No. 21-CV-640

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

UNITED HOUSE OF PRAYER FOR ALL PEOPLE OF THE CHURCH,	)	
Appellant,	)	CAB 2450-15
vs.	)	
RESTORATION DOCTOR, INC.,	)	
Appellee.	)	

BRIEF OF APPELLEE RESTORATION DOCTORS, LLC

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List of Parties and Corporate Disclosure Statements

A. D.C. App. R. 28(a)(2)(A) Statement

Restoration Doctors, LLC ("RD-Plural") was represented by Courtney R. Abbott, Esq., PARAGON LAW FIRM, PLLC, in the proceedings below until November 8, 2016, when Judge Campbell granted a motion for substitution, (APPX. 006), replacing Ms. Abbott with undersigned counsel, Stuart L. Peacock, Esq. Mr. Peacock tried the case, including remand proceedings, on behalf of RD-Plural and remains as counsel for Appellee.

Appellant United House of Prayer ("UHP") was represented by Mickie Bailey, Esq., in all proceedings before the Superior Court and in this appeal. Ms. Bailey was joined by Mary E. Gately, Esq. and Paul D. Schmitt, Esq. in the first appeal, the remand, and this second appeal.

B. D.C. App. R. 28(a)(2)(B) Disclosure

RD-Plural is a limited liability company registered in Virginia owned by Farough "Frank" Darakhshan. RD-Plural is a successor to Restoration Doctor, LLC ("RD-Singular").

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BRIEF OF APPELLEE RESTORATION DOCTORS, LLC

Appellee Restoration Doctors, LLC ("RD-Plural") respectfully requests that the August 23, 2017 Judgment and the August 16, 2021 Judgment Order (reinstating its August 23, 2017 Judgment) be affirmed.

I. STATEMENT OF THE ISSUES FOR REVIEW

A. Matters Raised in Second Appeal.

1. Alleged Error regarding Intent to Be Bound to the Contract.

Even though the trial court found that "the job was properly done and professionally done, . . ., that all charges invoiced to the United House of Prayer were proper and were not inflated and were reasonable under all the circumstances," (APP-446), did the trial court err in finding that the Contract was enforceable as a matter of fact and law?

2. Alleged Error regarding Lack of Intent to Be Bound to Preliminary Estimate.

Even though the insurance adjustor testified that there was no agreement with RD-Singular to be bound by a preliminary estimate provided by the property insurer's "preferred" vendor, F.B. Davis, did the trial court err by not finding that RD-Singular agreed to restore the building for an amount not to exceed $282,504.36?

3. Alleged Error regarding RD-Plural's Standing.

Even though Appellee's uncontroverted testimony established that RD-Plural

was a continuation of RD-Singular, did the trial court err by determining that RD-Plural is a proper plaintiff?

4. Alleged Error regarding the Statute of Limitations.

Was it error for the trial court to not apply the statute of limitations?

5. Alleged Error in Calculation of Interest.

Was it an abuse of discretion for the trial court to apply a payment to unpaid interest before unpaid principal?

B. Matters Raised and Addressed in the First Appeal.

During the first appeal, UHP raised four issues: (1) whether it was error to prevent UHP from cross-examining Frank Darakhshan about RD-Plural's corporate history and successorship status to RD-Singular (APPX. 458); (2) whether it was error to hold that the July 20, 2012 Contract was enforceable due to its open price term (APPX. 459); (3) whether the Superior Court erred by declining to find that the insurer's estimates bound the parties to the amount of the estimates (APPX. 459); and (4) was it error to calculate contractual interest by crediting UHP's payment of $150,970.19 to unpaid interest awarded to Appellee (APPX. 459).

Now during this second appeal, UHP raises five issues: (1) whether it was error to hold that the July 20, 2012 Work Authorization Agreement was enforceable due to a lack of certainty (Appellant's Brief, p. 1); (2) whether the Superior Court erred by declining to find that the insurer's estimates bound the parties to the

amounts of the estimates (*id.*); (3) whether it was error to hold that RD-Plural is a successor to RD-Singular (*id.* at 2); (4) whether RD-Plural's claim is barred by the statute of limitations (*id.*); and (5) whether the Superior Court erred by adopting RD-Plural's calculation of damages.

The narrow issue of whether cross-examination should have been allowed concerning standing, specifically whether RD-Plural was a proper plaintiff, was resolved favorably to Appellant during the first appeal. Thus, the matter was remanded to determine whether there was a proper plaintiff. (APPX. 469). This Court observed that if the Superior Court did find there was a proper plaintiff, UHP would be free to appeal from that judgment and could then seek review of the trial court's ruling on the merits. (APPX. 469). Since the Superior Court concluded that RD-Plural was a proper plaintiff after allowing discovery on the issue of standing, and tried the standing issue on October 15 and November 2, 2020 (APPX. 796-807), UHP appropriately challenges that determination in this second appeal.

UHP introduces a new issue to the second appeal: whether RD-Plural's claim is barred by Maryland's three-year statute of limitations for actions based on contract. That issue was briefed in UHP's March 3, 2017 Motion to Dismiss before the first trial, but the argument was never developed during the first appeal. (APPX. 069). UHP did not specifically mention a statute of limitations defense in its statement of issues in the first appeal. (APPX. 458-459). Instead, the entirety of

UHP's discussion of the statute of limitations defense was relegated to a footnote in Appellant's Brief in the first appeal. (APPX. 460). As is discussed *infra* at 41, that issue has been waived.

C. Matters Not Raised in Either Appeal.

UHP does not appeal the trial court's determination that the work was done properly and professionally and does not appeal the finding that all amounts invoiced were reasonable. Nonetheless, at times UHP argues that RD-Plural's costs were "exorbitant" (Appellant's Brief, pp. 20, 23, 28, 36), that Appellee failed to adequately complete the restoration work (Appellant's Brief, p. 4), and that the Contract gave RD-Plural a "blank check" that allowed RD-Plural to "charge any price, even in the millions of dollars." (Appellant's Brief, pp. 5, 33.) Those allegations were resolved at trial adversely to UHP after UHP had a full and fair opportunity to put on its best case at trial.

The court below found that "the job was properly done and professionally done, according to specifications, requirements of the job and specifications of the client, and that it was properly charged, that all charges invoiced to the United House of Prayer were proper and were not inflated and were reasonable under all the circumstances." (APPX. 446). The parties specifically litigated whether there was incomplete or defective work, and whether UHP was owed a set-off for work that UHP claimed had to be redone. (APPX. 439). Since those allegations were resolved

at trial adversely to UHP ***and UHP has not appealed them,*** its attempts to revise or revisit the record on this point should be disregarded. For example, Appellant's Brief, p. 23, n. 7 and page 38, n. 16, suggests that UHP is entitled to a reduction in the judgment for $19,878.00 for work that the trial court considered and specifically discredited. These arguments are a mere distraction, meant to unjustifiably sully RD-Singular's work, unsupported by the record, not part of the issues appealed, and were waived.

II. STATEMENT OF THE CASE

A. Summary of the Claim and First Trial.

UHP hired RD-Singular to perform emergency remediation and restoration work the day after a catastrophic flood filled UHP's basement to the ceiling with raw sewage and diesel fuel. Frank Darakhshan of RD-Singular met with Apostle Thompson, UHP's Corporate Secretary, and explained to him all terms of the Customer Communication and Work Authorization Agreement (the "Contract") on a page-by-page, paragraph-by-paragraph basis. (APPX. 227). As Frank Darakhshan went through the Contract with him, Apostle Thompson told him that he had dealt with floods before, and it was apparent to Frank Darakhshan that Apostle Thompson "knew exactly the procedures" associated with the work to be done. (APPX. 224). When the question of price was discussed, Frank Darakhshan told Apostle Thompson that they "would be using Xactimate, what everybody in the industry

uses" for invoicing. The price would be based on square footages, the type of materials taken out, the number of hours, the number of days equipment was left there and other factors that could not be determined in advance. (APPX. 225-226). That discussion regarding price did not just apply to the emergency remediation services, but also to restoration. (APPX. 226). Frank Darakhshan testified[1] "while I was explaining it to him, he was nodding that he knows what that is." (APPX. 225).

Frank Darakhshan and Apostle Thompson specifically discussed whether UHP wanted to proceed with restoration. Apostle Thompson wondered whether he needed to find a second company to do the restoration work and Mr. Darakhshan told him, "We do everything from A to Z. We handle the restoration as well." (APPX. 227) Apostle Thompson demonstrated UHP's assent to the Contract by initialing each of the Contract's provisions, including the provision that set out the scope of the Contract to "furnish materials, supply all equipment and perform all labor necessary to preserve and protect my property from further damage, ***and to perform all restoration procedures necessary to repair and restore the carpet, furniture, structure and other furnishings."*** (APPX. 829).

One of the provisions specifically initialed by Mr. Thompson addressed price

[1] While Frank Darakhshan testified during the first trial, Apostle Thompson did not.

and explained that in RD-Singular's industry, it was impractical to establish prices at the time of contracting due to variables encountered in responding to flood damage:

> [ ] Prices: I understand that water damage is a progressive condition and that drying time varies depending on the types of materials, quantity of water, degree of saturation, airflow volume and velocity, temperature and the indoor and outdoor humidity. Therefore, I understand it is impractical to give an accurate quote for services before completion. I have been supplied with an estimate or invoice from Restoration Doctor LLC, and agree to pay the full price for the work Restoration Doctor LLC performs.

RD-Singular provided an invoice for a $5,000.00 deposit before it started work immediately and provided remediation services including pumping, dehumidification, structural drying, demolition and hauling services at UHP's property. (APPX. 1032). While RD-Singular's work was underway, Travelers Insurance Companies ("Travelers") sent an adjustor, described by the senior adjustor James Hanrahan as a "first level guy who just walked through it quickly" to give an estimate for the cost of the emergency services.[2] Mr. Hanrahan testified at trial that the "estimate" for the emergency remediation that Travelers received from its adjustor was in the $50,000 to $75,000 range. (APPX. 358-359).

RD-Singular provided an invoice for the remediation work in the amount of $185,825.80 to Travelers. Over the next several weeks, Frank Darakhshan

[2] That estimate was never produced in litigation and there was no testimony from the estimator explaining the estimate or the process.

negotiated that invoice with Mr. Hanrahan, resulting in Travelers making a payment of $165,467.40 by check to UHP (not RD-Singular) on September 26, 2012. While Appellant's Brief, at p. 3, argues that the $165,467.40 price for the remediation services was negotiated and agreed to "using insurance estimates provided by an adjustor from Travelers," there is nothing in the record to support that contention. UHP incorrectly characterizes Frank Darakhshan's testimony by conflating the amount agreed upon -- $165,467.40—with the F.B. Davis estimate for the emergency services and demolition work. Mr. Hanrahan testified that RD-Singular did not agree to be bound to any estimates. There is no record establishing that the "first-level guy's" estimate, made just after the flood, was ever provided to RD-Singular for its consideration. This failure of proof is fatal to UHP's contention that RD-Singular's acceptance of the remediation estimate established a course of conduct between the parties whereby RD-Singular agreed to be bound to insurance estimates. There is no evidence that RD-Singular agreed to be bound to the early estimate for emergency remediation work and, notwithstanding that estimate, Travelers approved a payment for the emergency work in an amount that was more than three times the low-end of the estimate and double the amount of the high-end ($50,000 to $75,000 according to James Hanrahan) of that estimate. (APPX. 358-359).

Restoration work commenced after the remediation was completed. It

included rebuilding almost all features from the floor to the ceiling including, but not limited to, stained-glass windows, doors, floors, tiles, ceilings, framing, drywall, electrical, woodwork, fixtures, paint, trim, replacement and installation of high-end commercial kitchen equipment, bathroom fixtures, the elevator, PA system, fire suppression system and other detail work. A fifteen-page invoice was generated using Xactimate, summarizing all the restoration work performed by Restoration Doctors and its subcontractors in the amount of $827,300.02, and was submitted October 11, 2013. (APPX. 907-923).

Regarding the restoration phase of the work, the evidence at trial showed that Travelers procured an estimate from F.B. Davis, less than a week after the flood occurred that estimated restoration work for $282,504.36. During the first trial on June 21, 2017, UHP proffered Mr. Hanrahan to testify about "the conversations that he had with Frank Darakhshan and his understanding that the parties agreed on the scope of restoration work as provided in the F.B. Davis estimate."[3] Instead, Mr. Hanrahan testified that there was no such agreement, and correspondence between James Hanrahan and Apostle Thompson on May 7, 2014 confirmed that RD-Singular did not agree to accept the F.B. Davis estimate to establish the price. (APPX. 1047-1048).

[3] See June 21, 2017 trial transcript at p. 365.

During the June 19 through 22, 2017 trial, RD-Singular presented testimony and documentation to substantiate all parts of its final invoice in the amount of $827,300.02 for the restoration services. (APPX. 834-873). UHP presented testimony as to several minor items that it considered to have been improperly performed, including paint, a piece of tape on a window, wallpaper, doors, a range hood, and an alleged double charge relating to a delivery fee. On each of these points, the testimony of RD-Plural's witnesses was credited and the testimony of UHP's witnesses was discredited. (APPX. 445-446).

Appellee summarized the amounts it claimed with a demonstrative exhibit breaking down the charges for Remediation, Restoration and Stolen Equipment, payments by the Church to Restoration Doctors and a calculation of a 1.5% late charge current as of March 27, 2017, the prior date of trial. (APPX. 429). The amount RD-Plural sought to be awarded for principal was $617,767.42, the difference between charges of $997,767.42 and payments of $380,000.00. RD-Plural further sought to be awarded late fees based on the Contract, which stated, "Payment terms to Restoration Doctor LLC are Net-30 days and late charges of 1.5% monthly are charged on any unpaid balance." Late fees began to accrue no later than October 20, 2013, thirty days after the summary invoice (APPX. 834-873). was provided to the Church. A 1.5% monthly charge was stated as .04931507% daily or 18% simple interest annually. Between October 20, 2013 and July 14, 2017,

thirteen-hundred and sixty-three (1363) days had passed. The daily late fee can be determined as $304.65 (.0004931507 x $617,767.42). Thus, the court was asked to award a late charge, in addition to principal, in an amount not less than $415,241.26 plus $304.65 per day until paid. The sum of the principal ($617,767.42) and late charge ($415,241.26) are $1,033,008.68. The court was asked to deduct the $150,970.19 payment made September 13, 2016 by UHP to RD-Singular from the finance charge, yielding a judgment amount of $882,038.49 plus $304.65 per day.

B. Proceedings Material to the First Appeal.

UHP filed a Motion to Dismiss or in the Alternative, for Summary Judgment on March 3, 2017. (APPX. 58-72). It argued that the named plaintiff at the time, "Restoration Doctor, Inc." lacked capacity to sue, that the initial filing of the lawsuit was a nullity, and that under Maryland law, the statute of limitations barred the the claim. In response, RD-Plural acknowledged that it had erroneously sued in the name of "Restoration Doctor, Inc." when it should have sued in the name of "RD-Plural." (APPX. 96).[4] A sworn statement was submitted from Frank Darakhshan wherein he testified that RD-Plural was currently in good standing,[5] RD-Plural was

[4] In RD-Plural's Omnibus Opposition to Motion for Leave to Amend, Choice of Law and To Dismiss, or in the Alternative for Summary Judgment, RD-Plural expressly moved to be substituted in the place of Restoration Doctor, Inc. (APPX. 096).
[5] This established "capacity" for RD-Plural. Capacity rules determine whether the Plaintiff is qualified to sue. See Super. Ct. Civ. R. 17(b).

formed as a successor to RD-Singular, and that RD-Plural was a continuation of RD-Singular owning RD-Singular's assets and subject to all RD-Singular's debts. (APPX. 108). RD-Plural submitted that Super. Ct. Civ. R. 17(a) provided for substitution of RD-Plural in the place of Restoration Doctor, Inc., and that relation back would be automatic for a substitution under Rule 17(a). RD-Plural further argued that the result would be the same under Super. Ct. Civ. R. 15, specifically part (c). Specifically, in response to UHP's statute of limitation argument, RD-Plural pointed out that UHP had made a partial payment acknowledging the debt on September 9, 2016 in the amount of $150,970.19. (APPX. 91; 1044).

On May 8, 2017, the trial court issued three orders relating to UHP's Motion to Dismiss, or in the Alternative for Summary Judgment. (APPX. 093-095). The combined effect of these orders was to deny UHP's Motion to Dismiss, or in the Alternative for Summary Judgment, allow the substitution of RD-Plural for Restoration Doctor, Inc. pursuant to Super. Ct. Civ. R. 17(a), and allow UHP to file an amended answer that included a "lack of capacity" defense. After a four-day bench trial and submission of written closing arguments from the parties, (APPX. 387-431), the trial court concluded with its verdict. (APPX. 432-450).

C. The Remand Proceedings.

Following this Court's July 25, 2019 ruling, the parties engaged in discovery relating to the standing issue, focusing on the history of RD-Singular, its cancellation

on May 31, 2013, the creation of RD-Plural on May 10, 2013, as well as the several other companies owned and operated by Frank Darakhshan. Trial was conducted over the course of two days, October 15, 2020, and November 2, 2020, with both Apostle Thompson and Frank Darakhshan testifying. Beside the transcripts of the testimony (APPX. 515-728), the record includes the parties' closing arguments in the form of written briefs and the parties' responses (APPX. 729-795).

D. The Order on Remand.

On August 16, 2021, the Superior Court lodged its Order on Remand, re-entering judgment in favor of RD-Plural. (APPX. 796-807). The Order established that RD-Plural was the successor to RD-Singular and that RD-Plural was a proper plaintiff. (APPX. 798). RD-Plural was RD-Singular's successor, and that RD-Plural had standing to pursue the lawsuit. (APPX. 798).

III. STATEMENT OF FACTS

A. RD-Plural Is RD-Singular's Successor.

1. Formation of RD-Singular.

RD-Singular was founded on February 25, 2010 by its sole owner and operator, Frank Darakhshan. At the time of RD-Singular's formation, documents issued by the Virginia State Corporation Commission ("VSCC") associated ID No. S3184738 with RD-Singular. (APPX. 1084). RD-Singular was the original party to the July 20, 2012 Contract. (APPX. 221; 534; 536; 1084). It performed "flood

damage, mitigation and restoration, water extraction, dehumidifying, structural drying, emergency services, board-up services, demolition, rebuild, reconstruction for any sort of damages that arise from a flood." (APPX. 221). Frank Darakhshan testified that he had four companies including RD-Singular doing this sort of work, and that he determined which company would perform a project depending "upon the type of projects we picked up [and because the] insurance required different requirements on licensing." (APPX. 250; 575). In this instance, it was RD-Singular that performed the Contract, and its work was completed in February or March of 2012 while RD-Singular was still in existence.[6] (APPX. 536-538; 800; 1125-1128).

2. Formation of RD-Plural, Successor to RD-Singular.

In May 2013, Frank Darakhshan founded RD-Plural. (APPX. 536-538). The VSCC appears to have assigned RD-Plural the ID No. S4543825. (APPX. 1125-1128). Frank Darakhshan testified about his motivation to change from RD-Singular

[6] UHP contended that RD-Singular was "cancelled" in May 2010 based on a typographical error. The original Declaration of Farough (Frank) Darakhshan (APPX. 1234) erroneously stated that RD-Singular was cancelled in May 2010. That Declaration was corrected to show the termination date of May 20*13* to comport with the actual facts. (APPX. 1021-1023). Judge Campbell's August 16, 2021 Order on Remand observed that "[d]iscovery permitted in preparation for the hearing then revealed, based on Virginia state records, that the amended declaration was exactly right: there had been no gap in time between the two entities." (APPX. 800. ("The Court, however, credits Mr. Darakhshan's explanation as the only one that makes sense under all the circumstances and credits the corrected version.")) UHP ultimately relented, abided by lower court's decision, and did not appeal the rejection of its frivolous and unprofessional "sham" affidavit argument.

to RD-Plural: "It's just that [RD-Singular] expanded a little bit over the years and instead of calling the company Restoration Doctor when it came time to renew, we renewed it as Restoration Doctors." (APPX. 220). As owner of the companies, Frank Darakshan clarified, "We started offering more services [and] I thought it sounded better and was more accurate." (APPX. 220). He testified that the change from RD-Singular to RD-Plural was a change in name only. (APPX. 537-541, 800). All RD-Singular's contracts and debts continued to be honored by RD-Plural. (APPX. 540). Mr. Darakhshan was the founder and sole owner of both entities, and RD-Plural simply continued the work of RD-Singular, using the same employees and the same equipment, working on the same types of projects. (APPX. 538). All the equipment, including fans, dehumidifiers, structural drying equipment, construction tools, office equipment, computers that were used by RD-Singular were used by RD-Plural. (APPX. 538). The employees continued to wear the same uniforms, with no change to the "Restoration Doctor" label that was on them. (APPX. 538-539). The company's website, "restorationdoctor.com," continued to be used by RD-Plural. RD-Plural continued to use the same advertising under the same contracts with the same vendors. (APPX. 539). It continued to use the same insurance coverage and the same bank account. (APPX. 539-540). The tax-payer ID number ("TIN") associated with RD-Plural was the same as the TIN for RD-Singular. (APPX. 540). There were no written agreements memorializing the

succession or a transfer agreement because that sort of documentation simply was not required. (APPX. 540-541; 561). All in all, when asked to summarize the difference between RD-Singular and RD-Plural, Frank Darakhshan testified, "Just an 's' at the end of 'Doctor.' No other difference in operating or anything else." (APPX. 541).

On April 5, 2020, RD-Plural filed papers that had the effect of changing the name to "Restoration Doc, LLC." Frank Darakhshan testified that the new name with "Doc" in the title was intended to be only a "d/b/a" designation, but that the State of Virginia provides only one form to cover both formal name changes and additions of a d/b/a, and the wrong box got checked. (APPX. 635-636; 655). The VSCC ID number for Restoration Doc, LLC is S4543825, same as the number assigned to RD-Plural.

3. References to "Flood Doctor."

When the trial judge asked Frank Darakhshan why so much of the correspondence found in the parties' exhibits was addressed to and from "Flood Doctor," Frank Darakhshan explained that, at the time, his Blackberry was incapable of handling multiple e-mail accounts and that all his e-mails for all of his companies came from an account labelled "Flood Doctor." (APPX. 250-251; 552). Likewise, certain computer programs licensed to Flood Doctor were used in connection with RD-Singular's business, such as the program that tracked employee timesheets and

Xactimate. Thus, when Travelers asked for timesheets to evaluate the mitigation component of the loss, the only program RD-Singular had for employee time records was licensed to Flood Doctor and the time reports therefore bore the "Flood Doctor" logo. (APPX. 545-546; 1188). "Flood Doctor" also appeared on the $5,000 invoice issued to UHP at the time of contracting because the only invoicing software that Mr. Darakhshan had at the time was licensed to Flood Doctor. (APPX. 547-548; 586; 676;1034). Lastly, counsel's February 19, 2014 dunning letter referred to "Flood Doctor" rather than RD-Plural. (APPX. 1204-1207).

UHP never displayed any particular concern about the name of the company that it contracted with until March 3, 2017, when UHP filed Motion to Dismiss, or in the Alternative for Summary Judgment. (APPX. 59-72). Before that, UHP paid "Flood Doctor, Inc." during the work that was being done under the agreement at Frank Darakhshan's instruction. (APPX. 674). E-mail correspondence concerning the progress of work and payment requests were received by Apostle Thompson from Frank Darakhshan that described Frank Darakhshan as "project manager" for "Flood Doctor, LLC." (APPX. 677). Other e-mails, including the final invoice from Frank Darakhshan concerning the project, whether to Apostle Thompson or to Travelers, likewise bore references to "Flood Doctor" or "Flood Doctor, LLC." (APPX. 679-682; 691-692). Apostle Thompson referred to "Flood Doctor" rather than "RD-Singular" on May 7, 2014, when corresponding with James Hanrahan

about the final invoice. (APPX. 1047-1048).[7] At no time did UHP ever assert that it was not going to pay RD-Plural's invoice on the basis that the wrong party was seeking payment. (APPX. 190).

4. References to "Restoration Doctor, Inc."

On April 7, 2015, RD-Plural filed its Complaint against UHP inadvertently using a misnomer, "Restoration Doctor, Inc." (APPX. 20-30). On September 13, 2016, Appellant's counsel, Mickie Bailey, issued a check in the amount of $150,970.19 to Restoration Doctor, Inc. (APPX. 91; 1044). That check was signed by Bishop Clarence Matthew Bailey. Bishop Bailey was "Bishop Trustee" for United House of Prayer and was "responsible for all finances raised and spent" during the period. (APPX. 91; Plaintiff's Omnibus Opposition, March 22, 2017, Exhibit 2, p. 7, 11. 2-14).[8] Bishop Bailey testified that he authorized the September 2016 payment, albeit as a "final payment" because he realized that UHP still owed money for the repair work. (APPX. 91; Plaintiff's Omnibus Opposition, Exhibit 2, p. 21, 11. 11-20). Insofar as the $150,970.19 check was unaccompanied by any

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[7] Plaintiff's Exhibit 9 (APPX. 1047-1048) also shows that Appellee never agreed to the F.B. Davis restoration estimate. Apostle Thompson asked James Hanrahan if he had any documentation showing the "Flood Doctor" agreed to it, and James Hanrahan wrote back, "I am sorry but I do not have anything in writing to support that assumption."

[8] UHP prepared the Appendix but did not include the exhibits to Appellee's March 22, 2017 Omnibus Brief. Pursuant to D.C. App. R. 30(a)(2) respectfully submits that the Court may still rely upon the exhibits as part of the record below. (See APPX. 007).

instructions or restrictions, counsel wrote to Mickie Y. Bailey, on October 24, 2016 to confirm that the check was tendered without any restrictions and that Defendant would not assert the defense of accord and satisfaction. (APPX. 91-92; Plaintiff's Omnibus Opposition, Exhibit 3).

B. The Flood at UHP'S Church at 1515 Ashland Avenue

On July 19, 2012, the church basement at 1515 Ashland Avenue, Baltimore was destroyed by a catastrophic flood of water mixed with raw sewage and diesel fuel filling the entire area of the large basement from the floor to the ceiling. Frank Darakhshan responded to the call and came to the church the night of July 20, 2012 before the flood waters that filled the basement to its ceiling had receded. Frank Darakhshan is a professional in the field of emergency flood response. He testified that this was the worst situation he had ever seen in his career, both as to the volume of water and level of saturation involved along with the nature of the contaminants. (APPX. 435). Within the industry this sort of job is considered a "category three situation," "which is as bad as it gets short of nuclear contamination." (APPX. 435).

C. Apostle Thompson Reviews and Signs the Contract.

Apostle Thompson has been employed by UHP for more than 30 years. (APPX. 661). He has been the Assistant Corporate Secretary since 2006 and his responsibilities include maintaining the corporate records, obtaining insurance on

church properties, liaising with insurance companies in the instance of claims, and paying the taxes on taxable church properties. (APPX. 662). Apostle Thompson contacted UHP's insurance carrier about the flood and attempted to find companies that could remediate the flood. (APPX. 663). Although UHP argues that Frank Darakhshan "viewed the premises" before the parties signed the Contract,[9] its contention in this regard is unsupported by UHP's reference to the record and is contrary to the evidence presented to the court below. Frank Darakhshan testified: "I hadn't even entered the basement. I don't believe [Apostle Thompson] had either. Nobody had been in that basement. It was impossible. You would have to put on scuba gear at that point." (APPX. 225).

Apostle Thompson read the Contract and he went through it with Mr. Darakhshan "page by page, paragraph by paragraph." (APPX. 224; 532-533). He said that when he signed the Contract he believed that he had an agreement. (APPX. 667). Apostle Thompson told Mr. Darakhshan that he was familiar with this procedure, that he was a risk assessment specialist for the church, that he handled insurance companies in his role with the church, and it didn't sound like this was his first flood he had dealt with because he knew the procedures "exactly." (APPX. 224). As Apostle Thompson was reading the contract, he was initialing it. It was related at trial that Apostle Thompson initialed the paragraphs if he didn't have a question,

[9] See Appellant's Brief, p. 16.

and if he did have a question he would ask. (APPX. 224).

With regard to scope, Mr. Darakhshan explained to Apostle Thompson in general terms about both remediation and restoration that "everything has to get torn out, everything has to get replaced." (APPX. 225). But at this point I hadn't even entered the building so I didn't know how much building material was in there, how much contaminated furniture and contents were in there that needed to be removed. He recalled discussing their work procedures and tried to spell out those procedures as clearly as he could using the contract form, which itself explains the steps that needed to go into the project. (APPX. 222).

Frank Darakhshan could not tell Apostle Thompson how much the project would cost because he didn't know how much it was going to cost. (APPX. 222). He did not have measurements of the full square footage of the area that was damaged. (APPX. 222). Mr. Darakhshan stated that, at the time that he presented Apostle Thompson with the Contract, it was basically impossible to estimate price because Restoration Doctor LLC used invoicing software (Xactimate) that requires square footage and materials. (APPX. 223). The software needs to know how much contents we took out, how many dumpster loads were filled, how many man hours it took to take this stuff out. (APPX. 222). Frank Darakhshan explained that "There's no way for us to tell-- with water damage you're basically looking at the surface of things and we need to actually get into the work and start tearing stuff out and figure out

how much work there is for you to be able to figure out what the charge. (APPX. 223).

When the question of price was discussed, Frank Darakhshan told Apostle Thompson that they "would be using Xactimate, what everybody in the industry uses," and that invoicing would be done using the insurance company software called Xactimate. Thus the price would be based on square footages, the type of materials taken out, the number of hours, the number of days equipment was left there and other factors that could not be determined in advance. (APPX. 225-226). That discussion regarding price did not just apply to the emergency remediation services, but also to restoration. (APPX. 226). Frank Darakhshan testified "while I was explaining it to him, he was nodding that he knows what that is." (APPX. 225).

Frank Darakhshan and Apostle Thompson specifically discussed whether UHP wanted to proceed with restoration. Apostle Thompson wondered whether he needed to find a second company to do the restoration work and Mr. Darakhshan told him, "We do everything from A to Z. We handle the restoration as well." (APPX. 227) Apostle Thompson demonstrated UHP's assent to the Contract by initialing each of the Contract's provisions, including the provision that set out the scope of the Contract to "furnish materials, supply all equipment and perform all labor necessary to preserve and protect my property from further damage, ***and to perform all restoration procedures necessary to repair and restore the carpet,***

furniture, structure and other furnishings."

One of the provisions specifically initialed by Mr. Thompson addressed price and explained that in RD-Singular's industry, it was impractical to establish prices at the time of contracting due to variables encountered in responding to flood damage:

> [ ] Prices: I understand that water damage is a progressive condition and that drying time varies depending on the types of materials, quantity of water, degree of saturation, airflow volume and velocity, temperature and the indoor and outdoor humidity. Therefore, I understand it is impractical to give an accurate quote for services before completion. I have been supplied with an estimate or invoice from Restoration Doctor LLC, and agree to pay the full price for the work Restoration Doctor LLC performs.
>
> RD-Singular started work immediately and provided remediation services.

D. Travelers' Adjustment of the Loss.

While RD-Singular's work was underway, Travelers sent an estimator, described by Mr. Hanrahan as a "first level guy who just walked through it quickly" to give an estimate for the cost of the emergency services.[10] Mr. Hanrahan testified at trial that the "estimate" for the emergency remediation that Travelers received from its adjustor was in the $50,000 to $75,000 range. (APPX. 359).

RD-Singular provided an invoice for the remediation work in the amount of

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[10] That estimate was never produced in litigation, even though UHP subpoenaed Travelers' records.

$185,825.80 to Travelers. Frank Darakhshan negotiated the price downward with Travelers' representative, James Hanrahan, resulting in Travelers making a payment of $165,467.40 by check to UHP (not RD-Singular) on September 26, 2012. While Appellant's Brief, at p. 3, argues that the $165,467.40 price for the remediation services was negotiated and agreed "using insurance estimates provided by an adjustor from Travelers," there is nothing in the record to support that contention, and James Hanrahan testified that RD-Singular did not agree to be bound to any estimates. Testimony from F.B. Davis about the estimating process could have been presented by UHP at trial but was not.

Concerning RD-Singular's and Travelers' use of Xactimate to determine pricings, Appellee finds nothing to disagree with in UHP's written Closing Argument about Xactimate, which explained:

> The court has heard testimony that Xactimate is a software program that quantifies the fair market value of property claims. It calculates unit costs for thousands of pre-populated line items that comprise any property claim. Its automated calculations include average labor rates, the average time it takes a skilled worker to complete a specific task (i.e., to paint a 15 sq. ft. wall), the region where the work is to be performed (by zip code), the price of materials needed to complete the task, as well as profit and overhead calculations in accordance with industry standards – and all of this data is updated on a monthly basis. Both Mr. Frank Darakhshan and Mr. Hanrahan, UHP's insurance adjustor, testified that Xactimate is the leading software tool, widely used and accepted throughout the industry by both insurance companies and contractors to calculate replacement costs for property claims. Both Mr. Darakhshan and Mr. Hanrahan testified that they engaged persons to use the Xactimate software to calculate the restoration costs of UHP's basement. If there is any guide or tool relied upon by this

> Court to determine the fair market value of this claim, the automated calculations of the Xactimate software should be that guide. (APPX. 394).

RD-Singular's invoice for restoration was created using Xactimate. The fifteen page invoice provides a room-by-room breakdown of costs for all restoration work, including itemized descriptions of the work, the individualized quantities for all labor and material, their unit costs and total costs. (APPX. 907-923).

UHP vigorously challenged the charges at trial, but the trier of fact found against them, "there were no double charges, no incorrect charges, and no improper or inflated charges," (APPX. 442), and that "the work here was properly and professionally done and that the costs billed were reasonable under all the circumstance." (APPX. 446).

1. Negotiation of the Price of Emergency Services & Demolition.

Frank Darakhshan testified that RD-Singular initially presented an invoice for $185,000. (APPX. 232-233). Travelers had calculated the remediation costs at $41,000, but once RD-Singular provided them with the amount of the materials, receipts for hauling, pictures, video, measurements of the property, RD-Singular negotiated with Travelers to arrive at the amount around $165,000. (APPX. 233).[11]

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[11] At page 17 of Appellant's Brief, UHP contends that "[s]hortly after the Agreement was executed, RD-Singular began negotiating with UHP's insurance company, Travelers, as to an all-inclusive cost for the mitigation work. App. at 234:20–235:4." UHP's fact citation refers to a part of the Appendix completely

On August 20, 2012, James Hanrahan wrote to Frank Darakhshan, noting that he had "sent a check to Ap[ostle] Thompson for the [$]165,467 today." (APPX. 834).

At page 17 of Appellant's Brief, UHP asserts that the price negotiated for the remediation component of the Contract "reflect[ed] an estimate of $165,467.40." The factual citation UHP relies upon is a February 26, 2013 report, known in the insurance business as a "loss statement," that includes a line item for "Emergency Services and Demolition" in the amount of $165,467.40. The estimate that UHP claims RD-Singular agreed to was never produced in discovery and was never presented at trial. Likewise, there is no evidence whatsoever that the estimate was ever provided to RD-Plural for negotiation purposes. What little evidence there was about the remediation estimate comes from the trial testimony of Mr. Hanrahan. He said[12] that his claims notes referred to a remediation estimate of "fifty to seventy five thousand dollars" made by a "first level adjustor" that was "just sent out right away to have a look around" and "who just walked through it quickly" at the very beginning of the adjustment process.[13] (APPX. 358-359).

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unrelated to the "facts" that it purports to support and should be disregarded.

[12] The Appendix omits page 452 of the trial transcript, but pages 451 and 453 (Appx. 358-359).

[13] The remediation estimate was not "hard on paper or any real analysis," but rather "just the feeling that the first level adjustor had when he was there" came out very early in the process "just a few days before F.B. Davis's repair "estimate." (APPX. 359).

Mr. Hanrahan stated that the $165,467.40 payment made by Travelers to UHP was based on an agreed upon resolution between him and Frank Darakhshan and that the RD-Singular had provided him with an invoice for a higher amount (approximately $185,000) before agreeing to accept the adjustment downward to $165,467.40. (APPX. 358-359). Mr. Hanrahan acknowledged that the "fifty to seventy-five thousand dollars" estimate was substantially low in the final analysis, actually "three times the low end and more than double the high end of the estimation" in raw numbers. (APPX. 359). He surmised that the estimate was low relative to the agreed upon number because it did not include demolition, (APPX. 360), and that "there was never an offer made of that fifty thousand or seventy-five." (APPX. 360)

2. Restoration Work

Mr. Hanrahan testified that the flood was July 19, 2012, and that F.B. Davis provided its restoration estimate within a week of the flood. (APPX. 352). The estimate was for repair work in an amount of $282,504.36 for the "basic repair work" and did not include additional items like the elevator or the many expensive bid items. (APPX. 348). That number, $282,504.36, had as of July 26, 2012 (only one week after the flood), become Travelers' estimate for the basic repair work. (APPX. 901-903) A copy of that estimate was e-mailed to Frank Darakhshan by Apostle Thompson on August 25, 2012 with a cover note stating, "Attached is the

preliminary estimate from Travelers." (APPX. 948). The cover note did not include any language to suggest that the "preliminary estimate" was an offer or proposal for RD-Singular to accept or reject.[14]

That number subsequently appeared without revision in Travelers' periodic loss statements (for example, the February 26, 2013[15] statement of loss (APPX. 1007-1008) bearing the legend "For Discussion Purposes Only – Not an Offer to Settle.") (APPX. 1007). Travelers' witness, Mr. Hanrahan, disavowed the finality of the number stating that Travelers had not agreed to be bound by that number. (APPX. 354). And the trial court, given the preliminary nature of the estimate, considered it unreliable. (APPX. 440)("It cannot possibly be an accurate and complete picture of the scope of the work that's going to be required over the course of months to rebuild this basement.")

When Mr. Hanrahan was asked whether Appellee ever agreed to the

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[14] Appellant's Brief, at p. 19, characterizes the e-mail as "informing Mr. Darakhshan that UHP would pay $282,504.36 for the services specified in the estimate." Again, Apostle Thompson, the e-mail's author did not testify. The e-mail on its own falls far short of being an offer, and provides no justification for UHP's unreasonable assertion that RD-Singular performed based on those estimates.

[15] The amount of the July 26, 2012 F.B. Davis "estimate" of $282,504.36 remained unaltered in the February 26, 2013 statement of loss, even though the work had been mostly completed by that time. See UHP's "punch list" dated February 13, 2013, which (contrary to UHP's unfounded contention that they became "dissatisfied" with RD-Singular's work) shows only minor items, like wiring of switches and installing kitchen hood filters. (APPX. 904).

replacement value of $282,504.36 for the project, he testified unequivocally that Restoration Doctors never had such an agreement with any one at Travelers. (APPX. 349-350). On May 7, 2014, Apostle Thompson wrote to James Hanrahan:

> In your recent email to me, you stated "so I am sending my experts report which I believe they agreed to." My question is this: What is your basis for believing Flood Doctor agreed to this? Do you have it in writing or an email somewhere? Are you recalling a conversation or a meeting that you had with them which leads you to believe this? This is of critical importance in our case against them. If we have written documentation or an individual's recollection that Flood Doctor agreed to be bound by the estimate provided, then it will certainly make our situation easier! (APPX. 1047-1048).

On May 8, 2014, James Hanrahan wrote back to Apostle Thompson:

> I am sorry but I do not have anything in writing supporting that assumption. Typically, a contractor sends an estimate to the insured. Travelers then reviews it and determines if the scope is correct and the price for the work is usual and customary for the work to be done. In most cases the contractor accepts our pricing and contracts with the insured to complete the repairs for the insurance price given. If there is a disagreement on scope or price, the contractor would notify the insured, and the insurance company. I was never notified of any differences. (APPX. 1047).

Mr. Hanrahan's response describes the negotiation process that occurred. UHP acknowledges that "because the Travelers' estimate did not include all costs for the restoration," Frank Darakhshan and Mr. Hanrahan began negotiating prices for, among other things, the replacement of the alarm system, kitchen equipment, fire resistant doors, PA system, windows, flooring, fire suppression system,

bathrooms, electrical work, air conditioning units, an elevator and that Travelers approved these costs that were beyond the estimate. (Appellant's Brief, pp. 20-21.) *See* Frank Darakhshan's November 23, 2012 e-mail correspondence to Apostle Thompson, which reports regarding the status of the renovation referring to $300,000 worth of "big ticket" items, including without limitation electrical ($68,000), elevator ($64,000), flooring (working with Hanrahan and subcontractor to come to an agreed upon price), tile work, plumbing, doors, drywall, ceilings, bathrooms, PA system, fire alarm, security system. (APPX. 896).

IV. STANDARDS OF REVIEW

Any trial court judgment is to be treated as presumptively correct. *Jonathan Woodner Co. v. Adams*, 534 A.2d 292 (D.C. 1987) (citations omitted). UHP has the burden of demonstrating trial court error and must provide the appellate court with a record sufficient to show affirmatively that error occurred. *Id.*

Whether appellants have standing is a question of law which we consider on appeal *de novo*. *Bd. of Dirs. of the Washington City Orphan Asylum v. Bd. of Trs. of the Washington City Orphan Asylum*, 798 A.2d 1068, 1074 (D.C. 2002). Factual determinations as to standing are reviewed on a clearly erroneous standard. *Gaetan v. Weber*, 729 A. 2d 895 (D.C. 1999).

The determination whether an enforceable contract exists, when based on the

contract documents, is a question of law subject to *de novo* review. *Kramer Associates, Inc. v. Ikam, Ltd.*, 888 A.2d 247, 251 (D.C. 2005), *citing Rosenthal v. National Produce Co.*, 573 A.2d 365, 369 n. 9 (D.C. 1990). While principles of contract interpretation applied to the facts are reviewed *de novo*, factual findings by the court as to what the parties said or did are reviewed under the "clearly erroneous" standard. *Kramer v. Ikam*, at 251, *quoting L.K. Comstock & Co. v. United Engineers & Constructors, Inc.*, 880 F.2d 219 (9th Cir.1989).

A trial court's award of damages is an issue of fact reviewed for abuse of discretion. *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1083 (D.C. Cir. 2012); *see also Joel Truitt Mgmt., Inc. v. D.C. Comm'n on Human Rights*, 646 A.2d 1007, 1010 (D.C. 1994).

V. ARGUMENT

A. RD-Plural Is the Successor to RD-Singular and Therefore a "Proper Plaintiff."

During the remand trial, RD-Plural established that RD-Plural was RD-Singular's successor by "overwhelming evidence." (APPX. 806). UHP persists in its challenge against RD-Plural as the proper plaintiff, asserting that RD-Plural was not a party to the contract, did not itself do the work, and did not suffer any injury. Appellant's Brief, p. 40. UHP contends that RD-Plural cannot be a successor because the VSCC identification number associated with RD-Singular is different

from the identification number associated with RD-Plural. (APPX. 41) At the same time that UHP argues that identification numbers taken from the VSCC records preclude the successor status of RD-Plural, UHP incongruously dismisses the evidentiary value of the VSCC records that establish RD-Plural was formed on May 10, 2013 before RD-Singular was cancelled, May 31, 2013 (Appellant's Brief, p. 40). While UHP argues that the "say-so" testimony of Frank Darakhshan is "self-serving" and insufficient to carry RD-Plural's burden of proof on standing, UHP inconsistently contends that RD-Plural is bound by an erroneous and subsequently corrected averment of fact that mistakenly stated that RD-Singular was cancelled in 2010. UHP's remaining arguments include the immaterial points that RD-Plural lacked privity with UHP and did not perform the work, that VSCC filings do not expressly refer to RD-Plural as a successor to RD-Singular, and that UHP received no notice that RD-Plural succeeded to RD-Singular's rights under the Contract. As discussed below, UHP's arguments are insufficient to upend the Superior Court's conclusion that RD-Plural is a proper plaintiff.

The word "successor" has many legal applications and is "therefore difficult to define precisely." *Safer v. Perper*, 569 F.2d 87, 95 (D.C.Cir.1977). "There is, and can be, no single definition of 'successor' which is applicable in every legal context." *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 263 n. 9, 94 S.Ct. 2236, 2243 [n. 9], 41 L.Ed.2d 46 (1974). Justice Marshall endorsed a case-by-case

approach with emphasis on the facts of each case to determine the meaning of "successor" in the area of labor law. 417 U.S. at 256, 262-63 n. 9, 94 S.Ct. [at 2240, 2243-44 n. 9]. The same fact-oriented approach has also been employed by courts in defining the limits of purely contractual successorship. *Safer v. Perper*, 569 F. 2d at 95. In the non-labor contractual cases, "successor" has often been defined as "one who takes the place that another has left and sustains the like part or character." *Id. quoting Wawak Co. v. Kaiser*, 90 F.2d 694, 697 (7th Cir.1937); *Citizens Suburban Co. v. Rosemont Development Co.*, 244 Cal.App.2d 666, 53 Cal. Rptr. 551 (1966). The definition goes beyond the borders of contract assignment and is used to obviate the need for express assumption of burdens. *Citizens Suburban Co. v. Rosemont Development Co.*, 244 Cal.App.2d at 676.

The factors courts have looked to are whether the two entities have the same ownership and officers, *Sodexo Operations, LLC v. Not-For-Profit Hosp. Corp.*, 930 F. Supp. 2d 234, 238 (D.D.C. 2013) (citing *Bingham v. Goldberg, Marchesano, Kohlman, Inc.,* 637 A.2d 81, 91-92 (D.C. 1994)); whether there is a similarity of names, business addresses, and actual business operations, *Reese Bros., Inc. v. US. Postal Serv.*, 477 F. Supp. 2d 31, 41 (D.D.C. 2007); whether the successor uses the same employees, trucks, and other equipment as the predecessor, *Bingham*, 63 7 A.2d at 91 (citing *Bishop v. Dura-Lite Mfg. Co.*, 489 F .2d 710, 711 (6th Cir. 1973)); whether the successor has continued to perform obligations incurred by the

predecessor, see *Safer*, 569 F.2d at 95-96; and whether the predecessor continued to exist as a "viable business concern" after the succession, *Alkanani v. Aegis Def Servs., LLC*, 976 F. Supp. 2d 1, 10-11 (D.D.C. 2013), "in a way that is not merely formal." *Richter v. Analex Corp.*, 940 F. Supp., 353, 356 (D.D.C. 1996) (citing *Bingham*, 637 A.2d at 90).

When RD-Singular was cancelled on May 31, 2013, its employees were the same as RD-Plural's employees. The equipment used by RD-Singular in its trade was then used by RD-Plural. RD-Plural's employees used the uniforms that they had used when working for RD-Singular. RD-Plural used the same website as had been used by RD-Singular after RD-Singular was cancelled. RD-Plural used the same vendors for promotion and advertising as RD-Singular had used, the same insurance as RD-Singular, and the same bank accounts as had been used by RD-Singular. RD-Singular and RD-Plural both had the same federal taxpayer ID. RD-Plural also assumed the contractual obligations (like advertising contracts, equipment contracts, car insurance) of RD-Singular when the latter was cancelled. In sum, the biggest and only real difference between RD-Singular and RD-Plural "was the 's' at the end of Doctor."

In *Dawn v. Stern Equipment Co.*, 134 A.2d 341, 343 (D.C. 1957), the District of Columbia Municipal Court of Appeals rejected the argument that a successor could not sue for the value of goods sold by its predecessor. There, like here, the

substituted plaintiff admittedly did not sell the goods, but was only required to establish its succession to the seller that had privity with the defendant.[16]

1. The VSCC Records Match the Testimony of Frank Darakhshan.

During the remand proceedings, the parties took discovery on the limited issue of whether RD-Plural was the successor in interest to RD-Singular. Records from the Virginia State Corporation Commission ("VSCC") were introduced by both parties without objection. The online records from the VSCC were entirely consistent with and corroborated the testimony of Frank Darakhshan on all points.

2. The VSCC "Identification Numbers" Are Not Probative and Do Not Preclude RD-Plural from Being RD-Singular's Successor.

UHP also contends that, because RD-Plural's VSCC identification number was not the same as RD-Singular's identification number, RD-Plural cannot be RD-Singular's successor. Relying exclusively upon *Leiser, Leiser & Hennessy, PLLC v. Leiser*, 97 Va. Cir. 130 (2017), UHP contended that this difference alone

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[16] RD-Plural argued successorship along with equitable assignment to the court below but given that that Court based its decision on RD-Plural being an actual successor, it was unnecessary for it to analyze the liability under the theory of assignment. Assignment, if recognized here, would yield the same result. A contractual right can be assigned as long as the party's obligations are not materially changed or increased. *Fry v. Coyote Portfolio*, 739 A.2d 914, 920 (Md. 1999), *citing* 4 Corbin on Contracts § 868 Restatement (2nd 1981). There is no language in the Contract that prohibits its assignment, and not even the slightest suggestion is made that RD-Plural is materially changing or increasing UHP's obligations to pay for the work and goods that it received.

precluded a finding that RD-Plural was the successor to RD-Singular. UHP did not offer any foundation as to the meaning of the numbers, and there was no evidence before the trial court about who assigns the numbers, the protocols or rules by which they are assigned, or what legal meaning they carry at any level of Virginia law or regulation. (APPX. 804). UHP argues that "there can be no question that each corporate entity registered in the state of Virginia is assigned a unique ID number (Appellant's Brief, p. 41, n. 19), but UHP's reference to Va. Code §§ 13.1-1050.A.2, 13.1-1050.4.B.1, 13.1-1052.A.2, 13.1-1056.A.1, and 13.1-1056.3.B.1 at most shows that the VSCC requires that the number be included in certain applications, such as an application for cancellation. The defect in UHP's logic is in its assumption that a successor company will have the same identification number as its predecessor.

3. Written Documentation of Successorship Is Not Required.

Along similar lines, UHP contends that RD-Plural's articles of incorporation do not declare that RD-Plural is a successor or otherwise related to its predecessor, RD-Singular, and that there was no written agreement between RD-Singular and RD-Plural memorializing the succession. UHP's arguments are wholly deficient in the sense that UHP laid no foundation to establish that Virginia requires limited liability companies to identify themselves as successors, or that there is any requirement that RD-Plural was under any legal or contractual obligation to have such a writing. Likewise, UHP does not cite a single authority that requires a

business entity to notify its customers of corporate succession, change of ownership or assignment.

B. The Statute of Limitations Has Not Expired.

UHP contends that the mistaken filing of the original complaint in the name of Restoration Doctor, Inc. did not toll Maryland's three-year statute of limitations and that the subsequent substitution pursuant to Super. Ct. Civ. R. 15(a) of RD-Plural as the plaintiff did not relate back. UHP's contention fails for three reasons: (1) UHP recognized the debt by making a partial payment on September 13, 2016; (2) as a matter of procedural law, the relation-back doctrine applies in the case of a misnomer; and (3) UHP waived the issue by not pursuing it in the first appeal.

1. UHP Acknowledged the Debt in September 2016.

Maryland law recognizes that acknowledgement of a debt barred by limitations removes the bar to pursuing the remedy. *Potterton v. Ryland Group, Inc.*, 424 A.2d 761, 763-64 (Md. 1981); *James v. Thurn*, 290 A.2d 490, 492 (Md. 1972); *Hall v. Barlow*, 272 A.2d 386, 391 (Md. 1971); *Mettee v. Boone*, 247 A.2d 390, 394-95 (Md. 1968); *Brosius Dev. Corp. v. City of Hagerstown*, 206 A.2d 571, 574 (Md. 1965). An acknowledgement need not expressly admit the debt, it need only be consistent with the existence of the debt. *Doughty v. Bayne*, 160 A.2d 609, 611 (Md. 1960). An acknowledgement "sufficient to remove the bar of the statute of limitations requires an admission by the debtor, in word and/or deed, that the debt is

still owed by the debtor." *Columbia Ass'n, Inc. v. Poteet*, 199 Md. App. 537, 560 (2011).

On September 13, 2016, Defendant issued a check in the amount of $150,970.19 to Restoration Doctor, Inc. (APPX. 1044). Bishop Clarence Matthew Bailey is "Bishop Trustee" for United House of Prayer and is "responsible for all finances raised and spent" during the time period from 2013 until the present [time of his deposition on November 3, 2016]. Bishop Bailey testified that he authorized the September 2016 payment, albeit as a "final payment," because he realized that the church owed money for the repair work. Counsel for Plaintiff, Stuart L. Peacock, wrote to counsel for Defendant, Mickie Y. Bailey, on October 24, 2016 to confirm that the check was tendered without any restrictions and that Defendant would not assert the defense of accord and satisfaction. These facts are not just consistent with the existence of the debt, but they admit the debt, both in word and deed, and therefore qualify as an acknowledgement sufficient to remove any bar of the statute of limitations. *Poteet*, 199 Md. App. at 560. Thus, the statute of limitations was extended to at least September 13, 2019, which was after the first trial.

2. RD-Plural's Complaint Also Relates-Back to the Filing of the Original Complaint.

Upon realizing there was a misnomer, RD-Plural moved to be substituted in the place of Restoration Doctor, Inc. pursuant to Super. Ct. Civ. R. 17(a). The court below granted that motion (APPX. 128). Super. Ct. Civ. R. 17(a) is identical to Fed.

R. Civ. P. 17(a), and cases analyzing the latter are precedent for the former. See *Francis v. Recycling Solutions, Inc.*, 695 A.2d 63, 76 (D.C. 1997).

Super. Ct. Civ. R. 17(a) is the codification of the salutary principle that an action should not be forfeited because of an honest mistake. *U.S. ex rel. Wulff v. CMA, Inc.*, 890 F.2d 1070, 1075 (C.A.9 1989). "Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed." Fed. R. Civ. P. 17(a) advisory comm. notes, 1966 amend. Rule 17(a) should be applied "only to cases in which substitution of the real party in interest is necessary to avoid injustice." *Francis,* 695 A.2d at 76, *quoting* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1555 (2d ed.). Modern views of pleading and of the capacity to sue and be sued have replaced archaic nullity jurisprudence, particularly where the party asserting the nullity bar is not prejudiced. *Martinez v. Segovia,* 62 P.3d 331, 334 (N.M. 2002).

No prejudice befell UHP here because no new or different cause of action was introduced by the substitution. If, within the statute of limitations, the defendant was put on notice that the plaintiff was attempting to enforce a claim against him because of a certain occurrence or event, then there is no cognizable prejudice to the defendant when, after the running of the limitations period, plaintiff can amend the complaint to reassert the claim that was deficiently stated the first time. *Strother v. Dist. of Columbia,* 372 A.2d 1291, 1297-1298 (D.C. 1977)(allowing amendment,

albeit under Super. Ct. Civ. R. 15, to amend allegations regarding plaintiff's legal capacity to sue).

Although the statute of limitations would not bar the remedy in this case because UHP acknowledged the debt in September 2016, relation back would be automatic under Super. Ct. Civ. 17 if the statute of limitations were an issue. Super. Ct. Civ.Rule 17(a) provides that when an action is brought by someone other than the real party in interest within the limitations period, and the real party in interest joins or ratifies the action after the limitations period has run, the amendment or ratification *relates back* to the time suit was originally filed and the action need not be dismissed as time barred. *Hess v. Eddy,* 689 F.2d 977 (11th Cir. 1982) *abrogated on other grounds by Wilson v. Garcia,* 471 U.S. 261 (1985)(allowing joinder of administratrix under Fed. R. Civ. P. 17(a) after statute of limitations ran).

UHP's primary authority, *Stein v. Smith,* 751 A.2d 504 (Md. 2000), is not applicable here for several reasons. First and foremost, the statute of limitations has not run as to the real party in interest, RD-Plural. Second, the Maryland court in *Stein* denied substitution to the individual plaintiff into the place of the defunct corporation in deference to Maryland's long-standing law and policy recognizing the statutory framework for revival of a corporation through paying its back taxes, while no such consideration appears in the present case. Additionally, Maryland's law is not applicable to determine capacity under Sup. Ct. Civ. R. 17(b), and the procedural

law of the District of Columbia applies to the issue of relation back.

3. Waiver of Statute of Limitations Argument on Appeal.

"[W]here an argument could have been raised on an initial appeal, it is inappropriate to consider the argument on a second appeal following remand." *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-90 (D.C.Cir. 1984); *Parker v. United States*, 254 A.3d 1138, 1142 (D.C. 2021). "Failure to make the argument in the initial appeal amounts to a waiver." *Id.* This principle applies to criminal as well as to civil appeals. See *United States v. Henry*, 472 F.3d 910, 913 (D.C. Cir. 2007).

The statute of limitations issue was never developed by UHP during the first appeal. UHP only mentioned the issue in passing in a footnote buried at page 33 of UHP's opening brief in the first appeal. Neither the Court's July 25, 2019 Memorandum Opinion nor the proceedings on remand affected the specific issues of relation-back and applicable statutory limitation periods, and those issues were ripe at the time of the first appeal. Likewise, UHP did not address the relation-back/statute of limitations issue in its July 20, 2018 Reply Brief, except in passing at p. 4, fn. 7 ("RD-Plural only appeared in March 2017, after the statute of limitations had run.") "Unsupported issues adverted to in a perfunctory manner and without developed argumentation are deemed waived on appeal. *United States v. Kunzman*, 54 F.3d 1522, 1534 (10th Cir. 1995).

C. The Contract Was Valid and Enforceable.

The Superior Court examined the context of the Contract finding that, "as a matter of law," it was "a binding contract" and "[t]he fact that it is missing a price term is unsurprising, unavoidable, and legally unimportant in the circumstance." "It even recites in the contract that there's no way to know how much this is going to cost." "And that is frequently -- that is not infrequently, I would imagine the case, in jobs like this and in other circumstances where the full scope of the work will not become apparent until the work is begun." (APPX. 436).

A manifestation of mutual assent is an essential prerequisite to the formation of a contract. *Cochran v. Norkunas*, 919 A.2d 700, 708 (Md. 2007). In this instance, there is a written agreement, signed by both parties. The testimony at trial established that Apostle Thompson, a sophisticated party with experience in flood damage cases, reviewed the Contract page-by-page, paragraph-by-paragraph. There is no question that the express language of the Contract applied to both remediation services and to restoration, and that feature of the Contract was discussed before Apostle Thompson signed it.[17] He asked whether he should seek another company to do the restoration work and Frank Darakhshan told him that RD-Singular could do the

[17] Apostle Thompson is a sophisticated party who would have had no problem understanding UHP's rights and responsibilities under the Contract. See R*ankin v. Brinton Woods of Frankford, LLC*, 241 Md. App. 604, 211 A.3d 645 (Md. App. 2019).

restoration work. There is no question that UHP agreed to contracting the services for the remediation work, even though the Contract had an open price term.

The Contract contained a provision, initialed by Apostle Thompson as an indication of his understanding and assent, stating "I understand it is impractical to give an accurate quote for services before completion." The Contract expressly authorized the contractor "to perform all restoration procedures necessary to repair and restore the carpet, furniture, structure and other furnishings," and Apostle Thompson read and initialed that provision. Frank Darakhshan explained to Apostle Thompson that Xactimate, widely-used by property insurers for pricing jobs, would be used for purposes of pricing the work to be performed by RD-Singular, and it was for both remediation and for restoration services.

Under Maryland law, manifestation of mutual assent includes two issues: (1) intent to be bound and (2) definiteness of terms. *Cochran*, at 708. Here, intent to be bound is manifest by the uncontested testimony of Frank Darakhshan relating to his discussion regarding the Contract's terms with Apostle Thompson, and the signature and initials of Apostle Thompson on the Contract itself. See *Rafferty v. Sweeney*, No. 1989 (Md. Ct. Spec. App. Jun. 20, 2017). The second of these, definiteness of terms, is where UHP challenges the Contract.

While UHP does not contest the trial court's determinations that the amounts charged were appropriate, workmanlike and reasonable, UHP still contends that it

has no obligation to pay for the work and materials that it received -- a fully-restored building—because there was no agreement at the outset as to the ultimate price. These arguments take an impossibly limited view of the ways of addressing pricing and compensation under contracts, generally, and to contracts for remediation or construction work, specifically.

In *Falls Garden Condo. Ass'n, Inc. v. Falls Homeowners, Ass'n*, 107 A.3d 1183 (Md. 2015), the Maryland Court of Appeals examined a letter of intent concerning resolution of a dispute over parking spaces. Relying upon *Cochran*, the Court determined that an enforceable contract existed even though it contemplated future resolution of open terms. *Falls Garden* at 1188. Maryland adheres to the principle of "objective" interpretation of contracts and looks to "what a reasonably prudent person in the same position would have understood as to the meaning of the agreement." *Falls Garden* at 1190. Unambiguous contract language is given its plain meaning. *Id.*

The Contract here clearly acknowledges that the price term remained open due to the circumstances associated with the type of work and explained to UHP the rationale for the open price. Likewise, there is no ambiguity in the language that states that the Contact applies to both remediation and restoration. There is "a manifestation of agreement or mutual assent by the parties to the terms thereof; in other words, to establish a contract the minds of the parties must be in agreement as

to its terms." *Safeway Stores, Inc. v. Altman*, 296 Md. 486, 489 (1983). In this case, as in *Falls Garden,* there was mutual assent to an agreement contemplating an open term.

Where it is found that the parties intended to be bound, the Court should not frustrate this clearly expressed intention. *Oglebay Norton Co. v. Armco,* 52 Ohio St.3d 232, 236 (1990). The Ohio Supreme Court opined that an open price term could be filled with a "reasonable price" in accordance by analogy with the with sale of goods situations under Ohio's version of the UCC, specifically in accordance Section 2-305.[18] In the context of emergency medical care, patients challenging hospital contracts with "open-price" terms fail because, even though there is an open price term, the prices can be determined by reference to prices stated in hospitals' Chargemaster lists. See *Limberg v Sanford Med. Ctr. Fargo,* 881 N.W.2d 658, 661 (N.D. 2016). In the present case, the Xactimate invoicing software, which Frank Darakhshan and Apostle Thompson discussed, was used to provide the pricing in RD-Singular's final invoice.

An open price term does not necessarily prevent a contract from being formed or enforceable. *ID Elec. Inc. v. Gillman*, 402 P.3d 802 (Utah 2017)(electrician's contract enforceable notwithstanding open price term) (collecting cases: *Goodman*

[18] Maryland Comm. Code § 2-305 (2013) is not applicable here but provides an analog.

v. Physical Res. Eng'g, Inc., P.3d 852, 855 (Ariz. Ct. App. 2011) ("An agreement can be implied and is enforceable where there is a valid offer and acceptance, and the only term missing is the final price."); *MBH, Inc. v. John Otte Oil & Propane, Inc.*, No. A-00-287, 2001 WL 880683, at *3 (Neb. Ct. App. Aug. 7, 2001) ("[A] contract will not necessarily fail for indefiniteness with regard to an open price term ... if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."); *Fischer v. CTMI, LLC,* 479 S.W.3d 231, 240 (Tex. 2016) ("[W]hen the parties have done everything else necessary to make a binding agreement ..., their failure to specify the price does not leave the contract so incomplete that it cannot be enforced.")

UHP has not presented any authority for the proposition that a contract is unenforceable simply because it does not specify its end price. Not all contracts involve a "lump sum." *See Steiner Const. Co. v. Comptroller*, 121 A.2d 838, 844 (Md., 1956)(discussing classes of contracts that include "lump sum," "cost-plus," "a time and material contract with an upset or guaranteed price," and "contracts in which the contractor or subcontractor agrees to sell materials and supplies at an agreed price or at the regular retail price and to render the service either for an additional agreed price or on the basis of time consumed.") The broad notion that a contract does not form because no price was stated is not the law of Maryland.

D. RD-Singular Never Agreed to Either F.B. Davis Estimate.

UHP argues that "the parties established a course of dealing whereby Mr. Darakhshan negotiated directly regarding the ***mitigation*** work . . . based on an insurance estimate provided by Traveler's." Appellant's Brief, p. 35 (emphasis of "mitigation" provided in bold; emphasis in original in underline). A fundamental problem with UHP's "course of dealing" analysis is that it depends on evidence of Frank Darakhshan and Mr. Hanrahan having agreed upon a price for mitigation work based on the mitigation estimate, which even Mr. Hanrahan dismissed as having been performed by a "first level guy who just walked through it quickly." (APPX. 358-359). No documentation of that mitigation estimate appears in the record. The only testimony about it was that it was incomplete (it did not include demolition) and that it was for an amount in the range of $50,000 to $75,000. (APPX. 358-359). Appellant's Brief, at p. 3, argues that the $165,467.40 remediation price was negotiated "using insurance estimates provided by an adjustor" from Travelers, but no copy of that estimate was ever produced in the case, let alone presented at trial. Mr. Hanrahan testified that RD-Singular did not agree to be bound to any estimates, including any mitigation estimate. Instead, the price was negotiated over the course of weeks (Appellant's Brief, p. 3), based upon the documentation of actual mitigation expenses provided by Frank Darakhshan to Mr. Hanrahan.

Since there was never any acceptance by the parties of the F.B. Davis

remediation estimate, it follows that no "course of dealing" or "course of conduct" arose to support the conclusion that the F.B. Davis restoration estimate became binding upon RD-Singular. The restoration estimate was sent to Frank Darakhshan with a cover note stating, "Attached is the preliminary estimate from Travelers." (APPX. 948). The cover note did not include any language to suggest that the "preliminary estimate" was an offer or proposal for RD-Singular to accept or reject. Just as the remediation estimate turned out to be only a fraction of the actual cost, the $282,504.32 restoration estimate turned out to be far below the reasonable cost of restoration. When Mr. Hanrahan was asked whether Restoration Doctors ever agreed to the replacement value of $282,504.36 for the project, he testified clearly that Restoration Doctors never had such an agreement with any one at Travelers. (APPX. 349-350).

Lastly on this point, UHP contends that the course of dealing between the parties established that RD-Singular accepted the F.B. Davis "estimate" because it was sent to Frank Darakhshan. Having absolutely no evidence of acceptance, UHP argues that contractual assent was established because Frank Darakhshan never challenged or rejected the estimate. As a general rule of contract law, silence and inaction upon receipt of an offer do not constitute acceptance of the offer. *International Brotherhood of Teamsters v. Willis Corroon Corp.*, 369 Md. 724, 802 A.2d 1050, 1060 n. 3 (Md. 2002).

E. The Trial Court Did Not Abuse its Discretion in Calculating Damages.

In its July 7, 2017 post-trial Summation, RD-Plural set forth its methodology for calculating damages in precise detail, including an updated copy of the blow-up exhibit that RD-Plural used from the first day of trial. (APPX. 415-416; 429). The methodology calculated the total amount of the damages, including interest, to be $1,033,008.68, consisting of principal ($617,767.42) and interest ($415,241.26). RD-Plural asked the Court to award that amount, less the $150,970.19 payment made September 13, 2016 by the Church to Restoration Doctors from the interest charge, yielding a judgment amount of $882,038.49 plus $304.65 per day until paid. The trial court adopted this calculation in its verdict. (APPX. 446-448). Thus, there is no deficiency with regard to the court giving sufficient indication of how it computed the amount of damages so that the reviewing court could determine whether it is supported by the record. *Cort Furniture Rental Corp. v. Cafritz*, 10 F.3d 13 (D.C. Cir. 1993).

At no juncture during trial, first appeal or now second appeal, has UHP articulated any error in arithmetic. UHP instead contends that the court erred when it applied the $150,970.19 payment from September 2016 to unpaid interest rather than principal. UHP could not present a single authority saying that an unassigned payment should be used to pay down principal rather than accumulated interest. The one case UHP does cite, *Duggan v. Keto*, 554 A.2d 1126 (D.C. 1989), stands for the

wholly unremarkable proposition that where there was a partial error in calculating damages, the matter should be remanded.

Likewise, the record shows that UHP never objected when it had an opportunity to object, or that UHP sought reconsideration. The chart showing how damages were being calculated was used by RD-Plural throughout trial and incorporated into RD-Plural's Summation. (APPX. 429). During the reading of the verdict, UHP's counsel did attempt to correct the trial court on another point of damages, arguing that the amount paid by UHP was $530,000 rather than $380,000, (APP-438). A party who fails to raise an issue at trial generally waives the right to raise that issue on appeal. *Miller v. Avirom*, 127 U.S. App. D.C. 367, 370-71, 384 F.2d 319, 321-22 (1967).

VI. CONCLUSION

For the foregoing reasons, Appellee RD-Plural respectfully requests that this Honorable Court affirm the trial court's August 23, 2017 Judgment and the August 16, 2021 Judgment Order (reinstating its August 23, 2017 Judgment) in its favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2022, I caused to be served a true copy of the foregoing Brief via first class mail on:

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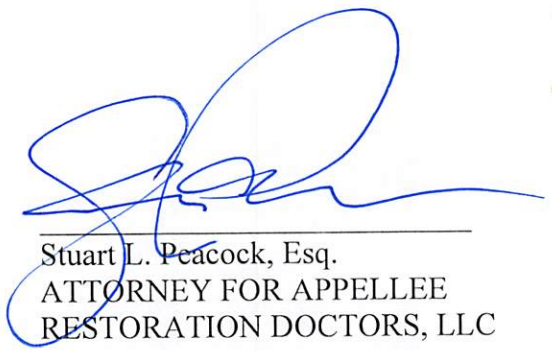

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REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

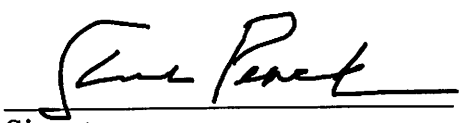
2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.



Signature

21-CV-640

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