In The

Supreme Court of Virginia

RECORD NO: 150278

CPM VIRGINIA, LLC,

Appellant,

v.

MJM GOLF, LLC,

Appellee.

BRIEF OF APPELLANT

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SCV: Submitted on 07-20-2015 16:17:44 EDT for filing on 07-20-2015

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INTRODUCTION

This case involves a somewhat complex contractual relationship between MJM Golf LLC (hereinafter "MJM") and CPM-Virginia LLC (hereinafter "CPM") with respect to the Battlefield Golf Course (hereinafter "the Property"). CPM entered into the Golf Course Development Agreement (hereinafter "the Contract")(App. 6-13) on August 28, 2006, which transferred ownership of the Property from CPM to MJM in exchange for the Note (App. 19-20) and MJM's agreement to develop the Property pursuant to CPM's Conditional Use Permit. (App. 7). MJM could elect to either: 1) pay off the Note plus interest within six years; or 2) facilitate CPM's election of either: a) an option to buy back the Property at an amount equal to MJM's "net capital investment"; or b) transfer of a one-third interest in the Property to CPM. (App. 7-9).

The crux of the dispute is whether the Note has been paid. Based upon MJM's non-payment of the Note within the six year payment period, CPM has elected to exercise its option to purchase and demands specific performance of its option right pursuant to the Contract. (App. 21) MJM alleges that CPM breached the seller's warranties in the Contract § VIII, by failing to place eighteen (18) inches of cover on amended fly ash, utilized on the Property as a structural fill material, prior to the contract closing on

January 30, 2011. (App. 22-27). MJM argues that costs associated with placing additional topsoil cover on the Property -- expended solely by Dominion pursuant to the Maintenance Agreement – have been set-off as payment on the Note. (App. 24-26). MJM alleges that CPM's option to purchase the Property has been extinguished by this set-off. Id.

In its Order and Ruling, the circuit court created both new law and a new contract before it ruled in favor of MJM. (App. 692-716, 735-737). The circuit court created new law -- expanding the application of a tort specific concept to breach of contract and overruling the longstanding precedent that entitlement to indemnification requires proof of actual loss or damages -- by applying the collateral source rule to the Contract's indemnity provisions. (App. 713-714, 736-737). As a result, funds provided by Dominion entirely rectifying the alleged breach of contract were not considered to reduce MJM's damages. *Id.*

The Court then rewrote the Contract. First, the Court relieved MJM of any due diligence responsibility with regard to the topsoil cover by ruling that the topsoil cover is excluded from "soil conditions" and "environmental matters". Compr. (App. 9) with (App. 710). Then, the circuit court found that state regulations required CPM to place eighteen (18) inches of cover on the amended ash prior to closing, when in fact, the "final cover system" as

defined by 9VAC20-85-120 is not required to be completed until six months after the final delivery of amended ash, and the final delivery of ash occurred several months after the contract closing. (App. 263-271). CPM did not make any warranties regarding the future condition of the Property. (App. 6-13). Nevertheless, the circuit court found CPM in breach for failing to place the cover, without identifying the specific contractual language CPM breached, and without explaining how the evidence supported the finding. (App. 700, 735-737).

CPM respectfully requests this Court reverse the circuit court's Order, based upon the clearly erroneous holdings and the unwarranted expansion of the collateral source rule, and enter an order directing MJM to comply with CPM's demand for specific performance of its contractual option to purchase the Property.

ASSIGNMENTS OF ERROR

I. The circuit court erred by ruling that the collateral source rule applies to the Contract's warranty and indemnity provisions. (App. 752-753, 753-737, 711-714)

II. The circuit court erred by finding that CPM failed to place eighteen (18) inches of topsoil cover on top of the amended ash without credible evidentiary support. (App. 750-751, 753-757, 700)

III. The circuit court erred by rewriting the Contract with respect to the following:

a. the circuit court wrote in a warranty that the amended ash would be covered by eighteen (18) inches of topsoil cover prior to the contract closing (App. 739-743, 753-757, 700); and

b. the circuit court erased the provision that MJM would "satisfy itself" as to "soil conditions", "environmental matters" and "all other matters it deems pertinent to the transaction" during the period of due diligence. (App. 750-754, 753-757, 700, 710).

STATEMENT OF FACTS

The Property began as a joint project between CPM, Dominion and VFL. (App. 242-251, 499-636). The project's goal was the beneficial reuse of 1.5 million tons of amended fly ash, a byproduct of burning coal, as a structural fill material in sculpting a golf course. Id. Dominion provided the fly ash, VFL amended the ash with cement dust and placed the amended ash on the Property, CPM owned the Property and covered the amended ash. (App. 242-251).

CPM entered into the Contract, on August 28, 2006, which transferred ownership of the Property to MJM. (App. 6-13). The Contract was drafted by Mr. Richard Matthews, Esq. acting as MJM's attorney. (App.

90). The consideration for the transfer was the Note and MJM's agreement to construct a golf course on the Property in accordance with the Conditional Use Permit previously granted to CPM by the City of Chesapeake. (App. 7, 233-251). The purchase price was deferred and made optional. (App. 7-9). The contract provided MJM with the choice to either: 1) pay off the Note within six (6) years, or 2) if MJM chose not to pay off the Note, CPM could elect to repurchase the course at an amount equal to MJM's "net capital investment". MJM would then be obligated to facilitate CPM's purchase option by providing documentation to allow CPM to determine the amount of MJM's "net capital investment", and MJM would be obligated to transfer the Property back to CPM upon payment thereof. Id. CPM could also choose to accept a one-third interest in the Property instead. Id.

The Contract provided that MJM would conduct due diligence within a 120 day period to "**satisfy itself**" as to "**soil conditions**", "**environmental matters**" and any and all other matters it "**deems pertinent to the transaction**." (App. 9)(Emphasis added). The Contract provided that if no site plan were required the due diligence period would be shortened to 45 days, but on October 5, 2008, CPM agreed, despite the fact that no site plan was required, to a contractual amendment which

allowed MJM the full 120 days for due diligence.(App. 9, 220-221) DEF. T.E. 1. The testimony at trial established that MJM's members were aware during the due diligence period of the state regulations requiring the placement of eighteen (18) inches of cover within six (6) months after the final delivery of amended ash and prior to administrative closure. (App. 87, 91). MJM's members testified that they took no action during the due diligence period to satisfy themselves with respect to the topsoil cover. (App. 94-95). MJM did not at any time during the period of due diligence, nor at any other time prior to filing its Answer and Counterclaim, express any concerns regarding the topsoil cover to CPM. (App. 97).

Because of the use of the amended ash on the Property, the Property was subject to state regulations as a Fossil Fuel Combustion Site. (App. 263-271) "Design and Construction" and "Operations" are governed by Articles 2 and 3, respectively, neither of which mentions an eighteen (18) inch cover requirement. (App. 263-266). Article 4 governs "Closure" and states "upon reaching the final grade, the owner or operator of a fossil fuel combustion product site shall close his project in a manner that minimizes the need for further maintenance." (App. 267-271). The placement of a "final cover system" consisting of eighteen (18) inches of earthen material is part of the "closure criteria". (App. 269).The state regulations provide that

applicants will have at least **six months after receiving the final volume of amended ash** to ensure compliance with the closure criteria. (App. 271).

The parties closed on the Contract on January 30, 2007 while the ash placement continued. (App. 158, 257-258). On March 3, 2007, ash placement was still only 90% complete. Id. The Property did not receive the final volume of amended ash until April of 2007. Id. The Property did not complete the process of administrative "closure" until October 4, 2007. (App. 261-262). Thus, Article 4's "final cover system" closure criteria requirement did not apply until over eight (8) months after the contract closing. (App. 269-271).

The parties' continuing obligations, after the contract closing, regarding "Golf Course Development Specifications", are stated explicitly in the Contract, which provides as follows:

> As a condition precedent to closing hereunder, consultants for both parties shall have met and determined in good faith the **specific obligations of each of them with regard to ash placement and golf course construction**. This shall be set forth in a **development plan agreed upon and signed off on by both parties** and by the city of Chesapeake if required by the city.

(App. 9)(Emphasis added). No development plan was presented at trial. (App. 32-685). The Contract also provides generally that MJM will accept

responsibility for constructing the golf course on the Property in accordance with the conditional use permit granted to CPM.

> CPM wishes to contract with MJM for MJM to construct the golf course pursuant to the previously issued conditional use permit from the City in accordance with the plans as previously submitted to the City of Chesapeake Planning Department. MJM desires to develop and/or operate a golf course and is willing to do so **subject to the terms and conditions imposed upon CPM to develop the said golf course, thereby satisfying the various commitments made by CPM**; provided that MJM shall, as a part of the transaction, become fee simple owner of the property as a transfer of ownership is essential to MJM's funding of the Project. MJM shall have no obligation to any party to develop the Property except upon closing of the conveyance of the Property pursuant to this Agreement.

(App. 7)(Emphasis added). On January 31st, 2007, the day after the Contract closing, Mike Waugh, a member of MJM, sent a letter to the Virginia Department of Environmental Quality requesting a reduction of the amount of earthen material required to be placed on the amended ash from twenty four (24) inches to eighteen (18) inches, which request was later granted. (App. 257-258). This letter confirms that MJM assumed responsibility for ensuring the property's compliance with the obligations imposed upon CPM by the conditional use permit consistent with the Contract terms in sections II and IV providing that MJM would be responsible for the ongoing development of the golf course.

On January 30, 2007, the parties also signed a document titled "Second Addendum to Golf Course Development Agreement and Contract for Sale and Purchase of Real Estate." (App. 220-221) The Second Addendum incorporated by reference a January 23rd letter from Neil Wallace, Managing Member of CPM, to Mark Sawyers, Managing Member of MJM. (App. 223). The incorporated letter states:

> CPM has an agreement with Midgette and Associates and John Blake to provide confirmation to the DEQ that CPM is in compliance with DEQ regulations and design plans and that it is CPM's obligation pursuant to that agreement to pay Midgette their costs in making such a determination and providing said confirmation.

Nowhere within this letter does CPM make any warranties regarding the cover. Id.

Consistent with the second addendum, Mr. Blake conducted surveys of the property concerning the depth of the cover in February and May of 2008. (App. 103-108). Mr. Blake is a certified civil engineer with over thirty years of professional experience. (App. 115). Mr. Blake randomly selected and measured the depth of the topsoil cover at between twenty (20) and forty (40) locations and found in all cases that the topsoil cover was eighteen (18) inches or deeper. (App. 115). Mr. Blake certified his results to the Virginia Department of Environmental Quality (hereinafter "VDEQ") in a letter dated August 13, 2007. (App. 255-256). Mike Waugh, a member of

MJM, testified that he was aware of the methods for testing the depth of cover used by Mr. Blake. (App. 126). MJM never made any objected to Mr. Blake's methods prior to the March 8, 2014 hearing. VDEQ approved the administrative closure in a letter to Mike Waugh on October 4, 2007, and warned that MJM's "use of the property after closure shall not disturb the integrity of the final cover…." (App. 261-262).

MJM's members and employees testified regarding significant erosion of the cover caused by MJM's failure to plant vegetation to hold the soil in place. MJM's members and employees testified at trial that there were no problems noted with the cover until July of 2008. (App. 140). Mr. Cooper, MJM's groundskeeper, testified that in July of 2008 a hard "gully-washer" rain had caused a washout of the cover, stating, "it was just a funneled --- basically just a washout where rain had, you know --- the water had ran and washed off the top soil." (App. 140). Mr. Cooper testified that areas that were washed out could have been caused by the failure to plant grass. (App 151-153). Mr. Cooper testified that there was no grass planted in the areas that were not fairways or tee boxes during the intervening year and a half between the contract closing and the alleged discovery of the cover inadequacies. (App. 151-152). Mr. Waugh testified that the tee boxes and fairways did not have grass planted until June of 2007, approximately

five months after the contract closing. (App. 178). Mr. Waugh testified, that in his experience as a golf course professional, an area of dirt that is not covered by grass would be expected to react to rain by making mud and ditches that would erode the cover material over time. (App. 186). Mr. Waugh also testified that concerns of erosion of the cover due to lack of vegetation existed until May of 2009, and that some areas continued to experience erosion, despite the planting of sod and grass. (App. 185).

MJM's members testified that, upon discovery of the washouts, they contacted Dominion. (App. 97, 189-195) On August 5, 2008, MJM and Dominion signed an agreement whereby Dominion agreed to pay MJM's expenses "reasonably incurred in complying with the Regulations relative to the Fly Ash." (App. 497-498). An initial payment of one hundred twenty thousand dollars ($120,000.000) was made to MJM pursuant to the agreement and monthly installments were provided thereafter to cover all of MJM's expenses related to rectifying the alleged cover inadequacies. Id. MJM's members testified that additional funds were paid pursuant to an off-contract "understanding" to cover all MJM's operational costs. (App. 189-193). Payments made to MJM by Dominion totaled approximately one million dollars ($1,000,000.00) per year. (App. 193-194). Dominion paid for all MJM's expenses and losses related to the cover. (App. 97, 189-195). No

one from MJM or Dominion ever contacted CPM to notify CPM of the alleged cover problems. Id.

MJM elected not to pay off the Note within six years and provided no notice to CPM of any intention to consider the Note set-off. (App. 211) CPM elected to exercise its option to purchase the golf course, by way of a letter sent on February 4, 2012, and requested the necessary financial information to calculate MJM's "net capital investment." (App. 210) CPM received a letter from Mr. Matthews on February 15, 2013, refusing to provide the financial information requested and anticipatorily breaching MJM's obligation to convey the property upon payment. (App. 211)

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

CPM filed a Complaint against MJM demanding specific performance of its option to purchase the Property. (App. 1-5). MJM filed an Answer and Counterclaim, on April 1, 2013, alleging CPM's option to purchase the Property had been extinguished. (App. 23-27). MJM argued that the expenses to add topsoil cover, incurred by Dominion pursuant to the Maintenance Agreement, had been retroactively applied as payment to CPM, and extinguished the Note. Id. MJM also argued that costs incurred by Dominion on the cover above the amount of the Note should be assessed as damages against CPM owed to MJM. Id. MJM's basis for the

set-off and recoupment claim was the allegation that six years prior, at the time of the parties' closing on the Contract, CPM breached the Contract by failing to place eighteen (18) inches of top soil cover on top of the amended ash. Id. MJM alleged that CPM's failure to place eighteen (18) inches of cover violated the Seller's warranty and indemnification provisions. Id.

The trial was held on May 8th, 2014 in the Circuit Court for the City of Chesapeake. (App. 32) The parties stipulated, and the circuit court ruled, barring the success of MJM's Counterclaim, CPM had an option to purchase the Property and MJM was obligated to provide sufficient information to allow CPM to calculate the purchase price. (App. 68-74). In its oral Ruling on September 17, 2014, the circuit court found in favor of MJM. (App. 713-714). The circuit court held that CPM had breached the Seller's warranty and indemnification provisions of the Contract by failing to place eighteen (18) inches of topsoil cover on the amended ash, that the cost of rectifying the breach was set-off from the Note to extinguish CPM's option to purchase, and that funds paid by Dominion to rectify the alleged breach could not be considered to reduce MJM's damages because the collateral source rule applied to the warranty and indemnity provisions of the Contract. (App. 696-714). The circuit court signed the Order on November 20, 2014 consistent with the Ruling. (App. 735-737).

ARGUMENT

I. The circuit court erred by ruling that the collateral source rule applies to the Contract's warranty and indemnity provisions.

The application of the collateral source rule is a pure question of law subject to de novo review. Janvier v. Arminio, 272 Va. 353, 363 (2006). No Virginia Court has ever held that the collateral source rule applies to a breach of contract. The circuit court acknowledged that it was creating new law requiring review before this Court, stating: "I don't need to make the record real lengthy here because any issues of law the Supreme Court is going to review on a de novo basis and everyone would be wrong supposing what they were saying." (App. 711). This Court should not extend the collateral source rule to the Contract, for the following reasons.

a. *The majority of jurisdictions have held that the collateral source rule categorically does not apply to breach of contract.*

The majority of jurisdictions who have addressed the issue of whether to apply the collateral source rule to breach of contract claims, including the United States District Court for the Eastern District of Virginia applying Virginia law, have found that the doctrine categorically does not apply.

> See Toulson v. Ampro Fisheries, Inc., 872 F. Supp. 271, 276 (E.D. Va. 1995)("the collateral source rule is generally applicable only in the area of tort, not contract… Moreover, inapplicability of the collateral source rule is particularly appropriate where the seaman [plaintiff] has not himself incurred actual expenses.") See Also Dennison v. Head Const.

> Co., 54 Md. App. 310, 322 (1983); United States v. City of Twin Falls, Idaho, 806 F.2d 862, 873 (9th Cir. 1986) ("We have found no authority to support the application of the collateral source rule in the contracts field. Authority is to the contrary….The policy rationales underlying the collateral source rule also do not support its application to contract cases."); Hurd v. Nelson, 714 P.2d 767, 771 (Wyo. 1986)("an obligation in tort is not satisfied by payment from a collateral source while payment from a collateral source may satisfy a contractual obligation."); Amalgamated Transit Union Local 1324 v. Roberts, 263 Ga. 405, 408 (1993) ("the collateral source rule is not applicable in *contract* cases because collateral source evidence *can* be admitted if it is relevant to demonstrate the extent of the plaintiff's *actual loss* that was caused by the breach");Kansas Gas & Elec. Co. v. United States, 685 F.3d 1361, 1366 (Fed. Cir. 2012)("The injured party is limited to damages based on his actual loss caused by the breach. If he makes an especially favorable substitute transaction, so that he sustains a smaller loss than might have been expected, his damages are reduced by the loss avoided as a result of that transaction.");Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc., 579 N.W.2d 823, 830 (Iowa 1998); Garofalo v. Empire Blue Cross & Blue Shield, 67 F. Supp. 2d 343, 347 (S.D.N.Y. 1999);United Protective Workers of Am., Local No. 2 v. Ford Motor Co., 223 F.2d 49, 54 (7th Cir. 1955); Centon Electronics, Inc. v. Bonar, 614 So. 2d 999, 1004 (Ala. 1993); Corl v. Huron Castings, Inc., 450 Mich. 620, 625-26 (1996); Safeco Ins. Co. of Am. v. City of White House, Tenn., 191 F.3d 675, 693 (6th Cir. 1999).

This Court has consistently defined the application of the collateral source rule in tort cases as being limited to tort and this Court has stated in *dicta* that the collateral source rule does not apply to breach of contract claims. See Acuar v. Letourneau, 260 Va. 180, 190-91 (2000) ("…we were construing the specific terms of an insurance contract in Bowers. Thus,

neither the tort policy of this Commonwealth **nor the collateral source rule was implicated**.”)(Emphasis added).

This Court has articulated the same principles of law discussed in other jurisdictions as supporting the majority position that the collateral source rule does not apply to contracts. This Court has held that punitive damages are disallowed in breach of contract actions and stated that contract damages are “subject to the overriding principle of compensation.” See Kamlar Corp. v. Haley, 224 Va. 699, 706 (1983). Other jurisdictions have similarly held that the collateral source rule is punitive and therefore not applicable to breach of contract. See Dennison v. Head Const. Co., 54 Md. App. 310, 322 (1983)(“The collateral source rule is punitive; contractual damages are compensatory. The collateral source rule, if applied to an action based on breach of contract, would violate the contractual damage rule that no one shall profit more from the breach of an obligation than from its full performance.”) See also Weichert Co. of Maryland v. Faust, 191 Md. App. 1, 10, (2010) aff'd, 419 Md. 306 (2011). Virginia Courts have also held that Contract damages should not exceed the amount that would place the Defendant in the same position as if the contract had been performed. See Nichols Const. Corp. v. Virginia Mach. Tool Co., LLC, 276 Va. 81, 89, (2008) (internal citation omitted)(“the proper measure of unliquidated

damages for breach of a contract is the sum that would put [the Plaintiff] in the same position, as far as money can do it, as if the contract had been performed.") Implicit within this rule is the principle that contract damages should not place the Plaintiff in a better position than performance of the contract. Id. Numerous jurisdictions have similarly held that the collateral source rule does not apply to breach of contract because of this same principle. See Dennison v. Head Const. Co., 54 Md. App. 310, 322 (1983); See Also Global Petrotech, Inc. v. Engelhard Corp., 824 F. Supp. 103, 104 (S.D. Tex. 1993); Centon Electronics, Inc. v. Bonar, 614 So. 2d 999, 1004 (Ala. 1993); Corl v. Huron Castings, Inc., 450 Mich. 620, 625-26 (1996); Garofalo v. Empire Blue Cross & Blue Shield, 67 F. Supp. 2d 343, 347 (S.D.N.Y. 1999).

Here, application of the collateral source rule is punitive. MJM would receive the Property without having paid a cent towards and the purchase price to CPM and additional recoupment of damages. The Property and damages would be a windfall because MJM received an initial payment from Dominion of one hundred twenty thousand dollars ($120,000.000) prior to undertaking any work related to rectifying the topsoil cover, and monthly installments from Dominion thereafter covering all MJM's expenses at the golf course and totaling approximately one million dollars

($1,000,000.00) per year. (App. 97, 189-195). Dominion has no subrogation rights to recover any of these amounts from a judgment against CPM. (App. 497-498). On the other hand, if the collateral source rule is **not** applied, CPM will execute its option to purchase the Property and MJM will be reimbursed for its "net capital investment" in the golf course. (App. 7-9). No one will receive a windfall.

b. *Even adopting the minority position, the application of the collateral source rule here is in error.*

A minority of jurisdictions have held that the collateral source rule may apply to breach of contract where the conduct underlying the breach is of "a willful or tortious character" or where third party contributions have been provided by an insurance agent or government actor with subrogation rights; nevertheless, even if this Court were to accept the minority position, the application of the Rule here is clear error. See John Munic Enterprises, Inc. v. Laos, 235 Ariz. 12, 326 (Ct. App. 2014), review denied (Dec. 2, 2014). First, the circuit court specifically found that CPM did not breach the contract willfully, stating: "I'm not saying, you know, misrepresentation, there is nothing that rises to fraud here that shows that it was intentional." (App. 713). The circuit court also specifically found that CPM did not commit tortious conduct, stating: "It's a breach of a duty, but a duty that's **not a common law duty** but a duty that was imposed by contract…." (App.

713)(Emphasis added). For a breach of contract to be tortious in character there must be a breach of a common law duty. See Richmond Metro. Auth. v. McDevitt St. Bovis, Inc., 256 Va. 553, 558 (1998). ("the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract"); See also Frank Brunckhorst CO., L.L.C. v. Coastal Atl., Inc., 542 F. Supp. 2d 452, 462 (E.D. Va. 2008) ("Because Coastal cannot identify a duty owed to it by Brunckhorst independent of their contract, it cannot maintain an action for constructive fraud"). Id. In addition, nothing within the Maintenance Agreement provides Dominion with any rights of subrogation should MJM prove successful in a lawsuit against any other party. (App. 497-498) Dominion is not an insurer or a government actor.

In its Brief in Opposition to Petitioner's Petition for Appeal, MJM failed cite a single case that supports the application of the collateral source rule to the facts of this case. CPM anticipated MJM will rely on the same cases and arguments in response to CPM's brief. MJM cited to Schickling v. Aspinall, 235 Va. 472, 475 (1988). Schickling involved a contractual agreement regarding "the sharing of profits and losses from the ultimate sale" of real property. Id. This Court ruled that the agreement between one party and his employer who agreed to pay for the employee's moving

expenses was entirely unrelated to the profits and losses from the sale of the real property. Id. Schickling states, “We never have had occasion to consider whether the collateral source rule applies to contract cases. And in this case, **the rule is inapposite**.” Schickling does not apply. The Contract provision allegedly breached was an indemnity agreement, not an agreement to share profits and losses, and proof of actual loss is a requirement for recovery on an indemnity agreement and is not a requirement in an agreement to share profits and loss. (App. 10-11) Accord City of Richmond, 205 Va. 424, 430 (1964).

Next, MJM cited to Hall v. Miller, 143 Vt. 135, 143 (1983). Vermont’s extremely liberal application of the collateral source rule to contracts has no bearing on this Court; nevertheless, even in Vermont, it is unlikely that the collateral source rule would apply to this Contract. Vermont has held that generally the collateral source rule should only apply where the third party has a right of subrogation. See My Sister's Place v. City of Burlington, 139 Vt. 602, 612-13 (1981) (collateral source rule is “usually limited to compensation provided an injured party through insurance, unemployment benefits or similar compensation yielded because the plaintiff actually or constructively paid for it, or in cases where the collateral source would be recompensed from the total recovery through subrogation, refund or some

other arrangement.") Although the Court in Hall did find that Plaintiffs did not need to prove that they paid for the protection of insurance to enforce the collateral source rule, Hall did not overturn Vermont's law holding that there must be some right to subrogation from a third party for the collateral source rule to apply. 143 Vt. 135, 144 (1983). In Hall, the government had a right to subrogation with respect to the value it paid for the taking of cows infected with contagious disease out of the damages award for breach of contract. (App. 713). Even under Vermont's extreme liberal application of the collateral source rule, which this Court has no obligation to adopt, the collateral source rule would not apply because Dominion has no right of subrogation.

MJM cited to GNP Commodities, Inc. v. Walsh Heffernan Co., a case where the defendant was found by a jury to have committed fraud. 95 Ill. App. 3d 966, 982 (1981). The court discussed application of the collateral source rule only in *dicta* because it found that the Defendants arguments regarding setoff were never raised at trial or by post-trial motion. Id. The facts are clearly distinguishable here because the circuit court found that CPM did not commit any tortious conduct. (App. 497-498).

Finally, MJM cited to John Munic Enterprises, Inc. v. Laos, 235 Ariz. 12 (Ct. App. 2014), review denied (Dec. 2, 2014). John Munic supports

CPM's argument that the collateral source rule does **not** apply. John Munic holds that the collateral source rule is inapplicable in "ordinary contract cases". Id. at 19. The court in John Munic discussed that the collateral source rule may apply to contracts when either: 1) "a party has paid valuable consideration before the breach to a collateral source to insure against a loss or otherwise to protect its interest"; or 2) there are "breaches of contract having a willful or tortious character, as when the breaching party secures the benefit of a contract by fraud". Id. at 18-19. John Munic involved a case where the trier of fact determined that the defendant had made fraudulent misrepresentations and therefore, "the eventual breach had a 'willful or tortious' character that justifies applying the collateral source rule in this case." Id. at 19-20. Also, the collateral source was a professional malpractice judgment and the plaintiff "paid specific consideration to its attorney before the breach with the anticipation that its attorney would protect its interests." Id. at 20. Here, CPM did not commit tortious conduct and MJM did not pay any consideration to Dominion before the alleged breach that would entitle MJM to any anticipation that Dominion would rectify alleged topsoil cover inadequacies.

c. *The application of the collateral source rule to the indemnification agreement overrules longstanding precedent holding that recovery on an indemnification agreement requires proof of damages.*

MJM did not suffer damages. (App. 710-711). The circuit court found:

> … we are getting back to the issue of damages and that MJM has to prove damages, and we have in this case the maintenance agreement with Dominion which, under this case and the testimony, has paid for all of what MJM had to do to rectify the breach of warranty by CPM. So maybe it's just my way of thinking, but I heard Mr. Matthews say I don't see a way that MJM prevails unless the Court determines to extend the collateral source rule to the contract in this situation.

Id. The testimony and evidence at trial supported this finding by the circuit court. (App. 97, 189-195, 497-498) The circuit court excused MJM's lack of damages by applying the collateral source rule, stating: "the contract with Dominion and Dominion paying the costs to cure the breach of warranty here does not deprive MJM of establishing damages as a result of the breach of contract…." (App. 736-737). MJM did not present evidence to suggest the Property is not now in the exact same condition as it would have been had CPM performed perfectly on the Contract or that MJM has or will suffer any other actual or potential future loss as a result of CPM's alleged breach. See Nichols Const. Corp. v. Virginia Mach. Tool Co., LLC, 276 Va. 81, 89 (2008).

Under Virginia common law, MJM cannot recover under an indemnification agreement without proving actual loss or damage. See City of Richmond v. Branch, 205 Va. 424, 430 (1964) ("the right to indemnification arises only where there has been actual loss or damage."). Pursuant to Va. Code Ann. § 8.01-281, a party may file a counterclaim for indemnity based upon "future potential loss"; however, claimed damages still cannot be based upon "uncertainties, contingencies or speculation…." See Manchester Oaks Homeowners Ass'n v. Batt, 284 Va. 409, 423 (2012) MJM failed to provide any evidence of potential future loss that was not entirely contingent and speculative. For Dominion to demand a refund from MJM, under the Maintenance Agreement, two events must occur: 1) MJM must fail to maintain the Property in accordance with the Regulations; and 2) Dominion, at its election, must demand an immediate refund. (App. 497-498). No evidence was presented to show either event will occur.

The sole purpose of an indemnification agreement is to allocate the risk of loss and a finding that no loss was suffered defeats the purpose of the agreement. Farmers Ins. Exch. v. Enter. Leasing Co., 281 Va. 612, 619 (2011) ("An indemnification provision in an agreement is nothing more than a contract between parties to pre-determine the allocation of a potential risk of loss.") No rationale or policy justifies the extension of the collateral

source rule under these circumstance. This Court must uphold the longstanding precedent that entitlement to indemnification requires proof of damages.

II. The circuit court erred by finding that CPM failed to place eighteen (18) inches of cover on top of the amended ash prior to the contract closing without credible evidentiary support.

Whether eighteen (18) inches of cover was placed on the amended ash prior to the contract closing is a factual finding of the trial court, to be reviewed in a light most favorable to the trial court; however, this Court may sustain the contention that the finding was unsupported by the evidence because the finding is plainly wrong and without credible evidence to support it. See Nat'l Coll. of Bus. & Tech., Inc. v. Davenport, 57 Va. App. 677, 685 (2011). There was no requirement in the Contract that eighteen (18) inches of topsoil cover be placed on the Property prior to the contract closing; therefore, whether eighteen (18) inches of topsoil cover was placed on the golf course prior to the contract closing is irrelevant. (App. 6-13, 263-271). Nevertheless, the circuit court stated in its Order that the failure to place eighteen (18) inches of topsoil cover prior to the contract closing was the basis for its finding of a breach of contract and this finding was not supported by the evidence presented at trial. (App. 735-736).

No evidence was presented at trial regarding the depth of the cover on the date of the contract closing when the circuit court found the alleged breach occurred. The only evidence presented regarding the amount of cover on or about the time of the administrative closure, October 4, 2007, was the testimony of John Blake indicating that the cover was at least eighteen (18) inches deep in February and May of 2007. (App. 103-108, 255-256). MJM's employees presented measurements – taken more than a year and a half after the Contract closing -- to suggest the presence of less than eighteen (18) inches of cover. (App. 140-163, 181-186) During the intervening year and a half, MJM's members and employees testified that the cover was significantly eroded due to washouts caused by "gully washer" rain storms and MJM's failure to plant vegetative cover. (App. 140-163, 181-186). Significantly, when these conditions were discovered, MJM did not inform CPM of the alleged problems. (App. 97, 189-195, 497-498). MJM contacted Dominion who agreed to assume all MJM's costs. Id. Neither Dominion nor MJM ever notified CPM of the alleged breach or asserted that CPM was responsible. (App. 97, 189-195).

MJM failed to present any evidence to show that the cover inadequacies in July of 2008 were not caused by erosion or other environmental factors during the intervening year and a half after the

contract closing. To the contrary, MJM's testimony supported this alternative cause. Thus, MJM failed to present credible evidence to support its theory of breach. The circuit court failed to provide any factual analysis in support of its conclusion that the alleged cover inadequacies were caused by CPM's conduct. The circuit court's findings were completely unsupported.

III. The circuit court erred by rewriting the Contract.

Contract interpretation is a matter of law subject to de novo review. See Copp v. Nationwide Mut. Ins. Co., 279 Va. 675, 681(2010). Courts may not rewrite contracts; this is among the most basic principles of black letter contract law. See Ames v. Am. Nat. Bank of Portsmouth, 163 Va. 1, 38 (1934) (emphasis in original).

> It is the function of the court to construe the contract made by the parties, not to make a contract for them, or to alter the contract they have made so as to conform it to the court's notion of the contract they should have made in view of the subject matter and the surrounding facts and circumstances.

See also Amos v. Coffey, 228 Va. 88, 92 (1984)("[W]hen the parties set out the terms of their agreement in a clear and explicit writing then such writing is the sole memorial of the contract and ... the sole evidence of the agreement."); See Seaboard Air Line R. Co. v. Richmond-Petersburg Tpk.

Auth., 202 Va. 1029, 1033 (1961). The circuit court placed a construction on the Contract which the language itself cannot properly bear. See Order.

MJM's members testified, over objection, that the Seller's Warranties clause was intended to place contractual responsibility on CPM for ensuring the placement of eighteen (18) inches of cover on the amended ash, and therefore, MJM had no duty to conduct due diligence with respect to the cover. (App. 88-92) The circuit court interpreted the Contract to be consistent with MJM's testimony, but this construction amounts to a complete rewrite of the Contract. (App. 6-13, 736).The Contract was drafted by Mr. Richard Matthews as attorney for MJM and any ambiguities should have been interpreted against the drafter according to Virginia Law. See Martin & Martin, Inc. v. Bradley Enterprises, Inc., 256 Va. 288, 291 (1998) Instead, the circuit court bent over backwards to ensure that MJM was relieved of all obligations regarding the cover and CPM was in breach. The Contract does not include a requirement that CPM place eighteen (18) inches of cover prior to the contract losing, nor does it exclude the depth of the topsoil cover from the due diligence and limited remedies clause.

a. *CPM's alleged conduct could not have resulted in a breach of any of the Seller's warranties clauses.*

The circuit court ruled, "CPM breached the warranty requirements in the Contract by failing to place the required eighteen (18) inches of topsoil

on top of the amended ash on the property as mandated by the Conditional Use Permit and state regulations." (App. 736).The circuit court further stated that CPM warranted compliance, "with its Conditional Use Permit and state regulations in placing the required amount of top soil on the property **prior to closing**." Id. The court's conclusory finding that CPM warranted that eighteen (18) inches of topsoil would cover the amended ash prior to contract closing is without any supporting analysis of the Contract, Conditional Use Permit, or state regulations. (App. 735-737).

The Contract never mentions a cover requirement and only three clauses in the Seller's warranties could be interpreted as imposing obligations on CPM with respect to the Conditional Use Permit or state regulations:

W.C. 1: Seller has no ***knowledge or reason to believe*** there **has been** any breach of any environmental laws;

W.C. 2: To the ***best of Seller's knowledge***, all activities taken with regard to the Property **are** fully in compliance with the zoning and planning laws of the City of Chesapeake, Commonwealth of Virginia and the United States of America.

W.C. 3: The Seller has not itself allowed anyone, nor to its knowledge has anyone disposed of or released any ***hazardous substance*** on or about the property, and that any activity involving ***the same*** **has been** fully compliant with all applicable federal, state, and local laws, regulations, ordinances, including without limitations, environmental laws.

(App.10)(Emphasis added). CPM could not possibly be in breach of W.C. 1 or W.C. 2 because both warranties require CPM to have had "knowledge or reason to believe" there "has been" a breach of an environmental or zoning and planning law. Id. The circuit court specifically found that CPM did not have knowledge of the alleged cover inadequacies. (App. 713). CPM could not have been in breach of W.C. 3 for two reasons. First, the language of W.C. 3 was drafted by MJM's attorney and what is meant by "**the same**" within the phrase "any activity involving **the same**" is entirely ambiguous; W.C. 3 is therefore unenforceable. (App. 10) Second, MJM did not present any evidence to suggest that the amended ash utilized at the Property was a "hazardous substance" and W.C. 3 only applies to 'hazardous substances'. Id.

b. *The survival clause does not transform warranties of present condition into warranties of future performance.*

All three of the applicable warranty clauses refer to the present condition of the Property and the work performed prior to entering into the Contract. (App. 10). MJM's counterclaim acknowledges that CPM's warranties applied to "**prior activity performed on the property**, during the ownership of CPM…." (App. 25). The Contract explicitly states that all warranties are included, no oral warranties exist, and all amendments or deletions must be in writing and signed by all parties. (App. 12). With

respect to the parties' obligations to continue to develop the golf course after the contract closing, the Contract provides as follows:

> V. Golf Course Development Specifications: As a condition precedent to closing hereunder, consultants for both parties shall have met and determined in good faith **the specific obligations of each of them with regard to ash placement and golf course construction**. This shall be set forth in a **development plan agreed upon and signed off on by both parties** and by the city of Chesapeake if required by the city. (Emphasis added).

MJM failed to present a development plan signed by the parties as part of its case. (App. 9). The Contract itself indicates that MJM will assume responsibility "**to construct the golf course pursuant to the previously issued conditional use permit from the City…."** (App. 7)(Emphasis added.) Consistent with this responsibility, MJM sent a letter to VDEQ on January 31, 2007, the day after the contract closing, informing VDEQ of the transfer of ownership and requesting an amendment to the original submittal documents allowing eighteen (18) inches of topsoil cover, as opposed to twenty-four (24) inches of topsoil cover, to be placed on the amended ash. (App. 257-258). MJM accepted responsibility for the ongoing construction activities with regard to the coal ash taking place at the Property.

MJM avered in its Brief in Opposition to Petitioner's Petition for Appeal that because the "survival clause" states "the provisions of this

contract and any collateral contract shall survive closing and not be deemed merged into the deed of conveyance", therefore, W.C. 1, 2 and 3 "were in full effect after closing, and are currently in effect now." CPM anticipates MJM will make the same argument in response to this Brief. Non-merger is irrelevant. MJM has the obligation to prove that the conditions that it alleges caused a breach existed at the time the warranties were made because there are no future warranties within the Contract. The Contract does not provide anywhere that CPM makes warranties regarding future conditions or performance. (App. 6-13). Without a warranty of future performance, CPM could not possibly be in breach of the Contract for failing to place eighteen (18) inches of topsoil cover because the state environmental regulations and the conditional use permit did not require placement of the "final cover system" consisting of eighteen (18) inches of topsoil until over eight (8) months after the contract closing. (App. 6-13, 263-271).

c. *The state regulations and conditional use permit did not require placement of the "final cover system" prior to the contract closing.*

The circuit court held that placement of eighteen (18) inches of topsoil cover was "mandated by the Conditional Use Permit and state regulations" prior to the contract closing. (App. 736). This assertion is false. Coal

Combustion Byproducts, e.g. fly ash, are regulated under Chapter 9, Article 85 of the VAC. Articles 2 and 3, governing “Design and Construction” and “Operations”, make no mention of an eighteen (18) inch cover requirement. (App. 263-271). The only mention of an eighteen (18) inch cover requirement is within Article 4, which governs “Closure” and states “upon reaching the final grade, the owner or operator of a fossil fuel combustion product site shall close his project….” (App 267-271)(Emphasis added). Article 4 requires the placement of a “final cover system” consisting of eighteen (18) inches of earthen material as part of the “closure criteria….” (App. 269). “Closure activities” need not be completed until six months after receiving the final volume of amended ash; therefore, state regulations and the conditional use permit did not require placement of the “final cover system” on the amended ash until six months after receiving the final volume of amended ash. (App. 271).

The evidence presented at trial established that the Property continued receiving amended ash until April of 2007, several months after the contract closing. (App. 158, 257-258). The project did not administratively close until October 4, 2007. (App. 261-262). Article 4’s requirement regarding the “final cover system” was not applicable until approximately eight months after the contract closing. (App. 271). Without a

warranty of future performance or conditions, CPM could not possibly have been in breach for failure to place the final cover system.

d. *The circuit court erased the provision that MJM would "satisfy itself" as to "soil conditions", "environmental matters" and "all other matters it deems pertinent to the transaction" during the period of due diligence.*

The circuit court found the Contract to be unambiguous; nevertheless, the circuit court ruled that the provision stating-- MJM will "**satisfy itself**" during the period of due diligence as to "**soil conditions**", "**environmental matters**" and "**any and all other matters it deems pertinent to the transaction**" and that MJM's remedies regarding any inadequacies with respect thereto would be limited to cancelation of the Contract -- does not apply to the depth of the topsoil cover. Compr. (App. 9) with (App. 710).

> Well, as far as the due diligence, that related to in that section of the contract with the buyer's sole remedy being cancellation, results to the due diligence to inspect the property for determining its **suitability for a golf course development, title and those types of issues**, and I have already ruled that the warranty section is different.

The Court's ruling cannot be reconciled with the Contract; "**soil conditions**", "**environmental matters**" and "**any and all other matters it deems pertinent to the transaction**" cannot be interpreted as limited to "**suitability for a golf course development, title and those types of**

issues…." Id. The depth of the cover cannot be excluded from MJM's due diligence obligations or the limited remedies clause.

MJM must be deemed to have satisfied itself as to the depth of the cover. MJM's members testified that they were fully aware of the cover requirement during the period of due diligence. (App. 91-92). MJM did not conduct any due diligence with respect to "soil conditions." (App. 92). Had MJM conducted due diligence, presumably, MJM would have discovered any cover inadequacies, if they existed, and MJM's sole remedy regarding those inadequacies would have been cancelation of the Contract. MJM cannot avoid the limitation of remedies in the due diligence clause by failing to perform its obligations.

The circuit court discarded the due diligence clause with respect to "soil conditions" based upon a conflict with the Seller's warranties.

> The due diligence clause does not supersede its express warranty section. To hold that MJM should have engaged experts to determine whether CPM complied with its Conditional Use Permit and state regulations in placing the required amount of top soil on the property prior to closing as warranted would render the warranty section meaningless in contravention of Virginia contract law.

(App. 736). The circuit court made no attempt to harmonize this alleged conflict. See Ames v. Am. Nat. Bank of Portsmouth, 163 Va. 1, 39 (1934).

> When two provisions of a contract seemingly conflict, if, without discarding either, they can be harmonized so as to effectuate

> the intention of the parties as expressed in the contract considered as a whole, this should be done. The presumption always is that the parties have not used words aimlessly and that no provision is merely a superfluity unless it is plainly merely a repetition.

The alleged conflict can be easily harmonized according to the plain language of the Contract considered as a whole. Id.

CPM warranted that it had no "knowledge" of any past or present violations of the applicable state regulations or other requirements imposed by other environmental laws or regulations applicable at the time of signing. (App. 10-11). The parties stated their intention to create a development plan regarding future golf course development obligations, like the Article 4 "closure criteria" and the "final cover system", but no development plan was presented at trial. (App. 9). CPM made no warranties regarding the property's future compliance with state regulations, including Article 4's "final cover system". (App. 10-11). With regard to "soil conditions", "environmental matters" and "any and all other matters MJM deemed pertinent to the transaction", including the topsoil cover, MJM had a duty to conduct due diligence and "satisfy itself". (App. 9). MJM's sole remedy with regard to topsoil cover problems was cancelation of the contract. Id. If MJM needed to hire experts to "satisfy itself", then that was MJM's obligation to do so. Id. If MJM spent money on ensuring Property's future compliance

with state regulations, those costs would be included in the option purchase price as part of MJM's "net capital investment". (App. 7-9). Because MJM made no objection to the cover depth during the period of due diligence, MJM is deemed to have satisfied itself and MJM's suit for damages must be dismissed.

CONCLUSION

For the reasons stated herein, this CPM respectfully asks this Court to reverse the ruling of the circuit court, and Order as follows: MJM shall facilitate CPM's calculation of the option purchase price; funds provided by Dominion exceeding the cost of rectifying the soil cover inadequacies shall be included as profits in the calculation of MJM's "net capital investment"; and, MJM shall transfer ownership of the Property to CPM upon payment of the option purchase price.

Respectfully Submitted CPM Virginia

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RULE 5:26(h) CERTIFICATE

I hereby certify that, on this, the 20th day of July, 2015:

1) I caused a true and exact electronic copy of the foregoing Brief of Appellant, and accompanying Appendix, to be filed with the Clerk of the Court, via VACES, and served upon opposing counsel, via electronic mail, addressed as follows:

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2) The required paper copies of the foregoing have been dispatched for hand-filing with the Clerk of the Court within the prescribed one business day of said electronic filing.

3) Excluding the portions exempted under Rule 5:26(h), this Brief contains 8,578 words.

/s/ Richard S. Phillips
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