VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 30th day of December, 2015.

Modern Oil Corp., Appellant,

against Record No. 141839
Circuit Court No. CL13-627

Barbara Cannady, et al., Appellees.

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

The appellant, Modern Oil Corp., challenges a jury verdict awarding compensatory and punitive damages for fraud. Modern Oil argues that the trial court should have granted its motion to strike the employees' actual fraud claim, permitting only a related breach of contract claim to proceed to verdict. We agree and remand the case for retrial solely on the breach of contract claim.

I.

For many years, S.W. Rawls, Inc. distributed and sold gasoline and convenience store products at various gas stations in Southampton County, Suffolk, and Smithfield. In October 2010, the shareholders of S.W. Rawls, Inc. entered into an agreement to sell all of their stock to a holding company, Modern Fuel, Inc. The closing was to be in December 2011.

On October 24, 2011, the president of S.W. Rawls, Inc., Elliot Whitfield, wrote a letter to the employees promising a one-time bonus (equal to approximately one month's base pay) if they remained with the company for at least ninety days after closure of the upcoming stock sale. They would also receive the bonus, the letter stated, if they were discharged without cause during this period.

Shortly after the closing, the new shareholders implemented a reorganization plan, which included dealership contracts with independent operators for the management and operation of company-owned gas stations. The employees working at those gas stations continued to work in the same stores at the same locations and were not informed by S.W. Rawls, Inc. of any change in their employment. Between February 20 and March 15, 2012, the independent operators presented the employees with preprinted form letters, addressed to the new President of S.W. Rawls, Inc. and told them that they would be fired if they did not sign the letter. The form letter stated that the employees were not terminated by S.W. Rawls, Inc. but that they chose to accept positions with the particular independent operator that managed the store where they worked.

After the end of the ninety-day retention period, S.W. Rawls, Inc. refused to pay bonuses to ten employees who had signed the letters presented to them by the independent operators. In 2013, the employees sued S.W. Rawls, Inc., which, by that time, was known as Modern Oil Corp. as a result of a name change. Count I of the complaint asserted that the company had violated its contractual obligation to pay the retention bonuses. Count II asserted that the company had made a fraudulent misrepresentation of fact when it promised the retention bonus. The employees claimed that they relied on the fraudulent promise, "which was communicated to [the employees] through W. Elliot Whitfield's October 24, 2011 letter." Verified Complaint ¶¶ 53, 56, 59, 62, 65, 68, 71, 74, 77, 80. The complaint alleged actual (not constructive) fraud, an express misrepresentation (not silence or nondisclosure), and identified only the letter promising the retention bonus as the allegedly fraudulent statement (not any subsequent statement).

At trial, counsel for Modern Oil moved to strike the evidence on the fraud claim. He

argued that the complaint only pleaded "actual fraud," which "requires a representation." J.A. at 72. Here, "[t]he only representation that was alluded to by testimony was Whitfield's letter on October 24th of 2011." Id. Counsel recognized the possibility of promissory fraud, applicable when "there was no intent to ever perform the promise," id. at 73, but argued that no evidence suggested that Whitfield had made the promise with the present intent to dishonor it. See, e.g., id. at 39 (trial testimony by Whitfield affirming intent to honor the promise).

In response, the employees' counsel conceded that the bonus letter was not a misrepresentation and that, with "no fraudulent intent at the time that the letter was sent," it could not constitute actual fraud. Id. at 75. No evidence suggested, counsel admitted, that Whitfield did not intend to keep the promise at the time the promise was made. The case should nevertheless go forward, counsel argued for the first time, because the "letter is not the representation that is the focus of the fraud claim." Id. Instead, the fraud was the company's "silence after the close and after this [new] dealer structure had been implemented," when the decision was later made that the employees "were not to be paid." Id. at 75-76. The company, counsel asserted, "did not insist that the new owners tell my clients that they had a new employer." Id. at 75.

The trial court denied the motion to strike (made at the close of the plaintiff's evidence and renewed at the close of all of the evidence), instructed the jury on the fraud count, and rejected a proposed jury instruction offered by Modern Oil, stating that the promise to pay the bonus "can only be a basis for finding actual fraud only if the promisor had no intention to fulfill its promise." Id. at 269. The court submitted both the fraud and contract counts to the jury.

The jury found in favor of the employees on the fraud count, awarding $15,648 in

compensatory damages and $200,000 in punitive damages. Id. The jury made no finding with respect to the contract count, as it was presented only as an alternative basis for an award. Modern Oil made, and the trial court denied, a motion for judgment notwithstanding the verdict. Modern Oil also made a post-trial motion for reconsideration and to suspend judgment until the court had an opportunity to reconsider. The trial court did not respond to these motions.

II.

On appeal, Modern Oil challenges only the trial court's decision to send the fraud count to the jury. Modern Oil concedes that the court properly submitted the contract count to the jury for resolution. At oral argument on appeal, Modern Oil further agreed that a reversal of the fraud judgment would necessitate a remand for purposes of retrial solely on the employees' contract count. See Oral Argument Audio 10:57 to 11:55. We thus focus our analysis solely on the fraud count.

A.

The complaint in this case alleged actual fraud and identified the misrepresentation as the express promise made by the president of S.W. Rawls, Inc. in his letter to the employees prior to the stock sale.[1] Under principles of promissory fraud, tort liability can be predicated on a contractual promise when clear and convincing evidence proves that a contracting party "makes a promise that, when made, he has no intention of performing." Station #2, LLC v. Lynch, 280 Va. 166, 172, 695 S.E.2d 537, 540 (2010) (quoting SuperValu, Inc. v. Johnson, 276 Va. 356,

[1] "We previously said, '[w]here fraud is relied on, the pleading must show specifically in what the fraud consists, so that the defendant may have the opportunity of shaping his defence accordingly, and since fraud must be clearly proved it must be distinctly stated.'" Station #2, LLC v. Lynch, 280 Va. 166, 173 n.5, 695 S.E.2d 537, 541 n.5 (2010) (quoting Mortarino v. Consultant Eng'g Servs., 251 Va. 289, 295, 467 S.E.2d 778, 782 (1996)); see also Ciarochi v. Ciarochi, 194 Va. 313, 315, 73 S.E.2d 402, 403 (1952).

368, 666 S.E.2d 335, 342 (2008)). But absent simultaneity between the promise and the intent not to honor it, fraud liability cannot be fixed upon the promisor based on an unfulfilled promise. "Were the general rule otherwise, every breach of contract could be made the basis of an action in tort for fraud." Lloyd v. Smith, 150 Va. 132, 145, 142 S.E. 363, 365 (1928); see also Dunn Constr. Co. v. Cloney, 278 Va. 260, 267, 682 S.E.2d 943, 946 (2009).

For these reasons, promissory fraud can only be viewed as a species of *actual fraud* and can never be folded into the category of *constructive fraud.* We made this point in SuperValu, Inc., a case in which a corporate executive made a unilateral promise of financial support to a contractual business partner conditioned on the partner's making a sizable investment of its own funds. SuperValu, Inc., 276 Va. at 362, 666 S.E.2d at 339. After the partner satisfied the condition, the promisor changed his mind and did not provide the promised financial support. Id. at 363, 666 S.E.2d at 339. The partner sued the promisor on several grounds, including promissory fraud based upon alternative theories of actual and constructive fraud. A jury rejected the actual fraud claim but awarded $15.5 million in damages on the constructive fraud claim.

On appeal, we recognized that the promisor could be liable for actual fraud if he had made the unilateral promise of financial support with no present "intention of performing" it. Id. at 368, 666 S.E.2d at 342. But we drew the line there. "Under no circumstances," we emphasized, "will a promise of *future* action support a claim of constructive fraud." Id. (emphasis added) (citing Richmond Metro. Auth. v. McDevitt Street Bovis, Inc., 256 Va. 553, 560, 507 S.E.2d 344, 348 (1998); Colonial Ford Truck Sales v. Schneider, 228 Va. 671, 677, 325 S.E.2d 91, 94 (1985)). "The rationale underlying this rule is plain. If unfulfilled promises,

innocently or negligently made, were sufficient to support a constructive fraud claim, every breach of contract would potentially give rise to a claim of constructive fraud." Id. at 368, 666 S.E.2d at 342 (citations omitted).

These distinctions have evolved from liability regimes crafted and honed over the centuries by English and American common-law courts. See 2 William Blackstone, Commentaries *117 (distinguishing between "[p]ersonal actions" that are "founded on contracts" and those arising out of "torts or wrongs" (emphasis omitted)). "[A]ll ordinary common-law actions are either founded on contract as the cause of action, or are not so founded. The former are called actions *ex contractu*, the latter *ex delicto*." Martin P. Burks, Common Law and Statutory Pleading and Practice § 73, at 144 (T. Munford Boyd ed., 4th ed. 1952). The difference between the two historically turned on the source of the underlying duty:

> If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort.

Id. § 234, at 406 (citation omitted).[2]

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[2] See also 1 Joseph Chitty, The Law of Contracts 2 (11th Am. ed. 1874); Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 91 (1879); Sir Frederick Pollock, The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law 19 (2d ed. 1890). Notwithstanding the starkly drawn substantive distinctions between contracts and torts, common-law courts permitted some types of actions to be pleaded as either contract or tort violations. See Pollock, supra, at 461-63. Even then, however, whether the plaintiff framed the issue as a breach of contract or a violation of a tort duty, "the rights and liabilities of the parties were not to be altered by varying the form." Id. at 464. "Where there is an undertaking without a contract, there is a duty incident to the

True to this jurisprudential tradition, "we have consistently adhered to the rule that, in order to recover in tort, 'the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract.'" Dunn Constr. Co., 278 Va. at 267, 682 S.E.2d at 946 (citation omitted). Except in the narrow context of promissory fraud, when a false representation is solely "related to a duty or an obligation that was specifically required by the . . . [c]ontract," Richmond Metro. Auth., 256 Va. at 559, 507 S.E.2d at 347, the rights and liabilities of contractual parties in a dispute over economic losses are governed by principles of contract, not tort, law. That is because the "law of contracts" serves as the controlling legal paradigm for the "protection of expectations bargained for" and the remediation of "disappointed economic expectations." Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419, 425, 374 S.E.2d 55, 58 (1988).[3]

B.

In this case, Whitfield testified that he had every intention to honor the retention bonus at the time he wrote his letter to the employees of S.W. Rawls, Inc. In response to Modern Oil's motion to strike, the employees' counsel conceded the point and disavowed that the letter was "the focus of the fraud claim." J.A. at 75. The "crux" of the claim, counsel announced, was the

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undertaking, and if it is broken there is a tort, and nothing else." Id. And "[e]ven where there is a contract, our authorities do not say that the more general duty ceases to exist, or that a tort cannot be committed; but they say that the duty is 'founded on contract.'" Id. at 464-65. Thus, "[t]he contract, with its incidents either express or attached by law, *becomes the only measure of the duties between the parties*." Id. at 465 (emphasis added). Consequently, "the plaintiff could not by any device of form get more than was contained in the defendant's obligation under the contract." Id.

[3] See also Richmond Metro. Auth., 256 Va. at 558, 507 S.E.2d at 347 (noting that "[i]f the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not upon tort" (quoting Oleyar v. Kerr, 217 Va. 88, 90, 225 S.E.2d 398, 399 (1976))).

"silence" after the promise was made. Id. at 76.

Modern Oil contends that the employees' argument assumes, without citing binding authority, that a contracting party has a tort duty to announce that he either cannot or will not perform a promise that he previously honestly made and had every intention to perform. We agree that no Virginia precedent has extended fraud principles this far. To be sure, doing so would be all but impossible to square with our view that "no circumstances" could ever support a "constructive" promissory fraud claim if the promisor intended to keep his promise at the time he made it. SuperValu, Inc., 276 Va. at 368, 666 S.E.2d at 342; see also Station #2, LLC, 280 Va. at 172, 695 S.E.2d at 540.

The employees disagree with this characterization of their fraud claim, insisting instead that they are merely seeking an application of conventional common-law principles of fraudulent inducement. We disagree. Fraudulent inducement claims involve one of two types: fraudulent inducement to enter into a contract, and fraudulent inducement to perform a contract. See generally Devine v. Buki, 289 Va. 162, 175, 767 S.E.2d 459, 466 (2015). In the former situation, a misrepresentation entices a party to enter into a contract that, but for the fraud, he would not have entered into. See, e.g., Abi-Najm v. Concord Condo., LLC, 280 Va. 350, 362-63, 699 S.E.2d 483, 490 (2010). In the latter situation, a misrepresentation entices a contracting party to perform an executory contract that, but for the fraud, he would not have continued to perform. See, e.g., Devine, 289 Va. at 175, 767 S.E.2d at 466.

In both situations, the misrepresentation must involve an affirmative false statement or "concealment" by "word or conduct" that amounts to the "equivalent of a false representation." Lambert v. Downtown Garage, Inc., 262 Va. 707, 714, 553 S.E.2d 714, 717-18 (2001) (citation

omitted). Under Virginia law, "concealment always involves deliberate nondisclosure designed to prevent another from learning the truth." Van Deusen v. Snead, 247 Va. 324, 328, 441 S.E.2d 207, 209 (1994) (citation omitted) (finding that sellers' concealment of cracks in the basement to prevent purchasers from detecting the defect amounted to an affirmative act constituting actual fraud). Our application of this doctrine is in "full accord" with the Restatement (Second) of Contracts § 160 (1981), which states: "Action intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist." Such "affirmative action" is equivalent to an express misrepresentation. Van Deusen, 247 Va. at 329, 441 S.E.2d at 210. "Such affirmative action is always equivalent to a misrepresentation and has any effect that a misrepresentation would have." Restatement (Second) of Contracts § 160 cmt. a.[4]

Here, the employees neither pleaded nor proved that Modern Oil engaged in any active concealment or any other affirmative action intending to deceive them. Their theory at trial relied solely on a claim of *mere silence*, predicated on the assertion that the company had a tort duty to inform them during the ninety-day retention period that new independent operators were

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[4] See also Spence v. Griffin, 236 Va. 21, 28, 372 S.E.2d 595, 599 (1988) (stating that "concealment, whether accomplished by word or conduct, may be the equivalent of a false representation, because concealment always involves deliberate nondisclosure designed to prevent another from learning the truth"); Clay v. Butler, 132 Va. 464, 474, 112 S.E. 697, 700 (1922) ("If a party conceals a fact that is material to the transaction, knowing that the other party is acting on the assumption that no such fact exists, the concealment is as much a fraud as if the existence of the fact were expressly denied, or the reverse of it expressly stated."); United States v. Colton, 231 F.3d 890, 899 (4th Cir. 2000) ("[C]oncealment is 'equivalent to a false representation' and separately forms the basis for a common law fraud action [because] 'the concealment or suppression is in effect a representation that what is disclosed is the whole truth.'" (quoting Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383, 388 (1888))); John D. Calamari & Joseph M. Perillo, The Law of Contracts § 9-20, at 288-89 (2d ed. 1977) ("Positive action designed to hide the truth or to stymie the other party's investigation is deemed to constitute misfeasance that can result in liability for misrepresentation.").

taking over the management of the gas stations.[5] No Virginia case — either in the context of fraudulent inducement or otherwise — has imposed a tort duty under such circumstances.

Determining "whether a cause of action sounds in contract or tort" requires that we ascertain "the source of the duty violated." Abi-Najm, 280 Va. at 361, 699 S.E.2d at 489 (quoting Richmond Metro. Auth., 256 Va. at 558, 507 S.E.2d at 347).[6] In Virginia, "when a plaintiff alleges and proves nothing more than disappointed economic expectations, the law of contracts, not the law of torts, provides the remedy for such economic losses." Filak v. George, 267 Va. 612, 618, 594 S.E.2d 610, 613 (2004). The dispute between the employees and their former employer, Modern Oil, involves duties and alleged liability arising solely out of the contractual relationship between them.[7] The application of fraud principles to this dispute changed the nature and character of these legal duties in a manner inconsistent with settled

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[5] "[M]any courts have distinguished between simple silence and concealment or suppression, holding that the former is not without more fraudulent, while the latter may be a basis for a fraud claim even in the absence of statutory or common law duty to the other party." 26 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 69:17, at 572 (4th ed. 2003); see also id. § 69:16, at 567-68 ("It is settled that there is no general requirement of full disclosure of all relevant facts in every business relationship . . . provided no words or acts of the party who failed to disclose the fact in question contribute to the mistake, and there is no duty existing between the parties that compels disclosure of the facts . . . ." (footnotes omitted)).

[6] See generally Sensenbrenner, 236 Va. at 425, 374 S.E.2d at 58 ("The controlling policy consideration underlying tort law is the safety of persons and property — the protection of persons and property from losses resulting from injury. The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for. If that distinction is kept in mind, the damages claimed in a particular case may more readily be classified between claims for injuries to persons or property on one hand and economic losses on the other.").

[7] This point renders it unnecessary for us to address Modern Oil's argument that the employees' silence-*qua*-fraud theory cannot constitute a concealment of a fact that, if disclosed, would have induced them to do anything other than what they did — start working for the new independent dealers. See generally SuperValu, Inc., 276 Va. at 367, 666 S.E.2d at 341-42 (noting that a successful fraud claim requires proof of "reliance"); see also Augusta Mut. Ins. v. Mason, 274 Va. 199, 204, 645 S.E.2d 290, 293 (2007); Richmond Metro. Auth., 256 Va. at 557-58, 507 S.E.2d at 346; see also Dan D. Dobbs, Handbook on the Law of Remedies 593 (1973).

principles of Virginia law.

III.

We reverse the judgment against Modern Oil based upon the employees' allegations of fraud in Count II and remand the case for retrial on the contract claim in Count I.[8]

This order shall be certified to the said circuit court.

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Teste:

Clerk

[8] The parties analogize the retention-bonus letter as an offer to enter into a unilateral contract subject to conditions. See generally Pitts v. City of Richmond, 235 Va. 16, 19-20, 366 S.E.2d 56, 58 (1988) (applying principles of unilateral contracts to noncontributory employee plans); Nicely v. Bank of Va. Trust Co., 221 Va. 1084, 1089, 277 S.E.2d 209, 211-12 (1981) (same).