IN THE COURT OF APPEALS OF IOWA

No. 8-649 / 98-158

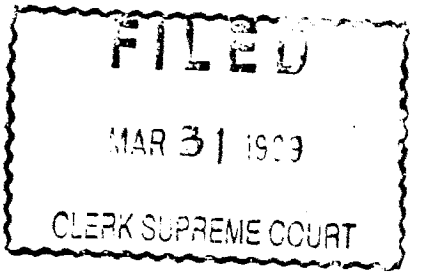
RHONDA K. CORNWELL,

Plaintiff-Appellant,

vs.

CHRISTINE SUE LAMBE,

Defendant-Appellee.



Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

The plaintiff appeals a district court ruling granting the defendant's summary judgment motion and dismissing her personal injury action. **REVERSED AND REMANDED.**

Joseph J. Bitter of Bitter Law Offices, Dubuque, for appellant.

Martha L. Shaff and Peter Thill of Betty, Neuman & McMahon, L.L.P., Davenport, for appellee.

Considered by Sackett, C.J., Streit, J., and Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

SCHLEGEL, S.J.

Plaintiff appeals the decision of the district court which granted summary judgment to defendant in this tort action. The court found plaintiff's claims were barred by a release. Plaintiff claims the release was the result of a mutual mistake, there was a rescission of the release, and the release was unconscionable. We reverse and remand for further proceedings.

On October 14, 1994, Rhonda Cornwell and Christine Lambe were involved in an automobile accident. Cornwell was injured as a result of the accident.

Lambe was insured by Auto Owners Insurance Company. Gary Dobereiner, a claims adjuster for Auto Owners, telephoned Cornwell in December 1994, and offered her $1053 to settle the property damage portion of her claim. Dobereiner sent Cornwell a written release, which she signed. He then issued her a check for $1053, which she accepted and cashed.

In January 1995, Dobereiner telephoned Cornwell and offered her $4000 as a final settlement of her claims. Cornwell orally agreed to the offer. Dobereiner sent her a release form, which she signed on February 13, 1995. After receiving the release, Dobereiner sent Cornwell a check for $4000.

Cornwell had second thoughts about the release and contacted an attorney. On February 17, 1995, the attorney telephoned Dobereiner and told him Cornwell wanted to rescind the release because she was under stress, and had not been acting in her own best interests. Cornwell returned the check to Auto Owners.

On October 14, 1996, Cornwell filed a tort suit against Lambe. She alleged Lambe had been driving in a negligent manner and this was the proximate cause of her injuries. Lambe raised an affirmative defense, claiming Cornwell had entered into a full release of her claims.

Lambe filed a motion for summary judgment, asserting Cornwell's claims were barred by the written release. Dobereiner signed an affidavit stating he had never agreed to a rescission of Cornwell's release. Cornwell resisted the motion. In her affidavit, she stated her total medical bills to date were $14,430 and she had lost wages of $5593. She stated Dobereiner realized she was returning the $4000 check and he agreed to further negotiations. In order to support her claim she attached a letter from Dobereiner, which stated:

> We accept your offer to attempt to negotiate a settlement. Please forward copies of all specials and your demand for our consideration.

Cornwell additionally alleged she was under stress due to her injuries. Furthermore, she stated she had problems with depression, and was on medication at the time she agreed to the release. Cornwell's mother filed an affidavit which supported her daughter's statements.

The district court granted the motion for summary judgment. The court found Cornwell had failed to show the release was the result of economic duress or mutual mistake. The court also found Cornwell had failed to present sufficient medical evidence to show she did not understand the release at the time she signed it. The

court concluded the release precluded Cornwell from pursuing her tort claims against Lambe. The district court denied Cornwell's post-trial motion. She appealed.

I. We review an appeal from summary judgment for errors of law. Iowa R. App. P. 4. Summary judgment is appropriate only if no genuine issue of material fact exists. Iowa R. Civ. P. 237. The moving party bears the burden of proving the nonexistence of a material fact. *Thornton v. Hubill, Inc.*, 571 N.W.2d 30, 32 (Iowa App. 1997). We view the evidence in the light most favorable to the nonmoving party. *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 811 (Iowa 1994).

II. A release is a contract and its validity is governed by the usual rules relating to contracts. *Verne R. Houghton Ins. Agency, Inc. v. Orr Drywall Co.*, 470 N.W.2d 39, 42 (Iowa 1991). A contract may be set aside for a mutual mistake of a material fact, and a release is no different from any other contract. *Thomas v. Sheehan,* 260 Iowa 618, 621, 149 N.W.2d 842, 843 (1967). A release for personal injuries may be set aside where the release was given and taken under a mutual mistake as to the nature and extent of the releasor's injuries. *Stetzel v. Dickenson,* 174 N.W.2d 438, 440 (Iowa 1970).

The party seeking relief based on a mutual mistake has the burden of proof to show the injuries were not as both parties assumed at the time of the settlement. *Barnard v. Cedar Rapids City Cab Co.*, 257 Iowa 734, 747, 133 N.W.2d 884, 893-894 (1964). In cases where mutual mistake has been found, the actual injuries were quite different from the ones known at the time of settlement. *Thomas,* 260 Iowa at

623-624, 149 N.W.2d at 845; *Barnard,* 257 Iowa at 748, 133 N.W.2d at 894; *Reed v. Harvey,* 253 Iowa 10, 19-20, 110 N.W.2d 442, 447 (1961).

The supreme court has not found mutual mistake where a party had the same complaints, but in a lesser form, at the time of settlement. *Stetzel,* 174 N.W.2d at 442. The court stated:

> Practically every settlement for personal injury involves the element of chance as to future consequences and developments. There are usually unknown and unknowable conditions (congenital or otherwise) that may affect the ultimate recovery or failure of recovery. Mutual ignorance of their existence cannot constitute "mutual mistake." No two persons have the same power of recuperation, and the settlement is an agreement by which both take the chance that the amount paid may eventually prove to have been too great or too small.

Id. (quoting *Wieland v. Cedar Rapids & Iowa City Ry. Co.,* 242 Iowa 583, 588, 46 N.W.2d 916, 918 (1951)).

In the present case, Cornwell has not claimed her actual injuries were different from the ones known at the time she signed the release. In her affidavit, she states she was not feeling well and had not fully recovered from her injuries at the time of the settlement. Later, she discovered her condition was worse than she had thought, and she still had serious problems with her neck. The rule found in *Stetzel* seems to be applicable here: there is no mutual mistake if a party had the same complaints, but in lesser form, at the time of the settlement. Cornwell has not sufficiently shown there was a mutual mistake regarding the extent of her injuries. We conclude summary judgment on this issue was proper.

III. Cornwell contends there was a valid rescission of the release. Lambe asserts this issue was not adequately preserved. The issue was first raised, albeit in the negative, by Lambe through Dobereiner's affidavit. The issue was also raised by Cornwell's resistance to the motion for summary judgment. We will proceed to address this issue.

As noted above, a release is a contract. *Verne R. Houghton Ins. Agency,* 470 N.W.2d at 42. The parties to a contract may rescind it by mutual agreement. *Recker v. Gustafson,* 279 N.W.2d 744, 755 (Iowa 1979). The supreme court has stated:

> The rescission of a contract by mutual consent does not require any formal agreement or release but may result from any act or any course of conduct of the parties which clearly indicates their mutual understanding that the contract is abrogated or terminated, or from the acquiescence of one party in its explicit repudiation by the other * * * There can be rescission by the acts and conduct of the parties, without an express oral agreement to rescind.

Shell Oil Co. v. Kelinson, 158 N.W.2d 724, 729 (Iowa 1968) (quoting *Mortensen v. Frederickson Bros.,* 190 Iowa 832, 846-848, 180 N.W. 977, 982 (1921)).

Thus, there is no particular formality required by parties in order to rescind a contract. *Wiysel v. William Penn College,* 448 N.W.2d 712, 713 (Iowa App. 1989). The evidence must clearly show, however, a mutuality of consent. *Novak Equip., Inc. v. Hartl,* 168 N.W.2d 924, 926 (Iowa 1969).

Both parties agree Cornwell expressly repudiated the release on February 17, 1995, when she and her attorney telephoned Dobereiner. They also agree Cornwell returned the check, uncashed, to Dobereiner. In her affidavit, Cornwell claims Dobereiner agreed to the rescission. She asserts Dobereiner's letter, which indicates

a willingness to negotiate, supports her claim the original contract had been rescinded. On the other hand, in his affidavit, Dobereiner states he never agreed to a rescission of the release.

We determine there is clearly a genuine issue of material fact concerning whether the parties mutually agreed to rescind the release. For this reason, summary judgment in this case was improper. The case should be remanded for further proceedings on this issue.

We reverse the decision of the district court which granted summary judgment to defendant and remand for further proceedings. There is a genuine issue of material fact concerning whether the parties mutually agreed agreed to rescind the release. We do not retain jurisdiction. Costs of this appeal are assessed one-half to each party.

REVERSED AND REMANDED.