

Catholic University Law Review

Volume 30
Issue 4 *Summer 1981*

Article 23

1981

Practice and Pleadings

Thomas H. Suddath Jr.

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Recommended Citation

Thomas H. Suddath Jr., *Practice and Pleadings*, 30 Cath. U. L. Rev. 773 (1981).
Available at: <https://scholarship.law.edu/lawreview/vol30/iss4/23>

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PRACTICE AND PLEADINGS

I. LONG-ARM STATUTE

The United States Court of Appeals for the District of Columbia Circuit held, in *Gatewood v. Fiat, S.p.A.*,¹ that a District of Columbia court may exercise personal jurisdiction over a person alleged to have caused a tortious injury through an act or omission outside the District under the District of Columbia's "long-arm" statute.² The court may exercise jurisdiction provided the defendant (1) regularly does business in the District; (2) engages in any persistent course of conduct in the District; or (3) derives substantial revenue from goods used in the District, *and* provided the claim arises out of an injury occurring in the District.³

Gatewood, a Maryland resident, was injured in an automobile accident that occurred in the District of Columbia. He filed a diversity action in federal district court against Fiat. The court of appeals rejected Fiat's contention that the action should be dismissed for lack of personal jurisdiction under section 13-423(b).⁴ Fiat maintained that personal jurisdiction could be invoked only when the "injury prompting the law suit result[s] from (1) the actual solicitation of business, (2) persistent course of conduct, or (3) derivation of substantial revenue, in the District."⁵ The court stated that when jurisdiction is based upon section 13-423(a)(4), subsection (b) requires only that the claim for relief arise out of an injury occurring in the District. It is not necessary to show that such injury was directly related to actual business solicitation, course of conduct, or derivation of revenue

1. 617 F.2d 820 (D.C. Cir. 1980).

2. D.C. CODE § 13-423 (1973) provides in pertinent part:

(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—

.....
(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;

.....
(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

3. 617 F.2d at 825 (emphasis in original).

4. See note 2 *supra*.

5. 617 F.2d at 824.

within the District. Here, although Fiat had no franchised dealers located within the District of Columbia, there were fourteen Fiat dealerships located in the metropolitan area. Their aggregate sales constituted about 1.5% of the total Fiat sales in the United States.⁶ The court concluded that Fiat obtained "substantial revenue" from these sales and that this fell within the ambit of the District's "long-arm" jurisdiction under section 13-423(a)(4).

II. SERVICE OF PROCESS

In *Varela v. Hi-Lo Powered Stirrups, Inc.*,⁷ the District of Columbia Court of Appeals held that, under Rule 3 of the Civil Rules of the District of Columbia Superior Court,⁸ the filing of a complaint by itself tolls the applicable statute of limitations. Varela had filed his complaint before the statutory period of limitations ran but did not attempt service of process until three days after the statute had run. The court stated that Varela had satisfied the statute of limitations and that any question of plaintiff's lack of due diligence in securing service of process was covered by Rule 4(a),⁹ for which a Rule 41(b)¹⁰ motion to dismiss provides the appropriate remedy. The court explicitly overruled its reading of Rule 3 in *Criterion Insurance Co. v. Lyles*,¹¹ which imposed on plaintiff the additional obligation of delivering the summons to the marshal for service before the statute of limitations would be tolled.

The District of Columbia's current interpretation is consistent with all federal circuits that have addressed this issue.¹²

III. VOLUNTARY DISMISSAL

The District of Columbia Court of Appeals, in *Bernay v. Sales*,¹³ eschewed a strictly literal reading of Superior Court Civil Rule 41(a)(1)¹⁴ in

6. *Id.* at 827.

7. 424 A.2d 61 (D.C. 1980).

8. D.C. SUPER. CT.—CIV. R. 3 states: "A civil action is commenced by filing a complaint with the court."

9. D.C. SUPER. CT.—CIV. R. 4(a) states in pertinent part: "Upon receipt and due notation thereof, the clerk shall return all but one copy of the summons to the plaintiff or his agent for service of process in accordance with section (c) of this rule."

10. D.C. SUPER. CT.—CIV. R. 41(b) reads in part: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

11. 244 A.2d 913 (D.C. 1968).

12. *See, e.g.*, *United States v. Wahl*, 583 F.2d 285 (6th Cir. 1978); *International Controls Corp. v. Vesco*, 556 F.2d 665 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

13. 424 A.2d 123 (D.C. 1980).

14. D.C. SUPER. CT.—CIV. R. 41(a)(1) reads in pertinent part: "[A]n action may be

favor of a more flexible interpretation. Plaintiff Sales had filed a complaint against defendant Bernay alleging loss of consortium, alienation of affection, and criminal conversation. The two latter causes of action have been abolished by statute in the District of Columbia.¹⁵ After several pre-trial motions had been made, Sales filed a notice of dismissal of her complaint. Since she filed the notice before either defendant had served an answer or motion for summary judgment, Sales was technically entitled to a voluntary dismissal pursuant to Rule 41(a)(1). The court of appeals held that, despite such literal compliance with the requirements of Rule 41(a)(1), the plaintiff was not entitled to a voluntary dismissal as a matter of right. Such a strict interpretation of the rule would violate its purposes.¹⁶ Instead, the facts of this case justified the more liberal approach to Rule 41(a)(1) followed by a minority of other jurisdictions.¹⁷ Under the minority view adopted by the court, voluntary dismissal, as a matter of right, is prohibited where all three of the following conditions exist: (1) the merits of the controversy have been fully presented to the court; (2) the defendant has expended considerable amounts of time and effort in establishing his defense; and (3) the plaintiff's chances of success on the merits are extremely remote.¹⁸ Since all three factors were present in the case, the court remanded the action to the trial court to determine whether voluntary dismissal was warranted.

IV. STATUTE OF LIMITATIONS

The District of Columbia Court of Appeals held in *William J. Davis, Inc. v. Young*¹⁹ that evidence of an employer's fraudulent concealment of material facts, giving rise to an action for unpaid compensation, tolls the three-year statute of limitations. In such a case, the statute does not begin to run until the factual basis for the action is discovered or reasonably should have been discovered.

Young's employer concealed information that the minimum wage had

dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . ."

15. D.C. CODE § 16-923 (Supp. V 1978).

16. The court identified these purposes as (1) limiting voluntary dismissal as a matter of right to the early states of litigation, and (2) preventing a plaintiff from running for cover after the defendant has expended a significant amount of time and effort in preparing his defense. 424 A.2d at 127.

17. See *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir.), cert. denied, 345 U.S. 964 (1953). But see *Thorp v. Scarne*, 599 F.2d 1169 (2d Cir. 1979).

18. 424 A.2d at 125.

19. 412 A.2d 1187 (D.C. 1980).

increased and continued to pay Young at the former rate. Young learned of his right to a higher wage, and sued for the unpaid wages, after the statute of limitations had run.²⁰ The court of appeals held that the employer's actions constituted fraudulent concealment. This warranted an exception to the general rule that a cause of action for compensation accrues on the date the compensation is due. In light of the remedial purpose underlying the District of Columbia Minimum Wage Act, the court extended the common law exception²¹ from the usual rule for fraudulent concealment of a cause of action to actions for unpaid minimum wages.

V. NOTICE OF CLAIM

In *DeKine v. District of Columbia*,²² the District of Columbia Court of Appeals held that, under the claims notice provision of section 12-309 of the District of Columbia Code,²³ the District government must actually receive notice of the claim within six months of the injury. The mere mailing of the notice is insufficient.

On April 30, 1975, DeKine's attorney mailed a letter giving notice of a claim for damages against the District arising out of an incident alleged to have occurred on October 31, 1974. The Mayor's office received the letter on May 2, 1975. To determine whether the notice was timely under section 12-309, the court construed the phrase "has given notice in writing to the Mayor"²⁴ within six months. The court found that, although DeKine mailed the notice of claim within six months of the alleged incident, the Mayor's office received the notice one day late. This barred recovery. The court held that the timeliness of notice of a claim under section 12-309 is based upon the actual receipt of the notice, and not its mailing.²⁵

20. The claim arose under the District of Columbia Minimum Wage Act, D.C. CODE §§ 36-401 to -419 (1973 & Supp. V. 1978).

21. See, e.g., *King v. Kitchen Magic, Inc.*, 391 A.2d 1184, 1186 (D.C. 1978); *Weisberg v. Williams, Connolly & Califano*, 390 A.2d 992, 995-96 (D.C. 1978).

22. 422 A.2d 981 (D.C. 1980).

23. D.C. CODE § 12-309 (1973) provides in pertinent part:

An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Commissioner of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage.

24. *Id.*

25. The court stated that placing the consequences of slow postal service upon the claimant was not unfair, since the method of delivering written notice was entirely within the claimant's discretion. 422 A.2d at 985.

VI. ESTOPPEL

A. *Judicial Estoppel*

In *Konstantinidis v. Chen*,²⁶ the United States Court of Appeals for the District of Columbia Circuit declined to adopt the doctrine of judicial estoppel²⁷ for the District. Plaintiff was injured in a fall at work and stated in a workmen's compensation application that the resulting injuries were due to this fall. Subsequently, plaintiff brought a medical malpractice action against defendant Chen, claiming that Chen's negligent medical treatment caused the same injuries. Chen argued that the doctrine of judicial estoppel barred the malpractice suit. The court noted that no District of Columbia court had ever adopted the doctrine.

Judicial estoppel is presently followed by a distinct minority of jurisdictions and no trend toward wider acceptance has appeared.²⁸

B. *Collateral Estoppel*

In *Jackson v. District of Columbia*,²⁹ the District of Columbia Court of Appeals abolished the requirement of mutuality³⁰ for the defensive use of collateral estoppel provided that the plaintiff had a full and fair opportunity to litigate the issues in the prior suit. After being arrested by mistake in a pre-dawn raid, Jackson sued the federal agents and the District of Columbia police officers who participated in the raid, alleging a violation of his right to privacy. To achieve personal jurisdiction, Jackson filed suit against the federal agents in federal district court and against the police officers in the Superior Court of the District of Columbia. The federal district court granted summary judgment in favor of the defendant federal agents.³¹

26. 626 F.2d 933 (D.C. Cir. 1980).

27. The doctrine of judicial estoppel precludes a party from contradicting testimony or pleadings successfully maintained in a prior judicial proceeding. Unlike the doctrine of equitable estoppel, judicial estoppel does not require proof of privity, reliance, or prejudice by the party seeking to invoke the estoppel. The purpose behind judicial estoppel is to safeguard public confidence in the administration of justice by restraining any tendency to make false assertions under oath. *See generally* 1B MOORE'S FEDERAL PRACTICE ¶ 0.405[8] (2d ed. 1980).

28. 626 F.2d at 938; *see, e.g.*, *Parkinson v. California Co.*, 233 F.2d 432, 437-38 (10th Cir. 1956).

29. 412 A.2d 948 (D.C. 1980).

30. The doctrine of mutuality generally requires that one who invokes the conclusive effect of a judgment must have been either a party or is privy to the suit in which the judgment was rendered. *See* 1B MOORE'S FEDERAL PRACTICE ¶ 0.412[1] (2d ed. 1980).

31. *Jackson v. Young*, No. 77-1010 (D.D.C. May 4, 1978), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979).

The District of Columbia Court of Appeals held that the prior judgment of the federal court collaterally estopped the plaintiff from relitigating the same issue in the municipal court, despite the absence of mutuality of parties. The court stated that considerations of judicial economy and the policy against repetitious litigation justified its precluding the plaintiff from relitigating the same issue in a different court by merely switching adversaries.³² The *Jackson* court adopted the modern trend followed by other jurisdictions.³³

VII. DEFAULT JUDGMENT

A. Motion to Vacate

In *Clark v. Moler*,³⁴ the District of Columbia Court of Appeals announced that a motion to vacate a default judgment on the ground of excusable neglect would succeed under Rule 60(b) of the Civil Rules of the District of Columbia Superior Court³⁵ if the movant presented only a *prima facie* showing of his defense. The movant did not have to demonstrate that the defense would be likely to succeed.

After Clark's attorney failed to file a timely answer to the original complaint, the clerk entered a default against Clark pursuant to Rule 55(a).³⁶ After a default judgment was entered three years later, Clark filed a Rule 60(b) motion to vacate on the ground of excusable neglect. The court of appeals found that Clark's reliance upon her attorney's assurances that her case was progressing satisfactorily constituted excusable neglect under Rule 60(b). In considering her motion to vacate the default judgment, the trial court erred in requiring the movant to demonstrate that she would be

32. 412 A.2d at 953.

33. See, e.g., *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313 (1971); *Federal Sav. & Loan Ins. Corp. v. Hogan*, 476 F.2d 1182 (7th Cir. 1973). It should be noted that the abrogation of mutuality decided in *Jackson* extends only to the defensive use of collateral estoppel. The court stated that the role of mutuality in the offensive use of collateral estoppel was not at issue in the case. 412 A.2d at 953 n.11. However, it would appear that the demise of mutuality for the offensive use of collateral estoppel is but a short step away. See *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 497 F. Supp. 313 (D.D.C. 1980) (when interpreting *Jackson* in a diversity action, the court found that District of Columbia law permits use of offensive collateral estoppel without mutuality).

34. 418 A.2d 1039 (D.C. 1980).

35. D.C. SUPER. CT.—CIV. R. 60(b) states in pertinent part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . ."

36. D.C. SUPER. CT.—CIV. R. 55(a) allows for an entry of default by the clerk of the court when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided.

“likely to succeed” on the merits. In light of the judicial policy favoring a trial on the merits,³⁷ the proper standard was to require the movant to establish only a *prima facie* meritorious defense.³⁸

B. Multiple Defendants

In *Hudson v. Ashley*,³⁹ the District of Columbia Court of Appeals held that, where multiple defendants are named, a default entered against one defendant should not become a final decree until the liability of the other defendants is determined on the merits. In this case, a law firm sued a father and son to collect unpaid legal fees. The trial court entered a default against the son for failure to appear at a pretrial hearing. After the plaintiff's opening statement, the court granted the father's motion for a directed verdict. Since this absolved the father of liability while the son remained subject to the default, the court of appeals reversed and remanded the case for a trial on the merits. The court maintained that entering a default against one defendant while directing a verdict in favor of a co-defendant was legally inconsistent. In such a situation, the correct procedure would have been to enter a default against the first defendant pursuant to Rule 55(a) of the Civil Rules of the District of Columbia Superior Court,⁴⁰ and to proceed on the merits against the co-defendant.⁴¹ The court followed the trend of other jurisdictions⁴² in extending this procedure to situations in which the co-defendants have “closely-related” defenses.⁴³

37. See, e.g., *Jones v. Hunt*, 298 A.2d 220, 221 (D.C. 1972).

38. *Clark v. Moler*, 418 A.2d at 1043-44.

39. 411 A.2d 963 (D.C. 1980).

40. See note 36 *supra*.

41. The court followed the principle set forth in *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552 (1872):

The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal.

Id. at 554.

42. Other jurisdictions have applied the *Frow* principle to a number of multiple liability situations to avoid inconsistency of decrees. See, e.g., *United States v. Peerless Ins. Co.*, 374 F.2d 942, 944-45 (4th Cir. 1967); *Davis v. National Mortgage Corp.*, 349 F.2d 175, 178 (2d Cir. 1965).

43. 411 A.2d at 969-70.

C. Damages

In a case of first impression, the District of Columbia Court of Appeals held, in *Firestone v. Harris*,⁴⁴ that a defaulting defendant may not introduce evidence regarding liability at an *ex parte* hearing on damages. The defendant may, however, present evidence to mitigate the damages and may cross-examine witnesses.

After defendant Firestone repeatedly failed to answer adequately plaintiff's interrogatories, the trial court entered a default against Firestone and scheduled an *ex parte* hearing on damages. At the hearing, the court denied Firestone the opportunity to cross-examine plaintiff's witnesses. The court of appeals remanded for a new hearing on damages, adopting the majority view⁴⁵ that an entry of default in a claim for unliquidated damages decides only the non-defaulting party's right to recover, not the amount of damages. Thus, although the defaulting party may not introduce evidence concerning liability at the damages hearing, he is entitled to cross-examine the witnesses and present evidence to mitigate damages.

VIII. LAW OF THE CASE

A. Motion to Dismiss

The District of Columbia Court of Appeals, in *Kritsidimas v. Sheskin*,⁴⁶ held that a denial of a motion to dismiss for failure to prosecute was sufficiently final to become the law of the case upon that issue. Such finality precluded the movant from raising the identical issue later if no new facts or developments in the law had arisen since the original motion was denied.

After the trial court judge denied Sheskin's motion to dismiss for failure to prosecute, Sheskin renewed the same motion at a pretrial conference conducted by another judge. This judge granted the motion and entered judgment for Sheskin. The court of appeals reversed, relying upon the law of the case doctrine. Under this rule, once a court has decided an issue in a case, that issue is settled unless reversed or modified by a higher court.⁴⁷ The court held that the first judge's denial of the motion to dismiss for failure to prosecute had sufficient finality to become the law of the case.⁴⁸ In addition, there were no new facts or changes in the substantive law

44. 414 A.2d 526 (D.C. 1980).

45. *See, e.g.*, *Peitzman v. City of Illmo*, 141 F.2d 956, 962 (8th Cir. 1944); *Gallegos v. Franklin*, 89 N.M. 118, 547 P.2d 1160 (1976).

46. 411 A.2d 370 (D.C. 1980).

47. *See generally* 1B MOORE'S FEDERAL PRACTICE ¶ 0.404 (2d ed. 1980).

48. 411 A.2d at 372. *See also* *United States v. Davis*, 330 A.2d 751, 755 (D.C. 1975).

presented to the second judge when he departed from the original ruling.⁴⁹ Although some jurisdictions have taken a different view,⁵⁰ the court's reading and application of the doctrine appears to follow that of a majority of other jurisdictions.⁵¹

B. Motion for Summary Judgment

In *P.P.P. Productions, Inc. v. W & L, Inc.*,⁵² the District of Columbia Court of Appeals held that denial of a motion to dismiss was the law of the case when a subsequent motion for summary judgment was made on the same grounds. In the prior motion to dismiss, W & L had argued unsuccessfully that the breach of contract action of P.P.P. Productions was barred because it was not raised as a compulsory counterclaim. Later, a different trial judge granted W & L's motion for summary judgment argued on identical grounds. The court of appeals reversed, concluding that the prior motion to dismiss possessed sufficient finality to justify application of the law of the case to bar consideration of the subsequent summary judgment motion. As in the *Kritsidimas*⁵³ motion to dismiss for want of prosecution, the motion in *P.P.P. Productions* demanded a detailed reconsideration by the court of the specific facts of the case—precisely the type of exercise the law of the case doctrine is designed to prevent.⁵⁴

IX. EXECUTION OF FOREIGN JUDGMENTS

The District of Columbia Court of Appeals, in *Fehr v. McHugh*,⁵⁵ held that a judgment from a foreign jurisdiction, which was enforceable in the foreign state while on appeal there, was also immediately enforceable in the District of Columbia. A Colorado court entered a money judgment against Fehr, who immediately appealed in Colorado, but failed to post a supersedeas bond.⁵⁶ This failure to post bond rendered the judgment immediately enforceable in Colorado. Plaintiff sought to enforce the Colo-

49. 411 A.2d at 373. See also *Pitts v. District of Columbia*, 391 A.2d 803, 805 n.1 (D.C. 1978).

50. See, e.g., *Castner v. First Nat'l Bank of Anchorage*, 278 F.2d 376, 379-80 (9th Cir. 1960); *Stepanov v. Gavrilovich*, 594 P.2d 30, 36 (Alaska 1979).

51. See, e.g., *Stevenson v. Four Winds Travel, Inc.*, 462 F.2d 899, 904-05 (5th Cir. 1972); *Travelers Indem. Co. v. United States*, 382 F.2d 103, 107 (10th Cir. 1967).

52. 418 A.2d 151 (D.C. 1980).

53. See notes 46-51 *supra* and accompanying text.

54. 418 A.2d at 153.

55. 413 A.2d 1285 (D.C. 1980).

56. A supersedeas bond is required of a party that appeals a judgment rendered against it. From this bond, the other party may be made whole if the appeal is unsuccessful. BLACK'S LAW DICTIONARY 1289 (5th ed. 1979). See FED. R. CIV. P. 62(d).

rado judgment in the District of Columbia, but Fehr claimed that the judgment could not be enforced in the District while on appeal in Colorado.

The court of appeals found that as failure to post the supersedeas bond made the judgment enforceable in Colorado, the judgment was sufficiently final to be enforceable in the District under the full faith and credit clause of the federal constitution.⁵⁷ In such a case, the court continued, the finality of the action must be determined by the laws of the state where the action was originally brought. And, because the judgment was final under Colorado law, the mere pendency of an appeal would not deprive its finality of the recognition it was entitled under the full faith and credit clause. In so holding, the court was in agreement with a large number of other jurisdictions.⁵⁸

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57. Article IV, § 1 of the United States Constitution states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. Under the full faith and credit clause, a judgment properly entered by one state is entitled to the same degree of recognition in a sister state as would be afforded in the state where the judgment was originally rendered. *See Johnson v. Muelberger*, 340 U.S. 581 (1951).

58. *See, e.g., Maner v. Maner*, 412 F.2d 449 (5th Cir. 1969); *Fidelity Standard Life Ins. Co. v. First Nat'l Bank & Trust Co. of Vidalia, Ga.*, 382 F. Supp. 956 (S.D. Ga. 1974).