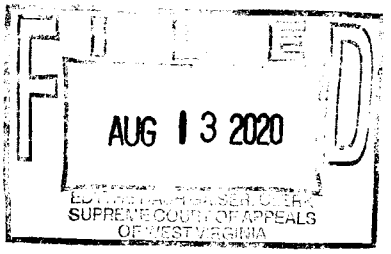
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**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.**

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# REPLY BRIEF

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**WesBanco Bank, Inc.**

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## 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] By trial, their allegations were limited to two breach-of-contract claims: they alleged that WesBanco (1) had paid their contractor, Residential Creations, for unfinished work and (2) had failed to obtain lien waivers from a materialman, O.C Cluss, before releasing draw payments.[2] They told the jury they had incurred $299,100 in damages.[3]

After finding WesBanco liable on both claims, a Marion County jury awarded the Millers $404,500[4]—an award that means the Millers will pay only $591,000 of the $704,000 contracted cost for their home. Faced with this manifest injustice, and likewise prejudiced by evidentiary errors and the Millers' failure to make a *prima facie* case on either their unfinished-work or lien-waiver claims, WesBanco filed a post-trial motion[5] under Rule 50(b)[6] and Rule 59(a).[7] When the trial court denied those motions,[8] this appeal followed.

## ARGUMENT

### I. The trial court erred by allowing the Millers to use parol evidence and the duty of good faith and fair dealing to alter or contradict the Loan Agreement.

Five of the cardinal rules from this Court's breach-of-contract jurisprudence apply here. The first is that what constitutes a contract is a question of law for the court.[9] The second is that

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[1] A.R. 5-15 (Compl.).
[2] A.R. 360-61 (Jury Charge).
[3] A.R. 818-19 (Trial Tr. 444:10-445:9) & A.R. 345 (Pls.' Summation Demonstrative Ex.).
[4] A.R. 1107-09 (Jury Verdict).
[5] A.R. 272-309 (Def.'s Post-Trial Mot.).
[6] W. Va. R. Civ. P. 50(b).
[7] W. Va. R. Civ. P. 59(a).
[8] A.R. 346-48 (Order Denying Post Trial Mots.).
[9] *Pipemasters, Inc. v. Putnam Cty. Comm'n*, 218 W. Va. 512, 518, 625 S.E.2d 274, 280 (2005) (*per curiam*).

an unambiguous written contract is conclusively presumed to be fully-integrated.[10] The third is that an unambiguous contract cannot be altered, explained, or modified by parol evidence, no matter if that parol evidence dates from before, during, or after the contract's execution.[11] The fourth is that, while parties must perform their contractual obligations in good faith, the duty of good faith and fair dealing cannot create new or inconsistent rights or obligations.[12] And the fifth is that a trial court commits reversible error when it allows a jury to consider parol evidence to alter, explain, or modify an unambiguous written contract[13]—a rule that should apply equally when the duty of good faith and fair dealing is manipulated to achieve the same result.

WesBanco asked the trial court to apply those cardinal rules, both in motions in *limine* before trial[14] and in evidentiary objections.[15] Yet the trial court refused each request[16] and allowed the Millers to introduce argument and evidence—including the so-called Expectations Form[17]—to alter or contradict the parties' Loan Agreement.[18]

The trial court thus allowed the Millers to ask WesBanco's corporative representative, Cathi McClelland, "Do you believe that that clause [¶ 7 of the Loan Agreement] is subject to being interpreted under principles of good faith and fair dealing?"[19] And when McClelland asked for clarification, it allowed the Millers to go further and ask, "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

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[10] Syl. Pt. 2, in part, *Kanawha Banking & Tr. Co. v. Gilbert*, 131 W. Va. 88, 46 S.E.2d 225 (1947) ("An 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.").
[11] *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).
[12] *Barn-Chestnut, Inc. v. CFM Dev. Corp.*, 193 W. Va. 565, 572, 457 S.E.2d 502, 509 (1995).
[13] *Spencer v. Travelers Ins. Co.*, 148 W. Va. 111, 121, 133 S.E.2d 735, 741 (1963).
[14] A.R. 209-12 (Mot. in *Limine* on Parol Evidence) & A.R. 213-56 (Mot. in *Limine* on Contractual Definition).
[15] A.R. 718 (Trial Tr. 344:22-23) & A.R. 719 (Trial Tr. 345:2-10).
[16] A.R. 373 (Prelim. H'rg Tr. 10:1-13), A.R. 718 (Trial Tr. 344:22-23) & A.R. 719 (Trial Tr. 345:2-10).
[17] A.R. 860 (Pls.' Ex. 1).
[18] A.R. 999-1032 (Def.'s Ex. 5).
[19] A.R. 718 (Trial Tr. 344:22-23).

responsibility [if the bank identified a supplier's lien and either did not pay or short-paid, leading to the filing of a lien]?"[20] It allowed the Millers to introduce testimony through their loan originator, Michelle Hamilton, about pre-Loan Agreement discussions pertaining to lien waivers,[21] 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.[22] It further 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."[23] It similarly 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.[24] It even 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."[25] And it allowed the Millers to publish and develop testimony on the Residential Construction Loan Program (RCLP) manual,[26] an internal WesBanco document that the Millers would never have seen.[27]

Through this evidence and argument, the Millers invited the jury to redefine the parties' 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.[28]

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[20] A.R. 719 (Trial Tr. 345:2-10).
[21] *See* A.R. 422 (Trial Tr. 48:15-24).
[22] *See* A.R. 432-34 (Trial Tr. 58:21-60:16) & A.R. 865 (Pls.' Ex. 6).
[23] A.R. 538 (Trial Tr. 164:12-17).
[24] A.R. 586-87 (Trial Tr. 212:21-213:6).
[25] A.R. 738-39 (Trial Tr. 364:17-365:3).
[26] A.R. 980-97 (Pls.' Ex. 17).
[27] A.R. 659 (Trial. Tr. 285:2-9).
[28] A.R. 814 (Trial Tr. 440:9-15) (emphasis added).

Even without the presumption of reversible error, the cumulative effect of this inadmissible parol evidence and argument was material and prejudicial. This Court should hold that the trial court erred by denying WesBanco's pre-trial motions in *limine* and its objections to the questioning of McClelland. And it should then reverse.

### A. The Millers misplace their reliance on the single-transaction rule, which neither applies nor creates an ambiguity if it did.

To support the trial court's conclusion that the Expectations Form had been incorporated into the parties' agreement, the Millers rely on this Court's holding that "[s]eparate written instruments will be construed together and considered to constitute one transaction where the parties and the subject matter are the same, and where there is clearly a relationship between the documents."[29] But not only does the single-transaction rule not apply, it fails to create the ambiguity required for the admission of parol evidence.

#### 1. The single-transaction rule does not apply and cannot expand the parties' contract beyond the Loan Agreement.

The single-transaction rule is limited to separate written *contracts*. It requires the contracts to share the same parties and subject matter. And it requires the contracts to have been executed contemporaneously. None of those elements is found here.

**The Loan Agreement is the only contract**. If there were any doubt that the reference to "written instruments" is to *contracts*, this Court has also described the rule as applying to "executed agreements."[30] And here, only the Loan Agreement has the hallmarks of a contract: the $555,000 loan amount, the numbered paragraphs defining the parties' rights and obligations, and

[29] Syl. Pt. 3, *T.D. Auto Fin. LLC v. Reynolds*, --- W. Va. ---, 842 S.E.2d 783 (2020).
[30] *Id.* at ---, 842 S.E.2d at 790.

the parties' signatures at the end.[31] The documents advanced by the Millers for inclusion bear none of those hallmarks: they are nothing more than early disclosure or draw-payment forms.[32]

**The parties and subject matter are different**. In *TD Auto Finance LLC v. Reynolds*, this Court held that a credit application and a retail installment sales contract (RISC) were two separate agreements rather than a single transaction.[33] Not only were the agreements signed at different times, but they had different subject matters: whereas the credit application was intended to secure credit approval, the RISC was intended to document the actual purchase and financing.[34] So too here. The Loan Agreement, signed by WesBanco and the Millers, set the terms and conditions under which WesBanco would disburse its $555,000 loan to the Millers.[35] The Expectations Form, signed by Residential Creations and the Millers (but not WesBanco), summarized the general construction loan process as part of the loan pre-qualification process.[36] And the builder's affidavits and lien waivers, signed by Residential Creations (and no one else), were submitted by the builder to obtain payment.[37]

**None of the documents were signed contemporaneously**. Even when there are multiple contracts, all involving the same parties and subject matter, this Court held in *McDaniel v. Kleiss* that the single-transaction rule will not apply unless "the two agreements were signed contemporaneously or where the earlier contract was specifically referenced in the later contract."[38] In *TD Auto*, this Court was even more explicit: "our rule provides that *contemporaneously* executed

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[31] A.R. 999-1032 (Def.'s Ex. 5).
[32] A.R. 860 (Pls.' Ex. 1), A.R. 1043-44 & 1046-47 (Def.'s Ex. 11), A.R. 1057-58 (Def.'s Ex. 12), A.R. 1067-68 (Def.'s Ex. 13), A.R. 1077-78 (Def.'s Ex. 14) & A.R. 1087-88 (Def.'s Ex. 15).
[33] *T.D. Auto Fin. LLC*, --- W. Va. at ---, 842 S.E.2d at 791.
[34] *Id.* at ---, 842 S.E.2d at 790.
[35] A.R. 999-1032 (Def.'s Ex. 5).
[36] A.R. 860 (Pls.' Ex. 1).
[37] A.R. 1043-44 & 1046-47 (Def.'s Ex. 11), A.R. 1057-58 (Def.'s Ex. 12), A.R. 1067-68 (Def.'s Ex. 13), A.R. 1077-78 (Def.'s Ex. 14) & A.R. 1087-88 (Def.'s Ex. 15).
[38] *McDaniel v. Kleiss*, 202 W. Va. 272, 279, 503 S.E.2d 840, 847 (1998).

agreements between the same parties and *relating to the same subject matter* may be construed together as part of one contract or transaction."[39] Each document advanced by the Millers, however, came into existence at different points in time: the Expectations Form in June 2015,[40] the Loan Agreement in October 2015,[41] and the builder's affidavits and lien waivers with each individual draw payment application from November 2015 through March 2016.[42] The contemporaneous-execution element is simply missing.

#### 2. Applying the single-transaction rule to encompass the Expectations Form fails to create an ambiguity.

Even if the Millers were correct that the single-transaction rule extends the parties' contract beyond the Loan Agreement, the rule would not justify the admission of parol evidence on its own: the trial court would still need to find an ambiguity. Yet the Expectations Form is silent on the issue of materialmen's liens, which was the only issue subject to competing contractual interpretations. And so even if the Expectations Form were properly considered to be part of the parties' contract, it would not justify the trial court's admission of parol evidence in this case.

### B. The Millers attempt to use a policy disagreement to create a contractual ambiguity where none exists.

As both an alternative and a supplement to their single-transaction argument, the Millers also argue that the Loan Agreement has an internal ambiguity in its approach to materialmen waivers. This argument focuses on three separate clauses found in ¶ 4(C)(i), ¶ 4(C)(ii), and ¶ 6:

> **4. Advance of funds.** ...
> C.) After depletion of the Borrower's portion of the contract price

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[39] *T.D. Auto Fin. LLC*, --- W. Va. at ---, 842 S.E.2d at 790 (emphasis in original).
[40] A.R. 860 (Pls.' Ex. 1).
[41] A.R. 999-1032 (Def.'s Ex. 5).
[42] A.R. 1043-44 & 1046-47 (Def.'s Ex. 11), A.R. 1057-58 (Def.'s Ex. 12), A.R. 1067-68 (Def.'s Ex. 13), A.R. 1077-78 (Def.'s Ex. 14) & A.R. 1087-88 (Def.'s Ex. 15).

> 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 ...[43]
>
> **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.[44]

The Millers seize on the similarities between ¶ 4(C)(i) and ¶ 4(C)(ii) to argue that it makes no sense to predicate lien waivers for both the initial and subsequent disbursement on the supply of materials before the initial advance.[45] But an *ambiguity* is "language reasonably susceptible of two different meanings or language of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning."[46] Key to this definition is some disagreement over *meaning*—"that which is conveyed (or intended to be conveyed) by a written or oral statement of other

[43] A.R. 1001 (Def.'s Ex. 5 at ¶ 4(C)(i)-(ii)).
[44] A.R. 1002 (Def.'s Ex. 5 at ¶ 6).
[45] Resps.' Br. 5.
[46] Syl. Pt. 3, *Estate of Tawney v. Columbia Nat. Res. LLC*, 219 W. Va. 266, 633 S.E.2d 22 (2006).

communicative act."[47] And, here, there is no disagreement over meaning: the Millers themselves acknowledge that ¶ 4(C)(i) and ¶ 4(C)(ii) together "state that both the initial disbursement and subsequent disbursements will require waivers of lien[s] from those who furnished labor or materials to the site prior to the initial advance."[48] The Millers clearly understand these clauses; they just think that they are redundant.

In fact, however, the requirements make perfect sense in the context of West Virginia law on lien priority. Under West Virginia law, "all perfected ... materialmen's liens attach at the time the initial construction of the building is commenced and take priority over all other intervening liens created by deeds of trust, or otherwise, that are not recorded before the construction begins."[49] If a materialman supplied materials to the site before the initial advance, its lien could thus take priority over WesBanco's deed of trust. And because a materialman's lien attaches when materials are first supplied, every subsequent delivery would relate back to the first. For that reason, if materials are supplied before the initial advance, then WesBanco can protect its lien position only by requiring lien waivers for each disbursement—from the first through the last. This, of course, is exactly the purpose that ¶ 4(C)(i) and ¶ 4(C)(ii) serve.

There is no ambiguity in the Loan Agreement's treatment of materialmen's lien waivers, and the trial court erred by allow the Millers to introduce parol evidence to alter or contradict the plain contractual language.

## II. The trial court erred by denying WesBanco's post-trial motions under Rule 50 and Rule 59.

Although a jury verdict is entitled to substantial deference, it is not sacrosanct. There are five primary reasons why a trial court may set aside a jury verdict:

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[47] *Meaning*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[48] Resps.' Br. 10 (third emphasis omitted).
[49] *Carolina Lumber Co. v. Cunningham*, 156 W. Va. 272, 280, 192 S.E.2d 722, 727 (1972).

1. Under Rule 50(b), if the plaintiff has failed to adduce sufficient evidence to make a *prima facie* case,[50] meaning that the jury verdict "could only have been the result of sheer surmise and conjecture;"[51]
2. Under Rule 50(b), if the evidence weighs so heavily in favor of the defendant that "reasonable and fair minded jurors could not arrive at a verdict against [it];"[52]
3. Under Rule 59(a), if the jury verdict is against the clear weight of the evidence;[53]
4. Under Rule 59(a), if the jury verdict is based on false evidence;[54] or
5. Under Rule 59(a), if the jury verdict will result in a miscarriage of justice.[55]

A trial court acting under Rule 50(b) must give the plaintiffs the benefit of every assumption, doubt, and inference,[56] whereas a trial court acting under Rule 59(a) may weigh the evidence, assess the witnesses' credibility, and set aside the verdict even if supported by substantial evidence.[57] Consistent with the different standards, this Court reviews a trial court's decision under Rule 50(b) *de novo*,[58] whereas it reviews a trial court's decision under Rule 59(a) for abuse of discretion, with factual findings reviewed for clear error and legal conclusions reviewed *de novo*.[59]

### A. The jury verdict on the Millers' unfinished-work claim is not supported by the evidence and results in an unlawful betterment to the Millers.

To prevail on their unfinished-work claim, the Millers had to prove that WesBanco paid

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[50] Syl. Pt. 3, *Roberts v. Gale*, 149 W. Va. 166, 139 S.E.2d 272 (1964).
[51] Franklin D. Cleckley et al., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 1118 (4th ed. 2012).
[52] 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).
[53] 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).
[54] *Id.*
[55] *Id.*
[56] Syl. Pt. 1, *Bailey v. Norfolk & W. R. Co.*, 206 W. Va. 654, 527 S.E.2d 516 (1999).
[57] Syl. Pt. 3, *In re State Public Building Asbestos Lit.*, 193 W. Va. at 119, 454 S.E.2d at 413.
[58] Syl. Pt. 1, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009).
[59] *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)).

Residential Creations for work that was not done.[60] And they then had to prove they had been damaged as a result.[61]

**1. The jury verdict is based on speculation and unsupported inference.**

**a. The evidence showed that work under each construction milestone was finished when WesBanco made the corresponding draw payment.**

The evidence at trial showed that the work associated with each construction milestone was done when WesBanco released payment. Before making each draw payment, WesBanco obtained four documents assuring it that the corresponding work had been finished:[62]

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.

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.[63]

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[60] A.R. 361 (Jury Charge).
[61] *Id.*
[62] *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).
[63] A.R. 783 (Trial Tr. 409:7-11).

Under either the Rule 50(b) or the Rule 59(a) standard, no reasonable jury could have considered this evidence, paired with Brad Miller's admission that all work through the last draw payment was done, and still found against WesBanco on liability.

**b. The Millers' inferences are based on unsupported assumptions.**

Instead of specific evidence of unfinished work for which Residential Creations had been paid, the Millers relied exclusively on inferences. They asked the jury to find liability and damages *either* from the difference between their home's $704,000 expected cost and its $878,500 actual cost[64] *or* from a comparison of the share of finished construction to the share of total disbursements when Residential Creations quit work.[65] Before a jury could rely on these inferences, however, the Millers had to establish a correlative relationship.

For the comparison of actual to expected cost, for instance, the Millers had to show that each draw payment correlated to the cost of completing the associated work. Without this correlation, a jury could not rely on the $105,000 in remaining draw payments to infer that the Millers' $287,500 in out-of-pocket expenses included payment for unfinished work. Likewise, for a comparison of construction progress to construction disbursements, the Millers had to show that the payment's proportionate share of the contract price correlated to its proportionate influence on construction progress. Without this correlation, a jury could not infer, as an example, that a 20% disbursement of the construction costs represented 20% of the construction progress.

The Millers never established either correlative relationship. And, in fact, the evidence showed that none existed. Under their contract with Residential Creations, the Millers agreed that

[64] *See* A.R. 563 (Trial Tr. 189:15-19).
[65] *See* A.R. 490 (Trial Tr. 116:2-4).

the $690,000 contract price would be made in draw payments corresponding to ten specific milestones.[66]

| | | |
|---|---|---|
| 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 admitted, this draw schedule was frontloaded and put them upside-down from the start.[67] The early draw payments were higher than the true cost of the work, and the proportion of funds disbursed to Residential Creations would not begin to match the progress of construction until the house was nearly finished.[68] The Millers' comparisons between actual and expected costs, or between construction progress and construction disbursements, thus have no probative value for their unfinished-work claim. Under either the Rule 50(b) or the Rule 59(a) standard, no reasonable jury could have relied on them to find liability or calculate damages.

### c. The Millers' total-costs inference does not support the jury verdict for liability or damages on their unfinished-work claim.

As part of their total-costs inference, the Millers relied at trial (as they do here) on a spreadsheet listing each expense they incurred to finish their home.[69] But liability on the Millers' unfinished work claim did not turn on whether the Millers incurred costs to finish their home. Nor did

[66] A.R. 866 (Pls.' Ex. 9). The difference between the $690,000 contract price and the $704,000 expected cost is explained by closing costs and an approximately $7,600 payment to a separate contractor, Three C Construction.
[67] 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).
[68] A.R. 490 (Trial Tr. 116:2-4).
[69] *See* Resps.' Br. 11.

damages turn on that amount. Instead, liability and damages focused on a narrower issue: whether any of those costs represented unfinished work for which Residential Creations had been paid. The Millers repeatedly testified that they did not know the answer.

- I don't know, you tell me. (Jamie Miller)[70]
- I can't tell you specifically... (Jamie Miller)[71]
- I don't know what all [WesBanco] paid for... (Jamie Miller)[72]
- I don't know under which [draw] category things were paid for that hadn't been done. (Jamie Miller)[73]
- I can't pinpoint it to something. (Jamie Miller)[74]
- I cannot identify specifically what that is [that was paid for when unfinished]. (Jamie Miller)[75]

The truth is that there probably is not any unfinished work reflected in the Millers' spreadsheet. Given the frontloaded draw schedule, the most likely explanation is that the Millers' spreadsheet represents the true cost of finishing the work under the last three draw payments that were never released to Residential Creations. And if the Millers had made even the slightest attempt to exclude that work from their spreadsheet, perhaps the trial court could have justifiably excused their reliance on it as a proxy for liability and damages. The Millers, however, made no such attempt. Multiple witnesses, including the Millers, testified that their spreadsheet included a number of expenses for things that could not be part of their unfinished-work claim because payment for them had never been released to Residential Creations.

- I suspect there are [things in the spreadsheet that fall under Interior/Exterior A or Interior/Exterior B], yes. (Jamie Miller)[76]
- 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

[70] A.R. 563 (Trial Tr. 189:9).
[71] A.R. 563 (Trial Tr. 189:13).
[72] A.R. 570 (Trial Tr. 196:1).
[73] A.R. 580 (Trial Tr. 206:17).
[74] A.R. 581 (Trial Tr. 207:2).
[75] A.R. 582 (Trial Tr. 208:16-17).
[76] A.R. 581 (Trial Tr. 207:9-13).

wouldn't expect the bank to pay for that. (Jamie Miller)[77]

- I would not expect that it [the kitchen] was included in those disbursements [made by WesBanco]. (Jamie Miller)[78]
- I don't expect [WesBanco] to have paid for painting. (Jamie Miller)[79]
- That [soffit and fascia] would be for the exterior of the house. (Chris Cluss)[80]
- The interior doors and probably the trim package as well [are for the interior of the house]. (Chris Cluss)[81]
- ...trim and molding and casing. (Cathi McClelland)[82]
- Shelving and plumbing supplies, floor paper, etc. (Cathi McClelland)[83]
- Shoe molding ... vanity tops ... fireplace boxes ... flooring supplies ... stair treads, railings. (Cathi McClelland)[84]
- Wood flooring ... ceiling fan for livingroom [sic] ... garbage disposals. (Cathi McClelland)[85]

Under either the Rule 50(b) or the Rule 59(a) standard, no reasonable jury could have heard this testimony and nonetheless relied on the Millers' spreadsheet as a proxy for liability and damages on their unfinished-work claim. The Millers left the jury to speculate on which *unidentified* expenses represented unfinished-work in distinction to the many *identified* expenses which did not. And the result is unsupportable: a jury that avoided the exercise, and a $287,500 damages award that relieves the Millers from paying part of the contracted costs for their home.

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[77] A.R. 582 (Trial Tr. 208:6-8).
[78] A.R. 573 (Trial Tr. 199:13-14).
[79] A.R. 575 (Trial Tr. 201:4-5).
[80] A.R. 604 (Trial Tr. 230:18-21).
[81] A.R. 605 (Trial Tr. 231:3-5).
[82] A.R. 709 (Trial Tr. 335:11).
[83] A.R. 709 (Trial Tr. 335:14).
[84] A.R. 709 (Trial Tr. 335:19-22).
[85] A.R. 710 (Trial Tr. 336:17-21).

### d. The Millers' construction-progress inference does not support the jury verdict for liability or damages on their unfinished-work claim.

As an alternative to their spreadsheet, the Millers relied at trial (as they do here) on a construction-progress inference that compares construction progress and construction disbursements.[86] The Millers argue that WesBanco must have paid Residential Creations for unfinished work because 80% of the construction disbursements had been made, but only 53% of the home was finished. And in their Respondents' Brief, they make the comparison between 47% of the contract amount (about $324,000) and the amount they spent to finish their home ($287,500).[87] According to the Millers, the relative proximity of the two figures, together with their testimony about completing their home to a lower standard, means that a reasonable jury could have found that they proved damages with reasonable certainty.[88] Not so.

Even without the failure of the assumptions underlying their construction-progress theory, the Millers' argument fails to account for the $105,000 allotted to the last three draw payments for Interior/Exterior A, Interior/Exterior B, and retainage.[89] Because those payments had never been released,[90] the corresponding work fell outside the Millers' unfinished-work claim. Yet work associated with those construction milestones is undeniably included in the $287,500 spent to finish their home.[91]

Under either the Rule 50(b) or the Rule 59(a) standard, no reasonable jury could thus have

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[86] Resps.' Br. 2.
[87] *Id.*
[88] *Id.*
[89] A.R. 1006 (Def.'s Ex. 5).
[90] A.R. 687 (Trial Tr. 313:3-8).
[91] A.R. 573 (Trial Tr. 199:13-14), A.R. 575 (Trial Tr. 201:4-5), A.R. 581 (Trial Tr. 207:9-13), A.R. 581 (Trial. Tr. 207:17-217:20), 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), A.R. 709 (Trial Tr. 335:14), A.R. 709 (Trial Tr. 335:19-22) & A.R. 710 (Trial Tr. 336:17-21).

relied on the Millers' construction-progress theory for liability or damages on the Millers' unfinished-work claim. As with their total-costs theory, the Millers left the jury to speculate on how much of the $287,500 represented unfinished work and how much did not. And the result is likewise supportable: a jury that avoided the exercise, and a $287,500 damages award that relieves the Millers from paying part of the contracted costs for their home.

### 2. The jury verdict provides the Millers with an unlawful betterment that allows them to pay $591,000 instead of the $704,000 contract price.

Under West Virginia law, breach-of-contract damages are measured by the amount required to provide the non-breaching party with the benefit of its bargain.[92] But while the non-breaching party is entitled to compensation, it is not entitled to a betterment: "a plaintiff is not to be put in a better position by a recovery of damages for the breach of a contract than he would have been in if there had been performance."[93] Both principles are violated here.

Within the $287,500 that they spent to finish their home, the Millers were always going to be responsible for the $113,000 representing work that was unstarted (and hence unpaid) when Residential Creations quit work. The Millers knew that this was the case: referring mistakenly to the undisbursed loan amount as $112,000, Jamie Miller 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."[94] And for that reason, the $174,500 difference between the Millers' expected costs and their actual costs represents an approximate ceiling for their damages on their unfinished-work claim.

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[92] *See Ohio Valley Builders' Supply Co. v. Wetzel Const. Co.*, 108 W. Va. 354, ---, 151 S.E. 1, 5 (1929).
[93] *Id.*
[94] A.R. 582 (Trial Tr. 208:6-10).

| **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 jury's verdict, however, includes the entire $287,500 that the Millers spent to finish their home. And so it reduces the Millers' out-of-pocket costs for their home to $591,000 and absolves the Millers from paying for any of the work that remained when Residential Creations quit. Whether viewed under the Rule 50(b) reasonable-juror standard or under the Rule 59(a) clear-weight-of-the-evidence and miscarriage-of-justice standards, the jury verdict provides the Millers with an unlawful betterment and should have been set aside.

### B. The jury verdict on the Millers' lien-waiver claim is unsupported by the evidence and results in an unlawful betterment to the Millers.

The Millers' lien-waiver claim alleged that WesBanco had paid Residential Creations without first obtaining lien waivers from materialmen.[95] To prevail on this claim, the Millers had to show that WesBanco breached a contractual obligation to obtain a lien waiver from a materialman.[96] And they had to show that they were harmed because WesBanco failed to do so.

#### 1. WesBanco did not breach an obligation to obtain a materialman's lien waiver.

The only lien at issue in this case was O.C. Cluss's materialman's lien. And even with the parol evidence that the trial court allowed the Millers to introduce, the only document that addressed materialmen's liens was the Loan Agreement. The Loan Agreement itself required lien waivers from materialmen in only three specific cases.

1. If materials had been supplied to the site before the initial advance,

[95] A.R. 5-15 (Compl.) & A.R. 361 (Jury Charge).
[96] A.R. 361 (Jury Charge).

then before disbursement of the initial advance;[97]

2. If materials had been supplied to the site before the initial advance, then before each subsequent disbursement;[98] and
3. Before the final disbursement.[99]

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.[100] And there likewise was no dispute that WesBanco did not make the final disbursement, thus eliminating the third option.[101] The only arguments to the contrary rely on inadmissible parol evidence and an improper extension of the duty of good faith, both of which are addressed above.

Under either the Rule 50(b) or the Rule 59(a) standard, no reasonable jury could have considered the Loan Agreement, and particularly its assignment of responsibility for liens to the Millers in ¶ 7, and found that WesBanco breached an obligation to obtain a materialmen's lien waiver from O.C. Cluss.

**2. Even if WesBanco had breached its obligation to obtain a materialman's lien waiver, the jury verdict includes $14,000 that did not result from any such breach.**

No one disputed that lien waivers were required only when WesBanco made draw payments.[102] No one disputed that the seventh-and-last draw payment was made on March 28, 2016.[103] And no one disputed that O.C. Cluss's $113,000 lien included about $14,000 in expenses for materials that had been delivered after March 28.[104] The jury thus overcompensated the Millers by

[97] A.R. 1001 (Def.'s Ex. 5 at ¶ 4(C)(i)).
[98] A.R. 1001 (Def.'s Ex. 5 at ¶ 4(C)(ii)).
[99] A.R. 1002 (Def.'s Ex. 5 at ¶ 6).
[100] A.R. 673 (Trial Tr. 299:2-4).
[101] A.R. 673 (Trial Tr. 299:17-24).
[102] *See* A.R. 1001 (Def.'s Ex. 5 at ¶ 4).
[103] *See* A.R. 1001 (Def.'s Ex. 5 at ¶ 4).
[104] *Id.*

$14,000 when it included this amount in its award.

The Millers dismiss this as the consequence of WesBanco's lack of diligence.[105] But the general measure of damages in breach-of-contract cases is the amount required to restore the plaintiff to the position it would have obtained as a result of performance.[106] And here, that represents, at most, freedom from liens through the seventh-and-last draw payment on March 28.

Under either the Rule 50(b) or the Rule 59(a) standard, no reasonable jury could have found that the $14,000 lien from post-March 28 expenses attached because WesBanco failed to obtain a lien waiver from O.C. Cluss.

### 3. When the Millers released WesBanco from liability for liens, the jury verdict on the lien-waiver claim is a miscarriage of justice.

Under the Loan Agreement, the *Millers* agreed that any lien would be its sole responsibility and they would hold WesBanco harmless.[107] Under each draw payment authorization submitted during construction, the *Millers* likewise again agreed to "in no way" hold WesBanco responsible for any consequences arising from payment.[108] The Millers now say that to enforce those clauses would be an audacious disregard of the duty of good faith.[109] But the point of these clauses is that the Loan Agreement imposes the responsibility for liens on the *Millers*, not WesBanco. The lien waivers under ¶ 4(c)(i), ¶ 4(C)(ii), and ¶ 6 are all to be submitted as part of an application from the *Millers*, and the waiver and hold-harmless language in ¶ 7 and the draw payment authorizations simply drives home the point. For the jury to nonetheless hold WesBanco responsible for the full

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[105] Resps.' Br. 14 n.6.
[106] *See Ohio Valley Builders' Supply Co.*, 108 W. Va. at ---, 151 S.E. at 5.
[107] A.R. 1002 (Def.'s Ex. 5 at ¶ 7) (emphasis added).
[108] A.R. 1045 & 1049 (Def.'s Ex. 11), A.R. 105( Def.'s Ex. 12), A.R. 1069 (Def.'s Ex. 13), A.R. 1079 (Def.'s Ex. 14) & A.R. 1089 (Def.'s Ex. 15).
[109] Resps.' Br. 6 n.2.

$113,000 O.C. Cluss Lien is a miscarriage of justice that should be corrected under Rule 59(a).

## CONCLUSION

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 reverse the trial court's order denying WesBanco's post-trial motion.[110] The Court should then grant the following relief, in order of preference:

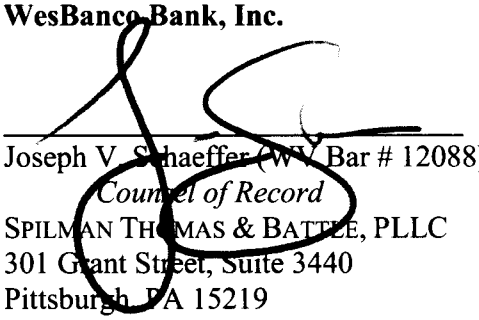
1. Remand for entry of judgment in favor of WesBanco under Rule 50(b);
2. Remand for a new trial under Rule 50(b) or Rule 59(a);
3. Remand with directions to remit the verdict to $277,500—representing a deduction of the $113,000 betterment on the unfinished-work claim and the $14,000 betterment on the lien-waiver claim; or
4. Remand with directions for the Millers to accept a remittitur of $277,500 or elect a new trial.

***Signatures Appear on Next Page***

[110] A.R. 346-48 (Order Denying Post Trial Mots.).

**Dated: August 13, 2020**

**WesBanco Bank, Inc.**



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

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**No. 20-0042**

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**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 13th day of August, 2020, I served the foregoing **Reply Brief** via electronic mail and U.S. Mail, postage pre-paid, addressed as follows:

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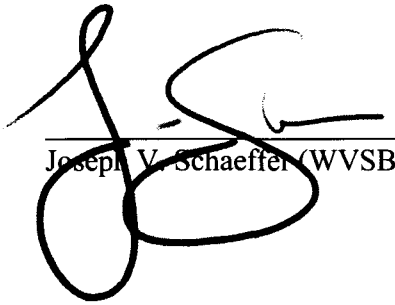

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