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)

APPELLEE'S BRIEF

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Dated: November 25, 2024

RULE 28(a)(2) STATEMENT OF COUNSEL

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These representations are made in order that judges of this Court, *inter alia*, may evaluate possible recusal.

RULE 26.1(a) CORPORATE DISCLOSURE STATEMENT

Appellee Ruppert Nurseries is privately held, does not have any parent company, and no publicly held corporation owns 10% or more of its stock.

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2. Did the trial court properly deny Galvin's claims under the Consumer Practices Protection Act ("CPPA") in light of the undisputed facts that Galvin was advised by her own personal landscape team regarding the project, had previous experience installing trees during summer, insisted on a July installation, refused to listen to Ruppert's project manager, and disclaimed the offered warranty?

3. Did the trial court properly apply the clear and convincing evidence standard to Galvin's CPPA claims in light of her argument that Ruppert's actions were willful and outrageous, and merited punitive damages?

4. Did the trial court properly resolve the scattershot issues that Galvin raised in her brief, including her contract claim, the alleged breach of the implied warranty of merchantability, and the claim that the trial court failed to resolve all material issues?

5. Did the trial court abuse its discretion in denying Galvin's post-trial motions, which raised the identical arguments the trial court had just rejected?

COUNTER-STATEMENT OF THE CASE

Ruppert filed suit on October 22, 2020 for breach of contract, seeking payment for the installation of several large trees on Galvin's property. Galvin filed a counterclaim on December 22, 2020 alleging breach of contract, breach of good faith and fair dealing, and a claim arising under the CPPA. Galvin twice amended her counterclaim, the final amendment on July 22, 2021 to add a separate CPPA claim in connection with the death of another tree in her yard, a Norway Maple, that was not the subject of the contract with Ruppert.

The Honorable Donald Tunnage presided over a bench trial conducted June 5-8, 2023, June 12-14, 2023, and August 8, 2023. After extensive post-trial briefing, on December 7, 2023, the Court entered judgment in Ruppert's favor, in the principal amount of $264,350.00 with an additional $313,821.15 in attorneys' fees. As indicated in the Order and Judgment, the Court further entered judgment against Galvin and in Ruppert's favor on Count I of her Counterclaim (breach of contract), Count II (breach of duty of good faith and fair dealing) and Count IV (violations of CPPA). The Court entered judgment in Galvin's favor, and against Ruppert, on Count III (breach of implied warranty of merchantability) as it related to only one of the six (6) trees at issue. On that basis, the Superior Court arrived at the $264,350.00 principal balance awarded to Ruppert by deducting the $2,900.00

cost allocated to one of the trees at issue and adjusting the interest calculation, from the full amount of the remaining payment.

Following the entry of judgment on December 7, 2023, Galvin timely filed a Motion for Reconsideration and Other Relief, pursuant to Superior Court Rules 52 and 59. On June 27, 2024, the Superior Court denied the Motion for Reconsideration and Other Relief. This consolidated appeal followed.

COUNTER-STATEMENT OF FACTS

A. GALVIN AND HER PERSONAL LANDSCAPE TEAM EMBARK ON A SUMMER TREE INSTALLATION PROJECT.

Elizabeth Galvin is a retired lawyer who lives on a multi-acre property at 4831 Indian Lane, Washington, D.C. 20016 ("the Galvin Property"). In March 2020, Galvin hired Holt Jordan, a landscape architect, to advise her on a new project: the installation of multiple large mature trees in her yard to complement her existing elaborate landscaping. (JA 1886) Mr. Jordan was a new addition to Galvin's personal landscape team, which included her long time arborist, a dedicated property manager, and a professional groundskeeper. (JA 138, 1386)

As early as April 2, 2020, Galvin described herself as "most eager to proceed" with the project. (JA 1439) In turn, Holt Jordan recommended Joe Proskine at Ruppert, who was an experienced arborist, with a particular expertise installing the types of large trees that Galvin and her landscape architect desired. (JA 137-38) Proskine and other members of Ruppert were in near constant

communication with members of the Galvin Team throughout the spring and early summer of 2020 about every aspect of the project, including details surrounding the timing of the installation, the types of trees and where they were coming from. (JA 1892, 1894, 1899, 1901, 1907-08, 1917, 1919) Beyond the lengthy and comprehensive email traffic, which included the frequent input of Shawn Siefers (Galvin's arborist), Holt Jordan accompanied Joe Proskine on numerous site visits to local nurseries to help select the trees. (JA 1899) In most instances, the Galvin Team, *not Ruppert*, made crucial decisions, including instructing Ruppert where on the Galvin Property to install the trees. Indeed, Jordan, *not Ruppert*, created a detailed plan showing the specific planting locations for each tree. (JA 1038-39, 2073) Galvin conspicuously omits any reference to her team and its lock-step coordination with Ruppert, when not overtly directing it, during the entire process.[1]

Given the size and weight of the six trees that the Galvin Team ultimately settled on, where Holt Jordan directed Ruppert to install them, and how Galvin's house and property are situated, the installation required the use of a large crane to

[1] Judge Tunnage made specific factual findings about Holt Jordan's role in the process (JA 1730) ("Mr. Jordan designed the plan and identified the planting and location of the [Galvin] property to install the trees that were ultimately selected. Prior to transplanting and while at the nursery, the Magnolia trees were personally inspected by Mr. Jordan on behalf of the defendant, Ms. Galvin."). An illustrative example of Jordan's role in the tree selection process is found on JA 1919, an email to Galvin in which he refers to two of the trees that he, not Ruppert, selected.

hoist the trees over the house and into position. (JA 146) (Ruppert witness noting that one of the trees weighed 15,000 pounds) (JA 1858, 1860, 1862, 1866, 1868)

B. GALVIN INSISTS ON A JULY INSTALLATION AND REFUSES TO ENGAGE ON PROJECT SPECIFICS.

Throughout the spring of 2020, Galvin, *not Ruppert*, insisted on a July installation because she wished to use the crane, not only to install the six new trees, but also (1) to install a new large electric generator; and (2) to remove a very large cherry tree that had partially fallen, which Galvin reasonably believed was a danger to her and her neighbors' property. (JA 1903, 1905) Galvin repeatedly pressured Ruppert throughout June 2020 to install the trees as quickly as possible. (JA 1907) ("Because I was just advised about the vulnerability of the large cherry – and the possibility of serious damage the tree will do to our neighbor's, and our own, property, we must continue the week of July 13.") [2]

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[2] *See also* (JA 1903) ("we are aiming for the week of July 13 in the face of recent news about the need to remove a large tree whose stability has been compromised to an urgent state."); (JA 1905) ("I have just learned about the need to remove a very large tree with the planned crane; the stability of the tree has apparently degraded to the point where time is now a serious concern."); (JA 1910) ("The reasons we are using the crane again this year is similar but the significance and urgency has recently changed...[r]emoving the cherry tree has now amplified the timing and importance of the project as the cherry tree is so large that it cannot be taken down by manual means without a substantial crane."); (JA 1921) ("... as among the removal of the very large hazardous cherry tree, to the replacement of our existing generator with a new model, and the installation of several large trees to fill holes where others have been lost, we are undertaking a major project on our property.").

Galvin's urgency is further reflected in the testimony of Howie Burrill, the Ruppert Project Manager, who had 42 years of experience installing trees, and who was in charge of the project logistics. (JA 243) Mr. Burrill testified that Galvin kept interrupting him as he tried to explain the details of the project (the very details Galvin now claims Ruppert failed to discuss) both because she had previous experience with craning trees into her yard and already understood everything, and also because of the expertise of her landscape team:

> And I tried to explain some things **and she kept cutting me short** and the conversation went downhill, it seemed. **She kept cutting me short** to the point where she said, you know, she needed it done. **She needed it done right away. She wanted it – us to start the next week and have the crane in there**. And I explained to her that that couldn't happen because I had over a week's worth of hand work to do in preparation for the crane. She seemed very upset by that. She went to the – the – she was holding her phone. She was waving her phone at me. "Maybe I need to make a phone call."
>
> I was cut short in conversations with Ms. Galvin, **that she was comfortable and she'd put trees there before and she obviously expressed that she knew more than me...she didn't seem willing to have a conversation to sort things out**.

and

> The first meeting going over everything, **she mentioned [that] she'd been involved in craning trees. [That] [s]he had a landscape architect. [That] [s]he had a property manager. [That] [s]he had an arborist, a gardener. [That] [s]he was very familiar with the process. And she seemed like she didn't really want to hear what I had to say**.

(JA 247-248, 370) Burrill further testified that Galvin "wanted to move on it as quickly as possible, and to the point where she wanted me to move quicker than

was realistic....” (JA 252) Galvin punctuated her dismissal of Burrill’s attempt to explain by gratuitously reminding him that she was a lawyer. (JA 248) (“...She mentioned 10 to 12 times ... in those conversations that she was an attorney. Even went to the point to mention she’d been an attorney since 1977, 1978.”).[3]

C. THE PARTIES SPECIFICALLY DISCUSS THE SOUNDNESS OF A JULY INSTALLATION.

Within the lengthy and comprehensive email traffic between Galvin and Ruppert, Galvin posed the following question -- not to Joe Proskine, who was cc’d -- but to her landscape architect, Holt Jordan:

> Should I be concerned about the timing re the new heat, etc.? I don’t want to rush decisions but I am mindful that the replanting window is closing somewhat. (JA 1898)

Joe Proskine wrote to Holt Jordan and expressed his professional belief that July was an *optimal* time to plant Magnolias, stating: “[a]s far as time of planting, this is the time we want to install the Magnolia [sic] to allow most time to root. Others will do fine with summer digging and proper maintenance. We would want to make sure that irrigation is up and running as we finish.” (JA 2065)

Then, responding directly to Galvin the next day, Proskine wrote:

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[3] Galvin witness Bill Pitchford corroborated Burrill’s testimony about Galvin’s prior experience, as he testified that Galvin had previously installed trees by crane at least two other times prior to the Ruppert installation, at least once during summer. The first time, four, possibly more, of the 12 trees did not survive. (JA 634) Mr. Pitchford testified that the second time was during the middle of summer and at least one those trees failed to thrive and possibly died. (JA 636-37)

> Timing of this work does not concern us. The Magnolia's [sic] thrive in this kind of weather. **All the others will transplant well with proper care before and after planting.** The biggest thing is to get moving. At this point we are probably into July before the trees go in the ground. (JA 1901)

Galvin testified that this was "an unequivocal assurance" that a July installation was safe. (JA 1516) Proskine copied Galvin's arborist and Jordan on this email and neither expressed any concern about planting the trees in July.[4]

D. GALVIN'S CLAIMS RELATING TO THE NORWAY MAPLE.

Galvin first claimed in July 2021 that a Norway Maple in her landscape garden died (or was dying) because of Ruppert's negligence. Galvin alleged that by using a stump grinder to remove a large Spruce tree that was approximately 15 feet from Norway Maple, to make room for the new Cryptomeria that Galvin desired, Ruppert severed the roots of the Norway Maple. (JA 1870, 1872) Significantly, the District regards Norway Maples as an invasive species and exempts contractors from erecting tree protection plans around them (JA 1317-18), a fact that Galvin's expert testified that he did not know. (JA 1286)

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[4] Galvin alleges that Ruppert violated the CPPA by failing to warn of the risks of planting large trees during summer. (App. Br. at 6, 39) Attempting to secure a lower burden of proof, Galvin insists that this omission was unintentional (*Id.* at 32) But if Ruppert unequivocally assured her of a fact that Galvin claims is false, *i.e.*, that large trees can be planted safely in summer, Galvin is claiming an *intentional* misrepresentation that is subject to the clear and convincing standard.

At trial, there was a classic "battle of the experts" presenting conflicting testimony about what caused the Norway Maple to die. Galvin's explanation was that Ruppert severed critical roots allowing a fatal fungal infection to take hold. (JA 1229) Ruppert's expert, however, testified to an alternative theory: that the Norway Maple died due to "wet feet," that is, having its roots soaked in water. (JA 1311) This resulted from a design choice Galvin made around 2018 when she had commissioned the installation/upgrade to an underground drainage pipe that deposited water directly to the base of the Norway Maple, which was covered by large rocks to manage the overflow. (JA 2052, 2054, 2056) Ultimately, Judge Tunnage weighed the evidence and in a lengthy discussion, resolved the disputed issue in Ruppert's favor, finding that Galvin did not establish that Ruppert's actions caused the Norway Maple to die. (JA 1737-39)

E. GALVIN DECLINES A WARRANTY.

Galvin and Ruppert executed the contract at issue on July 1, 2020. (JA 1818-24) The Contract required Ruppert to install six (6) trees, a Dogwood, a Hemlock, a Cryptomeria, and three (3) Southern Magnolias. Ruppert harvested the Dogwood, Hemlock, and Cryptomeria locally, and the three Southern Magnolias were sourced and transported from a nursery in Florida that Ruppert had used in the past. (JA 1729-30) The Magnolias were containerized, meaning that they were grown in containers before ground installation. (JA 148) The nursery operator

testified that he had previously shipped the specific species of magnolias transplanted onto the Galvin Property in summer and that those transplants have been successful. (JA 2153) Upon delivery of the magnolias, Jordan inspected them and reported to Galvin that "[t]hey really are beautiful." (JA 1730, 1926)

The Contract price was $345,800 and required a 50 percent deposit at signing ($172,900.00), which Galvin paid. (JA 1818) The contract stipulated that "[a]ll work shall be in accordance with the Landscape Specification Guidelines for the Baltimore Washington Metropolitan Area (5th Ed.)." (*Id.*) (hereinafter "LSG"). Galvin conceded that she did not review the LSG prior to entering the contract. (JA 1426) ("Q. And ma'am, you reviewed those guidelines closely before you signed the contract, correct? A. I did not. I discussed them with – I did not.").

In addition, the Contract *required* Ruppert to "coordinate with arborist, property manager, crane company, and electrician as needed to complete work in time allotted." (JA 1820) At trial, Galvin conceded that she never informed Ruppert of any limitations on the authority or agency of her arborist Shawn Siefers, or landscape architect, Holt Jordan. (JA 1430-31) More significantly, Galvin conceded that she declined a warranty indicated by the plain language "No Warranty" twice on its face. (JA 1819) ("No warranty on plant material supplied and installed by Ruppert Nurseries as part of this contract.") Moreover, Galvin "acknowledge[d] that plants are being planted into conditions that are considered

low light conditions. Lower branches and shaded sides of trees will thin out overtime [sic] in these situations." (JA 1820)

As Judge Tunnage correctly determined, the Contract "did not provide a metric for defining an end result or anything outside of the delivery and installation of six trees." (JA 1732) In correspondence that preceded the lawsuit, Galvin's lawyer Paul Cunningham conceded this very point by acknowledging that Galvin understood and assumed the risk that the trees might not thrive.

> Ruppert agreed to provide viable trees, make all required provision for planting, and planting them so that, with proper care and barring the unforeseeable, they would remain viable, Ms. Galvin agreed to pay for both **and took the risk that healthy trees properly planted, might not flourish over time**. (JA 1947-48)

F. GALVIN ACCEPTS THE TREES, CELEBRATES THEIR BEAUTY, AND HER TEAM ASSUMES THEIR CARE.

Ruppert installed the six trees on July 21, 2020. Galvin's arborist (Shawn Seifers), landscape architect (Holt Jordan), Property Manager (Garth Norris), and groundskeeper (Nancy Sainburg) attended the installation and none of them expressed any concern about the planting. (JA 1467-1469)[5] Contrary to Galvin's

[5] One of the most puzzling aspects of Galvin's claims is her acknowledgement that her landscaping team stood by silently and watched the installation, after participating and passing on every major decision involved in this project (including the types of trees and the timing of the project) even though she now claims that the installation, *per se*, constituted a violation of arboreal norms, so obvious and so egregious, that its non-observance merits punitive damages.

claims that her threats of litigation only began "during and after" the installation (App. Br. at 36), Galvin threatened to sue Ruppert *before* the trees were in the ground (JA 1915) ("[w]e might have to go to court and all the while the cherry tree is there.") (JA 1464) ("Q. Ma'am, you would agree with me that Wednesday, July 15th, was six days before the trees go in the ground, correct? A. Yes. Q. And you're already contemplating their liability, yes or no? A. Yes, in that context."). Thereafter, Galvin invited her long time litigator to the installation. (JA 1468)[6]

Judge Tunnage considered ample record evidence of the contemporaneous observations of Ms. Galvin and her landscape architect, Holt Jordan, expressing elation with the how the trees appeared when installed. (JA 1930) ("The trees do look splendid, Holt"); (JA 1932) ("I am so happy with the trees! I love that we don't even notice them and they seem to look as they've always been there"); (JA 1934) ("The trees do look wonderful and Annie's first comment was that the

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[6] Judge Tunnage recognized the strangeness of inviting *a litigator* to a *tree installation*, and noted that this fact, along with Galvin's arborist abandoning care of one of the trees, citing the inevitability of litigation, was evidence that Galvin never intended to pay Ruppert. (JA 1735) Galvin complains that this was an "erroneous inference." (App. Br. at 29) But Galvin misunderstands something fundamental: trial judges draw inferences based on the evidence and appellate courts may not disturb them. *Augustin v. U.S.*, 240 A.3d 816, 823-24 (D.C. 2020) ("In bench trials, we thus are deferential to the prerogatives and advantages of the trial judge in...drawing reasonable inferences..."). Galvin's extended attempt to re-argue the evidence on why she invited a *litigator* to a *tree installation* (App. Br. 36, fn 50) further reflects this misunderstanding.

Cryptomeria looks as if it had been there from the start....[e]veryone loves the color of the Magnolia...and the size is beyond anything I imagined.").

Ten days after the installation, on August 1, 2020, Ruppert handed off all maintenance responsibilities for the trees to the Galvin Team. (JA 1823) At the time of the handoff, all of the trees were in excellent condition and the remaining $172,900 of the contract price became due. (JA 1819) ("A 50% deposit due at contract signing with the balance due upon completion.") About a week after the handoff, Galvin complained that the Magnolias were shedding leaves (JA 1936) and thereafter refused to pay any of the remaining balance.

There were multiple competing explanations for the shedding of the Magnolia leaves, including unusually heavy rains in early August 2020 from the remnants of Hurricane Isaias, and also in September 2020 from unrelated storms that caused water to pool around certain trees. (JA 1055, 2044, 2046) There was additional video and testimonial evidence that one of the many vendors servicing the Galvin Property used a pump to remove chlorinated pool water from a pool cover and discharged the water so that it flowed to the Magnolias. (JA 1962) (JA 270-71) Contemporaneous text messages exchanged between Galvin and her team further indicate that a pool vendor caused an "extreme amount of overspray" of hydrochloric acid that reached plants near the pool. (JA 1944) Galvin referred to this as a "horrible confluence of water/pool/trees." (*Id*.) In addition, Galvin's

personal arborist admitted to withholding treatment for a curable foliar disease affecting two of the three Magnolias because of pending litigation. (JA 572) Judge Tunnage specifically referred to this evidence in his decision. (JA 1734)

STANDARD OF REVIEW

After a bench trial, questions of law are reviewed *de novo*. *Anderson v. Abidoye*, 824 A.2d 42, 44 (2003). However, "[w]hen the trial court sits as fact-finder, its factual findings are accorded considerable deference and are reviewed under a 'clearly erroneous' standard. *Technical Land, Inc. v. Firemen's Ins. Co. of Washington, D.C.,* 756 A.2d 439, 443 (D.C. 2000) (citations omitted); D.C. Code § 17–305 (1981) ("the judgment may not be set aside except for errors of law unless it appears that the judgment is plainly wrong or without evidence to support it"); *Lynch v. Ghaida*, 319 A.3d 1008, 1014 (D.C. 2024) ("findings of fact may be overturned only when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

With respect to the weight afforded the trial evidence, the Court of Appeals "may not substitute itself for the trier of fact who heard, received and weighed the evidence." *Murray v. District of Columbia Dept. of Employment Services*, 765 A.2d 980, 984 (D.C. 2001); *Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1063 (D.C. 2008) (Court of Appeals must "take care to avoid weighing the evidence, passing on the credibility of witnesses or

substituting [our] judgment for that of the [trial court] or jury.") (citations omitted); *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 687 (2021) ("[i]f the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance."). *See also Bandsa v. Wheeler*, 995 A.2d 189, 202 (D.C. 2010) (holding that in a non-jury trial, "the evidence presented to the trial court must be viewed in the light most favorable to the prevailing party.")

In addition, this Court has held that "it is well settled that an appellate court may affirm a decision for reasons other than those given by the trial court, provided there is a sufficient evidentiary basis and no procedural unfairness to the parties." *U.S. v. Pope*, 313 A.3d 565, 573 (D.C. 2024); *Segreti v. Deiuliis*, 193 A.3d 753, 760 (D.C. 2018) ("[t]his court may affirm a decision for reasons other than those given by the trial court.").

The standard of review for denial of a Rule 52 and/or Rule 59 motion is abuse of discretion. *Jones v. National R.R. Passenger Corp.*, 942 A.2d 1103, 1106 (D.C. 2008) ("we review a trial court's denial of a motion for reconsideration for an abuse of discretion."); *Queen v. D.C. Transit System, Inc.*, 364 A.2d 145, 148 (D.C. 1976) ("[w]hen reviewing the trial court's denial of a motion for a new trial, a reversal is not warranted unless there was an abuse of discretion.").

SUMMARY OF ARGUMENT

Galvin's appeal is a naked attempt to retry the case. Despite compelling record evidence supporting the judgment, and despite this Court's limited and deferential role in evaluating that evidence, Galvin argues that Judge Tunnage committed reversible error merely because he did not agree with her, including the claim that he relied on the wrong evidence and/or did not give her evidence the appropriate weight. Her appeal thus lacks a legal basis. *Fort Lincoln Civic Ass'n, Inc.*, 944 A.2d at 1063 ("In our review, we must take care to avoid weighing the evidence, passing on the credibility of witnesses or substituting [our] judgment for that of the trial court...") (internal citations omitted).

As set forth below, Judge Tunnage properly weighed and credited the overwhelming record evidence supporting his opinion and judgment. First, Ruppert proved that Galvin breached the contract by failing to pay Ruppert "upon completion" of the project. The evidence supporting this part of the opinion and judgment is undisputed: Galvin concedes she did not pay the balance owed after Ruppert installed the six trees. Having waived any objection to the amount of (1) the principal balance; (2) interest; and (3) Ruppert's attorneys' fees; the judgment in Ruppert's favor must be affirmed. Galvin further concedes that she declined a warranty, which eliminates any blame for her apparent dissatisfaction.

Second, the record overwhelmingly supports Judge Tunnage's opinion and judgment dismissing Galvin's counterclaims, including her cynical and specious claims arising under the CPPA, which she wields both to undermine Ruppert's right to recovery, but also in support of her own affirmative claims for damages. The evidence at trial showed that Galvin, a highly sophisticated retired and litigious lawyer, with previous experience planting large trees in summer via crane, and advised in this transaction by a team of experts (including a landscape architect, an arborist, and a gardener), *declined* the warranty Ruppert offered her, and thereby assumed the risk the trees would not thrive. Worse still, Galvin's lawyer admitted in writing that Galvin assumed that precise risk. (JA 1947-48)

Her main complaint, and the thrust of her CPPA claim -- that Ruppert failed to her warn her of the (purported) material risk of planting large trees in summer -- does not survive basic scrutiny. Prior to installation, Galvin asked her own landscape architect if summer planting presented a risk, and Ruppert representative Joe Proskine responded in substance that any risk could be mitigated with proper care and maintenance. Judge Tunnage made a specific finding of fact that Ruppert disclosed the risk and its belief that it could be mitigated. (JA 1745) Galvin did not argue, and cannot show, that this finding of fact was clearly erroneous. *Lynch,* 319 A.3d at 1014 ("findings of fact may be overturned only when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake

has been committed."). In ruling against Galvin, Judge Tunnage properly applied the clear and convincing standard, which Galvin argued her way into by claiming Ruppert acted willfully and by seeking punitive damages.

Galvin's remaining assignments of error fail. First, Galvin's argument that the Court erred by not ruling in her favor on her breach of contract claim is simply an attempt to secure another bite at the apple. Second, Galvin's claim that Judge Tunnage erred by finding that Ruppert did not breach the implied warranty of merchantability fails because of substantial record evidence showing that at the time of delivery, the trees were fit for their ordinary purpose. Third, Galvin's claim that Judge Tunnage failed to resolve every kitchen sink factual and legal issue she raised fails because "the Court is neither required nor encouraged to assert the negative of each rejected contention as well as the affirmative of those which they find to be correct." *U.S. ex rel. Morsell v. Nortonlifelock*, 651 F.Supp.3d. 95, 113 (D.D.C. 2023) (cleaned up). Finally, Judge Tunnage did not abuse his discretion in denying Galvin's post-trial motions seeking reconsideration and/or a new trial. Galvin used those motions as a transparent and improper attempt to reargue the very same legal and factual issues she had just lost.

ARGUMENT

In a comprehensive opinion comprising 28 transcribed pages (JA 1723-51), Judge Tunnage made detailed findings of facts and properly applied them to the

law. The Court should affirm his decision, which followed nine (9) days of trial and extensive post-trial briefing.

A. JUDGE TUNNAGE PROPERLY DETERMINED THAT GALVIN BREACHED THE CONTRACT BY REFUSING TO PAY THE BALANCE OWED.

Judge Tunnage correctly found that the Contract "did not provide a metric for defining an end result or anything outside of the delivery and installation of six trees." (JA 1732) He also noted that the Contract: "required [Ruppert] to install six trees and then to have a transfer of maintenance, and then, also, a monitoring period of six weeks [and that] [a]ll of those things happened." (JA 1733) He also determined, correctly, that Galvin did not fulfill her end of the bargain: payment. (*Id.*) Galvin does not argue, nor could she, that these factual findings are "clearly erroneous" as she would need to show reversible error. *Lynch*, 319 A.2d at 1013 ("[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

Rather, Galvin avoids the issue, and spends much of her brief belatedly attempting to graft onto the Contract an absent provision – a guarantee that the trees would provide screening that she found satisfactory into perpetuity – and to delete one that does: the express exclusion of a warranty. Indeed, as Galvin argues, her alleged "purpose" of obtaining "evergreen screening" trumps the express omission of a warranty. But this turns bedrock principles of contract

interpretation on their head: District of Columbia law requires an *objective* analysis limited to the expressed intent of the parties, not some unstated "purpose." *Tauber v. Quan*, 938 A.2d 724, 729 (D.C. 2007) ("the written language embodying the terms of an agreement will govern the rights and liabilities of the parties, regardless of the intent of the parties at the time they entered into the contract...") (internal citations omitted); *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 190 (2009) ("No matter what the [parties] may have had in mind, the court must construe the parties' rights on the contract as written.") (internal citations omitted).

Here, Judge Tunnage's finding that the terms of the contract "did not provide a metric for defining an end result outside of the delivery and installation of six trees" may not be disturbed on appeal. *Chang v. Louis & Alexander, Inc.*, 645 A.2d 1110, 1115 (holding that trial court, as trier of fact, resolves meaning of ambiguous contracts, and its determination will only reversed if it is plainly wrong or without evidence to support it). This is all the more true when, as here, the contract is not ambiguous: the Contract plainly says no warranty, ruling out any interpretation that includes a promise about the future success of the trees. Moreover, Galvin confirmed in writing that she assumed "the risk that healthy trees properly planted, might not flourish over time." (JA 1947-48) Thus, while Galvin complains that the Court erred by failing to examine "the expectations of a

reasonable consumer in Ms. Galvin's position..." (App. Br. at 38), Galvin admitted that her expectations included an outcome where the trees would not flourish.

B. JUDGE TUNNAGE PROPERLY DENIED GALVIN'S CPPA CLAIMS.

In *Pearson v. Chung*, 961 A.2d 1067 (D.C. 2008), this Court held that CPPA claims are not "determined solely by the customer, without regard to the facts or any notion of reasonableness." *Id.* at 1075. Judge Tunnage properly applied this holding to find that Galvin's frustration did not overcome the plain language of the Contract that required Ruppert to install trees, not to provide "evergreen screening" which is the "sort of general assertion, incapable of measurement, [that] is unlikely to lead reasonable consumers astray [and that] cannot be the basis for a CPPA violation." *Meta Platforms, Inc. v. D.C.*, 301 A.3d 740, 759 (D.C. 2023).

And with respect to the surrounding facts that *Pearson* commands courts to observe in evaluating the customer's perspectove, those facts are straightforward: Galvin, surrounded by her personal landscape team (including her very own arborist), with previous experience using cranes to install trees mid-summer, insisted on a July installation and interrupted Ruppert's logistics manager who tried to explain the very facts Galvin now claims Ruppert failed to provide, and thereafter signed a contract that expressly disclaimed a warranty. Galvin, flanked by her landscape team, who participated and coordinated in every decision leading up to the installation, including what types of trees to select and where they would

be planted, and when, and who inspected them upon delivery, nonetheless seeks punitive damages (arising, incongruously, out of what she claims was unintentional conduct) because she is not satisfied with the outcome.

These facts, and "any notion of reasonableness" they reflect, undermine Galvin's attempt to turn the CPPA into a retroactive attempt to secure a warranty she previously declined. *Pearson*, 961 A.2d at 1075. The Court should affirm Judge Tunnage's judgment that Galvin failed to prove any CPPA violation.

1. The Trial Evidence Supports Judge Tunnage's Finding that Ruppert Did Not Violate the CPPA.

Galvin's brief fails to identify the specific sections of the CPPA that apply to the myriad alleged misrepresentations and/or omissions she claims. Ruppert categorizes them, below, as best as possible:

(a) Sections 3904(a) and (d)[7]

Galvin appears to claim that the types of trees selected (by her team and with their approval) were not appropriate for planting either because they were not the type of trees that could provide screening even had they thrived or because some of them ultimately did not survive, pointing (in footnote 22) to pictures of how the

[7] CPPA § 28-3094(a) makes it illegal to "represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have...." § 28-3904(d) makes it illegal to "represent that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another...."

trees looked at some unspecified point after installation and contrasting that to what she claims Ruppert promised at the outset. In either case, this argument fails for two reasons. First, as stated above, Judge Tunnage's finding that the Contract "did not provide a metric for defining an end result or anything outside of the delivery and installation of six trees..." (JA 1732) is not clearly erroneous and cannot be reversed. *Lynch*, 319 A.2d at 1013 ("[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). Ruppert never promised a result, nor could it. "Evergreen Screening" is, at best, a non-actionable "aspirational sentiment," not an outcome "capable of measurement." *Meta Platforms*, 301 A.3d at 759.

Second, Galvin ignores that she and her agents agreed with Ruppert that the trees selected, if they remained healthy, were evergreen (as opposed to deciduous) trees that could provide a screen.[8] Indeed, Galvin had multiple existing Southern Magnolias on her property, and the nursery representative who supplied them testified that the nursery supplies those very trees to locations throughout the northeastern United States. (JA 2135) The other three trees were grown locally. The fact that some of the trees failed to thrive does not mean Ruppert misrepresented that the trees possessed (or lacked) certain qualities that everybody

[8] In other words, "evergreen" was used to describe the *types* of trees to be installed, *i.e.*, to differentiate them from deciduous trees, not as a measure of time.

agreed at the outset they did, the ability to provide a screen if properly cared for. Again, counsel for Galvin admitted that she assumed the risk that the trees could fail, in which case there would not be the desired screen. (JA 1947-48)

(b) Section 3904 (e) and (f)[9]

Galvin argues that Ruppert violated the CPPA by "misrepresenting the extent and quality of the services it would provide, [and] the material risks of planting the trees in July"; and [by] omitting "that its assurances regarding the Project's success were not based on sound analysis." (App. Br. at 15)

First, as to Galvin's claim that Ruppert misrepresented "the extent and quality of the services it would provide," Galvin is merely rehashing the same claim that Ruppert promised Galvin "evergreen screening" but that she did not get it, *ipso facto*, violating the CPPA. Again, this claim fails because, among other things, the Contract did not require Ruppert to meet some subjective satisfactory level of screening, and the trees that Galvin's team and Ruppert co-selected are commonly used for the precise type of screening Galvin claims to have desired, evidenced by the multiple existing Southern Magnolias on her property. (JA 637)

Second, Galvin's claim that Ruppert violated the CPPA by failing to inform Galvin "that its assurances regarding the Project's success were not based on sound

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[9] CPPA § 28-3094(e) makes it illegal to "misrepresent as to a material fact which has a tendency to mislead...." § 28-3904(f) makes it illegal to "fail to state a material fact if such failure tends to mislead..."

analysis..." (App. Br. at 10), is meritless. As articulated in footnote 13 of her brief, Galvin argues that Ruppert failed to conduct some unspecified suitability analysis and/or failed to inform Galvin that it was not performing such an analysis. But Galvin obfuscates that the source of the purported requirement to conduct a suitability analysis arises out of a statement in the LSG that state a contractor should "qualify[] [its] proposal to document *any* plant suitability or availability problems." (emphasis supplied) (JA 1828) Thus, Galvin's formulation of the alleged omission assumes the conclusion: the existence of a suitability problem, which she simply declares is the case, ignoring all the evidence showing that there was none. The trees installed were either native to Maryland or, with respect to the Magnolias, six to seven already existed on her property. (JA 548)

To the extent that Galvin argues that Ruppert did not perform any testing or analysis, that is false. Among other things, it is undisputed that Ruppert performed a percolation test to ensure that the soil in the planting sites was draining properly and otherwise used its experience to judge whether the transplant was appropriate. (JA 200-01) Galvin's use of the term "suitability," lifted out of context from the LSG to blame Ruppert for her decision to decline a warranty, does not overcome the evidence showing that the trees were appropriate for the project. The fact that some failed to thrive does not mean they were not suitable or that Ruppert misrepresented anything. In that vein, Galvin has no answer to the evidence that

the Florida nursery that supplied the Magnolias that Ruppert installed routinely sells the precise same Magnolias to areas north of Washington, D.C., and that those trees do well (JA 2135) negating any claim that the Magnolias at issue were not "suitable" for this climate.

Third, Galvin unsuccessfully claims that Ruppert violated the CPPA by failing to advise her of the purported risks of planting trees in July. Galvin is wrong because after hearing all this evidence, Judge Tunnage made a specific factual finding that there was a risk, but that it had been disclosed both by Ruppert and in the LSG, in context of Ruppert's ability to mitigate it. (JA 1745) Because there was evidence supporting this specific factual finding, it cannot be clearly erroneous. *Lynch*, 319 A.2d at 1013 ("[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

There is ample evidence supporting Judge Tunnage's factual finding. Indeed, it is uncontested that the parties discussed the method of mitigating the risk of summer planting, most prominently in the email exchange culminating in Joe Proskine's June 5, 2020 email. That email responded to Galvin's inquiry regarding a possible risk of planting trees in the summer heat. (JA 1899) Responding to Galvin's inquiry by discussing the mitigation of risk, including the need for proper

care and maintenance, the Court found that the risk had been disclosed.[10] In addition, Judge Tunnage relied on the LSG, which state that trees can be installed year round if certain criteria are followed and further states that "[c]ontainer-grown...material can be planted year-round, provided it receives adequate irrigation for the first growing season." (JA 1830)

Implicit in Judge Tunnage's findings is the obvious: there would be no need to mention "proper care" and "proper maintenance" or no need for the LSG to cite "certain criteria" if there were no risk. Indeed, these statements necessarily imply the existence of some risk, and also, the fact that this risk can be mitigated, an obvious proposition that experts on both sides testified to. (Ruppert expert Jeff Schwartz) (JA 818) ("Q. And, sir, you understand that large tree transplantation happens across the DMV in the summer frequently, correct? A. Yes. Again, if we could control the schedule of every project, it [would] be a wonderful thing....And so in our experience, it's not so much that you can't plant this time or that time, that's just a fact of our business. And then you work – you work towards that goal and what needs to be done to make it successful."); (Galvin expert) (JA 767) ("Q.

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[10] Proskine wrote: "Timing of this work does not concern us. The Magnolia's [sic] thrive in this kind of weather. All the others will transplant well with proper care before and after planting." (JA 1901) On the same day, before sending this email to Galvin, Joe Proskine wrote to Holt Jordan and said "As far as time of planting, this is the time we want to install the Magnolia [sic] to allow most time to root. Others will do fine with summer digging and proper maintenance. We would want to make sure that irrigation is up and running as we finish." (JA 2064)

And you recognize, ma'am, do you not, that there – there's another school of thought in the arborist community that says with the right precautions, you absolutely can [transplant trees in July]? You understand that, that that school of thought exists, right? A. Of course."). This evidence supports Judge Tunnage's finding of fact and thus the finding cannot be clearly erroneous.

What Galvin appears to be claiming, however, is that Ruppert (and Judge Tunnage) are substantively wrong, and that any claim that the risk of summer planting can be mitigated, is objectively, verifiably, and immutably false – so much so that any claim to the contrary is, *ipso facto*, a CPPA violation. (App. Br. at 39) ("[h]ad it considered the consumer's perspective...the Trial Court could not have found that stating summer planting is safe adequately discloses the challenges presented by summer planting."). But the documentary evidence contradicted that argument, and even Galvin's experts testified that summer tree planting is reasonable (JA 2041) ("[c]ontainer-grown Southern Magnolias can be planted successfully any time of year.") (JA 1158) ("Q. A reasonable landscape contractor could ... read [LSG] Section 1.12 it is safe to plant year round if certain criteria are followed, and they could reasonably rely on this objective criteria, correct? A. I would say yes.") (Galvin expert Christopher Mourlas)

Moreover, to the extent that Galvin's CPPA claim merely posits that Ruppert (and in particular Joe Proskine) trivialized what is a far larger risk than it

disclosed, this argument fails because to prevail under § 28-3904(f) "a plaintiff must establish...that a defendant failed to make a *required* disclosure." *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013) (emphasis added). Here, Judge Tunnage was entitled to rely on the expert evidence supporting Ruppert's claim that informing a customer of the purported extreme hazard of summer planting is not "required," because there is no consensus that such extreme hazard exists. (Galvin expert) (JA 767) Indeed the evidence on this topic demonstrated that any small quantum of risk that does exist can be mitigated easily.

Indeed, Ruppert's expert testified that Proskine's June 5 email appropriately responded to Galvin's inquiry because it was factually accurate, and that there is no professional standard of care that would have required any other response to an inquiry regarding summer planting. (JA 823-25) Judge Tunnage was entitled to rely on the evidence that Proksine provided factually accurate information and thus there was no CPPA violation. *Saucier*, 64 A.3d at 443 ("a reasonable consumer generally would not deem an accurate statement to be misleading, and hence, such statement generally would not be actionable under § 28-3904(e) and (f)").

CPPA § 28-3904 (e) and (f) proscribe misrepresentations or omissions of "facts" and it is simply not a fact, and certainly not one that can be shown by clear and convincing evidence, that Ruppert downplayed the risk of summer planting so much that it was misleading. Indeed, Galvin's claim boils down to the argument

that Judge Tunnage weighed the evidence on this topic incorrectly by crediting Ruppert's presentation over hers. But this is not the proper basis for an appeal. *Murray*, 765 A.2d at 984 (Court of Appeals "may not substitute itself for the trier of fact who heard, received and weighed the evidence.").

Judge Tunnage relied on evidence to find that Ruppert adequately disclosed the risk of summer planting and that it could be mitigated. His finding of these specific facts is not clearly erroneous and thus cannot be reversed.

2. Alternatively, the Court Can Affirm the Judgment by Finding that Risk of Summer Planting is Not Material and Thus There Was No CPPA violation.

Alternative to Judge Tunnage's finding that there was a disclosed risk of summer planting, there exists ample evidence on the record from which the Court could affirm Judge Tunnage's decision that there was no CPPA violation, by finding that the risk of summer planting was not material. *Segreti,* 193 A.3d at 760 ("[t]his court may affirm a decision for reasons other than those given by the trial court."). This evidence includes the testimony from both sides that summer planting is ubiquitous and that the risk is not elevated in summer versus any other time of year. (JA 2153) ("Q. Do you have any concerns with moving trees during the middle of the summer? A. No, I don't. Q. Why not? A. Just because we do a lot of it. We do it and a lot are successful. I guess you just get a lot of experience doing that during the summer."). *See also* JA 2041 ("Container-grown Southern

Magnolias *can be planted successfully any time of year*."); (JA 818) ("I think that there's certainly no reason that trees can't be planted successfully year round.") (Testimony of Ruppert Expert, Jeff Schwartz)

Based on evidence in the record, the Court could also find that Ruppert did not violate the CPPA because Galvin was aware of and assumed the risk of summer planting based on her prior experience with craning in trees during the summer, the knowledge of her personal landscape team about what she claims is an obvious risk, which is imputed to her as a matter of law, and/or that Galvin further assumed the risk of summer planting by insisting on the July installation and then refusing to listen to Ruppert's project manager discuss the project. All of these positions have ample record support and could, individually or in the aggregate, sustain the judgment.

3. Galvin's Claim that Judge Tunnage Misconstrued The CPPA Is Wrong.

Galvin argues that Judge Tunnage erred by evaluating her CPPA claims solely by her subjective dissatisfaction rather than by an objective look at the obligations the CPPA imposed on Ruppert, which Galvin argues is the only permitted perspective. (App. Br. at 38-39) But this argument is demonstrably false, for two reasons. First, *Pearson* makes clear that CPPA violations are not "determined solely by the customer, without regard to the facts or any notion of

reasonableness." *Id.* at 1075. Here, however, Galvin argues that only her perspective as the customer matters. (App. Br. at 38-39)

Second, Judge Tunnage clearly discussed the obligation the CPPA imposes on merchants, and noted that Galvin's own expert witness undermined her argument on that point. (JA 1744) ("Further, with respect to the duty to provide warnings that [Galvin] states the CPPA places on merchants [Galvin's expert, [Dahle] testified that what is material risk to trees that must be disclosed to a consumer is subject to considerable discretion..."). Indeed, at trial, when presented with a number of threats that he deemed material risks to the long-term health of trees (*e.g.*, climate change, wind, flooding, insect infestation, etc.), Dahle conceded that landscape professionals have discretion on what to disclose to consumers based on the circumstances. (JA 953) ("Q. And people may have different feelings about what constitutes a material risk, correct? A. I'd have to agree.").

In response, Galvin stammers that Dr. Dahle "was not qualified to opine on either the materiality of facts to consumers or the CPPA's requirements." (App. Br. 38, fn 54) But in addition to the fact that Dahle testified that he "worked for seven years as...a commercial sales arborist," and that he sold landscape materials to the general public (JA 943), this claim fails because Galvin is arguing that Judge Tunnage should not have relied on certain evidence or weighed it as much as he did, which is not something an appellate court can review. *Fort Lincoln Civic*

Ass'n, 944 at 1063. Indeed, while Galvin's attorney objected that this testimony called for a legal conclusion, Judge Tunnage overruled the objection (JA 953), finding that Galvin's attorney had previously opened the door it by asking similar questions. As such, Judge Tunnage was free to rely on this evidence. Moreover, by failing to seek review on appeal of Judge Tunnage's decision to overrule the objection and allow Dr. Dahle's testimony on the discretion merchants have, Galvin has waived any claim that it should not be in evidence or that Judge Tunnage should not have relied on it. *Pazianos v. Schenker*, 366 A.2d 440, 444 (D.C. 1976) ("It is well-settled that an issue not raised by a specific assignment of error need not be considered on appeal.").

As to Galvin's complaints that Judge Tunnage mischaracterized her position and thereby committed error by stating that "the explicit statement of no warranty in the written contract is essentially superseded by a statutory guarantee of subjective satisfaction through the CPPA...." (JA 1743) Galvin is once again wrong. Judge Tunnage was simply summarizing what Galvin has been arguing from the start, as evidenced through and including her appellate brief: that the CPPA should provide her an outcome that she clearly wanted but that contract did not provide: a promise that she would enjoy screening the trees provided into perpetuity (*i.e.*, the "subjective satisfaction" that Judge Tunnage referred to -- but that the contract did not provide for.").

In this regard, Judge Tunnage's analogy to *Pearson* and the alleged CPPA violation in that case surrounding the merchant's purported promise of "Satisfaction Guaranteed" is apt. (JA 1743) As Judge Tunnage found, and as *Pearson* requires, the term "Evergreen Screening" must be viewed the same way as "satisfaction guaranteed" that is, "through the lens of common understanding." (*Id.*) There is no common understanding that the term "Evergreen Screening" can be read to mean 100 percent screening into perpetuity, or that Ruppert's actions could ever be misleading in light of the undisputed facts that Galvin was advised by her own personal landscape team, had previous experience installing trees during summer, insisted on a July installation, refused to listen to Ruppert's project manager, and disclaimed the offered warranty.

4. Judge Tunnage Correctly Held That The Clear and Convincing Evidentiary Standard Applies to Galvin's CPPA Claims.

(a) Galvin's claim that she is alleging unintentional CPPA violations contradicts her position at trial in which she alleged "willful" violations.

As an initial matter, the Court should reject Galvin's argument that she merely asserts "unintentional" violations of the CPPA, as this characterization conflicts directly with the trial testimony and reflects a transparent attempt to secure a lower burden of proof after her punitive damages claim failed. Indeed, through and including the close of trial, and even as late as her submission of

proposed findings of fact and conclusions of law, Galvin emphatically pressed the claim that Ruppert's CPPA violations were "willful and outrageous," the precise *opposite* of unintentional. For example, on direct testimony, Galvin testified:

> Q. Do you believe the behavior of Ruppert Nurseries in conjunction – in this – is the subject of this litigation was **willful** and **outrageous** at times?
>
> A. Yes....[followed by non-responsive answer]

(JA 1506) (Elizabeth Galvin)

****

> Q. Do you believe the business practices that you just referred to were **willful** and **outrageous**?
>
> Objection. It's now cumulative
>
> The Court: I'll allow the answer.
>
> A. Willful in that whichever measures, **actions, words they spoke were <u>intended</u>**, that's my sense there. **Outrageous** in the context, yes.

(JA 1507-1508) (Elizabeth Galvin)

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Then, as Galvin's trial counsel, Mr. Cunningham, argued in closing:

> Now we come to punitive damages...Ms. Galvin bases her claim on the clear and convincing evidence that Ruppert's omissions and misrepresentations **willfully** and **outrageously** disregarded Ms. Galvin's rights under the CPPA...Just how **willful** and **outrageous** these violations were is shown by Ruppert's admission to contract with Ms. Galvin and undertook performance of the contract in complete ignorance of the CPPA.

(JA 1658) *See also*, Galvin's post-trial Proposed Findings of Fact and Conclusions of Law ¶¶ 115-117 (arguing that Ruppert's acted "in willful and outrageous disregard of the CPPA" and that its "choice to ignore the CPPA was willful").

Galvin's attempt to reverse course and argue on appeal that Ruppert's actions were *unintentional* – fails because the post-trial argument of counsel cannot contradict this record. *Pinkston v. Carter*, 150 A.2d 629, 632 (D.C. 1959) ("appellate review must be limited to matters in the official transcript of record and cannot be based on statements of counsel which speak against the record either by way of contradiction or by unauthorized additions thereto."); *cf. Spires v. Spires*, 743 A.2d 186 (D.C. 1999) (court cannot base its review on statements of counsel or statements of a party that are unsupported by the record).

Galvin cannot claim that she is merely prosecuting unintentional CPPA violations, which only require proof by a preponderance of the evidence, while at the same time arguing, as she did below, that the precise same conduct merited the imposition of punitive damages, which even Galvin acknowledges requires application of the clear and convincing evidence standard. Judge Tunnage astutely recognized that Galvin was trying to have it both ways:

> So if the cause of action is CPPA and if you're going to prove your cause of action with non-intentional conduct...then how is it that the violation, the cause of action is then further evidence that it was malicious enough to satisfy punitive damages?
> ...

> But I don't know how you get punitive if you're going to prove the cause of action. (JA 1691-92)

Boxed in, Galvin's trial counsel revealed in response, if only inadvertently, that Galvin alleges intentional violations after all. He stated:

> Those [CPPA] violations we allege entitle us to punitive damages not because they unto themselves were intentional, **but because in doing these things they sought to deprive Ms. Galvin of her rights under the statute**. **It was willful and outrageous**. That was **intentional** and we have to prove that by clear and convincing evidence. (JA 1692-93)

Thus, when forced to square the circle, Galvin's attorney conceded that Galvin alleged that Ruppert sought to deprive Galvin of her rights ... by "doing these things." (JA 1692-93) On its face, this answer reveals that Galvin really is alleging intentional conduct, *i.e.*, that Ruppert took affirmative steps to achieve a particular outcome. That clearly is intentional conduct and Galvin is attempting to re-characterize it as "unintentional" for the sake of claiming a lower burden of proof. But she fails to thread the needle.

Indeed, Galvin's position runs headlong into this Court's decision in *District Cablevision Ltd P'shp v. Bassin*, 828 A.2d 714, 726 (D.C. 2003), which held that to obtain a punitive damages award, a CPPA plaintiff "must prove egregious conduct and the requisite mental state by clear and convincing evidence...[and] the usual conditions for awarding punitive damages [must] not be waived." But Galvin is attempting to secure this precise waiver: she requests a

lower evidentiary standard on liability for alleged "unintentional" CPPA violations having demanded punitive damages under the same statute for the same conduct. The law does not allow this outcome. This is in line with D.C. law, which forbids the recovery of punitive damages arising out of negligence. *Doe v. DeAmigos, LLC*, 987 F.Supp.2d 12, 17 (D.D.C. 2013) ("in the District of Columbia, punitive damages are generally available only in actions arising from intentional torts."); *Zanville v. Garza*, 561 A.2d 1000, 1002 (D.C. 1989) ("punitive damages are appropriately reserved only for tortious acts which are replete with malice.").

By arguing that the alleged CPPA violations were unintentional and yet seeking punitive damages for them, Galvin inadvertently argued her way into the clear and convincing evidence standard by invoking a remedy that *required* her to meet it. It is incoherent to claim, as Galvin does, that "unintentional" conduct is "replete with malice." *Zanville,* 561 A.2d at 1002.

(b) Clear and Convincing is the Appropriate Burden of Proof for CPPA All Claims.

Even assuming that Galvin can re-characterize Ruppert's alleged CPPA violations as unintentional despite (1) arguing at trial that Ruppert's conduct was "willful"; and (2) seeking punitive damages for the precise same conduct, as a matter of precedent and prudence, the Court should re-affirm its prior decisions that the clear and convincing standard applies to both intentional or unintentional violations of the CPPA. STANDARDIZED CIVIL JURY INSTRUCTIONS FOR THE

DISTRICT OF COLUMBIA, § 20.11[2] p. 20-21 (June 2024) (synthesizing the law and noting that "the Court of Appeals has retained the 'clear and convincing evidence' standard for CPPA violations, whether they might be characterized as 'intentional' or 'unintentional' so that D.C. law retains a coherent legal standard for awarding punitive damages.").[11]

First, as a matter of precedent, this Court has repeatedly ruled that the clear and convincing standard applies to all violations of the CPPA without making a distinction for alleged unintentional claims. *Pearson v. Chung*, 961 A.2d 1067, 1074 (D.C. 2008) (discussing claims arising under §§ 28-3904 (a), (d), (e), (f), (h), and (u) and stating that "[v]iolations of the CPPA must also be proven by clear and convincing evidence..."); *Frankeny v. District Hospital Partners, LP*, 225 A.3d 999, 1005 (D.C. 2020) (analyzing claims under §§ 28-3904 (e) and (f) and stating that "[t]he burden for proof for CPPA claims is clear and convincing evidence.");

Indeed, *in Pearson*, this Court of Appeals affirmed the trial court's dismissal of plaintiff's claims, which included actions arising under sections (e) and (f) of the CPPA because plaintiff "failed to meet the standard of proving ... ***any*** of his

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[11] The Court need not reach this issue, if it determines that Galvin, contrary to her position on appeal and the record, was alleging intentional violations of the CPPA. Galvin concedes that intentional violations of the CPPA require clear and convincing evidence. In particular, Galvin's testimony that Ruppert unequivocally assured her that large trees can be planted safely in summer, something Galvin claims is false, is necessarily an *intentional* misrepresentation.

CPPA claims *by clear and convincing evidence*."). *Id*. at 1076 (emphasis added). The modifier "any" the Court used naturally and obviously refers to the §§ 28-3904 (e) and (f) claims that the plaintiff in *Pearson* brought, including all the others. *See also Osbourne v. Capital City Mortgage Corp.*, 727 A.2d 322, 326 (D.C. 1999) ("the clear and convincing evidence standard applies to claims of intentional misrepresentation under the CPPA."). Moreover, in *Osbourne*, this Court held that to the extent that an unfair practice under the CPPA is premised on a common law cause of action, that the burden of proof is the same as the burden of proof applicable to the common law claim. 727 A.2d at 325-326. Under the common law, where there is a duty to disclose, omission of a material fact constitutes fraud. *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1130-31 (D.C. 2015). Accordingly, the Court may not find a violation of the CPPA in this case by anything less than clear and convincing evidence.

Second, as a matter of prudence and policy, the only way to maintain a coherent structure for imposing punitive damages in the District of Columbia is to make clear that unintentional violations must too meet the clear and convincing evidence standard; otherwise the court would implicitly be undermining *Bassin's* prohibition on watering down, if not overturning altogether, the requirements for punitive damages in CPPA cases. *Bassin*, 828 A.2d at 726; *see also* STANDARDIZED CIVIL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, §

20.11[2] p. 20-21 (June 2024) ("If a claimant can establish an unintentional violation of the CPPA by a preponderance of the evidence, then on its face, the statute would allow a fact finder to award punitive damages for conduct that was not intentional, not egregious, not outrageous, and not grossly fraudulent.").[12]

5. Judge Tunnage Correctly Resolved Galvin's CPPA Claim Regarding the Death of the Norway Maple.

Simply stated, Galvin's argument on the Norway Maple boils down to a claim that Judge Tunnage did not sufficiently credit her expert's testimony that Ruppert was responsible for that tree's death, and instead relied on the testimony of Ruppert's expert. Because it is the quintessential role of the trial judge to resolve conflicting evidence, Galvin's argument fails. *Richbow v. District of Columbia*, 600 A.2d 1063, 1066-67 (D.C. 1991) ("Although an expert's testimony may not arbitrarily be disregarded or disbelieved, when there is some basis in the record for concluding that an expert witness should not be credited, we will not pit our judgment against that of the finder of fact who saw and heard the witness

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[12] Plaintiff's reliance on *Ballagh v. Fauber, Inc.*, 290 Va. 120 (Va. 2015) in support of the claim that preponderance of the evidence is the proper standard, is misplaced and that case actually supports Ruppert's position as it makes clear that a demand for punitive damages requires a higher standard of proof on liability. In addition, Galvin's claim that she only identified "*one* exception to this overwhelming trend" (App. Br. at 33, fn 46) (emphasis added) is curious as she omits at least one other: the *District of Columbia*, under whose law she seeks relief. *Pearson,* 961 A.2d at 1074 (D.C. 2008) ("[v]iolations of the CPPA must also be proven by clear and convincing evidence...").

testify.") (internal citations omitted); *Safeway Stores, Inc. v. Buckmon*, 652 A.2d 597, 603 (1994) ("[t]he factfinder's choice between two permissible views of the evidence cannot be clearly erroneous.").

Substantial expert testimony supports Judge Tunnage's finding that Ruppert did not cause the Norway Maple to die, and thus could not have violated the CPPA by failing to warn of material risks of excavating the Spruce. Ruppert's expert, Dr. Feather, unambiguously testified that the Norway Maple died because it was sitting at the end of an underground drainage pipe that dumped water directly onto its roots, triggering that species' well-known Achilles heel: "wet feet." (JA 1322-24) Galvin's claim that Dr. Feather never offered a competing explanation for the death of the Norway Maple is thus bafflingly false: ("Q. And is there some particular about Norway Maples having their roots subjected to standing water? A. They can take standing water for a time, but not over prolonged periods. This area is very wet. What kills roots is lack of oxygen.") (JA 1311); ("Q. If not armillaria, finish your opinion on what in your opinion as a plant pathologist killed the Maple? A. I think it was just an area that was too wet for the tree.") (JA 1308) Judge Tunnage's decision to accept one expert's views over another, which is what trial judges do, cannot be reversed.

Galvin persists, however, claiming that it does not matter what killed the Norway Maple, and that a CPPA violation (including statutory, treble, and punitive

damages) attaches even without proof of causation.[13] But the record contains ample evidence supporting the judgment. First, D.C. exempts Norway Maples from tree protection plans that might otherwise be applicable (JA 1317), a highly relevant fact that Galvin's brief ignores. In addition, the record includes Howie Burrill's testimony that Ruppert only used the stump grinder outside of any critical root zone, and hand-dug to mitigate any risk to the Maple. (JA 288, 290) Corroborated by several photos, Ruppert's expert testified that this was too far away from the roots of the Norway Maple to have caused the damage that Galvin alleges. (JA 1321, 1870, 1872, 1875)

This evidence undermines Galvin's theory that the use of the stump grinder too close to the Maple caused its death and supports the judgment. *Dorsey v. U.S.*, 902 A.2d 107, 111 (D.C. 2006) ("in reviewing bench trials, this court will not reverse unless an appellant has established that the trial court's factual findings are plainly wrong, or without evidence to support them.") (internal citations and edits omitted). Again, Galvin impermissibly seeks reversal by rearguing the weight of the evidence, claiming that Judge Tunnage did not properly credit hers.

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[13] Galvin does not explain why, if the cause of the death of the Norway Maple is irrelevant to whether a CPPA violation occurred, why she spent so much time at trial eliciting testimony from her expert regarding the cause of its death.

C. THE COURT PROPERLY EVALUATED AND DISMISSED GALVIN'S CONTRACT CLAIM.

Galvin complains that the Court did not find in her favor on her contract claim, arguing that (1) Ruppert failed to prove that it satisfied every element of the LSG; and (2) Ruppert failed to provide adequate assurances under the District's version of the Uniform Commercial Code (App. Br. at 43-46). Galvin is wrong.

First, to establish breach of contract, Ruppert did not have the obligation to demonstrate that it complied with every provision of the LSG; rather, Ruppert had the burden of showing that Galvin breached the contract by not paying. Ruppert met that burden. Galvin is thus arguing on appeal that Judge Tunnage failed to credit her argument that Ruppert breached the contract by not adhering to the LSG. But the opinion expressly refers to the LSG, indicating that Judge Tunnage was well aware of any obligations arising under them, and because his judgment is consistent with the finding that Ruppert satisfied any obligations it may have had (and that Galvin failed to show Ruppert did not meet them), Judge Tunnage's opinion cannot be disturbed. *In re I.B.*, 631 A.2d 1225, 1232 (D.C. 1993) ("it bears reiterating that judges are not required to inventory all the evidence and explain how they weighed each evidentiary item in reaching their decisions.").[14]

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[14] As Galvin points out, the LSG is "an 80+ page industry guidebook." (App. Br. 40, fn 56), which apply to many trees, practices, and situations not relevant to the project at issue. Galvin refers to only four alleged LSG requirements that Ruppert allegedly failed to abide: suitability, summer planting, tree protection

Second, Galvin's claim that Ruppert failed to provide adequate assurances once Galvin demanded them, is based on the demonstrably false premise that Ruppert was responsible for providing Galvin an "evergreen screen" that would last into perpetuity. As Judge Tunnage correctly noted, the contract "did not provide a metric for defining an end result or anything outside of the delivery and installation of six trees." (JA 1732) Once Galvin turned over maintenance to Galvin on August 1, 2020, Ruppert's performance was complete. Having disclaimed the warranty, Galvin has no standing to argue that Ruppert owed her any assurance that the trees would thrive into perpetuity.[15]

D. THE COURT CORRECTLY RESOLVED GALVIN'S IMPLIED WARRANTY OF MERCHANTABILITY CLAIM.

Galvin failed to prove that Ruppert breached the implied warranty of merchantability, which requires specific evidence that the trees were defective *at the time of delivery*. D.C. Code 28:2-725(2) ("A breach of warranty occurs when tender of delivery is made..."); *Pinney v. Nokia, Inc.*, 402 F.3d 430, 444 (4th Cir. 2005) ("To recover on a claim for breach of implied warranty of merchantability,

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procedures, and root pruning. (App. Br. at 46) But these topics were covered at considerable length: suitability (*passim*); summer planting (*passim*), tree protection procedures (JA 1225-27, 1317-18), and root pruning (JA 290-91, 392-393).

[15] In addition, the UCC applies to the sale of "goods" that is, things that are "moveable at the time of identification to the contract for sale." D.C. Code 28:2-105(1). In contrast, "Evergreen Screening" is, at best, a "general intangible" to which the UCC does not apply. *Id.* § 28:9-102(42).

as with a strict liability or negligence claim, a plaintiff must prove the existence of a defect at the time the product leaves the manufacturer."). Thus, whatever happened to the trees subsequently is irrelevant; the focus is squarely on the existence of defects at the time of delivery.

The evidence destroys Galvin's claim. First, the nursery supplying the three Southern Magnolias has had success sending the identical tree at issue in this case to Washington, D.C., and even into New England. (JA 2135) ("We have supplied Southern Magnolias, DD Blanchards in particular to the DC area.") (*Id.*) Indeed, Howie Burrill testified that several weeks after the Galvin installation, Ruppert installed in D.C. a Magnolia that was shipped from the same nursery at the same time as the three Magnolias that were planted in Galvin's yard (*i.e.*, an identical tree). Burrill testified that tree was thriving two years after installation. (JA 256)

Second, Keith Pitchford, the consultant Ms. Galvin hired in September 2020, testified that the magnolias he observed "were of high quality." That observation, made six (6) weeks after the installation further establish the absence of defects *at the time of delivery*. Third, Ruppert established ample record evidence that both Holt Jordan and Galvin herself were elated with how the trees looked when they were installed.[16] Judge Tunnage's thoroughness is reflected by his

[16] "They really are beautiful" (JA 1926); "The trees do look splendid, Holt"; (JA 1930); "I am so happy with the trees! I love that we don't even notice them and they seem to look as they've always been there" (JA 1932); "The trees do look

finding that one of the six trees, the Dogwood, was not merchantable at the time of delivery, and thus found for Galvin on this matter, removing $2,900.00 from the overall amount of the judgment to reflect the cost of the tree charged to Galvin. Galvin's counsel agreed that this approach "makes perfect sense." (JA 1747).[17]

E. JUDGE TUNNAGE ADDRESSED AND RESOLVED THE MATERIAL FACTUAL AND LEGAL ISSUES.

Galvin complains that Judge Tunnage did not resolve all material issues and argues that this purported failure constitutes a reversible error of law. (App. Br. at 46-48). Galvin is mistaken. *Yah Kai World Wide Enters., Inc. v. Napper*, 292 F. Supp.3d 337, 344 (D.D.C. 2018) ("In setting forth the findings of fact, the court need not address every factual contention and argumentative detail raised by the parties, nor discuss all evidence presented at trial."). Indeed, "the judge need only

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wonderful and Annie's first comment was that the Cryptomeria looks as if it had been there from the start....[e]veryone loves the color of the Magnolia...and the size is beyond anything I imagined." (JA 1934) Thus, the contemporaneous observations of Ms. Galvin and Holt Jordan, show that at the time of the delivery, there were no defects rendering the trees unfit for their ordinary purpose.

[17] Galvin's claim about Judge Tunnage misapplying the warranty provision of the LSG (App. Br. at 48-49) is meritless. After crediting Galvin's argument that because defects existing at time of delivery may not be immediately evident and possibly only discoverable after a reasonable period of time (JA 1740), Judge Tunnage was simply making the point that even using the one year warranty period the LSGs reference, any defects that had existed at the time of delivery would have become apparent for four of the six trees, and after 10 months, as it related to the Hemlock (*Id*.) This was a reasonable inference based on the evidence and therefore may not be disturbed on appeal. *Augustin*, 240 A.3d at 823-24.

make brief, definite, pertinent findings and conclusions upon the contested matters in a manner that is sufficient to allow the appellate court to conduct a meaningful review." *Wise v. United States*, 145 F.Supp. 3d 53, 57 (D.D.C. 2015) (quoting Fed. R. Civ. P. 52(a) (advisory committee's note to 1946 amendment)).

Here, Judge Tunnage's thorough opinion went through each of the counts in the Complaint and Counterclaim, pointing to specific evidence relative to each one. That is more than sufficient to permit appellate review. (JA 1723- JA 1751) *Century Marine, Inc. v. U.S.*, 153 F.3d 225, 231 (5th Cir. 1998) (holding that Rule 52 "exacts neither punctilious detail nor slavish tracing of the claims issue by issue and witness by witness."). Indeed, "when a trial court does not make a finding on a specific fact, a reviewing court may assume the trial court impliedly made a finding consistent with its holding as long as the implied finding is supported by evidence." *Kresge Dept. Stores v. Young*, 37 A.2d 448 (D.C. 1944) (holding that where trial court made general finding, reviewing court assumed that all disputed facts were found in appellee's favor); *Lynch*, 319 A.3d at 1014 ("we have often sustained rulings of the trial court on the basis of implied findings.").

The claim that Judge Tunnage did not specifically address all of Galvin's CPPA and contract claims arises out of her kitchen-sink trial presentation. Thus, Galvin resorts in her brief to directing the court to her Amended Counterclaim and proposed findings of fact (App. Br. at 47), not the trial transcript, to identify what

she claims are unresolved issues. Indeed, Galvin complains that the purported "narrow holding ignores several allegations *pleaded* by Ms. Galvin under the CPPA..." (*Id.*) But even a perfunctory review of the transcript reveals that suitability, especially relating to summer planting, dominated the trial.[18]

Finally, Galvin's argument that Judge Tunnage failed to address her repudiation allegation is false, because by finding as he did that the Contract required only the delivery and installation of six trees, there were no ongoing performance assurances available or required. *See supra*, pp. 19-20.[19]

F. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING GALVIN'S POST-TRIAL MOTIONS.

To reverse the denial of Galvin's post-trial motions, the Court must find that Judge Tunnage abused his discretion. *Jones*, 942 A.2d at 1106; *Queen*, 364 A.2d at 148. Galvin comes nowhere close to meeting that burdensome standard, as she relies only on conclusory claims of such an abuse. Galvin's post-trial motions

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[18] To the extent Galvin argues that Judge Tunnage did not address minor issues that she failed to emphasize at trial, including root pruning (App. Br. at 48), Ruppert witness Howie Burrill testified that whether root pruning for evergreens is necessary is decided on a case-by-case basis, and here, it was not. (JA 393)

[19] Galvin's reliance on *Tauber v. D.C.*, 511 A.2d 23 (D.C. 1986) is misplaced. *Tauber* stands for the unremarkable and obvious proposition that "there must be findings on material issues..." *Id.* at 28. It does not state, as Galvin attempts to force it to, that there must be a finding on *all* issues, whether material or not, much less that the Court must address every piece of admitted evidence of the testimony of each witness. *U.S. ex rel. Morsell*, 651 F.Supp.3d. at 113 (D.D.C. 2023).

simply reargued the trial evidence and urged Judge Tunnage to weigh it differently, this time, in her favor. But the Trial Court properly denied Galvin a second bite at the apple. *Estate of Gaither ex rel. Gaither v. District of Columbia*, 771 F.Supp. 2d 5, 10 (D.D.C. 2011) ("it is well-established that motions for reconsideration, whatever their procedural basis, cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled.").[20]

CONCLUSION

For the foregoing reasons, Ruppert Nurseries requests that this Court affirm the judgment of the Superior Court in all respects.

Respectfully submitted,

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[20] Even a perfunctory review of Galvin's post-trial motion reveals that it simply regurgitated, almost verbatim, every argument she had recently lost at trial (and had made throughout the preceding three years of litigation) including whether transplanting in July required disclosure of purported risks, alleged suitability issues, alleged assurances of successful performance, and the purported purposes of the Contract. (JA 1759-69) Because Galvin's motion was a re-hash of her trial arguments, Judge Tunnage did not abuse his discretion denying it.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Appellee's Brief was efiled with the Clerk of the Court for the District of Columbia Court of Appeals and e-served this 25th day of November, 2024 on Counsel for the Appellant and all interested parties.

/s/ William Goldberg
William A. Goldberg, Esq.