In The

Supreme Court of Virginia

RECORD NO. 092541

ALVIN KALTMAN, *et al.*,

Appellants

v.

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

Appellees.

REPLY BRIEF OF APPELLANTS

Robert T. Hall (VSB No. 4826)
Holly Parkhurst Essing (VSB No. 17538)
Gobind S. Sethi (VSB No. 72266)
HALL, SICKELS, FREI & MIMS P.C.
12120 Sunset Hills Road, Suite 150
Reston, Virginia 20190
(703) 925-0500 (Telephone)
(703) 925-0501 (Facsimile)
robert.hall@hallandsickels.com
gobind.sethi@hallandsickels.com
holly.essing@hallandsickels.com

Counsel for Appellants

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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DISCUSSION OF APPELLEES' STATEMENT OF FACTS

The recitation of the Statement of the Case and Material Proceedings in the Appellees' Brief contains discussions of incidents that are not relevant to the issues on 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 despite the fact that this Court refused an appeal as to Appellees' assignment of cross-error. The Appellees also brief issues involving discovery disputes and summary judgment rulings relating to the surviving four counts. (Brief, pg. 3-5). None of these issues are germane to this appeal.

Appellees' brief involves statements of matters which Appellees did not designate as part of the record to be included in the Appendix, and makes unfounded claims that certain matters have the effect of *res judicata*. (Brief, pg. 3-5). The matters Appellees claim are *res judicata* are not involved in a consideration of the granted assignments of error.

Similarly, the Statement of Facts understandably ignores the allegations as to the toxic properties of Orthene, and the injuries and damages caused by its application. Those factual allegations are recited in

Appellants' Statement of Facts on pages 6-8 and in the Complaints. [JA 2-38].

Appellees' Statement of Facts also recites matters not alleged in the Complaint; for example, there are no allegations on the cited pages of the appendix [JA 4, 23], that the pesticide "is approved and considered safe for use in all other indoor locations including restaurants, hotels, hospitals, schools, day care centers . . ." and so forth as argued in Appellees' brief, page 8. Those two Appendix pages contain no such language or portions from which those contentions might be reasonably inferred. Similarly, the footnote on page 9 of Appellees' brief makes reference to discovery and trial decisions on the counts which survived the demurrer and omits any citation to the record.

Additionally their brief claims the Complaints failed to allege the remediation expenses were "reasonably necessary." (Brief, pg. 9). Whether the remedial measures were reasonably necessary is a question of fact for the jury. The brief also asserts that the Kaltmans failed to allege they received any medical treatment or that any physician opined Appellants' conditions were caused by exposure to Orthene. (Brief, pg. 9). Such allegations are not required to adequately state a cause of action for negligence. The Complaints include allegations for each count that as a

direct and proximate result of Defendants' negligence, Plaintiffs were injured and suffered damages; the Damages and Prayer paragraphs specify the damages proximately caused by the Defendants' conduct. [Alvin Kaltman - JA 6, 8, 9,10, 12, 13, 15, 16, 17-19; Gwendolyn Kaltman - JA 27,27,28, 29, 31,32, 34,35,36 -38].

ARGUMENT

Appellees' brief pays lip service to the principle that when this Court reviews a judgment sustaining a demurrer, it 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, however, ignores that principle and improperly argues matters which occurred after the demurrer was sustained. Appellees lose sight of the fact that the demurrer tests only the legal sufficiency of the facts alleged in the complaint, not the strength of proof. *Abi-Najm v. Concord Condominium*, LLC, 280 Va. 350, 356, 699 S.E.2d 483, 486 (2010).

The Appellees fail in their attempt to distinguish this Court's recent decision in *Abi-Najm*, 280 Va. 350, 699 S.E.2d 483. They assert that "the complaint filed by the plaintiffs in *Abi-Najm* did not assert any negligence claim." [Brief, pg. 16]. Their argument misses the point. The economic loss doctrine precludes an action in tort brought "to compensate parties for

losses suffered as a result of a breach of duties assumed only by agreement." *Abi-Najm*, 280 Va. at 360, 699 S.E.2d at 489. The applicability of the economic loss doctrine depends on whether the action sounds in tort or contract. *Id.* at 361, 699 S.E.2d at 489. In finding that the Virginia Consumer Protection Act imposed a statutory duty this Court held that the statutory duty was "not one existing solely by virtue of the contract." *Id.* at 362, 699 S.E.2d at 489. Similarly here, All American and its employee, Harrison, had duties arising by virtue of common and statutory law.

All American argues in vain that the Virginia Pesticide Control Act (Va. Code § 3.1-249.52), is unlike the act involved in *Abi-Najm*, because the Pesticide Act does not specifically provide a private right of action. This Court has consistently recognized that statutes enacted for public safety may support a claim for negligence *per se*. *Schlimmer v. Poverty Hunt Club*, 268 Va. 74, 597 S.E.2d 43 (2004)(violation of statute making it unlawful to recklessly handle a firearm); *MacCoy v. Colony House Builders, Inc.*, 239 Va. 64, 69, 387 S.E.2d 760, 763 (1990)(violation of the building code); *VEPCO v. Savoy Const. Co.*, 224 Va. 36, 45, 294 S.E.2d 811, 817 (1982)(violation of the building code); *McClanahan v. California Spray-*

Chemical Corp., 194 Va. 842, 852, 75 S.E.2d 712, 718 (1953)(violation of the insecticide statute, which is the precursor of the current Pesticide Act).

The Court declared that the purpose of the statutes involved in those cases was the protection of public health and safety. *Schlimmer*, 268 Va. at 79, 597 S.E.2d at 46; *MacCoy*, 239 Va. at 69, 387 S.E.2d at 763; *VEPCO*, 224 Va. at 44, 294 S.E.2d at 817, 75 S.E.2d 712; *McClanahan*, 194 Va. at 851, 75 S.E.2d at 718. The same is equally true here. The pesticide statute provides the "consumer and the general public with a higher and surer degree of protection than is afforded by exclusive recourse to common-law remedies." *McClanahan*, 194 Va. at 851, 75 S.E.2d at 717-718. The criminal penalty imposed by the statute is evidence of the high standard of care required. *Id*. *a*t 852, 75 S.E.2d at 718. It is unlawful for any person to apply a pesticide in a manner inconsistent with its labeling. Va. Code § 3.1-249.64. Violation of any provision of the Pesticide Act was and is a misdemeanor. Va. Code § 3.1-249.70; now Va. Code § 3.2-3947.

All American and Harrison argue Harrison's lack of a Virginia license is simply a violation of an administrative requirement that can not give rise to a civil action, and in support they rely on *Duncan v. Hixon*, 223 Va. 373,

375, 288 S.E.2d 494, 495 (1982). Their reliance on *Duncan* is misplaced in that *Duncan* supports the Kaltmans' position.

In *Duncan*, the Court affirmed the trial court's decision that it was a jury question whether a young driver's violation of a statute (which required a driver with a learner's permit to be accompanied by an adult driver) was a proximate cause of an accident. *Duncan*, 223 Va. at 376, 288 S.E.2d at 495. According to the Court reasonable minds could differ as to whether having an adult in the car could have prevented the accident. Although the Court acknowledged it had held otherwise where evidence <u>at trial</u> indicated the lack of a drivers license was not a proximate cause of the accident as in *White v. Edwards Chevrolet Co*., 186 Va. 669, 43 S.E.2d 870 (1947) and *Laughlin v. Rose*, 200 Va. 127, 104 S.E.2d 782 (1958), the Court did not disturb the jury's verdict that a violation of the statute proximately caused injury to the pedestrian. *Duncan*, 233 Va. at 375, 288 S.E.2d at 495.

The procedural posture of the instant case is starkly different than the cases cited by the Court in *Duncan* and *Duncan* itself in that those cases involved trial proceedings while this case involves a test of the complaints via demurrer. The issue here is simply whether the complaints state causes of action. Whether the lack of Harrison's licensure was simply oversight or reflected his incompetence is a matter of proof to be

determined by evidence presented at trial and which cannot be resolved at the demurrer stage by unsupported contentions of matters admittedly outside the record as for example set out in footnote four on page 19 of Appellees' brief.

Appellees assert that the Kaltmans have not pled injuries proximately caused by the violation of the pesticide Act because they "do not claim ever to have received medical treatment or medical opinion" for the medical conditions alleged. (Brief, pg. 22). Appellees did not raise this argument in the trial court. Nevertheless, the Kaltmans adequately allege proximate cause of their injuries and damages. [Alvin Kaltman - JA 6, 8, 9,10, 12, 13, 15, 16, 17-19; Gwendolyn Kaltman - JA 27,27,28, 29, 31,32, 34,35,36 -38]. In addition, for more than one hundred years this Court has recognized a plaintiff's testimony is sufficient to establish a jury issue as to causation between an incident and injury. *Norfolk & W. Ry. v. Chittum*, 251 Va. 408, 415, 468 S.E.2d 887, 882, (1996) (noting "a plaintiff's testimony alone is sufficient to create a jury issue regarding causation."); *Chesapeake & O. R. Co. v. Hoffman*, 109 Va. 44, 64-65, 63 S.E. 432, 439 (1909).

Finally, in connection with the willful and wanton counts, Appellees wrongly assert that the Kaltmans do not allege facts suggesting anything other than a mere oversight by Harrison in his application of Orthene in the

Kaltmans' home. Oversight is not what is alleged by the Kaltmans; their complaints present Harrison's reckless acts and willful and wanton disregard of their rights by his application of Orthene and the subsequent falsifying of a document to cover up his violation of the Pesticide Act. [JA 9-10; 28-29]. Count Five includes those same allegations and additionally alleges All American authorized and instructed Harrison to apply pesticide without a license and ratified his falsification of the work order. [JA 10-11; 29-31].

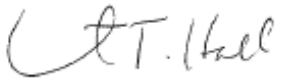
Contrary to the Appellees' assertion, the Kaltmans did not need to allege that Harrison intended to cause harm. (Brief, pg. 24). The standard includes not only "action undertaken in conscious disregard of another's rights" but also action taken "with reckless indifference to consequences with the defendant 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). Either Harrison was a competent, trained pesticide technician who knew the dangers of using the chemical in residences, or else he was untrained and incompetent and should not have been engaged in applying the dangerous pesticide. In either event, his conduct under the circumstances as alleged amounts to willful and wanton negligence.

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



Robert T. Hall (VSB No. 4826)
Holly Parkhurst Essing (VSB No. 17538)
Gobind S. Sethi (VSB No. 72266)
HALL, SICKELS, FREI & MIMS P.C.
12120 Sunset Hills Road, Suite 150
Reston, Virginia 20190
(703) 925-0500 (Telephone)
(703) 925-0501 (Facsimile)
robert.hall@hallandsickels.com
gobind.sethi@hallandsickels.com
holly.essing@hallandsickels.com

Counsel for Appellants

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 3rd Day of December, 2010, one electronic version on CD in PDF format and fifteen bound copies of the Appellants' Reply Brief were hand-delivered to the Clerk of the Supreme Court of Virginia; and

On that same date one electronic copy on CD and three bound copies were sent by UPS Ground Transportation to:

David D. Hudgins, Esquire
Robert E. Draim, Esquire
HUDGINS LAW FIRM
515 King St., Suite 400
Alexandria, Virginia 22314
Counsel for Appellees

Robert T. Hall, Esquire
Counsel for Appellants