Louisiana Law Review

Volume 23 | Number 4
June 1963

Obligations - Error as to Subject Matter - Avoidance of Insurance Releases in Louisiana

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dissenting Justice is probably more in accord with the intent of the parties. The majority's theory would indicate that even if the insured owned several automobiles, he might take out a policy on just one and all would receive full coverage, at least in the absence of an intent to deceive.[16]

The particular problem presented in the instant case seems to be remedied by the use of the new policy forms which provide in substance that an owned automobile means an automobile *described in the policy*, or a newly acquired automobile which replaces a described automobile, or a newly acquired automobile in addition to the described automobile when notice is given of its acquisition within thirty days.[17] Should similar problems arise in ascertaining the intention of parties to automobile liability policies, however, it is submitted that an obvious correlation between premium and risk should be among the factors carefully weighed; if premiums are based on the ownership of just one automobile, certainly neither party has reason to expect uncompensated coverage for any other owned vehicle.

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OBLIGATIONS — ERROR AS TO SUBJECT MATTER — AVOIDANCE OF INSURANCE RELEASES IN LOUISIANA

Plaintiff, injured in a collision between a train and the car driven by her husband, sought damages for personal injury from her husband's automobile insurer and the railroad. The defendant insurer pleaded res judicata on the basis of a purported written release obtained by the insurer from plaintiff and her husband. The defendant railroad filed an exception of no right of action based on the alleged release of the co-tortfeasor insurer.[1] Plaintiff sought to prove, by parol evidence,

(1948); Hemel v. State Farm Mut. Auto. Ins. Co., 211 La. 95, 29 So. 2d 483 (1947); Muse v. Metropolitan Life Ins. Co., 193 La. 605, 192 So. 72 (1939).

16. LA. R.S. 22:619 (1950) provides in part that "no oral or written misrepresentation or warranty made in the negotiation of an insurance contract . . . shall be deemed material or defeat or avoid the contract or prevent it from attaching, unless the misrepresentation or warranty is made with the intent to deceive." Consequently, the presence of such intent would be necessary for the incorrect declaration to cause avoidance of the contract on a theory of warranty. See Comment, 22 LA. L. REV. 190 (1961).

17. See the definition of owned automobile in note 3 *supra*.

1. The release was granted only to the insurer of the automobile, but there was no express reservation of rights in the release to sue the railroad company.

that the release was granted under circumstances such as to result in error as to the subject matter on her part. The trial court sustained both plea and exception, and the court of appeal affirmed.[2] On writ of certiorari, the Louisiana Supreme Court reversed and remanded. *Held,* a release signed while in error as to the subject matter due to misleading representations and conduct of the insurer's agent as shown by parol evidence is void and can support neither a plea of res judicata made by the party to whom the release was given nor an exception of no right of action made by his co-tortfeasor. *Moak v. American Auto. Ins. Co.,* 242 La. 160, 134 So. 2d 911 (1961).

Releases granted by parties who have potential claims against insurers are governed by the Louisiana Civil Code articles on transaction or compromise,[3] an agreement in which two or more persons by mutual consent adjust their differences to prevent litigation.[4] To be properly confected, the release must be written[5] and complete in itself;[6] it is then res judicata between the parties.[7]

Releases cannot be rescinded on the ground of error of law or of lesion.[8] Consequently, an attack merely on the ground the

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The driver of the automobile and the railroad company were allegedly joint tortfeasors. It has been held, on the basis of LA. CIVIL CODE art. 2203 (1870), that a release of one joint tortfeasor bars an action against another joint tortfeasor in the absence of a written reservation of such rights in the release. Reid v. Lowden, 192 La. 811, 189 So. 286 (1939); Long v. Globe Indem. Co., 144 So. 2d 275 (La. App. 1st Cir. 1962), *cert. denied*; Williams v. Marionneaux, 116 So. 2d 57 (La. App. 1st Cir. 1959). See Note, 13 TUL. L. REV. 642 (1939).

2. Moak v. American Auto. Ins. Co., 127 So. 2d 6 (La. App. 1st Cir. 1961).

3. LA. CIVIL CODE arts. 3071-3083 (1870). *E.g.*, Moak v. American Auto. Ins. Co., 242 La. 160, 134 So. 2d 911 (1961); Puchner v. Employer's Liab. Assur. Corp., 198 La. 921, 5 So. 2d 288 (1941); Thompson v. Kivett & Reel, Inc., 25 So. 2d 124 (La. App. 1st Cir. 1946).

4. LA. CIVIL CODE art. 3071 (1870).

5. *Ibid.*

6. A release must contain all elements of the agreement; there must be no necessity to refer to parol evidence to explain or establish its terms. Johnson v. National Cas. Co., 176 So. 235 (La. App. 1st Cir. 1937). See also Texas Creosoting Co. v. Tyler, 180 La. 535, 156 So. 814 (1934); Francois v. Maison Blanche Realty Co., 134 La. 215, 63 So. 880 (1914).

7. LA. CIVIL CODE art. 3078 (1870). It has been held that a single wrongful or negligent act causing damage to both the person and property of an individual gives rise to a single cause of action in favor of that individual. Thus, a release granted in settlement of the property damage for instance, bars a subsequent action for personal injury, since the cause of action was rendered res judicata by the release. Accordingly, when a release is attacked, it can be held valid or invalid only in its entirety. Darensbourg v. Columbia Cas. Co., 140 So. 2d 241 (La. App. 4th Cir. 1962), *cert. denied;* Thompson v. Kivett & Reel, Inc., 25 So. 2d 124 (La. App. 1st Cir. 1946). See LA. CODE OF CIVIL PROCEDURE art. 425 (1960) (prohibits splitting of single cause of action "for the purpose of bringing separate actions on different portions thereof").

8. LA. CIVIL CODE art. 3078 (1870); Stoufflet v. Duplantis, 208 La. 186, 23

amount received was insufficient relative to the severity of injury sustained is of no avail.[9] Releases can be rescinded,[10] however, when there appears vice of consent consisting of error in the person or matter in dispute, or fraud or violence.[11] Since a party is presumed to have read and understood the release before signing it, an allegation of simple failure to read the instrument is insufficient.[12] Nevertheless, courts have rescinded releases upon proof that illiteracy, lack of intelligence or education, or similar circumstances rendered a party unable to understand the subject matter and nature and effect of the release, or more susceptible to fraud or deception.[13] Other considerations indicating fraud or error sufficient to vitiate the release are the insurer's imposition and insistence upon settlement within

So. 2d 41 (1945); Young v. Glynn, 171 La. 371, 131 So. 51 (1930); Jackson v. United States Fid. & Guar. Co., 199 So. 419 (La. App. 2d Cir. 1940); Beck v. Continental Cas. Co., 145 So. 810 (La. App. 2d Cir. 1933).

9. Jackson v. United States Fid. & Guar. Co., 199 So. 419 (La. App. 2d Cir. 1940); Spears v. St. Charles Dairy, 194 So. 738 (La. App. Orl. Cir. 1940); Beck v. Continental Cas. Co., 145 So. 810 (La. App. 2d Cir. 1933).

10. A party who alleges the nullity of a release must bring a direct action, which may be combined with a claim for damages, for rescission. Poole v. Home Ins. Co., 75 So. 2d 385 (La. App. 1st Cir. 1954); Chapin v. Federal Transp. Co., 70 So. 2d 189 (La. App. 1st Cir. 1953); Beck v. Continental Cas. Co., 145 So. 810 (La. App. 2d Cir. 1933). A party urging rescission must also tender or return the amount received under the release. See Ackerman v. McShane, 43 La. Ann. 507, 9 So. 483 (1891); Poole v. Home Ins. Co., 75 So. 2d 385 (La. App. 1st Cir. 1954); Davis v. Whatley, 175 So. 422 (La. App. 1st Cir. 1937). *But see* Lervick v. White Top Cabs, 10 So. 2d 67 (La. App. Orl. Cir. 1942), *cert. denied*; Brandon v. Gottlieb, 16 La. App. 676, 132 So. 283 (1st Cir. 1931). Failure to tender or return the amount received under the release must be raised in the pleadings and proved by the party asserting such failure. Moak v. American Auto. Ins. Co., 242 La. 160, 134 So. 2d 911 (1961); Miller v. Judice, 149 So. 2d 715 (La. App. 4th Cir. 1963).

11. LA. CIVIL CODE art. 3079 (1870). *E.g.*, Wise v. Prescott, 151 So. 2d 356 (La. 1963); Davenport v. F. B. Dubach Lumber Co., 112 La. 943, 36 So. 812 (1904); Miller v. Judice, 149 So. 2d 715 (La. App. 4th Cir. 1963); Waagen v. Indiana Lumbermen's Mut. Ins. Co., 136 So. 2d 831 (La. App. 4th Cir. 1962); McDaniel v. Audubon Ins. Co., 121 So. 2d 531 (La. App. 1st Cir. 1960); Lervick v. White Top Cabs, 10 So. 2d 67 (La. App. Orl. Cir. 1942), *cert. denied*; Johnson v. National Cas. Co., 176 So. 235 (La. App. 1st Cir. 1937); Davis v. Whatley, 175 So. 422 (La. App. 1st Cir. 1937); Brandon v. Gottlieb, 16 La. App. 676, 132 So. 283 (1st Cir. 1931).

12. *E.g.*, Tooke v. Houston Fire & Cas. Ins. Co., 122 So. 2d 109 (La. App. 2d Cir. 1960); Blades v. Southern Farm Bureau Cas. Ins. Co., 95 So. 2d 209 (La. App. 1st Cir. 1957).

13. Davenport v. F. B. Dubach Lumber Co., 112 La. 943, 36 So. 812 (1904) (plaintiff in great pain and under influence of opiates when induced to sign release); Waagen v. Indiana Lumbermen's Mut. Ins. Co., 136 So. 2d 831 (La. App. 4th Cir. 1962) (release obtained from Norwegian seaman who spoke little English); McDaniel v. Audubon Ins. Co., 121 So. 2d 531 (La. App. 1st Cir. 1960) (illiterate); Lervick v. White Top Cabs, 10 So. 2d 67 (La. App. Orl. Cir. 1942), *cert. denied* (Norwegian citizen without fluent understanding of English induced to sign release within half hour after injury while lying on rolling table in hospital); Johnson v. National Cas. Co., 176 So. 235 (La. App. 1st Cir. 1937) (release obtained late at night from illiterate parents of injured boy); Davis v. Whatley, 175 So. 422 (La. App. 1st Cir. 1937) (illiterate).

a short time after the injury[14] and concealment of material facts or deception practiced by the insurer's agent.[15]

In the instant case the Supreme Court unequivocally stated that parol evidence was admissible "to show error as to the subject matter of a compromise."[16] The court then concluded that the agent's conduct and representation during negotiations caused plaintiff to sign the release under such error as to the subject matter, which is sufficient ground for rescission.[17] The court disapproved two appellate court cases which had indicated alleged misleading representations by the insurer resulting in error as to the subject matter are of no import in determining whether a release may be rescinded.[18] A recent appellate court decision rendered subsequent to, and in accord with the rationale of, the instant case has held error as to the subject matter resulting from breach of the insurer's duty to make clear to the insured his rights under the policy sufficient ground for rescission of the release.[19]

It is submitted that the instant case properly restricts prior jurisprudence which had indicated that misleading representations by the insurer while negotiating a release are of no import in deciding whether there is sufficient ground for rescission. Furthermore, it is now clear a party may show by parol evidence that the misleading representations resulted in such error.

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14. Wise v. Prescott, 151 So. 2d 356, 361 (La. 1963); Waagen v. Indiana Lumbermen's Mut. Ins. Co., 136 So. 2d 831 (La. App. 4th Cir. 1962) (release obtained three days after accident); Lervick v. White Top Cabs, 10 So. 2d 67 (La. App. Orl. Cir. 1942), *cert. denied* (release obtained half hour after accident); Davis v. Whatley, 175 So. 422 (La. App. 1st Cir. 1937) (release obtained one day after accident).

15. Brandon v. Gottlieb, 16 La. App. 676, 132 So. 283 (1st Cir. 1931) (insurer's agent, after conducting investigation of accident, disclosed some findings to plaintiff but suppressed material facts which led plaintiff to sign the release under error).

16. 242 La. at 166, 134 So. 2d at 913.

17. Rather than limiting the effects of the release to settlement for property damages, the court rescinded the release in its entirety to avoid splitting a single cause of action. See note 7 *supra*, and accompanying text.

18. Tooke v. Houston Fire & Cas. Ins. Co., 122 So. 2d 109 (La. App. 2d Cir. 1960); Blades v. Southern Farm Bureau Cas. Ins. Co., 95 So. 2d 209 (La. App. 1st Cir. 1957).

19. Miller v. Judice, 149 So. 2d 715 (La. App. 4th Cir. 1963) (defendant was insurer of injured party).