

262VA473

IN THE
Supreme Court of Virginia

RECORD NO. 002354



RONALD L. WILLARD,

Appellant,

v.

MONETA BUILDING SUPPLY, INC.,

Appellee.

JOINT APPENDIX

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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF BEDFORD

RONALD L. WILLARD,

Plaintiff,

v.

Case No. CL00009745-00

MONETA BUILDING SUPPLY, INC.,
a Virginia corporation,

SERVE: A.S. Cappellari
President/Registered Agent
Route 4, Box 9
Moneta, VA 24121

Defendant.

MOTION FOR JUDGMENT

COMES NOW the plaintiff, Ronald L. Willard ("Willard"), and moves for judgment against the defendant Moneta Building Supply, Inc. ("Moneta"), on the grounds and in the amount as set forth below:

1. This action seeks monetary relief for damage incurred by Willard caused by Moneta's failure to honor Willard's rights as a dissenting shareholder of the defendant pursuant to Virginia Code §§ 13.1-729 et. seq.

2. Willard is a resident of Franklin County, Virginia, and is a minority shareholder of Moneta. Until resigning on or about October 7, 1996, Willard was also the Secretary of Moneta and a member of Moneta's Board of Directors.

3. Moneta is a Virginia corporation with its principal place of business at Smith Mountain Lake in Bedford County, Virginia. Moneta engaged in the building supply business until it improperly and illegally transferred substantially all of its assets to Capps Home &

Filed in the Clerk's Office the 12th day of Jan. 2000
Legal Aid \$ 2.00
Library 1.50
CHMF 2.00
Vrt Tax 25.00
ss Fee 150.00
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ine Fee 183.50
\$ 372.00 R. Thomaan D.C.
Bedford County Circuit Court

no service. Rec'd at time of filing

Building Center, Inc. ("Capps") in 1997. Prior to this transfer, Moneta had been a profitable company throughout its existence.

4. On October 15, 1999, Moneta filed articles of dissolution with the State Corporation Commission. As of the filing date of this Motion for Judgment, the State Corporation Commission has not issued a certificate of dissolution.

5. At all times relevant herein, A. S. Cappellari served as a Director of Moneta. Beginning in October 1996, he also served as the President.

6. At all relevant times herein, Rose Mary Cappellari served as an officer and a director of Moneta.

7. Until resigning on or about October 7, 1996, David Cappellari served as the President of Moneta and as a member of the defendant's Board of Directors. He is the son of A. S. Cappellari and Rose Mary Cappellari.

8. Capps is a Virginia corporation engaged in the building supply business. At all relevant times herein, David Cappellari was the controlling shareholder of Capps.

9. At all relevant times herein, the approximate percentages of share ownership of the common stock of Moneta are as follows:

• A. S. Cappellari	-	49.8%
• Rose Mary Cappellari	-	25.4%
• Willard	-	19.7%
• David Cappellari	-	<u>5.1%</u>
		100.0%

10. On or about November 15, 1996, A. S. Cappellari and Rose Mary Cappellari, as the sole directors of Moneta, caused the defendant to enter into a written contract with Capps, whereby Moneta agreed to sell substantially all of its assets to Capps.

11. By letter dated November 22, 1996, A. S. Cappellari, as the President of Moneta, notified himself, Rose Mary Cappellari, David Cappellari and Willard of the proposed sale. *See* "Exhibit A."

12. Enclosed with the November 22, 1996 letter was a notice of a special meeting of Moneta's shareholders to be held on December 20, 1996, at 5:00 p.m. at the defendant's offices. *See* "Exhibit B." The only material attached to this notice was a proxy ballot by which the recipients of the notice were able to vote by mail on the proposed sale of the assets.

13. At all relevant times herein, Willard expressed his opposition to the proposed sale.

14. The special meeting of shareholders took place as scheduled on December 20, 1996.

15. At the meeting, A. S. Cappellari and Rose Mary Cappellari (by proxy) voted in favor of the proposed sale to Capps.

16. Willard, noting his own competing offer for a substantially greater amount, voted against the proposed sale to Capps. Nonetheless, the votes of A. S. Cappellari and Rose Mary Cappellari represented more than two-thirds of the outstanding shares in Moneta. Thus, the proposed sale was approved.

17. In early January 1997, the transaction between Moneta and Capps was closed.

18. As a result of the transaction, Moneta effectively ceased doing business.

19. The amount paid by Capps to Moneta for the assets purchased from Moneta was grossly inadequate and unfair and did not reflect the fair value of the property. As a result, the value of Willard's shares was seriously diminished.

20. Pursuant to Virginia Code § 13.1-729, Willard qualified as a “dissenter” at the time of the December 20, 1996 shareholders’ meeting. Thus, he was entitled to dissent from Moneta’s action under Virginia Code § 13.1-730.

21. Pursuant to Virginia Code § 13.1-732, Moneta was required to indicate in the notice of special shareholders’ meeting that “shareholders are or may be entitled to assert dissenters’ rights.”

22. Furthermore, the notice needed to be accompanied by a copy of Article 15 of Title 13.1 of the Virginia Code. These requirements are imposed to insure that shareholders are aware that their dissenters’ rights exist and that they are accorded certain protection.

23. The meeting notice contained no advisory to those shareholders entitled to assert dissenter’s rights, nor did it include a copy of Article 15 of Title 13.1.

24. As a consequence of being deprived of the information contemplated by Virginia Code § 13.1-732, Willard did not avail himself of his rights under Virginia Code § 13.1-733, which permits a dissenter to deliver to the corporation, e.g., Moneta, “written notice of his intent to demand payment for his shares if the proposed action is effectuated.” If Willard had been aware of his dissenter’s rights, he would have made such a demand.

25. In not knowing to send and, thus, failing to send a notice pursuant to Virginia Code § 13.1-733, Willard was eventually deprived of his right outlined in § 13.1-735 to have demanded payment for his shares and, if necessary, to have participated in a judicial proceeding to determine the fair value of his shares pursuant to Virginia Code § 13.1-739. If Willard had been able to assert such rights and pursue such remedies, he would have done so.

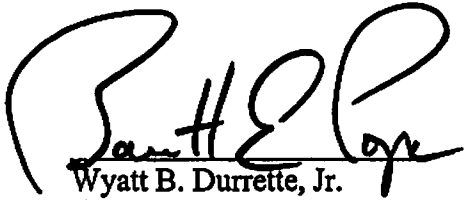
26. Moneta's failure to abide by Virginia Code § 13.1-729 et. seq. as set forth herein proximately caused serious diminution in the value of the shares held by Willard for which he is entitled to recover damages.

WHEREFORE, Willard prays that this Court enter a judgment in his favor in the amount of ONE MILLION AND 00/100 DOLLARS (\$1,000,000.00) and that he be awarded his costs expended in this action.

TRIAL BY JURY IS DEMANDED.

RONALD L. WILLARD

By Counsel

A handwritten signature in black ink, appearing to read "Wyatt B. Durette, Jr.", is written over the printed name.

Wyatt B. Durette, Jr.
Barrett E. Pope
Durette, Irvin & Bradshaw, P.C.
600 East Main Street, 20th floor
Richmond, VA 23219
804-775-6900

November 22, 1996

Mr. A. S. Cappellari
105 Larboard Drive
Moneta, Virginia 24121

Ms. Rose Mary Cappellari
105 Larboard Drive
Moneta, Virginia 24121

Mr. David L. Cappellari
127 Freeboard Drive
Moneta, Virginia 24121

Mr. Ronald L. Willard
P. O. Box 540
Wertz, VA 24184

RE: Special Meeting of the Shareholders
of Moneta Building Supply, Inc.

Dear Shareholders:

Please find enclosed a notice of a special meeting of the shareholders of Moneta Building Supply, Inc. to be held on December 20, 1996, at 5:00 P.M., at the office of Moneta Building Supply, Inc., Moneta, Virginia. At this special meeting you will be asked to consider and vote upon an Asset Purchase Agreement submitted to the shareholders pursuant to an offer by Capps Home and Building Center, Inc., in which Moneta Building Supply, Inc. is to sell substantially all of its assets to Capps Home and Building Center, Inc., a Virginia Corporation, in return for cash.

Further information concerning the special meeting and the proposed sale is set forth in the enclosed notice of special meeting and proxy statement.

Your vote on the proposed sale is of great importance. The affirmative vote of the holders of more than two-thirds of the outstanding shares of the common stock of Moneta Building Supply, Inc. entitled to vote, among other conditions, is required for the approval of the proposed sale. Even if you plan to attend this special meeting we ask that you execute and properly return your

A. S. Cappellari
Rose Mary Cappellari
David L. Cappellari
Ronald L. Willard
November 20, 1996
Page 2

completed proxy by mail in the enclosed self addressed envelope for delivery prior to the meeting, or by delivering it to the office of Moneta Building Supply, Inc. so that your vote can be recorded at the meeting. If you attend the meeting you may withdraw the proxy and vote your shares personally.

The Board of Directors of Moneta Building Supply, Inc. has considered and unanimously approved the proposed transaction and submits the offer with no recommendation for or against it.

Very truly yours,



A. S. Cappellari
President

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**NOTICE OF SPECIAL MEETING OF THE STOCKHOLDERS
OF MONETA BUILDING SUPPLY, INC. ON PROPOSED SALE OF SUBSTANTIALLY
ALL OF ITS ASSETS TO CAPPS HOME AND BUILDING CENTER, INC.**

PLEASE TAKE NOTICE that a special meeting of the stockholders of Moneta Building Supply, Inc. ("Moneta Building Supply") will be held at the offices of the company in Moneta, Virginia 24121 on the 20th day of December, 1996, at 5:00 p.m.

The stockholders will be asked to consider and vote upon an offer by Capps Home and Building Center, Inc. to purchase certain assets of Moneta Building Supply dated the 15th day of November, 1996. A copy of said offer, consisting of a proposed Asset Purchase Agreement and a Valuation Report of Moneta Building Supply submitted on behalf of Capps Home and Building Center, Inc. by Hope Player and Associates, P.C., certified public accountants, is attached to this Notice. All stockholders of record on the 18th day of November, 1996, shall be entitled to vote.

The sale of assets was approved subject to negotiation of the Representations by Seller and any other items of concern to the shareholders, and submitted to the stockholders with no recommendation either for or against, by unanimous consent of the Board of Directors of Moneta Building Supply, at a special meeting of the Board of Directors held on the 19th day of November, 1996. A copy of the minutes is also attached to this Notice.

You are hereby further notified that Mr. A. S. Cappellari, President, Director and shareholder of Moneta Building Supply and Mrs. Rose Mary Cappellari, Vice President, Director and shareholder of Moneta Building Supply are familial relatives to Mr. David L. Cappellari, President and sole shareholder of Capps Home and Building Center, Inc.

You are hereby further notified that the sale of assets contemplates the sale of substantially all of the assets of Moneta Building Supply, other than in the ordinary course of business, to Capps Home and Building Center, Inc., in exchange for consideration to be paid in accordance with the proposed Asset Purchase Agreement. It is anticipated that the net proceeds after deduction for outstanding liabilities and a reasonable reserve for future liabilities will then be distributed to the shareholders pro-rata based on the number of shares held. The Board of Directors of Moneta Building Supply deems this sale to represent the fair market value of the assets to be sold, and to be in the best interests of all of the shareholders.

You are hereby further notified that the Board of Directors of Moneta Building Supply has authorized the company to engage an independent financial expert to evaluate whether the Valuation Report reflects the fair market value of the assets of Moneta Building Supply to be purchased and whether the offer by Capps Home and Building Center, Inc. is consistent with the Valuation Report submitted therewith. The results of the independent evaluation

will be available prior to the special meeting of shareholders announced herein.

Please take notice that the affirmative vote of the holders of more than two-thirds of the outstanding shares of the common stock of Moneta Building Supply entitled to vote is required for the approval of the proposed sale of assets described above.

Also attached to this Notice is a proxy ballot, by which you may vote by mail on the proposed sale of assets. If you choose to vote by proxy please execute and promptly return the completed proxy by mail in the enclosed self addressed envelope for delivery, or by delivering it to the offices of Moneta Building Supply, prior to the special meeting so that your vote can be recorded at the special meeting of shareholders. If you attend the meeting you may withdraw your proxy and vote your shares personally.

If you have any questions or concerns you are invited to contact Mr. J. Lee E. Osborne, counsel for the undersigned, at (540) 982-0234.

MONETA BUILDING SUPPLY, INC.

By: A.S. Coppellari
President

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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF BEDFORD

RONALD L. WILLARD,

Plaintiff,

v.

MONETA BUILDING SUPPLY, INC.,

a Virginia corporation.

Law No. 00-9745

AMENDED RESPONSIVE PLEADINGS
OF MONETA BUILDING SUPPLY, INC.

Demurrer

Comes now, defendant, Moneta Building Supply, Inc., by counsel, and in support of its demurrer to plaintiff's motion for judgment states as follows:

1. Plaintiff failed to state a cause of action upon which relief can be granted because plaintiff's motion for judgment and the exhibits attached thereto, shows on its face that plaintiff was not entitled to Dissenters' Rights pursuant to Virginia Code §§13.1-729 et. seq.

2. Plaintiff failed to state a cause of action upon which relief can be granted because plaintiff's motion for judgment and the exhibits attached thereto, shows on its face that defendant did not owe a duty to plaintiff to give plaintiff

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BEDFORD COUNTY CIRCUIT COURT
The 25th day of February, 2000

Joseph M. Nichols ☐ CLERK
☒ DEP. CLERK

notice that he was (or may be) entitled to assert Dissenters' Rights pursuant to Virginia Code §13.1-732.

3. Plaintiff failed to state a cause of action upon which relief can be granted because plaintiff's motion for judgment and the exhibits attached thereto, shows on its face, that defendant breached no legal duty owed to plaintiff.

Plea of the Statute of Limitations

Comes now, defendant, Moneta Building Supply, Inc., and for its plea of the statute of limitations states that all or a part of plaintiff's claim is barred by the applicable statute of limitations.

Amended Plea of Res Judicata

Comes now, defendant, Moneta Building Supply, Inc., by counsel, and for its plea of res judicata states that the cause of action asserted by plaintiff in this case is the same cause of action (or is necessarily included in such cause of action) asserted by plaintiff in the case styled Ronald L. Willard, etc., v. Moneta Building Supply, et al., Chancery No. 97-18259, Bedford County Circuit Court. Such action resulted in a judgment entered against plaintiff and in favor of defendant. Accordingly, plaintiff's cause of action is barred by the doctrine of res judicata.

Amended Plea of Collateral Estoppel by Judgment

Comes now, defendant, Moneta Building Supply, Inc., by counsel, and for its plea of collateral estoppel by judgment, states that certain of the facts alleged in paragraphs 3 and 19 of plaintiff's motion for judgment as well as other facts necessary to the adjudication of this case were adjudicated in the case styled Ronald L. Willard, etc., v. Moneta Building Supply, et al., Chancery No. 97-18259, Bedford County Circuit Court. This Court adjudicated such facts adverse to plaintiff. Accordingly, under the doctrine of collateral estoppel by judgment (also known simply as collateral estoppel), plaintiff is barred from relitigating such facts in this case.

WHEREFORE defendant, Moneta Building Supply, Inc., by counsel, hereby requests this Court on the grounds set forth above to dismiss plaintiff's motion for judgment and to award to defendant its costs and attorney's fees incurred herein.

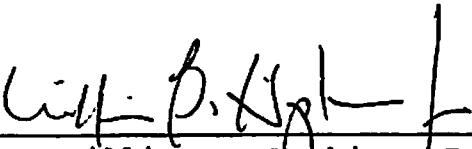
MONETA BUILDING SUPPLY, INC.

By William B. Hopkins, Jr.

William B. Hopkins, Jr.
MARTIN, HOPKINS & LEMON, P.C.
P. O. Box 13366
Roanoke, Virginia 2403
(540)982-1000 - telephone
(540)982-2015 - facsimile
Counsel for Moneta Building Supply

CERTIFICATE OF SERVICE

I, William B. Hopkins, Jr., do hereby certify that a true and correct copy of the foregoing amended responsive pleadings of Moneta Building Supply was mailed or caused to be delivered to Wyatt B. Durette, Jr., Barrett E. Pope, Durette, Irvin & Bradshaw, P.C., 600 East Main Street, 20th floor, Richmond, Virginia 23219, counsel for plaintiff, Ronald L. Willard, on this 24th day of February, 2000.



William B. Hopkins, Jr.

VIRGINIA:

IN THE CIRCUIT COURT FOR BEDFORD COUNTY

RONALD W. WILLARD,

Plaintiff,

v.

Law No. 00-9745

MONETA BUILDING SUPPLY, INC.,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S DEMURRER, PLEA
OF RES JUDICATA AND PLEA OF THE STATUTE OF LIMITATIONS

In his fourth lawsuit arising out of his ownership interest in Moneta Building Supply (MBS), Ron Willard asks this Court for damages for an asset sale he claims (again) was inadequate. If this sounds familiar, that's because it is. Unfortunately, (for MBS anyway), Virginia law does not limit the number of lawsuits a citizen can bring about a subject. There are, however, several legal doctrines at

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BEDFORD COUNTY CIRCUIT COURT
The 2nd day of March, 2000
[Signature] ☐ CLERK
☒ DEP. CLERK

common law (and other creations by statute) that preempt Willard's attempt to "get a mulligan."

First, Willard must state a claim upon which relief can be granted. This, he has failed to do. Thus, MBS demurred to Willard's motion for judgment. Secondly, Willard can not wait an inordinate amount of time before he brings his action. Three years after the closing of the sale of MBS's assets is too long. Therefore, Willard's claim is barred by the statute of limitations. Third, to quote former Delegate Bob Whitehead of Nelson County, "it's the same ole coon with another ring around its tail."¹ In legal terms, this means Willard's claim is barred by res judicata. Moreover, the heart of Willard's complaint, the value of MBS, has been adjudicated. Thus, a corollary of res judicata, collateral estoppel, precludes Willard from re-litigating this fact.²

For the reasons set forth below, MBS asks this Court to dismiss Willard's motion for judgment.

¹ This was a favorite expression of Delegate Whitehead for a bill that had been defeated and reintroduced under a different name. Delegate Whitehead was one of the great orators of the Virginia General Assembly. He served from 1942 to 1960.

² MBS does not intend to bring on for hearing the defense of collateral estoppel at this time. Although this defense will inflict a mortal wound on Willard's case, at this stage, it is not dispositive. Thus, it would be wasteful to argue this issue now, particularly since MBS's other legal defenses make this point moot.

STATEMENT OF CASE

Willard filed a motion for judgment seeking money damages for the failure of MBS to give him notice of his alleged dissenters' rights. MBS responded by demurrer, a plea of the statute of limitations, and a plea of res judicata and collateral estoppel. By order dated February 22, 2000, this Court granted MBS leave to file an amended plea of res judicata and collateral estoppel. Willard's current case is subsumed in an earlier lawsuit between these parties which was tried to judgment, Ronald L. Willard, etc., v. Moneta Building Supply, Inc., et al., Chancery No. 97-18259, Bedford County Circuit Court. The Supreme Court of Virginia affirmed judgment for MBS and the other defendants at 258 Va. 40, 515 S.E.2d 277 (1999).

MBS is bringing on for hearing its demurrer, plea of the statute of limitations and plea of res judicata and submits this memorandum in support of these defenses.

STATEMENT OF FACTS

On demurrer, all allegations in Willard's motion for judgment, well pled, are taken as true. Accordingly, this statement of facts, unless noted otherwise, is a summary of Willard's pleading.

Willard's motion for judgment alleges he was a minority shareholder in MBS, holding an approximately 20%

interest. Willard was a director in MBS until he resigned on October 7, 1996. David Cappellari owned approximately 5% and his parents, A. S. and Rose Mary Cappellari (The Cappellaris), held approximately 75% of the company.

MBS was engaged in the building supply business until it sold substantially all of its assets to Capps Home & Building Center, Inc. (Capps), in January, 1997. David Cappellari is the owner and operator of Capps.

A. S. Cappellari served as a MBS director and on October 7, 1996, became its President. Before October 7, 1996, David Cappellari served as President of MBS and as a director. Willard alleges Rose Mary Cappellari served as an officer and director of MBS at all relevant times.

On November 15, 1996, the Cappellaris caused MBS to contract to sell Capps substantially all of its assets. By letter dated November 22, 1996, A. S. Cappellari notified himself and the other shareholders, including Willard, of the proposed sale. Included with his letter was a notice of special meeting of MBS's shareholders to be held on December 20, 1996. This notice included a description of the proposed transaction and the planned disposition of the proceeds:

You are hereby further notified that the sale of assets contemplates the sale of substantially all of the assets of Moneta Building Supply, other than in the ordinary course of business, to Capps Home and building Center, Inc., in exchange for consideration to be paid in accordance with the proposed Asset Purchase agreement. It is anticipated that the net proceeds after deduction for outstanding liabilities and a reasonable reserve for future liabilities will then be distributed to the shareholders pro-rata based on the number of shares held. The Board of Directors of Moneta Building Supply deems this sale to represent the fair market value of the assets to be sold, and to be in the best interests of all of the shareholders.

In what has to be characterized as an understatement, Willard alleges in paragraph 13 of his motion for judgment, that he objected to this proposed sale.

The special meeting of shareholders took place as scheduled. The Cappellaris voted in favor of the proposed sale, Willard noting his own competing offer, voted against the sale. The votes of the Cappellaris, representing more than two-thirds of the outstanding shares in MBS, approved the sale.

In early January, 1997, the transaction between MBS and Capps closed and MBS effectively ceased doing business. Willard alleges in paragraph 19 that "the amount paid by Capps to MBS for the assets purchased from MBS was greatly inadequate and unfair and did not reflect the fair value of

the property. As a result, the value of Willard's shares was seriously diminished."

Willard alleges that pursuant to Virginia Code §13.1-729, he qualified as a "dissenter" at the time of the December 20, 1996, shareholders' meeting. Willard also alleges MBS was required to indicate in the notice of special shareholders' meeting that "shareholders are or may be entitled to assert dissenters' rights" and to include a copy of Article 15 of Title 13.1.

Willard alleges, that without this information, he did not avail himself of his dissenters' rights to demand payment for his shares. Willard alleges that had he been able to assert his dissenters' rights, he would have done so.

In paragraph 26 of his motion for judgment, Willard alleges that MBS's "failure to abide by Virginia Code §13.1-729 et. seq. ... proximately caused serious diminution in the value of shares held by Willard for which he is entitled to recover damages."

The parties have agreed that each can make use of the record in Ronald L. Willard, etc., v. Moneta Building Supply, Inc., et al., Chancery No. 97-18259, Bedford County Circuit Court, for the purpose of arguing MBS's plea of res judicata. Willard's amended bill of complaint in that case

alleges a factual predicate, in important respects, identical to the case at bar.

In his earlier pleading, Willard asked for relief in seven separate counts. In Counts I and II, Willard requested money damages on behalf of the corporation (by which he would benefit as a 20% shareholder) for the difference between the sales price for MBS's assets and what Willard claims was their actual value. Count III sought damages for misuse of MBS assets and the payment of excessive salaries. Counts IV and VII sought equitable relief; i.e., the voiding of the asset sale and a constructive trust, respectively. Counts V and VI sought damages for conspiracy, both statutory (Count V) and at common law (Count VI). The gravamen of the conspiracy counts is the common thread running through six (6) of the seven (7) counts of Willard's amended bill of complaint and his current motion for judgment: MBS sold its assets well below fair market value.

Following a five-day bench trial, this Court dismissed all seven (7) counts of Willard's amended bill of complaint. The Supreme Court of Virginia affirmed this decision.

ARGUMENT AND AUTHORITIES

Willard now attempts to recoup the losses he believes he suffered from the sale of MBS's assets through Virginia Code §§13.1-729 et. seq. These sections give shareholders unhappy with a sale of assets the right to "cash out" rather than remain a shareholder. Willard, however, cannot avail himself of this right. There are no dissenters' rights for a sale which contemplates a distribution of the proceeds within one year. Willard's motion for judgment, shows on its face, that this was exactly what MBS planned. Accordingly, Willard's motion for judgment cannot survive a demurrer.

Willard's current suit has other deficiencies. His cause of action accrued (at the latest) at the time the asset sale to Capps closed in January, 1997. Willard's alleged economic loss cannot be characterized as an "injury to property" nor does it fit any other classification. Thus, Willard's lawsuit is governed by Virginia's "catch-all" statute of limitation, §8.01-248. Willard had two years to file this action. Willard filed this suit on January 11, 2000. Accordingly, this claim is time barred.

Finally, Willard's claim is also barred by res judicata. The reason for Willard's complaint with MBS (and its directors) is indisputable. Willard believes MBS sold

the company's assets to Capps below their value. Whether Willard's theory of recovery is through a derivative suit or the assertion of dissenters' rights, it is the same cause of action. In both cases, Willard seeks damages for the economic loss he claims he suffered as a result of the asset sale. Willard fought this battle and lost. He is prevented by res judicata from fighting this battle again. For the reasons set forth in more detail below, Willard's motion for judgment should be dismissed.

I. Willard's Motion for Judgment Shows on Its
Face That He Did Not Have Dissenters' Rights

Willard contends the asset sale to Capps gave him dissenters' rights pursuant to Article 15 of Title 13.1 of the Virginia Code. Such rights, however, are not triggered by MBS's transaction with Capps. There are no dissenters' rights for a cash sale pursuant to a plan to disburse the proceeds within one year. See Virginia Code §13.1-730
(A) (3) (ii).³

³ Virginia Code §13.1-730 provides, in pertinent part, as follows:

A. A shareholder is entitled to dissent from and obtain payment of the fair value of his shares in the event of, any of the following corporate actions:...

3. Consummation of a sale or exchange of all, or substantially all, of the property of the corporation if the shareholder as entitled to vote on the sale or exchange or if the sale or exchange was in furtherance of a dissolution on which the shareholder was entitled to vote, provided that such dissenter's rights shall not apply in the case of (1) a sale or exchange pursuant to court order, or (2) a sale for cash pursuant to a plan by which all or

The Asset Purchase Agreement shows the sale to Capps meets the first requirement of this provision; i.e., that the sale be for cash. The second requirement, that the corporation plans to disburse to shareholders within one year, is supplied by MBS's notice of special meeting. The notice stated that the assets would be sold in accordance with the proposed Asset Purchase Agreement. It also provided that "it is anticipated that the net proceeds after deduction for outstanding liabilities and a reasonable reserve for future liabilities will then be distributed to the shareholders pro-rata based on the number of shares held." (emphasis added) See Exhibit B to Willard's motion for judgment.

MBS's notice of special meeting does not set forth a specific time for distribution, however, its language makes it clear that MBS intended to disburse the net proceeds without delay. The notice makes no mention of any delay, any built-in grace period, any moratorium on distribution - it provides that the net proceeds, after deduction for liabilities, "will then" be distributed to the shareholders. This language clearly contemplated

substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale. (emphasis added)

distribution within one year. Willard, in effect, asks this Court to check its "common sense" at the door. Only then, however, can one conclude that MBS's plan, as described in its special notice, did not contemplate distribution immediately, much less over one year later.

Willard cannot complain that MBS did not give him notice of dissenters' rights. Virginia Code §13.1-732 only requires this notice when the proposed corporate action creates such rights.⁴ The language requiring that "the meeting notice shall state that shareholders are or may be entitled to assert dissenters' rights" only applies if such rights are created. As shown above, the asset sale to Capps did not trigger these rights. Even if Willard is permitted to contort the plain meaning of §13.1-732 to require such notice, it makes no difference. Unless Willard was entitled to assert dissenters' rights, the failure to give notice cannot be the proximate cause of any

⁴ Virginia Code §13.1-732(A) sets forth the notice required to be given to a shareholder with dissenters' rights:

- A. If proposed corporate action creating dissenters' rights under §13.1-730 is submitted to a vote at a shareholders' meeting, the meeting notice shall state that shareholders are or may be entitled to assert dissenters' rights under this article and be accompanied by a copy of this article.

loss. Accordingly, this Court should sustain the demurrer of MBS to Willard's motion for judgment.

II. Willard's Claim Is Barred
By The Statute Of Limitations

In paragraph 17 of his motion for judgment, Willard alleges that the asset sale to Capps closed in January 1997. Therefore, Willard's claim accrued, at the latest, at that time. Willard filed this lawsuit on January 11, 2000.

Willard contends his claim is an action for "injury to property," which is governed by a five-year statute of limitation. See Virginia Code §8.01-243(B).⁵ Virginia case law and the language of the statute, however, reveals otherwise. Willard's claim cannot be characterized in this manner (or placed in any other category). Thus, it is governed by Virginia's "catch-all" statute of limitation, which is two years. See Virginia Code §8.01-248.⁶

⁵ §8.01-243. Personal action for injury to person or property generally : extension in actions for malpractice against health care provider.

B. Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years after the cause of action accrues.

⁶ §8.01-248. Personal actions for which no other limitation is specified. Every personal action accruing on or after July 1, 1995, for which no limitation is otherwise prescribed, shall be brought within two years after the right to bring such action has accrued.

A. History of Virginia's Current
Statutes of Limitation

In 1977, The General Assembly revised the general laws of Virginia relating to civil remedies and procedure. As part of this revision, the General Assembly enacted Code §§8.01-243 and-248. Virginia Code §8.01-243(B) has not been amended since its enactment in 1977. Virginia Code §8.01-248, when first passed, provided for a one-year statute of limitation.

Before 1977, a determination of the applicable period of limitations for damage to property turned on whether a cause of action survived the death of the party. The interplay of §§8-24 and former 64.1-145 required this determination. Section 8-24 (repealed in 1977 and replaced by §§8.01-243 and-248) provided for a two-year limitation period for personal injuries, a five-year limitation if an action survived, and a one-year limitation if it did not. Section 64.1-145 permitted the survival of actions for damages to the "estate" of a decedent. The Supreme Court of Virginia, however, construed this statute to relate only to "direct" injury to property and not "indirect" or

"consequential" injury. See Mumpower v. City of Bristol, 94 Va. 737, 27 S.E. 581 (1897).

Under the statutory scheme enacted in 1977, survivability was no longer an issue. As stated above, §8.01-243(B) provides for a five-year limitation period for "injury to property." In 1986, the Supreme Court of Virginia held in Pigott v. Moran, 231 Va. 76, 341 S.E.2d 179 (1986), that the one-year catch-all statute of limitation applied to fraud claims not involving injury to property. In 1987, the General Assembly amended §8.01-243(A) to include claims for fraud (which carries a two-year limitation period). In 1995, the General Assembly amended the "catch-all" limitation period set forth in §8.01-248 to provide for a two-year limitation (rather than one year).

B. Willard's Claim Cannot Be Characterized
As A Claim for Injury to Property

Claims characterized as an "injury to property" as set forth in Virginia Code §8.01-248(B) generally fall into three categories: (1) the exercise of dominion or control over tangible or intangible property; (2) the infliction of actual physical damage to property; and (3) interference with a recognized property right. Willard's claim cannot be placed in any of these categories nor can his claim be otherwise labeled

as an "injury to property." Even though Willard has alleged he suffered economic loss because "the value of his stock has diminished" does not mean his claim is for an "injury to property." See Ward v. Ernst & Young, 246 Va. 317, 435 S.E.2d 628 (1993) (economic loss suffered by plaintiff who sold his stock for less as a result of an accounting firm's error was not considered injury to property within the meaning of Virginia Code §8.01-223, the statute relating to the requirement of privity in tort claims) and Pigott v. Moran, 231 Va. 76, 341 S.E.2d 179 (1986) (Virginia's "catch-all" statute of limitation governed fraud claim which caused a diminution in the value of realty but no injury to such property). A review of cases in each category demonstrates why Willard's claim cannot be called an "injury to property."

The Supreme Court of Virginia has held that claims involving the exercise of use or control over tangible or intangible personal property amounts to an "injury to property." An example is Lavery v. Automation Management Consultants, Inc., 234 Va. 145, 360 S.E.2d 336 (1987). In Lavery, a consultant sued a government contractor for damages for the unauthorized use of his name for trade purposes. The protection of one's name for commercial purposes is granted by Virginia Code §8.01-40. The Supreme Court held that the use of the consultant's name, without

his permission, was an "injury to property" and, therefore, governed by the five-year statute of limitation. In Lavery, unlike the case at bar, defendant had made use of plaintiff's property; his name. The Supreme Court considered this an "injury to property." Other examples are Vines v. Branch, 244 Va. 185, 418 S.E.2d 890 (1992) (defendant's failure to return automobile of plaintiff considered "injury to property") and Bader v. Central Fidelity Bank, 245 Va. 286, 427 S.E.2d 184 (1993) (action for conversion against bank that paid proceeds on checks containing forged endorsements was governed by five-year limitation period-the bank had exercised dominion or control over plaintiff's monies, thus, the Supreme Court found an "injury to property"--MBS did not exercise any dominion over Willard's stock). Obviously, Willard's claim cannot be characterized in this manner.

Another category in which courts have applied the five-year property limitation period are cases involving actual physical damage to property. An example is Hampton Roads Sanitation District v. McDonnell, 234 Va. 235, 360 S.E.2d 841 (1987). In Hampton Roads Sanitation District, a landowner brought an action against the sanitation district for damage to his real property caused by the discharge of sewage and other pollutants. The five-year statute of

limitation governed. Willard's claim clearly does not fit into this category.

Finally, some courts have held that a claim for tortious interference with a property right (or quasi-property right) involves an "injury to property." An example is Central Fidelity Bank v. Lewis B. Goode, Jr., 30 Va. Cir. 521 (1990) in which the Lynchburg City Circuit Court held that a wrongful interference with a corporate business opportunity is an "injury to property." MBS did not interfere with any property right of Willard. These cases, like the other categories, have no application to Willard's claim. Accordingly, the five-year statute of limitation would not apply.

C. Cases Governed by Virginia's
Catch-All Statute of Limitation

As shown above, it is not enough for Willard to show he has suffered economic loss as a result of some action taken by MBS (or some action not taken). To enjoy the benefit of a five-year statute of limitation, Willard must have suffered an "injury to property." Otherwise, Willard's claim is governed by Virginia's "catch-all" statute of limitation. By definition, there are no guidelines for a case falling into this category other than it not fit anywhere else. As shown below, placing

Willard's claim into this group is consistent with decisions from the Supreme Court of Virginia and other courts.

In Singer v. Duncan, 45 F.3rd 823 (4th Cir. 1995), the Fourth Circuit Court of Appeals held that Virginia's catch-all statute of limitation governed a shareholder's suit against the corporation and certain other shareholders for a breach of fiduciary duty. In Singer, the plaintiff-shareholder claimed that defendants (fellow shareholders and directors) had breached their fiduciary duty to him by taking actions which diluted the value of his stock.

A decision from the Richmond City Circuit Court, Builders Supply Co. v. Brown, 24 Va. Cir. 369 (1991) is another example of a claim for economic loss which is not for an "injury to property." In important respects, this case is similar to Willard's claim. In Builders Supply Co., the clerk of court had failed to serve a confessed judgment on the judgment debtor with the notice required by Virginia Code §8.01-438. This code section requires the clerk to send the judgment debtor a copy of §8.01-433 (the code section relating to confessed judgments). Plaintiff filed a creditor's suit to sell property owned by the judgment debtor. The judgment debtor defended on the ground that the clerk of court had failed to comply with

§8.01-438. The court agreed and dismissed plaintiff's creditor's suit. Plaintiff then brought an action against the clerk of court for her mistake. The Richmond City Circuit Court sustained the clerk's plea of the statute of limitation. The Court held that plaintiff's claim was not for an "injury to property" and was, therefore, governed by Virginia's "catch-all" statute of limitation.

Even Willard's own characterization of his loss as a diminution in the value of his stock does not save his claim. See paragraphs 19 and 26 of Willard's motion for judgment. In Pigott v. Moran, 231 Va. 76, 341 S.E.2d 179 (1986) the Supreme Court of Virginia held that a diminution in the value of property because the abutting land was zoned for industrial rather than residential purposes does not make a claim one for an "injury to property."

As shown above, Willard's claim is not one for "injury to property." Accordingly, MBS's plea of the statute of limitations should be sustained.

III. Willard's Claim Is Also Barred by Res Judicata

Under the doctrine of res judicata, a judgment in a cause of action bars all subsequent proceedings on the same cause of action between the same parties, whether all potential issues involved were actually litigated in the

first proceeding. Bates v. Devers, 214 Va. 667, 202 S.E. 2d 917 (1974). Res judicata rests upon considerations of public policy which favor certainty in legal relations, demand an end to litigation and seek to prevent the harassment of parties. Bates v. Devers, 214 Va. 667, 670, 202 S.E.2d 917, 920 (1974). Important to the policy underlying res judicata is the notion that once a plaintiff has had a hearing on the merits of a claim (or a fair opportunity for such hearing), a plaintiff should not be granted a second chance to relitigate an adverse decision. See Restatement, Judgments, §65.

In order for res judicata to apply to Willard's claim, the current suit must involve the same parties and same cause of action as the prior litigation. For these purposes, a cause of action has been described as an assertion of particular legal rights that have arisen out of a definable factual transaction. Allstar Towing, Inc., v. City of Alexandria, 231 Va. 421, 344 S.E. 2d 903 (1986). By this definition, Willard's current claim is the same cause of action which this Court dismissed following a five-day bench trial. The essential evidence is the same; i.e., whether MBS sold the assets of the corporation below market value. Willard should not be permitted to litigate this matter for a second time.

Willard cannot avoid the application of the bar of res judicata by asserting a new theory of recovery for the same event he says caused his loss. This rule is set forth in Section 25 of the Restatement, Second, Judgments:

The rule of §24 [§24 sets forth the basic rule of res judicata] applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action

- (1) To present evidence or grounds or theories of the case not presented in the first action, or
- (2) To seek remedies or forms of relief not demanded in the first action.

Res judicata has the beneficial aspect of coercing Willard into presenting all theories of recovery he had. This rule also compelled MBS and the other defendants to present all available defenses (or risk losing them). Willard attempted to recover for the loss he claims he suffered by the asset sale to Capps by alleging a claim for breach of fiduciary duty. He made no claim for dissenters' rights at that time, although he could have. Willard cannot and should not be permitted to hold back on an alternate theory of recovery to get a second chance at proving the asset sale to Capps was below market value. Willard's answer that he could not assert a claim he did not know about is to no avail. Willard must be presumed to know the law. If Willard really missed an opportunity to

assert a viable claim because of ignorance of his rights,
his remedy is against others, not MBS.

CONCLUSION

For the reasons stated above, this Court should dismiss
Willard's motion for judgment.

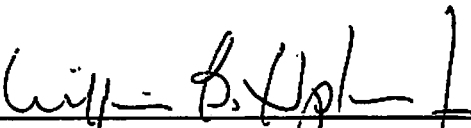
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CERTIFICATE OF SERVICE

I, William B. Hopkins, Jr., do hereby certify that a true and correct copy of the foregoing memorandum in support of defendant's demurrer, plea of res judicata and plea of the statute of limitations was mailed or caused to be delivered to Barrett E. Pope, Durette, Irvin & Bradshaw, P.C., 600 East Main Street, 20th floor, Richmond, Virginia 23219, counsel for plaintiff, Ronald L. Willard, on this 29th day of February, 2000.



William B. Hopkins, Jr.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF BEDFORD

RONALD L. WILLARD,

Plaintiff,

v.

Case No. CL 9745-00

MONETA BUILDING SUPPLY, INC.,
a Virginia corporation,

Defendant.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANT'S DEMURRER, PLEA OF THE STATUTE OF LIMITATIONS,
AND PLEA OF RES JUDICATA

Preliminary Statement

This action seeks monetary relief for damages suffered by plaintiff Ronald W. Willard ("Willard") caused by defendant Moneta Building Supply, Inc.'s ("Moneta") failure to honor Willard's rights as a dissenting shareholder of Moneta arising under Virginia Code §§ 13.1-729 et. seq. In its opening memorandum,¹ Moneta ridicules Willard's efforts to vindicate his rights, mischaracterizing this action as "Willard's attempt to 'get a mulligan.'" Def. Memo. at 2. However, Moneta's colorful rhetoric cannot overcome the plain truth that this proceeding is the first action brought by Willard in his *individual* capacity seeking to recover for an injury that *he* sustained as a result of the unlawful actions which occurred in December of 1996 and January of 1997.

Moneta has briefed three of the four preliminary challenges it has raised to Willard's maintenance of this action. For the reasons which follow, this Court should rule that Moneta's demurrer is not well founded. It is clear from the face of the dissenters' rights statutory scheme that Willard was entitled to notice of such rights from Moneta pursuant to Virginia Code § 13.1-

¹ Citations to Moneta's memorandum appear as "Def. Memo. at [page number.]"

FILED IN THE CLERK'S OFFICE
BEDFORD COUNTY CIRCUIT COURT

The 15th day of March 2000

TESTE

Clerk

733. With respect to Moneta's plea of the statute of limitations, Willard timely filed this action to recover damages for injury to his intangible personal property, namely, his stock in Moneta. The five-year statute of limitations set forth in Virginia Code § 8.01-243(B) applies to this action, and Willard instituted suit approximately three years after sustaining his injury. Finally, contrary to Moneta's plea of res judicata, the related but altogether distinct shareholders' derivative action styled *Willard v. Moneta Building Supply, Inc.*, 258 Va. 40, 515 S.E.2d 277 (1999), does not foreclose Willard's individual effort to recover in this proceeding his own damages caused by Moneta's unlawful conduct.

Facts²

The facts outlined in Moneta's memorandum are essentially correct, but largely unnecessary for determining the narrow issues before this Court. The focus must be on the letter dated November 22, 1996, where A. S. Cappellari, acting in his capacity as Moneta's President, notified himself, his wife, his son, and Willard of the proposed sale. MFJ, ¶ 11 and Ex. A attached thereto. In addition, Mr. Cappellari enclosed with his November 22, 1996 letter a notice of a special meeting of Moneta's shareholders to be conducted on December 20, 1996. MFJ ¶ 12 and Ex. B attached thereto. The only material attached to the notice was a proxy ballot by which recipients could register their vote by mail. *Id.* Significantly, these materials failed to indicate that anyone had or may have had dissenters' rights under Virginia Code §§ 13.1-729 et. seq. No copy of Article 15 of Title 13.1 of the Virginia Code was included. These materials did not notify anyone that Moneta was attempting to sell these assets in furtherance of a plan of dissolution. They also failed to state that there was a plan pursuant to which all or substantially all of the net proceeds of the sale would be distributed to shareholders within one year of the date of the sale. Indeed, no such distribution occurred in that time frame.

² Citations to the Motion for Judgment appear as "MFJ, ¶ [number]."

The special meeting of shareholders occurred as scheduled on December 20, 1996. MFJ, ¶ 14. At that meeting, A. S. Cappellari, for himself and with his wife's proxy, voted in favor of the proposed sale to Capps. MFJ, ¶ 15. Noting his own competing offer for a substantially greater amount, Willard voted against the proposed sale. MFJ, ¶ 16. However, the combined votes of Mr. and Mrs. Cappellari represented more than two-thirds of the outstanding shares of Moneta; thus, the sale received the approval of the shareholders. *Id.* The transaction between Moneta and Capps closed in January 1997. MFJ, ¶ 17. As a result of this transaction, Moneta ceased doing business as a going concern. MFJ, ¶ 18.

As more particularly set forth in the Motion for Judgment, Willard qualified as a dissenter at the time of the approval of the sale to Capps; thus he was entitled to dissent from Moneta's action. Moneta failed to provide appropriate dissenters' rights notice to him, and further failed to provide a copy of Article 15 of Title 13.1 of the Virginia Code. As a direct result of being deprived of this information, Willard did not avail himself of his rights under Virginia Code § 13.1-733 and was deprived of his rights elsewhere under the Code to have demanded payment for his shares and to have participated in a judicial proceeding to determine the fair value of his shares pursuant to Virginia Code § 13.1-739. Moneta's failure to abide by the dissenters' rights statutory scheme caused serious diminution of the value of those shares held by Willard for which he is now entitled to recover damages.

Argument and Authority

I. Virginia Statutory Law Accorded Willard Dissenters' Rights Under the Facts as Pled in the Motion for Judgment.

Pursuant to Virginia Code § 13.1-730, there are various scenarios in which a shareholder has dissenters' rights and, accordingly, may obtain the payment of the fair value of his shares.

With respect to the instant proceeding, there are two sets of circumstances, either of which accord Willard dissenters' rights. Section 13.1-730 states in pertinent part:

A. A shareholder is entitled to dissent from, and obtain payment of the fair value of his shares in the event of, any of the following corporate actions:

. . . 3. Consumation of a sale or exchange of all, or substantially all, of the property of the corporation if the shareholder was entitled to vote on the sale or exchange *or* if the sale or exchange was in furtherance of a dissolution on which the shareholder was entitled to vote, provided that such dissenters' rights shall not apply in the case of (i) a sale or exchange pursuant to court order, or (ii) a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of the sale; . . . (emphasis added).

Although this portion of § 13.1-730 is not the finest example of legislative draftsmanship, it is clear that two separate events are addressed in Subsection A(3):

- a sale of all or substantially all of the corporation's property, or
- a sale in furtherance of a dissolution unless done pursuant to court order or as an all-cash transaction with the proceeds to be distributed in a year.

According to the Code Commission Commentary (1985)³ as well as the Joint Bar Committee Commentary (revised 1997),⁴ this section of the Code generally follows §13.02 of the Revised Model Business Corporation Act ("the Model Act"). According to the Official Comments of the Model Act, §13.02(a) establishes the scope of a given shareholder's dissenters' rights. Included among these transactions are:

(3) A sale or exchange of all or substantially all of the property of the corporation not in the usual course of business under Section 12.02 if the shareholder is entitled to vote on the sale or exchange. *Section 13.02(a)(3) generally grants dissenters' rights in connection with sales in the process of dissolution but excludes them in connection with sales by court order and sales for cash*

³ See extract from *Laws of Virginia Related to the State Corporation Commission, Corporations, Limited Liability Companies, Partnerships & Limited Partnerships* (1999 Ed.) attached as Ex. 1.

⁴ *Id.*

*that require substantially all the proceeds to be distributed to the shareholders within one year. The inclusion of sales in dissolution is designed to ensure that the right to dissent cannot be avoided by characterizing sales as made in the process of dissolution long before distribution is made. An exception is provided for sales for cash pursuant to a plan that provides for distribution within one year.*⁵ (emphasis added.)

The Official Comments to the Model Act recognize two distinct scenarios which are codified in Virginia Code § 13.1-730(A)(3): one quoted above in bold and the other quoted above in italics. Moneta's memorandum focuses only on the second set of circumstances, namely, a sale in furtherance of a plan of dissolution. Moneta's memorandum is silent with respect to the subject sale involving, as A. S. Cappellari's November 22, 1996 letter indicates, "substantially all of [Moneta's] assets." Inasmuch as this transaction involved substantially all of Moneta's assets and Moneta acknowledged Willard's right to vote on the proposed sale, Willard has satisfied the requirements under the first scenario of § 13.1-730(A)(3).

If this Court wants to focus on the second set of circumstances under § 13.1-730(A)(3), Willard likewise satisfies these requirements. Implicit in Moneta's argument is that this transaction was in furtherance of a dissolution on which Willard was entitled to vote. The exception found in § 13.1-730(A)(3) under such circumstances simply does not apply here. Admittedly, the terms of the proposed sale contemplated an all-cash transaction. However, neither A. S. Cappellari's letter dated November 22, 1996 nor the notice and proxy form attached thereto state that there was an actual plan for the distribution of the net proceeds within one year after the date of sale. Instead, the operative language in the notice reads:

It is *anticipated* that the net proceeds after deduction for outstanding liabilities and a reasonable reserve for future liabilities will then be distributed to the shareholders pro rata based on the number of shares held. (emphasis added.)

⁵ See extract from *Corporations and Business Associations* (1994 Ed.) attached as Ex. 2.

Anticipation falls short of a plan. Neither the Board of Directors nor the shareholders had adopted such a plan.

Moreover, there is no mention of a specific time frame with respect to the eventual distribution. Moneta's opening memorandum admits that the "notice of special meeting does not set forth a specific time for distribution... ." Def. Memo. at 10. Nonetheless, Moneta would have this Court supply the language the notice omits by contending that the notice "makes it clear that [Moneta] intended to disburse the net proceeds without delay." *Id.* Therefore Moneta argues that the language in the notice contemplated distribution within one year. However, the document contains no such language. A notice designed to inform shareholders of their rights should not rest upon mere inferences when the purpose of the statutory scheme is to protect minority shareholders. *See generally, Adams v. U.S. Distrib. Corp.*, 184 Va. 134, 34 S.E.2d 244 (1945), *cert. denied* 327 U.S. 788, 66 S.Ct. 807 (1946) (design of the statutes relating to the rights of dissenting shareholder is to assure him that he will be fully compensated for the value of that of which he has been deprived by the merger).⁶ Moreover, irrespective of the aspiration Moneta alleges as of the November 22, 1996 letter to shareholders, actual distribution of proceeds did not occur within one year of the January 1997 closing date.⁷

Willard has dissenters' rights under § 13.1-730(A)(3). The motion for judgment makes clear that his rights were not observed by Moneta, and for the purposes of the defendant's demurrer, those allegations are taken as true.

II. Willard's Claim For Injury to His Stock in Moneta Is Timely and Thus Not Barred By the Statute of Limitations.

⁶ In this case, the required content of the notice imposes no significant burden on the corporation.

⁷ There had been no distribution of net proceeds of this sale by October 29, 1999, the date on which A. S. Cappellari, as Moneta's president, sent Willard (and presumably others) a Notice of Claim Against Dissolved Corporation (attached as Ex. 3) based upon Moneta's receipt of a Certificate of Dissolution with an effective date of October 15, 1999, issued by the State Corporation Commission. The October 29, 1999 letter solicited a description of any claims that Willard may wish to assert against the assets of Moneta.

The gravamen of Willard's Motion for Judgment is that he suffered an injury to the value of his stock in Moneta by virtue of Moneta's failure to honor his rights as a dissenting shareholder in connection with the sale to Capps. Virginia courts recognize that corporate stock is intangible personal property. *Va. Public Service Co. v. Steindler*, 166 Va. 686, 187 S.E. 353 (1936); *Iron City Savings Bank v. Isaacsen*, 158 Va. 609, 164 S.E. 520 (1932). Pursuant to Virginia Code § 8.01-243(B), "every action for injury to property . . . shall be brought within five years after the cause of action accrues." Willard instituted this proceeding approximately three years after the closing of the sale to Capps.

Moneta contends that this action is governed by the two-year "catchall" statute of limitations set forth in Virginia Code § 8.01-248. By its express terms, this section applies only to those personal actions for which no limitation is otherwise prescribed.

Moneta's argument is flawed in two respects. First of all, it identifies, without authority, three categories of injury into which injuries to property "*generally* fall." Def. Memo. at 14. (emphasis added.) Moneta contends that because Willard's claim cannot be placed into any of these three categories, it must necessarily fail as an injury to property. Of course, there can be an injury to property that does not fall within these three general categories. Moneta cannot possibly contend that three general categories necessarily encompass all instances of injury to property.

Moreover, the relevant case law upon which Moneta relies is either inapposite or actually supports Willard's characterization of his loss as a direct injury to his property. For example, Moneta cites *Pigott v. Moran*, 231 Va. 76, 341 S.E.2d 179 (1986), for the proposition that the two-year "catchall" statute of limitations governs a fraud claim even where there is an alleged diminution in the value of realty but no injury to such property. Careful review of *Pigott* demonstrates that it is factually distinguishable from the instant dispute. In *Pigott*, the purchasers of real estate were given the false impression by a realtor that the property under contract abutted

other property that was zoned residential. The purchasers signed the contract which included a purchase price that was higher than what it would have been if the purchasers had known that the abutting property was actually zoned for industrial and commercial uses. The purchasers eventually sued the realtor, contending that, as a result of her fraudulent misconduct, they had sustained a financial loss due to the difference between the value of the land if it had abutted residential property and its actual value.

The Virginia Supreme Court ruled that the statute of limitations in § 8.01-248 governed this fraud action. The Court specifically rejected the purchasers' contention that they had suffered an injury to their property within the meaning of § 8.01-243(B). The *Pigott* majority concluded that fraud is a tort, i.e., a wrongful act aimed at the person which will support recovery for economic injury to the individual. It added:

The fraud allegedly committed by the realtor had no impact on the real property itself. *The purchasers' land was in the same condition and was available for the same use after the alleged fraud as it was before.* The defendants' conduct was directed at the plaintiffs personally and not at their property, real or personal. Consequently, the trial court correctly decided the one-year limitation governs an action for fraud. (emphasis added.)

The Court found that while the purchasers may have paid more for the property than they would have paid had they known the truth, the real estate itself was unaffected by the realtor's misrepresentations. The true value of the real estate never varied; only the purchasers' subjective valuation of it changed once they learned the truth.

This holding is sound, and it illustrates why there has been an injury to Willard's intangible personal property (i.e., his stock) for which a five-year statute of limitations applies. As a result of not being apprised of his dissenters' rights, Willard lost the opportunity to receive fair value for his stock at that point in time, even if it required a hearing as contemplated by Virginia Code § 13.1-740. It is the impact on the stock, not Willard's person, that constitutes the

injury for which a five-year statute of limitations is applicable. Stated differently, the stock itself lost value wholly apart from Willard's perception of it.

Moneta also relies upon *Ward v. Ernst & Young*, 246 Va. 317, 435 S.E.2d 628 (1998), claiming that the economic loss suffered by the plaintiff who sold his stock at a price based upon his reliance on incorrect accounting statements was not considered an injury to property within the meaning of Virginia Code § 8.01-223, which statute removes lack of privity as a defense in tort claims. Def. Memo. at 15. In *Ward*, the plaintiff was not in privity with the accounting firm that provided the service. Accordingly, he had to assert tortious injury to his property in order to recover. The *Ward* court drew upon a distinction between property losses and economic losses found in an earlier decision, *Sensenbrenner v. Rust, Orling & Neale*, 236 Va. 419, 374 S.E.2d 55 (1988).

In *Sensenbrenner*, certain landowners contracted with a builder for the construction of a house with a swimming pool. In turn, the builder engaged an architect and a pool subcontractor with whom the landowners had no contract. After the project was completed, the landowners discovered that the pool had been constructed on fill dirt and, as a result, was defective. The landowners filed suit in federal district court, only to have their case dismissed. On appeal to the United States Court of Appeals for the Fourth Circuit, a question was certified to the Virginia Supreme Court. The Court found that the plaintiffs had alleged nothing more than disappointed economic expectations. They had contracted with a builder for the purchase of a package which included land, design services, construction of a dwelling, a swimming pool, and a pool enclosure. The package was defective. The effect of the failure of the substandard portion to meet the bargained-for level of quality caused a diminution in the value of the whole measured by the cost to repair. The Court concluded that this was purely an economic loss for which the law of contracts provided the sole remedy.

Ward and *Sensenbrenner*, the case on which it rests, are inapposite here. Moneta's failure to honor Willard's statutory right of notice as outlined in the Motion for Judgment had no effect other than to directly damage his intangible personal property. His shares of stock in Moneta had a value immediately prior to the approval of the sale of substantially all the assets to Capps, and it has a greatly-reduced value now based upon assets left to be distributed by Moneta.

The two cases upon which Moneta relies in the portion of its memorandum addressing authorities which involve the two-year catchall statute of limitations are likewise unpersuasive. *Singer v. Dungan*, 45 F.3d 823 (4th Cir. 1995), deals with a claim for breach of fiduciary duty. The *Singer* court recognized numerous rulings that a breach of fiduciary duty claim is subject to Section 8.01-248. Citing *FDIC v. Cocke*, 7 F.3d 396 (4th Cir. 1993), cert. denied ___ U.S. ___, 115 S.Ct. 53 (1994), the court explained that a breach of fiduciary duty claim is personal in nature because it springs from the duty to deal honestly and fairly with those to whom fiduciaries owe certain obligations. Once again, Willard asserts an injury to his property, not a breach of fiduciary duty owed to himself.

Likewise, *Builders Supply Co. v. Brown*, 24 Va. Cir. 369 (1991), fails to provide support for Moneta's position. In *Builders Supply*, the Circuit Court of the City of Richmond found that a court clerk's negligent failure to cause a judgment by confession to be properly served failed to constitute a property injury. Accordingly, the Court applied the statute of limitations under §8.01-248. The Court ruled:

For an injury to property, within the meaning of § 8.01-243, the injury must be direct and immediate and not based upon personal financial damage. [citations omitted] To say that plaintiff's loss of its judgment by confession amounted to an injury to property would mean that the embodiment of its former chose in action merged to judgment suffered an injury itself. *Rather than the judgment sustaining an injury to itself, plaintiff's rights in it and the claim it embodied were loss [sic] or diminished, things personal to plaintiff which are not injury to property.* While plaintiff's action here is not one sounding in fraud, a personal

action, . . . if there was a breach of duty resulting in damages those damages affect underlying personal claims not property injury which claims plaintiff could still pursue within the remaining period of limitation. (emphasis added.)

In essence, the Court ruled that the underlying obligation that had been incompletely reduced to a confessed judgment was still viable; thus, any injury that was suffered was personal in nature rather than property-related. By comparison here, Willard's stock in Moneta diminished in value. He seeks recovery, just as he would if Moneta had injured the value of the stock in any other fashion.

Although not cited by Moneta in its opening memorandum, *Brown v. American Broadcasting Co., Inc.*, 704 F.2d 1296 (4th Cir. 1983), recites a framework within which to evaluate Willard's claim. The *Brown* court declared that for there to be an injury to property for which the five-year statute of limitations applies, three factors must be present: the injury must be against and affect directly the plaintiff's property; the plaintiff must sue only for the direct injury; and the injury, to qualify as a direct injury, must be the very first injury which results from the wrongful act. Application of these criteria to the facts in this case yields the inescapable conclusion that a five-year statute of limitation should apply. Willard's stock was directly affected by Moneta's failure to honor his dissenters' rights. It is for that diminution in value, and that injury alone, that Willard seeks recovery. Finally, the diminution in value was the very first, and indeed only, injury resulting from Moneta's failure to honor Willard's statutory rights.⁸

By invoking a statute of limitations defense, Moneta bears the burden of demonstrating that Willard's claim is stale. Yet Moneta has failed to cite any case where a court has applied

⁸ The *Brown* court acknowledged that the Virginia Supreme Court might not apply as strict a test as articulated by the Fourth Circuit. 704 F.2d at 1304.

§ 8.01-248 in a dissenters' rights context as alleged here. Indeed, it defies logic that Moneta's failure to act created any injury other than one to Willard's property.

III. Willard's Claim Is Not Barred By the Doctrine of Res Judicata.

Moneta's remaining argument raised in its memorandum is easily refuted. Moneta contends that this action is barred by the doctrine of res judicata due to the result in the shareholders' derivative action which was affirmed on appeal by the Virginia Supreme Court in 1999. However, as Moneta correctly observes, res judicata bars this action only if it involves the same parties and the same cause of action as the previous litigation. Def. Memo. at 20.

With respect to the identity of parties component, Willard acting solely in a representative capacity, initiated the shareholders' derivative action seeking redress for damages to Moneta. Paragraph 9 of the amended motion for judgment indicated that the proceeding was a derivative action under Virginia Code § 13.1-672.1 *et. seq.* The heading of each of the seven counts being asserted against Moneta described a theory of recovery derivative in nature. Each of the seven counts either addressed duties owed to Moneta or outlined injuries suffered by Moneta. Willard asserted absolutely no claims for himself based upon any injury he suffered (i.e., the diminution of the value of his stock) in that proceeding. Indeed, the nature of a shareholders' derivative action forecloses individual claims.

In this action, Willard sues in his own right. The injury he suffered was peculiar to him in that he was the only individual who opposed the sale of the assets. Thus, he was the only shareholder entitled to assert dissenters' rights.

Secondly, the causes of action that were litigated in the shareholders' derivative action were corporate in nature, whereas the cause of action in the case before this Court is personal to Willard. A cause of action for purposes of res judicata is an assertion of a particular legal right which has arisen out of a definable factual transaction. *K&L Trucking Co. v. Thurber*, 1 Va.App.

213, 337 S.E.2d 299 (1985). Willard's current claim is separate and distinct from the legal theories being asserted and the operative facts upon which they turned in the shareholders' derivative action. Although some evidence may be common to both cases, the rights and causes of action being adjudicated are markedly different.

This action focuses on the "before" and "after" value of Willard's stock. The shareholders' derivative action largely addressed procedure and protocol. It addressed process: Did Moneta's Board fulfill its obligation to employ procedures adequately designed to arrive at fair value for certain assets? The value of Moneta as a going concern and the value of Willard's share in that going concern have not been at issue until now.

Moneta argues that "res judicata has the beneficial aspect of coercing Willard into presenting all theories of recovery he had." Def. Memo. at 21. When he brought the shareholders' derivative action in a representative capacity, he was obligated to assert all theories of recovery then available to Moneta, which was the true party plaintiff in interest. *If* he were attempting to litigate different theories of recovery in a subsequent shareholders' derivative action predicated on the same misconduct, a plea of res judicata would stand. Likewise, *if* Willard had presented his individual claims in combination with claims he asserted in a representative capacity, he would be precluded from litigating this claim arising out of the same set of operative facts.

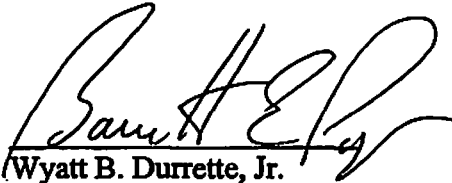
In the end, the shareholders' action and the case at bar involve different plaintiffs with different causes of action. The doctrine of res judicata has no application here. Contrary to Moneta's contention, Willard is not getting a second chance at anything. For the first time, he is seeking to recover for his injury, not the corporation's.

Conclusion

For the foregoing reasons, this Court should overrule the demurrer, the plea of the statute of limitations, and the plea of res judicata filed by Moneta.

RONALD L. WILLARD

By Counsel

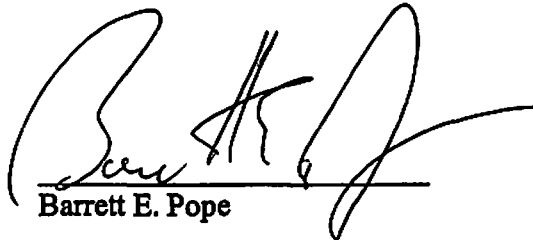


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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2000, the foregoing was served by facsimile and by overnight delivery to the following counsel:

William B. Hopkins, Jr., Esquire
Martin, Hopkins & Lemon, P.C.
10 South Jefferson Street, Suite 1000
Roanoke, VA 24011


Barrett E. Pope

**LAWS OF VIRGINIA RELATED TO
THE STATE CORPORATION COMMISSION,
CORPORATIONS, LIMITED LIABILITY COMPANIES,
PARTNERSHIPS & LIMITED PARTNERSHIPS**

1999 EDITION

**With Commentaries from
Virginia Code Commission
and
Virginia Joint Bar Committee**

**With Rules of Practice and Procedure
of the State Corporation Commission**

**Issued by the
State Corporation Commission
by its Clerk, P.O. Box 1197
Richmond, Virginia 23218**


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stance in Second Generation Takeover Legisla-
tion," see 21 U. Rich. L. Rev. 489 (1987).

Editor's note. — The cases below were de-
cided under prior law.

"Fair value" defined. — The term "fair
value" of the stock of a stockholder who dissents
from a sale means the intrinsic worth of the
dissenter's stock, which is to be arrived at after
an appraisal of all the elements of value. *Lucas*
v. Pembroke Water Co., 205 Va. 84, 135 S.E.2d
147 (1964).

Elements of "fair value." — Among the
elements to be considered in arriving at the
"fair value" or "fair cash value" of a dissenter's
stock are its market value, net asset value,
investment value, and earning capacity. *Lucas*
v. Pembroke Water Co., 205 Va. 84, 135 S.E.2d
147 (1964).

The book value, or net asset value, of the
stock is only one of the factors to be considered.
Mere book value alone is not determinative.
Lucas v. Pembroke Water Co., 205 Va. 84, 135
S.E.2d 147 (1964).

Excessive salary payments to officers and
directors of a corporation are assets of the
corporation to be considered along with other
assets in fixing the value of the stock. *Lucas v.*
Pembroke Water Co., 205 Va. 84, 135 S.E.2d
147 (1964).

§ 13.1-730. Right to dissent. — A. A shareholder is entitled to dissent
from, and obtain payment of the fair value of his shares in the event of, any of
the following corporate actions:

1. Consummation of a plan of merger to which the corporation is a party (i)
if shareholder approval is required for the merger by § 13.1-718 or the articles
of incorporation and the shareholder is entitled to vote on the merger or (ii) if
the corporation is a subsidiary that is merged with its parent under § 13.1-
719;

2. Consummation of a plan of share exchange to which the corporation is a
party as the corporation whose shares will be acquired, if the shareholder is
entitled to vote on the plan;

3. Consummation of a sale or exchange of all, or substantially all, of the
property of the corporation if the shareholder was entitled to vote on the sale
or exchange or if the sale or exchange was in furtherance of a dissolution on
which the shareholder was entitled to vote, provided that such dissenter's
rights shall not apply in the case of (i) a sale or exchange pursuant to court
order, or (ii) a sale for cash pursuant to a plan by which all or substantially all
of the net proceeds of the sale will be distributed to the shareholders within one
year after the date of sale;

4. Any corporate action taken pursuant to a shareholder vote to the extent
the articles of incorporation, bylaws, or a resolution of the board of directors
provides that voting or nonvoting shareholders are entitled to dissent and
obtain payment for their shares.

B. A shareholder entitled to dissent and obtain payment for his shares
under this article may not challenge the corporate action creating his entitle-
ment unless the action is unlawful or fraudulent with respect to the share-
holder or the corporation.

"Fair cash value" means actual value. —
Actual value of the shares of a stockholder
dissenting to a consolidation or merger of a
corporation is practically synonymous with
"fair cash value" as those words were used in
repealed § 13-47. *Adams v. United States*
Distrib. Corp., 184 Va. 134, 34 S.E.2d 244
(1945), cert. denied, 327 U.S. 788, 66 S. Ct. 807,
90 L. Ed. 1014 (1946).

The term "fair cash value" means the intrin-
sic worth of the dissenter's stock, which is to be
arrived at after an appraisal of all the elements
of value. *Adams v. United States Distrib. Corp.*,
184 Va. 134, 34 S.E.2d 244 (1945), cert. denied,
327 U.S. 788, 66 S. Ct. 807, 90 L. Ed. 1014
(1946).

And not contractual value. — Dissenters
may not recover the "contractual value" of their
shares, the par value plus accrued cumulative
dividends, as distinguished from the "fair cash
value" or the "actual value." *Adams v. United*
States Distrib. Corp., 184 Va. 134, 34 S.E.2d
244 (1945), cert. denied, 327 U.S. 788, 66 S. Ct.
807, 90 L. Ed. 1014 (1946).

Determination of fair value of dissent-
ers' stock upon conflicting evidence is for
the trial court. *Lucas v. Pembroke Water Co.*,
205 Va. 84, 135 S.E.2d 147 (1964).

Amount of allowance of interest is left to
discretion of trial court. *Lucas v. Pembroke*
Water Co., 205 Va. 84, 135 S.E.2d 147 (1964).

C. Notwithstanding any other provision of this article, with respect to a plan of merger or share exchange or a sale or exchange of property there shall be no right of dissent in favor of holders of shares of any class or series which, at the record date fixed to determine the shareholders entitled to receive notice of and to vote at the meeting at which the plan of merger or share exchange or the sale or exchange of property is to be acted on, were (i) listed on a national securities exchange or on the National Association of Securities Dealers Automated Quotation System (NASDAQ) or (ii) held by at least 2,000 record shareholders, unless in either case:

1. The articles of incorporation of the corporation issuing such shares provide otherwise;

2. In the case of a plan of merger or share exchange, the holders of the class or series are required under the plan of merger or share exchange to accept for such shares anything except:

a. Cash;

b. Shares or membership interests, or shares or membership interests and cash in lieu of fractional shares (i) of the surviving or acquiring corporation or limited liability company or (ii) of any other corporation or limited liability company which, at the record date fixed to determine the shareholders entitled to receive notice of and to vote at the meeting at which the plan of merger or share exchange is to be acted on, were either listed subject to notice of issuance on a national securities exchange or held of record by at least 2,000 record shareholders or members; or

c. A combination of cash and shares or membership interests as set forth in subdivisions 2 a and 2 b of this subsection; or

3. The transaction to be voted on is an "affiliated transaction" and is not approved by a majority of "disinterested directors" as such terms are defined in § 13.1-725.

D. The right of a dissenting shareholder to obtain payment of the fair value of his shares shall terminate upon the occurrence of any one of the following events:

1. The proposed corporate action is abandoned or rescinded;

2. A court having jurisdiction permanently enjoins or sets aside the corporate action; or

3. His demand for payment is withdrawn with the written consent of the corporation.

E. Notwithstanding any other provision of this article, no shareholder of a corporation located in a county having a county manager form of government and which is exempt from income taxation under § 501 (c) or § 528 of the Internal Revenue Code and no part of whose income inures or may inure to the benefit of any private share holder or individual shall be entitled to dissent and obtain payment for his shares under this article. (Code 1950, §§ 13-85, 13.1-75, 13.1-78; 1956, c. 428; 1968, c. 733; 1972, c. 425; 1975, c. 500; 1984, c. 613; 1985, c. 522; 1986, c. 540; 1988, c. 442; 1990, c. 229; 1992, c. 575; 1996, c. 246; 1999, c. 288.)

CODE COMMISSION COMMENTARY (1985)

This section follows Model Act § 13.02 with the deletion of a provision in the Model Act that creates dissenters' rights for any amendment of the articles of incorporation that materially and adversely affects the rights of the dissenter, and with the addition of subsections C and D. Subsection C is similar to a provision in Virginia Code §§ 13.1-75 and 13.1-78, but the Virginia Code does not eliminate dissenters'

rights for the holders of publicly traded shares if the consideration that the shareholders will receive includes cash (other than cash in lieu of fractional shares). Subsection C is new. Subsection D is similar to Virginia Code §§ 13.1-75(g) and 13.1-78(g).

In addition to the changes in subsection C described in the preceding paragraph, the Virginia Draft differs from Virginia Code §§ 13.1-

75 and 13.1-78

1. Subsection rights apply to apply to a sale for cash purs substantially will be distrib one year aft Virginia Cod rights in any assets not in

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shareholder of a of government r § 528 of the ay inure to the l to dissent and 950, §§ 13-85, c. 500; 1984, c. 575; 1996, c.

75 and 13.1-78 as follows:

1. Subsection A3 provides that dissenters' rights apply to a sale in dissolution, but do not apply to a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale. Under the Virginia Code shareholders have dissenters' rights in any sale of substantially all of the assets not in the usual and regular course of

business, but do not have such rights in a dissolution of the corporation.

2. In subsection A4 the Virginia Draft permits expansion of dissenters' rights as expressly provided for in the articles of incorporation, bylaws or by board resolution.

3. Subsection B is new. This subsection makes clear that dissenters' rights are in lieu of other rights the shareholder might have except where fraud or illegal conduct is involved.

JOINT BAR COMMITTEE COMMENTARY (REVISED 1997)

This section generally follows the Model Act; however, consistent with present law it does not provide for dissenters' rights upon amendments to the articles of incorporation.

This section continues the "Wall Street exception" contained in former Code § 13.1-75 for shares that are widely held and publicly traded and expands the exception to include transactions in which the shareholders receive cash rather than shares of a public company.

Section 13.1-730B makes the exercise of dissenters' rights an exclusive remedy, unless the action is "unlawful or fraudulent." The Official Comment to Model Act § 13.02 says that this formulation is based upon the New York approach, and is designed to recognize and preserve the principles that have developed in the case law of Delaware, New York, and other states with regard to the effect of dissenter's rights or other remedies of dissident shareholders. This is believed to be consistent with former law. See Comment to Section 13.1-75 in Report by the Code Commission of Virginia for Revision of the Laws Relating to Corporations (Sept. 1955), p. 67 ("this plain and efficient remedy is intended to be exclusive as in *Adams v. U.S. Distributing Corp.*, 184 Va. 134 (1945)"). See Macrae, *Dissenting Stockholders Rights in Virginia: Exclusivity of the Cash-Out Remedy and Determination of "Fair Value"*, 12 U. Rich. L. Rev. 505 (1978).

The 1986 amendment rewrote the introductory language of subdivision C 2 to clarify an

ambiguity in the old statute as to application of the "no right of dissent" provision in connection with the sales or exchange of property. The 1988 amendment revised subdivision C 3 to make clear that an "affiliated transaction" that is approved by a majority of "disinterested directors" will not be automatically excluded from "the no right of dissent" provision.

A 1990 amendment to Subsection A3 confirms that dissenters rights apply if there is a sale or exchange of all or substantially all of the assets and the shareholder is entitled to vote either on the sale or on the dissolution of which the sale or exchange is a part. At the same time subsection C2 was amended to make clear that the shares of the surviving corporation in a merger or the acquiring corporation in a share exchange may be used even if the shares are not listed on a national securities exchange or held of record by at least two thousand shareholders without destroying the "Wall Street" exception to dissenters rights. That subsection was amended again in 1992 to provide for mergers with limited liability companies. A 1996 amendment makes the "Wall Street" exception available if the merging corporation's shares are listed in NASDAQ. Note that, probably through oversight, the exception is not available if the shares to be received are not shares of the surviving entity, are owned of record by less than 2,000 shareholders and are not listed or approved for listing on a national securities exchange.

VIRGINIA CODE ANNOTATIONS

The 1999 amendment added subsection E. Law Review. — For article discussing shareholder approval of mergers, see 56 Va. L. Rev. 755 (1970). For survey of Virginia law on business associations for the year 1971-1972, see 58 Va. L. Rev. 1172 (1972). For survey of Virginia administrative law for the year 1974-1975, see 61 Va. L. Rev. 1632 (1975). For survey of Virginia law on business associations for the year 1974-1975, see 61 Va. L. Rev. 1650 (1975). For article, "Virginia's 'Affiliated Transactions'

Statute: Indulging Form Over Substance in Second Generation Takeover Legislation," see 21 U. Rich. L. Rev. 489 (1987).

Editor's note. — The cases below were decided under prior law.

Purpose of statutes. — The design of the statutes relating to the rights of a dissenting stockholder is to assure him that he will be fully compensated for the value of that of which he has been deprived by the merger, and no more. *Adams v. United States Distrib. Corp.*,

blicly traded shares ie shareholders will : than cash in lieu of on C is new. Subsec- a Code §§ 13.1-75(g)

ges in subsection C ; paragraph, the Vir- ginia Code §§ 13.1-

184 Va. 134, 34 S.E.2d 244 (1945), cert. denied, 327 U.S. 788, 66 S. Ct. 807, 90 L. Ed. 1014 (1946).

Stockholder has election as to dissent. — Every stockholder of a merging corporation has an election either to dissent and secure in the prescribed manner the fair cash value of his stock or, if he fails to dissent, to be bound by the terms of the merger. *Adams v. United States Distrib. Corp.*, 184 Va. 134, 34 S.E.2d 244 (1945), cert. denied, 327 U.S. 788, 66 S. Ct. 807, 90 L. Ed. 1014 (1946); *Pittston Co. v. O'Hara*, 191 Va. 886, 63 S.E.2d 34, appeal dismissed, 342 U.S. 803, 72 S. Ct. 38, 96 L. Ed. 608 (1951).

Exclusiveness of statutory remedy. — Unless a corporate merger be tainted with fraud or illegality, the dissenting stockholder must pursue the remedy prescribed by statute. *Adams v. United States Distrib. Corp.*, 184 Va. 134, 34 S.E.2d 244 (1945), cert. denied, 327 U.S. 788, 66 S. Ct. 807, 90 L. Ed. 1014 (1946), wherein the court expressly refused to agree with *Weiss v. Atkins*, 52 F. Supp. 418 (S.D.N.Y. 1943), rev'd, 149 F.2d 193 (2nd Cir. 1945), and pointed out that *Winfree v. Riverside Cotton Mills*, 113 Va. 717, 75 S.E. 309 (1912), holding contra, was no longer applicable. See *McGhee v. General Fin. Corp.*, 84 F. Supp. 24 (W.D. Va. 1949), holding that the remedy is available only in state courts.

The provisions of former law in regard to the

valuation of the interest of dissatisfied members or stockholders in case of the merger of their corporation with another, were held to apply only in those cases in which the corporations seeking to merge had proceeded in all respects by authority of law. The provisions, therefore, were not exclusive of the right of dissatisfied members to contest the validity of an order of merger by the State Corporation Commission claimed to be destructive of their rights and interests, and utterly without warrant of law. *Jones v. Rhea*, 130 Va. 345, 107 S.E. 814 (1921).

It was held that the existence of a summary remedy of appraisal and payment under former § 13-85 did not make the remedy at law adequate in such a manner as to defeat equity jurisdiction, and the existence of such remedy did not otherwise foreclose the plenary jurisdiction of a court of equity to grant an injunction in advance of action or to grant a money award on equitable principles after action. *Craddock-Terry Co. v. Powell*, 181 Va. 417, 25 S.E.2d 363 (1943); *Pittston Co. v. O'Hara*, 191 Va. 886, 63 S.E.2d 34, appeal dismissed, 342 U.S. 803, 72 S. Ct. 38, 96 L. Ed. 608 (1951).

Purchaser of stock is legally put upon notice that in event of merger his remedy will be provided by the statute. *McGhee v. General Fin. Corp.*, 84 F. Supp. 24 (W.D. Va. 1949).

§ 13.1-731. Dissent by nominees and beneficial owners. — A. A record shareholder may assert dissenters' rights as to fewer than all the shares registered in his name only if he dissents with respect to all shares beneficially owned by any one person and notifies the corporation in writing of the name and address of each person on whose behalf he asserts dissenters' rights. The rights of a partial dissenter under this subsection are determined as if the shares as to which he dissents and his other shares were registered in the names of different shareholders.

B. A beneficial shareholder may assert dissenters' rights as to shares held on his behalf only if:

1. He submits to the corporation the record shareholder's written consent to the dissent not later than the time the beneficial shareholder asserts dissenters' rights; and

2. He does so with respect to all shares of which he is the beneficial shareholder or over which he has power to direct the vote. (Code 1950, §§ 13-85, 13.1-75, 13.1-78; 1956, c. 428; 1968, c. 733; 1972, c. 425; 1975, c. 500; 1984, c. 613; 1985, c. 522.)

CODE COMMISSION COMMENTARY (1985)

This section was taken from Model Act § 13.03.

The Virginia Code limits dissenters' rights to shareholders of record. Virginia Code §§ 13.1-

75(c) (i) (B) and 13.1-78(c) (i) (B) provide that a shareholder may exercise his dissenter's rights with respect to less than all shares held by him.



CORPORATIONS AND BUSINESS ASSOCIATIONS

Statutes, Rules, Materials, and Forms

1994 Edition

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1994

REVISED MODEL BUSINESS CORPORATION ACT

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* Omitted.

§ 12.02 REVISED MODEL BUSINESS CORPORATION ACT

clear that transactions like this, which actually constitute a distribution, are not subject to section 12.02. See Siegal, "When Corporations Divide: A Statutory and Financial Analysis," 79 Harv.L.Rev. 534 (1966).

Chapter 13
DISSENTERS' RIGHTS

Subchapter A

Right to Dissent and Obtain Payment for Shares

§ 13.01 Definitions

In this chapter:

- (1) "Corporation" means the issuer of the shares held by a dissenter before the corporate action, or the surviving or acquiring corporation by merger or share exchange of that issuer.
- (2) "Dissenter" means a shareholder who is entitled to dissent from corporate action under section 13.02 and who exercises that right when and in the manner required by sections 13.20 through 13.28.
- (3) "Fair value," with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.
- (4) "Interest" means interest from the effective date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans or, if none, at a rate that is fair and equitable under all the circumstances.
- (5) "Record shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.
- (6) "Beneficial shareholder" means the person who is a beneficial owner of shares held in a voting trust or by a nominee as the record shareholder.
- (7) "Shareholder" means the record shareholder or the beneficial shareholder.

Official Comment

Section 13.01 contains specialized definitions applicable only to chapter 13....

- (2) The definition of "dissenter" in section 13.01(2) is phrased in terms of a "shareholder," a term that is itself specially defined in section 13.01(7)....

... Under this definition, a shareholder who initially objects but fails to perform any of these conditions within the times specified by this chapter loses his status as "dissenter" under this section.

- (3) The definition of "fair value" in section 13.01(3) leaves to the parties (and ultimately to the courts) the details by which "fair value" is to be determined within the broad outlines of the definition. This definition thus leaves untouched the accumulated case law about market value, value based on prior sales, capitalized earnings value, and asset value. It specifically preserves the former language excluding appreciation and depreciation in anticipation of the proposed corporate action, but permits an exception for equitable considerations. The purpose of this exception ("unless exclusion would be inequitable") is to permit consideration of factors similar to those approved by the Supreme Court of Delaware in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del.1983), a case in which the court found that the transaction did not involve fair dealing or fair price: "In our view this includes the elements of [rescissory] damages if the Chancellor considers them susceptible of proof and a remedy appropriate to all the issues of fairness before him." Consideration of appreciation or depreciation which might result from other corporate actions is permitted; these effects in the past have often been reflected either in market value or capitalized earnings value.

"Fair value" is to be determined immediately before the effectuation of the corporate action, instead of the date of the shareholder's vote, as is the case under most state statutes that address the issue. This comports with the plan of this chapter to preserve the dissenter's prior rights as a shareholder until the effective date of the corporate action, rather than leaving him in a twilight zone where he has lost his former rights, but has not yet gained his new ones.

- (4) The definition of "interest" in section 13.01(4) is included to make interest computations under this chapter more realistic. The right to receive interest is based on the elementary consideration that the corporation has the use of the dissenter's money, and the dissenter has no use of it, from the effective date of the corporate action until the date of payment....

§ 13.02 Right to Dissent

- (a) A shareholder is entitled to dissent from, and obtain payment of the fair value of his shares in the event of, any of the following corporate actions:
- (1) consummation of a plan of merger to which the corporation is a party (i) if shareholder approval is required for the merger by

§ 13.02 REVISED MODEL BUSINESS CORPORATION ACT

- section 11.03 or the articles of incorporation and the shareholder is entitled to vote on the merger or (ii) if the corporation is a subsidiary that is merged with its parent under section 11.04;
- (2) consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, if the shareholder is entitled to vote on the plan;
 - (3) consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder is entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;
 - (4) an amendment of the articles of incorporation that materially and adversely affects rights in respect of a dissenter's shares because it:
 - (i) alters or abolishes a preferential right of the shares;
 - (ii) creates, alters, or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the shares;
 - (iii) alters or abolishes a preemptive right of the holder of the shares to acquire shares or other securities;
 - (iv) excludes or limits the right of the shares to vote on any matter, or to cumulate votes, other than a limitation by dilution through issuance of shares or other securities with similar voting rights; or
 - (v) reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under section 6.04; or
 - (5) any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.
- (b) A shareholder entitled to dissent and obtain payment for his shares under this chapter may not challenge the corporate action creating his entitlement unless the action is unlawful or fraudulent with respect to the shareholder or the corporation.

Official Comment

1. Transactions Giving Rise to Dissenters' Rights

Section 13.02(a) establishes the scope of a shareholder's right to dissent (and his resulting right to obtain payment for his shares) by defining the transactions with respect to which a right to dissent exists. These transactions are:

- (1) A plan of merger if the shareholder (i) is entitled to vote on the merger under section 11.03 or pursuant to provisions in the articles of incorporation, or (ii) is a shareholder of a subsidiary that is merged with a parent under section 11.04. The right to vote on a merger under section 11.03 extends to corporations whose separate existence disappears in the merger and to the surviving corporations if the number of its outstanding shares is increased by more than 20 percent as a result of the merger.
- (2) A share exchange under section 11.02 if the corporation is a party whose shares are being acquired by the plan and the shareholder is entitled to vote on the exchange.
- (3) A sale or exchange of all or substantially all of the property of the corporation not in the usual course of business under section 12.02 if the shareholder is entitled to vote on the sale or exchange. Section 13.02(a)(3) generally grants dissenters' rights in connection with sales in the process of dissolution but excludes them in connection with sales by court order and sales for cash that require substantially all the proceeds to be distributed to the shareholders within one year. The inclusion of sales in dissolution is designed to ensure that the right to dissent cannot be avoided by characterizing sales as made in the process of dissolution long before distribution is made. An exception is provided for sales for cash pursuant to a plan that provides for distribution within one year. These transactions are unlikely to be unfair to minority shareholders since majority and minority are being treated in precisely the same way and all shareholders will ultimately receive cash for their shares. A sale other than for cash gives rise to a right of dissent since property sometimes cannot be converted into cash until long after receipt and a minority shareholder should not be compelled to assume the risk of delays or market declines. Similarly, a plan that provides for a prompt distribution of the property received gives rise to the right of dissent since the minority shareholder should not be compelled to accept for his shares different securities or other property that may not be readily marketable.

The exclusion of court-ordered sales from the dissenter's right is based on the view that court review and approval ensures that an independent appraisal of the fairness of the transaction has been made.

- (4) Amendments to articles of incorporation that impair the shareholders' rights as shareholders in any of the enumerated ways. The reasons for granting a right of dissent in these situations are similar to those granting such rights in cases of merger and transfer of assets. The grant of these rights increases the security of investors by allowing them to escape when the nature of their investment rights is fundamentally altered or they are compelled to accept cash for their investment in an amount established by the corporation. The grant also enhances the freedom of the majority to make changes, because the existence of an escape hatch makes fair and reasonable a change that might be unfair if it forced a fundamental

§ 13.02 REVISED MODEL BUSINESS CORPORATION ACT

change of rights upon unwilling investors without giving them a reasonable alternative....

Generally, only shareholders who are entitled to vote on the transaction are entitled to assert dissenters' rights with respect to the transaction. The right to vote may be based on the articles of incorporation or other provisions of the Model Act. For example, a class of nonvoting shares may nevertheless be entitled to vote (either as a separate voting group or as part of the general voting group) on an amendment to the articles of incorporation that affects them as provided in one of the ways set forth in section 10.04; such a class is entitled to assert dissenters' rights if the transaction also falls within section 13.02. On the other hand, such a class does not have the right to vote on a sale of substantially all the corporation's assets not in the ordinary course of business, and therefore that class is not entitled to assert dissenters' rights with respect to that sale. One exception to this principle is the merger of a subsidiary into its parent under section 11.04 in which minority shareholders of the subsidiary have the right to assert dissenters' rights even though they have no right to vote.

2. Exclusivity of Dissenters' Rights

Section 13.02(b) basically adopts the New York formula as to exclusivity of the dissenters' remedy of this chapter. The remedy is the exclusive remedy unless the transaction is "unlawful" or "fraudulent." The theory underlying this section is as follows: when a majority of shareholders has approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous, and persuades a court that this is correct. Since dissenting shareholders can obtain the fair value of their shares, they are protected from pecuniary loss. Thus in general terms an exclusivity principle is justified. But the prospect that shareholders may be "paid off" does not justify the corporation in proceeding unlawfully or fraudulently. If the corporation attempts an action in violation of the corporation law on voting, in violation of clauses in articles of incorporation prohibiting it, by deception of shareholders, or in violation of a fiduciary duty—to take some examples—the court's freedom to intervene should be unaffected by the presence or absence of dissenters' rights under this chapter. Because of the variety of situations in which unlawfulness and fraud may appear, this section makes no attempt to specify particular illustrations. Rather, it is designed to recognize and preserve the principles that have developed in the case law of Delaware, New York and other states with regard to the effect of dissenters' rights on other remedies of dissident shareholders. See *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del.1983) (appraisal remedy may not be adequate "where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross or palpable overreaching are involved"). See also *Voren-*

To: Mr. Ronald L. Willard
125 Blackwater Cr.
Penhook, VA 24137

COPY



NOTICE OF CLAIM AGAINST DISSOLVED CORPORATION

Moneta Building Supply, Inc. has filed Articles of Dissolution with the State Corporation Commission of the Commonwealth of Virginia which has issued a Certificate of Dissolution with an effective date of October 15, 1999. This notice is being provided to you pursuant to Section 13.1-746 of the Code of Virginia, 1950, as amended.

1. A description of the claim which you as claimant (either on your own behalf or for the benefit of the corporation or its stockholders) may be entitled to assert is as follows: Any claim for monies due, sums owed or other causes of action which may be asserted against Moneta Building Supply, Inc., its officers and/or directors.
2. The claim described in Paragraph 1 above is not admitted by the corporation.
3. The mailing address where a statement of claim may be sent is as follows:

Moneta Building Supply, Inc.
c/o Stephen W. Lemon, Esq.
Martin, Hopkins & Lemon, P.C.
P.O. Box 13366
Roanoke, Virginia 24033

4. A statement describing and setting forth any claim you wish to assert must be delivered by you to Moneta Building Supply, Inc. no later than 120 days from the date hereof.
5. The claim will be barred if written confirmation of the claim is not delivered by you to Moneta Building Supply, Inc. at the address set forth in Paragraph 3 by the deadline set forth in Paragraph 4:

MONETA BUILDING SUPPLY, INC.

By A.S. Cappellari
A.S. Cappellari, President

Date October 29, 1999

VIRGINIA:

IN THE CIRCUIT COURT FOR BEDFORD COUNTY

RONALD L. WILLARD,

Plaintiff,

v.

MONETA BUILDING SUPPLY, INC.,

Defendant.

Law No. 00-9745

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S DEMURRER,
PLEA OF RES JUDICATA AND PLEA OF THE STATUTE OF LIMITATIONS

In Ronald L. Willard's (Willard) reply to Moneta Building Supply's (MBS or Moneta) memorandum, he misreads Virginia's statute granting dissenters' rights. As he must, Willard argues that even if MBS planned to distribute the proceeds within a year (which it clearly did), he still had the right to dissent. However, neither the Virginia statute nor the Revised Model Business Corporation Act (on which Willard contends the Virginia statute was based) can be read in this manner. Accordingly, Moneta's demurrer should be sustained.

FILED IN THE CLERK'S OFFICE

BEDFORD COUNTY CIRCUIT COURT

The 22nd day of March 2000

TESTE: _____

Clerk

D.C.

As to Moneta's plea of the statute of limitations, Willard acknowledges that his case does not fit the pattern of claims previously held to constitute injury to property. Instead, he argues his claim should start a fourth category. Yet, the closest reported case to Willard's claim, Builders Supply Co. v. Brown, 24 Va.Cir. 369 (1991), compels a finding that Willard has suffered economic loss, not injury to property. Thus, Moneta's plea of the statute of limitations should be sustained.

Finally, Willard misstates the K & L Trucking definition of a cause of action as he "easily refutes" Moneta's plea of res judicata. The Court of Appeals of Virginia actually defines a cause of action as an assertion of legal rights (not the singular "legal right" as Willard claims) which has arisen out of a definable factual transaction. K & L Trucking Co. v. Thurber, 1 Va.App. 213, 220, 337 S.E.2d 299, 302 (1985); Plaintiff's Memorandum In Opposition To Defendant's Demurrer, Pleas Of The Statute Of Limitations, And Plea Of Res Judicata at 12 (hereafter plaintiff's memorandum at ____). The implication of the plural "legal rights" for Willard's argument is obvious. A discrete factual transaction can give rise to more than one legal right. All of these legal rights, however, are embodied into one cause of action, whether such rights are

asserted in a lawsuit or not. What is easily refuted, however, is Willard's claim that there is no identity of parties. Willard represented his individual interests in the prior litigation. He cannot object to the application of res judicata on this basis.

I. Moneta's Demurrer to Willard's Motion for Judgment

Virginia Code §13.1-730(A)(3) sets forth two scenarios in which a shareholder acquires dissenters' rights: (1) a sale of substantially all of the corporation's assets if the shareholder is entitled to vote, and (2) a sale pursuant to a dissolution on which the shareholder was entitled to vote. Section 13.1-730(A)(3) further provides, however, that dissenters' rights do not apply in "a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of the sale."

Willard argues that this limitation (a plan of distribution within one year) only applies to scenario (2), a dissolution sale and not scenario (1), a sale of corporate assets. According to Willard, even if MBS intended to disburse the proceeds of its sale within a year, he still acquired dissenters' rights under the first scenario. Section 13.1-370(A)(3), however, cannot be read

in this manner. These scenarios are joined together by the word "or" but there is no comma before or after the conjunction. This sentence does contain a comma, but it comes right before the provision which limits when a shareholder acquires dissenters' rights. One can only conclude that the General Assembly intended this provision (that dissenters' rights not apply to plans to disburse within one year) to apply to both scenarios.

Willard asserts that the Virginia Code section generally follows §13.02(a)(3) of the Revised Model Business Corporation Act. Section 13.02(a)(3), however, leaves no doubt that the limiting provision in Virginia Code §13.1-730(A)(3) applies to both a sale of assets and dissolution.¹

By the reading of §13.1-730(A)(3) set forth above, Willard must show MBS did not intend to disburse the proceeds within one year to acquire dissenters' rights. This Willard cannot do. Willard argues that absent the use

¹ Section 13.02 (a) (3) of the Revised Model Business Corporation Act provides as follows:

- (3) consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder is entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholder within one year after the date of sale;...

of the word "plan" and a specific time frame in the MBS notice of special meeting, MBS does not meet the one-year exception. Willard's arguments, however, are to no avail. It is clear from the MBS notice that "anticipated" set forth what MBS planned to do with the net proceeds. Moreover, Willard's claim that the notice must specifically provide for distribution within one year is a triumph of form over substance. The only reasonable construction of this language compels the conclusion that MBS planned to disburse the proceeds within one year. Accordingly, Moneta's special notice meets this one-year distribution requirement.

Finally, Willard argues that even if the MBS plan intended distribution within one year, MBS did not meet the deadline. This argument must also fail. Virginia Code §13.1-730(A)(3) only requires that a corporation must plan to disburse within a year; other circumstances beyond the corporation's control may delay the pay out. Willard's pleading does not allege, as it must for this argument to succeed, that MBS delayed distribution for improper reasons. The reason the allegation is missing is obvious. MBS did not disburse within a year because Willard tried to rescind the asset sale to Capps. Under these circumstances, Willard cannot complain about the delay. For these reasons,

Moneta's demurrer to Willard's motion for judgment should be sustained.

II. Moneta's Plea of the Statute of Limitations

Willard acknowledges that his case does not fall into the category of cases previously held to involve an injury to property. See Plaintiff's Memorandum at 7. His attempt to start a fourth category must fail. The closest reported case to Willard's claim is Builders Supply Co. v. Brown, 24 Va.Cir. 369(1991). The Builders Supply court applied Virginia's "catch-all" limitation to plaintiff's claim against a circuit court clerk. In Builders Supply, the clerk of court had failed to serve a confessed judgment on the judgment debtor with the notice required by Virginia Code §8.01-438. When plaintiff brought a creditor's suit to sell property owned by the judgment debtor, the court voided plaintiff's judgment lien because of the clerk's mistake.

Willard argues that Builders Supply was distinguishable based on language found in the Circuit Court's opinion:

For an injury to property, within the meaning of §8.01-243, the injury must be direct and immediate and not based upon personal financial damage. [citations omitted] To say that plaintiff's loss of its judgment by confession amounted to an injury to property would mean that the embodiment of its former chose in action

merged to judgment suffered an injury itself. Rather than the judgment sustaining an injury to itself, plaintiff's rights in it and the claim it embodied were loss (sic) or diminished things personal to plaintiff which are not injury to property. While plaintiff's action here is not one sounding in fraud, a personal action, ... if there was a breach of duty resulting in damages those damages affect underlying personal claims not property injury which claims plaintiff could still pursue within the remaining period of limitation.

Willard cannot distinguish his claim on this basis. Like plaintiff's judgment in Builders Supply, Willard's stock did not suffer an injury itself. At most, Willard's rights in his stock were lost or diminished, things personal to Willard. Moreover, the Builders Supply court emphasized that the injury must be direct and immediate to constitute injury to property. Moneta's failure to provide Willard with notice of his alleged dissenters' rights did not cause a direct and immediate injury to Willard's stock. According to Willard, his loss occurred, when after not receiving such notice, he failed to exercise his right to dissent.

Willard's reliance on the framework outlined in Brown v. American Broadcasting Co., Inc., 704 F.2d 1296 (4th Cir. 1983) is misplaced. According to Willard, the Brown court requires three factors to be present for a claim to be an injury to property:

the injury must be against and affect directly the plaintiff's property; the plaintiff must sue only for the direct injury; and the injury, to qualify as a direct injury, must be the very first injury which results from the wrongful act.

The application of these criteria, however, does not yield the conclusion that a five-year statute of limitation should apply; quite the contrary. As shown above, if anything, Willard's rights in his stock, not the stock itself was affected. In addition, Willard's economic loss was, at least, once removed from the alleged wrongful act, no notice from MBS. For these reasons, Moneta's plea of the statute of limitations should be sustained.

III. Moneta's Plea of Res Judicata

Willard contends that Moneta's plea of res judicata must fail because there is no identity of parties and his current lawsuit is not the same cause of action. As shown below, Willard is incorrect on both counts. For res judicata to apply, the parties to the first suit (or their privies) must be the same as the parties to the second suit (or their privies). Dotson v. Harman, 232 Va. 402, 350 S.E.2d 642 (1986). Privity requires that a party's interest be so identical with another that he represents the same legal right. Nero v. Ferris, 222 Va. 807, 284 S.E.2d 828 (1981). Willard's role in the first suit meets

this requirement. The first suit was styled, Ronald L. Willard, on behalf of Moneta Building Supply, Inc., and all its shareholders (emphasis added). Not only did Ron Willard represent the interests of the corporation, he also represented the interests of the shareholders, including his own. Willard selected the attorneys, he attended hearings and depositions, and he was present for all five days of the trial. Willard controlled the earlier litigation and, in it, he represented his individual interests. Under these circumstances, the requirement of identity of parties has been satisfied.

The previous lawsuit also subsumed Willard's current claim. As shown above, a cause of action is an assertion of particular legal rights which have arisen out of a definable factual transaction (emphasis added). A party may (and often does) have a choice of several legal theories to address a particular wrong. Willard's earlier lawsuit included a challenge to the procedures employed by MBS and its board of directors, but the essential wrong which Willard complained of is the same: the alleged sale of MBS's assets below market value.

Willard asserts that the value of MBS as a going concern was not an issue until Willard's current suit. See Plaintiff's Memorandum at 13. This, however, is incorrect.

In the earlier case, both Willard and the defendants (including MBS), offered extensive expert testimony on the value of MBS as a going concern. The fairness of Moneta's asset sale could not be determined without adjudicating the value of MBS as an operating business. The asset sale to Capps included a sum for the good will of the company. Willard offered expert testimony from Mr. John McLeod and Mr. Harry Schwarz. These witnesses testified or made an analysis of the asset sale as an ongoing business. Defendants offered expert testimony from Ms. Hope Player, Mr. Larry Lynch, and Mr. Vittorio Bonomo on the same issue. See excerpts of testimony from these witnesses collectively identified as Exhibit A.

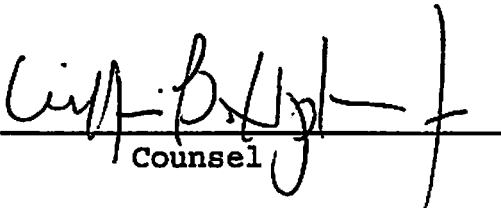
For these reasons, Willard's earlier case and his current claim are the same cause of action.

CONCLUSION

For the reasons stated above, this Court should
dismiss Willard's motion for judgment.

MONETA BUILDING SUPPLY, INC.

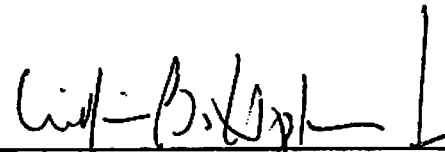
By


Counsel

William B. Hopkins, Jr.
MARTIN, HOPKINS & LEMON, P.C.
P. O. Box 13366
Roanoke, Virginia 24033
(540)982-1000 - telephone
(540)982-2015 - facsimile
Counsel for Moneta Building Supply, Inc.

CERTIFICATE OF SERVICE

I, William B. Hopkins, Jr., do hereby certify that a true and correct copy of the foregoing reply memorandum in support of defendant's demurrer, plea of res judicata and plea of the statute of limitations was mailed or caused to be delivered to Barrett E. Pope, Durette, Irvin & Bradshaw, P.C., 600 East Main Street, 20th floor, Richmond, Virginia 23219, counsel for plaintiff, Ronald L. Willard, on this 21st day of March, 2000.



William B. Hopkins, Jr.

COPY

EXHIBIT

A

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE
COUNTY OF BEDFORD

----- :
RONALD L. WILLARD, :
on behalf of Moneta Building :
Supply, Inc. and all its :
Shareholders, :
:

Plaintiff :
:

-vs- :
:

MONETA BUILDING SUPPLY, INC., :
et al, :
:

Defendants :
:
----- :

Law No. 97-18259

Volume 2

April 21, 1998
9:30 a.m.

HEARD BEFORE:

THE HONORABLE JAMES W. UPDIKE, JR.

CENTRAL VIRGINIA REPORTERS
P. O. Box 12628
Roanoke, Virginia 24027
(540) 380-5017

FILED IN THE CLERK'S OFFICE

BEDFORD COUNTY CIRCUIT COURT

The 22nd day of March, 2000

TESTE: _____

Ruth Thomason Clerk
b.c.

EXHIBIT A = 11 PAGES

1 A That is correct.

2 Q So you were trying to find the fair market
3 value as of September 30th, 1996, that would be the price
4 at which the ownership interest would change hands between
5 a willing buyer and a willing seller informed of the
6 relevant facts, neither being under compulsion to buy or
7 sell; isn't that true?

8 A That is correct.

9 Q And one purpose of such a valuation as you
10 did might be to assist someone like the judge here to
11 determine whether the offer made for the assets of Moneta
12 Building Supply of all the operating assets was a fair
13 one?

14 A Are we talking about assets or are we
15 talking about Moneta Building Supply, Inc.?

16 Q We are talking about operating assets of
17 Moneta Building Supply.

18 A As I stated previously, my engagement was
19 to value Moneta Building Supply, Inc.

20 Q So in this case the Judge is going to have
21 to make a determination as to whether or not the Asset
22 Purchase Agreement which sold the operation assets of
23 Moneta Building Supply, Inc. was fair and reasonable. Are
24 you saying your report is not helpful in that regard?

V I R G I N I A:

COPY

IN THE CIRCUIT COURT FOR THE
COUNTY OF BEDFORD

----- :
:
RONALD L. WILLARD, :
on behalf of Moneta Building :
Supply, Inc. and all its :
Shareholders, :
:
:
Plaintiff :
:
-vs- :
:
MONETA BUILDING SUPPLY, INC., :
et. al, :
:
:
Defendants :
----- :

Plaintiff

-vs-

MONETA BUILDING SUPPLY, INC.,
et. al,

Defendants

Law No. 97-18259

Volume 3

April 22, 1998
9:30 a.m.

HEARD BEFORE:

THE HONORABLE JAMES W. UPDIKE, JR.

P. O. Box 12628
Roanoke, Virginia 24027

CENTRAL VIRGINIA REPORTERS (540)380-5017

McLeod - Direct

1 THE COURT: 208 is the map.

2 MR. LOFTIS: 214 is the corrected.

3 THE COURT: Oh, that is correct, the
4 corrected sheet.

5 (The referred-to exhibits were entered into
6 the Record Plaintiff's Exhibits 208 and 214.)
7

8 MR. LOFTIS: Your Honor, I believe from
9 some of the colloquy among counsel there may have
10 been some problem hearing Mr. McLeod so let me
11 have him have restate something just for the
12 record.

13 THE COURT: All right.
14

15 BY MR. LOFTIS:

16 Q In terms of your review of Ms. Player's
17 report, with the corrections you have made, what did you
18 come up with as the value of Moneta Building Supply?

19 A On the Player report?

20 Q Yes, sir.

21 A On the Player report I came up with a range
22 of value of \$2,750,000 to \$3,200,000.

23 Q And as to the Lynch report, what were the
24 ranges of value?

McLeod - Cross

1 A The ranges of value there were
2 approximately 2.6 million to approximately 4.6 million.

3 Q Mr. McLeod, are those your opinions as to
4 value of the company based on the information you had
5 using the methodology that Ms. Player and Doctor Lynch
6 used?

7 A Using the methodology that they did, yes,
8 that is my opinion as to the value of this company.

9 MR. LOFTIS: Thank you, sir. I apologize,
10 Your Honor, I wanted to make sure that was clear.

11 MR. RAKES: Good morning, Your Honor.

12 THE COURT: Good morning.

13

14 CROSS EXAMINATION

15

16 BY MR. RAKES:

17 Q Good morning, Mr. McLeod.

18 A Mr. Rakes.

19 Q How are you doing today?

20 A Doing well, thank you.

21 Q At the time you were first contacted by
22 representatives of Mr. Willard back in November of 1996,
23 was David Cappellari an officer, director or employee of
24 Moneta Building Supply?

Ms. Player Direct

1 securities in your conclusions?

2 A No, sir, I did not.

3 Q Have you had a chance to review the asset
4 purchase agreement after closing?

5 A Yes.

6 Q Do you know whether it included cash and
7 marketable securities?

8 A No, sir, it did not.

9 Q Why did you choose this excess earnings
10 approach?

11 A Because I had been asked, David had asked
12 me to help him determine the value of the assets, a lot of
13 that based on representations made by him. His primary
14 concern was the value of the company as a going concern,
15 basically what is the good will, and the excess earnings
16 approach allows us to be able to do that.

17 The company has a good long history, it has
18 stable management in place, it has stable financial
19 records, it's in a mature market, it's a mature industry,
20 so the information was readily available and just lends
21 itself very easily to the excess earnings approach.

22 Q And as we sit here today are you
23 comfortable with having employed that approach?

24 A Yes, definitely.

Mr. Bonomo Direct

1 this market and share these profits.

2 Q I want you to focus on the question, your
3 opinion as to the fairness of the \$1,370,000 offer.

4 A Obviously I am skirting around the answer
5 to that question because--

6 Q But I am not going to let go of it.

7 A I know it. Usually when we do fair market
8 value we do it in terms of an arm's length transaction and
9 we talk about a valuation if we just threw it out into the
10 market. In this case you have a father/son relationship
11 for example, so even though you can get the business for
12 \$800,000, you wouldn't pay that, you wouldn't want to, you
13 would like to share some of that benefit you are going to
14 get by getting the business with your parents as I
15 understand the situation in this here, and I would say
16 that that \$500,000 he paid over and above what I thought
17 some other person should pay was probably worth it to him
18 and certainly was of benefit to the shareholders of the
19 company because they got more money. So I would say that
20 that was a fair price, I think anything over \$800,000 is a
21 fair price.

22 Q But you would say that the million three
23 that was actually paid was a fair price to the
24 corporation?

Mr. Bonomo- Direct

1 A Yes.

2 Q For the sale of the business?

3 A Yes.

4 Q Doctor Bonomo, I want to go back and touch
5 on one other thing and then I will let these other lawyers
6 ask you some questions. As you went through your charts--

7 MR. RAKES: By the way, before I forget it,
8 and I might, I move the admission of Exhibits 503
9 and 504 into evidence.

10 THE COURT: Any objections?

11 MR. POFF: No objection, Your Honor.

12 THE COURT: So admitted.

13 (The referred-to exhibits were entered into
14 the record as Defendants' Exhibits 503 and 504.)

15

16 BY MR. RAKES:

17 Q I want to go back and focus on two items,
18 and I know there is probably lots of explanations that can
19 be given for both, but could you briefly address as a
20 general proposition the importance of management, in
21 particular David Cappellari's importance to Moneta
22 Building Supply and the loss of him leaving, and then the
23 second part is I would like you to address again in a
24 capsule the issue of competition.

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HEARD BEFORE :

THE HONORABLE JAMES W. UPDIKE, JR.

CENTRAL VIRGINIA REPORTERS
P.O. Box 12628
ROANOKE, VIRGINIA 24027
(540) 380-5017

1 THE COURT: All right, the qualifications of
2 the witnesses is accepted as an expert as
3 stated.

4 MR. FENNEL: Thank you, your Honor.
5

6 BY MR. FENNEL:

7 Q Dr. Lynch, can you describe to the court the
8 purpose for which you were hired as an expert in this case?

9 A Yes, I was called to give my opinion as to
10 whether an asset purchase agreement that had been offered
11 for the purchase of Moneta Building Supply was in fact a
12 fair and reasonable offer.

13 Q What steps did you take to determine whether
14 that was a fair and reasonable offer?

15 A When I applied business valuation techniques
16 to the financial statements available through September 30,
17 1996 on Moneta Building Supply, after I evaluated the
18 business from the standpoint of generally accepted
19 techniques I then also priced out the asset purchase
20 agreement and compared the two prices to see in fact they
21 were in the ballpark.

22 Q You mentioned the valuation of a business as
23 a going concern, can you describe that briefly to the
24 court?

1 A Certainly, the assumption in the going
2 concern value is that the business would continue to
3 operate and the owners prior to any of these transactions
4 that have brought us to court still have a claim of
5 ownership in a company that was operating and was a going
6 concern.

7 In this particular case there was some strong
8 positives and strong negatives as to whether or not that
9 company would continue in the future at the point that I
10 was asked to consider was the point at which the asset
11 purchase agreement was dated which was September 30th.

12 So I valued the company as a going concern as of
13 that date and compared that to the value of the asset
14 purchase agreement.

15 MR. FENNEL: May I have permission to
16 approach the witness, your Honor?

17 THE COURT: Certainly.

18
19 BY MR. FENNEL:

20 Q Dr. Lynch, I show you a document that has
21 been identified previously as Exhibit 70.

22 Can you identify that document, please?

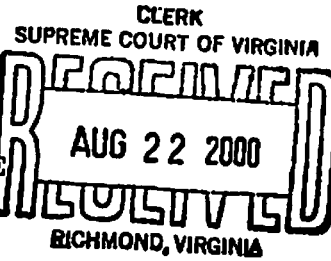
23 A Yes, this is a letter and report that I sent
24 to Lee Osborne dated December 12, 1996 and attached to that

002354

V_I_R_G_I_N_I_A

ORIGINAL

IN THE CIRCUIT COURT FOR THE
COUNTY OF BEDFORD



RONALD L. WILLARD,

Plaintiff

-vs-

MONETA BUILDING SUPPLY, INC.,
a Virginia corporation,

Defendant

CASE NO. CL9745-00

MARCH 28, 2000

HEARD BEFORE:

THE HONORABLE JAMES W. UPDIKE, JR.

CENTRAL VIRGINIA REPORTERS

P.O. BOX 12628

ROANOKE, VIRGINIA 24027

FILED IN THE CLERK'S OFFICE
BEDFORD COUNTY CIRCUIT COURT

the 28 day of July 2000

TESTE

Clerk

D.C.

CENTRAL VIRGINIA REPORTERS (540) 380-5017

1 APPEARANCES:

2 DURRETTE, IRVIN & BRADSHAW
3 Richmond, Virginia

4 BY: BARRETT E. POPE and WYATT B. DURRETTE, JR., ESQS.

5 Counsel on behalf of the Plaintiff

6 MARTIN, HOPKINS & LEMON
7 Roanoke, Virginia

8 BY: WILLIAM B. HOPKINS, JR., ESQ.

9 Counsel on behalf of the Defendant
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1 The following cause came on to be heard before The
2 Honorable James W. Updike, Jr., Judge of the Circuit Court
3 of Bedford County, sitting at Bedford, Virginia, at 11:00
4 A.M., on this, the 28th day of March 2000.

5 Roxane Ray, RPR, Court Reporter, was duly sworn, and
6 the following took place:

7
8 THE COURT: This is the matter of Ronald L.
9 Willard versus Moneta Building Supply. Moneta
10 Building has filed a demurrer, special plea of res
11 judicata, statute of limitations. I understand
12 collateral estoppel is not to be addressed today.

13 MR. HOPKINS: That's correct, Your Honor.

14 THE COURT: Counsel, I have read the
15 memorandum that you had submitted and generally
16 familiarized myself with the cases. I appreciate
17 counsel having forwarded those documents to me in
18 advance. With that, Mr. Hopkins, are you ready to
19 proceed?

20 MR. HOPKINS: Yes, sir, Your Honor.

21 THE COURT: And the plaintiff is ready as
22 well?

23 MR. POPE: We are, Your Honor.

24 THE COURT: All right, Mr. Hopkins.

1 MR. HOPKINS: Briefly, I'll provide a little
2 bit of factual background. I know that very little
3 is necessary for the court, but it will help set up
4 the arguments.

5 Moneta Building Supply, as the court knows, is
6 a building supply company here in Bedford. Ron
7 Willard, the plaintiff in the case, was a 20 percent
8 shareholder in that company. The Cappellari family
9 held 80 percent. 75 percent was held by the parents
10 and 5 percent by David Cappellari.

11 David Cappellari announced his intention of
12 withdrawing from the company. As a result of that
13 withdrawal, the majority shareholders and the board
14 of directors sought and obtained a sale of assets of
15 the company, sale of the operating assets. Notice
16 was provided to the shareholders that an asset sale
17 would be voted on at a meeting. I believe it was
18 scheduled for December 20, 1996.

19 The notice provided that the company
20 anticipated that after deduction of expenses and
21 liabilities that the proceeds from the sale would be
22 provided to the shareholders on a pro rata basis.
23 The notice -- as the paperwork shows, the sale was
24 for cash, and the sale was to a company held by --

1 owned by David Cappellari in the name of Capps
2 Building Supply.

3 One of the allegations in the motion for
4 judgment is that the sale of assets was below -- well
5 below the fair market value and it was unfair to the
6 shareholders.

7 This current case is premised on Mr. Willard's
8 contention that he was qualified for dissenters'
9 rights, that no notice was given to him of his
10 dissenter's rights, that as a result of not receiving
11 that notice he did not exercise his right to have the
12 assets valued, his stock valued in a court
13 proceeding, and that as a result of that he lost a
14 significant amount of money.

15 He has sued for a million dollars. I'm not
16 sure what his evidence, obviously, will show. He
17 will try to show what his losses were.

18 We raised three points brought up for hearing
19 for today. We demurrer to the motion for judgment.
20 We assert, in any event, that the motion for judgment
21 is after the running of the statute of limitations.
22 And the third issue that we brought on for hearing
23 today is that this case is barred by the prior
24 litigation between the parties, a case brought by

1 Mr. Willard as a derivative suit on behalf of the
2 corporation and on behalf of the shareholders,
3 including himself.

4 I'll deal with the issues in the orders
5 briefed. First off, on the demurrer, the applicable
6 code sections, Your Honor, are 13.1-730(3)(A) and the
7 then the code section relating to when notice is
8 required, which is 13.1-732.

9 Now, (3)(A) provides that there are
10 dissenters' rights under two scenarios. One, where
11 there is a sale of assets or substantially all the
12 assets of the corporation other than in the ordinary
13 course of business. Or, two, in a dissolution, when
14 a sale -- when the corporation is being dissolved.

15 Now, the first, really, bone of contention
16 between Mr. Willard and Moneta Building Supply is the
17 interpretation of this statute. Mr. Willard contends
18 that the exceptions set out in the statute that take
19 away the dissenters' rights, and the exceptions are
20 sale pursuant to a court order or sale where the net
21 proceeds will be disbursed within a year of the sale,
22 only apply in a dissolution scenario, that they do
23 not apply where there is a sale of substantially all
24 the assets other than in the ordinary course of

1 business absent a dissolution.

2 So, if I understand Mr. Willard's argument
3 correctly, they contend that if there was a sale of
4 assets other than in the ordinary course of business
5 and there is no dissolution, it doesn't matter if the
6 parties contemplated or planned to disburse the
7 proceeds within a year, that the dissenters' rights
8 kick in and he was entitled to have his stock valued
9 at a proceeding pursuant to the dissenters' rights
10 statute.

11 We would submit to the court that that's an
12 incorrect ruling of the statute. Obviously, the best
13 place to go in interpreting the statute is the
14 language of the statute itself. As the court will
15 note, the two scenarios are separated by the word
16 "or". There is no comma before the word "or" or
17 after the word "or" that would set it off from the
18 part that sets up the exception.

19 So the statute provides sale of assets or
20 dissolution provided, comma, provided it shall not
21 apply if it's pursuant to the court order or if the
22 net proceeds are disbursed within a year.

23 We would submit to the court that the only
24 fair reading of the statute is that those two

1 exceptions apply to both scenarios, and I would
2 submit to the court it would be very unusual to have
3 a situation where you would sell all the assets of
4 the corporation, disburse the proceeds, and not
5 dissolve, but that can be done.

6 But I would submit to the court that, in that
7 event, as long as the proceeds are disbursed within a
8 year, that assures that all the shareholders are
9 treated in a similar manner, both the majority and
10 the minority. So the reason for the exception that
11 is in the statute would apply equally, I would submit
12 to the court, in the scenario where you have a sale
13 of assets and the scenario where you have a
14 dissolution.

15 Now, this point is probably more important for
16 the demurrer than it may be should we be proceeding
17 down the line because by the face of the pleading we
18 submit, Moneta Building Supply submits, it is clear
19 that Moneta Building Supply contemplated a sale of
20 assets for a cash sale to be disbursed within a year.

21 Now, Mr. Willard complains that we did not use
22 the magic language of we intend to disburse within a
23 year, but I would submit to the court that the only
24 fair reading of the language used in the special

1 notice was that that was the plan.

2 I think the specific language was that Moneta
3 Building Supply anticipated after paying any
4 liabilities and holding back reserves for any
5 contingent liabilities that the net proceeds would be
6 disbursed to the shareholders. There is no mention
7 in the notice of any delay, any time frame that they
8 would hold the assets. I would submit that the only
9 fair reading is that it would be done in a year.

10 Mr. Willard also complains, well, okay, even
11 if your plan was to disburse within a year, you
12 didn't disburse within a year. And, therefore, the
13 dissenters' rights kicks in. I would counter with
14 the statement, Your Honor, that the statute
15 contemplates that that's what your plan is. Clearly,
16 there can be circumstances beyond the control of the
17 corporation and others that can put that plan aside
18 or force that plan to be held on delay.

19 If that's the case, I think it's Mr. Willard's
20 duty to plead that in his motion for judgment that,
21 yes, there was a plan, but the corporation improperly
22 did not follow its plan and, therefore, I have
23 dissenters' rights.

24 It's interesting because that would be a way

1 that someone not entitled to dissenters' rights would
2 probably acquire them. Corporation selling assets,
3 plans to disburse. You bring a lawsuit challenging
4 it. As most lawsuits do, they go beyond a year. The
5 corporation is put between a rock and a hard place as
6 to whether it disburses or not while the case is
7 pending.

8 If Mr. Willard's reading of the statute is
9 corrected, that would be a way a minority shareholder
10 could acquire dissenters' rights when really there
11 would be no need and no justice in granting
12 dissenters' rights to that shareholder.

13 So I would submit to the court that what the
14 statute requires is that you have a plan to disburse
15 within a year. If you don't meet that plan, you
16 better have a good excuse. But for the purposes of
17 the dissenters' rights, you only have to have the
18 plan.

19 Now, the reason Mr. Willard does not allege
20 that we improperly didn't disburse is it's fairly
21 obvious the reason we didn't disburse. This is
22 beyond the pleading, Your Honor. It's not necessary
23 for today's purposes to get into this, but there was
24 a suit brought to rescind the sale. The corporation

1 didn't disburse and didn't want to disburse until,
2 obviously, after the suit had been resolved. Once
3 the suit was resolved, then the corporation
4 proceeded.

5 But I would submit to the court that on the
6 face of a pleading it demonstrates that the plan was
7 to disburse within a year, really before then. The
8 statute only accords dissenters' rights when you have
9 a sale of assets and the plan is not to disburse
10 within a year.

11 The duty to give notice only kicks in when
12 there are dissenters' rights. The statute is a
13 little confusing when it uses the word "are" or "may
14 have" dissenters' rights, but it's clear when you
15 read the statute that the duty to give notice only
16 kicks in if the corporate action creates dissenters'
17 rights.

18 I submit to the court on that basis that the
19 demurrer should be sustained and Mr. Willard's
20 pleading should be dismissed.

21 The second issue that we raised is the statute
22 of limitations. The two statutes that are important
23 here are 243 and 248. I believe 243 is the statute
24 that sets out that there is a five-year statute for

1 injury to property. 248 provides that there is no
2 other limitation. Now, there is a two-year statute
3 of limitation.

4 I set out for you a little bit of the history
5 on how these statutes have evolved over the last
6 twenty years. But for our purposes today, if it's an
7 injury to property, it's five years. If there is no
8 other category, it's two years. Apparently,
9 Mr. Willard agrees that if it's not an injury to
10 property, it doesn't fit any other category and it
11 would be governed by the two-year statute.

12 Now, looking at the cases that have dealt with
13 what is an injury to property, I think it is fair --
14 I submit to the court that it's fair to put them into
15 three categories. And, no, Moneta Building Supply
16 does not suggest that there cannot be a fourth
17 category. We would submit that this case does not
18 form a fourth category.

19 The three categories are: Some sort of
20 exercise or dominion of control over property.
21 Second category would be actually doing physical
22 damage to the property. The most obvious example
23 would be a collision involving your vehicle. You
24 have five years to bring an action for the property

1 damage to your vehicle. And the third would be
2 interference with a recognized property right. Those
3 are the three categories that really cases involving
4 an injury to property have fit into.

5 I would submit to the court that Mr. Willard
6 does not fit into any of those categories. I would
7 also submit to the court that when you examine
8 Mr. Willard's claim that his claim should not create
9 a fourth category.

10 Probably the most helpful case that we have
11 found on the issue of injury to the property is the
12 Builders Supply versus Brown. In Builders Supply the
13 plaintiff had a cause of action against the
14 defendant, obtained a confessed judgment. The clerk
15 failed to give notice that she was required to do
16 under the confessed judgment statute to perfect the
17 judgment.

18 Plaintiff had docketed his judgment and had it
19 challenged by the judgment debtor on that basis, and
20 the trial court held -- Circuit Court of Richmond
21 held that that was not an injury to property, that
22 that involved -- really didn't fit in any category,
23 that what the plaintiff was really talking about was
24 economic loss, not injury to property. And as a

1 result, the two-year statute of limitations applied.

2 Moneta Building Supply would submit to the
3 court that the statute of limitations of five years
4 is inapplicable. One, no actual damage or injury was
5 done to the stock itself. Mr. Willard complains
6 about being deprived of his right to notice. I would
7 submit to the court that that did not cause any
8 injury or damage to the stock.

9 The second problem Mr. Willard has with his
10 argument is there has got to be direct and immediate
11 impact between the wrongful act and the injury. I
12 would submit to the court that there is a gap there.
13 There is a delay there. There is a space there
14 between the wrongful act that he complains of, the
15 failure to get notice, and the ultimate injury, and
16 that is the sale of assets below market value
17 thereby, according to Mr. Willard, decreasing the
18 value of the stock.

19 So I would submit to the court, Your Honor,
20 that Mr. Willard's claim is barred by the statute of
21 limitations. The sale was closed January '97. This
22 action was brought approximately three years later.
23 The catch-all statute under 8.01-248 is a two-year
24 statute, and thereby Moneta Building -- Mr. Willard's

1 claim as set forth in this motion for judgment is
2 barred by the statute.

3 The third area, Your Honor, is res judicata.
4 A connected or a related doctrine is collateral
5 estoppel. We have not brought collateral estoppel on
6 for hearing primarily because we would submit that
7 these other defenses will abort Mr. Willard's claim.

8 Moreover, collateral estoppel at this stage of
9 the proceeding would not be dispositive. It would
10 probably end the litigation or it should end the
11 litigation, but it would not be dispositive. So we
12 have not brought that on here.

13 Res judicata, the two biggest issues on that
14 on which we disagree with Mr. Willard is it has to
15 involve the same parties and the same causes of
16 action.

17 On the issue of same parties, the parties do
18 not have to be identical, but it has to be the same
19 parties or their privies. Privies is defined as that
20 your interest in the litigation is so identical to
21 the other party that you essentially are representing
22 the same legal right. I would submit to the court
23 under the circumstances of this case that the test is
24 met.

1 Mr. Willard brought a derivative action on
2 behalf on the corporation and on behalf of the other
3 shareholders. Obviously, the other shareholders
4 included himself. He has brought, in his individual
5 capacity, the current case, the dissenters' rights
6 litigation.

7 I would submit to the court that under the
8 circumstances Mr. Willard had been in control of the
9 litigation. He's the one that brought the
10 litigation. He's the one that attended all the
11 proceedings. He essentially called all the shots in
12 the prior litigation.

13 And if not representing precisely himself, he
14 was acting on behalf of himself. The requirement of
15 privity has been met in this case and should be met
16 in that the same parties are involved, Ron Willard in
17 the first case, Ron Willard in the second case.
18 There would be, I would submit, no reason or justice
19 in not applying that the same party is involved under
20 the facts of this case.

21 The second aspect of res judicata, which is a
22 little harder to get your arms around because it's --
23 if you go to the restatement and you go to the cases,
24 it's just not as clear cut as what you would like.

1 But it has to involve the same cause of action.

2 We would submit that the evidence -- the
3 primary evidence in both cases is the same, and that
4 is that the sale of assets was below fair market
5 value. Mr. Willard will try to show that the sale of
6 the assets, including the operating assets, including
7 the goodwill of the company as an ongoing business in
8 the first litigation, was well below fair market
9 value. That evidence is essential to his case in the
10 second -- in the case he has before us today.

11 There is language in the restatement that the
12 fact that you have different theories available to
13 you does not preclude from a holding that it's the
14 same cause of action, but I would submit to the court
15 that the first cause of action would have as a subset
16 of it the dissenters' rights case, which is what is
17 before the court here, that we met the test of the
18 res judicata.

19 On that basis, an additional basis really,
20 Mr. Willard's motion for judgment should be
21 dismissed. Thank you, Your Honor.

22 THE COURT: All right. Mr. Pope.

23 MR. POPE: May it please the court, I am
24 Barrett Pope and I will be addressing the issues

1 pertaining to the demurrer that has been filed by the
2 defendant. My colleague, Wyatt Durette, will be
3 addressing the issues of the plea of statute of
4 limitations as well as the plea of res judicata.

5 Mr. Hopkins is correct in that one of the
6 fundamental differences in our position is how each
7 side uses Section 13.1-730(A)(3), which sets forth,
8 we believe, two scenarios among other scenarios which
9 qualify a shareholder to have dissenters' rights, a
10 right to dissent from a proposed transaction or set
11 of events.

12 I will walk the court through sections that I
13 know the court has already looked at, and I apologize
14 for having to focus this intently on the language,
15 but it's critical that we do that when we draw a
16 comparison both to the model act on which this
17 section is largely drawn as well as the official
18 comments to the act, because we can see that the
19 foundation upon which the Virginia scheme is built
20 accords dissenters' rights in two scenarios and takes
21 great pains to show that the idea of a court-ordered
22 sale or a transaction for all cash with distribution
23 to be done within a year applies only to the second
24 of those two scenarios and not the first.

1 If we look at the Virginia section, it states
2 that among the bases upon which a shareholder is
3 entitled to dissent is where there is a consummation
4 of a sale or exchange of all or substantially all of
5 the property of the corporation if the shareholder
6 was entitled to both, and that is precisely what was
7 noticed up in the letter from Mr. Cappellari to
8 shareholders and in the attached notice that came
9 from Mr. Cappellari as president of Moneta, which are
10 Exhibits 1 and 2 to our motion for judgment.

11 Then the statute says or, and it uses the word
12 "or", where you have a sale or exchange -- note that
13 it doesn't say all or substantially all of the
14 property, merely a sale or exchange -- that's in
15 furtherance of dissolution provided that such rights,
16 and we believe that refers to in the dissolution
17 scenario only, do not obtain or shall not apply if
18 you have a sale or exchange pursuant to a court order
19 or if you have a sale for cash where there is a plan
20 by which the proceeds are going to be distributed
21 within one year.

22 Now, both the code commission commentary as
23 well as the joint bar committee commentary state that
24 Section 730 of the Virginia Code generally follows

1 the counterpart section that is Section 13.02, Other
2 Revised Model Business Corporation Act, which I'll
3 refer to as the model act.

4 If you look at the language in the model act,
5 and this appears in the defendant's reply brief at
6 Page 4 and it's Footnote 1, it's worded somewhat
7 differently. So there is a difference between the
8 Virginia statute and the model act.

9 The model act's counterpart says that where
10 you have a consummation of a sale or exchange of
11 substantially all or all of the property, then the --
12 other than in the usual course of business, including
13 a sale in dissolution, but not including a sale
14 either pursuant to court order or where it's an all
15 cash transaction with proceeds to be distributed
16 within a year.

17 So I suggest to the court that the general
18 assembly in enacting Section 13.1-730(A)(3) put even
19 more distance between scenario one and scenario two,
20 which includes the exceptions to scenario two, than
21 did the draftsman of the model act.

22 In spite of that difference, and I don't
23 believe there is any disagreement between the parties
24 on what I'm about to say, the official comments to

1 that portion of the model act establish the true
2 scope of dissenters' rights under these two
3 scenarios. And I am quoting from our brief at Page 4
4 over to Page 5, and this is really the centerpiece of
5 our argument on this particular point.

6 Note that the official comments in
7 interpreting Section 13.02 state that these
8 transactions are, and then they list, and it says a
9 sale or exchange of all or substantially all of the
10 property of the corporation not in the usual course
11 of business under 12.02 if the shareholder is
12 entitled to vote.

13 Then it goes on to say that Section
14 13.02(A)(3) generally grants dissenters' rights in
15 connection with the sale in the process of a
16 dissolution, but, but, excludes them in connection
17 with sales by court order or sales for cash where
18 there is going to be distribution within a year.

19 So the official comments to the model act
20 section upon which our law is based clearly link this
21 court-ordered scenario or cash sale with the
22 distribution-within-one-year scenario to the
23 dissolution environment but not to the sale of all or
24 substantially all of the assets.

1 This is really unchallenged by Moneta in their
2 submissions to the court. There is no way, there is
3 no way to reconcile the official comments to this
4 section of the model act with the defendant's
5 position on the issue of the demurrer. They are
6 absolutely irreconcilable.

7 The model act says that these two exceptions
8 that fail then to trigger dissenters' rights are
9 limited to the dissolution scenario, and that's
10 absolutely at odds with Moneta's position on this
11 point.

12 Now, why does it make sense to interpret the
13 Virginia statute in the way that we urge this court
14 to interpret it? It's a fair question for anyone to
15 ask, and it's essentially for this reason. In the
16 first scenario where you have a sale of all or
17 substantially all of the assets of a corporation, not
18 in a dissolution context, mind you, but with a going
19 concern, for whatever reason it may be proposed,
20 that's probably the most significant event that a
21 corporation can experience.

22 If the corporation, which is a going concern
23 not in dissolution, is proposing to sell all of its
24 assets or substantially all of its assets, that is a

1 significant development to which minority rights,
2 dissenters' rights, logically attach.

3 We can compare that to the different scenario
4 where we have a plan of dissolution, and this is
5 where I go back to how I focused the court's
6 attention earlier. It doesn't say that the sale or
7 exchange in that scenario involves all of the assets
8 or substantially all of the assets. Indeed, it can
9 involve a minor asset. Then, if that's the case,
10 less dignity is going to attach to according
11 dissenters' rights.

12 If there is a plan of dissolution and the
13 corporation is essentially going out of business,
14 liquidating assets, paying off creditors, and
15 disbursing whatever is left, if any, to shareholders,
16 then the train has sort of left the station and there
17 is not as much that a dissenter ought to be able to
18 do in that context.

19 That's especially true where there is a
20 court-ordered sale and there is some logical
21 expectation that there is fairness attached to the
22 sale if the court has been involved and the court has
23 ordered it or where you have a clean prompt
24 transaction for all cash for distribution within a

1 year.

2 Now, note that if it's not court ordered and
3 it's not for all cash with distribution in a year,
4 even if it's in a dissolution and even if it's not
5 all or substantially all of the assets, dissenters'
6 rights do attach. They do attach.

7 Now, if the court opts to interpret the
8 statute the way that Mr. Willard urges him to do so,
9 there is no question that we have satisfied scenario
10 number one. This involved a proposed sale of
11 substantially all of the assets of Moneta. That
12 language appears on the face of the letter that was
13 sent out. So there is no question that that's what
14 this sale involved. And if the court adopts our
15 interpretation, we have satisfied scenario one. End
16 of story on the demurrer.

17 However, even if we look to number two, even
18 if not all of the assets were being sold or not
19 substantially all of the assets were going to be
20 sold, we still survive for essentially two reasons.
21 Number one, there was no indication that there was an
22 actual established plan in place as far as any sort
23 of dissolution is concerned.

24 If the court looks at the second exhibit to

1 our motion for judgment, this is the notice of the
2 special meeting. And in the fifth paragraph toward
3 the middle, it states, It is anticipated, it is
4 anticipated, that the net proceeds, after deduction
5 for outstanding liabilities and a reasonable reserve
6 for future liabilities, will then be distributed.
7 Doesn't say the word "plan", and I'm not playing a
8 semantics game mere.

9 There are differences in an anticipation which
10 has an air of uncertainty to it, an air we would like
11 to do this, we anticipate doing this, but we really
12 don't know that we're going to do this on the one
13 hand, versus a plan that's been voted on either by
14 the board of directors or the shareholders themselves
15 that says this is what we're going to do.

16 Secondly, there is no commitment to a
17 dispersal within one year. Interestingly enough, on
18 Page 10 of the defendant's opening brief, they admit
19 that.

20 They admit that neither the letter that went
21 from Mr. Cappellari, which is the first exhibit to
22 our motion for judgment, nor the notice which
23 accompanied the letter, which is the second exhibit
24 to our motion for judgment, state on their face that

1 a distribution will be made within one year. The
2 time frame is sound. In terms of a precise deadline,
3 there is silence. There is no indication.

4 Now, Moneta's position is essentially that
5 shareholders like Mr. Willard or shareholders in
6 other corporate disputes ought to somehow make
7 assumptions as to what is planned or what is
8 anticipated and they ought to make assumptions or
9 draw inferences as to time frames that are involved.

10 I suggest to the court that this whole
11 legislative scheme does not compel that. It's not
12 designed to do that. Why? Well, essentially two
13 reasons.

14 Number one, the burden on the corporation is
15 really very light. If the corporation wants to
16 comply with the law, all it has to do is through its
17 board of directors propose and adopt an actual plan.
18 Nothing difficult about that. There was certainly
19 nothing difficult about doing that in this case.

20 And, secondly, the notice has to be worded in
21 accordance with the law. If there is going to be a
22 distribution within one year, say so. That's not
23 hard. That's not burdensome. That's not difficult
24 for a corporation to comply with. That wasn't done

1 here.

2 Secondly, the expectation that the minority
3 shareholder will receive the true intent -- the true
4 stated intent of the corporation is consistent with
5 sort of a quid pro quo of how dissenters' rights
6 legislation came about.

7 Originally, as the court undoubtedly is aware,
8 at common law minority shareholders had virtual veto
9 power over anything out of the ordinary course of
10 business. If a corporation at common law wanted to
11 do something outside of opening the doors for sales
12 that day, there had to be unanimity among the
13 shareholders. This, in essence, paralyzed
14 corporations. They couldn't act when there was a
15 dissenting shareholder outside of ordinary business.

16 So state legislatures addressed that problem
17 by enacting a statute that would permit boards of
18 directors and eventually shareholders to accomplish
19 certain things through the corporation outside the
20 ordinary course of business without getting unanimity
21 among the shareholders themselves. It, in essence,
22 was a legislated effort to cancel the veto power that
23 a minority interest had at common law.

24 The problem was that that spawned what later

1 became known as freeze-out actions. Once armed with
2 the ability to overcome the veto power that the
3 minority shareholder had at common law, majority
4 shareholders found creative ways to freeze out the
5 minority shareholders.

6 So that gave rise to, in essence, the
7 dissenters' rights legislation, which said the
8 pendulum has now swung too far the other way. At
9 first the minority shareholder had veto power. Now
10 they are being squeezed out. There is freeze out.
11 We will craft legislation that accords them
12 dissenters' rights so that if they don't want to go
13 along with something out of the ordinary, then they
14 can fix the value of their shares, be redeemed, and
15 they can go on their separate way.

16 To that extent this legislative scheme is
17 remedial in nature, and it ought to be interpreted
18 liberally, in essence, to suppress the mischief that
19 was being sought to be cured and to advance the
20 remedy.

21 The mischief is a majority being able to
22 squeeze or otherwise trample upon the rights of a
23 minority, the remedy being there is a way to value
24 the shares of a minority shareholder then and there,

1 and he, she, or it can be redeemed and the
2 conflicting parties can go their separate ways.

3 So, in summary, Your Honor, we believe that a
4 close look at the statute yields the inescapable
5 conclusion that the two factors that follow i and ii
6 apply just to the second scenario and not the first.

7 It really makes sense from this standpoint,
8 and I will close with this unless the court has
9 questions. We have on the one hand a situation like
10 this where all or substantially all of the assets of
11 the corporation are going to be sold, extraordinary
12 development. We have a scenario where there is
13 dissolution and any old asset may be sold.

14 If Moneta's position is correct, either of
15 those two scenarios which do not sit on the same
16 plane of importance can be trumped by the language
17 that follows, that if there is a court-ordered sale
18 that that would trump the first scenario just as it
19 would trump the second. Or if it's an all cash
20 transaction with a stated distribution to occur
21 within one year, that too would trump either of those
22 scenarios.

23 I submit to the court that those two scenarios
24 do not occupy the same level of dignity. The first

1 one is a far more significant, a far more serious,
2 matter than the second. And, therefore, it should
3 not be trumped or gutted by these exceptions as they
4 would trump or gut the second.

5 We believe we have satisfied scenario one. We
6 believe in the alternative we satisfy scenario two.
7 Thank you, Your Honor.

8 THE COURT: All right. Mr. Durette.

9 MR. DURRETTE: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. DURRETTE: Obviously, what my colleague,
12 Mr. Pope, had to pull was a good deal more
13 complicated than the two that I have. But I have
14 worked in both of these areas fairly extensively, so
15 it was something that was familiar to me, and Barrett
16 was kind enough to let me come along with him and
17 argue part of it.

18 Let's start with, on the statute of
19 limitations argument, what we agree on. What we
20 agree on is that the stock is intangible personal
21 property. So we start with that, and that is a point
22 of agreement.

23 The other points of agreement are that we both
24 cited all the same cases. We found all the same

1 cases. There are no surprises. Neither of us can
2 pull a case out of the hat and walk in this morning
3 and say, Here it is, Judge. Follow this case. So we
4 know what the cases are and we know that the stock is
5 intangible personal property.

6 So the question before the court is is the
7 failure to follow the proper procedure and accord
8 dissenters' rights an injury to property or does it
9 fall under the catch-all section. The two sections
10 of the code are agreed upon as well. Obviously,
11 that's where we part company.

12 I believe that the proper analogy or analysis
13 of the cases is a relatively bright line, which I
14 found myself coming to that conclusion somewhat
15 surprisingly. But I think the bright line is that
16 where the two-year statute applies as the catch-all
17 is in those circumstances where there is absolutely
18 no impact on the property interest in question by
19 reason of the misconduct, but the impact is on the
20 -- either the mind or the attitude or the perception
21 of the individual.

22 If you look all of the cases, that is almost
23 uniformly the distinction. Nothing happens to the
24 underlying asset, if you will. If you look at

1 Pickett, the real estate was unaffected by the fraud.
2 It was the same piece of property before and after.
3 The only thing that was affected was the owner's
4 perception of value because he was defrauded.

5 The Vines case, the transfer of stock, the
6 stock was transferred based upon a misrepresentation
7 or a breach of duty. The stock was the same stock,
8 same value before and after. What changed was the
9 perception of the circumstances under which the
10 transfer occurred.

11 If you look at the Builders Supply Case, which
12 was mentioned specifically by Mr. Hopkins, the
13 underlying claim and judgment was completely
14 unaffected. What was affected was an enforcement
15 mechanism, the use of a confessed judgment to perfect
16 the claim, but the claim was still there unaffected
17 and could still be pursued, as Judge Hughes pointed
18 out.

19 Now, it is correct, as Mr. Hopkins argues,
20 that this misconduct and resulting property loss is
21 somewhat different than an automobile accident or a
22 trespass on land or a conversion of funds. But it is
23 an injury to property nonetheless, because the only
24 consequence immediate and direct of the failure to

1 accord dissenters' rights was the diminution in the
2 value of the intangible personal property.

3 That's all that happened here. Nothing
4 happened to Mr. Willard's mind. He wasn't deceived.
5 He didn't -- there is nothing akin to the other cases
6 that occurred here other than the loss of value of
7 the stock, period. So the only thing that happened
8 here was an injury to personal property.

9 Now, that, of course, is subject to proof.
10 We're at this stage of the pleading, so it's our
11 allegation that that has to be taken at this point as
12 true, that there was a diminution in value of the
13 stock.

14 So we would contend that the cases are fairly
15 clear that this doesn't fit neatly into the
16 pigeonhole of a crushed automobile, but it is
17 intangible personal property that was damaged
18 directly by the failure to be accorded the rights
19 preserved by statute.

20 If you will, it is almost analogous
21 conceptually, it seems to me, to an inference with a
22 business expectation, which is admittedly by the
23 cases an injury to property.

24 When you own stock, that stock is surrounded

1 with business expectations, if you will, the rights
2 that are given by the codes of the various states to
3 the owners of stock. And the owner has a legitimate
4 business expectation that he will be accorded those
5 rights and that those rights will be protected by
6 law.

7 The failure then to comply with the statutes
8 which deprives him of that expectation is no
9 different than a tortious interference with the
10 business expectation in the marketplace. It is the
11 same direct injury to property. That's the closest
12 analogy that I could come up with from the cases
13 which have been decided.

14 So I think that the two situations are very
15 similar, a business expectation on the one hand and
16 the expectation that -- the business expectation that
17 you have when you own the stock, that the rights that
18 are attended to that ownership will be protected or
19 will not be violated. And when they are violated,
20 just as with a tortious interference, you have a
21 direct injury to the property.

22 So we believe the five-year statute applies.
23 There is no question that it was three years. So if
24 we're wrong on that, it's either two years or five

1 years, nowhere in between.

2 The second issue -- and I have to digress a
3 moment just to take sixty seconds to tell a quick
4 story. It reminds me of a situation I was in once
5 with another counsel about a dozen years ago.

6 We were arguing a case to the D.C. Court of
7 Appeals that had previously been briefed, and both
8 sides agreed completely that the only precedent was a
9 footnote in a prior decision of the D.C. Court of
10 Appeals and the footnote needed to be interpreted.
11 We both briefed that point.

12 When we got there that morning, the chief
13 judge of our panel was Judge Abner Mikva, who had
14 written the footnote. And so here we are sitting
15 there trying to tell him what he meant when he wrote
16 that footnote.

17 Well, the res judicata argument reminds me a
18 little bit of that this morning in that you, of
19 course, decided the prior case and you know what you
20 ruled. So we're in the position, or at least I am,
21 of saying, well, I think I know what you ruled too.

22 I would suggest to you two things on the res
23 judicata argument. The first is that Ron Willard,
24 individual, pursuing whatever individual rights he

1 has as a shareholder is not in privy with Ron
2 Willard, the shareholder, who filed a derivative
3 action for damage to Moneta.

4 The derivative action, regardless of who
5 brought it, regardless of who was shareholders,
6 claimed only one thing, damage to the corporation,
7 qua corporation, corporate entity. That is the
8 essence, the very character of derivative action.

9 This is Ron Willard, individual, saying, My
10 rights were violated. I personally was damaged, not
11 Moneta Building Supply. So the parties are
12 completely different. And there was no obligation in
13 a derivative action -- and neither of us have been
14 able to find a case on this. If either of us could
15 have found it, and we did a nationwide search, we
16 would have brought it in here. So we are arguing
17 from logic and each of us, I suppose, in our own way.
18 We couldn't find any case law.

19 But it seems to me that if you bring an action
20 in derivative capacity for damage to the corporation,
21 you are distinct from asserting your own individual
22 rights and you have no duty to bring your individual
23 claim in your derivative action. So that's the first
24 prong of res judicata.

1 The second prong is this is the same cause of
2 action as what was decided in a prior case. I have
3 read everything that I could read about the prior
4 case, including much beyond the transcripts that
5 Mr. Hopkins attached to the Supreme Court decision,
6 much of, of course, Your Honor's opinions. And
7 without question there was testimony on the fair
8 market value. No question about that. But the issue
9 wasn't decided.

10 What was decided in that case was that the
11 processes were sufficient to create the safe harbor
12 under the business judgment rule, that the steps
13 taken were proper, and that opinions were gotten and
14 that the value selected was within the range of
15 reasonableness that put it in a condition of being
16 able to withstand the challenges that were made in
17 that lawsuit. But you, I think, will comb the Record
18 without success to find anywhere where Your Honor
19 decided what the fair market value was.

20 If you read Your Honor's opinion and the
21 Supreme Court opinion and the cases cited in the
22 Supreme Court opinion, particularly the ruling -- the
23 footnote in the Virginia Supreme Court opinion which
24 upheld this court's ruling on discovery where you

1 denied access to certain financial records on the
2 grounds that the objective reasonableness of the
3 decision was not at issue here, and the Supreme Court
4 upheld you in a footnote and said that that's right.

5 The objective reasonableness was not at issue
6 here. What is at issue here is process under the
7 statute. Were the proper procedures followed? Were
8 good faith estimates obtained? Could the safe harbor
9 business judgment rule be sustained by the action of
10 the directors? Nowhere was the fair market value
11 decided. Testimony on it, but it wasn't decided. It
12 was merely decided that the figure obtained here was
13 obtained after proper procedures were followed and
14 was within the range of reasonableness.

15 So the issue that is presented in this case,
16 which is, if you agree with our interpretation of the
17 dissenters' rights statute, agree with our position
18 on the statute of the limitations, for the very first
19 time under the procedures in the Code of Virginia,
20 the fair market value of the stock in Moneta Building
21 Supply will be determined for the first time. And
22 that is not barred by res judicata because it's never
23 been decided.

24 THE COURT: Mr. Hopkins.

1 MR. HOPKINS: Very briefly, Your Honor. As to
2 the arguments advanced by Mr. Pope, Mr. Pope tries to
3 distinguish between an act of sale of assets and one
4 having the higher dignity or more severe action on
5 behalf of the corporation. But I believe, Your
6 Honor, that both require two-thirds votes of the
7 shareholders, which I would think would put them on
8 the same plane.

9 The second point he makes -- actually, he made
10 this before, and that is he tried to -- he talked a
11 little bit about the mischief that the granting of
12 dissenter rights to the minority shareholders was
13 trying to correct. And, obviously, he's absolutely
14 right. The dissenters' rights statute is designed to
15 protect the minority shareholders from oppression or
16 overbearing by the majority.

17 But it does not follow and I would submit that
18 it clearly does not follow that to interpret
19 13.1-730(A)(3) in the way that Moneta Building Supply
20 thinks it should. That is, if you have a sale of all
21 the assets or substantially all the assets, you have
22 dissenters' rights. But you don't get them, one, if
23 there is a court order, pursuant to a court order,
24 or, two, there is distribution within one year,

1 because both of those exceptions, both of those
2 mechanisms, provide the kind of protection necessary
3 to minority shareholders.

4 One, in the first instance, as Mr. Pope said,
5 if it's pursuant to a court order, the assumption is,
6 perhaps incorrect, but I think it's a fair
7 assumption, the court can set up a mechanism and set
8 up procedures and set up requirements of the sale
9 that's going to protect the majority as well as the
10 minority. So there is no need to grant dissenters'
11 rights to a minority shareholder under that scenario.

12 Same thing if there is distribution within a
13 year. If everybody is going to get their cash of a
14 sale that involves substantially all the assets
15 within a year, then that's enough of a protection for
16 the minority shareholders because essentially the
17 majority and the minority are being treated in the
18 same way. There is nothing unfair going on. There
19 is nothing unjust. Everybody is getting the same
20 treatment.

21 The minority and the majority may disagree
22 about the value of the assets as we had in the prior
23 litigation between Mr. Willard and Moneta Building
24 Supply, but it's obvious that the majority is willing

1 to live by its valuation of the assets because they
2 are going to be disbursed to the majority as well as
3 the minority.

4 So I would submit to the court that the
5 language of the statute applies the exceptions to
6 both scenarios, that the primary arguments advanced
7 by Mr. Pope in terms of what is trying to be
8 accomplished by this statute, what mischief is trying
9 to be prevented, really just doesn't apply here.

10 It's really undercut by what we know to be the
11 case, and that is court-ordered distribution within a
12 year gives the minority a protection in the sale of
13 substantially all the assets as well as in the
14 dissolution scenario. For that reason, we would
15 submit to the court that the only fair reading of the
16 statute is that it applies to both.

17 As to the statute of limitations, Mr. Durette
18 is correct. We could essentially tell you we just
19 disagree. We would submit, Your Honor, Moneta
20 Building Supply, that no damage was done to the stock
21 itself. What is being complained of is a failure to
22 get notice of dissenters' rights, but that did not
23 eliminate the dissenters' rights.

24 In fact, the scenario that Mr. Durette has

1 set up for the court, which is a little different
2 from the approach taken in the brief, really fits
3 right into that. He says that where there is no
4 impact and the impact is only on the mind or the
5 attitude of the individual, there is no property --
6 there is no injury to property.

7 Well, in this sense there has been an impact
8 on the mind of Mr. Willard in the sense that
9 according to him he was not aware that he had
10 dissenters' rights. But it did not change the stock,
11 did not change the value of the stock. It only,
12 according to him, prevented him from exercising the
13 mechanism to start the proceeding of having the stock
14 valued.

15 So I would submit to Your Honor that it does
16 not fit the categories that the cases have decided.
17 It should not create a fourth category. It had no
18 impact on the stock. There is a disconnect between
19 the wrong complained of and the injury, and the case
20 law shows there has to be a direct and immediate
21 impact. For those reasons, we think the statute of
22 limitations is applicable.

23 Finally, as to res judicata, Your Honor, I
24 would submit to the court that obviously the parties

1 do not have to be identical and in identical
2 capacities. What the law wants to ensure is is it
3 fair to burden the party in the second case with what
4 happened in the first case.

5 Obviously, when they are talking about two
6 different individuals -- let's say David Cappellari
7 had brought the first case and Ron Willard brought
8 the second case. You have less of a compelling
9 argument that they should be treated -- that the
10 second -- that the plaintiff in the second case
11 should be bound by what happened in the first case.

12 Under these facts and under the test that's
13 set up by the law as to when res judicata should
14 apply, particularly I'm talking now about that the
15 parties are the same, I would submit to Your Honor
16 that it's clear that Mr. Willard should be bound by
17 what happened in the first case.

18 He brought the suit in the style of Moneta
19 Building Supply and on behalf of all the
20 shareholders, of which he was one. He controlled the
21 litigation. He's the party in this case. And that
22 part of res judicata, that test of res judicata that
23 they be the same parties, I would submit to the court
24 clearly it should be under these facts.

1 Now, as I have said to the court, the tougher
2 argument and the one that's harder to get your arm
3 around is the same cause of action. But the various
4 tests that have been set up -- and we submitted to
5 the court some language from the restatement of
6 judgments. If the evidence is the same, the fact
7 that there are different theories or some theories
8 aren't advanced, they are all poured into the same
9 cause of action.

10 Not only do I think it would be just and fair
11 to apply res judicata under these facts, I think the
12 law compels that res judicata be applied under these
13 facts.

14 Now, Mr. Durette makes one mention that
15 nowhere has the value of the corporation been
16 litigated, and I would submit to the court that the
17 time at which it was litigated was under the court's
18 ruling on conflict of interest.

19 As I recall from the court's earlier decision
20 and the Supreme Court handling of that, this court
21 ruled that there was no conflict of interest, but, if
22 there was a conflict of interest, that the
23 transaction was fair to the corporation. So the only
24 thing -- and that was based on the testimony of

1 Mr. Bonomo, Mr. Lynch, and the other witnesses
2 presented by the court.

3 The only thing really lacking -- and all of
4 them dealt with Moneta Building Supply as an ongoing
5 business, not just what are these nails worth, what
6 is this real estate worth, what are these accounts
7 receivables worth. There was goodwill. There was an
8 element of goodwill in the contract. I believe
9 \$175,000 was paid for goodwill of the corporation.
10 It was clear from the evidence taken by this court
11 that the value of the business as a whole was being
12 valued.

13 The only thing that was lacking, no one ever
14 did the mathematical equation of this is the value
15 and this is how many shares you have got and this is
16 your value per share. That's the only thing lacking.
17 That's a simple math problem that can be provided by
18 all of us.

19 I would submit to the court on this basis that
20 res judicata also should be applied.

21 THE COURT: Thank you again, counsel, not only
22 as I stated earlier for the memoranda and providing
23 me with cases, particularly those that I do not have
24 access to here in Bedford.

1 I make use in the courtroom and in my office
2 of the Geronimo program. I use that a lot. It's
3 simple and I can use that. But I think that is to
4 change next month or so, but at least at present
5 district court decisions are not on that program and
6 other cases as well.

7 I appreciate the arguments made here today,
8 and I will not rule today. I would, I think, like to
9 ask certain questions.

10 There were several points raised, and I was
11 glad to hear from Mr. Durette on this point. I have
12 not done exhaustive research most certainly, but
13 since receiving the briefs I did what I'll call a
14 small amount of effort trying to see something of the
15 nature of a derivative action that might be
16 instructive, and I could not find anything in the
17 limited amount of research that I had done.

18 I'm glad to hear that with you all's efforts
19 there apparently is no such case. So as far as my
20 further efforts in ruling on this case, I will not
21 attempt that because it's just not there.

22 MR. DURRETTE: Your Honor, I will tell you
23 further, we tried several different formulas through
24 Lexus, Nexus, WestLaw, and we just couldn't find

1 anything.

2 THE COURT: Okay. I took the bench or assumed
3 the duties of the bench in this court, as I'm sure
4 you all know, on April 1 of 1998, and this case was
5 tried during five days later that very month. Of
6 course, in my seventeen years in the Commonwealth's
7 Attorney's office, there was not a lot of exposure to
8 corporate law.

9 It was a very interesting case, and it's true
10 here today. Even when there is not a lot of prior
11 experience with a particular issue, when it's well
12 tried and well presented by good attorneys, that is
13 extremely helpful. But enough digression.

14 I would like to ask, I think, a question or
15 two, not to debate most certainly, but there are a
16 couple of points I have some question about. The
17 responses of counsel I expect will assist me in that
18 regard.

19 First of all, as to the demurrer, I want to
20 ask Mr. Hopkins a question. I have Section 13.1-730
21 in front of me. I have read it prior to today's
22 hearing and feel that I followed along with the
23 arguments of counsel as to the different
24 interpretations of that statute, and I want to

1 reflect upon that further, of course, before ruling.

2 I'm wondering and wish to ask Mr. Hopkins,
3 we're here, of course, in that regard on the
4 demurrer. Now, the statute starts out by saying a
5 shareholder is entitled to dissent from an opinion of
6 the fair value of his shares in the event of any of
7 the following corporate actions. They are listed
8 there.

9 Then in Paragraph 3 after legislated statement
10 of creation of the rights, then an exception is
11 expressed. And I wonder in two regards as far as the
12 exception, where the burden lies in that regard,
13 first of all, as to pleadings and, secondly, as to
14 proof itself, which, of course, is not to be
15 addressed here today.

16 But the issue as to the demurrer is simply, as
17 the plaintiff stated, a cause of action upon which
18 relief can be granted. And is the burden upon --
19 which may be a general principle. One claiming the
20 benefit of an exception has the burden of
21 establishing that exception, in which case is that
22 burden -- if the exception does apply, is that burden
23 upon you if you wish to claim the benefit of it?

24 In which case if the burden is on you in that

1 respect, then that would not be something that, I
2 wonder, needs to be addressed in the motion for
3 judgment. And if the motion for judgment is not
4 inadequate in that respect, then that is the extent
5 of a demurrer, isn't it?

6 MR. HOPKINS: Let me see if I understand Your
7 Honor correctly.

8 THE COURT: Regardless of either
9 interpretation argued, whether the exception applies
10 to scenario one, scenario two, both, whatever, if you
11 are claiming the benefit of the exception, if the
12 court interprets this statute as you do, is that
13 determined by the ruling on demurrer?

14 MR. HOPKINS: There is still debate between
15 the parties as to where that leads. Obviously, on a
16 demurrer the defendant is at a disadvantage because
17 the plaintiff is entitled to take everything alleged
18 as true and all reasonable inferences from the
19 allegations. I think I'm on the same page as the
20 court.

21 It's our position that if you hold the
22 pleading up and the universe is limited to this
23 pleading, that the language -- that the only fair
24 reading of the language that's attached to the notice

1 is that we meet the exception.

2 And maybe if they had pled it in a way that
3 left the notice out and simply alleged that we had
4 dissenters' rights and, therefore, I would have to
5 bring on proof to show that the exception applied,
6 then clearly they could have gotten over the hurdle
7 of the demurrer.

8 To give counsel for the plaintiff some credit,
9 it's always more efficient for the parties to prepare
10 a fair pleading so that issues that may be
11 dispositive in the case could be tested on demurrer
12 rather than having to go to a trial where obviously
13 under Virginia law with limitations on depositions
14 it's hard to get at these kinds of things except by a
15 motion to strike.

16 I don't know if that answers your question. I
17 think the burden is on me to show that the only fair
18 reading and conclusion one can draw from the pleading
19 itself, which includes the notice, is that the
20 exception applied. And if the court comes to the
21 conclusion that it's debatable, then I don't prevail
22 on the demurrer. I don't know if that answers the
23 question.

24 THE COURT: To phrase it differently -- and

1 I'm just asking for thoughts in this regard. No
2 rulings here today, of course.

3 I guess a demurrer challenges, as I understand
4 it, the sufficiency of the pleadings. Is the
5 plaintiff required to set forth in his pleadings the
6 various elements concerning dissenters' rights and
7 further state that there was no plan by which all or
8 substantially all of the net proceeds of the sale
9 will be distributed to the shareholders within one
10 year? Are they required to plead that? Because if
11 they are not required to plead that, then that's not
12 a deficiency as to the pleadings.

13 Now, if I decide and deny the demurrer -- I'm
14 not saying that I will -- then the issues you all
15 have raised would most certainly have to be addressed
16 later or at some point if the other pleas are not
17 sustained. But, nevertheless, just as a single issue
18 of demurrer here, I'm wondering whether or not the
19 pleadings are deficient in that respect.

20 MR. HOPKINS: Maybe this answers it. I would
21 submit to the court that he may not have to plead
22 that to survive in the normal course. But if what he
23 has pled raises that issue, he raises it at his
24 peril.

1 Now, I guess you could go back and -- so once
2 he attaches the special notice, which we submit shows
3 that there was a plan to disburse within a year, and
4 there is nothing else in the pleading that disputes
5 that, because there isn't, then I would submit to the
6 court that it's a good demurrer if the court agrees,
7 one, with our interpretation of the statute and if
8 the court agrees, two, with our interpretation of the
9 special notice.

10 THE COURT: All right. Do you wish to address
11 that point, Mr. Pope?

12 MR. POPE: Briefly. If the court will look at
13 Page 4 of the motion for judgment, at the top of that
14 page appears Paragraph 20 in which we state, and I
15 quote, Pursuant to Virginia Code Section 13.1-729,
16 Willard qualified as a dissenter. It probably should
17 be 730.

18 We have alleged that he is a dissenter. We
19 have alleged that he has a right to dissent under the
20 code. We then allege that, as someone with a right
21 to dissent, he was entitled to certain notices,
22 including a copy of Title 13.1 of the Code. And I
23 don't think there was any dispute that there was
24 never a notice given. Their position is a notice

1 wasn't required. I don't think there is any dispute
2 that he didn't get Title 13.1 of the code. Their
3 position is they weren't required to send it to him.

4 In order to make out a claim for violation of
5 dissenters' rights, I think all we have to plead is
6 that he was entitled to dissent, he was a dissenting
7 shareholder under the code, and those rights were
8 abridged. He was not given the requisite notices.
9 Therefore, that didn't trigger his ability to make
10 certain challenges that he could under the code.

11 With respect to looking at their demurrer, as
12 I understand their position, they believe that under
13 our theory of recovery we have fallen short of what
14 is legally sufficient because he wasn't entitled to
15 dissenters' rights. And I think to that end each
16 side bears the ultimate burden of persuading this
17 court as to how to interpret that section of the
18 code.

19 We believe that the code in that subsection,
20 that subparagraph, sets forth two scenarios. So does
21 Moneta. In their reply brief, they acknowledge there
22 are two scenarios. The difference is, does the
23 limiting language, whereas the court has described
24 the exceptions, apply just to the latter as we

1 contend or to both as Moneta contends?

2 I think each side bears an ultimate burden, if
3 you will, of persuading this court as to how to
4 interpret this language. How do we find what was
5 intended by the legislature? And I won't beat to
6 death our difference --

7 THE COURT: And I agree with that point,
8 certainly. I was just addressing initially, does
9 that decision have to be decided when ruling upon the
10 demurrer itself.

11 MR. HOPKINS: Let me respond just very briefly
12 to the point he raised. I don't think Paragraph 20
13 gets him over the hump. The demurrer admits all
14 facts well pled and all reasonable inferences. I
15 think Paragraph 20 is a conclusion of law. If the
16 facts otherwise pled refutes that, then I think we
17 can bring it on on demurrer, which we have.

18 THE COURT: Then another question that I have
19 -- I believe this would be directed at Mr. Durette
20 because it's a question concerning the cause of
21 action. It comes down to the essential issue here.
22 I mean, the essential issue, I think, if answered,
23 can be determinative, obviously. And that is, is
24 this a cause of action for property damage?

1 If it is, then as to the statute of
2 limitations argument there is no disagreement. You
3 have got the five years. If it's not, you have the
4 two years.

5 Then, as to the res judicata issue, as counsel
6 have pointed out and as I understand it, you have two
7 issues there. Same cause of action, same parties.
8 Now, again I'm just making observations, no rulings.

9 As far as the earlier action is concerned, I'm
10 not sure the earlier action would reasonably be
11 described as being a cause of action for property
12 damage of the property owned by Ron Willard. I mean,
13 that case involved the assets of the corporation,
14 whether or not there was a fair value given for them,
15 and the duties of the corporate officers and
16 shareholders and so forth.

17 If this is a cause of action for damage to Ron
18 Willard's property, that is to say his shares, not
19 the corporate assets, if it is a cause of action for
20 property damage, then as to res judicata it's a
21 different cause of action and you need not address
22 the other.

23 So I would appreciate from counsel any
24 assistance. And I have the cases here. What is this

1 a cause of action for? What is the claim of this
2 cause of action? And in that regard I have read the
3 one case, the Brown versus ABC case. I believe
4 that's the one that sets forth the four elements.

5 But, Mr. Durette, the motion for judgment
6 alleges that Ron Willard had the right to get notice
7 of dissenters' rights pursuant to a duty imposed, as
8 I understand, by statute.

9 Now, does property damage -- for there to be a
10 cause of action for property damage, does not the
11 alleged property damage have to be the direct damage
12 rather than consequential injury? And if that is so,
13 my question is, did the failure to notify of
14 dissenters' rights damage Mr. Willard's property?
15 And if so, is that direct damage or direct injury or
16 consequential injury?

17 MR. DURRETTE: I think the court has focused
18 laser-like on what the issue is in this case. That
19 is precisely the question, and that is precisely the
20 issue on which the parties have joined. I think the
21 cases are helpful but not dispositive because there
22 is not anything quite like this. Some of them are
23 similar, but nothing is quite like this.

24 Ultimately -- let me come at it from the back.

1 Ultimately, this is a claim for property damage.
2 There is no question but that the claim here is that
3 my stock was diminished in value. Mr. Willard's
4 stock was diminished in value, and stock is
5 intangible personal property. So a very core of this
6 case is a claim for property damage.

7 Now, we would say that unlike the cases that
8 hold that there has been no damage to property,
9 Pickett being the classic one, the underlying
10 property -- the value of the property to which the
11 damage was claimed never varied. The real estate
12 that was involved in the Pickett case was worth --
13 whatever it was worth, it was worth the same thing
14 before the transaction as it was after the
15 transaction.

16 If you look at the court decisions, that's
17 what they say. They analyze that and they say, Look,
18 what changed here was the plaintiff's perception.
19 The plaintiff thought that the zoning adjacent to the
20 property was one thing. It was really something
21 else. But it always was what it was, to use the
22 cliche. It didn't change. So the property itself
23 had the same value before and after. Merely the
24 plaintiff's perception of it changed. That's, I

1 think, the most illustrative case.

2 But if you look at all the other cases that go
3 in the same direction, that is the same underlying
4 analysis, that the property for which damage was
5 claimed wasn't altered by reason of the conduct.

6 We would say here the property for which
7 damage is claimed is not a paper certificate, but it
8 is the value of that paper certificate. And the
9 value of that paper certificate, if our allegations
10 are correct, and we're entitled to that at this
11 stage, was changed by reason of not being able to
12 exercise the dissenters' rights at issue in this
13 case. It was worth less.

14 So unlike all of the cases that hold that the
15 two-year statute, the catch-all statute, applies
16 because there is no injury to property, there is no
17 change in the value of the property for which injury
18 is claimed. And here there is, if we're right.

19 So in all of those cases, only the individual
20 on whom the wrong was committed had a change of
21 perception. Things were really worth more or less in
22 their minds but not in actuality. Here it's worth
23 less in actuality if our pleading is correct.

24 THE COURT: To follow up on that -- and I

1 agree, I'll state, with my limited reading of these
2 cases, I understand in all the property damage cases,
3 whether you are talking about conversion, trespass, a
4 negligence action where someone's car is damaged as a
5 result, the property is different after the wrongful
6 conduct than it was before, the property itself. And
7 it would certainly seem to me that a difference in
8 value can be a difference that would constitute
9 injury.

10 But I guess my specific question to put it
11 simply would be, if the alleged wrongful conduct here
12 is failure to give notice of dissenters' rights and
13 the property is the stock, isn't the stock worth the
14 same before notice was required to be given -- its
15 value is the same before the requirement of notice as
16 it was when notice was not given?

17 And, rather, what affected the value of the
18 stock itself, the shares, was not failure to give
19 notice but rather the alleged failure to get an
20 adequate price for the assets of the corporation?
21 You see what I'm saying? Is the share worth the same
22 both before and after the actual alleged wrongful
23 conduct here?

24 MR. DURRETTE: I think our answer to that,

1 Your Honor -- my answer to that is no. Or maybe
2 better put, we have alleged that it isn't. But until
3 a proceeding takes place at which a determination is
4 made, I guess we would never know for sure. But at
5 this stage of the proceeding, our allegation becomes
6 the fact.

7 Therefore, on the basis of our allegation,
8 which is the fact, the stock was worth less because
9 the right accorded by statute was violated. And,
10 again, I will go back to the analogy which I think is
11 the closest that I have been able to come, and that
12 is the tort of interference with a business
13 expectancy.

14 THE COURT: I see that. One last question in
15 that regard. Then I'm going to hear from Mr. Hopkins
16 if he wishes to respond, and then I'll close this
17 hearing. I certainly appreciate you all's
18 understanding in that regard.

19 MR. POPE: Your Honor, could I have thirty
20 seconds just to follow up on the court's last
21 question?

22 THE COURT: Let me ask this question because
23 it's along the same lines. Then I'll hear from
24 everybody on my last question.

1 Brown versus American Broadcasting, qualified
2 injury must be against and affect directly the
3 plaintiff's property. Two, the plaintiff must sue
4 only for direct injury. Three, the injury to qualify
5 as a direct injury must be the very first injury
6 which results from the wrongful conduct -- wrongful
7 act, excuse me. As Mr. Durette has argued, the
8 impact must be direct.

9 Here is essentially my question: Taking your
10 allegations as true, your allegations are Mr. Willard
11 had the right to be notified of the dissenters'
12 rights. He didn't get such notice. Therefore, he
13 didn't exercise them. And then those acting on
14 behalf of the corporation failed to get an adequate
15 price for the assets of the corporation, and,
16 therefore, Mr. Willard's shares diminished in value.

17 I'm just asking, that's going some several
18 steps. And by doing so, do you still have direct
19 injury alleged or is it consequential? Because if
20 it's just consequential, I wonder pursuant to this
21 case whether it qualifies as property damage.

22 MR. DURRETTE: Let me respond. This is really
23 the critical part of the case, and I think the answer
24 to the court's question is found in Brown, at least

1 part of it. It's Page 7 on my printout here, but it
2 looks like it was maybe Page 1303 and going over to
3 1304 in the decision.

4 Defendants argue that the district court was
5 incorrect because the statute is only applicable to
6 actions for injury to property where the injury to
7 the property is the direct or immediate result of the
8 wrongful conduct. And there is a cite there. Where
9 the injury to property is an indirect or
10 consequential injury resulting from a direct injury
11 to the person, the one- or two-year statute of
12 limitations for personal injury applies. When that
13 was decided, that is the catch-all statute that we're
14 talking about.

15 Now, if you then go further down where they
16 discuss that -- and this is over on Page 1304, the
17 final sentence before part Roman Numeral VI of the
18 opinion. The allegations of damage to her business
19 made by plaintiff are nothing more than consequential
20 damages resulting from the alleged injury to her
21 reputation.

22 So in this case, the damage, the injury, the
23 direct injury -- and there is a required injury to
24 the person from which the indirect damages or

1 consequential damages arise. The injury to her
2 person was the damage to her reputation which then,
3 because her reputation was damaged, she had the
4 indirect damage to her business.

5 That I don't think is -- what that language
6 contemplates is not what happens here. This is a
7 direct right of ownership that is analogous to a
8 business expectancy which Willard is afforded by
9 statute. There was no injury to his person. Fraud
10 wasn't perpetrated. His reputation wasn't damaged.
11 Nothing happened to his person that makes this
12 personal by reason of the failure to give the notice.

13 The failure to give the notice indeed
14 triggered things that one might say are, quote,
15 indirect. But I don't think the term "indirect" as a
16 legal analysis, as this case uses that word to mean
17 derivative sort from a direct injury to the person,
18 is what is -- is the same application in the
19 dissenters' rights statute. I don't think it means
20 that there may have to be another step or two before
21 you can measure the impact on property.

22 But there was no injury to the person here.
23 There was a property right that was prejudiced, and
24 the right really belongs to the shareholders, the

1 concept of owning the stock. That's why I say it's
2 analogous to the business expectancy. It is indeed
3 an expectancy attended to stock ownership that was
4 impacted detrimentally by the failure to follow the
5 procedures of law.

6 So I don't think indirect or consequential
7 eliminates the possibility of a step or two. I think
8 what it means is, if there is an injury to the
9 person, such as a fraud or damage to reputation, and
10 you are claiming then consequential economic loss,
11 that's what is eliminated.

12 THE COURT: Mr. Pope.

13 MR. POPE: Thank you, Your Honor, for the
14 time. I am similarly going to make two points.

15 Following the court's progression of events,
16 what really occurred here is that, in advance of this
17 special meeting of shareholders, Mr. Willard was not
18 notified of the things he should have been notified
19 of under the code.

20 The minute the gavel went down approving the
21 sale of those assets, then and there the shares of
22 all the shareholders, including Mr. Willard, were
23 directly and immediately affected. As soon as there
24 was a contract approved, even though the closing

1 occurred later, as soon as the contractual right
2 arose between the purchaser and the seller of these
3 assets, then and there the value of that stock
4 changed and it went down.

5 So the injury was direct. It was immediate.
6 It was not a sequence of events but rather a meeting
7 that took place which approved the sale which at that
8 moment directly affected the value of Mr. Willard's
9 stock.

10 Secondly, I would suggest to the court that,
11 even if Mr. Willard, as we contend, qualified as
12 having a right to dissent and didn't get his notice
13 or got it and didn't exercise it or got it, exercised
14 it, but it proved to be that the actual value of the
15 stock was the same whether he cashed out or elected
16 to remain, there would be no injury. At most he
17 might be entitled to nominal damage for not getting
18 his notice.

19 The injury that's experienced, the direct
20 injury that is suffered, is when he doesn't get his
21 notice. Therefore, he doesn't know what his rights
22 are. Therefore, he doesn't follow what the statute
23 requires. And the value of his shares goes down as
24 it did here. That's the direct injury.

1 Up to that point you are sort of in the Big
2 Ten where it's no harm, no foul. But at that point
3 there is a direct injury to property, and that is
4 what we seek recovery for.

5 MR. HOPKINS: The statute of limitations shows
6 that the stock itself has been injured as a result of
7 failure to give notice. We submit it is not, nor
8 could it be.

9 The second hurdle they have is the failure to
10 give them notice has to cause a direct injury. I
11 submit to the court, as you went through it, there is
12 a disconnect there between the actual injury -- and
13 what we would submit is really economic loss is what
14 he's complaining about, not injury to property. When
15 it comes under the economic loss category, it's a
16 five-year statute of limitations.

17 If I went on, I would just be repeating what I
18 put in the briefs and what I have argued to the
19 court. Two hurdles he has to overcome, injury to the
20 stock as a result of not getting the notice. He
21 cannot show that. He has not shown that, because he
22 can't. And, two, disconnect. It's got to be
23 immediate and direct, and it's not there. For those
24 reasons, Your Honor, we think the statute of

1 limitations bars his claim.

2 THE COURT: Counsel, I wanted to ask one more
3 question. I apologize. And there are parties
4 waiting on another hearing. I'll quickly do this if
5 counsel wish to quickly respond.

6 As to the issue of res judicata, I have asked
7 the question concerning same cause of action. The
8 other part of that, same party. Res judicata bars
9 re-litigation of the same cause of action between the
10 same parties or their privies. I read that a number
11 of times asking myself what does privity mean in that
12 context.

13 I was relieved when I saw -- or I felt a
14 little better, I'll put it that way, when I read Nero
15 v. Ferris at 222 Virginia 807 at which point -- at
16 one point the Supreme Court of Virginia says there is
17 no fixed definition of privity that automatically can
18 be applied to all cases involving res judicata
19 issues.

20 MR. HOPKINS: That's some comfort.

21 THE COURT: But it doesn't answer it. At
22 least I felt like maybe I'm not the only person who
23 doesn't know.

24 So it goes on to say, While privity generally

1 involves a party so identical in interest with
2 another that he represents the same legal right, a
3 determination of just who are privies requires a
4 careful examination of the circumstances of the case.
5 There we are.

6 Particularly, in this context of the previous
7 cause of action being a derivative action brought by
8 Mr. Willard on behalf of all shareholders -- he, of
9 course, is a shareholder -- if he is not the
10 identical party himself, is he a privy for res
11 judicata purposes? And if so, why? And if so, why
12 not? Then once we all address that, we will complete
13 that. Anything in that regard I would appreciate.

14 MR. DURRETTE: When you started talking about
15 res judicata, I was going to read to you what you
16 just read. I pulled it out and that's what I was
17 going to do.

18 I think the key here is that -- not a key,
19 but, obviously, they tell us it requires a careful
20 examination into the circumstances of each case.
21 That's just an invitation to do the kind of analysis
22 that we have all done here for whatever time we have
23 spent on this issue.

24 A party so identical in interest with another

1 that he represents the same legal right. That's what
2 Mr. Hopkins has to convince you has occurred here if
3 he is to prevail on his plea of res judicata. That's
4 his burden of persuasion.

5 Our answer to that is you do not and logically
6 cannot represent the same legal right. When you file
7 a lawsuit for damage to a corporation on behalf of
8 all the others in that corporation, it is a -- the
9 legal issue is was the corporation as an entity
10 damaged, on the one hand.

11 On the other hand, when you file an individual
12 personal action saying regardless of what happened to
13 the corporation, regardless of what happened to any
14 other shareholders, I personally was damaged, that
15 can't be the same legal right. That's our analysis
16 of it.

17 MR. HOPKINS: Your Honor, what Mr. Durette is
18 addressing is in some respects not the same cause of
19 action. But this is an important issue to both sides
20 because, if they survive today, there is going to be
21 a collateral estoppel argument, and the collateral
22 estoppel argument is -- we are going to be through
23 the same analysis.

24 Is it fair to bind Ron Willard today with the

1 issue this court litigated -- we submit that you did.
2 They submit that it did. That will be hashed out, if
3 necessary. Is it fair to bind Ron Willard today with
4 what Ron Willard did in his earlier lawsuit?

5 I think Nero is perfect on that. There is no
6 hard and fast answer. But every notion of fair play,
7 equity, and justice that I know of would bind
8 Mr. Willard today with what he litigated in the
9 earlier lawsuit. For that reason, Your Honor, I
10 would submit to the court that we have met the test
11 of same parties.

12 THE COURT: Okay. Well, counsel, I think it
13 comes down to what is fundamentally fair. A person
14 should not be denied an opportunity to be heard on a
15 cause of action, but under the law it's equally not
16 fair that a person get more than one opportunity to
17 be heard on the same cause of action. Thank you.

18
19 (The Hearing was adjourned.)
20
21
22
23
24

C E R T I F I C A T E

COMMONWEALTH OF VIRGINIA

COUNTY OF ROANOKE

I, Roxane Ray, RPR, Notary Public in and for the Commonwealth of Virginia, at Large, do hereby certify that the Hearing held on March 28, 2000 was by me reduced to machine shorthand in the presence of all Parties, afterwards transcribed under my direction by means of computer, and that to the best of my ability, the foregoing is a true and correct transcript of the Hearing as aforesaid.

I further certify that this Hearing was taken at the time and place in the foregoing caption specified.

I further certify that I am not a relative, counsel or attorney for either party or otherwise interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand at Roanoke, Virginia, on this the 30th day of May 2000.



ROXANE RAY, RPR
Notary Public

My Commission expires February 28, 2001.

TWENTY-FOURTH JUDICIAL CIRCUIT
OF VIRGINIA

JAMES W. UPDIKE, JR., JUDGE
BEDFORD COUNTY CIRCUIT COURT
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COMMONWEALTH OF VIRGINIA
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April 18, 2000

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IN RE: Ronald L. Willard v. Moneta Building Supply, Inc.
CL00009745-00

Dear Counsel:

In his motion for judgment, plaintiff, Ronald L. Willard (hereinafter "Willard") alleges that defendant, Moneta Building Supply, Inc. (hereinafter "Moneta") failed to honor his rights as a dissenting shareholder of Moneta, and Willard seeks monetary relief for damage he allegedly incurred.

In response, Moneta has filed a demurrer, a special plea of the statute of limitations, and a special plea of res judicata. These issues were argued by counsel during a hearing on March 28, 2000, and at the conclusion of this hearing, I deferred all rulings to allow further consideration of the arguments and memoranda submitted by counsel. Moneta also filed a special plea of collateral estoppel, but this issue was not argued during the hearing on March 28, 2000.

For reasons that follow, I sustain Moneta's special plea of the statute of limitations, and I dismiss Willard's motion for judgment.

Wyatt B. Durrette, Jr., Attorney at Law
Barrett E. Pope, Attorney at Law
William B. Hopkins, Jr., Attorney at Law
April 18, 2000
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FACTUAL BACKGROUND

Willard previously filed a derivative proceeding pursuant to Sec. 13.1-672.1 of the Code of Virginia on behalf of Moneta and all its shareholders. Moneta, A. S. Cappellari, Rose Mary Cappellari, and David Cappellari were named as defendants in this proceeding. At the conclusion of a five-day trial, this Court dismissed Willard's bill of complaint, and this ruling was subsequently affirmed by the Supreme Court of Virginia. Willard v. Moneta Building Supply, Inc., 258 Va. 140, 515 S.E.2d 277 (1999).

The factual background of the present proceeding is essentially the same as that thoroughly stated in the appellate decision in the earlier proceeding, and a detailed review of the facts is not necessary for purposes of ruling on the special plea of the statute of limitations. I will, however, briefly state certain relevant facts.

The present motion for judgment states that the shareholders of Moneta, and their approximate percentages of ownership of shares, are: A. S. Cappellari (49.8%), Rose Mary Cappellari (25.4%), Willard (19.7%), and David Cappellari (5.1%).

On or about November 19, 1996, A. S. Cappellari and Rose Mary Cappellari, as the sole directors of Moneta, entered into a written contract whereby Moneta agreed to sell substantially all of its assets to Capps Home and Building, Inc. (hereinafter "Capps"). A. S. Cappellari, as president of Moneta, notified the shareholders of the proposed sale by letter dated November 22, 1996. Enclosed with this letter was a notice of a special meeting of Moneta's shareholders to be held on December 20, 1996. However, no notice of dissenters' rights was given Willard in accordance with Sec. 13.1-732 of the Code of Virginia.

In the present proceeding, Willard argues that he did not assert his rights as a dissenting shareholder because he was not notified of these rights. Willard further argues that when two-thirds of the shareholders approved the sale of Moneta's assets to Capps for what he believes to have been a grossly inadequate purchase price, the value of his shares in Moneta was diminished and damaged.

SPECIAL PLEA OF STATUTE OF LIMITATIONS

Moneta argues that Willard's motion for judgment is barred by Sec. 8.01-248 of the Code of Virginia, which provides:

Every personal action accruing on or after July 1, 1995, for which no limitation is otherwise prescribed, shall be brought within two years after the right to bring such action has accrued.

Wyatt B. Durette, Jr., Attorney at Law
Barrett E. Pope, Attorney at Law
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Willard responds by arguing that Moneta's failure to honor his dissenter's rights diminished the value of his shares in Moneta. Willard further argues that this injury to his shares constitutes property damage, and that Sec. 8.01-243 provides the applicable period of limitation. Sec. 8.01-243(B) provides in pertinent part:

Every action for injury to property ... shall be brought within five years after the cause of action accrues.

The parties agree that Willard filed his motion for judgment more than two years from accrual of his cause of action, but less than five years from accrual of his cause of action. Therefore, the issue, simply stated, is whether Willard's motion for judgment is an action for injury to property.

Because Willard alleges injury resulting from violation of his dissenter's rights, as those rights are provided by Sec. 13.1-729 et. seq. of the Code of Virginia, it becomes necessary to analyze these statutes and the rights they provide, and determine the consequences of noncompliance with these statutes.

Sec. 13.1-730 provides in pertinent part:

A. A shareholder is entitled to dissent from, and obtain payment of the fair value of his shares in the event of, any of the following corporate actions:

3. Consummation of a sale or exchange of all, or substantially all, of the property of the corporation if the shareholder was entitled to vote on the sale or exchange or if the sale or exchange was in furtherance of a dissolution on which the shareholder was entitled to vote, provided that such dissenter's rights shall not apply in the case of (i) a sale or exchange pursuant to court order, or (ii) a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of the sale.

"Fair value" is defined in Sec. 13.1-729:

'Fair value,' with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

Wyatt B. Durette, Jr., Attorney at Law
Barrett E. Pope, Attorney at Law
William B. Hopkins, Jr., Attorney at Law
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This right to obtain payment of fair value of shares terminates upon the following:

D. The right of a dissenting shareholder to obtain payment of the fair value of his shares shall terminate upon the occurrence of any one of the following events:

1. The proposed corporate action is abandoned or rescinded;
2. A court having jurisdiction permanently enjoins or sets aside the corporate action; or
3. His demand for payment is withdrawn with the written consent of the corporation.

Sec. 13.1-730(D) of the Code of Virginia.

If a shareholder is entitled to dissent from a corporate action in accordance with Sec. 13.1-730, notice of dissenters' rights must be given to him in accordance with Sec. 13.1-732, which provides in pertinent part:

A. If proposed corporate action creating dissenters' rights under Sec. 13.1-730 is submitted to a vote at a shareholders' meeting, the meeting notice shall state that shareholders are or may be entitled to assert dissenters' rights under this article and be accompanied by a copy of this article.

Sec. 13.1-732(A) of the Code of Virginia.

If a shareholder wishes to assert his dissenter's rights and demand payment of the fair value of his shares, he must give notice in accordance with Sec. 13.1-733, which provides:

A. If proposed corporate action creating dissenters' rights under Sec. 13.1-730 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert dissenters' rights (i) shall deliver to the corporation before the vote is taken written notice of his intent to demand payment for his shares if a proposed action is effectuated and (ii) shall not vote such shares in favor of the proposed action.

B. A shareholder who does not satisfy the requirements of subsection A of this section is not entitled to payment for his shares under this article.

Sec. 13.1-733 of the Code of Virginia.

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The purpose of Sec. 13.1-733 is to require notice to the corporation and other shareholders of the demand for payment of shares before the vote is taken on the proposed corporate action.

As an analysis of similar statutes, including those patterned after the Model Business Corporation Act, the following has been stated:

The right of a dissenting stockholder to an appraisal and payment for his stock is usually dependent upon his submitting a written notice of objection and demand within a certain period, and refraining from voting of his stock in favor of the proposed corporate action. In this regard, the Model Business Corporation Act provides that if the proposed corporate action is submitted to a vote at a meeting of shareholders, any shareholder who wishes to dissent and obtain payment for his shares must file with the corporation, prior to the vote, a written notice of intention to demand that he be paid fair compensation for his shares if the proposed action is effectuated, and must refrain from voting his shares in approval of such action; a shareholder who fails in either respect will acquire no right of payment for his shares under the statute. The basic purpose of requiring a stockholder who opposes a merger to object in writing prior to the stockholders' meeting called to vote on the proposal, is to inform the corporation and its other stockholders of the number of possible dissenters, and therefore the potential amount of cash which will be required to pay for their shares, and the management and the majority of stockholders are thus put on notice, before they act and vote for a merger, of the maximum number of shares which may have to be paid off in cash.

18A Am. Jur. 2d, Corporations, Sec. 818, pp. 689 and 690.

Once a dissenting shareholder has given notice of his intent to demand payment in accordance with Sec. 13.1-733, the corporation must provide him dissenters' notice in accordance with Sec. 13.1-734, which provides:

A. If proposed corporate action creating dissenters' rights under Sec. 13.1-730 is authorized at a shareholders' meeting, the corporation, during the ten-day period after the effectuation of such corporate action, shall deliver a dissenters' notice in writing to all shareholders who satisfied the requirements of Sec. 13.1-733.

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B. The dissenters' notice shall:

1. State where the payment demand shall be sent and where and when certificates for certificated shares shall be deposited;
2. Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;
3. Supply a form for demanding payment that includes the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action and requires that the person asserting dissenters' rights certify whether or not he acquired beneficial ownership of the shares before or after that date;
4. Set a date by which the corporation must receive the payment demand, which date may not be fewer than thirty nor more than sixty days after the date of delivery of the dissenters' notice; and
5. Be accompanied by a copy of this article.

Sec. 13.1-734 of the Code of Virginia.

Once a dissenting shareholder has received dissenters' notice in accordance with Sec. 13.1-734, he has a duty to demand payment in accordance with Sec. 13.1-735, which provides:

- A. A shareholder sent a dissenters' notice described in Sec. 13.1-734 shall demand payment, certify that he acquired beneficial ownership of the shares before or after the date required to be set forth in the dissenters' notice pursuant to subdivision 3 of subsection B of Sec. 13.1-734, and, in the case of certificated shares, deposit his certificates in accordance with the terms of the notice.
- B. The shareholder who deposits his shares pursuant to subsection A of this section retains all other rights of a shareholder except to the extent that these rights are canceled or modified by the taking of the proposed corporate action.
- C. A shareholder who does not demand payment and deposits his share certificates where required, each by the date set in the dissenters' notice, is not entitled to payment for his shares under this article.

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Sec. 13.1-735 of the Code of Virginia.

Sec. 13.1-737 provides, in pertinent part, that "within thirty days after receipt of a payment demand made pursuant to Sec. 13.1-735, the corporation shall pay the dissenter the amount the corporation estimates to be the fair value of his shares, plus accrued interest."

If a dissenting shareholder is dissatisfied with the payment made in accordance with Sec. 13.1-737, or an offer of payment for after-acquired shares in accordance with Sec. 13.1-738, the following procedure is provided by Sec. 13.1-739:

A. A dissenter may notify the corporation in writing of his own estimate of the fair value of his shares and amount of interest due, and demand payment of his estimate (less any payment under Sec. 13.1-737), or reject the corporation's offer under Sec. 13.1-738 and demand payment of the fair value of his shares and interest due, if the dissenter believes that the amount paid under Sec. 13.1-737 or offered under Sec. 13.1-738 is less than the fair value of his shares or that the interest due is incorrectly calculated.

B. A dissenter waives his right to demand payment under this section unless he notifies the corporation of his demand in writing under subsection A of this section within thirty days after the corporation made or offered payment for his shares.

Sec. 13.1-739 of the Code of Virginia.

If the demand for payment under Sec. 13.1-739 remains unsettled, Sec. 13.1-740 requires the following:

[T]he corporation shall commence a proceeding within sixty days after receiving the payment demand and petition the circuit court ... to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the sixty-day period, it shall pay each dissenter whose demand remains unsettled the amount demanded.

Sec. 13.1-740(A) of the Code of Virginia.

When a proceeding is commenced under Sec. 13.1-740, Sec. 13.1-741 requires the court to determine and assess all costs, including reasonable compensation and expenses of appraisers appointed by the court. The court may also assess the reasonable fees and expenses of experts

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for the parties, and may award attorneys' fees when the services of counsel for the dissenter were of substantial benefit to other dissenters.

This statutory scheme therefore provides a shareholder the right of dissenting from a proposed corporate action, the right to demand and receive payment of fair value of his shares, and the right of appraisal in circuit court of the fair value of his shares. As to the right of appraisal, the following has been stated:

Because the phrase 'appraisal right' implies the automatic grant of a formal judicial appraisal, with its attendant delays, uncertainties, and legal expenses virtually prohibitive to small investors, it has been suggested that the term should be avoided and reference made instead to 'dissenters' rights to obtain payment for their shares,' or, more colloquially, the 'cashout right.'

18A Am. Jur. 2d, Corporations, Sec. 805, p. 680.

This "cashout right" is in my opinion a personal right of a dissenting shareholder, and a right that is forfeited upon failure to comply with the prescribed statutory scheme. Moreover, other rights may also be forfeited by failure to assert dissenters' rights in accordance with the applicable statutes. In this regard, the following has been stated:

If a minority stockholder passes up his appraisal rights under the applicable statute, it is clear that he waives any contention of possible undervaluation of the assets of a corporation which has been acquired in exchange for stock in the acquiring corporation.

18A Am. Jur. 2d, Corporations, Sec. 815, p. 687.

When arguing in his memorandum that his cause of action is a claim of injury to property subject to the five-year period of limitation provided by Sec. 8.01-243(B), Willard encourages this Court to apply the analysis stated in Brown v. American Broadcasting Co., Inc., 704 F.2d 1296 (4th Cir. 1983).

In Brown, the United States Court of Appeals for the Fourth Circuit reviewed on appeal a decision by a district court that claims for intentional interference with a business and conspiracy to interfere with a business were actions for injury to property, and subject to Virginia's five-year statute of limitation, rather than Virginia's statute of limitations for personal injury or Virginia's catchall statute of limitations (one year at the time of the decision). When reviewing the lower court's decision, the Court of Appeals relied upon Evans v. Sturgill, 430 F. Supp. 1209 (W.D.Va. 1977) and Holdford v. Leonard, 355 F. Supp. 261 (W.D.Va. 1973).

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However, the Court of Appeals acknowledged that Evans and Holdford were decided in accordance with the statutes of limitations that were in effect in Virginia before those statutes were amended in 1977. The Court of Appeals nevertheless found the holdings in Evans and Holdford to be instructive for the following reasons:

Although Evans and Holdford were decided under Virginia's old statute of limitations, the analysis applied in those cases is equally applicable to the present case. Under Virginia's old statute of limitations the resolution of the question of which limitation period applied to a particular action turned on the question of whether or not the cause of action would survive the injured party. The survival of an action depended upon whether or not the action was an injury to property or to the person. Accordingly, the resolution of the question of survival in Evans depended on the same distinction between actions for injury to the person and actions for injury to property which it is necessary to make under the current Virginia statute of limitations.

704 F.2d at 1303.

The Court of Appeals continued by stating:

[T]he Virginia Supreme Court has been extremely technical in its determination of whether the damage for which a plaintiff seeks to recover is a direct injury to property and thereby qualifies for the benefit of the five year statute of limitations. In order for the five year statute to apply, the following facts, among other things, must be found: (1) the injury 'must be against and affect directly the plaintiff's property' Holdford, 355 F. Supp. at 264; (2) 'the plaintiff must sue only for the direct injury' *Id.*; and (3) the injury, to qualify as a direct injury, must be the very first injury which results from the wrongful act. *Id.*

704 F.2d 1296, 1303-1304.

The Court in Brown then found that the plaintiff's causes of action for injury to her business failed all three of the above-stated tests, and therefore, for purposes of application of the appropriate statute of limitations, plaintiff's causes of action did not qualify as claims of direct injury to her property. Instead, plaintiff's claims of injury to her business were "nothing more than consequential damages resulting from the alleged injury to her reputation." 704 F.2d at 1304. The Court of Appeals therefore ruled that the district court erroneously applied the five-year statute of limitation for property damage to plaintiff's two causes of action for injury to her business.

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Before applying Brown to Willard's motion for judgment, I wish to review certain decisions rendered by the Supreme Court of Virginia since the 1977 amendments to Virginia's statutes of limitations.

In Pigott v. Moran, 231 Va. 76, 341 S.E.2d 179 (1986), the purchasers of land alleged that they had been defrauded by the misrepresentations of a real estate agent concerning the zoning of abutting property. At the time of this decision, Sec. 8.01-248 (the catchall statute of limitations) provided a one-year period of limitation. Nevertheless, the issue presented in Pigott is identical to the issue presently under consideration:

Upon the main issue, the crucial question is whether this is an 'action for injury to property,' as that phrase is used in Sec. 8.01-243(B). If so, the five-year limitation governs and the purchasers' suit is timely. If not, the catchall provisions of Sec. 8.01-248 govern and the action is time-barred by the one-year limitation.

231 Va. at 79.

When resolving this issue, the Supreme Court stated:

Prior to 1977, a determination of the applicable period of limitations for damage to property turned upon whether or not the cause of action survived. That determination was necessitated by the interplay of Secs. 8-24 and former 64.1-145. Sec. 64.1-145 permitted the survival of actions for damages to the 'estate' of a decedent. This statute, however, was construed to relate only to 'direct' injury to property and not 'indirect' or 'consequential' injury. ***

The statutes now under consideration are among a number of laws enacted in 1977 which sought to relieve the uncertainty and confusion caused by these earlier statutes and their judge-made corollaries. ***

Under the new statutory scheme, survivability no longer is germane in determining which statute of limitations applies. Code Sec. 8.01-25 provides that all causes of action survive the death of the plaintiff or defendant. Moreover, the problem of determining direct or indirect injury has been eliminated. Code Sec. 64.1-145 now provides, in part, that: 'Any action at law for damages for the ... destruction of, or damage to any estate of or by the decedent, whether such damage be direct or indirect, may be maintained by or against the decedent's personal representative. Any such action shall survive pursuant to Sec. 8.01-25.' Now, under the straightforward provisions of Sec. 8.01-243(B), '[e]very' action for

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'injury to property' is governed by a five-year statute of limitations. As we already have said, this is not an action for 'injury to property.' Rather, this is a 'personal action,' under Sec. 8.01-248.

Fraud is a tort. *** The wrongful act is aimed at the person and, when sued upon at law, fraud will support a recovery for financial damage personal to the individual. This is the gist of plaintiffs' claim. The fraud allegedly committed by the realtor had no impact on the real property itself. The purchasers' land was in the same condition and was available for the same use after the alleged fraud as it was before. The defendants' conduct was directed at the plaintiffs personally and not their property, real or personal.

231 Va. at 80 and 81.

In J. F. Toner & Son v. Staunton Production Credit Association, 237 Va. 155, 375 S.E.2d 530 (1989), the plaintiffs alleged "that they were fraudulently induced to convey to the lenders a security interest in both corporate and individual assets, which they subsequently lost entirely through foreclosure and repossession." 237 Va. at 158. The plaintiffs in J. F. Toner attempted to distinguish the Court's earlier ruling in Pigott by stating:

The plaintiffs point out that the allegedly defrauded purchasers in Pigott retained their property, with all the rights of use they would have had in the absence of the agent's misrepresentations, but that they, the present plaintiffs, have suffered a loss of all use, enjoyment and value in their property by reason of the alleged fraud.

237 Va. at 158.

The Supreme Court rejected this attempted distinction by stating:

We think this purported distinction to be more apparent than real. The defendants' alleged fraud had no effect upon the plaintiffs' property. The property had the same form, the same value, and was adapted to the same uses after the defendants' actions as before. The defendants are simply alleged to have persuaded the plaintiffs to part with it. Thus, the allegedly wrongful acts were aimed at the persons of the plaintiffs. Rather than injuring their property, the alleged wrongs caused them to sustain 'financial damage personal to the individual,' as did the misrepresentations alleged in Pigott.

237 Va. at 158.

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In a later decision, the Supreme Court again cited Pigott with approval and stated:

After 1977, however, survivability is no longer germane in determining which statute of limitations applies and the problem of determining direct or indirect injury has been eliminated.

Virginia Farm Bureau Mutual Insurance v. Frazier, 247 Va. 172, 178, 440 S.E.2d 898 (1994).

Though as stated in Virginia Farm Bureau, "the problem of determining direct or indirect injury has been eliminated" when determining which statute of limitations applies, I do not read this statement as being inconsistent with the three tests stated in Brown v. American Broadcasting Company, Inc. Indeed, since 1977, the issue of survivability of a cause of action has been eliminated when determining the appropriate statute of limitations, and a determination of direct or indirect injury was critical to resolution of the issue of survivability before 1977. Nevertheless, as stated in Brown, for a cause of action to be a claim for injury to property, the alleged injury must directly affect the plaintiff's property, rather than his person. If the injury to property is a consequence of injury to the person, and therefore an indirect injury, then the claim is not a claim for property damage. This analysis from Brown is consistent, in my opinion, with Pigott because, according to either analysis, a claim of injury to property cannot be sustained if the property was not directly injured by the wrong alleged.

In Pigott, the property alleged to have been injured "was in the same condition and was available for the same use" after the wrongful conduct as it was before. 231 Va. at 81. Moreover, the allegedly wrongful conduct "was directed at the plaintiffs personally and not their property," and "had no impact on the property itself." 231 Va. at 81. Therefore, the wrongful conduct alleged in Pigott did not directly affect plaintiffs' property, since it was in the same condition both before and after the alleged wrong.

I will therefore apply to Willard's motion for judgment the three tests stated in Brown as urged by Willard in his memorandum. I will also apply the analysis of Pigott, though, as previously stated, the two analyses are, in my opinion, consistent with one another and equally applicable.

In his motion for judgment, Willard alleges the following:

This action seeks monetary relief for damage incurred by Willard caused by Moneta's failure to honor Willard's rights as a dissenting shareholder of the defendant pursuant to Virginia Code Sections 13.1-729 et. seq.

Motion for Judgment, para. 1.

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Notwithstanding this allegation, Willard also alleges:

The amount paid by Capps to Moneta for the assets purchased from Moneta was grossly inadequate and unfair and did not reflect the fair value of the property. As a result, the value of Willard's shares was seriously diminished.

Motion for Judgment, para. 19 (emphasis added).

According to Brown, the first test of whether an action for alleged injury qualifies for the benefit of the five-year statute of limitation is: "The injury must be against and affect directly the plaintiff's property." 704 F.2d at 1303.

Willard argues that Moneta did not advise him of his dissenter's rights in accordance with Sec. 13.1-732. Therefore, according to Willard, he did not give notice of his intent to demand payment in accordance with Sec. 13.1-733. The direct and immediate result of this failure, as specifically provided in subsection B of Sec. 13.1-733, is that Willard "is not entitled to payment for his shares under this article." This right, described in colloquial terms as Willard's cashout right, is a personal right granted Willard by statute in his capacity as a dissenting shareholder. Therefore, Willard's injury, the loss of his cashout right, was not against nor did it directly affect his property.

In my opinion, this is seen even more clearly when the analysis of Pigott is applied. Stated specifically, the issue is whether Willard's stock was in the same condition and was available for the same use after the allegedly wrongful conduct as before. When addressing this issue, it is necessary to determine when the allegedly wrongful conduct occurred so that the condition of Willard's property can be analyzed both before and after this date.

Sec. 13.1-658 requires notice of a special meeting of the shareholders to act on "a proposed sale of assets pursuant to Sec. 13.1-724" to "be given not less than twenty-five nor more than sixty days before the meeting date." Moneta complied with this requirement by giving Willard notice on November 22, 1996, of the special meeting of the shareholders to be held on December 20, 1996. However, Sec. 13.1-732(A) states that "the meeting notice shall state that shareholders are or may be entitled to assert dissenters' rights under this article and be accompanied by a copy of this article." Moneta's notice of the special meeting of the shareholders did not include notice of dissenters' rights in accordance with Sec. 13.1-732. Consequently, on November 22, 1996, Moneta violated Willard's right of notice of his dissenter's rights. Moreover, even if Moneta had attempted to remedy this violation, it could not have done so beyond the twenty-five day period immediately preceding December 20, 1996, because of the requirements of Sec. 13.1-658. At the latest, notice of the special meeting of the shareholders,

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and notice of dissenters' rights, would have had to have been given by November 25, 1996, if Moneta intended to conduct a special meeting of the shareholders on December 20, 1996.

When Willard failed to give written notice to Moneta of his intent to demand payment of the fair value of his shares if the proposed corporate action was effectuated, Willard's cashout right was lost at the moment of the shareholders' vote because of the prohibition stated in Sec. 13.1-733(B). In terms of Willard's cashout right, Moneta's wrongful conduct occurred on or about November 22, 1996, and Willard's loss was sustained and completely realized on December 20, 1996, when the shareholders voted. In my opinion, whether the sale of Moneta's assets was for adequate consideration or inadequate consideration, and whether the sale of Moneta's assets increased or decreased the value of Willard's shares, or had no impact upon Willard's shares, such issues are matters of no relevance to this cause of action because the allegedly wrongful conduct preceded the vote of the shareholders, and the alleged injury of loss of the cashout right occurred when the shareholders' vote was taken. Any injury to the value of Willard's shares resulting from the shareholders' vote cannot be a direct injury resulting from the wrong alleged, because the alleged injury was sustained at the time of the vote, notwithstanding any subsequent impact of the vote.

I will now address the issue of impact upon the "fair value" of Willard's shares as that term is defined by Sec. 13.1-729.

It must be remembered that Willard seeks monetary relief for the failure of Moneta to honor his dissenter's rights. The alleged wrong is therefore failure to give Willard notice of his dissenter's rights. However, this failure did not diminish the value of his shares. Rather, as alleged in the motion for judgment, Willard's shares diminished in value because Moneta sold substantially all of its assets for a "grossly inadequate and unfair amount."

Before the alleged wrong (failure to give notice of dissenters' rights on or about November 22, 1996), Willard's shares had a fair value. After this alleged wrong, and before the proposed corporate action was effectuated on December 20, 1996, these shares also had a fair value. In accordance with the definition of "fair value" stated in Sec. 13.1-729, this fair value is to be determined as of the time "immediately before the effectuation of the corporate action," not after effectuation of the corporate action. Consequently, even if effectuation of the corporate action (the sale of Moneta's assets) diminished the value of Willard's shares, Willard's cashout right entitled him to recovery of the fair value determined before the sale of assets was effectuated. In terms of Willard's potential recovery, if he had successfully asserted his rights as a dissenting shareholder, the consideration paid for Moneta's assets is virtually irrelevant, and any injury to his shares resulting from the actual sale of the corporate assets does not provide a basis for monetary relief in the present cause of action.

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In further accord with the analysis of Pigott, Willard's shares had the same use both before and after the alleged violation of his dissenter's rights. Before the alleged wrong on or about November 22, 1996, Willard was entitled to vote his shares in opposition to the proposed corporate action, and it is this right which qualified him as a dissenting shareholder pursuant to Sec. 13.1-730. After the alleged wrong, Willard could still vote his shares in opposition to the proposed corporate action, and did in fact take such action during the special meeting of the shareholders on December 20, 1996. Moreover, a "share" is defined by Sec. 13.1-603 as "the unit into which the proprietary interests in a corporation are divided." The proportional amount of Willard's proprietary interests in Moneta (19.7%) remained unchanged by the allegedly wrongful conduct of failing to notify him of his dissenter's rights on or about November 22, 1996.

Other than the personal loss of his cashout right, I am unaware of any rights extended Willard as a shareholder by common law or by Title 13.1 of the Code of Virginia, including his right to proportional distribution of the net assets of the corporation upon dissolution, that were directly affected by violation of his dissenter's rights. Instead, Willard's shares were in the same condition, and available for the same use, both before and after the alleged violation of dissenter's rights, notwithstanding any injury that may have subsequently resulted from sale of the corporate assets for less than adequate consideration.

It must be further remembered what Willard lost as a result of the allegedly wrongful conduct. If Willard had been given notice of dissenters' rights in accordance with Sec. 13.1-732, he could have given notice of his intent to demand payment of the fair value of his shares in accordance with Sec. 13.1-733, and received payment of the fair value of his shares within thirty days in accordance with Sec. 13.1-737. If Willard had been dissatisfied with the payment of the fair value of his shares, he would then have been entitled to institute the procedure provided by Sec. 13.1-739. If the demand for payment remained unsettled, Willard would have been entitled to a proceeding in circuit court in accordance with Sec. 13.1-740 for judicial determination of the fair value of his shares. The loss of these rights constitutes injury to Willard personally, and caused him personal financial damage.

It should be further emphasized that it is not known what corporate action would have been taken if Willard had given notice of his intent to demand payment in accordance with Sec. 13.1-733. As previously stated, the purpose of such notice to other shareholders is to inform them of the demand for payment of shares before a vote is taken on the proposed corporate action so that all shareholders will be aware of the potential amount of cash required to satisfy the cashout rights of any dissenting shareholders. If Moneta had abandoned the proposed sale of its assets, Willard would not have been entitled to dissenters' rights as a result of the prohibition stated in Sec. 13.1-370(D)(1).

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For these reasons, I rule that the alleged injury was not "against and (did not) affect directly the plaintiff's property" (first test of Brown), and that Willard's shares had both the same value and same use before and after the allegedly wrongful conduct. Moreover, Moneta's failure to notify Willard of his dissenter's rights was an act directed at Willard's person, rather than his property, causing him to sustain financial damage personal to the individual.

I will next address the second test of Brown: "The plaintiff must sue only for the direct injury." 704 F.2d 1303 and 1304. As already stated, Willard's motion for judgment is a suit for recovery of his cashout right, and his direct injury is the loss of the fair value of his shares determined as of the time immediately preceding the sale of Moneta's assets. However, Willard also alleges injury to his shares resulting from the amount paid for Moneta's assets. Such an injury may be alleged as the basis for judicial dissolution of the corporation in accordance with Sec. 13.1-747 for illegal, oppressive or fraudulent conduct, or such injury may be alleged as the basis for a derivative proceeding pursuant to Sec. 13.1-672.1. Indeed, such proceedings have been previously instituted by Willard in this matter. Nevertheless, any such injury to Willard's shares resulting from the sale of Moneta's assets would be an indirect or consequential injury, and not a direct injury resulting from failure to give notice of dissenters' rights. I therefore rule that the second test of Brown is not satisfied.

Finally, the third test of Brown states that "the injury, to qualify as a direct injury, must be the very first injury which results from the wrongful act." 704 F.2d 1304. Again stated, the first injury resulting from Moneta having failed to notify Willard, in accordance with Sec. 13.1-732, of his right to dissent was that Willard did not give notice of intent to demand payment in accordance with Sec. 13.1-733(A). According to subsection B of Sec. 13.1-733, a "shareholder who does not satisfy the requirements of subsection A of this section is not entitled to payment for his shares."

The remainder of the statutory scheme of dissenters' rights may be addressed in sequential fashion. When Willard failed to give notice of his intent to demand payment in accordance with Sec. 13.1-733, he did not receive dissenters' notice in accordance with Sec. 13.1-734. Not having received dissenters' notice, Willard did not demand payment in accordance with Sec. 13.1-735. According to subsection C of Sec. 13.1-735, the result of this failure to demand payment is that Willard "is not entitled to payment for his shares under this article."

Willard further lost his right to payment of the fair value of his shares in accordance with Sec. 13.1-737, and also lost the benefit of Sec. 13.1-739, which provides a dissenting shareholder with a procedure by which he may notify the corporation in writing of his own estimate of the fair value of his shares and the amount of interest due.

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As an additional injury, Willard lost his right to judicial determination of the fair value of his shares in accordance with Sec. 13.1-740. Finally, Willard was not entitled to recover fees, expenses, and attorneys' fees in accordance with Sec. 13.1-741.

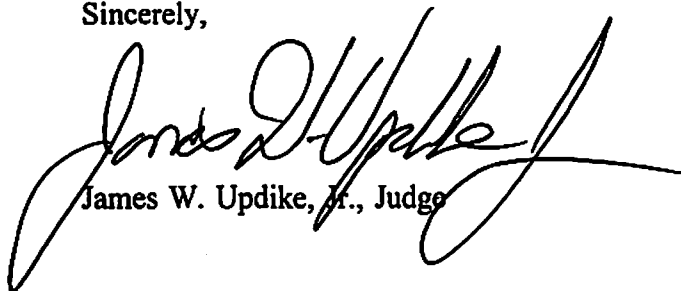
As a dissenting shareholder, Willard was entitled to the benefit of numerous personal rights accorded by Sec. 13.1-729, *et. seq.* The loss of these rights was a loss personal to Willard, causing him personal financial damage, without impact upon his shares. Though Willard alleges injury to his shares resulting from the sale of Moneta's assets for a grossly inadequate amount, any such injury would not be the first injury resulting from failure to notify him of his dissenter's rights. I therefore rule that the third test of Brown is not satisfied. ~

For these reasons, I rule that Willard's motion for judgment is not an action for injury to property that qualifies him for the benefit of the five-year period of limitation stated in Sec. 8.01-243(B) of the Code of Virginia. Rather, it is my opinion that Willard's motion for judgment is barred by the catchall provisions of Sec. 8.01-248, and its two-year period of limitation. I therefore sustain Moneta's special plea of the statute of limitations and I dismiss Willard's motion for judgment.

Having sustained Moneta's plea of the statute of limitations, it is unnecessary to address Moneta's demurrer and Moneta's special plea of res judicata.

I ask Mr. Hopkins to prepare an order consistent with this opinion.

Sincerely,



James W. Updike, Jr., Judge

JWUJr:mks

cc: The Honorable Carol W. Black, Clerk

000155

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF BEDFORD

RONALD L. WILLARD,

Plaintiff,

v.

Case No. CL 9745-00

June 30, 2000

MONETA BUILDING SUPPLY, INC.,
a Virginia corporation,

Defendant.

FINAL JUDGMENT ORDER

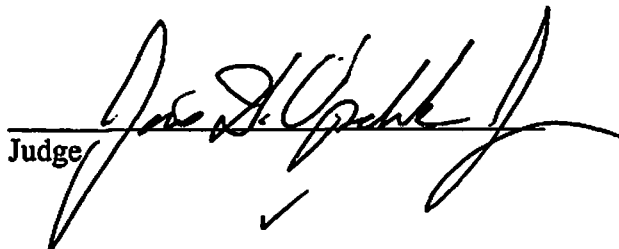
On the 28th day of March, 2000, came the parties, by counsel, on the demurrer, the plea of the statute of limitations, and the plea of *res judicata* filed on behalf of defendant, Moneta Building Supply, Inc., upon memoranda filed by defendant and plaintiff in support of and in opposition to such papers, and the same were argued by counsel.

Upon consideration whereof, this Court hereby finds, for the reasons stated in its letter opinion dated April 18, 2000, that defendant's plea of the statute of limitations should be, and it hereby is, sustained. Accordingly, it is hereby ORDERED that this action is dismissed with prejudice, there having been no adjudication of defendant's demurrer and plea of *res judicata*.

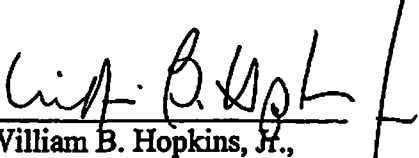
The Clerk is directed to provide a certified copy of this order to all counsel of record and to remove this cause from the docket of this Court.

ENTER: 6 / 30 / 2000

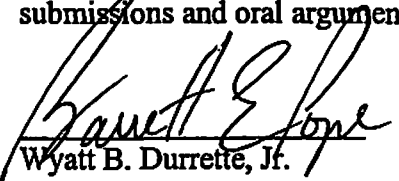
Judge



I ask for this:


William B. Hopkins, Jr.,
Martin, Hopkins & Lemon, P.C.
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P.O. Box 13366
Roanoke, VA 24033
540-982-1000
Counsel for defendant

Seen and objected to on the
grounds stated in the record,
including plaintiff's written
submissions and oral arguments:


Wyatt B. Durette, Jr.
Barrett E. Pope
Durette, Irvin & Bradshaw, P.L.C.
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Counsel for plaintiff

7/5/00
C. Hopkins & Durette
P/O T. S/I

ASSIGNMENT OF ERROR

The trial court erred in holding that Willard's claim is time barred due to the two-year statute of limitations set forth in Virginia Code § 8.01-248 being applicable instead of the five-year statute of limitations set forth in Virginia Code § 8.01-243(B) governing injuries to property.