RECORD NO. 11-1988

In The

United States Court Of Appeals

For The Fourth Circuit

EDWARD PRIMOFF; SUZANNE PRIMOFF,

Plaintiffs – Appellees,

v.

KENNARD WARFIELD, JR.; MARY WARFIELD,

Defendants – Appellants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT BALTIMORE**

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

A. The District Court had jurisdiction over this civil action pursuant to 28 U.S.C. § 1331.

B. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

C. This appeal is from a final judgment for the Plaintiffs entered on December 8, 2010, (Joint Appendix ("J.A.") at 656), following a jury verdict on December 7, 2010. (*Id.* at 654). Thereafter, on August 30, 2011 the Honorable District Judge William N. Nickerson denied Defendants' Motion for Judgment as a Matter of Law, Remittitur, and/or a New Trial. (*Id*. at 665). Defendants filed a timely Notice of Appeal on September 12, 2011. (*Id*. at 666).

D. The final judgment of the District Court disposed of the entire case as to all issues and all parties.

STATEMENT OF THE ISSUES

Defendants-Appellants Kennard and Mary Ellen Warfield ("Appellants" or the "Warfields") raise the following substantive issues by the instant appeal:

A. Whether the Warfields were entitled to a judgment as a matter of law on the issue of Plaintiffs'-Appellees' Edward and Suzanne Primoff's ("Appellees" or the "Primoffs") consequential damages, where the Primoffs sought lost profits but failed to prove such damages (1) were reasonably foreseeable, (2) proximately caused by the Warfields, or (2) with reasonable certainty.

B. Whether the Primoffs failed to mitigate their damages when they refused to proceed with the sale of the property for an amount which would have made them whole.

C. Whether the jury improperly returned separate and duplicative damage awards on the Primoffs' breach of warranty and breach of contract claims, where both claims arose out of the same acts and caused the same loss.

STATEMENT OF THE CASE

This controversy arises out of an agreement between the parties (the "Agreement") whereby Appellees Edward and Suzanne Primoff conveyed to Appellant Kennard Warfield real property in Carroll County, Maryland (the "Property"), a portion of which was in the process of development for residential housing (known as "Freedom Hills Farms"). The Agreement called for Appellant to complete development of Freedom Hills, subdivide, and return the balance of the Property (the "Resulting Lands") to the Primoffs. The Primoffs claimed the Resulting Lands were returned to them encumbered by environmental easements granted to Carroll County in contravention of the Agreement.[1]

The Primoffs filed suit in state court against the County seeking to extinguish the disputed easements. *Primoff v. Board of County Commissioners*, No. 06-C-5044402 (Cir. Ct. Carroll Cnty). The Warfields moved to intervene in that litigation; the Primoffs opposed intervention and the court denied the Warfields' motion. The court granted the Primoffs the relief requested and ordered the Easement extinguished in June, 2006. Thus the Primoffs were placed in precisely the position they claimed the Agreement provided.

[1] There were three disputed easements on the Property. However, it was one easement, the "Floodplain Easement," which covered a large area of the Resulting Lands and which was the focus of the litigation. For simplicity's sake, Appellants refer to this "Easement."

The Primoffs thereafter commenced this action against the Warfields in the District of Maryland on October 19, 2007. (J.A. at 11-30). The Complaint included several alternative theories of recovery, including fraud, breach of contract, and breach of warranty of title. The Primoffs sought recovery of their expenses in the Carroll County litigation and lost profits based on a purported inability to sell the Resulting Lands due to the Easement.[2] After motion practice, the Warfields filed an Answer and Counterclaims on April 7, 2008. (*Id.* at 31-56). The Warfields' counterclaims were grounded in, *inter alia*, breach of contract and fraud. *Id*. The Primoffs answered the counterclaims on April 29, 2008. (*Id.* at 57-65).

A jury trial commenced on November 15, 2010 and comprised five days of testimony. At the close of the Plaintiffs' case-in-chief, the Warfields moved for a directed verdict on various grounds, including that the Primoffs had failed to prove their fraud claims, had failed to prove substantial damages other than their fees in the Carroll County case, and had failed to mitigate their damages. (J.A. at 326:8 *et seq.*). The trial court, Honorable William M. Nickerson, granted the Warfields a directed verdict on the Primoffs' fraud claims, and reserved with respect to the

[2] The parties stipulated that the Primoffs incurred $24,000 in expenses for the Carroll County litigation. That portion of the jury's award is not at issue in this appeal.

Warfields' other motions. (*Id*. at 327:9-13; 328:13-21; 329:24-330:5). The Warfields renewed their motions at the close of the evidence. (*Id*. at 387:18-22).

The Warfields argued there was insufficient evidence to create a jury question as to the Primoffs' consequential damages and duty of mitigation. Judge Nickerson, however, submitted those issues to the jury. Late in the afternoon on December 7, 2010, after less than an hour of deliberations, the jury returned a verdict in favor of the Primoffs on their claims, and against the Warfields on their counterclaims. The jury awarded $250,000 on the Primoffs' breach of contract claim, and $274,000 (the same $250,000 plus the aforementioned $24,000 in costs to which the parties had stipulated) on the Primoffs' warranty of title claim. (J.A. at 654-55).

The Court polled and excused the jury, then asked if either party wanted to put anything on the record. Counsel to the Warfields made record motions for a judgment as a matter of law, judgment notwithstanding the verdict, and remittitur. (J.A. at 400F:25-400G:8). The Court asked for briefs. (*Id*. at 400G:9-15). Thereafter, on August 30, 2011, Judge Nickerson denied Defendants' Motion for Judgment as a Matter of Law, Remittitur, and/or a New Trial. (*Id*. at 665). Defendants filed a timely Notice of Appeal on September 12, 2011. (*Id*. at 666-68).

STATEMENT OF FACTS

This litigation arises out of a contractual arrangement between the Primoffs, owners of real property in Carroll County, Maryland, and Kennard Warfield, a developer from Howard County, Maryland. The Primoffs' property comprised just over 194 acres, and in 2002 they determined to take advantage of a favorable change in local zoning laws to develop a portion of the property, known as the Freedom Hills Farms development. (Edw. Primoff, J.A. at 103:13-104:10).

Appellee Edward Primoff is a sophisticated real estate investor and lender who resides with his wife Suzanne in Florida and Maryland. (Edw. Primoff, J.A. at 139:2-5; 169:2-9). He was the co-founder and a president of the Carroll County Landowners Association, an organization formed to advocate on behalf of local property owners. (*Id*. at 148:10-19). Mr. Primoff unsuccessfully ran for election as a Carroll County Commissioner in 2000 or 2002. (*Id.* at 148:25-149:6). He subsequently became a member of the Carroll County Zoning and Ordinance Review Committee ("ZORC"), which made recommendations benefitting Mr. Primoff personally. (*Id.* at 149:7-150:2). After he became a member of ZORC, the County changed its regulations to permit landowners such as Mr. Primoff to combine acreage zoned for agricultural and conservation uses in order to increase lot yield. (*Id*. at 150:6-14). Approximately three weeks after the county enacted

those regulations, the Primoffs submitted the Concept Plan for Freedom Hills Farms to Carroll County for approval. (*Id.* at 151:7-12).

The Primoffs retained Carroll Land Services, Inc. ("CLSI") to shepherd the project through the County's Preliminary Plan Approval in November, 2002. (*Id.* at 72:12-73:2). Because the Primoffs did not want to carry the project further, they solicited bids from third parties to complete Freedom Hills Farms. (*Id*. at 152:16-20). Appellant Kennard Warfield, a developer from Howard County, Maryland, agreed to pay the Primoffs $3.5 million for the right to bring Freedom Hills Farms to completion within five years. (J.A. 647 at ¶ 2).

On December 16, 2002 the parties entered into a written contract (the "Agreement"). (J.A. at 647-652). Although issues of real estate law and conveyances complicated the document, the basic agreement between the parties was simple: The Primoffs conveyed the entire 192-acre tract that they owned to Mr. Warfield, but remained in their home on southern portion of the property. Mr. Warfield agreed to complete the Primoffs' development of the northern portion of the property and, upon receiving final approval from the County for Freedom Hills Farms, to return the southern portion, comprising just over 126 acres (the

"Resulting Lands"), to the Primoffs. (*Id.*).[3] ***There is no language in the Agreement which suggests the Primoffs intended to resell the Resulting Lands.***

The Agreement recognizes in order to complete Freedom Hills Farms, the Resulting Lands will subject to certain environmental protection easements which are identified on an exhibit to the Agreement and which, subject to allowances for minor deviations, the Agreement permitted Mr. Warfield to grant the County. (J.A. 647 at ¶ 3).[4] There is an area of the Resulting Lands which is traversed by a stream and appurtenant wetlands which was otherwise subject to restrictive Federal, state and local laws and regulations. An exhibit to the Agreement showed both the stream and the wetlands within an approximated 100-year floodplain, but did not identify a Floodplain Easement. (J.A. 422).

Three witnesses from CLSI, whom Mr. Warfield kept on to complete the Primoffs' development, as well as one witness from Carroll County, testified that the County required a Floodplain Easement as a condition of its granting final approval. (Covington, J.A. at 367:9-12; Hackett, J.A. at 332:21-333:7; Donoff, J.A. at 354:14-23; Rickell, J.A. at 363:10-13). Although the Primoffs' expert opined the Easement was not required by applicable regulations, that the County demanded, and CLSI recommended, Mr. Warfield grant the Easement was not

[3] In addition to the home the Primoffs built, the Resulting Lands also contained their private airstrip and hanger. (Edw. Primoff, J.A. at 71:14-20).

disputed. (*Id*.). The Floodplain Easement Mr. Warfield granted the County as a result was coextensive with the 100-year floodplain, and contained the otherwise regulated stream and wetlands areas. (Rickell, J.A. at 362:1-12).[5] However, none of the Primoff's home, the outbuildings, the hangars, the airstrip, or other improvements to the Resulting Lands were contained in or otherwise affected by the Easement.

Subsequently, in December, 2004, Mr. Warfield conveyed the Resulting Lands back to the Primoffs, who objected to the Easement. (Edw. Primoff, J.A. at 102:18-103:1). The Primoffs instituted litigation against the County in state court to remove the Easement, along with other encumbrances which were not the focus of the instant litigation. The Primoffs successfully fought the Warfields attempt to intervene in that litigation, which resulted in the extinguishment of the Easement in June, 2006. (*Id*. at 126:17-24).

The Primoffs made arrangements to sell the Resulting Lands by auction in May, 2005. (*Id*. at 116:22-117:1). Although the Freedom Hills Farms project had stripped the Resulting Lands of any further residential subdivision rights, the auction was advertised as a "Rare Development Opportunity." (*Id.* at 180:1-181:15). At the time of the auction, the Easement was a matter of public record. (*Id*. at 138:17-23). The Primoffs received several offers to purchase the Resulting

[5] The jury found the Easement was in breach of the Agreement, a finding Appellants do not challenge on this appeal.

Lands, including a high bid of $5.2 million, ***all of which they rejected without comment or inquiry.*** (*Id*. at 142:14-18; 146:1-6; 144:1-5). Plaintiff Suzanne Primoff, whose deposition was read into evidence, admitted her husband refused to proceed with the sale because he "wanted it to be his decision on what to do with the property," and "at the time the auction took place, there really wasn't a lot of time to discuss…whether to take the bid." (Suzanne Primoff, J.A. at 147:1-17). Edward Primoff agreed with this testimony. (Edw. Primoff, J.A. at 147:1-18).

Thus, the Easement Period comprised just over 18 months. In addition to their attorney's fees incurred in the Carroll County litigation, the Primoffs sought consequential damages based on contract and breach of warranty arising out of the Easement Period. The Primoffs still owned the unencumbered Resulting Lands at the time of the trial.

SUMMARY OF ARGUMENT

May a plaintiff summarily reject *bona-fide* offers to sell its property, then collect damages from a defendant on the grounds that the property could not be sold? Equity, law, and common sense all require the same answer: no.

As litigants, the Primoffs faced a vexing problem: they had received their entire $3.5 million in monetary compensation under the Agreement back in 2002, they still owned the Resulting Lands, and the brief period the Easement was on the property ended before this lawsuit even was initiated. ***In other words, they were in precisely the position they expected to be when they entered into the Agreement***. Proving damages for breach of contract and of warranty, beyond what they had paid to extinguish the Easement, was not possible in the absence of evidence of other damages suffered during the Easement Period. The Primoffs introduced no evidence of any actual diminution in the value of the Resulting Lands, or other compensable loss, directly caused by the Easement. Instead, the Primoffs claimed they intended to sell the property but were prevented from doing so by the Easement, and sought profits "lost" when the value of the Resulting Lands decreased during the recent recession. Appellants are aware of no case in this or any other jurisdiction awarding such damages on the facts of this case.

A. THE PRIMOFFS FAILED TO PROVE LOST PROFITS.

The Primoffs sought $1 million as lost profits, based on their purported inability to sell the Resulting Lands between 2005 and 2008 as a result of the Easement. Because the real estate market coincidentally declined, they sought as damages the decrease in value of the Resulting Lands. As a matter of law they failed to introduce legally sufficient evidence to recover damages on that basis.

Maryland law applies to the Primoffs claims. Under that state's settled jurisprudence, damages must be (1) foreseeable by the defendant at the time of contracting, (2) proximately caused by the defendant's conduct, and (3) calculable with certainty. The strictest level of proof is required where, as here, a plaintiff seeks collateral lost profits. The evidence introduced at trial on each of the above requirements does not meet this standard. The failure to prove any one is fatal to the Primoffs' damage claim.

First, the Primoffs offered no evidence showing at the time he entered into the Agreement, Mr. Warfield knew or should have known they intended to resell the Resulting Lands. The Agreement contains no language to this effect. Nor did any witness, including the Primoffs, testify that reselling the Resulting Lands was contemplated by anyone at the time of contracting. No purported effort was even made to sell the property until 2005, nearly three years after the Agreement was signed. The decision below effectively eliminates the foreseeability requirement in

any case involving a contract to sell real property, and thus does not follow applicable state law.

Second, they failed to introduce any competent evidence from which a reasonable trier of fact could conclude that the Easement proximately caused the Primoffs' purported injury. No witness testified that at any time, any person declined to purchase the property due to the Easement. They introduced no evidence, expert or otherwise, that the Easement affected any potential purchaser's estimation of the value of the Resulting Lands. The only evidence on this point was to the contrary. It is undisputed that the Primoffs ***turned down*** offers tendered during the Easement Period, including at least two which were ***higher*** than the value their expert placed on the property.

Third, even if the above deficiencies of proof are overlooked, the Primoffs nevertheless failed to prove lost profits with reasonable certainty. The Primoffs admitted to no sales efforts for approximately one year due to personal reasons, and their expert testimony proved only a decline in value without specifying whether the decline occurred during or after the Easement Period. The jury was left to speculate whether, when, and on what terms a sale might have taken place.

Each of these failures of proof alone is fatal to the Primoffs' damages claims, whether for breach of contract or breach of warranty of title. Accordingly,

this Court should remand the case to the District Court with an order to vacate all but $24,000 of the award below.

B. THE PRIMOFFS FAILED TO MITIGATE DAMAGES.

It is inherently unjust for a plaintiff to refuse to consider offers to sell his property, then seek lost profits on the grounds that the property could not be sold. Maryland law requires a plaintiff to use "all reasonable efforts" to minimize his or her damages. The Primoffs sought lost profits from the Warfields based on the contention that the Easement prevented their selling the Resulting Lands. The Primoffs admitted receiving a $5.2 million offer for the property which they rejected without inquiry. Both Appellees admitted the decision was voluntary and caused by Mr. Primoff's cold feet. At trial, Mr. Primoff claimed he did not want to risk a lawsuit due to the Easement. However, the Easement was a matter of public record when the offer was made, and Mr. Primoff admitted never speaking to the buyer to determine whether, and if so to what extent, the Easement affected the offer. He admitted, however, an advertisement for the auction which characterized the property as a "Rare Development Opportunity" was misleading.

If the duty to mitigate damages means anything, it must require that a plaintiff given an opportunity to completely recoup any potential loss take minimum steps to investigate that opportunity, particularly when he can do so free of charge and free of risk. Here, the Primoffs did nothing to investigate the

opportunity, and thus cannot be said to have used "all reasonable efforts" to minimize their damages.

C. THE JURY IMPROPERLY AWARDED DUPLICATIVE DAMAGES.

The Warfields' final assignment of error is the jury's duplicative awards on the Primoffs' breach of warranty and breach of contract claims. It is settled law that a plaintiff may not recover twice for one wrong which gives rise to alternative theories of recovery. Both of the Primoffs' claims arise from the exact same operative facts, and the Primoffs did not attempt to prove any injury particularly attributable to, or compensable under, either claim. Moreover, although the awards appear to differ in amount, the difference is equal to the stipulated damages the Primoffs incurred extinguishing the Easement. Excluding those damages, the jury awarded the same $250,000 for the Primoffs' breach of contract and breach of warranty claims. Two awards for the same breach (*i.e.*, reconveyance of the Resulting Lands with the Easement in breach of the Agreement and the warranty of title), contravenes the District Court's instructions to the jury and applicable law. Therefore, if this Court upholds the consequential damages award, it nevertheless should reduce the award by $250,000.

ARGUMENT

Appellants submit three legal challenges to the District Court's affirmance of the jury's award: (1) The Primoffs failed to prove an entitlement to substantial damages, (2) the Primoffs failed to mitigate their damages, and (3) the award is improperly duplicative.

Standard of Review

The Warfields' post-trial motion sought in the alternative a judgment as a matter of law, remittitur, or a new trial. (J.A. at 400E:25-400F:8). This Court reviews *de novo* the District Court's denial of Defendant's Rule 50(b) motion for a judgment as a matter of law. *Sloas v. CSX Transp. Inc.*, 616 F.3d 380, 392 (4th Cir. 2010). In conducting its review, the Court asks " 'whether there was a legally sufficient evidentiary basis for a reasonable jury, viewing the evidence in the light most favorable to the prevailing party, to find for that party. If reasonable minds could differ about the verdict, we are obliged to affirm.' " *King v. McMillan,* 594 F.3d 301, 312 (4th Cir.2010) (quoting *ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co.,* 472 F.3d 99, 113 (4th Cir. 2006)) (internal citations omitted); *see also* Fed. R. Civ. P. 50(a)(1) (providing a court may grant a party judgment as a matter of law if "a reasonable jury would not have a legally sufficient evidentiary basis to find for" the nonmoving party). The Court will review the entire record, "disregard[ing] all evidence favorable to the moving party that the jury is not

required to believe." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

The Warfields' appeal of the District Court's denial of its alternative motions for remittitur and a new trial are reviewed for abuse of discretion. *Sloane v. Equifax Info. Servs., LLC*, 510 F.3d 495, 502 (4th Cir. 2007). In denying a motion for remittitur, "[a] district court abuses its discretion only by upholding an award of damages when the jury's verdict is against the weight of the evidence or based on evidence which is false." *Id.*

Applicable Law

Since the District Court's jurisdiction was based on diversity, the damages recoverable by the Primoffs and the sufficiency of the evidence are controlled by the substantive law of Maryland. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 435 (1996); *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*. 492 U.S. 257, 279 (1989).[6] Under Maryland law, "the measure of damages for the breach of an express warranty in the sale of real property is the same as the measure of damages for breach of contract." *Hall v. Lovell Regency Homes, Ltd.*

[6] The Agreement references Maryland law, but does not have a choice of law provision as such. (J.A. 649 at ¶ 10). Maryland adheres to the doctrine of *lex loci contractus. American Motorists Insurance Company v. Artra Group, Inc.*, 338 Md. 560, 570, 659 A.2d 1295, 1300 (1995). Since Maryland was the place of contracting, Maryland law applies to the Primoffs' claims.

Partnership, 121 Md. App. 1, 13, 708 A.2d 344, 350 (1998) (citations omitted).[7] Appellants therefore discuss the Primoffs' two alternative claims for relief together.

I. THE PRIMOFFS FAILED TO PROVE ANY OF THE THREE REQUIREMENTS TO RECOVER DAMAGES FOR COLLATERAL LOST PROFITS UNDER MARYLAND LAW.

The record below is devoid of any evidence the Easement directly caused any damage to the Resulting Lands other than the stipulated cost of restoration (*i.e.*, the $24,000 stipulated amount the Primoffs spent removing the Easement). The Primoffs did not introduce any evidence of lost rental income during the Easement Period. No effort was made to characterize or quantify any other injury caused by the Easement during the Easement Period.[8] Two real estate valuation experts testified for the Primoffs: Mr. Betz, who appraised the property at $4 million in 2005 (J.A. at 591), and Mr. Wolfing, who appraised the property at $3 million in 2008. (J.A. at 552). ***Neither expert considered the Easement's effect***

[7] There are few recent reported cases considering breach of warranties of title. Authority from other jurisdictions indicates in the event of a breach of a covenant warranting a property is free from encumbrances, where, as here, the encumbrance can be removed, the plaintiff may recover the expense to cure the defect as well as consequential damages. *See Loveland Essential Group, LLC v. Grommon Farms*, 231 P.3d 1109, 1114 (Colo. Ct. App. 1st Div. 2010).

[8] This is not surprising, since the Floodplain Easement was virtually coextensive with existing features of the Resulting Lands which significantly limited its use, including wetlands, a stream, and the one hundred year floodplain. (Lennon, J.A. at 249:10-12; Wolfing, J.A. at 276:18-23; Rickell, J.A., at 362:1-2; J.A. 422**).**

on the value of the Property. (Wolfing, J.A. at 280:5-7; J.A. at 552, 591). The Primoffs' own evidence thus proved the decrease in the value of the property was caused by something other than the Easement.

Damages recoverable for breach of contract are those which will place the injured party in the monetary position he would have occupied if the contract had been properly performed. *Beard v. S/E Joint Venture*, 321 Md. 126, 133, 581 A.2d 1275 (1990), *reconsideration denied*, 322 Md. 225, 587 A.2d 239 (1991). A fact pattern analogous to the instant case is a contract action for a breach of a real estate construction agreement. There, the primary measure of damages is the cost of repairing or remedying the defect. *Hall, supra*, 121 Md. App. at 12-13, 708 A.2d at 349. Where restoration is infeasible or impracticable, an acceptable alternative measure of damages is the loss in value caused by the breach. *Id.*

In this case, the jury awarded the Primoffs their cost of restoration; *i.e.*, the $24,000 spent removing the Easement which is not challenged on this Appeal. The only theory on which the jury could have awarded the Primoffs additional damages for breach of contract or warranty was on a theory of lost profits, as the District Court indicated. (Memorandum, J.A. at 658-59). The Primoffs sought lost profits caused by a purported inability to sell the Resulting Lands during the Easement Period. (*Id.*).

Three rules are applied to limit the recovery of lost profits under Maryland law: "(i) a plaintiff must show that a breach by a defendant was the cause of the loss; (ii) damages may not be awarded unless, when the contract was executed, the defendant could have reasonably foreseen that a loss of profits would be a probable result of a breach; and (iii) lost profits may not be recovered unless they can be proved with reasonable 'certainty.'" *M & R Contractors & Builders, Inc. v. Michael*, 215 Md. 340, 346, 138 A.2d 350, 353 (1958) (citations omitted).

Maryland law distinguishes between two types of lost profits: ***direct lost profits***, such as where the defendant fails to convey property which is worth more on the date settlement was to take place than on the date of contracting, and ***collateral lost profits***, such as where, as here, the plaintiff is a buyer who claims anticipated earning upon resale of the property to a third party. *Id.* at 346, 138 A.2d at 353-54; *Hoang v. Hewitt Ave. Associates, LLC*, 177 Md. App. 562, 595-96, 936 A.2d 915, 935-36 (2007). In *M & R Contractors*, the Maryland Court of Appeals underscored the necessity for strict proof of collateral lost profits:

> [A] plaintiff is less likely to be permitted to show that the breach has caused him to be unable to make or perform other contracts collateral to the one broken, contracts to which the defendant was not himself a party. The profits from these contracts may be regarded as too remote or too speculative.

215 Md. at 347, 138 A.2d at 354 (citation, quotation omitted). Thus, the Primoffs' claim to recover collateral lost profits as damages faces the most demanding level

of proof. *Id.* *See also Hoang*, 177 Md. App. at 610, 936 A.2d at 943 (Maryland law "requires that a plaintiff to recover damages prove proximate causation, foreseeability, and reasonable certainty; and in collateral lost profit cases, it strictly applies those requirements, particularly that of reasonable certainty").[9]

The inability to meet this standard with respect to any one of the three requirements identified above is fatal to a claim for lost profits. The Primoffs' evidence was legally insufficient with respect to all three. The District Court should not have permitted the jury to rule on the Primoffs' consequential damages.

A. THE PRIMOFFS FAILED TO PROVE THE EASEMENT PROXIMATELY CAUSED THEIR DAMAGES; THERE WAS NO EVIDENCE THE EASEMENT PREVENTED THEM FROM SELLING THE RESULTING LANDS.

As noted above, the Primoffs offered no evidence of any direct loss caused by the Easement, such as lost rental income. They did not ask either of their experts to render an opinion as to the effect of the Easement on value or salability the Resulting Lands. (J.A. at 552 and 591). Instead, they claimed that the Easement prevented them from selling the property, which coincidentally declined in value. There are two problems with the Primoffs' evidence, however. First, they did not prove by a preponderance of the evidence that the Resulting Lands decreased in value during the Easement Period. Second, the only evidence

[9] *Hoang*, 177 Md. App 593-611, 936 A.2d at 934-44, contains an exhaustive analysis of the evolution of Maryland law on the recovery of lost profits.

regarding the salability of the Resulting Lands during the Easement Period is 180 degrees from the Primoffs' theory of the case.

1. The Primoffs did not sustain their burden of proving the Resulting Lands decreased in value during the Easement Period.

The Primoffs did not prove the Resulting Lands decreased in value during the Easement Period. As noted above, they called two expert appraisers, both of whom appraised the Resulting Lands without any consideration of the Easement. Mr. Betz appraised the property in 2005 at approximately $4.2 million. (J.A. 591). Mr. Wolfing appraised the property in 2008 at approximately $3 million. (J.A. 552). If their opinions are credited, as this Court is bound to do, the Primoffs proved only that the value of the Resulting Lands decreased between 2005 and 2008 for a reason unrelated to the Easement. However, Mr. Primoff admitted the Easement was removed in June, 2006. (Edw. Primoff, J.A. at 126:21-24). There was no evidence from which the jury could determine when the Resulting Lands decreased in value; instead they were left to speculate whether it occurred during the Easement Period.

What evidence the Primoffs did introduce is inconsistent with their theory. Mr. Wolfing admitted "that 2007 saw a leveling off of overall property values. And so, this value that I concluded, had I appraised [the Resulting Lands] in 2007, I probably would have come up with a higher valuation." (Wolfing, J.A. at 273:4-

7). The decrease in the value of the Resulting Lands between 2007 and 2008 cannot be attributed to Appellants since the Easement had already been extinguished six months earlier. This failure of proof alone is a sufficient basis on which to vacate the award below.

2. There was insufficient evidence for a reasonable juror to find that the Easement prevented the Primoffs from selling the Resulting Lands, since their only attempt to sell the property was successful.

In the six years between their receipt of the Resulting Lands and the trial in this case, evidence showed the Primoffs made only one effort to sell the property, in 2005. Mr. Primoff testified that he did not attempt to sell the property sooner because he was preoccupied by his and his daughter's illnesses and damage to their Florida home from a hurricane; *i.e.*, for reasons having nothing to do with the Easement or the Warfields. (Edw. Primoff, J.A. at 115:10-116:21). In 2005 the Primoffs conducted a two-day auction of their personal property and, the following day, the Resulting Lands. (*Id.* at 117:12-19). The Primoffs introduced no evidence of a subsequent attempt to sell the Resulting Lands.

Far from demonstrating an inability to sell the land due to the Easement, the auction proved just the opposite. At the time of the auction, the Easement was a matter of public record. (*Id.* at 138:17-23). The Primoffs received several offers to purchase the Resulting Lands, including a high bid of $5.2 million, from which the Primoffs voluntarily chose to walk away. (*Id.* at 142:14-18; 146:1-6; 144:1-3).

The evidence, viewed in a light most favorable to the Primoffs, establishes the cause of the Primoffs' abandonment of the auction was Mr. Primoff's failure to disclose the Easement.

Mr. Primoff admitted he does not know if the winning bidder was aware of the Easement, whether the Easement affected the bidding, or whether any of the bidders would have closed on the Resulting Lands with the Easement. (*Id*. at 154:19-25; 155:1-8; 143:23-25). Mr. Primoff does not know whether any of the bidders would have purchased the Resulting Lands for a reduced price; for instance, had they been willing to accept up to $1 million less than the high bid, the Primoffs would have been made whole.

The District Court stated the Primoffs "testified that they were ***unable*** to complete the auction for $5.2 million in 2005 due to the easement…" (J.A. at 662) (emphasis added). However, this finding is clearly erroneous; the Primoffs were ***unwilling*** to complete the auction. *See Jiminez v. Mary Washington College*, 57 F.3d 369, 378-79 (4th Cir. 1995) (Court not bound to adopt findings which are clearly erroneous). Although the reason for the Primoffs' decision was disputed, there was ***no evidence*** the Primoffs' decision was anything other than voluntary. Mrs. Primoff, whose testimony was read into evidence, admitted they did not pursue the offer because events were happening too fast and her husband was not ready to make a decision. Edward Primoff agreed with this testimony:

Let me read to you from your wife's deposition. This is Volume II of the deposition of Suzanne Primoff. Mr. Boddie it's at -- begins at page 344, line 3.

"Question: Did he tell you why he didn't accept the bid" -

- referring to Mr. Primoff?

"Answer: Not in detail.

"Question: Did he tell you generally why he didn't accept the bid?

"Answer: Well, yes.

"Question: Please tell me?

"Answer: Okay. He said that he wanted it to be his decision on what to do with the property.

"Question: What did you understand him to mean by that?

"Answer: That at the time the auction took place, there really wasn't a lot of time to discuss it, and he said it was going to be his decision on what to do.

"Question: There was not a lot of time to discuss what?

"Answer: Whether or not to take the bid."

A That's all correct. I don't dispute any of that.

(Edw. Primoff, J.A. at 147:1-18).

Mr. Primoff also testified he turned down the offer because he did not want to "buy a lawsuit." (Edw. Primoff, J.A. at 136:19-137:6). However, as noted above, he rejected all offers without ever speaking to the winning, or any other, bidder. (*Id*. at 138:6-23). A reasonable effort to determine the bidders' knowledge and whether the Easement affected the bidders' offers posed no risk whatsoever. The Easement itself posed no risk of triggering a lawsuit, since it is settled law in Maryland that a purchaser of real property is bound by every recorded encumbrance, including the Easement. *See Beins v. Oden*, 155 Md. App. 237, 243, 843 A.2d 147, 151 (2004) (purchaser of land charged with implied notice of and bound by recorded easement). Even were that not the case, Mr. Primoff could have eliminated any purported risk associated with the Easement by simply disclosing its existence.

The risk of a lawsuit arose, therefore, from Mr. Primoff's own acts and omissions. His failure to disclose the Easement, which Mr. Primoff knew he was obligated to do, was the basis for his concern, not the Warfield's grant of the Easement to the County. ***In his direct testimony, Mr. Primoff admitted he never intended to accept any of the bids.*** Instead, he failed to disclose the Easement to the auctioneer and the bidders, assuming he could proceed with litigation to remove the Easement. He would then attempt to contact the bidders:

> What we were going to do is get everybody to bid -- which is, I think, what you would have done -- go to the

> county and get the -- what anybody would have done. We'd go to the county, get the -- after the sale and get the easement off. You'd have their names, all the money we spent wouldn't be in vain, and call the people up and say, You were at the auction. We would now set the auction that would couldn't sell at the time, but we would get back to people, and that's exactly what we did.

(Edw. Primoff, J.A. at 122:9-18).[10] In short, when viewed in a light most favorable to the Primoffs, the only permissible conclusion is that their decision to abandon the auction of the Resulting Lands was voluntary.[11]

There was no evidence of any other attempt to sell the Resulting Lands. Not a single witness testified that he or she would have purchased the property but for the presence of the Easement. Nor did the Primoffs identify any prospective purchaser of the Resulting Lands who withdrew or canceled on account of the Easement. There was no evidence that any broker declined to represent the Primoffs in connection with the property. In fact, the Primoffs' experts testified that the Resulting Lands were not even listed for sale in 2005 and 2008. (Betz, J.A. at 291:9-18; Wolfing, J.A. at 274:6-11). Finally, as noted above, at the time of trial the Primoffs were in possession of the unencumbered Resulting Lands.

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[10] Appellants note Mr. Primoff's statement "that's exactly what we did" is not supported by the evidence. Mr. Primoff admitted he never spoke to the winning bidder. (Edw. Primoff, J.A. at 144:1-3).

[11] Appellants separately discuss the Primoffs failure to mitigate their damages in Section II of this brief, *infra*.

Absent any evidence a sale of the property was prevented by the Easement, there is no legally sufficient basis to find Mr. Warfield's breach of the Agreement or Appellants' breach of the title warranty was the proximate cause of any lost profits.[12]

B. THE PRIMOFFS OFFERED NO EVIDENCE THAT WHEN HE ENTERED INTO THE CONTRACT, MR. WARFIELD KNEW OR SHOULD HAVE KNOWN THAT THEY INTENDED TO RESELL THE RESULTING LANDS.

The decision below improperly reads the foreseeability requirement of *M & R Contractors* out of Maryland law in breach of contract cases where the plaintiff seeks collateral lost profits from the resale of land. Cases in Maryland and elsewhere permitting recovery of collateral profits share one or more of three common facts: (1) the collateral contract was in existence at the time the defendant entered into the subject contract, (2) the plaintiff's business was based on collateral transactions, such as a plaintiff developer purchasing vacant land for subdivision, or (3) the plaintiff proved the defendant contemplated the collateral transaction. This case includes none of these facts. The Primoffs did not even try to prove Mr. Warfield knew or should have known they intended to resell the Resulting Lands when they entered into the Agreement. This failure is fatal to their claim for lost profits.

[12] The closest thing to evidence was Mr. Primoff's testimony that he just "knows" the property could not be sold on account of the Easement. (Edw. Primoff, Doc. J.A. at 138:6-139:9). This is nothing other than *ipse dixit*, which is not competent or admissible evidence.

Maryland follows the two principles of foreseeability established in *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854), for recovery of damages for breach of contract. *Winslow Elevator & Mach. Co. v. Hoffman*, 107 Md. 621, 69 A. 394 (1908). The first principle holds that when a contract has been breached, the non-breaching party is entitled to damages for the breach " 'such as may fairly and reasonably be considered as arising naturally, *i.e.*, according to the usual course of things from such a breach of contract itself [.]' " *Id.* at 635, 69 A. 394 (quoting *Hadley, supra*, 9 Exch. 341, 354, 156 Eng. Rep. at 151). Thus, a plaintiff in a breach of contract action may recover general damages of the sort that are ***presumed*** to have been in the contemplation of the parties when the contract was made. *Id.*

The second principle in *Hadley* holds a plaintiff in a breach of contract action also entitled to recover damages " 'such as may fairly and reasonably be supposed to ***have been in the contemplation of both parties*** at the time they made the contract, as the probable result of the breach of it.' " *Winslow Elevator, supra*, at 635, 69 A. 394 (quoting *Hadley, supra,* 9 Exch. at 354, 156 Eng. Rep. at 151) (emphasis in *Winslow).* Such special or consequential damages are ***not presumed*** to have been in the contemplation of the parties when they made their contract but may be shown from evidence of the particular circumstances to have been in their contemplation. *See Della Ratta, Inc. v. American Better Community Developers,*

Inc., 38 Md. App. 119, 138–39, 380 A.2d 627, 639 (1977) (lost profits were foreseeable to developer because developer "should have known that Della Ratta, as a contractor, entered into the building contract to make a profit"). *Accord* Restatement (2d) Contracts § 351 (1981).

Collateral lost profits are thus subject to the second principle in *Hadley*. They are not presumed to have been in the contemplation of the parties, but must affirmatively be shown to have been by the evidence. Absent proof that at the time of contracting in 2002 the parties to the Agreement contemplated the Primoffs reselling the Resulting Lands, the Primoffs cannot recover any lost profits. On this point, the Primoffs introduced no evidence whatsoever.

The leading case on the foreseeability of lost profits is *Hoang, supra*, which synthesizes a century of case law on the quantum of proof necessary to award damages. 177 Md. App. at 593-595, 936 A.2d at 934-45. Early cases required the third party contract on which lost profits were based to have existed at the time the defendant signed the subject agreement. *Id.* at 595, 936 A.2d at 935 (citing *Abbott v. Gatch*, 13 Md. 314, 333-34 (1859)). In *Hoang*, the court stopped short of that requirement where the facts of the underlying transaction clearly contemplated resale of the property:

> In the case at bar, HAA presented evidence that ***the property in question was marketed for sale for the purpose of developing town houses, and that that purpose was in the contemplation of both parties when***

> ***the contract was made.*** It also presented evidence through Mark Ezra that it had an established track record in Montgomery County as a developer of residential communities such as the town house community the parties expected would be built on the property after it was conveyed to HAA.

Id. at 610, 936 A.2d at 943 (emphasis added).

This case is nothing like *Hoang*, where "it was expressly within the contemplation of the appellant and her co-defendants that the property, which was raw land, would be purchased in order to build up to 15 town houses on it, for resale." *Id.* at 607, 936 A.2d at 942. That court concluded "it was clear to all parties at the time the contract was entered into that the force driving this agreement between them was anticipated profits by the purchaser in purchasing the property offered by the seller, so clearly a loss of profits was foreseen…." *Id.* at 573, 936 A.2d at 922.

Here, the opposite is true: The Primoffs conveyed the development rights to the Warfields in return for a payment of $3.5 million. (Agreement, J.A. 647). The undisputed evidence was: (1) at the time of contracting the parties contemplated Mr. Warfield would develop Freedom Hills Farms on a portion of the property separate from the Resulting lands (*id.*), (2) the Resulting Lands were already improved with the Primoffs' home, outbuildings, airstrip, and hangar (J.A. 422), (3) the Resulting Lands would be conveyed back to the Primoffs (J.A. 647-48 at ¶ 3), (4) the Primoffs "loved" the Resulting Lands, and intended they would be

returned subject to specific conditions (Edw. Primoff, J.A. at 72:8-11; J.A. 647-48 at ¶ 3) and (5) the conveyance back to the Primoffs would occur at no set time, *i.e.*, the earlier of final plat approval for Freedom Hills Farms or five years. (J.A. 647-48 at ¶ 3).

Mr. Primoff testified in great detail about his negotiations with Mr. Warfield and offered no evidence a resale of the Resulting Lands was discussed. (Edw. Primoff, J.A. at 83:15-89:21). Nor did Mr. Lennon, who represented the Primoffs in connection with the subject transaction. (Lennon, J.A. at 195:18-197:19; 198:8-217:19). Neither does the Agreement evidence an understanding the Primoffs intended to resell the Resulting Lands. (*See, e.g.*, J.A at 647-52). Mr. Primoff was asked what he understood could legally be done with the upland area of the Resulting Lands on which his home sat, and he denied any intention to sell:

> …you can have a residence, you can do just about anything you want to do, other than ***--you can sell it for*** - you can actually subdivide it, if you wanted, and put like any agricultural things. You can put a church on it, you can put a school on it. There's a whole list of things, variety of things you can do on that property***. Although, we had never planned to do that.***

(Edw. Primoff, J.A. at 79:6-12) (emphasis added). Similarly, Mr. Primoff was asked his concerns when he learned of the Easement. Although he detailed several, including the inability to bring his dogs into the area, ride horses in the area, picnic, build on the property, and the "things I told you about the property

that we enjoyed could never be done again," he did not testify he was concerned he could not resell the property. *Id*. at 108:23-109:13. In the absence of evidence the Primoffs intended to resell the Resulting Lands at the time of contracting, there is no basis to suggest Mr. Warfield contemplated such an intention.

Certainly there was no evidence the Primoffs' communicated their purported intent to resell the Resulting Lands to Mr. Warfield. In *Stone v. Chicago Title Insurance Co. of Maryland*, 310 Md. 329, 624 A.2d 496 (1993), the Maryland Supreme Court focused on whether special circumstances—such as the Primoffs' claimed intent to resell the Resulting Lands—were communicated to the defendant at the time of contracting. In that case the plaintiff sued his attorney on various theories, including breach of contract. The plaintiff alleged his attorney's failure to record a release of lien in a timely manner delayed plaintiff's closing on a home equity loan which, in turn, forced him to sell stock at a loss to cover a margin call. Plaintiff failed to allege, however, that when the attorney accepted the engagement he was aware that the plaintiff needed funds to cover his stock market speculation. In denying any recovery for the plaintiff's market losses, the court stated:

> [I]f the special circumstances under which the contract was actually made, were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of a contract under these special circumstances so known and communicated.

> ***But on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances for such a breach of contract***.

Id. at 339, 624 A.2d at 501 (citations, quotation omitted, emphasis added). No such communication occurred at the time the parties entered into the Agreement. Not even Mr. Primoff, who was repeatedly cautioned by the District Court against speculating as to the knowledge and intention of other persons, testified Mr. Warfield was told or otherwise knew the Primoffs intended to resell the Resulting Lands.[13]

Cases from other jurisdictions are in accord. For instance, on similar facts the plaintiff was refused lost profits in *Spangler v. Holthusen*, 61 Ill. App.3d 74, 378 N.E.2d 304 (1978). In that case, plaintiff-buyer sought to recover lost profits on a collateral contract for immediate resale of real property. The court stated:

> We conclude Holthusen may not charge the Spanglers with the claimed profits lost from his proposed collateral transaction with Richardson which arose after the Spanglers entered into the contract with him and of which they were not informed. The general knowledge that Holthusen developed land and might sell off some

[13] The Court was moved to strike Mr. Primoff's testimony on more than one occasion. *See* J.A. at 119:18-120:14 (on motion to strike hearsay testimony, Court noted Mr. Primoff's "continual rambling" and directed Mr. Primoff to cease further testimony regarding "what other people said or thought").

> part of the farm in question to others during the 10 year term of the contract is insufficient to charge the Spanglers with knowledge of and liability for the unusual loss of profits claimed here.

Id. at 82, 378 N.E.2d at 310. As noted above, the Agreement provided that Mr. Warfield might not return the Resulting Lands to the Primoffs for up to five years. (J.A. 647-48 at ¶ 3). There is no proof, let alone strict proof, the Primoffs' purported intent to resell the property, which was not acted on for three years, was known to or contemplated by Mr. Warfield at the time the parties entered into the Agreement.

In *Duggin v. Williams*, 233 Va. 25, 353 S.E.2d 25 (1987), another case factually similar to the instant case, the Virginia Supreme Court affirmed a refusal to award lost profits based on the plaintiff-buyer's loss of an assignment of real property due to the defendant-seller's non-performance. The defendant agreed to sell real property to the plaintiff contingent on a zoning change. The parties subsequently agreed on a lower price if the zoning could not be obtained. During the pendency of the zoning proceedings the plaintiff entered into a collateral agreement with a third party to assign his rights under the original agreement. When the defendant failed to perform, the plaintiff sought to recover, *inter alia*, the profit he would have realized from the assignment. In pertinent part, the court stated:

> It has long been held in Virginia that loss of profits may be recovered in a breach of contract action only if they are such that can be fairly supposed were within the contemplation of the parties when the contract was made….
>
> ***The record is devoid of any evidence that such an assignment was in the contemplation of the parties upon their entering into the contract of sale or the addendum.*** We cannot say that, when she contracted with Duggin, Williams reasonably should have foreseen that Duggin would assign the contract for sale of the property at a profit of $119,673.60 in a transaction that Duggin himself did not even consider until more than two years after the contract was made.

Id. at 28-29, 353 S.E.2d at 723-724 (citations omitted, emphasis added). The present record is devoid of any evidence that resale of the Resulting Lands was in the contemplation of the parties when they entered into the Agreement in 2002.[14]

In an opinion accompanying his Order denying the Warfields' post-trial motions, the District Court stated:

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[14] *See also Scott S. Div. Employees Credit Union v. Loftin*, 50 Ala. App. 571, 281 So.2d 283, 285-86 (1973) (where contract to resell land made eight years subsequent to original agreement, and nature of original agreement was not such as to give notice thereof, lost profits from collateral transaction too remote) (citations omitted); *Texas Power & Light Co. v. Barnhill*, 639 S.W.2d 331, 335-36 (Tex. App. 1982) ("Lost profits from collateral contracts, however, are recoverable only if such collateral contracts are known to or are within the contemplation of the parties at the time they enter into the contract which is subsequently breached.") (citations omitted); *Florafax Int'l v. GTE Mkt. Res., Inc*, 933 P.2d 282, 293 (Ok. 1997) (collateral contracts communicated to or known by defendant at time of contracting).

> Drawing all inferences in favor of Plaintiffs, a reasonable jury could have concluded based upon the evidence presented at trial that the alleged lost profits from Plaintiffs' claimed inability to sell the Resulting Lands at auction were foreseeable. It is reasonable to infer that a prospective seller may have difficulty selling land that is encumbered by an easement. It is also reasonable to infer that if a seller conveys improperly-encumbered property to a buyer, the buyer may have difficulty reselling that property thereafter. ***Thus, a jury could have inferred that, at the time the parties entered into the agreement, it was reasonably foreseeable to Defendants that if they re-conveyed the Resulting Lands to Plaintiffs with the easement improperly installed, Plaintiffs would have difficulty reselling the Resulting Lands.***

(J.A. 661-62) (emphasis added). Respectfully, the District Court's analysis begs the dispositive question: whether an intention on the Primoffs' part to resell the Resulting Lands was contemplated by the parties at the time of contracting. That a buyer may have "difficulty reselling land encumbered by an easement" applies to any real property transaction. The Maryland and other authority discussed above focuses on whether ***the resale transaction itself*** was foreseeable, not whether the defendant's breach could affect a hypothetical resale. The District Court did not address that question. Because the Primoffs offered no evidence Mr. Warfield contemplated them reselling the Resulting Lands, as a matter of law they cannot recover lost profits as damages.

C. THE PRIMOFFS FAILED TO PROVE COLLATERAL LOST PROFITS WITH CERTAINTY.

The final requirement for the recovery under Maryland law is proof of the amount of damages with "certainty." *M & R Contractors, supra*, 215 Md. at 346, 132 A.2d at 353-54. Maryland's courts require collateral lost profits to be proven with a relatively higher degree of precision. *Id.* at 357, 132 A.2d. at 354 ("To meet the demands of the 'certainty' rule, a *buyer* for resale must introduce detailed evidence of the number of sales lost, the prices which might have been obtained, and the costs of reselling.") (emphasis in original); *Hoang*, 177 Md. App. at 595, 936 A.2d at 935 ("law of lost profits contract damages concerns itself primarily with reasonable certainty….") (internal quotation omitted). This rule was laid down by Judge McSherry in *Lanahan v. Heaver*, 79 Md. 413, 29 A. 1036 (1894):

> [W]henever it is purely problematical whether any profits would have been realized at all, by reason of contingencies which might never happen, or ***where the profits have reference to dependent and collateral engagements entered into on the faith of the performance of the principal contract***, there, without regard to any uncertainty as to mere amounts, probable profits cannot be recovered, because too speculative, indefinite, and remote

29 A. at 1037 (emphasis added). The Primoffs' evidence was of this sort.

In *St. Paul at Chase Corp v. Manufacturers Live Ins. Co.*, 262 Md. 192, 278 A.2d 12 (1971), the Maryland Court of Appeals addressed the issue of certainty in a context similar to that which obtains in the case at bar. The defendant was found

in breach of an agreement to finance an apartment building. Because the breach caused a delay in construction, the plaintiff claimed an entitlement to profits it would have earned from rents paid during the delay. The Court disagreed:

> What rent they might have received from the building was not only dependent upon collateral engagements with persons who might rent the rooms, but upon many other considerations, such as location, desirability of rooms, the amount of rent asked, light and air, competition of other buildings, the number of tenants, the ability of the owners to keep the rooms occupied, and the general character of the management of the building. There are so many elements of uncertainty which enter into and affect the question that any estimate of loss could be little short of a guess. The special damages sued for in this case are so uncertain and incapable of reasonable ascertainment that they cannot be recovered.

Id. at 39. *See also Winslow Elevator, supra*, 69 A. at 397-98 (striking claim for lost rental profits); *Reighard v. Downs*, 261 Md. 26, 35-36, 276 A.2d 109, 114 (1971) (denying resale profits lost due to conveyance of fewer acres than stated in contract, where collateral sales uncertain).

Here, the jury was left to speculate as to the timing of the decrease in the Resulting Lands' market value, whether the decrease occurred during the Easement Period, when the Primoffs might have offered it for sale, whether anyone would have made an offer to purchase the property, how much would have been offered, and whether an offer would have been acceptable to and accepted by the Primoffs. The damages sought were "too dependent on numerous and changing

contingencies to constitute a definite and trustworthy measure of damages…." *Witherbee v. Meyer*, 155 N.Y. 446, 453, 50 N.E. 58, 60 (N.Y. 1898).

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The Primoffs failure to prove any one of the three elements of damages discussed in this Section I is fatal to their claim for lost profits. Appellants have shown the absence of all three elements. Therefore, as a matter of law the Primoffs are not entitled to damages beyond the stipulated restoration costs. Appellants respectfully request the Court remand the case to the District Court with instructions to vacate all but $24,000 of the judgment. In the alternative, Appellants respectfully request the Court remand the case to the District Court for a new trial on the issue of consequential damages.

II. AS A MATTER OF LAW THE PRIMOFFS FAILED TO MITIGATE THEIR DAMAGES WHEN THEY ABANDONED, WITHOUT INQUIRY, OFFERS TO PURCHASE THE RESULTING LANDS WHICH WOULD HAVE MADE THEM WHOLE.

Whether a plaintiff made reasonable efforts to mitigate damages is a determination of fact which this Court is bound to overturn if against the weight of the evidence. The District Court held it plausible the jury found the Primoffs abandoned the auction offers because they "did not want to accept the risk another lawsuit from the purchaser" due to the Easement. (J.A. 664). There are several reasons to reject this excuse for failing to mitigate damages.

To begin with, the Easement could not have caused a lawsuit since it was a matter of public record. Under Maryland law purchasers of real property are presumed to have knowledge of recorded Easements, and the Primoffs introduced no competent evidence to rebut that presumption. Mr. Primoff admitted making no effort whatsoever to determine whether the bidders knew about the Easement or, if they did not know, whether they would take the Resulting Lands at a lower price. ***The Primoffs cannot rely on an risk they themselves created by failing to disclose the Easement to the auctioneer or the bidders.*** Moreover, as discussed above, Mr. Primoff admitted he never intended to accept any of the offers made at the auction. Under the circumstances, a finding that the Primoffs used "all reasonable efforts" to mitigate their damages is without sufficient basis.[15]

In Maryland and elsewhere, a plaintiff is under a "duty to take advantage of reasonable opportunities it may have to prevent the aggregation of his injuries so as to reduce or minimize loss or damage." *First Union Commercial Corporation v. GATX Capital Corporation*, 411 F.3d 551, 557 (4th Cir. 2005). The standard to be applied is one of ordinary care under the circumstances:

[15] Appellants submit as a matter of law one cannot obtain lost resale profits when he received *bona fide* offers to sell the subject property and summarily rejected those offers. Whether the Court reviews the issue *de novo*, or on the clearly erroneous standard, the result in this case is the same: the Primoffs failed to mitigate their damages.

> The mitigation of damages doctrine is "[t]he principle requiring a plaintiff, after an injury or breach of contract, to use ordinary care to alleviate the effects of the injury or breach. If the defendant can show that the plaintiff failed to mitigate damages, the plaintiff's recovery may be reduced. Also termed *avoidable-consequences doctrine*." Black's Law Dictionary 1018 (7th ed.1999) (emphasis in original). When it is determined that the doctrine applies, the burden is necessarily on the defendant to prove that the plaintiff failed to use "***all reasonable efforts to minimize the loss he or she sustained.***" *Schlossberg v. Epstein*, 73 Md. App. 415, 422, 534 A.2d 1003 (1988).

Cave v. Elliott, 190 Md. App. 65, 96, 988 A.2d 1, 19 (2010) (emphasis added). Thus the District Court instructed the jury there was a duty on the part of the Primoffs to "use reasonable efforts to reduce or minimize [their] damages. But there's no requirement that [the Primoffs] accept the risk of additional loss in an effort to reduce damages." (J.A. at 399:2-6).

The Warfields introduced evidence establishing the Primoffs' efforts fell well short of what is required. If *Schlossberg*, *supra*, means anything, it must require a plaintiff given an opportunity to completely recoup any potential loss take minimum steps to investigate that opportunity. The following evidence was undisputed and establishes the Primoffs did not use "all reasonable efforts to minimize the loss" they claimed from their putative lost profits:

1. The Primoffs put the Resulting Lands up for auction. (Edw. Primoff, J.A. at 116:22-117:1).

2. At the time of the auction, the Easement was a matter of public record. (*Id*. at 138:17-23).

3. One day prior to the auction, at least some of the potential bidders were aware of the Easement. (*Id.* at 144:23-145:2)

4. The Primoffs received several bids on the Resulting Lands. (*Id*. at 146:6-22)

5. The winning bid was in the amount of $5.2 million. (*Id*. at 142:14-18).

6. The Primoffs did not accept the winning, or any other, bids. (*Id*. at 146:1-6).

7. The Primoffs assumed without basis the winning bidder was unaware of the Easement. (*Id*. at 155:6-8).

8. The Primoffs did not communicate whatsoever with the any bidder. (*Id*. at 144:1-3).

9. There was no evidence the Primoffs contacted the winning bidder when the Easement was removed.

Wholly apart from the question whether there ultimately was a legally sufficient reason for the Primoffs to reject the winning bid, there cannot have been a legally sufficient basis for the Primoffs' making no effort to determine whether any reason existed.[16]

[16] Larry Makowski. the auctioneer, was identified as a trial witness by the Primoffs. (Pretrial Statement, Doc. 66, at 27). However, they did not produce him. The Primoffs claimed they could not identify the individual who offered them $5.2 million. (Edw. Primoff, J.A. at 146:6-9).

The District Court denied Warfield's post-trial motions based on the principle that a party need not risk additional loss in an effort to mitigate its damages:

> Edward Primoff testified he did not pursue the auction sale because he did not want to accept the risk of another lawsuit from the purchaser. Based upon that testimony, a reasonable jury could have inferred that the sale would have caused Plaintiffs to accept an unreasonable additional risk. Thus, it was reasonable for the jury to find that Plaintiffs did not fail to mitigate their damages.

(J.A. 664). Respectfully, there are three problems with the District Court's analysis. First, because a purchaser of real property is bound by every recorded encumbrance, including the Easement, the Warfields' conduct ***could not have caused*** Mr. Primoff to "buy a lawsuit," assuming he intended to sell the Resulting Lands. *See Beins*, *supra*, 155 Md. App. at 243, 843 A.2d at 151 (purchaser of land charged with implied notice of and bound by recorded easement).[17]

Second, there was no competent evidence from which a reasonable trier of fact could find the winning—or any—bidder was unaware of the Easement. Even assuming, *arguendo*, a bidder had put up millions of dollars without knowledge of

[17] Indeed there was a reason wholly apart from the Easement which would have caused Mr. Primoff to fear a lawsuit: the advertisement of the Resulting Lands as a "Rare Development Opportunity." Mr. Primoff admitted this was misleading, since the property had been stripped of its residential development rights. (Edw. Primoff, J.A. at 180:18-181:11). Although he claimed subsequent advertisements did not include the misleading statement, none were introduced at trial.

a record easement, Mr. Primoff could have eliminated any risk by simply disclosing the Easement.[18]

Third, the District Court's analysis is too narrowly focused on acceptance versus rejection of the several offers. Whether or not they ultimately accepted any of the offers to purchase the Resulting Lands, the Primoffs failed to mitigate their damages when they failed to disclose the Easement to the auctioneer and the bidders. Before they may recover damages from the Warfields based entirely on the proposition that the Easement rendered it impossible to sell the Resulting Lands, the Primoffs had a duty to disclose the Easement or at least ***inquire*** as to the bidders' offers. By so doing, the Primoffs risked nothing. Summarily rejecting the offer is not a reasonable effort at mitigation. *Cave, supra,* 190 Md. App. at 96, 988 A.2d at 19. *See also M & R Contractors, supra*, 215 Md. at 354, 138 A.2d at 350 ("a plaintiff is not entitled to a judgment for damages for a loss that he could have avoided by a reasonable effort without risk of additional loss").

Determining whether the bidders were aware of the Easement, disclosing the Easement if necessary, and/or negotiating for the sale of the Resulting Lands with

[18] As noted previously, the Easement was coextensive with a floodplain, wetlands, and stream on the Resulting Lands which otherwise limited the potential uses for this area of the property. (Lennon, J.A. at 249:10-12; Wolfing, J.A. at 276:18-23; Rickell, J.A. at 362:1-12). Thus, it was possible the presence of the County's Easement did not materially affect the property's value or its attractiveness to a prospective buyer.

the Easement, are all reasonable efforts to minimize damage without risk of loss which the Primoffs summarily declined to undertake.

Since the duty to mitigate damages is widely recognized, cases from other jurisdictions have persuasive authority. *See* Comment Note—Duty to Mitigate Damages, 81 A.L.R. 282 (1932) (mitigation is a "fundamental rule"). For instance, in *Trust for the Certificate Holders of Merrill Lynch Mortgage Pass-Through Certificates Series 1999-C1 v. Love Funding Corp.*, 736 F. Supp. 2d 716 (S.D.N.Y. 2010), the court rejected a plaintiff's assertion that a transaction in mitigation might not have succeeded, where the plaintiff's lack of knowledge was due to its own inaction. *Id*. at 724. Similarly, in *In re WPRV-TV, Inc.*, 102 B.R. 231 (Bankr. E.D. Okla. 1988), the court described the plaintiff's duty after breach of contract:

> In a case where a defaulting buyer is offering to purchase, there is a duty upon the seller to consider such an offer. However, the crucial test in such circumstances is "did they use such care and diligence in the crisis when the breach occurred as a man of ordinary prudence and diligence would have used under the circumstances then existing?"

Id. at 234 (citation omitted). *See also First Nat. Bank of Akron v. Cann*, 503 F. Supp. 419, 442 (N.D. Ohio 1980), *aff'd*, 669 F.2d 415 (6th Cir. 1982) (Bank summarily refusing offer of mitigation as "unacceptable" will have damages reduced). *Cf. In re Stone & Webster*, 279 B.R. 748, 790 (Bankr. D. Del. 2002)

(discussing with approval efforts plaintiff made to evaluate unsuccessful transactions in mitigation).

A person of ordinary prudence and diligence who desired to sell does not summarily reject an offer for his property which, according to his experts, was $1 million above market. He does not simply assume a group of multi-million dollar bidders are unaware of a recorded easement. He does not walk away without disclosing the easement in order to eliminate any real concern about "buying a lawsuit." In sum, there is no evidence the Primoffs were unable to complete the auction. Instead, they simply abandoned the process. By doing so, they forfeited a claim for those lost profits.

For the foregoing reasons, Appellants respectfully request the Court remand the case to the District Court with a mandate to vacate all but $24,000 of the jury award or, alternatively, remand the case to the District Court for a new trial on the issue of damages. *Sloane, supra,* 510 F.3d at 502.

III. THE DOUBLE AWARD OF DAMAGES ON THE PRIMOFFS' BREACH OF CONTRACT AND BREACH OF WARRANTY OF TITLE CLAIMS IS UNLAWFUL AND IF PERMITTED TO STAND WILL UNJUSTLY ENRICH APPELLEES.

Appellants demonstrated above the Primoffs' evidence as to damages in excess of $24,000 was insufficient as a matter of law. Should the Court rule against the Warfields on this point, the jury's separate award of damages on the Primoffs' alternate claims of breach of warranty and breach of contract must be set

aside. Both claims arise from the same operative facts, the reconveyance of the Resulting Lands to the Primoffs with the Easement, and the Primoffs did not attempt to prove any injury distinctly attributable to, or compensable under, either claim. Moreover, although the awards differ in amount, the difference is equal to the damages the Primoffs sought for their stipulated expenses incurred extinguishing the Easement. Excluding those damages, the jury awarded the same $250,000 twice: once for the Primoffs' breach of contract claim and once for the Primoffs' breach of warranty claim.

It is settled law that a "plaintiff may not recover twice for the same tort, merely because the wrong gave rise to alternative theories of recovery." *Shapiro v. Chapman*, 70 Md. App. 307, 315, 520 A.2d 1330, 1333-34 (1987). That opinion relies on *Clappier v. Flynn*, 605 F.2d 519 (10th Cir. 1979), in which the plaintiff joined a negligence claim with one under 42 U.S.C. § 1983. Because the relief afforded under both claims is identical, the Tenth Circuit explained:

> the two claims for relief pled in this case are simply alternative bases for seeking the same relief, in much the same way as negligence, breach of express and implied warranties, and strict liability are alternative theories for according a damaged plaintiff in a products liability action identical relief. It is clear, particularly in products liability suits, that a plaintiff is not entitled to a separate compensatory damage award under each legal theory. Rather, he is entitled to only one compensatory damage award should liability be found on any of the three, or more than the three theories involved.

Clappier, 605 F.2d at 529. In the case at bar, the Primoffs' breach of contract and of warranty of title are similarly "alternative theories for relief" which arise out of one set of operative facts. The verdict is thus unlawful and should be reduced by $250,000.

This case is similar to *Baltimore Harbor v. Ayd*, 134 Md. App. 188, 759 A.2d 1091 (2000), *aff'd. in part and vacated in part on other grnds.*, 365 Md. 366, 780 A.2d 303 (2001), in which the Special Court of Appeals affirmed a trial court's remittitur of a double verdict where the amount awarded under two separate claims was identical. The trial court stated as follows:

> The [c]ourt agrees with [BHC] that the number the jury found, $76,099.33 … was a duplicative award. It was awarded twice. It-it's just too specific and unusual a number for it to be a number pulled out of the air. And therefore, the [c]ourt feels that the jury misunderstood unjust enrichment and in fact awarded [Ayd] the judgment for breach of contract twice.

Id. at 200, 759 A.2d at 1097. As noted above, once the stipulated attorney's fee amount of $24,000 is backed out of the breach of warranty of title award, the jury verdicts on the two alternative theories of relief are exactly the same, $250,000.

Decisions from other circuits support this conclusion. For instance, in *Conway v. Icahn & Co., Inc.*, 16 F.3d 504 (2nd Cir. 1994), a case virtually "on all fours" with this case, the district court reduced a duplicative jury verdict on breach

of fiduciary and negligence claims where both arose from the same transaction. The Second Circuit affirmed:

> ***Regardless of the jury's intentions***, it is clear that the separate awards were duplicative and therefore impermissible as a double recovery. Where a plaintiff seeks recovery for the same damages under different legal theories, only a single recovery is allowed …. Conway sought damages arising from the sellout of his account without notice on two different theories-negligence and breach of fiduciary duty. ***His theories of recovery were based on a single set of facts, and the economic loss sustained was predicated on those unitary facts.***

Id. at 511 (citations omitted, emphasis added).

These very same factors are present in this case. The Primoffs' claims of breach of contract and breach of warranty of title arise out of the same transaction; indeed, the breach arose at the same moment and by the same act regardless of the theory of recovery: the Warfields' conveyance of the Resulting Lands to the Primoffs encumbered by the Easement. So too, the economic losses claimed by the Primoffs are identical regardless of the theory of recovery.

The District Court rejected Appellants' motion to vacate one of the awards because "it is plausible that the jury intended to award Plaintiffs a total of $500,000 in collateral lost profits, plus an additional $24,000 to compensate Plaintiffs for the costs incurred to remove the easement." (J.A. 663). In so ruling, the District Court relied on a Second Circuit case holding "if there is any way to view a case that

makes the jury's answers to the special verdict form consistent with one another, the court must resolve the answers that way even if the interpretation is strained." *Id.* (*citing McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1311 (2d Cir. 1993)).[19]

Respectfully, however, this authority is inapposite. Appellants do not challenge inconsistent answers in a special verdict form; instead, they challenge duplicative awards on a general verdict form. (J.A. 654-55). The Second Circuit authority on point is *Conway*, discussed above, which deals with separate jury awards on a single set of facts. 16 F.3d at 511. Notably, the district court in *Conway* engaged in a colloquy with the jury foreperson which revealed the jury intended to award the aggregate amount. Both the district court and the Second Circuit held the jury's intentions to be immaterial. *Conway v. Icahn & Co., Inc.*, 1993 WL 60025, *3 (S.D.N.Y. 1993), *aff'd*, 16 F.3d 504, 511 (2nd Cir. 1994).

[19] The District Court also relied on this Court's decision in *Bristol Steel & Iron Works v. Bethlehem Steel Corp.*, 41 F.3d 182 (4th Cir. 1994). In *Bristol*, the jury twice sent notes to the district court stating that it was deadlocked on the third of seven special verdict questions. The court responded that if the seventh question, which pertained to a defense, was answered in the affirmative then a complete verdict would have been reached, and directed them to continue deliberating even if they remained deadlocked on question three. *Id.* at 185-86. The plaintiff-appellant sought a new trial on grounds that, *inter alia*, the district court had coerced the judgment against it and, further, the court should have submitted evidence to the jury to break the deadlock, (evidence which the plaintiff itself had not introduced at trial). *Id.* at 189-90. The panel affirmed the district court's denial of a new trial on the grounds that a rational basis for the verdict existed once the jury found that the affirmative defense had been proven. *Id.* *Bristol* does not control the case at bar.

Instead, the District Court below adopted a rule which eliminates ***any*** successful challenge to a duplicative verdict, since one can always read separate awards on alternate theories as intending to award the aggregate amount. Irrespective of the jury's intent, however, separate awards for breach of contract and breach of warranty of title cannot be sustained as a matter of law.

Therefore, should the Court be of the view that the Primoffs proved an entitlement compensatory damages beyond the $24,000 paid to extinguish the easement, Appellants respectfully request the Court remand the case with a mandate to the District Court to vacate that part of the jury's award which exceeds $274,000. In the alternative, the Warfields respectfully request the Court reverse the District Court's denial of the Warfield's motion for remittitur or remand the case for a new trial on damages. *See Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891-92 (4th Cir. 1980) (court may set aside a verdict and grant a new trial even though verdict is supported by substantial evidence, if the excessive amount of the verdict is the result of an error of law); *Sloane, supra*, 510 F.3d at 502 ("[a] district court abuses its discretion only by upholding an award of damages when the jury's verdict is against the weight of the evidence….").

CONCLUSION

For all of the foregoing reasons, Appellants respectfully request the Court grant the following alternative relief:

1. Whether for failure to prove lost profits or failure to mitigate damages as a matter of law, remand the case to the District Court with a mandate to vacate all but $24,000 of the judgment below.
2. Remand the case to the District Court with a mandate to vacate one of the two $250,000 awards.
3. Remand the case to the District Court for a new trial on damages in excess of $24,000.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a) and L. R. 34(a), Appellants respectfully request oral argument. The Court's consideration of the issues presented on this appeal may be advanced or assisted by the presence of counsel to comment and respond to inquiries from the Court. This case involves the novel issues of Maryland law applied to an unusual fact scenario which merits the opportunity for oral advocacy.

November 11, 2011

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Dated: November 10, 2011

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 10, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

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