VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 2nd day of June, 2016.

RL & DR Enterprises, LLC, Appellant,

against Record No. 151480
Circuit Court No. CL11-4920

Good Shepherd International
Miracle Center, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Virginia Beach.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no error in the judgment of the Circuit Court of the City of Virginia Beach, and the judgment is affirmed.

BACKGROUND

Good Shepherd International Miracle Center (Good Shepherd) signed a lease with RL & DR Enterprises, LLC (RL & DR) in April 2009 (lease) for a building located at 157 Morrison Avenue, Virginia Beach (the Premises). The lease provided, in relevant part:

> 4. **Construction of the Demised Premises**. It is understood and agreed to by Landlord, Tenant and Agent that **Tenant will be responsible for any and all repairs and improvements to the Premises. All** of the improvements shall be done at Tenant's sole cost and expense, subject to the provisions of Section 13 of this Lease. If any improvements will affect the building structurally, Tenant will obtain prior written consent from the Landlord to make such structural improvements, which consent may be withheld at the Landlord's sole discretion. **The Landlord has agreed to reduce the base rent for the months of August, September and October in the gross amount of $12,200.00. All monies shall be used for Tenant improvements related to the repair of the roof, ceiling, walls and subfloor of the building. All said work shall be completed at Tenant's sole cost and expense on or before August 2009.**
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> . . .
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> 10. **Landlord's Repairs and Right of Entry**. Landlord covenants that it will, with reasonable dispatch after being notified in writing by Tenant of the need

therefor, make such repairs to the roof, gutters, downspouts as may be necessary to keep the same in a good condition of repair; provided however, that if the need for such repair is occasioned by a casualty resulting from negligence or willful act of Tenant, or any of its agents, employees or contractors, such repairs shall be made by Landlord, but the cost of such repairs shall be charged to and be promptly paid for by the Tenant subject to Tenant being given credit for any money Landlord actually receives in respect to such damage from its insurance. Anything in the foregoing to the contrary notwithstanding, Landlord shall have no liability whatsoever for damage or injury to person or property occasioned by its failure to make any such repair (e.g., injury damage to property resulting from leaks caused by a defect in the roof, gutters and/or downspouts) unless, within a reasonable time after being notified in writing by Tenant of the need therefor, Landlord shall have failed to make such repair and such failure shall not have been due to any cause beyond Landlord's control, including, without limitation, strikes and/or inability to obtain materials and/or equipment at reasonable prices. In no event, however, shall Landlord be liable for any damage to inventory, furniture, fixtures or equipment (all of which are required to be insured by Tenant pursuant to subsequent provisions of this Lease), or for special or consequential damages (such as lost profits) resulting from Landlord's failure to make such repairs. . . .

11. **Tenant's Repairs**

. . .

(b) . . . . Tenant agrees that Tenant will . . . (ii) keep the roof free of all debris and (iii) keep the gutters and downspouts free of trash, leaves and gravel.

12. **Miscellaneous Covenants of Tenant**

. . .

(b) . . . . **Tenant is also responsible for the Common Area maintenance and cleaning, sanitary control, snow, trash, garbage, and other refuse removal, including costs related to common trash dumpsters and compactors; repair, maintenance, replacement of roofs, roof skins and downspouts; repair, maintenance and painting of building; pest control; general repairs; fire protection and security services and all costs related to such. If Tenant fails to meet any of these obligations, Landlord may, with prior written notice to Tenant, take care of said obligation. If Landlord performs any of these actions, Tenant will be responsible for all costs associated with Landlords work.**

(Emphases in original.)

On May 7, 2009, the parties executed an addendum to the lease giving Good Shepherd the right to purchase the Premises at any time during the original lease term as well as the right of first refusal on any offers made on the Premises.

In December 2009, Good Shepherd notified RL & DR that it had contracted with Voliva Enterprises, Inc. (Voliva) to address numerous repair issues beyond those identified by the parties during the lease negotiations (hidden repairs). Such repairs included removing and replacing a wall upon discovery of termite and mildew damage, fixing and replacing three heating units, replacing attic stairs and "reinforcement of the structure," and bringing two water-damaged rooms into compliance with the fire code.

Additionally, in January 2010, the parties reached an agreement to address Good Shepherd's ongoing concerns about mildew and moisture damage due to the roof leaking; RL & DR gave Good Shepherd two additional $2,500 rent deductions to cover the expense of roof repairs by Bailey Roofing Inc. (Bailey). The repairs were made in February 2010. However, Good Shepherd subsequently complained that the roof continued to leak and to cause water damage and mildew/mold, and RL & DR sent an agent to inspect the Premises.

In May 2011, continued roof leakage and resulting damage prompted Good Shepherd to seek repairs from RL & DR, and the parties disputed responsibility for maintenance and repair. Good Shepherd claimed that Paragraph 10 of the lease required RL & DR to maintain the roof in good repair, so the mold, mildew and structural damage caused by the leaky roof were RL & DR's responsibility. RL & DR countered that Paragraph 4 superseded Paragraph 10 to assign responsibility for roof repair to Good Shepherd.

On August 5, 2011, Good Shepherd filed a declaratory judgment action against RL & DR in the Circuit Court for the City of Virginia Beach alleging that Paragraph 10 of the lease "requires [RL & DR] to repair damage to the roof [ ], eliminate leaks in the roof, replace gutters," and "remediate any damage caused by harmful moisture" to the ceilings, insulation and structure. Good Shepherd asked the circuit court to "construe and interpret the Lease so as to determine the rights of the parties" such that RL & DR is "required to remedy the issues detailed herein at its sole cost and expense."

On October 11, 2011, a Virginia Beach inspector informed Good Shepherd that the building was unsafe for use due to mold and mildew, and that it had to vacate the building within 48 hours. Good Shepherd complied. RL & DR later filed a counterclaim for nonpayment of rent, damages to the Premises and attorneys' fees.

On February 24, 2012, Good Shepherd amended its complaint to add an allegation of constructive eviction. It alleged that due to the eviction, it left behind significant property and improvements for which it was entitled to recover.

A bench trial was held on March 4, 2015. In addition to testimony establishing the above facts, Good Shepherd's representative, Bishop Howard Gales (Gales), testified that RL & DR offered the Paragraph 4 rent credit in recognition that the facility needed upgrading before it was usable, specifically to repair restrooms, a "hole approximately 100 by 40 feet" in the rear of the building, and rotting wood around every rear window. He testified that there was no discussion about roof repairs prior to signing the lease. Gales stated that he signed the lease without making any modifications and did not know why certain sections were in bold.

Gales acknowledged the 2010 rent deductions for roof repairs, but stated that the roof was not repaired properly so it continued to leak. Gales conceded that RL & DR sent an agent to inspect the roof after the repairs, but he disputed the agent's opinion that it was not the roof, but rather Good Shepherd's failure to properly maintain the gutters and downspouts, which caused the leaks.

Good Shepherd produced evidence that it paid Voliva $46,190.33 for the hidden repairs, and that it also paid other contractors for additional work on the Premises, spending a total of $65,030.99 (Exhibit 8).[1]

RL & DR moved for summary judgment, arguing that Good Shepherd had not produced any evidence of recoverable damages in light of Paragraph 10's bar to consequential damages. The court denied the motion.

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[1] Exhibit 8 lists the amounts paid by Good Shepherd to various contractors for repairs to the Premises. Good Shepherd provided additional evidence of damages not relevant to this appeal, including that the extensive mold/mildew was caused by the leaking roof and water damage, and that it harmed the church's reputation and made several parishioners ill, necessitated additional repairs, and damaged its equipment.

RL & DR's property manager testified that it provided the 2010 roof repair deductions in order to facilitate its goal of Good Shepherd purchasing the Premises, not because the lease obligated it to do so.

At the close of all the evidence, the court requested that the parties brief two issues: (1) "why Exhibit 8 . . . is not [Good Shepherd's] consequential damages as contemplated by the lease;" and (2) "under what circumstances in Virginia, the deteriorated condition of a rental property entitles the tenant to abandon it and stop paying rent."

On June 22, 2015, the court issued a letter opinion that "based upon all of the evidence that was introduced at the trial and my review of [the] memoranda, I have concluded that [Good Shepherd was] justified in leaving the leasehold premises and [is] entitled to damages in the amount of $46,190.33." The circuit court did not provide a basis for this award. The court entered its final order on June 30, 2015.

This Court granted RL & DR an appeal on two issues. First, whether the circuit court erred in concluding that Paragraph 10 of the lease controlled responsibility for the roof repair, and second, whether the circuit court erred in concluding that the funds expended by Good Shepherd for tenant improvements and repair in 2009 were direct rather than consequential damages barred by Paragraph 10.

ANALYSIS

I. Contract Interpretation

"Whether contractual provisions are ambiguous is a question of law and not of fact, and we do not, on appeal, accord the circuit court's resolution any deference since we are afforded the same opportunity to consider the provisions. Thus, we conduct a de novo review." Nextel WIP Lease Corp. v. Saunders, 276 Va. 509, 515-16, 666 S.E.2d 317, 320-21 (2008) (citation omitted).

"Contractual provisions are ambiguous if they may be understood in more than one way or if they may be construed to refer to two or more things at the same time." Id. at 516, 666 S.E.2d at 321. Contradictory provisions in an instrument are ambiguous, even if the words themselves are not. See McLean v. Piedmont & Arlington Life Ins. Co., 70 Va. (29 Gratt.) 361, 378 (1877); Lynchburg Fire Ins. Co. v. West, 76 Va. 575, 585-86 (1882).

The lease is patently ambiguous in that Paragraph 10 directly contradicts Paragraphs 4

and 12(b). Paragraph 10 provides that RL & DR will "make such repairs to the roof, gutter, downspouts as may be necessary to keep same in good condition." However, Paragraph 12(b) provides that Good Shepherd is "responsible for repair, maintenance, replacement of roofs, roof skins and downspouts" and Paragraph 4 provides that "Tenant will be responsible for any and all repairs and improvements to the Premises." Because no other portions of the lease shed light on the parties' contractual intent to resolve this contradiction, it is proper to consider parol evidence.

"If a written contract is so ambiguous . . . that all contractual intention of the parties cannot be understood from a mere inspection of the instrument," a court may examine "extrinsic evidence of the subject matter of the contract, of the relations of the parties to each other, and of the facts and circumstances surrounding them when they entered into the contract." Georgiades v. Biggs, 197 Va. 630, 634, 90 S.E.2d 850, 854 (1956). "The practical construction of a contract by the parties themselves is entitled to great weight in determining its proper interpretation." Coal Operators Cas. Co. v. C. L. Smith & Son Coal Co., 192 Va. 619, 626, 66 S.E.2d 521, 525 (1951).

There is evidence to suggest that the parties understood RL & DR to be responsible for roof repair and maintenance. The initial terms of the lease provided for a rent credit to be used for roof repair. Also, in response to Good Shepherd's complaints about the roof, RL & DR sent an agent to inspect, provided two additional $2,500 credits for repairs, and again sent an agent when the repairs seemed to be ineffective. It was not until two years into the lease that RL & DR asserted its current position that Good Shepherd was responsible for roof maintenance and repair. This behavior is consistent with the duties as provided in Paragraph 10. RL & DR's testimony that it provided the deductions for roof repairs not because it was obligated to do so, but because it was trying to facilitate the process of Good Shepherd buying the Premises, does not show that the parties shared an understanding that RL & DR was not responsible for roof repairs. Thus, there is evidence to support a finding by the circuit court that the lease should be construed against RL & DR because it is patently ambiguous, an inspection of the lease as a whole does not show the contractual intent of the parties, and parol evidence shows the parties understood that RL & DR was responsible for roof repairs. However, even if this Court determined the evidence of the parties' intent was in equipoise, the lease should be construed against RL & DR as the drafter. See Robinson-Huntley v. George Wash. Carver Mut. Homes Ass'n, 287 Va. 425, 431

n.*, 756 S.E.2d 415, 419 n.* (2014).

In a lease drafted by a landlord

> where uncertainties or ambiguities exist, the tenant is favored because the landlord, having the power of providing expressly in his own favor, has neglected to do so; and also upon the general principle that every man's grant is to be taken most strongly against himself. Thus, the language of a lease which is fairly susceptible of two constructions is to be taken most against the lessor.

Parrish v. Robertson, 195 Va. 794, 800, 80 S.E.2d 407, 410-11 (1954) (internal quotation marks and alteration omitted); see also Landmark HHH, LLC v. Gi Hwa Park, 277 Va. 50, 57, 671 S.E.2d 143, 147 (2009) (holding that if "[the landlord] as the drafter of the lease, desired to be exempt from all liability for losses sustained by [tenant] as the result of the common hazards to which the property would be subject, it was required to express the exemption in the plain language of the lease"). "[W]here there is no extrinsic evidence of the parties' intent or where such evidence is in equipoise," the rule that ambiguous contracts are to be construed against the drafter applies. Robinson-Huntley, 287 Va. at 431 n.*, 756 S.E.2d at 419 n.*.

The parties agree that the lease was provided by RL & DR. Gales testified that it was wholly prepared by RL & DR, that he did not know why some sections were bolded, and that he signed it without making changes. Although RL & DR's manager believed there was "back and forth," he testified that he was not personally involved in the lease. At oral argument, RL & DR stated that its agent prepared the document on its computer. Thus, there is sufficient evidence to conclude that RL & DR was the drafter and the ambiguous contract language is properly construed against it. Accordingly, the circuit court did not err in concluding that Paragraph 10 of the lease controlled the issue of responsibility for roof repair.

II. Characterization of Damages

"There are two broad categories of damages which may arise from a breach of contract. Direct damages are those which flow naturally or ordinarily from the contract breach. Consequential damages occur from the intervention of special circumstances that are not ordinarily predictable." Long v. Abbruzzetti, 254 Va. 122, 126, 487 S.E.2d 217, 219 (1997).

While "[t]he issue whether damages are direct or consequential is a question of law" which we review de novo, a circuit court's decision to award damages is factual and "we will

uphold its decision unless it is clearly erroneous or without evidence to support it." Id. at 127, 487 S.E.2d at 219; Nextel, 276 Va. at 515-16, 666 S.E.2d at 320-21; Little v. Cooke, 274 Va. 697, 714, 652 S.E.2d 129, 139 (2007). In making this determination, we view the facts in the light most favorable to the prevailing party below. Landmark HHH, 277 Va. at 52-53, 671 S.E.2d at 144.

The record before us is not sufficient to grant the relief sought by RL & DR. RL & DR did not assign error to the circuit court's decision to award damages, but rather its classification of damages as direct rather than consequential damages barred by Paragraph 10 of the lease regarding the roof repair. The court made no explicit classification of the damages it was awarding. Its order states only that Good Shepherd was entitled to $46,190.33.[2]

Good Shepherd sought damages not only for repair of the roof pursuant to Paragraph 10 of the lease, but also for the subsequent termination of the lease. On this record, we cannot discern the basis upon which the damages were awarded, nor whether the circuit court erred in awarding those damages. Thus, we must affirm the circuit court's damage award.

In conclusion, having found no reversible error in the proceedings that are the subject of this appeal, this Court affirms the decision of the circuit court. The appellant shall pay to the appellee damages according to law.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Patricia L Harrington

Clerk

[2] We note that the circuit court was not required to state any such classification. Fitzgerald v. Commonwealth, 223 Va. 615, 627, 292 S.E.2d 798, 805 (1982) (holding that "[a]bsent a statutory mandate . . . a trial court is not required to give findings of fact and conclusions of law").