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Res Judicata -- Consent Judgment in Favor of Infant as Bar to Litigation Between Joint Tortfeasors

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without the questionable finding on the naturalness of the object.[19] The court in its estimation of common knowledge might have held as a matter of law that one who eats corn flakes should anticipate the presence of an occasional hard object derived from corn.[20] However, it is equally conceivable that the court would have left the question of reasonable fitness to the jury.[21]

The present trend is toward using naturalness as only one factor among others in order to determine what the consumer should expect. Other jurisdictions have rejected the limitations of the *Mix* rule with or without factual distinctions from the *Mix* case. *Adams* is factually more distinguishable from *Mix* than the other holdings which follow its rationale. It is submitted that reliance upon the consumer-expectation rationale would provide a sounder basis for determining liability in future cases arising in this area.

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Res Judicata—Consent Judgment in Favor of Infant as Bar to Litigation Between Joint Tortfeasors.

In *Pack v. McCoy*[1] the plaintiff brought suit to recover for his personal injuries and property damage arising out of a motorcycle-bus collision. Plaintiff was the operator of the motorcycle and defendants were the bus driver and the bus company. In a previous personal injury action a bus passenger, an infant, had sued the bus company, the bus driver, and the motorcycle operator as joint tort-feasors. The infant's suit was settled by a consent judgment entered in her favor against all defendants. The defendants in *Pack* pleaded res judicata, asserting that the prior judgment was a final adjudication of the issue of negligence between the present parties. The supreme court reversed the trial court's order striking the defense.[2]

[19] Naturalness would be relevant in some cases, but in others this test properly could be omitted and the decision placed on what the consumer should expect, with other criteria determining the issue.

[20] See Allen v. Grafton, 170 Ohio St. 249, 164 N.E.2d 167 (1960), where the court took the case from the jury on the ground that common knowledge requires that consumers of fried oysters anticipate the presence therein of an occasional piece of oyster shell.

[21] In most of the recent cases which have used "naturalness" only in conjunction with other criteria, the question of reasonable fitness has been left to the jury. *E.g.*, Bryer v. Rath Packing Co., 221 Md. 105, 156 A.2d 442 (1959); Lore v. De Simone Bros., 172 N.Y.S.2d 829 (Sup. Ct. 1958); Wood v. Waldorf Sys., Inc., 79 R.I. 1, 83 A.2d 90 (1951); Betchia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960). *Contra*, Allen v. Grafton, 170 Ohio St. 249, 164 N.E.2d 167 (1960).

[1] 251 N.C. 590, 112 S.E.2d 118 (1959).

[2] There was a dissent. Judge Bobbitt (Judge Parker joining) thought there had not been an adjudication of the negligence between the former defendants, that the defense should not be allowed, and that precedents to the contrary should be over-ruled. 251 N.C. at 593, 112 S.E.2d at 121.

Two defendants may settle a plaintiff's claim out of court, and this settlement will not be res judicata as to their rights and liabilities *inter se* if they subsequently litigate their own claims.[3] Also, a plaintiff's voluntary non-suit taken after an extra-judicial settlement of his claim will not bar future litigation between the original defendants.[4] But if the plaintiff in the original action happens to be an infant, the present decision indicates that the necessary court approval of the settlement,[5] as evidenced by the consent judgment, will bar any further action between the former defendants.

In the principal case the court expressly relied on *Lumberton Coach Co. v. Stone*,[6] which held that a previous consent judgment in favor of an adult plaintiff barred a suit between the former defendants. In following this precedent the court adhered to the rule that "a judgment for the plaintiff against two or more defendants charged with joint and concurrent negligence establishes their negligence and may be pleaded in bar by one defendant against the other in a subsequent action between them based on the negligent acts at issue in the first cause."[7] It is true that in a subsequent suit between the defendants to collect contribution the issue of the defendants' negligence to the plaintiff is res judicata.[8] This situation, however, is clearly distinguishable from that presented in either *Lumberton Coach Co.* or the principal case. In the latter two instances the second action is based upon the damage allegedly caused one defendant by the negligence of the other, and the recovery sought is not a pro rata share of the damages owed the original plaintiff but the damages sustained by the former defendant himself.

Since North Carolina holds that a consent judgment in favor of the plaintiff constitutes res judicata in any later action between the defendants, it would seem to follow that a judgment on the merits in the first suit would bar the subsequent action. Where the first action has resulted in a verdict on the merits, the great majority of courts hold that a second action (between the original defendants) is not barred by the first judgment.[9] This is true in all jurisdictions except New York,

[3] Penn Dixie Lines, Inc. v. Grannick, 238 N.C. 552, 78 S.E.2d 410 (1953).

[4] Mercer v. Hilliard, 249 N.C. 725, 107 S.E.2d 554 (1959).

[5] An infant's contract may be avoided. Chandler v. Jones, 172 N.C. 569, 90 S.E. 580 (1916). Thus it is necessary that a court pass on any settlement where a party is a minor. Where the judgment recites an investigation by the court and a finding that the compromise is just, the judgment is binding in the absence of fraud. Oates v. The Texas Co., 203 N.C. 474, 166 S.E. 317 (1932).

[6] 235 N.C. 619, 70 S.E.2d 673 (1952).

[7] 251 N.C. at 593, 112 S.E.2d at 120.

[8] Under N.C. GEN. STAT. §1-240 (1953), each defendant found to be a joint tortfeasor is liable to the plaintiff for a proportionate amount of the judgment rendered; if any defendant pays more than his proportionate part, he can obtain contribution from the other joint tortfeasors.

[9] *E.g.*, Hellenic Lines v. The Exmouth, 253 F.2d 473 (2d Cir. 1957); Kimmel v. Yankee Lines, 224 F.2d 644 (3d Cir. 1955); St. Paul Fire & Marine Ins. Co. v. Dowdell, 109 So. 2d 151 (Ala. 1959); Casey v. Balunas, 19 Conn. Supp. 365, 113

where the decisions are in conflict.[10] The majority of courts[11] reason that in the first suit the co-defendants were not adverse parties and their rights and liabilities as between themselves were not put in issue nor litigated.[12] Where the co-defendants were actually adverse parties in the first suit and the issue of their negligence to each other was litigated, the judgment rendered therein will act as a bar to further litigation between them.[13] In North Carolina where the defendants are joined in the first suit they could never be true adverse parties since our court has held that one defendant may not cross claim another in an action where the plaintiff has sued both as joint tortfeasors.[14] Since the issue of negligence as between the defendants cannot properly be adjudicated in the first suit, the judgment should not be res judicata as to such negligence.

In the principal case the consent judgment appears to be the result of a friendly suit to facilitate the settlement of the infant's claims.[15] The North Carolina court has said, "The law favors the settlement of controversies out of court."[16] It is submitted that settlements in court should also be encouraged. The court should recognize, as it has in the

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A.2d 867 (1955); Clark's Adm'x v. Rucker, 258 S.W.2d 9 (Ky. 1953); Bunge v. Yager, 236 Minn. 245, 52 N.W.2d 446 (1952); Boston & M.R.R. v. Sargent, 72 N.H. 455, 57 Atl. 688 (1904); Wiles v. Young, 167 Tenn. 224, 68 S.W.2d 114 (1934); Ray v. Consolidated Freightways, 4 Utah 2d 137, 289 P.2d 196 (1955); Byrum v. Ames & Webb, Inc., 196 Va. 597, 85 S.E.2d 364 (1955). A fortiori a consent judgment would not bar the second action.

[10] Holding that the prior suit is not res judicata are Israel v. Krupa, 180 Misc. 995, 43 N.Y.S.2d 113 (Sup. Ct. 1943); Glasser v. Huette, 232 App. Div. 119, 249 N.Y.S. 374 *aff'd mem.* 256 N.Y. 686, 177 N.E. 193 (1931). For cases *contra*, see Moyle v. Cronin, 189 N.Y.S.2d 96 (Broome County Ct. 1959); James v. Saul, 184 N.Y.S.2d 934 (N.Y. Munic. Ct. 1958).

[11] The North Carolina court is in the minority and admits, "It must be conceded, however, there is authority in conflict with . . . *Lumberton Coach Co. v. Stone*. . . . However, adhering to our rule, we conclude the trial court committed error in striking the further defense." 251 N.C. at 593, 112 S.E.2d at 121.

[12] "The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have an opportunity to litigate, between themselves." RESTATEMENT, JUDGMENTS § 82 (1942) (often quoted in majority opinions).

[13] Vaughn's Adm'r v. Louisville & N.R. Co., 297 Ky. 309, 179 S.W.2d 441 (1944); *accord*, Simodejka v. Williams, 360 Pa. 332, 62 A.2d 17 (1948). See generally the dissenting opinion by Clark, J., in Hellenic Lines v. The Exmouth, 253 F.2d 473 (2d Cir. 1957) (the majority held the defendants not to be adverse parties in the first suit).

[14] Bell v. Lacey, 248 N.C. 703, 104 S.E.2d 833 (1958); Clark v. Pilot Freight Carriers, Inc., 247 N.C. 705, 102 S.E.2d 252 (1958). But where one defendant has another brought in for purposes of contribution, the second defendant may cross claim against the original defendant for his own injuries or property damage. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957).

[15] Brief for Appellee, pp. 2-3, Pack v. McCoy, 251 N.C. 590, 112 S.E.2d 118 (1959).

[16] Penn Dixie Lines, Inc. v. Grannick, 238 N.C. 552, 555, 78 S.E.2d 410, 413 (1953).

past,[17] that a consent judgment merely evidences the agreement of the parties and is not an adjudication of negligence.

In view of *Pack* it seems almost impossible in North Carolina for two parties to settle a third-party-infant's claim and at the same time protect their right to litigate the issue of damages between themselves. Either the out-of-court settlement with the infant will be open to later disaffirmance, or the in-court settlement will bar future litigation between the defendants.[18] There is a possibility of a separate consent judgment in favor of the infant against each of the defendants, as an injured party may sue one or all joint tortfeasors.[19] It is submitted that it should not be necessary to use this cumbersome and uncertain procedure. The writer believes that the North Carolina court should follow the reasoning of the dissent in *Pack,* which would allow all parties to a controversy to litigate their claims while at the same time encouraging the settlement of suits by an infant.

CHARLES E. DAMERON III

Rule Against Perpetuities—Commercial Leases.

A leasehold to commence after the completion of a building was declared void *ab initio* by the California District Court of Appeals in the recent case of *Haggerty v. City of Oakland*[1] as a violation of the rule against perpetuities.[2] The City of Oakland and one Goodman entered into a written contract whereby the city was to build a building and lease it to Goodman for a term of years. The term was not to commence until the first day of the second month after completion of the building. The lease contained no specified date for beginning construction on the building but did provide that the city "shall and will in good faith immediately after the execution of this lease proceed with plans for

[17] The North Carolina Supreme Court, in holding an Ohio divorce decree not to be a consent judgment, stated, "A judgment by consent is the agreement of the parties. . . . It is not a judicial determination of the rights of the parties and does not purport to represent the judgment of the court, but merely records the pre-existing agreement of the parties." McRary v. McRary, 228 N.C. 714, 719, 47 S.E.2d 27, 31 (1948).

[18] The holding in the principal case does not apply to actions involving a contract. Stanley v. Parker, 207 N.C. 159, 176 S.E. 279 (1934).

[19] Denny v. Coleman, 245 N.C. 90, 95 S.E.2d 352 (1956); Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911 (1943). Since there can be only one recovery for an injury, satisfaction of the infant's first consent judgment would bar a suit against the second tortfeasor. Bell v. Hawkins, 249 N.C. 199, 105 S.E.2d 642 (1958). Likewise, a release of one tortfeasor will bar an action against the other. King v. Powell, 220 N.C. 511, 17 S.E.2d 659 (1942); Smith v. Thompson, 210 N.C. 672, 188 S.E. 395 (1936).

[1] 161 Cal. App. 2d 407, 326 P.2d 957 (Dist. Ct. App. 1958).

[2] Dallapi v. Campbell, 45 Cal. App. 2d 541, 114 P.2d 646 (Dist. Ct. App. 1941); Spicer v. Moss, 409 Ill. 343, 100 N.E.2d 761 (1951); Johnson v. Preston, 226 Ill. 447, 80 N.E. 1001 (1907); McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 68 S.E.2d 831 (1952).