

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-30036  
Summary Calendar

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IN THE MATTER OF: JULIEN E. PEMBO, ET AL.,

Debtors.

JULIEN E. PEMBO, ET AL.,

Appellee,

versus

CARL A. DENGEL, Trustee,

Appellant.

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Appeals from the United States District Court for the  
Eastern District of Louisiana  
(CA-93-3803-H-5)

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(July 28, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY:\*

I

Sherrie Conrad Pembo and Julien Pembo (the "Debtors"), filed a petition seeking relief under Chapter 7 of the Bankruptcy Code on February 27, 1992. In due course, Carl A. Dengel was appointed as

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

the Chapter 7 trustee, and on May 18, 1993, Dengel filed an adversary proceeding against the Debtors. Through the adversary proceeding, Dengel sought a declaration and turnover of a pending state-court personal injury suit,<sup>1</sup> arguing that the state-court suit constituted property of the bankruptcy estate.

On July 8, 1993, Geraldine Guarino sought to intervene as a defendant in the adversary proceeding to assert that she, and not the Debtors, owned the pending state-court suit by virtue of an assignment dated December 1, 1990.<sup>2</sup> Dengel, however, argued that a personal injury suit cannot be assigned under Louisiana law and, thus, that the December 1, 1990 assignment was a nullity as a matter of law. Accordingly, Dengel filed a motion to dismiss Guarino's complaint of intervention on July 22, 1993.

On September 29, 1993, the bankruptcy court held a hearing on the motion to dismiss and a trial on the merits. At the conclusion of the hearing, the bankruptcy court ruled in favor of Dengel, dismissing Guarino's intervention and ordering that the state-court

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<sup>1</sup>This personal injury suit was filed by the Debtors against Swiss Chalet Picnic Grounds & Catering Service, Scottsdale Insurance Company, Barbara Tannebaum, Elliot Tannebaum, The Roma Club, Inc. and United States Fidelity & Guaranty Company. The essence of the underlying claim is that on July 31, 1988 Sherrie Conrad was a guest at a social event hosted by the Krewe of Ceasar at the Swiss Chalet Picnic Grounds in Abita Springs, Louisiana, and that she stepped on an upturned nail in the doorway of the ladies' dressing room, sustaining a severe injury to her left foot.

<sup>2</sup>The personal injury suit, along with another civil action, was assigned to Guarino by the Debtors in exchange for which Guarino paid them \$5,000.00 and assumed the liens and encumbrances in both of the actions.

suit was property of the bankruptcy estate. The bankruptcy court entered judgment in the adversary proceeding on October 4, 1993.

The Debtors and Guarino filed a notice of appeal to the district court on October 8, 1993, and in January of 1994 the district court reversed the judgment of the bankruptcy court. Following the judgment of the district court, Dengel filed the instant appeal, seeking a ruling from this court that the district court erred, and that a sale and assignment of a personal injury action, as a matter of law, is not permissible pursuant to Louisiana law.

## II

The question of whether the Debtors could legally assign their personal injury suit to Guarino under Louisiana law, and thus effectively remove it from their bankruptcy estate, is purely a question of law. We review questions of law de novo. In re Allison, 960 F.2d 481, 483 (5th Cir. 1992).

The federal courts have previously addressed issues concerning Louisiana property rights, and we have understood the general framework as follows: In Louisiana,

"[r]ights are divided into real rights (those that confer authority over a thing) and personal rights (those that confer authority over a person). Personal rights are further subdivided into heritable rights and strictly personal rights."

Covert v. Liggett Group, Inc., 750 F. Supp. 1303 (M.D. La. 1990) (citing LA. CIV. CODE ANN. art. 1763, comment (b)). A heritable

right is a right that may be transferred to another person,<sup>3</sup> whereas a strictly personal right is a right that may not be transferred, in life or by death.<sup>4</sup>

Guarino and the Debtors (collectively called the "Appellees") recognize that a personal injury right, i.e., the right to institute a personal injury action, is a strictly personal right under Louisiana law. See Gilboy v. American Tobacco Co., 540 So.2d 391, 393 (La. Ct. App. [1st Cir.] 1989); Covert, 750 F. Supp. at 1306. Appellees argue, however, that a personal injury action (a suit that has already been initiated)<sup>5</sup> is different from the mere right to sue for personal injuries--they argue that although a personal injury right is strictly personal, a personal injury action is heritable.<sup>6</sup>

In Nathan v. Touro Infirmary, 512 So.2d 352 (La. 1987), the Louisiana Supreme Court made this same distinction in determining

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<sup>3</sup>LA. CIV. CODE ANN. art. 1765. The term heritable was originally used only in the context of survivorship rights. The Louisiana Civil Code has defined heritable right, however, to denote a right that is both inheritable and transferable between living persons. Id.

<sup>4</sup>LA. CIV. CODE ANN. art. 1766; see also LA. CODE CIV. PROC. ANN. art. 428 (stating that an action does not abate on the death of a party unless it is an action to enforce a strictly personal right or obligation).

<sup>5</sup>See LA. CODE CIV. PROC. ANN. art. 421, defining action as "a demand for the enforcement of a legal right . . . commenced by the filing of a pleading . . . [in] a court of competent jurisdiction."

<sup>6</sup>This distinction finds its roots in both Roman and Spanish law. See Covert 750 F. Supp. at 1305-06.

whether a personal injury action abated upon the death of the plaintiff.<sup>7</sup> In Nathan, the Court stated, "there is a significant difference between inheriting an instituted action and inheriting the right to institute an action." Id. at 355. When a personal injury victim has instituted suit, he has "creat[ed] a property right which is heritable." Id.

As previously noted, there are only two categories of personal rights under Louisiana law: strictly personal rights and heritable rights. A strictly personal right is not transferable,<sup>8</sup> and, similarly, a "strictly personal action" will abate at the death of the plaintiff.<sup>9</sup> On the other hand, the term heritable under Louisiana law denotes that a right is not only transferable mortis causa but is also transferable between living persons. LA. CIV. CODE ANN. art. 1765; see also 2 A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE § 210 (3d ed. 1991). As previously noted, the Louisiana Supreme

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<sup>7</sup>More specifically, the Court addressed survivorship rights under LA. CODE CIV. PROC. ANN. art. 428 and LA. CIV. CODE ANN. art. 2315. LA. CODE CIV. PROC. ANN. art. 428 provides:

An action does not abate on the death of a party. The only exception to this rule is an action to enforce a right or obligation which is strictly personal.

<sup>8</sup>LA. CIV. CODE ANN. art. 1766.

<sup>9</sup>See LA. CODE CIV. PROC. ANN. art. 428; Nathan, 512 So.2d at 354. Nathan itself stated that "a victim's action for recovery of tort damages is not strictly personal." Nathan 512 So.2d at 354 (noting that "C.C.P. art. 428 overruled 'the jurisprudence which had adopted the common law rule that a tort action abates on the death of the victim.'"). But cf. Covert, 750 F. Supp. at 1307 ("Personal injury actions fall into this exception to nonabatement if personal injury rights are strictly personal.")

Court has held that a personal injury action is heritable under the law.

It is well-settled that we are bound by the decisions of a state Supreme Court in answering questions of state law, whether or not we agree with the reasoning upon which it is based or the outcome that it dictates. Delta Air Lines, Inc. v. McDonnell Douglas Corp., 503 F.2d 239, 245 (5th Cir. 1974) (citing Erie R.R. v. Thompkins, 304 U.S. 64 (1938)). Accordingly, Nathan dictates our holding in the present case: Once the Debtors instituted the personal injury action against the various defendants in state court, the action became heritable, and, therefore, the Debtors' assignment of that action to Guarino was valid under Louisiana law.<sup>10</sup>

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<sup>10</sup>Appellants argue that Nathan considered only transfers mortis causa, and that we should limit the holding of Nathan to those facts, even though the language of the court's holding has a much broader import. Further, the appellants cite Ducote v. Commercial Union Ins. Co., 616 So.2d 1366, 1369 (La. Ct. App. [3d Cir.]), writ denied, 620 So.2d 877 (1993), for the proposition that a personal injury action cannot be assigned during life.

We cannot say, however, that Ducote governs our disposition of the case at bar. First, the Louisiana Court of Appeals in Ducote construed the question before it as whether the plaintiff's could transfer their "right to assert their cause of action," noting no potential distinction between the transfer of a right to assert an action and the transfer of an instituted action. Instead, Ducote focused primarily upon the law of subrogation among solidary obligors. Accordingly, we cannot say that Ducote decided the specific question presented today any more than Nathan did (i.e., both cases are potentially distinguishable from the case at bar). Accordingly, we give weight to the clearly defined language of Louisiana's highest court.

Further, we note that the distinction made by the Louisiana Supreme Court is further supported by the fact that personal injury actions (but not personal injury rights) can be seized by creditors

III

The Supreme Court of Louisiana has held that when a personal injury action has been instituted, a heritable right has been created. Furthermore, it is undisputed that a heritable right under Louisiana law is transferable both by death and in life. The personal injury suit that was instituted by the Debtors and later assigned to Guarino in the present action is therefore lawfully the property of Guarino. Accordingly, we affirm the judgment of the district court.

A F F I R M E D.

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under LOUISIANA LAW. See LA. REV. STAT. ANN. § 13:3864-:3868; Pounds v. Chicago Insurance Co., 298 So.2d 134 (La. Ct. App. [1st Cir.]), application denied, 302 So.2d 19 (1974). And, finally, we note that "litigious rights," defined much like "actions," are generally considered to be transferable under Louisiana law. See LA. CIV. CODE. ANN. arts. 2652-2654; Martin v. Morgan Drive Away, Inc., 665 F.2d 598 (5th Cir. 1982); see also La. Civ. Code Ann. art. 2652 (Supp. 1994) (effective January 1, 1995) (discussing "assignment" of litigious rights).