

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert J. Cummins, d/b/a Bob Cummins Construction Company, Appellant	:	CASES CONSOLIDATED
	:	
	:	
v.	:	
	:	
Bradford Sanitary Authority	:	No. 1263 C.D. 2024
	:	
Robert J. Cummins, d/b/a Bob Cummins Construction Company	:	
	:	
	:	
v.	:	
	:	
Bradford Sanitary Authority, Appellant	:	Nos. 1320, 1515 C.D. 2024
	:	Argued: November 6, 2025

BEFORE: HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY

FILED: October 23, 2026

Robert J. Cummins, d/b/a Bob Cummins Construction Company (Cummins) appeals from the McKean County Common Pleas Court's (trial court) order entered on August 23, 2024 (August 23, 2024 Order)¹ denying Cummins' motion for post-trial relief (Cummins' Motion) and denying in part and granting in part the Bradford Sanitary Authority's (Authority) motion for post-trial relief (Authority's Motion) (collectively, Post-Trial Motions), and all interlocutory orders made final thereby. The Authority cross-appeals from the portion of the trial court's

¹ The trial court issued its order on August 22, 2024, but entered it on the docket on August 23, 2024.

August 23, 2024 Order denying the Authority’s Motion in part, and from the trial court’s October 9, 2024 order denying the Authority’s Motion for Attorney’s Fees and Costs (Authority’s Second Fees Motion).²

Cummins presents five issues for this Court’s review: whether the trial court erred by: (1) denying Cummins’ Motion seeking a new trial or remittitur where the Authority prevented Cummins from addressing influent overtopping, excessive effluent decant and sequencing batch reactor (SBR) air pipe painting issues; (2) denying Cummins’ Motion seeking a new trial or remittitur where the Authority failed to mitigate the damages it allegedly sustained as a result of the influent overtopping and excessive effluent decant issues; (3) interpreting the parties’ contract (Contract) and/or this Court’s decision in *Cummins v. Bradford Sanitary Authority*, 237 A.3d 584 (Pa. Cmwlth. 2020) (*Cummins I*), as placing sole responsibility on Cummins for identifying, making, and paying for any change necessary to incorporate the Enaqua ultraviolet (UV) system; (4) granting judgment notwithstanding the verdict (JNOV) in the Authority’s favor on Cummins’ extra

² Technically, an “[a]ppeal lies from the judgment entered and not the denial of post-trial motions,” [*Crosby v. Dep’t of Transp.*, 548 A.2d 281, 283 (Pa. Super. 1988)], and a “verdict [does] not become final for purposes of appeal until properly reduced to and entered as a formal judgment under [Pennsylvania Rule of Civil Procedure] [] 227.4.” *Crystal Lake Camps v. Alford*, 923 A.2d 482, 488 (Pa. Super. 2007).

Your Towne Builders, Inc. v. Manheim Twp., 303 A.3d 1126, 1129 n.1 (Pa. Cmwlth. 2023) (quoting *Mitchell v. Milburn*, 199 A.3d 501, 504 n.3 (Pa. Cmwlth. 2018)). Because the trial court entered Judgment on the docket on September 19, 2024, on the jury verdicts against the Authority in the amount of \$188,855.08, *see* Reproduced Record (R.R.) at 5347a-5348a, and against Cummins in the amount of \$791,063.10, *see* R.R. at 5349a-5350a, this Court treats Cummins’ and the Authority’s cross-appeals as appeals from the trial court’s Judgment entered on the docket on September 19, 2024.

work claims; and (5) granting JNOV in the Authority's favor on the Authority's counterclaims.

The Authority presents three issues for this Court's review: whether the trial court erred or abused its discretion by: (1) failing to find that Cummins' execution of Change Order 06R1 barred Cummins' extra work claims relating to control/survey, storm sewer rerouting overtime, communication, and topsoil; (2) failing to find that the Contract both barred Cummins' extra work claim relating to topsoil and entitled the Authority to JNOV on its topsoil counterclaim as a matter of law; and (3) concluding that the Authority's Second Fees Motion was not timely filed. After extensive review, this Court affirms the trial court's August 23, 2024 Order in part and reverses it in part, vacates the trial court's October 9, 2024 order, and remands for the trial court to rule on the Authority's Second Fees Motion.

Background

This matter is before this Court on appeal for the third time. The extensive procedural history is detailed in *Cummins I* and *Cummins v. Bradford Sanitary Authority* (Pa. Cmwlth. No. 1107 C.D. 2021, filed Nov. 16, 2022) (*Cummins II*). Relevant here, the Authority owns and operates a wastewater treatment plant (Plant) in Foster Township, McKean County, that serves the City of Bradford and other nearby communities. When the Authority sought to conduct Wastewater Treatment Plant Upgrades (Project), it retained Gannett Fleming, Inc. (GF) to provide engineering and construction management services and to act as the Authority's agent. The Project required, *inter alia*, the construction of concrete tanks containing SBRs to treat sewage and other wastewater at the Plant.³

³ Basically, the SBR system consists of four phases: (1) filling the tanks; (2) aerating the tanks' contents (i.e., air blown into the tanks destroys the undesirable contents) through air pipelines; (3) settling the undesirable contents as sludge; and (4) driving the cleaned water out of the tanks to a UV system for disinfection before being released into a nearby creek.

In 2013, the Authority issued an Invitation for Bids (IFB) from contractors for the Project that included Contract 2013-2 (hereafter, Contract)⁴ and documents attached thereto and incorporated therein, including the Project Manual (collectively, Contract Documents).⁵ See Ex. D-2 (Project Manual) at 1-1849. The Project Manual contained, *inter alia*, Division 0, Section 00200 (Instructions to Bidders), see Ex. D-2 at 15-31, Section 00700 (General Conditions), see Ex. D-2 at 119-207, and specifications for each Project part. Pertinent here, Project Manual Division 11, Section 11393 governs the specifications for the SBR and its ancillary structures, equipment, and controls (SBR Specifications). See Ex. D-2 at 1028-1051. The SBR Specifications required, *inter alia*, that the system process 13.88 million gallons per day (MGD) (9,638 gallons per minute (GPM)) (plus or minus 10%) of influent (i.e., untreated wastewater). See Ex. D-2 at 1029. Cummins proposed to install an Ashbrook Simon Hartley (Ashbrook) SBR, a true sequencing (rather than continuous-flow) SBR system, in which only one of the four SBR tanks fills at a time.⁶ Because the Authority sought an open channel configuration - rather than standard hard pipes and valves - to handle influent flow into each tank, Cummins/Ashbrook proposed to install automatic gates to control the influent flow. The Authority awarded Cummins the Contract due to its \$16,192,517.00 bid.

⁴ The IFB specified the Project would be performed under three contracts: Contract 2013-2 (General Construction), Contract 2013-3 (Plumbing/Heating, Ventilation, and Air Conditioning Construction), and Contract 2013-4 (Electrical Construction). See Ex. D-2 (Project Manual) at 11. Cummins' work on the Project was governed by Contract 2013-2.

⁵ After initially issuing an IFB for the Project resulting in bids which were several millions of dollars over budget, the Authority rebid the Project in 2013.

⁶ In Section 1.05 of the SBR Specifications, the Authority designated as Acceptable SBR Manufacturers: A. ABJ Sanitaire, B. Ashbrook, and C. Aqua Aerobics. Although the SBR Specifications listed Ashbrook or Aqua Aerobics as acceptable manufacturers, SBR Specifications Section 11.01.B.3 made the contractor fully responsible for changes to the structural, piping, mechanical, electrical, instrumentation, or any other changes necessary to incorporate those systems into the Project. See *Cummins I*. Because it received a better deal on the SBR system from Ashbrook than from ABJ Sanitaire, Cummins proposed to install the Ashbrook SBR.

On February 12, 2014, the Authority and Cummins executed the Contract. On March 11, 2014, GF issued Cummins a Notice to Proceed. Cummins installed the Ashbrook SBR at the Plant. After the SBR was put into operation in 2015,⁷ the parties discovered, *inter alia*, influent overflow and excessive effluent decant problems.⁸ The parties disagreed on the solutions and the costs thereof. On March 17, 2016, Cummins filed a complaint (and, thereafter, an amended complaint and second amended complaint) in the trial court against the Authority alleging that the Authority breached the Contract. In response, the Authority filed answers with new matter and counterclaims against Cummins.

In *Cummins I*, this Court declared regarding the SBR system:

Cummins was at all times solely responsible for incorporating the Ashbrook SBR as specified in the Contract Documents. In that context, Section 11.01.B [of the Project Manual (Section 11.01.B.3), (Ex. D-2 at 22),] mandated: “[T]o the extent that [the Ashbrook SBR’s] proper incorporation into the Work^[9] require[d] changes to the structural, piping, mechanical, electrical, instrumentation, or any other changes of whatsoever nature, [Cummins was] responsible for” exercising its (or Ashbrook’s) ingenuity anticipating and identifying changes necessary to make the Ashbrook SBR *and* the connecting systems work as required by the Contract

⁷ The Authority began operating the new SBR in August 2015. The Project’s certificate of substantial completion reflected that it was substantially completed as of December 22, 2015.

⁸ Effluent is treated or untreated wastewater that flows out of the system.

⁹ *Work* is defined in General Conditions Section 1.01.A.52 as

[t]he entire completed construction, or various separably identifiable parts thereof required to be provided under the Contract Documents. *Work* includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction, and furnishing, installing, and incorporating all materials and equipment into such construction, all as required by the Contract Documents.

Ex. D-2 at 127 (emphasis added).

Documents, designing or *at the very least* making GF aware of such changes and/or working with GF to incorporate them, and ultimately guaranteeing an operational SBR system in accordance with the Contract Documents, all at Cummins' expense. Section 11.01.B.3 [] (emphasis added). . . . The Contract expressly shifted to [Cummins] the responsibility and risk for "changes of whatsoever nature," Section 11.01.B.3, for [Cummins] to incorporate a different SBR and/or equipment into GF's design.

Cummins I, 237 A.3d at 601 (emphasis omitted). In *Cummins II*, this Court remanded this case for the trial court to conduct a new trial on the parties' SBR-related claims, including the SBR-related counterclaims, the change order¹⁰/extra work claims, and the non-SBR-related counterclaims. In light of *Cummins I*, the *Cummins II* Court expressly prohibited Cummins from retrying questions of its liability for defective SBR system performance.

On April 1, 2021, while this case was on remand to the trial court the first time, the Authority filed an interim Motion for Attorneys' Fees and Costs (First Fees Motion) and a brief in support thereof. *See* Reproduced Record (R.R.) at 190a-209a, 213a-226a. Cummins challenged the First Fees Motion as premature. *See* R.R. at 210a-211a. On June 29, 2021, the trial court dismissed the First Fees Motion as premature, without prejudice. *See* R.R. at 227a.

On remand, by January 24, 2023 order, the trial court, *inter alia*, ordered a new trial and granted time for the parties to conduct limited discovery. On September 8, 2023, the Authority filed a Motion *in Limine* Concerning Contract Interpretations for SBR Claims and a supporting brief asking the trial court to, *inter alia*, prohibit Cummins from disputing, and instruct the jury, that Cummins alone

¹⁰ According to General Conditions Section 1.01.A.11, a *change order* "authorizes an addition, deletion, or revision in the Work, or an adjustment in the Contract [p]rice or the Contract [t]imes; and which is issued on or after the [e]ffective [d]ate of the [Contract], and upon execution by all parties, amends the Contract." Ex. D-2 (Project Manual) at 123.

was contractually responsible for identifying, making, and paying for any changes necessary for the proper incorporation of the Enaqua UV equipment into the Project design. *See* R.R. at 378a-400a, 494a-509a. Cummins opposed the Motion *in Limine* Concerning Contract Interpretations for SBR Claims. *See* R.R. at 401a-451a. By December 22, 2023 order, the trial court granted the Authority's request, in part, determining based on the Contract language and *Cummins I*,

Cummins is solely responsible for identifying, making[,] and paying for any changes necessary for the proper incorporation of the UV [] equipment into the Project design.^{[FN]1}

^{[FN]1} There is a genuine dispute as to who chose the UV equipment. [The Authority] asserts that it was Cummins and therefore [SBR Specifications Section] 11.01.B [(Section 11.01.B)] applies. Cummins asserts that it was [GF], and therefore [Section 11.01.B] does not apply. Cummins argues that the penultimate question of who chose the UV equipment presents an issue of material fact that must be resolved by the jury. But for the Commonwealth Court's [*Cummins I*] decision, this [trial c]ourt agrees.

R.R. at 511a; *see also* R.R. at 510a, 512a-521a.

The trial court conducted a jury trial from January 22 to February 1, 2024. On February 1, 2024, the jury concluded that the Authority breached the Contract by failing to pay Cummins the Contract balance. *See* R.R. at 3030a. In addition, the jury determined that the Authority breached the Contract by failing to pay Cummins and awarded Cummins compensation for the following extra work claims: control/survey (\$34,140.60), communication (\$46,800.00), additional painting - Headworks Building No. 2 (Headworks No. 2) (\$83,455.00), painting conduit¹¹ (\$13,720.00), painting (Issue Nos. 111-115) (\$2,700.00), storm sewer

¹¹ Conduit is piping that surrounds and protects electrical wires.

rerouting overtime (\$60,455.07), and SBR electrical work (\$30,457.27). *See* R.R. at 3031a. Further, having concluded that Cummins breached the Contract by failing to perform its work in accordance with the Contract's requirements, which resulted in defective or incomplete work, the jury awarded the Authority compensation for the SBR's excessive effluent decants (\$605,000.00) and painting the SBR air pipeline (\$30,668.00). *See* R.R. at 3032a-3033a. Although it did not award the Authority any compensation for the Authority's resolution of the SBR gate overflows with hard pipe and valves, *see* R.R. at 3033a, the jury reduced the \$259,920.00 Contract balance by the \$241,622.00 the Authority eventually paid to have hard pipe and valves installed during Project Phase 3; thus, the jury awarded Cummins only \$18,298.00 of the Contract balance. *See* R.R. at 3030a. Finally, the jury determined that since Cummins achieved timely final completion of the Project as the Contract required, the Authority was not entitled to liquidated damages. *See* R.R. at 3034a.

On February 2, 2024, the trial court ordered the parties to file post-trial motions by March 25, 2024. *See* R.R. at 3035a. On March 21, 2024, the Authority filed its Motion seeking judgment as a matter of law on all of the claims on which Cummins prevailed and on certain of the Authority's counterclaims. *See* R.R. at 3037a-3942a. The Authority's Motion included a request to mold the verdict. Cummins opposed the Authority's Motion.

On March 25, 2024, Cummins filed its Motion, therein requesting a new trial on the influent overtopping, excessive decant, and SBR air pipe painting issues or, in the alternative, remittitur and molding of the jury's verdicts on those counterclaims. *See* R.R. at 3980a-4074a. The Authority opposed Cummins' Motion. That same day, Cummins also filed a Motion to Mold the Verdict, wherein it maintained, *inter alia*, that it was entitled to attorneys' fees, costs, and penalty interest relative to the Authority's bad faith, but added:

[G]iven the significant issues still remaining in the case for resolution, including the issues identified in Cummins' Motion . . . , it is premature for the [trial c]ourt to rule on Cummins' entitlement to penalty interest, costs, and attorneys' fees under the [Contract]. Thus, Cummins requests that the [trial c]ourt defer ruling on this issue until after it has ruled on Cummins' Motion Consequently, Cummins respectfully reserves the right to a supplemental submission regarding its entitlement to penalty interest, costs, and attorneys' fees . . . subject to the [trial c]ourt's ruling on Cummins' Motion

Cummins Br. App. D at 2-3.

Following July 10, 2024 oral argument on the Post-Trial Motions, by the August 23, 2024 Order, the trial court¹² denied Cummins' Motion. Relevant to this appeal, the trial court also: denied the Authority's Motion relative to the topsoil extra work claim and counterclaim; granted the Authority's Motion and entered JNOV in its favor regarding the control/survey, storm sewer rerouting overtime, communication, Headworks No. 2 painting, conduit painting, additional painting, and SBR electrical extra work claims; and granted the Authority's Motion and entered JNOV in its favor relative to, *inter alia*, the SBR hydraulic issue analysis, SBR electrical redesign, UV channel redesign for change to Enaqua, AUMA Actuator, Inc. (AUMA) gate failure service calls and parts due to gate failures, and the Authority's overtime and call-in costs for alarms. *See* Trial Ct. August 23, 2024 Order (R.R. at 4449a-4465a).

By separate order dated August 22, 2024 (entered August 23, 2024), the trial court granted Cummins' Motion to Mold the Verdict in part and denied it in part, awarding it pre- and post-judgment interest. *See* R.R. at 5341a-5342a. In addition, the trial court granted the Authority's Motion to Mold the Verdict in part

¹² The Honorable Judge Christopher G. Hauser retired before hearing argument and deciding the Post-Trial Motions. The Honorable John H. Foradora, a judge from the Jefferson County Common Pleas Court, issued the decision. *See* R.R. at 4346a.

and denied it in part, awarding it pre- and post-judgment interest. The trial court further determined that, given its resolution of Cummins' bad faith claim, the Authority's related motion for nonsuit was moot. *See* R.R. at 5342a.

By September 3, 2024 order, the trial court granted the Authority's Supplemental Motion for Post-Trial Relief to Mold the Verdict and, in addition to the amounts of interest awarded in its order dated August 22, 2024 (entered August 23, 2024), it molded the verdict on the counterclaims for which the trial court granted JNOV in the Authority's favor and awarded damages as follows, *inter alia*: SBR hydraulic issue engineer analysis (\$20,527.00); engineer SBR electrical redesign (\$7,390.00); engineer UV channel redesign for change to Enaqua (\$12,596.00); AUMA service calls and parts (\$4,016.00); and Authority overtime and call-in costs (\$13,619.00). *See* R.R. at 5344a-5245a.

On September 11, 2024, the Authority filed its Second Fees Motion seeking \$3,108,611.71. *See* R.R. at 4468a-5240a. On September 17, 2024, Cummins filed an Application to Stay Ruling on the Authority's Second Fees Motion "until after [this] Court has resolved Cummins' forthcoming appeal." R.R. at 5242a-5249a. On September 19, 2024, Cummins filed a Praecipe for Entry of Judgment. *See* R.R. at 5307a-5308a. That same day, the trial court entered judgment against Cummins in the amount of \$791,063.10 and against the Authority in the amount of \$188,855.08. *See* R.R. at 5347a-5350. Also that same day, Cummins appealed to this Court from the August 23, 2024 Order denying Cummins' Motion.¹³ On October 2, 2024, the Authority filed its cross-appeal.

On October 9, 2024, the trial court denied the Authority's Second Fees Motion as untimely. Also on October 9, 2024, the trial court directed the Authority to file a Concise Statement of Errors Complained of on Appeal pursuant to

¹³ This Court docketed Cummins' appeal at Pa. Cmwlth. No. 1263 C.D. 2024.

Pennsylvania Rule of Appellate Procedure (Appellate Rule) 1925(b) (Appellate Rule 1925(b) Statement). On October 10, 2024, the trial court directed Cummins to file an Appellate Rule 1925(b) Statement.

On October 18, 2024, the Authority appealed to this Court from the trial court's August 23, 2024 Order and October 9, 2024 order.¹⁴ On October 22, 2024, the Authority filed its Appellate Rule 1925(b) Statement. On October 25, 2024, Cummins filed its Appellate Rule 1925(b) Statement. The trial court issued its opinions pursuant to Appellate Rule 1925(a) (Appellate Rule 1925(a) Opinions) on November 1, 2024.¹⁵ On March 28, 2025, this Court consolidated the three appeals, identifying Cummins as the designated appellant and the Authority as the designated appellee/cross-appellant. Thereafter, the parties filed their briefs. The matter is now ripe for disposition.

Discussion

Cummins' Motion

a. Proposed Fixes

Cummins argues that the trial court erred by denying its Motion seeking a new trial or remittitur when, despite that Cummins had the contractual obligation to achieve the SBR's requisite performance standards and remedy any defects, the Authority prevented it from implementing fixes it proposed for the influent overtopping, excessive effluent decant, and SBR air pipe painting issues at no cost to the Authority.

¹⁴ This Court docketed the Authority's appeals at Pa. Cmwlth. Nos. 1320, 1515 C.D. 2024.

¹⁵ The trial court's Appellate Rule 1925(a) Opinions in response to the Post-Trial Motions summarize and/or adopt its reasoning in its August 23, 2024 Order and the separate August 22, 2024 order (entered August 23, 2024). *See* R.R. at 5501a-5502a. The trial court's additional Appellate Rule 1925(a) Opinion adopts its reasoning in its October 9, 2024 decision. *See* R.R. at 5503a.

Initially,

[w]hile a jury's verdict and damages award are generally insulated from challenge, the grant of a new trial may be required to achieve justice in those instances where the original trial, because of taint, unfairness, or error, produces something other than a just and fair result, which is the principle goal of judicial proceedings.

Mader v. Duquesne Light Co., 241 A.3d 600, 612 (Pa. 2020) (*Mader II*).

“A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion.” [*Commonwealth v. Clay*, 64 A.3d 1049,] 1055 [(Pa. 2013)]. When a trial court considers a motion for a new trial based upon a weight of the evidence claim, **the trial court may award relief only “when the jury’s verdict is so contrary to the evidence as to shock one’s sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.”** *Id.* The inquiry is not the same for an appellate court. Rather, when an appellate court reviews a weight claim, **the court is reviewing the exercise of discretion by the trial court**, not the underlying question of whether the verdict was against the weight of the evidence. *Id.* at 1054. The appellate court reviews a weight claim using an abuse of discretion standard. *Id.* at 1057.

Commonwealth v. Jacoby, 170 A.3d 1065, 1080 (Pa. 2017) (emphasis added).

In *Harman ex rel. Harman v. Borah*, . . . 756 A.2d 1116, 1121-22 ([Pa.] 2000), [the Pennsylvania Supreme] Court explained the process of reviewing a motion to grant or deny a new trial. First, the underlying matter that formed the basis for **the trial court’s decision is to be reviewed** - that is, **whether a mistake occurred and whether that mistake was sufficient to order a new trial**. If the appellate court agrees with the trial court that an error occurred, it proceeds to **determine whether the trial court abused its discretion in ruling on the request for a new trial**. *Id.* at 1122; *Morrison*, 646 A.2d at 571; *Coker*, 625 A.2d at 1184 (“Discretion must be exercised on the foundation of reason.”). An abuse of discretion

exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will. *Id.* at 1184-85. Merely because an appellate court would have reached a different result than the trial court does not constitute a finding of an abuse of discretion. *Morrison*, 646 A.2d at 571. Also, “[w]here the record adequately supports the trial court’s reasons and factual basis, the [trial] court did not abuse its discretion.” *Id.* (quoting *Coker*, 625 A.2d at 1187).

Mader II, 241 A.3d at 607 (emphasis added).

In the alternative, Cummins seeks remittitur, which is the process by which a trial court may reduce an excessive jury verdict. *See Carlino v. Ethicon, Inc.*, 208 A.3d 92 (Pa. Super. 2019).¹⁶

[U]nder Pennsylvania law, the decision to grant a remittitur depends on whether the award of compensatory damages lies beyond “the uncertain limits of fair and reasonable compensation” or whether the verdict “so shocks the conscience as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption.” *Potochnick v. Perry*, 861 A.2d 277, 285 (Pa. Super. 2004). This standard is highly deferential, because the trial judge serves not as finder of fact but as impartial courtroom authority with obligation to give great respect to the jury’s function. *Ferrer v. Tr[s.] of Univ. of P[a.]*, . . . 825 A.2d 591, 611 ([Pa.] 2002). . . . Th[e] appellate c]ourt is not free to substitute its judgment for that of the fact[-]finder. “Rather, it is [the appellate court’s] task to determine whether the lower court committed a ‘clear’ or ‘gross’ abuse of discretion when conducting its initial evaluation of a defendant’s request for remittitur.” *Dubose v. Quinlan*, 125 A.3d 1231, 1244 (Pa. Super. 2015) (citation omitted).

¹⁶ “In general, [Pennsylvania] Superior Court decisions are not binding on this Court, but they offer persuasive precedent where they address analogous issues.” *Lerch v. Unemployment Comp. Bd. of Rev.*, 180 A.3d 545, 550 (Pa. Cmwlth. 2018).

Carlino, 208 A.3d at 118 (emphasis added) (quoting *Hammons v. Ethicon, Inc.*, 190 A.3d 1248, 1285-86 (Pa. Super. 2018), *aff'd*, 240 A.3d 537 (Pa. 2020)).

Here, regarding Cummins' proposed fixes, the trial court held:

Having read the trial transcripts in their entirety, . . . the [trial c]ourt is neither shocked nor surprised by the jury's verdict.

As advocates are wont to do, Cummins casts the evidence in a self-promoting light. Evaluated more objectively, it did not depict [the Authority] as the justified obstructionist [Cummins] attempts to portray. Certainly the evidence and instructions would have supported a verdict consistent with Cummins' position. But on every issue - the cover-fix, the excessive decant, and painting - [the Authority] countered [Cummins'] evidence with testimony indicating that Cummins' proposed solutions were impractical or would not remedy the contractual deficiencies or that Cummins' failure to communicate with [the Authority] was the reason it never drained the SBR tank housing the air line Cummins admits it was responsible to paint, and that evidence was not so weak or preposterous as to defy common sense. The jury thus had a choice and did precisely what juries are supposed to do: it weighed the evidence and concluded that [the Authority's] was more credible. Its decision was wholly sustainable and does not warrant a new trial or remittitur.

Trial Ct. August 23, 2024 Order at 4 (R.R. at 4452a).

At the outset, this Court observes that Cummins' President and owner, Robert Cummins, and his brother, Project manager, Nick Cummins, admitted - and GF's Senior Project Manager/engineer, John F. Rae, P.E. (Rae), confirmed - based on *Cummins I*, that Cummins was contractually responsible for identifying, making, and paying for any changes necessary to incorporate the SBR into the Project design, and complying with the Contract's performance specifications. *See* R.R. at 743a, 771a-772a, 1161a, 1175a, 1233a, 1913a-1916a. The *Cummins I* Court further declared:

[I]f Ashbrook failed to take into account the hydraulics and the influent piping size for the SBR system, the Contract made Cummins responsible therefor. Section 6.06.D of the General Conditions (Concerning Suppliers and Others), specified: “[Cummins] **shall be fully responsible to [the Authority] and [GF] for all acts and omissions of the . . . [s]uppliers**, and other individuals or entities performing or furnishing any of the Work just as [Cummins] is responsible for [its] acts and omissions.” [Ex. D-2 at 155] (emphasis added).

Cummins I, 237 A.3d at 599.

Proposed Influent Overtopping Cover Fix

Cummins sought either a new trial or remittitur, claiming that the jury’s reduction of Cummins’ contract balance by \$241,622.00 was against the clear weight of evidence that demonstrated that the Authority improperly prevented Cummins from implementing the cover-fix to address the influent overtopping issue.

The Authority’s original IFB sought an SBR system that handled influent by hard pipe and valves to each influent tank, which was Ashbrook’s standard design and was less expensive; however, when the Authority rebid the Project in 2013, the IFB specified an open channel configuration with gates, rather than hard pipe and valves. *See* R.R. at 703a-704a, 706a-707a, 750a-751a, 976a, 1464a-1465a, 1535a, 1612a-1619a, 1629a-1635a, 1654a-1656a, 1920a, 2270a-2283a, 2288a-2289a, 2295a, 2308a, 2414a, 2543a; *see also* Ex. D-45.

Although the Authority did not inform Cummins during the first six months the SBR was in operation (from August 2015 to February 2016) that influent overtopping was occurring, once being made aware, Nick Cummins investigated, simulated peak wet weather (i.e., heavy rain or snowmelt) flows, and agreed that the Ashbrook SBR gates did not comply with the Contract’s performance specifications; specifically, “[u]nder certain high flow conditions, . . . the influent . . . at . . . 88 or

9[,]200 [GPM], [] would . . . spill over the gates and go into another tank” at the wrong point in a treatment cycle. R.R. at 693a; *see also* R.R. at 694a-695a, 750a-753a, 756a, 941a-948a; *see also* Exs. P-522, D-341.

Cummins proposed a fix that consisted of removing the grate from the top of each SBR influent box and replacing it with a solid cover that filled the space between the top of the influent gate and the influent box until the automatic gate opened, thereby preventing the overtopping. *See* R.R. at 695a, 958a-959a, 1404a; *see also* Ex. D-175. Nick Cummins described that the cover would be made of aluminum, would be approximately 6 feet, 4½ inches by 2 feet, 11¼ inches by ½ inch, with a plate that measured 3 feet by 4½ inches by 1 foot, 2½ inches, and would require approximately 20 plus bolts. *See* R.R. at 1241a, 1243a-1245a; *see also* Ex. Demonstration (Demo) 12. Cummins discussed its proposed cover fix with Alfa Laval/Ashbrook’s¹⁷ Global Technical Manager, Jeff Devine (Devine), and Ashbrook’s SBR and Enaqua UV system representative Ed Nichols (Nichols) of Nichols Environmental, neither of whom voiced any problem or objection to the solution; in fact, although Ashbrook had not previously used a cover on an influent box to control wastewater flow into an SBR tank and declined to review and provide feedback on it, Ashbrook agreed to stand behind its warranty for the SBR system with the cover fix in place. *See* R.R. at 696a, 701a, 965a-966a, 982a-984a, 1235a-1240a, 1407a-1408a, 1438a-1440a, 1465a, 1627a-1628a, 1656a-1657a; *see also* Exs. P-130, P-143.

Cummins hired Hannon Engineering, P.C.’s James Hannon (Hannon),¹⁸ who worked with Ashbrook and Cummins’ fabricator, Micale Fabricators, and prepared shop drawings for the proposed cover fix that Cummins

¹⁷ Alfa Laval acquired Ashbrook in 2012. *See* R.R. at 1485a.

¹⁸ The trial court accepted Hannon as an expert witness in the fields of structural engineering and Department of Environmental Protection (DEP) permit compliance.

presented to GF, which GF marked *reviewed*. See R.R. at 695a-700a, 706a, 750a, 1396a-1397a, 1401a-1406a, 1418a, 1422a, 1426a-1427a, 1431a, 1435a-1436a; *see also* Exs. P-130, P-469, P-522, D-175, Demo 12. Thereafter, Cummins' ordered the necessary materials from Micale Fabricators. See R.R. at 757a-758a, 780a-789a, 950a-951a, 959a-960a, 966a-969a, 973a-974a. However, when Cummins contacted the Authority to set an installation date, citing concerns of potential leakage, Ashbrook's warranty, and safety risks, the Authority informed Cummins that it would rather have hard pipe and valves instead of Cummins' proposed cover fix. See R.R. at 701a-702a, 951a-952a, 959a, 969a-971a, 973a-974a, 985a-988a, 1254a-1255a, 1351a-1352a, 2578a-2579a.

Rae confirmed that GF marked the proposed cover fix *reviewed*, but denied that it represented GF's approval. See R.R. at 1945a-1946a, 1949a, 2132a; *see also* Exs. P-130, D-175. Rae and the Authority's consultant, Brian Book (Book),¹⁹ claimed they had never seen an SBR that used a cover for influent control and, thus, did not consider it a proven design, which the Contract required. See R.R. at 1945a-1946a, 2308a; *see also* Ex. Demo 12. Rae posed numerous concerns to Cummins, in particular, that Ashbrook did not expressly endorse the cover fix and the fix did not address the underlying problem of incompatibility between the influent piping and Ashbrook's design. See R.R. at 1945a-1951a; *see also* Ex. Demo 12, Exs. P-130, D-371.

Book and the Authority's operations manager, Donnie Hayden (Hayden), also expressed concerns that the cover could create a pressurized vessel containing methane, the leakage potential of the seal between the gate frame and the concrete, and the safety risk to Authority staff who would have to lean over to remove the numerous bolts, lift a 150- to 200-pound cover, and enter the SBR box

¹⁹ The trial court accepted Book as an expert in the design and operation of wastewater treatment plants and SBR and specifications applicable thereto.

to apply grease to prevent the gates from freezing.²⁰ *See* R.R. at 2308a-2310a, 2312a-2323a, 2431a, 2436a-2437a, 2470a-2474a, 2555a, 2558a; *see also* Ex. D-282. Authority board member, Bucky Clark (Clark), confirmed that the Authority refused the cover fix because it was not in accordance with the Contract's specification, Ashbrook never confirmed or warranted that it was a good solution, and it posed a safety risk. *See* R.R. at 2602a-2604a.

Hannon and Nick Cummins admitted that the cover would create a pressurized space, and Nick Cummins agreed that the grates over the cover could freeze, making it more difficult to remove the cover's bolts, and acknowledged that having operators kneel or lay on their stomachs over the SBR box to unbolt the cover posed a safety risk. *See* R.R. at 1238a-1242a, 1247a-1251a, 1412a-1415a, 1422a, 1425a-1429a, 1437a. Nick Cummins also acquiesced that the cover sealant could freeze, which would require moving or defrosting and greasing the gates. *See* R.R. at 1246a-1249a.

Cummins did not intend to charge the Authority for what it estimated was a \$15,000.00 solution, and assured the Authority that Cummins would design the cover to accommodate the Authority's concerns and that, if it ultimately did not work, Cummins would remove it and proceed with the Authority's suggested hard pipe and valves; however, the Authority did not allow Cummins to do so, and three years later, in 2019, the Authority bid that work out in Project Phase 3. *See* R.R. at 706a-709a, 960a, 966a-967a, 985a-986a, 989a, 1161a, 1251a, 1414a, 1417a-1418a, 1428a, 1437a. The Project Phase 3 bid winner, Hickes Associates, Inc. (Hickes), ultimately charged the Authority \$241,622.00 for that work.²¹

²⁰ Hayden estimated such maintenance work would require two staff and approximately two to three hours to complete. *See* R.R. at 2473a.

²¹ Both Cummins and Hickes bid on Project Phase 3, which included installing hard pipe to address the SBR influent issues. *See* R.R. at 1952a, 2142a-2145a; *see also* Ex. P-496. Hickes

Robert Cummins and Nick Cummins maintained that if the rebid Contract specifications had included hard pipe and valves, Cummins' bid would have been approximately \$80,000.00 less because Cummins would only have been required to construct one (rather than two) influent boxes. *See* R.R. at 703a-704a, 706a-707a, 976a, 1464a-1465a. They described that after-the-fact retrofitting of the hard pipe and valves would require Cummins to jackhammer the concrete, dig down two to three feet, cut the pipe, drill through concrete walls, add fittings, and refill with concrete, which Cummins was not willing to do for free. *See* R.R. at 706a-707a, 977a. Cummins informed GF that since the hard pipe and valves were not required in light of its cover fix proposal, Cummins would not absorb the additional \$241,622.00 cost thereof. *See* R.R. at 979a-980a.

This Court observes that General Conditions Section 6.19.A provided:

[Cummins] warrants and guarantees to [Authority], [and GF] . . . that all Work, materials, equipment, and other Contract performances **shall be in accordance with the Contract Documents and not be defective.**^[22]

1. [Cummins] shall remedy, at no increase in Contract [p]rice, any defects which may develop therein during the guarantee period stated within the [Contract].

bid \$40,000.00, Cummins bid \$189,000.00, and a third contractor bid \$148,000.00. *See* R.R. at 712a; *see also* Ex. P-156. Hickes won the bid, coordinated with Devine, and installed hard pipe and valves in 2020. *See* R.R. at 712a, 1722a-1724a, 1951a-1955a, 2141a-2144a, 2147a; *see also* Exs. P-137, P-140, P-156, D-374, D-402 at 45. Rae admitted that the Authority included the work in Project Phase 3 in order to get competitive prices; however, Hickes had presented an unbalanced bid and ultimately charged the Authority \$241,622.00 (\$190,000.00 plus \$10,000.00 for the influent modifications, \$15,000.00 for concrete work, and \$26,622.00 for electrical work related thereto). *See* R.R. at 1723a, 1953a-1955a, 2251a-2253a; *see also* Exs. D-374, D-375.

²² General Conditions Section 1.02.C defines the term *defective*, when modifying the word *work*, as “Work that is unsatisfactory, faulty, or deficient in that it does not conform to the Contract Documents or does not meet the requirements of any inspection, reference standard, test, or approval referred to in the Contract Documents . . . prior to [GF’s] recommendation of final payment.” Ex. D-2 at 128.

Ex. D-2 at 165 (emphasis added). General Conditions Section 9.02.A.4 made GF, as the Authority’s agent on the Project, responsible for “endeavor[ing] to guard the [Authority] against defective Work.” *Id.* at 172. Accordingly, General Conditions Section 9.02.B **granted GF “full authority to decide** questions which may arise under the Contract relative to the quality and acceptability of materials furnished and work performed, . . . the interpretation of the Project Manual and Contract Drawings, and **acceptable fulfillment of the Contract** on the part of [Cummins].” *Id.* at 173 (emphasis added). Correspondingly, General Conditions Section 9.06.A authorized GF to “**disapprove or reject Work which [it] believe[d] to be defective, or . . . w[ould] not produce a completed Project that conforms to the Contract Documents, or that w[ould] prejudice the design concept of the completed Project as a functioning whole** as indicated by the Contract Documents.” *Id.* at 174 (emphasis added). General Conditions Section 6.19.B represented that when any equipment or work did not conform to the Contract Documents, it “**shall be considered as defective and shall be immediately . . . made satisfactory as required by [GF].**” *Id.* at 165 (emphasis added). Notably, General Conditions Section 6.19.C.6 made “[Cummins]’ obligation to perform and complete the Work in accordance with the Contract Documents absolute” regardless of “[a]ny review . . . by [GF].” *Id.* at 166 (emphasis added).

In addition, General Conditions Section 13.06.A.1 specified: “[Cummins] **shall pay all [c]laims, costs, losses, and damages[,]** including but not limited to, **all fees and charges of . . . other professionals . . . arising out of or relating to such correction** or removal, including but not limited to all costs of repair or replacement of the work of others.” *Id.* at 192 (emphasis added). General Conditions Section 13.04.B.1 further declared:

If it is found that such Work is defective, [Cummins] **shall pay all [c]laims, costs, losses, and damages, including but**

not limited to, all fees and charges of . . . other professionals . . . arising out of or relating to . . . all costs of repair or replacement of work of others, and the [Authority] shall be entitled to an appropriate decrease in the Contract [p]rice”

Id. (emphasis added). Therefore, General Conditions Section 6.06.D represented that “[Cummins] shall be fully responsible to [the Authority] and [GF] for all acts and omissions of the [s]ubcontractors, [s]uppliers, and other individuals or entities performing or furnishing any of the Work just as [Cummins] is responsible for [its] own acts and omissions[.]” *Id.* at 155.

Consequently, General Conditions Section 6.21.A stated, in pertinent part:

[Cummins] shall defend, indemnify, and hold harmless the [Authority] . . . from and against all . . . costs, losses, and damages, including but not limited to, all fees and charges of . . . other professionals . . . arising out of, connected with, or caused by any of [Cummins’] operations or matter in, of, or related to the Project, or the performance of the Work, . . . failure to perform, [or] breach of contract

Id. at 167. Finally, pursuant to General Conditions Section 18.04.A, such warranties, indemnifications, and guarantees “survive[d] final payment, completion, and acceptance of the Work or termination or completion of the [Contract].” *Id.* at 207.

Thus, at all relevant times, Cummins was contractually responsible for complying with the Contract’s performance specifications, in particular, identifying, making, and paying for any changes necessary to incorporate the SBR into the Project design, and Ashbrook’s acts or omissions related thereto. *See Cummins I.* Moreover, Cummins’ bid on the hard pipe and valve installation in Project Phase 3 is very close to Hickes’ base cost (\$189,000.00 versus \$190,000.00). Accordingly, because the record evidence “adequately supports the trial court’s reasons and factual basis” for denying a new trial, *Mader II*, 241 A.3d at 607 (quoting *Morrison*,

646 A.2d at 571), and the jury's damage award was not "beyond the limits of fair and reasonable compensation," *Carlino*, 208 A.3d at 118 (quoting *Potochnick*, 861 A.2d at 285), the trial court did not err by denying Cummins' Motion on the basis that the Authority prevented it from implementing the proposed influent overtopping cover fix.

Proposed Excessive Effluent Decant Fix

Cummins also sought a new trial or remittitur arguing that the jury's \$605,500.00 award in the Authority's favor for the excessive decant issue was against the overwhelming weight of the evidence demonstrating that the Authority improperly prevented Cummins from addressing the excessive decant issue.

The Contract specified that the SBR's peak flow capacity should be 13.88 GPD, or 9,638 GPM (excluding the Authority's existing conventional automated sludge (CAS) system) (plus or minus 10%, i.e., 8,674 to 10,600 GPM). *See* Specification Section 11393 ¶¶ 1.03(a)(3), 2.03(B)(3); *see also* R.R. at 758a-759a, 1012a, 1191a-1193a, 2124a-2126a, 2302a; Exs. P-467, D-2. The Authority alleged that the floating decanter Ashbrook manufactured that pushed effluent out of the SBR tanks and downstream to the UV system for disinfection occasionally decanted at too high a rate. *See* R.R. at 718a, 1924a-1925a, 1927a, 2354a-2358a, 2513a, 2608a-2609a; *see also* Ex. D-60. Former Authority Executive Director, Rick Brocius (Brocius),²³ specifically recalled that the average daily flow into the Authority's SBR was approximately 1.8 to 2.4 million GPD, with peak and wet weather flows increasing the volume to 5.4 to 10 million GPD, and that the overflows occurred at approximately 9 million GPD (or 6,250 GPM), or two-thirds of the SBR's designed capacity. *See* R.R. at 1725a-1727a.

²³ Because Brocius was deceased at the time of the hearing, counsel read his deposition testimony into the record. *See* R.R. at 993a.

Cummins admitted that Ashbrook's decanters failed to control decant flows above 8,800 GPM.²⁴ *See* R.R. at 758a-759a, 1012a, 1191a-1193a; *see also* Ex. P-467. Cummins and Devine attributed the issue to a downstream obstruction or narrowing of the shoulders where the outfall box transitioned to the channel at the UV plant, and questioned why GF did not design the UV building at a lower elevation.²⁵ *See* R.R. at 759a-760a, 1516a-1518a, 1520a, 1528a, 1540a-1543a,

²⁴ Nick Cummins acknowledged that the Authority issued a punch list on December 6, 2016, reflecting that excessive decants exceeded the downstream UV disinfection system's capacity. *See* R.R. at 1357a-1358a. Rae, Hayden, and Clark explained that complete control was necessary so that the UV system can properly disinfect the flow before it is dispensed into the stream, as the Authority's DEP permit requires, thereby preventing public health problems and DEP violations. *See* R.R. at 1927a-1929a, 1991a, 2328a-2332a, 2338a-2358a, 2456a, 2608a-2609a; *see also* Exs. P-68 at 13, D-389 (video), D-401 (video), D-403.

Devine claimed that the average peak wet weather flow SBR Specification requirement did not require a constant decant at precisely at 9,638 GPM; rather, that was an average, a goal, which the Ashbrook system satisfied, as long as the downstream flow did not back up into the SBR. *See* R.R. at 1519a-1521a, 1526a-1528a, 1531a-1533a, 1541a, 1546a, 1562a-1563a, 1577a, 1588a, 1592a-1593a, 1595a-1599a, 1607a. Nick Cummins observed that the effluent overflow did not stop GF from putting the SBR into operation in summer 2015, and the Authority never notified Cummins of any effluent quality issues. *See* R.R. at 610a-611a, 948a, 953a. Specifically, Cummins claimed, and Hannon agreed, that there was no evidence that the effluent water quality failed to meet the Contract's SBR Specifications or that the Authority was cited for any environmental violations due to excessive decants over the eight and one-half years the SBR system was in operation before the trial. *See* R.R. at 720a, 1396a-1401a, 1424a-1425a, 1433a-1434a, 1439a-1440a, 1508a-1510a, 1512a-1515a; *see also* Ex. P-469. Brocius, Book, and Hayden confirmed that the Authority did not receive any DEP violation notices after the SBR system was put into operation. *See* R.R. at 1721a, 1728a, 2417a, 2477a-2479a. Clark asserted that whether or not DEP cited the Authority for effluent violations had no bearing on whether the system decanted at 9,638 GPM as required. *See* R.R. at 2609a.

²⁵ According to Devine, Ashbrook initially submitted its standard SBR fabrication (which was optimum for the SBR decanter), but since Ashbrook had to lower the decant pipe into the box by more than two feet, once the final UV system was selected, GF should have revised the hydraulic profile for Ashbrook to ensure free flow of discharge. *See* R.R. at 1583a-1586a. Rae denied that the UV system downstream of the SBR created the excessive decants. *See* R.R. at 2001a. Hayden attributed the overflows to the Ashbrook gates not adequately controlling the flow into each of the tanks, rather than any back-up in the UV system. *See* R.R. at 2452a-2455a, 2482a-2484a, 2571a. Book declared within a reasonable degree of professional certainty based on his hydraulic calculations, that the UV system shoulders did not cause the excessive decants. *See* R.R. at 2381a-2382a, 2385a. Book and Rae claimed the excessive flow rates out of the decanters were

1545a-1550a, 1554a, 1560a-1566a, 1568a-1569a, 1572a-1574a, 1581a-1582a, 1588a-1592a, 1620a; *see also* Exs. P-522, D-379A.

Nick Cummins met with Hannon and Cummins' carpenter foreman, Dale Campbell, to devise a solution. *See* R.R. at 697a, 712a, 718a-719a, 785a, 861a-862a, 865a, 934a, 949a, 957a, 1234a. Based solely on Devine's visual observation - without analysis or calculations²⁶ - that the shoulders of the concrete channel leading into the UV tank appeared to contribute to the back-up in the UV channel, Cummins proposed removing or widening (i.e., shaving) the channel shoulders. *See* R.R. at 996a-1000a, 1003a, 1543a, 1572a-1575a, 1601a-1603a; *see also* Exs. P-461, D-379A. Book, on the other hand, analyzed the flows through the UV plant and determined within a reasonable degree of engineering certainty that the shoulders did not create the problem. *See* R.R. at 2371a-2372a, 2376a-2378a, 2383a-2385a. Book further opined that chipping away at the concrete foundation to correct the issue could damage the structural integrity of the channel leading to the UV equipment. *See* R.R. at 2384a-2385a.

In addition, Devine suggested a programming fix using a Supervisory Control and Data Acquisition (SCADA) system (which includes controls plus a black box or Project historian that could record among numerous parameters

the result of other changes Ashbrook made to the system without accounting for the downstream water level - i.e., making their tanks shallower, making their tanks lower, and lowering their pipe into the effluent box two feet. *See* R.R. at 1930a, 1937a-1939a, 1956a-1962a, 1967a-1969a, 2001a-2003a, 2062a-2065a, 2115a, 2245a-2246a, 2369a, 2371a-2379a, 2384a, 2410a; *see also* Exs. D-60, D-143. Further, Benjamin Israel-Devadason, who the trial court accepted as an expert in hydraulic and hydrologic engineering and the execution and analysis of computational fluid dynamics modeling, opined with a reasonable degree of engineering certainty that the problems were not with the UV chamber, but rather Cummins' changes to the decanter system and pipeline elevation. *See* R.R. at 2673a, 2710a-2713a.

²⁶ At Hannon's recommendation, Cummins asked GF for the hydraulic analysis GF would have conducted to determine the pipes flow and friction, but GF and the Authority never produced it. *See* R.R. at 954a-958a.

measuring flow coming in and flow going out) by Martz Technologies²⁷ to assess why the Authority was getting higher flows out than flows entering the system, which Cummins proposed to do for the Authority at no charge, but which the Authority refused to implement. *See* R.R. at 690a-691a, 788a-789a, 999a-1009a, 1017a-1018a, 1561a-1562a, 1622a. Devine also recommended installing a six-inch stainless steel restrictor plate across the bottom of the decant pipe to restrict the decant into the effluent box and balance the system. *See* R.R. at 719a-720a, 997a-999a, 1171a-1173a, 1458a-1460a. Devine was nearly certain that the restrictor plate fix would work, and maintained that Ashbrook was at all times willing to ensure the Authority's satisfaction with the fix at no charge. *See* R.R. at 994a-997a, 1001a-1009a, 1181a-1191a, 1462a-1463a, 1552a, 1559a-1561a, 1567a, 1581a, 1588a. However, the Authority chose not to implement Devine's proposed fixes. *See* R.R. at 719a-720a, 1171a-1173a, 1458a-1460a, 1519a-1520a, 1559a-1561a, 1566a-1567a, 1577a-1579a, 1622a.

Benjamin Israel-Devadason (Devadason) testified that he conducted an independent computational fluid dynamics simulation from December 2022 through February 2023 on the Authority's behalf to determine the capacity of the SBR system as-built and whether it functioned as intended. *See* R.R. at 2669a, 2674a, 2719a-2723a. Devadason concluded, based on his modeling of the system as-built,

²⁷ Martz Technologies is a control systems integrator that processes monitoring and control system contracts for, *inter alia*, water and wastewater plants. *See* R.R. at 1362a. Former owner and president of Martz Technologies, Gregory Martz (Martz), described that SCADA was the brains of the system that supplies wastewater operation instrument readings and which includes project historian software that records process parameters and records and archives events for future analysis. *See* R.R. at 1363a-1364a, 1381a, 1387a-1388a. Martz recalled that Cummins asked Martz Technologies to provide data analysis for all instances in which the SBR system exceeded its 9,638 GPM flow rate, which report reflected that the meter was configured on that day (October 6, 2015) for a maximum flow rate of 10,500 GPM, but it was impossible to tell whether or by how much the flow rate exceeded that amount. *See* R.R. at 1378a, 1380a-1381a, 1385a; *see also* Ex. P-165.

and using the specified 9,638 GPM designed flow, SBR tank levels, and the creek's average and flood pool levels, that the UV plant had no impact on upstream flow. *See* R.R. at 2677a-2697a; *see also* Exs. D-389, D-431, Demo 3. Devadason expounded that lowering the pipe two feet had a "huge impact" on what was occurring in the effluent box; it brought the flow into the water's zone of turbulence and restricted the flow out of the decanter, causing the system to fail. R.R. at 2697a; *see also* R.R. at 2698a-2701a. Devadason added that the weir structure crucial to the process was significantly reduced (to 26 feet) from the (80-foot) design specifications which created upstream bottlenecks and system failure. *See* R.R. at 2702a-2710a. Devadason opined with a reasonable degree of engineering certainty that the problems were not with the creek or the UV chamber, but stemmed from the decant box and the pipeline elevation. *See* R.R. at 2710a-2713a.

Book testified that Cummins' recommended restrictor plate fix would not have worked because not only would it have restricted flow from backing up into the tank, it would have restricted water coming out of the tank and sink the decanter, which creates the same problem Cummins was attempting to solve. *See* R.R. at 2358a-2369a; *see also* Ex. Demo 2. Hayden agreed that a restrictor plate would cause the decanters to sink, and added that it would place additional stress on the jack screws and brass nuts, requiring them to be changed more frequently. *See* R.R. at 2479a-2480a. Hayden and Clark also declined for the Authority to experiment with the unique decanter by installing such a plate or repurposing the influent gates without knowing the effect on the rest of the system. *See* R.R. at 2480a-2481a, 2615a. Hayden added that when the Authority later attempted to install a restrictor plate on the decanter to resolve the problem in 2022 or 2023, the fix did not work. *See* R.R. at 2560a-2564a, 2572a-2573a; *see also* Ex. Demo 13. Brocius, Hayden, and Clark concluded that, ultimately, the Authority and its customers did not get

what they paid for with the Ashbrook SBR. *See* R.R. at 1729a, 2513a, 2600a-2601a, 2610a.

Eventually, the Authority proposed in Project Phase 3 to control the effluent side of the SBR by taking the gates from the influent boxes and placing them on the effluent boxes, which Cummins had previously suggested and the Authority rejected. *See* R.R. at 710a, 991a-992a, 1460a-1462a, 1477a; *see also* Ex. P-461. Robert Cummins stated that Hickes bid \$20,000.00 to install throttle plates where the decanter drains out of the SBR tanks to prevent the excess decants from exceeding 9,639 GPM. *See* R.R. at 712a, 2144a-2150a; *see also* Ex. P-156. Cummins also bid on that work. *See* R.R. at 1460a; *see also* Ex. P-156. Brocius declared that the Authority preferred Hickes' solution. *See* R.R. at 1722a-1724a. However, after Hickes began the work, the Authority ultimately declined to use that option and issued a change order crediting the Authority \$16,000.00 for the work Hickes had not yet undertaken. *See* R.R. at 993a-994a, 2150a-2153a; *see also* Ex. P-492. Rae stated at trial, and Clark confirmed, that because of the excessive decant issue, GF had not yet certified that the Project was built in accordance with the Department of Environmental Protection permit and the Authority's PENNVEST funding.²⁸ The jury awarded the Authority \$605,500.00 to compensate it for the SBR system's excessive effluent decant issue. *See* R.R. at 3033a.

As stated above, General Conditions Sections 6.06.D, 6.19.A, 6.19.B, 6.21.A, 9.02.A.4, 9.02.B, 9.06.A, 13.06.A.1, 13.04.B.1, and 18.04.A, authorized GF to determine whether Cummins' proposed Work qualified as an acceptable fulfillment of the Contract Documents and to disapprove or reject work that failed to conform to would compromise or prejudice the completed Project's functioning,

²⁸ According to Clark, PENNVEST was still holding approximately \$450,000.00 awaiting GF's certification, and the Authority's ratepayers are paying it back with interest. *See* R.R. at 2600a-2601a.

and made Cummins responsible for paying all costs arising from the correction of defective work even after GF/the Authority accepted the Work or the Contract was completed. *See* Ex. D-2 at 155, 165-167, 172-175, 192, 207.

Consequently, Cummins was ultimately contractually responsible for complying with the Contract's performance specifications, in particular, identifying, making, and paying for any changes necessary to incorporate the SBR into the Project design, and Ashbrook's acts or omissions related thereto. *See Cummins I*. Accordingly, because the record evidence "adequately supports the trial court's reasons and factual basis" for denying a new trial, *Mader II*, 241 A.3d at 607 (quoting *Morrison*, 646 A.2d at 571), and the jury's damage award was not "beyond the limits of fair and reasonable compensation," *Carlino*, 208 A.3d at 118 (quoting *Potochnick*, 861 A.2d at 285), the trial court did not err by denying Cummins' Motion on the basis that the Authority prevented it from implementing the proposed excessive effluent decant fix.

Proposed Air Pipeline Painting Fix

In addition, Cummins sought a new trial contending that the jury's \$30,668.00 award in the Authority's favor for SBR air pipeline²⁹ painting was against the weight of evidence demonstrating that the Authority improperly prevented Cummins from repainting the SBR air pipeline. Alternatively, Cummins sought remittitur in the amount of \$28,668.00 (reduction from \$30,668.00 to \$2,000.00) therefor.

The record reflects that one of the items on the Authority's August 15, 2016 punch list, proffered eight months after GF issued the certificate of substantial

²⁹ The SBR air pipelines supplied oxygen to the diffusers located at the bottom of each SBR tank for the aeration stage of the wastewater treatment process. *See* R.R. at 845a-846a, 2497a-2498a.

completion of the Project, was repainting one of the SBR air pipelines that had begun to chip. *See* R.R. at 712a-715a, 1156a-1158a, 2727a. Therein, GF specified: “Paint on pipes inside of tanks peeling off[.]” Ex. P-28. Because Cummins believed it had failed to allow the paint to properly cure on that pipeline, Cummins agreed to repaint it at no cost to the Authority. *See* R.R. at 846a-847a, 1156a-1158a. Under “Comments,” GF described: “Tanks in service; need drained, pipe cleaned then painted.” Ex. P-28. GF estimated the value of that work at “\$2,000.00[.]” *Id.*; *see also* R.R. at 2517a-2518a.

The parties agreed that draining the SBR tanks was necessary for Cummins to repaint the SBR air pipeline.³⁰ *See* R.R. at 714a, 2514a. Hayden stated that he did not see any schedule that Cummins supplied the Authority suggesting when Cummins planned to repaint. *See* R.R. at 2500a. However, Rae recalled “trying to get a schedule together” for the Authority to drain the tank or use a boat in the tank to remove the affected pipe, have it painted, and return it to the tank, but admitted that the Authority’s plan never came together. R.R. at 2239a. This explanation is consistent with the testimony of Cummins’ witnesses that Cummins asked for dates when the Authority could drain the tank and, despite the Authority’s internal discussions on how best to carry out that process, the Authority never notified Cummins when it could do the work - even when the Authority, at one point, drained the tanks to observe the diffusers. *See* R.R. at 846a-847a, 1158a-1159a, 2237a-2240a, 2514a-2515a, 2728a.

³⁰ Hayden estimated that the process would take approximately five to seven days - during which the Authority would have to drain the tanks and use high-pressure hoses and a four- or five-man work crew to remove the sludge in order for Cummins to repaint - and then the cure time could take up to seven days. *See* R.R. at 2499a-2500a, 2502a. Hayden added that draining the tanks would reduce the SBR’s capacity by 25% for each tank removed from service. *See* R.R. at 2502a.

After Cummins later learned that the other three SBR air pipelines were also chipping, and concluded, albeit incorrectly, that it was due to GF providing incorrect paint specifications and that the warranty had expired, Cummins declined to paint the other pipes. *See* R.R. at 846a, 2728a-2730a. Hayden recalled that the Authority's estimate to repaint all four SBR air pipelines, including its costs, totaled \$124,672.00 - consisting of MJ Painting's May 2017 \$24,190.00 estimate to repaint each tank (x 4 = \$96,760.00 total) + the Authority's \$6,978.00 estimate to drain and clean each tank (x 4 = \$27,912.00 total). *See* R.R. at 2501a-2502a, 2516a-2517a; *see also* Ex. D-253. Accordingly, the Authority's estimate to drain, clean, and paint each tank was \$31,168.00.

This Court observes that the Contract's painting specifications required Cummins to supply a written certification to GF that Cummins complied with the air pipeline painting and coating requirements. *See* R.R. at 848a-849a, 2052a-2053a; *see also* Ex. D-2 at 858-860. Although Cummins claims to have had the paint manufacturer visit and inspect its painting work, Cummins admitted that it did not provide a written certification to GF. *See* R.R. at 849a, 2052a-2053a. Notwithstanding, the record clearly reflects that the Authority did not facilitate and, in fact, appeared to prevent, Cummins from undertaking the work it agreed to do. Cummins was never in a position to dictate that timing to the Authority. Rather, the Authority - the party obliged to provide continuous wastewater treatment services to its customers - was the only party that could properly assess when it could suspend a portion of its operations and expend the time and effort to drain the SBR tank so Cummins could repaint the chipping SBR air pipeline. In addition, when the Authority drained the tank for another reason, it did not inform Cummins. Therefore, the record does not support the trial court's conclusion that "Cummins' failure to communicate with [the Authority] was the reason [the Authority] never

drained the SBR tank.” Trial Ct. August 23, 2024 Order at 4 (R.R. at 4452a). However, such error does not warrant a new trial. *See Mader II*.

The record also supports that the Authority estimated the value of repainting one SBR air pipeline in August 2016 at \$2,000.00, but just nine months later, in May 2017, valued the same work at \$24,190.00, the jury, as the fact-finder,³¹ limited its award to \$30,668.00 - as opposed to awarding the Authority the \$124,672.00 it was seeking, and which is less than the \$31,168.00 the Authority sought in compensation to repaint a single SBR air pipeline.

[The Pennsylvania Supreme Court has] cautioned that it was within “the province of the jury to assess the worth of the testimony and to accept or reject the estimates given by the witnesses,” and if the verdict “bears a reasonable resemblance to the proven damages, it is not the function of the court to substitute its judgement for the jury’s.” [*Kiser v. Schulte*, 648 A.2d 1, 4 (Pa. 1994)].

Mader II, 241 A.3d at 612-13.

Here, in the absence of evidence that the jury’s award was unfair or unreasonable or “so shock[ed] the conscience as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption[,]” *Carlino*, 208 A.3d at 118 (quoting *Potochnick*, 861 A.2d at 285), and in deference to the jury’s function because neither the trial court nor this Court may “substitute its judgment for that of

³¹ The *Mader II* Court explained:

Our civil dispute resolution framework is founded on the impartiality and integrity of a jury’s verdict. The citizens selected, and who serve, as jurors stand as the ultimate trier of fact, and the sole determiner of liability and damages. Jurors are given great leeway in arriving at these decisions. Critically, jurors are “free to believe all, part, or none of the evidence and to determine the credibility of the witnesses.” *Samuel-Bassett v. Kia Motors Am[.], Inc.*, . . . 34 A.3d 1, 39 ([Pa.] 2011).

Mader II, 241 A.3d at 612.

the fact[-]finder[.]" *Carlino*, 208 A.3d at 118, the trial court did not err by denying remittitur.

Accordingly, the trial court did not abuse its discretion by denying Cummins' Motion seeking a new trial or remittitur on the basis that the Authority prevented it from implementing a cover fix, addressing the excessive decant issue, and/or painting the SBR air pipeline.

b. Mitigation

Cummins contends that the trial court erred by denying Cummins' Motion seeking a new trial or remittitur because the jury's verdict was against the weight of the evidence that the Authority failed to mitigate its damages by refusing to undertake Cummins' proposed cost-effective solutions for the influent overtopping and the excessive decant issues.

"A party who suffers a loss due to a breach of contract generally has a duty to make reasonable efforts to mitigate his losses." *TruServ Corp. v. Morgan's Tool & Supply Co., Inc.*, 39 A.3d 253, 262 (Pa. 2012); *Pa. Mfrs.' Ass'n Ins. Co. v. Johnson Matthey, Inc.*, 243 A.3d 298 (Pa. Cmwlth. 2020). Such duty "prevents the injured party from being rewarded for its failure to act." *Mader v. Duquesne Light Co.*, 199 A.3d 1258, 1267 (Pa. Super. 2018) (quoting *Forest City Grant Liberty Assocs. v. Genro II, Inc.*, 652 A.2d 948, 952 (Pa. Super. 1995)).³² The burden is on the breaching party to show that the injured party's reasonable efforts could have prevented further loss. *See TruServ Corp.* "The fact[-]finder must determine whether [the injured party's] actions, in the face of the breach, were reasonable considering all the facts and circumstances." *Hena v. Vandegrift*, 612 F. Supp. 3d

³² *Mader II* affirmed *Mader*.

457, 498 (W.D. Pa. 2020) (quotation marks omitted) (quoting *Aircraft Guar. Corp. v. Strato-Lift, Inc.*, 991 F. Supp. 735, 739 (E.D. Pa. 1998)).

Here, the trial court reasoned:

[The Authority] explained through multiple witnesses why it had never followed through with either Cummins' remedial solutions [for the influent overtopping and the excessive decant issues] or those [the Authority] had independently explored over the years. **[The Authority's] explanations were not objectively unreasonable, which meant [it] created a material question of fact to be resolved by the fact[-]finder.** Could the system's deficiencies have been rectified less expensively at an earlier point in time? Plainly[,] they could have. That fact alone did not dictate the amount of damages the jury could properly assess, however. **The totality of the evidence tended to support a broad spectrum of permissible damages awards, and the one the jury arrived at was among them.**

Trial Ct. August 23, 2024 Order at 5 (R.R. at 4453a) (emphasis added). Based upon the evidence before the jury regarding Cummins' proposed fixes for the influent overtopping and the excessive decant issues, this Court discerns no error with the trial court's assessment. Accordingly, the trial court did not err by denying Cummins' Motion seeking a new trial or remittitur on the basis that the Authority failed to mitigate its damages.

c. UV System

Cummins asserts that the trial court usurped the jury's role in determining which party chose the Enaqua UV system. Cummins claims that the trial court erred by interpreting the Contract and/or *Cummins I* as placing sole responsibility on Cummins for identifying, making, and paying for any change necessary to incorporate the UV system into the overall Project design. Cummins adds that, but for the jury instruction, the jury may have concluded that the excessive

decant issue was caused by a downstream interference in the UV system, the inadequacies of which were attributable to GF.

Over Cummins' objections at retrial, the trial court judge instructed: "[Cummins] was solely responsible for identifying, making, and paying for any changes necessary for the proper incorporation of the UV [] equipment into the [P]roject design." R.R. at 2894a. The trial court judge issued a similar instruction in the middle of the trial over Cummins' objection. *See* R.R. at 1711a.

[An appellate court's] . . . review regarding jury instructions is limited to determining whether the trial court committed a clear abuse of discretion or error of law which controlled the outcome of the case. *Quinby v. Plumsteadville Fam[.] Practice, Inc.*, . . . 907 A.2d 1061, 1069 ([Pa.] 2006).

Error in a charge is sufficient ground for a new trial if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to a fundamental error. In reviewing a trial court's charge to the jury [the appellate court] must look to the charge in its entirety.

Id., 907 A.2d at 1069-[]70 (citations and quotation)[] [marks] omitted) (emphasis added).

Gorman v. Costello, 929 A.2d 1208, 1211-12 (Pa. Super. 2007) (original emphasis omitted; emphasis added).

Importantly, the IFB included the Project Manual containing, *inter alia*, Instructions to Bidders and the Contract. GF's Contract Drawing incorporated the Trojan UV system (named first in the Project Manual). *See* R.R. at 2161a-2162a. Notwithstanding, Cummins was permitted to propose substitute UV systems in

accordance with Project Manual Division 11, which included Section 11.01.B.3, that stated:

If products of manufacturers other than those named first differ from those named first in the Project Manual or on [GF's Contract] Drawings^[33] to the extent that their proper incorporation into the Work requires changes to the structural, piping, mechanical, electrical, instrumentation, or any other changes of whatsoever nature, the [c]ontractor [(i.e., Cummins)] shall be responsible for such changes.

Ex. D-2 at 22 (emphasis added); *see also Cummins I*.

The trial court permitted Cummins to present evidence concerning the selection of the Enaqua system installed on the Project. Based on this Court's review, Cummins' bid on the Project proposed the Trojan UV, the first named UV system manufacturer, which satisfied the Authority's specifications, but that Cummins also bid Enaqua as a substitute UV system manufacturer. *See R.R. at 640a-641a, 675a-677a, 1666a-1667a, 1672a, 1714a; see also Ex. P-240, P-503.* Moreover, Cummins offered the Authority a \$35,000.00 credit if the Authority chose the Enaqua system, and the Authority accepted. *See R.R. at 640a-641a, 675a-677a, 749a, 1916a, 1919a, 2163a; see also Ex. D-43.*

GF/the Authority thereafter decided to change from an inline system to a dual or parallel track system that allowed for continuous operation during maintenance work. *See R.R. at 797a-799a, 1661a-1664a, 1713a-1714a, 1976a-1977a, 1984a, 2166a-2168a; see also Exs. P-240, P-241, P-246.* After GF determined that the Enaqua (Model No. D10i.10121) Cummins' proposed did not offer a dual or parallel track, GF worked directly with Nichols Environmental and Enaqua to choose the split unit system Model D11-I.10141 that GF accepted and

³³ General Conditions Section 1.01.A defines *Contract Drawings* as "[t]hat part of the Contract Documents, prepared or approved by [GF], which graphically show[] the scope, extent, and character of the Work to be performed by [Cummins]." Ex. D-2 at 123.

redesigned into the system. *See* R.R. at 677a-686a, 797a-805a, 814a-819a, 823a-824a, 868a-869a, 1663a-1667a, 1698a-1700a, 1712a-1713a, 1715a, 1922a-1923a, 1971a-1973a, 1978a-1979a, 1985a-1997a; *see also* Exs. P-25A, P-248, P-503, D-2 at 1054, D-20, D-89, D-354, D-355, D-356, D-364, D-365. Cummins was copied on the communications regarding the parallel UV system, but did not weigh in. *See* R.R. at 680a, 807a, 1978a-1980a. GF issued Cummins a change order for the parallel system Model D11-I.10141. *See* R.R. at 814a-819a, 1984a, 2163a-2164a, 2168a-2171a; *see also* Ex. P-505. Moreover, Nichols Environmental/Enaqua gave the Authority a 50% discount on the parallel UV unit. *See* R.R. at 868a.

Importantly, the *Cummins I* Court ruled that Cummins had the responsibility for “any [] changes of whatsoever nature” “to make the Ashbrook SBR **and the connecting systems work** as required by the Contract Documents[.]” *Cummins I*, 237 A.3d at 601 (bold emphasis added). The *Cummins I* Court declared: “The Contract expressly shifted to the contractor [(i.e., Cummins)] the responsibility and risk for “changes of whatsoever nature,” Section 11.01.B.3, for [Cummins] **to incorporate a different SBR and/or equipment into GF’s design.**” *Id.* (emphasis added).

Because the UV system for the Project was a *connecting system* of *different equipment* immediately downstream from the SBR, regardless of who proposed the Enaqua UV system ultimately installed, Cummins was responsible for incorporating it into the SBR, and for Ashbrook’s acts or omissions related thereto. *See Cummins I*; *see also* R.R. at 550a, 560a, 675a, 787a, 1545a-1546a, 2357a, 2675a-2676a. Accordingly, the trial court did not err by so instructing the jury.

d. Directed Verdict Precursor to JNOV

Cummins argues that the trial court erred by granting JNOV in the Authority’s favor on the Authority’s counterclaims, given that the Authority waived

the right to JNOV by not moving for a directed verdict on its counterclaims at the conclusion of its case-in-chief at trial.

“A motion for [JNOV] is a post-trial motion which requests the court to enter judgment in favor of the moving party” despite the jury’s verdict. *Stange v. Janssen Pharm., Inc.*, 179 A.3d 45, 52 (Pa. Super. 2018) (quoting *Drake Mfg. Co., Inc. v. Polyflow, Inc.*, 109 A.3d 250, 258 (Pa. Super. 2015)).

There are two bases on which the [trial] court can grant [JNOV]:

[O]ne, the movant is entitled to judgment as a matter of law and/or two, the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. With the first, **the [trial] court reviews the record and concludes that even with all factual inferences decided adverse to the movant[,] the law nonetheless requires a verdict in his favor**, whereas with the second, the [trial] court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure.

Polett v. Pub[.] Comm[c’ns], Inc., 83 A.3d 205, 212 (Pa. Super. 2013)[, *rev[’d] on other grounds*, . . . 126 A.3d 895 (Pa. 2015).

Stange, 179 A.3d at 52-53 (emphasis added) (quoting *Drake Mfg. Co., Inc.*, 109 A.3d at 258-59 (Pa. Super. 2015)).

In *Chin v. New Flyer of America, Inc.*, 169 A.3d 689 (Pa. Cmwlth. 2017), this Court held: “It is well[]established that in order to preserve a challenge to the sufficiency of the evidence, the appellant must have moved for a *nonsuit or directed verdict*.” *Id.* at 699 (emphasis added); *see also Joers v. City of Phila.*, 190 A.3d 797, 803 (Pa. Cmwlth. 2018) (“[A] party waives the right to seek JNOV on the ground that the evidence is insufficient to support the verdict if it does not move for a nonsuit or directed verdict at trial.”).

Here, although the Authority did not request a directed verdict at trial, the record reflects that, during the trial, on January 26, 2024, the Authority made a motion for compulsory nonsuit, renewed the motion when testimony ended on January 30, 2024, and thereafter filed a Motion for Compulsory Nonsuit in its favor and against Cummins. *See* R.R. at 1752a, 1875a-1885a, 2725a, 2749a, 2751a-2752a, 2757a, 3028a, 3942a-3979a. Cummins agreed that the trial court should defer its ruling on the nonsuit until later. *See* R.R. at 1885a. Because the Authority's request for nonsuit made at trial preserved its right to seek JNOV, *see Chin; see also Joers*, the trial court properly concluded in its Appellate Rule 1925(a) Opinion that "[t]he . . . trial transcript reflects, [the Authority] did indeed preserve its right to bring a JNOV motion." Trial Ct. Appellate Rule 1925(a) Opinion at 1 (R.R. at 5501a).

e. JNOV in the Authority's Favor on Cummins' Extra Work Claims

Cummins contends that the trial court erred by granting JNOV in the Authority's favor on seven of Cummins' extra work claims and five of the Authority's counterclaims. Cummins specifically asserts that, even though the jury found in Cummins' favor on all of those claims at trial, the trial court judge misapplied the JNOV standard and impermissibly reweighed the evidence in the Authority's favor and disregarded crucial factual evidence supporting the jury's verdict in Cummins' favor.

This Court's "review of a trial court's order granting a [] post[-]trial motion for [JNOV] is limited to determining whether the trial court abused its discretion or committed legal error." *Redmond v. Dep't of Transp.*, 194 A.3d 229, 234 n.2 (Pa. Cmwlth. 2018). In making that assessment, this Court

must consider the evidence in the light most favorable to the verdict winner, who must receive "the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his

favor.” *Moure v. Raeuchle*, . . . 604 A.2d 1003, 1007 ([Pa.] 1992) (citing *Broxie v. Household Fin[.] Co.*, . . . 372 A.2d 741, 745 ([Pa.] 1977)). Any doubts must be resolved in favor of the verdict winner, and [JNOV] should **only be entered in a clear case.** *Id.* Finally, “a **judge’s appraisal of evidence** is not to be based on how he would have voted had he been a member of the jury, but **on the facts as they come through the sieve of the jury’s deliberations.**” *Id.* (citing *Brown v. Shirks Motor Express*, . . . 143 A.2d 374, 379 ([Pa.] 1958)).

Redmond, 194 A.3d at 234 n.2 (emphasis added). Because factual questions are within the sole purview of the jury, “JNOV should not be entered if the evidence conflicts regarding a material fact[.]” *Young v. City of Scranton*, 291 A.3d 1245, 1249 (Pa. Cmwlth. 2023). “Thus, where the jury has been presented with conflicting evidence, a motion for JNOV should be denied.” *Rohm & Haas Co. v. Cont’l Cas. Co.*, 732 A.2d 1236, 1248 (Pa. Super. 1999), *aff’d*, 781 A.2d 1172 (Pa. 2001).

Here, despite that the jury found in Cummins favor on Cummins’ extra work claims for (1) control/survey, (2) communication, (3) additional painting - Headworks No. 2, (4) painting conduit, (5) painting (Issue Nos. 111-115), (6) storm sewer rerouting overtime, and (7) SBR electrical work, *see* R.R. at 3031a, the trial court granted the Authority’s Motion and entered JNOV in the Authority’s favor as to those claims. The trial court interpreted, based on *Cummins I* and *II*:

What should have guided the jury’s deliberations when it came to Cummins’ change order/extra work claims and [the Authority’s] counterclaims was **the [C]ontract’s clear, unambiguous language** - language that should have been interpreted for it as a matter of law. That language, **as well as governing legal precedent, precluded the bulk of the jury’s verdict.**

Trial Ct. August 23, 2024 Order at 6 (R.R. at 4454a) (emphasis added).

Preliminarily, Project Manual Division 0, Section 00500 (relating to General Construction Contract 2013-2), subsection 1.01, stated:

[Cummins] shall complete all Work as specified or indicated in the Contract Documents. The Work is generally as described as follows:

A. [Cummins] shall at its sole expense furnish all labor, superintendence, materials, supplies, equipment, plant and other facilities, utilities, and all things necessary or proper for, and to perform all work necessary or incidental to, and perform all other obligations imposed by this Contract for [the Project].

Ex. D-2 at 76. General Conditions Section 6.03.A also declared: “Unless otherwise specified in the General Requirements, [Cummins] shall provide and assume full responsibility for all services, materials, equipment, labor, . . . and all other . . . incidentals necessary for the performance, testing, start up, and completion of the Work.” Ex. D-2 at 148.

Control/Survey

The jury awarded Cummins \$34,140.60 for its control/survey extra work claim. Notwithstanding, the trial court granted JNOV in the Authority’s favor. *See* Trial Ct. August 23, 2024 Order at 8 (R.R. at 4456a). Cummins argues that this Court should reverse the trial court’s decision and reinstate the jury’s award in its favor because GF provided incorrect control points³⁴ and a survey of only approximately 10% of the Project site, which failed to list catch basins, manholes, and 15 or 20 different unmarked underground pipes.

“The [Authority’s] duties in respect to providing . . . engineering surveys to establish control points are set forth in [General Conditions Section] . . . 4.04.” General Conditions Section 8.04.A, Ex. D-2 at 170. In compliance with General Conditions Section 4.04.A, GF provided engineering surveys “to establish control points for construction which in [GF’s] judgment [were] necessary to allow

³⁴ A control point is a benchmark, i.e., a fixed point for establishing elevations during construction upon which the Project was based.

[Cummins] to proceed with the Work.” Ex. D-2 at 138; *see also* R.R. at 1029a, 1875a, 2010a-2012a; Exs. D-2 at 134, D-15 at 38. Section 1.02.A of the Project Manual Division 1 (General Requirements) also states that “[GF] will furnish controls points and benchmarks for [Cummins’] use in laying out the Project.” Ex. D-2 at 383. Importantly, the Contract Documents did not require the Authority to provide a site-wide survey. *See* R.R. at 1292a. Moreover, Instructions to Bidders Section 4.07.A adds: “The [Authority] and [GF] make no representations regarding the physical conditions, existing underground structure locations, the nature of the materials below the surface, the depth to satisfactory foundations, or the stability of beds or banks[,]” and to the extent the bidders rely on that information, they “assume all risks resulting from conditions different from any approximations indicated.” Ex. D-2 at 18.

Correspondingly, Instructions to Bidders Sections 4.04 and 4.06 also made it Cummins’ responsibility, before submitting its bid, to, *inter alia*: carefully review all subsurface tests and reports; visit the site; obtain any additional studies, tests, or data that could affect cost, progress, and performance; and apprise GF of any conflicts, errors, ambiguities, or discrepancies. *See* Ex. D-2 at 17-18. General Conditions Section 2.05 required Cummins to “carefully study and compare the Contract Documents and check and verify pertinent figures therein and all applicable field measurements[,]” review the site and all conditions thereof, and promptly notify GF in writing of any conflict, error, ambiguity, or discrepancy before undertaking construction. *Id.* at 130. General Conditions Section 4.04.B also stated: “[Cummins] shall be responsible for laying out the Work.” *Id.* at 139. General Conditions Section 6.02.A mandated: “[Cummins] shall provide competent, suitably qualified personnel to survey, lay out, and construct the Work as required by the Contract Documents.” *Id.* at 148. In addition, General Conditions Section 4.04.B specified, in pertinent part: “[Cummins] shall report to [GF] whenever any control

point . . . needs to be relocated because of changes in grades or locations, and shall be responsible for the accurate replacement or relocation of such control points . . . and the costs thereof by professionally qualified personnel.” *Id.* at 139; *see also id.* at 383 (Cummins shall notify GF if the conditions in the field are not as indicated in GF’s drawings). Instructions to Bidders Section 4.10.A reflects that Cummins’ bid shall be “an incontrovertible representation by [Cummins] that [it] has complied with every requirement of [] Article 4 [thereof].” *Id.* at 19.

Cummins notified GF of problems it encountered because of GF’s survey, plus supplied GF with survey sheets with piping elevations in order to keep the Project moving. *See* R.R. at 1040a. Cummins eventually obtained its own survey, and GF instructed Cummins to supply necessary fittings to go around obstacles it could not move. *See* R.R. at 1038a-1040a, 1458a. According to Nick Cummins, in all, Cummins listed 35 additional tasks it had to complete, with attendant costs and delays, due to GF’s incomplete survey. *See* R.R. at 1041a-1045a; *see also* Exs. P-194, P-271, P-272, D-324.

Nick Cummins further recalled that after Cummins checked the benchmark against existing buildings and discovered a six and one-half inch discrepancy, it notified GF of the inaccuracy, and GF acknowledged the error. *See* R.R. at 1030a-1033a, 1211a, 1860a-1865a; *see also* Exs. P-193, D-2 at 189. In the meantime, Cummins conducted its own calculations and undertook SBR foundation undercut and backfill work. *See* R.R. at 1031a, 1292a. The Authority provided the correct benchmark to Cummins in July 2014 and directed Cummins to do the necessary SBR foundation undercut and backfill work, for which GF issued a change order in September 2014. *See* R.R. at 1292a, 2011a-2012a; *see also* Ex. D-324. The change order reflected that it “constitute[d] full and final settlement of all claims [for that work] by [Cummins] for time, scope[,] and cost impacts to date.” Ex. D-324. Nevertheless, and without seeking prior approval or an extension of time, Cummins

requested compensation for extra work and delays related to survey and grading issues in March 2015. *See* R.R. at 1034a-1035a, 1293a-1294a, 1861a-1862a, 2013a; *see also* Exs. P-193, P-271, P-457, D-15.

The trial court declared that the Contract made it “incumbent upon Cummins, notwithstanding GF’s established control points [and surveys], to assess the site and formulate its bid so as to account for any expenses it would incur making the area suitable for the work it had to perform.” Trial Ct. August 23, 2024 Order at 8 (R.R. at 4456a). Accordingly, based on the Contract’s clear language and considering the evidence in a light most favorable to Cummins, as it must, *see Redmond*, this Court concludes that the trial court did not abuse its discretion or commit legal error by granting JNOV in the Authority’s favor as to Cummins’ control/survey extra work claim.

Communication

Although the jury found in Cummins’ favor and awarded it \$46,800.00 on its communication extra work claim, *see* R.R. at 3031a, the trial court granted JNOV in the Authority’s favor. *See* Trial Ct. August 23, 2024 Order at 8-9 (R.R at 4456a-4457a). Cummins argues that this Court should reverse the trial court’s decision and reinstate the jury’s award in its favor because of the Authority’s/GF’s repeated failures to provide timely responses to Cummins’ requests for information, which resulted in Cummins’ superintendents performing a tremendous amount of additional work that Cummins was not contractually obligated to perform. Cummins claims that it was not seeking compensation for delays (for which it had to request an extension) but, rather, pay for extra work it had to undertake because of those delays.

General Conditions Section 2.05.D declared that by submitting the bid and executing the Contract, Cummins agreed to create the Project schedules, subject

to scheduling requirements in the Contract Documents “intended to place the burden of early planning, active coordination, and communication regarding the planned work” on Cummins. Ex. D-2 at 130. General Conditions Section 6.06.E specified that Cummins “shall be solely responsible for scheduling and coordinating the work of [s]ubcontractors, [s]uppliers, and other individuals or entities performing or furnishing any of the Work” *Id.* at 155.

In addition, General Conditions Section 9.02.A stated that “[GF] w[ould] make visits to the [s]ite at intervals appropriate to the various stages of construction[.]” *Id.* at 171. Section 9.02.A.3 of the General Conditions expounded that GF’s site visits were for the purpose of “providing for the [Authority] a greater degree of confidence that the complete Work will conform generally to the Contract Documents.” *Id.* at 172.

General Conditions Section 9.10.F further made GF “the initial interpreter of the requirements of the Contract Documents, and judge of the acceptability of the Work thereunder.” *Id.* at 175. Accordingly, General Conditions Section 2.05.C directed Cummins to obtain written interpretations or clarifications of any conflicts, errors, ambiguities, or discrepancies among the Contract Documents, Contract Drawings, and site review from GF before proceeding with any work affected thereby. *See id.* at 130; *see also* Ex. P-5 (Contract Drawings). Thus, General Conditions Section 9.04.B granted GF “full authority to decide questions which may arise under the Contract relative to quality and acceptance of materials furnished and work performed, rate of progress, the interpretation of the Project Manual and Contract [d]rawings, and the acceptable fulfillment of the Contract” by Cummins. Ex. D-2 at 173. To that end, General Conditions Section 9.04.A established:

[GF] shall, within a reasonable time after presentation, respond to questions in relation to the interpretation of the

Contract Documents that may arise relative to compliance with the Project Manual and Contract Drawings.

1. All requests from [Cummins] for clarification or interpretation shall be submitted to [GF] in writing.
2. [Cummins] represents that, prior to submitting a request for information [(RFI)] or clarification[,], that[] it has thoroughly reviewed the Contract Documents to determine that the information requested has not been provided or included [sic] the Contract Documents.

Id. at 173-174. Rae confirmed that GF provided Cummins with a Word document for Cummins to submit RFIs (rather than on a verbal basis), which he purportedly reviewed, distributed to GF engineers for responses, and returned to Cummins. *See* R.R. at 1901a-1903a, 1910a.

In addition, General Conditions Section 12.04.A stated:

If [Cummins] shall be delayed in the substantial completion or the completion of all the work by reason of unforeseeable or inevitable causes beyond [its] responsibility, without [its] fault or negligence, the periods specified for substantial completion or the completion of all the work may be extended by such time as shall be determined by [the Authority].

Ex. D-2 at 188. General Conditions Section 12.07.B declared that Cummins' sole and exclusive remedy for delay was an extension equal to the time lost, as the Authority shall determine. *See id.* at 189. Section 12.02.A of the General Conditions specified that "[t]he Contract [t]imes and [m]ilestones may only be changed by a [c]hange [o]rder or by a [w]ritten [a]mendment." *Id.* at 187.

Don Cummins, who prepared Cummins' communication extra work claim, recounted that GF would often take weeks, and sometimes months, to approve and return shop drawings and/or provide timely answers to Cummins' RFIs, which Cummins documented to the Authority/GF. *See* R.R. at 1735a-1736a, 1738a, 1741a-1749a, 1842-1843a; *see also* Exs. P-268, P-271, P-272, P-281. Don Cummins

described that GF's failure to provide adequate pre-construction investigation, design, plotting, and documentation caused Cummins to expend hundreds of man hours deciphering drawings with missing information, incorrect elevations, and incomplete drainage system design. *See* R.R. at 1842a-1843a. Don Cummins stated that when Cummins attempted to pose its questions directly to the Authority, the Authority insisted that Cummins work solely through GF. *See* R.R. at 1741a, 1745a, 1848a, 1863a-1864a; *see also* Ex. P-268.

Don Cummins admitted that although the communication issues began in March 2014, Cummins did not provide written notice to the Authority until March 2015 and again in October 2015, when Cummins listed 38 issues GF had yet to resolve (that included conflicting measurements and elevations, lack of surveys of power sources, underground electric, and roof drains), the number of days the issues remained unresolved (several of which exceeded 300 days), and the dollar values of those issues. *See* R.R. at 1746a-1747a, 1839a-1843a, 1847a, 1860a-1861a; *see also* Exs. P-260, P-268, P-271, P-272, P-281, Demo 20. Don Cummins estimated that its superintendent spent approximately one-third of his time over a six-month period as a result of GF's poor communication. *See* R.R. at 1849a-1853a, 1867a-1869a; *see also* Ex. P-260.

Don Cummins admitted that Cummins could have requested change orders on those matters (which it did in some cases), and an extension of the Project's schedule due to GF's failure to respond to Cummins' inquiries, but claimed it did not do so because it did not realize the cumulative effect of the communication difficulties until later. *See* R.R. at 1859a-1862a, 1867a, 1870a-1871a, 1874a, 1906a-1907a. He also expressed Cummins' ongoing concern about timing subcontractor

work and Cummins' exposure to liquidated damages based on delays.³⁵ *See* R.R. at 1850a, 1856a-1857a, 1863a, 1866a. However, according to Rae, Cummins did not request prior approval to incur overtime or other charges related to the communication issues. *See* R.R. at 2025a.

Based on the evidence, the trial court concluded that General Conditions Section 12.07.B did not authorize Cummins to unilaterally opt out of its extension provisions, and its after-the-fact justifications for failing to follow that plain and unambiguous provision were unpersuasive. *See* Trial Ct. August 23, 2024 Order at 8-9 (R.R. at 4456a-4457a). Accordingly, based on the Contract's clear language and considering the evidence in the light most favorable to Cummins, as this Court must, *see Redmond*, because Cummins did not follow either the Contract's extra work claim or delay provisions when it experienced communication difficulties and, when it eventually made a claim, it only provided an estimate of its superintendents' time, this Court concludes that the trial court did not abuse its discretion or commit legal error by granting JNOV in the Authority's favor as to Cummins' communication extra work claim.

Additional Painting - Headworks No. 2

Although the jury awarded Cummins for its \$83,455.00 additional painting - Headworks No. 2 claim, *see* R.R. at 3031a, the trial court granted JNOV in the Authority's favor. *See* Trial Ct. August 23, 2024 Order at 9 (R.R. at 4457a). Cummins argues that this Court should reverse the trial court's decision and reinstate the jury's award in its favor because the trial court erred by interpreting General Conditions Section 3.01, together with Project Manual Division 9, Section 09900,

³⁵ The Contract specified that Cummins would be subject to liquidated damages in the amount of \$500.00 per day if it did not complete the Project within 720 days. *See* R.R. at 2025a; *see also* Ex. P-4.

which governs the Project's Paints and Coatings (Painting Specifications), to require Cummins to paint Headworks No. 2 without additional compensation, thereby fundamentally misconstruing the Contract and ignoring Pennsylvania contract law principles. Cummins asserts that the Contract's Painting Specifications instructed it *how* to paint any given surface, whereas Contract Drawing A18 designated as *Room Finish and Door Schedules, Details - All Buildings* (Finish Schedule) specified *the facilities to be painted*, and Headworks No. 2 was not among them. Therefore, painting Headworks No. 2 was extra work.

Cummins constructed the Headworks No. 2 building as part of the Project to house a wet well and pumps. *See* R.R. at 1100a-1101a. Headworks No. 2's interior consisted of exposed cast-in-place concrete and masonry. *See* R.R. at 1310a; *see also* Ex. P-369. Project Manual Division 3, Section 03300 governed the Project's Cast-in-Place Concrete (Concrete Specifications). *See* R.R. at 1103a; *see also* Ex. D-2 at 650. The Concrete Specifications described how to treat concrete if/when used in Project construction. *See* Ex. D-2 at 650-672. Concrete Specifications Section 303.D.1 represented that concrete is either to remain as natural concrete or "to receive an additional applied finish or material." *Id.* at 665. The finishes Cummins had to apply included, *inter alia*, rubbing or painting. Although Cummins claims that GF directed it to rub the concrete surfaces in Headworks No. 2, *see* R.R. at 1105a, its support for that claim was in Concrete Specifications Section 303.D.5.d.1, which represented that a rubbed finish shall be applied to "[a]ll interior . . . [concrete] surfaces exposed to view[;]" however, that phrase also contained the limitation, "*which are not to be painted.*" Ex. D-2 at 667 (emphasis added). Thus, Cummins was only to apply a rubbed finish to those exposed interior concrete walls on the Project that were not to be painted. GF maintains that it intended for Cummins to *paint* Headworks No. 2 pursuant to the Painting Specifications. *See* Ex. P-369.

Headworks No. 2 was not listed on the Finish Schedule in the Contract Drawings as a building Cummins had to paint. *See* R.R. at 1101a-1102a, 1104a-1105a, 1308a, 1311a, 2227a-2234a; *see also* Ex. P-5 at A18 (AL002050), D-3 at A18 (AL002050). Accordingly, Cummins did not initially paint Headworks No. 2, nor included the cost of that work in its bid. *See* R.R. at 1105a, 1107a, 1308a, 1310a-1313a; *see also* Ex. P-366, P-369. However, before Cummins began painting work on the Project, Nick Cummins asked Rae if the Authority wished to have Headworks No. 2 painted and offered to provide GF a price for that additional work. *See* R.R. at 1105a; *see also* Ex. P-369. Rae responded that the Authority expected Cummins to paint Headworks No. 2 at no extra cost because it consisted of concrete or masonry walls, which Painting Specification Sections 3.09.B.1 and C.1 required Cummins to paint. *See* R.R. at 1020a, 1105a, 1107a, 1119a-1120a, 1312a; *see also* Ex. P-369. Cummins painted Headworks No. 2 and charged the Authority, but the Authority denied payment. *See* R.R. at 1107a-1108a.

Painting Specifications Section 2.02.D.1 directed Cummins to “[p]rovide surface treatments and finishes as specified in [the] Painting Schedule at the end of th[e Painting Specifications].” Ex. D-2 at 862. Despite that the Painting Specifications Section 3.09 (Paint Schedule) also does not specifically name Headworks No. 2, *see id.* at 880, Painting Specifications Section 3.03.F **required Cummins to “[p]aint all exposed surfaces, except where natural finish of material is specifically noted as a surface not to be painted.”** *Id.* at 868 (emphasis added). In addition, Painting Specifications Section 3.09.A authorized GF to “select the proper painting systems from the Paint Schedule (as well as color) for such surfaces . . . **not specifically named in the [Paint] Schedule, but requiring paint according to [GF’s] direction in the field.**” *Id.* at 875 (emphasis added). GF also included its color selections for Headworks No. 2 in response to Cummins’ paint submittal (Submittal 190R1). *See* R.R. at 2231a-2232a; *see also* Ex. D-98.

Further, Painting Specifications Section 3.09.B.1 instructed Cummins as to how to paint “[a]ll interior exposed cast[-]in[-]place concrete walls . . . [.]” and Subsection C.1 thereof as to how to paint “[a]ll interior exposed masonry wall surfaces[.]” like those in Headworks No. 2. *Id.* at 875-876; *see also* R.R. at 1306a-1311a. Notably, while some portions of the Painting Specifications qualified the instructions with the phrases “where scheduled on [the Contract] Drawings” (related to interior concrete floors), Ex. D-2 at 876, and “where indicated on [the Contract] Drawings” (related to exterior masonry walls), *id.*, the interior concrete and masonry wall instructions did not include those limiting phrases.

“In interpreting a contract, [courts] must give effect to all its provisions[.]” *MBC Dev., LP v. Miller*, 316 A.3d 51, 64 (Pa. 2024), *cert. denied*, 145 S.Ct. 548 (2024). The trial court granted JNOV in the Authority’s favor, reasoning that the Contract plainly and unambiguously directed Cummins to paint the types of surfaces included in Headworks No. 2. This Court observes that there was no record evidence that GF instructed Cummins to rub, rather than paint, the exposed interior concrete and masonry walls in Headworks No. 2, or that GF expressly excepted painting those areas from Cummins’ scope of work. Therefore, Cummins was required to paint all such surfaces at no extra cost, even if GF later directed that work.

Because the Contract plainly and unambiguously directed Cummins to paint the types of surfaces included in Headworks No. 2, regardless of whether GF listed it on the Finish Schedule or the Paint Schedule, that work was not additional work for which Cummins could seek reimbursement.³⁶ Accordingly, the trial court

³⁶ Because this conclusion is consistent with the Contract’s express terms, this Court does not need to resort to interpretation based on General Conditions Sections 3.01.A (“The Contract Documents are complementary; what is called for by one is as binding as if called for by all.”) and 3.01.B.1 (“Any labor, documentation, services, materials, or equipment that may reasonably be

did not abuse its discretion or commit legal error by granting JNOV in the Authority's favor as to Cummins' additional painting - Headworks No. 2 extra work claim.

Painting Conduit

The jury found in Cummins' favor and awarded Cummins \$13,720.00 on Cummins' painting conduit extra work claim. *See* R.R. at 3031a. However, the trial court granted JNOV in the Authority's favor. *See* Trial Ct. August 23, 2024 Order at 9 (R.R. at 4457a). Cummins asserts that this Court should reverse the trial court's decision and reinstate the jury's award because the Authority's electrical contractor, Bronder Technical Services, Inc. (Bronder), not Cummins, was contractually required by Contract 2013-4 (Electrical Construction) to paint the conduit that Bronder installed.

General Requirements Section 01311 (Coordination), subsection 1.03.D.1, declared that "each contractor is responsible for performing the interface Work of its [c]ontract in cooperation with Work of the other [c]ontracts." Ex. D-2 at 342. However, Painting Specification Section 2.02.E.1 (Piping Markers), mandated Cummins to "[c]olor code all pipelines and conduits[.]" except "flexible connectors, flexible tubing, stainless steel, uninsulated copper tubing, and valve operators and appurtenances[.]" *Id.* at 862; *see also* R.R. at 1308a-1309a, 2032a-2034a. Painting Specification Section 3.04.U added that Cummins was to, "[a]fter finish painting, mark non-submerged piping with an applicable color band bearing the stenciled name of its contents." Ex. D-2 at 872. Moreover, Painting Specification Section 3.09.S (Paint Schedule) listed the piping colors Cummins was

inferred from the Contract Documents, or from prevailing custom or trade usage[.] as being required to produce the intended result, shall be provided, whether or not specifically called for, at no increase in the Contract [p]rice." Ex. D-2 at 132.). Notwithstanding, those provisions further support this Court's determination.

to use. *See id.* at 879-880. Accordingly, GF directed Cummins via a punch list to paint the conduit Bronder installed, and withheld Cummins' payment until it did the work. *See R.R.* at 1100a; *see also* Ex. P-339.

Accordingly, because the Contract plainly and unambiguously directed Cummins to paint conduit, the trial court did not abuse its discretion or commit legal error by granting JNOV in the Authority's favor as to Cummins' painting conduit extra work claim.

Painting (Issue Nos. 111-115)

The jury found in Cummins' favor and awarded Cummins \$2,700.00 on Cummins' painting (Issue Nos. 111-115) extra work claim. *See R.R.* at 3031a. However, the trial court granted JNOV in the Authority's favor on the basis that Change Order 19 and General Conditions Section 12.01 barred Cummins' claim. *See Trial Ct. August 23, 2024 Order* at 6-7 (*R.R.* at 4454a-4455a). Cummins contends that the trial court's decision should be reversed and the jury's award reinstated because Change Order 19 only covered the installation of additional piping; it did not also require Cummins to paint it.

When Cummins attempted to connect new pumps and piping to the Authority's existing piping and discovered that the existing pipes were leaking, GF issued Change Order 19 for Cummins to replace the leaking pipes. *See Ex. D-331* at 2. Specifically, Change Order 19 directed Cummins to undertake wet well modification to pipes 1, 2, and 3. *See Ex. D-331* at 2. Cummins proposed its cost for the extra work, which GF found reasonable. *See id.* at 1. According to Cummins, because Change Order 19 did not direct Cummins to paint the pipes, Cummins' estimate did not include painting in its costs. *See R.R.* at 1096a-1098a; *see also* Exs. P-332, P-334, D-331. GF later, on a punch list, directed Cummins to paint the new

piping, which Cummins did. *See* R.R. at 1097a. Cummins sought to recover its costs for that extra work. *See* R.R. at 1098a.

General Conditions Section 10.01.B.2 stated that “[Cummins] shall be entitled to additional compensation if [a] change requires a greater amount of labor, or material, or both.” Ex. D-2 at 176. General Conditions Section 3.01.E represented that if the Authority’s change requests result in extra costs to Cummins, “[Cummins] will only pursue such extra costs by requesting a change order in strict accordance with the [c]hange [o]rder requirements of the Contract Documents” *Id.* at 132. Specifically, General Conditions Articles 10 and 12 permitted Cummins to seek adjustments via change order when any change in the scope of work involved extra cost or additional time. *See id.* at 176-180, 185-190. There is no record evidence that Cummins submitted a change order to GF seeking extra costs for painting the piping it installed pursuant to Change Order 19.

Moreover, General Conditions Section 12.01.E added: “[Cummins] represents that any [c]hange [o]rder agreed between the [Authority] and [Cummins] on this Contract will include all costs associated with the additional work described in the [c]hange [o]rder, including all . . . costs of material, labor, and supervision.” Ex. D-2 at 186. General Conditions Section 12.01.F further specified, in pertinent part:

Payment of a [c]hange [o]rder shall constitute accord and satisfaction of all claims in connection with the change or changes to the Contract addressed by the [c]hange [o]rder; and it is understood and agreed that a signed [c]hange [o]rder form shall be the complete and fully integrated agreement for all related costs, and that there are no oral or written understandings, representations, or agreements, directly or indirectly, connected with the [c]hange [o]rder that are not affirmatively stated on the signed [c]hange [o]rder form.

1. [Cummins'] execution of a [c]hange [o]rder constitutes a representation that it will make no further claims for damages inconsistent with [s]ubparagraph 12.01.F.

Id. at 186-187. Change Order 19 itself also clearly stated that Cummins' proposed price included "[a]ll labor, material, tools, and equipment[,] including overhead and profit for [that work.]" Ex. D-331. Therefore, the General Conditions and Change Order 19 clearly made Cummins responsible for all work and costs associated with its installation of additional piping pursuant to Change Order 19, and precluded Cummins from seeking additional compensation therefor.

In addition, despite that Change Order 19 did not explicitly include that Cummins was to paint the new piping it installed, as stated above, Painting Specifications Section 3.03.F **required Cummins to "[p]aint all exposed surfaces, except where natural finish of material is specifically noted as a surface not to be painted[,]"** including exposed pipelines. Ex. D-2 at 868 (emphasis added). Section 3.03.F also directed Cummins to refer to the Paint Schedule, which clearly specified the types and colors Cummins was to paint water pipes, chemical pipes, waste lines, and other lines. *See id.* at 879-880. Because Change Order 19 did not instruct Cummins *not* to paint the added pipes, *see* Ex. D-331, and painting the pipes was "necessary or incidental" to its Change Order 19 work, Ex. D-2 at 76, Cummins was obligated to paint them and should have included the cost thereof in its proposed fee. Cummins' failure to do so precluded it from later seeking additional funds therefor.

Accordingly, because the Contract plainly and unambiguously directed Cummins to paint all exposed pipes, and Change Order 19 and General Conditions Section 12.01.E and F barred Cummins' extra work claims related thereto, the trial court did not abuse its discretion or commit legal error by granting JNOV in the Authority's favor as to Cummins' painting extra work claim (Issue Nos. 111-115).

Storm Sewer Rerouting Overtime

The jury awarded Cummins \$60,455.07 for its storm sewer rerouting overtime claim. *See* R.R. at 3031a. However, the trial court granted JNOV in the Authority's favor concluding that Change Order 1 and General Conditions barred Cummins' claim. *See* Trial Ct. August 23, 2024 Order at 6-7 (R.R. at 4454a-4455a). Cummins argues that this Court should reverse the trial court's decision and reinstate the jury's award because, after it executed Change Order 1 for storm sewer rerouting, Cummins incurred unexpected overtime costs to get the SBR tanks installed before winter (otherwise, the Project would have been delayed six months).

When preparing to excavate for the SBRs, Cummins discovered an existing storm sewer line (not reflected on the Construction Drawings) that ran through where proposed SBR tank 4 was to be located. *See* Ex. P-231. On May 19, 2014, GF, the Authority, and Don Cummins signed Change Order 1, therein agreeing that Cummins would receive an additional \$39,080.00 to reroute the storm sewer line around the SBR location. *See* Exs. P-234, D-15 at 60-61, D-324; *see also* R.R. at 1271a, 2006a-2008a. Change Order 1 also reflected that the work would add "0" days to the Project, and that the \$39,080.00 included "[a]ll labor, material, tools, and equipment[,] including overhead and profit for [that work.]" Ex. P-234; *see also* R.R. at 1267a-1274a. Cummins completed the work on June 3, 2014. *See* Ex. P-231 at 3. Cummins signed Change Order 1 on June 19, 2014. *See* Ex. P-234. Thereafter, Cummins requested another \$60,455.07 from the Authority for overtime Cummins attributed to keeping the Project on time in the face of GF's delays, which the Authority declined to pay. *See* Exs. P-231, P-235.

Nick Cummins explained that because Cummins lost valuable good weather time, it had to reroute the storm sewer before the plumbers and electricians could do their work, and it was subject to liquidated damages for delays, it hired extra workers who worked overtime to meet the Project's deadlines. *See* R.R. at

1046a-1053a; *see also* Ex. P-231. Although Nick Cummins claimed that GF authorized Cummins to work overtime, he admitted that Cummins had nothing in writing from GF or the Authority to that effect.³⁷ *See* R.R. at 1273a, 1275a-1279a.

Not only did General Conditions Section 10.01.C.1.a expressly prohibit Cummins from undertaking extra work in the absence of a written change order that authorized overtime, *see* Ex. D-2 at 176, as stated above, General Conditions Sections 3.01.E, 10.01.B.2, and Articles 10 and 12 permitted Cummins to seek additional compensation for extra work only if properly requested and approved in writing *before* undertaking the work. Otherwise, Cummins' signature on Change Order 1 constituted accord and satisfaction of all claims associated with its storm sewer rerouting work, including labor costs. *See* Exs. P-231, P-234, D-2 at 186-187 (General Conditions Section 12.01.E and F).

In addition, General Conditions Section 10.05.A.1 mandated that “if [Cummins] claim[ed] that any change of the scope of work involve[d] extra cost or additional time under the Contract, [it had to] give [GF] written notice thereof within [seven] days after being advised of such change, and in every event before proceeding to execute the Work.” Ex. D-2 at 178; *see also* General Conditions Sections 12.01 (relating to contract price adjustment claims) and 12.02 (relating to contract time adjustments). Further, General Conditions Section 10.05.F represented that failure to timely initiate an extra work or additional time claim in

³⁷ Instead, Nick Cummins asserted that GF/the Authority waived the right to challenge Cummins' storm sewer rerouting extra work claim because they failed to follow the Contract's change order process. *See* R.R. at 1273a-1275a. Notably, General Conditions Section 10.01.C.1.a prohibited Cummins from undertaking extra work in the absence of a fully executed change order, except where such “changes [are] necessitated by construction exigencies, or job conditions[.]” Ex. D-2 at 176. General Conditions Section 10.01.C.1.a-b authorized GF to allow Cummins to undertake extra work *before* a change order was in effect, if the work involved “[c]hanges in the . . . location of sewers . . . or piping[.]” *Id.* at 177. Therefore, that GF permitted Cummins to complete the work before signing Change Order 1 did not violate the Contract's change order requirements.

writing resulted in waiver. *See* Ex. D-2 at 179. Finally, General Conditions Section 12.07.B specified: “[Cummins’] sole and exclusive remedy for delays under this Contract shall be an extension of the Contract [t]imes or [m]ilestones as approved by [the Authority] pursuant to this [General Conditions] Article 12 in an amount equal to the time lost as determined by the [Authority.]” Ex. D-2 at 189.

Therefore, in the absence of written pre-approval to work overtime on the Project, Cummins’ signature on Change Order 1 constituted accord and satisfaction of all claims associated with its storm sewer rerouting work, including related labor costs. *See* Exs. P-234, D-2 at 186-187 (General Conditions Section 12.01.E and F). Even if Cummins could seek overtime costs above and beyond Change Order 1 (as opposed to a Contract extension), because Cummins purportedly incurred the overtime costs for more than six months *before* it apprised GF of that claim on or about December 19, 2014,³⁸ and in the absence of a written change order, Cummins waived that opportunity.

Accordingly, because the Contract plainly and unambiguously barred Cummins’ storm sewer rerouting overtime claim, the trial court did not abuse its discretion or commit legal error by granting JNOV in the Authority’s favor on that claim.

SBR Electrical Work

The jury awarded Cummins \$30,457.27 for its SBR electrical extra work claim. *See* R.R. at 3031a. However, the trial court granted JNOV in the Authority’s favor concluding that *Cummins I* made Cummins responsible for costs related to electrical modifications needed to incorporate the Ashbrook SBR into the

³⁸ Although the request is not dated, the supporting documentation includes Cummins’ overtime documentation from pay periods ending June 1 through December 19, 2014. *See* Ex. P-231.

Project's design. Cummins argues that this Court should reverse the trial court's decision and reinstate the jury's award because the trial court usurped and/or ignored the jury's factual determinations that Cummins was entitled to recover \$30,457.27 for extra electrical costs to incorporate betterments that were not Cummins' contractual responsibility.

GF conducted the electrical redesign work necessary to incorporate the Ashbrook SBR into the Project in 2015. *See* R.R. at 1934a-1937a, 2215a-2216a. GF afforded Cummins the opportunity to have its own electrical contractor evaluate the electrical work, but it did not seize that opportunity. *See* R.R. at 793a, 909a, 922a-923a, 926a, 1934a-1936a, 2212a-2213a; *see also* Exs. D-108, D-199, D-260.

Ultimately, GF hired Bronder to conduct the electrical work, for which Bronder charged the Authority \$54,791.22. *See* R.R. at 728a-730a, 1934a-1935a; *see also* Ex. P-350. Because Cummins did not agree with the additional cost, it informed Bronder not to proceed with the work until Cummins discussed the matter further with Nichols Environmental and Ashbrook; however, Rae instructed Bronder to proceed, which it did. *See* R.R. at 731a, 733a-734a, 1094a-1095a; *see also* Ex. P-351. Rae passed Bronder's cost on to Cummins. *See* R.R. at 1934a-1936a, 2212a-2213a; *see also* Exs. D-108, D-199, D-260. Thereafter, GF acknowledged by change order that \$15,300.00 of Bronder's electrical work consisted of betterments, and subtracted that amount from what Bronder claimed Cummins owed Bronder. *See* R.R. at 732a, 735a-736a, 890a-891a, 898a-899a, 2219a-2223a; *see also* Exs. P-347, P-357. Rae maintained that other costs related to electrical changes necessary to incorporate the Ashbrook SBR were Cummins' responsibility. *See* R.R. at 2246a. Rae referenced in a December 15, 2015 letter to the Authority that Ashbrook failed to identify to Cummins the "missing electrical components required to make [its SBR] equipment function." Ex. D-150 at 2.

Robert Cummins agreed that Ashbrook was responsible for electrical work necessitated by its SBR system and would be responsible for changes necessary to incorporate the SBR, but claimed Ashbrook was not responsible for paying for all of the electrical work leading into the SBR. *See* R.R. at 795a-796a. Accordingly, Cummins declined to pay. *See* R.R. at 731a-732a. However, in response to Bronder's threat to tear out its electrical work on April 29, 2016, unless Cummins paid Bronder, on April 28, 2016, Cummins paid Bronder \$30,457.27. *See* R.R. at 732a-733a, 735a, 738a, 791a, 794a-795a, 866a; *see also* Exs. P-365, P-457. Notably, in an April 28, 2016 email, Nick Cummins declared: "[Cummins] feel[s] [it] owe[s] [\$]34,457.27." Ex. D-199; *see also* R.R. at 794a. In a May 5, 2016 letter to Bronder, Robert Cummins stated: "Today [Cummins has] mailed [Bronder] a check for the amount [(\$30,457.27)] that [Cummins] believe[s] [Bronder is] entitled to." Ex. D-416; *see also* R.R. at 794a-795a, Ex. P-365.

After later determining from electrical engineer Bob Schmidt's (Schmidt)³⁹ and contractor Bob Silvis' (Silvis)⁴⁰ independent evaluations that Cummins should not owe Bronder the additional amount,⁴¹ Cummins requested a \$30,457.27 reimbursement. *See* R.R. at 733a, 736a-737a, 792a-795a, 1095a; *see also* Ex. P-457. However, Schmidt admitted that since there were wiring differences between the ABJ Sanitaire and Ashbrook systems, the electrical work changed due to Cummins' installation of the Ashbrook SBR. *See* R.R. at 902a, 905a-906a. The

³⁹ The trial court accepted Schmidt as an expert in the field of electrical power engineering. *See* R.R. at 882a.

⁴⁰ Silvis passed away before the trial commenced. *See* R.R. at 737a.

⁴¹ Schmidt questioned the need for the installation of a second transformer and circuit panel, opining that the existing single transformer and panel could have satisfactorily handled a complete load with everything operating. *See* R.R. at 892a-897a, 917a-918a. He also claimed that Cummins' use of the Ashbrook SBR rather than the ABJ Sanitaire SBR reduced the cost of the incorporating electrical work, thereby saving the Authority \$18,000.00 (and, thus, incurring no damages), which Cummins did not request back from the Authority. *See* R.R. at 884a, 886a-889a, 919a-921a.

Cummins I Court held that “Cummins was at all times solely responsible for incorporating the Ashbrook SBR as specified in the Contract Documents.” *Cummins I*, 237 A.3d at 601. Specifically, to the extent that incorporation required “**“electrical . . . or any other changes of whatsoever nature, [Cummins was] responsible’ . . . at Cummins’ expense.”** *Cummins I*, 237 A.3d at 601 (quoting Section 11.01.B.3) (some emphasis added).

Accordingly, because the Contract plainly and unambiguously made Cummins responsible for costs related to electrical work required to incorporate the Ashbrook SBR, the trial court did not abuse its discretion or commit legal error by granting JNOV in the Authority’s favor on that claim.

b. Authority’s Counterclaims

Cummins asserts that this Court should reverse the JNOV on the Authority’s (1) SBR electrical redesign, (2) SBR hydraulic issue analysis, (3) UV channel redesign, (4) AUMA service calls, and (5) overtime/call-in cost counterclaims.⁴²

Preliminarily, it is well settled that “[t]he party who pleads the existence of certain facts bears the burden of establishing those facts.” *Clairton Slag, Inc. v. Dep’t of Gen. Servs.*, 2 A.3d 765, 776 (Pa. Cmwlth. 2010). Specifically, “[a] defendant bears the burden of proving his counterclaim.” *Laurelton Ctr. Dep’t of Pub. Welfare v. L&L Boiler Maint., Inc.*, 407 A.2d 98, 99 (Pa. Cmwlth. 1979). In

⁴² Cummins also challenges the JNOV in the Authority’s favor on its manhole vacuum testing counterclaim. *See* Cummins’ Br. at 55, 77; *see also* Cummins Br., Appendix B (Appellate Rule 1925(b) Statement), at 2-3. However, because Cummins does not offer any argument, let alone analysis, regarding its manhole vacuum testing counterclaim in its brief to this Court, it waived that issue. *See Goldata Computer Servs., Inc. v. Dep’t of Banking & Sec.*, 350 A.3d 278, 299 (Pa. Cmwlth. 2025) (quoting *770 Ameribeer, Inc. v. Pa. Liquor Control Bd.*, 318 A.3d 998, 1009 (Pa. Cmwlth. 2024) (“At the appellate level, a party’s failure to include analysis and relevant authority results in waiver.”)).

addition to establishing the existence of a valid contract and breach thereof, **a party must prove its entitlement to damages.** *See Sch. Express, Inc. v. Upper Adams Sch. Dist.*, 303 A.3d 186, 199 (Pa. Cmwlth. 2023) (“Damages are an essential element of a breach of contract claim.”).

SBR Electrical Redesign

The jury declined to award the Authority \$7,390.00 on its SBR electrical redesign counterclaim. *See* R.R. at 3033a. Nevertheless, the trial court granted JNOV in the Authority’s favor in that amount, reasoning that Cummins was contractually obligated to pay all costs necessary to incorporate the Ashbrook SBR. *See* Trial Ct. August 23, 2024 Order at 13 (R.R. at 4461a). Cummins asserts that the trial court usurped the jury’s factual determination that Cummins was not responsible for the SBR electrical redesign costs where the Authority failed to prove the existence or amount of damages.

In March 2015, GF notified Cummins that electrical redesign was necessary to incorporate the Ashbrook SBR, and offered for Cummins to retain the services of an electrical engineer or have GF do the redesign and “back[]charge Cummins.” Ex. D-108; *see also* R.R. at 1934a-1937a, 2213a. According to Rae, Cummins did not hire its own electrical engineer. *See* R.R. at 1936a. GF purportedly conducted the electrical redesign work in 2015 and billed the Authority \$7,389.86 for GF’s time as part of its monthly services.⁴³ *See* R.R. at 1934a-1937a, 2214a-2217a. In January 2019, the Authority for the first time listed a \$7,390.00 claim against Cummins for that work, supported only by a GF Project Detail Charges report (generated on January 2, 2019) that consisted of a list of contractors who

⁴³ GF did not bill Cummins directly because it did not have a contract with Cummins. *See* R.R. at 1937a.

conducted GF's work and the dates, hours, and costs thereof.⁴⁴ See R.R. at 1936a, 2215a-2218a; *see also* Exs. P-519, D-260.

The Project Detail Charges report lists \$7,389.86 under the heading *SBR Electrical Redesign* for work undertaken in 2015 and 2016; however, based on this Court's review, those charges are not limited to SBR electrical redesign. See Ex. D-260. While some of the charges specify that they relate to the UV system, the vast majority of the charges either describe work not clearly related to GF's electrical redesign (i.e., *SBR finish grading, sidewalks, piping painting color, Bronder COs, work needed for CAS, RFIs, hoist, Cummins' punch list*, etc.) or contain no detail at all. See *id.* In addition, Rae could not point to any work product to support GF's electrical redesign charge, see R.R. at 2215a-2216a, nor did the Authority identify or proffer any work product to support GF's electrical redesign charge. Moreover, since Bronder - the Authority's electrical contractor - carried out the redesign work, there was no basis on which to conclude that Cummins would have knowledge of any GF document or drawing that guided it. Finally, this Court observes that the entries specifically referencing GF's electrical redesign total only \$1,667.74. See *id.*

Nevertheless, the trial court held: "Although GF incorporated certain 'betterments' in the process, its electrical redesign was necessary to incorporate the Ashbrook SBR[,]" Cummins was required to pay the \$7,390.00 in associated costs. Trial Ct. August 23, 2024 Order at 13 (R.R. at 4461a). While this Court agrees that Cummins was at all times responsible for costs related to electrical work required to incorporate the Ashbrook SBR into the Project design, see *Cummins I*, Cummins cannot be required to pay damages the record does not support. See *Sch. Express, Inc.; Clairton Slag, Inc.* Resolving conflicting evidence in Cummins' favor as this Court must, see *Redmond*, and where "the jury [was] presented with conflicting

⁴⁴ This Court found no Contract provision that required the Authority to bill Cummins for Work within any particular timeframe.

evidence” of the Authority’s costs related to its SBR electrical redesign counterclaim, “JNOV should [have] be[en] denied.” *Rohm & Haas Co.*, 732 A.2d at 1248. Accordingly, the trial court erred by entering JNOV in the Authority’s favor on the SBR electrical redesign counterclaim.

SBR Hydraulic Issue Analysis

The jury determined that the Authority failed to establish its entitlement to \$20,527.00 in compensation for its SBR hydraulic issue analysis counterclaim. *See* R.R. at 3033a. Notwithstanding, the trial court granted JNOV in the Authority’s favor concluding that, in the face of Ashbrook’s refusal to acknowledge that its SBR did not meet the Contract’s specifications, the Authority had no choice but to hire professionals to assess the matter, and it was Cummins’ contractual duty to compensate the Authority for costs related thereto. *See* Trial Ct. August 23, 2024 Order at 13 (R.R. at 4461a). Cummins argues that the trial court improperly reweighed the evidence in the Authority’s favor despite that the Authority failed to provide proof of its damages related to GF’s hydraulic analysis.

Importantly, the *Cummins I* Court held that Cummins was responsible for costs associated with incorporating the Ashbrook SBR into the Project’s design. *See id.* Moreover, as stated above, General Conditions Sections 6.06.D, 6.19.A, 6.19.B, 6.21.A, 9.02.A.4, 9.02.B, 9.06.A, 13.06.A.1, 13.04.B.1, and 18.04.A, authorized GF to determine whether Cummins’ proposed Work qualified as an acceptable fulfillment of the Contract Documents and to disapprove or reject work that failed to conform to or would compromise or prejudice the completed Project’s functioning, and made Cummins responsible for paying all costs arising from the correction of defective work - including “special inspection[s] or testing of the Work[,]” General Conditions Section 9.06.B, Ex. D-2 at 174 - even after GF/the Authority accepted the Work or the Contract was completed. *See* Ex. D-2 at 155,

165-167, 172-175, 192, 207. After Cummins/Ashbrook denied contractual responsibility for the SBR gate overflows, in July of 2015, GF undertook a hydraulic analysis to determine why they were occurring. *See* R.R. at 1944a-1945a, 2113a-2114a. Rae's findings are summarized in a December 15, 2015 letter to the Authority (with drawings), wherein he concluded that the hydraulic problem occurred where the Ashbrook equipment takes control of the flow because Ashbrook failed to provide the modifications necessary to make its standard system work in the Project design. *See* Ex. D-150. Although GF clearly undertook the UV channel redesign work, it is unclear in the record whether GF billed the Authority separately for it. *See* R.R. at 1944a-1945a, 2112a-2115a. In January 2019, the Authority for the first time listed a \$20,527.00 claim against Cummins for GF's hydraulic analysis, supported by a GF Project Detail Charges report (generated on January 2, 2019). *See* R.R. at 2113a-2115a; *see also* Exs. P-519, D-261.

The Project Detail Charges report lists \$20,527.00 under the heading *SBR Hydraulic Analysis* for work undertaken in 2015; however, based on this Court's review, those charges are not limited to SBR hydraulic issue analysis. *See* Ex. D-261. While some of the charges specify that they relate to SBR hydraulic calculations, the vast majority of the charges either describe work not clearly related to hydraulic analysis (i.e., *onsite*, *Bronder COs*, *Cummins' punch list*, *revise SBR influent tanks*, *SBR gates and actuators*, *alarm questions*, etc.) or contain no detail at all. *See id.* Based on this Court's review, the entries that specifically reference GF's hydraulic calculations total only \$3,516.65. *See id.* at 3.

The trial court concluded that since GF's hydraulic analysis arose from Ashbrook's denial that its SBR was the faulty mechanism and Cummins was contractually responsible for paying for charges attendant to the SBR's incorporation into the Project design and arising out of or relating to correction of defective work, Cummins must reimburse the Authority for the \$20,527.00 it paid GF for the SBR

hydraulic issue analysis. *See* Trial Ct. August 23, 2024 Order at 13 (R.R. at 4461a). While this Court agrees that Cummins was at all times responsible for costs related to hydraulic analysis required to incorporate the Ashbrook SBR into the Project design, *see Cummins I*, the Authority failed to prove them. *See Sch. Express, Inc.; Clairton Slag, Inc.* Resolving conflicting evidence in Cummins' favor as this Court must, *see Redmond*, and where "the jury [was] presented with conflicting evidence" of the Authority's costs related to its SBR hydraulic issue analysis counterclaim, "JNOV should [have] be[en] denied." *Rohm & Haas Co.*, 732 A.2d at 1248. Accordingly, the trial court erred by entering JNOV in the Authority's favor on the SBR hydraulic issue analysis counterclaim.

UV Channel Redesign

The jury determined that the Authority failed to establish its entitlement to \$12,596.00 in compensation for its UV channel redesign counterclaim. *See* R.R. at 3033a. Nevertheless, the trial court granted JNOV in the Authority's favor in that amount concluding that Cummins was contractually responsible for costs incurred to incorporate the Enaqua UV system into the Project design. *See* Trial Ct. August 23, 2024 Order at 13 (R.R. at 4461a). Cummins argues that the trial court incorrectly assumed that Cummins proposed a UV system that did not meet the Authority's specifications, and the Authority offered no evidence to support its purported costs.

As concluded above, Cummins was responsible for incorporating the Enaqua UV system into the SBR and for any subcontractor or supplier's acts or omissions related thereto. *See Cummins I*; *see also* R.R. at 550a, 560a, 675a, 787a, 1545a-1546a, 2246a-2247a, 2357a, 2675a-2676a. Rae recalled, and Robert Cummins confirmed, that GF prepared revised foundation drawings to incorporate the upgraded UV system in accordance with the SBR Specifications, which required channel redesigns to insure proper UV disinfection. *See* R.R. at 681a-683a, 1669a-

1670a, 1673a-1707a, 2172a-2177a; *see also* Exs. P-248, P-500 at 2. Because GF was not previously familiar with Enaqua, it relied on Enaqua for the necessary calculations. *See* R.R. at 806a, 1972a-1973a, 2177a-2188a; *see also* Ex. D-363. Thereafter, GF provided stamped and approved redesign for the upgraded UV equipment to Cummins.⁴⁵ *See* R.R. at 683a, 868a-870a, 1986a-1987a, 2173a, 2176a-2177a; *see also* Ex. P-248. Robert Cummins declared that Cummins installed the upgraded UV system as specified in GF's revised foundation drawings. *See* R.R. at 686a. According to Robert Cummins, the change order GF eventually issued for the Enaqua UV system upgrade included the costs of GF's channel redesign. *See* R.R. at 815a-816a; *see also* Exs. P-248, P-505, D-105.

Rae claimed that GF billed the Authority for its UV channel redesign work, either in a separate invoice or as part of its ongoing services. *See* R.R. at 2189a. However, the Authority did not point to any UV channel redesign invoice. Rather, the record reflects only that, in January 2019, the Authority listed the \$12,596.00 claim against Cummins for GF's UV channel redesign, supported solely by a GF Project Detail Charges report (generated on January 2, 2019). *See* Exs. P-519, D-259. Importantly, however, because the Authority failed to move that Project Detail Charges report (Ex. D-259) into evidence, *see* R.R. at 2888a, it is not a part of the record and, thus, could not form the basis for JNOV.

Therefore, although this Court agrees that Cummins was responsible for costs related to electrical work GF undertook to incorporate the Enaqua UV system into the Project design, *see Cummins I*, the Authority failed to prove them. *See Sch. Express, Inc.; Clairton Slag, Inc.* Resolving conflicting evidence in

⁴⁵ Although on the PENNVEST/DEP Change Order form accompanying the GF Change Order the *No* box is checked under the question "Is there any redesign or rework involved in this change?[,]" under "If yes, describe[,]" the revised process and structural sheets are listed. Ex. D-105 at 2. Thus, it appears that the *No* response was inaccurate. Further, that document is not part of the Project's Specifications. *See* R.R. at 1704a.

Cummins' favor as this Court must, *see Redmond*, and where "the jury [was] presented with conflicting evidence" - or, in this instance, *no* record evidence - of the Authority's costs related to its UV channel redesign counterclaim, "JNOV should [have] be[en] denied." *Rohm & Haas Co.*, 732 A.2d at 1248. Accordingly, the trial court erred by entering JNOV in the Authority's favor on the UV channel redesign counterclaim.

AUMA Service Calls

The jury concluded that the Authority did not prove that it was entitled to compensation for its \$4,015.77 counterclaim for AUMA service calls from January 17 to March 5, 2017. *See* R.R. at 3033a; *see also* Ex. D-241. Notwithstanding, the trial court granted JNOV in the Authority's favor concluding that the Authority's expenditures related directly to SBR system gate failures for which Cummins was contractually responsible. *See* Trial Ct. August 23, 2024 Order at 14 (R.R. at 4462a). Cummins contends that this Court should reverse the JNOV for AUMA service calls because extensive record evidence established that there were numerous AUMA actuators on the site and AUMA frequently made service calls for actuators not related to the SBR, that freezing gates were not Cummins' responsibility, and that all of the claimed service calls were outside Cummins' one-year warranty.

AUMA manufactured the actuators needed to activate the large number of motors on the Project, many of which did not involve the SBR. *See* R.R. at 2744a-2745a. Nick Cummins described that the SBR's actuators informed the valves whether to open or close. *See* R.R. at 2743a. After Cummins' one-year warranty expired on December 22, 2016, the Authority presented documentation seeking \$4,015.77 from Cummins related to AUMA services calls. *See* Ex. D-241. AUMA

invoiced the Authority for \$2,902.47 for a February 9, 2017 service call, plus parts.⁴⁶ *See id.* The Authority also included its Overtime/Call-In spreadsheet seeking an additional \$1,113.30 in labor costs incurred when its employees assisted AUMA on nine dates between January 17 and March 5, 2017. *See id.* at 1-3.

Hayden acknowledged that the entries on the AUMA invoice were for calls after Cummins' warranty expired, and they do not specify what AUMA did at each visit, *see* R.R. at 2566a-2567a; however, he estimated, and Nick Cummins confirmed, that the majority of the service calls were for gate failures due to freezing. *See* R.R. at 2457a-2459a, 2485a, 2566a-2567a, 2743a-2744a; *see also* Ex. D-241. Hayden further acknowledged that Cummins and Ashbrook installed the gates as GF designed, but articulated that the gates required maintenance, especially in winter weather conditions. *See* R.R. at 2534a-2535a, 2570a. Hayden testified that, before the Authority eventually installed the hard pipe and valves,⁴⁷ because gate freezes rendered the SBR tanks inoperable, and the Authority's efforts to free frozen gates put undue strain on the actuators, AUMA had to fix the actuator components and adjust the torque settings. *See* R.R. at 2457a, 2485a-2487a, 2570a. Nick Cummins confirmed that the Authority complained early on about the SBR gates freezing, but denied Cummins' responsibility for gate freezes.⁴⁸ *See* R.R. at 1247a-1250a, 1466a-1467a, 1478a, 2739a-2744a.

⁴⁶ The invoice was for labor (\$1,200.00) plus travel expenses (\$333.47) and parts \$154.00 (SWITCH TANDEM 200MM UL/CSA CASSETTE), \$154.00 (SWITCH TANDEM 200MM UL/CSA CASSETTE), CTRL UNIT MS05 1-500 00RR1AH-000-A30 CSA (\$869.00), and FRAME 100MM DOUBLE SEAL H027-KP (\$192.00). *See* Ex. D-241 at 4-6.

⁴⁷ Hayden and Nick Cummins agreed that freezing issues have not arisen since Hickes installed the hard pipe and valve, with a flapper at the end of the hard pipe that prevents cold air from hitting the valve. *See* R.R. at 2461a.

⁴⁸ Nick Cummins declared that the problem occurred when temperatures in Bradford dipped lower than 20 degrees Fahrenheit. Nick Cummins maintained that he requested operator's reports of the problems the Authority claimed it was experiencing, but never received them. *See* R.R. at 2738a, 2742a-2743a.

However, Cummins was contractually responsible for identifying, making, and paying for any changes necessary to incorporate the SBR into the Project design, and comply with the Contract's performance specifications. *See Cummins I*. SBR Specifications Section 1.03.A.8 required that the SBR had to operate in air temperatures ranging from 20 to 90 degrees Fahrenheit, which includes temperatures below freezing. *See* R.R. at 2534a-2535a, 2569a-2570a; *see also* Ex. D-2 at 1029. The fact that the IFB specified an open channel configuration with gates, rather than hard pipe and valves did not change Cummins' obligation. Moreover, General Conditions Sections 6.21.A., 13.04.B.1, 13.06.A.1, and 18.04.A, obligated Cummins to hold the Authority harmless and pay all fees and charges of other professionals "arising out of, connected with, or caused by . . . performance of the Work, . . . failure to perform, [or] breach of [C]ontract . . . [,]" Ex. D-2 at 167, which included AUMA service calls to repair actuators affected by the process of freeing frozen gates, and "survive[d] final payment, completion, and acceptance of the Work or termination or completion of the [Contract]." *Id.* at 207.

This Court observes that the Overtime/Call-In spreadsheet for labor related to AUMA service calls reflect that Hayden and Authority employee Matt O'Connell (O'Connell) were each paid 1.5 hours to "WORK WITH AUMA DURING ONSITE FOR SBR #2." Ex. D-241 at 1. Notably, the time sheets the Authority proffered to support those hours did not show Hayden's and O'Connell's work hours for that week.⁴⁹ *See id.* at 2-3. In addition, the Call-In Summary the Authority offered to support its overtime/call-in counterclaim also includes a different number of hours Hayden and O'Connell purportedly expended in conjunction with the February 9, 2017 AUMA service call.

⁴⁹ The time sheets show Hayden's and O'Connell's work hours for the previous week, and the time sheets for the week of February 9, 2017, do not include Hayden and O'Connell. *See* Ex. D-241 at 2-3.

The trial court concluded: “As the testimony and exhibits confirm, the only AUMA-related expenditures for which [the Authority] sought compensation were those directly related to gate failures. Those gates were part of the Ashbrook SBR system Cummins selected. That being the case, [Cummins] was contractually bound to reimburse the [Authority].” Trial Ct. August 23, 2024 Order at 14 (R.R. at 4462a). However, while this Court agrees that Cummins was at all times responsible for costs related to AUMA service calls, *see Cummins I*, the Authority failed to prove them. *See Sch. Express, Inc.; Clairton Slag, Inc.* Resolving conflicting evidence in Cummins’ favor as this Court must, *see Redmond*, and where “the jury [was] presented with conflicting evidence” of the Authority’s costs related to its AUMA service calls counterclaim, “JNOV should [have] be[en] denied.” *Rohm & Haas Co.*, 732 A.2d at 1248. Accordingly, the trial court erred by entering JNOV in the Authority’s favor on the AUMA service calls counterclaim.

Overtime/Call-In Costs

The jury determined that the Authority did not prove its entitlement to \$13,619.00 in compensation for its overtime/call-in counterclaim. *See* R.R. at 3033a. Nevertheless, the trial court granted JNOV in the Authority’s favor, declaring that Cummins was contractually obligated to cover the Authority’s personnel costs related to gate overflows and freezes. Cummins argues that it was not responsible for gate freezes and high water flows caused by heavy rainfall, the Authority’s Call-In Summary did not specify the reasons for the call-ins (some of which did not involve gate overflows and freezes), and the vast majority of the costs are barred because the Authority incurred them after the SBR’s system’s one-year warranty expired.

The Authority presented its 2016 through 2018 Call-In Summary to Cummins in support of its \$13,619.00 counterclaim for its employee overtime and

call-in hours expended due to SBR gate failures involving overflows and freezes. *See* R.R. at 2457a, 2570a; *see also* Exs. P-519, D-110. The Call-In Summary covers Authority employee hours from January 4, 2016 to July 2, 2018. *See* D-110 at 2-4. It specifically charges \$6,295.20 for 2016, \$5,316.30 for 2017, and \$2,007.50 for 2018. *See id.*

Although Hayden admitted that he did not require the Authority's staff to detail the reasons for call-ins, *see* R.R. at 2548a, the Call-In Summary does contain short-hand references as to why Authority employees responded to SBR alarms. *See* Ex. D-110 at 2-4. For example, it lists call-ins and overtime related to alarms "FOR SBR'S," "FOR SBR FROZEN GATES," "INFLUENT GATE/FAIL TO CLOSE," "INFLUENT GATE FAILED TO OPEN," "MAX DECANT," etc. *Id.* However, the Call-In Summary also includes call-ins and overtime for reasons not clearly related to the SBR operation defects. For example, some refer to "BLOWER ISSUES," "DIVERSION VALVES," "JMS SLUDGE COLLECTION SYSTEM," and "OVERTIME TO COVER PLANT DURING RAIN EVENT," etc. *Id.* In addition, it shows that Hayden and O'Connell each put in .75 hours of overtime on February 9, 2017 "WORKING ON SBR ACTUATORS WITH AUMA TECH[.]" *id.* at 3, which the Authority already charged Cummins for in the AUMA service call-related Overtime/Call-In spreadsheet. *See* Ex. D-241 at 1.

The trial court declared that Cummins was contractually obligated to cover the Authority's personnel costs related to gate freezes and overflows "because those issues stemmed from Cummins' failure to properly incorporate the Ashbrook [SBR] system[.]" Trial Ct. August 23, 2024 Order at 14 (R.R. at 4462a). Although this Court agrees that General Conditions Sections 1.02.C, 6.19.A, 6.21.A, 13.01, 13.04.B.1, 13.06.A.1, and 18.04.A, obligated Cummins to hold the Authority harmless and pay all fees and charges of other professionals "arising out of, connected with, or caused by . . . performance of the Work, . . . failure to perform, [or] breach of contract . . . [.]" Ex. D-2 at 167, which included labor to repair defects,

and “survive[d] final payment, completion, and acceptance of the Work or termination or completion of the [Contract,]” *id.* at 207, the Authority failed to prove them. *See Sch. Express, Inc.; Clairton Slag, Inc.* Resolving conflicting evidence in Cummins’ favor as this Court must, *see Redmond*, and where “the jury [was] presented with conflicting evidence” of the Authority’s costs related to its overtime/call-in counterclaim, “JNOV should [have] be[en] denied.” *Rohm & Haas Co.*, 732 A.2d at 1248. Accordingly, the trial court erred by entering JNOV in the Authority’s favor on the overtime/call-in costs counterclaim.

Authority’s Motion

Change Order 06R1

Regarding Change Order 06R1, the trial court held:

Unlike the others . . . [Change Order 06R1] concluded with the following disclaimer: “This Change Order [06R1] constitutes full and final settlement of all claims by [Cummins] for time, scope and cost impacts to date.” According to [the Authority], that language precluded Cummins from asserting any further claims for work predating [Change O]rder [06R1]. That interpretation does not comport with [General Conditions Section] 12.01.E & F, though, which indicate that a change order governs only the scope of work addressed by that change order.

Trial Ct. August 23, 2024 Order at 7 (R.R. at 4455a).

The Authority asserts that the trial court erred or abused its discretion by failing to find that Cummins’ execution of Change Order 06R1 barred Cummins’ extra work claims relating to control/survey, storm sewer rerouting overtime, communication, and topsoil when the Contract’s express terms required a full and final settlement of all of Cummins’ claims for time, scope, and cost impacts to date.

However, General Conditions Section 12.01.E memorialized Cummin's representation that any change order includes "all costs associated with the additional work described in the [c]hange [o]rder, including all costs of associated delay, acceleration, inefficiency, and overhead; and costs of material, labor, and supervision." Ex. D-2 at 186. General Conditions Section 12.01.F further provided that payment of a change order constitutes accord and satisfaction of all claims addressed therein, and there are no other agreements. *See id.* at 186.

Robert Cummins and Nick Cummins recalled, and Rae confirmed, that GF issued the September 16, 2014 \$142,000.00 Change Order 06R1 for Cummins to excavate and remove the regulated fill (i.e., garbage consisting of leaking drums and ballasts, electrical transformer parts, and capacitors) Cummins discovered under the SBR footprint and backfill the area. *See* R.R. at 724a, 850a-853a, 873a-875a, 2210a-2212a; *see also* Ex. D-324. Change Order 06R1 represented: "[T]his [c]hange [o]rder constitutes full and final settlement of all claims by [Cummins] for time, scope[,] and cost impacts to date." Ex. D-324; *see also* R.R. at 1293a. However, the subject thereof was clearly limited to "SBR [f]oundation undercut and backfill." Ex. D-324. Change Order 06R1 did not reference control/survey, storm sewer rerouting, communication, or topsoil. *See* R.R. at 874a-875a; *see also* Ex. D-324. Because, under Section 12.01.E and F of the General Conditions, Change Order 06R1 was expressly limited to the time, scope, and cost impacts *related to foundation undercut and backfill*, its settlement language did not bar any of Cummins' other extra work claims. Accordingly, the trial court did not err or abuse its discretion by concluding that Change Order 06R1 did not bar Cummins' extra work claims for control/survey, storm sewer rerouting overtime, communication, and topsoil.

Topsoil Extra Work Claim/Counterclaim

The jury awarded Cummins \$75,961.67 for its topsoil extra work claim and denied the Authority's counterclaim that Cummins did not provide six inches of topsoil and carried out substandard seeding. *See* R.R. at 3031a, 3033a. The trial court held that the jury acted within its discretion to compensate Cummins for that extra work. *See* Trial Ct. August 23, 2024 Order at 12-13 (R.R. at 4460a-4461a). The Authority argues that the trial court erred by failing to find that the Contract both barred Cummins' extra work claim relating to topsoil and entitled the Authority to JNOV on its counterclaim as a matter of law because the Contract required Cummins to place additional topsoil *where indicated* for those areas where grading contours changed, and Cummins admitted that the contours, in fact, changed.

GF claimed that the Contract required Cummins to add six inches of topsoil and seeding wherever grading contours changed, including where Cummins had to place previously unknown/undisclosed garbage fill around the Project site. *See* R.R. at 2020a-2024a. However, Project Manual Division 2, Section 02313 (Finish Grading), subsection 3.02.A specified that Cummins shall “[p]lace topsoil **over areas indicated for new grading contours.**” Ex. D-2 at 508 (emphasis added). Robert Cummins and Nick Cummins interpreted that the Project's Specifications required Cummins to place six inches of topsoil with seeding and mulching over areas disturbed by Cummins' work, but only as GF designated by contour lines on its drawings.⁵⁰ *See* R.R. at 721a-724a, 1069a-1070a; *see also* Drawing C2. Nick Cummins acknowledged that while it was common for contours to change on construction projects, the Contract did not require Cummins to topsoil

⁵⁰ Robert Cummins and Nick Cummins related that Cummins completed all of that work without seeking additional compensation. *See* R.R. at 723a-724a, 1069a-1070. The Authority produced no evidence that Cummins did not do the extra topsoil and seeding work properly. *See* R.R. at 2072a-2074a, 2207a-2209a, 2525a, 2527a; *see also* Exs. P-309, P-519.

and seed the areas where it had to place the garbage it excavated from the SBR area because that work was not anticipated when the parties executed the Contract. *See* R.R. at 1070a-1075a, 1297a, 1301a-1303a; *see also* Exs. P-287, P-292, P-530, P-531, D-2 at 508, D-132. Cummins nevertheless undertook the additional work because the Authority included it on the punch list - thus, if Cummins did not perform that work, the Project would not be substantially complete, and the Authority would not release the Contract retainage to Cummins - and charged the Authority \$104,176.00. *See* R.R. at 1019a, 1077a, 1085a, 2068a-2071a, 2204a-2206a; *see also* Exs. P-22, P-457, D-132.

The trial court concluded that the jury was permitted to find in Cummins favor on this extra work/counterclaim where Project Manual Division 2, Section 02312, subsection 3.02.A only required Cummins to topsoil discrete areas identified in the Contract Documents and did not permit the Authority to designate additional areas - not reasonably discernable from the Contract Documents - as the Project progressed. *See* Trial Ct. August 23, 2024 Order at 12 (R.R. at 4460a). Accordingly, based on the Contract language, and considering the evidence in a light most favorable to Cummins - the verdict winner on the topsoil extra work claim - as the trial court was required to do, *see Redmond*, the trial court did not err or abuse its discretion by concluding that the Contract did not bar Cummins' topsoil extra work claim and, thus, denying JNOV on the Authority's topsoil counterclaim.

Second Fees Motion

The Authority asserts that the trial court erred or abused its discretion by concluding that its Second Fees Motion was untimely under Pennsylvania Rule of Civil Procedure (Civil Rule) 227.1(b)(2) because it was not a post-trial motion, the Authority filed it before the trial court entered judgment, and the parties had

agreed they should file motions for fees and costs after the trial court determined which party prevailed.

In its October 9, 2024 order, the trial court declared that the Authority's Second Fees Motion was late-filed because it had ordered the parties to file their post-trial motions by March 25, 2024, and the Authority timely filed three motions, none of which sought attorneys' fees and costs. *See* Trial Ct. October 9, 2024 order. The trial court acknowledged that the Authority submitted the First Fees Motion after *Cummins I*, but it denied the request without prejudice to raise fees and costs later. *See id.* The trial court determined that the Authority could have: (as Cummins did in its Motion to Mold the Verdict) preserved its claims by generally asserting them in the Authority's Motion and asking the trial court to defer its decision until after it decided the other issues; referenced its previous claims with up-to-date information; or sought leave of court to file the Authority's Second Fees Motion after the trial court resolved the Post-Trial Motions. *See id.* The trial court held that because the Authority did none of those things, it waived its claims pursuant to Civil Rule 227.1(b)(2). *See id.*

Civil Rule 227.1(b)(2) mandates: Post-trial relief may not be granted unless the grounds therefor "are specified in the motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds." Pa.R.Civ.P. 227.1(b)(2). Although post-trial motions are generally due within 10 days after "verdict," Pa.R.Civ.P. 227.1(c)(1), in its February 2, 2024 order, due to the extensive nature of the proceedings and the evidence, the trial court

granted the parties until March 25, 2024, to file their Post-Trial Motions.⁵¹ *See* R.R. at 3035a.

However, the law is well settled that “[t]he venerable purpose of the post-trial motion procedure is to permit the trial court to correct its own errors before appellate review is commenced.” *Perseus House Charter Sch. of Excellence, Inc. v. Sch. Dist. of City of Erie*, 327 A.3d 354, 360 (Pa. Cmwlth. 2024) (quoting *Motorists Mut. Ins. Co. v. Pinkerton*, 830 A.2d 958, 964 (Pa. 2003)). According to Civil Rule 227.1(a), post-trial motions allow a trial court to do any of the following: order a new trial as to all or any of the issues; direct the entry of judgment in favor of any party; remove a nonsuit, affirm, modify or change the decision; or enter any other appropriate order. *See* Pa.R.Civ.P. 227.1(a). It does not expressly reference motions for attorneys’ fees.

Moreover, in its March 7, 2019 order granting the Authority’s Motion *in Limine* to Exclude Evidence or Argument Concerning its Attorneys’ Fees, **the trial court acknowledged that “counsel [] reached an agreement” that “if necessary, the [trial c]ourt will address any outstanding claims for attorneys’ fees in post-trial motions and proceedings.”** R.R. at 92a (emphasis added). This Court has clarified that “[a] **petition seeking an award of attorneys’ fees** as a prevailing party, where authorized . . . , **is a *post-judgment proceeding*[.]**” - *as opposed to a post-trial motion* - “that does not affect the finality of the order to which it relates[.]” *Lancaster Cnty. Agric. Pres. Bd. v. Fryberger*, 257 A.3d 192, 200 (Pa. Cmwlth. 2021) (bold and italic emphasis added). Thus, a trial court’s attorneys’ fees award “constitutes a separately appealable order that would be reviewable upon filing of a timely separate notice of appeal, measured from the date the fee award

⁵¹ Civil Rule 248 states: “The time prescribed by any rule of civil procedure for the doing of any act may be extended or shortened by written agreement of the parties or by order of court.” Pa.R.Civ.P. 248.

order was entered.” *Id.* (quoting Appellate Rule 1701, Pa.R.A.P. 1701, Official Note).

In addition, Cummins made clear in its opposition to the First Fees Motion that judgment had not been entered in either party’s favor and that **both parties reserved the right to seek attorneys’ fees upon entry of judgment.** *See* R.R. at 210a. On June 29, 2021, **the trial court dismissed the First Fees Motion as premature, without prejudice.** *See* R.R. at 227a. More recently, Cummins represented in its March 25, 2024 Motion to Mold the Verdict that **it was premature for the trial court to rule on its request for attorneys’ fees**, costs, and penalty interest, and that the trial court should “defer ruling on th[at] issue until after it has ruled on Cummins’ Motion” Authority Br. App. D at 3. Cummins added that it “respectfully reserve[d] the right to a supplemental submission regarding its entitlement to penalty interest, costs, and attorneys’ fees under the [Contract] subject to the [trial c]ourt’s ruling on Cummins’ Motion” *Id.* In the meantime, the **Authority expressly reserved the right to seek attorneys’ fees** in two memoranda it filed in the trial court concerning issues on retrial - on April 12, 2023 and August 2, 2023.⁵² *See* R.R. at 335a, 348a, 357a, 371a. Thus, the trial court was well aware that both parties anticipated the trial court would entertain attorneys’ fees requests after the trial court entered judgment.

⁵² Even if the Authority’s reservations were insufficient to satisfy the trial court’s March 7, 2019 order, this Court acknowledges the Pennsylvania Supreme Court’s conclusion that “[i]t has long been the law of this Commonwealth that the grant of a new trial restores the case to its original status to be tried *de novo* as to all parties and all issues.” *Arthur v. Kuchar*, 682 A.2d 1250, 1255 (Pa. 1996). Because the March 7, 2019 order was an *evidentiary* order, it did not affect the Authority’s deadline to submit the Second Fees Motion after the trial court decided the Motions and entered judgment.

Finally, under Section 5505 of the Judicial Code,⁵³ “a trial court retains jurisdiction to act on a motion for attorney’s fees that is filed within 30 days after final resolution of a case.” *Miller Elec. Co. v. DeWeese*, 907 A.2d 1051, 1054 (Pa. 2006), *amended*, 918 A.2d 114 (Pa. 2007). Here, the Authority filed the Second Fees Motion on September 11, 2024, which was well within 30 days of the trial court’s August 23, 2024 orders and before the trial court entered judgment on September 19, 2024. Accordingly, this Court holds that the trial court erred by concluding that the Authority waived its claims in the Second Fees Motion by not including the request in its Motion.

Conclusion

Based on the foregoing, the portions of the trial court’s August 23, 2024 Order granting JNOV in the Authority’s favor on Cummins’ (1) control/survey, (2) communication, (3) additional painting - Headworks No. 2, (4) painting conduit, (5) painting (Issue Nos. 111-115), (6) storm sewer rerouting overtime, and (7) SBR electrical work extra work claims are affirmed. The portions of the trial court’s August 23, 2024 Order granting JNOV in the Authority’s favor on the Authority’s (1) SBR electrical redesign, (2) SBR hydraulic issue analysis, (3) UV channel redesign, (4) AUMA service calls, and (5) overtime/call-in cost counterclaims are reversed. The portion of the trial court’s August 23, 2024 Order denying JNOV in the Authority’s favor on the Authority’s topsoil counterclaim is affirmed.

⁵³ Section 5505 of the Judicial Code states: “[A] court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed.” 42 Pa.C.S. § 5505.

The trial court's October 9, 2024 order is vacated, and this matter is remanded to the trial court to make a ruling on the Authority's Second Fees Motion consistent with this Opinion.

ANNE E. COVEY, Judge

Judge Wallace did not participate in the decision in this matter.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert J. Cummins, d/b/a Bob Cummins Construction Company, Appellant	:	CASES CONSOLIDATED
	:	
	:	
	:	
v.	:	
	:	
Bradford Sanitary Authority	:	No. 1263 C.D. 2024
	:	
Robert J. Cummins, d/b/a Bob Cummins Construction Company	:	
	:	
	:	
v.	:	
	:	
Bradford Sanitary Authority, Appellant	:	Nos. 1320, 1515 C.D. 2024
	:	

ORDER

AND NOW, this 23rd day of October, 2026, the McKean County Common Pleas Court's (trial court) order dated August 22, 2024 (entered August 23, 2024) (August 23, 2024 Order) is AFFIRMED in part and REVERSED in part. The portions of that order granting judgment notwithstanding the verdict (JNOV) in the Bradford Sanitary Authority's (Authority) favor on Robert J. Cummins, d/b/a Bob Cummins Construction Company's (1) control/survey, (2) communication, (3) additional painting - Headworks No. 2, (4) painting conduit, (5) painting (Issue Nos. 111-115), (6) storm sewer rerouting overtime, and (7) sequencing batch reactor (SBR) electrical work extra work claims are AFFIRMED. The portions of the August 23, 2024 Order granting JNOV on the Authority's (1) SBR electrical redesign, (2) SBR hydraulic issue analysis, (3) UV channel redesign, (4) AUMA service calls, and (5) overtime/call-in counterclaims are REVERSED. The portion of the trial court's August 23, 2024 Order denying JNOV in the Authority's favor on the Authority's topsoil counterclaim is AFFIRMED.

The trial court's October 9, 2024 order is VACATED, and the matter is REMANDED to the trial court to rule on the Authority's September 11, 2024 Motion for Attorney's Fees and Costs consistent with this Opinion.

Jurisdiction is relinquished.

ANNE E. COVEY, Judge