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.

REPLY BRIEF OF APPELLANTS

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SCV: Submitted on 03-08-2019 15:57:25 EST for filing on 03-08-2019

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1. The *Kaltman* doctrine warrants reversal here.

This Court has long respected the boundary between tort and contract claims. "The primary consideration underlying tort law is the protection of persons or property from injury, while the major consideration underlying contract law is the protection of bargained for expectations." *Filak v. George*, 267 Va. 612, 618 (2004).

The Court applied this doctrine in reinstating a suit for personal injuries attributable to negligent performance of contracted-for duties by a pest-control contractor in a home. *Kaltman v. All American Pest Control, Inc.*, 281 Va. 483 (2011). Here, the Tinglers hired a contractor to perform work on their home, just as the Kaltmans had done. Here, the contractor performed the work negligently, just as did the *Kaltman* pest-control company. And here, the Tinglers sustained personal injuries as a proximate result of that negligence – just as the Kaltmans did.

Graystone seeks to distinguish *Kaltman* by arguing that the pesticide used was inappropriate for residential use, and was nonetheless applied to the Kaltmans' home. Brief of Appellee at 18. But it never explains why this distinction makes a difference. Using an incorrect method to exterminate insects is analytically indistinguishable

from using an incorrect method to prevent mold, where each creates an unreasonably dangerous condition.

Graystone also states that, in *Kaltman*, "the chemicals *created* the alleged injury." *Id*. (emphasis supplied). This parallels the pleadings here, where the Tinglers pleaded that Graystone's errors *caused* the mold exposure and the Tinglers' injuries. *See*, *e.g*., A. 128, ¶29; A. 129, ¶31.

Finally, Graystone describes its own actions as "nonfeasance," as contrasted with "misfeasance," Brief of Appellee at 18, but never even tries to explain why this distinction is case-dispositive or even meaningful. In any event, the Tinglers do plead affirmative, negligent acts by Graystone, so its actions do constitute "misfeasance" after all. *See*, *e.g*., A. 127, ¶28 (e), (l), (n), (o), (p), (r), (s), and (t) and A. 128, ¶30 (u).

2. Graystone undertook to perform work to protect persons.

Graystone seeks to dodge *Restatement (2d) of Torts* § 323 by claiming incorrectly that "There are no allegations that Graystone's actions increased the risk of harm or worsened the condition of the home." Brief of Appellee at 21. The complaints contain exactly such allegations. *See*, *e.g*., A. 128, ¶29 (defects in original construction caused

mold growth and injury); A. 129, ¶31 (defects in remediation/repair caused mold growth and injury). For example, ¶¶18-23 of the complaints (A. 125-26) describe the cavalier manner in which Graystone approached containment of exposed mold.

Graystone thus falls squarely within the parameters of § 323, since it undertook to render services that it "should recognize as necessary for the protection" of others. It is thus "subject to liability . . . for physical harm resulting from [its] failure to exercise reasonable care." This is because (a) Graystone's actions increased the risk of harm by fostering and worsening mold growth, and (b) the Tinglers relied on Graystone when they moved into a mold-infested home.

3. The trial court took a factual question – agency – away from a jury.

The Brief of Appellant explains that "The question of agency *vel non* is one of fact for the factfinder" unless the agency "depends upon unambiguous written documents or undisputed facts." *Reistroffer v. Person*, 247 Va. 45, 48 (1994). Graystone chooses not to address *Reistroffer*. Instead, it notes that Belle Meade is not named in the contract. Brief of Appellee at 29. Graystone perceives that this ends the

inquiry: Since Belle Meade is not the contracting party, the argument goes, it may not sue to enforce it.

This approach ignores the facts that Graystone knew that Belle Meade owned the property (the basis for Graystone's claim that the Tinglers have no standing), that the Tinglers entered into the contract with Belle Mead's consent, and that Belle Meade made all payments for Graystone's work. A. 83, ¶¶12-16. It also ignores the express allegation that the Tinglers were in fact acting as agents for Belle Meade when they entered into the contract. A. 89, ¶46. A jury could properly conclude that the Tinglers acted as Belle Meade's agent in contracting for the work.

This created a jury issue; the trial court should have allowed the factfinder to determine this agency question.

4. Belle Meade was an intended third-party beneficiary of the contract.

The essence of Graystone's position on Assignment 3 is that Belle Meade was not named in the contract, so it cannot be a third-party beneficiary. This approach would fundamentally alter Virginia law by changing "*intended* third-party beneficiary" to "*named* third-party beneficiary." *See*, *e.g*., *Ogunde v. Prison Health Servs. Inc*., 274 Va. 55, 63-64 (2007) (discussing status of intended third-party beneficiary).

Here, Graystone knew that Belle Meade owned the land on which the home was to be built. A. 83, ¶12. The construction of this improvement would make Belle Meade's property more valuable – assuming there were no mold infestation – so Belle Meade unambiguously benefited from the contract.

This issue, too, presented a jury question. *Ward v. Ernst & Young*, 246 Va. 317, 331-32 (1993) (jury decides whether third party is intended beneficiary). A jury should have evaluated this issue, considering the entire record, and not, as Graystone urges, by looking at the contract in isolation. *Id*. at 330 and n.4.

CONCLUSION

The Tinglers' home is uninhabitable. Graystone built it, and Graystone negligently attempted to repair and remediate it. The pleadings here made out a claim of duty, breach, and proximate damages, but the trial court improperly short-circuited the case.

This Court should reverse the judgment and remand this case for trial on all issues.

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CERTIFICATE

I hereby certify that on this 8th day of March, 2019, pursuant to Rule 5:26, three paper copies of the Reply Brief of Appellants have hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Brief was filed, via VACES. On this same day, an electronic copy of the Reply Brief of Appellants was served, via email, upon:

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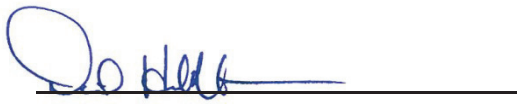

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