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RELEASE OF ONE JOINT TORT-FEASOR IS A RELEASE OF ALL—COVENANT NOT TO SUE CONSTRUED TO HAVE SAME EFFECT AS RELEASE

Plaintiffs brought an action for fraud and deceit in connection with the sale of stock for $2500 to two of the defendants and work performed by plaintiff for defendant company. When the matter was at issue in the trial court, defendant Howell, in consideration of $1500.00, entered into a covenant not to sue with plaintiffs whereby the covenant could be pleaded as a defense in any further suit on the matter. The covenant expressly reserved the plaintiffs' right to sue the other defendants. Howell then filed a stipulation to dismiss without prejudice. The other defendants presented the covenant to the court who permitted them to amend their answer, move for summary judgment, and granted the motion. On appeal, the judgment of the trial court was affirmed. *Held:* The release of one joint tort-feasor is a release of all. The same is true of a covenant not to sue which goes beyond the agreement not to sue to the point where it has the effect of a release. *Price v. Baker,* 12 Colo. Bar Ass'n Adv. Sh. 157 (1959).

Historically the rule that the release of one joint tort-feasor is a release of all harks back to the indivisibility of the wrong. The rule originated in property law, thence to contract law, and, as an already accepted concept, it was made a part of tort law.[1] In tort law the inseparability-of-the-injury concept has been broadened to the extent of including joint, concurrent, or successive torts.[2] In order to abate the harshness of the release rule whereby the unwary plaintiff lost all rights when he entered into a partial settlement with one or more of the defendants, the courts early recognized the covenant not to sue which was an agreement for a consideration between the plaintiff and one or more defendants to not sue those defendants.[3] The covenant not to sue was not a defense to suit by the plaintiff, but if the plaintiff after covenanting sued the defendant the latter could in turn sue the plaintiff for breach of covenant.[4]

The plaintiff has the right to sue one or all joint-tortfeasors for the injury. It is the plaintiff's choice as to whom he will sue, and it is assumed that he will sue for total damages sustained. Thus, if the plaintiff chooses to release one or more joint tort-feasors who are each legally liable for the whole damage, the law holds that he who pays for the injury has paid for all and there is nothing left for which the other tort-feasor can be liable. Even if the release contains a reservation of the right to sue the remaining tort-feasors, it is held that the plaintiff no longer has a right to reserve and the reservation clause is void.[5]

The traditional viewpoint, upheld by the majority opinion in the instant case, i.e. that the release of one joint tort-feasor releases

1 McKenna v. Austin, 134 F.2d 659 (1943).
2 Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956).
3 McKenna v. Austin, 134 F.2d 659 (1943).
4 Haney v. Cheatham, 8 Wash.2d 310, 111 P.2d 1003 (1941).
5 Roper v. Florida Public Utilities Co., 131 Fla. 709, 179 So. 904 (1938).

all, has several advantages, viz. (1) the rule is certain and unequivocal, (2) it has been upheld by the Colorado courts,[6] and (3) a covenant not to sue if properly drawn is allowed.[7] Oftentimes the contract is ambiguous, and there is confusion as to whether it is a release or a covenant not to sue. The distinction is technical, and, according to the traditional viewpoint, adheres to the party's exact wording rather than to his intention.[8] The courts have held that the determination of whether or not the contract is a release or a covenant not to sue is a question of law for the courts to decide.[9] It is a jury question as to any wrongful obtaining of the release which if found would negate the release and allow a continuance of the cause of action.[10] It is also a jury question as to whether or not the plaintiff has received accord and satisfaction from the released tort-feasor that would preclude the plaintiff's suit of the other tort-feasors.[11]

The majority opinion states that several cases relied upon by the plaintiff herein are in jurisdictions where contribution among joint tort-feasors is allowed.[12] It is contended that since contribution is not allowed in Colorado, these cases are not persuasive here. Other jurisdictions who rule as Colorado on contribution have held that allowing a compromise settlement between one or more of the joint tort-feasors and the plaintiff is no bar to a cause of action against the other tort-feasors.[13] The only party to be benefitted by the majority ruling is the tort-feasor who refuses to compromise with the injured party. The covenant not to sue can have real meaning only if it effectively enables any party willing to compromise to avoid litigation and alleviates the plaintiff's fear of a partial settlement being held as full satisfaction.[14]

The modern viewpoint, voiced by the dissenting opinion, advocates examining the contract in the light of the party's intention and the compensation that he receives. The party's intention should govern the interpretation of the contract. If the party intended to reserve a right to sue the other tort-feasors, the cause of action is not extinguished by the release of one or more tort-feasors. Legal hair-splitting required to obtain the exact intrepretation of the contract is avoided, and a release is construed as a covenant not to sue if there is a reservation of right against the other tort-feasor.[15] The plaintiff cannot receive compensation for his injury more than one time, and the amount contributed by the compromising party, if not understood as a full satisfaction to the plaintiff, is credited to the

6 Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956).
7 Walling v. Warren, 2 Colo. 434 (1874).
8 Roper v. Florida Public Utilities Co., 131 Fla. 709, 179 So. 904 (1938).
9 Gillette Motor Transport Co. v. Whitfield, 186 S.W.2d 90, (Tex. Civ. App. 1945); Richardson v. Pacific Power & Light Co., 11 Wash.2d 288, 118 P.2d 985, (1941).
10 Roper v. Florida Public Utilities Co., 131 Fla. 109, 179 So. 904 (1938).
11 Matheson v. O'Kane, 211 Mass. 91, 97 N.E. 638, (1912).
12 McKenna v. Austin, 134 F.2d 659 (1943); Louisville Gas & Electric v. Beaucond, 188 Ky. 725, 224 S.W. 179 (1920); Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958); Judson v. People's Bank and Trust Co., 17 N.J. 67, 110 A.2d 24 (1954).
13 Grondquist v. Olson, 242 Minn. 119, 64 N.W.2d 159 (1954).
14 McKenna v. Austin, 134 F.2d 659 (1943).
15 Gilbert v. Finch, 173 N.Y. 444, 66 N.E. 133 (1903); Grondquist v. Olson, 242 Minn. 119, 64 N.W.2d 159 (1954).

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other tort-feasor.[16] In a recent case the tort-feasor had the burden of proving that a general release without an express reservation of right to sue other tort-feasors was a discharge of all tort-feasors.[17]

The traditional rule, which represents a diminishing minority viewpoint, was revoked in an American equity court in 1822[18] and in an English court in 1892.[19] It has also been repudiated by legal scholars who describe it as a relic of common law procedure.[20] Dean Prosser recommends that the plaintiff's cause of action should survive until he intentionally releases it or receives full compensation.[21] The Restatement provides that a reservation of the right to sue other tort-feasors in a release agreement be construed as a covenant not to sue.[22]

Progress, logic, and fair play stand with the modern viewpoint as against consistency and certainty with the traditional rule. The author believes that departure from ancient technicalities will bring necessary relief to such cases as the instant one. Tennessee, Washington, and Florida are the only remaining jurisdictions which support the majority opinion's ruling. It is time for Colorado to join the modern view and overthrow its archaic rule.

Joyce Cocovinis

16 Louisville Gas & Electric v. Beaucond, 188 Ky. 725, 224 S.W. 179 (1920).
17 Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958).
18 Gilbert v. Finch, 173 N.Y. 444, 66 N.E. 133 (1903).
19 Duck v. Mayer, 2 Q.B. 511 (C.A. 1892).
20 4 Corbin, Contracts, §§ 931-35 (1951); Prosser, Torts, § 46 (2d ed. 1955).
21 Prosser, *supra* note 20.
22 Restatement, Torts, § 885 (1939).

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