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Right of Removal Where Third Party Impleaded - Elliott v. Larrimore

RIGHT OF REMOVAL WHERE THIRD PARTY IMPLEADED

Elliott v. Larrimore[1]

The Plaintiff, Mildred Larrimore, was injured when the automobile, in which she was a passenger, ran off the road and struck a pole of one of the Appellees, the Consolidated Gas, Electric Light and Power Company of Baltimore (hereinafter referred to as "Gas Company"). The vehicle was owned by the Defendant-Appellant, Harry Elliott, and at the time of the accident was being driven by his wife, Norma Elliott, the other Defendant-Appellant. Suit was brought in the Circuit Court for Anne Arundel County, alleging negligence on the part of Defendant-Appellants Elliotts. The Elliotts, with leave of Court, filed a third-party complaint[2] against the Gas Company, alleging that the negligence of the company in erecting an unlighted pole so that it jutted, in part, onto the highway, contributed to the happening of the accident. Thereafter the Elliotts, without notice to the Gas Company, filed a suggestion for removal pursuant to the constitutional[3] provision. An order was passed removing the case. On the day following this order, the Gas Company[4] filed a motion seeking a rescission thereof. After a hearing on the motion,

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[1] 203 Md. 526, 101 A. 2d 817 (1954).

[2] Under Rule 4, General Rules of Practice and Procedure, Part Two, subd. III.

[3] Maryland Constitution, Art. IV, Sec. 8, which provides, in part:

> ". . . upon suggestion in writing under oath of either of the parties to said proceedings, that such party cannot have a fair and impartial trial in the Court in which the same may be pending, the said Court shall order . . . (the case) . . . to be transmitted to some other Court. . . ."

[4] Note that General Rules of Practice and Procedure, *supra*, n. 2, by Rule 7, superseded Md. Code (1951), Art. 26, Sec. 50, which was the statutory predecessor of Rule 4, under which the Gas Company was brought in.

an order was entered rescinding the prior order. The lower court in denying the Elliotts' request for removal held that even though the Constitution of Maryland guarantees to litigants in civil cases an absolute right of removal, the application for such removal must be joined in, as required by the case law of Maryland,[5] by all the defendants which includes the impleaded party, the Gas Company. The Elliotts appealed this last order, contending that since the Plaintiff did not amend her declaration so as to declare against the Gas Company, no relation of plaintiff and defendant existed between them and that therefore the Gas Company was not in the status of a co-defendant for the purposes of removal. The Gas Company defended the lower court's ruling on the ground that by being joined in the action as a third-party under the Third-Party Practice rule,[6] it had the status of a defendant and therefore consent to removal by all parties defendant was essential before the Constitutional right could be exercised.

In affirming the ruling of the lower court, the Court of Appeals, speaking through Judge Hammond, pointed out that a party defendant to an action may, under our Third-Party Practice procedure, within the discretion of the trial court, implead as a third party a person who is or may be liable for all or part of the claim of the plaintiff. Judge Hammond went on to point out that Rule 4,[7] under which the Gas Company was impleaded, did not specify the status of such a party, but that compelling logic would classify him as a defendant. In *Northwestern Nat. Ins. Co. v. Rosoff*,[8] decided under the Third-Party Practice rule, Judge Marbury said:

> "Where a third party is impleaded, he is in no worse situation than if he had been originally sued. Nothing final has been decided against him. He still has the opportunity to try his case, and if it goes against him, he can then appeal. No rights of the original plaintiff have been interfered with, because the result is only that he has another defendant in the case, against whom he may recover."

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[5] State v. Gore, 32 Md. 498 (1870).

[6] *Supra*, n. 2.

[7] *Supra*, n. 2. But under Md. Code (1951), Art. 50, Sec. 26(a), superseded by Rule 7, *supra*, n. 4, the impleaded party was specified as a "third-party defendant".

[8] 195 Md. 421, 433, 73 A. 2d 461 (1950). In this case, plaintiff did not amend to declare against the third parties.

Judge Hammond also cited an earlier case[9] decided under the Joint Tortfeasors statute.[10] Both cases indicated, without deciding, that a party joined under procedural rules would be treated as a party plaintiff or defendant for all purposes. Judge Hammond concluded, therefore, that the third-party Gas Company must be considered as a defendant and that their consent was necessary in a suggestion for removal by defendant Elliotts.

Aside from the basic question raised in the case, the Court raised, without answering, the problem of the right of a third party to remove where a separate trial is ordered under Rule 5 of the General Rules of Practice and Procedure, Part Two, subd. III. Another question could arise where the defendant moves for a change of venue and then impleads the third party. Will the impleaded third party be precluded from obtaining a change of venue because one defendant has already exercised the limited right of removal?

The Maryland Constitution[11] gives the authority for removal. The Legislature has the constitutional power to enlarge, but not restrain, this right.[12] The Court of Appeals early stated that it will liberally construe this privilege,[13] but later cases seem to indicate that, in the absence of clear legislative directive, a somewhat narrow interpretation is applied to the words "party" and "parties". In *State v. Gore*,[14] the Court stated that where there is more than one person as plaintiff or as defendant, the term "party" must be interpreted in a "collective and representative sense". In that case the Court indicated that any other interpretation could lead to a defeat of the judicial processes. If the number of defendants, for example, were great enough,

[9] Brotman v. McNamara, 181 Md. 224, *dis. op.* 229, 231, 29 A. 2d 264, *dis. op.* 267 (1942), where Judge Marbury, in a dissenting opinion said:

> "There does not seem to be any doubt that under the joint tortfeasors law the intention is to have the jury pass upon the liabilities of all parties in one case. If the plaintiff does not put them all in, the defendant can do so, and in such case the same result will be reached as if the added parties had originally been made defendants. The fact that plaintiff did not then amend his declaration cannot prejudice the rights of the defendants to have the others in."

See also Shedlock v. Marshall, 186 Md. 218, 46 A. 2d 349 (1946).

[10] Md. Code (1951), Art. 50, Secs. 20-29. Sec. 26 (superseded by Rule 7, *supra*, n. 4), provided that the third party could be offered as a person liable to the defendant or to the original plaintiff, and that plaintiff "shall amend" to assert any claims he may have against the third party.

[11] *Supra*, n. 3.

[12] Wright v. Hamner, 5 Md. 370, 375 (1854).

[13] State v. Dashiell, 6 H. & J. 268 (Md., 1824); Cromwell v. The State, 12 G. & J. 257 (1841); Negro Jerry v. Townshend, 2 Md. 274 (1852); Price v. The State, 8 Gill 295 (1849); Griffin v. Leslie, 20 Md. 15 (1863).

[14] *Supra*, n. 5.

successive exercises of a right of removal could exhaust the judicial circuits within the State.

The doctrine of the *Gore* case has subsequently been cited and affirmed by the Court of Appeals in several cases.[15] It seems clear that where there are two or more persons to a side, all must concur in suggesting removal, or, at least, offer no dispute to the desire of one of their number.[16]

The early interpretation of the Constitutional provision was made on a common law basis and prior to the adoption of our third-party practice. Under common law rules the right of removal was not absolute but depended largely on the ability of the party to convince the judge of the inability of obtaining a fair trial in the particular county. As an exercise of quasi-equitable jurisdiction, the judge could order the case removed to an alternate county.

With the adoption of the third-party practice in 1941 a new element was introduced. A party defendant, for example, could, at the discretion of the court, implead a third party on the contention that he is not a party to the case but "is or may be liable to (defendant) for all or part of the plaintiff's claim . . ." Rule 4 of the General Rules of Practice and Procedure, Part Two, subd. III, states that plaintiff "may assert . . . any claim" against the impleaded third party. This provision leaves the option to the plaintiff. Under Sec. 26(a) of Article 50 of the Code of 1951,[17] it was stated that plaintiff "shall" amend against the new party.[18] Under either provision, however, it is indicated that a decision in the case will normally be *res judicata* as to all liabilities between all parties.

The impleaded third party, in a technical sense, is not a party to the action as contemplated by the framers of our Constitution. At that time it was customary for plaintiff to include such defendants as he desired in testing liability on the cause of action. Under the new practice, a somewhat different situation comes into being, since plaintiff, as in the *Elliott* case, may *elect* not to amend as to the new

[15] Cooke v. Cooke, 41 Md. 362, 368 (1875); Baltimore County v. United Rys. Co., 99 Md. 82, 83, 57 A. 675 (1904); Taxicab Co. of Balto. v. Emanuel, 125 Md. 246, 265, 93 A. 807 (1915).

[16] In Diamond State of Balto. Co. v. Blake, 105 Md. 570, 66 A. 631 (1907), it was held that a foreign corporation seeking to remove to a United States Court was precluded from such removal where the co-defendant, a domestic corporation, objected.

[17] The procedure outlined in this section has been replaced by Rule 4, and superseded by Rule 7, *supra*, ns. 4, 10.

[18] Held not mandatory by Judge McLanahan in Shaut v. Baltimore Transit Co., Superior Court of Baltimore City, Daily Record, October 8, 1942.

party. For the purposes of trial, however, it seems undisputable that all persons involved, whether by direct suit or through impleading, are concerned with the legal implications of the alleged wrong in the case. It may be true that plaintiff has no particular interest regarding the third party, but certainly the third party himself has an interest in the decision inasmuch as the result will settle his liability, if any, in the action.

Tracing the logic and reasoning of the Maryland decisions, it seems to be an inescapable conclusion that, in the absence of further legislative expansion of the privilege, the Court of Appeals interprets our Constitutional provision on removal as limiting the right to one per side, regardless of the number of parties per side, their technical positions as litigants in the case, or the manner in which they were brought in. Hence, if the trial court orders two or more cases consolidated for trial, it would appear that the doctrine in the instant case would be applied as to suggestions for removal.

The *Elliott* case has settled that an impleaded third party defendant must consent to a request for removal by the original defendant. Under the power of the courts today to order a separate trial it would seem that in such a case concurrence of both defendants in requesting removal would not be necessary. The trials being separate, the parties should be able to act independently. Rule 5[19] states that the court ". . . to avoid prejudice . . ." or for convenience may order separate trials. As Judge Hammond pointed out in the *Elliott* case, the trial courts have ". . . very wide discretion and power of regulation of the proceedings . . ."[20] In the present case, for example, if plaintiff had amended against the third-party Gas Company, a severance could have been ordered by the trial judge, and in such an event the generally liberal (where practical) interpretation of the removal right by the Court of Appeals, would appear to support the view that the defendant Elliotts could, after the severance, remove their case, and that the impleaded third-party defendant Gas Company could elect, as sole defendant in their case, to have their trial in the county where sued. Or, as would seem more likely under that situation, the Elliotts could defend alone, exercise their right of removal unfettered, and go against the Gas Com-

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[19] General Rules of Practice and Procedure, Part Two, subd. III, Rule 5(a).

[20] 203 Md. 526, 533, 101 A. 2d 817 (1954).

pany in a suit for contribution.[21] Since, however, the possibility of separate trials is present, it would appear sound to treat each trial, and rights of removal in each, separately and independently. Certainly by such an interpretation and by the prudent exercise of his discretion, the trial judge could protect the interests of all parties concerned as fully as possible under the law.

The question of removal after a defendant has once removed and then impleads a third party (assuming venue requirements can be satisfied), seems to present greater obstacles. In such a case the right has already been exercised according to present interpretations of "party" and "parties" and yet, the third party has been denied voice in the motion. Under the Maryland decisions on the question of removal it would seem that the third party would be barred from further removal despite the apparent prejudice.[22] The Court of Appeals has too consistently adhered to the theories of "one right only" and "consent of all on a side" to open such a loophole in the administration of justice. The same fears expressed in *State v. Gore*[23] could become realities under a contrary ruling. The discretion of the trial judge in permitting the impleading of a third party after one removal, or in authorizing separate trials, would appear an adequate protection from injustice. Or, indeed, as indicated by the Court of Appeals and within the Constitutional provision itself, the Legislature may act to enlarge the privilege of removal in cases where it feels injustice would be done as a result of the third-party rules, which have undoubtedly magnified the scope of the original Constitutional provision on change of venue.

[21] Cong. Country Club v. B. & O. R. Co., 194 Md. 533, 71 A. 2d 696 (1950); O'Keefe v. Baltimore Transit Co., 201 Md. 345, 94 A. 2d 26 (1953), noted in 14 Md. L. Rev. 97 (1954).

[22] In addition to cases cited earlier, see State v. B. & O. R.R. Co., 69 Md. 339, 14 A. 685 (1888); Chappell Co. v. Sulphur Mines Co., 85 Md. 684, 36 A. 712 (1897).

[23] 32 Md. 498 (1870).