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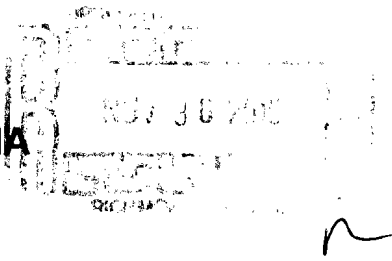

IN THE SUPREME COURT OF VIRGINIA

Alvin Kaltman, et al., Appellants v. All American Pest Control, Inc., et al., Appellees.	Record No. 092541

MOTION TO STRIKE

Appellants Alvin Kaltman and Gwendolyn Kaltman move to strike certain portions of the brief of Appellees All American Pest Control, Inc. and Patric J. Harrison, for the reasons set forth below.

Posture

This Court awarded Appellants an appeal on September 15, 2010. Appellants filed their brief on October 25, 2010, and Appellees filed their brief on November 19, 2010. Appellees intend to file a reply brief within the time permitted by the rules of court.

Argument

This appeal is limited in scope to the trial court's ruling sustaining demurrers to seven counts of the Appellants' eleven-count complaint. [A. 1-38]. This Court awarded Appellants an appeal limited to the issues raised in those seven counts, and the Brief of Appellants contained facts and arguments relating only to those issues.

In contrast, the Appellees' brief addresses numerous issues that are not germane in any way to the assignments of error in this appeal. For example, on pages 1 and 2-3, they discuss issues that were never pleaded in the complaints (breach of contract) and the fact that the complaints were not amended to include breach of contract. On page 3, they address the damages sought on the claims on which their demurrer was overruled (nuisance and negligent infliction of emotional distress), despite the fact that this Court refused an appeal as to Appellees' assignment of cross-error. The Appellees also brief issues relating to discovery disputes and summary judgment rulings relating to the surviving four counts. [Brief at 3-5]. None of these issues are relevant to this appeal.

The Appellees' statement of facts similarly includes references to immaterial matters. For example, at pages 8-10, they maintain that certain arguments were not alleged, or could have been alleged, in the complaint. They also argue the complaints failed to allege the Kaltmans received any medical treatment or that any physician was of the opinion Orthene caused any of their conditions. (Brief page 9). A demurrer tests the sufficiency of the Complaint actually pleaded, not some hypothetical other complaint which may not have been pleaded or contained in amended pleadings. Code § 8.01-273(A). This Court confines its analysis to the facts alleged in

the Complaint. *Van Deusen v. Snead*, 247 Va. 324, 324, 441 S.E.2d 207, 208 (1994).

Their brief also contains recitations that are not supported by the record. On page 8, they cite Appendix pages 4 and 23 for the proposition that the pesticide Orthene is "approved and considered safe for use in all other indoor locations including restaurants, hotels, hospitals, schools, day care centers" and so forth; but those pages contain no such language or portions from which those contentions might be reasonably inferred. Similarly, the footnote on page 9 makes reference to discovery and trial decisions on the counts which survived the demurrer and omits any citation to the record.

Appellees' improper briefing seeks to obscure the only issues actually at stake in this appeal, which are the seven struck counts as pleaded. The Appellees' expansive briefing unnecessarily adds to the Appellants' time and expense in responding to these extraneous matters, and adds to the Court's burden in evaluating the issues to be adjudicated in this appeal.

Conclusion

This court should order that the Brief of Appellees be stricken, or that those portions of it that do not relate to the assignments of error be stricken.

Respectfully submitted,

Alvin Kaltman
Gwendolyn Kaltman
By Counsel

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Counsel for Appellants

CERTIFICATE OF SERVICE

The undersigned counsel certifies that pursuant to Rule 5:4(a)(1), counsel for the Appellees was notified of the intended filing of this motion, and has been informed that the Appellees do not consent to the relief requested herein; and

On the 30th day of November, the original and three copies of this motion were hand-delivered to the Clerk of the Supreme Court of Virginia: and

On that same date one copy was sent by first class mail postage prepaid to:

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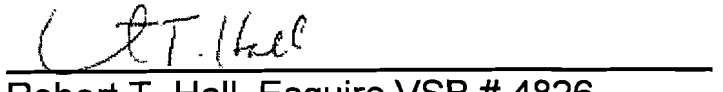

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