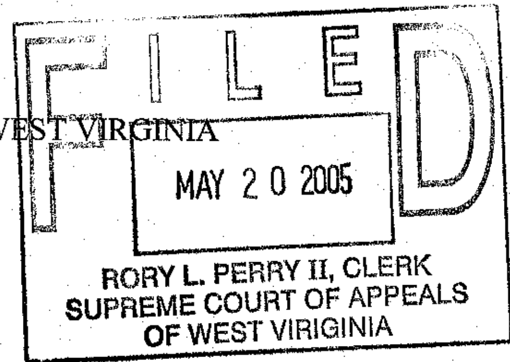
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 32667

PIPEMASTERS, INC., a
West Virginia corporation,
Plaintiff/Appellee,

v.

(Appeal from the Circuit Court of Putnam County,
Hon. O. C. Spaulding; Civil Action No. 02-C-350)

PUTNAM COUNTY BUILDING COMMISSION,
a West Virginia Public Corporation, and Political
Subdivision of the State of West Virginia, THE WEST
VIRGINIA AMERICAN WATER COMPANY, a
West Virginia corporation,

Defendants/Appellants, et al.

JOINT BRIEF OF DEFENDANTS PUTNAM COUNTY BUILDING COMMISSION AND WEST VIRGINIA-AMERICAN WATER COMPANY

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VIRGINIA AMERICAN WATER COMPANY, a
West Virginia corporation,
Defendants/Appellants,

and

PUTNAM COUNTY BUILDING COMMISSION,
a West Virginia public corporation,
Third-Party and Counterclaim Plaintiff/Appellant,

v.

PIPEMASTERS, INC., a West Virginia corporation,
Counterclaim Defendant/Appellee, and

MID-STATE SURETY CORPORATION, a foreign corporation,
Third-Party Defendant/Appellee,

and

WEST VIRGINIA-AMERICAN WATER COMPANY,
a West Virginia corporation,
Third-Party Plaintiff/Appellant,

v.

HNTB CORPORATION, a Delaware corporation,
Third-Party Defendant/Appellee.

JOINT BRIEF OF DEFENDANTS PUTNAM COUNTY BUILDING COMMISSION AND WEST VIRGINIA-AMERICAN WATER COMPANY

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INTRODUCTION

This case grew out of the efforts of public officials to extend water service in rural Putnam County.

- The Putnam County Building Commission, **owner** of the project, issued industrial revenue bonds to finance the extension of the water mains and service lines.
- West Virginia-American Water Company acted as project **engineer**.
- HNTB Corporation was hired by the Water Company to design the lines, and, for an additional sum of about $100,000, to observe the work as project **inspector** to protect the Building Commission from any poor work.
- Pipemasters, Inc. was the **contractor** hired by the Building Commission to properly install the water lines in accordance with written contract specifications.
- Mid-State Surety Corporation, as Pipemasters' **surety**, promised the Building Commission in a performance bond that Pipemasters would correctly complete its work.

The Building Commission's goal has been met: many more families and small businesses are now receiving reliable, quality water. But the scales of justice are far out of balance.

As shown in the Statement of Facts, the Water Company during construction discovered that Pipemasters had, notwithstanding the inspection of HNTB, laid many of the new lines far too shallow, in violation of contract specifications. Not only did Pipemasters and HNTB concede that this had occurred; Pipemasters agreed, in return for specification-related concessions from the Building Commission, to correct its nonconforming work. But once the easier portion of this corrective work had been completed, Pipemasters, in its own words, "ran out of money," and refused to proceed. The Building Commission then called upon Mid-State

under the performance bond to finish up. At that point, Mid-State started to work with Pipemasters to rewrite history, taking the position that the poor work was the fault of .... well, the finger was pointed in various directions at various times, from HNTB, to the Water Company, to the Building Commission, and even to the West Virginia Department of Transportation, Division of Highways ("DOH"). While the excuses evolved over time, Mid-State and Pipemasters stuck to the point that would save them both money: Pipemasters' noncompliant work was not ***Pipemasters'*** fault.

With people clamoring for the water that had been promised, and stuck with a reneging contractor and surety, the Building Commission asked the Water Company to help. And the Water Company did, paying a new contractor and inspector with its own funds, with the understanding that the Building Commission would still proceed against those responsible once the work was complete. But Pipemasters, wanting to win the race to the courthouse, filed suit first, as discussed more fully in Proceedings Below.

At the trial, Pipemasters and Mid-State, joined eventually by HNTB, strove to evade responsibility. They succeeded, enabled by the trial court's continuing refusal to apply the governing contract, flawed jury instructions, and an outrageous closing argument by Mid-State. The trial court refused to relieve the Building Commission and Water Company from a deeply flawed verdict, instead entering a judgment that is obviously unjust.

Unless the trial court's errors are corrected, the Water Company will not recover nearly $700,000 it spent to correct the defective work of Pipemasters. In an even more grotesque violation of the governing contract, the trial court has directed the Water Company to pay ***to*** Pipemasters $482,976.70 (plus interest since March 5, 2004) for performing the initial (and

easier) portion of the corrections, work to which Pipemasters had recommitted at no further charge, after admitting that its work was defective, and after the Building Commission agreed to help Pipemasters by loosening the specification to the minimum pipe coverage permitted under applicable health regulations designed to prevent freezing during extreme winter weather.

Nor, unless the trial court's errors are corrected, will Pipemasters escape alone. Also evading responsibility will be HNTB, even though it was paid to observe the defective work performed by Pipemasters right under its nose. Perhaps most unfairly, Mid-State reneged right along with Pipemasters when called upon by the Building Commission to complete the corrective work. Then, at trial, Mid-State persuaded the trial court to erroneously instruct the jury about suretyship, and committed an egregious foul in its closing argument.

The trial court refused at every step of this case to enforce the plain language in the contract and Pipemasters' own letters. Instead, the parties and a jury of lay people were put to a three-week trial, consisting mostly of redundant "excuses" from Pipemasters. In light of the evidence detailed below in our Argument, the verdict is flawed, and the judgment entered on that verdict is nothing short of legal nonsense. The Water Company – which even the misguided jury found to be without fault – will end up spending well over $1,000,000 to clean up a mess for which Pipemasters, HNTB, and Mid-State were plainly responsible.

As things now stand, Pipemasters will receive, and HNTB and Mid-State will keep, money for which the Water Company, the Building Commission, and the people of Putnam County received nothing in return. On May 9, 2005, this Court granted the joint petition of the Building Commission and the Water Company for appellate review. We respectfully urge this Court to correct the manifest errors of the trial court.

PROCEEDINGS BELOW[1]

Pipemasters sued the Building Commission and the Water Company for breach of contract and negligence. *Docket #1.* The Building Commission sued Pipemasters, HNTB, and Mid-State for defective work (*Docket #6*); the Water Company sued HNTB for poor inspection (*Docket #4)*; Mid-State sued Pipemasters and Pipemasters' guarantors (Mr. and Mrs. Gibson, and Mr. and Mrs. Fellure) under the performance bond (*Docket #23)*; and HNTB sued the Water Company for unpaid invoices *(Docket #14)*.

The trial court denied the summary judgment motion of the Building Commission and Water Company on Pipemasters' claims. *Docket #218.* Before trial, (i) the Building Commission assigned its claims to the Water Company (*Docket #149)*, (ii) the Water Company agreed to hold the Building Commission harmless beyond remaining project funds *(Pipemasters Ex. 11A)*, and (iii) the Water Company and HNTB settled HNTB's claims for unpaid invoices. *Tr. 1394, 1426-27 [Weekley]*. The trial court also bifurcated Mid-State's claims against Mr. and Mrs. Fellure and Mr. and Mrs. Gibson (who, with Pipemasters, were liable to indemnify Mid-State for claims paid under the performance bond) upon an express assurance of Mid-State's counsel. *Tr. 188 (Mr. Salsbery:* "So, no. Do I intend to bring that in this case? No. And I would agree to bifurcate that."; *Judge Spaulding:* "Anybody have any objection to bifurcating the claims of Mid-State against the Fellures and the Gibsons individually? The Court hears none, then I'm going to bifurcate that issue.").

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[1] The docket ("*Docket #_*") lists all filings. The transcript of proceedings before the trial court has been consecutively numbered, and will be cited here as "*Tr. ___ [name of witness or speaker]*." The trial exhibits are also denoted in italics, "*WC Ex.* __" for the exhibits introduced by the Water Company, "*BC Ex.* __" for the exhibits introduced by the Building Commission, "*Pipemasters Ex.* __" for the exhibits introduced by Pipemasters, "*HNTB Ex.* __" for the exhibits introduced by HNTB, and "*Mid-State Ex.* __" for the exhibits introduced by Mid-State.

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The trial court denied the Building Commission/Water Company motions for judgment as a matter of law on Pipemasters' claims. *Tr. 2751, 3059.* Over three weeks of trial, no one had mentioned the bifurcated claims of Mid-State against the Fellures and Gibsons. But Mid-State bushwhacked the Building Commission and the Water Company, telling the jury in closing argument that, "there is an indemnity agreement between Mr. Fellure and his wife, Mr. Gibson and his wife, where they become personally responsible to us if we pay money to somebody such as the water company." *Tr. 3416.* When the Water Company objected (*Tr. 3417*), Mid-State compounded its foul: "Judge, I sat and listened to characterizations by this man about my client and me throughout his entire closing and never said a word. All I'm asking for is fair play."

The jury found that "Pipemasters satisfactorily completed its obligations under the PC4 contract" and that "Pipemasters was required to perform additional work beyond its obligations under the PC4 contract and for which it should receive reasonable compensation." But the jury also found that the Water Company had ***not*** "acted negligently in the administration ... and ... supervision of the PC4 contract." As to the Water Company's claims, the jury found that Pipemasters had not "breached its duties under the PC4 contract ... caus[ing] damages sought by the ... Water Company" and that HNTB had not "breached its contract with the ... Water Company to provide inspection and certification services of Pipemasters' work ... caus[ing] ... damages sought by the ... Water Company." *Docket #244.*

Judgment was entered on the verdict. *Docket #262.* The Building Commission and the Water Company thereafter moved unsuccessfully for judgment as a matter of law and/or a new trial. *Docket ##263, 265, 287; Tr. 3486-3542.*

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STATEMENT OF FACTS

Specific citations to the evidentiary trial record are found below in our Argument. However, an overview of the facts is essential to an informed consideration of those issues.

In the late 1990s, the Water Company worked with the Putnam County Commission and the Building Commission to extend water service in rural Putnam County. *Tr. 294 [Judge Spaulding]*. The Water Company selected consultants to design the specific projects. *Tr. 2367-70 [Carovillano]*. For this project to install approximately 12 miles of water pipeline along rural roads in Putnam County, known as "PC4," the Water Company selected HNTB to design the work and serve as resident project representative during construction. *WC Ex. 29; Tr. 294-95 [Judge Spaulding], 2368-81 [Carovillano], 2955 [Schultz]*. After HNTB prepared the design drawings for PC4, the Water Company (which remained the engineer under the contract) prepared or compiled the contract documents and specifications, and then provided them on behalf of the Building Commission (the owner of the project) to Pipemasters and other potentially interested contractors. *Pipemasters Ex. 9; Tr. 656 [Fellure]*.

Pipemasters, as low bidder, was awarded the PC4 contract by the Building Commission. *Tr. 677-78 [Fellure]*. The contract (*WC Ex. 1*)[2] was in writing, and carefully spelled out the terms and specifications, including particular specifications governing the depth of backfill material, or "cover," under which pipeline was to be buried. Pipemasters reviewed these specifications, as well as the provisions about how and when field orders, change orders, and claims must be perfected, before submitting its bid, and before signing the contract.

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[2] Hereinafter, *e.g.*, "*Contract 0009*." Special Conditions ("SC"), Engineering Specifications ("ES"), and General Conditions ("GC") are variously cited.

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The contract spoke plainly and repeatedly about how to cover the pipeline.[3] SC #7 required "42 inches of cover over the top of the pipe barrel to the top of the finished grade unless otherwise authorized by the ENGINEER." *Contract 0172*. SC #9 required Pipemasters to conform with applicable regulations, including those of the DOH. *Contract 0172*. SC #10 incorporated as Appendix A a DOH manual that required "[c]are ... to avoid disturbing existing drainage facilities," stated that "[t]he critical control for cover on a pipeline crossing is the low point in the highway cross-section; usually the bottom of the longitudinal ditch," and depicted three feet of cover as the minimum over the pipe casing. *Contract 0172*.[4] SC #26 required Pipemasters "to restore all existing ground ... disturbed or damaged during construction to a condition which is comparable to original or better." *Contract 0173*. In this regard, ES 2210-1.02 provided that, irrespective of the contract drawings, "The CONTRACTOR shall accept the construction site with conditions the same as existed at the time of bidding." *Contract 0240*. ES 15000, Part 3.01 required that, "All pipe shall be laid to the depth specified. The depth shall be measured from the final surface grade to the top of the pipe barrel. The minimum pipe cover shall be as shown on the Drawings or as specified in accordance with Section 2210." *Contract 0319*. Pipemasters never questioned these specifications, either before it submitted its bid,

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[3] It is important in this context to distinguish between two related terms. A **ditch** is a designed depression in the surface grade along a highway, which diverts water from the roadway and carries it away to a larger stream or other watercourse. A **trench** is the much deeper channel dug by a contractor, into which a waterline is laid, and which is then backfilled.

[4] In footnote 10 (page 14) of its response to our petition for appeal, Pipemasters says that this citation is "deceptive, and misleading" because it comes from a portion of the DOH manual that addresses pipeline crossings, not lines laid along highways. Of course, pipes are just as susceptible to freezing when laid "longitudinally." In any event, there can be no question that the contractual specification was "42 inches of cover over the top of the pipe barrel to the top of the finished grade unless otherwise authorized by the ENGINEER." *Contract 0172*.

before signing the contract, during the course of its original or corrective work, or at any time before the Building Commission terminated the contract for cause, as discussed below. *Tr. 1220-21 [Fellure]*.

The contract also carefully addressed how and when any of Pipemasters' concerns about the specifications or claims for additional compensation were to be resolved. *Contract 0102, 0123, 0124, 0125, 0155-0156.* Pipemasters never submitted a request for or received a field order; Pipemasters never submitted a request for or received a change order; and Pipemasters never submitted a claim in the form or within any of the temporal requirements of the contract. *Tr. 1220-21 [Fellure]*.

In late 2000, the Water Company discovered that at least some of the lines installed by Pipemasters had not been sufficiently covered, *i.e.*, there was less than the specified 42" of cover on top of the lines. *Tr. 2383-2384 [Carovillano], 2954 [Schultz]*. After the Water Company asked HNTB, who was supposed to have been inspecting, for an explanation, HNTB issued a preliminary report, and recommended that test holes be dug at regular intervals so that the actual depth of cover could be systematically measured. *WC Ex. 32*. Later, HNTB, in the presence of Pipemasters, measured the depth of backfill along designated points of the work, using test holes dug by Pipemasters. *WC Ex. 33; Tr. 1312-13 [Fellure]*. At more than half of the 213 tested locations, the backfill fell short of the required 42", as reflected in the records of both HNTB and Pipemasters. *WC Ex. 33; Tr. 930-31, 1314-15 [Fellure]*. A detailed documentation of the specific extent of the shortcomings in Pipemasters' work is set forth in an annotated set of project drawings. *WC Ex. 13; Tr. 2421-24, 2442-43 [Carovillano]*.

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Pipemasters suggested at the time and later claimed at trial that its work was initially adequate, but that cover was then removed through "[re]ditching" at the behest of the DOH. *E.g., Tr. 765-69 [Fellure]*. When Pipemasters first proffered this excuse for its defective work in a March 14, 2001, letter (*Pipemasters Ex. 8*), it spoke only of "ditching," *i.e.*, a single procedure that would have removed some of the cover over the lines. By the time Pipemasters refined its story for trial, it had evolved to "reditching," *i.e.*, a second such procedure at the purported whim of the DOH.[5] There is no corroborative evidence for this excuse. Pipemasters is unable to state where this occurred, or to what extent, other than "six to eighteen inches." *See, e.g., Tr. 778 [Fellure]; cf., Tr. 2444 [Carovillano]* (stating that ditches were, in fact, deeper prior to Pipemasters' work).

But the cause(s) of the inadequate cover are irrelevant because Pipemasters repeatedly acknowledged -- ***after*** it had raised the "[re]ditching" excuse -- that its work was defective, and that it was contractually responsible to correct the defects. *Pipemasters Exs. 8, 10; Tr. 1091, 1098-1102 [Fellure]*. Then, ***after*** substantial, informed negotiations, Pipemasters recommitted to cure the defects when the Building Commission agreed to a substantial reduction in the relevant specification, *i.e.*, a reduction in the depth of required cover from 42" to 36" (as shallow as permissible under applicable health regulations), an accommodation that cut the amount of corrective work approximately in half. *WC Exs. 5, 6; Pipemasters Ex. 10; Tr. 987 [Fellure], 2401-2405 [Carovillano], 2956-61 [Schultz]*.

After this compromise was reached, Pipemasters added sufficient cover to the "dry" lines, *i.e.*, those lines not yet in service. *WC Ex. 6; Tr. 2961-62 [Schultz]*. But Pipemasters then

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[5] Not surprisingly, in Pipemasters', HNTB's, and Mid-State's responses to our appeal petition, the "reditching" version is in full flower.

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stopped, reneging on its commitment to correct the defects in the "wet" lines because it "ran out of money." *WC Ex. 9; Tr. 1163-69, 1181 [Fellure]*. (It is much more expensive to work with and around water lines already in service, if fire protection and customer service are not to be interrupted. *Tr. 2962-63 [Schultz]*.) On March 5, 2002, the Building Commission formally notified Pipemasters and Mid-State of the remaining defects, and that the contract would be terminated effective March 15, 2002, "in the absence of mutual written assurance from Pipemasters and its surety that the remaining deficiencies will be corrected at their sole expense." *WC Exs. 12-13*. Neither Pipemasters nor Mid-State gave the Building Commission that assurance; to the contrary, each took the incredible position that the Building Commission owed Pipemasters hundreds of thousands of dollars for correcting the defects (previously acknowledged by Pipemasters) in the "dry" lines before Pipemasters walked away. *WC Ex. 14; Tr. 1664-68 [Bowen]*.

The Building Commission, with no funds of its own sufficient to finish the project, then authorized the Water Company to undertake the remaining corrective work with a new competitively selected contractor (Tralyn, Inc.) and resident project representative (Terradon). *WC Ex. 41; Tr. 2964-65 [Schultz]*. Including other incidental costs paid to third parties, the Water Company ultimately spent $692,530.88 (not including the time of its own employees or internal costs) to complete correction of the "wet" lines on which Pipemasters reneged. *WC Ex. 41; Tr. 2965-68 [Schultz]*.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying the joint motions of the Building Commission and the Water Company for judgment as a matter of law and for a new trial as to the claims of Pipemasters.

2. The trial court erroneously instructed the jury on the law of suretyship, misstating the primary duties of Mid-State as "secondary" and giving a completely irrelevant and misleading instruction about the "impairment" of Mid-State's "collateral."

3. The trial court erred in denying the motion of the Water Company for a new trial as to the claims of the Water Company (including those claims assigned to it by the Building Commission) against Pipemasters, HNTB, and Mid-State.

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POINTS AND AUTHORITIES RELIED UPON

Standard of Review Generally

1. "[W]here the issue on an appeal from the circuit court is clearly a question of law . . . we apply a *de novo* standard of review." Charleston Area Medical Center, Inc. v. Parke-Davis, __ W. Va. ___, 2005 WL 1124271 (May 11, 2005), *citing* Chrystal R.M. v. Charlie A.L., Syl. Pt. 1, 194 W. Va. 138, 459 S.E.2d 415 (1995).

Pipemasters' Claims

2. "This State's public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public." Wellington Power Corp. v. CAN Surety Corp., Syl. Pt. 3, __ W.Va. __, No. 31869 (May 16, 2005). "'It is the province of the Court, and not of the jury, to interpret a written contract.'" Toppings v. Rainbow Homes, Syl. Pt. 1, 200 W. Va. 728, 490 S.E.2d 817 (1997) (citations omitted). "It is well-settled that the Court resolves questions respecting the construction and interpretation of a contract. See, e.g., Murray v. Kaiser Aluminum & Chemical Corp., 591 F. Supp. 1550, 1553 (S.D. W. Va. 1984) (Haden, C.J.) (citing Lee Enterprises v. Twentieth Century Fox, 172 W. Va. 63, 303 S.E.2d 702 (1983))." Interstate Props. v. K-Mart Corp., 88 F.Supp.2d 609, 611 (S. D. W. Va. 2000).

3. "'The law favors and encourages the resolution of controversies by contracts of compromise and settlements rather than by litigation and it is the policy of the law to uphold such contracts if they are fairly made and not in contravention of some law or public policy.'" Kesari v. Simon, Syl. Pt. 1, 182 W. Va. 795, 392 S.E.2d 511 (1990) (citations omitted).

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4. "Although the doctrines of waiver and estoppel are both grounded in equity, they differ significantly in application. To effect a waiver, there must be evidence which demonstrates that a party has intentionally relinquished a known right. Estoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact." Ara v. Erie Ins. Co., Syl. Pt. 2, 182 W. Va. 266, 387 S.E.2d 320 (1989).

5. "'The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was made must have relied on or acted on it to his prejudice.'" Hunter v. Christian, Syl. Pt. 2, 191 W. Va. 390, 446 S.E.2d 177 (1994) (citation omitted).

6. "'To show an accord and satisfaction, the person asserting the defense must prove three elements: (1) Consideration to support an accord and satisfaction; (2) an offer of partial payment in full satisfaction of a disputed claim; and (3) acceptance of the partial payment by the creditor with knowledge that the debtor offered it only upon the condition that the creditor accept the payment in full satisfaction of the disputed claim or not at all.'" Painter v. Peavy, Syl. Pt. 5, 192 W. Va. 189, 451 S.E.2d 755 (1994) (citation omitted).

7. "'Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that a party has waived

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his rights.'" Spahr v. Preston County Bd. of Ed., Syl. Pt. 5, 182 W. Va. 726, 391 S.E.2d 739 (1990) (citations omitted).

8. "When the plaintiff's evidence, considered in the light most favorable to him, fails to establish a prima facie right to recovery, the trial court should direct a verdict in favor of the defendant." Brannon v. Riffle, Syl. Pt. 1, 197 W. Va. 97, 475 S.E.2d 97 (1996) (citation omitted).

9. "'Upon a motion to direct a verdict for the defendant, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence.'" Brannon, Syl. Pt. 2 (citations omitted).

10. "'In considering whether a motion for judgment notwithstanding the verdict under Rule 50(b) of the West Virginia Rules of Civil Procedure should be granted, the evidence should be considered in the light most favorable to the plaintiff, but, if it fails to establish a prima facie right to recover, the court should grant the motion.'" First Nat'l Bank v. Clark, Syl. Pt. 1, 191 W. Va. 623, 447 S.E.2d 558 (1994) (citation omitted).

The Building Commission / Water Company Claims Against Mid-State

11. "'In a contract of suretyship the obligation of the principal and his surety is original, primary, and direct, and the surety is liable for the debt, default, or miscarriage of his principal.' ... As a general rule, the liability of the surety is coextensive with that of the principal." Gateway Communications, Inc. v. John R. Hess, Inc., Syl. Pts. 1, 2, 208 W. Va. 505, 541 S.E.2d 595 (2000) (citation omitted). *See also*, Wellington Power Corp., Syl. Pt. 6 (reiterating Syllabus Point 2 of Gateway).

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12. "'A surety does not insure his principal against loss but agrees to be answerable for any debt, default or miscarriage of such princip[al].'" Wellington Power Corp., Syl. Pt. 8 (citation omitted).

13. "With respect to notice of default, the surety is ordinarily held to know every default of his principal because he is under a duty to make inquiry and ascertain whether the principal obligor is discharging the obligation resting on him." Elkins Manor Assocs. v. Eleanor Concrete Works, Inc., 183 W. Va. 501, 508-509, 396 S.E.2d 463, 470-471 (1990) (citations omitted).

14. "The question of whether a jury was properly instructed is a question of law, and the review is de novo." State v. Brooks, 214 W. Va. 562, 566, 591 S.E.2d 120, 124 (2003).

15. "As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*." Bailey v. Norfolk & Western Ry., Syl. Pt. 11, 206 W. Va. 654, 527 S.E.2d 516 (1999) (citation omitted), cert. denied, 529 U.S. 1110 (2000).

Mid-State's Closing Argument

16. "''Great latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury.''" Matheny v. Fairmont Gen'l Hosp., Syl. Pt. 1, 212 W. Va. 740, 575 S.E.2d 350 (2002) (citations omitted).

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Motion for New Trial

17. "'A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.'" Faris v. Harry Green Chevrolet, Syl. Pt. 1, 212 W. Va. 386, 572 S.E.2d 909 (2002) (citations omitted).

18. "[A]lthough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." McKenzie v. Carroll Int'l Corp., __ W. Va. __, 610 S.E.2d 341, 344 (2004), citing Sanders v. Georgia-Pacific Corp., Syl. Pt. 4, 159 W. Va. 621, 225 S.E.2d 218 (1976).

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ARGUMENT

The jury exonerated the Water Company with respect to Pipemasters' claim of negligence; the verdict in favor of Pipemasters was based solely on the Building Commission's alleged breach of the contract. But, as a matter of law, Pipemasters had no right to recover under the contract because (i) Pipemasters' claims, with the exception of retainage and compensation for test holes that revealed at least 42" of cover, were foregone when the Building Commission and Pipemasters entered into a new agreement that allowed Pipemasters to leave in place a substantial portion of its otherwise defective work, (ii) Pipemasters failed to timely make application or claim for any of the other damages it sought in accordance with the contract, (iii) the written terms of the contract expressly precluded any payment for corrective work, and (iv) the change in the construction of stream crossings was made at Pipemasters' request and worked to the benefit of Pipemasters.

The Water Company (by assignment of the Building Commission's claims) was also entitled to recover all amounts reasonably expended to complete the corrective work as to which Pipemasters reneged. The jury's determination that Mid-State had no obligation to complete the work plainly arose from the same misapprehension as to Pipemasters' contractual responsibilities that led to the flawed verdict on Pipemasters' claims, compounded by the trial court's erroneous instructions concerning the law of suretyship and Mid-State's egregious argument designed to engender sympathy for the Gibsons and Fellures. As to HNTB, although the errors are not as apparent, the evidence when fairly reviewed compelled a new trial, because HNTB was paid to observe and report to the Water Company, but instead stood by and literally ignored the defective work of Pipemasters while it was being undertaken. HNTB acknowledged that it had a

contractual duty to inspect Pipemasters' original work, and that Pipemasters under the PC4 contract was required to construct ditches in the highway rights-of-way where the pipe was installed. HNTB breached that duty when, by its own admission, it only required 42" ***trenches*** above the pipe barrel, and otherwise paid no attention to the depth at which pipe would ultimately be buried once the construction of ditches had been completed.[6]

The trial court erroneously instructed the jury on the law of suretyship, misstating the primary duties of Mid-State as "secondary" and giving a completely irrelevant and misleading instruction about the "impairment" of Mid-State's "collateral." Mid-State's closing argument took full advantage of these erroneous instructions, and also included an inflammatory and highly improper assertion to the jury that individual members of the Gibson and Fellure families would bear the ultimate liability for any verdict adverse to Mid-State. (Mid-State's claims against these individuals had been bifurcated with Mid-State's express consent, and every other party scrupulously avoided any mention of the claims over several weeks of trial.) Mid-State's argument was knowingly wrong, and was obviously intended to, and likely did, sway the jury to find in favor of Pipemasters, HNTB, and Mid-State, and against the Building Commission and the Water Company.

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[6] Again, as noted above, a **ditch** is to be left in place after construction, in order to manage surface water along the highway, while a **trench** is the channel into which a waterline is laid, and then backfilled. A waterline can be, and often is, installed beneath a ditch; in such instances, the ditch needs to be taken into account if adequate cover is to be maintained.

At one point in its response to our petition for appeal, Pipemasters argues, citing Mr. Fellure's sworn testimony, that it laid the waterlines in a location other than beneath the ditch. *See* page 25 ("'the pipe was not in the ditch.'") Yet, Pipemasters also argues that, when deeper ditches ("reditching") were required by the DOH, this purported change in the contractual specification "removed cover." But how can a deeper ditch remove cover if the pipe is "not in the ditch"? Perhaps Pipemasters can reconcile these two arguments in its brief.

{C0944940.1}

Claims of Pipemasters

Pipemasters sought four types of damages: (i) $91,500.00 for test holes, replaced backfill, additional berm stone, and modified stream crossings; (ii) $265,286.51 for "additional" (*i.e.*, corrective) work after discovery of the shallow pipe; (iii) $33,659.78 for retainage; and (iv) $23,825.70 for "reditching." *Pipemasters Exs. 7, 11*. The jury apparently awarded the first three categories, and denied the fourth, as the total award then comes out to the exact penny. But, with two exceptions, none can be recovered as a matter of law.[7]

The jury determined that there was no negligence on the part of the Water Company (or anyone else), so the claims of Pipemasters are purely matters of contract. "'It is the province of the Court, and not of the jury, to interpret a written contract.'" Toppings, Syl. Pt. 1. Pipemasters cannot receive the damages awarded by the trial court because (i) its claims were foregone when the cover specification was eased in consideration of Pipemasters' promise, in its own words, to "correct" its "defective work," (ii) Pipemasters never properly perfected a claim under the contract, (iii) the contract precludes payment for corrective work, and (iv) the only relevant purported oral modification (stream crossings) was made to accommodate Pipemasters.

[7] The exceptions are the $33,659.78 in retainage and the cost of test holes that showed adequate cover. The issue of retainage was addressed by the trial court in the judgment order. *Docket #262*. As to the second exception, we acknowledge that Pipemasters can recover the test hole expense because, under GC 13.04.B, no claim or payment application was necessary. *Contract 0130*. But there were only 36 such holes, not the 98 holes claimed by Pipemasters. *Tr. 1271 [Fellure]*. The Building Commission ***later*** agreed to 36" of cover, in lieu of the 42" required under the contract, but no one ever agreed that Pipemasters would be compensated under GC 13.04.B for the 62 holes that revealed between 36" and 42" of cover. Accordingly, the proper award (or credit against any recovery by the Water Company) is $17,100.00, *i.e.*, 36 holes @ $475 per hole. (If the trial court had determined that the jury had sufficient evidence to find that 98 test holes satisfied the cover specification, then this amount would have been increased to $46,550.00. Due to an apparent clerical error, the Pipemasters invoice recites only $46,500.00.)

{C0944940.1}

Pipemasters Agreed to Cure the Defects
In Its Work In Consideration of Relief
from the Original 42" Specification

Pipemasters' claims (aside from retainage, and compensation for test holes that revealed at least 42" of cover, discussed above) were foregone through its negotiation of a modified 36" cover specification. Irrespective of any oral statement of Mr. Boggs,[8] the purportedly "additional" work undertaken as directed by the DOH, *etc.*, the parties put these issues behind them when Pipemasters made a ***new*** promise to the Building Commission to cover the pipe with at least 36" of material.

"'The law favors and encourages the resolution of controversies by contracts of compromise and settlements rather than by litigation and it is the policy of the law to uphold such contracts if they are fairly made and not in contravention of some law or public policy.'" Kesari, Syl. Pt. 1. As a matter of law, the cause(s) of the inadequate cover became irrelevant when Pipemasters acknowledged that its work was defective, and that it was contractually responsible for the defects; these acknowledgements were made ***after*** Pipemasters had raised its "[re]ditching" excuse.[9] Pipemasters then promised to cure the defects when the Building

8 Pipemasters maintained that Water Company employee Tommy Boggs said that 36" of cover would be sufficient. This "loose talk" is insufficient to alter a carefully specified standard for construction. *See generally*, Charleston Lumber Co. v. Friedman, 64 W. Va. 151, 160, 61 S.E. 815, 818 (1908). In any event, while the Water Company and Mr. Boggs deny the oral modification, it doesn't even matter because the standard ***was*** ultimately reduced at Pipemasters' request to 36" when Pipemasters made a new commitment to satisfactorily complete the work.

9 Pipemasters, HNTB, and Mid-State in their responses to our appeal petition all assert that Pipemasters' work was initially adequate, but that cover was then removed at the behest of the DOH. However, none of them confronts the important point that this "[re]ditching" excuse was raised in March 2001, ***before*** HNTB helped evaluate the scope of Pipemasters' shortcomings, and Pipemasters resolved the issue through a renewed commitment to complete the project at a reduced cover specification.

Commission agreed to ease the cover specification from 42" to 36". That this new commitment was made is irrefutable; one need only look at Pipemasters' own letters.

- On February 28, 2001, Pipemasters told the Water Company that it was "surprised at some of our findings," and that it was prepared to "start lowering those sections that are ***obviously not acceptable*** according to SSC-2-7 of the contract specifications." [emphasis added]

PIPEMASTERS, INC.
P.O. BOX 1008
HURRICANE, WV 25526
PHONE: 304-562-2382
FAX: 304-562-7519

FEBRUARY 28, 2001
DAVID CAROVILLANO, P.E.
WV-AMERICAN WATER
PO BOX 1906
CHARLESTON, WV 25327
RE: PUTNAM COUNTY CONTRACT #4

MR. CAROVILLANO,
PIPEMASTERS INC. COMPLETED UNCOVERING THOSE SECTIONS YOU REQUESTED ON LETTER DATED FEB. 12, 2001. AGAIN I WAS SURPRISED AT SOME OF OUR FINDINGS. PIPEMASTERS IS PREPARED TO START MONDAY MORNING MARCH 5, 2001 AND START LOWERING THOSE SECTIONS THAT ARE OBVIOUSLY NOT ACCEPTABLE ACCORDING TO SSC-2 -7 OF THE CONTRACT SPECIFICATIONS.
WE PLAN TO START AT LINE A NEAR MT. MORIHA BAPTIST CHURCH AND WORK OUR WAY TOWARDS BRIDGE CREEK. WE PLAN TO HAVE TWO CREWS SO WE MAY BRING THIS CONTRACT TO END. WE ALSO PLAN TO WORK, WEATHER PERMITTING, EVERY DAY BUT SUNDAY. PLEASE INFORM ME OF YOUR FINAL DETERINATION AS SOON AS POSIBLE SO WE MAY ACT ON YOUR DECISION. PLEASE FEEL FREE TO CALL ANY TIME AT 562-2382.

RESPECTFULLY,

[signature]

HOY FELLURE

Post-it® Fax Note 7671

To David Carovillano	Date 2-28-01 / # of pages 1
Co./Dept. WV-American Water Co	From Hoy Fellure
Phone # 340-2014	Co. Pipemasters Inc.
Fax # 340-2041	Phone # 304-562-2382
	Fax # 304-562-7519

Pipemasters Depo 0038

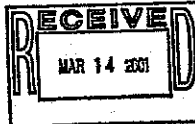
Pipemasters Ex. 10; Tr. 1071-1073 [Fellure].

{C0944940.1}

- On March 14, 2001, after the test hole data had been collected, Pipemasters told the Water Company that the ***average*** distance from "the top of the water line to the berm of the DOH" was 42", as though pipe buried more deeply than 42" might magically keep shallow pipe miles away from freezing. Importantly, Pipemasters in this letter also asserted that the backfill over the pipe had been reduced because "the DOH told me to cut in ***the*** ditchline" (emphasis added).

PIPEMASTERS, INC.
P.O. BOX 1088
HURRICANE, WV 25526
PHONE: 304-562-2382
FAX: 304-562-7519

MARCH 14, 2001



DAVID CAROVALLANO, P.E.
WEST VIRGINIA AMERICAN WATER
P.O. BOX 1906
CHARLESTON, WV 25327

MR. CAROVILLANO,

ENCLOSED IS A COPY OF A CHART THAT REPRESENTS THE DISTANCE OF THE TOP OF THE WATER LINE TO THE BERM OF THE DOH. THE OVERALL AVERAGE OF THE DISTANCE OVER THE PIPE IS 42" FOR THE ENTIRE PROJECT. I ALSO ENCLUDED PHOTO'S TAKEN MARCH 13, 2001 THAT SHOWS THE DEPTH OF THE DITCH LINE THAT THE DOH INSTRUCTED PIPEMASTERS TO INSTALL IN SOME AREAS, PARTICULARY THE TRACE FORK AREA. I MUST ADD THAT AFTER THE PIPE WAS INSTALLED THE DOH TOLD ME TO CUT IN THE DITCHLINE. THE DIRECTION BY THE DOH GREATLY IMPACTED THE COVER OVER THE WATERLINE.

THE DATA ON THE CHARTS ENCLOSED WERE TAKEN DURING THE TEST HOLES WE DUG FOR WVAM IN FEBRUARY. ATER THE REVIEW OF ALL PARTIES I AM REQUESTING A MEETING TO DISCUSS THE PROJECT SO PIPEMASTERS CAN COMPLETE THE WORK REQUIRED.

RESPECTFULLY,

[signature]

HOY FELLURE

CC. JIM PENNINGTON, HNTB (W/ATTACHMENTS)
DAVID SHULTZ, WVAWC (W/ ATTACHMENTS)
MARJORIE RYAN, PCOPI (W/ ATTACHMENTS)
LEE McCOY, BENATEC ASS. (W/ ATTACHMENTS)

Pipemasters Depo 0048

Pipemasters Ex. 8; Tr. 1076-1085 [Fellure].

- The Putnam County Commission first insisted that Pipemasters abide by the contract. *WC Ex. 4.* On June 8, 2001, Pipemasters was told to proceed with corrective work at the 42" standard. *Pipemasters Ex. 10; WC Ex. 34.*

{C0944940.1}

- On June 18, 2001, Pipemasters acknowledged that, "It is known that thousands of feet of pipeline ***do not conform*** to the contract specifications SSC-2, Item #7," and advised that it "will start ***correcting*** those sections of pipe... ... Pipemasters, Inc. wants to be responsible for it's [*sic*] workmanship and is going to make the ***corrections*** necessary to secure the integrity of the pipe." However, because HNTB had "signed every [Pipemasters] pay request affirming and acknowledging that the pipe was installed by the specifications," Pipemasters asked HNTB to share in the cost of the corrective work. [emphases added]

Dallas H. Fellure
President

PIPEMASTERS, INC.
P.O. BOX 1088
HURRICANE, WV 25526
PHONE: 304-562-2382
FAX: 304-562-7519

Ted Kester
Vice President

June 18, 2001

Mr. Gene Weekly
HNTB Architects Engineers Planners
#3 Mission Way
Scott Depot, WV 25560

RE: Putnam county Water Extension Project
Contract No. 4

Dear Mr. Weekly,

Pipemasters, Inc. has been directed by West Virginia American Water Company to comply with the general conditions 13.06 and 13.07 of the contract documents regarding the Putnam County Water Extension Project Contract 4.

It is known that thousands of feet of pipeline do not conform to the contract specifications SSC-2, Item # 7. Pipemasters, Inc. will start correcting those sections of pipe, as directed by West Virginia American Water, by the first week in July, 2001. We wish to get water to those customers on Contract #4 as soon as possible. We plan on working every day but Sunday and 12 hour days.

Pipemasters, Inc. wants to be responsible for it's workmanship and is going to make the corrections necessary to secure the integrity of the pipe. HNTB signed every pay request affirming and acknowledging that the pipe was installed by the specifications.

Pipemasters Inc. respectfully request that HNTB pay some of the cost of the corrective work that is directed by West Virginia American Water.

We ask that you respond to this question by Monday, June 25, 2001, so we may proceed with the work ahead of us.

Thank you for your consideration.

Sincerely,

Dallas H. Fellure

DHF:pt

Cc: David Shultz, WVAWC
David Carovillano, WVAWC
Marjoie Ryan, PC Bldg. Com.
Lee McCoy, Benatec Assoc.
Jim Withrow, President, PCC

Pipemasters Depo 0070

Pipemasters Ex. 10.

{C0944940.1}

- That same day, Pipemasters said that it was "preparing a schedule for the correction of the ***deficiencies***," and asked to be allowed a few more days "to finish the schedule for ***correction***." [emphases added]

PIPEMASTERS, INC.
P.O. BOX 108[8]
HURRICANE, WV 2552[6]
PHONE: 304-[illegible]
FAX: 304-562-7519

JUNE 18, 2001

MR. DAVID B. SHULTZ
W.V. AMERICAN WATER
P.O. BOX 190[6]
CHARLESTON, WV 2532[7]

RE: PUTNAM CO. WATER EXTENSION-CONTRACT #4

DEAR MR. SHULTZ,

PIPEMASTERS INC. HAS BEEN PREPARING A SCHEDULE FOR THE CORRECTION OF THE DEFICIENCES ON THE PUTNAM CO. WATER LINE EXTENSIONS. WE ARE UNABLE TO MEET THE SCHEDULE BY THE TIME SPECIFIED IN YOUR LETTER DATED JUNE 8, 2001. WE CAN HAVE THE SCHEDULE IN YOUR OFFICE BY NOON JUNE 21, 2001. THERE HAVE BEEN A NUMBER ISSUES WE MUST RESOLVE IN ORDER TO GIVE YOU AN ACCURATE SCHEDULE FOR THE CORRECTION OF WORK INDICTATED IN YOUR LETTER.

PIPEMASTERS INC. CAN MEET THE DEADLINES YOU ARE REQUIRING FOR THE CONSTRUCTION OF THE WORK AND WANT TO START AS SOON AS POSSIBLE. WE RESPECTFULLY ASK THAT YOU ALLOW US UNTIL JUNE 21, 2001 TO FINISH THE SCHEDULE FOR CORRECTOIN.

SINCERELY,

HOY FELLURE

Pipemasters Depo 0071

Pipemasters Ex. 10.

{C0944940.1}

- In its third letter that same day, Pipemasters went so far as to ask the Water Company to "consider the acceptance of ***defective*** work" and for "the appropriate ***decrease*** in the contract price ... [so] we can be able to weigh the cost verses [*sic*] the cost of construction." [emphases added]

PIPEMASTERS, INC.
P.O. BOX 1088
HURRICANE, WV 25526
PHONE: 304-562-2382
FAX: 304-562-7319

JUNE 18, 2001

MR. DAVID SHULTZ
W.V. AMERICAN WATER
P.O. BOX 1906
CHARLESTON, WV 25327

RE: PUTNAM CO. WATER EXTENSION-CONTRACT #4

DEAR MR. SHULTZ,

PIPEMASTERS INC. RESPECTFULLY REQUEST YOU CONSIDER THE ACCEPTANCE OF DEFECTIVE WORK IN THE CONTRACT SPECICATIONS IN THE GENERAL CONDITIONS 13.08. WE WOULD LIKE TO KNOW THE APPROPRIATE DECREASE IN THE CONTRACT PRICE ACCORDING TO THE SPECIFICATIONS. IF YOU CAN PROVIDE US WITH THE PRICE REDUCDTION WE CAN BE ABLE TO WEIGH THE COST VERSES THE COST OF CONSTRUCTION. IF YOU HAVE ANY QUESTIONS PLEASE FEEL FREE TO CALL US AT 562-2382.

SINCERELY,

HOY FELLURE

Pipemasters Depo 0072

Pipemasters Ex. 10; see also, Tr. 1091 (Mr. Fellure acknowledges requesting a reduction in the cover specification from 42" to 36"), *1098-1102* (Mr. Fellure incredibly attempts to explain how his third letter of June 18 was not an offer to refund part of the contract price to the Building Commission).

- On June 18, 2001, the Water Company told Pipemasters that the Building Commission might be willing to accept 36" of cover in lieu of the specified 42". *WC Ex. 5; Tr. 1124-1126 [Fellure]*.

{C0944940.1}

- On June 20, 2001, Pipemasters gave the Water Company "a schedule for the ***correction of the deficiencies***..." [emphasis added]

Dallas H. Fellure
President

PIPEMASTERS, INC.
P.O. BOX 1088
HURRICANE, WV 25526
PHONE: 304-562-2382
FAX: 304-562-7519

Ted Kester
Vice President

June 20, 2001

Mr. David Shultz
West Virginia American Water Company
P.O. Box 1906
Charleston, WV 25327

RE: Putnam County Water Extension
Contract # 4

Dear Mr. Shultz,

Following is a schedule for the correction of the deficiencies on a area-by-area basis with first priority given to those customers who are not presently receiving service. The schedule is based on the set of plans given to Pipemasters by WV-American Water Company on June 14, 2001. We want to thank you for those plans which were a great help in preparing this schedule. We will work hard and long to get water to those customers who need it on Contract # 4.

We plan on starting at Mount Moriah Church and working on Trace Fork Road heading east. We would like to complete Trace Fork Road and make taps on that completed section before starting on the Bridge Creek Road area. We feel we can complete the Trace Fork Area by August 15, 2001, pending start date of specified time.

We then plan on working on the Bridge Creek area and stopping at about station STA. 130+00. This will allow us to make taps in this area for about 30 customers. We feel we can complete this section of pipe by September 15, 2001.

We plan on starting at STA. 130+00 on Bridge Creek Road and going to the top of the hill at STA. 111+00 at the intersection of Bridge Creek and Adkins Fork Road. We feel we can complete this section in 2 weeks or by October 1, 2001.

We plan to continue on Adkins Fork to STA. 80+00 at the point where there is water service at the present time. We feel we may be able to complete this section by the date you have set of October 10, 2001.

The dates and times are conservative figures for estimating purposes. We are looking forward to resolving these matters as soon as possible. Ted Kester will be representing Pipemasters, Inc. on this project.

Please let us know when you plan to have a meeting will all parties involved. We may have to video the Trace Fork area because of the new blacktop that was installed last fall.

If you have any questions please feel free to call me at 562-2382.

Respectfully,

Hoy Fellure

DHF:pt

Pipemasters Depo 0075

Pipemasters Ex. 10; Tr. 1132-33 [Fellure].

{C0944940.1}

- On June 26, 2001, Pipemasters asked that those portions of the defective work already in service be reviewed at a later date under GC 14.04 and 14.05.

Pipemasters Inc.
P.O. Box 1088
Hurricane WV, 25526

Lic # WV 021731

June 26, 2001

Mr. David B. Schultz
West Virginia-American Water Company
P.O. Box 1906
Charleston, WV 25327-1906

Subject: Putnam County Water Extensions – Contract #4

Dear Mr. Schultz,

With respect to the portions of the project currently being utilized by West Virginia-American Water Company, we respectively request that these areas of the project be reviewed under Article 14.04 and 14.05 of the Standard General Conditions at a later date. This will allow us to focus our efforts on the portion of the project not currently being utilized.

Thank you for time and efforts on this matter and we are looking forward to completing the project as soon as possible.

If you should have questions or concerns regarding our request, please feel free to call us.

Thank you for your time and consideration.

Respectfully yours,

Ted Koster
Vice President

P.O. Box [illegible]
Hurricane, WV [illegible]

Phone 304-[illegible]
Fax 304-[illegible]

Pipemasters Ex. 10; Tr. 1133-34 [Fellure]. (These provisions address substantial completion of the work, wholly or in part. *Contract 0133-0134*.)

{C0944940.1}

- By June 29, 2001, the Building Commission had accepted Pipemasters' proposal of 36" of cover over the lines not yet placed in service, and to defer consideration of the lines already placed in service. The Water Company requested of Pipemasters that, "If my understanding of Pipemasters intention as set forth above is incorrect or if you have any questions whatsoever about the Building Commission's position, please let me know right away so that we can try to resolve any such questions." *WC Ex. 6; Tr. 1136-1141 [Fellure]*. Pipemasters never responded to this letter (*Tr. 1142 [Fellure]*), and proceeded to remediate its defective work on approximately 13,000 feet of the "dry" lines (*Tr. 987 [Fellure]*). Purportedly, Pipemasters had by this time already decided to pursue a claim for this corrective work, although it admitted at trial that it chose not to raise any demand for payment with anyone else at the time. *Tr. 1275-76 [Fellure]* ("Did you ever share with anyone else this expectation [of payment] that you now say that you had?" "No, sir.").

- On October 8, 2001, the Water Company advised the Building Commission in a letter also sent to Pipemasters that Pipemasters was nearly finished with remediation of the "dry" lines, but that the "wet" lines were not substantially complete and should not be paid for until they were conformed to the Building Commission's satisfaction. "By copy of this letter the contractor is being made aware of our determination and, if Pipemasters disagrees or takes exception to the above, their comments should be set out in a letter to me." *WC Ex. 9; Tr. 1163-1169 [Fellure]*. No such letter ever was sent.

{C0944940.1}

- On October 22, 2001, Pipemasters advised the Water Company that certain "punch list" work had been completed, and that "the depths have been verified by the HNTB's on-site inspector and do not require any ***corrective*** work." [emphasis added]

234 P01 OCT 22 '01 14:07

PIPEMASTERS, INC.
P.O. BOX [illegible]
HURRICANE, WV 25526
PHONE: 304-562-2382
FAX: 304-562-7519

OCTOBER 22, 2001

MR. DAVID SHULTZ
WEST VIRGINIA AMERICAN WATER
P.O. BOX [illegible]
CHARLESTON, WEST VIRGINIA [illegible]

RE: PUTNAM COUNTY WATER EXTENSIONS- CONTRACT #4

DEAR MR. SHULTZ,

PIPEMASTERS INC. HAS COMPLETED THE PRELIMINARY PUNCH LIST FOR CONTRACT NO. 4, LINE A, TRACE FORK. WE RECEIVED THIS PUNCH LIST OCTOBER 10, 2001. THE DEPTHS HAVE BEEN VERIFIED BY THE HNTB'S ON-SITE INSPECTOR AND DO NOT REQUIRE ANY CORRECTIVE WORK. PLEASE BE ADVISED THAT PIPEMASTERS IS READY TO TEST THIS SECTION OF PIPE.

[signature]

Post-it® Fax Note 7671

To	Dave Schultz	Date	10-22-01
Co./Dept.	WV American Water Co	From	Hay Fellure
Phone #	340-2051	Co.	Pipemasters Inc.
Fax #	340-2076	Phone #	562-2382
		Fax #	562-7519

C: Dave C.
Steve C.

PCBC / WVAWC 048

WC Ex. 11; Tr. 1179-80 [Fellure].

{C0944940.1}

Pipemasters' counsel had Mr. Fellure attempt to explain away the correspondence shown above with the excuse that "I'm not a real good letter writer" and that he "stole" some of his terminology from the Water Company's Mr. Schultz. *Tr. 864, 867-68, 876-77, 891-92, 896-97, 905-06 [Fellure]*. In its 50-page response to our appeal petition, Pipemasters essentially ignores these pivotally important letters. But Pipemasters eventually (albeit grudgingly) acknowledged, including through questioning from the bench (*Tr. 1132 [Fellure]*) ("I'll tell the judge yes.")), that it negotiated for and received from the Building Commission a reduction in the backfill specification from 42" to 36". *Tr. 1091-1103, 1122-1142 [Fellure]; see also, Tr. 2956-61 [Schultz]* (a much more concise and credible account of this negotiation process).

The evidence overwhelmingly demonstrates that Pipemasters compromised any claims in exchange for a reduced cover specification. The modification of the contract saved Pipemasters thousands of dollars in corrective work, *i.e.*, every foot of line buried beneath at least 36" but less than 42" of material. As Mr. Fellure said, "it's like another contract." *Tr. 1142*. The trial court should have enforced that agreement under Syllabus Point 1 of Kesari. Pipemasters' claims also fail under the doctrines of waiver (Ara, Syl. Pt. 2), estoppel (Hunter, Syl. Pt. 2), and accord and satisfaction (Painter, Syl. Pt. 5). Pipemasters, if it truly did intend to seek additional compensation for either the initial or the corrective work, misled the Building Commission, the Water Company, and HNTB. Absent any claim for additional compensation, the other parties were all entitled to rely on the belief that all work would be completed correctly at no additional charge, which was plainly spelled out in the contract, anyway, as discussed below.

Pipemasters Failed to Timely Assert
Claims in Accordance with the Contract

Pipemasters' claims are subject to a written contract that spelled out how concerns about specifications or claims for additional compensation were to be resolved. *Tr. 1050 [Fellure]* ("We went through the specifications very carefully, familiarized ourselves with the contract documents, yes, sir."). GC 1.01.21, 9.04, and 9.05 required Pipemasters to obtain clarifications in writing, making clear that even a minor variation in the work required a written field order, and even at that would not change the time or compensation for performance. *Contract 0102, 0123*. GC 10.03 said that any change order, *i.e.*, a change that would modify either the time or compensation for performance of the work, had to be in writing, and a form for this purpose was provided to Pipemasters as part of the contract documents. *Contract 0124, 0155-0156*. GC 10.05 required claims for additional compensation or other relief to be made in writing within 30 days, with specific calculations and support to follow within an additional 30 days. "No Claim for an adjustment in Contract Price or Contract Time (or Milestones) will be valid if not submitted in accordance with this paragraph 10.05." *Contract 0125*.

Pipemasters never took issue with any of these terms of the contract until it was terminated and started to put together this lawsuit. Nor did Pipemasters ever timely and properly submit a request for or receive a field order, change order, or claim. *Tr. 1218-1221 [Fellure]* ("It did not."). Accordingly, Pipemasters has no right to recover the damages awarded by the jury.

Even apart from these contractual requirements, Pipemasters' claims are barred under the doctrine of laches. Spahr, Syl. Pt. 5. The Building Commission, the Water Company, and, for that matter, HNTB all worked in good faith with Pipemasters when it promised to correct its mistakes, and Pipemasters made no timely claim for additional payment for doing so.

The Contract Precludes
Payment for Corrective Work

The jury found that, "Pipemasters was required to perform additional work beyond its obligations under the PC4 contract and for which it should receive reasonable compensation." This was based on an obviously incorrect understanding of the contract. Even if one overlooks the renewed commitment to a 36" specification and the failure to perfect any claim, Pipemasters has no right to recover the vast majority of the damages found by the jury because a portion (dirt replacement, berm stone) of the $91,500 "Invoice No. 1," and all of the $265,286.51 "Invoice No. 2 / Invoice # 012102" (*Pipemasters Ex. 11*) was for corrective work under the contract, as confirmed over and over again by Mr. Fellure's own letters, addressed above.[10] Payment for corrective work is plainly prohibited by GC 13.06 and 13.07. *Contract 0130* ("without cost to OWNER."). Again, Pipemasters admitted at the trial that it understood and agreed to this prohibition. *Tr. 1256-1260 [Fellure]* ("That's what the contract states, sir. ... I agreed to that, sir. ... That's what the contract says.").

"[A] contract shall be enforced except when it violates a principle of even greater importance to the general public." Wellington Power Corp., Syl. Pt. 3. No such public policy has ever been raised that would alter that rule in this case. Yet, in allowing Pipemasters to recover for correcting its own mistakes, the trial court violated the contract governing PC4.

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[10] A unique element of the corrective work was the cost of replacing wet backfill. However, this possibility (i) was made clear to Pipemasters when it agreed to undertake the corrective work at the reduced 36" specification and (ii) was due to weather for which no one else involved in the PC4 project can be held responsible. *Pipemasters Ex. 18, at HNTB 001989* ("The existing backfill material may not be suitable for reuse in some locations. ... Areas with unsuitable material must be replaced with suitable material from on off-site location"); *Tr. 1160-62 [Fellure]*.

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The Stream Crossing Changes
Were Made to Accommodate Pipemasters

The damages awarded to Pipemasters include $12,000 in "Invoice No. 1" for restraint joint pipe in stream crossings. *Pipemasters Ex. 11; Tr. 804-809 [Fellure]*. But Pipemasters acknowledged that this change was at ***its*** request, in order to not lose time forming, pouring, and curing the concrete thrust blocks that would otherwise have been required. *Tr. 804 [Fellure]* ("And we thanked him for that"), *809 [Fellure]* ("restraint joint pipe in this creek crossing allowed us to get across at a much better pace"), *1221-26, 1326 [Fellure]* (in which Mr. Fellure also acknowledges that Pipemasters did not credit the Building Commission for the corresponding elimination of $275 thrust blocks); *see also, Tr. 2322-26 [Carovillano]* (explaining how this modification was to the benefit of Pipemasters). Mr. Fellure's last testimony on this issue – under examination by Pipemasters' own counsel – was that, "We all agreed out there that day." *Tr. 1326*. Especially in light of the fact that the jury returned its verdict solely on the basis of contract, this element of damages, too, cannot be awarded as a matter of law.

Claims of the Water Company

The Water Company's right to a new trial on its claims arises from the same facts and law that preclude any recovery by Pipemasters. Pipemasters' repeated acknowledgments of defective work and renewed commitment (under a loosened specification) mandate a recovery in favor of the Water Company, not *vice versa*.

The Building Commission by October 2001 had spent most of its bond proceeds for PC4. When Pipemasters quit, and Mid-State refused to step in, the Building Commission asked the Water Company to step up. The Water Company did, working with another contractor and inspector and spending $692,530.88 of its own funds in the process. *WC Ex. 41; Tr. 2770-84 [Halstead], 2791-2804 [Goode], 2964-2969 [Schultz]*. The Water Company was assigned the Building Commission's claims to recover from Pipemasters and Mid-State. *Pipemasters Ex. 11A; Tr. 2915-2951 [Chambers]*. The Water Company also had claims against HNTB under its own contract because HNTB allowed Pipemasters to do a poor job.

Pipemasters has suggested repeatedly that the Water Company's payment for the corrective work was a deal to avoid the Building Commission's assertion of some type of claim against the Water Company. *See, e.g., Tr. 506-508.*[11] But nothing to support this theory was ever presented, and the jury exonerated the Water Company of the "negligent administration"

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[11] In footnotes 3, 4, 5, and 9 (pages 6-8, 14) of its response to our petition for appeal, Pipemasters describes the transaction between the Building Commission and Water Company as an "ill advised payoff for professional negligence and breach of duties owed to Appellant Building Commission under the O & M Agreement," an effort to "literally buy, sell, and trade justice between themselves...," "disingenuous and trumped up schemes," and a "sham." This is consistent with Pipemasters' hyperbole during the trial, which led Judge Spaulding repeatedly to admonish counsel. *See, e.g., Tr. 2233* ("It's been asked, Mr. Roncaglione. Control yourself."), *2237* ("How many times?"), *2250* ("You're not impeaching him because he hasn't said anything."), *2942* ("Mr. Roncaglione, either you've been in a different trial or I've been --...").

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that Pipemasters alleged. Accordingly, the trial court should have awarded the Water Company a new trial on all of its claims. "[I]t is clear that the trial court has acted under some misapprehension of the law or the evidence." McKenzie, 610 S.E.2d at 344. Indeed, the verdict, and now the judgment, are "against the clear weight of the evidence [and] ... will result in a miscarriage of justice." Faris, Syl. Pt. 1.

Pipemasters Breached the Contract,
and Then Reneged On a Modified Agreement

SC #7 required "42 inches of cover over the top of the pipe barrel to the top of the finished grade unless otherwise authorized by the ENGINEER." *Contract 0172*. Under ES 15000, Part 3.01, "All pipe shall be laid to the depth specified. The depth shall be measured from the final surface grade to the top of the pipe barrel. The minimum pipe cover shall be as shown on the Drawings or as specified in accordance with Section 2210." *Contract 0319*. SC #9 required Pipemasters to conform to applicable regulations, including those of the DOH. *Contract 0172; Tr. 670-71, 1057* ("It does.") *[Fellure]*.[12] Pipemasters already knew about this requirement ("Oh, yeah."), independent of the contract. *Tr. 1037 [Fellure]*.

The contract addressed ditches, too. SC #10 incorporated as Appendix A a DOH manual that required "[c]are ... to avoid disturbing existing drainage facilities," stated that "[t]he critical control for cover on a pipeline crossing is the low point in the highway cross-section; usually the bottom of the longitudinal ditch," and depicted three feet of cover as the minimum over the pipe casing. *Contract 0172, 0186, 0188, 0193*. SC #26 required Pipemasters "to restore all existing ground ... disturbed or damaged during construction to a condition which is comparable to original or better." *Contract 0173*. Pipemasters knew that it would have to restore roadway ditches to at least as good a condition as prior to beginning its work. *Tr. 1052 [Fellure]* ("That's what the plans called for, sir, yes."), *Tr. 1153 [Fellure]*.

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12 "All water mains shall be covered with sufficient earth or other insulation to prevent freezing. All distribution mains shall be provided with a minimum of thirty-six (36) inches of earth covering; forty-two (42) inches are recommended. All mains of less than eight (8) inches in diameter within five (5) feet of a heavily traveled highway shall be provided with at least forty-two (42) inches of cover." *WC Ex. 17 at 0029* (portion of 64 CSR 77).

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Pipemasters relied at trial on the fact that HNTB, the Water Company, and the Building Commission each executed pay applications that reflect Pipemasters' satisfactory completion of the work. *Pipemasters Exs. 5, 5A; Tr. 712-721 [Fellure]*. (Pipemasters made the same argument at pages 20-21 of its response to our appeal petition.) But this is the way that any substantial construction project is carried out, allowing contractors to be paid ratably for the work performed in order to meet payrolls, and owners to be assured of having sufficient funds remaining for completion of the work in the event the contractor quits midstream. In any event, Pipemasters' signature was the first on each application. *Tr. 1226-29 [Fellure]*. Their subsequent execution, in turn, by HNTB, the Water Company, and the Building Commission were all, therefore, after Pipemasters' initial false certifications "that all work has been performed and/or material supplied in full accordance with the requirements of the referenced Contract, and/or duly authorized deviations, substitutions, alterations, and/or additions...." In any event, GC 6.19.B, 13.06, 13.07, 14.02.B, 14.09A.1, and 17.04 make plain that such certifications or payments neither excuse defective work, nor absolve Pipemasters of its obligation to cure defects and the attendant liability of Pipemasters (and Mid-State) if it fails to do so. *Contract 0120, 0130, 0132, 0135, 0137*. Pipemasters eventually acknowledged that it understood these terms. *Tr. 1170-71 [Fellure]* ("I understood that. I signed it."), *(Tr. 1230-44)* (*Judge Spaulding:* "I just don't think this man wants to answer the question. He has been evasive over and over during this cross-examination."; *examination of Mr. Fellure:* "That's what the contract says, isn't it?" "It does." "And you knew that before you signed it, didn't you?" "Yes. Yes, I did.").

But the specifications, the applications and payments thereon, *etc*., became irrelevant when Pipemasters ***renewed*** a commitment to cover the line with at least 36". Pipemasters

reneged on this ***new*** commitment when it "ran out of money." *Tr. 1181 [Fellure]*. (Pipemasters may have quit then because it had come to the "wet" lines, and it is "more difficult to relay a line that's got water in it." *Tr. 986-87 [Fellure]*.) This ***second*** breach gave rise to the Building Commission's claims (later assigned to the Water Company) against Pipemasters and Mid-State.

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Mid-State Breached Its Bond

Notwithstanding the Court's charge to the jury (discussed below), "'In a contract of suretyship the obligation of the principal and his surety is original, primary, and direct, and the surety is liable for the debt, default, or miscarriage of his principal.' ... As a general rule, the liability of the surety is coextensive with that of the principal." Gateway, Syl. Pts. 1, 2 (citation omitted). *See also*, Wellington Power Corp., Syl. Pt. 6, in which this Court just a few days ago reiterated Syllabus Point 2 of Gateway.

"'A surety does not insure his principal against loss but agrees to be answerable for any debt, default or miscarriage of such princip[al].'" Wellington Power Corp., Syl. Pt. 8 (citation omitted). Consistent with this nature of its liability, Mid-State had a duty to inquire and to ascertain whether Pipemasters had properly performed the work on the contract. Elkins Manor Assocs., 183 W. Va. 501, 508-509, 396 S.E.2d 463, 470-471 ("With respect to notice of default, the surety is ordinarily held to know every default of his principal because he is under a duty to make inquiry and ascertain whether the principal obligor is discharging the obligation resting on him." (citations omitted)). Mid-State apparently knew that it was exposed with respect to any shortcoming in Pipemasters' work, as it asked the Water Company, as project engineer, to keep it advised of the status of the project. Unfortunately, Mid-State did nothing when it was advised that things were not going well, except to accept Pipemasters' assurances (contrary to Pipemasters' letters, shown above) that Pipemasters had done nothing wrong. When it finally had to do something, Mid-State backed Pipemasters to the hilt, dishonoring its bonded obligations to the Building Commission to see to the completion of PC4.

In March 2001, the Water Company had advised Mid-State that "currently pipe previously installed by the contractor is under review for compliance with the contract documents, work has been stopped on the project." *WC Ex. 20.* Mid-State did nothing but have its local agent get a report from Pipemasters that "Pipemasters did nothing wrong." *WC Ex. 21; Tr. 1655-60 [Bowen].* Mid-State's bond in the third and fourth provisos expressly covers amendments to the contract, including Pipemasters' new commitment to complete the corrective work at the reduced 36" cover specification. *Contract at 0077.* In November 2001, the Water Company again advised Mid-State that "contractor is correcting defective work." *WC Ex. 20.* Yet again, Mid-State made inquiry of no one but Pipemasters. *Tr. 1659-60 [Bowen].*

On March 5, 2002, the Building Commission formally notified Pipemasters and Mid-State of the remaining defects in the work, and that the contract would be terminated March 15, 2002, "in the absence of mutual written assurance from Pipemasters and its surety that the remaining deficiencies will be corrected at their sole expense." *WC Exs. 12, 13.* Neither Pipemasters nor Mid-State satisfied this demand. Instead, after conferring only with Mr. Fellure, Mid-State's Michael Bowen refused to complete the remedial work to which Pipemasters had agreed. *WC Ex. 14; Tr. 1664-68 [Bowen].*

HNTB Breached Its Contract with the Water Company

HNTB was paid by the Water Company to act as Resident Project Representative, to "observe the work [of Pipemasters] for compliance with the Contract Documents." HNTB's agreement with the Water Company made no exception for Pipemasters' compliance with DOH standards; the approximately $100,000.00 paid to HNTB for this work on PC4 alone included an obligation of HNTB to inspect for fulfillment of the DOH specifications. *WC Exs. 28 and 29; Tr. 3080-83 [Weekley]*.[13]

Pipemasters started work in February 2000, and its work was inspected on a daily basis by HNTB. *Tr. 681-82 [Fellure]*. With respect to trench depth, vigilance was essential, as the laid pipe was exposed for two hours or less. *Tr. 703, 705 [Fellure]*. But HNTB was neglectful of this duty. HNTB -- when it did check -- only required a ***trench*** depth (net of pipe diameter) of 42". *Tr. 1823-24 [Downey]* ("From the top of the pipe to the top of the trench."), *Tr. 1842-43 [Downey]*. Surprisingly, at pages 20-21 of its response to our petition, HNTB emphasizes that its Mr. Downey stood on the pipe barrel and used his navel to make sure that the remainder of the trench, *i.e.*, up to the level of the ground, was 42". But his technique left no room for any ***ditch***, much less the standard 12" ditches that typically lie atop the backfilled trench, about which the DOH had reminded HNTB early (March 6, 2000) during the course of the work, as reflected in HNTB's own daily log:

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[13] HNTB vociferously denied responsibility ***as to the DOH*** to perform inspection services. *Tr. 3073-75 [Weekley]*. This spurious issue grew out of HNTB's interrogation of Mr. Carovillano, who recalled that HNTB had agreed to do so due to a shortage of DOH inspectors. *Tr. 2457-86 [Carovillano]*. But HNTB's agreement ***with the Water Company*** was to inspect for Pipemasters' fulfillment of all requirements, ***including*** the restoration of ditches that might, to use Mr. Fellure's phrase, "remove cover." *Tr. 1824-41 [Downey], 3079-83 [Weekley]*. HNTB carefully avoids this distinction in its response to our appeal petition.

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Special Assignments
DITCHES MUST BE BACKFILLED AS V-DOT INSPECTORS (DAMON CLINE 1' DITCH DEPTH)

Pipemasters Ex. 13 at HNTB 000040; see Tr. 1833-35 [Downey].

Notwithstanding this DOH admonition documented in its very own records, HNTB completely overlooked how ditching would affect the cover over the pipe; it only watched the first lift of dirt placed on top of the pipe, and then "went on down the line," leaving to Pipemasters and the DOH any concerns about how the remainder of the work and the required ditching would affect cover. *Tr. 1823-24 [Downey]* ("After that, I didn't see any work because after the first lift, the rest is the responsibility of the DOH. I'm going on down the line while the rest of the clean up is being performed."), *1836-41 [Downey].*

Pipemasters submitted to HNTB payment applications, which HNTB routinely approved and forwarded to the Water Company, with HNTB's recommendation that the applications be further processed for payment by the Building Commission. *Pipemasters Ex. 12; Tr. 687 [Fellure].* Those recommendations were poor, because they were based on poor construction work by Pipemasters and poor inspection by HNTB.

HNTB was paid tens of thousands of dollars to see that Pipemasters did what it was supposed to do: dig trenches deep enough to accommodate (i) the waterlines, (ii) at least 42 inches of cover, and (iii) an adequate drainage ditch. As is clear from HNTB's own response to our appeal petition, HNTB never even thought about this third step. HNTB having failed to do what it agreed and was paid to do, the costs incurred by the Water Company to remedy the HNTB oversights should be borne by HNTB, too.

The Water Company's Claims All Arose Directly from the Completion of the Corrective Work for Which Pipemasters, Mid-State, and HNTB Were Responsible

"The cost incurred of relowering a pipe is greater than putting it in the first time." *Tr. 857 [Fellure].* The Water Company paid Tralyn and Terradon to finish the expensive, corrective work on which Pipemasters reneged. No one disputed the necessity, the efficacy, or the reasonableness of the Water Company's payments. *See generally, WC Ex. 41.* The Water Company should be awarded a new trial to seek recovery, free from the spurious claims of Pipemasters, erroneous jury instructions, and any misconduct by Mid-State's counsel.

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Jury Instructions as to Suretyship

"The question of whether a jury was properly instructed is a question of law, and the review is de novo." State v. Brooks, 214 W. Va. 562, 566, 591 S.E.2d 120, 124 (2003). "As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*." Bailey v. Norfolk & Western Ry., Syl. Pt. 11, 206 W. Va. 654, 527 S.E.2d 516 (1999) (citation omitted).

The trial court incorrectly stated the law of suretyship, erroneously instructing the jury as to the relative duties of Mid-State and the Building Commission. The Water Company (assignee of the Building Commission) requested a jury instruction that would properly explain to the jury that a surety's obligation is primary, running right along with the obligations of its principal. *See*, Gateway Communications, Inc. v. John R. Hess, Inc., Syl. Pts. 1, 2, 208 W. Va. 505, 541 S.E.2d 595 (2000) ("'In a contract of suretyship the obligation of the principal and his surety is ***original, primary, and direct***, and the surety is liable for the debt, default, or miscarriage of his principal.' ... As a general rule, the liability of the surety is coextensive with that of the principal.") (emphasis added; citation omitted).[14] Contrary to this West Virginia law, and over the objection of the Water Company and Building Commission, the Court erroneously instructed the jury at Mid-State's request that a "surety's liability is ***secondary*** and is ***derived*** from that of its princip[al]." The trial court compounded this error when, over the Water Company's and Building Commission's objections, it gave another instruction proffered by Mid-State which suggested that the Building Commission had "impaired" Mid-State's "collateral" when it paid

[14] As noted above, this Court only a few days ago, in Wellington Power Corp., Syl. Pt. 6, reiterated Syllabus Point 2 of Gateway.

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Pipemasters for defective work, even though the contract explicitly contemplated the possibility of corrective work notwithstanding payment therefor having already been made. *Docket ## 157, 158, 216; Tr. 3243-44, 3246-48, 3282-83.*

In short, instead of correctly instructing the jury about Mid-State's important duties to the Building Commission, the trial court emphasized a non-existent Building Commission duty to Mid-State to only pay for work that was, in fact, correct, irrespective of any certification by Pipemasters (Mid-State's principal!) that such was the case.[15] Respectfully, this was a ludicrous inversion of what the contract says about pay applications, payments, and corrective work, all as discussed above. Not surprisingly, Mid-State took full advantage of these errors in its closing argument. *Tr. 3403* ("our liability is secondary"), *3407-08* ("You remember the Court's instruction about collateral, that the balance of the contract, that is the money that hadn't been paid, was Midstate's collateral. ... Only – at that point they'd already paid the money."), *3421* ("you keep in mind we're secondarily liable").

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[15] At pages 15-17 of its response to our petition for appeal, Mid-State appears to be backing away from its "impairment of collateral" argument, suggesting that, because the jury found in favor of Pipemasters, "the collateral argument, and any objection thereto, are completely irrelevant."

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Mid-State's Closing Argument

"“‘Great latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury …’”" Matheny, Syl. Pt. 7. Mid-State's counsel – after committing to bifurcation – shrewdly pulled the ace from his sleeve on the last hand, throwing into his argument the "fact" that Mid-State could turn around and pursue the individual members of the Gibson and Fellure families for whatever recovery was obtained against his client. Not one word of this "fact" had been breathed during three weeks of trial. As the trial court noted, "that argument was improper." *Tr. 3539.*

At page 17 of its response to our petition, Mid-State states, without citation to any authority, that the Water Company's objection to its argument was "untimely." Mid-State is wrong. "‘To preserve error with respect to closing arguments by an opponent, a party need not contemporaneously object where the party previously objected to the trial court's *in limine* ruling permitting such argument, and the argument pursued by the opponent reasonably falls within the scope afforded by the court's ruling.’" State v. Mills, Syl. Pt. 8, 211 W. Va. 532, 566 S.E.2d 891 (2002) (citation omitted). Here, Mid-State had ***agreed*** up front that its claims against the Fellures and Gibsons would not be raised before the jury. And, the Water Company objected just as soon as the improper argument was made.

At page 17 of its response to our petition for appeal, the best that Mid-State can come up with as an excuse for its tactic is that, "during closing argument it became necessary for Mid-State's counsel to explain all of the obligations that it had." Mid-State has not elaborated on why this "became necessary," but it dismisses the issue at pages 19 and 20 as "an isolated suggestion to the jury [that Mid-State] could pursue in Gibson certain indemnity obligations…" and "a

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fleeting mention of the Gibsons and Fellures…" Respectfully, this is a poor excuse for pulling such a surprising stunt at the most critical stage of a three-week trial.

Calculated sandbagging like that employed by Mid-State is "inconsistent with substantial justice." Lacy, 205 W. Va. at 643, 520 S.E.2d at 431, n. 10 (citing W. Va. R. C. P. 61). We are entitled to a new trial because "there is a reasonable probability that the jury's verdict was affected or influenced by trial error" and this court should have "grave doubt about the likely effect" of Mid-State's closing argument. Lacy, 205 W. Va. at 643-644, 520 S.E.2d at 431-432.[16]

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16 If the Court believes that Mid-State's conduct was sufficiently egregious, then it might wish to direct the trial court to consider under its inherent powers requiring Mid-State to reimburse an appropriate portion of the other parties' legal fees incurred during the first trial. *See generally*, Daily Gazette Company, Inc. v. Canady, 175 W. Va. 249, 332 S.E.2d 262 (1985).

CONCLUSION, AND RELIEF REQUESTED

The trial court's judgment is a perversion of suretyship and fundamental justice because it is based on a deeply flawed verdict that will deny the Water Company $692,530.88 that it spent to clean up a mess for which it bore no responsibility, as the jury so found. That would be bad enough, but as things stand the Water Company will have to pay hundreds of thousands of dollars to the defaulting Pipemasters, in direct contradiction of the original contract and Pipemasters' renewed commitment to the project at a reduced specification, after the "[re]ditching" and every other Pipemasters excuse had all come to light. It would be difficult to concoct a more nonsensical misapplication of contract law.

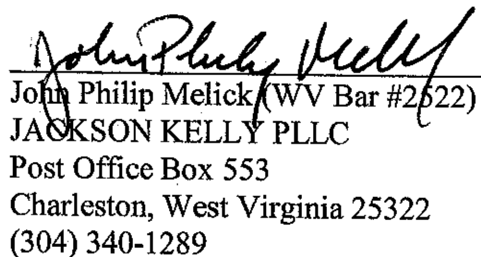
Parties reduce their agreements to writing for various reasons, but one of the best is to make clear who owed what duty to whom. Those involved in PC4 took that prudent approach with a thorough and clear contract, but the trial court refused at every step of this proceeding to give the contract any effect, instead entrusting this complex case to a lay jury. Mid-State certainly made the jury's job even tougher when it persuaded the trial court to erroneously instruct the jury about suretyship, and then contaminated the weeks-long trial with a flagrant foul in its closing argument. Perhaps not surprisingly, the jury got it very wrong. Quite surprisingly, the trial court failed to enforce the contract throughout the entire case, and then refused to correct the jury's obvious mistakes.

The trial court's judgment has imposed upon the Water Company the cost of correcting the defective work of a reneging contractor, allowing a do-less surety and engineering firm to escape scot free. We respectfully urge reversal of that judgment, so that the Building Commission and Water Company have a fair opportunity to recover the cost of this fiasco from

those truly responsible. This case should be remanded for a new trial of the Water Company's claims (including those assigned to it by the Building Commission) against Pipemasters, Mid-State, and HNTB. Any offsetting claims of Pipemasters should be limited to recovery of test hole expense under GC 13.04.B of the contract. There is simply no basis under the law for any other claims to be presented.

PUTNAM COUNTY BUILDING COMMISSION and
WEST VIRGINIA-AMERICAN WATER COMPANY

By Counsel



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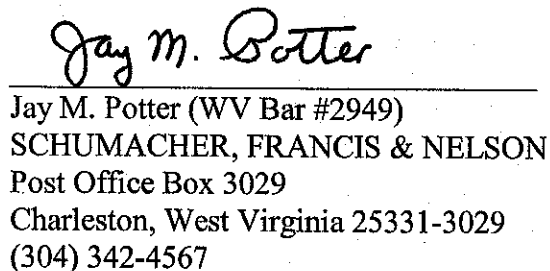

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32667

PIPEMASTERS, INC., a
West Virginia corporation,
Plaintiff/Appellee,

v.

(Appeal from the Circuit Court of Putnam County, Hon. O. C. Spaulding; Civil Action No. 02-C-350)

PUTNAM COUNTY BUILDING COMMISSION,
a West Virginia Public Corporation, and Political
Subdivision of the State of West Virginia, THE WEST
VIRGINIA AMERICAN WATER COMPANY, a
West Virginia corporation,
Defendants/Appellants, et al.

CERTIFICATE OF SERVICE

I certify service of JOINT BRIEF OF DEFENDANTS PUTNAM COUNTY BUILDING COMMISSION AND WEST VIRGINIA-AMERICAN WATER COMPANY by United States first class mail on May 19, 2005, upon each of:

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