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## Death by Wrongful Act - Amendment Supplying Necessary Allegation Naming Decendent's Next of Kin and Their Pecuniary Loss Not Barred by Expiration of Limitation Period Provided by the Wrongful Death Statute

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criminal proceeding. It would be meaningless to require her *written* statement to remain in the insurance company files in order to retain its privileged status, whereas her *oral* statement to her attorney in another cause, disclosing the same information, would be privileged. The rule, that there is no waiver of the privilege so long as there is not a disclosure to a person not within the attorney-client relationship, adequately protects the client's freedom of mind in securing legal advice without unnecessarily restricting the courts' search for truth.

THOMAS C. RYDELL

**DEATH BY WRONGFUL ACT—AMENDMENT SUPPLYING NECESSARY ALLEGATION NAMING DECEDENT'S NEXT OF KIN AND THEIR PECUNIARY LOSS NOT BARRED BY EXPIRATION OF LIMITATION PERIOD PROVIDED BY THE WRONGFUL DEATH STATUTE.**—In *Waller v. Cooper*, 49 Ill. App. 2d 482, 200 N.E.2d 105 (1st Dist. 1964), the Illinois Appellate Court was confronted with the problem of whether an amendment to a complaint, supplying an allegation naming decedent's next of kin and their pecuniary loss, was barred by the two year period fixed by the Wrongful Death Act. The court held that an amendment of this type related back to the filing of the original complaint.

The decedent in the present case died on January 30, 1960. The plaintiff, as administratrix, filed a Statement of Claim on January 27, 1962, against defendant Cooper for wrongfully causing the death of plaintiff's intestate. This claim failed to allege the decedent's "next of kin" and their "pecuniary loss" as required by Section 2 of the Wrongful Death Act.<sup>1</sup> The plaintiff subsequently filed an amendment to her claim supplying these necessary allegations. However, this amendment was not filed until after the two year period for filing claims under the Wrongful Death Act had expired.<sup>2</sup>

The Municipal Court of Chicago dismissed the plaintiffs' action on the ground that the original claim failed to comply with the requirements of the Wrongful Death Act, because it failed to name the decedent's "next of kin" and their "pecuniary loss," and the amended claim which supplied these missing allegations was barred by the two year period prescribed by the Act. On Appeal, held: Reversed for plaintiff. The appellate court reasoned that an amendment to a claim under the Wrongful Death Act, supplying necessary allegations of decedent's next of kin and their pecuniary loss, filed more than two years after decedent's death, *related back* to the filing of the original claim. Under the original claim, the plaintiff sought

<sup>1</sup> Ill. Rev. Stat., Ch. 70, § 2 (1963) "Every such action shall be brought . . . in the names of the personal representative . . . shall be for the exclusive benefit of the widow and next of kin . . . jury may give damages . . . with reference to pecuniary injuries . . ."

<sup>2</sup> Ill. Rev. Stat. Ch. 70, § 2 (1963) ". . . Provided, that every such action shall be commenced within two years after the death of such person . . ."

recovery as the personal representative of the decedent for the benefit of the estate. Under the amended claim, the plaintiff sought to recover for and on behalf of the decedent's "next of kin" and not for the decedent's estate. Under the Wrongful Death Act, the suit must be brought by the personal representative for and on behalf of the heirs,—there being no possible action by the personal representative for the benefit of the decedent's estate.<sup>3</sup> The plaintiff, by filing the amended claim, had changed her capacity to comply with the act.

At common law, the filing of an amendment which changed the capacity in which the plaintiff sued was regarded as instituting a new cause of action,<sup>4</sup> and was barred by any statute limiting actions if not filed within the stated time period. The Illinois Practice Act of 1872 permitted amendments which changed the capacity in which the plaintiff sued to relate back to the filing of the original complaint.<sup>5</sup> The courts construed that act to mean that a complaint which stated a cause of action defectively could be cured by a subsequent amendment;<sup>6</sup> however, if the original complaint failed to state a cause of action, amendments were not permitted to relate back to the filing of the original complaint on the theory that there was nothing to which it could relate.<sup>7</sup>

An amendment to the Illinois Practice Act in 1929 attempted to abolish this distinction by providing that any amendment should relate back if the cause of action in the amended pleading

grew out of the same transaction or occurrence and is substantially the same as set up in the original pleading, even though the original pleading . . . failed to allege the performance of some act . . . or fact . . . or . . . other . . . matters . . . which are necessary conditions precedent to the right of recovery . . . when such conditions precedent have in fact been performed.<sup>8</sup>

In the case of *Keslich v. Williams Heating Corp.*,<sup>9</sup> the 1929 Amendment was strictly construed by the court. In that case, the plaintiff was the administratrix of the estate and also the widow of the decedent. She filed her claim as administratrix and, after the expiration of the period of

<sup>3</sup> Ill. Rev. Stat. Ch. 70, § 2 (1963) "Every such action shall be brought by and in the names of the personal representatives . . ."

<sup>4</sup> *Lower v. Segal*, 60 N.J.L. 99, 36 Atl. 777 (1897).

<sup>5</sup> Ill. Laws, 1872, 338; Construed in *Litchfield Coal Co. v. Taylor*, 81 Ill. 590, 592 (1876); *Teutonia Life Ins. Co. v. Mueller*, 77 Ill. 22, 23 (1875); *McCall v. Lee*, 120 Ill. 261, 266, 11 N.E. 522, 524 (1887).

<sup>6</sup> *Wheeler v. Sanitary District*, 270 Ill. 461, 110 N.E. 605 (1915); *Chicago City Ry. Co. v. McMeen*, 206 Ill. 108, 114, 68 N.E. 1093, 1095 (1903); *Fish v. Farwell*, 160 Ill. 236, 240, 43 N.E. 367, 370 (1896).

<sup>7</sup> *Shaw v. Dorris*, 290 Ill. 196, 201, 124 N.E. 796, 799 (1919); *Chicago City Ry. Co. v. McMeen*, 206 Ill. 108, 114, 68 N.E. 1093, 1095 (1903); *Vogrin v. American Steel Co.*, 263 Ill. 474, 476, 105 N.E. 332, 334 (1914).

<sup>8</sup> Ill. Laws, 1929, 578.

<sup>9</sup> 277 Ill. App. 263, (3rd Dist. 1934), *aff'd*, 360 Ill. 552, 196 N.E. 814 (1935); following *Holden v. Schley*, 271 Ill. App. 159, 190 N.E. 80 (3rd Dist. 1933).

limitations, filed an amendment substituting herself, individually, as plaintiff. She then claimed in her capacity as surviving widow. The appellate court held that her amendment was barred by the limitation period on the theory that the action as amended was not "substantially the same" as required by the Act. The court stated that the original claim did not state a cause of action since the statute did not authorize suit to be brought by the administratrix in her own right, and that the two claims were therefore not substantially the same, as was required by the statute.

The 1934 legislature, noting the court's interpretation of the 1929 Amendment to the Practice Act in the *Keslich* case, eliminated the words "substantially the same"<sup>10</sup> from Section 46(a) of the Practice Act. By this enactment, the legislature expressed a desire to overrule the *Keslich* case so that an amendment changing the capacity of the plaintiff filed after the expiration of the limitation period would not be barred.

The 1934 Amendment was interpreted in the case of *Friend v. Alton Ry. Co.*,<sup>11</sup> The plaintiffs were the heirs of the decedent. The decedent's personal representatives was not made a party in the original action. After the limitation period had expired, the complaint was amended, substituting the personal representative as plaintiff for and on behalf of the heirs. The appellate court held that the amendment was barred by the limitation period. The court's reason for the decision was that the two year period prescribed in the Wrongful Death Act was not a statute of limitation, but rather a condition of liability. The court stated that the action was not a common law action, but one created by statute. The statute required certain prerequisites, or conditions, to invoke its use. One of these prerequisites was the filing of an action by the personal representative of the decedent before the two year limitation had expired. Since this was not done, the court concluded that the original complaint failed to state a cause of action due to the omission of a necessary condition precedent.

The language of Section 46(2) of the Civil Practice Act relating to amendments has remained substantially the same since 1934.<sup>12</sup> In *Metropolitan Trust Co. v. Bowman Dairy Co.*,<sup>13</sup> the complaint stated that both of the defendant's vehicles struck plaintiff's intestate, however, the proof varied by showing that only one of the defendant's vehicles struck the plaintiff. The appellate court held that, under the Wrongful Death Act, an amendment to conform the pleadings to the proof after the period of limitation had expired was not barred, and the amendment related back to the filing

<sup>10</sup> Ill. Laws, 1934, 797.

<sup>11</sup> 283 Ill. App. 366 (3rd Dist. 1936); followed in *Serio v. Stefkin*, 291 Ill. App. 614, 9 N.E.2d 422 (1st Dist. 1937); disapproved in *Metropolitan Trust Co. v. Bowman Dairy Co.*, 292 Ill. App. 492, 11 N.E.2d 847 (1st Dist. 1937), *aff'd*, 369 Ill. 222, 15 N.E.2d 838 (1938); criticized in *Illinois Law Review*, Vol. 31, p. 396 (1936).

<sup>12</sup> Ill. Rev. Stat., Ch. 110, § 46(2) (1963).

<sup>13</sup> 292 Ill. App. 492, 11 N.E.2d 847 (1st Dist. 1937), *aff'd*, 369 Ill. 222, 15 N.E.2d 838 (1938).

of the original complaint. This case differs from the previous cases. Here, there was no attempt to substitute parties or change capacity, but merely an error in the content of the pleadings. The amendment, therefore, was not regarded as instituting a new cause of action, as had been done in the above cases, but merely to correct a defective complaint. The court, by dictum, disapproved of the holding in *Friend v. Alton Ry.*

In the instant case, the court was presented with a fact situation similar to that in *Friend v. Alton Ry.* In both cases, the amendment was made to change the capacity of the plaintiff either by a substitution of a new party, or by the joining of a new party, and in both cases this amendment was made after the time period prescribed in the Wrongful Death Act had expired. The only difference was that in the *Friend* case, the heirs brought suit and failed to join the decedent's personal representative, while in the instant case, the personal representative brought suit and failed to join the heirs. The court in *Waller v. Cooper* expressly overruled *Friend v. Alton Ry.* In so doing, the appellate court, after holding on to a technical and archaic distinction for thirty years, has finally followed the apparent legislative intent of Section 46 of the Civil Practice Act as it applies to the Wrongful Death Act. Now, an amendment to correct the capacity of the plaintiff, which technically begins a new cause of action, is permissible, even if filed after the two year limitation prescribed in the Wrongful Death Act has expired.

J. MARSHALL