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Civil Procedure--Service of Process upon a Corporation

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of action arises out of, and is based on, the same alleged negligent act that caused the injury to the minor. The majority rule would say that the parent has an independent cause of action which is true in some respects. However, upon what will the parent base his action where in a prior suit the defendant has been found to be free from negligence? Should the courts ignore the fact that the defendant has been found to have committed no tort against the minor and continue to state "different parties, different causes of action"? Through common sense and necessity a logical and more practical view would be that the parent's right is derivative and secondary. Hence, the parent's rights should be conditioned on the minor's right of recovery.

The decision in the *Videtto* case is undoubtedly the Ohio rule and represents the prevailing rule throughout the United States. In all probability the Ohio courts will continue to follow this rule notwithstanding a well reasoned minority view. However, it is suggested that Ohio should re-examine the problem closely.

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CIVIL PROCEDURE — SERVICE OF PROCESS UPON A CORPORATION

Moriarty v. Westgate Center, Inc.
172 Ohio St. 402, 176 N.E.2d 410 (1961)

It is well established that a corporation cannot avoid service of process by the absence of those officers and employees who are designated by statute as the proper recipients of such service.[1] Ohio Revised Code section 2703.10 provides for service of summons, in the absence of the therein named officers and employees, upon the person having charge of the office or usual place of business of the defendant corporation. Recently the Supreme Court of Ohio broadened the interpretation of that statute by permitting service of summons on one not in fact an employee of the defendant corporation being served.[2]

In *Moriarty v. Westgate Center, Inc.*[3] the Court of Appeals for Cuyahoga County affirmed the trial court's decision granting a motion to quash service of summons on the defendant corporation. However, on appeal this decision was reversed by a unanimous supreme court.

1. Fee v. Big Sand Iron Co., 13 Ohio St. 563 (1862); Sunday Creek Coal Co. v. West, 47 Ohio App. 537, 192 N.E. 284 (1933); Tioga Coal Corp. v. Silman, 125 W. Va. 58, 22 S.E.2d 873 (1942).

2. Moriarty v. Westgate Center, Inc., 172 Ohio St. 402, 176 N.E.2d 410 (1961). See also discussion in *Civil Procedure* section p. 440 *supra,* and in *Corporations, Partnerships, and Associations* section, p. 453 *supra.*

3. *Ibid.*

Defendant corporation's motion to quash service was based on the allegation that in serving the summons the sheriff had failed to comply with the statutory requisites.[4] To sustain that allegation defendant argued that both the chief and subordinate officers of defendant corporation were available in the county for service and could have been found upon reasonable inquiry, and that the person served was neither an employee of defendant corporation nor in charge of its office.[5]

The supreme court was confronted with a situation wherein summons had been served upon a non-employee in the office of the defendant corporation, who had in turn notified the subordinate officers of that corporation of the summons prior to the running of the statute of limitations. Thus, the defendant corporation had been given an opportunity to defend in the proceedings against it.

Because there had been no prior judicial determination of who constitutes "the person having charge thereof," the court was free to provide a definition. It seized upon the fact that the statute does not require that such person be either an officer or employee of the corporation being served. The result was an interpretation of "the person having charge thereof" to mean the superior of the persons in the office of the defendant corporation at the time of service, whether or not such person be an employee or officer of that corporation.[6]

The fundamental purpose of service statutes is to provide that notice which will be most likely to result in actual notice to the defendant corporation of the proceedings against it.[7] It seems likely that a person not in the employ of a corporation would not utilize sufficient effort to call such summons to the attention of the corporation. On the other hand, an employee or person left in charge of a corporation's office would

4. Ohio Revised Code section 2703.10 provides: "A summons against a corporation may be served upon [1] the president, mayor, chairman or president of the board of directors or trustees, or other chief officer; or [2] if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or [3] if *none of such officers can be found,* by a copy left at the office or usual place of business of the corporation with *the person having charge thereof . . . .*" (Emphasis added.).

5. Record, p. 6-9, Moriarty v. Westgate Center, Inc., 172 Ohio St. 402, 176 N.E.2d 410 (1961). The affidavits of the corporate officers and that of the non-employee, who was served with the summons, establish that the person served was an employee of a real estate management agency which was under contract to manage the affairs of defendant corporation. The affidavits also show that the agency and defendant corporation occupy space in the same suite of offices.

6. Moriarty v. Westgate Center, Inc., 172 Ohio St. 402, 407, 176 N.E.2d 410, 413 (1961). The court made no effort to define further the term "superior."

7. Abraham v. Akron Sausage Co., 23 Ohio App. 224, 155 N.E. 254 (1926). One authority states: "The fundamental object of all laws relating to the service of process is to give that notice which will in the nature of things most likely bring the attention of the corporation to the commencement of the proceedings against it, and when the legislature carries out this design its provisions should not be stricken down by the courts." 42 AM. JUR. *Process* § 107 (1942). The court in the *Moriarty* case quoted with approval the portion of this statement preceding the comma, but neither quoted nor commented on the latter portion of the statement. 172 Ohio St. 402, 407, 176 N.E.2d 410, 413 (1961).

be more likely to bring such matters to the attention of the chief or subordinate officers of the corporation. Although the non-employee in the *Moriarty* case brought the summons to the attention of the defendant corporation, it cannot be assumed that every non-employee would do the same. For this reason it would seem that the judicial interpretation of section 2703.10 in the *Moriarty* case would place an undue burden on the defendant corporation by requiring it to depend upon a person not in its employ to notify its officers of the summons. In the light of the purpose of service statutes, the interpretation by the *Moriarty* court should be limited to the factual situation in that case.

In attempting to provide a means by which both service on and notice to a corporation could be effected, the Ohio General Assembly provided for three alternate methods of service.[8] It recognized that service pursuant to the first (upon the chief officer) and second (upon the subordinate officers) would be more likely to provide the corporation with actual notice, and, therefore, subjected the third method (upon the person in charge) to a condition precedent. Previous courts have held that the third method must be strictly construed and can be utilized only after the sheriff has made a reasonable effort to ascertain the whereabouts of each of the persons included in the other two categories.[9]

Although the court in the *Moriarty* case found that the statute had been complied with in regard to the person served on behalf of the corporation, it was confronted with the fact that the sheriff had made no effort to find the chief or subordinate officers of defendant corporation. The supreme court recognized that the failure to comply with such a condition precedent should have the effect of invalidating the service of summons on a corporation. However, it seemed to limit such recognition to the case wherein there was a question of fact as to whether the attention of the defendant corporation was promptly brought to the commencement of proceedings against it. Without further discussion, it held that where actual notice of the summons is received by the corporation, the fact that the sheriff has not made a reasonable effort to find the chief or subordinate officers of that corporation prior to serving the summons

8. OHIO REV. CODE § 2703.10. See note 4 *supra.*

9. In Sunday Creek Coal Company v. West, 47 Ohio App. 537, 192 N.E. 284 (1933), the court held that when the sheriff made no attempt to locate the company's officers, his leaving a copy of the summons with the payroll clerk did not constitute effective service. In Abraham v. Akron Sausage Company, 23 Ohio App. 224, 155 N.E. 254 (1926), the court held that a sheriff may serve summons on a subordinate officer of a corporation before he finds the chief officers of the corporation. Though the case was decided under the second (service on a subordinate officer) method, the court noted that service by the third method is conditioned by the mandatory verb *can,* while the second method is not so conditioned. This case was tried under Ohio General Code section 11288, the immediate predecessor of Ohio Revised Code section 2703.10. In the latter statute the mandatory verb *can* still conditions the use of the third method of service. The court in the *Moriarty* case either overlooked or disregarded this fact.