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# Civil Procedure--Splitting a Cause of Action in Ohio--Actions Ex Delicto

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provement which the provisions of this section may have over the old chancery test, the *Hawkins* decision clearly shows that the basic problem which plagued the courts under the old test still exists under the new statute. Because of the necessity of determining the primary and paramount relief being sought by the plaintiff, the court's efforts are still diverted from the substantive questions involved to a procedural issue. This was exactly the evil complained of under the chancery test.<sup>23</sup> An intense discussion of this subject in *Hawkins* failed to produce any meaningful criteria for determining the primary relief being sought in a particular action. Thus, any future amendment of the statute should include some provision clarifying the meaning of the term "primary and paramount relief."

By accentuating the weaknesses of the present statute regulating appeals on law and fact, the *Hawkins* decision has, by implication, suggested the need for further legislative action on this subject. However, the effectiveness of any revision of section 2501.02 can only be determined by the application of the statute to future law and fact appeals. Thus, unfortunately, the process of "trial and error" which has plagued this area of appellate procedure for over a century seems destined to continue.

DALE C. LAPORTE

#### CIVIL PROCEDURE — SPLITTING A CAUSE OF ACTION IN OHIO — ACTIONS EX DELICTO

*Shaw v. Chell*, 176 Ohio St. 375, 199 N.E.2d 869 (1964)

One of the most confused areas of Ohio law since 1945 has been the rule concerning the number of causes of action available to an injured party as a result of a single tortious act causing both personal injury and property damage. Major factors contributing to this dilemma were the presence in most cases of an insurer-subrogee<sup>1</sup> and the failure of the bench and bar to distinguish law from dicta.<sup>2</sup> The recent case of *Shaw v. Chell*<sup>3</sup> serves to clear up the confusion that has existed in this area since the misinterpreted case of *Vasu v. Kohlers, Inc.*<sup>4</sup> In *Shaw* it was held that only one cause of action arises where a single tortious act causes injury to both the person and property of the same party. Where, however, the plaintiff files a separate action for each of the injuries, and the actions are pending simultaneously, the failure of the defendant to object to the pendency of two actions between the same parties for the same

this legislative enactment are no longer controlling in this area." *Hawkins v. Hawkins*, 176 Ohio St. 469, 471, 200 N.E.2d 300, 302 (1964).

23. *Westerhaus Co. v. Cincinnati*, 165 Ohio St. 327, 333, 135 N.E.2d 318, 323 (1956)

cause will result in a waiver of the rule against splitting a cause of action.<sup>5</sup> Before considering the holding in the subject case in more detail, it is necessary to briefly examine the background of the problem.

The development of Ohio law in this area can be divided into two segments, the dividing line being the 1945 case of *Vasu v. Kohlers, Inc.*<sup>6</sup> Before the *Vasu* case, there was no doubt that a single tortious act gave an injured party only a single cause of action.<sup>7</sup> Thus, an injured party had

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1. No attempt is made here to deal with the insurance-subrogation problem as it relates to splitting a cause of action. It is important, however, to note the basic rules dealing with the insurance issue. Under the 1961 ruling in *Hoosier Cas. Co. v. Davis*, 172 Ohio St. 5, 173 N.E.2d 349 (1961), it appears that an insurer may bring a separate action for the amount of its indemnification of the injured party if the tortfeasor, with knowledge of the insurer's interest in the insured's action, fails to have the insurer joined in the action by the injured party for his remaining damage (either the remaining property damage or personal injuries). A plea of res judicata in a subsequent action by the insurer will not bar his recovery therein. See *id.* at 13, 173 N.E.2d at 354 (concurring opinion.). Thus, whether or not the actions by the insurer and the insured are simultaneous, the injured party must object and have the two parties plaintiff joined or he will not be allowed to raise the first judgment rendered as a bar to the continuation of the other suit.

For a more complete discussion of the conflicts and questions remaining in this area, see *Civil Procedure, Survey of Ohio Law — 1961*, 13 W. RES. L. REV. 421, 442 (1961).

2. It is frequently stated that in Ohio the syllabus of the court is the law. This has led to the belief that there can be no obiter dicta in the court syllabus. This is incorrect. In *American Mortgage Co. v. Rosenbaum*, 114 Ohio St. 231, 151 N.E. 122 (1926), it was stated: "It will be seen from the foregoing that it was not necessary, in order to decide that case, that there should be a decision on the subject of motive. All that is therein said as to motive is obiter." *Id.* at 235, 151 N.E. at 123. In *Williamson Heater Co. v. Radich*, 128 Ohio St. 124, 190 N.E. 403 (1934), the court discussed this question as follows:

It is of course true that the syllabus of a decision of the Supreme Court of Ohio states the law of Ohio. However, that pronouncement must be interpreted with reference to the facts upon which it is predicated and the questions presented to and considered by the Court. It cannot be construed as being any broader than those facts warrant. When obiter creeps into a syllabus it must be so recognized and so considered. *Id.* at 126, 190 N.E. at 404.

More recently Judge Stewart concurring in *Rush v. Maple Heights*, 167 Ohio St. 221, 147 N.E.2d 599, *cert. denied*, 358 U.S. 814 (1958), in commenting on the weight to be given to a syllabus paragraph in a prior decision, stated the following:

[N]either the discussion in the *Vasu* case as to whether a single or double cause of action arises from one tort nor the language of the fourth paragraph of the syllabus was necessary to decide the issue presented in the case, and obviously both such language and such paragraph are obiter dicta and, therefore, are not as persuasive an authority as if they had been appropriate to the question presented. *Id.* at 236, 147 N.E.2d at 608.

Thus, it would seem that the rule on the syllabus in Ohio is that the syllabus is the law unless it is obiter dicta. It is unwise, therefore, even in Ohio, to use the syllabus of the supreme court cases without confirming its relevance and necessity to the determination of the issue presented for decision.

3. 176 Ohio St. 375, 199 N.E.2d 869 (1964).

4. 145 Ohio St. 321, 61 N.E.2d 707 (1945).

5. The single cause of action rule had been reinstated in *Rush v. Maple Heights*, 167 Ohio St. 221, 147 N.E.2d 599, *cert. denied*, 358 U.S. 814 (1958). The waiver rule was renewed in *Shaw v. Chell*, 176 Ohio St. 375, 199 N.E.2d 869 (1964).

6. In 1945, the case of *Vasu v. Kohlers, Inc.*, 145 Ohio St. 321, 61 N.E.2d 707 (1945), announced a reversal of the rule then existing on the subject under consideration.

7. *Mayfield v. Kovac*, 41 Ohio App. 310, 181 N.E. 28 (1932). (Cited as pre-1945 authority in *Shaw v. Chell*, 176 Ohio St. 375, 381, 199 N.E.2d 869, 873 (1964)).

to plead both property damage and personal injury in the same action to avoid the risk of being precluded from recovery in the second action by a plea of *res judicata*. But this rule was subject to the limitation that where two actions were filed simultaneously, one for property damage and the other for personal injuries sustained from the same tortious act, the defendant's failure to object in the earlier action to the second action would result in a waiver of the right to have the entire matter litigated in one action.<sup>8</sup> This was and remains today the rule in the majority of American jurisdictions.<sup>9</sup>

The decision in the *Vasu* case, however, announced a change in the law which was to cause confusion for nearly two decades. There, the litigation began when plaintiff's insurer, by the terms of the insurance contract, was assigned plaintiff's entire claim for property damage. In an action on this claim, judgment was rendered against the insurer. In a separate action for personal injuries filed in the same court and pending at the same time, defendant pleaded the first judgment as a bar to the second. The trial court rejected this plea and returned a verdict for the plaintiff. The court of appeals reversed<sup>10</sup> and the plaintiff appealed to the supreme court. There, the issue was not whether a plaintiff in a tort action has separate causes of action for personal injuries and property damage, but whether an insurer can maintain a separate action for the amount of the property damage claim to which it has become subrogated under the contract with the insured. The supreme court properly disposed of this issue in paragraphs six, seven and eight of its syllabus, stating that an insurer could "prosecute a separate action against the party causing such injury for reimbursement for indemnity monies paid "

8. *Fox v. Althorp*, 40 Ohio St. 322 (1883); *Mayfield v. Kovac*, *supra* note 7. The waiver problem was first considered in the *Fox* case where a landlord was suing for four months rent. Instead of instituting one action, he filed four separate actions. Defendant made no objection to the severance and did not plead the first judgment in the other three. After judgment was rendered in all the actions, the defendant-landlord appealed the last three actions on the ground of *res judicata*. The court, in rejecting his appeal, held that "the fair presumption is that [defendant] acquiesced in the severance " *Fox v. Althorp*, *supra* at 324. The *Mayfield* case applied the *Fox* waiver rule to an auto tort case involving injury to person and property.

9. Twenty-two states and the federal jurisdiction have specifically heard cases on the single cause of action rule and have held as had Ohio. See, *e.g.*, *Daniel v. City of Tucson*, 52 Ariz. 142, 79 P.2d 516 (1938); *Wells v. Wildin*, 224 Iowa 913, 277 N.W. 308 (1938); *Continental Ins. Co. v. H. M. Loud & Sons Lumber Co.*, 93 Mich. 139, 53 N.W. 394 (1892); *Cook v. Conners*, 215 N.Y. 175, 109 N.E. 78 (1915); *Fields v. Philadelphia Rapid Transit Co.*, 273 Pa. 282, 117 Atl. 59 (1922); *Sprague v. Adams*, 139 Wash. 510, 247 Pac. 960 (1926) (all *ex delicto* cases)

The issue of waiver has not been as fully litigated, however, and the cases in accord with the Ohio rule are scarce. See, *e.g.*, *Georgia Ry. & Power Co. v. Endsley*, 167 Ga. 439, 145 S.E. 851 (1928) (simultaneous actions for personal injury and property damage); *Todd v. Central Petroleum Co.*, 155 Kan. 249, 124 P.2d 704 (1942) (simultaneous *ex contractu* actions); *Stapp v. Andrews*, 172 Tenn. 610, 113 S.W.2d 749 (1938) (simultaneous *ex contractu* actions).

10. *Vasu v. Kohlers, Inc.*, No. 2970, Ohio Ct. App. Mahoning County (Spring term, 1945)

and that the "assignor is not bound, as to third persons, by any judgment which such third persons may obtain against his grantee or assignee

unless he participated in the action in such manner as to become, in effect, a party."<sup>11</sup> This holding was dispositive of the issues before the court. Nevertheless, the court went on in paragraph four of the syllabus to state the dictum which has given rise to the confusion in this area. The court stated:

[I]njuries 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.<sup>12</sup>

Great significance has been attached to the syllabus in Ohio, and accordingly the dictum in paragraph four of the syllabus in *Vasu* was given substantive effect by both the bench and bar in subsequent cases.<sup>13</sup>

11. *Vasu v. Kohlers, Inc.*, 145 Ohio St. 321, 322, 61 N.E.2d 707, 709-10 (1945)

12. *Id.* at 321, 61 N.E.2d at 709.

13. In a survey of Ohio case law, two members of the Ohio Bar completely confused the two issues in *Vasu v. Kohlers, Inc.* They came to the right conclusion about the insurance-subrogation problem for the reason of paragraph four of the syllabus, which was not at issue in the case. See Hart & Hart, *Review of Ohio Case Law for 1945*, 32 Ohio Op. 467, 474-75 (1945). Confusion was compounded when *Ohio Jurisprudence* stated paragraph four of the syllabus as the rule in the case. 1 OHIO JUR. 2d, *Actions* § 76 (1953). In *Markota v. East Ohio Gas Co.*, 154 Ohio St. 546, 97 N.E.2d 13 (1951) (unanimous decision), some indication was given that paragraph four of the *Vasu* syllabus was unnecessary to the determination of that case. There the supreme court was called upon to rule on the question whether several elements of damage caused by the same transaction gave rise to separate causes of action. Although the action was *ex contractu* and not *ex delicto*, the court was required to explain and distinguish paragraph four of the *Vasu* syllabus as follows:

It should be noted, however, that the plaintiff, in the *Vasu* case, had not been a party to the action brought by his indemnitor against the defendant; and, as indicated by paragraph eight of the syllabus in the *Vasu* case, the plaintiff was not, therefore, bound by the judgment against his indemnitor who had sought to recover from that defendant the portion of the plaintiff's claim assigned to such indemnitor. *Id.* at 551, 97 N.E.2d at 16.

However, just two months after the decision in the *Markota* case, Judge Carpenter of the Court of Appeals for Huron County referred, in a concurring opinion in *Hughes v. Baltimore & O.R.R.*, 90 Ohio App. 278, 282 (1951), to the two causes of action of injuries to person and to property that arise from the same tortious act. Judge Carpenter used paragraph four of the *Vasu* syllabus as his authority.

The confusion was continued by the attempted explanation of the *Vasu* syllabus in *Mansker v. Dealers Transp. Co.*, 160 Ohio St. 255, 116 N.E.2d 3 (1953), where Judge Zimmerman, writing for the court, discussed estoppel but did not comment on the main impact of paragraph four of the *Vasu* syllabus, namely, that a separate cause of action arises for the property damage and personal injuries resulting from the same tortious act. Judge Zimmerman stated that

actually, the fourth paragraph of the syllabus in the *Vasu* case means and was intended to mean that where a second action is instituted upon a claim, demand or cause of action different from that involved in the first action, the judgment in the first action is not a bar to the prosecution of the second, but operates only as an

A decade of confusion followed until 1958 when the case of *Rush v. Maple Heights*<sup>14</sup> was considered by the supreme court. There, plaintiff asserted a right under the supposed rule in *Vasu* to bring separate actions for personal injuries and property damage. But unlike the *Vasu* case, *Rush* involved no insurer-subrogee to confuse the issue. The supreme court erroneously recognized paragraph four of the *Vasu* syllabus as law rather than dictum, but finally succeeded in correcting some of the confusion by overruling it. The court thus returned to the rule prior to *Vasu* by holding that only a single cause of action arises from a single tortious act, the different injuries being merely different elements of damage.<sup>15</sup>

The issue of waiver was not clarified in *Rush*, although both actions in that case were pending simultaneously.<sup>16</sup> It was not until the subject case of *Shaw v. Chell*<sup>17</sup> that the last vestige of confusion caused by the dictum in *Vasu* was laid to rest. There, defendant Chell was the administrator of the estate of one Montgomery. The first action instituted against Chell by plaintiff and his insurer was for recovery of property damage claimed to have been proximately caused by the negligence of defendant's decedent. The second suit was begun by plaintiff for personal injuries sustained in the same accident. At no time did defendant object to the institution of the second suit. The trial of the property damage claim resulted in a verdict for plaintiff for \$100.00, but against plaintiff's insurer for the part of the claim to which the insurer had become subrogated by payment to the plaintiff. After satisfying the judgment in the property damage action, defendant set up that judgment as a bar to the personal injury action. The trial court held against defendant on this question, and the jury returned a verdict for the plaintiff.<sup>18</sup> The court of appeals affirmed.<sup>19</sup>

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estoppel with regard to points or questions actually litigated and determined in the first action. *Id.* at 259, 116 N.E.2d at 6.

The first sentence of paragraph four of the *Vasu* syllabus clearly states that the same tortious act gives rise to two causes of action — one for property damage, the other for personal injuries. See p. 443 *supra*.

14. 167 Ohio St. 221, 147 N.E.2d 599, *cert. denied*, 358 U.S. 814 (1958)

15. *Rush v. Maple Heights*, *supra* note 14 at 235, 147 N.E.2d at 607

16. "Both the report of the *Rush* case and the briefs filed therein indicate that that question [of waiver] was not raised or considered by this court in rendering its decision in that case." *Shaw v. Chell*, 176 Ohio St. 375, 384, 199 N.E.2d 869, 875 (1964) Thus any reference made to the waiver situation in the report of the *Rush* case would not have the weight of law for "a reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon or raised at the time of the adjudication." *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129, 131, 107 N.E.2d 206, 208 (1952)

17. 176 Ohio St. 375, 199 N.E.2d 869 (1964)

18. *Shaw v. Chell*, No. 29490, Ohio C.P., Portage County, May 31, 1962.

19. *Shaw v. Chell*, No. 278, Ohio Ct. App., Portage County, June 24, 1963 (no written opinion).

In reviewing the court of appeals decision, the supreme court pointed out that although there was originally an insurer as a party plaintiff in *Shaw*, after the judgment against the insurer in the first action the situation was identical to the situation in the *Rush* case. But although the court accepted the rule of the *Rush* case that but one cause of action arises from a single tortious act,<sup>20</sup> it went on to distinguish the *Rush* case as to the waiver question. The court noted that the *Rush* case was not in point, for "that question was not raised or considered by this court in rendering its decision in that case . . ." <sup>21</sup> The issue of waiver, therefore, had to be reasoned anew.

Beginning with the assumption that only one cause of action arises from a single tortious act, the court developed its logic on the basis of two sections of the Ohio Revised Code. First, the court noted that section 2309.08 provides that a "defendant may demur to a petition only when it appears on its face that . . . another action [is] pending between the same parties for the same cause . . ." <sup>22</sup> Section 2309.10 further requires that "when on the face of the petition, no ground of demurrer appears, the objection may be taken by answer. If the objection is not made either way, the defendant has waived it . . ." <sup>23</sup> On the basis of these provisions, the court concluded that "by failing to so amend his answer, defendant certainly waived his right to object that the concurrent pendency of the property damage and personal injury actions represented a splitting of plaintiff's single cause of action." <sup>24</sup> The waiver rule that existed before *Vasu* was thus clearly re-established.

On both the issue of splitting a cause of action and the issue of waiver, the present status of Ohio law appears to be exactly what it was prior to *Vasu v. Kohlers, Inc.*<sup>25</sup> Only one cause of action arises where a single tortious act causes injury to both the person and property of the

20. Compare syllabus paragraph one of *Shaw v. Chell*, 176 Ohio St. 375, 199 N.E.2d 869 (1964) with the syllabus paragraph of *Rush v. Maple Heights*, 167 Ohio St. 221, 147 N.E.2d 599, cert. denied, 358 U.S. 814 (1958).

21. See note 16 *supra*.

22. OHIO REV. CODE § 2309.08.

23. OHIO REV. CODE § 2309.10.

24. *Shaw v. Chell*, 176 Ohio St. 375, 380, 199 N.E.2d 869, 872-73 (1964) The court concluded in paragraph three of the syllabus that

where an action to recover for personal injuries caused by the negligence of a defendant is commenced by a plaintiff and service of summons is made therein on the defendant before trial of a separate action by plaintiff to recover for property damage caused by the same negligence, (1) the defendant can amend his answer in the property damage action so as to allege that the personal injury action is pending and is another action pending between the same parties for the same cause, (2) the defendant, by failing to so amend his answer before judgment is rendered in the property damage action, waives his right to object and thereby consents to the plaintiff's splitting of his single cause of action, and (3) defendant cannot thereafter plead a judgment for the plaintiff in the property damage action as a bar to the personal injury action. *Id.* at 375, 199 N.E.2d at 870.

25. 145 Ohio St. 321, 61 N.E.2d 707 (1945).