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Article 8

Federal Jurisdiction: Diversity of Citizenship: Substitution of Administrator Under Federal Rule 25 (a)

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RECENT DECISIONS

Federal Jurisdiction: Diversity of Citizenship — Substitution of Administrator Under Federal Rule 25 (a) — Plaintiff, a citizen of Maryland, commenced an action in the District Court for the Western District of Virginia against a citizen of Virginia to recover damages for personal injuries. During pendency of the action the plaintiff died as a result of the injuries sustained in the accident. Counsel for the plaintiff in accordance with FED. R. CIV. P. 25 (a)[1] filed a motion for the substitution of the duly appointed administrator *c.t.a.* of the decedent plaintiff's estate as party plaintiff. The administrator was a citizen of Virginia as required by the Virginia code.[2] Counsel also moved that a supplemental bill under FED. R. CIV. P. 15(d)[3] be allowed amending the complaint pursuant to the requirements of section 8-640 of the Virginia Code so as to convert the action into one for wrongful death under sections 8-633 and 8-634 of the Virginia Code. Section 8-640 of the Virginia Code requires a conversion of an action for personal injuries, where the plaintiff dies pending the action, into one brought under Section 8-633 and 8-634, the wrongful death statutes, and all further proceedings must be as if the action had been filed initially under the wrongful death statutes. The Supreme Court of Virginia had held that under section 8-640 and the wrongful death statutes the right of action for wrongful death did not arise during the continued life of the injured person nor did the injured person's right

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[1] FED. R. CIV. P. 25 (a), 28 U.S.C.A. Rule 25—Substitution of Parties:
"(a) Death
"1) If a party dies and the claim is not thereby extinguished, the court within two years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district.
"2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties."

[2] CODE 1950 VA. 26-59 renders it imperative that the personal representative bringing an action for wrongful death in accordance with CODE 1950 VA. 8-633 and 8-634 must be a resident of Virginia. The U.S. Court of Appeals in Holt v. Middlebrook, 214 F. 2d 187 (4th Cir. 1954) has held that this is binding on the Federal Courts.

[3] FED. R. CIV. P. 15(d), 28 U.S.C.A. Rule 15(d)—"Supplemental Pleadings. Upon a motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party pleads thereto, it shall so order, specifying the time therefore."

of action for personal injuries survive his death, if death resulted from the injury. The District Court allowed the substitution of the administrator as party plaintiff and the supplemental bill; however, the court on its own initiative raised the question of jurisdiction and, finding that the plaintiff administrator and defendant were both citizens of Virginia, ordered that the action should be dismissed for want of jurisdiction.[4]

Plaintiff administrator appealed from the order. The United States Court of Appeals for the Fourth Circuit affirmed.[5] It held that the administrator's supplemental bill allowed under Rule 15(d) was, under the Virginia Statutes as construed by the Supreme Court of that State, a new and different right of action in complete substitution of the right of action of the decedent and that consequently the citizenship of the administrator, and not the citizenship of the decedent, was controlling for the purpose of determining diversity of citizenship. Therefore the action was properly dismissed for want of jurisdiction.

In cases of mere formal substitution of an administrator or executor under Rule 25(a), namely, where the personal representative is substituted to prosecute the action in aid of the same right asserted by the decedent, the citizenship of the decedent and not that of the representative controls for the purpose of determining whether diversity exists.[6] The last cited case was a stockholder's derivative suit. An action was commenced by the plaintiff, a citizen of New York, against the defendant corporations and directors, citizens of Delaware and California respectively. The plaintiff died while the action was pending and a special administrator, a citizen of California, was substituted. The Court held that the citizenship of the decedent governed. The reason for this is the general well-established principle that jurisdiction once attached is not defeated by subsequent events. Thus it is not defeated by a subsequent change of citizenship of one of the parties to the action.[7] Chief Justice Marshall said in the last cited case, "It is quite clear that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events."[8]

The rationale, that jurisdiction is tested by the facts as they existed when the action is brought, is applied to a situation where a party dies and a non-diverse representative is substituted.[9]

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[4] Relying on FED. RULE CIV. P. 12(h), 28 U.S.C.A. Rule 12 (h) "—2—That whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. . . ."

[5] Grady v. Irvine, 254 F. 2d 224 (4th Cir. 1958), *cert. denied,* 358 U.S. 819 (1958).

[6] Smith v. Sperling, 354 U.S. 91 (1957).

[7] Mollan v. Torrance, 9 Wheat. 537 (U.S. 1824).

[8] *Ibid* at 539.

[9] Dunn v. Clark, 8 Pet. 1 (U.S. 1834).

However, the foregoing principles are inapplicable where, as in the principal case, there is no mere formal substitution of the personal representative in aid of the same right of action asserted by the decedent and derived from him, but the representative by amendment seeks to assert a new right of action for wrongful death. Here the well settled rule that where a personal representative initially files an action for wrongful death it is the resident of the representative, not that of his decedent, which is relevant in the resolution, for the purposes of federal jurisdiction, of the question of diversity of citizenship is applicable.[10]

The reason for the latter rule, namely, using the citizenship of the representative rather than the citizenship of the decedent to determine diversity, is that the executor or administrator is the real party in interest before the court and no other persons are capable of suing and being sued.[11]

Other situations where the citizenship of the representative governs are in actions by trustees litigating for the benefit of their beneficiaries. The rule in regard to trustees is that if the trustee is personally qualified by his citizenship to bring suit in the federal court, the jurisdiction is not defeated by the fact that the beneficiary may be disqualified.[12]

Diversity jurisdiction in an action by a guardian for the benefit of the ward is more complex. Here the powers and duties of a guardian to sue are determined by the state law. If the pertinent state statute does not give the guardian title in the ward's estate and the right to maintain an action in his own name to recover property belonging to the ward, it appears that the citizenship of the ward, not that of the guardian, governs diversity jurisdiction.[13]

What would be the effect of the holding of the main case under Wisconsin law? Assume A, a citizen of Illinois, commences an action against B, a citizen of Wisconsin, in the Federal District Court for the Eastern District of Wisconsin for personal injuries sustained in Wisconsin due to B's negligence involving the jurisdictional amount. Further assume that A dies while the action is pending and a duly appointed administrator, a citizen of Wisconsin, is substituted as party plaintiff under Federal Rule 25 (a). What would be the effect on the jurisdiction of the court?

Under the Wisconsin survival statute[14] an action for personal injuries is authorized to be brought on behalf on a decedent's estate,

[10] Chappel Claine v. Dechenaux, 4 Branch 306 (U.S. 1808); Mexican Central R. Co. v. Eckman, 187 U.S. 429, 434 (1902); Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 186 (1931).

[11] Childress v. Emory, 8 Wheat. 642, 669 (U.S. 1823).

[12] Susquehanna and Wyoming Valley Railroad and Coal Company v. Blatchford, 78 U.S. 172 (1870).

[13] Ansaldi v. Kennedy, 41 F. 2d 858, 859 (D. Mass. 1930); Mexican Central R. Co. v. Eckman, 187 U.S. 429, 434 (1902).

[14] WIS. STATS. §331.03 (1957) "What Actions Survive. In addition to the actions

and the proceeds of the action are distributed as personal property. The cause of action is considered to arise at the time of injury or wrong and to inhere in the decedent while alive.[15] Such cause of action is separate and distinct from that given by the Wisconsin wrongful death statute,[16] which substantially follows the Lord Campbell Act of England, enacted in 1846.[17] The death statute authorizes compensation for damages to the prescribed beneficiaries including both pecuniary loss and loss of society and companionship. The wrongful death right of action does not arise until the death of the person injured. It is a new right of action not for the benefit of the decedent's estate, but solely for the benefit of the beneficiaries named in the statute.[18]

Applying the rule of *Smith v. Sperling*[19] to the assumed facts it is apparent that the substitution of a Wisconsin citizen as administrator would not affect the Federal Court's jurisdiction of the action for personal injuries, because under section 331.01 the personal representative would be prosecuting the same right of action that A was prosecuting prior to his demise. Therefore there would be a mere formal substitution and the citizenship of the deceased would govern and not that of the substituted personal representative.

However, if the personal representative filed a supplemental bill and attempted under Rule 18(a)[20] to join the cause of action for wrongful death it appears that the court would have to dismiss the second cause for lack of jurisdiction, the reason being that the cause of action for wrongful death attempted to be joined would involve the assertion of a different right than that asserted by the decedent. The citizenship of the substituted personal representative governs and not that of the decedent under the rule of *Grady v. Irvine*. The fact that

which survive at common law the following shall also survive: Actions for the recovery of personal property or the unlawful withholding or conversion thereor, for the recovery of the possession of real estate and for the unlawful withholding of the possession thereof, for assault and battery, false imprisonment or *other damages to the person. . . .*" Emphasis added.

[15] Kohler v. Waukesha Milk Co., 190 Wis. 52, 55, 208 N.W. 901 (1926).

[16] WIS. STATS. §331.03 (1957) Recovery For Death By Wrongful Act. Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then in every such case the person who, or the corporation which, would have been liable, if death had not ensued shall be liable to an action for damages not withstanding his prior death and not withstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state. . . ."

[17] See 1937 WIS. L. REV. 234.

[18] Brown v. Chicago and Northwestern Ry. Co., 102 Wis. 137, 140, 77 N.W. 748 (1899); Estate of Arneberg, 184 Wis. 570, 200 N.W. 557 (1924). See also WIS. STATS. §331.04 (1957).

[19] *Supra* note 6.

[20] FED. R. CIV. P. 18(a), 28 U.S.C. Rule 18(a) "Joinder of Claims and Remedies. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. . . ."

Rule 18 (a) permits the joinder of independent claims would not change the result. The usual principles of jurisdiction must be met in relation to any claim that is joined. As said in MOORE'S FEDERAL RULES:[21] "It should be borne in mind that Rule 18 is only a procedural rule relating to joinder of claims and remedies; and that under Rule 82[22] jurisdiction and venue are not affected. . . ."

The dismissal of a supplemental bill joining the cause of action for wrongful death could be avoided in Wisconsin by substituting a citizen of Illinois as administrator to continue the litigation. Unlike Virginia, Wisconsin does not require the administrator to be a citizen of this state. A duly appointed administrator of a foreign jurisdiction may prosecute the action for wrongful death. The basis appears to be that full faith and credit should be given to the judicial proceedings of the foreign jurisdiction appointing the party as administrator of the decedent's estate.[23]

Grady v. Irvine illustrates the interrelation of principles of Federal jurisdiction, the Federal Rules of Civil Procedure and the law of the state where the District Court is sitting which the pleader must consider in charting his course when a person has commenced an action in the Federal District Court for personal injuries and dies as a result of the injuries while the action is pending.

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Decedents' Estates: Liability for Payment of Joint Mortgage Debt as Between Estate of Deceased Co-Owner and Survivor—Real estate was conveyed to husband and wife as tenants by the entireties. Thereafter both husband and wife executed a joint and several bond secured by a mortgage on the realty. The husband died testate before any mortgage payments were made. His will contained numerous bequests, including a bequest to the widow of $35,000, plus a direction for the order of payment in case the funds were insufficient to meet all bequests.[1] The document also contained a general provision directing the executors to pay "all my just debts." During administration, it became evident that estate assets were insufficient to pay all bequests plus the mortgage debt. The executors sought instructions as to the percentage of the debt for which the estate was liable, the widow contending that the estate must pay the entire debt or at least contribute fifty percent if she paid it. The lower court refused to award contribution to the wife and held she was solely responsible

[21] MOORE'S FEDERAL RULES AND FORMS 128 (1956).

[22] FED. R. CIV. P. 82, 28 U.S.C. Rule 82 "Jurisdiction and Venue Unaffected. These rules shall not be constructed to extend or limit the jurisdiction of the United States District Courts or the venue or the actions therein."

[23] Robertson v. C., St. P., M. & O. R. Co., 122 Wis. 66, 74, 99 N.W. 1135 (1904).

[1] In re Keil's Estate, 140 A. 2d 139 (Orph's Ct. Del. 1958).