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Torts - Injured Tortfeasor Cannot Succeed To Cause of Action Against Liability Insurer

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development. Inasmuch as this case may represent a return to what appears to be a sounder basis for the examination of carried interest cases, as well as a step in the direction of expressly overturning the *Abercrombie* and *Prater* rule, it is a welcome addition to the growing body of carried interest jurisprudence. Moreover, it furnishes a stepping stone for the eventual adoption of a pattern of analytical consistency and evenhanded tax treatment based upon the placement of economic interest as revealed by the actions of the parties rather than as dictated by technical construction of the instruments employed in setting up a given transaction.

George M. Snellings III

TORTS — INJURED TORTFEASOR CANNOT SUCCEED TO CAUSE OF ACTION AGAINST LIABILITY INSURER

A husband, injured through his wife's negligent driving, sued her liability insurer under the Direct Action Statute for damages for personal injuries. At the trial the insurance company admitted the wife's negligence. After trial, but before judgment was rendered, the husband died from causes unrelated to the accident. His widow, his succession representative, and his major daughter each moved to be substituted as party plaintiff. The trial court's decision that the admission of negligence operated to make the action a heritable property right[1] was rejected by the court of appeal, which concluded that the proper party plaintiff was the surviving widow under Revised Civil Code Article 2315 as amended in 1948.[2] The court of appeal held further that

1. The trial court reasoned that the judicial admission of negligence was an admission of indebtedness. Therefore, the action was converted into a property right even though the amount had not been judicially determined.

The opinion of the court of appeal, reported at 125 So. 2d 12 (La. App. 3d Cir. 1960), rejected the argument that the trial court's decision was supported by Article 2291 of the Louisiana Civil Code, which provides that a judicial confession is full proof against the party making it. The court of appeal pointed out that this article relates merely to the obligation of proof. Since the admission was only of negligence and not of liability or indebtedness, no property right was vested at that point in the proceedings. The Louisiana Supreme Court agreed with this view. See 134 So. 2d 45, 47, 48 (La. 1961).

2. At the time of the accident in the instant case this article read in part as follows: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, including adopted children and children given in adoption, or spouse of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them, and in default

the wife's negligence did not bar her recovery since the action was a survival action as distinguished from an action for wrongful death.[3] On certiorari, the Louisiana Supreme Court *held*, reversed and dismissed. A direct action against a liability insurer is dependent upon the cause of action against the insured.[4] While the surviving widow is the proper substitute party plaintiff, she sues not merely as a representative of the deceased, but in her own right as well. She may not recover because the policy of the law does not permit one to benefit from his own misconduct. Moreover, the cause of action was extinguished by the doctrine of confusion when the surviving widow became plaintiff as well as tortfeasor. *Dumas v. United States Fidelity and Guaranty Co.*, 134 So. 2d 45 (La. 1961).

Louisiana Civil Code Article 2315 allows recovery for two types of actions. One type, commonly called a survival action, is for damages sustained by the deceased for which he could have recovered had he lived. The other is for damages to survivors occasioned by the decedent's death, generally known as a wrongful death action.[5] In several decisions they have been considered as separate and distinct causes of action.[6] A release by the in-

of any of the above persons, then in favor of the surviving blood brothers and sisters, or either of them, for the space of one year from the death. However, should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and the minor children. *The right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor child or children.*

". . .

"The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters or adoptive parent, or parents, or adopted person, as the case may be. (As amended by Acts 1948, No. 333, § 1.)" (Emphasis added.)

3. The court of appeal found that the widow's negligence was immaterial since the suit involved a "survival action" rather than a "wrongful death action." The opinion stated at 125 So. 2d 12, 19: "This is the action of John Stanley Dumas to recover damages for suffering, disability, medical expenses and loss of earnings. The case stands or falls on his entitlement to damages and not on the entitlement of the substituted party plaintiff."

4. The confusion argument was not presented to the trial court nor to the court of appeal, but was first raised in a brief to the Supreme Court. Confusion is an affirmative defense and ordinarily must be specially pleaded. See LA. CIVIL CODE art. 2130 (1870); LA. CODE OF PRACTICE art. 327 (1870); LA. CODE OF CIVIL PROCEDURE art. 1005 (1960). Nevertheless, the Supreme Court held that the confusion argument was properly before the court because it was met without objection and defended fully when presented.

5. For the text of Article 2315 see note 2 *supra*. For further discussion of the effect of Article 2315 upon abatement of actions, see McMahon, *Legislation Affecting Courts and Judicial Procedure*, 15 LOUISIANA LAW REVIEW 38 (1954); Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death — A Survey and a Proposal*, 16 TUL. L. REV. 386 (1942); Snellings, *Certain Aspects of Heritable Obligations*, 30 TUL. L. REV. 305 (1956); Comment, 15 LOUISIANA LAW REVIEW 722 (1955).

6. Dougherty v. New Orleans Ry., 133 La. 993, 63 So. 493 (1913); Wester-

jured party does not bar a wrongful death action by his survivors.[7] Furthermore, a judgment obtained in a suit by the injured party while living does not preclude a subsequent wrongful death action by the survivors should he later succumb to the injuries.[8] However, it has been held that all survivors may be required to assert their claims for both types of damages in one suit.[9] While it is settled that contributory negligence of a survivor will bar his recovery in a wrongful death action,[10] no definitive holding in Louisiana prior to the instant case has been found on the question of whether a survivor's negligence will bar his recovery in a survival action.[11] It is well settled that negligence of the deceased injured party will bar recovery in both types of actions under Article 2315.[12]

If an injured party obtains a judgment before death, the judgment passes to his heirs or legatees as part of his succession rather than to the survivors designated by Article 2315.[13] But before a judgment is rendered in favor of the injured party, survival of the tort action is governed by Article 2315.[14]

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field v. Levis Bros., 43 La. Ann. 63, 9 So. 52 (1891); Johnson v. Sundbery, 150 So. 299 (La. App. 1st Cir. 1933). See dicta in Dowell, Inc. v. Jowers, 166 F.2d 214, 219 (5th Cir. 1948).

7. Johnson v. Sundbery, 150 So. 299 (La. App. 1st Cir. 1933).

8. Dougherty v. New Orleans Ry. & Light Co., 133 La. 993, 63 So. 493 (1913).

9. Norton v. Crescent City Ice Mfg. Co., 178 La. 135, 150 So. 855 (1933); Reed v. Warren, 172 La. 1082, 136 So. 59 (1931); Davies v. Consolidated Underwriters, 14 So. 2d 494 (La. App. 2d Cir. 1943). Language in these cases is clearly to the effect that Article 2315 creates only one cause of action. It is submitted, however, that application of these cases should be restricted to situations where it is desirable to avoid a multiplicity of suits.

10. Majors v. Allen Mfg. Co., 144 La. 314, 80 So. 549 (1919); Wise v. Eubanks, 159 So. 161 (La. App. 2d Cir. 1935); Richmond, F. & P. R.R. v. Martin's Adm'r, 102 Va. 201, 45 S.E. 894 (1903).

11. In Westerfield v. Levis Bros., 43 La. Ann. 63, 9 So. 52 (1891), parents brought a wrongful death action for the death of their son and also claimed damages for his suffering. The court considered the defense of contributory negligence of the plaintiffs in deciding the wrongful death issue but did not mention contributory negligence in deciding whether the parents could recover for the suffering of their child. This indicates that contributory negligence of survivors is not a defense to a survival action, but it is not authority for the proposition because the court found the plaintiffs not to have been contributorily negligent and allowed recovery for both types of damages. *Cf.* Olivier v. Transcontinental Ins. Co., 93 So. 2d 701 (La. App. Orl. Cir. 1957); Kientz v. Charles Dennery, Inc., 17 So. 2d 506 (La. App. Orl. Cir. 1944). For the rule in other jurisdictions see Kuehn v. Jenkins, 251 Iowa 718, 100 N.W.2d 610 (1960); Crevelli v. Chicago, Milwaukee & St. Paul Ry., 98 Wash. 42, 167 Pac. 66 (1917); Potter v. Potter, 224 Wis. 251, 272 N.W. 34 (1937); Annot., 2 A.L.R.2d 785 (1948).

12. Vitale v. Checker Cab Co., 166 La. 527, 117 So. 579 (1928).

13. Castelluccio v. Cloverland Dairy Products, Inc., 165 La. 606, 115 So. 796 (1927); Foy v. Little, 197 So. 313 (La. App. 2d Cir. 1940); Williams v. Campbell, 185 So. 683 (La. App. 2d Cir. 1939).

14. McConnell v. Webb, 226 La. 385, 76 So. 2d 405 (1954); Payne v. Georgetown Lumber Co., 117 La. 983, 42 So. 475 (1906).

The Louisiana Direct Action Statute allows an injured person to sue the tortfeasor's liability insurer without first obtaining judgment against the tortfeasor or joining him as a party defendant.[15] Since a suit under the Direct Action Statute must be based upon a cause of action against the insured, the insurer may urge general defenses relating to the cause of action such as lack of negligence, contributory negligence, prescription, and confusion.[16] However, defenses personal to the insured, such as interspousal or governmental immunity, are not available to the insurer.[17] This result has been justified by reasoning that the *cause of action* against the insurer is dependent upon a cause of action against the insured, but that *rights of action* against the insurer and the insured are not the same.[18] For purposes of federal diversity jurisdiction an action under the Direct Action Statute is separate and distinct from an action against the insured.[19] Thus the fact that the injured party and the insured are residents of the same state does not destroy diversity jurisdiction between the injured party and a non-resident insurer.

In the instant case the court agreed with the court of appeal that survival of a tort action not reduced to judgment is governed by Article 2315 rather than by the laws of inheritance.[20] This presented the court with the choice of either allowing a survivor to recover for damages occasioned by her own negligence or of granting the insurer a windfall because the injured party died before obtaining judgment. Citing the maxim that one should not benefit from his own misconduct, the court chose

15. LA. R.S. 22:655 (1950), as amended, La. Acts 1958, No. 125. For a recent discussion of the Direct Action Statute see Comment, 22 LOUISIANA LAW REVIEW 243 (1961).

16. Emmco Ins. Co. v. Globe Indem. Co., 237 La. 286, 111 So. 2d 115 (1959); Hidalgo v. Dupuy, 122 So. 2d 639 (La. App. 1st Cir. 1960); Addison v. Employers Mut. Liab. Co., 64 So. 2d 484 (La. App. 1st Cir. 1953); Rome v. London & Lancashire Indemnity Co., 169 So. 132 (La. App. Orl. Cir. 1936).

17. Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935); Edwards v. Royal Indem. Co., 182 La. 171, 161 So. 191 (1935); Rice v. Traders & Gen. Ins. Co., 114 So. 2d 92 (La. App. 1st Cir. 1959); McDowell v. National Sur. Corp., 68 So. 2d 189 (La. App. 1st Cir. 1953); Chapman v. Travelers Indem. Co., 45 So. 2d 557 (La. App. 1st Cir. 1950); Rome v. London & Lancashire Indem. Co., 169 So. 132 (La. App. Orl. Cir. 1936); Stamos v. Standard Acc. Ins. Co., 119 F. Supp. 245 (W.D. La. 1954).

18. Addison v. Employers Mut. Liab. Ins. Co., 64 So. 2d 484 (La. App. 1st Cir. 1953).

19. Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954).

20. The Louisiana Supreme Court did not dwell at length on this issue: "Obviously, in view of the explicit provisions of the law, the rights of the heirs or the succession representative of the deceased injured party can only come into being if the right of the beneficiary designated by Article 2315 does not exist at the date of death — that is, when the decedent's *right of action* has been reduced to judgment." 134 So. 2d 45, 48 (La. 1961).

the latter. It is clear that liability insurance covers the risk of liability to the insured's spouse;[21] therefore, the court's decision in this case allowed the insurer to profit by the injured party's death. Characterizing the survivor under Article 2315 as a plaintiff in her own right and not merely a representative of the injured party,[22] the court reasoned further that confusion extinguished the cause of action when the surviving widow became plaintiff as well as tortfeasor. Confusion is a doctrine, normally applied to conventional obligations, and extinguishes an obligation when the qualities of debtor and creditor are united in the same person.[23] The court found that the insurer was released because liability insurance partakes of the nature of suretyship.[24] On rehearing, the court bolstered its position on confusion by concluding that whether or not a liability insurer is analogous to a surety, the cause of action against the insurer was extinguished along with the cause of action against the insured because a direct action is dependent upon the existence of a cause of action against the insured.[25]

As a result of the instant case, it appears that negligence of a survivor will preclude recovery by him in a survival action as well as in an action for wrongful death. The court did not explain why a substitute party plaintiff of a survival action should not be considered merely a representative of the injured party. One state has justified a similar result by reasoning that statutory survival actions are not mere continuations of an injured

21. Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935); Edwards v. Royal Indem. Co., 182 La. 171, 161 So. 191 (1935); McDowell v. National Sur. Corp., 68 So. 2d 189 (La. App. 1st Cir. 1953); Chapman v. Travelers Indem. Co., 45 So. 2d 557 (La. App. 1st Cir. 1950).

22. The court did not concern itself with a detailed analysis of this issue. It dismissed the opinion of the court of appeal with the following statement: "We cannot subscribe to this reasoning as it fails to properly assess the realities of the case. Mrs. Dumas is not suing in a representative capacity. She is seeking to recover damage for her own account, by virtue of her survivorship of the right of action of her deceased husband, for the personal injuries he sustained as a result of her own negligence." 134 So. 2d 45, 49 (La. 1961).

23. LA. CIVIL CODE art. 2217 (1870): "When the qualities of debtor and creditor are united in the same person, there arises a confusion of right, which extinguishes the obligation."

24. *Id.* art. 2218: "The confusion that takes place in the person of the principal debtor, avails his sureties." *Id.* art. 3035 defines suretyship. The court realized that its analogy between liability insurance and suretyship was not sound in all respects, but it pointed to several cases holding that the analogy was sufficiently sound to prohibit insurers from urging defenses personal to the insured. *Id.* arts. 3056, 3060; 134 So. 2d 45, 50, 52 (La. 1961).

25. 134 So. 2d 45, 52 (La. 1961). In response to an attack upon its conclusion that a liability insurer is a surety, the court said that the cause of action against the insurer was extinguished when the cause of action against the insured was extinguished under LA. CIVIL CODE art. 2217 (1870).

party's action but are new causes of action, an essential element of which is the death of the injured party.[26] It is submitted, however, that Article 2315 was intended to transfer the injured party's original cause of action to the designated survivors. Thus recovery under a survival action should be based on whether or not the injured party could have recovered had he lived, irrespective of any defenses against the survivors.

It is submitted that the principle that one should not profit from his own misconduct seems harsh when applied to a situation such as the instant case involving no willful misconduct or gross negligence. Also, it leads to rather anomalous results because had the injured party obtained judgment in his favor before death, the judgment would have been community property.[27]

Since the events giving rise to the instant case, Article 2315 has been amended. The injured party's major daughter in the instant case would now be a proper party plaintiff along with the surviving widow.[28] No Louisiana cases have been found indicating the allocation of recovery among survivors when a co-survivor under Article 2315 is precluded from recovery. There has also been little development on this question in other states

26. Crevelli v. Chicago, Milwaukee & St. Paul Ry., 98 Wash. 42, 167 Pac. 66 (1917). This distinction was recognized in Kuehn v. Jenkins, 251 Iowa 718, 100 N.W.2d 610 (1960). See Annot., 2 A.L.R.2d 785, 811 (1948).

27. LA. CIVIL CODE arts. 2334, 2402 (1870). McHenry v. American Employers' Ins. Co., 206 La. 70, 18 So.2d 656 (1944).

28. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

"*The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children;* (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child,' 'brother,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father, and mother, by adoption, respectively." (As amended Acts 1960, No. 30, § 1.) (Emphasis added.)

Although this amendment made a tort action for property damages a property right, an action for personal injuries is not a property right. However, an action for personal injuries does survive in favor of the designated beneficiaries.

concerning survival actions.[29] However, the great weight of authority in other states concerning wrongful death situations is that negligence of a co-survivor should neither increase nor decrease recovery by non-negligent survivors.[30]

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So the instant case would be applicable under the article as amended except with the modification as discussed in the text above.

29. This can be explained by the fact that in most other states a deceased injured party's estate is the proper substitute party plaintiff and contributory negligence of the ultimate beneficiaries does not affect recovery. See Annot., 2 A.L.R.2d 785, 811-14 (1948).

30. See Wettach, *Wrongful Death and Contributory Negligence*, 16 N.C.L. Rev. 211, 219-31 (1938); Annot., 2 A.L.R.2d 785 (1948).