VIRGINIA: IN THE CIRCUIT COURT OF SOUTHWESTERN COUNTY[1]

SMOOTH RIDE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.: 1234-567**
	)	
IRONMEN CORP.	)	
d/b/a TUFF STUFF, INC.	)	
	)	
and	)	
	)	
STEEL-ON-WHEELS, LTD.,	)	
	)	
Defendants.	)	

PLAINTIFF SMOOTH RIDE, INC.'S MEMORANDUM OF AUTHORITY IN OPPOSITION TO DEFENDANT IRONMEN CORP.'S DEMURRER

COMES NOW the Plaintiff, Smooth Ride, Inc. ("Plaintiff"), by counsel, and in support of its oral argument on November 28, 2006 opposing the Demurrer of Defendant Ironmen Corp. ("Defendant Ironmen"), files the following points and authorities:

STATEMENT OF FACTS

Defendant Ironmen manufactured the tank at issue and authorized Steel-on-Wheels, Ltd., ("Defendant Steel-on-Wheels"), a defendant in this case, to deliver it to the Plaintiff's primary place of business and install it there on September 25, 2003. The Plaintiff believes that Defendant Steel-on-Wheels is a licensed agent of Defendant

[1]Names and locations have been changed to protect privacy.

Ironmen or that the Defendants intended the Plaintiff to be a third-party beneficiary of their contract. Both Defendants warranted that the tank and its installation were safe and proper for the Plaintiff's particular use of storing a specific type of oil aboveground at an automobile dealership.

The tank failed on August 3, 2004, spilling a considerable amount of oil. The oil damaged not only the ground to which the tank was attached but also nearby property owned by the Plaintiff, as well as the surrounding environment, including a drainage basin and nearby streams.

The cost to the Plaintiff to repair the damage was well over $100,000. That loss comprises both property damage (including the considerable damage to the Plaintiff's real property unrelated to the tank) and economic losses (including damage to the tank itself, lost oil, lost business, lost use of nearby facilities, and lost wages). The Plaintiff has fully alleged several causes of action in tort and in contract that will allow it to recover compensation for these losses from Defendant Ironmen under Virginia law.

Defendant Ironmen continues to raise arguments that the Plaintiff has already rebutted, and it continues to dispute the facts of this case. The Plaintiff reiterates that no demurrer may be sustained on behalf of Defendant Ironmen, because the Plaintiff has fully asserted facts sufficient to support several causes of action and because the law requires those facts to be read in the light most favorable to the Plaintiff.

ARGUMENT

Virginia law specifically enables a buyer of a defective product to recover damages from a remote manufacturer. *See* Va. Code Ann. § 8.2-318 (lack of privity no defense for manufacturer in negligence action even if it did not sell directly to plaintiff); *id.* § 8.01-223 (lack of privity no defense in cases not provided for in § 8.2-318).

By themselves, the statutes would appear to enable the recovery of any type of damages, whether property damage, economic loss, or both. Since the General Assembly enacted those statutes, however, courts have carved out an exception: A plaintiff may recover from the manufacturer in all cases unless the *only* injury involves economic expectations, such as lost profits or injury to the product itself. *See Redman v. John D. Brush & Co.*, 111 F.3d 1174, 1182 (4th Cir. 1997) ("[A] plaintiff who is not in privity of contract with the defendant cannot maintain an action for negligence . . . based on purely economic losses.").

The exception for economic losses *alone* leaves available causes of action for negligence and breach of warranty, whether at common law or under the Code,[2] in every

[2]Any argument that the tank was not made for a "particular purpose" under Code § 8.2-315 may be easily rebutted. The Plaintiff has fully alleged that the product was custom-made and custom-installed for the express purpose of storing a certain specific type of oil at an automobile dealership. *See generally Medcom, Inc. v. C. Arthur Weaver Co.*, 232 Va. 80, 84, 348 S.E.2d 243, 246 (1986) (requiring proof that the plaintiff relied on the defendant's skill and that the defendant had reason to know of the purpose and the reliance).

Even if the tank is found not to have had a particular purpose, the Plaintiff has alleged that the tank was not reasonably safe for its intended use once it was placed in the stream of commerce, an allegation that is sufficient to implicate a warranty of merchantability under Code § 8.2-314. *See Turner v. Manning, Maxwell & Moore, Inc*.,

case containing either (i) privity or (ii) injury to property. Because the parties in this case are in privity and because (even if privity did not exist) an injury to real property presents a loss that is noneconomic in nature as a matter of law, this case may not be dismissed on the basis of the economic loss rule. The Demurrer should be overruled.

I. THE EXISTENCE OF PRIVITY PERMITS RECOVERY OF ALL TYPES OF LOSSES.

"According to the [economic loss] rule, a plaintiff who is not in privity of contract with the defendant cannot maintain an action for negligence, such as a product liability suit, based on purely economic losses." *Redman*, 111 F.3d at 1182; *see also Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc.*, 152 F.3d 313, 319 (4th Cir. 1998) ("If . . . privity is still required to recover economic losses in negligence claims, notwithstanding the language of the statute, then it is certainly conceivable that the Virginia Supreme Court would also require privity to recover economic losses in a breach of warranty claim[.]") This rule is relevant because the statute at issue works to obviate the requirement of privity, apparently in all cases. *See* Va. Code Ann. § 8.2-318.

The key to *Beard* is its holding that a subcontractor's monetary loss (in that case, it was a payment resulting from the settlement of a lawsuit against the subcontractor) simply does not constitute property damage. *See* 152 F.3d at 316 (holding that the settlement payment and the loss of income and similar losses are "a pure economic loss"). Although the defective pipe in *Beard* caused considerable injury to property, namely the

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216 Va. 245, 217 S.E.2d 863 (1975); Va. Code Ann. § 8.2-314(1).

building in which the subcontractor had installed it, the building was not owned by the subcontractor, and the subcontractor therefore did not suffer the physical injury. *Id.* The subcontractor also was not in privity of contract with the manufacturer, but that fact arguably would have been irrelevant if any of the subcontractor's own property had been damaged by the faulty pipe. *See id.*

Where the parties are in privity of contract, however, the economic loss rule has no application and as a matter of law cannot prevent a suit to recover an economic loss. *See generally Redman*, 111 F.3d at 1182. Because an agent can be held liable for negligent performance of a contract to which his principal is a party, *Allen Realty Corp. v. Holbert*, 227 Va. 441, 450, 318 S.E.2d 592, 597 (1984), the finding of an agency relationship between Defendant Steel-on-Wheels and Defendant Ironmen in this case puts the Plaintiff in privity with both Defendants. *See generally SettlementRoom L.C. v. Certified Env'ts, Inc.*, 67 Va. Cir. 69, 2005 WL 832215, at *3 (Fairfax County 2005) (finding agency relationship sufficient to satisfy privity requirement of economic loss rule, while holding against plaintiff for failure to show property injury). An agency relationship requires "one person's manifestation of consent to another person that the other shall act on his behalf and subject to his control, and the other person's manifestation of consent so to act." *Reistroffer v. Person*, 247 Va. 45, 48, 439 S.E.2d 376, 378 (1994). The *Reistroffer* case, cited by Defendant Ironmen, also states that the existence of agency is a question of fact for the factfinder. *Id.* Therefore, if the Plaintiff has alleged facts that, when viewed in the Plaintiff's favor, are sufficient to support an agency relationship, the Court may not dismiss this case. *See id.*

In Paragraphs 5, 6, 7, 8, 9, and 24 of the Amended Complaint, the Plaintiff fully alleged the existence of an agency relationship. Those paragraphs state that Defendant Steel-on-Wheels consulted with the Plaintiff about installing a tank for a particular purpose, recommended Defendant Ironmen as the supplier of the tank, arranged for Defendant Ironmen to manufacture the tank, arranged for the delivery of the tank, conducted the negotiations and evaluation on behalf of both itself and Defendant Ironmen, and acted as an agent of Defendant Ironmen. The fact alleged in Paragraph 24 must be taken as true when deciding whether the allegations are sufficient: "Defendant, Steel-on-Wheels, Ltd., was therefore the agent of . . . Defendant, Ironmen Corporation." By sufficiently alleging the existence of an agency relationship, the Amended Complaint states a cause of action that cannot as a matter of law be barred by the economic loss rule. *See generally Beard*, 152 F.3d at 316-19. The Demurrer should be overruled.

Defendant Steel-on-Wheels has admitted the allegations contained in Paragraph 8 of the Amended Complaint, which states that Defendant Steel-on-Wheels "conducted the said contact, negotiations, and evaluation on behalf of Defendant, Ironmen Corporation." The Plaintiff brought this admission by Defendant Steel-on-Wheels to the attention of the Court. Viewing this admission and the underlying allegation as true facts for purposes of the Demurrer, the Court should find that the Plaintiff has alleged sufficient evidence of an agency relationship to avoid the economic loss rule and prevent dismissal of this case.

In its own pleadings in this case, Defendant Steel-on-Wheels admitted negotiating the deal on behalf of Defendant Ironmen. The Plaintiff brought this admission to the attention of the Court. If this allegation is proven true at trial, the Plaintiff will have

proven the existence of an agency relationship sufficiently to make the economic loss rule irrelevant and to hold Defendant Ironmen liable both in contract and in tort. Although Defendant Ironmen asserts that no agency relationship existed, this dispute is a factual one that may be resolved only by the finder of fact. *See Reistroffer*. Therefore, the Plaintiff has put forth allegations sufficient to overrule the Demurrer.

II. THE EXISTENCE OF PROPERTY INJURY PERMITS RECOVERY OF ALL TYPES OF LOSSES.

The economic loss rule prohibits the recovery of economic losses in some cases and permits it in others. *See Redman*, 111 F.3d at 1182 (where there is no privity, barring the recovery for economic losses in "an action for negligence, such as a product liability suit, based on purely economic losses"); *see also Beard*, 152 F.3d at 317 (a party may "escape that privity requirement" if "the damages it seeks go beyond economic loss"). The rule provides an exception to the statutory warranty for the purpose of excluding recovery in situations such as that of *Beard*, where the plumbing subcontractor could show neither a contractual relationship with the pipe manufacturer nor any property damage whatsoever. *See* 152 F.3d at 316 (the property that was injured did not belong to the subcontractor). Where a party has suffered both economic losses and property injury, however, the economic loss rule has no application, and it can do nothing to bar a recovery or to require privity between the parties. *See* Va. Code Ann. § 8.2-318 (lack of privity is no defense); *Beard*, 152 F.3d at 315-19 (modifying rule to state that lack of privity is no defense unless the only injury is economic loss) .

"Economic loss" refers to damage to the product itself, damage to the product's component parts, the cost to repair the product, lost business, and disappointed economic expectations. *Sensenbrenner v. Rust, Orling & Neale, Architects,* 236 Va. 419, 425, 374 S.E.2d 55, 58 (1988); *see also Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 284 (3d Cir. 1980) (economic loss includes "damages for inadequate value . . . without any claim of personal injury or damage to other property"); *Redman*, 111 F.3d at 1182 (citing *Jones & Laughlin*). "[W]here there is no accident, and no physical damage, and the only loss is a pecuniary one, through loss of the value or use of the thing sold, or the cost of repairing it, the courts have adhered to the rule . . . that purely economic interests are not entitled to protection against mere negligence, and so have denied the recovery." *Jones & Laughlin,* 626 F.2d at 287 (quoting William L. Prosser, *Handbook on the Law of Torts* § 101, at 665 (4th ed. 1971)).

Contrasted against purely economic losses, the harm that constitutes injury to physical property is obvious. *See generally Jones & Laughlin*. "There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries, but also property damage[.]" *Id.* (quoting Prosser, *supra*, § 101, at 665). Property damage is recoverable in all cases, while economic loss is recoverable only if it is accompanied by property damage. *See Va. Transformer Corp. v. P.D. George Co.*, 932 F. Supp. 156, 162 (W.D. Va. 1996) ("[T]he economic loss rule applies to cases of defective products where the only injury is to the product itself."); *Beard*, 152 F.3d at 317 (a party may "escape that privity requirement" if "the damages it seeks go beyond economic loss"); *Bank of Am. v. Musselman*, 240 F. Supp. 2d 547, 554 n.9 (E.D.

Va. 2003) ("[T]he privity requirement is waived when the plaintiff is alleging non-economic losses, such as physical injury to person or property."); Va. Code Ann. § 8.01-223 ("In cases not provided for in § 8.2-318 where recovery of damages for injury to person, including death, or to property resulting from negligence is sought, lack of privity between the parties shall be no defense."); *Blake Constr. Co. v. Alley*, 233 Va. 31, 34, 353 S.E.2d 724, 726 (1987) (holding that § 8.01-223 eliminates the privity requirement in "cases involving injuries to person or property").

Defendant Ironmen in this case may argue, at most, that the defective product somehow also included that portion of the Plaintiff's land that became an element of the tank when it was installed. *See generally Sensenbrenner* (holding that swimming pool allegedly constructed in a defective manner constituted the product itself and that it was therefore not plaintiff's damaged "property"); *Va. Transformer Corp*. (holding that varnish used in manufacture of transformer is a component of the product itself). The definition of "product" in this case might be expanded to include, at most, the holes that were dug to create seats for the tank supports and, arguably, even to include the patch of earth directly beneath the tank if the earth was altered in some way. *See generally Sensenbrenner*. No other part of the Plaintiff's real property can possibly be considered a product that was manufactured or sold by Defendant Ironmen, however. Therefore the Plaintiff's allegations of injury to its real property, independent of the tank, are sufficient to obviate the economic loss rule and to permit the Plaintiff to recover all types of losses in this case. *See generally Beard*. It would be an error of law to sustain a demurrer on the basis of the economic loss rule where the plaintiff has alleged property damage. *See*

Va. Code Ann. § 8.2-315 (statutory implied warranty of fitness); *see also Beard*, 152 F.3d at 318 (allowing damages if a plaintiff shows elements for statutory implied warranty of fitness).

III. THE COURT MUST VIEW THE FACTS IN THE AMENDED COMPLAINT AS TRUE.

Finally, Defendant Ironmen has failed to supply this Court with any reason to sustain a demurrer. No demurrer may be sustained unless "the pleading, considered in the light most favorable to the plaintiff, fails to state a valid cause of action." *Welding, Inc. v. Bland County Serv. Auth.*, 261 Va. 218, 226, 541 S.E.2d 909, 913 (2001) (citing *W.S. Carnes, Inc. v. Bd. of Suprv'rs*, 252 Va. 377, 384, 478 S.E.2d 295, 300 (1996)); *see also* Va. Code Ann. § 8.01-273. "Any permissible inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party." *Beard*, 152 F.3d at 315 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986)).

Although the parties dispute the facts of this case, the decision of whether to overrule a demurrer does not require a substantive weighing of the facts. *See* Va. Code Ann. § 8.01-273. Instead, the decision requires the Court to assume that the allegations are true and then to decide whether these allegations minimally cover the requirements for a cause of action. *See generally id.* By itself, the admission by Defendant Steel-on-Wheels of certain numbered paragraphs in the Amended Complaint establishes

sufficient authority to overrule the Demurrer in this case. Therefore the Court should permit the litigants to proceed to trial.

CONCLUSION

Because the Plaintiff seeks more than merely economic losses, the causes of action in its Amended Complaint may go forward whether or not there is privity with Defendant Ironmen. If the Plaintiff's case also depends on showing that Defendant Ironmen occupies an agency relationship with Defendant Steel-on-Wheels, then the Plaintiff has already alleged more than enough facts to do so. Defendant Steel-on-Wheels has *admitted* that an agency relationship existed, as the Plaintiff has informed the Court. These controversies are questions of fact, and, as such, they may not be decided prior to trial. Therefore, the Court should overrule the Demurrer.