IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

GREGORY DELPINO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. NO. N13C-03-288 VLM
	)	
MICHAEL SPINKS,	)	
	)	
Defendant,	)	

OPINION

Date Submitted: May 22, 2014
Date Decided: August 22, 2014

Upon Consideration of Defendant's Motion
For Summary Judgment, **GRANTED**

Robert J. Leoni, Esquire, Shelsby & Leoni, 221 Main Street, Stanton, DE 19804, Attorney for Plaintiff.

Daniel P. Bennett, Esquire, Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, Citizens Bank Center, 919 North Market Street, Suite 200, Wilmington, DE 19801, Attorney for Defendant.

MEDINILLA, J.

INTRODUCTION

This personal injury case arises from a June 2011 motor vehicle accident wherein Plaintiff Gregory Delpino ("Plaintiff") was a passenger in a vehicle struck by Defendant Michael Spinks ("Defendant"). Plaintiff brought a personal injury action against Defendant for bodily injuries he claims were proximately caused by the accident. Defendant filed a Motion for Summary Judgment and argues entitlement to judgment as a matter of law because Plaintiff executed a valid release with Defendant's insurance carrier and settled all bodily injury claims related to said accident. Plaintiff admits to signing a release but argues it is not binding because his post-release diagnosis is materially different than that which was known at the time the release was executed and thus the product of a mutual mistake of fact. This Court finds the release was not the product of a mutual mistake. Therefore, Defendant's Motion for Summary Judgment is **GRANTED**.

FACTUAL AND PROCEDUAL BACKGROUND

On June 12, 2011, Defendant failed to stop at a red light at the intersection of Barley Mill Road and Route 100 in Wilmington, Delaware and struck the front passenger side of a vehicle driven by Plaintiff's girlfriend, Stephanie Dryden ("Dryden"); Plaintiff was the front seated passenger. Eight days after the accident, on June 29, 2011, Plaintiff sought medical treatment for complaints of right

shoulder pain with Dr. David Yucha at the Crozer Chester Medical Center ("Crozer"). According to the Crozer records, Dr. Yucha performed an evaluation, opined Plaintiff suffered a right shoulder strain and instructed him to schedule an MRI to "rule out rotator cuff pathology."[1]

Dryden filed bodily injury and property damage claims through Defendant's insurer, Progressive Classic Insurance Company ("Progressive"). On July 6, 2011, approximately one week following Plaintiff's visit to Crozer, he accompanied Dryden to the Progressive office for a meeting she had scheduled with Progressive claims supervisor, Michelle Martineau ("Martineau"). Martineau asked Plaintiff about both his lost wages and bodily injuries related to the accident. Plaintiff explained he had been evaluated by Dr. Yucha and expressed a desire to settle his case. He further informed Martineau that he had been instructed to undergo further diagnostic testing for his right shoulder pain through an MRI.

Plaintiff elected to settle his claim at the July 6 meeting and signed a "Full Release of All Claims with Indemnity" in exchange for a $750 check from Progressive. The language of the release expressly states that personal injury claims were included in the settlement agreement. The single page release states in part:

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[1] Plaintiff's Response, Exhibit B.

> It is understood and agreed that this settlement is in full compromise of a doubtful and disputed claim as to both questions of liability ***and as to the nature and extent of the injuries*** . . . it is understood and agreed that the undersigned rely(ies) [sic] wholly upon the undersigned's judgment, belief ***and knowledge as to the nature, extent, effect and duration of said injuries*** and liability therefore.[2] (emphasis added).

Following the execution of the release, Plaintiff continued to experience shoulder pain and eventually underwent an MRI on March 3, 2102, approximately nine months after the accident. The MRI revealed a posterior labral tear and Plaintiff's eventual medical treatment included surgery.

Plaintiff filed the instant action on March 27, 2013. Defendant filed a Motion for Summary Judgment on February 27, 2014 and Plaintiff's Response was filed on March 21, 2014. Defendant filed a Reply on April 8, 2014. The Court heard oral arguments on May 22, 2014. After consideration of the written and oral arguments of the parties, the Court finds that Summary Judgment is appropriate for the reasons set forth below.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to

[2] Defendant's Motion, Exhibit E.

any material fact and that the moving party is entitled to a judgment as a matter of law."[3] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party.[4] The moving party bears the initial burden of establishing that material facts are not in dispute.[5] If, after discovery, the non-moving party cannot make sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted.[6] If, however, material issues of fact exist, summary judgment is inappropriate.[7]

DISCUSSION

Plaintiff executed a release with Progressive and, in exchange for a sum certain, agreed to relinquish his right to pursue litigation against Defendant. A release is a device by which parties seek to control the risk of the potential outcomes of litigation.[8] Releases are executed to resolve the claims the parties know about as well as those that are unknown or uncertain.[9] Because litigation is inherently risky, a general release avoids the uncertainty, expenses, and delay of a

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[3] Super. Ct. Civ. R. 56(c).
[4] *Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991).
[5] *Moore v. Sizemore,* 405 A.2d 679, 680 (Del. 1979).
[6] *Burkhart*, 602 A.2d at 59.
[7] *Sternberg v. Nanticoke Mem'l Hosp., Inc.,* 2012 WL 5830150 (Del. Super. Feb. 13, 2012) *aff'd,* 62 A.3d 1212 (Del. 2013) (citing *Ebersole v. Lowengrub, 180* A.2d 467, 470 (Del. 1962)).
[8] *See E.I. DuPont de Nemours & Co. v. Fla. Evergreen Foliage,* 744 A.2d 457, 462 (Del.1999) ("A release is a form of contract with the consideration typically being the surrender of a claim or cause of action in exchange for the payment of funds or surrender or an offsetting claim.").
[9] *See Hob Tea Room v. Miller,* 89 A.2d 851, 856 (Del.1952) ("[A] general release ... is intended to cover everything—what the parties presently have in mind, as well as what they do not have in mind, but what may, nevertheless, arise.").

potential trial.[10] Delaware courts will generally uphold a release and will only set aside a clear and unambiguous release where it was the product of fraud, duress, coercion, or mutual mistake.[11] Plaintiff does not argue that the release is ambiguous or the product of fraud, duress or coercion. He argues that the release is unenforceable because there was a mutual mistake of fact.

To establish a mutual mistake of fact, the plaintiff must show by clear and convincing evidence that (1) both parties were mistaken as to a basic assumption, (2) the mistake materially affects the agreed-upon exchange of performances, and (3) the party adversely affected did not assume the risk of the mistake.[12] The mutual mistake "must relate to a past or present fact material to the contract and not to an opinion respecting future conditions as a result of present facts."[13] Nevertheless, mutuality of mistake in the insurance context can exist "only where neither the claimant nor the insurance carrier is aware of the existence of personal injuries."[14] Moreover, if the plaintiff knew that "*indicia* of injuries existed at the

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[10] *Hicks v. Sparks*, 89 A.3d 476 (Del. 2014).
[11] *Alston v. Alexander,* 49 A.3d 1192, 2012 WL 3030178, at *3 (Del.2012); *Deuley v. DynCorp Int'l, Inc.,* 8 A.3d 1156, 1163 (Del.2010); *Hob Tea Room,* 89 A.2d at 856.
[12] *Hicks*, 89 A.3d 476.
[13] *Alvarez v. Castellon*, 55 A.3d 352, 354 (Del. 2012).
[14] *Id.*

time [he/she] signed the release," the Court will not invalidate the release by mutual mistake.[15]

Plaintiff argues that the mutual mistake of fact here is simply the mistaken appreciation of the severity of the injury, or in the alternative, a mistake as to whether the release was limited to Plaintiff's lost wages claim. As to the severity of Plaintiff's injury, Plaintiff has failed to establish that there was a basic assumption about which both parties were mistaken. The record is clear that both parties understood that Plaintiff continued to experience shoulder pain in connection with the accident and both knew that an MRI for Plaintiff's right shoulder had been recommended. The knowledge of a right shoulder injury shows clear "indicia of injuries" existing at the time of the release.[16]

Furthermore, even though a plaintiff might be unaware of the "exact degree of injuries with medical certainty," knowledge of the existence of an injury will preclude a finding of mutual mistake.[17] Here, although Plaintiff did not have actual knowledge of the labral tear at the time the agreement was executed, he was fully aware that he had suffered a right shoulder injury, sought medical attention for that particular injury, and was instructed to undergo additional diagnostic testing to confirm the extent of that injury. As in *McLarthy v. Hopkins*, where the

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[15] *Hicks*, 89 A.3d 476.
[16] *Id.*
[17] *Id.*

Supreme Court did not find merit to plaintiff's mutual mistake claim, this Court finds Plaintiff's argument here fails for the same reasons. Both parties knew that Plaintiff was suffering ongoing pain and treatment. "On the basis of this information, the fact that both parties knew that [his] injuries had not been resolved, and in contemplation of the risk that [plaintiff's] pain and treatment would continue, the parties entered a valid contract this Court may not now set aside."[18]

Plaintiff's alternative mutual mistake argument centers on his belief that the release was limited to his lost wages. It is clear from the previously quoted language of the release that Progressive was executing a release for any and all claims, not solely for lost wages. As such, Plaintiff fails to establish that both parties were mistaken as to a basic assumption in their agreement.

Plaintiff lastly argues that the circumstances of this case are analogous to *Webb v. Dickerson*, a personal injury case in which this Court held a release unenforceable based on mutual mistake.[19] In *Webb*, a claims adjuster unexpectedly met the plaintiff and improperly engaged in impromptu negotiations about settling his claim while he was under medically prescribed narcotic and muscle relaxant medications. The execution of the release took place within 24 hours of the

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[18] *McLarthy v. Hopkins*, 26 A.3d 214 (Del. 2011).
[19] *Webb v. Dickerson*, 2002 WL 388121 (Del. Super. Mar. 11, 2002).

accident in a salvage yard where the plaintiff was addressing issues related to his vehicle. The adjuster made no inquiry regarding the plaintiff's injuries and immediately released his claims.

This Court distinguishes this case from the extenuating circumstances in *Webb*. Here, Plaintiff freely chose to accompany his girlfriend to the Progressive office to negotiate and settle her claims. The meeting occurred weeks after the accident and after Plaintiff had consulted with a medical provider and received information regarding the nature of his shoulder injury with instructions to seek additional testing. Plaintiff engaged in a voluntary and knowing discussion with a Progressive representative regarding his injuries. Plaintiff was not under the influence of narcotics or any medications that precluded him from understanding the nature of the settlement agreement. He fully explained to the Progressive representative what he believed were his injuries and, with an understanding that an MRI was recommended, opted to settle his claim.

While the Court is sympathetic to Plaintiff, it is clear from the facts of this case that even if there had been a mutually mistaken basic assumption that was materially different, Plaintiff cannot claim mutual mistake where he assumed the risk. In discussing assumption of the risk in the context of a liability release, our Supreme Court has cited to the standard set forth in the *Restatement (Second) of*

Contracts: a party assumes the risk of a mistake where the mistaken party consciously performed under a contract aware of his or her limited knowledge with respect to the facts to which the mistake relates.[20] By settling his claim, Plaintiff assumed the risk that the recommended MRI would reveal more serious injuries than that which he believed to exist. As such, he fails to establish a mutual mistake claim.

CONCLUSION

Based on the foregoing reasons, Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

/s/ Vivian L. Medinilla
Judge Vivian L. Medinilla

cc: Prothonotary

[20] *Id.* (citing Restatement (Second) of Contracts § 152 (1981)).