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Mark Alan Billhimer
University of Baltimore School of Law

CASENOTES

TORTS—SATISFACTION—RELEASE—WHERE THE TERMS OF A GENERAL RELEASE ARE AMBIGUOUS WITH RESPECT TO WHETHER THE PARTIES INTEND TO BAR SUIT AGAINST A SUBSEQUENT NEGLIGENT PHYSICIAN, PAROL EVIDENCE IS ADMISSIBLE TO DETERMINE THE INTENT OF THE PARTIES AT THE TIME OF EXECUTION. *Morgan v. Cohen*, 309 Md. 304, 523 A.2d 1003 (1987) (4-3 decision).

Under general principles of tort law, a negligent actor is liable not only for the harm he directly causes, but also for any additional injuries "resulting from normal efforts of third persons in rendering aid, irrespective of whether such acts are done in a proper or a negligent manner."[1] Accordingly, when a physician negligently treats injuries caused by an original tort-feasor, both the original tort-feasor and the physician are jointly and severally liable for any *additional* injuries resulting from the physician's negligence.[2] However, when an original tort-feasor obtains a general release from an injured party[3] or a judgment is entered satisfied as to the original tort-feasor,[4] jurisdictions are split as to whether a negligent physician can be held liable for any enhanced damages to the injured party.[5]

Prior to 1987, Maryland courts had indicated that a general release of the original tort-feasor prevented the injured party from later bringing suit against a negligent treating physician.[6] Similarly, a judgment en-

1. *See* Morgan v. Cohen, 309 Md. 304, 310, 523 A.2d 1003, 1005-06 (1987); RESTATEMENT (SECOND) OF TORTS § 457 (1965). "The reasoning behind this rule is that the original tort-feasor by his actions places the plaintiff in a position of danger and should be held accountable for the risks inherent in treatment and rendering aid." *Morgan*, 309 Md. at 310, 523 A.2d at 1006.
2. *See Morgan*, 309 Md. at 310, 523 A.2d at 1006; RESTATEMENT (SECOND) OF TORTS §§ 433A comment c (1977), 457 comment a (1965); W. PROSSER & W. KEETON, THE LAW OF TORTS § 52, at 352 (5th ed. 1984); *see also* Fieser v. St. Francis Hosp. & School of Nursing, Inc., 212 Kan. 35, 510 P.2d 145 (1973) (quoting RESTATEMENT (SECOND) OF TORTS § 457 (1977)); Trieschman v. Eaton, 224 Md. 111, 115, 166 A.2d 892, 894 (1961) (original tort-feasor is liable for additional damage to the injured party caused by negligent acts of a doctor; doctor is also liable for the additional damage).
3. A release is a "giving up of a right, claim or privilege, by the person in whom it exists . . . to the person against whom it might have been demanded or enforced." BLACK'S LAW DICTIONARY 1159 (5th ed. 1979).
4. Satisfaction of judgment is the discharge of a judgment by paying the amount due, and subsequent entry in the record of the judgment "paid and satisfied." *Id.* at 1204-05; *see also* Grantham v. Board of County Comm'rs, 251 Md. 28, 246 A.2d 548 (1968), *rejected in part in* Morgan v. Cohen, 309 Md. 304, 523 A.2d 1003 (1987), *overruled in* Welsh v. Gerber Prod., Inc., 315 Md. 510, 555 A.2d 486 (1989).
5. *See* Annotation, *Release of One Responsible for Injury as Affecting Liability of Physician or Surgeon for Negligent Treatment of Injury*, 39 A.L.R.3D 260 (1971 & Supp. 1988).
6. *See* Trieschman v. Eaton, 224 Md. 111, 114-15, 166 A.2d 892, 894 (1961); *cf.* Lanasa v. Beggs, 159 Md. 311, 151 A. 21 (1930) (covenant not to sue one concurrent tort-feasor, where covenant contained a reservation of rights to sue the other

tered satisfied as to the original tort-feasor was also a bar to a subsequent suit against the physician.[7] In *Morgan v. Cohen*,[8] however, the Court of Appeals of Maryland seemingly abandoned its prior position and held that a general release of the original tort-feasor would not bar a subsequent suit against a negligent physician if the release is ambiguous.[9] The court also held that satisfaction of a judgment against the original tort-feasor, where the subsequent tort-feasor is not joined in the original suit, would not bar a suit against the subsequent tort-feasor if the satisfied judgment was not intended to compensate for both the original and subsequent torts.[10]

Two divergent theories have developed among those jurisdictions that have addressed the effect of a general release on the liability of a subsequent tort-feasor. Under the traditional view,[11] when an injured party releases[12] the original tort-feasor from further liability, the release bars an action against a physician for negligently treating the injured party.[13] This view evolved from the common law rule that a release of

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tort-feasor, held to constitute a "satisfaction," preventing recovery from the other tort-feasor despite the reservation of rights), *overruled in part in* Morgan v. Cohen, 309 Md. 304, 523 A.2d 1003 (1987); *see also infra* notes 31-39 and accompanying text.

7. *See* Grantham v. Board of County Comm'rs, 251 Md. 28, 246 A.2d 548 (1968), *rejected in part in* Morgan v. Cohen, 309 Md. 304, 523 A.2d 1003 (1987), *overruled in* Welsh v. Gerber Prod., Inc., 315 Md. 510, 555 A.2d 486 (1989); Cox v. Maryland Elec. Rys. Co., 126 Md. 300, 95 A. 43 (1915), *overruled in part in* Morgan v. Cohen, 309 Md. 304, 523 A.2d 1003 (1987).
8. 309 Md. 304, 523 A.2d 1003 (1987).
9. *Id.* at 317-18, 523 A.2d at 1009.
10. *Id.* at 320-21, 523 A.2d at 1011. The court's holding in this respect is unclear. The court did not state whether an ambiguous release must also be present to allow the court to inquire into the factual question of whether the satisfaction was intended as compensation for both the original and subsequent torts. *See infra* notes 97-98 and accompanying text.
11. The traditional view, which was once the majority view, has eroded to the minority rule within the last decade. *See* Annotation, *supra* note 5.
12. Quite often courts have confused "release" with "satisfaction." *See* Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 423 (1937). "A satisfaction is an acceptance of full compensation for the injury; a release is a surrender of the cause of action, which might be gratuitous, or given for inadequate consideration." *Id.*; *see also* W. PROSSER & W. KEETON, *supra* note 2, § 49, at 332. The traditional view presumes that a release of one joint tort-feasor is a satisfaction of all the injured party's claims. Conversely, the modern rule rejects the underlying premise of the traditional view, and states that a release of one tort-feasor is no longer presumptive evidence that the injured party has received full compensation for his injuries. *See infra* notes 21-24 and accompanying text.
13. *Morgan*, 309 Md. at 309 n.3, 523 A.2d at 1005 n.3; *see also* Trieschman v. Eaton, 224 Md. 111, 115, 166 A.2d 892, 894 (1961). *Compare* RESTATEMENT OF TORTS § 885(1) (1939) ("A valid release of one tort-feasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others. . . .") *with* RESTATEMENT (SECOND) OF TORTS § 885(1) (1977) ("A valid release of one tort-feasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them."). *See generally* Annotation, *Release of One Responsible for Injury as Affecting Liabil-*

one joint tort-feasor released all joint tort-feasors, including those who acted concurrently or independently.[14] The rationale underlying the traditional view is:

> [T]hat since the original wrongdoer is liable for the additional damages resulting from the acts of the doctor and there can be but one satisfaction for the same injury, the satisfaction of the injured person by the first negligent actor does away with all right[s] of action against the second.[15]

Jurisdictions that follow the traditional view reason that the original injuries are the proximate cause of the additional damages.[16] Thus, a set-

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ity of Physician or Surgeon for Negligent Treatment of Injury, 40 A.L.R.2D 1075 (1955) (superseded by Annotation, *supra* note 5). For a comparison of the cited authority with the modern rule, see *infra* notes 21-24 and accompanying text.

14. *See* W. PROSSER & W. KEETON, *supra* note 2, §§ 46-49. Statutes in many states have abrogated the common law rule, while other states have judicially retreated from it. *Id.* § 49, at 333-34. The Uniform Contribution Among Tort-feasors Act abrogated the common law rule in Maryland. *See* MD. ANN. CODE art. 50, §§ 16-24 (1979).

15. *Trieschman*, 224 Md. at 115, 166 A.2d at 894; *see also* Lovejoy v. Murray, 70 U.S. (3 Wall.) 1, 11 (1866) ("[N]o matter how many judgments may be obtained for the same trespass . . . the acceptance of satisfaction of any one of them by the plaintiff is a bar to any other action for the same cause."); Lanasa v. Beggs, 159 Md. 311, 151 A.2d 21 (1930) (plaintiff who was injured while a passenger in a cab, by the collision of the cab with a truck, and who had signed a release with the cab company, could not bring suit against the truck driver because the release of the cab company constituted full satisfaction for the injury), *overruled in part in* Morgan v. Cohen, 309 Md. 304, 523 A.2d 1003 (1987); Cox v. Maryland Elec. Rys. Co., 126 Md. 300, 95 A. 43 (1915) (because the plaintiff could have but one satisfaction for the wrong, settlement of first action was a complete bar to second action against a different defendant, notwithstanding that the defendants in the two actions were not joint tort-feasors), *overruled in part in* Morgan v. Cohen, 309 Md. 304, 523 A.2d 1003 (1987); Thompson v. Fox, 326 Pa. 209, 192 A. 107 (1937) (release of one responsible for an injury constituted a bar to an action against a physician whose negligence aggravated the original injury, based on the theory that there can be but one satisfaction for an injury).

16. *See, e.g.*, Keown v. Young, 129 Kan. 563, 283 P. 511 (1930) (release of the original tort-feasor precluded recovery from the physician based on the theory that the negligence of the original tort-feasor was the proximate cause of the additional damages, and that the plaintiff could have recovered for all the injuries caused to him directly or by the negligent physician), *overruled in* Fieser v. St. Francis Hosp. & School of Nursing, Inc., 212 Kan. 35, 510 P.2d 145 (1973). *But cf.* Kyte v. McMillion, 256 Md. 85, 259 A.2d 532 (1969). In *Kyte*, the Court of Appeals of Maryland held that where a passenger was injured in an automobile driven by the original tort-feasor, settlement and release of the subsequent tort-feasor (the hospital) did not bar her action against the original tort-feasor. The court reasoned that the initial actor's negligence was not the proximate cause of the plaintiff's dyscrasia of the blood which resulted when the hospital's nurse replaced an empty bag of blood with the wrong type of blood. The court concluded that the original injuries and the dyscrasia of the blood were not the same injuries. *Id.* at 99, 259 A.2d at 539. In so ruling, the court created an exception to the traditional view. *See* Annotation, *Release of One Negligently Treating Injury as Affecting Liability of One Originally Responsible for Injury*, 64 A.L.R.4TH 839 (1975).

Other courts had already created exceptions to the traditional view when the subsequent negligent physician inflicted either a "new injury" or acted with gross

tlement between an injured party and an original tort-feasor is presumed to include damages for any additional injuries caused by the treating doctor's negligence.[17]

Application of the traditional rule, however, has been sharply criticized by many commentators.[18] One criticism is that the traditional view "does not provide for the contingency of latent and unpredictable . . . injuries which may result in a . . . manner entirely unanticipated when the original tort-feasor was released."[19] Because there is a presumption under the traditional view that an injured party intends to release a negligently treating physician, plaintiffs may be denied recovery for injuries that are not fully compensated for by the original tort-feasor.[20]

In response to the potentially harsh results of the traditional rule as well as the scholarly criticism, a majority of courts have rejected the traditional approach in favor of the "modern" view. The modern view holds that a release of an original tort-feasor by an injured party does not preclude an action by the injured party against the physician for negligent treatment of the injury, unless the language of the release clearly indicates such an intention or there has been full compensation for both

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negligence. *See, e.g.*, Piedmont Hosp. v. Truitt, 48 Ga. App. 232, 172 S.E. 237 (1934) (release of the initial negligent actor did not bar an action against subsequent tort-feasor where additional injury was not reasonably foreseeable or anticipated as a result of the original tort-feasor's negligence); Corbett v. Clarke, 187 Va. 222, 46 S.E.2d 327 (1948) (notwithstanding the release of the original tort-feasor, action against dentist was permitted for committing further injuries by leaving a foreign substance in plaintiff's cavity). Both *Truitt* and *Corbett* were cited with approval in *Kyte*.

17. *See, e.g.*, Sams v. Curfman, 11 Colo. 124, 137 P.2d 1017 (1943) (release of the original tort-feasor raised a presumption that any injuries resulting from the negligence of the physician could have been and were included in the action against the original tort-feasor); Edmonson v. Hancock, 40 Ga. App. 587, 592, 151 S.E. 114, 117 (1929) ("[T]he release, having been made in full satisfaction of all existing claims, precludes . . . a second action for malpractice against the surgeon . . . ."), *overruled in* Williams v. Physicians & Surgeons Community Hosp., 249 Ga. 588, 292 S.E.2d 705 (1982); Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934) (satisfaction of all damages caused by the original tort-feasor bars an action against the negligent physician who aggravated the damage), *rejected in* Derby v. Prewitt, 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962).

18. *See* 4 A. CORBIN, CORBIN ON CONTRACTS §§ 931-36 (1951); 3 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 10.1, at 31-39 (2d ed. 1986); W. PROSSER & W. KEETON, *supra* note 2, § 49, at 332-33; 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 338A (3d ed. 1959); Wigmore, *Release to One Joint Tort-Feasor*, 17 ILL. L. REV. 563, 563-64 (1923).

    Dean Wigmore denounced the doctrine as a "surviving relic of the Cokian period of metaphysics." *Id.* at 563. Dean Prosser has criticized the rule as "at best an antiquated survival of an arbitrary common law procedural concept." W. PROSSER & W. KEETON, *supra* note 2, at 333; *see also infra* note 85.

19. Thornton v. Charleston Area Medical Center, 158 W. Va. 504, 514, 213 S.E.2d 102, 108 (1975).

20. *See* Fieser v. St. Francis Hosp. & School of Nursing, Inc., 212 Kan. 35, 510 P.2d 145 (1973); Lanasa v. Beggs, 159 Md. 311, 326-27, 151 A. 21, 28 (1930) (Offutt, J., dissenting) *overruled in part in* Morgan v. Cohen, 309 Md. 304, 523 A.2d 1003 (1987).

the original and subsequent injuries.[21] The rationale underlying the modern rule is that the intent of the parties at the time the release is executed is controlling.[22] In determining whether a subsequent tort-feasor is included within the language of a general release, courts which follow the modern view look to the intention of the parties who execute the release, rather than relying on an artificial conclusive presumption of law based on boilerplate provisions contained in the release.[23] Courts have also justified adoption of the modern rationale on the theory that the negligence of the treating physician results in a separate injury which gives rise to a distinct cause of action.[24]

Under the modern rule, courts generally allow admission of parol evidence to determine whether the parties to a release intended to discharge a subsequent negligent physician from liability.[25] Admission of parol evidence to examine the intent of the parties, however, is limited by several factors. First, "parole evidence ordinarily is inadmissible to vary, alter or contradict . . . a release that is complete and unambiguous, in the absence of 'fraud, accident or mutual mistake.' "[26] Second, under Mary-

21. *See* Williams v. Physicians & Surgeons Community Hosp., 249 Ga. 588, 292 S.E.2d 705 (1982); Fieser v. St. Francis Hosp. & School of Nursing, Inc., 212 Kan. 35, 510 P.2d 145 (1973); Derby v. Prewitt, 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962); *see also* RESTATEMENT (SECOND) OF TORTS § 885(1) (1977) ("A valid release of one tort-feasor from liability for harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them."). *See generally* Annotation, *supra* note 5.

Derby is often cited as the leading case in support of the modern rule, and has been discussed with approval in several casenotes. *See* Recent Development, 63 COLUM. L. REV. 1142 (1963); Recent Decision, 62 MICH. L. REV. 1089 (1964).

22. *See Fieser*, 212 Kan. at 40-41, 510 P.2d at 150-51; *Thornton*, 158 W. Va. at 513-14, 213 S.E.2d at 108; *see also* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 342-48 (1971) (Court rejected the common law rule that a release of one joint tort-feasor releases all parties jointly liable, and held that the effect of a release in an antitrust action upon co-conspirators is to be determined in accordance with the intention of the parties); Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476, 501 (1964) ("A release given a direct infringer in respect of past infringement, which clearly intends to save the releasor's rights against a past contributory infringer, does not automatically surrender those rights."); Annotation, *supra* note 5, at 281-82.
23. *See Williams*, 249 Ga. at 590, 292 S.E.2d at 706; Wecker v. Kilmer, 260 Ind. 198, 203, 294 N.E.2d 132, 135 (1973); *Derby*, 12 N.Y.2d at 106, 187 N.E.2d at 559-60, 236 N.Y.S.2d at 958.
24. *See* Morgan v. Cohen, 309 Md. 304, 316, 523 A.2d 1003, 1008 (1987); Ash v. Mortensen, 24 Cal. 2d 654, 657, 150 P.2d 876, 877 (1944); *Derby*, 12 N.Y.2d at 106, 187 N.E.2d at 559, 236 N.Y.S.2d at 958.
25. *See, e.g.*, *Morgan*, 309 Md. at 317-19, 523 A.2d at 1009-10; *Williams*, 249 Ga. at 591, 292 S.E.2d at 707; *Fieser*, 212 Kan. at 42, 510 P.2d at 151; *Thornton*, 158 W. Va. at 513-15, 213 S.E.2d at 108-09; *see also* Annotation, *supra* note 5.
26. Bernstein v. Kapneck, 290 Md. 452, 460, 430 A.2d 602, 607 (1981); *accord* McLain v. Pernell, 255 Md. 569, 572, 258 A.2d 416, 418 (1969) ("The release being complete and unambiguous, parol evidence is inadmissible as a matter of substantive law to vary, alter or contradict it. . . ."); *see also* Kasten Constr. Co. v. Rod Enters., 268 Md. 318, 301 A.2d 12 (1973); Glass v. Doctors Hosp., Inc., 213 Md. 44, 131 A.2d 254 (1957).

In *Bernstein*, the court denied recovery of additional damages when it later

land's law of contracts, a court construing an agreement must determine, from the language of the agreement itself, what a reasonable person in the position of the parties would have meant at the time the document was executed.[27] Finally, words of a contract are to be given their ordinary meaning.[28] A court, however, is permitted to consider the circumstances under which the contract is executed in determining whether any of the its terms are ambiguous.[29] Consequently, where the terms of a release are determined to be ambiguous, courts that allow admission of parol evidence under the modern view consider the issues surrounding the execution of the release to be questions of fact.[30]

Before the decision in *Morgan*, Maryland courts had never directly addressed the issue of whether a subsequent negligent tort-feasor is discharged from liability by a general release of the original tort-feasor.[31] Nevertheless, Maryland courts had apparently been in accord with the traditional view.[32] For example, in *Lanasa v. Beggs*,[33] the Court of Ap-

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appeared that *unknown wounds* existed at the time the release was executed. *Bernstein*, 290 Md. at 464-65, 430 A.2d at 609. For a more detailed discussion of *Bernstein*, see Note, *Bernstein v. Kapneck—Unambiguous Personal Injury Release Bars Suit For Subsequently Discovered Injuries*, 41 MD. L. REV. 478 (1982).

27. *See* General Motors Acceptance Corp. v. Daniels, 303 Md. 254, 261, 492 A.2d 1306, 1310 (1985); *Kasten*, 268 Md. at 327-28, 301 A.2d at 18.
28. *See* Pacific Indem. Co. v. Interstate Fire & Casualty Co., 302 Md. 383, 388, 488 A.2d 486, 488 (1985); *Bernstein*, 290 Md. at 459, 430 A.2d at 606; *Kasten*, 268 Md. at 329, 301 A.2d at 18.
29. *See Morgan*, 309 Md. at 317, 523 A.2d at 1009; *see infra* note 53.
30. *Morgan*, 309 Md. at 321, 523 A.2d at 1011; *see also* Wecker v. Kilmer, 260 Ind. 198, 203, 294 N.E.2d 132, 135 (1973) (whether the injured party intended the release to discharge all successive tort-feasors from liability is a question of fact for the jury); Daily v. Somberg, 28 N.J. 372, 384, 146 A.2d 676, 683 (1958) ("[I]ssues of intent and full compensation are factual in nature and could not properly be determined by the trial court . . . on the defendant's motion for summary judgment.").
31. *But cf.* Federal Sav. & Loan Ins. Corp. v. Williams, 622 F. Supp. 132 (D. Md. 1985) (discharge of judgment against outside directors did not release inside directors arguably responsible for the same harm, where intent and understanding of all parties was that the settlement did not constitute full satisfaction of the plaintiff's claims, and evidence supported finding that the injury was divisible); Kyte v. McMillion, 256 Md. 85, 259 A.2d 532 (1969) (settlement and release of a subsequently negligent hospital did not bar action against original tort-feasor); University Nursing Home, Inc. v. R.B. Brown & Assoc., 67 Md. App. 48, 506 A.2d 268 (nursing home was not barred from bringing an action against its insurance agent, after signing a release and settlement with insurer, where the agent's failure to procure insurance adequate to cover entire loss was an independent, separate and distinct injury), *cert. denied*, 306 Md. 514, 510 A.2d 260 (1986); Huff v. Harbaugh, 49 Md. App. 661, 671, 435 A.2d 108, 114 (1981) ("Where a wrong consists of separate and distinct, although closely related, injuries for which the parties are respectively liable, then the release of one with respect to his wrongdoing will not discharge the other from liability for his share in the transaction.").
32. *See* Bell v. Allstate Ins. Co., 265 Md. 727, 291 A.2d 478 (1972); Kyte v. McMillion, 256 Md. 85, 259 A.2d 532 (1969); Grantham v. Board of County Comm'rs, 251 Md. 28, 246 A.2d 548 (1968), *overruled in* Welsh v. Gerber Prod., Inc., 315 Md. 510, 555 A.2d 486 (1989); Lanasa v. Beggs, 159 Md. 311, 151 A. 21 (1930); Cox v. Maryland Elec. Rys. Co., 126 Md. 300, 95 A. 43 (1915); Berkley v. Wilson, 87 Md. 219, 39 A. 502 (1898); Gunther v. Lee, 45 Md. 60 (1876). *Morgan* overruled these cases to the

peals of Maryland held that a plaintiff, who was injured when the cab in which she was a passenger collided with a truck, could not bring suit against the truck driver after executing a covenant not to sue the cab company.[34] The *Lanasa* court based its holding on the principle that there can be only one satisfaction for a single injury, and concluded that the consideration given by the cab company in return for the covenant not to sue constituted presumptive evidence of full satisfaction of the plaintiff's claims.[35]

In *Kyte v. McMillion*,[36] however, the court held that an injured party was not barred from bringing suit against the original tort-feasor after executing a release with a subsequent tort-feasor and entering the judgment satisfied.[37] Notwithstanding the majority's adherence to the traditional rule,[38] the court reasoned that there had only been a satisfaction for the subsequent injury because the injuries inflicted by each tort-feasor were separate and distinct.[39]

In response to the lack of clear judicial guidance on subsequent tort-feasor liability situations, the Maryland General Assembly recently amended article 79 of the Maryland Code.[40] Section 13 of article 79 provides that a release of an original tort-feasor by an injured party does not discharge a subsequent tort-feasor who is not a party to the release and who is not specifically identified in the release or whose responsibility for

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extent they conflicted with the rule there announced. *See Morgan*, 309 Md. at 316, 523 A.2d at 1009.

33. 159 Md. 311, 151 A. 21 (1930), *overruled in part in* Morgan v. Cohen, 309 Md. 304, 523 A.2d 1003 (1987).
34. *Id.* at 321-22, 151 A. at 26.
35. *Id.* at 320-21, 151 A. at 25-26. In overruling *Lanasa*, the *Morgan* court found this rationale erroneous for two reasons. First, the *Morgan* court concluded that the *Lanasa* court misinterpreted and misapplied the holding of the court of appeals in Cox v. Maryland Elec. Rys. Co., 126 Md. 300, 95 A. 43 (1915). In *Cox*, the court held that full satisfaction by a tort-feasor discharged all other tort-feasors, regardless of whether the other tort-feasors were joint, concurrent or consecutive. *Cox*, 126 Md. at 305-06, 95 A. at 44-45. The *Lanasa* court interpreted the *Cox* decision as support for its conclusion that there was an indivisible cause of action in concurrent tort-feasor situations. *Lanasa*, 159 Md. at 322-24, 151 A. at 26-27. According to the *Morgan* court, however, *Cox* simply stood for the proposition that "for purposes of preventing *double recovery*, it was not necessary to distinguish between true joint tort-feasors and concurrent tort-feasors, subsequent tort-feasors, or volunteers for that matter." *Morgan*, 309 Md. at 314, 523 A.2d at 1008 (emphasis added).

    Second, the *Morgan* court found that the *Lanasa* court did not properly distinguish between a satisfaction and a covenant not to sue. *Id.*; *see also* Trieschman v. Eaton, 224 Md. 111, 116-17, 166 A.2d 892, 895 (1961) (describing distinction between a satisfaction and a release); *Lanasa*, 159 Md. at 326-29, 151 A. at 28-29 (Offutt, J. dissenting) (distinction between a covenant not to sue and a release). *See generally* Prosser, *supra* note 12, at 423.
36. 256 Md. 85, 259 A.2d 532 (1969); *see also supra* note 16.
37. *Kyte*, 256 Md. at 108-09, 259 A.2d at 543.
38. *See id.* at 97, 106, 259 A.2d at 537-38, 542.
39. *Id.* at 99, 108-09, 259 A.2d at 539, 543.
40. Act of May 13, 1986, ch. 379, 1986 Md. Laws 1457 (codified at MD. ANN. CODE art. 79, § 13 (Supp. 1988)). Section 13 provides:

    A release executed by a person who has sustained personal injuries does

the additional injuries is unknown at the time of execution of the release.[41]

In *Morgan v Cohen*,[42] two women were injured in unrelated motor vehicle accidents.[43] The same orthopedic surgeon treated each woman for injuries sustained from the accidents.[44] Both women suffered additional injuries as a result of the doctor's treatment.[45] Subsequent to the treatment, but before the extent of the additional injuries was known, both women executed general releases with the original tortfeasors.[46]

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not discharge a subsequent tort-feasor who is not a party to the release and:

(1) Whose responsibility for the injured person's injuries is unknown at the time of execution of the release; or

(2) Who is not specifically identified in the release.

Id. Other related statutory provisions regulating the enforceability of releases include sections 11 and 12 of article 79 of the Maryland Annotated Code. MD. ANN. CODE art. 79, §§ 11, 12 (1980). Section 11 makes any release of claims for personal injuries, or contracts for legal representation in connection with the pursuit of damages arising out of a tort and executed within five days of the incident, voidable at the behest of the injured party any time within the succeeding 60 days. Section 12 enables releasors, in certain circumstances, to invalidate a release executed within 15 days of the injury.

Additionally, the Uniform Contribution Among Tort-feasors Act has been interpreted by *Morgan* and previous cases to abrogate the common law rule that a release of one joint tort-feasor releases all tort-feasors. MD. ANN. CODE art. 50, §§ 16-24 (1986); Morgan v. Cohen, 309 Md. 304, 315-16, 523 A.2d 1003, 1008 (1987); *see also* Note, *Torts—Joint Tortfeasors—Accord and Satisfaction Executed By One Joint Tortfeasor Constitutes A Release Of That Defendant From Further Liability But Not A Bar To The Plaintiff's Suit Against The Unreleased Joint Tortfeasor Nor To The Unreleased Joint Tortfeasor's Indemnity Claim Against The Released Tortfeasor*, 11 U. BALT. L. REV. 495 (1982) (discussing cases interpreting the Uniform Act).

41. MD. ANN. CODE art. 79, § 13 (Supp. 1988). This statute has no application to a judgment marked "satisfied." *See infra* notes 97-98 and accompanying text.
42. 309 Md. 304, 523 A.2d 1003 (1987).
43. Morgan suffered a comminuted fracture of the left femur as a result of riding as a passenger on a motorcycle when it overturned. *Id.* at 307, 523 A.2d at 1004. Hovermill, the second named appellant, was struck by an automobile and suffered a dislocation of her left hemipelvis. *Id.* at 308, 523 A.2d at 1004.
44. *Id.* at 307-08, 523 A.2d at 1004.
45. *Id.* at 307-08, 523 A.2d at 1004-05. After two operations, Dr. Cohen informed Morgan that the treatment had been unsuccessful and referred her to another physician for a third operation. The other doctor was able to heal the fractured bone, but as a result of Dr. Cohen's allegedly negligent treatment, Morgan's left leg was two inches shorter than her right. Similarly, as a result of Dr. Cohen's discontinuance of traction on Hovermill's pelvis at an allegedly "medically inappropriate" time, Hovermill suffered a redislocation of the pelvis which resulted in " 'a one-inch leg length discrepancy, a fused sacroiliac joint, an asymmetrical pelvis and a grossly deformed bony birth canal which is much reduced in size.' " *Id.*
46. *Id.* Morgan signed a general release of all claims in exchange for $20,000 consideration. In pertinent part her release provided:

> [T]he undersigned . . . do/does hereby . . . release, acquit and forever discharge [original tort-feasor] and all other persons, firms . . . of and from any and all claims, actions, causes of action, demands . . . which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and

Each release discharged the original tort-feasor "and all other persons" from any further liability in connection with the accident.[47] Notwithstanding the release, both women sued the doctor for negligent treatment of their injuries.[48] Each trial judge granted summary judgment for the doctor, reasoning that the doctor had been discharged from liability as a result of the general releases executed between both women and the original tort-feasors.[49]

In reversing the decisions of the trial judges,[50] the court of appeals in *Morgan* held that both releases were ambiguous with respect to whether the parties intended to release the physician from liability.[51] Therefore, parol evidence was admissible to determine the intent of the parties at the time the release was executed.[52] The court reasoned that the phrases "in consequence of" and "resulting from" contained in the releases were ambiguous in light of the surrounding circumstances under

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> unforeseen bodily and personal injuries . . . resulting or to result from the accident. . . .
>
> The undersigned hereby declare(s) and represent(s) that the injuries sustained are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite. . . .

Brief of *Amici Curiae*, Exhibit A, Morgan v. Cohen, 309 Md. 304, 523 A.2d 1003 (1987) (Nos. 86-53 and 86-54).

Hovermill signed a similar release for $49,000 which provided in pertinent part:

> The undersigned . . . hereby release[s] and forever discharge[s] [the original tort-feasor] . . . and all other persons, firms or corporations liable, or who might be claimed to be liable . . . from any and all claims, [or] demands . . . on account of bodily injuries, known and unknown and which have resulted or may in the future develop . . . out of damage or loss, direct or indirect, sustained by undersigned in consequence of an accident on or about [a particular date] . . . .
>
> As further consideration . . . [the] undersigned hereby agree[s] to protect the said releasees against any claim for damages, compensation or otherwise on the part of said minor or any other party, growing out of or resulting from injury to said minor in connection with the above mentioned accident. . . .

Id. Exhibit B.

47. *Morgan*, 309 Md. at 307-08, 523 A.2d at 1004-05.
48. *Id.* at 308-09, 523 A.2d at 1005.
49. *Id.* at 309, 523 A.2d at 1005. The trial judge in Morgan's case based his decision solely upon the release. In Hovermill's case, however, "the trial judge characterized the alleged negligent treatment as an aggravation of a single bodily injury and held that the single injury had been both *satisfied* and released." *Id.* (emphasis supplied).
50. *Id.* at 307, 523 A.2d at 1004. The majority in *Morgan* stated that a general release of the original tort-feasor does not, of itself, produce the legal result of releasing the injured person's claims against the subsequent negligently treating physician. *Id.* at 306, 316, 523 A.2d at 1004, 1009.
51. *Id.* at 317-19, 523 A.2d at 1009-10. On remand to the trial court, the jury in Morgan's case found that she had intended to release Dr. Cohen when she released the original tortfeasor.
52. *Id.* at 318, 523 A.2d at 1010. Since Hovermill's judgment was marked "satisfied" on the court record, the court also held that a satisfaction of a judgment against an original tort-feasor, in an action in which the treating physician is not a party, does not bar an action against the physician for negligent treatment of the injuries. *Id.* at 320, 523 A.2d at 1011.

which the releases were executed.[53]

With respect to the circumstances surrounding the execution of the releases, the court found several factors which indicated that the parties lacked the intent to release the physician. First, the court explained that "[a]lthough the releases in question were broadly worded, neither named [the physician]."[54] Next, the court noted that the doctor did not provide any compensation for the releases secured by the original tort-feasors.[55] Finally, the court noted that the physician probably was not even aware of the executed releases until after the claims had been brought against him.[56]

Of particular importance to the court were the phrases in the releases that released "all other persons" from liability for injuries either "resulting or to result from the accident" or "in consequence of [the] accident."[57] The majority reasoned that these phrases were susceptible of two interpretations. The phrases could be construed broadly to release subsequent tort-feasors from liability, or they could be interpreted narrowly to release only those claims for injuries resulting from specific accidents caused by the original tort-feasors.[58] The court placed emphasis on the latter interpretation reasoning that the phrases "in consequence of" and "resulting from" were not technical legal phrases and that they should be read in their ordinary and literal sense.[59] The court argued

53. *Id.* at 317, 523 A.2d at 1009. In arriving at this conclusion, the court relied on Burroughs Corp. v. Chesapeake Petroleum & Supply Co., 282 Md. 406, 384 A.2d 734 (1978). In *Burroughs*, the court held that " 'where doubt arises as to the true sense and meaning of the words themselves or difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and determined by evidence *dehors* the instrument.' " *Id.* at 411, 384 A.2d at 737 (quoting Eastover Stores, Inc. v. Minnix, 219 Md. 658, 666, 150 A.2d 884, 888 (1959)); *see also* Pacific Indem. Co. v. Interstate Fire & Casualty Co., 302 Md. 383, 388, 488 A.2d 486, 488 (1985) (to determine the intention of the parties to an insurance contract, the court should examine the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution).

54. *Morgan*, 309 Md. at 317, 523 A.2d at 1009.

55. *Id.*

56. *Id.* The court's reliance on this factor in determining the intent of the parties may be misplaced. The analysis should focus on the intent of the injured party and the original tort-feasor rather than on the knowledge of the physician. Because the other factors had demonstrated that Dr. Cohen was not a party to the release, his subsequent knowledge as to the existence of the release is irrelevant in construing the terms of the release. If, however, the court meant to say that the physician was not consulted prior to release execution, or that the doctor's liability was not even discussed, these facts would circumstantially demonstrate that the parties did not intend to release the physician.

57. *Id.*; *see also supra* note 46.

58. *Morgan*, 309 Md. at 318, 523 A.2d at 1009.

59. *Id.* To reach this conclusion, the court relied on Kasten Constr. Co. v. Rod Enters., 268 Md. 318, 301 A.2d 12 (1973). In *Kasten*, the court noted that "[i]n the construction of contracts, words are to be given their ordinary meaning." *Id.* at 329, 301 A.2d at 18. In dissent in *Morgan*, however, Judge Rodowsky argued that "*Kasten* involved a fluid fact situation that was unique to the contracting parties, particularly as to the state of completion of various phases of [a] real estate development." *Morgan*, 309 Md. at 323, 523 A.2d at 1012 (Rodowsky, J., dissenting). Judge

that "what followed from [the physician's] treatment was the result or consequence of that treatment, and not of the original accidents."[60] Because the plaintiff's injuries were caused by separate torts which were neither in consequence of, nor a result of, the original accident, the court concluded that the release language was unambiguous only as to the original tort-feasors, and not as to subsequent tort-feasors.[61]

In *Morgan*, the majority of the Court of Appeals of Maryland adopted a new approach to the construction of releases that is consistent with the modern view.[62] For instance, the court's decision to admit extrinsic evidence to determine whether the parties intended to release the subsequent tort-feasors from liability, despite the traditional presumption that compensation for subsequent injuries had been included in the consideration for the releases, reflects the majority's willingness to adopt the modern rule.[63] The court's conclusion that the physician's allegedly negligent treatment was a separate tort from that committed by the original tort-feasor, thereby giving rise to a separate cause of action, was also consistent with the modern trend.[64]

Because the ambiguity issue was dispositive in both cases, however, the majority found it unnecessary to decide the issue of whether Maryland should adopt the modern rule.[65] Nevertheless, the court did employ a rationale in accord with the modern view when it overruled *Lanasa v. Beggs*,[66] and all other Maryland decisions that supported the traditional view.[67] Thus, it appears that the majority rejected the traditional view by

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Rodowsky further argued that "if parol evidence was excluded in *Kasten, a fortiori* it should be excluded [in *Morgan*]." *Id.*

60. *Morgan*, 309 Md. at 318-19, 523 A.2d at 1009-10.
61. *Id.*
62. *See supra* text accompanying notes 21-24.
63. The court of appeals cited two "modern rule" cases to support its decision. *See* Williams v. Physicians & Surgeons Community Hosp., 249 Ga. 588, 292 S.E.2d 705 (1982); Fieser v. St. Francis Hosp. & School of Nursing, Inc., 212 Kan. 35, 510 P.2d 145 (1973). In general, most courts adopting the modern rule have allowed parol evidence to determine the intent of the parties. *See generally* Annotation, *supra* note 5.
64. *Morgan*, 309 Md. at 316, 523 A.2d at 1008; *see also supra* note 24. By recognizing that the plaintiffs' injuries were caused by two seperate and distinct torts, the *Morgan* decision is also consistent with the view that the original and subsequent torts are two seperate causes of action. *See supra* note 31. For example, in Kyte v. McMillion, 256 Md. 85, 259 A.2d 532 (1969), the court employed similar reasoning to reach a conclusion closely anologous to the holding in *Morgan*. *Compare Morgan*, 309 Md. at 317-19, 523 A.2d at 1009-10 (although original tort-feasor was liable for both injuries, injuries sustained as a result of a car accident and the negligence of a physician were factually seperate harms) *with Kyte*, 256 Md. at 98, 259 A.2d at 538 (injuries sustained as a result of a car accident and by the negligence of a hospital were seperate and distinct harms).
65. *Morgan*, 309 Md. at 309-10, 523 A.2d at 1005.
66. 159 Md. 311, 151 A. 21 (1930), *overruled in part in* Morgan v. Cohen, 309 Md. 304, 317, 523 A.2d 1003, 1009 (1987).
67. *Morgan*, 309 Md. at 316, 523 A.2d at 1009. *Morgan* does not dispute the well-settled doctrine that there can be only one *satisfaction* for a wrong, notwithstanding the number of joint tort-feasors. *Id.* at 315-16, 523 A.2d at 1007-08; *accord*

subtly indicating their approval of the modern rule.

The court's conclusion in *Morgan* that the releases were ambiguous, however, appears *prima facie* inconsistent with prior Maryland case law on the parol evidence rule.[68] It can be argued that the language releasing all other persons from all damages "resulting from," or "in consequence of" were clear and unambiguous phrases, because the parties bargained for the releases and used terms having a recognized legal meaning."[69] When the releases are read in light of the facts and circumstances under which they were executed,[70] however, the court's result is neither inconsistent nor illogical. At the time the releases were executed, it is not likely that the injured parties contemplated sustaining additional injuries as a result of the treating physician's negligence.[71] A presumption that the parties intended to release all potential tort-feasors would place an unfair burden on the injured party to calculate damages for the possibility of future injuries resulting from a second, separate and distinct tort, irrelevant to the present settlement of claims. Thus, it would be illogical to conclude, as a matter of law, that the intention of the parties was to release a physician from liability when the results of the subsequent treatment were still unknown.[72]

Trieschman v. Eaton, 224 Md. 111, 117, 166 A.2d 892, 895 (1961); Huff v. Harbaugh, 49 Md. App. 661, 670, 435 A.2d 108, 113 (1981). Rather, the court held that a *release* of an orginal tort-feasor did not, as a matter of law, preclude recovery from a subsequent tort-feasor who inflicts a seperate and distinct injury. *Morgan*, 309 Md. at 306, 316, 523 A.2d at 1004, 1009. Therefore, the *Morgan* court overruled only those portions of Maryland cases that were inconsistent with its holding. *See supra* note 32.

68. *See supra* notes 26-28 and accompanying text; *see also supra* note 46 (release provisions).

69. *See Morgan*, 309 Md. at 321-24, 523 A.2d at 1011-12 (Rodowsky, J., dissenting). Judge Rodowsky stated that "[t]he words of causation used to limit the scope of the releases necessarily have the same meaning as proximate causation has in the law of torts." *Id.* at 323, 523 A.2d at 1012.

70. *See supra* note 53 and accompanying text; *see also* Prosser, *supra* note 12, at 425 ("[W]hether the plaintiff's claim has been satisfied . . . is clearly a matter of the intent of the parties, to be determined in the light of the language of the instrument, the amount paid, and the surrounding circumstances.") (footnotes omitted).

71. *See* Thornton v. Charleston Area Medical Center, 158 W. Va. 504, 213 S.E.2d 102 (1975). In *Thornton*, the court noted the distinction between the traditional view and the modern view in regard to the issue of future injuries:

> In jurisdictions following the modern rule, execution of the release in favor of the original tort-feasor does not furnish an irrebuttable presumption that the injured party also contemplated that he had recovered a complete satisfaction for his injuries, including those suffered at the hands of a negligent physician or hospital treating his original injuries. To the contrary, in the "modern" rule jurisdictions, parol evidence is admissible to explain the intention of the parties. . . .

Id. at 513, 213 S.E.2d at 107-08; *see also* Annotation, *Modern Status of Rules as to Avoidance of Release of Personal Injury Claim on Ground of Mistake as to Nature and Extent of Injuries*, 13 A.L.R.4TH 686 (1982) (majority rule is that release of claim for personal injury can be avoided on grounds of mutual mistake of parties at the time of signing the release as to the nature and extent of the injuries).

72. *See Thornton*, 158 W. Va. at 514, 213 S.E.2d at 107-08.

Furthermore, although the releases could have been construed to encompass the subsequent treating physician,[73] the more plausible construction was that the releases only limited claims to those injuries directly related to the original tortious conduct.[74] As the court indicated, the terms in each release only discharged "all persons" from liability in connection with a motor vehicle accident on a particular date.[75] The releases did not purport to release the unnamed physician who treated the injured parties at a later date. Additionally, the use of boilerplate language was one factor that weighed in favor of admitting parol evidence to determine the real intention of the parties.[76] Denying admission of parol evidence in these situations produces the undesirable result of forcing injured parties to accept virtual contracts of adhesion. Accordingly, the court's conclusion that the ambiguous phrasing in the releases necessitated the admission of parol evidence appears well reasoned in light of the circumstances surrounding the execution of the releases.

In dissent, however, Judge Rodowsky expressed concern over the

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73. *See* Morgan v. Cohen, 309 Md. 304, 318, 523 A.2d 1003, 1009 (1987).
74. *Id.*
75. *Id.*
76. In Williams v. Physicians & Surgeons Community Hosp., 249 Ga. 588, 292 S.E.2d 705 (1982), the court explained its decision to allow parol evidence to determine the intent of the parties as follows:

> We think it extremely unlikely that when [the injured person] executed a release to [the original tort-feasor] and "all other persons," [the injured person] intended to release a hospital whose treatment aggravated her foot injury nearly fifteen months after the automobile accident. Perhaps she did; our only point is that the parties should be allowed to present proof outside of the document itself on this vital question of intent.
>
> The form of the usual release document itself supports such an interpretation. The release executed by [plaintiff] was on a standard, preprinted form which the parties completed by filling in the date and time of the accident in question. . . . [T]his court has held that where a contract is partly printed and partly handwritten or typed, the written or typed portions are to be given greater weight in construing the parties' intent. The content of the typed portions of the release in this case indicate that the parties to the release were primarily concerned with the original accident, not a subsequent aggravation of the plaintiff's injuries by one not a party to the release.

Id. at 590-91, 292 S.E.2d at 707 (citations omitted); *see also* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS §§ 9-44 to 9-46, at 336-47 (2d ed. 1977); 1 A. CORBIN, CORBIN ON CONTRACTS § 107, at 478-80 (1963); RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981). *See generally* Murray, *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342 (1975). Murray contends:

> Standardized writings are particularly suspect in identifying the true intent of the parties. Absent an understanding of most boilerplate provisions . . . there can be no conscious assent to such terms. Conscious assent can be given only to "dickered" terms, the terms reasonable parties normally and consciously negotiate. As to the boilerplate, "blanket assent" may be presumed as to any "decent" terms; but such "blanket assent" will not be presumed as to "indecent" or, in the language of the Restatement (Second), "bizarre or oppressive" boilerplate provisions.

Id. at 1374 (footnote omitted).

majority's holding with respect to future application of the parol evidence rule.[77] The dissent suggested that the court's opinion would change Maryland contract law by allowing parol evidence to alter written language "which carries a recognized legal meaning."[78] The dissent also argued that "what the majority really has sanctioned are excursions into subjective intent and individual assumptions."[79]

The dissenting opinion, however, fails to explain how the court's opinion would affect Maryland's objective parol evidence rule outside of the particular facts in *Morgan*.[80] Moreover, the majority indicated that their decision to allow parol evidence on the issue of intent does not suggest that the court should "no longer derive intention 'from the meaning that an individual would normally ascribe to the words chosen by the parties to memorialize their agreement.' "[81] Rather, the decision "merely means that when those words in their ordinary sense under the circumstances are ambiguous, [the court] may seek evidence of intent beyond the document."[82] At best, it could be argued that the majority has created an exception to the objective parol evidence rule, and that the decision might subject prior releases, with similar language, to future litigation on the issue of intent. The majority, however, did not hold that the ambiguous language in this case would be ambiguous in other contexts as well.[83]

The *Morgan* decision is also well reasoned with respect to proper determination of the liability of a subsequent tort-feasor. Under the

77. *Morgan*, 309 Md. at 323, 523 A.2d at 1012 (Rodowsky, J., dissenting).
78. *Id.* at 324, 523 A.2d at 1012.
79. *Id.* To presume that the parties to the release intended to discharge a subsequently negligent physician, however, undermines the objective intent of the parties during settlement. The original tort-feasor seeks relief from any further liability, while the injured party seeks monetary damages for the injuries sustained. Each party's objective is to enhance their own position, not the position of an unknown subsequent tort-feasor. Nothing in the language of the releases suggests that the parties bargained for the release of a subsequently negligent physician who could, and allegedly did, inflict additional injuries. Accordingly, parol evidence should not be excluded on the basis of boilerplate language contained in the release which fails to evidence the real intentions of the parties. *See supra* notes 68-76 and accompanying text.
80. For a discussion on the objective parol evidence rule, see *supra* notes 25-30 and accompnaying text. The dissent argued that the language "and all other persons" could be construed as ambiguous in other instruments as well. *See Morgan*, 309 Md. at 322-23, 523 A.2d at 1012 (Rodowsky, J., dissenting). That contention, however, is not supported by the majority opinion. *See infra* notes 81-83 and accompanying text. Additionally, several cases cited by the appellee, involving releases containing the exact language, "and all other persons," were distinguished by the majority as cases involving *single* injuries, and not independent or successive injuries. *See, e.g.*, White v. General Motors Corp., 541 F. Supp. 190 (D. Md. 1982); Pemrock, Inc. v. Essco Co., 252 Md. 374, 249 A.2d 711 (1969); Peters v. Butler, 253 Md. 7, 251 A.2d 600 (1969). As the majority indicated, these cases are untouched by the decision in *Morgan*. *Morgan*, 309 Md. at 319, 523 A.2d at 1010.
81. *Morgan*, 309 Md. at 319, 523 A.2d at 1010 (quoting Bernstein v. Kapneck, 290 Md. 452, 462, 430 A.2d 602, 608 (1981)).
82. *Id.*; *see also supra* notes 29 & 53 and accompanying text.
83. *Morgan*, 309 Md. at 319, 523 A.2d at 1010.

traditional view, a subsequent negligently treating physician was released from liability as a matter of law when the injured party released the original tort-feasor.[84] Conceptually, this result is unfair to an injured party who subsequently suffers additional injuries due to a physician's negligent treatment. The traditional rule also discourages injured persons from settling suits with original tort-feasors, because of the fear of also releasing a subsequently negligent physician from liability. Thus, a doctor who is not named in the release and who does not provide compensation for the release, should not be able to use the injured party's settlement with the original tort-feasor as a vehicle to avoid liability for injuries caused by his independent negligence.[85] Otherwise, persons who are properly liable for subsequent negligence would "be permitted to go scatheless, while the plaintiff is deprived of compensation."[86]

Finally, the *Morgan* decision is also in accord with the recent addition of section 13 to article 79 of the Maryland Code.[87] The legislative intent in enacting section 13 was to allow an injured person to recover from a subsequent tort-feasor who is not a party to the release and whose responsibility for the injuries is unknown when the release is executed, or who was not specifically identified in the release.[88] In *Morgan*, the court found that neither release mentioned the doctor, and that the appellants'

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84. *See supra* notes 11-17 and accompanying text.

85. In an often quoted opinion, McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943), Justice Rutledge observed that:

> The [traditional] rule's results are incongruous. More often than otherwise they are unjust and unintended. Wrongdoers who do not make or share in making reparation are discharged, while one willing to right the wrong and no more guilty bears the whole loss . . . . Many, not knowing this, accept less only to find later they have walked into a trap. The rule shortchanges the claimant or overcharges the person who settles . . . . Finally, it is anomalous in legal theory, [to] giving tort-feasors an advantage wholly inconsistent with the nature of their liability.

Id. at 662.

86. Lanasa v. Beggs, 159 Md. 311, 327, 151 A. 21, 28 (1930) (Offutt, J., dissenting); *see also* Daily v. Somberg, 28 N.J. 372, 384, 146 A.2d 676, 683 (1958) (subsequent tort-feasor "seeks a windfall because of the compromise of the claim against the original tort-feasor").

87. MD. ANN. CODE art. 79, § 13 (Supp. 1988). For the text of section 13, see *supra* note 40.

88. *See* SENATE BILL 891, *Summary of Committee Report*, GENERAL ASSEMBLY OF MARYLAND OF 1986, at 1-2 (Senate Judicial Proceedings Committee). The committee report's background section illustrates the purpose of the bill:

> A is injured in a car accident caused by B's negligence. A is treated for injuries by Dr. C. A settles her case against B and gives B a general release. A subsequently discovers that Dr. C has committed malpractice in treating her original injuries and that the malpractice caused further or different injuries. Assume that Dr. C's malpractice could not have been discovered with due diligence prior to releasing B. A judgment will be sought on the grounds that the release given to B bars the suit against Dr. C. The motion for summary judgment is granted and A is out of court and left without a remedy.
>
> *This bill is designed to prevent this result.*

Id. (emphasis added).

additional injuries were unknown at the time the releases were executed.[89] Accordingly, if section 13 had been applicable, it would have prevented the releases from barring the subsequent suits against the physician. The court, however, refused to apply section 13 retroactively.[90] Nevertheless, by finding that the releases did not bar suit against the physician, the *Morgan* decision is consistent with the legislative intent in enacting section 13 of article 79 of the Maryland Code.

Although section 13 would have been dispositive of the issues presented in *Morgan*, it arguably applies in only two release situations. The first situation is where the subsequent tort-feasor *is not* a party to the release *and* responsbility for the injured person's injuries is unknown at the time the release was executed.[91] The second situation is where the subsequent tort-feasor *is not* a party to the release *and* the subsequent tort-feasor is not specifically identified in the release.[92] Where the subsequent tort-feasor *is* a party to the release, however, section 13 apparently does not apply.[93] For example, section 13 would not apply where the physician *is* a party to the release but the responsibility for the injured person's injuries is unknown at the time of release execution.[94] In such a situation, an ambiguity would exist if the release contained language similar to the release at issue in *Morgan*.[95] Therefore, under the *Morgan* decision, the injured party would be permitted to present extrinsic evidence to show that there was no intention to release the negligent physician.[96]

Furthermore, section 13 of article 79 does not address the situation where judgment has been marked "paid and satisfied" as to the original tort-feasor, but where there is *no executed release* present. If the facts surrounding the execution of the satisfaction cast doubt on the actual intent of the injured person in entering the satisfaction in the record, the satisfaction would be ambiguous as to whether the injured party agreed

89. *Morgan*, 309 Md. at 317-19, 523 A.2d at 1009-10.
90. *Id.* at 309-10, 523 A.2d at 1005.
91. MD. ANN. CODE art. 79, § 13(1) (Supp. 1988); *see also supra* note 40.
92. MD. ANN. CODE art. 79, § 13(2) (Supp. 1988); *see also supra* note 40. Because section 13 applies only where the physician is not a party to the release, it would be prudent for a physician who has been allegedly negligent in the treatment of injuries caused by another person to cooperate in the defense of the claim against the original tort-feasor, and join in any release executed in satisfaction of the claim against the original tort-feasor.
93. *See supra* note 40. Section 13 also would not apply where the physician is not a party to the release but where the injured party actually knows that their physician was negligent and the doctor is specifically identified in the release. Although the *Morgan* decision would be applicable in such a situation, it would be extremely difficult to demonstrate that the release was ambiguous. *Cf. Morgan*, 309 Md. at 317-19, 523 A.2d at 1009-10; *see also supra* text accompanying notes 26-28.
94. *See supra* note 40. Section 13 also would not apply where the physician *is* a party to the release but is not specifically identified in the release.
95. *See supra* notes 68-83 and accompanying text.
96. Conversely, the physician would also be permitted to present extrinsic evidence as to the intent issue.

to accept full satisfaction for both injuries.[97] Therefore, where a doctor is not a party to the suit and the record is simply marked "paid and satisfied," the *Morgan* rule would apply and extrinsic evidence would be admissible to determine the intention of the parties to the release.[98]

Morgan v. Cohen has changed release law in Maryland to conform with the modern view. A release of the original tort-feasor will no longer, as a matter of law, discharge subsequent tort-feasors for their separate and distinct torts. Instead, the court adopted the view that the parties' intent is controlling on the issue of whether a subsequent tort-feasor is released. Although section 13 of article 79 of the Maryland Code would now control the disposition of the exact issues presented in *Morgan*, the *Morgan* decision is nevertheless applicable to situations which do not fall within the statutory protection afforded by section 13. Therefore, regardless of whether general release — subsequent tort-feasor issues are decided on a statutory law or a common law basis, Maryland is now in line with the modern view.

Mark Alan Billhimer

97. The *Morgan* court noted that if the doctor was not joined in the suit against the original tort-feasor, parol evidence would be admissible to show the intent of the parties as to whether the compensation accepted was for the original injury, or for both the original and subsequent injuries. *See Morgan*, 309 Md. at 320-21, 523 A.2d at 1011.

98. If the doctor were a party to the suit, the satisfaction described in the text is *unambiguous* in its reservation of rights, and the doctor would be released from the suit as a matter of law. *See* Welsh v. Gerber Prod., Inc., 315 Md. 510, 555 A.2d 486 (1989).