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Effect of Prior Settlement Between Parties as Estoppel

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RECENT DECISIONS

Effect of Prior Settlement Between Parties as Estoppel — The defendent, in this action, had previously started an action for personal injuries and property damage against the plaintiff and his liability insurer. The plaintiff's insurer settled this claim for $150.00 and obtained from the defendant a standard release and a dismissal of the action. Plaintiff's insurer (who was also the collision insurer) paid the plaintiff his collision loss, and, as subrogatee, began the present action to collect from the defendant and his liability insurer the amount of plaintiff's collision damages. The defendant pleaded the prior settlement and dismissal, and the trial court dismissed the instant action on its merits. Plaintiff's appealled. *Held:* Judgment affirmed. The payment of $150.00 by the plaintiff's insurer for the release and dismissal was a settlement in full of all claims between the parties arising out of the collision. Therefore, the insurer was estopped from prosecuting the instant action. The plaintiff, on rehearing, argued that the court's decision was a repudiation of the principle that the making of a settlement was inadmissible as conduct constituting an admission of liability, and that it ran afoul of the court's policy to encourage the settlement of disputes. The court answered flatly that the above mentioned principle was not repudiated, and that the plaintiff could have been protected by inserting a clause in the release form expressly reserving the right to sue, subsequently, for his insured's damages. *Heinemann Creameries, Inc. v. Milwaukee Automobile Ins. Co.*, 270 Wis. 443, 71 N.W.2d 395 (1955).[1]

Where a prior action has proceeded to judgment or final order for dismissal, a subsequent action arising out of the same incident may be barred for one of a number of reasons:

1) Res Adjudicata: Some courts and text writers have taken the view that res adjudicata is a term which covers the entire area of bars and estoppels based on prior adjudication. The RESTATEMENT OF JUDGEMENTS, for example, has adopted this meaning.[2]

Res adjudicata is also viewed in the more confined sense, that is, as the principle which dictates that in a subsequent proceeding upon the same cause of action, between the same parties and/or their privies, a previous judgment completely precludes litigation not only on matters actually decided in the first action, but also on matters which might have been decided.[3]

[1] Rehearing denied, 270 Wis. 452, 72 N.W.2d 102 (1955).
[2] REST. OF JUDGMENTS, Introductory Note to Ch. 3, pp. 160-161 (1942).
[3] cf. AM. JUR., Judgments, §161; but statements made by eminent jurists have been found extending the doctrine to cases where there were two *different* causes of action, when they have such a measure of identity that a different judgment in the second would impair the rights created by the first. cf. Car-

> "We are satisfied that the order of dismissal of the Circuit Court action is not res adjudicata as to plaintiff's right of recovery in the instant action."[4]

The Wisconsin court with this language make it clear that its decision is not based upon res adjudicata. To understand the court's position, however, it is essential that we understand what the court means by res adjudicata. It is apparent that the court in the *Heinemann* case was speaking of res adjudicata in the more confined sense. The court perceived that the subsequent suit by Heinemann and its insurer was based on a different cause of action — one which they could have asserted by way of counterclaim in the prior action by the defendant against them.[5] As the Wisconsin statute[6] makes counterclaims purely permissive, the court held that plaintiff could not, by the principle of res adjudicata, alone, be precluded from bringing the instant action.[7]

2) **Merger or Bar:** Although there is a distinction between these two principles, it is merely technical and is best explained by rephrasing the comments of Professor Scott. If the judgment is for defendant in the first action, it is a *bar* to a subsequent action by the plaintiff.[8] If the judgment is for the plaintiff in the first action, the cause of action is extinguished but there are rights based on the judgment and these *merge* into the judgment, as does the cause of action.[9] But if there is a different cause of action, as in the *Heinemann* case, subsequent litigation is precluded neither by bar nor by merger.[10]

3) **Collateral Estoppel:** It is apparent from the language of the court in the *Heinemann* case that the decision rests upon some type of estoppel. The court did not make clear whether that estoppel was collateral estoppel. Professor Scott, through his industrious efforts as an individual writer, as well as his work on the *Restatement of Judgments,* popularized the term "collateral estoppel." Although the term was new, the idea was old. For years the courts had been deciding cases on estoppel; but they referred to it variously as estoppel by judgment, by verdict, by record, and by findings . . . all of which connoted some phase of the idea embodied in Professor Scott's general term, collateral estoppel:

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dozo, in Schuykill Fuel Corp. v. B. and C. Neiberg Realty Corp., 250 N.Y. 304 at 306, 165 N.E. 456 at 457 (1929).

[4] Heinemann Creameries Inc. v. Milwaukee Automobile Ins. Co., 270 Wis. 443 at 448 (1955).

[5] The Wisconsin court, citing the RESTATEMENT OF JUDGMENTS with approval, stated: ". . . His claim against the plaintiff, however, is a different cause of action from the plaintiff's claim against him, and is not merged in the judgment given in the action on plaintiff's claim." *Ibid.* at p. 449.

[6] WIS. STATS. (1953), §263.14(1).

[7] Nevertheless, it seems that the latter holding of the court, that the original defendant's counterclaim is barred by estoppel, emasculates the statute.

[8] REST. OF JUDGMENTS, *op. cit.*, §§48-54.

[9] *Ibid.* at §47.

[10] Scott, *Collateral Estoppel by Judgment,* 56 HARV. L. REV. 1, at p. 21.

namely, where a second suit is brought between the same parties, whether on the same cause of action or not, the prior judgment operates as an estoppel only as to questions actually litigated or decided by necessity in that prior action. Stated conversely, it means simply that where the subsequent suit is based on a *different* cause of action, the prior judgment prevents relitigation only of all issues which were *actually* decided in the prior action, as opposed to those which *might* have been litigated (as would be barred by res adjudicata if the cause of action were the same).[11]

The subsequent action in the *Heinemann* case was based on a different cause of action. It is imperative, then, that we examine the decision to see whether the rules of collateral estoppel would justify a dismissal of the second action. We must find what issues were actually litigated or decided of necessity in the prior action. This is not an easy task. The prior action was instituted by the defendant against the liability insurance carrier of Heinemann for damages in the amount of $1000.00.[12] A complaint was filed, but no answer was ever filed by the insurance company.[13] Instead, a payment of $150.00 settled the case and a dismissal of the action was stipulated to by the parties and ordered by the court. What, then were the issues which were decided in this prior suit? No issue was ever joined because no answer was ever made to the complaint. Should the complaint by itself govern the issues which were decided? It would seem that consent judgments do not rest upon a judicial determination of fact and law. They rest rather upon the intent of the parties and cover only the matter which they have expressly stated in the stipulation for dismissal and the release itself.[14] Therefore, in a subsequent action, a collateral estoppel cannot be raised upon issues not covered by the compromise.[15]

The compromise was contained in the release which was taken in the previous action by the insurance company for the $150.00 it paid to the other driver. This release was in standard form and contained the clause

> "It is further agreed and understood that said payment is not to be construed as an admission of any liability."[16]

This clause, until the present case, was considered by most attorneys

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[11] Huntziger v. Crocker, 135 Wis. 38, 115 N.W. 370, 15 Ann. Cas. 444 (1908); Pereles v. Gross, 126 Wis. 122, 105 N.W. 217 (1905); Wentworth v. Racine County, 99 Wis. 26, 74 N.W. 551 (1898); Cromwell v. County of Sac, 94 U.S. 351 (1876).

[12] Tronca v. Wm. H. Heinemann Creameries, Inc., Circuit Court of Milwaukee County Docket, Vol. 489, Page 240 (1952).

[13] *Ibid.*

[14] Nashville, Chattanooga, & St. Louis Ry. v. U.S., 113 U.S. 261 (1885).

[15] Trapp v. U.S., 73 F. Supp. 385 (W.D. Okla. 1947); Roseman v. Roseman, 155 Fla. 750, 21 So.2d 215 (1945); B.C.&M. Ry. v. Benton, 56 Iowa 89, 8 N.W. 791 (1881).

[16] Heinemann Creameries Inc. v. Milwaukee Automobile Ins. Co., *supra* n.1, at 445.

to be a declaration of intent sufficient to preserve whatever subsequent action they may wish to bring against the other party and also sufficient to prevent any subsequent estoppel from operating against them on issues of negligence which might have been decided in the prior action. It was clearly a device to settle "nuisance-value" claims, such as the one involved here, without forfeiting an insurer's right to proceed later on subrogation claims to which it first would become entitled to prosecute against the other driver when it would have paid the insured his damages under the collision policy. The court, in the instant case, stated simply that the above clause is not sufficient to overcome the inference raised by the settlement itself.[17] What this amounts to is a statement that inferences override facts: the inference that one is admitting liability by paying a claim is taken to override the fact that he explicitly denied liability by a special clause in the release.

4) Equitable Estoppel: There is always the possibility that a party to a prior action may make some statement or perform some act upon which the opposing party might rely to his detriment. This change of position may prevent the other party from later acting in a manner inconsistent with his original act or statement.[18]

It is entirely possible that the court in the *Heinemann* case could have based its decision upon equitable estoppel.[19] However, it seems difficult to find any detrimental reliance on the part of the defendant (plaintiff in the previous suit). Certainly, it cannot be found in the giving of the release, for, by its very terms the release was merely consideration for the $150.00 paid by the liability carrier to settle whatever claims the defendant had against it. Furthermore, it is questionable whether the defendant had any cause to rely upon the release as an admission of liability on the part of the insurance company, when, in fact, the release contained the aforementioned clause which expressly denied any liability.

It is submitted that there can be no logical justification in the field of res adjudicata and estoppel for the decision. The court based its decision squarely upon a recent New Jersey case, *Kelleher v. Lozzi*.[20] The *Kelleher* case created quite a furor when it was decided, and there was considerable speculation as to the extent to which it would change the then-existing law in that state. The *Kelleher* case has been cited many

[17] "We do not deem that such recital of non-liability should be held to override the inference to be drawn from the act of the plaintiff Indemnity Company in paying damages to Tronca, that the Indemnity Company had not claim against Tronca arising out of the accident." *Ibid.* at 451.

[18] Rowell v. Smith, 123 Wis. 510, 102 N.W. 1, 3 Ann. Cas. 773 (1905).

[19] ". . . we now turn to the third and last issue . . . whether the compromise settlement made with Tronca . . . constituted *conduct* which estops plaintiffs from prosecuting the instant action." (emphasis added). *Supra*, n.1, at 450. Reference to conduct seems to infer that the court is considering estoppel as equitable estoppel.

[20] 7 N. J. 17, 80 A.2d 196 (1951).

times in the years ensuing its rendition. The decisions in which the case is cited have served to interpret and explain it. One such decision implied that the *Kelleher* decision rested upon the doctrine of estoppel by judgment (collateral estoppel). Thus, in *Mechanical Devices Co. v. General Builders,*[21] the court stated:

> "It may seem, upon first inspecting the matter, that the doctrine of estoppel by judgment barely touches the doctrine of equitable estoppel relied on here, and that there is nothing to be gained by looking at the matter from that tangent. However, the argument in this case, and indeed in the Kelleher case, seems to rest upon the doctrine of estoppel by judgment, and properly so in one respect. A judgment is a determination of the existence of certain minimal facts without which it could not have been rendered."[22]

Inasmuch as neither this decision nor the *Kelleher* decision gave any further reasoning or explanation of the factors which forced them to apply the principles of collateral estoppel, we still have no light as to the nature of the legal or equitable considerations which led the court to its conclusion.

In a later decision, in which the court cited the *Kelleher* case, the court also took notice of certain facts which it felt had a bearing on the decision:

> "We understand that . . . the defendant in the former action did not file therein any answer, counterclaim, or other pleading. (facts similar to the Heinemann case) While we do not regard it as a decisive circumstance, we note that there was therefore no existing issue projected by the pleadings in the former action relative to the contributory negligence of Sherwood . . ." (parentheses added)[23]

The *Kelleher* case has been further distinguished and held not to apply where the settlement was made by the insurer in the prior action without the joining of the insured.[24] In fact, the court in the *Heinemann* case made a similar distinction, allowing the insured to collect its $100.00 if the trial court should find that it had not joined in the original settlement. What these later cases seemed to have overlooked is the fact that Kelleher sought a rehearing to show that the settlement with Lozzi was entered into by her insurer without her consent. But the New Jersey court refused a rehearing, thereby inferring that such facts would not affect the outcome.[25]

It seems, therefore, that the *Kelleher* case has little more upon which to base its reasoning than the *Heinemann* case, and that subsequent dis-

[21] 27 N.J.S. 501, 99 A.2d 605, (1953), reversed (but on a different issue) 15 N.J. 506, 105 A.2d 673 (1954).
[22] *Ibid.* at 607.
[23] Isaacson v. Bosewell, 18 N.J.S. 48 86 A.2d 695, at 697 (1952).
[24] *Ibid.* De Carlucci v. Brasley, 16 N.J.S. 48, 83 A.2d 823 (1951).
[25] Kelleher v. Lozzi, Docket #765, N.J. Sup.Ct., May 14, 1951.

tinctions indicate that New Jersey is not completely satisfied with the decision.

There is no doubt that the *Heinemann* decision has wrought a change in Wisconsin law. It is questionable, however, that it will radically affect Wisconsin practice. The decision itself indicated the method which will undoubtedly be adopted by practicing attorneys and insurance companies to avoid its holding. As the majority opinion suggested, there should be inserted in the release a clause which is a little more definite in reserving the right of the then-defendant to proceed later against the plaintiff on any cause of action the defendant may have for his own damages.[26] The dissenting opinion pointed out that attorneys for the plaintiff are not likely to accept a release which contains such a clause. This could have an adverse effect on the chances of settlement in such matters. This is not entirely inconsistent, however, with the growing tendency to avoid settling suits on a purely "nuisance-value" basis. Certain interests are voicing opinions that these claims should not be paid, as they have in the past, for the sole purpose of getting them out of the office.[27] The *Heinemann* decision should do much to further such views; for now an attorney will think twice before paying a nuisance claim where there is a possibility that he may later have a claim through subrogation. Balanced against this we have the long-enunciated policy of the courts:

> "It would be a harsh and oppressive rule which would make it necessary for one sued on a trifling claim to resist it and engage in costly litigation in order to prevent the operation of a judgment which would be held conclusively to have established against him every material fact alleged and not denied in the declaration, so as to preclude him from showing the truth if another controversy should arise between the same parties."[28]

It is submitted that the *Heinemann* case does justice between the parties to an ordinary claim. When an injured party gives a release to an insurance company, he assumes that the matter is ended between them on all issues arising out of the accident. The insurance companies are well staffed with counsel who can advise them to insert the proper clauses in the release if they wish to preserve their rights to sue subsequently.

Nevertheless, the basis upon which the case was decided may cause confusion in the field of collateral and equitable estoppel when it is applied to other cases. JAMES J. WILLIAMSON

[26] The court seems to indicate that any clause such as:

> "It is agreed that this release shall not be deemed in any way to be an admission of liability, nor shall it in any way impair the rights of the party taking such release to prosecute later any claims arising from this accident which he may have against the party giving the release."

should be sufficient to prevent the undesired estoppel.

[27] cf. R. C. Carlson, *Nuisance Value Settlements—a Necessary Evil,* 22 INS. L. J., 156 (1955).

[28] Justice Knowlton, in Watts v. Watts, 160 Mass. 464, 36 N.E. 479 (1894).