IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0042

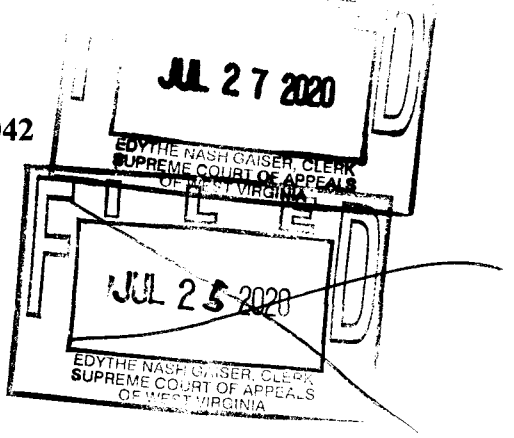
WESBANCO BANK, INC.,

Defendant Below, Petitioner

vs.) **Docket No. 20-0042**

THOMAS B. MILLER and JAMIE MILLER,

Plaintiffs Below, Respondents.



RESPONDENTS THOMAS B. MILLER AND JAMIE MILLER'S RESPONSE TO WESBANCO'S PETITION FOR APPEAL

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Counter Statement of Fact

The Millers were first-time home builders who went to WesBanco to obtain a construction loan. Numerous form documents were presented to the Millers for their acceptance as a condition of WesBanco's participation. These included:

a. An "expectations document" (captioned WesBanco Bank, Inc. Mortgage Loan Department Expectations: Borrower/Builder) which provided assurances to the Millers as to how draws against their loan amount could and could not be applied (A.R. 000860);

b. A "Construction Loan Agreement" which, due to ambiguities, is best interpreted as requiring that waiver of lien forms are to be signed by contractors, subcontractos and materialmen prior to the disbursement of funds (A.R. 000999 - 001003); and

c. Multiple "Builder's Affidavits"forms which the Millers were charged to supply periodically to their building contractor for his completion and submission to WesBanco whenever it needed to draw additional funds (See A.R. 001044).

WesBanco supplied its employees with a guide called "Residential Construction Loan Program." (Henceforth "RCLP"). (A.R. 0980 - 0997). WesBanco's employees were cautioned that "[t]here is a higher degree of risk associated with construction lending, therefore it is essential to keep such risks at a minimum by adhering to prudent Bank approved underwriting standards whenever possible as well as diligent administrative practices." (A.R. 0982). Draw requests were to be supported by "Waiver of Liens — Executed by General Contractor and notarized and executed by all Sub Contractors and notarized." (A.R. 0991). Imaging indices of supporting documentation were to be maintained, and were to include "Lien Waivers from Contractors/Suppliers." The policy document stated "[t]he Bank reserves the right to withhold the disbursement of funds if construction progress is not commensurate with the amount of loan proceeds to be disbursed or is not in accordance with the construction contract, plans and specifications or draw schedule." (A.R. 0995).

The Construction Loan Agreement was signed in October 2015. However, in early Spring

2016 Ms. Miller received a telephone call from the owner of O.C. Cluss Lumber Company, a material supplier. At that time she learned that he was about to file a Mechanic's Lien because his company had not been paid by their Contractor, Residential Creations. His company was owed over $117,500. She was also told that her Contractor was in the process of filing for bankruptcy. (A.R. 000493).

The Expectations document WesBanco had given the Millers and the contractor to sign emphasized that "**Funds will not be disbursed for work not completed,**" and "**Funds will not be disbursed for materials on site not installed.**" However, when the contractor walked off the job 80% of the funds had been spent, but only 53% of the home was completed. (A.R. 000735). The percentage of completion was confirmed by the appraiser WesBanco had hired to monitor construction progress. (A.R. 001092).

At trial the Millers presented evidence that they had to spend $287,000 of their own money to finish the house for occupancy (A.R. 000508, 000517 - 000518, and 001095 - 001106) , albeit to a lesser standard. (A.R. 000498 - 000499, 000557). O.C. Cluss did file a Mechanic's Lien for slightly more than $117,500 (A.R. 0919 - 0977), and sued them in the Circuit Court of Marion County. (A.R. 0905 - 0918). A jury returned a verdict in the Millers favor finding that WesBanco had breached its contract with the Millers. They awarded the couple $404,500 in damages. (A.R. 001108 - 001109).

Counter Statement of Law

WesBanco's Petition for Appeal should fail by operation of the following legal principles:

A. WesBanco breached the Covenant of Good Faith and Fair Dealing in its contract with the Millers.

B. Separate written instruments in a given transaction will typically be construed together. Thus, the parties' contract here consisted of more than simply the document captioned "Construction Loan Agreement."

C. Proof of damages to a reasonable certainty does not demand absolute certainty to the exactitude of a mathematical calculation.

D. A jury verdict involving witness credibility and the reasonable inferences drawn from

conflicting testimony should not ordinarily be set aside.

Counter Argument

A. WesBanco breached the Covenant of Good Faith and Fair Dealing in its contract with the Millers.

The concept of good faith and fair dealing appeared in our State's jurisprudence in the late 1980's. At first, this was in the specific context of employment litigation. However, that principle of law is not limited to employment contracts:

> Good faith and fair dealing between parties are pervasive requirements in our law; it can be said fairly, that parties to contracts or commercial transactions are bound by this standard. Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977). See also, Cort v. Bristol-Myers Co., 385 Mass. 300,431 N.E.2d 908 (1982).
>
> *Bryan v. Massachusetts Mut. Life Ins. Co.*, 178 W.Va. 773, 778, 364 S.E.2d 786,791 (1987).

More recently, this Court has held:

> Our federal district court has observed that West Virginia law "implies a covenant 13 of good faith and fair dealing in every contract for purposes of evaluating a party's performance of that contract." Stand Energy Corp. v. Columbia Gas Transmission, 373 F.Supp.2d 631,644 (S.D.W.Va.2005) (quoting Hoffmaster v. Guiffrida, 630 F.Supp. 1289, 1291 (S.D.W.Va.1986)). However, by the same token, this Court has observed that "[t]he implied covenant of good faith and fair dealing cannot give contracting parties rights which are inconsistent with those set out in the contract." Bam-Chestnut, Inc. v. CFM Dev. Corp., 193 W.Va. 565, 457 S.E.2d 502, 509 (1995).
>
> *Evans v. United Bank, Inc.*, 235 W.Va. 619,628, 775 S.E.2d 500,509 (2015).

In denying the Respondent's Motion for Summary Judgment by Order entered July 11, 2019 the trial court ruled:

> 3. The Court finds that under West Virginia law there is an implied "covenant of good faith and fair dealing in every contract for purposes of evaluating a party's performance of that contract." Evans v. United Bank, Inc., 235 W.Va. 619, 628, 775 S.E.2d 500, 509 (2015). See also, Bryan v. Massachusetts Mut. Life Ins. Co., 364 S.E.2d 786, 791, 178 W. Va. 773, 778 (1987).
>
> 4. With respect to the "Expectations" form, which states that "funds will not be disbursed for work not completed," the November 2015 exchange of e-mails between Ms. Miller and Michelle Hamilton reveals that both the Millers and WesBanco acknowledged the vitality of the expectations form, even post-contract. Having acknowledged that its obligations under the "Expectations" form existed in November of 2015, the finder of fact could conclude that the parties, by their conduct, adopted that "Expectations" form as a term of the loan agreement.
>
> 5. If the jury resolves the questions of fact identified above in favor of the plaintiffs,

then, contrary to WesBanco' s argument, the rights which the plaintiffs assert would not be inconsistent with the terms of the contract and the good faith and fair dealing obligation could fairly be imposed upon the defendant.

(A.R. 0197 - 0208).

In this regard, Judge Jane's Charge To The Jury stated:

> The Court instructs the jury that West Virginia law implies a covenant of good faith and fair dealing in every contract for purposes of evaluating a party's performance of that contract. However, by the same token, the implied covenant of good faith and fair dealing cannot give contracting parties rights which are inconsistent with those set out in the contract.
>
> Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving a bad faith because they violate standards of decency, fairness or reasonableness.
>
> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

(A.R. 0359 - 0360).

Substantial evidence was presented to the jury throughout trial that WesBanco did not administer the Millers' loan in conformity with their justified expectations. For example:

- The "expectations" document assured the Millers that WesBanco would attend to liens. Michelle Hamilton told the Millers that this extended to Materialmen Liens. Also, Michelle Hamilton's email pointed the Millers in the direction of the "expectations" document as a response to one of their questions. (A.R. 000865).
- The "expectations" document stated "funds will not be disbursed for work not completed." In light of this, Ms. Miller had expressed concern as to how the very first draw in November 2015 was going to be handled.[1] Several weeks later, on December 28, 2015, one of

[1] In an email dated November 10, 2015, Ms. Miller wrote: "Ladies we have a problem...[Y]ou told us several times that with the exception of his initial $70,000 draw made at closing, no funds would be dispersed (sic) until work was completed." "The draw request forms you all sent to us say nothing about

WesBanco's Vice Presidents, Cathi J. McClelland, expressed similar concern that with a subsequent release of funds request the project would be "advanced at 59% with total completion of the project at 23%." Nevertheless, additional funds were authorized to be disbursed.

- The "expectations" document stated 'funds will not be disbursed for materials on site not installed. "
- Paragraph 4.B.)(i) of the Construction Loan Agreement document specifies that WesBanco would not advance funds until it has "received the executed Waiver of Liens from the general contractor and from the subcontractors, supplies and materialmen, if deemed necessary." (A.R. 001001). No explanation was offered by Wesbanco at trial as to what circumstance would render it unnecessary to secure its position and that of the Millers by requiring waivers of lien.
- Paragraphs 4.C.)(i) and (ii) of the Construction Loan Agreement document contain virtually identical language concerning liens from materialmen which are both conditioned on materials provided prior to the first draw. (*Id.*) Such language makes no sense and is either an obvious clerical error or ambiguity which the jury was entitled to interpret against WesBanco.
- The supply of Builder's Affidavit forms the Millers were given to supply to their contractor to be given in turn to WesBanco gave them reassurance that actual waivers of liens would be presented to WesBanco along with the Builder's Affidavits. (A.R. 001044, 001058, 001068, 001078, 001088).

Finally, another telling communication involving Ms. McClelland and Ms. Miller occurred on May 17, 2016. At that point Residential Creations' bankruptcy had become known. Ms. McClelland optimistically wrote "I am hoping that my letting him [Derrick Pritt, principal of

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work in progress, only for work completed." "If he were to quit the project tomorrow, we have very little to show for our $260,000 investment." (A.R. 000862)

Residential Creations] know we are aware of the situation will help." (A.R. 0978). Ms. Miller thanked her and inquired "is there some sort of protocol the bank has to insure that the builder actually pays his bills with the money he is given?" Ms. McClelland's response was "when a builder is contracted by the borrower we all act in good faith and assume that they will abide by the terms of their contract. There is really no way of knowing whether they have paid all bills until we hear from an supplier or a subcontractor like we did in this case." Possibly, Ms. McClelland had forgotten about the numerous WesBanco documents which address withholding draws for projects when the amount of disbursements is out of sync with construction progress; or that waivers of lien are required before authorizing disbursements.

These examples of WesBanco's cavalier observance of its own documents supplied the jury with ample evidence to determine that WesBanco had breached the covenant of good faith and fair dealing in its contract with the Millers.[2]

B. Separate written instruments in a given transaction will typically be construed together. Thus, the parties' contract here consisted of more than simply the document captioned "Construction Loan Agreement."

The law in West Virginia is that:

> "'Separate 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.' Syllabus point 3, McCartney v. Coberly, —W.Va. —, 250 S.E.2d 777 (1978), *overruled on other grounds by* Syllabus point 2, Overfield v. Collins, 199 W.Va. 27, 483 S.E.2d 27 (1996)." Syl. Pt. 1, McDaniel v. Kleiss, 202 W. Va. 272, 273-74, 503 S.E.2d 840, 841-42 (1998).

Syllabus Pt. 3, *TD Auto Fin. LLC v. Reynolds*, 842 S.E.2d 783 (W. Va. 2020).

The Millers sued WesBanco because, pursuant to their agreement, WesBanco should not have paid Residential Creations for work that was not done. Also, WesBanco was responsible for ensuring that

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[2] The Petitioner's suggestion at page 27 of its Brief that the Millers have no cause of action against WesBanco because they "agreed to hold WesBanco harmless from any liability, cost, or damages resulting from liens" is remarkable. The obvious purpose of that clause is to protect the bank from liens that a borrower permits without the bank's knowledge. Despite numerous documents confirming that liens were undesirable and that WesBanco would obtain lien waivers; it failed to do so at each and every turn. Now it wants to be indemnified due to its laxity. This audacious argument should either be discounted entirely as inapt, or found void against public policy. It is perhaps the most egregious and emblematic signal of WesBanco's total disregard for the covenant of good faith and fair dealing.

contractors, subcontractors, and materialmen were paid so that the potential for any Mechanic's Lien being filed against their property was negated. As touched on above, these are the important documents which constituted the parties transaction, and define where WesBanco was in breach of contract:

1. "Expectations" document.

The WesBanco's form expectations document began: "[t]he following requirements must be addressed with the borrower(s) and their builder as soon as possible. Failure to make the borrower(s) and their builder aware of this information may result in a delayed closing or first draw." Among the clauses which are particularly relevant to WesBanco's breach are:

> - - **Builder's Affidavit**: Properly completed with all work detailed including materials and labor for all subcontractors. The total amount due must be clearly identified. The form must be signed by the general contractor in the presence of a notary public.
>
> - - **Lien Waivers**: Required. Properly executed and notarized Lien Waivers must be presented by each subcontractor in addition to the general contractor.
>
> **Funds will not be disbursed for work not completed**. The first draw will not be made until the foundation is complete (exception would be funds disbursed at closing for lot purchase if applicable).
>
> **Funds will not be disbursed for materials on site not installed**.

2. Construction Loan Agreement.

On October 22, 2015 the parties signed a document captioned "Construction Loan Agreement." Key provisions include:

> 4. Advance of Funds ..... .
>
> B.) The procedure for requesting disbursements is as follows:
>
> (I) When funds are needed for the project, Borrower shall notify Lender at least 48 hours prior to the date that an advance is required. Lender agrees to advance funds in accordance with the CONSTRUCTION LOAN DISBURSEMENT SCHEDULE attached hereto as Exhibit "A" and made a part thereof. **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. Borrower hereby grants to Lender, or its authorized representative, authority to enter onto the subject property at reasonable times to perform the inspections provided for herein. Borrower further agrees that any such inspections shall in no way be construed to warrant the quality of workmanship of any work performed. **(Emphasis added)**.

C.) ... Lender shall, upon application of the Borrower, 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. (Emphasis added)**.

(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. (Emphasis added)**.

(A.R. 001000 - 001001).

3. "Builder's Affidavit" forms.

Ms. Miller testified that at the closing they received a welcome packet which included several blank Builder's Affidavit forms. (A.R. 000586). The Builder's Affidavit documents contain the following relevant provisions:

> The following are the names of all parties who have furnished material or labor, or both, to the undersigned for said work and of all parties having contracts or subcontracts with the undersigned for specific portions of said work or for materials entering into the construction thereof. ...

The form contained boxes in which the name of the appropriate subcontractor or materialmen should have been provided along with a description of what was done, and what was owed. Those specific details were never provided. Rather, Residential Creations routinely inserted what appears to be stamped information alluding to details in the Construction Contract. WesBanco apparently never questioned these omissions. The Millers, on their part, were unaware of the omission of lien details.

Once the blank affidavits were given to Derrick Pritt, the principal of Residential Creations, he delivered the completed forms directly to the bank. (A.R. 000514).

This is what the Builder's Affidavit said about Mechanic's Liens:

> The undersigned further states that there are no contracts for said work outstanding and that there is nothing due or to become due to any person for material, labor or other work of any kind done or to be done upon or in connection with said work other than stated above: that the **waivers of lien presented herewith** are true, correct and genuine and are signed by the respective persons whose names appear thereon ....(**Emphasis Added**). (A.R. 001044, 001058, 001068, 001078, 001088)

The Millers were under the assumption that actual waivers of lien were being obtained and presented to the bank because: a) That is what the Affidavits state; b) This is what they had been told by WesBanco's representative, Michelle Hamilton. (A.R. 738 - 739); and c) The "Construction Loan Agreement" specified that WesBanco would take care of liens before issuing draws to Residential Creations. However, waivers of lien were never "presented herewith." The Millers did not learn that WesBanco was not properly addressing liens until after Residential Creations had filed for bankruptcy. (A.R. 000586, 000744).

In this regard, there is one additional trial exhibit which confirms what WesBanco knew its contractual obligations were in regards to properly administering the Millers' loan: the RCLP primer. (A.R. 980 - 997). This document further underscores that there is an ambiguity in Paragraph 4. C.) of the Construction Loan Agreement. WesBanco persists in maintaining that it had no discretion to do anything other than passively do the bidding of the Millers and their contractor. However, the internal employee document confirms WesBanco's awareness that

A. It had the obligation to verify work in progress and materials in place (A. R. 0984),

B. Draw requests required waivers of lien (A.R. 0991),

C. Lien waivers from Contractors/Suppliers were important documentation of the loan file (A.R. 0993), and

D. It had "the right to withhold disbursement of funds if construction progress is not commensurate with the amount of loan proceeds to be disbursed..." (A.R. 0995).

Furthermore, the RCLP confirms the ambiguity of Paragraph 4. C) of the Construction Loan Agreement in a way that cannot be palatable to Wesbanco. Wesbanco states that "West Virginia law requires a trial court to enforce an unambiguous written contract according to its plain language without reference to parol evidence..." (Petitioner's Brief, page 14).. Well, clearly Para 4. C) is ambiguous. This is self-evident from the juxtaposition of subparts (i) and (ii) that pertain to different events, but which get similar lien waiver treatment. This is what the Millers meant when they said that the Construction Loan Agreement did not make sense. (Petitioner's Brief, page 3). Not that it was unfair, or that they did not agree with it. Rather, Paragraph 4. C) is clearly the result of a clerical error. This error is confirmed by the RCLP paper which underscores the importance WesBanco attaches to its employees obtaining and documenting lien waivers. This goal would not be achieved by WesBanco's promotion of a plan that would essentially ignore the hundreds of thousands of dollars worth of activity sandwiched between the relatively modest exposure to liens that might arise prior to the first advance and the final draw to the contractor. (See A.R. 1036]. WesBanco would have us believe that it intended that only the $70,000 initial payment and the $10,000 final payment (i.e. "retainage") would be scrutinized for liens. Yet, there was no reason to be cautious about $610,000 of payments that were to be made between those two? The Millers were correct: this makes no sense.

Under West Virginia law "[t]he term 'ambiguity' is defined as 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." *Estate of Tawney v. Columbia Nat. Res.*, 219 W.Va. 266, 633 S.E.2d 22 (2006). The Respondents respectfully submit that consecutive clauses in the Construction Loan Agreement which state that both the initial disbursement and subsequent disbursements **will require waivers of lien from those who furnished labor or materials to the site prior to the initial advance** is of doubtful meaning. As such, it is to be construed against WesBanco — the drafter. [See Syllabus Pt. 3, *Auber v. Jellen*, 196 W.Va. 168, 469 S.E.2d 104 (1996): "Ambiguous provisions in an insurance policy, especially those having the qualities of a

contract of adhesion, are to be construed against the insurer and in favor of the insured."].

Because all the documents discussed above collectively "constitute the transaction" they are not mere parol evidence modifying the parties' agreement. They are integral parts of the agreement. The RCLP harmonizes the meaning of relevant documents in the transaction, including the ambiguous language in Paragraph 4. C) (ii).

C. Proof of damages to a reasonable certainty does not demand absolute certainty to the exactitude of a mathematical calculation.

The jury awarded the Millers $404,500 in damages. That amount is the sum of two components: a) $287,500 which the Millers had computed in a spreadsheet; and b) $117,000 for the O.C. Cluss mechanic's lien which had been filed against their property.[3] The Petitioner challenges the Respondents's evidence of their damages for being speculative and conjectural. That characterization is inaccurate. The Respondents proved their damages to the required degree of reasonable certainty.

We must look first to see what is meant by "reasonable certainty" of damages. Presumably, the Petitioner selected the most compelling authority it could locate in support of its position. That can be found at pages 23 - 24 of the Petition which cites a 1901 case from the 8th Circuit: *Central Coal & Coke v. Harman*, 111 F. 96, 98 (8th Cir. 1901):

> 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, from 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 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. **(Emphasis added).**

This is actually very similar to what this Court has said about proof of damages:

> 4. In the ascertainment of damages, absolute certainty is not required. The causes and probable amount of the loss may be shown with reasonable certainty.

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[3] At some point during Ms. Miller's direct examination the $117,500 mechanic's lien had gotten rounded down to $117,000. (A.R. 000506, 000517). That must have been the number which stuck with the jury.

Substantial damages may be recovered, though the loss can be stated only approximately.

5. A verdict for damages cannot be set aside upon the ground that the evidence afforded no basis for ascertainment of its amount, when the facts, circumstances, and data justify the inference that the amount found is a just and reasonable compensation for the injury suffered.

Syllabus Pts. 4 and 5, *Hurxthal v. St. Lawrence Boom & Mfg. Co.*, 65 W. Va. 346,, 64 S.E. 355 (1909).[4]

Here, the Millers damage claim is founded on three pillars. The amount in the recorded mechanic's lien is not in dispute: $117,500. (A.R. 0920). The second component of proof which quantified the Millers' damage claim is the spreadsheet itemizing the out of pocket expenses they had to make in order to complete their house after Residential Creations quit. Ms. Miller testified "I have every single receipt for every item that we had to finish to complete our home." (Transcript

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[4] To similar effect are these examples from other jurisdictions:

"In actions for breach of contract, damages must be proven with reasonable certainty." "While the plaintiff need not prove the amount of damages suffered to a mathematical certainty, the award must be supported by evidence in the record. (Internal citations omitted). *R & R Real Estate v. C & N Armstrong Farms*, 854 N.E.2d 365, 370 - 371 (Ind. App. 2006).

Generally, under Pennsylvania law, damages need not be proved with mathematical certainty, but only with reasonable certainty, and evidence of damages may consist of probabilities and inferences. Although the law does not command mathematical precision from the evidence in finding damages, sufficient facts must be introduced so that the court can arrive at an intelligent estimate without conjecture. Where the amount of damage can be fairly estimated from the evidence, the recovery will be sustained even though such amount cannot be determined with entire accuracy. It is only required that the proof afford a reasonable basis from which the fact-finder can calculate the plaintiff's loss. *Molag, Inc. v. Climax Molybdenum Co.*, 431 Pa.Super. 569, 573 -574, 637 A.2d 322 (Pa. Super. Ct. 1994).

Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required. (Internal citations omitted). *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981).

The party seeking damages bears the burden of proving them in a manner that allows the fact-finder to calculate the amount of damages to a reasonable certainty. While the claiming party must present relevant data providing a basis for a reasonable estimate, proof to an absolute mathematical certainty is not required. (Internal citations omitted). *State Properties, LLC v. Ray*, 155 N.C. App. 65, 574 S.E.2d 180 (N.C. App. 2002).

129, 131 A.R. 000503, 000505). The jury observed the voluminous collection of receipts stuffed into the folder balanced on her lap which she testified was the basis for the spreadsheet she prepared that catalogued and totaled all necessary out of pocket expenses. (A.R. 1095). The total amount for these was over $287,000. (Transcript pg 134 A.R. 508).[5] The third element of evidence is derived in part from the final report prepared by WesBanco's own appraiser. In a report dated March 28, 2016, he determined that at that point in time only 53% of the home had been completed. Put otherwise, 47% of a $690,000 home remained to be completed. Forty-seven percent of $690,000 is $324,300. That evidence — that extrapolation — on its own might not have been sufficient to support a verdict for $324,300. However, the amount actually expended by the Millers is in a similar range. It is in a lower amount, which is consistent with their testimony that they were finishing the house to a lower level. (A.R. 498 - 499). The Millers did not spend $324,300 to complete their home. Between a family loan and personal savings they were able to come up with $287,500 and that is what they spent. That is what was proven to the jury's satisfaction.

D. A jury verdict involving witness credibility and the reasonable inferences drawn from conflicting testimony should not ordinarily be set aside.

The Millers were diligent in compiling and tabulating voluminous documentation of their relevant expenditures. They prepared a spreadsheet recording this data. (A.R. 503). They testified that the amount they spent was what they could afford, without improvements or embellishments. Their explanation of what they did and what they had to spend so as to surmount the damage that WesBanco's breach of contract had caused was compelling. More importantly the jury must have found their testimony and their evidence credible.

It is axiomatic that a jury's findings of fact are entitled to considerable deference. That is because:

> 2. It is the peculiar and exclusive province of the jury to weigh the evidence and to resolve questions of fact when the testimony is conflicting.

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[5] During cross-examination, defense counsel stated that he had recalculated the amounts on the spreadsheet, and came up with a total of 290,867.42. (Transcript pgs. 180, 183). (A.R. 000554, 000557)

> 3. A jury verdict based upon conflicting testimony, involving credibility of witnesses and reasonable inferences to be drawn from testimony and approved by the trial court, will not be set aside by this Court on the ground that it is contrary to the evidence unless in that respect it is clearly wrong." (Internal citations omitted).
>
> Syllabus Pts. 2 and 3, *Blamble v. Harsh*, 163 W.Va. 733, 260 S.E.2d 273 (1979).

In this case, several WesBanco documents established that it was to obtain waivers of materialmen liens, and withhold disbursements for work and materials that did not further the construction of the home. Nevertheless, O.C. Cluss' large mechanic's lien was allowed to slip through.[6] Hundreds of thousands of dollars were disbursed to the contractor (i.e. 80% of a $704,000 loan); yet the house was still 47% away from completion. WesBanco's contention has been that the house was really much further along. In doing so they contradicted the report of their own appraiser. WesBanco tried to enlist the Millers agreement that the house was further along than it was — and by extension that they were mistaken (or worse) in describing what they had to spend to finish the house. Obviously, the jury determined that the Millers proof of damages was credible. Their verdict was based on a preponderance of evidence presented from three sources: a) WesBanco's own documents; b) The Millers testimony and spreadsheet; and c) The appraisers report.

> "In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." Syl. Pt. 3, Walker v. Monongahela Power Company, 147 W.Va. 825, 131 S.E.2d 736 (1963).
>
> Syllabus Pt. 6, *Pauley v. Bays*, 200 W.Va. 459, 490 S.E.2d 61 (1997).

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[6] The Petitioner believes that certain O.C. Cluss materials delivered after WesBanco's final payment to Residential Creations should be excluded from consideration. (Petitioner's Brief, pg. 28). Here is the problem with that. Had WesBanco been diligent all along in obtaining waivers of lien as it was required to do, Residential Creations' delinquencies in payment would have been caught much sooner. This would most likely have forestalled all of the arrearage which are part of the O.C. Cluss $117,500 Mechanic's Lien. The deliveries made by O.C. Cluss in April were the tail-end of a pattern which began in November 2015 and which WesBanco facilitated. The jury was right to assess the total Cluss Mechanic's Lien as part of the verdict.

Also,

> In an action to recover damages for breach of contract, when the case has been fairly tried and no error of law appears, the verdict of a jury, based upon conflicting testimony and approved by the trial court, will not be disturbed unless the verdict is against the plain preponderance of the evidence.
>
> Syllabus Pt. 3, *Franklin. v. Pence*, 128 W.Va. 353, 36 S.E.2d 505 (1945).

The jury awarded damages precisely as they were instructed. The pertinent portion of the jury charge stated:

> If WesBanco breached the contract entered into with the Millers, then the Millers may be awarded compensatory damages. Compensatory damages for breach of contract are those damages that may fairly and reasonably be considered as arising naturally from the breach of the contract itself. (A.R. 0358).

That is nearly identical to WesBanco's proposed Jury Instruction No. 6. (A.R. 0267). The verdict form (A.R. 001108 - 001109) is likewise taken practically verbatim from WesBanco's Proposed Verdict Form (A.R. 0270 - 0271). The jury's verdict is composed of two clearly defined elements that arose "naturally from the breach of the contract itself." The Respondent acknowledges this: "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." (Petitioner's Brief, pg. 11).

In light of the law and the evidence which was presented, this verdict should not be disturbed.

Conclusion

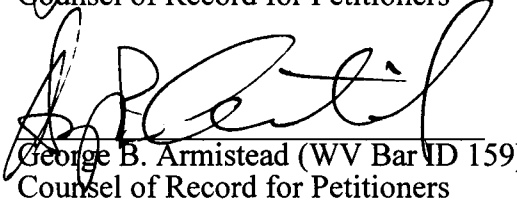
The plain preponderance of the evidence in this case was that WesBanco not only breached the provisions of numerous documents that formed the parties transaction, it also violated the covenant of good faith and fair dealing which, by operation of law, was also a part of that contract. WesBanco did not obtain mechanic lien waivers as the loan documents indicated it would. The Millers presented evidence from which it could reasonably be inferred that WesBanco had improperly advanced loan proceeds, as the pace of disbursements was markedly disproportionate to the progress of construction. They further provided detail and testimony which the jury must have found credible as to what they had to personally expend in order to complete the house.

WesBanco's Petition for Appeal should be denied. The jury's verdict should be affirmed and

the case remanded to the Circuit Court of Marion County West Virginia for the purpose of having the Millers' Motion for prejudgment interest considered on the merits.

Respectfully submitted this 24th day of July, 2020.

Jacques R. Williams (WV Bar ID 4057)
Counsel of Record for Petitioners



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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July 2020, true and accurate copies of the foregoing **Respondents Thomas B. Miller and Jamie Miller's Response to WesBanco's Petition for Appeal** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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