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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6962

In the Supreme Court of Appeals of Virginia at Richmond

WILLIE LEE VALENTINE

v.

MARGARET W. JESTER

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a.m.; Adjourns at 1:00 p.m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 6962

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 24th day of April, 1968.

WILLIE LEE VALENTINE, Plaintiff in error,

against

MARGARET W. JESTER, Defendant in error.

From the Circuit Court of the City of Portsmouth
Henry W. MacKenzie, Judge

Upon the petition of Willie Lee Valentine a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of the City of Portsmouth on the 7th day of December, 1967, in a certain motion for judgment then therein depending, wherein Margaret W. Jester was plaintiff and the petitioner was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of $5,000, with condition as the law directs.

RECORD

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page 17 }

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ORDER

This matter came to be heard on June 29, 1967, upon the PLEA OF RELEASE AND PAYMENT filed by the defendant, and the Court having heard the evidence it is ADJUDGED, ORDERED and DECREED that the PLEA OF RELEASE AND PAYMENT filed by the defendant is overruled, and the release previously executed between the parties hereto is declared null and void and of no effect as there was a mutual mistake of fact existing at the time of said signing.

It is further ADJUDGED, ORDERED and DECREED that the defendant be allowed twenty-one days after the entrance of this order in which to file his grounds of defense to the plaintiff's motion for judgment.

ENTER THIS ORDER 7/24/67.

H. W. M., Judge

* * * * *

page 33 }

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ORDER

This day came the parties by counsel upon the motion of the defendant to vacate and set aside the judgment previously entered in this matter on November 20, 1967, upon the ground that said Order failed to state the exceptions taken by the defendant in the Order entered herein on October 30, 1967, it not being the intent of the defendant to waive said exceptions; and upon the further motion of the plaintiff to grant a new trial as to the amount of damages only as the verdict was contrary to the law and evidence. Upon consideration of the Motion and arguments of counsel, it is hereby ORDERED that the judgment previously entered in this

matter be vacated; and it is further ORDERED that plaintiff's motion for a new trial is hereby denied to which action the plaintiff objects and excepts.

And it is further ORDERED That the verdict in favor of the plaintiff vacated by this Order be reinstated and judgment entered for the plaintiff against the defendant in the amount of $4,000.00 plus interest from October 30, 1967, to which action of the Court, the defendant by counsel objects and excepts.

Enter this 7th day of December, 1967.

H. W. M., Judge

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page 35 }

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

The appellant, Willie Lee Valentine, hereby gives notice of his intention to apply to the Supreme Court of Appeals of Virginia and states that he will apply for a writ of error to the final judgment entered on the 7th day of December, 1967, and said appellant assigns the following error of the Circuit Court of the City of Portsmouth, Virginia, in the hearing of the aforesaid cause:

1. The Court erred in failing to sustain the appellant's Plea of Release and Payment and entering judgment for the defendant.

WILLIE LEE VALENTINE

By JAMES N. GARRETT, JR.
Counsel

* * * * *

Filed Circuit Court Portsmouth, Va. Dec. 13, 1967.

KENNETH L. DIETRICK, Clerk

By L. K. B., D. C.

* * * * *

page 5 }

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Mr. Garrett: Your Honor, this is on a motion or a plea of release and payment filed in response to the plaintiff's suit for damages alleging personal injuries, and since it is here on my plea, I'm going to offer the release that we have here, and I understand from counsel that they do not deny that it is the signature of Margaret W. Jester and James M. Jester on this paper.

(Document shown to Mr. Carter for examination.)

The Court: This will be Defendant's Exhibit Number 1.

page 6 } (So marked by the Court.)

Mr. Garrett: Your Honor, I think the pleadings show—and I don't think it would be necessary to call a witness to prove this, but I believe the pleadings show that this release does relate to the accident claimed to cause some injury in the Motion for Judgment. The Motion for Judgment alleges an accident on February 2, 1965, with the defendant Willie Lee Valentine, and the release also refers to an accident of that date, I believe. On the release it states W. Valentine, who was the driver of the car, and the other name there, being released, is the policyholder of Nationwide Mutual Insurance Company.

The Court: I take it there's no question but this release relates to the accident?

Mr. Carter: That is correct, Your Honor.

Mr. Garrett: All right, sir. With that, Your Honor, we rest at this point.

Mr. Carter: Your Honor, it is mentioned by counsel that the defendant insurance company—this was an automobile accident case in which a personal injury action was filed, and the defendant filed an action or an answer claiming a release and satisfaction, and the answer filed by the plain-
page 7 } tiff takes the position that this release was procured as a result of mutual mistake between the parties as to the injury suffered by the party; also that the consideration of the lease was grossly inadequate as to the subsequent injuries that developed; and that there was misrepresentation on the part of the insurance company's agent as to the procurement of this release. We feel that we will

be able to show the facts and illustrate that the release was procured through these avenues and will ask the Court to set this release aside.

* * * * *

JAMES M. JESTER, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Carter:

Q. Would you state your name, please?

page 8 } A. James M. Jester.

Q. Are you related to Margaret Jester?

A. Husband.

Q. Mr. Jester, were you involved in an automobile accident in February of 1965?

A. Yes, sir, February the 2nd.

Q. Would you explain to the Court the circumstances as to the happening of that accident?

A. I, with my family, my wife and two children, were stopped at the east stoplight at Alexanders Corner and we were struck from the rear by another car.

Q. I believe you said your wife was in the car with you?

A. Yes.

Q. Where was she sitting?

A. She was on my right, front seat.

Q. Did anyone receive any medical attention at the scene of the accident?

A. No, sir.

Q. Was anyone taken to the hospital?

A. No, sir.

Q. Did you learn the identity of the owner or driver of the other car?

A. Yes, sir, Mr. Valentine.

Q. Mr. Jester, after that accident were you con-

page 9 } tacted by anyone in relation to the accident?

A. Approximately five or six days after the accident a Mr. Diener came to our home, introduced himself as an adjustor for Nationwide Insurance.

Q. And is this the same Mr. Diener sitting here by Mr. Garrett?

James M. Jester

A. It is, yes, sir.

Q. What time of the day was this when Mr. Diener called, Mr. Jester?

A. It was in the evening after work hours.

Q. Now, what conversations did you have with Mr. Diener?

A. I met Mr. Diener on the porch and he asked if there were any injuries in reference to the accident. I told him that I felt that I was all right, that my children were all right, but that my wife appeared to have a minor burning sensation in the neck and I didn't think that that was too bad, and we went out and looked at the car, the damage to the car. as I recall, he took some pictures at that time, and we went back on the porch. Mr. Diener had some papers with him. He said since there appeared to be no injuries and we had not been to the doctor at this time, he asked if we would sign some papers, releases of some type, and I told him that I would prefer that he discuss this with my insurance agent.

page 10 } He was quite adamant about not bringing my agent into it; that he could take care of any problems that might occur.

Q. Did he indicate that he did not wish you to see your agent?

A. That was correct. He handed me a paper, I understood a release of some type, and I glanced at it and said that I would take it to my insurance adjustor, and he said he didn't think it would be necessary, that—

Q. Was Mrs. Jester present during this conversation?

A. No.

Q. Did Mr. Diener subsequently discuss this with you and Mrs. Jester?

A. Yes. We went in the house after that and we discussed the situation for probably an hour or so.

Q. Did Mr. Diener request you and your wife to sign a release at that time?

A. Yes. He seemed quite obsessed with getting a release signed, but my wife felt that she should see a doctor before signing any release and have some X-rays and what-not.

Q. Then Mr. Diener under—let me ask you this: did Mr. Diener understand at that time that no medical attention had been received?

A. That's correct.

page 11 } Q. And was any release signed at that time?

A. No.

Q. What understanding did you have with Mr. Diener after your conversations, if any?

James M. Jester

A. We discussed some doctors for my wife to see, and I think we agreed on seeing Doctor Psimas for X-rays and examination, and as soon as she could get an appointment that we would be back in touch—or he would be in touch.

Q. Do you know if your wife subsequently saw a doctor?

A. She got an appointment on the 19th of February, '65.

Q. And did she see Doctor Psimas on that date?

A. Yes, I think she had X-rays and examination.

Q. I believe you said this was the 19th of February?

A. That's correct.

Q. Did she see Doctor Psimas again after that?

A. Again on the 22nd of February.

Q. Did Mr. Diener contact you or your wife again between the initial visit and the doctor's visit or sometime between the initial visit and the second doctor's visit?

A. As I recall, he came to our home on the evening of the 22nd and my wife—he brought the papers again
page 12 } and asked that we sign them, and my wife had not heard from—the report from the doctor, so she tried to contact him that night, but failed to do so, so we did not sign the releases at that time.

Q. Do you know if your wife was later able to talk with Doctor Psimas?

A. I think she talked to him on the 23rd, in that—

Q. And as of this time, Mr. Jester, are you aware of what she was being treated for?

A. Well, on the 23rd, after talking with him, he gave her therapy—

Mr. Garrett: Now, Your Honor, I'm going to object to him telling what Doctor Psimas told Mrs. Jester on the telephone. I think that's too far out.

Mr. Carter: Don't state what Doctor Psimas told you. Just state what you know she was being treated for.

That was the question I asked, Your Honor, if he understood what she was being treated for.

Mr. Garrett: All right, sir.

A. That she had therapy for muscle spasm in her neck, or some pain in the neck and shoulder.

page 13 } By Mr. Carter:

Q. Did Mr. Diener contact you again after Mrs. Jester had consulted with Doctor Psimas?

James M. Jester

A. Yes, sir.

Q. And do you recall when this was?

A. I think it was on the 24th.

Q. This would have been the 24th of February?

A. That's correct, '65.

Q. And what was discussed at that time?

A. He brought a check for—as I recall, for the car, and I signed the release for repair work on the car, and at that time I think we signed a release of some type for my wife and myself.

Q. And how much were you paid, you and your wife, at that time to sign this release?

A. I was paid for the car in the $250.00 range. I'm not sure.

Q. Well, how much for the release for you and your wife?

A. The release for my wife was $175.00.

Q. And was there any other arrangement as to any further payment?

A. We were to get medical treatment, she was, for any bills that might incur in the next few weeks.

Q. Did you review this release with Mr. Diener,
page 14 } have any discussions with him about its contents?

A. Yes. Before signing it we went into the theory a little bit, that we understood that the injury wouldn't take over five or six weeks before she would be all right, and we certainly thought that the medical payment would be sufficient and that we had no cause for any liable action, and Mr. Diener indicated to me that if there were any underlying problems that appeared in the future that they would certainly be easy to reopen the case, and on this basis we had no call to have any contingency with the insurance company, so we signed the release.

Q. Now, at that time, Mr. Jester, did you have any knowledge of your own or from any physicians or otherwise that Mrs. Jester's injury was other than minor?

A. No.

Q. Did your wife continue to see Dr. Psimas after that?

A. Yes, regularly.

Q. For how long a period of time?

A. Approximately a year.

Q. And did her condition change during this time?

A. Well, sporadically. She seemed to be better, and then if she used her right arm very much she would get worse.

page 15 } Q. Did you have any understanding about her condition changing?

James M. Jester

A. Well, she seemed to—nothing more than if she used her arm it changed until sometime around Christmas. I understood that—

Q. Christmas of when?

A. Christmas of '65.

Q. This was the Christmas after the accident in February?

A. Yes. She contacted Doctor Psimas and she was upset that she couldn't get any decision over a change in her condition. We thought that it would be over in five or six weeks, and here it is Christmas and she doesn't seem to be any better, and she contacted the doctor. He took X-rays and indicated that she might have permanent damage.

Q. And what action, or what subsequently took place on your part after that?

A. Well, I immediately contacted my attorney. You.

Q. And what subsequent action was taken after that that you are aware of?

A. Well, the insurance company sent us a check for $90.00, and we returned that, and also returned the $175.00 that they had paid us at the signing.

Q. And was this returned, $175.00, plus the other
page 16 } check, accepted by the company?

A. No. They returned them.

Q. And what subsequent action developed after that?

A. Well, I discussed the situation with you numerous times and we filed suit.

Q. Mr. Jester, did you contact your insurance company at any time after that?

A. After I talked with you I discussed it with my agent.

Q. And did you have an automobile policy on your car at that time?

A. Yes.

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page 18 }

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Q. Is this a copy of the coverage you had on your policy, Mr. Jester?

A. Yes, sir.

Q. And what coverage do you have on there as to medical payments?

James M. Jester

A. $1,000.00 each person.
Q. And were you aware that you had this coverage?
A. No, sir.
Q. When did you first become aware of it?
page 19 } A. I called my broker and he indicated that we could collect for the same payments that we had received from Nationwide.

(Document handed to the Court.)

The Court: Plaintiff's Exhibit Number 1.

(So marked by the Court.)

Mr. Carter: I believe that's all. Answer Mr. Garrett's questions.

CROSS EXAMINATION

By Mr. Garrett:
Q. What is your occupation, Mr. Jester?
A. Contractor.
Q. What?
A. Masonry contractor.
Q. And in your work you enter into written agreements all the time, do you not, sir?
A. Very few, sir.
Q. Don't you enter into agreements that have penalty clauses in them and bonus clauses?
A. As I have grown in business, since then I do.
Q. But you didn't do this before then?
page 20 } A. Very few.
Q. But you didn't comment on this to Mr. Diener, about you were very familiar with contracts?
A. Not at that time.
Q. Now, I think you told us a minute ago that your wife was suffering at the time of this accident from pain, burning pain in the back of her neck and shoulder, right shoulder—
A. Yes, sir.
Q. —was bothering her?
A. Yes, sir.
Q. And that's the same thing that's been bothering her ever since?
A. That's correct?

James M. Jester

Q. And she went to the doctor and talked to the doctor and had X-rays and then talked to the doctor after she had the X-rays before she signed this release?

A. That's correct.

Q. All right, sir. On the first occasion that Mr. Diener came to see you he was there for an extended period of time, was he not?

A. Yes.

Q. And he went over the effect of the various releases and payments that could be made; is that correct?

A. Yes.

page 21 } Q. And then again the second time he was there you-all didn't want to sign it because she hadn't heard from the doctor; is that right?

A. That's correct.

Q. And then the third time you had a conversation of, what, a half an hour?

A. Approximately.

Q. All right. And are you able to read and write?

A. Oh, yes.

Q. And is your wife able to read and write without difficulty?

A. We are literate.

Q. You-all read this agreement and release, did you not?

A. We glanced at it.

Q. Well, he put it in your hand, did he not?

A. You asked about my business—

Q. No. Answer my question, please.

A. He put it in my hand, yes.

Q. Yes, sir. You had this in your hand?

A. Yes.

Q. You had full opportunity to read it, did you not?

A. Yes.

page 22 } Q. Your wife had a full opportunity to read it, did she not?

A. Yes.

Q. And this is not a lengthy agreement, is it? It's a single sheet of paper?

A. We spent considerable time interpreting this.

Q. Right. You asked a lot of questions about it, and when you were finished you were satisfied with it, were you not?

A. That's right. Mr. Diener indicated we could reopen it at will, and that's why we signed it. If there occurred a

future—if her case appeared to be worse than it was at that time.

Q. Now, Mr. Jester, this thing says right on its face that it's for medical expenses, does it not?

A. For medical expenses, $2,000.00 maximum for one year.

Q. That's right. And he told you that whatever the doctor okayed as far as medical expenses were concerned that the company would pay?

A. That's correct.

Q. Within one year after the date of the accident?

A. That's right.

Q. And up to $2,000.00?

page 23 } A. That was fine with me.

Q. Right. And in addition to that you received $175.00 right then and there?

A. He was insisting that we take some cash. We didn't pursue the cash situation.

Q. I see.

A. I certainly wouldn't have accepted $175.00 if I wanted to sue the insurance company.

Q. Right. Now, you didn't even want to bring your own company into this, did you?

A. Yes. I was adamant about that on the porch with Mr. Diener, and he insisted I did not bring my agent into it. I wanted to take that paper to him.

Q. Didn't he leave one of these with you?

A. No. I don't know why he was so persistent to get that paper signed. He was obsessed with it.

Q. That was his job, was it not?

A. I don't know his job. He came out and was quite satisfactory, he was a gentleman. I read about insurance companies getting stuck all the time. We didn't have any cause to sue the insurance company. We didn't apparently have any damage. I hadn't been to a doctor and I was perfectly willing right then to sign my release, whatever that amounts to, but my wife felt that we may need some medical payment.

page 24 } Q. Right. Now—

A. I don't know why he didn't want my insurance broker to read the paper.

Q. Well, you knew that you could take it over there if you wanted to, didn't you?

A. Well, he convinced me that it wasn't necessary. I trust my fellow man. That's how I do business. I sign few con-

tracts. Maybe I review this and start signing more contracts.

Q. All right. Now, the part about he said you could reopen the case, that meant if you had any further doctor's treatment, even if it ocurred some months later, you could come in and make a claim up to $2,000.00; is that right?

A. We knew we were going to be paid for the medical side of it, but he said if she had trouble that developed in the future, and he cited two instances where—I don't know the names of the instances—where the cases had been reopened on a contract similar to this.

Q. And the doctor was paid for the treatment; is that right?

A. Not the doctor, but there was a liability suit. I'm perfectly sure of what that says about the two thousand and the payments. I'm talking about the liability contingency, which he indicated we would have no problem if
page 25 } she had damage after one year; that we could reopen the case, and this was our understanding, mine, completely, and I have faith in my fellow man.

Q. But you understood that notwithstanding the fact that you read this agreement?

A. That's correct.

Q. Well, it doesn't say that in here, does it?

A. Since I have studied it, it doesn't, but this was my understanding fully and sincerely before we—why did we wait three trips out there to sign it?

Q. I don't know why you did, but it says right here this agreement and release contains the entire agreement between the parties, doesn't it? Doesn't it say that in there?

A. Yes, if you read it it says so.

Q. Didn't you read the part where it says that you are releasing all claims against everybody growing out of and the damages that are in any way growing out of any and all known or unknown personal injuries resulting or to result from this accident?

A. It's difficult to understand that language when you have him insisting that this can be reopened and hiding this in a number of conversational epics.

Q. Didn't you read that right in there? Isn't it printed right in there?

page 26 } A. It's right in there, but the interpretation was being continuously expounded upon by Mr. Diener all the time that we were handling this. I didn't take

this one any time and study it. We were signing this in good faith, and that's the way I feel about it right now.

Q. Well, now, you had an extended conversation about it and then you had the thing right in front of you; is that correct?

A. Yes.

Q. And notwithstanding the fact that it says directly opposite of what you claim somebody was telling you, you went on and signed it; is that right?

A. That's right.

* * * * *

page 27 } DR. GEORGE N. PSIMAS, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Carter:

Q. Would you state your name, please?

A. George N. Psimas.

Q. And you are an orthopedic surgeon?

A. Yes, I am.

Mr. Carter: Would you admit the doctor's qualifications?

Mr. Garrett: Oh, yes, sir, he's well qualified in that field.

By Mr. Carter:

Q. Doctor Psimas, did you have occasion to see Mrs. Margaret Jester in February of 1965?

A. Yes, I did.

Q. And what date did you initially see her?

A. I examined her first on February 19, 1965.

Q. And what history did you obtain at that time?

page 28 } A. Well, she gave me a history that she had a complaint of headache and pain in the neck which followed an accident which occurred on February 2, 1965, about 7:30 p.m. The accident occurred at Alexander's Corner stoplight. She stated her husband was driving the vehicle in which she was riding. She was sitting in the right front seat when the vehicle was struck in the rear. She was using a seat belt at the time. And following the accident she noted that her head was thrown backward and her hat thrown

backwards into the back seat. She sustained no cuts, noted no change in vision, but did complain of a pain located between the shoulder blades and mid back area and up the neck as well.

Q. What treatment did you prescribe at that time, Doctor?

A. Well, I examined her and found that she had local signs of soreness in the neck and I gave her a muscle relaxant for relief of her back, neck pain and soreness.

Q. Did you take any X-rays?

A. No, I did not on that occasion.

Q. Did you see her after that date?

A. Well, I asked her to return for X-rays on February 22, 1965. On that day she returned to the office and certain X-rays were made of her neck.

Q. Doctor Psimas, after these two visits what
page 29 } was your prognosis of Mrs. Jester's injury?

A. Well, it was my feeling that she sustained a mild sprain of the neck and that this would clear up within a few days to a few weeks.

Q. And this is what you advised her at that time?

A. Yes.

Q. Did you continue to see Mrs. Jester after that date?

A. Yes, I did. She continued to have complaints, so she was followed during the period that she had these complaints and she was followed next on March 9, 1965. At this time I checked her again and I reviewed the X-rays of February 22nd again. I indicated that these X-rays showed some alteration of the neck curve, and I indicated that she had a—I found that she had a trigger area of soreness in the right shoulder area, and I asked her to use heat and rest and to avoid unusual activities, and I asked her to return in four weeks to repeat the X-ray to determine whether any change had occurred in the X-ray findings.

Q. Had you continued to see her after that date, Doctor Psimas?

A. Yes. I saw her fairly regularly thereafter, seeing her eleven or twelve times in all, the last time being October 21, 1966.

page 30 } Q. And what was your prognosis of her injury as of the last visit?

A. Well, as of the last visit repeat films were made of her neck at that time, periodically, during her follow-up visits following her original injury, and these films showed a persistence of some alteration of the neck curve, this alteration

consisted of some kinking of the vertebra, if I may describe it, between the C4-5 level.

Q. Doctor, in your opinion is this alteration permanent?

A. Since it had lasted that long it would be my opinion that it was permanent.

Q. And what is your opinion as to the cause of this alteration?

A. It's due to the accident.

Q. Doctor Psimas, what has been your total bill for services to Mrs. Jester?

A. $350.00.

Q. And, Doctor Psimas, how does this injury affect her in her daily activities?

A. Well, it's the sort of thing that occurs following this type of injury, and patients who have this may have periodic episodes of soreness in the neck or pain in the neck or tightness in the muscles of the neck, and these findings will be aggravated by certain activities. For example,
page 31 } back, during those activities it might put a stretch on the neck in the forward flexion position, or if she should read for example with her head forward in this position for a long period, iron with her head forward, or any activities in this position, would aggravate her at times. Not always, but at times.

Mr. Carter: I believe that's all the questions I have, Doctor.

CROSS EXAMINATION

By Mr. Garrett:

Q. Doctor, first, with relation to your bill, by whom have you been paid?

A. Well, according to the records I have here I have one check of $140.00 from Nationwide Insurance Company.

Q. All right, sir. That's all you've got?

A. That's correct.

Q. Now, you mentioned some X-rays you took on the 22nd of February. Is this your statement here?

A. Yes, it is.

Q. Does that appear to be accurate?

A. Yes, I have a copy here.

page 32 } Q. All right, sir. Well, refer to yours. According to this one that I have it indicates that you

made a charge on February 22, 1965, for X-rays; then on March 9th there was an OV, which indicates office visit?

A. That's correct.

Q. April 6th, OV is another office visit?

A. That's correct.

Q. April 6 office visit; June 3rd, OV, office visit, and then June 3rd you had X-rays again?

A. That is correct.

Q. Is that correct?

A. Yes.

Q. All right, sir. Now, what you found in the beginning is the same thing that Mrs. Jester has today; is that correct?

A. That is correct, however, I think there has been slight improvement. I indicated this to her.

Q. There's no question about the fact that her shoulder, her right shoulder, and this spinal change was present in the beginning?

A. That is correct.

Q. And you knew that; is that correct?

A. Well, I knew that at the time after I obtained the X-rays on the 22nd.

Q. Right, on the 22nd of February you knew

page 33 } that?

A. That is correct.

Q. So that this report I have here that you sent to Nationwide dated 6-28-65—do you have a copy of that?

Mr. Carter: I don't have a copy of that, Mr. Garrett.

Mr. Garrett: Well, I'm just asking him to refer to it.

A. I have a copy.

By Mr. Garrett:

Q. All right, sir. Look down there at the section that says X-ray. It says date taken 4-6-65.

A. Yes. Of course, this is a form that's filled out by my secretary, usually signed—

Q. Who did that typing in there?

Mr. Carter: Your Honor, I object to that testimony. If that form was filled out by—

Mr. Garrett: Well, it's his record.

The Court: I overrule the objection.

A. Well, I'll just simply say that my insurance forms are

filled out by my secretary after which I sign them. Now, I don't check each specific date, and it is true that
page 34 } she did have films taken also on 4-6-65. That is correct.

By Mr. Garrett:

Q. Right. But all these things you are telling us about you saw right in the beginning?

A. I saw soreness in the beginning and she had pain in the neck in the beginning and the initial X-rays showed the change in the beginning, on the 22nd.

Q. Right. So that this statement here that says findings, X-rays of cervical spine shows obvious reversal of cervical curve at C4, C5 level, indicative of partial subluxation here, repeat films on 6-3-65, still shows offset noted originally?

A. That is correct.

Q. So this was a condition known to you from the time you took these very first X-rays?

A. Well, I understand the point you are trying to get at. May I just say that—

Q. You don't know how long it would last?

A. I had no idea how long this would last. Most of these cases have some alteration in the beginning and within a period of a few days to a few weeks will clear up, and I see many, many of these cases.

Q. But some of them don't?

A. But some do not. And in her case, because
page 35 } she persisted in having symptoms, I felt that she should have periodic films to record the sequence of whether she recovered completely or whether she did not, and that's why I did what I did.

Q. Right.

A. And I couldn't tell until the time elapsed—

Q. I see.

A. —as to what actually happened.

Q. But you were simply confirming and checking on what you found in the beginning?

A. That is correct.

Mr. Garrett: I think that's all.

The Court: Doctor, as I understand your testimony, you would have expected in the normal case when you took your X-ray in April or in June that you would have found the situation returned to normal?

Margaret W. Jester

The Witness: That is correct.
The Court: And that happens in a majority of the cases?
The Witness: Yes, it does.
The Court: But it did not in this particular case?
The Witness: That's correct.

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page 36 }

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MARGARET W. JESTER, the Plaintiff, called as a witness on her own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Carter:
Q. State your name, please?
A. Margaret W. Jester.

* * * * *

page 37 }

* * * * *

Q. Were you involved in an accident in February of 1965?
A. That's right.
Q. Would you explain the circumstances to the Court as to that accident?
A. We had stopped at a red light at the second stoplight at Alexandria's Corner and were hit from the rear by another car.
Q. Did you later learn the identity of the owner or driver of that car?
A. We learned that night. It was Mr. Willie Valentine.
Q. Did you receive any medical treatment at that time?
A. No.
Q. Did you experience any pain?
A. I had not so much pain at that time, a burning sensation in the neck area.
Q. Did anyone contact you or your husband after that accident as to the accident?

Margaret W. Jester

A. Yes.

page 38 } Q. And who was that?

A. Mr. Diener.

Q. And did he identify himself?

A. Yes, he did, as a claims adjuster for the Nationwide Insurance.

Q. And when were you contacted by Mr. Diener?

A. It was a few days after the accident, approximately four or five days.

Q. And where were you contacted?

A. At our home.

Q. Who first talked with Mr. Diener when he came?

A. Mr. Jester talked with him outside.

Q. Did he later come in and talk with you?

A. Yes, he did.

Q. And what was your conversation about?

A. Mr. Diener had a release form that we talked about, had a conversation about, and asked that we sign it at that time.

Q. Had you seen a doctor or had any medical treatment at that time?

A. No, I had not.

Q. Did you explain this to Mr. Diener?

A. Yes. This was one of the reasons we wouldn't sign that night.

page 39 } Q. Did you have any understanding with Mr. Diener as a result of your conversations that night?

A. We discussed doctors and it was—we were both in agreement to see Doctor George Psimas, and I in turn contacted Doctor Psimas and made an appointment with him.

Q. And when did you see him?

A. February the 19th, for the first time, in '65.

Q. And did you see him after that?

A. Yes, I did. I went back on the 22nd.

Q. Did you have any X-rays taken?

A. X-rays were taken on the 22nd.

Q. And after these two visits what were you being treated for?

A. For minor pain and strain of the neck with medication of muscle relaxants and physical therapy treatments.

Q. Did Mr. Diener contact you after any of these visits to Doctor Psimas?

A. Yes. Mr. Diener was back at our home twice. I don't

remember whether the second time was on the 22nd or the 19th. And then the third time was on the 24th when we signed the release.

Q. What conversations took place on the second
page 40 } visit?

A. I had not had my X-rays—or I had not received my report from my X-rays when he was out the second time, and I attempted to call Doctor Psimas, or I did call Doctor Psimas at that time. Did not contact him. And so we waited until I got the report from the X-rays.

Q. And did you explain this to Mr. Diener?

A. Yes.

Q. And what explanation did you give to Mr. Diener as to why you wouldn't sign the release the first or the second visit?

A. I hadn't received a doctor's report at that time.

Q. Did you and Mr. Diener have any discussions as to the extent of your injury, if any?

A. Yes. It was my feeling and in our discussion it was felt that it was a very minor injury, if any.

Q. Did Mr. Diener express his thoughts along those lines?

A. It was a general discussion between the three of us.

Q. Did you have any discussions with Mr. Diener as to what this release involved when you did sign it?

A. Yes. We understood that it was a medical
page 41 } coverage and so much was what he termed a general release would not be a medical coverage. This was a medical coverage that Nationwide had at that time. He made us to understand it was the only company that was using this type of release that would give me medical coverage for a year's period if I should need it that long, up to a certain amount.

Q. Did Mr. Diener advise you or interpret for you in any way as to whether the release was effective if later injuries were developed?

A. It was my understanding from our conversation that if I had underlying injuries or more involved injuries that did not show up at that time that the case could be reopened or that it would not be binding.

Q. Did you continue to see Dr. Psimas, Mrs. Jester?

A. I did.

Q. And for how long a period had you continued to see Doctor Psimas?

Margaret W. Jester

A. Continually since that time, since the time of the accident.

Q. What have been your symptoms as to this injury?

A. Stiff neck, as Doctor Psimas stated. It's a spasmodic thing. I go along some weeks and get along pretty

page 42 } good. I have a stiff neck and spasms in the right shoulder, and which in turn affects the use of my right arm.

Q. Do you still experience these difficulties today?

A. Yes.

Q. Are you still being occasionally treated by Doctor Psimas?

A. My last trip was in '66 I believe.

Q. And what were you being treated for at that time?

A. For additional X-rays.

Q. Are you employed, Mrs. Jester?

A. No, I'm not.

Q. Prior to this accident did you do your own housework?

A. I did. I did all of it.

Q. Are you able to do all of your housework now?

A. No, I'm not. I secured help in the late summer after the accident. It was July or August that I secured help for my housework and for the yard work. I have had them since that time.

Q. Did you secure this additional help as a result of your not being able to do the work yourself?

A. Yes.

page 43 } Q. Did Mr. Diener's insurance company make any statements to Doctor Psimas on your behalf?

A. The bill was handled from Doctor Psimas' office to Nationwide, so I couldn't make a positive statement to that. As far as I know they handled the bills that were presented to them.

Q. Do you know how much your total bills were from Doctor Psimas?

A. Yes. The amount was around $350.00 I believe.

Q. Did you have any expenses for other treatments?

A. Yes. My therapy was somewhat over a hundred, and I had some medication. I don't remember what the medication amounted to.

Q. And I believe you said you had expenses for your household help?

A. Yes.

Margaret W. Jester

Q. And how much did you receive at the time this release was signed, Mrs. Jester?
A. $175.00.
Q. And did you and your husband both sign this release?
A. Yes, we did.
Q. Was there any specification or breakdown as to how much was applicable to you or to your husband?
page 44 } A. That was paid?
Q. Yes, in the $175.00 check?
A. No.
Q. Was the check payable to both of you?
A. That I don't remember.
Q. Mrs. Jester, at the time that this release was signed did you feel you had anything other than a minor injury?
A. No. It was my understanding that it was a minor thing that would possibly—with my therapy and the muscle relaxants, would clear up in maybe eight weeks at the most, if that long.

* * * * *

CROSS EXAMINATION

By Mr. Garrett:
Q. Mrs. Jester, you can read and write?
A. Yes.
Q. You are a high school graduate?
A. Yes.
Q. And you are approximately 35 years old?
A. 36 now.
Q. You received and endorsed and kept $175.00
page 45 } that was on a check isued by Nationwide to you and your husband?
A. That's right.
Q. On 24 February, '65?
A. That's right.
Q. And you never made any attempt to return this money until after you consulted your attorney?
A. No.
Q. Is that correct?
A. That's right.
Q. You also received $42.00, did you not, around April 2, '65, for medical expenses?
A. This was for therapy, that's correct?

Margaret W. Jester

Q. And this money was paid by Nationwide for your benefit for those therapy treatments, was it not?

A. That's correct.

Q. And I believe Doctor Psimas has testified that he received $140.00 for his treatment to you and this was issued around July 1, 1965. You don't deny that Nationwide paid him $140.00?

A. If that's what he has in his records, yes.

Q. All right. Now, you also had some prescriptions from the pharmacy, did you not, around the 10th of September, '65, $25.03?

A. I don't remember the date, but I did. I had
page 46 } medication, yes.

Q. All right. And then in November of 1965 there was another check issued to you and your husband for $75.00?

A. That's correct.

Q. And you accepted that?

A. That was for therapy, yes.

Q. And then on February 14, 1966, the check for $95.00 payable to you and Doctor Psimas for his additional care; is that correct?

A. Yes.

Q. Did you accept that check?

A. The check was not cashed.

Q. Right. That's the first one you didn't cash?

A. That's correct.

Q. So you accepted the benefits of this release and agreement that you signed all the way up until February 14, 1966?

A. Yes.

Q. Now, earlier the thing that you were unhappy about was the fact that Mr. Diener wouldn't authorize you to get a whirlpool bath, wasn't it, back in November?

A. We discussed this. I called and talked with
page 47 } Mr. Diener about this after talking with Doctor Psimas.

Q. Now, you read this agreement and release before you signed it, did you not?

A. As to say I read it thoroughly, I cannot say that I did. I glanced over it.

Q. You had it in your hand, did you not?

A. I did when I signed it, yes.

Q. You could have had it any time prior to that, could you not?

Margaret W. Jester

A. Yes, I could have.

Q. Mr. Diener was there for fully a half hour?

A. Or longer.

Q. Or longer, on the time that you signed it; is that correct?

A. That's right.

Q. And you also discussed this for over an hour or two hours the first time you had a meeting?

A. That's right.

Q. That's not a long agreement, is it?

A. One page.

Q. Right. Now, in it it says that you release for all injuries known and unknown and that you accept the benefit by the company that they will pay all your medical expenses for one year up to $2,000.00 that are reasonably incurred as a result of this accident and injuries, and Mr. Diener told you that whatever injuries that you had that the doctor's bill would be paid, did he not?

page 48

A. That's right.

Q. Whether you had to go for eight weeks or eighteen weeks?

A. For a year's period.

Q. Up to a year up to $2,000.00?

A. Up to an amount, that's correct.

Q. And you asked him what if you had to go for a while and then stop and then have to go again. Didn't you ask him about that?

A. I understood that it was for a year. I don't know what you mean by that.

Q. In other words, suppose you had to go for eight weeks and then it developed two months later that you had to go back again for another eight weeks, didn't you ask him about that?

A. I don't recall. If it was in a year's period I would have understood that it was covered.

Q. Right. So you knew that you could go back and get any treatment that you needed for your injuries for a year?

A. For a year.

Q. And in addition to that you got $175.00 right then?

page 49

A. That's correct.

Q. And you and your husband were together with Mr. Diener all during these conversations, were you not?

Margaret W. Jester

A. Yes, except the first meeting when Mr. Diener met Mr. Jester outside.

Q. When ever you were speaking to him though you and your husband were together, were you not?

A. Yes.

Q. And aside from this burning sensation in your shoulder which you had from the time of the accident on through the time of this release you weren't in any condition—in any unusual condition, were you?

A. I had discomfort.

Q. I understand that. You had a pain up there, but other than that you were in your normal right mind and physical condition, were you not?

A. As far as I know, yes.

Q. You're not sure about that?

A. Well, that is—I don't understand what you mean by the question.

Q. I mean there was nothing else wrong with you?

A. No.

Q. Now, what's bothering you today is the same thing that was bothering you on the day that you signed this
page 50 } release, isn't that true? Your neck has a burning sensation?

A. No, my neck does not have a burning sensation. This was immediately after the accident that the burning sensation was there.

Q. Well, your neck hurt though on the day you signed this release?

A. It was uncomfortable, yes.

Q. You told that to Mr. Diener, didn't you?

A. Yes.

Q. And you told him about your shoulder?

A. I did. I based my understanding of what I had been told from my reports.

Q. And you talked to Doctor Psimas before you signed this release, did you not?

A. I did.

Q. And you were satisfied with what he told you?

A. I was satisfied that it was a minor thing that was going to correct itself with some short treatment.

Q. Well, I mean, you took his word for it, didn't you?

A. I did. That's why I went to him.

Q. And that's why you signed the release?

A. That's right.

Margaret W. Jester

Q. It wasn't because of anything Mr. Diener
page 51 } did, because you wouldn't sign it until you talked
to your doctor, would you?

A. No. I had not had a medical examination.

Q. Right. And so what you are telling this Court about the reopening is that it was your understanding that if you got some other complaints out of this injury that this could just be torn up?

A. Not some other complaints. If there were underlying injuries or more injuries involved than I had at the time that this was signed.

Q. Why did you wait so long to make a complaint, all the way up until 1966?

A. I didn't know I had a permanent injury until December.

Q. Well, you heard Doctor Psimas testify that his X-rays showed it way back in June of '65?

A. No, he did not. He testified that it was permanent in December of '65. This is when I went back for additional X-rays. I don't know what he had on his report. I didn't read those reports. He told me it was permanent in December of '65, after additional X-rays and it had been prolonged for that period of time, and he termed it permanent at that time at my questioning.

Q. Didn't you ask him about it before?

A. We had additional treatment, we were still
page 52 } trying.

Q. And you were still accepting the benefits of this agreement all during this time?

A. If I received a check during that time, yes.

Q. Well, you told me in the beginning of your testimony that you did.

A. I don't remember the dates.

Q. Now, Mrs. Jester, doesn't this release say that you release James Woodrow Johnson and W. Valentine and any other companies and persons from any and all known and unknown personal injuries, et cetera, resulting or to result from an accident which occurred on or about the 2nd day of February, 1966?

A. If it's stated on that sheet, yes.

Q. It's there. I'm not misreading it, am I?

A. No.

Q. All right. Doesn't it also say that this agreement and release contains the entire agreement between the parties hereto?

A. If it is so stated,

Q. You never read it though?

A. I don't remember reading it thoroughly. As I say, we signed this after our detailed conversation with

page 53 } Mr. Diener when he assured us that if there were underlying or more serious injuries involved this would not be a binding agreement.

Q. And that is directly opposite of what it says, isn't it?

A. It appears that way, yes.

Q. Well, assuming that I've read it correctly, that is exactly to the contrary of what the paper says that you signed after he told you this?

A. True.

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page 54 }

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JAMES M. JESTER, recalled as a witness on behalf of the plaintiff, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION (Rec.)

By Mr. Carter:

Q. Mr. Jester, are you familiar with this $95.00 check Mr. Garrett had mentioned?

A. Yes.

Q. What was the disposition of that check after you came to see me?

A. We gave it to you and along with assembling other bills you sent it back to the insurance company. This was after December I think.

Q. And to your knowledge was any request made of the insurance company to advise you or your attorney of any other bills to be reimbursed?

A. Yes. We requested a record of all the bills

page 55 } that had been paid for us so that we might reimburse them.

Q. And was that check refused by the insurance company?

A. It was, yes.

Mr. Carter: That's all.
Mr. Garrett: Just one question.

CROSS EXAMINATION

By Mr. Garrett:
Q. You knew with whom you had dealt, did you not? Doctor Psimas?
A. Yes.
Q. You knew which hospital your wife had gone to?
A. Yes.
Q. You knew which pharmacy you had incurred bills at?
A. Yes.
Q. You made no effort to check the bills yourself?
A. Doctor Psimas handled his bills directly with Nationwide. I had no knowledge of the amount.
Q. You never asked Doctor Psimas?
page 56 } A. I never asked Doctor Psimas.
Q. You never asked at the hospital?
A. I let my attorney assemble the bills.

* * * * *

page 59 } WALTER ANTHONY DIENER, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Garrett:
Q. State your name, please?
A. Walter Anthony Diener.
Q. And where do you live?
A. 1407 Hillsboro Avenue in Richmond.
Q. By whom are you employed?
A. Nationwide Mutual Insurance Company.
Q. And by whom were you employed in February of 1965?
A. The same.
Q. Did you have occasion to handle the adjustment of a claim involving an accident by a car driven by Willie Lee Valentine and a car occupied by Margaret W. Jester?
A. Yes, I did.
Q. And this is the accident that occurred on February 2, 1965?

Walter Anthony Diener

A. That's correct.

Q. And this claim came to you in the normal
page 60 } course of your duties; is this correct?

A. That's correct.

Q. When did you first see Mr. or Mrs. Jester?

A. It was approximately five or six days after the accident.

Q. And did you see both of them or just one of them?

A. I saw Mr. Jester outside on the porch, took pictures of his car. We talked about some people—one person we both knew, and Mr. Jester used to be insured by Nationwide. We mentioned the agent he used to have. We didn't discuss any releases on the porch. I had my brief case with me, but I couldn't see opening it out there. I waited until I got inside. The main thing was to go over and look at his car and to reinsure him we could fix it, and everything as far as subsequent evaluation of the car would not be there. We went inside, I would say, after about fifteen minutes.

Q. When you went inside did Mrs. Jester join you?

A. Yes, she did.

Q. What took place then?

A. I opened my brief case and explained a general release. This was after the conversation that neither Mr. or Mrs.

Jester had been to the doctor, and this was—
page 61 } I believe it was around six days, it may have been

closer to six the first time I saw them. I inquired as to how they were feeling. Mr. Jester said he was feeling okay, the children were okay; Mrs. Jester said her neck had been giving her some trouble, and I asked her if she had been to the doctor, and she said no. I inquired if she was going to go, and at that time she was undecided. They advised me that they wanted to wait and not sign the release until they knew. This was agreeable to me at the time. I believe Mr. Jester commented that if everything was okay there would be no problem, something along this line; that we wouldn't have to fear him or anything of that nature. I think we got off the subject for about a half hour, I believe, talking about his business and the contracts he handles, and I believe he has payroll in the thousands and so forth. It was a conversation along this line. Then at the time I asked him if they were only concerned about their medical bills, that this was what they were telling me, then I thought I had a solution to that if they were interested, and this was when I explained this release in question now. We must have discussed this for about fifteen or twenty minutes with some comment

about all reasonable expenses in that area, and I defined that anything which the doctor said was necessary for her treatment in order to cure whatever injury she had was okay, and they seemed to accept this.

page 62 } Q. All right. Now, did you explain to them anything about the fact that this second release had two aspects to it?

A. Well, the wages, but Mrs. Jester wasn't employed, so we just agreed to cross that out and not even discuss it.

Q. Did you explain to her the difference between the liability and the medical portions of that release?

A. Yes, I explained to her that if she never went to the doctor, fine, and if six months she went there, we could reopen the medical payment and pay her bills, and I'm certain they understood this. And on this release and on the general release, the wording on the bottom paragraphs here, the wording which you read, was approximately the same, but the main thing here was we used this when someone did not know how they were. This was the idea of this, so we could do our job, make ourselves available to the people and give them the protection they needed. This is why I introduced this form. We don't normally put this out right away if someone is not hurt. As you can see, it's a right big exposure, $2,000.00, if somebody is working, six months of salary, depending on the job they might have. Finally, we thought the best thing to do was for Mrs. Jester to see a doctor, and I believe we arrived at Doctor Psimas. It was agreed that she would—I volunteered to make an

page 63 } appointment, but she agreed she would do it and let me know the outcome and we would discuss it again. Now, the date I came back I'm not sure, but it was within a couple of days before this release was taken. She told me she had been to the doctor but she was going back for X-rays, so I would have to assume it was before the 22nd that I was there. The next meeting was a telephone call—or the next communication was—excuse me—was a telephone call, and again I don't know who called who at this time, but in that conversation Mrs. Jester said it would be fine if I would come out and see them, that she would be interested now in signing the release. After the first two visits out there—not that I did not want to go back, but it seemed like I had explained everything that was necessary, so it was up to them to call me when they wanted me. They knew they had two years in Virginia to bring a suit, and they also knew

that this was going to take care of the first year. If they wanted to sign it, there was a chance something could be wrong, but that was up to them, whatever they wanted to do. They elected either way they wanted to. They didn't have to sign. She could seek outside help. Mr. Jester definitely stated that he had all kinds of medical hospitalization which were available to him. I believe he has hospitalization and also this medical payment on his automobile. I told him that they could pay it twice. This was up to him to collect page 64 } if he wanted to. He stated that he was not going to charge his company or have it against his record since we were the ones that owed it. I have to admit I agreed with him, we did owe it, but I did inform him on this release when the year was up if it was a possibility she still had more bills, his old company would pick up some of the old bills and he would actually use that payment to offset any new ones. This was explained to him. And Mr. Jester impressed me with the knowledge of the various hospitalization policies and the extensive coverage that he had, and, actually, all this conversation really took place the first meeting.

Q. All right, sir. Now, when you got there at the second meeting when the release was signed, did you go over anything about the finality of this instrument that they eventually signed?

A. No. Most of the conversation was back to that one little box, what was all reasonable medical expenses. Mr. Jester mentioned that he travels to a chiropractor, and I believe Mrs. Jester does, I'm not sure, or they knew of one in the area, and they wanted to know if this would be covered. I said, as far as I know, if the doctor would okay it, it would be, but just for them to go on their own, I said, no, since he was not a medical person.

Q. Did you tell them what the $175.00 was for?

A. This was clearly understood it was for Mrs. page 65 } Jester, because Mr. Jester said we would take care of the car subsequent to this. There was no hurrying on this.

Q. Was there a separate payment, separate release for the automobile?

A. Yes, sir, it was. A general release was used on the automobile, which Mr. Jester signed, and a separate check was written for that.

Walter Anthony Diener

Q. Did you tell them that they could come back and sue Nationwide if she got another injury?

A. No. I think they knew that because Mr. Jester impressed me with his financial dealings, with his large contracts, and payroll, so forth. I don't think this really ever entered the picture. The main concern was the reasonable medical expenses, and we reiterated on this a long, long time. I think the main thing was if she did not go again to the doctor, say, six months from now she went back, she hadn't heard from me, we had stopped making payments under the medical section, the benefit section, would I still go back and make it. I explained to her I would and I also explained to her if another injury came up the medical section would still offer it. The medical section was for anything from the accident, whether it was no, now or none.

Q. Did you explain to her that if she signed this agreement that she would be signing away her right to sue on the accident?

page 66 } A. Yes. Mr. Jester even joked about that. He says, you don't have to worry; we're not going to sue, whether we sign it or not. So it really wasn't any need to go over this again.

Q. Well, did you tell her that she could in effect tear this agreement up and sue the company or make a further claim above the $2,000.00 if she found that she had some other injury?

A. No. This was known, that this was a general release, this subject body of this, and the main concern was never—after the first few minutes in the house was never any question about what they knew they had to sign. The only real discussion took place on what bills would be paid within this section. They were somewhat disturbed over this "all reasonable medical expenses," what this actually meant. I defined it by anything which the doctor would okay for payment or he would order as treatment.

Q. Did you-all later have some disputes over what would be paid and what wouldn't be paid?

A. Yes. There was a whirlpool bath or some type of machine similar to what we used in college for sore muscles and so forth—I guess the terminology is whirlpool bath, and there was some indication that perhaps the doctor thought this might be better for her. I told her if the doctor would prescribe it, as far as I knew we would take care

page 67 } of it, and I also mentioned the time, which possibly

was wrong for me to do, after the year if everything was okay and she was better, this would be the same as a crutch or something that we might use to give to somebody when they no longer need it. We usually turn these over to welfare societies or the Richmond Home for Boys, things along this line. We have done that in the past. And I called the doctor's office, and I'm not sure who I spoke to. I think it was his secretary.

Mr. Carter: I object to anybody he talked to on the phone in the doctor's office, Your Honor.

By Mr. Garrett:

Q. Did you ever get any confirmation from Doctor Psimas that this was necessary, this whirlpool bath was necessary?

A. No. Well, through either his secretary or nurse it was said this was not suggested.

Mr. Carter: I again object, Your Honor.

By Mr. Garrett:

Q. I just asked you whether or not you ever received any confirmation from Doctor Psimas that this whirlpool bath was necessary. You can answer yes or no.

page 68 } A. No, he never said it was.

Q. Did you attempt to get confirmation?

A. Yes, I did, the same day, within about thirty minutes from Mrs. Jester's phone call.

Q. I may have asked you this before, but did you explain to Mrs. Jester what the $175.00 was for?

A. Yes. This was what we call, at the time—I guess they referred to it as pocket money. It was something which was not intended to cover any medical bills. This was something for her trouble. At the time there was no question one way or the other on this amount. It was accepted.

Mr. Garrett: Okay. You can answer him.

CROSS EXAMINATION

By Mr. Carter:

Q. Mr. Diener, when you first visited Mrs. Jester, you knew that she had not seen a doctor from her conversation?

A. Yes, sir.

Walter Anthony Diener

Q. And you yourself felt this was just a minor injury which would soon clear up, didn't you?

A. Yes, sir, I did.

Q. And I believe you expressed your opinion
page 69 } previously that you thought it would clear up in
six or seven weeks, or something of that nature;
is that correct?

A. I answered by saying that unless she was the exception it should clear up.

Q. So there's no doubt in your mind she had a minor injury?

A. Oh, there was a doubt in my mind. I just didn't know what type of injury she had. It seemed rather unusual after six days she had not been to a doctor.

Q. Now, how long have you been an adjustor for insurance companies, Mr. Diener?

A. Since November of '64.

Q. And it's your job to obtain releases in this course of work, isn't it?

A. Yes, sir.

Q. And I believe it's your job to obtain these releases at the lowest price you can, isn't it?

A. No, sir. It's the agreement—or, at least, let me say this: we are supposed to reach a mutual agreement. If it's agreeable to the people we are dealing with, and, of course, if I offered it, if they accept it, then we have to assume that this is a fair amount.

Q. It's not your job to give them more than what you would think would be fair, is it?

A. Well, there again, that's a judgment factor
page 70 } of me, and when I see the people, what I feel that
moment is worth their trouble, what they've been
through, I have to make that decision.

Q. There's no breakdown by you as to the $175.00, as to where that would go, is there, as to whether it would go to Mrs. Jester or Mr. Jester?

A. Well, it was intended for Mrs. Jester. I'm not quite sure what you're asking. It was issued to her. This is required. The main reason we do this is because the husband is responsible for the bill.

Q. And you wanted to limit his rights by having him sign the release, didn't you?

A. This was the intention, yes, sir.

Q. And it was your intention to pay him part of this money too, wasn't it?

Walter Anthony Diener

A. Well, speaking of intentions, it becomes routine to expect the husband and wife to sign these releases. Now, what my intention was other than what the company has required ——this is why I can't break it down for you. It's a requirement of the company to have the husband and wife sign the release statement.

Q. I believe you mentioned previously that this was a new type of release, didn't you?

A. Yes, sir, I did.

Q. And how was this $2,000.00 figure arrived at?

page 71 } A. Now, I don't handle the book work for the company. I have no idea who drew this up and what the mechanics were on it. I might state this: That I have not seen one exceed the $2,000.00.

Q. What I'm asking, the $2,000.00 in the release, was there any negotiation of this figure or was this already there?

A. Are you saying did Mr. and Mrs. Jester ask me how this money would be—

Q. No, no, the $2,000.00 figure itself, how was that arrived at?

A. Well, this was written in this little section, the benefit schedule.

Q. This was already printed in the release?

A. Yes, sir.

Q. Mr. Diener, you were familiar with accidents of this nature before, general whiplash injuries, weren't you?

A. Yes, sir.

Q. And had you ever seen one where the expenses went up to $2,000.00?

A. Not with the injury that Mrs. Jester claimed she had, no, sir.

Q. So you really felt that it would only be some minor medical expenses, didn't you?

page 72 } A. No. When she did come back from the doctor—

Q. In the beginning I mean, Mr. Diener?

A. The very first day, yes.

Q. And I believe you stated to her that you had never seen one go anywhere near $2,000.00, didn't you?

A. This is correct.

Q. Now, Mr. Diener—

A. Within a year from the accident.

* * * * *

Walter Anthony Diener

Q. Mr. Diener, you are familiar with various types of insurance coverages, aren't you?

A. Yes, sir.

Q. And you would know what medical payment provisions would be in a policy, wouldn't you?

A. Yes, sir.

page 73 } Q. And you would know that if Mr. Jester had medical payment provisions he could recover these amounts up to that amount from his company, couldn't he?

A. Mr. Jester knew this too, yes, sir.

Q. He knew this?

A. Yes, sir.

Q. Did you volunteer this information to him?

A. No. The conversation was, I asked him if he had other coverage and he informed me he had hospitalization and—it was United States Fidelity Surety and Trust, I believe was the whole title. That was on his car. He advised me he had medical pay on that. He had hospitalization, and there was no question that he knew at the time all he had to do was submit these bills, they would be paid. He understood the difference between liability and the contractual arrangements that he had with his own companies.

Q. Now, I believe you stated you advised him to see his insurance adjustor or his agent?

A. I told him that he could discuss this form with his company and they would have to admit that this was something unique and something that granted a pretty wide range of coverage at that time.

Q. Was the purpose of referring him to his own agent to get an interpretation of what this release covered?

A. No, I don't believe it was, sir, no.

page 74 } Q. And was the purpose that he would feel they had a good release form there? What was the purpose of your recommendation that he see his agent?

A. Well, I don't know. It may have been at the time they wanted to know—there was some conversation about their own insurance, and it may have been whether or not this would hurt or help them, somewhere along this line. I just don't remember that.

Q. Did you feel that this release was better than a general release form for their purposes?

A. Yes, I did, because the second time I came back, Mrs.

Jester said she was still having trouble—well, the form can be signed any time within a year, so that's why I didn't go back the third time. I was going to leave it up to them to call me when they wanted me. I was concerned, and I thought if she was still having these symptoms then the least we could do is stay behind her and follow through on these bills. And this is why I more or less myself insisted that if at least she signs anything that it would be one that gives her protection for the next year.

Q. Well, did you recommend that they consult anyone as to this release to better understand it?

A. Using the word recommend—I said to talk to anyone.

Q. Or suggest?

page 75 } A. I said talk to anyone they care to.

Q. Did you suggest they talk to an attorney?

A. No, but I believe Mr. Jester said he had one at the time he could discuss the accident with.

Q. Did you feel that they should have someone look at it?

Mr. Garrett: Your Honor, I object to that.

The Court: I sustain the objection.

Mr. Garrett: I think that's going too far.

By Mr. Carter:

Q. You never talked with Doctor Psimas prior to the signing of this release, did you-

A. No, sir, I did not.

Q. So your knowledge of what Mrs. Jester's injuries were were from Mrs. Jester or Mr. Jester; is that correct?

A. Yes, sir.

Q. Now, I believe you testified a few minutes ago that if any unknown injury came up the medical provisions would cover that; is that correct?

A. This is correct, as long as we could get some report and trace it to the medical report and trace it to the accident.

page 76 } Q. Even though you didn't know what the injury was at the time?

A. Yes, sir.

Q. Did you clearly distinguish that this could not apply as to any liability coverage?

A. I thought I did, but apparently, since we're all here, someone feels I did not.

Q. And I believe you stated that Mr. Jester said there

would be no problem whether or not he signed the release as to your company being sued? I believe you testified to that a few minutes ago.

A. This is approximately right, yes, sir.

Q. And you are aware that he and Mrs. Jester both were under the impression that there was only a minor injury, aren't you?

A. Not when the release was signed there wasn't, no, because Mrs. Jester said I don't know if I should do this, it was some conversation along this line, and that is again when we went into what would happen six months from now or eight months from now if I have a bill that we didn't know of now, will you pay it.

Q. You didn't think there was any permanent injury there, did you?

Mr. Garrett: Your Honor, I object to that.

The Court: Overrule that.

page 77 } Mr. Garrett: Note our exception.

By Mr. Carter:

Q. Did you think there was permanent injury there?

A. Not at that time, I did not, no, sir.

Q. Now, you mentioned also that you said something to Mr. and Mrs. Jester that they had two years in which to bring a suit and you were giving them the first year's medical payments. Could you explain that further?

A. Well, it was explained to them if they wanted us to deal with them directly we could go as far as one year, release all liability, but still worry and take care of their bills for them. This was a compromised settlement. This is what the release says. I did not know if she would come out with any other bills. If she did, she came out within that year, we are going to pay them. I felt at the time and I still do now that this was a *bona fide* offer on my part based on the information that they gave me.

Q. How was the $175.00 figure arrived at?

A. There again, we just pick a figure that may be with the personality, with some people the sound of $200.00 means more, the sound of $100.00 might mean more.

Q. Actually, this was offered by you, wasn't it? Suggested by you?

page 78 } A. Yes, sir, it was.

Q. And I believe you stated that they actually

didn't ask for any money; that you offered it; is that correct?

A. No, they wanted some money. They were questioning trips to the doctor, if they have to go more to the doctor and so forth.

Q. I'm speaking of the liability portion. I believe you testified their concern was the medical payments?

A. This was their concern.

Q. They didn't talk to you at all about this other amount of money, only the medical payments in the beginning; is that correct?

A. No. I think there was a question of how much would be written in on the top line.

Q. You definitely wanted to put some amount in there, didn't you?

A. Well, there were some questions asked about if she should have to get a maid, if she would have to go to the doctor, take a cab and so forth, if this was necessary.

Q. Was the $175.00 to cover that?

A. Not to cover that. It was for her trouble. It was—this was the intent of it. It was for her trouble to go to the doctor.

page 79 } Q. The $175.00 was to cover her trouble of going to the doctor, and possibly the maid, and all those expenses; is that correct?

A. Well, the only way I can answer that again is to say that this is a general sum. It was not broken down, and I think you yourself pointed this out.

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page 92 }

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The Court: Gentlemen, I took the time to read these authorities in some detail because I had the feeling after hearing this evidence that there might be some factual

page 93 } distinctions in the application of one rule or another with this case. I was familiar with the *Ice Company* case; I was familiar with the *Bonney* case, as a general proposition, but I was not immediately familiar with the details of the evidence that was before the Court in each instance. As I will point out when I get to it in my summa-

tion, it seems very material to me that exactly the extent of holdings in these two cases on the factual situations that were before the Court was of major importance in applying the correct rule in this case. I feel that most of the others that have been cited, while they are applying the matter of mutual mistake or fraud to other sets of facts, that they were applying it under circumstances that were too remote from the nature of this controversy to be of real service as precedents.

Now, as I view the evidence in this case, I don't believe that it is really necessary to resolve the conflicts that exist in the testimony of the plaintiff and the defendant because those conflicts are largely irrelevant to what I consider the main crux of the issue before us. I think it can be said to be established without serious conflict that at the time

page 94 } that Mr. Diener on behalf of the insurance company originally contacted the Jesters that it was not thought by any of the parties involved that Mrs. Jester had suffered any serious injury from this accident. That's borne out not only by the testimony of both parties, but the fact that after five days from the accident she had not felt her condition serious enough to consult a physician. It's also without dispute that while the matter of release and settlement was mentioned at that time, that it was determined that Mrs. Jester would be examined by a physician before she undertook to enter into any settlement of this matter with the insurance company. Pursuant to that, she was examined by her doctor, and after the first examination again refused to reach a matter of settlement because she had been in effect given no prognosis by the doctor, and the results of the X-rays were not known at that time. After her next visit to the doctor, or at least after the point when the results of the X-rays had become known, the negotiations took place that led to the execution of this release. It is also undisputed at that time that while it was known that this lady

page 95 } had suffered some damage to her neck, some injury to her neck, she didn't consider it serious, the doctor didn't consider it serious, and the adjustor obviously in reliance on what they had said didn't consider the matter serious, and at least serious enough to make his own contact with the doctor on the subject.

The description that has been given by Doctor Psimas of his findings at the time was that the plaintiff had suffered a mild sprain of the neck, which he expected would clear up in a few days to a few weeks. It has developed and it's uncontroverted that while the nature of the injury has not

changed, it did not clear up in a few days to a few weeks, and is now pronounced by the doctor to be a permanent injury, something which does happen in cases of this kind, something which he did not expect at the time of his original or second or indeed after several subsequent examinations to have occurred. So the issue here now is whether under that state of facts a release having been executed on the conditions where the plaintiff was apprised of the nature of her injuries, but expected them to clear up within a few days to a few weeks, and a release executed under that in-
page 96 } formation, you can't call it assurance, but at least under that information is hold good where the evidence discloses where the injury is in fact permanent.

The only two cases that I know of that have gone to the Court of Appeals on the validity of releases under those circumstances have been the two that have been cited; the *Ice Company* against *Lee* case, 199 Va., and *Corbett* against *Bonney,* 202 Va. In the *Ice Company* case the Court held in sustaining the finding of the lower court that the release had been executed pursuant to a mutual mistake of fact on the part of the insurance company and the injured party. *Corbett* against *Bonney,* the opposite result was reached. This is the point that I was particularly sensitive to, the facts in this case. In the *Ice Company* case the evidence clearly showed that the nature of the injury did not come to the knowledge of the medical practitioners until after the date the release was executed and was entirely unsuspected by either of the parties or the doctor at that time. On the contrary, in the *Corbett* against *Bonney* case, plaintiff had been treated by an orthopedic surgeon and was advised by the orthopedic surgeon in North Carolina to see her
page 96-A } doctor in Virginia when she got home. But between receiving the information from the North Carolina treating physician and the time when she got home, she executed the release that was tendered to her by the insurance adjustor. The Court held in that case, and bearing out that it was applying the law of North Carolina, because that's where the accident happened, that this injured party had signed the release knowing the nature of her injury, knowing that she had been advised to consult another physician at her place of residence, knowing that she was not cured, and under those circumstances did not complain about the fact that she had misjudged the extent of her injury or the length of time that it would take to restore her to good health. There lies your distinction. If a release is executed under circumstances which party is ignorant, that is, that some-

thing exists which is not known to the party signing the release or her medical advisors, that's been held to vitiate a release that has been signed. On the other hand, a party with full knowledge of her condition signs a release, she can't complain that she has misjudged the length of time that it will take her to be restored to health, and
page 97 } is bound by the plain facts of which she had knowledge all along.

Now, in which category does this case fall? I am of the opinion from all that I have heard here and from what I have been able to *discovery* in this research that has been done, the chief point here is the premanency of this lady's injury. The testimony was clear and positive by Doctor Psimas that this lady had suffered a sprain of the neck; that ordinarily these sprains would clear up in from days to weeks, and while he didn't say so, in so many words, that no permanent injury was to be expected. The course of treatment which was given this lady, and which is uncontroverted, shows that she stayed under the care of Doctor Psimas for a period of months and months with his taking periodic X-rays for the purpose of determining when this clearance that he expected to take place did or would in fact take place. He finally came to the conclusion in December of 1965 that the condition was permanent; that she would have this condition presumably for the rest of her life and he could expect no further curing or relief of what had existed from the date of the accident. This is something that can happen but ordinarily would not be expected to happen.

page 98 } Now, looking at it from the standpoint of the plaintiff at the time that she executed the release, I can't say the fact that she knew that she had a neck sprain would preclude her from ever raising any question about the effect of that neck sprain. She was in the position of any other ordinary layman taking the advice of her doctor that she had a neck sprain, yes, but that she could expect this matter to clear up in days or in weeks; that it was something that she would get over. She knew that she was hurt, she knew that she was going to have discomfort and inconvenience, but she had been led to believe by her doctor that there would be an end to this thing at an indefinite time in the future. The evidence is that there is no immediate future, and under those circumstances I do not feel that she is bound by this release. She has executed it under a *bona fide* misapprehension; she has made a mistake for which she is in no way responsible, and I don't think that she must be bound under those circumstances by the provisions of this release.

In that respect, this case is more like the *Ice Company* case in my opinion than it is like the *Corbett* case.

page 99 } Now, we can go a bit further in this thing: she was approached by the insurance adjustor. He was the man who wanted the release. I can't say that the evidence here established in the Court's mind that his object was entirely altraistic. He wanted to get rid of this case to more or less fix his company's position with respect to it and be able to get it out of his hair, so to speak.

Looking at it from the standpoint of Mrs. Jester—and this testimony is not in conflict either. The Jesters were very well aware of the fact that they had coverage from other sources that would take care of the medical expenses. That's Mr. Diener's direct testimony. So even if we assume that to be correct, what object could have existed, what advantage could have been gained by Mrs. Jester in signing the release that was tendered at this particular time, other than the fact that it might make more convenient the payment of the doctors and other medical bills as they occurred? There's no evidence here that there was any solicitude on the part of Mrs. Jester or her husband arising out of the fact that Mrs. Jester would probably need medical attention

page 100 } that they could not conveniently afford to pay, and that the advance tendered by Nationwide Insurance Company would relieve them of the worries attendant to this thing. The only inference this Court can draw from the evidence that it has heard is that Mrs. Jester and Mr. Jester and Mr. Diener all regarded this as a trifling injury. And there was no indication of any attempt on the part of the Jesters to try to milk the insurance company. Their conduct has been to the contrary all the way through, and I can see, as I say, that there's no reason to expect that they would get any advantage from signing this release tendered by the insurance company unless it was the fact that it would be a quick and convenient means of having whatever medical bills existed being paid.

Now, one word about the form of this release. I am not saying that this agreement is of itself totally bad and a device available to the insurance company to mislead innocent parties, where instead of taking a release for a specific amount and calling it quits, they go on to provide for a fixed payment at the time and agree to pick up the tab for medical expenses incurred over a period of one year not to exceed

page 101 } $2,000.00. But I do say that this instrument is capable of being a mailed fist when used by the insurance company under certain factual situations, and it could be a means of lessening the impact, or attempt by the

insurance company to lessen the impact of a case of the nature of the *Ice Company* case where there has not been a complete recovery by the injured party. In other words, the holding out of the company's willingness to pay all the medical expenses that are incurred up to $2,000.00 for a period of one year after the date of the settlement would sound much better from the company's standpoint in litigation of this nature than would the case of an outright release executed for a nominal amount of money where it turns out that the injuries are entirely out of proportion to what was paid.

I therefore feel that the fact that there is an agreement on the part of the company to pay these medical expenses is of no legal help from its standpoint so far as a release of all known and unknown injuries that have been incurred from the accident. The law has already held in the *Ice Company* case that a release outright executed when in-
page 102 } juries develop are not known at the time vitiates the release. The benefits schedules that are provided in this agreement in this Court's opinion do not legally help the insurance company's position. The law remains as it is outlined in the *Ice Company* case, for those things which are unknown and are not taken into account by the parties at the time the release is given. It vitiates the release in this case just as it does in the absolute case, and the company's position is not made any better by the fact that it will agree to pick up the expense bills of the accident up to $2,000.00.

It is the conclusion of this Court from the law and the evidence in this case that this release was executed under a condition which Mrs. Jester did not know that she had a permanent injury at the time; that she did in fact have a permanent injury at the time, and such being the case this release is inoperative and the plea of release by the defendant is overruled and the defendant will be given 21 days to file any further pleadings in this case.

Mr. Garrett: Your Honor, we note our exception to the ruling of the Court, and request that they be
page 103 } granted so that we can appeal the ruling of the Court before we go to trial on the other issues.

The Court: Well, I'll hold this matter in abeyance pending a determination of whether this is an appealable order. I'm not satisfied offhand that it is. Now, in the cases in which this has arisen—of course, the *Ice Company* case involved a chancery suit to enjoin the prosecution of a lawsuit that was pending in another court. As I recall, in the *Bonney* case the issue was raised in the damage suit, but I didn't pay any particular attention to the matter of procedure that was

involved in it. Now, whether the case was ever carried through on its merits—

Mr. Garrett: Yes, sir, it was. The verdict for $5,000.00 for the plaintiff was reversed.

The Court: Well, I'm going to hold this matter in suspense until I hear from you-all on whether this is an appealable order, or if you-all are of the opinion that this is not an appealable order. But the matter of a hearing on the merits of the case is no real controversy. In other words, if you-all can by agreement shorten that part of it to make it an appealable order, well and good, but if you

page 104 } can't, let me hear from you-all within ten days. If you feel it is an appealable order let me know.

Mr. Garrett: In what way could we agree that it would be an appealable order?

The Court: Well, I don't know the degree of damages in this case, whether there's any real controversy between you-all as to the amount of damage in the case.

Mr. Garrett: Well, I'm sure there's no agreement about it.

The Court: Well, I know there's no agreement. That's what I say; if you-all can between yourselves determine where you stand on the merits of the case, that will make it an appealable order. If you-all voluntarily agree on a sum or if you voluntarily agree that there's no question of liability and that a figure on X dollars is acceptable to all of—

Mr. Garrett: We would be hesitant to agree with these parties about anything after this.

The Court: Well, I don't know. That's something for you-all to explore.

Mr. Garrett: All right, sir.

The Court: But if you can't agree on that, you show it to me, the ruling on the plea to the exclusion of

page 105 } a subsequent determination on the merits, because, after all, this is an action for tort damage.

Mr. Garrett: Yes, sir, I realize that.

The Court: Let me know.

Mr. Garrett: All right.

The Court: If it is then you won't have to go any further with it. I mean, if it's an appealable order, I'll give you a stay.

Incidently, this applies to Tennessee law and it involves fraud, and I don't think this is a fraud case.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

INDEX TO RECORD

	Page
Writ of Error and *Supersedeas* Awarded	1
Record	2
Order—July 24, 1967	2
Judgment—December 7, 1967	2
Notice of Appeal and Assignment of Error	3
Proceedings	4, 40
Witnesses:	
James M. Jester	5, 28
Dr. George N. Psimas	14
Margaret W. Jester	19
Walter Anthony Diener	29