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CPLR 203(e): Wrongful Death Claim Deemed Not To Relate Back to Cause of Action for Personal Injuries

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CPLR 302(a)(3)(ii); what instruments qualify for expeditious treatment under CPLR 3213; and, when is the last day on which an application to stay arbitration may be received by a party demanding arbitration?

Additionally, a number of recent decisions have created uncertainty in areas which appeared to be settled. Particularly important are the cases dealing with the relation back doctrine of CPLR 203(e), the definition of timely commencement under CPLR 205(a), and the personal delivery requirement of CPLR 308(1).

Lastly, special mention should be made of *Murphy v. St. Charles Hospital* and *In re Einstoss* which are discussed under CPLR sections 214(6) and 320 respectively. In *Murphy* the Second Department moved one step closer to a rule of discovery in medical malpractice cases. In *Einstoss* the Court of Appeals broadened the concept of a limited appearance and opened the door for a reevaluation of the liability of a nonresident defendant vis-à-vis his codefendants and the original plaintiff.

The *Survey* sets forth in each installment those cases which are deemed to make the most significant contribution to New York's procedural law. Due to limitations of space, however, many other less important, but, nevertheless, significant cases cannot be included. While few cases are exhaustively discussed, it is hoped that the *Survey* accomplishes its basic purpose, viz., to key the practitioner to significant developments in the procedural law of New York.

The Table of Contents is designed to direct the reader to those specific areas of procedural law which may be of importance to him. The various sections of the CPLR which are specifically treated in the cases are listed under their respective titles.

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 203(e): Wrongful death claim deemed not to relate back to cause of action for personal injuries.

To overcome the harsh effects of *Harriss v. Tams*,[1] the Advisory Committee[2] recommended passage of CPLR 203(e). This section provides that a claim asserted in an amended pleading relates back, for

1 258 N.Y. 229, 179 N.E. 476 (1932) (statute of limitations is tolled only as to those claims originally inserted).

2 *See* SECOND REP. 50-51. In drafting the CPLR, the Advisory Committee intended to afford the courts the "widest possible discretion" when ruling on motions to amend or supplement pleadings. FIRST REP. 78. In fact, both CPLR 203(e) and CPLR 3025(b) were designed to permit even greater freedom than the federal rule, FED. R. CIV. P. 15(a), (c), after which they were patterned. *See* 1 WK&M ¶ 203.30.

statute of limitations purposes, to the time when the original claim was interposed, "unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." Recently, in *Roberson v. First National City Bank*,[3] the court was confronted with a problem that has puzzled academicians almost since the enactment of the CPLR: does the language of CPLR 203(e) encompass claims which are interposed in supplemental rather than amended pleadings?[4]

In *Roberson* plaintiff sought leave to amend her complaint in a personal injury action to add a cause of action for wrongful death. Since the statute of limitations had already expired on the latter claim, it would be time-barred unless it were deemed to fall within the ameliorative prescription of CPLR 203(e). Fully cognizant of liberal holdings such as *Berlin v. Goldberg*,[5] the court nonetheless held that the claim was barred; although the original complaint gave notice of the accident which allegedly caused the death, it did not give "notice of the causal connection to effectuate the subsequent death which is an essential element of the occurrence constituting the death 'to be proved pursuant to the amended pleading.' "[6]

Apparently, the *Roberson* court was troubled by the fact that the death was not caused directly by injuries sustained in the accident, but by an aggravation of a preexisting ulcer condition. Nevertheless, similar facts were presented in *Berlin*, where the death was allegedly caused by the aggravation of a preexisting heart condition. Thus, in neither case did the original complaint give notice of the causal connection to effectuate the subsequent death. A distinction between the cases, however, which might afford grounds for reconciliation in the future, is that in *Berlin* the defendant was apprised of the wrongful death claim shortly after service of the original complaint when plaintiff sought unsuccessfully to transfer the action to the supreme court;[7] in *Roberson* it appears that the defendant received no notice of the wrongful death claim until six years after the death. Indeed, the court concluded by noting that the motion before it was accompanied by gross laches.

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3 63 Misc. 2d 105, 311 N.Y.S.2d 601 (Sup. Ct. N.Y. County 1970).

4 An amended pleading is one that adds allegations which could have been included in the original pleadings; a supplemental pleading is one that adds allegations of events which occurred after the service of the original pleading or of which the pleader was ignorant at the time of service. For a discussion of the theoretical difficulty created by CPLR 3025(b) vis-à-vis CPLR 203(e), see 7B McKINNEY'S CPLR 203, supp. commentary at 31-32 (1966).

5 48 Misc. 2d 1073, 266 N.Y.S.2d 475 (N.Y.C. Civ. Ct. N.Y. County 1966); *see also* Ringle v. Bass, 46 Misc. 2d 896, 260 N.Y.S.2d 1006 (Sup. Ct. Ulster County 1965).

6 63 Misc. 2d at 106, 311 N.Y.S.2d at 603.

7 Berlin v. Goldberg, 22 App. Div. 2d 770, 253 N.Y.S.2d 647 (1st Dep't 1964).

Implicit in the *Roberson* holding is the proposition that had the subsequent death been caused by injuries sustained in the accident, a prompt motion to amend would have been granted. Apparently, the distinction between amended and supplemental pleadings has become blurred to the point that in and of itself it is not a ground for denying a motion to amend.[8] Instead, the court's power to deny the motion on the basis of prejudice to the opposing party should become the focal point of inquiry. Where, as in *Roberson*, the lapse of time reeks of injustice, the motion to amend is properly denied.

CPLR 203(e): Notice requirement of section is not satisfied when movant seeks to change the status in which party is sued.

Under CPLR 203(e), may a claim asserted in an amended pleading against a party as defendant be deemed to relate back to notice contained in the original complaint which was received by the party in his status as plaintiff? The Supreme Court, Nassau County, answered this question negatively in *Ward v. Marino*.[9]

In *Ward* an action was commenced on behalf of Linda Ward to recover damages for injuries sustained in an automobile accident and on behalf of the estate of Thomas Ward, a passenger in a car driven by Linda Ward, to recover damages for personal injuries and wrongful death. Subsequent to the Court of Appeals decision in *Gelbman v. Gelbman*,[10] the executrix of Thomas Ward's estate sought leave to serve a supplemental summons and amended complaint asserting a claim for personal injuries and wrongful death against Linda Ward. In response, the statute of limitations defense was raised.

The court was confronted with two alternatives in deciding whether the claim was embodied by CPLR 203(e). On the one hand, it could compare the instant situation to the case wherein the plaintiff does not seek to add new parties, but merely to change the capacity in which the defendant is sued, *e.g.*, from trustee capacity to individual capacity. On the other hand, the court could compare the proposed amendment to the instance where a plaintiff is asserting a claim against a third-party defendant. In the former situation, the statute of limitations is not a bar;[11] in the latter case, the claim is time-barred[12] (even

8 *See* Werner Spitz Constr. Co. v. Vanderlinde Elec. Corp., 64 Misc. 2d 157, 314 N.Y.S.2d 567 (Monroe County Ct. 1970) (term "amended" under 203(e) embraces supplemental as well as amended pleadings).

9 64 Misc. 2d 44, 313 N.Y.S.2d 931 (Sup. Ct. Nassau County 1970).

10 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969) (doctrine of intrafamily immunity abolished); *see also* 44 ST. JOHN'S L. REV. 127 (1969).

11 Boyd v. United States Mort. & Trust Co., 187 N.Y. 262, 79 N.E. 999 (1907).