IN THE SUPREME COURT OF VIRGINIA

Record No. 140171

RICHARD L. OWENS, SR.,
and
CYNTHIA M. OWENS,

Appellants,

v.

DRS AUTOMOTIVE FANTOMWORKS, INC.,
and
DANIEL R. SHORT,

Appellees.

BRIEF OF APPELLANTS

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ASSIGNMENTS OF ERROR

1. The trial court erred by striking the plaintiffs' evidence and entering judgment for defendants on plaintiffs' fraud and Virginia Consumer Protection Act claims, based on the trial court's finding that two of the witnesses were "believable" and "credible," thus usurping the function of the jury and improperly ruling on an issue of witness credibility. **Preserved:** JA 438, 441-42, 444, 448, 450, 452, 455, 459-69.

2. The trial court erred by striking the plaintiffs' evidence and entering judgment for defendants on plaintiffs' Virginia Consumer Protection Act claim, based on the trial court's conclusion that proof of a claim under that Act requires proof of fraud. **Preserved:** JA 446, 462; JA 469 (noting plaintiffs' exception).

3. The trial court erred by striking the plaintiffs' evidence and entering judgment for defendants on plaintiffs' Virginia Consumer Protection Act claim because there was sufficient evidence of deception, fraud, false pretense, false promise, or misrepresentation by the defendants to support a judgment for the plaintiffs. **Preserved:** JA 442-45, 446-48, 449, 450-51, 462-65.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Richard and Cynthia Owens, plaintiffs, bought a 1960 Thunderbird automobile for $11,500 and took it to DRS Automotive Fantomworks, Inc. (DRS) for repair and restoration. Nine weeks later, after paying $30,000 for DRS's services, they were left with a shell of a car, valued at $3,500. JA 242, 431. Plaintiffs' expert testified that after DRS had finished disassembling the Thunderbird, ostensibly in preparation for the restoration work, it was "just too far gone to make it a restored vehicle. It just wouldn't work." JA 203.

Mr. and Mrs. Owens brought this action against defendant DRS and its owner, defendant Daniel R. Short, seeking damages for breach of contract, violation of the Virginia Consumer Protection Act (the VCPA) (*see* Addendum), and common law fraud. (The remnants of the Thunderbird were released to plaintiffs, by agreement of the parties, in December 2012.)

Defendants filed an Answer and Counterclaim. The Counterclaim alleged that Mrs. Owens had defamed the defendants in conversations with Alexander Thiess, the seller of a "donor" car to DRS and a lieutenant in the Navy, and with his squadron legal officer, his commanding officer, and other persons in his command structure. JA 22-23. The Counterclaim was dismissed on demurrer.

The case was tried to a jury for three days. At the conclusion of plaintiffs' case in chief, the trial court granted defendants' motion to strike plaintiffs' claims for violation of the VCPA and fraud. After hearing additional evidence, the jury returned a verdict for defendants on plaintiffs' breach of contract claim.

The trial court stated two reasons for granting defendants' motion to strike. First, it credited the testimony of defendant Daniel Short and Mr. Thiess (who sold the donor car to DRS, to be used as a source for parts for the Thunderbird), that DRS paid Mr. Thiess $6,000 for the donor car:

> THE COURT: Counsel, I am impressed with the two witnesses. I find their testimony believable. I find that the two parties, the lieutenant and the defendant, did not know each other prior. There's no evidence that they've had past or present dealings. They each testified that the price for the vehicle was $6,000. I don't find any credible evidence to the contrary. I am going to dismiss the claim, note your exception.

JA 449.

Second, the court held that the VCPA claim would be dismissed because plaintiffs had not presented any "credible evidence" of fraud. *See* JA 449-50:

> THE COURT: I don't know that there was any credible evidence that they deceived anyone or there was fraud. I would say that the business needs management. It may need some rules and regulations on how to do things. It was obviously a failure, a huge failure, of the job.

> I mean, here is a plaintiff, quite frankly – if I remember the evidence – who paid $11,000 for a car and gave the defendant $30,000 and has got a car that's worth $2,000. There are a lot of things wrong, but I feel that the problem was they weren't listening to each other. They weren't talking to each other. They weren't communicating in an intelligent manner, and they just – they don't speak the same language....
>
> ....
>
> MR. BAUMGARTNER [Plaintiffs' counsel]: And the jury – the Court is making that determination based upon the credibility of witnesses. That's for the jury to determine because the whole communication –
>
> THE COURT: I don't think there's any evidence of fraud.

See also JA 461-62, 468, 469.

The trial court's "credibility" and "fraud" analyses thus stated alternative but not independent grounds for its decision to grant the motion to strike. The court reasoned, as indicated above, that there was no "credible evidence that [the defendants] deceived anyone or there was fraud." JA 449-50. *See also* JA 452: "As to the allegation of fraud, I find that the two witnesses who talked about the value of the car, I find them credible. I thought I made that clear." As counsel for plaintiffs stated at the hearing, the court's finding that the plaintiffs had not proved fraud was based, at least in part, "upon the credibility of witnesses." JA 450. If the jury had been permitted to find that DRS paid $2,000 for the donor car, as shown by plaintiffs' circumstantial evidence (discussed *infra*) and contrary

to Mr. Short's and Mr. Thiess's testimony that it paid $6,000, then it could have found that defendants committed fraud.

Plaintiffs' circumstantial evidence pointed strongly to an inference that Mr. Short sent an email to Mr. Thiess, the seller of the donor car, linked through a Craigslist advertisement which offered the car for sale for $2,000 and stated that Mr. Thiess was "willing to negotiate on price." That inference would have supported a finding that Mr. Short misled Mr. and Mrs. Owens by claiming that he offered and paid $6,000 for the donor car and by charging them $7,200 – and later $7,500 – for that purchase.

The missing email was the subject of extensive pretrial litigation and attempted discovery:

A subpoena to Craigslist produced an email log showing that Mr. Short ("drs@fantomworks.com"[1]) sent an email to Mr. Thiess through the Craigslist ad on July 13, 2012, at 7:51 AM Pacific time, or 10:51 Eastern time (JA 608).

In response to requests for production, defendants provided copies of numerous emails between the parties, but only one email from Mr. Short to

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[1] That email address consists of Mr. Short's initials and the company's domain name. Mr. Short's wife, who also is a DRS employee (*see* JA 254, 397-98, 570), testified in a deposition that to the best of her knowledge no one other than Mr. Short uses that email address. *See* JA 43. There was no contrary testimony at the trial.

Mr. Thiess (an email dated November 19, 2012, relating to Mr. Thiess's participation in the preparation of defendants' defamation counterclaim. *See* JA 38.)

Plaintiffs served a subpoena duces tecum on Mr. Thiess requesting emails pertaining to the donor car, Mr. Short, or DRS; emails to or from Craigslist pertaining to any item for sale, from June 1, 2012, to the date of the subpoena (December 7, 2012); and cell phone records. JA 30-32. Mr. Thiess produced his Craigslist advertisement for the donor car (a 2001 Ford Crown Victoria Police Interceptor); several emails, linked through the Craigslist ad, from *other* persons interested in the Interceptor; and a cell phone log showing that he called Mr. Short on July 13, 2012, 12 minutes after the time of the email from Mr. Short to Mr. Thiess (JA 603-07, 614; *see* JA 327, 331, 376-77.)

Neither defendants nor Mr. Thiess produced a copy of the July 13 email, and both Mr. Short and Mr. Thiess denied any knowledge of it. JA 326, 410.

Mr. Thiess admitted, however, that he "deleted e-mails from [his] account over a two-year period," including "the end of 2012 and beginning of 2013," JA 329 – in other words, while a subpoena was outstanding (*see*

JA 30-32) (but he claimed that "since this case has been introduced," he had "deleted no e-mails pertaining to the case." JA 328-29.)

Plaintiffs also attempted to obtain a copy of the email from Microsoft, but Microsoft advised that "they don't maintain deleted e-mails on backup storage .... Therefore, they could not find that e-mail." JA 49-50.

FACTS[2]

Mr. and Mrs. Owens purchased a 1960 Ford Thunderbird in Rhode Island, for $11,500, and had it shipped to Virginia. The car needed restoration and repair. Mr. and Mrs. Owens selected DRS and its owner, Daniel R. Short, to do that work. *See* JA 77-83. Mr. Owens, a gentleman in his 70's, did not want a "show" car or a "fire-breathing hotrod," "just ... something to ride to the golf course once in a while." JA 77, 517.

DRS's website advertised "Quality Restorations [and] Extraordinary Value" and stated that Mr. Short "has 28 Years of Experience Including Certifications in Systems Engineering, Program Management, and Multiple Automotive Restoration Fields." JA 569; *see* JA 79-80. But Mr. Short

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[2] In accordance with established rules of appellate review, appellants state the facts in the light most favorable to Mr. and Mrs. Owens, the parties who opposed the motion to strike, according them the benefit of all reasonable inferences from the evidence. *E.g.*, *Claycomb v. Didawick*, 256 Va. 332, 333, 505 S.E.2d 202, 203 (1998); *Austin v. Shoney's, Inc.*, 254 Va. 134, 135, 138, 486 S.E.2d 285, 285, 287 (1997).

admitted at trial that he was "unaware of any certifying process" for automotive restoration and does not have any certification "specifically in that." JA 389-90; *see* JA 395, 396-97.

Mr. and Mrs. Owens first met with Mr. Short on July 10, 2012. Mr. Owens asked Mr. Short "to inspect the vehicle and tell me professionally what it needed to get it in good, reliable running order. I didn't want to do anything other than that." JA 81. Mr. Short "suggest[ed] that we find a donor vehicle with low miles and a certified engine," because the engine in a car with the age and mileage of the Thunderbird was "not reliable." *Id.* He told Mr. and Mrs. Owens that "he had a lot of experience getting so-called donor vehicles to restore older antique vehicles" and "usually purchased them at auction at very low prices." JA 244. At trial, however, he testified that as of May 2013, DRS had used donor cars only twice in the previous two years. JA 399.

Mr. Short advised Mr. and Mrs. Owens that a donor vehicle would cost "a couple thousand dollars, and he can put the engine in, and plus he gets a lot of other parts to use if I needed other parts on the vehicle." JA 82. Mrs. Owens told Mr. Short that "he was not to spend more than a few thousan[d] dollars for this vehicle, and [she] defined a few thousan[d] dollars as $2,000 to $3,000 dollars [*sic*] and not a penny more. [Mr. Short]

said that … wouldn't be a problem." JA 269. Mr. Short also told Mr. and Mrs. Owens that "he charges only 25 percent markup on all parts." JA 82. *See* JA 247-48; JA 571 (DRS Parts Policies). And Mr. Short "promised that the car could be finished … within two months." JA 248-49; *see also* JA 300.

Mr. Short called Mr. Owens a few days later to report "that he was looking at a donor car, a police Interceptor, that had an engine that would fit into [Mr. Owens's] Thunderbird, and that … he was thinking about buying this at auction at a low price. And it was a certified engine." JA 85. *See also* JA 251-52, 499.

Mr. Owens met with Mr. Short again on July 17. Mr. Short had not completed his inspection of the Thunderbird, as Mr. Owens had expected, but he "wanted [Mr. Owens] to write down a preliminary list of potential things [to] do with the vehicle" (Mr. Short's recommendations). JA 86. *See* JA 573-74. Mr. Short annotated that list at a subsequent meeting, on July 19. JA 89, 575-76.

Mr. Owens visited the DRS shop again on July 31, 2012, and inquired about the "donor" car (among other things). Mr. Short presented an invoice for a total of $38,093.48, including $7,200 for a "2001 Ford Police Interceptor Sedan for Drive Train." JA 93, 95-96; *see* JA 578.

Mr. Owens was "very upset" with the $7,200 charge for the donor car, because Mr. Short had told him that the cost of a donor car would be "a couple thousand dollars." JA 96. Mr. Short attempted to mollify Mr. Owens, telling him that the Interceptor was a "great buy" because he "found out [he] could use a lot more parts on that vehicle that [he would not] have to buy brand new." JA 97.

Mr. Owens contacted Mr. Short from time to time seeking status reports, which were promised every two weeks. JA 93-94, 98-99, 249. The first report that Mr. Owens received was a "preliminary report" provided by email on September 5, 2012, which consisted of nothing more than an itemized list of parts and labor. JA 100-01, 581-83. On that "report," however, the price listed for the donor car had grown from $7,200 to $7,500, without explanation. JA 101, 583.

Mr. and Mrs. Owens also learned that the donor car's engine was not certified, as Mr. Short had represented. Mr. Short "said it was certified. Then he said later on that it was not." JA 286-87.

JA 602 is a copy of a check given by DRS to "Alex Thiess," for a "Crown Victoria," the donor vehicle, in the amount of $2,000. That points to a key issue in this appeal. A 25% markup of a $2,000 purchase price

equals $500, for a total price to Mr. and Mrs. Owens of $2,500, and not $7,200 or $7,500, the amounts that DRS charged on its invoices.

Mr. Thiess advertised the donor car for sale on Craigslist for $2,000, and the advertisement stated that he was "willing to negotiate on price." JA 603. Mr. Thiess testified that he was asking $2,000 on July 13, 2012, JA 315-16, the day that he sold the car to DRS, JA 383-84. A log of emails sent through Craigslist's servers and linked through Mr. Thiess's ad[3] shows that an email was sent from Mr. Short ("drs@fantomworks.com") to Mr. Thiess on July 13, 2012, at 7:51 AM Pacific time, or 10:51 Eastern time. JA 327, 608. Despite strenuous efforts by counsel in discovery, that email was never produced. *See* pages 5-7, *supra*. Mr. Thiess admitted, however, that his cell phone records show that he called Mr. Short on July 13, 2012, the date of the email. JA 327, 377. The cell phone records show that he made that call at 11:03 AM, 12 minutes after Mr. Short's email to him. JA 327, 377, 614.

Mr. Thiess testified that he neither knew nor had heard of Mr. Short before selling him the donor car. JA 331, 364. The trial court found "that the two parties, the lieutenant and the defendant, did not know each other

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[3] Each Craigslist advertisement is assigned a unique identification number, and the Craigslist email log lists emails linked to the number of Mr. Thiess's ad (3111539452). *See* JA 604-08, 612.

prior." JA 449. If that is true – and there is no evidence to the contrary – then there is no explanation of how Mr. Thiess obtained Mr. Short's telephone number, other than through the missing email.[4]

Mr. Short admitted that he "explored multiple websites," including eBay, in his search for a donor vehicle (JA 428); but he denied seeing Mr. Thiess's Craigslist ad and testified that he uses Craigslist "very rarely" and not "routinely." JA 410, 412. He denied seeing Mr. Thiess's Craigslist ad despite the evidence that an email went from his email address to Mr. Thiess through Mr. Thiess's Craigslist ad, shortly before he purchased the donor car (JA 608). And he denied using Craigslist despite proof that DRS itself advertises on Craigslist and that some of those advertisements are signed "Dan" (JA 410-11, 616-20).

Mr. Thiess testified that DRS paid him $4,000 in cash on July 13, 2012, as a partial payment, and another $2,000 by check, sometime the following week, when he delivered the car to Mr. Short. JA 329-30, 367-68. Defendants introduced a handwritten bill of sale, dated 13 July 2012, purporting to show that Mr. Thiess sold the Interceptor "for $6,000.00 cash to Dan Short for DRS Fantomworks" (JA 628) and a Florida Certificate of

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[4] Mr. Thiess initially testified that Mr. Short called him first, JA 364, but later acknowledged that he placed the first call. JA 376-77.

Title also indicating a sale to "Dan Short" for $6,000 (JA 629). Mr. Short admitted, however, that he created a "QuickBooks" accounting journal entry on December 31, 2012, purporting to record a $4,000 cash payment to Mr. Thiess on July 12, 2012 (the day before Mr. Short and Mr. Thiess first met). JA 413-14, 417; *see* JA 364, 621-22. Mr. Short testified that he created that backdated entry after this suit was filed, "after the Owens [*sic*] requested in discovery that [he] produce a record of the fact that [he] had paid for the Interceptor," and "in order to meet the requirements of the Court." JA 414.[5] Mr. Short also admitted that he did not provide the handwritten bill of sale or the Florida title to Mr. and Mrs. Owens, despite their requests for documentation, until after this suit was filed. JA 420-21.

The relationship between the parties grew increasingly contentious through September 2012, as Mr. and Mrs. Owens grew frustrated with the lack of reports and the absence of any apparent progress on the project. On September 21, 2012, Mr. Short notified Mr. Owens that DRS had "stopped work on this project at this time because of your dissatisfaction with our company and our reporting system." JA 625. This suit followed.

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[5] Mr. Short also testified that "[w]e normally do all of our cash entries at the end of the year." JA 418. In a deposition, however, he testified that "as a rule" DRS does not enter cash transactions until its tax filings are due, in September, at the end of its fiscal year. JA 41.

ARGUMENT

I. The trial court erred by striking the plaintiffs' evidence and entering judgment for defendants on plaintiffs' fraud and VCPA claims, based on the trial court's finding that two witnesses were "believable" and "credible." (Assignment of Error 1)

Standard of review: This issue presents a question of law, which the Court should review *de novo*, for legal error. *E.g.*, *Wright v. Minnicks*, 275 Va. 579, 585, 659 S.E.2d 276, 279 (2008); *Brown v. Hoffman*, 275 Va. 447, 451, 657 S.E.2d 150, 153 (2008).

The trial court's ruling and reasoning are described in the Statement of the Case, *supra* at 3-4. The trial judge was "impressed with the two witnesses" – Mr. Short and Mr. Thiess – and found "their testimony believable." He found "that the two parties, the lieutenant and the defendant, did not know each other prior" and that there was "no evidence that they've had past or present dealings." JA 449. *See also* JA 440: "THE COURT: I see no reason why a stranger to the whole deal, who has never done business with Mr. Short, would come in here and lie about getting more money than he really did."[6] He concluded that "[t]hey each

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[6] The judge apparently overlooked both Mr. Thiess's and Mr. Short's testimony that the two of them met several times after the events at issue in this case, both to discuss Mrs. Owens's call to Mr. Thiess regarding the sale of the donor vehicle and to take one of his vehicles to DRS for repairs. *See* JA 324-25, 332-33, 370, 421. The court also excluded evidence that Mr. Thiess helped Mr. Short prepare a defamation counterclaim against

(footnote continued)

testified that the price for the vehicle was $6,000. I don't find any credible evidence to the contrary. I am going to dismiss the claim, note your exception." JA 449.

Respectfully, that ruling was flagrantly erroneous. This case was tried to a jury, not to the court, and the court should not have refused to allow the case to go to the jury based on its own finding regarding the credibility of the witnesses. "[I]n controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." Constitution of Virginia, Article I, Section 11. That constitutional precept is echoed in numerous decisions of this Court which state the well established rule that "[i]t is the jury's function to determine the credibility of witnesses and the weight of the evidence and to resolve all conflicts in the evidence." *Carter v. Lambert*, 246 Va. 309, 314, 435 S.E.2d 403, 406 (1993). *Accord*, *e.g.*, *Brown v. Hoffman*, 275 Va. at 451, 657 S.E.2d at 153; *Selfe v. Fuller*, 179 Va. 30, 36, 18 S.E.2d 254, 257 (1942); *Crowell v. Duncan*, 145 Va. 489, 500, 134 S.E. 576, 579 (1926).

Mrs. Owens (which was dismissed on demurrer). JA 272-77, 380; *see* JA 20-24. (The record includes four separate statements that Mr. Thiess provided to Mr. Short, apparently for that purpose, which were attached to pleadings filed in the trial court but were not introduced at the trial. *See* JA 29, 33-37.)

> The standard under which a trial court should review the evidence adduced at trial before granting a motion to strike the case at the end of a plaintiff's evidence is well settled under prior decisions of this Court. That standard requires the trial court to accept as true all the evidence favorable to the plaintiff as well as any reasonable inference a jury might draw therefrom which would sustain the plaintiff's cause of action. *The trial court is not to judge the weight and credibility of the evidence*, and may not reject any inference from the evidence favorable to the plaintiff unless it would defy logic and common sense.

Austin v. Shoney's, Inc., 254 Va. 134, 138, 486 S.E.2d 285, 287 (1997) (emphasis added; citations omitted).

This Court has not hesitated to reverse judgments entered on trial judges' improper weighing of witness credibility, either before or after submitting a case to a jury for decision. *See, e.g.*, *Monday v. Oliver*, 215 Va. 748, 214 S.E.2d 142 (1975); *Smith v. Wright*, 207 Va. 482, 151 S.E.2d 359 (1966) (reversing judgment for plaintiff entered after second trial and entering judgment on verdict for defendant at first trial); *Eubank v. Hayden*, 202 Va. 634, 119 S.E.2d 328 (1961) (reversing judgment for defendant after second trial and entering judgment on verdict for plaintiff at first trial); *Pope v. Overbay*, 196 Va. 288, 83 S.E.2d 365 (1954) (reinstating and entering judgment on verdict); *Ryan v. Maryland Casualty Co.*, 173 Va. 57, 3 S.E.2d 416 (1939).

Plaintiffs recognize that "[w]hile a jury … are the judges of the weight of the testimony and the credibility of witnesses, they may not arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with the facts appearing in the record, even though such witnesses are interested in the outcome of the case." *Hodge v. American Family Life Assur. Co. of Columbus*, 213 Va. 30, 31, 189 S.E.2d 351, 353 (1972) (citations omitted). The trial court did not rely on that rule, however – it simply found two of the witnesses "believable" and "credible" – and it does not support the decision below in this case. The evidence here is such that reasonable men may differ, and therefore the question is one of fact for the jury.

The central (but not only) issue is whether Mr. Short and DRS paid $6,000 for the donor car, as he and Mr. Thiess testified, or some lesser amount. The evidence on that issue is circumstantial, to be sure, but it was sufficient to allow the jury to find that the testimony was inaccurate:

It is undisputed that Mr. Thiess placed a Craigslist advertisement to sell the car for $2,000 and that the advertisement stated that he was "willing to negotiate on price." JA 603. *See* JA 315-16.

There is documentary evidence that Mr. Short sent an email to Mr. Thiess through Mr. Thiess's Craigslist ad. JA 608.

Mr. Thiess admitted, and his cell phone log shows, that he called Mr. Short 12 minutes after the time of the missing email. JA 327, 377, 614.

Mr. Thiess admitted to deleting emails from his account, not only while a subpoena was outstanding (*see* pages 6-7, *supra*) but "over a two-year period." JA 329.

DRS gave Mr. Thiess a check for $2,000 and noted "Crown Victoria" in the memo line. JA 602.

Mr. Thiess testified that "the $2,000 check was [his] idea." JA 368. He also testified, however, that he "wanted most of the payment in cash because [he] didn't want a check to bounce or anything ...." JA 369. And Mr. Short testified that he was "in a position" to pay Mr. Thiess $6,000 cash and that that was his intent, but Mr. Thiess requested a $2,000 check. JA 415. Mr. Thiess testified similarly that Mr. Short "offered cash." JA 369.

Mr. Short claimed at trial that he offered and paid $6,000 for the donor car without even asking Mr. Thiess's asking price. JA 429. A reasonable jury could find that that testimony was not credible and elect to doubt the remainder of Mr. Short's testimony as well.

Mr. Short and Mr. Thiess created a handwritten bill of sale reflecting a sales price of "$6,000.00 cash" (JA 628), but the evidence proves conclusively that the "$6,000.00 cash" notation was inaccurate.

DRS's "QuickBooks" journal entry for a $4,000 cash payment was created on December 31, 2012, months after the transaction occurred, in response to a discovery request in this action, and backdated to July 2012. JA 413-14, 417, 621-22. The backdating was discovered only through the efforts of an accountant who was allowed to review DRS's QuickBooks by order of the court. JA 417-18.

Mr. Thiess was asked at trial if he told Mrs. Owens, in September 2012, that he sold the car for $2,000. His answers were, "I don't remember" and "I don't recall precisely what I said to her" (JA 323) – answers that a reasonable jury might well view as evasive and as calling his credibility into question.

Mr. Thiess was unable to account for his disposition of any part of the $4,000 that he claimed to have received in cash. He testified only that "I never deposited all that cash in one lump sum because I used some of it to pay for various things that I wanted to use cash for: Christmas gifts, work I had done on my cars. So I never deposited the $4,000 lump sum." JA 383.

That testimony was in response to a question submitted by the jury – "When did you deposit the $4,000? What date?" (*id.*) – which indicates that at least some members of the jury, unlike the judge, entertained some

doubts regarding Mr. Thiess's credibility. The jurors' reasonable doubts may well have been further enhanced by consideration of Mr. Thiess's previous, inconsistent testimony that "the $4,000 cash I used for savings and other personal things." JA 368.

In their Brief in Opposition, defendants argued that Mr. Thiess had no motivation to assist Mr. Short with a scheme to mislead Mr. and Mrs. Owens. The trial court commented, similarly, "I see no reason why a stranger to the whole deal, who has never done business with Mr. Short, would come in here and lie about getting more money than he really did." JA 440. Mr. Thiess testified, however, that Mrs. Owens made an accusatory telephone call to him in September 2012 and that she later had "relatively lengthy" conversations with his public affairs officer, his legal officer, and his commanding officer, all of which potentially could have had "some impact" on his career. JA 370-73. (Those calls were the subjects of defendants' dismissed counterclaim.) Defendants are entitled to argue issues of motivation to the jury on remand, of course, but an argument that there was no evidence that Mr. Thiess had any motivation to assist and support Mr. Short is wrong.[7]

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[7] In addition, as noted *supra* at 15 n.5, it is undisputed that Mr. Thiess has met with Mr. Short several times, both to discuss Mrs. Owens's call to Mr.

(footnote continued)

In short, the jury might have inferred from the evidence that DRS acquired the car for no more than $2,000 and cheated Mr. and Mrs. Owens by charging them $7,500, including a purported 25% markup. The trial court therefore erred by granting defendants' motion to strike the VCPA and fraud claims based on its own finding that Mr. Short and Mr. Thiess were "believable" and "credible."

II. The trial court erred by striking the plaintiffs' evidence and entering judgment for defendants on plaintiffs' VCPA claim on the ground that proof of a VCPA claim requires proof of fraud. (Assignment of Error 2)

Standard of review: This issue presents a question of statutory construction. That is a pure question of law, which the Court should review *de novo*, for legal error. *E.g.*, *The Falls Church v. Protestant Episcopal Church*, 285 Va. 651, 666, 740 S.E.2d 530, 538 (2013), *cert. denied,* 134 S.Ct. 1513 (2014).

As discussed in the Statement of the Case, *supra* at 3-4, the trial court dismissed the VCPA claim on the alternative ground that plaintiffs had not presented any "credible evidence" of fraud. JA 449-50, 452, 461-62,

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Thiess and to take one of Mr. Thiess's vehicles to DRS for repairs; and the trial court excluded evidence that Mr. Thiess helped Mr. Short prepare a defamation counterclaim against Mrs. Owens. Mr. Thiess obviously had ample opportunities to collaborate with Mr. Short, and questions of motivation are properly left to the jury for resolution.

468, 469. That finding was thus an alternative but not independent ground for its decision to grant the motion to strike. Even if the Court concludes that proof of a VCPA claim requires proof of fraud, therefore, it should reverse for the reasons stated in Section I, *supra*.

Analytically putting that point to the side, however, the decision below presents a question of first impression in this Court, *i.e.*, whether proof of a VCPA claim requires proof of fraud. Plaintiffs respectfully submit that the ruling below was in error. Proof of a VCPA claim should not require proof of fraud; and if proof of fraud is required, it need not be proved by clear and convincing evidence as at common law.

The relevant provision of the statute, Va. Code § 59.1-200(A), provides, in part:

> The following *fraudulent acts or practices* committed by a supplier in connection with a consumer transaction are hereby declared unlawful:
>
> …
>
> 2. *Misrepresenting* the source, sponsorship, approval, or certification of goods or services;
>
> …
>
> 5. *Misrepresenting* that goods or services have certain quantities, characteristics, ingredients, uses, or benefits;
>
> 6. *Misrepresenting* that goods or services are of a particular standard, quality, grade, style, or model;

> ...
>
> 14. Using *any other deception, fraud, false pretense, false promise, or misrepresentation* in connection with a consumer transaction ....

Emphases added.

This Court has decided only a few cases involving § 59.1-200. Its most relevant decision is *Wilkins v. Peninsula Motor Cars*, 266 Va. 558, 587 S.E.2d 581 (2003), where the plaintiff recovered damages on claims for both common law fraud and a violation of the VCPA. The Court held that the case "involve[d] causes of action with *different elements of proof* and potentially duplicative damage awards." *Id.* at 562, 587 S.E.2d at 584 (emphasis added).

In *Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350, 362, 699 S.E.2d 483, 489 (2010), the Court said this:

> Based on the plain language of the VCPA, it is unlawful to misrepresent that goods are of "a particular standard, quality, grade, style, or model." Code § 59.1-200(A)(6). This duty not to misrepresent the quality, grade, or style of goods is a statutory duty that exists independent of the Contracts entered into between the parties to this litigation ....

That statement is not conclusive of the issue presented in this appeal, but it suggests that a "statutory duty" exists under the VCPA which exists independent of and is not bound by rules that control the analogous common law duty not to defraud.

The statute declares that "fraud" in a consumer transaction is unlawful, but it does not stop there. It prohibits "fraudulent acts or practices," including (*inter alia*) "[m]isrepresenting the source, sponsorship, approval, or certification of goods or services" and "[u]sing any other deception, fraud, false pretense, false promise, or misrepresentation ...." § 59.1-200(A)(2), (14). The words "deception," "false pretense," "false promise," and "misrepresentation" must be understood as describing something other than fraud, or they would be redundant or superfluous. That would violate well-established rules of statutory construction. *See, e.g.*, *Lynchburg Division of Social Services v. Cook*, 276 Va. 465, 483, 666 S.E.2d 361, 370 (2008):

> "The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd. On the contrary, it is well established that every act of the legislature should be read so as to give reasonable effect to every word ...." *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984). "[E]very part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." *Hubbard v. Henrico Ltd. P'ship*, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998).

Further, numerous subsections of § 59.1-200 proscribe acts that are not common law frauds, such as § 59.1-200(A)(16) ("[f]ailing to disclose" certain "conditions, charges, or fees") and §§ 59.1-200(A)(16a) - (53). The meaning of "fraudulent acts or practices" in § 59.1-200 also is illuminated

by § 59.1-200.1(A)(1), which prohibits certain "fraudulent acts or practices," which likewise do not constitute common law fraud, "[i]n addition to the provisions of § 59.1-200." *See also* § 59.1-199(E), which refers in the disjunctive to "a misrepresentation *or* fraudulent act or practice under § 59.1-200" (emphasis added).

Section 59.1-207, which governs "unintentional violation[s]" of the Act, and § 59.1-204(A), which authorizes treble damages for "willful" violations, further demonstrate that actual fraud is not a necessary element of all violations of the statute. Fraud, by definition, is intentional and willful. *See, e.g.*, *Winn v. Aleda Construction Co.*, 227 Va. 304, 308, 315 S.E.2d 193, 195 (1984): "The elements of actual fraud are: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled."

Sections 59.1-200(A)(2), (5), (6), and (14) should be construed in accordance with the clear indications of legislative intent manifested in §§ 59.1-200(A)(16) - (53), 59.1-200.1(A)(1), 59.1-204(A), 59.1-207, and 59.1-199(E).

In addition, the VCPA is "remedial legislation," Code § 59.1-197, and should "be construed liberally to remedy the mischief to which [it is]

directed in accordance with the legislature's intended purpose." *Carmel v. City of Hampton*, 241 Va. 457, 460, 403 S.E.2d 335, 337 (1991). *See also, e.g.*, *Board of Supervisors v. King Land Corp.*, 238 Va. 97, 102-03, 380 S.E.2d 895, 897-98 (1989) (describing the history of the "mischief rule"). If § 59.1-200 proscribes nothing more than common law fraud, then it is a hollow statute, accomplishing little or nothing. That is not what the General Assembly intended.

Finally, *if* proof of fraud is required, it need not be proved by clear and convincing evidence as at common law. The normal standard of proof in a civil action is a preponderance of the evidence, and nothing in the VCPA suggests that a higher standard is appropriate. *Cf. Grogan v. Garner*, 498 U.S. 279, 290 (1991) (federal bankruptcy case, holding that statutory silence is inconsistent with endorsement of "a background rule that clear-and-convincing evidence is required to establish exemption from discharge").

That conclusion also is consistent with those of courts applying similar statutes in other states. *See, e.g.*, *State by Humphrey v. Alpine Air Products, Inc.*, 500 N.W.2d 788 (Minn. 1993) (holding that the preponderance of the evidence standard of proof is the proper standard to use in a case under Minnesota's Prevention of Consumer Fraud Act, Minn.

Stat. §§ 325F.68-.70[8]); *Kugler v. Banner Pontiac-Buick, Opel, Inc.*, 295 A.2d 385, 388 (N.J. Super. Ch. Div. 1972) ("The present action is civil in nature and … requires plaintiff to prove his case only by a preponderance of the evidence. To preclude the State from attempting to meet the lesser burden required in a civil action simply because it did not meet the strict and much higher standard in [a prior criminal] case would result in undermining the most important aim of the Consumer Fraud Act [N.J.S.A. §§ 56:8-1, *et seq.*], the remedial aspect").[9]

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[8] The Minnesota statute, much like the VCPA, proscribes "[t]he act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise …." Minn. Stat. § 325F.69.

[9] The New Jersey Act prohibits "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate." N.J.S.A. § 56:8-2. Again, the language is similar to that of the VCPA, Code § 59.1-200(A)(14).

III. The trial court erred by striking the evidence on plaintiffs' Virginia Consumer Protection Act claim, because there was sufficient evidence of deception, fraud, false pretense, false promise, or misrepresentation by the defendants to support a judgment for the plaintiffs. (Assignment of Error 3)

Standard of review: The standard under which a trial court should review the evidence at trial before granting a motion to strike the evidence at the end of a plaintiff's case

> requires the trial court to accept as true all the evidence favorable to the plaintiff as well as any reasonable inference a jury might draw therefrom which would sustain the plaintiff's cause of action. The trial court is not to judge the weight and credibility of the evidence, and may not reject any inference from the evidence favorable to the plaintiff unless it would defy logic and common sense.

Claycomb v. Didawick, 256 Va. 332, 335, 505 S.E.2d 202, 204 (1998), quoting *Austin v. Shoney's, Inc.*, 254 Va. 134, 135, 138, 486 S.E.2d 285, 285, 287 (1997). "This same standard applies" to this Court's "review of the evidence when a trial court's decision to strike the evidence in a bench trial is challenged on appeal." *Claycomb*, 256 Va. at 335, 505 S.E.2d at 204. The same standard also applies to this Court's review of the evidence when a trial court strikes the plaintiff's evidence in a jury trial. *E.g.*, *Brown v. Hoffman*, 275 Va. at 449, 657 S.E.2d at 151.

There was sufficient evidence to support a verdict and judgment for plaintiffs on the VCPA claim, even putting aside the evidence that

defendants misled Mr. and Mrs. Owens regarding the price of the donor vehicle, discussed *supra* in Section I :

There is evidence that defendants misrepresented, through DRS's website, that Mr. Short "has 28 Years of Experience Including Certifications in … Multiple Automotive Restoration Fields." JA 569. Mr. Short admitted at the trial that he was "unaware of any certifying process" for automotive restoration and does not have any certification "specifically in that." JA 389-90; *see* JA 395, 396-97.

There is evidence that defendants misrepresented that the donor car's engine was certified. *See* JA 286-87.

The VCPA prohibits misrepresenting the "certification of goods or services." Va. Code § 59.1-200(A)(2). In this case there is sufficient evidence to allow a reasonable jury to find that defendants violated both of those prohibitions.

Viewing that evidence in the light most favorable to the plaintiffs (*see* n.2, *supra*), it is sufficient to support a verdict and judgment for plaintiffs under the VCPA. When it is added to the evidence that defendants misled Mr. and Mrs. Owens regarding the price of the donor vehicle, there should be no remaining doubt that the trial court erred by striking the VCPA claim.

CONCLUSION

This Court should reverse the judgment and remand for a new trial on plaintiffs' claims for violation of the Virginia Consumer Protection Act and fraud.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing Brief complies with Va. Sup. Ct. Rule 5:26.

I further certify that on this 30th day of June, 2014:

Fifteen printed copies of the foregoing Brief and eight copies of the foregoing Brief in PDF format on CD-ROM have been delivered by hand to the Clerk of the Supreme Court of Virginia; and

A copy of the foregoing Brief in PDF format has been emailed to counsel for appellees, and three copies of the foregoing Brief have been transmitted by US First Class Mail to counsel for appellees, named below.

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ADDENDUM

Virginia Consumer Protection Act

§ 59.1-196. Title.

This chapter may be cited as the Virginia Consumer Protection Act of 1977.

(1977, c. 635.)

§ 59.1-197. Intent.

It is the intent of the General Assembly that this chapter shall be applied as remedial legislation to promote fair and ethical standards of dealings between suppliers and the consuming public.

(1977, c. 635.)

§ 59.1-198. Definitions.

As used in this chapter:

"Business opportunity" means the sale of any products, equipment, supplies or services which are sold to an individual for the purpose of enabling such individual to start a business to be operated out of his residence, but does not include a business opportunity which is subject to the Business Opportunity Sales Act, Chapter 21 (§ 59.1-262 et seq.) of this title.

"Children's product" means a consumer product designed or intended primarily for children 12 years of age or younger. In determining whether a consumer product is primarily intended for a child 12 years of age or younger, the following factors shall be considered:

1. A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable;

2. Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger;

3. Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger; and

4. The Age Determination Guidelines issued by the staff of the Consumer Products Safety Commission in September 2002, and any successor to such guidelines.

"Consumer transaction" means:

1. The advertisement, sale, lease, license or offering for sale, lease or license, of goods or services to be used primarily for personal, family or household purposes;

2. Transactions involving the advertisement, offer or sale to an individual of a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged;

3. Transactions involving the advertisement, offer or sale to an individual of goods or services relating to the individual's finding or obtaining employment;

4. A layaway agreement, whereby part or all of the price of goods is payable in one or more payments subsequent to the making of the layaway agreement and the supplier retains possession of the goods and bears the risk of their loss or damage until the goods are paid in full according to the layaway agreement; and

5. Transactions involving the advertisement, sale, lease, or license, or the offering for sale, lease or license, of goods or services to a church or other religious body.

"Cure offer" means a written offer of one or more things of value, including but not limited to the payment of money, that is made by a supplier and that is delivered to a person claiming to have suffered a loss as a result of a consumer transaction or to the attorney for such person. A cure offer shall be reasonably calculated to remedy a loss claimed by the person and it shall include a minimum additional amount equaling 10 percent of the value of the cure offer or $500, whichever is greater, as compensation for inconvenience, any attorney's or other fees, expenses, or other costs of

any kind that such person may incur in relation to such loss; provided, however that the minimum additional amount need not exceed $4,000.

"Defective drywall" means drywall, or similar building material composed of dried gypsum-based plaster, that (i) as a result of containing the same or greater levels of strontium sulfide that has been found in drywall manufactured in the People's Republic of China and imported into the United States between 2004 and 2007 is capable, when exposed to heat, humidity, or both, of releasing sulfur dioxide, hydrogen sulfide, carbon disulfide, or other sulfur compounds into the air or (ii) has been designated by the U.S. Consumer Product Safety Commission as a product with a product defect that constitutes a substantial product hazard within the meaning of § 15(a)(2) of the Consumer Product Safety Act (15 U.S.C. § 2064(a)(2)).

"Goods" means all real, personal or mixed property, tangible or intangible. For purposes of this chapter, intangible property includes but shall not be limited to "computer information" and "informational rights" in computer information as defined in § 59.1-501.2.

"Person" means any natural person, corporation, trust, partnership, association and any other legal entity.

"Services" includes but shall not be limited to (i) work performed in the business or occupation of the supplier, (ii) work performed for the supplier by an agent whose charges or costs for such work are transferred by the supplier to the consumer or purchaser as an element of the consumer transaction, or (iii) the subject of an "access contract" as defined in § 59.1-501.2.

"Supplier" means a seller, lessor or licensor who advertises, solicits or engages in consumer transactions, or a manufacturer, distributor or licensor who advertises and sells, leases or licenses goods or services to be resold, leased or sublicensed by other persons in consumer transactions.

(1977, c. 635; 1981, c. 205; 1987, c. 464; 1988, c. 485; 1992, c. 278; 2001, cc. 741, 762; 2004, cc. 41, 90; 2009, cc. 359, 700; 2010, c. 143; 2011, c. 615.)

§ 59.1-199. Exclusions.

Nothing in this chapter shall apply to:

A. Any aspect of a consumer transaction which aspect is authorized under laws or regulations of this Commonwealth or the United States, or the formal advisory opinions of any regulatory body or official of this Commonwealth or the United States.

B. Acts done by the publisher, owner, agent or employee of a newspaper, periodical, or radio or television station, or other advertising media such as outdoor advertising and advertising agencies, in the publication or dissemination of an advertisement in violation of § 59.1-200, unless it be proved that such person knew that the advertisement was of a character prohibited by § 59.1-200.

C. Those aspects of a consumer transaction which are regulated by the Federal Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq.

D. Banks, savings institutions, credit unions, small loan companies, public service corporations, mortgage lenders as defined in § 6.2-1600, broker-dealers as defined in § 13.1-501, gas suppliers as defined in subsection E of § 56-235.8, and insurance companies regulated and supervised by the State Corporation Commission or a comparable federal regulating body.

E. Any aspect of a consumer transaction which is subject to the Landlord and Tenant Act, Chapter 13 (§ 55-217 et seq.) of Title 55 or the Virginia Residential Landlord and Tenant Act, Chapter 13.2 (§ 55-248.2 et seq.) of Title 55, unless the act or practice of a landlord constitutes a misrepresentation or fraudulent act or practice under § 59.1-200.

F. Real estate licensees who are licensed under Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1.

(1977, c. 635; 1987, c. 464; 1994, c. 400; 1995, c. 703; 1996, cc. 61, 77, 179; 1999, c. 494; 2000, cc. 691, 706.)

§ 59.1-200. Prohibited practices.

A. The following fraudulent acts or practices committed by a supplier in connection with a consumer transaction are hereby declared unlawful:

1. Misrepresenting goods or services as those of another;

2. Misrepresenting the source, sponsorship, approval, or certification of goods or services;

3. Misrepresenting the affiliation, connection, or association of the supplier, or of the goods or services, with another;

4. Misrepresenting geographic origin in connection with goods or services;

5. Misrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or benefits;

6. Misrepresenting that goods or services are of a particular standard, quality, grade, style, or model;

7. Advertising or offering for sale goods that are used, secondhand, repossessed, defective, blemished, deteriorated, or reconditioned, or that are “seconds,” irregulars, imperfects, or “not first class,” without clearly and unequivocally indicating in the advertisement or offer for sale that the goods are used, secondhand, repossessed, defective, blemished, deteriorated, reconditioned, or are “seconds,” irregulars, imperfects or “not first class”;

8. Advertising goods or services with intent not to sell them as advertised, or with intent not to sell at the price or upon the terms advertised.

In any action brought under this subdivision, the refusal by any person, or any employee, agent, or servant thereof, to sell any goods or services advertised or offered for sale at the price or upon the terms advertised or offered, shall be prima facie evidence of a violation of this subdivision. This paragraph shall not apply when it is clearly and conspicuously stated in the advertisement or offer by which such goods or services are advertised or offered for sale, that the supplier or offeror has a limited quantity or amount of such goods or services for sale, and the supplier or offeror at the time of

such advertisement or offer did in fact have or reasonably expected to have at least such quantity or amount for sale;

9. Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;

10. Misrepresenting that repairs, alterations, modifications, or services have been performed or parts installed;

11. Misrepresenting by the use of any written or documentary material that appears to be an invoice or bill for merchandise or services previously ordered;

12. Notwithstanding any other provision of law, using in any manner the words “wholesale,” “wholesaler,” “factory,” or “manufacturer” in the supplier’s name, or to describe the nature of the supplier’s business, unless the supplier is actually engaged primarily in selling at wholesale or in manufacturing the goods or services advertised or offered for sale;

13. Using in any contract or lease any liquidated damage clause, penalty clause, or waiver of defense, or attempting to collect any liquidated damages or penalties under any clause, waiver, damages, or penalties that are void or unenforceable under any otherwise applicable laws of the Commonwealth, or under federal statutes or regulations;

14. Using any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction;

15. Violating any provision of § 3.2-6512, 3.2-6513, or 3.2-6516, relating to the sale of certain animals by pet dealers which is described in such sections, is a violation of this chapter;

16. Failing to disclose all conditions, charges, or fees relating to:

a. The return of goods for refund, exchange, or credit. Such disclosure shall be by means of a sign attached to the goods, or placed in a conspicuous public area of the premises of the supplier, so as to be readily noticeable and readable by the person obtaining the goods from the supplier. If the supplier does not permit a refund, exchange, or credit for return, he shall so state on a similar sign. The provisions of this subdivision shall not apply to

any retail merchant who has a policy of providing, for a period of not less than 20 days after date of purchase, a cash refund or credit to the purchaser's credit card account for the return of defective, unused, or undamaged merchandise upon presentation of proof of purchase. In the case of merchandise paid for by check, the purchase shall be treated as a cash purchase and any refund may be delayed for a period of 10 banking days to allow for the check to clear. This subdivision does not apply to sale merchandise that is obviously distressed, out of date, post season, or otherwise reduced for clearance; nor does this subdivision apply to special order purchases where the purchaser has requested the supplier to order merchandise of a specific or unusual size, color, or brand not ordinarily carried in the store or the store's catalog; nor shall this subdivision apply in connection with a transaction for the sale or lease of motor vehicles, farm tractors, or motorcycles as defined in § 46.2-100;

b. A layaway agreement. Such disclosure shall be furnished to the consumer (i) in writing at the time of the layaway agreement, or (ii) by means of a sign placed in a conspicuous public area of the premises of the supplier, so as to be readily noticeable and readable by the consumer, or (iii) on the bill of sale. Disclosure shall include the conditions, charges, or fees in the event that a consumer breaches the agreement;

16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess of $5 (i) on an account maintained by the supplier and (ii) resulting from such consumer's overpayment on such account. Suppliers shall give consumers written notice of such credit balances within 60 days of receiving overpayments. If the credit balance information is incorporated into statements of account furnished consumers by suppliers within such 60-day period, no separate or additional notice is required;

17. If a supplier enters into a written agreement with a consumer to resolve a dispute that arises in connection with a consumer transaction, failing to adhere to the terms and conditions of such an agreement;

18. Violating any provision of the Virginia Health Spa Act, Chapter 24 (§ 59.1-294 et seq.) of this title;

19. Violating any provision of the Virginia Home Solicitation Sales Act, Chapter 2.1 (§ 59.1-21.1 et seq.) of this title;

20. Violating any provision of the Automobile Repair Facilities Act, Chapter 17.1 (§ 59.1-207.1 et seq.) of this title;

21. Violating any provision of the Virginia Lease-Purchase Agreement Act, Chapter 17.4 (§ 59.1-207.17 et seq.) of this title;

22. Violating any provision of the Prizes and Gifts Act, Chapter 31 (§ 59.1-415 et seq.) of this title;

23. Violating any provision of the Virginia Public Telephone Information Act, Chapter 32 (§ 59.1-424 et seq.) of this title;

24. Violating any provision of § 54.1-1505;

25. Violating any provision of the Motor Vehicle Manufacturers' Warranty Adjustment Act, Chapter 17.6 (§ 59.1-207.34 et seq.) of this title;

26. Violating any provision of § 3.2-5627, relating to the pricing of merchandise;

27. Violating any provision of the Pay-Per-Call Services Act, Chapter 33 (§ 59.1-429 et seq.) of this title;

28. Violating any provision of the Extended Service Contract Act, Chapter 34 (§ 59.1-435 et seq.) of this title;

29. Violating any provision of the Virginia Membership Camping Act, Chapter 25 (§ 59.1-311 et seq.) of this title;

30. Violating any provision of the Comparison Price Advertising Act, Chapter 17.7 (§ 59.1-207.40 et seq.) of this title;

31. Violating any provision of the Virginia Travel Club Act, Chapter 36 (§ 59.1-445 et seq.) of this title;

32. Violating any provision of §§ 46.2-1231 and 46.2-1233.1;

33. Violating any provision of Chapter 40 (§ 54.1-4000 et seq.) of Title 54.1;

34. Violating any provision of Chapter 10.1 (§ 58.1-1031 et seq.) of Title 58.1;

35. Using the consumer's social security number as the consumer's account number with the supplier, if the consumer has requested in writing that the supplier use an alternate number not associated with the consumer's social security number;

36. Violating any provision of Chapter 18 (§ 6.2-1800 et seq.) of Title 6.2;

37. Violating any provision of § 8.01-40.2;

38. Violating any provision of Article 7 (§ 32.1-212 et seq.) of Chapter 6 of Title 32.1;

39. Violating any provision of Chapter 34.1 (§ 59.1-441.1 et seq.) of this title;

40. Violating any provision of Chapter 20 (§ 6.2-2000 et seq.) of Title 6.2;

41. Violating any provision of the Virginia Post-Disaster Anti-Price Gouging Act, Chapter 46 (§ 59.1-525 et seq.) of this title;

42. Violating any provision of Chapter 47 (§ 59.1-530 et seq.) of this title;

43. Violating any provision of § 59.1-443.2;

44. Violating any provision of Chapter 48 (§ 59.1-533 et seq.) of this title;

45. Violating any provision of Chapter 25 (§ 6.2-2500 et seq.) of Title 6.2;

46. Violating the provisions of clause (i) of subsection B of § 54.1-1115;

47. Violating any provision of § 18.2-239;

48. Violating any provision of Chapter 26 (§ 59.1-336 et seq.);

49. Selling, offering for sale, or manufacturing for sale a children's product the supplier knows or has reason to know was recalled by the U.S. Consumer Product Safety Commission. There is a rebuttable presumption that a supplier has reason to know a children's product was recalled if notice of the recall has been posted continuously at least 30 days before the sale, offer for sale, or manufacturing for sale on the website of the U.S.

Consumer Product Safety Commission. This prohibition does not apply to children's products that are used, secondhand or "seconds";

50. Violating any provision of Chapter 44.1 (§ 59.1-518.1 et seq.) of this title;

51. Violating any provision of Chapter 22 (§ 6.2-2200 et seq.) of Title 6.2;

52. Violating any provision of § 8.2-317.1; and

53. Selling, offering for sale, or using in the construction, remodeling, or repair of any residential dwelling in the Commonwealth, any drywall that the supplier knows or has reason to know is defective drywall. This subdivision shall not apply to the sale or offering for sale of any building or structure in which defective drywall has been permanently installed or affixed.

B. Nothing in this section shall be construed to invalidate or make unenforceable any contract or lease solely by reason of the failure of such contract or lease to comply with any other law of the Commonwealth or any federal statute or regulation, to the extent such other law, statute, or regulation provides that a violation of such law, statute, or regulation shall not invalidate or make unenforceable such contract or lease.

(1977, c. 635; 1979, c. 304; 1981, c. 205; 1983, c. 173; 1986, c. 432; 1987, cc. 462 to 464; 1988, cc. 24, 534; 1989, cc. 689, 703; 1990, c. 584; 1991, cc. 300, 605, 608, 630, 654; 1992, cc. 278, 545, 768; 1993, cc. 455, 760; 1994, cc. 261, 400, 655; 1995, c. 10; 1998, c. 848; 2000, cc. 880, 901; 2002, cc. 217, 897; 2003, cc. 800, 1003; 2004, cc. 784, 790, 798, 817; 2005, cc. 269, 303, 640, 861; 2006, c. 399; 2008, cc. 294, 791, 842; 2009, cc. 321, 359, 376, 699, 700; 2010, cc. 477, 713; 2011, c. 615.)

§ 59.1-200.1. Prohibited practices; foreclosure rescue.

A. In addition to the provisions of § 59.1-200, the following fraudulent acts or practices committed by a supplier, as defined in § 59.1-198, in a consumer transaction involving residential real property owned and occupied as the primary dwelling unit of the owner, are prohibited:

1. The supplier of service to avoid or prevent foreclosure charges or receives a fee (i) prior to the full and complete performance of the services

it has agreed to perform, if the transaction does not involve the sale or transfer of residential real property, or (ii) prior to the settlement on the sale or transfer of residential real property, if the transaction involves the sale or transfer of such residential real property;

2. The supplier of such services (i) fails to make payments under the mortgage or deed of trust that is a lien on such residential real property as the payments become due, where the supplier has agreed to do so, regardless of whether the purchaser is obligated on the loan, and (ii) applies rents received from such dwellings for his own use;

3. The supplier of such services represents to the seller of such residential real property that the seller has an option to repurchase such residential real property, after the supplier of such services takes legal or equitable title to such residential real property, unless there is a written contract providing such option to repurchase on terms and at a price stated in such contract; or

4. The supplier advertises or offers such services as are prohibited by this section.

B. This section shall not apply to any mortgage lender or servicer regularly engaged in making or servicing mortgage loans that is subject to the supervisory authority of the State Corporation Commission, a comparable regulatory authority of another state, or a federal banking agency.

C. In connection with any consumer transaction covered by subsection A, any provision in an agreement between the supplier of such services and the owner of such residential real property that requires the owner to submit to mandatory arbitration shall be null and void, and notwithstanding any such provisions, the owner of such residential real property shall have the rights and remedies under this chapter.

(2008, c. 485; 2009, cc. 203, 272.)

§ 59.1-201. Civil investigative orders.

A. Whenever the attorney for the Commonwealth or the attorney for a county, city, or town has reasonable cause to believe that any person has engaged in, or is engaging in, or is about to engage in, any violation of

§ 59.1-200 or 59.1-200.1, the attorney for the Commonwealth or the attorney for a county, city, or town if, after making a good faith effort to obtain such information, is unable to obtain the data and information necessary to determine whether such violation has occurred, or that it is impractical for him to do so, he may apply to the circuit court within whose jurisdiction the person having information resides, or has its principal place of business, for an investigative order requiring such person to furnish to the attorney for the Commonwealth or attorney for a county, city, or town such data and information as is relevant to the subject matter of the investigation.

B. The circuit courts are empowered to issue investigative orders, authorizing discovery by the same methods and procedures as set forth for civil actions in the Rules of the Supreme Court of Virginia, in connection with investigations of violations of § 59.1-200 or 59.1-200.1 by the attorney for the Commonwealth or the attorney for a county, city, or town. An application for an investigative order shall identify:

1. The specific act or practice alleged to be in violation of § 59.1-200 or 59.1-200.1;

2. The grounds which shall demonstrate reasonable cause to believe that a violation of § 59.1-200 or 59.1-200.1 may have occurred, may be occurring or may be about to occur;

3. The category or class of data or information requested in the investigative order; and

4. The reasons why the attorney for the Commonwealth or attorney for a county, city, or town is unable to obtain such data and information, or the reason why it is impractical to do so, without a court order.

C. Within 21 days after the service upon a person of an investigative order, or at any time before the return date specified in such order, whichever is later, such person may file a motion to modify or set aside such investigative order or to seek a protective order as provided by the Rules of the Supreme Court of Virginia. Such motion shall specify the grounds for modifying or setting aside the order, and may be based upon the failure of the application or the order to comply with the requirements of this section, or upon any constitutional or other legal basis or privilege of such person.

D. Where the information requested by an investigative order may be derived or ascertained from the business records of the person upon whom the order is served, or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the information is substantially the same for the attorney for the Commonwealth or attorney for a county, city, or town as for the person from whom such information is requested, it shall be sufficient for that person to specify the records from which the requested information may be derived or ascertained, and to afford the attorney for the Commonwealth or attorney for the county, city, or town reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries thereof.

E. It shall be the duty of the attorney for the Commonwealth or attorney for a county, city, or town, his assistants, employees and agents, to maintain the secrecy of all evidence, documents, data and information obtained through the use of investigative orders or obtained as a result of the voluntary act of the person under investigation and it shall be unlawful for any person participating in such investigations to disclose to any other person not participating in such investigation any information so obtained. Any person violating this subsection shall be guilty of a Class 2 misdemeanor and shall be punished in accordance with § 18.2-11. Notwithstanding the foregoing, this section shall not preclude the presentation and disclosure of any information obtained pursuant to this section in any suit or action in any court of this Commonwealth wherein it is alleged that a violation of § 59.1-200 or 59.1-200.1 has occurred, is occurring or may occur, nor shall this section prevent the disclosure of any such information by the attorney for the Commonwealth or attorney for a county, city, or town to any federal or state law-enforcement authority that has restrictions governing confidentiality and the use of such information similar to those contained in this subsection; however, such disclosures may only be made as to information obtained after July 1, 1979.

F. Upon the failure of a person without lawful excuse to obey an investigative order under this section, the attorney for the Commonwealth or attorney for the county, city, or town may initiate contempt proceedings in the circuit court that issued the order to hold such person in contempt.

G. No information, facts or data obtained through an investigative order shall be admissible in any civil or criminal proceeding other than for the enforcement of this chapter and the remedies provided herein.

(1977, c. 635; 1979, c. 493; 1982, c. 13; 1987, c. 464; 1995, c. 703; 2008, c. 485.)

§ 59.1-201.1. Attorney General empowered to issue civil investigative demands.

Whenever the Attorney General has reasonable cause to believe that any person has engaged in, or is engaging in, or is about to engage in, any violation of this chapter, the Attorney General is empowered to issue a civil investigative demand. The provisions of § 59.1-9.10 shall apply mutatis mutandis to civil investigative demands issued pursuant to this section.

(1995, c. 703.)

§ 59.1-202. Assurances of voluntary compliance.

A. The Attorney General, the attorney for the Commonwealth, or the attorney for a county, city, or town may accept an assurance of voluntary compliance with this chapter from any person subject to the provisions of this chapter. Any such assurance shall be in writing and be filed with and be subject on petition to the approval of the appropriate circuit court. Such assurance of voluntary compliance shall not be considered an admission of guilt or a violation for any purpose. Such assurance of voluntary compliance may at any time be reopened by the Attorney General, or the attorney for the Commonwealth, or attorney for the county, city, or town respectively, for additional orders or decrees to enforce the assurance of voluntary compliance.

B. When an assurance is presented to the circuit court for approval, the Attorney General, the attorney for the Commonwealth, or the attorney for the appropriate county, city, or town shall file, in the form of a motion for judgment or complaint, the allegations which form the basis for the entry of the assurance. The assurance may provide by its terms for any relief which an appropriate circuit court could grant, including but not limited to restitution, arbitration of disputes between the supplier and its customers, investigative expenses, civil penalties and costs; provided, however, that

nothing in this chapter shall be construed to authorize or require the Commonwealth, the Attorney General, an attorney for the Commonwealth or the attorney for any county, city or town to participate in arbitration of violations under this section.

(1977, c. 635; 1981, c. 423; 1982, c. 13; 1988, c. 850.)

§ 59.1-203. Restraining prohibited acts.

A. Notwithstanding any other provisions of law to the contrary, the Attorney General, any attorney for the Commonwealth, or the attorney for any city, county, or town may cause an action to be brought in the appropriate circuit court in the name of the Commonwealth, or of the county, city, or town to enjoin any violation of § 59.1-200 or 59.1-200.1. The circuit court having jurisdiction may enjoin such violations notwithstanding the existence of an adequate remedy at law. In any action under this section, it shall not be necessary that damages be proved.

B. Unless the Attorney General, any attorney for the Commonwealth, or the attorney for any county, city, or town determines that a person subject to the provisions of this chapter intends to depart from this Commonwealth or to remove his property herefrom, or to conceal himself or his property herein, or on a reasonable determination that irreparable harm may occur if immediate action is not taken, he shall, before initiating any legal proceedings as provided in this section, give notice in writing that such proceedings are contemplated, and allow such person a reasonable opportunity to appear before said attorney and show that a violation did not occur or execute an assurance of voluntary compliance, as provided in § 59.1-202.

C. The circuit courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of § 59.1-200 or 59.1-200.1.

D. The Commissioner of the Department of Agriculture and Consumer Services, or his duly authorized representative, shall have the power to inquire into possible violations of subdivisions A 18, 28, 29, 31, 39, and 41, as it relates to motor fuels, of § 59.1-200 and § 59.1-335.12, and, if necessary, to request, but not to require, an appropriate legal official to bring an action to enjoin such violation.

(1977, c. 635; 1982, c. 13; 1988, c. 485; 2008, c. 485; 2012, cc. 803, 835.)

§ 59.1-204. Individual action for damages or penalty.

A. Any person who suffers loss as the result of a violation of this chapter shall be entitled to initiate an action to recover actual damages, or $500, whichever is greater. If the trier of fact finds that the violation was willful, it may increase damages to an amount not exceeding three times the actual damages sustained, or $1,000, whichever is greater. Any person who accepts a cure offer under this chapter may not initiate or maintain any other or additional action based on any cause of action arising under any other statute or common law theory if such other action is substantially based on the same allegations of fact on which the action initiated under this chapter is based.

B. Notwithstanding any other provision of law to the contrary, in addition to any damages awarded, such person also may be awarded reasonable attorneys' fees and court costs.

C. No cure offer shall be admissible in any proceeding initiated under this section, unless the cure offer is delivered by a supplier to the person claiming loss or to any attorney representing such person, prior to the filing of the supplier's initial responsive pleading in such proceeding. If the cure offer is timely delivered by the supplier, then the supplier may introduce the cure offer into evidence at trial. The supplier shall not be liable for such person's attorneys' fees and court costs incurred following delivery of the cure offer unless the actual damages found to have been sustained and awarded, without consideration of attorneys' fees and court costs, exceed the value of the cure offer.

D. In any action which the parties desire to settle all matters in dispute, the question of whether the plaintiff shall be awarded reasonable attorneys' fees and court costs in accordance with subsections B and C may be tendered to the court for consideration of the amount of such an award, if any.

(1977, c. 635; 1995, cc. 703, 726; 2004, cc. 41, 90; 2005, c. 250; 2006, c. 453.)

§ 59.1-204.1. Tolling of limitation.

A. Any individual action pursuant to § 59.1-204 for which the right to bring such action first accrues on or after July 1, 1995, shall be commenced within two years after such accrual. The cause of action shall accrue as provided in § 8.01-230.

B. When any of the authorized government agencies files suit under this chapter, the time during which such governmental suit and all appeals therefrom is pending shall not be counted as any part of the period within which an action under § 59.1-204 shall be brought.

(1988, c. 241; 1995, cc. 703, 726.)

§ 59.1-205. Additional relief.

The circuit court may make such additional orders or decrees as may be necessary to restore to any identifiable person any money or property, real, personal, or mixed, tangible or intangible, which may have been acquired from such person by means of any act or practice declared to be unlawful in § 59.1-200 or 59.1-200.1, provided, that such person shall be identified by order of the court within 180 days from the date of the order permanently enjoining the unlawful act or practice.

(1977, c. 635; 2008, c. 485.)

§ 59.1-206. Civil penalties; attorney's fees.

A. In any action brought under this chapter, if the court finds that a person has willfully engaged in an act or practice in violation of § 59.1-200 or 59.1-200.1, the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town may recover for the Literary Fund, upon petition to the court, a civil penalty of not more than $2,500 per violation. For purposes of this section, prima facie evidence of a willful violation may be shown when the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town notifies the alleged violator by certified mail that an act or practice is a violation of § 59.1-200 or 59.1-200.1, and the alleged violator, after receipt of said notice, continues to engage in the act or practice.

B. Any person who willfully violates the terms of an assurance of voluntary compliance or an injunction issued under § 59.1-203 shall forfeit and pay to the Literary Fund a civil penalty of not more than $5,000 per violation. For purposes of this section, the circuit court issuing an injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town may petition for recovery of civil penalties.

C. In any action pursuant to subsection A or B and in addition to any other amount awarded, the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town may recover any applicable civil penalty or penalties, costs, reasonable expenses incurred by the state or local agency in investigating and preparing the case not to exceed $1,000 per violation, and attorney's fees. Such civil penalty or penalties, costs, reasonable expenses, and attorney's fees shall be paid into the general fund of the Commonwealth or of the county, city, or town which such attorney represented.

D. Nothing in this section shall be construed as limiting the power of the court to punish as contempt the violation of any order issued by the court, or as limiting the power of the court to enter other orders under § 59.1-203 or 59.1-205.

E. The right of trial by jury as provided by law shall be preserved in actions brought under this section.

(1977, c. 635; 1980, c. 171; 1982, c. 13; 1991, c. 156; 1995, c. 703; 2008, c. 485.)

§ 59.1-207. Unintentional violations.

In any case arising under this chapter, no liability shall be imposed upon a supplier who shows by a preponderance of the evidence that (i) the act or practice alleged to be in violation of § 59.1-200 or 59.1-200.1 was an act or practice of the manufacturer or distributor to the supplier over which the supplier had no control or (ii) the alleged violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid a violation; however, nothing in this section shall prevent the court from ordering restitution and payment of reasonable attorney's fees and

court costs pursuant to § 59.1-204 B to individuals aggrieved as a result of an unintentional violation of this chapter.

(1977, c. 635; 1995, cc. 703, 726; 2008, c. 485.)