ORAL ARGUMENT
NOT YET SCHEDULED

No. 24-CV-538

DISTRICT OF COLUMBIA
COURT OF APPEALS

DARRY SIMMONS ET AL.,

Appellants

v.

DARLENE JACKSON,

Appellee.

On Appeal from the
Superior Court for the District of Columbia
Civil Action No. 2020-CA-004791-B

APPELLEE'S BRIEF

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DISTRICT OF COLUMBIA COURT OF APPEALS

Darry Simmons, et. al.	:	
Appellants,	:	
v.	:	
Darlene Jackson	:	Civil Action No. 24-CV-0538
Appellee	:	

APPELLEE'S LIST OF PARTIES AND COUNSEL

Appellee, by and through her counsel and pursuant to Rules 28(a)(2)(A) and 28(b) respectfully submits Appellee's List of Parties and Counsel.

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I. JURISDICTIONAL STATEMENT

The instant appeal is from the Superior Court of the District of Columbia's ("Superior Court") May 14, 2024 Final Order of Judgment, which disposed of all of all parties' claims.

II. STATEMENT OF THE ISSUES

1. Whether the Superior Court correctly held, consistent with the position that Defendants took at trial, that Ms. Jackson's breach of contract claim presented factual issues to be resolved by the jury.

2. Whether the Superior Court correctly held that there was sufficient evidence to support the jury's verdict.

3. Whether the Superior Court acted within its discretion in dismissing an untimely counterclaim.

4. Whether the Superior Court correctly held that Defendants were jointly and severally liable for the single injury they caused.

III. STATEMENT OF THE CASE

A. Ms. Jackson's Claims

On November 9, 2020, Appellee Darlene Jackson filed suit against Defendants PCMD, LLC ("PCMD") and PCMD's sole owner, Darry Simmons, to recover over one-hundred thousand dollars that she had lost as a result of Defendants' misrepresentations and failures to meet their contractual obligations in connection with a construction project ("the Project") to renovate and build an addition to Ms. Jackson's home. JA00048. As detailed in her complaint, Ms. Jackson discovered through third-party inspections that Defendants' construction work on her home was riddled with code violations and hazardous conditions that Defendants had covered with drywall, all while misleading Ms. Jackson about the status and quality of their work. *See id*; JA00113; JA00183–290.

On April 19, 2021, the Superior Court granted in part and denied in part Defendants' motion to dismiss the complaint, ruling that Ms. Jackson's Consumer Protection Procedures Act (CPPA) claim could proceed against both Defendants and that her breach of contract claim could proceed against PCMD. JA00091. Among other things, the Superior Court held that a reasonable consumer reading text messages that Mr. Simmons sent to Ms. Jackson could plausibly assume that the property "was at a certain standard and quality, such that it passed inspections and was ready to move into another phase of construction." JA00098. The Superior

Court further held that Ms. Jackson's allegations that Defendants failed to obtain or work within certain permits, failed to obtain proper inspections, and violated numerous building codes were sufficient to support the counts of breach of contract and violations of the CPPA. JA00100–101.

On April 7, 2023, the Superior Court denied Defendants' Motion for Summary Judgment. JA00160–182. The Superior Court found that Ms. Jackson had "presented significant evidence" of the defects in Defendants' work through "multiple inspection reports and Plaintiff's Expert Report." JA00176. This evidence of defective work included "uneven floors," "pipes which led nowhere," "improperly performed electrical work," "water leaks," and unlicensed plumbing work. JA00175–176. With respect to the issue of whether the work "was close enough to completion" such that it could be expected to be "code compliant," the Court found there was evidence that it was—including the fact that Defendants had installed drywall over their work—suggesting that they did not intend to perform any further work on the plumbing, electrical, or ductwork behind those walls. JA00176–178. On the basis of all of this evidence, the Superior Court concluded that a reasonable jury could find that Defendants breached the contract with Ms. Jackson and violated the CPPA. JA00176–178.

B. Defendants' Untimely Counterclaim

Near the close of the discovery period, it was revealed that—contrary to Defendants' representations to Ms. Jackson and in written discovery responses—another company partially owned by Mr. Simmons, The Simmons Group, LLC ("TSG"), had served as the general contractor for the construction work at her home. R. 14 (PDF) (Plts. Motion for Leave to Amend Complaint)[1]; JA00107–108. In light of this revelation, Ms. Jackson sought and was granted leave to file an amended complaint adding claims against TSG as an alter ego of PCMD.[2] R. 14 (PDF) (Plts. Motion for Leave to Amend Complaint); JA00106 at JA00109 ("What is most concerning to the Court is Defendants' avoidance of disclosing TSG's role in the project during discovery."); *id*. at JA00110 ("The Court also finds that Plaintiff's proffered claim against TSG has merit. Plaintiff claims TSG is liable because it is an alter ego of PCMD."); JA00129–142.

On December 27, 2022, Defendants filed an answer to Ms. Jackson's amended complaint and PCMD filed a counterclaim alleging that Ms. Jackson

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[1] "R." refers to pages 1–25 of the Record Index submitted to this Court on September 25, 2024.

[2] The Court subsequently granted Ms. Jackson's Motion for Partial Summary Judgment, finding that TSG was the alter ego of PCMD. JA00106; JA00160–182. At trial, the jury was asked to make findings as to "PCMD/TSG" as a single entity. JA01444. Defendants do not challenge this alter ego finding on appeal. Accordingly, as in the Superior Court, Ms. Jackson refers to "PCMD/TSG" jointly in the remainder of this brief.

wrongfully terminated the contract and caused PCMD to suffer losses. JA00143–150. On February 21, 2023, the court granted Ms. Jackson's Motion to Dismiss PCMD's counterclaim as untimely. JA00152–159. As the Superior Court noted, Defendants had never filed an answer to Ms. Jackson's original complaint, nor had they sought leave to file a belated compulsory counterclaim. *Id*. (Order Granting Pltfs Motion to Dismiss Counterclaim, at 7). Even had they sought leave, however, the Superior Court concluded that leave should still be denied because it would delay the case and thus prejudice Ms. Jackson. *Id*.

C. The Jury's Verdict and Judgment in Favor of Ms. Jackson

Trial commenced on January 29, 2024. With respect to Ms. Jackson's CPPA claim, the jury found that Mr. Simmons had "violated the DC Consumer Protection Act" and separately found that PCMD/TSG had "violated the DC Consumer Protection Act." JA01444–445. The jury allocated damages in the amount of $88,774 to PCMD/TSG and $1 to Mr. Simmons. *Id*. With respect to Ms. Jackson's contract claim, the jury found that PCMD/TSG had "breached their contract with Ms. Jackson" and awarded damages in the amount of $137,775. *Id*.

Following trial, the Superior Court reviewed briefing and held argument on the damages to be awarded in light of the jury's verdict. JA01455–458. With respect to the CPPA claim, the Superior Court held that Mr. Simmons was jointly liable for the damages awarded against PCMD/TSG and therefore, after applying the statutory

trebling of damages, ordered that a final judgment of $266,322 be entered against Mr. Simmons, PCMD, and TSG. JA01457. With respect to the contract claim, the Superior Court held that the damages should be reduced to the extent that they were duplicative of amounts awarded on the CPPA claim, and therefore entered judgment of $49,001.00 against PCMD/TSG. *Id*. The Superior Court also denied Defendants' Renewed Motion for Judgment as a Matter of Law or Alternatively, Motion for a New Trial. JA01446–454.

IV. STATEMENT OF FACTS

A. Defendants' Contract with Ms. Jackson

On September 23, 2019, Ms. Jackson entered into a contract with PCMD/TSG to perform a renovation and addition to her home located at 213 Oglethorpe Street in Northeast Washington, DC ("the Property"). JA00310–311; JA00394–395 (Trial Tr. at 70:16–71:18). Before entering into the contract with PCMD/TSG, Ms. Jackson engaged an architect to create building plans for the renovation of the Property. JA00385–386 (Trail Tr. at 61:3–62:10). Ms. Jackson submitted the building plans to the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") for approval. JA00386–387 (Trial Tr. at 62:5–63:7). After DCRA approved Ms. Jackson's building plans and issued Ms. Jackson a building permit, PCMD/TSG's work began at the Property. JA00183; JA00243; JA00385–387 (Trial Tr. at 61:3–63:7); JA00395–398 (Trial Tr. at 70:21–74:11); JA00509–

510 (Trial Tr. at 60:17–61:7). Under the parties' contract, Defendants agreed, among other things, to the following provisions with respect to the Property:

1. That all work at the Property would be done "as per owners drawing approved by DCRA." JA00311.
2. That all materials would be "as specified" and that "all work" would be "completed in a substantial workmanlike manner according to specifications submitted, per standard practices." JA00310.

In exchange for the work to be performed, Ms. Jackson agreed to pay PCMD/TSG a total of $147,000 in four installments that came due as the work progressed. JA00310. The first installment, $49,000, was to be paid up front at the start of construction. *Id*. The second installment, another $49,000 was to be paid "once the addition is up." *Id*. The third installment called for a half of the remaining amount, $24,500, to be paid "near completion." *Id*. Finally, the fourth installment amounting to any remaining balance was due at the end of the Project. *Id.*

B. Defendants' Defective Work and Misrepresentations

As the work at the Property progressed, Ms. Jackson observed numerous issues, such as flooding in the basement, problems with the HVAC ductwork, and uneven floors. *See, e.g.*, JA00243–244; JA00312; JA00413–422 (Trial Tr. at 89:21–96:21); JA00485 (Trial Tr. at 36:15-9); JA00808–814 (Trial Tr. at 9:5–14:23); JA01202 (Trial Tr. at 130:11–22). Ms. Jackson repeatedly brought these issues to

Mr. Simmons' attention, but he either ignored her or proposed inadequate solutions, if any. *See, e.g.*, JA00312–313; JA00413–421 (Trial Tr. at 89:18–97:5); JA00460–461 (Trial Tr. at 11:7–12:8 ("And so when I had -- by the time I had Mr. Henry come out, he pointed out so many defects. I mean, just electrical things that were wrong, plumbing things that were wrong and framing things that were wrong. And at that point, I had a conversation with Mr. Simmons, and Mr. Simmons basically told me that people were exaggerating and that things weren't as bad as they were saying.")).

On November 4, 2019, Mr. Simmons provided a quote to Ms. Jackson for $7,500 to make changes to the Project that would include demolishing the wall between the existing kitchen and dining room, and the new addition to the house, and installing a steel support beam. JA00291. However, contrary to Mr. Simmons' representation to Ms. Jackson, a steel support beam was never installed after the wall was removed. JA00234 (item 1); JA00236 (picture 2). A structural engineer subsequently determined that this change made the structure unsound. JA00234 ("It was noticed that the LVL beam supports half of an 8" thick brick wall above, and there is a L4x4x1/4 steel angle (B21B) supporting another half of the brick wall above, ***which is not structurally sound***.) (emphasis added); JA00668–669 (Trial Tr. at 103:12–104:15 ("Q. And was this a safe way to support the structure of Ms. Jackson's house? A. The building is not safe. Q. And in your opinion, was it structurally sound? A. No.")).

On December 14, 2019, Mr. Simmons told Ms. Jackson in a text message: "we past inspection we move ahead with drywall." JA00292. Following this text, Defendants proceeded to cover up most of their work at Ms. Jackson's home with drywall. JA00321–324; JA00422 (Trial Tr. at 98:7–12); JA00431–432 (Trial Tr. at 107:7–108:2); JA01296–97 (Trial Tr. at 73:19–74:14). Indeed, they covered all of the work with drywall except for a small utility room in the basement. JA00496 (Trial Tr. at 47:1–10 ("All of the drywall -- all of the drywall on the first and second floors was up and complete and painted. There was a small portion in the basement that had not been dry-walled yet")). They also had spackled/sanded the drywall in most locations and installed flooring and fixtures. *Id*., *see also* JA00431–437 (Trial Tr. at 107:12–113:4); JA00808–809 (Trial Tr. at 8:1–2); JA00321–323 (pictures showing drywall installed spackled/sanded by Defendants); JA00703 (Trial Tr. at 16:1–20).

On December 20, 2019, Mr. Simmons requested a payment installment, which the contract stipulated would be the payment due "near completion" of the project. JA00294 (text message from Mr. Simmons requesting $16,000 from the "final draw"); JA00310.

C. Ms. Jackson's Discovery of Defendants' Defective Work

As the Project appeared to near completion, Ms. Jackson became increasing concerned about Defendants' work. JA00413–420 (Trial Tr. at 89:21–96:21). She

showed Defendants' work to individuals with construction experience, who advised her that the problems were significant and that she should not allow Defendants to continue to work on her Property. JA00437; JA00437–447 (Trial Tr. at 113:5–123:14); JA00452–453 (Trial Tr. at 3:14–4:17); JA00456–458 (Trial Tr. at 7:14–9:6). Following additional communications with Mr. Simmons, in which he failed to address her concerns, Ms. Jackson finally terminated Defendants on February 3, 2020. JA00460–461 (Trial Tr. at 11:7–12:8).

Subsequent inspections of Defendants' work at the Property by DCRA and third-party inspectors identified numerous code violations and safety hazards. *See, e.g.*, JA00183–290. These inspections also identified several ways in which the construction work was not built in accordance with the DCRA-approved drawings or standard practices, including: (i) joists in the ceiling were of the wrong size and "wrong direction as installed" (JA00229; *see also*, JA00579–580 (Trial Tr. at 14:3–15:12 "Q. Okay. So the plans stipulated they were 2x10; yet, they were 2x8s, so they're two inches smaller? A. Right. And they were in the wrong direction. Q. And they were also in the wrong direction. Okay. So would that be two separate violations? A. Yes.")); (ii) the structure did not have the "required braced wall lines" to carry the lateral forces in the addition that Defendants built did not match the DCRA-approved plans and was not structurally sound (JA00241; *see also* JA00234–237, JA00673–676 (Trial Tr. at 108:12–111:14); JA00297 (bracing plans)); and (iii)

"[t]here [was] no fire-blocking located anywhere in the home." (JA00243), JA00576–577 (Trial Tr. at 11:13–12:15), JA00302 (DCRA approved drawings requiring adhering to fire code). PCMD/TSG and Mr. Simmons had covered up many of these defects with drywall prior to the contract termination, making them more difficult to detect. *See, e.g.*, JA00321–323 (pictures showing drywall installed spackled/sanded by Defendants); JA00575–576 (Trial Tr. at 12:16–17:25); JA00824–826 (Trial Tr. at 24:11–26:16); JA01268 (Trial Tr. at 45:3–16).

Prior to terminating the contract, Ms. Jackson made payments to Defendants under the contract totaling $128,476. JA00461 (Trial Tr. at 12:6–12). Ms. Jackson then had to hire another construction company to redo the work done by PCMD/TSG and to complete the project, which cost an additional $167,000. JA00463–468 (Trial Tr. at 14:9–19:6). Because this work took many months longer than the project duration stipulated in the contract, Ms. Jackson also had to pay over $10,000 in rental and storage costs. *Id*.

V. SUMMARY OF ARGUMENT

Defendants fail to identify any error in the Superior Court's rulings in this case, much less one that would justify overturning the jury's well-supported verdict in favor of Ms. Jackson. First, the Superior Court correctly permitted the jury to resolve the factual issue of whether PCMD/TSG breached its contract with Ms. Jackson. The Superior Court did not err by refusing to interpret the meaning of any

supposedly ambiguous contract term, as Defendants suggest. Defendants expressly argued to the Superior Court that there was no such ambiguity, thus waiving their contrary argument on appeal, and did not present evidence of this supposed ambiguity in any event.

Second, the Superior Court correctly denied Defendants' Motion and Renewed Motion for Judgment as a Matter of Law because there was more than sufficient evidence to find that PCMD/TSG breached its contract and that Defendants misled Ms. Jackson as to the quality of the work performed at her Property. This evidence included the testimony and reports of construction industry professionals about the safety hazards and other significant defects in Defendants' work, as well as documents and testimony from Ms. Jackson of the specific misrepresentations that Defendants made to her throughout the Project.

Third, the Superior Court acted well within its discretion in dismissing PCMD's counterclaim, which was filed two years late. PCMD offered no justification for its delay and excusing the untimely filing would have required reopening discovery, causing undue delay and prejudice to Ms. Jackson.

Finally, under settled law, the Superior Court properly determined that PCMD/TSG and Mr. Simmons were jointly and severally liable for the single injury that they caused Ms. Jackson by violating the CPPA.

VI. ARGUMENT

A. The Superior Court Correctly Held, Consistent with the Position that Defendants Took at Trial, that Ms. Jackson's Breach of Contract Claim Presented Factual Issues to be Resolved by the Jury

The evidence at trial established that Defendants breached at least two provisions of their contract with Ms. Jackson. They did not (i) build "as per owners drawing approved by DCRA," and (ii) their work was not "completed in a substantial workmanlike manner according to specifications submitted, per standard practices." *See supra* pp. 6–11. Defendants' first claimed error is that the second of these two contractual breaches should not have been submitted to the jury because the Court should have considered evidence of "custom and usage" to interpret the term "completed" in the parties' contract as a matter of law. Br. at 17–19. This argument is waived and, in any event, unsupported by the record.

First, this new argument contradicts Defendants' position in the Superior Court and is therefore waived. If there is an ambiguity in a contract, a court may consider extrinsic evidence, such as "usages—habitual and customary practices—which either party knows or has reason to know," to interpret the contract. *See, e.g.*, *Keister v. AARP Benefits Comm.*, 410 F. Supp. 3d 244, 257 (D.D.C. 2019), aff'd, 839 F. App'x 559 (D.C. Cir. 2021) ("[I]t is well established that extrinsic evidence may not be relied upon to show the subjective intent of the parties absent ambiguity in the contract's language."); *In re Bailey*, 883 A.2d 106, 118 (D.C. 2005). But at

no time prior to judgment did Defendants argue that the contract contained an ambiguity that the Superior Court should resolve. Even when Defendants invoked the concept of "custom and usage" in their post-trial motion for judgment as a matter of law, they only cited it to argue that the evidence did not support the jury's verdict—not to argue that the contract was ambiguous. R. 2 (PDF) (Defs.' Renewed Motion for Judgment, at 2–3; JA01446–454).

Indeed, Defendants affirmatively argued at trial that there was no ambiguity in the contract. Objecting to the inclusion of a proposed jury instruction that would have instructed the jury that ambiguous terms in a contract must be construed against the contract drafter, Defendants argued: "***there's been no argument or any issues about intent, ambiguity in the contract*** . . . So that could be confusing for the jury because you have to first get to ambiguity before you start talking about how to look at language and – who's getting it construed." JA01076–77 (Trial Tr. at 4:24–5:9)(emphasis added); *see also* JA01077–185 (Trial Tr. at 5:11–13:12). Further, Defendants argued, "***That's not ambiguity. The contract clearly says it must be completed in a substantial workmanlike manner***." JA01077 (Trial Tr. at 5:19–21) (emphasis added). The Superior Court agreed with Defendants and omitted the proposed jury instruction. JA01085 (Trial Tr. at 13:13–17).

"[P]arties cannot change positions on appeal." *Davis v. D.C.*, 925 F.3d 1240, 1262 (D.C. Cir. 2019). Defendants argued to the Superior Court that the contract

was unambiguous. They did not ask the Superior Court to resolve any supposed contractual ambiguity as a matter of law prior to submission of the case to the jury. The contrary position that Defendants take on appeal has therefore been waived. *See, e.g*. *Murthy v. Vilsack*, 609 F.3d 460, 465 (D.C. Cir. 2010) ("[I]ssues not raised before judgment in the district court are usually considered to have been waived on appeal."); *Garrett v. Am. Airlines, Inc*., No. 92-1987, 1993 WL 13579262, at *1 (5th Cir. Dec. 29, 1993) ("[W]e will not consider that argument, as we do not entertain issues that are raised for the first time on appeal, nor are parties permitted to change their position on appeal.").

Second, even if Defendants had not waived their argument, there is no record evidence of the supposed "custom and usage" meaning on which they seek to rely. Defendants assert that according to "construction usage and trade or industry standards, 'complete' could only mean that the work had been inspected at the requisite stages of construction and that [the contractor] had declared or communicated to [the owner] that the work was complete or substantially complete." Br. at 18–19. But the only evidence Defendants cite anywhere in their Brief of a supposed "industry" meaning of the word "complete" is the testimony of Mr. Simmons that "there is no way that you can ***complete a project*** without getting a final [inspection]." JA01314 (emphasis added); *see also* Br. at 13. What it means to "complete a project" has no bearing on whether "work" that was done was

"completed" under the terms of the parties' contract. As the Superior Court correctly found and as discussed further below, there was more than enough evidence—including the significant evidence of defective work that had been covered with drywall, *see supra* pp. 6–11—for the jury to find that work on Ms. Jackson's home was completed in a manner that did not meet the standards required by the plain language of the contract. *See* JA01446–53; *see also*, JA00183–290.

B. The Superior Court Correctly Held that There Was Sufficient Evidence to Support the Jury's Verdict

The Superior Court correctly held that there was sufficient evidence for the jury to have found in Ms. Jackson's favor on both her breach of contract claim and her CPPA claim. Judgment as a matter of law may only be granted if, after a party has been fully heard on an issue during a jury trial, the court finds that a reasonable jury would not have a legally sufficient basis to find for the party on that issue. DC Super. Ct. Civ. R. 50; *see also District of Columbia. v. Bryant*, 307 A.3d 443, 450 (D.C. 2024). "This is an exacting standard," that is met "only in the unusual case[ ] in which only one conclusion could reasonably be drawn from the evidence." *Id.* (citing *Etheredge v. District of Columbia*, 635 A.2d 908, 915 (D.C. 1993)). In other words, Defendants must prove that "no reasonable person, viewing the evidence in the light most favorable to the prevailing party, could reach a verdict in favor of that party." *Osman v. First Priority Mgmt*., No. 22-CV-0997, 2024 WL 481129, at *4 (D.C. Feb. 8, 2024) (citing *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 363

(D.C. 1993)). Ms. Jackson's evidence at trial easily surpasses a legally sufficient basis to find for her on both her breach of contract claim and her CPPA claim.

i. The Evidence Was Sufficient for the Jury to Find Defendants Breached Their Contract with Ms. Jackson

Defendants argue that no reasonable juror could have found PCMD/TSG breached the contract because—drawing on the "custom and usage" theory addressed above—whether their work was completed "in a substantial workmanlike manner" could not be evaluated "until PCMD or TSG communicated or declared that the work was actually complete." Br. at 19–20. Defendants' argument fails for three reasons.

First, Defendants ignore one of the two independent bases on which the jury could find that PCMD/TSG breached the contract with Ms. Jackson. PCMD/TSG agreed to build "as per owners drawing approved by DCRA." JA00311. The evidence at trial proved that, in many instances, PCMD/TSG failed to build according to the DCRA-approved drawings. For example, a structural engineer testified that the bracing of the walls in the addition that Defendants built did not match the DCRA-approved drawings and was not structurally sound. *See* JA00234–237; JA00673–676 (Trial Tr. at 108:12–111:14). As another example, a DCRA Inspector testified that the joists in the ceiling that Defendants built did not match the DCRA-approved drawings because they were undersized and going in the wrong direction. *See* JA00579–580 (Trial Tr. at 14:3–15:12); JA00229. Defendants did

not present any evidence that Ms. Jackson was aware of—much less agreed to—either of these deviations from her approved drawings during the Project.

Defendants do not argue on appeal that this evidence of breach by failure to build in accordance with the DCRA-approved drawings, as required by contract, was insufficient. For this reason alone, Defendants' challenge to the jury's verdict on breach of contract should be rejected.

Second, as shown above, Defendants' claim as to the supposed meaning of the term "completed" as a matter of "custom and usage" has no support in the record. *See* pp. 14–16, *supra*. The jury cannot be faulted for failing to accept evidence that was never presented. *See, e.g.*, *Freeman v. Giuliani*, No. CV 21-3354 (BAH), 2024 WL 1616675, at *7 (D.D.C. Apr. 15, 2024) "[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.") (quotation omitted).

Third, there was more than sufficient evidence at trial for the jury to find that work was not completed in a substantial and workmanlike manner, as required by the plain terms of the contract. JA00310. Ms. Jackson introduced significant evidence that there was "completed" work behind drywall throughout the construction Project. *See* pp. 9–16, *supra*. Indeed, so much of the work had been completed that Mr. Simmons requested payment for the entire Project being "near completion." JA00310; JA00294. Mr. Simmons also informed the Better Business

Bureau that "the project was 85% complete" and he was working to move Ms. Jackson and her mother back into their home. JA01281–83 (Trial Tr. at 58:1760:14); *see also*, JA00312 ("No way My Mom and I will be able to move back into the house by this weekend without a Fully functioning HVAC system."). And Ms. Jackson presented evidence from multiple construction industry professionals demonstrating that Defendants' work was not completed in a substantial workmanlike manner, according to specifications submitted, per standard practices. *See, e.g.*, JA00183–290 (reports prepared by five construction industry professional enumerating defects in Defendants work at the Property); JA00581–582 (Trial Tr. at 16:6–17:25) (DCRA inspector testifying that joists were undersized and installed by Defendants in the wrong direction); JA00611–618 (Trial Tr. at 46:9–50:15) (DCRA inspector testifying that he identified code violations in the electrical, framing, and plumbing work performed by Defendants at the Property) ; JA00709–711 (Trial Tr. at 22:14–24:8) (Ms. Englebert of MCP Inspections testifying that she identified forty-five building code violations in Defendants' work at the Property); JA00712 (Trial Tr. at 25:5–11); JA00718–745 (Trial Tr. at 31:13–57:4); JA00808–812 (Trial Tr. at 8:12–12:21) (testimony of replacement contractor identifying problems he observed with Defendants' work at the Property); JA00817–827 (Trial Tr. at 17:16–27:8); JA00876–880 (Trial Tr. at 76:19–80:2); JA00886–890 (Trial Tr. at 86:24–90:11).

This evidence was more than sufficient for a reasonable jury to find that PCMD/TSG had breached the contract.

ii. The Evidence Was Sufficient for the Jury to Find that Defendants Violated the CPPA By Misleading Ms. Jackson

"Under the CPPA, people and businesses are precluded from misrepresenting any material fact which has a tendency to mislead. [] That prohibition extends beyond literal falsehoods and includes any omissions, innuendos, or ambiguities that have a tendency to mislead reasonable consumers." *Earth Island Inst. v. Coca-Cola Co*., 321 A.3d 654, 664 (D.C. 2024) (cleaned up). Ms. Jackson proved at trial that Defendants made multiple misrepresentations to her about the status and quality of their work in violation of the CPPA.

Defendants' challenge to the sufficiency of the jury's verdict on the CPPA claim starts from the false premise that Ms. Jackson's evidence at trial "boiled down to [Mr.] Simmons' text message to [Ms.] Jackson indicating a passed inspection and the start of drywall." Br. at 21. As an initial matter, Defendants ignore a number of ***additional and entirely independent*** misrepresentations that Ms. Jackson proved at trial and that are more than sufficient to support the jury's verdict. Specifically, Ms. Jackson presented evidence at trial that Defendants misled her by: (i) telling her that they had had a wall check done at the Property, even though they had not[3]; (ii) telling

[3] *See* JA00405 (Trial Tr. at 81:5–21 ("Q. And did you ask Mr. Simmons about the wall check for your construction project? A. I did. Q. And what did he say? A. He

her that the reason her addition was not level with the existing house was because of her building plans, when in reality it was because of their defective work[4]; and (iii) making her believe they had replaced a load-bearing wall in a structurally sound way by installing a steel beam, even though they had not.[5] This evidence on its own was sufficient to support the jury's verdict.

In addition, the evidence at trial also established that Mr. Simmons misled Ms. Jackson into reasonably believing that the Project was at a stage where it was ready to be covered with drywall, and that the work that would be behind the drywall had passed all of the required DCRA inspections, when it had not. On December 14,

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told me that he would take care of it. Q. At what point in the process? A. I think it was before the project was supposed to get a foot or two feet high or something. But I recall him telling me that it would be done during the inspection. Q. Did you subsequently come to learn whether Mr. Simmons ever had a wall check done for your project? A. I did. Q. Had he had it done? A. He had not.")); JA00241 ("12A DCMR 109.3.1.2 Failure to obtain the required As-Built survey (Wall Check)").

[4] *See* JA00238 (PTX-0005.0002, 0004; Ex. H Trial Tr. (Jan. 29, 2024, PM session) at 36:2–13; 38:7–11); Ex. M, Trial Tr. (Jan. 31, 2024, AM session) at 30:5–31:10 (Mr. Marshall confirming that he used the same DCRA approved drawings as Defendants and was able to build floors in the addition that were level with the original house)).

[5] JA00291 (quote to "Install steel support beams 7500"); JA00295 (requesting payment for "Remov[ing] structural wall between kitchen and addition in steel support"), JA00236 (showing LVL (engineered wood) beam installed instead of steel beam); JA00281 (highlighting missing "steel I-beam"); *see also* JA00428 (Trial Tr. at 104:12–22 ("Q. What did you understand Mr. Simmons to be referring to as a change that had been done in that bullet? A. That that was for him opening up the first floor and removing that back wall and putting in a steel beam and LVL. Q. And specifically, when he says: 'Addition and steel support and 2 by 2, LVL', what did you understand that to refer to? A. I understood that to mean the steel beam.").

2019, Mr. Simmons sent Ms. Jackson a text message stating "we past (sic) inspection we move ahead with drywall." JA00292. Ms. Jackson testified that she understood this message "to mean that everything, the electrical components; the plumbing components; the mechanical components; the framing, everything that would be underneath the walls was complete and had passed inspection." JA00421–422 (Trial Tr. at 97:24–98:6). Yet, at the time of Mr. Simmons' text message, the work was not ready to be covered with drywall and the work had not and could not have passed required inspections. JA00599–600 (Trial Tr. at34:12–35:4 (DCRA Inspector McNeil confirming that electrical, plumbing, and framing work cannot be inspected once the drywall is installed and that pictures of work covered by drywall are insufficient to pass inspection)), JA01120–127 (Trial Tr. at 48:14–50:20, 55:15–20 (Mr. Ball testifying that he only performed a partial inspection of certain bathrooms and that the entire rest of the project was not ready for drywall)); JA00928–929 (Trial Tr. at 128:3–129:24 (Mr. Rehfuss confirming that the work was not then ready to move ahead with installing drywall because the mechanical and insulation had not yet passed the required inspections and the work was "deficient")); JA00321–323 (photographs showing installed drywall that had been spackled and sanded covering Defendants' completed work). Even Mr. Simmons admitted at trial that it was a "miscommunication" to put up drywall in portions of Ms. Jackson's home when he did. JA01296–97 (Trial Tr. 73:19–74:14).

Thus—even focusing solely on the one misleading statement that Defendants' Brief attempts to address from among several—this evidence was sufficient for a reasonable jury to find that a reasonable consumer would have been misled by Mr. Simmons's text message, as required to establish a violation of the CPPA. In combination with the other misrepresentations that were proved at trial and ignored in Defendants' Brief, the evidence was more than sufficient to support the jury's verdict on Ms. Jackson's CPPA claim.

C. The Superior Court Acted Within Its Discretion in Dismissing PCMD/TSG's Untimely Counterclaim

PCMD/TSG inexcusably delayed for over two years before attempting to bring a counterclaim against Ms. Jackson based on the same contract at issue in her original complaint. The Superior Court has discretion in deciding whether to grant leave to file an untimely counterclaim. *See Hartford Acc. & Indem. Co. v. D.C.*, 441 A.2d 969, 973 (D.C. 1982). It acted well within its discretion here.

PCMD/TSG's breach of contract counterclaim was filed on December 27, 2022. JA00154; JA00143. It was based on the same contract for home improvement work underlying the breach of contract claim first alleged in Ms. Jackson's original complaint filed almost two years earlier, on November 9, 2020. JA00048–060; JA00143; JA00152–159; JA00310–311. Because the counterclaim arose out of the same transaction or occurrence that is the subject matter of Ms. Jackson's claim, it was a compulsory claim that should have been filed two years earlier, in answering

Ms. Jackson's original complaint. *Johnson v. United States*, No. 17-2411 (CRC), 2021 WL 950421, at *2 (D.D.C. Mar. 12, 2021) (D.C. Superior Court Rule 13 "deems a counterclaim 'compulsory' (rather than 'permissive') if it arises out of the same transaction or occurrence as the opposing party's claim and does not require adding a third-party over whom the court lacks jurisdiction."); *Lazarus v. Karizad, LLC*, No. 1:20-CV-1787-RCL, 2021 WL 765708, at *9 (D.D.C. Feb. 26, 2021) (opining that if a defendant has compulsory counterclaims, it is "obliged to assert [them] as counterclaims in [its] answer to [the] complaint.").

PCMD/TSG never requested leave to file their untimely counterclaim. JA00158. Nevertheless, the Superior Court considered whether granting such a request would have been warranted based on "oversight, inadvertence, or excusable neglect, or where justice so demands." *Bronson v. Borst*, 404 A.2d 960, 963 (1979) (internal citations omitted). The Court correctly concluded that leave should be denied because it would delay the case and thus prejudice Ms. Jackson. JA00158. If PCMD had been granted leave to pursue its compulsory counterclaim, discovery would have had to be reopened to allow Ms. Jackson to obtain information on PCMD's alleged damages in the form of "monies expended for the purchase of supplies and materials for the project which were not recovered, consequential damages, and incidental damages," (JA00150)—none of which Ms. Jackson had an

adequate opportunity to previously explore. The result would have been months of delay and expense to the prejudice of Ms. Jackson.

Defendants' reliance on *Randolph v. Franklin Inv. Co.*, 398 A.2d 340 (D.C. 1979), is misplaced. *See* Br. at 24. In *Randolph*, the Court of Appeals adopted a "presumption that leave to file a compulsory counterclaim is inherent, as a matter of 'justice,' in a court's grant of leave to file an answer," given that "the same liberal standards for consideration would seem to apply" to both Rule 15 (as to answers) and Rule 13 (as to counterclaims). *Randolph*, 398 A.2d at 350.

Here, Defendants never sought leave to file an untimely answer, and the Superior Court never granted Defendants leave to do so. Rather, considering the relevant factors under Rule 13, the Superior Court found that leave to file a late counterclaim should be denied. JA00157–158. That holding was well within the Superior Court's discretion and should be affirmed. *See, e.g.*, *Hartford Acc. & Indem. Co.*, 441 A.2d at 973 (finding trial judge did not abuse her discretion in denying motion to amend answer to include an untimely counterclaim absent an adequate showing of "oversight, inadvertence, or excusable neglect," or that "justice so demands").

D. The Superior Court Correctly Held that PCMD/TSG and Mr. Simmons Were Jointly and Severally Liable with Respect to Ms. Jackson's CPPA Claim

The jury found that both PCMD/TSG and Mr. Simmons had violated the CPPA.[6] JA01444–445. On that basis, the Superior Court correctly held that PCMD/TSG and Mr. Simmons were jointly and severally liable for the full amount of damages awarded against PCMD/TSG on the CPPA claim. JA01455–57. The

[6] Defendants do not challenge the liability verdict as to Mr. Simmons on appeal, nor could they. Corporate officers such as Mr. Simmons can be "personally liable for torts which they commit, participate in, or inspire even though the acts are performed in the name of the corporation. " *Lawlor v. Dist. of Columbia*, 758 A.2d 964, 974 (D.C. 2000); *see also, Dist. Of Columbia v. EADS, LLC*, No. 2018 CA 005830 B, 2022 WL 4010013, at *2 (D.C. Super. Ct. Jan. 13, 2022) (holding that individual defendant may be found jointly and severally liable for violations of the CPPA because "corporate status does not protect members from liability for their own torts"); *Cooper v. First Gov't. Mortg. & Investors Corp.*, 206 F. Supp.2d 33, 36 (D.D.C. 2002) (holding that an individual may be held personally liable under the CPPA); *Camacho v. 1440 Rhode Island Ave. Corp*., 620 A.2d 242, 246 (D.C. 1993) ("corporate officers are not shielded by the limited liability of the corporation for liability for their own tortious acts."). The evidence at trial showed that Mr. Simmons was the only officer or employee of either PCMD or TSG working on the Project at Ms. Jackson's home prior to the dispute arising between the parties. JA01246–250 (Trial Tr. at 23:23–27:4). In that role, Mr. Simmons made all of the misleading statements that formed the basis of Ms. Jackson's CPPA claim. *See supra* pp. 6–11; *see also* JA00391–393 (Trial Tr. at 67:1–69:25); JA00404–406 (Trial Tr. at 80:3–82:4); JA00411–416 (Trial Tr. at 87:9–92:17); JA00434–436 (Trial Tr. at 94:9–96:21); JA00420–432 (Trial Tr. at 96:25–108:17); JA00391–393 (Trial Tr. at 110:22–112:20); JA00458–459 (Trial Tr. at 9:7–10:23); JA00460–461 (Trial Tr. at 11:11–12:12); JA00462–463 (Trial Tr. at 13:9–14:4); JA00485 (Trial Tr. at 36:2–9); JA00507 (Trial Tr. at 58:4–9); JA00508 (Trial Tr. at 59:13–17); JA00291; JA00292 (text message from Mr. Simmons to Ms. Jackson stating "we past (sic) inspection we move ahead with drywall."); JA00293–295, JA00321–324. The jury's finding that Mr. Simmons personally violated the CPPA is thus well-supported as a matter of law and the evidence at trial.

Superior Court's holding is well-supported in the law, and Defendants have offered no authority to the contrary.

It is well established that when multiple defendants are found liable for a single injury "any compensatory damages for that single injury ***must*** be awarded jointly and severally against them." *Faison v. Nationwide Mortg. Corp.*, 839 F.2d 680, 686 (D.C. Cir. 1987) (emphasis added) (applying D.C. law). Consistent with this principle, defendants found liable for a single injury caused by violations of the CPPA are held jointly and severally liable. S*ee, e.g.*, *McMullen v. Synchrony Bank*, No. CV 14-1983 (JEB), 2020 WL 1975425, at *2 (D.D.C. Apr. 24, 2020) (holding defendants jointly and severally liable with each other and with other defendants for fraudulent practices resulting in a single injury of wrongful billing of customers); *EADS, LLC*, 2022 WL 4010013, at *2 (holding at summary judgment stage that an individual defendant "may be found jointly and severally liable [along with other corporate and individual defendants] for violations of the CPPA" arising from his alleged fraudulent misrepresentations).

Mr. Simmons and PCMD/TSG are jointly and severally liable for the damages awarded to Ms. Jackson under the CPPA because Ms. Jackson suffered a single injury as a result of Defendants' actions. Specifically, the evidence at trial showed that Ms. Jackson paid for work, and incurred additional expenses, which she would not have paid for or incurred if not for misleading statements that Mr. Simmons

made to her in his capacity as the sole representative of PCMD/TSG on the Project. *See, e.g.,* JA00291, JA00292, JA00293–295, JA00310, JA00314–320; JA00422–425 (Trial Tr. at 98:13–101:6 (Ms. Jackson testifying that she worked directly with Mr. Simmons and that he requested payments at the construction milestones per the contract between Ms. Jackson and PCMD); JA00464–468 (Trial Tr. at 15:14–19:6 (Ms. Jackson testifying concerning the additional expenses she incurred as a result of Mr. Simmons' misrepresentations)); JA01265–288 (Trial Tr. at 42:12–65:5 (Mr. Simmons' testimony confirming that he made misleading statements to Ms. Jackson in his capacity as the sole representative of PCMD/TSG)); JA01359–364 (Trial Tr. at 39:23–44:4 (summarizing evidence of a single injury caused by Defendants' violations of the CPPA)).

The fact that the jury apportioned damages among the Defendants does not alter the legal conclusion that the Defendants are jointly and severally liable for the single injury caused. Rather, as the D.C. Circuit has explained in applying D.C. law, "in actions" like this "against joint tortfeasors," a jury's "apportionment of damages should be omitted, and the verdict directed against all defendants for the largest sum found against any defendant." *Faison*, 839 F.2d at 687; *see also id*., at 688 (approving of the Second Circuit's holding that "[w]here, as here, defendants, if liable at all, are liable for causing the same injury . . . [a]ll defendants found liable for the injury are then jointly and severally liable for the single award of

compensatory damages.") (quoting *Gagnon v. Ball*, 696 F.2d 17, 19 n. 2 (2d Cir. 1982). Thus, while the Court told the jury in this case that it could "apportion [damages] how you want," it further explained that the jury would be awarding "just one single amount of damages." JA001437 (Trial Tr. at 12:6–10 ("Does this mean we have to award the same amount for all defendants liable under the DC CPPA or can we award one amount to one and one to another? You award one single amount. You can apportion it how you want, but it's just one single amount of damages.")). And the Court correctly observed at the time of the verdict that Defendants would remain jointly and severally liable for the single amount. *See* JA01435 (Trial Tr. at 10:7–22 ("[B]ecause they're jointly and severally liable, but we broke them out on the verdict form, so it seems to me that . . . [the jury] can split it up how they want, . . . but it is one single amount.")).

In line with these authorities, the Superior Court omitted the jury's apportionment of damages under the CPPA and entered judgment against all Defendants jointly and severally for the largest sum found against any defendant: $266,322 (treble the single damages of $88,774). That judgment is correct and should be affirmed.

VII. CONCLUSION

For the reasons discussed herein, this Court should affirm the Superior Court's entry of final judgment against PCMD, TSG, and Mr. Simmons in all respects.

Respectfully submitted,

Date: January 10, 2025

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Appellee's Opening Brief was served via the Court's electronic case filing service, this 10th day of January, 2025 on the following:

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