IN THE SUPREME COURT OF THE STATE OF DELAWARE

PATRICIA J. HICKS and FRANK L. HICKS,	§	
	§	No. 522, 2013
Plaintiffs Below-Appellants,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
DEBRA SPARKS,	§	No. N13C-02-131
	§	
Defendant Below-Appellee.	§	
	§	

Submitted: March 05, 2014
Decided: March 25, 2014

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

O R D E R

On this 25th day of March 2014, it appears to the Court that:

(1) Plaintiffs-Below/Appellants Patricia J. Hicks and her husband, Frank L. Hicks, appeal from a Superior Court's grant of a Motion for Summary Judgment in favor of Defendant-Below/Appellee Debra Sparks. The Hicks raise one claim on appeal. They contend that the Superior Court erred because there was a mutual mistake of fact between the parties that should have allowed for rescission of an insurance release. We find no error and affirm.

(2) This case arises from a motor vehicle accident that occurred in March 2011. Patricia Hicks was a passenger in a motor vehicle operated by her husband

that was rear-ended by Sparks. Hicks, who was seventy-two years old at the time of the accident, went to the Emergency Room and followed up with her family physician a few days later with complaints of neck pain and headaches. She received medical treatment and physical therapy for headaches and neck pain for approximately fifteen visits.

(3) In April 2011, Hicks presented her claim to Progressive Northern Insurance Company, Sparks' liability carrier. The adjuster handling the claim was Sharon O'Connell. Hicks spoke with O'Connell, explaining that she had stopped physical therapy. Hicks also told O'Connell that she was still having some problems but was happy with her progress and ready to negotiate a settlement. O'Connell initially offered Hicks $2,000 for the full and final resolution of the claim. Hicks did not accept.

(4) In May 2011, Hicks spoke with O'Connell a second time and told her that she was still having headaches. Hicks then made a demand of $7,000, indicating that she had spoken to an attorney regarding her injuries and their approximate costs. O'Connell countered with a $2,500 offer as full and final resolution. Hicks stated that she wanted more time to consider the counteroffer.

(5) More than three months after the accident, Hicks contacted O'Connell again. Hicks issued a settlement demand for $5,000, explaining that she had spoken to two attorneys about the case. She further stated that the attorneys

advised her to wait at least a year before settling to ensure that her injuries were resolved. O'Connell explained that she respected Hicks' right to wait for settlement but offered her $3,000.

(6) Finally in October 2011, Hicks reiterated her demand of $5,000. In response, O'Connell offered $4,000. Hicks accepted the $4,000 settlement offer. She and her husband later went to the Progressive office, obtained a settlement check, and executed a full and final release (the "Release"). After executing the Release and nearly a year after the accident, Hicks began to experience pain in both of her arms and tingling and numbness in her hands. An MRI revealed a cervical disc herniation. Thereafter, Hicks received disc surgery.

(7) In 2013, Hicks filed suit in the Superior Court alleging that it was Sparks' negligence that caused her injuries. After discovery, Sparks filed a Motion for Summary Judgment. The Superior Court heard arguments and granted Sparks' Motion for Summary Judgment.[1] This appeal followed.

(8) Hicks contends that the Superior Court erred by granting Sparks' Motion for Summary Judgment because Hicks' post-Release injuries are materially different than those contemplated in the Release, amounting to a mistake of fact and because Hicks did not assume the risk of mistake. We review the Superior Court's grant of summary judgment *de novo* "to determine whether, viewing the

[1] *Hicks v. Sparks*, 2013 WL 5788403 (Del. Super. Ct. Sept. 25, 2013).

facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[2]

(9) A release is a device by which parties seek to control the risk of the potential outcomes of litigation.[3] Releases are executed to resolve the claims the parties know about as well as those that are unknown or uncertain.[4] Because litigation is inherently risky, a general release avoids the uncertainty, expenses, and delay of a potential trial. Delaware courts will generally uphold a release and will only set aside a clear and unambiguous release where it was the product of fraud, duress, coercion, or mutual mistake.[5]

(10) To establish a mutual mistake of fact, the plaintiff must show by clear and convincing evidence that (1) both parties were mistaken as to a basic assumption, (2) the mistake materially affects the agreed-upon exchange of performances, and (3) the party adversely affected did not assume the risk of the

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[2] *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 456 (Del. 2010) (quoting *Brown v. United Water Del., Inc.*, 3 A.3d 272, 275 (Del. 2010)).

[3] *See E.I. DuPont de Nemours & Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 462 (Del. 1999) ("A release is a form of contract with the consideration typically being the surrender of a claim or cause of action in exchange for the payment of funds or surrender or an offsetting claim.").

[4] *See Hob Tea Room v. Miller*, 89 A.2d 851, 856 (Del. 1952) ("[A] general release . . . is intended to cover everything—what the parties presently have in mind, as well as what they do not have in mind, but what may, nevertheless, arise.").

[5] *Alston v. Alexander*, 49 A.3d 1192, 2012 WL 3030178, at *3 (Del. 2012); *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1163 (Del. 2010); *Hob Tea Room*, 89 A.2d at 856.

mistake.[6] Under principles of contract law, a contract is voidable, *inter alia*, on the grounds of mutual mistake existing at the time of contract formation.[7] But the mutual mistake "must relate to a past or present fact material to the contract and not to an opinion respecting future conditions as a result of present facts."[8] Nevertheless, mutuality of mistake in the insurance context can "exist[] only where neither the claimant nor the insurance carrier is aware of the existence of personal injuries."[9]

(11) A release will bar suit for a plaintiff's subsequently discovered injuries unless the injuries are materially different from the parties' expectations at the time the release was signed.[10] Mutual mistake will invalidate the release where both parties are mistaken as to the presence or extent of the plaintiff's injuries at the time they executed the release.[11] If the plaintiff knew that "an *indicia* of injuries

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[6] *See Cerberus Int'l v. Apollo Mgmt.*, 794 A.2d 1141, 1151–52 (Del. 2002); *Am. Bottling Co. v. Crescent/Mach I Partners, L.P.*, 2009 WL 3290729, at *2 (Del. Super. Ct. Sept. 30, 2009); *Restatement (Second) of Contracts* § 152 (1981).

[7] *Tatman v. Phila., Balt. & Washington R.R. Co.*, 85 A. 716, 721 (Del. Ch. 1913).

[8] *Alvarez v. Castellon*, 55 A.3d 353, 354 (Del. 2012) (quoting *Tatman*, 85 A. at 718).

[9] *Id.* at 356 (quoting *Hicks v. Doremus*, 1990 WL 9542, at *2 (Del. Super. Ct. Jan. 8, 1990)).

[10] *See, e.g.*, *Alvarez*, 55 A.3d at 356–57 (holding that there was no mutual mistake where plaintiff's later-discovered herniated disc following an accident because it was not a new injury or unrelated to the original trauma caused by the car accident); *McLarthy v. Hopkins*, 26 A.3d 214, 2011 WL 3055252, at *2 (Del. 2011) (finding no mutual mistake for later-discovered injuries where both the plaintiff and the insurance adjuster knew that the plaintiff continued to experience pain at the time the release was signed a week following the accident).

[11] *See, e.g.*, *Reason v. Lewis*, 260 A.2d 708, 709 (Del. 1969) (invalidating a release on mutual mistake where both parties erroneously believed at the time of the release that the plaintiff would not require any medical treatment but plaintiff later developed a nerve injury). *But see Hicks*, 1990 WL 9542, at *4 (rejecting a mutual mistake claim where the plaintiff, who experienced

exist[ed] at the time [she] signed the release," the release will bar suit and a court will not invalidate it by mutual mistake.[12] Even though the plaintiff might be unaware of "the exact degree of injuries with medical certainty," knowledge of the existence of an injury will preclude a finding of mutual mistake.[13]

(12) Finally, mutual mistake does not exist if the party adversely affected assumed the risk of the mistake. As the *Restatement (Second) of Contracts* explains, a party assumes the risk of a mistake where the contract assigns the risk to the party or where the mistaken party consciously performed under a contract aware of his or her limited knowledge with respect to the facts to which the mistake relates.[14]

(13) Hicks argues that the Release is voidable by mutual mistake because her injuries are materially different from the injuries that both parties believed she sustained at the time the Release was signed. Hicks explains that she and O'Connell were aware that Hicks suffered a cervical sprain requiring treatment before signing the Release. Hicks contends that surgery for a herniated disc is materially different from the minor head and neck injuries contemplated at the time of release. Hicks further argues that this mistake adversely affected the parties'

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some pain at the time of the release but believed it to be innocuous and later was diagnosed with a herniated disc requiring surgery fifteen months after the settlement).

[12] *Hicks*, 1990 WL 9542, at *2.

[13] *Id.*

[14] *Restatement (Second) of Contracts* § 154(a)–(b).

agreed-upon performance because the herniated disc was a new, undiscovered injury for which Hicks did not assume the risk of mistake.

(14) The record shows that Hicks has failed to demonstrate a mutual mistake of fact held by both parties at the time of the release. Hicks concedes that she told O'Connell that she had not made a full recovery and continued to experience headaches and neck pain. Although Hicks may have been mistaken as to the future effect of her injury, both parties were aware that Hicks injured her neck in the accident. This can reasonably be considered an "indicia of injuries" existing at the time of the Release. Hicks had ample opportunity to consult additional physicians and obtain further diagnoses to discover the herniated disc. Her later diagnosis is not a materially different fact but an injury of which Hicks and O'Connell had some awareness. Therefore, there was no mutual mistake.

(15) The record also shows that Hicks assumed the risk of mistake. She executed a clear and unambiguous Release in exchange for a settlement payment. This release specifically provided that Hicks "declares and represents that the injuries are or may be permanent and that recovery therefrom is uncertain and indefinite."[15] Hicks assumed the risk of mistake when she signed the Release without obtaining a more thorough medical examination to fully discover the extent of her injuries related to her neck pain. Hicks assumed the risk that her

[15] Appellant's Op. Br. Appendix at A15.

injuries were more serious than she believed and that her symptoms could worsen and require further treatment. Because she assumed this risk, she cannot now claim mutual mistake.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice