IN THE

Supreme Court of Virginia

RECORD NO. 081741

DUNN CONSTRUCTION COMPANY, INC.
and
BILLY G. DUNN,

Appellants,

v.

RICHARD M. CLONEY,

Appellee.

REPLY BRIEF OF APPELLANTS

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IN THE SUPREME COURT OF VIRGINIA

Dunn Construction Company, Inc. and Billy G. Dunn	)	
	)	
Appellants,	)	
	)	
v.	)	Record No. 081741
	)	
Richard M. Cloney,	)	
	)	
Appellee.	)	

Reply Brief

This is a breach of contract case, and one that falls squarely within the scope of the Court's holding in *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344 (1998) [hereinafter *Richmond Metro*]. Dunn Construction Company, Inc., performed noncompliant work under its contract with Richard Cloney, and Billy Dunn submitted a false warranty and description of that work in exchange for a contractually required payment. Under *Richmond Metro*, these simple facts are fatal to Cloney's fraud and punitive damages claim. They show that his complaint is one for breach of contract, not fraud.

In his opening brief, Dunn[1] adequately addresses most of the issues Cloney raises. He will limit his reply to specific errors in Cloney's brief.

1. The parties' written contract expressly provided for the $14,896 payment at issue.

Cloney repeatedly insists that he paid Dunn "an additional $14,896," "outside and independent from" the parties' original contract. (*E.g.*, Appellee's Br. 1, 8, 24, 25.) This is simply not correct. The parties' contract unambiguously required the final payment of $14,896. (J.A. 200.)

2. This is not a fraud in the inducement case.

In an attempt to avoid both the plain language of the contract and the force of *Richmond Metro*'s holding, Cloney tries to repackage his breach of contract claim at least three different ways. All three fail.

First, Cloney asserts that, because Dunn failed to complete the front wall "in a workmanlike manner according to standard construction practices," the $14,896 "final payment...was outside and independent from [the] Building Contract—which called for final payment only upon completion, which never occurred." (Appellee's Br. 8.) Thus, Cloney argues, Dunn fraudulently induced him to enter a

[1] This brief will refer to the appellants collectively as "Dunn."

new contract. In the alternative, Cloney complains that Dunn forced him to modify the original building contract under duress and "to accept in its place substandard workmanship in the form of inadequate repairs to" the wall. (Appellee's Br. 9, 15.) And in a third alternative theory of the case, Cloney argues that rather than fraudulently inducing him to enter a new contract, Dunn fraudulently induced Cloney to perform under the parties' existing contract. (Appellee's Br. 11-12.)

A. Cloney should not be allowed to raise fraud in the inducement and duress theories—on which the jury was never instructed—for the first time in this appeal.

Cloney's fraud in the inducement and duress theories are entirely creatures of this appeal. He never raised them below. Cloney did not even plead, let alone prove, fraud in the inducement or modification under duress in the trial court.[2] (J.A. 4-5, 12-18, 25-26, 36-40) (Cloney's Complaint and responsive pleadings in the consolidated

[2] The Complaint does allege that Dunn made false representations to the building inspector to induce him to approve the wall and issue a certificate of occupancy. (J.A. 17.) But this cannot be construed as a claim of fraud in the inducement of a contract between Dunn and Cloney. The Complaint also refers to threats and intimidation. But it does so in the context of a request for punitive damages, and it presents no claim that the contract was modified under duress. (J.A. 18.)

cases). The jury was not instructed on either theory, and Cloney has not assigned error to any of the jury instructions. (J.A. 48-77.)

B. Cloney has not proved the elements of fraud in the inducement.

Cloney cannot claim fraud in the inducement for another reason: his proof does not meet the elements of that cause of action.

Fraud in the inducement is a distinct species of fraud, which must be proved by showing particular elements. A plaintiff must establish not merely the elements of actual fraud, but a false representation of a material fact, constituting an inducement to the contract, on which the plaintiff had a right to rely. *Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 205, 645 S.E.2d 290, 293 (2007) (citing *George Robberecht Seafood, Inc. v. Maitland Bros., Co.*, 220 Va. 109, 111-12, 255 S.E.2d 682, 683 (1979)). To support an action for fraud in the inducement, the misrepresentation must have been intended to induce, and must have in fact induced, the contract. *Ware v. Scott*, 220 Va. 317, 319-20, 257 S.E.2d 855, 867 (1979) (holding that a party can be fraudulently induced to perform a contract as well as to enter it).

Finally, to make out a *prima facie* case of fraud in the inducement, a plaintiff must show that the defendant breached some duty apart

from those arising under the contract. *Augusta Mut.*, 274 Va. at 205, 645 S.E.2d at 293.

Cloney has utterly failed to make such a showing here. He cannot establish that Dunn breached any duty independent of the contract. His breach of contract and fraud claims are identical; they are premised on the same predicate acts, and they seek the same compensatory damages.

Cloney argues on brief that he has shown "fraud in the inducement supporting damages independent of those already appropriate based on the Contractor's breach of the Building Contract." (Appellee's Br. at 12-13.) But he gives no hint as to what those independent damages might be. In fact, there are none. Cloney's evidence did not establish any injury flowing from Dunn's alleged fraud that was distinct from the damages from his breach of contract. Likewise, his Complaint seeks identical compensatory damages for breach of contract, negligence, and fraud. (J.A. 15-17.)

Cloney does not assert that he has met the elements of fraud in the inducement. Instead, he argues the traditional elements of actual fraud. (Appellee's Br. 19-20.) Even if Cloney were correct that he had met these elements, showing actual fraud would not be enough to

establish fraud in the inducement and escape the force of *Richmond Metro*.

C. Cloney's arguments about a new or modified contract are incorrect and irrelevant.

Cloney argues that the parties entered into a new or modified contract. (*E.g.*, Appellee's Br. 8, 9, 15.) He is wrong.

Viewed in the light most favorable to Cloney, the evidence does not show that the parties entered into a new or modified contract for the construction or repair of the foundation wall. And there was certainly never an agreement "to accept...substandard workmanship in the form of inadequate repairs to a deficient Failed Foundation Wall." (*Cf.* Appellee's Br. 9.) The record lacks evidence of any meeting of the minds on that point. Cloney's entire case is predicated on the *absence* of such an agreement, which goes to the heart of the breach of contract and "fraud" at issue.

But even if that were not so, it wouldn't be enough to entitle Cloney to punitive damages. If the parties had entered into a new or modified contract that Dunn breached, then Cloney's remedy would be to sue under the new contract. If, on the other hand, Dunn had never completed work for which he was paid under the original contract, then Cloney's remedy would be a suit for the breach of the

original contract. Either way, a contract remedy would make him whole. Cloney can establish fraud only by showing that Dunn breached a duty independent of the contract. Because his evidence was limited to Dunn's false warranty under a construction contract offered in order to receive a contract payment, he cannot make that showing.

3. Punitive damages are not available for a simple breach of contract unaccompanied by an independent, willful tort.

Cloney argues that punitive damages are available "in the presence of breach of contract." (*E.g.,* Appellee's Br. 18, 20.) That is correct, but only if the breach of contract is accompanied by an independent, willful tort. *E.g., Kamlar Corp. v. Haley*, 224 Va. 699, 707, 299 S.E.2d 514, 518 (1983) (5-2 decision). Punitive damages, however, are not available for a simple breach of contract, which is all that Cloney has established.

In the wake of *Kamlar*, this ought to be an uncontroversial proposition. Although Cloney makes a nod to *Kamlar* on brief, he attacks its holding, advising the Court that "Virginia jurisprudence is replete with decisions awarding punitive damages in cases involving breach of contract." (Appellee's Br. 22-23.)

In support, Cloney cites two federal decisions from the 1970s. They are notable primarily because they are the same cases that the *Kamlar* dissent cited. *Kamlar,* 224 Va. at 710, 299 S.E.2d at 520 (Compton, J., dissenting). Cloney's authorities were before the Court when it decided *Kamlar*, and they represent the position that it rejected. *See id.* at 710-11, 299 S.E.2d at 520. Unsurprisingly, the legal conclusion that Cloney reaches in reliance on them—that "punitive damages clearly <u>are</u> available even in contract actions" (Appellee's Br. 23) (emphasis in original)—misstates Virginia law. It also informs his ultimate determination that, because "the Contractor's false misrepresentations to the Homeowner and the Building Inspector...were made at a minimum in bad faith," he is entitled to punitive damages. (Appellee's Br. 23-24.)

Cloney's conclusion that he is entitled to punitive damages is mistaken for two reasons. First, the dispositive issue in *Kamlar* was whether a bad motive, underlying a breach of contract and absent an independent, willful tort, would support a punitive damages award. It will not. *Kamlar*, 224 Va. at 707, 299 S.E.2d at 518. Dunn's simple breach of contract, no matter how malicious, cannot entitle Cloney to punitive damages. Second, assuming for the sake of argument that

Cloney could show an independent, willful tort, the standard for a punitive damages award is not "bad faith." In fraud cases, punitive damages are available only where the plaintiff shows actual malice. *Jordan v. Sauve*, 219 Va. 448, 453, 247 S.E.2d 739, 741 (1978). For the reasons stated in Dunn's opening brief, Cloney's proof does not rise to this level. (*See* Opening Br. 23-24.)

4. *Nichols* does not support Cloney's entitlement to punitive damages.

In the course of defending his punitive damages award, Cloney argues that *Nichols Construction Corp. v. Virginia Machine Tool Co.*, 276 Va. 81, 661 S.E.2d 467 (2008) "actually supports the Homeowner's position." (Appellee's Br. 26) (emphasis in original). As best Dunn can discern, the "Homeowner's position" is that Cloney is entitled to punitive damages, even though they would put him in a better position than he would have been had the contract been properly performed. (*See, e.g.*, Appellee's Br. 26-27.)

No legitimate reading of *Nichols* will support this argument.

Fraud and punitive damages were not at issue in *Nichols*, which was a straight breach of contract case. *Id.* at 84, 661 S.E.2d at 468-469. The parties agreed that the plaintiff was entitled to damages that would put it in the same position as if the contract had been properly

performed. *Id.* at 89, 661 S.E.2d at 471. They simply disputed the magnitude of those damages, given the unusual facts of the case. *Id.* Not even the plaintiff argued, as Cloney does here, that it was entitled an award in excess its expectancy interest. And unlike *Nichols*, the issue here is not merely the quantum of damages. It is the very submission of Cloney's fraud and punitive damages claim to the jury.

5. Dunn's assignments of error are not limited to punitive damages.

Cloney characterizes Dunn's assignments of error as "all essentially disputing the propriety of the punitive damages award." He misreads Dunn's brief. Dunn's assignments of error are not limited to punitive damages. (Opening Br. 2-3.) To the contrary, he assigns error to the trial court's submission of Cloney's fraud claim to the jury, and its refusal to set the jury's verdict aside. (*Id.* at 2 (Assignment of Error 1).) This attacks both the compensatory and punitive damages awards.

6. There is no merit to Cloney's request for attorney's fees.

Cloney closes his brief with a demand for "appellate attorney's fees." There is no basis for his request. Cloney cites no authority allowing this Court—as opposed to the juvenile and domestic relations court or the intermediate court of appeals—to award

attorney's fees. Cloney refers the Court to Virginia Code § 16.1-278.19, which authorizes the juvenile and domestic relations court to award attorney's fees and costs it "deems appropriate based on the relative financial ability of the parties." Cloney also relies on *Brandau v. Brandau*, 52 Va. App. 632, 666 S.E. 532 (2008), a divorce case out of the Court of Appeals. Finally, he cites *Lynchburg Division of Social Services v. Cook*, 276 Va. 465, 666 S.E.2d 361 (2008), a custody case in which this Court reviewed a denial of attorney's fees under Code § 16.1-278.19.

Conspicuously absent from Cloney's brief is any authority allowing this Court to award attorney's fees in a civil case arising outside of the juvenile and domestic relations context. In fact, *Lynchburg Division of Social Services* reversed the Court of Appeals' denial of attorney's fees because it was not based on the proper statutory standard. 276 Va. at 484, 666 S.E.2d at 371. By failing to provide this Court with pertinent authority, Cloney invites it to commit the same error.

And contrary to Cloney's contention, this appeal is anything but "frivolous." (Appellee's Br. 28.) It implicates pressing legal questions about the borders between tort and contract law, as well as the

interpretation of important recent cases. A panel of this Court granted Dunn's petition without requiring oral argument. The issues involved are meaningful enough that a legal foundation submitted an unsolicited amicus brief. Simply put, this appeal has merit. Cloney's demand for attorney's fees does not.

Conclusion

The Court should reverse and vacate the judgment on Cloney's cause of action for fraud; reverse and vacate the award of punitive damages; and enter final judgment on those claims. It should reverse the award of compensatory damages, and remand this case for a new trial solely on breach of contract.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 5:26(d)

I hereby certify as follows:

The appellants in this case are Dunn Construction Company, Inc. and Billy G. Dunn. They are represented by Monica T. Monday and James J. O'Keeffe, IV, GENTRY LOCKE RAKES & MOORE LLP, P. O. Box 40013, Roanoke, Virginia 24022-0013, (540) 983-9300. The appellee is Richard M. Cloney. He is represented by George H. Bagwell, BAGWELL & BAGWELL, P.C., P.O. Box 696, Halifax, Virginia 24558, (434) 476-6521. The Pacific Legal Foundation has entered an appearance as amicus curiae in support of neither party. They are represented by Michele A. Mulligan, MCSWEENEY, CRUMP, CHILDRESS & TEMPLE, P.C., 11 South 12th Street, Richmond, Virginia 23219, (804) 783-6839.

That on this 10th day of April 2009, the correct number of true and accurate copies of this Reply Brief have been hand-filed with the Supreme Court of Virginia along with one copy filed electronically by email at scvbriefs@courts.state.va.us and three copies served by mail upon counsel for the appellee and the amicus curiae.

The appellants desire to state orally and in person the reasons why the judgment below should be reversed.

Monica Taylor Monday

Of Counsel