IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 081741

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

Appellants,

v.

RICHARD M. CLONEY,

Appellee.

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

A. Fraud, Misrepresentation, Negligence, and Breach of Contract Claims Arose from the Contractors' Substandard Work and Misrepresentations Regarding It.

This case involves the Contractors' fraud, misrepresentation, negligence, and breach of contract arising from their construction of a home for the Homeowner in Mecklenberg County (the "Home") pursuant to a building contract between the parties (the "Building Contract"). (Joint Appendix ["J.A."] at 104; see Building Contract, J.A. at 200.) Specifically, the Contractors omitted structural reinforcements of a foundation wall; then, after the wall buckled and failed, they performed "repairs" that did not comply with the Virginia Building Code regarding rebar and concrete reinforcements. These actions violated the Building Contract, for which the Homeowner brought this action seeking his actual damages.

In addition to, and separate from, this breach of the Building Contract, the Contractors gave the Homeowner written assurance regarding the repairs, and they guaranteed the repaired wall for ten years, based on which reassurances the Homeowner paid the Contractors an additional $14,896. The Contractors also misrepresented the nature and extent of the repairs to the Building Inspector, who relied on those misrepresentations in approving the Home.

The Homeowner hired an engineer, who concluded that the repairs were inadequate and not to code in that cells filled with rebar and concrete had not been used to reinforce the wall as required. Even where the concrete was present, it was of insufficient height (6 feet or 7 feet instead of filled), and there was no rebar present, contrary to the claim of using 1/2-inch rebar instead of 3/4-inch rebar, as required by the code.

B. The Jury Gave Ample Consideration to the Situation Before Finding in the Homeowner's Favor.

The jury visited and personally viewed the repaired wall; its verdict shows that the jurors firmly accepted that the wall had not been filled with reinforcement materials as it should have beenCand as the Contractors had misrepresented to the Building Inspector that it had been.

The issue of punitive damages was sent to the jury as to fraud not regarding the original building of the Failed Foundation Wall, but regarding the affirmative misrepresentation of existing facts regarding the noncontractual repairs that the Contractors had performed.

The jury found in the Homeowner's favor, awarding him compensatory damages of $33,838.27 on the breach-of-contract claim and punitive damages of $25,000 on the fraud claim. (J.A. at 112.) The Contractors filed a Motion to Reconsider, citing the same authority on which they rely here. The Motion to

Reconsider complained that the evidence would not support the damages awardedCbut it did not complain that the final judgment was contrary to the law. The trial court asked counsel for the Contractors to prepare an Order containing the Contractors' objections; however, no such Order ever was submitted. That motion was overruled on the basis that the case "had been properly decided," and the Contractors then filed this appeal.

QUESTION PRESENTED

Given that there is no question that the Failed Foundation Wall failed, that the Contractors' attempted repairs did not meet code, or that the Contractors misrepresented the nature and scope of those repairs after the fact to both the Building Inspector and to the Homeowner, the only real question here is whether the trial court properly concluded that the Contractors' fraudulent misrepresentations constituted tortious conduct beyond and independent of their breach of contract, rather than simply part of that breach of contract.

The answer here is clearly yes. The Contractors' fraudulent misrepresentation was willful, wanton, and maliciousCand reliance upon it prompted the Homeowner to accept and pay for noncontractual, inadequate repairs to the substituted Failed Foundation Wall.

NO ASSIGNMENT OF ERROR

Plaintiff/Appellee Richard M. Cloney (the "Homeowner") does not contend that there are any assignments of error in the decision below. Appellants Billy G. Dunn ("Defendant Dunn") and Dunn Construction Company, Inc. (collectively the "Contractors"), assert three assignments of error, all essentially disputing the propriety of the punitive damages award under the premise that the Contractors' fraudulent misrepresentations were entirely related to their breach of the parties' building contract rather than an independent tort. (Opening Br. of Appellants ["Appellants' Br."] at 2-3.)

There is no dispute that the Contractors built a defective foundation wall (the "Failed Foundation Wall") that failed, that they performed repairs that did not meet code, or that they afterward misrepresented the nature and extent of those repairs both to the Building Inspector and to the Homeowner. The only dispute is regarding whether their misrepresentations sufficiently support the punitive damages awarded as being based on tortious conduct independent of their breach of the Building Contract.

However, the evidence in the record clearly supports all damages awarded.

STATEMENT OF FACTS

Only a brief summary is necessary here to amplify the Statement of Facts set forth by the Contractors, since the relevant facts, and even the Contractors' misrepresentation regarding the nature and extent of the repairs they performed to the Failed Foundation Wall, are not in dispute.

The Building Contract expressly specified for "[a]ll work to be completed in a workmanlike manner according to standard practices." (J.A. at 200.) Unfortunately, however, while the Contractors were building the Home, a masonry wall forming the foundation failed. (J.A. at 132, 157.) The Building Inspector's preliminary report called for satisfactory repairs to the Failed Foundation Wall and recommended having an engineer inspect the Failed Foundation Wall to certify its structural integrity. (J.A. at 109-11, 147-48, 152.)

The Contractors partially repaired the Failed Foundation Wall, and they told the Building Inspector they had filled it with concrete and rebar. (J.A. at 120-21, 148:8-9, 158-63.) The Building Inspector testified that such a repair would have been consistent with normal practice. (J.A. at 149, 151-52.) Accordingly, he issued a certificate of occupancy. (J.A. at 150:12B151:3.)

However, the repairs actually performed did not meet that standard, and the evidence at trial confirmed that repairs were inadequate, not to code, and contrary to what the Contractors told the Building Inspector about the Failed

Foundation Wall having been "filled" with concrete and rebar. (J.A. 120-21, 128-38, 158-76, 177-78.)

The Contractors refused to comply with the Building Inspector's recommendation to hire an engineer to inspect and certify the Failed Foundation Wall's structural integrity. (J.A. at 111.) The brick mason whom the Homeowner hired to investigate the Failed Foundation Wall found that rebar and concrete were not present in all wall cells (J.A. at 139-41), and there was no rebar in the concrete. The Structural Engineer hired by the Homeowner to inspect the Failed Foundation Wall further testified that the repairs were sub-standard, that the walls were not "filled" with concrete, and that the Failed Foundation Wall failed to meet Virginia Building Code requirements. (J.A. at 122-25, 129, 131.) Accordingly, he concluded that the walls were not safe, and he recommended replacing or repairing the Failed Foundation Wall, which he believed to be a "candidate for a catastrophic failure." (J.A. at 126, 127-28, 131.)

The Homeowner incurred significant out-of-pocket expenses in conjunction with the Failed Foundation Wall's deficiencies, repairs, and evaluation; he was unable to move into the Home as scheduled because he did not believe it to be safe; and he still faces significant expenses to repair the Failed Foundation Wall. (J.A. at 142-43, 145, 153-56.)

Although the Home never was completed "in a workmanlike manner according to standard practices," as called for in the Building Contract (J.A. at 200), the Homeowner paid the Contractors an additional $14,896 based on the Contractors' misrepresentation regarding the repairs performed on the Failed Foundation Wall (i.e., that it had been filled with concrete and rebar according to standard practice). Accordingly, the nearly $15,000 final payment was made notwithstanding the Contractors' failure to perform the original Building Contract, and it thus was outside and independent from that Building ContractCwhich called for final payment only on completion, which never occurred.

Even if and to the extent that the Contractors' misrepresentation was related to the Building Contract, it was as part of the duress under which the Homeowner was placed in being forced to modify the original Building Contract (which expressly required workmanlike completion according to standard practices) to accept in its place substandard workmanship in the form of inadequate repairs to a deficient Failed Foundation Wall.[1] (J.A. at 110-16, 200.)

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[1]The Homeowner clearly was intimidated into any deemed modification of the Building Contract by the Contractors' outrageous conduct, as detailed at trial. (See, e.g., J.A. at 112:4-10 (Homeowner explained how he was told by Defendant Dunn to "fuck the building inspector. The building inspector can't tell me what to do. Fuck the engineer. I'm not paying for any fucking engineer. Fuck you. You're going.").) The Homeowner confirmed that Defendant Dunn's conduct scared him. (J.A. at 113:20.)

The Building Contract does not address repairs to cure a contract breach or compliance with a building code or certificate of occupancy.

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

I. SUMMARY OF THE ARGUMENT: THE CONTRACTORS' INDEPENDENTLY TORTIOUS, FRAUDULENT CONDUCT SUPPORTS THE PUNITIVE DAMAGES AWARD.

All three of the Contractors' assignments of error essentially dispute the propriety of punitive damages, arguing that their fraudulent misrepresentations related only to their breach of the parties' Building Contract rather than standing alone as independently tortious conduct. However, the Contractors' misrepresentations regarding the repairs that they had performed on the Failed Foundation Wall constituted an independent, knowing tort clearly sufficient to support a punitive damages award.

There is no dispute that the Failed Foundation Wall was defective and failed, or that the Contractors misrepresented to the Building Inspector and to the Homeowner the scope and nature of the repairs that they had performed.

The Contractors' misrepresentations to both the Building Inspector and the Homeowner regarding the nature and scope of the repairs that they claimed to have performed induced the Building Inspector to certify the Home for occupancy, and induced the Homeowner to accept substandard work on the

deficient Failed Foundation Wall. The Homeowner relied on those misrepresentations in doing so, and he was thereby damaged in accepting a Home containing a substandard Failed Foundation Wall that was at risk of a "catastrophic failure." Clearly, the Contractors' misrepresentations constituted independent, actionable fraud sufficient to support punitive damages.

Another way to summarize the situation is to state that the Contractors misrepresented the nature of the repairs they had made to the Failed Foundation Wall to induce the Homeowner to pay nearly $15,000 that was not due given that the Building Contract specified that that sum would have been due only on completion of the contractCwhich, as the Contractors themselves pointed out, was <u>not</u> for the construction of a substandard wall. (Appellants' Br. at 20.) Since the Failed Foundation Wall was substandard, the final installment payment never became due (nor would it have become due, given the substandard condition of the Failed Foundation Wall and that the Building Contract required work to be performed "in a workmanlike manner according to standard practices"). Accordingly, the Contractors' misrepresentations regarding the repairs to the Failed Foundation WallCwith the desired, and achieved, intent of inducing the Homeowner to pay them $14,896Cconstituted fraud in the inducement.

The authority on which the Contractors rely confirms that punitive damages are appropriate where tortious conduct is present as well as a breach of

contract. The case of Richmond Metro. Auth. v. McDevitt St. Bovis, Inc., 256 Va. 553, 507 S.E.2d 344 (1998), on which the Contractors heavily rely is factually distinguishable because the court there specifically found that that case did not involve fraud in the inducement.

Here, by contrast, no such finding was madeCand in fact, the facts here would not support such a finding, given the presence of the Contractors' admitted fraudulent misrepresentations regarding the repairs they made to the Failed Foundation Wall. Those fraudulent misrepresentations induced the Homeowner to pay the Contractors an additional nearly $15,000, constituting fraud in the inducement supporting damages independent of those already appropriate based on the Contractors' breach of the Building Contract.

II. THE STANDARD OF REVIEW HERE STRONGLY FAVORS THE HOMEOWNER, WHO, ARMED WITH A JURY VERDICT, OCCUPIES THE MOST FAVORED POSITION KNOWN TO THE LAW.

The Contractors correctly acknowledge that the Homeowner occupies "the most favored position known to the law," coming before the Court as he does with a jury verdict:

> When parties come before us with a jury verdict that has been approved by the trial court, they hold the most favored position known to the law. The trial court's judgment is presumed to be correct, and we will not set it aside unless the judgment is plainly wrong or without evidence to support it. We view the evidence and

> all reasonable inferences fairly deducible from it in the light most favorable to the prevailing party at trial.

Banks v. Mario Indus. of Va., 274 Va. 438, 450-51, 650 S.E.2d 687, 694 (2007) (upholding award of punitive damages). (Appellants' Br. at 15-16.)

Here, viewing the evidence and all reasonable inferences fairly deducible from it in the light most favorable to the Homeowner, the decision below clearly was supported and correct.

III. THE RICHMOND DECISION IS LEGALLY HELPFUL TO, AND FACTUALLY DISTINGUISHABLE FROM, THE HOMEOWNER'S CLAIMS.

The Contractors rely heavily on the Richmond decision, which acknowledged that the source of the duty violated must be ascertained to determine whether a cause of action sounds in contract or tort. Although no such showing was made under the facts of the Richmond case, the Contractors conveniently fail to note that the Virginia Supreme Court observed that "a party can, in certain circumstances, show both a breach of contract and a tortious breach of duty." 256 Va. at 558, 507 S.E.2d at 347 (emphasis added). The Supreme Court clarified that the duty "tortiously or negligently breached must be a common law duty." Id.

Crucial to the Richmond decision was that the misrepresentation there "related to a duty or an obligation that was specifically required by the . . .

[c]ontract." Id. at 559, 507 S.E.2d at 347. By contrast, the misrepresentations by the Contractors here were separate from their duties under the breached Building Contract and the building code. As noted, the Building Contract contemplated completion of the Home, with a sufficient foundation wallCnot a substandard Failed Foundation Wall such as the one created by the Contractors.

A. Fraud In The Inducement Of Contract Reformation Or Modification Supports Punitive Damages.

Even if and to the extent that the Contractors' misrepresentation was related to the Building Contract, it was as part of the duress under which the Homeowner was placed (as noted above, based on the Contractors' outrageous conduct and profanity) in being forced to modify the original Building Contract (which required work to be performed "in a workmanlike manner according to standard practices") to accept in its place substandard workmanship in the form of inadequate repairs to a deficient Failed Foundation Wall. (J.A. at 110-16.)

Acts under a modified contract are not binding when such acts have been induced by the fraud of the other party or result from fraud or mistake. Luck Constr. Co. v. Russell County, 115 Va. 335, 79 S.E. 393, 396 (1913).

The Virginia Supreme Court long has found fraud in the inducement of contract rescission, cancellation, and reformation under circumstances where a misrepresentation has been made to induce a contract regarding factual matters

not apparent to ordinary observation. See McDaniel v. Hodges, 176 Va. 519, 11 S.E.2d 623 (1941) (suit for rescission of real estate sale because of reliance on false and fraudulent material representations that property had good water well and spring, while well in fact was in worthless condition and no spring was located on property, as known by agent but not apparent to ordinary observation).

Here, any modification to the original Building Contract was induced by the Contractors' fraudulent misrepresentations and extreme conduct and profanity. Accordingly, fraud in the inducement clearly was present here, by sharp contrast to the Richmond case, in which the court expressly found that no such fraud was present.

B. Actual Fraud Warrants Punitive Damages.

Unlike the facts here, the Richmond case did not involve fraud in the inducement. 256 Va. at 560, 507 S.E.2d at 348. A more analogous situation was considered by the Fourth Circuit in 1988, finding actual fraud arising out of a contractual relationship. Flip Mort. Corp. v. McElhone, 841 F.2d 531 (4th Cir. 1988). In Flip, actionable fraud arose from a contractual relationship, based on the fact that there was fraud in the inducement, construed as an intent never to abide by the terms of the contract. Id. at 537. This comported with the Supreme Court's prior holding that a "promisor's intention . . . [w]hen he makes the promise, intending not to perform . . . is a misrepresentation of present fact . . . [that] is actionable as an actual fraud." Colonial Ford Truck Sales v. Schneider, 228 Va. 671, 677, 325 S.E.2d 91, 94 (1985).

The trial evidence here established that the Contractors' misrepresentations did constitute fraud in the inducement, in that those misrepresentations led the Homeowner to enter into a new or modified contract by agreeing to accept, and pay for, the deficient Failed Foundation Wall with its inadequate repairs, based on the Contractors' representations regarding the nature and extent of the repairs that they had performed upon it.

C. The Contractors' Fraudulent Misrepresentations Constituted Tortious Conduct.

Notwithstanding the availability of punitive damages in the presence of breach of contract, the Contractors' fraudulent misrepresentations here constituted tortious conduct independent of the Building Contract.

The separation of the Contractors' misrepresentation from the Building Contract, and its support for punitive damages, is clear under Virginia law:

> Fraud . . . is purely a tort: it involves a misrepresentation, detrimentally relied upon, that occasions a loss. The duty to refrain from fraudulent acts is imposed by tort law, not by any contract between the parties. The character of fraud is not changed from tort to contract merely because the parties are also engaged in a contractual relationship.

Rowland v. State Farm Fire & Cas. Co., 64 Va. Cir. 16, 2003 WL 22779071, at *3 (Fairfax Oct. 14, 2003) (not designated for publication).

Here, the evidence clearly supported the independent tort of fraud. Actual fraud includes both silence and actual misrepresentations. 313 Freemason v. Freemason Assocs., Inc., 59 Va. Cir. 407, 2002 WL 31990272, at *7 (City of Norfolk Aug. 30, 2002) (not designated for publication). The essence of constructive fraud is negligent misrepresentation. Mortarino v. Consultant Eng'g Servs., Inc., 251 Va. 289, 295, 467 S.E.2d 778, 782 (1996). The elements of actual fraud are (1) false representation; (2) of a material fact; (3) intentionally and knowingly made; (4) with the intent to mislead; (5) reliance by the party misled;

and (6) resulting in damage to the party misled. El Jalapeno Mexican Food, L.L.C. v. Rodgers, 68 Va. Cir. 178, 2005 WL 3579056, at *2 (Nelson County June 22, 2005) (not designated for publication).

Here, the Contractors' misrepresentations regarding the repairs that had been made to the Failed Foundation Wall clearly satisfy all requirements for actual fraud. Specifically,

(1) the representations were false (statements that the Failed Foundation Wall had been "filled" with concrete and repaired adequately or to Code);

(2) the representations were material to the Homeowner's acceptance of the inadequate repairs and payment of an additional $15,000 and to the Building Inspector's certification of the Home for occupancy;

(3) the representations were intentionally and knowingly made (the Contractors cannot credibly argue that they were unaware of the truth regarding repairs that they themselves had made);

(4) the misrepresentations were made with the intend to mislead not only (a) the Building Inspector to approve the Failed Foundation Wall by certifying the Home for occupancy, but also (b) the Homeowner into agreeing to accept, and pay for, the substandard repairs to the Failed Foundation Wall;

(5) the Building Inspector relied on the misrepresentations in approving the Failed Foundation Wall repairs, and the Homeowner relied upon the misrepresentations in agreeing to accept, and pay for, substandard repairs to the Failed Foundation Wall; and

(6) the Homeowner was damaged by incurring significant expensesCand he still does not have a safe Home, given that the Failed Foundation Wall is a candidate for a "catastrophic failure."

Thus, all requirements for the independent tort of fraud have been satisfied, and the verdict awarding punitive damages based on that fraud was proper.

IV. PUNITIVE DAMAGES ARE AVAILABLE IN CONTRACT ACTIONS.

It must be remembered that exemplary, or punitive, damages are allowed to warn and punish for action that is wanton, oppressive, reckless, or malicious, implying a spirit of mischief or criminal indifference to civil obligations. Wright v. Everett, 197 Va. 608, 614, 90 S.E.2d 855, 859 (1956). The Contractors' fraudulent misrepresentations regarding the repairs they had performed to the Failed Foundation Wall clearly were the kind of reckless or indifferent representations to which punitive damages are intended to apply.

In defense of their position, the Contractors observe that the Failed Foundation Wall has not yet collapsed nor injured anyone, arguing that public policy favors reversing the jury's verdict against them for this reason. (See Appellants' Br. at 24-25.) However, certainly public policy does not require personal injury and catastrophic failure as prerequisites to damages for fraudCand the Contractors fail to cite any authority to the contrary. In fact, they acknowledge that "the policies underlying tort law . . . involve the protection of people and property from harm." (Appellants' Br. at 26 (emphasis added).) Allowing the jury's verdict to stand would serve to protect people and property

from harm by creating a deterrent from future dishonest behaviorCrather than waiting to somehow attempt to compensate people or property after a catastrophic failure and resulting personal injury.

The Homeowner contendsCand the trial court and the jury agreedCthat the Contractors perpetrated a willful fraud independent of their breach of the Building Contract. Such an independent, willful tort clearly supports an award of punitive damages. However, even if the Contractors' fraud were deemed to be related only to the parties' contract, the punitive damages awarded would be appropriate under Virginia law.

Contrary to the Contractors' contention, the parties did not agree that no punitive damages would be recoverable in a contract action. Virginia law approves awarding punitive damages in a contract action when the breach is occasioned by conducted accompanied by malice, bad faith, or reckless disregard for the rights of others. See Wright, 197 Va. at 615, 90 S.E.2d at 860.

Virginia jurisprudence is replete with decisions awarding punitive damages in cases involving breach of contract. See, e.g., United States v. Snepp, 595 F.2d 926, 936 (4th Cir. 1979), aff'd in part, rev'd in part on other grounds, 444 U.S. 507 (1980) (punitive damages recoverable in contract action by United States against former CIA agent for breach of secrecy agreement where acts constituting breach also constituted commission of tort or were "closely analogous thereto"); Nat'l

Homes Corp. v. Lester Indus., Inc., 336 F. Supp. 644, 647 (W.D. Va. 1972) (Virginia law makes clear that recovery of punitive damages for breach of contract is permitted although suit may sound principally in contract).

Accordingly, punitive damages clearly are available even in contract actions. However, the general rule that punitive damages are not allowed for simple breach of contract does not obtain in cases where the breach amounts to an independent, willful tort. Goodstein v. Weinberg, 219 Va. 105, 109, 245 S.E.2d 140, 143 (1978); see also Kamlar Corp. v. Haley, 224 Va. 699, 707, 299 S.E.2d 514, 518 (1983) (noting interim change in pleading requirements, now permitting tort and contract claims to be brought together, under separate counts, to allow claims to be tested separately).

Here, the Contractors' false misrepresentations to the Homeowner and the Building Inspector regarding the repairs that had been performed to the Failed Foundation Wall clearly were made at a minimum in bad faith, given that at the time of the misrepresentations, the Contractors undisputably were aware of the exact nature of the repairs that had been performed.

V. THE CONTRACTORS' INDEPENDENT TORT OF FRAUDULENT MISREPRESENTATION SUPPORTS THE PUNITIVE DAMAGES AWARD.

The Contractors first breached the Building Contract, then fraudulently induced the Homeowner to pay nearly $15,000 independent of that contract for repairs to the Failed Foundation Wall, the nature of which they misrepresented.

The original Building Contract specified construction of the Home "in a workmanlike manner according to standard practices," with final payment due only upon completion. Given that standard practices were not employed in constructing a defective, unsafe Failed Foundation Wall, the Contractors never fulfilled that aspect of the Building Contract. Independently of the Building Contract (under which, again, final payment never became due, given that the Home never was properly completed), the Contractors persuaded the Homeowner (by utilizing false and fraudulent misrepresentations to both him and the Building Inspector regarding the nature of the repairs performed on the Failed Foundation Wall) to pay them an additional $14,896.

The Contractors themselves acknowledge that the Building Contract did not encompass "the construction of a substandard foundation wall." (Appellants' Br. at 20.) Indeed, they induced the Homeowner to pay nearly $15,000 independently of the breached Building Contract, by misrepresenting the nature and extent of the repairs they had made to the substandard Failed Foundation Wall. In other words, the Contractors first breached the Building Contract by not completing all work "in a workmanlike manner according to standard practices"

in constructing the Failed Foundation Wall; they then fraudulently induced the Homeowner to pay $14,896 based on misrepresentations regarding the repairs made to the Failed Foundation Wall.

The Contractors have admitted to having "submitted a false description of work performed." (Appellants' Br. at 18 (citing J.A. at 111-17, 177-78, 200).) The Contractors do not dispute that they submitted false documents; instead, they make excuses for their false representations, quibbling that Defendant "Dunn's false statements were not made under oath," apparently attempting to suggest that lying outside of court, or lying in an attempt to obtain money, is not fraudulent. (See Appellants' Br. at 18-19.)

Finally, the authority on which the Contractors rely in attempting to limit the Homeowner's damages actually supports the Homeowner's position. (See Appellants' Br. at 26 (citing Nichols Constr. Corp. v. Va. Mach. Tool Co., 276 Va. 81, 88, 661 S.E.2d 467, 471 (2008)).) The Contractors argue that the jury's verdict would place the Homeowner in a better position than he would have been in had the contract been properly performed, and that they "could never have dreamed that [they were] assuming such a risk when [they] negotiated the contract with [the Homeowner] in 2005." (Appellants' Br. at 26.) However, the authority on which the Contractors rely supports the Homeowner's position, since it affirmed

a jury verdict awarding more than $450,000 in damages based on breach of a contract to install a $140,000 roof. See Nichols, 276 Va. at 90, 661 S.E.2d at 472.

In Nichols, despite "the considerable disparity between the contract price for the roof and the amount of damages awarded [,] which provided 'facially compelling evidence' in support of the position that the award result[ed] in a betterment or windfall," the Virginia Supreme Court affirmed the award of $450,842 in damages on the installation of a $140,000 roof called for by the underlying contract. Id. Accordingly, the Contractors' argument that the damages awarded by the jury here would place the Homeowner in a better position than he would have been in had the contract been performed is unpersuasive.

VI. APPELLATE ATTORNEY'S FEES.

Finally, an award of appellate attorney's fees to the Homeowner is proper. This Honorable Court's authority to award such fees is clear, since it has the opportunity to view the record in its entirety and to determine whether the appeal is frivolous or whether other reasons exist for requiring additional payment. Brandau v. Brandau, 52 Va. App. 632, ___, 666 S.E.2d 532, 537-38 (2008).

The Virginia Supreme Court recently reiterated that Virginia law expressly permits appellate attorney's fee awards. See, e.g., Va. Code Ann. ' 16.1-278.19; Lynchburg Div. of Soc. Servs. v. Cook, 276 Va. 465, 484, 666 S.E.2d 361, 371 (2008). Where an appeal is meritless, Virginia courts have had "no reluctance" imposing appellate attorney's fees. Brandau, 666 S.E.2d at 538.

This appeal is frivolous, based on the facts of the Contractors' intentional, knowing misrepresentations, which clearly support the imposition of all damages awarded below. Accordingly, the Homeowner respectfully requests that he be awarded his attorney's fees on appeal.

CONCLUSION

The failure of the Failed Foundation Wall, the inadequacy of the substandard repairs, and the Contractors' misrepresentations regarding those repairs is not in dispute. The only argument here is whether those misrepresentations sufficiently support the punitive damages awardCwhich they clearly do.

The Contractors' misrepresentations regarding the nature and extent of the repairs they performed to the Failed Foundation Wall constituted fraud and fraud in the inducement constituting an independent, knowing tort sufficient to support the punitive damage award.

For these reasons, the judgment below was proper. The Homeowner respectfully requests that he be awarded his appellate attorney's fees. The Homeowner additionally requests such other and further relief, general and special, at law and in equity, to which he may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 5:26(d)

I hereby certify that the requisite number of copies of the foregoing Appellee's Brief have been filed in the office of the Clerk by overnight courier delivery; that three copies have been mailed or delivered to counsel of record for the Defendants/Appellants at the address reflected below; and that an electronic copy of the brief has been filed contemporaneously with this Brief on disc, CD, or by e-mail to scvbriefs@courts.state.va.us, pursuant to Rule 5:26.

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