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Legal Malpractice in Virginia: Tort or Contract?

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LEGAL MALPRACTICE IN VIRGINIA: TORT OR CONTRACT?

I. INTRODUCTION

A client who attempts to recover from an attorney does so because the client feels that the attorney has acted negligently. The concepts of standard of care, negligence, and damages are usually associated with actions in tort. However, while an examination of applicable Virginia law reveals that concepts usually associated with tort apply to legal malpractice, the presence of elements of negligence does not always equal tort.

Whether the cause of action for legal malpractice lies in tort or contract is a question which troubles many Virginia attorneys. The principal cause of this confusion is the nature of an action for legal malpractice. In attempting to define the nature of a legal malpractice action, this comment will examine the attorney standard of care, statutes of limitation, and the question of recoverable damages.

II. STANDARD OF CARE

In 1796, the Virginia Supreme Court decided *Stephens v. White*,[1] the first reported legal malpractice case in the United States.[2] In *Stephens*, the court held that an attorney was liable to his client for legal malpractice, provided the client could show that the attorney was guilty of "gross negligence," and "that the attorney was employed [on the client's behalf] . . . . "[3] Seventy-five years later, the court adopted an "ordinary negligence" standard in *Pidgeon v. Williams*.[4] The attorney standard of care has evolved into one of reasonableness, a standard established in the 1951 case of *Glenn v. Haynes*.[5] There, the court stated:

> The law implies a promise on the part of attorneys that they will execute the business intrusted to their professional management, with a *reasonable degree of care*, skill, and dispatch, and they are liable to an action if guilty of a default in either of these duties whereby their clients are injured, and this liability of the attorney is not affected by the client's diligence or the want of it, unless stipulated for by special contract . . . and [the attorney] is not to be answerable for every error or mistake, but on the contrary, will be protected if he acts in good faith, to the best of his skill and knowledge, and with an ordinary degree of attention.[6]

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1. 2 Va. (2 Wash.) 203 (1796).
2. *See* Allied Productions, Inc. v. Duesterdick, 217 Va. 763, 764, 232 S.E.2d 774, 775 (1977).
3. 2 Va. (2 Wash.) at 212.
4. 62 Va. (21 Gratt.) 251, 254 (1871).
5. 192 Va. 574, 66 S.E.2d 509 (1951).
6. *Id.* at 581, 66 S.E.2d at 512-13 (quoting 2 R.C.L. Attorneys at Law § 95) (emphasis

The Code of Virginia prescribes liability to the attorney "for any damage sustained by [the client] by the neglect of [the attorney's] duty . . . . "[7] While there is no question that an attorney has a potential liability to his client for negligence,[8] he will only be liable if he violates the "reasonable care and skill" standard of *Glenn v. Haynes*.[9] In addition, to maintain an action for attorney malpractice the injured client must show a breach of certain other duties in the attorney-client relationship.

The elements necessary to maintain an action for attorney malpractice were enumerated by the Fourth Circuit in *Maryland Casualty Co. v. Price*.[10] The Virginia Supreme Court adopted these elements in *Allied Productions, Inc. v. Duesterdick*.[11] Quoting the Fourth Circuit, the Virginia Court stated that "[i]n a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) the attorney's employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client."[12]

III. TORT OR CONTRACT?

The standard of care articulated in *Glenn* and the cases preceding it is the source of the confusion in deciding whether an action for legal malpractice lies in tort or contract. The *Glenn* court couched its opinion in terms of tort standards. However, a contract cause of action would also seem appropriate, since the negligent attorney has failed to perform as he has promised, or he has made a misrepresentation in the course of his service which would constitute a breach of the attorney's oral implied

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added). *See* Fowler v. American Fed'n of Tobaccco Growers, Inc., 195 Va. 770, 80 S.E.2d 554 (1954) (failure to exercise reasonable care).

7. VA. CODE ANN. § 54-46 (Repl. Vol. 1978). *See also* VA. CODE ANN. § 26-5 (Repl. Vol. 1979) (attorney's liability for loss of money through negligence or improper conduct).

8. Litigation may be one area in which an action for malpractice is not recognized. The Tennessee Court of Appeals has held that "there can be no cause of action against an attorney arising out of the manner in which he honestly chooses to present his client's case to the trier of facts." Stricklan v. Koella, 546 S.W.2d 810, 814 (Tenn. App. 1976). The *Stricklan* court adopted the English view articulated in Rondel v. Worsely, [1967] 1 Q.B. 443 (1966), *aff'd*, [1969] 1 A.C. 191 (1967), [1967] 3 W.L.R. 1666, [1967] 3 All E.R. 993. *But see* Olson v. North, 276 Ill. App. 457, 498 (1934) (a cause of action will lie for negligence in conducting litigation). *See also* Annot., 45 A.L.R.2d 5 (1956).

9. This standard of care has been interpreted so as to require the attorney to exercise only the degree of care which is required by community or jurisdictional standards. Coggin, *Attorney Negligence . . . A Suit Within a Suit*, 60 W. VA. L. REV. 225, 227 (1958) [hereinafter cited as Coggin]. *See also* W. PROSSER, THE LAW OF TORTS § 32 (4th ed. 1971). However, *Glenn* held that the requisite skill is that which is demanded by the character of the business the attorney has undertaken. 192 Va. at 581, 66 S.E.2d at 513.

10. 231 F. 397 (4th Cir. 1916).

11. 217 Va. 763, 232 S.E.2d 774 (1977).

12. *Id.* at 764-65, 232 S.E.2d at 775 (quoting Maryland Casualty Co. v. Price, 231 F. at 401). The attorney may be "employed" even if he serves without compensation. Stephens v. White, 2 Va. (2 Wash.) at 210-12.

contract of employment.[13]

In *Oleyar v. Kerr*,[14] the Virginia Supreme Court eliminated the confusion over which action should lie. They did so by first examining the nature of the relationship between attorney and client. The court determined that the duty which flows from the attorney to the client exists solely because of the contract of employment.[15] In *Oleyar*, the court stated that "[b]ut for the contract [of employment], no duty . . . would have existed."[16]

In *Oleyar*, the plaintiff, Kerr, had employed the defendant attorney to examine a title to real estate. The attorney, in his title certificate, failed to report a judgment duly docketed against the vendor of the property. Kerr was forced to pay the judgment amount when she reconveyed the property. She then instituted an action for damages against her attorney, who defended on the grounds that the action was in tort and that the one year period of limitations had run, barring any recovery from him.[17] Kerr, having plead that the action was based on an oral contract with Oleyar, argued that a five year statute of limitations should apply.[18] The trial court held that the action was in tort and that a one year statute of limitations should apply. However, the court decided that Kerr's action was timely because the statute did not begin to run until the judgment was entered against Kerr by her grantees.[19]

On appeal, the Virginia Supreme Court affirmed the trial court's judgment against the attorney on other grounds. The court stated that the action was not one in tort, but in contract. It was not a contract in writing allowing for a five year period of limitations, but an express or implied contract which was governed by a three year period.[20] The action by Kerr was therefore timely.[21] In affirming the trial court, the Virginia Supreme Court adopted "the better reasoned view . . . that an action for the negligence of an attorney in the performance of professional services, *while*

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13. Keeton, *Professional Malpractice*, 17 WASHBURN L.J. 445, 448 (1978). *See also* Annot., 49 A.L.R.2d 1216, 1219-21 (1956).

14. 217 Va. 88, 225 S.E.2d 398 (1976).

15. *Id.* at 90, 225 S.E.2d at 399. *See also* PROSSER, *supra* note 9, at § 92.

16. 217 Va. at 90, 225 S.E.2d at 399.

17. *Id.* at 89, 225 S.E.2d at 399. *See* VA. CODE ANN. § 8-24 (Repl. Vol. 1957) (current version at VA. CODE ANN. § 8.01-243A (Repl. Vol. 1977) (providing for a two-year statute of limitations)).

18. *See* VA. CODE ANN. § 8-13 (Repl. Vol. 1957) (current version at VA. CODE ANN. § 8.01-246(2) (Repl. Vol. 1977)).

19. 217 Va. at 89, 225 S.E.2d at 399.

20. *Id.* at 90, 225 S.E.2d at 400 (citing McCormick v. Romans, 214 Va. 144, 198 S.E.2d 651 (1973)). *See* VA. CODE ANN. § 8-13 (Repl. Vol. 1957) (current version at VA. CODE ANN. § 8.01-246(4) (Repl. Vol. 1977)).

21. 217 Va. at 90, 225 S.E.2d at 400.

sounding in tort, is an action for breach of contract . . . . "[22]

It is now clear that the cause of action against a negligent attorney is one which may lie in contract. But, can there be a cause of action against an attorney in tort? The Virginia Supreme Court addressed this question in *Goodstein v. Weinberg*.[23] The court mentioned its *Oleyar* opinion, that the action for legal malpractice was for breach of contract, but the court further stated that an action could lie in tort if the "action was "purely in tort' and "not merely sounding in tort.' "[24] Since the client in *Goodstein* was alleging fraud and willful negligence on the part of the attorney, the court held that this action would constitute an "independent willful tort."[25] At first *Goodstein* may appear to be inconsistent with *Oleyar*. However, the *Goodstein* court's opinion holds that while *Oleyar* applies in the normal case involving attorney negligence,[26] if the act by the attorney is one ordinarily in tort and the duty owed by the attorney is not one created solely by the contractual relationship,[27] an action in tort will also lie.[28]

IV. Statute of Limitations

A central issue in *Oleyar, Goodstein* and other cases of attorney malpractice[29] was the question of which period of limitations should govern. Under the Virginia Code, an action for breach of an oral contract is barred three years after the action has accrued.[30] For actions in tort, the applicable statutory period is two years.[31] After *Oleyar*, the statute of

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22. *Id.* at 90, 225 S.E.2d at 400 (emphasis added). *But see* Family Sav. & Loan v. Ciccarello, 157 W. Va. 983, 207 S.E.2d 157 (1974) (cause of action depends solely on the pleadings).

23. 219 Va. 105, 245 S.E.2d 140 (1978).

24. *Id.* at 109, 245 S.E.2d at 142.

25. *Id.*

26. The *Goodstein* court distinguished *Oleyar*. The court stated that the question in *Oleyar* was one concerning "the nature of the action, whether in contract or in tort," 219 Va. at 109, 245 S.E.2d at 142, while the question in *Goodstein* was whether an action "based solely on tort liability" would lie. *Id.*

27. Prosser tells us that "[t]he fundamental difference between tort and contract lies in the nature of the interest protected. Tort actions are created to protect the interest in freedom from various kinds of harm . . . . Contract actions are created to protect the interest in having promises performed." Prosser, *supra* note 9, at § 92.

28. Since the passage of § 8.01-272 of the Virginia Code, both the contract and tort causes of action may be joined in the same motion for judgment. In pertinent part, this section provides that "a party may plead as many matters, whether of law or fact, as he shall think necessary. A party may join in a claim in tort with one in contract provided that all claims so joined arise out of the same transaction or occurrence." Va. Code Ann. § 8.01-272 (Cum. Supp. 1981).

29. *See, e.g.*, McCormick v. Romans, 214 Va. 144, 198 S.E.2d 651 (1973).

30. *See* Va. Code Ann. § 8.01-246(4) (Repl. Vol. 1977). For an application of this section, see 214 Va. 144, 198 S.E.2d 651. *See also* note 20 *supra* and accompanying text.

31. *See* Va. Code Ann. § 8.01-243(a) (Repl. Vol. 1977). This section is a recodified and

limitations period for the majority of actions involving legal malpractice is the three year period provided in section 8.01-246(4) of the Virginia Code.

Once the nature of the action and thus the applicable period of limitations have been determined, the question of critical importance becomes when the action accrued and the limitation period began to run.[32] Under Virginia law, the statutory period begins to run when the injury or breach occurs and not when the "resulting damage is discovered."[33] The Virginia Supreme Court has not been disposed to alter this rule. In *Virginia Military Institute v. King*,[34] an action against an architect for negligence,[35] the court stated that:

> [t]he inequities that may arise from the general rule which may trigger a statute of limitations when the injury or damage is unknown or difficult or even incapable of discovery are apparent. Nevertheless, we believe that any change in a rule of law that has been followed in our jurisdiction and relied on by bench and bar for so many years should be made not by us, but by the General Assembly, which thus far has not approved any modification.[36]

This general rule is mitigated somewhat by the adoption in Virginia of the "continuing negligence" rule.[37] In *McCormick v. Romans*,[38] the court held that "where there is an undertaking which requires a continuation of services, the statute of limitations does not begin to run until the termination of the undertaking."[39] Traditionally, the court has applied the "continuation of services" concept to the employment relationship between attorney and client.[40]

In *Goodstein v. Allen*,[41] the sequel to *Goodstein v. Weinberg*,[42] the Virginia Supreme Court addressed an interesting issue concerning the statute of limitations. While an appeal was pending in the *Goodstein v.*

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amended version of former § 8-24 which provided for a one-year period of limitation for tort actions of this type. *See* note 17 *supra* and accompanying text.

32. For a discussion of when the action accrues, see Annot., 18 A.L.R.3d 978 (1968).

33. VA. CODE ANN. § 8.01-230 (Repl. Vol. 1977). *See* Virginia Military Instit. v. King, 217 Va. 751, 232 S.E.2d 895 (1977) (statute begins to run from the moment the cause of action arises rather than from the time of discovery).

34. 217 Va. 751, 232 S.E.2d 895 (1977).

35. The court in *King* felt that the cause of action against an architect would be governed by the same principles that would apply in an action against an attorney, citing *Oleyar v. Kerr*, 217 Va. at 759, 232 S.E.2d at 899-900.

36. 217 Va. at 760, 232 S.E.2d at 900 (citations omitted).

37. Zepkin, *Virginia's Continuing Negligent Treatment Rule: Farley v. Goode and Fenton v. Danaceau*, 15 U. RICH. L. REV. 231, 237-38 (1981) (dealing principally with medical malpractice).

38. 214 Va. 144, 198 S.E.2d 651 (1973).

39. *Id.* at 148, 198 S.E.2d at 654.

40. *See, e.g.*, Beale v. Moore, 183 Va. 519, 525-26, 32 S.E.2d 696, 699 (1945).

41. 222 Va. 1, 278 S.E.2d 787 (1981).

42. 219 Va. 105, 245 S.E.2d 140. *See* notes 23-28 *supra* and accompanying text.

Weinberg tort action, the attorneys sued the clients for unpaid fees.[43] The clients counter-claimed and sought damages for breach of contract, whereupon the attorneys pled the statute of limitations.[44] The clients argued that the three year contract statue of limitations should be tolled by the attorneys' fraudulent concealment of their negligence and breach of contract.[45] The court held that the statute had not begun to run on their contract action, since, in their appeal in *Goodstein v. Weinberg*, they had not contested the trial court's finding that the statute had begun to run on their tort claim.[46] The court held that since "the contract remedy arose from the same wrong as the tort remedy, . . . if the statute had not been tolled as to one, it was not tolled as to the other."[47]

V. DAMAGES

A plaintiff who successfully sues for breach of contract may recover damages that are directly attributable to the breach. In addition, he may be entitled to consequential damages when the special circumstances that give rise to the consequential damages are within the contemplation of the parties.[48] In tort, a recovery of damages is extended to "afford complete compensation to the injured party" and is limited only by the concept of "proximate cause."[49]

In legal malpractice actions, "the burden is upon the client to prove the damages he has suffered."[50] In *Allied Productions, Inc. v. Duesterdick*,[51] the Virginia Supreme Court outlined the requirements necessary to recover damages against an attorney. The court stated that "the extent of the damages sustained by the complainant must be affirmatively shown; for the attorney is only liable for the *actual* injury his client has received . . . ."[52] It is not enough to prove that the attorney was negligent; rather, the claimant must prove that he was damaged, and he must allege

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43. 222 Va. at 3, 278 S.E.2d at 788.

44. *Id.*

45. *Id.* at 4, 278 S.E.2d at 788-89.

46. *Id.*

47. *Id.* at 4-5, 278 S.E.2d at 789.

48. Roanoke Hospital Ass'n v. Doyle & Russell, Inc., 215 Va. 796, 214 S.E.2d 155 (1975). "[D]amages will be limited to those which were within the contemplation of the parties at the time of the making of the contract." Coggin, *supra* note 9, at 232 (citing Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854)).

49. Coggin, *supra* note 9, at 232 (citing Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928) (Andrews, J., dissenting)). Punitive damages may also be recovered if there is evidence, either direct or circumstantial, of actual malice. *See* Jordon v. Sauve, 219 Va. 448, 247 S.E.2d 739 (1978).

50. Maryland Casualty Co. v. Price, 231 F. at 403.

51. 217 Va. 763, 232 S.E.2d 774.

52. *Id.* at 764, 232 S.E.2d at 775 (quoting Staples v. Staples, 85 Va. 76, 85, 7 S.E. 199, 203 (1888) (emphasis added)).

the extent of the damages in his motion for judgment.[53] Moreover, if the claimant has had a judgment entered against him due to the attorney's negligence, he can recover "only to the extent such judgment has been paid."[54] The reason given for this requirement is that the client has not suffered an actual injury until he has paid a judgment or sustained a loss due to the negligence of an attorney.[55] As a further limitation, the claimant must reduce his damage claim by any amount he has recovered from other parties to the action.[56] In addition, he is not allowed to recover, as an element of damages, the amount of the fee paid to the negligent attorney.[57]

VI. CONCLUSION

After *Oleyar*, there should be no question as to which cause of action is preferred in a legal malpractice claim. The court has chosen the interest to be protected, the interest created by the contract of employment, by focusing on the creation of the attorney-client relationship.

However, while the confusion over which action should lie has been alleviated, the problem associated with the running of the statute of limitations remains. When should the three year period begin to run? The court has stated that it will look to the General Assembly to pass a "discovery" statute to eliminate the injured client's burden of discovering the negligence before the statutory period has run,[58] yet the court may depend more on the continuing negligence rule articulated in *McCormick v. Romans* as a means of easing the burden.

From the client's viewpoint, the best possible action would be one in tort if there were a "discovery" statute. Otherwise, he must sue within the three-year statutory period allowed for breach-of-contract actions. The client's advantage in claiming a tort cause of action is especially obvious when one considers the difficulty of proving damages in a legal malpractice action which is based on breach of contract.

It will be interesting to follow the development of the legal malpractice action if the General Assembly passes a "discovery" statute. Perhaps the focus will then change from one which examines the creation of the relationship between attorney and client to one which seeks to correct inequi-

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53. 217 Va. at 764, 232 S.E.2d at 775.

54. *Id.* at 766, 232 S.E.2d at 776.

55. *Id.* at 764, 232 S.E.2d at 775; *See* Note, Annual Survey of Developments in Virginia Law, 63 VA. L. REV. 1491, 1495 (1977).

56. Katzenberger v. Bryan, 206 Va. 78, 85, 141 S.E.2d 671, 677 (1965) (amount paid to claimant by third party vendor under breach of warranty of title must be subtracted from damages alleged against attorney for negligent title investigation).

57. Hiss v. Friedberg, 201 Va. 572, 112 S.E.2d 871 (1960) (fee paid is not an element of damage since client received benefit of negligent attorney's work).

58. *See* notes 32-36 *supra* and accompanying text.

ties under the general rule. Otherwise, the court may simply reaffirm its decision in *Oleyar*, and maintain that the action for legal malpractice is truly one which arises in contract.

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