MAJOR EXCEPTION TO ONE CAUSE OF ACTION RULE

The Hoosier Casualty Co. v. Davis
172 Ohio St. 5, 173 N.E.2d 349 (1961)

Carl Davis, appellant, was involved in an automobile accident on August 6, 1956 with appellee's insured, Gertrude Peterson. On August 16, 1956, the Hoosier Casualty Company notified Davis that it had indemnified its insured according to her fifty dollar deductible policy and that Hoosier Casualty Company was now subrogated to her rights for property damage above the fifty dollar deductible limit. Peterson filed suit against Davis for the personal injuries she had received. A private settlement was made between the parties pursuant to which Peterson released her claim and the action for personal injures was dismissed with prejudice. Later, the insurance company filed an action against Davis to recover the amount paid to its insured for damage to his automobile. Davis alleged as defenses the dismissal with prejudice of the personal injury action and the release executed by appellee's insured. The insurance company's reply alleged the prior notice to Davis of its rights under the contract of indemnity. Davis's motion for judgment on the pleadings was sustained by the Municipal Court of Marion, Ohio. Judgment was reversed by the Court of Appeals, and the Supreme Court of Ohio affirmed the judgment of the Court of Appeals.

Despite its ruling in *Rush v. Maple Heights*[1] that there was but one cause of action where personal injuries and property damage were caused by the same tortious conduct, the supreme court held that an insurance company subrogated to the rights of the insured by a casualty insurance policy was not prohibited from prosecuting a separate action because the insured dismissed with prejudice a prior personal injury action. This is a major exception to the single cause of action rule adopted in the *Rush* decision.[2]

The question of splitting a cause of action has been raised in many cases where personal injuries and property damage have been caused by the same tortious conduct. There is considerable controversy as to whether there is but one cause of action for both kinds of injuries or whether there are two separate and distinct causes of action. The English rule, which has substantial minority support in the United States, is that there are two distinct causes of action.[3] The underlying reason for this rule is the distinction recognized by the common law between torts causing injury to property and torts causing personal injuries. The differences give rise to the notion that there are two separate rights, and therefore, two separate causes of action stemming from the same wrongful conduct.[4] The majority rule in the United

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[1] Rush v. Maple Heights, 167 Ohio St. 221, 147 N.E.2d 599 (1958).

[2] For general discussions see 27 U. Cinc. L. Rev. 307 (1958); 19 Ohio St. L.J. 447 (1958); 3 Western Reserve L. Rev. 349 (1959).

[3] Brunsden v. Humphrey, 14 Q.B. Div. 141 (1884); 1 Am. Jur., "Action," 114 (1936); Annot., 64 A.L.R. 656 at 670 (1929); 7 Wash. & Lee L. Rev. 99 (1950).

[4] See 21 Ore. L. Rev. 319, 361 (1942).

States, presently the rule in Ohio, is that a single wrongful act which causes both personal injury and property damage gives rise to only one cause of action.[5] The reason given is that since the defendant's wrongful act is a single one, the different injuries occasioned by it should merely be items of damage proceeding from the same wrong.[6] Most courts which have adopted this rule feel that to hold otherwise would subject a defendant to unnecessary and vexatious litigation.[7]

Jurisdictions taking the majority view are split as to whether the subrogor's insurance company can maintain a separate action against the tort-feasor. Some states hold that when an insurer pays the insured for property damage under a collision policy, one of the two will lose his right of action against a negligent third party where the other brings a prior suit without joining him.[8] Other jurisdictions, while recognizing the general principle that a single wrongful act creates one cause of action, nevertheless permit an action by the insurer, subrogated to the rights of the insured, irrespective of a prior action by the insured.[9] This exception is allowed because a strict application of the single cause rule would be prejudicial to the interests of both the insured and the insurer.[10]

The first case *decided*[11] by the Ohio Supreme Court involving an insurance company subrogated to the rights of the insured was *Vasu v. Kohlers*,[12] which allowed the insured to sue for his personal injuries after his insurance company had failed to recover the property damage. Paragraph 4 of the syllabus stated that there are two causes of action when a tort-feasor causes both personal injuries and property damage. The court also stated in paragraph 6 of the syllabus that an insurance company could prosecute a separate action.[13] In the later *Rush* case,[14] the supreme court

[5] 1 Ohio Jur. 2d, "Actions," 76 (1953); 1 C.J.S. "Actions," 104(2) (1936).

[6] See 33 Yale L.J. 829 (1924); 21 Ore. L. Rev. 319, 321 (1942).

[7] 32 Yale L.J. 190 (1922).

[8] Annot. 140 A.L.R. 1236 (1936); Globe & Rutgers Fire Ins. Co. v. Cleveland, 162 Tenn. 83, 64 S.W.2d 1059 (1931); Sprague v. Adams, 139 Wash. 510, 247 Pac. 960 (1926).

[9] Travelers Indem. Co. v. Moore, 304 Ky. 456, 210 S.W.2d 7 (1947); 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).

[10] See Underwood v. Dooley, *supra* note 9; Annot., 62 A.L.R.2d 989 (1929).

[11] Redman v. North River Ins. Co., 128 Ohio St. 615, 193 N.E. 347 (1934), involved similar facts but the defense of res judicata was not property raised by motion for judgment on the pleadings.

[12] 145 Ohio St. 321, 61 N.E.2d 707 (1945).

[13] Vasu v. Kohlers, *supra* note 12, paragraph 6 of syllabus: "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 the 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 of the indemnity monies paid under such contract."

[14] Rush v. Maple Heights, *supra* note 1.

expressly overruled paragraph 4 of *Vasu*. The court held that where the plaintiff had recovered for property damage in a previous action, she could not recover for personal injuries in a later action. The *Rush* case, however, did not involve collision insurance. The same injured person was attempting to bring two different suits; thus the court did not specifically commit itself upon how it would rule in a case which involved a subrogation insurer. The court did imply, in dicta, that it approved an exception to the single cause of action rule when subrogation was involved by citing cases from other jurisdictions that so held.[15] The effect of holding in the present case confirming the dictum in the *Rush* case, is that Ohio will allow an exception to the single cause of action where a subrogated insurer is involved.

The supreme court has attempted to eliminate the evil of multiplicity of suits resulting from the two causes of action rule and, at the same time, to avoid cutting off a valid claim by strict application of the single cause of action rule to subrogation situations. It might be well to examine the success of its attempt by observing the situation of these parties. The insured and the subrogated insurance company are in a decidedly better position with the exception established by the present case. In the event of an accident resulting in both personal injury and property damage, the latter being covered by collision insurance, the interests of the insured and the subrogated insurance company are different. While the insurance company knows the exact amount of its damages and would ordinarily prefer bringing immediate action, the insured may not be sure of the extent of his injuries and so may prefer to wait. The rule established by this case allows the insured to abstain from prosecuting his claim without fear that a judgment in favor of or against the insurer will have the effect of res judicata against him. The tort-feasor must now object if he does not wish to defend two suits. Failure to object by motion, demurrer[16] or answer[17] constitutes a waiver,[18] and defendant cannot later complain in a subsequent action that plaintiff has split his cause of action or that the previous judgment is res judicata.

The supreme court has succeeded in minimizing the disadvantages of

[15] Rush v. Maple Heights, *supra* note 1, at 234; 147 N.E.2d at 606. "The reason why the exception is recognized that, where the plaintiff has recovered from an insurance company a part of his damage, he is not estopped from prosecuting his own action, is well stated in the North Carolina case of Underwood v. Dooley, supra note 9, as follows: 'It cannot be held as law in this state that the owner of an automobile, who, as the result of the wrong or tort of another, has sustained damages both to his automobile and to his person, and whose automobile is insured against the loss or damage which he has sustained because of damages to his automobile, is put to an election whether or not he shall, in order to maintain an action against the wrongdoer to recover damages for injuries to his person, release the insurance company from liability to him under its policy. He does not lose his right of action to recover for the injuries to his person, by accepting from the insurance company the amount for which it is liable to him . . .'"

[16] Ohio Rev. Code 2309.08 (1954).

[17] Ohio Rev. Code 2309.10 (1954).

[18] Sears & Nichols v. Squire, 132 Ohio St. 140, 5 N.E.2d 486 (1936).

the single cause of action rule and at the same time has retained the merits of the two cause of action rule. It has placed the burden of objecting to nonjoinder upon the defendant. However, it has succeeded in relieving the plaintiff from having an otherwise valid claim barred merely because the other party united in interest has made a prior settlement of his portion of the claim with the defendant or has sued on such portion. The court has refused to enforce an inflexible procedural rule because there is a strong policy consideration against cutting off the substantive rights of a litigant by the strict application of the rules of procedure. "All procedure is merely a methodical means whereby the court reaches out to restore rights and remedy wrongs; it must never become more important than the purpose it seeks to accomplish."[19]

[19] Clark v. Kirby, 243 N.Y. 295, 153 N.E. 79 (1926).