

April 2013

## CPLR 203(e): Relation Back to Commencement of Personal Injury Action Allowed Where Executor Enlarges Original Action to Include a Claim for Wrongful Death

St. John's Law Review

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### Recommended Citation

St. John's Law Review (1966) "CPLR 203(e): Relation Back to Commencement of Personal Injury Action Allowed Where Executor Enlarges Original Action to Include a Claim for Wrongful Death," *St. John's Law Review*: Vol. 40 : No. 2 , Article 12.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol40/iss2/12>

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The cases discussed herein are those deemed to be of the most importance in the procedural area. Many other cases would be included, but limitations of space prevent the treatment of those less important but, nevertheless, significant cases. Few cases treated in the *Survey* are exhaustively discussed. It is hoped, however, 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 key 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 articles.

#### ARTICLE 2—LIMITATIONS OF TIME

*CPLR 203(e): Relation back to commencement of personal injury action allowed where executor enlarges original action to include a claim for wrongful death.*

In New York, once a personal injury action has been commenced, an executor may enlarge that suit to include a claim for wrongful death upon the decease of the original plaintiff.<sup>1</sup> In *Ringle v. Bass*,<sup>2</sup> the court allowed such an enlargement even though the wrongful death action was not asserted until after the two-year statute of limitations had expired.<sup>3</sup> The court based its decision on a combined interpretation of CPLR 203(e) and Decedent Estate Law Section 120. CPLR 203(e) permits an amendment to a complaint to assert a new claim as long as the original pleadings gave "notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."<sup>4</sup> Furthermore, Decedent Estate Law Section 120 permits the enlargement of the complaint by the executor to include a claim for wrongful death. The court, in reading these sections together, concluded that since the new claim is based on occurrences stated in the original pleadings and that since the executor has the power to enlarge the action, then the wrongful death cause of action must relate back to the commencement of the original action.<sup>5</sup> Thus, this result effectively avoided the bar of the statute of limitations.

CPLR 203(e) was an adaptation of Rule 15(e) of the Federal Rules of Civil Procedure which has been interpreted by the federal

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<sup>1</sup> N.Y. DECED. EST. LAW § 120.

<sup>2</sup> 46 Misc. 2d 896, 260 N.Y.S.2d 1006 (Sup. Ct. Ulster County 1965).

<sup>3</sup> N.Y. DECED. EST. LAW § 130.

<sup>4</sup> CPLR 203(e).

<sup>5</sup> See 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 203.29 (1965).

courts to include such a theory.<sup>6</sup> Furthermore, it cannot be contended that this relation back, although a device for avoiding the statute of limitations, does not produce a beneficial result, especially when viewed in light of the notice to the defendant in the original pleadings of the facts upon which the wrongful death action is based. Since the defendant must have been apprised of the occurrences upon which the new cause of action is based, the mere addition of a new legal theory for recovery cannot prejudice him and, therefore, the wrongful death action should be allowed to relate back to the commencement of the original personal injury action.

However, there is still another issue that must be discussed in relation to the disposition of this case. CPLR 218(a) provides that "nothing in this article shall authorize any action to be commenced which is barred when this article becomes effective. . . ." In the principal case decedent's death occurred on December 5, 1960. The statute of limitations for wrongful death expired on December 5, 1962, prior to the effective date of the CPLR. At first glance, the relation back theory as applied by this court falls squarely within the limits of this provision, thereby precluding the relief afforded by this case. It should be noted that this section was apparently not called to the attention of this court, so that judicial reflection on this point is not available.

This section, however, is amenable to conflicting interpretations, one possibly consistent with this case. Primarily the statute deals with an "action to be *commenced*" and since the executor merely sought to enlarge an already pending action it could be argued that no new action was *commenced* within the strict wording of the statute.

Contrariwise, it is apparent that no initial action for wrongful death could have been commenced, indicating that plaintiff should not be able to circumvent the purpose of the statute, *i.e.*, to prevent the commencement of any cause of action which is barred at the effective date of the CPLR. Wrongful death is obviously a separate cause of action and it appears that the purpose of CPLR 218(a) was to bar just such an enlargement as perfected here, although it was not technically the *commencement* of an action.

*General Municipal Law Section 50-e: Motion to file late notice of claim denied where city's ownership of property not discovered by usual search.*

In *Thomson v. City of New York*,<sup>7</sup> the plaintiff sought permission to file a late notice of claim. The plaintiff contended that

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<sup>6</sup> *Beach v. Grollman*, 169 F. Supp. 612 (E.D. Pa. 1959); *Denver & Rio Grande W.R.R. v. Clint*, 235 F.2d 445 (10th Cir. 1956); 3 MOORE, FEDERAL PRACTICE § 15.15 (1964).

<sup>7</sup> 24 App. Div. 2d 477, 260 N.Y.S.2d 667 (1st Dep't 1965).