Rectifying “Mistaken” Applications of the Mistake Doctrine to Personal Injury Releases

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Grace M. Giesel, *A New Look at Contract Mistake Doctrine and Personal Injury Releases*, 19 **Nev. L.J.** 535 (2018).

When one enters into a contractual agreement with another, expectations are created on both sides. Party A expects to receive something from Party B, and Party B expects to receive something in return from Party A. When courts become involved in contractual disputes, ensuring the fulfillment of these expectations is often one of their primary goals. The pursuit of this goal, however, must be balanced against other contracts principles, particularly those related to defenses against the enforceability of contracts. Professor Grace Giesel explores the balance between expectations and enforceability in her recent thought-provoking article, *A New Look at Contract Mistake Doctrine and Personal Injury Releases*.

Professor Giesel’s article begins with an informative discussion about the terms typically included in a personal injury release agreement. In particular, she notes that such agreements often require the injured party to relinquish “claims for all injuries relating to the incident whether those injuries are known or unknown” (P. 542) and whether those injuries have presently developed or will develop in the future. When those unknown injuries manifest themselves after the execution and payment of the release agreement, parties seek to invoke the mistake doctrine to challenge the enforceability of the agreement in their efforts to recover for additional related injuries. As Professor Giesel argues, injured parties will have a steep uphill battle to successfully make a case for mutual or unilateral mistake under such circumstances.

After discussing the rules related to contract mistake doctrine, Professor Giesel identifies several stumbling blocks that could impede injured parties’ ability to make a successful case for mutual mistake. First, as a threshold matter, there may not be a mistake of fact as the doctrine requires, but rather a mistaken prediction or speculation about the future. In addition, if a mistake of fact truly exists, it may not be shared by both the releasor and the releasee. Finally, the injured party may be deemed to bear the risk of the mistake either through conscious ignorance or contract allocation. Professor Giesel also identifies additional rules-based obstacles for those asserting a theory of unilateral mistake.

Despite the fact that in theory any one of these obstacles could successfully defeat a mutual or unilateral mistake claim, Professor Giesel asserts that courts struggle in their application of the doctrine in the context of personal injury releases. Their application is often more nuanced and less straightforward resulting in more successful mistake claims than perhaps would be expected “[i]f a court applies traditional contract doctrine.” (P. 553.) For example, some courts have drawn a distinction between an injured party’s mistaken belief regarding the existence of an injury as opposed to the consequences of an injury thereby permitting contract mistake doctrine to “apply to a mistake of diagnosis but not one of prognosis.” (P. 556.) Considering that such an analysis requires courts to wade into the “high weeds” of medical injuries, Professor Giesel expresses her and courts’ concerns that judges without medical training may be ill-equipped to consistently apply such a test, which could result in inconsistent holdings.

Professor Giesel also notes inconsistencies in courts’ holdings when they apply the unconscionability doctrine and traditional notions of contract interpretation to claims of mistaken personal injury releases. Competing policy concerns contribute to discrepancies in the courts’ analysis and decisions. As Professor Giesel notes:

> Several policies are at play. On the one hand are the policies in favor of enforcing contracts freely entered into and the policy in favor of encouraging settlement. On the other side of the ledger, courts have spoken of the

> unknowability of the human body and thus its injuries, a desire that injured parties be compensated by the wrongdoer and not become a public burden, the noncommercial context, and a need to protect injured parties because of their weakness or lesser bargaining position. (P. 565.)

If one were to characterize the competing policies in terms of a "rules versus justice" dichotomy, it is safe to say that Professor Giesel would favor rules. After a thorough yet critical discussion of courts' rationales to justify holdings that seemingly contradict traditional applications of contract doctrine, Professor Giesel concludes that "in order to protect the sanctity of contracts, contracts should be set aside only when a traditional doctrine demands that," and for her, "[n]o policy put forward in support of providing more favorable treatment to personal injury releasors demands that preferential treatment." (P. 572.)

In her skillful critique of arguments that plaintiffs and judges advance for setting aside a personal injury release, Professor Giesel makes a convincing case that more careful consideration should be afforded to the potential costs associated with misapplying traditional contract doctrine in this context. She worries that judicious application of the mistake doctrine in other situations may be compromised, and she cautions courts against contorting "traditional contract doctrine to reach a result desired." (P. 575.)

Instead, Professor Giesel proposes that courts adopt "a release review doctrine," similar to that applied when individuals agree to relinquish particular federal rights, to ascertain whether the injured party voluntarily and knowingly entered into the release agreement. In making their determination, courts could consider multiple factors such as "the education and experience of the releasor, whether the releasor had ample opportunity to review the release, whether the releasor enjoyed the assistance of counsel, whether the releasor was discouraged or encouraged to consult with counsel, and whether the release was clear or confusingly complex." (P. 581.) According to Professor Giesel, adopting such a process-oriented approach could accomplish the dual goals of protecting the interests of both the releasor and the releasee while simultaneously preserving the sanctity of traditional contract doctrine on which parties and courts have traditionally relied. While it may be too soon to tell if courts will embrace Professor Giesel's proposal and begin to employ a release review doctrine to analyze personal injury releases, doing so may lessen the number of inconsistent holdings that arguably result from courts' "mistaken" application of the mistake doctrine to such contracts.

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