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## Civil Procedure--Joinder of Actions for Pain and Suffering and Wrongful Death

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## Recent Decisions

### CIVIL PROCEDURE—JOINDER OF ACTIONS FOR PAIN AND SUFFERING AND WRONGFUL DEATH

The plaintiff, administrator, brought an action based on pain and suffering sustained by his decedent and joined as a second cause of action one for wrongful death. The Ohio Supreme Court, three judges dissenting, held<sup>1</sup> that in the absence of an enabling statute the administrator could not join the two causes of action because both causes of action do not affect all the parties to the action as required by Ohio Revised Code Section 2309.06 (Ohio General Code Section 11307)<sup>2</sup>

Actions brought under the "survivor" statute<sup>3</sup> and under the "wrongful death" statute<sup>4</sup> are separate and distinct even though they may have arisen from the same wrongful act of the defendant.<sup>5</sup> Thus an adverse judgment rendered against one of the litigants in the survivorship action would not be res judicata in an action brought upon the same facts for wrongful death.<sup>6</sup>

In a survivorship action evidence of pain and suffering is admissible, whereas in a wrongful death action it is not admissible. One of the reasons behind the rule against the joinder of the two actions is that the details of pain and suffering in the survivor action might have a prejudicial influence on the wrongful death verdict.<sup>7</sup>

Under the Ohio "survivor" statute, the personal representative of the estate has the exclusive right to bring suit, and any damages recovered by him accrue to the estate of the decedent.<sup>8</sup> When, however, the personal representative sues under the "wrongful death" statute, he acts not as trustee of the estate of his decedent but solely for the benefit of the next of kin.<sup>9</sup> He is merely a nominal party and has no interest in the case for the estate he

<sup>1</sup> *Fielder v. Ohio Edison Co.*, 158 Ohio St. 375, 109 N.E.2d 855 (1952).

<sup>2</sup> "The causes of action so united must not require different places of trial, and, except as otherwise provided, must affect all the parties to the action."

<sup>3</sup> OHIO REV. CODE § 2305.21 (OHIO GEN. CODE § 11235).

<sup>4</sup> OHIO REV. CODE § 2125.01 (OHIO GEN. CODE § 10509-166).

<sup>5</sup> *Mahoning Valley Ry. v. Van Alstine*, 77 Ohio St. 395, 83 N.E. 601 (1908).

<sup>6</sup> *Lyons v. Empire Fuel Co.*, 262 Fed. 465 (6th Cir. 1920); *The J.R. Langdon*, 163 Fed. 472 (6th Cir. 1908); *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943).

<sup>7</sup> *See Fielder v. Ohio Edison Co.*, 158 Ohio St. 375, 387, 109 N.E.2d 855, 861 (1952).

<sup>8</sup> *May Coal Co. v. Robinette*, 120 Ohio St. 110, 165 N.E. 576 (1929); *Mahoning Valley Ry. v. Van Alstine*, 77 Ohio St. 395, 83 N.E. 601 (1908)

<sup>9</sup> *May Coal Co. v. Robinette*, 120 Ohio St. 110, 165 N.E. 576 (1929); *Wolf v. Lake Erie & Western Ry.*, 55 Ohio St. 517, 45 N.E. 708 (1896); OHIO REV. CODE § 2125.02 (OHIO GEN. CODE § 10509-167).

represents.<sup>10</sup> Therefore it is apparent that the personal representative is not affected in the same way or considered to be the same person in both of these actions, and is suing in two different capacities.

A basic rule of pleading is that a plaintiff cannot sue in more than one capacity in the same law suit.<sup>11</sup> His identity must be the same.<sup>12</sup>

Ohio Revised Code Section 2309.05 (Ohio General Code Section 11306)<sup>13</sup> permits joinder of causes of action arising out of the same transaction, but Ohio Revised Code Section 2309.06 (Ohio General Code Section 11307) places a limitation on such joinder, declaring that the cause of action must "affect all the parties to the action." A judicial construction of these two sections together was the basis of the court's holding in the principal case.

The rule prohibiting joinder of a survivorship action and an action for wrongful death has been followed in a majority of jurisdictions,<sup>14</sup> in the absence of express statutory language allowing such joinder.<sup>15</sup>

There are, however, many courts which have permitted joinder of the wrongful death and survivorship actions in the absence of an enabling statute. One reason advanced is that the actions, although separable, arise from the same set of facts.<sup>16</sup> Joinder has also been allowed on the theory that, although they are independent actions, they may be joined to avoid the expense and delay of multiple suits.<sup>17</sup> Other jurisdictions have stated that since the only difference in the actions is the element of damages, the suits

<sup>10</sup> *Mahoning Valley Ry. v. Van Alstune*, 77 Ohio St. 395, 83 N.E. 601 (1908).

<sup>11</sup> *Bostrom v. Jennings*, 326 Mich. 146, 40 N.W.2d 97 (1949); *Jones v. Detroit*, 277 Mich. 272, 269 N.W. 171 (1936).

<sup>12</sup> *Seitz v. Michel*, 141 Minn. 244, 170 N.W. 197 (1918).

<sup>13</sup> "The plaintiff may unite several causes of action in the same petition, whether they are legal or equitable, or both, when they are included in any of the following classes: 1. The same transaction; 2. Transactions connected with the same subject for action; "

<sup>14</sup> *Pease v. Rockford City Traction Co.*, 279 Ill. 513, 117 N.E. 83 (1917); *Fink v. Taylor*, 4 Greene 196 (Iowa 1854); *Hendrick's Adm'r v. Am. Express Co.*, 138 Ky. 704, 128 S.W. 1089 (1910); *McVey v. Illinois Cent. Ry.*, 73 Miss. 487, 19 So. 209 (1896); *Grainger v. Greenville, S. & A. Ry.*, 101 S.C. 399, 85 S.E. 968 (1915); *Bennet v. Spartanburg Ry., Gas & Elec. Co.*, 97 S.C. 27, 81 S.E. 189 (1914).

<sup>15</sup> *E.g.*, MASS. GEN. LAWS c. 229, § 6 (1933); WASH. REV. STAT. ANN. 4.20.060 (1952).

<sup>16</sup> *Illinois Cent. Ry. v. Crudup*, 63 Miss. 291 (1885).

<sup>17</sup> *Carbary v. Detroit United Ry.*, 157 Mich. 683, 122 N.W. 367 (1909).

<sup>18</sup> *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W. 674 (1937); *Ranney v. St. Johnsbury & L.C. Rd. Co.*, 64 Vt. 277, 24 Atl. 1053 (1892); *Nemecek v. Filer & Stowell Co.*, 126 Wis. 71, 105 N.W. 225 (1905).

<sup>19</sup> *Tillar v. Reynolds*, 96 Ark. 358, 363, 131 S.W. 969, 971 (1910); *McAllister v. Drislane*, 239 App. Div. 85, 266 N.Y. Supp. 809 (1933); *Silfies v. American Stores Co.*, 357 Pa. 176, 53 A.2d 610 (1947).