

FINDING FOR DEFENDANT IN WRONGFUL DEATH ACTION PRECLUDES SUBSEQUENT PERSONAL INJURY SUIT BY STATUTORY BENEFICIARY

Brinkman v. The Baltimore & Ohio Railroad Co.

111 Ohio App. 317, 172 N.E.2d 154 (1960)

This action was brought by the next friend of a minor to recover damages for personal injuries sustained when an automobile in which the minor and her mother were passengers was struck at a crossing by a train operated by defendant. The mother was killed, and in a prior wrongful death action brought by the administrator of the mother's estate, a verdict was returned in favor of the defendant. In the wrongful death action, the girl, her brother, and her sister were the statutory beneficiaries. In this separate action for personal injuries, the defendant set up the defense of res judicata and estoppel by judgment, based upon the verdict in the wrongful death action which established that the defendant was not negligent. The defense was allowed and on appeal the judgment was affirmed.

A great many courts and legal writers treat "res judicata" and "estoppel by judgment" as synonymous. Technically speaking, this is not proper although both doctrines have the effect of preventing the relitigation of a prior determination.¹ This effect finds its justification in the public policy of protecting the defendant from harassment and society from multiplicity of litigation.²

In an evaluation of this decision, it must be determined whether the result can be supported by the defense of res judicata or estoppel by judgment. Under res judicata, a final judgment or decree of a court of competent jurisdiction upon the merits is a bar to any subsequent suit between the same parties or their privies upon the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised. The principle of estoppel by judgment, however, is applicable where the two causes of action are different, in which case the judgment in the first suit only estops the parties or their privies from litigating in the second suit issues common to both causes of action which were actually adjudicated in the prior litigation.³

In the instant case it appears that the court based its decision on both estoppel by judgment and res judicata. The court seems to have recognized

¹ Gordon v. Gordon, 59 So. 2d 40 (Fla. 1952); Charles, "Res Adjudicata and Estoppel by Judgment," 32 Wis. Bar Bull. 16 (June, 1959).

² Mansker v. Dealers Transp. Co., 160 Ohio St. 255, 116 N.E.2d 3 (1953); Annot., 23 A.L.R.2d 710 (1952); Note, 1952 U. Ill. L.F. 306; 52 Mich. L. Rev. 289 (1953).

³ Cromwell v. County of Sac., 94 U.S. 351 (1877); Gordon v. Gordon, *supra* note 1; Mansker v. Dealers Transp. Co., *supra* note 2. See also Vasu v. Kohlers, Inc., 145 Ohio St. 321, 61 N.E.2d 707 (1945); Scott, "Collateral Estoppel by Judgment," 56 Harv. L. Rev. 1 (1942).

the distinction between the two defenses by referring to *Gordon v. Gordon*,⁴ but does not clearly apply the distinction in arriving at its decision.

The matter or point in dispute may be the same in two actions, and yet involve different causes of action, in which case *res judicata* is not applicable and a prior judgment is no bar to the second action.⁵ In the factual situation out of which the principal case arose, there were two separate and distinct causes of action, one for the wrongful death of the mother and one for the personal injuries suffered by the girl.⁶ However, the factor of the defendant's negligence was common to both actions. Since it was decided that the defendant was not negligent in the wrongful death suit, the issue of the defendant's negligence is permanently determined between the parties to the wrongful death suit or their privies. However, each person injured in an accident is entitled to litigate the issue of defendant's negligence without regard to prior litigation by other persons injured in the same accident.⁷ Therefore the plaintiff in the present case would have to be considered a party to the previous suit or a privy of a party if the finding on negligence is to be binding on her by the operation of estoppel by judgment. The plaintiff would also have to be considered a party in the same capacity in both cases since a judgment is not conclusive as to a material fact adjudicated unless the second action is not only between the same parties but also between them in the same capacity.⁸

The wrongful death action referred to above was brought under the Ohio wrongful death statute which provides that "an action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent."⁹ The personal representative has no interest in the recovery.¹⁰

From the wording of this statute the court argues that there was identity of parties in the two causes of action. Identity of parties is not a mere matter of form but of substance. Courts look beyond the nominal party whose name appears formally on the record and treat the one whose interests are involved in litigation as the real party in interest.¹¹ The

⁴ *Gordon v. Gordon*, *supra* note 1.

⁵ *Kraut v. Cleveland Ry.*, 132 Ohio St. 125, 5 N.E.2d 324 (1936); *Nixon v. Ogg*, 53 Ohio St. 361, 42 N.E. 32 (1895); *Hollywood Cartage Co. v. Wheeling & L.E. Ry.*, 85 Ohio App. 182, 88 N.E.2d 278 (1948); *Wharton v. Pollock*, 49 Ohio App. 443, 197 N.E. 379 (1934).

⁶ *Gibson v. Solomon*, 136 Ohio St. 101, 23 N.E.2d 996 (1939); *Mahoning Valley Ry. v. Van Alstine, Adm'r*, 77 Ohio St. 395, 83 N.E. 601 (1908); *Keith v. Willers Truck Serv.*, 64 S.D. 274, 266 N.W. 256 (1936).

⁷ *Annot.*, 23 A.L.R.2d 710 (1952). In Ohio this is true even between husband and wife. See *Kraut v. Cleveland Ry.*, *supra* note 5.

⁸ *Gibson v. Solomon*, *supra* note 6; *Annot.*, 170 A.L.R. 1180 (1947); 30 Am. Jur. "Judgments" § 398 (1958).

⁹ Ohio Rev. Code § 2125.02 (1953).

¹⁰ *Steel v. Kurtz*, 28 Ohio St. 191 (1876).

¹¹ *Gibson v. Solomon*, *supra* note 6; *Keith v. Willers Truck Serv.*, *supra* note 6; *Annot.*, 125 A.L.R. 908 (1940).

representative in the wrongful death action was the "trustee" for the beneficiaries,¹² and whenever an action may be properly maintained or defended by a trustee in his representative capacity without joining the beneficiaries, the latter are necessarily bound by any resulting judgment.¹³ From this the court reasons that the plaintiff is precluded from relitigating the issue of defendant's negligence in the principal case.

It appears that this result is a product of the failure of this court and previous courts to properly differentiate estoppel by judgment and res judicata, and in particular, their failure to appreciate the *differing* significance of representation in the operation of the two principles.

As stated before, for either res judicata or estoppel by judgment to operate, the general rule requires identity of parties in each suit, or at least privity. The term "parties" has been said to include all who are directly interested in the subject matter of a suit and who have a right to make a defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment.¹⁴ Where it appears that a person, though not actually a party, is so represented by an actual party that his interests receive complete and efficient protection, he is held to be in privity with the actual party with respect to the cause of action upon which the judgment is based, and the decree or judgment is binding upon him through the operation of the doctrine of res judicata.¹⁵

Thus it is not unfair that the statutory beneficiary of a wrongful death action should be bound by an adjudication of the cause of action giving rise to the suit. It is in fact essential that the beneficiary should be so bound; otherwise the defendant would be harassed by repeated wrongful death actions. However, it is quite another matter to say that the wrongful death beneficiary is also bound, by the principle of estoppel by judgment, as to a determination of a material issue affecting his cause of action for his own personal injuries, incurred in the same accident causing the death. If the wrongful death beneficiary had no control over the wrongful death action, it is unfair to preclude him, by a determination in that action, from relitigating a common issue in a subsequent personal injury action. On the other hand it is not unfair to the tortfeasor to permit the beneficiary to relitigate the issues, as a tortfeasor often must do so against successive adversaries.

This kind of privity by representation, sometimes appropriate in the application of res judicata, has been carried into the area of estoppel by judgment in two situations by Ohio courts. In *Haines v. Cincinnati Inter-*

¹² Chicago, R.I. & P. Ry. v. Schendel, Adm'r, 270 U.S. 611 (1925); Douglas, Adm'r v. Daniels Bros. Coal Co., 135 Ohio St. 641, 22 N.E.2d 195 (1939); Wolf, Adm'r v. Lake Erie & W. Ry., 55 Ohio St. 517, 45 N.E. 708 (1896); Gibson v. Solomon, 30 Ohio L. Abs. 666 (Ct. App.), *aff'd*, 136 Ohio St. 101, 23 N.E.2d 996 (1939).

¹³ Steel v. Kurtz, *supra* note 10; Gibson v. Solomon, *supra* note 12.

¹⁴ Gallagher v. Harrison, 86 Ohio App. 73, 88 N.E.2d 589 (1949), *appeal dismissed*, 152 Ohio St. 254, 88 N.E.2d 921 (1949); 1 Freeman, Judgments § 430 (5th ed. 1925); 32 Ohio Jur. 2d "Judgments" § 322 (1958).

¹⁵ Gibson v. Solomon, *supra* note 12; 1 Freeman *op. cit. supra* note 14, at § 435.

urban Co.,¹⁶ Haines, his wife and child were riding in a buggy which collided with the defendant's car. An action by Haines for personal injuries resulted in a verdict for the defendant. The determination of the issue of the defendant's negligence was allowed as a bar to Haines' right to benefit from a recovery against the defendant in a wrongful death action for the death of his wife. The decision can be justified by the fact that Haines controlled the first suit that determined the question of defendant's negligence. This fact also appears to distinguish the case from the principal case.

In *Gibson v. Solomon*,¹⁷ Solomon, as administrator, sued Gibson for the wrongful death of his wife. Solomon was ruled out as a beneficiary because of his own contributory negligence, but the verdict was otherwise for Solomon in his capacity as administrator. Subsequently Gibson sued Solomon for her personal injuries sustained in the accident, resulting in a judgment for Solomon. The court stated that the question of negligence could not be relitigated by either party. The fact that Solomon, as administrator, in the first suit had control over the action in which the question of negligence was determined appears at least to some extent to justify the decision, and distinguishes the case from the principal case.¹⁸

It appears that by its holding in the principal case, the court is extending the doctrine of estoppel by judgment far beyond its logical bounds. The acceptance of the dissenting opinion of Judge Ross in the court of appeals in *Gibson v. Solomon* would have confined estoppel by judgment within its proper limits:

. . . though represented by the administrator, they (the beneficiaries) are not parties. . . . A beneficiary is not entitled to be represented by counsel. . . . He can file no pleadings. He cannot appeal from the judgment. . . . The plaintiff in the instant action is entitled to have that (his) culpability made a matter of exclusive litigation not connected with other issues.¹⁹

A hypothetical case will illustrate the possible ramifications of the principal case. Suppose a beneficiary in a wrongful death action, who was permanently injured himself in the accident causing the death, has only a small interest in any recovery that might be allowed. Would it not create a great injustice to hold that a decision on the negligence issue favorable to the defendant in the wrongful death action, over which the beneficiary had no control and in which he has only a very slight interest, would preclude this beneficiary from litigating that issue in a subsequent suit for his own personal injuries?

In the principal case the court appears to consider only the policy of protecting the defendant from harassment and the public from multiplicity of suits, without regard to the fact that the rights of the parties should

¹⁶ *Haines v. Cincinnati Interurban Co.*, 7 Ohio L. Rep. 48, 31 Ohio C.C.R. (n.s.) 265 (Ct. App. 1909).

¹⁷ *Gibson v. Solomon*, *supra* note 6.

¹⁸ For an annotation discussing the *Gibson* case which disagrees with this position, see Annot., 125 A.L.R. 908 (1940).

¹⁹ *Gibson v. Solomon*, *supra* note 12.

be determined. The court apparently ignores the fundamental right of every person to have his day in court. This right is denied unwittingly when a litigant is denied recovery on her individual cause of action by reason of a determination rendered in a suit on a different cause of action over which she had no control. The extension of the doctrine of estoppel by judgment, by the uncritical application of principles appropriate only to *res judicata*, should be discontinued. The doctrine of estoppel by judgment should be confined within its proper limits so as to prevent the possibility of injustice in situations like the one present in the principal case.