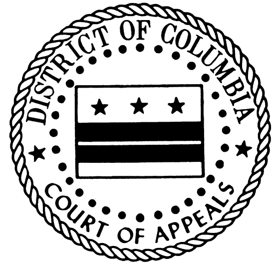

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Nos. 24-CV-23, 24-CV-0685

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

ELIZABETH GALVIN,

APPELLANT,

v.

RUPPERT NURSERIES, INC.,

APPELLEE.

On Appeal from the Superior Court for the District of Columbia, Civil Division in Case No. 2020 CA 000445 B (Honorable Donald W. Tunnage, Judge)

APPELLANT'S REPLY BRIEF

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Dated: December 16, 2024

TABLE OF CONTENTS

I. ARGUMENT 1

A. This Court Does Not Defer to Findings Induced from Legal Error.....3

B. The Trial Court Did Not Analyze Ms. Galvin's CPPA Claims from the Perspective of a Reasonable Consumer 4

C. The Trial Court's Opinion That Merchants Have "Considerable Discretion" to Determine Which Facts Are Material Contravenes the CPPA.....6

D. A Preponderance of the Evidence Proves Unintentional CPPA Violations 8

E. RN's Additional Arguments Against Ms. Galvin's CPPA Claims Fail 9

1. RN's Reply About the Evergreen Screening Claim Does Not Excuse The Trial Court's Failure To Find That RN's Extracontractual Omissions And Misrepresentations Violated The CPPA 9

2. RN's Reply Regarding the July Planting Claim Does Not Address the Trial Court's Legal Error and Raises Factually Incorrect or Legally Irrelevant Defenses 12

3. The Trial Court Erred as Matter of Law Regarding the Maple Claim...16

4. The Trial Court Failed to Address the Business Practices Claim 17

F. The Trial Court Erred In Granting RN's Contract Claim 18

G. RN's Arguments About Ms. Galvin's Merchantability Claim Fail.....19

II. CONCLUSION 20

TABLE OF AUTHORITIES*

Cases

Ballagh v. Fauber Enter., Inc., 290 Va. 120 (2015)………………………………8

Brody v. 1239 Kenyon ST NW LLC, No. 2019 CA 002705 B, 2023 WL 7107658 (D.C. Super. Ct. Feb. 24, 2023)……………………………………………..8

Burton v. Artery Co., Inc., 279 Md. 94 (1977)…………...……………………19

Campbell v. Fort Lincoln New Town Corp., Inc., 55 A.3d 379 (D.C. 2012)……….10

Dist. Cablevision Ltd. P'ship v. Bassin, 828 A.2d 714 (D.C. 2003)…………………9

D.C. v. EADS LLC, No. 2018 CA 005830 B, 2024 WL 3445767 (D.C. Super. Ct. Jun. 20, 2024)…………………………………………………………9

D.C. v. Google LLC, 2022 CA 000330 B (D.C. Super. Ct. Aug. 31, 2022)………...16

Earth Island Inst. v. Coca-Cola Co., 321 A.3d 654 (D.C. 2024)…………………..12

Eni US Operating Co., Inc. v. Transocean Offshore Deepwater Drilling, Inc., 919 F.3d 931 (5th Cir. 2019)……………………………………………………18

Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp., 944 A.2d 1055 (D.C. 2008)……………………………………………………………10

Frankeny v. Dist. Hosp. Partners, LP, 225 A.3d 999 (D.C. 2020)……………8, 17

Golden v. Den-Mat Corp., 47 Kan.App.2d 450 (2012)……………………………19

Hayes Fam. Tr. v. State Farm Fire & Cas. Co., 845 F.3d 997 (10th Cir. 2017)……..2

* Cases chiefly relied upon are designated with an asterisk.

Howard v. Riggs Nat'l Bank, 432 A.2d 701 (D.C. 1981)…………………………........8

In re Nestlen, 441 B.R. 135 (B.A.P. 10th Cir. 2010)………………………………15

Kim v. DP Cap. LLC, No. CV 23-1101 (TJK), 2024 WL 4253168 (D.D.C. Sept. 20, 2024)……………………………………………………………………………..9

McGowan v. U.S., 296 F.2d 252 (5th Cir. 1961)……………………………………16

**Murphy v. McCloud*, 650 A.2d 202 (D.C. 1994)…………………………………...3

**Pearson v. Chung*, 961 A.2d 1067 (D.C. 2008)………………………………4, 6, 8

Pinney v. Nokia, Inc., 402 F.3d 430 (4th Cir. 2005)…………………………….....19

**Saucier v. Countrywide Home Loans*, 64 A.3d 428 (D.C. 2013)…………..…6, 7, 8, 13

<u>Statutes</u>

D.C. Code § 28-3901(b)(2)……………………………………………………………7

D.C. Code § 28-3901(b)(3)……………………………………………………………7

D.C. Code § 28-3904(a)………………………………………………………….1, 6

D.C. Code § 28-3904(d)……………………………………………………….…1, 6

D.C. Code § 28-3904(e)……………………………………………………….…1

D.C. Code § 28-3904(f)……………………………………………………...…1

D.C. Code § 28-3905(k)(2)(C)……………………………………………....…9

D.C. Code § 28:2-609(1)……………………………………………………..…19

D.C. Code § 28:2-725(2)……………………………………………………….....19

Va. Code Ann. § 59.1-204(A)……………………………………………………8

I. ARGUMENT

Ms. Galvin's appeal is about the Trial Court's legal errors resulting from its failure to identify the statutory requirements governing each of Ms. Galvin's claims and apply them to the facts adduced. Appellant's Brief ("G. Br.") at 1–3, 28–29.

As explained in her Initial Brief, Ms. Galvin proved that RN violated the CPPA by: (1) misrepresenting (under §§ 3904(a) and (d)) that its goods *and* services would satisfy the agreed purpose of evergreen screening (the "Evergreen Screening Claim"), (2) misrepresenting or omitting (under §§ 3904(e) and (f)) the fact that planting the Trees in July materially increased the risks to the Project's success (the "July Planting Claim"), (3) omitting (under § 3904(f)) the fact that its work would pose a mortal risk to her well-established 25 year-old Maple (the "Maple Claim"), and (4) misrepresenting or omitting (under §§ 3904(a), (d), (e), and (f)) the fact that it was RN's business practice (i) not to conduct analyses required to meet its duties under the Contract and the CPPA; (ii) not to perform its duties under landscape guidelines (the "LSGs") incorporated in the Contract; and (iii) to assure results RN could not deliver to induce Ms. Galvin to enter their Contract (the "Business Practices Claim"). Ms. Galvin also proved the Trees were unsuitable for their ordinary purpose of evergreen screening (the "Merchantability Claim").

The Trial Court made several errors of law in adjudicating these claims. Regarding the four CPPA claims, it misconstrued the statute's reasonable consumer

standard to dismiss the Evergreen Screening Claim and then used that faulty analysis to dismiss the July Planting and Business Practices Claims; it applied an improper materiality standard to dismiss the July Planting Claim; it never considered the Maple Claim as a CPPA claim (wrongly assuming she had made a Contract claim) and held Ms. Galvin to a higher standard to prove causation than required by the CPPA (or contract law); and it did not address the Business Practices Claim.[1] With respect to the Merchantability Claim, it failed to apply the statutorily prescribed "ordinary purpose" analysis to the Trees.

RN seeks to obfuscate Ms. Galvin's legal claims, often attempting to transform distinct legal issues into issues of fact. Where RN purports to address Ms. Galvin's claims on legal grounds, it fails. Addressing the Evergreen Screening Claim, RN erroneously argues that because (1) the Contract did not define "evergreen screening," (2) "evergreen screening" is an aspirational statement, and (3) Ms. Galvin agreed the Trees were evergreen (as opposed to deciduous), RN did not misrepresent that its goods or services would provide evergreen screening.

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[1] The Trial Court also (a) adopted a prejudicial "lens"; (b) applied the wrong burden of proof for claims of unintentional violations of the CPPA; and (c) allowed RN to succeed on its breach of contract claim without evidence that it complied with several relevant provisions of the LSGs. Ms. Galvin identified all these legal errors in her Motions for Reconsideration, but the Trial Court (at RN's insistence) denied them for "relitigating." G. Br. at 49–50. But Rule 59(e) allowed Ms. Galvin to reargue to "correct clear legal error" contained in the Opinion even if raised before. *Hayes Fam. Tr. v. State Farm Fire & Cas. Co.*, 845 F.3d 997, 1005 (10th Cir. 2017).

Addressing the July Planting Claim, RN erroneously argues that Ms. Galvin was aware of the risks of July planting or that this risk is not material. RN (like the Trial Court) failed to address Ms. Galvin's Maple Claim under the CPPA, erroneously treating Ms. Galvin's Maple Claim as a Contract defense and only disputing facts related to causality. RN only disputed the "suitability" component of the Business Practices Claim and failed to rebut Ms. Galvin's other allegations regarding RN's misrepresentations and omissions related to its purportedly meticulous services, JA 2245–47. Finally, addressing the Merchantability Claim, RN asserts nonexistent barriers to this claim but does not dispute the facts showing the Trees were not fit for their ordinary purpose (as properly defined) of providing evergreen screening. Throughout its discussion of these claims, RN mischaracterizes the record.

A. This Court Does Not Defer to Findings Induced from Legal Error

RN argues this Court must accept the Trial Court's express or implied factual findings. *See*, *e.g.*, Appellee's Brief ("R. Br.") at 12 n.6, 14–15, 26, 41–42. But this Court does not defer to "findings induced by, or resulting from, a misapprehension of controlling substantive legal principles," *Murphy v. McCloud*, 650 A.2d 202, 210 (D.C. 1994) (quoting *Davis v. Parkhill Goodloe Co.*, 302 F.2d 489, 491 (5th Cir. 1962)). The Court reviews *de novo* the Trial Court's findings premised on its impermissible, self-imposed, and subjective "lens" and other distinct errors of law. *See* G. Br. at 26, 28–29.

B. The Trial Court Did Not Analyze Ms. Galvin's CPPA Claims from the Perspective of a Reasonable Consumer

Ms. Galvin's CPPA claims must be evaluated from the perspective of a reasonable consumer of a highly profitable, G. Br. at 10 n.11, evergreen screening project costing nearly $350,000 to transplant six trees. *Id.* at 31, 36–38. Like the Trial Court, RN ignores the reasonable consumer standard, asserting her claims are unreasonable when viewed "through the lens of a common understanding." JA 1743:9–10; R. Br. at 34. No law or record evidence supports this supposed "common understanding." JA 1743:18–23; R. Br. at 23 n.8, 34.

The Trial Court assessed the Evergreen Screening Claim (and *all* of Ms. Galvin's claims) based on Ms. Galvin's purported "dissatisfaction," "unhappiness," and "displeasure." G. Br. at 29. It noted consumer and expert testimony that "the trees that were planted did not have the ultimate effect of a screening," JA 1743:18–23, but it held that Ms. Galvin's "displeasure," JA 1743:18, meant she demanded "subjective satisfaction," JA 1743:16. The Trial Court erred by failing to (1) analyze a reasonable consumer's expectation of "evergreen screening," (2) acknowledge RN's extracontractual representations that the Trees would provide "evergreen screening," *see*, *e.g.*, G. Br. at 9 n.10, 11, 15 n.22, and (3) determine whether the Trees provided "evergreen screening."

The "reasonable consumer" standard proscribes such a prejudicial analysis. In *Pearson v. Chung*, 961 A.2d 1067 (D.C. 2008) (the only case cited in the Opinion),

neither the trial court nor this Court drew negative inferences regarding Pearson's character or use such those inferences to guide their reasonable consumer analysis. They evaluated Pearson's interpretation of "Satisfaction Guaranteed" based on the testimony of six other consumers and the merchant defendants. G. Br. at 31 n.38. Here, Ms. Musick's testimony[2] is the best record evidence of the information to which a reasonable consumer would attach importance. JA 750:19–25, 763:20–25; G. Br. at 18–19; *see also* JA 1135:17–1136:6 (Mourlas). Ms. Galvin also provided testimony regarding objective information important to her decision making and the meaning of evergreen screening. *See*, *e.g.*, JA 1378:9–1379:12, 1380:8–23, 1386:19–1387:1. RN's only response is an irrelevant *ad hominem* claim about Ms. Galvin *herself. See*, *e.g.*, R. Br. at 6.

The Trial Court ignored the record and failed to conduct reasonable consumer analyses on all of Ms. Galvin's CPPA claims. It rejected the Evergreen Screening Claim based on its subjective assessment that what Ms. Galvin expected was unmeasurable. It compounded that error by summarily extrapolating from its baseless analysis of the Evergreen Screening Claim to dismiss the July Planting and

[2] RN states that Ms. "Galvin argues that only her perspective as the customer matters," R. Br. at 32, and fails to discuss whether her and/or Ms. Musick's perspective(s) are that of a reasonable consumer. Nor did RN address the logical point that any consumer willing to pay almost $350,000 to install Trees to screen her property would want the merchant to identify and disclose conditions that could frustrate that purpose and any potential mitigation. *See* G. Br. at 18–19.

Business Practices Claims, JA 1744:8–14, when those were independent claims that required independent assessments.[3] G. Br. at 47.

C. The Trial Court's Opinion That Merchants Have "Considerable Discretion" to Determine Which Facts Are Material Contravenes the CPPA

Ms. Galvin's July Planting Claim was that RN omitted or misrepresented a material fact.[4] The Trial Court simply ignored the CPPA's standard of materiality for this claim,[5] even though materiality "is a significant term that has a specific meaning requiring proof." *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 444 (D.C. 2013). It found RN had satisfied its CPPA duties by "communicat[ing] its belief that the risk associated with summer planting was not one that considered [sic] it, and that the risk would be mitigated if not successfully protected against by proper care and maintenance before and after transplanting." JA 1744:25–1745:5. RN asserts the Trial Court had discretion to make this finding, *see* R. Br. 27–30,[6] but the Trial Court had no discretion to ignore the governing legal standard.

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[3] This Court did not dismiss all of Pearson's CPPA claims because the "Satisfaction Guaranteed" claim was unreasonable. Instead, it conducted an independent reasonable consumer analysis of his "Same Day Service" claim, which was also found to be unreasonable. *Pearson*, 961 A.2d at 1077.

[4] RN does not contest Ms. Galvin's argument that §§ 3904(a) and (d) do not have a materiality requirement. *See* R. Br. at 22–24; G. Br. at 30 n.37.

[5] The Trial Court did not rule that Ms. Galvin's Maple and Business Practices Claims failed for lack of materiality. *Infra* pp. 16–18; G. Br. at 23–24.

[6] RN's only support for the Trial Court's legal error is the testimony of Dr. Dahle, R. Br. at 32–33, who was proffered only as an academic expert on the biomechanics

The CPPA does not permit merchants to decide unilaterally what information might be material to a reasonable consumer. *Saucier*, 64 A.3d at 442; G. Br. at 38–39 & n.55. It requires merchants as the experts to determine and then disclose to consumers the "existence or nonexistence" of facts which a reasonable consumer would "attach importance to . . . in determining his or her choice of action in the transaction." *Saucier*, 64 A.3d at 442. RN did not rebut evidence that it failed to ascertain what might be material to a reasonable consumer or to meet the CPPA's disclosure requirements.[7] By upholding RN's failure, the Trial Court vitiated the purpose of the CPPA—to "promote, through effective enforcement, fair business practices throughout the community," and "educate consumers to demand high standards and seek proper redress of grievances." D.C. Code § 28-3901(b)(2), (3).

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of trees. G. Br. at 20; *see also* JA 992:10–12 (Dahle). To the extent Dr. Dahle's testimony is relevant to materiality, he testified that there is a material risk to July transport and planting. JA 906:10–907:11, 914:16–21.

[7] RN's *post hoc* factual argument to support the Trial Court's legal error presents a merchant's dream for relief from the CPPA's mandates: As a purported basis for affirmance in the alternative, RN argues, unlike the Trial Court, that "the risk of summer planting was not material" because a magnolia grower (JA 2153), an academic publication (JA 2041), and one landscape contractor believe so, (JA 818). R. Br. at 30–31. Thus, disclosure of those risks was not required under the CPPA because RN believes "there is no consensus that such extreme hazard exists." R. Br. at 29. But RN ignores the contrary perspective held by reasonable consumers, and supported by contractors' testimony. *Infra* p. 13 note 19. It also ignores the obvious fact that if a consumer asks about how an obstacle or condition might affect the outcome of a major project, JA 1899, the merchant must disclose the known facts regarding that obstacle to a consumer. RN should have told Ms. Galvin about any professional disagreement to help her decide whether and how to move forward but it did not.

D. A Preponderance of the Evidence Proves Unintentional CPPA Violations

The Trial Court erred by weighing Ms. Galvin's CPPA evidence under a "clear and convincing" evidence standard. JA 1744:10–11. Contrary to RN's argument, neither *Pearson* nor *Frankeny v. Dist. Hosp. Partners, LP*, 225 A.3d 999 (D.C. 2020) held that *unintentional* CPPA violations[8] are subject to that standard. G. Br. at 32 n.42, 33 n.45. RN imagines the CPPA is premised on common law fraud, which requires proof of a duty to disclose, so proving *any* violation requires clear and convincing evidence. R. Br. at 40. But the CPPA's imposition of a duty to disclose obviates the need to prove that duty. It is an "ambitious piece of legislation," *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 708 (D.C. 1981), designed to ease the burdens of pleading common law fraud. *Saucier*, 64 A.3d at 442.

RN also argues that the availability of punitive damages under the CPPA requires applying the higher standard of proof to unintentional violations.[9] R. Br. at

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[8] RN's attempt to recast Ms. Galvin's testimony as allegations of intent, R. Br. at 34–38, falls flat, since Ms. Galvin admitted during *cross-examination* that she does not allege that RN intentionally sought to harm her. G. Br. at 40.

[9] *Ballagh v. Fauber Enter., Inc.*, 290 Va. 120, 127 (2015) does not support RN's policy argument because the Virginia Consumer Protection Act (by statute) does not allow for punitive damages. Va. Code Ann. § 59.1-204(A). More importantly, RN overlooks (and does not dispute) the Virginia Supreme Court's convincing rationale for applying a preponderance of the evidence standard. *See* R. Br. at 41 n.12. RN also cites Standardized Civil Jury Instructions to support its burden of proof argument, *id.* at 38–39, 40–41, but juries have been instructed to use the preponderance of the evidence standard. *See*, *e.g.*, *Brody v. 1239 Kenyon ST NW LLC*, No. 2019 CA 002705 B, 2023 WL 7107658, at *1 (D.C. Super. Ct. Feb. 24, 2023).

40–41. But proving liability and the existence of actual damages is a *distinct* task *unrelated* to proving that RN's conduct justifies punitive damages.[10] The CPPA recognizes this distinction: after finding a violation, a consumer "may" (i.e., not automatically)[11] "recover or obtain" punitive damages. D.C. Code § 28-3905(k)(2)(C). A court, having found liability and actual damages by a preponderance of the evidence, can then determine if clear and convincing evidence justifies punitive damages.[12]

E. RN's Additional Arguments Against Ms. Galvin's CPPA Claims Fail

1. <u>RN's Reply About the Evergreen Screening Claim Does Not Excuse The Trial Court's Failure To Find That RN's Extracontractual Omissions And</u>

[10] Ms. Galvin agrees that she must prove by clear and convincing evidence that RN's conduct was outrageous or done in reckless disregard for her rights. G. Br. at 34 n.48.

[11] *See*, *e.g.*, *Dist. Cablevision Ltd. P'ship v. Bassin*, 828 A.2d 714, 733 (D.C. 2003) (affirming Superior Court's rulings that merchant was liable under the CPPA but there was insufficient evidence to uphold jury's punitive damages award); *cf. D.C. v. EADS LLC*, No. 2018 CA 005830 B, 2024 WL 3445767, at *4–6 (D.C. Super. Ct. Jun. 20, 2024) (awarding civil penalties based on unintentional CPPA violations where "conduct rose above the level of mere negligence").

[12] Making an argument that the Trial Court neither considered nor decided, RN argues that D.C. law "forbids the recovery of punitive damages arising out of negligence," so Ms. Galvin's claim for punitive damages implies she is alleging intentional violations of the CPPA. R. Br. at 38. But any analogy of unintentional violations of the *statutory* CPPA to causes of action for *common law* negligence is inapt. And even at common law, punitive damages may be awarded under causes of action sounding in negligence when there are "aggravating circumstances that would make punitive damages available." *Kim v. DP Cap. LLC*, No. CV 23-1101 (TJK), 2024 WL 4253168, at *7 (D.D.C. Sept. 20, 2024) (quoting *Doe v. De Amigos*, 987 F.Supp.2d 12, 18 (D.D.C. 2013)). Notably, the burden of proof for negligent misrepresentation is a preponderance of the evidence, *see* G. Br. at 33 n.43, which RN does not contest.

Misrepresentations Violated The CPPA

RN tries to create reasons for the Trial Court's ruling on the Evergreen Screening Claim.[13] It asserts (without record support) that Ms. Galvin unreasonably equates "evergreen screening" with "100 percent screening in perpetuity," while the "common understanding" of "evergreen screening" is a description of "the *types* of trees [rather than the purpose] to be installed." *See* R. Br. at 23 n.8, 34; *see also id.* at 19 (emphasizing the absence of "evergreen screening" (other than in the title) in the Contract).[14] RN then asserts the definition of evergreen screening it falsely attributes to Ms. Galvin is an "aspirational sentiment" that was not defined in the Contract and is "incapable of measurement," R. Br. at 23 (quoting *Meta Platforms, Inc. v. D.C.*, 301 A.3d 740, 759 (D.C. 2023)). None of this fabrication overcomes the fact the Trial Court did not conduct the proper "reasonable consumer" analysis. What it does show is RN's sense of impunity: commercially, RN held itself out to Ms. Galvin as providing "evergreen screening" but now asserts as a matter of law that "evergreen screening" has no discernible meaning.

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[13] RN disputes the §§ 3904(a) and (d) claims by focusing on whether the *Trees* provided "evergreen screening." R. Br. at 22–24. But Ms. Galvin also claimed that RN misrepresented the quality and characteristics of its services.

[14] The absence of a contractual guarantee cannot bar Ms. Galvin's CPPA claim. *Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1070–75 (D.C. 2008) (allowing CPPA and Condominium Act claims to proceed despite absence of contractual right); *Campbell v. Fort Lincoln New Town Corp., Inc.*, 55 A.3d 379, 383 (D.C. 2012) (explaining that the Condominium Act claim "had a non-contractual basis—namely, the condominium purchasers' statutory right[s]").

The record shows that RN's representation that it would provide "evergreen screening" would be understood by a reasonable consumer as installing "evergreen type trees so that the screening was year round." JA 731:3–4 (Musick); *see also* G. Br. at 9 n.10 (RN expert testifying that a consumer would only buy evergreen trees 25 to 30 feet tall "to screen"). A reasonable expectation of evergreen screening is not "incapable of measurement"; Dr. Dahle, an academic on biomechanics, *supra* p. 6 note 6, stated that "evergreen" refers to "how long [trees] hold their leaves," which should be "for multiple years," JA 927:21–25, and, for Magnolias, "three to five years," JA 928:22. The Trees began losing their leaves within two weeks after the installation.[15]

RN also argues that a reasonable consumer would not expect evergreen screening because the Contract "plainly says no warranty," G. Br. at 20, and Ms. Galvin admitted in a letter that she had accepted the risk of "an outcome where the [T]rees would not flourish," R. Br. at 21. But the "No Warranty" clause referred only to RN's offered replacement warranty, G. Br. at 9; *see also* JA 2291, 2295, 2300,[16] and the letter acknowledged that healthy, properly planted Trees may not be viable

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[15] Ms. Galvin alleged that the Trees *immediately* began to decline, brown, or shed their leaves and could never have provided the evergreen screening that matched RN's representations. *See*, *e.g.*, JA 2471, 2475; G. Br. at 12, 14 n.19, 15 n.22.

[16] Any holding that the Warranty precludes Ms. Galvin's CPPA claims was error as a matter of law because, absent an explicit waiver, this provision has no legal effect on a merchant's extra-contractual obligations. G. Br. at 34, 40–41.

over time, JA 1947–48. Neither imply that a reasonable consumer would expect RN to provide Trees that failed to comport with RN's representations.[17]

2. <u>RN's Reply Regarding the July Planting Claim Does Not Address the Trial Court's Legal Error and Raises Factually Incorrect or Legally Irrelevant Defenses</u>

Ignoring the CPPA's definition of materiality, which requires the application of the reasonable consumer standard, RN asserts a factual argument to support the Trial Court's finding under its fabricated "considerable discretion" test that the July Planting Claim fails because Mr. Proskine's email communicated RN's "ability to mitigate [the risks]." R. Br. at 26. Because RN ignores the reasonable consumer test, its proffered support is unavailing. The Trial Court's error regarding the summer planting claim was a legal error because it, too, ignored the "reasonable consumer" element of the materiality requirement. *Supra* pp. 6–7; G. Br. at 38–39.

RN's factual argument that attempts to contort two three-sentence emails to satisfy the CPPA's disclosure requirements fails. Mr. Proskine's email was not "factually accurate."[18] R. Br. at 29. The evidence showed that planting in July was not "optimal," *id.* at 7, because it caused the Project to face many additional obstacles

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[17] This is especially true with respect to the "No Warranty" clause, where Ms. Galvin declined the Warranty because RN's CEO encouraged her to decline it since "the risk of loss" was "less than the cost of the warranty." G. Br. at 9.

[18] Even a "literally true" statement is actionable under the CPPA if it creates a "false impression." *Earth Island Inst. v. Coca-Cola Co.*, 321 A.3d 654, 668 (D.C. 2024) (quoting *Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986, 990 (D.C. 1980)).

to its success resulting from the increased summer heat, G. Br. at 8 n.9. Ample testimony[19] shows a reasonable consumer would "attach importance" to the "existence or nonexistence" of the heightened risk caused by July planting "in determining his or her choice of action in the transaction." *Saucier*, 64 A.3d at 442. Mr. Proskine's supposed "professional belief," R. Br. at 7, does not overcome the Trial Court's error in disregarding that testimony. *See* G. Br. at 38–39.

Mr. Proskine's email also did not disclose *any* risk involved with summer planting.[20] G. Br. at 39 n.56. His assertion that the Magnolias "thrive" in July weather[21] does not address risks but omits that there were risks. He also stated that "[a]ll the other[] [Trees] will transplant well with proper care," but did not show what care by RN was necessary and what or how it would mitigate risks to ensure a

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[19] *See*, *e.g.*, JA 739:4–13, 766:23–25, 767:7–14 (Musick), 905:13–18 (Dahle), 1150:4–1151:3, 1153:16–19 (Mourlas); *see also* JA 832:11–25, 840:10–18 (Schwartz) (admitting that there are unique risks to planting in the summer).

[20] RN asserts it is "uncontested that the parties discussed the method of mitigating the risk of summer planting." R. Br. at 26. That is untrue, *e.g.*, JA 1515:18–1516:1 (Galvin), and RN provides no evidence the risk was discussed. RN also wrongly asserts the LSGs disclose the heightened risk. G. Br. at 39 n.56. Yet, irrelevantly, RN argues for the application of the LSG's "certain criteria" for *deciduous* trees to a case regarding *evergreen* trees. R. Br. at 27; JA 1830.

[21] RN also relies on a document related to transplantation of Magnolias within Georgia. R. Br. at 28. But the document does not state that summer is the "optimal" time to transplant Magnolias, much less transport them in July 800 miles from Florida to the District. *Cf.* JA 971:9–972:12 (Dahle). The fact that "[c]ontainer grown Southern Magnolias [of undisclosed size] *can* be planted successfully any time of year," JA 2041 (emphasis added), in Georgia does not mean there were no material risks.

successful transplantation. JA 2068. And Mr. Proskine's use of general *industry* terms did not "imply the existence of some risk," R. Br. at 27, because the email fails to delineate the required "care" to a reasonable *consumer* outside the industry.[22]

i. <u>RN's Post Hoc Argument That Ms. Galvin Assumed the Risks of July Planting Not Disclosed by RN Is Irrelevant to Her Statutory Claims and Also Without Basis in Fact or Law</u>

RN argues erroneously that the Court can affirm the Trial Court's ruling on the July Planting Claim because Ms. Galvin was aware of and assumed the risks. R. Br. at 30–31. That argument only affirms that there were risks to be disclosed. Otherwise, RN's fallacious arguments based on Ms. Galvin's purported insistence on a July installation and her purported refusal to listen to RN's Project manager only compound the Trial Court's error of focusing on Ms. Galvin's state of mind, as opposed to whether RN met the materiality requirements of the CPPA.[23] RN's

[22] Mr. Mourlas recognized that a reasonable *landscape contractor* could read the LSGs to permit summer planting under certain conditions, R. Br. at 28 (citing JA 1158:18–22 (Mourlas)), but he also asserted that a landscape contractor has a duty to disclose the heightened risks, especially in the context of a high-end installation like the Project, JA 1134:23–1136:6, 1145:15–25, 1154:7–13 (Mourlas).

[23] The emails RN points to as showing Ms. Galvin expressing urgency are from June 21, 2020 (JA 1903, 1905, 1907)—well *after* Mr. Proskine had, on June 6, assured Ms. Galvin that July planting was safe and "the biggest thing is to get things moving," JA 1901, and a June 12, 2020 Project proposal provided for a July installation, JA 2299. And Ms. Galvin's conversation with Mr. Burrill did not involve "the very details Galvin now claims Ruppert failed to discuss," R. Br. at 6; Mr. Burrill was RN's "logistics" person who "pretty much just coordinated everything," JA 244:21–3 (Burrill), so logistical scheduling and coordination was naturally the subject of their discussion, not arboriculture, G. Br. at 8.

request that this Court affirm based on facts *not* found in the Opinion[24] or present in the record is misplaced.[25]

RN contends that it can deny a consumer her statutory rights to material information simply by characterizing the consumer as difficult. To a significant extent, the Trial Court enabled that baseless conclusion. However, a discerning customer is still entitled to her rights under the CPPA. If RN had difficulty with Ms. Galvin, it should have said so. Instead, RN's CEO encouraged her reliance by stating that RN would do everything possible to assure success.

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[24] RN accuses Ms. Galvin of taking a "kitchen sink" approach to her appeal. R. Br. at 18. But RN deflects from the Trial Court's legal errors by raising (and misstating) irrelevant facts regarding post-transplant events. *Id*. at 13–14. Events *after* the early August defoliation cannot have caused that defoliation. Moreover, neither the video taken by Mr. Burrill, JA 1962, nor his testimony, JA 270–71, proves the water pumped from the pool cover was chlorinated. And Mr. Norris testified that that all the drained water flowed *away* from the Magnolias. JA 1089:21–1091:21. RN provided no evidence that the Magnolias were sprayed with "hydrochloric acid." JA 1944. And Mr. Seifers explained that anthracnose was "not a death sentence," JA 571:24, and its treatment would not "make the foliage come back that was already off the trees," JA 572:15–18.

[25] *See In re Nestlen*, 441 B.R. 135, 141 (B.A.P. 10th Cir. 2010) (To affirm on alternative grounds, parties must have had a "fair opportunity to develop the record and to address the ground on which [the affirming court] rel[ies].") (quoting *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1324 (10th Cir. 2007)). For example, RN asks this Court to affirm the ruling on the July Planting Claim because "summer planting is ubiquitous" and "the risk is not elevated in summer versus any other time of year." R. Br. at 30. These assertions are unsupported even by RN's own expert, *supra* p. 13 note 19, and the purported ubiquity of summer planting does not preclude the existence of obstacles to summer planting.

RN also argues for affirmance based on Ms. Galvin's purported knowledge or experience. But materiality turns on whether *a* reasonable consumer, not a *particular* consumer, would find the information material. *See* Order at 16–17, *D.C. v. Google LLC*, 2022 CA 000330 B (D.C. Super. Ct. Aug. 31, 2022).[26]

3. The Trial Court Erred as Matter of Law Regarding the Maple Claim

Contrary to RN's claim that Ms. Galvin challenges only factual determinations, R. Br. at 41, Ms. Galvin identifies *four* specific legal errors in the Trial Court's dismissal of the Maple Claim: (1) reviewing her claim as a "defense to a breach of contract" rather than as an omission of a material fact, (2) holding that CPPA liability depended on Ms. Galvin proving damages, (3) applying the incorrect burden of proof, and (4) substituting its judgment that a lab test is necessary for an expert's judgment that the tree died because RN cut roots within the critical root zone ("CRZ").[27] G. Br. at 41–42. RN provides no evidence showing it disclosed that

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[26] The Trial Court rejected previous iterations of RN's arguments. JA 50 (holding that Ms. Galvin's "vocational status and renovation experience" do not overcome her statutory right to truthful information); JA 1725:16–1726:23 (holding that the "experienced user exception" was "not appropriate" in this case).

[27] The Trial Court erred as a matter of law by rejecting Mr. Shaw's testimony solely because there was no positive lab test for Armillaria—a test that Mr. Shaw, within reasonable professional certainty, did not believe was necessary. G. Br. at 42; *see also McGowan v. U.S.*, 296 F.2d 252, 254 (5th Cir. 1961) (appellate courts do not defer to trial court's "credibility choices" or "selection[s] of two divergent choices" when those decisions are premised on legal error). To justify that error, RN states that Dr. Feather identified "an alternative theory" that the Maple died because its roots were too wet. R. Br. at 9. However, Feather admitted (1) the area around the

it would not prepare a tree protection plan but would be digging within the Maple's CRZ—which are both material facts.[28] *Id.* at 21–22; *see also* 894:20–895:10 (Dahle). Thus, RN committed a CPPA violation regarding the Maple.

4. <u>The Trial Court Failed to Address the Business Practices Claim</u>

The Trial Court neither addressed, nor analyzed under the requisite reasonable consumer standard, RN's misrepresentations of its supposedly meticulous and methodical business practices.[29] RN mischaracterizes the Business Practices Claim as a "rehash" of her "evergreen screening" arguments, R. Br. at 24, or premised on the LSG's "suitability" requirement, *id.* at 25, but they are distinct extracontractual assurances that RN would provide exceptional, expert service that RN fails to

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Maple was not frequently wet but rather was wet on the two occasions he visited the site, JA 1327:8–12, (2) maples can survive standing water, except over "prolonged periods," JA 1311:19–23, (3) he did not take any soil samples or perform any lab analyses, JA 1334:3–8, and (4) he neither understood the nature of the drain near the Maple nor knew whether water could pool around it. JA 1327:22–1328:25.

[28] "[A] consumer only needs to establish that the merchant . . . failed to make a material disclosure under § 28-3904(f)." *Frankeny*, 225 A.3d at 1005. RN's factual arguments about "invasive species" and the unlikelihood of its cutting critical roots are not "highly relevant fact[s]" to this determination, *see* R. Br. at 43, because a longstanding tree's importance to a consumer does not turn on whether it is invasive, JA 1353:7–10 (Feather); *see also* JA 1518:13–16 (Galvin), and both parties' experts agreed that RN dug within the Maple's CRZ, G. Br. at 21–23.

[29] *See* G. Br. at 5–6 (RN's CEO representing that its services were "conscious" and "meticulous"), 9 (RN's CEO assured Ms. Galvin RN would make every effort to assure the Contract's objectives and claimed a warranty on plant material was unnecessary), 12 (RN claimed it would do everything it could to facilitate the Trees' success). But RN failed to identify, assess, or disclose conditions that could jeopardize the success of the Project, *id.* at 10 nn.12–15, 14; DPFFCL at ¶¶ 60–62 (PDF Pages 14–15).

address.[30] Based on unrebutted evidence, this Court can rule these statements and omissions violated the CPPA. G. Br. at 42–43.

F. The Trial Court Erred In Granting RN's Contract Claim[31]

The Trial Court erred by ruling that RN fulfilled its contractual obligations without addressing RN's failure to meet four LSG requirements.[32] G. Br. at 46. While RN argues that it did not have to prove compliance with every LSG provision, R. Br. at 44, compliance with those four provisions is a pre-condition of fulfilling the Contract and to Ms. Galvin paying the Contract balance. G. Br. 44 n.63, 45–46.

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[30] RN states that it conducted one percolation test to analyze drainage from the planting holes, R. Br. at 25, but that analyzed only the soil's ability to drain properly, JA 457:25–458:15 (Burrill); it did not analyze the broader drainage or other material conditions identified by Ms. Galvin's experts, *see* G. Br. at 19. RN's assertion that its installation experience excuses it from the CPPA's requirements, R. Br. at 26, conflicts with its *own* Project manager's testimony that "each tree [is] an independent entity and each project [is] a different project," JA 374:22–24 (Burrill).

[31] Ms. Galvin reiterates that RN's violations of the CPPA constitute a recission of the Contract, and therefore RN cannot state a claim for breach of contract. G. Br. at 42–43 & n.61. Her breach of contract claims are defenses to RN's breach of contract claim, but she only asserts them if the Court affirms that there is a valid contract despite RN's violations of the CPPA.

[32] The Trial Court did not make "enough subsidiary findings to allow [this Court] to glean 'a clear understanding of the analytical process by which [its] ultimate findings were reached.'" *Eni US Operating Co., Inc. v. Transocean Offshore Deepwater Drilling, Inc.*, 919 F.3d 931, 936 (5th Cir. 2019) (quoting *Golf City, Inc. v. Wilson Sporting Goods, Co.*, 555 F.2d 426, 433 (5th Cir. 1977)). It states no rationale for denying the suitability claim. JA 1614:10–1615:23. It ignored the root pruning claim, that Ms. Galvin expressly pled, DPFFCL at ¶¶ 37 (PDF Page 10), 125 (PDF Page 26), and was tried, *see*, *e.g.*, JA 924:2–14 (Dahle), 391:8–392:12 (Burrill). And it did not decide if RN complied with the LSG's tree protection rules for the Maple. *See* JA 1737:23–1738:11.

The Trial Court did not rule on Ms. Galvin's repudiation claim, even though Ms. Galvin proved RN repudiated the Contract. *See* JA 2443–45; D.C. Code § 28:2-609(1). Even if RN's "performance was complete," R. Br. at 45, or "there were no ongoing performances available or required," *id.* at 49, the Trial Court was required to make that ruling in its Opinion, G. Br. at 48 n.66.

G. RN's Arguments About Ms. Galvin's Merchantability Claim Fail[33]

RN argues Ms. Galvin had to provide "specific evidence that the trees were defective at the time of delivery," R. Br. at 45, but provides no legal basis.[34] A reasonable consumer would expect the Trees to provide "evergreen screening" for a substantial, but not indefinite, period after installation, and not begin to deteriorate within two weeks of their planting. *Supra* p. 11. Since the Trees did not provide that screening,[35] they did not meet their ordinary purpose.[36] Rather than analyze a

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[33] RN's assertion that Ms. Galvin did not challenge RN's "goods" is wrong because the Trees (the subject of Ms. Galvin's repudiation and Merchantability claims) are "goods" under the UCC. *Burton v. Artery Co., Inc.,* 279 Md. 94, 97–99 (1977).

[34] *Pinney v. Nokia, Inc.*, 402 F.3d 430, 444 (4th Cir. 2005) does not state that "a plaintiff must prove a defect at the time the product leaves the manufacturer," and D.C. Code § 28:2-725(2) does not articulate a legal standard for an Implied Warranty of Merchantability claim. However, even if time of delivery was the moment to measure, Ms. Galvin proved that the Trees were defective at the time of transplant due to transplant shock (including transport shock). G. Br. at 20–21.

[35] RN claims the Trees were "of high quality" because they appeared as such upon installation, R. Br. at 46–47 & n.16, but appearance at installation does not establish the Trees' serve their ordinary purpose.

[36] *See Golden v. Den-Mat Corp.*, 47 Kan.App.2d 450, 488 (2012) (recognizing that since "veneers are, by their very purpose, cosmetic," failure to meet that purpose "likely would not meet standards of merchantability under the UCC").

reasonable consumer's expectations of the Trees' ordinary purpose, the Trial Court imposed an arbitrary, irrelevant standard on the claim—dead within one year—which was legal error. G. Br. at 47–48.

II. CONCLUSION

Ms. Galvin appeals for two principal reasons: to (1) correct the Trial Court's many errors of law that deny the CPPA and Implied Warranty of Merchantability's protections to D.C. consumers and (2) rectify Trial Court's decisions eviscerating those protections—an effort few consumers can afford in litigation with an industry leader that will benefit to the extent consumers are no longer protected.

For the reasons listed in Ms. Galvin's Initial and Reply Briefs, the Trial Court's Judgment should be reversed. This Court should find as a matter of law that RN (1) violated §§ 3904(a), (d), (e), and (f) of the CPPA and the Implied Warranty of Merchantability; and (2) that RN's contract claim failed because it (i) rescinded the Contract by not meeting those statutory requirements, (ii) repudiated its contract claim, and (iii) did not prove the elements of its contract claim. The case should be remanded to the Trial Court with directions to retry, with no biased lens, Ms. Galvin's damages claims, applying the preponderance of the evidence to her claim for actual damages and the clear and convincing standard to her claim for punitive damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 16th day of December, 2024, a copy of the foregoing was served via the Court's electronic filing and service system on all parties:

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