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CURRENT PROBLEMS IN PLEADING, DISCOVERY AND SETTLEMENTS

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I. PLEADING

A. *Departure*

Plaintiffs continue to be troubled by petitions which are not broad enough to permit introduction of necessary proof. Such was the problem in *Lorraine v. E. M. Harris Bldg. Co.*[1] Plaintiff was injured when she fell on the slick concrete porch of defendant's "display house." Plaintiff complained that the porch and walk were dry but that a "wooly mat" on the porch was soaked with water. When she stepped on the mat her shoes became wet causing her to slip on the "glaze" finish of the front porch. The petition is not set out in the opinion but the briefs indicate that it made no reference to the sinister wet mat.

The problem first arose during voir dire examination when plaintiff made a reference to the wet mat. Defendant objected that this was outside the pleadings, but the trial judge overruled the defendant because *the wet mat was mentioned in plaintiff's deposition.* Defendant protested that it was "surprised" and requested a continuance. This too was overruled and defendant continued its protest throughout the trial, including an objection to plaintiff's verdict directing instruction which was premised on the existence of a wet mat. The jury gave plaintiff a verdict and defendant appealed.

The St. Louis Court of Appeals said:

> As stated by our Supreme Court in the case of Faught v. St. Louis, San Francisco Ry. Co., Mo., 325 S.W.2d 776, 781, ". . . neither the evidence nor the instructions may be broader than the pleadings, one may not plead one state of facts in theory and to the unprepared *surprise* of his adversary recover on another and different theory and state of facts. . . ." (Emphasis supplied.)[2]

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1. 391 S.W.2d 939 (St. L. Mo. App. 1965).
2. *Id.* at 943.

The court concluded: "Appellant's assertion that there was no allegation in the petition concerning the wet mat is correct. *And no amendment to the petition was made.*" (Emphasis supplied.)[3] The court acknowledged that the mat had been mentioned in plaintiff's deposition so that it was not a complete surprise to defendant. By pointing to the absence of an amendment, the court implied that a different result might have been reached had the amendment been made.

Harsh as it seems, failure of plaintiff to go through the simple formality of getting leave to amend may have affected the outcome of the case. So long as the petition remained unchanged, proof of the wet mat was outside the pleadings and admission of the evidence would be error.[4] Had plaintiff

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3. *Ibid.*

4. It is far from clear why it is error to let in "unsurprising" evidence not supported by the pleading, but proper to let in the same evidence after the ritual of amending of the pleadings. Such seems to have been the rule in Missouri for a long time. For example, in Ziervogel v. Royal Packing Co., 225 S.W.2d 798 (St. L. Mo. App. 1949), plaintiff pleaded certain injuries but neglected to plead resulting high blood pressure. Defendant was not surprised at the trial as plaintiff had mentioned the condition in her statement to defendant's investigator and during an examination by defendant's doctor. Evidence of the blood pressure was admitted over defendant's objection and the court of appeals reversed. Significantly, the court said, at 801: "However, we are of the opinion that although it cannot be said that defendant was 'surprised' when plaintiff presented evidence at the trial relating to the condition of her blood pressure, defendant nevertheless had the right to object to such evidence on the ground that it related to 'special damages' which were not pleaded in plaintiff's petition. Although defendant could not have claimed 'surprise' upon the introduction of such evidence, it was not required to do so and its objections at the trial to such evidence in the absence of proper allegations thereon in plaintiff's petition should have been sustained. No such special damages were pleaded by plaintiff, *nor did plaintiff ask leave to amend* her petition to include such special damages *which she could have done on such terms,* at that stage of the proceedings, as the court should order." (Emphasis supplied.)

Thus it was error for the trial judge to admit the testimony as to high blood pressure but inferentially would not have been error to admit the same testimony immediately after an amendment. This seems an undue deference to form at the expense of substance.

In contrast at least one federal court has taken a more practical view of looking solely to prejudicial effect of admitting the evidence. In State Farm Mut. Auto. Ins. Co. v. Scott, 198 F.2d 152 (5th Cir. 1952), plaintiff pleaded a lacerated and sprained left knee and the trial judge, over defendant's objection, admitted proof of a "fractured" knee. The court of appeals said, at page 153: "However, it appears that the defendant requested that the plaintiff submit to a physical examination by its physician a few days prior to the trial and that upon this examination the knowledge of the actual extent of the injury became known to such physician. The present Rules of Civil Procedure, 28 U.S.C.A. have abrogated the function of the complaint to state fully and in detail the claims upon which the plaintiff will rely and litigants have the responsibility of limiting such claims by employing the discovery methods so amply available. In any event, the determination of such questions must necessarily rest largely within the discretion

requested leave to amend and had the trial court allowed the amendment, the question on appeal would then have been entirely different.

Missouri Rule 55.53 states that leave to amend "shall be freely given when justice so requires." Conversely the trial judge would have been guilty of error in allowing a late amendment only if justice did not "so require." Nor is a continuance necessarily required. The supreme court has expressly approved such late amendments, saying:

> An amendment of an adversary's pleading does not entitle a party to a continuance as a matter of course . . . and where it appears from the pleadings, application for continuance and testimony that the parties have prepared to meet the issues tendered by the amendment, a continuance on account of the amendment is not necessary. . . . No showing was made that defendants were not ready to meet the allegations of the amended petition, or that different witnesses not then available would be required, or that defendant's rights were prejudiced in any manner.[5]

The wet mat was not a complete surprise to defendant for "the wet mat was mentioned in plaintiff's deposition." Nor does it seem that the case would have been defended differently had the mat been mentioned in the original pleading for defendant's only testimony was an expert who testified that the steps and porch were typical of porch slabs throughout the area. The court does not even discuss the question of whether the wet mat testimony actually prejudiced defendant.

The Missouri Supreme Court has said: "If every case in which improper questions were asked was reversed, few verdicts would stand."[6] Reversals have accordingly been limited to *prejudicial* error. No clear reason appears for applying a different standard in cases where the proof is beyond the pleadings.

B. *Intervention*

Occasionally a party is on the outside of a lawsuit when he prefers to be in it. Upon proper application he may be allowed to intervene and thus participate without being invited. On some occasions his intervention is a *right*, in others it is *permissive* or discretionary with the trial judge. He

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of the trial judge. In this case, no prejudice is shown to have resulted to the defendant and the trial Court properly held that, under the circumstances, the evidence was properly admissible."

5. Ethridge v. Perryman, 363 S.W.2d 696, 703 (Mo. 1963).

6. Ryan v. Campbell "66" Express, 300 S.W.2d 825, 829 (Mo. En Banc 1957).

has a "*right*" to intervene if "the representation of [his] . . . interest by existing parties is or may be inadequate" and he will or may be "bound by a judgment in the action."[7]

The attempted intervention is not always welcome. Such was the case in *State ex rel. Royal-McBee v. Luten.*[8] Plaintiff, an employee of Royal-McBee, was injured in an automobile collision which arose out of and in the scope of her employment. She was paid Workmen's Compensation and later filed suit against the tort-feasor who injured her. Employer and its Workmen's Compensation carrier were entitled to subrogation from any recovery which plaintiff made so they hired plaintiff's own attorney to represent their special interests as subrogees Plaintiff's attorney thereafter concluded that he could not represent both plaintiff and the subrogees because of a potential conflict of interests and he so notified the subrogees.[9]

Plaintiff's case against the negligent tort-feasor was set for trial in April 1964. In March the subrogees filed a petition to intervene. The petition was denied and subrogees brought a mandamus action in the St. Louis Court of Appeals. The subrogees argued that they had a *right* to intervene because they would be bound by the judgment and "their representation in the law suit is or may be inadequate (in fact does not exist by reason of the withdrawal of [plaintiff's attorney] as their counsel)."[10]

The court of appeals concluded that the inadequate representation was "established by the record filed in this court and need not be considered further."[11] This conclusion is not only surprising but the absence of any consideration of the subject is disturbing. The opinion seems to assume that the subrogees' interests necessarily will go on unrepresented unless subrogees' own attorney sits at the counsel table. The conclusion is doubtful to say the least. The interests of plaintiff and subrogees in the conduct of the trial would seem to be parallel in every respect. Plaintiff's own attorney will be trying to get a judgment against the tort-feasor of a sufficient size to reimburse subrogees and have something left over for plaintiff herself. The subrogees' interests can hardly conflict with the interests of plaintiff. Conceivably a subrogee might worry that a plaintiff's own

7. Mo. R. Civ. P. 52.11.
8. 390 S.W.2d 931 (St. L. Mo. App. 1965).
9. Presumably the conflict would arise when settlement offers were made. Subrogees would be wise to accept a settlement offer equal to subrogees' claim. The same offer should be rejected by plaintiff who would have nothing to gain from such a settlement and who would be wise to gamble on a bigger verdict.
10. State *ex rel.* Royal-McBee v. Luten, *supra* note 8, at 933.
11. *Ibid.*

attorney was incapable of presenting plaintiff's case, thus putting subrogee's rights in jeopardy. But in this case the subrogees had sufficient confidence in plaintiff's attorney that they initially hired him to represent their interests. Subrogees' sudden apprehension about the well-being of their interest is neither discussed nor explained.

Conceivably subrogees might have worried about collecting their subrogation from plaintiff, although nothing in the case supports such an apprehension. The trial judge expressly preserved to subrogees their right to refile a petition for intervention "subsequent to jury verdict." This would have permitted any judgment to run in favor of both plaintiff and subrogees and would have fully protected subrogees.

While subrogees prevailed they accomplished very little. It is not at all clear that subrogees have the right to control the lawsuit and few things could be more detrimental to subrogees' position than a lack of unity in presentation of plaintiff's case. About the only thing accomplished was a delay during which defendant's insurer became insolvent—something of a Pyrrhic victory.

The case is disturbing because it holds that a subrogee's interests are conclusively presumed to be inadequately represented by plaintiff's attorney, no matter how competent the attorney. When plaintiff's sole objective is a large verdict, it is hard to understand why a fully competent attorney would not adequately represent a subrogee's interests.

II. Discovery

A. *Duty to Amend Interrogatory Answers When Additional Facts Are Discovered*

Does a lawyer have a continuing duty to amend interrogatory answers if new facts are discovered after the initial answers are filed? This question has been argued among Missouri lawyers for some time but no clear answer has yet been provided. Such a duty was claimed in the recent case of *Aulgur v. Zylich*.[12] Plaintiff sued defendant for injuries sustained when struck by defendant's automobile. Defendant submitted interrogatories asking plaintiff to name witnesses to the event and plaintiff answered that he thought there were two or three witnesses but that he did not know their names. Plaintiff subsequently learned the names of the witnesses and produced these witnesses at the trial. Defendant protested that the testimony of these

12. 390 S.W.2d 553 (K.C. Mo. App. 1965).

witnesses should be excluded because their names were not mentioned in the original interrogatory answers, nor were the answers ever amended to include their names. The trial judge sustained the objection and refused to allow these witnesses to testify about the accident although the witnesses did testify (out of the jury's hearing) that they were first interviewed by plaintiff's attorney long after the interrogatory answers were filed.[13]

Plaintiff put on his case without the excluded witnesses and a defendant's verdict resulted. Plaintiff then moved for a new trial on the sole ground of error in excluding the testimony of these witnesses. Plaintiff alleged that the interrogatories were truthful when answered and that no subsequent interrogatories were ever filed which called for the newly discovered information. The trial judge apparently had some misgivings about his original ruling and he granted plaintiff a new trial. Defendant wanted to save his verdict so he appealed claiming that the trial judge erred in granting plaintiff a new trial.

Defendant conceded that the interrogatory answer was true when given by plaintiff but claimed that plaintiff had an obligation to file amended answers without additional prompting when he later discovered the witnesses' names.

The court of appeals chose to decide the case solely on the basis of "whether *the trial court* acted within the bounds of its authority"[14] in granting the new trial. The court added that "it is not necessary for this court to decide whether plaintiff was required by Missouri discovery rules to amend his original answers and advise defendant of information learned since filing them."[15] The court then concluded that the trial judge did not abuse his discretion in granting the new trial.

The case is important for what is implied rather than the specific holding. The court implied that the trial judge had discretion to *deny* the new

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13. A related problem is whether a party may offer any evidence contrary to the answers contained in interrogatories. Smith v. Trans World Airlines, Inc., 358 S.W.2d 91 (K.C. Mo. App. 1962), "a case of first impression" in Missouri, answered the qusetion saying, at page 94: "It has long been the rule in Missouri that a party is not conclusively bound by his deposition answers, but on the contrary may explain them away or contradict them at the trial (citing cases) and by the very wording of the Missouri rules concerning interrogatories they are co-extensive with and can be used the same extent as depositions."

The question is thoroughly explored in Joyner, *Practice and Procedure—Discovery—Answers to Interrogatories as Limiting Proof at Trial*, 27 Mo. L. Rev. 242 (1962). The author discusses three Missouri cases which suggest that the trial judge does have authority to keep out testimony inconsistent with the response given in an interrogatory.

14. Auglur v. Zylich, *supra* note 12, at 555. (Emphasis in original.)

15. *Ibid.*

trial as well as to grant it, and that a denial of plaintiff's new trial motion would also have been sustained on appeal. The court said:

> It is well established that the trial court has a broad discretion to chose a course of action during trial when evidence is challenged on the ground it has not been disclosed by answers to interrogatories. In the sound exercise of that discretion, the trial court may admit or reject such evidence, or otherwise determine and impose appropriate sanctions for violations of rules governing interrogatories.[16]

Undisclosed witnesses have been denied permission to testify in Missouri where the original interrogatory answer was not amended at the proper time. In *Central & So. Truck Lines v. Westfall G.M.C. Truck, Inc.*[17] plaintiff suffered damages to its trailer. Plaintiff charged that defendant had negligently repaired a tractor by failing to connect a tie rod to the steering apparatus. Plaintiff filed interrogatories asking defendant for names of all employees who worked on the tractor or inspected it. Five names were given and plaintiff took the depositions of all five. About twenty months later the case came up for trial. Three days before trial defendant allegedly learned of three additional employees who either worked on the tractor or inspected it. This information was telephoned to plaintiff two days before trial and on the morning of trial defendant asked leave to amend his interrogatory answers to include the new names. The plaintiff protested the late amendment and the trial judge denied defendant's request. The judge further refused to let the newly discovered witnesses testify as defendant did not account for the long delay in getting these names. A continuance was also denied because of plaintiff's special efforts to have out-of-state witnesses present on that particular day.

In affirming the action of the trial judge, the Kansas City Court of Appeals said:

> To allow defendant, as here, to answer an inquiry concerning the identity of key witnesses and then to allow a twenty month period to lapse, with a request, not supported by a sound and compelling showing of just cause, to file amendments on the day of trial disclosing new key witnesses would obviously prejudice plaintiff in preparation for trial. Nor can we say as a matter of law that under the circumstances shown a continuance would be fair to

16. Auglur v. Zylich, *supra* note 12, at 556.
17. 317 S.W.2d 841 (K.C. Mo. App. 1958).

> plaintiff and appear to offer a reasonable solution in view of plaintiff's problem and again securing the attendance of his out-of-state and other witnesses. In any event, the trial judge is to be accorded a broad and sound discretion when called upon to pass on this type of problem, and we find no abuse of that discretion by his refusal to permit the out-of-time filing of the amended answers to the interrogatories and his refusal to permit a newly named person therein to testify.[18]

The case differs from *Aulgur v. Zylich* in two important respects. First, defendant's lawyer apparently notified plaintiff as soon as he got the new information, even though it was only three days before trial. Second, defendant was a corporation and thus charged with all the knowledge of its employees. Defendant presumably had constructive knowledge of all the facts when the original answer was filed. While the court did not proclaim a continuing duty to amend on obtaining new evidence, the case is an important warning to lawyers as to how much discretion the trial judge has in protecting litigants from misleading interrogatory answers. The cautious lawyer will regard *Aulgur v. Zylich* as a red flag. When interrogatory answers on file become misleading in the light of newly discovered evidence, good judgment would dictate filing amended answers. Failure to do so may cause the trial judge to exercise his discretion in keeping out evidence which conflicts with the original answers. There is little reason to believe that the appellate courts would interfere with such a ruling by the trial judge.

B. *Refusal to Answer Interrogatories*

Litigants are occasionally reluctant to cooperate with the broad discovery procedures now permitted. When they refuse, severe sanctions are generally imposed. Such was the case in *State ex rel. Jones v. Reagan.*[19]

Plaintiff delivered her deceased mother to defendant's mortuary for burying. Two weeks later the body turned up at St. Louis University Medical School as somebody's homework. The "remains were in such condition that proper burial and proper funeral services were impossible."[20] Plaintiff was upset. Replevin seemed inappropriate and trover likewise left something to be desired. Plaintiff settled on a suit for damages based on defendant's negligent failure to fulfill its contract of burial.

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18. *Id.* at 847.
19. 382 S.W.2d 426 (St. L. Mo. App. 1964).
20. *Id.* at 427.

Plaintiff served interrogatories on defendant and when defendant failed to answer, plaintiff filed a motion to compel answers. The motion was sustained, defendant was ordered to answer, but again defendant failed. The court then struck defendant's answer and pursuant to Civil Rule 61.01[21] ordered a default. Answers to a few interrogatories followed and the default was set aside, but when the remaining questions remained unanswered another default was entered. The court then heard testimony on damages and entered the judgment for $10,000.

On the appeal the defendant protested that a default judgment could not be entered where defendant had an answer on file and that the judge had improperly denied defendant a jury trial.

The court said:

> If the trial court had no power to enter a default under these circumstances, then the rule has no purpose, and the answers to interrogatories could never be compelled. Whether or not defendant had an answer on file is not in point. Under the aggravated circumstances showing defendant's utter disregard for various orders of the court and notice of motions, the trial court exercised its discretionary power to enter judgment by default for defendant's failure to answer interrogatories.[22]

The power of courts to enter such orders has been recognized for at least fifty-six years. The United States Supreme Court expressed the rule in *Hammond Packing Co. v. Arkansas*[23] when defendant failed to produce required witnesses and records for pre-trial discovery. The trial judge struck his answer and entered a default judgment and the Supreme Court of the United States affirmed the trial judge's action. The Court said:

> As the power to strike an answer out and enter a default . . . is clearly referable to the undoubted right of the law-making authority to create a presumption in respect to the want of foundation of an asserted defense against a defendant who surpresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation.[24]

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21. Mo. R. Civ. P. 61.01(b) provides: "If any party . . . refuses to obey any order [to answer interrogations] . . . the court may make such orders in regard to the refusal as are just, and among others the following: . . . (3) An order striking out pleadings or parts thereof, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party."

22. *Supra* note 20, at 430.

23. 212 U.S. 322 (1909).

24. *Id.* at 353.

The Missouri Supreme Court faced the issue in 1912[25] when a trial judge struck the answer of a defendant who refused to give his deposition. Defendant argued that the act violated the due process provision of both the federal and Missouri constitutions, but the supreme court rejected the argument and quoted from *Hammond Packing Co. v. Arkansas,* saying:

> [T]he power exerted below was like the authority to default or take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering . . . .[26]

III. Settlements

Settlements in multi-claim law suits contain the hidden peril that the release may have consequences far beyond those intended. Lawyers must chart their courses with considerable care if they wish to avoid serious problems. *Portell v. Pevely Dairy Co.*[27] illustrates one such hazardous area. Plaintiff sued a master and servant for injuries sustained when he collided with an automobile driven by servant within the scope of his employment. Servant then counterclaimed for his own injuries. The jury denied plaintiff's claims and awarded servant $1,500 on his counterclaim. Plaintiff appealed and, while the appeal was pending, a settlement was paid to servant and his counterclaim dismissed with prejudice. The master then moved to dismiss plaintiff's appeal contending that payment to servant in settlement of his counterclaim worked an automatic release of master.

No such inadvertent release occurred because the money was paid by plaintiff's liability *insurer* and plaintiff did nothing which could be regarded as active participation in the settlement or ratification of the transaction. Had *plaintiff* paid the money, the master would have been automatically released although plaintiff gave no formal release to either master or servant and intended no such consequences.

The rationale is this: When two parties are involved in a collision and one party pays the other for a release, the party paying the money is thereafter estopped from asserting a claim against the person paid.[28] Thus

25. Miles v. Armour, 239 Mo. 438, 144 S.W. 424 (1913).
26. *Id.* at 448, 144 S.W. at 426.
27. 388 S.W.2d 790 (Mo. 1965).
28. In Farmer v. Arnold, 371 S.W.2d 265 (Mo. 1963), Farmer and Arnold collided and both sustained injuries. Farmer had no insurance and to avoid having his license suspended he gave Arnold fifty dollars in return for a full release of Arnold's claim against him. Thereafter Farmer brought suit against Arnold, and Arnold moved for summary judgment on the basis of estoppel. The court said,

if plaintiff had paid servant, he would have been estopped from recovering from servant. If he cannot recover from servant who was primarily liable, he cannot recover from the master who is only secondarily liable.[29]

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at page 268: "the crux of this controversy and of this appeal is whether nevertheless, in all the circumstances of this record, it was appropriate under summary judgment procedure . . . for the court to declare as a matter of law that the plaintiff Farmer was estopped from maintaining this action."

The court answers the question saying at page 269: "whatever the parties may have thought or intended when the plaintiff Farmer paid Arnold $50 for a release and regardless of whether the release constituted the entire contract, the release was executed at the instigation of Farmer for his own immediate needs and benefit and he is now estopped after rendering Arnold all but defenseless from prosecuting one side of a tort action arising out of a single transaction."

In England v. Yellow Transit Co., 225 S.W.2d 366 (Spr. Mo. App. 1949), plaintiff brought suit against a master and servant for damages sustained in a collision in which servant was driving master's car. The master and servant both counterclaimed against plaintiff. After the counterclaims had been filed the master made a $500 settlement payment to plaintiff. Plaintiff and master entered into a stipulation agreeing that plaintiff's petition against both defendants was dismissed but also stipulating that servant's counterclaim against plaintiff was in no way affected by the settlement. Nothing was said about the status of master's counterclaim against plaintiff.

Thereafter master indicated an intention to press its counterclaim and plaintiff moved to dismiss the counterclaim on the basis of estoppel. The Springfield Court of Appeals agreed, saying, at 369: "It seems to us that the offer to pay, an actual payment of $500.00 to the plaintiff, an agreement to pay the expenses of the litigation, the faliure to specifically except in the stipulation the counterclaim of [master] . . . , but specifically excepting the counterclaim of [servant] . . . , the recital in the release that the purpose thereof was to avoid trouble and expense of further investigation and litigation, and failure to specifically mention the counterclaim in the negotiations leading to settlement and release, were all calculated to and did lead the plaintiff to believe that the entire controversy was being settled. She acted, in dismissing her case, receiving the payment and signing the release, in reliance upon that belief, and reasonably so. Under these circumstances [master] . . . is now estopped to proceed further with their counterclaim."

Eberting v. Skinner, 364 S.W.2d 829 (Spr. Mo. App. 1963), raised a related problem. In that case Eberting, an uninsured motorist, collided with a car driven by Mrs. Skinner. In order to avoid loss of his driver's license he obtained from Mrs. Skinner and her husband the necessary statutory release. He later brought an action against Mrs. Skinner for personal injuries and the court sustained Mrs. Skinner's summary judgment on the basis of some sort of estoppel. The court said, at page 835: "In situations of this kind the courts have frequently applied the principles of equitable estoppel . . . . In this instance the appellant, for his own benefit, induced the respondent to change her position to her detriment . . . [H]e cannot now take the shield which she has handed him and use it as a sword against her." This case is strongly criticized in Caskey, *Safety Responsibility Law Release,* 30 Mo. L. REV. 160 (1965).

29. In Max v. Spaeth, 349 S.W.2d 1 (Mo. 1961), Max was injured when he collided with an automobile driven by servant in the scope of his employment for master. Servant filed the first suit against Max for his injuries. Max did not file a counterclaim. Servant's suit was dismissed before trial under a stipulation providing: "All of the matters and things in controversy in the above entitled cause having been adjusted, compromised and finally settled . . . [servant's suit is dismissed with prejudice.]." 349 S.W.2d at 2.

Thereafter Max brought a suit against master. The supreme court said that

The rule is different where an insurance company makes the payment in an effort to protect itself from liability. In the instant case, the attorney for plaintiff's insurance carrier filed an affidavit stating that he was not representing the plaintiff individually and that he had paid the money and obtained a release from servant without consulting with either plaintiff or her personal attorney. This was of critical importance for as the court said:

> [A] liability insurer's settlement of a claim against the insured, made without the insured's consent or against his protest of non-liability, and not thereafter ratified by him, will not ordinarily bar an action by the insured against the person receiving the settlement, on a claim arising out of the same set of facts.[30]

The case serves as a timely reminder that obtaining a release may work an estoppel not only as to future claims against the party from whom the release was obtained but also from those secondarily liable.

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the action of Max in compromising his case with servant effected an automatic release of master. The court does not say whether Max paid the servant for the dismissal, but there is no suggestion to the contrary.

The court said, at page 3: "when plaintiff settled [servant's] . . . suit against her, agreeing without any qualifications that 'all matters and things in controversy' had been 'adjusted, compromised and finally settled,' she gave up all rights she might have had to sue him on any claim based on his negligence. This with the agreement for dismissal 'with prejudice' amounted to a full release of [servant's] . . . liability to her. A valid release of a servant from liability for tort operates to release the master."

Continuing, the court said: "Our view is that because the basis of liability on the theory of respondeat superior is that the master is liable only for the act of his servant (and not for anything he himself did, as in the case of a joint tort-feasor), therefore, when the servant is not liable, the master for whom he was acting at the time should not be liable. We hold that the settlement of [servant's] . . . suit released plaintiff's claim against him and therefore released plaintiff's claim against his employer, the defendant herein."

Significantly the court distinguishes this case from Rudloff v. Johnson, 267 F.2d 708 (8th Cir. 1959), on the basis that the attorneys who paid the settlement money in that case were not the same attorneys who were representing the litigant's individual interest. The court implies that the attorneys who settled with servant also represented Max in his individual action against the master.

30. *Supra* note 27, at 792. This is in accord with Kirtley v. Irey, 375 S.W.2d 129 (Mo. 1964), which also holds that "a liability insurer's settlement of a claim against the insured, made without the insured's consent or against his protest and non-liability and not thereafter ratified by him, will not ordinarily bar an action by the insured against the person receiving the settlement, on a claim arising out of the same state of facts." 375 S.W.2d at 134.