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Distinguished, Followed, And Overruled West Virginia Extends Mills V. Dewees

DISTINGUISHED, FOLLOWED, AND OVERRULED

WEST VIRGINIA EXTENDS MILLS v. DEWEES

Under the heading "Procedure—Number of Causes of Action Arising from Single Act of Wrongdoing Causing Both Personal and Property Damage," the West Virginia case of *Mills v. DeWees*[1] was commented upon in 14 Wash. & Lee L. Rev. 114 (1957). In *Mills v. DeWees,* the insured attempted, after a trial of the personal injury claim, to bring a second action for property damage arising from the same collision. In denying the second action, the court adopted the rule of the majority of American jurisdictions that the single act of wrongdoing by the defendant is the gist of the cause of action, thus requiring the uniting of the claims for personal injuries and property damages in one action.[2] This is contrary to the English view and that taken in a minority of American jurisdictions, which regards the resulting damages to the plaintiff as the criterion of a cause of action. Under this view there are thus two independent causes of action for the two distinct harms suffered by the plaintiff.[3]

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[1]93 S.E.2d 484 (W. Va. 1956).

[2]Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948); Jenkins v. Skelton, 21 Ariz. 663, 192 Pac. 249 (1920); Kidd v. Hillman, 14 Cal. App. 2d 507, 58 P.2d 662 (1936); Seger v. Town of Barkhamsted, 22 Conn. 290 (1853); Wealth v. Renai, 114 A.2d 807 (Del. 1955); Gregory v. Schnurstein, 212 Ga. 497, 93 S.E.2d 680 (1956); Bennett v. Dove, 93 Ga. App. 57, 90 S.E.2d 601 (1955); Fiscus v. Kansas City Pub. Serv. Co., 153 Kan. 493, 112 P.2d 83 (1941); Pillsbury v. Kesslen Shoe Co., 136 Me. 235, 7 A.2d 898 (1939); Baltimore & Ohio R.R. v. Ritchie, 31 Md. 191 (1869); Dearden v. Hey, 304 Mass. 659, 24 N.E.2d 644 (1939); Szostak v. Chevrolet Motor Co., 279 Mich. 603, 273 N.W. 284 (1937); Coy v. St. Louis & San Francisco R.R., 186 Mo. App. 408, 172 S.W. 446 (1915); Farmer's Ins. Exchange v. Arlt, 61 N.W.2d 429 (N.D. 1953); Fields v. Philadelphia Rapid Transit Co., 273 Pa. 282, 117 Atl. 59 (1922); Flickner v. One Chevrolet Truck & Trailer, 178 S.C. 53, 182 S.E. 104 (1935); Globe & Rutgers Fire Ins. Co. v. Cleveland, 162 Tenn. 83, 34 S.W.2d 1059 (1931); Smith v. Lenzi, 74 Utah 362, 279 Pac. 893 (1929); Moultroup v. Gorham, 113 Vt. 317, 34 A.2d 96 (1943); Sprague v. Adams, 139 Wash. 510, 247 Pac. 960 (1926); Booth v. Frankenstein, 209 Wis. 362, 245 N.W. 191 (1932). See Southern Ry. v. King, 160 Fed. 332, 335 (5th Cir. 1908); Mayfield v. Kovac, 41 Ohio App. 310, 181 N.E. 28, 29 (1932); Boos v. Claude, 69 S.D. 254, 9 N.W.2d 262, 264 (1943).

[3]Borden's Condensed Milk Co. v. Mosby, 250 Fed. 839 (2d Cir. 1918); Boyd v. Atlantic Coast Line, 218 Fed. 653 (S.D. Ga. 1914); Clancy v. McBride, 338 Ill. 35, 169 N.E. 729 (1930); Smith v. Red-Top Taxicab Corp., 111 N.J.L. 439, 168 Atl. 796 (1933); Ochs v. Public Service Ry., 81 N.J. 661, 80 Atl. 495 (1911); Reilly v. Sicilian Asphalt Paving Co., 170 N.Y. 40, 62 N.E. 772 (1902); Timian v. Whelan, 128 Misc. 192, 218 N.Y. Supp. 108 (Sup. Ct. 1926); Vasu v. Kohlers Inc., 145 Ohio St. 321, 61 N.E.2d 707 (1945); Baltimore American Ins. Co. v. Cannon, 181 Okla. 244, 73 P.2d 167 (1937); Winters v. Bisallon, 153 Ore. 509, 57 P.2d 1095 (1936); Watson v. Texas Pac. Ry., 8 Tex. Civ. App. 144, 27 S.W. 924 (1894); Carter v. Hinkle, 189 Va. 1, 52 S.E.2d 135 (1949); Brunsden v. Humphrey, 14 Q.B.D. 141 (1884).

After this prior action by the insured, the insurance company, in *State Farm Mutual Automobile Ins. Co. v. DeWees*,[4] sought to maintain as subrogee of the insured an action against the tortfeasor for property damage. The action was denied. A contrary ruling, the court felt, would allow the splitting of what logically is a single cause of action. This later case, therefore, carried *Mills v. DeWees* to its logical conclusion. On the question of what constitutes a cause of action—negligence or damage—West Virginia adheres rigorously to the theory that it is the negligence.

State Farm Mutual Ins. Co. v. DeWees offered the West Virginia court an excellent opportunity to adopt an intermediate approach which exists in a few jurisdictions.[5] This view does not specifically accept the minority concept by allowing two causes of action to the same plaintiff generally. Instead, it regards the insurer as having an equitable interest in the automobile at the time of collision by reason of its having written the policy of insurance; thus, when the automobile is damaged an independent cause of action arises in favor of the insured. West Virginia could well have adopted this approach, a mere qualification of the majority rule in cases involving subrogation, without having to overrule its previous decision in *Mills v. DeWees*.[6]

It is unfortunate that the West Virginia court relied solely on *Mills. v. DeWees* as precedent, since the cases cited therein to support the majority view were not influenced by the element of subrogation.[7]

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[4]101 S.E.2d 273 (W. Va. 1957).

[5]Fidelity & Guaranty Fire Corp. v. Silver Fleet Motor Express, Inc., 242 Ala. 559, 7 So. 2d 290 (1942); Traveler's Indemnity Co. v. Moore, 304 Ky. 456, 201 S.W.2d 7 (1947); Underwriters at Lloyds Co. v. Vicksburg Traction Co., 106 Miss. 244, 63 So. 455 (1913); Underwood v. Dooley, 197 N.C. 100, 147 S.E. 686 (1929).

[6]Having previously been a proponent of the strict majority rule, Kentucky, in Traveler's Indemnity Co. v. Moore, 304 Ky. 456, 201 S.W.2d 7 (1947), approved the intermediate view but cautioned through dictum that there could possibly develop instances where exceptions to the "exception to the general rule" would be proper to facilitate the same justice contemplated in adopting the intermediate view. This approach did not require the Kentucky court to overrule its previous decisions adhering to the strict majority view in cases not involving subrogation, such as Cassidy v. Berkovitz, 169 Ky. 785, 185 S.W. 129 (1916), and Cole's Adm'x v. Illinois Central R.R., 120 Ky. 686, 87 S.W. 1082 (1905). In Traveler's Indemnity Co. v. Moore, supra, the court noted that it was hardly possible to have a general rule without an exception.

Mississippi, another intermediate jurisdiction, has also upheld the majority view in cases where subrogation was not involved. Kimball v. Louisville & N.R.R., 94 Miss. 396, 48 So. 230 (1909). Dicta in intermediate view decisions, cited in note 5 supra, indicates that the majority rule will be adhered to when cases not involving subrogation arise in those jurisdictions.

[7]Vasu v. Kohlers Inc., 145 Ohio St. 321, 61 N.E.2d 707, 716 (1945); and see cases cited note 2 supra.