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Rush v. City of Maple Heights--Ramifications of Ohio's One Cause of Action Doctrine

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NOTES

Rush v. City of Maple Heights—*Ramifications Of Ohio's One Cause of Action Doctrine*

SELDOM, IF EVER, has a decision of the Ohio Supreme Court left the practice of law in Ohio so unsettled as did that court's decision in *Rush v. City of Maple Heights*.[1]

The question presented to the court in that case was whether one or two causes of action arise when one person suffers both personal injury and property damage as the result of one wrongful act. Other jurisdictions differ with respect to this issue.[2]

The minority of jurisdictions view a single act resulting in both personal injury and property damage to one individual as giving rise to two causes of action.[3] These courts reason that the defendant's wrongful

1. 167 Ohio St. 221, 147 N.E.2d 599 (1958), *cert. denied*, 358 U.S. 814 (1958).

2. See generally, Annot., 62 A.L.R.2d 977 (1958).

3. Clancey v. McBride, 338 Ill. 35, 169 N.E. 729 (1929); Public Service Co. v. Dalbey, 119 Ind. App. 405, 85 N.E.2d 368 (1949); Lennon v. Butle, 67 Mont. 101, 214 Pac. 1101 (1923); Smith v. Red-Top Taxicab Corp., 111 N.J.L. 439, 168 Atl. 796 (Ct. Err. & App. 1933); Reilly v. Sicilian Asphalt Paving Co., 170 N.Y. 40, 62 N.E. 772 (1902); Winters v. Bisaillon, 153 Ore. 509, 57 P.2d 1095 (1936); Carter v. Hinkle, 189 Va. 1, 52 S.E.2d 135 (1949); Brunsden v. Humphrey, 14 Q.B. D. 141 (1884).

act is not in itself a cause of action, but, rather, that a cause of action consists of the result of the defendant's wrongful act upon the plaintiff's rights. They hold that simultaneous injury to person and property is an invasion of two distinct primary rights of the plaintiff, thus giving rise to two separate causes of action. . . .

The majority of jurisdictions view the simultaneous injury to person and property by a single act of the defendant as giving rise to but one cause of action.[4] These courts reason that a cause of action consists of the defendant's wrongful act rather than the effect of that act upon the plaintiff's primary rights. Further, they hold that the efficient administration of justice requires that all claims the plaintiff may have against the defendant arising from one transaction be adjudicated in one law suit.

For thirteen years prior to *Rush v. City of Maple Heights*,[5] many attorneys relied upon the Ohio Supreme Court's holding in *Vasu v. Kohlers, Inc.*[6] as stating Ohio's adherence to the minority view. In the *Vasu* case, the insurer of plaintiff's automobile indemnified plaintiff for damage sustained to his automobile in a collision with defendant's automobile. The insurer was thus subrogated[7] to plaintiff's right of recovery against defendant for the amount paid to plaintiff. In a suit by the insurer against defendant, the latter prevailed. Plaintiff then sued for his personal injuries. Defendant pleaded the prior judgment in his favor as a bar to plaintiff's recovery in the instant suit. Defendant's argument was that one indivisible cause of action arose in plaintiff's favor for injury to person and property occasioned by the auto collison, and that to allow two suits to be brought against the defendant, one by plaintiff and one by

4. *E.g.*, Levitt v. Simco Sales Service, Inc., 50 Del. 557, 135 A.2d 910 (1957); Travelers Indem. Co. v. Moore, 304 Ky. 456, 201 S.W.2d 7 (1947); Hayward v. State Farm Mut. Auto. Ins. Co., 212 Minn. 500, 4 N.W.2d 316 (1942); Lloyds Ins. Co. v. Vicksburg Traction Co., 106 Miss. 244, 63 So. 455 (1913); Underwood v. Dooley, 197 N.C. 100, 147 S.E. 686 (1929); Saber v. Supplee-Wills-Jones Milk Co., 191 Pa. Super. 167, 124 A.2d 620 (1956); Globe & Rutgers Fire Ins. Co. v. Cleveland, 162 Tenn. 83, 34 S.W.2d 1059 (1931); Cormier v. Highway Trucking Co., 312 S.W.2d 406 (Tex. Civ. App. 1958); Moultroup v. Gorham, 113 Vt. 317, 34 A.2d 96 (1943); Sprague v. Adams, 139 Wash. 510, 247 Pac. 960 (1926); State Farm Mut. Auto. Ins. Co. v. DeWees, 101 S.E.2d 273 (W. Va. 1957).

5. 167 Ohio St. 221, 147 N.E.2d 599 (1958).

6. 145 Ohio St. 321, 61 N.E.2d 707 (1945).

7. 50 AM. JUR. *Subrogation* § 2 (1944) defines subrogation as "the substitution of one person in the place of another with reference to a lawful claim or right. It is a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it. When subrogation does not result from agreement between the parties, it may arise by operation of law where one person has been compelled to pay a debt which ought to have been paid by another, thus becoming entitled to exercise all the remedies which the creditor possessed against that other."

plaintiff's insurer, would allow plaintiff to split his cause of action. Defendant argued further that even if two suits could be brought against him, the issue of negligence had been determined in his favor in the suit by plaintiff's insurer, and because plaintiff was in privity with his insurer, plaintiff was collaterally estopped from relitigating this issue, thus barring a recovery by plaintiff in the second suit.

The court rejected both of the defendant's arguments. The pertinent holdings of the court quoted from the syllabus of the case are set forth below:

> SYLLABUS 4
>
> Injuries to both person and property suffered by the same person as a result of the same wrongful act are infringements of different rights and give rise to distinct causes of action, with the result that the recovery or denial of recovery of compensation for damages to the property is no bar to an action subsequently prosecuted for the personal injury, unless by an adverse judgment in the first action issues are determined against the plaintiff which operate as an estoppel against him in the second action.
>
> SYLLABUS 6
>
> Where an injury to person and to property through a single wrongful act causes a prior contract of indemnity and subrogation as to the injury to property, to come into operation for the benefit of the person injured, the indemnitor may prosecute a separate action for reimbursement for indemnity monies paid under such contract.
>
> SYLLABUS 7
>
> Parties in privy, in the sense that they are bound by a judgment, are those who acquired an interest in the subject matter after the beginning of the action or the rendition of the judgment; and if their title or interest attached before that fact, they are not bound unless made parties.[8]

The legal profession accepted syllabus 4 of the *Vasu* case as stating the law in Ohio and acted accordingly. It became common practice for many Ohio attorneys to file two actions, one for property damage and one for personal injury, even when both actions were instituted by the same plaintiff. It was as a result of this practice that the Ohio Supreme Court was called upon to decide the case of *Rush v. City of Maple Heights.*[9]

In the *Rush* case, the plaintiff recovered a municipal court judgment against the defendant for property damage sustained due to the unsafe condition of a public highway. Thereafter, plaintiff brought suit in common pleas court for personal injuries sustained from the same cause and recovered judgment for $12,000.00. On appeal, the Ohio Supreme Court reversed the judgment and ruled that:

> Where one person suffers both personal injuries and property damage as the result of the same wrongful act, only a single cause of action arises, the different injuries occasioned thereby being separate items of damage

8. Vasu v. Kohlers, Inc., 145 Ohio St. 321, 61 N.E.2d 707 (1945).

9. 167 Ohio St. 221, 147 N.E.2d 599 (1958).

> from such act. (Paragraph four of the syllabus in the case of *Vasu v. Kohlers, Inc.* . . . overruled.) [10]

The plaintiff's cause of action had, therefore, merged into the municipal court judgment, and she was left with no right of recovery for the injury to her person.

In its opinion of the *Rush* case, the Supreme Court intimated that the holding in syllabus 4 of *Vasu v. Kohlers, Inc.*[11] was not necessary to the determination of the issues therein, and, thus, that syllabus 4 was dictum.[12] It should be noted, however, that on two occasions subsequent to its decision of the *Vasu* case, the court had examined its holding in syllabus 4, and on neither occasion did the court give any indication that syllabus 4 would not be followed.[13] Further, a close reading of the opinion in the *Vasu* case compels this writer to conclude that syllabus 4 was not dictum, but, rather, that it was the real basis upon which the court based its decision.[14]

To the degree that the plaintiff in the *Rush* case lost a $12,000 judgment because she had filed separate suits in reliance upon the Supreme Court's holding in syllabus 4 of *Vasu v. Kohlers, Inc.*,[15] the *Rush* case will always stand as a sad commentary on Ohio justice, and as a forceful argument for prospective rather than retrospective court decisions.

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10. *Ibid.*

11. 145 Ohio St. 321, 61 N.E.2d 707 (1945).

12. Rush v. City of Maple Heights, 167 Ohio St. 221, 235, 236, 147 N.E.2d 599, 607, 608 (1958).

13. In Markota v. East Ohio Gas Co., 154 Ohio St. 546, 97 N.E.2d 13 (1951), the Supreme Court distinguished the *Vasu* case. In Mansker v. Dealers Transport Co., 160 Ohio St. 255, 116 N.E.2d 3 (1953), the court held that the plaintiff was barred from recovery for his personal injury loss because the issue of negligence had been determined against him in a previous suit wherein he had asserted his claim for property damage. The court could also have held the previous action for property damage to be res judicata to the present action for personal injury and, thus, overrule syllabus 4 of the *Vasu* case without causing the plaintiff to forefeit an otherwise valid judgment.

14. See Vasu v. Kohlers, Inc., 145 Ohio St. 321, 342, 61 N.E.2d 707, 718, where the court held that an insurer who takes an assignment of an *entire* property loss claim may recover the amount paid by him to the insured in a separate action, but that where the insurer takes only a partial assignment of the property loss claim, an action by him to recover the amount paid would be res judicata to a subsequent action by the insured to recover the unassigned portion of that claim. The court thereby restricted the concept of a "separate right of action" to those situations wherein the insured and his insurer would have been vested with separate *causes of action* by reason of the distinction between personal injury and property damage. Thus, the "separate right of action" concept developed by the court in the *Vasu* case appears to be nothing more than a by-product of the two cause of action doctrine stated in syllabus 4.

15. 145 Ohio St. 321, 61 N.E.2d 707 (1945).

CONSEQUENCES OF THE ONE CAUSE OF ACTION DOCTRINE

If the *Rush* case decided nothing else, it did decide that where one person suffers injury to both person and property as the result of one wrongful act, he has but one cause of action and must, therefore, assert both injuries in a single lawsuit if he is to have a full recovery. The consequences of the one cause of action doctrine are, however, unsettled in those instances where one who suffers injury to person and property is insured against the property loss sustained, and where upon payment of that loss, the insurer is subrogated[16] *pro tanto* to the injured party's right of recovery against the tortfeasor.

Modification of the One Cause of Action Doctrine

If, as was held in *Vasu v. Kohlers, Inc.*,[17] simultaneous injury to person and property gave rise to two causes of action, the subrogation of an insurer to the entire property damage claim of its insured would cause no difficulty. In accordance with the Ohio code provision requiring that all suits be prosecuted in the name of the real party in interest,[18] the insurer would be able to maintain an action for the property damage loss, and the insured would be able to maintain a separate action for his personal injury loss. Now that injury to person and property has been held to constitute but one cause of action, it is conceivable that only a single action may be maintained in which the interests of both the insured and his insurer must be asserted if there is to be a full recovery, and the majority of jurisdictions so hold.[19]

The majority of jurisdictions view the insured and the insurer of his property damage loss as joint owners of a single cause of action who may not split that cause of action by maintaining separate suits to recover their respective losses.[20] Thus, the completion of an action by one joint owner against the tortfeasor is held to be res judicata to a subsequent action by the other joint owner. In order that there be a full recovery against the tortfeasor, it is necessary that the insured and his insurer join in one suit, or that the insured sue for the full amount of his damages, holding as trustee for his insurer that portion of the judgment to which

16. See note 7 *supra.*

17. 145 Ohio St. 321, 61 N.E.2d 707 (1945).

18. OHIO REV. CODE § 2307.05.

19. *E.g.*, Levitt v. Simco Sales Service, Inc., 50 Del. 557, 135 A.2d 910 (1957); Hayward v. State Farm Mut. Auto. Ins. Co., 212 Minn. 500, 4 N.W.2d 316 (1942); Saber v. Supplee-Wills-Jones Milk Co., 181 Pa. Super. 167, 124 A.2d 620 (1956); Globe & Rutgers Fire Ins. Co. v. Cleveland, 162 Tenn. 83, 34 S.W.2d 1059 (1931); State Farm Mut. Auto. Ins. Co. v. DeWees, 101 S.E.2d 273 (W.Va. 1957).

20. *Ibid.*

the latter is entitled.[21] The application of this rule has, in several instances, deprived either the insured or his insurer of the right to recover against the tortfeasor.[22]

In order to avoid this inequitable effect, a minority of jurisdictions has circumvented the one cause of action doctrine in order to allow the insured and his insurer to maintain separate actions.[23]

A few jurisdictions, while maintaining that there is only a single cause of action for injury to person and property, recognize two causes of action where the property damage portion of the injured party's loss has been assigned to his insurer pursuant to a subrogation agreement.[24] These jurisdictions contend that the partial assignment of a cause of action by the insured divests him of his right to recover upon the part assigned and creates in his insurer a new and different cause of action, thus allowing each party to maintain a separate suit against the tortfeasor.

Ohio, however, has never viewed the partial assignment of a cause of action as creating in the assignee a separate cause of action.[25] The Ohio Supreme Court recently reaffirmed its position in *Holibaugh v. Cox*.[26] In that case, the plaintiff instituted an action within the time allowed by the statute of limitations against the defendant for the full amount of damages suffered by her as the result of an automobile collision. Over the defendant's objection, the court allowed the insurer of the plaintiff's automobile to join as co-plaintiff in the action after the statute of limitations had run. Certainly, had the court viewed a partial assignment as creating in the assignee a separate cause of action, it would have refused to allow the insurer in this case the right to assert his claim after the statute of limitations had run. It must therefore be concluded that Ohio

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21. *E.g.*, Hayward v. State Farm Mut. Auto Ins. Co., 212 Minn. 500, 4 N.W.2d 316 (1942).

22. See, *e.g.*, Sprague v. Adams, 139 Wash. 510, 247 Pac. 960 (1926); Annot., 47 A.L.R. 536, 537 (1927).

23. Travelers Indem. Co. v. Moore, 304 Ky. 456, 201 S.W.2d 7 (1947); Farmer v. Union Ins. Co., 146 Miss. 600, 111 So. 584 (1927); Lloyds Ins. Co. v. Vicksburg Traction Co., 106 Miss. 244, 63 So. 455 (1913); General Exchange Ins. Corp. v. Young, 357 Mo. 1099, 212 S.W.2d 396 (1948); Underwood v. Dooley, 197 N.C. 100, 147 S.E. 686 (1929); Le Blond Schacht Truck Co. v. Farm Bureau Mut. Auto. Ins. Co., 34 Ohio App. 478, 171 N.E. 414 (1929).

24. Lloyds Ins. Co. v. Vicksburg Traction Co., 106 Miss. 244, 63 So. 455 (1913); General Exchange Ins. Corp. v. Young, 357 Mo. 1099, 212 S.W.2d 396 (1948); Underwood v. Dooley, 197 N.C. 100, 147 S.E. 686 (1929).

25. Northwestern Ohio Natural Gas Co. v. First Cong. Church, 126 Ohio St. 140, 184 N.E. 512 (1933); Lake Erie & W.R.R. Co. v. Falk, 62 Ohio St. 297, 56 N.E. 1020 (1900); Verdier v. Marshallville Equity Co., 70 Ohio App. 434, 46 N.E.2d 636 (1940); Norwich Union Fire Ins. Sec'y, v. Stang, 18 Ohio C.C.R. 464, 9 Ohio C.C. Dec. 576 (1897).

26. 167 Ohio St. 340, 148 N.E.2d 677 (1958).

views the partial assignor and his assignee as joint owners of one cause of action.

It need not be concluded, however, that because Ohio does not recognize separate causes of action in the insured and his insurer, that they may not maintain separate suits. A few jurisdictions which adhere to the one cause of action doctrine have engrafted an exception onto the doctrine to allow the parties to sue separately.[27] Although these jurisdictions do not purport to create a separate cause of action in the insurer, they recognize instead a separate "right of recovery" in each of the parties. Under this theory, the outer limits of the parties' separate "rights of recovery" should not need to conform to the distinction between personal injury and property damage that is part and parcel of the doctrine which holds that there are two causes of action for injury to person and property. Thus, where the insurer is only partially subrogated to the property damage loss sustained by the insured, the insurer should be able to sue for the amount of the property damage loss to which he has been subrogated, and the insured should retain the right to recover for the personal injuries he has sustained and for the unsubrogated portion of his property damage loss. For example, if A suffers $5,000 injury to his person and $2,000 damage to his automobile in a collision with an automobile operated by X, and B indemnifies A for $1,900 pursuant to a $100 deductible automobile collision insurance contract, B may recover the $1,900 paid to A, and A should retain the right to recover $5,100, representing his entire personal injury loss and the unindemnified portion of his property damage loss.

This may be the theory that Ohio adopts, or, perhaps, has already adopted. As was noted earlier,[28] the court's decision in *Vasu v. Kohlers, Inc.*[29] allowing separate suits to be prosecuted by the insured and the insurer was based upon two grounds. The first ground, stated in syllabus 4 of the *Vasu* case, that injury to person and property constitutes two causes of action, was overruled by *Rush v. City of Maple Heights.*[30] The second ground, stated in syllabus 6, that the indemnitor of the injured party may prosecute a separate action against the tortfeasor, has not been overruled and probably remains as the law in Ohio today. The Supreme Court in its decision of the *Rush* case appears to have approved a modification of the one cause of action doctrine when it stated:

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27. Travelers Indem. Co. v. Moore, 304 Ky. 456, 201 S.W.2d 7 (1947); Farmer v. Union Ins. Co., 146 Miss. 600, 111 So. 584 (1927); Le Blond Schacht Truck Co. v. Farm Bureau Mut. Auto. Inc. Co., 34 Ohio App. 478, 171 N.E. 414 (1929).

28. See text accompanying note 8 *supra.*

29. 145 Ohio St. 321, 61 N.E.2d 707 (1945).

30. 167 Ohio St. 221, 147 N.E.2d 599 (1958).

> Upon further examination of the cases from other jurisdictions, it appears that in those instances where the courts have held to the majority rule, a separation of causes of action is almost universally recognized where an insurer has acquired by an assignment or by subrogation the right to recover for money it has advanced to pay for property damage.[31]

Further, in holding syllabus 4 of the *Vasu* case to be dictum,[32] the court in the *Rush* case must have intended that syllabus 6 of the *Vasu* case was determinative of the issues therein, thus giving tacit approval to the separate right of recovery concept.

Although this concept substantially eliminates the inequity resulting from the one cause of action doctrine, it does create problems with respect to joinder of parties.

JOINDER OF PARTIES

Section 2307.20 of the Ohio Revised Code states in part:

> Parties who are united in interest must be joined as plaintiffs or defendants. If the consent of one who should be joined as plaintiff cannot be obtained . . . , and that fact is stated in the petition, he may be made a defendant.

If, as was held in the *Vasu* case, simultaneous injury to person and property gave rise to two separate causes of action, Ohio's mandatory joinder statute would not be applicable where subrogation had operated to invest the injured party's insurer with the right to recover the entire property damage loss sustained by his insured. The insured would retain his cause of action for personal injury, and the insurer would have the right to prosecute a distinct and separate cause of action for property damage. Thus, because each would be the owner of a separate cause of action, they could not be held to be parties united in interest under the Ohio mandatory joinder statute. Where, however, two parties are the joint owners of a single cause of action, they are united in interest and the defendant may require that the party not represented in the action be joined, or in default thereof, that the action be dismissed for a defect in parties plaintiff.[33]

If Ohio should adhere to the one cause of action doctrine as modified by allowing the insured and his insurer a separate right of recovery, it seems that the mandatory joinder statute should be applicable. Despite

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31. Rush v. City of Maple Heights, 167 Ohio St. 221, 233, 147 N.E.2d 599, 606 (1958).

32. See note 12 *supra* and accompanying text.

33. Holibaugh v. Cox, 167 Ohio St. 340, 148 N.E.2d 677 (1958); Cleveland Paint & Color Co. v. Bauer Mfg. Co., 155 Ohio St. 17, 97 N.E.2d 545 (1951); Nat'l Retailers Mut. Ins. Co. v. Gross, 142 Ohio St. 132, 50 N.E.2d 258 (1943); Verdier v. Marshallville Equity Co., 70 Ohio App. 434, 46 N.E.2d 636 (1940).

the fact that they may institute separate suits against the tortfeasor, the insured and his insurer are still joint owners of but one indivisible cause of action, and are parties united in interest.

It should be noted that the mandatory joinder statute does not operate so as to make the joint owners of one cause of action "indispensable parties." The defendant may require that a party not represented be joined in the action or, in default thereof, that the action be dismissed, but if the defendant should fail to call the court's attention to the defect in parties prior to final judgment, the defendant will have waived his right to have the parties joined, and the judgment rendered will be valid and binding.[34] Thus, it has been held that the partial assignor of a tort claim may recover the full amount of his loss in the absence of a motion by the defendant to have the partial assignee made a party to the action.[35]

It is clear in Ohio that in an action by the insurer for that portion of a tort claim to which he is subrogated, the defendant may require the insured to be joined in the action.[36] Although authority for the proposition is scarce, it seems logical that in an action by the insured to recover only the unsubrogated portion of a tort claim, the defendant could require that the insurer be joined as a party to the action.[37] Thus, the defendant is able to compel the insured and his insurer to assert in one action every claim they may have against him arising from his wrongful act.

Where the defendant has failed to move for joinder, and thus has allowed either the insured or the insurer to maintain a separate action, it is doubtful that the defendant could require a joinder of parties in a subsequent action prosecuted by one who was not made a party to the earlier suit.[38] The purpose of the mandatory joinder statute is to protect the defendant from litigating a multiplicity of actions, and to speed the administration of justice by removing from the courts those matters which have already been adjudicated. Thus, it would serve no purpose

34. Holibaugh v. Cox, 167 Ohio St. 340, 148 N.E.2d 677 (1958).
35. *Ibid.*
36. Holibaugh v. Cox, 167 Ohio St. 340, 148 N.E.2d 677 (1958); Nat'l Retailers Mut. Ins. Co. v. Gross, 142 Ohio St. 132, 50 N.E.2d 258 (1943).
37. See Barnhill v. Brown, 58 Ohio App. 188, 16 N.E.2d 478 (1937), where the court held that the partial insurer of an injured party's loss is a "proper" party to an action by the injured party, but not a "necessary" party thereto. The court further stated that the insurer "could be brought into the case by the action of either the plaintiff or defendant so as to have a complete determination of the rights of all parties who might have an interest in the result of the litigation." It appears to this writer that one who can be joined as a party to an action by either the plaintiff or the defendant may correctly be termed a "necessary" party thereto rather than merely a "proper" party. *Compare* Annot., 157 A.L.R. 1242, 1254 (1945), *with* 30 O. JUR.2d *Insurance* § 898 (1958).
38. Travelers Indem. Co. v. Moore, 304 Ky. 456, 201 S.W.2d 7 (1947); Spargur v. Dayton Power & Light Co., 152 N.E.2d 918 (Ohio C.P. 1958).

in allowing the defendant to join a party whose rights against him had already been adjudicated in a prior action.

ESTOPPEL BY JUDGMENT

As has already been noted, one of the arguments asserted by the defendant in *Vasu v. Kohlers, Inc.*[39] was that the issue of negligence had been decided in his favor in a prior action brought against him by the plaintiff's insurer, and, because plaintiff was in privity with his insurer, plaintiff was collaterally estopped from relitigating this issue. The Ohio Supreme Court rejected this argument. The court held that the insured was not in privity with his insurer, and thus the determination in an action by the insurer that the defendant was not negligent was not binding upon the insured and could be relitigated by him in a subsequent action. The court laid down two principles in support of this holding:

> SYLLABUS 7
>
> Parties in privy, in the sense that they are bound by the judgment, are those who acquired an interest in the subject matter after the beginning of the action or the rendition of the judgment; and if their title or interest attached before that fact, they are not bound unless made parties.[40]
>
> SYLLABUS 8
>
> A grantor or assignor is not bound, as to third persons, by any judgment which such third persons may obtain against his grantee or assignee adjudicating the title to or claim for the interest transferred, unless he participated in the action in such manner as to become, in effect, a party.[41]

Thus, the court held that the insured was not in privity with his insurer because the succession of the insurer to the rights of the insured occurred before the institution of the action to adjudicate those rights.[42] Further, the court held that the insured could not be in privity with his insurer because the insured did not succeed to the rights of his insurer, but rather it was the insurer who succeeded to his insured's rights, and the successor cannot bind his predecessor in interest.[43]

A recent common pleas court decision, *Spargur v. Dayton Power and Light Co.*,[44] has taken issue with the Supreme Court on the question of what parties are in privity. The common pleas court held that syllabus 7, stating that only those who acquire an interest after the beginning of an action are in privity, was dictum in the *Vasu* case and need not be fol-

39. 145 Ohio St. 321, 61 N.E.2d 707 (1945).
40. *Id.* at 345, 61 N.E.2d at 719.
41. *Id.* at 346, 61 N.E.2d 719.
42. See RESTATEMENT, JUDGMENTS § 89 (1942).
43. See 1 FREEMAN, JUDGMENTS § 442 (5th ed. 1925).
44. 152 N.E.2d 918 (Ohio C.P. 1958).

lowed. Briefly stated, the court's reasoning is that the insured could not have been in privity with his insurer because the insurer was the *successor* in interest and so could not bind the insured.[45]

The common pleas court held that the issue of negligence, decided in favor of the defendant in a suit brought by the insured, was binding on the insurer in a subsequent suit brought by him and would bar a recovery by him. Thus, this court refused to restrict the effect of estoppel by judgment to those situations where the successor's interest is acquired by him after the commencement of an action. The legal basis of the court's holding seems to rest upon the theory that because the insured is able to maintain an action to recover the full amount of his damages, thereby representing his insurer as well as himself, he has the power to bind his insurer as to matters decided in a suit prosecuted by the insured to recover only the unsubrogated portion of his loss.[46] The true rationale of this decision, though, seems to rest upon considerations of public policy. The public policy concepts involved are stated by the court as follows:

> It is logical and well within public policy that an adverse finding on either the issue of negligence or contributory negligence in the principle action should estop the insurer in the separate action. This will avoid contrary decisions within an 'indivisible' cause of action and prevent a return to the litigious chaos that the former rule promoted.[47]

Admitting that there is some authority to the contrary,[48] this writer is compelled to accept the Supreme Court's theory that only those who acquire an interest in the subject matter after the commencement of the action are parties in privity. The reasoning employed by the common pleas court is not entirely convincing. Although the insured is able to maintain an action to recover the full amount of his loss, and in so doing represents his insurer as well as himself,[49] when the insured chooses to sue for only the unsubrogated portion of his loss, there is no legal principle that compels one to conclude that the insurer is bound as to matters adjudicated in a prior suit to which the insurer was not a party and was not represented.[50] The relationship of the insurer to the insured is most similar to that of cotenancy. The insured and his insurer are joint owners of one cause of action, and like cotenants, they are not in privity.[51]

45. *Id.* at 925.
46. *Id.* at 926.
47. *Id.* at 927.
48. Travelers Indem. Co. v. Moore, 304 Ky. 456, 201 S.W.2d 7 (1947).
49. See notes 21 and 35 *supra* and accompanying text.
50. 1 FREEMAN, JUDGMENTS § 438 (5th ed. 1925).
51. RESTATEMENT, JUDGMENTS § 103 (1942); 1 FREEMAN, JUDGMENTS § 485 (5th ed. 1925).

Granted that the relationships differ in that each cotenant has a separate cause of action for injury to the property in which he has a partial interest, whereas the insured and his insurer share but one cause of action, still the similarities are greater than the dissimilarities. This is particularly true where the joint owners of one cause of action have separate rights of recovery. The following excerpt from the *Restatement of the Law of Judgments* states well the theory herein advanced:

> Joint tenants and tenants in common normally should be co-plaintiffs in maintaining an action with reference to the common property, but if the defendant does not object to the non-joinder, his failure to do so does not prevent, by merger or by bar, the other co-owners from bringing an action, nor is any matter decided in the case determinative in a subsequent action brought by the other co-owners.[52]

There are public policy arguments present on either side of this issue. To this writer, one of those arguments stands out above all the others. If the separate right of recovery of the insured and his insurer is to be preserved, it is necessary that neither of them be deprived of his day in court. The Ohio mandatory joinder statute[53] provides adequate protection against harassment to the defendant who will but avail himself of its use.[54]

CONCLUSION

Based upon established Ohio law, it is most likely that the Ohio mandatory joinder statute will be interpreted as requiring the joinder of the insured and his insurer on motion of the defendant in any action prosecuted separately by one or the other of them. Where the defendant fails to move for joinder, an exception will probably be made to the one cause of action doctrine which will allow the party not joined to bring a separate suit. The insured and his insurer will probably not be held to be parties in privity, and, thus, a determination of law or fact in a suit prosecuted separately by one of them will not be binding upon the other unless he has participated or has been represented in the prior suit.

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52. RESTATEMENT, JUDGMENTS § 103 (1942).

53. OHIO REV. CODE § 2307.20 (1953).

54. An insurer who prefers not to gamble on how the Supreme Court will decide the issue of privity has the right to intervene in a suit instituted by the insured. Lake Erie & W.R.R. Co. v. Falk, 62 Ohio St. 297, 56 N.E. 1020 (1900).