NO. 24-661

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COROTOMAN, INC.,

Petitioner,

v.

CENTRAL WEST VIRGINIA REGIONAL AIRPORT AUTHORITY,

Respondent.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONSE BRIEF OF RESPONDENT

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I. INTRODUCTION

This case presents fundamental, interrelated questions of contract law: Does West Virginia recognize the gross disproportionality rule to limit an injured party's damages in a breach of a construction contract dispute? Under ordinary and longstanding principles of contract law, the answer to this question is clearly yes.

Given that, how is gross disproportionality 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? Again, the answers to these related questions of law are set forth in longstanding jurisprudence of West Virginia, under which (1) gross disproportionality is calculated by comparing the cost to complete the contracted-for work to the value of the subject property or structure, (2) the non-breaching party bears the burden of proof as to gross disproportionality and the alternate form of damages (*i.e.*, diminution in value); and (3) the failure by a non-breaching party to meet that burden results in dismissal of the breach of contract claim as damage is an essential element of any breach of contract claim.

Because this Court has not had occasion to apply the gross disproportionality rule in the context of a breach of construction contract case, the Fourth Circuit opted to certify these specific questions to this Court. However, this Court need look no further than its own established, controlling precedent to answer the certified questions presented by the Fourth Circuit.

II. CERTIFIED QUESTIONS

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

1. 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?

2. If so: (1) how is gross disproportionality calculated, (2) 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 (3) what is the consequence of that party failing to meet its burden?

III. STATEMENT OF CASE

A. Procedural history.

This matter is before this Court upon certified questions from the United States Circuit Court for the Fourth Circuit Court of Appeals. The appeal in front of the Fourth Circuit, in turn, stemmed from a Memorandum Opinion and Order issued on July 27, 2023 ("Order"), by the Honorable Irene Berger of the United States District Court for the Southern District of West Virginia, who found that Petitioner Corotoman, Inc. ("Corotoman") should not be awarded any damages in this matter as a result of application of the gross disproportionality rule to Corotoman's claims for damages for breach of contract. App. at JA 2268-2288. The District Court issued the Order following extensive briefing from Corotoman and the Central West Virginia Regional Airport Authority, Inc. (the "Airport Authority") in the spring of 2023. Notably, the discovery deadline in the Civil Action before the District Court expired on July 15, 2022, with all depositions completed by September 13, 2022. App. at JA 10.

Corotoman appealed the Order to the Fourth Circuit on August 18, 2023, pursuant to which Corotoman filed its initial brief on November 21, 2023, the Airport Authority filed its response

brief on January 18, 2024, and Corotoman filed its reply brief on February 8, 2024. App. at JA 2290-2292. Oral argument before the Fourth Circuit on the appeal took place on May 7, 2024.

The Civil Action in which the Order was entered originally arose as an adversary proceeding in the United States Bankruptcy Court for the Southern District of West Virginia, Case No. 2:19-bk-20134. On December 9, 2022, long after expiration of the discovery deadline in the Civil Action, Corotoman filed a Motion to Convert Case to Chapter 7, which asked to convert Corotoman's bankruptcy from a reorganization under Chapter 11 to liquidation pursuant to Chapter 7 of the Bankruptcy Code. S. App. at 0001-0002. The Bankruptcy Court entered an order granting the Motion to Convert on January 20, 2023, which converted Corotoman's bankruptcy to a liquidation under Chapter 7. S. App. at 0003-0005. Both the Motion to Convert and the Order Granting Motion to Convert were filed in Corotoman's bankruptcy case after the close of discovery in the Civil Action and were not included in the record considered by the District Court in issuing the Order.

On December 22, 2020, the Bankruptcy Court entered an order that appointed a Chapter 11 Trustee, Martin P. Sheehan, for Corotoman in place of John H. Wellman, III, the President of Corotoman, which had been operating as a debtor-in-possession in its Chapter 11 bankruptcy. S. App. at 0036.

On April 15, 2024, after briefing before the Fourth Circuit in the appeal of the Civil Action concluded, the United States filed an Information that began criminal proceedings against Mr. Wellford. S. App. at 0074-0075.[1] The Information charged Mr. Wellman with knowingly concealing, covering up, falsifying, and making a false record by failing to disclose in Corotoman's

[1] The Airport Authority filed Respondent's Motion for Leave to File Supplemental Appendix on February 19, 2025. Corotoman filed a response in opposition to this motion on March 3, 295, but this Court has not ruled upon the motion.

bankruptcy filing that Corotoman had transferred, outside the ordinary course of business, over $925,326.43 to another business under his control in violation of 18 U.S.C. ¶1519. S. App. at 0074-0075. Mr. Wellman pled guilty to this charge on May 2, 2024, mere days before oral argument before the Fourth Circuit of the appeal in the Civil Action. S. App. at 0076-0080; S. App. 0081. Mr. Wellman was sentenced to one year and one day in prison followed by three years of supervised probation, and upon information and belief, he remains in prison. S. App. at 0083-0084. Again, Mr. Wellman's criminal proceedings began well after the District Court issued its Order and after completion of the briefing on the appeal of the Civil Action before the Fourth Circuit. Significantly, any monies received by Corotoman in the Civil Action will go straight to its bankruptcy estate, where the single largest secured creditor is Katherine Wellford – Mr. Wellford's wife. S. App. 0006-0013.

B. Statement of facts.

In the mid-2000s, the Airport Authority undertook a project to remove an obstruction in the form of a large knoll at the end of a runway at the West Virginia International Yeager Airport ("Airport") in Charleston, West Virginia (the "Project"). Joint Appendix ("JA") 546-547, 970-971.[2] The Project, which was funded by a series of grants from the Federal Aviation Administration ("FAA"), required the Airport Authority to acquire property on and around the knoll that it did not own, including property owned by Corotoman, Inc. (the "Corotoman Property"). JA 1101.

As part of its efforts to acquire the knoll, the Airport Authority retained Zdrojewski & Company in late 2010 to appraise the Corotoman Property, which consisted of a series of non-

[2] Corotoman's statement that the obstruction was "costing the airport almost $2 million per year" is simply false. Petitioner's Opening Brief at 5. The departure was costing airlines using the Airport that amount. JA 1462.

contiguous parcels (the "Zdrojewski Appraisal"). JA 976-1048. The Zdrojewski Appraisal established that the value of the Corotoman Property was $186,000.[3] JA 976. Thereafter, by letter dated February 24, 2011, the Airport Authority offered to purchase the Corotoman Property from Corotoman for $260,125.00. JA 523-525. This offer letter, based on the Zdrojewski Appraisal, represented an attempt by the Airport Authority to purchase the Corotoman Property without having to file an eminent domain action to acquire it. JA 438, 2093. Notably, the Airport Authority's offer to Corotoman was inflated beyond the fair market value of the property to increase the likelihood the offer would be accepted, and it was the practice of the Airport Authority to inflate its offers by 15% to encourage acceptance of the offer. JA 552.

Corotoman declined the Airport Authority's offer, believing that it undervalued the property despite never appraising the property for itself. JA 1711-1713, 1715, 1912. In fact, both Corotoman and the Airport Authority agree that Corotoman never, at any point, had its own property appraised, even during the litigation before the District Court, and John Wellman, Corotoman's president, who gave testimony as Corotoman's corporate representative in this litigation, was unable to testify what Corotoman believed the property was worth in 2010. JA 1712-1713, 1715, 1717, 1725-1726, 1912-1913. Instead, Corotoman began negotiating an avigation easement over the Corotoman Property with then-Airport Director Rick Atkinson. JA 750, 972.

On March 27, 2012, Charles Bailey, Esq., of Bailey & Wyant, PLLC, then serving as general counsel to the Airport Authority, received an email from K.O. Damron, a representative

[3] The Zdrojewski Appraisal did not have a "shelf-life" of 30 days. Petitioner's Opening Brief at 5. Rather, banks and mortgage companies generally relied upon an appraisal for that long in making loan decisions. Other industries, including courts, may find value in appraisals for other purposes over longer periods of time.

of Corotoman, attaching the first draft of a document titled "Settlement Agreement."[4] JA 1074. The next day, during a meeting of the Airport Authority's Board of Directors ("Board"), the members of the Board received an oral report regarding the Settlement Agreement, though there is no indication the draft Settlement Agreement itself was presented to the Board. JA 1076. The Board conditionally approved the draft Settlement Agreement pending review and approval by legal counsel. JA 1076. The Board authorized its Chairman, R. Edison Hill, to sign the agreement once it had been approved by legal counsel. JA 1076. After the Board meeting on March 28, 2012, however, the Board received no updates regarding the Settlement Agreement, and it was never presented to Mr. Hill for signature. JA 1066-1068.

The draft Settlement Agreement stated that that parties would "agree to execute License and Work Agreement . . . regarding the Airport Authority's blasting, excavating, and grading of certain property" owned by Corotoman. JA 439. The terms "overblast" or "overblasting" do not appear within the Settlement Agreement. It does, however, appear in the License and Work Agreement ("LWA"). Critically, however, even as negotiations between Mr. Atkinson and Corotoman progressed, neither understood what the "overblast" would cost. JA 669-671, 1056, and 1058. Mr. Bailey, the Airport Authority's legal counsel, had little to no understanding of the term at all. JA 1084. Neither the overblast work nor any associated costs for the overblast work were ever brought up with either the Board or any of the contractors retained to work on the Project. JA 1055. In short, neither Mr. Atkinson, nor Mr. Bailey, nor Corotoman were aware of the astronomical cost of performing the overblast work when Mr. Atkinson eventually signed the Settlement Agreement. Further, because neither Mr. Atkinson nor Mr. Bailey reported the LWA's

[4] This document was labeled as a "Settlement Agreement" because the Airport Authority and Corotoman each recognized that it represented an agreement to "settle" the right of the Airport Authority to condemn the Corotoman Property had it chosen to do so.

overblast provision, including the lack of information concerning the attendant costs, or even estimate of costs to perform the overblasting, the Board was similarly unaware of the cost.

Nonetheless, the final version of the Settlement Agreement established: 1) that the LWA would be executed; 2) that the Project would be completed in accordance with that LWA; 3) that Corotoman and the Airport Authority would exchange parcels of real property; and 4) that Corotoman would convey an avigation easement to the Airport Authority. JA 439-440. In exchange, the Airport Authority agreed to pay Corotoman $350,000.00. JA 440. The Settlement Agreement contains no provisions establishing what happened in the event of a breach and no liquidated damages provision.

The LWA granted the Airport Authority a license to enter the Corotoman property and perform the Project. JA 447-448. It also established that, in addition to performing the Project in accordance with Grading and Construction Plans, Specifications, and Schedules (the "Grading and Construction Plans"), "[t]he Airport Authority agrees to overblast at least thirty-five (35) feet below the planned final grade, on drill dates and blasting plan acceptable to Corotoman and as otherwise outlined in the Grading and Construction Plans, Specifications, and Schedules." JA 448. Further, the LWA required project completion within twenty-four months of commencement. JA 448. Finally, the LWA contained a liquidated damages provision allowing that "Corotoman may ... revoke the License granted herein and/or seek the greater of (1) actual, compensatory, consequential, and/or incidental damages or (2) liquidated damages in the amount of ten thousand dollars ($10,000.00) per breach." JA 451.

After Rick Atkinson signed the Settlement Agreement, but before it had been executed by Corotoman, a $250,000 payment to Corotoman was requested by Mr. Atkinson for "acquiring" the property, and the Airport Authority paid Corotoman this amount in July 2012. JA 2186, 2189.

The Airport Authority and Corotoman never effectuated the land exchange, however, because that part of the Settlement Agreement required FAA approval, and the FAA refused—and continues to refuse—to approve the exchange.[5] JA 2192-2195, 2197, 2201.[6] Corotoman, however, never returned the $250,000.00 payment made by the Airport Authority, and it never granted an avigation easement to the Airport Authority over Corotoman's property.[7] When the FAA learned Corotoman never granted the avigation easement, it required the Airport Authority to repay to the FAA $225,000 of the monies granted by the FAA for the Project. JA 2204.

Further, because the Airport Authority had not been fully apprised of the contents of the final version of the Settlement Agreement and LWA (together, the "Agreements") and was unaware of the promised 35-foot overblast provision in the LWA, the overblast was omitted from the Grading and Construction Plans, Specifications, and Schedules, and was never performed on Corotoman's property. Notably, it was Corotoman's practice to require anyone performing construction on its property to submit plans to Corotoman for approval. JA 1051-1052. Corotoman, in line with its usual practice, received the Grading and Construction Plans related to the Project, but they contained no mention of overblast work to be performed. JA 1062. Despite being aware that overblasting was not included in the Grading and Construction Plans, Corotoman

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[5] As noted by the District Court, "Corotoman has not sought damages for the failure to exchange certain parcels of property." JA 5127. Corotoman did not appeal that finding; hence, nothing about the failure to exchange parcels of property without FAA approval is part of Corotoman's appeal, though the lack of exchange demonstrates why, in part, Corotoman's claims for damages represent a classic example of economic waste, as explain in Section V1.C.1, below.

[6] Corotoman claims that the FAA's refusal was due to the Airport Authority's "own mistakes and errors." Petitioner's Opening Brief at 10, 13, 36. In fact, the FAA never disclosed why it would not allow the property swap. Moreover, the Airport Authority sued its former lawyers because of their conduct related to the Agreements – not for their failure to obtain FAA approval for the property swap. Corotoman's statement to the contrary is simply not true.

[7] Corotoman's claim that it "performed its obligations" and "the airport received the entire benefit of its bargain with Corotoman" is, therefore, patently false. Petitioner's Opening Brief at 1.

raised no objection to the plans, even though they required Corotoman's approval, and made no effort to request any "drill dates and blasting plans acceptable to Corotoman" or Grading and Construction Plans that included the overblast work. JA 1059, 1060.

Work began on the Project in accordance with the Grading and Construction Plan reviewed by Corotoman, but even as work progressed on the Project, nothing was said about the overblast requirement that Corotoman later complained about, even though an engineer hired by Corotoman was on the Project site "a lot." JA 1060, 1061, 1064. In fact, Corotoman made no mention of the overblast work to anyone until halfway through the Project, when Mr. Welford asked Steve Cvechko of Central Contracting, the contractor on site responsible for removing the knoll, about it. JA 1090. At that point, Mr. Cvechko informed Mr. Wellford that the overblast work was not part of the Project plans (i.e., the Grading and Construction Plans required by the Agreements). JA 1090. More importantly, no one from Corotoman mentioned the issue to Rick Atkinson, or anyone else at the Airport Authority, until the Project work was nearly complete. JA 1063. When Mr. Atkinson asked Mr. Cvechko about the cost of any such overblast work, an inquiry made close to the completion of the Project, he was told it would be very expensive. JA 975. In fact, it would have been too expensive for the Airport Authority to perform. JA 1092.

The Project was completed in accordance with the Grading and Construction Plans, Specifications, and Schedules as required by the Settlement Agreement and the LWA, which, again, Corotoman had reviewed prior to the work commencing, and which did not include any overblast work.

Since executing the Agreements, the Airport Authority has paid Corotoman at least $900,000 and received nothing in exchange. As detailed above, the Airport Authority paid Corotoman at least $250,000 for "acquiring" Corotoman's property as established in the

Settlement Agreement. JA 2202. The Airport Authority also paid Corotoman $150,000 for a separate 9.39-acre parcel of property, for which Corotoman has never provided the Airport Authority with a deed. JA 2202, 2206. Additional payments of approximately $500,000 were made following the 2015 failure of an engineered slope at the end of West Virginia International Yeager Airport's runway, which were not reduced to a written agreement and were ostensibly for payments for dirt from the Project to rebuild the failed slope. JA 2202, 2205. The Airport Authority received nothing in exchange for these payments, either in the form of deeds to property or an avigation easement, and it even had to repay $250,000 to the FAA because it never acquired any property from Corotoman. JA 2202, 2204. In short, over the course of the last decade, Corotoman has received nearly one million dollars from the Airport Authority related to the relevant property, but the Airport Authority has received absolutely nothing in return.[8]

It is against this backdrop that Corotoman's contention that it should be awarded over $4.3 million in damages for the cost to "complete" overblasting work that will never actually be performed on the Corotoman Property—property that has negligible market value as a standalone piece of property—must be examined.[9] This factual backdrop also demonstrates that Corotoman asks this Court to provide it with a tremendous windfall that has no bearing on its actual damages in this matter.

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[8] Corotoman's suggestion that the Airport Authority "profited" from this litigation because of the settlement of its legal malpractice claim against its former lawyers is both untrue and ironic, considering that Corotoman received ~$900,000 from the Airport Authority in return for virtually nothing. Petitioner's Opening Brief at 16, n. 1.

[9] And, in fact, any monetary award in this matter would not be used for anything related to the Corotoman Property, as explained below, but would simply go to Corotoman's bankruptcy estate, where the largest secured creditor is Katherine Wellford, the wife of John Wellford, the president of Corotoman. JA 2005.

IV. SUMMARY OF ARGUMENT

A. Certified Question No. 1 - The Gross Disproportionality Rule

This Court should remove any doubt as whether West Virginia law recognizes application of the gross disproportionality rule to breach of contract claims, including breach of construction contract claims. Specifically, the Court should confirm that, under West Viginia law, a non-breaching party to a construction contract may only recover the cost to complete construction if that cost is not grossly disproportionate to the value of the property subject to the contract, as recognized in Steinbrecher v. Jones, 153 S.E.2d 295, 304 (W. Va. 1967), and again in Trenton Constr. Co., Inc. v. Straub, 310 S.E.2d 496, 499 (W. Va. 1983).

B. Certified Question No. 2 - The Burden of Proof under the Gross Disproportionality Rule

Similarly, this Court should clarify that, under West Virginia law, the party claiming damages for a breach of contract bears the burden of proving its legally permissible damages, whether those legally permissible damages represent cost of completing the construction or the diminution in value of the property because of the breach of contract, and if that party fails to do so, it should be awarded nominal or no damages.

V. RESPONDENT'S STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 20(a)(1) of the West Virginia Rules of Appellate Procedure, the Airport Authority submits that the certified questions presented in this matter warrant oral argument as the Fourth Circuit clearly views these issues as matters of first impression under West Virginia law. Further, given the importance of these issues to the Airport Authority and the region it serves, the decisional process would be significantly aided by oral argument.

VI. ARGUMENT

A. Standard of Review

Section 51-1A-3 of the West Virginia Code provides that "[t]he supreme court of appeals of West Virginia may answer a question of law certified to it by any court of the United States . . . if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state." W. Va. Code § 51-1A-3. While the Court may reformulate a certified question, W. Va. Code § 51-1A-4, it may not answer a question that is not dispositive of a claim or necessary to the decision of the case. See Kincaid v. Magnum, 432 S.E.2d 74, Syl. Pt. 3 (W. Va. 1993) (noting that the court may reformulate a certified question) and State ex rel. Advance Stores Co. v. Recht, 230 W. Va. 464, 740 S.E.2d 59, 63–64 (2013) (court will not answer a certified question that is not necessary).

This Court applies a *de novo* standard in addressing legal issues presented by certified question from a federal court. Leggett v. EQT Co., 800 S.E.2d 850 (W. Va. 2017).

B. Prefatory Statement

Corotoman expends considerable space unnecessarily and inappropriately arguing the merits of its appeal of the District Court's Order currently pending before the Fourth Circuit. Petitioner's Opening Brief at 30 – 40. In fact, it begins the title of Section IV of its Opening Brief as follows: "Although this Court need not reach this issue . . . ." Opening Brief at 30. Thereafter, it argues what it asks the Fourth Circuit – not this Court – to do. It even closes its 10-page missive by stating: "In any event, this Court need not and should not analyze the 2010 appraisal or the specific facts of this case. Instead, . . . the Court should simply answer the certified questions of law and let the Fourth Circuit do the rest." Opening Brief at 40. Unlike Corotoman, the Airport Authority will not delve into matters that do not, and should not, impact the purely legal issues before this Court. The Airport Authority fully briefed the merits of this case (*i.e.*, the application

of the law to the facts) before the Fourth Circuit and will not repeat those arguments here as this Court need only consider the issues of law presented by the certified questions regarding the gross disproportionality rule and the burden of proof for proving damages pursuant to that rule under West Virginia law.

C. Certified Question No. 1: 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.

Notwithstanding the Fourth Circuit's certified question, this Court recognized the gross disproportionality rule over fifty years ago and stated that the alternative rule for measuring damages for breach of contract claims is to be used "where extensive reconstruction is necessary at a cost grossly disproportionate to the value of the [property]." Steinbrecher v. Jones, 153 S.E.2d 295, 304 (W. Va. 1967). See also Trenton Constr. Co., Inc. v. Straub, 310 S.E.2d 496, 499 (W. Va. 1983) (same). Despite arguing vociferously before the District Court and the Fourth Circuit that West Virginia does not recognize the gross disproportionality rule, Corotoman has now reversed course. Petitioner's Opening Brief at 21 ("Corotoman ***agrees*** that the doctrine does or should exist in West Virginia law.") (emphasis added). As a result, both the Airport Authority and Corotoman urge this Court to answer the first certified question in the affirmative.

The Airport Authority concedes, as it did before both the District Court and the Fourth Circuit, that the "usual" or "standard" measure of compensatory damages in breach of construction contract claims is the cost of completing the work.[10] Critically, however, courts – including West

[10] The District Court noted that it "is less convinced that the Settlement Agreement and License and Work Agreement is properly construed, in its entirety, as a construction contract." JA 2278. The Airport Authority agrees, as this case does not involve the "construction" of a home, or a structure, or anything else. It simply requires the reconfiguration of real property. As discussed in Section VI.C.2 below, West Virginia law concerning tortious damages to real property likewise supports awarding only diminution of damages in the circumstances presented here.

Virginia – have long recognized that diminution in value damages represents the proper measure of damages when the cost of repair or completion of the property or structure at issue is grossly disproportionate to the diminution in value of that property or structure. This alternative method of calculating damages for breach of contract claims, sometimes called the "gross disproportionality rule" or the "economic waste doctrine," extends back to at least 1921 in Justice Benjamin Cardozo's seminal opinion in Jacobs & Youngs, Inc. v. Kent, 129 N.E. 889, 891 (N.Y. 1921), in which he concluded that "[t]he owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value." Justice Cardozo concluded that, "[i]n the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing."[11] Jacobs & Youngs, Inc., 129 N.E. at 891. See also Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 113 (Okla. 1962) (ruling that while "the measure of damages in an action for . . . breach of contract is ordinarily the reasonable cost of performance of the work[,] . . . where the economic benefit which would result to the [non-breaching party] by full performance of the work is grossly disproportionate to the cost of performance, the damages to which [the non-breaching party] may recover are limited to the diminution in value resulting to the premises because of the non-performance.").

The gross disproportionality rule has been recognized for so long because it avoids what the law abhors and what Corotoman seeks in this case: unjust enrichment and economic waste.

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[11] While the phrase "economic waste" does not appear in Jacobs & Youngs, courts generally consider Justice Cardozo's opinion to be the origin of the "economic waste doctrine." See Ross Dress for Less, Inc. v. Markarios-Oregon, LLC, 512 F. Supp. 3d 1138, 1155–1156 (D. Or. 2021) (reversed on other grounds related to calculation of pretrial interest.).

1. The gross disproportionality rule avoids unjust enrichment and economic waste.

Courts that apply the gross disproportionality rule seek to avoid unjust enrichment or economic waste. See Jacobs & Youngs, Inc., 129 N.E. 889 (N.Y. 1921). The Restatement (Second) of Contracts provides the current iteration of the gross disproportionality rule (or economic waste doctrine) first articulated in Jacobs & Youngs:

> (2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on:
>
> (a) the diminution in the market price of the property caused by the breach, or
>
> (b) the reasonable cost of completing performance or of remedying the defects *if that cost is not clearly disproportionate to the probable loss in value to him*.

Restatement (Second) of Contracts § 348(2) (Am. Law Inst. 1981) (emphasis added). Further, Comment (c) explains the relationship between the language in this section and the doctrine of economic waste:

> Sometimes, especially if the performance is defective as distinguished from incomplete, it may not be possible to prove the loss in value to the injured party with reasonable certainty. In that case he can usually recover damages based on the cost to remedy the defects. Even if this gives him a recovery *somewhat in excess* of the loss in value to him, it is better that he receive *a small windfall* than that he be undercompensated by being limited to the resulting diminution in the market price of his property.
>
> Sometimes, however, such a large part of the cost to remedy the defects consists of the cost to undo what has been improperly done that *the cost to remedy the defects will be clearly disproportionate to the probable loss in value to the injured party. Damages based on the cost to remedy the defects would then give the injured party a recovery greatly in excess of the loss in value to him and result in a substantial windfall. Such an award will not be made. It is sometimes said that the award would involve "economic waste," but this is a misleading expression since an injured party will not, even if awarded an excessive amount of damages, usually pay to have the*

> *defects remedied if to do so will cost him more than the resulting increase in value to him.* If an award based on the cost to remedy the defects would clearly be excessive and the injured party does not prove the actual loss in value to him, damages will be based instead on the difference between the market price that the property would have had without the defects and the market price of the property with the defects. This diminution in market price is the least possible loss in value to the injured party, since he could always sell the property on the market even if it had no special value to him.

Restatement (Second) of Contracts § 348(2), cmt. c (Am. Law Inst. 1981) (emphasis added).

In short, the law avoids awarding damages that either (1) result in unjust enrichment of the party seeking damages or (2) represent economic waste. See, e.g., Nichols Constr. Coro. v. Va. Mach. Tool Co., LLC, 661 S.E.2d 467, 472 (Va. 2008) (citations omitted) (ruling that, under Virginia law, "the cost measure [of damages] is appropriate unless the cost to repair . . . would involve unreasonable economic waste." (citations omitted)); Gilbert v. Tony Russell Constr., 772 P.2d 242, 246 (Idaho 1989) (holding that, under Idaho law, the gross disproportionality rule should apply when "the ordinary measure would be disproportionate to the loss in value or to the benefits of a full repair, i.e. economically wasteful or result in a windfall."). Here, Corotoman seeks an exorbitant financial windfall in the form of the cost to complete overblasting work that will never be completed, on properties that were never exchanged, that would have resulted in a contiguous parcel of land that will never exist, and that constitutes a classic case of economic waste. As noted by the District Court "the property swap cannot occur because the FAA refused to approve the transfer of Airport property[,]"[12] and "Corotoman elected not to present evidence or seek damages for the Airport Authority's breach of contract related to the property swap[,]" which means that "the cost to complete an overblast that is impractical and will not be performed is not an accurate

[12] In light of the fact that the property swap did not and cannot occur, the Corotoman Property is checkerboarded with interspersed parcels owned by the Airport Authority.

reflection of the damages actually incurred as a result of the breach." JA 2283-2284. Put another way, Corotoman openly seeks damages based on a speculative scenario that could never exist.[13]

The District Court recognized as much when it stated that such a solution would simply "penalize the Airport and act as a windfall to Corotoman, rather than placing Corotoman in the position it would be in absent the breach." This point is further highlighted by the fact that Corotoman entered Chapter 7 liquidation after it filed its claims against the Airport Authority, meaning that any award of damages will not go towards the overblasting work or anything else to do with Corotoman's business. Instead, it will go to Corotoman's creditors, with Katherine Wellford, the wife of John Wellford, the principal of Corotoman until his recent imprisonment, standing at the front of the line. S. App. at 0001-0002.

To aid in its analysis, the District Court correctly found BLB Aviation S.C., LLC v. Jet Linx Aviation, LLC, 808 F.3d 389, 391 (8th Cir. 2015), instructive:

> [T]he Eighth Circuit addressed the measure of damages where an airplane lessee breached a contract by failing to keep maintenance and repair records required for regulatory compliance. . . . The lessor sought damages equaling the cost to re-do the maintenance, but there was evidence establishing that other, less costly, alternatives were available to remedy the breach and bring the aircraft back into regulatory compliance. Id. at 394 (also noting that the aircraft had been sold and the lessor would therefore not be performing any repairs). The Eighth Circuit, applying Nebraska law, explained that the 'cost of repair supplies the default measure unless the breaching party shows that economic waste would result,' in which case diminution of value may be applied. Id. at 393. Because the cost to repair, as presented by the plaintiff based on the cost to redo the maintenance work, 'would result in windfall and, therefore, in economic waste,' the Eighth Circuit found that '[d]iminution in

[13] Notably, Corotoman undoubtedly knew that the value of its property in a condemnation proceeding based upon a property swap that could not occur and some kind of unspecified future development would be rejected as too speculative and uncertain. See W. Va. DOT v. CDS Family Trust, LLC, 807 S.E.2d 780, 788 (W. Va. 2017) (court rejected using only value of future mitigation credits for a mitigation bank to be developed on condemned property as a value of the property because such credits are only "a factor would be weighed in negotiations between private persons participating in a voluntary sale and purchase of the land at the time it was taken.").

> value thus provides the appropriate measure of damages.' Id. at 394. Neither party had 'presented non-speculative evidence of any diminution in value for either aircraft,' and, because 'the burden of proving the amount of damages with sufficient certainty fell to [the plaintiff,' the Eighth Circuit affirmed the district court's refusal to award damages following a bench trial. Id. at 394-95.

JA 5129-5130. While not strictly a construction contract case, Corotoman's efforts to distinguish BLB Aviation still fall short. Petitioner's Opening Brief at 25 fn. 3. While the facts of BLB Aviation are particular and unique, the reasoning applies with equal force to the legal issues presented by the Fourth Circuit's certified questions here because, much like maintenance would never occur on airplanes that the plaintiff no longer owned in BLB Aviation, the overblast work will never occur on parcels of property that Corotoman does not and will never own. In that sense, Nebraska law aligns with that of West Virginia, both of which adopt damages principles that avoid unjust enrichment and economic waste.

2. West Virginia law has long recognized the gross disproportionality rule.

Given both the history of the gross disproportionality rule and its rationale, it is not surprising that this Court has expressly recognized the rule. Specifically, this Court stated that the alternative rule for measuring damages for breach of contract claims is to be used "where extensive reconstruction is necessary at a cost grossly disproportionate to the value of the [property]." Steinbrecher v. Jones, 153 S.E.2d 295, 304 (W. Va. 1967). See also Trenton Constr. Co., Inc. v. Straub, 310 S.E.2d 496, 499 (W. Va. 1983) (same). Where such gross disproportionality exists, damages are "the difference in value between what is built and what was supposed to have been built[.]" Steinbrecher, 153 S.E.2d at 304 (citations omitted).

This Court expressly recognized the probity of using an alternative measure of damages under West Virginia law per the gross disproportionality rule since at least 1967. In both Steinbrecher and Trenton Constr. Co., this Court simply noted that the record before it did not

demonstrate "gross disproportionality" that required application of the alternative measure of damages. See Steinbrecher, 153 S.E.2d at 304 (alternative measure of damages "not involved under the facts presented by the evidence produced at the trial . . . .); Trenton Constr. Co., 310 S.E.2d at 499 ("The alternative rule is not involved under the facts presented at trial in the case before us" where the cost of repair was $8,500 and the value of the home was $200,000).

West Virginia courts also apply this alternative calculation of damages to tort claims that involve damage to real property. For example, this Court held that lost value represents the correct measure of damages for tortious injury to real property when the cost of repair exceeds the property's market value:

> When realty is injured the owner may recover the cost of repairing it, plus his expenses stemming from the injury, including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover its lost value, plus his expenses stemming from the injury including loss of use during the time he has been deprived of his property.

Jarrett v. E.L. Harper & Son, Inc., 235 S.E.2d 362, Syl. Pt. 2 (W. Va. 1977). Again, Corotoman acknowledges as much in its Opening Brief. Petitioner's Opening Brief at 20 ("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." (citation omitted)).

Regardless of whether damages are claimed for breach of a construction contract or for damage to real property, West Virginia law, consistent with virtually all jurisdictions, abhors windfall damages that amount to economic waste. In Brooks v. City of Huntington, 768 S.E.2d 97, 105 (W. Va. 2014), this court examined the "reason personal" exception to the damage rule that it articulated in Jarrett. Under the "reason personal" exception, if "the cost of replacing the

land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, *unless there is a reason personal to the owner for restoring the original condition*, damages are measured only by the difference between the value of the land before and after the harm." Brooks, 768 S.E.2d at 103 (emphasis in original) (citing *Restatement (Second) of Torts* § 929, cmt. b (Am. Law Inst. 1979)). Mindful that the "exception, as articulated [in the *Restatement (Second) of Contracts*] is empty noise and in practicality does little to further its stated goal of preventing a windfall or economic waste," the court recognized that an award of cost-of-repair damages could be in excess of the fair market value of the residential real property, but only under very narrow circumstances. In doing so, however, the court emphasized that cost-of-repair "damages grossly in excess of a property's pre-damage market value smacks of 'uncomfortable' economic waste," such that "to the extent that damages awarded for cost of repair to residential real property exceed the fair market value of the property before it was damaged, damages awarded for cost of repair must be reasonable in relation to its fair market value before it was damaged." Brooks, 768 S.E.2d at 105 (W. Va. 2014).[14]

While neither Jarrett nor Brooks directly address the proper measure of damages in a breach of construction contract claim, they directly support both the existence of the gross disproportionality rule for determining the proper measure of damages available under West Virginia law and the application of the alternative measure damages in this case. They also demonstrate why the District Court correctly determined that the alternative measure of damages represented the proper measure of damages in this case.

[14] The court in Brooks noted that "with respect to non-residential real property, however, Jarrett is still controlling authority and we leave for another day the determination as to whether Jarrett should be revisited with respect to such properties." Brooks, 768 S.E.2d at 105 n. 12.

Moreover, neither unjust enrichment nor economic waste are permitted under West Virginia law. See Realmark Devs. v. Ranson, 542 S.E.2d 880, 884–885 (W. Va. 2000) (noting that "if benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor," the party should not be allowed to retain such benefits)[15]; Brooks v. City of Huntington, 768 S.E.2d 97, 105 (W. Va. 2014) ("[r]ecognizing that damages grossly in excess of a property's pre-damage market value smacks 'uncomfortably' of economic waste, [and] to accommodate our policy concerns of full compensation, any such award must be subject to reasonable limitations." (citing Osborne v. Hurst, 947 P.2d 1356, 1360 (Alaska 1997) ("The purpose for limiting an award to those costs that have been or may be reasonably incurred appears to be a desire to reduce the economic waste that occurs when a party incurs repair costs in excess of the diminished value of the property."))); Adkins v. Stacy, 589 S.E.2d 513, 516 n. 2 (W. Va. 2003) (instructing the trial court on remand to fashion a remedy "in the interest of avoiding economic waste . . . .").

Put simply, while the "usual" or "standard" measure of damages for breach of construction contracts claims is the cost of completing the work, courts—including this Court—have long recognized the viability of awarding diminution in value damages when the cost of completion is grossly disproportionate to the value of the property at issue. While this Court has not issued a written opinion in which gross disproportionality existed that allowed application of the gross disproportionality rule, it has clearly recognized and adopted that rule. As such, the first certified question should be answered in the affirmative.

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[15] "Unjust enrichment" in this context represents "benefits" in the form of cost of repair damages that would be "inequitable and unconscionable" for Corotoman to receive when compared to the diminution in value of its property—and not a legal claim for "unjust enrichment," which is a "species of quasi contract relief." Gulfport Energy Corp. v. Harbert Private Equity Partners, LP, 851 S.E.2d 817, 823 (W. Va. 2000).

D. Certified Question No. 2: Under West Virginia law (1) how is gross disproportionality calculated, (2) 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 (3) what is the consequence of that party failing to meet its burden?

Answer: Gross disproportionality is calculated by examining the cost to complete the contracted-for work and the value of the property. The non-breaching party bears the burden of proving its permissible damages, and if it fails to carry that burden, it shall be awarded nominal or no damages.

1. Under West Virginia law, gross disproportionality is calculated by examining the cost of completion or repair and the value of the structure – not the cost of completion and the diminution in value of the property.

Under West Virginia law, gross disproportionality is evaluated by examining the cost of completion or repair and "the ***value of the structure***." Steinbrecher v. Jones, 153 S.E.2d 295, 304 (W. Va. 1967) (emphasis added).[16, 17] In Trenton Constr. Co., Inc. v. Straub, 310 S.E.2d 496, 499 (W. Va. 1983) this Court observed that Steinbrecher "noted that this [alternative] rule is sometimes applied where extensive reconstruction is necessary at a cost grossly disproportionate to the value of the structure." The gross disproportionality analysis under West Virginia law, therefore,

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[16] Petitioner argues that this Court defined the gross disproportionality doctrine based upon a comparison of the cost to complete and diminution in value in Steinbrecher. Petitioner's Opening Brief at 21 - 22. Not only does Corotoman's Opening Brief fail to cite any language in Steinbrecher in support of that statement, but the phrase "diminution in value" *does **not** appear in the decision*. Rather, this Court specially stated that "[t]he alternate rule in some states relating to the measure of damages as being the difference in value between what is built and what was supposed to have been built, sometimes applied where extensive reconstruction is necessary at a cost grossly disproportionate to the ***value of the structure***...." Steinbrecher, 153 S.E.2d at304 (emphasis added).

[17] Petitioner also argues, incorrectly, that the Airport Authority utilized its formulation of disproportionality in its briefing before the federal district court. Petitioner's Opening Brief at p. 21. It did not. JA1997 ("Nor is the proper measure of damages the cost of performing the overblast. Even if overblast could occur on the various unconnected properties, the cost of that overblast would be grossly disproportionate to the value of the land, and therefore, it should not be awarded as damages. At best, the proper measure of damages related to the breach of the overblast requirement is the difference in value between what should have been built (land overblasted) and what was built (land as is).... Corotoman, however, has no evidence of that difference in value, if any, and therefore, it cannot be recovered."). Petitioner's citation to JA 2278 appears to be an error as this is a page from the District Court's Memorandum Opinion and Order, not the Airport Authority's briefing.

compares the "cost to complete" with the "value" of the property at issue to determine whether "gross disproportionality" exists:

$$\text{Gross Disproportionality} = \frac{\text{Cost to Complete}}{\text{Value of Property}}$$

Notably, other courts define gross disproportionality in the same or similar ways without requiring specific evidence of "diminution in market value" of the property. See BRB Contrs., Inc. v. Web Water Dev. Ass'n, Inc., CIV. NO. 19-4095, 2021 U.S. Dist. LEXIS 26480, at *22–23 (D.S.D. Feb. 11, 2021) (noting that South Dakota courts have recognized a variety of "methods of proving diminution in value[,]" including by showing that "the destruction of usable property would be disproportionate to the benefit to be attained by remedying the defect" (citation omitted)); Nichols Constr. Corp. v. Virginia Mach. Tool Co., LLC, 661 S.E.2d 467, 473 (Va. 2008) (finding there must be a "proffer [of] competent evidence" that "an award of cost damages would be grossly disproportionate and result in economic waste."); Lochaven Co. v. Master Pools by Schertle, Inc., 357 S.E.2d 534, 538–39 (Va. 1987) (even without submission of evidence of "countervailing damage figure" from breaching party at trial, court found that "cost measure of damages will not be awarded in cases where . . . the cost of compliance is grossly disproportionate to the benefit to be achieved.").

Section 348(2) of the Restatement (Second) of Contracts likewise differentiates between the "probable loss in value to" the property owner and "the diminution in the market price caused by the breach." *Restatement (Second) of Contracts* § 348(2) (Am. Law Inst. 1981). The former—"probable loss in value to" the property owner—is used as part of the gross disproportionality

analysis. The latter is used to precisely calculate diminution in value damages that may be awarded.

The Airport Authority submits that in answer to the first prong of the second certified question, this Court should make it abundantly clear that, under West Virginia law, gross disproportionality is calculated by examining the cost of completion or repair and the value of the structure – not the cost of completion and the diminution in value of the property.

2. Under West Virginia law, the non-breaching party bears the burden of proof as to damages, including diminution in value damages, and the failure to carry that burden results in a nominal or no monetary award.

Corotoman's argument that the breaching party bears the burden of proving gross disproportionality[18] and the specific amount of the alternative form of damages fundamentally misconstrues West Virginia law concerning damages. Petitioner's Opening Brief at 22 ("the breaching party bears the burden of proving disproportionality, and thus the necessarily the burden of proving the diminution in value."). This argument rests upon the flawed premise that, under West Virginia law, gross disproportionality is calculated by comparing the cost of completion or repair against the diminution in value of the property rather than the value of the structure. That premise fails to reflect, however, that the burden of proving gross disproportionality requires only evidence of the value of the structure (See Steinbrecher and Jones) -- not the higher burden to prove damages for diminution in value, and the District Court recognized that distinction, though

[18] Even ***if*** the burden of proving gross disproportionality fell to the Airport Authority, the District Court correctly held that the cost to complete the overblasting ($4,381,080–$14,659,351) (JA 2274) was grossly disproportionate to the value of the Corotoman Property ($186,000). JA 976. In doing so, the District Court correctly determined that the Zdrojewski Appraisal, which appraised the property's value at $186,000 in 2010, "suffices to establish that the cost of completion . . . would be grossly disproportionate to the value of the land." JA 2282.

Corotoman refuses to do so. For this reason alone, Corotoman's argument must be rejected in its entirety.

Moreover, as a matter of fundamental West Virginia law, the party asserting a breach of contract claim bears the burden of proving all the elements of its claim, including proving all legally permissible damages caused by the breach of the contract. "A claim for breach of contract requires proof of the formation of a contract, a breach of the terms of that contract, and resulting damages." Sneberger v. Morrison, 776 S.E.2d 156, 171 (W. Va. 2015) (citing State ex rel. Thornhill Group, Inc. v. King, 759 S.E.2d 795 (W. Va. 2014);Wetzel County Savings & Loan Co. v. Stern Bros., Inc., 195 S.E.2d 732, 736 (W. Va. 1973)).

As for damages, West Virginia law continually describes rules and principles as being applicable to the party seeking damages from the breach of contract. For example, "[t]he general rule with regard to proof of damages is that such proof cannot be sustained by mere speculation or conjecture." Spencer v. Steinbrecher, 164 S.E.2d 710, Syl. Pt. 1 (W. Va. 1968). Rather, "[c]ompensatory damages *recoverable by an injured party* incurred through the breach of a contractual obligation *must be proved with reasonable certainty*." Taylor v. Elkins Home Show, Inc., 558 S.E.2d 611, 618–619 (W.Va. 2001) (citing Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro, 214 S.E.2d 823, Syl. Pt. 2 (W. Va. 1975) ("Compensatory damages recoverable *by an injured party* incurred through the breach of a contractual obligation must be proved with reasonable certainty." (emphasis added)); Sammon Bros. Constr. Co. v. Elk Creek Coal Co., 65 S.E.2d 94, 104 (W. Va. 1951) (""[T]he burden of proving damages rests upon the claimant, . . . So it is the duty of the plaintiff to establish by a preponderance of the evidence all provable elements which may enter into the quantum of damages sought to be recovered."); Upton v. Liberty Mut. Grp., Inc., No. 16-0354, 2017 W. Va. LEXIS 275, at *17–18 (W. Va. Apr. 21, 2017) ("[w]ith

regard to the petitioner's remaining claim, *he had to prove the following elements to show breach of contract: . . . (3) resulting damages.*" (emphasis added)). Simply put, the party claiming damages from a breach of contract under West Virginia law always bears the burden of proving damages.

Moreover, under West Virginia law, compensatory damages in breach of contract actions are "more strictly confined than in cases of tort[.]" Hurxthal v. Boom Co., 44 S.E. 520, 526 (W. Va. 1903). Only the primary and immediate result of the alleged breach of contract are to be examined when assessing a party's ability to collect compensatory damages; damages may not be awarded "beyond fair compensation for actual loss sustained." Hurxthal, 44 S.E. at 526. Therefore, any compensatory damages sought to be recovered by an aggrieved party must "fairly and reasonably be considered as arising naturally—that is, according to the usual course of things—from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach." Desco Corp. v. Harry W. Trushel Constr. Co., 413 S.E.2d 85, Syl. Pt. 1 (W. Va. 1991); Sellaro, 214 S.E.2d at 823, Syl. Pt. 2.

Further, in West Virginia, "[c]ontract damages are . . . intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." Kanawha-Gauley Coal & Coke Co. v. Pittston Minerals, CIVIL ACTION NO. 2:09-cv-01278, 2011 U.S. Dist. LEXIS 80411, at *10 (S.D. W. Va. July 22, 2011) (citing *Restatement (Second) of Contracts* § 347, cmt. a (Am. Law Inst. 1981)); see also Milner Hotels, Inc. v. Norfolk & Western Ry. Co., 22 F. Supp. 341, 344 (S.D. W. Va. 1993) ("[i]t is a fundamental principle of the law of contracts that a plaintiff is only entitled to such damages as would put him in the same position as if the contract had been

performed. . . . In other words, a plaintiff is not entitled to damages beyond his actual loss attributable to defendant's breach." (citing Horn v. Bowen, 67 S.E.2d 737 (W.Va. 1951)).

West Virginia recognizes, therefore, "that a party injured by the breach of a contractual obligation may recover compensatory damages 'as may fairly and reasonably be considered as arising naturally—that is, according to the usual course of things—from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach.'" Wickland v. Am. Mountaineer Energy, Inc., Case No. 1:17-cv-205, 2019 U.S. Dist. LEXIS 63313, at *38 (N.D. W. Va. Apr. 12, 2019) (quoting Sellaro, 214 S.E.2d 823, 827 (W. Va. 1975). See also Equinor USA Onshore Props. v. Pine Res., LLC, 917 F.3d 807, 818 (4th Cir. 2019) (sustaining District Court's conclusion that non-breaching party "failed to prove that it sustained any damages" from the breaching party's failure to drill two of three wells required by the contract, when the non-breaching party only presented evidence of "royalties to which it would have been entitled had the three wells been completed and producing. No separate evidence of damages sustained solely due to the failure to spud the second and third wells was introduced.").

"Recoverable damages in an action for breach of contract cannot be too remote, contingent or speculative, but must consist of actual facts from which a reasonably accurate conclusion could be drawn regarding the cause and amount of such damages." Kanawha-Gauley Coal & Coke Co. v. Pittston Minerals, CIVIL ACTION NO. 2:09-cv-01278, 2011 U.S. Dist. LEXIS 80411, at *10 (S.D. W. Va. July 22, 2011) (citing Exec. Risk, Inc. v. Charleston Area Med. Ctr. Inc., 681 F. Supp. 2d 694, 726 (S.D. W. Va. 2009)). In addition, in order to recover damages for a breach of contract, a plaintiff "must establish not only the amount of damages but also that the damages were proximately caused by the defendant's breach." Kanawha-Gauley Coal & Coke Co. v. Pittston

Minerals, CIVIL ACTION NO. 2:09-cv-01278, 2011 U.S. Dist. LEXIS 80411, at *10 (S.D. W. Va. July 22, 2011).

In sum, the rules and principles of West Virginia law concerning damages available for breach of contract claims squarely place the burden of proving those damages on the non-breaching party. Period. Failure to meet the burden of proof as to damages may, as Justice Cardozo recognized over 100 years ago, result in a damages award for an unquestioned breach of contract being "nominal or nothing." Jacobs & Youngs, Inc., 129 N.E. 889 at 891.[19] While superficially harsh, courts other than New York have reached a similar result. For example, the court in Commercial Cabinet Co. v. Mort Wallin of Lake Tahoe, 737 P.2d 515 (Nev. 1987) ("Mort Wallin I"), faced a similar situation to that presented here. In Mort Wallin I, Mort Wallin, a builder in charge of constructing stores in various casinos, requested that Commercial Cabinet, a cabinet maker, rebuild a men's store destroyed by fire. Commercial Cabinet rebuilt the men's store for $158,058, which included installation of Philippine mahogany veneer inside the store. Mort Wallin filed a lawsuit claiming defects in the mahogany veneer, while Commercial Cabinet filed a lawsuit claiming that Mort Wallin failed to pay for work performed. The trial court awarded damages to both parties, and both appealed. The critical issue on appeal, however, focused on Mort Wallin's claim that the trial court should have awarded at least $344,000 in damages for the cost to repair the defective paneling in the men's store. Commercial Cabinet argued that such an award "would constitute economic waste since the cost of rebuilding the entire store after the

[19] West Virginia law recognizes that, in some circumstances, a breach of contract or other legal duty may result in an award of nominal damages. See Mays v. Marshall Univ. Bd. of Governors, No. 14-0788, 2015 W. Va. LEXIS 1027 (W. Va. Oct. 20, 2015) (invasion of privacy); General Pipeline Constr., Inc. v. Hairston, 765 S.E.2d 163 (W. Va. 2014) (grave stone desecration); Flanagan v. Stalnaker, 607 S.E.2d 765 (W. Va. 2004) ($1 in nominal damages for willful interference in right to use property, including blocking access, cutting hole in pipeline, and harassment); Wines v. Jefferson County Bd. of Educ., 582 S.E.2d 826 (W. Va. 2003) and White v. Barill, 557 S.E.2d 374 (W. Va. 2001) (violation of Due Process right); Jones v. Credit Bureau, 399 S.E.2d 694 (W. Va. 1990) (violation of Fair Credit Reporting Act).

MGM fire was only about $158,000.00." Mort Wallin I, 737 P. 2d at 517. After holding that "a money damage award must be supported by substantial evidence to be sustained because the law does not permit arriving at a figure by conjecture[,]" and that a "plaintiff who proves a right to damages without proving the amount as well is only entitled to nominal damages[,]" the court remanded because "it is impossible to discern how the [trial court] arrived at the $110,000.00" awarded to Mort Wallin for the defective panels. Mort Wallin I, 737 P. 2d at 517.

On remand, the trial court "determined that $10,000 of Wallin's award was for remedial repairs to the defective wall panels and $100,000 was for diminution in value to the store." Mort Wallin v. Commercial Cabinet Co., 784 P.2d 954 (Nev. 1989) ("Mort Wallin II"). On appeal following remand, however, the court reiterated that the "party seeking damages has the burden of proving both the fact of damages and the amount thereof[,]" and "the plaintiff must provide to the court an evidentiary basis upon which it may properly determine the amount of plaintiff's damages." Mort Wallin II, 784 P.2d at 955. Despite acknowledging that "the fact that the property suffered at least some diminution in value seems obvious[,]" the court nonetheless held that "Wallin failed to establish a proper evidentiary foundation for the $100,000.00 diminution award granted by the district court." Mort Wallin II, 784 P.2d at 955. As a result, the court concluded that, "[b]ecause Wallin failed to carry its burden to reasonably establish the amount of the diminution in property value, it is only entitled to the $10,000.00 for remedial repairs." Mort Wallin II, 784 P.2d at 956. See also Ervin Constr. Co. v. Van Orden, 874 P.2d 549, 554 (Idaho Ct. App. 1992) (finding that the injured party must prove its damages regardless of the methodology used, "or damages are not recoverable."); BLB Aviation, 808 F.3d at 391 (recognizing that, under Nebraska law, the burden of proving damages with sufficient certainty fell on party bringing the breach of contract claim).

Very simply, West Virginia law, like the law of Nevada, Idaho, and Nebraska, requires the party claiming damages for a breach of contract to prove both entitlement to and the amount of damages to which the party is legally entitled. Corotoman, therefore, has always borne that burden. For that reason, Corotoman's citations to out-of-jurisdiction authority to the contrary are simply inapposite as those cases run counter to long-established and fundamental West Virginia law governing the burden of proving breach of contract damages. Having lost its gamble to cash in on its lottery ticket to gain an exorbitant windfall in the form of cost of completion damages, it cannot now complain about the consequences of failing to meet its burden to prove its legally permissible damages under West Virginia law. As such, the Airport Authority submits that in answer to the second prong of the second certified question, this Court should make it abundantly clear that, under West Virginia law, the non-breaching party has the burden of proof as to damages and the failure to do so will result in nominal to no award by the adjudicating court.

VII. CONCLUSION

The Airport Authority submits that this Court should answer the certified questions presented by the Fourth Circuit as outlined above.

Dated: March 5, 2025

CENTRAL WEST VIRGINIA REGIONAL AIRPORT AUTHORITY

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NO. 24-661

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COROTOMAN, INC.,

Petitioner,

v.

CENTRAL WEST VIRGINIA REGIONAL AIRPORT AUTHORITY,

Respondent.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2025, I electronically filed the foregoing **Response Brief of Respondent** via File & ServeXpress which will provide electronic notification to the following counsel of record:

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