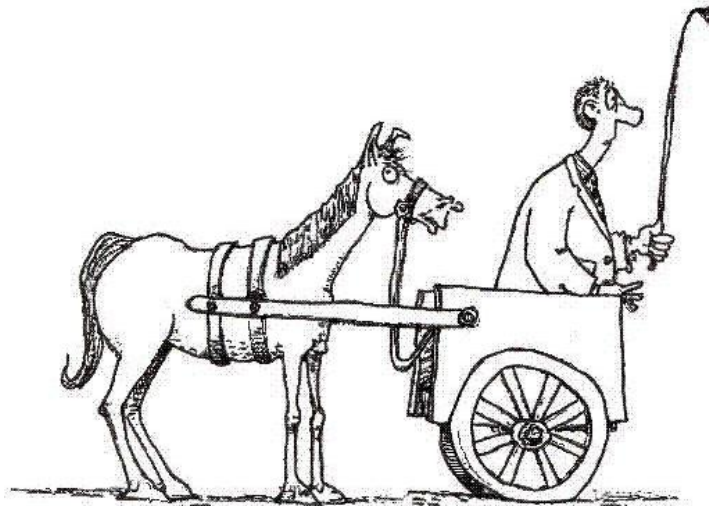


TRYING AND DEFENDING BREACH OF CONTRACT CASES

**Ten Recurring Themes and Techniques in Defending Breach of
Contract Cases**

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**William R. Rakes, Esquire
Gregory J. Haley, Esquire
Abigail E. Murchison, Esquire
Gentry Locke Rakes & Moore, LLP
10 Franklin Road, S.E., Suite 800
P.O. Box 40013
Roanoke, VA 24022-0013
(540) 983-9300
Fax: (540) 983-9400
Rakes@gentrylocke.com
Haley@gentrylocke.com
Murchison@gentrylocke.com**

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By: William R. Rakes, Gregory J. Haley and Abigail E. Murchison
Gentry Locke Rakes & Moore, LLP

Introduction

The topic of trying breach of contract cases from the defense perspective is huge. This outline addresses recurring themes and topics in defending these cases. The content reflects the personal experiences of the authors and the “lessons learned.” Many of the comments below may seem obvious, but most of the suggestions are based on observations of obvious things that competent parties fail to do.

Business litigation involves complicated evidence about issues that are not familiar to jurors (or judges) including business practices, technical issues, industry practices, and related tax and accounting issues. The task of defense counsel is to make the evidence and law make sense to the jury. The trial is where the facts, law and the fact-finder’s common sense all come together. There will be competing narratives and claims of victimhood or villainy. The defense counsel must develop a coherent strategy and then execute that strategy while grappling with the opposing party, the court, and his or her own client.

The defense must be relentlessly realistic in evaluating the facts and the evidence. At trial, defense counsel must be the truth-teller in the room and the source of consistently reliable and accurate information. It is a simple reality that many cases with a lopsided plaintiff’s victory were poorly defended. It is often the difficult cases that get tried; *i.e.*, those cases with tough liability issues, large damages, and/or difficult personalities involved. Defense counsel, however, must implement a defense strategy that manages and minimizes risk, not a strategy that maximizes risk by antagonizing the court and creating avoidable “all or nothing” decisions.

For cases which appear (at least in hindsight) to be examples of defense strategies that increased risk, see: Prospect Development Company v. Bershader, 258 Va. 75 (1999) (affirming award of discretionary attorney’s fees of \$151,000 on an award of \$34,000 with equitable relief; aggressive defense tactics noted); and Condominium Services, Inc. v. First Owner’s Association, 281 Va. 561 (2011) (affirming punitive damages award of \$275,000 associated with a \$91,000 breach of contract and conversion claims; aggressive business tactics and weak counterclaims noted).

1. Every case has a fact theme that must be developed.

- a. It is all about the facts.



**Defense
counsel
turning
the
tables!**

- b. Identify and develop the theme of the case with the evidence and law. The defendant must commit to a theme of the case. It just does not work well to try to keep options open and react to what the plaintiff does in pleading, discovery or at trial.

The theme of the case must tell a compelling story. A defendant that takes a legalistic “checklist” approach to the adequacy of the plaintiff’s proof is implementing a poor strategy with the jury. If the jury concludes that the plaintiff is due relief and the defendant has behaved poorly, whether each box has been checked is not going to matter. The defense themes must take into account human nature.

Use the “topography” of the litigation in selecting your themes. Defend the high ground where you have a factual or legal advantage. Do not rely on a theme that can be attacked from all directions at once. The defense themes must have focus and establish priorities in presenting the evidence and arguments.

Once you have selected your defense themes, do nothing and present no evidence that does not serve your themes.

- c. The case theme must be consistent with reality, common sense and the evidence.
- d. Examples from cases:
- i. The plaintiff was the one who broke the promise; the plaintiff failed to perform; or the plaintiff was in breach.
 - ii. Defendant’s actions were authorized by the plain meaning of the contract.
 - iii. Professional advantage. In any case involving a professional, quasi-professional, or specialized contractor, the “lay person” defendant can invoke the theme of the plaintiff’s superior knowledge and bargaining power resulting from professional advantage.
 - iv. “It is their form contract.” The boilerplate defense. The defendant can invoke the theme that the contract terms should not be given effect, or at least full effect, because the disputed provision was included in the plaintiff’s form contract.
 - v. “The hell with the cheese, just get me out of the damn trap.” This theme works when the plaintiff is a mean and cruel business person and people in the zone of danger are just trying to escape. Stated differently, the plaintiff is a bully.

- vi. The plaintiff is seeking a windfall.
- vii. The plaintiff caused all of his own problems.
- viii. The sophisticated businessperson theme. The defense will show that the plaintiff was a sophisticated businessperson and the contract assigned risks to the plaintiff.
- ix. “We negotiated but we never reached a final contract.”
 - 1. Use the surrounding circumstances to show that the deal was never finalized.

In many cases, whether or not the parties reached a final agreement will be the critical issue. In such cases, the circumstances show the parties took actions that can be characterized as performance of the claimed contract, or as actions in preparation of the anticipated contract. In Reid v. Boyle, 259 Va. 356, 367-8 (2000), the Court reviewed the surrounding facts to show the plaintiff proved the contract had been made:

Applying these principles, we hold Reid presented evidence which would permit the chancellor to ascertain, with reasonable certainty, from the language that the parties used and in light of all the surrounding circumstances, that Reid entered into an oral contract with Boyle and Cellar Door Venues and that pursuant to the terms of this contract, Boyle and Cellar Door Venues promised to give Reid a one-third interest in the value of Cellar Door Venues’ leasehold interest in the amphitheater. Reid presented evidence of the following pertinent facts. Boyle exerted absolute control of Cellar Door Venues which owned the leasehold interest, and Boyle conducted the corporation’s financial affairs with an “air of informality.” Boyle promised Reid that he would own one-third of the amphitheater project if Reid could bring his concept of an amphitheater in Virginia Beach to fruition. Boyle repeatedly assured Reid that Reid owned a one-third interest in the amphitheater project. As we have already stated, Boyle told Lyons, his friend for 35 years, that Reid owned an interest in the amphitheater project.

Reid also partially performed this oral contract. Reid permitted approximately \$88,000 of compensation that he ultimately received from Cellar Door Productions to fund the initial operational costs for Cellar Door Venues. Significantly, Reid signed a letter of credit and a guaranty which the City required before it would proceed with the construction of the amphitheater. Boyle and Cellar Door Venues admitted in their response to a request for admission that Reid’s acts of signing the personal guaranty and letter of credit were “above and beyond” his job responsibilities as president of Cellar Door Productions.

The chancellor was also certainly entitled to consider, as a surrounding circumstance, Boyle’s history of giving employees, including Reid, ownership interests in corporations that Boyle controlled. The chancellor also considered the facts that Cellar Door Venues’ primary asset was its leasehold interest with the City, and Boyle’s statement to Reid that Boyle had an agreement that would confer an ownership interest to Reid in the amphitheater project, but that “the lawyers [had] made it too complicated” and that Boyle intended to return it to the lawyers for simplification.

In contrast, in Smith v. Farrell, 199 Va. 121, 128-29 (1957), the Court reversed the trial court and held that there had been no final agreement to develop 1500 homes in a subdivision despite

cooperative preparatory efforts. The Court noted that only three sample homes had been built but they lacked utility services; no sales commissions had been paid; adequate capital was not in hand; arrangements had not been made for water and sewer service; the property had not been rezoned; and financing for purchases was not assured. *Id.* at 127-29.

The Court noted: “Unquestionably, defendant was hopeful and believed the project could be made a success and plaintiff was likewise of the same opinion, yet the many major problems which had to be overcome were not solved and might never be and both parties were aware of these facts. **It is another of those unfortunate cases where all were hopeful, but the ship failed to reach port.**” *Id.* at 128-29.

The Court concluded that, even resolving all conflicts in favor of the plaintiff, the alleged contract was indefinite, vague and inconclusive. *Id.* at 129.

- e. **Using the strong witness.** A strong, articulate witness is a huge weapon in a breach of contract case. If the litigation gods grant you such a weapon, use it!
- f. **Using the smoking gun exhibit.** “These documents are the eyewitnesses to what really happened...” *Banks v. Mario Industries*, 274 Va. 438, 453-5 (2007) (affirming admission of defendant former employee’s email communications with attorney deleted and later recovered, from employee’s work computer; attorney client privilege waived).
- g. **Minimizing the plaintiff’s smoking gun exhibit.** “This document reflects the defendant’s actions and state of mind expecting that the agreement would be finalized. The plaintiff is taking it out of context.”
- h. Develop a “hook” phrase based on memorable testimony or other evidence.
 - i. The “Covenant on the Mound.” (In a case involving an alleged verbal amendment to a construction contract made while standing on a mound of dirt at the construction site).
 - ii. “Napkin Spec.” (In a case where the plaintiff claimed a product development contract had been finalized based on a product specification written on a napkin over cocktails).
 - iii. The “Armistice Day Amendment” (In a case in which a proposed amendment was presented on Armistice Day).
 - iv. The “flotsam and jetsam of a failed business relationship.”
 - i. **Have a “Plan B.”** Plan on the possibility of things going poorly at trial. Give yourself flexibility, if possible, to present a Plan B liability or damages scenario at trial.



2. Do not let the plaintiff turn a contract case into a tort case – the ConTorts Dilemma.

- a. Virginia law is vigilant against “turning every breach of contract into a tort.” Dunn Constr. Co. v. Cloney, 278 Va. 260, 267 (2009).
- b. Misrepresentations concerning a duty owed solely by virtue of a contract are not independently actionable as fraud. See Richmond Metro. Auth. v. McDevitt Street Bovis, Inc., 256 Va. 553 (1998) (holding that “false applications under oath to induce payments” did not give rise to actionable fraud, because each misrepresentation related to a duty or obligation specifically required by the parties’ contract). See also Dunn Constr. Inc. v. Cloney, 278 Va. at 268 (holding that a misrepresentation made in order to obtain payment due under a contract did not give rise to a separate tort claim).
- c. Virginia law does not recognize a claim for negligent performance of a contract. See Dunn Constr., 278 Va. at 268 (rejecting the plaintiff’s efforts to characterize the defendant’s breach of a construction contract as the violation of a duty independent from such contract, because even if the defendant’s faulty construction work “initially could be attributed to negligence,” and even though defendant’s subsequent false statements about claimed repair work were plainly deliberate misrepresentations, the plaintiff’s claims all sounded in contract).

The rule applies regardless of the motive for breaching the contract. See Kamlar Corp. v. Haley, 222 Va. 699, 707 (1983) (requiring “proof of an independent, wilful tort, beyond the mere breach of a duty imposed by contract, as a predicate for an award for punitive damages, regardless of the motives of the underlying breach”).

d. Overview of Virginia’s classic “ConTorts” cases

- i. Richmond Metro. v. McDevitt Street Bovis, Inc., 256 Va. 553 (1998) (holding that the defendant contractor’s alleged breach of contractual duties did not give rise to a claim for actual fraud, even if the defendant, in order to obtain payment, falsely asserted under oath that it had complied with those contractual requirements).

In Richmond Metro., the Authority contracted with McDevitt for the construction of a baseball stadium in Richmond. McDevitt submitted sworn progress-payment requests falsely stating that it had completed the construction work according to the design specifications set forth in the contract. McDevitt’s “deception” (it hadn’t filled certain concrete conduits with grout as required by the contract) was discovered more than five years after the completion of the work, barring a claim for breach of contract. At issue was whether the Authority could recover against McDevitt in tort. Richmond Metro., 256 Va. at 555-56.



The Authority brought claims for actual and constructive fraud based on the false statements made to obtain progress payments. The circuit court entered summary judgment for McDevitt on the fraud claims, finding that the alleged misrepresentations only breached duties assumed by contract, and that nothing demonstrated the breach of any duty that was separate and independent from the contract. Id. at 556-57.

The Supreme Court affirmed. It rejected the Authority’s argument that McDevitt’s misrepresentations about its compliance with the contract and its “false applications under oath to induce payments” were “separate and independent wrongs that [went] beyond [the] contractual duties” and supported causes of action for actual and constructive fraud. Id. at 557.

The Supreme Court explained that the determination of whether a cause of action sounds in contract or tort depends on the source of the duty violated. Because “each particular misrepresentation by McDevitt related to a duty or an obligation that was specifically required by the Design-Build Contract,” the Court concluded that the misrepresentations did not give rise to a cause of action for actual fraud. Id. at 559.

Likewise, because the record failed to show that McDevitt did not intend to fulfill its contractual duties when it entered into the agreement with the Authority, the Court held there was no claim for fraud in the inducement. Id. at 560.

The Court concluded, “In ruling as we do today, we safeguard against turning every breach of contract into an actionable claim for fraud.” Id.

- ii. Augusta Mutual Ins. Co. v. Mason, 274 Va. 199 (2007). The Supreme Court reaffirmed its commitment to safeguarding the line between tort and contract. Here, an insurance agent sold an Augusta Mutual homeowner’s insurance policy to a homeowner. When completing the application for the policy, the agent allegedly fraudulently misrepresented that the home had a masonry flue lined with tile. Six years later, when a fire destroyed the home, Augusta Mutual denied coverage based on the misrepresentation concerning the flue. In the homeowners’ coverage suit against Augusta Mutual, Augusta Mutual filed a third-party complaint against the agent on claims of fraud in the inducement and breach of fiduciary duty. 274 Va. at 201-03.

On the inducement claim, Augusta Mutual alleged that the agent knowingly misrepresented that the flue was lined with tile, forged the homeowner’s signature, and did so in order to receive a commission. Id. at 204-05. On the fiduciary duty claim, Augusta Mutual alleged that the agent breached by failing to perform due diligence. Id. at 207-08. The circuit court sustained demurrers to the two claims.

The Supreme Court affirmed, holding that any duties running from the agent to Augusta Mutual existed by virtue of the agency contract between the two. Id. at 206-08.

Accordingly Augusta Mutual was limited to breach of contract claim against the agent. But, of course, any such contract claim was barred by the statute of limitations – leaving Augusta Mutual with no remedy at all.

- iii. Abi-Najm v. Concord Condominium LLC, 280 Va. 350 (2010). This case offers hope to plaintiffs in avoiding Richmond Metro and Augusta Mutual. Here, several purchasers of residential condominiums in Arlington County sued in connection with purchase agreements. In these agreements, Concord Condominium made certain representations as to the quality of flooring. The purchasers claimed that Concord instead used prefabricated hardwood, in violation of the purchase agreements. Despite a contractual relationship between the parties, the Court held that the plaintiffs stated viable tort claims for fraud-in-the-inducement and breach of a statutory duty under the Virginia Consumer Protection Act (VCPA).

e. **The federal courts’ attempts to side-step the Virginia rule.**

- i. Some federal courts have interpreted Virginia law to permit independent fraud claims to stand beside a breach of contract claim. See Vanguard Military Equip. Corp. v. David B. Firestone Co., Inc., 6 F. Supp. 2d 488, 493-94 (E.D.

Va. 1997) (“An independent tort is one that is factually bound to the contractual breach but whose legal elements are distinct from it. Fraud is a willful tort. It is the knowing misrepresentation of a material fact to a person whose reasonable reliance results in damage.”)

1. The Supreme Court of Virginia criticized this case in Richmond Metro., 256 Va. at 560.
 - ii. Hewlette v. Hovis, 318 F. Supp. 2d 332, 337 (E.D. Va 2004) (holding that “the duty not to defraud is owed by everyone to everyone, regardless of any special relationship between the alleged tortfeasor and victim,” that the defendant’s duty not to defraud the plaintiff for his own financial gain was owed “irrespective of their attorney-client relationship,” and therefore was independent of the plaintiff’s claim for breach of contract).
 - iii. Kamin v. U.S. Bank Nat’l Assoc., No. 1:13-cv-58, 2013 U.S. Dist. LEXIS 172935 (W.D. Va. Dec. 9, 2013) (Jones, J) (denying a motion to dismiss bank’s tort claims against an individual, despite allegations that the individual was liable under a personal contractual guaranty of a commercial mortgage and other loan documents).
- f. **Strategies to Eliminate the Tort Claim.**
- i. Demurrer or Motion to Dismiss.
 - ii. Summary judgment after discovery.
 - iii. The timing of the effort depends on the case, the nature of the parties, and a host of other factors. Based on anecdotal experience, it seems that State Court judges are more likely to dismiss tort claims on demurrer than federal court judges. It is generally better to knock the tort claims out as early in the case as is possible.
- g. **Avoiding the exceptions to the rule.**
- i. **Fraud in the inducement.**
 - a. Where a promise is made with the present intention not to perform, the promisor makes a misrepresentation of a present, material fact, which can support a claim for fraud in the inducement. See Abi-Najm v. Concord Condominium LLC, 280 Va. 350, 363 (2010); Augusta Mut. Ins. Co., 274 Va. at 204 (“A false representation of a material fact, constituting an inducement to the contract, on which a party has a right to rely, is always ground for rescission of the contract ... or ground for an action for damages.”).

- b. "To state a cause of action for fraudulent inducement of contract under Virginia law, a plaintiff must allege that the defendant made misrepresentations [that] were positive statements of fact, made for the purpose of procuring the contract; that they are untrue; that they are material; and that the party to whom they were made relied upon them, and was induced by them to enter into the contract." Enomoto v. Space Adventures, Ltd., 624 F. Supp. 2d 443, 452 (E.D. Va. 2009) (citing Brame v. Guarantee Fin. Co., Inc., 139 Va. 394 (1924)).
1. In Abi-Najm, the Court held that condominium purchasers had stated a viable claim of fraud in the inducement against Concord. The purchasers had alleged that Concord "knowingly misrepresented the quality of the flooring it would deliver ... and absent those representations [the purchasers] would not have entered into [the purchase agreements]." 280 Va. at 355-56.
 2. In Augusta Mutual, by contrast, the insurance company failed to state a claim for fraud in the inducement, despite allegations that the agent made intentional misrepresentations about the condition of the homeowner's house (and even forged the homeowner's signature) in order to obtain a commission on the policy. The Court held that any duties allegedly violated arose solely by virtue of the agency agreement, and that Augusta Mutual alleged only breach of those contractual obligations. 274 Va. at 206.
- c. Courts carefully distinguish between misrepresentations made pre-contract and misrepresentations made after the contract had been formed. To support a claim for fraud in the inducement, the misrepresentation must have occurred prior to or at the time of contract formation. Otherwise, the misrepresentation is not a tort, but only a breach of contract. . Stated differently, any action taken after the contract was formed and performance starts can only be a breach of contract.
1. "[E]ven though fraudulent, a misrepresentation made subsequent to, or a concealment of a fact arising after, formation of a contract cannot constitute fraudulent inducement to enter into the contract; the misrepresentation or concealment must have been intended to induce and must, in fact, have induced the formation of the contract." Ware v. Scott, 220 Va. 317, 319 (1979) (emphasis added).
 2. "[W]hen the tort alleged is fraud perpetrated before a contract between the parties came into existence, it cannot logically follow that the source of the duty breached was the contract." County of Grayson v. Ra-Tech Servs., No. 7:13-cv-00384, 2013 U.S. Dist. LEXIS 161323 (W.D. Va. Nov. 13, 2013) (applying Virginia law).

ii. **Post termination actions.**

- a. In Condominium Services, Inc. v. First Owners' Assoc., 281 Va. 561 (2011), the Court held that the defendant's conversion of plaintiff's funds after the plaintiff had terminated the prior property management services contract was a separate tort claim; the Court affirmed a jury verdict for breach of contract and conversion).

iii. **Breach of other non-contractual duties.**

a. **Fiduciary duties**

1. While a single act or occurrence can, in certain circumstances, support causes of action both for breach of contract and for breach of a duty arising in tort, the duty tortuously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract. See Augusta Mut. Ins. Co., 274 Va. at 205-06.
2. In Augusta Mutual, the insurance company alleged that the agent breached fiduciary duties in failing to obtain accurate information regarding the condition of a home being insured. The Court held that this claim was without merit, reasoning that "any fiduciary duty allegedly breached existed solely because of the contractual relationship" between the insurance company and the agent. The Court found no violation of any duty separate from the contract that "specifically required 'due diligence in obtaining accurate information and making all necessary inspections required.'" Id. at 205-06.

b. **Statutory duties**

1. In Abi-Najm v. Concord Condominium, LLC, 280 Va. 350 (2010), the circuit court sustained a demurrer to a claim under the Virginia Consumer Protection Act. The defendant had argued that any statutory duties arising under the Act were duties that arose solely by virtue of contracts entered between the parties. The Supreme Court disagreed and reversed. The Act made it unlawful to misrepresent the quality, grade, or style of goods, which created a statutory duty existing independent of any contracts between the parties.

c. **Conversion**

1. In Virginia, a conversion claim requires (1) ownership or right to possession of property at the time of the conversion, and (2) the defendant's wrongful exercise of dominion or control over the plaintiff's property, depriving the plaintiff of possession. United Leasing Corp. v. Thrift Ins. Corp., 247 Va. 229 (1994).
 2. Other jurisdictions have held that a conversion claim may only succeed if the party alleges a wrong that is distinct from any contractual obligations. Command Cinema Corp. v. VCA Labs, Inc., 464 F. Supp. 2d 191, 199 (S.D.N.Y. 2006).
 - a. Condominium Services, Inc. v. First Owners' Assoc., 281 Va. 561 (2011) (affirming verdict for breach of contract and separate claim of conversion based on acts after the contract was terminated).
- h. **Punitive damages.**
- i. Punitive damages are not available for a simple breach of contract unaccompanied by an independent, willful tort. Kamlar Corp. v. Haley, 224 Va. 699 (1983).
 - ii. See Condominium Services Inc. v. First Owners' Assoc., 281 Va. 561 (2011) (affirming jury's award of \$275,000 in addition to \$91,125 compensatory damages for breach of contract and conversation of funds; evidence adequate to show conscious disregard of plaintiff's rights).
 - iii. "Under Virginia law, a tort claim normally cannot be maintained in conjunction with a breach of contract claim. An exception arises where a party establishes an independent, willful tort that is factually bound to the contractual breach but whose legal elements are distinct from it. It is not sufficient for plaintiff to show that defendant willfully desired to breach the contract for its own benefit. Instead, Plaintiff must show that defendant maliciously desired to injure plaintiff." Erdmann v. Preferred Research, Inc., 852 F.2d 788, 791 (4th Cir. 1988).
 - iv. A plaintiff may recover punitive damages for fraud in the inducement of a contract. See, e.g., RMA Lumber, Inc. v. Pioneer Mach., LLC, No. 6:08-cv-00023, 2008 U.S. Dist. LEXIS 86293 (W.D. Va. Oct. 24, 2008).
 - v. If the plaintiff can keep the tort claims in the case, he may be able to assert a claim for attorney's fees under Prospect Development Company v. Bershader, 258 Va. 75, 92-3 (1999) (affirming discretionary award of attorneys' fee in breach of contract and fraud case).

- vi. A federal district court recently reaffirmed Virginia’s aversion to punitive damages in contract actions. See 56th St. Investors, LLC v. Worthington Cylinders Mississippi, No. 4:13-cv-149, 2014 U.S. Dist. LEXIS 59387 (E.D. Va. April 16, 2014). There, the plaintiffs alleged breach of a contract governing the defendant’s removal of equipment and other assets from a building. Specifically, the plaintiffs alleged that the defendant breached the contract by damaging the building, failing to repair such damage, failing to remove certain items, and improperly removing others. *Id.* at *1-*2. The court dismissed the plaintiffs’ claim for punitive damages, citing “long-held” Virginia law that “punitive damages are not recoverable in breach of contract cases unless the plaintiff proves that the breach amounts to an independent, wilful tort.” *Id.* at *4-*5 (citing Wright v. Everett, 197 Va. 608 (1956)). Negligence in performing the contract cannot be the “independent, wilful tort.” *Id.* at *5 & n.2.

The court did not rule out the possibility that “gross negligence” in the performance of a contract could support a claim for punitive damages. “[E]ven if it is assumed that grossly negligent performance of a contract, as contrasted with ordinary negligence, could constitute an independent, willful tort, Plaintiffs’ amended complaint fails to allege facts sufficient to support a claim for gross negligence.” *Id.* at *7. Gross negligence consists of an “utter disregard of prudence” that would “shock fair minded people.” *Id.* (citing Ferguson v. Ferguson, 212 Va. 86 (1971)). Merely damaging a building while removing equipment, failing to remove certain items, and improperly removing others are not allegations that amount to gross negligence. *Id.* at *6-*8 & n.2. In any event, the court ruled that the plaintiffs failed to allege any facts demonstrating that the defendant violated duties other than those imposed by the contract and, therefore, dismissed the claim for punitive damages.

- i. Analysis of the Virginia Rule – Case Illustrations.

Virginia judges tend to follow the Supreme Court’s direction and are quick to dismiss tort claims asserted with breach of contract claims.

Several cases illustrate the effect of eliminating tort claims in business litigation. First, in ITT Hartford Group, Inc. v. Virginia Financial Associates, Inc., 258 Va. 193 (1999), the Supreme Court considered a case involving the development of a new “package” of insurance products for dentists. The plaintiff Virginia Financial Associates (“VFA”) had played an important role in structuring the package and organizing the insurance providers, but the parties had not entered into a written contract. VFA brought claims under theories of express and implied contract, actual and constructive fraud, and sought compensatory and punitive damages. The jury awarded VFA \$5,200,000 in compensatory damages and \$1,000,000 in punitive damages. The Supreme Court reversed the decision and remanded the case for a new trial limited to the issue of VFA’s damages on the implied contract (quantum meruit) claim.

The Court held that the damages evidence of lost future profits was unduly speculative because the new insurance “package” was a new business enterprise. 258 Va. at 203. The Court also held that the evidence did not support the jury’s verdict on theories of actual and constructive fraud. The Court stated: “This is another situation that we have confronted when the “moving party in the controversy is a disgruntled player in the rough-and-tumble world comprising the competitive marketplace.” Id. at 204.

The Court noted that the plaintiff made no effort at the beginning of the courtship to obtain any agreement in writing or orally about compensation for its efforts. Id. The Court observed that the defendant’s statements that the plaintiff would be treated “fairly” were promises and statements about future events and were not fraudulent. The Court concluded: “Actually, the plaintiff seeks to convert a dispute occurring in the marketplace over what is “fair” compensation into a tort action for fraud. The alleged actionable conduct of Hartford and its agents did not amount to false representations, and the trial court erred in ruling to the contrary. Id. at 204-05.

After the 1999 Supreme Court decision, the case was retried on remand on VFA’s implied contract (quantum meruit) damages. The jury returned a verdict in favor of VFA for \$1,230,000, and both parties appealed. Virginia Financial Associates, Inc. v. ITT Hartford Group, Inc., 266 Va. 177 (2003). The Court upheld the admissibility and sufficiency of VFA’s damages evidence as to the reasonable value of VFA’s services. Id. at 182. The Court also upheld the trial court’s exclusion of evidence concerning future premium income as unduly speculative. Id. at 184-185.

Another notable example of the effect of associated tort claims is Prospect Development Corp. v. Bershader, 258 Va. 75 (1999), in which the Supreme Court affirmed the discretionary award of attorney’s fees of \$151,000 after the jury awarded compensatory damages of \$34,000 and equitable relief for breach of contract and fraud in the inducement claims. The Supreme Court quoted at length from the trial court’s overview including:

To say that this case was hotly contested by the defendants I think is something of an understatement. It was certainly hotly contested in all respects by the defense. And it was not a precise, surgical defense in this case. It was a global, comprehensive, all inclusive – basically defend everything and deny everything. And I’m not saying that faulting the attorneys. That was the position taken by the defendants themselves...It did take an enormous amount of effort by the complainants to prove their case in this situation.

Id. at 93.

In Prospect Development Corporation, the associated tort claim for fraud allowed the discretionary award of attorney’s fees. Id. at 92.

Finally, in Condominium Services, Inc. v. First Owner’s Association, 281 Va. 561 (2011), the Court affirmed a punitive damages award of \$275,000 associated with a breach of contract and conversion award of \$91,125. The opinion notes the aggressive positions asserted by the defendants.

3. Using affirmative (and other) defenses and special pleas.

- a. Common defenses and special pleas.
 - i. FRCP 8(c) Affirmative Defenses.
 1. Accord and satisfaction

2. Duress
 3. Estoppel
 4. Failure of consideration
 5. Fraud
 6. Illegality
 7. Laches
 8. License
 9. Payment
 10. Release
 11. Res judicata
 12. Statute of frauds
 13. Statute of limitations
 14. Waiver
- ii. Additional general defenses
1. Statute of repose
 2. Ratification
 3. Laches
 4. Estoppel
 5. Excuse
 6. Unclean hands
 7. Failure to do equity
 8. Duty to mitigate
 9. Mistake
 - b. “Let’s get fancy!” Defenses specific to breach of contract claims.
- i. Existence of written contract (to quantum meruit claims).
 - ii. Plain meaning of the contract. Condominium Services, Inc. v. First Owners’ Assoc., 281 Va. 561 (2011) (applying rules of contract construction including plain meaning, related documents, giving meaning to all provisions, harmonizing provisions seemingly in conflict, and more specific provision controlling over the general).
 - iii. Lack of damages.
 - iv. The new business enterprise rule. ITT Hartford Group, Inc. v. Virginia Financial Associates, Inc., 258 Va. 193, 202 (1999). Va. Code Ann. § 8.01-221.1.
 - v. Betterment (damages caused by breach offset by expenses saved).
 - vi. Betterment #2. The plaintiff seeks a remedy that would constitute a windfall: “The plaintiff has contracted for a Chevy of a roof but wants that replaced with a Cadillac of a roof.” Nichols Constr. Co. v. Virginia Machine Tool Company, LLC, 276 Va. 81, 88 (2008).
 - vii. Speculative damages. ITT Hartford Ins. Group v. Virginia Financial Associates, Inc., 258 Va. 193 (1999).
 - viii. Relief sought inconsistent with contract terms or limitation of remedies provision in contract.
 - ix. Disclaimer in contract.
 - x. Limitation of liability in contract.

- xi. Action complained about allowed by contract. Charles E. Brauer Co., Inc. v. Nationsbank, 251 Va. 28 (1996); Mahoney v. Nationsbank, 249 Va. 216 (1995)(cases holding a defendant does not breach an obligation of good faith by exercising rights created by the contracts).
- xii. Exercise of discretion allowed by contract.
- xiii. Failure to comply with condition precedent. Lerner v. The Gudelsky Co., 230 Va. 124 (1985).
- xiv. Failure to allege that conditions precedent have occurred or been performed. FRCP 9(c).
- xv. Failure to comply with prerequisite to cause of action (e.g. notice or demand).
- xvi. Failure to give notice of breach and opportunity to cure.
- xvii. Failure to give notice of breach as required by contract.
- xviii. Plaintiff's actions preventing defendant's performance.
- xix. No final agreement/no meeting of the minds.
- xx. Merger/integration clause. Martin & Martin, Inc. v. Bradley Enterprises, Inc., 256 Va. 288 (1998).
- xxi. Failure to comply with written change order requirement.
- xxii. Equitable defenses to legal claims under Va. Code § 8.01-422.
- xxiii. First material breach.
- xxiv. Election of remedies upon prior or earlier breach.
- xxv. Defense based on provisions of separate but related contract document. Condominium Services, Inc. v. First Owners' Assoc., 281 Va. 561 (2011) (court considers bylaws in applying management agreement when management agreement refers to bylaws).
- xxvi. Economic loss rule (in all its derivations).
- xxvii. Failure to plead fraud in the inducement with particularity. RFPCP 9(b).
- xxviii. Lack of reliance in fraud in inducement claim (also lack of plaintiff's knowledge of alleged misrepresentation).
- xxix. Alleged damages caused by actions of plaintiff or third parties.
- xxx. Incompetence (minors etc.)
- xxxi. The contract assigned the risk of the event to the plaintiff.
- xxxii. UCC Defenses. Acceptance, payment, use, impracticability, latent defect, etc.
- xxxiii. Force majeure.
 - c. A defendant must have a good faith basis for pleading defenses. Ford Motor Company v. Benitez, 273 Va. 342 (2007).
 - d. Do not overlook the obvious.
 - i. If the contract allows the defendant's actions, the complaint fails to state a claim for breach. Charles E. Brauer Co., Inc. v. Nationsbank, 251 Va. 28 (1996); Mahoney v. Nationsbank, 249 Va. 216 (1995) (cases holding a defendant does not breach an obligation of good faith by exercising rights created by the contracts).
 - e. Smart (and stupid) counterclaims.
 - i. Smart counterclaims. Well-grounded in fact and law. Consistent with the defense themes in the initial case. How will it play to the jury?
 - ii. Stupid counterclaims.

1. Condominium Services, Inc. v. First Owners' Assoc., 281 Va. 561 (2011) (property manager counterclaim for improper termination of property management agreement; trial court dismissal on demurrer sustained).
2. It is not strategic if the counterclaim blows up in your face and makes you look petty.
 - f. **Requesting a Reply. Rule 3:11.** When you have a serious special plea defense, consider alleging the facts in detail and requesting the plaintiff to reply to the special plea allegations.
 - g. Ask for a separate evidentiary hearing on a special plea if appropriate.
 - i. A plea in bar is a defensive pleading that reduces the litigation to a single issue which, if proven, creates a bar to the plaintiff's right of recovery. The party asserting the plea has the burden of proof. Cooper Industries, Inc. v. Melendez, 260 Va. 578, 590 (2000).

A plea in bar can be considered on the pleadings or evidence can be taken. When considered on the evidence, the facts stated in the plaintiff's complaint are deemed true. Tomlin v. McKenzie, 251 Va. 478, 480 (1996).

- ii. Why try the whole plaintiff's case or the whole case if the judge will dismiss the case based on an affirmative defense or special plea? Argue judicial economy.

4. Managing Expert Issues.

- a. After the underlying facts, it is all about the experts.
- b. Start early and get it done promptly.
- c. Use multiple experts when possible. Parties sometimes try to overload an expert to cover too many topics or areas beyond the expert's expertise.

Possible types of expert analysis in breach of contract cases:

- i. Damages; reliance damages; lost profits. An excellent resource on information concerning damages analyses is Recovery of Damages for Lost Profits, R.L. Dunn, (6th ed. 2005) (Title sheet and Chapter 2 index "Recovery in Contract Litigation" attached as Exhibit 1).
- ii. Equipment or property valuation.
- iii. Business valuation; going concern valuation; stock valuation.
- iv. Accounting and forensic accounting.
- v. Cost of performance; variable cost analyses.
- vi. Mitigation opportunities; cost reductions.
- vii. Betterment; cost avoidance; special benefit.
- viii. Product market; marketing.
- ix. Product lifecycle and lifespan.
- x. Product development costs, accounting, schedule.
- xi. Alternative product or service availability.
- xii. Project management.
- xiii. Engineering: mechanical, industrial, design, production, industry, etc.
- xiv. Industrial operations.
- xv. Organizational behavior.

- xvi. Compensation. See Online Resources Corp. v. Lawlor, 285 Va. 40 (2013).
- xvii. Industry/trade custom and practice. See Westmoreland-LG&E Partners v. Virginia Power, 254 Va. 1 (1997).
- xviii. Capital management, cash flow, working capital and similar issues.
- xix. Banking and lending; credit administration.
- d. Pick the best experts.
- e. Frame the expert issues correctly.
- f. Minimize putting the expert's personal credibility on the line except to support the analysis leading to the final opinion.
 - i. In a recent case, the defendants tried to use a single expert to interpret ambiguous documents, speculate on individual motives, and give legal conclusions. It did not go well.
- g. Maintain the independence of your expert before the court and the jury. Avoid making the expert "one of the team." Be aware of where the expert is seated and who the expert is speaking with during the trial.
- h. Exclude the expert from the courtroom during the presentation of evidence. In appropriate cases, move the court to exclude expert witnesses as well as nonparty fact witnesses. See Va. Code Ann. § 8.01-375 (attached as Exhibit 2) This may be particularly important when the plaintiff is relying on one expert to cover several topics or where the expert's opinion is based on assumptions that will be contradicted at trial.
 - i. When the expert is excluded, ask the court to remind the parties about the limitations of discussing evidence with witnesses.
- i. Prepare a high quality expert disclosure or Rule 26 report. Condominium Services, Inc. v. First Owners' Assoc., 281 Va. 561 (2011) (allowing expert testimony); John Crane, Inc. v. Jones, 274 Va. 581 (2007) (affirming exclusion of expert opinion).
- j. Charts, graphs, summaries, timelines. Good graphic exhibits are crucial. These exhibits should be easy to read, intuitive, and self-explanatory.

Possible uses:

- i. Damages.
- ii. Financial data.
- iii. Schedules, timelines, critical path analysis.
- iv. Sequences, events, processes.
- v. Maps, location, travel routes or times.
- vi. Locational relationships.
- vii. Correlation of events/factors.
- viii. Cause and origin.
- ix. Other causation factors.
- x. Mechanical operations.
- xi. Size comparisons.
- xii. Before and after comparison. See attached Exhibit 3.
- xiii. An excellent resource on creative approaches to exhibits and summaries is Show the Story: The Power of Visual Advocacy, W.S. Bailey and R.W. Bailey, (2011) (Title page and index attached as Exhibit 4); see also Volume 2 of Recovery of Damages for Lost Profits, R.L. Dunn (Exhibit 1).
- k. Research the opposing expert.

- i. Websites.
 - ii. Google.
 - iii. Publications.
 - iv. Prior testimony.
1. **Use the treatise rule.** Va. Code § 8.01-401.1. (Attached as Exhibit 2). Whenever possible, use learned treatises to bolster the opinion testimony of your expert. The authoritative treatise can be read into evidence by the expert. The statute requires timely and proper notice and designation of the relevant portions of the designated treatise.
 - m. Juries and judges know when something does not make sense. When the plaintiff has gone too far with expert testimony, relentlessly attack the overreach.
 - n. Motion in limine/Experts/Objections.
 - i. Timing and Form.
 1. Make a timely motion in limine prior to trial. Biter v. Rahman, 272 Va. 130, 140-1 (2006) (allowing expert testimony because no timely objection; noting availability of pretrial motion in limine). Do not forget Rule 4:15.
 2. An objection to admissibility must be made prior to or when the evidence is presented. The objection comes too late if the objecting party remains silent during its presentation and brings the matter to the court's attention by a motion to strike made after the opposing party has rested. Kondaurov v. Kerdasha, 271 Va. 646, 655 (2006).
 3. Use of deposition. A pretrial motion in limine to exclude expert testimony may be supported by deposition. Lamar Corporation v. Commonwealth Transp. Comm'er, 262 Va. 375, 380-81 (2001). But see Lloyd v. Kime, 275 Va. 98 (2008) (noting that it would be error to exclude expert based on deposition testimony, where motion in limine would be functional equivalent of summary judgment motion).
 - ii. **Abuse of discretion standard.** A trial court's decision to admit or exclude expert testimony is reviewed on appeal under an abuse of discretion standard. Blue Ridge Service Corp. v. Saxon Shoes, Inc., 271 Va. 206, 212 (2006). In most cases, therefore, the trial court's decision on whether to admit expert testimony will be the last word; you get one practical chance to get the expert opinion testimony or to keep it out.
 - iii. **Foundation.** The Supreme Court has noted that the admission of expert testimony is limited and subject to certain fundamental requirements, including the requirement that the evidence be based on an adequate foundation. Therefore, expert testimony is inadmissible if it rests on assumptions that have an insufficient factual basis or it fails to take into account all of the relevant variables. Expert testimony founded on assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter-experts; it is inadmissible. The failure of a trial court to strike such testimony upon a motion timely made is error subject to reversal on appeal. CNH America LLC v. Smith, 281 Va. 60, 67 (2011).

Similarly, expert testimony cannot be speculative or founded on assumptions that have an insufficient factual basis. ITT Hartford Group, Inc. v. Virginia Fin. Associates, Inc., 258 Va. 193, 201 (1999). Scrutiny of expert testimony is especially important when it consists of an array of numbers conveying an illusory impression of exactness on a subject in which the fact finder's common sense is tested in order to evaluate the array. Id. at 201. See also SunTrust Bank v. Farrar, 277 Va. 546, 556-57 (2009).

An expert's opinion that is without a basis supported by the evidence is therefore speculative and unreliable as a matter of law. Blue Ridge Service Corp. v. Saxon Shoes, Inc., 271 Va. 206, 212 (2006) (error to admit testimony of cause and origin expert when the expert's conclusion was speculative).

If you succeed in excluding expert testimony on a point necessary to establish liability, the plaintiff will be unable to establish a prima facie case and the court will be required to grant your motion to strike. Blue Ridge Service Corp. v. Saxon Shoes, Inc., 271 Va. 206, 218-9 (2006).

- iv. **Failure to consider known facts or variables.** Vasquez v. Mabini, 269 Va. 15 (2005) (damages expert failing to consider variables necessary to render opinion on lost future earnings); Countryside Corp. v. Taylor, 263 Va. 549 (2002) (error to allow appraisal testimony assuming ownership of a strip of land when plaintiff acquired the property at a later date).
- v. **New business rule.** ITT Hartford Ins. Group, Inc. v. Virginia Financial Associates, Inc., 258 Va. 193 (1999); Va. Code Ann. § 8.01-221.1. (Attached as Exhibit 2).
- vi. **Common knowledge.** Polyzos v. Cotrupi, 264 Va. 116 (2002) (applying principle in breach of contract case against real estate broker; no expert testimony needed to prove that a broker could not offer to sell property without the owner's permission); Chapman v. City of Virginia Beach, 252 Va. 186 (1996) (excluding "human factors") expert testimony as within the range of common experience.)
- vii. Invading province of jury.
- viii. Legal question.
- ix. Based on hearsay opinions.
 - o. **Expert voir dire.** Virginia Financial Associates, Inc. v. ITT Hartford Group, Inc., 266 Va. 177, 181 (2003). Use voir dire to test the adequacy of the fact basis of the expert's proposed opinion testimony.
 - p. Use the distinction between the admissibility of and sufficiency of expert testimony. Banks v. Mario Industries, 274 Va. 438 (2007).
- i. Admissibility.
 1. An objection to the admissibility of evidence must be made when the evidence is presented.
 2. An objection comes too late if the objecting party remains silent during its presentation and brings the matter to the trial court's attention by a motion to strike after the opposing party has rested.

3. In some cases, a defect in an expert witness' testimony may not be apparent until the testimony of that witness is completed. Therefore, an objection to the admissibility of that type of evidence must be raised at the first opportunity.
- ii. Sufficiency.
1. In contrast, an objection to the sufficiency of the evidence is properly made by a motion to strike rather than when the evidence is first offered.
 2. The opposing party cannot be sure, nor can the court decide, until the offering party has rested, whether the various fragments of evidence have added up to a justiciable whole.
 3. A motion testing the sufficiency of evidence must be weighed by the evidence that has been admitted. In Banks, the plaintiff corporation's president qualified as an expert witness. After a preliminary challenge based on hearsay, evidence of the gross profit margin was elicited without objection. Such evidence was admitted without objection and the question of admissibility of this evidence was not a proper subject of a motion to strike its sufficiency. In some cases evidence is admitted conditioned on further foundational support and the satisfaction of that condition may not be known until the conclusion of the case in chief or at the end of the presentation of all of the evidence. In such cases, the proper motion at that time is the exclusion of the evidence. Assuming the exclusion of the evidence creates a deficiency in the quantum of proof, a motion to strike may then test the sufficiency of the evidence.
 4. In affirming the damages award, the Court noted that evidence relating to Mario's loss of specific projects was admitted without objection, including causation, Mario's expectation of getting the projects, and the specific amounts of lost profits. Having been admitted, this evidence was sufficient to support the jury's finding.
 - q. At trial, limit the opposing expert's testimony to opinions expressly stated in disclosure or report. John Crane, Inc. v. Jones, 274 Va. 581 (2007). The plaintiff will often try to present expert testimony or opinions beyond the disclosures. Do not let them get away with it!
 - r. The problem of late charts and summaries. FRCP 26(a)(2)(B)(iii) requires that an expert report include all exhibits that will be used to summarize the expert testimony. It is a best practice, therefore, to get the expected charts and similar summaries prepared at the time of expert disclosures.

5. The Purposeful Cross-Examination of the Plaintiff's Expert – A Step by Step Approach.

- a. Elicit the expert's acknowledgement of facts that support the defense themes.
- b. Elicit the expert's acknowledgement of certain publications or materials as authoritative.

- c. Elicit the expert's acknowledgement of principles in the field that support the defense themes.
- d. When possible, flip the expert and get him or her to give opinions that support the defense themes.
- e. Establish facts that limit the expert's ability to give a sound opinion.
 - i. Limited investigation.
 - ii. Information or materials not available.
 - iii. No site visit.
 - iv. Limited opportunity to observe.
 - v. No relationship with the plaintiff or familiarity with the plaintiff's business.
- f. Establish the expert's limited experience in the field.
- g. Establish the vulnerable assumptions.
 - i. When appropriate, have the expert explain the basis for the assumptions (but only when you can prove they are bad assumptions).
- h. Establish what the expert did not know and should have.
- i. Establish bias. VRE 2:607 and 2:610.
 - i. Paid expert.
 - ii. Lack of any relationship with the plaintiff or familiarity with the plaintiff's business other than as a paid witness.
 - iii. "Expert" expert.
 - iv. Always testifies for the same side.
 - v. Large fee.
- j. Impeachment.
 - i. Website statements.
 - ii. Publications. Prior inconsistent writings. VRE 2:607(a)(vi) and 2:613(b).
 - iii. Prior testimony. Prior inconsistent statement. VRE 2:607(a)(vi) and 2:613(a).
 - iv. Deposition. Same.
- k. Handling the narrative response to cross-examination questions.
 - i. Ask only limiting questions. Do not ask "how" or "why" questions.
 - ii. Politely cut the expert off: "Thank you Ms. Smith. That is interesting information, but you are not answering my question. The specific question is..."
 - iii. If he or she persists, stop them again: "Please answer my question." After a while, the jury will pick up on what the expert is doing.

6. A picture is worth...

- a. Simple and effective technology.
 - i. Exhibit books. Premark the exhibits that you know you will be using.
 - ii. Blow ups and enlargements.
 - iii. Photographs.
 - iv. Charts. Several examples of charts and graphs are attached as Exhibit 5.
 - v. Projectors.
- b. Photo-simulations. An example of a "before and after" photo-simulation from an eminent domain case is attached as Exhibit 3.
- c. Use the Elmo projector.

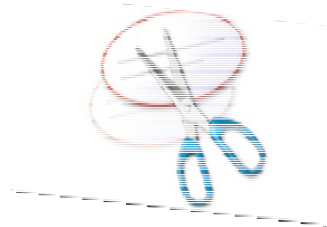


- d. A timeline exhibit. When helpful, use a 30 day monthly calendar format rather than a timemap format. An example of a timeline exhibit is attached as Exhibit 6.
- e. Daily transcript. Particularly when the plaintiff's witnesses are not telling the truth.
- f. Do not let the technology tail wag the trial lawyer dog. Face and speak to the jury.
- g. Power Point is for dummies. It is difficult to use Power Point well.
 - i. Beware of the abrupt: "next slide" instruction to your colleague (or minion).
 - ii. If the other side proposes to use a Power Point presentation to the jury during opening statement and you have not seen it beforehand, object. Some lawyers find it irresistible to engage in power point parlor tricks and sleight of hand by manipulating evidence and images. Do not let them get away with it!

7. “Ready, Aim, Plead...” Using Motions Practice/Better Pleading.

- a. Demurrer/Motion to Dismiss.
 - i. Motion Craving Oyer. See e.g. Ward’s Equipment, Inc. v. New Holland North America, Inc., 254 Va. 379 (1997) (“When a demurrant’s motion craving oyer has been granted, the court in ruling on the demurrer may properly consider the facts alleged as amplified by any written agreement added to the record on the motion.”); Hechler Chevrolet, Inc. v. General Motors Corp., 230 Va. 396, 398, 337 (1985) (Granting oyer of contract in breach of contract claim); Culpeper National Bank of Culpeper v. Morris, 168 Va. 379, 383 (1937) (Granting oyer of the entire record of a prior lawsuit partially referenced in motion for judgment).
 - ii. Documents attached to or referred to in Complaint. FRCP 10(c); Rule 1:4(i). In considering a demurrer, a court may ignore the plaintiff’s factual allegations contradicted by the terms of authentic, unambiguous documents that properly are part of the pleadings. See Ward’s Equipment v. New Holland North America, 254 Va. 379, 382 (1997).
 - iii. Include Demurrer and Special Pleas with Answer? Does it undermine a Demurrer to also file an Answer?
- b. Filing a strong responsive pleading. It helps to get a defense strategy started properly. A strong responsive pleading ensures that the defenses have been well analyzed and sets the tone for further proceedings.
- c. Bifurcation. Liability/Damages.
- d. Motions in Limine.
 - i. As to experts, see discussion above.
 - ii. As to other evidence: The filing of a good motion in limine may have the effect of restraining the plaintiff even if the court does not grant it.
- e. Motion for Summary Judgment.
 - i. Use of discovery responses, depositions and affidavits. State v. Federal. Lloyd v. Kime, 275 Va. 98 (2008) (If the defendant relies on depositions or affidavits in summary judgment proceedings, the plaintiff must affirmatively object or the court will deem that the plaintiff has acquiesced).
- f. The trial brief (aka the motion to strike brief). Even in a jury trial, a trial brief will help the judge understand the defense case. Anything that may get the court on your side is worth doing.
- g. Bullet briefs on anticipated evidence and expert issues.
- h. Motion to Strike/Renewing Motion to Strike.
 - i. Renew any motion for a mistrial.
 - ii. Motion to strike for sufficiency at the close of the plaintiff’s case.
 1. State the grounds for the motion to strike with as much specificity as possible.
 2. Based on the plaintiff’s own evidence.
 3. Prepare in advance.
 4. Keep a list of arguments on motion to strike issues.
 - a. The trial evidence is insufficient as a matter of law.
 - b. Failure to establish a necessary fact element.
 - c. Failure to prove a prima facie case.

- d. Admission by a party during testimony.
- e. Speculative damages.
- iii. The defendant must renew its motion to strike at the close of all of the evidence.
- iv. Making a motion to strike based on the insufficiency of the plaintiff's evidence of damages. Banks v. Mario Industries, 274 Va. 438 (2007).
- i. Post-trial motions.
 - i. If the jury announces an adverse verdict, move the trial court for judgment notwithstanding the verdict.
 - 1. Ask the trial court for leave to file written post-trial motions.
 - ii. Motion to set aside the verdict because of insufficient evidence.
 - iii. Motion for judgment notwithstanding the verdict.
 - iv. Motion to set aside verdict because of excessiveness.
 - v. Motion for remittor or additur.
 - vi. Motion to set aside verdict because it is contrary to law.
 - vii. Motion to set aside verdict as being inconsistent with the evidence.
 - viii. Motion for new trial. See Va. Code Ann. § 8.01-383.
 - ix. See also Virginia Civil Procedure, K. Sinclair and L.B. Middleditch, § 13.13 (2008); Va. Code Ann. § 8.01-430.
- j. Use the snip tool in WORD to insert excerpts from documents and photographs directly into the brief.



8. The Last Refuge of a Plaintiff...Be ready.

- a. The moving target on damages.
- b. The separate verbal contract: "If we had put it in writing, then it would not have been a verbal contract." See Reid v. Boyle, 259 Va. 356, 369-70 (2000) (effect of merger/integration clause; allowing proof of verbal amendment by clear, unequivocal and convincing evidence).
- c. Industry custom and practice. Westmoreland – LG&E Partners v. Virginia Power, 254 Va. 1, 8-9 (1997) (evidence of trade custom and usage excluded).
- d. Prior course of performance. Reid v. Boyle, 259 Va. 356, 369-70 (2000).
- e. Formalities and technicalities. Parsing the contract for trivia.
- f. Implied duty of good faith and fair dealing. Stoney Glen LLC v. Southern Bank and Trust Co., 944 F.Supp.2d 460, 465-66 (E.D. Va. 2013) (holding that Virginia recognizes an implied duty of good faith and fair dealing in common law contracts; collecting Virginia and federal cases).
- g. Abuse of contract discretion. See Stoney Glen v. Southern Bank, 944 F.Supp.3d at 468-69 (allowing claim to proceed based on allegation of improper exercise of contractual discretion; distinguishing between exercise of a right expressly allowed under the contract and a discretionary power).
- h. Implied reasonableness term.
- i. Latent ambiguity in the contract allowing extrinsic evidence of the parties' intent and understanding of the contract. Galloway Corp. v. S.B. Ballard Constr. Co., 250 Va. 493, 502-03 (1995) (latent ambiguity in "pay when paid" clause in construction contract).

- j. Impracticality or impossibility.
- k. The Virginia Consumer Protection Act.

9. In the woodshed...

- a. Memories fade over time. In the right situation, have your key witnesses write out for defense counsel (to maintain privilege) a narrative description of what happened. This document can be used to help get the witness back up to speed when it is time for deposition and trial.
- b. Witness preparation must be done and done well.
- c. The witness must know the facts, the documents, and the context of his/her testimony.
- d. Practice, rehearsal, reviewing documents, working with documents, mock cross.
- e. Avoid overdoing it. The fine line.
- f. Be prepared if the plaintiff calls your client as an adverse witness.

10. Miscellaneous Dilemmas and Pitfalls

- a. Do not chase every thread. The defense theme must have focus and set priorities in presenting evidence and argument.
- b. Do not have an answer for every challenge or point.
- c. Do not zealously resist every motion or agreement suggested by the plaintiff. The defense must consider its posture and make decisions consistent with the defense themes and strategies.
- d. It is sometimes the little things (like the email time stamps, cellphone records, desk calendar, Outlook calendar, etc.)
- e. The judge v. jury dilemma. In the right case with the right judge, it is a lot easier without the jury.
- f. Witness order. Start early with a strong witness and go long. Bury the weak witness when the time pressure is on.
- g. The Quantum Meruit Dilemma. Virginia Financial Associates, Inc. v. ITT Hartford Group, Inc., 266 Va. 177 (2003); ITT Hartford Group, Inc. v. Virginia Financial Associates, Inc., 258 Va. 193 (1999). How can a defendant force the plaintiff to elect between an express contract claim and an implied contract claim?
- h. The undeclared intention dilemma. Brooks & Company v. Randy Robinson Contracting, Inc., 257 Va. 240, 245 (1999).
- i. The dilemma of having witnesses explain what the contract meant or what the parties intended. See Galloway Corporation v. SB Ballard Constr. Co., 250 Va. 493, 505-06 (1995).
- j. The ambiguous contract dilemma.
 - i. The judge determines whether a contract is ambiguous.
 - ii. Generally, the judge is to instruct the jury on the meaning of the contract.
 - iii. Do you want the judge to instruct the jury on what an ambiguous provision means? Or are you better off leaving it to the jury?
 - iv. Online Resources Corp. v. Lawlor, 285 Va. 40, 55 (2013) (“To the extent that the contractual provisions are ambiguous, it is proper to submit the question to the jury for consideration”).

- k. The Scrivener’s Dilemma. Have the scrivener testify about the meaning of a disputed but ambiguous provision? Or deal with the missing witness argument? See e.g. ITT Hartford Ins. Group, Inc. v. Virginia Financial Assoc., 258 Va. 193, 205 (1999).
- l. The Plan B Dilemma. Does presenting evidence of an alternative damages analysis undermine your liability defense?
 - i. You do not want to read the words: “The defense did not contest the calculation of the plaintiff’s damages” in a court opinion.
- m. The unsigned contract coupled with performance dilemma. Brooks and Company v. Randy Robinson Contracting Inc., 257 Va. 240 (1999); Persinger & Company v. Larowe, 252 Va. 404, 407-8 (1996) (partner in accounting firm not bound by restrictive covenant in partnership agreement when he did not sign the agreement).
- n. The dilemma of the uncontested amount. The dilemma is presented if the defendant does not contest one part of the plaintiff’s claim, then the dilemma is presented. The defense must make a considered decision whether to just go ahead and pay the uncontested amount or to hold that money “hostage” and then face the argument at trial of refusing to pay even undisputed amounts.
- o. The “damages only” defense. When the defendant cannot effectively deny breach, then the challenge is presenting a damages only defense. Mitigation, set off, speculation, and other concepts will apply.
- p. Necessity of proffering excluded evidence. Comm. Transp. Comm’er v. Target Corp., 274 Va. 341 (2007).
- q. Keeping out extrinsic evidence and vice versa. Merger clause. Prospect Development Company v. Bershader, 258 Va. 75, 84-5 (1999) (merger clause does not preclude testimony to explain meaning of ambiguous contract term); Martin & Martin, Inc. v. Bradley Enterprises, Inc., 256 Va. 288 (1998) (parol evidence excluded; merger clause cited).
- r. Jury instructions. Watch for waiver.
 - i. Object to those instructions that address related matters or have the same burden of proof on a related matter. For example, in a defamation case, if you object to the obstruction on malice, you should also object to the punitive damages instruction. The Supreme Court has relied on the failure to object to other instructions as a waiver of an objection to a separate instruction. See Raythern Technical Services v. Hyland, 273 Va. 292 (2007).
 - ii. Object to instructions asking jury to decide question of law. Banks v. Mario Industries, 274 Va. 438 (2007).
- s. Use a good “theory of the case/finding” instruction. See Exhibit 8.
- t. Verdict forms.
 - i. Va. Code § 8.01-379.3. See Exhibit 2. This statute specifically authorizes the trial court to use verdict forms in complicated cases.
 - ii. A good verdict form may address:
 - 1. Each count or claim going to the jury. (sometimes with reference to each separate defendant).
 - 2. The burden of proof on each count.
 - 3. A finding on each required fact element for each count.
 - 4. The application of affirmative and other defenses.

5. The amount of damages awarded (if any).
 6. Prejudgment interest. See Exhibit 8.
- u. A good review of jury instructions issues and post-trial motions is stated in Cole and King LLC v. Cole, Case No. CL08-1978 (Cir. Ct. of the City of Roanoke, March 5, 2010; Judge J.M. Apgar) (Attached as Exhibit 7).
 - v. Several examples of verdict forms, finding instructions, and contract litigation instructions are attached as Exhibit 8.
 - w. A final word about the litigation gods and karma.

