
IN THE
Supreme Court of Virginia

RECORD NO. 141248

DEBRA A. BALLAGH,

Plaintiff-Appellant,

v.

FAUBER ENTERPRISES, INC.,
BERNARD M. FAUBER, JR., ALICE SMITH, and
THE REALTY GROUP OF LYNCHBURG, LLC,

Respondents-Appellees.

**AMICUS CURIAE BRIEF IN SUPPORT OF
APPELLANT'S ASSIGNMENT OF ERROR
LEGAL SERVICES OF NORTHERN VIRGINIA, VIRGINIA POVERTY
LAW CENTER, THE NATIONAL ASSOCIATION OF CONSUMER
ADVOCATES, THE VIRGINIA TRIAL LAWYERS ASSOCIATION,
AND THE NATIONAL CONSUMER LAW CENTER**

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I. INTEREST OF AMICUS GROUPS

Amicus Legal Services of Northern Virginia (LSNV) is the largest legal aid organization in Northern Virginia, helping thousands of clients each year in civil legal matters. LSNV partners closely with other legal aid organizations, state and local bar associations, as well as the courts to serve the region's low-income and neediest populations. LSNV provides services regarding: Consumer Law, Elder Law, Family Law, Housing Law, Public Benefits, Child Advocacy & Education Law. LSNV's consumer practice focuses on preserving and protecting our client's limited property or income from adverse creditor action. LSNV's assistance can include counsel and advice, negotiated settlements or court representation. LSNV gives the highest priority to cases in which a client is facing the loss of a critical economic resource, such as income through a wage or bank account garnishment or other collection activity. It also focuses on unfair, fraudulent or predatory consumer cases. Its cases involve a variety of federal, state and common law matters, including cases covered by the Virginia Consumer Protection Act, the Virginia Uniform Commercial Code, and the Federal Consumer Credit Protection Act.

Amicus National Association of Consumer Attorneys (NACA) is a non-profit association of attorneys and consumer advocates committed to

representing consumers' interests. Its members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus is the protection and representation of consumers. NACA members provide counsel for consumers against banks, finance companies, car dealers and others who profit from taking unfair advantage of consumers. NACA is committed to rebuilding an effective marketplace that is based on our nation's fundamental sense of fairness, equity and honesty. On both the federal and state level, NACA takes an active role in advocating consumer interests before the courts, legislatures, and administrative agencies. It has filed amicus briefs in the leading consumer protection cases before the United States Supreme Court and other state and federal appellate courts across the country. It has also presented oral argument as amicus counsel in consumer cases in the United States Court of Appeal for the Fourth Circuit, and the Supreme Court of Ohio.

Amicus Virginia Poverty Law Center (VPLC) provides leadership, support, training, public education, and advocacy to address the civil legal needs of Virginia's low-income population. Its legal staff specializes in the diverse areas of law that affect low-income Virginians. Through training and communications, VPLC educates others about the legal rights of the poor and identifies systemic problems and issues. VPLC works

collaboratively with Virginia's legal aid community, other organizations, and stakeholders to represent the interests of low-income Virginians in the courts, executive agencies, and legislative bodies. VPLC has been extensively involved in the numerous legislative initiatives concerning consumer matters that have come before the Virginia General Assembly over the past 20 years. It is recognized by the legislators, the media and the public as an expert on legislative issues involving consumers in Virginia.

Amicus Virginia Trial Lawyers Association (VTLA) is a voluntary bar association dedicated to enhancing the knowledge, skills and professionalism of trial lawyers and committed to improving the law and the fairness of Virginia's system of justice. VTLA has approximately 2,200 members across the Commonwealth, representing clients in a large number of practice areas. The vast majority of VTLA members own or work in small to mid-sized firms and spend a substantial portion of their time in the courtroom. VTLA conducts a variety of continuing legal education seminars throughout the Commonwealth for trial lawyers and their support staff designed to enhance competency and provide currency in the law. VTLA also works to educate the public about the role of trial lawyers and the importance of the jury in our justice system. VTLA is dedicated to

promoting professionalism within the trial bar, enhancing the competence of trial lawyers, and protecting and preserving individual liberties and rights. It seeks and supports an efficient and constitutionally sound judicial system.

Amicus Legal Aid Justice Center (LAJC) provides legal representation for low-income individuals in Virginia. Its mission is to serve those in its communities who have the least access to legal resources. LAJC is committed to providing a full range of services to its clients, including services the federal and state governments choose not to fund. As part of its Civil Advocacy Program, LAJC advocates on behalf of disadvantaged clients regarding consumer matters in state and federal courts throughout Virginia.

Amicus National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on the legal needs of low-income, financially distressed, and elderly consumers. With offices in Boston and Washington, D.C., NCLC is a nationally recognized expert on consumer issues, and has drawn on this expertise to provide information, legal research, policy analyses, and market insight to Congress and state legislatures, administrative agencies, and courts for 40 years. A major focus of NCLC's work has been to increase public awareness of, and to

promote protections against, unfair and deceptive practices perpetrated against low-income and elderly consumers. NCLC's twenty-five attorneys write and edit an eighteen-volume Consumer Credit and Sales Legal Practice Series, including, *inter alia*, Unfair and Deceptive Acts and Practices (8th ed. 2012), that is used by consumer law practitioners throughout the United States. NCLC frequently is asked to appear as *amicus curiae* in consumer law cases before courts around the country and does so in appropriate circumstances.

All *amici* share an interest in the proper interpretation and application of the Virginia Consumer Protection Act by trial courts.

II. STATEMENT OF THE CASE

The Plaintiff, Debra A. Ballagh, filed her complaint in the Circuit Court for the City of Lynchburg against Fauber Enterprises, Inc., Bernard M. Fauber, Jr., The Realty Group Lynchburg, LLC, and Alice Smith. She alleged six claims collectively against the Defendants:

- (1) actual fraud by misrepresentation,
- (2) actual fraud by concealment,
- (3) constructive fraud by misrepresentation,
- (4) constructive fraud by affirmative concealment,

(5) violation of the Virginia Consumer Protection Act Code (“VCPA”) § 54.1-200(A)(14), and

(6) violation of the VCPA Code § 54.1-200(A)(6).

JA at 6-10.

At trial, the motion to strike by Defendants Alice Smith and The Realty Group regarding the VCPA claim against them was granted and the case proceeded on the other claims. JA at 60.

Plaintiff offered the following jury instructions on the burden of proof under the VCPA:

INSTRUCTION 17

“The burden is on the party charging a violation of the Virginia Consumer Protection Act to prove it by the greater weight of the evidence.”

INSTRUCTION 18

“The greater weight of all the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive. The testimony of one witness whom you believe can be the greater weight of the evidence.”

JA at 37-38. The Court refused to give these instructions. JA at 80-81.

Instead, it gave the instruction F proffered by the Defendants.

Jury Instruction F

"The court instructs the jury that the burden is on the party charging a violation of the Virginia Consumer Protection Act,

whether by misrepresentation or concealment, to prove any such violation by clear and convincing evidence.

The court instructs the jury that under the facts in this case, Alice Smith and The Realty Group of Lynchburg, LLC cannot be guilty of a violation of the Virginia Consumer Protection Act."

In a separate jury instruction, Defendants' Instruction C, the Court then combined the VCPA finding instruction with the fraud instruction against Fauber Enterprises, Inc., and Bernard M. Fauber, Jr. JA at 28-30. The jury returned a verdict in favor of Defendants on all the claims.

Plaintiff's Petition for Appeal with this Court was granted on December 19, 2014.

III. ASSIGNMENT OF ERROR

The Trial Court erred by instructing the jury that the burden of proof on the two counts for violation of the Virginia Consumer Protection Act was by clear and convincing evidence and refusing to instruct the jury that the burden of proof was by the preponderance of the evidence.

IV. ARGUMENT

Standard of Review

When the Court considers the appropriateness of jury instructions, the Court reviews de novo whether the law "has been clearly stated and that the instructions cover all issues which the evidence fairly raises."

Orthopedic & Sports Physical Therapy Associates, Inc. v. Summit Grp. Properties, LLC, 283 Va. 777, 782, 724 S.E.2d 718, 721 (2012).

A. To accomplish the VCPA’s purposes, the standard of proof under the VCPA should be preponderance of the evidence.

The Virginia Protection Act (“VCPA”) is intended to be “applied as remedial legislation to promote fair and ethical standards of dealings between suppliers and the consuming public.” Va. Code Ann. § 59.1-197. The VCPA codified and supplemented the common law definitions of fraud and misrepresentation. 1985-86 Va. Op. Att’y Gen. 324 (1985)(citing State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W.2d 362 (Mo. App. 1973)). “The legislative purpose underlying the VCPA was, in large part, to expand the remedies afforded to consumers and to relax the restrictions imposed upon them by the common law.” Owens v. DRS Auto. Fantomworks, Inc., 764 S.E.2d 256, 260 (Va. 2014). The VCPA must be liberally construed to further its goal to protect consumers from unethical and unfair business practices. See Holmes v. LG Marion Corp., 258 Va. 473, 521 S.E.2d 528, 532 (1999); Valley Acceptance Corp. v. Glasby, 230 Va. 422, 428, 337 S.E.2d 291, 295 (1985) (holding that acts remedial in nature “must be liberally construed to avoid the mischief at which it is directed and to advance the remedy for which it was promulgated.”).

Unless a statute provides otherwise, the ordinary standard of preponderance of the evidence should be used for statutory claims. “The burden is on the plaintiff in civil suits or actions to prove his case by a mere preponderance of the evidence.” Hong v. Kim, 81 Va. Cir. 102 (2010) (internal citations omitted). “The requirement of proof by clear and convincing evidence generally is limited to certain cases that are equitable in nature, such as suits involving fraud and misrepresentation, undue influence, estoppel, and requests for the imposition of constructive and resulting trusts.” RF & P Corp. v. Little, 247 Va. 309, 318, 440 S.E.2d 908, 914 (1994). The preponderance of evidence was the proper standard for that statutory violation even though the claim included penalties and would have a significant impact on the defendant’s reputation. *Id.*

Many Virginia courts have found violations of the VCPA without proof of actual fraud by clear and convincing evidence. For instance, a trial court found that a licensed contractor’s material misrepresentation violated the VCPA, but did not amount to actual fraud. Surprenant v. Bd. For Contractors, 30 Va. App. 165, 172, 516 S.E.2d 220, 223 (1999). Similarly, in Robert M. Seh Co., Inc. v. O'Donnell, 277 Va. 599, 675 S.E.2d 202, 204 (2009)(rev’d on other grounds) the jury found a violation of the VCPA but no finding of fraud. Such results are not surprising because the General

Assembly would not “enact remedial legislation aimed at protecting consumers and, at the same time, implicitly require those consumers to prove their case by the heightened clear and convincing standard.” Kelley v. Little Charle's Auto Sales, 2006 WL 1075025, at *2 (W.D. Va. Apr. 21, 2006). Also, this Court has acknowledged that when both fraud and violations of the VCPA are alleged, the case “involves causes of action with different elements of proof and potentially duplicative damage awards.” Wilkins v. Peninsula Motor Cars, Inc., 266 Va. 558, 587 S.E.2d 581, 584 (2003).

Courts in other states with statutes similar to the VCPA apply the preponderance of evidence standard. In Re Cohen, 185 B.R. 180, 186 (Bankr. D.N.J. 1995), *aff'd*, 191 B.R. 599 (D.N.J. 1996), *aff'd on other grounds*, 106 F.3d 52 (3d Cir. 1997), *aff'd*, 523 U.S. 213 (1998)(finding that, under New Jersey consumer statute, statutory fraud was to be proven by preponderance of the evidence); Nielsen v. Wisniewski, 628 A.2d 25, 27-28 (Conn. App.1993); Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 856-57 (Ill. 2005)(overruling cases that used clear and convincing standard under consumer fraud act because the statute’s purpose was “to provide broader protection to consumers than an action for common law fraud.”); Kelly v. VinZant, 197 P.3d 803, 812 (Kan. 2008)(stating that

“KCPA claims may be established by a preponderance rather than clear and convincing evidence applied to common-law fraud claims.”); Regnier v. Payter, No. 233321, 2003 WL 21246635, at *6 (Mich. Ct. App. May 29, 2003); State ex rel. Humphrey v. Alpine Air Prods., Inc., 500 N.W.2d 788, 790-91 (Minn.1993); Nickerson v. Quaker Group, 2008 WL 2600720, at *12 (N.J. Super. Ct. App. Div. July 3, 2008); State v. Eddy Furniture Co., 386 N.W.2d 901, 903 (N.D. 1986)(holding that to protect consumers and implement public policy the standard is preponderance of the evidence); Isla Fin. Servs. v. Sablan, 2001 N. Mar. I. LEXIS 24 (N. Mariana Is. Dec. 14, 2001); State ex rel. Fisher v. Rose Chevrolet, 612 N.E.2d 782, 786-87 (Ohio Ct. App. 1992); Benkoski v. Flood, 626 N.W.2d 851 (Wis. Ct. App. 2001); Hair Excitement, Inc. v. L'Oreal U.S.A., Inc., 965 A.2d 1032, 1038 (N.H. 2009); Betsinger v. D.R. Horton, Inc., 232 P.3d 433, 435-36 (Nev. 2010)(“Statutory offenses that sound in fraud are separate and distinct from common law fraud”).

A small minority of jurisdictions specify that part of their consumer protection statute is subject to the higher burden of proof. See Iowa Code § 714H.5(3), (4) (specifying preponderance of evidence standard in private causes of action for actual damages, but higher standard for multiple damages); Weisblatt v. Minnesota Mut. Life Ins. Co., 4 F. Supp. 2d 371,

377 (E.D. Pa. 1998)(explaining that Pennsylvania law applies the clear and convincing standard to fraud based violations of its statute and the preponderance of evidence standard to non-fraud based violations).

Over thirty years ago, the reasoning for using the preponderance of the evidence standard was succinctly explained by the Arizona Court of Appeals.

Consumer fraud is a cause of action which is separate and distinct from common law fraud. Murray v. Western American Mortgage Company, 124 Ariz. 387, 604 P.2d 651 (App.1979). The mere fact that the word "fraud" appears in the title of our consumer protection statute does not give rise to an inference that the legislature intended to require a higher degree of proof than that ordinarily required in civil cases.

Dunlap v. Jimmy GMC of Tucson, Inc., 666 P.2d 83, 88-89 (Ct. App. 1983). The reasoning from Dunlap applies directly to the VCPA and is consistent with this Court's reasoning in RF & P Corp, Wilkins, and Owens.

As held in RF & P Corp., if a statute is silent as to the burden of proof but has a remedial goal, then the preponderance of evidence must be used.

The absence of language stipulating a higher standard of proof in these instances, as in the case of violations under the Act, is consistent with the policy underlying all similar statutory provisions, that of holding public officials accountable under the law for the breach of duties entrusted to them. If this Court were

to apply a standard of proof not specified by these statutes, and higher than that imposed in the vast majority of civil cases, we would undermine the very purpose of these enactments.

247 Va. at 318-19, 440 S.E.2d at 914-15.

B. The VCPA is based on a Federal Trade Commission model statute and intended to alter and supplement the common law of fraud rather than incorporate it.

Pursuant to Virginia Code § 1–200, the common law that adheres to the principles set forth in the Bill of Rights and Constitution of Virginia shall be in effect and be the rule of decision *except as altered by the General Assembly*. (Emphasis added). “[A] statutory provision will not be held to change the common law unless the legislative intent to do so is plainly manifested. Therefore, a statutory change in the common law will be recognized only in that which is expressly stated in the words of the statute or is necessarily implied by its language.” Herndon v. St. Mary's Hosp., Inc., 266 Va. 472, 476, 587 S.E.2d 567, 569 (2003) (internal citations omitted). In addition, a “statutory change in the common law is limited to that which is expressly stated or necessarily implied because the presumption is that no change was intended.” Boyd v. Commonwealth, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988). The common law is abrogated “where it is apparent that the legislature has made a value judgment with respect to certain behavior” Long v. Commonwealth, 23 Va.App. 537, 544, 478

S.E.2d 324, 327 (1996); *see also* Collins v. Commonwealth, 57 Va. App. 355, 361-62, 702 S.E.2d 267 (2010).

In 1914, Congress established the Federal Trade Commission (FTC) to protect consumers against false advertising and deceitful commercial schemes which common law tools were inadequate to protect against. Victor E. Schwartz & Cary Silverman, Common-Sense Construction of Consumer Protection Acts, 54 U. Kan. L. Rev. 1, 7-8 (2005). Initially, Congress passed the FTC Act and authorized the FTC to regulate unfair methods of competition. The FTC Act was later amended to declare unlawful all “unfair or deceptive acts or practices in commerce,” and this laid the foundation for federal consumer protection today. *Id.* During the 1960s and 1970s, many states adopted their own consumer protection agencies often referred to as “little-FTC Acts.” *Id. at 15.*

The VCPA is based on the model statute promulgated by the Council on State Governments in conjunction with the Federal Trade Commission. 1985-86 Va. Op. Att'y Gen. 324 (1985) (citations omitted). Although Virginia has not specified the precedential value of FTC interpretations to the VCPA, implementation of such model statutes, or “little-FTC Acts,” is to be guided by FTC construction and interpretation. *See* Board of Supervisors v. Boaz, 176 Va. 126, 131, 10 S.E.2d 498 (1940)(interpreting

model worker's compensation statute similar to previous interpretation by Indiana); *see, e.g., Russell v. Dean Witter Reynolds, Inc.*, 510 A.2d 972, 976 (1986). ("This court has repeatedly held, in accordance with this statutory instruction, that Federal Trade Commission (FTC) rulings and cases under the Federal Trade Commission Act (FTC Act) serve as a lodestar for interpretation of the open-ended language of Connecticut Unfair Trade Practices Act."); *Luskin's, Inc. v. Consumer Prot. Div.*, 726 A.2d 702, 716 (Md. 1999); *Commonwealth by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 818 (1974); *Dep't of Legal Affairs v. Rogers*, 329 So. 2d 257, 263 (Fla. 1976); *Carter v. Gugliuzzi*, 716 A.2d 17, 21 (Vt. 1998). Actions under the FTC Act use the preponderance of the evidence standard. *See e.g. FTC v. Lukens Steel Co.*, 454 F.Supp. 1182, 1200 (D.D.C., 1978); *United States v. Alpine Indus., Inc.*, 77 Fed. Appx. 803, 813 (6th Cir. 2003); *United States v. Louisiana-Pacific Corp.*, 554 F. Supp. 504, 509 (D. Or. 1982)(rev'd on other grounds, 754 F.2d 1445 (9th Cir. 1985)).

To arm consumers with a tool to combat deceptive practices in the marketplace, the Virginia General Assembly, like most other states, intended the prohibitions of its consumer protection statute to apply in a broader and more remedial context than the narrow common law fraud action. "The VCPA's proscription of conduct by suppliers in consumer

transactions extends considerably beyond fraud.” Owens, 764 S.E.2d at 260. Thus, the use of the word “fraudulent” in Va. Code 59.1-200(A) and “fraud” in 59.1-200(A)(14) occurs within the context of a statutory scheme that has specifically altered and expanded the common law. The statutory language should be interpreted in this context, and in context with other consumer protection statutes also based on the FTC Act. Under those authorities, the proper standard is preponderance of the evidence.

C. The clear and convincing standard of common law fraud should not be applied to any part of the VCPA.

In Owens, this Court opined that the VCPA’s “remedial purpose would be nullified by an interpretation of the VCPA that construed it as merely declarative of the common law.” 764 S.E.2d at 260. That the legislature intended the VCPA to increase protections to consumers is shown by the extensive list of prohibitions in Va. Code § 59.1-200(A). The word “fraud” appears as part of a list in just one subsection, 59.1-200(A)(14); all other subsections identify specific conduct that causes a violation. For instance, the Plaintiff here identified a violation of 59.1-200(A)(6) which requires a misrepresentation of a “particular standard, quality, grade, style, or model.” That violation turns simply on whether this conduct occurred.

Furthermore, because “fraud” has multiple meanings only one of which is the specific common law action and all its narrow requirements. The inclusion of the word “fraud” in the catch-all provision of 59.1-200(A)(14) does not show any intent to create a heightened burden of proof for a VCPA claim.

Requiring a higher burden of proof to establish any VCPA violation is to rewrite the statute and is contrary to legislative intent. If the legislature intended to impose a higher burden of proof on consumers, it could have said so. This Court should not write in a higher burden of proof that would undermine the expressly stated remedial purpose of this Act.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request this Court to reverse the trial court determination that a clear and convincing standard of proof applies to the Virginia Consumer Protection Act. Such a standard, not made part of the Act by General Assembly, undermines the remedial purpose of the Act and is therefore contrary to legislative intent.

Respectfully submitted,

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RULE 5:26(h) CERTIFICATE

I hereby certify that on this 28th day of January, 2015, fifteen (15) copies of this brief have been filed in the Office of the Clerk of the Supreme Court of Virginia; an Adobe Acrobat PDF copy of the brief has been filed with the Clerk of the Supreme Court of Virginia by e-mail at scvbriefs@courts.state.va.us; an Adobe Acrobat PDF copy of the brief has been sent by e-mail, and three (3) copies have been posted first class, to all counsel listed below.

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