IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 092541

CLERK
SUPREME COURT OF VIRGINIA
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DEC - 7 2010
RICHMOND, VIRGINIA

ALVIN KALTMAN
and
GWELDOLYN KALTMAN

Appellants

v.

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

Appellees

APPELLEES' BRIEF IN OPPOSITION TO APPELLANTS' MOTION TO STRIKE

Appellees All American Pest Control, Inc. ("AAPC") and Patric J. Harrison ("Harrison"), collectively "Appellees", by counsel, submit their Opposition to the Motion to Strike filed by Appellants Alvin Kaltman and Gwendolyn Kaltman (the "Kaltmans").

1. The Kaltmans' motion represents a cynical attempt by these Appellants to prevent Appellees from addressing the issues on appeal. Contrary to the Kaltmans' Motion, Appellees have not argued any of their cross-assignments of error which were not granted.

2. Appellees' cross-assignments sought to challenge the Circuit Court's decisions overruling Appellees' demurrer to the Kaltmans' claims for nuisance and negligent infliction of emotional distress, denying Appellees' motion for summary judgment, and denying certain motions in limine. Nowhere in Appellees' brief do they argue that the Circuit Court committed error in connection with those rulings. Likewise, nowhere in Appellees' brief do they argue for any relief beyond affirming the Circuit Court's rulings as to Counts 1 - 5 and 10 - 11.

3. Even the Kaltmans' opening brief mentioned the Circuit Court's other rulings in summarizing the procedural history of this case. For example, the Kaltmans state at page 2 of their opening brief that "[t]he order correctly overruled the demurrers to Counts 6 - 9, which alleged negligent infliction of emotional distress and nuisance."

4. The Kaltmans complain that Appellees argue in their brief that the Kaltmans' claims arose in contract rather than in tort. Thus, the Kaltmans by their Motion ask this Court to strike Appellees' argument on the principal issue on appeal, so that the Court can only consider *the Kaltmans'* argument without the benefit of Appellees' argument. Such a gross misuse of the Court's motion procedures should not be countenanced. Indeed, this Court retains discretion, after granting a

petition for appeal, to dismiss an appeal for good cause. The Kaltmans' Motion to Strike should be denied, and their appeal should be dismissed.

5. The Kaltmans' Motion is even inconsistent with their own appeal brief, which noted at page 9 that "... Defendants asserted the Kaltmans had no cause of action for negligence because *Defendants' duties arose from the contract for pest control services.*" (Emphasis supplied). Apparently, the Kaltmans believe that *they* can summarize Appellees' argument in *their* brief, in an attempt to rebut Appellees' argument, but that Appellees should be prohibited from making the argument for themselves.

6. The Kaltmans complain at page 2 of their Motion that Appellees have "address[ed] 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." However, the Kaltmans' Complaints sought a single set of damages under all of the counts, as reflected in paragraph 90 of the Complaints under the heading "Damages and Prayer." The damages sought in the counts that were dismissed on demurrer were therefore the same as in the counts that were not dismissed on demurrer. Thus, the Kaltmans' appeal brief at page 1 contends that "[a]s 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." By their Motion, the Kaltmans seek to prevent Appellees from arguing that the Kaltmans failed to allege sufficient facts supporting the damages sought under the counts at issue in this appeal, and that the Circuit Court's decision to strike the Kaltmans' claim for loss of use and enjoyment is *res judicata*.

7. The Kaltmans also complain at page 2 of their Motion that Appellees have "brief[ed] issues relating to discovery disputes and summary judgment rulings relating to the four surviving counts." On the contrary, Appellees merely noted in their Statement of the Case and Material Proceedings that in order to resolve a pending motion to compel the Kaltmans consented to an order withdrawing their claim for lost income and earning capacity, which was asserted as to all counts *including* the counts whose dismissal the Kaltmans are appealing. Likewise, Appellees noted in their Statement of the Case and Material Proceedings that the Circuit Court struck the Kaltmans' claim for loss of use and enjoyment as a result of the Kaltmans' failure to abide by a prior order of the Circuit Court. Since the Kaltmans stated in their appeal brief that they suffered a loss of

use and enjoyment, the Appellees should be entitled to argue that the Kaltmans are precluded from further asserting those damages since they chose not to appeal the Circuit Court's dismissal. With respect to Appellees' summary judgment motion, the Appellees' Statement of the Case and Material Proceedings accurately noted that the Circuit Court denied the motion. In keeping with this Court's decision not to grant Appellees' cross-assignment on this issue, Appellees' appeal brief makes no argument that the Circuit Court's denial of summary judgment was in error or should be reversed by this Court.

8. The Kaltmans erroneously complain at page 2 of their Motion that Appellees' Statement of Facts "includes references to immaterial matters." The Kaltmans then state as an "example" that Appellees maintain in their appeal brief that the Kaltmans did not make certain "arguments" in their Complaints. On the contrary, Appellees nowhere asserted that the Complaints lacked "arguments." Rather, Appellees' Statement of Facts pointed out that the Complaints lacked supporting *facts* in a number of respects. For example, the Complaints alleged that Patric Harrison applied the same pesticide from the same tank at a Ritz Camera Center prior to his application at the Kaltmans' residence, but the Kaltmans made no allegation in their Complaints that Ritz Camera experienced any

problem including any noxious odor. (No doubt, if Ritz Camera *had* experienced the same problem as alleged by the Kaltmans, the Kaltmans would have highlighted that fact in their Complaints and in their appeal brief). Similarly, the Kaltmans alleged in their Complaints that they incurred expenses to "remediate the damage," but they failed to allege that any "remediation" expenses were reasonably necessary. 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 the Kaltmans received any medical treatment or that any psychiatrist, psychologist or physician ever rendered any medical opinion that either of them suffered any condition as a result of the October 23, 2006 pesticide application.

9. Since this Court's appellate review is *de novo*, Appellees are entitled to point out in their appeal brief that the factual allegations of the Kaltmans' Complaints, coupled with all necessary inferences, lead to the conclusion that the Kaltmans' claims were properly dismissed by the Circuit Court. Regrettably, the Kaltmans apparently prefer to argue this appeal on their motion for a gag order, rather than in the appeal briefs and oral argument. As a result, the Kaltmans should be treated as having waived further right to prosecute this appeal, which should now be dismissed.

10. The Kaltmans erroneously complain that there is no record support for Appellees' statement that the pesticide Orthene is "approved and considered safe for use in all other indoor locations including restaurants, hotels, hospitals, schools ...." On the contrary, Appellees cited to the Kaltmans' Complaints (JA 4, 23), where the Kaltmans quoted the Material Safety Data Sheet concerning Orthene. The quoted language states that Orthene "is not for indoor residential use," and that Orthene "is for use in places *other than* private homes." (Emphasis supplied). The necessary inference from the Material Safety Data Sheet is that Orthene is permissible and considered safe in any place "other than private homes," *i.e.* including restaurants, hotels, hospitals, schools, etc. The Kaltmans do not even attempt to suggest otherwise.

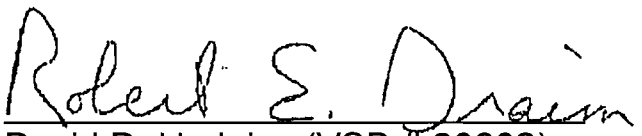
11. The Kaltmans' contention that they have incurred "time and expense" responding to the Appellees' "expansive briefing" on "extraneous matters" is absurd. As noted above, Appellees have not briefed any issue not on appeal, and they have not asked for any relief other than affirming the Circuit Court's dismissal of Counts 1 - 5 and 10 - 11. It is the Kaltmans who have needlessly caused Appellees to incur the time and expense of responding to their baseless Motion to Strike.

12. It is telling that the Kaltmans do not cite a single rule or court decision in support of their Motion to Strike. Virginia appellate courts rarely grant motions to strike appellate briefs, and they appear to have done so only where a brief is filed out of time or without proper leave. See Watkins v. Com., 26 Va. App. 335, 494 S.E.2d 859 (Va. Ct. App. 1998) (denying Commonwealth's motion to strike appellant's reply brief); Murphy-Brown, LLC v. Budnick, No. 2752-08-2, 2009 WL 981334 (Va. Ct. App. 2009) (denying motion to strike appellee's brief); Hey v. Arlington County Dept. of Human Serv., Nos. 2795-07-4, 2796-07-4, 2840-07-4, 2008 WL 5396603 (Va. Ct. App. 2008) (denying two motions to strike appellate briefs); Wilk v. Tamkin, No. 0432-05-4, 2005 WL 2493451 (Va. Ct. App. 2005) (denying motion to strike appellant's brief); Shelton v. Univ. of Virginia, No. 1498-95-2, 1995 WL 648005 (Va. Ct. App. 1995) (denying motion to strike appellee's brief for citing unpublished opinions); McWhorter v. Williamsburg/James City County & Cmty Action Agency, Inc., No. 2063-07-1, 2008 WL 1944100 (Va. Ct. App. 2008) (denying motion to strike reply brief for exceeding the scope of the appellee's brief); In re Carpitcher, 47 Va. App. 513, 624 S.E.2d 700 (Va. Ct. App. 2006) (granting motion to strike supplemental brief in a habeas case because leave had not been given for supplemental brief); Johnson v. City of Richmond, No. 2558-99-2, 2000 WL

1459848 (Va. Ct. App. 2000) (granting motion to strike brief that was not timely filed).

WHEREFORE, Appellees All American Pest Control, Inc. and Patric J. Harrison respectfully request that this Honorable Court deny the Kaltmans' Motion to Strike. In light of the frivolous and vexatious nature of the Kaltmans' Motion to Strike, Appellees further request that this Honorable Court strike the Kaltmans' Motion, dismiss the Kaltmans' appeal, and award reasonable costs and attorney's fees to Appellees.

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



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CERTIFICATE OF SERVICE

This is to certify that undersigned counsel has complied with the requirements of Rule 5:4, and that on December 7, 2010, four paper copies of this Brief in Opposition to Appellants' Motion to Strike were hand-filed with the Clerk of the Supreme Court of Virginia, and that on the same date, one paper copy was served, via UPS Ground Transportation, to:

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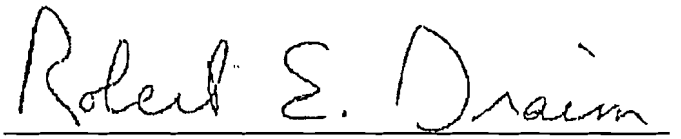

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