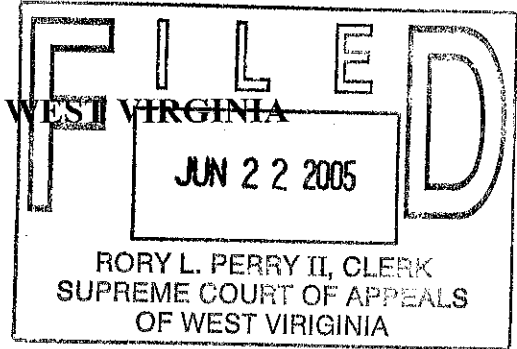


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.***

**THIRD-PARTY DEFENDANT / APPELLEE HNTB CORPORATION'S
BRIEF**

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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

THIRD-PARTY DEFENDANT / APPELLEE HNTB CORPORATION'S
BRIEF

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I. Statement of the Case

Appellants, the West Virginia American Water Company and Putnam County Building Commission, contest a jury verdict rendered on February 17, 2004, after three and one-half weeks of trial, in the Circuit Court of Putnam County, West Virginia. The Appellants contest the jury's finding that Pipemasters satisfactorily completed its obligations under the subject contract with the Putnam County Building Commission, and the jury's finding that Pipemasters was required to perform additional work beyond its obligations under the subject contract, and for which it should receive reasonable compensation from the Appellants. In addition, the Appellants contest the jury's finding that neither Pipemasters nor HNTB Corporation breached their respective duties under the subject contract.

At issue in the case primarily is the initial construction of a water line extension in certain portions of Putnam County which occurred from February through May of the year 2000. Pipemasters, a local Putnam County contractor, submitted the bid that was chosen by West Virginia American Water Company for the laying of some sixty-four thousand feet (approximately twelve miles) of eight-inch ductile iron pipe to complete a water line extension in certain rural portions of Putnam County.

HNTB's involvement in this project began in 1999, when representatives of West Virginia American Water Company approached HNTB and inquired about whether it would be interested in providing engineering services for the installation of water line extensions in Kanawha County. The Water Company informed HNTB that this would ultimately be a project that would extend into Putnam County, Cabell County and Boone County.

Ultimately, HNTB was chosen to be the Resident Project Representative for the Water Company on Contract 4, which became the subject matter of the present litigation. Contract 4 involved the water line extensions in those portions of Putnam County referred to as Adkins Fork, Bridge Creek, Trace Fork and Riders Creek. HNTB was also selected by the Water Company to be Project Representative on Contracts 3 and 7 of water line extensions, but those particular contracts are not a part of this particular litigation.

The subject dispute between the parties arose because of an allegation of insufficient burial of portions of the sixty-four thousand feet of ductile iron pipe. West Virginia American Water Company's written specifications required that all pipe laid by the contractor was to have forty-two inches of cover (dirt) over the top of the pipe. As Project Representative, HNTB Corporation was charged with inspecting the contractor Pipemasters' work to ensure that Pipemasters' employees were indeed placing forty-two inches of cover over the pipe. During the trial, witness after witness testified that Pipemasters had laid the pipeline correctly, and that HNTB had performed its inspection duties appropriately, with the concomitant result that forty-two inches of cover was placed upon all buried pipe. Nevertheless, in December of 2000, representatives of West Virginia American Water Company discovered a number of locations where the pipeline had not been buried appropriately with a sufficient amount of cover. Consequently, charges were exchanged between and among the parties, with the Water Company and the Putnam County Building Commission contending that Pipemasters' work was unsatisfactory in the first instance, and

that HNTB had obviously been negligent in the performance of its inspection duties. On the other hand, Pipemasters and HNTB asserted that there was no competent evidence before the jury to challenge the proposition that the pipeline was laid correctly in the first instance, and that forty-two inches of cover was indeed placed over the buried pipeline. Moreover, Pipemasters and HNTB suggested and provided evidence to the jury that “re-ditching” had occurred at the behest of the West Virginia Division of Highways so that cover was taken away from the buried pipeline that resulted in the discovery of various instances of pipeline having been buried with less than forty-two inches of cover in December of 2000.

Now, despite having a plethora of oral testimony and documentary exhibits placed before the jury during a three and one-half week trial, in which the jury concluded that Pipemasters and HNTB had not done anything wrong in their respective jobs in installing and inspecting the pipeline, the Appellants request that this Court overturn the jury’s verdict, because they contend there is insufficient evidence to support the jury’s findings.

After the jury verdict was rendered on February 17, 2004, the Appellants filed a Joint Motion for Judgment as a Matter of Law and for a New Trial on April 2, 2004. On June 7, 2004, the parties appeared before the Honorable O.C. Spaulding, Judge of the Circuit Court of Putnam County, and presented oral argument both for and against the Motion for Judgment as a Matter of Law and New Trial. The Court denied the motion for a new trial, and entered its Order denying post-trial motions on June 15, 2004, stating in relevant part that it is the province of the jury to weigh the evidence, and that the verdict of the jury is

supported by the clear weight of the evidence, and that it was therefore appropriate for the Court to deny the post-trial motion.

The Appellants are correct in their assertion that where an issue on appeal from a trial court is clearly a question of law, this Court must apply a *de novo* standard of review. It is equally true, however, as a general proposition that when this Court reviews a Circuit Court's rulings on a motion for a new trial, it utilizes an abuse of discretion standard. In this Court's holding in In Re: State Public Building Asbestos Litigation, 193 WV 119, 454 S.E.2d 413 (WV 1994), this Court explained that in reviewing challenges to findings and rulings made by a trial court, a two-pronged deferential standard of review is applied. In reviewing the rulings of the trial court concerning a new trial and its conclusion as to the existence of reversible error, an abuse of discretion standard is utilized, while in reviewing the trial court's underlying factual findings, a clearly erroneous standard is utilized. Finally, questions of law are indeed subject to a *de novo* review. In other words, this Court must find that the Putnam Circuit Court was clearly wrong, in that it made a "clear error of judgment or exceed[ed] the bounds of the permissible choices in the circumstances." Rollyson v. Jordan, 205 WV 368, 379, 518 S.E.2d 372, 383 (WV 1999) (Citations omitted). See also Syl.Pt. 5, State v. Leep, 212 WV 57, 569 S.E.2d 133 (WV 2002).

In the subject case, the Appellants are unable to identify any errors or mistakes in judgment made by the trial court, other than erroneously instructing the jury as to the law of

suretyship with respect to the Third-Party Defendant, Mid-State Surety Corporation.¹ Indeed, with respect to HNTB Corporation, the Appellants have yet to identify any particular reason why the jury's verdict as to HNTB should be overturned. Instead, the Appellants continue to re-invent and restate arguments that were made to the trial court at the summary judgment stage before the trial ever occurred, in arguing why judgment should be directed in favor of them as to every issue. These Appellants reject every aspect of the jury's verdict, except for that portion of the jury's verdict which found that the West Virginia American Water Company was not negligent in its administration of the subject contract.

While no one can criticize the Appellants for highlighting those portions of the trial court record which lend support to their version of the case, the Appellants conveniently ignore all the evidence and sworn testimony that was contrary to their version of the case, seemingly wishing to sweep all such evidence under the rug as if it never existed. The Appellants boldly declare that this jury got it ever so wrong in rendering the verdict that it did, and ask both the trial court and this Court as to how the jury could have gotten its verdict so wrong? The problem, of course, in dealing with this type of logic is that the Appellants fail to consider the fact that perhaps the jury did precisely what it was supposed to do, *i.e.*, it considered all of the evidence placed before it, and thereby found that HNTB had performed its inspection and certification services appropriately.

¹At the hearing on the post-trial motion, when Judge Spaulding inquired, "Where is the error?" Appellants indicated there was no error in any aspect of the case in a legal sense, unless the Judge would deny the post-trial motion. **Tr. 3493-3494 (J. Spaulding).**

Thus, the Appellants come before this Court, acknowledging that there were no identifiable errors during the trial itself, but maintaining that it was an error for the trial court not to grant judgment as a matter of law and a new trial. HNTB urges this Court to understand that the trial court did not err in refusing to grant the Appellants a new trial and judgment as a matter of law, as every party in this case had a full and fair opportunity to fully present their respective theories of the case. HNTB urges this Court to affirm the trial court's jury verdict, and leave in place the findings of this jury that heard the evidence, evaluated the witnesses, and entered its verdict. The transcript of proceedings for this three and one-half week trial, while comprehensive, can never duplicate for this Honorable Court the various nuances and credibility of the various witnesses that must be taken into account. Obviously, this honorable Court cannot listen to the testimony of West Virginia American Water Company employees David Carovillano and Tom Boggs, consider their demeanor, and question the veracity of their explanations as to why there was insufficient cover over the buried pipe. It is abundantly clear, however, that the jury was not persuaded that the West Virginia Water Company's theory was correct about why there was insufficient cover. The jury concluded that the West Virginia Division of Highways' decision to reditch the area where the pipe had been laid removed the cover. This verdict represents the quiet and determined deliberations of six citizens of Putnam County, as well as one alternate juror, who heard detailed testimony through the explanation of dozens of documents and some fifteen witnesses, and at the end of the day brought an end to a dispute, which the companies could

not resolve between and among themselves. Quite simply, there is no justification to disturb this jury verdict.

The Appellants state forthrightly in the introduction to their brief that “The scales of justice are far out of balance.” Their sweeping indictment of the jury’s verdict is indeed far-reaching. The trial court is chastised at every possible moment for failing to correct its errors (Appellants’ brief at 4), and to enforce the plain language of the contract and Pipemasters’ own letters (*Id.*). The Appellants are still apparently of the opinion that the trial court should have granted summary judgment as to the claims of Pipemasters. However, the trial court, in its wisdom, chose to deny the motion and let the jury decide the crucial questions.

As to the trial, no one can fairly claim that the West Virginia American Water Company did not have a full and fair opportunity to present every aspect of its case to the jury. The trial court did not place any limitations on the West Virginia American Water Company, and did not exclude any evidence the West Virginia American Water Company sought to introduce. Quite simply, at the end of the day, the jury did not agree with West Virginia American Water Company’s interpretation of what happened at the site that led to the discovery of insufficient cover over portions of the pipeline.

The Appellants not only are critical of the trial court, but are particularly disdainful of the jury. They state that “The parties and jury of lay people were put to a three-week trial, consisting mostly of ‘redundant excuses’ from Pipemasters.” (Appellants’ brief at 4.) Again, in their conclusion, the Appellants question the trial court for “entrusting this complex case

to a lay jury.” (Appellants brief at 49.) Query: What other type of jury is there, other than a lay jury? The members of this jury, citizens from all walks of life in Putnam County, sat intently during the three-week trial and listened to all testimony of all parties put before them. Moreover, is it not the jury’s prerogative to hear the evidence and in its collective judgment determine if Pipemasters’ explanations were indeed redundant? Evidently, the jury did not agree with the Appellants’ assessment of Pipemasters, or for that matter, HNTB, in this regard.

The jury was also characterized by the Appellants as “misguided” (Appellants’ brief at 4) and accused the jury of getting “it very wrong”. (Appellants’ brief at 49.) The Appellants’ criticism of this jury is misplaced.

From the beginning of this case, there was a story to be told and a mystery to be solved. To be certain, there was a legal contract that required the application of legal principles and guidance from the trial court in developing appropriate jury instructions. But nevertheless, no party claimed to have a complete and thorough explanation for the factual circumstances that had led to the instances of insufficient cover being discovered.

After May of 2000 when Pipemasters completed the initial phases of construction, some seven months passed until December of 2000 when representatives of the West Virginia American Water Company found that the pipe did not have sufficient cover. West Virginia American Water Company can grimace, whine, complain or look the other way all it wants, but this jury heard testimony from a number of witnesses that after Pipemasters’

work was completed and approved by the Division of Highways' representative Damon Cline, Mr. Cline's supervisor, Drucilla Hackney, required additional ditches to be recut in a different manner. Thus, criticize this jury's verdict if you must, but do not have the audacity to state that this jury was misguided or did not have a reasonable basis for the conclusions that it reached.

With respect to HNTB, the Appellants state that HNTB will be "evading responsibility" unless the trial court's errors are corrected. (Appellants' brief at 4.) How so? This jury heard HNTB witnesses in the chain of command from Gene Weekley to Jim Pennington to Eddie Byrd and to Greg Downey. The jury heard their testimony through detailed direct and cross-examination, and had the opportunity to scrutinize HNTB log books and other documentary evidence. Not one shred of evidence was ever offered that an HNTB employee was not where he was supposed to be, inspecting Pipemasters' work at every instance. Moreover, HNTB provided inspection services to the West Virginia American Water Company on countless additional miles of pipe that were laid throughout the entire Putnam County project. No questions have been raised about the quality of HNTB's work until this particular lawsuit. Thus, in the eyes of this jury, it was not credible to suggest that HNTB had evaded its responsibilities, and the jury verdict reflected this.

HNTB was found by this jury by a preponderance of the evidence to not have breached its contract with the West Virginia American Water Company. There is no discernable error in the jury's handling of this particular issue. When a jury has thus spoken,

it is not credible for the party who has lost to argue that the scales of justice are far out of balance simply because the jury ruled against it. This is the way the jury system works.

II. Kind of Proceeding and Nature of Ruling Below

Pipemasters sued the Putnam County Building Commission and the West Virginia American Water Company for breach of contract and negligence. Subsequently, as the case proceeded, the Putnam County Building Commission advanced claims against Pipemasters, HNTB Corporation and Mid-State Surety Corporation. In addition, the West Virginia American Water Company sued HNTB Corporation. Mid-State Surety Corporation counterclaimed against Pipemasters and Pipemasters' guarantors under the performance bond for indemnification. HNTB counterclaimed against West Virginia American Water Company for alleged unpaid invoices. Before the trial began, HNTB and West Virginia American Water Company settled the claim brought by HNTB for unpaid invoices.

The case was tried before a Putnam County jury from January 27, 2004, until February 18, 2004, at which time the jury returned a verdict. The jury found that Pipemasters had satisfied its contractual obligations, and had been required to perform additional work. The jury also concluded that West Virginia American Water Company had not acted negligently in its administration of the subject contract. Finally, the jury found that HNTB Corporation did not breach its contract with the West Virginia American Water Company to provide inspection and certification services of Pipemasters' work on the subject contract.

III. Statement of Facts

Because the trial of this case took three and one-half weeks to present to a jury, this Honorable Court can well imagine the amount of detail that was presented to the jury. As with any construction case, there were numerous documents admitted into evidence, including but not limited to the construction contract itself, along with its specifications, construction log books, interoffice memoranda, payment certifications, photographs, videotape, and various investigative reports, to name but a few.

In order to install the water line along the approximate twelve miles of narrow rural roads serving those areas of Putnam County known as Riders Creek, Trace Fork, Bridge Creek and Adkins Fork, the Putnam County Building Commission was required to apply for a permit from the West Virginia Division of Highways to enter upon, under, over or across the state roads of West Virginia for the installation of the water line. The permit obtained by the Putnam County Building Commission contained supplemental conditions on its reverse side that required the installation of water lines to be in accordance with the current manual, "Accommodation of Utilities on Highway Rights-of-Way." In addition, the subject contract between the West Virginia American Water Company and Pipemasters included as Appendix A the "Accommodation of Utilities on Highway Rights-of-Way Manual." Thus, there was no disagreement among the parties that the specifications contained in the subject contract governed the manner in which a company such as Pipemasters is to install the water line, and, most importantly, **the West Virginia Division of Highways had the final say on**

all utilities that were installed within or on its rights-of-way, i.e., the highways and roads of the State of West Virginia.

The general agreement for professional services between HNTB and West Virginia American Water Company was entered into between these companies on September 25, 1997. **Tr. 1372 (G. Weekley.)** The agreement between HNTB and West Virginia American Water Company predated the agreement between Pipemasters and the Water Company, because HNTB² had been providing professional engineering services, including inspection and certification of various contractors' work for a number of years on other projects in the State of West Virginia, and indeed other projects in Putnam County that are unrelated to the subject litigation.

HNTB was chosen by West Virginia American Water Company to design and prepare plans for the construction of the Putnam County water line extension project. These plans included such things as hydraulic analysis, alignment, location of existing utilities, public and private property lines, and design drawings. This litigation, however, does not involve a dispute over those particular services provided by HNTB. HNTB was sued in the underlying case because West Virginia American Water Company contends that HNTB failed to inspect Pipemasters' installation of the water line according to its specifications.

²HNTB is a company of architects, engineers and planners, who design public works projects primarily for governmental entities throughout the United States. HNTB is involved in ongoing projects throughout the State of West Virginia, and has an office in Teays Valley, West Virginia, that employs thirty-four people, and a Morgantown, West Virginia, field office.

The entire dispute between the parties herein that resulted in the filing of the subject lawsuit focuses on the requirement that anytime a water line is installed by a contractor, it must have "forty-two inches of cover over the top of the pipe barrel to the top of the finished grade, unless otherwise authorized by the engineer." See Contract 0172. No party has, through its authorized representative or witnesses, challenged the fact that this indeed was West Virginia American Water Company's specification on this job site in Putnam County. Pipemasters, through its owner and various witnesses, testified during the trial that between the commencement of work on Contract No. 4 in Putnam County in February of 2000 until the work was completed in May of 2000, that all water line installed by Pipemasters' employees was installed with forty-two inches of cover. Similarly, HNTB representatives and employees testified at the trial that during their inspection of Pipemasters' work, they certified the fact that Pipemasters had installed pipeline on Contract No. 4 with forty-two inches of cover. No one, including West Virginia American Water Company's Project Representative, Tom Boggs, or any other individual, ever challenged, reported or complained in any respect that Pipemasters' work was somehow deficient, or that HNTB had neglected to perform its inspection duties during the initial phase of construction. Not until late 2000 did West Virginia American Water Company discover that at least some of the lines installed by Pipemasters had not been sufficiently covered, *i.e.*, there was less than the specified forty-two inches of cover on top of some of the lines. **Tr. 2383-2384 (D. Carovillano), and Tr. 2954 (D. Schultz).**

It is important to note that during the initial construction phase from February to May of 2000, the West Virginia Division of Highways had a representative, Damon Cline, on the site of Putnam County Contract No. 4 throughout the project. Mr. Cline was present as the representative of the West Virginia Division of Highways to himself inspect and approve the ditches dug by Pipemasters' employees, so that the Division of Highways could give its final approval to the restoration of the right-of-way after the pipeline had been installed. Damon Cline testified at the trial of the case that in his opinion, the ditches that had been dug by Pipemasters were appropriate. Mr. Cline also revealed, however, that after he had approved the ditches dug by Pipemasters, his supervisor at the Division of Highways, Drucilla Hackney, required that re-ditching be done on Putnam County Contract 4, as the ditches initially approved by Mr. Cline were now deemed to be insufficient. Consequently, it is the contention of both Pipemasters and HNTB that after Pipemasters had completed its work and installed the pipeline on Contract No. 4 with forty-two inches of cover, that subsequent re-ditching required by the West Virginia Division of Highways removed the forty-two inches of cover in many instances that led to West Virginia American Water Company's discovery in late 2000 that many portions of the subject pipeline did not have sufficient cover. West Virginia American Water Company disputes this particular explanation for why there is insufficient cover on its pipeline, and suggests in its analysis that the only conclusion that can be reached is that Pipemasters' work was negligent and in breach of the subject contract, as it did not, in a number of instances, place forty-two inches of cover over the water line. In

addition, West Virginia American Water Company also contended that HNTB was negligent and/or breached its contract with the Water Company in failing to provide appropriate inspection services in certifying the work that Pipemasters had installed the pipeline with forty-two inches of cover..

Nearly all of the witnesses who testified during the trial of the case testified in some part regarding this particular controversy, *i.e.*, how did the pipeline installed by Pipemasters with a strict requirement that there be forty-two inches of cover placed upon it, end up in many instances with insufficient cover. While the parties herein were diametrically opposed in their explanations as to why insufficient cover was discovered in late 2000, there can be no disagreement among the parties that the Putnam County jury which heard this case was presented with sufficient evidence for it to have reached the conclusion that it did; namely, that Pipemasters had installed the pipeline correctly in the initial phase of construction from February through May of 2000, and that HNTB had inspected Pipemasters' work appropriately, to certify that there was indeed forty-two inches of cover.

The following excerpts from the transcript illustrate aptly the testimony the jury heard in this regard, and explain why the jury's verdict was that HNTB had performed its inspection and certification services as required by the subject contract.

HNTB Vice-President, Gene Weekley, the engineer in charge of all HNTB operations in West Virginia, was asked:

Q Who's responsible under the contract documents for the supervision of the work being performed on the right-of-way?

A Our inspector is responsible, but there is also a Highway Department inspector present.

Q And in terms of the restoration of the right-of-way, who supervises the restoration of the right-of-way as between HNTB and the Department of Highways, when Pipemasters is doing their work?

A Department of Highways is the one that has to be satisfied.

Q All right. So, if Pipemasters would install the drainage ditch after the installation of the water pipe, and that activity was under the supervision of and to the satisfaction of the Division of Highways, would that be consistent with Pipemasters' obligations under the contract to perform that work?

A That's -- the contractor was to satisfy the Highway Department.

Tr. 1406-1407 (G. Weekley). Weekley's testimony demonstrates conclusively that the West Virginia Division of Highways' representative was always responsible for supervising and approving the restoration of the right-of-way after the contractor had installed the pipeline.

HNTB's Project Representative, Jim Pennington, was asked a series of questions regarding HNTB's inspection of Pipemasters' work.

Q Specifically focusing on the February to May 2000 time frame, when you executed these documents for HNTB and the one specifically in front of you dated June 8, 2000, did you have any information or knowledge back then, as of June 8, 2000, that the work performed by Pipemasters from February to May 2000 somehow did not conform to the requirements of the contract?

A No.

Tr. 1448 (J. Pennington). Pennington's testimony clearly illustrates that at the conclusion of the initial construction phase from February through May of 2000, neither HNTB nor any

other party to this litigation had any information whatsoever to demonstrate or even hypothesize that Pipemasters' installation of the pipe had been completed with insufficient cover.

Jim Pennington's testimony also revealed that HNTB was not involved in the subsequent corrective work that was undertaken by Pipemasters after the insufficient cover was discovered. Pennington explained:

Q Now, my question to you is, why is it necessary to contact or at least determine if it was acceptable to the Department of Highways as to the relocation of the ditches?

A From the time that this alleged problem was discovered until this corrective work was undertaken, we were -- HNTB, we were like out of the loop. And then by whatever -- by whatever means, I learned that they were attempting to move the ditchline out there to gain cover over the pipe. So my question was, 'Is this acceptable?' I don't know what you all agreed on. We were not involved in that. It was a meeting between Pipemasters and West Virginia American Water.

Q Why did you have to contact the Department of Highways to determine whether or not the relocation of the ditch is acceptable?

A It's their right-of-way. It's their responsibility.

Q All right. And when you say it's their right-of-way and their responsibility as to the relocation of the ditchline, whose responsibility would it have been with respect to the original location of the ditchline?

A The DOH.

Tr. 1475-1476 (J. Pennington).

Jim Pennington was also asked about who he encountered on the Contract 4 job site, and about HNTB's inspection work on that site.

Q During the February to May 2000 period, Mr. Pennington, did you travel the job site from time to time?

A Yes, I did.

Q When you did travel the job site, did you frequently or infrequently encounter Damon Cline of the Department of Highways?

A Frequently. Every time I was on the job, to the best of my recollection, he was there. I didn't always talk to him, but I saw him.

Q Did you also, when you would travel the job site between February and May of 2000, would you encounter the West Virginia American Water Company representative, Tom Boggs?

A On occasion, yes.

Q Was there a time, in your opinion, for Mr. Boggs and Mr. Cline to interact with one another, if they desired to?

A Yes.

Q Mr. Melick left the impression with this jury that there may have been some doubt in your mind as to the quality of HNTB's inspection services during the original February to May 2000 period. Do you have any reason to believe that HNTB inspectors did not inspect Pipemasters' work with regard to the installation of pipe to the forty-two inch specification?

A No, I do not.

Tr. 1530-1532 (J. Pennington). Again, Mr. Pennington did not hesitate to emphasize that he had no reason to believe, during the initial phase of the construction, that there was any reason to believe that HNTB inspectors had not inspected Pipemasters' work with regard to the forty-two inch specification for cover on all installed pipeline. In addition, it is important to note that Pennington did notice West Virginia Division of Highways employee, Damon

Cline, on the job site, performing his duties for the Division of Highways whenever Pennington went to the job site. This testimony is particularly important, given testimony introduced by West Virginia American Water Company personnel during the latter stages of the trial that attempted to shift the responsibility for inspecting the restoration of DOH rights-of-way to HNTB. At this particular phase of the trial, however, early on on February 3, 2004, West Virginia American Water Company had not yet changed its strategy to try to place DOH's inspection responsibility with HNTB.

Further testimony from HNTB Project Representative Jim Pennington reveals that Pennington inquired of his subordinates as to how they were inspecting Pipemasters' work on the job site, and the fact that HNTB was never involved in any discussion about the original placement of ditches, nor subsequent arguments about re-ditching.

Q ...I'm wanting to know what you found out about your investigators, if anything – what you found out about your inspectors, excuse me, if anything, what your inspectors may have done or not done in providing inspection services on this project that could have led to an improper measurement being taken of cover on the site. What did you find out, if anything, in that regard?

A I asked each one of them individually, 'Did you allow pipe to be installed with a cover less than forty-two inches at any time on this contract?' That was my question I asked.

Q And what was the answer?

A No.

Q What reason would an HNTB inspector have not to enforce the forty-two inch specifications?

A I couldn't think of any.

Tr. 1536-1537 (J. Pennington).

...

Q Mr. Pennington, what role did Mr. Damon Cline have in being at the site every day, if not every day, close to every day, during the original work February to May of 2000?

A Mr. Cline was the DOH inspector on the site on Contract 4, and he supervised reclaiming the state's right-of-way and everything with the DOH right-of-way.

Q Is ditching one of the things that is included in protecting the DOH's right-of-way?

A Yes, sir.

Q You were here in the courtroom and heard Mr. Fellure testify, did you not, about that he was required by Damon Cline to go out and ditch on two or three more occasions?

A I heard that.

Q At any time in your internal investigation or any investigation that you performed, did you know about how ditching may or may not have affected any aspect of the work that was completed in May of 2000?

A No, I did not.

Q Did HNTB have any responsibility whatsoever about any aspect of ditching on this project?

A No.

Q Did Damon Cline ever talk to you about ditching?

A Me, personally?

Q Yes.

A Not that I recall.

Tr. 1538-1539 (J. Pennington). Still further testimony from HNTB Project Representative Jim Pennington shows that it was not at all uncommon for a contractor such as Pipemasters to get caught in the middle when representatives of the Division of Highways would change their opinion about how the right-of-way was to be restored.

Q ...In other words, the Water Company didn't have an opinion as to whether or not that was acceptable, they deferred to Highways?

A Yes.

Q And if Highways changed their opinion from time to time and that caught the contractor in the middle, then Highways would be at fault, would you agree?

A I would agree that happens a lot. In other words, any time any question arose about ditching and whether the procedure being utilized was acceptable or not, whether the inquiry was being made by West Virginia American Water Company, by Pipemasters or by HNTB, the answer to the inquiry was always, 'As long as it was acceptable to DOH.' Quite logically, however, if DOH changed its opinion in mid-stream as to how it wanted the right-of-way restored on a particular project, it is not surprising that a contractor like Pipemasters could get caught in the middle.

TR 1549-1550 (J. Pennington).

HNTB employee, Greg Downey, was called to testify in the case about his job as an inspector. Downey actually witnessed Pipemasters' installation of the work and the subsequent forty-two inches of cover that was placed upon the pipe that had been laid.

Downey was asked:

Q What was the depth of cover that was to be overtop of the pipe during the performance of the work?

A Forty-two inches.

Tr. 1822-1823.

...

Q After the forty-two inches was determined, measuring from the top of the pipe, up, was it measured from the top of the pipe overtop of it, or the top of the pipe to some other location?

A It was measured from the top of the pipe to the top of the trench. Then you put the first lift in. 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 cleanup is being performed.

Q What do you mean, the rest of it is the responsibility of the DOH?

A That's the DOH right-of-way, and so whatever they say needs to be done on that right-of-way, that's what – you know, that's more or less their job to be done.

Q When you were present and inspecting the work of Pipemasters, was there any time that Pipemasters installed pipe that did not have forty-two inches of cover overtop of the pipe?

A No, sir.

Q Did you feel that when you were out there on the job site as an HNTB inspector, that you had adequate opportunity to inspect the work?

A Yes, sir.

Q Was there any time that Pipemasters refused you to allow – or prevented you from allowing you to inspect the work?

A No.

Q Who did you see out there from the Department of Highways?

A I'm sorry?

Q Who did you see out there from the Department of Highways?

A Damon Cline.

Q What was Mr. Cline doing?

A He's the Department of Highways inspector. His responsibility was to take from the second lift to put the berm and berm stone and stuff back down, make sure that they were in compliance to the way he felt.

Q Did you see Pipemasters perform that portion of the work in the presence of Mr. Cline?

A Yes, sir.

Tr. 1823-1825.

...

Q When Pipemasters completed the work in a particular section, excavate the trench, pipe in, proper depth, proper cover, backfill the trench and restore the right-of-way, did you see that process completed in any of the sections where you did the inspection work?

A In pieces, yes. Mostly, like I say, I stay up there where the main pipe was being laid and also the first lift. Then after that, Damon Cline from the Department of Highways, that's his responsibility...

Tr. 1828 (G. Downey). Finally, with respect to Greg Downey, Downey was asked to demonstrate to the jury how he actually verified whether the pipeline was being installed correctly so that there would be forty-two inches of cover over the top of it. Mr. Downey was permitted by the Court to stand up and show how he would climb on top of the pipe in

the trench and verify whether the excavation was deep enough so that it would reach just below his navel. Downey explained that his navel was forty-four inches from the ground, so that forty-two inches would be just below his navel. Downey explained:

Q Mr. Downey, could you stand up and show the Court and the jury, when you do get down in trenches, how you measure the depth?

A I walk into a trench line – ...when I walk into an open or cut trench, and I know this is the existing ground, I'll walk up to it and measure. Like this right here right now is hitting me I'm going to say probably at forty inches. I know my belly button is forty-four, so right here is forty-two inches. So, when I walk in and I know that I'm hitting this part of my body at the top of that trench, then I know I've got forty-two inches.

Q Now, if I pull out a tape measure here and I put that beside you, forty-two inches is coming out just a little bit below your navel?

A Yes.

Q Okay, is that your standard way of measuring the depth of a trench?

...

A Yes.

Tr. 1842-1843 (G. Downey). After Greg Downey testified, there can be little doubt that this jury understood how HNTB employee, Greg Downey, went about measuring whether there was sufficient cover over the pipeline that Pipemasters had laid.

West Virginia American Water Company has also taken the testimony of HNTB employee Greg Downey and argued that Mr. Downey's testimony confirms that HNTB was skipping the third step and not verifying that appropriate cover had been placed upon the

buried pipe. There is no question that the Division of Highways' employee, Damon Cline, followed behind HNTB and gave his approval to the manner in which Pipemasters was restoring the right-of-way.

Damon Cline explained in his testimony (Tr. 2695) that after the pipe was installed and lifts of dirt were put back, he would make sure that the dirt was compacted and that the sides of the hill were not damaged. Cline testified that a trench is where you put the pipe. The ditch is what you leave for the water to drain off the road. (Tr. 2694).

West Virginia American Water Company's argument that HNTB's inspector did not see that sufficient cover was placed upon the buried pipe completely ignores the topography of this job site. Damon Cline testified that the lay of the land on this particular stretch of sections of Putnam County does dictate where a contractor can put the water line. (Tr. 2698).

Cline further testified:

The water line had to get as close to the road. In those areas where you had no room between the road and the hill, you had to get as close to the road as you could get in order not to destroy that hill. You don't have that hill the same stretch back down the road.

(Tr. 2698). Cline did not see anything wrong with Pipemasters' installation of the pipeline along the side of the right-of-way where they selected. (Tr. 2699). Cline testified that HNTB was out there all the time. Ultimately, Pipemasters installed the pipeline which was inspected by HNTB for sufficient cover, and Damon Cline on behalf of the Division of

Highways approved the restoration of the right-of-way, which should have ended the work done on this particular job site. Drucilla Hackney, however, Damon Cline's supervisor, objected to the manner in which ditches were dug on this project and ordered that reditching occur. Damon Cline was specifically asked, "Were you able to see, in other words, where he was digging and how it would affect the prior construction? A. Well, it would have taken some of the cover off the pipe." (Tr. 2706-2707). Cline further testified that he had never heard of any requirement that dictated that a trench with a pipe in it must go underneath a ditch. (Tr. 2709). Indeed, the topography dictated that the pipeline be buried in a trench and a subsequent ditch be dug so that they did not interfere with one another. Cline testified that you could not put in a ditch that was straight up and down in that location because it was not going to stay there. He said you had to put small ditches in to make sure they were tapered and the soil did not break off the side. (Tr. 2725). While Cline had approved the configuration of the small more shallow ditches, the reditching insisted upon by Drucilla Hackney affected the prior work completed by Pipemasters and inspected by HNTB. When asked how the reditching had reduced the cover of the pipe that was in the shoulder or the berm of the road, Cline responded:

The bucket reached over into the shoulder when they were reditching it and dug some of the shoulder out.

(Tr. 2727). Thus, returning to the West Virginia American Water Company's contention that HNTB inspector Greg Downey did not assure that there was significant cover over the buried pipeline, it is easy to see that this argument is in error. Given the particular narrow

topography of where the pipe was being installed, Greg Downey verified that forty-two inches of cover was placed upon the buried pipe. The shallow small ditches that Damon Cline then approved on behalf of the Division of Highways did not interfere with the cover that was placed upon the pipe. It was entirely another story, however, when reditching occurred. The deeper ditches ordered by Drucilla Hackney directly affected the cover placed over the pipe and removed portions of the forty-two inches of cover that had been placed upon the pipe. Quite frankly, there is no other explanation to offer as to why the work of Pipemasters was completed in the initial construction phase appropriately, but some seven months later found to have deficiencies with instances of insufficient cover having been discovered. Needless to say, the West Virginia American Water Company rejects this explanation, but the jury in this case heard sufficient testimony for it to conclude that there was a reasonable explanation offered as to why insufficient cover had been found, and more importantly in the case of HNTB, the jury concluded that HNTB did not breach its contract with the West Virginia American Water Company as to providing inspection and certification services.

When Damon Cline of the Division of Highways testified, Mr. Cline was asked many questions about how he fulfilled his duties of inspecting the restoration of the right-of-way after Pipemasters had laid the pipe.

Q Does the lay of the land out on this particular stretch of sections in Putnam County, does it dictate sometimes where the contractor can go with the water line?

A Absolutely.

Tr. 2698.

...

Q With respect to Pipemasters' installation of this utility along the side of the right-of-way where they selected, did you find anything wrong with Pipemasters' chosen location of it?

A No.

Tr. 2699.

...

Q Did there ever come a time where Pipemasters was required to cut additional ditches or do what we call --

A Yes. Yes, they did.

Q How did that come about?

A Dru wanted deeper ditches. Said the ditches weren't deep enough.

Q Who is Dru?

A Drucilla Hackney is my boss.

Tr. 2700-2701

...

Q What was -- what happened when the re-ditching occurred? I mean physically, tell the jury what happened.

A Well, the ditches they had in there was -- I thought was adequate, adequate to protect the road. They dug the ditches. In order to dig -- you wind up with about this much room to put a ditch in. You've got to dig it straight down, and that's going to keep the ditch from sliding right back in. If it's less

than a two-to-one slope, dirt won't stay there. It sides off.

Tr. 2701-2702.

...

Q Now, you mentioned there was a time when Ms. Hackney indicated that she wanted the ditches cut deeper. Tell the jury what Mr. Fellure said, or his position was, with respect to the cutting of additional and deeper ditches.

A Well, he objected to it. Said, 'Well, you were satisfied with the ditches I cut. I cut them the way you wanted them. I don't think I should have to cut them any more.'

Tr. 2704-2705 (D. Cline). It is readily apparent when considering Damon Cline's testimony, that Drucilla Hackney's decision to require that deeper ditches be cut caused cover to be taken away from the pipe that had been laid by Pipemasters, and changed the configuration of the landscape from which it had been left when Pipemasters originally installed the pipe and HNTB had inspected the same in May of 2000.

Damon Cline also emphatically stated that he was the only individual at the site who could give any directions or orders with respect to ditching or the restoration of the right-of-way. By Damon Cline's answer, there can be no speculation that HNTB somehow shared inspection duties with the Division of Highways.

Q And you were working only on Contract 4?

A Yeah. It was a twelve-mile area there. I don't know, just three or four contracts there. I was on all those contracts.

Q You weren't assigned to any other job besides Contract 4 by DOH at that time?

A No. Absolutely not.

...

Q If you had any questions at all about how a ditch was supposed to be dug or where a ditch was supposed to be dug, who would you ask that question to?

A I never asked that question. If I would have asked it, I would ask Hackney. I wouldn't ask HNTB.

Tr. 2742-2743.

...

Q You were continuing to do your job as the DOH inspection; is that right?

A That's right.

Q You never gave any of that job function to HNTB, did you?

A No.

Tr. 2746 (D. Cline).

While the aforementioned excerpts from the transcript of the trial only provide a brief glimpse as to the totality of this testimony regarding the work that was done on Project 4 in Putnam County and HNTB's job in inspecting that work, it is abundantly clear that after hearing testimony such as that set forth in the excerpts above, that the jury had a reasonable basis to conclude that HNTB did not breach its contract with the West Virginia American Water Company to provide inspection and certification services of Pipemasters' work.

IV. Response to Assignment of Error

The West Virginia American Water Company contends that 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 HNTB. HNTB responds that a new trial is not warranted in this instance because the Appellants did not and cannot demonstrate that the verdict rendered by the Putnam County jury was against the clear weight of the evidence. Moreover, the Appellants also cannot demonstrate that the verdict was based upon false evidence, or that the verdict would result in a miscarriage of justice. The Appellants' arguments fall short of proving that the trial court abused its discretion in any respect in ruling on issues that arose in discovery or at trial, or on the Appellants' motion for a new trial. With respect to the claims against HNTB Corporation, there was clearly sufficient evidence presented in the record for the jury to conclude that HNTB had properly performed its inspection and certification services. No error has been suggested, implied or articulated in any manner whatsoever with regard to the claims against HNTB. Consequently, the jury's verdict that HNTB did not breach its contract with the West Virginia American Water Company must stand.

V. Authority and Discussion of Law

Any analysis as to the merit of this Appeal as it pertains to the claims against HNTB must begin with the statement in the Appellants' brief that, "As to HNTB, although the errors are not as apparent," the evidence when fairly reviewed compels a new trial. (See brief at Page 18.) Not only are there no errors in the record of this case as to HNTB, the Appellants have not identified any discernable issue or matter which should cause this Honorable Court to take pause to consider whether the verdict of this jury should be disturbed as to HNTB. That portion of the Appellants' brief which focuses on HNTB is the new invention of the West Virginia American Water Company that seeks to give HNTB the responsibility of DOH inspection services. It appears that because the Appellants are so sure and so adamant that Pipemasters did not bury the pipeline sufficiently during the original contract phase, the Appellants believe it is axiomatic that HNTB must not have inspected Pipemasters' work in an appropriate manner.

The difficulty encountered by the Appellants in articulating why the jury's verdict should be disturbed as to the claims against HNTB is perhaps best explained by focusing on the special interrogatory provided to the jury in the verdict form. The special interrogatory reads:

Do you find by a preponderance of the evidence that HNTB Corporation breached its contract with the West Virginia American Water Company to provide inspection and certification services of Pipemasters' work on the contract, and that such breach was a proximate cause of the damages sought by the West Virginia American Water Company?

Yes

No

(See Page 4 of Verdict form.) The question posed to the jury in this special interrogatory required the jury to make a summation of all of the evidence presented to it during the trial. There is no legitimate reason to disturb the jury's judgment in responding to this special interrogatory. To be sure, the Appellants had the opportunity to present any and all documentary evidence and oral testimony to this jury that would demonstrate that HNTB did not inspect Pipemasters' work correctly. HNTB, on the other hand, also had the opportunity to present its evidence to the jury that its inspection services were competent and professional in every respect. Excerpts from the transcript provided earlier in this brief show that every HNTB witness and West Virginia Division of Highways employee, Damon Cline, testified that HNTB had inspected appropriately. While references to their oral testimony have not been included here because of their redundant nature, all witnesses who testified on behalf of Pipemasters similarly had no complaints or challenges to make about the quality of HNTB's inspection services. At the end of the day, the only individuals who criticized HNTB's work were West Virginia American Water Company employees David Carovillano and, to a certain extent, Tom Boggs. Even in those instances, however, their criticism was simply based upon an assumption that there must have been something wrong with HNTB's inspection services, or else Pipemasters' depth of burial of the water line would not have been called into question. From West Virginia American Water Company's perspective, there can be no other explanation for Pipemasters' alleged insufficient burial of the pipeline; HNTB had to be negligent in performing its inspection of Pipemasters' work.

The West Virginia American Water Company's criticism of HNTB, however, took a different turn when West Virginia American Water Company engineer, David Carovillano, suggested that HNTB also had neglected to perform DOH inspection duties as a part of its inspection services. For nearly one-half to three-fourths of the time spent in trial, no witness had even implied that HNTB ought to be performing DOH inspection services in addition to its own duties under the contract. There can be no doubt, however, that during the latter stages of the trial, for whatever reason, West Virginia American Water Company began to advocate the proposition that HNTB had either been negligent or breached its contract with the Water Company in failing to assume these DOH responsibilities. Remarkably, in its brief, at Footnote 13 on Page 42, West Virginia American Water Company characterizes this line of inquiry as a spurious issue which grew out of HNTB's interrogation of Mr. Carovillano.³ While the characterization of this particular line of inquiry may have indeed been spurious, the origin of this line of inquiry grew out of testimony from a West Virginia American Water Company engineer, David Carovillano. Moreover, West Virginia American Water Company did not let the issue die after Mr. Carovillano's testimony. The Water Company continued to advance this proposition, and in its closing argument maintained that HNTB had failed to assume DOH inspection duties. If the Water Company had any credibility with respect to its claim against HNTB, that credibility was lost by this particular

³While HNTB does not dispute the characterization of this issue as spurious, the issue only arose because Water Company witnesses embraced the concept and made it their theme throughout the remainder of the trial.

strategy.

Throughout the trial, the jury had heard evidence about DOH's involvement in this project, and had heard testimony from Damon Cline, the West Virginia Division of Highways employee, as to how he was present on the job site nearly every day, and as to how he was performing his DOH inspection duties. Thus, for the Water Company to have suggested that HNTB had assumed some or all of the DOH inspection responsibilities simply did not make any sense with respect to the evidence the jury had heard up to that particular point in time. For that matter, even assuming *arguendo* that HNTB had assumed DOH inspection duties, why did the DOH have Damon Cline assigned to Contract 4 full time? Mr. Cline's presence would have been unnecessary if HNTB had assumed DOH inspection functions.

Yet, despite the fact that there was no evidence before this jury to suggest that HNTB had accepted DOH inspection responsibilities, the Appellants still state forthrightly in their brief that, "The approximately \$100,000 paid to HNTB for this work on PC-4 alone included fulfillment of the DOH specifications." See brief at Page 42. This statement in the brief is contradicted completely by HNTB Vice-President Gene Weekley's testimony during the trial when he was asked whether HNTB was to make sure that Pipemasters was fulfilling DOH specifications. Mr. Weekley responded, "Negative." **Tr. 3082 (G. Weekley)**. (Emphasis supplied.) Weekley responded further:

I don't know where you're going with this. But the simple fact of the matter is that the Highway Department has their own inspector on site to look after the Highway Department matters. Our inspectors obviously observe what's going on. And I'm sure, at least I hope, if they see something unsafe

relative to the traveling public or the contractor leaving mud on the road, those kinds of things, that he would point it out to the Highway Department inspector. But it's the Highway Department's inspector's responsibility to deal with the contractor on those matters.

Tr. 3082 (G. Weekley). (Emphasis supplied.) Gene Weekley's testimony could not have been more emphatic to anyone who was in the courtroom on this particular day. The pages of the transcript do not reveal the resonance of Mr. Weekley's voice when he denied, in no uncertain terms, that HNTB had any responsibility whatsoever when it came to DOH duties with regard to the inspection and restoration of the right-of-way. Yet, the Appellants continued to argue to this jury that HNTB had, in fact, assumed DOH inspection duties. Credibility of the parties and the arguments and theories they advanced was an issue in this particular case, and credibility of these witnesses cannot be judged from reviewing the subject paper transcript.

Without a doubt, this Putnam County jury was presented with conflicting testimony on many issues about the laying of the pipe on this water line extension project. Quite recently, however, in this Court's decision, In Re: Tobacco Litigation, 215 WV 476, --, 600 S.E.2d 188, 192 (WV 2004), this Court affirmed a jury's verdict declining to require the manufacturers of certain tobacco-containing products to provide medical monitoring to individuals who were significantly exposed to the potentially harmful effects of smoking. In affirming the trial court's Order upholding the jury verdict, this Court stated:

Typically, when a case has been determined by a jury, the questions of fact resolved by the jury will be accorded great deference. 'An Appellate Court will not set aside the verdict of a jury, founded on conflicting testimony

and approved by the trial court, unless the verdict is against the plain preponderance of the evidence.’ [Citations omitted.] ‘On appellate review of a case wherein jury verdict has been rendered, it is the duty of the reviewing court to treat the evidence as deemed favorable to the verdict...and give it the strongest probative force of which it will admit. So long as there is nothing so inherently or otherwise manifestly improbable in the character of the evidence as to justify the Court in ignoring it.’ [Citation omitted.] Accordingly, ‘...[i]n 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.’ [Citation omitted.]

(In Re: Tobacco Litigation, 600 S.E.2d at 192.)

Clearly, throughout the trial of this case, there was conflicting testimony as to why there was insufficient cover on part of the pipeline that had been installed by Pipemasters. While the Appellants steadfastly dispute the contention of Pipemasters, Mid-State Surety Corporation and HNTB that re-ditching had caused this problem to occur, and/or the involvement of the West Virginia Division of Highways, the jury made up of citizens of Putnam County heard the various witnesses from each of the parties describe the circumstances *ad nauseum* as to why the pipe had insufficient cover in certain areas. Acknowledging that there was a factual dispute, how can the Appellants now contend that the jury’s verdict is plainly wrong simply because they disagree with it? Each of these parties to this litigation had full and fair opportunities to present their cases through exhibits and the oral testimony of witnesses, and in the end the jury found the case presented by the Appellants was not convincing.

In Gillingham v. Stevenson, 209 WV 741, 551 S.E.2d 663 (WV 2001), the Supreme

Court of Appeals of West Virginia stated that in determining whether there is sufficient evidence to support a jury verdict, the Court should:

1. Consider the evidence most favorable to the prevailing party;
2. Assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party;
3. Assume as proved all facts which the prevailing party's evidence tends to prove; and
4. Give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Gillingham v. Stevenson, 209 WV at 744, 551 S.E.2d at 669. Similarly, in the present case, if the trial court (1) considers the evidence most favorable to HNTB; (2) assumes that all conflicts in the evidence were resolved by the jury in favor of HNTB; (3) assumes as proved all facts which HNTB's evidence tends to prove; and (4) gives HNTB the benefits of all favorable inferences which reasonably may be drawn from the facts proved, it is axiomatic to conclude that it would be improper for this Court to grant a new trial to the Appellants as to their claims against HNTB.

This Honorable Court has continued over the years to refine and analyze the circumstances in which an appellate court should disturb a jury's verdict. In Hines v. Hills Department Stores, Inc. 193 WV 91, 454 S.E.2d 385 (WV 1995), in a concurring opinion, Justice Franklin Cleckley prefaced his remarks by stating: "Normally, I would dissent in cases where this Court, in its appellate role, overrules a jury verdict. One of the risks of trial is an unpleasant verdict." Hines, 193 WV at 97, 454 S.E.2d at 391. In the present case, it

goes without saying that the verdict of the Putnam Circuit Court was unpleasant to the Appellants. Nevertheless, this Honorable Court needs something more tangible, something more overt, in which to sink its teeth into, if it wishes to disturb the jury verdict in this case. To argue that the weight of the evidence does not support the jury verdict in this case after three and one-half weeks of trial simply does not cut it. Particularly with respect to HNTB, the jury rendered its verdict that HNTB had performed its inspection and certification services properly without any qualification.

In another opinion of this Court concerning the authority of a trial court to set aside a jury's verdict as being against the weight of the evidence, Justice Cleckley offered a succinct concurring opinion dealing with this Court's authority to grant or deny a motion for a new trial under Rule 59 of the West Virginia Rules of Civil Procedure. See In Re: State of West Virginia Public Building Asbestos Litigation, 193 WV 119, 131, 454 S.E.2d 413, 425 (WV 1994). In this concurring opinion, Justice Cleckley agrees with Justice McHugh's analysis in the majority opinion, and explains that by broadening the authority of trial courts and limiting that of the appellate courts, this Court has struck a decent note for judicial restraint and judicial economy. Justice Cleckley further explains that the decision to grant or deny a new trial rests within the sound discretion of the trial court, and this Court reviews that decision for a clear abuse of discretion. Id., 454 S.E.2d at 426, see also Browning Ferris Industries of Vermont, Inc., v. Kelco Disposal, Inc., 492 US 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). In fact, Justice Cleckley states that absent a clear abuse of discretion,

the position of this Court is the same as the federal test in that a trial court's decision will not be reviewable on appeal save in the most exceptional circumstances. *Id.*, 454 S.E.2d at 426, see also *Linder v. Durham Hosiery Mills, Inc.* 761 F.2d 162, 168 (4th Cir. 1985), quoting *Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 354 (4th Cir. 1941). (Emphasis supplied.)

Cleckley explains that Judge McHugh is correct in his analysis that the power of the trial court should be exercised sparingly. Even if a trial court disagrees with the verdict, it should accept the jury's findings on credibility matters unless the verdict is clearly against the manifest weight of the evidence or the jury acted under some mistake or under some improper motive, bias or feelings. Justice Cleckley further explained that this particular decision is committed to the discretion of a trial court, because it, "is in a position to see and hear the witnesses and is able to view the case from a perspective that an Appellate Court can never match." *Id.*, 454 S.E.2d at 426. See also *Weil v. Seltzer*, 873 F.2d 1453, 1457 (D.C. Cir. 1989). (Emphasis supplied.) Justice Cleckley goes on to explain that there are many critical events that take place during a trial that cannot be reduced to record, which may affect the mind of the judge as well as the jury in forming the opinion as to the weight of the evidence and the character and the credibility of witnesses. "These considerations can and should not be ignored in determining whether a new trial was properly granted." *Id.* (Emphasis supplied.) Moreover, the Eleventh Circuit Court of Appeals has observed that these principles are particularly apt even in cases where the motion for a new trial is denied. *Id.*, 454 S.2d 426-427. See *Blu-Jay, Inc. v. Kemper CPA Group*, 916 F.2d 637 (11th Cir.

1990).

In the present case, after the three and one-half week trial, it is clear that the trial court was in a unique position to scrutinize and consider many critical events that took place during this case which cannot be made a part of the transcript herein. The trial court as well as the jury formed many opinions about the weight of the evidence and the character and credibility of the witnesses that came before it to testify about the way the pipe was laid and the issues concerning insufficient cover. The trial court, in its wisdom, recognized that there was a reasonable basis for the conclusions reached by the jury.

Consider, for example, the trial court's comments at the post-trial hearing on June 7, 2004, when it posed the following question to counsel for the West Virginia American Water Company:

The Court: Could the jury in this case, based on the evidence, have reached the determination that the work was done, the work was inspected by HNTB on behalf of the Water Company, on behalf of the Highway Department, but then, subsequently, after having been approved, that the Highway Department made them come back, do the recontouring, the re-ditching, all the terminology that we've done, and could not the jury have reached a decision in this case that, quote, unquote, the bad guy, unquote, was the Highway Department? That as a result of the re-ditching, if there was subsequent problems, it was caused by the Highway Department making them come back and undo what was otherwise good work as evidenced by HNTB.

Tr. 3525 (J. Spaulding).

While counsel for the West Virginia American Water Company never really answered the Court's inquiry, it is perhaps not remarkable that in this concise question posed by Judge Spaulding, the trial court summed up exactly what had occurred during the three and one-half

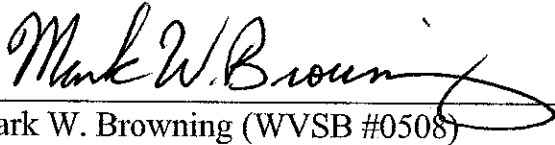
weeks of trial. In considering the evidence in the light most favorable to the plaintiff and to those parties that were found not to have breached their contract with the Appellants, it is quite plausible to suggest that the jury reached just such a conclusion. Under such circumstances, this Honorable Court should not disturb the trial court's verdict in this case. The mountain of documentary evidence and oral testimony which was presented to this Putnam County jury gave this jury the opportunity to consider all possible scenarios as to why insufficient cover was discovered on portions of the pipeline in late 2000. After considering this evidence and deliberating about it amongst themselves, this jury concluded that HNTB had performed its inspection and certification duties appropriately, and that Pipemasters had likewise performed its obligations under Contract 4 appropriately. In addition, the jury found that Pipemasters was entitled to additional compensation for the extra work that it was required to do, rejecting the argument of the Appellants that a new contract had been formed. However unpleasant this verdict may be to the Appellants herein, there is no justification for this Honorable Court to disturb this jury verdict. To do otherwise after the time and efforts that have gone into the preparation and trial of this case would be a miscarriage of justice to HNTB Corporation, Pipemasters and Mid-State Surety Corporation.

VI. Reasons Relief Is Not Warranted

The jury's verdict in this matter is not against the clear weight of the evidence, is not based on false evidence and does not result in a miscarriage of justice. The jury answered the special interrogatory posed to it by declaring that HNTB had performed its inspection and certification services of Pipemasters' work on the project, consistent with HNTB's obligations under the subject contract. For these reasons, Third-Party Defendant HNTB opposes this Appeal and urges this Honorable Court to uphold the findings of the Putnam County jury and put this matter to rest.

HNTB CORPORATION,

By counsel



Mark W. Browning (WVSB #0508)

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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, and
THE WEST 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,

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.

CERTIFICATE OF SERVICE

I, Mark W. Browning, counsel for Third-Party Defendant/Appellee HNTB Corporation, do hereby certify that true and correct copies of the foregoing "*Third-Party Defendant/Appellee HNTB Corporation's Brief*" were sent via United States mail to the

following counsel of record this 22nd day of June, 2005:

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