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 APPELLEE

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COMES NOW, Appellee/Defendant, Graystone Homes, Inc. ("Graystone") by counsel, and respectfully submits the following:

I. STATEMENT OF THE CASE

The trial court properly sustained demurrers to negligence and contract claims in a case arising out of the construction of a residential home pursuant to a contract between Owners, Crystal and George Tingler ("the Tinglers") and the builder, Graystone[1]. At the thirty day inspection, after the home was built, and again almost one year later, the Tinglers reported a water leak at their French patio doors. Graystone responded and performed repairs. There are no allegations that these repairs either created or aggravated the alleged leak. Approximately three years later, the Tinglers advised Graystone that the repair was ineffective, and the leak had not been fixed. At the Tinglers' request, Graystone made additional repairs and inspected for mold. However, contrary to the Tinglers' bold assertions in their Statement of the Case, Graystone did nothing to make the "mold contamination inside the home to get worse." (See Appellant's Br., p. 1.) There are NO allegations in any of the amended pleadings to support any

[1]The contract did not involve the sale of residential property or the transfer of title and as a result, there are no implied warranties under Va. Code § 55-70.1.

claim on appeal that Graystone's actions worsened the existing condition. This is a case about quality of work based on contract, not negligence. Ineffective repairs do not convert a contract action into tort as recognized by the trial court. The contract action failed because neither the Tinglers or Belle Meade had standing to sue.

In 2009, the Tinglers contracted with Graystone to build a family home on land owned by Belle Meade Farm, LLC ("Belle Meade" or "LLC"). (J.A. 82, 99.) The Tinglers and their children moved into their new home in March 2010, and subsequently moved out in November 2014, claiming injuries related to mold exposure. (J.A. 84.) Negligence and breach of contract/warranty actions ensued. (J.A. 81, 122, 135, 148, 160, 172, 184.)

On March 2, 2015, the Tinglers, their minor children[2], by their father and next friend, George Tingler, and Belle Meade filed a single Complaint against Graystone, alleging that as a result of Graystone performing ineffective repairs to prevent water leaking into the house, mold growth occurred causing either personal injury and/or property damage. Graystone filed a Plea in Bar, a Motion Craving Oyer and Demurrer, as well as a Motion to Drop the misjoined parties. (J.A.[3]1-3.) By Consent Order, dated July 27,

[2] Austin S. Tingler, Dru A. Tingler, Faith L. Tingler, and Gia S. Tingler.
[3] The Joint Appendix is abbreviated "J.A.".

2015, the trial court granted Graystone's Motion to Drop and Motion Craving Oyer and gave leave of court for the Tinglers and Belle Meade to file an Amended Complaint for any non-personal injury claims and the Tinglers and their minor children to file their own separate personal injury claims. (J.A. 4-5.) The demurrer to the original Complaint was determined moot since amended and separate Complaints were to be filed (J.A. 5.)

On July 31, 2015, the Tinglers and Belle Meade filed their Amended Complaint against Graystone asserting claims for damages for Breach of Contract (Count I); Breach of Warranty (Count II); Violation of the Virginia Consumer Protection Act (Count III); Negligence (Count IV); Negligent Repair (Count V); and Negligence Per Se (Count VI). On the same date, the Tinglers, and on behalf of their minor children, filed their own separate Complaints for damages under the same negligence theories. Graystone filed demurrers to the Amended Complaint and to the separate Complaints and Motions Craving Oyer. On March 22, 2017, an order was entered consolidating the cases for discovery **only** and the right to consolidate for trial was taken under advisement.[4] (J.A. 78-80.) By Order entered on June 15, 2017, the trial court sustained all of the demurrers with leave to amend,

[4] Prior to the dismissal of all action with prejudice, no order was ever entered consolidating the cases for trial. There has been no appeal of this order denying consolidation for all purposes.

and the basis for the ruling was set forth in a letter opinion dated March 22, 2017. (J.A. 448-454.)

On July 6, 2017, the Tinglers and Belle Meade filed a Second Amended Complaint (Case No. CL15-201) against Graystone for Breach of Contract by Belle Meade (Count I); Breach of Contract by the Tinglers as agents for Belle Meade (Count II); Breach of Warranty by Belle Meade (Count III); Breach of Warranty by the Tinglers as agents for Belle Meade (Count IV); Breach of Contract by Third Party Beneficiary Belle Meade (Count V); Violation of the Consumer Protection Act[5] (Count VI); Negligence (Count VII); Negligent Repair (Count VIII); and Negligence Per Se (Count IX). (J.A. 81-121.) Separate Amended Complaints were also filed by each of the Tinglers and on behalf of the minor children asserting claims under the same negligence theories. (J.A. 122-134; 135-147; 148-159; 160-171; 172-183; 184-195.) Because there were no new allegations which gave life to any of these claims, Graystone filed demurrers to each amended action. (J.A. 196-201; 202-206; 207-211; 212-216; 217-221; 222-226; 227-231.)

On March 19, 2018, the trial court entered Final Orders in each case sustaining the demurrers to the Second Amended Complaint and the Amended Complaints as to all counts, and dismissing each case with

[5] The Tinglers and Belle Meade did not assign error to this court.

prejudice. (J.A. 438-466.) The Final Orders, also incorporated as Exhibits A and B, the trial court's letter opinions dated February 10, 2018 and March 22, 2017. (J.A. 440-454.)

The Tinglers, their minor children, and Belle Meade filed separate Notices of Appeal. Even though the trial court never consolidated these cases for trial, but only for discovery, only one Petition for Appeal was filed on behalf of seven appellants who have different causes of action and/or legal analyses depending on the plaintiff. Graystone renews its motion to dismiss the petition due to insufficient assignment of error, or in the alternative, dismiss the remaining cases for the reasons previously stated.

II. STATEMENT OF THE FACTS

Crystal and George Tingler ("the Tinglers") are a married couple. (J.A. 82, ¶ 3.) Belle Meade Farm, LLC ("Belle Meade" or "LLC") is a Virginia limited liability corporation and it is the record owner of the land on which the subject home was constructed. (J.A. 82, ¶ 4.) Crystal's father, W. Stanley Hawkins, is "the sole managing [sic] of the LLC" and "has all control over the manner in which" the LLC is operated. (J.A. 82, ¶ 5.) Both Crystal and George work in some capacity for the LLC; Crystal performs "certain office and accounting functions" and George is a full time employee. (J.A. 82, ¶¶ 6-7.)

On or about April 13, 2009, the Tinglers entered into a contract with Graystone for the construction of a residential home for their family to occupy on real property in Culpeper, Virginia. (J.A. 99.) The LLC is not identified in the written contract as the owner of the real property. The construction contract, attached to the Second Amended Complaint as Exhibit 1, (J.A. 99-120), lists the "Owner" as "George & Crystal H. Tingler" at the top of the first page and expressly states in paragraph 1 that the Agreement is "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. (J.A. 99.) At the bottom of each page the Tinglers both initialed as "owners" (J.A. 99-120) and signed their full names as "Owner" [Owner: George & Crystal H. Tingler] on the signature page. (J.A. 106.)

The contract also provides in paragraph 15 that

> The **Contractor** warrants to the **Owner** that all work will be of good quality in conformance with the National Association of Home Builders publication "Residential Construction Performance Guidelines", and performed in a workmanlike manner. All work not conforming to these parameters may be considered defective. (J.A. 102.)
>
> A. A punchlist will be created at the homeowners walkthrough and those items will be corrected within a reasonable time frame . . . **Owner**, with reasonable notice, will provide access to **Contractor** to perform corrective punchout work.

> B. If within one year after completion date, any of the work is found not to be in accordance with the terms of this agreement, **the Contractor shall correct it promptly upon receipt of a written notice from Owner. Such notice must be received by Contractor within such one year period**. (emphasis added)(J.A. 102.)

There is no express allegation of compliance with these terms, and no allegation that the alleged defect of mold in the house was reported within the notice provisions of the contract. The first suggestion of mold was not until 2014, three years after the contractual deadline. (J.A. 84-85, ¶ 27.)

In an effort to overcome the fact that the house became affixed to Belle Meade's real property after it was built, the Tinglers added allegations to their Second Amended Complaint claiming an agency relationship. The Tinglers alleged that they entered into the Agreement for improvements to the real property with the consent and approval of Belle Meade and that Graystone was aware that Belle Meade was the owner of the real property and that it would be making the payments under the contract at the time it built the home. (J A. 83, ¶¶ 11-13.) The Tinglers also alleged that Graystone was aware that Belle Meade intended to partition the real property on which the home was located and transfer ownership "of both the real property and the completed Home to the Tinglers." (J.A. 83, ¶ 17.) The allegations of ownership are contrary to the express terms of the written contract, and the

language in the contract controls.[6] This allegedly unwritten planned transfer was never done prior to the filing of these lawsuits, and there is no reference to any agency relationship in the Contract. (J.A. 99-120.)

On March 22, 2010, construction of the home was completed and a certificate of occupancy issued. (J.A. 84, ¶¶ 20-21.) In late March 2010, the Tinglers and their minor children moved into the home. (J.A. 84, ¶ 23.) At the time of the 30 day inspection of the home, the Tinglers reported leaks at the patio French doors. (J.A. 84, ¶ 25.) In response, Graystone performed some repairs, applied some additional sealants, and replaced some damaged hardwood. (J.A. 84, ¶ 25.) In early 2011, almost one year later, the Tinglers noticed another leak in the dining room and reported it to Graystone; Graystone attempted repairs by removing and replacing some of the hardwood flooring and installing some additional flashing (J.A. 84, ¶ 26.) Again, there is no allegation of a report at the time of mold from this alleged leak.

In "early 2014," approximately three years later, and outside of the contractual period for giving written notice of the defects, the Tinglers had the home inspected for potential mold growth due to symptoms being experienced by the Tinglers and their guests. (J.A. 84, ¶ 27.) This

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[6] *Ward's Equip. v. New Holland N. Am.*, 254 Va. 379 (1997).

inspection allegedly found visible mold growth in the basement underneath the dining room leak location and elevated moisture readings in the dining room and kitchen near the patio French doors. (J.A. 84-85, ¶ 27.) Air tests showed elevated mold spore levels in the air of the home. (J.A. 85, ¶ 27.) The Tinglers verbally reported these findings to Graystone with a request that Graystone fix the patio doors and remediate the mold growth in the basement (J.A. 85, ¶ 28.) Graystone advised that they were extremely busy but would address these concerns as soon as they could. *Id*.

In October 2014, Graystone removed some windows, the patio French doors and hardwood flooring; Graystone installed drain pans underneath the patio French doors and reported that the leak was fixed. (J.A. 85, ¶ 29.) These doors continued to leak, however, whenever it would rain. (J.A. 85, ¶ 30.) There is no allegation that repairs either worsened the condition or created the condition. Rather, the allegation is that the mold existed prior to these repairs. At the Tinglers' request, Graystone returned and made additional repairs to include installing some additional sealants around the French patio doors and applying an anti-microbial in an attempt to clean and prevent any further mold growth. (J.A. 85, ¶¶ 30-31.) The Tinglers requested that the area behind the drywall in the area where the leak occurred be inspected for additional mold growth, but Graystone advised that this was

not necessary. (J.A. 85, ¶ 31.) Graystone informed the Tinglers that there was no mold in the walls and that everything was now taken care of. (J.A. 85, ¶ 31.)

Later that same month (October 2014), the Tinglers had the home inspected again to make sure that the leaks had been repaired; the inspection found continued elevated moisture levels in the dining room and kitchen areas near the leaking areas. (J.A. 86, ¶ 32.) There are no allegations that these levels had increased or that the condition worsened because of any of Graystone's actions. The Tinglers reported these findings to Graystone, and while the inspector was still present, Graystone asked to cut into the drywall in the dining room to check. (J.A. 86, ¶ 34.) Graystone cut a 1 x 2 foot hole and removed a large section of wet, moldy insulation from the wall cavity which it put on the floor. (J.A. 86, ¶ 34.) Graystone cleaned up the insulation and placed a black garbage bag over the hole, and on November 3, 2014 put up a containment sheet. (J.A. 86, ¶¶ 33-35.) There are no allegations that this conduct either created or worsened the mold in the property. On November 11, 2014, the Tinglers, after feeling continued symptoms which they attributed to mold exposure, moved out of the home, and it has remained vacant since that time. (J.A. 86, ¶ 36.)

Thereafter the Tinglers requested that Graystone have the home professionally cleaned and remediated (J.A. 86, ¶¶ 36-37.) Graystone hired PuroClean who inspected the house and reported that the containment that Graystone had placed in the dining room for approximately two weeks before the Tinglers vacated was improper and recommended another inspection. (J.A. 86, ¶ 37.) There are no allegations that the alleged improper containment worsened or created the existing condition. Hallmark Residential Services was hired to perform this additional inspection and found elevated moisture levels and mold spore levels, (J.A. 85, ¶ 38), both of which had been noted before Graystone performed any inspection or cut into the drywall after being contacted in 2014[7].

III. SUMMARY OF ARGUMENT

The trial court properly sustained the demurrers and dismissed the actions with prejudice since no new allegations were ever pled to give rise to a tort action or permit the Tinglers or Belle Meade to pursue contract remedies. The contract between the Tinglers and Graystone is the sole

[7] There are no allegations of any increase in these levels because of Graystone's inspection of the drywall, attempts to repair, or removal of the insulation. Notably, the Tinglers never allege that the repair work itself caused injury, only that Graystone failed to correct an existing problem that "continued to occur" despite the repair attempts. (J.A. 92, ¶¶ 62-65).

source of duty. The quality of the construction and repair does not give rise to any claim of negligence because, without the contract, there is no duty to construct or repair a house, and there are simply no allegations that Graystone's ineffective repairs created or worsened the existing condition or increased the mold growth.

Because Belle Meade owned the real property on which the Tinglers' home was built, the home became affixed to the real property after it was constructed. Therefore, the Tinglers did not have standing to pursue any contract claim for damages. Belle Meade was precluded from pursuing its own contract claim for damages because it was never in contractual privity with Graystone. Belle Meade had no standing to pursue remedies under tort law, because its alleged damages are purely economic losses. While the Tinglers creatively endeavor to rectify this defect by alleging that they were acting as agents for Belle Meade, the contract is bereft of any support for an agency theory, and the express language in the contract contradicts this new claim of agency. The trial court also properly sustained Belle Meade's third-party beneficiary claim because the contract is devoid of any specific intent to directly benefit Belle Meade.

Finally, there are no allegations, beyond the Tinglers' conclusory assertions, that Graystone's efforts to repair created an "unreasonably

dangerous condition." The trial court's ruling sustaining the demurrers with prejudice should be affirmed.

IV. STANDARD OF REVIEW AS TO ALL ASSIGNMENTS OF ERROR

The purpose of a demurrer is to determine whether the pleading and proper attachments state a cause of action upon which relief can be given. *Abi-Naim v. Concord Condo., LLC*, 280 Va. 350, 356-57 (2010). The decision whether to grant the demurrer is a question of law, which this Court reviews de novo. *Id.* Legal conclusions are not taken as true in considering a demurrer. *Yuzafovsky v. St. John's Woods Apts.*, 261 Va. 102 (2001).

V. ARGUMENT

I. THE TRIAL COURT PROPERLY SUSTAINED THE DEMURRERS TO THE TINGLERS' CLAIMS OF NEGLIGENCE, NEGLIGENT REPAIR, AND NEGLIGENCE PER SE BECAUSE THERE WAS NO COMMON LAW OR STATUTORY DUTY OWED BY GRAYSTONE. (ASSIGNMENT OF ERROR 1).

A. UNDER THE ALLEGATIONS SET FORTH IN THE AMENDED PLEADINGS, GRAYSTONE'S DUTY AROSE ONLY IN CONTRACT AND NOT NEGLIGENCE.

"In determining whether a cause of action sounds in contract or tort, the source of the duty violated must be ascertained." *Richmond Metro Auth. v. McDevitt*, 256 Va. 553, 558 (1998). This Court distinguished between tort and contract actions as follows:

> [**i]f the cause of complaint be for an act of omission or non-feasance** which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) **then the action is founded upon contract, and not upon tort.**

Id. at 558 (emphasis added) (quoting *Oleyar v. Kerr*, 217 Va. 88, 90 (1976)). In *McDevitt*, the Richmond Metropolitan Authority contracted for the construction of a stadium, and, in suing the builder for failing to comply with the construction contract, also sought damages under common law fraud based on misrepresentations allegedly made about the quality and extent of the contractors' performance. *Id.* at 556-57. This Court affirmed the trial court's dismissal of the tort claim on summary judgment stating that a tort action cannot be based solely on a negligent breach of contract. *Id*. at 559.

In order to avoid turning every breach of contract into tort, this Court has consistently applied the rule that, 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.*; *Foreign Mission Bd. v. Wade*, 242 Va. 234, 241 (1991) (citing *Spence v. Norfolk & Western R. R. Co.*, 92 Va. 102, 116 (1895)). *See also Dunn Construction Co. v. Cloney*, 278 Va. 260, 267 (2009)(this Court reversed the jury's award of punitive damages on a fraud count, which was based on a contractor's false representation to a property owner that he had made adequate repairs to a

foundation wall, finding that this arose from his duties under the contract). Even in the case of ineffective repairs, there is no presumption of negligence. *Oden v. S. Norfolk Redevelopment & Housing Auth*., 203 Va. 638, 640 (1962).

As in *McDevitt*, the Tinglers are alleging "nothing more than allegations of negligent performance of contractual duties," which are "not actionable in tort." *Id.* The Tinglers' allegations do not give rise to a negligent breach of a common law duty; instead, their claims arise from the quality of Graystone's work, which is governed by the contract. They allege that Graystone's original construction of the home was "deficient" in that it was not leak-proof, and that multiple repair attempts by Graystone were ineffective in repairing the alleged leak. (J.A. 123-126.)

There is no common law duty to construct a house to be "leak proof". Such a standard is a reference to the quality of the work, or a warranty standard, and not the common law. Our common law is based on the English Common Law. "The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue if full force within the same, and be the rule of decision, except as altered by the General Assembly." Va. Code § 1-200. The concept of a tort duty to construct a dwelling to a leak proof standard is

contrary to the common law. *See Bruce Farm, Inc. v. Coupe*, 219 Va. 287 (1978) (no common law warranty concerning the standard of construction of a new dwelling). While the Legislature has created a limited warranty for the *sale* of a new dwelling, the Tinglers have not and cannot allege a violation of Va. Code § 55-70.1. That section does not apply to construction contracts but on the sale of a new dwelling. The degree to which a dwelling resists water infiltration is a reference to quality of the work. If this court were to find a tort duty related to the quality of how weather tight a house must be, it would take tort law into the realm of contract warranties. It is hard to imagine how in the 1800's common law England, there would be a tort standard to make cottages or castles leak proof.

If there is no tort action, then the next step in the analysis is to determine if there is a contract based claim for the alleged failure to construct the dwelling to a certain quality. Under longstanding Virginia law, no action in tort arises from a failure to perform duties under contract. *See Caudill v. Gibson Fuel Co.*, 185 Va. 233 (1946). In looking at the allegations in the Second Amended Complaint and Amended Complaint, the alleged failures are either the failure to construct the property to a certain standard, or failure to make repairs. These are allegations of nonfeasance, or failure to perform, as opposed to misfeasance, the creating of an unreasonably dangerous

condition. While the Tinglers are seeking damages for personal injuries, these allegations do not give rise to a breach of a common law duty by Graystone. *See also Richmond v. Branch*, 205 Va. 424, 429 (1964) (the general rule is that

> except under peculiar circumstances . . . the independent contractor is not liable for an injury to person or to property of one not a party to the contract, occurring after the independent contractor has completed the work and turned it over to the owner or employer, and the same has been accepted by him, though the injury resulted from the contractor's failure to properly perform his contract).

Additionally, by attempting to contort their claims into tort, the Tinglers seek to have the judicial branch control the construction of houses in Virginia through tort law rather than permitting private parties to dictate the terms through contract.

1. The Tinglers' reliance on the *Kaltman* case is misplaced, and there are no allegations which support both a breach of contract and breach of a duty in tort in this case.

The alleged shortcomings of the construction and ineffective repair are issues related to the quality of the work performed under the contract and contractual warranty. The Tinglers have alleged no facts to support a common law or statutory duty and incorrectly rely on *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483 (2011), to argue otherwise. In *Kaltman*, the defendant pest control company permitted an unlicensed pesticide

technician to spray a harmful commercial grade pesticide not appropriate or licensed for residential use into a dwelling and in violation of Virginia statute (Va. Code § 3.2-3939(B)). *Id*. at 487. The homeowners subsequently filed a personal injury action alleging negligence theories. The trial court sustained the company's demurrer finding that the duty owed arose only from contract. On appeal, this Court found that, even though a contract existed, the trial court erred in sustaining the demurrer to the negligence count because the pest control company breached duties independent of the contractual duty to control pests and to the negligence per se count because the statute claimed to have been violated was "enacted to protect the public against the use of harmful chemicals" and imposed duties on the defendants separate from the contract. *Id.* at 498.

The important distinction from the instant case is that in *Kaltman,* a heavily regulated harmful chemical, not appropriate for residential use, in a heavily regulated industry was affirmatively applied to the house, and the chemicals created the alleged injury. This was a "misfeasance" as opposed to Graystone's alleged "nonfeasance" of failing to correct a leak. Unlike *Kaltman*, the Tinglers have not alleged duties separate and apart from the contract. There are no allegations that Graystone applied mold or any other toxic material to the house, or by its actions worsened the existing condition

thereby causing an unreasonably dangerous condition like the defendants in *Kaltman*. The presence of mold is an alleged consequence of water infiltration. There are no allegations that any act or omission of Graystone increased the moisture or mold spore levels or worsened the water leak or mold contamination. Instead, the Tinglers' primary complaint is simply that Graystone did not repair a water leak, water entered through the leak, and that mold growth resulted. (J.A. 124-126.) In other words, the house was allegedly not watertight. A leak that causes higher humidity which allegedly creates a condition where mold eventually develops is an entirely different scenario than the technician in *Kaltman* applying the wrong pesticide to the house. That distinction is fundamental. Graystone did not create the mold[8] and had no common law duty to build a house in which mold could not grow. The Tinglers acknowledge in their brief that Graystone also had no common law duty to remediate the mold. (App. Br., p. 25.) Any duty of Graystone to construct, build, or repair the house in a workmanlike manner arose pursuant to the contract. The Tinglers have failed to allege sufficient facts to support an independent tort duty separate from the contract. Similar to *Dunn*

[8] "Mold spores are ubiquitous; they are found both indoors and outdoors. Mold spores cannot be eliminated from indoor environments." *Mold Course Chapter 1: Introduction to Molds*, United States Environmental Protection Agency (November 8, 2018), https://www.epa.gov/mold/mold-course-chapter-1

Construction Co. v. Cloney, 278 Va. 260, 267 (2009), Graystone had contractual duties related to its construction work and any failure to repair stems from the duties imposed by contract, not common law.

2. Restatement (Second) of Torts § 323 does not give rise to a common law duty in this case.

The Tinglers erroneously rely on *Didato v. Strehler*, 262 Va. 617 (2001), to support their contention that this Court should apply the rule articulated in the *Restatement (Second) of Torts Section 323* ("§ 323")*:*

> One who undertakes . . . 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 <u>increases the risk of such harm</u>**, or (b) **the harm is suffered <u>because of the other's reliance</u> upon the undertaking**.

Id. at 628-29 (emphasis added).

In *Didato*, parents retained a pediatric practice who performed a sickle cell trait screening test on their child. In reliance on the practice reporting normal test results, the couple had another child who had the genetic blood disease the parents were trying to avoid. The parents would not have had this child if the test results had been accurately reported. The parents sued the doctor and his practice for negligently and inaccurately informing them that the test result was normal. *Id*. at 624-25. This Court reversed the trial court's ruling sustaining the demurrer as to negligence and assumption of

duty based on the doctor and his practice undertaking the duty to communicate certain information to the parents, their alleged negligence in doing so, and the parents' reliance on that information. *Id*. at 629.

The facts of *Didato* are easily distinguishable from this case. Section 323, upon which *Didato* is based, requires either "an increase in the risk of harm" or the suffering of harm "because of the other's reliance" on the defendant's undertaking. Neither element is present here. There are no allegations that Graystone's actions increased the risk of harm or worsened the existing condition of the home. (J.A. 124-125.)[9] There are no allegations to show any reliance on Graystone's actions resulting in harm. [10] (J.A. 125.)

Additionally, neither *Didato* nor *Restatement (Second) of Torts* § 323 address an alleged failure to properly perform duties arising from contract. *Didato* and its analysis of § 323 address "whether a legal duty existed between parties in the absence of a contract." *Jeannie's Jewelers, Inc. v. ADT Sec. Servs.*, 2012 U.S. Dist. LEXIS 71381 (E.D. Va. 2012) (distinguishing *Didato* from a case where a contract existed and allegations

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[9] The amended complaints reference visible mold growth, elevated mold spores, and elevated moisture levels, but lack any allegations that these conditions were worsened or exacerbated by Graystone's actions.

[10] The Amended Complaint alleges that a Graystone employee stated that inspecting behind drywall was unnecessary in October 2014, but that the Tinglers had the home inspected again in "late October[.]"

of negligence were that defendant failed to carry out obligations under contract; the federal court dismissed the action for failure to state a claim for negligence). A failure to perform obligations under contract is not equivalent to a tort. *See* § IV B(1)*, supra*.

3. Enforcing the source of duty rule does not transform contracts for services into pre-injury releases of liability for future negligent acts.

Relying upon the case of *Hiett v. Lake Barcroft Community Ass'n, Inc.*, 244 Va. 191 (1992), applying the source of duty rule will not, as the Tinglers argue, convert contracts into "pre-injury releases" for future negligent acts which is contrary to Virginia's public policy. *Id*. at 194-97. The *Heitt* case does not apply to the facts of this case. First, in *Heitt* there was no dispute that common law duties applied to the plaintiff. Here, common law duties do not apply, as the basis of the duty owed by Graystone lies in contract rather than tort or common law. Second, the contract in the present case defines and limits the duties of each party with respect to one another and contains no release. (J.A. 99-120.)

4. Landlord-tenant case law does not support the Tinglers' contention that a contractor has a common law duty to perform contractual obligations.

Absent a misfeasance in the undertaking of repairs, a landlord cannot be held liable for negligence. *See Caudill v. Gibson Fuel Co.*, 185 Va. 233

(1946); *Steward v. Holland Family Properties, LLC*, 284 Va. 282 (2012). In *Caudill*, the plaintiff brought suit against the defendant after she fell through a decaying porch. 185 Va. 233 (1946). This Court held that "[t]he failure of the landlord to fulfill his promise to repair property in possession and control of the tenant does not impose upon him any liability in tort." *Id*. at 240 (*quoting Newman v. Early*, 176 Va. 263, 265 (1940)). Conversely, in *Holland v. Shively*, this Court awarded an appeal to a plaintiff who filed suit against her landlord for negligence after falling and suffering injury and whose verdict was set aside by the trial court. 243 Va. 308, 310 (1992). This Court held that there was sufficient evidence for the jury to conclude that the defendant had undertaken and begun making repairs to the premises, and was negligent in doing so. *Id*. at 311. In that case, the defendant landlord actively made the premises more dangerous through his undertaking of repairs by boarding off the rear egress, removing rotted boards from the front porch without replacing them, and ignoring the cinderblock steps. *Id*. at 310. Thus, this Court reversed the judgment of the trial court and reinstated the jury's verdict. *Id*.

Unlike *Caudill*, which involved a failure to make repairs which this Court held to be a contractual obligation, *Holland* involved a misfeasance for which this Court held a finding of liability in negligence against the landlord proper.

Unlike *Holland,* there are no allegations in this case that Graystone's actions exacerbated the alleged undesirable condition of the home. The present case is more akin to *Caudill*, where the main allegation is a failure to correct a defective condition. (J.A. 124-125.)[11] Finally, just as landlords are not subject to a common law duty to undertake repair, there is no common law duty of a contractor to undertake the building or repairing of a dwelling. Unless there is a misfeasance that breaches a common law duty separate from the duties under contract, the contractor cannot be held liable in negligence.

5. Contractor duties, including any duty to perform the contracted-for work in a manner not to cause harm, all flow from contract.

This Court's ruling in *Dunn* offers the proper guidance in this matter. *Dunn* demonstrates that contractors *can* be held responsible for the quality of their work and the manner in which it is performed, while still upholding this Court's source of duty line of decisions, and enforcing the contractual nature of the obligations and duties owed by a contractor to its client. The contractual duty set forth in *Dunn* – the duty to perform duties under the

[11] The allegations against Graystone are that its original construction of the house was deficient in permitting a leak and subsequent repair attempts did not remedy the condition.

contract in a workmanlike manner – is the correct characterization of the duty imposed on contractors pursuant to the contracts that they enter.

B. ANY ALLEGED INEFFECTIVE REPAIRS DO NOT PROVIDE THE BASIS FOR A SEPARATE TORT ACTION FOR NEGLIGENT REPAIR.

Where one undertakes to make repairs, failure to correct the condition does not make the attempted repairer liable in negligence for the condition he sought to correct. *See Steward v. Holland Family Props., LLC*, 284 Va. 282, 292 (2012) (finding that "[a] covenant to repair . . . is a contractual term which gives rise only to an action for breach of contract, not a duty in tort."); *Isbell v. Commercial Investment Assocs., Inc.*, 273 Va. 605, 616 (2007); *Caudill*, 185 Va. at 240-41. Under this Court's decisions in *Steward*, *Isbell*, and *Caudill*, the Tinglers' allegations do not support a tort claim because Graystone was not subject to any common law duty to repair or remediate. The repairs are only alleged to have failed to correct an existing condition. (J.A. 124-125.) There are no allegations, beyond mere conclusions, that the repairs created an unsafe condition or worsened the existing condition. There are no allegations that any act or omission by Graystone increased the moisture levels in the home, increased the mold spore levels in the home, or worsened the alleged leak. The claim that the repairs were inadequate or ineffective is a contractual issue. The distinction between the 2011 and 2014

repairs and the underlying construction is crucial because the Tinglers do not allege that the repairs created any defective or unsafe condition. Instead, the Tinglers allege that the repair work failed to correct an existing problem that "continued to occur" despite the repair attempts. (J.A. 88-89, ¶¶ 41, 43) (emphasis added). The Tinglers attempt to distinguish negligent repair as a separate tort duty that gives rise to their claims, but this fails because a leak in patio doors is not an unreasonably dangerous condition.

C. THE TINGLERS' NEGLIGENCE PER SE CLAIMS ARE INSUFFICIENTLY PLED AND FAIL TO DEMONSTRATE A DUTY IMPOSED ON GRAYSTONE.

The negligence *per se* claims are precluded by the source of duty rule, and further fail to state a claim under Virginia law. The Tinglers and Belle Meade vaguely and conclusorily allege that the "Building Code" has been violated without ever citing any violated provisions. In light of the breadth of the Virginia Uniform Statewide Building Code ("USBC"), this allegation fails to put Graystone on notice of the basis of the claims against it. In addition to these shortcomings, the Tinglers also fail to demonstrate how any violation would give rise to a separate tort duty. A statutory violation assists in interpreting existing common law duty, however statutes do not "create[] the duty of care" where it does not exist. *Steward*, 284 Va. at 290-91 (interpreting *McGuire v. Hodges*, 273 Va. 199 (2007)). In *Steward v. Holland Family*

Properties, LLC, the plaintiff sought to bring action for negligence *per se* based on alleged violations of the Virginia Residential Landlord Tenant Act ("VRLTA"), but the claim was dismissed on demurrer because the code assists in interpreting the standard of care, but does not affirmatively impose any duty of care where it is otherwise absent. *Id*. Additionally, the duties articulated in the USBC typically apply to the owners and occupiers of property. *See, e.g.*, *McGuire*, 273 Va. at 202-203 n.3. This duty, if it exists, is a duty owed by the Tinglers or Belle Meade, not by Graystone.

D. THE ECONOMIC LOSS DOCTRINE BARS CLAIMS FOR PURELY ECONOMIC LOSSES BY PARTIES NOT IN CONTRACTUAL PRIVITY.

The economic loss doctrine bars recovery for purely economic losses where the parties are not in privity. *Blake Construction Co.,Inc. v. Alley*, 233 Va. 31, 34-35 (1987). This doctrine further prevents plaintiffs from converting a contract action into a tort claim. *Sensenbrenner v. Rust, Orling, & Neale Architects, Inc.*, 236 Va. 419, 424 (1988). Where a building "injures itself" because one component is allegedly defective, "a purely economic loss results to the owner for which no action in tort will lie." *Id*. The economic loss doctrine further applies to "compensate parties for losses suffered as a result of a breach of duties assumed only by agreement." *Id*. at 425. In *Sensenbrenner*, homeowners contracted with a construction firm to build a

new home and pool on their property. *Id*. at 421-22. The construction firm contracted with the defendants architects and pool contractor. *Id*. When the alleged poor construction and design of the pool led to damage to the entire property, the homeowners brought negligence actions in federal court against the architects and pool contractor. *Id*. at 422. The trial court granted the defendants' motions to dismiss based on the economic loss rule precluding recovery without privity. *Id*. The case was appealed and questions were certified to this Court. *Id*. This Court held that the plaintiffs were unable to recover in tort because the loss sustained, "the failure of the substandard parts to meet the bargained-for level of quality[,]" amounted to the economic loss of "diminution in value of the whole, measured by the cost of repair." *Id*. at 425. This Court held that contract law, rather than tort law, provided remedy. *Id*. Like the homeowners in *Sensenbrenner,* Belle Meade's damages, consist of the cost of repairs allegedly necessitated by the failure to perform duties existing under a contract to which it is not a party. These are purely economic losses for which Belle Meade lacks standing to sue.

II. THE TRIAL COURT PROPERLY SUSTAINED THE DEMURRERS AS TO THE TINGLERS' AND BELLE MEADE'S BREACH OF CONTRACT AND WARRANTY CLAIMS BECAUSE NEITHER HAS STANDING TO SUE AND NO AGENCY RELATIONSHIP EXISTED. (ASSIGNMENT OF ERROR 2).

A. BELLE MEADE FARMS LACKS PROPER STANDING TO SUE BECAUSE IT WAS NOT A PARTY TO THE CONTRACT WITH GRAYSTONE.

"The common law requirement of privity of contract is well established." *APAC-Virginia v. Virginia Dep't of Highways & Transp.*, 9 Va. App. 450, 452 (1990). An action on a contract must be brought in the name of the party in whom the legal interest is vested. *Cemetery Consultants, Inc. v. Tidewater Funeral Director's Asso.*, 219 Va. 1001, 1003 (1979).

In the present case, Belle Meade seeks to maintain and pursue contract claims against Graystone. Belle Meade's name is not mentioned within the four corners of the contract. (J.A. 99-120.) Thus, Belle Meade is not a party to the contract with Graystone and cannot maintain such an action. In an effort to overcome this defect, the Tinglers allege that they acted as agents for Belle Meade; however, these are conclusory assertions which do not give rise to an agency relationship and are contradicted by the contract which is attached to the Second Amended Complaint and governs the relationship between the parties. (J.A. 99-102.) Belle Meade is also not a third party intended beneficiary to the contract. *See infra,* § III.

1. The Tinglers did not enter the contract with Graystone as agents of Belle Meade.

Agency is the fiduciary relationship which results from the manifestation of consent by one person or entity to another that the other shall act on its behalf and subject to its control and consent by the other so to act. *Giordano v. Atria Assisted Living, Va. Beach LLC.*, 429 F. Supp. 2d 732, 736 (E.D. Va. 2006). Where a question of agency, or not, rests upon written documents and the inferences therefrom, the question is one of law "for [the] construction of written documents is exclusively for the court." *Murphy v. Holiday Inns., Inc.*, 216 Va. 490, 492 (1975). "The law indulges no presumption that an agency exists, but instead presumes that a person is acting for himself, and not as agent for another." *Montague Mfg. Co. v. Aycock-Holly Lumber Co.*, 139 Va. 742, 747 (1924). In determining whether an agency relationship exists, "the relationship of the parties does not depend upon what the parties themselves call it, but rather *in law what it actually is*." *Chandler v. Kelley*, 149 Va. 221, 231 (1928) (emphasis added). The creation and existence of an agency relationship depends on "what was actually done or agreed to by the parties, not from what they *may have privately meant or supposed they meant*. Agency or not is a question of law, to be determined by the relations of the parties as they exist in fact." *Id*. at 231-32 (emphasis in original); *Murphy*, 216 Va. at 492.

In this case, the allegations taken with the contract between the Tinglers and Graystone are insufficient to demonstrate an agency relationship between the Tinglers and Belle Meade. The contract bears no reference to Belle Meade, no indication that the Tinglers are acting as agents for an undisclosed principal, and no notation by the Tinglers that they are signing as agents of another person or entity. In fact, the contract is explicit and unambiguous that George and Crystal Tingler are the "Owners". (J.A. 99, 106.) Because the contract controls the question of whether an agency relationship exists, and there is no evidence in it to support an agency relationship, there is no reasonable inference that any agency relationship existed between Belle Meade and the Tinglers.

2. The Tinglers did not have actual authority as agents of Belle Meade.

An agency relationship is presumed when an entire business is placed under the management of an agent. *DHA Inc. v. Leydig*, 231 Va. 138, 140 (1986) (quoting *Whitten v. Bank of Fincastle*, 100 Va. 546, 551 (1902). In *Leydig*, this Court reversed judgment in favor of the defendant and held that an agency relationship had been established based on the facts that the general manager of the plaintiff company (1) was the "sole administrative and managerial employee," (2) conducted all of the company's operations, and 3) negotiated contracts. *Id*. at 139. In contrast, the Second Amended

Complaint, in the present case, is completely devoid of sufficient allegations to support an agency relationship. The new allegations the Tinglers injected in an effort to create an agency relationship fall far short of any reasonable inference that one exists. For instance, George Tingler works "full time on the farm" (J.A. 82); Crystal Tingler performs "office and accounting functions." (J.A. 82.) Comparatively, W. Stanley Hawkins is the "sole" manager and "has all control over the manner in which Belle Meade is run and how all of its business is operated." (J.A. 82.) None of the factual allegations support the legal conclusion that either George or Crystal Tingler had the ability to enter into and execute contracts on behalf of Belle Meade.

Additionally, the allegation that there was an arrangement between the Tinglers and Belle Meade pertaining to the property on which the house was built is wholly irrelevant to the present case because it is not incorporated into the contract to build the house. (J.A. 83.) The Tinglers, by arguing in favor of an agency relationship, are asking this Court to ignore the rules of contract construction and interpret the term "Owners" in a manner inconsistent with its normal, plain and ordinary meaning. The language in the contract controls. *See Ward's Equip.v. New Holland N. Am.*, 254 Va. 379, 387 (1997) (trial court did not have to accept allegations as true when contradicted by the contract). "When contract terms are clear

and unambiguous, a court must construe them according to their plain meaning." *Bridgestone/Firestone, Inc. v. Prince William Square Assocs.*, 250 Va. 402, 407 (1995). Therefore, when considering the four corners of the contract, this Court should find that the Tinglers were not acting as agents of Belle Meade.

Additionally, the primary element of agency is that the agent acts on behalf of the principal. The Tinglers and Belle Meade have alleged that "the Tinglers entered into an agreement with Graystone" for the construction of their residential family home and reference the attached contract. (J.A. 82.) Clearly, the Tinglers were acting to further their own interests, not as an agent for Belle Meade. The simple fact that one party supplies the funding for another to enter into a contract does not necessarily yield an agency relationship. For instance, a parent may supply funds necessary for his or her adult child to purchase a vehicle. This does not mean that the adult child is acting as the agent of the parent, particularly when the adult child is going to use the vehicle for his or her own benefit. That is essentially what we have in the present case – a parent (through the entity of Belle Meade), has furnished the land and funds for an adult child to construct a house. This does not yield an agency relationship on its own.

3. The Tinglers did not have apparent authority as agents of Belle Meade.

Apparent authority is also lacking as it "is not established by the principal's grant of consent to the agent and maintenance of control . . . but by the reasonable perception of third parties." *Giordano v. Atria Assisted Living, Va. Beach, LLC*, 429 F. Supp. 2d 792, 738 (2006); *see also Restatement (Second) of Agency § 8 cmt. C* (2010). While the contract between Graystone and the Tinglers clearly demonstrates that no agency relationship existed between the Tinglers and Belle Meade, even if this Court were to find an apparent agency relationship, the Tinglers' actions as apparent agents are "limited by the scope of that agency." *Giordano*, 429 F. Supp. 2d at 740. The finding of apparent agency is not "a *carte blanche* grant of authority." *Id*. It is unreasonable for the Tinglers to argue that Graystone believed that they were acting as agents on behalf of Belle Meade based on the mere fact that Crystal Tingler performs "office and accounting functions" and George Tingler works "full time on the farm." (J.A. 82.) The Tinglers' respective roles with Belle Meade do not give rise to an agency relationship of unlimited authority. Finally, the doctrine of apparent authority/agency does not apply for a principal to use against an agent as the Tinglers and Belle Meade seek to use it in this instance. *See Giordano*, 429 F. Supp. 2d at 738.

4. Even if this Court found Belle Meade to be a principal, it has relinquished its right to sue.

Belle Meade, even if deemed a principal, has given up its ability to sue because the original claims were brought in the name of the Tinglers. *See Thomas Branch & Co. v. Riverside & Dan River Cotton Mills, Inc.*, 147 Va. 522, 536 (1927)) ("[w]here a person enters into a simple contract, . . . when he is in fact acting as the agent of another and for his benefit, without disclosing his principal . . .[i]t is . . . well settled that upon such a contract *either* the agent or the principal may sue . . .") (emphasis added); *see also Nat'l Bank of Va. v. Nolting*, 94 Va. 263, 264 (1897) ("it is well settled that where a contract is made with an agent, and in the agent's name for an undisclosed principal, *either* the agent or principal may sue upon it.") (emphasis added). The Tinglers and Belle Meade rely on *Leterman v. Charlottesville Lumber Co.* to support their argument that both an undisclosed principal and agent have standing to sue for breach of contract. 110 Va. 769 (1910). However their characterization of *Leterman* is incomplete. This Court, in *Leterman*, held that it is "well settled that upon such a contract *either* the agent *or* the principal may sue." *Id*. at 772 (emphasis added). *Leterman* does not state that both a principal *and* an agent may pursue the same claim together.

An agent cannot sue if the "principal interferes in the suit." *Id*. Both agent *and* principal cannot sue under the same contract. *See* 1 M.J. AGENCY § 104 (2017) ("either the agent *or* his principal may sue when a nonnegotiable simple contract is entered into between an agent of an undisclosed principal and a third person.")(emphasis added). Thus, even if this Court finds a principal-agent relationship, this Court should affirm the trial court's ruling as to the contract-based claims asserted by Belle Meade as any right it had to sue has been usurped by the Tinglers as the alleged agent.

B. THE TINGLERS CANNOT CLAIM DAMAGES TO PROPERTY THAT THEY DO NOT OWN.

The Tinglers, as contracting parties, cannot state a claim for damages to the property or reduction in its value because they are not the owners of the dwelling or the property on which the dwelling sits. *See, e.g.*, *Cooper v. Horn*, 248 Va. 417, 423 (1994) ("property owner's possessory interest" was basis for claim for trespass to real property). It is axiomatic that everything annexed to real property "becomes a part thereof." *Effinger v. Hall*, 81 Va. 94, 101 (1885). Whatever right to compensation the party responsible for the improvement of land may have vis-à-vis the owner whose property has increased in value (*see Effinger*, 81 Va. at 102), the improving party lacks standing to bring claims against the contracting builder for damage to the

property or loss of property value. By vesting ownership of the real property in Belle Meade, the Tinglers have voluntarily relinquished any standing to seek damages for injuries or loss of value to the property. Any such right would be vested in Belle Meade as the owner of the real property and, thus, the home as a fixture. The inability of the Tinglers to recover under the contract arises from the fact that they entered into the contract before the lot was partitioned and the portion of land on which the house was built was put in their name. (J.A. 83.) Therefore, the trial court's decision to dismiss the Tinglers' contract-based claims should be affirmed.

III. THE TRIAL COURT DID NOT ERR IN RULING THAT BELLE MEADE WAS NOT A THIRD-PARTY BENEFICIARY. (ASSIGNMENT OF ERROR 3).

In order to recover under a third party beneficiary theory, "[a] clear intent to benefit the third person must appear to enable him to sue on the contract; incidental beneficiaries cannot maintain an action thereon." *Norfolk-Portsmouth Newspapers, Inc. v. Stott*, 208 Va. 228, 231 (1967). Whether a contract is intended for the benefit of a third person is generally regarded as an issue of construction and is determined by the contract as a whole. *Envtl. Staffing Acquisition Corp. v. B & R Constr. Mgmt.*, 283 Va. 787, 793 (2012) (citing *Valley Landscape v. Rolland*, 218 Va. 257, 261 (1977)). "It is a matter of common knowledge that any contract for construction is usually of

incidental benefit to numerous persons." *Valley Landscape*, 218 Va. at 260. However, the fact that a non-party derives an incidental benefit does not make that person an intended third-party beneficiary. *Id*. (affirming trial court's decision to sustain a demurrer to third-party contract beneficiary claim). Virginia's third-party beneficiary statute, Va. Code Section 55-22, does not apply "unless the party sought to be held liable has assumed an obligation for the benefit of a third party. The statute does not purport to create a contract where no contract exists." *Professional Realty Corp. v. Bender*, 216 Va. 737, 739 (1976) (internal quotation marks omitted).

In the present case, the contract at issue specifically states that "[t]his Contract constitutes the entire understanding between the parties . . ." (J.A. 105.) The extraneous assertions that Belle Meade has alleged in support of its third-party claims are not part of the contract. There is nothing in the contract which establishes that Graystone and the Tinglers had a clear and definite intent to confer a benefit on Belle Meade. Additionally, Belle Meade's reliance on *Ward v. Ernst & Young* is misplaced. In *Ward*, this Court reversed summary judgment against the plaintiff in a third party contract beneficiary claim against an accounting firm. *Ward v. Ernst & Young*, 246 Va. 317 (1993). The contract was for auditing services between HAZCO, a corporation, and the firm, to be conducted as part of negotiations for sale of

HAZCO stock. *Id*. at 320. The plaintiff was the sole stockholder of HAZCO and this Court noted a number of factors indicating that Ernst and Young knew of the plaintiff's potential benefit upon the sale of stock. *Id*. at 320-22. This Court held that the evidence was sufficient to create a jury issue on whether the parties to the contract intended to confer a benefit upon the plaintiff, because the plaintiff, as the sole stock owner, was the primary beneficiary of the benefits that would be realized upon the sale of stock. *Id*. at 332.

Ward is easily distinguishable from the present case. Here, there are no allegations that Belle Meade stood to profit as a result of the contract or that Graystone ever communicated with W. Stanley Hawkins, the sole director of Belle Meade. (J.A. 82.) In fact, and to the contrary, Belle Meade claims "the intent of the contract *was to build the Home for the Tinglers to live on the farm, and that the Tinglers would thereafter reside on the farm and [sic] their new Home*[.]" (J.A. 83.) (emphasis added). Belle Meade further claims that "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." (J.A. 83.) Further, Belle Meade's own allegations, *supra*, undercut its own claim. It is clear that

the intended beneficiaries of the contract were the Tinglers. Any benefit derived by Belle Meade was merely incidental.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the trial court sustaining the demurrers to all claims and dismissing these actions with prejudice.

Date: February 22, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26 of the Supreme Court of Virginia, I hereby certify that on the 22nd day of February 2019, three paper copies of the Brief of Appellee were hand-filed to the Clerk of the Supreme Court of Virginia and electronic copies of the Brief of Appellee were filed via VACES. On the same day, an electronic copy of the Brief of Appellee was served via email and one paper copy was served, via USPS First Class Mail, upon the following counsel:

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