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PLEADING

Demurrer—Condemnation—Necessary Allegations

Sease v. City of Spartanburg[1] held that when a landowner brings an action to enjoin a condemnation proceeding, he must allege and prove either (1) fraud; or (2) bad faith; or (3) clear abuse of discretion. If his complaint fails to allege facts which would constitute one of these three grounds, the complaint does not state a cause of action.

After a landowner had obtained a temporary restraining order pendente lite, her complaint against the city of Spartanburg was dismissed when the trial judge sustained a demurrer by the city. The complaint was based on four grounds: (1) that the proposed condemnation would make ingress to, and egress from, plaintiff's remaining property difficult or impossible; (2) that the proposed condemnation plan was "fantastic, unreasonable, unnecessary, uncalled for and unwarranted"; (3) that it would be a great detriment to plaintiff and would serve no useful purpose to the city; (4) that plaintiff had no adequate remedy at law.

The South Carolina Supreme Court unanimously affirmed the dismissal upon the demurrer by the city. The fact that the condemnation might affect access to other properties owned by plaintiff would influence the amount of damages recoverable but would not constitute a bar to the exercise of the power of eminent domain. The South Carolina Code[2] provides that compensation be paid for all "special injuries" which diminish the value of adjacent land, and the court held that this would be an adequate remedy at law under the state constitution. As to allegations (2) and (3), *supra*, the court held that these were merely conclusions, not facts, and as such were not admitted by the city's demurrer. Furthermore, these allegations were found to be insufficient to characterize fraud, bad faith, or clear abuse of discretion.

Demurrer—Condemnation—Allegation of "Public Use"

In *Tuomey Hosp. v. City of Sumter*[3] the court added a fourth ground to those enumerated in the *Sease* case, *supra*. An allegation that one's land is already devoted to a "public use" is

1. 242 S.C. 520, 131 S.E.2d 683 (1963).
2. S.C. CODE ANN. §§ 25-161 to -170 (1962).
3. 243 S.C. 544, 134 S.E.2d 744 (1964).

sufficient to state a cause of action in a suit to enjoin a condemnation proceeding.

The city of Sumter wished to acquire some land from the hospital in order to widen a street. It was alleged by the hospital that it had been incorporated and operated as a *non-profit* hospital for nearly fifty years, as directed in the will of the late Timothy J. Tuomey. It was further alleged that the land sought to be condemned was already devoted to a public use. The city demurred, but the trial judge overruled the demurrer and granted a temporary restraining order.

The city appealed, but the South Carolina Supreme Court affirmed the decision of the trial court, holding that the question of "public use" is a factual issue which must be determined under the facts as developed upon a trial of the case. For purposes of the demurrer it was sufficient to allege a "public use," so long as there were other facts alleged which would tend to support the conclusion. The court was careful to note that since the allegation of "public use" was a conclusion drawn by the pleader from other facts, it was not admitted as a matter of law by the city's demurrer.

The exemption from condemnation of land "devoted to a public use" is specified in the statute which governs eminent domain exercised by municipalities.[4] In the instant case the court implied that the allegation alone may not be sufficient. But support for the "public use" allegation was found in the allegation as to the founder's charitable intentions and as to the non-profit operation of the hospital. These allegations were enough to get the "public use" allegation past a demurrer.

There is excellent dictum in the *Tuomey* case which discusses the legal tests for finding that a "public use" existed. In this article on *Pleadings* only a brief summary may be given. There are many "charitable" institutions which may fall outside the protective bounds of "public use." The mere facts that the institution is eleemosynary and beneficial to the public are not the test. It must be shown that the public has a *right* to a definite use of the property which is enforceable in a court of law.[5]

Demurrer—Improper Joinder—Foreign Corporation

Joinder as a defendant of a foreign corporation, over which the court does not have jurisdiction, with an individual over

4. S.C. CODE ANN. § 47-68.1 (1962).
5. 243 S.C. 544, 134 S.E.2d 744 (1964).

whom the court does have jurisdiction was held in *Gibbs v. Young*[6] not to confer jurisdiction over the foreign corporate defendant.

An accident occurred in Georgia, involving a truck which was owned by an Alabama corporation, Bowman Transportation, Inc. The truck was driven by a South Carolinian. A motorist from California brought suit in South Carolina. Bowman had no contact with South Carolina, except that its employee Young resided there and that it was licensed to operate through the state. Bowman demurred for lack of jurisdiction. The trial court overruled the demurrer.

On appeal the South Carolina Supreme Court reversed. The court indicated that where the state does not have jurisdiction of the person, it must have jurisdiction of the subject matter. Neither was present as to Bowman, since the accident took place in Georgia. Section 10-214 of the Code of Laws of South Carolina, 1962, provides for jurisdiction over a foreign corporation ". . . by a plaintiff not a resident of this State when the cause of action shall have arisen or the subject matter of the action shall be situate within this State." Here the statute clearly limits jurisdiction over a foreign corporation when the plaintiff is not a resident of South Carolina. And joinder with an individual over whom the court does have jurisdiction does not change the status of the foreign corporation. Jurisdiction is still absent.

A corollary holding in *Gibbs v. Young* was that the trial court should also have granted to the defendant Young a change of venue from Chesterfield to Anderson County, where Young resided, since the court had no jurisdiction over the defendant alleged to have jurisdictional "presence" in Chesterfield, i.e., Bowman.

Demurrer—Joinder of Joint Tort-Feasors

Two alleged joint tort-feasors may be joined in a single action even though there is no allegation that they were acting "in concert," according to *Crowe v. Domestic Loans, Inc.*[7]

Plaintiff had borrowed money from two loan companies, Domestic Loans, Inc. of Columbia and Lender's Inc. of West Columbia. Unable to collect their respective claims, the tireless creditors resorted to calling plaintiff's employer by phone. The

6. 242 S.C. 217, 130 S.E.2d 484 (1963).
7. 242 S.C. 310, 130 S.E.2d 845 (1963).

employer then discharged plaintiff. Plaintiff brought suit against both Domestic and Lender's in Richland County for tortious interference with plaintiff's contractual relationship with his employer.

Domestic demurred on the ground that the complaint did not allege any "concerted action" between the alleged joint tortfeasors, i.e., that there was no agency, no conspiracy, and no knowledge of each other's actions. The demurrer was overruled, and the South Carolina Supreme Court affirmed.

The court seemed to accept the defendants' contention that their actions were independent and unrelated but found that this was not the controlling consideration. Its position seems to be in line with the majority notion that where there has been a single injury caused by two or more persons acting either in concert or independently of each other, the wrongdoers are jointly and severally liable and thus subject to joinder.[8] Also section 10-203 of the Code states that all persons who may have an interest in the controversy may be defendants, and many cases have held generally that this provision is to be liberally construed. In addition, equitable considerations favor joinder.

Damaging Allegations Binding

It is settled that a party to an action is judicially bound by his own pleadings. A companion rule is that the party may not introduce evidence that contradicts his own pleadings.[9] In the recent case of *Elrod v. All*[10] these well-known rules were slighted by imprecise pleading, proving fatal to the action.

An automobile guest passenger injured in a two-car accident attempted to sue his host-motorist and the operator of the other automobile in a single action. Under the Guest Statute[11] recovery from the host-motorist requires a showing of intentional or reckless misconduct. Simple negligence is not sufficient.

In his enthusiasm to plead a strong case against the *other* motorist, the guest passenger alleged that the host-motorist was operating his automobile "at a reasonable rate of speed, in a careful and prudent manner. . . ." He further alleged that the

8. See generally 39 AM. JUR. *Parties* § 40; *accord,* Pendleton Gas & Elec. Co. v. Columbia Ry., 133 S.C. 326, 131 S.E. 265 (1926).

9. Truesdale v. Jones, 224 S.C. 237, 78 S.E.2d 274 (1953).

10. 243 S.C. 425, 134 S.E.2d 410 (1964).

11. S.C. CODE ANN. § 46-801 (1962).

acts of the other motorist caused the host to be "faced with a sudden peril."

A verdict against the host-motorist was unanimously reversed by the South Carolina Supreme Court and was remanded for entry of judgment for the defendant host-motorist under the rules of the South Carolina Supreme Court.[12] The allegation that the host was reasonable and prudent bound plaintiff and precluded any finding of gross or wilful negligence, which is prerequisite to a recovery under the guest statute. In addition, the allegation of "sudden peril" caused by the other motorist was binding, and where there is a "sudden peril," the driver cannot be held to his ordinary standard of care.

Thus the cause of action was forfeited because of a failure to plead the facts so as to be consistent with the legal theory of recovery. This case illustrates the danger of imprecise pleading where joint tort-feasors are joined in a single action.

Necessary Allegations—Wrongful Death

In actions for wrongful death against the South Carolina Highway Department, it must be alleged that the decedent was not contributorily negligent.[13] *Patrick v. South Carolina Highway Dep't*[14] held that this statute applies to the wrongful death of a minor also, and even though the decedent's parents are the beneficiaries of an action for the minor, the statute does *not* require any allegation that the parents were not contributorily negligent.

The court raised another interesting question. It is arguable that the allegation of no contributory negligence, as required by the statute, *supra*, may not be necessary where the deceased party is a child too young to be capable of contributory negligence in the eyes of the law. However, the court did not try to answer this question.

Unnecessary Allegations—Estoppel

In the absence of a statute to the contrary, estoppel need not be pleaded. The same does not apply to waiver, however.

In *Spencer v. Republic Nat'l Life Ins. Co.*[15] the South Carolina Supreme Court sustained a directed verdict against the com-

12. S.C. SUP. CT. RULE 27.
13. S.C. CODE ANN. § 33-233 (1962).
14. 243 S.C. 246, 133 S.E.2d 750 (1963).
15. 243 S.C. 317, 133 S.E.2d 826 (1963).

pany, rejecting the contention that plaintiff had to plead estoppel. The court distinguished estoppel from the doctrine of waiver, noting by contrast that while waiver is "an intentional relinquishment of a known right, the essential elements of estoppel are the ignorance of the party who invokes the estoppel. . . ."[16] Estoppel need not be pleaded.

In the *Spencer* case estoppel arose from the oral representations of the insurance company's agent. The county of Florence agreed with the agent to switch its group life policy to the defendant company on the condition that all those county employees already covered by group insurance would be covered by the new policy and that there would be no gap or waiting period and no new terms which would exclude those already receiving coverage.

The written contract of insurance which arrived a month after the policy became effective contained a clause excluding employees not actively at work on the day the policy became effective. The dispute arose over an employee who had become ill and unable to work shortly before the new policy with the defendant company took effect. In the face of the oral assurances of the company's agent that there would be uninterrupted coverage for all employees, the company was estopped to assert the terms of the written contract even though the estoppel was not set out in the complaint.

Superfluous Allegations—School Bus Liability

Two cases have held recently that allegations of gross negligence, recklessness, and the like are irrelevant in an action against the insurer of a school bus owned by the state.[17] This is so because a statute limits the liability of the state to actual damages for simple negligence.[18] The statute also sets up the following limits: (1) $5,000 per person for personal injuries; (2) $5,000 total property damage; (3) $25,000 over-all limitation per accident, personal and property damage included. Therefore allegations in excess of the stated liability and allegations of gross negligence which would give rise to punitive damages may and should be stricken upon motion.

16. *Id.* at 322, 133 S.E.2d at 828; Ellis v. Metropolitan Cas. Ins. Co., 133 S.E.2d at 828 (1963), quoting from 187 S.C. 162, 167, 197 S.E. 510, 512 (1938).

17. Sossamon v. Nationwide Mut. Ins. Co., 243 S.C. 552, 135 S.E.2d 87 (1964); Coker v. Nationwide Mut. Ins. Co., 243 S.C. 170, 133 S.E.2d 122 (1963).

18. S.C. Code Ann. § 21-840 (1962).

Parties—Foreign Wrongful Death Statute

Designation of parties who may maintain an action for wrongful death under the laws of a foreign jurisdiction is a *substantive* element of the basic right to recover. Therefore the parties named in the foreign statute must institute the action, without regard to who would be the proper parties in a similar action arising in South Carolina.

The Georgia Wrongful Death Statute requires that the action must be instituted by the *beneficiaries* of the action as named in the statute, not by the representatives of the decedent's estate. Thus the South Carolina Supreme Court in *McDaniel v. McDaniel*[19] held that it was proper for the trial court to dismiss an action arising out of a death in Georgia which had been instituted by the administrator of the estate rather than by the decedent's spouse and son, who were beneficiaries under the Georgia statute.

The law of the place in which the transaction occurred, *lex loci*, governs all substantive rights; whereas, the law of the forum in which the action is brought, *lex fori*, prevails as to purely procedural matters. The determination of who shall have the right to recover is substantive. There is ample authority for this proposition cited in the *McDaniel* case. Apparently under Georgia law the recovery may go directly to the beneficiaries without going through the estate. In contrast many jurisdictions require that the recovery go through the estate, in which case it is subject to the claims of creditors. In this context the substantive nature of the designation of parties who may bring the action becomes clearer.

Uniform Declaratory Judgments Act

A complaint for declaratory judgment is sufficient on demurrer if it sets forth a "justiciable controversy." It need not state a cause of action. That is to say, it does not have to demonstrate upon its most favorable allegations that the plaintiff has a right to recover. It is sufficient if it makes reasonable allegations that a controversy exists which should be delineated by a declaration of the rights of the parties. There may be a "justiciable controversy" even if on the face of the complaint it appears that the plaintiff may be on the losing side of the controversy. This writer realizes that the reader's thirst to understand what a

19. 243 S.C. 286, 133 S.E.2d 809 (1963).

"justiciable controversy" is has not been satisfied by these remarks. And yet it might be misleading to attempt a more definite description.

In *Hardwick v. Liberty Mut. Ins. Co.*[20] the South Carolina Supreme Court found a "justiciable controversy." Plaintiff had an accident in an automobile owned by Capital-U-Drive-It. Plaintiff alleged that she was induced by an agent of Capital to rely on Capital's insurer, defendant Liberty Mutual, to indemnify the accident. In so relying plaintiff alleged that she forfeited her own insurance coverage. Then Liberty Mutual denied liability. Plaintiff on information and belief alleged that she *might* be entitled to coverage under Liberty Mutual's policy on Capital. Plaintiff alleged the existence of an insurance contract but was unable to allege its terms.

The court concluded that whether or not these allegations stated a cause of action, they did state a "justiciable controversy." In reaching this result the court also utilized the doctrine that when facts are peculiarly within the knowledge of the defendant, i.e., the alleged insurance policy in this case, the plaintiff is not required to plead with the ordinary degree of certainty as to the specific grounds for his right of recovery.

In passing it should be noted that the court also stated that under the Uniform Declaratory Judgments Act[21] the traditional distinction between "necessary" and "proper" parties was applicable. Therefore the plaintiff's insurer, who had denied liability for failure to give notice, was not a necessary party to the action against Liberty Mutual, although it would have been a proper party had plaintiff chosen to bring his insurer in.

Late Pleadings—Default

In his discretion the trial judge may declare a late pleader in default, and, absent an abuse, the South Carolina Supreme Court will not disturb his decision on appeal. Two decisions recently upheld default judgments for failure to plead timely.[22]

In *Irick v. Carr* the defendant, a businessman, was declared in default when he failed to answer the complaint in twenty days. The first attempt to take action occurred within thirty days after service of the complaint. At that time defendant tried to excuse

20. 243 S.C. 162, 133 S.E.2d 71 (1963).

21. S.C. CODE ANN. § 10-2008 (1962).

22. Irick v. Carr, 243 S.C. 565, 135 S.E.2d 94 (1964); Odell v. United Ins. Co. of America, 243 S.C. 35, 132 S.E.2d 14 (1963).

his omission by claiming emotional stress caused by his mother's illness and worry caused by his business. The trial judge refused to permit a late answer.

On affirming the default judgment, the South Carolina Supreme Court recognized that the trial court has wide discretion to relieve a party from default where there is excusable neglect. But he is not bound to do so. The court found no abuse of discretion in the trial court's finding that defendant was qualified to know the nature of the action and that it was wilful neglect for him to plead late.

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