William and Mary Review of Virginia Law

Volume 1 (1949-1953)
Issue 3

Article 4

May 1951

Procedure - Joinder of Claims in Tort and Contract

Wilson O. Edmunds

PROCEDURE —

JOINDER OF CLAIMS IN TORT AND CONTRACT

Action was brought to recover $650,000 damages alleged to have been sustained as a result of improper and defective paint materials furnished by Du Pont Company to Universal Corporation. The notice of motion contained five counts, of which two were in contract and three in tort. Defendant demurred to the notice of motion upon several grounds, the principal one being misjoinder of causes of action. The trial court overruled the demurrer and later refused, on motion of defendant, to set aside the jury's verdict in favor of the plaintiff. Defendant appealed, assigning as one of numerous errors the refusal of the trial court to sustain its demurrer for misjoinder of causes of action. On appeal *held,* not error. "The demands of the plaintiff are of the same nature and closely related. Each arose out of the same general cause of action, in a continuous course of dealing with reference to one subject, and one judgment may be given." *E. I. du Pont de Nemours & Co.* v. *Universal Moulded Products Corp.,* 191 Va. 525, 62 S. E. 2d 233 (1950).

The established rule of common law is that causes of action may be joined if they are of the same nature and the same judgment may be rendered in each, although the pleas may be different.[1] Thus a party having several causes of action of the same general character and against the same defendant may unite them in one suit,[2] but causes of action distinct from one another and arising out of different transactions cannot be joined.[3] The form rather than the subject matter of the several counts determines their joinder in many cases,[4] although the court will tend to construe the count according to its true nature as tort or contract unless the form clearly forbids.[5] Claims, likewise, cannot be joined at common law if different forms of action are necessary, even though the facts are closely connected.[6]

It is also a well established rule of common law that a cause of action arising ex contractu cannot be joined with a cause of action arising ex delicto, and it does not matter that the counts may be perfect in themselves.[7] The application of this principle has been more injurious than beneficial to the plaintiff seeking relief on both contract and tort theories, for he is forced to elect at his peril on which legal theory he will proceed. The possibility is obvious that he might elect himself out of court.[8]

Heretofore the prevalent opinion was that Virginia tended to follow the common law rule prohibiting joinder of tort and contract.[9] However, the court in the *Du Pont* case, referring especially

to the *Colonna*[10] and *Kroger*[11] cases, said, "Expressions . . . relied on by the defendant to sustain its contention that there was a misjoinder of counts, are purely dicta and contrary to previous Virginia decisions."[12] It was also stated, referring to the same cases, that "the question of misjoinder was not before this court."[13]

In the *Colonna* case the plaintiff sued to recover damages for illness caused by drinking infected milk sold to his father by defendant. The notice of motion contained two counts, one in contract and one in tort. The defendant's demurrer was sustained on the ground of misjoinder of causes of action, and final judgment was rendered thereon. This decision was affirmed on appeal; plaintiff, however, did not assign as error the striking of the tort count. Thus the court was obviously correct in saying in the *Du Pont* case that the question of misjoinder was not before the court in the *Colonna* case.

The plaintiff in the *Kroger* case brought an action for damages due to injuries sustained from eating ham, which caused ptomaine poisoning. The notice of motion contained two counts, one in contract and the other in tort. Defendant's demurrer alleging misjoinder of causes of action was overruled by the trial court, and the Supreme Court of Appeals affirmed, holding this merely harmless error, since the trial court, on motion of the defendant, subsequently struck all of the plaintiff's evidence on negligence and also instructed the jury to disregard it, leaving only the contract or implied warranty. The defendant admitted in both courts that he was not prejudiced by the trial court's ruling. The court, referring to the misjoinder, stated: "It thus appears that there was joined an action on contract and one in tort. This should not be done,"[14] citing the *Colonna* case and BURKS, PLEADING AND PRACTICE.[15] This section of BURKS, however, has been interpreted to apply only to the joinder of tort and the common law action of assumpsit, rather than notice of motion procedure.[16] The quoted statement may be considered as dictum, for it was not essential to the determination of the case, since the appeal was based primarily on the admissibility of evidence and not misjoinder of causes of action.

In a more recent case[17] involving the liability of a tenant for waste, the plaintiff landlord proceeded by notice of motion founded upon both contract and tort. The contract claim was based upon a preliminary oral agreement between the plaintiff and defendant, leasing property for a term of three years. Subsequently, a written lease was forwarded to defendants which they refused to sign because they desired a clause releasing them from liability in case their business of rendering dead animals was enjoined. Never-

theless, the defendants remained on the premises for three and one half years. The tort claim was based upon VA. CODE ANN. § 5509 (1942), now § 55-214 (1950), allowing a recovery for wanton waste and for negligence of the defendant in not leaving the premises in "good repair", ordinary wear and tear excepted.

The trial court sustained defendant's demurrer to the misjoinder of causes of action, and the plaintiff elected to proceed in tort. The trial court, however, allowed the unexecuted lease to be admitted in evidence to show the relationship of the parties, and instructed the jury that defendant was under a duty "to use ordinary care and prudence to protect the leased premises, and to return the same at the end of the lease in substantially the same condition as found." The Supreme Court of Appeals held that the trial court acted properly in requiring the election, but that it was error to admit the unexecuted lease in evidence and to give the instruction, since this allowed the plaintiff to proceed on both contract and tort as though no election had been required. A statement of the court in this respect is noteworthy: "While the court required the plaintiff to elect which cause of action he would pursue, and he did elect to proceed in tort, yet in the trial of the case he was allowed to proceed in both ways just as though no election had been required. This, of course, was improper."[18]

In conclusion, the issue of misjoinder was not before the court in the *Colonna* case or necessary to the decision in the *Kroger* case. However, in the *Donovan* case it was properly before the court and passed on by it. Yet there was no reference to this decision in the *Du Pont* case. The most logical and only justifiable conclusion, therefore, is that the *Du Pont* and *Donovan* cases are clearly in conflict. The court should have overruled the *Donovan* case, rather than leave two necessarily conflicting decisions standing as law in Virginia, while trying to reconcile the *Colonna* and *Kroger* cases.

The distinction between common law forms of action has largely disappeared since the adoption of the notice of motion statute, a tendency which is furthered by the New Rules of the Virginia Supreme Court of Appeals.[19] The notice of motion statute emphasizes the pleading of facts upon which the plaintiff claims relief, and is designed to give him a simpler, better, and more expeditious method of procedure.[20] Although the statute should be liberally construed,[21] some of the Virginia decisions have harked back to the ancient common law system,[22] disregarding this aspect of notice procedure. Now, however, the rule laid down in the *Du Pont* case gives to the plaintiff a broader theory on which to base his action. It brings out true notice procedure, for the purpose is to set forth

the facts clearly; and if a cause of action is stated, relief should be granted, regardless of whether the claim set forth sounds in tort, contract, or both.

WILSON O. EDMUNDS

FOOTNOTES

1. Bowman v. First Nat. Bank of Broadway, 115 Va. 463, 80 S. E. 95 (1913). See Standard Paint Co. v. E. K. Vietor Co., 120 Va. 595, 601, 91 S. E. 752, 754 (1917).
2. Thalman v. Schultz et al., 111 W. Va. 64, 160 S. E. 303 (1931).
3. Brown et al. v. Bedford City Land and Imp. Co. et al., 91 Va. 31, 20 S. E. 968 (1895).
4. Higdon v. Kennemer, 120 Ala. 193, 24 S. 439 (1898). *Accord,* Chambers v. Spruce Lighting Co., 81 W. Va. 714, 95 S. E. 192 (1918).
5. Ferrill v. Brewis' Adm'r, 25 Gratt (66 Va.) 764, 769 (1875); Standard Paint Co. v. E. K. Vietor & Co., 120 Va. 595, 601, 91 S. E. 752, 754 (1917).
6. CLARK, HANDBOOK ON CODE PLEADING 436 (2d ed., 1947).
7. Gary v. Abingdon Publishing Co., 94 Va. 775, 27 S. E. 595 (1897); Pennsylvania R. Co. v. Smith, 106 Va. 645, 56 S. E. 567 (1907); Kavanaugh v. Donovan, 186 Va. 85, 41 S. E. 2d 289 (1947).
8. See Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S. E. 94 (1936).
9. See note 7, *supra.*
10. Ibid.
11. 181 Va. 390, 25 S. E. 2d 254 (1943).
12. 191 Va. 525, 537, 62 S. E. 2d 233, 237 (1950).
13. Ibid.
14. 181 Va. 390, 392, 25 S. E. 2d 254, 255 (1943).
15. § 99, p. 201 (3rd ed. 1934).
16. See Phelps, *The Notice of Motion and Modern Procedural Reform,* 35 VA. LAW REV. 380, 385 (1949).
17. Kavanaugh v. Donovan, 186 Va. 85, 41 S. E. 2d 489 (1947).
18. Id. at 93, 41 S. E. 2d at 493.
19. See Rule 3:18(d).
20. Chandler v. Baltimore C. & A. Ry. Co., 125 Va. 63, 99 S. E. 794 (1919).
21. Felvey v. Shaffer, 186 Va. 419, 42 S. E. 2d 860 (1947).
22. Kavanaugh v. Donovan, 186 Va. 85, 41 S. E. 2d 489 (1947).