DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No: 24-cv-0058

Daisy Dixon	)
	) Civil Action below
on behalf of the General Public of the District of Columbia,	) 2022-CAB-003969-B
	)
Plaintiff/Appellant,	)
	)
v.	)
	)
John Paul Mitchell Systems,	)
Defendant/Appellee	)

REPLY OF PLAINTIFF/APPELLANT DAISY DIXON TO OPPOSITION OF JPMS TO OPENING BRIEF

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INTRODUCTION

Plaintiff-Appellant Daisy Dixon ("Dixon" or "Appellant"), by and through her counsel, individually and on behalf of the General Public of the District of Columbia, files this Reply to the Defendant's Opposition to Plaintiff's Opening Brief ("Opp). .

The most important reason why the trial court's decision is incorrect and should be reversed is that it would effectively eviscerate the CPPA in the common merchandising circumstances -- as here where some but not necessarily all iterations of a particular identical product contain unacceptable levels of contamination and others not. The court's rationale and holding, supported by the Defendant/Appellee, effectively requires consumers, in order to have standing to bring CPPA representative actions, to hunt throughout the District of Columbia for samples that, like those tested and found to be contaminated by Valisure, *match* the lot numbers of those previously tested and found to be contaminated. In these very common merchandising circumstances where some but not necessarily all iterations of the product are contaminated, no consumer would undertake such a likely fruitless endeavor. In these common circumstances, then, the court's requirement that in order to have standing the plaintiff must have "tested or evaluated" a bottle of the same lot number as those tested and found to be contaminated by the testing entity,would render the CPPA a dead letter.. . No such interpretation and purported application of the Act can possibly give effect to the Act – indeed, that interpretation and purported application of the Act would *violate* the Act. Yet that is exactly the practical effect of the trial court's decision and appellee's position embracing that decision. This is reason enough to find the trial court's rationale and holding erroneous. in Opposition to Ms. Dixon's Opening Brief. And tellingly, although Plaintiff has made this very point in both the case below, and in this appeal, neither the trial court nor Defendant has provided a satisfactory answer to this argument, let alone even address it. The point has gone entirely unmentioned by the trial court and the defendant.

Furthermore, although Defendant also overreads *Praxis*, misinterprets *Mostofi*, and falsely attributes to Plaintiff an argument that the product need not even be found in the District for the representative plaintiff to have standing, thereby opening the 'floodgates' on CPPA claims, even assuming these are close questions prompting reasonable disagreement, the fact remains that the trial court's rationale and holding would eviscerate the Act in these circumstances and thus flies in the face of the clear intent of the City Council in thus providing this right to District citizens to bring such representative actions.

Furthermore, although Defendant also overreads Praxis, misinterprets Mostofi, and falsely attributes to Plaintiff an argument that the product need not even be found in the District for the representative plaintiff to have standing (Opp. at 28), thereby opening the 'floodgates' on CPPA claims, even assuming these are close questions prompting reasonable disagreement, the fact remains that the trial court's rationale and holding would eviscerate the Act in these circumstances and thus flies in the face of the clear intent of the City Council in thus providing this right to District citizens to bring such representative actions.

I. COUNTERSTATEMENT OF SELECTED FACTS

The Plaintiff/Appellant wishes to challenge certain representation s made in the Defendant/Appellant's Statement of Facts.

The Defendant states, "The Valisure petition, relied upon by Ms. Dixon, explicitly states that the FDA has not set standards for benzene in cosmetic products, as opposed to drugs, and the harm to consumers in the context of dry shampoos has not been established." Cite. In fact, Plaintiff cites the 2 ppm standard for levels of benzene in drugs set forth by the FDA, and notes dry shampoo is applied to the body. See App 24-26

The Defendant further contends that "Ms. Dixon did not purchase the Product at Issue from a

store located in the District of Columbia. Rather, she ordered the Product at Issue from a store in California and had it shipped to her address in the District of Columbia. Opp. 5.

The Defendant is implying that because Ms. Dixon ordered the product online, somehow DC law might not apply to this matter. However, the Defendant does not suggest what other law might apply.

The Defendant contends that "Ms. Dixon did not allege that any amount of the Tested Lots reached the District of Columbia. . . Ms. Dixon did not allege that the Product at Issue contained shampoo product from the Tested Lots." Id. In fact, Ms. Dixon conceded that she cannot allege that the Product at Issue came from the Tested Lots." *Id.*

In fact, the Complaint alleges that the General Public would not have purchased the Product had the Defendant truthfully disclosed the possibility of the presence of benzene [1]

I. The Trial Court Erred When it Concluded that Ms. Dixon Lacks Standing To Assert Her Claims Under the CPPA.

A. The Grayson Case Demonstrates That A Person Need Not "Test" Products In "Variable Lot" Cases

Grayson v. AT&T Corp., 15 A.3d 219 (D.C. 2011) demonstrates the proper standard for determining what it means to "test" or "evaluate." In *Grayson*, the plaintiff was an industry insider who was aware from his prior employment in 1991 and 1992 that vendors of prepaid telecommunications calling cards were not, as required by DC law, escheating unused funds on these cards to the District of Columbia. In 2004, Mr. Grayson filed a complaint making these allegations.

[1] The Opening Brief contains an incorrect assertion that Ms. Dixon' "had [Ms/ Dixson] known of the contamination, [she] would not have purchased the [Product at Issue]," see Opening Brief at 27. This was an inadvertent error. In fact, the operative pleading states at para 64. "The DC General Public has been and will continue to be deceived or misled by Defendant's deceptive representations. The DC General Public has been damaged in its purchases of these Products and has been deceived into purchasing Products that it believed, based on Defendant's representations, were of a certain quality and had certain benefits, when in fact, they are and do not." App 28. .

Moreover, the *Grayson* Court noted that Mr. Grayson went from store to store purchasing cards:

> In Paragraph 23 of his complaint, Mr. Grayson lists retail chains at which defendants distributed prepaid calling cards and from which he purchased cards, including locations in the District.

Id. at 250, fn 23.

As the City Council did not pass the Representative Action legislation until 2000, it is clear Mr. Grayson made these purchases well after he left AT&T. Therefore, he had not been inside AT&T for ten years prior to the purchase of the cards as described. Thus, he could not have verified whether the cards he purchased were "defective." The *Grayson* court nonetheless ruled that he had Article III standing.

In short, the *Grayson* court made it clear that Mr. Grayson had standing as long as he purchased a prepaid calling card, whether AT&T had failed to escheat the funds on those particular cards that he purchased or not.

B. The Trial Court Incorrectly Held That the *Mostofi* Court Granted That Plaintiff Standing Based On His Own Testing

The Trial Court held that "[s]econd, the plaintiff in *Mostofi* alleged that he conducted independent testing in the complaint." App 40. To the contrary, as the relevant section of that opinion expressly stated, that court based the finding of standing expressly on Mr. Mostofi's review of third-party testing of the relevant olive oil at the University of California at Davis:

> Here, Plaintiff attempts to establish standing from purchasing one bottle of Pompeian from Defendant on January 3, 2011. **Defendant admits that Plaintiff bought one bottle of Pompeian on January 3, 2011**. Plaintiff admits that he bought "EVOO" (extra virgin olive oil) from Defendant after becoming aware of studies from the University of California – Davis, reported in June 2010 and April 2011 ("2010 Study" and "2011 Study," respectively), that concluded that certain brands of EVOO failed to satisfy international and United States Department of Agriculture ("USDA") standards for EVOO. Plaintiff admits to having purchased EVOO to test in comparison to the findings of the U.C. Davis

> studies of 2010 and 2011; this demonstrates Plaintiff's awareness of alleged defects with EVOO prior to filing suit. .
>
> Ultimately, neither the intent of Plaintiff nor whether he "manufactured" standing are dispositive of the question. No precedent establishes that the Court must apply a "good faith" standard to the actions of a plaintiff in order to find that the standing requirement has been met. Further, Plaintiff does not need to demonstrate that he suffered any physical, emotional, or monetary injury; an actual or immediate statutory violation is sufficient to establish an injury-in-fact. . .

Mostofi v. Mohtaram, Inc., No. 2011 CA 163 B, 2013 D.C. Super. LEXIS 12 (D.C. Sup. Ct., Nov.12, 2013) at 5-7 (Pagination of Copy in Addendum).

The court in *Mostofi* then found that the plaintiff satisfied the standing requirement on the motion for summary judgment, and thus implicitly based that conclusion on the plaintiff's purchase of the product and his reliance on the UC Davis test results showing impurity in the product – that is, tester standing. To conclude otherwise, when the *Mostofi* court expressly ruled on standing, would accept as reasonable the view that the court would find standing yet without even mentioning the plaintiff's testing of the olive oil as the basis for that finding, whereas the court discussed at some length the UC Davis results and the plaintiff's reliance on them. The court's extensive discussion of the UC Davis testing, by conventional rules of interpretation, would be superfluous unless the court included it to show the plaintiff's reliance on it as the basis for his standing.

The Opposition contends that Mostofi's Second Amended Complaint alleged that he performed specific independent testing on EVOO purchased in DC:

> " Unlike Ms. Dixon, the Mostofi plaintiff tested the specific bottle of product at issue. In the Mostofi plaintiff's operative complaint, under a section titled 'Plaintiff's Independent Testing of EVOO Purchased in D.C.', he alleged the specific independent testing that he completed on the specific bottle of extra virgin olive oil that he had purchased and from which his claim arose. . . Likely as a result of the Mostofi plaintiff's alleged independent testing, the Mostofi defendant did not argue that the Mostofi plaintiff lacked standing because he failed to test the specific bottle of product at issue."

Opp 31.

To the contrary, the four paragraphs discussing Mr. Mostofi's testing fail to name the expert who did the testing or any of the results, and they were not accompanied by an affidavit explaining the testing. The Mohataram defendant did not mention these paragraphs because they are patently inadequate to demonstrate that any testing was done, and the *Mostofi* court did not rely on them for that reason, relying instead on Mostofi's reliance on the UC Davis comprehensive testing.

As detailed below with respect to *Nelson, et al. v. John Paul Mitchell Systems*, No. 1:22-cv-06364 (N.D. Ill. Sept. 23, 2024), many such cases involve products where the defect is not uniform across all products. In such instances, to require a plaintiff to purchase products until a defective one is found completely undermines the purpose of a Representative Action; no plaintiff is going to make such a series of purchases.

The Opposition next cites *Praxis Project v. Coca-Cola Co*., No. 2017 CA 004801 B, 2019 D.C Super LEXIS 17 (D.C. Super. Ct Oct. 1. 2019) as the Trial Court interpreted it: for the proposition that Ms. Dixon tried to conflate the absence of a reliance requirement with the Defendant's claim that actual testing must be performed:

> [Ms Dixon's] reliance is misplaced as she conflates the lack of any requirement that she be actually misled by a misrepresentation with a lack of testing and ignores the ultimate conclusion that a plaintiff must conduct some sort of actual scientific or physical testing or evaluation of the product to assert standing pursuant to D.C. Code § 28-3905(k)(1)(B).

Opp 9.

The *Praxis* Court does not specify what "scientific or physical . . evaluation" might be, or how a plaintiff might conduct it. In fact, an expert would have to conduct such an "evaluation." The *Praxis* Court's rule in this regard flies in the fact of the express language of the statute.

However, the *Praxis* court did state correctly that "tester standing was created to allow consumers who offer to purchase, or actually purchase, products or services with the intent of determining whether those products or services are what they claim to be, to file suits against untruthful merchants" (quoting Committee Report Consumer Protection Act of 2012, Report on Bill 19-0581 (Nov. 28, 2012) (emphasis added), cited in the Order at 8).

Consistent with the clear legislative intent behind the statute, as reiterated by the Superior Court in *Praxis*, Dixon "bought the Product to test or evaluate it, within the meaning of the statute," as stated in the Opening Brief (OB) 25, see also, Amended Complaint, App 16, and thus satisfied the statute for purposes of standing.

The Order and Opposition Neglect The Fact That Section 390516(k)(1) Permits a Plaintiff to Either "Test" Or "Evaluate" the Product.

The Plaintiff/Appellant does not dispute the description of the "Traditional Standing Elements;" as set forth by the Defendant/Appellee. Notably, these elements do not require the plaintiff to "test or evaluate anything. However, the Defendant/Appellee admits that Plaintiff/Appellant may meet the Traditional Standing Elements via "tester standing." Opp at 21.

In order to minimize Plaintiff's alternative option to "evaluate, the Defendant uses the term of art "tester standing" to obscure the fact that Section 3905(k) (1) (B) or (C) simply state that the plaintiff must purchase the product at issue "in order to test" OR "evaluate" "qualities pertaining to use for personal household or family purposes". The Order takes advantage of this intertwining to bolster its holding that the Plaintiff must have conducted "scientific testing" in order to have standing. App 41-42.

C. The Language "Test or Evaluate" Makes Most Sense When Interpreted As Meant to Distinguish Section 3905(k)(1) from Section [consumer] Action.

The Plaintiff/Appellant's contention that the City Council inserted the dictate that the Plaintiff/Appellant "test" or "evaluate" the product for a different reason. In so inserting this

language, and stating a "person" may bring a (k)(1)(b) Action, the Council distinguished such a purchase from one by a consumer, under Section 3905(k)(1)(A). This is reasonable as the language "to test" makes no reference to any need for an expert. Even further, the language fails to specify when evaluation as opposed to testing is required. Far more specificity is necessary to require expert testing at the time of the complaint.

Not surprisingly, neither the Order nor the Opposition addresses this point.

II. Ms. Dixon's Construction of Tester Standing is Consistent with *Grayson,* the 2012 Committee Report and Subsequent Casea Interpreting The CPPA.

As the Defendant admits, the statute on its face does not "require that a plaintiff have tested the bottle she purchased in order to have standing." Opp 24. Instead, the Defendant contends that the legislative history requires that scientific testing be conducted. To the contrary, the legislative history's loose use of the terms "test" and "evaluate" makes the interpretation that such were inserted simply to distinguish an individual purchasing for the purpose of a representative action from a consumer purchasing for household use. *See, e.g, ChartOne. Julian Ford v. ChartOne, Inc.*, 908 A.2d 72 (D.C. 2006) As the *ChartOne* case demonstrates, for a purchaser to qualify for protections under the CPPA, the purchase must be for end household use.

Neither the Order nor the Opposition addresses the critical point in this case -- namely, that because Valisure found toxic levels of benezene in only random samples of the Product, it would be impractical for a consumer to go around looking for samples from the tested lots. There could be hundreds of lots. No consumer will do this. Hence, the Order's de facto holding that to satisfy the standing requirement, testing is necessary to find a random lot, is practical deterrent , if not actually an insurmountable obstacle, to any consumer seeking to put the Act into action for the sake of consumer safety. Consumers will not undertake such an endeavor, so the Act lies moribund and consumers suffer

in these typical merchandising circumstances, with irregular characteristics of different samples of the same product. That cannot be the intent of the Council in passing this legislation, for then it would be a dead letter in all situations replicating these common circumstances (i.e, testing lab finds samples from several lots contaminated, the manufacturer produces many lots, consumer buys product, cannot be held to the burden of checking the lot of sample after sample of the identical product on the shelf at one store and, if then unsuccessful, has to repeat same investigation at another store, and so on).

In sum, the trial court and appellee's position on standing would effectively eviscerate the CPPA in the common merchandising circumstances of some iterations of a particular identical product, such as here, dry shampoo, containing unacceptable levels of contamination and others not. As stated at the outset, thus to require consumers for representative actions under the CPPA to hunt throughout the District of Columbia for samples that *match* the lot numbers of those tested and found to be contaminated by Valisure, would render the CPPA a dead letter. No such interpretation and application of the Act can possibly give effect to it – indeed, it would violate the Act. Yet that is exactly the practical effect of the trial court's decision, and appellee's position embracing that decision.

Consistent with this reading as contrary to canons of statutory interpretation, neither the Order nor the Defendant/Appellee notes that a CPPA lawsuit based on a consumer purchase for the purpose of household consumption <u>do not require the consumer to "test" or evaluate"</u> in order to have standing. To require the individual to "test" the product prior to filing the complaint not only is inconsistent with the remedial purpose of the statute, but it would also make it more difficult to obtain standing than in a Consumer Action.[2]

[2] When the legislature wants expert opinion prior to the filing of a complaint, it makes such plainly clear. See Section 8.01-20.1 of the Code of Virginia, which applies to personal injury claims based upon a theory of health care malpractice and provides:

III. The Defendant Fails To Address Plaintiff's Argument That Evaluation Is Sufficient For the Filing of The Complaint and Any Expert Testing Need Only Be Submitted After Discovery, Consistent With The Superior Court Rules of Civil Procedure.

The statute does not state that the testing by an expert OR evaluation need be performed at the time of the complaint. To require testing by the plaintiff's expert at such time would be inconsistent with the standard for Consumer Cases and Rules 16 and 26.

The Defendant/Appellee does not address Plaintiff/Appellant's contention that to the extent that she must "test" the product, that can be done when expert testing is due as set forth above. Likewise, the Order fails to make any mention of such anywhere.

> Every motion for judgment, counterclaim, or third party claim in a medical malpractice action, at the time the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed.

(emphasis added).

Similarly, Section § 8.01-50.1 of the Code of Virginia applies to wrongful death claims based upon a theory of health care malpractice and provides:

> Every motion for judgment, counterclaim, or third party claim in any action pursuant to § 8.01-50 for wrongful death against a health care provider, at the time the plaintiff requests service of process upon a defendant, or requests a defendant to accept service of process, shall be deemed a certification that the plaintiff has obtained from an expert witness whom the plaintiff reasonably believes would qualify as an expert witness pursuant to subsection A of § 8.01-581.20 a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed.

(emphasis added).

In other words, if a plaintiff asserts a claim for medical negligence against a health care provider, whether that claim is a claim for personal injury or a claim for wrongful death, that plaintiff must have a qualified expert review the case in advance, and that expert must conclude that the defendant's health care provider did something wrong which caused the injuries or death at issue.

The Committee Report shows no such specific intent to deviate from the standard practice of requiring expert reports after discovery.

IV. Recent Case Law Is Consistent With the Plaintiff's Interpretation of Section 3905(k)(1).

As Defendant notes, the United States District Court for the Northern District of Illinois recently dismissed a claim brought against JPMS because the plaintiffs in that matter, who also relied upon testing by Valisure, failed to allege that, and failed to otherwise test to determine whether, the specific product that they had purchased contained benzene. *Memorandum Opinion and Order* at 5-6, *Nelson, et al. v. John Paul Mitchell Systems*, No. 1:22-cv-06364 (N.D. Ill. Sept. 23, 2024). Mr. Nelson, however, was a "consumer" who had to rely on representations in order to be defrauded, not a "person" who purchased the product to "test or "evaluate". The *Grayson* Court made it clear that the purpose of the new Section 3905(k)(1) was to permit plaintiffs to be proactive in stopping the sale of defective products or services:

> In explaining the rationale for the proposed amendments to D.C.Code § 28-3905(k)(1), . . the drafters appeared to focus on preventive enforcement through injunctive action, and disgorgement of unlawful 1 gains by merchants. They envisioned government coordination with public interest organizations as an additional funding source ("private and donated funds") for consumer protection enforcement. The drafters' explanatory rationale stated, in part:
>
> Currently it is not possible to bring a consumer action to stop illegal conduct until after a victim suffers injury. This amendment allows, for example, an organization that monitors fraud against the elderly to petition the court to stop a misleading and a fraudulent mailing in the public interest without waiting for a senior citizen to lose his or her life savings....
>
> This will also allow the government to coordinate with the non-profit and private sectors more efficiently.... Public interest organizations will be able to bring additional resources to consumer protection enforcement in the District, contributing private and donated funds that will advance public priorities without causing the expenditure of additional government resources.
>
> Proposed subsections (d) and (e) provide for injunctive relief and disgorgement of ill-gotten gain in representative actions, respectively. Although, injunctive relief presumably is available under current law pursuant to § 28-3905(k)(1)(e), this amendment codifies this presumption to eliminate any statutory ambiguity. Disgorgement has been recognized as an essential element of consumer protection law.

Id. at 240-241 (cleaned up).

Such action by plaintiffs would not be possible in variable lots cases if they had to engage in testing of tens, if not hundreds, of purchases in order to find defective ones.

A recent ruling by this Court, *Earth Island Institute v. The Coca-Cola Company*, demonstrates the proper standard for assessing standing .[3] The Earth Island Institute ("EII") brought a lawsuit under Section 3905(k)(1)(B(2)[4] which includes the same "test or evaluate" language as Section 3905(k)(1)(B). The *EII* Court assessed the claims of the plaintiff without any reference to any need for the plaintiff to test or evaluate anything. In short, Court deemed the Plaintiff's Complaint describing the claimed misrepresentations of the Defendant sufficient evaluation to confer standing on the Plaintiff.

[3] A copy of this case, which indicates it will be published, is included with the Addendum.
[4] "(C) A nonprofit organization may, on behalf of itself or any of its members, or on any such behalf and on behalf of the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District, including a violation involving consumer goods or services that the organization purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes."

CONCLUSION

For these reasons, this Court should reverse the Trial Court's ruling and remand with instructions the Trial Court should reinstate the case and discovery should commence.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I hereby certify that that I filed the foregoing Brief/ Reply via the Court of Appeals' efiling system, and confirmed that the system indicated a copy had been efiled with:

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Today

Wednesday, October 30, 2024

/s/ Thomas C. Willcox
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