VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 23rd day of November, 2016.

Medlin & Son Construction Co., Inc., Appellant,

against Record No. 160050
Circuit Court No. CL14-1742-01

The Matthews Group, Inc., t/a
TMG Construction Corporation, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Arlington County.

This case consists of a construction dispute involving claims by a subcontractor against a prime contractor over payment for various job tasks. Before the case went to the jury, the trial court struck from the record an invoice that was the basis for one of the subcontractor's breach of contract claims. Following a jury trial, the trial court vacated the jury's verdict in favor of the subcontractor for the remaining breach of contract claims. Finding both decisions to be erroneous, we reverse the final judgment, reinstate the jury's verdict, and order a retrial on the breach of contract claim related to the stricken invoice.

I.

On appeal, we review the evidence "in the light most favorable to the prevailing party at trial." *Exxon Mobil Corp. v. Minton*, 285 Va. 115, 121, 737 S.E.2d 16, 22 (2013) (alteration and citation omitted). This evidentiary prism safeguards the maxim that the "verdict of a jury in favor of a party determines all disputed questions of fact in his favor." *Lawson v. Southwestern Voluntary Ass'n*, 168 Va. 294, 300, 191 S.E. 648, 650 (1937); *see also Virginia Ry. & Power Co. v. N.H. Slack Grocery Co.*, 126 Va. 685, 691, 101 S.E. 878, 880 (1920).

From this perspective, the evidentiary record shows that Arlington County contracted with The Matthews Group ("TMG") to perform work on a municipal project that included leveling, groundwork, concrete work, and fencing at a community park. TMG subcontracted with Medlin & Son Construction ("Medlin & Son") to perform the concrete work. TMG had

two job numbers, 187 and 189, for the project with Arlington County. TMG executed an initial delivery order authorization ("DOA") with Medlin & Son for work on job number 187. This initial DOA was later amended by two change orders, increasing the total amount from $29,000 to $61,000. J.A. at 444-46. TMG later executed a second DOA with Medlin & Son on job number 189 that was also supplemented by two change orders that increased the total amount from $25,000 to $55,000. *Id.* at 447-48, 525-27. Neither the DOAs nor the change orders included an integration or merger clause but instead merely contained a clause requiring written change orders.

Work at the project lasted from November 2012 through May 2013. Medlin & Son was on the job site for most of the work days during that time period. The parties sharply disagreed at trial, however, as to what actually happened on the job site. James and Gail Medlin testified that TMG's Project Manager, Lloyd Staggs, frequently ordered Medlin & Son to perform tasks outside the scope of the DOAs. James Medlin was comfortable doing so, he said, because he had worked with Staggs for nearly a decade on other projects, which included "several projects" as a subcontractor for TMG around that same time as the park project. *Id.* at 70.

The course of dealing on each of the projects that Staggs managed, James Medlin explained, was always the same: Medlin and Staggs would verbally agree on whether the task was outside the scope of the written task orders, and then they would agree on a price for the new work prior to Medlin performing it. Medlin & Son would later send an invoice that Staggs would always promptly pay in full. Gail Medlin would prepare the invoice only after Staggs called her to confirm the predetermined price. During the six-month period on the job site, Medlin & Son issued nine invoices that served as written confirmation of both the verbal and written agreements between Staggs and the Medlins and totaled $242,635 for all work performed:

Invoice #	Date	Amount
602	11/5/12	$60,000
604	11/5/12	$25,000[1]
593	11/13/12	$17,000

[1] Gail Medlin testified that the $60,000 listed on Invoice No. 604 was a mistake and should have been $25,000. This amount was correctly reflected on Medlin & Son's summary-of-damages exhibit. *See* J.A. at 436.

606	1/14/13	$8,000
616	1/21/13	$15,660
621	1/25/13	$35,000
619	2/19/13	$32,000
624	2/28/13	$4,500
627	4/16/13	$45,475
Total		**$242,635**

The invoices included job tasks that were not expressly stated or necessarily implied in either of the DOAs or their respective change orders.[2] TMG created daily field reports documenting the work performed on the job site from November 2012 through May 2013.

Prior to receiving various interim payments, TMG would require James or Gail Medlin to execute a release. At trial, TMG introduced into evidence four such releases:

- a "FINAL RELEASE OF LIEN," dated November 30, 2012, issued upon payment of $29,000 for the original scope of the first DOA but without referencing any Medlin & Son invoice number, *compare id.* at 440 *with id.* at 498;

- a "PARTIAL RELEASE OF LIEN," dated December 10, 2012, issued upon payment of $17,000 for change order number one for the first DOA and referencing Invoice 593, *compare id.* at 427 *with id.* at 503;

- a "FINAL RELEASE OF LIEN," dated January 14, 2013, issued upon payment of $15,000 and referencing two invoices not in evidence but appearing to be related to the second change order for the first DOA, *compare id.* at 446 *with id.* at 508;

- a "FINAL RELEASE OF LIEN," dated March 29, 2013, issued upon payment of $40,000 and without listing invoice numbers but

[2] For example, Invoice No. 606 states that Medlin & Son power washed and sealcoated a concrete sidewalk. *Id.* at 428. Invoice No. 616 indicates that Medlin & Son hauled in five loads of "CR6" (gravel) and hauled out 16 loads (10 tons each) of CR6, a task which included renting a backhoe for five days to assist the plumbing subcontractor. *Id.* at 429. Invoice No. 619 demonstrates that Medlin & Son, among other things, dug drain lines by hand, dug a "6x6x7 ft. drain pit," and loaded over 200 tons of dirt. *Id.* at 432. Invoice No. 624 ordered Medlin & Son to repair a stone wall. *Id.* at 434. Although TMG challenges these tasks as being included within the scope of the plans and specifications for placing concrete at the project, James Medlin testified that he never received or reviewed these plans and specifications and that his "contract was to pour the concrete, period." *Id.* at 89-90.

> appearing to encompass payment for part of the second DOA, *compare id.* at 448 with *id.* at 524.

Each document titled "FINAL RELEASE OF LIEN" stated in relevant part:

> The undersigned for and in consideration of [sum of money paid], the receipt of which is acknowledged upon clearing the bank account, agrees and certifies as follows:
>
> 1. The undersigned forever waives and releases any and all causes of action, suits, debts, liens, damages, claims and demands of any nature whatsoever which the undersigned or its successors or assigns now has or may hereafter have against the Project (including the land and any improvements), the Owner, the General Contractor, or the General Contractor's payment bond surety, if any, by reason of labor and/or materials furnished to the Project.
>
> 2. The undersigned certifies that all persons, firms, or corporations who have furnished labor and/or materials and/or equipment to the undersigned, or at the direction of the undersigned, respecting the Project have been paid in full. . . .

Id. at 498, 508, 524. The "PARTIAL RELEASE OF LIEN" was nearly identical but added "for work covered by this payment" at the end of the last sentence of the first section. *Id.* at 503.

Of the $242,635 invoiced by Medlin & Son, TMG paid a total of $101,000. James Medlin testified that, following TMG's failure to pay multiple invoices, Staggs offered to attempt payment by inflating the price of future work performed. James Medlin refused the offer and took the issue to Staggs's boss, James Hoskinson, who said that he had not seen the invoices approved by Staggs but would nonetheless authorize payment for the extra work. TMG's position changed when Hoskinson later advised Medlin & Son that it was in violation of "the terms of the Master Agreement" between TMG and Medlin & Son, *id.* at 460, a contract the Medlins never saw or executed.[3] Medlin & Son filed this suit to recover the amount of the unpaid invoices it had sent to TMG, and TMG filed a counterclaim to recover money it expended in hiring another concrete subcontractor to correct Medlin & Son's work.

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[3] The trial court granted Medlin & Son's plea in bar on the master agreement, finding that it was "**NOT** part of any agreement between TMG and Medlin." *Id.* at 61.

By the time of trial, Staggs no longer worked for TMG, and Hoskinson denied ever making any promise of payment. Staggs testified that he never agreed to any extra work outside the scope of the DOAs, never instructed Gail Medlin to increase price figures in her invoices to reflect extra work, and never met with James or Gail Medlin to discuss outstanding invoices. Staggs further testified that invoices that were unrelated to a preexisting DOA could not be issued. In TMG's case in chief, TMG's owner testified that he understood that the release forms precluded subsequent unauthorized invoices from Medlin & Son and that, in any event, the invoices were unreasonably high.

A separate issue, pertaining to Medlin & Son's pleadings, arose during trial. In its complaint, Medlin & Son had pleaded breach of contract and, in the alternative, quantum meruit. At the beginning of trial, the parties agreed to strike the quantum meruit claim pursuant to TMG's motion to strike, and Medlin & Son proceeded solely on its breach of contract claims during trial. Medlin & Son introduced nine invoices, including Invoice No. 627, during its case in chief, explaining to the trial court that the invoices "were oral contracts that were reduced to writing." *Id.* at 76. Midway through its case in chief, Medlin & Son reversed course on agreeing to strike the quantum meruit claim, but only as to Invoice No. 627, and the trial court agreed to deny TMG's motion to strike as to Invoice No. 627 until after Medlin & Son rested its case. *Id.* at 159-61. At the conclusion of Medlin & Son's case in chief, TMG renewed its motion to strike the quantum meruit claim as to Invoice No. 627 on the ground that there was no evidence of reasonableness as to value. Medlin & Son argued that it had presented prima facie evidence as to reasonableness, and the trial court ultimately took the motion under advisement.

At the conclusion of the second day of trial, the trial court requested that counsel be prepared to address the quantum meruit claim for Invoice No. 627. The trial court confirmed that Medlin & Son had "two different counts," breach of contract and quantum meruit, and that "as to the first count" there was sufficient evidence offered for the count to go to the jury, but the trial court was "not sure about the second count, the quantum meruit count." *Id.* at 201-02. When the trial resumed the next week, the trial court heard argument on the issue and granted the motion to strike the quantum meruit claim as to Invoice No. 627 because "[t]here was no testimony in the plaintiff's case in chief as to reasonableness" and there was "insufficient evidence for the jury to determine the reasonableness of Invoice 627." *Id.* at 220. Later, at the conclusion of TMG's case in chief, the trial court struck Invoice No. 627 from Medlin & Son's

exhibits "based on the Court's ruling on the motion to strike" the quantum meruit claim, Trial Tr. (May 26, 2015) at 84-85, over Medlin & Son's argument that quantum meruit for Invoice No. 627 was only "a plea in the alternative," *id.* at 86.[4] In striking the invoice, the trial court cited its "original understanding . . . that 627 [was] only based on a quantum meruit." J.A. at 274. With the amount of $45,475 from Invoice No. 627 removed, Medlin & Son's summary-of-damages sheet submitted to the jury alleged $96,160 in total damages. *See id.* at 436.

The jury ultimately awarded a $71,500 verdict to Medlin & Son. The jury also rejected in full TMG's counterclaim against Medlin & Son. TMG filed a motion to set aside the verdict and to grant summary judgment in its favor because the release forms in evidence established as a matter of law that Medlin & Son had contractually waived *any* payments for work performed beyond the amounts already paid by TMG at the time of each release — with the March 29, 2013 final release (the third form titled as such) ending any further payment disputes. Medlin & Son disagreed, pointing out that the trial court had previously denied TMG's pretrial plea in bar on this very issue. In that previous ruling, the court had held that the releases were arguably ambiguous because it was unclear "what the waiver applied to." *Id.* at 47. The court's written order on that plea in bar had clarified, however, that the pretrial denial was without prejudice, giving TMG the ability to raise the same issue at trial.

In the post-trial ruling, the trial court granted TMG's motion to set aside the jury verdict and entered summary judgment dismissing Medlin & Son's claims against TMG. The court held that the March 29, 2013 final release contractually waived all claims by Medlin & Son for payment on any of its unpaid invoices submitted before that date. Since no other invoices in evidence were dated later than that release, Medlin had "no claim" that could go to the jury. *See*

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[4] In its brief, Medlin & Son points out numerous instances throughout the trial when its counsel explained to the trial court that the quantum meruit claim was merely in the alternative to the breach of contract claim for Invoice No. 627. *See, e.g.*, *id.* at 216-18 (noting "[t]hat would be in the alternative, Your Honor" in response to the trial court's explanation to opposing counsel that "plaintiff is arguing that instead of a breach of contract claim for Invoice 627, it's a quantum meruit claim on 627"); *id.* at 269 (interjecting "[w]ell, just as to the quantum meruit claim, not as to the breach of contract claim" after TMG's counsel argued that Invoice 627 "is out" because of the trial court's ruling on the motion to strike the quantum meruit claim); *id.*at 270 (answering "Yes" to the trial court's question of whether Invoice No. 627 "can be submitted under a contract claim").

id. at 594-96. Medlin & Son filed exceptions to the trial court's order, objecting to the trial court's decisions to strike the quantum meruit claim, to strike Invoice No. 627 from the evidence, and ultimately to set aside the jury's verdict based on the language of the releases. The trial court, however, rejected Medlin & Son's exceptions and stated in a memorandum opinion incorporated into the final order that the record supported each of the trial court's rulings. *See id.* at 605-09.

II.

On appeal, Medlin & Son assigns multiple errors to the trial court's decision to set aside the jury's verdict: (1) evidence at trial supported that verdict, (2) the law of the case established that the lien releases were ambiguous, (3) the trial court misinterpreted the lien releases, and (4) the court should not have struck Invoice No. 627 from the evidence before the case went to the jury. Medlin & Son argues that the jury verdict is supported not only by oral contracts reflected by the written invoices, which were outside the scope of the original DOAs and subsequent change orders, but also by the course of dealing between the parties. TMG assigns cross-error to the trial court's refusal to set aside the jury verdict based on the express language of the two DOAs and to the trial court's refusal to grant TMG's motion to strike on the basis that Medlin & Son failed to prove damages with reasonable certainty.

It is well-established that a jury's verdict "shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it." Code § 8.01-680. As a result, upon review of a trial court's decision to set aside the jury's verdict, "we give the recipient of the verdict the benefit of all substantial conflicts in the evidence and all reasonable inferences that may be drawn from the evidence." *Shalimar Dev., Inc. v. Federal Deposit Ins.*, 257 Va. 565, 570, 515 S.E.2d 120, 123 (1999). This deferential standard prohibits a trial judge from "substitut[ing] his conclusion for that of the jury merely because he would have voted for a different verdict if he had been on the jury" when "there is a conflict in the testimony on a material point, or if reasonable persons may differ in their conclusions of fact to be drawn from the evidence, or if the conclusion is dependent on the weight to be given the testimony." *Doherty v. Aleck*, 273 Va. 421, 424, 641 S.E.2d 93, 94 (2007) (citation and alteration omitted).

A. Course of Dealing and Collateral Agreements

Course of dealing between contracting parties is a common-law contracts principle that this Court has applied to "evince mutual intent to modify the terms of [the parties'] contract." *Cardinal Dev. Co. v. Stanley Constr. Co.*, 255 Va. 300, 305, 497 S.E.2d 847, 851 (1998) (quoting *Stanley's Cafeteria, Inc. v. Abramson*, 226 Va. 68, 73, 306 S.E.2d 870, 873 (1983)); *see also Kent v. Kent*, 2 Va. Dec. 674, 678, 34 S.E. 32, 33 (1899).[5] Course of dealing is "considered in light of all the circumstances," and such "circumstances surrounding the conduct of the parties must be sufficient to support a finding of a 'mutual intention' that the modification be effective." *Stanley's Cafeteria, Inc.*, 226 Va. at 73, 306 S.E.2d at 873. Mutual intention to modify the contract "must be shown by clear, unequivocal, and convincing evidence, direct or implied." *Reid v. Boyle*, 259 Va. 356, 370, 527 S.E.2d 137, 145 (2000) (citation omitted).

Although "[i]t is universally accepted that parol or extrinsic evidence will be excluded when offered to add to, subtract from, vary or contradict the terms of a written contract," one exception to the general rule is the collateral contract doctrine, which permits "parol proof of a prior or contemporaneous oral agreement that is independent of, collateral to and not inconsistent with the written contract, and which would not ordinarily be expected to be embodied in the writing." *High Knob, Inc. v. Allen*, 205 Va. 503, 506-07, 138 S.E.2d 49, 52 (1964).[6] "[B]y the rules of the common law," this Court has held that "it is competent for the parties to a simple contract in writing, before any breach of its provisions, either altogether to waive, dissolve, or abandon it, or add to, change, or modify it, or vary or qualify its terms, and thus make a new one." *Warren v. Goodrich*, 133 Va. 366, 391, 112 S.E. 687, 694 (1922) (citation omitted). This

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[5] "Course of dealing," which "consists of conduct prior to the agreement in question," is often distinguished from "course of performance," which "consists of conduct subsequent to the agreement." 2 E. Allan Farnsworth, Farnsworth on Contracts § 7.13, at 329 (3d ed. 2004). Virginia precedent does not appear to make such a distinction of phrasing as it applies "course of dealing" to both subsequent conduct, *see Cardinal Dev. Co.*, 255 Va. at 306, 497 S.E.2d at 851, and prior conduct, *see Government Emps. Ins. Co. v. Hall*, 260 Va. 349, 356, 533 S.E.2d 615, 618 (2000).

[6] *See* 14 Michael A. Branca & Mark R. Berry, Virginia Practice Series: Construction Law § 9:8, at 291 (2015 ed.) ("Under certain circumstances . . . Virginia courts have declined to enforce otherwise clear and unambiguous terms. As one example, the parties' course of dealing during the performance of the contract has been held to have modified the contract's written terms.").

can be proven "partly by the written and partly by the subsequent oral contract which has thus been incorporated into and made a part of the original one." *Id.* at 391-92, 112 S.E. at 694 (citation omitted). "Nor does it make any difference that the original written contract provided that it should not be substantially varied except by writing" because such a prohibition "itself may be rescinded by parol and any oral variation of the writing which may be agreed upon and which is supported by a sufficient consideration is by necessary implication a rescission to that extent." *Reid*, 259 Va. at 369-70, 527 S.E.2d at 145 (citation omitted); *see also* Branca & Berry, *supra* note 6, § 10:2, at 303 ("The absence of a written contract modification can be overcome by a course of conduct of the parties clearly evincing mutual intent to modify the contract.").

TMG argues in its first assignment of cross-error that the terms of the DOAs and subsequent written change orders are clear and unambiguous as the whole contract between the parties, and thus, parol evidence of prior or contemporaneous negotiations cannot modify or alter the terms of the written contracts between TMG and Medlin & Son. This argument, however, presumes that the parties' disagreement is over the meaning of the original written contracts instead of over the existence of multiple oral, collateral contracts — whether prior, contemporaneous, or subsequent — that are independent of the initial written contracts.

Neither the DOAs nor their respective change orders contained a clear merger or integration clause, and as a result, nothing prohibits Medlin & Son from introducing parol evidence to prove the existence of collateral contracts from the invoices that they submitted prior to or contemporaneous with the written contracts. *See Durham v. National Pool Equip. Co. of Va.*, 205 Va. 441, 447, 138 S.E.2d 55, 59 (1964) (considering parol evidence admissible when the "written contract is not a complete integration of all prior and contemporaneous negotiations which have been agreed upon by the parties"). Further, even if there were a merger and integration clause in any of the written contracts, parol evidence may be used to prove collateral contracts that were subsequent to the written contracts. *Zurich Gen. Accident & Liab. Ins. v. Baum*, 159 Va. 404, 408-09, 165 S.E. 518, 519 (1932) ("Under common law principles, the provisions of a simple contract in writing, by *subsequent* parol agreement of the parties before breach, may be waived, rescinded, added to, changed or modified." (emphasis added)). *See also* John Edward Murray, Jr. & Grover C. Grismore, Murray on Contracts § 108, at 238 (2d rev. ed. 1974) ("The [parol evidence] rule has no application to agreements subsequent to the writing.").

The record demonstrates that there was sufficient evidence to support the existence of multiple collateral contracts that either modified or supplemented the terms of the original DOAs and change orders, and thus, the trial court erred in setting aside the jury's verdict. James Medlin testified that the manner in which Staggs did business with Medlin & Son was to add money to the original contract "for extra work [Medlin & Son] did" and to "never change the date" so as to "make it look like it was the initial date of the contract that [they] agreed upon." Trial Tr. (May 19, 2015) at 179-80. James Medlin testified that "this is the way we worked for ten years." J.A. at 113. Gail Medlin also testified that Staggs "would call and tell [her] what to put and what to bill on an invoice." *Id.* at 119.

Medlin & Son introduced nine such invoices that it claimed to have sent to TMG over the course of the project. Four of the invoices (Invoice Nos. 593, 602, 604, and 621) only covered the scope of the original DOAs or written change orders, but other invoices covered work entirely outside the scope of any of the written contracts or covered a combination of both the scope of the original contracts and extra work. The amounts for two of the invoices (Invoice Nos. 602 and 621) reflect amounts greater than those agreed to for work within the scope of the original contracts, but Gail Medlin testified that Staggs instructed her to increase the amount because "there was an increase in the scope of work," J.A. at 121, or because "[i]t was more work than he thought it was," *id.* at 142. Invoice Nos. 606 and 624 contained tasks completely outside the scope of the DOAs and change orders, and Invoice Nos. 616, 619, and 627 reflected a combination of tasks both inside and outside the scope of the DOAs and change orders.

Furthermore, the daily field reports that TMG project supervisors prepared and sent to the Arlington County construction manager confirmed the performance of many tasks outside the scope of the original DOAs and change orders. *See id.* at 299-396. For example, one such daily field report recorded that Medlin & Son fielded a six-man crew and "worked on digging catch basins, and drain lines." *Id.* at 333; *see also id.*at 432-33 (showing charges to "hand dig [a] drain line" and "[t]o dig [a] 6x6x7 ft. drain pit" on Invoice No. 619). Through testimony and exhibits, Medlin & Son presented sufficient evidence for the jury to determine that collateral oral contracts existed that modified or supplemented the original DOAs and change orders. Thus, contrary to TMG's argument that the trial court should have set aside the jury verdict based on the express language of the two DOAs, the evidence supports the jury verdict's finding that TMG breached collateral contracts with Medlin & Son.

In a related assignment of error, Medlin & Son challenges the trial court's decision to strike Invoice No. 627 before the case went to the jury. The trial court reasoned that Invoice No. 627 applied only to Medlin & Son's quantum meruit claim, which the trial court had previously stricken because Medlin & Son had failed to present sufficient evidence on the reasonableness of the amount claimed. Medlin & Son argues that it introduced Invoice No. 627 to support both a breach of contract claim *and* an alternative quantum meruit claim. Although the trial court concluded that "it was not given the opportunity to address [the issue] prior to the case being submitted to [the] jury," *id.* at 608, Medlin & Son on numerous occasions throughout the trial made clear that Invoice No. 627 supported both its breach of contract claim and its alternative quantum meruit claim, *see id.* at 216-18, 269, 270. Medlin & Son even argued this very point during the jury instruction phase when Invoice No. 627 was stricken. *See* Trial Tr. (May 26, 2015) at 86. Medlin & Son's complaint in the case also does not limit Invoice No. 627's application solely to its quantum meruit claim. *See* J.A. at 1-5. The trial court thus erred in striking Invoice No. 627 and preventing Medlin & Son from presenting the invoice to the jury in support of its breach of contract claim.

B. The Ambiguity of the Multiple "Final" Releases

In setting aside the jury's verdict and entering summary judgment for TMG, the trial court held "as a matter of law" that the releases signed by Medlin & Son bar any assertion of claims against TMG. *Id.* at 596. The trial court found "each release to be a clear and explicit writing" free from any ambiguity that would have left the construction of the releases for the jury. *Id.* at 594-96. When a contract is "clear and explicit," it constitutes "the sole evidence of the agreement," but parol evidence is relevant when the written agreement is ambiguous. *Amos v. Coffey*, 228 Va. 88, 92, 320 S.E.2d 335, 337 (1984) (citation omitted). "An ambiguity exists when language is of doubtful import, admits of being understood in more than one way, admits of two or more meanings, or refers to two or more things at the same time." *Cascades N. Venture Ltd. P'ship v. PRC Inc.*, 249 Va. 574, 579, 457 S.E.2d 370, 373 (1995) (citation omitted). Summary judgment is inappropriate when "neither party has offered a construction of [contract] provisions that could be deemed so clear that it unambiguously excludes the explanation offered by the opponent." *Id.* at 582, 457 S.E.2d at 374-75.

The trial court erred in holding that the releases were unambiguous "as a matter of law," J.A. at 596, and thus erred in setting aside the jury's verdict and entering summary judgment for TMG on that basis.[7] The releases signed by Medlin & Son are ambiguous for several reasons. To begin, the titles of the "final" releases suggest an ambiguity because the titles state "release of lien" while the body of the releases state that Medlin & Son "releases any and all causes of action, suits, debts, liens, damages, claims and demands of any nature whatsoever." *Id.* at 498, 508, 524. In addition, each of the releases lists check numbers and amounts that link the releases to specific payments from TMG to Medlin & Son without any specific reference to the DOA or change order for which the payment is being made. The absence of any reference to a specific DOA make it unclear "what the waiver applied to," as the court previously had stated when it denied TMG's pretrial plea in bar. *Id.* at 47. The January 14, 2013 "final" release also lists two invoices that are not even in evidence, which creates further ambiguity as to which DOA or change order that release might apply. Moreover, under a common-sense view of the releases, the existence of three "final" releases indicate that none of them were actually "final" as to "any and all causes" that Medlin & Son may have had against TMG. *See id.* at 498, 508, 524.

Because the releases were not clear and unambiguous on their face as to what claims Medlin & Son actually waived, "the acts of the parties in relation to [the releases] establish a practical construction" of the releases, and this construction is "entitled to great weight in determining [their] proper interpretation." *Robinson-Huntley v. George Wash. Carver Mut. Homes Ass'n*, 287 Va. 425, 431, 756 S.E.2d 415, 419 (2014). The testimony at trial indicated that the parties acted as if the releases were only applicable to the interim payments received in exchange for each release. At trial, Gail Medlin testified that she was required to sign the releases in exchange "for that money" listed on the release and that the releases did "not mean[] that the job was done." J.A. at 130-31. She further testified that they "had to sign them or [they]

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[7] Medlin & Son raises a meritless argument that the trial court's final order was contrary to the law of the case because a different judge had already denied TMG's pretrial plea in bar based on the ambiguity of the waivers. This ruling on the pretrial plea in bar did not implicate the law-of-the-case doctrine because the plea in bar was denied "without prejudice," J.A. at 60, and because any interlocutory decree can be modified or rescinded before final judgment is rendered in the case, *see Freezer v. Miller*, 163 Va. 180, 197 n.2, 176 S.E. 159, 165 n.2 (1934) (collecting authorities). The trial court thus was not prohibited from reconsidering whether the releases were ambiguous before rendering final judgment.

couldn't get [their] money." *Id.* at 131. Gail Medlin's testimony as to the course of dealing regarding the releases is corroborated by TMG's payment of Invoice No. 593, dated November 13, 2012. This invoice was billed prior to the November 30, 2012 "final" release, and yet was paid in December 2012 after Medlin & Son signed the "final" release. *See id.* at 427, 502. The daily field reports further indicate that the final scope of the project was not complete even after the last final release was signed on March 29, 2013, because Medlin & Son continued to work at the site through May 7, 2013. Based on the evidence presented at trial, the jury's verdict was not plainly wrong, as the releases are ambiguous at best, and testimony presented at trial supports the finding that the releases only applied to the amounts indicated on each release.[8]

C. The Sufficiency of the Evidence on Damages

In its second assignment of cross-error, TMG challenges the trial court's refusal to rely on the specific ground that Medlin & Son failed to prove damages with reasonable certainty in granting its motion to strike. The jury awarded Medlin & Son $71,500 in damages, and that finding should not be set aside unless it is "plainly wrong or without evidence to support [it]." *Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 423, 732 S.E.2d 690, 698-99 (2012) (citation omitted).

In a breach of contract claim, "the plaintiff bears 'the burden of proving with reasonable certainty the amount of damages and the cause from which they resulted; speculation and conjecture cannot form the basis of the recovery. Damages based on uncertainties, contingencies, or speculation cannot be recovered.'" *Id.* at 423, 732 S.E.2d at 699 (quoting *Shepherd v. Davis*, 265 Va. 108, 125, 574 S.E.2d 514, 524 (2003)). Although "[p]roof with mathematical precision is not required, . . . there must be at least sufficient evidence to permit an intelligent and probable estimate of the amount of damage." *Id.* (citation omitted).

TMG argues that Medlin & Son's "proof of damages was entirely too vague, indefinite and speculative to support the $71,500.00 award." Appellee's Br. at 25. Although Medlin & Son hypothesizes that the last three admitted invoices (Invoice Nos. 619, 621, and 624) add up to

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[8] The *contra preferentem* doctrine, which directs that an "ambiguity must be construed against the drafter of the agreement," *Doctors Co. v. Women's Healthcare Assocs.*, 285 Va. 566, 573, 740 S.E.2d 523, 526 (2013) (citation omitted), further supports the jury's verdict because it confirms the "extrinsic evidence of the parties' intent," *Robinson-Huntley*, 287 Va. at 431 n.*, 756 S.E.2d at 419 n.*.

exactly $71,500 and could have formed the basis for the jury's damage award, Appellant's Br. at 17, TMG responds that Medlin & Son's own exhibit for Invoice No. 621 shows a $15,000 payment credit, thus making the amount due on that invoice only $20,000, Appellee's Br. at 27.

These disputes over the amount of Invoice No. 621, however, fail to consider the uncontested evidence that the original DOAs and their respective change orders totaled $116,000, of which TMG only paid $101,000. *See id.* at 7, 22 (admitting "an unpaid balance" under the second DOA of $15,000). With respect to this $15,000 that TMG did not pay to Medlin & Son under the second DOA, TMG filed its own counterclaim for breach of contract, alleging that Medlin & Son had refused to correct defective work. The jury's verdict form indicated that they were unpersuaded by TMG's counterclaim, finding that TMG "failed to prove breach of contract by Medlin & Son Construction Co. for defective work, or though proven, [finding] that Medlin & Son Construction Co. was excused from correcting the work." J.A. at 562. It is entirely plausible that the jury awarded this $15,000 that remained unpaid from the second DOA, combined with the $20,000 that remained unpaid from Invoice No. 621, the $32,000 from Invoice No. 619, and the $4,500 from Invoice No. 624 for a total of $71,500.[9] Viewing the evidence in the light most favorable to Medlin & Son, we cannot say that the jury's damages award of $71,500 was without "reasonable certainty" or that there was insufficient evidence "to permit an intelligent and probable estimate of the amount of damage." *Manchester Oaks*, 284 Va. at 423, 732 S.E.2d at 699 (citation omitted).

III.

In sum, we find that the jury's verdict was not plainly wrong or without evidence to support it because the course of dealing between the parties and the evidence presented at trial support the jury's finding that Medlin & Son proved a breach of contract by TMG. Additionally, the trial court erred in finding that Medlin & Son waived its claims by signing the releases and setting aside the jury's verdict on that basis. Finally, the trial court erred in excluding Invoice No. 627 as evidence in support of Medlin & Son's breach of contract claim.

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[9] Moreover, Medlin & Son's summary-of-damages sheet, the invoices, and TMG's payments, show an estimated damages total of $96,160, which is well above the $71,500 in damages that the jury awarded. *See* J.A. at 436, 497, 502, 507, 523.

We reverse the final judgment, reinstate the jury's verdict, and remand the case for a new trial on the breach of contract claim related to Invoice No. 627.

This order shall be certified to the Circuit Court of Arlington County.

A Copy,

Teste:

Clerk