VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court building in the City of Richmond on Thursday the 17th day of October, 2019.

Present: Lemons, C.J., Mims, Powell, Kelsey, McCullough, and Chafin, JJ., and Lacy, S.J.

Sumner Partners LLC, Appellant,

against Record No. 181259
Circuit Court No. CL16000442

Venture Investments LLC, Appellee.

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

Sumner Partners LLC appeals a judgment in favor of Venture Investments LLC, challenging the trial court's interpretation of several provisions in a contract to purchase commercial real estate. Because the trial court erred in its interpretation of the relevant contract, we reverse and remand.

I.

In February 2015, Sumner and Venture entered into a Purchase Agreement whereby Sumner agreed to purchase from Venture a parcel of commercial real estate in Stafford County for $1.3 million. The parcel previously had been utilized as a rental facility for both small-scale and large-scale construction equipment. Section 3 of the Agreement stated, in relevant part, that the parties would close on the contract

> on such date and at such time and location as shall be designated by [Sumner], upon ten (10) days prior written notice to [Venture], which shall be on or before the date that is thirty (30) days after the later of expiration of the Study Period or thirty (30) days after all conditions precedent to [Sumner's] obligations to close hereunder have been satisfied; provided that, in no event shall Closing occur later than the date that is Ninety Days (90) after the Effective Date hereof (the **"Closing Date"**).

2 J.A. at 676 (emphasis in original). The study period was for 60 days from the effective date of the Agreement, and Sumner could back out of the Agreement during this period for any reason

and receive a refund of its deposit. *See id.* at 683. The Agreement had a separate provision allowing Sumner to enter onto and inspect the property and to conduct environmental and engineering studies "[a]t any time and from time to time prior to [the] Closing Date." *Id.* at 682.

The Agreement also contained several conditions precedent to Sumner's obligation to close. First, Section 5.6 contained Venture's representation and warranty that, "[t]o the best of [Venture's] knowledge, no hazardous wastes or substances are located on, under or about the Property or any adjacent property." *Id.* at 679. That Section went on to define "[h]azardous wastes" and "hazardous substances" to include "any 'oil, petroleum products, and their by-products' as defined by the Maryland Statutes." *Id.*

Section 17 contained an explicit list of conditions precedent to closing. Two of those conditions precedent, found in Sections 17.1(h) and 17.1(i), required the property (including the land, the surface and ground water, and any improvements) to "be free of Hazardous Materials"[1] and required all of the "covenants, representations and warranties of [Venture] to [Sumner] contained in [the] Agreement . . . [to] be true and correct at Closing with the same force and effect as if such covenants, representations and warranties were made at and as of such time." *Id.* at 684.

Finally, Section 17.2 set forth Sumner's remedies in the event that any of the conditions precedent failed:

> In the event that the above conditions precedent set forth in this Agreement are other than as stated, then [Sumner] shall have the option, in its sole discretion, exercised by written notice to [Venture], to: (a) waive such conditions and proceed to Closing in accordance with the terms of this Agreement; (b) terminate this Agreement, whereupon the Earnest Money Deposit, plus all accrued interest thereon, shall be refunded to [Sumner] by the Escrow Agent and all parties hereto shall be thereupon relieved from any further liability or obligation hereunder (except as otherwise expressly set forth herein); and/or (c) take such actions as may be required to cause such failed conditions precedent to be fully satisfied, which actions shall be determined by [Sumner] in its sole discretion (the **"Conditions Satisfaction Work"**), in which case, the Closing Date shall be extended for the period of time necessary to permit [Sumner] to complete the Conditions Satisfaction Work, and all costs and expenses incurred by

[1] In the Agreement, the phrase "Hazardous Materials" contains diagonal slash marks through the capital "H" and the capital "M." *See* 2 J.A. at 684. The record contains no explanation for these markings.

> [Sumner] for or in connection with the completion of the Conditions Satisfaction Work shall be offset and charged against the Purchase Price . . . .

Id. (emphasis in original). Section 19.5 also contained a "Litigation Expense" provision entitling the prevailing party in any litigation to its attorney fees and litigation expenses both in the trial court and on appeal. *See id.* at 685. The parties subsequently agreed to several amendments to the Agreement that ultimately extended the closing date to July 7, 2015, and reduced the purchase price to $1.06 million.

In early June, ECS Mid-Atlantic, LLC conducted a preliminary Phase I and Phase II environmental study of the property at Sumner's request. In its summary of its Phase II findings, ECS reported elevated levels of diesel total petroleum hydrocarbons ("TPH") in the soil near the former location of aboveground storage tanks ("ASTs") and within the industrial building located on the property. ECS also noted the presence of two volatile organic compounds ("VOCs") in the groundwater at two different locations. The level of these compounds was "just below the screening level for vapor intrusion for a residential setting" and below "the commercial screening level." *See id.* at 697. "Based on the detection of petroleum contamination in [the] soil, and the low levels of VOCs in [the] groundwater," ECS recommended presentation of these findings to the Virginia Department of Environmental Quality ("VDEQ"). *Id.* ECS also recommended that Sumner allow ECS to perform additional soil and groundwater testing to determine the nature and scope of the contamination. ECS further presented a proposal whereby it would conduct such additional testing and then bid out to other contractors any necessary remediation work.

Sumner provided a copy of ECS's report to Venture on June 23. Venture subsequently agreed to the final extension of the closing date to July 7, 2015, though Sumner had asked for a longer extension. On July 6, the day before the agreed-upon closing date, Sumner gave Venture written notice that, because "the Property is contaminated with hazardous materials," "[t]he condition of the Property is not consistent with [Venture's] representations and warranties as set forth in Section 5.6 of the Agreement or the conditions precedent to Closing set forth in Section 17.1(h)." *Id.* at 702. Sumner further informed Venture that it was exercising its right under Section 17.2 of the Agreement to extend the closing date to perform the Conditions Satisfaction Work itself and receive an offset of the purchase price. *See id.* at 702-03. On July 8, after the parties had failed to close, Venture informed Sumner via letter that Venture disagreed that it had

misrepresented the condition of the property and declared the Agreement to be terminated based upon Sumner's failure to close on July 7. The parties continued to try to negotiate amendments to the Agreement, and during this time Venture obtained two letters from the VDEQ stating that the petroleum contamination on the property did not present a risk to human health or to the environment and that further investigation or corrective action was not required. *See id.* at 786-88. Venture then engaged Commonwealth Environmental Associates, Inc. ("CEA") to conduct its own testing, which revealed even higher levels of TPH than the ECS testing had revealed in the former location of the ASTs.

The negotiations between the parties ultimately failed, and Sumner filed a complaint seeking a declaratory judgment that it had the right to enter onto the property to perform the Conditions Satisfaction Work, to deduct the costs of that work from the purchase price, to purchase the property after the completion of that work, and to receive its costs and attorney fees pursuant to the Agreement. Sumner also sought specific performance of the Agreement so that Venture would be required to allow Sumner onto the property to perform the Conditions Satisfaction Work, to allow Sumner time to perform that work after receiving ECS's revised proposal, and to close on the sale with the deduction for Sumner's costs in performing that work. Venture counterclaimed, also seeking specific performance of the Agreement, along with an award of damages for Sumner's breach of the Agreement and the resulting delay, expense, and loss of income that Venture had suffered as well as for attorney fees and costs.

After a bench trial, the trial court issued an initial letter opinion that found that the final amendment to the Agreement had not been signed by one of the parties, which made the final extension of the closing date ineffectual. The court also held that Sumner had breached the Agreement by failing to close on the agreed-upon date in a previous amendment (June 29, 2015). *See* 1 *id.* at 66-67. The court then went on to find that TPH is not a hazardous waste or substance as defined in Section 5.6 of the Agreement because the experts had agreed that TPH does not satisfy the definition of a hazardous waste or substance in either the Agreement or in the industry. *Id.* at 67. Finally, the court found that TPH also does not qualify as a hazardous material under Section 17.1(h) of the Agreement because the Agreement does not define that term and because the experts had "all agreed" that "a petroleum product is not a hazardous waste or substance and as such not a hazardous material." *Id.* The court determined that the absence of a definition for the term hazardous materials was "an oversight on the drafter of the agreement

and render[ed] the term meaningless," and thus ambiguous, such that the canon of contra proferentem applied. *See id.* at 69. Based upon these findings, the court concluded:

> For the reasons as outlined previously, the [c]ourt finds in favor of [Venture], finding that the closing date had expired without closing or notification of a failed condition precedent because the presence of chemicals did not meet the definitions contained in the Purchase Agreement nor did they meet the undefined term *hazardous materials*.

Id. (emphasis in original). The court denied Sumner's requests for a declaratory judgment and for specific performance. It granted Venture's counterclaim in part, finding that because Venture had exercised its option to terminate the Agreement for default and because no provision for damages or attorney fees and costs existed in the default paragraph of the Agreement, Venture was only entitled to retain Sumner's deposit and the accrued interest on that amount. The trial court entered judgment in favor of Venture for the amount of the deposit plus interest in a final order that incorporated its letter opinion by reference.

Sumner filed a motion for reconsideration, arguing that the trial court had erred in finding that the final amendment to the Agreement was ineffectual. Sumner argued that the parties had admitted in their pleadings that the amendment had extended the closing date to July 7, 2015, and also argued that contract provisions prohibiting non-written modifications to the contract can themselves be modified by oral agreement. The motion also argued that the trial court had erred in its interpretation of the Agreement because TPH qualifies as a hazardous waste and substance under Section 5.6 of the Agreement and because the experts had not testified to the contrary.

The trial court granted Sumner's motion for reconsideration with respect to the closing date but denied it with respect to the definitions of hazardous wastes and substances. In a letter opinion incorporated into its final order, the court maintained its interpretation of the expert testimony and stated that Sumner had not met its burden of proof because one expert had stated that TPH is not considered a hazardous characteristic and because another expert had opined about the general usage of similar terms in the industry but could not testify as to this Agreement in particular. *See id.* at 86. The second expert had also testified that the terms hazardous substance and hazardous materials could be used interchangeably but had admitted that the capitalized term "Hazardous Materials" in the Agreement, 2 *id.* at 684, generally indicated a defined term. *See* 1 *id.* at 86. Sumner timely appealed, challenging the trial court's interpretation of the Agreement.

II.

A.

"Where the judgment of the trial court is based upon its interpretation of written documents, we review the issue de novo because 'we have an equal opportunity to consider the words of the contract within the four corners of the instrument itself.'" *Brizzolara v. Sherwood Mem'l Park, Inc.*, 274 Va. 164, 180 (2007) (alteration and citation omitted); *see also Babcock & Wilcox Co. v. Areva NP, Inc.*, 292 Va. 165, 178 (2016). "It is the court's duty to declare what the instrument itself says it says," and "[w]hat the parties claim they might have said, or should have said, cannot alter what they actually said." *Sweely Holdings, LLC v. SunTrust Bank*, 296 Va. 367, 379 (2018) (citation omitted). On the other hand, this Court has "neither the duty nor the inclination to creatively construe an unambiguous contractual phrase 'so as to conform it to the court's notion of the contract the parties should have made' under the circumstances." *Id.* at 378-79 (citation omitted).

We "construe a contract as written, without adding terms that were not included by the parties. When the terms in a contract are clear and unambiguous, the contract is construed according to its plain meaning." *RECP IV WG Land Inv'rs L.L.C. v. Capital One Bank (USA), N.A.*, 295 Va. 268, 283 (2018) (alteration and citation omitted). "An instrument will be deemed unambiguous if its provisions are capable of only one reasonable construction. Conversely, it will be deemed ambiguous if its language admits of being understood in more than one way or refers to two or more things at the same time." *Id.* (alterations and citation omitted). When the terms of a contract are unambiguous, this court "need not resort to extrinsic evidence or to the canons of construction that are applicable to ambiguous contracts," including the canon of contra proferentem. *Appalachian Reg'l Healthcare v. Cunningham*, 294 Va. 363, 371 n.7 (2017). In fact, this canon "is not favored by the courts and is not resorted to when the contract is clear." *Charles E. Russell Co. v. Carroll*, 194 Va. 699, 701-02 (1953).

We find that the Purchase Agreement is unambiguous. It explicitly defines "[h]azardous wastes" and "hazardous substances" to include "any 'oil, petroleum products, and their by-products' as defined by the Maryland Statutes." 2 J.A. at 679. Moreover, Section 17.1(i) of the Agreement specifically makes all of Venture's representations and warranties in Section 5 conditions precedent to closing. *See id.* at 683-84. Therefore, if any of Venture's representations and warranties in Section 5 are not true as of the closing date, Sumner is released

from its obligation to close and is entitled to exercise any of the available remedies under Section 17.2, including postponing the closing date to perform the Conditions Satisfaction Work and deducting the costs of that work from the purchase price. *See id.* at 684.

B.

The trial court misinterpreted the unambiguous Agreement because it misinterpreted the expert testimony. Steven Klebanoff, the owner of Sumner and Sumner's expert regarding the environmental provisions in the Agreement, testified that he understood the phrase "hazardous materials" in Section 17.1(h) to include "all of the items that could be included under Section 5.6" and that Section 5.6 "expand[s]" the definitions of hazardous wastes and substances from federal law to specifically include petroleum products. 1 *id.* at 139-40. During cross-examination, he expressly testified, "I believe that total petroleum hydrocarbons are a hazardous material." *Id.* at 289. When asked to clarify whether total petroleum hydrocarbons are hazardous materials under federal law, he answered, "I believe so, but I do not know specifically any citation . . . to verify that." *Id.* at 291. When asked to agree that, "if total petroleum hydrocarbons are not a hazardous material pursuant to law" then "they are not governed by" Paragraph 17.1(h), he responded, "I would not agree with that at all." *Id.* at 329. Finally, on re-direct examination, he agreed that it was "[his] understanding that the definition of . . . hazardous waste and hazardous substances in [Section 5.6] is also the definition of hazardous materials as it's used in section 17(H)." *Id.* at 344-45.

Garnett Williams, Sumner's expert regarding environmental assessments and the Principal Geologist who conducted the ECS Phase I and Phase II study of the property at issue here, testified that environmental conditions reported in Phase II environmental reports include not only aspects of contamination that could subject the owner to liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, "[b]ut it also pertains to non-CERCLA issues which could involve petroleum contamination." 1 J.A. at 410-11. Williams went on to confirm that CERCLA "expressly and explicitly excludes oil based substances from" the definition of a hazardous substance. *Id.* at 411-12. Finally, after a discussion concerning the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, Williams was asked whether gasoline and diesel fuel are hazardous materials, and he responded, "TPH is not considered to be a hazardous . . . characteristic." 1. J.A. at 425-26.

Channing Martin, Sumner's expert regarding how parties address petroleum contamination in purchase contracts, leases, and loan documents, testified that the terms hazardous substances and hazardous materials are often found in environmental provisions within these documents and that "these terms are always broadly defined, and they're used interchangeably." *Id.* at 456-57. He also testified that, "when they are used in that manner, they include all of the constituents that I have seen revealed in the reports that I have reviewed, including petroleum, volatile organic compounds, and metals." *Id.* at 457. He testified that most purchase contracts, leases, and loan documents address petroleum contamination by specifically identifying petroleum "as one of the elements of whatever the large defined term is" and further stated that he had "never seen a definition of hazardous materials . . . that doesn't have petroleum in it." *Id.* at 458-59. When asked why these documents specifically identify petroleum rather than simply relying on "certain statutes," Martin answered that "hazardous waste is a defined term under the Resource Conservation Recovery Act" and that "petroleum is also a defined term," and thus, "it's generally best practice to list out all of the types of things that could possibly be deemed hazardous materials or hazardous substances so that one can be sure that it's encompassed by the term." *Id.* at 459-60. Further, when asked whether he believed that the contamination reported in the environmental assessment for the property constituted a hazardous material as that term is used in his industry, he answered affirmatively. *See id.* at 465. Martin confirmed on cross-examination that "the term hazardous substance . . . is a defined term in federal law" that "expressly excludes petroleum products," but he also qualified that exclusion as limited to "pure petroleum product" rather than "waste oil." *Id.* at 500-01. He also agreed that defined terms in contracts are generally capitalized. *See id.* at 506.

William Mayes, Venture's environmental-assessment and remediation expert, who was responsible for CEA's testing and cost proposal in this case, answered "[n]o" when asked whether TPH was a hazardous substance. 2 *id.* at 542. Venture's counsel then immediately clarified, "[i]s that by federal law?" *Id.* Mayes replied that there was a "petroleum exemption" under federal law. *Id.* at 543.

The trial court incorrectly interpreted this expert testimony. The experts did not testify "that TPH does not meet the definition of hazardous waste or substance as defined by the Purchase Agreement, or used in the industry," nor did they "agree that TPH is not a hazardous waste or substance," 1 *id.* at 67. In fact, Klebanoff's and Martin's statements were directly to the

contrary. The experts also did not "all agree[] [that] a petroleum product is not a hazardous waste or substance and as such not a hazardous material," *id.* Again, the testimony of both Klebanoff and Martin is to the opposite effect. The experts only agreed that federal law exempts petroleum products from the definitions of a hazardous waste, substance, or material, but this fact does not negate the explicit definition of "[h]azardous wastes" and "hazardous substances" in Section 5.6 of the Agreement as including oil, petroleum products, and their by-products, 2 *id.* at 679.

The trial court misinterpreted the parties' unambiguous Agreement based upon its misunderstanding of the expert testimony. There was a hazardous waste or substance on the property, as defined by Section 5.6, and thus, Venture's representation and warranty that no such substances existed on the property were not true as of the closing date. Therefore, we find that Section 17.2 of the Agreement expressly permitted Sumner to postpone the closing date, to enter onto the property to perform the Conditions Satisfaction Work, and to deduct the costs of that work from the purchase price due to the failed condition precedent in Section 17.1(i).[2]

C.

Finally, we disagree with Venture that Section 3 of the Agreement provides an alternative basis to affirm the trial court's judgment. Venture argues that Section 3 of the Agreement sets an absolute 90-day boundary for the closing date and that the remedy of extending the closing date to perform the Conditions Satisfaction Work does not include extending the closing date beyond this absolute deadline. We disagree with Venture's interpretation.

First, Section 3 states that "in no event shall Closing occur later than the date that is Ninety Days (90) after the Effective Date hereof" and defines this date as the "Closing Date." *Id.* at 676 (emphasis omitted). However, Section 17.2 states that, if Sumner elects to perform the Conditions Satisfaction Work, "*the Closing Date* shall be extended for the period of time necessary to permit [Sumner] to complete the Conditions Satisfaction Work." *Id.* at 684 (emphasis added). This provision specifically mandates the extension of the *closing date*, which

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[2] Given our holding, we need not decide whether the trial court likewise misinterpreted the hazardous-materials condition precedent in Section 17.1(h). *See* Oral Argument Audio at 28:06 to 28:25 (acknowledging the alternative nature of these arguments). "As we have often said, 'the doctrine of judicial restraint dictates that we decide cases "on the best and narrowest grounds available."'" *Commonwealth v. White*, 293 Va. 411, 419 (2017) (alteration and citation omitted).

is defined as the date that is 90 days after the effective date of the Agreement. In other words, Section 3 cannot set an absolute closing window of 90 days because any extension of the *closing date* would be more than 90 days after the effective date of the Agreement since the closing date itself is the date that is 90 days after the effective date of the Agreement.

Moreover, the other conditions precedent in Section 17.1 contemplate action that may take more than 90 days, including the provision of utilities, the resolution of governmental moratoriums on development, compliance with all notices of violation and other legal requirements, the termination of existing leases and the removal of existing tenants, and the resolution of any condemnation proceedings. *See id.* at 683. If Section 3 were to set an absolute 90-day closing deadline, then Sumner would essentially never have the option to perform the Conditions Satisfaction Work because such work would almost always require an extension of the closing date (which by definition would be more than 90 days after the effective date of the Agreement). Finally, Section 17.2 expressly permits extension of the closing date by 180 days (meaning 270 days after the effective date of the Agreement) to address defects in title to the property. *See id.* Section 17.2 thus clearly operates as an exception to the 90-day closing deadline in Section 3, and considering "[t]he agreement as a whole" undermines Venture's interpretation of Section 3 "as both unreasonable and unrealistic," *Sweely Holdings, LLC*, 296 Va. at 378. Therefore, Sumner did not breach the Agreement by failing to close on July 7, 2015.

III.

Because the trial court misinterpreted the parties' Agreement, we reverse and vacate its judgment against Sumner. We remand this case for further proceedings consistent with this order.

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

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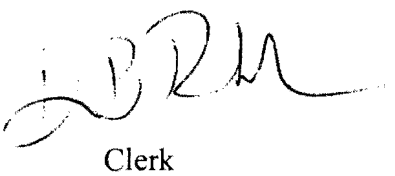

Clerk