Case Study

the risk of a mistake where the contract assigns the risk to the party or 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.

Hicks argues that the Release is voidable by mutual mistake because her injuries are materially different from the injuries that both parties believed she sustained at the time the Release was signed. Hicks explains that she and O'Connell were aware that Hicks suffered a cervical sprain requiring treatment before signing the Release. Hicks contends that surgery for a herniated disc is materially different from the minor head and neck injuries contemplated at the time of release. Hicks further argues that this mistake adversely affected the parties' agreed-upon performance because the herniated disc was a new, undiscovered injury for which Hicks did not assume the risk of mistake.

The record shows that Hicks has failed to demonstrate a mutual mistake of fact held by both parties at the time of the release. Hicks concedes that she told O'Connell that she had not made a full recovery and continued to experience headaches and neck pain. Although Hicks may have been mistaken as to the future effect of her injury, both parties were aware that Hicks injured her neck in the accident. This can reasonably be considered an "indicia of injuries" existing at the time of the Release. Hicks had ample opportunity to consult additional physicians and obtain further diagnoses to discover the herniated disc. Her later diagnosis is not a materially different fact but an injury of which Hicks and O'Connell had some awareness. Therefore, there was no mutual mistake.

The record also shows that Hicks assumed the risk of mistake. She executed a clear and unambiguous Release in exchange for a settlement payment. This release specifically provided that Hicks "declares and represents that the injuries are or may be permanent and that recovery therefrom is uncertain and indefinite." Hicks assumed the risk of mistake when she signed the Release without obtaining a more thorough medical examination to fully discover the extent of her injuries related to her neck pain. She assumed the risk that her injuries were more serious than she believed and that her symptoms could worsen and require further treatment. Because Hicks assumed this risk, she cannot now claim mutual mistake.

Grant of summary judgment to Sparks affirmed.

Requirements for Unilateral Mistake

A unilateral mistake exists when only one of the parties makes a mistake about a basic assumption on which he made the contract. For example, Plummer contracts to buy 25 shares of Worthwright Enterprises, Inc., from Taylor, mistakenly believing that he is buying 25 shares of the much more valuable Worthwrite Industries. Taylor knows that the contract is for the sale of shares of Worthwright. Taylor (the "nonmistaken party") is correct in his belief about the identity of the stock he is selling; only Plummer (the "mistaken party") is mistaken in his assumption about the identity of the stock. Does Plummer's unilateral mistake give him the right to avoid the contract? Courts are more likely to allow avoidance of a contract when both parties are mistaken than when only one is mistaken. The rationale for this tendency is that in cases of unilateral mistake, at least one party's assumption about the facts was correct, and allowing avoidance disappoints the reasonable expectations of that nonmistaken party.

It is possible to avoid contracts for unilateral mistake, but to do so, proving the elements necessary for mutual mistake is just a starting point. *In addition to* proving the elements of mistake discussed earlier, a person trying to avoid on the ground of unilateral mistake must show *either* one of the following:

1. *The nonmistaken party caused or had reason to know of the mistake.* Courts permit avoidance in cases of unilateral mistake if the nonmistaken party caused or knew of the mistake, or if the mistake was so obvious that the nonmistaken party had reason to realize that a mistake had been made.[6] For example, Ace Electrical Company makes an error when preparing a bid that it submits to Gorge General Contracting. If the mistake in Ace's bid was so obvious that Gorge knew about it when it accepted Ace's offer, Ace could avoid the contract even though Ace is the only mistaken party. The reasoning behind this rule is that the nonmistaken person could have prevented the loss by acting in good faith and informing the person in error that he had made a mistake. It also reflects the judgment that people should not take advantage of the mistakes of others.

   Or

2. *It would be unconscionable to enforce the contract.* A court could also permit avoidance because of unilateral

[6] *Restatement (Second) of Contracts* § 153.

mistake when the effect of the mistake was such that it would be unconscionable to enforce the contract. To show unconscionability in this context, the mistaken party would have to convince the court that the consequences of the mistake would be severe enough to make the contract unreasonably harsh or oppressive if it were enforced.[7] In the example above, Ace Electrical Company made an error when preparing a bid that it submits to Gorge General Contracting. Suppose that Gorge had no reason to realize that a mistake had been made, and accepted the bid. Ace might show that it would be unconscionable to enforce the contract by showing that not only will its profit margin not be what Ace contemplated when it made its offer, but also that it would suffer a grave loss by having to perform at the mistaken price.

The *Sumerel* case, which follows, deals with a unilaterally mistaken party's attempt to be excused from a contractual obligation.

[7] The concept of unconscionability is developed more fully in Chapter 15.

Sumerel v. Goodyear Tire & Rubber Company
232 P.3d 128 (Colo. Ct. App. 2009)

In 2002, Bob and Sally Sumerel, Steven and Ann Berzin, Dane and Kerry Dicke, and Bart Kaufman won their product liability lawsuit against two defendants, one of which was Goodyear Tire and Rubber Co. Goodyear had designed and manufactured a defective hose that was installed in the plaintiffs' heating systems. After trial, the jury awarded the plaintiffs approximately $1.3 million against Goodyear, including repair and replacement costs, diminution in value damages, and "other costs and losses" incident to having to repair and replace their heating systems. In addition, the jury found that Goodyear was responsible for 36 percent of such "other costs and losses" suffered by the Berzins and Dickes and 48 percent of those incurred by the Sumerels and Kaufman.

The district court awarded prejudgment interest (interest on the amount of the judgment from the time of the injury to the time that the court entered judgment) on the repair costs but not on the "other costs and losses" awarded to the plaintiffs. Both sides then appealed. The court of appeals upheld the award of "other costs and losses" to the plaintiffs and further held that they were entitled to prejudgment interest on those damages. However, the court of appeals remanded the case to the district court to calculate and award such interest.

After the case was remanded, Goodyear's attorneys and the plaintiffs' attorneys began discussing the calculation of the prejudgment interest. Although they agreed on the relevant dates, they had trouble getting their calculations of prejudgment interest based on those dates to match. One of Goodyear's attorneys, Michael Brooks, advised one of the plaintiffs' attorneys, Lee Gray, that his calculations showed a total amount of approximately $2.7 million. Gray responded that this amount was larger than his own estimates by "about six figures." Efforts to resolve the discrepancy ensued. Brooks suggested that the discrepancy could have been caused by the plaintiffs' failure to include the amount of prejudgment interest owed to Kaufman, and Gray responded, "That could be it," or words to that effect. Believing that he may have discovered the source of the discrepancy, Brooks sent an e-mail to Gray, stating, "Here are our charts providing the numbers that Goodyear believes are appropriate. . . . Please review these, then let's discuss." Attached to the e-mail were charts that reflected Goodyear's calculations as to the total amounts due to each plaintiff.

After reviewing these charts, the plaintiffs' attorneys noticed that Goodyear's calculations of the damages for "other costs and losses" were erroneously based on an allocation of 100 percent of those costs and losses to Goodyear, rather than the 36 percent responsibility Goodyear was to have regarding the Berzins' costs and losses and the 48 percent responsibility it was to have regarding the respective costs and losses of Kaufman and the Sumerels. This error resulted in an overstatement of the damages due by more than $550,000. The plaintiffs' attorneys did not call this obvious error to the attention of Goodyear's attorneys, nor did they call Brooks to discuss his charts, as Brooks had requested. Instead, the plaintiffs' lead attorney, who had not been directly involved in the recent discussions regarding the calculations, communicated through voicemail and fax with Goodyear's lead attorney, who also had not been directly involved, that the plaintiffs accepted Goodyear's "offer."

A "satisfaction of judgment" form was prepared, but Brooks discovered his error before anyone signed it. Brooks then sent corrected versions of the chart and revised the satisfaction of judgment form. The plaintiffs demanded that Goodyear pay the higher amount, and when Goodyear refused, the plaintiffs filed a motion to enforce the purported "settlement agreement." The district court granted the plaintiffs' motion, and Goodyear appealed.

Gabriel, Judge

A court may only enforce a settlement agreement if it constitutes an enforceable contract. The e-mail and charts were sent in a context in which the parties were attempting to complete a mathematical computation but had a discrepancy in their respective calculations, which Brooks was attempting to resolve. Brooks's e-mail did not solicit an acceptance but rather solicited a return call: "Please review these, then let's discuss." For these reasons alone, Brooks's e-mail and charts did not constitute an offer capable of acceptance. Goodyear contends that, even if its counsel's e-mail and attached erroneous charts constituted an offer, any agreement based on such an offer would be unenforceable.

Regarding unilateral mistake, Professor Corbin states, "[T]here is practically universal agreement that, if the material mistake of one party was known by the other or was of such character and accompanied by such circumstances that the other had reason to know of it, the mistake party has the power to avoid the contract." 7 Joseph M. Perillo, *Corbin on Contracts* § 28.41, at 255 (rev. ed. 2002). Corbin further states that relief due to unilateral mistake is available even if the offeree neither knew of nor had reason to know of the mistake, if enforcement of the contract would be "oppressive" to the mistaken party, and relief from the contract "would impose no substantial hardship" on the other party. Id. § 28.39, at 224.

Pronouncements by our supreme court and the Restatement (Second) of Contracts are consistent with these principles. Restatement (Second) of Contracts § 153 provides:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake. . . .

Restatement (Second) of Contracts § 154 in turn provides:

> A party bears the risk of a mistake when
>
> (a) the risk is allocated to him by agreement of the parties, or
>
> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
>
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Notably, comment f to section 153 states, "It is, of course, unusual for a party to bear the risk of a mistake that the other party had reason to know of. . . ."

Applying these principles here, we conclude for the following reasons that even if an agreement had been formed, it was voidable under the circumstances. First, it cannot reasonably be disputed that Goodyear's calculations were in error, and plaintiffs admit that they knew or had reason to know of the error. Second, the purported agreement would clearly be oppressive and unconscionable, and relief from such an agreement would pose no substantial hardship on plaintiffs. Simply stated, plaintiffs are attempting to exploit Goodyear's mistake to gain a windfall of over $550,000 more than the jury in this case awarded to them. Such a windfall is most certainly oppressive to Goodyear and, in our view, would be unconscionable. Conversely, avoiding the purported agreement and awarding plaintiffs only what the jury awarded works no hardship on plaintiffs. They would receive the amount to which they are entitled.

Third, we reject plaintiffs' assertion that the risk of mistake here rested with Goodyear. We perceive no basis for a determination that Goodyear did not act in good faith. Moreover, as noted above, it is unusual for a party to bear the risk of a mistake that the other party had reason to know of. Nor do we perceive any basis for concluding, as plaintiffs contend, that Brooks chose to charge ahead in conscious ignorance, believing that his limited knowledge was sufficient. The record reflects that someone had to share the first set of calculations here. Brooks did so, knowing that there was still a possible six-figure discrepancy. Hence, he asked Gray to review the calculations and to call him to discuss the numbers. Further, as was obvious from the November 2, 2006, e-mail, Brooks was continuing to try to identify the discrepancy and, thus, was seeking further discussion.

In short, the record demonstrates that Brooks did not seek an agreement through conscious ignorance. Rather, the record shows that he sought further dialogue because he knew of the discrepancy in the parties' calculations. In our view, plaintiffs' efforts to exploit Goodyear's obvious mathematical or clerical error, thereby obtaining a windfall of over $550,000, were clearly inequitable. For these reasons, we hold that even if Brooks's November 2, 2006, e-mail and charts could be characterized as an offer and that offer was accepted, Goodyear may properly avoid the resulting agreement on the facts presented here.

Reversed in favor of Goodyear.