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Torts - Release - Release of One Tort-Feasor Not a Release of Others When Tort-Feasors Are Independent and Successive - Sanchez v. George Irvin Chevrolet Co., 31 Colo. App. 320, 502 P.2d 87 (1972)

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COMMENT

TORTS—RELEASE—Release of One Tort-Feasor Not a Release of Others When Tort-Feasors Are Independent and Successive *Sanchez v. George Irvin Chevrolet Co.*, 31 Colo. App. 320, 502 P.2d 87 (1972).

INTRODUCTION

The legal consequence that inheres in finding two or more wrongdoers to be joint tort-feasors[1] has long been a vexatious area for the courts and a popular topic for legal writers. Once "jointness" is established, any or all of the following ramifications may ensue: (1) joinder of defendants in the same action is possible; (2) each wrongdoer is liable for the entire damages of the injured party; (3) satisfaction of a judgment against one releases all; (4) no contribution is permitted between the joint tort-feasors (unless changed by statute); or (5) a release of one releases all.[2] This last result, the effect of a release, has experienced a particularly agonizing evolution in this country. The relatively harsh common law rule which required that a release of one joint tort-feasor was a release of all[3] has been attacked, modified, and finally, in great part, abrogated in favor of a seemingly more just rule.

According to Dean Prosser, a release is "*a surrender of the cause of action*, which may be gratuitous, or given for inadequate consideration."[4] This definition itself has contributed to some of the problems with the law of releases.[5] Where there are multiple wrongdoers and the victim's cause of action is "extinguished," *i.e., surrendered*, by the release of one, a doctrinaire jurist, historically, would have a difficult time letting the plaintiff proceed with his case when theoretically it had virtually disappeared into thin air.

This comment reviews the evolution of the law of releases in Colorado and examines what appear to be contradictory developments in analogous situations: Colorado's abrogation of

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[1]Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937).

[2]*Id.* at 422-25.

[3]*See, e.g.*, Morris v. Diers, 134 Colo. 39, 42, 298 P.2d 957, 959 (1956); Pinkham Lumber Co. v. Woodland State Bank, 156 Wash. 117, 131, 286 P. 95, 100 (1930); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1, at 711 (1956); W. PROSSER, LAW OF TORTS § 49, at 301 (4th ed. 1971).

[4]W. PROSSER, *supra* note 3 (emphasis added).

[5]*Id.* at 301-03.

the common law rule of releases in *Sanchez v. George Irvin Chevrolet, Inc.*,[6] contrasted with its continued application of the common law rule in recent cases of medical malpractice.

I. COMMON LAW DEVELOPMENT

As mentioned above, the effect to be given a release where there are joint tort-feasors has not escaped theoretical confusion. The common law rule was based, in part, on the notion that since there was but a single cause of action against both tort-feasors, a release as to one of them extinguished the cause of action itself and necessarily protected the others.[7] Although the elements of jointness never seem to have been too clear, once the label was attached the courts have had no difficulty reaching a conclusion. The potential for hardship is apparent. Any time the unwitting victim of multiple wrongdoers released one of them for what seemed to him to be a roughly pro-rata share of his damages, the victim later discovered that he was foreclosed from collecting the balance of his damages from the other wrongdoers.

The courts have justified the common law rule with such legal flyswatters as proximate cause,[8] avoidance of double recovery by greedy plaintiffs,[9] the single cause of action fiction,[10] and others. Fortunately, the common law rule has been discarded to a great extent in most jurisdictions by statutes abolishing or severely weakening the common law rule,[11] by considering the intent of the parties, regardless of the form of the instrument,[12] and by construing what appears to be a release as a covenant not to sue.[13]

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[6]31 Colo. App. 320, 502 P.2d 87 (1972).

[7]*See, e.g.*, Cocke v. Jennor, 1614 Hob. 66, 80 Eng. Rep. 214, 215 (K.B. 1614); Duck v. Mayeu, [1892] 2 Q.B. 511, 513; W. PROSSER, *supra* note 3; Annot., 73 A.L.R.2d 403, 407 (1960).

[8]*See, e.g.*, Poltera v. Garlington, 489 P.2d 334, 335 (Colo. Ct. App. 1971), *cert. denied*, Oct. 26, 1971 (not selected for official publication).

[9]*See, e.g.*, Lamoreux v. San Diego & Ariz. E. Ry., 48 Cal. 2d 617, 624, 311 P.2d 1, 5 (1957) (dictum).

[10]*See* note 7 *supra*.

[11]*See, e.g.*, N.Y. GENERAL OBLIGATIONS LAW §§ 15-101 to -107 (McKinney 1964); N.D. CENT. CODE §§ 32-38-01 to -04 (1960); Baer, *Effect of Release Given Tortfeasor Causing Initial Injury in Later Action for Malpractice Against Treating Physician*, 40 N.C.L. REV. 88 (1961); *see also* 12 VAND. L. REV. 1414, 1416 n.9 (1959) for a list of jurisdictions with such statutory enactments.

[12]*See, e.g.*, Jukes v. North American Van Lines, Inc., 181 Kan. 12, 20, 309 P.2d 692, 699 (1957); Gronquist v. Olson, 242 Minn. 119, 125, 64 N.W.2d 159, 164 (1954); *see also* Annot., 73 A.L.R.2d 403, 425 (1960) for a collection of cases on this point.

[13]McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Breen v. Peck, 28 N.J. 351, 358-

The strict common law rule and the seemingly protracted period of change can be attributed, at least in part, to a rather serious and prolonged confusion in the courts between a release and satisfaction.[14] It is said that "[a] satisfaction is an acceptance of a full compensation for the injury."[15] As indicated above, a release could be gratuitous or given for inadequate consideration.[16] A release, therefore, did not necessarily mean the claimant was satisfied in fact, but since a release at common law was a sealed instrument which, by definition, dispelled any questions as to the adequacy of the consideration,[17] the courts mistakenly considered a release to be for full compensation.[18] Although the efficacy of the sealed instrument waned, the confusion in the courts persisted in the form of the so-called presumption of full satisfaction.

One of the simplest ways for the courts to avoid the common law rule is to find that the tort-feasors are independent, concurrent, successive, or any other similarly expressive classification other than joint. This avenue is appealing in that it circumvents the centuries of fictions and mysteries that have grown up around joint tort-feasors. Some courts have, in fact, made use of this distinction.[19] The simplicity of the logic is attractive, and, indeed,

> as to independent wrongdoers, not acting in concert, who were liable for the same loss, there seems to be no reason to conclude that a release of one would release the others, except insofar as it was based upon actual satisfaction of the claim.[20]

As attractive as this path is, it is not totally free from hazards. The obvious question is: Who are joint and who are independent tort-feasors? Harper and James feel that if construed strictly, "the words 'joint tort' should be used only where the behavior of two or more tort-feasors is such as to make it proper

59, 146 A.2d 665, 668-69 (1958). A covenant not to sue, unlike a release, does not release any of the tort-feasors. Instead of extinguishing the cause of action, it is an agreement not to enforce it against one or more of the wrongdoers; the cause continues to exist and is enforceable against the nonparty tort-feasors.

[14]W. PROSSER, *supra* note 3.

[15]*Id.*

[16]*See* text accompanying note 4 *supra*.

[17]S. WILLISTON & G. THOMPSON, SELECTIONS FROM WILLISTON'S TREATISE ON THE LAW OF CONTRACTS § 333A (Rev. ed. 1936).

[18]W. PROSSER, *supra* note 3.

[19]Panichella v. Pennsylvania R.R., 150 F. Supp. 79, 81 (W.D. Pa. 1957); Ash v. Mortensen, 24 Cal.2d 654, 657, 150 P.2d 876, 877 (1944); Valles v. Union Pac. R.R., 72 Idaho 231, 238-39, 238 P.2d 1154, 1159-60 (1951).

[20]W. PROSSER, *supra* note 3.

to treat the conduct of each as the conduct of the others as well."[21] In an early work,[22] Dean Prosser notes that there have been several tests for "jointness,"[23] but that the cases in which he found them "[lead] to the conclusion that 'joint tort-feasor' means radically different things to different courts, and often to the same court."[24] Although he may be correct, *his* conclusion can only lead to the *further* conclusion that to establish independence the practitioner's approach must be as broad-based as possible in order to square with the court's attitude on any given day. The most felicitous approach would seem to be an exclusionary one. Rather than casting about for a positive rule of law to show independence, one ought to guide the court in scrutinizing the actors under each of the traditional tests for jointness (concert of action, common plan, etc.) while pointing out the differences. The more tests the tort-feasors fail, the more likely independence will be conclusively established. Whatever the method, the literature taken as a whole shows a definitive trend away from the original common law rule in all jurisdictions, albeit to varying degrees.

II. COLORADO DEVELOPMENT

Colorado has been a long and faithful adherent to the common law rule that a release of one joint tort-feasor releases all.[25] In fact, in 1959, at the time when most other jurisdictions were in the process of reexamining the old rule,[26] the Colorado Supreme Court held, in *Price v. Baker*,[27] that a covenant not to sue had exactly the same effect as a general release and that it was the legal effect, not the intent of the parties, that was the control-

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[21]1 HARPER & JAMES, *supra* note 3, at 692.

[22]Prosser, *supra* note 1.

[23]They include:

> "[T]he identity of a cause of action against each of two or more defendants; the existence of a like, or common duty; whether the same evidence will support an action against each; the single, indivisible nature of the injury to the plaintiff; identity of the facts as to time, place and result; whether the injury is direct and immediate, rather than consequential; responsibility of the defendants for the same *injuria*, as distinguished from the same *damnum*."

Id. at 413.

[24]*Id.*

[25]Ashley v. Roche, 163 Colo. 498, 431 P.2d 783 (1967); Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956); Sams v. Curfman, 111 Colo. 124, 137 P.2d 1017 (1943); Denver & R.G.R.R. v. Sullivan, 21 Colo. 302, 41 P. 501 (1895).

[26]*See* 12 VAND. L. REV. 1414 (1959) for a review of the various approaches.

[27]143 Colo. 264, 352 P.2d 90 (1959). *See also* 37 DICTA 121 (1960) and 33 ROCKY MTN. L. REV. 127 (1960).

ling element.[28] Recently, however, the Colorado courts have evinced a change of heart. In 1969, the supreme court finally gave credence to a covenant not to sue and began circumventing the common law rule by way of the "intent" approach.[29] Even more encouraging, the court has recently held that a written instrument whereby a plaintiff agrees not to object to the motion to dismiss of some of the defendants will not affect the plaintiff's rights as to the remaining tort-feasors, and the intent of the parties will be given the same effect *as if* it were a pure covenant not to sue.[30] This holding would seem to point toward adoption by the Colorado courts of the "construction of releases as covenants not to sue" approach; that is, construing an instrument, whatever its appearance, in such a way that the plaintiff's rights are most fully protected and preserved. Indeed, were it not for the medical malpractice situation where the Colorado courts have not budged,[31] they would appear to have joined the majority jurisdictions in the space of three or four short years. By examining a case which is representative of Colorado's attitude in many release situations, the inconsistency in the malpractice area becomes evident.

III. *Sanchez v. George Irvin Chevrolet*[32]

Rufina Sanchez, the plaintiff, bought a new car from the defendant, George Irvin Chevrolet. Under the terms of the contract, the defendant had agreed to secure insurance coverage for the plaintiff. When Mrs. Sanchez sought insurance payment through Irvin for a broken windshield she was informed that the defendant had failed to acquire coverage for her, and she was denied reimbursement for the loss. Shortly thereafter, Mrs. Sanchez' automobile was involved in a collision and her car was taken to the defendant for repairs. While the car was in the defendant's custody, the rear wheels and tires were stolen, and the windshield was broken again. The defendant completed repairs on the car but refused to return it to the plaintiff until the $954.46 bill (which included the cost of wheels and tires) was paid. The plaintiff was allegedly unable to pay the bill and was forced to rent a

[28]143 Colo. at 265, 352 P.2d at 91.

[29]Cox v. Pearl Inv. Co., 168 Colo. 67, 73-74, 450 P.2d 60, 67 (1969).

[30]Farmer's Elevator Co. v. Morgan, 172 Colo. 545, 474 P.2d 617 (1970).

[31]When the second tort-feasor is an allegedly negligent physician, the Colorado courts continue to hold that the release of the first wrongdoer thereby protects the doctor. Title v. Freed, 515 P.2d 1149 (Colo. Ct. App. 1973) (not selected for official publication); Poltera v. Garlington, 489 P.2d 334 (Colo. Ct. App. 1971) (not selected for official publication).

[32]31 Colo App. 320, 502 P.2d 87 (1972).

car. Three months later, Mrs. Sanchez settled with the owner-driver of the other car involved in the collision and signed a general release from liability in his favor. She subsequently paid the repair bill and recovered possession of her automobile. She then brought an action against the defendant to recover the amounts which she had paid for the stolen wheels and tires, the broken windshield, and the cost of the rental car on the basis of defendant's alleged negligence. On the defendant's motion, the trial court granted summary judgment as to all amounts except the cost of the original windshield on the grounds that the defendant was protected, as a matter of law, by the release of the earlier tort-feasor. However, the judgment was reversed and remanded by the Colorado Court of Appeals which held that, where a plaintiff's claim involves distinct and separate injuries caused by independent successive tort-feasors, a release of one tort-feasor does not serve to release all unless the evidence discloses an intent to do so.[33]

The court dealt first with *Sams v. Curfman*[34] and *Ashley v. Roche*,[35] on which the trial court relied in granting summary judgment. These cases involved original wrongdoers and subsequently negligent physicians responsible for aggravation of the victims' injuries. In both it was held that a general release as to the first tort-feasors shielded the doctor from liability. The theory was that the first tort-feasor was the proximate cause of the later aggravation, presumably because the result was reasonably foreseeable. From this the courts reasoned that once the injured party settled with the original wrongdoer, full compensation was presumed and there was no longer any cause for concern.[36] In *Sanchez*, the court pointed out that the presumption of full compensation, which in any event is rebuttable, did not come into play because of the nature of plaintiff's claim. The claim involved "distinct and separate injuries" caused by "independent successive tort-feasors."[37] The release, therefore, was effective only as to the first tort-feasor who was a party to it unless "the evidence discloses an intent to release both."[38]

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[33]*Id.* at 323, 502 P.2d at 89.
[34]111 Colo. 124, 137 P.2d 1017 (1943).
[35]163 Colo. 498, 431 P.2d 783 (1967).
[36]*See* text accompanying notes 7-10 *supra*.
[37]31 Colo. App. at 323, 502 P.2d at 89.
[38]*Id.*

The court next cited Prosser's law review article,[39] which had been quoted with approval in *Bayers v. W.O.W., Inc.*,[40] to introduce the element of actual satisfaction of the claim as the basis for a multiparty release[41] and in order to determine the "jointness" (or lack of it) of the actors.[42] Finally, after disposing of the major elements of the case, the court indicated that while a release such as the one here may be a defense at trial, it is not a bar to suit as a matter of law.

The reasoning and holding in *Sanchez* are sound, just, and not lacking in authority,[43] and the court's emphasis of the intent factor in the face of a general release is a proper and realistic approach. However, in distinguishing the instant case from *Sams*[44] and *Ashley*,[45] the court could have dealt more forcefully with the full compensation question. Rather than stating that the presumption of full compensation is a rebuttable one and not relevant to the *Sanchez* case (and thereby giving credence to its very existence), the court might have been a little less delicate, exposing the presumption as the fiction that it is and emphasizing the existence *vel non* of actual satisfaction from the outset. Instead, the court relied on the "independent successive" tort-feasors rationale found in *Ash v. Mortensen*.[46] This case does provide relevant language, but one wonders if the court was aware that *Ash* was a malpractice case, not unlike *Sams* and *Ashley*. The law review quotations are undoubtedly valid and appropriate, with the exception that in the first-quoted material the author is talking about wrongdoers liable for the same loss and the court had just determined that *Sanchez* involved separate and distinct injuries. Although it is possible to quibble with these citations, the court eventually reaches what seems to be the right result. Indeed, had the opposite result been reached, "the repairman not only is excused from negligence, he also has *a license to*

[39]Prosser, *supra* note 1.

[40]162 Colo. 391, 396, 426 P.2d 552, 555 (1967).

[41]*Id.* at 396, 426 P.2d at 555 (1967). " '[A]s to independent wrongdoers, not acting in concert, who were liable for the same loss, there seems to be no reason to conclude that a release of one would release the others, except in so far as it was based upon actual satisfaction of the claim.' " *Id.*

[42]" 'The question is whether, upon the facts, it is possible to say that each defendant is responsible for a separate portion of the loss sustained.' " *Id.*

[43]*See generally* W. PROSSER, *supra* note 3.

[44]111 Colo. 124, 137 P.2d 1017 (1943).

[45]163 Colo. 498, 431 P.2d 783 (1967).

[46]24 Cal. 2d 654, 657, 150 P.2d 876, 877 (1944).

steal because the release of the original tort-feasor follows his every act."[47]

IV. THE ANALOGY TO MEDICAL MALPRACTICE

In Colorado, a release of one joint tort-feasor still releases a subsequent tort-feasor who is not a party to the release if he is an allegedly negligent physician.[48]

The policy considerations in favor of abrogation of the common law rule in this area, besides the generally unjust and unintended result it effects, are numerous and sound. The rule has been severly criticized as harsh, unfounded, and not in accord with the trend in other jurisdictions.[49]

It has been aptly pointed out that the old rule (1) provides a trap for the innocent plaintiff whereby he may be deprived of full compensation, (2) allows the courts to disregard totally the language and intent of the parties, (3) rewards the wrongdoer who makes no attempt to settle at the expense of the one who does, (4) gives tort-feasors an advantage inconsistent with the nature of their liability, and (5) stifles compromise since each wrongdoer wants to wait until the other settles first.[50]

When the current trend in other jurisdictions, Colorado's avowed denial of that trend, and the *Sanchez* case are considered together, one begins to wonder if, on its facts, *Sanchez* is really very different from malpractice cases like *Poltera v. Garlington*[51] and *Title v. Freed*.[52] Arguably not. In *Sanchez*, there is an original tort-feasor who actually inflicted the initial damage (injury). There is a person (doctor), corporate here, to whom the automobile (victim) was taken for repairs (treatment). In the course of that repair, certain mistakes are made through the repairman's

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[47]Brief for Appellant at 6, Sanchez v. George Irvin Chevrolet Co., 31 Colo. App. 320, 502 P.2d 87 (1972) (emphasis added).

[48]Title v. Freed, 515 P.2d 1149 (Colo. Ct. App. 1973) (not selected for official publication); Poltera v. Garlington, 489 P.2d 334 (Colo. Ct. App. 1971) (not selected for official publication).

[49]DeNike v. Mowery, 69 Wash. 2d 357, 418 P.2d 1010 (1966); Annot., 40 A.L.R.2d 1075 (1955) (as supplemented); Note, *Smith v. Conn: Effect of Release of Original Tortfeasor as to Subsequently Negligent Physician*, 6 WILLAMETTE L.J. 335 (1970); Comment, *Torts: Release of Joint and Successive Tort-Feasors in Oklahoma*, 15 OKLA. L. REV. 97 (1962).

[50]McKenna v. Austin, 134 F.2d 659, 662 (D.C. Cir. 1943) (not a malpractice case but involving identical policy considerations).

[51]489 P.2d 334 (Colo. Ct. App. 1971) (not selected for official publication).

[52]515 P.2d 1149 (Colo. Ct. App. 1973) (not selected for official publication).

(doctor's) negligence resulting in further loss to the plaintiff.[53]

In *Poltera*, the plaintiff sustained personal injuries as the result of an automobile collision. During the pendency of legal proceedings against the original tort-feasor, the plaintiff was examined by a physician at the request of the first wrongdoer and his insurer. After settling with the original tort-feasor, the plaintiff sought relief against the physician for his alleged negligence. The Colorado Court of Appeals held, in response to plaintiff's appeal from an adverse summary judgment at the trial court, that plaintiff's action was indeed barred as a matter of law:

> The law is settled in this jurisdiction that, where a person accepts a settlement for injuries with the tort-feasor who caused the accident resulting in his or her disability and executes a formal release from any and all causes of action, claims and demands, damages and expenses growing out of that accident, that person cannot thereafter recover from a physician for damages resulting from the alleged negligent treatment of those injuries. The rationale upon which this rule rests is that the original injuries are held to be the proximate cause of the additional damages which result from the purported negligence of the physician against whom recovery is sought.[54]

The court of appeals expressed the identical attitude in *Title*. In that case, the plaintiff suffered skull injuries in an automobile accident. Five days after the defendant-surgeon operated on the plaintiff, the plaintiff lost the use of his left arm. Later the plaintiff settled with the party responsible for the automobile accident and executed a general release. When the plaintiff appealed from an adverse summary judgment in his action against the doctor, the Colorado Court of Appeals, in affirming, stated:

> Under these facts *Ashley v. Roche* . . . and *Sams v. Curfman* . . . are controlling. In the latter case a party injured in an accident sued the tortfeasor, settled the case, executed a general release, and then sued the physician for alleged negligence in his treatment of the resultant injuries, all as in the present case. The Supreme Court affirmed the trial court's dismissal of the action on the ground that the release given in the first action released the physician because,

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[53]To some, the analogy may be weakened by the fact that the negligent doctor has personally committed a physical act that has aggravated the injury while the repairman, in a custodial capacity, has failed to act, leading to further damage. This will not be so troublesome to the reader who considers the defendant as the law does, as a corporate "person," and notes that the similarities in the fact situations far outweigh any possible differences.

[54]489 P.2d at 335, *citing* Ashley v. Roche, 163 Colo. 498, 431 P.2d 783 (1967), and Sams v. Curfman, 111 Colo. 124, 137 P.2d 1017 (1943).

> "the original injuries are held to be the proximate cause of the added damages resulting from the negligence and unskillfulness of the attending physician."[55]

These analyses, based on proximate cause, are typical of those used by courts applying the old common law rule. Their use seems dangerous in the law of releases,[56] and any such unfortunate theory[57] ought to be used only where nothing else is available.[58] Rather than diving headlong into the quagmire of proximate cause, one question most effectively answers the conflict better than volumes of precedent: Is it really more reasonably foreseeable that a physician, with years of formal education and training, will be more unskilled and negligent than an automobile body shop? Framed in this manner, the conflicting results in the cases are hard to reconcile. The visceral reaction in favor of abrogation of the common law rule is strong indeed, but there are other, more persuasive, arguments for an extension of *Sanchez* to the *Poltera* and *Title* situations.

As has been shown, Colorado has broken with the common law rule that a release of one joint tort-feasor releases all. This jurisdiction seems to be leaning towards abolishing the *Poltera* rule, but, to date, the development away from the old rule has taken place in fact situations with which the courts could cope.[59] Stating that the traditional rule has absolutely no efficacy may be too dramatic a step for the Colorado courts to take, but they may not have to do exactly that. *Ash v. Mortensen*[60] was used by the *Sanchez* court to arrive at the conclusion that they were dealing with independent and successive tort-feasors and separate and distinct claims.[61] In *Ash*, the plaintiff's injuries were aggravated by a negligent physician and the plaintiff had released the

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[55]515 P.2d at 1150.

[56]Both counsel in *Sanchez* relied heavily on *Poltera* in their briefs to the court of appeals. The trial court relied on two malpractice cases in granting the summary judgment. It is quite possible that if the malpractice cases are allowed to remain on the books their inevitable use in other fact situations might well lead to a revival of the old common law rule in cases that, to date, have denied its efficacy.

[57]*See* W. PROSSER, *supra* note 3, at 236 for an introduction to the nightmare of proximate cause.

[58]*E.g.*, Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[59]Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969), and Bayers v. W.O.W., Inc., 162 Colo. 391, 426 P.2d 552 (1967) (both dealing with financial loss to the plaintiff); Sanchez v. George Irvin Chevrolet Co., 31 Colo. App. 320, 502 P.2d 87 (1972) (involving property damage).

[60]24 Cal.2d 654, 150 P.2d 876 (1944).

[61]31 Colo. App. at 323, 502 P.2d at 89.

original tort-feasor. When the physician attempted to use that release as a defense, he was thwarted in his effort by the California court finding independence of the wrongdoers and holding the release to be effective only as to the original tort-feasor. The fact that the *Sanchez* court relied heavily on a malpractice case, totally inconsistent with Colorado's own malpractice cases, together with the fact that the Colorado Supreme Court cited *Ash* with approval in another recent release case[62] may well be the ultimate bridge in the gap between the last vestiges of the common law rule in Colorado and a modern realistic approach to releases. That is, in the next *Poltera* or *Title*, the Colorado courts can either flatly deny the efficacy of the common law rule or, if they prefer, find that it does not apply because the tort-feasors are not joint. In terms of "jointness" in malpractice cases like *Poltera* and *Title*, the problem of separability or inseparability of the injury[63] may often arise. It may well be a hard factual question, but it should not, as a matter of law, lead to "jointness" and its unjust consequences.[64] Likewise, with regard to the old common law rule itself, since the identity of cause of action fiction can be easily avoided by the technically unique (but practically identical) covenant not to sue,[65] its continued efficacy as a bar to recovery in the area of releases seems at best a minor obstacle to a new rule in Colorado.

CONCLUSION

Common sense, reported cases, and legal writers accurately point out that the vital elements in any release situation are the intent of the parties and the extent of actual compensation.[66] A plaintiff should never be barred from pursuing a second tort-feasor by a release of the first unless, by the instrument, he intended to release both or he has been so fully compensated for his injury that he ought not to be entitled to do so. The use of *Ash* by the Colorado courts more likely represents thorough analysis and thoughtful study of a sister state's precedent than an inad-

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[62]Bayers v. W.O.W., Inc., 162 Colo. 391, 396, 426 P.2d 552, 555 (1967).

[63]Prosser, *supra* note 1.

[64]*Id.* at 434-35.

[65]Comment, *Release of Joint Tort-Feasors in Texas*, 36 TEX. L. REV. 55, 56 (1957).

[66]*See, e.g.*, Justice Rutledge's excellent opinion in McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Wecker v. Kilmer, 294 N.E.2d 132 (Ind. 1973) (a malpractice case); Annot., 40 A.L.R.2d 1075, 1084 (1955); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1 (1956); W. PROSSER, *supra* note 3, at 304; Note, *supra* note 49; Comment, *supra* note 49, at 99; 3 WASH. & LEE L. REV. 151 (1941).

vertent extraction of appropriate language from a case in direct conflict with *Poltera*. Since *Poltera* was not selected for official publication, it is persuasive precedent only[67] and is not, therefore, too great a barrier in itself, to a new rule. If the rights of personal injury victims are to be as fully preserved and protected as the plaintiff's in *Sanchez*, and if medical practitioners are to be held accountable for their negligence, hopefully, at the next opportunity, the Colorado courts will finally lay to rest the problem raised here. Until that time, the only safe route for the cautious practitioner seeking to fully protect his client's rights is to have the victim execute a covenant not to sue[68] in favor of the settling tort-feasor evidencing a clear intent to benefit only that party and specifically exempting any treating physicians from its coverage. Such a procedure, requiring technical accuracy by the well-advised plaintiff and holding great potential injury for the ill-advised, provides a possible escape from the harsh common law rule of releases, but, in failing to repudiate the common law rule completely, lays an unjustified and unfortunate trap for the unwary.

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[67]COLO. APP. R. 35(f).

[68]Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969); Title v. Freed, 515 P.2d 149 (Colo. Ct. App. 1973) (not selected for official publication).