IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 770961

WINSLOW, INC., and
RICHARD B. COLYER,
Partners trading as
TANGLEWOOD LAKE,

APPELLANTS

VS.

WILLIAM M. SCAIFE, JR.,
and GERALD F. DALTON,

APPELLEES

APPENDIX

DANIEL H. BORINSKY
ROBERT J. ZELNICK
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191

COUNSEL FOR APPELLANTS

WILLIAM R. MARSHALL, JR.
5911 West Broad Street
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COUNSEL FOR APPELLEES

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MOTION FOR JUDGMENT

TO THE HONORABLE JUDGE OF THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG:

COMES NOW your plaintiffs, Winslow, Inc., a Virginia corporation and Richard S. Colyer, trading as Tanglewood Lake, a partnership, and as and for their Motion for Judgment respectfully represent to the Court as follows:

(1) That by Deed dated November 30, 1972, and recorded in the land records of Caroline County, Virginia, Deed Book 197, at Page 493, the plaintiffs acquired a certain tract of land located in Caroline County, Virginia containing 180.401 acres, more or less, as shown on plat of survey prepared by R. Wayne Farmer, CLS, dated February 4, 1972, from Universal Land and Development Corporation.

(2) That on the 10th day of July, 1973, your plaintiffs entered into a certain contract for the sale of the aforesaid property to Charles E. Minor Construction Company, Inc., an unexecuted copy of which is marked Exhibit "A", attached hereto and made a part hereof.

(3) That the contract was drawn in and by the law offices of the defendants, William M. Scalfe, Jr., and Gerald F. Dalton.

(4) That the contract provided in part that the plaintiff/seller was to receive a note secured by a deed of trust on the subject property, said deed of trust to be subordinated only to the deeds of trust specified therein.

RD R. NAGEOTTE
EY AT LAW, LTD.
RD R. NAGEOTTE
L H. BORINSKY
RT J. ZELNICK
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BRIDGE, VIRGINIA
22191

(5) That the said note is in default and has at the present time a principal balance due of $97,316.06 plus accrued interest as specified therein from April 1, 1974.

(6) That in September, 1973, before settlement, pursuant to the contract aforesaid, an agent of the plaintiff delivered to the law offices of the defendants as settlement attorney and escrow agent, a deed conveying the above described parcel of land to Charles E. Minor Construction Co., Inc.

(7) That the defendants, William H. Sciafe Jr., and Gerald F. Dalton as escrow agent and settlement attorney, were authorized to deliver and record the said deed if the terms of the said contract were complied with.

(8) That without the authority of the plaintiff or any of its agents, and contrary to the express terms of the contract heretofore referred to, the defendants, acting as settlement attorney and escrow agent, did agree to and in fact did actually subordinate the said plaintiff/seller's deed of trust to a lien of a certain deed of trust recorded at Deed Book 205, Page 198, from Charles E. Minor Construction Co., Inc. to L. Stuart Blanton and William S. Hayward, Trustees. Said senior deed of trust to Blanton and Haywood was to secure a certain promissory note in the amount of two hundred thirty thousand dollars ($230,000) payable to bearer on demand, which note was at all times prior hereto held by First Mortgage Corporation.

(9) That the plaintiff herein never at anytime authorized any variation from the said contract which would have the effect of authorizing the subordination of the deed of trust securing plaintiff to any deed of trust other than those specified in the said contract.

(10) That notwithstanding the foregoing noncompliance with the terms of the said contract, the defendants, acting as attorney and settlement agent,

did deliver the said deed to the grantee, Charles E. Minor Construction Co., Inc. and did record the said deed among the land records of Caroline County, Virginia, thereby divesting the plaintiff of title to the said property.

(11) That plaintiff is informed and believes and alleges on information and belief, that the said Charles E. Minor Construction Co., Inc. has been adjudicated a bankrupt in the Bankruptcy Court of the United States District Court for the Eastern District of Virginia, Richmond District, and has been discharged from liability on both your plaintiff's deed of trust and on the aforesaid deed of trust recorded at Deed Book 205, Page 198, the effect of which discharge, combined with defendants' unauthorized and improper subordination aforesaid, renders plaintiff/sellers purchase money deed of trust and note worthless.

(12) That, but for defendants' breech of their duty to plaintiff/seller in recording plaintiff/seller's deed of trust in an improper manner, plaintiff/seller would have been protected in the event of the purchaser's default on the purchase money note.

WHEREFORE, your plaintiff prays that the Court enter a judgment against the above described escrow agent and attorney, William Scalfe, Jr. and Gerald F. Dalton, partners formerly doing business as Scalfe and Dalton, in the amount of $97,316.06 plus interest from April 1, 1974 as specified in the note heretofore referred to.

WINSLOW, INC., a Virginia Corporation

and

RICHARD B. COLYER, Partners, t/a
TANGLEWOOD LAKE, a partnership

ORIGINAL SIGNED BY
DANIEL H. BORINSKY
ATTORNEY AT LAW

By Counsel

ORIGINAL SIGNED BY
DANIEL H. BORINSKY
ATTORNEY AT LAW

DANIEL H. BORINSKY
Counsel for Plaintiff

14908 Jefferson Davis Highway
Woodbridge, Virginia 22191

THIS CONTRACT, made this 10th day of July, 1973, by and between WINSLOW, INC. and RICHARD B. COLYER, partners trading as Tanglewood Lake, hereinafter called Sellers; CHARLES E. MINOR CONSTRUCTION CO., INC., hereinafter called Buyer; and JOHNSON & GLAZEBROOK, INC., hereinafter called Agent:

W I T N E S S E T H:

For and in consideration, as hereinafter set forth in the mutual agreements of the parties hereto, it is agreed as follows:

1. Buyer agrees to buy and Sellers agree to sell a tract of 180.6 acres, known as Tanglewood Lake, in Port Royal District, Caroline County, Virginia, joining the R.F.& P. Railroad and State Route 660.

2. Purchase price shall be Two Hundred Ten Thousand Seven Hundred Twenty Dollars ($210,720.00), payable as follows: One Thousand Dollars ($1,000.00) with the execution of this Contract, receipt whereof is hereby acknowledged; Approximately Thirty Five Thousand Two Hundred Fifty Dollars ($35,250.00) first trust to be assumed with interest to be pro-rated between the Buyer and the Sellers on the date of settlement; second trust, in the amount of approximately Fifteen Thousand Four Hundred Eighty Dollars ($15,480.00), with interest to be pro-rated on the date of settlement; one negotiable promissory note, to be made by the Buyer or its assignee, and secured by a third deed of trust on the subject property, in the approximate amount of One Hundred Six Thousand Four Hundred Seventy Dollars ($106,470.00), payable interest only quarterly, at the rate of seven percent (7%) per annum on the unpaid balance for three (3) years, then in five equal

payments of principal plus interest on the unpaid balance, the first such principal payment to be made three (3) years from date of settlement. The right of anticipation, in whole or in part without penalty shall be reserved. Balance of the purchase price shall be paid at settlement in cash.

3. Sellers agree to assign and deliver all of their interest in engineering work done with respect to the real estate which is the subject of this Contract including, but not limited to, Sections A, A-1 and B, to Buyer at settlement and covenant as a condition of this Contract: (a) that all engineering work has been paid for and that engineering design for Section A, Tanglewood Subdivision, has been completed and approved by the Virginia Department of Highways for acceptance into the Virginia Department of Highways system upon completion in accordance with such plans and specifications or that such approval will be obtained prior to settlement; (b) that Section A, Tanglewood Subdivision, shown on plat of J. Wayne Farmer, C.L.S., dated February 12, 1973, has been approved by all necessary and appropriate Caroline County governmental bodies, agencies and commissions, except that the bond for the completion of the roads in Section A-1 thereof will be posted by Buyer. All costs of recordation shall be paid by Sellers. This Contract will be void unless Buyer within sixty (60) days hereof, is satisfied that eighty-five percent (85%) of the lots in the subdivision will be approved for septic tanks and drain fields by the appropriate health authorities. In the event Buyer elects to perform without such assurance or satisfaction, it shall be credited Nine Hundred Eleven Dollars ($911.00), for each lot failing to so qualify for septic tank and drain field, against the next principal payment to become due on the third trust, described in Paragraph 2 above.

Credit shall be made upon notification and proof by Buyer to Sellers of such inability to obtain approval. Provided, however, that Buyer will be entitled to no such credit for the first fifteen percent (15%) of the total number of lots in the subdivision as now platted, which do not so qualify.

4. The terms and conditions of this Contract shall survive delivery of consideration by all parties.

5. Sellers agree to convey the subject real estate with a general warranty deed, with the usual covenants of title. Said title to be free, clear and marketable.

6. Settlement shall be made at 1103 Princess Anne Street, Fredericksburg, Virginia, on or before September 10, 1973, or as soon thereafter as title can be examined and papers prepared, allowing a reasonable time to correct any defects reported by the Title Examiner.

7. Sellers agree to pay Agent for his services, a fee of ten percent (10%) of the sale price of the property, one half of which shall be cash at settlement and the other one half shall be in the form of a promissory note, the terms of which shall be decided by Sellers and Agent. It is understood and agreed that Buyer shall have no obligation with regard to payment of this commission.

WITNESS the following signatures and seals:

WINSLOW, INC. and RICHARD B. COLYER
Partners Trading as
TANGLEWOOD LAKE

By _____
President

ATTEST:

_____
Secretary

(CORPORATE SEAL)

CHARLES E. MINOR CONSTRUCTION CO., INC.

By _____ President

ATTEST:

_____ Secretary (CORPORATE SEAL

JOHNSON & GLAZEBROOK, INC.

By _____ President

ATTEST:

_____ Secretary (CORPORATE SEAL)

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG

WINSLOW INC., a Virginia Corporation et al — Plaintiff

v.

WILLIAM M. SCAIFE, JR. and GERALD F. DALTAN, — Defendants.

SPECIAL PLEA OF STATUTE OF LIMITATIONS

The defendants, William M. Scaife, Jr. and Gerald F. Daltan, by counsel, move the Court to dismiss this action on the grounds that the Motion for Judgment was filed two years, ten months after the alleged course of action arose and is therefore barred by the applicable statute of limitations.

William M. Scaife, Jr.
Gerald F. Daltan

By _____
of Counsel

William R. Marshall, Jr.
THOMPSON, SAVAGE, SMITHERS, PRESS & MARSHALL, p.d
5911 West Broad Street
Richmond, Virginia 23230
804-288-4007

CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of July, 1976, mailed, postage prepaid, a copy of the foregoing to Daniel H. Borinsky, Esquire, 14908 Jefferson Davis Highway, Woodbridge, Virginia 22191, Counsel of Record for the Plaintiff herein.

_____
William R. Marshall, Jr.

MEMORANDUM IN SUPPORT
OF THE
PLEA OF STATUTE OF LIMITATIONS

I. FACTS

Plaintiff filed a motion for judgment in this case on July 12, 1976, which motion was served on the defendants on July 13, 1976, complaining of action taken by the defendants in September, 1973. The gravamen of the plaintiff's complaint against the defendants is that the defendants, who are licensed to practice law in Virginia and who represented Minor Construction Company, Inc., (hereinafter called "Minor") in the purchase of certain land situated in Caroline County, Virginia, from the plaintiff, allegedly failed to close the real estate transaction pursuant to an alleged contract of sale between the plaintiff and Minor so that a purchase money deed of trust taken back by the plaintiff would have a certain priority. It is alleged that the deed of conveyance was delivered to the defendants in escrow, and in thus closing the real estate transaction and permitting a priority of the plaintiff's deed of trust other than that contemplated by the plaintiff, the defendants violated their duty to the plaintiff. Throughout the entire transaction the plaintiff was represented by Harry B. F. Franklin, an attorney licensed to practice law in Virginia.

Minor, the maker of the note secured by plaintiff's purchase money deed of trust, defaulted on its note and later was adjudicated a bankrupt and was granted a discharge by the bankruptcy court of the United States District Court for the Eastern District of Virginia, Richmond District, thus discharging its liability on its note to the plaintiff.

As a result of the foregoing plaintiff seeks damages of $97,316.07 together with interest from April 1, 1974 (the presumed default date) and characterizes defendant's breach of duty as "settlement attorney and escrow agent."

II. LAW

The case at bar is not one which involves an action by a client against his attorney for failure to properly perform his function as an attorney in pursuit of his client's business as created by the attorney client relationship. The fact of the matter is that the defendants represented Minor and not the plaintiff and Harry B. F. Franklin represented the plaintiff in this real estate transaction. Thus, the recent case of Oleyar v. Kerr, Record No. 750876, decided by the Supreme Court of Virginia on June 11, 1976 (a photocopy of which is attached and marked Exhibit "A") establishing that "an action for negligence of an attorney in the performance of professional services, while sounding in tort, is an action for breach of contract and thus governed by the statute of limitations applicable to contracts" is not applicable to the case at bar. The Court in so deciding found upon an oral employment contract that the three year statute of limitations applied against the attorney for negligently examining a title to real estate. See also McCormick v. Romans and Gunn, 214 Va. 144 (1973) involving an attorney's misappropriation of his clients funds wherein it was held that the three year limitation established by §8-13 governed.

Defendants contend that the applicable limitation period is one year as established by §8-24 of the Code of Virginia (1950 as amended) and supported by Virginia cases and that therefore plaintiff's action is barred.

Section 8-24, as amended, reads as follows:

"OF ACTIONS NOT BEFORE SPECIFIED. — Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued. The amendment extending the period within which an action for personal injuries may be brought under this section to two years shall not apply to any cause of action arising prior to July one, nineteen hundred fifty-four.

Notwithstanding any other provision of law to the contrary, every action brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, shall be brought within one year next after the right to bring same shall have accrued." (Emphasis added)

In Carva Food Corporation v. Dawley, 202 Va. 543 (1961) Carva requested Dawley, an insurance solicitor, to procure an insurance policy protecting Carva's warehouse from any accidental discharge of water from its sprinkler system. Dawley procured a policy of insurance on May 10, 1954, insuring a period from said date to May 10, 1957, but which excluded damage due to sprinkler leakage caused by windstorm.

On October 15, 1957, Hurricane Hazel blew the roof off Carva's warehouse, activated the sprinkler system, which in turn damaged groceries stored in the building. Carva upon failing to recover its loss from the insurance carrier because of the exclusion in the policy of insurance, sought to recover its loss from Dawley upon the basis that the agent "was guilty of negligence or constructive fraud, in that he represented to Carva that it would be protected from loss caused by accidental discharge from its sprinkler system; and that through Dawley's negligence and breach of trust, such insurance coverage had not been provided for Carva." 202 Va. at 547.

The Court in construing Section 8-24 had to consider same juxtaposed to Section 64.1-145 (then §64-135) which provides for survival by or against a personal representative of certain types of claims. This section provides:

> "An action at law for money damages may be maintained by or against a personal representative for the taking or carrying away of any goods or for the waste of or damage to, any estate of or by his decedent."

Reading the two sections together, the Court concluded that where the damage sought by the plaintiff are the direct result of a wrong, the action survives and the applicable period of limitations is five (5) years. If, however, the damages sought are a indirect result of the wrong, the action does not survive and the applicable period of limitations is one (1) year.

In holding that the action by Carva seeking damages personally against Dawley for failure to procure the requested policy of insurance was barred by the one (1) year statute of limitations, the court found that the damages sustained were an indirect result of the wrong.

> "Carva's property was not damaged when the insurance policy was issued without full sprinkler leakage coverage. Its property was damaged when water was discharged from the sprinkler system as the result of a windstorm. Dawley was not instrumental in causing the windstorm, nor was he responsible for its results. The damages would not have occurred except for the happening of a severe windstorm, an intervening event which might have never happened. They were the indirect and consequential results of the wrong charged to Dawley.
>
> For the reason stated, we are of opinion that the trial court correctly held that the notice of motion did not allege a direct damage to property; that it did not state a cause of action which would survive; and that the one year limitation contained in § 8-24 was applicable." 202 Va. at 547.

Likewise, in Travelers Ins. Co. v. Turner, 211 Va. 552 (1971), the plaintiff sought to recover from the defendant for the failure to procure an automobile insurance policy at the time agreed, but which subsequently became effective. Between the time the policy of insurance should have been put into effect and the time it was put into effect the insured was negligently involved in an automobile accident. The plaintiffs as uninsured motorists carriers settled the claim, and were assigned the insureds claim against the defendant for failure to procure the requested insurance at the time indicated.

The issue before the court was whether or not the claim against the insurance agent was assignable. The assignability of a right to recover damages "in Virginia depends upon whether the original action is one which survives at common law and ... the tests of survivability and assignability of causes of action are the same." 211 Va. 553. In determining that the claim was not assignable, since the damage sustained was not direct, but rather indirect, the court held that Carva Food Corp. v. Dawley, supra, to be controlling.

> "As we pointed out in Carva, the real nature of the injury or claim must be regarded and not the form or method by which it is sought to be redressed or enforced. That the pleadings allege a breach of contract is immaterial where, as here, the basis of this proceeding was that Turner was guilty of negligence or constructive fraud in failing to effect a liability insurance policy on Harter's automobile which would cover the risks contemplated by the parties beginning at the time agreed upon.
>
> The damage to Harter did not occur when the insurance policy was not issued effecting coverage on the date agreed upon. The damage occurred at a subsequent time because of an intervening event, Harter's negligence in the operation of his car, which might never have occurred. In these circumstances we hold that the action was on a claim of a personal nature for indirect and consequential damages to Harter's estate and was not assignable." 211 Va. 552 (Emphasis added)

Finally, in the unreported case of Virginia Discount Auto Sales, Inc. v Henry J. Streat, Jr., Ray M. Paul and First Commonwealth Agency, Inc., decided by the Honorable Alex H. Sands, Jr., Judge, Law and Equity Court, City of Richmond, (now the Circuit Court, City of Richmond, Division I) by letter opinion, dated March 15, 1972, a copy of which is attached and marked Exhibit "B", the court had under a contract count, in a motion for judgment the failure of an insurance agent to procure an insurance policy which protected the plaintiff from unlawful repossession of automobile. A repossession was held unlawful for which the plaintiff was damaged in the amount of $3,344.63 in payment to the lawful owner of the automobile, which the plaintiff sought to recover from the agent for the latter's failure to procure the requested policy.

In holding that the plea of the one year statute of limitations barred recovery from the insurance agent for his failure to procure the policy requested, the court relied upon Carva v. Dawley, supra, and Travelers v. Turner, supra, the court found that the damage sustained was indirect, and did survive. In answering the argument that Carva and Travelers proceeded upon the theory of negligence, while the count at bar proceeded upon the theory of contract and was therefore different, the court said that the nature of action must be determined and not the form in which the action is brought. Here the court said:

"..... in determining the question of whether action is one which survives or which does not survive, the real nature of the injury or claim must be regarded irrespective of the form of redress sought. The identical reasoning adopted by the court in both Carva and Turner is applicable to the facts in the case at bar. Regardless of how the claim of the plaintiff may be characterized, the plaintiff cannot escape the fact that the damage complained of did not result at the time that Streat and Paul failed to issue the policy which they had agreed to issue but occurred at the time of the unlawful repossession." At page 4.

III. ARGUMENT

In the case at bar, the alleged wrong complained of occurred in September, 1973. At the time of the alleged wrong no damage was sustained by the plaintiff. Had the client of the defendants, namely Minor Construction Corp., continued to make payments and had not gone bankrupt, the plaintiff would not have been damaged.

It was only when Minor failed to make payments as required by the note and went bankrupt can there be said that the plaintiff sustained injury and a resulting loss incurred. Thus, the causal connection between the alleged wrong of the defendants and the loss of the plaintiff had an intervening event: the failure of Minor to pay and its bankruptcy. This intervening event is the distinguishing characteristic between a direct or indirect damage.

As pointed in Carva, Travelers, and in Judge Sands opinion, where, as here, the loss is the result of an intervening event, the damage is indirect, the action does not survive, and for which the limitation is one (1) year. The plaintiff cannot couch the language of his Motion for Judgment in such a fashion as to give the allusion of a contract claim in order to defeat this result. As so aptly stated in Travelers "In determining the question whether the action survives, the real nature of the injury or the claim must be regarded and not the form or method by which it is sought to be redressed or enforced."

Here, it can not be contended that any damage resulted from the alleged wrong in settling by the buyers attorney. It was only after the buyer failed to live up to the promise to make payments under his note that any loss occurred. The loss sustained by the plaintiff, if any, from the alleged wrong was indirect, the alleged action at law is of the type that does not survive, and for which § 8-24 of the Code prescribes a one year statute of limitations from the alleged date of the wrong, September, 1973. The plaintiff having brought their action in July, 1976, have exceeded the time prescribed to redress their alleged wrong, and is therefore barred.

Respectfully submitted

WILLIAM M. SCAIFE, JR.
GERALD F. DALTAN

By William R. Marshall, Jr.
Of Counsel

William R. Marshall, Jr.
THOMPSON, SAVAGE, SMITHERS & MARSHALL, p.d.
5911 West Broad Street
Richmond, Virginia 23230

NOTE:

BY AGREEMENT OF COUNSEL, EXHIBIT "A", WHICH IS A REPRODUCTION OF THE CASE OF OLEYAR v. KERR, 217 VA. 88, IS OMITTED.

EXHIBIT "A"

EXHIBIT "B"

Law and Equity Court
OF THE
City of Richmond

RICHMOND, VIRGINIA
23219

JUDGES
ROBERT LEWIS YOUNG
ALEX H. SANDS JR
A CHRISTIAN COMPTON

CLERK
LUTHER LIBBY, JR

March 15, 1972

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John M. Oakey, Jr., Esquire
McGuire, Woods & Battle
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Richmond, Virginia 23219

F. Carter Scott, III, Esquire
Browder, Russell, Little & Morris
1510 Ross Building
Richmond, Virginia 23219

Re: Virginia Discount Auto Sales, Inc. v. Henry J. Streat, Jr., Ray M. Paul and First Commonwealth Agency, Inc.

Gentlemen:

This matter is before the court upon plea of the statute of limitations filed by all defendants.

Plaintiff instituted action by motion for judgment seeking to recover from the individual defendants Streat and Paul and the corporate defendant First Commonwealth Agency, Inc. for damages allegedly sustained as the result of breach of contract by Streat and Paul. The motion for judgment contains three counts, Count I based upon damages resulting from alleged misrepresentations, Count II being based upon alleged breach of contract and Count III being based upon negligence in failure by the defendants to exercise reasonable care in the carrying out of their business. The sole question involved upon this plea is

whether or not the one year or the five year period applies insofar as the statute of limitations is concerned.

Plaintiff admits that the plea is good as to Count I and Count III, but it contends that Count II sounds in contract and that the gravamen of the claim therein set forth is breach of contract covered by the five year period of limitations. Since it appears from the Bill of Particulars that the alleged agreement between plaintiff and defendants was entered into on December 27, 1968 and was confirmed by letter of January 3, 1969, if the one year period is applicabl the plea is good, whereas if the five year period is applicabl the plea is bad.

The plaintiff claims, in essence, that on December 27, 1968, it entered into an agreement with the individual defendants Streat and Paul, insurance brokers, acting as agents for First Commonwealth Agency, Inc., under the terms of which Streat and Paul were to procure a policy of insurance from some insurance company protecting the plaintiff, among other things, from damages resulting from unlawful repossessio by the plaintiff of automobiles of customers.

It is alleged that pursuant to this agreement, Streat and Paul procured a policy with the United States Fidelity and Guaranty Company; that subsequent thereto the plaintiff unlawfully repossessed a vehicle belonging to one Haywood E. James and that James, as a result of such unlawful repossessio filed suit against the plaintiff which resulted in a settlemen of the claim and expenses incurred by the plaintiff of $3,344.63. It is for this loss that the plaintiff brings thi action alleging that the loss resulted from breach of contrac on the part of Streat and Paul as above indicated. Almost the identical factual situation was presented in the case of Pood Corporation v. Dawley, 202 Va. 543. There, the roof of the plaintiff's warehouse was blown off by a hurricane and, as a result, the fire sprinkler system was activated causing water damage to the plaintiff's goods. Prior to this, the plaintiff had procured insurance through the defendant Dawley an insurance agent, upon representation by Dawley that the policy which he was to procure and which he did procure covered loss by reason of accidental discharge of water from plaintiff's sprinkler system. In fact, the policy carried an express exclusion from such coverage. Being unable to recove upon its policy, the plaintiff sued Dawley to recover for the amount of water damage thus sustained. The same question was

there presented as is here before the court; i.e., whether the one year or the five year statute applies. After reviewing Code §8-24 and §64-135, the court concluded that the damages which the plaintiff sought to recover from Dawley were of a consequential and indirect rather than a direct result of Dawley's misconduct and that, therefore, the cause of action was not one which survived and, therefore, the ~~five~~ one year period applied. In defining "consequential damage," as to which the one year period would be applicable, the court adopted the definition from Black's Law Dictionary, reading:

> "Such damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act." (Emphasis added)

The court then goes on to point out that this was not an action to collect damages to property under an insurance policy, but was an action seeking to hold Dawley personally responsible for his failure to procure for Carva the policy which Carva had requested. The court then points out the controlling consideration; namely, that the property was not damaged when the wrong insurance policy was procured by Carva but was sustained later as the direct result of the leakage from the sprinkler system.

The exact same result was reached in Travelers Ins. Co. v. Turner, 211 Va. 552. In that case, the plaintiffs, who were the assignees of a claim, brought suit to recover against an insurance agent for negligence or constructive fraud in failing to procure the type of automobile liability insurance which he had agreed with the assignor to procure. The Supreme Court, relying principally upon Carva, again held the one year period applicable to the claim upon the ground that the damages sought in the action were of a consequential or indirect nature, the court holding that the alleged damage was not sustained when the proper policy failed to be issued but at a later date when the automobile accident occurred.

The plaintiff in the case at bar attempted to distinguish these cases from the present situation upon the basis that in each of the above two cases the plaintiff proceeded upon the theory of negligence whereas under Count II in the case at bar, the plaintiff proceeds upon the theory of breach of

contract. This distinction, however, is not tenable for in both Carva v. Dawley and Travelers v. Turner, the court emphatically stated that in determining the question of whether the action is one which survives or which does not survive, the real nature of the injury or claim must be regarded irrespective of the form ~~method~~ of redress sought. The identical reasoning adopted by the court in both Carva and Turner is applicable to the facts in the case at bar. Regardless of how the claim of the plaintiff may be characterized, the plaintiff cannot escape the fact that the damage complained of did not result at the time that Streat and Paul failed to issue the policy which they had agreed to issue but occurred at the time of the unlawful repossession.

It is, therefore, held that the cases of Travelers v. Turner and Carva v. Dawley are not distinguishable from the facts of the case at bar, and for this reason, the plea of the statute of limitations will be sustained. Counsel may present sketch for order carrying the above ruling into effect.

Yours very truly,

Alex H. Sands, Jr.

Alex H. Sands, Jr.

AHS,Jr/jat

MEMORANDUM IN OPPOSITION TO

DEFENDANT'S PLEA OF THE STATUTE OF LIMITATIONS

STATEMENT OF FACTS

This motion is before the Court in response to defendant's plea of the statute of limitations. Defendant has not as yet filed a response to the motion for judgment filed herein. Accordingly, the only facts relevant at this time are those which are before the Court as are alleged in the Motion for Judgment. They can be summarized as follows:

On or about the 10th day of July, 1973, your plaintiffs entered into a certain contract for the sale of certain real property to Charles E. Minor Construction Co., Inc., a copy of which contract has been filed in this case. This contract was drawn in and by the law offices of the defendants, William M. Scalfe,Jr., and Gerald F. Dalton. The contract provided, in part, that settlement should be held at their offices. The contract further provided in part that the plaintiffs were to receive a note secured by a deed of trust on the subject property which deed of trust was to be subordinated only to certain deeds of trust as specified in the contract. Sometime in September, 1973, before settlement, pursuant to this contract, an agent of the plaintiff delivered to the law offices of the defendants as settlement attorneys and escrow agents, a deed conveying the subject real estate to Charles E. Minor Construction Co., Inc. In accordance with the contract, the defendants as escrow agents and settlement attorneys, were authorized to deliver and record the deed only if the terms of the contract were complied with. Without the authority of the plaintiff, or any of its agents, and contrary to the express terms of the contract, the defendant agreed to and did in fact subordinate the plaintiff/sellers deed of trust to the lien of a certain deed of trust between Charles Minor and First Mortgage Corporation, which deed of trust was

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2191

in the amount of $230,000.00. It is emphasized that the plaintiff never at any time authorized any variation from the contract which would have the effect of authorizing the subordination of its deed of trust to any deed of trust other than those specified in the contract. In violation of the express terms of the contract, the defendants delivered the deed to the grantee, Charles E. Minor Construction Company, Inc. and recorded the deed among the land records of Caroline County, thereby divesting the plaintiffs of title to the property. Subsequently, Charles E. Minor Construction Company, Inc. was adjudicated a bankrupt and was released from liability on the note. The effect of this release from liability combined with the defendant's unauthorized and improper subordination of its Trust to the First Mortgage Trust results in the plaintiff's note being worthless. It is plaintiff's contention that had defendants not breached their duty to the plaintiffs in recording the plaintiff's deed of trust in an improper manner, that plaintiff would have been protected in the event that purchaser defaulted on the purchase money note. Accordingly, within three years after the alleged breach of the defendant's duties to plaintiffs plaintiffs instituted this action in the Circuit Court of the City of Fredericksburg.

AUTHORITIES IN SUPPORT OF PLAINTIFFS' POSITION

Based upon the two oral arguments in this case and upon the brief submitted by the defendant, the question before the Court has been narrowed to a choice of whether Virginia Code Section 8-13 or Virginia Code Section 8-24 applies. Plaintiffs here contends that the following provision of Section 8-13 governs this action:

> Every action to recover money which is founded upon an award or any other contract, . . . shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say:

> If it be upon any other contract expressed or implied within three years . . . (Va. Code Section 8-13) (Emphasis supplied.)

Defendant on the other hand contends that the following provision of section 8-24 is applicable:

> Every personal action for which no limitation is otherwise prescribed shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in the case a party dies it can be brought by or against his representative; and if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued. (Va. Code Sec. 8-24)

He contends that plaintiffs are precluded from recovery in that the action was brought more than one year after the cause of action accrued. If section 8-13 applies, Section 8-24 will by definition not apply, since it only comes in to effect when there is an action " . . . for which no limitation is otherwise prescribed." Similarly, the question of survivability only arises if it is determined that Section 8-24 applies. This is because Section 8-13 contains no such distinction between survivability and non-survivability.

In Travelers Insurance Company vs. Turner, (211 Va. 552, 1971), one of the two principal cases relied upon by the defendant in support of his claim of a shorter statute of limitations, the Virginia Supreme Court stated:

> As we pointed in Carva [Carva Food Corporation vs. Dawley, 202 Va. 543, 1961- the other principal case relied upon by the defendant] , the real nature of the injury or claim must be regarded and not the form or method by which it is sought to be redressed or enforced. (Traveler's Insurance Co. vs. Turner, 211 Va. 552, at 554).

In Virginia, the Supreme Court has spoken of the nature of the duties of a depository or escrow agent in the case of Humphries vs. R. and MRR Co. (88 Va. 431). In that case, an agreement to grant a right-of-way to a railroad had been shown to have been delivered to the President of the railroad on the condition that it should not take effect unless it was necessary for the building of a road or unless the Board of Directors of the railroad made compensation to the Grantor of the right-of-way. After the road was completed without the necessity for the use of the right-of-way and without compensation to the Grantor, the President delivered the agreement to the agent of the company in charge of managing the acquisition of rights-of-way. The Grantor sought, among other things, to have the agreement declared null and void. Ruling in favor of the Grantor and against the escrow agent, the Court stated the following with respect to the duties of the President as depository of the agreement:

> When a deed is delivered to a person to be held until certain conditions are performed, and then to be delivered to the Grantor or Obligee, it is an escrow . . . The depository of an escrow is, in fact, the agent of both parties. As the agent of the Grantor, it is his business to withhold the deed until the condition is performed; as the agent of the Grantee, it is his business to hold it for him and to deliver after the condition is performed. (Devlin on Deeds, Section 327) . . Humphries vs. R and MRR Co. 88 Va. 431 at page 454. (Emphasis supplied).

Unfortunately, there are no Virginia cases which expressly state whether the breach of an escrow agent's duty to his principal is considered a tort or a breach of contract. However, Mr. Justice Traynor, of the California Supreme Court, in deciding among other things which statute of limitations applied to an escrow agent who has breached his duty to a principal of the transaction, said the following with respect to the duty of an escrow agent:

An escrow holder must comply strictly with the instructions of the parties. (Rianda v. San Benito Title Guarantee Co. 35 Cal2d, 170, 173, 217 P.2d 25; Shreeves v. Pearson 194 Cal. 699, 711, 230 P.448; Dawson v. Bank of America, 100 Cal. App. 2d 305, 309, 223, P.2d 280). Upon the escrow holder's breach of an instruction that it was contracted to perform or of an implied promise arising out of the agreement with the buyer or seller, the injured party acquired a cause of action for breach of contract. (See Francis v. Eisenmayer, 171, Cal. App. 2d 221, 225-227, 340 P. 2d 54; Karras v. Title Ins. & Guarantee Co., 118 Cal. App. 2d 659, 665-666 258 P.2d 866; Chicago Title & Trust Co. v. Cleary, 319 Ill. App. 83, 48 N.E.2d 576, 578; Rest. 2d Agency, Sec. 14D, Comment a.) Similarly, if the escrow holder acts negligently, "it would ordinarily be liable for any loss occasioned by its breach of duty" (Rianda v. San Benito Title Gurantee Co., supra; Karras v. Title Ins. & Guarantee Co., supra; see Rest. 2d Agency, Sections 399 (b), 401) Amen v. Merced County Title Insurance Company (25 Cal. Reporter 65) (Emphasis supplied.) A copy of the entire opinion is attached to this memorandum. *

The Amen case has been relied on by subsequent litigants, for the proposition that the breach by an escrow of his duties to a principal gives rise to an action for breach of contract. (See for example, Banville vs. Schmidt, 112 Cal Reporter 126, and Commonwealth Insurance Systems, Inc. vs. Kersten, 115 Cal Reporter 653, copies of both are attached hereto.) *

Although we have no direct Virginia Supreme Court guidance on the question of the nature of an injury arising from an escrow agent's breach of duty, the case of Oleyar v. Kerr, decided by the Virginia Supreme Court on June 11, 1976 does provide very specific guidelines in deciding whether an injury sounds an either tort or contract. In that case, Mrs. Kerr engaged Oleyar, a Virginia attorney, to search a title on a certain piece of real estate. In

* NOTE: BY AGREEMENT OF COUNSEL, COPIES OF THE ABOVE INDICATED CASES ARE OMITTED FROM THE APPENDIX

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searching the title, Oleyar negligently failed to note a judgment lien against the property. Upon Kerr's later sale of the property, she was forced to satisfy the judgment lien holder with a resulting loss to her in excess of $17,000.00. She sued Oleyar for reimbursement of her loss and recovered a judgment against him. The Supreme Court limited its review to a determination of the applicable statute of limitations. In her Motion for Judgment, Kerr alleged that Oleyar was negligent in examining the title which she had engaged him to examine, which negligence caused her damage. The Court noted that:

> But for the contract, no duty by Oleyar to Kerr would have existed. Thus it is clear that Kerr's action against Oleyar is grounded upon and has its inception in the contractual relationship brought about by the oral agreement. Oleyar vs. Kerr page 3, a copy of which is attached).

The Court went on to cite with approval, the following tests, enunciated in Burks Pleading and Practice for evaluating whether a cause of action is grounded in tort or in contract.

> The following distinction, between actions for tort on contract is made by the English Court of Appeals: 'The distinction is this: 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 can do what is complained of exists) then the action is founded upon contract and not upon tort. If, on the other hand, the relationship 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, than the action is one of tort'" Oleyar vs. Kerr (Op. Cit. page 3). Emphasis supplied.

I think that it is clear that applying the foregoing test to the alleged facts cited in the motion for judgment, that the action herein is "grounded upon and has its inception in the contractual relationship brought about by the . . . agreement". (Oleyar vs. Kerr, at page 3). It is clear that like in Oleyar, but for the agent/principal relationship created by the escrow, no duty by the defendants to the plaintiffs would have existed.

The Carva and Travelers (Op.Cit) cases relied upon by the defendant simply do not apply to the factual setting here.

In Carva, the Supreme Court ruled that:

> The basis of this proceeding is that Dawley was guilty of negligence or constructive fraud, in that he represented to Carva that it would be protected from loss caused by accidental discharge from its sprinkler system and that through Dawley's negligence and breach of trust, such insurance coverage had not been procured for Carva. Carva Food Corporation vs. Dawley (202 Va. 543 at 547).

Similarly, in Travelers, the Supreme Court ruled that:

> . . . The basis of this proceeding was that Turner was guilty of negligence or constructive fraud in failing to effect a liability insurance policy on Harter's automobile which would cover the risks contemplated by the parties beginning at the time agreed upon. . . Travelers Insurance Co. vs. Turner (211 Va. 552, at 554. Emphasis supplied.

So, the distinguishing point between Carva and Travelers on the one hand and Oleyar and Scalfe on the other is that the former are basically fraud, negligence, and tort cases while Oleyar and Scalfe are fundamentally contract cases. The four cases are similar in that all four allege "indirect" damages. That is, but for the intervening event of the hurricane and auto accident, no damages would have obtained in either Carva or Travelers. Likewise, had Mrs. Ker held her property until the expiration of the judgment lien, its effect would never have been felt on her. Finally, the plaintiffs herein would not have suffered any damage had Minor gone bankrupt. The difference between the cases is this: Section 8-24 differentiates between those actions which survive and those actions which do not. Section 8-13 on the other hand, applicable to all contract actions, makes no distinction between the two types of actions.

Furthermore, to the extent that Carva and Travelers are inconsistent with Oleyar, Oleyar, being the more recent of the decisions, is the controlling precedent.

It is submitted that under the test enunciated in Oleyar and the other authorities herein cited that this case is one which is "grounded upon and has its inception in the contractual relationship brought about by the agreement," and accordingly is governed by Code Section 8-13 rather than Code Section 8-24. For the reasons stated, Plaintiffs hereby respectfully requests that this court overrule defendant's plea of the statute of limitations.

WINSLOW INC. et al

BY COUNSEL

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DANIEL H. BORINSKY
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this _____ day of December, 1976 mailed a copy of the foregoing to William R. Marshall, Jr., Thompson, Savage, Smithers & Marshal, 5911 West Broad Street, Richmond, Virginia 23230.

DANIEL H. BORINSKY

JUDGES

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Commonwealth of Virginia

FIFTEENTH JUDICIAL CIRCUIT

COUNTIES OF

NORTHUMBERLAND
WESTMORELAND
SPOTSYLVANIA
KING GEORGE
LANCASTER
CAROLINE
STAFFORD
RICHMOND
HANOVER
ESSEX

CITY OF FREDERICKSBURG

February 18, 1977

Mr. Daniel H. Borinsky
Attorney at Law
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191

Mr. William R. Marshall, Jr.
Thompson, Savage, Smithers & Marshall
P. O. Box 6447
Richmond, Virginia 23230

re: Winslow, Inc., et al vs.
William M. Scaife, Jr., et al
Circuit Court, City of Fredericksburg

Gentlemen:

As you know, the above styled case is before the Court on the plea of the statute of limitations filed by the defendants.

This action comes before the Court on a motion for judgement by the plaintiffs to recover from the defendants for damages allegedly sustained as a result of the failure of the defendants to give priority to the plaintiffs' deed of trust and for subordinating it to a prior deed of trust which resulted in the plaintiffs losing their security and failing to collect the proceeds of the note securing the said deed of trust. The motion for judgement further alleged that the defendants were escrow agents of the plaintiffs as well as attorneys. While the motion for judgement does not set forth whether or not the defendants were representing the plaintiffs as attorneys, memorandum filed by the defendants in support of their plea indicates that the plaintiffs in the real estate transaction were represented by their own attorney, Harry B. F. Franklin.

The basic question before the Court is whether or not the applicable period of the statute of limitations is one year as set forth in Virginia Code Section 8-24 or three years as set forth in Virginia Code Section 8-13 which provides for a three year statute of limitations upon a contract expressed or applied.

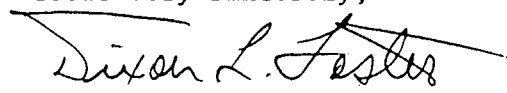
The Court has reviewed the memorandums submitted by the parties and the cases cited therein and is of the opinion that the one year statute of limitations is applicable. The instant case in the opinion of the Court is not governed by our recent case of Oleyar v. Kerr, record number 750876. The Supreme Court held in that case that an attorney-client relationship concerning the examination of title and damages resulting from the negligence thereof, the matter is a contractal relationship which comes under the three year statute of limitations. However, in this case before the Court we do not have the attorney-client relationship and we believe the action to be one of tort rather than contract. Also the damages done to the plaintiffs are indirect and not direct and we do not believe the action would survive against the personal representatives of the defendants. Consequently, the one year statute would apply.

No loss was sustained by the plaintiffs at the time of the real estate closing and the plaintiffs' loss, if any, did not occur until Minor Construction Company failed to make payments and went into bankruptcy. The plaintiffs rely upon the California case Amen v. Merced County Title Insurance Company (25 Cal. Rptr. 65) as controlling in this case. However, the California case involves a title company which acted as escrow agents and received a fee for its duties. We do not believe that in the case before the bar in this proceeding that the defendants were escrow agents in the strict sense of the word. There was no consideration for any contract for them to act as escrow agents and the factual situation in comparison with the California case is entirely different.

There apparently are no Virginia cases covering this situation and the matter has not previously been decided by the Virginia Supreme Court. The Virginia cases quoted by the defendants dealing with the failure of an insurance agent to provide requested coverage in situations are likewise different factual matters than the case before the Court. However, we believe the principles in the Carver and Travelers cases are applicable. For these reasons we believe that the plaintiffs are barred by the statute of limitations for recovery in this case because their action was brought more than one year after the date of the alleged wrong.

In view of the ruling of the Court we would request that counsel for the defendants prepare an order in accordance with the Court's ruling and submit it to counsel for the plaintiffs for endorsement to be forwarded to the Court for entry.

Yours very sincerely,



Dixon L. Foster
Judge

DFL/d

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ROBERT J. ZELNICK
ATTORNEYS AT LAW

G. DAVID TYREE, JR.
(1943-1975)

March 8, 1977

Honorable Dixon L. Foster
P.O. Box 152
Lancaster, Virginia 22503

RE: Winslow Inc., et al. vs. William M. Scaife, Jr., et al
Circuit Court, City of Fredericksburg, Virginia

Dear Judge Foster:

In accordance with your letter dated February 18, 1977, I am enclosing under cover of this letter an Order reflecting your ruling, which Order was prepared by Mr. Marshall and endorsed by me.

In reaching its opinion adverse to the plaintiff, the Court, in its letter, relied upon in part, the following factual determinations:

> While the motion for judgment does not set forth whether or not the defendants were representing the plaintiffs as attorneys, memoranda filed by the defendants in support of their plea indicates that the plaintiffs in the real estate transaction were represented by their own attorney, Harry B. F. Franklin.

And,

> We do not believe that in the case before the bar in this proceeding the defendants were escrow agents in this strict sense of the word.

The defendants' motion arose in response to the motion for judgment filed by the plaintiff. Defendants pleaded the statute of limitations in bar without otherwise responding to the motion for judgment. In effect, the defendant demurred to the motion for judgment. There is not at this time, any evidence, pro or con, before the Court. For purposes of considering defendants' motion, allegations contained in the plaintiffs motion for judgment must be accepted and considered by the Court to be true.

> It is a well settled rule that a demurrer to a pleading admits the truth of all the matters of fact which are well pleaded. Every allegation of fact contained in the pleading must, in accordance with the rule, be

> received as true. (Citation to approximately 50 cases omitted). Michies Jurisprudence Vol 6a (1976 Repl. Vol.) "Demurrers", pg. 21. (Emphasis supplied)

"Escrow" is defined by Michies Jurisprudence as

> A deed delivered to a stranger to be by him delivered to the grantee upon the happening of certain conditions, upon which last delivery the transmission of title is complete. (Vol. 7, 1976 Repl. Vol., page 180).

Michies goes on to say that a deed may be delivered to the grantee in escrow, which by implication would include delivery of a deed to the attorney of a grantee, as in the case at bar.

> The established rule has been changed in Virginia so that now either a sealed or unsealed instrument may be delivered to the grantee or obligee in escrow. (Citations omitted) (Id., at page 182).

Plaintiff is prepared to prove that the defendant acted as escrow agent as that term has been defined by the statutes and decisions of the state of Virginia. Plaintiff is further prepared to offer evidence to the Court to indicate, in accordance with the foregoing principles, that the fact that plaintiff may have been represented in some aspects of the transaction by counsel does not impair his remedy against the escrow agent for the escrow agent's breach of his duty to the plaintiff.

The Court, while properly noting the different factual contexts present in the Amen case, goes further and relies, in part, as a basis for distinguishing the breach of contract rule stated in Amen, on the fact that the escrow agent received a fee for his services from the plaintiff in that case, while the plaintiff here alleges no fee. The fact that the escrow agent in Amen received a fee for his services and the plaintiff herein did not, has no effect upon the nature of the relationship between the escrow agent and his principal, nor upon the nature of the cause of action arising from the breach of the escrow agent's duty to his principal. The fact that an escrow agent received no fee for acting as such has not prevented the Virginia Supreme Court from imposing on him the duty to act as agent for both parties. This was the case in both Humphries vs. Richmond and Mecklenburg Railroad Company (88 Va. 431), and Blair vs. Security Bank (103 Va. 762). In accordance with the foregoing, it is respectfully requested that the Court reconsider the applicability of the principles states in the Oleyar case to the case at bar. While Oleyar was an attorney-client case, the principles used by the Supreme Court in finding an implied contract there have broader applications which bear on the facts of this case. Plaintiff contends that the creation

of the escrow gave rise to a duty on the part of the defendant to plaintiff to properly perform the escrow agreement. In deciding Oleyar, the Virginia Supreme Court specifically adopted the following test, set forth in Burks Pleading and Practice, for differentiating between tort and contract actions:

> The distinction is this: 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. (Exphasis supplied)(Oleyar v. Kerr 217 Va. 88 at p. 90).

In accordance with that test, they ruled that "but for the contract, no duty by Oleyar to Kerr would have existed". (Id. at p. 90). The presence of this duty of an escrow agent to his principal is, under the Burks Pleading test stated above, determinative of whether the action is founded in tort or contract. In the case at bar, but for the escrow, (which at this stage of the proceeding must be considered to be established), no duty by Scaife and Dalton would have existed. The escrow created an implied contract between the parties which gave rise to the duty on the part of Scaife and Dalton to Winslow, Inc. et al.

In accordance with the foregoing, it is respectfully requested that the Court defer its ruling on the defendants plea on the statute of limitations until such time as the plaintiff has had an opportunity to present proof in support of its motion for judgment. Accordingly, the plaintiff urges the court not to enter the enclosed order.

In the event the order is entered at this time, I would appreciate if if a true copy thereof be mailed to the undersigned. A stamped self-addressed envelope is enclosed for this purpose.

Respectfully,

Daniel H. Borinsky

DANIEL H. BORINSKY

DHB/mkf
Enclosure
cc: William Marshall, Esq.
Clerk, Circuit Court of City of Fredericksburg

ORDER

The Court, having fully heard the argument on the plea of the statute of limitations by the defendants, William M. Scaife, Jr., and Gerald F. Daltan, and having fully considered the memorandums submitted by the parties and the cases cited therein, is of the opinion that the one year statute of limitations set forth in Section 8-24 of the Code of Virginia (1950 as amended) is applicable, and that the plaintiffs are barred by the Statute of limitations for recovery in this case because their action was instituted on July 12, 1976, for recovery of an alleged wrong occuring in September, 1973, said action being initiated more than one year after the date of the alleged wrong.

WHEREFORE, the Court doth sustain said plea of the statute of limitations, to all of which the plaintiffs by counsel object and except.

ENTER: 3 / 10 /77

S/ Dixon L Foster
Judge

I ask for this:
William R. Marshall Jr., p.d.

Seen and objected to:
Kenneth M. Barnes Esq., p.q.

A COPY TESTE: CHAS. H. BERRY, CLERK
BY Agnes A. McGee
DEPUTY CLERK

ASSIGNMEN OF ERROR

(1) The trial court erred in not finding the case of Oleyar v. Kerr, 217 Va. 88, controlling herein inasmuch as the defendants are being charged with a breach of duty arising out of the performance of professional services.

(2) The trial court erred by determining that an escrow did not exist in the case at bar and consequently failed to apply the proper limitation; Va. Code Sections 8-13 provides the applicable limitation for the breach by an escrow agent of his duty to a principal, and accordingly governs the subject action.

(3) The trial court erred in ruling that the statute of limitations prescribed by section 8-24 began to run from the date of the alleged wrong rather than from the date of the alleged damage; further, the trial court had insufficient facts upon which to determine the dates needed to rule upon the plea of the statute of limitations.

(4) The trial court erred in not finding that Winslow's cause of action is for direct damages; Winslow's action was thus timely filed within the five year statutory period provided by Code Section 8-24.