Maryland Law Review

Volume 18 | Issue 2 Article 10

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Recommended Citation

Douglas R. Due, *Effect of Plea of Limitation on Amended Declaration - Cline v. Fountain Rock Lime and Brick Co., Inc.*, 18 Md. L. Rev. 161 (1958)
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Effect Of Plea Of Limitation On Amended Declaration

Cline v. Fountain Rock Lime and Brick Co., Inc.[1]

This is the second appeal of this case to the Court of Appeals.[2] On January 11, 1952, plaintiff-appellee filed a declaration in the Circuit Court for Frederick County containing the common counts and a special count that alleged: " 'During the year 1949 the . . . defendant [Cline] agreed with the plaintiff [Fountain Rock] to lease the plaintiff's real estate, plant and equipment and to pay the plaintiff for the same a percentage of profit with guaranteed minimum amount . . .' "[3] The case was removed to Carroll County and was tried before a jury which rendered a verdict in favor of the plaintiff for $7,000. On the first appeal, the Court of Appeals reversed and remanded for a new trial. The Court rested its decision on the fact that the jury was permitted

[1] 214 Md. 251, 134 A. 2d 304 (1957).
[2] The first appeal was 210 Md. 78, 122 A. 2d 449 (1956).
[3] *Supra*, n. 1, 254.

to consider evidence of damages which was outside the scope of the original pleading as particularized.

On October 17, 1956, appellee, upon petition and with leave of Court, filed a substituted or amended declaration containing the common counts and also a special count, which, in addition to setting forth an alleged oral contract, stated: "that [defendant] accepted the advantages and profits from the proposed joint adventure and the proposed lease but failed to pay either a percentage of his profits or the minimum amount provided for in said proposed lease."[4] To this amended declaration, the defendant filed the General Issue Plea and three pleas of limitations. The lower court held the pleas of limitations improper and the jury found that there was an oral agreement between plaintiff and defendant in the year 1949 for the establishment of a stone business on a fifty-fifty basis and again returned a verdict in favor of the plaintiff.

On the second appeal, the case was reversed without a new trial. The Court held that the original declaration, as limited by a bill of particulars, set forth an oral lease of real estate, plant and equipment for profit, while the amended declaration, by alleging a joint adventure agreement, stated a new cause of action which was barred by the statute of limitations.

The Maryland Rules allow amendment from one form of action to another.[5] Thus, in the instant case Fountain Rock's amendment would normally have permitted the appellee to attempt to recover on the basis of a joint adventure agreement had such amendment been made during the statutory period. It is only where the amended pleading states a "new cause of action"[6] or a "new theory of liability"[7] and such amendment is made after the period of limitations has expired that the Maryland courts will permit a plea of limitations to bar the action as restated. The Court in the present case refers to Clark on Code Pleading[8]:

> " 'Where the statute of limitations would bar the bringing of a new suit at the time an amendment is offered in the pending suit, the amendment must refer to the cause of action which was stated in the original complaint or it will be refused. As in the case of amendments generally, the courts at first considered a change

[4] *Ibid*, 256.
[5] Rule 320a(2): "An action may be amended from one form to another."
[6] Spencer v. B. & O. R. R. Co., 126 Md. 194, 201, 94 A. 660 (1915).
[7] Schuck v. Bramble, 122 Md. 411, 413, 89 A. 719 (1914).
[8] (2nd ed. 1947) 729.

> in legal theory only to be a change violating this rule; but now in all but a few jurisdictions the amendment is allowed if it refers to the same general aggregate of operative facts upon which the original complaint was based.' "[9]

The key to applying this "relation back" doctrine lies in determining whether the amended declaration in question states a new cause of action or merely refers back to the same cause of action that was stated in the original declaration.

Clark's general "aggregate of facts" principle is also the approach of the Federal Rules of Civil Procedure to the problem of when relation back should be allowed to defeat a plea of limitations.[10] While the Court does cite the Federal rule in the present case, it cautions against a loose application of it and specifically rejects the views of an eminent writer who stated that the Federal Rule "makes a mere attempt to state a case enough to protect you."[11] Clearly, in the Maryland state courts at least, the original declaration must state some facts which support the theory of liability upon which the amendment is based.

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[9] *Supra*, n. 1, 261: The Court quoted further from Clark, as follows:

> " 'The term ["cause of action"] should be interpreted as referring to facts upon which one or more rights of action are based, rather than the rights themselves. Hence a change in legal theory only should not be considered the statement of a new cause. And unless there has been so great a change in the material operative facts that an entirely different fact situation is presented, the amendment should be allowed. This is the theory of the Federal Rules [F. R. C. P. 15(c)], which is reached through the device of relating back to the original complaint or defense any amendment stating a claim or defense arising out of the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading".' "

2 POE PRACTICE (5th ed. 1925) Sec. 189; 34 AM. JUR. 211, Limitation of Actions, Secs. 260-262; 54 C. J. S. 320, Limitations of Action, Sec. 279.

[10] Federal Rules of Civil Procedure, Rule 15(c), 28 U. S. C. A. (1950) 574:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

[11] Edmunds, *The New Federal Rules of Civil Procedure*, 4 John Marshall L. Q. 291, 306 (1939):

> "Subdivision c of Rule 15 is designed to accomplish the same purpose as our state Civil Practice Act does with the regard to the relating back of amendments. But it goes even farther and makes a mere 'attempt' to state a case enough to protect you. It would be a most peculiar situation in which you could not say you 'attempted' to state your cause of action. Hence if you file any pleading at all, you are guaranteed that the statute of limitations cannot be invoked against you."

See also: Sunderland, *The New Federal Rules*, 45 W. Va. L. Q. 5, 15 (1938).

The Maryland cases do not seem to offer any concrete tests for determining when the offered amendment states a cause of action or theory of liability which could not be found in the "aggregate of facts" originally stated. The terms are used interchangeably in defining the basis for allowing a plea of limitations to bar an action when the amendment has been made after the period of limitations has expired.[12]

In *Hamilton v. Thirston*,[13] where the original declaration stated a suit upon an alleged oral agreement and there was no count in the declaration on a *quantum meruit* for the value of services rendered, the Court held "the present suit, under the amendment, is an action in *assumpsit*, on a *quantum meruit*, and is a new case."[14] Thus the defendant was allowed to interpose the plea of limitations and defeat the amended declaration.

Where the last amendment alleged trespass to real property and the original declaration stated merely the negligence of the defendant, the Court spoke of the amendment as proceeding "upon an entirely different theory of liability" and being based "upon a new cause of action" which was "equivalent to a new suit" and the defendants "had the right to interpose the plea of limitations as a defense to the new case against them."[15]

In a somewhat closer situation in which the Court stated that it was confining its decision to the facts of the case, an amendment alleged that a conversion had taken place when defendant was acting in the capacity of plaintiff's employee.[16] The original declaration had simply stated the conversion had taken place while the defendant was acting in the capacity of a receiving teller of a bank. Since the amended declaration was not predicated upon the employment of the defendant by the bank, as were the allegations of the first declaration, the Court held the amendment set up a new theory of liability.

On the other side of the picture it was held that an amended bill of particulars permitting proof of damages of a different character, but which resulted from the same form of action, did not let in the plea of limitations.[17] Another case allowed an amendment to a declaration and

[12] Spencer v. B. & O. R. R. Co., 126 Md. 194, 201, 94 A. 660 (1915); Schuck v. Bramble, 122 Md. 411, 413, 89 A. 719 (1914).
[13] 94 Md. 253, 51 A. 42 (1902).
[14] *Ibid*, 256.
[15] Spencer v. B. & O. R. R. Co., *supra*, n. 12, 201.
[16] Schuck v. Bramble, *supra*, n. 12, 413.
[17] Middendorf, etc. Co. v. Milburn Co., 137 Md. 583, 113 A. 348 (1921).

bill of particulars to conform to the proof in a misnomer situation and the plea of limitations was barred.[18] Various other amendments have been allowed which were held not to state a new cause of action.[19]

Further expansion in the allowing of amendments against pleas of limitations in doubtful change of action situations will probably have to rely heavily on either *Zier v. Chesapeake Ry. Co.*[20] or *Brooks v. Childress*.[21]

In *Zier v. Chesapeake Ry. Co.* the Court permitted the plaintiff to amend an original declaration which had alleged negligence on the part of fellow servants, to one which stated that the defendant was liable in selecting such fellow servants.

> "[T]he original declaration though defective was founded on the alleged negligence of the defendant. The fact that the *narr* was insufficient in law — that it did not accurately and formally set forth the real cause of action — did not prevent the suit itself from being a pending suit wherein the gravamen was the negligence of the defendant. . . . The *statement* of the cause of action was different but the *cause of action* itself was identical. Injury resulting in death is what occasioned the suit. The imperfect statement of the case did not cause the correct statement of it to be a different cause of action."[22]

The exact language of the *Zier* case was used later in *Brooks v. Childress*[23] which held that a change from an action predicated upon a father's responsibility for the negligence of his son based on the father's permission was not changed by an amendment which sought to hold the father responsible under the doctrine of imputed negligence.

In the present case the only words in the first declaration which might have indicated a joint adventure were "to pay . . . a percentage of profit."[24] Receipt of a share of

[18] W. U. Tel. Co. v. State, *Use* Nelsen, 82 Md. 293, 33 A. 763 (1896).

[19] In Lichtenberg v. Joyce, 183 Md. 689, 39 A. 2d 789 (1944), no new cause of action was stated where the first declaration was based upon a policy holder's assessment made by the directors and ratified by the Court, and the second declaration was based on an assessment made by the Court. In Wolf v. Bauereis, 72 Md. 481, 19 A. 1045 (1890), an amendment which omitted a husband (who had abandoned his wife) from a declaration for injury to her was not founded upon a new cause of action.

[20] 98 Md. 35, 56 A. 385 (1903).

[21] 198 Md. 1, 81 A. 2d 47 (1951).

[22] *Supra*, n. 20, 42-43. The fellow-servant rule prevented liability from attaching to the master in the first declaration.

[23] *Supra*, n. 21, 14-15.

[24] 214 Md. 251, 254, 134 A. 304 (1957).

profits in a business, however, is not regarded as *prima facie* evidence of either a partnership[25] or a joint adventure where the profits are received in payment of rent to a landlord. Thus, the original declaration's allegation of an oral lease, even if not limited by particulars, would probably have been insufficient to establish a cause of action upon which a later amendment to a joint adventure could be based.

Determining what does and what does not constitute a new cause of action remains a difficult problem. It is clear that the pleader must set forth some minimum of material operative facts in the original declaration to which a later amendment can be said to refer. Just what facts are material depends upon the particular right of action upon which the amender relies and on the nature of the evidence needed to establish this right of action.

The instant case appears to be significant in that while it illustrates the Court's general willingness to accept the "relation back" theory of amendments opposed by a plea of limitations, it nevertheless requires more than a mere attempt on the part of the pleader to state a cause of action.

How far one may misstate a cause of action as was done in *Zier v. Chesapeake Ry. Co.*[26] and *Brooks v. Childress*[27] and still allege enough to constitute a cause of action will have to be determined by subsequent decisions of the Court.

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[25] 6 Md. Code (1957), Art. 73A, Sec. 7(4)(b).
[26] 98 Md. 35, 56 A. 385 (1903).
[27] 198 Md. 1, 81 A. 2d 47 (1951).