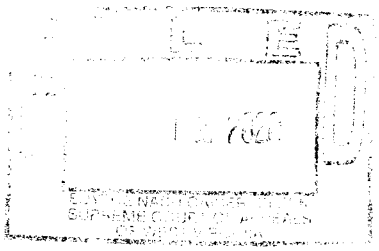
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0042



WesBanco Bank, Inc.

Defendant Below, Petitioner,

v.

(Circuit Court of Marion County
Civil Action No. CC-24-2017-C-119)

Thomas B. Miller and
Jamie Miller,

Plaintiffs Below, Respondents.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

Assignment No. 1: If a contract is unambiguous, the trial court generally must exclude extrinsic evidence and enforce the agreement as written. Here, the parties' contract unambiguously stated that lien waivers were required from materialmen in only three cases and the Millers would hold WesBanco harmless from all liens. Did the trial court err by declining to enforce the parties' unambiguous written agreement and, instead, admitting extrinsic evidence to modify and explain the terms?

Assignment No. 2: Although implied in every contract, the duty of good faith and fair dealing cannot contradict or modify an unambiguous written agreement. Here, the Millers developed testimony that invited the jury to disregard unambiguous contractual duties in favor of their own interpretation. Did the trial court err by failing to exclude this testimony?

Assignment No. 3: The Millers alleged that WesBanco breached the parties' construction loan agreement by paying their contractor for unfinished work. But, at trial, the Millers admitted that WesBanco paid their contractor only after the work for each draw payment was finished. And they conceded that they could not identify any unfinished work for which WesBanco paid. Did the trial court err by denying WesBanco's Rule 50 and Rule 59 motions on liability for this unfinished-work claim?

Assignment No. 4: To prove compensatory damages on their unfinished-work claim, the Millers had to prove their amount with reasonable certainty. And though the Millers produced a spreadsheet of the costs incurred to finish building their home, they admitted that they could not identify any specific costs representing unfinished work for which WesBanco had paid their contractor. Did the trial court err by denying WesBanco's Rule 50 and Rule 59 motions on damages for this unfinished-work claim?

Assignment No. 5: The Millers alleged that WesBanco breached the parties' construction loan agreement by paying their contractor without obtaining lien waivers from materialmen. Here, none of the contractual clauses requiring materialmen lien waivers was triggered during the performance of the contract. And the parties' agreement stated that the Millers would hold WesBanco harmless from all liens. Did the trial court err by denying WesBanco's Rule 50 and Rule 59 motions on liability for this lien-waiver claim?

Assignment No. 6: To prove compensatory damages on their lien-waiver claim, the Millers had to show that they were proximately caused by WesBanco's alleged breach. At trial, the evidence showed that, of the $117,000 lien amount at issue under the lien-waiver claim, about $14,000 would have attached even without an alleged breach. And the parties' agreement stated that the Millers would hold WesBanco harmless from all liens. Did the trial court err by denying WesBanco's Rule 59 motion on damages for this lien-waiver claim?

STATEMENT OF THE CASE

After their contractor quit work on their new home and declared bankruptcy, Dr. Thomas "Brad" Miller and Dr. Jamie Miller sued their lender, WesBanco.[1] They alleged that WesBanco had paid their contractor for unfinished work[2] and had failed to obtain lien waivers before releasing draw payments.[3] At trial, however, the Millers admitted that their contractor had finished the work corresponding to each draw payment that WesBanco had released.[4] They also admitted that they could not identify any unfinished work for which WesBanco had paid.[5] And while claiming that

[1] A.R. 5-15 (Compl.).
[2] A.R. 12 (Compl. ¶ 25).
[3] A.R. 12 (Compl. ¶ 26).
[4] A.R. 782-83 (Trial Tr. 408:22-409:10).
[5] *See* A.R. 563 (Trial Tr. 189:9 & 189:13), A.R. 570 (Trial Tr. 196:1), A.R. 580 (Trial Tr. 206:17), A.R. 581 (Trial Tr. 207:2) & A.R. 582 (Trial Tr. 208:16-17).

"it just doesn't make sense,"[6] their contract held WesBanco harmless from liens and did not require lien waivers under the facts of their case.[7] The jury nevertheless returned a verdict for the Millers in the amount of $404,500[8]—about $105,000 more than the Millers told the jury they had proved.[9]

A. The Millers negotiated and signed a construction contract with a draw schedule that put them underwater from the start.

When the Millers decided to build a new home in Fairmont, they selected Derrick Pritt and his company, Residential Creations LLC, as their contractor.[10] In their contract, signed in August 2015, the Millers and Residential Creations agreed on the construction of a 4,272 square foot home with a 4-car attached garage and unfinished basement.[11] The total cost would be $690,000, with payments to be made at 10 specific milestones:[12]

1.	Initial Payment	$70,000
2.	Foundation	$130,000
3.	Prefab, Walls & Floor (In Shop)	$60,000
4.	Superstructure A	$135,000
5.	Superstructure B	$50,000
6.	Rough Mechanicals	$75,000
7.	Insulation/Drywall	$65,000
8.	Interior/Exterior A	$50,000
9.	Interior/Exterior B	$45,000
10.	Retainage	$10,000
	Total:	**$690,000**

As the Millers later realized, this draw schedule was frontloaded and put them underwater from the start:[13] the proportion of funds disbursed to Residential Creations would not begin to match the progress of construction until the house was nearly finished.[14] But that would matter

[6] A.R. 589 (Trial Tr. 215:9-10).
[7] A.R. 546 (Trial Tr. 172:3-18) & A.R. 769 (Trial Tr. 395:5-18).
[8] A.R. 1107 (Jury Verdict).
[9] A.R. 818-19 (Trial Tr. 444:10-445:9).
[10] A.R. 464-66 (Trial Tr. 90:21-92:20).
[11] A.R. 866-92 (Pls.' Ex. 9).
[12] A.R. 866 (Pls.' Ex. 9).
[13] A.R. 490 (Trial Tr. 116:2-3), A.R. 578 (Trial Tr. 204:9 & 204:20-22) & A.R. 782 (Trial Tr. 408:6-7).
[14] A.R. 490 (Trial Tr. 116:2-4).

only if Residential Creations quit work before the Millers' home was finished. Unfortunately, that is exactly what happened.

In Spring 2016, the Millers received a call from one of Residential Creations' materialmen, O.C. Cluss, informing them that their contractor was about $117,000 behind on payments for materials supplied to their new home.[15] The Millers then learned that Residential Creations had stopped work sometime in April 2016 and declared bankruptcy.[16] At that time, Residential Creations had progressed through the first seven milestones and received $585,000 in corresponding draw payments. Even so, the Millers' house was only 53% complete,[17] and the Millers would spend an estimated $287,500 over the next year to finish the work.[18]

Unable to sue Residential Creations because of a bankruptcy stay,[19] the Millers instead sued their lender: WesBanco.[20]

B. The Millers obtained a construction loan from WesBanco to pay their contractor.

The Millers had contacted WesBanco about a construction loan before signing their agreement with Residential Creations.[21] They then worked with a contact there, a loan originator named Michelle Hamilton, on becoming pre-qualified—a process that generally requires the loan originator to collect financial information, make early disclosures, and collect any up-front fees.[22]

Later, the Millers would attach special significance to this pre-qualification process: they

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[15] A.R. 493 (Trial Tr. 119:5-22).
[16] A.R. 494 (Trial Tr. 120:3-5).
[17] A.R. 653-54 (Trial Tr. 279:15-280:19) & A.R. 893 (Pls.' Ex. 10).
[18] A.R. 505-08 (Trial Tr. 131:13-134:2) & A.R. 894-904 (Pls.' Ex. 11).
[19] A.R. 394 (Trial Tr. 20:3-4).
[20] A.R. 5-15 (Compl.) & A.R. 394 (Trial Tr. 20:3-7).
[21] A.R. 531-32 (Trial Tr. 157:24-158:4).
[22] A.R. 416 (Trial Tr. 42:1-9) & A.R. 418 (Trial Tr. 44:16-24).

alleged that Hamilton and certain early disclosure forms assured them that WesBanco would obtain lien waivers before each draw payment and pay only for finished work.[23] But at that time, the Millers were independently negotiating their construction contract with Residential Creations—including the frontloaded draw schedule.[24] WesBanco had no role in that process, and, in fact, the Millers signed an early disclosure agreeing that they were solely responsible for selecting their contractor.[25]

Indeed, the Millers and WesBanco did not sign their Residential Construction Loan Agreement (the Loan Agreement) until October 2015[26]—nearly two months after the Millers signed their separate agreement with Residential Creations.[27] Under the Loan Agreement, WesBanco agreed to loan the Millers $555,000 for the construction of their new home.[28] The Millers agreed to contribute about $149,000 as a down payment, which would cover the remainder of Residential Creations' contract price, a $7,600 balance owned to another contractor (Bill Beatty and his company, Three C Construction), and closing costs.[29] When the Loan Agreement closed on October 22, 2015, the settlement statement thus showed that the total amount of available funds was just over $704,000.[30]

C. WesBanco released seven draw payments to the Millers' contractor after receiving assurances that the corresponding work was finished.

Once the Loan Agreement closed, WesBanco assumed responsibility for making the draw payments to Residential Creations.[31] As required under Residential Creations' draw schedule,

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[23] A.R. 586-87 (Trial Tr. 212:21-213:6) & A.R. 738-39 (Trial Tr. 364:17-365:3).
[24] A.R. 531 (Trial Tr. 157:9-11) & A.R. 668 (Trial Tr. 294:5-15).
[25] A.R. 536-37 (Trial Tr. 162:13-163:8) & A.R. 998 (Def.'s Ex. 4).
[26] A.R. 999-1032 (Def.'s Ex. 5).
[27] A.R. 866-92 (Pls.' Ex. 9).
[28] A.R. 999 (Def.'s Ex. 5).
[29] A.R. 481 (Trial Tr. 107:1-13) & A.R. 1033-35 (Def.'s Ex. 6).
[30] A.R. 1033-35 (Def.'s Ex. 6).
[31] A.R. 1001 (Def.'s Ex. 5 at ¶ 4).

WesBanco made the $70,000 Initial Payment at closing.[32] But for each subsequent draw payment, WesBanco required four things before releasing the funds:[33]

1. Residential Creations' lien waiver for the work;
2. Residential Creations' builder's affidavit affirming, under oath, that no subcontractors or materialmen could claim a lien on the work;
3. A report from Priority Appraisal, a third-party inspector, confirming that the work associated with the draw payment was finished; and
4. The Millers' signed authorization allowing WesBanco to release the draw payment and agreeing to hold WesBanco harmless from any consequences from the release.

As Residential Creations made progress on the Millers' home, WesBanco made payments according to the draw schedule.[34] Each time, before releasing payment, WesBanco obtained Residential Creations' lien waiver, Residential Creations' builder's affidavit, Priority Appraisal's confirmation that the work was finished, and the Millers' confirmation that the work was finished and they would hold WesBanco harmless from any consequences.[35] WesBanco made its seventh-and-last draw payment to Residential Creations—the $65,000 Insulation/Drywall payment—on March 28, 2016.[36]

D. The Millers' contractor quit work and declared bankruptcy, and they acted as their own general contractor when finishing their home.

Shortly after WesBanco released the seventh draw payment for insulation and drywall

[32] A.R. 547 (Trial Tr. 173:18-20).
[33] A.R. 687-703 (Trial Tr. 313:16-329:13), A.R. 1037-54 (Def.'s Ex. 11), A.R. 1055-64 (Def.'s Ex. 12), A.R. 1065-74 (Def.'s Ex. 13), A.R. 1075-84 (Def.'s Ex. 14) & A.R. 1085-94 (Def.'s Ex. 15).
[34] A.R. 627 (Trial Tr. 253:17-22) & A.R. 668 (Trial Tr. 294:20-22).
[35] A.R. 687-703 (Trial Tr. 313:16-329:13), A.R. 1037-54 (Def.'s Ex. 11), A.R. 1055-64 (Def.'s Ex. 12), A.R. 1065-74 (Def.'s Ex. 13), A.R. 1075-84 (Def.'s Ex. 14) & A.R. 1085-94 (Def.'s Ex. 15).
[36] A.R. 687 (Trial Tr. 313:3-8).

work, Residential Creations quit work and declared bankruptcy,[37] leaving the Millers' home unfinished and subject to an approximately $117,000 lien in favor of O.C. Cluss.[38] Rather than hire a new general contractor, as WesBanco would have required before releasing additional funds under the Loan Agreement, the Millers elected to act as their own general contractors and self-financed the completion of their house by liquidating savings and obtaining a loan from Brad Miller's parents.[39] They calculated their total cost at $287,500.[40]

In the meantime, O.C. Cluss sued the Millers to enforce its lien in an action that remains pending in the Circuit Court of Marion County.[41]

E. Unable to sue their bankrupt contractor, the Millers sued WesBanco instead.

The Millers sued WesBanco about a year after Residential Creations quit work and declared bankruptcy.[42] In their complaint, the Millers alleged that WesBanco was responsible for cost overruns and the O.C. Cluss lien under theories of breach of contract, negligence, gross negligence, and breach of trust.[43] But the trial court dismissed the negligence and gross negligence claims,[44] and the Millers abandoned the breach of trust claim, leaving only two breach of contract claims in dispute.[45]

In their first claim, the Millers alleged that WesBanco breached their contract by paying Residential Creations for unfinished work.[46] And in their second claim, the Millers alleged that WesBanco breached their contract by paying Residential Creations without first obtaining lien

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[37] A.R. 687 (Trial Tr. 313:10).
[38] A.R. 493-94 (Trial Tr. 119:3-120:5).
[39] A.R. 500 (Trial Tr. 126:14-24) & A.R. 765-66 (Trial Tr. 391:16-392:8).
[40] A.R. 508 (Trial Tr. 134:2) & A.R. 894-904 (Pls.' Ex. 11).
[41] A.R. 494 (Trial Tr. 120:6-14) & A.R. 905-18 (Pls.' Ex. 13).
[42] A.R. 5-15 (Compl.).
[43] *Id.*
[44] A.R. 38-48 (Order on Mots. to Dismiss).
[45] *See, e.g.*, A.R. 349-63 (Jury Charge).
[46] A.R. 5-15 (Compl.) & A.R. 361 (Jury Charge).

waivers from materialmen.[47]

WesBanco moved for summary judgment on both claims before trial, arguing that the Millers had failed to demonstrate genuine issues of material fact on breach.[48] The trial court denied the motion, however, because it believed there was a "tension" between the Loan Agreement, on the one hand, and the early disclosures and Michelle Hamilton's statements, on the other hand.[49] It held that a jury could find that one of the early disclosures—the so-called "Expectations Form"[50]—had been incorporated into the Millers and WesBanco's contract.[51] So when WesBanco moved the trial court in *limine* to define the parties' contract as the Loan Agreement[52] and to exclude any parol evidence,[53] the trial court denied the motion for same reasons.[54] The trial court likewise refused WesBanco's jury instruction defining the parties' contract as the Loan Agreement.[55]

F. At trial, the Millers invited the jury to disregard the parties' written contract and offered discredited inferences on liability and damages.

The Millers' remaining breach of contract claims went to trial over three days in August 2019.[56] There were three predominating questions for the jury:

1. Did WesBanco pay Residential Creations for unfinished work?
2. Was WesBanco required to obtain lien waivers from materialmen before releasing the draw payments to Residential Creations?
3. If the Millers proved liability, what were their damages?

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[47] *Id.*
[48] A.R. 49-175 (Mot. for Summ. J.).
[49] A.R. 207 (Order on Mot. for Summ. J.).
[50] A.R. 860 (Pls.' Ex. 1).
[51] A.R. 207 (Order on Mot. for Summ. J.).
[52] A.R. 213-56 (Mot. in *Limine* on Contractual Definition).
[53] A.R. 209-12 (Mot. in *Limine* on Parol Evidence).
[54] A.R. 373 (Prelim. H'rg Tr. 10:1-13).
[55] *Compare* A.R. 261 (Def.'s Proposed Jury Instr. 1) *with* A.R. 349-63 (Jury Charge).
[56] A.R. 364 (Trial Tr. 1).

The Millers called Brad Miller, Jamie Miller, former WesBanco loan originator Michelle Hamilton, current WesBanco Vice President Cathi McClelland, and O.C. Cluss president Chris Cluss.[57] WesBanco called McClelland during the Millers' case-in-chief.[58]

On their unfinished-work claim, the Millers' liability argument turned on the difference between the expected and actual costs of constructing their home.[59] This difference generally represented the Millers' $287,500 in out-of-pocket expenses after Residential Creations quit work, less the $113,000 that was not disbursed under the Loan Agreement.

Expected Costs:	
WesBanco Loan	$555,000
Down Payment	$149,000
Out-of-Pocket Expenses	$0
Total:	**$704,000**

Actual Costs:	
WesBanco Loan	$442,000
Down Payment	$149,000
Out-of-Pocket Expenses	$287,500
Total:	**$878,500**

The Millers argued that this difference could be explained only if WesBanco had paid Residential Creations for unfinished work.[60] But they admitted that Residential Creations' draw schedule was frontloaded and had put them underwater from the start.[61] And they acknowledged that the work associated with each draw payment was finished before WesBanco released the funds: Residential Creations had said so, Priority Appraisal had said so, and the Millers had said so.[62] Moreover, of the $287,500 that the Millers spent to finish their home after Residential Creations quit work, the Millers could not identify any specific work for which Residential Creations had already been paid.[63] Multiple witnesses, however, could identify out-of-pocket expenses, amounting to tens of thousands of dollars,[64] that would have fallen under the Interior/Exterior A and Interior/Exterior B

[57] A.R. 365 (Trial Tr. 2).
[58] A.R. 365 (Trial Tr. 2) & A.R. 666 (Trial Tr. 292:4-7).
[59] *See, e.g.*, A.R. 490 (Trial Tr. 116:2-4) & A.R. 563 (Trial Tr. 189:15-19).
[60] A.R. 563 (Trial Tr. 189:3-19).
[61] A.R. 490 (Trial Tr. 116:2-4); *see also* A.R. 782 (Trial Tr. 408:6-7).
[62] A.R. 687-703 (Trial Tr. 313:16-329:13) & A.R. 783 (Trial Tr. 409:2-11).
[63] *See* A.R. 563 (Trial Tr. 189:9 & 189:13), A.R. 570 (Trial Tr. 196:1), A.R. 580 (Trial Tr. 206:17), A.R. 581 (Trial Tr. 207:2) & A.R. 582 (Trial Tr. 208:16-17).
[64] *Id.*

draw payments that were never released.[65]

On their lien-waiver claim, the Millers' liability argument focused on the Expectations Form and alleged oral representations by their loan originator, Michelle Hamilton. Although predating their execution of the Loan Agreement, the Millers argued that the Expectations Form had been made part of their agreement with WesBanco[66]—primarily because Hamilton had referenced it after closing when answering a question from Dr. Jamie Miller about draw payments.[67] But even if the Expectations Form imposed obligations on WesBanco, the Millers acknowledged that it made no reference to materialmen's liens—the only type of lien at issue in the case.[68] In fact, the only reference to materialmen's liens was in the Loan Agreement, which required materialmen's liens to be waived in three specific cases:

1. If materials had been supplied to the site before the initial advance, then before disbursement of the initial advance;[69]
2. If materials had been supplied to the site before the initial advance, then before each subsequent disbursement;[70] and
3. Before the final disbursement.[71]

None of those cases applied to the Millers.[72] They also admitted that they had agreed to hold WesBanco harmless from any liens under the Loan Agreement.[73] But they argued that it was nonsensical to use the same condition for requiring lien waivers with both the initial advance and subsequent disbursements.[74] And they suggested that their hold-harmless agreement was unjust because

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[65] A.R. 573 (Trial Tr. 199:13-14), A.R. 575 (Trial Tr. 201:4-5), A.R. 581 (Trial Tr. 207:9-13 & 207:17-20), A.R. 582 (Trial Tr. 208:6-8), A.R. 604 (Trial Tr. 230:18-21), A.R. 605 (Trial Tr. 231:3-5), A.R. 709 (Trial Tr. 335:11 & 335:14) & A.R. 710 (Trial Tr. 336:17-21).
[66] *See, e.g.*, A.R. 538 (Trial Tr. 164:12-17).
[67] *See, e.g.*, A.R. 433 (Trial Tr. 59:2-23) & A.R. 860 (Pls.' Ex. 1).
[68] A.R. 773 (Trial Tr. 399:7-11).
[69] A.R. 1001 (Def.'s Ex. 5 at ¶ 4(C)(i)).
[70] A.R. 1001 (Def.'s Ex. 5 at ¶ 4(C)(ii)).
[71] A.R. 1002 (Def.'s Ex. 5 at ¶ 6).
[72] A.R. 673 (Trial Tr. 299:2-4 & 299:17-24).
[73] A.R. 1002 (Def.'s Ex. 5 at ¶ 7).
[74] A.R. 546 (Trial Tr. 172:3-9).

WesBanco had accepted incomplete builder's affidavits from Residential Creations.[75]

Thus, in their closing argument, the Millers asked the jury to find that WesBanco breached the contract on both the unfinished-work and lien-waiver claims. The Millers then told the jury exactly what damages they had incurred: $291,500 plus $7,600 in unreleased funds for Three C Construction.[76] They even presented the jury with a detailed calculation:

	$442,000	Loan Distribution from WesBanco
+	$149,000	Down Payment
+	$287,500	Out-of-Pocket Expenses
+	$117,000	O.C. Cluss Lien
=	**$995,500**	**Subtotal of Actual Costs and Lien**
-	**$704,000**	**Expected Costs**
=	**$291,500**	**Subtotal of Requested Damages**
+	$7,600	Unreleased Funds for Three C Construction
=	**299,100**	**Final Total of Requested Damages**

G. The jury returned a verdict awarding the Millers more damages than they had presented in summation, and the trial court denied WesBanco's post-trial motions.

After deliberating for about 90 minutes, the jury returned a verdict for the Millers on liability and awarded $404,500 in damages—about $105,000 more than the Millers told the jury they had proved.[77] No one disputes that this award is composed of the Millers' $287,500 out-of-pocket expenses and the $117,000 O.C. Cluss Lien.[78]

WesBanco, which had timely moved for judgment as a matter of law under Rule 50 during trial,[79] renewed its Rule 50 motion and, additionally, moved for a new trial or remittitur under Rule 59.[80] The trial court denied WesBanco's Rule 50 and Rule 59 motions,[81] and this appeal followed.

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[75] A.R. 719 (Trial Tr. 345:4-10).
[76] A.R. 818-19 (Trial Tr. 444:10-445:9) & A.R. 345 (Pls.' Summation Demonstrative Ex.).
[77] A.R. 1107-09 (Jury Verdict).
[78] A.R. 1151-52 (Post-Trial Motions Hr'g Tr. 42:17-43:1).
[79] A.R. 786-89 (Trial Tr. 412:11-415:4).
[80] A.R. 272-309 (Def.'s Post-Trial Mot.).
[81] A.R. 346-48 (Order Denying Post Trial Mots.).

SUMMARY OF THE ARGUMENT

Before trial, WesBanco moved the trial court to define the parties' contract as the Loan Agreement and exclude any parol evidence that would supplement, amend, or contradict it. But the trial court denied WesBanco's motions because it found that there was an inherent tension in how the Loan Agreement and an early disclosure, the Expectations Form, discussed lien waivers. It also held that the parties' conduct could allow a jury to find that the Expectations Form had been made part of their contract. Under West Virginia law, however, the trial court—and not the jury—determines what constitutes a contract, and an unambiguous written agreement is presumptively integrated. The trial court thus erred by denying WesBanco's motions and allowing the Millers to introduce parol evidence to supplement, amend, and contradict the Loan Agreement.

The trial court similarly erred by overruling WesBanco's objections to the Millers' questions asking whether certain contractual clauses were consistent with the duty of good faith and fair dealing. By permitting the Millers to focus on the contract's fairness rather than the parties' conduct, the Millers were able to invite the jury to create new contractual rights.

Even with these highly-prejudicial evidentiary errors, however, the trial evidence failed to support a *prima facie* case, let alone the jury's verdict in favor of the Millers. On their unfinished-work claim, the Millers offered speculative theories on liability while admitting that all work was finished when WesBanco released the corresponding draw payments to Residential Creations. On their lien-waiver claim, the Millers offered a subjective interpretation of what they wished the Loan Agreement had said, while conceding plain language that did not require WesBanco to obtain lien waivers from O.C. Cluss under the facts of their case. And on damages more broadly, the unrebutted evidence showed that the jury's verdict included $113,000 that did not result from payment for unfinished work and another $14,000 that did not result from any failure to obtain lien

waivers. The trial court thus erred when it denied WesBanco's motion for judgment as a matter of law on the unfinished-work and lien-waiver claims under Rule 50(b)[82] or, alternatively, a new trial or remittitur under Rule 59(a).[83]

For those reasons, this Court should reverse and direct the trial court to set aside the jury verdict and either (1) enter judgment as a matter of law for WesBanco, (2) order a new trial, (3) remit the verdict to $277,500, or (4) allow the Millers to accept remittitur to $277,500 or elect a new trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

WesBanco requests oral argument and a signed decision under subparagraph (a)(1) or (a)(3) of Rule 19.[84] Under Rule 19(a)(1),[85] oral argument is appropriate because this case assigns error in the application of settled law on the proof of liability and damages in breach-of-contract cases. Alternatively, under Rule 19(a)(3),[86] oral argument is appropriate because this case claims that the jury reached its verdict upon insufficient evidence or against the weight of the evidence.

ARGUMENT

I. Unambiguous written agreements must be enforced according to their terms.

Under West Virginia law, "[w]hen a written contract is clear and unambiguous its meaning and legal effect must be determined solely from its contents and it will be given full force and effect according to its plain terms and provisions."[87] What constitutes a contract is a question of law for the court.[88]

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[82] W. Va. R. Civ. P. 50(a).
[83] W. Va. R. Civ. P. 59(a).
[84] W. Va. R. App. P. 19.
[85] W. Va. R. App. P. 19(a)(1).
[86] W. Va. R. App. P. 19(a)(3).
[87] Syl. Pt. 3, in part, *Kanawha Banking & Tr. Co. v. Gilbert*, 131 W. Va. 88, 46 S.E.2d 225 (1947).
[88] *Pipemasters, Inc. v. Putnam Cty. Comm'n*, 218 W. Va. 512, 518, 625 S.E.2d 274, 280 (2005) (*per curiam*).

A. The trial court allowed the jury to hear parol evidence that varied and contradicted the parties' Loan Agreement.

West Virginia law presumes that an unambiguous written contract is fully-integrated: "[a]n unambiguous written contract entered into as the result of verbal or written negotiations will, in the absence of fraud or mistake, be conclusively presumed to contain the final agreement of the parties to it."[89] And West Virginia law requires a trial court to enforce an unambiguous written contract according to its plain language and without reference to parol evidence: "such contract may not be varied, contradicted or explained by extrinsic evidence of conversations had or statements made contemporaneously with or prior to its execution."[90]

Here, the Millers and WesBanco signed the Loan Agreement on October 22, 2015.[91] Despite the Millers' self-serving arguments that the Loan Agreement does not make sense, its language on lien waivers is clear and unambiguous. Paragraph 4(B)(i) allows WesBanco to make any draw payment conditional upon lien waivers "if deemed necessary,"[92] but only ¶ 4(C)(i),[93]

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[89] Syl. Pt. 2, in part, *Kanawha Banking & Tr. Co.*, 131 W. Va. at 88, 46 S.E.2d at 225.

[90] *Id.*

[91] A.R. 999-1032 (Def.'s Ex. 5).

[92] A.R. 1001 (Def.'s Ex. 5) (cont.)

4. Advance of funds. ...

B.) The procedure for requesting disbursements is as follows:

(i) ... Lender shall be under no obligation to advance funds hereunder until Lender has obtained a satisfactory inspection report from an inspector of its own choosing indicating that sufficient construction has occurred to support the amount of draw requested and has received the executed Waiver of Liens from the general contractor and from the subcontractors, suppliers and materialmen, if deemed necessary. ...

[93] A.R. 1001 (Def.'s Ex. 5) (cont.)

4. Advance of funds. ...

C.) After depletion of the Borrower's portion of the contract price specified above towards the construction of the proposed improvements, Lender shall, upon application of the Borrower to make periodic disbursements to the Borrower for payment for work actually performed, materials delivered, or materials for the delivery of which the borrower has entered into an agreement, provided:

(i) That the initial request for disbursement of the proceeds of the loan shall be accompanied by the executed waiver of lien forms signed by all contractors, subcontractors, and materialmen who furnished labor or materials to the site prior to the initial advance;

(ii) That all subsequent disbursements shall have been approved by the Construction Loan Department, to the effect that the improvements are being completed in accordance with the predetermined schedule for utilization of the contract price and shall be accompanied by the executed waiver of lien forms signed by all contractors, subcontractors, and materialmen who furnished labor or materials to the site prior to the initial advance ...

¶ 4(C)(ii),[94] and ¶ 6[95] actually require lien waivers, and then in only three specific instances:

1. If materials had been supplied to the site before the initial advance, then before disbursement of the initial advance;[96]
2. If materials had been supplied to the site before the initial advance, then before each subsequent disbursement;[97] and
3. Before the final disbursement.[98]

If there were any doubt about who was responsible for obtaining lien waivers, ¶ 7 of the Loan Agreement states, "Borrower agrees that any mechanic's lien filed upon the property shall be Borrower's sole responsibility and hereby holds Lender harmless against all losses, including but not limited to, liability, costs, or damages resulting from same."[99]

Thus, WesBanco submitted two motions in *limine* asking the Court to define the parties' contract as the Loan Agreement[100] and to exclude any evidence that would supplement, amend, or contradict it. [101] Despite the Loan Agreement's plain language, however, the trial court denied both motions because it found the Loan Agreement to be in tension with the Expectations Form that WesBanco had given the Millers during the loan origination process[102]—nearly two full months before the Loan Agreement was signed.[103]

The Millers then used these evidentiary rulings to invite the jury to redefine the parties'

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[94] *Id.*

[95] A.R. 1002 (Def.'s Ex. 5) (cont.)

6. Final Advance of the Loan. The obligation of the Lender to make the final advance under the loan shall be subject to the Borrower providing evidence satisfactory to the Lender that a permanent certificate of occupancy and all government approvals, federal, state and local, necessary for the use and occupancy of the improvements have been obtained, if required. ... Borrower shall provide Lender with a final inspection report which must be satisfactory to the Lender, and the Lender has received the fully executed Waiver of Liens from all subcontractors, suppliers and materialmen and the Builder's Affidavit.

[96] A.R. 1001 (Def.'s Ex. 5 at ¶ 4(C)(i)).

[97] A.R. 1001 (Def.'s Ex. 5 at ¶ 4(C)(ii)).

[98] A.R. 1002 (Def.'s Ex. 5 at ¶ 6).

[99] A.R. 1002 (Def.'s Ex. 5 at ¶ 7).

[100] A.R. 213-56 (Mot. in *Limine* on Contractual Definition).

[101] A.R. 209-12 (Mot. in *Limine* on Parol Evidence).

[102] A.R. 439 (Trial Tr. 65:16-20) & A.R. 860 (Pls.' Ex. 1).

[103] A.R. 999-1032 (Def.'s Ex. 5).

agreement for itself. Nowhere was this more apparent than in the Millers' summation:

> "The construction loan agreement, which the defendants would have that being the sole contract, but **the Judge has instructed you differently, that it consists of all elements. It can consist of all elements that were part of the loan process** that the Millers has because a banker, and in fact, the Millers too, had the obligation of acting in good faith in fair dealing."[104]

But the Millers also used these evidentiary rulings to introduce Michelle Hamilton's testimony about pre-Loan Agreement discussions with the Millers about lien waivers,[105] as well as her post-Loan Agreement e-mail that attached a copy of the Expectations Form in response to the Millers' questions about draw payments.[106] Those rulings allowed Jamie Miller to testify that the Loan Agreement was just one part of the parties' contract, which was made up of the "many papers given to [the Millers] and signed and executed at various points along the way."[107] They also allowed Jamie Miller to contradict the Loan Agreement by testifying that WesBanco promised her that it would take care of lien waivers before each draw payment.[108] And they allowed Brad Miller to testify that Hamilton "reassured [the Millers] that release of mechanic's liens would be obtained throughout the process ... Right from the beginning."[109]

This evidence never should have been admitted. The Loan Agreement was an unambiguous written agreement that, under West Virginia law, presumptively expressed the parties' entire agreement.[110] The Expectations Form and associated testimony were inadmissible to alter, contradict, or vary the subsequently-executed Loan Agreement.[111] Nor did this evidence become admissible merely because Hamilton referred the Millers back to it after the Loan Agreement was signed.

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[104] A.R. 814 (Trial Tr. 440:9-15) (emphasis added).
[105] *See* A.R. 422 (Trial Tr. 48:15-24).
[106] *See* A.R. 432-34 (Trial Tr. 58:21-60:16) & A.R. 865 (Pls.' Ex. 6).
[107] A.R. 538 (Trial Tr. 164:12-17).
[108] A.R. 586-87 (Trial Tr. 212:21-213:6).
[109] A.R. 738-39 (Trial Tr. 364:17-365:3).
[110] Syl. Pt. 3, *Kanawha Banking & Tr. Co.*, 131 W. Va. at 88, 46 S.E.2d at 225.
[111] Syl. Pt. 2, *id.*

"The rule is [that a] court can consider no sort of parol evidence, such as the declaration of the parties before, at the time of, or after the execution of, a contract in writing; nor can the court call in aid any kind of parol testimony to alter, explain, or modify a written contract, if it is free from ambiguity on its face."[112]

The trial court thus erred when it denied WesBanco's motions in *limine*.

B. The trial court allowed questions suggesting to the jury that it could apply the duty of good faith and fair dealing to vary and contradict the Loan Agreement.

In ¶ 7, the Loan Agreement clearly and unambiguously made the Millers responsible for any liens: "Borrower agrees that any mechanic's lien filed upon the property shall be Borrower's sole responsibility and hereby holds Lender harmless against all losses, including but not limited to, liability, costs, or damages resulting from same."[113] And though this clause, like any other, is subject to the implied duty of good faith and fair dealing, that duty "cannot give contracting parties rights which are inconsistent with those set out in the contract."[114] Yet the Millers invited the jury to apply the duty of good faith of fair dealing to contradict the Loan Agreement, and the trial court allowed it.

The trial court twice overruled WesBanco's objections to the Millers' questioning of its corporate representative, Cathi McClelland, on the duty of good faith. The Millers' counsel first asked McClelland, "Do you believe that that clause [¶ 7] is subject to being interpreted under principles of good faith and fair dealing?"[115] And when McClelland asked for clarification after

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[112] *McCoy v. Ash*, 64 W. Va. 655, ---, 63 S.E. 361, 362 (1908) (quoting Syl. Pt. 2, *Martin v. Monongahela R. Co.*, 48 W. Va. 542, 37 S.E. 563 (1900)) (internal quotations omitted).
[113] A.R. 1002 (Def.'s Ex. 5 at ¶ 7).
[114] *Barn-Chestnut, Inc. v. CFM Dev. Corp.*, 193 W. Va. 565, 572, 457 S.E.2d 502, 509 (1995).
[115] A.R. 718 (Trial Tr. 344:22-23).

WesBanco's objection was overruled,[116] the Millers' counsel went further, asking, "Do you think it would be within the parameters of good faith and fair dealing to interpret this contract language to say this is your responsibility [if the bank identified a supplier's lien and either did not pay or short-paid, leading to the filing of a lien]?"[117] The trial court overruled WesBanco's objection to this question, too, stating that "the good faith and fair dealing that's an obligation of every contract ... would be something for the jury to consider."[118]

Yet, by focusing on the fairness of the Loan Agreement itself, rather than WesBanco's performance of the contract, the Millers invited the jury to disregard the plain contractual language and give the parties new contractual rights and obligations based on its own interpretation of fairness—precisely what this Court has said the duty of good faith and fair dealing does not allow.[119] The trial court thus erred when it overruled WesBanco's objections to the Millers' questions on the duty of good faith and fair dealing.

C. The trial court's evidentiary rulings were reversible errors.

The trial court's evidentiary rulings were highly prejudicial. By failing to define the parties' contract and admitting extrinsic evidence, it allowed the jury to substitute the Expectations Form for the parties' written Loan Agreement signed two months later, and to apply that Expectations Form based on the Millers' own subjective interpretation. Similarly, by focusing on the good faith and fairness of the Loan Agreement itself, rather than on WesBanco's performance under the Loan Agreement, the Millers invited the jury to disregard the plain contractual language and give the parties' new contractual rights and obligations based on its own interpretation of fairness. And

[116] A.R. 718-19 (Trial Tr. 344:22-345:1).
[117] A.R. 719 (Trial Tr. 345:2-10).
[118] A.R. 720 (Trial Tr. 346:9-12).
[119] *Barn-Chestnut, Inc.*, 193 W. Va. at 572, 457 S.E.2d at 509.

they made that argument a centerpiece of their summation.[120]

This Court has held that a trial court commits reversible error when it admits parol evidence to alter a contract's clear and unambiguous language, because there is the chance that the jury's verdict was based on such evidence.[121] This reasoning is equally persuasive when the same possibility exists because of an erroneous application of the duty of good faith and fair dealing. The Court thus should hold that the trial court's evidentiary rulings were reversible error.

II. A defendant is entitled to judgment as a matter of law when the plaintiff fails to make a *prima facie* case or no reasonable jury could have arrived at the verdict.

Under W. Va. R. Civ. P. 50(b),[122] there are two cases in which a trial court may set aside a jury verdict and grant the defendant judgment as a matter of law.[123] In the first case, the plaintiff has failed to adduce sufficient evidence to make a *prima facie* case,[124] meaning that the jury verdict "could only have been the result of sheer surmise and conjecture."[125] And in the second case, the evidence weighs so heavily in favor of the defendant that "reasonable and fair minded jurors could not arrive at a verdict against [it]."[126] Under either case, the trial court should give the plaintiffs the benefit of every assumption, doubt, and inference.[127] This Court applies a *de novo* standard of review.[128]

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[120] A.R. 839-42 (Trial Tr. 465:22-468:19).
[121] *Spencer v. Travelers Ins. Co.*, 148 W. Va. 111, 121, 133 S.E.2d 735, 741 (1963).
[122] W. Va. R. Civ. P. 50(b).
[123] Franklin D. Cleckley et al., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 1117-18 (4th ed. 2012).
[124] Syl. Pt. 3, *Roberts v. Gale*, 149 W. Va. 166, 139 S.E.2d 272 (1964).
[125] Cleckley et al., LITIGATION HANDBOOK at 1118.
[126] Cleckley et al., LITIGATION HANDBOOK at 1118; See also Syl. Pts. 5 & 6, *Lightner v. Lightner*, 146 W. Va. 1024, 124 S.E.2d 355 (1962).
[127] Syl. Pt. 1, *Bailey v. Norfolk & W. R. Co.*, 206 W. Va. 654, 527 S.E.2d 516 (1999).
[128] Syl. Pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009).

A. The Millers did not make a *prima facie* case on their unfinished-work claim, and no reasonable jury could have held WesBanco liable.

1. The Millers admitted that they could not identify the existence of any unfinished work.

To prove liability on their unfinished-work claim, the trial court instructed the jury that the Millers had to show "[t]hat WesBanco paid Residential Creations for work that was not done.[129] The Millers asked the jury to infer this element under one of two theories: (1) the Millers' home cost more to construct than Residential Creations had quoted them[130] or (2) the share of finished construction was less than the share of the contract price that had been disbursed when Residential Creations quit work.[131] Yet neither theory supports the conclusion for which it was offered.

For a reasonable jury to find that WesBanco paid for unfinished work based on the cost of the Millers' home or the proportion of funds disbursed, those measures would have had to correlate with the progress of construction. The Millers acknowledged, however, that Residential Creations' draw schedule had placed them underwater from the start, meaning that progress would only start to align with cost as construction progressed.[132] Moreover, Brad Miller admitted that all work through the seventh-and-last draw payment was finished when funds were released on March 28, 2016:

> Q. ... Our builder [*sic*; read: inspector] tells us on March 28 that the insulation and drywall stage of construction was done, right?
>
> A. Correct.
>
> Q. And you don't dispute that?
>
> A. No.[133]

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[129] A.R. 361 (Jury Charge).
[130] *See* A.R. 563 (Trial Tr. 189:15-19).
[131] *See* A.R. 490 (Trial Tr. 116:2-4).
[132] A.R. 490 (Trial Tr. 116:2-4); *see also* A.R. 782 (Trial Tr. 408:6-7).
[133] A.R. 783 (Trial Tr. 409:7-11).

Brad Miller's admission fatally discredited the Millers' theories on liability. But it was consistent with clear documentary evidence showing that, after releasing the first draw payment at closing, WesBanco never paid Residential Creations without first obtaining four documents assuring it that the corresponding work was finished:[134]

1. Residential Creations' lien waiver for the work;
2. Residential Creations' builder's affidavit affirming, under oath, that no subcontractors or materialmen could claim a lien on the work;
3. A report from Priority Appraisal, a third-party inspector, confirming that the work associated with the draw payment was finished; and
4. The Millers' signed authorization allowing WesBanco to release the draw payment and agreeing to hold WesBanco harmless from any consequences from the release.

In the face of this overwhelming evidence that WesBanco paid only for finished work, the Millers stood on their inferences. And the trial court found this sufficient, adopting those inferences in denying WesBanco's Rule 50(b)[135] motion on liability for the unfinished-work claim.

But even giving the Millers every benefit of the doubt,[136] Residential Creations said the work was finished, the third-party inspector said the work was finished, and the Millers said the work was finished, once with every release they signed during construction and once again at trial.[137] No reasonable jury could have relied on these inferences in the face of such overwhelming evidence—including Brad Millers' admission that discredited the Millers' only theories on liability. The trial court thus erred by denying WesBanco's Rule 50(b)[138] motion.

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[134] A.R. 687-703 (Trial Tr. 313:16-329:13), A.R. 894-904 (Def.'s Ex. 11), A.R. 1055-64 (Def.'s Ex. 12), A.R. 1065-74 (Def.'s Ex. 13), A.R. 1075-84 (Def.'s Ex. 14) & A.R. 1085-94 (Def.'s Ex. 15).
[135] W. Va. R. Civ. P. 50(b).
[136] Syl. Pt. 1, *Bailey*, 206 W. Va. at 654, 527 S.E.2d at 516.
[137] A.R. 687-703 (Trial Tr. 313:16-329:13), A.R. 894-904 (Def.'s Ex. 11), A.R. 1055-64 (Def.'s Ex. 12), A.R. 1065-74 (Def.'s Ex. 13), A.R. 1075-84 (Def.'s Ex. 14) & A.R. 1085-94 (Def.'s Ex. 15).
[138] W. Va. R. Civ. P. 50(b).

2. The Millers admitted that they could not identify the value of any unfinished work.

To prove liability on their unfinished-work claim, the trial court instructed the jury that the Millers had to show "[t]hat they incurred damages because WesBanco paid Residential Creations for work that was not done.[139] As they had with liability, the Millers invited the jury to speculate. Their only evidence on damages was an 11-page spreadsheet listing about $287,500 in expenses that they incurred when finishing their home after Residential Creations quit work.[140] Yet the Millers repeatedly admitted that they could not distinguish between expenses falling under the draw payments that had been released (unfinished work) and expenses falling under the draw payments that had not been released (unstarted work). The testimony on this point was consistent:

- I don't know, you tell me. (Jamie Miller)[141]
- I can't tell you specifically... (Jamie Miller)[142]
- I don't know what all [WesBanco] paid for... (Jamie Miller)[143]
- I don't know under which [draw] category things were paid for that hadn't been done. (Jamie Miller)[144]
- I can't pinpoint it to something. (Jamie Miller)[145]
- I cannot identify specifically what that is [that was paid for when unfinished]. (Jamie Miller)[146]

The Millers' inability to distinguish between unfinished work and unstarted work was significant. The trial court instructed the jury that the Millers could only recover damages for unfinished work.[147] And so any work that fell under the last three draw payments that WesBanco did

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[139] A.R. 361 (Jury Charge).
[140] *See* A.R. 894-904 (Pls.' Ex. 11).
[141] A.R. 563 (Trial Tr. 189:9).
[142] A.R. 563 (Trial Tr. 189:13).
[143] A.R. 570 (Trial Tr. 196:1).
[144] A.R. 580 (Trial Tr. 206:17).
[145] A.R. 581 (Trial Tr. 207:2).
[146] A.R. 582 (Trial Tr. 208:16-17).
[147] A.R. 361 (Jury Charge).

not release was unstarted work for which the jury could not award damages. This unstarted work fell under three broad categories:

8.	Interior/Exterior A	$50,000
9.	Interior/Exterior B	$45,000
10.	Retainage	$10,000
	Total:	**$105,000**

The Millers agreed that they were not seeking damages for unstarted work that fell under these three draw payments: "I'm not asking for damages for things that were not paid out in G and H [for Interior/Exterior A and Interior/Exterior B]."[148] But tellingly, multiple witnesses testified that the Millers' spreadsheet included expenses for unstarted work, or for things that otherwise did not qualify as unfinished work.

- I suspect there are [things in the spreadsheet that fall under Interior/Exterior A or Interior/Exterior B], yes. (Jamie Miller)[149]
- [The spreadsheet] doesn't show ... if certain things were paid for by the bank ... because that I don't know, or whether they overpaid for things that are in the draw schedule. It doesn't show either one of those. (Jamie Miller)[150]
- Some of these items that are on here were things that my husband and I had prepaid Mr. Beatty [of Three C Construction] before. ... I wouldn't expect the bank to pay for that. (Jamie Miller)[151]
- I would not expect that it [the kitchen] was included in those disbursements [made by WesBanco]. (Jamie Miller)[152]
- I don't expect [WesBanco] to have paid for painting. (Jamie Miller)[153]
- That [soffit and fascia] would be for the exterior of the house. (Chris Cluss)[154]
- The interior doors and probably the trim package as well [are for the

[148] A.R. 575 (Trial Tr. 201:20-21).
[149] A.R. 581 (Trial Tr. 207:9-13).
[150] A.R. 581 (Trial. Tr. 207:17-217:20).
[151] A.R. 582 (Trial Tr. 208:6-8).
[152] A.R. 573 (Trial Tr. 199:13-14).
[153] A.R. 575 (Trial Tr. 201:4-5).
[154] A.R. 604 (Trial Tr. 230:18-21).

interior of the house]. (Chris Cluss)[155]

- ...trim and molding and casing. (Cathi McClelland)[156]
- Shelving and plumbing supplies, floor paper, etc. (Cathi McClelland)[157]
- Shoe molding ... vanity tops ... fireplace boxes ... flooring supplies ... stair treads, railings. (Cathi McClelland)[158]
- Wood flooring ... ceiling fan for livingroom [sic] ... garbage disposals. (Cathi McClelland)[159]

Because West Virginia law requires plaintiffs to prove damages with reasonable certainty,[160] a reasonable jury could not have relied on the Millers' spreadsheet to award damages. The case of *Wilson v. Wiggin*[161] provides an example. In *Wilson*, the plaintiff alleged that he was damaged when the defendant delivered a poorer quality lumber than specified under their lumber supply contract.[162] When asked to quantify his damages, however, the plaintiff testified, "I can't tell how much. It is at least $3,000 or $4,000–$5,000; I don't now [sic]; it is as much as that; and I don't know but that it is a whole lot more; I can't tell you."[163] On those facts, this Court held that the plaintiff had not proved compensatory damages with the reasonable specificity required and would be entitled, at most, to nominal damages.[164]

That proof of damages requires reasonable specificity is a fundamental rule:

> The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for

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[155] A.R. 605 (Trial Tr. 231:3-5).
[156] A.R. 709 (Trial Tr. 335:11).
[157] A.R. 709 (Trial Tr. 335:14).
[158] A.R. 709 (Trial Tr. 335:19-22).
[159] A.R. 710 (Trial Tr. 336:17-21).
[160] *Rodgers v. Bailey*, 68 W. Va. 186, ---, 69 S.E. 698, 699 (1910).
[161] *Wilson v. Wiggin*, 77 W. Va. 1, 87 S.E. 92 (1915).
[162] *Id.* at ---, 87 S.E. at 92-93.
[163] *Id.* at ---, 87 S.E. at 93.
[164] *Id.*

> a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages.[165]

Yet like the lumber buyer in *Wilson*, the Millers admitted that they could not identify any spreadsheet expenses that represented unfinished work.[166] And, in fact, they went one step further by freely acknowledging that numerous spreadsheet expenses represented unstarted work for which WesBanco could not have been held liable.[167] The trial court thus erred when it accepted the Millers' arguments, which relied exclusively on this spreadsheet for proof of damages, to deny WesBanco's Rule 50(b)[168] motion on damages for the unfinished-work claim.[169]

B. The Millers did not make a *prima facie* case on their lien-waiver claim, and no reasonable jury could have held WesBanco liable.

1. The contractual lien-waiver clauses did not apply to the Millers' case.

To find liability on the Millers' lien-waiver claim, the trial court instructed the jury that the Millers had to show "[t]hat WesBanco was required by the contract to get a lien waiver from O.C. Cluss."[170] All parties agreed that O.C. Cluss was a materialman.[171] And so it was significant that the Millers' contract with WesBanco required lien waivers from materialmen in only three specific cases:

> 1. If materials had been supplied to the site before the initial advance, then before disbursement of the initial advance;[172]

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[165] *Central Coal & Coke Co. v. Hartman*, 111 F. 96, 98 (8th Cir. 1901).
[166] *See* A.R. 563 (Trial Tr. 189:9 & 189:13), A.R. 570 (Trial Tr. 196:1), A.R. 580 (Trial Tr. 206:17), A.R. 581 (Trial Tr. 207:2) & A.R. 582 (Trial Tr. 208:16-17).
[167] *See* A.R. 573 (Trial Tr. 199:13-14), A.R. 575 (Trial Tr. 201:4-5), A.R. 581 (Trial Tr. 207:9-13 & 207:17-20), A.R. 582 (Trial Tr. 208:6-8), A.R. 604 (Trial Tr. 230:18-21), A.R. 605 (Trial Tr. 231:3-5), A.R. 709 (Trial Tr. 335:11 & 335:14) & A.R. 710 (Trial Tr. 336:17-21).
[168] W. Va. R. Civ. P. 50(b).
[169] A.R. 346-48 (Order Denying Post-Trial Mots.); *see also* A.R. 1151-52 (Post-Trial Motions Hr'g Tr. 42:17-43:13).
[170] A.R. 361 (Jury Charge).
[171] *See, e.g.*, A.R. 412 (Trial Tr. 38:23).
[172] A.R. 1001 (Def.'s Ex. 5 at ¶ 4(C)(i)).

2. If materials had been supplied to the site before the initial advance, then before each subsequent disbursement;[173] and
3. Before the final disbursement.[174]

There was no dispute that O.C. Cluss did not supply materials before the initial advance, thus eliminating the first two options under which WesBanco might have been required to obtain a lien waiver.[175] And there likewise was no dispute that WesBanco did not make the final disbursement, thus eliminating the third option.[176] The Millers nonetheless urged the jury to disregard the plain contractual language because it did not meet their subjective sense of what the contract should have required.[177] They argued that the first two clauses were nonsensical, since both were contingent on materials being provided before the initial advance.[178] And they argued that the third clause was unjust, since the final disbursement was only $10,000.[179] In denying WesBanco's Rule 50(b) motion, the trial court adopted the Millers' view.

Yet a contract is not ambiguous simply because one party wishes it had negotiated a different or better contract. Nor is a contract ambiguous because one party has a subjective understanding of its terms. A contract is ambiguous only if it is "reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning."[180] If the language is plain, a trial court's "task is not to rewrite the terms of contact between the parties; instead, [the trial court is] to enforce it as written."[181]

Here, the contractual language governing materialmen lien waivers was clear. And it was

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[173] A.R. 1001 (Def.'s Ex. 5 at ¶ 4(C)(ii)).
[174] A.R. 1002 (Def.'s Ex. 5 at ¶ 6).
[175] A.R. 673 (Trial Tr. 299:2-4).
[176] A.R. 673 (Trial Tr. 299:17-24).
[177] A.R. 589 (Trial Tr. 215:8-10); *see also* A.R. 835 (Trial Tr. 461:21-22).
[178] *See* A.R. 815 (Trial Tr. 441:6-21).
[179] *See* A.R. 728-29 (Trial Tr. 354:21-355:6).
[180] Syl. Pt. 1, in part, *State v. Janicki*, 188 W. Va. 100, 422 S.E.2d 822 (1992) (*per curiam*).
[181] *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 101, 468 S.E.2d 712, 716 (1996).

equally clear that none of the clauses applied to the materials supplied by O.C. Cluss. A reasonable jury could not have found WesBanco liable for the Millers' lien-waiver claim, and the trial court thus erred by denying WesBanco's Rule 50(b)[182] motion.

2. The Millers agreed to hold WesBanco harmless from any liability, costs, or damages resulting from liens.

In ¶ 7 of the Loan Agreement, the Millers unambiguously agreed to hold WesBanco harmless from any liability, costs, or damages resulting from liens: "Borrower agrees that any mechanic's lien filed upon the property shall be Borrower's sole responsibility and hereby holds Lender harmless against all losses, including but not limited to, liability, costs, or damages resulting from same."[183] And the authorizations that the Millers submitted with each draw payment similarly represented that "Borrower has inspected, is satisfied and accepts such completed work and will, in no way, hold Lender responsible for any consequences which may arise as a result of this release."[184]

The Millers' counsel suggested that these clauses were unfair[185] and they relied on WesBanco's expertise.[186] Yet the Millers were intelligent people building a $690,000 home. Moreover, Brad Miller testified that he knew what a mechanic's lien was even before they signed the Loan Agreement.[187] He recalled that his father had encountered a mechanic's lien issue when building a home in the 1980s and, when he embarked on building his own home, his father's experience loomed large in his mind.[188] His father had even reminded him to pay particular attention to lien

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[182] W. Va. R. Civ. P. 50(b).
[183] A.R. 1002 (Def.'s Ex. 5 at ¶ 7).
[184] A.R. 1037 (Def.'s Ex. 11), A.R. 1055 (Def.'s Ex. 12), A.R. 1065 (Def.'s Ex. 13), A.R. 1075 (Def.'s Ex. 14) & A.R. 1085 (Def.'s Ex. 15).
[185] A.R. 718 (Trial Tr. 344:22-23) & A.R. 719 (Trial Tr. 345:2-10).
[186] A.R. 583 (Trial Tr. 209:22-23) & A.R. 395-97 (Trial Tr. 21-23).
[187] A.R. 737-38 (Trial Tr. 363:19-364:1).
[188] A.R. 737-38 (Trial Tr. 363:19-364:16).

waivers before the Millers started construction on their new home.[189] Brad Miller accordingly read through the entire Loan Agreement and paid particular attention to the language on mechanic's liens.[190]

Hence, there is no injustice in enforcing the Loan Agreement and draw payment authorizations, including their clauses that release and hold WesBanco harmless from any liability, costs, or damages resulting from liens. Indeed, this is the result that West Virginia law requires: an unambiguous contract must be enforced as written.[191] The Millers thus could not have made a *prima facie* case on either liability or damages, and the trial court erred when it denied WesBanco's Rule 50(b)[192] motion on those issues.

3. Even if the Millers had not agreed to hold WesBanco harmless, about $14,000 in damages was not caused by any failure to obtain lien waivers.

There was no dispute about the amount of the O.C. Cluss materialmen's lien: the lien notice listed thirty-five invoices totaling just over $117,000.[193] But for the Millers to recover any of that amount from WesBanco, the trial court instructed the jury that they had to show that their damages resulted from WesBanco's failure to obtain a waiver.[194] No one disputed that lien waivers were only required when WesBanco made draw payments.[195]

Three of the invoices included in the O.C. Cluss lien, however, post-dated the seventh-and-last draw payment, which WesBanco released to Residential Creations on March 28, 2016.[196] Invoice 12751570 was dated April 6, 2016, and Invoices 12756733 and 12756734 were dated April

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[189] A.R. 754 (Trial Tr. 380:10-18).
[190] A.R. 755 (Trial Tr. 381:3-10).
[191] *Fraternal Order of Police*, 196 W. Va. at 101, 468 S.E.2d at 716.
[192] W. Va. R. Civ. P. 50(b).
[193] *See* A.R. 919 (Pls.' Ex. 14).
[194] A.R. 361 (Jury Charge).
[195] *See* A.R. 1001 (Def.'s Ex. 5 at ¶ 4).
[196] A.R. 687 (Trial Tr. 313:3-8).

28, 2016.[197] A reasonable jury thus could not have found that a lien based on those three invoices, totaling about $14,000,[198] attached because WesBanco failed to obtain lien waivers from O.C. Cluss when the seventh-and-last draw payment was released on March 28. WesBanco never even had an opportunity to obtain the allegedly-required lien waivers.

In their post-trial briefing, the Millers dismissed this point as an "interesting observation."[199] They argued that WesBanco created the conditions for this post-March 28 lien amount by not obtaining waivers with earlier draw payments and suggested that WesBanco bore a moral responsibility for its repayment.[200] And the trial court adopted this argument when it denied WesBanco's Rule 50(b)[201] motion.[202]

Yet this argument is wholly speculative. No evidence supports the Millers' claim that they would have identified Residential Creations' financial troubles if WesBanco had obtained lien waivers with earlier draw payments. Nor does any evidence support the implied claim that they would have used that knowledge to instruct Residential Creations to stop work, thus avoiding the post-March 28 lien amount. The trial court thus erred by denying WesBanco's Rule 50(b)[203] motion on the approximately $14,000 in lien-waiver damages that post-dated WesBanco's last opportunity to secure a waiver.

III. A new trial or remittitur is required when a verdict is against the clear weight of the evidence or would result in a miscarriage of justice.

Under Rule 59(a),[204] "[i]f the trial judge finds the verdict is against the clear weight of the

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[197] A.R. 919 (Pls.' Ex. 14).
[198] *Id.*
[199] A.R. 323 (Pls.' Resp. in Opp. to Def.'s Post-Trial Mot.).
[200] *Id.*
[201] W. Va. R. Civ. P. 50(b).
[202] A.R. 346-48 (Order Denying Post-Trial Mots.)
[203] W. Va. R. Civ. P. 50(b).
[204] W. Va. R. Civ. P. 59(a).

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."[205] In distinction to Rule 50(b),[206] a trial court has the authority under Rule 59(a)[207] to "weigh the evidence and consider the credibility of witnesses."[208] This Court reviews the trial court's decision on a Rule 59(a) motion for abuse of discretion, with factual findings reviewed for clear error and legal conclusions reviewed *de novo*.[209] A trial court's ruling should be reversed "when it is clear that the trial court has acted under some misapprehension of the law or the evidence."[210]

A. The jury verdict on the unfinished-work claim is against the clear weight of the evidence and would result in a miscarriage of justice.

1. The jury ignored direct evidence rebutting liability in favor of discredited inferences.

At most, the Millers showed that (1) their home cost more to construct than Residential Creations had quoted them[211] and (2) the share of finished construction was less than the share of the contract price that had been disbursed when Residential Creations quit work.[212] Indeed, they disclaimed any ability to offer more than these inferences,[213] and they invited the jury to speculate that WesBanco must have paid Residential Creations for unfinished work. This was the set of inferences that the trial court accepted to deny WesBanco's Rule 50(b)[214] motion, and it relied

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[205] Syl. Pt. 3, *In re State Public Building Asbestos Lit.*, 193 W. Va. 119, 454 S.E.2d 413 (1994), cert. denied, *W.R. Grace & Co. v. W. Va.*, 515 U.S. 1160 (1995).
[206] W. Va. R. Civ. P. 50(b).
[207] W. Va. R. Civ. P. 59(a).
[208] Syl. Pt. 3, *In re State Public Building Asbestos Lit.*, 193 W. Va. at 119, 454 S.E.2d at 413.
[209] *Foster v. Sakhai*, 210 W. Va. 716, 722, 559 S.E.2d 53, 59 (2001) (quoting *Tennant v. Marion Health Care Found.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995)).
[210] *Id.* (quoting Syl. Pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976)).
[211] *See* A.R. 563 (Trial Tr. 189:15-19).
[212] *See* A.R. 843-44 (Trial Tr. 469:16-470:14).
[213] *See* A.R. 563 (Trial Tr. 189:9 & 189:13), A.R. 570 (Trial Tr. 196:1), A.R. 580 (Trial Tr. 206:17), A.R. 581 (Trial Tr. 207:2) & A.R. 582 (Trial Tr. 208:16-17).
[214] W. Va. R. Civ. P. 50(b).

upon them to deny WesBanco's Rule 59(a)[215] motion, as well.

Yet a Rule 59(a)[216] motion requires the trial court to go beyond whether the plaintiffs have made a *prima facie* case and consider whether the jury verdict was against the clear weight of the evidence or would result in a miscarriage of justice.[217] And here, the evidence weighing against WesBanco's liability on the unfinished-work claim was overwhelming.

Although Jamie Miller had catalogued the costs of finishing their home in an 11-page spreadsheet, the Millers repeatedly testified that they could not identify a single expense representing work that was unfinished when WesBanco released the corresponding draw payment.[218] WesBanco also showed that it obtained four documents before each draw payment, assuring it that the corresponding work had been finished:[219]

1. Residential Creations' lien waiver for the work;
2. Residential Creations' builder's affidavit affirming, under oath, that no subcontractors or materialmen could claim a lien on the work;
3. A report from Priority Appraisal, a third-party inspector, confirming that the work associated with the draw payment was finished; and
4. The Millers' signed authorization allowing WesBanco to release the draw payment and agreeing to hold WesBanco harmless from any consequences from the release.

And most damning for the Millers' case on liability, Brad Miller admitted that all work through the seventh-and-last draw payment was finished when funds were released on March 28, 2016.[220]

When the clear documentary evidence says that the defendant is not liable, when the plain-

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[215] W. Va. R. Civ. P. 59(a).
[216] *Id.*
[217] Syl. Pt. 3, *In re State Public Building Asbestos Lit.*, 193 W. Va. at 119, 454 S.E.2d at 413.
[218] *See* A.R. 563 (Trial Tr. 189:9 & 189:13), A.R. 570 (Trial Tr. 196:1), A.R. 580 (Trial Tr. 206:17), A.R. 581 (Trial Tr. 207:2) & A.R. 582 (Trial Tr. 208:16-17).
[219] *See* A.R. 687-703 (Trial Tr. 313:16-329:13), A.R. 1037-54 (Def.'s Ex. 11), A.R. 1055-64 (Def.'s Ex. 12), A.R. 1065-74 (Def.'s Ex. 13), A.R. 1075-84 (Def.'s Ex. 14)& A.R. 1085-94 (Def.'s Ex. 15).
[220] A.R. 782-83 (408:22-409:11).

tiff admits that the defendant is not liable, and when the plaintiff offers nothing more than speculation in rebuttal, the clear weight of the evidence is against liability and allowing a conflicting jury verdict to stand is a miscarriage of justice. So it is here. The documents WesBanco received for each draw payment show that the corresponding work was finished, Brad Miller admitted the work was finished, and the Millers offered nothing but speculation in rebuttal. In denying WesBanco's Rule 59(a)[221] motion on liability, the trial court thus condoned a jury verdict that is against the clear weight of the evidence and results in a miscarriage of justice.

2. The jury awarded the Millers more damages than they had claimed in summation and provided them with an unjust windfall.

The Millers' unfinished-work damages were based upon the difference between what they had expected to pay for their home and what they actually paid. This difference generally reflected the Millers' $287,500 in out-of-pocket expenses after Residential Creations quit work, less $113,000 that was not disbursed under the Loan Agreement.

Expected Costs:	
WesBanco Loan	$555,000
Down Payment	$149,000
Out-of-Pocket Expenses	$0
Total:	**$704,000**

Actual Costs:	
WesBanco Loan	$442,000
Down Payment	$149,000
Out-of-Pocket Expenses	$287,500
Total:	**$878,500**

This is exactly how the Millers presented their damages in summation: their request for $291,500 was simply the sum of the additional expenses to finish their home ($174,500) and the O.C. Cluss Lien ($117,000).[222] So by awarding the Millers $404,500 in damages, the jury ensured that the Millers' $704,000 home will end up costing them only $591,000—with WesBanco bearing the $113,000 difference.

[221] W. Va. R. Civ. P. 59(a).
[222] A.R. 818-19 (Trial Tr. 444:10-445:9) & A.R. 345 (Pls.' Summation Demonstrative Ex.).

Even Jamie Miller acknowledged this would be unjust. Referring mistakenly to the undisbursed loan amount as $112,000, she testified that "The 112 [thousand] that was left in there, I'm not making payments monthly to that on the bank [*sic*]. ... The 112 [thousand] that I put into the house, I put into the house. I got out of it what I got. I don't expect them to pay that part."[223] The trial court nonetheless denied WesBanco's Rule 59(a)[224] motion that asked the Court to set aside or remit this unjust verdict. And though its reasoning is uncertain—since it adopted by reference the Millers' arguments, which hardly address this issue—it seems likely that the trial court accepted the suggestion that the Millers were entitled to the costs of finishing their home.[225]

If this was in fact the trial court's reasoning, it was in error. As the trial court itself instructed the jury, the Millers' damages had to result from WesBanco paying Residential Creations for unfinished work.[226] But as the Millers, joined by two other trial witnesses, repeatedly testified, their $287,500 in out-of-pocket expenses included numerous expenses for unstarted work for which Residential Creations had never been paid.[227]

But even without this testimony, the trial court should have concluded that the jury verdict violated the most basic damages principle in breach-of-contract cases: "to restore the plaintiff to the position he would have been in had the contract not been breached."[228] If the Millers' expectation was that they would have paid $704,000 for their home without any breach, then the jury's verdict put them in the position of having paid $591,000 for their home after the breach. The existence of an unlawful betterment could not have been clearer.

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[223] A.R. 582 (Trial Tr. 208:6-10).
[224] W. Va. R. Civ. P. 59(a).
[225] A.R. 346-48 (Order Denying Post-Trial Mots.) & A.R. 1151 (Post-Trial Motions H'rg Tr. 42:17-24).
[226] A.R. 361 (Jury Charge).
[227] A.R. 573 (Trial Tr. 199:13-14), A.R. 575 (Trial Tr. 201:4-5), A.R. 581 (Trial Tr. 207:9-13 & 207:17-20), A.R. 582 (Trial Tr. 208:6-8), A.R. 604 (Trial Tr. 230:18-21), A.R. 605 (Trial Tr. 231:3-5), A.R. 709 (Trial Tr. 335:11 & 335:14) & A.R. 710 (Trial Tr. 336:17-21).
[228] *Assoc. Stations, Inc. v. Cedars Realty & Dev. Corp.*, 454 F.2d 184, 188 (4th Cir. 1972); *Milner Hotels, Inc. v. Norfolk & W. Ry. Co.*, 822 F. Supp. 341, 344 (S.D.W. Va. 1993).

The trial court thus erred when it denied WesBanco's Rule 59(a)[229] motion on the jury's verdict for unfinished-work damages. The verdict is against the clear weight of the evidence, since it exceeds the Millers' own calculation of their increased costs and includes expenses that multiple witnesses agreed were not for unfinished work. And the verdict results in a miscarriage of justice, since it provides the Millers with a $113,000 betterment in comparison to their position if Residential Creations had finished building their home without incident.

B. The jury verdict on the lien-waiver claim is against the clear weight of the evidence and would result in a miscarriage of justice.

For the Millers to prevail on their lien-waiver claim, the trial court instructed the jury that it had to find that WesBanco was obligated to obtain lien-waivers for O.C. Cluss and the Millers had been damaged by WesBanco's failure do to so.[230] Two issues from the preceding discussion under Rule 50(b)[231] have even greater relevance here under Rule 59(a).[232]

The releases and hold-harmless clauses. The Millers agreed in ¶ 7 of the Loan Agreement to hold WesBanco harmless from any liability, costs, or damages resulting from a lien.[233] And they similarly agreed in each draw payment authorization that they would, "in no way, hold Lender responsible for any consequences which may arise as a result of this release."[234] By nonetheless holding WesBanco liable under the lien-waiver claim and awarding the Millers $117,000 in damages, the jury ignored unambiguous contractual clauses and gave rise to a miscarriage of justice. The trial court thus erred by denying WesBanco's Rule 59(a)[235] motion on the Millers' lien-waiver

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[229] W. Va. R. Civ. P. 59(a).
[230] A.R. 361 (Jury Charge).
[231] W. Va. R. Civ. P. 50(b).
[232] W. Va. R. Civ. P. 59(a).
[233] A.R. 1002 (Def.'s Ex. 5 at ¶ 7).
[234] A.R. 1037 (Def.'s Ex. 11), A.R. 1055 (Def.'s Ex. 12), A.R. 1065 (Def.'s Ex. 13), A.R. 1075 (Def.'s Ex. 14) & A.R. 1085 (Def.'s Ex. 15).
[235] W. Va. R. Civ. P. 59(a).

claim.

The $14,000 in post-March 28 damages. No one disputed that lien waivers were required only when WesBanco made draw payments.[236] Nor did anyone dispute that the seventh-and-last draw payment was made on March 28, 2016.[237] And no one disputed that O.C. Cluss's lien included about $14,000 in expenses for materials that had been delivered after March 28.[238] So when the jury nonetheless included that $14,000 amount in its award of lien-waiver damages, it did so against the clear weight of the evidence and created another miscarriage of justice. The trial court thus erred by denying Wes Banco's Rule 59(a)[239] motion on the Millers' lien-waiver claim for this reason, as well.

IV. This Court should direct the trial court to either enter judgment for WesBanco, hold a new trial, remit the verdict, or give the Millers the option of remittitur or a new trial.

Between the trial court's evidentiary errors, the Millers' admission that all work was finished when WesBanco released the corresponding draw payments to Residential Creations, the Millers' inability to identify any work that was unfinished, and the contractual releases and hold-harmless clauses under the Loan Agreement, this Court has compelling reasons to set aside the jury's verdict and remand this matter for entry of judgment in favor of WesBanco under Rule 50(b).[240] If the Court believes that a new trial is warranted on some or all of the issues, however, it may direct the trial court to hold one under either Rule 50(b)[241] or Rule 59(a).[242] And if the

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[236] *See* A.R. 1001 (Def.'s Ex. 5 at ¶ 4).
[237] *See* A.R. 1001 (Def.'s Ex. 5 at ¶ 4).
[238] *Id.*
[239] W. Va. R. Civ. P. 59(a).
[240] W. Va. R. Civ. P. 50(b).
[241] Cleckley et al., LITIGATION HANDBOOK at 1119 (citing *Manley v. Ambase Corp.*, 121 F. Supp. 2d 758 (S.D.N.Y. 2000)).
[242] W. Va. R. Civ. P. 59(a).

Court believes that the jury's sole error lies in the calculation of damages, it has two options depending on whether it holds that the maximum damages were definitely ascertainable.[243] If the maximum damages are clear—as WesBanco has argued here that they are—then the Court may remand with directions for the trial court to remit the verdict to $277,500.[244] But if the maximum damages are not clear, then the Court may remand with directions for the Millers to accept the remittitur or elect a new trial.[245]

CONCLUSION

The Millers tried a breach-of-contract case against WesBanco under both a unfinished-work and lien-waiver theory. They did so with the benefit of erroneous evidentiary rulings that allowed the Millers to invite the jury to supply its own interpretation of the parties' contract in favor of the plain and unambiguous language of a presumptively integrated agreement. Even so, the Millers failed to make a *prima facie* case upon which a reasonable jury could find liability or damages. The Millers admitted that all work was finished when WesBanco released the corresponding draw payments, and they could not identify any work that was not. And the evidence showed that none of the clauses requiring lien waivers from O.C. Cluss had been triggered in their case. Nevertheless, and against the clear weight of the evidence, the jury found WesBanco liable for both the unfinished-work and lien-waiver claims and awarded $404,5000 in damages—more than even the Millers said that they had proved. This Court should now correct the error and reverse.

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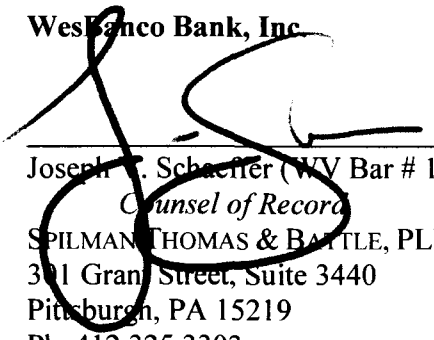
[243] Cleckley et al., LITIGATION HANDBOOK at 1267-68.
[244] *See Fortney v. Napier*, 153 W. Va. 143, 151-52, 168 S.E.2d 737, 742-43 (1969), overruled on other grounds, *Roberts v. Stevens Clinic Hosp.*, 176 W. Va. 492, 345 S.E.2d 791 (1986).
[245] Syl. Pt. 9, *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010).

Dated: June 12, 2020

WesBanco Bank, Inc.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0042

WesBanco Bank, Inc.

Defendant Below, Petitioner,

v.

(Circuit Court of Marion County Civil Action No. CC-24-2017-C-119)

Thomas B. Miller and Jamie Miller,

Plaintiffs Below, Respondents.

CERTIFICATE OF SERVICE

I, Joseph V. Schaeffer, hereby certify that on this the 12th day of June, 2020, I served the foregoing **Petitioner's Brief** via electronic mail and U.S. Mail, postage pre-paid, addressed as follows:

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