedures. In addition, the contractor's general notice that J.F. Allen expected additional compensation does not amount to Claims under the contract and does not excuse J.F. Allen from complying with the contractual claim procedures. *See Mike M. Johnson, Inc. v. County of Spokane*, 150 Wash. 2d 375, 78 P.3d 161 (2003).

Furthermore, to the extent J.F. Allen presents the West Virginia Supreme Court of Appeals' previous appellate decision in this case as *prima facie* proof J.F. Allen proved all aspects of its claim at trial, such view is misplaced and should be rejected. In *J.F. Allen Corp. v. Sanitary Board of the City of Charleston*, J.F. Allen appealed the Circuit Court's order dismissing, with prejudice, J.F. Allen's breach of contract claim against CSB pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.[11] 237 W.Va. 77, 785 S.E.2d 627 (2016). The Court concluded J.F. Allen had set forth a claim for purposes of Rule 12(b)(6) and was careful to note it construed the facts and allegations in the complaint as true as required for purposes of determining whether dismissal of the complaint was warranted under Rule 12(b)(6). Whether J.F. Allen did, in fact, satisfy the requirements of the contract, and whether CSB breached its obligations under the contract were

[11] Originally, J.F. Allen asserted a breach of contract claim and an unjust enrichment claim against CSB. The unjust enrichment claim was dismissed by the Circuit Court and the Circuit Court's dismissal of the unjust enrichment claim in the original complaint was not assigned as error.

questions of fact to be resolved after discovery and at trial. The Court stated the opinion should "not be interpreted as ruling upon the merits of any part of the complaint or the issues in the case below." *Id.* at n.6. However, that is precisely what J.F. Allen is doing here. J.F. Allen takes this Court's opinion too far by arguing the standards set forth by the Court at the *motion to dismiss* stage somehow prove its claims were not barred by the contract after the course of discovery and trial.

Because J.F. Allen could not establish at trial that it conformed with these requirements, and in fact admitted it did not, it failed to establish a *prima facie* case for breach and contract, and thus, the Circuit Court erred in denying CSB judgment as a matter of law.

IV. 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.

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

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