

NOW, this 20th day of October, 1981, the complaint for support of Aaron Johnson, son of Susan Ann Burke, plaintiff, born June 24, 1970 is denied.

Costs to be paid by the County.

HERMSDORFER ESTATE, ET AL, v. AMERICAN MOTORS CORP., C.P. Franklin County Branch, A.D. 1981 — 102

*Trespass - Discontinuance of Action - Pa. R.C.P. 299(c)*

1. The Court will not strike a discontinuance unless there is a showing of the deprivation of a substantial right or prejudice due to discontinuance.
2. Where plaintiff filed an action in both state and federal court and then sought to discontinue the state action, the differences in the Pennsylvania and federal joinder rules do not constitute prejudice for purposes of Pa. R.C.P. 299 (c).
3. Procedural differences between the Pennsylvania practice and federal practice may not be made the basis of mandating pursuit of an action in state rather than federal practice.

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#### OPINION AND ORDER

EPPINGER, P.J., December 15, 1981:

This action is one of a number of actions filed as a result of a March 25, 1979 automobile accident in which John William Hermsdorfer was killed. The Plaintiffs, John's parents, suing individually and as administrators of their son's estate, filed a Praecipe for Writ of Summons on March 24, 1981, naming American Motors and others as defendants (American Motors). (One day earlier, Plaintiffs began an action against

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Defendants in federal court by filing a complaint.) On April 10, 1981, Defendants' counsel entered their appearances in the Franklin County action. On June 5, 1981 Plaintiffs filed a Praecipe for Discontinuance. American Motors petitioned this court to strike off the discontinuance and consolidate this action with an earlier action Plaintiffs brought in this court, an action against five individual defendants including the operators of the two vehicles involved in the accident.

Pa. R. Civ. P. 229(c) allows the court, upon petition and after notice, to strike off a discontinuance "in order to protect the rights of any party from unreasonable inconvenience, vexation, harassment, expense or prejudice." American Motors argues the discontinuance prejudices them by denying them Pennsylvania's joinder remedies, allegedly more favorable to them than the federal joinder remedies. Under Pennsylvania rules, if the discontinuance is stricken and this action consolidated with the previously-filed Franklin County one, the corporate defendants here and the individual defendants (vehicle operators, etc.) in the previous action may be found liable to Plaintiffs alone or jointly. See Pa. R. Civ. P. 2255(d). Under federal rules, the individual defendants, made third-party defendants by American Motors, can only be liable to American Motors for indemnification and contribution. See Fed. R. Civ. P. 14(a). American Motors wants all potentially responsible parties to stand on equal footing.

The granting of discontinuances rests within the trial court's discretion, *Brown v. T.W. Phillips Gas and Oil Co.*, 365 Pa. 155, 74 A.2d 105 (1950). Before we can strike the discontinuance, American Motors must show that it has been deprived of a substantial right or will be prejudiced by the discontinuance. *Pesta v. Barron*, 185 Pa. Super. 323, 138 A.2d 690 (1958); *Martinelli v. Mulloy*, 223 Pa. Super. 130, 299 A.2d 19 (1972). We conclude there is no such showing.

American Motors will not be put to unreasonable inconvenience or expense if the discontinuance is allowed to stand. This is not a long-pending case involving extensive pleadings and discoveries (*see, e.g., Kaminski v. Moore*, 8 D&C 3d 208 (C.P., Del., 1978) which could be rendered worthless by a discontinuance. While, no doubt, some time and money have been expended in this matter, both have been minimal, relatively speaking. The pleadings here consist only of a praecipe, a writ of summons, an entry of appearance and a voluntary discontinuance; no substantial litigation efforts have been made.

Here, we need not strike the discontinuance to thwart a vexatious purpose (*see, e.g., Mechanics' Bank v. Fisher*, 1 Rawle

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341 (Pa., 1841)) because the discontinuance has no such characteristics. The Hermsdorfers' purpose in filing the Franklin County action was a non-vexatious one: to preserve their cause of action while obtaining jurisdiction in federal court. Once federal jurisdiction seemed assured, they entered the discontinuance without delay.

Finally, we conclude that discontinuance of the Franklin County action will not prejudice American Motors. The fact that, following discontinuance, it may no longer take advantage of the Pennsylvania joinder rules does not constitute prejudice for purposes of Rule 229(c). We do not view the differences in the Pennsylvania/Federal joinder rules as significant. Petitioners may still defend against liability in federal court on the ground that the individual defendants are at fault regardless of whether they are on "the same line of defense." Like the Superior Court in *Pesta v. Barron*, supra, "we are unable to see how any alleged procedural difference between the Pennsylvania practice and the federal practice may be made the basis of a mandate that the Plaintiffs pursue their action in the state court rather than in the federal court." 185 Pa. Super. at 327, 138 A.2d at 693.

Having concluded that American Motors failed to show that it has been deprived of a substantial right or will be prejudiced by the discontinuance, we will dismiss the petition to strike off discontinuance and consolidate actions.

#### ORDER OF COURT

December 15, 1981, the defendants' motion to strike off the discontinuance entered by the plaintiffs in this case is denied.

within the purview of this proceeding, and the defendant's preliminary objection as to these points is dismissed.

The defendant's motion to strike the plaintiff's request for the award of damages and interest under the policies is clearly well taken, for this Court may only construe contract terms and may not order specific monetary relief. Therefore, that motion will be sustained and the plaintiff will be granted leave to amend.