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KANAWHA COUNTY CIRCUIT COURT

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**J.F. ALLEN CORPORATION**
**a West Virginia corporation,**
**Plaintiff,**

**v.**

**CIVIL ACTION NO.: 14-C-1182**
**Judge: Joanna I. Tabit**

**THE SANITARY BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA, a municipal utility, and BURGESS AND NIPLE, INC. an Ohio Corporation.**
**Defendants.**

**ORDER GRANTING DEFENDANTS A NEW TRIAL ON DAMAGES AND DENYING DEFENDANTS' MOTIONS FOR RENEWED JUDGMENT AS A MATTER OF LAW**

These matters came on for hearing the 20th day of November, 2018, before the Court, the Honorable Joanna I. Tabit presiding, on the *Motion for New Trial Pursuant to Rules 49 and 59 of the West Virginia Rules of Civil Procedure* and *Renewed Motion for Judgment as a Matter of Law Pursuant to Rule 50 of the West Virginia Rules of Civil Procedure* filed by Defendant, The Sanitary Board of the City of Charleston ("CSB"), and the *Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial* filed by Defendant, Burgess & Niple ("B&N") (together, the "Motions"). Plaintiff appeared by counsel, Charles M. Johnstone, II. CSB appeared in person, by Tim Haapala, and by counsel, David A. Barnette and Vivian H. Basdekis. B&N appeared by counsel, Peter T. DeMasters.

The Court considered the arguments of counsel, the motions, memoranda of law, responses, replies, the record, the evidence at trial, and all pertinent legal authorities. Based on these deliberations, the Court finds that the jury verdict in favor of Plaintiff J.F. Allen Corporation and against CSB and B&N is inconsistent, is not based on the evidence or is against the clear weight of the evidence, impermissibly awards damages in excess of a single recovery,

and cannot be reconciled with remittitur. Having considered the issues presented, the Court hereby **GRANTS IN PART AND DENIES IN PART** Defendants' Motions and **ORDERS** a new trial on damages in this case. The verdict as to liability will be preserved. In addition, the Court hereby **DENIES** CSB's *Renewed Motion for Judgment as a Matter of Law Pursuant to Rule 50 of the West Virginia Rules of Civil Procedure*. Further, the Court makes the following findings of fact and conclusions of law, which govern the motions at issue:

## FINDINGS OF FACT AND PROCEDURAL HISTORY

### A. The Contract

1. On or about December 13, 2011, CSB, as Owner, and J.F. Allen Corporation ("Plaintiff" or "J.F. Allen"), as Contractor, entered into a construction contract ("Agreement") for work generally described as "Kanawha Two-Mile Creek Sewer Improvements—Sewer Replacements Sugar Creek Drive Sub-Area, Contract 10-8" (the "Project"). Pursuant to the Agreement, Defendant Burgess and Niple, Inc. ("B&N" or "Engineer") provided professional services to CSB and was designated as the Engineer/Architect on the Project.

2. The original contract price under the Agreement totaled $5,160,621.75 "subject to additions and deductions by Change Order and quantities actually performed," and required substantial completion by January 2, 2013, and final completion by February 1, 2013.

### B. Change Orders and Final Completion

3. J.F. Allen received notice to proceed on the Project on or about January 3, 2012 and construction began on or about January 23, 2012. 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.

4. Actual final completion of the Project occurred on August 15, 2013, six months after the February 1, 2013 final completion date established by the Agreement, and J.F. Allen submitted its request for Final Payment on or about November 4, 2013.

**C. Six Months After the Contract Expired, J.F. Allen Submitted a Request for Equitable Adjustment**

5. On November 5, 2013, B&N submitted its written recommendation to CSB for Final Payment to J. F. Allen, with a copy issued to Plaintiff and the WVDEP.

6. On or about November 20, 2013, CSB issued Final Payment, check no. 2068, in the amount of $143,320.43 to J. F. Allen.

7. On or about 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 for equitable adjustment under the Agreement.

8. Pursuant to the Agreement, Article 14.07 governs Final Payment, and provides in subsection C that payment becomes due as follows: "[Forty-five] days after the presentation to Owner of the Application for Payment and accompanying documentation, the amount recommended by Engineer, less any sum Owner is entitled to set off against Engineer's recommendation, including but not limited to liquidated damages, will become due and will be paid by Owner to Contractor."

9. Paragraph 14.09 of the Agreement further provides that "[t]he making and acceptance of final payment will constitute" a waiver of claims as follows:

> 1. A waiver of all Claims by Owner against Contractor . . . . ; and
> 2. 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.

10. On May 12, 2014, B&N returned J.F. Allen's request for equitable adjustment, noting that, under the Agreement, the Engineer was no longer authorized to provide professional services for the Project.

**D. Litigation and Jury Trial**

11. On June 30, 2014, Plaintiff filed this civil action and subsequently amended its Complaint on November 13, 2015, alleging one claim against CSB for breach of contract and one claim against B&N for negligence. CSB filed a counterclaim for liquidated damages under the contract.

12. This case was tried from January 22, 2018 to January 31, 2018 before a jury.

13. At trial, Plaintiff presented two distinct legal theories (breach of contract against CSB and negligence against B&N) for the possible recovery of a single injury. The maximum recovery Plaintiff sought for its alleged injury was $1,252,392.43.

14. Plaintiff's counsel, while explaining the jury verdict form during closing argument at trial, informed the jury and the Court that Plaintiff 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.

(Trial Tr. Day 8, at 163–64.)

15. Prior to deliberations, the Court instructed the jury not to award compensatory damages based on speculation or sympathy and stated that any assessment of compensatory damages must be based only upon the evidence presented at trial. Further, the Court instructed

the jury that if it found that Plaintiff was entitled to recover damages, it may only award damages that will provide it with a single recovery, because double recovery in damages is not permitted.

16. During deliberations, the jury submitted handwritten notes to the Court, which shed light on the jury's general state of confusion, and the Court submitted several clarifying instructions to aid the jury. For example, the jury foreperson sent the 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?" (Ex. F., Trial Tr. Day 8, at 4, 7:10 p.m.)[1] 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?" (*Id.* at 6, 7:35 p.m.) 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?" (*Id.* at 25, 9:25 p.m.)

17. When the jury returned to the Court after its first round of deliberations, the Court read aloud the jury's verdict, which found $1,300,000.20 against CSB (for breach of contract) and found B&N 90% negligent and Plaintiff 10% negligent. However, upon the jury returning to the Court 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

[1] The trial transcript was made available to counsel on or about May 22, 2018, after the filing of Defendants' motions. 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, after Defendants filed their post-trial motions and Plaintiff filed its responses. The supplemented portion of the Day 8 transcript was attached to CSB's Reply as **Exhibit F**. For clarity, any references to the supplemented portion will be clarified with a reference to Exhibit F.

incomplete in that the jury had left the damages portion against B&N blank. (Ex. F, Trial Tr. Day 8, at 11.)

18. After reading the incomplete verdict form aloud, the Court directed the jury to "return to the jury room" to permit the Court to "address some issues with counsel." (*Id.* at 14.)

19. The 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 Plaintiff 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, one point three million dollars, to the Sanitary Board, but by virtue of the fact they have found negligence in the amount of ninety percent as to Burgess and Niple, if they had intended to apportion and percentage of that to them." (Ex. F, Trial Tr. Day 8, at 15, 17–18.)

20. Plaintiff'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 one point three million be split between the defendants." (*Id.* at 20.)

21. The 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 Court then instructed the jury to go back into the jury room and focus on the blank portion of the verdict form and determine whether it was their intent to award zero damages against B&N. (*Id.* at 24.)

22. 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. (*Id.* at 25, 26.)

23. Even though the maximum recovery Plaintiff 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 Plaintiff on its negligence claim, resulting in damages against B&N in the amount of $2,700,000.

24. After polling the jury again and then excusing the jury, the 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. You haven't been able to do it before as mediation failed, and I don't care to know where you all were. I suggest that you talk over the weekend and avail yourself the opportunity to do that. I certainly suggest this. Thank you.

(Ex. F, Trial Tr. Day 8 at 30–31.)

25. As reflected in the record, CSB and B&N timely objected to the inconsistency of the jury's verdict during trial before the jury was dismissed. (*Id.* at 16–20; Trial Tr. Day 8, at 164–65; *see also* CSB's objections to entry of the Proposed Judgment Order by letter to the Court dated February 15, 2018, attached to CSB's Motion for New Trial as Exhibit A, and B&N's objections to entry of the Proposed Judgment Order by letter to the Court dated February 15, 2018.)

26. Judgment was subsequently entered on March 1, 2018.

27. Defendants moved post-trial to renew their motions for judgment as a matter of law, and alternatively, for a new trial absolute on grounds that, *inter alia*, an inconsistent verdict cannot form the basis of a valid judgment, and the jury's verdicts disregard the Court's

instructions, are not based on the evidence or result from "pure speculation," that is clearly against the law and the facts presented.

## CONCLUSIONS OF LAW

Based on the foregoing, the Court makes the following conclusions of law:

### Legal Standard on Granting New Trials

28. The West Virginia Supreme Court has held that a trial court may set aside a verdict and grant a new trial if "the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice." *In re State Public Bldg. Asbestos Lit.*, 193 W.Va. 119, 126, 454 S.E.2d 413 (1994). If it is reasonably clear prejudicial error has crept into the record or substantial justice has not been done, a new trial should be granted. *Id.* at 124.

29. When a trial judge vacates a jury verdict and awards a new trial, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses, and if the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. *Lamphere v. Consol. Rail Corp.*, 210 W.Va. 303, 557 S.E.2d 357, 360 (2001).

30. Further, a trial court is entitled to find an award is unsupported by the evidence and thus a motion for a new trial should be granted, even if there was enough evidence in the record to justify sending the issue to the jury in the first instance. Franklin D. Cleckley, *Litigation Handbook on West Virginia Rules of Civil Procedure* 1353 (5th ed. 2017).

31. "[I]n determining whether there is sufficient evidence to support a jury verdict, the trial court should: (1) consider the evidence most favorable to the prevailing party; (2)

assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syl. Pt. 2, *Bowyer v. Hi-Lad, Inc.*, 609 S.E.2d 895, 899 (W.Va. 2004).

32. Generally, "[w]hen a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to weight of the evidence or without sufficient evidence to support it." Syl. Pt. 2, *Walker v. Monongahela Power Co.*, 131 S.E.2d 736, 737 (W.Va. 1963).

33. Under the West Virginia Rules of Civil Procedure, when a verdict is irreconcilably inconsistent, a new trial should be granted. *See* W.Va. R. Civ. P. 49(b); W.Va. R. Civ. P. 59.

34. In general, a verdict is inconsistent when there is no rational, non-speculative way to reconcile two essential jury findings. 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. *Cleckley*, 1173; W.Va. R. Civ. P. 49(b); W.Va. R. Civ. P. 59.

35. 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 (4th Cir. 2015). Therefore, a court generally should not direct an inconsistent verdict be entered. W.Va. R. Civ. P. 49(b).

36. A jury verdict should be received by the court, but if it should appear the same is not supported by the evidence or justified by law, such verdict should be set aside. Syl. Pt. 1, *Ballengee v. Whitlock*, 138 W.Va. 58, 74 S.E.2d 780 (1953); *see also Rosenthal v. Fox*, 70 W.Va. 752, 74 S.E. 959 (1912) ("The trial court should set aside a verdict and grant a new trial when the verdict is plainly contrary to law and the evidence."). For example, a verdict will be set aside where the amount is such that, when considered in the light of the proof, it is clearly shown that the jury was misled by a mistaken view of the case. Syl. Pt. 2, *Keiffer v. Queen*, 155 W.Va. 868, 189 S.E.2d 842 (1972).

37. Pursuant to the West Virginia Rules of Civil Procedure, "a new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law." W. Va. R. Civ. P. 59 (in part).

38. Furthermore, under the doctrine of harmless error, mere irregularities or technical defects, even if they occur at trial, are insufficient to reverse the verdict unless it affected a parties' substantial rights at trial. Thus, West Virginia precedent follows the plain language of Rule 61: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." W.Va. Civ. P. 61 (in part). If refusal to set aside a verdict appears to the Court inconsistent with substantial justice, such is grounds for granting a new trial.

**New Trial on Damages**

39. In West Virginia, "[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. v. Wheeling Pub. Serv. Co.*, 106 W.Va. 206, 145 S.E. 272, 275 (1928).

40. In addition, though "[t]he assessment of damages is peculiarly the province of the jury," it is generally recognized there can be only one recovery of damages for one wrong or injury. *Pittsburgh-Wheeling Coal Co.*, 145 S.E. at 275; *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," citing *Bd. of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990)).

41. 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).

42. In fact, West Virginia evinces a "strong public policy against the plaintiff recovering more than one complete satisfaction." *John Doe v. Hasil Pak*, 237 W.Va. 1, 784 S.E.2d 328 (2016).

43. Moreover, 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, 232 S.E.2d 821 (1977).

44. In some instances, such as when the amount in an excessive verdict allegation is definitely ascertainable, remittitur may be properly employed. *Fortner v. Napier*, 153 W.Va. 143, 168 S.E.2d 737 (1969) (overruled on other grounds); *see also Cleckley*, at 1358.

45. However, the device of remittitur does not allow the court to substitute its judgment for the jury's, and thus, "[u]nless the excess of a verdict is clearly ascertainable from data in the record, the trial court cannot reduce the verdict or suffer a remittitur." *Flanagan v. Flanagan Coal Co.*, 77 W.Va. 757, 88 S.E. 397 (1916); *see also Stone v. United Engineering, a Div. of Wean, Inc,* 197 W.Va. 347, 475 S.E.2d 439 (1996) ("When the illegal part of the damages ascertained by the verdict of a jury is clearly distinguishable from the rest, and may be ascertained by the court without assuming the functions of the jury and substituting its judgment for theirs, the court may allow plaintiff to enter a remittitur for such part, and then refuse a new trial.").

46. Furthermore, the West Virginia Rules of Civil Procedure provide that a new trial may be granted to any of the parties on all or part of the issues, but a new trial may be limited to the single issue of damages only when it is apparent from a review of the evidence that: (1) the issue of damages is separate and distinct from the issue of liability; (2) the liability of the defendant is definitely established; and (3) the limitation will not operate to the prejudice of the defendant. *Rice v. Ryder*, 184 W.Va. 255, 400 S.E.2d 263 (1990).

47. Here, the Court finds that liability against Defendants was established, but the verdict on damages is inconsistent and cannot be reconciled with the instructions given by the Court or with what the law requires.

48. As reflected in the verdict, and despite the fact that J.F. Allen sought approximately $1.25 million total in damages for the recovery of a single injury, the jury listed $1,300,000.20 for the breach of contract damages assessed against CSB at Part II, Question 3, while in Part IV, Question 3, the jury listed $3,000,000.20 against B&N for negligence, for a total of $4,300,000.40.

49. The verdict, as rendered, impermissibly awards more than a single recovery. Syl. Pt. 7, *Harless,* 169 W.Va.

50. Among other reasons, it appears the jury based its verdict on speculation instead of the evidence, when it found $1,300,000.20 against CSB and $3,000,000.20 against B&N, despite the fact that J.F. Allen requested approximately $1.25 million in total damages for the single injury alleged.

51. Moreover, the verdict form and the hand-written notes from the jury reflect a general confusion and misunderstanding of the jury that calls into doubt the dependability of its findings on 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?" (Ex. F., Trial Tr. Day 8, at 4, 7:10 p.m.) 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?" (*Id.* at 6, 7:35 p.m.) 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?" (*Id.* at 25, 9:25 p.m.)

52. The Court returned the jury twice to work out the verdict's inconsistencies in an effort to alleviate confusion when faced with an inconsistent verdict. Despite the Court's instructions, and despite the foreperson believing on both occasions that the jury "got it right, this time," the jury's general confusion prevented it from arriving at a complete and coherent verdict. *See Hopkins v. Coen*, 431 F.2d 1055, 1059–60 (6th Cir. 1970) ("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.").

53. This Court ultimately concluded that the source of confusion would not be resolved by a third attempt at deliberation and chose not to enter judgment at that time, instead exercising its discretion to dismiss the jury and direct counsel to submit post-trial briefing.

54. Accordingly, the resulting verdict in and of itself is indicative of the overall confusion of the jury and its misunderstanding or disregard of the Court's instructions.

55. Regularly, courts order new trials when verdicts are inconsistent and cannot be reconciled with the instructions given by the Court or with what the law requires.[2]

56. Having thoroughly considered the record, the Court finds that, given the multiplicity of claims and defendants with respect to the single injury in this case, the total damage award violates the single-recovery rule, the resulting inconsistent verdict cannot be reconciled against the two Defendants into a coherent judgment as it is impossible for the Court to discern which of the two Defendants should have to pay if the Court were to remit damages, and the Court cannot properly remit or apportion the damages without additional factual findings. Accordingly, the Court concludes that a new trial on damages is the appropriate remedy.

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[2] *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 are 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).

57. Because the Court does not have the authority to invade the province of the jury by disregarding factual findings—or, as the case is here, to render factual findings in the first instance—the Court cannot enter judgment when the jury provides answers that are irreconcilably inconsistent without choosing between the conflicting findings of fact and thereby overturning one of them.

58. 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). Not only was CSB not sued in tort, but also under the immunity statute any damages that may have arisen from B&N's negligence, if any, cannot be apportioned to CSB. *Id.*

59. Moreover, Plaintiff sought a single recovery under two theories of liability, the jury found B&N 90% negligent and Plaintiff 10% negligent, totaling 100% of the verdict, despite the multiplicity of claims and defendants for Plaintiff's single injury, and the damage verdicts against both Defendants each exceed the total amount of damages for Plaintiff's single injury.

60. Without specific factual findings, this Court cannot apply remittitur and apportion damages between the two Defendants, and thus, the inconsistency of the verdicts cannot be harmonized without a new trial on damages. *See Flanagan,* 77 W.Va. ("Unless the excess of a verdict is clearly ascertainable from data in the record, the trial court cannot reduce the verdict or suffer a remittitur.").

61. At trial, the Court could not remedy the source of the confusion after the jury's two unsuccessful attempts at arriving at a complete verdict and after providing the jury with

limited instructions to address the issues that arose.[3] Now, at the post-trial stage of this case, the Court still cannot remedy the jury's confusion to arrive at a coherent verdict on damages.

62. Even if the damages were remitted, the Court cannot apportion damages and determine which of the two Defendants should pay which portion of the damages. Remittitur of this verdict is thus not possible in this case due to multiple factors, including that: the verdicts, individually and collectively, exceed the total amount requested by Plaintiff; the verdict violates the single-recovery rule; the inconsistencies of the jury's verdict cannot be reconciled without the Court impermissibly making new factual findings or choosing from the jury's factual findings, and thereby usurping the function of the jury by substituting its judgment for theirs in apportioning damages among the two Defendants based on two legal theories of liability. Based on the foregoing, the Court finds that a new trial on damages is the appropriate remedy.

63. While the Court grants Defendants a new trial on damages only, it recognizes that a trial on damages necessitates a complete retrial of the matter.

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[3] What occurred in this case is similar to what happened in *Hopkins v. Coen*, whereby 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. Rule 60(a), Federal Rules of Civil Procedure; *Wood-workers Tool Works v. Byrne*, 191 F.2d 667, 676 (9th Cir. 1951). 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. *Lansburgh & Bro., Inc. v. Clark*, 75 U.S.App.D.C. 339, 127 F.2d 331, 333 (1942). ***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).

**Judgment as a Matter of Law**

64. Under Rule 50 of the West Virginia Rules of Civil Procedure, a motion for judgment as a matter of law may be granted only where "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue . . . ." W.Va. R. Civ. P. 50 (in part).

65. In considering such a motion made by a defendant in an action, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged favorably to the plaintiff and the court must assume as true those facts which the jury may properly find under the evidence. *Stewart v. Johnson*, 209 W.Va. 476, 549 S.E.2d 670 (2001); *Radec, Inc. v. Mountaineer Coal Development Co.*, 210 W.Va. 1, 552 S.E.2d 377 (2000).

66. Only when the plaintiff's evidence, considered in the light most favorable to him, fails to establish a *prima facie* right to recovery should the trial court grant judgment as a matter of law in favor of the defendant. *Stewart*, 209 W.Va. at 482.

67. During the hearing, CSB's counsel argued that CSB is entitled to judgment as a matter of law on the breach of contract claim alleged against it because Plaintiff failed to identify any contractual duty on the part of CSB relating to underground facilities, Plaintiff failed to comply with the parties' contract requirements, and the parties' contract required B&N to recommend payment to CSB as a condition precedent to CSB issuing payment to J.F. Allen, but it is undisputed that B&N did not recommend CSB pay J.F. Allen on its Request for Equitable Adjustment. The Court denied CSB's renewed motion for judgment as a matter of law without specifically addressing the arguments raised.

68. Furthermore, after the Court made a ruling from the bench granting Defendants a new trial on damages, B&N's counsel argued that judgment as a matter of law for B&N was appropriate on grounds that Plaintiff failed to prove beyond a preponderance of the evidence at

trial that B&N breached its duties under the contract documents with respect to its administration of Plaintiff's contract with CSB. B&N's counsel pointed to the fact that Plaintiff admitted at trial that it did not follow the contract's claim procedures and acknowledged that it did not substantiate its claims during the contract period, since Plaintiff's Request for Equitable Adjustment was not sent to B&N until months after B&N recommended final payment to CSB. In addition, B&N's counsel argued that there was not sufficient evidence at trial to show that B&N breached the standard of care, that the Court erred in admitting the testimony of Charles Dutill as an expert, and that the Court erred in admitting into evidence the expert witness report of Plaintiff's expert Bryon Willoughby, and that doing so was highly prejudicial to Defendants since it is clear the jury consulted the document in their deliberations as they specifically asked for a portion of the report during deliberations. The Court denied B&N's renewed motion for judgment as a matter of law without specifically addressing B&N's arguments.

69. Based on the record as a whole and affording Plaintiff the benefit of all reasonable inferences and viewing the evidence in the light most favorable to the Plaintiff, the Court concludes that the jury's liability determination should be preserved and its judgment as to damages should be vacated.

## RULING

**WHEREFORE**, for the reasons stated above and upon the record, it is hereby **ORDERED** that:

1. CSB's *Motion for a New Trial Pursuant to Rules 49 and 59 of the West Virginia Rules of Civil Procedure* is **GRANTED IN PART AND DENIED IN PART;**
2. CSB's *Renewed Motion for Judgment as a Matter of Law Pursuant to Rule 50 of the West Virginia Rules of Civil Procedure* is **DENIED**; and

3. B&N's *Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial* is **GRANTED IN PART AND DENIED IN PART.**

The Court **ORDERS** that this action shall remain pending with respect to damages only. The verdict as to liability will be preserved.

The Court **DIRECTS** the parties, within 60 days of the entry of this Order, to obtain a pre-trial conference date and trial dates available on the Court's docket and submit a Scheduling Order, consistent with this Order, for entry by the Court.

Any and all objections of the parties are noted and preserved in the record.

It is **SO ORDERED.**

The Clerk is **DIRECTED** to forward a certified copy of this Order to all counsel of record.

Entered this the 20th day of March, 2019.

Joanna I. Tabit

**HONORABLE JOANNA I. TABIT**
**CIRCUIT COURT JUDGE**

Prepared by:

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 21 DAY OF MARCH 2019
CIRCUIT COURT OF KANAWHA COUNTY WEST VIRGINIA

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_____

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