



LITIGATION NEWS

VS

PUBLISHED BY THE LITIGATION SECTION OF THE VIRGINIA STATE BAR FOR ITS MEMBERS.

VOLUME VII NUMBER 2

SPRING 2000

“Waive the Tort and Sue in Contract” — The Current State of Virginia Law

by Ronald M. Ayers

Only the old-timers remember the adage, “Waive the tort and sue in contract,” and its reverse, “Waive the contract and sue in tort.” Before 1977, Virginia law embodied a strict doctrine of election of remedies, grounded in both procedure and substance, that dictated the proper scope of pleadings and forbade the joinder of tort actions and contract actions. The legislature’s abolition of the procedural objection in 1977 has cleared the landscape, and similarly, post-1977 judicial decisions make much clearer the substantive impropriety of trying to plead a contract claim as a tort. To place current law in perspective, this article will briefly describe the operation of the old rule, its legislative modification, and the subsequent case law establishing that the breach of a contractual duty does not give rise to a tort claim.

Standard Products Co. v. Wooldridge & Co., 214 Va. 476, 201 S.E.2d 801 (1974), illustrates the old rule. In that case, the plaintiff attempted to pursue both a claim in contract and one in tort against the defendants, an insurance brokerage business and an individual agent. The trial court sustained the defendants’ demurrer on the ground that the motion for judgment constituted a misjoinder of actions, and required the plaintiff to elect between its tort and contract counts. The plaintiff elected to proceed in tort, but then filed a separate action for breach of contract. In that contract action, the plaintiff obtained a default judgment against the defendant brokerage business, after the plaintiff nonsuited the agent.

Ronald M. Ayers is a partner with the firm Johnson, Ayers & Matthews in Roanoke, Virginia. He wishes to acknowledge the assistance of John Eure and Lori Jones in the preparation of this article.

In the companion tort action, the agent’s special plea was sustained by the trial court, on the ground that the plaintiff was barred from proceeding against the agent by virtue of the default judgment against the brokerage business in the contract action. The Supreme Court of Virginia affirmed and discussed at length the principle that:

[O]ne waiving a tort and suing in contract makes such a binding election of remedy as cannot be reconsidered.... He cannot thereafter treat the action brought as if it were a tort action, or bring an action of tort with regard to the same cause of action, notwithstanding he was unsuccessful in the action of contract.... By waiving the tort and suing in contract, a party necessarily waives the entire tort....

Id. at 483, 201 S.E.2d at 806. See also *Kavanaugh v. Donovan*, 186 Va. 85, 93, 41 S.E.2d 489, 493 (1947) (“It is elementary that causes of action in tort and contract should not be joined in the same notice of motion or declaration. They are not of the same nature.”) The *Standard Products* Court held that the plaintiff, by instituting its second

Tort — cont’d on page 6

Table of Contents

“Waive the Tort and Sue in Contract” — The Current State of Virginia Law	1
<i>by Ronald M. Ayers</i>	
Letter from the Chair	2
Moneta Building Supply: Building an Addition to the Virginia Corporate Governance Rules	3
<i>by Gregory J. Haley</i>	
Distributing the Proceeds of Property Fraudulently or Voluntarily Conveyed	8
<i>by Leighton S. Houck</i>	
Ethics at a Glance: Ethics in the Information Age	9
<i>by Thomas E. Spahn</i>	
Recent Law Review Articles	11
Litigation Section Board of Governors	14
Young Lawyers Committee	15

