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Raleigh Cooley

TORTS — COVENANT NOT TO SUE AS BAR TO ACTION AGAINST OTHER JOINT TORT-FEASORS

Plaintiff was injured in a collision between a train operated by the Railway Company and a tractor operated by defendant. In consideration of $3,500 plaintiff executed under seal an instrument covenanting not to prosecute any action against the Railway Company for damages based on his injuries. The instrument stated, "It is expressly understood that this instrument is a covenant not to sue and not a release. The undersigned expressly reserves the right to an action . . . against (defendant) . . ." By special plea in bar, defendant contended that the instrument served to release not only the Railway Company but also himself as a joint tort-feasor. The trial court sustained the plea. On appeal, *held,* affirmed. The distinction recognized in many jurisdictions between a covenant not to sue and a release is ill founded. What is important is that plaintiff effected an accord and satisfaction with one tort-feasor which should serve to extinguish his claim against others responsible for his injuries. *Shortt v. Hudson Supply Co.,* 191 Va. 306, 60 S. E. 2d 900 (1950).

It is familiar law that the release of one joint tort-feasor releases the others jointly liable for the same wrong. This is a proposition with which the Virginia court has long been in accord.[1] But many courts have added the qualification that such a release is not the release of all where in that release rights have been expressly reserved against other tort-feasors, either in the instrument[2] or where, aside from the instrument, such appears to have been the intention of the parties.[3] Where the instrument contains a covenant not to sue one joint tort-feasor, as distinguished from a release, the great weight of authority holds that other tort-feasors are not released. This also is true whether reservation of rights against the others is contained in the instrument[4] or is shown by parol evidence to have been the intention of the parties.[5] Finally, some courts have construed a release with reservations as tantamount to a covenant not to sue, and have allowed later suit accordingly.[6]

Where the instrument is given effect as a covenant not to sue one of two or more joint tort-feasors, it is usually held that the covenant serves to bar suit against no one, but that if sued, the one to whom the covenant has been given may institute collateral suit for breach of the covenant.[7] But other courts, desiring to avoid circuity of action, have allowed the covenant to be pleaded in defense to the original action, a seemingly desirable rule.[8]

It has been recognized for many years that Virginia is a jurisdiction which looks with disfavor upon later suit after an apparent discharge of one of two or more joint tort-feasors. In the leading case of *Ruble v. Turner,*[9] the plaintiff had been assaulted by several wrongdoers, to one of whom he later gave a written instrument evidencing a settlement between them in "satisfaction for the part" that party had played in the assault. The instrument expressly reserved plaintiff's rights against the defendant. Nevertheless the court held defendant's plea of accord and satisfaction to be a valid defense, saying, "when satisfaction is made, like a valuable consideration in a deed, it gives effect to the instrument; and satisfaction being received from one of the joint trespassers, shall discharge the whole. . . ."[10] Speaking of the attempted reservation of the right to sue the other joint tort-feasors, the court stated, "the proviso in this case is void, as being contrary to the policy of the law and the nature of the transaction."[11]

The principle that release of one joint tort-feasor with reservation of rights against others nevertheless releases all, has been repeated by the Virginia court numerous times,[12] while *Ruble v. Turner* was being criticized elsewhere.[13] But nowhere before the instant *Shortt* decision has an opinion of the court indicated its view on the effect of a pure covenant not to sue.

In Virginia the common law view was that release of one joint *obligor* was the release of all.[14] But the view seems to have been that in the case of a contractual obligation, a covenant not to sue one co-obligor did *not* serve to release others.[15] Today by statute "a creditor may compound or compromise with any joint contractor or co-obligor, and release him from all liability on his contract or obligation, without impairing the contract or obligation as to the other joint contractors or co-obligors."[16] In *First National Bank v. Bank of Waverly,*[17] it was held that this statute left unaffected the rule regarding joint wrongdoers.

It has been said that different considerations govern the co-obligor situation as distinguished from that of joint tort-feasors, since in the case of a contractual obligation it is difficult for the plaintiff to secure more than one total recovery from among the obligors, while in the case of an unliquidated tort claim, double or overlapping recovery is an eminent danger.[18] But the simple expedient of deducting the amount of the first satisfaction from the amount of the later recovery, as numerous courts do,[19] should avoid that danger.

Elsewhere it has become increasingly accepted as the most equitable rule that a covenant not to sue one of two joint tort-feasors

does not release those others responsible. At 45 AM. JUR., RELEASE, 676, this rule is spoken of as the "great weight of authority." RESTATEMENT, TORTS §885 adopts it by stating, "(2) A covenant not to sue one tort-feasor for a harm does not discharge any other liable for the harm."

The reason for dissatisfaction with the view now adopted by the Virginia court has been effectively stated by Mr. Justice Rutledge, speaking for the court in *McKenna v. Austin*:[20] "The rule's results are incongruous. More often than otherwise they are unjust and unintended. Wrongdoers who do not make or share in making reparations are discharged, while one willing to right the wrong and no more guilty bears the whole loss. Compromise is stifled, first, by inviting all to wait for the others, and, second, because claimants cannot accept less than full indemnity from one when doing that discharges all. Many, not knowing this, accept less only to find later that they have walked into a trap. The rule short-changes the claimant or overcharges the person who settles, as the recurring volume and pattern of litigation show. Finally, it is anomalous in legal theory, giving tort-feasors an advantage inconsistent with the nature of their liability."

In view of the early attitude of the Virginia court regarding covenants not to sue among co-obligors, together with the increasing weight of authority on the tort aspect elsewhere and the lack of binding precedents here, it was to be hoped that the court would have decided the *Shortt* case differently from the manner in which it did. It is submitted that the instant decision exhibits an overdue respect for an ancient common law doctrine which modern authority has wisely whittled away with exceptions.

RALEIGH COOLEY

FOOTNOTES

1. Ruble v. Turner, 2 Hen. & M. (12 Va.) 38 (1808); Harris v. City of Roanoke, 179 Va. 1, 18 S. E. 2d 303 (1942).
2. Adams Express Company v. Beckwith, 100 Ohio St. 348, 126 N. E. 300 (1919); Edens v. Fletcher, 79 Kas. 139, 98 P. 784 (1908).
3. Steenhuis v. Holland, 217 Ala. 105, 115 So. 2 (1927); Fitzgerald v. Union Stockyards Co., 89 Neb. 393, 131 N. W. 612, 33 L. R. A. (N. S.) 983 (1911).
4. Parry Mfg. Co. v. Cruell, 56 Ind. App. 77, 101 N. E. 756 (1913).

5. Pogel v. Meilke, 60 Wis. 248, 18 N. W. 927 (1884); City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271 (1892); Matheson v. O'Kane, 211 Mass. 91, 97 N. E. 638 (1912); Ellis v. Essau, 50 Wis. 138, 6 N. W. 518 (1880).

6. Gilbert v. Finch, 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807 (1903); Dwy v. Connecticut Co., 89 Conn. 74, 92 A. 883 (1915).

7. City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271 (1892); Matheson v. O'Kane, 211 Mass. 91, 97 N. E. 638 (1912).

8. Judd v. Walker, 158 Mo. App., 156, 138 S. W. 655 (1911).

9. 2 Hen. & M. (12 Va.) 38 (1808).

10. Id. at 43.

11. Id. at 46.

12. Bland v. Warwickshire Corp., 160 Va. 131, 168 S. E. 443 (1933); First National Bank v. Bank of Waverly, 170 Va. 496, 197 S. E. 462, 116 A. L. R. 1156 (1938); Harris v. City of Roanoke, 179 Va. 1, 18 S. E. 2d 303 (1942).

13. Chewning v. Tomlinson, 105 W. Va. 76, 81, 141 S. E. 532, 534 (1928).

14. Garnett v. Mason, 6 Call. (10 Va.) 308 (1825).

15. Ibid *Accord,* Ward v. Johnson, 6 Munf. (20 Va.) (1817).

16. VA. CODE ANN. § 11-10 (1950).

17. 170 Va. 496, 197 S. E. 462, 116 A. L. R. 1156 (1938).

18. See 2 WILLISTON, CONTRACTS § 338A (Revised Edition, Williston & Thompson, 1936).

19. Aldridge v. Morris, 337 Ill. App. 369, 86 N. E. 2d 143 (1949); Ellis v. Esson, 50 Wis. 138, 6 N. W. 518 (1880).

20. 134 F. (2d) 659, 662, 148 A. L. R. 1253, 1257 (1943).