In The

Supreme Court of Virginia

RECORD NO. 092541

ALVIN KALTMAN, *et al.*,

***Appellants*,**

v.

ALL AMERICAN PEST CONTROL, INC., *et al.*,

Appellees.

BRIEF OF APPELLEES

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

All American Pest Control, Inc. ("AAPC") and Patric J. Harrison ("Harrison"), collectively "Defendants", request that this Court affirm the judgment of the Circuit Court of Fairfax County, which sustained Defendants' demurrer to seven of the eleven counts in the Complaints filed by Alvin Kaltman and Gwendolyn Kaltman ("the Kaltmans"). The Kaltmans are appealing from the Circuit Court's dismissal of the Kaltmans' claims for negligence, negligence *per se*, and willful and wanton conduct, arising out of a pesticide application performed under the Kaltmans' contract for quarterly pesticide services.

The Kaltmans filed their separate Complaints on September 5, 2008, alleging negligence, willful and wanton conduct, negligent infliction of emotional distress, nuisance and negligence *per se* against AAPC and Harrison, and vicarious liability against AAPC. [JA 1-38]. The Kaltmans each demanded four million dollars in compensatory damages, and $500,000 in punitive damages.

Notably, the Kaltmans chose not to assert any cause of action for breach of contract, even though they alleged that Harrison applied the wrong pesticide while performing a scheduled application under the parties'

contract. Nor did the Kaltmans ever seek leave of court to add a count for breach of contract at any later time.

On October 6, 2008, AAPC and Harrison filed their Demurrers to all claims asserted against them. [JA 39-46]. In addition, AAPC and Harrison filed Motions to *Crave Oyer* of the service contract between the Kaltmans and AAPC. [JA 50-64]. The Kaltmans' separate actions were consolidated by Consent Order dated November 21, 2008. [JA 131-132].

The Demurrers were briefed by the parties. [JA 116-129, 133-187]. Oral argument was held on December 5, 2008, and a written Order was entered on the same date incorporating the Circuit Court's rulings. [JA 188-190]. The Court sustained the Demurrers to Counts 1, 2, 3, 4, 5, 10 and 11, *i.e.* the Kaltmans' claims for negligence, negligence *per se*, and willful and wanton conduct. The Court overruled the Demurrers to Counts 6, 7, 8 and 9, *i.e.* the Kaltmans' claims for negligent infliction of emotional distress and nuisance.

The Order expressly granted the Kaltmans 21 days to amend the counts for which the Demurrers were sustained. However, the Kaltmans failed to file any amended pleading. Likewise, although AAPC and Harrison had argued on Demurrer that any claim by the Kaltmans sounded in

contract, the Kaltmans chose not to amend their pleading to include a count for breach of contract.

Following the Court's ruling on the Demurrers, AAPC and Harrison filed an Answer and an Amended Answer as to the remaining counts. The parties thereupon engaged in seven months of extensive discovery.

One element of damages alleged by the Kaltmans in their Complaints consisted of lost income and earning capacity. However, the Kaltmans refused to produce their tax returns, or any other documents relating to their income, and AAPC and Harrison filed a motion to compel. The Kaltmans thereupon withdrew their claim for lost income and earning capacity by Consent Order dated March 10, 2009. [JA 191-193]. Needless to say, the Kaltmans did not appeal from the Consent Order, so that the dismissal of their claims for lost income or earning capacity is *res judicata*.

As another element of their claimed damages, the Kaltmans alleged in their Complaints that they suffered a lost of use and enjoyment of their home for nearly a year as a result of the pesticide application. However, that claim was stricken by the Circuit Court prior to the Kaltmans' nonsuit, and they failed to appeal that decision which is now *res judicata*. See Dalloul v. Agbey, 255 Va. 511, 514-15, 499 S.E.2d 279 (1998). By way of background, the Circuit Court had issued an Order dated June 19, 2009,

following yet another motion to compel filed by AAPC against the Kaltmans. As part of that Order, the Circuit Court compelled the Kaltmans to produce their bank records and credit card statements reflecting their travel for the period in which they claimed to have been displaced from their house. The motion was precipitated by evidence that they traveled extensively and elaborately, spending several months in Florida, as well as taking trips to England, Greece, Croatia, Slovenia, Barbados, Tobago, Atlanta, and Chicago, all during the time they alleged a loss of "use and enjoyment" of their home. Despite representations that the documents would be produced, the Kaltmans failed to comply with the Circuit Court's June 19, 2009 Order. On August 3, 2009, prior to commencement of the scheduled trial, the Court heard argument on Defendants' motion to strike the Kaltmans' claim for loss of use and enjoyment. The Court granted the motion, striking the Kaltmans' claims for loss of use and enjoyment of their house. The Kaltmans have not appealed from the Court's striking their claim for loss of use and enjoyment, which was ordered prior to the Kaltmans' motion for nonsuit. As a result, the Circuit Court's dismissal of the Kaltmans' claims for loss of use and enjoyment is *res judicata*.

Another element of damages alleged in the Complaints consisted of "physical and emotional injuries" as a result of the pesticide application.

However, as further addressed in the Statement of Facts as well as the Argument section below, the Kaltmans' Complaints were insufficient to allege any recoverable personal injuries or emotional distress, and both claims had been effectively abandoned by the Kaltmans by the time the parties appeared for trial on August 3, 2009.

Finally, the Kaltmans claimed in their Complaints that they incurred substantial costs for "remediation" of their house to eliminate the alleged pesticide odor. Prior to the scheduled trial, AAPC and Harrison filed a motion for summary judgment, seeking dismissal of that claim on the ground that the Kaltmans failed to retain any of the baseboards, crown molding, drywall, paneling, flooring, tile, concrete, or other building material that was removed from their home during the "remediation", and that they could therefore not prove that the extensive "remediation" was even necessary. However, the Circuit Court denied the motion, so that the issue remained one for determination at trial.

After the Court struck the Kaltmans' claim for loss of use and enjoyment, the Kaltmans moved for entry of a voluntary nonsuit. A written Order of Nonsuit was then entered. [JA 194].

On August 18, 2009, a Suspending Order was entered, suspending the finality of the Court's Order of Nonsuit until a ruling was made on the

Defendants' Motion to Assess Expert Witness Fees in Connection with Va. Code § 8.01-380(C). [JA 195-196]. On September 25, 2009, a Consent Order was entered, providing a sum which the Kaltmans would pay to the Defendants. [JA 197-198]. The Consent Order, which referenced the Suspending Order, resolved the Defendants' motion for assessment of expert witness fees.

The Kaltmans filed their Notice of Appeal on October 2, 2009, and filed their Petition for Appeal on December 21, 2009. The Kaltmans have appealed only from the Court's sustaining the Demurrers to the claims for negligence, negligence *per se* and willful and wanton conduct.

STATEMENT OF FACTS

The Kaltmans' Complaints against AAPC and Harrison arose out of a contract with AAPC for pest control services for their property. [JA 2, 21]. The Kaltmans entered into a pesticide service contract in about 1996, by which they received quarterly pesticide treatment inside and outside their residence. Id. Prior to October 23, 2006, the Kaltmans were satisfied with AAPC's performance under the contract. Id.

The terms of the contract were set forth in a written Pest Control Service Agreement, attached to the Complaints by entry of an Order dated November 21, 2008, granting the Defendants' motions to *crave oyer*. [JA

50-61, 130]. Under the Agreement, AAPC expressly disclaimed in bold print any liability for "special, incidental or consequential damages". Id. The Agreement further provided that "[i]n no event shall either party be liable to the other for indirect, special or consequential damages or loss of anticipated profits." Id. Although the Kaltmans apparently never returned a signed copy of the Agreement, it was signed on behalf of AAPC, and the Kaltmans received quarterly pesticide services in accordance with the parties' agreement.

Pursuant to the Agreement, AAPC technician Patric Harrison was scheduled to perform a quarterly pest control treatment at the Kaltmans' house on Monday, October 23, 2006. [JA 2, 21]. Three days before, *i.e.* on Friday, October 20, 2006, Harrison treated a commercial establishment (Ritz Camera Center) with Orthene pesticide. [JA 9, 28].

The Kaltmans alleged that after Harrison applied Orthene at the Ritz Camera Center on October 20, 2006, he "fail[ed] to thoroughly clean his pesticide application equipment" before coming to their home on October 23, 2006. [JA 14, 33]. As a result, there was Orthene in the pesticide that Harrison applied during the treatment of the Kaltmans' house on October 23, 2006 pursuant to the quarterly pesticide service agreement. [JA 4, 14, 23, 33].

At the time of Harrison's pest control services at the Kaltmans' house on October 23, 2006, Orthene was no longer approved for indoor "private homes", although Orthene is approved and considered safe for use in all other indoor locations including restaurants, hotels, hospitals, schools, day care centers, grocery stores, office buildings, retail stores, theatres, government buildings, etc. [JA 4, 23]. Accordingly, Harrison's application of Orthene at the Ritz Camera Center on October 20, 2006 was an approved use of the pesticide. Id.

Although the Kaltmans alleged that Harrison applied an Orthene solution from the same tank at the Ritz Camera Center only three days before his application at the Kaltmans' home, they did not allege that the Ritz Camera Center experienced any problems including any noxious odor. Nor did they allege that it was necessary for Ritz Camera to vacate its premises, or to spend any money in "remediation" as a result of Harrison's application of Orthene.

The Kaltmans alleged that they resumed living in the house approximately one year after the pesticide application, and that their house is now free of "all traces of the pesticide and the unpleasant odor …" [JA 18, 37].

The Kaltmans further alleged that they "incurred monetary expenses to remediate the damage to [the Kaltmans'] home and personal effects" [JA 18, 37]. However, the Kaltmans failed to allege that any "remediation" expenses were reasonably necessary. Indeed, the Complaints failed to allege that any of the flooring, walls, molding, etc. needed to be replaced, or that the Kaltmans preserved any of those removed materials in order to establish such a need.

Likewise, although the Kaltmans alleged that they suffered physical injury and emotional distress as a result of the pesticide application, their Complaints failed to allege that they received any medical treatment or that any psychiatrist, psychologist, or physician ever rendered a professional opinion that either of them suffered any condition as a result of the October 23, 2006 pesticide application.[1] Moreover, as noted above, Orthene is approved for commercial use, so that the Kaltmans and the general public may be exposed to Orthene where they spend countless hours at work, shopping, dining, etc. Accordingly, the Complaints failed to allege any

[1] Indeed, the Kaltmans admitted prior to the scheduled trial of the case that no psychiatrist, psychologist, or physician ever rendered a professional opinion that either of them suffered any condition as a result of the October 23, 2006 pesticide application. In addition, the Kaltmans' witness list failed to identify any physician, psychiatrist or psychologist who would testify as to any personal injury or emotional distress at the trial of the case.

basis to support the Kaltmans' speculation that they suffered any condition as a result of the pesticide application in their home.

The Kaltmans' appeal brief at p. 5 of their "Facts" section cites to one page of each Complaint where it was alleged in vague terms that the Defendants' conduct was "physically harmful". [JA 3, 22]. The other two pages of their Complaints which they cite in support of their statement that they suffered emotional distress and personal injury included no such allegation, but merely that "[e]xposure to acephate is known to cause irreversible nerve damage and to cause cancer in laboratory animals." [JA 5, 24]. However, the Kaltmans nowhere alleged that they suffered any "irreversible nerve damage" or cancer as a result of the pesticide application.

In other pages of their Complaints, which the Kaltmans do *not* cite in their appeal brief, they alleged that they suffered various minor maladies as a result of the pesticide application. However, as noted, the Kaltmans failed to allege that they ever received medical treatment or that they ever obtained any medical opinion linking any of those conditions to the pesticide application at their house on October 23, 2006.

SUMMARY OF ARGUMENT

The Kaltmans failed to allege a basis for asserting claims for negligence, negligence *per se*, or willful and wanton conduct. As alleged in the Kaltmans' Complaints, Harrison was performing a regularly scheduled pesticide application pursuant to the Kaltmans' contract with AAPC. AAPC would not have been at the Kaltmans' home but for the contract, and AAPC assumed the contractual duty to apply the appropriate pesticide. Indeed, the parties' contract even provided that "[a]ll labor and materials will be furnished to provide the most efficient pest control and maximum safety required by federal, state and city regulations." A breach of that duty could give rise to a breach of contract cause of action, but the Kaltmans chose not to assert any breach of contract claim for their alleged damages. No purpose is served by affording the Kaltmans the opportunity to assert tort claims that could and should have been brought in contract. Nor are tort remedies needed to pursue personal injury or emotional distress damages that are not sufficiently alleged and that cannot be recovered in this case. In addition, the Court should not by its ruling alter the dismissal of the Kaltmans' claims for loss of use and enjoyment, and for lost income, which they have failed to appeal. Finally, the Kaltmans' Complaints merely alleged that Harrison failed to clean his equipment after applying a

pesticide in an approved manner at a commercial establishment, which cannot support a claim for "willful and wanton conduct" or punitive damages even *if* tort principles were somehow applied.

STANDARD OF REVIEW

This court reviews *de novo* a circuit court's decision to sustain a demurrer. Abi-Najm v. Concord Condominium, LLC., 280 Va. 350, 356-57, 699 S.E.2d 483, 486-87 (2010); Mark Five Const., Inc. ex rel. Am. Econ. Ins. Co. v. Castle Contractors, 274 Va. 283, 287, 645 S.E.2d 475, 477 (2007). In reviewing a judgment sustaining a demurrer, this Court is "required to address the same issue that the trial court addressed, namely whether the [complaint] alleged sufficient facts to constitute a foundation in law for the judgment sought, and not merely conclusions of law." Hubbard v. Dresser, Inc., 271 Va. 117, 122, 624 S.E.2d 1, 4 (2006), citing Moore v. Jefferson Hospital, Inc., 208 Va. 438, 440, 158 S.E.2d 124, 126 (1967). When reviewing the trial court's judgment, the Court will determine "whether a plaintiff's factual allegations are sufficient to state a cause of action." Almy v. Grisham, 273 Va. 68, 76, 639 S.E.2d 182, 186 (2007). To survive a demurrer, a pleading must be made with "sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." Moore v. Jefferson Hosp., Inc., 208 Va. 438, 440, 158 S.E.2d 124, 126

(1967). “In other words, despite the liberality of presentation which the court will indulge, the motion must state a cause of action.” Id.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY SUSTAINED THE DEMURRERS TO NEGLIGENCE (COUNTS ONE, TWO AND THREE).

Since Defendants’ duties arose from the contract for pest control services, the Kaltmans could not maintain an action for negligence against AAPC or its employee.

In Richmond Metro. Auth. v. McDevitt Street Bovis, Inc., 256 Va. 553, 507 S.E.2d 344 (1998), this Court upheld the distinction between negligence and contract. The Court affirmed the dismissal of tort claims against a builder of a baseball stadium, holding that the allegations were “nothing more than allegations of negligent performance of contractual duties and are, therefore, *not actionable in tort*.” Id., 256 Va. at 559 (emphasis supplied). The Court reasoned that “[a] tort action cannot be based solely on a negligent breach of contract.” Id.

This distinction between negligence and contract was upheld in Dunn Constr. v. Cloney, 278 Va. 260, 267, 682 S.E.2d 943, 946, (2009). In Dunn, the plaintiff brought claims of breach of contract, negligence and fraud against a contractor who failed to take any actions to ensure the stability of

the walls constructed at the plaintiff's home. Id. 278 Va. at 265, 682 S.E.2d at 944. Apparently, the trial court dismissed the negligence claim, as this Court's opinion indicates that only breach of contract and fraud were tried. In reversing the lower court's award of punitive damages based on the claim of fraud, the Court held as follows:

> Under the contract, Dunn had a duty to construct the foundation wall in a workmanlike manner according to standard practices. Clearly, the original wall was not constructed in accord with this duty, and Dunn was required to make repairs to bring the wall in compliance with the applicable building code under that same duty. Dunn's false representation that he had made adequate repairs thus related to a duty that arose under the contract. The fact that the representation was made in order to obtain payment from Cloney does not take the fraud outside of the contract relationship, because the payment obtained was also due under the original terms of the contract.

Id. 278 Va. at 268, 682 S.E.2d at 947.

The Court repeated the long-standing rule that, "in order to recover in tort, the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract." Id. 278 Va. at 267, 682 S.E.2d at 946. See also Augusta Mutual Insurance Co. v. Mason, 274 Va.199, 202, 645 S.E.2d 290, 291 (2007) ("Because the only duties allegedly violated by the agent emanate exclusively from the parties' preexisting contractual relationship, we conclude that the insurance company failed to properly state claims for either fraud in the inducement or breach of fiduciary duty.").

The present case is indistinguishable from Richmond Metro, Dunn and Augusta Mutual, in that the Kaltmans, like the plaintiffs in those cases, complained of performance under a contract yet brought their action in tort.[2] The Kaltmans' claim for negligence was based on Harrison's failure to apply the appropriate pesticide during one of the contractually-agreed services.

Indeed, the Kaltmans did not allege that Defendants committed any act or omission unrelated to Defendants' performance under the contract. The application of pesticide inside (and outside) of the Kaltmans' house was the very essence of the parties' contract, and the Kaltmans complain that the Defendants failed to apply the appropriate pesticide.

The Kaltmans erroneously rely upon this Court's recent decision in Abi-Najm v. Concord Condominium, LLC, 280 Va. 350, 699 S.E.2d 483 (2010), to support their contention that they could assert negligence claims notwithstanding that the pesticide application was performed pursuant to contract. In Abi-Najm, the plaintiffs brought suit for breach of contract,

[2] The Kaltmans misconstrue the Court's statement that "Dunn's conduct in failing to construct the wall initially could be attributed to negligence" as support for their claim that Defendants' conduct in failing to apply the appropriate pesticide can support a claim for negligence. When the Court's statement is actually reviewed in context, it is clear that the Court was merely contrasting Dunn's *negligent* performance of the contract with his *intentional* act of making misrepresentations, *i.e.* the basis for the fraud claim.

fraud in the inducement, and violation of the Virginia Consumer Protection Act, Va. Code Ann. § 59.1-196 *et seq*., as a result of alleged defective flooring in the plaintiffs' condominium units. As described by this Court's opinion, the complaint filed by the plaintiffs in Abi-Najm did not assert any negligence claim. By contrast, the Kaltmans declined to assert any claim for breach of contract, opting instead to assert a negligence claim.

This Court in Abi-Najm distinguished cases such as Dunn Construction, Augusta Mutual, and Richmond Metropolitan Authority, noting that in Abi-Najm the plaintiffs alleged that the defendants committed an intentional fraud "*before* a contract between the two parties came into existence…." (Emphasis in original). In the present case, the Kaltmans do not allege that the Defendants committed any fraud or other tort *before* entering into the contract for pesticide services.[3] On the contrary, the Kaltmans made no complaint about the AAPC's pre-contract conduct, and they affirmatively alleged that they were satisfied with AAPC's performance under the contract for the ten years prior to the October 23, 2006 pesticide application.

In addition, the plaintiffs' assertion of a claim under the Virginia Consumer Protection Act in Abi-Najm is not akin to the Kaltmans' reliance

[3] The Kaltmans did not allege any fraud on the part of AAPC or Harrison.

upon the Virginia Pesticide Control Act, Va. Code Ann., § 3.2-3900 *et seq.*, in the present case. Indeed, the Consumer Protection Act expressly provides a private right of action for actual damages. See Va. Code Ann. § 59.1-204. By contrast, the Virginia Pesticide Control Act contains no such private right of action.

The Kaltmans also quote from this Court's decision in McClanahan v. California Spray-Chemical Corp., 194 Va. 842, 852-53, 75 S.E.2d 712 (1953). In McClanahan, the plaintiffs alleged that the manufacturer of an orchard spray failed to provide any warning as to the dangers of the spray, which damaged the plaintiffs' apple orchard. Unlike the pesticide that was applied at the Kaltmans' residence, the orchard spray was merely sold to the plaintiffs whose workmen mixed and applied the solution on the apple trees. There was no pesticide service contract in McClanahan which established any contractual duty on the part of the defendant manufacturer to provide the warnings required by the statute at issue. Unlike the present case, McClanahan was a product liability action, in which negligence may be asserted as a cause of action under established caselaw.

By contrast, AAPC's contract with the Kaltmans expressly provided that "[a]ll labor and materials will be furnished to provide the most efficient pest control and maximum safety required by federal, state and city

regulation." [JA 54]. As a result, AAPC undertook a contractual duty to provide efficient and safe pesticides. The Kaltmans' argument that they need to resort to tort law because the parties' contract does not supply the requisite duty is therefore based on a false premise.

The Kaltmans also erroneously argue that they were not seeking economic damages in this case. See Brief of Appellant, p. 14. In fact, the Kaltmans alleged that they incurred substantial "remediation" expenses as a result of the pesticide application, and those damages were the only ones still alive when the Kaltmans moved for nonsuit following the Circuit Court's dismissal of their claim for loss of use and enjoyment.

Likewise, the Kaltmans mistakenly argue that Harrison's licensure status supports their purported right to assert a negligence claim against AAPC and Harrison. On the contrary, the duty to apply the appropriate pesticide as required by the parties' contract exists whether the technician was licensed or not. If Harrison had been licensed in Virginia at the time of the application, his failure to apply an appropriate pesticide would presumably constitute a breach of the parties' contract. Indeed, the license requirement is administrative in nature, so that the failure of a technician to administer pesticides in Virginia without a Virginia license gives rise to an administrative fine or sanction, not a civil cause of action. See Va. Code

Ann. § 3.2-3940. The violation of such a licensing statute is simply not relevant to the determination of fault in a civil action for damages. See, e.g., Duncan v. Hixon, 223 Va. 373, 375, 288 S.E.2d 494, 495 (1982).

Moreover, by statute in Virginia, the Commissioner of Agriculture and Consumer Services may issue a certificate upon a written application, Va. Code Ann. § 3.2-3930, or on a reciprocal basis to any pesticide applicator who is licensed or certified in another state, Va. Code Ann. § 3.2-3934.[4] In the present case, the Kaltmans did not allege that Harrison's failure to obtain a Virginia certification prior to his service call at the Kaltmans' residence on October 23, 2006 was anything more than an administrative oversight.

The Kaltmans also sought to impose vicarious liability against AAPC for the alleged "negligence" of Harrison. Since AAPC is not liable in tort for its alleged breach of contract caused by its employee's action, then it cannot be liable in tort for vicarious liability for the same employee's action.

[4] Harrison was licensed in Maryland at the time of pesticide application at the Kaltmans' residence, he was entitled to obtain a Virginia license by reciprocity, and he in fact obtained his Virginia license after October 23, 2006, but the Kaltmans' Complaints conveniently failed to mention those facts.

For all of these reasons, the Circuit Court properly sustained the Demurrers to the Kaltmans' claims for negligence (Counts One, Two and Three).

II. THE CIRCUIT COURT PROPERLY SUSTAINED THE DEMURRERS TO NEGLIGENCE *PER SE* (COUNTS TEN AND ELEVEN).

Counts Ten and Eleven of the Kaltmans' Complaint purported to assert causes of action against AAPC and Harrison for negligence *per se*, based on the alleged violation of Virginia Code § 3.1-249.64. That section, which has been repealed and replaced by § 3.2-3939, prohibited the use of a pesticide in a manner inconsistent with its labeling.

Negligence *per se* does not subvert the distinction between contract and tort, nor does it transform a contract action into one for tort. As noted above, the Kaltmans could not maintain a negligence action against AAPC and Harrison for what amounts to a breach of contract, so they likewise could not have asserted a claim for negligence *per se*.

The first case cited by the Kaltmans in their discussion of negligence *per se* is Abi-Najm v. Concord Condominium, LLC, supra. However, the plaintiffs in that case did not assert any claim for negligence or negligence *per se*. Rather, the plaintiffs asserted claims for breach of contract, fraudulent inducement, and violation of the Virginia Consumer Protection

Act. As noted above, the Virginia Consumer Protection Act expressly provides a private right of action for actual damages, see Va. Code Ann. § 59.1-204, whereas the Virginia Pesticide Control Act does not.

The Kaltmans also cite McGuire v. Hodges, 273 Va. 199, 639 S.E.2d 284 (2007). However, that case did not involve damages allegedly resulting from breach of duties assumed by contract, as in the present case. In McGuire, the mother of a toddler brought a wrongful death action against a homeowner who failed to secure a gate to the backyard swimming pool. The toddler apparently walked through the unlocked gate and drowned in the swimming pool. The Court held that the homeowner's violation of the building code, setting specific standards for fences and gates around swimming pools, constituted negligence *per se*. In the present case, by contrast, the Kaltmans entered into a contract with AAPC, which contractually agreed to apply pesticide that was safe and efficient.

Moreover, negligence *per se* would not constitute a separate cause of action, even *if* a negligence cause of action could be asserted. See, e.g., Talley v. Danek Medical, Inc., 179 F.3d 154, 158 (4th Cir. 1999) ("But the negligence per se doctrine does *not* create new causes of action. Rather, it recognizes a legislatively created standard of care 'to be exercised where

there is an underlying common-law duty.'"), quoting Williamson v. Old Brogue, Inc., 232 Va. 350, 350 S.E.2d 621, 624 (1986).

In addition, the Kaltmans failed to allege facts establishing that the alleged statutory violation was the proximate cause of their alleged injuries. See McGuire v. Hodges, 273 Va. at 206 ("[A] mere breach of a particular duty imposed by statute does not make the violator guilty of actionable negligence, which will support a recovery for damages unless such violation was the proximate cause of the injury.'"), quoting Hamilton v. Glemming, 187 Va. 309, 317, 46 S.E.2d 438, 442 (1948). Rather, the only damages that the Kaltmans expressly allege in Counts Ten and Eleven as having been caused by the purported statutory violation were certain medical conditions for which the Kaltmans do not claim ever to have received medical treatment or medical opinion.

The Kaltmans erroneously argue that the licensing provision of Virginia Code Ann. § 3.1-249.52 (now Virginia Code Ann. § 3.2-3930) also provides a basis for their negligence *per se* claims. However, Counts Ten and Eleven of their Complaints made no such allegation, and those particular counts did not cite that provision as a basis for negligence *per se*. In any event, as argued above, any violation of the licensing requirement by

Harrison would not be relevant to determining fault in connection with the pesticide application on October 23, 2006.

For all of these reasons, the Circuit Court properly sustained the Demurrers to the Kaltmans' claims for negligence *per se* (Counts Ten and Eleven).

III. THE CIRCUIT COURT PROPERLY SUSTAINED THE DEMURRERS TO WILLFUL AND WANTON CONDUCT (COUNTS FOUR AND FIVE).

Counts Four and Five of the Kaltmans' Complaints purported to assert a cause of action against AAPC and Harrison for "willful and wanton conduct", also described in those counts as a cause of action for "a reckless disregard of Plaintiff's rights".

"Willful and wanton conduct" is the heightened degree of conduct that must be shown in order for a plaintiff to recover punitive damages, where such damages are otherwise recoverable. See, e.g., Bowers v. Westvaco Corp., 244 Va. 139, 150, 419 S.E.2d 661, 668 (1992). However, this Court has held that a party must prove "an independent, willful tort, beyond the mere breach of a duty imposed by contract, as a predicate for an award of punitive damages, regardless of the motives underlying the breach." Kamlar Corp. v. Haley, 224 Va. 699, 707, 299 S.E.2d 514, 518 (1983).

The Kaltmans did not allege any facts that would suggest anything more than an inadvertent oversight by Harrison when going from a commercial job to a residential job. As noted above, the Kaltmans alleged that Harrison "fail[ed] to thoroughly clean his pesticide application equipment before coming to their home …." [JA 14, 33]. As a result, the pesticide in Harrison's tank included a product that was approved for use in all indoor commercial establishments, including restaurants, hotels, etc., but not private homes. The Kaltmans do not allege any facts to suggest that Harrison intended to cause any harm to the Kaltmans or their property.

The Kaltmans cite three cases in support of their claim for willful and wanton conduct. In one of those cases, this Court affirmed the trial court's decision to strike a plaintiff's claim for willful and wanton conduct, even though the Court found sufficient evidence of gross negligence. See Green v. Ingram, 269 Va. 281, 608 S.E.2d 917 (2005). In that case, a police officer shot his gun through a door when attempting to gain entrance to a suspected drug house. The Court held that "[t]he plaintiff's evidence does not rise to the level where a reasonable jury could find that Ingram had conscious awareness of the danger, and probable consequences of his actions, and recklessly decided to proceed notwithstanding that awareness." Id., 269 Va. at 293.

Similarly, in the present case, the Kaltmans do not allege any facts that would permit a reasonable jury to find that Harrison had "conscious awareness" of a danger and probable consequences of his actions, and that he recklessly decided to proceed notwithstanding that awareness. As noted, the Kaltmans alleged that Harrison failed to "thoroughly clean" his tank after he used it in an approved manner at the Ritz Camera Center. [JA 14, 33].

In the other two cases cited by the Kaltmans, there was ample evidence of actual or constructive consciousness on the part of the defendants that injury would result from their actions. See Alfonso v. Robinson, 257 Va. 540, 514 S.E.2d 615 (1999) (sufficient evidence of willful and wanton negligence where truck driver "consciously elected to leave the disabled truck in a travel lane of an interstate highway without placing any warning devices behind it."); Hamilton Development Co. v. Broad Rock Club, Inc., 248 Va. 40, 445 S.E.2d 140 (1994) (credible evidence to support punitive damage award in trespass action where the defendant development company, ignoring repeated warnings that the plaintiff owned the property, cleared trees and carried away timber and soil from the plaintiff's property, and even took steps to record a deed

purporting to grant title to the property without having performed a title examination).

The Kaltmans erroneously argue that Harrison's purported "falsification" of a work order, noting the use of an appropriate pesticide, "indicates Harrison knew his conduct probably would cause injury to the Kaltmans." See Brief of Appellants, p. 19. Their argument is a complete *non sequitur*. Assuming that Harrison erroneously noted that he had used an appropriate pesticide for indoor private home use, any such notation does not suggest conscious awareness on Harrison' part that the Kaltmans would suffer any "injury". Indeed, since Harrison could lawfully spray the pesticide in a restaurant or hotel without concluding that it would injure any patrons, it is illogical to presume that he "knew" that the pesticide would "injure" the Kaltmans.

The Kaltmans further argue that "All American's conduct in authorizing and instructing its unlicensed employee technicians to apply commercial pesticides in violation of [statutes] support the conclusion that All American's conduct was willful and wanton." See Brief of Appellants, p. 20. However, the Kaltmans' Complaints failed to allege any facts supporting their conclusory statement that AAPC "authorized" and "instructed" Harrison to apply Orthene in the Kaltmans' home. As noted above, the

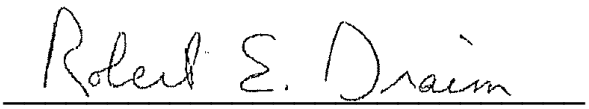
Kaltmans alleged that Harrison failed to "thoroughly clean" his equipment after applying pesticide at a commercial establishment. The Kaltmans do not allege that AAPC "authorized" and "instructed" Harrison to use the same pesticide without cleaning his equipment. The facts alleged in the Complaints simply do not support any such conspiracy theory.

For all of these reasons, the Circuit Court properly sustained the Demurrers to the Kaltmans' claims for willful and wanton conduct (Counts Four and Five).

CONCLUSION

For the foregoing reasons, the Circuit Court did not err in sustaining the Demurrers to Counts 1-5 and 10-11 of the Complaints. The Court should affirm the judgment and decline the Kaltmans' request that those counts be "reinstated" and remanded.

Respectfully Submitted,



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CERTIFICATE

Pursuant to Rule 5:26(h), I hereby certify that:

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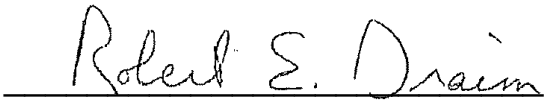
2. I do hereby certify that fifteen (15) bound copies, with one (1) electronic copy on CD, of the foregoing Brief of Appellees have been hand-filed with the Clerk of their Court, and that three (3) bound copies, with one (1) electronic copy on CD, of the same have been served, via UPS Ground Transportation, to opposing counsel, this the 19th day of November, 2010.

3. The Brief contains 5,791 words.



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