IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

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RECORD NO. 140171

RICHARD L. OWENS, SR., et al., *Appellants*,

v.

DRS AUTOMOTIVE FANTOMWORKS, INC., et al., *Appellees*.

THE COMMONWEALTH OF VIRGINIA'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS' ASSIGNMENT OF ERROR NUMBER TWO

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I. STATEMENT OF THE CASE AND ASSIGNMENTS OF ERROR

This appeal presents the question whether it is necessary to prove common law fraud to establish a violation of the Virginia Consumer Protection Act ("VCPA"), Virginia Code §§ 59.1-196 through 59.1-207. It is not. The VCPA was enacted as remedial legislation and created causes of action for individual consumers and government enforcement attorneys that do not require proof of common law fraud.

Appellants Richard L. Owens, Sr. and Cynthia M. Owens appeal a judgment from the Circuit Court of the City of Norfolk, in part to address the trial court's dismissal of a cause of action under the VCPA. On May 22, 2014, this Court granted the Appellants' Petition for Appeal for consideration of Assignments of Error Nos. 1, 2, and 3. Pursuant to Rule 30 of the Rules of the Supreme Court of Virginia, the Commonwealth files this Amicus Curiae Brief addressing Assignment of Error No. 2, which concerns whether 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. The Commonwealth takes no position on the merits of Appellants' Assignments of Error Nos. 1 and 3.

The trial court appears to have erred in its ruling on the defendants'

Motion to Strike, by equating the elements of proof required in a VCPA case with those required in a common law fraud case.[1] As the primary constitutional officer charged with enforcement of the VCPA, and with a staff of attorneys dedicated to enforcement of the VCPA as well as the numerous statutes enforced through it, the Attorney General has a particular interest in ensuring that the statute is properly construed and that its remedial purpose is not frustrated. The Commonwealth submits this Amicus Curiae Brief to protect the public interest and to advance the statute's purpose "to promote fair and ethical standards of dealings between suppliers and the consuming public." Va. Code Ann. § 59.1-197 (2014).

The Commonwealth defers to the Assignments of Error, Nature of the Case and Material Proceedings Below, and Facts sections of the Brief of Appellants. The Commonwealth takes no position on the underlying facts as presented by the Appellants, however, except to the extent necessary to address the issue of law presented in their Assignment of Error No. 2.

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[1] The trial court did not issue a written opinion concerning the VCPA claim and instead ruled from the bench. In its ruling, the court stated first that "I don't know that there was any credible evidence that they deceived anyone or there was fraud." (J.A. at 449-50.) During the course of continued argument (which took place over two days), the court noted on repeated occasions that it was striking the VCPA count because it found no evidence of fraud. (*See, e.g.*, J.A. at 455.)

II. ARGUMENT

A. Standard of Review

The standard of review for questions of law is *de novo*. *E.g.*, *Woodard v. Commonwealth*, 287 Va. 276, 280, 754 S.E.2d 309, 311 (2014); *Findlay v. Commonwealth*, 287 Va. 111, 114, 752 S.E.2d 868, 870 (2014).

B. Elements of Proof for a VCPA Violation and Common Law Fraud Are Different

This Court has recognized that the causes of action for common law fraud and a VCPA violation are different. In *Wilkins v. Peninsula Motor Cars, Inc.,* 266 Va. 558, 587 S.E.2d 581 (2003), the plaintiff had recovered at trial damages on claims for both common law fraud and a violation of the VCPA. In determining whether the plaintiff would be required to elect between the two remedies provided, 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).

As set forth below, the elements of proof necessary to show a VCPA violation and common law fraud differ in at least two critical ways. First, while proof of fraud is necessary to make out a common law fraud claim, it is not necessary—though it is sufficient—to make out a VCPA claim.

Second, intent is required to demonstrate common law fraud, but not a VCPA violation. That these elements are not required to make out a VCPA claim is a reflection of the General Assembly's intent that the VCPA serve a broad remedial purpose.

1. Actual fraud is not required to make out a VCPA violation

To assert a claim for common law actual fraud, a plaintiff bears the "burden of proving by clear and convincing evidence the following elements: '(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.'" *Richmond Metro. Auth. v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 557, 507 S.E.2d 344, 346 (1998) (citing *Evaluation Research Corp. v. Alequin*, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994)). A claim for constructive fraud requires proof by clear and convincing evidence "that a false representation of a material fact was made innocently or negligently, and the injured party was damaged as a result of . . . reliance upon the misrepresentation." *Mortarino v. Consultant Eng'g Servs., Inc.*, 251 Va. 289, 295, 467 S.E.2d 778, 782 (1996) (citing *Evaluation Research Corp.*, 247 Va. at 148, 439 S.E.2d at 390).

Although proof of fraud in a consumer transaction will establish a

VCPA violation, the VCPA allows other forms of proof as well. For a private plaintiff, the elements of a VCPA violation are set forth in the list of prohibited practices in § 59.1-200(A) and in the requirements of § 59.1-204. In general, but with many exceptions, there needs to be proof of a misrepresentation or false statement committed by a "supplier" in connection with a "consumer transaction," as those terms are defined in § 59.1-198. *See, e.g.*, Va. Code Ann. § 59.1-200(A)(1)-(6), (10)-(11) (2014). It also is "well settled that a misrepresentation, the falsity of which will afford ground for an action for damages, must be of an existing fact, and not the mere expression of an opinion." *Lambert v. Downtown Garage, Inc.*, 262 Va. 707, 712, 553 S.E.2d 714, 717 (2001). Section 59.1-200(A)(14), which is a catch-all provision, prohibits a "supplier" from "[u]sing any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction."

Based on well-established rules of statutory construction, the words "deception," "false pretense," "false promise," and "misrepresentation" in § 59.1-200(A)(14) must be understood as describing something other than and in addition to "fraud," or they would be redundant. This Court explained these rules in *Lynchburg Div. of Soc. Servs. v. Cook*:

> "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).

276 Va. 465, 483, 666 S.E.2d 361, 370 (2008). Accordingly, the circuit court erred to the extent that it required actual fraud to prove a violation of the VCPA.

2. Intent to deceive is not required to establish a VCPA violation

While required to establish common law actual fraud, proof of the speaker's (or in the context of the VCPA, the "supplier's") intent to deceive or mislead is not required to establish a VCPA violation. Although this proposition is not explicit in the VCPA, it is readily inferable from the last clause of § 59.1-207, which preserves a consumer's right to restitution and reasonable attorney's fees and court costs even though a violation is unintentional. It also is inferable from the fact that a private plaintiff is entitled to receive their damages trebled, or $1,000, whichever is higher, if they prove that the violation was "willful." Va. Code Ann. § 59.1-204(A)

(2014).[2] Under Virginia law, the term "willfully" is understood, in the context of misrepresentations, to mean "to make a statement deliberately and intentionally, knowing it to be false." *Glenn Falls Ins. Co. v. Long*, 213 Va. 776, 779, 195 S.E.2d 887, 890 (1973).[3]

Although proof of a misrepresentation often is required to establish a VCPA violation, many subsections found under § 59.1-200 prohibit acts that not only do not constitute common law fraud, but also do not amount to affirmative misrepresentations. For example, § 59.1-200(A)(16) prohibits any failure by a "supplier" to disclose "conditions, charges, or fees relating to . . . [t]he return of goods for refund, exchange, or credit;" § 59.1-21.4 of the Virginia Home Solicitation Sales Act, violations of which are

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[2] The Attorney General and other governmental enforcers of the VCPA are given authority to seek civil penalties in the event of willful violations. Va. Code Ann. § 59.1-206(A) (2014).

[3] Although proof of intent is not required, a private plaintiff will need to show reliance or causation and that there was some resulting damage or loss to establish a VCPA violation. Va. Code Ann. § 59.1-204(A) (2014) (providing, in part, that "[a]ny 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"). In contrast, individual consumer reliance is not a necessary element in an action brought by a government enforcer for restitution. Va. Code Ann. § 59.1-205 (2014) (providing that the court may make such additional orders "as may be necessary to restore to any identifiable person any money or property, . . . which *may* have been acquired from such person by means of any act or practice declared to be unlawful in § 59.1-200") (emphasis added).

enforceable through the VCPA pursuant to § 59.1-200(A)(19), makes it a violation of the VCPA, absent special circumstances, if a home solicitation seller does not provide the buyer with a notice including a three-day right to cancel the transaction; and § 59.1-207.4 of the Virginia Automobile Repair Facilities Act, violations of which are enforceable through the VCPA pursuant to § 59.1-200(A)(20), makes it a violation of the VCPA if an automobile repair facility does not offer to return to its customers automobile parts that are removed during repairs. There are numerous similar examples of conduct that violates the VCPA or a consumer protection statute enforceable through the VCPA that does not involve a misrepresentation or fraud.

3. Requiring fewer elements to prove a VCPA violation reflects the statute's broad remedial purpose

The fact that fewer elements are required to prove a VCPA claim than a common law fraud claim flows from the General Assembly's stated intent that the VCPA should be "applied as remedial legislation to promote fair and ethical standards of dealings between suppliers and the consuming public." Va. Code Ann. § 59.1-197 (2014). This Court has held on multiple occasions that a remedial statute "must be liberally construed to avoid the mischief at which it is directed and to advance the remedy for which it was promulgated." *See, e.g.*, *Valley Acceptance Corp. v. Glasby*, 230 Va. 422,

428, 337 S.E.2d 291, 295 (1985); *Bowman v. Commonwealth*, 201 Va. 656, 661, 112 S.E.2d 887, 891 (1960).

Moreover, it would be an empty victory for consumers—and a largely pointless legislative act—if the statute intended to level the playing field between them and suppliers required them to prove the exact same requirements, and be subject to the same heightened standards of proof, as those required to demonstrate common law fraud. *Accord Avery v. State Farm Mut. Auto. Ins. Co.,* 216 Ill. 2d. 100, 192, 835 N.E.2d 801, 856 (Ill. 2005) (holding that standard of proof under Illinois Consumer Fraud Act is preponderance of evidence, after noting first that the statute "is to be liberally construed to effect its purpose, which is to provide broader protection to consumers than an action for common law fraud"); *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St. 3d 31, 34, 989 N.E.2d 997, 1000 (Ohio 2013) (holding that Ohio Consumer Sales Practices Act "is remedial in nature, having been designed to compensate for incomplete consumer remedies available at common law"); *Willow Springs Condo. Ass'n, Inc. v. Seventh BRT Dev. Corp.,* 245 Conn. 1, 42-43, 717 A.2d 77, 99-100 (Conn. 1998) (holding that a "party need not prove an intent to deceive to prevail under [the Connecticut Unfair Trade Practices Act]," after noting that "[t]he entire act is remedial in character . . . and must be liberally

construed in favor of those whom the legislature intended to benefit"); *State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 30, 32 (Iowa 2013) (holding that proof of common law fraud elements is not required to obtain reimbursement for unlawful practices not specifically listed as requiring additional proof, and noting that the Iowa Consumer Fraud Act "is not a codification of common law fraud principles," and that the Act is a remedial statute); *State ex. rel. Spaeth v. Eddy Furniture Co.*, 386 N.W.2d 901, 903 (N.D. 1986) (holding that standard of proof under state consumer protection statutes is preponderance of the evidence, after noting that "[c]onsumer fraud is a cause of action which is separate and distinct from common law fraud," and that "it is generally recognized that consumer protection statutes are remedial in nature, and therefore must be liberally construed in favor of protecting consumers").

The highest appellate courts of other jurisdictions have come to similar conclusions and noted that there are differences between statutory fraud causes of action and common law fraud. *See, e.g.*, *Betsinger v. D.R. Horton, Inc.*, 232 P.3d 433, 436 (Nev. 2010) (holding that "[s]tatutory offenses that sound in fraud are separate and distinct from common law fraud," and that "deceptive trade practices . . . must only be proven by a preponderance of the evidence"); *Gaidon v. Guardian Life Ins. Co. of Am.*,

96 N.Y.2d 201, 209-10, 750 N.E.2d 1078, 1082-83 (N.Y. 2001) (holding that, "[i]n contrast to common-law fraud, General Business Law § 349 is a creature of statute based on broad consumer-protection concerns," and that "it is not merely the absence of scienter that distinguishes a violation of section 349 from common-law fraud; section 349 encompasses a significantly wider range of deceptive business practices that were never previously condemned by decisional law"); *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 724 (Tex. 1990) (holding that "misrepresentations which do not necessarily constitute common law fraud may be actionable under the [Texas Deceptive Trade Practices Act]", and noting that the primary purpose of the Act was "to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit").

The General Assembly defined in § 59.1-200 the list of those things that constitute statutory fraud.[4] As discussed above, the list of practices that violate the VCPA includes many items that do not constitute an affirmative misrepresentation, much less common law fraud. The present

[4] "The following fraudulent acts or practices committed by a supplier in connection with a consumer transaction are hereby declared unlawful: . . . ." Va. Code Ann. § 59.1-200(A) (2014).

case presents an opportunity for the Court to make clear that prohibited practices under the VCPA constitute statutory fraud, which requires different elements of proof from common law fraud.

C. The Court Should Take This Opportunity to Make Clear that Proof of Intent Is Not Required for a VCPA Claim

There currently is confusion among some Virginia circuit courts and some federal courts in Virginia regarding whether actual intent is required to state a cause of action under the VCPA. Some state and federal courts correctly have held that the causes of action for common law fraud and for VCPA violations are distinct, with different elements. *See, e.g.*, *Commonwealth v. Smoky Mountain Secrets, Inc.*, 41 Va. Cir. 564, 569 (Richmond City 1997) (holding that proof of common law fraud is not required to establish a VCPA violation and that only a finding of a tendency to mislead and deceive need be shown); *Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 2d 535, 553 (E.D. Va. 2001), *aff'd*, 319 F.3d 119 (4th Cir. 2003), *rev'd in part on other grounds*, 543 U.S. 50 (2004)[5] (holding that claims of fraud and misrepresentation are distinct under the VCPA and that proof of a false representation is required for a VCPA claim).

[5] On remand, the District Court reaffirmed its fee award under the VCPA, and the Court of Appeals upheld that award. 384 F. Supp. 2d 915 (E.D. Va. 2005), *aff'd in part*, 478 F.3d 183 (4th Cir. 2007).

Other state and federal courts, however, have mistakenly held that proof of an intent to deceive or mislead is required to establish a claim under the VCPA. *See, e.g., Weiss v. Cassidy Dev. Corp.*, 63 Va. Cir. 76, 78 (Fairfax County 2003) (holding that "[a]llegations of misrepresentation of fact must include the elements of fraud"); *Meng v. The Drees Co.*, 77 Va. Cir. 442, 443 (Loudoun County 2009) (granting post-verdict motion to dismiss VCPA count after holding that no actual fraud was found and noting that the jury had determined any misrepresentations were not made intentionally); *Padin v. Oyster Point Dodge*, 397 F. Supp. 2d 712, 722 (E.D. Va. 2005) (holding that, to sustain a claim under the VCPA, a plaintiff "must prove that the defendant acted with an intent to deceive or otherwise mislead"); *Synergistic Int'l, LLC v. Korman*, 402 F. Supp. 2d 651, 663 (E.D. Va. 2005) (holding that, "to satisfy the [VCPA], a misrepresentation must be 'a false representation, of material fact, made intentionally and knowingly, with intent to mislead . . . .'" (citation omitted)), *aff'd in part and vacated in part*, 470 F.3d 162 (4th Cir. 2006)[6]; *Jefferson v. Briner Inc.*, No. 3:05-CV-652, 2006 U.S. Dist. LEXIS 41423, at *29 (E.D. Va. June 21, 2006) (holding that "[a]n allegation of a misrepresentation of fact must include the

[6] The Fourth Circuit affirmed the lower court's finding of a VCPA violation without addressing it, but vacated additional claims brought by the plaintiffs. 470 F.3d 162, 176 (4th Cir. 2006).

elements of fraud" (internal quotation marks omitted)).

If it reaches this issue on the merits, this Court should take this opportunity to clarify the scope of its holding in *Lambert v. Downtown Garage*, *supra*, and make clear that proof of actual fraud (*i.e.*, intent to deceive) is not required to establish a standard VCPA claim. In *Lambert*, the plaintiff contended the defendant automobile repair facility committed common law fraud and violated the VCPA by, among other things, selling him a vehicle and failing to disclose the nature and extent of the damages and repairs previously made to the vehicle. After noting that, at common law, "concealment, whether accomplished by word or conduct, may be the equivalent of a false representation," the Court held that, even for purposes of a VCPA claim, "proof of misrepresentation by nondisclosure requires evidence of a knowing and a deliberate decision not to disclose a material fact." 262 Va. at 714 (internal quotation marks omitted).

But the Court's holding in *Lambert* is limited to misrepresentations by nondisclosure, and does not address the level of proof required in the context of affirmative misrepresentations that also constitute violations of the VCPA.[7] The Court should now confirm and make clear that, in cases of

[7] At least one sister state's consumer protection statute explicitly provides that only acts of concealment, suppression, or omission of a material fact, require proof of elements associated with common law fraud such as intent

affirmative misrepresentations and other non-concealment violations, these scienter requirements are inapplicable. Based on the clear language of § 59.1-207, no intent is required in those situations.

The Court should take this opportunity to clear up the confusion that exists on the issue, perhaps as a result of *Lambert*. All of the above-cited state and federal court decisions holding that proof of an intent to deceive or mislead is required to establish a VCPA violation were decided after *Lambert*—and several of them cite to *Lambert* in their holdings on this issue. *See, e.g.*, *Meng v. The Drees Co.*, 77 Va. Cir. at 443; *Weiss v. Cassidy Dev. Corp.*, 63 Va. Cir. at 78; *Jefferson*, 2006 U.S. Dist. LEXIS 41423, at *29.

Clarification on this issue is necessary for the VCPA to function, as intended, as remedial legislation. Decisions to the contrary ultimately may thwart the efforts of the Attorney General and other government attorneys to enforce the VCPA as intended by the General Assembly.

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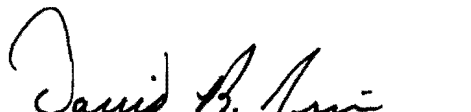
to deceive. *See State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 36 (Iowa 2013) (holding that the Iowa Consumer Fraud Act's requirement of common law fraud elements in concealment cases, demonstrated legislative intent to single out this particular unlawful practice, and that other unlawful practices under the statute therefore do not require these elements).

III. CONCLUSION

For these reasons, the Commonwealth requests that the Court reverse the circuit court's finding that proof of a VCPA claim requires proof of common law fraud.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By: 
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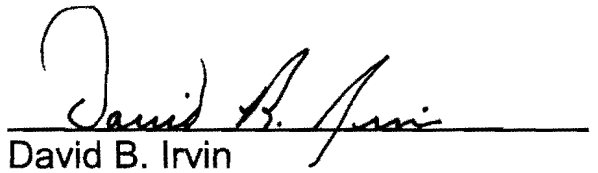
RULE 5:26(h) CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:26(h), I hereby certify that the Commonwealth of Virginia's Amicus Curiae Brief in Support of Appellants' Assignment of Error Number Two complies with the requirements of Rule 5:26. A word count was used through the Microsoft Office Word 2007 program, the number of words as provided in Rule 5:26 is 3,670.



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RULE 5:26(e) CERTIFCATE

I hereby certify that on this first day of July, 2014, fifteen (15) copies of this brief have been filed in the Office of the Clerk of the Supreme Court of Virginia; an Adobe Acrobat PDF copy of the brief has been filed with the Clerk of the Supreme Court of Virginia by e-mail at scvbriefs@courts.state.va.us; an Adobe Acrobat PDF copy of the brief has been sent by e-mail, and three (3) copies have been posted first class, to all Counsel listed below.

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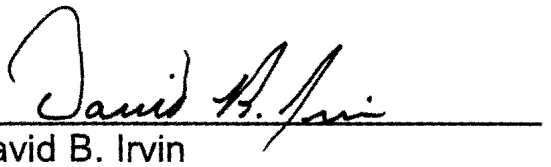

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