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“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.

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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

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Letter from the Chair

Twenty-one years ago, I graduated from law school and became associated with a prestigious law firm. Within weeks, I was encouraged by the firm's leadership to become active in Bar and community activities. Never was there a hint of a "client development" ulterior motive. Rather, a lawyer was simply expected to give back to the community, to serve the Bar and to participate in charitable and civic activities.

Four months ago I received the resignation of the chair of the Young Lawyer's Section of the Litigation Section. He had recently changed law firms and had become a father, and felt he did not have time to meet all of his obligations. When I spoke with several of the young lawyers who had been suggested to take his place, some simply had no interest in any non-billable activities; others questioned how it might advance their careers — would they meet potential clients? Would they be likely to get referrals from other lawyers on the Board of Governors? What would they get out of it?

One young lawyer asked none of those questions. When I asked whether he might be interested in helping to revitalize the Young Lawyers Section, he not only replied positively, but with genuine enthusiasm. He told me of his days in his college's student government when he had concluded that any democracy depended on the active participation of its citizenry. Without it, he believes, society sinks to its lowest common denominator. Likewise, he suggested, a self-regulating body like the Bar depends on the active participation of its members; if we do not actively participate in regulating ourselves, we will undoubtedly allow our profession to sink to unacceptable levels and others will take over the regulatory process. In short, he was eager to become involved in the task of identifying and coordinating projects that would be sufficiently beneficial to young litigators to attract their interest and participation. His enthusiasm was so keen and genuine I was tempted to share with him some thoughts I have on an issue that I believe increasingly threatens the core of our profession.

Last year the Litigation Section focused on lawyer advertising. Some of the more infamous commercials (spaceships, hammers, Mr. Cash and fighters) do nothing to enhance the public's knowledge about the law or about the abilities of the lawyers seeking to represent the injured among the viewing audience. Those

commercials, however, send powerful messages to the public and to the Bar.

To the public, much of it is glitz, money and memorable jingles, without even a hint of a principled, dedicated and persistent search for justice. To the Bar, I fear the message may be akin to "finders-keepers, losers-weepers." If the commercials continue to "find" clients who pay fees disproportionately higher than the cost of the commercials, how long will it be before most everyone does it? If the tackiest commercials prove the most effective, how many lawyers will opt for the more dignified but less effective variety?

If tacky commercials work and *if* they cannot legally be curtailed, they will become more prevalent. But if a lawyer's commercial lures an injured person into the office and into a contingent fee agreement, who wins when the lawyer takes an excessively high fee for reviewing the facts, writing a letter and recommending a settlement?

I believe the contingent fee remains an important and essential vehicle in order for many to access our system of justice. I also believe the reports of huge legal fees (sometimes appropriate, sometimes not) have contributed significantly to the public's perception of lawyers as "shysters" rather than as learned, scrupulous and diligent participants in the search for truth and justice.

Clearly, people who work long, arduous hours trying to solve other people's problems deserve to be well compensated. However, the problem I anticipate is in the confluence of huge legal fees and tacky commercials. Granted, the huge fees (as opposed to a high volume of smaller fees) may not be going to those in the tacky commercials. But when abuses occur and when the public *PERCEIVES* a connection between undeserved legal fees and attorney commercials, something will change. If the First Amendment protects the commercials, then unmonitored; unreviewed; unchecked contingent fees will be a likely target.

This is just one of the fears I have about our profession sinking to the lowest common denominator. I trust that the active participation of our more senior, as well as our younger lawyers, will keep us from going there.

We really do depend upon one another to ensure that the standards of conduct, professionalism and competency that historically have been a part of our profession remain intact.

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Moneta Building Supply: Building an Addition to the Virginia Corporate Governance Rules

by Gregory J. Haley

The Supreme Court of Virginia's decision in *Willard v. Moneta Building Supply*, 258 Va. 140, 515 S.E. 277 (1999), is destined to be a landmark decision governing Virginia law on corporate governance, director liability and shareholder rights issues. The *Moneta Building Supply* decision was the culmination of a bitterly contested transaction involving the sale of substantially all of the operating assets of Moneta Building Supply, Inc. ("Moneta") to a shareholder and former officer and director of the company. If ever a case had everything, it was this one: high stakes, resolute individuals, multiple parties, skilled attorneys on all sides, and difficult legal and factual questions. The course of the litigation and the ultimate holdings of the trial court and the Supreme Court illustrate several "lessons learned" that may be of interest to lawyers whose practice includes commercial litigation.

The Facts and Just the Facts

The trial court's decision in *Moneta Building Supply* and the Supreme Court's affirmation of that decision were intensely factual in nature. A reader of the Supreme Court's opinion should exercise caution not to overread the case or cite the opinion for sweeping propositions of law outside of the factual foundation on which the analysis and the holdings are anchored.

As in many cases, a careful reading of the Court's opinion brings to life the vivid and compelling personalities of the people involved. The factual review below is necessarily abridged and does not do justice to the full factual spectrum reflected in the texts of the trial court and Supreme Court opinions.

Moneta was a building supply company in Bedford County near Smith Mountain Lake. At the

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time of the litigation, Moneta had four shareholders. A. S. and Rose Mary Cappellari owned approximately 75% of the shares between them. Their son, David Cappellari ("David"), owned approximately 5%. The plaintiff Ronald L. Willard ("Willard") owned approximately 20% of the shares.

David served as Moneta's president, manager, and a director from the company's inception in 1978, until he resigned in 1996. Moneta was a very successful business and generated substantial income for its shareholders.

David became dissatisfied with his percentage of his ownership interest in Moneta and his inability to acquire additional shares from his parents due to a restrictive transfer provision in a 1978 Stock Purchase Agreement. The Stock Purchase Agreement had not been revised to reflect a 1986 restructuring of Moneta's ownership. The 1986 restructuring involved the dissolution of a holding company owned by A. S. and Rose Mary and the transfer of the holding company's interest in Moneta to A. S. and Rose Mary outright. Under the terms of the Stock Purchase Agreement, Willard would have the right to purchase the shares of A. S. and Rose Mary upon their respective deaths at an attractive formula price. David, therefore, would have no opportunity to increase his ownership interest even upon his parents' deaths. David, therefore, began developing a business plan to start his own competing building supply company.

David resigned as an officer and director of Moneta on September 18, 1996 and advised Moneta that he intended to explore opening his own building supply business. After his resignation, David incorporated Capps Home and Building Supply, Inc. ("Capps"). David then contracted to acquire a site for a business location, developed construction plans for a new building, and arranged bank financing for starting Capps.

At a special meeting of the shareholders on October 7, 1996, David informed the other shareholders (A. S., Rose Mary and Willard) that he might be interested in purchasing Moneta's assets if the company wished to sell the assets. Willard stated at that meeting that he was not interested in acquiring Moneta's assets.

On October 8, 1996, Moneta and Capps agreed to exchange information pertaining to the possible acquisition of Moneta's assets. Willard then filed a corporate dissolution suit and sought a preliminary injunction to enjoin any shareholders from competing with Moneta. The circuit court denied the requested injunction on October 24, 1996.

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Moneta*cont'd from page 3*

Capps submitted a proposed Asset Purchase Agreement to Moneta on November 15, 1996, offering a cash purchase of the corporation's operating assets for \$1,300,000 with a closing date of December 31. The offer specified an expiration date of November 23, 1996, because of the tight time limits if Capps was going to begin construction on its new building for a spring opening. The offer was accompanied by a valuation analysis by a certified public accountant concluding that the value of the assets as of September 30, 1996 was \$1,300,000. Capps also informed A. S. and Rose Mary that David had arranged bank financing for the proposed transaction.

A. S. and Rose Mary, as the sole remaining directors after David's and Willard's resignations in September and October, voted to accept the Asset Purchase Agreement on November 19, 1996, but reserved the right to negotiate matters of concern to the shareholders. The board of directors also voted to hire a valuation expert to analyze whether the Capps offer reflected the fair market value of the Moneta assets. Finally, the board referred the transaction to the shareholders without any recommendation from the directors and called a shareholder meeting for December 20, 1996. The sale of substantially all of the corporation's assets was a transaction requiring shareholder approval pursuant to VA Code Ann. § 13.1-724.

By letter dated December 10, 1996, Willard advised A. S. and Rose Mary that he believed that the Capps offer was too low. Willard also offered to purchase the assets for \$400,000 more if Moneta accepted his offer by December 13, 1996. A. S. replied on December 13 and advised Willard that the Board would not consider the offer prior to the December 20 shareholder meeting. A. S. encouraged Willard to attend the meeting and present his offer to the shareholders at that time.

Willard then sought an injunction to prevent the shareholders from convening the December 20 meeting. The circuit court denied the request on December 17.

On December 19, 1996, Willard again wrote and increased his offer to \$600,000 more than the amount offered by Capps. Willard also requested thirty days in which to evaluate the assets and determine if an even higher purchase price was warranted.

Moneta received the valuation analysis requested by the board in a report dated December 12, 1996. This report concluded that the \$1,300,000 Capps offer was fair taking into consideration that the going

concern assumption underlying the valuation analysis may have been effected by the loss of key personnel (David) and the pending litigation. This report was forwarded to the shareholders prior to the December 20 meeting.

A majority of the shareholders (A. S. voting his shares and voting Rose Mary's shares by proxy) approved the Asset Purchase Agreement with Capps on December 20, 1996. Prior to the vote, Willard noted his objection to the Capps offer and stated that he had a counteroffer on the table. Prior to voting, A. S. stated that he would consider the best interests of the employees, and other non-monetary factors including the corporation's customers, the continuity of management, and the realistic threat to Moneta of competition if the property was not sold.

On April 23, 1997, Willard filed a seven count shareholder derivative suit naming as defendants Moneta, A. S., Rose Mary, David, and Capps.

The case was tried as a bench trial before newly appointed Circuit Court Judge James W. Updike, Jr. At trial, the court heard extensive testimony from the individuals involved about their actions and motivations. In addition, the parties presented expert valuation testimony from three business valuation experts and from two real estate appraisers.

The trial court issued a lengthy letter opinion dated May 14, 1998, which included a detailed legal analysis and factual findings. The trial court dismissed the action by order dated June 4, 1998, finding that Willard had failed to present sufficient evidence to prove his claims.

The Key Holdings

The Supreme Court made six key holdings relating to the discussion in this article. The Court framed the issues presented to it as follows:

This appeal involves a sale of the assets of a closely held corporation. The minority stockholder of the corporation has attacked the propriety of the transaction, primarily on the grounds that the corporation's directors, who were also its majority stockholders, breached their statutory and common law duties by failing to maximize the sales price, by authorizing a transaction in which they had a conflict of interests, and by failing to comply with the statutory procedures for selling the assets of a corporation, not in the ordinary course of business. Finding no error, we will affirm the circuit court's judgment upholding the transaction.

258 Va. at 143, 515 S.E.2d at 280.

The first three key holdings applied VA Code Ann. § 13.1-690, the portion of the Virginia Stock Corporation Act that sets forth a statutory standard

