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# Insurance--Release--Recession for Mutual Mistake--Existing but Unknown Injury as Grounds Therefor

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obligate the insurer to defend. The view of the principal case would require the insurer to investigate such facts and to defend the insured when they exist even though the injured party did not allege them.

The minority view places importance upon the intent of the parties and grants to each policy holder the assurance that the insurer will make every reasonable inquiry in order to establish his duty to defend. The majority view, on the other hand, grants to the insurer a definite basis upon which he may determine his duty to defend and if the facts do not fall within this basis, the duty does not exist. When considering the great number of arm's length transactions entered into by insurance companies today, the majority view would eliminate the expense and time involved in investigation for each policy holder under the minority view.

While the decision in the principal case and the decisions of those jurisdictions with which it is in accord may carry weight in a future West Virginia litigation, the majority view cannot be overlooked. The principal case does illustrate that its view can be competently argued and may prevail. Which of these views West Virginia counsel may wish to adopt shall probably be determined, as a practical matter, by whether his client is the insurer or the insured. The preferred view, with regard to the West Virginia law, will have to be determined by the court.

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**Insurance—Release—Recission for Mutual Mistake—Existing but Unknown Injury as Grounds Therefor**

*P* received a bruised knee in an automobile accident. She did not consult a doctor, but signed a general release for consideration, ostensibly covering damages to the vehicle and all injuries "known at this time or which may hereafter develop." *P* subsequently discovered that she had suffered a serious knee fracture, and instituted an action for damages. *D* asserted the release as an affirmative defense, and *P* prayed for recission. The trial court entered judgment for *D*. *Held,* reversed. The evidence clearly established that the release was executed under a mutual mistake as to an existing but unknown injury which was not intended by either party to be covered by the release. *Dansby v. Buck,* 373 P.2d 1 (Ariz. 1962).

A release entered into in good faith by all parties cannot generally be voided or rescinded, unless procured through fraud, duress, misrepresentation, or mutual mistake. This rule is in furtherance of the policy of the courts to favor compromise and settlements. The proper application of the first three exceptions is fairly well-settled, but the fourth, mutual mistake, has not been uniformly applied. While there appears to be a liberal trend toward utilizing the mutual mistake doctrine in several jurisdictions, there has been little litigation in this area in the Virginias.

An anomolous situation is created when the courts attempt to encourage settlements out of court, and yet void releases on grounds which are in direct conflict with the expressed intent of both parties to those contracts. Basic bargaining principles inherent in freedom to contract are seemingly discarded when applying the mutual mistake doctrine to releases of personal injury claims. 7 CLEV.-MAR. L. REV. 98 (1958). However, certain guiding principles have evolved which enable trial courts to properly utilize this doctrine.

It is generally recognized that one may consciously bargain away his right to recover for another's tort, and the mere fact that a bad bargain is made will not entitle the releasor to avoid his contract. RESTATEMENT, RESTITUTION § 11(1) (1937). However, if the parties are bargaining away a right other than that which they intend, the mutual mistake doctrine may be invoked. Initially, there must be a relationship shown between the mistake and a past or present fact, rather than to a future development or matter of opinion. A mistake as to the consequences of a known injury is within the latter group and will not be a ground for relief, while a mistake as to an existing but unknown substantial injury is within the former, and may be grounds for recission. *Purvis v. Pennsylvania Ry.*, 96 F. Supp. 698 (E.D. Pa. 1950); 5 WILLISTON, CONTRACTS § 1551 (rev. ed. 1937). See generally Annot., 71 A.L.R.2d 82, 100 (1960), and cases cited therein. If the fact and species of the injury are known by both parties, but they do not know to what extent the injury exists, and money is paid to avoid further controversy, the releasee is merely "purchasing his peace," and any mistake as to the extent of the injuries would be immaterial. 46 ILL. B.J. 846 (1958). Whether or not a particular condition is a consequence of a known injury or an existing but unknown injury is a question of fact in each case. *Seaboard Ice Co. v. Lee,* 199 Va. 243, 99 S.E.2d 721 (1957).

Although a general release, as executed in the case at bar, purports to absolve the releasee from liability for any known or

unknown injuries, the courts will look behind this broad language to see whether the subsequent developments could have been within the contemplation of the parties at the time the release was executed. *Aronovitch v. Levy,* 238 Minn. 237, 56 N.W.2d 570 (1953). Controlling factors which the courts scrutinize to determine intent include the amount of the consideration and how soon following the accident the release was tendered. *Ruggles v. Selby,* 25 Ill. App. 2d 1, 165 N.E.2d 733 (1960); *Reed v. Harvey,* 110 N.W.2d 442 (Iowa 1961). In addition to these elements, the principal case announced that the negotiations and intelligence of both the releasor and releasee must be considered.

Since each case involving releases executed under mutual mistake must be resolved upon its own facts and circumstances, no hard and fast rules can be established. An examination of these types of cases in the Virginias reveals a paucity of litigation. The West Virginia Supreme Court recognizes that fraud, if clearly evidenced, is grounds for voiding a release of personal injury claims. *Campbell v. Campbell,* 124 S.E.2d 345 (W. Va. 1962). As early as 1937 our court ruled that a release could not be voided for mutual mistake in an action at law, but recognized that this might be done by a suit in equity. *Janney v. Virginian Ry.,* 119 W. Va. 249, 193 S.E. 187 (1937). This procedural distinction no longer appears to be controlling due to the promulgation of the West Virginia Rules of Civil Procedure. See W. VA. R.C.P. § § 8(e)(2), 18.

The only case found dealing with mutual mistake in executing a release in our jurisdiction is a recent federal case applying West Virginia law, in which the court refused to void the release. *Page v. Means,* 192 F. Supp. 475 (N.D. W. Va. 1961). In this case, plaintiff signed a general release ninety days after the accident, the consideration being one hundred dollars. Under the terms of the release, the releasee was relieved of liability for all known and unknown, foreseen and unforeseen injuries. Plaintiff had been examined by three physicians of her own choosing, and the adjuster discussed her condition with her at length. The court held that plaintiff (releasor) intended to give up what the release stated and insufficient evidence was adduced to establish that either party had a different understanding of the coverage of the release. The releasee denied liability up to the time of the release, thus causing the release to appear to be a compromise settlement. It is noteworthy that the court relied heavily upon the wording of the release

to reach its decision as to the intent of the parties. Therefore, it is evident that a liberal view in this area has not yet been adopted in our jurisdiction, at least not upon the facts as presented in *Page v. Means, supra.*

In the case at bar, while several facts support the court's conclusion, the fact that *P* failed to secure any medical advice appears to militate against her. As was stated in *Fraser v. Glass,* 311 Ill. App. 336, 35 N.E.2d 953 (1941), only a reasonably diligent search for injuries need be made by the releasor before releasing. The fact that *P* failed to make a reasonably diligent search indicates that she knew exactly what injuries she was releasing, or at least she should be estopped from claiming her ignorance of a knee fracture which a diligent medical examination would have disclosed.

Some help to the practitioner may be gained by a perusal of similar litigation in our neighboring state of Virginia. In two cases avoidance of the releases was allowed because the facts in each conclusively showed there was no meeting of the minds as to what the releases covered when they were executed. *Atlantic Greyhound Lines v. Metz,* 70 F.2d 166 (4th Cir. 1934); *Seaboard Ice Co. v. Lee,* 199 Va. 243, 99 S.E.2d 721 (1957). An opposite result was reached in *Corbett v. Bonney,* 202 Va. 933, 121 S.E.2d 476 (1961), wherein the releasor had known injuries and signed a general release. The court held that the fact that the treatment of the known injuries was prolonged does not entitle the releasor to recission on the grounds of mutual mistake.

The encouragement of compromises at times clashing squarely with the need for adequate compensation of accident victims appears to be the underlying explanation for the inconsistencies encountered in this area. The courts in several jurisdictions have displayed a readiness to sacrifice legal exactitude in an attempt to reach results which will prove just under the circumstances of each controversy. See *Ruggles v. Selby,* 25 Ill. App. 2d 1, 165 N.E.2d 733 (1960); *Reed v. Harvey,* 110 N.W.2d 442 (Iowa 1961); *Denton v. Utley,* 350 Mich. 332, 86 N.W.2d 537 (1957); *Duch v. Giacquinto,* 15 App. Div. 2d 20, 222 N.Y.S.2d 101 (1961); *Kerr v. May,* 24 Pa. D. & C.2d 97 (1960). The West Virginia Supreme Court has not yet passed upon this principle of law, and it appears doubtful whether it will follow this liberal trend due to the holding in *Page v. Means,* 192 F. Supp. 475 (N.D. W. Va. 1961). However, if a

factual situation presents itself which would shock the conscience of the court, the mutual mistake doctrine may be favorably invoked to grant relief.

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**Labor Law—Interrogation of Employee by Employer as an Unfair Labor Practice**

The NLRB sought enforcement of its order against *D* based on its findings that two of *D's* supervisors interrogated employees concerning their union activities in such a manner as to constitute interference, restraint, and coercion within the meaning of the National Labor Relations Act, 29 U.S.C. § 158(a) (1) (1958). Evidence showed that two of *D's* supervisors had on four occasions during a two week period questioned four employees about their union activities. One was questioned at his home and the others in *D's* plant. *D* had no history of labor trouble or unfair labor practices, nor was there evidence of anti-union activity. *Held,* enforcement granted. The court held that the conduct of the employer's supervisors was of such a nature as might reasonably be found to interfere with the free exercise of employee rights under the Act. A dissent argued that mere interrogation in the absence of unusual circumstances producing "coercive coloration" will not support a finding of an unfair labor practice. *NLRB v. Harbison-Fischer Mfg. Co.,* 304 F.2d 738 (5th Cir. 1962).

Since the passage of the National Labor Relations Act in 1935 which guaranteed the rights of employees to organize and bargain collectively, there has been a constant conflict between these rights and the right of the employer to free speech. In the NLRA of 1935 there was no provision for free speech by an employer. The National Labor Relations Board insisted upon strict and complete neutrality on the part of the employer. It justified its position by indicating the superior economic position of the employer. In 1941, however, the United States Supreme Court upheld the employer's right to speak as long as the speech was not coercive. The Court stated that a speech is not necessarily coercive if it pursues the employer's point of view, but it must be evaluated in terms of totality of the circumstances. *NLRB v. Virginia Electric & Power Co.,* 314 U.S. 469 (1941).