In The

Supreme Court of Virginia

RECORD NO. 180791

GEORGE TINGLER, CRYSTAL TINGLER, BELLE MEADE FARM, LLC, and the four children, AUSTIN S. TINGLER, DRU A. TINGLER, FAITH L. TINGLER, AND GIA S. TINGLER, by their father and next friend, GEORGE TINGLER,

***Appellants*,**

v.

GRAYSTONE HOMES, INC.,

Appellee.

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This is an appeal of final judgment of the Culpeper County Circuit Court in seven related cases arising out of injuries suffered as a result of the negligence and breach of contract by Graystone Homes, Inc. ("Graystone"). A. 438-466. Graystone built a new home on a family farm on land that was owned by Belle Meade Farm, LLC ("Belle Meade") pursuant to a contract between George and Crystal Tingler and Graystone.

Due to Graystone's negligence and breach of contractual duties during the original construction, the home was not built water-tight resulting in leaks that allowed mold to grow inside the walls of the home. When the Tinglers complained of the leaks, Graystone responded by negligently repairing the leaks, which only made the mold contamination inside the home to get worse. The mold created a hidden danger inside the home – adverse indoor air quality that was harmful to the occupants of the home.

George Tingler, Crystal Tingler, and their minor children, Austin Tingler, Dru Tingler, Faith Tingler, and Gia Tingler, by their father and next friend, George Tingler (collectively the "Tinglers") and Belle Meade filed a consolidated complaint against Graystone on March 2, 2015. A. 440. The Tinglers sought damages for personal injuries suffered as a result of mold created by Graystone's negligence. George and Crystal Tingler and Belle

Meade also sought economic loss damages for breach of contract and breach of warranty pursuant to the contract with Graystone.

Graystone filed a motion to drop, claiming misjoinder of parties. A. 1-2. Thereafter, the trial court entered an order dropping the Tinglers' personal injury claims from the original action and ordered that the Tinglers file separate complaints for their personal injury claims. A. 4.

The Tinglers filed separate complaints for the personal injuries, and Graystone demurred. The trial court sustained Graystone's demurrers with leave to amend.

The Tinglers then each filed an amended complaint for personal injuries and property damage caused by Graystone's negligence (Count 1), negligent repair (Count 2), and negligence per se (Count 3). A. 122-132 (George Tingler); A. 135-144 (Crystal Tingler); A. 148-158 (Austin Tingler); A. 160-170 (Dru Tingler); A. 172-182 (Faith Tingler); A. 184-194 (Gia Tingler). Belle Meade and Mr. and Mrs. Tingler filed a second amended complaint for economic losses, i.e., non-personal injuries, for breach of contract and breach of warranty by Belle Meade as principal (Counts 1 and 3) and by Mr. and Mrs. Tingler as agents (Count 2 and 4) and for breach of contract as a third-party beneficiary by Belle Meade (Count 5). A. 81-94.

The trial court sustained the demurrers to all counts and entered final judgment on March 19 and 20, 2018, as to all seven cases. A. 438-466. This Court awarded the Tinglers and Belle Meade an appeal on December 20, 2018.

ASSIGNMENTS OF ERROR

1. The trial court erroneously sustained demurrers to the Tinglers' negligence, negligent repair, and negligence per se claims in the amended complaints because they sought personal injury and property damage, which are protected by the duty implied by law to protect the safety of persons and their property from threatened or actual injury. [Preserved: A. 286-306, 316, 320-340, 389-403, 426-427, 435-436, 439, 456, 458, 460, 462, 464, 466.]

2. The trial court erroneously sustained demurrers to the claims for breach of contract and breach of warranty in the second amended complaint because there were sufficient allegations that Belle Meade Farm, LLC, as principal, and the Tinglers, as agents, had standing to bring these claims. [Preserved: A. 306-310, 408-416, 439, 456, 458, 460, 462, 464, 466.]

3. The trial court erroneously ruled that Belle Meade Farm, LLC, was not an intended third-party beneficiary of the contract because there were sufficient allegations in the second amended complaint that it was the intended beneficiary. [Preserved: A. 310-311, 416-418, 439, 456, 458, 460, 462, 464, 466.]

STATEMENT OF FACTS

Belle Meade is a family-held LLC which owns and operates a farm in Culpeper County.[1] A. 82. George and Crystal Tingler are members of this family-run farm. *Id.*

With Belle Meade's consent and approval, George and Crystal Tingler entered into a contract with Graystone as agents of Belle Meade to build a home for the Tingler family on the farm. A. 83. The contract stated that it was between "George and Crystal Tingler (hereinafter referred to as 'Owner') and Graystone Homes, Inc. (hereinafter referred to as 'Contractor') for the purpose of erecting a new home." A. 99. In Attachment #1 to the contract, it specifies the location of the new home as: "Private lot, Culpeper County, Virginia." A. 107. The new home was built on real property owned by Belle Meade. A.82-83. Other than the statement in the contract that the Tinglers should be referred to as "Owner," the contract does not identify the actual record owner of the private lot.

Crystal Tingler's father is the sole manager of Belle Meade and has all control over how Belle Meade is run and operated. A. 82. Crystal performs

[1] The trial court decided this case on demurrer, so all facts here are as alleged in the amended complaints for the tort claims, A. 122-132, 135-144, 148-158, 160-170, 172-182, and 184-194, and in the second amended complaint for the breach of contract and warranty claims, A. 81-94.

office and accounting functions, and George is a full-time employee on the farm; both work under the direction and control of Belle Meade. *Id*.

At all times relevant, George and Crystal Tingler acted within the scope of their authority as agents for Belle Meade. A. 89-90. Graystone was aware that Belle Meade, and not the Tinglers, would make all payments due under the contract. A. 83.

Pursuant to the contract, Graystone applied for and obtained a building permit on land that it knew was owned by Belle Meade. A. 83. Construction of the home was completed on or about March 22, 2010, when the certificate of occupancy was issued by the County of Culpeper. A. 84, 123, 136, 149-150, 161-162, 174, 186. The Tingler family moved into the home shortly thereafter and used it for the family residence while continuing to work on the farm until their departure from the home in November 2014. A. 84-86, 123-126, 136-139, 150-152, 162-164, 174-176, 186-188.

Shortly after moving into the home, the Tinglers noticed water leaks in the patio doors and dining room and requested that Graystone make the necessary repairs. A. 84, 124, 137, 150, 162, 174, 186. Graystone performed some repair work, installed additional sealants and flashing, and replaced the hardwood floors on at least two occasions, once in 2010 and again in 2011. *Id.*

In early 2014, the Tinglers had the home inspected for potential mold growth due to symptoms being experienced by the Tinglers and their guests while staying in the home. *Id.* This inspection found mold growth in the basement underneath the dining room leak location, elevated moisture readings in the dining room and kitchen near the patio doors, and elevated mold spore levels in the air of the home. A. 84-85, 124, 137, 150, 162, 174-175, 186-187. The Tinglers requested Graystone to make the necessary repairs and to perform mold remediation, and for the next several months Graystone responded that it was very busy but would address these concerns as soon as they were able. A. 85, 124, 137, 150, 163, 175, 187.

In October 2014, Graystone finally made several attempts to repair the windows, patio French doors, and hardwood flooring and applied an anti-microbial agent in an attempt to clean and prevent any further mold growth. A. 85, 124-125, 137-138, 151, 163, 175, 187. The Tinglers requested that the area behind the drywall also be inspected for additional mold growth, but Graystone stated that this was not necessary, that there was no mold in the walls, and that everything was fixed. A. 85, 125, 138, 151, 163, 175, 187. In late October 2014, the Tinglers had the home inspected again to make sure the leaks had been properly repaired but discovered that there were still

elevated levels of moisture in the dining room and kitchen, both of which were areas where it had leaked before. A. 86, 125, 138, 151, 163, 175, 187.

After the Tinglers reported these findings to Graystone, Graystone asked if it could remove portions of the drywall in the dining room to inspect behind the wall. A. 86, 125, 138, 151, 163, 176, 188. Crystal Tingler asked whether a containment barrier needed to be placed on the personal property and furniture in this area before the wall was opened, but Graystone said that it was not necessary. A. 86, 125, 138, 151, 163-164, 176, 188.

Graystone removed some of the drywall in the dining room, and discovered wet, moldy insulation inside the wall cavity, which was then just dropped on the floor. A. 86, 125-126, 138-139, 152, 164, 176, 188. Graystone cleaned up the moldy insulation with a vacuum cleaner borrowed from the Tinglers and taped a black garbage bag over the hole in the drywall. A. 86, 126, 139, 152, 164, 176, 188. In early November 2014, Graystone set up containment sheeting in the dining room, but by this time the home was already contaminated. *Id.*

The Tinglers requested that Graystone have the home professionally cleaned and remediated. *Id.* Graystone engaged PuroClean of Culpeper to perform the remediation work. *Id.* PuroClean inspected the home and

reported that the containment placed by Graystone was not done properly and recommended that the home be inspected again. *Id.*

Hallmark Residential Services, engaged to perform the additional inspection, discovered that elevated mold spores still existed in the indoor air environment of the home. A. 87, 126, 139, 152, 164, 176, 188. Since then, Graystone has refused to make any additional repairs or do any further remediation of the home. A. 87, 126, 139, 152, 164, 177, 189.

Due to health concerns, the Tinglers were forced to move out of their home in November 2014, and they have not been able to re-occupy the home since. A. *Id.* The Tinglers and Belle Meade filed their original complaint against Graystone on March 2, 2015, approximately four months after leaving their home. A. 280. The Tinglers each seek damages for personal injuries as a result of mold exposure inside the home. A. 126, 139-140, 152-153, 164-165, 177, 189. George and Crystal Tingler and Belle Meade also seek damages for breach of contract and breach of warranty. A. 90, 93.

ARGUMENT

This case offers a classic example of when the same facts can support both a claim for breach of contract and tort. The trial court misunderstood the distinctions between the duties that exist under the law of contracts and the law of torts. Where personal injury claims exist, the duties are those that are

implied by law. The fact that Graystone also assumed a contractual duty to build the home does not release Graystone for its future negligent acts that cause personal injuries. The Tinglers each alleged sufficient facts in their amended complaints to support claims for negligence (Count 1), negligent repair (Count 2), and negligence per se (Count 3).

The trial court also erred when it evaluated the allegations in the second amended complaint and ruled as a matter of law that no agency existed and that no allegations supported a third-party beneficiary claim. Belle Meade, as principal, and George and Crystal Tingler, as agents, alleged sufficient facts in the second amended complaint to support claims for breach of contract (Counts 1 and 2), breach of warranty (Counts 3 and 4), and breach of the contract as a third-party beneficiary (Count 5).

Unfortunately, the trial court mistakenly believed that the only duties assumed by Graystone were contractual, and because the contract was with George and Crystal Tingler, who did not own the property, and not with Belle Meade, neither could assert any contractual claims. The trial court found that the home builder was immune from any liability, whether under contract or tort, for its breach of contract and negligence. The underlying judgment in favor of the builder must be reversed and the cases remanded back to the trial court.

I. The trial court erroneously sustained the demurrers to the Tinglers' claims for negligence, negligent repair, and negligence per se in the amended complaints. (Assignment of Error 1)

A. Standard of Review.

This Court reviews de novo the trial court's judgment sustaining a demurrer. *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 357 (2010). The purpose of a demurrer is to determine whether a complaint states a cause of action upon which relief may be granted, accepting the truth of all properly pleaded facts contained in the complaint as well as all facts reasonably and fairly implied and inferred from those allegations. *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 488–89 (2011). A demurrer tests the legal sufficiency of facts alleged in the pleadings, but not the strength of proof. *Glazebrook v. Board of Supervisors*, 266 Va. 550, 554 (2003). A demurrer does not allow the trial court to evaluate and decide the merits of a claim. *Fun v. Virginia Military Inst.*, 245 Va. 249, 252 (1993).

A demurrer does not, however, admit the correctness of the pleader's conclusions of law. *Evans v. Evans*, 280 Va. 76, 81 (2010). Thus, this Court considers the facts stated in the complaint, and those reasonably and fairly implied and inferred, in a light most favorable to the plaintiff but reviews the sufficiency of the legal conclusions ascribed to those facts de novo. *Evans*, 280 Va. at 81–82.

B. The Tinglers have alleged the elements for common law negligence (Count 1) in the amended complaints.

To assert a cause of action for negligence, a plaintiff must plead the existence of a legal duty, violation of that duty, and proximate causation which results in injury. *Collett v. Cordovana*, 290 Va. 139, 146 (2015). The amended complaints include factual allegations supporting all three elements. The trial court sustained the demurrer focusing only on the first element – the lack of any legal duty. The trial court held that Graystone's duties only arose in contract rather than duties imposed by the common law. This ruling was made in error.

1. <u>There is a common law duty for a home builder to perform its work in a reasonable manner to avoid creating an unreasonably dangerous condition inside the home that poses a risk of personal injury to occupants of the home.</u>

Negligence claims arise in tort for a violation of the common law duty to take care for the safety of the person or property of another, which is an independent duty separate and apart from any contractual duty. *Kaltman,* 281 Va. at 492–93. The law of torts provides a remedy for the violation of common law duties involving the safety of persons and property, which are imposed to protect the broad interests of society, whereas the law of contracts provides a remedy for losses suffered for breach of a duty assumed by agreement. *Id.*

While the *Kaltman* case involved the negligence of a pesticide contractor rather than the negligence of a new home contractor, the trial court did not even address the *Kaltman* decision in either its March 22, 2017 opinion, A. 440, or February 10, 2018 opinion. A. 448.[2] In *Kaltman*, this Court found that the pesticide contractor had breached duties independent of the company's contractual duty to control pests, and as such it was error for the circuit court to sustain the demurrers to the Kaltmans' negligence counts. *Kaltman,* 281 Va. at 492–93; accord *Blake Construction Co., Inc. v. Alley*, 233 Va. 31, 34 (1987) (*citing Bartlett v. Recapping, Inc.,* 207 Va. 789, 793 (1967)); *Virginia Ry. & Power Co. v. Winstead's Adm'r*, 119 Va. 326, 328 (1916).

This duty is independent and separate from any duty imposed by contract. "A duty to use ordinary care and skill is not imposed in the abstract. It results from a conclusion that an interest entitled to protection will be damaged if such care is not exercised. Traditionally, interests which have been deemed entitled to protection in negligence have been related to *safety* or freedom from physical harm. Thus, where personal injury is threatened, a

[2] While the *Kaltman* decision was not cited during the original argument on demurrers held on February 15, 2017, A. 6, it was cited extensively in both consolidated opposition briefs to Graystone's demurrers to the amended complaints and second amended complaint, A. 287-288, 293-295, 321-322, 327-329, and during oral argument on November 29, 2017, A. 392-394.

duty in negligence has been readily found." *Blake Construction,* 233 Va. at 34-35 (*emphasis added*) (*citations omitted*).

Graystone had the legal obligation to assure that its work would not create a dangerous condition that could threaten harm to occupants of the home. The Tinglers are all reasonably foreseeable occupants who have suffered personal injuries as a direct result of Graystone's negligence.

2. The trial court's reliance on the source of duty rule fails to acknowledge that a contractor's negligence in performing its contract can support causes of action both for breach of contract and for breach of a duty arising in tort.

In sustaining the demurrers as to the negligence counts, the trial court relied upon *Richmond Metropolitan Authority v. McDevitt*, 256 Va. 553 (1998). In its March 22, 2017 opinion, the trial court ruled that "Graystone's alleged misdeeds consists of its failure to perform or fully perform its contractual duties," and on that basis sustained the demurrers as to the negligence counts. A. 453. The trial court held that Graystone's source of duties were only those assumed by contract. A. 452.

However, as stated by this Court, a "single act or occurrence can, in certain circumstances, support causes of action both for breach of contract and for breach of a duty arising in tort, thus permitting a plaintiff to recover both for the loss suffered as a result of the breach and traditional tort

damages, including, where appropriate, punitive damages." *Dunn Construction Co. v. Cloney*, 278 Va. 260, 266–67 (2009). In order to recover in tort, "the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract." *Id.,* 278 Va. at 267 (citations omitted). Here, the Tinglers are seeking damages for personal injuries caused by Graystone's negligence, which is a separate common law duty imposed by law. *Kaltman,* 281 Va. at 492–93.

Richmond Metropolitan Authority did not involve any allegations of personal injury or damage to personal property. McDevitt was seeking purely economic losses and not personal injuries. *Richmond Metropolitan Authority* involved a dispute arising out of an agreement for the construction of a baseball stadium. 256 Va. at 555. Many years after it was built, the owner discovered the contractor failed to comply with the design specifications set forth in the contract, despite its prior representations under oath to the contrary, prompting the owner to file an action against the contractor for actual and constructive fraud. *Id.* at 556. The issue on appeal was whether the contractor's misrepresentations about its compliance with the contract and its false payment applications were separate and independent wrongs, and not just breach of contractual duties, that would support causes of action for actual and constructive fraud. *Id.* at 557.

In raising the "source of duty" rule, this Court explained that the determination whether a cause of action sounds in contract or tort depends on the source of the duty violated. *Id.* at 558. Because the owner's allegations of fraud were "nothing more than allegations of negligent performance of contractual duties," they were not actionable in tort. *Id.* at 559. Each misrepresentation related only to duties required by the contract. *Id.*

In contrast, this Court found that the contractor in *Kaltmans* had stated a valid claim for negligence and negligence per se because there were claims of personal injury.

> "The primary consideration underlying tort law is the protection of persons and property from injury, while the major consideration underlying contract law is the protection of bargained for expectations."

Kaltman, 281 Va. at 492–93, citing *Filak v. George,* 267 Va. 612, 618 (2004). On the other hand, losses suffered as a result of a breach of contract, rather than a duty imposed by law, remain the sole province of the law of contracts. *Id.*

The Kaltmans sought recovery in negligence for injuries to their persons and property. The Kaltmans had entered into a contract with AAPC to apply chemicals to control pests in their home. Although there was a contractual duty to control pests, this did not mean that there was not a separate,

independent duty implied by law. Because the Kaltmans alleged that AAPC had breached common law and statutory duties independent of the contractual duty to control pests, this Court held that the trial court erred when it sustained the demurrers to the Kaltmans' negligence counts. *Kaltman,* 281 Va. at 492–93.

Like the trial court in *Kaltman*, the trial court in this case failed to acknowledge that the Tinglers were seeking personal injury claims when it sustained the demurrers to the negligence counts. The Tingler case is clearly in line with the decision in *Kaltman* and distinguishable from the facts in *Richmond Metropolitan Authority*. If personal injury is threatened, there is an independent common law duty to protect against personal safety and physical harm, even in relationships originating from contracts. *Blake Construction*, 233 Va. at 34-35.

Virginia law provides that any person who assumes the duty to act, whether gratuitously or for consideration, is required to act carefully as a reasonably prudent person. "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Nolde Bros., Inc. v. Wray*, 221 Va. 25, 28-29 (1980); *Didato v. Strehler*, 262 Va. 617, 628-69 (2001).

In *Didato*, parents engaged a pediatric practice to care for their children who performed a screening test for a sickle cell trait. The practice conveyed that the test results were normal, but this was not correct, and the couple then had another child who bore the same genetic trait. The family would not have had a second child if the test results had been conveyed accurately. The parents asserted in their lawsuit that the practice had assumed a duty to convey accurate results. This Court agreed and adopted the framework set under *Restatement (Second) of Torts § 323*:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Didato, 262 Va. at 628–29.

Here, Graystone undertook the contractual obligation to build the home for consideration. The *Restatement (Second) of Torts § 323* makes clear that Graystone is subject to liability for physical harm resulting from its failure to exercise reasonable care to perform its work in building the home where its failure to exercise such care increased the risk of harm to the Tinglers. There

is no language in the Graystone contract that vitiates the common law rule that one who assumes a duty must discharge that duty with reasonable care.

3. The economic loss rule does not apply to negligence claims involving personal injury.

The "economic loss rule" bars recovery for negligence when the damages sought are strictly economic damages arising from a contract. *Sensenbrenner v. Rust, Orling & Neale,* 236 Va. 419, 421 (1988). In distinguishing damages solely for economic loss from damages for injuries to persons or property, this Court has equated "economic losses, for which no action in tort will lie, with disappointed economic expectations." *Id.; Blake Construction,* 233 Va. at 31 (holding a general contractor did not have a tort claim for economic losses stemming from an architectural firm's alleged failure to perform "with the care, skill and diligence exercised by reasonably prudent and skillful architects" in like circumstances).

In stating the underlying principles of the economic loss rule, this Court recognized that the controlling policy underlying tort law is the safety of persons and property, while the controlling policy consideration underlying the law of contracts is the protection of expectations under the bargain. *Sensenbrenner,* 236 Va. at 425. "If that distinction is kept in mind, the damages claimed in a particular case may more readily be classified between

claims for injuries to persons or property on the one hand and economic losses on the other." *Id.* (emphasis added).

Significantly, there were no claims of personal injury in *Sensenbrenner* – it dealt only with economic losses. The economic loss rule does not apply to claims for personal injuries, which are governed by the underlying policy considerations of the law of torts.

4. Any interpretation of the contract that operates as a pre-injury release of liability for future negligent acts is void as against public policy.

The "source of duty" rule should not apply under any circumstances in dealing with future personal injury claims. If the source of duty is applied to bar future personal injury claims arising out of the performance of a contract, as the trial court did in this case, it would endorse the use of a contract that operates as a pre-injury release of personal injury claims in contracts in defiance of public policy, a position this Court has never endorsed.

This is consistent with this Court's ruling that pre-injury releases of personal injury claims for a tortfeasor's own negligence resulting in personal injury is void because it violates public policy. *Hiett v. Lake Barcroft Community Ass'n, Inc.*, 244 Va. 191, 196 (1992). A party cannot by contract release itself for its own future negligent acts as that would promote negligent behavior.

This rule of law has been recognized for over a century. *Johnson's Adm'x v. Richmond and Danville R.R. Co.,* 86 Va. 975, 978 (1890). In *Johnson,* this Court reviewed a contractual agreement that stated the railroad would not be liable for injuries or death occurring on the company's right of way for any reason whatsoever. This Court held that such a pre-injury release of liability for future negligent acts was void:

> [T]o hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct ... can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void.

Id. This Court emphasized that its holding in that case was not based on the fact that the railroad company was a common carrier, but rather that such contractual provisions for release from liability for personal injury which may be caused by future acts of negligence are prohibited "universally." *Id.*

5. Landlord-tenant cases also support the conclusion that a contractor has a duty under the common law to avoid personal injuries.

The Tinglers' negligence claims are based upon actions undertaken by Graystone that created a risk to personal injuries. This is not a case where Graystone failed to act or failed to make repairs. Instead Graystone negligently constructed the home when it was originally built, and then negligently performed repairs after the home was occupied.

While there is no common law duty for a landlord to maintain or repair the leased premises, if a landlord elects to perform such repairs, there is a common law duty to use reasonable care in performing the work. *Steward v. Holland Family Properties, LLC*, 284 Va. 282, 292 (2012); accord *Holland v. Shively,* 243 Va. 308, 311 (1992) ("It has long been the law in Virginia that where a landlord enters leased premises, after delivering possession to the tenant, for the purpose of making repairs, he must use reasonable care in performing the work."); *Luedtke v. Phillips,* 190 Va. 207, 212 (1949).

In *Steward*, this Court observed that the complaint merely alleged a legal conclusion that a landlord was negligent with respect to repairs of lead paint, but never alleged facts showing that any repairs had actually been undertaken. On that basis, this Court held that the complaint failed to state a valid cause of action. 284 Va. at 292. More to the point, this Court concluded

that the landlord would have had a legal duty if it had undertaken those repairs:

> A landlord who makes repairs to leased property has a common law duty not to make those repairs in a negligent manner and is liable for injuries sustained as a result of negligent repair.

Steward, 284 Va. at 292, 726 S.E.2d at 257 (emphasis added) (citations omitted). Unlike the facts in *Steward*, there are specific factual allegations regarding Graystone's negligent construction of the home in the amended complaint. A. 123-129, 136-142, 149-155, 161-167, 174-179, 186-191.

6. The trial court's ruling creates a conflict with other published circuit court opinions that have recognized a contractor's common law duty to perform its work using ordinary care.

The trial court's decision in this case is inconsistent with published circuit court opinions that have found that there is a common law duty by a contractor when its work creates an unreasonably dangerous condition that threatens or causes personal injury. *Gonella v. Lumbermens Mut. Cas. Co.,* 64 Va. Cir. 229, 235 (Fairfax 2004); *Meng v. The Drees Company,* 77 Va. Cir. 442, 443 (Loudoun 2009); *In re Chinese Drywall Cases*, 80 Va. Cir. 69 (Norfolk 2010). While these circuit court opinions are not binding on this Court, their reasoning is sound and consistent with this Court's decision in *Kaltman.*

Both *Gonella* and *Meng* are also very similar to the facts in this case. In *Gonella*, a roofing contractor improperly performed its work that led to water leaks and mold growth inside the home, causing personal injuries. The *Gonella* trial court overruled the contractor's demurrer, explaining that the contractor had a duty independent of the contract to use reasonable care in performing the work without creating an unreasonably dangerous condition. *Gonella*, 64 Va. Cir. at 235.

In *Meng*, the jury awarded damages due to mold arising from the contractor's negligence that created water leaks and mold growth in a newly constructed home causing the homeowners to suffer personal injuries. In upholding the jury verdict on the negligence count, the trial court stated that the builder was liable in negligence by creating an unsafe condition within the household leading to personal injuries – the "duty to avoid creating such a condition and of injuring the plaintiffs is one imposed by law and not dependent upon the terms of the contract." *Meng*, 77 Va. Cir. at 443.

C. Negligent repair (Count 2) is a valid claim for breach of the common law duty, independent of any contractual duty to perform repairs, when personal injuries are caused by such negligence.

Similar to negligence in the original construction of the home, negligent repair can also arise in tort for a violation of the common law duty to take care

for the safety of the person or property of another. *Blake Construction,* 233 Va. at 34-35 (where personal injury is threatened, a duty in negligence exists). When a contractor creates an unreasonably dangerous condition through the improper performance of its work, a breach of a duty in negligence arises.

The Tinglers are not alleging that Graystone had a tort duty to make repairs or to perform remediation. This is not a case involving the lack of action on the part of Graystone or where Graystone made no attempt to perform the repairs. It involves Graystone's affirmative acts in which it negligently repaired the home for leaks and negligently remediated the mold inside the home. This duty arises from the negligent performance of the work, whether it occurred during original construction or during subsequent repairs.

This is no different from the tort duty where a landlord undertakes repair efforts. The landlord has an independent common law duty not to make those repairs in a negligent manner and is liable for injuries sustained because of negligent repair. *Holland,* 243 Va. at 311; *Luedtke,* 190 Va. at 212; *Steward*, 284 Va. at 292.

D. The Tinglers' negligence per se claims (Count 3) have been properly pled in the amended complaints based upon Graystone's violation of the building code.

The Tinglers have adequately pled their negligence per se claims. The difference between negligence and negligence per se claims is that the source of a duty arises from a statute enacted for public safety. There are three elements for a negligence per se claim: (i) that the plaintiff belongs to the class of people that the statue was passed to protect, (ii) that the harm suffered was the type the statute was designed to protect against, and (iii) that the violation was the proximate cause of the injury. *McGuire v. Hodges*, 273 Va. 199, 206 (2007). The doctrine of negligence per se represents the adoption of "the requirements of a legislative enactment as the standard of conduct of a reasonable [person]." *Collett v. Cordovana*, 290 Va. 139, 148 (2015), citing *Butler v. Frieden*, 208 Va. 352, 353 (1967).

A negligence per se count does not need common law negligence provided there are allegations that support all three elements of negligence per se. *McGuire*, 273 Va. at 206; *Halterman v. Radisson Hotel* Corp., 259 Va. 171, 176–77 (2000); *Virginia Elec. & Power Co. v. Savoy Constr. Co.,* 224 Va. 36, 45 (1982).

In *McGuire*, this Court held that a property owner's duty arose from the building code that required fences and gates to be erected around swimming

pools to make them "inaccessible to small children." The defendant in that matter failed to do that, which this Court determined was a violation of the building code that supported a claim for negligence per se*. Id.*

The Tinglers rely upon the building code to support their negligence *per se* claim. The building code is the type of statute designed specifically to protect individuals and property by establishing minimum standards of compliance in the construction and reconstruction of residential and commercial buildings. *See* Va. Code § 36-99 (2016) ("The provisions of the Building Code and modifications thereof shall be such as to protect the health, safety, and welfare of the residents of the Commonwealth…"); *Federico v. Lincoln Military Housing, LLC*, 127 F. Supp. 3d, 623, 645 (E.D. Va. 2015) (denying a defendant's summary judgment motion for alleged failure to comply with the Virginia Maintenance Code, a subsection of the Building Code); *MacCoy v. Colony House Buildings, Inc.,* 239 Va. 64, 69 (1990).

Similarly, the Tinglers allege that Graystone violated the building code. Their amended complaints have set forth detailed allegations as to the specific deficiencies in the original construction of the home and repair efforts, which they contend violated the building code. A. 127-128, 140-141, 153-154, 165-167, 177-179, 189-191. These allegations adequately inform Graystone as to the nature of the claim against it and more than comply with the requirement

for pleading negligence. "An allegation of negligence . . . is sufficient without specifying the particulars of the negligence." Rule 3:18(b) of the Rules of the Supreme Court of Virginia. There is no basis for the trial court to have sustained the demurrers to the negligence per se counts.

II. The trial court erroneously sustained the demurrers to Belle Meade Farm's and George and Crystal Tingler's claims for breach of Contract and breach of Warranty in the second amended complaint. (Assignment of Error 2)

A. Standard of Review.

The standard of review of judgment sustaining a demurrer is de novo, accepting as true all facts contained in the complaint as well as all facts reasonably and fairly implied and inferred from those allegations. *Kaltman*, 281 Va. at 488–89.

B. Both Belle Meade and Mr. & Mrs. Tingler, as principal and agent, have standing to seek damages for breach of contract (Counts 1 & 2) and breach of warranty (Counts 3-4) as alleged in the second amended complaint).

In its February 10, 2018 opinion, the trial court ruled as a matter of law that the contract was "expressly between Graystone and the Tinglers as owners", and because there was no reference or allegation to support an agency relationship and the contract had not been ratified by Belle Meade, the trial court sustained the demurrers to the breach of contract and breach of

warranty claims. A. 446. But in the second amended complaint, there were clear factual allegations that support the agency relationship. A. 82-83, 89-90.

The trial court no doubt saw these allegations, but evidently chose not to give them any significance or at least failed to construe all reasonable inferences from those allegations in favor of Belle Meade and the Tinglers. Instead, the trial court focused on the language of the contract that did not expressly identify Belle Meade as the owner of the land.

1. <u>There are sufficient factual allegations in the second amended complaint that state the existence of an agency relationship between Belle Meade, as principal, and the Tinglers, as agents.</u>

The contract did state that the Tinglers are "hereinafter referred to as 'Owner,'" A. 99, but it did not contain any express representations that George and Crystal Tingler were actually *the* "Owner" or that they owned the private lot on which the home would be built. The contract only states that they would be referred to as "Owner" as a designation in the contract. While an interpretation of the contract could certainly be made that the Tinglers were the owners, an equally reasonable interpretation is that the Tinglers were only to be referred to as owner for purposes of identification in the contract.

It cannot be said, as a matter of law, that this refence in the contract bars the Court from considering additional factual allegations that Graystone

was aware that Belle Meade was the owner and that it would not be unreasonable for the Tinglers to act as Belle Meade's agent, being a family-run farming operation.

Both George and Crystal Tingler work on the family-run farm under the direction and control of Belle Meade. A. 82. The contract specifies the location of the new home as a private lot in Culpeper County. A. 107. It does not state which lot because the lot was not subdivided from the rest of the farm. The home sat in the middle of the real property owned by Belle Meade. A.82-83.

Graystone was aware that the entire farm was owned by Belle Meade and not the Tinglers. A. 83. Graystone was aware that Belle Meade was a family-run farm and that the parties intended for the Tinglers to live in the home after it was completed "so they would have a home onsite to assist in the day-to-day operation of Belle Meade Farm and its farming operation." A. 83, 90. Graystone was aware that Belle Meade, and not the Tinglers, would make all payments due under the contract. *Id*.

More significantly, the allegations state that the Tinglers entered into the contract to build a home on Belle Meade's real property with Belle Meade's "*consent and approval*." A. 83 (emphasis added). As owner of the real property, Belle Meade had the authority to allow daughter Crystal and son-in-

law George – with Belle Meade's consent and approval – to enter into the new contract with Graystone to build a family home.

At the time they entered into the contract, the Tinglers were "acting as agents for Belle Meade Farm and within the scope of their authority." A. 89. The Tinglers "consented to the agency relationship." *Id.* Belle Meade was and remained the principal under the terms of the contract. A. 90. These facts, including those facts reasonably and fairly implied from the allegations in the second amended complaint, are sufficient to allege an agency relationship, and must be construed in a light most favorable to Belle Meade and the Tinglers.

2. An agency relationship does not need to be expressly ratified or even identified in the contract to be valid.

Ratification is generally defined as the adoption or confirmation of a prior act that was performed on the principal's behalf by an agent lacking authority to bind the principal. 12 Richard A. Lord, *Williston on Contracts* § 35:22, at 268 (4th Ed. 1999). Ratification of an agent's acts need not be express. "Any conduct which indicates assent or its equivalent by the purported principal to become a party to the transaction, or by reason of which the principal has precluded himself from repudiating the transaction done by the purported agent such as acceptance of benefits, is sufficient." *Williston on Contracts* § 35:22, at 276–79.

> There is no formal requirement for ratification.
>
> A principal is bound by his agent's previously unauthorized act if he ratifies the act by accepting its benefits with full knowledge of the relevant facts, or, if upon learning of the act, he fails to promptly disavow it. If a principal, with knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard afterwards to impeach them under pretense that they were done without authority. And, when a principal, after being informed, fails to disavow the act, he makes it his own. Any act of disavowal must occur within a reasonable time.

Smith v. Mountjoy, 280 Va. 46, 55–56 (2010) (citations and internal quotations omitted).

The issue of ratification was raised for the first time, sua sponte, by the trial court in its final opinion sustaining the demurrers, and thus the Tinglers and Belle Meade were not given the opportunity to address this issue beforehand. However, this case is really about consent, which refers to prior authorization. This is not a case where the Tinglers entered into the contract *and then* sought permission from Belle Meade. They had prior approval as expressly alleged in the second amended complaint. A. 83. While this case more appropriately involves prior consent rather than ratification of a prior act, even if "ratification" was applicable, there are sufficient factual allegations that Belle Meade accepted the benefit of the contract with full knowledge of the facts. To that extent, the contract was ratified with the express approval and consent of Belle Meade.

3. Whether an agency relationship exists is a decision for the trier of fact.

An agency relationship results from one person's manifestation of consent to another person that the other shall act on his behalf and subject to his control, and the other person's consent to do so. *Reistroffer v. Person*, 247 Va. 45, 48 (1994). "The question of agency *vel non* is one of fact for the fact finder unless the existence of an agency relationship depends upon unambiguous written documents or undisputed facts." *Id.*

The law of principal and agency regarding contracts is clear, even when the principal in not disclosed on the face of the contract. Both an undisclosed principal and its agents have standing to sue for breach of a contract under Virginia law. *Leterman v. Charlottesville Lumber Co.*, 110 Va. 769, 772 (1910).

In sustaining the demurrer, the trial court ruled as a matter of law that the Tinglers were not acting as Belle Meade's agent. But as stated by this Court in *Reistroffer,* the issue of whether an agency relationship existed is an issue to be decided by a trier of fact.

The trial court's ruling held that Belle Meade may not recover for economic losses because it was not in contractual privity with Graystone and that Mr. & Mrs. Tingler, who were in privity with Graystone, could not recover for economic damages because Belle Meade was the record owner of the land.

This creates the absurd result that no one could seek redress against Graystone for damages caused by its breach of contract and breach of warranty or for any harm caused by Graystone's failure to perform in accordance with the requirements of the contract.

The Tinglers were acting as agents for Belle Meade, and due to the agency relationship, there was privity of contract between Belle Meade and Graystone. Belle Meade has the right to enforce all terms and conditions, express or implied, that exist under the contract.

The trial court failed to accept as true the allegations of agency when it sustained the demurrers to the claims for breach of contract and breach of warranty by either Belle Meade, as principal, or the Tinglers, as its agent, whether the principal-agency relationship was disclosed or not.

III. The trial court erroneously sustained the demurrer to Belle Meade's alternative theory of recovery as a third-party beneficiary of the contract. (Assignment of Error 3)

A. Standard of Review.

The Court should consider the facts stated in the complaint, and those reasonably and fairly implied, in a light most favorable to the plaintiffs. *Evans*, 280 Va. at 82. In considering a demurrer, the Court reviews the sufficiency of the legal conclusions ascribed to those facts de novo. *Id.*

B. Belle Meade asserted a valid claim for breach of contract as an intended third-party beneficiary (Count 5 of the second amended complaint).

Belle Meade pled an alternative count as an intended third-party beneficiary of the contract. Plaintiffs can plead alternative theories of recovery arising out of the same occurrence. *Cooper v. Horn,* 248 Va. 417, 423 (1994).

An intended third-party beneficiary may file an action under a contract whether it is named in the contract or not. Va. Code § 55-22. "This Court enforces third-party beneficiary contracts when '[t]he third party ... show[s] that the parties to the contract clearly and definitely intended it to confer a benefit upon him.' *Ward v. Ernst & Young*, 246 Va. 317, 330 (1993), citing *Professional Realty v. Bender*, 216 Va. 737, 739 (1976). In this case, both the Tinglers and Graystone clearly intended to confer a benefit on Belle Meade as record owner of the property.

Although Belle Meade was not expressly identified in the written contract, Graystone was aware that Belle Meade was the owner when it entered into the contract. For purposes of demurrer, it must be reasonably inferred that Graystone was aware that it was conferring a benefit on Belle Meade when it performed work under the contract. The intended purpose of the contract is clear: to improve the real estate owned exclusively by Belle

Meade by constructing a new home on its property for the use by members of the family run farm.

In the case of *Ward v. Ernest & Young*, this Court held that third-party beneficiary status was a question for the jury. There, the sole stockholder of a company sued an accounting firm as a third-party beneficiary of the services contract between the company he owned and the accounting firm. A third party's right to claim relief as the beneficiary of a contract between others requires evidence that not only the contracting parties intended to confer a benefit upon that particular claimant, but that the claimant was a direct beneficiary and not just an incidental beneficiary. *Ward*, 246 Va. at 331–32. Finding that the contract in *Ward* involved the sale of his stock, not the assets of the corporation, and because he was the sole owner of that stock, Ward could be viewed as the primary beneficiary of the benefits to be conferred upon execution of the contract, which was a question for the jury. *Id.*

Similarly, the primary beneficiary of the contract in this matter was Belle Meade, as it would obtain the benefits of the improvement to its real property. The trial court relied on the allegations of paragraph 17 of the second amended complaint to conclusively determine, as a matter of law, that there was no intent for Belle Meade to be a third-party beneficiary. A. 446. That paragraph states:

> At the time the contract to build the Home was being performed, Graystone was aware that Belle Meade Farm and the Tinglers intended in the future to partition the real property on which the Home was located from the rest of the farm land owned by Belle Meade Farm and transfer ownership of both the real property and the completed Home to the Tinglers.

A. 83. Graystone's awareness that Belle Meade and the Tinglers intended in the future to partition the real property on which the home was located is not inconsistent with the position that Belle Meade was an intended beneficiary of the contract.

The trial court should have considered the facts, and those reasonably and fairly implied, in a light most favorable to Belle Meade. Here, the trial court did just the opposite – it considered the allegations in a light least favorable to Belle Meade. Belle Meade should be allowed to pursue its alternative claim as a third-party beneficiary of the contract.

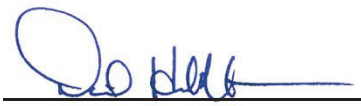
CONCLUSION

The trial court misapplied the source of duty rule and economic loss rule as to the negligence claims and allowed a home builder to escape any liability for personal injuries caused by the builder's negligence. The pleadings unambiguously assert that the Tinglers were acting as the agent for Belle Meade and state a valid claim for breach of contract, breach of warranty, and breach of contract under a third-party beneficiary theory.

The Court should reverse the judgment of the trial court and remand these cases to the circuit court for trial and grant such other relief that the Court deems proper and just.

Date: January 29, 2019

Respectfully submitted,



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CERTIFICATE

Pursuant to Rules 5:26 and 5:32(a)(3)(i) of the Supreme Court of Virginia, I hereby certify that on this 29th day of January, 2019, three paper copies of the Brief of Appellants and three paper copies of the Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia and electronic copies of the Brief and Appendix were filed via VACES. On the same day, an electronic copy of the Brief of Appellants was served, via email, and electronic copies on CD of the Brief and Appendix were served, via UPS Ground Transportation, upon:

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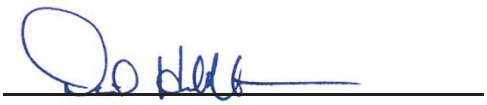

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