South Carolina Law Review

Volume 24 | Issue 2 Article 5

1972

Torts--The Release of One Tortfeasor Does Not Release Others in South Carolina--Bartholomew v. McCartha

Henry D. Sellers

TORTS—THE RELEASE OF ONE TORTFEASOR DOES NOT RELEASE OTHERS IN SOUTH CAROLINA —

BARTHOLOMEW V. McCARTHA*

A has a tort claim against B and C. B wants to compromise with A by giving him partial compensation. If A accepts B's offer and discharges him, strict application of the "general" or "common law" rule would disallow any action by A against C for the balance of the claim—the release of B having the legal effect of releasing C regardless of the intent of the parties.[1]

The result described above has been condemned by text-writers and courts alike for many years.[2] It rests for the most part upon the fiction that a release implies a satisfaction.[3] Strict application of the rule requires that a claimant either forego any opportunity of a compromise settlement with one defendant or, if he decides to settle with one, give up his entire claim against the other without total compensation for his injuries. The rule has lost much of its vitality through legislative[4] and judicial action.[5] In some jurisdictions it can

*255 S.C. 489, 179 S.E.2d 912 (1971).

1. The rule was first espoused in the case of *Cooke v. Jennor,* Hob. 66, 80 Eng. Rep. 214 (K.B. 1614). Cooke was assaulted by Jennor and Milborne. He released Milborne and proceeded against Jennor. Viewing the release as "satisfaction in law" the court held that it also released Jennor. For a general overview of the area of tort releases *see* 76 C.J.S. *Release* §50 (1952), *and* Annot., 73 A.L.R.2d 403 (1960).

2. Wigmore, *Release to One Joint Tortfeasor,* 17 ILL. L. REV. 563 (1923); Note, *Torts: Effect of the release of one joint tortfeasor on the liability of the others,* 13 CORNELL L. Q. 473 (1928); 12 VANDERBILT L. REV. 1414 (1959); W. PROSSER, LAW OF TORTS §49 (4th ed. 1971). *See also* McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958).

3. For an examination of the reasons advanced in support of the rule *see* H. Havighurst, *The Effect of a Settlement With One Co-Obligor Upon the Obligations of the Others,* 45 CORNELL L.Q. 1 (1959).

4. The Model Joint Obligations Act, 9B U.L.A. 355 (1925) and the Uniform Contribution Among Tortfeasors Act, 9 U.L.A. 233 (1939) are examples of typical legislation in this area. The Model Joint Obligations Act, which has been adopted in regard to tort claims by four States, provides that a release of an obligor shall release co-obligors to the full extent of the obligor's original liability unless the obligor expressly reserves his rights against the co-obligors. The Uniform Contribution Among Tortfeasor Act, which has been adopted by eight states, reverses the presumption arising from the absence of

be avoided by an express reservation of rights against any tortfeasor not a party to the instrument; in others it has given way to a rule that the release of one tortfeasor releases others only when so intended.[6] In the recent case of *Bartholomew v. McCartha*[7] South Carolina expressly repudiated the controversial rule and adopted the latter of the two variations described above.

I. BARTHOLOMEW V. MCCARTHA

In 1966 Bartholomew was injured in a collision between an automobile driven by Clyde McCartha and a truck driven by Ray Shealy. He sued both drivers charging that the negligence of each contributed to his injury. Bartholomew settled his claim against McCartha and executed and delivered to him a document styled "Covenant Not to Sue."[8] Subsequently he took an order dismissing his complaint as to McCartha "with prejudice." Shealy sought dismissal of the action against him, apparently arguing in the alternative that either (1) the document delivered to his co-defendant was a release as opposed to a covenant not to sue and had the effect of

---

an express provision in the release. It states that a release of one joint tortfeasor does not discharge others unless the release so provides.

Nine other states have statutes that deal generally with the construction of instruments in suit and with the effect and form of releases in particular.

5. *See, e.g.*, McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Breen v. Peck, 28 N.J. 351, 146 A. 2d 665 (1958); Riley v. Industrial Finance Service Co., 157 Tex. 306, 302 S.W.2d 652 (1957).

6. There are only two states (Washington and Virginia) that still adhere wholeheartedly to the common law rule and make it impossible to settle with one tortfeasor without releasing another. W. PROSSER, LAW OF TORTS §49 (4th ed. 1971).

7. 255 S.C. 489, 179 S.E.2d 912 (1971).

8. The text of the document was as follows:

> I, Dick Bartholomew of Little Mountain in the County of Newberry and State of South Carolina for his heirs, executors and administrators, in consideration of Fourteen Thousand and no/100 Dollars to me paid by C. H. McCartha the receipt of which is hereby acknowledged, do by this instrument convenant with said C. H. McCartha forever to refrain from, instituting, pressing or in any way aiding any claim, demand, action or cause of action for damages, cost, loss of service, expenses or compensation for, on account of, or in any way growing out of, or hereafter to grow out of an accident which happened to me on or about the 17th day of March 1966 at or near Little Mountain, South Carolina whereby I sustained injury.

releasing him from liability for the injuries or (2) that the document delivered to his co-defendant and the order of dismissal taken together constituted a release that likewise released him from liability. The basis of his argument was the common law rule that the release of one joint tortfeasor, regardless of the intention of the parties, releases all. The South Carolina Supreme Court held that it was not necessary to determine whether the transaction was in the nature of a release because:

> Being untrammeled by the ancient rule which, in our view, tends to stifle settlements, defeat the intention of parties and extol technicality, we adopt the view that the release of one tortfeasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has in fact, received full compensation amounting to a satisfaction.[9]

Accordingly Bartholomew was allowed to proceed against Shealy.

In reaching its decision the court noted that the holding was "foreshadowed" in the case of *Mickle v. Blackmon*.[10] There the court voiced animate disapproval of the common law rule but refused to adopt or repudiate the rule because "the case does not involve a release from which the fiction of a satisfaction could be raised."[11]

The court in both *Mickle* and *Bartholomew* referred to the fact that they were not bound by the weight of precedent since the common law rule had not been adopted in this state.[12] Though only of persuasive import, the federal district court of South Carolina has on numerous occasions held that South Carolina was in accord with the common law rule. In *McWhirter v. Otis Elevator Co.*[13] the district court stated:

> [A] general release of one joint tortfeasor has the effect of discharging all other joint tortfeasors, and a plaintiff may have only one satisfaction, although he has the option of suing joint tortfeasors either jointly or severally.[14]

Citing *Pendleton v. Columbia Ry., Gas & Electric Co.*[15]

9. 255 S.C. 489, 490, 179 S.E.2d 912, 913 (1971).
10. 252 S.C. 202, 166 S.E.2d 173 (1969).
11. *Id.* at 224, 166 S.E.2d at 182.
12. *But see* S.C. CONST. art. VII (1790); S.C. CONST. art. XXXIV (1778); S.C. CONST. art. XXIX (1776).
13. 40 F. Supp. 11 (D.S.C. 1941).
14. *Id.* at 13.
15. 133 S.C. 326, 131 S.E. 265 (1925).

and *National Bank of Savannah v. Southern Ry. Co.*[16] the *McWhirter* court found an endorsement by the South Carolina Supreme Court of the foundations of the common law concepts on which the traditional theory of release is based.[17] A question arises as to the reason for these inconsistencies.

II. PRE-BARTHOLOMEW LAW

In *National Bank of Savannah v. Southern Ry. Co.*[18] the South Carolina Supreme Court found that a claimant is entitled to but one satisfaction. National Bank brought suit against Southern Railway Company in the state court. While that action was pending another suit by the plaintiff in the district court against Kershaw Oil Mill arising from the same set of facts, resulted in a judgment against the oil mill. Southern Railway, which was not a party to the Kershaw case, argued that the judgment in the district court barred any additional recovery against it. The bank contended that the suit against Southern was grounded in contract whereas the suit against the Oil Mill sounded in tort. In dismissing the action against Southern the court stated:

> The plaintiff could have a judgment against either of the defendants or both, as they were joint tortfeasors, but it could have *but one satisfaction for the wrong done.* But when the plaintiff obtained its judgment against the oil mill and accepted satisfaction of it, as was done in this case, then under the law the defendant was released from all liability to the plaintiff.[19]

In *Pendleton v. Columbia Ry., Gas & Electric Co.*[20] the South Carolina court adopted the rule that there is but one cause of action although several individuals are involved as joint tortfeasors. The plaintiff brought a tort action against the Railway Company and Leon Dicks as joint tortfeasors, to recover for alleged personal injuries sustained when he was struck by a car driven by Dicks immediately after being discharged from a street car owned by the Railway Company. On appeal from a refusal by the circuit court to require Pendleton to elect between an action based on separate acts of negligence on the part of the co-defendants and one based on joint negligence the court noted that:

16. 107 S.C. 28, 91 S.E. 972 (1916).
17. *See generally* H. Havighurst, *supra* note 3.
18. 107 S.C. 28, 91 S.E. 972 (1916).
19. *Id.* at 32, 91 S.E. at 973 (emphasis added).
20. 133 S.C. 326, 131 S.E. 265 (1925).

> The facts alleged make a case of a single indivisible injury caused, without community or design or concert of action, by the separate and independent acts of the two defendants. No separate cause of action is formally alleged against either of the defendants, and the whole amount of the damages alleged to have been sustained is sought to be recovered against both. We think a recovery against one defendant in this action would clearly preclude the plaintiff from thereafter attempting to pursue and hold the other upon the theory that the recovery had against the one defendant was referable to a separate cause of action against such defendant and did not involve the adjudication of a similar separable controversay with the other defendant.[21]

The court held that the voluntary joinder of the two defendants indicated that the claimant elected to recover upon the theory of joint liability.

Faced with the reasoning discussed above it appears that the federal district court, charged with the responsibility of applying state law, took the available state precedent in the area of tort releases to a logical conclusion. Although not considered in its decision, the district court could have found additional support for its position in the case of *Parker v. Bissonette*.[22] In *Parker* the plaintiff was a passenger on a train belonging to Atlantic Coast Line Railroad Company. She was traveling from Savannah to Charleston under the auspices of a free-pass which contained the provision that:

> The person accepting this free ticket agrees that the Atlantic Coast Line Railroad Company shall not be liable under any circumstances, whether of negligence of agent or otherwise, for any injury to the person, or for any loss or damage to the property, of the passenger using the same.[22a]

Passengers traveling to Charleston from Savannah were required to leave the train at the North Station. They were then conveyed to the Union Station in a bus operated by the defendant Bissonette on behalf of the railroad company and pursuant to a written contract between Bissonette and the company. Parker was injured in a collision between the aforementioned bus and another motor vehicle. In an action by her against Bissonette, Bissonette contended that by reason of the limitations contained in the free-pass no actionable claim for injuries could be maintained against him. In holding that the limitations contained in the pass did not benefit the agents or servants of the Railroad with respect to their personal liability the court stated:

21. *Id.* at 333, 334, 131 S.E. at 268.
22. 203 S.C. 155, 26 S.E.2d 497 (1943).
22a. *Id.* at 158, 26 S.E.2d at 498.

> It is not contended that Bissonette was relieved of liability by reason of a release by Mrs. Parker of [the Railroad Co.]. The pass was not a release of an existing cause of action; *it was in the nature of an agreement not to sue.* It referred only to the future, and was given at a time when there was no existing liability which could be released.[23]

Such language may be understood to indicate that had the document released an *existing* cause of action, the plaintiff would have had no remedy against Bissonette.

Implicit in *Bartholomew* is the conclusion that the South Carolina Supreme Court rejected the federal district court's interpretation of the state court's prior decisions. It is now clear that the intent of the claimant will govern in deciding whether the release of one joint tortfeasor is to be considered as full satisfaction of a given claim. However, additional problems relative to compromise settlements remain unresolved.

III. POST-BARTHOLOMEW PROBLEMS

The rule adopted by the court in *Bartholomew* turns the emphasis away from the technical character of the instrument and toward the nature of the agreement with the tortfeasor who has been released. A general release of one tortfeasor still releases others if that was the intention of the parties or if there has been full compensation amounting to a satisfaction. A problem arises in this area when it becomes necessary to rely on extrinsic evidence to explain the character of the agreement. Will the court allow this evidence, or will it regard the language of the document as dispositive of the question of intent?

Generally, the parol evidence rule bars the use of oral or other extrinsic evidence of prior or contemporaneous negotiations or agreements of the parties which varies or contradicts the terms of the written document.[24] Also, it is generally held

23. *Id.* at 163, 26 S.E.2d at 500 (emphasis added).

24. 3 CORBIN ON CONTRACTS §573 (1960). It is unanimously agreed that the parol evidence rule applies to *prior* expressions and has no application to *subsequent* agreements. There is however, no unanimity as to expressions *contemporaneous* with the writing. *See* CALAMARI AND PERILLO, THE LAW OF CONTRACTS §40 (1970).

that the parol evidence rule may be invoked by and against a person who is not a party to the agreement.[25]

In applying the applicable rules of evidence to a *Bartholomew* type situation the court will eventually be required to decide the extent to which parole evidence will be allowed to show the intent of the parties, which is the crucial issue in such cases. The court could take the view that the document, on its face, is the best evidence of the intent of the parties and require the claimant to include language restricting the release to the parties named therein.[26] On the other hand, the court could agree to accept parol evidence of intent in the absence of restrictive language in the document. By expressly repudiating the common law rule, the court in *Bartholomew* seems to favor the latter approach. To trade a common law "technicality" for a modern counterpart as represented by the first alternative would seem to detract from the spirit of the *Bartholomew* decision.

Another important problem arises in deciding who shall shoulder the burden of proving that the claimant intended to release all parties, or that the claimant has been fully compensated. Traditionally, one who pleads an affirmative defense is required to shoulder the burden of proof associated with that defense.[27] Courts and other authorities that have advocated the rule laid down in *Bartholomew* are split on the question of who should be required to sustain the burden of proof. In *McKenna v. Austin*[28] the court chose to place that burden on the party claiming that the release discharged strangers or that the plaintiff had been fully compensated.[29] Dean

25. 3 CORBIN ON CONTRACTS §596 (1960). Some courts have recognized an oral agreement to discharge a joint tortfeasor and have met with the objection of the parol evidence rule with the argument that the second tortfeasor was not a party to the agreement. W. PROSSER, LAW OF TORTS §49 (4th ed. 1971).

26. This is the position taken by the First Restatement. RESTATEMENT OF TORTS §885(1) (1939).

27. Hoffman v. Greenville Cty., 242 S.C. 34, 129 S.E.2d 757 (1963).

28. 134 F.2d 659 (D.C. Cir. 1943).

29. Justice Rutledge in announcing the opinion of the court stated:

> Ordinarily the claimant will not secure complete indemnity from one or less than all, unless the others are judgment proof. Such a settlement usually would not be advantageous to the settling wrongdoer. The presumption of fact therefore generally would be against full satisfaction.

Id. at 664.

Prosser on the other hand has suggested that the releasor should have the burden of establishing that he did not intend to release strangers and had not been fully compensated.[30] It is submitted that the latter of these opposing views is the better. The injured party gains an advantage by being in a position to make successive settlements with the joint tort feasors.[31] In order to subject this advantage to some limitations the burden of proof in every instance where there is no express reservation of rights should be upon the injured party regardless of what form the instrument of release takes; *i.e.*, general release or covenant not to sue.

The alternative would, at least in some instances, place an almost insupportable burden upon the defendant. First, in order to show the intent of the claimant, and joint tortfeasor, he must present evidence of negotiations, conversations and the like to which he was not privy and to which his access by way of discovery may be severely limited by current court rules.[32] Secondly, if the defendant chooses to claim that the plaintiff has been fully compensated, additional evidentiary problems arise. Generally, the question of damages is to be decided by the jury.[33] Consequently, the defendant must be allowed to place the amount previously received by the plaintiff before the jury for a proper decision on the issue of full compensation. Under present rules of evidence it is unclear whether or not this proof would be admissible.[34]

Still another problem arises in a jurisdiction like South Carolina which recognizes no right of contribution among joint tortfeasors.[35] Where an anticipated defense in an action is one common to all defendants, it might be helpful to the claimant to make a nominal settlement with one defendant and thereby have a well disposed witness, who under the shield

30. W. PROSSER, LAW OF TORTS §49 (4th ed. 1971).

31. *See* H. Havighurst, *supra* note 3 at 4. The advantage is one of bargaining power taking into consideration the real value of the claim as opposed to its hypothetical value as a bargaining tool.

32. *See generally* S.C. CIR. CT. RULES.

33. Wright v. Gilbert, 227 S.C. 334, 88 S.E.2d 72 (1955); Laurence v. Southern Ry.-Carolina Div., 169 S.C. 1, 167 S.E. 839 (1933); Johnson v. Hannahan, 3 Strob. 425 (S.C. 1849); Bourke v. Bulow, 1 Bay 49 (S.C. 1787).

34. *See* Neal v. Clark, 199 S.C. 316, 19 S.E.2d 473 (1942) *and* Squires v. National Grange Mut. Ins. Co., 247 S.C. 58, 145 S.E.2d 673 (1965).

35. Seaboard Air Line Ry. Co. v. Coastal Distributing Co., 273 F. Supp. 340 (D.S.C. 1967).

of a settlement is free to give testimony damaging to his joint tortfeasors without fear of suit for contribution. If the fact of nominal settlement is concealed and especially if the released tortfeasor is made a party defendant, his testimony, would be most damaging to the defense and could work a fraud on the court.

IV. CONTRACT IMPLICATIONS

Since a release is a contract, consideration must be given to the effect of the *Bartholomew* opinion in the general area of contract law. The South Carolina Code provides that a creditor, under a composition agreement, may release one who is jointly obligated to him without impairing his rights against others unless a contrary intent appears on the face of the agreement.[36] The South Carolina Supreme Court has on one occasion refused to give this statute effect. In *Poole v. Bradham*[37] the guardian of the estate of an infant released two of the three co-guarantors on a bond which had been assigned to the infant. Upon default on the bond plaintiff sued the guarantors who set up the release as a bar. The third guarantor contended that the release operated as a matter of law to release him from any liability on the instrument. Conceding that the guarantors were "debtors" within the terms of the above statute the court nevertheless concluded that the third co-guarantor was released. The court opined:

> It is clear that in the present case the governing purpose of the guardian in the whole transaction was to save the investment of his ward; and there is nothing in the record to indicate that the parties intended that the release should not extend, according to the general rule, beyond Purdy and Bland [the two released co-guarantors] and discharge the other guarantor. It follows that when the guarantor executed the release . . . it operates as a matter of law, to discharge the other guarantor.[38]

Feeling that the statute would work a hardship on the third guarantor the court took refuge in the common law rule demanding the release of all co-obligors.[39]

36. S.C. CODE ANN. §11-251 (1962).

37. 143 S.C. 156, 141 S.E. 267 (1928).

38. *Id.* at 165, 141 S.E. at 270.

39. The holding in *Poole* would tend to lend support to the position that South Carolina was indeed in accord with the "common law" rule with regard to the release of joint obligors prior to the *Bartholomew* decision. It is interesting to note, however, that in applying the "general rule" the court looked to the intent of the parties and found that they intended that the general rule apply.

If a situation similar to *Poole* should arise today, *Bartholomew* could well be construed as disposing of the rationale therein since "the general rule" referred to has been explicitly repudiated. Assuming, *arguendo*, that the statute could be avoided the court would still be required as a minimum to give effect to the intention of the parties.[40]

V. CONCLUSION

The release of one joint tortfeasor in South Carolina no longer releases others. The question of the intent of the parties to the release is now the crucial issue. In embarking on what, for this state is a new course, many questions are necessarily generated. It is unfortunate that the nature and scope of the *Bartholomew* case did not present the court with the opportunity to settle the basic evidentiary and procedural difficulties that will ensue. Undoubtedly future litigation will be generated in the application of this newly announced doctrine that will present the court with the much needed opportunity to provide clear guidelines for the practitioner.

HENRY DONALD SELLERS

40. Giving effect to the intention of the parties would not change the result in *Bradham*. *See* note 39 *supra*.