

## RUSH v. CITY OF MAPLE HELGHTS

Supreme Court of Ohio, 1958.  
167 Ohio St. 221, 147 N.E.2d 599.

[Plaintiff and her motorcycle were both injured when she fell while riding on an unusually bumpy city street. In the first action, brought in Cleveland Municipal Court, plaintiff claimed that the city had maintained the street negligently. She sued for property damage and won a verdict for \$100. Defendant appealed without success through the Ohio Supreme Court. She then brought the current action in negligence in the Cuyahoga County Common Pleas Court, seeking recovery for personal injuries she sustained in the accident. She moved the trial court to set the trial solely on the issue of damages, and the trial court granted her motion.<sup>a</sup> After the trial, she recovered a verdict of \$12,000, and, after affirmance by the intermediate appellate court, the city sought review in the Ohio Supreme Court.]

HERBERT, JUDGE.

The eighth error assigned by the defendant is that “the trial and appellate courts committed error in permitting plaintiff to split her cause of action and to file a separate action in the Cleveland Municipal Court for her property damage and reduce same to judgment, and, thereafter, to proceed, in the Cuyahoga County Common Pleas Court, with a separate action for personal injuries, both claims arising out of a single accident.”

Other facets of this question have been before the court before.

In the case of *Vasu v. Kohlers, Inc.*, plaintiff operating an automobile came into collision with defendant's truck, in which collision he suffered personal injuries and also damage to his automobile. At the time of collision, plaintiff had coverage of a \$50 deductible collision policy on his automobile. The insurance company paid the plaintiff a sum covering the damage to his automobile, whereupon, in accordance with a provision of the policy, the plaintiff assigned to the insurer his claim for such damage.<sup>b</sup>

In February 1942, the insurance company commenced an action \* \* \* against Kohlers, Inc., the defendant in the reported case to recoup the money paid by it to cover the damage to Vasu's automobile.

In August 1942, Vasu commenced an action \* \* \* against Kohlers, Inc., to recover for personal injuries which he suffered in the same collision.

In March 1943, in the insurance company's action, a verdict was rendered in favor of the defendant, followed by judgment.

Two months later an amended answer was filed in the *Vasu* case, setting out as a bar to the action for recovery of damages for the personal injuries suffered by plaintiff the judgment rendered in favor of defendant in the insurance company case. A motion to strike that defense having been sustained, a second amended answer was filed omitting allegations as to such judgment. A trial of the action resulted in a verdict for plaintiff, upon which judgment was entered.

On appeal to the Court of Appeals the defendant claimed that the Court of Common Pleas erred in sustaining plaintiff's motion to strike from the defendant's answer the defense of *res judicata* claimed to have arisen by reason of the judgment in favor of the defendant in

---

<sup>a</sup> [EDITOR'S NOTE] If the original case had been in federal court, what sort of motion would Rush have made to achieve this result? Which rule applies to this situation?

<sup>b</sup> [EDITOR'S NOTE] This process is known as “subrogation,” and the insurance company is said to have been subrogated to the plaintiff's claim. In essence, the company bought the plaintiff's claim and acquired the right to sue in his place. This raises interesting problems concerning the constitutional and prudential doctrine of standing, which you will learn something about in Constitutional Law. Last year the Supreme Court muddied the area considerably with its split decision in *Sprint Communications, Co., L.P. v. APCC Services, Inc.*

the action by the insurance company.

The Court of Appeals reversed the judgment of the Court of Common Pleas and entered final judgment in favor of defendant.

This court reversed the judgment of the Court of Appeals, holding in the syllabus, in part, as follows:

1. If the owner of a single cause of action arising out of a single tortious act brings an action against his tort-feasor, he may have but one recovery; and, in case he fails to recover, he may not maintain a subsequent action on the same cause of action, even though he has failed to include his entire cause of action or elements of damage in his original action.

2. If an owner of a single cause of action has a recovery thereon, the cause of action is merged in the judgment; but if he fails to recover on his claimed cause of action and judgment goes against him, such judgment is *res judicata* and a bar to a second action on the same cause of action.

\* \* \*

4. Injuries to both person and property suffered by the same person as a result of the same wrongful act are infringements of different rights and give rise to distinct causes of action, with the result that the recovery or denial of recovery of compensation for damages to the property is no bar to an action subsequently prosecuted for the personal injury, unless by an adverse judgment in the first action issues are determined against the plaintiff which operate as an estoppel against him in the second action.

5. A right, question or fact in issue which was necessarily determined by a court of competent jurisdiction in a judgment which has become final, cannot be disputed or litigated in a subsequent suit between the same parties, although the subsequent suit is based upon a different cause of action.

6. Where an injury to person and to property through a single wrongful act causes a prior contract of indemnity and subrogation as to the injury to property, to come into operation for the benefit of the person injured, the indemnitor may prosecute a separate action against the party causing such injury for reimbursement for indemnity monies paid under such contract.

7. Parties in privity, in the sense that they are bound by a judgment, are those who acquired an interest in the subject matter after the beginning of the action or the rendition of the judgment; and if their title or interest attached before that fact, they are not bound unless made parties.

8. A grantor or assignor is not bound, as to third persons, by any judgment which such third persons may obtain against his grantee or assignee adjudicating the title to or claim for the interest transferred unless he participated in the action in such manner as to become, in effect, a party."

The foregoing syllabus is set forth at considerable length for subsequent reference herein. The first two paragraphs, although not pertinent there because of the fourth paragraph, are not only applicable but persuasive in our determination here. The sixth, seventh and eighth paragraphs deal with the factual situation which existed in the *Vasu* case, *i.e.*, a prior contract of indemnity and subrogation. Although, it was not actually necessary to the determination of the issue in that case, attention centers on the fourth paragraph.

The *Vasu* case was distinguished in the case of *Markota*, and explained in \* \* \* *Mansker* In the *Markota* case, plaintiffs commenced an action for damages alleged to have been caused by the defendant in constructing and installing a pipeline over the plaintiffs' premises. Plaintiffs and defendant had entered into a right of way agreement giving the defendant the

right to lay, maintain and operate the pipeline, the defendant agreeing to reimburse, indemnify and save plaintiffs harmless from and against any loss, damage or expense in connection therewith.

Plaintiffs' amended petition had seven causes of action, each for damages resulting from injuries to plaintiffs' property. Judgment was entered on the verdicts. The trial court granted a new trial on two causes of action, reducing the judgment by the amounts claimed in such causes of action. The question presented to this court was whether "the trial court erred in failing to grant a new trial *in toto*." This court reversed the judgment of the Court of Appeals which had affirmed the judgment of the Court of Common Pleas.

The pertinent portion of the syllabus in that case, decided by a unanimous court, is paragraph three: "Although a right of action may arise at each time that damage covered by a single indemnity agreement occurs, a plaintiff may maintain only one action to enforce any such rights existing at the time such action is commenced. (*Vasu v. Kohlers, Inc.*, distinguished.)"

The opinion in the *Markota* case states:

However, paragraphs four and six of the syllabus in *Vasu* do tend to support the defendant's contention that the separate causes of action, stated in the second amended petition in the instant case, were actually separate causes of action. It should be noted, however, that the plaintiff, in the *Vasu* case, had not been a party to the action brought by his indemnitor against the defendant; and, as indicated by paragraph eight of the syllabus in the *Vasu* case, the plaintiff was not, therefore, bound by the judgment against his indemnitor who had sought to recover from that defendant the portion of the plaintiff's claim assigned to such indemnitor.

The facts in the *Mansker* case are the converse of those in the instant case. In that case, Mansker commenced an action for personal injuries sustained by him in a collision of two motor vehicles and recovered a verdict and judgment, prevailing over the claim that he was estopped from prosecuting his action for the reason that the controlling issue of negligence therein had been fully litigated in a prior action between the same parties and had been determined by verdict and judgment adverse to him. *Cf.* paragraph five of the syllabus in the *Vasu* case.

Two separate actions involving the same collision had previously been commenced against Mansker and his employer, Summit Fast Freight, Inc., one by Dealers Transport Company and the other by its driver, Dow, Dealers' action being for property damage and Dow's for personal injuries. In the action initiated by Dealers, in addition to a cross-petition filed by Summit for damages to its fire truck, a cross-petition was filed by Mansker to recover for damage to his tractor, due to the collision. The two previous cases were tried together by agreement and resulted in verdicts in favor of Dealers and Dow, respectively, which verdicts \* \* \* were reduced to judgments, and the judgments subsequently paid.

In the *Mansker* case the issue of *res judicata* was raised. This court reversed the judgment of the Court of Appeals which had affirmed the judgment of the Court of Common Pleas, and entered judgment for Dealers.

As stated in the opinion, both lower courts relied on the fourth paragraph of the syllabus of the *Vasu* case and reached the conclusion that

such case is authority for the proposition that where the same person sustains injury to both his property and his person as a result of the same incident and due to the claimed negligence of another, an infringement of different rights occurs, so that he has two causes of action—one for damage to his property and the other for injury to his person; that, hence, where he prosecutes those causes of action separately, a verdict and judgment against him in one case do not preclude him from litigating the other, and his

success in the other case is not prevented by an adverse result in the first; and that in such a situation *res judicata* or estoppel may not be invoked by his opponent.

The syllabus states:

1. In a second action between the same parties on a claim, demand or cause of action different from that involved in the first action, a final judgment in the first action does not constitute a bar to the prosecution of the second, but does operate as an estoppel with regard to the relitigation of controlling points or questions actually determined in the first action. Paragraph four of the syllabus of *Vasu v. Kohlers, Inc.* explained.

2. The final adjudication of a material issue by a court of competent jurisdiction binds the parties in any subsequent proceeding between or among them, irrespective of a difference in forms or causes of action.”

Thus, the *Markota* and *Mansker* cases, distinguishing and explaining the *Vasu* case, have not changed the rule established in paragraph four of the syllabus of the latter case, holding that injuries to both person and property suffered by the same person as a result of the same wrongful act are infringements of different rights and give rise to distinct causes of action.

However, it is contended here that that rule is in conflict with the great weight of authority in this country and has caused vexatious litigation.

\* \* \*

Upon examination of decisions of courts of last resort, we find that the majority rule [that there is but a single cause of action for preclusion purposes when the plaintiff suffers both personal injury and property damage] is followed in the following cases in each of which the action was between the person suffering injury and the person committing the tort, and where insurers were not involved, as in the case here.

\* \* \*

The reasoning behind the majority rule seems to be well stated in the case of *Mobile & Ohio Rd. Co. v. Matthews* as follows:

The negligent action of the plaintiff in error constituted but one tort. The injuries to the person and property of the defendant in error were the several results and effects of one wrongful act. A single tort can be the basis of but one action. It is not improper to declare in different counts for damages to the person and property when both result from the same tort, and it is the better practice to do so where there is any difference in the measure of damages, and all the damages sustained must be sued for in one suit. This is necessary to prevent multiplicity of suits, burdensome expense, and delays to plaintiffs, and vexatious litigation against defendants. \* \* \*

Indeed, if the plaintiff fail to sue for the entire damage done him by the tort, a second action for the damages omitted will be precluded by the judgment in the first suit brought and tried.

\* \* \*

The minority rule would seem to stem from the English case of *Brunsdon v. Humphrey* (1884). \* \* \* The facts in that case are set forth in the opinion in the *Vasu* concluding with the statement:

The Master of the Rolls, in his opinion, stated that the test is “whether the same sort of evidence would prove the plaintiff’s case in the two actions,” and that, in the action relating to the cab, it would be necessary to give evidence of the damage done to the plaintiff’s vehicle.” In the present action it would be necessary to give evidence of the bodily injury occasioned to the plaintiff, and of the sufferings which he has undergone, and for this purpose to call medical witnesses. This one test shows that the causes of

action as to the damage done to the plaintiff's car, and as to the injury occasioned to the plaintiff's person, are distinct.

The fallacy of the reasoning in the English court is best portrayed in the dissenting opinion of Lord Coleridge, as follows:

It appears to me that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the technical cause of action, equally the cause is one and the same: that the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different *rights*, *i.e.* his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured, his trousers which contain his leg, and his coatsleeve which contains his arm, have been torn.

There appears to be no valid reason in these days of code pleading to adhere to the old English rule as to distinctions between injuries to the person and damages to the person's property resulting from a single tort. It would seem that the minority rule is bottomed on the proposition that the right of bodily security is fundamentally different from the right of security of property and, also, that, in actions predicated upon a negligent act, damages are a necessary element of each independent cause of action and no recovery may be had unless and until actual consequential damages are shown.

Whether or not injuries to both person and property resulting from the same wrongful act are to be treated as injuries to separate rights or as separate items of damage, paragraph three of the syllabus in the *Markota* case gives us the answer that a plaintiff may maintain only one action to enforce his rights existing at the time such action is commenced.

The decision of the question actually in issue in the *Vasu* case is found in paragraphs six, seven and eight of the syllabus, as it is quite apparent from the facts there that the first judgment, claimed to be *res judicata* in *Vasu's* action against the defendant, was rendered against *Vasu's* insurer in an action initiated by it after having paid *Vasu* for the damages to his automobile. \* \* \*

Upon further examination of the cases from other jurisdictions, it appears that in those instances where the courts have held to the majority rule, a separation of causes of action is almost universally recognized where an insurer has acquired by an assignment or by subrogation the right to recover for money it has advanced to pay for property damage.

In some instances those jurisdictions recognize the right of the insurer to become a party to the action and recover in the single action that part of the damages to which it has become subrogated.

In other states, and particularly in those having statutes requiring actions to be brought by the real party in interest, the courts have recognized the right of the insurer to bring a separate action to recover in its own name for that part of a single cause of action to which it has become entitled by payment of damages.

\* \* \*

Section 2307.05, Revised Code, requires actions to be prosecuted in the name of the real party in interest, as was done by *Vasu's* insurer.

The reason why the exception is recognized that, where the plaintiff has recovered from an insurance company a part of his damage, he is not estopped from prosecuting his own action, is well stated in the North Carolina case of *Underwood v. Dooley* as follows:

It cannot be held as law in this state that the owner of an automobile, who, as the result of the wrong or tort of another, has sustained damages both to his automobile and to his person, and whose automobile is insured against the loss or damage which he has

sustained because of injuries to his automobile, is put to an election whether or not he shall, in order to maintain an action against the wrongdoer to recover damages for injuries to [his] person, release the insurance company from all liability to him under its policy. He does not lose his right of action to recover for the injuries to his person, by accepting from the insurance company the amount for which it is liable to him \* \* \* .

Coming again to the defendant's eighth assignment of error, it is noted that the rule attributed to the Ohio courts \* \* \* is based primarily on the *Vasu* case, although prior lower court decisions reaching a different conclusion are cited and recognized therein with the statement that "these cases are impliedly overruled."

Apparently, much of the vexatious litigation, with its attendant confusion, which has resulted in recent years from the filing of separate petitions by the same plaintiff, one for personal injuries and one for property damage although sustained simultaneously, has grown from that one decision, this case presenting a good example.

In the light of the foregoing, it is the view of this court that the so-called majority rule conforms much more properly to modern practice, and that the rule declared in the fourth paragraph of the syllabus in the *Vasu* case, on a point not actually at issue therein, should not be followed.

We, therefore, conclude and hold that, where a person suffers both personal injuries and property damage as a result of the same wrongful act, only a single cause of action arises, the different injuries occasioned thereby being separate items of damage from such act. It follows that paragraph four of the syllabus in the *Vasu* case must be overruled.

It is not necessary in view of this conclusion to consider the other errors assigned herein.

Accordingly, the judgment of the Court of Appeals is reversed, and final judgment is entered for defendant.

*Judgment reversed and final judgment for defendant.*

STEWART, JUDGE (concurring).

In the case of *Vasu v. Kohlers, Inc.*, Judge Hart stated in part:

The rule at common law and in a majority of the states of the union is that damages resulting from a single wrongful act, even though they include both property and personal injury damages, are, when suffered by the same person, the subject of only one action against the wrongdoer.

However, he referred to the fact that there were a number of state jurisdictions which followed the English rule \* \* \* known as the two-causes-of-action rule, and then proceeded to announce that rule as the Ohio rule, and it was written into the fourth paragraph of the syllabus of the *Vasu* case. If it had been necessary to decide the question whether a single tort gives rise to two causes of action as to the one injured by such tort, I would be reluctant to disturb that holding. However, neither the discussion in the *Vasu* case as to whether a single or double cause of action arises from one tort nor the language of the fourth paragraph of the syllabus was necessary to decide the issue presented in the case, and obviously both such language and such paragraph are *obiter dicta* and, therefore, are not as persuasive an authority as if they had been appropriate to the question presented.

As to the case of *Brunsdan*, which is the basis for the minority rule in this country, it seems to me that the dissenting opinion of Lord Coleridge, as quoted in the majority opinion in the present case, is not only highly persuasive but logically unanswerable, and that this court is justified in departing from the *obiter dicta* of the *Vasu* case.

ZIMMERMAN, JUDGE (dissenting).

I am not unalterably opposed to upsetting prior decisions of this court where changing

conditions and the lessons of experience clearly indicate the desirability of such course, but, where those considerations do not obtain, established law should remain undisturbed in order to insure a stability on which the lower courts and the legal profession generally may rely with some degree of confidence.

Much may be said in support of the position taken in the majority opinion herein. However, there is a sharp division in the cases as to whether injuries to both person and property suffered by the same person as a result of the same wrongful act give rise to distinct causes of action or to a single cause of action. Less than 13 years ago that question was discussed at some length in the opinion in the case of *Vasu v. Kohlers, Inc.*, and the rule in favor of distinct causes of action was carried into the fourth paragraph of the syllabus and approved by a unanimous court.

As is pointed out in the majority opinion, neither of the later cases of *Markota* nor *Mansker* reversed the law as set out in paragraph four of the syllabus of the *Vasu* case.

\* \* \*

There is abundant and respectable authority for both \* \* \* viewpoints. Ohio has deliberately adopted one of them, and I can find no impelling reason for changing the rule at the present time.

\* \* \*

