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**

REPLY BRIEF OF APPELLANTS

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SUMMARY OF ARGUMENT

Until recently, collateral lost profits were considered too speculative to be awarded as damages in Maryland. In fact, the Maryland Court of Appeals has ***never*** permitted an award of damages where the collateral contract did not exist at the time the subject contract was negotiated or breached. *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, __ Md. App. __,__, 2011 WL 5428785, *14 (10/26/2011) (*citing Impala Platinum, Ltd. v. Impala Sales, Inc.*, 283 Md. 296, 389 A.2d 887 (1978)). The Special Court of Appeals in *Hoang v. Hewitt Ave. Assocs.*, 177 Md. App. 562, 573, 936 A.2d 915, 922 (2007), did not find it necessary for the collateral contract to have existed at the time of the breach, but only if "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…." The decision below is an unprecedented expansion of Maryland law.

No plaintiff has been awarded damages on facts similar to those which obtain here, where the plaintiff is not a business expected to realize profits from the underlying transaction, but instead claims profits which would have accrued only once, from a single transaction, (1) which was not expressly contemplated by both parties at the time of contracting, (2) which the plaintiff refused to consummate

when handed an opportunity to do so, and (3) which remains available since the breach of which the plaintiff complains was cured years ago.

In Sections I (sufficiency of the evidence) and II (mitigation) of this Reply the Warfields respond to the Primoffs' contention the award below is not a windfall for them which should be reversed. In Section III, the Warfields reply to the Primoffs' wholesale reproduction as part of their brief of several pages from a Northern District of New York opinion they do not cite. That case and its subsequent history confirm the jury's award of separate damages on the Primoffs' two claims is duplicative and unlawful.[1]

COUNTER STATEMENT OF FACTS

Appellants Kennard and Mary Ellen Warfield (the "Warfields" or Appellants) principally rely on the statement of facts in their Opening Brief ("OB"). Edward and Suzanne Primoff's (the "Primoffs" or Appellees) Answer Brief ("AB") contains several misleading factual assertions which are unsupported or contradicted by the record in this case. The Warfields will not engage in a point-by-point refutation. Certain of the Primoffs' erroneous statements, however, are relevant to this appeal and require a brief response to set the record straight.

[1] As noted in their Opening Brief, the parties stipulated the Primoffs incurred $24,000 restoring the Resulting Lands. The Warfields do not appeal that portion of the jury's award.

A. THERE WAS NO EVIDENCE, NOR ANY LEGITIMATE INFERENCE FROM THE EVIDENCE, THE EASEMENT PREVENTED THE PRIMOFFS FROM SELLING THE RESULTING LANDS.

In their Opening Brief, the Warfields asserted there was no evidence from which the jury could conclude the Easement caused the Primoffs' purported injury; *i.e.*, no witness identified any person who at any time declined to purchase the Resulting Lands due to the presence of the Easement.[2] The only evidence bearing directly on this point was to the contrary, as it was undisputed the Primoffs summarily turned down offers to purchase the property during the Easement Period. (OB at 16). Furthermore, their own experts denied the Primoffs had even listed the Resulting Lands for sale in 2005 and 2008. (Betz, J.A. at 291:9-18; Wolfing, J.A. at 274:6-11).

Nevertheless, the Primoffs state "As a direct result of the Warfields' conduct, the Primoffs were not able to sell their Property." (AB at 12, ¶ 31). The pertinent part of the transcript excerpt to which they cite, however, contains nothing more than Edward Primoff's bald statement that "I couldn't sell it with the easement on it. Nobody in their right mind would buy it." (Edw. Primoff, J.A. at 153:23-25). Even the District Court found "there was little or no testimony that the easement was the direct cause of the loss of value…" (J.A. at 662).

[2] For the sake of convenience and consistency, the Warfields use the same defined terms in this Reply Brief as they used in their Opening Brief.

Elsewhere, Appellees refer to Mr. Primoff's testimony in which he states unidentified potential bidders were informed of the Easement and did not return for the real property auction. (*Id.*, J.A. at 144:23-145:12). Neither the auctioneer who was identified as a witness by the Primoffs or any of the bidders testified at trial. (OB at 43, n. 16). Thus, there was no evidence as to why any such individual failed to return. The Primoffs nevertheless apparently contend it was reasonable for the jury to infer the cause was the Easement.

That contention runs afoul of the well-settled rule that "[p]ermissible inferences must…be within the range of reasonable probability…and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely on speculation and conjecture." *Ford Motor Co. v. McDavid*, 259 F.2d 261, 266 (4th Cir. 1958). Without more, that an individual may have been aware of the Easement is an insufficient basis to infer the Easement was his or her motivation for not returning to the auction. *See Gibson v. Old Town Trolley Tours of Washington, D.C., Inc.*, 160 F.3d 177, 182 (4th Cir. 1998) (knowledge of a fact alone is insufficient to infer motivation).[3]

[3] The Warfields note the auction took place over three days and included the Primoffs' personal property, farm equipment, tools, *etc*. (Edw. Primoff, J.A. at 117:10-19). There was no evidence from which the jury could determine whether such individuals, none of whom were identified, had any interest in the real estate portion of the auction.

Moreover, a "mere scintilla" of evidence is insufficient to affirm the jury's damage award; instead, "there must be evidence on which the jury could reasonably find for the [Primoffs]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). *Accord, Am. Arms Int'l v. Herbert*, 563 F.3d 78, 82 (4th Cir. 2009) (same). Thus, as fully discussed in the Warfields' Opening Brief, there was insufficient evidence for the jury to find the Easement prevented the Primoffs from selling the Resulting Lands. (OB at 23-28).[4]

B. THE WARFIELDS DO NOT "CONCEDE" THE PRIMOFFS SUFFERED ANY DAMAGES BEYOND THEIR COSTS OF RESTORATION.

The Primoffs state the Warfields "concede…the loss of value, and thus the damages to the Primoffs, during the time period that the easements remained on the Resulting Lands …." (AB at 35-36). The Warfields make no concession the Primoffs suffered ***any*** damages beyond the cost of restoration.

The Primoffs base their contention on an excerpt from the Warfields' post-trial brief in which the Warfields argued the Primoffs' appraisals, which evaluated improvements in addition to real property, exaggerated the alleged effect of the Easement. The Primoffs include only a portion of the relevant text in their brief. (AB at 36). The missing portion is as follows:

[4] Indeed, on information and belief, five years after the Carroll County court voided the Easement, it remains unsold.

> Both of [the Primoffs'] experts included the value of improvements in their appraisals. (Exs. 8 and 9). During cross-examination, each was asked the value they placed on the land only, excluding the value of the improvements, including the building, outbuildings, garages, hangers, and airstrip. The presence of the Wetlands Easement logically affected, if anything, the value of the land rather than the improvements. (See Wolfing, T3 at 20:10-14 [S.A. at 1:10-14] ("all of the improvements are not within the floodplain")).

(Doc. 102 at 14-15). This language, which the Primoffs omitted, clarifies and circumscribes the point the Warfields intended: a more relevant comparison of the two appraisals, focused on the value of the land as opposed to improvements, shows the Primoffs' characterization of their purported damages to have been overstated. When viewed in context, there is no basis to infer the Warfields adopted the appraisals or conceded the Primoffs suffered any damages, let alone any damages they caused.

C. THE EASEMENT PERIOD IS MORE ACCURATELY MEASURED FROM THE TIME THE RESULTING LANDS WERE RETURNED TO THE PRIMOFFS THROUGH THE CARROLL COUNTY COURT'S ORDER DECLARING THE EASEMENT VOID; IN OTHER WORDS, EIGHTEEN MONTHS.

Among several impertinent comments, the Primoffs state the Warfields "falsely state to this Court that the 'Easement Period comprised just over 18 months.'" (AB at 11, n. 3). Using the dates the Floodplain Easement and the two small easements were granted and extinguished, the Primoffs state the period is

"well in excess of two years." *Id.* While literally accurate, the Primoffs are not being candid with the Court.

The Primoffs' claim for damages is based on their contention the Easement prevented them from selling the Resulting Lands. The Warfields reconveyed the property to the Primoffs on December 5, 2004, (AB at 9, ¶ 24), and the Carroll County Court declared the Floodplain Easement "void *ab initio*" by Order dated June 23, 2006. (J.A. at 583). Although it was another eight months before it and the other two small easements, (neither of which played any material role in the trial), were formally removed by recording deeds of extinguishment, whatever practical effect, if any, the Easement had on the salability of the Resulting Lands ended in June, 2006. Thus, the Warfields characterized the Easement Period as the eighteen months between their conveyance of the Resulting Lands to the Primoffs and the state court's order voiding the Easement.[5]

[5] Judge Nickerson similarly found the easement to have been "extinguished" in 2006. (J.A. 658).

ARGUMENT

The Warfields rely primarily on their Opening Brief, and respectfully submit this Reply to the arguments the Primoffs advanced in their Answer Brief.

I. THE WARFIELDS DID NOT WAIVE THEIR RIGHT TO *DE NOVO* REVIEW OF THE DISTRICT COURT'S DENIAL OF THEIR MOTION FOR A JUDGMENT AS A MATTER OF LAW AS TO DAMAGES; ALTERNATIVELY, REVERSAL IS REQUIRED UNDER THE "ANY EVIDENCE" OR PLAIN ERROR STANDARDS.

In their Opening Brief, the Warfields demonstrated their entitlement to a judgment as a matter of law that the Primoffs' evidence as to their damages was insufficient. Specifically, the Primoffs failed to prove their damages (a) were proximately caused by the Warfields, (b) were foreseeable to them and to Mr. Warfield at the time the Agreement was signed and/or breached, or (c) with reasonable certainty. The Primoffs' failure to introduce sufficient evidence on any one of these three issues is fatal to their claim for lost profits.

The Primoffs' respond with three arguments: First, the Warfields' motion pursuant to Fed. R. Civ. P. ("Rule") 50(a) did not include grounds on which they rely for this appeal, thus denying the Warfields the right to this Court's *de novo* review. Second, by not objecting to the jury instructions below the Warfields likewise waived their right to this Court's *de novo* review of their Rule 50 motion. Third, the Primoffs assert there was sufficient evidence for the jury to find in favor

of the Primoffs on their claim for lost profits. Appellants respond to each argument in order.

A. THE WARFIELDS' ORAL MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE PRIMOFFS' CASE COMPLIED WITH RULE 50.

As the Primoffs concede, the Warfields made a timely motion for a directed verdict at the close of the plaintiffs' case pursuant to Rule 50(a), and renewed the motion at the close of the evidence pursuant to Rule 50(b). (AB at 16). The Primoffs correctly note a renewed motion pursuant to Rule 50(b) may not introduce new grounds for granting a judgment as a matter of law. (AB at 16). The Primoffs, however, relying on cases from other circuits in which movants specified little or no grounds at all, take an erroneously narrow view of both applicable law and the scope of the Warfield's directed verdict motion.[6]

The Primoffs admit the Warfields' motions raised issues of sufficiency of the evidence on damages, causation, and diminution in value. (AB at 16). They split hairs by arguing, however, counsel did not expressly raise the "issue of lost profits." (*Id.*) While the Warfields did not label the Primoffs' claim as such, neither did the Primoffs, who continue to mischaracterize their claim as one for "diminution in value." (AB at 27). Nevertheless, as found by the District Court,

[6] The Primoffs unsuccessfully made the same waiver argument to the District Court which heard the Warfields' directed verdict motion. (Doc. 115 at 4-5).

there can be no serious dispute the Primoffs sought anything other than lost profits. (J.A. at 661).

At the close of the Primoffs' case, the Warfields' counsel argued the Primoffs had failed to introduce sufficient evidence that any diminution in value was caused by the Easement or that the Primoffs' alleged loss was based on a purported inability to convey the Resulting Lands during the Easement Period. (S.A. at 6:14-7:16).[7] Furthermore, counsel indicated because the Easement had been removed long before trial, the Primoffs could not simply rely on their experts' testimony of a purported decrease in the value of the Resulting Lands. (*Id.* at 10:6-13). Instead, the Warfields argued, they had to demonstrate they were unable to sell the property during the Easement Period. (*Id*. at 10:14-23). Counsel identified several gaps in the Primoffs' evidence, including the lack of a single witness who testified that the easement affected the value of the Resulting Lands and the complete absence of any admissible evidence that the Easement rendered the property unsellable. (*Id.* at 7:8-25, 9:22-10:23). ***Thus, the Primoffs certainly understood they were seeking profits lost by their alleged inability to sell the Resulting Lands, and, further, were on notice the Warfields contended there was insufficient evidence to go to the jury.*** Foreseeability, along with proximate

[7] References to the Supplemental Appendix are denoted "S.A."

causation and reasonable certainty, are three "black letter law" requirements to proving ***any*** contract damages.

Though counsel could have more precisely articulated the grounds of the Warfields' motion, that is no basis to deem those grounds waived. The Federal Rules are to be interpreted liberally so as not to be a "trap for the unwary." *Witt v. Merrill*, 208 F.2d 285, 286 (4th Cir. 1953) (permitting appeal of Rule 59 decision notwithstanding, *inter alia*, grounds not specified below). With respect to Rule 50(a), "technical precision need [not] be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's position with respect thereto." *Virginia-Carolina Tie & Wood Co. v. Dunbar*, 106 F.2d 383, 385 (4th Cir. 1939). *See also Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 184 (3rd Cir. 1992) (while defendant's counsel "could more clearly have identified the grounds for directed verdict….plaintiffs' counsel was clearly on notice of legal rubric under which" defendant planned to proceed). The Warfields' motion put the Court and the Primoffs on notice that the Primoffs' evidence on damages was insufficient.

This Court has consistently applied *de novo* review in circumstances analogous to the instant case. For instance, in *Price v. City of Charlotte, N.C.*, 93 F.3d 1241 (4th Cir. 1996), nonminority police officers sought damages for, *inter alia*, emotional distress as a result of the defendant city's alleged race-based

promotion policies in violation of the Equal Protection Clause. At the close of the plaintiffs' case and the evidence, the city moved for a judgment as a matter of law on the issue of compensatory damages. On appeal, the police officers asserted the Court was barred from reviewing the sufficiency of the evidence because the city failed to raise and preserve the issue adequately. The Court disagreed, stating in pertinent part:

> Our review of the record compels us to conclude that the City sufficiently raised and preserved the sufficiency issue for appellate review. First, in its Rule 50(a) motion at the close of Appellees' case-in-chief, the City contended "there's no legally sufficient evidentiary basis for a reasonable jury to find for the plaintiff on any of the issues brought before the court." (J.A. at 196.) Also, in arguing its Rule 50(a) motion, the City specifically reiterated that "there's really been no evidence from which a reasonable jury could conclude that they did, in fact, suffer mental and emotional distress that can be related to the constitutional violation they complained of."

Id. at 1249 (citation omitted). Having found the "sufficiency issue was assuredly raised," the Court went on to review the city's sufficiency challenge. *Id*.

In this case, as in *Price*, the District Court expressly understood the Warfields' challenge to be to the sufficiency of the Primoffs' evidence on damages. (J.A. at 329:24-330:5). *See Singer v. Dungan*, 45 F.3d 823, 828 (4th Cir. 1987) (excusing an improperly raised sufficiency challenge under Rule 50 where the district court stated there was sufficient evidence to send the case to the jury).

See also Howard v. Walgreen Co., 605 F.3d 1239, 1243 (11th Cir. 2010) (in *dicta*, "strict identity of issues…is not required," so long as the issues are "closely related" such that counsel and the court are deemed to have notice of the deficiencies asserted by the moving party).

Nor would *de novo* review of the Warfields' appeal implicate the primary purpose of the rule: to give the non-movant an opportunity to cure any deficiencies which would prevent submission of his claim to the jury. *Virginia-Carolina Tie & Wood Co.*, *supra*, 106 F.2d at 385. The Primoffs have not identified any evidence which could have repaired the flaws in their case. *See Fed. Sav. & Loan Ins. Co. v. Reeves*, 816 F.2d 130, 137-38 (4th Cir. 1987) (rigid application of rule inappropriate where, *inter alia*, "there is no suggestion that plaintiff could have produced any additional evidence that would have been pertinent to the legal issue").

The authorities on which the Primoffs rely are inapposite and may be dealt with briefly. In *Williams v. Runyon*, 130 F.3d 568, 572 (3rd Cir. 1997), and *Wall v. United States*, 592 F.2d 154, 160 (3rd Cir. 1979), the appellants had made one-sentence, blanket directed verdict motions containing no specific grounds. In another Third Circuit case, *Chemical Leaman Tank Lines v. Aetna Casualty and Sur. Co.*, 89 F.3d 976, 993 (3rd Cir. 1996), the court refused to treat an objection to a jury instruction as the equivalent of a Rule 50 motion. In *Tolbert v. Queens*

College, 242 F.3d 58, 66-67 (2d Cir. 2001), the defendant made timely motions pursuant to Rules 50(a) and (b) which were heard on appeal. *Galdieri-Ambrosini v. National Realty & Development Corp.*, 135 F.3d 276, 286-89 (2d Cir. 1998), on balance, ***supports*** the Warfields; the Second Circuit elected to hear the defendant's appeal from a "flawed" Rule 50 motion where the plaintiff acknowledged she would not otherwise have had any additional evidence to present.

B. THE WARFIELDS' RULE 50(A) AND (B) MOTIONS PRESERVED THEIR RIGHT TO APPEAL THE SUFFICIENCY OF THE EVIDENCE IRRESPECTIVE OF WHETHER THEY CHALLENGED THE JURY INSTRUCTIONS.

The Primoffs next assert the Warfields waived their right to appeal the denial of their Rule 50 motions because they did not object to the jury instructions. The Primoffs attack a straw man: the relevant requirements for damages were included in the instructions, and the Warfields do not raise any issue with them on this appeal. Moreover, it is settled law that the Warfields' timely Rule 50 motions sufficiently preserved these issues irrespective of whether they also objected to the jury instructions pursuant to Rule 51.

As the Primoffs note, the District Court conducted a lengthy, off the record charge conference in chambers. (AB at 18-19). Thereafter, the Warfields did not object to the instructions which addressed each of the damages issues raised in this appeal—foreseeability, certainty, and causation. (J.A. at 398-99).

An appellant does not waive *de novo* appeal from denial of its Rule 50 motions by not objecting to jury instructions pursuant to Rule 51. The Supreme Court has held this to be the case even where the same legal issue is raised by the Rule 50 motions and the instructions:

> In the case before us, the focus of petitioner's challenge is not on the jury instruction itself, but on the denial of its motions for summary judgment and a directed verdict. ***Although the same legal issue was raised both by those motions and by the jury instruction, "the failure to object to an instruction does not render the instruction the 'law of the case' for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict."*** *Kibbe, supra,* 480 U.S., at 264, 107 S. Ct., at 1118 (dissenting opinion) (citations omitted).

City of St. Louis v. Proprotnik, 485 U.S. 112, 120 (1988) (emphasis added). This Court has also held an appellant's "failure to specifically object to the instructions" does not "waive the position…already unsuccessfully presented to the district court." *College Loan Corp. v. SLM Corporation, a Delaware Corp*, 396 F.3d 588, 600, n. 10 (4th Cir. 2005). *See also K & T Enterprises, Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 174-75 (6th Cir. 1996) (regardless of whether appellant objected to jury instructions, Rule 51 does not prevent normal appellate review where appellant made necessary arguments in its Rule 50 motions).

None of the cases the Primoffs cite suggests a different result, as they simply stand for the proposition that *de novo* review of a jury instruction is unavailable

where the appellant did not object at trial pursuant to Rule 51. *See, e.g., Fogarty v. Near North Insurance Brokerage, Inc.*, 162 F.3d 74, 79 (2d Cir. 1998) ("party who fails to object to a jury instruction at trial waives the right to make that instructionthe basis for an appeal"). In fact, *City of Richmond, Va. v. Madison Mgmt. Group, Inc.*, 918 F.2d 438 (4th Cir. 1990) ***supports the Warfields' appeal***. The Court observed the "failure to object [to jury instructions] may be disregarded if the party's objection has previously been clearly made to the court and it is plain that a further objection would be unavailing." *Id.* (citation omitted). The Warfields' Rule 50 motions clearly stated their position that the Primoffs' evidence on damages was insufficient as a matter of law.

C. THE PRIMOFFS DO NOT REBUT THE WARFIELD'S SHOWING OF INSUFFICIENT EVIDENCE TO CREATE A JURY QUESTION AS TO DAMAGES; IN THE ALTERNATIVE, BECAUSE THE PRIMOFFS HAVE COME FORWARD WITH NO EVIDENCE, EVEN IF THE WARFIELDS' RULE 50 MOTION WAS DEFICIENT, THE AWARD MUST NEVERTHELESS BE REDUCED PURSUANT TO THE "ANY EVIDENCE" STANDARD, OR REVERSED AND A NEW TRIAL ORDERED PURSUANT TO RULE 59.

The foregoing indicates the Warfields' are entitled to *de novo* review of the denial of their Rule 50 motion. Assuming, *arguendo*, this Court disagrees as to one or more of the issues raised in their Rule 50(b) motion, they are nevertheless entitled to a judgment as a matter of law pursuant to the "any evidence" standard or

a new trial pursuant to Rule 59.[8] For the reasons set forth below, regardless of the standard applied, the award cannot be sustained.

Where a party has failed to move the trial court pursuant to Rule 50(a) with respect to a particular issue, this Court's review is "limited to whether there was ***any*** evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed…." *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978) (emphasis in original) (quoting *American Lease Plans, Inc. v. Houghton Constr. Co.*, 492 F.2d 34, 35 (5th Cir. 1974)), *cited with approval* in *Bristol Steel & Iron Works v. Bethlehem Steel Corp.*, 41 F.3d 182, 187 (4th Cir. 1994). This standard is substantively similar to that which obtains under Rule 59, pursuant to which this Court reviews a denial of a motion for a new trial for abuse of discretion. *Sloan v. Equifax Info. Servs., LLC*, 510 F.3d 495, 502 (4th Cir. 2007). Irrespective of the standard applied, the verdict below cannot be sustained.

As set forth in the Warfields' Opening Brief, the Primoffs produced no competent evidence that (1) resale of the Resulting Lands was known to or contemplated by all parties when the Agreement was signed or breached, (2) the Easement prevented them from selling the Resulting Lands, or (3) the Easement caused the Resulting Lands to diminish in value. (OB at 21-37). Further, the

[8] There is no question Warfields preserved *de novo* review with respect to the sufficiency of the evidence as to whether the Easement caused any decrease in the value of the Resulting Lands and whether the Easement prevented the Primoffs from selling the Resulting Lands. (S.A. at 9:22-10:23).

Primoffs failed to prove their damages with reasonable certainty. (*Id*. at 38-40). The Primoffs' response to the Warfields' brief falls well short of refuting any of these contentions.

First, the Primoffs continue to conflate two theories of damages: lost profits and diminution in value, neither of which provides a basis to sustain the award below. For instance, the Primoffs assert "[t]he Warfields failed to note that courts in other jurisdictions overwhelmingly categorize diminution in value as a consequential damage," and that "diminution in value…was reasonably foreseeable and tracks directly with the defendants' breaches." (AB at 20, 27). However, the Primoffs made no attempt to prove the Easement decreased the value of the Resulting Lands. In fact, their experts did not take the Easement into account when appraising the property, and thus ***excluded*** the Easement as a cause of the decrease in value to which they testified. (OB at 18-19). They offered no evidence of the value of the Resulting Lands with, versus without, the Easement, or of any lost rental during the Easement Period.[9] Although the Primoffs' experts testified the property decreased in value, there is no basis in the record to assert the

[9] Nor is it beyond doubt that there was any material decrease in the value of the property during the Easement Period. The Floodplain Easement was essentially coextensive with existing features of the Resulting Lands which otherwise 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). Moreover, the Freedom Hills Farms development had stripped the Resulting Lands of any further residential development rights. (Edw. Primoff, J.A. at 180:18-181:11).

Warfields caused the decrease. To the extent the Primoffs contend they seek only diminution in value of the Resulting Lands, reversal of the damages award is therefore required irrespective of the standard of review applied since there is absolutely no evidence of proximate causation.

Next, the Primoffs assert Mr. Warfield should have known the Easements would cause the Primoffs difficulty reselling the Resulting Lands. (AB at 25). Assuming for the sake of argument that contention to be true, it misses the point. Pursuant to Maryland law, the Primoffs must demonstrate at the time they entered into the Agreement, "it was expressly within the contemplation of [Mr. Warfield] that the [Resulting Lands], would be [conveyed back to the Primoffs] ***for resale***." *Hoang*, *supra*, 177 Md. App at 607, 936 A.2d at 942 (emphasis added). They have failed to cite any direct or reasonable inferential evidence to this effect. That an encumbrance may affect the resale of a property could be argued in any real estate transaction. If that showing were sufficient, it would uncouple the foreseeability requirement from the collateral transaction in contravention of Maryland law.

The Primoffs make one attempt at a substantive response to the Warfields' appeal: They assert because the Warfields referred to Edward Primoff as a "sophisticated real estate investor and lender," and to the Primoffs as the original "developers" of Freedom Hills Farms, "the Warfields must have known the Primoffs…would sell their property." (AB at 26). In support of this dubious

contention, the Primoffs cite—but do not reproduce—one paragraph from the Warfields' Answer and Counterclaims. That paragraph states:

> Mr. & Mrs. Primoff, given their experience with the Carroll County Government and Carroll County politics, and their experience bringing "Freedom Hills Farm" to "Preliminary Plan" approval, knew that a reasonable person in Mr. Warfield's position would attach importance to the facts in deciding whether to enter into the Contract of Sale, and that these facts were material, and that the Primoffs intentionally failed to disclose them to Mr. Warfield.

(J.A. at 50, ¶ 52). There is nothing in this language which supports an inference the Primoffs intended to resell the Resulting Lands. Nor does Mr. Primoff having invested in and lent money secured by real estate support any such inference. As noted previously, Edward Primoff admitted the Freedom Hills Farms development had stripped the Resulting Lands of any further residential development rights. (Edw. Primoff, J.A. at 180:18-181:11). Furthermore, the Resulting Lands were their ***home***, not an investment property. Thus there is no reasonable basis to infer from this evidence Mr. Warfield knew or should have known the Primoffs intended to "develop" the Resulting Lands. Nor is there any evidence they, in fact, did intend to "develop" the Resulting Lands.[10]

[10] Moreover, *Hoang* makes clear that ***both*** parties to the subject agreement must have contemplated a collateral agreement in order to recover collateral lost profits as damages. *Id.* at 610, 936 A.2d at 943. The Primoffs brief makes clear they do not accept the characterization as "developers." (AB at 26). The Primoffs otherwise make no effort to assert ***they*** contemplated reselling the Resulting Lands

D. EVEN IF THE COURT WERE TO APPLY THE "PLAIN ERROR" STANDARD OF REVIEW, THE AWARD SHOULD BE REVERSED.

Even if the Court were to notice the District Court's denial of a judgment as a matter of law on the plain error standard, the decision should be reversed. This Court may correct an error not raised below if (1) there is an error, (2) the error is plain, (3) the error affects substantial rights, and (4) the Court determines, after examining the particulars of each case, the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 730 (1993). *See In re Celotex Corp.*, 124 F.3d 619, 630-31 (4th Cir. 1997) (applying *Olano* to civil cases). For the reasons discussed above, the first three prongs of *Olano* are met in this case: permitting the jury to consider lost profits in the absence of any evidence that resale was contemplated by the parties or that the Easement prevented resale was a plain error which adversely affected the Warfields' rights.

There are several reasons the decision below is a "manifest miscarriage of justice" and therefore also satisfies the fourth prong of the test. *Bristol Steel*, 41 F.3d at 187. First, the award represents an unprecedented expansion of Maryland law as it applies to lost profits. "[A] federal court sitting in diversity is obliged to apply state law principles to resolve such a question, utilizing such principles as

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at the time they entered into the Agreement. This alone is sufficient to reverse the judgment below.

enunciated and applied by the state's highest court." *Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.*, 510 F.3d 474, 482 (4th Cir. 2007) (citation omitted). As noted above, the Maryland Court of Appeals has never permitted recovery of lost profits where, as here, the collateral agreement was not already in existence at the time the subject agreement was signed or breached. *CR-RSC Tower I, LLC v. RSC Tower I, LLC, supra*, 2011 WL 5428785 at *14 (citations omitted). The Special Court of Appeals has likewise never permitted an award of lost profits in the absence of evidence the collateral transaction was manifestly contemplated by the parties. *Id.*; *Hoang v. Hewitt Ave. Assocs., supra*, 177 Md. App. at 573, 936 A.2d at 922. Respectfully, the decision below is contrary to the rule of judicial restraint which is implicit in diversity jurisdiction.

Moreover, the award below compensates the Primoffs for diminution in value proven to be unrelated to the Warfields. (OB at 18-19). The Primoffs, on information an belief, still own the Resulting Lands. As found by the District Court:

> In 2006, Plaintiffs successfully extinguished the improper easement, but they did not try again to sell the Resulting Lands. Thus, as of the date of trial, Plaintiffs owned all of the Resulting Lands unencumbered by any easements, just as was contemplated by Plaintiffs' original agreement with Defendants. Nevertheless, Plaintiffs claimed a loss.

(J.A. at 658). The award below unjustly enriches the Primoffs. Indeed, it provides a blueprint for similarly situated plaintiffs to insure themselves against adverse changes in market conditions by simply claiming a previously unexpressed intention to resell the subject property.

Accordingly, were the Court to apply the plain error standard, reversal is nevertheless warranted.

* * *

The above discussion makes clear the Warfields are entitled to a judgment as a matter of law that the Primoffs may recover no more than their restoration costs of $24,000, whether reviewed *de novo*, pursuant to the standard set forth in *Bristol Steel & Iron Works, supra*, or against the plain error standard. Alternatively, the Warfields respectfully request the Court reverse the decision below pursuant to Rule 59 and order a new trial on the issue of damages.

II. THE PRIMOFFS CREATED WHATEVER RISK THEY CLAIM RELIEVED THEM OF THEIR DUTY TO MITIGATE AND OTHERWISE FAILED TO DISCHARGE THEIR DUTY BY SUMMARILY REJECTING BIDS FOR THE RESULTING LANDS.

The Warfields chiefly rely on their Opening Brief addressing mitigation of damages. The Primoffs respond by contending the "risks" which excuse their abandoning the auction "arose because of the now conceded breach [and] are to be

borne by" the Warfields. (AB at 28). There are two problems with the Primoffs' analysis.

First, the risk of litigation which the Primoffs claim would have arisen had they gone through with the auction was created not by the Easement, but instead by the Primoffs' failure to disclose the Easement to the participants in the auction. Second, by not disclosing the Easement, or inquiring as to the bidders' state of knowledge, the Primoffs cannot say whether any risk existed. As the Primoffs concede, they were "required by the 'avoidable consequences' rule of damages to make all reasonable efforts to minimize the loss sustained from the breach" subject only to the qualification that they were not required to incur "risk of additional substantial loss or injury." (AB at 27-28). In the context of this case, by failing to disclose the Easement or inquire of the bidders, neither of which would have incurred ***any*** risk, the Primoffs did not use "all reasonable efforts." *Cave v. Elliott*, 190 Md. App. 65, 96, 988 A.2d 1, 19 (2010).

Accordingly, the Court should reverse the decision below and vacate all but $24,000 of the jury award or, in the alternative, remand the case for a new trial on the issue of damages.

III. THE PRIMOFFS CITE NO APPOSITE AUTHORITY ON WHICH THE JURY'S SEPARATE AWARD OF DAMAGES FOR BREACH OF CONTRACT AND BREACH OF WARRANTY OF TITLE MAY BE SUSTAINED.

In their Opening Brief, the Warfields demonstrated the jury's separate awards on each of the Primoffs' breach of warranty of title and breach of contract claims were duplicative. Both claims arise out of the same acts and are alleged to have caused a single economic injury. Under these circumstances, a separate award of damages on each claim is unlawful. (OB at 47-52).

Remarkably, the Primoffs respond by copying several pages of a Northern District of New York case and pasting them virtually word for word into their brief, changing the names of the parties and excluding text which is favorable to the Warfields. *Compare Bseirani v. Mahshie,* 881 F. Supp. 778, 784-87 (N.D.N.Y. 1995) ("*Bseirani I*"), *with* AB at 38-43. The Primoffs do not cite *Bseirani I* in their brief, nor is it listed in their Table of Authorities. Had they cited the case, they would also have been required to cite an unpublished Second Circuit affirmance, *Bseirani v. Mahshie,* 107 F.3d 2, 1997 WL 3632 (2d Cir. 1997) (table) ("*Bseirani II")*, which distinguishes *Bseirani I* and another case on which the Primoffs rely, *Gentile v. County of Suffolk,* 926 F.2d 142 (2d Cir.1991), from the instant case.[11]

[11] With all due respect, this is ***not*** the first time the Primoffs' counsel has failed to comply with appellate rules. *See Leavy v. American Federal Savings Bank,* 136 Md. App. 181, 201, 764 A.2d 366, 377 (2000).

Their inclusion of the *Bseirani I* text in the Primoffs' brief necessitates several points of clarification. First, the District Court below did not find "no plausible basis for concluding that duplication of damages occurred…" (AB at 41). Instead, Judge Nickerson found only that "it is plausible that the jury intended to award" the aggregate amount to the Primoffs. (Doc. 119 at 7). Second, the District Court below did not find this case to be "analogous to the jury's response to the trial judge in *Gentile* that its awards were 'independent.'" (AB at 41). In fact, Judge Nickerson did not cite *Gentile* at all; this language is copied from the Northern District of New York opinion. The "analogous" circumstances in *Gentile* and *Bseirani I* were that in both of those cases the juries' verdict forms contained responses manifesting their intent to aggregate the separate awards. *Bseirani I*, 881 F. Supp. at 786. No such jury response or other manifestation of intent is present in the instant case. Nor is jury intent material where, as here, the "threshold inquiry reveal[s] that the awards were duplicative…." (AB at 42).

Bseirani I and the Primoffs cite two other Second Circuit cases, *Conway v. Icahn & Co., Inc.*, 16 F.3d 504 (2d Cir. 1994), discussed at length in the Warfields' brief, (OB at 49-51), and *Wickham Contracting Co. v. Board of Educ.*, 715 F.2d 21, 28 (2d Cir. 1983). In both *Wickham* and *Conway*, the court held separate awards based on a single injury to be impermissible. *Wickham*, 715 F.2d at 28; *Conway*, 16 F.3d at 511. By way of contrast, in *Gentile*, the plaintiffs alleged, and

the jury may have found, they suffered multiple, discrete, and unduplicated injuries. *Id*. at 153-154. In *Bseirani*, the plaintiff alleged, and the jury may have found, non-overlapping injuries caused by legal malpractice, fraud, and conspiracy. *Bseirani II*, 1997 WL 3632 at *2. In those cases, separate awards were permitted.

The Warfields argued to the District Court that the key to harmonizing *Gentile* and *Conway* (and by analogy, *Bseirani* and *Wickham*) is to focus on the respective plaintiffs' injuries: separate or discrete injuries permit separate awards, while a single injury does not. (Doc. 116 at 15-18). The Second Circuit in *Bseirani II* distinguished it and *Gentile* from *Conway* on this very ground:

> [i]n *Gentile*, we cited a litany of injuries that could be termed psychological but did not necessarily result from the same injury. *Id.* at 153. Rather, we sought to find conceivable sets of nonoverlapping injuries that would result in nonoverlapping damages. Whether or not all of Bseirani's injuries can be termed "economic," the jury could have found distinct economic injuries under each of the four claims, as discussed above. This case is, therefore, extremely similar to *Gentile*.
>
> By contrast, in *Conway v. Icahn & Co.*, 16 F.3d 504 (2d Cir. 1994), upon which Mahshie relies, ***we found duplication because there was a single injury-not just a single type of injury-namely, the unauthorized liquidation of a portion of the plaintiff's account in order to satisfy a margin call, which led, therefore, to a single set of damages,*** *id.* at 511. In cases such as *Gentile* and the present one, the jury could have found separate

> injuries while awarding the same amount on each, a decision to which we must defer.

Bseirani II, 1997 WL 3632 at *2-3 (emphasis added). *See also Conway*, 16 F.3d at 511-12 (distinguishing *Gentile* on same grounds).

In the case at bar, the Primoffs' two claims sought the same lost profits. The Primoffs' "theories of recovery were based on a single set of facts, and the economic loss sustained was predicated on those unitary facts. Under such circumstances, 'the verdicts should be identical and a single recovery allowed.'" *Conway*, 16 F.3d at 511 (citing *Wickham*). *See also Gordon v. Pete's Auto Service of Denbigh, Inc.*, 637 F.3d 454, 460-61 (4th Cir. 2011) (plaintiff "may not receive a double recovery under different legal theories for the same injury").

Therefore, based on the authority cited herein and in the Warfields' Opening Brief, the duplicative award should be vacated.

CONCLUSION

For all of the foregoing reasons and for the reasons stated in their Opening Brief, the Warfields 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 duplicate awards.

3. Remand the case to the District Court for a new trial on damages in excess of $24,000.

January 17, 2012

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Dated: January 17, 2012

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I hereby certify that on January 17, 2012, 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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