IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-661

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COROTOMAN, INC.,

Petitioner,

v.

CENTRAL WEST VIRGINIA REGIONAL AIRPORT AUTHORITY, INC.,

Respondent.

***Upon Certified Questions from the United States Court of Appeals for the Fourth Circuit*, Case No. 23-1873**

OPENING BRIEF OF PETITIONER COROTOMAN, INC.

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INTRODUCTION

Plaintiff Corotoman, Inc. owns certain parcels of land next to the Yeager Airport in Charleston. Beginning in the mid-2000's, the airport sought to improve its services by removing a hilltop on Corotoman's land that was impeding the flightpath. After negotiations, Corotoman and the airport agreed to a contract that: (a) allowed the airport to remove the hilltop, in exchange for (b) the airport "overblasting" the land, meaning blasting below a specified elevation or a designated final grade and flattening the area, and the parties swapping certain parcels of land.

Corotoman performed its obligations, and the airport removed the hilltop that was impeding the flightpath, so the airport received the entire benefit of its bargain with Corotoman. But the airport materially breached its obligations to Corotoman by failing to overblast the land and never swapping the parcels of land.

Corotoman sued. The federal district court, after rejecting each of the airport's defenses, concluded as a matter of law that the airport had breached the contract by failing to overblast and failing to swap the land.

As to damages for breach of the overblasting obligation, the contract provided for, and Corotoman elected to recover, what is the standard measure of expectation damages in a construction case in West Virginia: the cost to complete the work, meaning here the cost to overblast the land. And to simplify that issue, Corotoman accepted the cost for that projected by the airport's own expert witness: $4,381,080.

The federal court, however, awarded zero in damages after applying the "gross disproportionality" doctrine, which allows a court to award the alternative measure of damages of diminution in value of the property at issue if the cost to complete the work is grossly disproportionate to that diminution in value. In so holding, the court first placed on the airport the burden to establish the existence of gross disproportionality, after which it shifted the burden to

Corotoman to establish diminution in value—even though diminution in value is the denominator of the gross disproportionality ratio and is therefore necessary to determine whether gross disproportionality exists in the first place. The court then held that the airport carried its burden to establish gross disproportionality, based entirely on an appraisal created 13 years earlier for another purpose that could not prove any diminution in value because it did not event attempt to establish the two numbers necessary for proving diminution in value: (a) the current value of the land as is, and (b) the current value of the land had the overblasting occurred. The court then held that Corotoman failed to carry its supposed burden to establish diminution in value because there was, undisputedly, no evidence at all of diminution in value.

Each of those holdings was an error of law. First, under the gross disproportionality doctrine, the airport had the burden to establish the existence of gross disproportionality—meaning that it had to show that the undisputed cost-to-complete damages sought by Corotoman were much greater than the alternative measure of damages of diminution in value, which *the airport* had the burden to establish, not Corotoman. The overwhelming weight of case law from around the country, and the treatises, show exactly that.

Second, the airport failed to carry that burden because, as the federal court properly acknowledged, neither party had presented any evidence of diminution in value. The court simply punished the wrong side for that lack of evidence. And the appraisal that the court relied on to supposedly show gross disproportionality cannot as a matter of law show the diminution in value, both because of its age and because it didn't value the things that needed to be valued to show diminution in value.

Corotoman appealed, asking the Fourth Circuit to reverse and remand with instructions to enter judgment for $4,381,080, the undisputed amount of the standard measure of cost-to-complete

damages that Corotoman sought and proved, or to reverse and remand with instructions for the district court to apply the correct law.

The Fourth Circuit, recognizing that this Court has never explicitly adopted the gross disproportionality doctrine or explained how it works, certified questions of law to this Court, asking whether the doctrine exists in West Virginia and how it is defined. This Court should adopt the doctrine and define it exactly how it has been defined across the country. As noted above, that means that the defendant has the burden to establish gross disproportionality, and specifically the denominator of that ratio—the alternative measure of damages of diminution in value. And if the defendant fails to carry that burden, then the plaintiff is awarded the cost-to-complete measure of damages that it sought and proved. This Court, after properly defining the doctrine, can then leave it to the Fourth Circuit to actually apply the doctrine to the facts of this case.

CERTIFIED QUESTIONS

The United States Court of Appeals for the Fourth Circuit certified the following questions of law to this Court:

I. In the appropriate case, would West Virginia courts apply the gross disproportionality rule to limit an injured party's damages in a breach of a construction contract dispute?

II. If so: (a) how is gross disproportionality calculated, (b) which party (the breaching party or the injured party) bears the burden of proving gross disproportionality and the specific amount of the alternative form of damages, and (c) what is the consequence of that party failing to meet its burden?

STATEMENT OF THE CASE

I. The Airport sought to condemn land owned by Corotoman, but the parties negotiated a contract instead.

In the mid-2000s, the Central West Virginia Regional Airport (the "Airport"), which operates the Yeager Airport in Charleston, West Virginia, decided to remove an obstruction near

the airport that was hampering aircraft departures and approaches and costing the airport almost $2 million per year. JA1462 (Vol. VII), JA1488-1489 (Vol. VII). The costly obstruction was a large knoll located at the end of one of the airport's runways. JA1462 (Vol. VII). Because of the knoll's location, the FAA required airplanes to gain elevation at fast rates immediately after takeoff to provide a sufficient margin of safety in the event of post-takeoff engine trouble. JA1462 (Vol. VII). On average, about 50 feet (and as much as 110 feet) needed to be sheared off the hilltop to eliminate the FAA restrictions. JA1462 (Vol. VII). The plan was to blast the hilltop, loosening up 1.3 million cubic yards of earth that would be hauled away to provide the needed airspace. JA1462 (Vol. VII).

To accomplish the obstruction removal project, the Airport obtained grants from the FAA to fund both the acquisition of real property (i.e., buying the knoll and the surrounding area) and the construction work. JA1491-1493 (Vol. VII). The Airport used a consultant, O.R. Colan Associates, Inc., to handle the land acquisition by valuing the parcels of land that it needed to acquire and preparing offers for property owners. JA1490 (Vol. VII). Once the Airport had an estimate of acquisition costs, that locked in the amount of the FAA grants for property acquisition. JA1492-1493 (Vol. VII). If a property owner decided not to sell their land and the Airport had to seek ownership through eminent domain (as a local/state government entity), the FAA would not amend the amount of the grant to cover the legal costs of eminent domain. JA1493 (Vol. VII). Thus, the Airport aimed to acquire the property voluntarily and avoid costly and time-consuming condemnation proceedings. JA1495-1497 (Vol. VII), JA1506-1508 (Vol. VII).

The largest single property owner in the obstruction removal area was a local development company, Corotoman, which owned more than 15 acres of land in and around the knoll. JA1462 (Vol. VII), JA2270 (Vol. XIV). To prepare an offer of just compensation to Corotoman, O.R. Colan hired Eugene Zdrojewski to appraise Corotoman's land. JA1945 (Vol. VIII), JA1962-1965 (Vol.

VIII). Mr. Zdrojewski assessed the value of the land in 2010 before the knoll was flattened as part of the obstruction removal project. JA2020-2092 (Vol. IX-XII), JA1968-1970 (Vol. VIII), JA1974 (Vol. VIII). Mr. Zdrojewski valued Corotoman's land at $186,000. JA2021 (Vol. IX). Mr. Zdrojewski testified that the appraisal had a "shelf-life" of about 30 days based on industry standards. JA1969-1972 (Vol. VIII).

In February of 2011, the Airport, in a letter signed by the airport's director, Richard Atkinson, offered Corotoman $260,125 for its land. JA1465-1467 (Vol. VII). Corotoman's president, John Wellford, knew that the offer of $260,125 was egregiously low given the potential development value of the land, and so he rejected the offer. JA1498-1499 (Vol. VII), JA1711-1717 (Vol. VIII), JA1725-1726 (Vol. VIII).

Instead of seeking condemnation, Mr. Atkinson resolved to work with Corotoman to make the obstruction removal project happen while Corotoman retained ownership of the property. This approach was for the Airport's own benefit because it wanted to avoid lengthy and costly condemnation proceedings, which would delay matters. JA1507-1508 (Vol. VII). The Airport was always free to condemn Corotoman's land, but it chose instead to contract with Corotoman. JA442 (Vol. IV).

Because the parties reached an agreement on the terms of a contract allowing the Airport to remove the obstruction and permitting Corotoman to retain ownership of the land, Corotoman did not obtain an appraisal of its property. JA1386 (Vol. VII).

The Airport was aware that the FAA would have to approve various aspects of the deal. In May of 2011, before the contract was signed, Mr. Atkinson, who apparently had spoken to the FAA, sent an email to Corotoman's attorney stating that the FAA was "agreeable" to the type of deal that the parties were proposing. JA136-137 (Vol. II).

II. The contract between Corotoman and the Airport.

On July 5, 2012, Corotoman and the Airport entered into a Settlement Agreement that provided for the parties to swap certain parcels and for Corotoman to provide an avigation easement over its land, as well as for a License and Work Agreement ("LWA") that would allow the Airport to enter Corotoman's land and remove the obstruction and then overblast. JA437-521 (Vol. IV). The Settlement Agreement focused on the ownership of the land involved in the project, JA438-439 (Vol. IV), and the LWA focused on the construction work that would be performed, JA448 (Vol. IV). In essence, the agreements provided that the Airport could remove the obstruction in exchange for overblasting the land and then swapping the parcels.

A. Key provisions of the Settlement Agreement.

At the outset, the Settlement Agreement states:

> The Airport Authority and Corotoman have agreed upon the terms of a settlement, in lieu of condemnation, that (1) meets the needs of the Airport Authority, (2) fairly and adequately compensates Corotoman for the property interests which it agrees to relinquish and for the severance damages that such relinquishment will cause to the value of Corotoman's remaining property, and (3) is acceptable to both parties.

JA438 (Vol. IV). It affirmatively acknowledges Corotoman's responsibilities:

> In lieu of condemnation, Corotoman agrees to grant a license for certain work to be performed on certain real property currently owned by Corotoman and to grant an easement for the passage of aircraft over certain real property. As fair and just compensation for said rights, including severance damages to Corotoman's remaining property rights, *the Airport Authority agrees to perform certain work on certain real property owned by Corotoman*, *exchange certain other real property with Corotoman*, and reimburse Corotoman for the severance damages caused by the Airport Authority's acquisition of property rights under this Settlement Agreement.

JA439 (Vol. IV) (emphasis added).

Section 6.01 of the Settlement Agreement states the agreement is the full and final resolution of all disputes arising out of the threatened condemnation. JA442 (Vol. IV). That section is reinforced in a later merger clause. JA442 (Vol. IV).

The Settlement Agreement explicitly provides for the execution of the LWA "regarding the Airport Authority's blasting, excavating, and grading" of Corotoman's property. JA439 (Vol. IV). Regarding the performance of that obligation as well as of the land swap, the Settlement Agreement contains a force majeure clause asserting: "In no event shall financial inability or acts or omissions within the control of the party seeking an excuse or extension be a cause for excuse or extension hereunder." JA443-444 (Vol. IV).

The Settlement Agreement also explicitly provides that the Airport had the obligation to obtain all necessary licenses and governmental approvals for the project, including from the FAA and for the land swap. JA444 (Vol. IV).

B. Key provisions of the License and Work Agreement.

The LWA allowed the Airport to conduct the obstruction removal project on Corotoman's land. The Agreement describes the purpose of the project as follows:

> [I]n order to completely and safely utilize the Avigation Easement, the grade and elevation of the Project Site and surrounding real property that is now owned or will be acquired by the Airport Authority must be altered by excavating, blasting, grading, removing the surface thereof, and/or other similar work (said alteration of the grade and elevation of the Project Site and surrounding property interests herein collectively referred to as the "Project").

JA447 (Vol. IV). The parties agreed that the project would begin by December 31, 2012 and be completed no later than 24 months after commencement, recognizing that time is of the essence. JA448 (Vol. IV). Thus, the work should have been completed on or before December 31, 2014.

The LWA also outlines additional work that the Airport agreed to perform as part of the

obstruction removal project for the benefit of Corotoman. In addition to directing that the project be completed in accordance with specific grading and construction plans, the LWA details the two primary components of the project: (1) bringing the final grade of the knoll to at least 10 feet below the elevation of the planned avigation easement; and (2) overblasting at least 35 feet below the final grade. JA448 (Vol. IV).

Overblasting is blasting below a specified elevation or a designated final grade. JA1159 (Vol. VI), JA1771 (Vol. VIII). Holes are drilled to the required depth and explosives are placed and detonated. JA1779 (Vol. VIII). In this case, the parties agreed that the 35-foot overblast would be performed immediately after the obstruction removal project was completed and the knoll was leveled to the final grade to comply with FAA climb-out regulations. JA448 (Vol. IV), JA1166 (Vol. VI). When overblasting occurs, the land stays in place but swells in height; the material is then removed to meet the final grade requirements. JA1159 (Vol. VI), JA1165-1166 (Vol. VI).

Like the Settlement Agreement, the LWA provided that the Airport was required to obtain all necessary licenses and governmental approvals for the project, including from the FAA and for the land swap (but not for the overblasting, which did not require FAA approval). JA450 (Vol. IV).

The LWA also provided that if the Airport breached the contract, Corotoman could choose the greater of its actual or liquidated damages:

> 15. Effect of Breach. Failure by the Airport Authority to strictly abide by the terms and conditions set forth in this Work Agreement shall constitute a material breach of the Agreement. …. The parties acknowledge that any breach by the Airport Authority occurring after commencement of the Project will cause significant harm to Corotoman, including lost profits, revenue, and rents; loss of the use of Corotoman's property; potential third-party litigation costs, including attorney's fees and court costs; and annoyance and inconvenience. Therefore, in event of a breach occurring after commencement of the Project, Corotoman may, in its discretion and as the circumstances reasonably dictate, revoke the License granted herein and/or seek the greater of either (1) actual, compensatory,

> consequential, and/or incidental damages or (2) liquidated damages in the amount of ten thousand dollars ($10,000.00) per breach.
> …

JA451 (Vol. IV).

Like the Settlement Agreement, the LWA contains a force majeure clause providing that financial inability is no excuse for not completing the 35-foot overblast. JA452 (Vol. IV).

III. The Airport breached the contract by failing to perform the overblast and swap the parcels.

Even though the Settlement Agreement required work to begin by December 31, 2012, and due to issues with the need for rebidding parts of the project in the summer of 2012, JA1565-1566 (Vol. VII), the obstruction removal project did not begin until November of 2013, JA1149 (Vol. VI). Corotoman permitted the Airport and its contractors to enter Corotoman's land per the terms of the Settlement Agreement. JA439 (Vol. IV).

About halfway through the project, in August or September of 2014, Corotoman's president Mr. Wellford asked Steve Cvechko, the primary contractor for the obstruction removal project, about the overblast and when it would be performed. JA1153-1154 (Vol. VI), JA1828 (Vol. VIII). Mr. Cvechko and Mr. Wellford then asked Mr. Atkinson, the Airport's director, about the overblast. JA1154-1155 (Vol. VI), JA1827 (Vol. VIII). At that point, in late 2014, the knoll had been flattened almost to the final grade, and all of the equipment necessary to do the overblast was still onsite. JA1828 (Vol. VIII), JA1299 (Vol. VI). An overblast is performed after the land has been brought down to the finished grade, JA1828 (Vol. VIII), and it is efficient to overblast with the existing equipment immediately after the grade is finished, JA1298-1299 (Vol. VI).

The obstruction removal project was completed in mid-2015. JA1155 (Vol. VI). The engineers, blasters, and contractors packed up their equipment and left, and airplanes began flying free and clear over the now-flattened knoll. JA1291 (Vol. VI). But the 35-foot overblast had not

been performed. JA1296 (Vol. VI). The Airport later claimed that its contractor walked off without overblasting because there was no meeting of the minds as to overblasting and thus it wasn't required by the LWA, and because underground utility lines posed an unforeseen risk, excuses that the district court later rejected. JA1291 (Vol. VI), JA1296 (Vol. VI).

By the time its contractor walked off the job, the Airport had spent more than $17 million on the obstruction removal project and completed every physical aspect of the work except for the overblast. JA1937 (Vol. VIII). The Airport achieved all of its own goals—to remove the knoll, expand operations, and create cost savings for airlines—but it failed to provide the benefit of the bargain to Corotoman.

What's more, the Airport never swapped the parcels with Corotoman. At the time it didn't explain that, but it later claimed that the FAA refused to allow the swap as proposed. JA1121 (Vol. VI). However, the Airport's failure to get FAA approval—as required by the contract—was due to its own mistakes and errors, so much so that the Airport crossclaimed against its own lawyers for legal malpractice for failing to obtain that approval, seeking as damages the amount that it might owe to Corotoman. JA1320-1327 (Vol. VI).[1]

IV. Corotoman sued the Airport for failing to perform the overblast and swap the parcels.

Corotoman filed suit against the Airport in 2019, alleging breach of contract. JA18 (Vol. II). Corotoman later amended its complaint. JA39-360 (Vol. II-IV). The Airport asserted 17 affirmative defenses in response, including mutual mistake and impracticability, but when it came to damages, the Airport did not assert any type of disproportionality defense. JA361-432 (Vol. IV).

[1] That crossclaim later settled, but none of that settlement money has been paid to Corotoman, meaning that thus far the Airport has *profited* from its own breach of contract.

V. The Airport first tried to defend its breach by contending that the parties never formed a contract, but the district court rejected that.

In September of 2021, Corotoman moved for partial summary judgment on the issue of contract formation. JA433-435 (Vol. IV). Corotoman argued that the Airport understood the terms of the contract when it signed the contract, that its lawyers confirmed to Corotoman that the Settlement Agreement was approved and authorized to be signed by Mr. Atkinson, and that, as an independent basis for its claim, the Airport had ratified the contract. JA904-925 (Vol. V). The Airport argued that there was no mutual assent as to the overblast term of the contract, that Mr. Atkinson lacked actual or apparent authority to sign the contract, and that the Airport did not ratify the contract. JA926-941 (Vol. V).

In January of 2022, the district court granted Corotoman's motion in full. JA942-959 (Vol. V). The court concluded that Corotoman had demonstrated that the Airport first tried to obtain ownership of Corotoman's land but, failing that, sought a license to remove the obstruction and an easement over the airspace. JA954 (Vol. V). The court held that there were no disputed material facts on the issue of contract formation: the lawyers had reviewed the contract, the Airport's board had approved the contract, and Mr. Atkinson had signed the contract with, at a minimum, the apparent authority to do so. JA954-957 (Vol. V). The court also held that the Airport had ratified the contract "by making payments and approving the land swap pursuant to the contract, obtaining the benefit of the contract by entering the property, removing the knoll, and using the airspace[.]" JA958 (Vol. V).

VI. The parties disclosed expert witnesses who estimated the cost to complete the overblast.

While waiting for the district court to rule on Corotoman's motion for partial summary judgment, the parties continued with discovery. Corotoman retained professional engineer David

B. Sharp, P.E. to estimate the cost to complete the overblasting. JA2253-2256 (Vol. XIV), JA1433-1459 (Vol. VII). Mr. Sharp estimated that, as of October 2021, the total cost to overblast was $12,859,000. JA1444 (Vol. VII).

The Airport designated Dr. Makarand Hastak, an engineering professor, as its rebuttal expert. JA1405-1407 (Vol. VII). Dr. Hastak opined that, as of March 2022, the cost to complete the overblast was $4,381,080.00. JA1415 (Vol. VII). Dr. Hastak's estimate was lower mainly because he believed that Mr. Sharp had overestimated the amount of material that would "swell" from the blasting activities. JA1413-1414 (Vol. VII).

VII. The district court rejected the Airport's defenses of impossibility, impracticability, laches, and waiver and concluded that the Airport had breached the contract.

Corotoman then moved for partial summary judgment on the issues of breach of contract and specific performance, JA1137-1139 (Vol. VI), and the Airport moved for summary judgment based on several of its affirmative defenses, JA965-968 (Vol. V).

Corotoman argued that the undisputed facts showed that the Airport breached the contract by failing to complete the overblast and perform the land swap. JA1238-1258 (Vol. VI). Corotoman asked for specific performance, for the district court to compel the Airport to perform the contract. JA1255-1256 (Vol. VI).

In its first two briefs, the Airport primarily argued that it was entitled to summary judgment (and that the court could not order specific performance) because the FAA had refused to approve the land swap, meaning that it couldn't perform the swap. JA1120-1123 (Vol. VI), JA1272-1273 (Vol. VI). It also argued that there was no meeting of the minds on the overblast requirement, that the parties were mutually mistaken about the cost of the overblast and the cost was impracticable, that there was an unforeseen risk to underground utilities from overblasting, and that Corotoman had waived the right to the overblast. JA1123-1132 (Vol. VI), JA1265-1275 (Vol. VI).

In its third brief, the Airport argued—in the context of opposing specific performance—that the cost to complete the project was "grossly disproportionate" to the value of the property and therefore an alternate measure of damages should apply: the difference in value between what had been built and what was supposed to have been built. JA2302-2304 (Vol. XIV). As the only evidence of the value of the land, the Airport cited the 13-year-old appraisal of Corotoman's land by Zdrojewski. JA2303 (Vol. XIV). Thus, for the first time in the case, in a reply brief in support of its motion for summary judgment, the Airport argued that gross disproportionality meant that Corotoman would only be entitled to damages measured by the diminution of property value. JA2302-2304 (Vol. XIV). By this point, the period for discovery under the scheduling order, including for the designation of experts, had long since closed. JA960-964 (Vol. V).

The district court granted summary judgment to Corotoman on the issue of breach of contract but denied Corotoman's request for specific performance. JA1285-1303 (Vol. VI). The court concluded that the contract required the Airport to investigate the cost of the overblast and to obtain FAA approval for the land swap *before* beginning the obstruction removal project. Accordingly, the court held that the Airport breached the contract by failing to overblast and failing to swap the land. JA1295-1296 (Vol. VI). (As noted above, the Airport's failure to get FAA approval of the swap was due to its mistakes and errors. Further, the Airport never told Corotoman about its failure to get FAA approval until much later, instead taking advantage of its contractual rights without performing its obligations. JA2172-2173 (Vol. XII), JA2192 (Vol. XIII).)

The district court also rejected all of the Airport's asserted defenses, concluding that: (1) there was a meeting of the minds about overblasting, and the parties couldn't have been mutually mistaken about the cost of the overblast because the Airport only inquired about the cost after work on the project began; (2) the Settlement Agreement expressly provided that financial inability

wasn't an excuse, and so impracticability wasn't a defense; (3) Corotoman raised the overblast issue with the Airport before the obstruction removal project was completed, and there was no evidence suggesting that the overblast couldn't have been performed after Corotoman inquired, rendering laches invalid; and (4) Corotoman never waived its right to the overblast, and in fact it tried to ensure the overblasting while the construction was ongoing. JA1296-1299 (Vol. VI).

The district court concluded that "Corotoman has been injured because its property is no longer useable, it did not gain the function that would have been achieved through the overblast requirement, and it did not gain the properties contemplated by the land swap[,]" JA1295 (Vol. VI), but it declined to order specific performance, JA1301-1302 (Vol. VI). The court noted that it was unclear whether it could order specific performance of the land swap because the FAA had failed to approve the swap and was not a party to the contract, and the court noted generally that it wasn't clear that damages were insufficient to remedy the harms caused by the breach. JA1301 (Vol. VI). The court went on to explain that the "parties [had] put forth evidence as to the cost of specific performance but little evidence as to the value of specific performance, any alternative measure of damages, or the reasons monetary damages would be inadequate to compensate Corotoman for the breach." JA1302 (Vol. VI).

VIII. Following a bench trial on briefs, the district court—despite holding that the Airport breached the contract—entered final judgment in favor of the Airport.

The district court's order on the second round of summary judgment motions narrowed the focus to damages. Corotoman filed a motion in limine to exclude the Zdrojewski appraisal because it was too old to have any evidentiary value, and because the land had been physically altered since the appraisal was completed (that is, the hilltop had been flattened), and that alteration requires a new appraisal. JA1280-1284 (Vol. VI).

In January of 2023, the parties filed their proposed findings of facts and conclusions of law

and a proposed pretrial order. JA1304-1328 (Vol. VI), JA2307-2326 (Vol. XIV). Corotoman asserted, consistent with its complaint, that the proper measure of damages in this case under the terms of the contract and West Virginia law was the cost to complete—the standard measure of expectation damages in a construction case. JA1308 (Vol. VI), JA2316-2317 (Vol. XIV). The Airport asserted that the cost to complete was grossly disproportionate to the value of the property, so that the proper measure of damages was diminution in value. JA1317-1318 (Vol. VI), JA2319-2320 (Vol. XIV).

At the pretrial conference, the district court denied Corotoman's motion in limine to exclude the Zdrojewski appraisal. JA13 (Vol. I). And the parties agreed to a trial by briefing the issue of damages. JA1329-1330 (Vol. VI).

In its trial briefing, Corotoman argued that, per the terms of the contract, it was Corotoman's prerogative to choose its measure of damages. JA1355-1372 (Vol. VII), JA2213 (Vol. XIII). Corotoman could elect the greater of its actual or liquidated damages. JA1368-1369 (Vol. VII). The default measure of the actual damages resulting from a breach of a construction contract in West Virginia is the cost to complete, and Corotoman had chosen this measure of damages. JA1369-1370 (Vol. VII). To resolve any disputed issues of fact about that damages number, Corotoman chose to accept the Airport's expert's estimate of the cost to complete, $4,381,080, rendering that amount undisputed going forward. JA1370 (Vol. VII), JA2214 (Vol. XIII).

Corotoman's trial briefing also explained that the alternative measure of damages in construction litigation, diminution in value, was not available because this Court has never adopted that measure in a breach of contract case. JA1372-1374 (Vol. VII), JA2215-2216 (Vol. XIII). In any event, Corotoman noted, to support the application of that alternative measure the Airport would have to prove that "the cost [to complete] [was] clearly disproportionate to the probable loss

in value[.]" JA1373 (Vol. VII). In other words, the Airport had the burden of establishing disproportionality by first establishing the diminution in value. JA1373 (Vol. VII), JA2217-2221 (Vol. XIII). Corotoman noted that the only evidence related to the land's value, the Zdrojewski appraisal completed for the purpose of condemnation 13 years earlier and before the land was physically altered, was wholly irrelevant. JA1373-1377 (Vol. VII), JA2225-2226 (Vol. XIII). Thus, Corotoman argued, the Airport had offered no evidence of the value of the land as it was left following the blasting and levelling of the knoll or of the land's projected value if the Airport had performed the overblasting as contractually required. JA1377 (Vol. VII), JA2221-2225 (Vol. XIII).

The Airport's trial briefing asserted that the diminution in value measure of damages should be applied because of gross disproportionality. And the Airport argued that the burden of proving the amount of diminution in value fell on Corotoman. JA2007-2016 (Vol. VIII), JA2235-2238 (Vol. XIII), JA2260-2264 (Vol. XIV). The Zdrojewski appraisal, which was the only valuation of the land in the entire record, was long outdated and incompetent on its face to show the diminution in value. JA2010 (Vol. VIII), JA2233 (Vol. XIII), JA2265 (Vol. XIV).

On July 27, 2023, the district court awarded no damages after applying the "gross disproportionality" doctrine, which allows a court to award the alternative measure of damages of diminution in value of the property at issue if the cost to complete the work is grossly disproportionate to that diminution in value. JA2268-2288 (Vol. XIV). In so holding, the court first placed on the Airport the burden to establish the existence of gross disproportionality, after which it shifted the burden to Corotoman to establish diminution in value—even though diminution in value is the denominator of the gross disproportionality ratio and is therefore necessary to determine whether gross disproportionality exists in the first place. JA2279-2287 (Vol. XIV). The court next held that the Airport had carried its burden to establish gross disproportionality, based

on the 13-year-old Zdrojewski appraisal that not only was extremely old, but also did not value what matters, which are the current values of the land as is and as it would be had the overblasting occurred. JA2282-2283 (Vol. XIV). The court then held that Corotoman had failed to carry its burden to establish diminution in value because there was no evidence at all of diminution in value. JA2285-2287 (Vol. XIV).

IX. The Fourth Circuit certified questions of law to this Court.

Recognizing that this Court has never explicitly adopted the gross disproportionality rule, the Fourth Circuit certified the following questions to this Court, JA2328 (Vol. XIV):

> Whether, in the appropriate case, West Virginia courts would apply the gross disproportionality rule to limit an injured party's damages in a breach of a construction contract dispute; and, if so, how gross disproportionality is calculated, which party (the breaching party or the injured party) bears the burden of proving gross disproportionality and the specific amount of the alternative form of damages, and what is the consequence of that party failing to meet its burden.

SUMMARY OF THE ARGUMENT

First, although this Court has never adopted the gross disproportionality doctrine in a breach of contract case, the Court has adopted the doctrine in other cases and has suggested that it would apply in a contract case. And the doctrine is hornbook law for breach of contract cases around the country. Thus, Corotoman agrees that the doctrine can apply in the appropriate construction contract case.

Second, how the doctrine is defined—that is, how gross disproportionality is calculated, who bears the burden of proving gross disproportionality and the specific amount of the alternative form of damages, and what happens when the burden is not satisfied—is also hornbook law around the country. So this Court should simply adopt that law. Specifically: (1) gross disproportionality exists when the amount of the cost-to-complete damages proven by the plaintiff is much greater

than the alternative measure of diminution in value; (2) the defendant bears the burden of proving gross disproportionality, meaning (necessarily) the burden to prove the denominator of that ratio, the diminution in value; and (3) if a defendant fails to carry that burden, then the plaintiff is awarded the cost-to-complete damages that it proved. There are a host of cases and treatises defining and applying the doctrine in exactly that way, including a treatise cited by this Court when describing the doctrine, and the Airport has failed to address those authorities. All of the Airport's arguments to the contrary are wrong on their face.

Finally, although the Court need not reach the issue and should simply answer the questions certified to it by the Fourth Circuit, how the doctrine applies here is clear: (1) Corotoman proved its cost-to-complete damages by accepting the overblasting cost established by the Airport's own expert, which the federal district court found credible; and (2) the Airport failed to carry its burden to establish gross disproportionality because there undisputedly was no evidence of the denominator, the alternative measure of diminution in value, which is the value of the land as it would be after overblasting minus the value of the land as-is. The 2010 appraisal could not and did not even purport to establish that diminution in value number, or either of the two numbers required to calculate it.

In short, the Court should simply adopt the prevailing American rule about gross disproportionality.

PETITIONER'S STATEMENT REGARDING ORAL ARGUMENT

Pursuant to the oral argument criteria set forth in West Virginia R.A.P. 18(a), oral argument in this appeal is unnecessary because the facts and legal arguments will be adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. Specifically, how the gross disproportionality doctrine works around the country is

clear, and this Court should simply adopt that hornbook law. That said, Corotoman would be happy to orally argue the case.

ARGUMENT

Here, Corotoman sought the usual measure of damages applicable in cases involving breach of construction contracts: the cost to complete, which is the standard measure of expectation damages in construction contract cases. But the federal district court didn't apply that measure. Instead, the court held that the cost to complete was grossly disproportionate to the diminution in value, and so it applied the alternative measure of diminution in value. The district court then held that Corotoman had the burden to establish the diminution in value and that it failed to carry that burden, and so it entered judgment for the Airport.

Although Corotoman agrees that the gross disproportionality doctrine exists in West Virginia law and can be applied in the appropriate situations, the district court erred as a matter of law here in outlining how that doctrine works. Specifically, the court erred in placing on Corotoman the burden to establish diminution in value, when it was always the Airport's burden to establish that as part of establishing gross disproportionality. The great weight of authority nationwide establishes exactly that. This Court should answer the questions certified as explained below, after which the Fourth Circuit can apply that law to the facts of this case.

I. Standard of decision

This Court applies a de novo standard of review in addressing the legal issues presented by certified questions from a federal court. *SWN Production Company, LLC v. Kellam*, 247 W.Va. 78, 83, 875 S.E.2d 216, 221 (2022).

II. Certified question one: in the appropriate case, would West Virginia courts apply the gross disproportionality rule to limit an injured party's damages in a breach of a construction contract dispute?

Answer: Yes.

West Virginia courts have long allowed plaintiffs to choose which measure of damages to seek and will award that measure of damages if the plaintiff proves them by sufficient evidence: "[I]t is the duty of the plaintiff to establish by a preponderance of the evidence all provable elements which enter into the quantum of damages sought to be recovered." *Sammon Bros. Const. Co. v. Elk Creek Coal Co*., 135 W.Va. 656, 674, 65 S.E.2d 94, 104 (1951); *Kaufman v. Catzen*, 81 W.Va. 1, 94 S.E. 388, 391 (1917) (allowing plaintiff to choose compensatory damages or alternative measure).

Here, Corotoman sought damages based on the cost of completing the contract that the Airport abandoned after obtaining the benefit it needed. That measure not only was allowed bv the contract, but it is the default measure of damages in construction cases in West Virginia. *See, e.g.*, *Steinbrecher v. Jones*, 151 W. Va. 462, 476, 153 S.E.2d 295, 304 (1967) ("[a]s a general rule, the proper measure of damages in a building contract is the cost of repairing the defects or completing the work and placing the construction in the condition it should have been in if properly done under the agreement contained in the building contract").

However, under the gross disproportionality rule, a defendant can force upon the plaintiff a lesser amount—diminution in value—if the defendant can show that the cost-to-complete is radically greater than the diminution in value. Although this Court has never explicitly adopted the gross disproportionality doctrine in a breach of contract case, it has applied the doctrine in cases involving tortious damage to real property. *See, e.g., Brooks v. City of Huntington*, 234 W. Va. 607, 615, 768 S.E.2d 97, 105 (2014). Furthermore, it has twice suggested that the doctrine might apply

in a breach of contract case. *See Steinbrecher*, 151 W. Va. at 476, 153 S.E.2d at 304; *Trenton Const. Co. v. Straub*, 172 W. Va. 734, 737, 310 S.E.2d 496, 499 (1983). Moreover, and as explained below, the doctrine is hornbook law around the United States.

Consequently, Corotoman agrees that the doctrine does or should exist in West Virginia law. Corotoman noted in the Fourth Circuit that the doctrine might not exist in West Virginia given the lack of controlling authority from this Court about the issue, but now that the issue is in front of this Court, the Court should adopt the doctrine. More importantly, and as explained below, the Court should define the doctrine exactly as it is defined around the country.

III. Certified question two: (a) how is gross disproportionality calculated, (b) which party (the breaching party or the injured party) bears the burden of proving gross disproportionality and the specific amount of the alternative form of damages, and (c) what is the consequence of that party failing to meet its burden?

Answer: (a) disproportionality is the ratio of the cost-to-complete damages to the alternative measure of diminution in value, and gross disproportionality exists when that ratio is too high, (b) the breaching party bears the burden of proving gross disproportionality and the specific amount of the alternative form of damages, and (c) the consequence of the breaching party failing to meet that burden is that the plaintiff is awarded the cost-to-complete damages that they sought and proved.

A. Disproportionality is the ratio of the cost-to-complete damages to the alternative measure of diminution in value, and gross disproportionality exists when that ratio is too high.

Under the gross disproportionality doctrine in a construction contract case, the measure of damages is: (a) the cost to complete, unless (b) the cost to complete is grossly disproportionate to the difference in value between what was built and what was supposed to have been built (the diminution in value), in which case the proper award is the diminution in value amount itself. *See, e.g., Nichols Const. Corp. v. Virginia Machine Tool Co*., LLC, 661 S.E.2d 467, 473 (Va. 2008). All of the cases and treatises cited below regarding who has the burden to establish gross disproportionality define gross disproportionality the same way. So did the Airport in its briefing in the federal district court. JA1997 (Vol. VIII), JA2278 (Vol. XIV). So did this Court in

Steinbrecher, 153 S.E.2d at 304.

In other words, disproportionality is defined as the ratio of the cost to complete to diminution in value, such that cost to complete is the numerator and diminution in value is the denominator:

$$\text{Gross Disproportionality} = \frac{\text{Cost to Complete}}{\text{Diminution in Value}}$$

Furthermore, as all of the cases and treatises cited below recognize, gross disproportionality exists when the numerator is significantly greater than the denominator.

B. The breaching party bears the burden of proving gross disproportionality and the specific amount of the alternative form of damages.

Most importantly for this case, it is always the *defendant's* burden to establish gross disproportionality, which *necessarily* includes the burden of establishing diminution in value, the denominator of the disproportionality ratio. In other words, the defendant cannot establish that the cost to complete is grossly disproportionate to the diminution in value without, of course, first establishing the diminution in value. (The plaintiff has the burden to establish the cost-to-complete damages that it seeks—which is the numerator—but here that number is undisputed. Corotoman accepted the Airport's number of $4,381,080, and the federal district court found that number credible. JA2274 (Vol. XIV). Thus, only the denominator is at issue here.)

The appellate courts of Virginia and Washington, whose decisions *Steinbrecher* cited for the definition of the gross disproportionality doctrine, have made clear that to avoid the cost of completion measure of damages, the breaching party bears the burden of proving disproportionality, and thus necessarily the burden of proving the diminution in value. *See, e.g., Nichols*, 661 S.E.2d at 473 (holding that because construction contractor in breach failed to offer evidence of the current values of the building as promised or as delivered, it could not prove that

cost to complete was grossly disproportionate); *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 10 P.3d 417, 422 (Wash. App. 2000) (holding that "[o]nce the injured party has established the cost to remedy the defects, the contractor bears the burden of challenging this evidence in order to reduce the award, including providing the trial court with evidence to support an alternative award"); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 798 P.2d 799, 802 (Wash. 1990) ("The plaintiff must come forward with only one measure of damages," so if it establishes the cost to complete, then the burden "shifts to the defendant to present evidence" of "diminution in market value").

Appellate courts in many other states, and applying many other states' law, have held the same. *See, e.g., Andrulis v. Levin Const. Corp.*, 628 A.2d 197, 206-08 (Md. 1993) (reversing trial court damages award because the defendant had the burden to establish disproportionality, including its variable diminution in value, and defendant failed to introduce any evidence of diminution in value like as-is and as-contracted values, and vacating lower appellate court remand because nothing remained to try given defendant's failure to carry that burden); *Legacy Builders, LLC v. Andrews*, 335 P.3d 1063, 1070 (Wy. 2014) (holding that "while the plaintiff has the burden of proving damages at trial, it is the defendant's burden to challenge the reasonableness or proportionality of the plaintiff's method and, where appropriate, to present evidence supporting an alternative measure of damages"); *Advanced, Inc. v. Wilks*, 711 P.2d 524, 526 (Alaska 1985) (holding that "[i]t is well established that the cost of completion or repair is the preferred measure for calculating damages when a building contractor breaches a construction contract" and that the defendant "clearly had the burden to present evidence from which the jury could find the diminution in value" in lieu of cost to complete); *Sanborn Elec. Co. v. Bloomington Athletic Club*, 433 N.E.2d 81, 90 (Ind. Ct. App. 1982) (holding that, to establish gross disproportionality, "the

builder should bear the burden of proving the difference in value"); *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 540–43 (Tenn. Ct. App. 2005) (holding that because the contractor failed to present evidence of value of home had repairs been completed, it failed to carry its burden to show "difference-in-value" measure of damages, and absent such a showing "cost of repair" damages were proper); *Blecick v. Cochise County*, 406 P.2d 750, 758 (Ariz. App. 1965) (rejecting builder's attempt to apply diminution in value instead of cost to complete because "the burden is on the builder to affirmatively prove that economic waste would result"[2] and builder failed to introduce evidence of diminution in value); *Moss v. Speck*, 306 N.W.2d 156, 158 (Neb. 1981) ("Without question, the contract breaker should pay the cost of construction and completion in accordance with his contract unless he proves affirmatively and convincingly that such construction and completion would involve an unreasonable economic waste."); *Stangl v. Todd*, 554 P.2d 1316, 1320 (Utah 1976) (same holding/quote); *Fetzer v. Vishneski,* 582 A.2d 23, 26 (Pa. Super. 1990) (holding that "once the homeowner has presented evidence as to the cost of remedying the defects, the burden is on the contractor to challenge this evidence" through diminution in value evidence, and holding that defendant "introduced no evidence of his own as to the diminution in market value").

For example, the Missouri Court of Appeals applied the cost-to-complete rule to measure damages for a contractor's breach of an agreement to excavate and pave a parking lot, reasoning that once the property owner presented evidence of the cost to complete the work, "the burden fell upon contractor to present evidence that the cost of repair was an unfair measure of damages and that the diminished value rule offered a more accurate alternative." *County Asphalt Paving Co., Inc. v. 1861 Group, Ltd.,* 908 S.W.2d 184, 186 (Mo. Ct. App. 1995). The court further explained:

[2] The gross disproportionality doctrine is sometimes referred to as the doctrine against "economic waste."

"To counter owner's claim under the cost rule, contractor was required to introduce evidence that repair of the parking lot involved unreasonable economic waste or, phrased another way, that the cost of repair was disproportionate to the diminution in value of the property." *Id.*; *see Ken Cucchi Const., Inc. v. O'Keefe*, 973 S.W.2d 520, 528 (Mo. Ct. App. 1998) ("Accordingly, if the contractor fails to present any evidence on the diminution of value of the property it fails to meet its burden.").

Likewise, in *Ross Dress for Less, Inc. v. Makarios-Oregon, LLC*, 512 F. Supp. 3d 1138, 1166 (D. Or. 2021), the federal district court applied Oregon law, cited *Fisher*, discussed the burden issue at length, held that the defendant had the burden to establish waste and its variable diminution in value, and held that because "the defendant did not produce that evidence, [the defendant] cannot receive the benefit of the economic waste doctrine." In fact, the court noted that, just like here, "[n]either side offered this evidence [of diminution in value], and thus the party who bears the burden of proof (or at least of production) loses on this point"—and that because the plaintiff "came forward with one of the measures of damages [cost-to-complete]," "[t]he burden then shifted to [the defendant] to establish the other measure of damages (diminution of value…)", which it failed to carry. *Id.* The Ninth Circuit recently affirmed in *Ross*, holding that "[w]e agree with the district court that [the defendant] failed to meet its burden to invoke the economic waste doctrine." *Ross Dress for Less, Inc. v. Makarios-Oregon, LLC*, No. 21-35106, 2022 WL 2643376, at *2 (9th Cir. July 8, 2022). *Ross* is directly on point.[3]

[3] The *only* case located by Corotoman even arguably to the contrary is *BLB Aviation South Carolina, LLC v. Jet Linx Aviation, LLC*, 808 F.3d 389 (8th Cir. 2015), which the federal district court cited below, JA2281-2282 (Vol. XIV). But that case is distinguishable on its particular and unique facts. More importantly, that court explicitly (and necessarily) relied on the evidence of diminution in value—the decrease in value of an airplane due to lack of records for maintenance undisputedly performed—when holding that the defendant carried its burden to establish that the cost to re-do the maintenance was disproportionate to that diminution in value, which makes its later holding that the plaintiff had the burden to establish the amount of diminution in value and failed to carry it confusing at best and illogical at worst. *Id.* at 393-95. Such confusion and illogicality are unavoidable if a court places the burdens like that, which is probably why every other case and the treatises do not do so.

Finally, treatises on damages uniformly place on the contractor the burden of proving a diminution in value to avoid the cost-to-complete measure of damages. *See 13 Am. Jur. 2d Building, Etc. Contracts* § 74 ("Once the landowner presents evidence on the cost of repair or replacement, the contractor has the burden of presenting evidence that the cost of repairing or replacing the property is disproportionate to the diminution in value of the property; if the contractor presents no evidence of the building as actually constructed, a trial court does not err in applying the cost measure of damages."); 5 *Corbin on Contracts* § 1089, at 488 (contractor bears the burden to prove "affirmatively and convincingly" that cost of completion would result in economic waste). Both of those treatises are designed to show what the prevailing American rule is, and this Court should adopt that rule. In fact, this Court in *Steinbrecher* cited the *Am. Jur. 2d* treatise when describing the gross disproportionality doctrine, 153 S.E.2d at 304, so this Court has already endorsed that rule.[4]

In the Fourth Circuit, the Airport failed to meaningfully address *any* of those authorities. In fact, the Airport cited only two of the cases (and neither of the treatises), and it did not address the relevant proposition in those two cases.

The Airport did cite a case supposedly putting the burden to establish the denominator on the plaintiff, but that's misleading. *See Commercial Cabinet Co. v. Mort Wallin of Lake Tahoe*, 737 P.2d 515, 516-17 (Nev. 1987). If the Airport cites *Mort Wallin* again, Corotoman will explain again why it's inapt—but, in short, who had the burden was never at issue in that case, and the evidence of disproportionality in *Mort Wallin* was undisputed and mathematically obvious. The Airport also cited *Ervin Construction Co. v. Van Orden*, 874 P.2d 549, 554 (Idaho Ct. App. 1992), but the parties

[4] Section 348 of the *Restatement (Second) of Contracts* discusses the waste/gross disproportionality doctrine but doesn't say who has the burden to establish it, but the cases that it cites—including several of those cited above—place the burden on the defendant.

there agreed that the homeowner had the burden to establish the diminution in value number, so the burden was not at issue, and in fact the homeowner there *wanted* and *sought* the greater diminution in value amount instead of the smaller amount of the cost to repair the minor defects, the contractor argued for the opposite, and the Idaho Supreme Court eventually held that the cost to repair and *not* diminution in value was the proper measure. Anyhow, even if *Mort Wallin* and *Ervin* were on point—and they are not—those two cases could not outweigh the host of cases and treatises making clear that the defendant has the burden to establish gross disproportionality and its denominator diminution in value in order to force upon a plaintiff an alternative to the default cost-to-complete measure of damages. The Airport's failure to engage with these authorities is telling.

The Airport also argued—confusingly and wrongly—that the denominator of the ratio was not the diminution in value of the land but simply "the value" of the land, and specifically the pre-contract value of the land, which here was $186,000. If necessary, Corotoman will explain again why that argument is wrong. But, briefly: (a) it contradicts all of the authorities cited above; (b) the Airport's own briefs quoted authorities noting that the denominator is diminution in value; (c) the Airport never explained why, if only one "value" matters, it is simply the pre-contract value and not the value at the time of trial (either as-is or had the contract been performed), which makes no logical sense anyhow; (d) the federal district court recognized that the denominator was diminution in value; and (e) the handful of cases cited by the Airport were not on point.

Of course, it's obvious why the Airport claims that the denominator is just "the value" of the land in 2010: because that's the only value in the record. The Airport knows that there's no evidence to support the later values of the land as-is or had the land been overblasted, the difference of which is the diminution in value. But the Airport cannot impose a nonsensical and unsupported

legal rule simply to excuse its failure to introduce necessary evidence.

Here, the federal district court simply misapplied the burden. Basically, the court held that there were two steps to the analysis: (1) first, determine whether the defendant carried its burden to establish gross disproportionality; and (2) if the defendant carried that burden, then determine whether the plaintiff carried its burden to establish the alternative measure of diminution in value.

But that makes no sense. A defendant literally cannot calculate gross disproportionality without calculating its numerator and denominator—and the denominator is diminution in value. Indeed, the cases cited in the district court's own review of the law on gross disproportionality used as the denominator the diminution in value. JA2279-2281 (JAXIV). Consequently, the defendant has the burden to establish both gross disproportionality and that ratio's baked-in denominator, diminution in value. That is why, for example, the cases and treatises cited above explicitly held that the defendant has the burden to establish diminution in value in order to establish the gross disproportionality defense.

It's unclear why the federal district court placed the burdens as it did. Respectfully, it appears that the court simply did not review the issue very deeply, perhaps because the Airport raised it only at the last minute, so that briefing on the issue was minimal.

C. The consequence of the breaching party failing to meet that burden is that the plaintiff is awarded the cost-to-complete damages that they sought and proved.

All of the authorities cited above make clear what happens when the breaching party fails to carry its burden: the plaintiff is awarded the cost-to-complete damages that they sought and proved. *See, e.g., GSB*, 179 S.W.3d at 540–43 (holding that because the contractor failed to present evidence of value of home had repairs been completed, it failed to carry its burden to show "difference-in-value" measure of damages, and absent such a showing "cost of repair" damages were proper); *Blecick*, 406 P.2d at 758 (rejecting builder's attempt to apply diminution in value

instead of cost to complete because "the burden is on the builder to affirmatively prove that economic waste would result" and builder failed to introduce evidence of diminution in value); 13 *Am. Jur. 2d Building, Etc. Contracts* § 74 (2023) ("the contractor has the burden of presenting evidence that the cost of repairing or replacing the property is disproportionate to the diminution in value of the property; if the contractor presents no evidence of the building as actually constructed, a trial court does not err in applying the cost measure of damages").

Indeed, the entire purpose of evidentiary burdens is to define which party loses if no evidence is presented. Which is why, in the cases cited above, the breaching party loses if there's no evidence of diminution in value. *See, e.g.*, *Ross Dress for Less*, 512 F. Supp. 3d at 1166 (noting that "[n]either side offered this evidence [of diminution in value], and thus the party who bears the burden of proof (or at least of production) loses on this point"—and that because the plaintiff "came forward with one of the measures of damages [cost-to-complete]," "[t]he burden then shifted to [the defendant] to establish the other measure of damages (diminution of value…)", which it failed to carry); *Andrulis*, 628 A.2d at 206-08 (reversing trial court damages award because the defendant had the burden to establish disproportionality, including its variable diminution in value, and defendant failed to introduce any evidence of diminution in value like as-is and as-contracted values, and vacating lower appellate court remand because nothing remained to try given defendant's failure to carry that burden).

In short, *Ross Dress for Less*, *Andrulis*, and every other case and treatise cited above make clear that if a breaching party fails to carry its burden to establish the alternative measure of diminution in value, then the plaintiff is awarded the cost-to-complete damages that it sought and proved.

IV. Although this Court need not reach the issue, it is undisputed that, if the Airport had the burden to establish gross disproportionality and its attendant variable diminution in value, it failed to carry it.

The Fourth Circuit did not ask this Court to determine whether, if the Airport had the burden to establish gross disproportionality and its attendant variable diminution in value, the Airport carried it. Thus, this Court need not reach that issue and should simply answer the questions of law that the Fourth Circuit posed.

In any event, for the sake of completeness, Corotoman will briefly outline why the single piece of evidence of value—an appraisal from 2010—is not evidence of diminution in value.

As an initial matter, if the Airport had the burden to establish diminution in value, it is undisputed that it failed to carry it. That's because there was no evidence at all of diminution in value, as the federal district court explicitly recognized: "*In short, the record is devoid of any evidence that would allow the Court to determine the diminution in value caused by the Airport Authority's breach*." JA2286 (Vol. XIV) (emphasis added). The Airport has never contended to the contrary, in either the federal district court or the Fourth Circuit. Instead, the Airport has contended—wrongly, as explained above—that diminution of value is irrelevant and all that matters is value of the land in 2010.

That holding was correct: there is no evidence of diminution in value, and diminution in value is the only disputed part of gross disproportionality. Consequently, the Airport failed to carry its burden. The district court reached that correct conclusion after wrongly concluding that Corotoman had the burden to show diminution in value, which simply means that the district court punished the wrong side for the lack of any evidence about diminution in value; the lack of such evidence was fatal to the Airport's alternative measure of damages defense, not to Corotoman's claim for the cost-to-complete default measure of damages that it proved.

In any event, in performing the first step of its analysis—analyzing whether the Airport had carried its burden to establish gross disproportionality—the district court held that the Airport carried that burden because of one piece of evidence in the record: the Zdrojewski appraisal from 2010. One, it logically makes no sense for the court to hold both (a) that there was no evidence at all of diminution in value, and (b) that there was some evidence of gross disproportionality (the appraisal), given that calculating diminution in value is necessary to calculate gross disproportionality. Putting that problem aside, the district court presumably held that there was no evidence of diminution in value because the only evidence even arguably about that, indeed the only evidence of value in the entire record, is the 2010 appraisal—which the court illogically analyzed only in connection with gross disproportionality and not diminution in value—and that appraisal is clearly incompetent on its face to establish diminution in value, as explained below.

Diminution in value is the value of the land now had overblasting occurred minus the value of the land now as is. The Zdrojewski appraisal of Corotoman's land was performed in 2010, 5 years before the Airport left the job site without overblasting and 13 years before the district court attempted to use it to determine damages resulting from the breach. The first problem with the appraisal is that it is far too old to be reliable or even relevant evidence of the value of the land now, either had the overblasting occurred or as-is. *See, e.g., Lambrinos v. Exxon Mobil Corp.*, No. 1:00-CV-1734, 2006 WL 2238977, at *7 (N.D.N.Y. Aug. 4, 2006) ("The Appraisal Report is dated October 18, 1999 and is simply too outdated to be probative as to the value of the property seven years later, in 2006."); *Mizner Bank v. Adib*, 588 So. 2d 325, 326 (Fla. Dist. Ct. App. 1991) (holding that it was reversible error for trial judge to rely on appraisal that was one year old at the time of a foreclosure sale); *Bd. of Assessors Of Cambridge v. Zuckerman*, 74 Mass. App. Ct. 1127 (2009) (excluding prior appraisals that were 15 years old because they were old and valuation

methodologies had changed since then); *Grenier v. New Bedford,* 344 N.E.2d 215, 219 (Mass. Ct. App. 1976) (finding no abuse of discretion in excluding evidence of prior sale of property where purchase occurred 11 years earlier). In short, even if the appraisal had measured the right thing—which it did not, as explained next—it is too old. Land values can change radically in 13 years.

What's more, and perhaps even worse, the 2010 appraisal does not anticipate that the land would have been flattened as a result of the overblasting. JA1968-1970 (Vol. VIII). Thus, the appraisal literally cannot establish what matters: the value of the land now had the overblasting occurred minus the value of the land now as is. In fact, it cannot establish either part of that equation. Furthermore, because the Airport did blast and excavate to remove the obstruction (which is different than overblasting the land after that), Corotoman's property is entirely different now from when it was appraised in 2010. Any physical change to a piece of property impacting the value of the property renders the appraisal obsolete or at the very least requires a reconsideration of the appraisal.

A related and more fundamental problem with the 2010 appraisal is this: the diminution in value figure requires two appraisals, or at least one appraisal with two values, to establish both (a) the value of the land with overblasting, and (b) the value of the land as-is. But here there is only one appraisal with one valuation. The 2010 appraisal cannot establish two values and does not purport to do so. (And the 2010 appraisal does not actually establish either of those two values, as explained above and below.)

The district court's entire analysis of the appraisal was this:

> The Airport Authority has consistently argued that the cost to complete the overblasting requirement would be disproportionate to the value of the property. Neither party presented current, credible, admissible evidence of the value of the property in its current state or its projected value following overblasting. However, the Court finds that the 2010 appraisal suffices to establish that the cost of

> completion as estimated by the expert reports of either party would be grossly disproportionate to the value of the land. The 2010 appraisal is quite detailed. It includes comparisons to similar raw land, as well as development properties sold following improvements. The range of sales outlined in the appraisal reflects prices closer to $200,000/acre for developed, flat property with access to roads and utilities. The value of the property without such improvements was estimated at approximately $10,000 per acre. While the 2010 appraisal is too outdated, both in terms of current property values and the current condition of the property, to establish a current value of the property, it does provide insight into the approximate potential value. The information regarding property values supports the Airport Authority's contention that an award of more than $4,000,000 would constitute a windfall for Corotoman.

JA2282-2283 (Vol. XIV). There are several fatal flaws with the court's analysis:

First, the court admitted that "[n]either party presented current, credible, admissible evidence of the value of the property in its current state or its projected value following overblasting." But that is exactly the evidence required to establish gross disproportionality and its variable diminution in value! So the court should have held that there was no evidence of that.

Indeed, the court reiterated later in its opinion the lack of evidence of diminution in value while specifically noting that the appraisal was *not* evidence of that: "The 2010 appraisal provides sufficient information as to the price per acre of comparable parcels of both raw and development-ready land to establish that more than $4,000,000 is grossly disproportionate to the value of the property *but provides no appraisal of the land in its current condition or its anticipated value following the overblast*." JA2286 (Vol. XIV) (emphasis added). Again, what the appraisal did not establish—the current values of the land as-is and as-overblasted—is actually what the district court needed.

Second, although the court noted that the appraisal analyzed and compared the raw land at issue to certain values of development-ready land (in 2010 of course), there is no evidence of how the overblasted land promised by the contract would have compared to the development-ready

land discussed in that appraisal. Indeed, the district court held exactly that in a footnote to the language quoted above: "Corotoman has not presented evidence that would permit the Court to understand how the property at issue, following overblasting, would compare to the development-ready parcels sold and considered as comparable properties [in the appraisal]." JA2283 (Vol. XIV). The court was correct there: the 2010 appraisal does nothing to show the value of the land had overblasting occurred, including how it would have compared to other development-ready land in 2010. The district court simply punished the wrong side for the fact that the appraisal could not establish that value (one of the two needed to establish diminution in value).[5]

Third, the court properly recognized that "the 2010 appraisal is too outdated, both in terms of current property values and the current condition of the property, to establish a current value of the property…." JA2283 (Vol. XIV). That is correct, and that is reason enough that the appraisal cannot carry the burden to show gross disproportionality and its variable diminution in value. But despite that fact, the court went on to say that the appraisal "does provide insight into the approximate potential value." JA2283 (Vol. XIV). One, it is unclear what "value" the court is referring to here—that is, the year of the "value" of the land being referred to or the condition of the land for that "value." Two, the vague words in that sentence highlight that even the district court recognized how weak the appraisal was at establishing what matters here: the appraisal supposedly provided *insight* into the *approximate* potential diminution in value. But "insight" into

[5] Immediately after the line in the footnote quoted above, the district court suggested that the value of the overblasted land might fall somewhere between the appraisal's comparison values of $10,000/acre for raw land and $200,000/acre for development-ready land. JA2282-2283 (Vol. XIV). But the appraisal does not say anything at all about the value of overblasted land, so that is pure speculation by the district court. Also, even if the value of the overblasted land did fall in that range, the total value of the land at $200,000/acre would be more than $8 million (based on 41+ acres, which is what would exist after the overblasting, JA1385 (Vol. VII)) or more than $3 million (based on 15+ acres, which is what exists now without the overblasting, JA1385 (Vol. VII)). On their face, neither of those numbers are grossly disproportionate to the $4,381,080 cost-to-complete number.

the "approximate" diminution in value is not enough for the Airport to carry its burden, which results in Corotoman losing his elected measure of damages and receiving much less than the contract itself provides for. More than a rough estimate is required.

It should be unsurprising that the Airport failed to carry its burden because it always contended that it never even had that burden. JA2007-2016 (Vol. VIII), JA2233-2238 (Vol. XIII), JA2260-2264 (Vol. XIV). Parties usually don't carry a burden if they don't know that they have it or if they explicitly claim that they don't have it. Indeed, the Zdrojewski appraisal was not even introduced in this case by the Airport. Instead, it was introduced by Corotoman as an exhibit to its amended complaint. JA96-134 (Vol. II). It's unsurprising that evidence introduced by another party for another purpose does not satisfy the Airport's burden here.

In short, and unlike the cost to complete the construction work that Corotoman bargained for, it was simply not possible for the district court to determine the diminution in value based on the evidence presented. And without that value, the district court's finding that the cost measure is "grossly disproportionate" was sheer speculation. By analogy, and as Corotoman acknowledged to the district court, there is no way to measure with sufficient certainty the amount of lost profits, revenues, or rent that Corotoman would have generated from January 1, 2015 to the present, which is why Corotoman expressly elected not to seek lost profits or the like. Corotoman held itself the appropriate standard of proof by doing so, but the district court erroneously concluded that a rough estimate of one land value based on incompetent evidence was enough.

Similarly, both Corotoman and the Airport analyzed and established the cost of completion in detail, with two expert witnesses quantifying those costs to a reasonable degree of engineering certainty. JA1408-1415 (Vol. VII), JA1439-1445 (Vol. VII). That is the type of evidence that's required here, and corresponding evidence for the diminution in value would require current

appraisals looking at the value of the land as-is and had the overblasting occurred.

In applying the gross disproportionality doctrine, the district court also stated that because the land swap didn't occur, Corotoman's tracts and the Airport's tracts still look a checkerboard, and it was impractical or impossible to overblast only one color of spaces on a checkerboard. JA2284 (Vol. XIV). Thus, the court held, awarding cost-to-complete damages would not be "placing Corotoman in the position it would be absent the breach" but would serve, instead, only to "penalize" the Airport. JA2284 (Vol. XIV). That holding is wrong for several reasons:

First, the Airport never clearly made this argument, and thus it was improper for the court to make it for them. *See, e.g., Dean v. Jones*, 984 F.3d 295, 303 (4th Cir. 2021).

Second, the Airport had the burden to establish the alternative diminution in value measure to establish gross disproportionality, and it failed to do so, thus the *undisputed* cost-to-complete amount should have been awarded. Nothing about the district court's new argument changes that.

Third, the Airport breached the contract not just by failing to overblast, but also by failing to swap the parcels (even if the FAA prohibited the swap[6]), meaning that the overblasting damages should be considered on the assumption that the swap had occurred—doing so *is* placing Corotoman in the position that it would have been in absent the breach. Had the Airport not breached but instead performed its overblast obligation, it would have overblasted all of the checkerboard spaces, and Corotoman would now have overblasted parcels, even if the FAA prohibited the swap and Corotoman remained with only its checkerboard spaces. Put another way, the essential purpose of expectation damages is to put the non-breaching party in the position that it would have been in absent a breach; here, had the Airport not breached the overblast obligation,

[6] As district court recognized, the Airport's failure to get FAA approval of the land swap before any other part of the contract was performed was a breach of contract, JA1295-1296 (Vol. VI), and that failure was due to the Airport's own mistakes and errors, JA1320-1327 (Vol. VI).

Corotoman would have overblasted parcels—regardless of whether the land swap occurred or not.[7]

Fourth, it is not actually impractical or impossible to overblast even now, because nothing would prevent the Airport from allowing Corotoman to overblast *all* of the spaces on the checkerboard by allowing work to be done on its own parcels (or the Airport could overblast all of the spaces itself). So there is no impracticability or impossibility.

Fifth, the law allows plaintiffs to recover cost-to-complete and similar expectation damages even when the plaintiff does not intend to or does not actually complete construction/finish performance of the contract. *See, e.g Info. Sys. & Networks Corp. v. City of Kansas City, Mo.*, 147 F.3d 711, 713 (8th Cir. 1998). Further, the law allows such expectation damages when completion or performance become impossible/impracticable as a result of a breach or other acts by the defendant, because a defendant cannot bootstrap its own breach to limit damages. *See, e.g.*, *Restatement (First) of Contracts* § 457 & cmt. d (noting that impossibility arising after a breach "will limit the damages recoverable" only if "the impossibility would have occurred had there been no breach"); *Restatement (Second) of Contracts* § 261 & cmt. a, 347 cmt. e (noting that impracticability arising after a breach will limit damages only if the impracticability would have discharged the party's obligation to perform, and that obligation is not discharged if the party causes the impracticability, § 261).[8] Here, the failure to swap the land was itself a breach by the

[7] In its opinion, the district court noted that "Corotoman elected not to present evidence or seek damages for the Airport Authority's breach of contract related to the swap." JA2283 (Vol. XIV). That's true but misleading. After the court denied specific performance to effect the swap, Corotoman didn't seek money damages directly related to the swap—for example, the value of the parcels it should have received. But it always sought the cost-to-complete overblasting damages, and it did so based on the cost for all the parcels, which is what both sides' experts analyzed. Thus, Corotoman always sought what matters here. And the Airport should not be entitled to escape the consequences of its breach of the swap obligation not only by not having to perform the swap or pay damages for it, but also by preventing the undisputed cost-to-complete damages that Corotoman always sought.

[8] The example provided by the *Restatement (Second)* illustrates how the impossibility/impracticability must not be caused by the promisor: if B promises to perform services for A beginning July 1, and B then breaches that promise, B owes damages—but if B becomes sick and thus unable to work after August 1, the damages stop on that date because of impracticability *not caused by B*. *See* Section 347 illus. 15.

Airport. Thus, even if completion of the overblasting were impossible here—and it is not, neither now nor when it should have occurred back in 2015—that would not be a basis to foreclose Corotoman's cost-to-complete damages.

One reason why a defendant cannot rely on its own acts or breaches to establish impossibility/impracticability is that a defendant cannot rely on impossibility/impracticability if the risk that occurs was foreseeable or was contractually allocated to the defendant. *See, e.g., CMA CGM S.A. v. Leader Int'l Express Corp.*, 474 F. Supp. 3d 807, 817 (E.D. Va. 2020) (rejecting regulatory impossibility defense because the risk of U.S. Customs detaining cargo was foreseeable and contractually allocated to the defendant) (applying *Opera Co. of Bos. v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094, 1102 (4th Cir. 1987)). Where the impossibility/impracticability is caused by the defendant, and especially where it constitutes a breach, then that risk is obviously foreseeable and is allocated to the defendant. Here, the risk that the FAA would not approve the swap was foreseeable and was allocated to the Airport, and the failure of that swap amounted to a breach by the Airport, so the Airport cannot rely on that risk/breach to limit damages.

In the Fourth Circuit, the Airport failed to address this analysis or any of the authorities cited by Corotoman in support of it. And there are plenty more such authorities, including controlling West Virginia cases. *See, e.g.*, *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W.Va. 577, 583-84, 746 S.E.2d 568, 574-75 (2013) ("Central to the application of the doctrine of impracticability is a determination that the party who seeks to be excused from performance was not at fault or had no control as to the nonoccurrence of the presupposed event upon which the contract depended."). Frankly, it is galling that the Airport tries to use its own undisputed breach of contract to preclude damages.

In a similar vein, the Airport speculated in the Fourth Circuit that Corotoman "undoubtedly

knew" that the property swap could not occur and therefore knew that its land would not be valued in a condemnation proceeding based on the assumption of the swap occurring. That assertion is baseless and untrue. During the original condemnation negotiations here, Corotoman had every reason to expect that the swap could occur, which is why it negotiated and ultimately signed a contract expressly requiring the swap, an obligation that the Airport then undisputedly breached. The swap could have and should have occurred. Anyhow, the condemnation negotiations are irrelevant: the parties signed a contract, the Airport breached it, and what matters now is damages.

Similarly, the Airport speculated that, if Corotoman were to receive its cost-to-complete damages, it wouldn't spend that money on overblasting. As noted above, Corotoman does not have to spend its cost-to-complete damages on actual completion, and the Airport cites no authorities to the contrary. More importantly, that is pure speculation because *there is no competent evidence of what Corotoman's land is worth now and what it would be worth overblasted*, so there is no evidence about what a "rational person" supposedly would do with cost-to-complete damages here.

Relatedly, and throughout its Fourth Circuit brief, the Airport asserted that Corotoman is seeking a "windfall" here, or that it wants to cash in its "lottery ticket," etc. Those assertions are predicated on the assumption that the cost-to-complete damages far exceed the diminution in value of Corotoman's property caused by the failure to overblast, *but there is no evidence of that*. That's the entire point of this appeal. There is no evidence that the diminution in value caused by the failure to overblast is not, in fact, quite close to the cost to complete, because there is no evidence of the value of the land had overblasting been completed or the value of the land as-is. The Airport speculates that there's a windfall but has utterly failed to prove it. Furthermore, there is no "windfall" here because Corotoman is asking for precisely what it negotiated for and contracted for, and nothing more: overblasted land, and in lieu of that, the money it would cost to overblast.

Finally, the Airport also cited many cases discussing general principles of contract law, including the principle that a plaintiff has the burden to establish its damages to a reasonable degree of certainty and cannot speculate about its damages. That's true and undisputed, but it misses the point. Corotoman *did* establish its damages to a reasonable degree of certainty, by accepting the Airport's cost-to-complete calculation based on evidence that the district court found credible. The Airport did not satisfy *its* burden to show that, due to gross disproportionality, diminution in value should apply in lieu of cost-to-complete damages.

In sum, the Airport failed to carry its burden of showing that the cost to complete was grossly disproportionate to the diminution in value. This case is just like *Advanced*, 711 P.2d at 526-27, where the contractor-defendant sought to carry its burden to establish that the cost of repairs was grossly disproportionate to the diminution in value, so that the diminution in value measure should apply instead. But the only appraisals available pre-dated the discovery of the defective construction, and there was no appraisal made as of the time of trial showing the value as-is or projecting the value if the contract had been performed. *Id.* Without such a later appraisal, the Alaska Supreme Court held, any diminution in value measure would be speculative, and so the contractor failed to carry its burden. *Id.* It's the same here.

In any event, this Court need not and should not analyze the 2010 appraisal or the specific facts of this case. Instead, and as explained above, the Court should simply answer the certified questions of law and let the Fourth Circuit do the rest.

CONCLUSION

This Court should answer the questions certified by the Fourth Circuit as outlined above, after which the Fourth Circuit can apply the law to the facts.

Respectfully submitted this 3rd day of February 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2025, I electronically filed the foregoing "Opening Brief of Petitioner Corotoman, Inc." with the Clerk of this Court, which will send notification of such filing to the attorneys listed below, and that I also served the Petitioner's Opening Brief on the attorneys listed below by email:

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