Survival of Personal Injury Actions in North Carolina

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North Carolina amendment statutes are closely in accord with the Federal Rules[55] except in connection with the all important matter of relation back. The relation back provision of the Federal Rules is as follows:

"15(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."[56]

This rule does not defeat the legitimate use of the statute of limitations. It does, however, prevent the defendant from defeating the plaintiff's claim on a technicality in the pleading. This is the desired result and avowed purpose of modern pleading. The adoption of the above provision from the Federal Rules by the North Carolina legislature would clarify the present confusion on this issue and place the North Carolina rules of pleading in accord with the liberal and just practice of modern pleading.

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In a recent case,[1] the North Carolina Supreme Court held that where a person is injured by the actionable negligence of another, and later dies as the result of such injuries, a cause of action for consequential damages sustained by the injured person between the date of the injury and the date of the death survives to the personal representative of such deceased person. Prior to 1915, it was the unquestioned[2] law of this jurisdiction that such causes of action did not survive. Causes of action for personal injury not causing death were expressly denied survival by the statute.[3] It was held that the legislature, in denying survival to causes of action where the injury did not cause the death

ment at any later stage of the action, if the adverse party was fairly apprised of its nature by the original pleading, and that the plaintiff was claiming thereunder, provided no new party is added thereby."

[55] Compare N. C. GEN. STAT. §1-161 with Fed. Rule 15(a); compare N. C. GEN. STAT. §1-163 with Fed. Rule 15(b); compare N. C. GEN. STAT. §1-167 with Fed. Rule 15(d); see Nassaney v. Culler, 224 N. C. 323, 30 S. E. (2d) 226 (1944); cited *supra* note 10.

[56] Applied with approval in Tiller v. Atlantic Coast Line R. R., 323 U. S. 574, 65 S. Ct. 421, 89 L. ed. 465 (1944). See also MOORE, FEDERAL PRACTICE §15.08; Notes (1944) 23 N. C. L. REV. 141, 145; (1930) 40 YALE L. J. 311.

[1] Hoke v. Atlantic Greyhound Corp. *et al.*, 226 N. C. 332, 38 S. E. (2d) 105 (1946).

[2] *But cf.* Peebles v. N. C. R. R., 63 N. C. 238 (1869). Prior to enactment of survival statute, causes of action for personal injury were held to survive under REVISED CODE (1868), c. 1, §1; now N. C. GEN. STAT. (1943) §1-22.

[3] N. C. REVISAL (1905) §157(2); now, as amended, N. C. GEN. STAT. (1943) §28-175.

and in creating a new cause of action by the wrongful death statute where the injury did cause the death, intended to deny survival to all causes of action for personal injury.[4] An amendment in 1915[5] struck from the list of actions denied survival the following: ". . . or other injuries to the person where such injury does not cause the death of the injured party." Prior to the principal case, it was held[6] that under the amendment causes of action for personal injury arising from a negligent act, the injury not causing death, survived; and by *obiter dicta* that all such causes of action for personal injury, regardless of the cause of death, would survive. In the principal case, the court following this *dicta* and supported by a federal case[7] in accord held that where a person dies as the result of injuries sustained by the actionable negligence of another, the right of action for personal injury existing in the deceased at the time of death survives to the personal representative of the deceased persons; the damages recoverable—i.e., such damages as were sustained by the deceased during his lifetime—are an asset of the estate to be administered as other property possessed by the deceased at his death; and the survival of such right of action does not affect the accrual of the cause of action under the wrongful death statute.

By a combination of the holdings of the two cases[8] construing the survival statute as amended, and from the terms of the survival statute,[9] it is clear that where a right of action exists as the result of injuries sustained by negligence and either the injured person or the negligent tortfeasor dies, the right of action for personal injury survives to or against the personal representative of the deceased person. The death of the tortfeasor, either before or after the accrual of a cause of action for wrongful death, would not affect the death action due to the provision of the wrongful death statute that such actions can be maintained against the personal representative of a deceased tortfeasor.[10]

The result of these two holdings, then, is to place rights of action for personal injury within the terms of the general section[11] rather than the excepting section[12] of the survival statute. It follows, therefore, that all rights of action for personal injury survive to and against the personal representative unless otherwise denied survival by the statute.

[4] Edwards v. Interstate Chemical Co., 170 N. C. 551, 87 S. E. 635, L. R. A. 1916 D. 635 (1915); Watts v. Vanderbilt, 167 N. C. 567, 83 S. E. 813 (1914); Bolick v. Southern Ry., 138 N. C. 370, 50 S. E. 689 (1905).

[5] N. C. Pub. Laws 1915, c. 38.

[6] Fuquay v. A. & W. R. R., 199 N. C. 499, 155 S. E. 167 (1930).

[7] James Baird & Co. v. Boyd, 41 F. (2d) 578 (C. C. A. 4th, 1930).

[8] Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105 (1946); Fuquay v. A. & W. R. Co., 199 N. C. 499, 155 S. E. 167 (1930).

[9] N. C. GEN. STAT. (1943) §§28-172 and 28-175.

[10] Tonkins v. Cooper, 187 N. C. 570, 122 S. E. 294 (1924).

[11] N. C. GEN. STAT. (1943) §28-172.

[12] N. C. GEN. STAT. (1943) §28-175.

Since the excepting section denies survival to rights of action for assault and battery,[13] it would seem that rights of action for personal injury arising out of an assault and battery would not survive. Whether this will be held to extend to all wilful injury cases, and thereby limit the present holdings to negligence cases, remains open for decision. If the present holdings are so limited, there will probably be further legislation, since it would seem unjust to allow survival against a negligent tortfeasor and deny survival against a wilful tortfeasor.

The court went to pains to make it clear that the right of the injured person to sue for personal injury of any kind was separate and distinct from the right of the personal representative to sue under the right of action conferred by the wrongful death statute. The former right is personal to the deceased during his lifetime, and upon death survives as an asset of his estate to his personal representative; while on the other hand, the latter right accrues to the personal representative at the date of death, not as an asset of the estate, but for the benefit of a particular class of beneficiaries. It was further pointed out that although both rights of action have as a basis the same wrongful act, there is no overlapping of damages recoverable since the measure of damages in each case is determinable upon separate elements of damage. It will be noted that the court refers to and distinguishes two rights of action. Does this mean, as to the personal representative, that there is one cause of action or two?

It is clear that the personal representative is the only person who can sue on either claim,[14] and there is but one wrongful act giving rise to both claims. Furthermore, it is clear that ordinarily when two personal rights of the same person are infringed upon by the same wrongful act but one cause of action exists.[15] However, there are here numerous grounds for distinction. The rights involved in the issue at hand have separate and distinct sources,[16] each accrues as against the tortfeasor at different times,[17] each is subject to a different limitation,[18] each recovery involves different elements of damage,[19] each

[13] N. C. GEN. STAT. (1943) §28-175(2).

[14] Personal injury: N. C. GEN. STAT. (1943) §28-172; Suskin v. Maryland Trust Co., 214 N. C. 347, 199 S. E. 276 (1938). Wrongful death: Hanes v. Southern Pub. Util. Co., 191 N. C. 13, 131 S. E. 402 (1925); Hood v. Amer. Tel. & Tel. Co., 162 N. C. 70, 77 S. E. 1096 (1913).

[15] Eller v. Carolina & N. W. R., 140 N. C. 140, 52 S. E. 305, 3 L. R. A. (N. S.) 225 (1905); *cf.* Underwood v. Dooly, 197 N. C. 100, 147 S. E. 686, 64 A. L. R. 656 (1929) (one cause of action exists, but insurer may sue on subrogation).

[16] The right against personal injury is a natural common law right, while the right against death is purely statutory.

[17] The personal injury action accrues at the date of the injury, while the death action accrues at the date of death. Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 337, 38 S. E. (2d) 105, 109 (1946).

[18] The injury action is subject to a three year limitation. N. C. GEN. STAT. (1943) §1-52(5); while the death action must be commenced within one year of the death as a condition precedent to the action, Curlee v. Duke Power Co., 205

recovery is for a different purpose,[20] and the decedent never possessed the right to sue for wrongful death.[21] Furthermore, it is held that rights given by a statute, as compared with natural rights or rights given by other statutes, give rise to an independent cause of action.[22] It would seem, therefore, that two causes of action exist.[23]

Assuming then, that two causes of action exist, may they be properly joined in one action? In the principal case the two actions had been joined, but this joinder was not questioned on appeal, and the court made no comment thereon. Under the joinder statute,[24] a joinder of causes of action arising out of the same transaction is permissive. It is evident that the causes of action in question arise out of the same transaction—i.e., the wrongful act of the tortfeasor—and could, therefore, be joined. Question, however, might arise as to the joinder of the parties, since the personal representative is suing in two different fiduciary capacities.[25] However, he is the only person permitted to maintain either action.[26] It would seem that in view of the announced purpose of allowing a joinder of all actions existing between the parties whenever possible,[27] the dual capacity of the personal representative would not prevent a joinder of the actions,[28] since the dual capacity in itself could not prejudice the defendant. There would also seem to be a question as to the present standing of the line of cases holding that the personal representative cannot, by amending a personal injury action

N. C. 644, 172 S. E. 329 (1933); Trull v. Seaboard Air Line Ry., 151 N. C. 545, 66 S. E. 586 (1909).

[19] The damages recoverable in the injury action are those suffered by the injured party during his lifetime, Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 337, 38 S. E. (2d) 105, 109 (1946); while the damages recoverable in the death action are the compensation for the injury resulting from the death. N. C. GEN. STAT. (1943) §28-174.

[20] The damages recovered in the injury action are an asset of the estate, Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 337, 38 S. E. (2d) 105, 109 (1946); while the damages recovered in the death action are for a particular class of beneficiaries. N. C. GEN. STAT. (1943) §28-173.

[21] Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105 (1946).

[22] Fuquay v. A. & W. Ry., 199 N. C. 499, 155 S. E. 167 (1930); Capps v. A. C. L. R. R., 183 N. C. 181, 111 S. E. 533 (1922).

[23] Murphy v. St. L. I. M. & S. R. R., 92 Ark. 159, 122 S. W. 636 (1909); Stewart v. Electric Light & Power Co., 104 Md. 332, 65 Atl. 49, 8 L. R. A. (N. S.) 384, 118 Am. St. Rep. 410 (1906); Bowen v. City of Boston, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365 (1892); Gorman v. Columbus & So. Ohio Electric Co., 144 Ohio St. 593, 60 N. E. (2d) 700 (1944); May Coal Co. v. Robinette, 120 Ohio St. 110, 165 N. E. 576, 64 A. L. R. 441 (1929); Brown v. Chicago & N. W. R. R., 102 Wis. 137, 77 N. W. 748, 44 L. R. A. 579 (1898).

[24] N. C. GEN. STAT. (1943) §1-123.

[25] In the personal injury action he is suing for the benefit of the estate, while in the death action he is suing for the benefit of a special class of beneficiaries. See note 20 *supra*.

[26] See note 14 *supra*.

[27] Gregory v. Hobbs, 93 N. C. 1 (1885); Hamlin v. Tucker, 72 N. C. 502 (1875).

[28] Moyer v. City of Oshkosh, 151 Wis. 586, 139 N. W. 378 (1913); Nemecek v. Filler & Stowell Co., 126 Wis. 71, 105 N. W. 225 (1905).

commenced by the deceased, allege a cause of action for wrongful death.[29] When this rule was laid down, the action commenced by the deceased abated at death, and the amendment was not a mere joining of two causes of action but a substitution of one action for the other. Today, since the personal representative may continue the suit commenced by his deceased, and the amendment would be a mere joining thereto of the death action, it would seem that such joinder should be allowed.[30] However, the date of the amendment would have to be within one year of the death, as the death action could not date from the comemncement of the prior action.[31]

If, then, there be two causes of action which may be joined, would a recovery, release, or bar in one action by the personal representative bar a recovery on the other action under the doctrine of *res judicata*? It is well established in this jurisdiction and elsewhere that a recovery or release by the injured person will bar the accrual of the death action.[32] This holding would not necessarily apply when the personal representative has recovered on one cause or has given a release, since the basis of the former holding was laid on the terms of the wrongful death statute and not on *res judicata*.[33] A judgment is decisive between the parties as to all points raised by the pleadings, or which might properly be predicated upon them,[34] but this does not embrace any matter which might have been brought into the litigation, or any causes of action which might have been joined, but which in fact were neither joined nor embraced in the pleadings.[35] In order to support a plea of *res judicata*, there must be identity of parties, subject matter, and issues.[36] The court in the principal case clearly pointed out that the issue of damage

[29] Edwards v. Interstate Chemical Co., 170 N. C. 551, 87 S. E. 635, L. R. A. 1916D 121 (1915); Bolick v. Southern Ry., 138 N. C. 370, 50 S. E. 689 (1905).

[30] The cases cited *supra* note 29 have language to the effect that a joinder would not be possible since the death action has not accrued at the commencement of the prior action; however, the court has held that this fact would not in itself preclude such an amendment, provided the pleadings as amended do not allege a wholly distinct claim which does not stem out of the original transaction. Nassaney v. Culler, 224 N. C. 323, 30 S. E. (2d) 226 (1944).

[31] *Ibid.*

[32] Edwards v. Interstate Chemical Co., 170 N. C. 551, 87 S. E. 635, L. R. A. 1916D 121 (1915); see TIFFANY, DEATH BY WRONGFUL ACT (2nd ed.) §124, and cases there cited. *But see* Schumacher, *Rights of Action Under Death and Survival Statutes* (1924) 23 MICH. L. REV. 114, 119.

[33] Edwards v. Interstate Chemical Co., 170 N. C. 551, 87 S. E. 635, L. R. A. 1916D 121 (1915) (the terms of the wrongful death statute ". . . such as would, if the injured party had lived, have entitled him to an action for damages therefor" require the existence of a right of action in the deceased at the date of death as a condition precedent to the accrual of the action).

[34] Jefferson v. Southern Land Sales Corp., 220 N. C. 76, 16 S. E. (2d) 462 (1941); Burton v. Carolina Light & Power Co., 217 N. C. 1, 6 S. E. (2d) 822 (1939).

[35] Stancil v. Wilder, 222 N. C. 706, 24 S. E. (2d) 527 (1942); Whitaker v. Garren, 167 N. C. 658, 83 S. E. 759 (1914); Ledwick v. Penny, 158 N. C. 104, 73 S. E. 228 (1911).

[36] Leary v. Va.-Car. Land Bank, 215 N. C. 501, 2 S. E. (2d) 570 (1939).

in each case is determinable upon separate and distinct elements of damage, and there could be no overlapping of damages recoverable. Therefore, it would seem that unless the pleadings in the action brought by the personal representative embraced all the points necessary for determining the elements of damage in both actions, and all the elements were submitted on the issue of damages, there would be no identity of issues.[37] However, it is clear that the issues determined in the action would be not open to question in the second action.[38] It follows, therefore, that an adverse verdict on the issue of negligence would bar the second action. The effect of a release by the personal representative would depend upon the terms of the release, and whatever rights were released in the contemplation of the parties would be barred.[39] Furthermore, as to the personal representative, it would seem that neither the bar of the statute of limitations on the personal injury action nor the failure to bring the wrongful death action within one year of the death would bar a recovery on the other action, since each action is separate and distinct, and subject to a different limitation.[40] It follows therefore, that a recovery, release or bar as to either of the causes of action by the personal representative will not bar a recovery on the other cause of action under the doctrine of *res judicata.*[41]

Inquiring further into the nature of the surviving action, is a cause of action for personal injury, standing alone, an asset in this jurisdiction such as would support the establishment of an ancillary administration of a deceased nonresident injured within this jurisdiction? It has been repeatedly held that the cause of action for wrongful death is an asset which will support the establishment of an ancillary administration.[42] The basis of this holding is laid on the premise that, although the recovery in the wrongful death action is not an asset of the estate, to hold otherwise would defeat the purpose of the statute. The same result would more logically follow as to the cause of action surviving under the survival statute since the recovery thereon is an asset of the estate. Furthermore, a cause of action for personal injury is a chose in action;[43]

[37] Connor v. Connor, 223 N. C. 664, 28 S. E. (2d) 240 (1943).
[38] Leary v. Va.-Car. Land Bank, 215 N. C. 501, 2 S. E. (2d) 570 (1939).
[39] Electric Supply Co. v. Burgess, 223 N. C. 97, 25 S. E. (2d) 390 (1943); Merrimon v. Postal Tel. & Cable Co., 207 N. C. 101, 176 S. E. 246 (1934).
[40] See note 18 *supra.*
[41] Murphy v. St. L. I. M. & S. R. R., 92 Ark. 159, 122 S. W. 636 (1909); Stewart v. United Electric Light & Power Co., 104 Md. 332, 65 Atl. 49, 8 L. R. A. (N. S.) 384, 118 Am. St. Rep. 410 (1906); Mahoning Valley Ry. v. Van Alstine, 77 Ohio St. 395, 83 N. E. 601, 14 L. R. A. (N. S.) 893 (1908); *see* Brown v. Chicago & N. W. R. R., 102 Wis. 137, 77 N. W. 748, 44 L. R. A. 579 (1898).
[42] Fann v. N. C. R. R., 155 N. C. 136, 71 S. E. 81 (1911); Vance v. R. R., 138 N. C. 460, 50 S. E. 860 (1905).
[43] Northern Texas Traction Co. v. Hill, —— Tex. Civ. App. ——, 297 S. W. 778 (1927); Sharp v. Cincinnati N. O. & T. P. Ry., 133 Tenn. 1, 179 S. W. 375 (1915).

a chose in action[44] or a right of action is property;[45] and property is an asset.[46] Thus whether the court follow its result as to the wrongful death action or apply the foregoing logic, it would seem that a cause of action for personal injury, standing alone, is an asset which will support the establishment of an ancillary administration.

If the court should not reach this result, it would seem that a right of action surviving under the statute to a nonresident would be of no value if service or recovery could not be had elsewhere. It is clear that where a right of action for personal injury accrues in a state other than the domicil of the deceased, the law of the scene of the injury decides whether there is a survival of the right of action.[47] Since a personal injury action is transitory,[48] if the action survive, it may be prosecuted in a state other than the scene of the injury, and that state will enforce the right provided jurisdiction may be had of all the necessary parties, and the enforcement of such right is not contrary to the public policy of the forum[49] or the laws of the forum are not so different from the laws of the scene of the injury as to work an injustice on the defendant.[50] It is evident, therefore, that where a nonresident is injured in this jurisdiction and later dies, and either service cannot be obtained on the tortfeasor in the domiciliary state, or the laws of that state are such that there can be no recovery on the surviving right of action, the personal representative must proceed either in this state, where the right accrued, or in some state where service and recovery may be had. Since a foreign administrator or executor cannot sue in this jurisdiction,[51] it would be necessary for ancillary administration to be established here.

Finally, what is the measure of consequential damages recoverable? The court in broad terms lays down the general measure: those damages resulting to the deceased during his lifetime.[52] The court made it clear, however, that the various elements of the consequential damages constitute but one cause of action.[53] The elements of damage would seem

[44] *Ibid.*; *In re* Morace, 111 Md. 372, 74 Atl. 375 (1909).

[45] Chubbuck v. Holloway, 182 Minn. 225, 234 N. W. 314 (1931); Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 189 (1918).

[46] See "Assets," BLACK'S LAW DICTIONARY (3rd ed. 1933), p. 153. In general see 4 WORDS AND PHRASES, p. 464; 21 AM. JUR., p. 475.

[47] Chubbuck v. Holloway, 182 Minn. 225, 234 N. W. 314 (1931); Potter v. First Nat. Bank of Morristown, 107 N. J. Eq. 72, 151 Atl. 546 (1930); see BEALE, THE CONFLICT OF LAWS (1935) §309.1.

[48] MacGovern & Co. v. A. C. L. R. R., 180 N. C. 219, 104 S. E. 534 (1920).

[49] Chubbuck v. Holloway, 182 Minn. 225, 234 N. W. 314 (1931). *But see* Clough v. Gardiner, 111 Misc. 244, 182 N. Y. S. 803 (1920).

[50] Higgins v. N. Y. & N. E. R. R., 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544 (1892); Rodwell v. Camel City Coach Co., 205 N. C. 292, 171 S. E. 100 (1933).

[51] Hall v. Southern Ry., 149 N. C. 108, 65 S. E. 899 (1908); Monfils v. Hazlewood, 218 N. C. 215, 10 S. E. (2d) 67 (1940) (such holding does not abridge U. S. Const.).

[52] Hoke v. Atlantic Greyhound Corp., 226 N. C. 332, 38 S. E. (2d) 105 (1946).

[53] *Id.* at 338, 8 S. E. (2d) at 110.

to include actual expenses for nursing and medical service; loss of income;[54] suffering, both mental and physical;[55] and any other injury which naturally and directly are proximate consequences of the wrongful act[56] and which are not elements of damage in the death action. Punitive damages should not be awarded.[57] If there were an injury to the property of the injured person as a result of the wrongful act, such property damages must be recovered in the same action with the personal injury damages.[58] It would seem that such elements of damage as permanency of injuries and loss of earning capacity would not be included since these elements are a part of the elements of damage resulting from the death.[59] It is clear that neither interest[60] nor attorney fees[61] are recoverable as damages.

Only those questions which it is felt the court will of necessity be called upon to answer in the near future have been brought within the scope of this note. Since the principal case clarifies the existence of a cause of action which prior to 1915 did not exist and since 1915 evidently was not understood by the bar to exist, it is certain that many other questions will be presented for determination.

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Gifts of Corporate Stock—Transfer on Corporation Books to Donor and Donee Jointly

In *Buffaloe v. Barnes*[1] a purchaser of 70 shares of corporate stock directed that the certificate be issued in the names of himself and his niece "as joint tenants with right of survivorship, and not as tenants in common." He told the broker handling the transaction that he wanted it that way so that if he pre-deceased her it would belong outright to her, and if she pre-deceased him it would belong outright to him. The certificate was delivered to him and was found at his death in his safety deposit box. A dividend check payable to both had been indorsed by her and delivered to him. Alleging a gift *inter vivos,* she claimed the shares as survivor in the joint tenancy. In an action by the executor

[54] Ledford v. Valley River Lumber Co., 183 N. C. 614, 112 S. E. 421 (1922); Rushing v. Seaboard Air Line Ry., 149 N. C. 158, 62 S. E. 890 (1908).

[55] Britt v. Carolina Northern R. R., 148 N. C. 37, 61 S. E. 601 (1908), *rehearing denied,* 149 N. C. 581, 64 S. E. 1135 (1908) (physical injury must accompany mental suffering).

[56] Lane v. Southern Ry., 192 N. C. 287, 134 S. E. 855, 51 A. L. R. 1114 (1926).

[57] Rippey v. Miller, 33 N. C. 247 (1850).

[58] See note 15 *supra.*

[59] Poe v. Raleigh & A. A. L. R. R., 141 N. C. 525, 54 S. E. 406 (1906); Burton v. Wilmington R. R., 82 N. C. 505 (1880).

[60] Penny v. A. C. L. R. R., 161 N. C. 523, 77 S. E. 774, Ann. Cas. 1914D 992 (1913).

[61] Crutchfield v. Foster, 214 N. C. 551, 200 S. E. 395 (1938).

[1] 226 N. C. 313, 38 S. E. (2d) 222 (1946), *petition to rehear denied,* 226 N. C. app. (Oct. 9, 1946).