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Article 17

Evidence - Admissibility of the Fact and Amount of a Compromise Settlement with One Joint Tort-Feasor in the Trial of a Second Joint Tort-Feasor - Burger v. Van Severn, 39 Ill. App. 2d 205, 188 N.E. 2d 373 (1963)

DePaul College of Law

ployment, which caused an engineer to reject a professorship[33] and a baker to become a cub reporter.[34] A plaintiff's changing her residence and enrolling in a beauty culture school were also held to be conditional acts rather than bargained-for consideration.[35]

Analysis of the instant case discloses that Mr. Grace's promise was not of a contractual nature, anticipating consideration, but was rather the promise of a conditional gift. Mr. Grace made a promise of a pension to Mrs. Bredemann, an employee he was free to discharge. He contemplated no consideration but certainly a condition. It would, of course, be a condition to a promise of pension that the promisee retire. Illinois formerly adhered to a traditional interpretation of the law of contractual consideration. The decision in *Bredemann v. Vaughan Mfg. Company* circumscribes a shadowy border of doubt around an area once defined with clarity.

[33] Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872 (1936), 21 MINN. L. REV. 748 (1937).

[34] Fisher v. Jackson, 142 Conn. 734, 118 A.2d 316 (1955).

[35] Coder v. Smith, 156 Kan. 512, 134 P.2d 408 (1943).

EVIDENCE–ADMISSIBILITY OF THE FACT AND AMOUNT OF A COMPROMISE SETTLEMENT WITH ONE JOINT TORTFEASOR IN THE TRIAL OF A SECOND JOINT TORTFEASOR

The plaintiff, John Burger, was a self employed contractor engaged in building and repairing gutters. The defendant, The Rock Island Lumber Co., a general contractor, contracted to replace roofing shingles and gutters on a two story residence in Milan, Illinois. The defendant lumber company then sublet the roofing work to the defendant, Henry Van Severn, and the gutter work to the plaintiff. Van Severn commenced work by building a scaffold from which to work on the roofing. The plaintiff arranged to borrow this scaffold to work on the gutters of the house (although there was some conflict in testimony regarding the exact arrangements agreed upon). While he was working on the gutters, one end of the scaffold gave way and the plaintiff fell sixteen feet, landing upon a large railroad tie, causing him severe injuries. The plaintiff then commenced suit against both the Rock Island Lumber Company and Van Severn under the Illinois Structural Work Act,[1] alleging negligent construction of the scaffold. Just prior to the trial, the plaintiff settled with

[1] ILL. REV. STAT. ch. 48, § 60 (1961).

the lumber company for $11,000.00 and covenanted not to sue it. The trial resulted in a jury verdict against Van Servern, but the jury awarded no damages. Throughout the trial, reference to the $11,000.00 settlement was made repeatedly by both the trial judge and counsel for the defendant, over the plaintiff's frequent objection. The trial court entered judgement on the verdict and the plaintiff appeals, alleging that the fact and amount of the compromise settlement should not have been admitted in evidence before the jury. The appellate court, after a review of Illinois authority, sustained the plaintiff's contention, and remanded the case for a new trial, in accord with the rule pronounced in recent Illinois authority. *Burger v. Van Severn*, 39 Ill. App. 2d 205, 188 N.E. 2d 373 (1963).

The first cases in Illinois were uniform in approving the admission of such convenants before juries.[2] However, these early cases all involved a defendant's appeal from a judgement for the plaintiff on the grounds that the contract entered into was a release rather than a covenant not to sue. Thus, the plaintiff did not bring before the court the question of whether the admission of such a covenant into evidence prejudiced plaintiff's right to a fair trial.

However, when the Supreme Court was faced in 1911 with an identical question in *Devaney v. Otis Elevator Company*,[3] on defendant's appeal, the earlier rule was overturned and such a covenant was held to be completely irrelevant in the trial of a joint tort-feasor. The court stated, ". . . the $375.00 paid by the Otis Elevator Co. could not be considered by the jury in part payment of the defendant's damage. . . . (E)ach wrongdoer is responsible for the whole amount of damages and . . . there is no such thing as apportionment among wrongdoers."[4] The court declined to reverse, however, as the instruction could not be prejudicial to the defendant.

Subsequent Illinois cases indicate that only one case really followed the *Devaney v. Otis Elevator Company*, precedent.[5] Other cases were either distinguished from *Devaney* on various grounds[6] or the court, due to preoccupation with other problems, failed to consider this issue fully, but permitted the admission of covenants not to sue into evidence.[7] These

[2] Gore v. Henrotin, 165 Ill. App. 222 (1911); Vandalia R.R. v. Nordhaus, 161 Ill. App. 110 (1911); Brennan v. Electrical Installation Co., 120 Ill. App. 461 (1905); Chicago v. Babcock, 143 Ill. 358, 32 N.E. 271 (1892).

[3] 251 Ill. 28, 95 N.E. 990 (1911). [4] *Id.* at 36, 39, 95 N.E. at 994.

[5] Scharfenstein v. Forest City Knitting Co., 253 Ill. App. 190 (1929).

[6] Garvey v. Chicago Rys., 339 Ill. 276, 171 N.E. 271 (1930), where settlement made after jury arrived at verdict; Onyschuk v. A. Vincent Sons Co., 277 Ill. App. 414 (1934), where settlement agreement admitted by stipulation; *compare* McManaman v. Johns Mansville Corp., 400 Ill. 423, 81 N.E.2d 137 (1948).

[7] Puck v. City of Chicago, 281 Ill. App. 6 (1935); Caruso v. City of Chicago, 305 Ill. App. 571, 27 N.E. 2d 545 (1945).

latter cases were considered adequate authority in two 1947 appellate court decisions to support defendants' contentions that the refusal to admit covenants not to sue into evidence was reversible error on the grounds that it permitted the plaintiff a double recovery.[8]

The Appellate Court case of *Aldridge v. Morris*[9] arose on plaintiff's appeal from a jury verdict for defendant. After an exhaustive review of Illinois authority, this court held that some adjustment for the prior settlement must be made to prevent the plaintiff from enjoying a double recovery. The court approved the trial court's decision to admit the covenant into evidence but indicated that it would also approve of a trial judge's determination to exclude the settlement from the jury and deduct the amount thereof from the jury's verdict, if any. The Supreme Court noted the *Aldridge* case in *N.Y.C. & St. L. R.R. Co. v. American Transit Lines* as a ". . . well reasoned case . . . which . . . we very carefully considered on petition for leave to appeal and, after such consideration denied it."[10] In this case, however, the defendant did not attempt to introduce the convenant before the jury and the trial court deducted the amount of settlement from the jury's verdict.

When an Illinois Appellate Court considered a similar question in 1951, it treated the trial court's refusal to either admit the covenant into evidence or deduct the amount of the prior settlement from the jury verdict as distinct error.[11]

This was the background of Illinois law when the Appellate Court for the First District was confronted with the case of *DeLude v. Rimek* in 1953.[12] The court promulgated the new rule that covenants not to sue a joint tort-feasor are inadmissible in the trial of a second joint tort-feasor and the trial judge should deduct the amount of such a settlement from the jury's award, if any, because any such admission is potentially prejudicial to the plaintiff. The court stated that ". . . to permit the introduction of the convenant and its attendant facts . . . would seriously jeopardize plaintiff's right for a fair trial."[13] The rationale was that the jury might feel that the party who settled out of court was the real wrongdoer and

[8] Bejnarowicz v. Bakos, 332 Ill. App. 151, 74 N.E.2d 614 (1947); Steowsand v. Checker Taxi Co., 331 Ill. App. 192, 73 N.E.2d 4 (1947).

[9] 337 Ill. App. 369, 86 N.E.2d 143 (1949).

[10] 408 Ill. 336, 342. 97 N.E.2d 264, 268 (1951).

[11] Hyde v. Montgomery Ward & Co., 343 Ill. App. 388, 99 N.E.2d 382 (1951). This was an unusual case where the plaintiff had settled with one joint tort-feasor for $4,500 and the jury verdict in favor of the plaintiff in the trial against the remaining tort-feasor was only $3,000. The jury had not been informed of the fact or amount of the compromise settlement. A majority court indicated that the best means of handling the situation would have been to introduce the covenant into evidence before the jury.

[12] 351 Ill. App. 466, 115 N.E.2d 561 (1953).

[13] *Id.* at 474, 115 N.E.2d at 565.

thus find in favor of the defendant appearing before them. The court professed to follow the principle of *Aldridge v. Morris* without causing the plaintiff the injustice referred to above.

Since the *DeLude* decision, there has been no appellate court reviewing Illinois authority that has failed to follow it fully.[14]

A brief survey of the law on this point in states other than Illinois indicates that most jurisdictions provide that some deduction should be made from a judgement if the plaintiff has received money for a covenant not to sue a joint tort-feasor, without setting out the specific manner of deduction.[15] Many states have ruled definitely that such a covenant is admissible to mitigate damages.[16] Only two states followed the rule set forth in *DeLude v. Rimek*[17] prior to 1953,[18] and since that time two other jurisdictions have expressly followed its rules.[19] There are also two jurisdictions which refuse to permit any kind of a reduction in damages as a result of such a covenant.[20] Rules comparable to that in *DeLude v. Rimek*[21] have also been adopted in two jurisdictions permitting contribution among joint tort-feasors.[22]

The whole question of the desirability of this rule revolves around whether there should be contribution among joint tort-feasors. Should the plaintiff, at his option, have the right to sue any one of a number of defendants and collect the entire damage from him? This is the current

[14] Burger v. Van Severn, 39 Ill. App. 2d 205, 188 N.E.2d 373 (1963); Ryan v. Monson, 33 Ill. App.2d 406, 179 N.E.2d 449 (1961); Frame v. Grecivich, 30 Ill. App.2d 271, 175 N.E.2d 415 (1961); Schumaker v. Rosenthal, 226 F.2d 946 (7th Cir. 1955), applying Illinois law.

[15] Peats v. Martin, 133 So.2d 920 (La. 1961); Williams v. Colquett, 272 Ala. 577, 133 So.2d 364 (1961); Byers Bros. Real Estate and Ins. Agency, Inc. v. Campbell, 329 S.W.2d 393 (Mo. 1959); Lysfjord v. Waldron, 135 F. Supp. 672 (S.D.Calif. 1955); Beck v. Bel Air Properties, 134 Cal. App.2d 834, 286 P.2d 503 (1955); Lone Star State Life Insurance Co. v. Foster, 250 S.W.2d 949 (Texas 1952); Green v. Lang Co., 115 Utah 528, 206 P.2d 626 (1949); Fagersburg v. Phoenix Flour Mills Co., 50 Ariz. 227, 71 P.2d 1022 (1937); Chisholm v. Vocational School for Girls, 103 Mont. 503, 64 P.2d 838 (1936).

[16] Bolton v. Ziegler, Ill. F. Supp. 516 (N.D.Iowa 1953); Stevens v. Hurenburg, 117 Vt. 525, 97 A.2d 250 (1953); Raughly v. Delaware Coach Co., 47 Del. 343, 91 A.2d 245 (1952); Horner v. Town of Cookeville, 36 Tenn. 535, 259 S.W.2d 561 (1952); Giem v. Williams, 215 Ark. 705, 222 S.W.2d 800 (1949); Solomon v. Dabrokski, 295 Mass. 358, 3 N.E.2d 744 (1936).

[17] 351 Ill. App. 466, 115 N.E.2d 561 (1953).

[18] Bedwell v. DeBoit, 221 Ind. 600, 50 N.E.2d 875 (1943); Jacobsen v. Woerner, 149 Kas. 598, 89 P.2d 24 (1939).

[19] Ramsey v. Camp, 254 N.C. 443, 119 S.E.2d 209 (1961); Steger v. Egyud, 219 Mid. 331, 149 A.2d 762 (1959).

[20] Western Springs Service Co. v. Andrew, 229 F.2d 413 (10th Cir., 1956), applying Colorado law; Papenfus v. Shell Oil Co., Inc., 254 Wis. 233, 35 N.E.2d 920 (1949).

[21] 351 Ill. App. 466, 115 N.E.2d 561 (1953).

[22] Oliver v. Russo, 29 N.J. 418, 149 A.2d 213 (1959); McKenna v. Austin, 134 F.2d 659 (D.C.Cir. 1943).

view of most courts,[23] although there is growing a trend of authority to the contrary.[24] However questionable this rule may be,[25] it is beyond the scope of this study to inquire further into this broader question.

Thus, if we accept the hypothesis that there should be no contribution permitted among joint tort-feasors, it follows that any settlement with one joint tort-feasor, no matter how large or small, should not infringe on the plaintiff's right to collect the entire balance of his damages from any other joint tort-feasor. He could have collected the entire amount from any defendant he chose. There would also seem to be no argument to refute the contention that the admission into evidence of a previous settlement from one joint tort-feasor might lead a jury to believe that it had the wrong party before it, or that the plaintiff had received adequate compensation for his injury. It would therefore appear that the rule in *DeLude v. Rimek* and *Burger v. Van Severn* represents the better reasoned view for adjusting a judgement where the plaintiff has received a settlement out of court from a joint tort-feasor.

Since no recent case applying Illinois law has followed any other rule, it seems clear that this is the current Illinois law on this issue, and it would seem likely that other jurisdictions will follow the lead of North Carolina and Maryland in adopting this rule in succeeding years.

[23] Union Stock Yards Co. of Omaha v. C., B & Q. R.R. 196 U.S. 217 (1904); Chapin v. C & E.I.R.R., 18 Ill. App. 47 (1885); RESTATEMENT, TORTS, § 879 (1948); *See generally* Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 418 (1937).

[24] *E.g.* Judson v. People's Bank and Trust Co., 25 N.J. 17, 134 A.2d 761 (1957); George's Radio, Inc. v. Capital Transit Co., 126 F.2d 219, 75 U.S. App. D.C. 187 (1947); Quatray v. Wicker, 178 La. 289, 151 So. 208 (1933); Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 231 (1928).

[25] *See also* Pennsylvania Co. v. West Penn. Rys., 110 Ohio St. 516, 144 N.E. 51 (1924), where following this rule blindly led to a blatantly unjust conclusion.

PATENTS–PATENTABLE INVENTION: QUESTION OF LAW OR FACT?

Brothers Incorporated brought action against Browning Mfg. Co. to secure a declaratory judgment that United States Patent No. 2,610,557, relating to a pneumatic roller compactor, was invalid since the claimed invention had been fully described and illustrated in a printed pamphlet which had been prepared and publicly distributed by Browning Mfg. Co., more than one year prior to the date of the application for patent.[1] Browning

[1] 35 U.S.C. § 102 (b) states: "A person shall be entitled to a patent unless . . . the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States."