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.

REPLY BRIEF

George A. Somerville (VSB No. 22419)
George.Somerville@troutmansanders.com
Troutman Sanders LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
(804) 697-1291 (Telephone)
(804) 698-5149 (Facsimile)

Counsel for Appellants

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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INTRODUCTION

Defendants-Appellees' Brief is a paradigm of historical revisionism. Aside from numerous mistakes in their factual recitations, betraying confusion,[1] they rely heavily on the attribution of thoughts and actions to the trial court that are at odds with what the court said. They also rely on the notion that plaintiffs' Virginia Consumer Protection Act proof is limited to the bare-bones allegations of the Complaint. They ignore the fact that plaintiffs introduced and argued additional evidence in support of their VCPA claim, with no objection from the defense, which is a waiver of the argument that plaintiffs are limited to the allegations of the Complaint on appeal.

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[1] Many of those errors relate to facts that are not material to any issue on appeal, and therefore they are not discussed at length here. Those include, for example, the statement that Mr. Short suspended work because of Mrs. Owens' letter of September 22, 2012, and "threats of litigation." Brief of Appellees at 13. In fact, Mr. Short's notice that he had stopped work on the Thunderbird, Plaintiffs' Exhibit 13, preceded Mrs. Owens' letter, JA 586-87. *See* JA 510-15. Defendants also imply that they provided a bill of sale and "an amended Florida title" to plaintiffs prior to the litigation. *See* Brief of Appellees at 1-2 & n.1. In fact, those documents were produced only in discovery. *See* JA 420-21. The rust on the Thunderbird and the cost of the restoration project, discussed in the Brief of Appellees at 7-8, were issues in the trial and may be issues in a new trial if one is ordered on a remand, but they are not issues on appeal.

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."

Defendants' over-arching theme, sounded repeatedly in their Brief, is that plaintiffs introduced "no evidence of fraud or misrepresentation of any kind." Brief of Appellees at 3; *see id.* at 3-4, 5, 8, 9-10, 14, 16-17.[2] But that is not true just because defendants say it and no matter how many times they say it. The trial court erred by taking the case away from the jury based on its own assessment of witness credibility, as discussed in the Brief of Appellants at 14-21.

But the trial court did not really judge the witnesses' credibility, say defendants. It simply "had no alternative but to strike the Appellants' VCPA claim," because "[t]here was simply no evidence to support it ...." Brief of Appellees at 3-4. *See also id.* at 14 (attempting to describe what the trial court "was ... observing," "in the context of the evidence"); *id.* at 15 (trial court found the proposed inference, that DRS actually acquired the donor car for its $2,000 advertised price, "preposterous"); *id.* at 16-17 (trial judge

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[2] Defendants also say that plaintiffs did not assign error to the trial court's decision to strike "the count relating to common law fraud." Brief of Appellees at 1. They are mistaken. *See* Assignment of Error 1.

"was not weighing the evidence. There was nothing to weigh. Rather, he was simply observing that it was the only evidence available for the jury to consider and *he found* no reason not to believe it") (emphasis added).

That is pure historical revisionism. The trial court said absolutely nothing to support defendants' *post hoc* interpretation, which presumably explains why they cite nothing in the record to support it. The trial court's reasoning is set out at some length in the Brief of Appellants at 3 and 14-15 and more fully in the Joint Appendix at 437-38, 440, 449-52,455, and 469. Defendants are simply trying to rationalize the indefensible.[3]

Defendants' argument goes yet further, implicitly asking this Court to follow the trial court into error by judging the witnesses' credibility. *See* Brief of Appellees at 6 (describing defendant Daniel Short's military history and purported charitable activities); *id.* at 15, 16 & n.5 (arguing that Mr. Thiess had no "motivation to lie" and that Mr. Short's sole motivation "was to make an additional $1,000").

But even if those arguments were properly directed to this Court instead of a jury, they are mistaken and therefore misleading. What they

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[3] Defendants' counsel *argued* that it would be "preposterous" to allow the jury to "speculate" that Mr. Thiess's testimony regarding the price of the donor car was not accurate. Trial transcript (Sept. 24, 2013) at 301. The *court*, however, said nothing of the kind.

call "abusive treatment" of Mr. Thiess did not occur "during the litigation," as they say (*id.* at 16 n.5), but before the litigation began. *See* Brief of Appellants at 20; JA 370-72 (Mrs. Owens called Mr. Thiess in September 2012); JA i (Complaint was filed on October 19, 2012). And DRS's gain from misrepresenting a $2,000 purchase as a $6,000 purchase is not merely the $1,000 difference in its 25% markup, as defendants argue. DRS's gain is that $1,000 *plus* the $4,000 difference in the actual and ostensible purchase prices itself.

A jury also might find that both witnesses were motivated to lie in court because they felt trapped into a "tangled web" of deception that they had created prior to litigation. But that obviously is a question for a jury to decide, and that is all that plaintiffs are seeking in this appeal.[4]

Defendants argue that plaintiffs are bound by Short's and Thiess's testimony because it was presented in plaintiffs' case in chief.[5] *See* Brief of

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[4] Tellingly, defendants' claim that Mr. Thiess had "no motivation to lie" appears first in their recitation of what "a jury would have to believe" to find for the plaintiffs. Brief of Appellees at 15. The whole problem with this case is that the jury was not allowed to decide whether to believe plaintiffs' or defendants' case. The trial court improperly took that decision away.

[5] Defendants state inaccurately that Messrs. Short and Thiess were plaintiffs' "only witnesses." Brief of Appellees at 17. Mr. and Mrs. Owens testified in their case in chief, and they also introduced testimony of two expert witnesses. Messrs. Short and Thiess were, however, the only

(footnote continued)

Appellees at 17-18. This Court has held, however, that "'[w]hen a defendant is called as an adverse witness the plaintiff is not bound by such of his testimony as is in conflict with evidence introduced by the plaintiff.'" *Miller v. White*, 222 Va. 311, 315, 281 S.E.2d 802, 804 (1981), quoting *Weddle v. Draper*, 204 Va. 319, 322, 130 S.E.2d 462, 465 (1963) (cited in Brief of Appellees at 18). In *Miller v. White*, the defendant, White, was called by the plaintiff as an adverse witness and testified that he was driving on the proper side of the road at the time of a head-on collision. Physical evidence, however, "support[ed] the inference that the collision occurred in Miller's lane of travel." 222 Va. at 315, 281 S.E.2d at 804. The Court acknowledged that "reasonable persons reviewing the physical evidence could disagree whether the collision occurred at the point where the skid marks began"; but nevertheless the physical evidence adduced by the plaintiff, "[s]tanding alone,"

> would be sufficient to withstand the defendant's motion to strike the plaintiff's evidence. The physical facts adduced by the plaintiff tend to show why, how, and where the collision occurred. On the basis of this physical evidence, a jury, without resorting to conjecture or speculation, could reasonably conclude that White was operating his vehicle on the wrong side of the road at the time of the collision, that White was

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witnesses who were in a position to testify regarding the sale of the donor car from the one to the other.

> negligent in doing so, and that his negligence was a proximate cause of the collision.

Id. at 315, 281 S.E.2d at 804. White's testimony that he was in his proper lane of travel therefore was not binding on the plaintiff, who introduced it. "From the physical evidence ..., a jury could reasonably infer that the collision occurred in Miller's lane. Because this reasonable inference conflicts with White's testimony that he was in his proper lane of travel, this portion of White's testimony is not binding upon the plaintiff." *Id.* at 315, 281 S.E.2d at 804.

The same rule should apply here. The circumstantial evidence that Mr. Short was aware of and therefore paid Mr. Thiess's $2,000 asking price for the donor car is not "physical" evidence in the same sense as in *Miller*, of course, nor is Mr. Thiess a defendant in this case. But the evidence that Mr. Short sent an email to Mr. Thiess through Mr. Thiess's Craigslist ad (and therefore that he must have seen that ad) would allow a reasonable jury to find a verdict for the plaintiffs "without resorting to conjecture and speculation," *id.* And there is no principled reason why the rule in *Miller* should not apply to witnesses other than defendants – and especially to Mr. Thiess, who plainly was hostile to plaintiffs in every practical if not legal respect.

Further attempting to bolster the witnesses' credibility, defendants quote Mr. Thiess's testimony regarding his acceptance of $4,000 cash and a $2,000 check as payment for the donor car. Brief of Appellees at 9, quoting JA 368. That testimony is at best difficult to reconcile with Mr. Short's testimony 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), and Mr. Thiess's own testimony that Mr. Short "offered cash" and that he (Thiess) "wanted most of the payment in cash because [he] didn't want a check to bounce or anything..." (JA 369), as discussed in the Brief of Appellants at 18.

Defendants argue further, in the same vein, that "direct documentary evidence" – including a bill of sale that they say (without citation) "was prepared on the date of the sale" – corroborated Mr. Short's and Mr. Thiess's testimony. Brief of Appellees at 14. But a bill of sale indicating that the car was sold for "$6,000.00 cash," JA 628, does not corroborate testimony that the sale price was paid partly in cash and partly by check.

Defendants state, also without citation but nevertheless as if it were an established fact, that neither Mr. Thiess nor Mr. Short has any recollection of sending or receiving the July 13, 2012, email to Thiess from "drs@fantomworks.com" (Mr. Short's email address) and "more important

still" that "Mr. Short has no recollection of ever seeing the Craigslist advertisement." Brief of Appellees at 10.[6] There is very clear documentary evidence that Mr. Short sent that email, and Mr. Thiess admitted that he called Mr. Short – a person previously unknown to him, JA 331, 364 – a mere 12 minutes later. JA 327, 377. *See also* JA 428 (Mr. Short's testimony that it "[c]ould have been [Mr. Thiess] that called me"). Given that evidence, a reasonable jury could decline to credit the referenced testimony; or it could find that the events at issue occurred, whether the witnesses recalled them at the time of the trial or not.

Defendants' repeated references to an "earlier" or "previous" Craigslist advertisement (Brief of Appellees at 10, 15, 15 n.4, 17) are mysterious at best. As noted in the Brief of Appellants at 11, Mr. Thiess testified that his asking price was $2,000 on July 13, 2012, JA 315-16, the day that he sold the car to DRS, JA 383-84.

Defendants concede that "[a]t best," the Craigslist log allows "the inference that someone – not necessarily Mr. Short – at DRS sent an email to Lt. Thiess." Brief of Appellees at 10. But there is no plausible theory –

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[6] That claim is at odds with DRS's counsel's statements to the court that "[a]s the other party to the e-mail, Mr. Short said that it was deleted months before any suit went on," JA 50, and that "[t]hese things had been deleted long before the suit was filed," JA 342.

certainly none has been suggested – that anyone other than Mr. Short emailed Mr. Thiess using Mr. Short's email address. Defendants' stealth emailer theory also fails to explain Mr. Thiess's telephone call to Mr. Short that day. (*See* JA 327: "Q: And approximately eleven o'clock Eastern time you called – did you call Mr. Short? A: I did call him on that day, yes.")

Defendants argue that plaintiffs' reliance on *Carter v. Lambert*, 246 Va. 309, 435 S.E.2d 403 (1993), is "misplaced." Brief of Appellees at 17. *Carter* is only one of ten cases cited at pages 15-16 of the Brief of Appellants, which demonstrate that this Court has long held and invariably applied the rule that it is the jury's function, not the trial judge's, to judge the credibility of the witnesses and the weight of the evidence. Defendants' shallow attempt to distinguish *Carter* factually from this case states no reason why the Court should not apply the settled rule of that case here.

Defendants also concede that "[h]ad the Plaintiffs offered any evidence sufficient to enable the jury to believe that both Lt. Thiess and Mr. Short were lying, the trial Court's assessment of their credibility would have clearly been inappropriate." Brief of Appellees at 14. That concession is proper, and it should be dispositive. A trial court's assessment of witness credibility, in a jury trial, is *always* "inappropriate"; and the evidence that Mr. Short sent an email to Mr. Thiess through Mr. Thiess's Craigslist ad listing

the donor car for sale for $2,000 – which means that he had to have seen that ad – and that Mr. Thiess promptly called Mr. Short in response to that email, is more than sufficient to allow a reasonable jury to find that the witnesses' denials were not truthful.

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.

Defendants now concede that proof of a VCPA claim is not limited to proof of fraud, a reversal of their position at the trial[7] and an express repudiation of the trial court's ruling to the contrary. But in a further attempt at historical revision, they attempt to re-characterize the trial court's ruling as a decision that plaintiffs' VCPA claim was limited to fraud because that is all that they alleged in their Complaint. Defendants err on multiple grounds.

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[7] *See* JA 433 (arguing, with specific reference to the VCPA claim, that an allegation "upon information and belief ... is arguably a defective allegation when one is trying to prove fraud or intent to deceive"); JA 448 (arguing that proof of a VCPA claim "requires evidence of intent to deceive"); JA 466 (arguing, in opposition to plaintiffs' motion for reconsideration of the court's ruling granting defendants' motion to strike the VCPA claim (*see* JA 459), that "there is absolutely no evidence of fraud in this case, and any intent to deceive requires some evidence of intent"); and trial transcript (Sept. 24, 2013) at 300-01 (arguing, again with reference to the VCPA claim, that "you can't prove fraud by inference. Fraud has to be proven by direct, compelling, clear and convincing, evidence").

First, there is once again nothing in the trial court's rulings to support defendants' new interpretation, and nothing is cited in their brief to support it. The trial court's rulings are set out in major part in the Brief of Appellants at 3-4, quoting JA 449-50 and 452. *See also* JA 461-62, 468, 469 (cited in Brief of Appellants). The trial court stated repeatedly that "there's got to be some evidence of fraud" and "there's just really no evidence of fraud in this case," JA 468, 469 (ruling denying plaintiffs' motion for reconsideration of its ruling granting defendants' motion to strike plaintiffs' VCPA claim (*see* JA 459)). But the court said absolutely nothing to support defendants' *post hoc* argument that its ruling was based on the specific allegations in the Complaint.

Second, plaintiffs introduced evidence that defendants violated the VCPA by misrepresenting that Mr. Short has "Certifications in ... Multiple Automotive Restoration Fields" (JA 569; *see* JA 389-90, 395, 396-97); by misrepresenting that Mr. Short "had a lot of experience getting so-called donor vehicles to restore older antique vehicles" (JA 244; *see* JA 399); by misrepresenting that the donor car had a certified engine and that it would be purchased at an auction (JA 85; *see* Brief of Appellees at 8, citing JA 499); and by misrepresenting the price that they paid for the donor car (as discussed at length in the opening Brief). Defendants did not object to any

of that evidence, and therefore they have waived any argument that such misrepresentations could not all be considered by the jury because they were not all pled in the Complaint. *See Culmore Realty Company v. Caputi*, 203 Va. 403, 406, 124 S.E.2d 7, 9-10 (1962):

> We are not unmindful of the principle that proof must correspond with the allegations or grounds of defense, but where no objection has been made to the admission of evidence, or no motion is made to exclude it because of the supposed variance with the pleadings, such variance must be considered to have been waived.... If this rule of practice was not adhered to it would deprive parties of their right to amend their pleadings to conform with the evidence, which is permitted in proper cases under § 8-217, Code of 1950, 1957 Replacement Volume [now Va. Code § 8.01-377], and thereby defeat the ends of justice and the purpose of the statute.

Id. (citations omitted).

Defendants aver that plaintiffs did not refer in their argument to the trial court to defendants' misrepresentation that the donor car engine was certified. Brief of Appellees at 22. They are mistaken. *See* JA 442-43.

Defendants also assert that certification of the engine was not a material factor in plaintiffs' decisions and that "Mrs. Owens testified that she did not care what kind of engine was used as long as it was reliable." Brief of Appellees at 22, citing JA 313. Defendants, who prevailed on a motion to strike the evidence, are asking the court to interpret the evidence in the light most favorable to themselves and to accord them the benefit of

possible inferences from the evidence. Mrs. Owens' testimony did not address the question of certification but "whether or not there was going to be an Interceptor fuel injected engine in the car." JA 313. Her response was, "I wanted the car to be reliable, but yes, I didn't care how it was made reliable." *Id.* Certification of an engine plainly implies satisfaction of a standard of reliability, and therefore the more reasonable inference from Mrs. Owens' testimony is that certification was an important consideration. In all events, that is a question for the jury and not for the trial court.

Defendants argue further that there is no evidence that their misrepresentation of Mr. Short's "Certifications in ... Multiple Automotive Restoration Fields" was material to plaintiffs' decisions. Brief of Appellees at 22. In fact, Mr. Owens testified that he relied on DRS's website, where the false representation appeared. *See* JA 80, 569.[8]

III. The jury's verdict on plaintiffs' contract claim does not preclude proof of the VCPA and fraud claims.

The Conclusion to the Brief of Appellees intimates that the jury's verdict on the contract claim precludes a finding for plaintiffs on the VCPA

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[8] Defendants also "concede that a provider of commercial services can violate the VCPA without committing fraud" – if, for example "a service provider misrepresented his qualifications." Brief of Appellees at 19. That is precisely what happened in this case.

and fraud claims, on the ground that if the jury had believed that DRS misrepresented the price of the donor car it would have found its verdict for the plaintiffs. But that is not necessarily so.

The court instructed the jury to find a verdict for defendants on the contract claim if the plaintiffs failed to prove *either* that there was a contract between the parties *or* that defendants breached the contract (or both); it instructed that a contract "must be both complete and reasonably certain," including all of the essential terms expressed in a clear and definite way; and it instructed that for a contract to exist, the minds of the parties must have met on every material term. Tr. (Sept. 25, 2013) at 135-37. There was no written contract, as defendants state in their Brief at 7; and a reasonable jury could treat the absence of a signed writing as evidence that there was no "complete and reasonably certain" agreement and that the minds of the parties did not meet on every material term. A finding that defendants did not breach the contract might establish that they did not misrepresent the price of the donor car; but a finding that plaintiffs failed to prove the existence of a contract would not, and there is no way to know the basis for the jury's decision. *See, e.g.*, *Jones v. Commonwealth*, 217 Va. 231, 237, 228 S.E.2d 127, 131 (1976) ("we can reasonably conclude from the record of the prior trial that ... 'a rational jury could have grounded

its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' [Citation]. Accordingly, we reject the defendant's claim that the Commonwealth was collaterally estopped in the trial of the present case from showing that the wounding of Gillispie was with malicious intent"); *Chakales v. Djiovanides*, 161 Va. 48, 81-82, 170 S.E. 848, 859-60 (1933).

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,

Richard L. Owens, Sr.,
Cynthia M. Owens

By *George A. Somerville*
Counsel

George A. Somerville (VSB No. 22419)
George.Somerville@troutmansanders.com
Troutman Sanders LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
(804) 697-1291 (Telephone)
(804) 698-5149 (Facsimile)

Counsel for Appellants

CERTIFICATE

Pursuant to Va. Sup. Ct. Rules 5:29 and 5:26(h), I hereby certify that the foregoing brief complies with Rule 5:26. I further certify that on this 7th day of August, 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

Copies of the foregoing Brief in PDF format have been emailed to counsel for appellees and to counsel for *amicus curiae* Commonwealth of Virginia, and three copies of the foregoing Brief have been transmitted by US First Class Mail to counsel for appellees and to counsel for *amicus curiae* Commonwealth of Virginia, named below:

Gregory N. Stillman, Esquire
Hunton & Williams LLP
500 East Main Street, Suite 1000
Norfolk, Virginia 23510
gstillman@hunton.com

Counsel for Appellees

The Honorable Mark R. Herring, Attorney General
Cynthia E. Hudson, Esquire
Rhodes B. Ritenour, Esquire
David B. Irvin, Esquire
dirvin@oag.state.va.us
Richard S. Schweiker, Jr., Esquire
rschweiker@oag.state.va.us
Stephen J. Sovinsky, Esquire
ssovinsky@oag.state.va.us
Office of the Attorney General of Virginia
900 E. Main Street
Richmond, VA 23219

Counsel for *Amicus Curiae* Commonwealth of Virginia

George A. Somerville