

IN THE  
SUPREME COURT OF VIRGINIA  
AT RICHMOND

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Record No.: 090143

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WILLIAM M. SALES,

Appellant,

v.

KECOUGHTAN HOUSING COMPANY, Ltd.,  
a Virginia Limited Partnership,  
and  
ABBITT MANAGEMENT, INC.,

Appellees.

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**REPLY BRIEF**

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IN THE SUPREME COURT OF VIRGINIA

WILLIAM M. SALES,

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v.

Record No. 090143

KECOUGHTAN HOUSING COMPANY, LTD.  
and ABBITT MANAGEMENT, INC.,

Appellees.

**REPLY BRIEF**

NOW COMES your appellant, William M. Sales (hereinafter “Sales”), by counsel, and pursuant to Rule 5:29 of the Rules of the Virginia Supreme Court, presents this Reply Brief for consideration by this Honorable Court.

**LAW AND ARGUMENT**

The trial court erred in sustaining the Demurrer and the Second Demurrer, as Sales properly pled a cause of action for injuries to his eye and his personal property resulting from defective repairs.

In his First Amended Complaint, Sales cited and relied upon the opinion of this Court in Tugman v. Riverside Cotton Mills, 144 Va. 473, 132 S.E. 179 (1926) in support of his “defective repair” claim. (J.A. 41). In the “Brief of Appellees”, there is an effort to distinguish this authority at pp. 3-4. Evidently, the appellees interpret the

Tugman opinion to provide that a “landlord’s liability is confined to having created a new, dangerous condition through making repairs which did not previously exist.” (Brief of Appellees, p. 4). The appellees misread Tugman. The controlling language in that opinion is the following:

A distinction is made by the authorities between nonfeasance and misfeasance of the landlord. In other words, the law distinguishes between the failure or refusal of the landlord to do what he has not promised to do, or is not legally bound to do, and his doing it in a negligent manner, but if the landlord voluntarily repairs and actually enters upon the carrying out of his scheme of repairs, he will be responsible for the want of due care in the execution of the work, upon the principle of liability for negligence, without reference to any question of implied contract to repair or implied consideration. Even in those jurisdictions where it is held that a tenant cannot sustain an action of tort for personal injuries received by him because of the breach of the landlord’s covenant to keep the premises in repair, if the landlord makes the repairs in accordance with the agreement, and is negligent in making them, the tenant may recover for resulting personal injuries.

Tugman, 144 Va. at 479, 132 S.E. at 180 (internal citation omitted).

The Tugman case explains in clear terms the difference between negligent failure to make any repairs versus negligent

performance of repairs. In the case brought by Sales, it is the negligent performance of repairs upon which he relies, and his allegations fall squarely within the Tugman opinion language.

On p. 5 of the Brief of Appellees, there is discussion of Oliver v. Cashin, 192 Va. 540, 65 S.E.2d 571 (1951). In that case, a visitor to a tenant was injured when some steps at the entrance of a building “tilted over and caused him to fall.” Id., 192 Va. at 542, 65 S.E.2d at 572. This Court, in affirming the result of a trial, determined that there was no causal connection between any conduct of the landlords and injury to the visitor because of two primary factors. First, the tenant created the dangerous condition by placing the subject steps “where and as they were when the plaintiff fell.” Id., 192 Va. at 544, 65 S.E.2d at 573. Second, this Court distinguished Tugman on the basis that all activities of the landlords pre-dated the relevant term of tenancy during which the plaintiff was injured. Id.

Oliver is easily distinguished from the facts of the case brought by Sales. Whereas in Oliver the tenant selected the defective placement of the steps, Sales did not “place” or create the mold that grew in his apartment. Moreover, Sales did not try to repair or alter

the mold, but instead, relied upon the representations of the appellees that they would effect repairs and, later, that they had completed repairs. Finally, there is no issue as to the timing of the problem. The defective repair efforts occurred during the relevant term of tenancy.

At pp. 9-10 of the Brief of Appellees, there is an effort to distinguish Holland v. Shively, 243 Va. 308, 415 S.E.2d 222 (1992) which the appellees characterize as a “curious decision” of this Court. Unfortunately for the appellees, there is simply no way for them to escape the clear language of the Holland opinion. These are the key passages from that case:

It has long been the law in Virginia that where a landlord enters leased premises, after delivering possession to the tenant, for the purpose of making repairs, he must use reasonable care in performing the work. In order for the tenant to recover for injuries caused by a defective condition resulting from the repairs, he must show that the repairs were made in a negligent manner.

We hold that the record contains sufficient evidence upon which the jury could have relied to find that Mr. Shively was negligent because his actions of merely removing the rotten boards did not correct the defects in the

steps which are an integral component of the porch.

Holland, 243 Va. at 311, 415 S.E.2d at 224 (1992) (internal citations omitted).

It is notable that the Holland opinion, which is the most recent of the “defective repair” cases the parties to this appeal have cited, squarely addresses and is deemed by this Court to be consistent with the older precedent which the appellees claim absolve them of any liability. Id. Accordingly, there is nothing “curious” about this Court’s opinion in Holland. For many decades, the law has been clear that a landlord who attempts to make repairs - - regardless of whether he initially had the obligation to do so - - must exercise appropriate care or will be deemed liable for negligence and resulting injuries. As a matter of public policy, this makes sense. It is reasonable for a tenant to rely upon a person making repairs to do so with the exercise of due care. A tenant is better off making repairs himself or contracting with someone else to perform repairs than he is in being lulled into a sense of false security based upon a landlord’s empty assurances that appropriate and safe repairs to a defective condition have been made.

In accordance with controlling authority of this Court, Sales pled a proper cause of action for injuries caused by defective repairs, and the trial court erred in ruling otherwise.

The trial court erred in sustaining the Demurrer and the Second Demurrer, as Sales properly pled a cause of action for actual fraud and constructive fraud.

The appellees' primary defense to the fraud claims is that the statements made by them to Sales that the property "was safe for habitation and that the mold problem had been remedied" (J.A. 2, 42) are statements of opinion, as opposed to being statements of fact. (Brief of Appellees, p. 12). The appellees are incorrect. First, a representation that repairs have been made is quite clearly a statement of fact. As Sales alleged, the appellees knew that proper repairs had not been made and that the mold problem had not been resolved.

Second, on the issue of the representation that the property was "safe for habitation", this is a statement that is strikingly similar to those analyzed by this Court in Yuzefovsky v. St. John's Wood Apartments, 261 Va. 97, 540 S.E.2d 134 (2001). In Yuzefovsky, this Court agreed that specific statements made to a tenant about a

property being safe were “not matters of opinion or puffing, especially when, as is alleged, the employees knew these statements to be objectively false.” Id., 261 Va. at 111.

In both his original Complaint (J.A. 2-3) and his First Amended Complaint (J.A. 44), Sales alleged that factual representations were made to him, when the appellees knew or should have known that the representations were false. Sales reasonably relied to his detriment upon the false representations and was injured as a result. Accordingly, Sales pled every element of actual fraud. See Elliott v. Shore Stop, Inc., 238 Va. 237, 384 S.E.2d 752 (1989) (reversing dismissal of fraud case on demurrer); Sea-Land Service, Inc. v. O’Neal, 224 Va. 343, 297 S.E.2d 647 (1982) (affirming jury award in favor of plaintiff in fraud case).<sup>1</sup>

Regarding the constructive fraud claim, the appellees make no effort to distinguish or even address this Court’s opinion in Prospect Development Co., Inc. v. Bershader, 258 Va. 75, 515 S.E.2d 291

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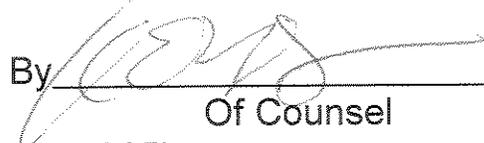
Although “factual” representations are generally required for fraud claims, this Court’s Elliott and Sea-Land cases discuss exceptions where the focus is on “fraudulent intent”. Whether based on a traditional fraud claim analysis or the “exceptions” analysis, Sales pled a proper case of fraud in both versions of his lawsuit.

(1999), which is discussed at length in the "Opening Brief of Appellant" (pp. 12-13) and which is clearly applicable to this case. The elements of a constructive fraud claim described by this Court in Prospect Development, 258 Va. at 86, 515 S.E.2d at 297, were pled by Sales in both his original Complaint (J.A. 3-4) and his First Amended Complaint (J.A. 44-45), and it was error for the trial court to rule otherwise.

**REQUEST FOR RELIEF**

WHEREFORE, your appellant, William M. Sales, respectfully requests that this Honorable Court reverse the ruling of the trial court and remand this case for a trial on its merits. Counsel for the appellant respectfully requests an opportunity to present oral argument to this Court.

WILLIAM M. SALES

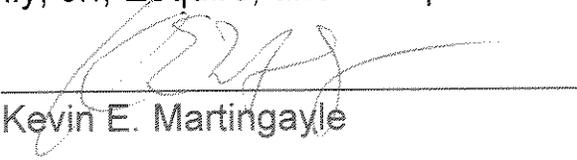
By 

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## CERTIFICATE

I hereby certify that Rule 26(d) of the Rules of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Reply Brief have been filed with the Clerk of the Supreme Court of Virginia and three (3) copies of the Reply Brief have been mailed to Herbert V. Kelly, Jr., Esquire, and Joseph F. Verser, Esquire, this 10<sup>th</sup> day of June, 2009. On this date, the Reply Brief was also filed electronically with the Court, with a copy being sent electronically to Herbert V. Kelly, Jr., Esquire, and Joseph F. Verser, Esquire.



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Kevin E. Martingayle