No. 08-1421

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARION D. JOHNSON and VIVIAN Y. JOHNSON,
Plaintiffs-Appellants,

v.

D AND D HOME LOANS CORPORATION, JASON C. WASHINGTON and WARREN MIKE ROBINSON,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

REPLY BRIEF FOR APPELLANTS MARION D. JOHNSON and VIVIAN Y. JOHNSON

DANIEL MOSTELLER
MELISSA BRIGGS
CENTER FOR RESPONSIBLE LENDING
910 17th Street NW, Suite 500
Washington, DC 20006
202-349-1863

TANYA BULLOCK
BULLOCK & COOPER, PC
5741 Cleveland Street, Suite 220
Virginia Beach, VA 23462
757-965-5608
Counsel for Marion and Vivian Johnson
July 14, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

Longstanding Virginia law dictates that Marion and Vivian Johnsons' ("the Johnsons") transaction with Jason C. Washington ("Washington") created an equitable mortgage. Moreover, if the transaction did not create an equitable mortgage, D and D Home Loans Corporation ("D&D") and Warren Mike Robinson ("Robinson") committed fraud.

The defendants fail to respond to the extensive authority cited in the Johnsons' opening brief that proved these points. Instead, they seek to divert this Court's attention by inventing procedural roadblocks and highlighting general propositions of law that are disconnected from the specific context of this case. In fact, the defendants even concede that this transaction created an equitable mortgage if there was a debt—which Virginia law dictates there clearly was. Accordingly, for the reasons both stated in the Johnsons' opening brief and those explored below, this Court should reverse the grant of summary judgment.

I. THIS TRANSACTION CREATED AN EQUITABLE MORTGAGE.

As explained in the Johnsons' opening brief, their transaction with Washington created an equitable mortgage under Virginia law, as it has been regularly applied by the Commonwealth's highest court since the nineteenth century and consistent with the law from across the country. This clear and overwhelming authority was unrefuted by the defendants.

This section, therefore, explains why the defendants' arguments are irrelevant diversionary tactics that do not diminish the conclusions of the Johnsons' opening brief. It first demonstrates that the Johnsons' arguments are properly before this Court and explains that the defendants' contrary arguments rely on misconstruing the record and misinterpreting this Circuit's waiver doctrine. Second, it reiterates that the Johnsons' transaction with Washington contained the debt necessary to create an equitable mortgage and explains that the defendants introduce requirements that are irreconcilable with Virginia's equitable mortgage doctrine. Finally, it reemphasizes that the Johnsons satisfy their burden under Virginia law to prove that a purported conditional sale created an equitable mortgage and exposes the defendants' vast overstatement of the potential consequences of this case.

A. The Johnsons Have Continuously Argued that the Purported Conditional Sale Created the Debt Necessary for an Equitable Mortgage.

The Johnsons have consistently argued throughout the course of this litigation that the purported conditional sale feature of their transaction with the defendants, as memorialized in the "Contract For Deed of Real Property," created the debt necessary for an equitable mortgage under Virginia law. Their complaint contained this argument: "[T]he transaction and Contract for Deed of Real Property created a borrower-lender relationship in which Plaintiffs' property was

intended as security for the conveyance transaction." JA37 ¶90. It was repeated in their opposition to summary judgment: "In this case the debt is expressly state [sic] in the Contract for Deed of Real Property." JA337.[1] It is also the argument that the Johnsons press on appeal: "By the terms of their transaction with Washington as memorialized in the 'Contract for Deed of Real Property,' the Johnsons were obligated to pay $235,559.68 over the course of thirteen months in order to retain ownership of their house in exchange for his advance of $176,521.06. . . . The Johnsons' repurchase provision was a sufficient obligation for purposes of Virginia's equitable mortgage doctrine." Appellants' Br. 25-26.

The issue of whether the purported conditional sale feature, as memorialized in the "Contract For Deed of Real Property," created the debt necessary for an equitable mortgage under Virginia law is properly before this Court. The consistency of the Johnsons' arguments belies the defendants' claim that the Johnsons now present an argument that was not before the district court. Contrary to the defendants' representation, Appellees' Br. 23, the Johnsons did not rely in the district court on a $5000 payment from Washington as the singular basis of the

[1] The Johnsons incorporated this portion of their response to Washington's summary judgment motion into their simultaneous response to Robinson's and D&D's summary judgment motion. *See* JA326. The district court then addressed the argument. S*ee* JA443-44, JA464 (citing the proposition "that the option to repurchase did not give rise to a debt") (citing *Clemons v. Home Savers LLC*, 530 F. Supp. 2d 803 (E.D. Va. 2008), *aff'd*, __ F. App'x ___, No. 08-1230 (4th Cir. Apr. 14, 2008) (unpublished)),

debt in the transaction. Instead, the Johnsons clearly identified the "Contract for Deed of Real Property" as the evidence of the debt "[i]n this case." JA337. The Johnsons' discussion of the $5000 payment—along with their discussion of the contract's use of the term "note," its requirement of a down payment, its provision for monthly mortgage payments, and references to refinancing—was an effort to highlight some of the features of the transaction and the contract.

Moreover, even if the defendants did not distort the district court record, this Court's case law would dictate the full consideration of the arguments found in the Johnsons' opening brief. In this Circuit, "[i]n assessing whether an issue was properly raised in the district court, we are obliged on appeal to consider any theory plainly encompassed by the submissions in the underlying litigation." *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 604 (4th Cir. 2004). The "theory" that Virginia's equitable mortgage doctrine applied to the transaction between the Johnsons and Washington has always been "plainly encompassed by the submissions" in this case; in fact, it has always been a central issue. *See*, *e.g.*, JA441-45 (recognizing that Robinson's and D&D's liability under First Count XI and Count IX depends on whether the transaction created an equitable mortgage); JA461-65 (recognizing that Washington's liability under Count IX depends on whether the transaction created an equitable mortgage).

Even the very cases that the defendants cite in invoking the waiver doctrine dictate that their argument must be rejected. *See* Appellees' Br. 22-23. Those cases demonstrate that waiver occurs in this Circuit only when a party on appeal attempts to rely on a body of law wholly missing from her arguments to the district court. *See Bakker v. Grutman*, 942 F.2d 236, 242 (4th Cir. 1991) (appeals court would not consider an argument that sanctions should have been imposed under a district court's inherent powers when the appellant only argued to the district court that 28 U.S.C. § 1927 provided the basis of sanctions); *Cordova v. Scottsdale Ins. Co.*, 5 F. App'x 142, 147 n.8 (4th Cir. 2001) (unpublished) (appeals court would not consider an argument that the appellee failed to comply with a statutory pleading requirement that was not raised in the district court);[2] *see also Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) (holding, in the Fourth Circuit's standard case on waiver, that the appellant had waived his argument that a continuing injury excused compliance with a statute of limitation when that "theory" was never raised in the district court). Accordingly, the Johnsons have not waived any argument contained in their opening brief based on any reading of the district court record.

[2] The third case cited by defendants is even more inapposite, as it left the unaddressed issues for the district court's consideration upon remand. *See French v. Assurance Co. of Am.*, 448 F.3d 693, 707 (4th Cir. 2006).

The defendants also misconstrue the record to argue that the Johnsons have made admissions fatal to their present arguments. The defendants wrongly and inexcusably assert that two excerpts from the Johnsons' depositions establish that "[t]he Johnsons freely admitted they owed no debt to *any* of the Defendants *at any time*." Appellees' Br. 6 (emphases added). The first cited excerpt, from Vivian Johnson's deposition, asked for a response from her perspective "[*b*]*efore* this whole thing happened, *before* you entered into any contract with Jason Washington, *before* you met Mike Robinson, *before* you went to D&D Home Loans." JA148 (emphases added). Obviously, this response did not speak to Vivian Johnson's understanding "at any time." And the second cited excerpt (also reproduced in the defendants' brief), from Marion Johnson's deposition, lacks any reference to Washington. *See* JA263-64. Obviously that response did not speak to Marion Johnson's position with regard "to any of the Defendants." Instead, the Johnsons consistently stated that they understood that Washington was lending them money as part of the transaction. *See, e.g.*, JA118 ("That's when we were introduced to Mr. Washington, who was going to be the one to give us the loan."); JA395 ("[Washington] was the one that loaned us the money, and we was paying him back.").

Therefore, nothing in the record procedurally limits this Court's consideration of the arguments contained in the Johnsons' opening brief.

B. The Debt Arising During the Course of This Transaction Created an Equitable Mortgage Under Well Established Virginia Law.

The defendants also endeavor to add requirements for the creation of an equitable mortgage that are irreconcilable with Virginia law. These arguments must be rejected.

As the Johnsons explained in their opening brief, the transaction with Washington obligated them to pay $235,559.68 over the course of thirteen months in order to retain ownership of their house in exchange for his advance of $176,521.06. *See* Appellants' Br. 25-26. It is undisputed that those terms were an integral part of the transaction from its outset and memorialized in the "Contract for Deed of Real Property." *See* Appellees' Br. 7 (recounting that at a May 2005 meeting between the Johnsons and the defendants, before any documents related to the transaction were signed, Robinson "outlined a plan that would allow the Johnsons to maintain possession of the Property"). This obligation satisfied the requirement in Virginia law that a debt must exist in order to create an equitable mortgage. *See* Appellants' Br. 26-30.

Virginia law is clear: The debt necessary to sustain an equitable mortgage "may be antecedent to, *or created contemporaneously with* the mortgage." *Snavely v. Pickle*, 70 Va. (29 Gratt.) 27, 35 (1877) (emphasis added). Although an equitable mortgage, like any other mortgage, certainly requires the existence of a

debt, that debt can be a product of the transaction that also created the mortgage. No case interpreting Virginia law holds to the contrary.

Accordingly, the defendants are flatly wrong when they argue that Virginia law requires a "preexisting" debt to create an equitable mortgage. Appellees' Br. 16-17. Although the defendants represent that Virginia law is "unambiguous," they support this statement with no case law from Virginia or any other jurisdiction. In fact, the defendants contradict their own argument and recognize that the case law establishes that the debt must merely exist "at the time of the transaction." Appellees' Br. 32.

The United States Bankruptcy Court's decision in *Seven Springs, Inc. v. Abramson* (*In re Seven Springs*)—the case the defendants principally cite for the requirements to create an equitable mortgage under Virginia law, *see, e.g*, Appellees' Br. 32[3]—simply stands for the undisputed proposition that an equitable mortgage can exist only in a transaction involving debt. *See* 159 B.R. 752, 756 (Bankr. E.D. Va. 1993) (Tice, J.) (requiring "a borrower-lender relationship between the parties" in order for an equitable mortgage to exist), *aff'd*, 35 F.3d 556 (4th Cir. 1994) (unpublished table decision). Nothing in that case limits the transaction itself from creating the debt. Accordingly, the author of *In re Seven*

[3] The Johnsons do not agree with the defendants that *In re Seven Springs* is an entirely correct articulation of how Virginia law evaluates an equitable mortgage claim. *See* Appellants' Br. 24 n.9.

Springs subsequently interpreted it to provide that parties who had no preexisting debt created an equitable mortgage when the debt arose as part of the transaction itself. *See Brannan v. Brymer* (*In re Brannan*), No. 06-3125, 2008 WL 1752206, at *3, *10-11 (Bankr. E.D. Va. Apr. 14, 2008) (Tice, J.) (explaining that *In re Seven Springs* requires the existence of a debt to create an equitable mortgage and holding that the requisite debt arose from a transaction in which the grantee, who had no previous relationship with the grantor, agreed as part of the transaction to pay $7,500 to stop a foreclosure and paid that sum after the transaction's completion).

Moreover, Virginia's equitable mortgage doctrine, when applied to a purported conditional sale, does not require the grantor to prove they are personally liable for the debt. This proposition is firmly established by the quartet of cases from Virginia's supreme court examined in the Johnsons' opening brief and *In re Brannan*. Those cases all hold that purported conditional sales created equitable mortgages in the absence of any evidence that the homeowners had personal liability for the debts, and they are reinforced by the jurisprudence of other states,

The Restatement (Third) of Property (Mortgages), and mortgage law scholarship. *See* Appellants' Br. 26-33.[4]

The threat that the grantor will lose her home if she does not repay the debt created by the purported conditional sale creates a sufficient obligation for an equitable mortgage. *See Tuggle v. Berkeley*, 43 S.E. 199, 201 (Va. 1903) (holding that the debt necessary to create an equitable mortgage transaction can be "either express or implied"). This threat is no different than the threat created by the common practice of nonrecourse lending, which unquestionably establishes the debt obligation requisite to create a mortgage. *See Restatement (Third) of Property (Mortgages)* § 1.1 cmt. (1997) ("Unless it secures an obligation, a mortgage is a nullity. . . . [I]t is not unusual for the parties to the mortgage to agree that there shall be no personal liability for the performance, or that personal liability is to be limited. This is often termed a 'nonrecourse' or 'limited recourse' mortgage. . . . Such a restriction or exclusion of personal liability does not impair the enforceability of the mortgage . . . .").

[4] The defendants conspicuously fail to address any of these authorities examined at length in the Johnsons' opening brief. To the extent that the district court's opinion in *Clemons v. Home Savers LLC* or a district court's oral decision are contrary to these authorities—including the binding authority of Virginia's supreme court—they are wrong. *See* Appellees' Br. 34-35. This Court's unpublished affirmance in the pro se appeal of the *Clemons* decision is "not binding authority." *Clemons v. Home Savers LLC*, __ F. App'x ___, No. 08-1230, slip op. at 2 (4th Cir. Apr. 14, 2008) (unpublished).

Therefore, the defendants' arguments concerning the Johnsons' ability to "walk away" from the transaction are irrelevant. *See* Appellees' Br. 25-26, 33. Moreover, they are inaccurate in two respects: First, as discussed above, the Johnsons faced the loss of their house of ten years (and the equity they had built up in the house) if they failed to make payments to Washington demanded by the nominal repurchase option, which was an integral part of the transaction from its very beginning and memorialized by the "Contract for Deed of Real Property." Second, the district court ruled, in resolving Washington's counterclaim, that the transaction created a personal obligation that results in the Johnsons still owing him $10,733.20. *See* JA486-94.

The defendants cannot justify the district court's summary judgment ruling by manufacturing requirements for the creation of an equitable mortgage that are irreconcilable with longstanding Virginia law. Likewise, they cannot shelter their dealings with the Johnsons from the scrutiny that Virginia's supreme court dictates courts must give to transactions involving a purported conditional sale like the one at issue here.

C. The Evidence Concerning This Atypical Land Transaction Satisfies the Burden Necessary To Prove an Equitable Mortgage Under Virginia Law.

The Johnsons do not dispute the defendants' observation that Virginia law imposes a substantial burden on a party seeking to prove that a deed should be

treated as an equitable mortgage. *See* Appellees' Br. 31; *see also Johnson v. Johnson*, 33 S.E.2d 784, 789 (Va. 1945) (stating, in the most recent articulation by Virginia's supreme court, that a party must prove her equitable mortgage claim with "clear, credible and convincing" evidence).[5] But the defendants cannot rest on that proposition because the evidence unquestionably satisfies the burden, particularly when this Court views it—as required on an appeal of summary judgment—in the light most favorable to the Johnsons.

The purported conditional sale is a key aspect of the transaction between the Johnsons and Washington that dictates the Johnsons met their burden. In determining whether an equitable mortgage exists, Virginia case law requires courts to be particularly searching of transactions that combine a deed with an

[5] The defendants cite *Warren v. Whitt*, a 1991 unpublished disposition from this Court, for the proposition that "Virginia law imposes a more stringent burden of proof than most states." Appellees' Br. 31. Even if this Court considers that deposition's terse discussion, *see* 4th Cir. R. 32.1 ("Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court . . . is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case."), it does not compare Virginia's equitable mortgage doctrine with other states. *See Warren v. Whitt*, No. 89-2841, 923 F.2d 850, 1991 WL 6311 (4th Cir. Jan. 28, 1991) (unpublished table decision). To the contrary, Virginia's equitable mortgage doctrine regularly considers the law in other jurisdictions and scholarly sources. *See* Appellants' Br. 21-22. The defendants have no excuse for their complete failure to address the various sources contained in the Johnsons' opening brief—case law from the United States Supreme Court and other jurisdictions, *The Restatement*, and scholarly sources—that confirm the Johnsons' transaction created an equitable mortgage.

agreement giving the grantor a means to reacquire formal ownership of the property. *See* Appellants' Br. 22-24.

This point is confirmed by Virginia supreme court's most recent review of whether a purported conditional sale created an equitable mortgage. In that case, *Johnson v. Johnson*, the court recognized that "[t]he burden of proof normally rests upon the party who alleges that a deed, absolute on its face, is in fact a mortgage, and the evidence in support thereof must be clear, credible and convincing." 33 S.E.2d at 789. Nevertheless, *Johnson* held that "it is usually *requisite* to resort to parol evidence, extrinsic to the deed creating the estate, to determine the true character of [a] transaction" involving a purported conditional sale and that "doubtful cases are generally declared to be mortgages" when such a feature is present. *Id*. (quoting 1 Raleigh C. Minor, *The Law of Real Property* § 580 (Frederick Deane Goodwin Ribble ed., 2d ed. 1928)) (emphasis altered); *see also Snavely*, 70 Va. (29 Gratt.) at 34 ("There is a well defined distinction between a mortgage and a conditional or defeasible sale, but it is often very difficult to determine whether a particular transaction amounts to the one or the other; and, after all, each case must be decided upon its own circumstances, and in doubtful cases the courts incline to construe the transaction to be a mortgage rather than a conditional sale.").

Accordingly, the Johnsons met their burden to prove an equitable mortgage when the transaction's nature as a purported conditional sale—as evidenced by the "Contract For Deed of Real Property"—is combined with the substantial other evidence of the parties' intent. *See* Appellants' Br. 37-40 (summarizing this evidence and explaining it satisfies the standards that courts typically consider when evaluating the parties' intent).[6] The bulk of this evidence has never been reviewed because of the district court's erroneous legal conclusion that the purported conditional sale transaction did not create a creditor-debtor relationship necessary for an equitable mortgage. *See* JA442, 463 ("Only after the court determines a borrow-lender [sic] relationship exists between the parties does the court move onto the second step of the analysis and look to the additional circumstances surrounding the transaction."). And even the defendants concede that this transaction created an equitable mortgage as long as it involved a debt.

[6] The defendants posit two entirely irrelevant reasons that they apparently believe indicate the Johnsons' intent that the deed would serve as an absolute conveyance. *See* Appellees' Br. 32. However, the Johnsons' stipulation that they "are not seeking to defeat or diminish the deeds of trust" executed by Washington to secure two loans with Finance America is simply a matter of the scope of relief that they are seeking and does not bear on whether their transaction with Washington created an equitable mortgage. *See* JA59. Moreover, even had "the Johnsons admitted that they know of no reason why the Deed of Sale would be invalid"—a claim for which the defendants provide no record citation and accordingly should be ignored, *see* Fed. R. App. P. 28(a)(9)(A) (requiring a citation to any part of the record upon which a party relies); *French*, 448 F.3d at 699 n.2 (treating arguments that do not comply with Rule 28(a)(9)(A) as abandoned)—the equitable mortgage doctrine does not invalidate a deed but merely recharacterizes its legal effect.

See Appellees' Br. 23-24 ("If the Johnsons can prove a preexisting debt, then the transaction becomes an equitable mortgage."). Accordingly, the district court's summary judgment ruling should be reversed.

The defendants seek to avoid that result by engaging in massive hyperbole: They argue that treating the Johnsons' proof as sufficient to create an equitable mortgage would "call into question almost all real estate transactions in the Commonwealth of Virginia." Appellees' Br. 24. But, as explained above, the purported conditional sale feature of this transaction separates it from the bulk of Virginia land transactions. Nothing in the Johnsons' arguments questions the treatment of deeds arising from transactions without a purported conditional sale. Nor do the Johnsons argue that the mere presence of a purported conditional sale, without other supporting evidence, creates an equitable mortgage. *See* Appellants' Br. 34-44.

Since the nineteenth century, Virginia law has consistently held that transactions like the one between the Johnsons and Washington create equitable mortgages. This law has created no instability of land titles, but instead it has prevented parties like the defendants from inequitably stripping equity from homeowners. Because the record provides strong evidence that the Johnsons' transaction with Washington created an equitable mortgage, the district court's grant of summary judgment on the Truth in Lending Act ("TILA") claim against

Washington, the Virginia Mortgage Lender and Broker Act ("MLBA") claim against Robinson and D&D, and the counterclaim should be reversed for the reasons explained in the Johnsons' opening brief and reiterated above.

II. DEFENDANTS COMMITTED FRAUD IF THIS TRANSACTION DID NOT CREATE AN EQUITABLE MORTGAGE.

If the Johnsons' transaction with Washington did not create an equitable mortgage—and instead absolutely conveyed their home to Washington—Robinson and D&D committed fraud in representing to the Johnsons that the transaction allowed them to maintain ownership of their home. The transaction either has to be treated as a loan—a loan that consequently created an equitable mortgage—or treated as a sale—and consequently a fraudulent transaction not designed to maintain their ownership.

The Johnsons explained in their opening brief that the district court erred in granting summary judgment in favor of Robinson and D&D on the fraud claim if the transaction did not create an equitable mortgage because Robinson made false representations to the Johnsons and the Johnsons' failure to read the transaction documents does not bar the claim. *See* Appellants' Br. 48-53.[7] In response, the defendants warp logic to make Robinson's false statements true or "promises and opinions as to future events"—completely ignoring Virginia's well established

[7] The Johnsons did not argue in their opening brief that Washington committed fraud.

case law holding that statements of intent are facts and not opinions. Appellees' Br. 37-39. The defendants then ignore case law allowing certain claims for fraud despite a party's failure to read a document. *See* Appellees' Br. 40-43. Finally, the defendants again bend logic past its breaking point by arguing that the Johnsons could not have reasonably relied on the simple false statements made by Robinson because they did not understand the complexity of the defendants' scheme. *See* Appellees' Br. 44-45.

The Johnsons now reiterate Robinson's misrepresentations of fact and discuss why neither their failure to read the contract nor their lack of understanding about the transaction's complexities bar the fraud claim.

A. Blatant Misrepresentations of Fact—Not Opinion—Occurred.

The defendants' attempt to transform Robinson's false statements into the truth or into mere "promises and opinions" completely fails.

The defendants defy common sense in arguing that Robinson's statements were not fraudulent because they were true. They make the bare representation (without any citations to the record) that several statements made by Robinson were, in fact, true. *See* Appellees' Br. 37 ("Robinson and D&D did *not* want and did *not* acquire an interest, in the Johnsons' real property."). They also argue the statement "We were told we could refinance in 12-13 months" was true because it was a "reference to ¶ 8 of the Contract." Appellees' Br. 37.

But the defendants could not both intend to create a transaction in which the Johnsons sold their house to Washington and not "want" their house. *See* Appellants' Br. 49 & n.18.[8] Nor does the fact that the contract also contained a false representation regarding the ability to refinance in twelve to thirteen months make Robinson's statement true: The Johnsons absolutely could not refinance a home that was owned by Washington—not by them. *See* 12 C.F.R. § 226.20(a) ("A refinancing occurs when an existing obligation that was subject to this subpart is satisfied and replaced with a new obligation undertaken by the same consumer.").

The defendants are also flatly wrong that Robinson's statements represent opinions, which do not create liability for fraud, rather than facts. Their argument that his statements were "promises and/or opinions regarding future events," Appellees' Br. 38, completely ignores Virginia's well established case law holding that *statements of intent are facts and not opinions*. *Lloyd v. Smith*, 142 S.E. 363, 366 (Va. 1928). Under Virginia law when one "represents his state of mind—that it, his intention—as being one thing when in fact his purpose is just the contrary, he misrepresents a then existing fact." *Id*.

[8] To the extent that the defendants are playing a parlor game of semantics—by arguing that Robinson did not obtain title but Washington did—the Johnsons alleged that both the statements "I [Robinson] do not want your house" and "Jason Washington does not want your house" were fraudulent. *See* JA437-38.

Instead of confronting this principle, the defendants cite (but fail to discuss) Virginia case law holding that opinions are not facts. *See* Appellees' Br. 38. That case law is irrelevant because the statements at issue are not opinions. Indeed, the *very cases* cited by the defendants prove that Robinson's statements were not opinions or promises. Three of the four cases cited by the defendants hold that the false assurances in those cases were not opinions but facts, and thus as facts could serve as a basis for a fraud claim. *See Yuzefovsky v. St. John's Wood Apartments*, 540 S.E.2d 134, 142 (Va. 2001) (determining statements that a development was crime-free "are not matters of opinion or puffing, especially when" the defendants knew they were false); *Prospect Dev. v. Bershader*, 515 S.E.2d 291, 297 (Va. 1999) (concluding that sellers' representations that an adjacent lot had failed a percolation test and could not be developed were facts not opinions nor statements of future events); *Boykin v. Hermitage Realty*, 360 S.E.2d 177, 179 (Va. 1987) (concluding that statements concerning a home's privacy were misrepresentations of fact rather than opinion when a playground was planned for the adjacent lot).

Likewise, the statements at issue here are factual. The statements "I do not want your house" and "Jason Washington does not want your house" are misrepresentations of intent "as being one thing when in fact his purpose is just the contrary": the defendants could not both intend to create a transaction in which the

Johnsons sold their house and not "want" their house. *See Lloyd*, 142 S.E. at 366.[9] Moreover, just like the statements made in the cases the defendants cite, Robinson's statements were false assurances to lure the Johnsons into the transaction.

B. Neither the Johnsons' Failure To Read the Contract Nor Their Lack of Understanding of the Transaction Bars the Fraud Claim.

The defendants also argue that even if Robinson's statements to the Johnsons were false, no fraud occurred because the Johnsons' failure to read the sales documents bars their fraud claim and the fact that the Johnsons did not completely understand the transaction precluded their reasonable reliance on Robinson's simple misrepresentations. *See* Appellees' Br. 40-45. The first argument is refuted by the undisputed explanation in the Johnsons' opening brief that this case falls in the exception to the general rule that the failure to read a document bars a fraud claim. The defendants' completely unsupported second argument incentivizes complex fraud.

The failure to read a contract generally bars fraud claims. *See* Appellants' Br. 51. That prohibition, however, is not absolute. Virginia law refuses to excuse misrepresentations—despite a party's failure to read the contract—when: (1) the

[9] As explained above, the Johnsons could not "refinance" the home once it was owned by Washington. Accordingly—unless the transaction created an equitable mortgage—the defendants make a completely specious argument that Robinson intended at the time of the transaction for the Johnsons to "refinance" but that their default prevented it. *See* Appellees' Br. 39.

failure to read is excused in light of the totality of the circumstances surrounding the contract; or (2) the misrepresentation induced a party to enter a contract to her disadvantage. *See* Appellants' Br. 51-52.

The defendants entirely fail to respond to the case law and argument in the Johnsons' opening brief explaining the district court's legal error in concluding that their failure to read the contract absolutely barred the fraud claims. Instead, the defendants wholly rely on earlier cases that stand for the undisputed rule that the failure to read a contract generally bars a fraud claim.[10] The defendants completely ignore the Johnsons' arguments that demonstrate this case falls into the two exceptions to the general rule.

Defendants do not and cannot explain why the district court should not have considered the Johnsons' failure to read the documents "in light of all surrounding facts and circumstances." *Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129, 136 (4th Cir. 1967). To be sure, as explained in the Johnsons' opening brief, the circumstances here were hardly that of a typical real estate sale: Robinson was a mortgage broker—not a real estate agent; Robinson continually preyed upon the Johnsons' shared faith; Robinson and his wife repeatedly consoled Vivian Johnson

[10] The defendants' argument that the Johnsons would have been fully protected through the "[o]rdinary care and prudence" of reading the contract is extremely doubtful considering that the legal meaning of those very contracts has served as the basis of pages of legal briefing. *See* Appellees' Br. 43.

as she cried; and Robinson consistently represented the transaction as a refinance rather than a sale. *See* Appellants' Br. 52.

Nor do the defendants even attempt to address Virginia case law that refuses to excuse fraud that "induce[s] another to enter into a contract to his disadvantage"—even when the induced party fails to read the contract. *Nationwide Ins. Co. v. Patterson*, 331 S.E.2d 490, 492 (Va. 1985); *see also Boykin*, 360 S.E.2d at 179 (refusing to allow defendants who promised privacy to home purchasers to avoid fraud claim despite the fact that public records revealed a playground was planned on an adjacent lot). The defendants' complete failure to respond to this argument is not surprising given Robinson's misrepresentations are exactly the kind of fraudulent conduct—perpetrating lies then hiding behind written documents—that Virginia courts refuse to reward by excusing the failure to read a contract.

Finally, the defendants again distort both reality and the law by arguing that the Johnsons could not reasonably rely on Robinson's repeated simple misrepresentations about the transaction because they did not understand the true complex nature of the transaction. Bizarre and not based on a shred of legal authority, this argument ignores reality.

The Johnsons clearly understood the simple false statements: "I do not want your house"; "Jason Washington does not want your house"; "you can refinance in

twelve to thirteen months"; and "we want to help you." The fact that the Johnsons did not understand the complexities of the corresponding transaction does not in any way negate the falsity of these statements nor negate the Johnsons' ability to rely on them. Indeed, the Johnsons' lack of understanding of the transaction was at the heart of the defendants' scheme: The Johnsons believed based on Robinson's misrepresentations that they were refinancing—not selling—their home.

The defendants' only support for their specious argument is basic case law requiring reliance to be reasonable—an entirely unremarkable proposition that cannot be stretched to include the defendants' theory that the Johnsons' reasonable reliance on simple clear statement was negated by their failure to understand the intricacies of the transaction. In fact, the defendants' theory would perversely immunize misrepresentations in the type of complex transactions considered to create more serious forms of fraud. *Cf. United States v. Achiekwelu*, 112 F.3d 747, 757 (4th Cir. 1997) (discussing the Federal Sentencing Guidelines' more serious sentences for complex fraud).

CONCLUSION

Accordingly, the district court's grant of summary judgment in favor of the defendants on the Johnsons' TILA, MLBA, and fraud claims and on Washington's counterclaim should be reversed for the reasons stated in the Johnsons' opening brief and those emphasized above.

Respectfully submitted,

s/ Daniel P. Mosteller
Daniel Mosteller
Melissa Briggs
Center for Responsible Lending
910 17th Street NW, Suite 500
Washington, DC 20006
202-349-1863

Tanya Bullock
Bullock & Cooper, PC
5741 Cleveland Street, Suite 220
Virginia Beach, VA 23462
757-965-5608

Counsel for Marion and Vivian Johnson
July 14, 2008

CERIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,548 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaces typeface using Microsoft Office Word 2003 in 14-point Times New Roman.

s/ Daniel P. Mosteller
Daniel Mosteller
Counsel for Marion and Vivian Johnson
July 14, 2008

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Paul R. Schmidt
Huff, Poole & Mahoney, P.C.
4705 Columbus Street
Virginia Beach, VA 23462
Counsel for D&D Home Loans and Mike Robinson

John C. Lynch
Jason E. Manning
Troutman Sanders LLP
PO Box 61185
Virginia Beach, VA 23462
Counsel for Jason Washington

s/ Daniel P. Mosteller
Daniel Mosteller
Counsel for Marion and Vivian Johnson
July 14, 2008