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Amendments May Relate Back To Validate Service of Process

Leniston v. Bonfiglio[1] is worthy of inspection not only because of the proposition for which the case stands but also because of the manner in which the Georgia Court of Appeals chose to convey this proposition to the reader. Mrs. Alice Bonfiglio filed her complaint in the State Court of DeKalb County for $200 in damages to her automobile, allegedly precipitated by the negligence of defendant, Mrs. Leniston. Service of process was effectuated by a deputy marshal's tacking the summons to the door[2] of Mrs. Leniston's most notorious place of abode in DeKalb County, pursuant to C.P.A. § 4(d)(6).[3] Contending that she had been improperly served, defendant moved to dismiss the complaint for lack of personal jurisdiction, since C.P.A. § 4(d)(6) authorizes leaving a copy of the summons at defendant's most notorious place of abode only in cases where the principal sum is less than $200. The trial court allowed plaintiff to amend her complaint by reducing the amount of relief demanded from $200 to $150, thereby bringing it within the confines of the statute. In light of the amendment to the complaint, defendant's motion to dismiss was denied and the case was tried before the court sitting without a jury. The court found for the plaintiff in the amount of $131.06.

Defendant appealed from this judgment and asserted as error improper service of process, notwithstanding the amendment permitted by the trial court. She contended "that since the [original] complaint was for $200, service of process could be perfected *only* by serving 'the defendant personally, or by leaving copies thereof at his dwelling house . . . with some person of suitable age' under C.P.A. § 4(d)(7)."[4] The fatal defect of plaintiff's complaint, argued defendant, was that C.P.A. § 4(d)(6) could not control since the amount asked in damages was not less than $200 and "plaintiff's amendment changing the amount claimed cannot relate back

1. 138 Ga. App. 151, 226 S.E.2d 1 (1976).

2. The phrase "tacking it on the door" is used throughout *Leniston* and similar cases to describe the manner of service of process authorized by C.P.A. § 4(d)(6), that of simply leaving a copy of the summons at defendant's most notorious place of abode in cases involving less than $200. In regard to the likelihood of actual notice to the person being served, this is clearly an inferior means of service when compared with C.P.A. § 4(d)(7), which stipulates that service "in all other cases" must be perfected to defendant personally or left at his "usual place of abode with some person of suitable age and discretion" if the factual situation involved does not fall within special provisions for service of process in C.P.A. §§ 4(d)(1) through 4(d)(6).

3. GA. CODE ANN. § 81A-104(d)(6) (1972). The 1966 Civil Practice Act, 1966 Ga. Laws 609-691, is codified at GA. CODE ANN. ch. 81A-1 (1972), the sections of which match the section numbers of the Act. Future references in this note will be to the Act only.

4. 138 Ga. App. at 151, 226 S.E.2d at 1 (emphasis in original).

to validate the service of process."[5]

The issue before the court was whether the amendment allowing a requested reduction in damages from $200 to $150 in order to bring the complaint within C.P.A. § 4(d)(6) could relate back to validate service of process by tacking. The court held in the affirmative and supported its conclusion by simply enumerating some Georgia appellate court cases which have interpreted the provisions of C.P.A. § 15 to provide for a liberal use of amendments and a liberal application of the doctrine of relation back.

To illustrate the liberal use of amendments,[6] the court cited three cases in which amendments were used for various purposes in the course of trial. In *Rigby v. Powell*[7] the appellant moved to strike the appellees' answers on the ground that the answers were not verified. The court sustained the appellant's motion to strike the answers subject to the appellees' filing an amendment to verify their answers. The Georgia Supreme Court cited C.P.A. § 15(a) and held that failure to verify, if required, may be corrected by amendment and thus the trial court did not err in allowing such an amendment.

Similarly, *McDonald v. Rogers*[8] held that a party may, by amendment, plead a new cause of action: "The right to amend pleadings under the Civil Practice Act is very broad and there is no prohibition against the pleading of a new cause of action by amendment."[9]

The liberal use of amendments was further exemplified in the context of an interesting factual setting in *City of Atlanta v. Fuller*.[10] Mrs. Fuller sued the City of Atlanta and the driver of a city water department truck for injuries allegedly sustained when the truck collided with an automobile in which she was a passenger. Thereafter the plaintiff set up the ante litem notice to the municipality by amendment. Defendant's motion for judgment on the pleadings based on insufficiency of notice was overruled.

On appeal, the court of appeals addressed the issue of whether notice to the municipality regarding the nature of the injury required by Georgia Code § 69-308, when not set out in the original petition, could be added by amendment. This question was answered in the affirmative. With the

5. *Id.* at 152, 226 S.E.2d at 1.

6. That amendments to pleading are favored is well-settled. C.P.A. § 15(a) states: "A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pre-trial order. Thereafter the party may amend his pleadings only by leave of court or by written consent of the adverse party; *and leave shall be freely given when justice so requires.*" (emphasis added).

7. 233 Ga. 158, 210 S.E.2d 696 (1974).

8. 229 Ga. 369, 191 S.E.2d 844 (1972).

9. *Id.* at 378, 191 S.E.2d at 852. It is entirely irrelevant that a proposed amendment changes the cause of action or theory of the case or that it states a claim arising out of a transaction different from that originally sued on. Longbottom v. Swaby, 397 F.2d 45 (5th Cir. 1968).

10. 118 Ga. App. 563, 164 S.E.2d 364 (1968).

rationale for its decision grounded in C.P.A. § 15,[11] the court was fully justified in holding that "[w]hatever may have been the former rule . . . there is now no procedural inhibition against allowing the ante litem notice to be added by amendment."[12]

Liberal construction of the relation-back provision of C.P.A. § 15(c)[13] is also essential to the *Leniston* holding, since the service of process could not be validated by subsequent amendment if the amendment were not permitted to relate back to that point in time when the deputy tacked the summons on the door of Mrs. Leniston's dwelling.

It is well established by such cases as *Gordon v. Gillespie*[14] that amendments may relate back to add parties after the statute of limitation has run.[15] Gordon brought a complaint against Gillespie seeking recovery of damages for the death of his father, alleging negligence on the part of defendant. The oversights of plaintiff's original attorney resulted in plaintiff's eventually changing counsel in the middle of the lawsuit and resorting to an affidavit attached to the amendment regarding several aspects of the case. Such oversights also resulted in the tolling of the statute of limitation on plaintiff's proposed suit before his brothers could be added as parties to the wrongful death action.

The trial court judge sustained, *inter alia*, defendant's objection to plaintiff's motion to amend based on the fact that the complaint on its face showed that any claim for relief by the additional parties sought to be added to the lawsuit was barred by the statute of limitation. The plaintiff appealed from this judgment.

In reviewing the effect of the relation-back doctrine of C.P.A. § 15(c), the court of appeals noted that relation back is applicable to amendments by plaintiffs as well as defendants, although the wording of the statute

11. As in *Leniston*, the relation-back provision of C.P.A. § 15(c) was material to the decision in City of Atlanta v. Fuller. Clearly, if the amendment had not related back to the original complaint, notice to the city would have been imperfect.

12. 118 Ga. App. at 564, 164 S.E.2d at 365.

13. C.P.A. § 15(c) provides in pertinent part: "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."

14. 135 Ga. App. 369, 217 S.E.2d 628 (1975).

15. *See* note 9, *supra*. It seems appropriate to recognize at this juncture that refusal to permit amendment is an abuse of discretion in the absence of some justification for such refusal: "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" Foman v. Davis, 371 U.S. 178, 182 (1962).

could be interpreted otherwise.[16] The court also examined[17] the underlying rationale behind the doctrine of relation back of amendments:

> The Federal Rules have broadened the meaning of "cause of action," shifting the emphasis from a theory of law as to the cause of action, to the specified conduct of the defendant upon which the plaintiff relies to enforce his claim. And an amendment which changes only the legal theory of the action, or adds another claim arising out of the same transaction or occurrence, will relate back.[18]

Consequently, the court held that "there is nothing in the language of Section 15 of the Civil Practice Act which requires that in order to add parties whose claims relate back to the filing of the original complaint, the added parties must be necessary parties."[19]

In *Sam Findley, Inc. v. Interstate Fire Insurance Co.*,[20] the court of appeals construed the relation-back provision of C.P.A. § 15(c) to allow the complainant to bring an entirely new cause of action after the statute of limitation had run. The court recognized the utility and rationale buttressing C.P.A. § 15(c):

> [Federal] Rule 15(c) is based on the idea that a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitation than one who is informed of the precise legal description of the rights sought to be enforced. If the original pleading gives fair notice of the general fact situation out of which the claim arises, the defendant will not be deprived of any protection which the state statute of limitations was designed to afford him. Being able to take advantage of plaintiff's pleading mistakes is not one of these protections.[21]

The court in *Leniston* offered an additional basis of support for its holding in the following excerpt: " 'Courts have allowed amendments to relate back in order to permit valid service of process, in certain other instances.' See, 3 Moore's Federal Practice § 15.15(6), p. 1071, and cases cited therein."[22] The court also noted that jurisdictional amendments were per-

16. 135 Ga. App. at 374-75, 217 S.E.2d at 633.

17. "The application of this rule [FED. R. CIV. P.] 15(c) by the federal courts may be of assistance in the present case." *Id.* at 374, 217 S.E.2d at 633. The reason for this emphasis on interpretation of FED. R. CIV. P. 15(c) is that C.P.A. § 15(c) is now an exact duplicate of the federal rule. With this fact in mind, the opinion subsequently cited three federal court cases in support of the holding in Gordon v. Gillespie.

18. 135 Ga. App. at 375, 217 S.E.2d at 633, *quoting from* 3 J. MOORE, FEDERAL PRACTICE, ¶ 15.15[3], at 1027-29 (1974).

19. *Id.* at 374, 217 S.E.2d at 632.

20. 135 Ga. App. 14, 217 S.E.2d 358 (1975).

21. *Id.* at 18, 217 S.E.2d at 361, *quoting from* 3 J. MOORE, FEDERAL PRACTICE, ¶ 15.15[2], at 1021-23 (1974).

22. 138 Ga. App. at 152, 226 S.E.2d at 2.

mitted prior to the enactment of the Civil Practice Act. In these older cases,[23] amendments were allowed where the amount originally claimed was in excess of the jurisdiction of the justice court in which plaintiffs brought their claims.

The decision in *Leniston v. Bonfiglio* concluded with this formulation of the court's holding: "Under these authorities we see no reason why an amendment should not relate back to the original complaint thereby validating service of process."[24] Implicit in this holding is a court footnote[25] which contains a cryptic comment that tacking as a valid means of service of process may have constitutional deficiencies. If the potential impact of *Leniston* upon civil procedure in Georgia is to be fully appreciated, this constitutional question must be addressed.

In *Womble v. Commercial Credit Corp.*,[26] service of process by leaving a copy of the summons at defendant's most notorious abode in the county, pursuant to Code § 81-202,[27] was attacked as "not reasonably calculated to apprise [appellant] of the pendency of the action and afford him an opportunity to present his defense to the action and was a denial of due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States."[28] The Georgia Supreme Court applied the *Mullane v. Central Hanover Bank & Trust Co.*[29] standard of notice reasonably calculated to apprise interested parties of the pendency of the action to the provisions of Code § 81-202 and found those provisions constitutionally inadequate. The court held: "The mere leaving of copy of suit at the residence of the defendant is not reasonably calculated to apprise him of the pendency of an action against him."[30] Therefore, the code section was concluded to be in violation of the Due Process Clause of the Fourteenth Amendment.

In *Pelletier v. Northbrook Garden Apartments*,[31] the supreme court held

23. Johnson v. Johnson, 113 Ga. 942, 39 S.E. 311 (1901) (summons may be amended to show that amount actually due on note was within jurisdictional limits), and MacDonald v. Ware & Harper, 17 Ga. App. 450, 87 S.E. 679 (1916) (where amount apparently claimed is in excess of jurisdiction of justice court, the defect may be obviated by amendment of the summons).

24. 138 Ga. App. at 153, 226 S.E.2d at 2.

25. *Id.* at 152, n.1, 226 S.E.2d at 1 n.1.

26. 231 Ga. 569, 203 S.E.2d 204 (1974).

27. Repealed by 1966 Ga. Laws 609, 687. It is important to note that the formulation of GA. CODE ANN. § 81-202 is similar to that of C.P.A. § 4(d)(6) except that there is no $200 limit on the principal sum involved in the lawsuit.

28. 231 Ga. at 569, 203 S.E.2d at 205.

29. 339 U.S. 306 (1950).

30. 231 Ga. at 571, 203 S.E.2d at 206. In so holding, the court noted the following possibilities that could result in allowing service of process by merely leaving a copy of suit at the residence of the defendant: "He may be absent from such residence for an extended length of time. He may be in the process of moving from one residence to another. The copy may be destroyed by inclement weather, or be removed by other persons."

31. 233 Ga. 208, 210 S.E.2d 722 (1974).

that service of process by tacking as provided for in Code § 61-302 was constitutional in the context of a landlord's dispossessory action. The distinction between a quasi-in-rem action, such as the dispossessory action, and an in-personam action, as in *Womble,* was the foundation for the decision in *Pelletier.*[32] Based on this quasi-in-rem—in-personam distinction, the court held that tacking is reasonably calculated to apprise the interested parties of the pendency of the action within the narrow limits of a landlord's dispossessory warrant.[33]

In contrasting these two cases, a general rule emerges in which tacking is a constitutionally permissible form of service of process in quasi-in-rem actions, but is fatally deficient in in-personam actions. *Leniston* is a classic in-personam action: Two individuals appeared in court to contest alleged negligence that proximately resulted in damage to personal property. However, appellant did not raise this constitutional issue at trial or on appeal. The probable reason for such an omission is the case of *Bryant v. Prior Tire Co.*[34] in which the Georgia Supreme Court declined to invalidate service of process by tacking because the appellant did not demonstrate that she had been injured (*i.e.*, that she had not received actual notice) by the purported unconstitutional tacking provision of C.P.A. § 4(d)(6).[35] It appears that Mrs. Leniston did, in fact, receive actual notice and, therefore, did not have a valid constitutional objection.

Taken together, these three cases lend credence to Justice Gunter's special concurrence in *Bryant:*

> However, I am of the opinion that Subsection 6 of subparagraph (d) of this statute [C.P.A. § 4] is violative of equal protection under both the Georgia and Federal Constitutions; and in a proper case it should be declared unconstitutional. I can see no rational basis for making a distinction in the manner of service of summons in actions involving less than two hundred ($200) dollars and those involving two hundred ($200) or more. In other words, I would hold that "in all other cases" involving any

32. Such a characterization was necessary to adequately distinguish *Womble:* "The tenant's argument that tacking is unconstitutional fails to take cognizance of the historical and practical differences between a dispossessory action—a descendant of the old ejectment action and arguably a quasi-in-rem proceeding—and in personam actions, decisions on which he urges are controlling here, most notably *Womble v. Commercial Credit Corp.* . . . a suit brought upon a note." *Id.* at 210, 210 S.E.2d at 724.

As directed by the court's footnote, *Id.*, n.2, see Fraser, *Actions in Rem,* 34 CORNELL L.Q. 29, 36-37 (1948); Note, *Developments in the Law—State Court Jurisdiction,* 73 HARV. L. REV. 909, 949 (1960); Note, *The Requirements of Seizure in the Exercise of Quasi in Rem Jurisdiction,* 63 HARV. L. REV. 657, 667 (1950).

33. 233 Ga. at 213, 210 S.E.2d at 725.

34. 230 Ga. 137, 196 S.E.2d 14 (1973).

35. The court stated that the appellant "must show that the alleged unconstitutional feature of the statute injures him, and so operates as to deprive him of rights protected by the Constitution of this State or by the Constitution of the United States, or by both." *Id.* at 138, 196 S.E.2d at 15.

> stated amount, service must be perfected in accordance with Subsection 7 of subparagraph (d) of this statute.[36]

This cogent argument was considered compelling in *Womble v. Commercial Credit Corp.* The subsequent case of *Pelletier v. Northbrook Garden Apartments* distinguished *Womble,* but only to the extent necessary to allow tacking as service of process within the narrow dispossessory warrant limits. These two cases supply the foundation for upholding tacking only in the limited context of quasi-in-rem actions, while invalidating its use in all in-personam actions. It is suspected that, given the appropriate case and Justice Gunter's persuasive concurring opinion, C.P.A. § 4(d)(6) would be struck down as unconstitutional in any in-personam action, regardless of the monetary amount involved. Unfortunately, *Leniston v. Bonfiglio* did not constitute such an appropriate case, since Mrs. Leniston had not been denied actual notice as a result of the utilization of tacking as service of process.

While it would appear that the court in *Leniston* has arrived at a procedurally logical conclusion regarding relation back of amendments to validate service of process,[37] the opinion is less than intellectually satisfying. Indeed, the case is totally devoid of incisive judicial analysis. Regardless of the method employed by the court in arriving at its decision, however, it is clear that *Leniston v. Bonfiglio* represents further liberalization of the Civil Practice Act and continued emphasis upon notice pleading, even when such notice must be judicially validated after the fact by the legal fiction of relation back. The questions raised by *Leniston* with regard to the suspect constitutionality of the tacking provision of C.P.A. § 4(d)(6) must wait for an appropriate case to reach the appellate courts of Georgia before answers are provided.

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36. *Id.* at 140, 196 S.E.2d at 15-16. For an excellent treatment of the cases cited by the courts regarding service of process by tacking and a discussion of the constitutional ramifications that are involved, see Beard and Ellington, *Annual Survey of Georgia Law: Trial Practice and Procedure,* 27 MER. L. REV. 235, 244-45 (1975).

37. This fact is especially true in light of the emphasis placed on notice of pending proceedings which is the focus of both the Civil Practice Act and the Federal Rules of Civil Procedure. In this regard, see Sam Finley, Inc. v. Interstate Fire Insurance Co., 135 Ga. App. 14, 217 S.E.2d 358 (1975).