

1949

# Harry W. Kirchgestner v. The Denver and Rio Grande Western Railroad Company : Brief of Appellants

Utah Supreme Court

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Van Cott; Bagley; Cornwall & McCarthy; Clifford L. Ashton; Attorneys for Appellants;

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In the  
**Supreme Court of the State of Utah**

HARRY W. KIRCHGESTNER,

*Respondent,*

VS.

THE DENVER AND RIO GRANDE  
WESTERN RAILROAD COMPANY,  
a corporation,

*Appellant.*

Case  
No. 7370

**APPELLANTS' BRIEF**

**FILED**

1937

CLERK, SUPREME COURT, UTAH

VAN COTT,  
BAGLEY,

CORNWALL & McCARTHY,  
CLIFFORD L. ASHTON,

*Attorneys for Appellants.*

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HARRY W. KIRCHGESTNER,  
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vs.

THE DENVER AND RIO GRANDE  
WESTERN RAILROAD COMPANY,  
a corporation,

*Appellant.*

Case  
No. 7370

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**APPELLANTS' BRIEF**

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**PRELIMINARY STATEMENT**

The parties will be designated as they appeared in the trial court. The record pages referred to are stenciled in the lower right-hand corner of the page. The action in which the appeal is taken was brought to recover damages for

personal injuries and was predicated upon a violation of the Federal Employer's Act (Title 45, Section 51, Et. Seq. U. S. C. A.) and also upon the Safety Appliance Act (Title 45, Section 4, U. S. C. A.). The trial court submitted to the jury only the issues arising under the Safety Appliance Act.

### STATEMENT OF FACTS

The plaintiff was awarded a verdict in the amount of Four Thousand Three Hundred Dollars (\$4,300.00), upon which the judgment appealed from was entered in the Third Judicial District Court for Salt Lake County. At the time of the accident and injuries complained of, plaintiff was employed by the defendant as a brakeman on its Narrow Gauge Railroad extending from Salida to Monarch in Colorado. He alleged and testified that the grab iron on the side of an ore car gave way as he grasped it in mounting the car then in motion. According to his testimony, he fell from the car and rolled down the mountain about twenty-five feet, striking his back against a large boulder (R. 100-101). Although the train was moving at a rate of speed of two miles per hour (R. 102) and the car from which he claims to have fallen was next to the engine, plaintiff was able to ascend the mountain and recover a position on the engine (R. 135). Throughout this dramatic accident, plaintiff never relaxed his grasp on the detached grab-iron. The alleged accident occurred about 8:30 P. M., June 26, 1948. Plaintiff continued to perform his duties as a brakeman until the train returned to Salida and his shift ended about 11:00 P. M. (R. 141-142). Immediately thereafter the

plaintiff contacted a Mr. Bennett, the local representative at Salida of the labor union to which plaintiff belonged and was advised by Bennett that he had a good lawsuit against the railroad (R. 137). Within a day or two after the accident, plaintiff went to the hospital at Salida, Colorado, maintained by the employees of the defendant, and consulted a Dr. Smith (R. 104). Plaintiff says that Dr. Smith prescribed some pills for the nerves (R. 104). He returned again to the hospital and some X-ray pictures were taken of his back (R. 104). The X-rays are marked Exhibits "3" and "4". On July 6th plaintiff went to Pueblo, Colorado, and contacted Mr. Sayger, a claim agent of the defendant (R. 107). He there negotiated a settlement of any cause of action arising out of the alleged accident of June 26th, received from the defendant \$135.00 and executed a general release (R. 160). This release is "Exhibit "2". He returned to work July 22nd and worked two days in that month, (Exhibit "C"). He worked eight days in August, eighteen days in September, four days in October and five days in November (Exhibit "C"). He was discharged early in December on account of reduction in force (R. 129).

This action was commenced October 16, 1948 (R. 6) and prior to the plaintiff's discharge. He claims to have sustained an injury to his back as a result of a fall from the train (R. 1-5). He further claims that this back injury activated and aggravated "a latent osteo-arthritic condition of the back, hips, lumbar and sacroiliac joints" (R. 3).

At the conclusion of the evidence, the defendant interposed a motion for a directed verdict in its favor upon the ground that the plaintiff had compromised and settled the



cause of action sued upon and that the release precluded the defendant from maintaining the action (R. 186-189). The motion was denied (R. 189).

### STATEMENT OF ERRORS RELIED ON

1. The trial court erred in refusing to direct the jury to return a verdict in favor of the defendant and against the plaintiff of no cause of action (R. 186-189).

2. The trial court erred in refusing to give defendant's Requested Instruction No. 2 as requested and in modifying said instruction by striking the words "clear and unequivocal evidence" and inserting in place thereof the words "a preponderance of the evidence" (R. 34).

3. The trial court erred in instructing the jury as set forth in Instruction No. 10 for the reason that it is not within the issues raised by the pleadings and there is no evidence to which it could be applied (R. 203).

4. The trial court erred in instructing the jury as set forth in Instruction No. 8 because it permitted the jury to assess damages for future suffering that might probably be endured (R. 202-203).

5. The court erred in permitting the plaintiff to testify to statements made to him by Dr. Hines for the reason that the statements were hearsay (R. 115).

6. The trial court erred in permitting the plaintiff to testify to statements made to him by Mr. Merrill for the reason that the same are hearsay (R. 106).

7. The trial court erred in permitting the plaintiff to testify concerning a release for the reason that the same is a conclusion (R. 106-107).

## ARGUMENT

1. NO FACTS ARE ALLEGED OR ESTABLISHED BY EVIDENCE THAT WOULD JUSTIFY AN AVOIDANCE OF THE RELEASE (ERROR No. 1).

For convenience we set forth below the exact language of the release upon which the defendant relies, omitting the heading and signatures:

"IN SOLE CONSIDERATION OF the payment to me by THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY of the sum of One Hundred Thirty-Five and No/100 Dollars (\$135.00), receipt of which is hereby acknowledged, I do hereby release and forever discharge said THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, from all claims and causes of action which I now have or may hereafter have or claim on account of any and all personal injuries, whether now known or apparent or unknown or not now apparent, including complications arising from such personal injuries, or the treatment thereof, for loss of services, and for loss of or damages to property, growing out of or resulting from an accident which occurred at or near Monarch, State of Colorado, on or about the 26th day of June, 1948, while I was employed as Brakeman; and I hereby acknowledge full payment, satisfaction and discharge of any and all such claims or causes of action, and fully understand that I can make no further claim against said Railroad Company even though said

injuries are more serious or different than I now know or understand them to be.

"I agree that the above stated amount is the sole and only consideration for this settlement and that no promise or contract, either of employment or of any other nature, on the part of said Railroad Company has been made to me.

"I have read the foregoing release and fully understand the same."

We also for convenience quote the plaintiff's reply, seeking the avoidance of the release, omitting only formal parts:

"Admits the truth of paragraph 2 of said amended answer; in answer to paragraph 4 plaintiff alleges that the \$135.00 which was paid to him by the defendant on the 6th day of July, 1948, was intended by both plaintiff and defendant to settle only the claim which plaintiff had at that time against the defendant for lost wages, suffered as a result of his injury; that at the time of the signing of the release, which defendant required plaintiff to execute before defendant would pay plaintiff his lost wages, plaintiff and defendant both believed that the plaintiff had not suffered any serious personal injury and that plaintiff had completely recovered from the effects of his fall from defendant's train, which said fall is accurately and completely described in plaintiff's complaint on file herein; plaintiff further alleges that contrary to the beliefs of plaintiff and defendant, plaintiff had suffered a serious and crippling personal injury which became evident to plaintiff soon after the signing of said release and continues to the present time, which said injury is described in plaintiff's complaint on file herein."

"WHEREFORE, plaintiff prays that he be granted relief against defendant in accordance with the prayer of his complaint on file herein."

We shall assume but not admit that the validity of a release of a cause of action arising under the Federal Employers' Liability Act or the Federal Safety Appliance Act is controlled by the law as declared by the courts of the United States. In *Callen v. Pennsylvania Railroad Company*, 332 U. S. 625, 68 S. Ct. 296, the Supreme Court of the United States held that a release of a cause of action arising under the Federal Employers' Liability Act stood upon the same footing as a release of any other cause of action. There is therefore no federal law peculiar to the release of a cause of action under the Federal Employers' Liability Act to be considered in this case.

It is the contention of the defendant that the plaintiff failed to either allege or produce any evidence of facts sufficient under federal law to warrant a jury or court to nullify the release.

We have set forth above, the pleading under which the plaintiff seeks to avoid the settlement and release of the cause of action sued upon. It is to be noted at the outset of an examination of the plaintiff's reply that he admits by failing to deny that he executed a written release which by its terms discharged the cause of action sued upon. Accordingly no legal effect can be given to the allegation that the \$135.00 payment made to the plaintiff on the date of the release was intended by both plaintiff and defendant to settle only the claim which plaintiff had at that time against the defendant for lost wages suffered as a result of his

injury. What the parties intended to accomplish by the payment must be ascertained solely from the language of the written release. See: *In re: Atwater*, 296 F. 278, affirmed 254 U. S. 423, 41 S. Ct. 150, 65 L. Ed. 339; *St. L. & S. F. Ry. Co. v. Dearborn*, 60 F. 880.

No claim is made by plaintiff in his reply that he was induced to execute the release by any misrepresentation of fact by the defendant or by any coercion or undue influence exerted by the defendant or anyone else. In this state of the pleadings the only inquiry left open is whether the allegations in the reply set forth a mutual mistake of fact which would justify a rescission of the release. The allegations of mutual mistake are simply that the parties believed that the plaintiff had not suffered any serious injury but had completely recovered from the effects of the fall from the train, and that contrary to this belief the plaintiff had suffered a serious injury which later became manifest and continues to the present time.

These allegations are insufficient as a foundation for nullification of the release. They do not disclose any mutual mistake of an existing or past fact. The only mutual mistake of the parties alleged concerns their beliefs or opinions with respect to the future consequences of the injury sustained in the accident. This is not enough.

The leading case in the Federal Courts establishing the conditions precedent to the right to avoid a release upon the ground of mutual mistake of fact is *Chicago & N. W. Ry. Co. v. Wilcox*, 116 Fed. 913. In that case Mrs. Wilcox sustained a fractured femur as a result of a fall while

riding as a passenger upon one of the defendant's trains. She settled her claim for \$600 and gave the railroad a general release. The claim agent of the railroad who effected the settlement informed the plaintiff that her injuries were temporary and that she would recover from them in about a year. She testified that she believed the claim agent and relied upon his assurance in making the settlement. It developed that her injuries were permanent and in her action against the railroad she sought to avoid her release upon the ground that it was predicated upon a mutual mistake of fact. The court held that the release was binding. The question whether a general release could be avoided upon the ground of the mutually mistaken beliefs of the parties as to the future effect of a known injury was answered in the negative. The court said:

“Again, it is not every mistake that will lay the foundation for the rescission of an agreement. That foundation can be laid only by a mistake of a past or present fact material to the agreement. Such an effect cannot be produced by a mistake in prophecy or in opinion, or by a mistake in belief relative to an uncertain future event. A mistake as to the future unknowable effect of existing facts, a mistake as to the future uncertain duration of a known condition, or a mistake as to the future effect of a personal injury, cannot have this effect, because these future happenings are not facts, and in the nature of things are not capable of exact knowledge; and everyone who contracts in reliance upon opinions or beliefs concerning them knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may turn out to be mistaken, and assumes the chances that they will do so. Hence, where parties have knowingly and

purposely made an agreement to compromise and settle a doubtful claim, whose character and extent are necessarily conditioned by future contingent events, it is no ground for the avoidance of the contract that the events happen very differently from the expectation, opinion, or belief of one or both of the parties." (Citing numerous cases.)

There has been no departure by the federal courts from the proposition announced in the above quotation from the *Wilcox* case. There has been some criticism of the dictum that a statement of a doctor to the effect that a patient will fully recover in a certain time is not a statement of a present fact. What was actually decided, however, in the *Wilcox* case has been followed without dissent. See *Wilson v. Sands*, 231 F. 921; *McGovern v. McClintock-Marshall Co.*, 269 F. 911; *Denver & S. L. Ry. Co. v. Moffat Tunnel Improvement Dist.*, 35 F. (2d) 365; *United States v. Golden*, 34 F. (2d) 367; *United States v. Garland*, 122 F. (2d) 118; *Pacific Mutual Life Insurance Co. of California v. Jacob*, 87 F. (2d) 870.

The reply was fatally defective for the additional reason that it contained no allegation that the release was predicated upon the alleged mistaken beliefs. It must be concluded from the omission of such an essential allegation that the mistaken beliefs of the parties played no part in the formation of the contract embodied in the release. In other words, the release would have been executed and delivered had the parties known that their beliefs were erroneous. The authorities are agreed that a mutual mistake of fact is without legal significance unless the contract would

not have been entered into if the parties had known the true facts.

As pointed out by the Supreme Court of the United States in *Grymes v. Saunders*, 93 U. S. 55, 23 L. Ed. 798:

“A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied, that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved. *Kerr on Mistake and Fraud*, 408; *Trigg v. Read*, 5 Humph. 529; *Jennings v. Broughton*, 17 Beav. 541; *Thompson v. Jackson*, 3 Rand. 507; *Harrod's Heirs v. Cowan*, Hardin, 543; *Hill v. Bush*, 19 Barb. (Ark.) 522; *Jouzan v. Toulmin*, 9 Ala. 662.”

The final and fatal defect in the reply lies in the failure of the plaintiff to tender to the defendant the consideration paid by it for the release.

Whether a party seeking to avoid the release of a cause of action arising under a federal statute must tender the consideration paid to him is to be determined by the decisions of the United States courts. See *Ricketts v. Pennsylvania Railroad Co.*, 153 Fed. (2d) 757; *Callen v. Pennsylvania Railroad Co.*, 332 U. S. 625, 68 S. Ct. 296. Under federal law, tender of the consideration paid for a release is a condition precedent to avoidance of the release.

*Collett v. Louisville & N. R. Co.*, 81 Fed. Supp. 428; *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; *Lyons v.*



*Allen*, 11 App. D. C. 543; *Thornton v. Puget Sound Power & Light Co.*, 49 Fed. (2d) 347.

In the *Collett* case the plaintiff sued the defendant under the Federal Employers' Liability Act to recover damages for personal injuries. The defendant pleaded in defense a general release of the cause of action. The plaintiff obtained an order permitting him to reply to the answer. He alleged in the reply that the release was obtained by fraud. He omitted to allege any tender back of the consideration paid for the release. The defendant moved to strike the reply. The motion was granted upon the ground that the reply failed to tender back the consideration for the release. The court said:

"Since the substantive and procedural rights involved in an attack upon a contract of compromise and release in an Employers' Liability case are governed by the same general principles that apply to other contracts the general principle which requires the return of the fruits of the contract before it can be attacked for fraud is applicable also. *Vandervelden v. Chicago & N. W. Ry. Co.*, C. C., 61 F. 54; *Patterson v. Cincinnati, N. O. & T. P. Ry. Co.*, D. C., 5 F. Supp. 595, and cases there cited."

In *Thornton v. Puget Sound Power and Light Co.*, *supra*, the plaintiff brought suit under the Merchant and Marine Act to recover for the death of a seaman. The plaintiff also sought to set aside a general release, upon the ground that it had been obtained by fraud. No tender of the consideration paid was set forth in the complaint. The court held that the complaint did not state a cause of action. *Hill v. N. P. Ry. Co.*, 113 Fed. 914; *Price v. Connors*, 146 Fed. 503;

*Mahr v. Union Pacific Railroad Co.*, 170 Fed. 699; *Miles v. Lavender*, 10 Fed. (2d) 450; the *Thomas P. Beal*, 298 Fed. 121, were cited and relied upon as establishing the proposition that federal law requires a tender of the consideration paid as a condition precedent to the avoidance of a general release. An examination of the cited cases will demonstrate that they fully sustain the decision of the *Thornton* case.

Apart from the insufficiency of the pleadings, there was an entire failure of proof of any facts that impair in the least the validity of the release.

The circumstances surrounding the execution and delivery of the release are as related by the plaintiff that on July 6th, following the alleged accident, he went to Pueblo and contacted Mr. M. V. Sayger, a claim agent of the defendant (R. 180). He went in Mr. Sayger's office in the depot and after introducing himself said: "Well, Mr. Sayger, how about settling up with me?" "He said: (Well, let's see what we can do" (R. 181).) Mr. Sayger further said: "Well, that would figure you about \$125, wouldn't it? I said: "I will take \$135 and that was all there was to it" (R. 181).

Q. What did he (Mr. Sayger) say?

A. He said, "You drive a hard bargain."

Q. Was anything else said?

A. No sir. He wrote me out a check. I went and cashed it and went on to Denver.

Q. Was anything said concerning your going back to work?

A. No, not that I recall. He asked me how I felt. I said, "I feel like I could go back to work again." And he said, "Okeh" (R. 181).

Plaintiff further testified that he believed he could go back to work and felt that his injuries were over (R. 182).

Mr. Sayger testified that when plaintiff called at his office in Pueblo he knew nothing about plaintiff's injuries except that Dr. Fuller had reported to him that plaintiff was physically qualified to return to work (R. 161-162). He asked the plaintiff about his injuries and plaintiff said he felt he was able to return to work but wanted to go to Denver and then back to Salida where he would be ready to go to work (R. 163). Over the objection of the defendant, counsel for the plaintiff was permitted to ask the question: "And at that time you agreed to pay him \$13.50 a day for the ten days," to which question Mr. Sayger replied: "I used no formula to arrive at the amount of payment (R. 165). He further stated that he had no discussion with the plaintiff as to how much a day should be allowed and no mention was made of the sum of \$13.50 per day in the course of the conversation (R. 165).

Mr. Sayger didn't know anything about the plaintiff's belief except that plaintiff told him he was ready to go to work and wanted to settle his case (R. 167). Plaintiff remarked to Mr. Sayger that he had been contacted by one Bennett, a switchman at Salida, who had suggested to the plaintiff that he claim a back injury and bring a lawsuit against the railroad (R. 167).

The symptoms of any injury sustained by the plaintiff in the alleged accident of June 26th are wholly subjective,

except that Dr. White claims to have discovered a slight muscle spasm in the lower region of the back. There was no evidence of any bruise, abrasion, or other trauma. The record is silent concerning any torn or disheveled clothing. X-rays of the plaintiff's back, taken at Salida within two or three days after the alleged accident and those taken about the time the action was commenced, revealed no pathology that was in any way connected with the asserted fall from the train. He received no medical treatment except that Dr. Smith at the Salida Hospital recommended some pills for his nerves (R. 124).

Plaintiff admitted that he completed his shift, which required several hours of switching work, following the alleged accident. He testified that he worked some following the accident and prior to the date of the settlement. He worked two full days on July 22nd and July 23rd and eight full days between August 1st and 15th, inclusive. He worked eighteen days in September, earning more in that month than in any previous month of his employment by the defendant. He worked four days in October and five days in November. He was cut off the board in December because of reduction in force. He admitted that the only reason he didn't earn more money between the date of the alleged accident and the date his employment terminated was that his seniority was so low that no work was available to him (R. 129).

Whether the plaintiff actually worked any time between the date of the alleged accident and the date of settlement as admitted by him is not of controlling importance. It is

certain, however, that he was not working on July 2nd because he was then in jail on a charge of drunkenness and indecent exposure (R. 130).

It is submitted that the evidence is entirely insufficient to support a finding that the general release rests upon a mutual mistake of fact which would render it invalid.

It is legally impossible to find in these circumstances, under which the release was executed, any evidence whatever that it was motivated by a mutual mistake of the parties with respect to any fact, past, future or present. There is no indication that at the time the release was executed he had sustained any personal injury of which he was not then aware. Nor is there any evidence of any subsequent aggravation or unexpected developments of the injuries, if any, growing out of the alleged accident. Plaintiff believed at the time he signed the release “\* \* \* Like I could go back to work again.” As to this belief, it was conclusively established to be correct. He not only was able to go back to work again, but was able to earn more money in a month than he had ever earned during his employment by the defendant. Not only did he return to work, but he returned as soon as work was available. He continued to work so long as it was available (R. 129).

He had not been advised by any physician that he was or was not able to return to work, nor was he acting under the influence of the opinion or advice of any physician or surgeon. There is no proof of any change in his condition prior to the release and subsequent thereto. He stated that the pain in his back continued from the time of the alleged accident up to the time of trial (R. 129).

With respect to the defendant, it had no knowledge concerning the plaintiff's condition except that both the plaintiff and his doctor believed that he was able to return to work, a belief heretofore shown to be well founded.

There is a complete absence of any fraud, erroneous representation, coercion or overreaching in the negotiations leading up to the settlement. Plaintiff sought out the defendant's claim agent in a distant city and requested a settlement of his claim. He demanded and received more money than the claim agent had offered. He read the release and understood its terms. Neither he nor the claim agent was under the least misapprehension concerning the nature, character or extent of any injury sustained by the plaintiff in the alleged accident. They were not even mistaken about any future development of any injury sustained by the plaintiff. The federal cases are clear that the release executed by the plaintiff is a valid and binding settlement of the cause of action sued upon. See *Chicago & N. W. Ry. Co. v. Wilcox*, 116 F. 913; *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; *Merwin v. N. Y., N. H. & H. R.*, 62 F. (2d) 803; *Rader v. Lehigh Valley Railway Co.*, 26 F. (2d) 73; *Sitchon v. American Export Lines, Inc.*, 113 F. (2d) 830.

Even if it be assumed contrary to the evidence that the parties were mutually mistaken with respect to the nature and extent of the plaintiff's injuries, such mistake would avail the plaintiff nothing because it is, as a matter of law, immaterial and played no part in the formation of the contract embodied in the release. It will be noted that the release discharges all claims and causes of action which the plaintiff then had or that he might thereafter have or claim

to have on account of any and all personal injuries whether then known or apparent or unknown or not apparent, including complications arising from such personal injuries or the treatment thereof. By these statements in the release the parties declared emphatically that it was immaterial to them in arriving at a settlement whether they were or might be mistaken with respect to the nature or extent of the plaintiff's injuries. The very basis of the contract is an assumption that the parties may be wholly mistaken as to both the nature and the duration of the plaintiff's injuries. The probability that the injuries might be greater or their duration longer than the parties then realized or expected was the very contingency that motivated the release. The plaintiff voluntarily and expressly assumed the risk of such a contingency. In view of the express written terms of the release, any mistakes of the parties with respect to the nature or extent of plaintiff's injuries were not material and did not induce the contract or form any basis for entering into it.

In *Sitchon v. American Export Lines, Inc.*, 113 Fed. (2d Series) 830, a seaman brought suit under the Jones Act to recover damages for personal injuries. He had previously, in consideration of the sum of \$180.00, executed and delivered to the defendant a general release covering any and all injuries and/or illness sustained on or about the date of the accident and reciting that plaintiff took the risk that he might then or in the future have other injuries, illness or disabilities that he did not then know of. In the accident involved in the case, the plaintiff was struck on the head by a piece of machinery. Both the plaintiff and the defendant had been informed by the doctors, after careful and thorough

examination of the plaintiff, that plaintiff's injuries were temporary and consisted of only a slight concussion. After the release had been executed it was discovered that the plaintiff had received a fracture of the skull in the accident and that the fracture was certain to result in permanent disability. It was admitted that both the plaintiff and the defendant were grievously mistaken as to both the nature and the extent of the plaintiff's injuries. The court held that the release was valid and not subject to attack upon the ground of the mutual mistake of fact concerning the nature or extent of the plaintiff's injuries. The court said:

"The release here contemplated a settlement of claims for all present and future damages arising out of the accident. The settlement does not bear the slightest taint of fraud and if there was a mistake as to the nature or extent of the injuries, and the judge in the court below seems to have thought there was none, the release accompanying the settlement fairly arrived at was a bar to the plaintiff's action. *Bonici v. Standard Oil Co.*, 2 Cir., 103 F. 2d 437; *Harmon v. United States*, 5 Cir., 59 F. 2d 372; *Spangler v. Kartzmark*, 121 N. J. Eq. 64, 187 A. 770; *Cogswell v. Railroad*, 78 N. H. 379, 101 A. 145.

"The law of New Jersey is apparently in accord with the result we have reached, though that fact is really unimportant where the question is one affecting the rights of a seaman under the maritime law. That question is one which the United States courts have to answer."

The proposition announced in the *Sitchon* case to the effect that where the release covers both known and unknown injuries and complications from known injuries, it



is immaterial that the parties may have been mutually mistaken with respect to the character or duration of the plaintiff's injuries, is settled of law in the federal courts. See *Lumley v. Wabash Railway Co.*, 76 Fed. 66; *Haddock v. North Atlantic and Gulf S. S. Co.*, 81 Fed. Supp. 421; *Chicago & N. Y. Railway Co. v. Wilcox*, *supra*.

## II. TO AVOID A RELEASE, PLAINTIFF MUST PROVE MUTUAL MISTAKE BY CLEAR AND CONVINCING EVIDENCE (ERROR No. 2).

The defendant in its request numbered 2 asked that the jury be instructed that the burden rested upon the plaintiff to prove by clear and unequivocal evidence that the release was executed under the mutual mistake of the parties with respect to the recovery of the plaintiff. The court, however, modified the request by instructing that the burden rested upon the plaintiff to prove by a preponderance of the evidence the alleged mistake of fact.

So far as we can determine, the law of every jurisdiction in this country requires a party seeking to avoid a release upon the ground that it was founded upon a mutual mistake of fact to prove the claimed mistake of fact by clear and unequivocal evidence. Certainly this the law of the federal courts. See *Chicago & N. W. Ry. Co. v. Wilcox*, 116 F. 913; *Callen v. Pennsylvania Railroad Co.*, 162 F. (2d) 832; *Merwin v. New York, N. H. & H. R. Co.*, 62 F. (2d) 803.

By modifying the defendant's request the court relieved the plaintiff of practically the entire burden which he was

required to carry in order to avoid the release. The cases above cited demonstrate that it was prejudicial error to relieve the defendant of this burden.

### III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY THAT PLAINTIFF COULD RECOVER FOR AN AGGRAVATION OF HIS PRE - EXISTING PHYSICAL CONDITION (ERROR No. 3).

In Instruction No. 10 the court said:

"Plaintiff is entitled to recover full compensation for all damages proximately resulting from the defective grab-iron, if any, even though his injuries may have been aggravated by reason of his pre-existing physical condition, or rendered more difficult to cure by reason of his state of health or even though by reason of a latent disease the injuries were rendered more serious to him that they would have been had he been in the best of health.

"In this connection you are instructed that if you find that the plaintiff is entitled under these instructions to recover damages, then plaintiff is entitled to full compensation for all damages proximately resulting from said defective grab-iron, if any, even though his injuries are more serious and of longer duration than they would have otherwise been because of any arthritic condition from which plaintiff may have been suffering."

The vice of this instruction lies in the absence of any evidence to which it could be applied by the jury.

There was evidence of an old osteo-arthritis involving the back bone, also a hernia and an injury to one of plain-

tiff's legs. However, there is no evidence that any injury sustained on June 26th was aggravated by any of these previous conditions or rendered more difficult to cure. The medical testimony with respect to pre-existing disease or conditions and the connection between them and the alleged fall from the train was given by Doctors White and Fuller. Neither of these doctors expressed the opinion that there was any connection between the pre-existing diseases and the injury complained of in this action. Doctor White explained that the only evidence of injury to the plaintiff traceable to a fall from a train was a muscle injury which was manifest by a spasm. He considered that the site of this claimed muscle injury was too remote from the site of the osteo-arthritis for that injury to be affected by the disease (R. 79-80). The most that Doctor Fuller would say was that there was a possibility of a connection between the assumed injury to the muscle and to the osteo-arthritic condition (R. 177-178).

There is, of course, no pretense of any connection between the old leg injury or the hernia and anything which occurred to the plaintiff on June 26th.

Nor does the testimony of the plaintiff afford any basis for connecting his claimed injuries with the pre-existing disease or condition. All of the pain, of course, originated on June 26th. He located the source of the pain at the point where Dr. White claims to have discovered a muscle spasm. Plaintiff nowhere claimed that his injuries of June 26th were in any manner aggravated or prolonged by his disease.

In this state of the evidence, there was none to which Instruction No. 10 could have any application. That an instruction to a jury upon a subject concerning which there is no evidence is erroneous is elementary. That the error was prejudicial in this case is patent. There was a sharp conflict in the evidence as to whether the plaintiff sustained any injury whatsoever at the time or place claimed by him. His admitted activities since the alleged accident and the medical testimony produced by the defendant fully authorize it to contend that the plaintiff was a malingerer. To direct the jury as the court did in Instruction No. 10, to award the plaintiff full compensation not only for the injuries sustained in the claimed accident but also for additional injuries of which there is no evidence, rendered it impossible for the defendant to obtain from the jury a just verdict. The following authorities unanimously condemn Instruction No. 10 and establish its prejudicial character :

*Tyng v. Constant Lorraine Investment Co.*, 37 Utah 304, 108 P. 1109; *State Bank of Beaver County v. Hollingshead*, 82 Utah 416, 25 P. (2d) 612; *Railroad Company v. Houston*, 95 U. S. 697; *Erie Railroad Co. v. Vajo*, 41 F. (2d) 738.

In the *Houston* case the Supreme Court of the United States said :

“To instruct a jury upon assumed facts to which no evidence applied was error. Such instructions tended to mislead them, by withdrawing their attention from the proper points involved in the issue. Juries are sufficiently prone to indulge in conjectures, without having possible facts not in evidence

suggested for their consideration. In no respect could the instructions mentioned have aided them in reaching a just conclusion."

Furthermore, the instruction was not within any issue raised by the pleadings. There is no allegation in the complaint or elsewhere that any injuries arising from the alleged fall have been aggravated by reason of plaintiff's pre-existing physical condition, or that such injuries were rendered more difficult to cure by reason of his state of health. Nor was any claim made that the injuries of June 26th were rendered more serious because of the plaintiff's lack of good health. On the contrary, the allegation of the plaintiff was that the injuries of June 26th had aggravated the latent osteo-arthritic condition. In other words, the instruction related to a subject exactly opposite to the subject in issue under the pleadings. The above authorities are equally clear to the proposition that it is prejudicial error to instruct upon subject not within the issues raised by the pleadings.

#### IV. THE COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY THAT PLAINTIFF WAS ENTITLED TO COMPENSATION FOR ALL PAIN AND SUFFERING THAT HE WILL PROBABLY ENDURE IN THE FUTURE (ERROR No. 4).

In Instruction No. 8 the court instructed the jury in part as follows:

"In determining the amount of such damages you are instructed that plaintiff is entitled to com-

pensation for all pain and suffering, if any, both mental and physical, which he has endured since the time he sustained his injuries and that he *will probably endure in the future* \* \* \* It is left to the sound judgment and discretion of the jury trying the case to determine from a preponderance of the evidence what amount is reasonable compensation to award plaintiff for the physical or mental pain and suffering which he has endured or *will probably endure in the future.*"

This instruction authorized recovery for future pain and suffering, regardless of the uncertainty of their ever being endured. If the jury considered there was a mere probability of future pain and suffering, they were required to make an award. Such is not the measure of damage for future pain or suffering. The plaintiff is entitled to recover damages for only such future pain and suffering as the evidence establishes with reasonable certainty will be endured. In *Chicago, M. & St. P. Ry. Co. v. Lindeman*, 143 Fed. 946, the court held that an instruction similar to the one given in the instant case constituted reversible error. The court said:

"Another specification of error is that the court instructed the jury that the plaintiff was entitled to recover for such pain and suffering caused by the injury as he 'may in the future suffer.' In *Chicago & N. Y. Ry. Co. v. De Clow*, 124 Fed. 142, 143, 145, 61 C. C. A. 34, 35, 37, in which this court had occasion to consider the rule applicable to this question, it said:"

"The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such suffering and other evil effects of the act as are reasonably certain to

result from it. Possible, *even probable*, future damages are too remote and speculative to form the basis of legal injury. If they may or subsequently do result from the accident, they are but a part of that *damnum absque injuria* which reaches too far into the realm of conjecture to form any part of the basis of an action at law. *Filer v. N. Y. Central R. R. Co.*, 49 N. Y. 42, 45; *Curtis v. R. & S. R. R. Co.*, 18 N. Y. 534, 542, 75 Am. Dec. 258; *Fry v. Railway Co.*, 45 Iowa, 416, 417; *White v. Milwaukee City Ry. Co.*, 61 Wis. 536, 541, 21 N. W. 524, 50 Am. Rep. 154; *Block v. Milwaukee St. R. Co.*, 89 Wis. 371, 380, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Smith v. Milwaukee Builders' & Traders' Exchange*, 91 Wis. 360, 368, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. Rep. 912; *Ford v. City of Des Moines*, 106 Iowa, 94, 97, 75 N. W. 630; *Chicago, R. I. & Pac. R. Co. v. McDowell (Neb.)* 92 N. W. 121'."

See also: *Southwest Brewery Co. v. Schmidt*, 226 U. S. 163 — S. Ct. —; *Daigneau v. Grand Trunk Railway Co.*, 153 Fed. 593; *Kennon v. Gilmer*, 131 U. S. 22, 9 S. Ct. 696.

## V. THE COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING THE PLAINTIFF TO TESTIFY TO TREATMENT PRESCRIBED BY DOCTOR HINES (ERROR No. 5).

Plaintiff testified that following the settlement made through Mr. Sayger, he went to Denver and consulted Dr. Hines. Over the objection of the defendant to any statements made to the plaintiff by Dr. Hines, the plaintiff testified:

Q. What did he prescribe?

A. He told me to go down and get some kind

\* \* \*

Q. What did he prescribe for you?

A. Prescribed a belt for me.

Q. Any particular kind of belt?

A. No, he didn't say. He just said: "Go get a belt for your back" (R. 115).

There is no evidence that Dr. Hines was an agent of, or had any authority whatever to represent the defendant at the time the plaintiff consulted him. Plaintiff does not say that anyone connected with the defendant sent him to Dr. Hines or even knew that he had gone to the doctor's office. It follows that any statements made by Dr. Hines to the plaintiff or any treatment prescribed by the doctor were hearsay as to the defendant, and inadmissible in evidence in this action. It is so held in *United States v. McCreary*, 105 F. (2d) 297. See also *Bucher v. Equitable Life Assur. Soc. of the United States*, 91 Utah 179, 63 P. (2d) 604.

VI. THE TRIAL COURT ERRED IN PERMITTING PLAINTIFF TO TESTIFY TO HEARSAY STATEMENTS MADE TO HIM BY MR. MERRILL, AND TO PLAINTIFF'S CONCLUSIONS CONCERNING HIS CONDITION (ERROR Nos. 6 and 7).

Plaintiff stated that after seeing Dr. Hoover at the employee's hospital in Salida, he went to his home in Denver. The following then occurred (R. 106-107) :

"Q. How did you happen to leave Salida for Denver?

MR. BAGLEY: I object to it as calling for a conclusion of the witness, and immaterial.

Q. Were you released from duty?

A. From the Salida Board, yes.



Q. Who released you?

A. The trainmaster's clerk, by the name of Mr. Merrill.

Q. Was that because of your physical condition?

MR. BAGLEY: I object to that, your Honor, as calling for a conclusion of the witness, and incompetent.

MR. KING: He knows why he was released.

THE COURT: Objection overruled.

Q. Were you released because of your physical condition?

A. Yes.

MR. BAGLEY: Just a moment, your Honor. I move to strike that answer on the ground it is a conclusion of the witness, hearsay, and incompetent.

THE COURT: Of course, it might be a conclusion.

MR. KING: He knows.

Q. (By Mr. King) Do you know why you were released, Mr. Kirchgestner?

A. Certainly.

MR. BAGLEY: I make the same objection.

MR. KING: It isn't a matter of opinion.

THE COURT: He can state what happened.

Q. (By Mr. King) Tell us just exactly what happened concerning your leaving Salida, Colorado?

A. Mr. Merrill released me from—

MR. BAGLEY: I move to strike that answer as a conclusion, and hearsay.

MR. KING: A statement of fact.

THE COURT: Don't make the conclusion as to what happened. State what happened. You went to Mr. Merrill, or he came to you, and what happened?

A. Sent me to Pueblo, down there to see the claim agent, Sayger.

MR. BAGLEY: I move to strike that answer upon the ground that it is hearsay and incompetent.

THE COURT: Objection overruled and the motion to strike is denied.

Q. About what day of the month was it, Mr. Merrill sent you down to see Mr. Sayger?

A. I believe it was June 25th or 6th."

There is a complete absence of any evidence that Merrill had any authority whatsoever to bind the defendant or represent the defendant in the matter of releasing any employee of the defendant from the Salida board. There is not even any competent evidence that Merrill was an employee or had any contractual connection with the defendant whatsoever. It is clear therefore that any statement made by Merrill to the plaintiff was not binding upon the defendant.

That it was prejudicial error to admit these hearsay statements is established by *State Bank of Beaver County v. Hollingshead*, 82 Utah 416, 25 P. (2d) 612, and *S. W. Bridges & Co. v. Candland*, 88 Utah 373, 54 P. (2d) 842. The statement of the plaintiff as to why he was released from the Salida board, if construed as reasons given by Merrill, is of course hearsay and inadmissible under the cases cited. If construed as a statement of plaintiff's reasons, it is either a conclusion or a self-serving statement. Under either interpretation it was inadmissible in evidence.

## VII. SUMMARY.

In conclusion, we respectfully submit that the reply of the plaintiff failed to allege facts sufficient to invalidate the general release in that there was no allegation of a mutual mistake of an existing or past fact or that any mutual mistake of the parties was the inducement or foundation of

the release; that the reply was insufficient for the further reason that the plaintiff did not tender or allege that he had offered to return the consideration paid for the release; that the evidence was insufficient to sustain a finding that the release was founded upon or induced by a mutual mistake of the parties with respect to either the nature, character or extent of the plaintiff's injuries; that as a matter of law any mutual mistake of the parties with respect to the nature, extent or duration of the plaintiff's injuries was immaterial and was not an inducement to, or the basis of, the release; that for the foregoing reasons the trial court erred in denying the defendant's motion for a peremptory instruction to the jury in its favor.

Should the foregoing conclusions be rejected, the defendant would respectfully submit that the court committed prejudicial error in its instructions to the jury and in admitting incompetent evidence over the objections of the defendant.

The judgment of the trial court should be reversed with directions to dismiss the action.

Respectfully submitted,

VAN COTT,  
BAGLEY,  
CORNWALL & McCARTHY,  
CLIFFORD L. ASHTON,  
*Attorneys for Appellants.*