IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 141248

DEBRA A. BALLAGH, *Appellant*,
v.
FAUBER ENTERPRISES, INC., et al., *Appellees*.

THE COMMONWEALTH OF VIRGINIA'S AMICUS CURIAE REPLY BRIEF

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INTRODUCTION

In the Brief of Appellees Fauber Enterprises, Inc. and Bernard M. Fauber, Jr. ("Brief of Appellees"), Defendants Fauber Enterprises, Inc. and Bernard Fauber, Jr. (collectively "Defendants") essentially ask this Court to construe the Virginia Consumer Protection Act ("VCPA"), Virginia Code §§ 59.1-196 through 59.1-207, as declarative of the common law. Such an interpretation would nullify the remedial purpose of the VCPA and conflict with the Court's prior construction of the act.

As a remedial statute intended to expand the remedies afforded to consumers and to remove restrictions imposed by the common law, the appropriate standard of proof in an action under the VCPA is preponderance of the evidence. That is the default standard applied in civil cases, and there is no reason for a different default rule here, particularly when the General Assembly has not stated that a different rule should apply.

ARGUMENT

I. In determining the appropriate standard of proof in an action under the Virginia Consumer Protection Act, this Court should consider the remedial purpose of the statute.

Defendants assert that "the fact that the VCPA is declared remedial legislation is irrelevant" to the question of the consumer plaintiff's burden of

proof and that "[n]o Virginia case has held that remedial legislation serves to lessen the burden of proof for a claimant." Brief of Appellees at 18. To the contrary, this Court has relied expressly upon the remedial nature of a statute to conclude that the preponderance-of-evidence standard should be applied instead of the clear-and-convincing-evidence standard in the absence of statutory language stating otherwise. *See, e.g.*, *Nationwide Mut. Ins. Co. v. St. John*, 259 Va. 71, 76, 524 S.E.2d 649, 651 (2000).

In *Nationwide Mutual Insurance Co.*, the Court considered whether the ordinary preponderance-of-evidence standard or the higher clear-and-convincing-evidence standard should apply in an action brought under Virginia Code § 8.01-66.1(A), a remedial statute providing for recovery of additional damages for refusal to pay claims based on the bad faith of a motor vehicle insurer. The Court rejected the clear-and-convincing-evidence standard, finding it "inconsistent with the remedial purpose of [the statute]." *Id.* The Court further concluded that, "absent legislative directive otherwise, [the plaintiff's] evidentiary burden under this remedial statute is the preponderance of the evidence standard." *Id.* The remedial purpose of a statute thus should be considered when determining the appropriate standard of proof.

II. With the remedial purpose of expanding the remedies afforded to consumers and removing restrictions imposed by the common law instead of codifying it, the appropriate standard of proof under the VCPA is the preponderance of the evidence.

The legislature clearly stated that "[i]t is the intent of the General Assembly that [the VCPA] shall be applied as remedial legislation to promote fair and ethical standards of dealings between suppliers and the consuming public." Va. Code Ann. § 59.1-197 (2014). As this Court recently explained:

> [T]he 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. That remedial purpose would be nullified by an interpretation of the VCPA that construed it as merely declarative of the common law.

Owens v. DRS Auto. Fantomworks, Inc., 289 Va. ___, ___, 764 S.E.2d 256, 260 (2014).

Disregarding this legislative purpose, Defendants argue that the General Assembly instead intended to impose the heightened clear-and-convincing-evidence standard of proof for a common law fraud action upon the consumer plaintiff. With no language in the VCPA specifically directing the higher standard of proof in lieu of the ordinary preponderance-of-evidence standard, Defendants speculate that the legislature meant to incorporate the common law standard by using some terms, or variations of

terms, that also were used in common law cases. *See* Brief of Appellees at 6-14. Defendants' characterization of the history of the VCPA and its terms in support of their argument is not persuasive.[1]

Defendants attempt to explain the origins of the VCPA and compare its wording to a model consumer protection statute from 1970. *See* Brief of Appellees at 2-8. Although Defendants claim the VCPA was based on a model statute from 1970, they actually appear to compare the original language of the VCPA as enacted in 1977 to quoted text of a different model statute from 1965. *Compare* Council of State Governments, Uniform Deceptive Trade Practices Act *in* XXIV *Suggested State Legislation* 188-89 (1965) (appears to be source of quoted text found in Brief of Appellees at 3-8) *with* Council of State Governments, Unfair Trade Practices and Consumer Protection Law *in* XXIX *Suggested State Legislation* 146-47 (1970) (appears to be model act upon which Defendants claim VCPA was based in Brief of Appellees at 2-3). In this regard, Defendants try to attach some significance to the General Assembly's use of different language in what Defendants call the "preamble" of Virginia Code § 59.1-200(A) and

[1] Defendants' discussion of *Lambert v. Downtown Garage, Inc.*, 262 Va. 707, 553 S.E.2d 714 (2001), also is not helpful. *See* Brief of Appellees at 22-28. *Lambert* held that a violation of the VCPA based on the nondisclosure of a material fact requires evidence of a knowing and deliberate decision not to disclose the fact. *Id.* at 714, 553 S.E.2d at 718. *Lambert* did not address the standard of proof in a VCPA action.

the "catch-all" provision found in Code § 59.1-200(A)(14) when compared to template provisions of the model act. *See* Brief of Appellees at 3, 7-11. But Defendants quote from the wrong model act.

Initially, Defendants claim the VCPA was based on a model act that "'enumerates 13 prohibited practices and then generally prohibits "any other practice that is unfair or deceptive."'" Brief of Appellees at 3 (citing Dee Pridgen & Richard M. Alderman, *Consumer Protection and the Law* § 2:10 (2014-15 ed.)). Subsequently, Defendants state that the relevant model act listed 12 subsections with a catch-all provision that "simply forbade conduct which 'creates a likelihood of confusion or misunderstanding.'" Brief of Appellees at 4, 7, 10-11. Although apparently unintentional, Defendants' conflicting references are confusing and cannot provide the basis for a credible analysis of the VCPA's legislative history or the General Assembly's intent in using certain words in the VCPA.

Putting aside the problem with Defendants' flawed references to model statutes, Defendants' contention that the General Assembly's use of "misrepresenting" in §§ 59.1-200(A)(1)-(6) and (10)-(11) as well as "other deception, fraud, false pretense, false promise, or misrepresentation" in § 59.1-200(A)(14) evinced an intent to incorporate and codify the standard of proof for common law fraud directly conflicts with the VCPA's remedial

purpose "to relax the restrictions imposed upon [consumers] by the common law." *Owens*, 289 Va. at ___, 764 S.E.2d at 260. Defendants' argument also is inconsistent with the analysis of state consumer protection statutes found in the same treatise upon which Defendants rely for their purported history of the VCPA. As explained in *Consumer Protection and the Law*:

> Enactment of these laws in the 1960s and 1970s was motivated by several factors. First, . . . common-law actions for consumers were considered inadequate. The relatively heavy burden of proof and the numerous defenses encountered by the litigant in common-law fraud and warranty cases led some legislatures to conclude that consumers needed a statutory cause of action for marketplace deception and unfairness that would not be so difficult to pursue in the state judicial system.

Pridgen & Alderman, *supra* at § 2:9. Furthermore, "[t]he statutory provisions are viewed as creating new substantive rights, not bound by the common-law definitions of deceit, fraud or misrepresentation." *Id.* at § 3:1. Thus, Defendants' treatise states that "since a cause of action under a consumer protection statute is supposed to be easier to establish than one for common-law fraud or negligent misrepresentation, some courts have concluded that preponderance of the evidence is the proper standard of proof, not clear and convincing evidence." *Id.*

Indeed, as noted in the Commonwealth's opening brief, the vast majority of courts considering the issue in other states have applied the

preponderance-of-evidence standard to state consumer protection statutes. *See* Commonwealth of Virginia's Amicus Curiae Brief in Support of Appellant at 16-21. In so doing, courts have found the preponderance-of-evidence standard rather than the common law clear-and-convincing-evidence standard applicable to consumer statutes that use the same terms found in the VCPA that are the subject of Defendants' argument: **deception**, **fraud**, **false pretense**, **false promise**, and **misrepresentation**. *See, e.g.*, *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 856 (Ill. 2005) (finding preponderance-of-evidence standard applicable to Illinois Consumer Fraud Act, which prohibits "deception, fraud, false pretense, false promise, misrepresentation," 815 Ill. Comp. Stat. 505/2); *Minnesota ex rel. Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 790 (Minn. 1993) (finding preponderance-of-evidence standard applicable to consumer fraud statutes, including provisions that prohibit "fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice," Minn. Stat. § 325F.69); *Liberty Mut. Ins. Co. v. Land*, 892 A.2d 1240, 1247-48 (N.J. 2006) (finding preponderance-of-evidence standard applicable to Insurance Fraud Prevention Act and referencing appellate court decisions finding preponderance-of-evidence standard applicable to New Jersey Consumer Fraud Act, which prohibits

"deception, fraud, false pretense, false promise, misrepresentation," N.J. Stat. Ann. § 56:8-2 (West)). Thus, contrary to Defendants' argument, the use of terms such as deception, fraud, false pretense, false promise, and misrepresentation in the VCPA should not be construed to impose a heightened standard of proof on the very consumers who were intended to benefit from the remedial legislation.[2]

In concluding that the ordinary preponderance-of-evidence standard is the appropriate standard of proof in VCPA actions, the United States District Court for the Western District of Virginia specifically rejected the same argument Defendants offer—that "in Virginia all claims of fraud must be proved by clear and convincing evidence." *Kelley v. Little Charlie's Auto Sales*, No. 4:04CV00083, 2006 U.S. Dist. LEXIS 22148, at *5 (W.D. Va. Apr. 21, 2006). The court explained:

> [T]he VCPA states that it "shall be applied as remedial legislation to promote fair and ethical standards of dealings between suppliers and the consuming public." Va. Code § 59.1-197. It is difficult to believe that the Virginia Legislature would enact remedial legislation aimed at protecting consumers and, at the same time, implicitly require those consumers to

[2] Defendants also assert that "false pretense" and "false promise" are synonyms for "fraud." *See* Brief of Appellees at 12. This conclusion is not clear from the cases cited in their brief. In any event, rules of statutory construction "discourage any interpretation of a statute that would render any part of it useless, redundant or absurd." *Owens*, 289 Va. at ___, 764 S.E.2d at 260.

> prove their case by the heightened clear and convincing standard.

Id. at *5-6. Likewise, this Court should apply the ordinary preponderance-of-evidence standard to VCPA cases.

III. The use of the preponderance-of-evidence standard in the affirmative defense provision of the VCPA does not require or suggest application of the clear-and-convincing-evidence standard to consumer actions under the VCPA.

The VCPA provides a partial affirmative defense as follows:

> In any case arising under this chapter, no liability shall be imposed upon a supplier who shows by a preponderance of the evidence that (i) the act or practice alleged to be in violation of § 59.1-200 or 59.1-200.1 was an act or practice of the manufacturer or distributor to the supplier over which the supplier had no control or (ii) the alleged violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid a violation; however, nothing in this section shall prevent the court from ordering restitution and payment of reasonable attorney's fees and court costs pursuant to § 59.1-204 B to individuals aggrieved as a result of an unintentional violation of this chapter.

Va. Code Ann. § 59.1-207 (2014). Defendants assert that the express inclusion of the preponderance-of-evidence standard in § 59.1-207 shows the General Assembly's intent that actions brought by consumers under § 59.1-204 are subject to the higher clear-and-convincing-evidence standard. *See* Brief of Appellees at 20-22. This argument, in fact, fails to consider the VCPA as a whole, including its remedial purpose.

As a remedial statute, the VCPA "must be liberally construed to avoid the mischief at which it is directed and to advance the remedy for which it was promulgated." *Valley Acceptance Corp. v. Glasby*, 230 Va. 422, 428, 337 S.E.2d 291, 295 (1985) (citing *Bowman v. Commonwealth*, 201 Va. 656, 661, 112 S.E.2d 887, 891 (1960)). With the intended purpose "to expand the remedies afforded to consumers and to relax the restrictions imposed upon them by the common law," *Owens*, 289 Va. at ___, 764 S.E.2d at 260, the statute was meant to benefit consumers. Providing even a limited affirmative defense to a supplier runs counter to the consumer's interest. Therefore, given that some affirmative defenses require proof by clear and convincing evidence,[3] one could expect the ***supplier*** might be held to the heightened standard when seeking to avoid liability under the remedial statute. The inclusion of the ordinary preponderance-of-evidence standard in § 59.1-207 merely shows that the General Assembly did not want to place the higher burden on the defendant for this affirmative defense. It certainly cannot be read to imply that the legislature intended—

[3] *See, e.g.*, *American Sec. & Trust Co. v. John J. Juliano, Inc.*, 203 Va. 827, 833, 127 S.E.2d 348, 352 (1962) (affirmative defense of payment to an agent with express or apparent authority to accept payment requires clear and convincing evidence).

without so stating—that the consumer plaintiff bear a higher standard of proof to obtain relief under the VCPA.[4]

CONCLUSION

The VCPA is a remedial statute intended to expand the remedies available to consumers and eliminate obstacles to relief erected by the common law. With these purposes, and in the absence of an express legislative directive otherwise, the appropriate standard of proof is preponderance of the evidence.

The trial court erred by instructing the jury that the consumer had the burden of proving her VCPA claims by clear and convincing evidence. This Court should reverse the trial court's order and remand for a new trial on the VCPA claims with the direction that the preponderance-of-evidence standard is the applicable standard of proof under the VCPA.

[4] Under Defendants' strained reading of § 59.1-207 and the VCPA, a consumer plaintiff would be required to establish an "unintentional violation" of the VCPA by clear and convincing evidence to obtain restitution and attorney's fees, while a defendant would be required to establish an affirmative defense by only a preponderance of the evidence. That makes no sense given the remedial purpose of the VCPA.

Respectfully submitted,

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RULE 5:26(h) CERTIFICATE

Pursuant to Va. Sup. Ct. Rule 5:26(h), I hereby certify that the Commonwealth of Virginia's Amicus Curiae Reply Brief complies with the requirements of Rule 5:26. A word count was used through the Microsoft Office Word 2007 program, the number of words as provided in Rule 5:26 is 2,423.

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RULE 5:26(e) CERTIFICATE

I hereby certify that on this 9th day of March, 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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