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TORT RELEASES IN WISCONSIN

HARROLD J. McCOMAS*

Two years have passed since the Wisconsin Supreme Court, in the case of *Pierringer v. Hoyer*¹ determined that joint tort-feasors could effectively bargain for and settle claims both as to plaintiffs and as to the contribution claims of co-defendants without certain knowledge of the ultimate quantitative negligence apportionable among the various defendants. The *Pierringer* case followed closely the case of *Bielski v. Schulze*,² which case held, as a proposition unprecedented in the law of Wisconsin, that in the establishment of contribution rights between joint tort-feasors in Wisconsin, damages were to be ratably allocated in proportion to the percentage of causal negligence attributable to each joint tort-feasor. The decision in *Bielski v. Schulze*, while somewhat startling by reason of its inception through judicial reversal of prior case law rather than by statutory enactment, was a reasonable and natural extension of Wisconsin's comparative negligence doctrines which had developed since the enactment of the Wisconsin comparative negligence statute by the Legislature in 1931.³

While the *Bielski* decision was unequivocal in its determination, serious questions remained in implementing its application. The question was presented as to whether, in light of prior decisions relating to rights of contribution between joint tort-feasors, and the seemingly absolute and mandatory provisions of the Uniform Joint Obligations Act,⁴ it would now be feasible to effect settlements with fewer than all multiple joint tort-feasors, while protecting the settling defendants from further liability for contribution claims from nonsettling joint tort-feasors. A separate but allied question also involved the issue of whether the settling parties could also be protected against their retention or interpleader as nominal parties in continuing litigation between the plaintiff and the nonsettling tort-feasors. If either of these questions were answerable unfavorably to a settling joint tort-feasor, the effective negotiation of settlement prior to trial would have been seriously impaired in personal injury cases involving multiple defendants.

The factual situations presented in the *Pierringer* actions were not atypical of the complexity of actions which often evolve from modern industrial accidents. Present in the case were three separate individual

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¹ 21 Wis. 2d 182, 124 N.W. 2d 106 (1963).

² 16 Wis. 2d 1, 114 N.W. 2d 105 (1962).

³ WIS. STAT. §331.045 (1963).

⁴ WIS. STAT. ch. 113 (1963).

plaintiffs, each claiming extensive personal injuries (along with their respective workmen's compensation carriers as silent but interested and participating entities) together with eight named defendants and interpleaded defendants. The plaintiffs' claim arose from an explosion which had occurred on November 1, 1957 and the actions had been commenced in the middle of 1958. More than three years had been consumed following commencement of the actions in multitudinous pleadings, examinations, depositions, motions, and other procedures which are largely unavoidable when multiple parties are involved in claims resulting from such an intricate industrial occurrence.

As of 1962, the plaintiffs and all but one of the defendants had come to a general agreement as to the extent and value of the plaintiffs' injuries and the probable involvement and responsibility of the various defendants, and had projected a basis for a proposed settlement of all three actions. These parties were also generally agreed that the trial of the action would involve some three to four weeks' time, that the exposure to the individual defendants was substantial and that the individual plaintiffs and their respective workmen's compensation carriers were willing to accept reasonable compensation rather than undergo the hazards and delay of the trial and certain appeal of the actions. One defendant, however, was unwilling to contribute to the funds needed to satisfy the requirements for the total settlement package in an amount considered sufficient by the remaining defendants who had negotiated for the total amount of the settlement payments to the three plaintiffs.

While the settlement terms were being evolved by the many parties to these actions during 1962, the case of *Bielski v. Schulze*, *supra*, was announced by the Wisconsin Supreme Court. Accordingly, the defendants in the *Pierringer* cases who were desirous of completing the settlement were then faced with these questions, vis-a-vis the non-participating and nonsettling defendants: (1) Could they, under the *Bielski* decision, effect a settlement which would protect them from further damages or contribution claims from the nonsettling defendant, while reserving to the plaintiffs their rights against the nonsettling defendant? (2) Could they effectively obtain their dismissal from the pending actions and continued litigation over the objection of the nonsettling defendant?

A brief review of the applicable Wisconsin statutes and case law will indicate the nature of the problem presented. The early case of *Ellis v. Esson*⁵ laid much of the groundwork for further development of the rights and obligations of joint tort-feasors in Wisconsin. In that action, the plaintiff effected a settlement with one defendant prior to trial and "released" the settling defendant, but provided under the

⁵ 50 Wis. 138, 6 N.W. 518 (1880).

terms of the agreement that the plaintiff was left free to prosecute his cause of action against the other tort-feasor for the balance of his damages due. The common law generally had held that a release under seal, as was the document in the *Ellis* case, was to be distinguished from a covenant not to sue, and necessarily resulted in a bar to any further action against the nonsettling defendants, as the "release" was conclusively presumed to have been in full satisfaction and sufficient compensation for the injury sustained. The Wisconsin Supreme Court paid lip service to this common law rule relative to releases under seal in *Ellis*, but concluded that the intent of the parties should nonetheless govern. It was held that inasmuch as it appeared from the "release" that the payment received had not been in full satisfaction for the injury, it had not been the plaintiff's intention to release the other tort-feasors and that the nonsettling defendants would be protected only to the extent of having the amount of payment received credited against the damages found against them.

Some 32 years later, the Wisconsin Supreme Court again looked past the term of art of a "release" contained in a document purporting to release one of two joint tort-feasors in the case of *Kropidowski v. Pfister & Vogel Leather Co.*,⁶ and gave effect to the stated language in the document (designated as a sealed release) that "said sums are received not as an accord and satisfaction for the whole injury suffered, but only as part satisfaction thereof."⁷ The court then held that the parties' intent could best be carried out by treating the settlement agreement as a covenant not to sue, and accordingly did so.

While Wisconsin case law was developing the rule (contrary to the rule of common law) that settlement agreements would be implemented according to their provisions and intent, and would not automatically bar recovery against non-settling joint tort-feasors simply because the document was designated as a release of the settling tort-feasor, rights of contribution between joint tort-feasors were also being developed by the courts. Thus in *Ellis v. Chicago & N.W. R. Co.*,⁸ some nine years prior to the enactment in 1927 of the Uniform Joint Obligations Act in Wisconsin, our supreme court considered the split of authority as to the existence of common law rights of contribution, and determined that contribution or indemnity would lie between joint tort-feasors except in those instances in which elements of moral turpitude, or willful or conscious wrong, might bar such recovery. Following the enactment of the Uniform Act in Chapter 113, drafting of settlement agreements, releases covenants not to sue, and indemnity agreements (and often documents which combined elements of all of these) so that Wisconsin's common law rights of contribution would be compatible

⁶ 149 Wis. 421, 135 N.W. 839 (1912).

⁷ *Id.* at 422, 135 N.W. at 839.

⁸ 167 Wis. 392, 167 N.W. 1048 (1918).

with the provisions of the various statutory sections of Chapter 113, became increasingly difficult.

In *State Farm Mut. Auto Ins. Co. v. Continental Cas. Co.*⁹ the plaintiff's husband's insurer paid the plaintiff a nominal amount (\$15) and obtained from the plaintiff a signed written instrument entitled "Joint Tort-Feasor Release under Chapter 113 of the Wisconsin Statutes With Indemnifying Agreement." The terms of the instrument were such that the settling party was purportedly released from all liability and causes of action for the plaintiff's personal injury, but the plaintiff reserved the right to make claim for her full cause of action against all other parties. The court found the settlement agreement in the *State Farm Mutual* case to be synonymous with a covenant not to sue, and held that it did not preclude the nonsettling defendant from seeking contribution from the settling defendant, since the settlement had reserved to the plaintiff her full cause of action, rather than satisfying half of the plaintiff's damages. The court also concluded that the Uniform Joint Obligations Act was applicable and held Section 113.04, rather than Section 113.05, applied in this instance.

The converse situation was presented in the subsequent case of *Heimbach v. Hagen*,¹⁰ in which the settlement agreement executed by the plaintiff in favor of one of two joint tort-feasors specifically provided, in addition to releasing the settling party, that the plaintiff's cause of action was credited and satisfied to the extent of one-half thereof, and that the settling defendant was released from any claims for contribution. Against an attempted claim for contribution brought by the nonsettling joint tort-feasor against the settling party, the Supreme Court of Wisconsin upheld the provisions of the settlement agreement and particularly the provision which satisfied and discharged 50 per cent of the plaintiff's cause of action, whatever the amount of damages might prove to be. The court reasoned that in no event would the nonsettling tort-feasor be obligated to pay more than 50 per cent of the verdict, since the plaintiff had already disposed of one-half of any judgment which might ultimately be entered in favor of the plaintiff. The supreme court was apparently unable to decide satisfactorily whether the settlement agreement was properly classifiable under Section 113.04 or Section 113.05 of the Wisconsin Statutes, and concluded that it was not necessary to make such determination in upholding the settlement agreement with the following language:

Whichever Section of the statutes may be applicable, defendants are discharged by the settlement to the extent of at least one-half of plaintiff's total damages, and, therefore no right to contribution from Calbick and her insurer can arise.¹¹

⁹ 264 Wis. 493, 59 N.W. 2d 425 (1953).

¹⁰ 1 Wis. 2d 294, 83 N.W. 710 (1957).

¹¹ *Id.* at 298, 83 N.W. at 713; See also *Kerkhoff v. American Auto. Ins. Co.*, 14 Wis. 2d 236, 111 N.W. 2d 91 (1961).

While establishing the right of a settling joint tort-feasor to be free from claims of contribution in those instances in which the settlement agreement provided that satisfaction of the plaintiff's claim would inure to the benefit of the nonsettling defendant so that he would not be injured by the settlement, the court also resolved the question as to whether a settling tort-feasor was entitled to be protected from joinder in or release from participation in litigation, or whether the nonsettling defendant could require the joinder or continuation of the settling defendant in the case as a nominal party. It was determined that the settling defendant was entitled to dismissal from pending actions or protection from joinder in subsequent actions, that it was not material whether the settlement was made before or after an action was commenced and that no possible infringement upon procedural rights of nonsettling defendant would be sufficient to require the presence of the settling tort-feasor in the case.¹²

Based upon this statutory and case history, it appears that, prior to the decision in *Bielski v. Schulze*, *supra*, the following determinations and procedures had been established by the Supreme Court of Wisconsin for utilization in effecting settlement of personal injuries involving joint tort-feasors.

1. The right of contribution of a joint tort-feasor against another tort-feasor arose in Wisconsin by operation of law upon the making of a payment by a tort-feasor which inured to the benefit of a joint tort-feasor.

2. The strict common law view that releases under seal operated to discharge all other joint tort-feasors from liability was not effective in Wisconsin when the release or settlement agreement by its terms evinced an intention not to release joint tort-feasors.

3. The payment by a settling tort-feasor to a claimant would not have the effect of releasing or saving the paying tort-feasor from contribution claims brought by his joint tort-feasor if the settlement agreement retained all causes of action of the claimant and did not satisfy an appropriate fractional portion ($\frac{1}{2}$ in each reported case) of the plaintiff's damages.

4. A settlement agreement would protect a settling tort-feasor from claims of contribution if the settlement agreement adequately provided for satisfaction and release of an appropriate portion of the plaintiff's cause of action and ultimate recoverable judgment, which thereby inured to the benefit of a nonsettling joint tort-feasor.

5. A payment by a defendant or supposed joint tort-feasor who was ultimately determined not to be liable did not operate to release

¹² *Heimbach v. Hagen*, 1 Wis. 2d 294, 83 N.W. 2d 710 (1957).

or discharge any of a claimant's cause of action since contribution was necessarily predicated upon joint liability.

6. The title or designation of a settlement agreement, release, or covenant not to sue was not deemed significant, as the Court would look to the intention of the parties as expressed in the agreement to determine the rights of the settling parties and of the non-settling parties.

7. The courts, along with practitioners, were unable in all instances reasonably to classify settlement agreements, releases, covenants not to sue, and indemnity agreements under appropriate sections of Chapter 113 of the Wisconsin Statutes. This was not a substantial problem since the Uniform Joint Obligations Act, as applied to joint tort-feasors, was considered to be largely declarative of Wisconsin case law establishing contribution rights.

8. Settling parties who adequately provided for a release and satisfaction of an appropriate portion of a plaintiff's cause of action and damages could be protected both from claims of contribution and from continuing as nominal parties in litigation.

9. The reported cases setting out these rules and procedures had apparently never involved more than two joint tort-feasors, so that the fractional share released, as contained in each reported case, was always stated to be one-half of the recoverable damages and judgment in each instance. It was considered that an appropriately worded settlement agreement and covenant not to sue could be employed to release other fractional shares of a plaintiff's cause of action and damages, but such agreements in the nature of covenants not to sue invariably carried indemnity agreements as well to protect the settling tort-feasors from possible miscarriage of the document.

Following the decisions in *Bielski v. Schulze*, *supra*, and *Pierringer v. Hoyer*, *supra*, it appears that the general rules recited above have not been substantially changed, other than to reflect the new concept of prorating liability and damages among joint tort-feasors in proportion to their liability (usually causal negligence) as finally determined in the trial or other disposition of the action. The settling parties in the *Pierringer* cases were clearly unable to predict, even approximately, the ultimate allocation of negligence among the many participating defendants and the nonsettling defendant. Accordingly, the agreements utilized to effectuate the proposed settlement and to prevent its being precluded by the nonparticipating defendant provided in essence that the plaintiffs would release all of their causes of action and credit and satisfy all of their damages in any judgments which might ultimately be found to be attributable to all of the settling parties,

reserving and maintaining to the plaintiffs only that portion of their causes of action and damages which might ultimately be held to be attributable to the nonsettling party. A copy of the form of release upheld in the case involving *Pierringer, Hoger and Bormann* is set out in the appendix.

Approval by the Supreme Court of Wisconsin of the type of settlement agreement utilized in the *Pierringer* cases should be of assistance in encouraging the settlement of the increasing number of actions and claims involving multiple joint tort-feasors in Wisconsin. In such instances, those defendants who wish to effect a settlement and pay for their release from liability on a negotiated basis can now do so with the assurance that if an adequate settlement agreement is utilized, they will be protected both from claims of contribution and future participation as parties in any continuing litigation. Nonsettling co-defendants will be unable to trade upon the position that unless unwarranted concessions are made to them, they will be able to prevent other parties from effecting settlements deemed favorable to them by the settling parties.

Claimants will be able to make settlements with the settling parties in those instances where agreement can be reached between them and still retain their pro rata claims and causes of actions against nonsettling joint tort-feasors to the extent of the ultimately determined proportionate liability of the nonsettling defendants. Nonsettling defendants will be protected in that they will benefit from a *pro tanto* reduction in the recoverable damages allocable to the conduct of settling parties, and will only be responsible for the damages attributable to their own proportionate liability in the action. Under these circumstances, it appears that the policy of encouraging settlement has been substantially fostered by the *Pierringer, Hoger and Bormann* decision, and that the equitable rights of contribution are well served by the decision in these cases.

A final note of interest is the court's determination in the *Pierringer, Hoger and Bormann* case that facts relative to the conduct and ultimate negligence of settling defendants are fully determinable in appropriate special verdicts despite the absence of such settling parties as named parties in the action. Such appeared to be the law of Wisconsin prior to these decisions, but it is considered that the *Pierringer* case constitutes a square holding to this effect.

It seems equally⁹ clear that, in its decision in the *Pierringer* case, the Supreme Court of Wisconsin has forever terminated its concern with the applicability of the Uniform Joint Obligations Act, as set out in Chapter 113, to personal injury settlements, agreements, releases, covenants not to sue, and indemnity agreements in Wisconsin contribu-

tion cases, since it has determined that Chapter 113 will not be applicable in these instances unless the specific terms and provisions of the settlement agreement require its application. It is submitted that consideration should be given to repealing Chapter 113, insofar as it pertains to claims for contribution relating to joint tort-feasors in Wisconsin.

A P P E N D I X

The following is the substance of the release agreement given effect in *Pierringer v. Hoger*:

(Recitals of circumstances relating to settlement agreement are omitted.)

Now, Therefore, I, the undersigned Loschel Pierringer, for myself, my heirs, administrators, executors, successors and assigns, for and in consideration of the payment of the total amount of Seventeen Thousand Nine Hundred and Sixty-four Dollars (\$17,964.00) by Milwaukee Gas Light Company, Stoelting Brothers Company, Burton E. Hoger, William Bormann, Schmitz Ready Mix, Inc., James E. Greisch and William R. Greisch to the undersigned, the receipt of which amount is hereby acknowledged, and other good and valuable consideration, do hereby release, remise and forever discharge the following named persons, corporations and firms, and their respective officers, agents, employees, successors, assigns, and insurers, and each of them, and only such persons, corporations and firms, to-wit: Milwaukee Gas Light Company, Stoelting Brothers Company, Burton E. Hoger, William Bormann, Schmitz Ready Mix, Inc., James E. Greisch and William R. Greisch, of and from any and all claims, demands, rights or causes of action of whatsoever kind or nature which the undersigned has ever had or may now have or may hereafter have, whether now known or unknown, foreseen or unforeseen, arising from or by reason of or in any way connected with, any injuries, losses, damages, disability, suffering, property damage or loss, or the results thereof, which heretofore has been or hereafter may be sustained by the undersigned as a result of or in connection with or arising out of that certain fire and/or explosion which occurred on or about November 1, 1957 at the Schmitz Ready Mix plant at Port Washington, Wisconsin.

It has been represented by the undersigned that the injuries sustained and the suffering and damages resulting therefrom by the undersigned have persisted and that recovery therefrom is uncertain and indefinite, and in making this release and agreement it is understood and agreed that the undersigned relies on the undersigned's own beliefs and knowledge, and that of the physicians and attor-

neys of the undesigned, as to the nature, extent and duration of the symptoms and injuries.

The settlement and release made and effected hereby is a compromise settlement of the undersigned with Milwaukee Gas Light Company, Stoelting Brothers Company, Burton E. Hoyer, William Bormann, Schmitz Ready Mix, Inc., James E. Greisch and William R. Greisch (hereinafter called the "settling parties") and neither this release nor the payments made pursuant thereto shall be construed as an admission of liability of any of said settling parties, the same being denied. The total damages and claims of the undersigned amount to more than the amount of the aforesaid consideration of \$17,964.00 paid and credited to the undersigned herewith by the settling parties being released hereunder, and the undersigned, knowing that the settling parties released hereunder and herein are not paying the total of the undersigned's full amount of damages as would be paid if all defendants and interpleaded defendants in said pending action, including Mathias Greisch, were settling said action and all claims for damages of the undersigned therein, does hereby credit and satisfy that portion of the total amount of damages of the undersigned which the undersigned has suffered and will suffer because of the aforesaid fire and/or explosion which has been caused by the negligence, if any, of such of the settling parties hereto as may hereafter be determined to be the case in the further trial or other disposition of this or any other action, it being the act and intention of the undersigned to release and discharge, and he does hereby release and discharge that fraction and portion and percentage of his total causes of action and claim for damages against all parties in said case No. 12830 pending in said Circuit Court of Ozaukee County which shall hereafter, by the further trial or other disposition of this or any other action, be determined to be the sum of the portions or fractions or percentages of causal negligence for which any or all of the settling parties hereto are found to be liable and responsible in causing said fire and/or explosion with respect to any finding of damages or recovery made by or for said Loschel Pierringer; and the undersigned does hereby reserve, save, maintain and preserve against Mathias Greisch the balance of the whole cause of action of the undersigned against the Mathias Greisch, which balance of said cause of action is not released hereunder. Except as above specified, the undersigned does not release Mathias Greisch from any liability for damages and specifically reserves his rights, claims and causes of action, as aforesaid, against said Mathias Greisch.

In further consideration of the aforesaid payment to the under-

signed by the settling parties hereto for the damages, injuries and claims of the undersigned, the undersigned, for himself, his heirs, administrators, executors, successors and assigns, does hereby indemnify and agree to indemnify and save harmless said Milwaukee Gas Light Company, Stoelting Brothers Company, Burton E. Hoger, William Bormann, Schmitz Ready Mix, Inc., James E. Greisch and William R. Greisch, their respective officers, agents, employees, successors, assigns and insurers, for any amount that they will or may be required to pay upon any judgment (exclusive of costs, if any) obtained against them by a joint tortfeasor or any party to said action or any other party for contribution in any way arising out of any damages of the undersigned herein resulting from said fire and/or explosion of November 1, 1957, and all claims made by the undersigned with respect thereto, and to satisfy any such judgment against the settling parties, and does hereby further agree, and authorizes his attorneys to execute a stipulation thereto, to dismiss, on the merits and without costs to the undersigned or any of the settling parties, said actions No. 12830 and No. 12997 as against Milwaukee Gas Light Company, Stoelting Brothers Company, Burton E. Hoger, William Bormann, Schmitz Ready Mix, Inc., James E. Greisch and William R. Greisch.

It being understood that the undersigned Loschel Pierringer, for himself, his heirs, executors, successors, administrators and assigns, agrees to satisfy on behalf of the settling parties any amount of any judgment to which he may be found to be entitled against Mathias Greisch up to the extent of the fraction of his cause of action hereinbefore defined and released hereunder.

The foregoing Release and Indemnification Agreement has been read and understood by the undersigned before signing thereof.

IN WITNESS WHEREOF, the undersigned has hereunto set his hand and seal this 15th day of May, 1962.

/s/ Loschel Pierringer (SEAL)
Loschel Pierringer

(Acknowledgment)