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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**GLADE SPRINGS VILLAGE
PROPERTY OWNERS ASSOCIATION, INC.,**

Plaintiff,

v.

**COOPER LAND DEVELOPMENT, INC.,
an Arkansas corporation, and
JUSTICE HOLDINGS LLC,
a West Virginia limited liability company,**

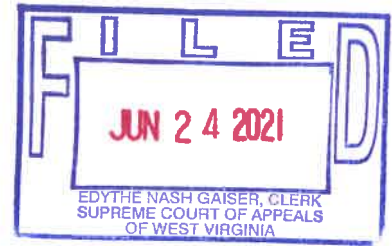
Defendants.

**GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC.'S
MEMORANDUM REPLY IN OPPOSITION TO DEFENDANT'S
MOTION TO REFER TO BUSINESS COURT**

COMES NOW, Plaintiff Glade Springs Village Property Owners Association, Inc. ("GSVPOA"), by counsel Mark A. Sadd, Ramonda C. Marling, and Lewis Glasser PLLC, and submits this memorandum of law in opposition to Defendant Cooper Land Development, Inc.'s ("Cooper Land") *Motion to Refer Action to the Business Court* (the "Motion") as follows:

Prefatory Statement

Significantly, Cooper Land only mentions the companion case of *Justice Holdings LLC v. Glade Springs Village Property Owners Association, Inc.*, Civil Action No. 19-C-481 (Cir. Ct. Raleigh City.) (Burnside, J.) (the "Justice Holdings Civil Action") in passing on the final page of its Motion. Motion, p. 6. Further, Cooper Land omits any reference to the identical claims for developer assessment liability asserted in Count VII of its counterclaims in the Justice Holdings Civil Action and Count III of its Complaint in the above-captioned matter (the "Cooper Land Civil



**Civil Action No. 21-C-129
Circuit Court of Raleigh County
Judge Robert A. Burnside**

Action”).¹ See GSVPOA’s *Rule 42(b) Motion to Transfer* attached hereto as Exhibit A. These claims clearly arise out of the same transaction or occurrence and are predicated upon the Uniform Common Interest Ownership Act, W. Va. Code § 36B-1-101, *et seq.* (“UCIOA”). GSVPOA initially sought referral of the Justice Holdings Civil Action to the business court division, but this Court denied that motion. A copy of that order is attached hereto as Exhibit B. In his reply in opposition to that motion, Judge Burnside argued that:

3. The issues raised in the Defendant's answer and counterclaims will require the application of general principles of law associated with a secured transaction and the impact of the Uniform Common Interest Ownership Act (UCIOA) (W. Va. Code §36B-1-101 *et seq.*) on those general principles.

4. Although the UCIOA is lengthy and detailed, the analysis thereof requires only the application of the ordinary principles of statutory construction and it does not require the deployment of special skill, expertise, or technological knowledge that is outside the ordinary knowledge and understanding of a circuit judge.

5. The issues presented in the pending action do not “present commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles” as required by *Trial Court Rule 29.04(2)*.

See Exhibit C, Judge Burnside Reply in the Justice Holdings Civil Action, p. 3. In denying GSVPOA’s *Motion to Refer* the Justice Holdings Civil Action to the business court division, “the Chief Justice [] determined that this dispute does not require specialized treatment to improve the expectation of a fair and reasonable resolution, and, therefore, this case does not meet the criteria

¹ Rather, Cooper Land highlighted the claims related to the Working Capital Loan asserted against both Cooper Land and Justice Holdings in this matter. Motion, p. 4 (“The Complaint filed by the GSVPOA seeks an accounting from CLD and Justice Holdings of all money advanced and paid on the operating and capital expense loan (“Capital Expense Loan”) from the date of inception in 2001. Notably, the Justice Holdings Civil Action also involved another loan, the Infrastructure Loan. The presence of loan-related claim did not render that matter.

for referral under Rule 29.04 of the West Virginia Trial Court Rules.” Exhibit B. The reasoning set forth in Judge Burnside’s Reply and this Court’s ruling in the Justice Holdings Civil Action apply with equal force and clarity to Cooper Land’s *Motion* in this matter. Further, the doctrine of *stare decisis* mandates that this Court deny Cooper Land’s motion for the same reasons it denied GSVPOA’s motion in the Justice Holdings Civil Action.

As set forth below, there have been four civil actions filed in the past two years involving the creation of GSV, its management and operation as well as Cooper Land sale of its rights in the development to Justice Holdings. However, the issues raised in this case and the Justice Holdings Civil Action are predicated upon a core of common aggregate operative facts that stem from the period of declarant control of GSV, first by Cooper Land and later by Justice Holdings, during which the developer/declarant attempted to evade assessment liability under W. Va. Code § 36B-2-107 (Allocation of allocated interests) and W. Va. Code § 36B-3-115 (Assessments for common expenses) by exempting developer-owned lots or units from assessment under the *Declaration of Covenants and Restrictions Glade Springs Village, West Virginia* (the “Declaration”) in contravention of UCIOA. Judge Poling was originally assigned to preside of this action. However, he voluntarily recused himself from this matter and it has now been assigned to Judge Burnside. See Exhibit D, *Voluntary Recusal Order and Order Transferring Case*. In recognition of the common aggregate operative facts in each case, Judge Poling noted that he had voluntarily recused himself in the Justice Holding Civil Action and that because this matter involves “similar parties and similar issues as those contained in Civil Action No. 19-C-481” he likewise recused himself in this matter. As such, this matter has been referred to Judge Burnside.

Related Actions

As set forth below, three of four civil actions other related to the creation, management, and operation of GSV are pending in the Circuit Court of Raleigh County and one is pending in the United States District Court for the Southern District of West Virginia, Beckley Division:

1. *Glade Springs Village Property Owners Association, Inc. v. EMCO Glade Springs Hospitality, LLC, et al*, Civil Action No. 19-C-357 (Cir. Ct. Raleigh Cty., Business Court Division) (Dent, J., Presiding; Lorensen, J., Resolution) (the “GSR Civil Action”);
2. *Justice Holdings LLC v. Glade Springs Village Property Owners Association, Inc.*, Civil Action No. 19-C-481 (Cir. Ct. Raleigh Cty.) (Burnside, J.);
3. *Justice Holdings LLC v. Cooper Land Development, Inc.*, Civil Action No. 5:20-cv-687 (S.D. W. Va.) (Volk, J.) (the “Federal Civil Action”); and
4. *Glade Springs Village Properties Owners Association, Inc. v. Cooper Land and Justice Holdings LLC*, Civil Action No. CC-41-2021-C-129 (Cir. Ct. Raleigh Cty.) (Judge Burnside).

Procedural Background of this Action

The procedural background of this action is as follows:²

1. On April 30, 2021, GSVPOA filed its *Complaint* against Cooper Land and Justice Holdings, LLC (“Justice Holdings”). A Copy of the *Complaint* is attached hereto as Exhibit F (the “Cooper Land Complaint”).
2. On May 5, 2021, Cooper Land was served with a copy of the Complaint and summons through the West Virginia Secretary of State.
3. On May 27, 2021, Justice Holdings was served with a copy of the Complaint and summons through the West Virginia Secretary of State.

² An updated docket sheet is attached hereto as Exhibit E.

4. On June 4, 2021, Cooper Land filed a *Motion to Dismiss the Complaint* under W. Va. R. Civ. P. 12(b)(1),(6) with an accompanying *Memorandum of Law*. A copy is attached hereto as Exhibit G.
5. Also on June 4, 2021, Cooper Land filed a *Motion to Refer Action to the Business Court Division* with the Supreme Court of Appeals of West Virginia, attached hereto as Exhibit H.
6. On June 7, 2021, the Supreme Court of Appeals of West Virginia issued an Administrative Order directing GSVPOA to file its reply memorandum to the *Motion to Refer Action to the Business Court Division* by June 24, 2021.
7. On June 17, 2021, GSVPOA filed its *Notice of Filing* related to its *Rule 42(b) Motion to Transfer and Memorandum of Law* in the Action Before Judge Burnside to transfer this action to his Court (the “Transfer Motion”). A copy is attached hereto as Exhibit I.
8. On June 23, 2021, Judge Poling entered a *Voluntary Recusal Order and Order Transferring Case*. A copy is attached hereto as Exhibit J.
9. Also on June 23, 2021, counsel for GSVPOA filed a letter with Judge Burnside in regard to the *Motion to Refer Action to the Business Court Division*, which is attached hereto as Exhibit K.
10. Finally on June 23, 2021, Judge Burnside issued a memorandum advising counsel “it is my general policy not to reply to motions to refer to Business Court...” and that he “made an exception to that general practice with respect to the motion to refer Civil Action No. 19-C-481 because, as reflected in [his] motion for to file a late reply to that motion, that action had been very active during the time the motion to refer was pending.” A copy of Memorandum is attached here to as Exhibit L.

***Relevant Procedural Background of Related State Court Actions
In Prior Motions to Refer to Business Court***

The relevant procedural background of the related state court actions in prior *Motions to Refer to Business Court Division* is as follows:

*The GSR Civil Action*³

1. On August 14, 2019, GSVPOA filed its *Complaint* in the GSR Civil Action. The *Complaint* has subsequently been amended twice (on August 28, 2019, and April 30, 2021, respectively) and the Second Amended Complaint is attached hereto as Exhibit N.
2. On October 4, 2019, Defendants EMCO Glade Springs Hospitality, LLC (“EMCO”) and GSR, LLC (“GSR”) filed their Answer to the Amended Complaint and Counterclaims. EMCO and GSR have amended their Counterclaims most recently on June 9, 2021, attached hereto as Exhibits O and P.
3. On October 9, 2019, Defendants Coppoolse, Miller, and Butler filed their Answer to the Amended Complaint, attached hereto as Exhibit Q.
4. On October 15, 2019, GSVPOA filed its *Motion to Refer to Business Court Division* in the Action before Judge Dent, attached hereto as Exhibit R.
5. On October 31, 2019, Defendants Coppoolse, Miller, and Butler filed their *Reply in Opposition to Plaintiff’s Motion to Refer to Business Court*, attached hereto as Exhibit S.
6. On November 4, 2019, Defendants EMCO Glade Springs Hospitality, LLC and GSR, LLC filed their *Reply in Opposition to Plaintiff’s Motion to Refer to Business Court*, attached hereto as Exhibit T.
7. On November 7, 2019, this Court granted GSVPOA’s *Motion to Refer to Business Court Division*. The Administrative Order is attached hereto as Exhibit U.

³ A docket sheet is attached hereto as Exhibit M.

*The Justice Holdings Civil Action*⁴

1. On November 6, 2019, Justice Holdings filed its *Complaint* against GSVPOA in the Action Before Judge Burnside. Justice Holdings subsequently filed an Amended Complaint on August 21, 2020, attached hereto as Exhibit W.
2. On April 8, 2020, GSVPOA filed its Answer and Counterclaims. GSVPOA has subsequently twice Amended its Answer and Counterclaims, with the latest filed on April 22, 2020, attached hereto as Exhibit X.
3. On January 2, 2020, Judge Poling *sua sponte* filed his *Voluntary Recusal Order and Order Transferring Case*, in which he recused himself and transferred the case to Judge Burnside. See Exhibit D.
4. On February 19, 2020, GSVPOA filed its *Motion to Refer to Business Court Division*, attached hereto as Exhibit Y.
5. On March 3, 2020, Justice Holdings filed its *Reply Memorandum in opposition to Defendant's Motion to Refer to the Business Court Division*. A copy is attached hereto as Exhibit Z.
6. On June 1, 2020, Judge Burnside filed his *Motion of the Affected Judge for Leave to File a Late Reply to the Defendant's Motion to Refer this Action to the West Virginia Business Court and Reply of the Affected Judge to the Motion to Refer this Action to the West Virginia Business Court* (“Judge Burnside’s Reply”). See Exhibit C.
7. On July 8, 2020, this Court issued its Administrative Order denying GSVPOA’s *Motion to Refer to Business Court Division* and the matter remained within Judge Burnside’s Court. See Exhibit B.

⁴ A docket sheet is attached hereto as Exhibit V.

8. On June 17, 2021, GSVPOA filed its *Transfer Motion*. See Exhibit A.
9. On June 23, 2021, Judge Poling *sua sponte* filed his *Voluntary Recusal Order and Order Transferring Case*, in which he recused himself and transferred the Cooper Land Civil Action to Judge Burnside. See Exhibit J.

Argument

A. This Court should be consistent and deny Cooper Land’s Motion because the proper forum to hear this action is before Judge Burnside under W. Va. R. Civ. P. 42(b).

As set forth in GSVPOA’s *Rule 42(b) Motion to Transfer and Memorandum of Law*, Judge Burnside’s Court is the proper forum in which this action should be heard and adjudicated. W. Va. R. Civ. P. 42(b). The rationale underlying Rule 42(b) is to “avoid unnecessary cost or delay and [] avoid the necessity of two trials instead of one, therefore avoiding the possibility of judgments in direct conflict.” *State ex rel. Bank of Ripley v. Thompson*, 149 W. Va. 183, 189, 139 S.E.2d 267, 271 (1964) (citing W. Va. R. Civ. P. 42(b); *Hoffman v. Stuart*, 188 Va. 785, 51 S.E.2d 239 (1949)). “Litigating these cases in one circuit court in front of the same judge will help to ensure that none of the parties is prejudiced by the potential of duplication of efforts and possible inconsistent results” *Stern v. Chemtall*, 217 W. Va. 329, 339, 617 S.E.2d 876, 886 (2005) (per curiam) (finding that “[w]e made the determination to send the *Pettry* litigation to the Circuit Court of Marshall County based solely upon the fact that the *Stern* litigation is much further along with discovery and therefore, the Circuit Court of Marshall County should necessarily be more familiar with the litigants and the surrounding issues.” *Stern*, 217 W. Va. at 339).⁵

In short, the reason that these actions should be transferred to Judge Burnside’s court are that GSVPOA’s claims in this action and its counterclaims in the Justice Holdings Civil Action

⁵ “Even so, we believe that the issues are similar enough that many of the same depositions, requests for admissions, interrogatories, and various other discovery requests will be identical in nature.” *Stern*, 217 W. Va. at 336.

arise out of the same transaction or occurrence, namely, the period of Declarant control of GSVPOA, first under Cooper Land and then its successor Justice Holdings. This Court will notice the similarity in parties, factual issues, and claims asserted by GSVPOA in this action and in the Justice Holdings Civil Action. *See e.g., Complaint at Count III (Exhibit W); GSVPOA's Second Amended Answer, Affirmative Defenses, and Counterclaims at Count VII (Exhibit X).* As a result, discovery, motion practice and trial preparation will be duplicative if this action is transferred to the Business Court Division. Simply put, this civil action and the Justice Holdings Civil Action should be before the same judge, Judge Burnside.

B. This case does not require specialized treatment and does not meet the criteria under Rule 29.04 of the West Virginia Trial Court Rules and This Court should be consistent with its prior Administrative Order in the Justice Holdings Civil Action denying referral to the business court division.

Based on the quote *supra* from Judge Burnside's Reply to this Court in the Justice Holdings Civil Action, this Court should be consistent and apply the same reasoning due to the core set of common operative facts in the two cases. As Judge Burnside stated in his Reply:

3. The issues raised in the Defendant's answer and counterclaims will require the application of general principles of law associated with a secured transaction and the impact of the Uniform Common Interest Ownership Act (UCIOA) (W. Va. Code §36B-1-101 *et seq.*) on those general principles.

4. Although the UCIOA is lengthy and detailed, the analysis thereof requires only the application of the ordinary principles of statutory construction and it does not require the deployment of special skill, expertise, or technological knowledge that is outside the ordinary knowledge and understanding of a circuit judge.

5. The issues presented in the pending action do not "present commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles" as required by *Trial Court Rule 29.04(2)*.

See Exhibit C, Judge Burnside Reply at p. 3.

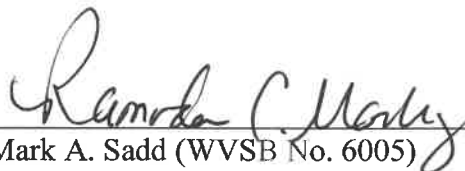
Further, Judge Burnside is already familiar with UCIOA and the issues presented by the claims between GSVPOA and Justice Holdings related to developer assessment liability. Therefore, this case should be adjudicated by Judge Burnside because “[W. Va. R. Civ. P. 42(b) is] designed to accomplish one goal, namely provide for a system which will give consistent, economical, and efficient relief.” Louis J. Palmer, Jr. and Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure*, at 1098 (5th Ed. 2017) (citations in footnote omitted). Given that the factual circumstances revolve around the same transaction or occurrence, and the claims of GSVPOA in the Justice Holdings Civil Action and this action are similar (if not mirroring in some instances), this Court should be consistent with its prior Administrative Order and deny Cooper Land’s Motion.

Conclusion

WHEREFORE, for the reasons stated herein, GSVPOA requests that this Court deny Cooper Land’s *Motion*.

GLADE SPRINGS VILLAGE
PROPERTY OWNERS ASSOCIATION, INC.

By Counsel


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IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

**GLADE SPRINGS VILLAGE
PROPERTY OWNERS ASSOCIATION, INC.,**

Plaintiff,

v.

**Civil Action No. 21-C-129
The Honorable Darl W. Poling**

**COOPER LAND DEVELOPMENT, INC.,
an Arkansas corporation, and
JUSTICE HOLDINGS LLC,
a West Virginia limited liability company,**

Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing **GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC'S REPLY MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO REFER TO BUSINESS COURT** was served this 24th day of June, 2021, *via* electronically through WV E-Filing and/or U.S. mail to:

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Ramonda C. Marling

Hoffman v. Stuart

Supreme Court of Virginia

January 10, 1949

Record No. 3397

Reporter

188 Va. 785 *; 51 S.E.2d 239 **; 1949 Va. LEXIS 247 ***; 6 A.L.R.2d 247

MINNIE E. HOFFMAN, ADMRX., ET AL. v. W. B. STUART, ET ALS

Prior History: [***1] Error to a judgment of the Circuit Court of Prince William county. Hon. Paul E. Brown, judge presiding.

Disposition: *Reversed and remanded.*

Case Summary

Procedural Posture

Defendant estate administrators sought review of the decision of the Circuit Court of Prince William County (Virginia), which granted plaintiff automobile owners' motion to dismiss the estate administrators' negligence cross-claim in the automobile owners' action to recover damages for property damages.

Overview

The decedent was involved in a collision with an automobile that resulted in his death and damage to the vehicle owned by the automobile owners. The automobile owners filed an action for damages to the automobile in the trial justice court. The estate administrators filed a motion to remove the case to the circuit court, which was granted, and then filed a cross-claim for negligence. The circuit court granted the automobile owners' motion to dismiss the cross-claim because it exceeded the jurisdiction amount of the trial justice and that Va. Code Ann. § 6097a did not permit such a cross-claim to be filed by the administrators. On appeal, the court reversed and remanded the trial court's decision. The court held that the estate administrators had never invoked the jurisdiction of the trial justice court, thus there was no subject limitation on the jurisdiction of the circuit court. The court also held that § 6097a was designed to avoid multiple actions and to enable parties to tort action to settle in one proceeding

their controversy that stemmed from the same transaction and evidence. Therefore, the court held that the estate administrators' cross-claim was improperly dismissed.

Outcome

The court reversed the trial court's dismissal of the estate administrators' negligence cross claim in the property owners' action for property damages.

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Subject Matter
Jurisdiction > Amount in Controversy

Civil
Procedure > ... > Pleadings > Crossclaims > General
Overview

HNI **Subject Matter Jurisdiction, Amount in Controversy**

Va. Code Ann. § 6097a provides: in any action at law or warrant for a small claim for a tort, a defendant may file in writing a cross-claim averring that the plaintiff is liable for a tort to the defendant for damages arising out of the same transaction. It further provides that such cross-claim shall be tried at the same time and as a part of the original case, and the defendant allowed to recover damages against the plaintiff on such cross-claim where the law and the evidence make it proper; but that no such cross-claim shall be filed before a justice where the amount claimed exceeds the jurisdiction of the justice; and that the pleadings to the cross-claim shall be substantially as in cases brought by notice of motion.

Torts > Wrongful Death & Survival
Actions > General Overview

[HN2](#) [📄] **Torts, Wrongful Death & Survival Actions**

Va. Code. Ann. §§ 5786 through 5790 provide, in substance, for a right of action for wrongful death; that it shall be brought by the personal representative of the deceased person; that the amount recovered shall be paid to certain relatives of the deceased, and shall be free of the debts of the decedent; but if there are no such relatives, then the recovery shall be assets in the hands of the personal representative to be disposed of according to law.

Torts > Wrongful Death & Survival
Actions > General Overview

[HN3](#) [📄] **Torts, Wrongful Death & Survival Actions**

Where the action brought by the injured party in his lifetime is revived, in the name of his administrator, after his death, or the action is brought under the statute after his death, the issue in either case is the same, the right of recovery resting upon the same state of facts, namely, the injuries resulting in death being caused by the wrongful act, neglect or default of the defendant.

Civil
Procedure > ... > Pleadings > Crossclaims > General Overview

Torts > ... > Defenses > Comparative Fault > General Overview

[HN4](#) [📄] **Pleadings, Crossclaims**

Va. Code. Ann. § 6097a provides that on a claim for damages for a tort, a defendant may assert that the tort was committed against him, not by him, and that instead of the plaintiff being entitled to damage, he, the defendant, is the one who is entitled to damage. The issue is, therefore, who was negligent. If the trouble was caused solely by the negligence of the defendant, the plaintiff recovers. If it was caused solely by the

negligence of the plaintiff, the defendant recovers. If both were at fault, neither recovers. There can be no balancing of fault, no offsetting of the damage done by one against the damage done by the other.

Estate, Gift & Trust Law > ... > Probate > Personal Representatives > General Overview

[HN5](#) [📄] **Probate, Personal Representatives**

The estate of a decedent to be protected, within the meaning Va. Code. Ann. § 6351, is any claim or right which a personal representative as such must protect or defend because this is his bounden duty and because he is appointed for that very purpose.

Torts > Wrongful Death & Survival
Actions > General Overview

[HN6](#) [📄] **Torts, Wrongful Death & Survival Actions**

Va. Code. Ann. § 5790 provides that where an action is brought by the person injured for damage caused by the wrongful act of another, and the person injured dies pending the action, the action shall not abate but may be revived in the name of his personal representative.

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Governments > Courts > Judges

Governments > Courts > Justice Courts

[HN7](#) [📄] **Appeals, Appellate Jurisdiction**

An appeal from the trial justice is a continuation of the original case, and on appeal the warrant cannot be amended to make a case of which the trial justice would not have jurisdiction. If this were not so, many actions might be brought in the trial justice court framed to give the appearance of jurisdiction, but relying on an appeal to permit the real cause to be stated and tried.

Civil Procedure > ... > Removal > Procedural

Matters > General Overview

Governments > Courts > Justice Courts

HNS [📌] Removal, Procedural Matters

Va. Code. Ann. § 4987f-1 (1942) provides that upon removal of the case the proceeding in the circuit or city court shall conform to Va. Code. Ann. § 6046, which is the notice of motion for judgment statute. Such notice of motion is an action at law referred to in Va. Code. Ann. § 6097a. After removal the defendants may proceed as if plaintiffs had filed a notice of motion against them in the circuit court.

Headnotes/Summary

Headnotes

1. DEATH BY WRONGFUL ACT -- *Right to Recover -- Right May Be Asserted as Cross-claim under Code Section 6097a -- Case at Bar.* -- The instant case was an action for damages growing out of an automobile collision in which defendants, who were administrators of the estate of a decedent killed in the collision, filed their cross-claim asking damages for the wrongful death of their decedent. Section 6097a of the Code of 1942 (Michie) authorizes the filing of cross-claims in actions at law for a tort. Plaintiffs moved to dismiss the cross-claim, on the ground that defendants could not maintain it under section 6097a, contending that their cross-claim was not asserted by them in the same right in which they were sued, because they were sued by plaintiffs as representatives of the estate of decedent, whereas in their cross-claim for his death they were acting as representatives of the beneficiaries named in the death by wrongful act statutes (sections 5786-5790 of the Code of 1942 (Michie)), and that these statutes created a new and distinct [***2] cause of action. The trial court sustained this motion.

Held: Error. Under the death by wrongful act statutes it was the cause of action of the injured person that the personal representative prosecuted. Since the cause of action was the same, and the right of either party to recover rested upon the same state of facts, there was no reason why defendants should not be allowed to file their cross-claim and have the rights of the parties determined in the same suit.

2. DEATH BY WRONGFUL ACT -- *Right to Recover -- Right May Be Asserted as Cross -- Claim under Code Section 6097a -- Case at Bar.* -- The instant case was an action for damages growing out of an automobile collision in which defendants, who were administrators of the estate of a decedent killed in the collision, filed their cross-claim asking damages for the wrongful death of their decedent negligently caused by plaintiffs' agent. Section 6097a of the Code of 1942 (Michie) authorizes the filing of cross-claims in actions at law for a tort. Plaintiffs moved to dismiss the cross-claim, on the ground that defendants could not maintain it under section 6097a, contending that their cross-claim was not asserted [***3] by them in the same right in which they were sued, because they were sued by plaintiffs as representatives of the estate of decedent, whereas in their cross-claim for his death they were acting as representatives of the beneficiaries named in the death by wrongful act statutes, and that a recovery on the cross-claim would not become assets of decedent's estate. The trial court sustained this motion.

Held: Error. Defendants were nominal parties and the fact that a recovery on the cross-claim might be distributed differently from ordinary assets was not material. If plaintiffs recovered, they would have their judgment to be collected in the regular way. If defendants recovered, the court would follow the matter up and direct what they should do with the money. The question of who would ultimately benefit should not affect the right to maintain the cross-claim, because it did not affect the issue of negligence to be decided.

3. PLEADING -- *Cross-Claims in Actions of Tort -- Construction of Code Section 6097a.* -- The cross-claim provided for by section 6097a of the Code of 1942 (Michie) is not like a plea of setoff in a contract action. In the latter the demands of [***4] the parties must be in the same right, because defendant's claim is used as a credit against plaintiff's claim, and they must be of such nature that there can be an accounting and it can be ascertained who owes the more. That is not the situation with respect to the cross-claim under section 6097a. That section provides that on a claim for damages for a tort, a defendant may assert that the tort was committed against him, not by him, and that instead of the plaintiff being entitled to damage, he, the defendant, is the one who is entitled to damage. The issue is, therefore, who was negligent? If the trouble

was caused solely by the negligence of defendant, plaintiff recovers. If it was caused solely by the negligence of plaintiff, defendant recovers. If both were at fault, neither recovers. There can be no balancing of fault, no offsetting of the damage done by one against the damage done by the other. What the statute aims at is that it may be determined in any action for tort whose was the fault and the matter be ended in one trial.

4. DEATH BY WRONGFUL ACT -- *Right to Recover -- Right May Be Asserted as Cross-Claim under Code Section 6097a -- Case at Bar.* -- The instant [***5] case was an action for damages growing out of an automobile collision in which defendants, who were administrators of the estate of a decedent killed in the collision, filed their cross-claim asking damages for the wrongful death of their decedent negligently cause by plaintiffs' agent. Section 6097a of the Code of 1942 (Michie) authorizes the filing of cross-claims in actions at law for a tort. Section 5790 of the Code of 1942 (Michie) provides that where an action is brought by the person injured for damage caused by the wrongful act of another, and the person injured dies pending the action, the action shall not abate but may be revived in the name of his personal representative. Plaintiffs moved to dismiss the cross-claim, on the ground that defendants could not maintain it under section 6097a, contending that their cross-claim was not asserted by them in the same right in which they were sued, because they were sued by plaintiffs as representatives of the estate of decedent, whereas in their cross-claim for his death they were acting as representatives of the beneficiaries named in the death by wrongful act statutes (sections 5786-5790 of the Code of 1942 (Michie)). The trial [***6] court sustained this motion.

Held: Error. Section 6097a provided that in any action at law for a tort a defendant might file a cross-claim against a plaintiff for damages arising out of the same transaction. These administrators were the defendants whom plaintiffs sued. They were also the persons required to be plaintiffs in any action for the wrongful death of their decedent. In both cases they represented their decedent. If plaintiffs had sued decedent while alive, certainly he could have filed a cross-claim under section 6097a, and if he had done so and then died, his administrators could have prosecuted his cross-claim under section 5790. This being so, they could also prosecute an original cross-claim, because section 6097a

was designed to avoid a multiplicity of suits and to enable parties to a tort action to settle in one proceeding their controversy growing out of the same transaction and determinable by the same evidence.

5. PLEADING -- *Definition and General Consideration -- Object of Rules of Pleading.* -- The object of rules of pleading should be to bring the case down to the real issues and to have a decision of the dispute according to the right and [***7] justice of the matter, without circuitous approach and needless delay.

6. JUSTICES -- *Jurisdiction -- Amount of Cross-Claim Not Limited After Removal of Cause to Court of General Jurisdiction -- Case at Bar.* -- The instant case was an action instituted in a trial justice court for damages of \$619 growing out of an automobile collision. Defendants, who were administrators of the estate of a decedent killed in the collision, removed the cause to the circuit court and there filed their cross-claim in plaintiffs' action, asking damages of \$15,000 for the wrongful death of their decedent. Section 4987f-1 of the Code of 1942 (Michie) provides that upon removal of a cause the proceeding in the circuit court shall conform to section 6046 of the Code of 1942 (Michie) governing notices of motion. The trial court sustained plaintiff's motion to dismiss the cross-claim on the ground that section 6097a of the Code of 1942 (Michie), authorizing cross-claims in any action at law or warrant for a small claim for a tort, provides that no cross-claim authorized under that section shall be filed before a justice where the amount claimed exceeds the jurisdiction of the justice.

Held: [***8] Error. A notice of motion was an action at law referred to in section 6097a, and after removal of a cause from the trial justice court under section 4987f-1 defendants might proceed as if plaintiffs had filed a notice of motion against them in the circuit court. Defendants had not chosen the trial justice court as the tribunal in which to assert their claim, but had removed the case to the circuit court to assert there a cross-claim which section 6097a expressly prohibited them from asserting in the trial justice court. Not having invoked the jurisdiction of the trial justice court, their claim was not subject to the limitation on the jurisdiction of that court.

Syllabus

The opinion states the case.

Counsel: *H. Thornton Davies*, for the plaintiffs in error.

Flournoy L. Largent, Jr., J. Sloan Kuykendall and Dabney W. Watts, for the defendants in error.

Judges: Present, Gregory, Eggleston, Spratley, Buchanan, Staples and Miller, JJ.

Opinion by: BUCHANAN

Opinion

[*788] [**241] BUCHANAN, J., delivered the opinion of the court.

In the trial justice court of Prince William county, W. B. Stuart Company, herein called plaintiffs, filed a notice of motion for judgment against Charles [***9] Berry and the administratrix and administrator of the estate of Frank Lee Hoffman, deceased, claiming \$619 as damages to plaintiffs' truck. The notice alleged that Hoffman was driving an automobile belonging to Berry, and at the intersection of Routes 234 and 621 negligently collided with the truck, owned by the plaintiffs and driven by Ball, causing the damage claimed. Hoffman was killed in the collision.


On motion of the defendants this action was removed to the circuit court, where Berry demurred to the notice and was dismissed as a defendant, which ruling is not here questioned.

On June 16, 1947, in the circuit court, Hoffman's administrators (as they will be herein called) filed their cross-claim in the plaintiffs' action, asking damages from the plaintiffs in the sum of \$15,000 for the death of Hoffman, resulting from the collision, which they alleged was caused by the negligence of plaintiffs' agent, Ball. An order of June 16, filing the cross-claim, noted a plea of the general issue thereto by the plaintiffs and the case was continued.

[*789] Thereafter, on October 14, over objection of the administrators, an order was entered stating that the recital in the [***10] June 16 order that the plaintiffs

filed a plea of the general issue to the cross-claim was incorrect; that such plea was not filed, but that counsel for plaintiffs had requested the continuance which was then granted.

On October 22, the day set for trial, plaintiffs moved to dismiss the cross-claim of the administrators on the grounds, (1) that no cross-claim could be filed for an amount exceeding the jurisdiction of the trial justice (\$1,000); and (2) section 6097a of the Code did not permit such a cross-claim to be filed by these administrators. The court sustained the motion on both grounds, dismissed the cross-claim and continued the plaintiffs' action. The error assigned is to the action of the court in dismissing the cross-claim. We will discuss the grounds for the motion in inverse order.

HNI[] Section 6097a of the Code (Michie, 1942) (Acts 1926, ch. 331, p. 598; Acts 1928, ch. 249, p. 755; Acts 1932, ch. 29, p. 23) provides that "in any action at law or warrant for a small claim for a tort, a defendant may file in writing a cross-claim averring that the plaintiff is liable for a tort to the defendant for damages arising out of the same transaction. * * *

It further provides [***11] that such cross-claim shall be tried at the same time and as a part of the original case, and the defendant allowed to recover damages against the plaintiff on such cross-claim where the law and the evidence make it proper; but that no such cross-claim shall be filed before a justice where the amount claimed exceeds the jurisdiction of the justice; and that the pleadings to the cross-claim shall be substantially as in cases brought by notice of motion. There are some other provisions not necessary to be noted.

The administrators contend that the plaintiffs' motion to dismiss the cross-claim came too late after the plaintiffs had made a general appearance thereto. In view of our conclusion on the merits of the motion it is unnecessary to discuss that point.

[*790] The plaintiffs argue that the administrators cannot maintain their cross-claim under section 6097a because they were sued by the plaintiffs as representatives of the estate of Hoffman, whereas in their cross-claim for the death of Hoffman they were acting in a different capacity as representatives of the beneficiaries named in the death by wrongful act statutes. (Code, Michie, 1942, secs. 5786-90).

[**242] [***12] HN2 [†] These statutes provide, in substance, for a right of action for wrongful death; that it shall be brought by the personal representative of the deceased person; that the amount recovered shall be paid to certain relatives of the deceased, and shall be free of the debts of the decedent; but if there are no such relatives, then the recovery shall be assets in the hands of the personal representative to be disposed of according to law. (Plaintiffs' brief states that Hoffman was survived by a widow and children. The record does not show, but we will assume that to be the case.)

Plaintiffs assert that these statutes, under which the cross-claim is filed, create a new and distinct *cause* of action; that a recovery on the cross-claim would not become assets of decedent's estate, and that, therefore, the cross-claim to the plaintiffs' action is not asserted by the administrators in the same right in which they are sued. They rely on Anderson v. Hygeia Hotel Co., 92 Va. 687, 24 S.E. 269; Richmond, etc., R. Co. v. Martin, 102 Va. 201, 45 S.E. 894 and Virginia Iron, etc., Co. v. Odle, 128 Va. 280, 309, 105 S.E. 107, as supporting their position.

The question [***13] in Anderson v. Hygeia Hotel Co., *supra*, was whether an action for personal injuries could be brought within five years, on the theory that the death by wrongful act statutes caused the right of action to survive. It was held that was a mistaken view; that the purpose of the statutes was to provide for the case of an injured person who had a good cause of action but died from the injuries before recovering damages; but that it was not intended to continue or cause to survive his *right* of action "but to substitute for it and confer upon his personal representative a new and original *right* of action." (Emphasis added). 92 Va. at p. 691, 24 S.E. at p. 271.

[*791] [1] It is made plain in the later cases of Brammer v. Norfolk, etc., R. Co., 107 Va. 206, 57 S.E. 593; Virginia Elec., etc., Co. v. Decatur, 173 Va. 153, 3 S.E.2d 172 (dissenting opinion 4 S.E.2d 294); and Street v. Consumers Mining Corp., 185 Va. 561, 39 S.E.2d 271, 167 A.L.R. 886, that it is the *cause* of action of the injured person that the personal representative prosecutes.

"* * * The cause of action of the injured party, while alive, is the same cause of action [***14] that passes to

the personal representative. It is thus seen that the right of the personal representative to recover for the death of his decedent stands upon no higher ground than that occupied by the injured party while living. * * *" Virginia Elec., etc., Co. v. Decatur, *supra*, 173 Va. 153, 159, 3 S.E.2d 172, 175.

And in Street v. Consumers Mining Corp., *supra*, it is said that we have definitely held in the *Brammer* and *Decatur Cases* "that our statutes create no new cause of action; but simply continue, transmit, or substitute the right to sue which the decedent had until his death, the effect of which is to permit the personal representative to pick up the abated right of the deceased and prosecute it for the benefit of decedent's beneficiary. * * *" 185 Va. at p. 570, 39 S.E.2d at p. 274.

In Brammer v. Norfolk, etc., R. Co., *supra*, in holding that where the injured person sued in his lifetime and after his death the action was revived in the name of his administrator, and final adjudication made thereon, the personal representative could not then maintain a separate action for the death, it is said:

HN3 [†] "Where the action brought by the injured [***15] party in his lifetime is revived, in the name of his administrator, after his death, or the action is brought under the statute after his death, the issue in either case is the same, the right of recovery resting upon the same state of facts, namely, the injuries resulting in death being caused by the wrongful act, neglect or default of the defendant. * * *" 107 Va. at p. 210, 57 S.E. at p. 595.

Since the cause of action is the same, and the right of either [*792] party to recover rests upon the same state of facts, no solid reason appears why the administrators should not be allowed to file the cross-claim and have the rights of the parties determined in the same suit.

[2] It is true that if the administrators prevail, the recovery will not go to the estate [**243] of their decedent; but what difference will that make? If they were claiming damages for the automobile of their decedent, could it be doubted that they could file a cross-claim under section 6097a? The only difference in the situation would be that if they recover for the death of their intestate they would distribute the money as the court would direct under the wrongful death statutes, whereas, if [***16] they recovered for the

automobile, the money would go as provided by the statutes of descents and distribution. In either case the administrators are not claiming in their own right. They are nominal parties in both cases, and trustees in both for the beneficiaries of the amounts recovered. The fact that a recovery on the cross-claim might be distributed differently from ordinary assets is not material. That does not affect the issue to be tried, which is, who was negligent? If the plaintiffs recover, they have their judgment to be collected in the regular way. If the defendants recover, the court follows the matter up and directs what they shall do with the money. The question of who will ultimately benefit should not affect the right to maintain the cross-claim, because it does not affect the issue to be decided.

[3] The cross-claim provided for by section 6097a is not like a plea of setoff in a contract action. In the latter the demands of the parties must be in the same right. Burks Pl. & Pr., 3rd ed., sec. 224, p. 398. That is because the defendant's claim is used as a credit against the plaintiff's claim. Therefore, they must be of such nature that there can be [***17] an accounting and it can be ascertained who owes the more.

That is not the situation with respect to the cross-claim under section 6097a. HN4 [↑] That section provides that on a claim for damages for a tort, a defendant may assert that [*793] the tort was committed against him, not by him, and that instead of the plaintiff being entitled to damage, he, the defendant, is the one who is entitled to damage. The issue is, therefore, who was negligent? If the trouble was caused solely by the negligence of the defendant, the plaintiff recovers. If it was caused solely by the negligence of the plaintiff, the defendant recovers. If both were at fault, neither recovers. There can be no balancing of fault, no offsetting of the damage done by one against the damage done by the other.

What the statute aims at is that it may be determined in any action for tort whose was the fault and the matter be ended in one trial. If there must be two trials instead of one, it may turn out that on the trial of the plaintiffs' claim it will be determined that the administrators' decedent was at fault and the plaintiffs allowed to recover, and on the trial of the administrators' claim it may be determined [***18] that the plaintiffs were at fault and the administrators allowed to recover, -- a palpable miscarriage of justice.

[4, 5] Section 6097a provides that in *any* action at law for a tort a defendant may file a cross-claim against a plaintiff for damages arising out of the same transaction. These administrators are the defendants whom the plaintiffs sued. They are also the persons who are required to be plaintiffs in any action for the wrongful death of their decedent. In both cases they represent their decedent.

In Richardson v. Shank, 155 Va. 240, 245, 154 S.E. 542, 544, it was contended that because that case depended upon the death by wrongful act statute, the exception in section 6351 of the Code (Michie, 1942), relieving the estate of a decedent from giving an appeal bond, did not apply. The contention was rejected and it was said:

HN5 [↑] "The estate of a decedent to be protected, within the meaning of that statute (Code, section 6351), is any claim or right which a personal representative as such must protect or defend because this is his bounden duty and because he is appointed for that very purpose."

HN6 [↑] Section 5790 of the Code provides, *inter alia*, that where [***19] [*794] an action is brought by the person injured for damage caused by the wrongful act of another, and the person injured dies pending the action, the action shall not abate but may be revived in the name of his personal representative. If [**244] the plaintiffs here had sued Hoffman while alive, certainly Hoffman could have filed a cross-claim under section 6097a. If he had done so and then died, by the terms of the statute his administrators could have prosecuted his cross-claim. If they could prosecute a revived cross-claim it is not apparent why they could not also prosecute an original cross-claim. Brammer v. Norfolk, etc., R. Co., *supra*, 107 Va. at pp. 210, 214.

The object of rules of pleading should be to bring the case down to the real issues and to have a decision of the dispute according to the right and justice of the matter, without circuitous approach and needless delay.

Section 6097a was designed to avoid multiplicity of suits and to enable parties to a tort action to settle in one proceeding their controversy growing out of the same transaction and determinable by the same evidence. We can see no good reason, either theoretical or practical, [***20] for reading into the statute an exception that will exclude these administrators and others similarly

situated from its benefits.

[6] We conclude, also, that the administrators are not precluded from filing their cross-claim because the \$15,000 damages claimed in it exceeds the jurisdiction of the trial justice in whose court the plaintiffs' suit was brought.

In *Stacy v. Mullins*, 185 Va. 837, 40 S.E.2d 265, 168 A.L.R. 636, and *Addison v. Salver*, 185 Va. 644, 40 S.E.2d 260, we held that the jurisdiction of the appellate court on appeal from the trial justice is derivative, and if the justice had no jurisdiction the appellate court acquires none on appeal; that HN7 an appeal from the trial justice is a continuation of the original case, and on appeal the warrant cannot be amended to make a case of which the trial justice would not have jurisdiction. If this were not so, many actions might be brought in the trial justice court framed [*795] to give the appearance of jurisdiction, but relying on an appeal to permit the real cause to be stated and tried.

These considerations do not apply to a case removed from the trial justice court by the defendant. HN8 Section [***21] 4987f-1 of the Code (Michie, 1942) provides that upon removal of the case the proceeding in the circuit or city court shall conform to section 6046 of the Code. That is the notice of motion for judgment statute. Such notice of motion is an action at law referred to in section 6097a, *supra*. After removal the defendants may proceed as if plaintiffs had filed a notice of motion against them in the circuit court. The defendants have not chosen the trial justice as the tribunal in which to assert their claim, with the avowal implicit in that act that that court has jurisdiction of their claim. On the contrary, they have removed the case to the circuit court to assert there a cross-claim which section 6097a expressly prohibits them from asserting in the trial justice court. Not having invoked the jurisdiction of the trial justice court, their claim is not subject to the limitation on the jurisdiction of that court. There is no reason that we can think of why it should be.

It follows that the judgment of the trial court is reversed and the case remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

Dissent by: GREGORY

Dissent

GREGORY, J., dissenting.

[***22] I am unable to agree with the majority. The opinion applies what the majority think ought to be the law rather than what is the law. If we had in Virginia what is generally known as third party procedure such as is found in Federal rules of civil procedure the opinion would be correct, but until we adopt third party procedure I think it is error to permit those who are strangers to the original action to file cross-claims under section 6097a. I am informed that at the 1948 session of the General Assembly an effort was made to enact a statute authorizing third party practice but it failed.

[*796] The vital question is, can the statutory beneficiaries defined in Code, section 5788, through the personal representatives, file [**245] as a cross-claim to the action brought by the plaintiffs, a claim for the wrongful death of the decedent?

Code, section 6097a, provides, among other things, that "in any action at law or warrant for a small claim for a tort a defendant may file in writing a cross-claim averring that the plaintiff is liable for a tort to the defendant for damages arising out of the same transaction. * * *"

Code, section 5786, creates a right of action [***23] for the wrongful death of another, and section 5787 provides how and when the action may be brought and how the damages are awarded. Section 5788 designates the parties to whom the amount recovered shall be paid. The pertinent language of this section is as follows: "The verdict, if there be one, and the judgment of the court shall * * * specify the amount or the proportion to be received by each of the beneficiaries * * *. The amount recovered in any such action shall be paid to the personal representative * * * and shall be distributed by such personal representative to the surviving wife, husband, child, and grandchild of the decedent * * * and shall be free from all debts and liabilities of the deceased; but if there be no such wife, husband, child, * * * the amount so received shall be assets in the hands of the personal representative to be disposed of according to law * * *."

The statutory beneficiaries under section 5788 are the

real parties in interest to the present cross-claim. In the brief they are designated to the the widow and children of the deceased. This is not denied. For the purpose of instituting an action for the wrongful death of the decedent under section [***24] 5788, the personal representatives are only nominal parties. Here they had no interest in the cross-claim other than as trustees to distribute to the beneficiaries any recovery which might have been had on the cross-claim. They acted not in their general capacity as personal representatives but in a special capacity.

A mere reading of the statutes commonly designated as [*797] the "death by wrongful act" statutes (sections 5786 to 5790, inclusive), makes it plain that the General Assembly intended to create a new and distinct right of action for the benefit of those persons identified and named in section 5788, to compensate them for the loss sustained by them by reason of the death of their kinsman. The only service to be performed by the personal representative in such case is to bring the action in his name. He has no authority to administer any recovery which may be had and it does not become a part of the assets of the estate of the decedent as long as there are those whom the statute says are entitled to it.

In Anderson v. Hygeia Hotel Co., 92 Va. 687, 24 S.E. 269, the court analyzed the statutes thus: "The Act requires the suit to be brought by and in [***25] the name of the personal representative, but he by no means sues in his general right of personal representative. He sues wholly by virtue of the statute and in respect of a different right. His suit proceeds on different principles. He sues not for the benefit of the estate, but primarily and substantially as trustee for certain particular kindred of the deceased who are designated in the statute."

In Withrow v. Edwards, 181 Va. 344, 25 S.E.2d 343, Mr. Justice Hudgins, now Mr. Chief Justice Hudgins, at page 354, said: "It (the statute) creates the right of action, limits the amount recoverable, and names the classes of beneficiaries who may be entitled to share in the amount recovered. * * * It is clear that the primary object of the statute * * * is to compensate the family of the deceased and not to benefit his creditors. (Richmond, etc., R. Co. v. Martin, 102 Va. 201, 45 S.E. 894.) * * * If the distributees named in the statute of descents and distribution are different from the persons entitled to the proceeds named in Code, sec. 5788, the

provisions of the latter control." On the other hand, if the beneficiaries named in the statute are the same as those [***26] who take under the statute of descents and distribution, their claims under section 5788 are not to be mitigated by what they may inherit.

[*798] [**246] The wrongdoer is required to contribute only to those named in the statute. He is not required to contribute to the decedent's estate. Porter v. Virginia Elec., etc., Co., 183 Va. 108, 31 S.E.2d 337.

See also, Brammer v. Norfolk, etc., R. Co., 107 Va. 206, 57 S.E. 593, and Virginia Iron, etc., Co. v. Odle, 128 Va. 280, 105 S.E. 107.

I repeat that the real parties for whom the personal representatives act are those named in the statute and not those who are entitled to the estate. The statutory beneficiaries, not being parties defendant to the plaintiffs' action, have no right under Code, section 6097a, to file a cross-claim for damages for the wrongful death of the decedent. Our statute, section 6097a, does not contemplate a cross-claim for wrongful death in such case. It contemplates a cross-claim only by a defendant. The statutory beneficiaries are not and could not be defendants to the action of the plaintiffs with whom they have no connection and to whom they are not obligated.

[***27] If the situation were reversed and the personal representatives were bringing an action against a defendant for wrongful death, it is clear that such a defendant would have no right to file a cross-claim for property damage.

In 16 Am. Jur., Death, sec. 280, this rule is stated: "In an action to recover damages for a wrongful death caused by negligence, damages to property of the defendant alleged to have resulted from the negligence of the deceased may not be claimed as a set-off."

The original action brought by the plaintiffs against the personal representatives was against them in their general capacity as personal representatives of the estate. If the plaintiffs are successful, the damages they recover will be paid from the estate. The personal representatives, acting under the authority of sections 5786 to 5790, inclusive, are limited to bringing an action for the death of their decedent. If damages were recovered for the benefit of the widow and children on

the cross-claim they "shall be free from all debts" of the decedent. (Code, sec. 5788.)

[*799] It is argued by the majority that if there should be two trials instead of one the plaintiff might recover in [***28] one while the defendants recover in the other -- " a palpable miscarriage of justice". Like situations have arisen in Virginia. In the same accident where two are injured, one sometimes recovers while the other does not. See *Yorke v. Cottle*, 173 Va. 372, 4 S.E.2d 372, and *Yorke v. Maynard*, 173 Va. 183, 3 S.E.2d 366.

Such a result is evidence of just another weakness in the law or its administration which wise men in the past have been unable to correct.

I am not unmindful of the policy of the law, which is that the adjustment of a defendant's demand by cross-claim rather than by an independent suit is favored and encouraged as serving to avoid circuitry of action, inconvenience, and the consumption of the time of the court. The tendency of the law is toward a liberal extension of the right to file cross-claims, but here our statute, section 6097a, grants no right to the widow and children of Hoffman to file a cross-claim against the plaintiffs.

There is no privity or community of interest between the plaintiff in the original action and the statutory beneficiaries. They are strangers. Their cross-claim is not germane to the claim of the plaintiffs nor [***29] is it founded upon or connected with the subject matter of the plaintiffs' claim. A decision on the issues to be raised on the cross-claim is not essential to a complete and full determination of the cause of action alleged by the plaintiffs. Certainly if the cross-claim had not been filed a decision of the plaintiffs' claim could not have been successfully urged as *res adjudicata* to a new and subsequent action brought for the statutory beneficiaries for the wrongful death. However, the effect of the holding on the majority is to the contrary. So now in all original actions of this nature, if there is an action for wrongful death, it must be asserted in a cross-claim or it might be barred by a plea of *res adjudicata*.

A cross-claim or counter-claim was not known to the common law. It is exclusively [**247] statutory. It must be between [*800] the same parties and between them in the same capacity. 47 Am. Jur., Set-Off and Counterclaim, sec. 48.

"Parties in interest and not mere nominal parties are usually regarded by the courts in determining the question as to mutuality of demands and in equity or at law, the nominal difference of parties plaintiff, where [***30] the litigation, in reality, is for the sole use and benefit of a party not named in the complaint, but whose title is shown to be absolute, is not a bar which prevents the other party from maintaining his claim in set-off against the real party, and it has been held that set-off can be made only against the real party in interest." 47 Am.Jur., Set-Off and Counterclaim, sec. 50.

The real parties in interest in the cross-claim filed in this case are the widow and children of the deceased, but they are not parties defendant to the action of the plaintiffs and therefore, under section 6097a, are not entitled to file a cross-claim in these proceedings. For this reason I think the trial court was correct in its ruling that the cross-claim be dismissed.

EGGLESTON, J., concurs in this dissent.

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