In the

Supreme Court of Virginia

At Richmond

Record No. 161066

HEATHER GRAHAM,

Appellant,

– v. –

COMMUNITY MANAGEMENT CORPORATION,

Appellee.

OPENING BRIEF OF APPELLANT

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OPENING BRIEF OF APPELLANT

Heather Graham ("Graham"), by counsel, respectfully submits her Opening Brief of Appellant pursuant to Rule 5:27 of the Rules of the Virginia Supreme Court. All references to the Joint Appendix are indicated as (JA at ____).

STATEMENT OF THE CASE

A. MATERIAL PROCEEDINGS BELOW

This appeal involves an issue not previously considered by this Court concerning the construction, interpretation and application of Virginia Supreme Court Rule 3:25 entitled **Claims For Attorneys Fees.** It arises from an appeal of a Final Order of the Circuit Court of Fairfax County, Virginia (Honorable Jan L. Brodie) entered on April 21, 2016 (JA at 221) that denied Defendant Community Management Corporation's ("CMC") Demurrer but granted its Plea In Bar (JA at 55) as a matter of law dismissing with prejudice Heather Graham's Complaint which sought

money damages resulting from CMC's breach of contract. (JA at 30)

In its Final Order, the Trial Court concluded that Heather Graham, as the defendant in the Underlying Action[1] in which she was sued for an alleged breach of a Confidentiality Agreement containing a prevailing party attorney fee provision, was required to seek, demand, and claim, prevailing party attorneys' fees in the underlying proceeding, and that because she had not done so, she had waived her right to seek or claim attorney's fees as damages in a later breach

[1] Whenever a reference is made to the Underlying Action, this means the case of Community Management Corporation v. Community Association Management Professionals, LLC and Heather Graham (Fairfax County Circuit Court Civil Action 2014-08589) (JA at 1) in which Community Management Corporation sued Heather Graham *inter alia* for breach of an Employment Contract and for breach of a Confidentiality Agreement and sued Heather Graham and Community Management Professionals, LLC for the improper use of CMC's confidential information. A jury found in favor of Heather Graham on all counts and the case was dismissed with prejudice.

of contract action brought by her after her cause of action for breach of contract had accrued.

Graham has consistently maintained throughout these proceedings that Virginia Supreme Court Rule 3:25 was inapplicable in this case for the following three reasons:

First, she had no facts to support any claim by her that CMC was in breach of contract during the pendency of the Underlying Action and therefore no claim or counterclaim could have been made by her against CMC under either Virginia Supreme Court Rule 3:25 or under Virginia Supreme Court Rule 3:9;

Second, Heather Graham did not seek or claim attorney's fees in the Underlying Action pursuant to Virginia Supreme Court Rule 3:25 because she did not need to do so under the language of Rule 3:25 as her claim against CMC did not accrue under Virginia Code §8.01-230 until such time as CMC had breached the contract which only occurred

following: (i) entry of the Final Order dismissing the underlying case against her; (ii) the determination of post trial motions in her favor; (iii) the elapse of 21 days under Virginia Supreme Court Rule 1:1; (iv) after Ms. Graham made a demand upon CMC for payment of damages pursuant to the contract; and (v) CMC's rejection of Graham's demand for payment. Only at that time was CMC in breach of contract, and only at that time could Heather Graham prosecute an action against CMC for breach of contract; and

Third, Virginia Supreme Court Rule 3:25 did not change Virginia Supreme Court Rule 3:9 by creating a category of counterclaims that were compulsory. Rather, all that Virginia Supreme Court Rule 3:25 did was to establish a Rule prohibiting the splitting of a cause of action where a successful litigant, as the prevailing party in the Underlying Action, had the right to seek attorney's fees in connection with their

claims made in an Underlying Action but then failed to allege or prove either the entitlement to or the quantum of damages sought and later brought a separate action seeking the same relief.

The Trial Court disagreed with Heather Graham's arguments and entered a Final Order on April 21, 2016 granting the Plea in Bar dismissing Graham's complaint. (JA at 221)

A timely Notice of Appeal was filed by Heather Graham on May 12,2016 (JA at 222).

B. STATEMENT OF RELEVANT FACTS

The relevant and material facts in this case are undisputed and are all found in Heather Graham's Complaint (JA at 30). The facts material to this proceeding are as follows:

On June 30, 2014, CMC filed a complaint in the Circuit Court of Fairfax County against Heather Graham ("Graham") and her new employer, Community Association Management Professionals, LLC, ("CAMP") claiming *inter alia* that Graham,

following the termination of her employment as President of CMC, breached her "Employment Agreement" with CMC and that she had improperly shared CMC's confidential information with her new employer, CAMP, who was CMC's competitor. CMC's claims against CAMP, which were later nonsuited and never re-filed, were related to Graham's alleged breach of her Employment Agreement and CAMP's alleged tortious use of CMC's confidential information in competition with CMC.

Later, CMC, with the Court's permission and over Graham's objection, amended its complaint and added a new claim against Graham asserting that Graham, in addition to breaching her "Employment Agreement", had also breached a separate "Confidentiality Agreement" that had been entered into in 2007. (JA at 1) The Confidentiality Agreement (JA at 28), unlike the Employment Agreement (JA at 19), had a prevailing party attorney fee provision which read as follows:

> The undersigned has carefully read all of the terms and conditions of this Agreement and has given careful consideration to the covenants and restrictions imposed upon him herein, and agrees that the same are necessary for the reasonable and proper protection of the business of **Associa** and are in all respects reasonable from the undersigned's viewpoint. The undersigned further agrees that regardless of when in or what manner his/her association with Associa may be terminated, with or without cause, whether voluntary or involuntary, whether by resignation or otherwise, said covenants and restrictions shall remain operative. The undersigned further agrees that in the event of a breach of these covenants that **Associa** will suffer irreparable harm and shall be entitled to immediate injunctive relief without the necessity of posting a bond or, if bond is required in the minimum amount permitted by law, in addition to any other damages that it may prove, at law or in equity. **In the event that an action is brought for relief under the provisions of this paragraph, the prevailing party shall be entitled to an award of its attorney's fees.** The parties agree to jurisdiction and venue in the Commonwealth of Virginia.

(JA at 29). (Emphasis Supplied).

Graham filed a Plea in Bar to CMC's claim under the Confidentiality Agreement and argued that the

Confidentiality Agreement was between Associa, Inc. a Texas Corporation and its affiliates and Heather Graham, but that Associa, Inc. was a non-existent entity, and therefore, CMC, who claimed to be an affiliate of the non-existent Associa, Inc., lacked standing to sue Graham as an affiliate of a non-existent entity. (JA at 77-78) CMC responded that this was essentially a misnomer; that CMC's parent company Associations, Inc. existed; that Associations, Inc. did business under the fictitious name "Associa"; and that CMC was an affiliate of Associations, Inc. trading as Associa. The Trial Court agreed with CMC's contention, denied Graham's Plea in Bar, and allowed the case to go to trial on CMC's claims that Heather Graham breached both the Employment Agreement and the Confidentiality Agreement. At the request of counsel for CMC, the Court bifurcated CMC's claim for attorneys' fees under

the Confidentiality Agreement in the event CMC prevailed at trial.

While CMC in its amended complaint in the underlying case claimed entitlement to damages including attorneys' fees under the Confidentiality Agreement's prevailing party attorney fee provision, it is undisputed that Graham never sought, claimed, or requested attorneys' fees by way of counterclaim, responsive pleading or in any other manner in the underlying case. (JA at 186 Lines 5-7)(JA at 59-60) Rather, Graham simply denied the allegations of the complaint without seeking any relief at all against CMC. Similarly, at no time did Graham ever claim in her pleadings nor did she argue that CMC was in breach of the Confidentiality Agreement. (JA at 185-206).

After trial, the jury found that Heather Graham did not breach either the Employment Agreement or

the Confidentiality Agreement.[2] (JA at 43). Post trial motions were thereafter made and denied and a Final Order was entered by the Court on May 6, 2015 dismissing CMC's claims for damages, attorneys' fees, and injunctive relief. (JA at 43) CMC did not appeal the dismissal of its claims and did not re-file the non-suited claims against CAMP.

Several months after entry of the Final Order, Graham, for the first time, made a written demand upon CMC requesting that CMC pay her an award of damages equal to her attorneys' fees incurred by her in defending against CMC's claims pursuant to the contractual provision of the Confidentiality Agreement.(JA at 45-46)[3] CMC refused to honor its

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[2] There was no claim before the Court or any defense to CMC's complaint that CMC was in breach of contract. Accordingly, there was no finding by the jury that CMC was in breach of contract.

[3] In its Memorandum in Support of its Plea in Bar at JA at 60) CMC admits that "The present Complaint, filed ten months after entry of the

contractual obligation at which time Graham declared CMC in breach of contract and filed this action seeking damages for breach of contract pursuant to the terms of the Confidentiality Agreement.

ASSIGNMENTS OF ERROR

I. The Trial Court erred in granting CMC's Plea in Bar thereby dismissing Heather Graham's Complaint on the basis that Virginia Supreme Court Rule 3:25 created a compulsory counterclaim mandating that Heather Graham, as a prevailing party defendant in the Underlying Action between her and CMC, was required to pursue a claim for attorneys' fees even though as a defendant she had not asserted any claims for affirmative relief, including a claim for attorneys' fees, in the Underlying Action and further holding that her failure to make such a claim, irrespective of whether her chose in action had even accrued, forever barred her from filing an independent action against CMC for breach of contract.
The error alleged was preserved: Tr. Of Hearing of April 15, 2016 (JA at190-205 and 208-209); and Plaintiff's Opposition to Demurrer and Plea In Bar(JA at 172)

II. The Court erred in holding that Heather Graham was precluded from seeking prevailing party attorneys' fees in an independent breach of

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Final Order, **is the first time Graham has invoked the provisions of the 2007 Confidentiality Agreement."** (Emphasis Supplied)

contract action because Virginia Supreme Court Rule 3:25 created a compulsory counterclaim that mandated that she make her contractual claim for prevailing party attorneys' fees in the earlier litigation or be barred from doing so even though her breach of contract claim against CMC had not ripened until:

(i) 21 days after the Final Order was entered[4] holding that Graham was the prevailing party; and

(ii) Graham's cause of action had accrued under Virginia Code §8.01-230 following her having first made a claim upon CMC pursuant to the contract, and CMC's subsequent refusal to pay the claim thereby breaching the Confidentiality Agreement.

Tr. Of Hearing of April 15, 2016 (JA at190-205 and 208-209); Plaintiff's Opposition to Demurrer and Plea In Bar (JA at 172).

THE STANDARD OF REVIEW

The standard of review based on the Trial Court's construction, application, and interpretation of Virginia Supreme Court Rule 3:25

[4] Virginia Supreme Court Rule 1:1 provides that for 21 days following entry of a Judgment Order the Court has the right to reverse, alter, amend, suspend, or otherwise change the Judgment Order. Heather Graham could not claim to be the "Prevailing Party" until the Order was final.

and its granting of a Plea in Bar and dismissal of the complaint as a matter of law is *de novo*. This standard of review applies to all assignments of error.

ARGUMENT

I. THE TRIAL COURT ERRED IN HOLDING THAT HEATHER GRAHAM WAS PRECLUDED FROM FILING AN INDEPENDENT ACTION FOR BREACH OF CONTRACT BECAUSE VIRGINIA SUPREME COURT RULE 3:25 REQUIRED HEATHER GRAHAM, AS THE DEFENDANT IN THE UNDERLYING LITIGATION, TO FILE A COMPULSORY CLAIM AGAINST CMC IN THE UNDERLYING ACTION SEEKING PREVAILING PARTY ATTORNEY'S FEES UNDER THE CONFIDENTIALITY AGREEMENT EVEN THOUGH THE CLAIM HAD NOT YET ACCRUED AND SHE HAD NEVER SOUGHT OR CLAIMED ATTORNEY'S FEES IN THE UNDERLYING ACTION.

In this case of first impression before this Court, Heather Graham seeks a reversal of the Final Order of the Circuit Court of Fairfax County that dismissed her complaint against Community Management Corporation ("CMC") based on its erroneous reading, interpretation, and application of Virginia Supreme Court Rule 3:25.

The Lower Court ruling held that because Graham had been sued for allegedly breaching a

Confidentiality Agreement that contained a prevailing party attorney fee provision and because she had not counterclaimed or otherwise sought attorney's fees in her responsive pleadings in the Underlying Case, that she had therefore waived her right under Virginia Supreme Court Rule 3:25(C) to later bring an independent breach of contract action for damages against CMC. Heather Graham respectfully disagrees.

The Court, in reaching this decision, ignored the fact that Graham, as the defendant in the underlying case, had no legal or factual basis to claim that CMC was in breach of the Confidentiality Agreement because, in fact, they were not in breach. Accordingly, because CMC had not breached the Confidentiality Agreement until after the conclusion of the underlying litigation and its refusal to pay attorney's fees following a demand upon it to do so, Graham had no legal or factual basis in the Underlying Action on which to

seek or claim any damages including prevailing party attorneys' fees as damages for breach of contract.[5]

It is further undisputed that Graham, as the defendant in the Underlying Action, never sought, claimed, demanded, or counterclaimed for prevailing party attorneys' fees (JA at 186 Lines 5-7);(JA at 59-60); (JA at 85-106) because: (i) during the pendency of the Underlying Action, not only was she was not a "Prevailing Party"; but also (ii) she had no facts upon which to premise a good faith claim that CMC was in breach of contract, i.e. in breach of the Confidentiality Agreement. Because of these attendant circumstances, Ms. Graham's cause of action had not yet accrued and did not exist thereby preventing her from properly making any type of

[5] Although a jury found in favor of Heather Graham on all counts in the Underlying Action, she did not become a "Prevailing Party" until the Final Order was entered and 21 days had elapsed under Virginia Supreme Court Rule 1:1.

claim in any responsive pleading or in a counterclaim under either Virginia Supreme Court Rule 3:25 or under Virginia Supreme Court Rule 3:9.

Accordingly, because no cause of action for breach of contract existed against CMC while the Underlying Action was pending, any breach of contract action, if there was to be one, would have to wait until after the cause of action accrued. Thus, the conditions precedent to the accrual of the cause of action for breach of contract could only be satisfied by: (i) a jury verdict in Graham's favor; (ii) the disposition of post trial motions; (iii) the entry of a final judgment order; (iv) the elapse of 21 days under Supreme Court Rule 1:1;(v) the making of a claim by Graham against CMC for payment of damages pursuant to the terms of the Confidentiality Agreement; and (vi) CMC's rejection of the claim.

Based on the foregoing, Heather Graham respectfully submits that Virginia Supreme Court Rule 3:25 should not have been construed or applied in such a manner as to have required her to plead in the Underlying Action what was tantamount to a compulsory claim or counterclaim lacking any factual predicate, which cause of action did not exist during the pendency of the Underlying Action and might not ever exist, and that had not yet accrued and might not ever accrue.

Additional support for the validity of this contention can also be found in Virginia Code §8.01-230 which defines the moment when a cause of action accrues in actions *ex contractu* as being ". . . when the breach of contract occurs". . ." Thus, the trial court's interpretation and application of Rule 3:25 as applied in the present case, conflicts with Virginia Code §8.01-230 because CMC was not in breach of contract during

the pendency of the Underlying Action and because Heather Graham was unable to assert any valid claims against CMC under Virginia Supreme Court Rule 3:25 or 3:9 as no cause of action had not yet accrued.

Significantly, while the Trial Court's dismissal of Heather Graham's complaint was premised wholly on the waiver language of Virginia Supreme Court Rule 3:25(C), in order to reach this conclusion the Court not only had to read Rule 3:25(C) in isolation from Subsections (A) and (B) of Rule 3:25 but the Court had to also ignore the words used in Virginia Supreme Court Rule 3:25(A) necessitating that a "**claim**" for attorneys fees be made and the words used in Rule 3:25(B) which requires a party who "**seeks**" attorneys fees to make the "**claim**" in a complaint, counterclaim, crossclaim or other responsive pleading. Here, Heather Graham did not do anything which would

have caused her to later waive her claim for damages.

The language of Rule 3:25 states in pertinent part:

> **A. Scope of Rule.** This rule applies to **claims for attorney's fees . . .**
>
> **B. Demand.** A **party seeking to recover attorney's fees** shall include a demand therefor in the complaint filed pursuant to Rule 3:2, in a counterclaim filed pursuant to Rule 3:9, in a cross-claim filed pursuant to Rule 3:10, in a third-party pleading filed pursuant to Rule 3:13, or in a responsive pleading filed pursuant to Rule 3:8. **The demand must identify the basis upon which the party relies in requesting attorney's fees.**

(Emphasis Supplied).

Here, the key ingredients required for the invocation of the waiver contained in Rule 3:25(C) were absent as Graham did not **demand, seek** or make a "**claim**" for attorney's fees and could not do so because she had no legal or factual basis whatsoever to make such a demand as CMC was not in breach of the Confidentiality Agreement and she was not yet a prevailing party. Accordingly, the

waiver contained in Rule 3:25(C) simply could not apply under the circumstances of this case and Heather Graham should have been free to pursue an independent action for damages for breach of contract after she was found to be the prevailing party and following CMC's breach of contract when it refused to pay under the Confidentiality Agreement. Stated otherwise, had the Trial Court given meaning to all of the words used in Virginia Supreme Court Rule 3:25, the Court should have concluded that because Heather Graham did not claim or seek attorney's fees in the Underlying Action, Virginia Supreme Court Rule 3:25(C) did not apply; Heather Graham had not waived her breach of contract claims; and the Plea In Bar should have been overruled.

This argument is further bolstered by the fact that we have never had compulsory counterclaims or any other compulsory claims in Virginia unless otherwise required by statute. Virginia Supreme

Court Rule 3:25 did not change this nor did it create a class of claims that were compulsory. The lower Court's holding, taken to its logical conclusion, interprets Rule 3:25 to require any party sued for breach of contract (or declaratory judgment) to counterclaim, cross claim, or otherwise demand in a responsive pleading or third-party pleading any potential right of indemnification in which it could otherwise recover its attorney's fees as damages. Yet Rule 3:25 does not by its terms require that a party "claim" or "seek" attorney's fees. Rather, Virginia Supreme Court Rule 3:25 did nothing more than "codify" the common law prohibition against splitting a cause of action thereby making it clear that if you had a cause of action either by statute or pursuant to a contract and if, as a litigant you sought and claimed prevailing party attorney's fees in your pleadings, in such event, you were not permitted to split your cause of

action and were required to prove entitlement to and the quantum of damages in the underlying case and if you do not do so your claim would be deemed waived. Further, it creates the procedural requirement that if such fees are being sought in that suit, then the demand for such fees and the basis for such demand must be identified in the pleading stage.

Further, unlike the situation where a statute provides for attorneys' fees to a prevailing party, Rule 3:25 did not create an exception requiring a defendant to file compulsory counterclaims under Rule 3:9 in cases where attorneys fees are claimed as damages for breach of contract. *Arguendo*, if a claim or counterclaim that had not yet accrued was plead under Virginia Supreme Court Rule 3:9 or as part of a responsive pleading would have been demurrable or subject to a Plea In Bar under Virginia Supreme Court Rule 3:9 because it had not yet accrued, how could

Virginia Supreme Court Rule 3:25 nevertheless require that a claim that could not be brought under Virginia Supreme Court Rule 3:9 because the right had not yet accrued still have to be made under Virginia Supreme Court Rule 3:25 or be waived. This is the conundrum that would result if the Trial Court's decision in this case was affirmed.

Similarly, if a claim for attorney's fees was made in the Underlying Action in the form of a counterclaim, would Virginia Supreme Court Rule 3:25(C) bar a defendant from immediately non-suiting its counterclaim following its filing pursuant to Virginia Code §8.01-380 and then later bringing it back as a separate action? If the answer is that an independent action could be brought following a non-suit, this should lead one to conclude that Virginia Supreme Court Rule 3:25 purpose was not to create a form of compulsory claim but rather to prohibit the splitting of a

cause of action. The same argument and resulting quagmire would apply to the nonsuit and refiling of independent actions for cross-claims or third party claims for contractual indemnification for attorney's fees.

For these reasons it is respectfully submitted that the final judgment of the Trial Court was erroneous, should be reversed and the case remanded for trial on the merits.

II. THIS IS NOT A CASE WHERE HEATHER GRAHAM SPLIT HER CAUSE OF ACTION BY CLAIMING AND SEEKING ATTORNEY'S FEES IN THE UNDERLYING ACTION AND LATER BRINGING THE SAME CLAIM IN A SEPARATE ACTION. RATHER, IT IS A CASE WHERE HEATHER GRAHAM HAD TO BRING A SEPARATE ACTION BECAUSE SHE HAD NO LEGAL OR FACTUAL BASIS FOR MAKING A CLAIM IN THE UNDERLYING ACTION.

It is submitted that Virginia Supreme Court Rule 3:25 was intended to prevent "claim splitting" with respect to a prevailing party's entitlement to attorneys' fees where attorneys' fees are permitted either by statute or, in the proper case, by contract and is sought and claimed

by a defendant in the Underlying Case.[6] Thus, Virginia Supreme Court Rule 3:25 was intended to compel a plaintiff who asserts a claim for and seeks attorney's fees as part of its claim to allege and prove both the entitlement to and the quantum of attorney's fees claimed as part of plaintiff's *prima facie* case or else be precluded from doing so in the future. This makes perfect sense as it presupposes that a plaintiff would not bring a claim unless it believed that it would prevail in the litigation. It also makes sense in that it prevents a plaintiff from bringing more

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[6] "Claim-splitting" is bringing successive suits on the same cause of action where each suit addresses only a part of the claim. *Jones v.* Morris Plan Bank of Portsmouth, 168 Va. 284, 291, 191 S.E. 608, 610 (1937). Courts have imposed a rule prohibiting claim-splitting based on public policy considerations similar to those underlying the doctrine of *res judicata:* avoiding a multiplicity of suits, protecting against vexatious litigation, and avoiding the costs and expenses associated with numerous suits on the same cause of action. *Id.* at 291-92, 191 S.E. at 610.
Bill Greever Corp. v. Tazewell Nat. Bank, 256 Va. 250, 254, 504 S.E.2d 854, 856-57 (1998)

than one action on claims arising out of the same nucleus of facts. It also serves the important procedural function of identifying early in litigation whether the party(ies) asserting a cause of action in the litigation is/are seeking attorney's fees and the basis for that claim. Likewise, it is logical that Rule 3:25 would also apply in the case of a plaintiff or a defendant who are parties to litigation brought pursuant to a statute that specifically provides for a prevailing party to be awarded attorney's fees.

However, while Virginia Supreme Court Rule 3:25 may also apply under the proper circumstances to claims arising under contracts containing prevailing party attorney fee provisions where the defendant claims or defends on the basis that the contract in issue was breached by the plaintiff, it does not necessarily follow that such is always the case. In such a case, unlike the case at bar, because the cause of action has admittedly accrued

as stated in its pleadings and where a defendant has sought and claimed entitlement to attorney's fees, Rule 3:25 requires a defendant under those circumstances must prove at the trial its entitlement to and the quantum of attorney's fees as part of defendant's *prima facie* claim or counterclaim, as the case may be, or else those rights will have been waived under Virginia Supreme Court Rule 3:25(C). This too makes perfect sense in the proper case.

Such is not the case here. As applied to the present case, because CMC was not in breach of the Confidentiality Agreement and because Heather Graham was not a Prevailing Party until the Order dismissing the Underlying Case became final, she lacked any right to claim, seek, or demand prevailing party attorney's fees during the pendency of the Underlying Action because she had no legal or factual basis for doing so. Stated otherwise, Virginia Supreme Court Rule 3:25 did

not change Virginia Code §8.01-230 which requires that a cause of action accrue prior to filing a complaint for claims that have not yet ripened. Similarly, Virginia Supreme Court Rule 3:25 did not change Virginia Supreme Court Rule 3:9 by creating a separate class of compulsory claims which would be waived if not brought in the underlying litigation.

More specifically, Virginia Code §8.01-230 provides:

> In every action for which a limitation period is prescribed, **the right of action shall be deemed to accrue** and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, **when the breach of contract occurs in actions ex contractu** and not when the resulting damage is discovered. . .

(Emphasis Supplied). Accordingly, because CMC was not in breach of the Confidentiality Agreement prior to or during the pendency of the underlying litigation, Heather Graham had no right to claim that CMC was in breach of the

Confidentiality Agreement until the Final Order was entered in the Underlying Action demonstrating that she was the prevailing party; and even then, she could only make such a claim after she had made a demand for damages under the Confidentiality Agreement and following CMC's refusal to pay. At that time, because the statute of limitations had begun to run on her claim, the cause of action had accrued under Va. Code §8.01-230, the claim had ripened, and Ms. Graham, for the first time, had the right to declare a breach of contract and file her complaint for damages.

Here, the parties agree that Heather Graham never claimed, sought, requested or made any claims whatsoever for attorneys' fees or any other claims for monetary or equitable relief in the prior litigation in which she prevailed. Clearly, Ms. Graham did not split her cause of action and the waiver of Virginia Supreme Court Rule 3:25(C)

had not been triggered because Ms. Graham never fell within the Scope of the Rule defined in Virginia Supreme Court Rule 3:25(A).

III. PREVAILING PARTY ATTORNEY'S FEES ARE A FORM OF SPECIAL OR CONSEQUENTIAL DAMAGES CONTAINED WITHIN A CONTRACT THAT MODIFIES THE "AMERICAN RULE".

This Court in East Texas Salvage & Machine v. Duncan, 226 Va 160, 306 S.E. 2d 896 (1983) stated that attorneys' fees permitted under an attorney fee provision contained in a contract, are part of the damages arising out of the breach of contract. This Court stated:

> In general, attorney's fees are not recoverable as damages. However, one exception to this general rule is where the parties by contract agree that attorney's fees will be recoverable.

In State Farm Fire and Casualty Company v. Scott, 236 Va. 116,122 372 S.E. 2d 363, 386 (1988) although the circumstances were materially different from those in the present case, this Court again recognized that where a contract provided for attorney's fees, attorneys' fees were

part of the damages that the non-breaching party was entitled to. Citing Hiss v. Friedberg, 201 Va. 572,577, 112 S.E. 2d 871, 875-76 (1960).

Here, whatever rights Heather Graham had arose out of contract that provided that she would be entitled to a form of damages in the event she was sued by CMC and she became the prevailing party. The same rings true for CMC, except that CMC, as the plaintiff in the Underlying Action, without splitting its cause of action, had to claim not only that Heather Graham breached the Confidentiality Agreement but that they were entitled to prevailing party attorney's fees as damages for her breach of contract.

CONCLUSION

It is respectfully submitted that for the reasons stated the Lower Court misconstrued and misapplied Virginia Supreme Court Rule 3:25 and therefore erred in entering its Final Order granting the Plea in Bar resulting in the

dismissal of Heather Graham's complaint against Community Management Corporation.

It is prayed that this Honorable Court reverse the Final Order of the Circuit Court of Fairfax County entered on April 21, 2016, reinstate Heather Graham's Complaint, and remand the case for trial on the merits.[7]

ORAL ARGUMENT IS RESPECTFULLY REQUESTED

RESPECTFULLY SUBMITTED

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[7] In the event that Graham prevails in this appeal, she intends to seek attorneys' fees and costs with respect to this appeal under the Confidentiality Agreement that is the subject of these proceedings and to the extent applicable Virginia Supreme Court Rule 5:35.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 12, 2016, the Opening Brief and Appendix were filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the brief and three of the appendix were sent via third party commercial carrier for overnight delivery to the clerk's office. This same date, a copy of the brief and appendix were sent via email to all counsel of record, at the email addresses below:

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The appellant respectfully requests Oral Argument.

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