IN THE

Supreme Court of Virginia

RECORD NO. 081741

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

Appellants,

v.

RICHARD M. CLONEY,

Appellee.

OPENING BRIEF OF APPELLANTS

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IN THE SUPREME COURT OF VIRGINIA

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

Opening Brief of Appellant

This is a breach of contract case. Richard Cloney sued Billy Dunn and Dunn Construction Company, Inc. for breach of contract, and he tacked on a claim for fraud. Cloney based each claim on the same predicate acts—noncomplying work under a construction contract, and submission of a false contract document—and the same alleged injuries. The jury found in Cloney's favor on each claim, awarding him compensatory damages of $33,838.27 and punitive damages on the fraud claim of $25,000. But the misrepresentations Cloney complained of all related to the contract. Under a well-known line of cases including *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344 (1998), Cloney's evidence did not and could not give rise to a cause of action for fraud, because

the duties breached arose solely by reason of contract. *Richmond Metro* safeguards against letting plaintiffs dress every breach of contract up as a tort, just to collect punitive damages—precisely as Cloney has done here. And even if Cloney had established a fraud claim, he failed to show the malice or conscious disregard required to support an award of punitive damages.

The trial court erred by submitting Cloney's fraud and punitive damages claims to the jury and refusing to set its verdict aside. This Court should reverse and vacate the judgment on those claims, and enter final judgment.

Assignments of Error

I. Under *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344 (1998), submitting a false payment application to receive a contractual payment is a breach of contract, not fraud, because the duties breached arose under the contract. Cloney sued for breach of contract and fraud, alleging that Dunn submitted a false contract document to receive a contractual payment. The trial court erred by submitting Cloney's fraud claim to the jury and refusing to set its verdict aside, because the evidence established a breach of contract, not fraud or any tort independent of the contract.

II. Punitive damages cannot be recovered for a breach of contract unaccompanied by an independent, willful tort. The trial court erred by submitting Cloney's punitive damages claim to the jury and refusing to set its verdict aside because the evidence

established only a breach of contract, not an independent, willful tort.

III. The trial court erred by submitting Cloney's punitive damages claim to the jury and refusing to set its verdict aside. The evidence was insufficient to support an award of punitive damages because it failed to show actual malice or a conscious disregard for Cloney's rights.

Statement of the Case

This appeal arises out of three individual cases which were consolidated for trial in Mecklenburg County. Two of the cases were filed by Dunn Construction against Cloney, and are not at issue in this appeal.

This appeal concerns the Complaint Cloney filed against Dunn Construction and Dunn individually, case number CL06-267. The four-count Complaint alleged breach of contract, negligence, and two counts of fraud. Cloney alleged that defendants breached the construction contract, negligently failed to construct the foundation wall, and negligently failed to furnish specified items required by the contract. Further, Cloney alleged that Dunn "fraudulently . . . represented himself to the Plaintiff as a contractor experienced in building houses," and fraudulently said that he had repaired the

foundation wall. Cloney sought $100,000 in punitive damages, and $34,038.27 in compensatory damages.

The cases were tried to a jury on April 7 and 14, 2008. After hearing the evidence, the jury viewed the foundation wall. (J.A. 182.)

Cloney requested that the jury be instructed on punitive damages because he had presented evidence of more than a simple breach of contract. (J.A. 183-84.) Specifically, he argued that this was an "exceptional case[] where the breech [*sic*] amounts to an independent willful tort...." (J.A. 184-85.) Cloney asserted that the breach of contract and negligence claims also supported a punitive damages instruction. (J.A. 196-97.)

Dunn objected to submitting punitive damages to the jury. He argued that there was no intentional misrepresentation establishing fraud, no malice, no willful and wanton conduct, and insufficient evidence to prove punitive damages. (J.A. 188-92, 197.) The trial court understood that Dunn was "objecting to anything punitive damages." (J.A. 194, 197.)

The trial court permitted the punitive damages claim to go to the jury on the basis that Dunn misrepresented the repairs he'd made.

(J.A. 186, 190, 192-93.) The trial court stated that punitive damages would not be allowed for breach of contract or negligence. (J.A. 193.)

The jury returned a verdict in favor of Cloney, awarding compensatory damages of $33,838.27, and punitive damages of $25,000. (J.A. 198.) Dunn moved to set aside the verdict as contrary to the evidence. (J.A. 199.)

On May 5, 2008, Dunn filed a Motion to Reconsider. Citing *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344 (1998), he maintained that any misrepresentations arose out of contract, not tort. He argued that the compensatory and punitive damages awards were contrary to the law and evidence. Accordingly, Dunn asked the trial court to set aside the jury's verdict. (J.A. 80-83.)

On June 2, 2008, the trial court overruled Dunn's motion from the bench, and entered judgment on the jury's verdict. (J.A. 85-88, 91-92.)

Questions Presented

I. Did the trial court err by submitting Cloney's fraud claim to the jury and refusing to set its verdict aside, because the alleged misrepresentations breached only duties assumed by contract? (Assignment of Error I.)

II. Did the trial court err by submitting Cloney's punitive damages claim to the jury and refusing to set its verdict aside, because Cloney had merely established a breach of contract claim, for which punitive damages are not available? (Assignment of Error II.)

III. Did the trial court err by submitting Cloney's punitive damages claim to the jury and refusing to set its verdict aside, because even if Cloney had established a cause of action for fraud, his evidence was insufficient to support an award of punitive damages? (Assignment of Error III.)

Statement of Facts

I. Parties

Billy G. Dunn is President and part owner of Dunn Construction Company, Inc. (J.A. 98.) His wife co-owns the company. (J.A. 98.)

Richard Cloney is a retired banker who hired Dunn Construction to build a lake house in Mecklenberg County. (J.A. 104.)

II. The Contract

In 2005, Dunn Construction entered into a written contract with Cloney to build his lake house. (J.A. 99.) The contract called for progress payments to be made at certain points during construction,

with a final payment of $14,896 due upon completion. (J.A. 99, 200.) By the conclusion of construction, Cloney had paid the total contract price of $172,106. (J.A. 101-03.) Cloney contended at trial that Dunn had not completed the contract, and listed five unfinished items. (J.A. 105-06.) These unfinished items totalled approximately $2,000.00. (J.A. 107-08.)

III. The Front Wall

This appeal arises out of a problem with the front wall of the lake house. (J.A.118.) The wall is a masonry wall, which forms the foundation for the house and encloses the basement. (J.A. 132.) The wall is eight or nine feet tall and 44 feet long. (J.A. 160, 64.) It contains 33 masonry units,[1] or "blocks." (J.A. 160.)

On November 23, 2005, the front basement wall failed. (J.A. 119.) Cracks and water marks appeared throughout the wall. (J.A. 119.) The wall did not collapse, but part of it bowed out 3-6 inches. (J.A. 157.) The wall never cracked all the way through. (J.A. 160.)

[1] Contractors no longer use the term "cinderblock." Instead, they refer to "masonry units." (J.A. 142.)

IV. Repair of the Wall

Dunn did not conceal the problem with the front wall. (J.A. 157.) Instead, he readily pointed it out to Cloney. Dunn's son advised Cloney that Dunn Construction would repair the wall. (J.A. 119-20.)

Dunn Construction immediately placed supports against the wall to hold it upright and prevent further failure. (J.A. 120.) A few days later, they began repairs. Dunn Construction brought in a backhoe to excavate dirt, or fill, down to the bottom of the wall, and cut holes in several of the blocks across the length of the wall. (J.A. 120.) It also pushed the wall back into place, recoated it with waterproofing, moved wet mud into the hole, and re-backed the wall with fill. (*See* J.A. 120-21.)

Dunn testified about the work his company performed to repair the wall. He stated that, when Dunn Construction excavated the backfill dirt from the foundation, "[t]he wall went back in place." (J.A. 158-59.) Dunn Construction also removed sections of block "about every 16 inches across the face of the block and cut it out. [It] put rebar in the walls, every other cell,[2] all the way across...." (J.A. 159-61.) Adding rebar to every other cell meant that the individual pieces of rebar

[2] A "cell" is a vertical hole in a masonry unit. There are two cells in each masonry unit. (J.A. 144, 160.)

were spaced approximately 16 inches apart. (J.A. 170.) Dunn Construction then topped the rebar with 6½ yards of pea gravel concrete. (J.A. 160.) It filled the cells with concrete to a height of roughly six or seven feet, just above the crack line. (J.A. 163.)

Since the face of each block was open along the front of the structure, Dunn Construction completed the project by resetting the block, redoing the mortar, and resealing the wall. (J.A. 159, 161-62.)

According to Dunn, each block is now reinforced with one piece of rebar. (J.A. 162.) Two of Dunn's employees confirmed his testimony that concrete and rebar were placed in the wall to reinforce it. (J.A. 169-71, 174-76.) The front wall did not contain rebar when it was first constructed. (J.A. 165.)

Cloney learned that Dunn Construction had filled the wall with concrete and added steel rebar. (J.A. 120.) At that point, Cloney "assumed it was fixed." (J.A. 121.)

V. Inspection of the Wall

David Hash is the Building Inspector for Mecklenberg County. (J.A. 146.) On Friday, March 10, 2006, Hash visited Cloney's property to prepare a preliminary report and issue a temporary Certificate of Occupancy. (J.A. 109.) He noted four items that needed to be

remedied before he issued a final Certificate of Occupancy. (J.A. 109.) Only one involved the wall; Hash called for "the satisfactory repairs of the front wall." (J.A. 109-10.) During his inspection, Hash had identified a hairline crack in the wall. (J.A. 152.) He recommended having an engineer inspect the wall and certify its structural integrity. (J.A. 110-11.)

Hash testified that when he inspected the house, he learned that the foundation wall had failed and been repaired. (J.A. 147.) Dunn advised him of the corrective measures taken. (J.A. 148.) Specifically, Dunn told Hash that "the wall had been filled with concrete and rebar." (J.A. 148.) Dunn did not tell Inspector Hash how much concrete and rebar Dunn Construction used. (J.A. 148.)

Hash testified that normal practice in a case like this would be to fill every cell or cavity with rebar. (J.A. 149.) He testified that placing rebar every four feet, 4-8 inches on center, would comply with the Code. (J.A. 151-52.)

VI. Completion of the Repairs

On the Monday after Hash's Friday visit, Dunn and his crew were back on site, making the repairs that Hash had recommended. When they finished, Cloney and Dunn retired to the kitchen of the house,

where Dunn presented a final bill which "included a number of items that [were] due under the contract plus change order items,"[3] and said that his work was done. (J.A. 111.) Cloney questioned the change orders, and Dunn replied that the money was due to him and should be paid. (J.A. 111.) Cloney argued that Dunn hadn't "satisfied everything that the building inspector required." (J.A. 111.) Cloney thought that Dunn had originally agreed to hire an engineer to inspect the walls as Hash had recommended, and believed that Dunn had since changed his mind. (J.A. 111.)

At that time, Cloney believed that Dunn had adequately repaired the wall, and that it was structurally sound. (J.A. 111.) When he reminded Dunn that "he needed to be able to confirm to the building inspector the repairs had been done, Mr. Dunn flew off the handle." (J.A. 111.) Cloney stated that Dunn used profanity, and said that the building inspector could not tell him what to do and that he would not pay for an engineer. (J.A. 112.)

According to Cloney, Dunn told him that he would throw him out of the lake house and that he was "through with this job." (J.A. 112.) Cloney tried to calm Dunn. (J.A. 112.) He felt that Dunn's "concern

[3]A change order covers any work that was not part of the original contract. (J.A. 100.)

was about being paid." (J.A. 112-13.) Cloney told Dunn that they needed to determine whether the wall was safe. (J.A. 113.)

The contract between Cloney and Dunn Construction expressly required final payment in the amount of $14,896.00 "upon completion of job." (J.A. 200.) Cloney suggested that they escrow this final payment until an engineering report was prepared, but Dunn "didn't like that suggestion." (J.A. 113.)

Cloney then offered to give Dunn the money for the final payment if Dunn would put in writing the repairs he had done to the wall and agree to pay for any further repairs. (J.A. 113.) Dunn initially rejected this offer. (J.A. 113.)

Dunn informed Cloney that he was through with the job and called the Sheriff. (J.A. 113.) By the time the Sheriff's Deputy arrived, Cloney had already written a check for the $14,896.00 final payment due under the contract. (J.A. 115.) According to Cloney, it had "been sitting there in the kitchen the whole time." (J.A. 115.) Cloney told the Deputy that he was "more than willing to make the payment." (J.A. 116.)

When the Deputy returned to the house after speaking with Dunn, he brought Dunn's written description of the repairs and a ten-year

warranty on the wall. (J.A. 116.) This document, dated March 13, 2006, was admitted as Defendant's Exhibit 21. (J.A. 117, 213.) In the writing, Dunn stated that he had performed the repair work to the house. He indicated that he had installed one-half inch rebar in each well of block and filled it with 3,500 weight concrete. (J.A. 177.) At trial, Dunn testified that he'd actually used 4,000 weight concrete. (J.A. 178.) He testified that the document should have stated that he had placed rebar in each block, rather than each well of block. (J.A. 178.)

Cloney made the final payment required by the contract. (J.A. 115.) Upon payment, Dunn's participation on the job ended.

VII. Expert Testimony

Cloney hired Leon Morris, a structural engineer, to inspect the wall. (J.A. 122-23.) Cloney drilled into the basement walls "to see what cells contained concrete." (J.A. 124-25.) Morris found concrete in some of the cells, but not in others. (J.A. 125.) According to Morris, 10 or 15 of the cells (out of a total of 33) lacked concrete. (J.A. 131.)

Morris did not believe that the walls, in their current condition, were safe, and recommended replacing or repairing the wall. (J.A. 126.) Morris further testified that pushing the wall back, as Dunn

Construction had done, was insufficient and created more pressure on the wall. (J.A. 127.) He believed the wall was "a candidate for a catastrophic failure." (J.A. 127.)

With regard to the presence of rebar, Morris testified as follows:

> Q: Did you find any evidence of rebar in the walls?
>
> A: No. That would be hard to do anyway, just like unless you—
>
> Q: Unless you drilled into it?
>
> A: Unless you were lucky enough to hit some steel.

(J.A. 128.)

Morris opined that the repairs to the wall were "not to average to correct the problem. The underlying condition remains." (J.A. 129.) He believed that the front masonry wall failed to meet the requirements of the Virginia Building Code. (J.A. 129.) Morris further testified that only those cells with rebar needed to be filled with concrete. (J.A. 137.) Reinforcing a wall with rebar is ineffective without adding concrete; likewise, reinforcing a wall with concrete is ineffective without adding rebar. (J.A. 138.)

Juan Jeffries, a brick mason, investigated the wall at Cloney's request. (J.A. 139-40.) Jeffries cut two holes in the wall to see if the

wall contained rebar and concrete. (J.A. 140-41.) He "found some concrete cells that weren't consistent with being every cell and [he] didn't find any rebar in either one, no rebar, no reinforcement rods in it." (J.A. 141.)

VIII. Damages

Cloney testified that his out-of-pocket expenses totalled $10,042.25, and that the repairs were not yet complete. (J.A. 153, 155-56.) At the time of trial, Cloney had not moved into the lake house because he did not believe it was safe. (J.A. 155.)

Two witnesses, Don Moore and Steve Parks, estimated the cost of repairing the wall at $20,000-$25,000. (J.A. 142-43, 145.)

Principles of Law, Arguments, and Authorities

I. Standard of Review

Parties who come before the Court with a jury verdict approved below occupy the most favored position known to the law. *Xspedius Mgmt. Corp. of Va., L.L.C. v. Stephan*, 269 Va. 421, 424, 611 S.E.2d 385, 387 (2005) (reversing a punitive damages award). The trial court's judgment is presumptively correct; it will not be set aside unless it was plainly wrong or without evidentiary support. *Id.* at 424-25, 611 S.E.2d at 387. This Court will view the evidence and draw all

reasonable inferences in the light most favorable to Cloney, the prevailing party below. *See id.* at 425, 611 S.E.2d at 387.

II. The trial court erred by submitting Cloney's fraud claim to the jury and refusing to set its verdict aside.

Under a well-known line of Virginia cases, Cloney's evidence did not and could not support a fraud claim. Because any duty Dunn breached arose solely by virtue of his contract with Cloney, Cloney's evidence established a breach of contract, not fraud. The trial court therefore erred by submitting Cloney's fraud claim to the jury and refusing to set its verdict aside.

A. *Richmond Metro* governs this case and compels reversal.

Cloney's claims fall squarely within the holding of *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 507 S.E.2d 344 (1998) (hereinafter "*Richmond Metro*"). There, a municipal authority hired a private contractor to build a baseball stadium. *Id.* at 555, 507 S.E.2d at 345. The contractor submitted sworn payment applications and other contract documents stating that it had completed the work according to design specifications. *Id.* at 555-56, 507 S.E.2d at 345. Years later, the authority found that, notwithstanding its representations, the contractor had not complied

with the specifications. *Id.* at 556, 507 S.E.2d at 345. The contractor had failed to inject grout into conduits within certain of the stadium's concrete structural members, or "bents." The grout would have enhanced the bents' structural integrity and made them more resistant to corrosion. *Id.* at 555-56, 507 S.E.2d at 345. In accordance with the design specifications, the contractor had sealed the grout-tube openings, which gave the impression that the conduits were filled. *Id.*

The authority sued the contractor for breach of contract and fraud. *Id.* at 556, 507 S.E.2d at 346. The trial court dismissed the contract claim as time-barred and entered summary judgment for the contractor on the fraud claims. *Id.* at 556-57, 507 S.E.2d at 346. It found that the contractor's alleged misrepresentations had breached only duties assumed by contract. *Id.* at 557, 507 S.E.2d at 346.

On appeal, this Court affirmed. The authority argued that the contractor's misrepresentations about its contract compliance, its physical concealment of its noncompliance, and its false payment applications comprised "separate and independent wrongs that [went] beyond [its] contractual duties" and supported causes of action for actual and constructive fraud. *Id.*

The Court rejected this argument. *Id.* at 557, 507 S.E.2d at 346. It explained that whether a cause of action sounds in contract or tort depends on the source of the duty violated. *Id.* at 558, 507 S.E.2d at 347. Because each of the contractor's misrepresentations related to a duty specifically required by the contract, none of them could support a fraud claim. *Id.* at 559, 507 S.E.2d at 347. The trial court was therefore correct to dismiss the authority's fraud claims. *Id.*

Like the authority, Cloney has made out a breach of contract claim, not a fraud claim. Even viewed in the most favorable light, his evidence shows that Dunn submitted a false description of work performed under a construction contract, in order to receive the final payment due under that contract. (J.A. 111-17, 177-78, 200.) Cloney then paid Dunn $14,896, as expressly required by the original contract, and nothing more. (J.A. 115, 200.) This is precisely the sort of misrepresentation involved in *Richmond Metro.* The breach of

these contractual duties gives rise to a contract claim, not a fraud claim.[4]

If anything, Cloney's fraud case is weaker than the plaintiff's in *Richmond Metro.* Rather than concealing noncomplying work so that it remained undiscovered for years, like the contractor in *Richmond Metro*, Dunn alerted Cloney to the initial problem with the wall. *Id.* at 164. And unlike the contractor in *Richmond Metro*, Dunn's false statements were not made under oath.

Any duty Dunn breached existed solely by virtue of the contract. In light of this Court's holding in *Richmond Metro*, it was plainly wrong to submit Cloney's fraud claim to the jury and to refuse to set its verdict aside.

B. This is not a case of fraud in the inducement.

At the petition stage, Cloney tried to distinguish *Richmond Metro* on the ground that the case's holding does not apply to fraud in the inducement. *See* 256 Va. at 560, 507 S.E.2d at 348 ("[t]he present

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[4] In certain circumstances, a party can show both a breach of contract and a tortious breach of duty—but only where the duty breached is an independent common law duty, not one existing between the parties by virtue of contract. *E.g.*, *Richmond Metro.*, 256 Va. at 558, 507 S.E.2d 347. Here, Cloney showed only the breach of contractual obligations, not an independent breach of common law duty.

case is not one of fraud in the inducement."). Cloney argued that he, by contrast, was fraudulently induced into accepting "substandard workmanship in the form of inadequate repairs to a deficient Foundation Wall."[5]

The flaws in this argument are obvious. There was never a contract for the construction of a substandard foundation wall. There was no meeting of the minds on that point. To the contrary, Cloney's entire theory of the case is predicated on Dunn's misrepresentation of the state of the wall. Nor was Cloney fraudulently induced to enter the original contract. Nothing in the record suggests that either Dunn or his company did not intend to fulfill their contractual duties when Dunn Construction first contracted with Cloney. Moreover, it was Cloney—not Dunn—who demanded the written warranty at issue. All Dunn asked of Cloney was the final $14,896 payment expressly required by the contract. And there is no indication from the record that Cloney has tested this warranty. So far as can be determined, the basement wall is still standing. Letting Cloney repackage his complaints about Dunn's contractual performance as fraud in the

[5] Cloney also appeared to argue that Dunn induced the building inspector to certify the lake house for occupancy. But the building inspector is not a party to this suit, and Cloney has no standing to claims on his behalf.

inducement would allow *Richmond Metro's* exception to swallow its rule.

C. Cloney's "fraud" claim was based on the same predicate acts and alleged injuries as his breach of contract claim.

Even if *Richmond Metro* and its progeny were not on the books, Cloney's fraud claim would still fail as a matter of logic. Cloney sued Dunn and his company for breach of contract and fraud on the basis of exactly the same predicate acts, seeking exactly the same compensation.

But Cloney's grievances were not tort claims. They were disappointed economic expectations arising solely by virtue of his contract, based on Dunn's alleged misrepresentations under that agreement. In his "fraud" claim, Cloney seeks payment for a front wall that does not comport with his expectations under his contract with Dunn Construction. The $14,896 payment Cloney made to Dunn was simply the final payment due under that original contract. (J.A. 115, 200.)

Cloney's bargained-for expectations, however, have nothing to do with the policies underlying tort law. "The law of torts provides redress only for the violation of certain common law and statutory duties

involving the safety of persons and property, which are imposed to protect the broad interests of society." *Filak v. George* , 267 Va. 612, 618-19, 594 S.E.2d 610, 613-14 (2004) (citations omitted). Cloney's complaints are the stuff of contract, not tort.

And it is particularly telling that Cloney sought identical compensation for his contract and tort claims, based on the same predicate acts. In *Filak*, the Court found that the plaintiffs' attempt to recover identical damages for breach of contract and constructive fraud illustrated the purely economic nature of their loss. *Id.* at 618, 594 S.E.2d at 613. The Court rejected their constructive fraud claim, finding that any duty breached had arisen solely by virtue of their contract with the defendant. *Id.* at 618, 594 S.E.2d at 613-14. They therefore had failed to state a valid tort claim. The same reasoning applies here.

III. The trial court erred by submitting Cloney's punitive damages claim to the jury and refusing to set its verdict aside.

A. Cloney merely established a breach of contract claim, and punitive damages are not available for breach of contract.

The trial court further erred by submitting Cloney's punitive damages claim to the jury and refusing to set its verdict aside. Under

settled law, punitive damages are not available for a simple breach of contract unaccompanied by an independent, willful tort. *Kamlar Corp. v. Haley*, 224 Va. 699, 707, 299 S.E.2d 514, 518 (1983) (5-2 decision). As shown above, Cloney established only a cause of action for breach of contract, not fraud. He therefore had not established an independent, willful tort. Yet the trial court nonethelss submitted Cloney's punitive damages claim to the jury, which awarded compensatory damages of $33,838.27 and punitive damages of $25,000. The trial court refused to set the jury's verdict aside. This was plain error.

B. Even if Cloney had established a fraud claim, his evidence did not show the wanton, oppressive, or malicious conduct needed to support a punitive damages award.

Moreover, even if Cloney had shown facts giving rise to a cause of action for fraud, his evidence would have been insufficient to support an award of punitive damages. Punitive damages are generally disfavored in the law, and are to be awarded only in cases involving the most egregious conduct. *Xspedius*, 269 Va. at 425, 611 S.E.2d at 387. In fraud cases, they are available only where the plaintiff shows actual malice. *Jordan v. Sauve*, 219 Va. 448, 453, 247 S.E.2d 739, 741 (1978). Thus, to recover punitive damages, Cloney

was required to show that Dunn acted with such recklessness or negligence as to evince a conscious disregard of his rights—that is, that Dunn acted wantonly, oppressively, or with such malice as to evince a spirit of mischief or criminal indifference to civil obligations. *See id.* at 453, 247 S.E.2d at 742.

Even viewed in the light most favorable to Cloney, the record lacks evidence of actual malice or conscious disregard sufficient to support an award of punitive damages. The trial court acknowledged as much. With respect to punitive damages, it stated, "My understanding of malice, I don't see malice." (J.A. 191.) It's easy to see why. Dunn did not conceal the initial problem with the front wall from Cloney, but readily pointed it out. (J.A. 157.) His company immediately began repair work to fix the wall. (J.A. 120.) There is no evidence that Dunn had prior notice of problems with the wall. Although Cloney's evidence showed that the wall was a "candidate for catastrophic failure," the wall never collapsed. Nor did the wall ever cause any personal injury or property damage. (J.A. 127.) And nothing in the record suggests that Dunn wantonly or maliciously built a dangerous wall. As such, punitive damages were simply not warranted.

IV. This Court has long resisted plaintiffs' efforts to transform every breach of contract case into a tort claim, and should continue to do so here.

The Court has long resisted "the 'more or less inevitable efforts of lawyers to turn every breach of contract into a tort.'" *Kamlar Corp. v. Haley*, 224 Va. 699, 706, 299 S.E.2d 514, 517 (1983) (quoting W. Prosser, *Handbook of the Law of Torts* § 92 (4th ed. 1971)); *accord Richmond Metro. Auth.*, 256 Va. at 560, 507 S.E.2d at 348 ("[i]n ruling as we do today, we safeguard against turning every breach of contract into an actionable claim for fraud"). It recently reaffirmed its commitment to *Richmond Metro* in a unanimous decision. *Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 208, 645 S.E.2d 290, 295 (2007).

This case shows why.

Because punitive damages are not available for a breach of contract unaccompanied by an independent, willful tort, plaintiffs like Cloney have a major incentive to try to fashion tort claims out of breach of contract elements. And that is precisely what Cloney has done here. Dunn and Cloney had an agreement, and Dunn did not perform his part of the bargain. Not content to simply collect direct damages for breach of contract, Cloney brought a fraud claim on the

basis of a false contract document that Dunn submitted to receive a contract payment.

The result was a distortion of the issues and an improper punitive damages verdict. On the basis of his "fraud" claim, Cloney sought $100,000 in punitive damages, and was awarded $25,000. Those damages in no way furthered the policies underlying tort law, which involve the protection of people and property from harm. They put Cloney, who has already been compensated for any breach, in a better position that he would have been had the contract been performed—all at Dunn's expense. *Cf. Nichols Constr. Corp. v. Va. Mach. Tool Co., LLC,* 276 Va. 81, 88, 661 S.E. 2d 467, 471 (2008) (holding that the proper measure of damages for a breach of contract is the sum that would put the plaintiff in the same position as if the contract had been performed). Dunn could never have dreamed that he was assuming such a risk when he negotiated the contract with Cloney in 2005.

Conclusion

The Court has drawn and held a bright line between contract and tort. It should continue to do so here. 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.

Respectfully submitted,

Dunn Construction Company, Inc. and
Billy G. Dunn

By: _____
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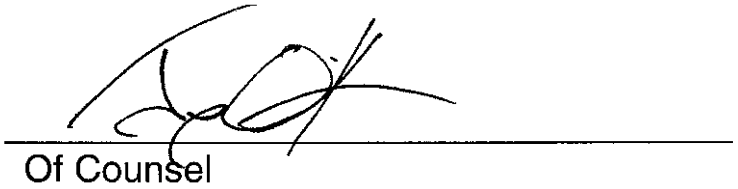
Certificate of Service

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.

That on this 3rd day of March 2009, the correct number of true and accurate copies of this Opening Brief of Appellant have been hand-filed with the Supreme Court of Virginia and served by mail upon counsel for the appellee. A copy of the Brief and Appendix in PDF format on CD was also delivered to the Supreme Court this same day.

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



Of Counsel