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 APPELLANTS

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STATEMENT OF THE CASE and MATERIAL PROCEEDINGS

Alvin and Gwendolyn Kaltman (Kaltmans) request that this Court reverse the judgment of the Circuit Court of Fairfax County. The trial court sustained a demurrer to seven of the eleven counts in their complaints. Those seven counts sought recovery in negligence, negligence *per se*, and willful and wanton negligence.

The Kaltmans hired All American Pest Control, Inc. (All American) to treat their home and prevent pest infestation. The Kaltmans each filed their complaints on September 5, 2008, seeking recovery against All American and its employee, Patric J. Harrison (Harrison), for breaches of duties to exercise that degree of care of a reasonably prudent pest control company and technician and for application of a pesticide to the interior of their home in violation of the labeling of the product and in violation of the Code of Virginia. As a result of the application of the pesticide, the Kaltmans sustained significant damages, including but not limited to the loss of use and enjoyment of their home for approximately eleven months, physical and emotional injuries, and property damage.

All American and Harrison filed Motions to Crave Oyer of the service contract between the Kaltmans and All American and demurred to each count asserting, among other theories that Defendants' only duties arose

from the contract for pest control services. [JA 50, 56]. The Court granted the Motions to Crave Oyer on November 21, 2008. [JA 130]. The cases were consolidated by Consent Order dated November 21, 2008. [JA 131].

The parties briefed and argued their positions on the demurrers and on December 5, 2008, the circuit court erroneously sustained the demurrers to Counts 1, 2, 3, 4, 5, 10, and 11, which sought recovery in negligence, negligence *per se,* and willful and wanton conduct. [JA 188-189]. The order correctly overruled the demurrers to Counts 6-9, which alleged negligent infliction of emotional distress and nuisance. [JA 189].

After the Defendants answered, the parties engaged in discovery and trial was set to begin on August 3, 2009; but the Kaltmans nonsuited their cases and the court entered an Order of Nonsuit. [JA 194]. At All American's request, the Court entered a Suspending Order on August 18, 2009, suspending the finality of the Court's Order of Nonsuit until a ruling was made on Defendant's Motion to Assess Expert Witness Fees in connection with Va. Code § 8.01-380(C). [JA 195]. On September 25, 2009 the Court entered a Consent Order, which referenced the suspending order, disposed of the Motion to Assess Expert Witness Fees, and is the final order in the case. [JA 197-198]. Plaintiffs timely filed their Notice of Appeal on October 2, 2009.

On April 2, 2010, this Court initially dismissed, without prejudice, the Kaltmans' Petition for Appeal indicating the order appealed from was not a final, appealable order. Thereafter, the Court granted the Kaltmans' Petition for Rehearing.[1] The Court then granted the Kaltmans an appeal but refused the appeal as to the appellees' assignments of cross-error. [September 15, 2010].

FACTS

As Counts 1-5 and 10-11 were dismissed on demurrer, and there has been no hearing to determine the merits of the suit, the facts are set forth as alleged in the complaint.

The Kaltmans hired All American to treat their home and prevent pest infestation. On the date of the pesticide application, its employee, Harrison, was not licensed as a pesticide technician by the Commonwealth of Virginia. [JA 2, 21].

On October 23, 2006, Harrison applied Orthene dilution as a fan spray to the baseboards and adjoining floor surfaces through out the Kaltmans' home, including the untreated, porous concrete surfaces in the

[1] The Petition for Rehearing clarified that the order sustaining the demurrer was a final appealable order consistent with this Court's determination in the similar case of *Dalloul v. Agbey*, 255 Va. 511, 515, 499 S.E.2d 279, 282 (1998)(holding that where some counts were dismissed via demurrer and the remaining counts were later nonsuited, an appeal would lie as to those counts eliminated by demurrer.).

basement and garage. As the pesticide was being applied the Kaltmans complained to Harrison about the unusual and extraordinarily pungent odor and were told the smell would dissipate. Later that day the Kaltmans called the owner of All American to report their concern about the overwhelming stench and were told that Harrison had applied an inappropriate pesticide. The noxious fumes remained in the home and the Kaltmans were forced to leave their home and live elsewhere until the condition could be remediated. [JA 2-3, 21-22].

Thereafter at the request of the Kaltmans, the Virginia Department of Agriculture and Consumer Services (VDACS) performed analyses which revealed concentrations of acephate, a key toxic ingredient in Orthene PCO Pellets ranging from 1.4 micrograms to 363 micrograms. The Material Safety Data Sheet for Orthene PCO Pellets included the following: “This product is not for indoor residential use”...“is for use in places other than private homes” and “do not treat unpainted masonry floors in poorly ventilated areas such as garages or basements …since persistent odor could develop.” [JA 4, 23].

During the investigation by VDACS, Harrison admitted he applied Orthene dilution as a fan spray and that he falsified the work order by

documenting instead that he applied Demand CS and Talstar PC pesticides. [JA 4, 23].

All American's agents advised that Orthene PCO Pellets pesticide did not present a health hazard. However, exposure to acephate is known to cause irreversible nerve damage and to cause cancer in laboratory animals. The Kaltmans made more than a dozen attempts to eradicate the odor by washing the treated surfaces on their hands and knees without any protective equipment, but high concentrations remained 24 days after the Orthene was applied. [JA 5, 24].

Ninety days after application and after the treated surfaces had been washed more than twenty-four times the acephate levels still remained high and were twice the EPA's recommended limit for pesticide technicians working with a respirator during an eight hour shift. As a result of exposure to the pesticide, the Kaltmans sustained personal injury, their home was uninhabitable for nearly a year, and they incurred the expense of remediating the damage to their home and personal effects. [JA 3, 5, 22, 24].

ASSIGNMENTS OF ERROR

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 objection to the trial court's error in sustaining the demurrers to Counts 1-5 and 10-11. [JA 133-144, 190].

STANDARD OF REVIEW

Because a decision to grant a demurrer involves issues of law, this Court reviews the circuit court's decision *de novo*. *Abi-Najm v. Concord Condominium, LLC*, 2010 Va. LEXIS 229, 7 (2010)(citing *Augusta Mutual Ins. Co. v. Mason*, 274 Va. 199, 204, 645 S.E.2d 290, 293 (2007).

When this Court reviews a judgment sustaining a demurrer, it confines its analysis to the facts alleged in the pleadings. *Van Deusen v. Snead*, 247 Va. 324, 324, 441 S.E.2d 207, 208 (1994). The familiar principles applicable to resolving a demurrer instruct that a "demurrer admits the truth of all properly pleaded material facts" and that all

"reasonable factual inferences fairly and justly drawn from the facts alleged must be considered in aid of the pleading," but conclusions of law are not admitted. *Kellermann v. McDonough*, 278 Va. 478, 484, 684 S.E.2d 786, 788 (2009).

SUMMARY OF ARGUMENT

The facts alleged are sufficient to state claims for negligence, negligence *per se,* and willful and wanton conduct. Simply because there was a service agreement does not convert the tort claims brought by the Kaltmans into claims arising out of breach of the service agreement. The Kaltmans may seek redress in tort for Defendants' violations of "common law and statutory duties involving the safety of persons and property." *Abi-Najm v. Concord Condominium, LLC*, 2010 Va. LEXIS 229, at 14 (2010). The duties the Kaltmans allege that Defendants breached arose independent of the service agreement.

ARGUMENT

The complaints allege an occurrence that gives rise to an action in negligence. *Abi-Najm v. Concord Condominium, LLC*, 2010 Va. LEXIS 229, at 15 (2010)(recognizing that an act can give rise to breach of contract and breach of a tort duty). As a matter of law, the Kaltmans are entitled to sue in tort for the loss suffered as a result of the breach by All American

and Harrison of their duties arising from common law and statutes and to recover traditional tort damages, including," if "appropriate, punitive damages." *Dunn Construction Co. v. Cloney*, 278 Va. 260, 266-267, 682 S.E.2d 943, 946 (2009).

I. The Court Erred in Sustaining the Demurrer to Counts One, Two, and Three – Negligence

Count One alleges All American's breach of its duty to exercise the skill and diligence of a reasonably prudent pest control company at the time it had the pesticide applied in the Kaltmans' home. All American breached the applicable standard of care by authorizing and allowing Harrison to engage in pesticide application on its behalf even though he did not have the required commercial pesticide certification. All American was negligent and breached the standard of care in authorizing and allowing Harrison, who was not registered as a pest control technician in the Commonwealth, to perform pest control services in Virginia. Finally, the count alleges their negligence was a proximate cause of the Kaltmans' injuries. [JA 6, 25].

Count Two alleges All American is liable *respondeat superior* for the negligence of its employee, Harrison, who was acting within the scope of his employment and breached the standard of care: 1) by failing to adhere to proper pesticide application technologies; and 2) by improperly applying a pesticide (Orthene PCO Pellets) that is not licensed or approved for use

in a residence. As a proximate result the Kaltmans sustained damages. [JA 6-7, 25-26]

Count Three alleges Harrison was negligent in that he had a duty to exercise the degree of skill and diligence of a reasonably prudent pest control technician, but he breached the standard of care. It is alleged he failed to adhere to and use proper pesticide application techniques; he improperly applied pesticides that are not licensed or approved for use in a residential setting; he applied commercial pesticide without first having obtained a commercial pesticide certification; and his negligence was a proximate cause of the Kaltmans' injuries. [JA 8, 27].

On demurrer, citing *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998), Defendants asserted the Kaltmans had no cause of action for negligence because Defendants' duties arose from the contract for pest control services. In response, the Kaltmans argued that independent of the service agreement, the Defendants were required to exercise prudence in their application of pesticides to the Kaltmans' home by virtue of duties imposed both by common law and statute and Defendants' failure to comport with these duties provided the Kaltmans an action in tort for the damages they sustained.

The elements that must be shown to establish negligence are the existence of a duty, breach of that duty, and damages proximately caused by the breach. *Atrium Unit Owners Ass'n v. King*, 266 Va. 288, 293, 585 S.E.2d 545, 548 (2003). Counts 1-3 state causes of action for negligence as the allege facts establish the required elements.

Whether the factual allegations establish that All American had a duty to use reasonable care in providing pest control services is a question of law. *Thompson v. Skate America, Inc.*, 261 Va. 121, 128, 540 S.E.2d 123, 127 (2001). The law determines whether there is a duty "and the jury, upon the evidence, determines whether the duty has been performed." *Id.* The duty "breached must be a common law duty, not one existing between the parties solely by virtue of the contract." *Dunn Construction Co v. Cloney*, 278 Va. at 267, 682 S.E.2d at 946; *Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998).

Where personal injury and property interests are threatened, a duty in negligence has been found. Tort law redresses "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." *Abi-Najm v. Concord Condominium, LLC*, 2010 Va. LEXIS 229, at 14 (quoting *Filak v. George*, 267 Va. 612, 618, 594 S.E.2d 610, 613 (2004)).

> A duty to use ordinary care and skill is not imposed in the abstract. It results from a conclusion that an interest entitled to protection will be damaged if such care is not exercised. Traditionally, interests which have been deemed entitled to protection in negligence have been related to *safety* or freedom from physical harm. Thus, where personal injury is threatened, a duty in negligence has been readily found. Property interests also have generally been found to merit protection from physical harm.

Blake Const. Co., Inc. v. Alley, 233 Va. 31, 34-35, 353 S.E.2d 724, 726 (1987).

All American and Harrison were in the business of pest control. As with other specialized businesses and professions, there are standards that determine the required degree of care and diligence that must be met by a reasonably prudent pest control company and pest control technician in performing the services. And where a dangerous agency, such as an insecticide, is involved, "the common law requires a higher degree of care and vigilance . . . than is required in the ordinary affairs of life . . . which involve small risk of injury." *McClanahan v. California Spray-Chemical Corporation*, 194 Va. 842, 852-3, 75 S.E.2d 712, 718 (1953). The Kaltmans' actions rest in tort arising from violations of duties imposed by common law and statutes. As such, their claims are not predicated upon

the service agreement.[2] Similarly, they are not actions for fraud in connection with the negligent performance of a contractual duty as was present in the *Dunn Construction Co.* case.

This Court's decision in *Dunn Construction Co.* is further instructive. In *Dunn Construction Co.*, the defendant failed to build the foundation wall of Cloney's house in accordance with standards required by the building code and the wall cracked. Defendant then told plaintiff he had remedied the defects by filling the cinder blocks with rebar and cement, but the work had not actually been done. Based on that representation Cloney paid Dunn the amount due under the contract. The case was submitted to the jury on the issues of breach of contract, negligence, fraudulent representations, and punitive damages. The trial court entered judgment

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[2] The Pest Control Service Agreement, which was <u>not</u> signed by the Kaltmans or by Defendant Harrison, provided:

> Pests to be Controlled:
>
> > Silverfish, small ants, crickets, spiders, millipedes, German roaches, American roaches, oriental roaches and mice.
>
> Special Instructions:
>
> > Service is to be performed four (4) times per year at Three (3) month intervals. A Thirty day guarantee will follow each treatment. A $25.00 service charge will be billed for services in between regular services but after the thirty day guarantee.
>
> We agree to apply chemicals to control above-named pests in accordance with terms and conditions of this Service Agreement. All labor and materials will be furnished to provide the most efficient pest control and maximum safety required by federal, state and city regulations. [JA 54].

on the jury's verdict, which included an award of punitive damages for the fraudulent representation regarding the repair to the foundation wall.

The issue on appeal was whether Dunn's fraudulent act was "independent of the contractual relationship between Dunn and Cloney such that Cloney could maintain an action both for breach of contract and fraud." *Dunn Construction Co. v. Cloney*, 278 Va. at 682 S.E.2d at 946. This court held it was not, because the duty tortiously breached, was one arising out of the contract, not out of common law.

> 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.

Dunn Construction Co., 278 Va. at 268, 682 S.E.2d at 947.

Nevertheless, the Court observed that "Dunn's conduct in failing to properly construct the wall initially could be attributed to negligence." *Dunn Construction*, 682 S.E.2d at 947. Similarly here, ". . . [All American's] conduct in failing to properly . . . [apply the appropriate pesticide] could be attributed to negligence."

In further contrast to the Kaltmans' case, the recoveries sought in the *Dunn Construction Co.* and the similar *Richmond Metropolitan Authority* cases involved pecuniary loss sustained as a result of the breach of the contract. The law of contracts provides the remedy for such economic losses. *Abi-Najm v. Concord Condominium, LLC*, 2010 Va. LEXIS 229 at 13-14). Had the foundation wall built by Dunn collapsed and injured Cloney before the unsafe condition of the foundation wall was discovered, clearly Cloney would have been entitled to recover for his personal injuries and damage to his personal effects.

Importantly, unlike *Dunn Construction Co. and Richmond Metropolitan Authority*, the Kaltmans' claims do not involve claims for economic loss arising out of fraudulent misrepresentations in connection with contractual duties. This distinction is significant. The Kaltmans are not seeking recovery for damage caused by a failure of All American and Harrison to control pest infestation or treat their home for pest infestation pursuant to the service agreement. Rather in the instant case, the Kaltmans are claiming personal injury and emotional distress suffered by the plaintiffs and damage to their property resulting from improperly applied, unsafe pesticides in violation of duties imposed by the common law and statutes.

II. The Court Erred in Sustaining the Demurrer to Counts Ten and Eleven – Negligence *Per Se*

As alleged in the complaint, Harrison violated two statutes when, without required commercial pesticide certification and without being registered in Virginia as a pest control technician, he applied a commercial pesticide in a residential home in a manner inconsistent with its labeling. Va. Code § 3.1-249.52 and Va. Code § 3.1-249.64. All American is alleged to be liable for authorizing its uncertified and unregistered employee to apply commercial pesticide. [JA 6, 25]. All American is also alleged to be liable, *respondeat superior*, based on Harrison's violation of the statute prohibiting application of any pesticide inconsistently with its label. [JA 6-7, 25-26].

> A. No person shall, in exchange for compensation of any kind . . . use, except under supervised conditions of training for certification, or supervise the use of any pesticide without first obtaining certification as either a commercial applicator or registered technician in accordance with regulations promulgated by the Board. . . .
>
> B. The Commissioner shall not issue a commercial applicator's or registered technician's certificate until the individual who uses or supervises the use of any pesticide is certified by (i) presenting proof of completion of a training course approved by the Board and appropriate to the desired classification and (ii) passing a written examination.

Code § 3.1-249.52.

> It shall be unlawful for any person to use or cause to be used any pesticide in a manner inconsistent with its labeling or regulations of the Board. . . .

Code § 3.1-249.64.

Importantly and clearly on point is this Court's recent determination that 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 16-17 (holding 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.). As in the *Abi-Najm* case, here, the applicable statutes impose duties on All American and Harrison separate and apart from the contract. Their violations of the statutes constitute negligence *per se*.

"The doctrine of negligence *per se* represents the adoption of 'the requirements of a legislative enactment as the standard of conduct of a reasonable [person].'" *McGuire v. Hodges*, 273 Va. 199, 206, 639 S.E.2d 284, 288 (2007) (quoting *Butler v. Frieden*, 208 Va. 352, 353, 158 S.E.2d 121, 122 (1967)). The elements of duty and breach are supplied by a violation of such a statute. *McGuire*, at 199,

206, 639 S.E.2d at 288. A plaintiff need not establish common law negligence; rather the plaintiff must show that the defendant violated a statute enacted for public safety, that plaintiff belongs to the class of persons for whose safety the statute was enacted, that the harm plaintiff sustained was the type against which the statute was designed to protect, and that the violation proximately caused the injury. *McGuire*, at 206, 639 S.E.2d at 288 (citing *Halterman v. Radisson Hotel Corp.*, 259 Va. 171, 176-77, 523 S.E.2d 823, 825 (2000); *Virginia Elec. & Power Co. v. Savoy Constr. Co.*, 224 Va. 36, 45, 294 S.E.2d 811, 817 (1982)).

The violation of Virginia's statute relating to the requirement of label warnings for insecticides and pesticides is negligence *per se*. *McClanahan v. California Spray-Chemical Corporation*, 194 Va. at 852, 75 S.E.2d at 718. The statute, Code § 3.1-249.64, prohibiting the application of pesticide in a manner contrary to its labeling, was enacted for public safety. The pesticide Orthene is a dangerous poison capable of causing physical injury to humans when applied in a manner inconsistent with its labeling. The purpose of legislation regulating agents like pesticides is "the need to provide the particular consumer and the general public with a higher and

surer degree of protection than is afforded by exclusive recourse to common-law remedies." *McClanahan*, at 851, 75 S.E.2d at 717-718.

The Kaltmans are also members of the class of persons for whose benefit Code § 3.1-249.64 was enacted. The injuries they sustained were precisely the danger the statute sought to prevent and the misapplication of Orthene in their home proximately caused their injuries and damages they allege.

Additionally, Code § 3.1-249.52, which regulates who is authorized to apply pesticides, furthers the legislature's intent to protect the public from the dangers arising from the application of pesticides by those who have not demonstrated adequate knowledge to appreciate the dangers. Harrison's violation of that statute is likewise negligence *per se*.

III. The Court Erred in Sustaining the Demurrer to Counts Four and Five – Willful and Wanton Negligence

"Willful and wanton negligence is action undertaken in conscious disregard of another's rights, or with reckless indifference to consequences with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another." *Green v. Ingram*, 269 Va. 281, 292, 608 S.E.2d 917, 923 (2005) [citations omitted]. "Willful and wanton negligence . . . requires an actual or constructive consciousness that injury will result from the act done or

omitted." *Alfonso v. Robinson*, 257 Va. 540, 545, 514 S.E.2d 615, 618 (1999). Willful and wanton negligence will support an award of the punitive damages sought by the Kaltmans. *Hamilton Development Co. v. Broad Rock Club, Inc.*, 248 Va. 40, 45, 445 S.E.2d 140, 143 (1994).

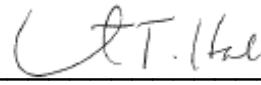
All American and Harrison engaged in an enterprise that involved potential dangers because of the toxic effects of commercial pesticides like Orthene. The inappropriate application of a commercial pesticide involves a significant risk of injury. Harrison, who was not authorized to apply pesticides in Virginia, applied the Orthene in violation of the uses set out in the label. That conduct exhibits a reckless indifference to the consequences of his actions. Harrison knew commercial pesticides were not to be applied to a residence. As alleged in the complaints, Harrison falsified the work order pertaining to the pesticides treatment at the Kaltmans' home to indicate the use of an appropriate pesticide rather than the Orthene he actually applied. [JA 4, 23]. In addition to his other Code violations, his falsification of the record violated Code § 3.1-249.63(C)(1)(f), which prohibits making "false or fraudulent records, invoices or reports relative to the use or application of any pesticide." His falsification of the record indicates Harrison knew his conduct probably would cause injury to the Kaltmans.

Similarly, All American's conduct in authorizing and instructing its unlicensed employee technician to apply commercial pesticides in violation of Code §§ 3.1-249.52 and 3.1-249.64, as well as its violation of Code § 3.1-249.63(C)(1)(f), support the conclusion that All American's conduct was willful and wanton.

CONCLUSION

The circuit court erred when it sustained the demurrers to Counts 1-5 and 10 and 11. Those counts state causes of action for violations of duties independent and not existing by virtue of the contract. The Court should reverse the judgment of the circuit court by reinstating Counts 1-5, 10 and 11, and remand the case for further proceedings and trial.

Respectfully submitted,
Alvin Kaltman
Gwendolyn Kaltman
By Counsel



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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(h) of the Supreme Court of Virginia, Counsel for Appellants, Alvin Kaltman and Gwendolyn Kaltman, certifies that on the 25th day of October, 2010, fifteen bound copies with one electronic copy in PDF format of the Opening Brief of Appellants and Appendix were hand-filed with the Clerk of the Supreme Court of Virginia; and

On that same date the required number of bound copies and one electronic copy on CD of the Opening Brief of Appellants and Appendix were sent by UPS Ground to:

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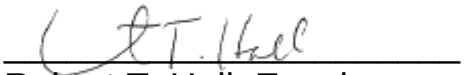

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