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SUCCESSIVE TORTFEASORS: SETTLEMENT DOES NOT BAR INDEMNITY ACTION FOR DAMAGES FROM SUBSEQUENT NEGLIGENCE

*State ex rel. Tarrasch v. Crow*¹

In a ground-breaking decision, the Missouri Supreme Court clarified the right of an initial tortfeasor to seek indemnity for any increased damages caused by subsequent negligence and held that this indemnity right may not be cut off by a settlement between the successive tortfeasor and the plaintiff. The decision, another in the string of cases following in the wake of *Missouri Pacific Railroad v. Whitehead & Kales Co.*,² may also be authority by analogy for the proposition that a joint or concurrent tortfeasor's settlement with the plaintiff may not relieve him of the duty of contribution to his nonsettling co-tortfeasor.

The plaintiff in *State ex rel. Tarrasch v. Crow*³ filed suit against a school bus driver, a fellow student, and an ophthalmologist. The plaintiff alleged that the driver negligently left his bus unattended after a mechanical failure; during the driver's absence, the fellow student threw a ruler, striking the plaintiff in the eye. Negligent medical treatment by the doctor aggravated the injury and resulted in the plaintiff's total blindness. The plaintiff sought damages from the driver and the student for the initial injury and for his loss of vision⁴ and from the doctor for his loss of vision.⁵ The driver

1. 622 S.W.2d 928 (Mo. En Banc 1981).

2. 566 S.W.2d 466 (Mo. En Banc 1978). The Missouri Supreme Court held in *Whitehead & Kales* that contribution actions may be brought against joint or concurrent tortfeasors and that damages may be apportioned among them on the basis of relative fault. *Id.* at 474. Missouri had previously followed the common law rule that joint or concurrent tortfeasors were not entitled to contribution if they were equally culpable. *Id.* at 469. Due to the harshness of this rule, a number of exceptions were devised, including an active-passive distinction based on the equitable concept of implied indemnity. See notes 20-27 and accompanying text *infra*. For an analysis of the use of implied indemnity, see Comment, *Products Liability—Non-Contractual Indemnity—The Effect of the Active-Passive Negligence Theory in Missouri*, 41 MO. L. REV. 382 (1976); Comment, *Procedure—Third Party Practice—Non-Contractual Indemnification*, 28 MO. L. REV. 307 (1963).

3. 622 S.W.2d 928 (Mo. En Banc 1981).

4. *Id.* at 930. If the plaintiff's allegations were true, the driver and the student were concurrent tortfeasors. Their wholly *independent* acts combined to produce an indivisible injury, i.e., the initial injury to the plaintiff's eye. Joint tortfeasors, in contrast, act *in concert* to produce an indivisible injury. Both joint and concurrent

and the student filed cross-claims⁶ against the doctor, seeking a determination of relative fault and apportionment of damages.⁷

Before trial, the plaintiff settled with the driver and the doctor,⁸ executing covenants not to sue either defendant⁹ and releasing both from all claims and actions related to the initial suit. The driver then dismissed his cross-claim against the doctor. All that remained of the action was the plaintiff's claim against the fellow student and the student's cross-claim for indemnity against the doctor.¹⁰ The doctor moved for summary judgment on the cross-claim, asserting that his settlement with the plaintiff barred further action against him.¹¹ When the trial judge indicated an intent to

tortfeasors are jointly and severally liable for the entire harm. W. PROSSER, *THE LAW OF TORTS* §§ 46-48 (4th ed. 1971). *See also* Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466, 472 (Mo. En Banc 1978) (no real difference between joint and concurrent tortfeasors today; principle of fairness applies to both); Stephenson v. McClure, 606 S.W.2d 208, 211 n.5 (Mo. App., S.D. 1980) (term "joint tortfeasors" includes concurrent tortfeasors for purposes of non-contractual indemnification or contribution). *See generally* Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1393-94 (1974).

5. 622 S.W.2d at 930. The doctor could not be held liable for the original injury because his acts did not cause it. *State ex rel. Baldwin v. Gaertner*, 613 S.W.2d 638, 639-40 (Mo. En Banc 1981). The plaintiff asserted that the doctor's negligent failure to remove the injured eye resulted in sympathetic ophthalmia and total blindness in the plaintiff's other eye. 622 S.W.2d at 930.

6. *See* MO. REV. STAT. §§ 509.460-470 (1978) (cross-claims and impleader actions). Both types of action are available to joint, concurrent, and successive tortfeasors because both of the criteria are met: (1) the claims arise out of the transaction or occurrence that is the subject of the main action; and (2) the claims are asserted against a party who is or may be liable for all or part of the claim. 622 S.W.2d at 934-35. *See also* Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466, 468 (Mo. En Banc 1978).

7. 622 S.W.2d at 930.

8. Both the driver and the doctor paid their maximum insurance policy limits. *Id.*

9. Covenants not to sue are used instead of releases to avoid the common law rule that a plaintiff's release of one tortfeasor discharges all tortfeasors liable for the same injury. W. PROSSER, *supra* note 4, § 49. For analysis of the common law rule and its demise in Missouri, see *Settling Joint Tortfeasor Can Sue for Contribution from Nonsettling Joint Tortfeasor*, 46 MO. L. REV. 886, 887-89 (1981).

10. The student's cross-claim actually sought determination of respective relative fault and apportionment of damages among the defendants. 622 S.W.2d at 930. The cross-claim was couched in terms of contribution in the form of relative fault because the student believed the action was authorized by *Whitehead & Kales*. Contribution entitles a defendant to partial relief from a co-tortfeasor, while indemnity entitles him to complete relief. Comment, *Contribution in Missouri—Procedure and Defenses Under the New Rule*, 44 MO. L. REV. 691, 692-94 (1979); Comment, 41 MO. L. REV., *supra* note 2, at 382-84.

11. 622 S.W.2d at 934. The doctor relied on cases holding that a joint or con-

deny his motion,¹² the doctor petitioned the Missouri Supreme Court for a writ of prohibition.¹³ That court denied the writ, thus settling an important issue in Missouri tort law. It is now clear that the right of an initial tortfeasor to seek total indemnity from a successive tortfeasor cannot be prejudiced by a settlement to which he was not a party.¹⁴

current tortfeasor's settlement bars all actions against him, including those for contribution. *See generally* Orr v. Coleman, 455 S.W.2d 59 (Ky. 1970); Norton v. Benjamin, 222 A.2d 248 (Me. 1966); Kuna v. Hollman, 137 N.J. Super. 199, 238 A.2d 550 (1975); McNair v. Goodwin, 262 N.C. 1, 136 S.E.2d 218 (1964); Blanchard v. Wilt, 410 Pa. 356, 188 A.2d 722 (1963); Claunch v. Bennett, 395 S.W.2d 719 (Tex. Civ. App. 1965). For good collections of authorities, see Comment, *supra* note 10, at 714-19; Annot., 12 U.L.A. 57, 104-06 nn. 7 & 8 (1975); Annot., 34 A.L.R.3d 1374, 1374-86 (1970).

12. The trial judge evidenced his intent in a memorandum stating his belief that a settling tortfeasor cannot cut off the right of another tortfeasor to receive contribution for the settling party's proportionate share of liability to an injured party. 622 S.W.2d at 930.

13. *Id.*

14. The initial tortfeasor's indemnity action may be barred by a settlement if he is in privity or other legal relationship with a party to the settlement. 622 S.W.2d at 935. One judge dissented in *Tarrasch*, arguing that the doctor's settlement with the plaintiff barred the student's indemnity claim because the right to indemnity is a derivative right that is defeated when the plaintiff no longer has a cause of action against the initial tortfeasor. When the plaintiff settled with the successive tortfeasor, both the claim against the initial tortfeasor (for injuries caused by the successive tortfeasor) and the derivative indemnity action were extinguished. *Id.* at 938 (Rendlen, J., dissenting). *Cf.* Parks v. Union Carbide Corp., 602 S.W.2d 188, 204 (Mo. En Banc 1980) (Welliver, J., dissenting) (settlement should bar contribution action against settling tortfeasor). The dissent's argument, it should be noted, treated the plaintiff's covenant with the doctor as a general release that barred all claims against any tortfeasor responsible for the plaintiff's subsequent injury. 622 S.W.2d at 938 (Rendlen, J., dissenting). Covenants not to sue, however, may be treated as partial rather than general releases. MO. REV. STAT. § 537.060 (1978). The wording of the covenant at issue expressly reserved all claims against the driver and the student, 622 S.W.2d at 936, and thus fulfilled the requirements for a partial release. *See* Western Newspaper Union v. Woodward, 133 F. Supp. 17, 23 (W.D. Mo. 1955) (release does not discharge joint tortfeasors unless it is in full satisfaction of all claims); State *ex rel.* Normandy Orthopedics, Inc. v. Crandall, 581 S.W.2d 829, 833-34 (Mo. En Banc 1979) (whether release is general or partial is question of fact). *But see* Liberty v. J.A. Tobin Constr. Co., 512 S.W.2d 886, 890-91 (Mo. App., K.C. 1974) (release that says "all claims" and indicates that it is in full satisfaction for injuries will be considered general and will bar all further claims). For a look at how other courts handle releases under these circumstances, see Wecker v. Kilmer, 260 Ind. 198, 203, 294 N.E.2d 132, 135 (1973) (question of fact whether release of initial tortfeasor bars suit against successive tortfeasor); Fieser v. St. Francis Hosp. & School of Nursing, 212 Kan. 35, 42, 410 P.2d 145, 151 (1973) (release of initial tortfeasor is affirmative defense to be pleaded by successive tortfeasor); Kyte v. McMillion, 256 Md. 85, 98, 259 A.2d 532, 539 (1969) (release of

In reaching this decision, the court rejected the argument that an initial tortfeasor has no right to indemnity or contribution from a successive tortfeasor.¹⁵ The doctor in *Tarrasch* had maintained that the remedy of pre-judgment apportionment of fault and contribution established in *Whitehead & Kales* is available only to joint and concurrent tortfeasors, not a successive tortfeasor like himself.¹⁶ The court agreed that the cross-claim against the doctor was not the sort of partial indemnity or contribution claim recognized in *Whitehead & Kales*¹⁷ but found an independent right to total indemnity antedating that case.¹⁸

Tarrasch is the first Missouri case to expressly hold that an initial tortfeasor has a right to total indemnity from a successive tortfeasor. Although the court did not identify the source of this right, it relied on *Gertz v. Campbell*,¹⁹ a similar case in which the Illinois Supreme Court recognized a right to indemnity based on equitable principles.²⁰ Missouri courts have

successive tortfeasor does not bar suit for original injuries against initial tortfeasor); *Huff v. Harbaugh*, 49 Md. App. 661, 670-71, 435 A.2d 108, 113-14 (1981) (release of one party in successive tortfeasor case does not bar suit against the other); *Selby v. Kuhns*, 345 Mass. 600, 608, 188 N.E.2d 861, 866 (1963) (plaintiff who settles with initial tortfeasor has burden of proof regarding full satisfaction); *Lasprogata v. Qualls*, 263 Pa. Super. 174, 179, 397 A.2d 803, 807 (1979) (release of successive tortfeasor does not bar suit against initial tortfeasor); *McMillan v. Klingensmith*, 467 S.W.2d 193, 195 (Tex. 1971) (settlement does not bar action against nonsettling successive tortfeasor); *Harris v. Grizzle*, 599 P.2d 580, 586 (Wyo. 1979) (question of fact whether initial tortfeasor's release bars action against successive tortfeasor).

15. 622 S.W.2d at 934.

16. Brief for Relator at 8-9, *Tarrasch*. The doctor's argument was based on the refusal of Missouri courts, in some cases, to allow contribution actions among parties who were not joint or concurrent tortfeasors. In these cases, however, either parties were not commonly liable to the plaintiff, *see, e.g.*, *State ex rel. Maryland Heights Concrete Contractors, Inc. v. Ferriss*, 588 S.W.2d 489, 490-91 (Mo. En Banc 1979) (employer not subject to action for contribution when statute granted immunity), or a legal bar to the claim existed, *see, e.g.*, *Renfrow v. Gojohn*, 600 S.W.2d 77, 79 (Mo. App., W.D. 1980) (interspousal immunity); *Martinez v. Lankster*, 595 S.W.2d 316, 318 (Mo. App., E.D. 1980) (same). *Cf.* *Kohler v. Rockwell Int'l Corp.*, 600 S.W.2d 647, 650 (Mo. App., W.D. 1980) (no bar to contribution action against plaintiff's family member).

17. For analysis of the implications of *Whitehead & Kales*, *see generally* Comment, *supra* note 10; *Tort Law: Missouri Pacific Railroad v. Whitehead & Kales Co.: Uncertain Renovations*, 48 UMKC L. REV. 54 (1979).

18. 622 S.W.2d at 934.

19. 55 Ill. 2d 84, 302 N.E.2d 40 (1973).

20. *Id.* at 91-92, 302 N.E.2d at 44-45. The plaintiff in *Gertz* sued an automobile driver to recover for initial injuries and for their aggravation by subsequent medical malpractice. The driver, in turn, sought indemnity by impleading the negligent doctor. *Id.* at 85-86, 302 N.E.2d at 41-42. The *Gertz* court pointed out that prohibiting an indemnity action by an initial tortfeasor, whose liability is increased only by the independent subsequent tortfeasor over whom he has no control, would re-

long held that equity requires a wrongdoer to reimburse another person compelled to pay damages on account of the wrongdoer's act.²¹ Since the sole cause of an initial tortfeasor's *added* liability²² is the successive tortfeasor's negligence, the right recognized in *Tarrasch* may well be rooted in this venerable concept of equitable or implied indemnity. Either of two specific implied indemnity theories would support the holding in *Tarrasch*. First, the right to indemnity may have been implied from the breach of a respective duty to a co-tortfeasor. A successive tortfeasor breaches a duty to an initial tortfeasor by increasing the damages chargeable to him.²³ Sec-

sult in the indefensible enrichment of the successive tortfeasor at the initial tortfeasor's expense. *Id.* at 91-92, 302 N.E.2d at 44-45. The *Tarrasch* court agreed with this analysis, stating that "as against the . . . [successive tortfeasor], the initial tortfeasor is not justly chargeable with the damages from the aggravation and is entitled to indemnity." 622 S.W.2d at 932. *See also* *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 75, 38 Cal. Rptr. 490, 493-94 (1964) (implied indemnity available to initial tortfeasor for subsequent negligence); *Lindsey v. Austin*, 336 So. 2d 486, 487 (Fla. Dist. Ct. App. 1976) (complaint seeking indemnity as passive tortfeasor for subsequent negligence states cause of action). *See generally* RESTATEMENT (SECOND) OF TORTS § 457 (1965); Annot., 8 A.L.R.3d 639 (1966).

21. Equitable or implied rights of indemnity have been recognized in a number of situations. *See, e.g.*, *Woods v. Juvenile Shoe Corp.*, 361 S.W.2d 694, 697 (Mo. 1962) (suppliers and manufacturers must indemnify third person or retailer who was unaware of defect at time of sale); *Kansas City S. Ry. v. Payway Feed Mills, Inc.*, 338 S.W.2d 1, 5-6 (Mo. 1960) (active tortfeasor creating dangerous situation must indemnify passive tortfeasor who caused injury); *Barb v. Farmers Ins. Exch.*, 281 S.W.2d 297, 304 (Mo. 1955) (owner of property may seek indemnity from tortfeasor who created dangerous situation on property); *State ex rel. Algieri v. Russell*, 359 Mo. 800, 803, 223 S.W.2d 481, 483 (En Banc 1949) (principal may recover indemnity from negligent agent); *City of Springfield v. Clement*, 205 Mo. App. 114, 120-21, 225 S.W. 120, 122-23 (Spr. 1920) (city may seek indemnity from negligent abutting property owner). *See generally* RESTATEMENT OF RESTITUTION § 76 (1937); Comment, 41 MO. L. REV., *supra* note 2; Comment, 28 MO. L. REV., *supra* note 2.

22. Missouri has expressly adopted the common law rule that an initial tortfeasor is liable for the original injury and for any foreseeable harm caused by subsequent negligence. *See* *Staehlin v. Hochdoerfer*, 235 S.W. 1060, 1062 (Mo. 1921) (announcing rule). *See also* *Boehmer v. Boggiano*, 412 S.W.2d 103, 109 (Mo. 1967) (initial tortfeasor liable for aggravation by subsequent negligence); *Schumacher v. Leslie*, 360 Mo. 1238, 1245-46, 232 S.W.2d 913, 914 (En Banc 1950) (liable for subsequent negligence that was probable and natural consequence of original wrong). An initial tortfeasor arguably would be entitled to an implied indemnity action because he is required to pay damages on account of the successive tortfeasor's negligence.

23. *Humble Oil & Refining Co. v. Martin*, 148 Tex. 175, 184-85, 222 S.W.2d 995, 1002 (1949). *Cf.* *State ex rel. Siegel v. McLaughlin*, 315 S.W.2d 499, 503 (Mo. App., St. L. 1958) (indemnitee must prove that he breached no duty to indemnitor and that indemnitor breached duty toward him). For an analysis of this theory, see Comment, 28 MO. L. REV. *supra* note 2, at 309-10.

ond, the right may have been based on the old active-passive distinction.²⁴ Prior to *Whitehead & Kales*, one active tortfeasor had no right to indemnity from another active tortfeasor for damages paid on account of mutual fault,²⁵ but a passive tortfeasor was entitled to indemnity from an active tortfeasor for such damages.²⁶ The active-passive distinction resulted in all-or-nothing judgments, and it was rejected by *Whitehead & Kales* in favor of a relative fault test.²⁷ But if, as the court indicates, *Whitehead & Kales* has no application to cases involving successive tortfeasors, the active-passive distinction may still be significant in such cases. Under pre-*Whitehead & Kales* principles, a suit for indemnity by the initial tortfeasor (e.g., the student)—whose negligence was passive with respect to the aggravation of the plaintiff's injury—against the active successive tortfeasor (e.g., the doctor) might well have been entertained.

After rejecting the doctor's first argument, the court considered his second: even if a right to indemnity generally existed, it should not be applied against a successive tortfeasor who has settled with a plaintiff. The doctor pointed out that permitting an indemnity action could result in liability for the settling tortfeasor in excess of his settlement amount.²⁸ Compromise, he argued, is a favorite of the law,²⁹ and any decision that strips settlements of finality and robs defendants of protection from further liability would so discourage settlements as to contravene public policy.³⁰

24. For analysis of the active-passive theory, see generally Comment, 41 MO. L. REV., *supra* note 2; Comment, 28 MO. L. REV., *supra* note 2; *Civil Procedure—The Active-Passive Negligence Theory*, 30 MO. L. REV. 624 (1965).

25. Comment, 41 MO. L. REV., *supra* note 2, at 382-83; Note, *The Joint Tortfeasor in Missouri*, 25 WASH. U.L.Q. 572, 572-73 (1940).

26. See, e.g., *Kansas City S. Ry. v. Payway Feed Mills, Inc.*, 338 S.W.2d 1, 5-6 (Mo. 1960). It was often difficult to distinguish active from passive negligence. Comment, 28 MO. L. REV., *supra* note 2, at 310. Although *Whitehead & Kales* abandoned the active-passive distinction in joint and concurrent tortfeasor cases in favor of a relative fault test, 566 S.W.2d at 472-74, the decision does not apply to successive tortfeasor cases and any pre-existing remedy remained intact. *Tarrasch*, 622 S.W.2d at 933-34.

27. 566 S.W.2d at 474.

28. 622 S.W.2d at 934. For example, a successive tortfeasor who settles with the plaintiff for \$50,000 might later be required to pay the cost of defending in indemnity action in which he is adjudged liable for another \$450,000. A prospect of such further liability, argued the doctor in *Tarrasch*, removes all incentive for the defendant to settle. While recognizing the possibility of such a result, the Missouri Supreme Court pointed out that it could be avoided by carefully drafting the settlement agreement. *Id.* at 936. See notes 35-39 and accompanying text *infra*.

29. 622 S.W.2d at 934. See, e.g., *Sosa v. Velvet Dairy Stores, Inc.*, 407 S.W.2d 615, 622 (Mo. App., K.C. 1966).

30. For analysis of the import of a settlement's finality and protection, see *Sanger v. Yellow Cab Co.*, 486 S.W.2d 477, 480-81 (Mo. En Banc 1972) (release protects settling tortfeasor from liability with regard to all of plaintiff's injuries, even if settlement was not full satisfaction); *Liberty v. J.A. Tobin Constr. Co.*, 512

This argument was flatly rejected by the court.³¹ Barring an initial tortfeasor's right to indemnity under the circumstances of *Tarrasch*, said the court, would be "a gross violation of due process."³² A successive tortfeasor commits two wrongs—one against the plaintiff (by aggravating his original injuries) and one against the initial tortfeasor (by increasing his liability). Settling with the plaintiff discharges the successive tortfeasor's duty to the plaintiff, but the injury to the initial tortfeasor remains unredressed unless the settlement constitutes full compensation for the plaintiff's subsequent injuries.³³ Permitting a settlement of one cause of action to deprive a non-party of his separate cause of action would violate due process.³⁴

The court also disputed the doctor's contention that allowing indemnity actions against settling tortfeasors would discourage settlements, noting

S.W.2d 886, 890 (Mo. App., K.C. 1974) (once plaintiff settles with tortfeasor, cause of action against tortfeasor is extinguished and cannot be revived); *State ex rel. State Highway Comm'n v. Sheets*, 483 S.W.2d 783, 785 (Mo. App., St. L. 1972) (purpose of settlement is to obtain peace).

31. 622 S.W.2d at 934. The court agreed that the decision may have an impact on settlements but concluded that preserving the initial tortfeasor's rights is more important. *Id.* at 935.

32. *Id.* Individual freedom from deprivation of property without due process is protected in U.S. CONST. amends. V, VII; MO. CONST. art. I, § 10. *See Dewitt v. Lutes*, 581 S.W.2d 941, 945 (Mo. App., S.D. 1979) (due process applies to protect person's cause of action, but no violation if person was party to settlement that bars cause of action). A cause of action is usually considered property. *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 343, 205 S.W. 196, 198 (En Banc 1918). Notice and opportunity to be heard are the essentials of due process. *Dittmeier v. Missouri Real Estate Comm'n*, 316 S.W.2d 1, 4 (Mo. En Banc 1958). Thus, denial of a cause of action without notice and opportunity to be heard is a deprivation of property without due process. *Tarrasch*, 622 S.W.2d at 935.

It can also be argued that allowing a settlement to bar an indemnity action is a denial of the right of access to the courts, which is protected by MO. CONST. art. I, § 14. That section provides that the courts shall offer a remedy for every injury to person, property, or character. *See Horner v. David Distrib. Co.*, 599 S.W.2d 100, 102 (Mo. App., S.D. 1980) (purpose of section is to protect citizens in enforcing rights recognized by law). *But see Missouri Pub. Serv. Co. v. Henningsen Steel Prods. Co.*, 612 F.2d 363, 367 (8th Cir. 1980) (employer immunity from tort liability to third party did not violate Missouri's right of access to courts); *Renfrow v. Gojohn*, 600 S.W.2d 77, 80 (Mo. App., W.D. 1980) (spousal immunity did not violate right of access, which protects only rights recognized by law).

33. Suppose, for example, that the jury awarded the plaintiff a \$1,000,000 judgment against the student and apportioned the doctor's liability at 50% on the student's cross-claim. The student was actually responsible for \$500,000 of the plaintiff's damage, but he would be required to pay the entire judgment, less the \$50,000 paid by the doctor. The \$50,000 must be deducted because the plaintiff is entitled to receive only one "full satisfaction" for his injuries. *Liberty v. J.A. Tobin Constr. Co.*, 512 S.W.2d 886, 889 (Mo. App., K.C. 1974). The doctor in this situation wronged the *student* in the amount of \$450,000.

34. 622 S.W.2d at 935.

that settling tortfeasors can protect themselves from further liability with carefully drafted settlement agreements.³⁵ The agreement between the doctor and the plaintiff was praised by the court as an example of good draftsmanship. In exchange for \$50,000, the plaintiff promised to dismiss all claims against the doctor and refrain from further prosecution.³⁶ The plaintiff promised that if cross-claims were permitted by the driver or the student against the doctor, the plaintiff would consider the doctor's payment full satisfaction of any additional liability attributed to the doctor's negligence.³⁷ To ensure that the doctor was protected from further liability, the plaintiff assigned to him that portion of any judgment he received against the driver or the student that was, contemporaneously or later, attributed to the doctor's negligence.³⁸ The plaintiff also agreed to ask the court to offset the driver's or the student's judgment by any amount attributed to the doctor's fault.³⁹

Although consistent with the modern trend, *Tarrasch* is at odds with a number of jurisdictions that bar all further action against joint, concurrent, and, presumably, successive tortfeasors. These jurisdictions emphasize the policy favoring settlements and hold that a settling tortfeasor is entitled to the finality and protection of his settlement against all actions, including those for indemnity, apportionment, and contribution.⁴⁰ A settling tortfeasor, according to these courts, intends to make payment without involving himself in costly judicial proceedings, and allowing contribution ac-

35. *Id.* at 936.

36. The plaintiff expressly reserved all claims against the driver and the student in his settlement agreement. *Id.*

37. If the agreement and covenant not to sue did not in fact bar further claims against the doctor, the plaintiff agreed to hold him harmless to the extent that he had to pay more than \$50,000. The plaintiff also agreed that the \$50,000 would satisfy any obligation for damages against the doctor based on his relative fault and that no judgment based on relative fault would be payable by the doctor. *Id.*

38. The agreement and corresponding examples actually named the driver rather than the student and were written as though the judgment would be for relative fault rather than indemnity for subsequent negligence. *See id.*

39. The agreement included two examples. Assuming, for example, that the plaintiff recovered a \$1,000,000 judgment against the student, and the jury determined on the cross-claim that the doctor was responsible for 50% of the damages, the student would be responsible to the plaintiff for \$950,000 (\$1,000,000 minus the \$50,000 paid by the doctor). The student would be entitled to \$450,000 in indemnification from the doctor. The judgment due the plaintiff would be satisfied when the student paid the \$500,000 for his own negligence. The indemnity owed the student would be satisfied by the court's reduction of the damage award in accordance with the settlement agreement. *Id.*

40. *See, e.g.,* Norton v. Benjamin, 220 A.2d 248, 251 (Me. 1966); McNair v. Goodwin, 262 N.C. 1, 5, 136 S.E.2d 218, 220-21 (1964); Claunch v. Bennett, 395 S.W.2d 719, 721 (Tex. Civ. App. 1965). This is the approach advocated in UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4 (1955), 12 U.L.A. 98 (1975).

tions against him will result in the very expenditures of time and money that he hoped to avoid.

Other jurisdictions allow actions against settling joint and concurrent tortfeasors without distinguishing them from successive tortfeasors.⁴¹ In some of these jurisdictions, the nonsettling tortfeasor may implead the settling tortfeasor for a determination of relative fault. The court will reduce the nonsettling tortfeasor's damages accordingly and will require no additional payment by the settling tortfeasor.⁴²

Tarrasch recognizes the right of an initial tortfeasor to obtain indemnity from a successive tortfeasor.⁴³ The court's holding that one tortfeasor's settlement cannot bar another tortfeasor's indemnity claim⁴⁴ may be applicable to joint and concurrent tortfeasors as well as successive tortfeasors.⁴⁵

41. See, e.g., *Orr v. Coleman*, 455 S.W.2d 59, 61 (Ky. 1970); *Kuna v. Hollman*, 137 N.J. Super. 199, 207, 348 A.2d 550, 554 (1975); *Blanchard v. Wilt*, 410 Pa. 356, 361, 188 A.2d 722, 725 (1963).

42. See, e.g., *Gomes v. Brodhurst*, 394 F.2d 465, 470 (3d Cir. 1968); *Orr v. Coleman*, 455 S.W.2d 59, 60 (Ky. 1970); *Cartel Capital Corp. v. Fireco of New Jersey*, 81 N.J. 548, 570, 410 A.2d 674, 685 (1980); *Tarantola v. Williams*, 48 A.D.2d 552, 560, 371 N.Y.S.2d 136, 139-40 (1975); *Bartels v. City of Williston*, 276 N.W.2d 113, 121-22 (N.D. 1979). This is the approach advocated in COMPARATIVE FAULT ACT § 6 (1979), 12 U.L.A. 42 (Supp. 1983).

43. The court did not examine the rights of the other tortfeasors in *Tarrasch*. The driver may be in a particularly favorable position. Under *Stephenson v. McClure*, 606 S.W.2d 208, 212 (Mo. App., S.D. 1980), he may be entitled, as a settling concurrent tortfeasor, to contribution from the student for a portion of the \$100,000 he paid in settlement to the plaintiff. He may also have indemnity rights against the doctor, whose subsequent negligence added to the damages chargeable both to him and the student, although any action against the doctor may be defeated by the driver's dismissal with prejudice of his own cross-claim. *Tarrasch*, 622 S.W.2d at 930. The doctor's position is less favorable. He would not be entitled to indemnity or contribution from the driver or the student for the subsequent injury because his acts were the sole cause of the subsequent injury. See *State ex rel. Baldwin v. Gaertner*, 613 S.W.2d 638, 639-40 (Mo. En Banc 1981). He would not be entitled to recover from the driver or the student if he paid a settlement in excess of the judgment against him because (1) he chose that amount, (2) the driver and the student were not responsible to the doctor for the subsequent negligence, and (3) the settlement was not recompense for the original injuries, for which he had no liability. See *Tarrasch*, 622 S.W.2d at 937 (gain or loss is nature of settlements). The student may possibly have partial indemnity—contribution—rights against the driver if the courts hold that settlements do not bar such claims in Missouri. See notes 44-47 and accompanying text *infra*.

44. 622 S.W.2d at 936. The Missouri Supreme Court characterized the initial tortfeasor as, in effect, a third part beneficiary of the settlement agreement.

45. Division of the injury among tortfeasors on the basis of fault places the nonsettling joint or concurrent tortfeasor in the same position as a nonsettling initial tortfeasor. A joint or concurrent tortfeasor, like a successive tortfeasor, commits two wrongs: one against the plaintiff by causing his injuries and one against his co-

The arguments for precluding contribution actions are the same in both cases and can be countered by much the same reasoning.⁴⁶ In both cases, barring the nonsettling tortfeasor's contribution or indemnity action cuts off his claim for compensation from the settling tortfeasor without notice or an opportunity to be heard. If due process precludes one, it should preclude the other.⁴⁷ The case also contains a grave warning for Missouri practitioners: a settlement agreement that does not provide for contribution or indemnity actions may expose the settling tortfeasor to liability greatly in excess of the settlement amount.

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tortfeasor by increasing the latter's liability. Settling with the plaintiff discharges the duty to the plaintiff, but it does not discharge the duty to the co-tortfeasor unless the settlement is in full compensation for that portion of the injuries attributed to the settling tortfeasor.

46. Suppose, for example, a \$1,000,000 judgment was returned against the nonsettling tortfeasor and a jury determined that the tortfeasor who had settled for \$100,000 was responsible for 60% (\$600,000) of the judgment. If the settlement barred the contribution action, the nonsettling tortfeasor would be liable for \$900,000 (\$1,000,000 minus the \$100,000 paid by the settling tortfeasor), \$500,000 of which was due to the negligence of the settling tortfeasor. The settling tortfeasor would have wronged the nonsettling tortfeasor by \$600,000 (the amount by which his negligence increased the latter's liability), and the nonsettling tortfeasor would have received only the \$100,000 reduction in the judgment.

47. There is no reason to believe that joint and concurrent tortfeasors could not, as easily as successive tortfeasors, limit their liability by carefully drawn agreements. The settlement document in *Tarrasch*, in fact, was drafted as though a relative fault judgment would occur. 622 S.W.2d at 936.