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Release - Construction and Operation - Covenant Not to Sue - Covenant Not to Sue Executed in Favor of Servant Extinguishes Master's Liability When Basis for Liability of Master Is Doctrine of Respondeat Superior

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The position taken by the Illinois Supreme Court that the wrongful death action does not abate on the death of the sole next of kin would appear to be in accord with the history and development of tort law. At early common law, a tort action was regarded as punitive in character and retaliatory in nature; no action would lie if the victim was dead, as there would no longer be anyone to punish the wrongdoer. However, with time, the purpose of granting damages for tortious conduct became to compensate the victim rather than to punish the wrongdoer, and the courts began to hold that the estate of an individual should not be depleted because of the wrong of another. The trend of allowing compensation for the victims of tortious conduct is reflected in the decision of the Illinois Supreme Court in the instant case.

There is one dissent in the *McDaniel* case. Justice Underwood dissented on the grounds of *stare decisis*. He agreed with the majority in principle but disagreed with the decision, feeling the Illinois law was settled by *Wilcox v. Bierd*, and any change in the law should be left to the legislature.

What is the impact of the *McDaniel* decision upon the law? First, it places Illinois in step with the majority of decisions of this type. Second, it clearly widens the construction given to the Survival Statute in Illinois and in doing so corrects a wrong. The estate which must bear expense for the support of the next of kin may now be reimbursed. Lastly, the *McDaniel* decision suggests that the Supreme Court will be willing to overstep the bounds of *stare decisis*[21] when it believes a change in the law and common justice call for it.

GERALD J. SMOLLER

RELEASE—CONSTRUCTION AND OPERATION—COVENANT NOT TO SUE—COVENANT NOT TO SUE EXECUTED IN FAVOR OF SERVANT EXTINGUISHES MASTER'S LIABILITY WHEN BASIS FOR LIABILITY OF MASTER IS DOCTRINE OF RESPONDEAT SUPERIOR.—In the case of *Holcomb v. Flavin*, 34 Ill. 2d 558, 216 N.E.2d 811 (1966), the Supreme Court of Illinois was asked to decide whether the execution of covenant not to sue the servant extinguished the liability of the master. The court held that when the basis of liability is

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gardt better states this proposition in his minority opinion in *Danis v. New York Cent. Ry.*, 160 Ohio St. 474, 478, 117 N.E.2d 39, 41 (1954). He declared:

> . . . . [T]here is no more effective method for defeating justice than simply to delay it.

Justice Cardozo, in *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 350, 57 Sup. Ct. 452, 456 (1936), discussed the ills of abatement by stating:

> Death statutes have their roots in dissatisfaction with the archaisms of the law. . . . It would be a misfortune if a narrow or guilding process of construction were to exemplify and perpetuate the very evils to be remedied.

21 It appears that the only reason the court held against the plaintiff in *Danis v. New York Cent. Ry., supra* note 20, a case with a similar question to the *McDaniel* case, was on the grounds of *stare decisis*. The court stated that if the case had been one of first impression, it would have held otherwise.

predicated upon the doctrine of respondeat superior, a covenant not to sue the servant serves to extinguish the claim against the master.

The decision reached by the Supreme Court of Illinois was grounded in two legal concepts. The first concerns the master-servant relationship or the law of agency. The second involves the distinction between the release and a covenant not to sue and the effect of that distinction on the master-servant relationship.

The liability created when a servant injures a third party is a matter long settled. Both the master and the servant are personally liable for torts committed by the servant while in the scope of his employment.[1] In addition, the master has a right of indemnification from the servant in the event that a third party recovers a judgment from the master for a tort committed by his servant while in the scope of his employment.[2]

The master's liability is based on his servant's tort. This type of liability is secondary or vicarious in nature and thus may be distinguished from the liability of the usual joint tort-feasor. The underlying question presented to the court for decision was—what effect does the fact that the party sued is only vicariously liable have upon the law of releases and covenants not to sue?

Under Illinois law, a release and a covenant not to sue may be distinguished. A release is the giving up or abandoning of a claim, right, or cause of action by the person who holds it to the person against whom the claim, right, or cause of action in enforceable.[3] A covenant not to sue is a covenant by which the covenantor agrees not to enforce the right of action he has against the covenantee.[4] This technical distinction gives rise to the difference in the rights created by these two instruments.

A release of one of two or more co-obligors or joint tort-feasors is an effective release of all. However, a covenant not to sue is only a bar to an action by the covenantor against the covenantee. The covenant bars the suit so as to prevent circuity of action; it does not extinguish the liability of the joint tort-feasor, co-obligor, or covenantee. In determining whether an instrument is a covenant not to sue or a release, the court will look to the circumstances of the case. The principal distinguishing factor is that a covenant not to sue contains a clear reservation of rights; a release contains no such reservation.[5]

In the instant case, the plaintiff suffered injuries as a result of a collision between his automobile and one driven by Barnard, an employee of

1 57 C.J.S. *Master and Servant* § 577 (1948).
2 42 C.J.S. *Indemnity* § 21 (1944).
3 31 I.L.P. *Releases* § 2 (1957).
4 *Ibid.*
5 31 I.L.P. *Releases* § 28 (1957).

the defendant. Suit was filed in the circuit court naming Barnard as defendant. The plaintiff then executed a covenant not to sue the employee and dismissed the suit against Barnard. Shortly thereafter the plaintiff filed suit against Barnard's employer, predicating liability upon the doctrine of respondeat superior. The defendant, in its answer, pleaded the execution of the covenant not to sue the employee as a bar to the cause of action. The defendant, relying on his right of indemnification, also filed a third-party complaint against Barnard. Plaintiff and Barnard filed motions to dismiss the third-party complaint and the motions were allowed. The defendant appealed and the appellate court reversed the decision of the trial court and remanded for trial.[6] After a mistrial, the defendant filed a motion for summary judgment.

The trial court allowed the motion, stating that the covenant not to sue extinguished the cause of action against the servant Barnard and, necessarily, against his employer since its liability was ". . . . derivative or secondary, resting solely on the doctrine of respondeat superior."[7] On appeal, the appellate court reversed the trial court and remanded for further proceedings. In its decision the appellate court said that when the master's liability is based upon his servant's tort, the master cannot be held liable if the servant is exonerated by a trial on the merits. The court concluded, however, that ". . . . there is no logical or legal basis for extending the rule to situations where a servant terminates his liability by obtaining a covenant not to sue."[8]

The defendants appealed to the Supreme Court of Illinois. The court, through Justice Solfisburg, quoted extensively from the appellate court's decision and noted that in its discussion the appellate court said,

> Barnard, at the time of paying the money in exchange for the covenant not to sue is likewise presumed to know that if plaintiff recovered from defendants, they in turn, would seek indemnity from him. If he sought to avert this possibility, he should have required plaintiff to agree that he would not seek damages from defendants. As was stated above, the instrument is a covenant, not a release, and its legal effect is not to release either the defendants or Barnard, but to bar legal action against the covenantee. *City of Chicago v. Babcock,* 143 Ill. 358, 32 N.E. 271.[9]

With this view, the Supreme Court took issue. Although agreeing that a covenant not to sue differs from a release in its effect upon the liability of joint tort-feasors, the court chose to follow that line of decisions which held the distinction to be without force when liability is based upon the doctrine of respondeat superior.[10]

6 Holcomb v. Flavin, 37 Ill. App. 2d 359, 185 N.E.2d 716 (4th Dist. 1962).
7 Holcomb v. Flavin, 34 Ill. 2d 558, 560, 216 N.E.2d 811, 812 (1966).
8 Holcomb v. Flavin, 62 Ill. App. 2d 245, 249, 210 N.E.2d 565, 567 (4th Dist. 1962).
9 *Supra* note 7, at 562, 216 N.E.2d at 813.
10 For an extensive review of decisions on this point, see: 92 A.L.R.2d 552, *et seq.* (1962).

The court, being faced with a question of first impression, relied extensively on decisions from other jurisdictions. Of these decisions, principally relied upon were *Stewart v. Craig*,[11] and *Karcher v. Burbank*.[12]

Drawing from these sources the court put forth two reasons for reversing the appellate court. As was held in the *Karcher* case, the master is, in effect, a surety for his employee and it is a principle of the law of suretyship that a covenant not to sue the party who is primarily liable results in a discharge of the surety. The *Stewart* case was of similar import and the Illinois court agreed with its holding when it reasoned,

> . . . . If a judgment were obtained against the employer based upon the employee's negligence, the employer would be entitled to sue the employee and obtain the same judgment against him. Since the plaintiff had given the employee a covenant not to sue, the employee would be then entitled to judgment against the plaintiff as was originally obtained in the action against the employee, thus completing the circuit. . . .[13]

Justice Solfisburg based the decision of the court upon two main ideas. The first was grounded in pragmatic considerations. In short, a multiplicity of suits and circuitry of action would be avoided. The second basis for the decision is more theoretical in nature. The court said that the liability of the master, based on respondeat superior, is derivative or secondary. Thus, the fact that the servant cannot be sued prevents the imputing of his negligence to the master under the doctrine of respondeat superior.[14] The court said that the effect of the covenant not to sue was to exonerate the covenantee.

In reaching its decision in the *Holcomb* case, the court assumed that a recovery by the plaintiff against Barnard's employer would be a breach of covenant. Barnard would then have a cause of action grounded in breach of covenant against the plaintiff for the same amount that the plaintiff had recovered from Barnard's employer. The result would be to leave all of the parties in the position they were in before the plaintiff sued Barnard's employer. This indeed would be circuitry of action. The appellate court, in reaching its contrary decision, assumed that a suit by the plaintiff against Barnard's employer would not be a breach of covenant.[15]

The term "exoneration"[16] used by the Supreme Court was not really accurate. The word exonerate implies that the servant was legally discharged or that liability was extinguished. A covenant not to sue neither discharges nor exonerates the covenantee. It merely acts as a bar to an action by the cove-

11 208 Tenn. 212, 344 S.W.2d 761 (1961).
12 303 Mass. 303, 21 N.E.2d 542 (1939).
13 *Supra* note 7, at 564, 216 N.E.2d at 814 (1966).
14 *Id.* at 565, 216 N.E.2d at 815.
15 Holcomb v. Flavin, 34 Ill. 2d 558, 562, 216 N.E.2d 811, 813 (1966).
16 *Supra* at note 14.

nantor and does not extinguish the liability of the covenantee.[17] This liability could still be imputed to the master but for the circuitry of action that would develop.

In reaching its conclusion, the court was no doubt influenced by the fact that a release does extinguish liability.[18] The operative difference between a release and a covenant not to sue is that the latter contains a clear reservation of rights.[19] In the instant case, the instrument in question bore the label—covenant not to sue—but otherwise contained no specific reservation of rights.[20] Thus, the instrument might have been construed as a release which extinguished the liability of the servant, but the issue was never raised.

It is curious that in reaching this decision an Illinois case in point was not discussed. On facts quite similar to those in the instant case, the Illinois Court of Claims held that due to the master's right to recover from the servant, the suit could not be allowed for circuitry of action would result and the very purpose of the covenant not to sue would be defeated.[21]

In the instant case, the covenant not to sue contained no specific reservation of rights against the principal or master beyond the statement that it was to be construed as a covenant and not a release.[22] What the result would be in a case where a specific reservation of rights did appear in the covenant is difficult to predict. Such a covenant would probably not release the master from liability in the absence of a further provision to save the servant harmless. The reason for this is twofold. Firstly, since the specific reservation would apprise the servant of a possible suit against and recovery from the master, it is unlikely that such suit would be construed as a breach of covenant. The servant would then have no action for breach of covenant against the plaintiff and circuity of action would be avoided. Secondly, a covenant not to sue does not really extinguish liability. The covenant merely acts as a bar to the action preventing possible circuity of action via a suit for breach of covenant.[23] This being so, the basis for liability has not really been extinguished and liability may be imputed to the master under the doctrine of respondeat superior even though the plaintiff is barred from bringing an action against the servant.

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17 31 I.L.P. *Releases* § 28 (1957).
18 *Ibid.*
19 *Ibid.*
20 34 Ill. 2d at 561, 216 N.E.2d at 813.
21 Winston v. Illinois, 21 Ill. Ct. Cl. 307 (1952).
22 34 Ill. 2d at 561, 216 N.E.2d at 813.
23 Vandalia Ry. v. Nordhaus, 161 Ill. App. 110 (4th Dist. 1911).