IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 092541

ALVIN KALTMAN
and
GWENDOLYN KALTMAN,

Appellants,

v.

ALL AMERICAN PEST CONTROL, INC.
and
PATRIC J. HARRISON,

Appellees.

AMICUS CURIAE BRIEF OF VIRGINIA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS ALVIN KALTMAN AND GWENDOLYN KALTMAN

Respectfully submitted,

THE VIRGINIA TRIAL
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I. PRELIMINARY STATEMENT AND AMICUS CURIAE'S INTEREST

This brief *amicus curiae* is submitted by the Virginia Trial Lawyers Association (hereinafter, "VTLA") in support of Appellants, Alvin Kaltman and Gwendolyn Kaltman (hereinafter, "the Kaltmans" or "Appellants"). The Virginia Trial Lawyers Association ("VTLA") is an organization of over nineteen hundred attorneys dedicated to, among other worthy causes, protecting and preserving the liberties and rights of Virginia's citizens, including their access to justice, as well as supporting an efficient and constitutionally sound judicial system.

The VTLA believes that this appeal presents a clear case of reversible error committed by the trial court in contravention of this Court's developing jurisprudence relating to recovery for injuries in tort outside of the law of contracts. The VTLA holds the belief that citizens of the Commonwealth of Virginia who are injured by the tortious and wrongful acts of others deserve access to justice and full avenues of redress. Moreover, such individuals especially deserve access to justice and full avenues of redress where the Virginia legislature has expressly set forth statutory duties, such as those applicable to pesticide companies, which involve the safety of the Commonwealth's persons and property.

The VTLA also believes that wrongdoers should not be permitted a

means of blocking redress for those individuals that they have injured. To allow wrongdoers to contract out of their own negligent and injurious acts is the equivalent of making Virginia citizens sign pre-injury release provisions. Such provisions are prohibited by public policy.

II. STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

For the Court's convenience and in the interest of brevity, the VTLA incorporates the Kaltmans' Statement of the Case and Material Proceedings from their Opening Brief.

III. ASSIGNMENTS OF ERROR

The VTLA supports the position of the Kaltmans with respect to all Assignments of Error set forth in their Petition for Appeal, which read:

1. The Circuit Court erred in sustaining the demurrers to the negligence counts (One, Two and Three) because those counts adequately state claims upon which relief can be granted as they allege facts establishing Defendants' duty which was breached and which proximately caused Plaintiffs' injuries.

2. The Circuit Court erred in sustaining the demurrers to the willful and wanton conduct counts (Four and Five) since those counts allege facts which state claims upon which relief can be granted.

3. The Circuit Court erred in sustaining the demurrers to Counts Ten and Eleven because the facts alleged establish Defendants' violations of Code § 3.1-249.52 and Code § 3.1-249.64 and state claims upon which relief can be granted for negligence *per se*.

The Kaltmans preserved their objections to the trial court's errors in

sustaining the demurrers to Counts 1-5 and 10-11. [JA 190].

IV. FACTS

The Kaltmans' Statement of Facts from their Opening Brief is accurate and incorporated herein by reference.

V. STANDARD OF REVIEW

The Kaltmans' Standard of Review from their Opening Brief is accurate and incorporated herein by reference.

VI. SUMMARY OF ARGUMENT

Public policy mandates that the citizens of the Commonwealth of Virginia who are injured by the tortuous and wrongful acts of others deserve access to justice and full avenues of redress. Therefore, the VTLA urges this Court to follow its recent holding in *Abi-Najm v. Concord Condominium, LLC*, 2010 Va. LEXIS 229 at 5-6 (September 16, 2010) where it re-examined the limitations of the "economic loss doctrine." In doing so, the VTLA asks this Court to make it abundantly clear to the lower courts that a single act or occurrence can support causes of action both for breach of contract and for breach of a duty arising in tort, thus permitting a plaintiff to recover both for the loss suffered as a result of the breach and traditional tort damages including, where appropriate, punitive damages.

In this case, the Kaltmans should be entitled to seek redress in tort for

the Appellees' violations of "common law and statutory duties involving the safety of persons and property." *Abi-Najm*, 2010 Va. LEXIS 229 at 5. As to the statutory duties, the statutes enacted by the General Assembly of Virginia that are intended to protect the safety of its citizens are meant to have value and not be rendered meaningless. Finally, public policy dictates that citizens of the Commonwealth who cause harm to other citizens should not be allowed to contract out of their own negligence and wrong-doing.

VII. ARGUMENT

A. PUBLIC POLICY MANDATES THAT CITIZENS OF THE COMMONWEALTH OF VIRGINIA WHO ARE INJURED BY THE TORTIOUS ACTS OF OTHERS DESERVE ACCESS TO JUSTICE AND FULL AVENUES OF REDRESS.

The lower court erred in sustaining the Appellees' Demurrers to Counts One, Two, Three, Four, Five, Ten and Eleven of the Complaint. This case involves a situation where the Kaltmans did not contract for personal injury and unforeseen personal losses, including the loss of the use of their home for almost a year. Rather, they contracted for the eradication and prevention of bugs in their home. The bargained for agreement was that they would have the bugs eliminated. Breaches of the statutory and common law duties in the application of pesticide were not part of the bargained relationship between the parties.

This Court recently re-examined the limitations on certain tort actions

created by the "economic loss doctrine" in the case of *Abi-Najm v. Concord Condominium, LLC*, 2010 Va. LEXIS 229 at 5-6 (September 16, 2010). In *Abi-Najm,* the plaintiffs alleged breach of contract, fraud in the inducement, and violations of the Virginia Consumer Protection Act (VCPA) where inferior flooring material was substituted for the bargained for material in residential condominiums. In reversing the trial court's dismissal of the fraud in the inducement and VCPA counts, this Court, citing *Dunn Construction Co., Inc. v. Cloney,* 278 Va. 260, 266-67, 682 S.E.2d 943, 946 (2009), stated:

> it is well-established that a single act or occurrence can, in certain circumstances, support causes of action both for breach of contract and for breach of a duty arising in tort, thus permitting a plaintiff to recover both for the loss suffered as a result of the breach and traditional tort damages, including, where appropriate, punitive damages. *Foreign Mission Bd. v. Wade,* 242 Va. 234, 241, 409 S.E.2d 144, 148 (1991).

Abi-Najm, 2010 Va. LEXIS 229 at 5-6. Since the law of torts provides redress beyond the law of contracts and provides redress for the violations of certain common law and statutory duties involving the safety of persons and property, Virginia's citizens should be entitled to bring causes of action in tort and contract where they otherwise cannot be made "whole." This Court should ensure that Virginia's citizens have access to justice and full redress for the wrong-doings of others, even if the wrong-doing and

subsequent injury would not have occurred but for the entry into a contractual agreement. In providing the means for full redress, this Court also will have adopted a system whereby wrong-doers can be held fully accountable thereby discouraging wrong-doing. For these reasons, public policy dictates that the lower court's ruling on the Demurrers to Counts One through Five, and Ten and Eleven, of the Complaint, be overturned.

B. STATUES ENACTED BY THE GENERAL ASSEMBLY OF VIRGINIA THAT ARE INTENDED TO PROTECT THE SAFETY OF ITS CITIZENS ARE MEANT TO HAVE VALUE AND NOT BE RENDERED MEANINGLESS.

The lower court erred in sustaining the Demurrers to Counts Ten and Eleven of the Complaint, which were the negligence *per se* counts. Statutes enacted by Virginia's legislature that are intended to protect the safety of its citizens are meant to have value and not be rendered meaningless.

It is highly illustrative that, in discussing the Virginia Insecticide, Fungicide and Rodenticide Law, which was modeled on the federal Insecticides Act, this Court in *McClanahan v. California Spray-Chemical Corporation,*194 Va. 842, 851, 75 S.E.2d 712, 717-18 (1953) noted, "[at the b]ack of both the federal and Virginia statutes lies the need to provide the particular consumer and the general public with a higher and surer degree of protection then is afforded by exclusive recourse to common-law

remedies." This Court went on to note:

> As stated in *United States v. Dotterweich, 320 U.S. 277, 280, 64 S. Ct. 134, 136, 88 L. Ed. 48*, in reference to the Federal Food, Drug and Cosmetic Act:
>
> > **"The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words."**
>
> This quotation, frequently cited with approval (*e.g., 62 Cases, Etc. v. United States, 340 U.S. 593, 71 S. Ct. 515, 95 L. Ed. 566*; *United States v. Sullivan, 332 U.S. 689, 68 S. Ct. 331, 92 L. Ed. 297*), lies [at the] back of the liberal interpretation which the courts have insisted upon in construing the Federal Food, Drug and Cosmetic Act. This construction is likewise relevant to the Insecticide, Fungicide and Rodenticide Law.
>
> It is consistent with the liberal interpretation which the act commands to hold, in keeping with general principles of tort law, that violation of the statute constitutes negligence as a matter of law precluding the need for establishing the common-law elements of negligence. The statute itself creates the standard of conduct required.

Id., 194 Va. at 851-52, 75 S.E.2d at 717-18 (emphasis added).

To similar effect in this case, Virginia Code sections 3.1-249.52 and 3.1-249.64 were enacted to protect the lives and health of Virginia citizens such as the Kaltmans who, with the advent of modern day specialized pesticides, are at the mercy of the specialized knowledge and expertise of pesticide companies and their employees. The Kaltmans did not have

specialized knowledge or hold certifications in pesticide application. The violation of a statute enacted for the public safety is a violation of a duty independent of and "not one existing between the parties solely by virtue of the contract." *Abi-Najm v. Concord Condominium, LLC*, 2010 Va. LEXIS 229 at 6 (citing *Dunn Construction Co. v. Cloney,* 278 Va. 260, 267, 682 S.E.2d 943, 946 (2009) and holding that the trial court erred when it sustained a demurrer to plaintiff's claim for violation of the Virginia Consumer Protection Act on the grounds that the claim arose out of the contract and was barred by the economic loss rule); See also, *Christ v. Fitzgerald,* 189 Va. 109, 118, 52 S.E.2d 145 (1949), a case involving a violation of The Motor Vehicle Code of Virginia in which this Court stated, "The violation of a statute constitutes negligence *per se,* and if it proximately causes or contributes to an injury, it will support a recovery for damages for such injury" (cited with approval in *McClanahan,* 194 Va. at 852, 75 S.E.2d at 718).

As in the *McClanahan, Abi-Najm* and *Christ* cases, the applicable pesticide statutes in this case impose duties on All American and Harrison separate and apart from the contract. Their violations of the statutes constitute negligence *per se* and the intentions of the legislature in protecting its citizens should be given effect by allowing the negligence *per*

se claims of the Appellants be heard by a judge or jury. For these reasons, public policy dictates that the lower court's ruling on the Demurrers to Counts Ten and Eleven of the Complaint, be overturned.

C. PUBLIC POLICY DICTATES THAT CITIZENS OF THE COMMONWEALTH WHO CAUSE HARM TO OTHER CITIZENS SHOULD NOT BE ALLOWED TO CONTRACT OUT OF THEIR OWN NEGLIGENCE AND WRONG-DOING.

The lower court erred in sustaining the Appellees' Demurrers to Counts One, Two, Three, Four, Five, Ten and Eleven of the Complaint. In doing so, the lower court essentially let the Appellees contract out of responsibility for their own negligence and wrong-doing. To allow the lower court's ruling to stand in this case is the equivalent of letting the Appellees use their contract as a "pre-injury release of liability" for personal injury and unforeseen personal losses. Such releases consistently have been held by this Court to be void and prohibited by public policy.

In *Hiett v Lake Bareroft Community Assoc., Inc., et. al.,* 244 Va. 191, 418 S.E.2d 894 (1992), the plaintiff sustained an injury which rendered him a quadriplegic while participating in a triathlon sponsored by a community association. He was injured when his head struck an underwater object in a lake. Prior to the event, the plaintiff signed an entry form which provided that he released all rights and claims for damages which might result from the triathlon. In finding that the pre-injury release agreement signed by the

plaintiff was void as against public policy, this Court examined a long line of cases beginning with the case of *Johnson's Adm'x v. Richmond and Danville R.R. Co.,* 86 Va. 975, 11 S.E. 829 (1890) (where the plaintiff's decedent, a quarry worker, was killed while attempting to warn one of his employees of a fast-approaching train and his company had signed a release agreement with the railroad). In *Hiett,* this Court in finding the release language in *Johnson's Adm'x* to be invalid because it violated public policy, reiterated that:

> **[T]o hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct . . . can never be lawfully done where an enlightened system of jurisprudence prevails.** Public policy forbids it, and contracts against public policy are void.
>
> *86 Va. at 978, 11 S.E. at 829.* This Court emphasized that its holding was not based on the fact that the railroad company was a common carrier. Rather, **this Court found that such provisions for release from liability for personal injury which may be caused by future acts of negligence are prohibited "universally."** *86 Va. at 978, 11 S.E. at 830.*

Hiett, 244 Va. at 194-95, 418 S.E.2d at 896 (emphasis added).

To limit the Kaltmans to only those damages available via a breach of contract action in this case is akin to having the Kaltmans sign a pre-injury release for personal injury. The Appellees should not be permitted to

"contract away" their own negligence and wrong-doing, especially where personal injury and unforeseeable personal losses are involved. Public policy mandates that wrong-doers be held accountable. For these reasons, public policy dictates that the lower court's ruling on the Demurrers to Counts One through Five, and Ten and Eleven, of the Complaint, be overturned.

VIII. CONCLUSION

For the reasons previously stated, the circuit court erred when it sustained the Demurrers to Counts One through Five and Ten and Eleven. These Counts ensured that the Appellants had full access to justice and redress for the injuries to them caused by the Appellees' wrong-doing. Public policy favors access to justice in order to provide injured citizens a means by which to be made "whole" and as a deterrent to citizens violating their common-law and statutory duties. Therefore, the Court should reverse the judgment of the circuit court and remand the case for trial.

Respectfully submitted,

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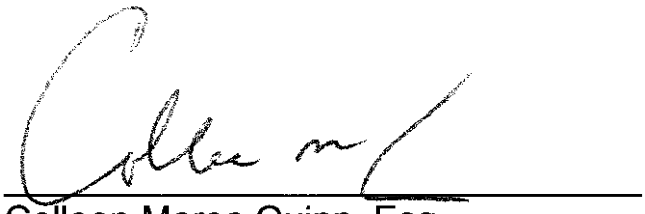
CERTIFICATE OF SERVICE

This is to certify that undersigned counsel has complied with the requirements of Rule 5:26(d), and that on October 25, 2010, one electronic version in PDF format and the original and fifteen copies of the foregoing Brief *Amicus Curiae* were hand-delivered to the Clerk of the Supreme Court of Virginia and three copies of the Brief *Amicus Curiae* were mailed, First Class U.S. Mail, postage prepaid, to counsel for all parties, specifically to David D. Hudgins, Esq. and Robert E. Draim, Esq., Hudgins Law Firm, 515 King Street, Suite 400, Alexandria, Virginia 22314, (703) 739-3300, counsel for Appellees All American Pest Control, Inc. and Patric J. Harrison, and Robert T. Hall, Esq., Hall Sickles Frei Mims, P.C., 12120 Sunset Hills Road, Suite 150, Reston, Virginia 20190, (703) 925-0500, counsel for Appellants.



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