

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 24th day of March, 2016.*

Richard L. Suslick, et al., Appellants,

against Record No. 150045  
Circuit Court No. CL-13-11742

William Schnittker, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Fairfax County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the circuit court.

William and Samantha Schnittker owned a yacht designed and built by Sparkman & Stevens, LLC (“S&S”). The Schnitkners put the yacht up for sale in Wisconsin with S&S acting as their broker. Richard and Margaret Suslick contracted to purchase the yacht.

After closing, the Suslicks sailed the yacht from Wisconsin to Virginia. During the voyage, they encountered problems with the keel. The Suslicks contracted with S&S to design repairs. The Suslicks contracted with Ocean Marine, LLC (“Ocean Marine”) to execute the repairs. According to the Suslicks, the repairs S&S designed were inadequate and, in any event, were improperly executed by Ocean Marine. The Suslicks also claimed that the Schnitkners and S&S had withheld records of other problems with the yacht despite a contractual duty to disclose them.

The Suslicks thereafter filed a second amended complaint alleging: (1) that the Schnitkners breached an express warranty, in violation of the Uniform Commercial Code; (2) that the Schnitkners breached the sales contract; (3) that S&S and the Schnitkners violated the Virginia Consumer Protection Act (“VCPA”) by failing to disclose material facts, in violation of Code § 59.1-200(A)(14); (4) that S&S and the Schnitkners violated the VCPA by misrepresenting the yacht’s condition, in violation of Code § 59.1-200(A)(6); (5) that S&S and the Schnitkners

violated the VCPA by committing fraud, in violation of Code § 59.1-200(A)(14); (6) that S&S breached the keel repair design contract; and (7) that Ocean Marine's execution of the defective S&S keel repair design breached an implied warranty of good workmanship.

The Suslicks thereafter reached a settlement with S&S resulting in its dismissal as a defendant in the action. The case proceeded to trial against the Schnittkers and Ocean Marine. At the conclusion of the evidence, the parties proposed jury instructions to the court. Proposed Jury Instruction 7 stated that a party alleging fraud must prove it by clear and convincing evidence. The Suslicks objected to that jury instruction, asserting that the standard of proof for claims under the VCPA is a preponderance of the evidence. Ruling prior to this Court's decision in Ballagh v. Fauber Enterprises, Inc., \_\_\_ Va. \_\_\_, 773 S.E.2d at 366 (2015), the circuit court noted the absence of any controlling precedent or statutory language, overruled the Suslicks' objection, and accepted the proposed jury instruction. The court also refused several jury instructions proposed by the Suslicks, including Jury Instructions QQ, SS, TT, UU, and VV.

After concluding its deliberations, the jury returned verdicts for Ocean Marine and the Schnittkers on all remaining counts. The court denied all post-trial motions and entered judgment on the verdicts. The Suslicks appeal.

In their first assignment of error, the Suslicks assert that the circuit court erred by instructing the jury that they needed to prove their VCPA claims by clear and convincing evidence. They argue that this Court subsequently held in Ballagh that the correct standard of proof is a preponderance of the evidence. The Schnittkers respond that the judgment should be affirmed because the evidence the Suslicks adduced at trial did not satisfy even the preponderance of the evidence standard.

The Court reviews questions relating to the standard of proof de novo. Ballagh, \_\_\_ Va. at \_\_\_, 773 S.E.2d at 367-68.

The disposition of this assignment of error is controlled by the Court's ruling in Ballagh. There, the Court held that "a plaintiff must prove a violation of the VCPA by a preponderance of the evidence rather than by clear and convincing evidence." \_\_\_ Va. at \_\_\_; 773 S.E.2d at 370. Because the instructions stating the standard of proof on the VCPA claims "were erroneous, the question was submitted to the jury under incorrect legal principles. The judgment appealed from

will, therefore, be reversed and the case remanded for a new trial” on those claims. Old Republic Life Ins. Co. v. Bales, 213 Va. 771, 775, 195 S.E.2d 854, 858 (1973).

In their second assignment of error, the Suslicks assert that the circuit court erred by refusing their proposed jury instructions QQ, SS, TT, UU, and VV. They argue that each of the jury instructions at issue correctly stated the law and was supported by the evidence. The Schnitckers respond that the court properly refused the Suslicks’ proposed jury instructions.

The Court reviews jury instructions to see that the law has been clearly stated and that the instructions cover all issues that the evidence fairly raises. Lawlor v. Commonwealth, 285 Va. 187, 228, 738 S.E.2d 847, 870 (2013). Whether a jury instruction accurately states the relevant law is a question of law reviewed de novo. Id. A court may exercise its discretion and properly exclude an instruction that correctly states the law when other granted instructions fully and fairly cover the relevant principle of law. Id. at 256, 738 S.E.2d at 887.

A seller may not affirmatively say or do anything to divert the buyer from making such inquiry and inspection as a prudent man would make. Norris v. Mitchell, 255 Va. 235, 241, 495 S.E.2d 809, 812-13 (1998). However, proposed Jury Instruction QQ would expand that prohibition beyond affirmative statements or actions to include mere failure to disclose facts a reasonable buyer would want to know. Proposed Jury Instructions UU and VV do not accurately quote Code § 8.2-313 and include concepts not expressed in the statute. These three instructions therefore do not accurately state Virginia law.

Proposed Jury Instruction SS would have instructed the jury that a plaintiff is entitled to rescission of a contract he was fraudulently induced to make. However, the Suslicks did not include rescission in their prayer for relief. This instruction therefore was not relevant. Proposed Jury Instruction TT is duplicative of Jury Instructions 36 through 38, which “fully and fairly cover the relevant principle[s] of law.” Lawlor, 285 Va. at 256, 738 S.E.2d at 887.

Accordingly, the circuit court did not abuse its discretion by refusing these five instructions.

For these reasons, the Court reverses the judgment of the circuit court on Counts 3, 4, and 5 only and remands for a new trial in all respects on those counts.

This order shall be certified to the said circuit court.

A Copy,

Teste:

*John L. Hamilton*

Clerk