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NOTES

KELLY v. WIDNER: UNCONSCIONABILITY THROUGH THE LOOKING GLASS

David G. Dennis

The cat only grinned when it saw Alice. It looked good-natured, she thought: still it had very long claws and a great many teeth, so she felt that it ought to be treated with respect.¹

I. INTRODUCTION

For every personal injury claim that goes to trial, hundreds more are resolved without litigation. Settlement is crucial to the legal system; without it the amount and cost of litigation would skyrocket, raising insurance costs, crowding court dockets, and slowing the judicial assembly line. Essential to the settlement process is the enforcement of release agreements which generally accompany settlement. Such agreements fix the amount of compensation to be paid to an injured party. Without strict enforcement of release agreements, culpable parties would remain open to suit, and incentives for speedy settlement would not exist.

Several factors, however, separate settlement agreements from the typical arms-length bargain.² First, the injured party (releasor) has no choice but to deal with the culpable party and/or its insurance company. Second, releasors often are less educated and less informed of their alternatives than the insurance adjuster with whom they negotiate. Third, if the injuries have affected the releasor's ability to work, financial pressures may compel acceptance of an unfair offer. Finally, and most importantly, the unpredictable nature of injuries to the human body can have devastating consequences to a person who executes a release while ignorant of the

¹. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 57 (1898).
full extent of his or her injuries.

The unique nature of personal injury releases creates difficult questions for courts. The very uncertainty that mandates strict adherence to contract principles can also create significant hardship for the releasor. Often, these pressures produce strained interpretations of contract principles as courts attempt to achieve equitable results within the parameters of contract law. 3

The Montana Supreme Court's most recent brush with personal injury releases, *Kelly v. Widner,* 4 typifies the distortion that occurs when courts confront unfair settlement agreements. Innocuously buried under extreme facts, the court's unorthodox construction of unconscionability lays releases open to rescission even in cases where the agreement was fair when executed. Additionally, the court bases its analysis of unconscionability on Illinois case law that interprets mistake of fact. As a result, the decision may alter the Montana Supreme Court's future application of mistake of fact as a basis for rescinding personal injury releases.

After an overview of the decision, this casenote briefly outlines the doctrine of unconscionability and its application in Montana and other jurisdictions. Section IV focuses on the *Kelly* opinion, diagraming the general principles that can be extracted from the decision and their effect on Montana law. Finally, this note presents a hypothetical application of the *Kelly* decision.

II. *Kelly v. Widner*

A. Facts

On November 18, 1979, Eleanor Kelly sustained injuries in an auto accident while a passenger in a car driven by defendant Widner and owned by defendant Huntley. 5 The accident fractured Kelly's leg in several places and hospitalized her for twenty three days; 6 she wore a cast for ten months following the accident. 7 At the time of the accident, Kelly, age forty five, had a ninth grade education and lived alone in a log cabin with no telephone. 8 Unable to work because of the cast on her leg, she survived on $10 and

5. *Id.* at 525, 771 P.2d at 143.
6. *Id.*
7. *Id.*
8. *Id.*
food stamps during November and December of 1979. In January 1980, with thirty minutes notice, two agents representing Huntley's insurer visited Kelly's home. During their half-hour meeting, the agents made out two checks totalling $8,959. The payments covered Kelly's medical expenses and lost wages up to that date. In exchange, Kelly signed a release of all potential claims against both defendants.

Nine months later, Kelly's doctors determined that her leg required more surgery and, consequently, Kelly incurred additional medical bills. In November of 1980, Kelly sued Widner and Huntley alleging negligence. Claiming that the pain and physical instability caused by her injury prevented her from working, she requested an additional $56,000 in damages.

The defendants pleaded release as an affirmative defense and, on that basis, the district court granted summary judgment in their favor. On appeal, Kelly asserted that the following factual issues precluded summary judgment: (1) Whether the parties were mutually mistaken as to the nature and extent of plaintiff's injuries; (2) Whether the settlement agreement and release were unconscionable; and (3) Whether Kelly agreed to the settlement and release because of economic duress, constructive fraud, undue influence, or overreaching.

B. The Montana Supreme Court Holding

The Montana Supreme Court reversed summary judgment for both defendants and remanded the case to the district court, holding that a question of fact existed as to whether the settlement was unconscionable. The court based its ruling on the questionable circumstances surrounding the execution of the release and the potential "disparity between the settlement amount and the actual monetary loss" incurred by Kelly.
III. UNCONSCIONABILITY

A. Roots in Equity

Society's aversion to unfair bargains dates back as far as Roman law, in which the doctrine of *laesio enormis* allowed rescission of unfair land sales contracts. As an articulated doctrine, however, unconscionability had its genesis in medieval English courts. Used to deny enforcement of "improvident bargains struck between amateur confidence men and country bumpkins," unconscionability gained quick acceptance in the courts of chancery. Common law courts, however, were not as eager to embrace the doctrine. Although many common law contract principles mirrored equitable remedies that denied enforcement of contracts, "[t]he courts of common law did not create a rule against unconscionability and did not purport to refuse to sustain a common law action to enforce an unconscionable agreement." While an American common law court recognized unconscionability as early as 1870, application of the doctrine at law is primarily a twentieth-century phenomenon.

The refusal of common law courts to embrace unconscionabil-

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23. Note, *Unconscionable Contracts: The Uniform Commercial Code*, 45 Iowa L. Rev. 843, 847 (1960) (citing James v. Morgan, 1 Lev. 111, 83 Eng. Rep. 323 (1664); and Thornborough v. Whitacre, 2 Ld. Raym. 1164, 92 Eng. Rep. 270 (1706)). *James* illustrates the classic circumstance in which equity courts employed the doctrine. The case involved an action in assumpsit to enforce an agreement to pay for a horse at a rate based on the number of nails in the shoes of the horse; one barley corn for the first nail, then double for each successive nail. Total price for the horse was five-hundred quarters of barley (a quarter equaling twenty-five pounds). The court refused to enforce the contract, demanding only that defendant pay the fair value of the horse.

24. See H. Hunter, *Modern Law of Contracts*, §12.06[1] at 12-68 (1986 & Supp. 1991) (the author notes: "[T]he doctrine was invoked in scores of cases in equity. Most of the equity cases involved sharp dealing or overreaching by a commercial party or by one in a strong and knowledgeable bargaining position, against a consumer or a person in a weaker, more vulnerable position." *Id.*).

25. Common law contract notions such as mistake, fraud, duress, undue influence and misrepresentation reflect largely equitable concepts.


27. See Scott v. United States, 12 U.S. (Wall.) 443, 445 (1870) ("If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to.")
ity stemmed largely from its amorphous nature. While many definitions were forwarded, none quite captured the essence of the elusive doctrine. As a result, common law courts treated unconscionability with suspicion and shied away from its use. Instead, courts frequently employed disingenuous means to avoid enforcing bargains deemed offensive to the conscience; manipulating more conventional contract principles to achieve just results. Not until the Uniform Commercial Code ("U.C.C.") adoption of section 2-302 in 1952 did unconscionability begin to gain widespread accept-

B. Section 2-302: The U.C.C. Unconscionability Provision

The U.C.C. provision on unconscionability, section 2-302 resulted in part from the code drafters' desire to "encourage courts to openly strike down provisions of the type which had previously been denied enforcement at law largely through covert means." 

28. The most commonly cited definition, articulated by the United States Supreme Court, identifies an unconscionable contract as one that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other . . . ." Hume v. United States, 132 U.S. 406, 411 (1889) (quoting Earl of Chesterfield v. Janssen, 2 Ves Sen. 125, 155, 28 Eng. Rep. 82, 100 (1750)). See also United States v. Bethlehem Steel Corp., 315 U.S. 289, 327-28 (1942) (the court defined unconscionability as one party taking "advantage of the necessities and distress of the other . . . ."); Campbell Soup Co. v. Wentz, 172 F.2d 80, 84 (3rd. Cir. 1948) (a contract is unconscionable when "the sum total of its provisions drives too hard a bargain for a court of conscience to assist"); and Gimbel Bros. Inc. v. Swift, 62 Misc.2d 156, 158, 307 N.Y.S.2d 952, 954 (N.Y. Civ. Ct. 1970) (unconscionability is that which "affronts the sense of decency . . . .")

29. Comment, supra note 21 at 196-98.

30. Common methods for avoiding unconscionable results included strict construction of unconscionable provisions, declaring the contract against public policy, finding a failure of consideration, finding ineffectiveness of offer or acceptance, or finding lack of mutual assent. See H. Hunter, supra §12.06[1]; Comment, supra note 21 at 197-98.

31. U.C.C. § 2-302 provides:

Unconscionable contract or clause. (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.


This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by ma-
The furtive methods used by common law courts to circumvent oppressive contracts often proved unreliable and "generated confusion respecting the proper methods of contract interpretation." Additionally, the explosion in the number of adhesion contracts generated demand for an effective and consistent tool for dealing with onerous clauses and agreements. Section 2-302, the drafters felt, would "make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable."

The U.C.C. codification of unconscionability has engendered widespread acceptance and use of the doctrine. Once described as "the most controversial provision in the entire [Uniform Commercial Code]," section 2-302 now boasts adoption in forty-nine jurisdictions. More importantly, U.C.C. codification has given unconscionability greater vitality in the common law. Since its adoption in 1952, common law courts have demonstrated a ready willingness to apply the provision by analogy to transactions outside the U.C.C.

C. Analyzing Unconscionability

Notwithstanding its broad acceptance and more frequent use by common law courts, unconscionability remains undefined. The "test" provided in the comment to section 2-302 defines unconscionability in circular terms and is of little help. Furthermore, countless attempts at definition generally have proved no more instructive. Indeed, many commentators argue that confining the

nipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. U.C.C. § 2-302 official comment (1952).

33. W. HAWKLAND, supra note 26 at 46. See also supra note 23 at 845-46; Comment, supra note 21 at 197-98.

34. U.C.C. § 2-302 official comment (1952).

35. Id.

36. HAWKLAND, supra note 26 at 44.

37. Davenport, supra note 22 at 123 (all jurisdictions except California and North Carolina have adopted section 2-302.).

38. See H. HUNTER, supra note 24 §12.06[1] at 12-72 n.214 (the author provides a listing of cases in which section 2-302 has been applied outside the sale-of-goods context).

39. The official comment to section 2-302 cites as the basic test for unconscionability: "[W]hether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." U.C.C. § 2-302 official comment (1952).

40. Note, supra note 23 at 850 ("It must be concluded that no precise definition of unconscionability may be derived from either the common law or the Uniform Commercial Code.").
concept of unconscionability to a static definition would limit the doctrine's usefulness. 41

While attempts to define the doctrine have fallen short, cases analyzing unconscionability do provide guidelines for its application. When analyzing the unconscionability of a contract, courts generally focus on two aspects of the transaction: the negotiation process leading to contract formation and the contract terms. 42

Analysis of the negotiation process generally focuses on the relative bargaining power of the parties. 43 Factors that influence bargaining power include: lack of education or sophistication; inability to protect one's interest because of physical or mental infirmities; illiteracy; and lack of economic power. 44 Additionally, a proper examination of the negotiation process must consider the ability of each party to exercise its bargaining power. 45 Factors such as ignorance of contract terms and ignorance of the risk involved, while not affecting bargaining power, may still signal a defective negotiation process. 46 In essence, the bargaining process must result in contract terms "intelligently, knowingly, and voluntarily assumed." 47

The other focus of unconscionability centers on the fairness of the contract terms—the overall balance in the obligations or risks that the parties assume. Unconscionable contract terms are provisions so one-sided as to oppress 48 or unfairly surprise 49 an innocent

   The section does not provide the machinery [for analysis]; it will lead courts to that machinery, machinery which the courts themselves must create. How will the section lead the courts into creating the machinery? It will do so by coercing courts into dealing with the problem under the heading "unconscionability".
   Id. at 36 (citing K. Llewellyn, The Common Law Tradition: Deciding Appeals 371 (1960)).


44. See Restatement (Second) of Contracts § 208 comment d (1981).

45. Fort, supra note 42, at 798.

46. Id. at 809-10.

47. Id. at 798.

48. In early drafts of section 2-302, the drafters were uncertain whether the section would apply only to hidden or unexpected provisions in form contracts or would also encompass bargained-for provisions, which were nonetheless unfair. The latter proposition prevailed, as evidenced by the addition of "oppress" in the final version of the official comment to section 2-302. Leff, Unconscionability and the Code—The Emperor's New Clause, 155 U.
party.\textsuperscript{50} Courts should view contract terms “in the light of the general commercial background and the commercial needs of the particular trade or case.”\textsuperscript{51} Additionally, courts cannot use hindsight when reviewing contract terms, but must examine them in light of the circumstances existing when the contract was made.\textsuperscript{52}

Most courts define unconscionability to require \textit{both} a defective negotiation process and inequitable contract terms.\textsuperscript{53} However, both courts and commentators acknowledge that grossly inequitable contract terms alone may justify rescission of a contract because of unconscionability.\textsuperscript{54} Even courts that require both elements will consider the “degree” of unfairness of the contract terms in determining whether the negotiation process was impaired.\textsuperscript{55} Realistically, a defective negotiation process will almost always accompany grossly inequitable contract terms. In no jurisdiction will abuses in the negotiation process alone support a find-
D. Unconscionability in Montana

Prior to Kelly, the Montana Supreme Court had addressed unconscionability on just two occasions. In All-States Leasing Co. v. Tophat Lounge, the plaintiff challenged the conscionability of a commercial equipment lease. Looking to the U.C.C. for guidance, the court cited the official comment to section 2-302 as the "basic test for unconscionability." Quoting the official comment, the court identified the critical question as:

[Whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.]

Applying this standard, the court refused to find the lease unconscionable where "the appellants selected both the equipment and the supplier," and the "surrounding circumstances [did not] suggest oppression . . . [or] . . . disparity of bargaining power."

A lease also was at issue in Westlake v. Osborne. Westlake involved an agreement for the sale and lease-back of residential property between two friends, Charles Osborne and Henry Larson. Larson died soon after executing the agreement and Westlake, personal representative of Larson's estate, sued to have the contract set aside. Westlake argued that a provision in the contract releasing Osborne from further payment upon Larson's death was unconscionable. The Montana Supreme Court rejected Westlake's argument, stating: 

"[W]hat Westlake is really challenging is

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58. 198 Mont. 1, 649 P.2d 1250 (1982).
59. Id. at 4, 649 P.2d at 1251.
60. Although Article Two specifically governs sale of goods transactions, the court held that it could, by analogy, be applied to commercial lease transactions. All-States, 198 Mont. at 6, 649 P.2d at 1252.
61. Id. at 6, 649 P.2d at 1252-53.
62. Id.
63. Id. at 6-7, 649 P.2d at 1253 (the court emphasized the sophistication of the contracting parties and noted that, "[courts] . . . are reluctant to rewrite the terms of a contract between businessmen . . .").
64. 220 Mont. 91, 713 P.2d 548 (1986).
65. Id. at 92-94, 713 P.2d at 549.
66. Id. at 94, 713 P.2d at 550.
67. Id. at 96, 713 P.2d at 551.
the sufficiency of consideration . . . .”68 The court held that absent a showing of oppression, prejudice, or unfair surprise, “inadequacy of consideration [is] not grounds for setting aside or refusing to enforce a contract.”69

In both All-States Leasing and Westlake, the Montana Supreme Court refused to find unconscionability when only inequitable contract terms existed. In effect, the court acknowledged in both cases that unconscionability requires a defective negotiation process in addition to inequitable terms.

IV. ANALYSIS OF KELLY V. WIDNER

In Kelly, the Montana Supreme Court provides a useful framework for future decisions by setting out the two required elements of unconscionability and by identifying factors that signal a defective negotiation process. However, the court’s choice of Illinois authority for its opinion detracts from its usefulness. The Illinois “standard” adopted by the Kelly court is taken from Illinois cases applying and interpreting the doctrine of mutual mistake of fact, not unconscionability. The result is a decision that contradicts itself, misconstrues unconscionability, and complicates the law of mistake of fact in Montana.

A. “Whether under all the circumstances justice was done”

The Montana Supreme Court begins its examination of Kelly by constructing a framework for analyzing the case. Initially, the court confirms its use of section 2-302 as the test for determining unconscionability.70 After setting forth the U.C.C. test, however, the court makes no further reference to it. Instead, recognizing that the doctrine is not amenable to a “succinct or precise definition,” the court identifies several factors that indicate unconscionability, including: “unequal bargaining power, lack of meaningful choice, oppression, and exploitation of the weaker party’s vulnerability or lack of sophistication . . . .”71 Additionally, the court notes that inadequacy of consideration, though by itself not determinative, may signal unconscionability when considered along with other factors.72 Having set forth general factors that indicate un-

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68. Id.
69. Id.
70. Kelly v. Widner, 236 Mont. 523, 527, 771 P.2d 142, 144 (1989). As in All-States Leasing the court held that section 2-302 could be applied to contracts outside the U.C.C. Id.
71. Id. at 528, 771 P.2d at 145.
72. Id.
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conscionability, the Kelly court turns to Illinois case law for a standard with which to apply these factors to personal injury releases. Quoting Scherer v. Ravenswood Hospital,73 the court directs that personal injury releases are to be set aside “in situations where the facts, when finally known, present an unconscionable result . . . .”74

Armed with this analytical framework, the court proceeds to its analysis of the facts. Examining the negotiation process, the court finds that Kelly’s strained financial condition, lack of education, lack of legal advice, and isolated living arrangements “created a vulnerability susceptible to exploitation.”75 This vulnerability combined with the “hasty settlement” procured by the adjusters rendered the negotiation process “subject to question.”76 The court then focuses its attention on the release terms. Emphasizing the minimal consideration received by Kelly and the uncertainty of her injuries,77 the Montana court holds that an issue of fact remains as to “whether the checks issued to Ms. Kelly were adequate under the circumstances known by the parties at that time.”78

This holding was sufficient to support a finding of inequitable contract terms. Apparently unsatisfied, however, the Kelly court goes further and holds that it can also consider “facts subsequent to a settlement” to determine whether an agreement is unconscionable.79 Again the court turns to Illinois authority to buttress its argument, explaining that “[t]he Illinois Supreme Court in Scherer and Newborn considered the large disparity between the settlement amount and the actual monetary loss which the injured party eventually incurred.”80 Pointing to Kelly’s inability to work and her continuing need for medical care, the court speculates that the “disparity in the present case may be similarly large.”81 Weighing this factor, along with the questionable circumstances surrounding the negotiation of the settlement, the court holds that a question of fact remains as to “whether under all the circum-

73. 70 Ill. App. 3d 939, 942, 388 N.E.2d 1268, 1271 (1979)).
74. Id. at 528, 771 P.2d at 145.
75. Id.
76. Id. at 528-29, 771 P.2d at 145-46.
77. Kelly, 236 Mont. at 528, 771 P.2d at 145. The court noted that at the time Kelly executed the release, only two months had passed since the accident, and that her leg, which had required insertion of a steel rod, was still in a cast and would not heal for some time. Therefore, “at the time of settlement there was substantial uncertainty as to the extent of injury to Ms. Kelly’s leg, and the future prognosis.” Id.
78. Id. (emphasis added).
79. Id. at 529, 771 P.2d at 146.
80. Id. (emphasis added).
81. Id.

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stances, justice was done."^{82}

The Montana Supreme Court’s use of Illinois authority to analyze the unconscionability question presented in *Kelly* is troublesome for two reasons. First, the court borrowed standards and language from Illinois case law interpreting mistake of fact, not unconscionability. Second, unlike the Montana Supreme Court, the Illinois courts take a progressive view of mistake of fact as a basis for rescission of personal injury releases. These two factors create several problems for Montana law. To fully understand the effect of the decision, a brief examination of how courts apply mistake of fact to personal injury releases is necessary.

### B. **Mistake of Fact as a Basis for Rescission of Personal Injury Releases: Two Views**

Almost all jurisdictions recognize mutual mistake of fact as a valid justification for setting aside a release of claims.^{83} However, courts vary widely in their analyses of what circumstances give rise to a mistake sufficient to justify rescission. A majority of courts, including the Montana Supreme Court,^{84} will set aside a release because of mistake only when the releasor suffers an injury that is not discovered until after the release is executed.^{86} These courts will not find mistake simply because an injury takes longer than anticipated to heal or because the releasor does not recover as fully as expected. These situations, commonly labelled "mistaken prognoses," are mistakes of opinion, not fact, and will not justify rescission of a release under the majority view.^{86}

Even this limited application of mistake to personal injury re-

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^{82}. *Id.*


^{84}. See *Whitcher v. Winter Hardware Co.*, 236 Mont. 289, 769 P.2d 1215 (1989) (the Montana Supreme Court expressed its reluctance to set aside settlement agreements, noting that it had only done so in cases "where a new and different medical problem was discovered after the settlement" or when "the treating physician's initial assessment was a misdiagnosis of the actual extent of the injury." *Id.* at 294, 769 P.2d at 1218.); *Kimes v. Charlie's Family Dining & Donut Shop*, 233 Mont. 175, 759 P.2d 986 (1988); *Sollie v. Peavey Co.*, 212 Mont. 197, 686 P.2d 920 (1984); *Kienas v. Peterson*, 191 Mont. 325, 624 P.2d 1 (1980).


leases stretches the doctrine somewhat. A standard release typically includes language freeing the releasee from liability for all injuries, whether known or unknown. It is irrelevant that the parties were mistaken as to the injuries, when the very purpose of a release is to shift "the burden of risk in exchange for prompt payment of cash."\textsuperscript{87} Nevertheless, out of compassion for the injured, most courts ignore the explicit language of the release and apply a "special doctrine ... liberally relieving the party who has signed the release."\textsuperscript{88}

A small minority of courts,\textsuperscript{89} led by the Illinois Supreme Court, extend the majority construction of mistake even further. The minority rule, articulated by the Illinois Court of Appeals in \textit{Scherer v. Ravenswood Hospital,}\textsuperscript{90} holds that "a release may be set aside . . . when known injuries [result] in unknown and unexpected consequences . . . ."\textsuperscript{91} The Illinois rule discards the limitation on the majority view that allows rescission only when an unknown injury existed at the time of settlement.\textsuperscript{92}

The key difference between the majority and minority view of mistake lies in the range of facts and circumstances that the court is allowed to consider. Under the majority view, the facts that give rise to the mistake (i.e. the unknown injury) must exist at the time

\textsuperscript{87} Wheeler v. White Rock Bottling Co., 229 Or. 360, 366, 366 P.2d 527, 530 (1961) (the Oregon Supreme Court discussed the impropriety of applying the doctrine of mistake to personal injury releases). \textit{See also} Sanger v. Yellow Cab Co., 486 S.W.2d 477, 481 (Mo. 1972) ("It is quite clear there could not be any mutual mistake here . . . . The releasee prepares the instrument and knows what it is and what it contains. By its terms the parties agreed the release was to apply to unknown injuries as well as known injuries.").

\textsuperscript{88} As Professor Williston notes:

\textit{[I]t is a question of fact whether the parties assumed as a basis of the release the known injuries, or whether the intent was to make a compromise for whatever injuries from the accident might exist whether known or not. On a fair interpretation not only of the language of the instrument, but of the intention of the parties, the latter supposition is more likely, but presumably out of tenderness for the injured plaintiffs some courts have gone very far in finding the facts in accordance with the former possibility.}

\textit{S. WILLISTON, WILLISTON ON CONTRACTS, § 1551, at 192-93 (3d ed. 1970).}


\textsuperscript{90} 21 Ill. App. 3d 637, 316 N.E.2d 98 (1974).

\textsuperscript{91} \textit{Id.} at 639-40, 316 N.E.2d at 101. \textit{See also} Witt v. Watkins, 579 P.2d 1065 (Alaska 1978) (the Alaska Supreme Court declared: "We deliberately have not preserved the additional artificial distinction between cases involving a known injury which proves to be much more serious than believed, and an injury different in type from that originally known. . . . Niceties of distinction between the extent of a known injury or a difference in the character of the injury should not be determinative." \textit{Id.} at 1069); Meyer v. Murray, 70 Ill. App. 3d 106, 387 N.E.2d 878 (1979); Reede v. Treat, 62 Ill. App. 2d 120, 210 N.E.2d 833 (1965).

\textsuperscript{92} \textit{See text accompanying supra} notes 84, 85 and 86.
the release is executed. Thus, a court applying the majority rule may not base a finding of mistake on complications or conditions which arise after the parties sign the release. Conversely, courts applying the minority view do not limit their analysis to facts and circumstances in existence at the time the agreement is executed.93 As the Appellate Court of Illinois stated in Newborn v. Hood,94 "[w]e believe it is proper to consider the facts that occur subsequent to the execution of the release in determining . . . whether it was the result of mutual mistake of fact."95 Thus, the Illinois courts' scrutiny of "the facts when finally known" includes conditions arising after execution of the release. This approach causes the Illinois courts to focus almost entirely on the resulting fairness of the settlement amount. Indeed, the Illinois Court of Appeals, reviewing its approach to mistake in McComb v. Seestadt,96 observed that the development of the Illinois view had "progressed to the stage where . . . the question in these cases is simply 'whether the result . . . is unconscionable'."97

C. Implications of the Kelly Decision

The Kelly court's approval of the "Illinois standard" creates several difficulties with respect to Montana's law on mistake and unconscionability. First, the Illinois mistake rule adopted by the Kelly court as an unconscionability standard, does not examine the negotiation process. Rather, it considers only the resulting fairness of the agreement. Second, when examining this result, the court is not limited to examining the fairness of the contract at the time it is executed. The court can look at circumstances arising after execution of the release that make the settlement inequitable. Finally, by citing Illinois law on mistake, the court obscures its approach to mistake as a basis for rescission of a personal injury release.

1. Unconscionability in Montana

The Montana Supreme Court's adoption of the Illinois rule

93. See Reede v. Treat, 62 Ill. App. 2d 120, 210 N.E.2d 833 (1965) (The Appellate Court of Illinois stated: "There is indeed no absolute line to be drawn between mistakes as to future, and as to present facts." Reede, 62 Ill. App. 2d at 126-27, 210 N.E.2d at 837 (quoting Fraser v. Algernon Glass, 311 Ill. App. 336, 342, 35 N.E.2d 953, 956 (1941)).
94. 86 Ill. App. 3d 784, 408 N.E.2d 474 (1980).
95. Id. at 786, 408 N.E.2d at 476.

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contradicts prior Montana case law interpreting unconscionability. In both All-States Leasing and Westlake, the court refused to find unconscionability absent a showing of a defective negotiation process.98 Indeed, the Montana Supreme Court actually found such a defect in Kelly. However, the Illinois standard embraced by the Kelly court does not require a defective negotiation process; inequitable contract terms alone will justify rescission.99

More importantly, the Kelly decision disregards a fundamental tenet of unconscionability. Unconscionability allows courts to consider only the circumstances that existed when the parties executed the contract.100 The Kelly court ignored this aspect of unconscionability. Relying on Illinois case law, the Kelly court held that it need not limit its analysis of the settlement agreement to the circumstances as they existed when the agreement was made.101 Instead, the court held that it could evaluate the unconscionability of the release based on circumstances that developed later.102 The Kelly court’s holding allows a finding of unconscionability to be based on a settlement amount that, although sufficient in light of the circumstances existing at the time of settlement, subsequently proves inequitable.

The Kelly decision renders a general release subject to attack whenever the injured party ultimately incurs expenses greater than the settlement amount. This is true even if the court continues to require a defective negotiation process. In most cases where a layman negotiates settlement terms with a skilled insurance adjuster, the court will be able to find some weakness in the negotiation process to hang its hat on. Indeed, if the release works a particularly

98. See text accompanying supra notes 57 through 69.
99. See text accompanying supra notes 90 through 97. While the court found such a defect in Kelly, the Illinois standard it adopted does not require one.
100. See supra note 52 and accompanying text. A useful illustration of the need for such a limitation is provided by R.L. Kimsey Cotton Co. v. Ferguson, 233 Ga. 962, 214 S.E.2d 360 (1975). In R.L. Kimsey, defendant farmers executed a contract in March 1973 to sell their entire output of cotton. Id. at 964, 214 S.E.2d at 362. Between execution of the contract and harvesting, the price of cotton increased dramatically. Id. at 966, 214 S.E.2d at 363. The farmers argued for rescission of the contract, alleging that the disparity between the market price and contract price rendered the contract unconscionable. Id. The Georgia Supreme Court rejected the defendants’ unconscionability claim, finding that the contract was fair under the “circumstances existing when the contract was made . . . .” Id. at 966, 214 S.E.2d at 363.
101. Kelly at 528, 771 P.2d at 145.
102. Kelly at 529, 771 P.2d at 146. Ironically, on this point the decision also appears to contradict itself. The specific passage from the official comment to MONT. CODE ANN. § 30-2-302, quoted in the decision, requires that the contract terms be unconscionable “under the circumstances existing at the time of the making of the contract.” Id. at 527, 771 P.2d at
harsh result, the court may be obliged to find such a defect. Thus, any settlement agreement and release, no matter how fair its terms when executed, may become unconscionable because of circumstances developing later.

Moreover, application of the court’s holding is not limited to personal injury releases. The Kelly rule allows a party to set aside any contract, when circumstances arising after its execution make it inequitable.

2. Mistake of Fact in Montana

Approval of the Illinois mistake standard also contradicts Montana’s previous application of the mistake doctrine to personal injury releases. Prior to Kelly, the Montana Supreme Court followed the majority view, which denies rescission of a release unless the releasor had an unknown injury at the time she signed the release. Relying on Kelly, a releasor now may argue for a change in the Montana Supreme Court’s view of mistake as a basis for rescinding personal injury releases. A releasor can assert that the Kelly court’s approval of the Illinois mistake standard signals a shift from the majority view to the more liberal Illinois view of mistake, which allows rescission whenever enforcement of the release would create a hardship for the releasor.

V. HYPOTHETICAL ILLUSTRATION

A. Facts

Kathy was injured when Tess, driving a half-ton pickup, made a right hand turn on a red light and struck her in a crosswalk. Kathy sustained a compound fracture to her left leg, facial lacerations, and a slight injury to her back. Following her initial emergency room care, Kathy was referred to Dr. Surehand, an orthopedic surgeon. Despite the extensive damage to her leg, Kathy’s prognosis was good. Dr. Surehand advised her that she could expect to return to her job within six months after the accident. Without a job, however, Kathy found it difficult to pay her bills. Three months after the accident, she entered into a settlement agreement with Tess’s insurer, Open Arms Indemnity. In exchange for an agreement releasing “all claims for any known or unknown injuries,” Kathy received a settlement amount based on her current and estimated future medical bills and eight months lost wages.

103. See supra notes 84 through 86 and accompanying text.
Unfortunately, Kathy did not recover as quickly as anticipated. Because of complications with her leg, she was unable to work for two years. When Kathy finally resumed working, she could not return to her high-paying career in construction. Instead, she now works as a collection agent earning approximately one-half of her previous salary. Additionally, her leg has required continuous physical therapy during the five years since the injury. Thus, the actual cost to Kathy for her injuries is many times the settlement amount.

B. Plaintiff's Argument for Rescission of the Release

Prior to Kelly, the general release would have foreclosed any attempt by Kathy to pursue Tess and Open Arms Insurance for additional compensation. The Montana Supreme Court has held that only unknown injuries, not unknown consequences of known injuries, will constitute a mistake sufficient to justify rescission of a release. Since Kathy knew the extent of her injuries when she executed the release, an argument for rescission based on mistake would fail. Nor could Kathy have argued that the release was unconscionable, since the settlement was fair under the circumstances existing when it was executed. However, relying upon Kelly, Kathy may now make three arguments for rescission of the release.

1. Release is Unconscionable—Both Elements are Present

Initially, Kathy could argue that the release is unconscionable. Arguably, the settlement Kathy received was fair under the circumstances existing when Kathy signed the release. Relying upon Kelly, however, Kathy can point to the harsh result worked by the release to establish the requirement of grossly inequitable settlement terms. Secondly, she could assert that her immediate need for cash, lack of education, and inherent disadvantage in negotiating with a savvy and highly skilled insurance adjuster created a disparity in bargaining power severe enough to render the negotiation process defective.

2. Release is Unconscionable—Harsh Result Alone Justifies Rescission

Additionally, Kathy can argue that the grossly inequitable result alone renders the settlement agreement unconscionable. If, as

104. See supra note 84 through 86 and accompanying text.
Kelly suggests, the Montana Supreme Court has adopted the Illinois mistake rule as an unconscionability standard, Kathy could rely on ample Illinois case law, as well as Kelly, to support such an argument.

3. Release was Executed Based on Mistake

Finally, by using Kelly as a conduit to the Illinois authority, Kathy can argue that the Montana Supreme Court adopted the Illinois courts’ construction of mistake of fact. Kathy can point specifically to the Montana Supreme Court’s approval of the standard enunciated in Newborn and Scherer. Although Kelly dealt solely with unconscionability, the Illinois language cited by the Kelly court cannot be separated from its mistake context. The Illinois mistake standard embodies a sympathetic perspective through which the Illinois courts view personal injury releases. By citing that language from Kelly, Kathy may argue that Montana has adopted a similar viewpoint. If Kathy were successful in persuading the court to adopt such a position, she would then need to prove only that the release results in a hardship.

C. Probable Disposition by Montana Supreme Court

Kathy’s third argument, that the Montana Supreme Court impliedly adopted the Illinois view of mistake, should, and probably would, fail. The court’s endorsement of the majority view is rooted deeply in Montana case law. Moreover, it is doubtful that the Kelly court intended to subvert a position on mistake that it clearly enunciated only two months before in Whitcher v. Winter Hardware Co. More likely, the Montana Supreme Court did not comprehend the implications of the Illinois language that it cited. Nonetheless, the Kelly court’s approval of the standard enunciated in Scherer and Newborn provides support for releasors arguing for a more liberal application of mistake to personal injury releases.

Kathy’s second argument, that unconscionability requires only a harsh result, although stronger than her mistake argument, also should fail. To some extent, the Kelly opinion itself rebuts this argument. The Kelly court’s position that inadequate consideration alone does not invalidate a contract indicates that the court will require a defective negotiation process as well as a grossly inequitable settlement amount. Additionally, the court actually found both elements present in Kelly. At best, however, the opin-

105. See supra notes 89 through 97 and accompanying text.
106. 236 Mont. 289, 769 P.2d 1215.
ion is contradictory because the Illinois mistake standard “approved” by the Kelly court as an unconscionability standard does allow rescission solely because of a grossly inequitable result.

Even if Kathy loses on the first two arguments, under Kelly she could establish both elements of unconscionability and, therefore, avoid the release. Arguably, Kathy’s case differs from Kelly in that Kathy’s settlement terms were fair when she signed the release; circumstances arising after execution of the release rendered the settlement inequitable. Regardless, under the broad holding of Kelly, the court is not limited to the facts as they existed at the time of settlement. The court may consider the facts arising after the settlement. The large disparity between the settlement amount and Kathy’s actual damages create a grossly inequitable “result.”

Additionally, Kathy could make a strong argument that the settlement amount resulted from a defective negotiation process. Although the facts of her case do not support such a finding as well as the facts of Kelly, Kathy’s weak financial position and lack of commercial background support an argument that the terms were not “intelligently, knowingly, and voluntarily” assumed. Indeed, if enforcing the release would work a severe hardship on Kathy, the court may be compelled to find a defective negotiation process.

VI. Conclusion

Courts have long recognized the contractual nature of release agreements and the need for finality of settlement. However, courts also have acknowledged the special character of such agreements and the unique circumstances that often surround their execution. In most jurisdictions this tension has produced, in varying degrees, strained interpretations of contract principles. The widely acknowledged “special rule” for applying mistake of fact to personal injury releases, and its more liberal minority interpretation, attest to the rule-perverting force of inequitable personal injury settlements.

The Kelly decision, with its unique construction of unconscionability and potential consequences for mistake, holds two lessons. For insurance companies, it mandates closer scrutiny of the methods used by claims adjusters when negotiating settlements. Under the Kelly court’s interpretation of unconscionability, such methods will be the sole focus of attention when the risk shifted to the releasor ripens into hardship. For courts, the lesson is to tread cautiously when embracing authority in this twilight zone of law that warps contract principles to serve the demands of equity. By striving to justify a finding favorable for Ms. Kelly, the Montana Su-
The Supreme Court adopted a standard that stretches the bounds of contract law and threatens the incentive to settle personal injury cases. One can only hope that the *Kelly* decision, like Alice's Cheshire cat, will slowly fade away leaving only its grin behind.