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Pleadings -- Overruling of Demurrer for Misjoinder of Parties and Causes -- Effect of Reversal on Appeal

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The court affirmed for two reasons; that the allegation did not specify wherein the negligence consisted,\(^1\) and, as plaintiff had offered no proof to substantiate the allegation, he could not proffer an efficacious appeal because "an appeal ex necessitate follows the theory of the trial."\(^2\) Hence, plaintiff had no basis for an appeal.\(^3\)

This latter reason alone would be sufficient to defeat plaintiff, and the reason that the allegation is too general was not necessary, yet, it was powerfully stated. Consequently, it seems probable that the court inserted it to serve notice on future pleaders that a general allegation of negligence is an insufficient pleading of a cause of action.

In the future, the *Davis* case will probably be limited to its facts and North Carolina will probably require specific allegations of negligence. It should be noted, however, that the *Fleming* case made no mention of the *Davis* case, and the latter was decided on demurrer while the former was not. Even so, cautious pleaders of negligence should make specific allegations of the manner in which the defendant was negligent.

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**Pleadings—Overruling of Demurrer for Misjoinder of Parties and Causes—Effect of Reversal on Appeal**

The question was recently presented\(^4\) as to whether an action was still pending after the North Carolina Supreme Court had reversed the lower court's judgment\(^5\) overruling a demurrer for misjoinder of parties and causes of action.\(^6\)

After the first opinion was certified down, but before the lower court had acted in accordance therewith,\(^7\) plaintiffs moved for leave to file an amended complaint.\(^8\) When the motion came before him, the resident judge concluded that the Supreme Court had sustained the

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\(^1\) The complaint did set out a cause of action on another theory of negligence.


\(^6\) N. C. GEN. STAT. §1-123 (1943) determines what causes of action may be joined. For a thorough discussion of joinder of parties and causes, see Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N. C. L. REV. 1, 16 (1946).

\(^7\) See McIntosh, *North Carolina Practice and Procedure in Civil Cases* §694 (1929) for the disposition of a case on appeal.

\(^8\) N. C. GEN. STAT. §1-131 (1943) allows amendments in the discretion of the court. N. C. GEN. STAT. §1-131 (1943) which gives the right to move for leave to amend when a demurrer is sustained, has no application to cases in which the action has been dismissed for misjoinder of parties and causes. *Grady v. Warren*, 202 N. C. 638, 163 S. E. 679 (1932).
demurrer and that this had the legal effect of dismissing the action. Hence he denied the motion for want of authority. The basis of the decision appealed from seems to lie in the often repeated rule that a demurrer must be sustained and the action dismissed when there is a misjoinder of parties and causes. There can be no division of the action to eliminate the misjoinder, and after the demurrer has been sustained and the action dismissed, an amendment will not be allowed.

On appeal from the refusal to hear the motion, the Supreme Court, while recognizing the dismissal rule, stated that the effect of its order reversing the judgment of the lower court overruling the demurrer was not to sustain the demurrer, but was an order to the lower court to do so. As the order did not expressly dismiss the action, it was pending and open to motion until the lower court rendered final judgment.

The Supreme Court has the discretion to enter final judgment or to allow the lower court to do so upon receipt of its opinion. In previous cases where the appeal was from an order overruling a demurrer for misjoinder of parties and causes, the Supreme Court has rarely dismissed the action upon reversing.

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6 No appeal lies to the Supreme Court from the exercise of a discretionary power of the superior court in the absence of palpable abuse. But if the exercise of its discretion is refused upon the ground that it has no power to grant a motion addressed to its discretion the ruling of that court is reviewable. Hooper v. Glenn, 230 N. C. 571, 53 S. E. 2d 843 (1949); Gilchrist v. Kitchen, 86 N. C. 20 (1882).


8 N. C. GEN. STAT. §1-132 (1943), which provides for division of actions after a demurrer has been sustained for misjoinder of causes of action, does not apply when there is also a misjoinder of parties. Moore County v. Burns, 224 N. C. 700, 32 S. E. 2d 225 (1944); Southern Mills, Inc. v. Summit Yarn Co., 223 N. C. 479, 27 S. E. 2d 289 (1943); Rose v. Fremont Warehouse and Improvement Co., 182 N. C. 107, 108 S. E. 389 (1921); Roberts v. Utility Mfg. Co., 191 N. C. 294, 106 S. E. 664 (1921); Thigpen v. Kinston Cotton Mills, 151 N. C. 97, 65 S. E. 750 (1909); Morton v. Western Union Telegraph Co., 130 N. C. 299, 41 S. E. 484 (1902); State ex rel. Cromartie v. Parker, 121 N. C. 198, 28 S. E. 297 (1897); Mitchell v. Mitchell, 96 N. C. 14, 1 S. E. 648 (1887).


10 It is not the practice to render final judgment in the Supreme Court unless it is necessary to protect some right of the litigant parties in danger of ad interim defeat, or where it is demanded by public convenience or welfare. Ordinarily, the opinion of the court is certified down to the superior court of the county from which the appeal came, where a judgment in accordance with the opinion is entered. Goodson v. Lehmon, 225 N. C. 514, 35 S. E. 2d 623 (1945). McIntosh, North Carolina Practice and Procedure in Civil Cases §894(6) (1929).

remanded the action with directions for further proceedings. Ordinarily, upon finding that the lower court erred in not sustaining the demurrer, it has repeated the dismissal rule and simply reversed, giving no clear indication whether an amendment to the pleadings could or could not thereafter be allowed.

That the action remains open for motion seems to be a desirable decision. Plaintiffs are given opportunity to cure a defect which is otherwise fatal, thus allowing the action to continue, to be decided on its merits.

While dismissal for "dual misjoinder" is ordinarily without prejudice, and plaintiffs may begin a new action or actions, there is some advantage to plaintiffs in avoiding dismissal. By being allowed to continue, plaintiffs are able to avoid paying the costs in the original action, and save the time and expense involved in starting a new action.

The question was raised but was not decided in the present opinion as to the effect of affirming a judgment which sustained a demurrer for "dual misjoinder." In such case, authority seems to indicate that the action is no longer pending and open to motion for leave to amend. If the order which sustained also dismissed, it is clear that no cause

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12 Beam v. Wright, 222 N. C. 174, 22 S. E. 2d 270 (1942); Shore v. Holt, 185 N. C. 312, 117 S. E. 165 (1923); Street v. Tuck, 84 N. C. 605 (1881).
13 See note 7 supra.
14 It is the policy of the code system to be liberal in allowing amendments to pleadings so that causes may be tried upon their merits. See Page v. McDonald, 159 N. C. 38, 41, 74 S. E. 642, 643 (1912); Cheatham v. Crews, 81 N. C. 343, 345 (1879); Bullard v. Johnson, 65 N. C. 436, 438 (1871).
15 Burleson v. Burleson, 217 N. C. 336, 7 S. E. 2d 706 (1940); Weaver v. Kirby, 186 N. C. 387, 119 S. E. 564 (1923). N. C. GEN. STAT. §1-25 (1943), which allows a new action to be brought within one year after nonsuit, reversal, or arrest of judgment, if the original suit was commenced within the time prescribed therefor, applies to the new action. Blades v. Southern Ry., 218 N. C. 702, 12 S. E. 2d 553 (1940).
16 A new action may be brought under N. C. GEN. STAT. §1-25 (1943) only if the costs in the original action have been paid by the plaintiff prior thereto, unless the original suit was brought in forma pauperis.
17 Wingler v. Miller, 221 N. C. 137, 19 S. E. 2d 247 (1942) held that the order sustaining a demurrer to cross actions for misjoinder of parties and causes worked a dismissal of the cross actions. It was, therefore, improper to sustain the demurrer and at the same time retain the cross actions for amendment. As pointed out in the principal case, "the asserted cross actions were not pleadable in that action so that an amendment could not serve to remedy the defect." Furthermore, an answer rather than a complaint was involved. However, it is doubtful that these possible distinctions detract from the authority of Wingler v. Miller, supra, as setting forth a rule of general application. The opinion in the case clearly dealt with the problem just as if it had been presented by a complaint.
is pending after the order is affirmed. In a few cases, after affirming a judgment sustaining a demurrer, the court has remanded the case to allow an amendment. These cases are exceptions to the dismissal rule.

An awkward situation now exists. Assuming that a complaint contains a misjoinder of parties and causes, the principal case holds that if the lower court overrules a demurrer, and the judgment is reversed on appeal, plaintiffs have opportunity to move for leave to amend until the time final judgment is entered in the superior court. But if the lower court sustains the demurrer and dismisses the action, and the judgment is affirmed on appeal, plaintiffs have no chance to cure the defect as no action is pending. The same result is probable when the order merely sustains the demurrer. Thus the rights of the parties are materially affected by the opinion of the trial judge as to what constitutes a misjoinder of parties and causes. That is, if an appeal is taken in each case, a proper sustaining of the demurrer is to the advantage of the defendants, while an erroneous order overruling the demurrer works to the obvious advantage of the plaintiffs. If this discrepancy is to be regretted, it must be noticed that nothing short of abrogating the dismissal rule or overruling the present decision is likely to cure it.

The decision in the present case is a liberal one. In allowing plaintiffs the opportunity to eliminate the objectionable features after the Supreme Court has found a misjoinder of parties and causes, it is a recognition that it is feasible to allow severance of the causes, rather than to require dismissal of the action, upon the sustaining of a demurrer. However, in view of its long standing, it can hardly be said that an indication has been given that the dismissal rule will be changed.

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Gatti v. Kilgo, 125 N. C. 133, 34 S. E. 246 (1899); Mitchell v. Mitchell, 96 N. C. 14, 1 S. E. 648 (1887); Logan v. Wallis, 76 N. C. 416 (1877). In Robertson v. Robertson, 215 N. C. 562, 2 S. E. 2d 552 (1939) the court dismissed only as to the parties causing misjoinder.


The court has allowed the misjoinder defect to be eliminated after a demurrer was interposed, but before a decision was made sustaining it. Sparks v. Sparks, 230 N. C. 715, 55 S. E. 2d 477 (1949); Walker v. Standard Oil Co. of New Jersey, 222 N. C. 607, 24 S. E. 2d 254 (1943); Campbell v. Washington Light and Power Co., 166 N. C. 488, 82 S. E. 842 (1914).