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Attorney's Approval of Faulty Order for Summary Judgment Construed as an Order Entered by Agreement.

Cathleen G. Randall

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Randall: Attorney's Approval of Faulty Order for Summary Judgment Construe

arose under a common nucleus of fact, the district court could exercise its power to adjudicate all the claims before it.[70] That Omaha Power had been dismissed from the suit prior to trial did not require dismissal of Mrs. Kroger's claim against Owen Equipment, since Omaha Power's dismissal was just one factor to be considered in determining whether to exercise jurisdiction over the claim.[71]

The decision in Kroger is a sound one, and this case presents an opportunity for the Supreme Court to rule on the question whether a plaintiff should be allowed to assert a claim against a nondiverse third-party defendant absent independent grounds of federal jurisdiction. Although the Court has indicated a policy of limiting the power of the federal courts to exercise jurisdiction,[72] any question as to the propriety of the *Kroger* decision should be resolved in favor of the trial court's exercise of discretion. A flexible discretionary test involving an ad-hoc balancing of the various conflicting considerations is the ideal mechanism for promoting economy, efficiency, and fairness to the parties while at the same time not overstepping the limits of the jurisdiction of the federal courts.

Mike Davis

JUDGMENTS — Form and Substance — Attorney's Approval of Faulty Order for Summary Judgment Construed as an Order Entered by Agreement

Hollen v. State Farm Mutual Automobile Insurance Co., 551 S.W.2d 46 (Tex. 1977).

Two minor passengers injured in a one-car accident involving an uninsured driver brought suit, individually and through their parents as next friends, against State Farm Mutual Automobile Insurance Company, seeking recovery under the "uninsured motorist" provision contained in their

70. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

71. *See, e.g.*, Rosado v. Wyman, 397 U.S. 397, 405 (1970); Moore v. New York Cotton Exch., 270 U.S. 593, 608 (1926); Arizona v. Cook Paint & Varnish Co., 541 F.2d 226, 227 (9th Cir. 1976); A.H. Emery Co. v. Marcan Prods. Corp., 268 F. Supp. 289, 292-93 (S.D.N.Y. 1967) (will retain jurisdiction to prevent waste of time, effort, and expense), *aff'd*, 389 F.2d 11 (2d Cir. 1968); *cf.* Pipeliners Local 798 v. Ellerd, 503 F.2d 1193, 1199 (10th Cir. 1974) (retaining jurisdiction over a counterclaim under rule 13(a) after main claim dismissed). *But see* Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 890, 895 (4th Cir. 1972).

72. *See* Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) (refusing to allow aggregation of claims to reach jurisdictional amount). *See also* Osbahr v. H. & M. Const., Inc., 407 F. Supp. 621, 623 (N.D. Iowa 1975) (*Zahn* precludes application of pendent party or ancillary jurisdiction to claims below jurisdictional amount); Freeman v. Gordon & Breach, Science Publishers, Inc., 398 F. Supp. 519, 525-26 (S.D.N.Y. 1975) (*Zahn* precludes application of pendent party or ancillary jurisdiction to claims below jurisdictional amount).

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parents' policies. State Farm filed a cross-action against the minor driver and his father, Arthur Hollen. The plaintiffs then amended their petition to include both the driver and his father in the suit. Arthur Hollen moved for summary judgment. The motion included the plaintiffs in the style of the case, but the body of the motion and the prayer requested only that third party plaintiff State Farm take nothing against the defendant. The trial court granted the motion after hearing arguments of counsel for both State Farm and Hollen and after reviewing the evidence presented. The court then requested that Hollen's attorney prepare the appropriate order. The judge entered an "Order Sustaining Defendant and Cross-Defendant Arthur Hollen's Motion for Summary Judgment and Severance,"[1] but not before the plaintiffs' attorney had given Hollen's attorney permission to sign his name to the order, approving it as to substance and form.[2] The summary judgment was rendered against both State Farm and the plaintiffs. On appeal by State Farm, the court of civil appeals reversed, finding that a material question of fact existed which precluded the granting of a summary judgment.[3] Hollen appealed the decision, contending that the summary judgment rendered against the plaintiffs had become final due to their failure to appeal, thereby destroying the subrogation rights of State Farm.[4] Held—*Reversed.* When counsel for a party not mentioned in a motion for summary judgment approves the order for summary judgment as to substance and form, it will be construed as an order entered by agreement as to that party, rather than a summary judgment.[5]

Generally, summary judgment may be rendered if the pleadings, depositions, and affidavits reveal no genuine issue which would require a trial on the merits.[6] Absent a motion, however, neither a trial court nor an appellate court may render a summary judgment.[7] In *Bell v. TACA, Inc.*,[8] one

1. Hollen v. State Farm Mut. Auto. Ins. Co., 551 S.W.2d 46, 48 (Tex. 1977). The title of the order, as well as the body, indicates that both claims against Hollen were severed and dismissed. *Id.* at 48.

2. *Id.* at 48-49.

3. State Farm Mut. Auto. Ins. Co. v. Hollen, 543 S.W.2d 178, 180 (Tex. Civ. App.—Houston [14th Dist.] 1976), *rev'd*, 551 S.W.2d 46 (Tex. 1977).

4. The insurer's right of subrogation is derived from the rights of the insured, and is limited to those rights; where the insured has no cause of action against the defendant, there can be no subrogation. Hollen v. State Farm Mut. Auto. Ins. Co., 551 S.W.2d 46, 49 (Tex. 1977); McBroome-Bennett Plumbing, Inc. v. Villa France Inc., 515 S.W.2d 32, 36 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.); Sheppard v. State Farm Mut. Auto. Ins. Co., 496 S.W.2d 216, 218 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ); *see* TEX. R. CIV. P. 38.

5. Hollen v. State Farm Mut. Auto. Ins. Co., 551 S.W.2d 46, 49 (Tex. 1977).

6. TEX. R. CIV. P. 166A; *e.g.*, Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970); Smith v. Ortman-McCain Co., 537 S.W.2d 515, 518 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.); PHB, Inc. v. Goldsmith, 534 S.W.2d 196, 198 (Tex. Civ. App.—Houston [14th Dist.]), *writ ref'd n.r.e. per curiam*, 539 S.W.2d 60 (Tex. 1976).

7. *E.g.*, Hinojosa v. Edgerton, 447 S.W.2d 670, 673 (Tex. 1969); Republic Nat'l. Bank v. Southern Brokerage Co., 338 S.W.2d 295, 301 (Tex. Civ. App.—San Antonio 1960, writ ref'd

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of two defendants moved for summary judgment, yet the court granted summary judgments for both defendants. The Eastland Court of Civil Appeals held that the trial court was without authority to render a judgment in favor of the nonmoving defendant since the plaintiff had never been called to defend such a motion.[9]

An agreed judgment,[10] on the other hand, is an agreement made by the parties to the dispute and entered upon the record with the approval and sanction of the court.[11] To become a binding judgment, the agreement must conform to certain guidelines.[12] First, the judgment is in the nature of a contract since the parties involved, not the court, determine its provisions.[13] The general rules of contract interpretation are therefore applicable.[14] No rule of contract interpretation is more firmly established than the rule which gives effect to the parties' own interpretation of a contract of uncertain meaning.[15]

Second, to be enforceable, the agreement must comply with rule 11, Texas Rules of Civil Procedure, which requires that it be in writing, signed, and filed as part of the record, or made in open court and entered of record.[16] The court has no power to render a judgment until all the terms

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n.r.e.); Durham v. I.C.T. Ins. Co., 283 S.W.2d 413, 415 (Tex. Civ. App.—Dallas 1955, writ dism'd); *see* TEX. R. CIV. P. 166A(c).

8. 493 S.W.2d 281 (Tex. Civ. App.—Eastland 1973, no writ).

9. *Id.*

10. The words "agreed judgment," "consent decree," and "consent judgment" will be used interchangeably throughout this paper. *See* 4 R. MCDONALD, TEXAS CIVIL PRACTICE § 17.21 (1971).

11. *E.g.*, Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412, 416 (7th Cir. 1963); Layton v. Layton, 139 S.E.2d 732, 735 (N.C. 1965); Matthews v. Looney, 132 Tex. 313, 317, 123 S.W.2d 871, 872 (1939); Wright v. Allstate Ins. Co., 285 S.W.2d 376, 379 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

12. *See, e.g.*, Vickrey v. American Youth Camps, Inc., 532 S.W.2d 292, 292 (Tex. 1976); Stewart v. Mathes, 528 S.W.2d 116, 118 (Tex. Civ. App.—Beaumont 1975, no writ); Farr v. McKinzie, 477 S.W.2d 672, 676-77 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.). *See generally* Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 HARV. L. REV. 1314 (1959).

13. *E.g.*, Yount v. Lowe, 215 S.E.2d 563, 567 (N.C. 1975); Threet v. Texas Employers' Ins. Ass'n., 516 S.W.2d 276, 277 (Tex. Civ. App.—Tyler 1974, no writ); McClain v. Hickey, 418 S.W.2d 588, 590 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.). *But see* Coca-Cola Co. v. Standard Bottling Co., 138 F.2d 788, 789 (10th Cir. 1943).

14. *E.g.*, Edwards v. Gifford, 137 Tex. 559, 563, 155 S.W.2d 786, 788 (1941); Threet v. Texas Employers' Ins. Ass'n., 516 S.W.2d 276, 277 (Tex. Civ. App.—Tyler 1974, no writ); DeLee v. Allied Fin. Co., 408 S.W.2d 245, 248 (Tex. Civ. App.—Dallas 1966, no writ). Consent decrees are to be read within their four corners since they represent the agreement of the parties, rather than an independent examination by the court. Hart Schaffner & Marx v. Alexander's Dept. Stores, Inc., 341 F.2d 101, 102 (2d Cir. 1965).

15. *E.g.*, Richards v. Bycroft, 249 N.W.2d 743, 745 (Neb. 1977); United Founders Life Ins. Co. v. Carey, 363 S.W.2d 236, 243 (Tex. 1962); Threet v. Texas Employers' Ins. Ass'n., 516 S.W.2d 276, 278 (Tex. Civ. App.—Tyler 1974, no writ).

16. *See* TEX. R. CIV. P. 11.

of the agreement have been settled and reduced to writing or placed in the record.[17]

The most essential element of an agreed judgment, however, is consent.[18] The power of the court to render judgment depends upon the consent of the parties, not at the time of the agreement, but at the time judgment is rendered, for a party may withdraw his consent at any time prior to the rendition.[19] When rendered, the judgment must be in strict, literal compliance with the parties' agreement.[20] The court may not add to, delete from, or modify the terms, as the rendering of an agreed judgment is purely a ministerial function.[21] Once an agreed judgment is entered it generally may not be appealed, except on grounds of fraud, collusion, lack of jurisdiction, or mutual mistake.[22]

While an authorized attorney may consent to a judgment on behalf of his client,[23] the authorities are in conflict as to whether an agreed judgment

17. *E.g.*, Matthews v. Looney, 132 Tex. 313, 319, 123 S.W.2d 871, 873 (1939); Carter v. Carter, 535 S.W.2d 215, 217 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); Owen v. Finigan, 381 S.W.2d 578, 579 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.); *see* TEX. R. CIV. P. 11; 4 R. MCDONALD, TEXAS CIVIL PRACTICE § 17.22 (1971).

18. *See, e.g.*, Edwards v. Gifford, 137 Tex. 559, 563,155 S.W.2d 786, 788 (1941); Farr v. McKinzie, 477 S.W.2d 672, 676 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); Wright v. Allstate Ins. Co., 285 S.W.2d 376, 379 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

19. *E.g.*, Cranford v. Steed, 151 S.E.2d 206, 208 (N.C. 1966) (judgment void if consent does not exist when court approves agreement and promulgates it as judgment); Burnaman v. Heaton, 150 Tex. 333, 338, 240 S.W.2d 288, 291 (1951) (that party's consent existed at one time insufficient to support consent judgment, since consent must exist at very moment court undertakes to make agreement into judgment); Farr v. McKinzie, 477 S.W.2d 672, 676 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.) (valid consent judgment cannot be rendered by trial court when consent of one party is lacking).

20. *E.g.*, Edwards v. Gifford, 137 Tex. 559, 563, 155 S.W.2d 786, 788 (1941); Farr v. McKinzie, 477 S.W.2d 672, 676 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); Wright v. Allstate Ins. Co., 285 S.W.2d 376, 379 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

21. Matthews v. Looney, 132 Tex. 313, 317, 123 S.W.2d 871, 872 (1939); W.L. Moody & Co. v. Yarbrough, 510 S.W.2d 396, 398 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.); Wright v. Allstate Ins. Co., 285 S.W.2d 376, 379 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

22. *E.g.*, Gravel v. Alaskan Village, Inc., 409 P.2d 983, 986 (Alaska 1966) (consent judgment not subject to appellate review, except in cases of fraud, mutual mistake, collusion, or lack of jurisdiction); Cofield v. Sanders, 451 P.2d 320, 322 (Ariz. Ct. App. 1969) (agreed judgment not subject to appellate review except on grounds of fraud, mutual mistake, collusion, lack of jurisdiction, or lack of consent); Alexander v. Alexander, 373 S.W.2d 800, 805 (Tex. Civ. App.—Corpus Christi 1963, no writ) (agreed judgments governed by laws relating to contracts, rather than laws relating to judgments); *see* Rocks v. Brosius, 217 A.2d 531, 541 (Md. 1966) (appeal will not lie in consent decree); *cf.* Trupski v. Kanar, 115 N.W.2d 408, 410 (Mich. 1962) (order denying motion to dismiss not subject to appellate review, since defendant consented to it both as to substance and form). *But cf.* Hall v. McKee, 179 S.W.2d 590, 592 (Tex. Civ. App.—Fort Worth 1944, no writ) (consent judgment by justice court may be appealed to county court for trial de novo).

23. *E.g.*, Cranford v. Cranford, 158 S.E.2d 246, 247 (Ga. 1967) (order entered with con-

exists when the attorneys have approved and signed the draft for judgment.[24] Some courts have held that such approval does indeed constitute an agreed order.[25] The greater weight of authority, however, supports the view that a notation of approval, followed by counsel's signature, does not in and of itself constitute an agreed judgment.[26] Instead, these cases have held that such approval has no significance other than to indicate that the proposed draft truly evinces the judgment rendered by the court, and not that the judgment is agreed.[27]

In *Hollen v. State Farm Mutual Automobile Insurance Co.*[28] the court found the judgment rendered was an agreed judgment, notwithstanding the fact that it was styled "summary judgment" and had been considered as such by the lower courts and the parties throughout the litigation. To reach its determination, the court followed the principle that it must look beyond the title of the order to determine its true nature.[29] State Farm's concern on appeal was whether the plaintiffs' failure to appeal the sum-

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sent of counsel is binding on client absent fraud, accident, mistake, or collusion of counsel); Commonwealth v. Rozman, 309 A.2d 197, 200 (Pa. Commw. Ct. 1973) (attorney has authority to enter consent decree with the client's direction, knowledge, or consent); Noska v. Mills, 141 S.W.2d 429, 432 (Tex. Civ. App.—Dallas 1940, no writ) (attorney of record authorized to bind client by agreement so long as agreement does not surrender client's rights).

24. *Compare* Kirn v. Ioor, 253 N.W. 318, 319 (Mich. 1934) *with* Chicago & Vicinity Hungarian Benevolent Soc'y v. Chicago & Suburb Hungarian Aid Soc'y, 118 N.E. 1012, 1014 (Ill. 1918).

25. *See* Chicago & Vicinity Hungarian Benevolent Soc'y. v. Chicago & Suburb Hungarian Aid Soc'y., 118 N.E. 1012, 1014 (Ill. 1918) (consent decree found where, before entry, decree prepared by master in chancery was approved by "OK" and signatures of counsel); Kelly v. Winkler, 114 N.E.2d 335, 336 (Ill. App. Ct. 1953) (counsel's "OK" construed as being his unqualified approval, thereby making it a consent order); *accord*, Trupski v. Kanar, 115 N.W.2d 408, 410 (Mich. 1962) (order not subject to appellate review since approved as to substance and form by defendant). *But see* Sampson v. Village of Stickney, 180 N.E.2d 457, 459 (Ill. 1962) (approval cannot ipso facto be construed as acquiescence to substance of decree); Kirn v. Ioor, 235 N.W. 318, 319 (Mich. 1934) (order approved as to "substance and form" was not order entered by agreement).

26. *See, e.g.*, Sampson v. Village of Stickney, 180 N.E.2d 457, 459 (Ill. 1962) ("approved" or "approved as to form"); Faust v. Louisville Trust Co., 232 S.W. 58, 59 (Ky. 1921) ("OK"); McRary v. McRary, 47 S.E.2d 27, 31 (N.C. 1948) ("OK"); State v. Reagan County Purchasing Co., 186 S.W.2d 128, 136 (Tex. Civ. App.—El Paso 1944, writ ref'd w.o.m.) (signature of counsel on draft indicated approval of proposed form); Bank of Gauley v. Osenton, 114 S.E. 435, 437 (W. Va. 1922) ("OK").

27. *E.g.*, James C. Wilborn & Sons, Inc. v. Heniff, 205 N.E.2d 771, 774 (Ill. App. Ct. 1965); Faust v. Louisville Trust Co., 232 S.W. 58, 59 (Ky. 1921); Gillespie v. Martin, 109 S.W.2d 93, 94 (Tenn. 1937).

28. 551 S.W.2d 46, 49 (Tex. 1977).

29. *Id.* at 49. The motion, which included the plaintiffs in its caption, but not in the body, did not apply to the plaintiffs since a motion's substance is not to be determined by its caption, but is to be gleaned from the body of the instrument and its prayer for relief. Mercer v. Band, 454 S.W.2d 833, 835-36 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ); *see* Rubenstein v. United States, 227 F.2d 638, 642 (10th Cir. 1955); Ramirez v. Flores, 505 S.W.2d 406, 412 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.).

mary judgment had destroyed its subrogation rights, as contended by the petitioner. State Farm maintained that there could not be a final judgment against the plaintiffs since no motion for summary judgment had been filed.[30] The Texas Supreme Court, however, held that the rules pertaining to summary judgments were not applicable since the signature of the plaintiffs' attorney approving the order as to substance and form created an agreed judgment.[31]

An entirely different construction was placed on the notation "approved as to substance and form" by the Supreme Court of Michigan in *Kirn v. Ioor.*[32] In that case, the court refused to find an agreed judgment, holding instead that the indorsement by the losing party's attorney merely acknowledged that the proposed decree was legally formulated and contained in substance the decision as orally announced by the court.[33] By looking to the attending circumstances behind the judgment, the court found no evidence of preliminary discussion or negotiation between the attorneys to compromise or surrender the rights of either party.[34] Similarly, an examination of the surrounding circumstances in *Hollen* revealed no evidence of contract negotiations.[35] The Texas Supreme Court based its finding solely upon the notation itself and the plaintiffs' failure to appeal the summary judgment. By failing to appeal, the court reasoned, the plaintiffs thereby acknowledged the existence of an agreed judgment.[36]

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30. *See, e.g.*, Hinojosa v. Edgerton, 447 S.W.2d 670, 673 (Tex. 1969); Republic Nat'l Bank v. Southern Brokerage Co., 338 S.W.2d 295, 301 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.); Durham v. I.C.T. Ins. Co., 283 S.W.2d 413, 415 (Tex. Civ. App.—Dallas 1955, writ dism'd).

31. Hollen v. State Farm Mut. Auto. Ins. Co., 551 S.W.2d 46, 49 (Tex. 1977). The court did not address the requirements of an agreed judgment, but held that from the order itself there appeared to be an order entered by agreement. *Id.* at 49.

32. 253 N.W. 318 (Mich. 1934).

33. *Id.* at 319.

34. *Id.* at 319; *cf.* Leupe v. Leupe, 130 P.2d 697, 700 (Cal. 1942) (property settlement not agreement by consent since none of terms of proposed settlement were disclosed and it did not appear whether agreement was actually concluded or whether terms of decree were in accordance with terms of proposed settlement).

35. *See* State Farm Mut. Auto. Ins. Co. v. Hollen, 543 S.W.2d 178 (Tex. Civ. App.—Houston [14th Dist.] 1976), *rev'd*, 551 S.W.2d 46 (Tex. 1977). In the court of civil appeals, both State Farm and Hollen conceded that a summary judgment had been rendered against the plaintiffs by the trial court. Their concern on appeal was whether the summary judgment destroyed State Farm's subrogation rights. Neither party contended that an agreement had been made between them. *Id.* at 180. The validity of the summary judgment was not questioned until the oral arguments before the Texas Supreme Court. When State Farm attacked the judgment because of failure to file a motion for summary judgment, again neither party mentioned an agreement between them. Hollen v. State Farm Mut. Auto. Ins. Co., 551 S.W. 2d 46, 49 (Tex. 1977).

36. Hollen v. State Farm Mut. Auto. Ins. Co., 551 S.W.2d 46, 49 (Tex. 1977); *cf.* Gravel v. Alaskan Village, Inc., 409 P.2d 983, 986 (Alaska 1966) (consent judgments are not generally appealable); Rocks v. Brosius, 217 A.2d 531, 541 (Md. 1966) (appeal will not lie in a consent

The judgment against the plaintiffs in the trial court does not appear to have been based on the independent agreement of the parties, however, in light of the common procedure followed by the courts in entering an order into judgment. After the court announces its decision, it usually directs the prevailing party to prepare a draft of the order. The draft is prepared and submitted to the opposing party to determine whether it conforms with the announced decision, approved by that attorney, and then submitted to the court.[37] In accordance with this practice, the trial court in *Hollen* determined that a motion should be granted and directed Hollen's attorney to prepare the order.[38] Since a hearing on the merits of a summary judgment had occurred, and a judicial determination had been made, the supreme court's finding appears to refute the established requirements of an agreed judgment.[39] By definition, an agreed judgment must conform with the contract voluntarily entered into by the parties and does not require proof on the merits.[40] A hearing before the court and a judicial determination of the rights of the parties, followed by the attorneys' approval of the order, does not represent an independent agreement by the parties, but instead reflects the decision of the court.[41]

Nevertheless, the order in *Hollen* was explicitly approved as to *substance,*[42] whereas in most instances the notation indicates approval only of form.[43] While the plaintiffs' attorney signed the order as to substance and form, the attorney for State Farm was requested to approve the order as to form only.[44] Furthermore, had the plaintiffs' attorney read the order before it was entered, it should have been apparent to him that the court was also dismissing his clients' cause of action.[45] The word "approved" imports the exercise of judgment and discretion,[46] and the

decree); Alexander v. Alexander, 373 S.W.2d 800, 805 (Tex. Civ. App.—Corpus Christi 1963, no writ) (agreed judgments are governed by the laws relating to contracts).

37. *E.g.*, Sampson v. Village of Stickney, 180 N.E.2d 457, 459 (Ill. 1962); Bank of Gauley v. Osenton, 114 S.E. 435, 437 (W. Va. 1922); *see* State v. Reagan County Purchasing Co., 186 S.W.2d 128, 136 (Tex. Civ. App.—El Paso 1944, writ ref'd w.o.m.).

38. Hollen v. State Farm Mut. Auto. Ins. Co., 551 S.W.2d 46, 48 (Tex. 1977).

39. *See* Nelson v. Nelson, 92 N.E.2d 534, 535 (Ill. App. Ct. 1950); Harter v. King County, 119 P.2d 919, 923 (Wash. 1941).

40. Harter v. King County, 119 P.2d 919, 923 (Wash. 1941); *see* Matthews v. Looney, 132 Tex. 313, 319, 123 S.W.2d 871, 873 (1939); 4 R. McDONALD, TEXAS CIVIL PRACTICE § 17.22 (1971).

41. People v. Hunter, 111 N.E.2d 906, 907 (Ill. App. Ct. 1953); Nelson v. Nelson, 92 N.E.2d 534, 535 (Ill. App. Ct. 1950); McRary v. McRary, 47 S.E.2d 27, 31 (N.C. 1948).

42. Hollen v. State Farm Mut. Auto. Ins. Co., 551 S.W.2d 46, 48 (Tex. 1977).

43. *See* James C. Wilborn & Sons, Inc. v. Heniff, 205 N.E.2d 771, 774 (Ill. App. Ct. 1965); Gillespie v. Martin, 109 S.W.2d 93, 94 (Tenn. 1937); State v. Reagan County Purchasing Co., 186 S.W.2d 128, 136 (Tex. Civ. App.—El Paso 1944, writ ref'd w.o.m.).

44. Hollen v. State Farm Mut. Auto. Ins. Co., 551 S.W.2d 46, 48 (Tex. 1977).

45. The title of the order, as well as the body, expressly stated that the actions against Arthur Hollen, both as defendant and cross-defendant, be severed and dismissed. *Id.* at 48.

46. Nelson v. Nelson, 92 N.E.2d 534, 536 (Ill. App. Ct. 1950) (dissenting opinion).

court had the right to assume that the attorney utilized both in approving the order.

While the Texas Supreme Court has adopted the view that approval as to substance and form constitutes an agreed judgment, a further difficulty remains in the *Hollen* decision in that the plaintiffs were minors. To determine whether an agreed judgment should be entered, the court should first determine whether the parties are capable of binding themselves by consent and whether they have in fact done so.[47] Since a minor is in a sense a ward of the court when party to a suit, the court should require satisfactory proof before entering a decree against him.[48] Furthermore, an attorney may not waive any substantial rights of a minor or consent to anything which may be prejudicial to him.[49] While a minor's next friend or authorized attorney may agree to judgments when *approved by the court*,[50] it appears no inquiry was made in *Hollen* into the authority of the attorney or the wisdom of allowing him to consent to an order which destroyed the minors' cause of action.[51]

As a result of the *Hollen* decision, the announced rule in Texas is that the notation, "approved as to substance and form," shall be interpreted as acquiescence by the losing party to the terms set forth in the order, rather than as recognition that the judgment entered is in substance the one announced by the court. The fact that the parties add their consent to an order should not be allowed to convert it into an agreed order, however formally such consent or approval is made.[52] If the order does not evince an agreement of the parties, the mere fact that the order is approved and endorsed by the attorney should not operate to waive the fundamental requirements of an agreed judgment.[53] An adverse judgment by agreement

47. Risk v. Director of Ins., 3 N.W.2d 922, 926 (Neb. 1942). *See generally* James, *Consent Judgments As Collateral Estoppel*, 108 U. PENN. L. REV. 173, 179 (1959).

48. Dial v. Martin, 37 S.W.2d 166, 175 (Tex. Civ. App.—Amarillo 1931), *rev'd on other grounds*, 57 S.W.2d 75, 85 (Tex. 1933).

49. *See* Lowery v. Berry, 153 Tex. 411, 414, 269 S.W.2d 795, 797 (1954). *See generally* 43 C.J.S. *Infants* § 114b (1947).

50. TEX. R. CIV. P. 44(2).

51. The Texas Supreme Court did not address itself to the issue of authorization of the attorney and, of course, the trial court did not inquire into the minors' rights, since it was not determined until the supreme court review that an agreement had been made. *See* Hollen v. State Farm Mut. Auto. Ins. Co., 551 S.W.2d 46, 49 (Tex. 1977).

52. Leupe v. Leupe, 130 P.2d 697, 700 (Cal. 1942) ("approved" followed by signature of attorney does not transform decree into contractual agreement); Faust v. Louisville Trust Co., 232 S.W. 58, 59 (Ky. 1921); McRary v. McRary, 47 S.E.2d 27, 31 (N.C. 1948) (decree entered by court upon consideration of pleadings and evidence is a judgment of the court; that parties have superadded their consent does not convert decree into judgment by consent however formally consent or approval may be made); *see* 49 C.J.S. *Judgments* § 173 (1947).

53. Faust v. Louisville Trust Co., 232 S.W. 58, 59 (Ky. 1921) (approval of counsel no more than notation that order was drawn in accordance with court's opinion and has none of the attributes of agreed judgment); McRary v. McRary, 47 S.E.2d 27, 31 (N.C. 1948) (ap-