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Civil Procedure--Res Judicata as to Parent and Child

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Court cases. The three landmark cases have brought about considerable comment pro and con among legal scholars and labor authorities,[19] not to mention disagreement and confusion in the lower federal courts.[20] However, it seems clear that the intention of the Supreme Court is to favor the finality of the arbitration process.[21]

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CIVIL PROCEDURE — RES JUDICATA AS TO PARENT AND CHILD

Videtto v. Marsh, 112 Ohio App. 151, 175 N.E.2d 764 (1960)

In *Videtto v. Marsh*[1] Leonard Videtto, an infant, commenced an action through his father as next friend against defendant to recover for personal injuries which he had received due to the alleged negligence of defendant. At the close of plaintiff's evidence the trial court directed a verdict for the defendant " 'on the ground that defendant owed no legal duty to the plaintiff which was breached by defendant.' "[2] Plaintiff appealed, and the judgment of the trial court was affirmed. Motion to certify to the supreme court was denied.

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19. *E.g.,* Robinson, *Labor Law: Arbitration: Scope of the Arbitration Clause: Scope of Judicial Review,* 46 CORNELL L.Q. 336, 340 (1961). The article in general criticizes the three decisions as giving too much authority to arbitrators and going against the intention of the parties to the contract. In Robinson's opinion, United Steelworkers v. Enterprise Wheel & Car, 363 U.S. 593 (1960), leaves no room for review by the courts of arbitration awards.

Another writer warns management that it will be necessary to make specific exclusions from arbitration in future contracts. Snyder, *What Has the Supreme Court Done to Arbitration?,* 12 LAB. L.J. 93 (1961).

Brown, *Arbitration and Award — Interpretation of Arbitration Clauses in Collective Bargaining Agreements,* 36 N.Y.U. L. REV. 233, 237 (1961), interprets *Warrior* to mean that the old view that management retains all rights not contracted away is rejected and that management rights are derived exclusively from the terms of the agreement broadly construed.

20. The Fourth Circuit itself is inconsistent. In American Brake Shoe v. Local 149, 285 F.2d 869, 873 (4th Cir. 1961), it said that where arbitration is agreed to and had, then there is no question of arbitrability being proper and the court only determines whether the arbitrator ruled on a contract question. The decision was a liberal one.

For cases applying the liberal intent of the Supreme Court view, see Lodge No. 12, v. Cameron Iron Works Inc., 292 F.2d 112 (5th Cir. 1961); International Tel. & Tel. Corp. v. Local 400, 286 F.2d 329 (3d Cir. 1960); Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 283 F.2d 93 (3d Cir. 1960); Howard v. U.S. Rubber Co., 190 F. Supp. 663 (1961).

The Sixth Circuit takes a view in favor of limitation and holds that the question of arbitrability is for the courts. Vulcan-Cincinnati, Inc., v. United Steelworkers, 289 F.2d 103, 107 (6th Cir. 1961); *accord,* Local 791, Int'l Union of Elec. Workers v. Magnavox Co., 286 F.2d 465 (6th Cir. 1961); United Brick Workers v. Gladding McBean & Co., 192 F. Supp. 64 (1961).

21. But see the opinion of Justices Brennan and Harlan who wrote a concurring opinion to the triology of Supreme Court cases. Their opinion points out that the scope of judicial review will broaden where it is evident from a narrow arbitration clause and a specific exclusion clause that the parties intended to limit the scope of arbitration. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 569-73 (1960).

During pendency of his son's suit, the father brought another action in the same trial court for consequential damages to himself against the same defendant. The damages, loss of services and hospital and medical expenses, were based on the same occurrence as that in the son's suit. To plaintiff's amended petition the defendant filed an answer and also filed a cross-petition for a declaratory judgment that the adjudication in the son's case, *as finally determined against the son,* should estop and bar[3] the father from maintaining an action for consequential damages. The trial court rendered judgment in favor of defendant on the strength of his cross-petition, and plaintiff's petition was dismissed. Plaintiff's motion for a new trial was denied, and plaintiff appealed.

Although two issues were presented for determination by the appellate court, only one was dealt with extensively.[4] The important question for decision was: Where an infant, by his father and next friend, brings an action against a defendant for personal injuries alleging negligence on the part of the defendant and loses through failure to prove such negligence, does such adjudication against the son estop or bar the father from bringing an action for consequential damages against the same defendant for negligence arising out of the same occurrence?

In Ohio an action by a minor must be brought by an adult guardian or next friend.[5] Hence the importance of res judicata or estoppel is crucial in a parent-child action against an allegedly negligent defendant. If the child recovers, does this mean that the parent is practically assured

1. 112 Ohio App. 151, 175 N.E.2d 764 (1960).

2. *Id.* at 152, 175 N.E.2d at 765.

3. It should be pointed out that there is considerable confusion among the courts in attempting to distinguish between res judicata and estoppel in actions such as the instant case. In Clark v. Baranowski, 111 Ohio St. 436, 441, 145 N.E. 760, 761 (1924), the court stated that res judicata ". . . is treated by the courts as a branch of the law of estoppel . . . ."

The doctrine of estoppel is that a party may be prevented by his prior actions from assuming an argumentative position to the contrary. The doctrine of collateral estoppel is that in a subsequent action between the same parties or their privies, but on a different cause of action, the judgment is conclusive as to those issues raised in the subsequent action if those issues were actually litigated and determined in the prior action.

The doctrine of res judicata can be stated: when a valid judgment has been rendered on the merits by a court having proper jurisdiction, such judgment is conclusive in a subsequent action between the same parties or their privies and brought before a court of like or concurrent jurisdiction, of rights, questions, and facts which were decided or could have been decided in the former action.

The question is further complicated when, as in the instant case, the court dealt with estoppel in the light of the parent's active participation in the son's suit from the trial level to the perfection of an appeal after final judgment. Thus, the court recognized an additional possibility of estoppel apart from the more common concept of "collateral estoppel." See also 32 OHIO JUR. 2d *Judgments* §§ 275-78 (1955).

4. The other issue presented was: Does the filing of a cross petition for a declaratory judgment prevent a trial by jury in an action for money only? The court held in the negative. See Royal Indem. Co. v. McFadden, 65 Ohio App. 15, 29 N.E.2d 181 (1940); 16 OHIO JUR. 2d *Declaratory Judgments* § 17 (1955); Harper, *Declaratory Judgments in Ohio,* 28 U. CINC. L. REV. 33, 51, (1959).

5. OHIO REV. CODE § 2307.11.

of success in a second suit for consequential damages? Must a defendant go through a second suit against a parent even if the defendant was proven non-negligent in a prior suit between himself and the parent's child? A number of other interesting situations can arise which may turn on a court's interpretation of res judicata.

In a unanimous decision, the court of appeals reversed the trial court and held that the father was not barred or estopped by the adjudication in his son's case in favor of the defendant.[6] The court was of the opinion

> . . . that in the son's case the son, and not the father, was the real party in interest and he appeared . . . by statute as "next friend," and that as such he is not one and the same individual as the plaintiff in this case. Here, in contemplation of law he is a distinct person, and a stranger to the prior proceedings and judgment.[7]

In essence, the court held that there were different parties and different causes of action; therefore, res judicata did not apply.

In so holding the court relied heavily on *Krisher v. McAllister*,[8] a case in which the situation was nearly identical to that in the *Videtto* case. In the child's suit the verdict was for the defendant. In a later suit by the father, the defendant contended that in the child's suit all questions of negligence had been decided in favor of the defendant, and as such the issue of negligence was res judicata. However, the court stated that while there was considerable merit in defendant's contention, it was against the weight of authority both in Ohio and throughout the United States. For this reason the court in *Krisher* ruled that the parent and child were different parties in a legal sense and that the parent was not barred by an adverse decision in the child's action. The court went on to hold that since the parent was not barred by res judicata, surely he would not be estopped because of participation in the son's suit, for as "next friend" he had both the right and duty to proceed on his son's behalf as forcefully as possible.[9]

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6. Motion to certify the record denied, January 11, 1961, 112 Ohio App. 151, 175 N.E.2d 764 (1961).

7. Videtto v. Marsh, 112 Ohio App. 151, 154-55, 175 N.E.2d 764, 766 (1960).

8. 71 Ohio App. 58, 47 N.E.2d 817 (1942).

9. In deciding that there were two distinct causes of action the court in the *Videtto* case also relied on Kraut v. Cleveland Railway Company, 132 Ohio St. 125, 5 N.E.2d 324 (1936). There the relationship was that of husband and wife, and the husband brought an action against defendant for consequential damages sustained through his wife's injury. In a prior suit the wife had failed to sustain her case, and judgment was rendered for the defendant. In holding that the wife's suit was not res judicata as to the husband's action the court stated: "There was but one wrong but from it sprang two separate and distinct rights of action, one in the husband and the other in the wife. Their actions are wholly distinct and separate from each other and since there is no privity between them in the connection involved, an adjudication in one could not properly be res judicata in the other." *Id.* at 127, 5 N.E.2d at 325. Using this as an analogy, the court in the *Videtto* case reasoned that the same rule must also apply where the relationship is one of parent and child. As a result, the court held that the

The position taken by the court in the *Videtto* case seems to have the support of the majority of case decisions outside of Ohio.[10] However, some question can be raised as to the wisdom of the postion adopted by Ohio and the majority of the several states.

The view which finds favor in a minority of the states can be stated as follows: If the child's case falls, then the parent's case also falls, but if the child's case stands, it does not necessarily follow that the parent's case stands.[11] The parent's case would not necessarily stand because the parent must prove, in fact, that he has suffered damages through loss of services or hospital and medical expenses.[12] Many jurisdictions favor this view.[13] In *Whang v. Hong*[14] the Oregon Supreme Court stated, "It is a general rule that if a child may not recover in a tort action, the parent's cause of action is defeated."[15] In *Jones v. Schmidt*[16] the Illinois appellate court was of the opinion that "upon failure to establish a right of action in the infant plaintiff, the claim of the father must fail with it . . . ."[17]

It has been held in Ohio that the contributory negligence of a parent leading to the minor's injury, though not imputed to the minor,[18] will bar any action *by the parent* for consequential damages.[19] It seems incongruous to deny the parent recovery for consequential damages when he has been judicially determined to be contributorily negligent in a prior suit brought by a minor, while allowing the parent a chance to recover the same damages when the defendant himself has been found

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father could bring suit upon a different cause of action than that of his son even though they both arose from the same allegedly negligent acts. The son's action would be for pain and suffering, while the father's action would be for loss of services and hospital and medical expenses.

10. Sayre v. Crews, 184 F.2d 723 (5th Cir. 1950); McManus v. Arnold Taxi Corp., 82 Cal. App. 215, 255 Pac. 755 (1927); Youngblood v. Taylor, 89 So. 2d 503 (Fla. 1956); Ball v. Benjamin, 313 Ky. 623, 233 S.W.2d 267 (1950); Detore v. Demers Bros., 312 Mass. 531, 45 N.E.2d 745 (1942); Hall v. Waters, 132 S.C. 117, 128 S.E. 860 (1925); Fall v. Weber, 47 S.W.2d 365 (Tex. Civ. App. 1934). See also Annot., 133 A.L.R.181, 201-02 (1941).

11. Annot., 32 A.L.R.2d 1060, 1064 (1953).

12. McCray v. Earls, 267 Ky. 89, 101 S.W.2d 192 (1936).

13. Central of Ga. R.R. v. Robins, 209 Ala. 12, 95 So. 370 (1923); Cavanaugh v. First Nat'l Stores, 329 Mass. 179, 107 N.E.2d 307 (1952); Mendes v. Costa, 326 Mass. 608, 96 N.E.2d 161 (1950); Thompson v. United Labs. Co., 221 Mass. 726, 108 N.E. 1042 (1915); Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (Ct. Err. & App. 1942); Reilly v. Rawleigh, 281 N.Y. Supp. 366 (App. Div. 1935); Pitrelli v. Cohen, 169 Misc. 117, 6 N.Y.S.2d 696 (Sup. Ct. 1938); Hall v. Royce, 109 Vt. 99, 192 Atl. 193 (1937). See also 39 AM. JUR. *Parent and Child* § 74 (1942); 67 C.J.S. *Parent and Child* § 41 (1950).

14. 206 Ore. 125, 290 P.2d 185 (1955).

15. *Id.* at 131-32, 290 P.2d at 188.

16. 349 Ill. App. 336, 110 N.E.2d 688 (1953).

17. *Id.* at 341, 110 N.E.2d at 691.

18. Saint Clair St. Ry. v. Eadie, 43 Ohio St. 91, 1 N.E. 519 (1885).

19. Scott v. Marshall, 90 Ohio App. 347, 105 N.E.2d 281, *appeal dismissed,* 156 Ohio St. 270, 101 N.E.2d 906 (1951); Shadwick v. Hills, 79 Ohio App. 143, 69 N.E.2d 197 (1946).

to be non-negligent in a prior suit brought by the minor. This is the result in the *Videtto* case. Surely the defendant should be as free from liability to the parent when the defendant is non-negligent as when the parent is contributorily negligent.

Further support for the minority view in the United States can be found in a close analysis of *Krisher v. McAllister*,[20] which was the cornerstone of the decision in the *Videtto* case. The opinion in the *Krisher* case was sympathetic with the minority view.[21] When a court reaches its decision reluctantly, as did the court in the *Krisher* case,[22] there is ample reason for concern when that case is used as a basis for a decision in a later case.

Moreover, the court in *Krisher* relied heavily upon wrongful death cases[23] in its decision. It must be remembered, as pointed out in *Moss v. Hirzel Canning Company*,[24] that this type of situation is expressly covered by statute[25] in Ohio. Two distinct rights of action in wrongful death cases are maintainable by the same personal representative of the deceased, one for the benefit of the estate, and one for the benefit of the next of kin.[26] Statutory wrongful death actions should not be confused with common law parent-child actions.

It is illogical to hold that a defendant should have to pay the parent for consequential damages arising directly from the child's injury when previously the defendant has been found by a court of competent jurisdiction to have breached no duty owed to the child. The parent's cause

20. 71 Ohio App. 58, 47 N.E.2d 817 (1942).

21. *Id.* at 60-61, 47 N.E.2d at 818. The court stated: "Were this a matter of first impression, we would be inclined to hold with the appellee. There is certainly much reason in the proposition that when an issue has been thoroughly litigated and finally determined, and it has been decided that no cause of action exists for the injuries sustained, it follows that claims incidental to, or growing out of, these injuries should not thereafter be sustainable against one who has been found free from liability in the original action."

22. *Id.* at 63, 47 N.E.2d at 819. The court said: "With considerable reluctance, we come to the conclusion that the judgment in the former action of Krisher by his next friend, against McAllister and others, is not *res judicata* in the present action."

23. Gibson v. Soloman, 136 Ohio St. 101, 23 N.E.2d 996 (1939); May Coal Co. v. Robenitte, 120 Ohio St. 110, 165 N.E. 576 (1929); Mahoning Valley Ry. v. Van Alstine, 77 Ohio St. 395, 83 N.E. 601 (1908).

24. 100 Ohio App. 509, 137 N.E.2d 440 (1955).

25. OHIO REV. CODE §§ 2125.01-02, 2305.21.

26. The right of action for the benefit of the estate is for the injuries for which the deceased would have had a cause of action had he lived, and the right of action for the next of kin is for the pecuniary loss suffered by them because of the death. The distinct rights of action in a wrongful death case are for different types of injuries. The right of action for the estate is based on a physical injury, but the right of action for the next of kin is based on monetary loss. Hence, although both of the rights arise out of one death they are considered as separate rights *granted by statute*. As a result the doctrine of res judicata has limited application in wrongful death cases.

For an interesting variation in a wrongful death action dealing with res judicata, estoppel by judgment, and personal injury, see Brinkman v. Baltimore & O.R.R., 111 Ohio App. 317, 172 N.E.2d 154 (1960).