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North Carolina's interest in the subject matter of litigation is greater than that of Pennsylvania.

Many authorities consider the loss of the advantages inherent in *lex loci delicti* a small price to pay for a conflict of laws rule which would permit greater recognition of governmental interests. It is hoped that if, and when, the North Carolina Supreme Court accedes to this position, the reason for abandonment of the traditional rule will not be ignored in application of the new.

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Consent Judgment—Reservation of Rights Against Third Party—Release

In a recent North Carolina case,¹ plaintiff passenger brought an action against two defendants as joint tortfeasors for injuries sustained in an automobile collision. While the action was pending the plaintiff entered into a covenant not to sue, consent judgment and satisfaction of that judgment with *A*. Both the covenant not to sue and the consent judgment reserved the rights of the plaintiff against the other defendant, *B*, a corporation. In the pending action *B* pleaded that the transactions constituted a release of one of the two joint tortfeasors and therefore barred further recovery against the defendant corporation. The jury found that the transactions constituted a covenant not to sue and awarded damages. The trial judge set aside the jury's verdict and ordered a new trial at which the transactions were concluded to be a release. The court affirmed this decision stating that the agreement, consent judgment and satisfaction extinguished the cause of action notwithstanding the intention of the parties; therefore, the plaintiff was barred from further recovery. This raises the question of whether a consent judgment should be given the same effect as a judgment after trial or whether a consent judgment should be viewed merely as a contract approved by the court, thereby allowing the court to look behind the agreement and determine whether the intention of the parties has been carried out.

When a person is injured by the negligence of joint tortfeasors, he may elect to sue them either jointly or individually.² There has

¹ *Simpson v. Plyler*, 258 N.C. 390, 128 S.E.2d 843 (1963).

² *RESTATEMENT, TORTS* § 882 (1939).

been some confusion concerning the effect which a judgment against one joint tortfeasor will have on the rights of the other tortfeasors. The early English rule, until changed by statute in 1935,³ provided that there was only one cause of action in joint torts⁴ and that a judgment against one, even though unsatisfied, merged with the single cause of action and was a bar to further action.⁵ If the defendants were concurrent tortfeasors,⁶ there were multiple causes of action and an unsatisfied judgment against one did not bar recovery against the others.⁷ The American courts, due to the code method of pleading,⁸ no longer distinguish between joint and concurrent tortfeasors but permit joinder of parties in situations where the independent negligence of both defendants produces a single injury⁹ or where defendants were under a common duty.¹⁰ In the absence of a statute to the contrary¹¹ the rule in this country rejects

³ Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30.

⁴ The common law rules as to joinder were restricted to those who acted in concert of action. Where there was concert of action, joinder was permitted but not compulsory, and the defendants could be sued severally for the entire damages. *Sir John Heydon's Case*, 11 Co. Rep. 5a, 77 Eng. Rep. 1150 (1613); *Smithson v. Garth*, 3 Lev. 324, 83 Eng. Rep. 711 (1691). See generally PROSSER, *TORTS* § 46 (2d ed. 1955).

⁵ *Brinsmead v. Harrison*, [1872] L.R.7C.P. 547 (joint detainee); *Brown v. Wooten*, Cro. Jac. 73, 79 Eng. Rep. 62 (1600) (joint trover); *King v. Hoare*, 13 M. & W. 494, 153 Eng. Rep. 245 (1838) (joint trespass). See 13 HALSBURY, *LAW OF ENGLAND Estoppel* § 471 (2d ed. 1934). See generally PROSSER, *op. cit. supra* note 4, at 241.

⁶ If the defendants joined separately and independently to cause a single injury, the early English courts would not permit the plaintiff to bring a joint action against both. *Sadler v. Great W. Ry.*, [1896] A.C. 450. See PROSSER, *op. cit. supra* note 4, at 236.

⁷ *Morris v. Robinson*, 3 B. & C. 196, 107 Eng. Rep. 706 (1824).

⁸ "[I]n this country . . . , where the wrongful acts of two or more persons, though independent, were concurrent and resulted in a single injury to the plaintiff, such persons are considered joint tort-feasors for the purpose of suit." CLARK, *CODE PLEADING* § 60, at 383-84 (2nd ed. 1947).

⁹ *Way v. Waterloo, Cedar Falls & No. R.R.*, 239 Iowa 244, 29 N.W.2d 867 (1947); *Meyer v. Cincinnati St. Ry.*, 157 Ohio St. 38, 104 N.E.2d 173 (1952).

¹⁰ *Schaffer v. Pennsylvania R.R.*, 101 F.2d 369 (7th Cir. 1939); *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707 (1899); *Johnson v. Chapman*, 43 W. Va. 639, 28 S.E. 744 (1897).

¹¹ R. I. GEN. LAWS ch. 6, § 10-6-6 (1956) was construed in *Hacket v. Hyson*, 72 R.I. 132, 48 A.2d 353 (1946) to reverse the common law notion in America that satisfaction of judgment effected a discharge of all tortfeasors and held that satisfaction is merely applied in reduction of any judgments against the others. *Contra*, *McTigue v. Levy*, 260 App. Div. 928, 2 N.Y.S.2d 114 (1940) construing N.Y. CIV. PRAC. ACT § 112-a; *Sarine v. American Lumberman's Mut. Cas. Co.*, 258 App. Div. 653, 17 N.Y.S.2d 754 (1940) construing N.Y. CREDITOR & DEBTOR LAW § 232.

the idea that a mere rendition of a judgment against one tortfeasor releases the others and holds that nothing short of satisfaction of the judgment will bar the plaintiff from proceeding further.¹² The plaintiff may recover separate judgments against all the joint tortfeasors, and until he accepts satisfaction the cause of action is not extinguished. If the plaintiff gets only one judgment and accepts satisfaction of that judgment, his cause of action is extinguished and he cannot bring any further action against the other defendants. The theory behind the American rule stems from the common law notion that a person is entitled to but one compensation.¹³ Since the plaintiff's cause of action against the joint tortfeasors is single and indivisible, the reducing of his claim to judgment merges the cause of action in the judgment and the satisfaction of that judgment is a satisfaction and settlement of the whole cause of action.¹⁴ Merely a partial satisfaction of the judgment does not extinguish the cause of action but does credit the amount paid to that due from the remaining tortfeasors.¹⁵ Moreover, once satisfaction of judgment has been tendered, the court rendering the judgment cannot reserve the rights of the plaintiff against the other tortfeasors.¹⁶ Since the plaintiff has an indivisible cause of action and can receive but one satisfaction for that cause, he has no right to split that single cause or apportion it. The court could not grant the plaintiff this right by its judgment; therefore, that portion of the judgment which reserves the plaintiff's rights would be inoperative as beyond the power of the court to render.¹⁷ This implies that once the plaintiff accepts full satisfaction of a judgment from one defendant, it constitutes a release of the other defendant by operation of law notwithstanding

¹² *Lovejoy v. Murray*, 70 U.S. (3 Wall.) 1 (1865). RESTATEMENT, TORTS § 886 (1939). See Annot., 166 A.L.R. 1099 (1947), supplementing, Annots., 27 A.L.R. 805 (1923) and 65 A.L.R. 1087 (1930).

¹³ See PROSSER, *op. cit. supra* note 4, at 241-42.

¹⁴ *City of Wetumka v. Cromwell-Franklin Oil Co.*, 171 Okla. 565, 43 P.2d 434 (1935); *Cain v. Quannah Light & Ice Co.*, 131 Okla. 25, 267 Pac. 641 (1928).

¹⁵ *Lovejoy v. Murray*, 70 U.S. (3 Wall.) 1, 17 (1865); 2 BLACK, JUDGMENTS § 782, at 1182 (2d ed. 1902).

¹⁶ *Eberle v. Sinclair Prairie Oil Co.*, 120 F.2d 746 (10th Cir. 1941); *City of Wetumka v. Cromwell-Franklin Oil Co.*, 171 Okla. 565, 43 P.2d 434 (1935); *Cain v. Quannah Light & Ice Co.*, 131 Okla. 25, 267 Pac. 641 (1928).

¹⁷ *City of Wetumka v. Cromwell-Franklin Oil Co.*, 171 Okla. at 566, 43 P.2d at 436; *Cain v. Quannah Light & Ice Co.*, 131 Okla. at 28, 267 Pac. at 644.

the intentions of the parties in bringing the suit or the court in rendering its judgment. While no authority can be found in North Carolina in which a judgment reserved the rights of the plaintiff to proceed further, North Carolina has followed the same line of reasoning as the majority in holding that satisfaction of a judgment extinguishes the indivisible cause of action,¹⁸ thereby indicating that the operation takes place by way of law rather than by construction.

A judgment by consent has been defined as an agreement or contract of the parties, acknowledged in court and ordered to be recorded, with the sanction of the court.¹⁹ It is usually agreed to have dual aspects—that of an agreement between the parties and that of an entry of judgment by the court. Because of the contractual aspect of the consent judgment, it is always relevant in determining the effect of the judgment, to ascertain the intent of the parties.²⁰ However where there has been an agreement, consent judgment and satisfaction, the majority of cases do not distinguish between a judgment by consent and a judgment after trial and issue. In this situation the courts have rejected the contractual aspect, and hold that the satisfaction of the consent judgment extinguishes the cause of action by operation of law irrespective of the intention of the parties.²¹ When applied to the joint tortfeasor situation this rule merely applies the basic law concerning satisfaction of judgment and dis-

¹⁸ *Bell v. Hankins*, 249 N.C. 199, 105 S.E.2d 642 (1958); *Burns v. Womble*, 131 N.C. 173, 42 S.E. 573 (1902).

¹⁹ *Keach v. Keach*, 217 Ky. 723, 290 S.W. 708 (1927); *McArthur v. Thompson*, 140 Neb. 408, 299 N.W. 519 (1941); *McRary v. McRary*, 228 N.C. 714, 47 S.E.2d 27 (1948); *Union Bank v. Commissioners of Oxford*, 119 N.C. 214, 25 S.E. 966 (1890); *Blair v. Dickinson*, 136 W. Va. 611, 68 S.E.2d 16 (1951).

²⁰ "The extent to which a judgment or decree entered by consent is conclusive in a subsequent action should be governed by the intention of the parties as expressed in the agreement which is the basis of the judgment and gathered from all the circumstances, rather than by a mechanical application of the general rules governing the scope of estoppel by judgment." Annot., 2 A.L.R.2d 514, 520 (1948).

²¹ *Eberle v. Sinclair Prairie Oil Co.*, 120 F.2d 746 (10th Cir. 1941); *Jenkins v. Southern Pac. Co.*, 17 F. Supp. 820 (S.D. Cal. 1937); *Battle v. Morris*, 265 Ala. 581, 93 So.2d 428 (1957); *Vattani v. Damiano*, 9 N.J. Misc. 290, 153 Atl. 841 (Sup. Ct. 1931); *Sykes v. Wright*, 201 Okla. 346, 205 P.2d 1156 (1949); *City of Wetumka v. Cromwell-Franklin Oil Co.*, 171 Okla. 565, 43 P.2d 434 (1935); *Cain v. Quannah Light & Ice Co.*, 131 Okla. 25, 267 Pac. 641 (1928); *Blake v. Kansas City So. Ry.*, 38 Tex. Civ. App. 337, 85 S.W. 430 (Civ. App. 1905). *Contra*, *Colby v. Walker*, 86 N.H. 568, 171 Atl. 774 (1934). See generally Annot., 135 A.L.R. 1498 (1941).

cards any notion of construction. This treatment by the courts has been described as a condition which society places on the parties as a price for the granting of judgment.²² The effect of not exacting this price would be to give some credence to the contractual nature of a consent judgment and ultimately to the intention of the parties.²³ The court by imposing a rule of construction, would apply the same criteria it uses in construing releases and covenants not to sue.²⁴ If it could be seen from looking at the instrument as a whole that the plaintiff intended to receive full satisfaction from one defendant or to abandon his cause of action against that defendant, then the consent judgment should operate as a release, and plaintiff would be barred from further recovery.²⁵ If the construction showed that neither full satisfaction nor an abandonment were intended, then it should have the effect of a covenant not to sue.²⁶ By treating a consent judgment in this fashion, the court would be substituting a rule of construction for a rule of law.

North Carolina has recognized both the contractual and judgment aspects of the consent judgment. Many North Carolina cases hold that a consent judgment is *res judicata* between the parties in the same manner as a judgment after trial and issue.²⁷ There is also

²² James, *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173, 176 (1959).

²³ *Colby v. Walker*, 86 N.H. 568, 171 Atl. 774 (1934). See *Sykes v. Wright*, 201 Okla. 346, 349, 205 P.2d 1156, 1160 (1949) (dissenting opinion).

²⁴ See 22 MINN. L. REV. 692 (1938); 30 N.C.L. REV. 75 (1951).

²⁵ *E.g.* *Shapiro v. Embassy Dairy, Inc.*, 112 F. Supp. 696 (E.D.N.C. 1953); *Westinghouse Elec. Supply Co. v. Burgess*, 223 N.C. 97, 25 S.E.2d 390 (1943); *Braswell v. Morrow*, 195 N.C. 127, 141 S.E. 489 (1928); *Sircey v. Hans Rees' Sons*, 155 N.C. 296, 71 S.E. 310 (1911); *Howard v. J. H. Harris Plumbing Co.*, 154 N.C. 224, 70 S.E. 285 (1911); *Burns v. Womble*, 131 N.C. 173, 42 S.E. 573 (1902); *Brown v. Town of Louisburg*, 126 N.C. 701, 36 S.E. 166 (1900).

²⁶ In North Carolina, a covenant not to sue does not release the other tortfeasors from the cause of action, however compensation from the covenant is set off against any defendant who wishes to litigate rather than settle. *Butler v. Norfolk So. Ry.*, 140 F. Supp. 601 (E.D.N.C. 1956); *Ramsey v. Camp*, 254 N.C. 443, 119 S.E.2d 209 (1961); *Holland v. Southern Pub. Util. Co.*, 208 N.C. 289, 180 S.E. 592 (1935); *Slade v. Sherrod*, 175 N.C. 346, 95 S.E. 557 (1918); *Winston v. Dalby*, 64 N.C. 299 (1870).

²⁷ See *Stone v. Carolina Coach Co.*, 238 N.C. 662, 78 S.E.2d 605 (1953); *Herring v. Queen City Coach Co.*, 234 N.C. 51, 65 S.E.2d 505 (1951); *Boucher v. Union Trust Co.*, 211 N.C. 377, 190 S.E. 226 (1937); *Tilley v. Lindsey*, 203 N.C. 410, 166 S.E. 168 (1932); *Lalonde v. Hubbard*, 202 N.C. 771, 164 S.E. 359 (1932); *Morris v. Patterson*, 180 N.C. 484, 105 S.E. 25 (1920); *Simmons v. McCullin*, 163 N.C. 409, 79 S.E. 625 (1913); *Donnelly v. Wilcox*, 113 N.C. 408, 18 S.E. 339 (1893). The language in the North Carolina cases is to the effect that a consent judgment is as binding on the

authority to the effect that a consent judgment is a decree of the parties, not of the court; that it should be construed as any other contract and that the judgment should be given effect in light of that construction.²⁸ By its decision in *Simpson v. Plyler*,²⁹ North Carolina has discarded those cases calling for construction of the consent judgment and has joined the majority in decreeing that satisfaction of the consent judgment extinguishes the cause of action by operation of law.

The question arises whether consent judgments should be given an effect beyond what the parties intended—should such a condition be imposed by society on the parties as a price for granting a judgment?³⁰ It is the opinion of the writer that the contractual nature of the consent judgment offers reasons for not doing so.

Since the doctrine of merger applies only when the judgment has been fully satisfied,³¹ the question of satisfaction is highly important in raising the bar.³² In a judgment by trial and issue, the

parties as a judgment after trial, and cannot be changed without consent of the parties or set aside except for fraud or mutual mistake.

²⁸ *Cason v. Shute*, 211 N.C. 195, 189 S.E. 494 (1937); *Southern Eng'g Co. v. Boyd*, 191 N.C. 143, 131 S.E. 305 (1926); *Southern Distrib. Co. v. Carraway*, 189 N.C. 420, 127 S.E. 427 (1925); *Walker v. Walker*, 185 N.C. 380, 117 S.E. 167 (1923); *Holloway v. City of Durham*, 176 N.C. 550, 97 S.E. 486 (1918); *Idging v. Hiatt*, 51 N.C. 402 (1859).

²⁹ 258 N.C. 390, 128 S.E.2d 843 (1963).

³⁰ See James, *Consent Judgments as Collateral Estoppel*, 108 U. PA. L. REV. 173 (1959), for the argument that the doctrine of collateral estoppel should not apply to consent judgments.

³¹ "[W]hen the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected, until he has received full satisfaction, or that which the law must consider as such." *Lovejoy v. Murray*, 70 U.S. (3 Wall.) 1, 17 (1865).

³² "[W]here the bar accrues in favor of some of the wrongdoers by reason of what has been received from or done in respect to one or more others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar to all. And so a release of one releases all, although the release expressly stipulates that the other defendants shall not be released. And this rule is held to apply, even though the one released was not in fact liable. It does not lie in the mouth of such plaintiff to say that he had no cause of action against one who paid him for his injuries, for the law presumes that the one who paid committed the trespass and occasioned the whole injury'. . . . It is immaterial whether the satisfaction is obtained by judgment and final process in execution of it or by amicable adjustment without any litigation of the claim for damages. The essential thing is satisfaction." *Sircey v. Hans Rees' Sons*, 155 N.C. 296, 300-01, 71 S.E. 310, 312 (1911).

damages of the plaintiff have been determined and set by the court serving in its judicial office so that it can readily be seen whether full or partial satisfaction has been received. In a consent judgment, however, the amount of satisfaction has been settled by the parties in their agreement and entered into the record by the court acting in its ministerial office.³³ Since the court has neither set nor determined the plaintiff's damages, it can not be seen from the payment of the judgment alone whether there has been full or partial satisfaction. Instead of flatly inferring full satisfaction, the better alternative to the court would be to construe the intent of the parties in the light of the circumstances to see whether full satisfaction was intended.

The argument for the finality of judgments³⁴ rests on the logic that if the consent judgment in the first suit is held to be binding in the second, it will diminish litigation by eliminating trials in both cases. However, if the first suit was not intended to be binding in the second, an ignorant party would be highly susceptible to entrapment. On the other hand, a party having knowledge of the binding effect would be less willing to compromise, resulting in more contested trials in the first suit. Thus the binding effect of a consent judgment would present a detriment to desirable compromise and would increase trials by contest.

The argument against double satisfaction³⁵ is feeble ground for the courts to tread in binding the plaintiff to a consent judgment in which full compensation was not in fact paid, since in such a situation the plaintiff might be inadequately compensated. By construing the consent judgment as a contract, the court could determine whether full satisfaction was or was not intended—thus better protecting the plaintiff against inadequate compensation as well as the defendant against double vexation.

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³³ The process in North Carolina is even less of a judicial determination because N.C. GEN. STAT. § 1-209(b) (1953), provides for the entry of consent judgments by the clerk of the Superior Court.

³⁴ See James, *supra* note 30, at 184-85.

³⁵ *Id.* at 185.