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No. 21-0934



**IN THE SUPREME COURT OF APPEALS OF  
WEST VIRGINIA**

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**Redstone International, Inc., Petitioner**

**v.**

**J.F. Allen Company, AMEC Foster Wheeler Environment & Infrastructure, Inc,  
& MarkWest Liberty Midstream & Resources, Inc, Respondents**

**On Appeal from the Circuit Court of Wetzel County, Business Court  
(The Honorable H. Charles Carl, III., Civil Action No. 16-C-82)**

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**BRIEF OF RESPONDENT J.F. ALLEN COMPANY**

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Jeffrey M. Wakefield, Esquire (WV Bar No. 3894)  
Flaherty Sensabaugh Bonasso PLLC  
200 Capitol Street 25301  
PO Box 3843  
Charleston, West Virginia 25338  
304-345-0200  
304-345-0260 fax  
[JWakefield@flahertylegal.com](mailto:JWakefield@flahertylegal.com)  
*Counsel for Respondent J.F. Allen Company*

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## STATEMENT OF THE CASE

Rule 10(d) of the West Virginia Rules of Appellate Procedure provides that “[t]he respondent’s brief must conform to the requirements in subsection (c) of this Rule, except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the petitioner’s brief, ....” Here, Petitioner’s brief contains an abbreviated Statement of the Case which does not fully portray the extensive history and factual findings made the Business Court, particularly as to Petitioner. Accordingly, the Respondent, J.F. Allen Company [“JFA”], is compelled to provide a more robust Statement of the Case.

The underlying litigation was a multi-faceted dispute arising from a project undertaken by Respondent, MarkWest Liberty Midstream and Resources, Inc. [“MarkWest”], to increase the capacity of a natural gas processing facility located in Mobley, West Virginia [the “Facility”]. The Facility had four existing processing plants and MarkWest decided to build a fifth processing plant in order to address the natural gas processing needs of EQT Corporation [“EQT”]. In order to accommodate the fifth plant [“Plant V”], MarkWest chose to remove a portion of a mountaintop and dispose of the excavation through the erection of a massive steel pile anchored wall [“Project”]. [JA 00048-51]. MarkWest contracted with Civil and Environmental Consultants [“CEC”] to collaboratively prepare requests for bids for the design, construction and building of the Project [“Wall RFB”]. The Wall RFB was a “design-build” which meant that a single contractor would be fully responsible for design, procuring materials, and construction and would have full design freedom and responsibility once the project was awarded. [JA 00051-52]. On August 29, 2014, MarkWest notified JFA that it had been awarded the design-build contract for the Project and the contract was entered into with an effective date of September 5, 2014. [JA 00056]. The contract contained a “Time is of the Essence” clause and required project completion by March 31, 2015. [JA 00058]. JFA subcontracted with

Respondent, AMEC Foster Wheeler Environment & Infrastructure, Inc. [“AMEC”], to develop the design and to provide design support during construction. JFA also subcontracted separately with AMEC to provide observation and testing on site during the construction of the Project. AMEC’s design, in compliance with CEC’s requirements, consisted of a soldier retaining wall and reinforced soil slope wall extending up to the final grade, providing a level site for MarkWest’s construction of Plant V. JFA subcontracted with Petitioner, Redstone International, Inc. [“Redstone”], for construction of the soldier pile retaining wall, including installation of steel piles, precast concrete lagging and anchor assembly. [JA 00056].

The Project and Redstone’s performance went awry from the inception. A little over a month into the Project, Redstone was already substantially behind in installing soldier piles. [JA 00060]. By two months into the Project, Redstone was twenty-eight (28) days behind schedule. [JA 00069]. Problems also developed with the improper installation of walers, the failure of anchors due to the grouting process and the failure of Redstone to properly grease anchor caps. [JA 00099-101]. Adequate staffing was also an issue. [JA 00101]. The relationship between JFA and Redstone deteriorated further when JFA was put on notice by Redstone’s equipment vendor that Redstone was in default in paying its rental for leased horizontal drill rigs and that the vendor intended to repossess its equipment and file mechanic’s liens against the Project. [JA 00077]. As a result of this notice, JFA contacted Redstone and requested outstanding accounts payable for all vendors and suppliers. Redstone provided its accounts payable for the Project and the delinquent accounts payable were satisfied by JFA through two party checks. Eventually, JFA terminated Redstone for cause, claiming Redstone had failed to pay its vendors and failed to properly staff the Project. After the termination, JFA hired a separate subcontractor to perform Redstone’s remaining work under the subcontract and to correct deficient work. [JA 00077-78].

MarkWest filed its Complaint in the Circuit Court of Wetzel County, on August 18,

2016. It named JFA, AMEC, Redstone, CEC, and Coastal Drilling East, Inc. ["Coastal"] as defendants. JFA subsequently brought a Third-Party Complaint on October 20, 2016 against Lane Construction Company ["Lane"]. The claims involving CEC, Lane and Coastal were settled before the commencement of a bench trial. [JA 00045].

In its Complaint, MarkWest alleged that JFA had breached the Prime Contract by failing to design and build the wall to have a useful life expectancy of seventy-five (75) to one hundred (100) years, failed to otherwise design and build the wall in a workman like manner consistent with industry standards, failed to complete the Project by March 31, 2015, and failed to design and build the Project with a factor of safety of 1.5. MarkWest further alleged that JFA was negligent in failing to complete the wall by March 31, 2015, failed to design the wall consistent with generally accepted design and engineering practices and failed to hire qualified and capable subcontractors. [JA 00045].

JFA filed a counterclaim against MarkWest. It also filed a crossclaim against AMEC, alleging that AMEC breached the design and quality control subcontracts. JFA asserted a cross claim against Redstone alleging that Redstone breached the subcontract by engaging in design modification, failing to advise JFA of the different site conditions it encountered on the Project, failing to timely pay its vendors thereby resulting in liens against the Project that JFA satisfied, and failing to adequately staff the Project thereby causing delays. JFA specifically asserted a contractual indemnification provision pursuant to the subcontract's General Conditions. Both AMEC and Redstone filed crossclaims against JFA as well. [JA 00047].

On April 10, 2018, Chief Justice Workman transferred the action to the Business Court Division. The parties engaged in extensive discovery and a seventeen (17) day bench trial commenced on September 21, 2020 and concluded on October 15, 2020. [JA 00042]. During the trial, the Business Court heard testimony from multiple expert witnesses, some of whom

addressed the issue of substantial delay damages being claimed by MarkWest. Following the trial, the parties submitted proposed Findings of Fact and Conclusions of Law on June 3, 2021. On October 15, 2021, the Business Court issued its Judgment Order. The Judgment Order is one hundred fifty-three (153) pages in length and contains three hundred thirty-nine (339) separate findings. [JA 00042-194].

With respect to the claims involving JFA and Redstone, the Business Court made several findings. It found that Redstone agreed to indemnify JFA pursuant to Article 6.19 of the General Conditions of the subcontract and that JFA was entitled to contractual indemnification. [JA 00178]. The Business Court further found that JFA should be awarded \$981,673.00 in repair costs for five failed anchors in the bond zone with no resistance due to grout washout. [JA 00179]. It also concluded that JFA should be awarded \$904,438.00 in damages from Redstone for JFA's overpayment to Redstone under the subcontract, which was the difference in the amount of the amended contract value and payments made to or on behalf of Redstone and to complete Redstone's work. [JA 00180]. With respect to the contractual indemnification claim, the Business Court awarded indemnification to JFA from Redstone in the amount of \$1,458,342.35, representing delay damages awarded to MarkWest and against JFA, but attributable to delay caused by Redstone. [JA 00191]. The court previously concluded in the Judgment Order that Redstone was responsible for 3.2 months of delay damages.<sup>1</sup> [JA 00134-135].

Following the entry of the Judgment Order, MarkWest, JFA and AMEC satisfied the respective judgments entered between them and the Business Court entered an Order Granting Rule 60(b)(5) Motion for Relief from Final Judgment Order Due to Satisfaction of Judgment on

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<sup>1</sup> The Business Court further found that Redstone's claims for damages against JFA resulted in no recovery because credit for certain change orders was already given to Redstone by JFA. The Business Court further concluded that JFA was not entitled to any damages in extended duration costs.

January 4, 2022. The Business Court specifically provided in the Order that it did not relate to or affect the judgment obtained by JFA against Redstone.

### **SUMMARY OF ARGUMENT**

The Judgment Order should be affirmed because it contains no error with respect to the claims involving Redstone. It reflects a thorough factual and legal analysis of an exceedingly complex series of claims involving sophisticated construction, engineering and damage issues. The Judgment Order contain three hundred thirty-nine (339) separate findings, demonstrating the careful consideration which was afforded to all claims and evidence. That careful consideration was demonstrated by MarkWest, JFA and AMEC satisfying the various judgments entered between them without resort to the filing of any post-judgment motions. The remaining aspects of the Judgment Order involving Redstone should, therefore, be left undisturbed.

None of Redstone's arguments of error involving JFA are meritorious. Redstone's argument that its subcontract with JFA contains a consequential damages waiver which prevents enforcement of the \$1,458,342.35 indemnification claim for lost profits (delay damages) is not supported by contract language. The provision upon which Redstone relies does not, by its terms, limit or waive lost profit damages whatsoever. Indeed, any question about the scope of the cited language was eliminated when JFA interlineated additional language which specifically reserved the right to recover actual damages from Redstone which resulted in financial loss to JFA. More importantly, Redstone's waiver argument ignores an express provision of the subcontract, uncited by Redstone, which make Redstone liable to JFA for delay damages paid to the Owner (MarkWest) attributable to any failure to timely perform the contract.

Redstone's argument that JFA likewise was contractually required to waive claims against Redstone for MarkWest's lost profits (delay damages) as well as property damage is equally unpersuasive. The General Conditions contract language cited by Redstone, again

without resort to other contract language specifically addressing delay damages, does not apply and is not supported by the record. There was no evidence in the record that the delay damages and property damage were caused by fire or other peril or that the damages were covered by property insurance. In fact, no evidence of insurance was introduced from which any coverage determination could be made. Instead, all Redstone cites is a contractual obligation to procure insurance. It offered no evidence at trial as to what insurance was procured and whether coverage would be afforded for any of the claimed losses.

Redstone's assignment of error that JFA was not entitled to damages for overpayment also fails. Redstone's challenge is simply based upon the assertion that the Business Court grounded its award upon an expert opinion which Redstone deems unreliable. An argument disagreeing with findings of fact and determinations of witness credibility made in a bench trial can only succeed if the determinations were clearly erroneous, a standard which Redstone does not come close to satisfying. The Business Court heard the evidence and made detailed findings to support the overpayment award. Finally, Redstone's general assertion that it did not perform defective work is equally without merit given the extensive analysis by the Business Court of the evidence submitted during the seventeen (17) day trial. This evidence included testimony from multiple experts and the Judgment Order contains detailed analysis and findings, including the weight accorded the evidence by the Business Court. While Redstone may disagree with the Business Court's conclusions, they cannot be disturbed on appeal, particularly when the record fails to demonstrate that they are clearly erroneous.

### **ORAL ARGUMENT AND DECISION**

JFA does not believe oral argument is necessary pursuant to the criteria set forth in the Rule 18 of the West Virginia Rules of Appellate Procedure. The facts and legal arguments are adequately presented in the briefs and record on appeal and the decisional process would not be

aided by oral argument. This is particularly true given that the Judgment Order from which the appeal has been taken consists of one hundred fifty-three (153) pages with three hundred thirty-nine (339) separate findings.

### **STANDARD OF REVIEW**

In actions tried before the bench, “(f)indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” W.Va. R. Civ. P. 52(a). Consistent with this language, the Supreme Court of Appeals applies a two-prong deferential standard of review. The Court reviews the final order and the ultimate disposition under an abuse of discretion standard, and reviews the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to *de novo* review. *Bluestone Paving, Inc. v. Tax Com’r of State*, 214 W.Va. 684, 591 S.E.2d 242 (2003); *McConaha v. Rust*, 219 W.Va. 112, 632 S.E.2d 52 (2006). If the circuit court’s account of the evidence in a bench trial is plausible in light of the record viewed in its entirety, the Supreme Court of Appeals may not reverse it, even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently. *Harrell v. Cain*, 242 W.Va. 194 832 S.E.2d 120 (2019).

### **ARGUMENT**

Redstone asserts four (4) assignments of error which directly relate to JFA. One assignment challenges the Business Court’s awarding of indemnification in favor of JFA in the amount of \$1,458,342.35 for delay damages which JFA was found liable to MarkWest. Another assignment asserts that JFA was contractually required to waive claims against Redstone for MarkWest’s lost profits as well as property damage in the amount of \$981,673.00. A third assignment contends that the Business Court erred in determining that Redstone performed defective work on the Project. The final assignment maintains that the Business Court erred in

determining that JFA was entitled to \$904,438.00 in damages for its overpayment under the subcontract with Redstone.<sup>2</sup> The Judgment Order rulings with respect to these assignments were unequivocally correct and should be affirmed.

**I. The Subcontract Between Redstone and JFA Does Not Contain A Consequential Damages Waiver Which Prevents Enforcement Of JFA's \$1,458,342.35 Indemnification Claim For MarkWest's Lost Profits.**

Attempting to “piggyback” on a damage waiver ruling the Business Court made in connection with the subcontract between JFA and AMEC, Redstone asserts that its subcontract with JFA contains a similar waiver which prevents recovery by JFA of its \$1,458,342.35 indemnification award for delay damages associated with lost profits for which JFA was held liable to MarkWest. This argument is not supported by the language of the agreement between JFA and Redstone and, in fact, is directly at odds with other contract language rendering Redstone specifically liable for delay damages.

The damage waiver ruling the Business Court made with respect to AMEC was based upon entirely different language in the JFA/AMEC subcontract and it was interpreted under Tennessee law. [JA 00111-113]. The AMEC agreement provided:

Notwithstanding any other provision of his agreement, the total liability of AMEC, its officers, directors and employees, for liabilities, claims, judgments, demands and causes of action arising under or related to this Agreement, whether based in contract or tort, shall be limited to \$2,000,000.00. AMEC and CLIENT shall not be responsible to each other for any special, incidental, indirect, or consequential damages (including lost profits) incurred by either AMEC or CLIENT or for which either party may be liable to any third party, which damages have been or are occasioned by Services performed or reports prepared or other work performed hereunder. [JA 05293].

By contrast, the language relied upon by Redstone is markedly different and is set forth in a letter dated August 26, 2014 which is defined as a scope letter. [JA 05357-58]. It states:

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<sup>2</sup> The Assignments of Error set forth in Petitioner's Brief do not clearly correspond with the argument headings of the Brief.

Redstone will not be liable for any additional costs, penalties or back charges *due to* liquidated, actual, or consequential damages. Redstone cannot accept any liability for disturbance to existing structures and their inhabitants. Redstone requires that the Owner and General Contractor indemnify Redstone against any and all claims for such disturbances and also take precautions as necessary to avoid any such claims. This may include pre-performance property surveys, vibration monitoring, excavation trenches, etc. Payment terms will be 30-days from receipt of invoice. (emphasis supplied) [JA 05358].

There is scant resemblance between the above language and the very specific waiver language in the AMEC subcontract. The Redstone letter contains no reference to lost profits and it does not state that a party is not responsible for special, incidental, indirect or consequential damages, including any for which a party may be liable to any third party. Indeed, the Redstone language is far more limiting as it merely attempts to relieve liability “for any additional costs, penalties, or back charges *due to* liquidated, actual or consequential damages.” (emphasis supplied). It does not relieve liability for consequential damages but only as to costs, penalties, or back charges due to such damages. In this regard, it is well settled that in construing the terms of a contract, the court is guided by common sense cannons of contract interpretation. One such cannon teaches that contracts containing unambiguous language must be construed according to their plain meaning. *Payne v. Weston*, 195 W.Va. 502, 466 S.E.2d 161 (1985); *see also Bass v. Coltelli-Rose*, 207 W.Va. 730, 536 S.E.2d 494 (2000) (emphasizing that the best mode of construction is to give words their plain and ordinary meaning).

Any question about the breadth of the language in the Redstone scope letter is eliminated by consideration of the additional language interlineated by JFA at the bottom of the paragraph. That language specifically reserved the right to recover damages from Redstone which resulted in financial loss to JFA. The interlineated language states: “JFA shall have the right to recover actual damages as a result of acts or omissions by Redstone International which result in financial loss to JFA.” [JA 05358]. This language was added by Mr. Hadjis, president of JFA,

and was never challenged or rejected by Redstone.

More importantly, Redstone's waiver argument ignores an express provision set forth in the actual "Subagreement Between Design/Builder and Subcontractor on the Basis of a Fixed Price" which was signed by Redstone on September 10, 2014. [JA 05737-43]. Section 3.03, which is never cited by Redstone, specifically addresses damages for subcontractor delay. It provides:

3.03 *Damages for Subcontractor Delay*

Design/Builder and Subcontractor recognize that time is of the essence as stated in Paragraph 3.01 and that Design/Builder may suffer financial loss if the Work is not completed within the time specified in paragraph 3.02.A above, plus any extensions thereof allowed in accordance with Article 11.02 the General Conditions. *Subcontractor shall pay to Design/Builder its actual damages, including those damages paid to owner or others by Design/Builder attributable to Subcontractor's failure to timely perform.* (emphasis supplied). [JA 05202].

This specific provision makes Redstone liable to JFA for delay damages paid to the Owner. The Owner was MarkWest and the Judgment Order contains an award in Paragraph 331 of delay damages to MarkWest from JFA in the amount of \$2,651,531.54. Paragraph 331 further awards JFA indemnification from Redstone for \$1,458,342.35 of that amount based upon a determination that part of the delay was attributable to Redstone. [JA 00191]. That indemnification award is clearly governed by Section 3.03 and is fully enforceable.

The application of Section 3.03 to require Redstone to indemnify JFA for delay damages is also consistent with two cardinal rules of contract construction. First, "a contract must be considered as a whole, effect being given, if possible, to all parts of the instrument." *Mun. Mut. Ins. Co. of W. Virginia v. Hundley*, 228 W.Va. 573, 573, 723 S.E.2d 398, 398 (2011). Here, JFA's position on the meanings of the provision cited by Redstone and Section 3.03 gives effect to both. There is a limitation on costs, penalties or back charges, but no limitation whatsoever on

actual damages suffered by JFA, including damages caused by Redstone's delay. Second, Section 3.03 is a provision dealing specifically with delay damages and it has long been recognized in West Virginia that general provisions in a contract will be limited in their application and must yield to provisions which are more specific. *See Bischoff v. Francesca*, 133 W.Va. 474, 56 S.E.2d 865 (1949); *Jones v. Island Creek Coal Co.*, 79 W.Va. 532, 91 S.E. 391 (1917); *see also, U.S. for Use of Westinghouse Elec. Corp. v Marietta Mfg. Co.*, 339 F. Supp. 18 (S.D. W.Va. 1972) In short, the specific provisions of the agreement dealing with delay damages supersede the language upon which Redstone relies. Accordingly, the Judgment Order's award of indemnification damages in favor of JFA against Redstone should be affirmed.

## **II. JFA Was Not Contractually Required To Waive Claims Against Redstone For Markwest's Lost Profits Or For Property Damage.**

Redstone's claim that there is a contractual requirement that JFA waive claims against Redstone for MarkWest's lost profits and for separate property damage is equally unpersuasive. Redstone bases this argument upon provisions contained in the "Standard General Conditions of the Subcontract Between Design/Builder and Subcontractor," which were incorporated into the subcontract in Section 8.01 [JA 05298-5359]. Those General Conditions do not affect the validity of JFA's judgment for indemnification for lost profits or for property damage for three reasons. First, any General Condition relating to damages must yield to the specific provisions of Section 3.03 which impose liability upon Redstone for damages arising out of delay in performance. Second, the General Conditions apply only in instances where loss is caused by fire or other peril and the damage claims against JFA were not caused by fire or other peril. Finally, the General Condition which relates to loss resulting from fire or other insured peril covered by any property insurance cannot be invoked because the record is devoid of any evidence of the existence and scope of insurance coverage.

Section 5.07B of the General Conditions is cited by Redstone in support of its waiver argument. The Section states:

B. Design/Builder waives, and will cause Owner to waive, all rights against Subcontractor, Subcontractors, Suppliers and Design/Builder's Consultants and the officers, directors, members, partners, employees and agents, and other consultants and subcontractors of any of each and any of them for:

1. Loss due to business interruption, loss of use, or other consequential loss extending beyond direct physical injury or damage to Owner's or Design/Builder's property or the Work caused by arising out of or resulting from fire or other peril, whether or not insured by Owner or Design/Builder; and

2. Loss or damage to the completed Project or part thereof caused by, arising out of, or resulting from fire or other insured peril or cause of loss covered by any property insurance maintained on the completed Project or any part thereof by Owner during partial utilization pursuant to Paragraph 13.05, after substantial completion pursuant to Paragraph 13.04, or after final payment pursuant to Paragraph 13.07.

[JA 05325].

As previously noted, there is a specific provision in the subcontract which imposes upon Redstone liability for damages due to subcontractor delay. The specific provision provides:

### *3.03 Damages for Subcontractor Delay*

Design/Builder and Subcontractor recognize that time is of the essence as stated in paragraph 3.01 and that Design/Builder may suffer financial loss if the Work is not completed within the time specified in paragraph 3.02.A above, plus any extensions thereof allowed in accordance with Article 11.02 the general conditions. Subcontractor shall pay to Design/Builder its actual damages, including those damages paid to owner or others by Design/Builder attributable to Subcontractor's failure to timely perform.

[JA 05301].

Not only is this provision specific, but it does reference the General Conditions. Specific contract language dealing with damages attributable to the subcontractor's failure to timely perform (delay) clearly controls in the face of any general language to the contrary. *See Bischoff*

*v. Francesca*, 133 W.Va. 474, 56 S.E.2d 863 (1949); *Jones v Island Creek Coal Co.*, 79 W.Va. 532, 91 S.E. 391 (1917); *U.S. for Use of Westinghouse Elec. Corp. v Marietta Mfg. Co.*, 339 F. Supp. 18 (S.D. W.Va. 1972).

Not only is General Condition Section 5.07 superseded by the specific delay damages provision of the subcontract, it simply does not apply in this situation. The language of Section 5.07D.1. requires that the loss or damage be “caused by, arising out of or resulting from fire or other peril....” There is nothing in the record to suggest that delay damages or the property damage for which judgment was awarded in favor of JFA were caused by fire or other peril. They were a direct outgrowth of a breach of contract. Thus, the provision would not apply to the losses claimed by JFA against Redstone.

Additionally, the provisions of Section 5.07B.2. do not apply because they concern “an insured peril or cause of loss which is covered by any property insurance maintained on the completed project.” Here, there is no evidence in the record as to what property insurance may have been in place and, more importantly, whether such property insurance would provide coverage for any or all of the losses for which JFA was awarded damages against Redstone. The only citation by Redstone to the record is a contractual provision requiring the procurement of insurance. Evidence of actual policies of insurance and the scope of their coverage was never introduced in the trial court. Therefore, there is nothing in the record which would demonstrate that the losses were covered by insurance to the extent General Condition Section 5.07 would even be applicable notwithstanding the provisions of Section 3.03 dealing with subcontractor delay.

In short, Redstone’s argument that JFA was contractually required to waive MarkWest’s lost profit claim as well as any claim for property damage fails because of the specific liability imposed upon Redstone for delay damages, the inapplicability of General Condition Section 5.07

and the lack of any evidence in the record that all or part of the damages claimed by JFA were covered by property insurance. Thus, the Judgment Order awarding indemnification damages to JFA as well as property damages in the amount of \$981,673.00 should be affirmed.

**III. The Business Court's Finding That Redstone Performed Defective Work Is Not Clearly Erroneous.**

Redstone complains that the Business Court committed error by finding that it was responsible for \$981,673.00 in repair costs incurred by JFA for certain anchors that failed to adhere to cement grout in the bond zone. Though Redstone's argument heading maintains that "Redstone did not perform defective work," its brief acknowledges that certain anchors installed by it failed. *See* Petitioner's Brief, pp 26, 30. Redstone's complaint appears to really be that the damage numbers proffered by JFA's expert, Bryan Willoughby, P.E. were disproportionate to the alleged damage sustained. *Id.*, p. 30. This assertion of error, however, is unsustainable because there was ample evidence in the record demonstrating that the Business Court carefully considered whether Redstone performed defective work and the extent of the damages claimed.

In cases tried to the bench, challenges to findings and rulings made by the court are reviewed the Supreme Court of Appeals pursuant to a two-prong deferential standard: (1) the final order and the ultimate disposition are reviewed under an abuse of discretion standard and (2) the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. *McConaha v. Rust*, 219 W.Va. 112, 632 S.E.2d 52 (2006); *Williams v. Charleston Area Med. Ctr. Inc.*, 215 W.Va. 15, 5392 S.E.2d 794 (2003). If the circuit court's account of the evidence in a bench trial is plausible in light of the record viewed in its entirety, this Court will not reverse it even though convinced that had it been sitting as a trier of fact, it would have weighed the evidence differently. *Harrell v. Cain*, 242 W.Va. 194, 832 S.E.2d 120 (2019).

Use of the deferential standard with respect to whether Redstone performed defective

work or breached the contract leads to the inescapable conclusion that the Judgment Order should be affirmed. The Business Court's analysis of the conduct of Redstone and all parties was extensive. It heard evidence from multiple experts on construction, engineering and damage issues. Specific to Redstone, the Judgment Order analyzed the testimony provided by two of Redstone's experts, Dr. James Collin, Ph.D., P.E., D.GE and Dr. Donald Bruce, Ph.D. [JA 00090-92]. It similarly analyzed and weighed the testimony of other experts. After considering the evidence, the Court found "from the evidence presented, including photographic evidence, that Redstone committed errors in construction. Redstone installed some of the walers upside down, so that the drain hole was on top instead of in the bottom where water and debris could have escaped." [JA 00099]. The Business Court further found "that Redstone failed to properly grease anchor caps as a mechanism for corrosion protection." [JA 00100]. It also concluded that Redstone "welded the additional steel plates or 'tabs' which were welded upon the solid pile flanges to hold the concrete lagging panels in place, they did not use a certified welder as required. Also, the welds failed inspection and had to be redone." [JA 00100]. The Business Court also determined that "despite encountering ground water in the process of attempting to install anchors in May 2015, Redstone did not provide notice to J.F. Allen of this differing condition. Mainly because of this, the grouting process utilized by Redstone failed, causing some of the anchors to pull out or fail. Further, with regard to grouting, the Court finds Redstone's installation resulted in anchors failing to form proper bonds with the rock because of faulty grouting." (JA 00101).

Clearly, the Business Court considered extensive evidence and made findings which cannot, in viewing the record in its entirety, be deemed to be clearly erroneous. This also includes consideration of the testimony of JFA expert Bryan Willoughby, P.E. The Business Court considered the testimony of Mr. Willoughby and his report and made extensive findings

deeming the testimony to be credible. Deference to this finding should also be accorded.

Accordingly, Redstone cannot meet the rigorous standard of demonstrating that the findings of the Business Court in concluding that there were errors in the construction work performed by Redstone were clearly erroneous. The Judgment Order's findings on this issue should, therefore, be affirmed.

#### **IV. The Business Court Correctly Awarded Damages to JFA for Contractual Overpayment.**

Like the Business Court's finding that Redstone committed construction errors and otherwise breached its contract, Redstone complains about the finding that JFA overpaid Redstone the amount of \$904,438.00. Again, Redstone's complaint fails to overcome the deferential standard this Court employs in reviewing the findings made by the Business Court. The Business Court specifically concluded that its award of damages for overpayment was based upon evidence which demonstrated the difference in the amount of the amended contract value to Redstone and payments to or on behalf of Redstone and costs to complete Redstone's work. [JA 00180]. The Business Court considered expert testimony of JFA's expert, Bryan Willoughby, and testimony from Redstone witnesses Blake Bolyard and Terry Cunningham. Ultimately, the Business Court concluded that there was no evidence to support Redstone's claim for additional compensation due to alleged unpaid change orders. Accordingly, the Business Court deemed the evidence provided by Mr. Willoughby, who determined that the amended contract value to Redstone was \$7,338,982.70 and that payments JFA made to or on behalf of Redstone totaled \$7,335,834.51, was credible. The Business Court also concluded that the cost to complete Redstone's work totaled \$907,587.00, which created an overpayment in the amount of \$904,438.00 by JFA. (JA 00180).

The analysis by the Business Court was thorough and based upon the evidence presented.

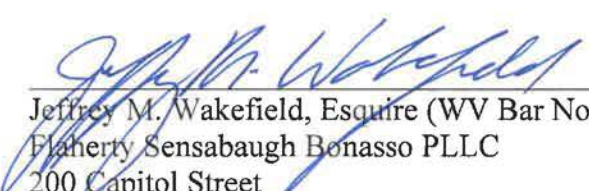
Nothing in the argument advanced by Redstone rises to a level of demonstrating that the findings by the Business Court were clearly erroneous. Accordingly, the Judgment Order to the extent it awards damages to JFA in the amount of \$904,438.00 for overpayment to Redstone should be affirmed.

### **CONCLUSION**

For the reasons set forth above, the Respondent, J.F. Allen Company, prays that this Court affirm the Judgment Order of the Circuit Court of Wetzel County, West Virginia, dated October 15, 2021, together with such other and further relief as the Court may deem proper.

**J.F. ALLEN Company**

**By Counsel,**



Jeffrey M. Wakefield, Esquire (WV Bar No. 3894)  
Flaherty Sensabaugh Bonasso PLLC  
200 Capitol Street  
Charleston, West Virginia 25301  
304-345-0200  
304-345-0260 fax  
[JWakefield@flahertylegal.com](mailto:JWakefield@flahertylegal.com)  
*Counsel for Respondent, JF Allen Company*

**SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**REDSTONE INTERNATIONAL, INC.,**

**Defendant Below, Petitioner,**

**v.**

**No. 21-0934**

**J.F. ALLEN COMPANY, AMEC FOSTER WHEELER  
ENVIRONMENT & INFRASTRUCTURE, INC.**

**Defendants Below, Respondents**

**and**

**MARKWEST LIBERTY MIDSTREAM & RESOURCES, INC.**

**Plaintiff Below, Respondent.**

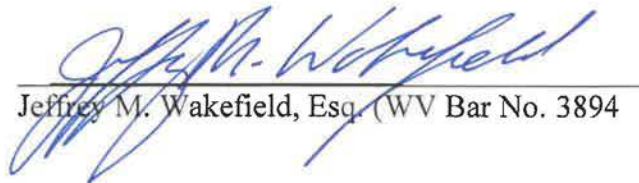
**CERTIFICATE OF SERVICE**

I hereby certify that on this 4<sup>th</sup> day of April, 2022, I served the foregoing “**BRIEF OF RESPONDENT J.F. ALLEN COMPANY**” and I have provided service to all counsel of record via electronic mail or regular mail.

Joseph M. Ward, Esquire  
Ericson P. Kimbel, Esquire  
Frost Brown Todd, LLC  
500 Virginia Street, East, Suite 1100  
Charleston, WV 25301  
*Counsel for Markwest Liberty Midstream & Resources, LLC*

Vic L. McConnell, Esquire  
William Fitts, Esquire  
Smith Cashion & Orr, PLC  
One American Center  
3100 West End Avenue, Suite 800  
Nashville, Tennessee 37203  
*Counsel for Defendant AMEC Foster Wheeler Environment & Infrastructure*

Michael A. Jacks, Esquire  
Jacks Legal Group, PLLC  
United Federal Credit Union Building  
3467 University Avenue, Suite 200  
Morgantown, WV 26505  
*Counsel for Defendant Redstone International Inc.*



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Jeffrey M. Wakefield, Esq. (WV Bar No. 3894)