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Can You Appeal an Agreed Judgment? Not in Indiana

For the second time in two months, the Court of Appeals addresses whether a party can appeal an agreed judgment. Consistent with long-standing Indiana precedent, the court of appeals again held that a party cannot. In April, the Court of Appeals recognized: "'absent fraud,' an agreed judgment is not appealable." Ironically, because that was an appeal of a Marion County Small Claims case, the court of appeals was actually the second appellate court–the Marion County Superior Court acting as the court for direct appeal's in the Marion County Small Claims system (until the system changes in July 2018)–the court of appeals ruled on the appeal instead of merely dismissing the appeal for lack of jurisdiction.

Although two cases have appeared in rapid succession, it is an issue for which there is relatively little caselaw, with a 1952 Indiana Supreme Court decision still leading the way. The discussion in the case from April, *Community Health Network v. Bails*, was, as is almost always the case, succinct:

> The judgment underlying the motion to correct error purports to dismiss a small claims case filed by Community, which case had been resolved by an agreed judgment and garnishment of Bails's wages. An agreed judgment "does not represent the judgment of the court. It is merely the agreement of the parties consented to by the court." Thus, "absent fraud," an agreed judgment is not appealable.

What brings us back to an otherwise settled topic is that *Gallops v. Shambaugh Kast Beck & Williams*, from last week, provides a very thorough discussion of the issue. That, and we have not previously discussed the issue. The case also gives us an opportunity to discuss an interesting nuance appellate law, which is how the issue arose in *Gallops*.

Before we jump into discussing agreed judgments any further, let us first look at what an agreed judgment is. An "agreed judgment," also called a "consent judgment," "stipulated judgment," "judgment by consent," or a "consent decree," is "[a] settlement that becomes a court judgment when the judge sanctions it. • In effect, an agreed judgment is merely a contract acknowledged in open court and ordered to be recorded, but it binds the parties as fully as other judgments." As the late federal Judge Allen Sharp recognized, although it is contractual in nature, "[a] consent decree is more than a simple contract; 'it is a contract wrapped in a judgment with attributes of both.'" The Indiana Court of Appeals has echoed this sentiment, in part:

> There has been much debate over the years of whether an agreed judgment is contractual in nature or a judicial act. "Nevertheless, Indiana law and precedent repeatedly provide that agreed judgments do not represent the judgment of the court. The court merely performs the ministerial duty of recording the agreement of the parties."

Notably, in Indiana, "absent fraud or lack of consent, a trial court *must approve or consent* to an agreed judgment submitted by the parties." There is authority that suggests things are different in federal courts: district judges may review the agreed judgment as a matter of discretion.

With that said, let us turn to *Gallops*. We need not look at the specific facts of the underlying case, but the procedural posture is important. At summary judgment, the trial court struck the plaintiffs' brief in opposition and struck part of their expert testimony. The court then granted partial summary judgment, leaving a couple issues for trial. Following two subsequent interlocutory orders, the plaintiffs requested leave to file an interlocutory appeal following each order,. The trial court did not certify either order.

We have discussed the dichotomy between interlocutory appeals and those of final judgments before. An interlocutory appeal is one that comes before the case has resolved all issues. Although, in Indiana, a handful of interlocutory appeals may be taken automatically and appeals of class certification decisions circumvent the requirement for the trial court's permission, the vast majority of would-be interlocutory appeals require both the trial court to certify the interlocutory decision

for appeal and the court of appeals to accept the appeal. Each decision is as a matter of discretion.

Believing that there was little hope of success at trial, the plaintiffs sought to move the case to a final judgment so that they might appeal the earlier orders. (Most orders can be appealed at the end of the case even if interlocutory appeal was not permitted at an early stage). The problem is, in order to do this, plaintiffs chose to utilize an agreed judgment instead of requesting entry of partial final judgment under Indiana Trial Rule 54(B), although there is no guarantee the trial court would have granted such a request. With, what plaintiffs thought was now an appealable final judgment in hand, they set off to the court of appeals.

The appellate court's analysis began with the 1952 Indiana Supreme Court decision. Quoting the Supreme Court, the *Gallops* court wrote:

> When, as in the instant case, the parties plaintiffs and defendants stipulate the finding of facts and the conclusions of law and hand these stipulations to the judge in open court, bearing the approval of each of the parties, evidenced by the written O.K. of their attorneys of record, the court is not called upon to perform a judicial act. The writing is in fact a consent finding and judgment, and the duty of the court is ministerial-to have the writing entered as agreed upon.
>
> In the absence of fraud, parties who are competent to contract and not standing in confidential relations to each other may agree to the rendition of a judgment or decree respecting any right which may be the subject of litigation. When such a decree is entered it is a decree by consent. A consent decree is not a judicial determination of the rights of the parties. *It does not purport to represent the judgment of the court, but merely records the agreement of the parties with respect to the matters in litigation. Such decree cannot be reviewed by appeal.*

The court looked to an even older case, from 1892, to further understand agreed judgments:

> In this case a trial was in progress, and, when the evidence was concluded, an endeavor was made between the counsel in the case, acting for their respective clients, to enter into an agreement in regard to the final judgment that should be entered by the court, and an agreement was drafted, together with a final decree to be entered. It was signed by some of the parties, and the attorneys for these appellees indorsed it "O. K.," and signed their names, and it was

> handed to the judge. *As it seems to us, but one inference could be drawn, and that is that the decree as drafted to be entered was all right, and they were giving their consent to the entry of the decree as prepared, and the court had the right to so regard it, and order the decree entered at the date agreed upon, which it did. Taking the view of the case which we do, the judgment must be affirmed, without considering the merits of the case.* If the judgment entered by such agreement was entirely extrajudicial, and beyond the jurisdiction of the court entering it, so that it would be absolutely void, it is possible this court should intervene and set it aside; and yet it would seem that, even in such a case, when a court had acquiesced and rendered a void judgment on the agreement of parties, a party to the agreement is in no position to reverse it on appeal, and have the act of the court which he instigated set aside as erroneous.

Where things got interesting was when the plaintiffs attempted to invoke *Bemenderfer v. Williams* to get around their procedural conundrum. In *Bemenderfer*, the Indiana Supreme Court explained:

> In order to appeal from a denial of a motion for partial summary judgment, the trial court is required to certify its order for interlocutory review and the Court of Appeals must accept jurisdiction . . . . Here, the parties provided and the trial court signed an "Agreed Final Judgment and Agreement Preserving the Issue of the Appropriate Measure of Damages" in an attempt to create a final appealable judgment pursuant to 54(B). An "Agreed Judgment" represents an agreement of the parties, not a judgment of the court. Thus, absent fraud, it is not appealable. But because it is clear that the trial court intended for its order to be appealable and the Court of Appeals, by issuing an opinion, has accepted appellate review of the trial court's order, we exercise our discretion to ignore this procedural irregularity because only further delay in the disposition of this matter would be generated by sending it back to the trial court for proper certification.

The court of appeals opted not to apply *Bemenderfer* and use its discretion to hear the case:

> In the present case, there is nothing explicit in the agreed judgment concerning an appeal of any issues after entry of the agreed judgment. Indeed, the only language referring to the effect of the entry of the agreed judgment is that it would be entered on the trial court's docket

> "as a final judgment" and that the "judgment will have the same effect as if the case had proceeded to trial, as it is presently postured, a verdict had been arrived at by a jury on all presently pending claims, and the Court had then entered judgment in favor of Shambaugh Kast." Furthermore, there is no evidence that the trial court intended for the agreed judgment to be appealable. Finally, unlike the panel in *Bemenderfer*, we decline to accept appellate review, and instead follow our Supreme Court's precedent that agreed judgments are not appealable.

At the beginning, I mentioned that the case raised an interesting nuance of appellate law. You are probably thinking that the nuance was the ability to exercise discretion to hear an appeal that is not procedurally sound. Not exactly. The nuance is that neither party raised the issue in their briefs. This was a matter addressed *sua sponte* by the court. "*Sua sponte*" is one of the lingering Latin terms in law, which means the court is acting of its own accord. Where the court recognizes that it lacks subject matter jurisdiction, a concept we've discussed before, it must raise the issue on its own and dismiss the case. That is what happened here.

Join us again next time for further discussion of developments in the law.

Sources

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- *Gallops v. Shambaugh Kast Beck & Williams*, ---N.E.3d---, No. 02A03-1509-CT-1401, 2016 Ind. App. LEXIS 195 (Ind. Ct. App. June 17, 2016) (Sharpnack, S.J.).
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- Colin E. Flora, Indiana Court of Appeals Addresses Right to Appeal Denial of Motion to Dissolve a Preliminary Injunction, HOOSIER LITIG. BLOG (Feb. 28, 2014).
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