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Pleading--Real Subrogee is Not a Real Party in Interest

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there *must* be an adjudication of delinquency before the court can order treatment leading to rehabilitation for the juvenile.[22]

In adopting any one of these statutory interpretations, the West Virginia courts should be mindful of the standards of fair treatment considered by the New Jersey and Wisconsin courts. This, however, should pose no problem, for West Virginia, like New Jersey and Wisconsin, recognizes the underlying principles of the juvenile court process:" [J]uvenile courts are not for punishment but are instrumentalities for determining needs as to training and guidance for the child's better physical, mental and moral development."[23]

While it is important that the juvenile process be utilized to further the principles of care, guidance, treatment, and rehabilitation—those things which are in the best interest of the juvenile—it is equally important that juveniles not be denied due process and fair treatment by an unwarranted, overextended use of the statutory discretion given to the juvenile courts. An interpretation of the West Virginia statute[24] will settle the question, if and when the issue is raised.

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Pleading — Real Subrogee is Not a Real Party In Interest

In a diversity action in a federal court for damages resulting from an automobile collision, the defendant moved that the plaintiff's insurance carrier be joined as a party plaintiff. This motion was made under Federal Rule of Civil Procedure 19, on the grounds that the insurance carrier had paid plaintiff under his deductible collision policy and was, therefore, subrogated to its insured's rights to that extent. This, it was contended, made the insurance carrier a real party in interest under Federal Rule of

[22] The phrase in W. VA. CODE ch. 49, art. 5, § 14 (Michie 1966), "after the proceedings" could easily be taken to mean, under a strict interpretation, that the hearing must be completed and an adjudication of deliquency entered before the court has the power to make one of the dispositions provided for in that section.

[23] 57 W. VA. L. REV. 225, 226 (1955).

[24] W. VA. CODE ch. 49, art. 5, § 14 (Michie 1966).

Civil Procedure 17 (a). *Held*: Motion denied, since under West Virginia law a partial subrogee would be treated as one with only a contingent interest in the litigation and not one in whose name an action could be prosecuted. *Cleaves v. DeLauder,* 302 F. Supp. 36 (N.D. W. VA. 1969).

Defendant argued that to join the partial subrogee would not deprive the court of jurisdiction[1] and that failure to join the insurance company would subject the defendant to substantial risk of double liability. The court pointed out that under the law of West Virginia the rights of a partial subrogee are derivative and he may not split the cause of action.[2]

The plaintiff resisted the motion[3] by arguing that all parties were aware of the subrogee's rights and that this motion was a subtle way to inform the jury that an insurance company was involved.[4]

The court recognized that the issue is a mixed question of state substantive law and federal procedural law.[5] It endeavored to determine the "real party in interest" as that party who has the substantive right sought to be enforced. In order to determine whether the insurance carrier has such a right the court referred to the substantive law of West Virginia. On the other hand, the

[1]Cleaves v. DeLauder, 302 F. Supp. 36, 37 (N.D. W. Va. 1969).

[2] *Id.* at 38. The court in *Cleaves* cited State Farm v. Dewees, 143 W. Va. 75, 101 S.E.2d 273 (1967). In *Dewees* the plaintiff insurer had paid for property damage to the insured's car. Insured had brought two previous actions, one for personal injuries and one for property damages. The question of spitting the cause of action went to the West Virginia Supreme Court of Appeals by certification on the trial court's own motion. The decision (quoted in the *Cleaves* case) was that:

> By the very nature of the law governing subrogation, the insured having no right to the claim asserted in the second action at law, there is no debt or obligation due to the insurer from the alleged tort-feasors; and, therefore, no basis upon which the purely equitable doctrine of subregation may be asserted. *Id.* at 82, 101 S.E.2d at 277.

See also, Mills v. Dewees, 141 W. Va. 782, 93 S.E.2d 484 (1956).

[3] Cleaves v. DeLander, 302 F. Supp. 36, 37 (N.D. W. Va. 1969).

[4] Normally the mere mention of the fact that an insurance company is involved in the litigation will be held to prejudice the jury. *See* Graham v. Wreston, 146 W. Va. 484, 120 S.E.2d 713 (1961); Bradford v. Board of Ed., 128 W. Va. 228, 36 S.E.2d 512 (1945); Lynch v. Alderson, 124 W. Va. 446, 20 S.E.2d 657 (1942).

[5] After discussion of Erie R. R. v. Tompkins, 304 U.S. 64 (1938) the court concluded: "It appears settled beyond controversy that where the substance procedure distinction is important . . . the state substantive law determines the nature of the interest sought to be enforced while the Federal Rules control the procedural aspects of the litigation. Osborne v. Campbell, 37 F.R.D. 339 (S.D. W. Va. 1965)" Cleaves v. DeLauder, 302 F. Supp. 36, 37 (N.D. W. Va. 1969).

federal rules govern the question of whether the party having such a right must be joined.[6] The court relied on *Erie R.R. v. Tompkins*[7] in making this distinction. That case held that a federal court must apply the substantive law of the state in determining the rights of the parties in diversity actions.[8]

The court cited *Davidson's Inc. v. Scott*,[9] in determining the substantive right of a partial subrogee under West Virginia law. In that case the defendant moved that the plaintiff's insurance carrier be joined under West Virginia Rule of Civil Procedure 17 (a). The trial court overruled the motion but indicated it would allow the insurance companies' names to be disclosed.[10] This ruling was apparently not attacked on appeal.

In an earlier federal case, *Southern Bell Telephone & Telegraph Co. v. Watts*,[11] the court held:

> Where the owner of property, which has been destroyed by fire through another's negligence, has been paid a part of his loss by an insurer, who thereby becomes subrogated to the ermedies of the assured, an action to recover from the wrongdoer the value of the property destroyed is properly brought in the name of the assured alone and the insurer is neither a necessary nor a proper party to such action.[12]

In a similar case in the tenth circuit,[13] where an insurance carrier had paid plaintiff for fire damage, the defendant made a motion to have the carrier joined. In distinguishing the substantive and procedural questions the court said: "The right of action against the wrongdoer is substantive . . . but the person in whose name the action may be brought is procedural, not substantive."[14]

In the *Cleaves* case the court reasoned that the partial subrogee's interest is enforced by the insured, and that upon recovery the insured holds the proceeds in trust as to the amount of the subrogee's share.[15] It appears that the decision in *Southern Bell Telephone & Telegraph v. Watts*,[16] followed the trust theory. In *Cleaves* the

[6] For a discussion of this problem see: Annot., 13 A.L.R.3d 140 (1967).
[7] 304 U.S. 64 (1938).
[8] *Id.* at 71.
[9] 149 W. Va. 470, 140 S.E.2d 807 (1965).
[10] *Id.* at 472, 140 S.E.2d at 808.
[11] 66 F. 460 (1895).
[12] *Id.* at 460.
[13] Gas Service v. Hunt, 183 F.2d 417 (10th Cir. 1950).
[14] *Id.* at 419.
[15] Cleaves v. DeLauder, 302 F. Supp. 36, 38 (N.D. W. VA. 1969).
[16] 66 F. 460, 464 (1895). For a more extensive discussion on this topic see Annot., 157 A.L.R. 1242 (1945).

court apparently looked on this theory as controlling in West Virginia.[17]

The *Cleaves* case raises an important question concerning the effect of the Federal Rules, when the substantive law contradicts the rule of procedure. This question is not answered by *Erie R.R. v. Tompkins*,[18] because that case only guides the court in applying the substantive law to the issues concerning the rights of the parties.[19] The question is treated in *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*[20] This case was decided on certificate from the third circuit and concerned a motion under the Admiralty Rules of December, 1920. The rule, provided for staying the proceedings on failure of the prosecuting party to give security on a counterclaim. The argument against the rule was that it would unjustly prohibit the claimant from prosecuting the action solely because he was unable or unwilling to post security bond. The court decided:

> The right of a citizen of the United States to sue in a court having jurisdiction of the parties and of the cause of action includes the right to prosecute his claim to judgment. . . . Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principal of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law.[21]

The holding in *Washington-Southern* has been applied to the Federal Rules of Civil Procedure.[22] In a case in the fifth circuit the court declared Rule 25 (a) inapplicable in certain situations.[23]

Rule 17 (a) of the West Virginia Rules of Civil Procedure states: "Every action shall be prosecuted in the name of the real party in interest . . . and in subrogation and similar cases, the court shall apply this subdivision as will promote justice."[24] A

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[17] Cleaves v. DeLauder, 302 F. Supp. 36, 38 (N.D. W. VA. 1969).
[18] 304 U.S. 64 (1938).
[19] *Id.*
[20] 263 U.S. 629 (1926).
[21] *Id.* at 635.
[22] *See* Provident Tradesmens Bank and Trust Co. v. Lumbermens Mut. Cas. Co., 365 F.2d 802, 813 (3rd Cir. 1966); Perry v. Allen, 239 F.2d 107, 111 (5th Cir. 1956).
[23] Perry v. Allen, 239 F.2d 107 (2th Cir. 1956). *But see* 77 HARV. L. REV. 801, 808 (1964).
[24] M. LUGAR & L. SILVERSTEIN, W. VA. RULES 159 (1960).

commentator has suggested that in subrogation matters Rule 17 (a) "in effect . . . continues the former practice, leaving to local rule the question whether an insurance company suing as subrogee must sue in its own name or may sue in the name of the insured."[25]

If the West Virginia Supreme Court of Appeals follows the holding of the federal court in the *Southern Bell* case, and the *Cleaves* case, it would appear that in cases of only partial subrogation the insurance carrier cannot be joined as a real party in interest. The problems involved in such a holding are apparent. First, it would defeat the latitude given the trial court by the West Virginia rule, by taking the decision as to whether joining the party would promote justice away from the trial court. Second, if the insured brings an action against the tortfeaser the authority noted in the *Cleaves* case would allow neither joinder[26] nor a separate action by the partial subrogee[27] if the insured failed to allege damages for that portion of the claim for which he had been compensated.[28]

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[25] *Id.* at 160.

[26] Cleaves v. DeLauder, 302 F. Supp. 36 (N.D. W. VA. 1969); Southern Bell Telephone & Telegraph Co. v. Watts, 66 F. 460 (1895).

[27] State Farm v. Dewees, 143 W. Va. 75, 101 S.E.2d 273 (1957).

[28] For a discussion of related problems see 29A AM. JUR. INSURANCE § 1746 (1960).