

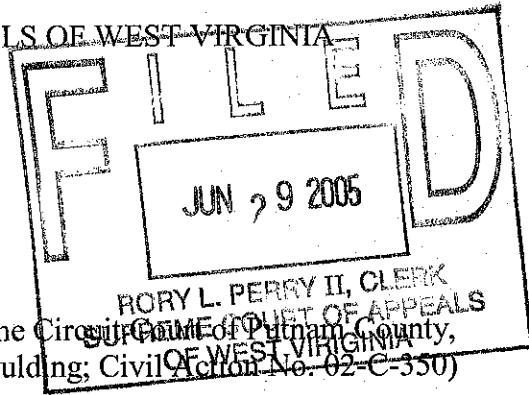
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

John Philip Melick (WV Bar #2522)  
JACKSON KELLY PLLC  
Post Office Box 553  
Charleston, West Virginia 25322-0553  
(304) 340-1289

Jay M. Potter (WV Bar #2949)  
SCHUMACHER, FRANCIS & NELSON  
Post Office Box 3029  
Charleston, West Virginia 25331-3029  
(304) 342-4567

June 29, 2005

## TABLE OF CONTENTS

	<u>Page</u>
Introduction and Review	2
Appellees Ignore the Most Critical Evidence	4
Where Did Pipemasters Put the Pipe?	5
The Contract Required <i>Earth</i> on <i>Top</i> of the Waterlines	7
The Contract Required Appellees to Satisfy the DOH	8
The Only Change in the Contract Specification Benefitted Pipemasters, Mid-State, and HNTB by Reducing the Amount of Corrective Work	11
Incorrect Certifications and Partial Payments Do Not Excuse Defective Work	12
Mid-State's Refusal to <i>Perform</i> Was the Genesis of Its Liability	14
The Building Commission Was Under No Obligation to Sue the Water Company	17
The Jury Instructions on Surety Liability Were Incorrect	18
Mid-State Has No Excuse for Its Improper Closing Argument	20
HNTB Failed to Allow for <i>Any</i> Ditches	21
A Long Trial Is Not Necessarily a Good Trial	23
Conclusion	24

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Gateway Communications, Inc. v. John R. Hess, Inc.,</u> 208 W. Va. 505, 541 S.E.2d 595 (2000)	2
<u>Hurxthal v. Boom Co.,</u> 53 W. Va. 87, 44 S.E. 520 (1903)	17
<u>Kesari v. Simon,</u> 182 W. Va. 795, 392 S.E.2d 511 (1990)	3, 4
<u>Logan Bank &amp; Trust Company v. The Letter Shop, Inc.,</u> 190 W. Va. 107, 437 S.E.2d 271 (1993)	18
<u>Nat'l Surety Corp. v. The United States,</u> 118 F.3d 1542 (Fed. Cir. 1997)	13
<u>Smith v. Buege,</u> 182 W. Va. 204, 387 S.E.2d 109 (1989)	15
<u>Southwood Builders, Inc. v. Peerless Ins. Co.,</u> 366 S.E.2d 104 (Va. 1988)	13
<u>Toppings v. Rainbow Homes,</u> 200 W. Va. 728, 490 S.E.2d 817 (1997)	18
<u>Transamerica Insur. Co. v. Kennewick,</u> 785 F.2d 660 (E.D. Va. 1995)	13
<u>Other</u>	
64 CSR 77	7
<i>Restatement (3d) of Suretyship</i> § 42	12

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,*

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

## Introduction and Review

It is not surprising, given the factual complexities and competing interests, that each appellee goes its own way in responding (or not) to the issues that this Court has already determined merit appellate review.<sup>1</sup> Our initial brief (“BC/WC Brief”) was organized as follows:

Claims of Pipemasters	20
Pipemasters Agreed to Cure the Defects In Its Work In Consideration of Relief from the Original 42" Specification	21
Pipemasters Failed to Timely Assert Claims in Accordance with the Contract	32
The Contract Precludes Payment for Corrective Work	33
The Stream Crossing Changes Were Made to Accommodate Pipemasters	34
Claims of the Water Company	35
Pipemasters Breached the Contract, and Then Reneged On a Modified Agreement	37
Mid-State Breached Its Bond	40
HNTB Breached Its Contract with the Water Company	42
The Water Company’s Claims All Arose Directly from the Completion of the Corrective Work for Which Pipemasters, Mid-State, and HNTB Were Responsible	44
Jury Instructions as to Suretyship	45
Mid-State’s Closing Argument	47

---

<sup>1</sup> Several issues ignored by all three appellees are: Pipemasters’ recovery is limited to retainage and test hole expense (*see* BC/WC Brief at 20, n. 7); Pipemasters failed to timely assert claims under the contract (*Id.* at 32); the contract precludes payment for corrective work (*Id.* at 33); and the only change made in the field involved a stream crossing, and accommodated Pipemasters (*Id.* at 34).

Because each appellee has responded differently, this reply is somewhat challenging to organize.

We hope that the following approach will efficiently close the briefing:

- ▶ First, at page 4, we note the appellees' unanimous disregard of the most critical evidence in the record: Pipemasters' correspondence acknowledging the "deficiencies" in its work, and recommitting to correct it. *See* BC/WC Brief at 21-31. That evidence is dispositive of many issues in this case under Kesari v. Simon, Syl. Pt. 1, 182 W. Va. 795, 392 S.E.2d 511 (1990), a case that none of the appellees so much as acknowledges.
- ▶ Pages 5 and 6 address an unusual argument about where the waterlines at issue were buried, relative to the highway ditches. Then, at page 7, we will show that the contract specifications always required that the waterlines be buried directly beneath solid material, irrespective of their relative lateral location, and that there never was any "change in the specifications" in this regard.
- ▶ Pages 8 through 10 are a reply to the argument that the cost of the purported "reditching" should be borne by the Building Commission and the Water Company, as opposed to appellees, who were responsible for the actual construction.
- ▶ Page 11 addresses Pipemasters' distortion of the compromise concerning cover.
- ▶ From pages 12 to 19, we address a series of additional suretyship and related arguments made by Mid-State. Mid-State fails to appreciate the nature of a performance bond, and how it came to be and remained liable when its principal, Pipemasters, refused to complete the corrective work to which it had agreed in consideration of a loosened cover specification.
- ▶ Page 20 briefly addresses Mid-State's closing argument.
- ▶ Pages 21 and 22 are devoted to HNTB, and its arguments about its duties on the job site. HNTB's own daily log and witnesses' testimony show that it failed to see to adequate coverage of waterlines under the contract specifications. HNTB simply forgot to take the required highway ditches into account in monitoring trench depth.
- ▶ Page 23 reviews the respective roles of judges and juries in the resolution of contractual disputes.

We appreciate the number and complexity of the issues that this Court has agreed to consider.

No brief can completely cover every issue, and we look forward to addressing them directly with the Court when the case is argued later this year.

{C0956660.1}

### Appellees Ignore the Most Critical Evidence

The importance of Mr. Fellure's letters displayed at pages 21-31 of our opening brief cannot be overstated; they are dispositive of most issues in this case. But the closest that any appellee comes to dealing with them is Pipemasters' sweeping assertion that our brief "attempts to bizarrely mischaracterize and interpret various correspondence..." Pipemasters Brief at 24.<sup>2</sup> To the contrary, the actual letters appear right in the pages of our opening brief, and speak clearly for themselves. This evidence not only precludes any recovery by Pipemasters; it also establishes the liability of both Pipemasters and Mid-State *to* the Building Commission and Water Company.

Every excuse for the shallow cover over the waterlines was foregone when Pipemasters *renewed* a commitment to cover the line with at least 36" of earth, long after the "(re)ditching" excuse was raised. See BC/WC Brief at 21-31. "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 (citations omitted). It is remarkable that there is not a single mention of Kesari in any of the three appellees' briefs.<sup>3</sup>

---

<sup>2</sup> See also, Mid-State Brief at 10, asserting that Pipemasters "demanded payment" when it "proceeded to perform corrective work." In fact, Pipemasters wanted to know "the appropriate **decrease** in the contract price ... [so] we can be able to weigh the cost verses [sic] the cost of construction." (emphasis added) See BC/WC Brief at 26.

<sup>3</sup> With respect to Kesari, we acknowledge that HNTB was not as directly bound by Mr. Fellure's letters. However, HNTB was privy to the entire investigation and renegotiation process. HNTB not only measured the test holes dug by Pipemasters, it returned to the field and oversaw without any further charge Pipemasters' corrective work up to the time Pipemasters (and Mid-State) reneged. *Tr. 1427 [Weekley]*.

{C0956660.1}

### Where Did Pipemasters Put the Pipe?

Appellees argue that DOH-directed “reditching” removed cover from work that would otherwise have been adequate. See Pipemasters Brief at 16, 22-23; Mid-State Brief at 8-10; HNTB Brief at 27-30. This appears to be appellees’ central argument, it was addressed in our opening brief, and it will be further addressed below.

Yet, appellees also say that the pipe was *not* laid beneath the ditches. See Pipemasters Brief at 13-15, 17, 26, 28-29, 31-32, 35; Mid-State Brief at 12, fn. 6; HNTB Brief at 24-26 (implicit). But then how could the so-called “reditching” have removed cover?



This and several other pictures of Mr. Fellure came with his March 14, 2001, letter in which he first raised the ditching issue. *Pipemasters Ex. 8* (“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”).

{C0956660.1}

Notwithstanding his own letter, Mr. Fellure during the trial maintained that, in many of these pictures, the pipeline had *not* been buried beneath the ditch. *Tr. 1041-1042 [Fellure]*.<sup>4</sup> This seemed to us odd at the time, a tactic irreconcilable with any strategy other than to confuse the jury. We have no idea at all why appellees would at this point still be making an argument that is not merely pointless, but that contradicts the whole “reditching” excuse.

---

<sup>4</sup> It also bears repeating that Mr. Fellure’s March 14, 2001, letter only addressed a *single* ditching requirement, *i.e.*, “CUT IN **THE DITCHLINE.**” *See* BC/WC Brief at 23 (emphasis added). The excuse evolved to “reditching,” *i.e.*, a purported *second* ditching directive from the DOH, much later, after Pipemasters reneged on its recommitment to the Building Commission, and the lawyers got involved. There is no contemporaneous record of Pipemasters having complained about having to ditch *again*. *Cf.*, *Tr. 2877-2878 [Hackney]* (“What ditching? You know, there’s not that much out there.”).

Mid-State also asserts that “[t]he contract and bid documents tendered by the Building Commission were inadequate and defective in that they failed to disclose the necessity or location of these ditches and, as a result of the over-excavation, the proper cover over the previously installed waterline was inadequate and was, at least in some places, below the required 36”.” Mid-State Brief at 9-10. Neither Pipemasters, Mid-State, nor HNTB made such an assertion when they had the opportunity to review the bid package, before committing themselves to satisfactory completion of the project; this was just another issue raised by the lawyers for Pipemasters and Mid-State after both reneged on the corrective work. Nor does Mid-State now make this assertion in the context of any cogent argument relevant to this appeal.

{C0956660.1}

The Contract Required *Earth* on *Top* of the Waterlines

The contract said how to cover the pipeline. See BC/WC Brief at 8-9, 37. (Pipemasters ignores all these provisions; Mid-State and HNTB address only a few of them.) Mr. Fellure admitted that pipeline must be buried with “solid material.” *Tr. 1036 [Fellure]*; see also, HNTB Brief at 2 (“forty-two inches of cover (dirt) over the top of the pipe.”) But Pipemasters and Mid-State now say that “cover” could be measured from the highway pavement, even if lying several feet away! See Pipemasters Brief at 9 (“The Appellants’ PC4 Contract documents did not define ‘finished grade’...”), 26 (“pipe to black top”), 32-36; Mid-State Brief at 11-12. Nonsense; a waterline is no more “covered” by the “finished grade” of a paved highway five feet away than it is “covered” by the airspace of the ditches in which Mr. Fellure posed for his pictures.

SC #9 of the contract (*Contract 0172*) required compliance with DOH regulations: “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) (emphases added).

To assert that measuring cover from the top of the pipe to the “bottom of the ditch” was some “change in the specifications” is to obfuscate. There always had to be adequate solid cover (not air) directly atop the waterline, from the top of the pipe to the “finished grade.” For those lines buried beneath the pavement, the “finished grade” is the surface of the road. For those lines buried beneath the berm, the “finished grade” is the top of the gravel. And, for those lines buried beneath highway ditches, the “finished grade” *is* the “bottom of the ditch.”

### The Contract Required Appellees to Satisfy the DOH

Appellees now blame everything on the DOH.<sup>5</sup> They say that Damon Cline, a DOH inspector whom Pipemasters describes as “[p]erhaps the most authoritative witness,” a man “[w]ith 25 years of experience in the DOH Utility Construction Division,” was countermanded by his supervisor, “[t]he ‘new’ DOH utility inspector, a Ms. Drucilla Hackney...,” who would only “‘drive through’” the job site. Pipemasters Brief at 23 (note 13), 29-30 (footnote 17), 31; *see also*, Mid-State Brief at 9-10, HNTB Brief at 26-29.<sup>6</sup>

Appellants fail to note that Mr. Fellure had called Ms. Hackney and “requested Damon to be his inspector,” an unheard of request. *Tr.* 2876 [*Hackney*].<sup>7</sup> Later, Mr. Cline told Ms. Hackney that “he couldn’t get [Pipemasters] to put a ditch line in.” She also overheard him telling others that he had “kept [Mr. Fellure] from going bankrupt.” *Tr.* 2874-2875 [*Hackney*].

---

<sup>5</sup> This “empty chair” strategy starts with the first sentence in Mid-State’s brief: “This controversy is the unfortunate result of a party factually responsible, but not legally liable, inadvertently causing the expense of the waterline installation at issue to be far greater than Appellants originally planned.” *See* Mid-State Brief at 1.

On the other hand, HNTB was unwilling to commit on this issue, even as late as opening statements. *Tr.* 619 [*Browning*] (“There is going to be evidence presented by Pipemasters that ditching that occurred after it left the work site resulted in leaving it with the problem that it now has of insufficient cover. I can’t tell you whether that is true or not because we weren’t on the job site. ... I look forward to talking to you at the end of the case when I’ll come back to you and actually give you, hopefully, my interpretation much more pointedly as to why I think this project resulted in the problems that resulted.”).

<sup>6</sup> Pipemasters and Mid-State say she was “new,” but Ms. Hackney at the time of the trial had been working for the DOH for 34 years. *Tr.* 2861 [*Hackney*].

<sup>7</sup> Earlier in the trial, Mr. Fellure admitted having known Mr. Cline since 1993, but denied any effort to have him assigned to Pipemasters’ PC4 project. *Tr.* 1040-41 [*Fellure*]. After Ms. Hackney testified to the contrary, Pipemasters’ counsel declined any cross-examination. *Tr.* 2900 [*Roncaglione*]. Nor was there anything further from Mr. Fellure on this issue when he retook the stand to dispute testimony about one of his other conversations. *Tr.* 3086 [*Fellure*].

But even assuming that Mr. Cline did oversee and accept adequate ditches, and that Ms. Hackney then required “reditching,” contractual responsibility among these parties would be unaffected. Pipemasters, HNTB, and Mid-State all took on their respective responsibilities under contracts that explicitly imposed upon each of them the obligation to satisfy *the DOH*, not just Mr. Cline. See BC/WC Brief at 8-9. Indeed, HNTB emphasizes that DOH had the “final say”:

~~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.**~~

See HNTB Brief at 11-12 (emphasis by HNTB); see also, HNTB Brief at 15-16, citing *Tr. 1406-1407 [Weekley]* (“Department of Highways is the one that has to be satisfied.”; “That’s – the contractor was to satisfy the Highway Department.”).

Even if one assumes that the DOH acted capriciously, Mid-State fails to explain why the Building Commission and Water Company are the parties who should bear the brunt:

Appellants bore the risk of this expense as they had agreed that any such adjustments would occur at no expense to DOH –hence, DOH’s the factual but not legal responsibility. (Tr. 742-743 [H. Fellure]; Pipemasters Ex. 2 and 3.) ...

It was thus the re-ditching process and attendant expense that began the controversy, because it put the Appellants in the unfortunate situation of having to pay for work which the DOH was factually responsible, since the DOH insisted on the re-ditching that removed the cover, but not legally liable, given the indemnification agreement making Appellants responsible for corrections. (Tr. 742-743 [H. Fellure]; Pipemasters Ex. 2 and 3.)

Mid-State Brief at 2, 10 [sic]; see also, Mid-State Brief at 16. But the record cited by Mid-State fails to support the proposition. Mr. Fellure at this point was testifying that the line was not placed in the ditch, an argument that, as shown above, is inconsistent with the “reditching”

{C0956660.1}

excuse. *Tr. 742-743 [Fellure]*. Pipemasters Ex. 2 is a voluminous extract from the contract, and Mid-State makes no reference to any specific provision. Pipemasters Ex. 3 is a copy of the permit issued by the DOH (by “Drucilla A. Hackney, Utility Supervisor”), which does indeed impose upon the permittee Building Commission obligations running to the DOH. But how do those obligations obviate provisions of independently negotiated construction contracts, under which Pipemasters as contractor, Mid-State as surety, and HNTB as resident-inspector agreed to achieve compliance with DOH construction standards? Mid-State does not say.

{C0956660.1}

The Only Change in the Contract Specification Benefitted Pipemasters, Mid-State, and HNTB by Reducing the Amount of Corrective Work

At page 14 of its brief, Pipemasters says that changing the cover specification from 42 to 36 inches resulted in additional work for Pipemasters, and at page 25, Pipemasters asserts that the change “saved the Appellants, not Pipemasters hundreds of thousands of dollars.” (emphasis by Pipemasters).<sup>8</sup> To the contrary, the change was an accommodation that made acceptable thousands of feet of otherwise defective work, *i.e.*, all lines with between 36 and 42 inches of cover, thereby reducing the corrective work and liability of Pipemasters, Mid-State, and HNTB. See BC/WC Brief at 10, 21-31.

---

<sup>8</sup> There are two misleading citations to the record on page 25 of Pipemasters’ brief in support of this proposition. The Water Company’s Mr. Boggs at page 2231 of the transcript was testifying about his dispute with the DOH on *other* contracts about *two-foot* ditches that were too *deep*. (See also, Mid-State Brief at 11, citing the same Boggs testimony.) Counsel at page 588 of the transcript was describing Pipemasters’ recommitment to correct its work, after the Building Commission, upon advice from the Water Company as consulting engineer, agreed to accept only 36 inches of cover, in lieu of the 42 inches specified in the contract. This only “saved” the Water Company money later, after Pipemasters and Mid-State reneged on this recommitment, and the Building Commission – without any more funds – asked the Water Company to finance completion of the project.

We would also note that Pipemasters misstates (twice) the evidence given by Bill Chambers with respect to his conversation with the Water Company’s Mr. Schultz. Pipemasters asserts that Mr. Schultz told Mr. Chambers “that it was not Pipemasters’ fault.” See Pipemasters Brief at 18 (footnote 12) and 23 (footnote 13) (emphasis by Pipemasters). Here is the actual testimony of Mr. Chambers about what was said: “And Dave [Schultz] expressed his view to me that *if*, in his opinion, at that time *if* Pipemasters had done the work according to specifications and the Department of Highways had later come along and either made them cut those gutters deeper or had done it themselves, that *ought not* be Pipemasters’ fault.” *Tr. 2311 [Chambers; emphases added]*. Mr. Chambers also readily acknowledged that Mr. Schultz at the time of their conversation “had not acquired any direct or specific knowledge about what had actually happened.” *Tr. 2312 [Chambers]*. Mr. Schultz later had an investigation conducted by HNTB, after which Pipemasters promised to go back and achieve at least 36 inches of cover, with HNTB again inspecting, neither receiving any further compensation. *Tr. 2952-61 [Schultz]*.

{C0956660.1}

Incorrect Certifications and Partial Payments  
Do Not Excuse Defective Work

Pipemasters and Mid-State continue to argue (i) that HNTB, the Water Company, and the Building Commission each executed pay applications that reflect Pipemasters' satisfactory work and (ii) that the Water Company advised Mid-State before the defects came to light that work was nearing completion. See Pipemasters Brief at 19-20; Mid-State Brief at 7-8, 23-24. Pipemasters and Mid-State continue to ignore (i) that this is the way that progress payments are made on any substantial construction project, (ii) that Pipemasters was the first to sign each such pay application, starting the process by incorrectly certifying its work as adequate, and (iii) that the contract says over and over again 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. See BC/WC Brief at 38.

Mid-State frames this argument as one of suretyship: by making periodic payments, the Building Commission "impaired" Mid-State's "collateral." See Mid-State Brief at 15, 23-24. Mid-State's only cited authority now is § 42 of the *Restatement (3d) of Suretyship*, as the cases that it presented to the trial court were all shown to be inapposite. We quote from one of our briefs (*Docket # 154*) to the trial court, in response to Mid-State's motion for summary judgment:

Mid-State still wants to assert that the Building Commission has no right under the bond because it paid Pipemasters for defective work. The Court has twice previously rejected this argument, denying Mid-State's motion to dismiss, and a subsequent motion for reconsideration. Now, in a strained effort to bring the facts of this case within the holdings of the foreign cases on which it relies, Mid-State repeatedly mischaracterizes the progress payments made to Pipemasters as "prematurely dissipating contract funds," a "premature release of funds," and an "abrogation of the payment clause provisions."

In fact, Pipemasters was paid exactly in accordance with the contract that Mid-State agreed to bond, *i.e.*, on the basis of periodic applications for payment

{C0956660.1}

that were presented by Pipemasters as the contractor, approved by HNTB as the resident project representative monitoring the work in the field, approved by the Water Company as engineer in reliance upon the certifications of Pipemasters and HNTB, and only then authorized for payment by the Building Commission as owner. There was here no undisclosed, unauthorized advance (Southwood Builders, Inc. v. Peerless Ins. Co., 366 S.E.2d 104, 105 (Va. 1988)), no failure to hold retainage required by the contract (Nat'l Surety Corp. v. The United States, 118 F.3d 1542 (Fed. Cir. 1997)), and no payment for pipe that had not even been installed (Transamerica Insur. Co. v. Kennewick, 785 F.2d 660, 661 (E.D. Va. 1995)). Rather, Pipemasters was found not to have adequately covered the installed pipe, and was called upon to undertake corrective work, all as specifically contemplated in the contract. *See* General Conditions, Articles 13.06, "Correction or Removal of Defective Work," and 13.07, "Correction Period," found at page 0130 of the copy of the contract appended to the Water Company's previously filed summary judgment brief as to the claims of Pipemasters. Under the contract, Pipemasters (and, therefore, Mid-State) agreed to remain exposed to corrective work for a full year after substantial completion. Again, if Mid-State did not like these terms of the contract, then it should have attempted to negotiate within the bond an exception for the cost of this type of defective work, or failing that, declined to underwrite Pipemasters' performance. What happened, of course, is that Mid-State was happy to receive its premium at the time, but has been furiously attempting to wriggle out from under its obligation ever since.

This remains an adequate response to Mid-State's "impaired collateral" argument.

Mid-State's Refusal to *Perform* Was the Genesis of Its Liability

Mid-State continues to mount technical, suretyship defenses. Mid-State made all of these arguments before, not only to the trial court, but to this Court by way of a petition for a writ of prohibition filed January 26, 2004, that was refused the same day. *Docket # 234*. None of them has any more merit on appeal.

Mid-State asserts that "no bonded event ever occurred in the controversy here at issue ... since the Building Commission, which was the beneficiary of the Bond, sustained no loss at all." See Mid-State Brief at 26-27. But in March 2002, when the Building Commission asserted its rights under the performance bond, neither the Building Commission, the Water Company, nor anyone else had spent any money to clean up the remaining mess from which Pipemasters got up and walked away. Accordingly, the Building Commission's notice to Mid-State was a demand for *performance*, i.e., completion of the corrective work:

Pipemasters has indicated that it intends to do no further work to correct these deficiencies in the absence of additional payment. We reiterate that Pipemasters is contractually obligated to timely correct the remaining deficiencies, including any "punch list" items, at its sole expense, and that refusal to do so constitutes a default in Pipemasters' obligations to the Owner.

You are hereby notified pursuant to Sections 15.02A.1 and 15.02B of the General Conditions that we, as Owner, will terminate the Agreement effective March 15, 2002 at 2:00 p.m. in the absence of mutual written assurance from Pipemasters and its surety that the remaining deficiencies will be corrected at their sole expense. In the absence of such written assurance, the Agreement will at that time terminate without further notice, and we will be free to pursue any of our rights upon termination including, but not limited to, completing corrections of deficient work and seeking reimbursement of the associated costs from Pipemasters and its surety.

*WC Ex. 12.*

Mid-State's bond covered not just "all claims," but "all claims *and demands*." *Contract 0077* (emphasis added). Only as a result of the Pipemasters and Mid-State failures to satisfy the

{C0956660.1}

demand for *performance* did the Water Company provide the funds to finish the corrective work, and the Building Commission assign its claims to the Water Company. Obviously, after the corrective work was completed by Tralyn, the claim became one for money, but Mid-State was explicitly warned of this consequence in the notice and demand quoted above. Mid-State has confused the nature of its liability with the nature of our resulting damages.

Mid-State's "no-loss" argument is also highly inequitable, in that it arises solely from circumstances of Mid-State's making, which forced the Building Commission to turn elsewhere for money to complete the corrective work. If Mid-State wanted only to stand behind Pipemasters to the extent that the Building Commission paid money out of its own funds, then it should have said so at the time. In fact, the role of the performance surety in a construction contract is to *be* the ready source of funds to allow for the timely completion of the work. When Mid-State decided to keep its money in Michigan, it left the Building Commission no option but to seek the necessary funds from another source.<sup>9</sup>

Nor does Pipemasters' renewed commitment to complete corrective work with 36 inches of cover provide any escape for Mid-State, which is just as firmly bound to Pipemasters' *renewed* commitment as it was to the original contract. Indeed, Mid-State's bond included a provision on this very point:

---

<sup>9</sup> Mid-State also argued below that claims under the bond could not be assigned to the Water Company because "The OWNER and GOVERNMENT are the only beneficiaries hereunder." *Contract 0077*. Mid-State appears to have abandoned this argument on appeal, but we would note that, under West Virginia law, it is clearly wrong. *See generally, Smith v. Buege*, Syl. Pt. 2, 182 W. Va. 204, 210-211, 387 S.E.2d 109, 115-116 (1989) ("[a]n assignment of a fire-insurance policy [or the proceeds] subsequent to the loss is valid regardless of the conditions of the policy."; citation omitted).

PROVIDED, FURTHER, that it is expressly agreed that the BOND shall be deemed amended automatically and immediately, without formal and separate amendments hereto, upon amendment to the Contract not increasing the contract price more than 20 percent, so as to bind the PRINCIPAL and the SURETY to the full and faithful performance of the CONTRACT as so amended. The term "Amendment", wherever used in this BOND, and whether referring to this BOND, the Contract or the Loan Documents shall include any alteration, addition, extension or modification of any character whatsoever.

*Contract 0077.*

We would also note that honoring its performance bond would not have cost Mid-State any legitimate argument. Mid-State could have financed completion of the corrective work under a reservation of rights, leaving for later the fight over who should bear ultimate responsibility. Instead, Mid-State left the Building Commission high and dry until the Water Company agreed to write the checks.

Mid-State's attempts to turn the financial distress in which it placed the Building Commission into suretyship defenses should be rejected.

{C0956660.1}

The Building Commission Was Under  
No Obligation to Sue the Water Company

Mid-State also argues (without citing any authority) that the Building Commission “failed to mitigate its damages” in not suing the Water Company for “mismanagement.” *See* Mid-State Brief at 27. This is yet another Mid-State argument that we previously addressed (*Docket # 154*) to the trial court:

Finally, Mid-State says that the Building Commission in not suing the Water Company failed to “mitigate damages.” This argument is too good to be true. If it were the law that a plaintiff had to sue *every* potentially liable party in order to sue *any* potentially liable party, then one would think that Mid-State could have found a case that said so. Of course, that is not the law, which is why construction cases (like this one) often include not only cross-claims, but third-party complaints. It is within the discretion of a plaintiff to sue – or not sue – whom it chooses.

The mitigation required by Hurxthal v. Boom Co., 53 W. Va. 87, 44 S.E. 520, 525 (1903) applies not to suing some requisite number of defendants, but to situations in which the claimant has failed to do something to “lessen the injury and reduce the damages caused by the breach.” For purposes of illustration, assume that the Building Commission had simply engaged Tralyn to complete the proper coverage of the “wet” lines on a time and materials basis; someone could then argue that the Building Commission should be entitled only to the price of corrective work that would have resulted from competitive bidding.

But no one has even suggested in this case that the corrective work on the “wet” lines could have been completed at any lesser expense. In fact, the Building Commission awarded the contract to the lowest of several qualified bidders. It also bears mention that the Building Commission mitigated its damages (and, therefore, Mid-State’s exposure) by seeing that Pipemasters undertook correction of the “dry” lines before Mid-State and its bond were ever called upon. [emphases added; footnote omitted]

### The Jury Instructions on Surety Liability Were Incorrect

Mid-State's arguments about the jury instruction on "impairment of collateral" (*see* Mid-State Brief at 22-24) are sufficiently addressed at pages 12 and 13, above.

Mid-State correctly notes that a surety's liability is "secondary" in the sense that it must arise from that of a principal. *See* Mid-State Brief at 19-21. However, the jury instruction at issue was that, if "Pipemasters is liable to the Putnam County Building Commission, then you *may* find that Mid-State is liable" [emphasis added], hardly an elucidation of the "coextensive liability" theme Mid-State now adopts as justification. Had there been any legitimate suretyship defense for the jury to consider, that would have been another matter. But Mid-State used the challenged instruction only as leverage for its plainly incorrect assertions about "collateral impairment," and its improper closing argument addressed below.

Sureties underwriting the performance of contractors in West Virginia accept the consequences of their principals' actions. "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*, Logan Bank & Trust Company v. The Letter Shop, Inc., 190 W. Va. 107, 109, 437 S.E.2d 271, 273 (1993) ("Every surety by the nature of his obligation undertakes risks which are the inevitable concomitants of the transactions involved"; quoting Comment (b) to § 124 of the Restatement of the Law of Security (1941)). If the principal fulfills its contract, then the surety keeps the

premium, and makes a profit. But, if the principal defaults, then the surety is required to step forward when asked to fund completion of the work.

Mid-State could and should have financed the corrective work to which its principal had recommitted; instead, it left the Building Commission with no one to turn to but the Water Company, which became surety *de facto* (but without receiving any premium). If we receive the relief requested, and if Mid-State is ultimately required to recompense the Water Company, then it will only be turning loose the money that *it* should have spent on Tralyn's and Terradon's completion of the corrective work years ago. There is nothing wrong with that.

{C0956660.1}

### Mid-State Has No Excuse for Its Improper Closing Argument

Mid-State spends relatively little time on the issue of its improper closing argument. *See* Mid-State Brief at 24-26. (Mid-State's assertion that the Water Company's objection was "untimely" is completely unsupported, and wrong.) The only excuse not sufficiently addressed at pages 47-48 in our opening brief is that, "The jury would have become aware of the fact that the Fellures and Gibsons indemnified Mid-State, as this was set out clearly in the contract that was in evidence before the jury." *See* Mid-State Brief at 26. Mid-State cites no particular page in the contract to support this assertion, and we are aware of nothing in the contract that would have allowed a lay jury to independently make such a determination, especially when the claims against the Fellures and Gibsons had been bifurcated, and their names did not even appear on the verdict form.

HNTB Failed to Allow for *Any* Ditches<sup>10</sup>

At page 31 of its brief, HNTB states, “No error has been suggested, implied or articulated in any manner whatsoever with regard to the claims against HNTB.” To the contrary, it is clear that HNTB failed to adequately observe Pipemasters’ work, as shown by its own witnesses and a critically important document. HNTB chooses to ignore before this Court the DOH’s admonition (via Damon Cline!) about the need for standard 12" ditches. Here is a portion of HNTB’s own daily log on March 6, 2000, at the very beginning of the work:

Special Assignments

DITCHES MUST BE BACK FILLED AS V-DOT  
INSPECTORS (DAMON CLINE 1' DITCH DEPTH)

*Pipemasters Ex. 13 at HNTB 000040; see Tr. 1833-35 [Downey]; cf. HNTB Brief at 27* (characterizing Mr. Cline’s ditches as “shallow” and “small”). We put the same picture in our opening brief. *See BC/WC Brief at 43.* But HNTB has nothing to say about it.

Under HNTB’s approach, virtually any ditching would have produced inadequate cover. This is evident even from the testimony of Mr. Downey that HNTB chooses to highlight in its own brief. *See HNTB Brief at 21-24.* By his own words, and irrespective of any “reditching,”

---

<sup>10</sup> The Water Company and HNTB settled HNTB’s claims for unpaid invoices before trial. Pipemasters seizes upon this as “mysterious,” implying some lack of integrity. Pipemasters Brief at 4, n. 6. But in the same footnote, Pipemasters itself solves the “mystery”: HNTB’s invoices included work on other contracts that did not even involve Pipemasters, the invoices had never been broken down, and it was for this undisputed work on PC3 and PC7 that the Water Company paid HNTB in a pretrial partial settlement, once these parties agreed upon an allocation. *See also, Tr. 1427 [Weekley]; HNTB Brief at 2* (“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 part of this particular litigation.”)

{C0956660.1}

Mr. Downey's old navel technique for measuring *trench* depth would have turned "42 inches" of cover into only 30 inches of earth as soon as the *first* ditch was cut.

HNTB cites Mr. Pennington, who said that HNTB did not "have any responsibility whatsoever about any aspect of ditching on this project." See HNTB Brief at 20, citing *Tr. 1538-39 [Pennington]*. HNTB also cites Mr. Downey, who said that ditching was mere "cleanup" that was the responsibility of the DOH, not HNTB. See HNTB Brief at 22, citing *Tr. 1823-1824 [Downey]*. But HNTB's highest ranking witness, Mr. Weekley, ultimately had to acknowledge that HNTB, as Resident Project Representative, was to "observe the work [of Pipemasters] for compliance with the Contract Documents," that HNTB's agreement with the Water Company made no exceptions in this regard, and that HNTB was therefore to observe Pipemasters' work for compliance with the DOH standards that were explicitly incorporated into the Contract Documents. *WC Exs. 28 and 29; Tr. 3080-83 [Weekley]*.<sup>11</sup>

---

<sup>11</sup> Moreover, as noted above at page 9, HNTB elsewhere in its brief emphasizes the responsibility of all concerned to satisfy the DOH. Frankly, it is unclear just where HNTB comes down on this issue.

None of this should be confused with a different point about which HNTB continues to obsess, *i.e.*, whether HNTB had agreed *with the DOH* to assume DOH inspection responsibilities. See HNTB Brief at 19, 29-30, 34-36. According to HNTB, "there was no evidence before this jury to suggest that HNTB had accepted DOH inspection responsibilities." HNTB Brief at 35. In fact, Mr. Carovillano, Ms. Hackney, and Mr. Schultz all testified – principally through cross-examination by HNTB's counsel, who simply refused to let the matter drop – about HNTB's agreement to do so. *Tr. 2457-86 [Carovillano], 2864-65, 2880-91 [Hackney], 2990-3001 [Schultz]*; see also, *HNTB Ex. 1*. But we reiterate that this is, indeed, an entirely spurious issue having nothing to do with HNTB's contractual and common law responsibilities to the Building Commission and the Water Company. See BC/WC Brief at 42 (footnote 13).

## A Long Trial Is Not Necessarily a Good Trial

Mr. Pennington's and Mr. Downey's testimony about contractual responsibility for ditching, noted above, exemplifies the flawed nature of the trial. Pipemasters, too, repeatedly cites the testimony of various witnesses concerning "material change" and other issues of contractual interpretation. *See, e.g.*, Pipemasters Brief at 10-11, 14, 21-22, 26, 28 (footnote 16), 33-34. Throughout its brief, Pipemasters cites Mr. Fellure's opinions about what the contract did or did not require.

"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). Allowing self-serving testimony (and, thus, closing argument) about the parties' contractual rights and responsibilities was the principal error of the trial court. But instead of acknowledging Toppings, appellees make the cynical argument that, because the trial court *did* let everything in, there must be a basis for the verdict!<sup>12</sup> Does HNTB seriously maintain that, just because the trial was long and expensive, it would be "a miscarriage of justice" (*see* HNTB Brief at 42) to correct substantial trial court errors? This case *could* and *should* have been tried in just a few days and, if this Court grants the relief requested in this appeal, that is all that will be necessary on remand.

---

<sup>12</sup> *See, e.g.*, HNTB Brief at 3 ("despite having a plethora of oral testimony and documentary exhibits placed before the jury ..."), 7 ("The trial court ... did not exclude any evidence the West Virginia American Water Company sought to introduce."), 9 ("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.") and 39 ("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.")

{C0956660.1}


Conclusion

The trial court's judgment 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. Moreover, as things stand, the Water Company will have to pay hundreds of thousands of dollars more 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. Meanwhile, Mid-State and HNTB will be allowed to escape scot free.


It would be difficult to concoct a misapplication of contract law with a more unfair result, or a judgment in greater need of reversal.

PUTNAM COUNTY BUILDING COMMISSION and  
WEST VIRGINIA-AMERICAN WATER COMPANY

By Counsel

  
\_\_\_\_\_  
John Philip Melick (WV Bar #2522)  
JACKSON KELLY PLLC  
Post Office Box 553  
Charleston, West Virginia 25322  
(304) 340-1289

*Counsel to West Virginia-American  
Water Company*

  
\_\_\_\_\_  
Jay M. Potter (WV Bar #2949)  
SCHUMACHER, FRANCIS & NELSON  
Post Office Box 3029  
Charleston, West Virginia 25331-3029  
(304) 342-4567

*Counsel to Putnam County Building  
Commission*

{C0956660.1}

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 REPLY BRIEF OF DEFENDANTS PUTNAM COUNTY  
BUILDING COMMISSION AND WEST VIRGINIA-AMERICAN WATER COMPANY by  
United States first class mail on June 29, 2005, upon each of:

Carl J. Roncaglione, Jr., Esq. 1018 Kanawha Boulevard, East Suite 401 Boulevard Tower Charleston, WV 25301-2827 <i>Counsel to Pipemasters, Inc.</i>	Mark W. Browning, Esq. Shuman, McCuskey & Slicer PLLC P. O. Box 3953 Charleston, WV 25339-3953 <i>Counsel to HNTB Corporation</i>
H. F. Salsbery, Esq. Bailey & Glasser LLP 227 Capitol Street Charleston, WV 25301 <i>Counsel to Mid-State Surety Corporation</i>	Timothy D. Martin, Esq. Alber Crafton, PLLC Hurstbourne Place, Suite 1300 9300 Shelbyville Road Louisville, KY 40222-5079 <i>Counsel to Mid-State Surety Corporation</i>

  
\_\_\_\_\_  
John Philip Melick