

1958

Raymond B. Maxfield v. The Denver and Rio Grande Western Railroad Company : Brief for Respondent

Utah Supreme Court

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Case No. 8854

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IN THE SUPREME COURT
of the
STATE OF UTAH

RAYMOND B. MAXFIELD,

Plaintiff and Respondent,

—vs.—

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY
a corporation,

Defendant and Appellant.

FILED
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Clerk, Supreme Court, Utah

BRIEF FOR RESPONDENT

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—vs.—

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BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

The parties will be referred to as in the court below. ✓
All italics are ours.

FACTS

This lawsuit arose from an injury which Plaintiff received on July 25, 1955, approximately 8 miles west of Green River, Utah, on U.S. Highway No. 50 and 6. The lawsuit was filed under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51, et seq.

The injuries to plaintiff resulted when a railroad truck in which he was a passenger in the back tipped over throwing him out (R. 23). He testified that most

of the impact received from being thrown out of the back of the truck was to his left shoulder and that he felt a great amount of pain in the left shoulder from the time of the injury. Plaintiff was taken to the hospital at Price, Utah, where he remained for approximately eight days. He was treated by Dr. Hubbard who found that his shoulder had been dislocated. The doctor immediately took x-rays and re-set the shoulder after giving plaintiff an anaesthetic (R. 24, 108, 119). Plaintiff had never had any trouble with his left shoulder prior to July 25, 1955 (R. 23, 34). His left arm was bound tight to his side until a day or two before he left the hospital at which time a splint was placed on his arm. Plaintiff was released from the hospital with instructions not to raise his arm too much (R. 24-25). Subsequently Maxfield was seen by Dr. Hubbard in the doctor's office on August 12, 16 and 23 and September 6 and 27. The doctor released him for work on October 1, 1955 (R. 110). Plaintiff has suffered pain in his left shoulder ever since the accident (R. 27, 33).

Maxfield first became acquainted with Stephen, the claim agent of defendant, while he was recuperating at home, when Stephen came to his house to see him (R. 26). At a later date Stephen took plaintiff to the scene of the accident and obtained information from him as to how the accident happened. On one of these visits Stephen told plaintiff that if he needed money he could advance him some (R. 26). On September 10, 1955, Stephen gave plaintiff a check in the amount of \$200.00 and had him sign an agreement (Ex. P-1). This agreement

provided, among other things, that plaintiff agreed that said advancement would not be considered as an admission of liability on the part of the Railroad Company and that he agreed with the Railroad Company that he would endeavor, in good faith, to adjust and settle any claim for his injuries without resorting to litigation.

On October 1st when plaintiff had been released by the doctor to go back to work he went to Stephen's office at the Grand Junction Railroad Yards and had a conversation with him in regard to the settlement of his case. Stephen offered plaintiff a settlement of \$710.00 which was payment of lost wages for his time off work. Maxfield complained of this offer stating that he did not think it was a just settlement inasmuch as he was paid nothing for his pain and suffering which he was still having at that time. He then stated that he informed Stephen that he, plaintiff, was thinking of getting a lawyer and that maybe he could get more that way. In response to this Stephen stated "You will lose your job and it will take months for a procedure of that kind anyway". After this, plaintiff accepted the settlement because "I will take what I can get then because I don't want to lose my job" (R. 30). At that time Stephen typed up the release and had Maxfield sign it, giving him in return a check in the sum of \$510.00 (Ex. P-2).

Dr. Hubbard testified that in a case such as this he would not anticipate a permanent injury and that he did not anticipate any permanent injury in this particular case (R. 111). He stated (R. 110):

"A. No. I thought it was just a normal treatment for a dislocated left shoulder, and the man

went back to work with no complications.

There were no complications at all”.

The plaintiff testified (R. 32):

“Q. Now tell me, did you have any idea at that time that you had a permanent injury in your shoulder?

A. No, Sir.”

Speaking of the time when the release was signed, October 1, 1955, Stephen testified (R. 91):

“Q. At the time you made this settlement it was your idea that he had no permanent disability, wasn't it?

A. As far as I know that is right.”

Dr. Reed Smoot Clegg, a local orthopedic surgeon, testified that he examined plaintiff in his office on July 5, 1957, and January 24, 1958, and that x-rays of plaintiff's left shoulder were taken on both occasions (R. 65). Dr. Clegg testified that the x-rays showed a callus or bone deposit in the region of the shoulder bone on the upper end of the humerus, or arm bone. This formation had the appearance on the x-rays of a knob (Ex. P-3, P-4). Dr. Clegg further testified that this callus deposit usually occurs after some kind of an injury and that it usually manifests itself with the complaint of pain and tenderness in that area and that occasionally there is some secondary weakness because the injured person seems to favor it. In his opinion plaintiff had incurred a 10% permanent partial disability in his left shoulder based on the fact that there is still slight weakness, tenderness and a deposit of bone about the shoulder

joint (R. 66-67). Dr. Clegg further testified that assuming prior to July 25, 1955, plaintiff had never had any complaints or limitations in his left shoulder and that on said date he was thrown out of an overturned truck and landed on his left shoulder and suffered a dislocation and that the dislocation was reduced at the hospital and that ever since that time and at the present time plaintiff has pain in his shoulder and with the examinations that he had performed and the x-rays that he had taken, in his opinion that type of injury probably caused the disability which plaintiff has (R. 67). Dr. Clegg further testified that the callus formation would restrict motion in the extreme ranges (R. 71).

Dr. Hubbard, an employee of respondent's hospital association, came from Price, Utah, where he practices, to testify. On the witness stand he exhibited an antagonistic, argumentative and biased attitude in favor of the Railroad which is exhibited to some degree in the following testimony (R. 119):

“Q. You gave him an anaesthetic?

A. You have to do that.

Q. Why did you do that?

A. So I wouldn't hurt the man, but I have reduced a hundred shoulders without anything.

Q. I understand, but in this case you didn't, did you?

A. I think I could have done it with Raymond

Q. I understand, but you did give it, didn't you?

A. Of course, that is an exceptional—

Q. Did you or didn't you?

A. I gave him an anaesthetic, a mild, a very mild Anaesthesia, not an anaesthetic, a mild anaesthesia.

Q. What did you give him?

A. Well, you might call it semi-comatose. See, they are partially conscious.

Q. And he would feel it?

A. I guess he would feel it a little.

Q. Why did you give it to him?

A. To relax him."

(R. 121-122)

"Q. In other words, Mr. Maxfield, at the time you took that bandage off, had absolutely no pain at all?

A. That is right.

Q. And he could move that whole arm any way around?

A. I will tell you why.

MR. ASHTON: Why don't you let him tell you why?

A. A dislocation isn't a fracture. A dislocation, you put back what God placed there. It is not broken; it is nothing. A ballplayer has a finger pulled out, a dislocated finger. Doesn't he go and play? Sure he does.

Q. Just a minute.

A. I have studied anatomy and surgery and you haven't.

THE COURT: Wait a minute, Doctor. Let's don't argue.

THE WITNESS: Excuse me, Judge Hanson.

THE COURT: Just answer his questions.

THE WITNESS: All right. Yes.

Q. (By Mr. Roberts) Just be seated. Just be seated, Doctor."

Also, Dr. Hubbard testified that all persons over 40 years of age would hurt in their shoulder on moving their arms to the extreme position. Dr. Hubbard stated at (R. 123):

"Q. Doctor, at the age of fifty I am supposed to hurt when I go like this, if that is right (illustrating).

A. If you are playing basketball I think it would bind up quite quickly.

Q. I am not saying that. When I move in the extremes I am supposed to hurt?

A. Yes, sir.

Q. Everybody over forty years old?

A. Yes."

At the close of the evidence plaintiff's counsel made a motion to amend as follows (R. 128):

"MR. ROBERTS: We move at this time to amend to conform to the proof in connection with the evidence that was introduced in the case about a mutual mistake of fact, which was present if the claim agent and the plaintiff testified that

at the time they made the settlement that they were under the impression there was no permanent injury.”

This motion was granted by the court and mutual mistake of fact was given to the jury as well as fraud and undue influence.

STATEMENT OF POINTS

POINT I.

THE “PREPONDERANCE” RULE IS THE ESTABLISHED FEDERAL RULE FOR PLAINTIFF’S BURDEN IN AVOIDING A RELEASE.

POINT II.

THE TRIAL COURT PROPERLY ALLOWED PLAINTIFF TO AMEND HIS COMPLAINT AND PROPERLY INSTRUCTED THE JURY ON MUTUAL MISTAKE OF FACT.

POINT III.

THE GROSS UNFAIRNESS OF A SETTLEMENT IS A PROPER MATTER FOR THE JURY TO CONSIDER IN CONNECTION WITH PLAINTIFF’S EVIDENCE AS TO UNDUE INFLUENCE EXERCISED UPON HIM BY DEFENDANT’S CLAIM AGENT.

ARGUMENT

POINT I.

THE “PREPONDERANCE” RULE IS THE ESTABLISHED FEDERAL RULE FOR PLAINTIFF’S BURDEN IN AVOIDING A RELEASE.

It is admitted that the Federal Law is controlling as to this question. Defendant relies entirely upon the case of *Kirchgestner v. Denver & Rio Grande Western R. R. Co.* decided May 17 1950, 118 U. 20, 218 P. 2d 685,

for establishing the Federal law on this question. A review of the recent developments in the Federal Law on this subject will show that the Kirchgestner case is no longer controlling. In its decision on rehearing at 118 U. 41, 233 P. 2d 699 June 19, 1951, the Supreme Court of Utah referred to Federal Law cited in its decision granting a rehearing at 118 U. 37, 225 P. 2d 754. It there appears that the Utah Supreme Court relied on the case of *Callen v. Pennsylvania Railroad Co.* 3rd Cir. 162 F. 2d 832, and on appeal to the Supreme Court of the United States at 332 U.S. 625, 68 S. Ct. 296, 92 L. Ed. 242. In the Callen case the trial judge instructed the jury that the release was not binding as to permanent injuries suffered by the plaintiff. The Third Circuit Court, on appeal, reversed the trial court for the reason that the release issued was not presented to the jury and stated that the proper rule was the clear, unequivocal and convincing rule. The Circuit Court opinion was appealed to the Supreme Court of the United States. The Supreme Court of the United States affirmed the decision of the Third Circuit Court on the ground that the plaintiff had the burden of proving fraud or mutual mistake and that the question should have been given to the jury to decide. However, in its opinion the Supreme Court made no statement whatsoever as to whether the burden was by a preponderance or by clear, unequivocal and convincing evidence.

It is interesting to note that there was a four judge dissent consisting of Justices Black, Douglas, Murphy and Rutledge in which it was stated that Federal Em-

ployers Liability Act cases should be governed by the same rule which applies to releases by seamen in Admiralty Cases, which is that the defendant would have the burden of proving that the release was not obtained by fraud. Thus, two of the judges who are now on the Supreme Court, Black and Douglas, would have an even more liberal rule for plaintiffs in F.E.L.A. cases than the preponderance of the evidence rule. We desire to make special note of this fact at this time so that it may be borne in mind during the following discussion of later developments in the Supreme Court of the United States.

Over seven months after the decision on rehearing in the Kirchgestner case, on February 4, 1952, the Supreme Court of the United States ruled on the case of *Dice v. Akron, Canton & Youngstown R. R. Co.* 342 U.S. 359, 72 S. Ct. 312. In the Dice case the trial judge applied the procedure of the State of Ohio to an F.E.L.A. case in trying the issue as to the validity of the release separately as a court of equity. The trial court held that there was no clear, unequivocal and convincing evidence of fraud. The majority opinion in the Dice case was written by Justice Black and announced by Justice Douglas holding that the trial court, in trying the release issue as a court of equity, had denied a jury trial to plaintiff to which he was entitled under the Federal Employers Liability Act. Justice Frankfurter along with Justices Reed, Jackson and Burton concurred in the reversal of the Dice case for a different reason. In a separate opinion Justice Frankfurter concurred in reversal for the reason that the trial court had applied

the rule of clear, unequivocal and convincing evidence and stated at page 318:

“Such proof of fraud need be only by a preponderance of the relevant evidence. See Union Pacific Railroad Co. vs. Harris, 158 U.S. 326, 15 S. Ct. 843, 39 L. Ed. 1003.”

Thus, it can be seen from the special opinion of Justice Frankfurter in the Dice case that Justices Frankfurter, Reed, Jackson and Burton agreed that the preponderance rule applied in F.E.L.A. cases. It may be noted that undoubtedly at least Justices Black and Douglas who were on the majority side in the Dice case would agree with the rule as stated by Justice Frankfurter as opposed to the clear, unequivocal and convincing rule inasmuch as in the Callen case both of these Justices had spoken out for a rule even more liberal for the plaintiff than the preponderance of the evidence rule, that is, they would place upon the Railroad the burden of proving the release was not tainted by fraud.

It may be noted at this time that the case of *Union Pacific R. Co. v. Harris*, cited by Justice Frankfurter, indicates that the Federal rule is the preponderance of the evidence rule. This was a case brought in a Federal Court for personal injuries received by plaintiff while he was a passenger on defendant's train. There was a release issue involved in the case. The trial court instructed the jury that plaintiff was not bound by the release if his mind was in such condition from drugs and whiskey that he could not understand what he was doing or if he understood the settlement was for only medical

expenses and loss of time and he did not read the release because prostrated by the accident. In the trial court's instructions, reviewed by the Supreme Court, the trial court, in effect, told the jury "if you believe certain facts then the plaintiff is not bound by the release". At no time did the trial court state that the plaintiff had to show these facts by clear and convincing evidence. In speaking in the normal manner concerning these things it is inescapable that the trial court was applying the preponderance of the evidence rule. If it had applied the clear and convincing rule it would have so stated. By approving the instructions given as they were, it can be reasoned that the Supreme Court approved of the preponderance of the evidence rule. Certainly this is what Justice Frankfurter thought when he cited this case as authority in the *Dice* decision.

Subsequent to the *Dice* case, on August 4, 1952, the Third Circuit Court of Appeals decided the case of *Purvis v. Pennsylvania Ry. Co.* 198 F. 2d, 631. It can be noted that this is the same Circuit Court which had earlier decided the *Callen* case holding that the Federal rule was the clear, unequivocal and convincing rule. In *Purvis* the trial court had held that even though the broad issue was correctly an issue to be decided by the jury, the endorsement on the back of the check received by the plaintiff beneath release language printed on the back of the check constituted a ratification of the release and accordingly set aside a verdict and judgment in favor of the plaintiff. The Circuit Court held that this was not correct and that the endorsement of the check

was not a separate transaction. The Court then went on to set at rest any doubt that there may have been concerning the question of what plaintiff's burden of proof is in order to set aside a release. The court, on page 633, discussed the history of this law and adopted the preponderance of the evidence rule. The court stated:

"Until *Dice v. Akron, C. & Y. R. R. Co.* * * * it had been assumed that the Federal rule was that the evidence had to be clear, unequivocal and convincing. * * * That test was followed by us in *Callen v. Pennsylvania R. Co.* 162 F. 2d 832. *Callen* was affirmed by the Supreme Court * * *, but the above precise question was not formally passed upon by the court. * * * Mr. Justice Frankfurter who had been of the majority in *Callen* wrote the dissenting opinion in *Dice*. * * * Mr. Justice Jackson, who wrote the *Callen* decision, Mr. Justice Reed and Mr. Justice Burton joined with him. The dissent agreed with the majority on reversal but thought that the case should be returned for further proceedings ' * * * on the sole question of fraud in the release.' * * * and Mr. Justice Frankfurter went on to say that, 'such proof of fraud need be only by a preponderance of relevant evidence.'

"We are satisfied that if and when the problem is squarely before the Supreme Court the rule pronounced will be in accord with Mr. Justice Frankfurter's above quoted language and therefore, in fairness to the district judges of this Circuit and to ourselves, we adopt that test for this Circuit in applicable instances."

It can be seen that in the *Purvis* case the indication of the Supreme Court of the United States as to its feelings on this question was so strong that the Third

Circuit Court reversed itself on its holding in the Callen case. It may also be noted that the Callen case was the case on which the Supreme Court of Utah relied in arriving at its holding in the Kirchgestner case. Certiorari was denied in the Purvis case at 344 U.S. 898, 97 L. Ed. 694, 73 S. Ct. 278. The Supreme Court of the United States has cited the Purvis case with approval in the case of *South Buffalo Ry. Co. v. Gertrude Sloan Ahern*, 344 U.S. 367, 97 L. Ed. 395, 73 S. Ct. 340 (1952). This case involved a question of the validity of a law in New York providing that a claimant under F.E.L.A. could waive his rights and proceed under Workmen's Compensation Law in New York. The court held that the law, being permissive rather than coercive, did not unconstitutionally conflict with the Federal Employers' Liability Act. In discussing generally the nature of a railroader's rights under F.E.L.A. Justice Clark stated at 401:

“To be sure, peculiarities of local law may not gnaw at rights rooted in federal legislation. (Citing cases) * * * Untainted by fraud or overreaching, full and fair compromises of F.E.L.A. claims do not clash with the policy of the Act. *Callen v. Pennsylvania R. Co.* 332 U.S. 625, 92 L. Ed. 242, 68 S. Ct. 296 (1948). The validity of such an agreement, however, raises a federal question to be resolved by federal law. (Citing cases) * * * and, mindful of the benevolent aims of the Act, we have jealously scrutinized private arrangements for the bartering away of federal rights. (Citing cases including the *Purvis* case).

After the Purvis case, in 1952, the Circuit Court of Appeals for the First Circuit decided the case of *Cam-*

erlin v. New York Cent. R. Co. 199 F. 2d 698. This case involved validity of a release in an F.E.L.A. case. The plaintiff had testified in a deposition, among other things, that the claim agent represented that plaintiff was entitled only to Workmen's Compensation benefits at the rate of \$25.00 per week for his time off. The trial judge granted a summary judgment based on the testimony of plaintiff in his deposition. On appeal the cases cited by defendant in support of the summary judgment rendered by the trial court were all cases which had held that the rule was that plaintiff had the burden of setting aside the release by clear, unequivocal and convincing evidence. The court stated at page 704:

“This may have been the rule at one time but, at least as applied to cases under the Federal Employers' Liability Act, we take the federal rule now to be, as was indicated in the recent case of *Purvis v. Pennsylvania R. R. Co.* 3 Cir. 1952, 198 F. 2d 631, that it is enough if the employee establishes, by a preponderance of the relevant evidence, the facts invalidating the release.”

The *Purvis* case has also been followed by the Supreme Court of Minnesota in the case of *Allison v. Chicago Great Western Ry. Co.* (1954) 62 NW 2d 374. This was an action to recover for personal injuries in which the defendant set up a release as a defense. The trial court instructed that plaintiff's burden in upsetting the release was by a fair preponderance of the evidence. The jury awarded a verdict for plaintiff and the trial court entered judgment for defendant notwithstanding the verdict. One of the questions on appeal was whether

the burden was by a preponderance of the evidence or by clear, certain and unequivocal evidence. The court stated at page 379:

“It seems clear under the latest federal decisions that the applicable rule governing the weight of evidence essential to the avoidance of a release for mistake or fraud, under the Federal Employers’ Liability Act, is the ‘fair preponderance’ rather than the ‘clear unequivocal and convincing’ evidence rule.”

The court proceeds to review the Dice case and the Purvis and Camerlin cases and states at page 380:

“In accordance with the rule expressed in these late decisions, we must apply the ‘fair preponderance’ rule in weighing the evidence here presented.”

It may be pointed out that a review of Shepards Reporter Citations subsequent to the Purvis case shows that there has been no instance whatsoever where a subsequent case has modified in the least the decision in the Purvis case.

It is respectfully submitted that the federal law is what the Supreme Court of the United States says it is. It is obvious from foregoing that the Supreme Court of the United States has clearly spoken its preference for the preponderance rule. The fact that Justices Douglas and Black were on the majority opinion of the Dice case and therefore were not required to state their views as to this issue and in view of their stand on the Callen case where in the dissent they held that the rule should be even more liberal than the preponderance rule makes

it certain that at least two judges in addition to the four on the Dice dissent would hold for the preponderance rule as opposed to the clear, unequivocal and convincing rule. Furthermore, the fact that the Supreme Court denied certiorari in the Purvis case and cited the Purvis case with approval in the Ahern case is a further indication of its feeling as to this question of law. The Third Circuit Court in the Purvis case reversed its own decision in the Callen case on the strength of the Dice case and was subsequently followed by the First Circuit Court in the Camerlin case and by the Supreme Court of Minnesota in the Allison case. It appears that there is now no question whatsoever but that the federal rule is that a plaintiff need only prove by a preponderance of the evidence facts sufficient to avoid a release for fraud or mutual mistake of fact.

In a recent decision our Utah State Supreme Court has clearly indicated an intention to depart from prior niceties of distinction with regard to burden of proof between the preponderance of the evidence rule, and the clear and convincing evidence rule.

In *re Swan's Estate*, decided February 15, 1956, 4 Ut. 2d, 277, 293 P. 2d 682, involved the burden of proof problem with respect to overcoming the presumption of fraud and undue influence upon a showing of confidential relationship, procurement of a will and heirship in the will. In that case the contestant of the will claimed that the proponents of the will had the burden of establishing a lack of fraud and undue influence by clear and convincing evidence. The Supreme Court of Utah

reversing its prior position in the case of *Jardine v. Archibald*, 3 Ut. 2d 88, 279 P. 2d 454, adopted the preponderance of the evidence rule and rejected the clear and convincing evidence rule. We quote from said decision:

“After careful study and consideration we conclude that this presumption shifts the burden on to the confidential advisor of persuading or convincing the fact finder by a preponderance of the evidence that no fraud or undue influence was exerted, or in other words, he has the burden of convincing the fact finder from the evidence that it is more probable that he acted perfectly fair with his confidants; that he made complete disclosure of all material information available and took no unfair advantage of his superior position than that he exerted fraud or undue influence to obtain the benefits in question. *This is contrary to our holding in the Jardine case, which is supported by the California cases and some other decisions that clear and convincing evidence to the contrary is necessary to overcome such presumption. We reach this conclusion because we feel that the rule is more clear and understandable than the rule requiring clear and convincing evidence; that this rule is more apt to produce a just result and is more generally recognized as the correct rule governing this situation.*”

POINT II.

THE TRIAL COURT PROPERLY ALLOWED PLAINTIFF TO AMEND HIS COMPLAINT AND PROPERLY INSTRUCTED THE JURY ON MUTUAL MISTAKE OF FACT.

Rule 15(b) Utah Rules of Civil Procedure gives the trial court a wide discretion in allowing amendments to conform to the evidence. The trial court in the case at

bar allowed plaintiff to amend so as to put in issue the question of mutual mistake of fact. The evidence which was brought out at the trial clearly permitted the question of mutual mistake of fact to be presented to the jury. The evidence which brought out this issue came in without objection by counsel for defendant. The evidence of which defendant complains merely had to do with whether or not the claim agent knew that pain and suffering is one of the elements of damages to which plaintiff is entitled under the F.E.L.A. This evidence pertains to the transaction between plaintiff and the claim agent, was proper cross-examination and was material to show that the claim agent did not fully advise plaintiff as to his rights. It tends to corroborate plaintiff's testimony that the claim agent threatened him with the loss of his job if he would not accept the settlement.

The following facts were thought to be important as to mutual mistake of fact by this Court in the Kirchgastner case, *Supra*, as stated at page 690:

“The plaintiff had been examined by two doctors who had been unable to find anything wrong with him and one of whom had told him that he would be ‘all right’. The plaintiff expressed to Sayger (claim agent) that he thought he was able to return to work. Dr. Fuller had assured Sayger that the plaintiff was able to return to work. Sayger testified that he did not know at that time that the plaintiff was suffering from a disabling back injury and admitted that in making the settlement he (Sayger) acted upon that mistaken belief. The fact that the amount of the settlement closely approximates what the plaintiff had lost in earnings is an indication that

both parties acted upon the belief that the plaintiff's sufferings were at an end or would be short-lived."

And further at page 691:

"To tell a layman who has been injured that he will be about again in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it is ordinarily more than a forecast; it is an assurance as to his present condition, and so understood."

(Above quoted by court in *Union Pacific Railroad Company v. Zimmer* 197 P. 2d 363)

In the case at bar plaintiff had been released to return to work by Dr. Hubbard. Plaintiff testified that at the time of the settlement he thought he would make a complete recovery. He testified that his objection to merely accepting lost wages as a complete settlement was that he was receiving nothing for the pain and suffering he had had from the date of the injury up to the time of the settlement. The claim agent Stephen testified that he knew plaintiff had been released by the doctor and had returned to work. He stated that as far as he knew plaintiff had no permanent disability. The fact that both plaintiff and the claim agent thought that plaintiff had only a temporary disability was clearly established by this evidence and was fortified by the fact that the doctor had released plaintiff for duty. In addition, the fact that the amount of the settlement was identical to the lost wages of plaintiff is another indication that both parties acted upon the belief that plaintiff's sufferings were at an end or would be short lived. It is respectfully submitted that this evidence is almost

identical to the evidence which was approved by this court in the Kirchgestner case.

As to the evidence that plaintiff had a permanent disability of 10% in his left shoulder one need only recall the testimony of Dr. Reed Clegg who is a specialist in the field of orthopedics. The jury obviously believed the testimony of Dr. Clegg. Dr. Clegg testified that his examination showed that plaintiff had a permanent partial disability in the left shoulder of 10%. He further testified that the disability was caused by "the fact that there is still slight weakness, there is a tenderness, and that there is a deposit of bone about the shoulder joint." The deposit of bone about the shoulder joint appeared as a knob on the x-rays of Dr. Clegg. This knob appeared to be substantial and stood out in these x-rays. Dr. Clegg further testified that such a deposit was usually caused by trauma. Also in answer to a hypothetical question in which it was assumed that plaintiff had had no complaints or difficulty with the shoulder prior to the accident and had had complaints since the time of the accident and with his condition as found by Dr. Clegg's examination, Dr. Clegg gave it as his opinion that the accident caused the disability from which plaintiff is suffering. Plaintiff established the facts of the hypothetical question in his testimony.

In regard to the witness presented by defendant, Dr. Hubbard, there is no evidence in the record from which defendant can make a statement as it does in its brief that Dr. Hubbard was a disinterested witness. This court in the case of *Mooney v. Denver & Rio Grande Western R. Co.* (1950) 118 U. 307, 221 P. 2d 628, recog-

nized the fact that this defendant has control over doctors in the hospital association. This case presented a question of forum non conveniens. In discussing the inconvenience asserted by defendant this court stated at page 341:

“Little weight need be given in this case to the state lines and lack of process as the witnesses are all either employees of defendant or doctors closely associated with the company and all are available if paid at the same rate they would be paid for attendance in Denver.”

And again at page 354:

“In non-fatal accidents where there is a question of the extent of the injury suffered the plaintiff is often dependent entirely on the evidence of doctors employed by the railroad. The railroad not only employs the doctors who treat the injured, but have in their employ every type of expert in obtaining evidence * * *”

In this case Dr. Hubbard came all the way from Price, Utah, to testify on behalf of the railroad company, and his demeanor on the witness stand indicated very clearly that he was a biased witness and was very definitely interested in doing everything he could for the railroad company. The jury had the benefit of seeing the doctor on the witness stand and observing his demeanor. Dr. Hubbard's testimony was diametrically opposed to the testimony of Dr. Clegg. He testified that the bone deposit or callus as shown on Dr. Clegg's x-rays would not cause any disability and that every person over the age of forty would have pain in his shoulders at extreme ranges of motion. Furthermore, he

refused to assume that plaintiff had any pain at all in his shoulder after the dislocation had been reduced and even hesitated to state the plaintiff had any pain in the shoulder at the time the reduction was made even though he admitted that he administered an anaesthetic to plaintiff at the time of making said reduction. Dr. Hubbard testified that the x-rays which he took on the day of the accident showed the same bone callus which Dr. Clegg's x-rays showed so clearly, although even to the unpracticed eye there is no such appearance on these x-rays. (See exhibits P-3, P-4, D-5 and D-6). In addition to this Dr. Hubbard testified that the callus would not cause any disability whatsoever which was in direct conflict with the evidence of Dr. Clegg. Obviously, the jury believed Dr. Clegg over Dr. Hubbard and discredited the evidence of Dr. Hubbard as it was entitled to do.

The evidence clearly showed that there was a mistake in the mind of Dr. Hubbard, Stephen and plaintiff as to the fact that plaintiff had a permanent disability in his left shoulder. Plaintiff testified that he had never in his life had any symptoms or trouble in his left shoulder prior to the accident and that he had trouble in said shoulder from the date of the accident to the present time. Plaintiff had been assured by the doctor that there was nothing wrong with the shoulder and had no idea whatsoever that the shoulder would not get completely well. The evidence which the jury chose to believe as to the permanent disability in plaintiff's shoulder, was the evidence of Dr. Clegg. Dr. Clegg gave it as his opinion

that plaintiff had a 10% permanent partial disability in his left shoulder.

The evidence which came in without objection from defendant clearly showed a mutual mistake of fact, and the trial court properly allowed plaintiff to amend his complaint to conform to the evidence and properly submitted this issue to the jury.

POINT III.

THE GROSS UNFAIRNESS OF A SETTLEMENT IS A PROPER MATTER FOR THE JURY TO CONSIDER IN CONNECTION WITH PLAINTIFF'S EVIDENCE AS TO UNDUE INFLUENCE EXERCISED UPON HIM BY DEFENDANT'S CLAIM AGENT.

It has been generally recognized as a principle of law that an unconscionable or unfair contract gives rise to an inference of fraud. Specifically, a recent F.E.L.A. case involving a question as to validity of a release is squarely in point on the subject presented in defendant's Point III. This is the case of *Seaboard Air Line Railroad Company v. Gill*, Fourth Circuit (1955), 227 F. 2d 64, which was an action involving a release where plaintiff claimed that fraud and undue influence were used in obtaining the release. The trial court instructed the jury that gross inadequacy of consideration alone is sufficient evidence to sustain an allegation of fraud and undue influence provided that the consideration is so inadequate as to shock the conscience or the moral sense of right and wrong. Also the court instructed that inadequacy of consideration, although not gross, is a proper circumstance to be considered upon the issue of fraud in connection with other evidence and circumstances suf-

ficient to show fraud. The Circuit Court in reviewing this instruction stated that it was not erroneous on the ground that it averted the jury's attention from other evidence in the case if the jury found that the amounts paid were grossly inadequate.

The argument made by counsel for plaintiff of which the defendant complains was to the effect that the gross inadequacy of the consideration paid plaintiff for his injury gave credence to and supported the other evidence of plaintiff that the claim agent had threatened him with the loss of his job if he would not accept the settlement. This argument was based on the Gill case and was perfectly proper under that case. Of course, under the Gill case it would be improper to instruct the jury that they could not consider the fairness or unfairness of the consideration paid for the release. Certainly, if the consideration had been fair and just defendant would be entitled to have the jury use this in support of its testimony that no fraud or undue influence was practiced on plaintiff.

The evidence shows that plaintiff had received a severe initial injury by being thrown from the bed of the truck. In addition to the dislocation of the left shoulder, he was hit in the mouth and chin, cut his eye and several teeth were loosened. He could hardly eat when he was afterwards in the hospital because of this (R. 24). Subsequent to the accident, plaintiff suffered severe pain while in the hospital, and from the time the shoulder was reduced and his arm strapped to his side and later put in splints plaintiff suffered continuous

pain in his left shoulder. The pain did not leave plaintiff after he returned home and hadn't left him to the date of the trial. Although plaintiff felt that he would make a complete recovery, he felt that the offer of settlement for lost wages alone was grossly unfair because it took no account whatsoever of the experience he had gone through and the great pain and suffering he had endured. His resistance to the offer made by the claim agent was beaten down by the threat that plaintiff would lose his job if he did not accept this offer. Certainly, it is common sense that the jury could consider the gross inadequacy of the consideration paid for the release as corroboration of the evidence that the claim agent had practiced fraud and undue influence upon plaintiff.

CONCLUSION

We submit that the trial court acted properly in instructing the jury that plaintiff's burden of proving fraud and mutual mistake of fact was by a preponderance of the evidence inasmuch as this rule has been adopted by the Federal Courts subsequent to the Kirchgestner case. In addition, the evidence produced at the trial clearly justified the allowance of plaintiff's amendment to conform to the proof as to mutual mistake of fact. The evidence heretofore outlined was clearly the same type of evidence that was relied on by this Court in the Kirchgestner case in supporting a finding of mutual mistake of fact. Furthermore, the jury could very properly consider the gross inadequacy of the settlement as corroborating the other evidence surrounding the procurement of the release in determining that the

claim agent had exercised fraud and undue influence upon plaintiff in obtaining the settlement. For the reasons as set forth herein we respectfully submit that the judgment of the trial court should be affirmed.

Respectfully submitted

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