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Pleading--Wrongful Death Action--Improper to Include Claim For Property Damage

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as merely *descriptio personae* and surplusage. Yet in *Thurmand v. Guyan Valley Coal Co.*, 85 W. Va. 501, 102 S.E. 221 (1920), plaintiffs sued "in their said capacity of executors of the last will and testament of W. D. Thurmond, deceased," and the court said that "the whole tenor of the declaration shows that plaintiffs are suing in a representative character." The fourth point of the syllabus says that "Whether the plaintiff has instituted an action in a representative or individual capacity, and whether words following his name are to be deemed descriptive of his person or of the character in which he sues, is to be determined from all the allegations of the pleading." This agrees in substance with the *Scott* and *Hall* cases, *supra,* but it appears that if the court had so desired it could have followed the reasoning in the *Milan* and *Hudkins* cases, *supra,* and arrived at the same result.

The last two cases to be discussed have been criticized in previous case comments. *Hardesty v. Fairmont Supply Co.*, 123 W. Va. 161, 14 S.E.2d 436 (1941), is analyzed in 48 W. VA. L.Q. 72 (1941), and *Hughes v. Charlton,* 104 W. Va. 640, 141 S.E. 1 (1927), is commented on in 34 W. VA. L.Q. 397 (1928). In the *Hardesty* case, the grantee of a deed was described as "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association." The court held that Miller's heirs took title on his death. In the *Charlton* case, *supra,* Charlton, "Trustee", contracted to buy the stock in a certain corporation. The court held that the use of the term "trustee" was not merely *descriptio personae* but was used advisedly and the vendors should have been put on notice that the vendee was contracting only as trustee, not individually. This case seems squarely contra to the first group of cases cited. The court was split three-two on this proposition and no authority was cited for the majority opinion. However, it came up on the equity side of the court. In effect, "as" was omitted and representative capacity found. This seems to be the only case so holding in West Virginia.

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PLEADING—WRONGFUL DEATH ACTION—IMPROPER TO INCLUDE CLAIM FOR PROPERTY DAMAGE.—*P*'s decedent instituted action to recover from *D* for personal injuries and for damage to his automobile sustained in a collision with *D*'s vehicle. He died pending trial from these injuries and *P,* decedent's administratrix, was allowed to revive the action in her name. Trial court instructed the jury that

they could return two separate verdicts, one, not to exceed $10,000, for wrongful death, and the other for damage to automobile of *P*'s decedent. Verdict returned, and judgment entered thereon, for $11,062.63. *Held,* that it was error for the court to permit testimony as to the damage to decedent's automobile and to instruct the jury that they could return two separate verdicts. The total amount of jury's verdict was in excess of the recovery permitted under W. VA. CODE c. 55, art. 7, §§ 5 and 6 (Michie, 1949). *Alloy v. Hennis Freight Lines,* 80 S.E.2d 514 (W. Va. 1954).

W. VA. CODE c. 55, art. 7, § 8 (Michie, 1949), provides that where such action for personal injuries is pending and the injured person dies, the action shall not abate, but his death being suggested, it may be revived in the name of his personal representative, and the declaration and other pleadings shall be amended so as to conform to an action under Article 7, Sections 5 and 6. Section 5 gives a right of action for wrongful death. It is the modern counterpart of the famous English statute, known as Lord Campbell's Act, which first gave this right of action. Section 6 provides that the action shall be brought by and in the name of the personal representative; that the amount recovered shall be distributed to the parties and in the proportion as would decedent's personal estate had he died intestate; and that recovery shall be limited to $10,000.

Dunsmore v. Hartman, 84 S.E.2d 137 (W. Va. 1954), cites the principal case as controlling its decision. Here the action was instituted by the administratrix under Sections 5 and 6. The declaration contained a count for wrongful death and one for property damage. A demurrer to the declaration was overruled. This was held to be error there being a misjoinder since recovery on both counts would not in effect be in favor of the same *P*. The recovery for property damage would be in favor of the personal representative of decedent's estate, while a recovery for damages for wrongful death is actually for the decedent's next of kin and not for the estate, with the personal representative acting as trustee for the next of kin.

The two cases seem distinguishable since the *Dunsmore* case is an original action brought under Sections 5 and 6, while the principal case is the action of *P*'s decedent revived under Section 8. Actions brought under Sections 5 and 6 are not actions for personal injuries for these die with the deceased. This is a new cause of action, not existing at common law, which is given by the statute. *Swope, Adm'r v. Keystone Coal & Coke Co.,* 78 W. Va.

517, 89 S.E. 284 (1916). But Section 8 ". . . expressly preserves the cause of action which originally accrued to the injured person in his lifetime to his personal representative. . . ." *Wheeling v. Casualty Co.,* 131 W. Va. 584, 589, 48 S.E.2d 404, 408 (1948).

The court seems to have overlooked, or at least not reconciled, some of its earlier decisions bearing on this subject. In *Larzo v. Swift & Co.,* 129 W. Va. 436, 442, 40 S.E.2d 811, 814 (1946), it is said, "A plaintiff who has sustained personal injuries and property damage in an automobile collision has but a single cause of action and the elements of damage consisting of injuries to the person and property of plaintiff, *must* be joined in the same action." And this case cited an earlier decision which held that these separate claims *should* be united in the same action while recognizing that there were differences between the right incident to personal injuries and the right incident to property damage. "The period if limitation of action for personal injury is shorter than the period for injury to property; the former dies with the person unless the injury caused death, the latter does not; the former is non-assignable, the latter is assignable; the former does not pass to the trustee of a bankrupt for the benefit of his creditors, the latter does; if the personal injury produces death the damages recovered by reason thereof are, under the express terms of the statute, conserved for the distributees of the deceased, while recovery for the property damage would go to his estate primarily for the benefit of creditors." *Thalman v. Schultz,* 111 W. Va. 64, 68, 160 S.E. 303, 304 (1931). It would seem from the *Thalman* case that the court at that time did not foresee these most recent results. And in *Wheeling v. Casualty Co., supra* at 591, 48 S.E.2d at 409, "Unless the statute . . . operates to cause the survival of the original cause of action to the extent necessary to enable the pending action when revived to proceed to final judgment, the right to revive the action, conferred by its terms, becomes a nullity. . . . It would seem to be unreasonable, if not indeed absurd, to suppose that the Legislature, having authorized the revival of the action, had failed to preserve the cause of action on which it is based for the purpose of enabling the person in whose name it is revived to prosecute the action after its revival to final judgment. . . The effect of the statute which in express language prevents the abatement, and authorizes the revival, of the pending action, is to cause the cause of action upon which this action is based to survive for the purpose of prosecuting it to final termination." If the deceased had but a single cause of action, as held in the *Larzo* case, and if Section 8

causes it to survive, as held in the *Wheeling* case, how can the decisions of the principal case and of the *Dunsmore* case follow? Do not these cases, in effect, treat these elements of damages as separate causes of action? Since the right of action for property damage survived to the personal representative at common law, and that for personal injuries did not, it would necessarily mean that any pending action seeking recovery for either or both would abate with the plaintiff's death and his personal representative must institute two new actions with the attendant increased delay in settling the estate and the risk of increased costs if he were unsuccessful. It would seem that the court might have construed the legislative intent behind Section 8 to provide for the survival, also, of the element of damage for personal injuries, merely limiting the amount of recovery for that element to correspond with the limit allowed for wrongful death, thus avoiding the consequences of abatement of decedent's action.

If the deceased had but a single cause of action, does the court intend to abrogate the common law rule prohibiting the splitting of a cause of action, or does it mean that the personal representative must choose to recover either for wrongful death or for property damage and abandon the other? If a plaintiff splits his cause of action and brings suit for only a portion thereof, he is precluded from recovering the balance of his demand. *State* ex rel. *Shawver v. Casto,* 136 W. Va. 797, 68 S.E.2d 673 (1952); *Ward v. Evans,* 49 W. Va. 184, 38 S.E. 524 (1901).

Thus these cases seem to present a conflict in basic common law rules—that prohibiting the splitting of a cause of action and that prohibiting the joining of plaintiffs with different claims in the same action. To resolve this conflict it would seem that the court must either admit that the claims present different causes of action (which would be joinable by the injured person), or that the personal representative really sues to recover both claims in the same capacity, as a personal representative of his decedent, and recognize the different rights incident to the damages as was done in *Thalman v. Schultz.* It would seem that the mere mechanical difficulty of dealing with the different nature of the different elements of damage could, in either event, be overcome by an instruction to the jury to bring in separate verdicts as is provided for in W. VA. CODE c. 56, art. 6, § 5 (Michie, 1949). Nor would this be contrary to the holding in *Lyons v. Fairmont Real Estate Co.,* 71 W. Va. 754, 77 S.E. 525 (1913), which refused request by defendant for special interrogatories seeking an itemization of damages on the assumption

of an adverse general verdict. Such separate verdicts are not unknown in this jurisdiction. They are required by W. VA. CODE c. 38, art. 5, § 21 (Michie, 1949), for money recovered in a suit for the recovery of property subject to a lien, and are urged by the court in an action where the defendant pleads a set-off. *Black v. Thomas,* 21 W. Va. 709 (1883).

G. W. S. G.

PUBLIC UTILITIES—SUPPLEMENTAL MOTOR TRUCK OPERATIONS OF RAILROADS—CERTIFICATE OF CONVENIENCE AND NECESSITY AS MATTER OF RIGHT.—*P* railroad applied to the Public Service Commission of West Virginia for a certificate of public convenience and necessity authorizing the transportation, by the railroad, of its less-than-carload freight over state highways by motor truck, rather than by rail, within a defined area. The commission denied the application, apparently on the basis of interpreting the protective clause of the Motor Carrier Act, W. VA. CODE c. 24A, art. 2, § 5 (Michie, 1949), as requiring the commission to deny any such application unless it be sufficiently shown that existing motor carrier service is inadequate, which was not shown. The railroad appealed. *Held,* that the factual question, relating to inadequacy of service being rendered by existing motor vehicle carriers, is not material in the determination of the right of the applicant in this proceeding, that proof of such fact should not be required or considered in determining whether the authority sought should be granted, and that the final order is reversed and ". . . remanded . . . with directions that such certificate be granted . . . ." *Chesapeake & Ohio R.R. v. Public Service Comm'n,* 81 S.E.2d 700 (W. Va. 1953).

For the purposes of this comment it is assumed that the court properly construed the Motor Carrier Act as inapplicable to a factual situation like the one under consideration. So construing the statute, the court might properly have reversed the commission's order and remanded the cause with direction that the commission *might* issue the certificate regardless of the existence of adequate motor carrier service. But, instead the court directed that the commission *must* issue the certificate.

By this decision the court seems necessarily to have taken one of two possible positions, either that in such cases the court, rather that the commission, will determine if public convenience and necessity will be best served by issuance or denial of the certificate, or that in such cases a certificate must issue irrespective of considerations of public convenience and necessity.