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A New Look at Contract Mistake Doctrine and Personal Injury Releases

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Recommended Citation

Nevada Law Journal, Vol. 19, No. 2, 2019

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A NEW LOOK AT CONTRACT MISTAKE DOCTRINE AND PERSONAL INJURY RELEASES

Grace M. Giesel*

*“[C]ourts cannot make for the parties better agreements than they themselves
have been satisfied to make.”¹*

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¹ *Green Cty. v. Quinlan*, 211 U.S. 582, 596 (1909).

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INTRODUCTION

Given the policy in favor of enforcing contracts in general² and the specific policy in favor of enforcing agreements that are a part of a settlement,³ one might expect a court to look very skeptically when a party to a personal injury

² Courts rarely set aside contracts of any kind. *See Davis v. G N Mortgage Corp.*, 244 F. Supp. 2d 950, 956 (2003) (“A bedrock principle of contract law is *pacta sunt servanda*, which translates from Latin as ‘agreements must be kept.’”). This reticence to set aside a contract is a result, at least in part, of the notion that enforcement of contracts honors the policy of freedom of contract that underpins our society’s system of economic ordering by protecting justified expectations, providing stability to transactions, and honoring the autonomy of the individual to enter into the transaction of that individual’s choice. Professor John Edward Murray explained as follows: “If people cannot project their realistic needs, desires and aspirations into the future and be assured that they will be fulfilled, their creative energies will not be released. The social institution of contract is an indispensable condition, not only to economic freedom, but freedom, itself.” JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 1, at 3 (5th ed. 2011); *see also* discussion *infra* Section VI.A.

³ In addition to the general desire to enforce contracts, courts also state that they favor and encourage the settlement of disputes outside of courts. Courts acknowledge the need to respect settlement agreements because the finality of those agreements is a vital part of the policy of encourage settlements. *See Schmidt v. Smith*, 216 N.W.2d 669, 672 (Minn. 1974) (“To permit them [release settlements] to be vacated except for the most compelling reason creates ‘uncertainty, chaos, and confusion’ with respect to future dispositions, and is a disservice to other litigants whose matters are thereby delayed”) (quoting *Simons v. Schiek’s, Inc.*, 145 N.W.2d 548, 553 (Minn. 1966) (Otis, J., dissenting)); *see also* discussion *infra* Section VI.B.

release asks a court to set aside the release. But many courts have reacted atypically when injured parties who have settled their claims have sought to have those releases set aside on the basis of a lack of understanding or knowledge about the injury.⁴ Absent facts supporting a claim of fraud or duress, injured parties have turned to the mistake doctrine for relief.

Injured parties make, implicitly or explicitly, two separate claims when urging that they should not be held to the releases they signed. First, the injured parties—the releasors—claim that they entered into the releases suffering from mistakes about injuries suffered.⁵ For example, an injured party might agree to release the tortfeasor for injuries suffered when she knows that she has suffered a concussion. Later, she might seek to avoid the release after she discovers that a result of the incident is a seizure disorder and she was therefore mistaken as to the injury.⁶ Second, because in the typical situation, such a party signs a document that states that the injured party releases the other party regarding all injuries, even those unknown,⁷ the injured party must also convince the court that the written release should not be interpreted to apply to unknown injuries or that the words of the written release should be, simply, disregarded.⁸

In this setting many courts have devised unique techniques to tilt the playing field in favor of the injured party. These techniques involve idiosyncratic application of the mistake doctrine, novel attitudes toward written contract language, and even the creation of an added analysis of whether the release was fairly and knowingly made. In using these techniques, some courts, implicitly or explicitly, have engaged in a hindsight substantive review of the fairness of the deal. These courts are very lenient in the analysis of what constitutes a mistake, are very lenient regarding the requirement of mutuality of the mistake, do

⁴ This article addresses releases that are in settlement of a claim regarding injuries already incurred by the releasing party. It does not address exculpatory agreements, sometimes also called releases, entered into before any injury occurs. Parties often challenge such exculpatory agreements as unenforceable because they are contrary to public policy. *See, e.g., Combs v. W. Siloam Speedway Corp.*, 406 P.3d 1064, 1066–67 (Okla. Civ. App. 2017) (considering exculpatory release signed before car race attendance); *Tayar v. Camelback Ski Corp.*, 47 A.3d 1190, 1198–99, 1203 (Pa. 2012) (considering exculpatory release signed before snow tubing).

⁵ *See, e.g., Delpino v. Spinks*, No. N13C-03-288, 2014 WL 4348236, at *1–3 (Del. Super. Ct. Aug. 22, 2014) (involving a plaintiff who signed a release while believing injury to be a shoulder strain but claimed mistake when he later learned injury was a labral tear requiring surgery); *Ranta v. Rake*, 421 P.2d 747, 749–51 (Idaho 1967) (explaining plaintiff signed release believing injury to be minor but claimed mistake when he later learned the injury was a herniated disc requiring surgery).

⁶ This is, in effect, what occurred in *Gleason v. Guzman*, 623 P.2d 378, 380 (Colo. 1981).

⁷ For example, in *Maglin v. Tschannerl*, 800 A.2d 486, 487 (Vt. 2002), the Vermont Supreme Court reviewed a release which related to “all injuries, known and unknown, both to the person and the property, which have resulted or may in the future develop from an accident” (emphasis in original); *see also infra* Part I (for other examples of release language).

⁸ *See, e.g., Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1458–60 (9th Cir. 1988) (applying Guam law) (discussing these arguments).

not apply the conscious ignorance concept, and do not apply the traditional respect given to written agreements—thereby neglecting to acknowledge assumptions of the risk taken by the personal injury releasor in the written agreement.

For the situation to fit into the traditional mutual mistake framework, there must be a belief that is not in accord with the facts at the time the parties enter into the release.⁹ If a court takes a broad view of the situation, it might determine that as long as the injured party knew he or she was injured at the time of the release, then there was no mistake. Rather than take such an unforgiving path, some courts attempt the arguably impossible task of distinguishing a later-claimed injury as an injury unknown at the time of contracting rather than a consequence of an injury known at the time of the signing of the release.¹⁰ The courts then recognize the unknown injuries as legally cognizable mistakes.¹¹ The distinctions made by some courts applying this analysis are fine, indeed.¹² Other courts adopt a broader view of what might constitute a mistake. These courts accept as sufficient a mistake about the nature or extent of the injury.¹³ Thus, the injury need not be unknown at the time of the release for it to be a cognizable mistake for purposes of the mistake doctrine.¹⁴

Some courts assume the releasee shares the mistake.¹⁵ While mutual mistake doctrine requires that both parties to the release be mistaken,¹⁶ courts often do not address the question of whether the other party to the release, the re-

⁹ Section 151 of the Restatement (Second) of Contracts states: “A mistake is a belief that is not in accord with the facts.” RESTATEMENT (SECOND) OF CONTRACTS § 151 (AM. LAW INST. 1981); see also *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123, 127 (2d Cir. 2003) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 151). See discussion *infra* Section IV.A.

¹⁰ See, e.g., *LaFleur v. C.C. Pierce Co.*, 496 N.E.2d 827, 830–31 (Mass. 1986) (explaining ignorance of injury required; ignorance of consequences insufficient); see discussion *infra* Section V.A.

¹¹ See, e.g., *Mangini v. McClurg*, 249 N.E.2d 386, 391–92 (N.Y. 1969) (explaining that injured party was aware of hip pain yet court found evidence sufficient to survive summary judgment motion on the issue of whether hip injury was an unknown injury); see discussion *infra* Section V.A.

¹² See discussion *infra* Section V.A.

¹³ See, e.g., *Simmons v. Blauw*, 635 N.E.2d 601, 604 (Ill. App. Ct. 1994) (explaining that mistakes about the nature and extent of injuries are legally cognizable); see also discussion *infra* Section V.B.

¹⁴ See, e.g., *Simmons*, 635 N.E.2d at 604 (explaining that mistake as to nature or extent is accepted for purposes of the doctrine); see also discussion *infra* Section V.B.

¹⁵ See, e.g., *Gleason v. Guzman*, 623 P.2d 378, 385–86 (Colo. 1981) (describing how the injured party survived a motion for summary judgment without a discussion of whether the other party was mistaken); see also *Bernstein v. Kapneck*, 430 A.2d 602, 607 (Md. 1981) (noting that other courts find mutual mistake without a finding of “mutual misconception of basic fact”).

¹⁶ RESTATEMENT (SECOND) OF CONTRACTS § 152 (AM. LAW INST. 1981); see, e.g., *Steiner v. Am. Friends of Lubavitch (Chabad)*, 177 A.3d 1246, 1255 (D.C. 2018) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 152); see also discussion *infra* Section IV.A.

leasee, shared the mistake with the releasor.¹⁷ Releasees must surely claim that they were not mistaken about the releasor's injuries but were contracting to avoid further litigation and added expense. Some courts recognize the doctrine of unilateral mistake generally,¹⁸ but courts usually do not explicitly address application of that doctrine.¹⁹

Courts also do not acknowledge the releasor's conscious ignorance. With either mutual or unilateral mistake doctrine, there is no mistake if the injured party was aware or should have been aware of his or her lack of knowledge with regard to the extent of the injuries.²⁰ This is a barrier for the injured party to successfully claim mistake because the injured party, as a sentient soul and given the vagaries of the human body, should know that he or she may not know the injuries or their consequences relating to the incident with any degree of certainty. The injured party knows that he or she does not know. Yet, courts rarely acknowledge this as a barrier for the injured party.²¹

Finally, some courts do not give respect to the language of the written release in which the releasor assumes the risk of unknown injuries and consequences. Many personal injury releases state that the release is in exchange for the agreed compensation and that the release is for all liability for all injuries, known and unknown, relating to the incident involving the injuries.²² By this language the releasor assumes the risk of any injury not yet discovered at the time of the signing of the release. Mutual and unilateral mistake doctrine provides that the doctrine is not available to one who assumes the risk of the mistake even if there is a mistake.²³

Many courts attempt to minimize the effect of this release language by wrapping the consideration of the written document into the mistake analysis. Rather than analyzing whether the writing is reasonably susceptible to the two interpretations urged by the parties and then considering surrounding circum-

¹⁷ See, e.g., *Gleason*, 623 P.2d at 385–86 (describing how the injured party survived a motion for summary judgment without discussion of mistake regarding the other party).

¹⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 153; see also *Greene v. Ablon*, 794 F.3d 133, 147–48 (1st Cir. 2015) (explaining the doctrine of unilateral mistake is disfavored but does exist in Massachusetts); *Gamewell Mfg., Inc., v. HVAC Supply, Inc.*, 715 F.2d 112, 116 (4th Cir. 1983) (holding that a unilateral mistake as stated in § 153 is recognized as a part of federal law).

¹⁹ But see *Maglin v. Tschannerl*, 800 A.2d 486, 490 (Vt. 2002) (noting the injured party presents a case of unilateral mistake, not mutual mistake).

²⁰ See, e.g., *Greene*, 794 F.3d at 148 (applying Mass. law) (relying in part on RESTATEMENT (SECOND) OF CONTRACTS § 154); see also RESTATEMENT (SECOND) OF CONTRACTS § 154(b).

²¹ See *Christensen v. Oshkosh Truck Corp.*, 12 F.3d 980, 989 (10th Cir. 1993) (relying on RESTATEMENT (SECOND) OF CONTRACTS § 154(b) to deny claim of mistake in personal injury release setting); see also discussion *infra* Section IV.B.

²² See *Maglin*, 800 A.2d at 487. For other release examples see *infra* Part I.

²³ See, e.g., *Brandt v. MIT Dev. Corp.*, 552 F. Supp. 2d 304, 323 (D. Conn. 2008) (relying on RESTATEMENT (SECOND) OF CONTRACTS § 154(a) to refuse to set aside settlement agreement); see RESTATEMENT (SECOND) OF CONTRACTS § 154(a); see also discussion *infra* Section IV.C.

stances to interpret the words of the writing,²⁴ some courts seem to be swayed by the releasor's hindsight claim that he or she did not intend to release anything with regard to unknown injuries and do not give respect to the words used in the release itself.²⁵ Other courts create a separate analysis as a second stage of the mistake analysis to determine whether the release itself was "fairly and knowingly" made, thus focusing, at least in part, on the substantive fairness of the deal.²⁶

The courts who apply the traditional contract doctrines in untraditional ways are guided by a host of motivations such as a desire to have the wrongdoer compensate the injured party in harmony with tort law theory. Some courts are motivated by a belief that the complexity of the human body creates a situation in which people cannot possibly understand what they are doing when they sign releases dealing with unknown injuries.²⁷ Some courts are concerned that the release is the product of unequal ability and bargaining strength.²⁸ Indeed, some courts seem motivated by compassion to protect releasors²⁹ even when those releasors are represented by counsel at the time they entered into the release.³⁰

A few courts have refused to treat personal injury releases more favorably than other contracts. These courts find no persuasive reason to tilt the playing field to assist personal injury releasors in avoiding releases.³¹

Courts' idiosyncratic treatment of personal injury releases is not new. Regardless of the validity of the underlying assumptions and presumptions that motivated courts of the previous century,³² courts today should look with new

²⁴ See discussion *infra* Section IV.C.

²⁵ See, e.g., *Ranta v. Rake*, 421 P.2d 747, 750–53 (Idaho 1966); see also discussion *infra* Section V.C.

²⁶ See, e.g., *Finch v. Carlton*, 524 P.2d 898, 901 (Wash. 1974) (en banc); see also discussion *infra* Section V.D.

²⁷ See, e.g., *Clancy v. Pacenti*, 145 N.E.2d 802, 805 (Ill. App. Ct. 1957) ("[T]he most complicated and mysterious of all the things that are upon or inhabit the earth."); see discussion *infra* Section VI.C.

²⁸ See discussion *infra* Part VI.

²⁹ See E. ALLAN FARNSWORTH, *CONTRACTS* 611–12 (4th ed. 2004) ("Courts have often been torn between sympathy for the injured party and the policy favoring compromise as a means of settling claims, and they have been swayed by many factors, such as unfairness, that are not germane to the issue of avoidance for mutual mistake."). See also *Bernstein v. Kapneck*, 430 A.2d 602, 605 (Md. 1981) ("On the other side there are considerations, largely stemming from compassion, which importune the larger number of courts to treat seemingly unambiguous and freely entered into personal injury releases as *sui generis*, so as to justify their permitting the releasor to renege on his bargain.").

³⁰ See, e.g., *Gleason v. Guzman*, 623 P.2d 378, 380, 387 (Colo. 1981) (the injured party's guardian was represented by counsel); see also *Witt v. Watkins*, 579 P.2d 1065, 1067–68 (Alaska 1978) (explaining the same).

³¹ See, e.g., *Bernstein*, 430 A.2d at 607; *Wheeler v. White Rock Bottling Co. of Or.*, 366 P.2d 527, 530 (Or. 1961); see also discussion *infra* Section V.E.

³² See Dan B. Dobbs, *Conclusiveness of Personal Injury Settlements: Basic Problems*, 41 N.C. L. REV. 665, 704–05 (1963); Harold C. Havighurst, *Problems Concerning Settlement*

eyes upon the question of whether personal injury releasors should enjoy more favorable treatment than other contracting parties. Courts should not continue to rely on approaches first adopted many decades ago without a fresh policy analysis.

Courts may conclude, as some courts have done in the past, that there is no good reason to provide greater contractual protection to an injured releasor who now claims that he or she did not know or understand the injury suffered.³³ Perhaps the vagaries of bodily injuries in the twenty-first century are not so mysterious that they cannot be contemplated and understood—at least with the assistance of counsel. Perhaps the goal of tort law that seeks to ensure the wrongdoer compensates the injured does not require that personal injury releases be treated more favorably than more typical agreements in the mainstream of commerce. Perhaps contracting parties who sign releases for personal injuries need no special protection as the result of being weaker in ability or having a lesser bargaining position. Perhaps compassion alone cannot justify such special treatment. Such a conclusion means that claims of mistake will rarely succeed because the injured party will not have suffered a mistake at the time of contracting and, in any event, assumed the risk of any mistake by the language of the release and by conscious ignorance.³⁴

A releasor's plea is not always doomed, however. All other contract avoidance doctrines are available as they are for any contract scenario. If such a party can prove fraud or duress, for example, a court may look favorably on the releasor's claim that the release should be set aside.³⁵ In addition, a releasor today has at hand the unconscionability doctrine, a doctrine that was not well-recognized when the courts began addressing personal injury releases under the banner of the mistake doctrine.³⁶ In some cases a court might conclude that a personal injury release was unconscionable at the time of formation and thus should not be enforced.

A court, after careful policy analysis, may conclude that injured parties should receive additional protection if they seek to avoid releases on the basis of newly discovered or newly understood injuries. Such a conclusion does not lead inexorably to a court blindly following past practice and attempting to

Agreements, 53 NW. U. L. REV. 283, 307 (1958); Eugene J. Keefe, *Validity of Releases Executed Under Mistake of Fact*, 14 FORDHAM L. REV. 135, 136 (1945).

³³ See discussion *infra* Section V.E; see also *Bernstein*, 430 A.2d at 606 (“[O]ur society will be best served by adherence to the traditional methodology . . .”).

³⁴ See discussion *infra* Sections VII.A and VII.B.

³⁵ See, e.g., *Ford v. Phillips*, 994 N.Y.S.2d 688, 691 (N.Y. App. Div. 2014) (“[A] motion to dismiss a complaint based solely upon a release should be denied when the plaintiff alleges fraud or duress in the release’s procurement.”) (citation omitted).

³⁶ See discussion *infra* Section VII.C. See generally Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123, 149–51 (2005) (discussing the origin and development of the doctrine); Colleen McCullough, Comment, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779, 781 (2016) (discussing the origin and development of the unconscionability doctrine).

shove the square peg of personal injury releases into the round hole of traditional mistake and other contract doctrines. Nor should it mean that such a court should engage in a bare analysis of the substantive fairness of the deal.

If a court concludes that personal injury releasors should be treated more favorably than other contractors, the court should create a stand-alone process analysis akin to that used with releases of certain federal rights. Releases of certain federal rights, such as Title VII rights, must be knowing and voluntary.³⁷ Federal courts have delineated factors to analyze and the evidence to consider in determining whether a release of federal rights is knowing and voluntary.³⁸ If an injured party knowingly and voluntarily entered into the release, no substantive fairness analysis should second guess the deal struck by the parties.³⁹ This approach provides added protection to the individual releasor while also honoring the basic tenets of contract law. Such an approach is forthright, and its rationale can be clear. Even so, a releasor will not often be able to shoulder the burden of proving that the release was not made knowingly and voluntarily, especially if that party was represented by counsel at the time the injured party signed the release.⁴⁰

Ultimately, in very many situations, injured parties must be held to the release they signed because such releasor signed in exchange for prompt payment; agreed to the exchange knowing that he or she might learn later of injuries or effects not realized at the time of the deal; and signed a clear and understandable document which placed the risk of unknown injuries and consequences on the releasor.

I. THE SETTING: THE TYPICAL CASE

In the typical case in which this sort of claim arises, a person is injured and then enters into an agreement relinquishing all claims relating to the incident.⁴¹ The release often states that the injured person relinquishes claims for all injuries relating to the incident whether those injuries are known or unknown.⁴² For example, in *Maglin v. Tschannerl*, the Vermont Supreme Court reviewed a release with the following language:

For the sole consideration of \$500.00 . . . the undersigned hereby releases and forever discharges [defendant] from any and all claims . . . causes of action or suits of any kind or nature whatsoever, and particularly on account of *all injuries, known and unknown, both to the person and the property, which have re-*

³⁷ See discussion *infra* Part VIII.

³⁸ See, e.g., *Myricks v. Fed. Reserve Bank of Atlanta*, 480 F.3d 1036, 1040 (11th Cir. 2007).

³⁹ See *id.* at 1042–43.

⁴⁰ See discussion *infra* Part VIII.

⁴¹ See, e.g., *Maglin v. Tschannerl*, 800 A.2d 486, 487 (Vt. 2002) (describing how plaintiff thinking she suffered whiplash in an automobile collision, signed a release of “all injuries, known and unknown” in exchange for \$500 and then later discovered that her injuries were more significant).

⁴² *Id.*

sulted or may in the future develop from an accident which occurred on or about the 12th day of March, 1996.⁴³

And in *Sanger v. Yellow Cab Co., Inc.*, the Missouri Supreme Court quoted the release before it in part as follows:

FOR THE SOLE AND ONLY CONSIDERATION . . . to me/us paid, . . . , I/we hereby release and discharge . . . [the tortfeasor] from all claims of any kind or character which I/we have or may have against him or them, and especially because of all damages, *losses or injury to persons or property, or both, whether known or unknown, developed, or undeveloped*, resulting or to result from accident on or about September 18, 1969, . . . , and I/we hereby acknowledge full settlement and satisfaction of all claims of whatever kind or character which I/we may have against him or them by reason of the above mentioned damages, losses or injuries.⁴⁴

In the typical case, after the injured party has signed the release and received the money that is the consideration supporting the release, the injured party claims that the release should be set aside because his or her injuries are not what the party thought at the time the release was signed. *Bronson v. Hansel* presents a good example.⁴⁵ In *Bronson*, the plaintiff was injured in an automobile collision, after which she suffered from neck pain and was treated for a

⁴³ *Id.* (emphasis provided by the court).

⁴⁴ *Sanger v. Yellow Cab Co.*, 486 S.W.2d 477, 479 (Mo. 1972) (en banc) (emphasis added). A sample release presented as one used by a common insurer and found online releases parties:

[F]rom any and every claim, . . . in any way growing out of any and all personal injuries and consequences thereof, including, but not limited to, . . . any injuries which may exist but which at this time are unknown and unanticipated and which may develop at some time in the future, all unforeseen developments arising from known injuries, . . . resulting or to result from an accident that occurred

See *Release in Full of All Claims*, MILLER & ZOIS, LLC, <https://www.millerandzois.com/files/release-geico.pdf> [<https://perma.cc/6WG9-ADZU>] (last visited Oct. 22, 2018). Another release presented as one used by another common insurer and found online releases parties: “[F]rom any and all actions, causes of action, claims and demands, damages, costs, loss of services, expenses and compensation on account of or in any way arising out of any and all known and unknown personal injuries and property damage resulting or to result from an accident which occurred” *Release and Settlement of Claim*, MILLER & ZOIS, LLC, <https://www.millerandzois.com/files/release-hartford.pdf> [<https://perma.cc/98R5-GUZL>] (last visited Oct. 22, 2018). For other examples, see *Full Release of all Claims with Indemnity*, MILLER & ZOIS, LLC, <https://www.millerandzois.com/files/release-progressive.pdf> [<https://perma.cc/9TYE-&7YHL>] (last visited Oct. 22, 2018); *Parents/Guardian Release and Indemnity Agreement*, MILLER & ZOIS, LLC, <https://www.millerandzois.com/files/release-usaa.pdf> [<https://perma.cc/3VLL-D8K2>] (last visited Oct. 22, 2018); and *Release of all Claims*, MILLER & ZOIS, LLC, <https://www.millerandzois.com/files/release-zurich.pdf> [<https://perma.cc/ZKF4-J2XS>] (last visited Oct. 22, 2018). Releases that apply by their terms to known and unknown injuries and consequences are not a new phenomenon. See Dobbs, *supra* note 32, at 672 (noting that releases at that time, the early 1960s, contained such language).

⁴⁵ See generally *Bronson v. Hansel*, 913 N.Y.S.2d 851, 852 (N.Y. App. Div. 2010).

strain.⁴⁶ She signed a release, entitled, “Release of All Claims,” in exchange for approximately \$1,050.⁴⁷ The release stated that the plaintiff was releasing all claims “growing out of any and all known and unknown, foreseen and unforeseen[,] bodily and personal injuries and property damage and the consequences thereof resulting from the accident” and that the plaintiff “declare(s) and represent(s) that there may be unknown or unanticipated injuries resulting from the . . . accident . . . and[,] in making [the r]elease[,] it is understood and agreed that [it] is intended to include such injuries.”⁴⁸ Later, the injured party discovered that she suffered a herniated disc as a result of the accident.⁴⁹ The plaintiff sued, claiming that the release should not be a barrier to her action to recover for her injuries because she had signed the release when mistaken about her injury.⁵⁰

II. CONTRACT DOCTRINE APPLIES

A settlement agreement is a contract, and thus traditional contract law principles apply.⁵¹ A release is, in effect, a settlement agreement⁵² and so, likewise,

⁴⁶ *Id.* at 852. Many of the cases in which the issue arise involve automobile collisions but, of course, the issue can arise in other contexts as well. *See, e.g.,* Gleason v. Guzman, 623 P.2d 378, 379–80 (Colo. 1981) (describing how vending machine fell on the injured party).

⁴⁷ *Bronson*, 913 N.Y.S.2d at 852.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* *See* Hicks v. Sparks, No. 522, 2013, 2014 WL 1233698, at *2 (Del. Mar. 25, 2014). In *Hicks*, the plaintiff was in an automobile collision and suffered headaches and neck pain as a result. *Id.* at *1. After settling her claim for \$4,000, she began experiencing additional pain which led to a diagnosis of cervical disk herniation requiring surgery. *Id.* The plaintiff sued, claiming that the release should not be a bar to her recovery because at the time of the release she had been mistaken about her injury. *Id.* at *1–2. She had believed the injury to be a cervical strain when in reality it was a herniated disc. *Id.* at *3. The release the plaintiff signed stated in part that the plaintiff “declares and represents that the injuries are or may be permanent and that recovery therefrom is uncertain and indefinite.” *Id.*; *see also* Delpino v. Spinks, No. N13C-03-288, 2014 WL 4348236, at *1 (Del. Super. Ct. Aug. 22, 2014). The plaintiff in *Delpino* was involved in an automobile collision. *Id.* He suffered from shoulder pain which he believed to be a strain. *Id.* In exchange for \$750, he signed a release provided by the defendant’s insurer which stated:

It is understood and agreed that this settlement is in full compromise of a doubtful and disputed claim as to both questions of liability and as to the nature and extent of the injuries . . . it is understood and agreed that the undersigned rely(ies) [sic] wholly upon the undersigned’s judgment, belief and knowledge as to the nature, extent, effect and duration of said injuries and liability therefore.

Id. Later, he discovered that he had suffered a labral tear which required shoulder surgery. *Id.* at *2. The plaintiff sued and when the defendant moved for the matter to be dismissed on the basis of the release, the plaintiff claimed that the release was the product of a mutual mistake such that it should not be enforced. *Id.*

⁵¹ *See* May v. Anderson, 119 P.3d 1254, 1257 (Nev. 2005) (“Because a settlement agreement is a contract, its construction and enforcement are governed by principles of contract law.”) (citing *Reichelt v. Urban Inv. & Dev. Co.*, 611 F. Supp. 952, 954 (N.D. Ill. 1985)); *see also* *Washington v. Bd. of Educ. of Chi.*, No. 17 CV 2343, 2018 WL 558501, at *4 (N.D.

traditional contract law principles apply,⁵³ including traditional contract formation⁵⁴ and interpretation principles.⁵⁵ Once a party proves a release has been entered into, courts require the releasor to shoulder the burden of proving that the release should not be honored but rather should be set aside.⁵⁶

III. CONTRACT MISTAKE DOCTRINE

Injured parties throughout the years have sought to avoid releases on the basis that the injured parties were not aware of or did not fully understand the injuries suffered when they entered into the releases as part of settlements of claims and in exchange for remuneration.⁵⁷ Injured parties have claimed that that the releases should not be enforced because the parties to the releases shared a mutual mistake about the injuries.⁵⁸

Ill. Jan. 24, 2018), *appeal docketed*, No. 18-2626 (7th Cir. July 26, 2018) (“A settlement agreement is a contract, and it is governed by principles of state contract law.”).

⁵² 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.”).

⁵³ See *Washington*, 2018 WL 558501, at *4 (“A release within a settlement agreement is also governed by contract law.”).

⁵⁴ See *Chaganti & Assocs. v. Nowotny*, 470 F.3d 1215, 1221 (8th Cir. 2006), *cert. denied*, 551 U.S. 1131 (2007) (“Basic principles of contract formation govern the existence and enforcement of the alleged settlement.”).

⁵⁵ See *Powell v. Omnicom*, 497 F.3d 124, 128 (2d Cir. 2007) (“A settlement agreement is a contract that is interpreted according to general principles of contract law.”).

⁵⁶ See, e.g., *Witt v. Watkins*, 579 P.2d 1065, 1069–70 (Alaska 1978) (“Once the party relying on a release establishes that it was given with an understanding of the nature of the instrument, the burden is on the releasor to show by clear and convincing evidence that the release should be set aside.”) (citation omitted); *Ranta v. Rake*, 421 P.2d 747, 752 (Idaho 1966) (“[T]he releasor has the burden of proving the reasons for setting aside the release by clear, satisfactory and convincing evidence.”).

⁵⁷ For historical discussion of this phenomenon, see generally Dobbs, *supra* note 32. See Joseph Conder, Comment, *The Enforceability of Personal Injury Releases: Gleason v. Guzman*, 54 U. COLO. L. REV. 277, 277–78 (1983); Michael A. Plotz, Comment, *Personal Injury Releases May Be Set Aside Under the Doctrine of Mutual Mistake When the Injury Later Sued for Was Unknown at the Time of Signing: Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990), 32 S. TEX. L. REV. 311, 314–24 (1991); Robert A. Radcliffe, Note, *When Should the Trier of Fact Determine the Validity of Personal Injury Releases?—Bennett v. Shinoda Floral, Inc.*, 108 Wash. 2d 386, 739 P.2d 648 (1987), 63 WASH. L. REV. 749, 750–53 (1988); For a list of cases see Michael DiSabatino, Annotation, *Modern Status of Rules as to Avoidance of Release of Personal Injury Claim on Ground of Mistake as to Nature and Extent of Injuries*, 13 A.L.R. 4th 686 (1982).

⁵⁸ For a discussion of the contract mistake doctrine generally, see Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CALIF. L. REV. 1573 (2003); Melvin A. Eisenberg, *Disclosure in Contract Law*, 91 CALIF. L. REV. 1645, 1684–86 (2003); and Val D. Ricks, *American Mutual Mistake: Half-Civilian Mongrel, Consideration Reincarnate*, 58 LA. L. REV. 663, 664–76 (1998). For general discussion about the mistake doctrine in contracts as well as the criminal law’s mistake doctrine, see E. ALLAN FARNSWORTH, *ALLEVIATING MISTAKES: REVERSAL AND FORGIVENESS FOR FLAWED PERCEPTIONS* (2004).

Today, there are two recognized mistake doctrines that can cause a court to refuse to enforce a contract: mutual mistake and unilateral mistake. The stated definitions of the doctrines across jurisdictions vary.⁵⁹ The Restatement (Second) of Contracts, with regard to both types of mistake, defines a “mistake” as “a belief that is not in accord with the facts.”⁶⁰ A comment notes that “the erroneous belief must relate to the facts as they exist at the time of the making of the contract” and that a “party’s prediction or judgment as to events to occur in the future, even if erroneous,” is not a mistake.⁶¹

The Restatement provides with regard to mutual mistake that:

1. both parties must share the mistake,
2. the mistake must be “as to a basic assumption on which the contract was made[.]”
3. the mistake must have a “material effect on the agreed exchange of performances,” and
4. the party seeking relief must not bear the risk of the mistake.⁶²

Unilateral mistake differs from mutual mistake in that only one party to the contract must be mistaken. In addition, “the effect of the mistake is such that enforcement of the contract would be unconscionable,” or that the other party caused or had reason to know of the mistake.⁶³

⁵⁹ Some jurisdictions adopt the Restatement approach. *See, e.g.*, *Rotunda v. Marriott Int’l, Inc.*, 123 A.3d 980, 984 n.4 (D.C. 2015); *Hart v. Arnold*, 884 A.2d 316, 333 (Pa. Super. Ct. 2005). Other jurisdictions have their own approach. *See, e.g.*, *Anderson Cty. v. Preston*, 804 S.E.2d 282, 297 (S.C. Ct. App. 2017) (“A contract may be rescinded for mistake, if justice so requires, in the following circumstances: (1) whe[n] the mistake is mutual and is in reference to the facts or supposed facts upon which the contract is based; (2) whe[n] the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with the true agreement of the parties; (3) whe[n] the mistake is unilateral and has been induced by the fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the rescission, without negligence on the part of the party claiming rescission; or (4) whe[n] the mistake is unilateral and is accompanied by very strong and extraordinary circumstances which would make it a wrong to enforce the agreement, sustained by competent evidence of the clearest kind.”) (quoting *King v. Oxford*, 318 S.E.2d 125, 128 (S.C. Ct. App. 1984)).

With regard to unilateral mistake, see *Whistleblower 4496-15W v. Comm’r*, No. 4496-15W, 2017 WL 2304309, at *7 (T.C. May 25, 2017) (“A party’s unilateral mistake, by contrast, generally will not suffice to invalidate a contract unless it was induced in some way by the other party . . .”). *See Gessin Elec. Contractors, Inc. v. 95 Wall Assocs., LLC*, 903 N.Y.S.2d 26, 29 (N.Y. App. Div. 2010) (“[A] court sitting in equity can rescind a contract for unilateral mistake if failure to rescind would unjustly enrich one party at the other’s expense, and the parties can be returned to the status quo ante without prejudice.”) (citation omitted). *But see Vandenberg v. Brunswick Corp.*, 90 N.E.3d 1048, 1057 (Ill. App. Ct. 2017) (“A unilateral mistake is insufficient to invalidate an agreement compromising and settling a disputed claim.”) (quoting *Cole Taylor Bank v. Cole Taylor Bank*, 586 N.E.2d 775, 783 (Ill. App. Ct. 1992)).

⁶⁰ *See* RESTATEMENT (SECOND) OF CONTRACTS § 151 (AM. LAW INST. 1981).

⁶¹ *See id.* § 151 cmt. a.

⁶² *See id.* § 152.

⁶³ *See id.* § 153.

With both mutual mistake and unilateral mistake, a party bears the risk of the mistake and cannot use the mistake doctrine to his or her benefit in three situations. First, a party cannot use the mistake doctrine if the parties have allocated the risk to that party by agreement; in such a situation the parties have, in advance, confronted the possibility that there could be errors but deal with how that should be handled by agreement.⁶⁴ The agreement that a party entered into while mistaken can, and usually does, itself allocate the risk and saves the document's validity.⁶⁵ Second, a party cannot use the mistake doctrine if that party entered into the agreement with "conscious ignorance."⁶⁶ A party is "conscious[ly] ignorant" if the party knows he or she lacks information about the issue to which the mistake relates but enters into the agreement anyway.⁶⁷ Third, a court may place the risk on a party because "it is reasonable in the circumstances to do so."⁶⁸

IV. TRADITIONAL APPLICATION OF CONTRACT DOCTRINE TO THE TYPICAL PERSONAL INJURY RELEASE SITUATION

A personal injury releasor has four tremendous hurdles blocking the way to success of a mutual mistake claim. First, the releasor must prove that the mistake at the heart of the basic assumption of the deal is about the facts as they existed at the time the release was entered into and not simply a speculation or prediction of the future.⁶⁹ Second, the injured party must prove that the injured party and the releasee shared a mistake about the injured party's injuries.⁷⁰ Third, the injured party cannot have been acting in conscious ignorance, and fourth, the agreement cannot have placed the risk on the injured party by its own terms.⁷¹

A. *A Shared Mistake of Fact and Not a Speculation or Prediction*

A party seeking to avoid a personal injury release likely cannot prove that he or she acted with "a belief that is not in accord with the facts."⁷² A logical view of the situation at the time an injured party agrees to a release in exchange for recompense is that the injured party is speculating that his or her injuries will not become something other than what the injured party knows at the time of the signing of the release. An injured party weighs what he knows of his injuries, the amount of money being offered, and the value to that party of having

⁶⁴ See *id.* § 154(a), cmt. b.

⁶⁵ See, e.g., *Lenawee Cty. Bd. of Health v. Messerly*, 331 N.W.2d 203, 210 (Mich. 1982).

⁶⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 154 cmt. c.

⁶⁷ See *id.* § 154(b).

⁶⁸ See *id.* § 154(c).

⁶⁹ See *id.* § 151 cmt. a.

⁷⁰ See *id.* § 152 cmt. a.

⁷¹ See *id.* § 154(a), (b), cmt. c.

⁷² See *id.* § 151; see also discussion *supra* Part III.

that money immediately without the hassle of further haggling, lawsuits, and such.

Even if an injured party can prove that her or she was mistaken, in the vast majority of situations that party cannot prove that the other party to the release shares the mistake. The releasee, too, is speculating. The releasee hopes that the injuries and their consequences do not change but seeks to settle the matter so that there is certainty and closure short of extended litigation.⁷³

Often the injured party has legal counsel.⁷⁴ The basic professional obligation of competence requires such counsel to bring home to the injured party the possibility of later discovered physical effects of the precipitating event.⁷⁵ If an injured party with the benefit of the advice of counsel enters into a release as part of the settlement of a matter, a successful claim of mutual mistake is hard to fathom.

B. The Injured Party Has the Risk of Mistake by Conscious Ignorance

In the vast majority of these situations the injured party cannot survive the conscious ignorance analysis. This is especially true when the injured party has the benefit of the advice of an attorney at the time of the signing of the release. In *Wood v. Boynton*, a classic conscious ignorance case, a woman brought a stone to a shop to sell because she needed money.⁷⁶ Neither she nor the shopkeeper knew what the stone was, but both thought it was a topaz.⁷⁷ The shopkeeper bought the stone for a dollar.⁷⁸ Later, the parties discovered that the stone was a diamond.⁷⁹ The seller of the stone claimed mistake and asked the court to set aside the contract of sale.⁸⁰ The court refused, noting that the seller chose to sell without further investigation of its composition.⁸¹ The seller sold knowing she did not know with certainty the composition of the stone.⁸²

In the release setting, to avoid the conscious ignorance bar, injured parties must claim that they did not perceive the uncertainty of their medical condition. Given the society in which injured parties live—a society which bombards

⁷³ See, e.g., *Bocarossa v. Watkins*, 313 A.2d 135, 137 (R.I. 1973) (describing how releasee did not share the mistake); *Maglin v. Tschannerl*, 800 A.2d 486, 490 (Vt. 2002) (explaining that at most the injured party has proved unilateral mistake).

⁷⁴ See, e.g., *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1454 (9th Cir. 1988).

⁷⁵ See MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2013) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

⁷⁶ *Wood v. Boynton*, 25 N.W. 42, 43 (Wis. 1885).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 44.

⁸¹ *Id.* ("If she chose to sell it without further investigation as to its intrinsic value . . . she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain.").

⁸² *Id.*

people with information of all sorts, including medical knowledge—this claim seems far-fetched. As one court has noted: “There was, of course, at the time of settlement negotiations, as in every personal injury case, a conscious uncertainty regarding the medical outcome of the victim’s case. At the time of settlement, both parties undertook a risk that the resolution of the uncertainty might be unfavorable.”⁸³

In addition, many injured parties enter releases in exchange for compensation only after consulting an attorney.⁸⁴ Such an attorney, if competent, surely explained to the injured party the possibility that not all injuries or effects of injuries had manifested at the time the injured party considered the release.⁸⁵ Thus, the attorney made the injured party aware of his or her ignorance about injuries. The involvement of an attorney makes an injured party’s claim of lack of conscious ignorance particularly suspect. A rational explanation for the situation is that the injured party, after consultation with counsel, understood that further injury or complications could occur and yet that party preferred the certainty of the payment in the short term rather than the chance of a payment in the long term after costly litigation.⁸⁶

C. *The Release Places the Risk of Mistake on the Injured Party*

In many situations mistake doctrine should not be available to the personal injury releasor, regardless of the releasor’s knowledge of injury, because the release placed the risk of any mistake regarding injuries on the releasor. When a contract allocates the risk of a particular type of mistake to a party, that party cannot rely on such a mistake to avoid the contract.⁸⁷ A common scenario in which this issue arises is when a purchaser of land seeks to have the contract for sale set aside on the basis of a mistake about the possible uses of the land.⁸⁸ Often such contracts provide that the purchaser is buying the property “as is.”⁸⁹ Courts find that purchasers cannot rely on a mistake as to possible land use be-

⁸³ *Blackhurst v. Transamerica Ins. Co.*, 699 P.2d 688, 692 (Utah 1985) (citation omitted).

⁸⁴ *See, e.g., Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1454–55 (9th Cir. 1988) (explaining that an attorney was consulted before the release was signed); *Gleason v. Guzman*, 623 P.2d 378, 380 (Colo. 1981) (also explaining an attorney was consulted before the release was signed).

⁸⁵ This explanation would be required by the duty of competence all attorneys owe to their clients. *See* MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2013) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

⁸⁶ *See Harbor Ins. Co. v. Stokes*, 45 F.3d 499, 503 (D.C. Cir. 1995) (holding party cannot claim mistake because party knew the matter had been appealed and a decision could be rendered at any time; settlement was made in conscious ignorance).

⁸⁷ *See* RESTATEMENT (SECOND) OF CONTRACTS § 154(a) (AM. LAW INST. 1981); *see also* discussion *supra* Part III.

⁸⁸ *See, e.g., Lenawee Cty. Bd. of Health v. Messerly*, 331 N.W.2d 203, 205, 210 (Mich. 1982).

⁸⁹ *See, e.g., id.* at 210.

cause the “as is” language of the contracts placed the risk of the mistake on the purchasers.⁹⁰

Typical personal injury releases refer expressly to the possibility of unknown injuries or effects on the releasor.⁹¹ The court in *Ranta v. Rake* reviewed a particularly explicit release which referred to “all known and unknown, foreseen and unforeseen bodily and personal injuries and property damage and the consequences thereof,” and then continued:

It is understood and agreed that this settlement is the compromise of a doubtful and disputed claim, and that the payment made is not to be construed as an admission of liability on the part of the party or parties hereby released, and that said releases deny liability therefor and intend merely to avoid litigation and buy their peace.

The undersigned hereby declare(s) and represent(s) that the injuries sustained are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite and in making this Release it is understood and agreed, that the undersigned rely(ies) wholly upon the undersigned’s judgment, belief and knowledge of the nature, extent, affect and duration of said injuries and liability therefor and is made without reliance upon any statement or representation of the party or parties hereby released or their representatives or by any physician or surgeon by them employed.

. . . .
THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT.⁹²

Regardless of whether the document states that the party has read it, a party who signs a document is held to have read it.⁹³ As the Supreme Court stated long ago in *Upton v. Tribilcock*, “It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained.”⁹⁴

The language of this *Ranta* release or any other typical release is such that the result of any interpretation analysis must conclude that the release clearly places the risk of unknown injuries on the injured party. In modern contract law, a court determines a party’s assent to an agreement by looking at the external or objective manifestations of intentions.⁹⁵ The focus is on what the other

⁹⁰ See, e.g., *id.*; *Atkins v. Kirkpatrick*, 823 S.W.2d 547, 553 (Tenn. Ct. App. 1991).

⁹¹ See *supra* Part I for examples of releases.

⁹² *Ranta v. Rake*, 421 P.2d 747, 749 (Idaho 1966).

⁹³ See *Giaccone v. Canopus U.S. Ins. Co.*, 133 F. Supp. 3d 668, 674 (D.N.J. 2015) (applying N.J. law) (“Indeed, signing a contract creates a conclusive presumption that the signer read, understood, and assented to its terms.”) (citation omitted) (internal quotation marks omitted); *Anzuetto v. Wash. Metro. Area Transit Auth.*, 357 F. Supp. 2d 27, 30 (D.D.C. 2004) (“[I]t is well established that a person has a duty to read a contract before he signs it. If he had the opportunity to read it, he is bound by its terms regardless of whether he thought he was signing an actual contract.”) (citation omitted).

⁹⁴ *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875).

⁹⁵ See, e.g., *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954); see also MURRAY, *supra* note 2, § 31, at 62.

party would reasonably believe as a result of the party's manifestations of assent.⁹⁶ The objective approach means that when a court evaluates what the parties intended by the words used in the document they signed, the court should focus on how each party's words and actions would be reasonably perceived by the other party.⁹⁷

A court entertaining a releasor's plea to not enforce a release of "all injuries, known and unknown,"⁹⁸ acts with this objective view as background. Even assuming the parol evidence rule is not an obstacle to the admission of evidence relating to the deal struck,⁹⁹ and with the court considering all evidence proffered by the releasor, the releasor has a difficult path to success in arguing that the words of the release should be interpreted to not place the risk of any mistake as to injuries squarely on the releasor.¹⁰⁰

When parties seek to have courts interpret the meaning of agreements, courts look to the writing and, often, to extrinsic evidence¹⁰¹ to interpret the writing and to determine whether the writing is reasonably susceptible to the meanings suggested by the parties.¹⁰² Some courts give the writing more weight

⁹⁶ See FARNSWORTH, *supra* note 29, § 3.6, at 115 ("By the end of the nineteenth century, the objective theory had become ascendant and courts universally accept it today."); see also *Greene v. Ablon*, 794 F.3d 133, 147 (1st Cir. 2015) (applying Mass. law) ("Although mutual assent is often misleadingly referred to as a 'meeting of the minds,' the formation of a valid contract under Massachusetts law requires objective, not subjective, intent.") (citation omitted).

⁹⁷ See *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814 (7th Cir. 1987) ("['I]ntent' does not invite a tour through [the plaintiff's] cranium, with [the plaintiff] as the guide."); see also *Westlake Invs., LLC v. MLP Mgmt., LLC*, 842 F. Supp. 2d 1119, 1126 (S.D. Iowa 2012) ("Mutual assent is determined from objective evidence. When interpreting a settlement agreement the primary concern is to determine the intention of the parties; '[e]vidence of the parties' mutual intent is what matters.'") (internal citation omitted) (quoting *Peak v. Adams*, 799 N.W.2d 535, 544 (Iowa 2011)).

⁹⁸ *Maglin v. Tschannerl*, 800 A.2d 486, 487 (Vt. 2002).

⁹⁹ See *Bernstein v. Kapneck*, 430 A.2d 602, 607 (Md. 1981) ("[P]arole [sic] evidence ordinarily is inadmissible to vary, alter or contradict a contract, including a release, that is complete and unambiguous, in the absence of 'fraud, accident or mutual mistake.'") (quoting *McLain v. Pernell*, 258 A.2d 416, 418 (Md. 1969)); see generally Juanda Lowder Daniel, *K.I.S.S. the Parol Evidence Rule Goodbye: Simplifying the Concept of Protecting the Parties' Written Agreement*, 57 SYRACUSE L. REV. 227, 248 (2007) (discussing the rule and its exceptions). For a general discussion of the parol evidence rule, see MURRAY, *supra* note 2, §§ 83, 86, at 416, 442.

¹⁰⁰ *Eustis Mining Co. v. Beer, Sondheimer & Co., Inc.*, 239 F. 976, 982 (S.D.N.Y. 1917) ("[T]here is a critical breaking point . . . beyond which no language can be forced[.]").

¹⁰¹ See *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1010 (3d Cir. 1980) ("External indicia of the parties' intent other than written words are useful, and probably indispensable, in interpreting contract terms. If each judge simply applied his own linguistic background and experience to the words of a contract, contracting parties would live in a most uncertain environment."); see also E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939, 940-42 (1967) (describing how context gives words meaning).

¹⁰² See, e.g., *Mellon Bank, N.A.*, 619 F.2d at 1011 ("If a reasonable alternative interpretation is suggested, even though it may be alien to the judge's linguistic experience, objective evidence in support of that interpretation should be considered by the fact finder.") (citation

and require a finding of ambiguity within the document itself before considering evidence other than the writing.¹⁰³

A typical generic contract interpretation approach is presented in *Engineered Abrasives, Inc. v. American Machine Products and Service, Inc.*¹⁰⁴ In that case, the parties settled a matter in a commercial setting that included a release provision in which Engineered Abrasives agreed as follows:

[Engineered Abrasives] . . . hereby releases [American] . . . from any . . . claims, . . . liabilities, obligations, damages, costs, attorneys' fees, expenses, actions, and/or causes of action of every nature, . . . whether known or unknown, suspected or unsuspected, which it ever had, now has, or may hereafter claim to have by reason of any matter, . . . whatsoever arising or occurring prior to and including the date of the Agreement, including but not limited to the claims and defenses set forth in the Action.¹⁰⁵

As part of this settlement and in exchange for the release, Engineered Abrasives was to receive \$75,000, an injunction against slander by American Machine, and a \$250,000 liquidated damages provision supporting the injunction.¹⁰⁶ After the settlement, American Machine introduced the release in a separate trade secret matter in which Engineered Abrasives had obtained a \$714,814 default judgment against American Machine, claiming that the release applied to this earlier matter.¹⁰⁷

Engineered Abrasives claimed that the release did not apply to the trade secret matter, noting that the parties, in developing the settlement that included the release, did not discuss or refer to the trade secret matter and that the compensation given in exchange for the release was only approximately one-tenth

omitted); *see also* *Alyeska Pipeline Serv. Co. v. O'Kelley*, 645 P.2d 767, 771 n.1 (Alaska 1982) (rejecting approach that requires finding of ambiguity before extrinsic evidence can be considered to interpret).

¹⁰³ For example, in *Fackler v. Powell*, 891 N.E.2d 1091 (Ind. Ct. App. 2008), the court stated:

If the contract language is unambiguous and the intent of the parties is discernible from the written contract, the court is to give effect to the terms of the contract. A contract is ambiguous if a reasonable person would find the contract subject to more than one interpretation; however, the terms of a contract are not ambiguous merely because the parties disagree as to their interpretation. When the contract terms are clear and unambiguous, the terms are conclusive and we do not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions.

Id. at 1096 (internal citations omitted); *see also* *Washington v. Bd. of Educ. of Chi.*, No. 17 CV 2343, 2018 WL 558501, at *4 (N.D. Ill. Jan. 24, 2018), *appeal docketed*, No. 18-2626 (7th Cir. July 26, 2018) (noting that the meaning of the document and the intention of the parties is gathered from the document alone); *Bolling Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 475 A.2d 382, 385 (D.C. 1984) ("If the release is facially unambiguous, we must rely solely upon its language as providing the best objective manifestation of the parties' intent.").

¹⁰⁴ *Engineered Abrasives, Inc. v. Am. Mach. Prods. & Serv., Inc.*, 882 F.3d 650, 653 (7th Cir. 2018).

¹⁰⁵ *Id.* at 651–52.

¹⁰⁶ *Id.* at 651.

¹⁰⁷ *Id.* American Machine did so via Federal Rule of Civil Procedure 60(b). *Id.* at 652.

of the amount of the default judgment.¹⁰⁸ The court, applying Illinois law, affirmed the lower court's finding that the release unambiguously applied to the trade secret matter.¹⁰⁹ Because the writing was unambiguous, the court refused to consider evidence extrinsic to the writing, stating that "[c]ourts look to the language of the settlement agreement to determine the parties' intent unless the agreement is ambiguous."¹¹⁰ The court noted the significant discrepancy between the \$75,000 settlement amount and the \$714,814 default judgment, but stated that, because the document was not ambiguous, the parties' reasoning in settling for so little was "outside the scope of a court's inquiry."¹¹¹

If a court applies traditional contract principles to the situation of personal injury releases, it is likely the court will determine that the releasor, by signing the release, agrees to release the other party regarding all injuries, even those unknown at the time of the signing of the release. The injured party takes on the risk of unknown injury in exchange for compensation and the extinguishment of the risk of receiving no compensation or less compensation later.¹¹²

The language of the typical personal injury release is not unduly complex, nor is the entire transaction itself complex.¹¹³ The release document is typically not lengthy—only a page or two pages.¹¹⁴ While the releasee often controls language of the release, the releasor commonly negotiates the compensation with the releasee or the releasee's representative.¹¹⁵ The injured party presents evidence of the injury that he or she claims resulted from the actions of the other party and the releasor and releasee or the releasee's agent negotiate an ap-

¹⁰⁸ *Id.* at 652.

¹⁰⁹ *Id.* at 654–55.

¹¹⁰ *Id.* at 653.

¹¹¹ *Id.* at 654–55. Note that Illinois courts treat personal injury releases very differently. See discussion *infra* Section V.B. For another example of a typical approach, see *Goldberg v. Goldberg*, 428 A.2d 469, 474–75 (Md. 1981) (“[W]here a contract is plain and unambiguous, there is no room for construction, and it must be presumed that the parties meant what they expressed.”) (quoting *Kasten Constr., v. Rod Enters., Inc.*, 301 A.2d 12, 18 (Md. 1973)).

¹¹² See *Hicks v. Sparks*, No. 522, 2013, 2014 WL 1233698, at *2 (Del. Mar. 25, 2014) (“A release is a device by which parties seek to control the risk of the potential outcomes of litigation. Releases are executed to resolve the claims the parties know about as well as those that are unknown or uncertain. Because litigation is inherently risky, a general release avoids the uncertainty, expenses, and delay of a potential trial.”).

¹¹³ See the following sample releases: *Full Release of All Claims with Indemnity*, *supra* note 44; *Parents/Guardian Release and Indemnity Agreement*, *supra* note 44; *Release and Settlement of Claim*, *supra* note 44; *Release in Full of All Claims*, *supra* note 44; and *Release of All Claims*, *supra* note 44.

¹¹⁴ All of the sample releases referenced in *supra* note 113 are one page with the exception of one which is two pages.

¹¹⁵ See, e.g., *Hicks*, 2014 WL 1233698, at *1 (explaining the releasee initially offered Hicks \$2000; Hicks countered with \$7000; the releasee then offered \$2500; Hicks countered with \$5000; the releasee then offered \$3000; Hicks reiterated a demand of \$5000; the releasee then offered \$4000 which Hicks accepted); *Witt v. Watkins*, 579 P.2d 1065, 1067 (Alaska 1978) (noting release was signed five months after automobile collision and after negotiation of amount).

appropriate amount without undue haste.¹¹⁶ The releasor then, often after consultation with an attorney, signs the release.¹¹⁷ The releasor seeks money in the short term without further expense or delay while the releasee seeks to end the matter efficiently.¹¹⁸ In this situation, it is a difficult argument to assert that the proper interpretation of the words of the writing is that the risk of unknown injury is *not* given to the releasor.¹¹⁹

D. Traditional Application of the Unilateral Mistake Doctrine to the Typical Personal Injury Release Situation

An injured party claiming unilateral mistake avoids the hurdle of proving that the mistake is shared, but encounters the similarly difficult hurdle of proving “a belief that is not in accord with the facts.”¹²⁰ Likewise, an injured party claiming unilateral mistake would likely bear the risk of the mistake as the result of being consciously ignorant.¹²¹ As is true with a claim of mutual mistake, it is also very likely that the release puts the risk of the mistake on the injured party and thus renders the party unable to use the unilateral mistake doctrine.¹²²

In addition, the unilateral mistake doctrine, at least under the Restatement formulation, adds to the injured party’s burden by requiring that the mistake be caused by the other party, or that the other party have reason to know of the injured party’s mistake or that enforcement of the release would be unconscionable.¹²³ Unlike the stand-alone unconscionability doctrine which focuses on un-

¹¹⁶ In *Hicks*, the automobile collision occurred in March and the release of the adverse party’s liability was signed in October. Hicks was treated by a physician and presented her injuries to the representative of the releasee. The releasee initially offered Hicks \$2000. Hicks countered with \$7000. The releasee then offered \$2500. Hicks countered with \$5000. The releasee then offered \$3000. Hicks reiterated a demand of \$5000. The releasee then offered \$4000 which Hicks accepted. *Hicks*, 2014 WL 1233698, at *1; *see also Witt*, 579 P.2d at 1066–67 (release signed five months after automobile collision and after negotiation; information about injury gained from treating physicians).

¹¹⁷ *See, e.g., Hicks*, 2014 WL 1233698, at *1 (explaining Hicks consulted two attorneys who advised to wait at least a year); *Simmons v. Blauw*, 635 N.E.2d 601, 603 (Ill. App. Ct. 1994) (noting attorney negotiated on plaintiff’s behalf).

¹¹⁸ *See generally Dobbs, supra* note 32, at 665–66 (discussing the benefits of settlement in general).

¹¹⁹ Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 623 (1944) (“The more bizarre and unusual an asserted interpretation is, the more convincing must be the testimony that supports it. At what point the court should cease listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense.”).

¹²⁰ *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 151, 153 cmt. a, b (AM. LAW INST. 1981); *see also* discussion *supra* Part III and Section IV.A.

¹²¹ *See* RESTATEMENT (SECOND) OF CONTRACTS § 154(b); *see also* discussion *supra* Part III and Section IV.B.

¹²² *See* RESTATEMENT (SECOND) OF CONTRACTS § 154(a); *see also* discussion *supra* Part III and Section IV.C.

¹²³ *See* RESTATEMENT (SECOND) OF CONTRACTS § 153; *see also* discussion *supra* Part III.

conscionability at the time of the formation of the release,¹²⁴ the focus of the unilateral mistake doctrine unconscionability analysis is the possible unconscionable effect of enforcing the document.¹²⁵ Injured parties, assuming they could prove mistake, might make a colorable claim that the effect of the release is unconscionable by presenting evidence that the injured party gave the release in exchange for a very small compensation in light of the ultimately discovered injuries of the releasor.¹²⁶

E. Conclusions about Traditional Application of the Mistake Doctrine

If a court applies traditional contract doctrine, an injured party cannot often succeed in having a release rescinded. For both doctrines, the situation does not present a recognizable mistake, but instead presents a mistake in prediction or speculation. For mutual mistake, there is the added problem of the mistake not being shared. And with regard to both doctrines, the releasor has the risk of unknown injury as a result of conscious ignorance and the language of the release itself. That language is usually clear and does not lend itself to an interpretation other than that the injured party releasor takes the risk that there are injuries or consequences that the releasor does not fully perceive or understand.

V. COURTS' TREATMENT OF PERSONAL INJURY RELEASES

Courts struggle with applying mistake doctrine to personal injury releases in the situation of later claimed injuries. Courts have a difficult time determining whether the injured party was mistaken about a fact at the time of contracting or, rather, simply speculating about the future, consciously ignorant of the true physical state of his or her body.¹²⁷ Not only is the existence of a mistake a sticky wicket, the issue of the mutuality of the mistake is one not often addressed by the courts, although it is a requirement of the mutual mistake doctrine.¹²⁸ Courts also struggle with the language of the release in terms of mistake doctrine and traditional written contract treatment.¹²⁹

¹²⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 208; see also discussion *infra* Section VII.C.

¹²⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 153 (“the effect of the mistake is such that enforcement of the contract would be unconscionable”).

¹²⁶ See, e.g., *Schmidt v. Smith*, 216 N.W.2d 669, 670–71 (Minn. 1974) (explaining the injured party settled for \$2,100 but later sued for \$95,000 claiming that she released the releasee when she thought she suffered from muscular strain but later had disc removal and spinal fusion surgery as a result of cervical disc syndrome); see also *LaFleur v. C.C. Pierce Co.*, 496 N.E.2d 827, 829 (Mass. 1986) (describing that in a matter arising from a workplace injury, the injured party signed a release in exchange for \$4,000 thinking he had a toe injury; he sued to set aside the release after he had both legs amputated above the knee as a consequence of the accident).

¹²⁷ See discussion *supra* Sections IV.A, IV.B; see also *infra* Sections V.A, V.B.

¹²⁸ See, e.g., *Ranta v. Rake*, 421 P.2d 747, 753 (Idaho 1966) (explaining that the lower court dismissed but the appellate court reversed on the basis of the releasor’s intent only). Occasionally, courts do address whether the other party to the release was mistaken. See, e.g.,

A. Mistake Doctrine Applies with an Unknown Injury But Not with an Unknown Consequence of a Known Injury

Because mistake doctrine requires that the mistake be one of fact existing at the time of the signing of the release, some courts state that the mistake doctrine can apply to a situation in which the injured party is not aware of the injury at the time of the release.¹³⁰ If, however, the injured party is aware of the injury but not its consequences, there is no mistake because the injury existed and was known at the time of the release.¹³¹ The contract mistake doctrine can apply to a mistake of diagnosis but not one of prognosis.¹³²

For example, in *Mangini v. McClurg* the injured party, resisting enforcement of the release she had executed, claimed that at the time of the signing of the release her hip injury was unknown.¹³³ No doctor had identified the hip injury, though she was experiencing pain in the hip.¹³⁴ Examining physicians believed the hip pain to be related to a back strain and a hematoma with no lasting consequences.¹³⁵ The New York court stated the test as follows:

A mistaken belief as to the nonexistence of presently existing injury is a prerequisite to avoidance of a release If the injury is known, and the mistake, it has been said, is merely as to the consequence, future course, or sequelae of a known injury, then the release will stand.¹³⁶

In effect, with this analysis, if a releasor knows of an injury and releases the other party, the releasor has assumed the risk of further consequences of that injury. No claim of mistake is therefore possible.¹³⁷

Boccarossa v. Watkins, 313 A.2d 135, 137 (R.I. 1973) (finding releasee did not share the mistake); *Beaver v. Estate of Harris*, 409 P.2d 143, 148 (Wash. 1965) (determining releasee did not share the mistake).

¹²⁹ See discussion *supra* Section IV.C and *infra* Sections V.C., V.D.

¹³⁰ See, e.g., *Mangini v. McClurg*, 249 N.E.2d 386, 391 (N.Y. 1969).

¹³¹ *Id.*

¹³² The court in *La Fleur v. C.C. Pierce Co.*, 496 N.E.2d 827 (Mass. 1986), noted:

[T]he great weight of authority in other jurisdictions supports the view that a release of claims for personal injuries may be avoided on the ground of mutual mistake if the parties at the time of signing the agreement were mistaken as to the existence of an injury, as opposed to the unknown consequences of known injuries.

Id. at 831. The *LaFleur* court adopted that approach in finding that there was evidence that the injured party had an unknown injury since the earlier diagnosis was a toe injury and the later issue was a circulatory problem resulting in leg amputation. *Id.* at 832; see also *Oliver v. Clark*, 537 N.W.2d 635, 640–41 (Neb. 1995) (“Oliver, to avoid the release in this case, must demonstrate that his present condition is not the result of the development of an injury known at the execution of the release, but is an injury that was wholly unknown at the release’s signing.”); *Nevue v. Close*, 867 P.2d 635, 636–37 (Wash. 1994) (applying this approach).

¹³³ *Mangini*, 249 N.E.2d at 388.

¹³⁴ *Id.*

¹³⁵ *Id.* at 389.

¹³⁶ *Id.* at 391.

¹³⁷ See, e.g., *Hicks v. Sparks*, No. 522, 2013, 2014 WL 1233698, at *3 (Del. Mar. 25, 2014) (“Hicks assumed the risk of mistake when she signed the Release without obtaining a more

The *Mangini* court, in reviewing the matter before it, opined that the injured party had put forth sufficient evidence to survive the other party's motion for summary judgment on the issue of mistake.¹³⁸ Though the injured party was aware of pain in her hip area, no hip injury had been contemplated at the time of the signing of the release.¹³⁹ Thus, the hip injury was unknown at the signing of the release.¹⁴⁰

As the facts of this case illustrate, this analysis requires courts to delve into the high weeds of the injuries. The *Mangini* court acknowledged the difficulty of applying the test stating, "The distinction, a well-established one, is more easily expressed than applied in practice, and as a result the cases, it will be seen, do not classify perfectly."¹⁴¹ Indeed, such an analysis seems ill-suited for judges who are trained in the art of words, not medicine. It leads to bizarre situations in which courts must decide issues such as whether a completely severed nerve is a new and different injury than a partially severed nerve when the nerve being considered is the same,¹⁴² or whether an injured party's knowledge of a neck injury means that the herniated disc diagnosis later revealed to the injured party is not a new, previously unknown injury.¹⁴³ Addressing the difficulty of the test, the Michigan Supreme Court in *Denton v. Utley* stated: "Yet we may well ask, as a practical matter (as distinguished from a verbal technique) is it possible to completely divorce diagnosis from prognosis? Is there not an interrelation, even if not an interdependence?"¹⁴⁴

thorough medical examination to fully discover the extent of her injuries related to her neck pain.").

¹³⁸ *Mangini*, 249 N.E.2d at 393.

¹³⁹ *See id.* at 391.

¹⁴⁰ *Id.* The court then determined that the injured party had also presented evidence to survive the other party's motion for summary judgment on the issue of whether the injured party had taken the risk of injuries unknown at the time of the signing of the release. *See id.* at 393.

¹⁴¹ *Id.* at 391.

¹⁴² In *Gibli v. Kadosh*, 717 N.Y.S.2d 553, 556 (N.Y. App. Div. 2000), the injury was diagnosed as an injury to an intact nerve but was eventually discovered to be a permanent injury, a completely severed nerve. Reversing a grant of summary judgment for the releasee, the court stated that "[t]he nature of the presumed injury is so different from that of the actual injury, it is not merely a matter of degree or severity (greater pain or for a longer period). Although the parties knew the *location* of the damage, they misunderstood the *nature* of the damage." *Id.*

¹⁴³ In *Bronson v. Hansel*, 913 N.Y.S.2d 851, 852 (N.Y. App. Div. 2010), the injured party knew she had a neck injury but did not know that the injury was a herniated disc. The court refused to find that the herniated disc was "as a practical or medical matter, . . . distinguishable from unanticipated consequences of [the] known injury." *Id.* (quoting *Mangini*, 249 N.E.2d at 393). See also *Cardovez v. High-Rise Installation, Inc.*, 46 So. 3d 1120, 1121 (Fla. Dist. Ct. App. 2010), in which the injured party knew he had a head injury at the time of the signing of the release but claimed that he did not know of a later discovered carotid cavernous fistula. The court determined that the fistula was an unknown manifestation of a known injury and therefore not a recognizable for relief. *Id.* at 1123.

¹⁴⁴ *Denton v. Utley*, 86 N.W.2d 537, 540 (Mich. 1957); see also *Tulsa City Lines, Inc. v. Mains*, 107 F.2d 377, 381 (10th Cir. 1939) ("In cases of this kind it is sometimes difficult, if

Note that once a court using this analysis decides that there is or may be a recognizable mistake, the court must then face the issue of the value to bestow on the release that may allocate the risk of that unknown injury.¹⁴⁵

B. Mistake about the Nature or Extent of the Injury Coupled with an Unconscionable Result

In contrast, Illinois courts recognize a mistake for purposes of the mistake doctrine even if the claimed mistake relates to the extent of a known injury.¹⁴⁶ These courts, acknowledging that the approach applies only to releases dealing with personal injuries,¹⁴⁷ also require the party seeking to have the release set aside to prove that the effect of enforcement of the release would be unconscionable given the facts eventually known about the injury.¹⁴⁸

not impossible, to draw a distinct line of separation between mistakes relating to present and future facts.”) In *Gleason v. Guzman*, 623 P.2d 378, 379–80 (Colo. 1981), the court, in ruling that summary judgment was inappropriate where the injured party suffered a head injury known at the time of the release but later suffered a seizure disorder, stated:

Admittedly, line-drawing here is difficult and its direction may well vary with the thrust of evidence. These basic components of knowledge, however, relate primarily to a comprehension of the basic character of the injury as distinct from a prediction or opinion about the future course of recovery when its basic nature is otherwise known.

Id. at 385. In *Coomer v. Phelps*, 172 S.W.3d 389, 391 (Ky. 2005), the court rejected the distinction between injury and consequence for purposes of mistake doctrine. The court stated that the distinction was a “distinction without a difference.” *Id.*

¹⁴⁵ The injured party must prove a legally cognizable mistake and must also prove that the risk of that mistake does not lie with the injured party. See RESTATEMENT (SECOND) OF CONTRACTS §§ 152, 154 (AM. LAW INST. 1981); see also discussion *supra* Part IV.

¹⁴⁶ See, e.g., *Simmons v. Blauw*, 635 N.E.2d 601, 604 (Ill. App. Ct. 1994) (“A unilateral or self-induced mistake as to the nature and extent of the plaintiff’s injuries is insufficient to void a clear and unambiguous release, and the mistake of fact must be mutual, material to the transaction, and affect its substance”) (citation omitted); *Newborn v. Hood*, 408 N.E.2d 474, 476 (Ill. App. Ct. 1980) (“Numerous cases have considered the extent and nature of the injury as eventually manifested in determining conscionability and mutual mistake”) (citation omitted). Courts of other jurisdictions may use a similar standard. See, e.g., *Taylor v. Liberty Mut. Ins. Co.*, No. 01-A-01-9210-CV00420, 1994 WL 24311, at *3 (Tenn. Ct. App. Jan. 26, 1994) (“Accordingly, both the Supreme Court and this court have declined to enforce general releases of insurance claims when the parties have been mutually mistaken concerning the nature or seriousness of the claimant’s injuries.”).

¹⁴⁷ See, e.g., *Simmons*, 635 N.E.2d at 604 (“[C]ases which have determined the validity of releases based on a mistake of fact with respect to the nature and extent of the plaintiff’s injuries have been treated *sui generis*, and the rules governing releases from liability for non-personal injury torts or breaches of contracts do not apply.”).

¹⁴⁸ In *Newborn*, the court stated:

The modern trend is to set aside releases of personal injury claims in situations where the facts, when finally known, present an unconscionable result because of the equitable principle of doing justice under the circumstances of each case. . . . Thus, it is clear that all the facts, including those which become known after the release has been executed, must be considered in determining whether there was a mutual mistake of fact and whether or not the settlement is unconscionable.

Newborn, 408 N.E.2d at 476 (quoting *Scherer v. Ravenswood Hosp. Med. Ctr.*, 388 N.E.2d 1268, 1271 (Ill. Ct. App. 1979)).

In *Simmons v. Blauw*, the injured party claimed that when she signed the release in exchange for compensation of \$5,082, she thought that she had suffered a muscular strain in her back as a result of an automobile collision.¹⁴⁹ She later discovered that she had suffered a herniated disc requiring surgery costing \$15,000 and was not able to work.¹⁵⁰ The injured party, with the benefit of advice of counsel, had released the releasee from all claims for “all injuries, known and unknown, . . . which [had] resulted or may in the future develop from [the] accident.”¹⁵¹ The court stated that in determining whether the releasor had a cognizable mistake, the court should consider the following: “[W]hether (1) the parties believed the plaintiff had recovered at the time of the release, (2) the condition was one which ordinary x-rays and customary examination did not reveal, and (3) the evidence justified the conclusion that the plaintiff acted with reasonable diligence in ascertaining the extent of injury.”¹⁵²

The court concluded that the evidence showed only that the releasor, not the released party, may have labored under a mistake.¹⁵³ In addition, the court concluded that the effect of enforcing the release was not unconscionable.¹⁵⁴

In contrast, the court reached the opposite result in *Newborn v. Hood*.¹⁵⁵ In *Newborn*, the injured party was treated for injuries resulting from an automobile collision.¹⁵⁶ After signing the release with the benefit of advice of counsel, in exchange for compensation, the releasor suffered congestive heart failure related to the accident and incurred expenses exceeding the settlement amount.¹⁵⁷ The court found mutual mistake and, focusing on the monetary effect alone, determined that enforcing the release would have an unconscionable result.¹⁵⁸

C. Special Scrutiny of the Written Release as Part of the Mistake Analysis

Some courts begin the discussion with the mistake doctrine but detour to an analysis of what the injured party intended to release. For example, in *Witt v.*

This unconscionability analysis is in contrast to the analysis under unconscionability doctrine itself. That doctrine requires that the determination of unconscionability occur at the time the contract is formed. See discussion *infra* Section VII.C. Some courts accept claims of mistake relating to the nature or extent of the injury and do not couple the analysis with an inquiry into the unconscionability of the result. See, e.g., *Taylor*, 1994 WL 24311, at *3.

¹⁴⁹ *Simmons*, 635 N.E.2d at 602.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 604.

¹⁵² *Id.*

¹⁵³ *Id.* (“Aside from conclusory assertions in the affidavit of plaintiff’s attorney, there is no evidence that defendant or the representative of his insurer believed that plaintiff would not suffer further injuries as a result of the accident.”).

¹⁵⁴ *Id.* at 605 (“[T]he amount of the settlement was not unconscionable.”).

¹⁵⁵ *Newborn v. Hood*, 408 N.E.2d 474, 476 (Ill. App. Ct. 1980).

¹⁵⁶ *Id.* at 475.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 476 (“[T]here was a mutual mistake . . . there is a disparity of over \$7,000 . . . a settlement . . . would be unconscionable.”).

Watkins, the Alaska Supreme Court shifted its focus away from determining whether there might be a mutual mistake or a disfavored unilateral mistake,¹⁵⁹ and away from any analysis involving a discernment of mistake as to injury as opposed to mistake as to unknown effect of known injury.¹⁶⁰ The court stated:

Niceties of distinction between the extent of a known injury or a difference in the character of the injury should not be determinative. In either event, the decision as to whether the release is enforceable should hinge on whether the releasor, at the time of signing the release, intended to discharge the disability which was subsequently discovered.¹⁶¹

The court then directed consideration of factors such as:

1. “the manner in which the release was obtained—including whether it was hastily secured at the instigation of the releasee;”
2. “whether the releasor was at a disadvantage because of the nature of his injuries;”
3. “whether the releasor was represented by counsel;”
4. “whether [the releasor] relied on representations of the releasee or a physician retained by the releasee”;
5. “whether liability was seriously in dispute”;
6. “[t]he relative bargaining positions of the parties”;
7. “the amount to be paid”¹⁶²

In *Witt*, the releasor initially was treated for bruised ribs as a result of an automobile collision.¹⁶³ He continued to have pain in his back, which was diagnosed as related to a bladder problem probably unrelated to the accident.¹⁶⁴ After settling the matter for \$3,000 with the benefit of counsel, the releasor discovered he had suffered two broken vertebrae, probably as a result of the accident.¹⁶⁵ In refusing to grant summary judgment for the releasee, the court noted that there was no evidence of wrongdoing on the part of the releasee, that

¹⁵⁹ *Witt v. Watkins*, 579 P.2d 1065, 1068 (Alaska 1978) (“[T]he preservation of agreements entered into in good faith and the encouragement of settlement of disputes” are interests that “may still be preserved without adhering to rigid formulas dependent upon whether mistakes are unilateral or mutual.”).

¹⁶⁰ *Id.* at 1069 (“[W]e deliberately have not preserved the additional artificial distinction between cases involving a known injury which proves to be much more serious than believed, and an injury different in type from that originally known.”).

¹⁶¹ *Id.*

¹⁶² *Id.* at 1070. In *Casey v. Proctor*, 378 P.2d 579, 588–89 (Cal. 1963) (en banc), the court noted the following factors to consider when deciding whether a release was knowingly made and bars an action for later discovered personal injuries: (1) “the amount of consideration received compared with the risk of the existence of unknown injuries”; (2) “the presence of bargaining and negotiation leading to the settlement”; (3) “the closeness of the issue of liability”; (4) “whether the subject of personal injuries was discussed”; and (5) “the reasonableness of the contention that the injuries were in fact unknown at the time the release was executed.”

¹⁶³ *Witt*, 579 P.2d at 1066.

¹⁶⁴ *Id.* at 1067.

¹⁶⁵ *Id.*

the releasor had enjoyed the assistance of counsel, and that the release was not the product of haste and was not induced by the releasee or his agents.¹⁶⁶ Yet, the court concluded that because the releasor had no knowledge at the time of entering into the release that he suffered from two broken vertebrae, “A question is presented as to whether the fractured vertebrae caused any increased disability, and particularly, as to whether such disability, if any, was of a type substantially different from the possibilities of disability considered by Witt at the time he signed the release.”¹⁶⁷

This approach deviates significantly from traditional mistake doctrine and traditional views of the value of a written agreement.¹⁶⁸ The court appears to be applying an analysis of the injured party’s subjective intent without giving much if any weight to the release itself. The analysis seems unmoored from the language of the document entirely. In effect, this approach appears to be a substantive fairness analysis—at least in part.¹⁶⁹

D. Special Scrutiny of the Written Release When the Releasor Acts with an Otherwise Cognizable Mistake

New York courts look first for a cognizable mistake for purposes of the mistake doctrine and do so using the unknown injury/unknown consequence distinction.¹⁷⁰ Once a court finds a cognizable mistake, the court must then deal with the language of the release.¹⁷¹ According to courts in New York, a release typically stating that the releasor releases the other party with regard to all injuries, known and unknown¹⁷² must be “fairly and knowingly made.”¹⁷³ As the court in *Mangini v. McClurg* noted, however, if it is apparent from the language of the release and the surrounding circumstances that the releasor released the

¹⁶⁶ *Id.* at 1070.

¹⁶⁷ *Id.*

¹⁶⁸ See discussion *supra* Section IV.C.

¹⁶⁹ See *Gleason v. Guzman*, 623 P.2d 378, 387 (Colo. 1981), in which the court found summary judgment improper for an injured party’s claims though the injured party’s guardian had entered into the settlement and signed the release two years after the injury and with the assistance of counsel. There had been negotiation and the probate court approved the release. *Id.* at 380; see discussion of traditional doctrine *supra* Section IV.C.

¹⁷⁰ See discussion *supra* Section V.A.; see also *Mangini v. McClurg*, 249 N.E.2d 386, 391 (N.Y. 1969).

¹⁷¹ See, e.g., *Mangini*, 249 N.E.2d at 390 (“[T]he traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake, must be established or else the release stands.”).

¹⁷² See releases quoted and discussed *supra* Part I.

¹⁷³ See, e.g., *Mangini*, 249 N.E.2d at 392 (quoting *Farrington v. Harlem Sav. Bank*, 19 N.E.2d 657, 657 (N.Y. 1939)); see also *Ford v. Phillips*, 994 N.Y.S.2d 688, 690 (N.Y. App. Div. 2014). Washington follows a similar approach. See *Del Rosario v. Del Rosario*, 97 P.3d 11, 14 (Wash. 2004) (en banc) (“A release may be avoided if (1) there is an unknown or latent injury discovered after the release was executed and (2) the plaintiff proves the release was not fairly and knowingly made.”) (citation omitted); *Finch v. Carlton*, 524 P.2d 898, 901 (Wash. 1974) (en banc) (finding the same).

other party from all liability even for unknown injuries, so be it.¹⁷⁴ Indeed, the court noted that a circumstance such as this was very likely:

It requires particular emphasis that, more often than not, the releasors in personal injury cases are willing to settle for relatively small sums or sums that do not discount injuries unknown at the time because of the doubtful liability of the releasee, even when ordinary caution would suggest awaiting the development of unknown injuries or consequences. When that is the inducement it would be false reasoning to assume that the amount of the settlement or the precipitousness of effecting the settlement is corroborative of a mutual mistake.¹⁷⁵

While more bounded than the approach used in the *Witt* case, this approach also is, at least in part, a substantive fairness analysis. Because the approach also focuses on whether the release was knowingly made, there also appears to be a focus on whether in fact the release was formed as a result of proper process.

E. *Applying Traditional Doctrine in the Traditional Way*

Some courts have refused to set aside releases on the basis of a claim of mistake relating to the injuries suffered.¹⁷⁶ In *Bernstein v. Kapneck*, the Maryland court, writing in the early 1980s, reviewed the treatment personal injury releases had received across the United States historically and refused to set aside the release before it.¹⁷⁷ In *Bernstein* a child suffered injuries as a result of an automobile collision.¹⁷⁸ Approximately three years after the collision and after consulting with counsel, the child's mother entered into a release in exchange for \$7,500.¹⁷⁹ After the settlement the child began exhibiting a seizure

¹⁷⁴ *Mangini*, 249 N.E.2d at 391 (holding that a release must be enforced if the language of the release or circumstances show "a conscious and deliberate intention to discharge liability").

¹⁷⁵ *Id.*

¹⁷⁶ *See, e.g., Coomer v. Phelps*, 172 S.W.3d 389, 391–92 (Ky. 2005). The *Coomer* court reaffirmed the rule of the jurisdiction set out in *Trevathan v. Tesseneer*, 519 S.W.2d 614 (Ky. 1975), that a lack of knowledge or understanding about injuries at the time of the signing of a release is not a recognizable mistake for purposes of setting aside the release. The court stated:

To retreat from this rule would cast great doubt on the finality of releases in this state and unnecessarily complicate settlement considerations. As the Court noted in *Trevathan*, "[t]his rule favors the orderly settlement of disputes and avoids multiplicity of suits and the chaos which would result if the releases were not treated seriously by the courts." We see no need to retreat from this rule, thus we expressly reaffirm the holding of *Trevathan*.

Coomer, 172 S.W.3d at 391 (alteration in original) (citations omitted) (quoting *Trevathan v. Tesseneer*, 519 S.W.2d 614, 616 (Ky. 1975)); *see also* *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1460 (9th Cir. 1988) (applying Guam law); *Bernstein v. Kapneck*, 430 A.2d 602, 605 (Md. 1981); *Raymond v. Feldmann*, 853 P.2d 297, 299 (Or. Ct. App. 1993) (en banc); *Leyda v. Norelli*, 564 A.2d 244, 245 (Pa. Super. Ct. 1989); *Kendrick v. Barker*, 15 P.3d 734, 741 (Wyo. 2001).

¹⁷⁷ *Bernstein*, 430 A.2d at 605.

¹⁷⁸ *Id.* at 603 (describing that the child had a facial laceration, chip fractures of the nasal bones, a fracture of a shoulder, and traumatic neurosis).

¹⁷⁹ *Id.* The release stated in part:

disorder related to the collision.¹⁸⁰ The mother sought to have the release set aside.¹⁸¹ Thus, the court was faced with a very compelling case in terms of compassion.

But the *Bernstein* court took a different route, noting that many courts have been motivated by compassion for the insured to set aside “long established and well understood rules of contract law, which . . . normally apply to releases.”¹⁸² The court acknowledged that some courts may be motivated by a desire to prevent an injured party from becoming a public charge.¹⁸³ The court also noted the competing policies of encouraging compromise, of honoring the freedom of contract, and of applying traditional contract rules.¹⁸⁴

With regard to findings of mistake by other courts, the *Bernstein* court noted that the courts reach their results by “an utterly inappropriate application of the mutual mistake of fact doctrine to factual circumstances which not only do not present a mutual misconception of basic fact, but often do not appear to involve a mistake by even one party.”¹⁸⁵ The court did not believe that “violence to the human body presents a unique situation” that would validate “the bastardization of the well-founded principles concerning mutual mistake of fact.”¹⁸⁶

With regard to interpretation, the court stated: “[W]e are convinced that our society will be best served by adherence to the traditional methodology for interpreting contracts in general, including other species of releases.”¹⁸⁷ In criticizing the approach taken by other courts, the *Bernstein* court stated:

This approach often overlooks or avoids the words used by the parties to express their agreement and in its place substitutes undefined conjecture as to what the releasor would have intended if the full extent of the injuries had been known at the time of the compact. Thus, these courts depart from the otherwise settled rules of construction which, for the most part, have operated satisfactorily for

For the sole consideration of Seven Thousand Five Hundred Dollars . . . Helen M. Bernstein, individually and as parent and natural guardian of Irene Schulman, a minor, hereby releases and forever discharges Barbara Sue Sussman . . . and all other persons, firms or corporations liable for or who might claim to be liable, . . . from any and all claims, demands, damages, actions, causes of action, or suits of whatsoever kind or nature, and particularly on account of loss or damage to the property and on account of bodily injuries, known and unknown, and which have resulted or may in the future develop, sustained . . . in consequence of an accident involving the automobile accident occurring on or about July 25, 1975.

Id. at 604 (emphasis omitted).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 605 (citation omitted).

¹⁸³ *Id.* at 606. The *Bernstein* court criticizes other courts for not “openly balancing these policies” in reaching their conclusion in favor of the injured party. *Id.* at 607.

¹⁸⁴ *Id.* at 606.

¹⁸⁵ *Id.* at 607.

¹⁸⁶ *Id.* at 607–08.

¹⁸⁷ *Id.* at 606.

centuries, in order to dispose of particularly distressing cases in a compassionate and seemingly just manner.¹⁸⁸

Finally, the *Bernstein* court turned to the release before it, which released all claims relating to “bodily injuries, known and unknown.”¹⁸⁹ The court concluded that “[i]t would require turning the English language on its head to conclude that, from these words used, the releasors did not by this document exhibit a clear desire to extinguish the claim for the damages they now seek.”¹⁹⁰

Similarly, in *Morta v. Korea Insurance Corporation*, the court reached the issue of the value to be given to the writing.¹⁹¹ In *Morta*, a party injured in an automobile collision, after consulting with counsel, signed a release in exchange for compensation.¹⁹² Later, the injured party claimed that the release was the product of fraud, undue influence, or mistake in that he did not read the release and did not understand that it applied to injuries of which he was not aware.¹⁹³ The federal court, applying Guam law, found no evidence of fraud or undue influence.¹⁹⁴ In addition, the court found no mistake because the injured party had the opportunity to read the release and have it explained to him by his counsel.¹⁹⁵

Addressing the claim that the release should not be read to apply to unknown injuries, the *Morta* court noted that the release was unambiguous and, by its terms, the injured party released the other party from all claims “growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries and property damage” arising from the incident relating to the injuries.¹⁹⁶ The injured party argued that the release should not be held to release unknown claims unless evidence extrinsic to the writing supported that interpretation.¹⁹⁷ The court refused to adopt such an approach, choosing to rely on the writing, the release, and not on evidence extrinsic to that writing,¹⁹⁸ noting that “it is exceedingly difficulty [sic] to know what parties *really* thought

¹⁸⁸ *Id.* at 607.

¹⁸⁹ *Id.* at 604; *see supra* note 179 for the release language.

¹⁹⁰ *Bernstein*, 430 A.2d at 609.

¹⁹¹ *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1455 (9th Cir. 1988) (applying Guam law).

¹⁹² *Id.* at 1454–55.

¹⁹³ *Id.* at 1455, 1457–58. The injured party claimed that he was not aware of a blood clot in his brain that necessitated surgery. *Id.* at 1455, 1458.

¹⁹⁴ *Id.* at 1456–57.

¹⁹⁵ *Id.* at 1458.

¹⁹⁶ *Id.* at 1458 n.7.

¹⁹⁷ *Id.* at 1459.

¹⁹⁸ *Id.* The *Morta* court stated:

Written instruments, fixing the parties’ rights and responsibilities by mutual consent, bring an important measure of order to life and greatly facilitate the adjudicatory process. While interpreting contract language is not always easy, sticking to the words the parties actually used limits substantially the bounds of legitimate disagreement. This objective rule thus “favors the orderly settlement of disputes and avoids multiplicity of suits and the chaos which would result if the releases were not treated seriously by the courts.”

Id. (quoting *Trevathan v. Tesseneer*, 519 S.W.2d 614, 616 (Ky. 1975)).

many years back and virtually impossible to divine what they *would* have thought had they but known something they did not.”¹⁹⁹

VI. THE POLICIES AT PLAY

Why is it that some courts treat claims of mistake regarding personal injury releases differently? What is the basis for reforming the mistake doctrine so that a claim of mistake in a personal injury release setting is cognizable, or for short-circuiting established agreement interpretation canons? 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.

A. *Freedom of Contract Should Be Honored*

Courts enforce contracts unless there is a very good reason not to do so.²⁰⁰ There is a long-recognized understanding that keeping and enforcing promises has a moral dimension as well as a utilitarian one.²⁰¹ Our system of economic ordering depends on individual actors being able to enter into agreements with regard to the future and have some degree of confidence that those agreements will be enforced.²⁰² The parties’ expectations are honored and the transactional world enjoys stability. Enforcing contracts and therefore honoring freedom of contract also touches upon respect for the autonomy of each individual actor in that individuals contract as they see fit and the courts honor each individual’s choice. Thus, each actor has the right and power to contract as he or she chooses and courts honor that choice without second-guessing. This exercise of individual choice in contracting and the respect given that choice by courts’ enforcement of contracts is a facet of liberty.²⁰³ As the United States Supreme

¹⁹⁹ *Id.* at 1460; *see also* Raymond v. Feldmann, 853 P.2d 297, 299 (Or. Ct. App. 1993) (en banc) (noting mutual mistake is not a basis for setting aside a personal injury release).

²⁰⁰ *See* Diamond Match Co. v. Roeber, 13 N.E. 419, 422 (N.Y. 1887) (“[P]ublic policy and the interests of society favor the utmost freedom of contract, within the law . . .”).

²⁰¹ *See* MURRAY, *supra* note 2, § 1, at 2 (“Historically and philosophically, the most fundamental concept of contract is that promises ought to be kept.”).

²⁰² *See* EV3, Inc. v. Lesh, 114 A.3d 527, 529 n.3 (Del. 2014) (“Delaware courts seek to ensure freedom of contract and promote clarity in the law in order to facilitate commerce.”) (citation omitted); *see also* MURRAY, *supra* note 2, § 6, at 15 (“By facilitating future exchanges, the institution of contract brings persons and resources together as a necessary condition to the operation of the market system.”).

²⁰³ *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 2 (2d ed. 2015) (“The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights.”); *see also* Hodge v. Evans Fin. Corp., 707 F.2d 1566, 1568 (D.C. Cir. 1983) (“A

Court has stated, “[T]he right of private contract is no small part of the liberty of the citizen, and . . . the usual and most important function of courts of justice is . . . to maintain and enforce contracts”²⁰⁴

Even so, the courts have developed several narrow doctrines over the years for identifying situations in which the contract or its formation is flawed. In the rare situation in which the facts fit one of these doctrines, a court might rescind the contract to obtain a superior justice than would result from enforcing the contract. Today’s courts rarely set aside contracts or refuse to enforce contracts, but if they do, they do so because those contracts are the product of fraud, duress, mistake, or another recognized contract avoidance doctrine.²⁰⁵

Courts long have been wary of engaging in a review of the substantive fairness of an agreement and do so only when such a review is a part of a recognized doctrine such as unconscionability.²⁰⁶ For example, in *Apfel v. Prudential-Bache Securities, Inc.*, the court stated:

Under the traditional principles of contract law, the parties to a contract are free to make their bargain, even if the consideration exchanged is grossly unequal or of dubious value. Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny. It is enough that something of “real value in the eye of the law” was exchanged.²⁰⁷

Thus, this freedom of contract carries with it a downside—the freedom to make an improvident deal. To honor the freedom of contract is to enforce the bad deal absent a recognized flaw addressed by a recognized contract avoid-

basic principle of contract law is the concept of freedom of contract—the right of the contracting parties to structure their transactions in accordance with their wishes.”). In fact, the United States Constitution protects the freedom of contract. *See* U.S. CONST. art. I, § 10, cl. 1.

²⁰⁴ *Balt. & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900) (discussing setting aside a contract on the basis of public policy). *See generally* Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall”*, 79 B.U. L. REV. 263 (1999) (discussing the relationship of freedom to freedom of contract).

²⁰⁵ *See* 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS: AVOIDANCE AND REFORMATION §§ 28–29 (rev. ed. 2002 Supp. 2016) (discussing the doctrines generally).

²⁰⁶ The unconscionability doctrine does call for a substantive fairness review but usually only when linked with a procedural fairness analysis and in any case the review is done as of the time the contract was formed, not in hindsight. *See* discussion *infra* Section VII.C. A fairness analysis might also be a part of the unilateral mistake doctrine, at least as the doctrine is delineated by the Restatement, but there the analysis is also linked to a finding of blameworthiness on the part of the other party to the contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 153 (AM. LAW INST. 1981); *see also supra* Section IV.D.

²⁰⁷ *Apfel v. Prudential-Bache Sec. Inc.*, 616 N.E.2d 1095, 1097 (N.Y. 1993) (citations omitted); *see also* *Thomsen v. Famous Dave’s of Am., Inc.*, 606 F.3d 905, 911 (8th Cir. 2010) (“Whether Thomsen made a wise bargain is irrelevant, as unambiguous contract language ‘shall be enforced by courts even if the result is harsh.’”) (quoting *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 347 (Minn. 2003)); Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 953 (1958) (reasoning courts should not delve into fairness analysis). *See generally* FARNSWORTH, *supra* note 29, § 4.1, at 218 (“[C]ourts have been most reluctant to view the problem in the first perspective, that of substantive unfairness.”).

ance doctrine. As one court has stated, “the general rule of freedom of contract includes the freedom to make a bad bargain.”²⁰⁸

B. Settlement of Disputes Outside of Courts Should Be Encouraged

Because releases settle disputes, the universally-recognized policy in favor of settlement is relevant. The starting point is the idea that settlement of controversies outside of courts is a positive result which courts should encourage.²⁰⁹ Courts recognized this policy long ago and continue to do so even in this time of plentiful settlements.²¹⁰ The policy is present in court decisions and also is manifested in the Federal Rule of Civil Procedure 16, which makes settlement a proper topic for the pretrial conference.²¹¹ Settlements have value only if they are respected, so it is the finality of settlement agreements—and releases that are part of settlement agreements—which furthers the policy of encouraging settlement.²¹²

The motivating rationale for this pro-settlement policy is a blend of ideas. First, is the idea that when matters are decided by settlement, there is less burden on the judicial system.²¹³ Some courts also note that settlement is easier on the parties because it reduces the financial²¹⁴ and emotional strain²¹⁵ that litiga-

²⁰⁸ *Sanger v. Yellow Cab Co.*, 486 S.W.2d 477, 482 (Mo. 1972) (en banc); see also *United Food & Commercial Workers Union v. Lucky Stores, Inc.*, 806 F.2d 1385, 1386 (9th Cir. 1986) (“Wise or not, a deal is a deal.”).

²⁰⁹ See generally Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 3 (1992); J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 60–61 (2016).

²¹⁰ See *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011) (citing the long-held view that settlements should be encouraged); see also *St. Louis Mining & Milling Co. v. Mont. Mining Co.*, 171 U.S. 650, 656 (1898) (“[S]ettlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored . . .”). With regard to the commonness of settlements, see Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 146 (2009) (stating that about two-thirds of civil cases settle).

²¹¹ See FED. R. CIV. P. 16(a)(5), (c)(2)(I); see also FED. R. CIV. P. 16 advisory committee’s note to 1983 Amendment (The amendments “explicitly recognize[] that it has become commonplace to discuss settlement at pretrial conferences” and “it obviously eases crowded court dockets and results in savings to the litigants and the judicial system”).

²¹² See *Bennett v. Shinoda Floral, Inc.*, 739 P.2d 648, 653 (Wash. 1987) (en banc) (discussing the policy in favor of finality of settlement agreements).

²¹³ See, e.g., *Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483, 1486 (11th Cir. 1994) (encouraging settlements to “conserve judicial resources”); see also Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1498 (2016) (discussing the burden on the courts).

²¹⁴ See, e.g., *Vill. of Kaktovik v. Watt*, 689 F.2d 222, 231 (D.C. Cir. 1982) (stating that settlement allows the parties to avoid the expense and delay that accompanies litigation); see also David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91–92 (1983) (discussing the financial burden).

²¹⁵ See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2621 (1995) (“Lawsuits are expensive, terrifying, frustrating, infuriating, humiliating, time-consuming, perhaps all-consuming.”).

tion and the associated risks can cause. Settlement is also a way that parties can have more control over the result than is possible in litigation.²¹⁶

C. Bodily Injuries Are Not Commercial and Are Too Mysterious for the Common Person to Understand; Injured Parties Are in Need of Protection Because of Weakness or Bargaining Disparity; Injured Parties Must Be Compensated

Several motivations may be at work when a court chooses to give special treatment to personal injury releasors who seek to avoid their releases. Those attempting to understand motivations note that the situation is not truly commercial and so some of the underpinnings of contract enforcement do not apply.²¹⁷ Some courts inclined to apply particularly favorable analysis to injured parties seeking to avoid releases have focused on the fact that a personal injury release deals with the person and the body, and that there is something unknowable about the workings of the human body.²¹⁸ Another motivation seems to be a belief that the injured party needs protection, either because such a person is somehow weak or simply as a result of bargaining disparity.²¹⁹ Some courts seem concerned that the blameworthy party will enjoy a windfall at the expense of the injured party or the public coffers.²²⁰ Of course, another implicit if not explicit motivation is a desire to impose what, in retrospect, appears to the court to be a substantively fair result.²²¹

²¹⁶ See, e.g., *Natare Corp. v. Aquatic Renovation Sys., Inc.*, 987 F. Supp. 695, 700 (S.D. Ind. 1997) (“Settlements . . . allow the parties to fashion the outcome of their disputes through mutual agreement.”).

²¹⁷ See PERILLO, *supra* note 205, § 28.34, at 174 (“Social policies favoring the assumption of entrepreneurial risks as a means of improving market efficiency are not present.”); see also *Ricketts v. Pa. R.R. Co.*, 153 F.2d 757, 767 (2d Cir. 1946) (Frank, J., concurring) (explaining that the consistency needed in commercial setting is not needed here).

²¹⁸ See, e.g., *Clancy v. Pacenti*, 145 N.E.2d 802, 805 (Ill. App. Ct. 1957) (“[T]he most complicated and mysterious of all the things that are upon or inhabit the earth.”).

²¹⁹ See, e.g., *Ranta v. Rake*, 421 P.2d 747, 751 (Idaho 1966) (addressing the inequality of bargaining positions); *Clancy*, 145 N.E.2d at 805 (addressing bargaining inequality).

²²⁰ See, e.g., *Casey v. Proctor*, 378 P.2d 579, 587 (Cal. 1963) (en banc) (“[I]f the releaser is bound by the literal terms of the release, it has been recognized that he is left to suffer personal injuries without compensation, while the releasee, who usually is an insurer, has received a windfall”); *Bennett v. Shinoda Floral, Inc.*, 739 P.2d 648, 653 (Wash. 1987) (en banc) (discussing the policy of just compensation of injured parties by tortfeasors); see also *Dobbs*, *supra* note 32, at 667 (“But an equally individualistic principle says that the wrongdoer—not society, or the victim, or the victim’s family, but the wrongdoer—should pay.”). Of course, taken to its extreme, this argument could justify a position that allows no settlements at all. See 1 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 13, at 26–27 (2d ed. 2011) (“Compensation of persons injured by wrongdoing is one of the generally accepted aims of tort law . . . [U]ncompensated injured persons will represent further costs and problems for society.”).

²²¹ In *Ranta v. Rake*, the Idaho Supreme Court, writing in 1966 and looking back at earlier cases, noted that one concern was “the amount of consideration received compared to the risk of the existence of unknown injuries.” *Ranta*, 421 P.2d at 751. See *Wheeler v. White Rock Bottling Co. of Or.*, 366 P.2d 527, 530 (Or. 1961) (“Such cases simply hold that it is

The court in *Clancy v. Pacenti*, attempted to explain the motivating rationales relating to human biology being unknowable and not a commercial matter as follows:

In such cases it is not an article of commerce that is involved, but the human mind and body, still the most complicated and mysterious of all the things that are upon or inhabit the earth. Here, mistakes are easily made and the consequences are more serious than in any other of the affairs of man. A slight abrasion may mean nothing or it may lead to a malignancy. Insignificant pain may mean the beginning of a fatal coronary attack or only a slight intestinal disturbance. Yet, a man cannot and does not live in dread of these possibilities. He accepts assurances that all will be well, even though ultimate consequences cannot be appraised as in matters involving property or services.²²²

The *Clancy* court also addressed the bargaining ability and power rationales, likening the situation of personal injury releases in general to the treatment historically given to releases signed by seamen when dealing with their employers.²²³ In this regard, the *Clancy* court stated:

The sharp economic inequality of the bargaining parties which generally exists in this class of cases has also been considered by the courts in their consideration of this doctrine. It is by no means as modern an innovation as to some may appear. Long before personal injury cases began to absorb the common law courts, the rule was applied to seamen in admiralty cases. That related to contracts between seamen and their employers, but no one can doubt that it has a considerable bearing upon situations such as are here presented.²²⁴

Other earlier cases, like *Clancy*, rely in part on the historical treatment courts have given releases for seamen's injuries.²²⁵ Traditionally, courts have viewed seamen as "wards of admiralty," and have reviewed releases entered into by seamen with great scrutiny.²²⁶ In 1823 in *Harden v. Gordon*, the court stated the standards for the analysis as follows:

[Seamen] are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees. . . . If there is any undue inequality in the terms, any disproportion in the

not fair to an injured tort victim to hold him to a bargain if it turns out later that the bargain was grossly unwise.").

²²² *Clancy v. Pacenti*, 145 N.E.2d 802, 805 (Ill. App. Ct. 1957).

²²³ *Id.*

²²⁴ *Id.* (citation omitted).

²²⁵ See, e.g., *Ricketts v. Pa. R.R. Co.*, 153 F.2d 757, 764–65 (2d Cir. 1946) (Frank, J., concurring).

²²⁶ *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 247–48 (1942). See *Karim v. Finch Shipping Co.*, 374 F.3d 302, 310 (5th Cir. 2004) ("Seamen, of course, are wards of admiralty whose rights federal courts are duty-bound to jealously protect.") (quoting *Bass v. Phx. Seadrill/78, Ltd.*, 749 F.2d 1154, 1160 (5th Cir. 1985)). For a discussion of the origin of the treatment of seamen, see *Hume v. Moore-McCormack Lines, Inc.*, 121 F.2d 336, 345 (2d Cir. 1941) (concluding that at least some of the reason for the special treatment was commerce and national security which benefit when employees are induced to serve at sea).

bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction, is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable.²²⁷

In *Garrett v. Moore-McCormack Co.*, the United States Supreme Court, in reviewing a Jones Act case involving a seaman's personal injury release, stated that the employer-releasee dealing with the seaman "must affirmatively show that no advantage has been taken; and his burden is particularly heavy where there has been inadequacy of consideration."²²⁸

Some of the statements of rationale behind this special treatment seem loaded with assumptions and prejudices.²²⁹ For example, an early statement of supporting rationale refers to seamen as "a class of persons remarkable for their rashness, thoughtlessness and improvidence."²³⁰

Some modern courts focus more on the issue of whether the seaman entered into the release knowingly and less on the substantive fairness of the deal. For example, in *Durley v. Offshore Drilling Company*, the court stated that the test is "whether, at the time of relinquishing his rights, the seaman had 'an in-

²²⁷ *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6047).

²²⁸ *Garrett*, 317 U.S. at 247. The *Garrett* court noted that this protection is not unusual in that Congress had taken other steps to protect seaman's rights. *See id.* at 246; *see also* *Rabenstein v. Sealift, Inc.*, 18 F. Supp. 3d 343, 355 (E.D.N.Y. 2014) ("[T]he burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights.") (quoting *Garrett*, 317 U.S. at 248).

²²⁹ *See* *Havighurst*, *supra* note 32, at 307 ("This rule had its origin in early times and is based upon the recognition that most seafaring men are as individuals relatively incapable of adequately protecting their own interests.")

²³⁰ *Brown v. Lull*, 4 F. Cas. 407, 409 (C.C.D. Mass. 1836) (No. 2018); *see also* *The S.S. Standard. Bonici v. Standard Oil Co.*, 103 F.2d 437, 438 (2d Cir. 1939) (quoting *Brown*, 4 F. Cas. at 409). In *Hume v. Moore-McCormack Lines, Inc.*, the court quoted a passage from an earlier opinion that sheds great insight on this peculiar view of seamen:

On the one side are gentlemen possessed of wealth, and intent, I mean not unfairly, upon augmenting it, conversant in business, and possessing the means of calling in the aid of practical and professional knowledge. On the other side is a set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection, even against themselves.

Hume v. Moore-McCormack Lines, Inc., 121 F.2d at 341 (quoting *The Minerva*, 1 Hagg. Adm., 347, 355 (1825)). The *Hume* court also stated:

Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached. . . . They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract, in which they engage.

Id. at 341 n.13 (quoting *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6047)).

formed understanding of his rights and a full appreciation of the consequences.’²³¹ The court noted that courts have been concerned with the adequacy of the settlement consideration only in regard to what that tells courts about the seaman’s understanding of the deal, not as a review of the substantive fairness of the deal.²³²

Perhaps these courts are acknowledging that earlier courts’ opinions of the contractual capabilities of seamen is no longer true if it ever was. Perhaps seamen of the twenty-first century do not require such paternalism as was presented in cases from an earlier time. Perhaps seamen should be treated like any other party who releases federal rights.²³³ In any event the broad class of parties who sign personal injury releases cannot be described as being incapable of evaluating their situations and weighing their choices and entering into valid releases in exchange for compensation.

Beyond the suggestions touching upon the injured party’s ability, courts have also justified lenient treatment of personal injury releases by noting that releasors are often in a position of unequal bargaining strength.²³⁴ Interestingly, several courts dealing with the issue of enforcement of personal injury releases refer approvingly for rationale to a concurring opinion in *Ricketts v. Pennsylvania Railroad Company*, a case decided under the Federal Employers’ Liability Act (FELA).²³⁵ Judge Learned Hand wrote the majority opinion for the court,²³⁶ but some later courts dealing with personal injury releases have looked, not to the majority opinion, but to Judge Frank’s concurrence as a touchstone.²³⁷ This is true even though the *Ricketts* case involved a release of rights under FELA, federal law, not a release of state law rights, and even though the release was in the employee and employer context rather than the

²³¹ *Durley v. Offshore Drilling Co.*, 288 Fed. App’x 188, 190 (5th Cir. 2008) (quoting *Borne v. A & P Boat Rentals No. 4, Inc.*, 780 F.2d 1254, 1256 (5th Cir. 1986)). See *Rabenstein*, 18 F. Supp. 3d at 355 (explaining releasee has the burden of proving that the seaman entered into the release freely, knowing and understanding his rights but if that is proven, the seaman will be bound).

²³² *Durley*, 288 Fed. App’x at 190. See *Steverson v. GlobalSantaFe Corp.*, 508 F.3d 300, 304 (5th Cir. 2007) (explaining the same).

²³³ Claims related to injuries to seamen are generally federal claims, often under the Jones Act, 46 U.S.C. § 30104 (2012). See, e.g., *GlobalSantaFe Corp.*, 508 F.3d at 302. See *infra* Part VIII for a discussion of a modern federal approach.

²³⁴ See, e.g., *Clancy v. Pacenti*, 145 N.E.2d 802, 805 (Ill. App. Ct. 1957); see also *Havighurst*, *supra* note 32, at 308 (noting releasee has “experience, knowledge and economic power” so “many settlements are undoubtedly unfair”).

²³⁵ *Ricketts v. Pa. R.R. Co.*, 153 F.2d 757, 758 (2d Cir. 1946). See *Federal Employers’ Liability Act*, 45 U.S.C. § 51 (2012).

²³⁶ The majority opinion in *Ricketts* stated that the jury in the lower court could have found that the injured employee of the railroad authorized his attorney to settle only part of the claim and not to settle the entire matter. *Ricketts*, 153 F.2d at 760. Thus, the release that the employee signed at the direction of the attorney and that he could not read due to his injuries, was not a bar to the employee recovering against his employer, the railroad. *Id.*

²³⁷ See, e.g., *Witt v. Watkins*, 579 P.2d 1065, 1068 (Alaska 1978); *Gleason v. Guzman*, 623 P.2d 378, 384 (Colo. 1981); *Ranta v. Rake*, 421 P.2d 747, 752 (Idaho 1966).

context of automobile collisions as is true with many personal injury releases.²³⁸ In Judge Frank's view, injured employees—when dealing with employers regarding releases—were in the same position as seamen since they were “no less helpless in their trafficking with their employers.”²³⁹ Judge Frank concluded that the employee of the railroad who arguably entered into a release of the railroad for his personal injuries, should be treated “as . . . if he were a seaman.”²⁴⁰

Even if one accepts that seamen should receive protective treatment regarding personal injury releases in terms of heightened scrutiny of the release process or even the substantive fairness of the release as a result of weakness of bargaining position or ability of seamen, it is quite an analytical journey to reach Judge Frank's position that employees under FELA are also weak in terms of bargaining position or ability such that they should be treated like seamen. It is then a further journey to the position that all personal injury releasors should enjoy special, favorable treatment as the result of weakness of bargaining position or ability.

VII. PERSONAL INJURY RELEASES SHOULD NOT RECEIVE SPECIAL TREATMENT

A. *The Policies Do Not Require It*

Traditional contract law provides that in order to protect the sanctity of contracts, contracts should be set aside only when a traditional doctrine demands that.²⁴¹ The avoidance doctrines of mistake, duress, unconscionability, and such are situations in which the law recognizes that the contract or the process used to form it was flawed. When the question is the enforceability of personal injury releases, the releases should not be set aside unless those traditional doctrines, applied as they would be in other settings, dictate that result. The fact that the contracts at issue are, in effect, settlement contracts makes the situation one in which courts should especially take care to set aside only those contracts that are truly problematic under traditional doctrine analysis.

No policy put forward in support of providing more favorable treatment to personal injury releasors demands that preferential treatment. Personal injury releases deal with the body and are therefore not commerce in the same sense

²³⁸ See, e.g., *Maglin v. Tschannerl*, 800 A.2d 486, 487 (Vt. 2002) (regarding automobile collision). But see *Gleason*, 623 P.2d at 380 (regarding accident in employment context).

²³⁹ *Ricketts*, 153 F.2d at 767 (Frank, J., concurring). Judge Frank stated that the United States Supreme Court in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), had “broadly hinted that the courts should treat non-maritime employees, with respect to releases of personal injury claims, just as they treat seamen.” *Id.* at 760 (Frank, J., concurring). Judge Frank pointed to footnote seventeen of the *Garrett* case for this broad hint. *Id.* However, footnote seventeen simply noted several maritime cases as well as non-maritime cases that the Court referred to as “somewhat comparable.” *Garrett*, 317 U.S. at 248 n.17.

²⁴⁰ *Ricketts*, 153 F.2d at 769 (Frank, J., concurring).

²⁴¹ See discussion *supra* Section VI.A.

that agreements relating to widgets are commerce—but releases are a sort of commerce nonetheless. The parties to the release are attempting to create certainty in a matter about which there is uncertainty. The releasor seeks compensation sooner rather than later and seeks the certainty of payment that may not occur at all if the parties do not agree to settle the matter. The releasor seeks to eliminate further worry and expense that would occur without the settlement. The other party likewise seeks to settle the matter without further time and money commitments. This party, too, seeks to end the matter and thus gain certainty with regard to the ultimate cost of the matter. There is always uncertainty about the injuries and their eventual path, just as there are uncertainties about whether a widget maker will be able to provide the widgets as agreed.

Nor is this unknowability regarding bodily injuries such that an injured party must be protected more than traditional contract doctrine otherwise provides. As the Oregon Supreme Court stated in *Wheeler v. White Rock Bottling Company of Oregon*:

When courts recite, for example, as a matter of more or less common knowledge, that terminal tumors sometimes begin with minor contusions, or otherwise concern themselves with details of tragedy that may stalk those who sign early releases, they are not announcing truths known only to lawyers. These matters are also commonly known by laymen.²⁴²

Perhaps members of society were less aware of the nature of human biology at some point in the past, but today the *Wheeler* court is correct. Members of society who are injured in automobile collisions and other accidents of life understand the possibilities of their injuries.

Similarly, the notion that the releasor in a personal injury release situation is somehow incapable of understanding the transaction he or she enters into when signing a release is, simply, preposterous. People who find themselves in automobile crashes are, one would imagine, a fair sampling of society as a whole: everyone gets into car accidents. Releasors are neither weaker of mind nor stronger of mind than the populace as a whole. It is not a complex notion that injuries from an automobile collision or other such event may not have manifested at the time of the signing of the release. The language of the releases, though perhaps awkward, is not difficult to understand. And a party who reads a document that says that in exchange for a certain sum of money that party is agreeing to forego all claims regarding known and unknown injuries or effects, can easily understand what that means. Unlike a loan document with complex payment and liability language,²⁴³ a personal injury release actually deals with a subject matter every person understands, his or her own body. The release is also a part of a fairly simple transaction, an exchange of compensa-

²⁴² *Wheeler v. White Rock Bottling Co. of Or.*, 366 P.2d 527, 530 (Or. 1961).

²⁴³ See, e.g., *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640, 654 (W. Va. 2012) (discussing a confusing loan transaction).

tion in exchange for a promise to look no more to the releasee. The release is typically not complex and comprises one or two pages.²⁴⁴

Further, because a personal injury release follows a calamitous event, parties of today are very often represented at the time they sign the release.²⁴⁵ These attorneys should be assisting the injured parties, their clients, in understanding the realm of possible outcomes regarding their injuries as well as assisting the injured parties in understanding exactly what the release means in terms of risk assumption.

In addition, an injured party is not necessarily in a bargaining position that would demand special treatment by the courts. The injured party may be the less sophisticated party to the settlement if the other side of the deal is, as is often the case, being handled by an insurer, but, again, the injured party often has the benefit of counsel. While the language of the release is often that of the releasee, the injured party can and often does negotiate with regard to the amount of compensation.²⁴⁶ Ultimately, the injured party can refuse to settle the matter and opt to pursue litigation.

Finally, general tort policy that wrongdoers should compensate injured parties so those parties do not become a burden on society is too general a policy to justify special treatment for personal injury releases. With a personal injury release in exchange for compensation, the wrongdoer is compensating the injured party the amount the injured party agrees is sufficient. Is the law to say that the injured party cannot be the judge of that amount and that the courts should always be the ultimate decider? While the issue of the burden on society is not present in the commercial dispute setting, even there the policy of requiring the wrongdoer to compensate the harmed party is present. Should settlement agreements not be allowed? Tort policy should not trump contract policy in this way.

B. The Current Situation is Problematic for Traditional Doctrines

As the Maryland court in *Bernstein v. Kapneck* court stated, “violence to the human body” does not justify “the bastardization of the well-founded principles concerning mutual mistake of fact” or any other contract doctrine.²⁴⁷ Not only is the policy justification for special treatment for personal injury releases lacking, but also the courts, in applying the traditional mistake doctrine differently and in refusing to give traditional treatment to the releases signed by personal injury releasors, may be doing subtle harm to traditional contract doc-

²⁴⁴ See discussion *supra* Part I.

²⁴⁵ See, e.g., *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1458 (9th Cir. 1988).

²⁴⁶ See, e.g., *Hicks v. Sparks*, No. 522, 2013, 2014 WL 1233698, at *1 (Del. Mar. 25, 2014) (explaining the releasee initially offered Hicks \$2000; Hicks countered with \$7000; the releasee then offered \$2500; Hicks countered with \$5000; the releasee then offered \$3000; Hicks reiterated a demand of \$5000; the releasee then offered \$4000; Hicks accepted).

²⁴⁷ *Bernstein v. Kapneck*, 430 A.2d 602, 607–08 (Md. 1981).

trine. While mistake doctrine has never been the model of clarity, the treatment courts have given personal injury releases under the guise of mistake doctrine has done nothing to clarify the proper bounds of the doctrine. Indeed, while such an effect cannot be measured, the bastardization of the doctrine may cause damage to its rational application in other settings. In effect, to misuse it in the personal injury release setting is to do damage to the doctrine for all purposes. The same may be true for the value given the written document for purposes of adding to it or interpreting its words.

In many cases, courts may be simply reviewing the releases on a substantive fairness basis explicitly or surreptitiously.²⁴⁸ In contrast, courts generally have not reviewed contracts for fairness.²⁴⁹ Courts have long noted that they would not review adequacy of consideration—a fairness analysis; that was the job of the parties to the contract.²⁵⁰ It is true that unconscionability doctrine allows for a substantive fairness analysis, but most courts link that analysis with a procedural analysis as well.²⁵¹

The superior approach is to treat personal injury releases as other contracts are treated. Courts should not bend or reform current traditional contract doctrine to reach a result desired.

C. *The Unconscionability Doctrine May Be Useful*

Though mistake doctrine is not a useful doctrine when properly applied to the situation of personal injury releases, unconscionability doctrine might be useful just as duress and fraud could be useful with the right facts. Historically, releasors seeking to have personal injury releases set aside have not turned to the contract unconscionability doctrine as a means of achieving that end.²⁵²

²⁴⁸ See *Wheeler v. White Rock Bottling Co. of Or.*, 366 P.2d 527, 530 (Or. 1961) (“Such cases simply hold that it is not fair to an injured tort victim to hold him to a bargain if it turns out later that the bargain was grossly unwise.”).

²⁴⁹ See *Ryan v. Weiner*, 610 A.2d 1377, 1381 (Del. Ch. 1992), in which the court stated: “The notion that a court can and will review contracts for fairness is apt for good reason to strike us as dangerous, subjecting negotiated bargains to the loosely constrained review of the judicial process.”

²⁵⁰ See, e.g., *Apfel v. Prudential-Bache Sec., Inc.*, 616 N.E.2d 1095, 1097 (N.Y. 1993). The *Apfel* court stated: “Under the traditional principles of contract law, the parties to a contract are free to make their bargain, even if the consideration exchanged is grossly unequal or of dubious value. Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny.” *Id.* (citation omitted).

²⁵¹ See, e.g., *Kindred Healthcare Operating, Inc. v. Boyd*, 403 P.3d 1014, 1022–23 (Wyo. 2017) (requiring both substantive and procedural unfairness); see also discussion *infra* Section VII.C.

²⁵² While some courts have examined whether a release has unconscionable effect as part of a mistake doctrine analysis, such an examination of unconscionable effect considers the situation in hindsight. See, e.g., *Simmons v. Blauw*, 635 N.E.2d 601, 604 (Ill. App. Ct. 1994) (applying an unconscionable effect analysis); *Kelly v. Widner*, 771 P.2d 142, 144–46 (Mont. 1989) (citing to Uniform Commercial Code unconscionability doctrine provision but considering post-contract evidence).

Though the concept of unconscionability has existed in the common law for a very long time,²⁵³ its clear recognition as a doctrine coalesced in the middle of the twentieth century with states' adoption of the Uniform Commercial Code.²⁵⁴ Section 2-302 of the Code provides that a court may refuse to enforce a contract or a part of a contract on the basis of unconscionability. Section 2-302 states, in part:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.²⁵⁵

Following this example, the drafters of the Restatement (Second) of Contracts added a new unconscionability provision, Section 208, which states:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.²⁵⁶

Courts have struggled to develop a principled approach to the unconscionability doctrine. Many courts follow a two-pronged analysis that focuses on procedural unconscionability and substantive unconscionability.²⁵⁷ An agreement or provision is procedurally unconscionable if it is the result of defective bargaining process.²⁵⁸ Substantive unconscionability is present when the agreement's terms are unreasonably favorable to one of the parties to the deal.²⁵⁹ As one court has stated, “[s]ubstantive unconscionability occurs when

²⁵³ See McCullough, *supra* note 36, at 787 (discussing the history of the doctrine and noting that the concept dates back to at least the seventeenth century; early cases were treated as public policy cases).

²⁵⁴ A draft of the Uniform Commercial Code was completed in 1951. Pennsylvania adopted it in 1953. After the New York Law Revision Commission critically studied the proposal, a revised draft was created in 1958. New York adopted the revised version and other states did as well. See CHARLES L. KNAPP, ET AL., *RULES OF CONTRACT LAW* 362 (2017). See also generally Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949-1954*, 49 BUFF. L. REV. 359, 375 (2001) (discussing the drafting and adoption process). The UCC recognizes unconscionability. See Barnes, *supra* note 36, at 149–50 (“[Unconscionability’s] acceptance as a mainstream doctrine, a ready aid in contract limitation, dates back only to its inclusion in the UCC.”).

²⁵⁵ U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM’N 2017). This provision applies only to goods transactions. See U.C.C. § 2-102 (“Unless the context otherwise requires, this Article applies to transactions in goods”).

²⁵⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

²⁵⁷ See, e.g., *State v. Wolowitz*, 468 N.Y.S.2d 131, 145 (N.Y. App. Div. 1983); *Kindred Healthcare Operating, Inc. v. Boyd*, 403 P.3d 1014, 1022 (Wyo. 2017).

²⁵⁸ See *Resource Mgmt. Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1042 (Utah 1985) (cataloguing all sorts of procedural bargaining irregularities); see also MURRAY, *supra* note 2, § 97, at 541.

²⁵⁹ See, e.g., *Maxwell v. Fidelity Fin. Servs., Inc.*, 907 P.2d 51, 58 (Ariz. 1995) (“[C]ontract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance

the terms of the agreement are so one-sided that no one in his right mind would agree to its terms.”²⁶⁰ Some courts require both forms of unconscionability, although some of these courts apply a sliding scale such that a lower level of one type of unconscionability can be offset by a greater level of the other type of unconscionability.²⁶¹

One aspect of the doctrine that is clear is that the analysis of whether the contract or provision is unconscionable must consider the situation at the time of the contract’s formation.²⁶² Both the Uniform Commercial Code and the Restatement explicitly state that the unconscionability must exist at the time the contract is made.²⁶³

Unfortunately, the typical personal injury releasor likely will not find the unconscionability doctrine to be a friendly port in the storm.²⁶⁴ Such a plaintiff must illustrate that the release was procedurally unconscionable.²⁶⁵ The typical release and settlement that the release is a part of is not a complex transaction.²⁶⁶ The plaintiff gets money in exchange for ceasing to pursue any claim

in the obligations and rights imposed by the bargain . . .”); *see also* McCullough, *supra* note 36, at 797.

²⁶⁰ *West v. West*, 891 So. 2d 203, 213 (Miss. 2004).

²⁶¹ *See, e.g., Kindred*, 403 P.3d at 1023 (“In other words, both the absence of meaningful choice and the presence of contract provisions unreasonably favorable to one party must be found in order to sustain a claim that a contract is unconscionable.”) (citing *Roussalis v. Wyo. Med. Ctr., Inc.*, 4 P.3d 209, 246 (Wyo. 2000)); *James v. Nat’l Fin., LLC*, 132 A.3d 799, 815 (Del. Ch. 2016) (“The analysis is unitary, and ‘it is generally agreed that if more of one is present, then less of the other is required.’”) (quoting E. ALLEN FARNSWORTH, 1 FARNSWORTH ON CONTRACTS § 4.28, at 585 (3d ed. 2004)). With regard to the sliding scale nature of the analysis, *see Wolowitz*, 468 N.Y.S.2d at 145 (“However, in general, it can be said that procedural and substantive unconscionability operate on a ‘sliding scale’; the more questionable the meaningfulness of choice, the less imbalance in a contract’s terms should be tolerated and vice versa”) (quoting Jonathan A. Eddy, *On the Essential Purposes of Limited Remedies: The Metaphysics of UCC Section 2-719(2)*, 65 CALIF. L. REV. 28, 41, 42 n.56 (1977)); *see also* Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 12 (2012). Other courts seem to allow a finding of unconscionability with only one form of unconscionability. *See, e.g., Edwards v. Vemma Nutrition*, No. CV-17-02133-PHX-DGC, 2018 WL 637382, at *5 (D. Ariz. Jan. 31, 2018) (requiring only substantive unconscionability).

²⁶² *See James*, 132 A.3d at 814 (“Whether a contract is unconscionable is determined at the time it was made”); *see also Doctor’s Assocs. v. Jabush*, 89 F.3d 109, 113 (2d Cir. 1996) (explaining the same); *Clift v. RDP Co.*, 200 F. Supp. 3d 660, 677 (W.D. Ky. 2016) (explaining the same).

²⁶³ *See* U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM’N 2017) (“unconscionable at the time it was made”); RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981) (“unconscionable at the time the contract is made”).

²⁶⁴ *See, e.g., Maglin v. Tschannerl*, 800 A.2d 486, 491 (Vt. 2002) (“Because she had an opportunity for meaningful choice when the release was presented to her, any differential in bargaining power was not critical to the contract’s formation and not enough to void the release as unconscionable.”).

²⁶⁵ *See supra* note 261 and accompanying text.

²⁶⁶ *See supra* note 113 and accompanying text.

against the other party.²⁶⁷ The actual release document is often one or two pages and the language used is relatively clear that the injured party is releasing his or her claim for all injuries related to the event, whether or not the injuries are known at the time of the release.²⁶⁸ The release is often the product of some negotiation over time with the actual amount to be paid changing in the midst of the back-and-forth.²⁶⁹ While it is certainly true that in most cases the injured party does not create the language of the release and simply accepts that language, it is also true that the injured party could refuse to enter into the agreement if the terms are unacceptable or could demand more in exchange for the executed release. Often, the releasor has the benefit of an attorney's assistance as well.²⁷⁰ In such circumstances it is difficult to find that the release is the product of procedural unconscionability.

An injured party might have an easier time illustrating that the deal is substantively unconscionable but only if the determination of unconscionability is made after the injuries have all come to light.²⁷¹ Yet, the unconscionability doctrine requires that the determination of unconscionability be a determination that the agreement was unconscionable at the time of the formation of the release, not as it later appears with the benefit of hindsight.²⁷² Thus, the unconscionability doctrine, if properly applied, will rarely be the basis for a refusal to enforce a personal injury release.

²⁶⁷ See *supra* note 115 and accompanying text.

²⁶⁸ See discussion *supra* Part I and Section IV.C.

²⁶⁹ See, e.g., *Hicks v. Sparks*, No. 522, 2013, 2014 WL 1233698, at *1 (Del. Mar. 25, 2014) (explaining the automobile collision occurred in March and the release was signed in October. The releasee initially offered Hicks \$2000. Hicks countered with \$7000. The releasee then offered \$2500. Hicks countered with \$5000. The releasee then offered \$3000. Hicks reiterated a demand of \$5000. The releasee then offered \$4000 which Hicks accepted); see also *Witt v. Watkins*, 579 P.2d 1065, 1966–67 (Alaska 1978) (noting release signed seven months after automobile collision and after negotiation).

²⁷⁰ See, e.g., *Witt*, 579 P.2d at 1067 (noting attorney consulted); *Simmons v. Blauw*, 635 N.E.2d 601, 603 (Ill. App. Ct. 1994) (noting attorney negotiated on her behalf).

²⁷¹ See *Kelly v. Widner*, 771 P.2d 142, 145 (Mont. 1989). The *Kelly* court found that the lower court should not have granted summary judgment for the released party because the injured party had raised a question of material fact as to whether the release was unconscionable—that is, “whether under all the circumstances, justice was done.” *Id.* at 146. The court noted the injured party was in dire financial straits, that she lacked education, that she lacked legal advice, that her living arrangements were isolating, that “there was substantial uncertainty as to the extent of injury . . . and the future prognosis,” and that the settlement had occurred in a hasty fashion. *Id.* at 145. In so doing the court strayed from traditional unconscionability jurisprudence by noting that “facts subsequent to a settlement may be considered in determining unconscionability.” *Id.* at 146.

²⁷² See *James v. Nat'l Fin. LLC.*, 132 A.3d 799, 814 (Del. Ch. 2016) (“Whether a contract is unconscionable is determined at the time it was made.”); see also *Doctor's Assocs. v. Jabush*, 89 F.3d 109, 113 (2d Cir. 1996); *Clift v. RDP Co.*, 200 F. Supp. 3d 660, 677 (W.D. Ky. 2016); U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM'N 2017) (“unconscionable at the time it was made.”); RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981) (“unconscionable at the time the contract is made.”).

VIII. ANOTHER ALTERNATIVE: INDEPENDENT ANALYSIS OF WHETHER THE RELEASOR SIGNED THE RELEASE KNOWINGLY AND VOLUNTARILY: A PROCESS ANALYSIS

If, after a thoughtful consideration of all policy arguments involved, a court is of the opinion that personal injury releasors should, categorically, receive more deference than traditional contract law provides, the better approach, as compared to the current situation, is for courts to forthrightly create a release review doctrine apart from traditional common law contract principles. Such an approach makes clear that personal injury releases are subject to special treatment and the justification for such treatment can be clearly stated and understood. In addition, traditional doctrine would no longer suffer the indignity of being twisted into something far different from its traditional profile.²⁷³ In creating such a release review doctrine, courts should not create a paternalistic substantive fairness review, but rather courts should respect the autonomy of the parties by using a review focused on process.

The federal approach to releases of certain federal rights is an example of such a stand-alone release review doctrine. When a court reviews the validity and enforceability of a release of certain federal rights, that court must ensure that the releasor entered into the agreement knowingly and voluntarily.²⁷⁴ In so doing, the courts consider the totality of circumstances.²⁷⁵ Courts have created lists of factors to guide the totality of circumstances analysis of the process resulting in the release being signed.²⁷⁶ A good example of this approach is that of the Eleventh Circuit, which has identified the following factors as objective evidence to consider:

1. the releasor's education and business experience;
2. the amount of time the releasor had to review the agreement before signing it;
3. "the clarity of the agreement;"
4. the releasor's opportunity to be advised by an attorney;
5. the other party's encouragement or discouragement of consultation with an attorney; and
6. "the consideration given in exchange for the waiver when compared with the benefits to which the employee was already entitled."²⁷⁷

²⁷³ See discussion *supra* Section IV.B.

²⁷⁴ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (regarding a Title VII matter; "a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing."). See *Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, 65 F.3d 562, 570 (7th Cir. 1995) (regarding ADEA matter; "knowingly and voluntary[ly].").

²⁷⁵ See, e.g., *Myricks v. Fed. Reserve Bank of Atlanta*, 480 F.3d 1036, 1040 (11th Cir. 2007); *Melanson v. Browning-Ferris Indus.*, 281 F.3d 272, 274 (1st Cir. 2002).

²⁷⁶ See, e.g., *Cuchara v. Gai-Tronics Corp.*, 129 Fed. App'x 728, 731 (3d Cir. 2005); *Pierce*, 65 F.3d at 571.

²⁷⁷ See *Myricks*, 480 F.3d at 1040; see also *Puentes v. United Parcel Serv., Inc.*, 86 F.3d 196, 198 (11th Cir. 1996).

Other jurisdictions use slightly different factors.²⁷⁸ In discussing the non-exclusive factors used by the Seventh Circuit, the court in *Pierce v. Atchison, Topeka and Santa Fe Railway Company* acknowledged that the court was providing a system of evaluation of a release that can include evidence extrinsic to an unambiguous writing, but limited that evidence to objective evidence from disinterested third parties, not a party's subjective, possibly self-serving testimony.²⁷⁹ The *Pierce* court justified its approach of special scrutiny of releases, even those facially unambiguous, as appropriate to support "the strong congressional purpose underlying the ADEA to eradicate discrimination in employment."²⁸⁰ Thus, releases of federal rights are not only subject to review on any traditional contract basis such as duress or fraud or mistake, but also such releases are governed by the idiosyncratic knowing and voluntary requirement implemented with the totality of circumstances analysis.²⁸¹ That special treatment is clearly and tightly tied to a significant public policy and is done in recognition of other policies at play such as the policy in favor of settlement, even settlement of disputes regarding federally-prohibited discrimination.²⁸²

²⁷⁸ For example, in *Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, the court established the approach for the Seventh Circuit. *Pierce*, 65 F.3d at 571. The court, reviewing a release of an employee's age and racial discrimination claims under the ADEA, provided the following list of non-exclusive factors to consider when determining whether the release was entered into knowingly and voluntarily:

1. the employee's education and business experience;
2. the employee's input in negotiating the terms of the settlement;
3. the clarity of the agreement;
4. the amount of time the employee had for deliberation before signing the release;
5. whether the employee actually read the release and considered its terms before signing it;
6. whether the employee was represented by counsel or consulted with an attorney;
7. whether the consideration given in exchange for the waiver exceeded the benefits to which the employee was already entitled by contract or law; and
8. whether the employee's release was induced by improper conduct on the defendant's part.

Id. (citation omitted). Contrary to the Seventh Circuit approach, other courts do not include whether the releasor read the release as a factor. These courts apparently hold the more traditional view that a party signing a document has the obligation to read it. For example, in *Russell v. Harman Int'l Indus.*, the court reviewed a release of ERISA claims. *Russell v. Harman Int'l Indus.*, 945 F. Supp. 2d 68, 74 (D.D.C. 2013). The *Russell* court found the release to be knowing and voluntary and noted that the releasor who signs a document without reading it is held to that document. *Id.* at 75. *See* *Gaub v. Prof'l Hosp. Supply, Inc.*, 845 F. Supp. 2d 1118, 1130 (D. Idaho 2012) (reasoning the court would not accept a failure to read as a factor).

²⁷⁹ *Pierce*, 65 F.3d at 568.

²⁸⁰ *Id.* at 571 (ADEA is the acronym for the Age Discrimination in Employment Act). *See* *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 522–23 (3d Cir. 1988) ("In light of the strong policy concerns to eradicate discrimination in employment, a review of the totality of the circumstances, considerate of the particular individual who has executed the release, is also necessary.").

²⁸¹ *See, e.g.*, *Washington v. Bd. of Educ. of Chi.*, No. 17 CV 2343, 2018 WL 558501, at *7 (N.D. Ill. Jan. 24, 2018), *appeal docketed*, No. 18-2626 (7th Cir. July 26, 2018).

²⁸² *See, e.g.*, *Stroman v. W. Coast Grocery Co.*, 884 F.2d 458, 460–61 (9th Cir.1989) ("A general release of Title VII claims does not ordinarily violate public policy. To the contrary,

One factor that has received particular emphasis in the federal analysis is the assistance of an attorney. Courts have stated that if the releasor had the benefit of the advice of counsel regarding the release and if the release is unambiguous by its own terms, a presumption arises the release is valid and enforceable.²⁸³ While the result of such a presumption and thus the result of the totality of the circumstances analysis may then be a conclusion that the releasor knowingly and voluntarily entered into the agreement such that the party has released important federal rights, courts have recognized that they should not attempt to subvert traditional principles and interpret subjective intent. Rather, the releasor must be left to the deal the releasor formed—supplemented by a possible malpractice action against the lawyer.²⁸⁴ Even in a situation in which the releasor chooses not to consult with counsel, that choice can be powerful, especially if the other party suggested consulting counsel would be helpful.²⁸⁵

Courts who, after carefully evaluating the competing policies, conclude that personal injury releasors should receive more favorable treatment than parties to other agreements might turn to a similar knowing and voluntary analysis. Such an approach would allow for a careful review of the process surrounding the signing of a release. A court using such an approach could consider such process factors 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. This sort of analytical framework would allow the court to come to a principled decision as to whether the release should be enforced and should create an environment in which a court might be less likely to be swayed by a releasor's subjective, hindsight statements that he or she did not intend to enter into the deal spelled out by the release itself. A framework that explicitly considers such factors as the clarity of the writing and whether the releasor was represented forces a focus on what an extraordinary move it is to set such a release aside.

public policy favors voluntary settlement of employment discrimination claims brought under Title VII.”) (quoting *Rogers v. Gen. Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1986)).

²⁸³ See, e.g., *Myricks v. Fed. Reserve Bank of Atlanta*, 480 F.3d, 1036, 1041 (11th Cir. 2007) (“[A]n employee’s decision to consult an attorney before signing a clear release creates a presumption that the release is enforceable.”); *Riley v. Am. Family Mut. Ins. Co.*, 881 F.2d 368, 373 (7th Cir. 1989) (“[A] plaintiff who executes a release within the context of a settlement pursuant to the advice of independent counsel is presumed to have executed the document knowingly and voluntarily absent claims of fraud or duress.”).

²⁸⁴ See *Riley*, 881 F.2d at 374 (“[T]hat plaintiff’s counsel may have inaccurately conveyed the effect of the release . . . may be remedied through a malpractice action, but not through judicial interpretation of plaintiff’s subjective intent.”).

²⁸⁵ See, e.g., *Cuchara v. Gai-Tronics Corp.*, 129 Fed. App’x 728, 731 (3d Cir. 2005) (finding it “particularly significant” that Cuchara was repeatedly advised in writing to obtain the services of counsel).

CONCLUSION

Many courts long have treated personal injury releases differently from other contracts when releasors have sought to avoid the effect of the releases. These courts have striven to provide more favorable treatment to personal injury releasors by modifying contract mistake doctrine to make it possible for the doctrine to apply in situations in which it otherwise would not apply. In addition, contrary to what is true with typical written agreements, some courts have not given the traditional respect to the writing when the writing is a personal injury release that the releasor seeks to avoid. Thus, these releasor-friendly approaches have found legally-cognizable mistakes and have failed to recognize any assumption of the risk by the releasor as a result of the releasor's conscious ignorance or by the express words of the release.

Courts should no longer provide special treatment for personal injury releasors. The releases should be enforced unless a recognized contract avoidance doctrine, traditionally applied, dictates otherwise. The policies behind more favorable treatment of personal injury releasors are particularly suspect in the twenty-first century world. In addition, idiosyncratic modifications to traditional contract doctrines done in the name of this special treatment may do broader violence to those doctrines and to the policies underlying contract enforcement generally and settlement agreements in particular.

While the typical personal injury releasor cannot successfully claim mistake, other contract doctrines may provide assistance if the facts of the situation at hand fit the doctrine. The unconscionability doctrine traditionally has not been used but should be considered along with the other avoidance doctrines that may be claimed, such as fraud and duress. If a release was unconscionable when the agreement was formed, the unconscionability doctrine provides an avenue of relief from the release.

And if a court, after careful consideration, believes the personal injury release situation deserves more scrutiny, perhaps a process analysis focusing on whether the release was knowingly and voluntarily made, patterned after the analysis used with releases of certain federal rights, would be a superior alternative to an analysis that lacks a workable framework of analysis and thus opens the door to ad hoc hindsight judgments by courts as to the fairness of the deal struck by the parties. Such a process analysis would provide added protection to the release setting while at the same time preventing the damage to contract doctrine generally that may occur when that doctrine is bent and applied idiosyncratically to provide special treatment to personal injury releases.