UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 39 | Number 1 Article 13

12-1-1960

Demurrer Ore Tenus -- Amendment -- Relation Back

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In conclusion, it is submitted that any conflict of laws rule which requires the application of a particular law irrespective of other relevant factors is unsound. In a situation where a tort occurs in one jurisdiction and a partial settelment in another, the inflexible administration of the *lex loci delicti* in the construction of the legal nature of the instrument of settlement will frequently work a substantial injustice through the defeat of the plainly-expressed intent of the parties even where such intent is not repugnant to the laws of either the forum or the situs of the tort. This supremacy of the *lex loci delicti,* for which the courts claim to find support in the *Restatement,* is nothing more nor less than a sacrifice of justifiable flexibility for the sake of mere uniformity.

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Demurrer Ore Tenus—Amendment—Relation Back.

In *Stamey v. Rutherfordton Elec. Membership Corp.*[1] the plaintiff alleged separate causes of action for wrongful death and for pain and suffering. The defendant answered, and the trial court sustained the plaintiff's motion to strike several of the defenses alleged. On appeal before the supreme court the defendant demurred *ore tenus* on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer *ore tenus* was sustained without prejudice to the plaintiff's right to move for leave to amend.

Twenty-five months after the accident the plaintiff amended the complaint. The defendant demurred to the amended complaint on the ground that the amendment constituted new matter and therefore was barred by the statute of limitations. The trial court sustained the demurrer. On appeal[2] the supreme court refused to allow the amendment to relate back and held that the cause of action for wrongful death was vulnerable to a proper plea of the statute of limitations.[3]

In many prior decisions the North Carolina court has classified a plaintiff's complaint as either a "defective statement of a good cause of action" or a "statement of a defective cause of action."[4] The court has

(S.D.N.Y. 1956); New Amsterdam Cas. Co. v. Stecker, 1 App. Div. 2d 629, 152 N.Y.S.2d 879 (1956); Kaufman v. American Youth Hostels, Inc., 13 Misc. 2d 8, 174 N.Y.S.2d 580 (Sup. Ct. 1957); *cf.* Bierman v. Marcus, 140 F. Supp. 66 (D. N.J. 1956).

[1] 247 N.C. 640, 101 S.E.2d 814 (1958).

[2] 249 N.C. 90, 105 S.E.2d 282 (1958).

[3] Since the statute of limitations can never be taken advantage of by demurrer, Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952), the court vacated the order sustaining the demurrer and remanded the cause.

[4] The substantive distinction between a defective statement of a good cause and a defective cause is discussed in 1 MCINTOSH, NORTH CAROLINA PRACTICE & PROCEDURE § 1189, at 644 (2d ed. 1956). A good definition of the two terms is set out in *Davis v. Rhodes,* 231 N.C. 71, 73, 56 S.E.2d 43, 45 (1949): "When the defect goes to the substance of the cause and not to the form of the statement, it is a defective cause of action which cannot be made good by adding other allegations

enunciated various rules with respect to these terms, and it appears that the holding of the principal case on the first appeal is inconsistent with these rules regardless of whether the plaintiff's complaint was in fact a defective statement of a good cause or a statement of a defective cause.

All defects in a complaint except lack of jurisdiction over the subject matter and failure to state a cause of action are waived by the defendant when he answers the complaint on the merits instead of demurring.[5] The rule that the defendant may object at any time for failure to state a cause of action is not absolute. There are numerous decisions to the effect that the ability to raise this objection *ore tenus* will depend upon whether the complaint is a statement of a defective cause of action or a defective statement of a good cause of action.[6] If the complaint is a statement of a defective cause of action the objection is not waived and a demurrer may be interposed at any time.[7] However, a demurrer to a defective statement of a good cause of action comes too late after answer and should be overruled.[8] Further, since the court has held that a final judgment dismissing the action is mandatory where there is a defective cause of action,[9] it follows a fortiori that an amendment should be allowed *only* where there is a defective statement of a good cause of action.

Thus, regardless of whether the complaint was in fact a defective statement or a defective cause an inconsistency is present. If in fact the complaint was a defective statement, though there is consistency in allowing the amendment, there is inconsistency in the sustaining of the demurrer. If in fact the complaint was a defective cause, though there is consistency in sustaining the demurrer, there is inconsistency in allowing amendment.

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not included in the original complaint. It is in no event, however expertly stated, an enforceable cause of action. . . .

"When, however, there is an enforceable cause of action stated but the statement thereof is inartificially expressed, or is in general terms, or the facts are not clearly and definitely stated, or it is lacking in some material allegation, it constitutes a defective statement of a good cause. . . ."

[5] N.C. GEN. STAT. § 1-134 (1953); City of Raleigh v. Hatcher, 220 N.C. 613, 18 S.E.2d 207 (1942); Schnibben v. Ballard & Ballard Co., 210 N.C. 193, 185 S.E. 646 (1936); Hitch v. Commissioners, 132 N.C. 573, 44 S.E. 30 (1903); Baker v. Garris, 108 N.C. 218, 13 S.E. 2 (1891).

[6] Bailey v. McGill, 247 N.C. 286, 100 S.E.2d 860 (1957); Gurganus v. McLawhorn, 212 N.C. 397, 193 S.E. 844 (1937); Bader v. Garris, 108 N.C. 218, 13 S.E. 2 (1891); 1 McINTOSH, NORTH CAROLINA PRACTICE & PROCEDURE § 1194, at 653 (2d ed. 1956).

[7] Howze v. McCall, 249 N.C. 250, 106 S.E.2d 236 (1958); Hall v. Queen City Coach Co., 224 N.C. 781, 32 S.E.2d 325 (1944).

[8] Johnson v. Graye, 251 N.C. 448, 111 S.E.2d 595 (1959); Davis v. Rhodes, 231 N.C. 71, 56 S.E.2d 43 (1949); Eddleman v. Lentz, 158 N.C. 65, 72 S.E. 1011 (1911); Garrison v. Williams, 150 N.C. 674, 64 S.E. 783 (1909).

[9] Mills v. Richardson, 240 N.C. 187, 81 S.E.2d 409 (1954). *Accord*, Adams v. Flora Macdonald College, 247 N.C. 648, 101 S.E.2d 809 (1958); Burrell v. Dickson Transfer Co., 244 N.C. 662, 94 S.E.2d 829 (1956); Lindley v. Yeatman, 242 N.C. 145, 87 S.E.2d 5 (1955).

In considering the effect of the plaintiff's amendment filed subsequent to the decision on the first appeal, the court on the second appeal failed to take notice of the rule that "if the amendment is germane to the original cause of action, deals with the same transaction, and does not introduce a new cause of action, it relates back to the commencement of the action, and prevents the running of the statute of limitations . . . ."[10] In deciding whether or not the statute of limitations had run as to the amended complaint the court did not consider the substantive content of the amendment as this rule requires.[11] The court instead applied a technical rule, enunciated by *Webb v. Eggleston,*[12] that when a demurrer for failure to state a cause of action is sustained, this becomes the "law of the case"—that the original complaint did not state a cause of action and that any amended complaint necessarily states a "new cause of action." In applying the *Webb* case the court concluded that since the "new cause of action" was filed after the running of the statute of limitations it was barred by a proper plea of the statute.

In viewing the decisions of the court on both appeals, it appears that an obvious inequity may result if they are followed. When the supreme court sustains a demurrer *ore tenus* after answer, allows an amendment, and then applies the "law of the case rule," it would seem that the defendant is given an unwarranted advantage with respect to the running of the statute of limitations. A defendant with an attorney who realizes the cause of action is defective and who has no compunction about using delaying tactics can answer instead of filing a demurrer. Should the jury return a verdict against him, the defendant can then appeal the decision and demur *ore tenus* in the supreme court. Should the court fail to apply the defective statement-defective cause rules requiring waiver or dismissal, and sustain the demurrer without prejudice to amend,[13] the defendant will be able to set up the law of the case rule. Thus, the defendant may be permitted to take his chances with the jury and, upon losing, to delay the plaintiff out of court.

[10] McLaughlin v. Raleigh, C. & S. Ry., 174 N.C. 182, 186, 93 S.E. 748, 749 (1917). *Accord,* Ray v. French Broad Elec. Membership Corp., 252 N.C. 380, 113 S.E.2d 806 (1960); Picket v. Atlantic Coast Line R.R. 153 N.C. 148, 69 S.E. 8 (1910).

[11] It might be noted that on the second appeal both attorneys argued whether the amendment was germane and material. Nevertheless, the court refused to use these criteria in deciding the issue. Brief for Plaintiff, pp. 9-12, Brief for Defendant, pp. 17-20, Stamey v. Rutherfordton Elec. Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958).

[12] 228 N.C. 574, 46 S.E.2d 700 (1948).

[13] This is basically what happened in Perkins v. Langdon, 231 N.C. 386, 57 S.E.2d 407 (1950). The defendant answered and verdict and judgment were for the plaintiff. The defendant appealed the holding, demurred *ore tenus,* and his demurrer was sustained without prejudice. However, the subsequent appeal on the effect of the amendment was decided on the basis of whether the amendment was germane and material. Perkins v. Langdon, 233 N.C. 240, 63 S.E.2d 565 (1951).

It is not discernible when the court will or will not apply the defective statement-defective cause rules. It is apparent, however, that an alert attorney should amend as early as possible after the sustaining of a demurrer and not rely on relation back.[14] Similarly, should he discover a defect in his complaint, he would be wise to amend and not to rely on waiver.

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Food—Sales—Implied Warranty of Fitness for Human Consumption.

In *Adams v. Great Atl. & Pac. Tea Co.*[1] plaintiff purchaser of a box of corn flakes sued defendant retailer for damages for breach of an implied warranty. While eating the corn flakes plaintiff bit down on an extremely hard object and broke off part of a tooth, the remainder of which was subsequently extracted. Plaintiff alleged that the food, sold in the original sealed container, was unwholesome and unfit for human consumption.[2] A chemical analysis showed that the object causing the harm was part of a grain of corn that had partially crystalized into a state as hard as quartz. In affirming an involuntary nonsuit, the North Carolina court held as a matter of law that the presence of the harmful object was not a breach of the implied warranty. The court predicated

[14] In the principal case the death occurred February 26, 1956; the defendant's demurrer *ore tenus* was sustained January 31, 1958; and the plaintiff's attorney did not ask leave to amend until March 7, 1958. If he had immediately moved for leave to amend instead of relying upon relation back, he could have averted the situation which defeated the cause of action for wrongful death.

[1] 251 N.C. 565, 112 S.E.2d 92 (1960).

[2] Where the article is sold for human consumption, the existence of the implied warranty between vendee and his immediate vendor is firmly established in North Carolina. Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951); Williams v. Elson, 218 N.C. 157, 10 S.E.2d 668 (1940); Rabb v. Covington, 215 N.C. 572, 2 S.E.2d 705 (1939). See generally Note, 32 N.C.L. REV. 351 (1954).

It is not clear in North Carolina whether the vendee could sue the manufacturer on implied warranty. An initial dictum stated that the manufacturer could be held liable. Ward v. Morehead City Sea Food Co., 171 N.C. 33, 87 S.E. 958 (1916). In Thomason v. Ballard & Ballard Co., 208 N.C. 1, 179 S.E. 30 (1935) the court expressly rejected this theory for the reason that there was no contractual relation between the manufacturer and the consumer to which implied warranty could attach. This requirement of privity was followed in subsequent cases. Enloe v. Charlotte Coca-Cola Bottling Co., 208 N.C. 305, 180 S.E. 582 (1935); Caudle v. F. M. Bohannon Tobacco Co., 220 N.C. 105, 16 S.E.2d 680 (1941). The present trend in other jurisdictions is toward eliminating this requirement of privity. See generally Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); Spruill, *Privity of Contract as a Requisite for Recovery on Warranty*, 19 N.C.L. REV. 551 (1941).

Plaintiff may sue the manufacturer for negligence. Ward v. Morehead City Seafood Co., *supra*. The value of the warranty action is that negligence need not be proved, implied warranty being a form of liability without fault. Existence of the warranty does not eliminate the necessity for proof that the product was defective when it left the manufacturer's hands. Great Atl. & Pac. Tea Co. v. Adams, 213 Md. 521, 132 A.2d 484 (1957). See generally DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER §§ 2.15, 4.1 (1951); PROSSER, TORTS § 84 (2d ed. 1955).