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Daniel B. Davis

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could properly be paid to one who was under an obligation to assign it to the Legal Aid Defender Fund of the Cleveland Welfare Federation has already been decided in the *McCurdy* case, the court said. Notices of appeal have been filed by both plaintiffs, so the final chapter has not yet been written. Perhaps next year's survey of Ohio Law will contain the conclusion to this interesting aspect of the war on the unauthorized practice of law.

WILLIAM W. FALSGRAF

CIVIL PROCEDURE*

RES JUDICATA AND ESTOPPEL BY JUDGMENT

In *Brinkman v. Baltimore and Ohio Railroad*[1] the Court of Appeals for Montgomery County was presented with the question of whether a verdict in favor of the defendant in a wrongful death action gives rise to the doctrines of res judicata or estoppel by judgment when, subsequent to the wrongful death action, one of the several persons for whose benefit the wrongful death action was brought brings an action for personal injuries which resulted from the same alleged negligence of the defendant. The court, finding all necessary conditions present, held that both doctrines were applicable.[2] Of particular interest is the court's holding that there was an identity of parties in both actions.

In holding that there was an identity of parties, the court relied upon the case of *Gibson v. Solomon.*[3] Although the fact situation in *Gibson* was similar to that in *Brinkman,* it should be noted that the party involved in the later personal injuries action in *Gibson* was, unlike its *Brinkman* equivalent, also the administrator of the decedent's estate, and thus, the party who had control over the earlier wrongful death action. Because of this difference, the merit of extending the reasoning in *Gibson* to the fact situation in *Brinkman* is open to some doubt. Admitting, as was held in *Gibson,* that the beneficiaries are the real parties in interest in a wrongful death action, a question arises as to whether this factor alone should be enough to satisfy the requirement that there be an

*This article was written by Daniel B. Davis with the guidance of Samuel Sonenfield, formerly Associate Professor of Law at Western Reserve Law School.

1. 111 Ohio App. 317, 165 N.E.2d 239 (1960).

2. The plaintiff contended only that there were not: (1) an identity of parties, and (2) an identity of causes of action. As stated by the court, four conditions must be present in order for the doctrine of res judicata to apply, those conditions being: (1) identity of parties, (2) identity of causes of action, (3) identity of subject matter, and (4) identity in the quality of persons for or against whom the claim is made.

3. 136 Ohio St. 101, 23 N.E.2d 996 (1939).

identity of parties in both actions. The requirement that there be an identity of parties is based upon the reasoning that a party should not be bound by a court's decision unless he has had an opportunity to represent his own interest in the earlier case. There is some doubt as to whether one of several persons for whose benefit a wrongful death action has been brought has that degree of control over the action which would justify a holding that that person had an opportunity adequately to represent his own interest.[4] Where, however, as in *Gibson,* the party involved in the later action for personal injuries was the administrator who brought the wrongful death action and also one of the parties for whose benefit the wrongful death action was brought, it appears that such a party has had an adequate opportunity to represent his own interests in the earlier action.

In *Videtto v. Marsh*[5] it was held that where an infant, by his father as next friend, brings an action for personal injuries and loses through failure to prove that the defendant was negligent, such a decision does not estop or bar the father from bringing an action for consequential damages against the same defendant even though the negligence alleged arose during the same occurrence.[6]

SERVICE OF SUMMONS

In *Sours v. Director of Highways*[7] a question arose whether the fastening of a summons to the outside doorknob of a residence constitutes valid residence service. Section 2703.08 of the Ohio Revised Code provides that "service shall be made by delivering a copy of the summons . . . to the defendant personally, or by leaving a copy at his usual place of residence." In *Sours,* the sheriff took the summons to the defendant's usual place of residence. Finding no one present, he attached the summons to the doorknob of the residence. In holding that the action of the sheriff did not comply with the provisions of section 2703.08, the court stated that in order for there to be valid residence service there must be strict compliance with the statutory provisions. Furthermore, the manner in which the summons is left at defendant's residence must be of such a nature that it is reasonably probable that the person so served will actually receive the notice. Although the sheriff actually left the summons at the usual place of residence, the court felt that the manner in which it was left was such that the defendant could not reasonably have been expected to receive it. The court said:

4. See 22 OHIO ST. L.J. 433 (1961), where the cases cited point out that the person for whose benefit a wrongful death action is brought may not file pleadings or personally select counsel to represent his own interests.

5. 112 Ohio App. 151, 175 N.E.2d 764 (1960).

6. See *Recent Decision,* p. 600 *infra,* for a further discussion of the case.

7. 172 Ohio St. 242, 175 N.E.2d 77 (1961).

> One must take into consideration the fact that today it is a common practice of large numbers of advertisers and other door-to-door canvassers to attach their sundry materials to the doorknobs of homes by means of rubber bands or otherwise. . . . It is common experience for persons first entering the house . . . to immediately dispose of it or at best to make no more than cursory inspection of such papers.[8]

It should be noted, however, that the court emphasized that whether the manner in which the summons is left at one's usual place of residence constitutes valid residence service is a question of fact "which must be determined under the facts and circumstances of each case."[9]

In *Moriarty v. Westgate Center, Incorporated*[10] summons was served upon a non-employee of the defendant corporation. The officers of the corporation were, however, notified of the summons prior to the running of the statute of limitations. The trial court sustained defendant's motion to quash service of summons. The Court of Appeals for Cuyahoga County affirmed the trial court's decision. The Ohio Supreme Court, in a unanimous decision, reversed the decision of the lower court and held that under Ohio Revised Code section 2703.10, there may be valid service where the person served is not an employee of the defendant corporation.[11]

Service of an Affidavit to Obtain a Mechanic's Lien

Under Ohio Revised Code section 1311.07 a copy of an affidavit to obtain a mechanic's lien must, within thirty days after the filing of the affidavit, be served upon the:

> Owner, part owner, or lessee of such premises or his agent, but if none of such persons be found within the county where such premises are situated, then such copy shall be served by posting the same in some conspicuous place on such premises within ten days after the expiration of said thirty days.

In *Scagnetti Inc. v. Pleister*[12] a copy of an affidavit was, pursuant to the provisions of Ohio Revised Code section 1311.19, served by a registered letter sent to the last known place of residence of the property owner. Unknown to the plaintiff, the defendant had moved several times and had left no forwarding address. Defendant, however, continued to receive his mail by general delivery. The registered letter arrived at the post office eight days before the end of the statutory thirty day period, but was not picked up by the defendant until two days after the expiration of that period. Meanwhile, the plaintiff did not, within

8. *Id.* at 245, 175 N.E.2d at 79.

9. *Id.* at 244, 175 N.E.2d at 78.

10. 172 Ohio St. 402, 176 N.E.2d 410 (1961). See also discussion in *Recent Decision*, p. 605 *infra*, and in *Corporations, Partnerships and Associations* section, p. 453 *supra*.

11. See *Recent Decisions*, p. 605 *infra*, for a further discussion of the case.

12. 172 Ohio St. 260, 175 N.E.2d 81 (1961).

ten days after the expiration of the thirty day period, post a copy of the affidavit on the premises. The supreme court, in holding that there was valid service, accepted the trial court's reasoning that the post office became the agent of the defendant and even though the defendant did not actually receive the letter until after the statutory thirty day period "that this delivery was a substantial compliance with the law."[13] Further, since the defendant had notice of the filing of the lien, the court held that the plaintiff did not have to post a copy of the affidavit on the premises.[14]

As pointed out by the court, the decision should be considered in light of the fact that the defendant did not make certain contentions which possibly could have changed the decision as to whether there had been substantial compliance with the statutory provisions. For example, there was no contention that the address used by the plaintiff was not the last place of residence known to the plaintiff, or that the defendant did not actually receive the copy of the affidavit.[15] For this reason, the case should not be considered to have substantially changed the rule that the statutory provisions in question are to be strictly construed.[16]

PLEADING — MALICIOUS PROSECUTION

In *Vesey v. Connally*[17] the Court of Appeals for Lucas County was faced with the question whether plaintiff's petition stated a cause of action for malicious prosecution. Plaintiff alleged that while he had originally been found guilty of the misdemeanor in question, this decision had subsequently been reversed. The court, in holding that the plaintiff failed to state a cause of action, stated that the allegation of a prior conviction raised a presumption of probable cause, which constitutes a valid defense in an action for malicious prosecution. The court stated, however, that a cause of action would have been stated if the plaintiff's petition had alleged facts disclosing that the original conviction had been obtained by means of fraudulent or perjured testimony, or through unfair means employed by the defendant.

FINAL ORDER OR JUDGMENT

In *Preister v. State Foundry Company*[18] plaintiff's motion for a summary judgment was sustained as to a portion of his claim. At this point

13. *Id.* at 263, 175 N.E.2d at 83.

14. While the court speaks in terms of notice, it is not clear whether it is referring to constructive notice before the end of the thirty-day statutory period or actual notice within the ten-day period following said thirty-day period.

15. 172 Ohio St. 260, 263, 175 N.E.2d 81, 83 (1961).

16. See, *e.g.*, Edgemont Coal v. Gaylor, 100 Ohio App. 42, 133 N.E.2d 651 (1955).

17. 112 Ohio App. 225, 175 N.E.2d 876 (1960).

18. 172 Ohio St. 28, 173 N.E.2d 136 (1961).

the defendant appealed. The Ohio Supreme Court held that the trial court's order with respect to a portion of the plaintiff's claim was not a judgment which may be the subject of an appeal. In reaching this conclusion, the court relied upon Ohio Revised Code section 2323.01 which, while it provides that pursuant to a motion for summary judgment a court may enter an order as to part of a party's claim, also indicates that such an order is not actually a judgment which may be the subject of an appeal. The court held that in order to have a judgment under section 2323.01 which may be the subject of an appeal, the judgment must be upon the whole case or for all the relief asked.[19]

SPLITTING A CAUSE OF ACTION — SUBROGATION AGREEMENTS

In *Rush v. Maple Heights*[20] it was held that where a person suffers both personal injuries and property damage as a result of the same wrongful act, only a single cause of action arises. This decision cast considerable doubt upon the status of the insurance subrogation cases. Viewed against a background of many cases holding that a cause of action may not be split, the question arose as to whether, or under what circumstances, the insured or the insurer could bring separate actions against a tortfeasor. And if separate actions could be brought, there was a question whether the insurer could, where it has become subrogated to only a part of the property damage claim, bring a separate action for that part of the property damage.

In *Hoosier Casualty Company v. Davis*[21] the supreme court answered some of the questions which were raised by its decision in *Rush*. The Hoosier Casualty Company, having become subrogated to only a part of its insured's property damage claim, brought a separate action for that part of the property damage claim. In his answer the defendant alleged that the insured had, prior to the time of the insurer's action, brought an action for personal injuries, and that that action was terminated by a settlement and was dismissed without prejudice to the bringing of a new action. In its reply the plaintiff admitted the above facts, but further alleged that the defendant knew of the plaintiff's interest prior to entering into the settlement with the plaintiff's insured. The trial court sustained the defendant's motion for judgment on the pleadings. The Court of Appeals for Marion County reversed the judgment and remanded the

19. In reaching its decision the court relied heavily upon the case of Biggins v. Oltineur Iron Works, 154 F.2d 214 (7th Cir. 1946). A different conclusion was reached in *Biggins* because of a slight variation in the factual pattern, but, as to the legal question in *Pleister* the court in *Biggins* reached the same conclusion.

20. 167 Ohio St. 221, 147 N.E.2d 599 (1958). See Sonenfield, *Survey of Ohio Law — Civil Procedure*, 10 WEST. RES. L. REV. 349 (1959).

21. 172 Ohio St. 5, 173 N.E.2d 349 (1961).

action to the trial court. The supreme court affirmed the decision of the court of appeals.

In affirming the decision, the court held that the subrogee of a part of a property damage claim may bring an action on that claim even where the insured has brought a separate action for personal injuries which has been settled and dismissed prior to the bringing of the insurer's action. The court, in so holding, stated that the decision in *Rush v. Maple Heights*[22] overruled only paragraph four of the syllabus in *Vasu v. Kohlers*[23] and thus paragraphs six, seven, and eight remained unaffected.[24] Thus the holding in *Vasu* that the insured was not barred from bringing a separate action for personal injuries where its insurer had earlier brought an action for property damage, was not conditioned upon the fact that there were two separate causes of action. While reaffirming its holding that a single cause of action arises where a person suffers both personal injuries and property damage as a result of a single wrongful act, the court in *Hoosier Casualty Company* further stated that it adhered to the rule that a cause of action may not be split. Nevertheless, the court in effect allowed a splitting when it held that the assignee under a subrogation agreement may bring a separate action.

It should be noted that the court did not hold that the insurer may prosecute a separate action under all circumstances. As Judge Taft stated in his concurring opinion, the insurer's right to bring a separate action is not unlimited. Upon close examination of the opinions, it appears that the insurer may prosecute a separate action only where the defendant in

22. 167 Ohio St. 221, 147 N.E.2d 599 (1958).

23. 145 Ohio St. 321, 61 N.E.2d 707 (1945).

24. Paragraphs six, seven, and eight of Vasu v. Kohlers, Inc., 145 Ohio St. 322 (1945) provide that:

"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 against the party causing such injury for reimbursement for indemnity monies paid under such contract.

"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 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."

25. As pointed out by Judge Taft in his concurring opinion in *Hoosier,* Ohio Revised Code section 2307.05 provides that an action must be brought in the name of the real party in interest, and further, under section 2307.20 parties united in interest must be joined. If the tortfeasor does not require the insured and the insurer to bring their action jointly, he has, as provided in section 2309.10, waived the defect of parties which exists under the provisions of section 2309.08. Where the tortfeasor has knowingly waived his right to have the insurer and its insured joined, this fact should not preclude the insurer or its insured from subsequently bringing a second action.

the earlier action, with knowledge of the insurer's interest in the cause of action, has failed to require that the insurer be made a party to the action brought by the insured.[25]

In *Motorists Mutual v. Gerson*[26] the plaintiff paid its insured $119 for property damage which the insured had sustained as a result of a collision with a truck which was driven by the defendant. Since the insured's policy had a fifty dollar deductible clause, the insurer became subrogated to the insured's claim only to the extent that it exceeded fifty dollars. Subsequent to entering into the subrogation agreement, the insured, for the sum of $50 signed a release with the defendant for all claims arising out of the collision. The trial court held that the release barred the plaintiff's action for its share of the property damage claim. The Court of Appeals for Lorain County, in reversing the trial court's decision, held that it could be inferred from the facts of the case that the defendant had knowledge of the insurer's rights under the subrogation agreement. Further, the court held that where a tortfeasor has knowledge of an insurer's interest under a subrogation agreement, a release given by the insured to the tortfeasor will not bar the insurer from subsequently bringing an action to recover his portion of the property damage claim.[27]

In *American Insurance Company v. Ellsworth*[28] the insurer brought an action to recover on a property damage claim to which it had become subrogated. Defendant alleged that the plaintiff's insured had recovered a judgment upon a verdict in his favor in an earlier personal injury action, and thus the plaintiff was barred from bringing the action for property damage. The court held, however, that the insured's action for personal injuries did not bar the insurer from subsequently bringing a separate action for the subrogated property damage.[29]

In *Allstate v. Dye*[30] the insurer brought an action against its insured to recover amounts which it had paid to the insured. After the insurer had paid its insured, and had become subrogated to part of the insured's claim, the insured settled his claim against the tortfeasor. The court found that the tortfeasor had, at the time of the settlement, no notice of the insurer's interest. In holding that the plaintiff was entitled to recover from its insured, the court stated that the plaintiff was, by its insured's

26. 113 Ohio App. 321, 177 N.E.2d 790 (1960).

27. See Pittsburgh C.C. & St. L. Ry. v. Vokert, 58 Ohio St. 362, 50 N.E. 924 (1898). Judge Taft, in his concurring opinion in *Hoosier Casualty Company v. Davis*, stated that the *Vokert* case could alone be the basis for affirming the lower court's decision in *Hoosier*.

28. 113 Ohio App. 426, 178 N.E.2d 819 (1960).

29. The court makes no mention of the question of whether the tortfeasor knew of the insurer's interest at the time the insured brought the action for personal injuries. Such knowledge possibly could be inferred from the fact that the tortfeasor knew that there was property damage for which no claim was made in the insured's action.

30. 113 Ohio App. 90, 170 N.E.2d 862 (1960).