No. 123626

In the Supreme Court of Illinois

DESTIN MCINTOSH, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

WALGREENS BOOTS ALLIANCE, INC., a Delaware corporation,

Defendant-Appellant.

On Appeal from a Judgment of the Appellate Court of Illinois,
First Judicial District, No. 1-17-0362.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 16 CH 10738.
The Honorable **Diane J. Larsen**, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE DESTIN MCINTOSH

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POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff Destin McIntosh filed a class action complaint ("Complaint") alleging that Walgreens violated the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* ("ICFA") by charging the Chicago bottled water tax on items specifically not subject to the tax. The Complaint alleges that Walgreens knowingly overcharged taxes to Plaintiff and the putative class by charging the bottled water tax on sales of carbonated, flavored and mineral water, which are specifically excluded from the bottled water tax. The Complaint alleges that this is both a deceptive and unfair practice under the ICFA.

Walgreens moved to dismiss pursuant to Section 2-619(a)(9)—thereby necessarily accepting the legal sufficiency of Plaintiff's Complaint—and raised affirmative matter, contending that Plaintiff's claim is barred by the voluntary payment doctrine as a matter of law. The circuit court agreed and dismissed the case. The appellate court reversed, holding that Plaintiff sufficiently alleged a deceptive act and that therefore the voluntary payment doctrine did not apply.

ISSUES PRESENTED FOR REVIEW

1. Whether the voluntary payment doctrine applies to Plaintiff's well-pled allegations that Defendant violated the Illinois Consumer Fraud and Deceptive Business Practices Act?

STATUTES INVOLVED

1. Section 815 ILCS 505/2 of the ICFA provides:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the

> use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.

2. Section 815 ILCS 505/10a(a) provides: "Any person who suffers actual damages as a result of a violation of this Act committed by any other person may bring an action against such person."

COUNTER-STATEMENT OF FACTS[1]

A. The Chicago Bottled Water Tax

The City of Chicago has charged a bottled water tax since 2008 ("Bottled Water Tax"). The Bottled Water Tax is $0.05 per bottle of water. However, not all bottled water is subject to the tax. Carbonated, flavored and mineral waters are excluded from the Bottled Water Tax. Specifically, the following are not taxable as part of the Bottled Water Tax: (1) Any beverage that qualifies as a "soft drink" under the Chicago Soft Drink Tax Ordinance; (2) Pedialyte; (3) Gatorade; (4) Vitamin Water; (5) Sobe Life Water; (6) Propel Fitness Water; (7) Water Joe; (8) Perrier, Seltzer Water, Club Soda or Tonic Water; (9) Mineral water as defined by the FDA; (10) distilled water; (11) other similar products that have flavoring, vitamins, caffeine or nutritional additives; and (12) water provided by delivery services that is in a reusable container not sold with the water. (R. C00005 at ¶¶13-15; A-33.)

B. Walgreens Unlawfully Charges the Bottled Water Tax

In November 2015, several Chicago news outlets revealed that Walgreens was charging the Bottled Water Tax on sparkling water sales that are supposed to be exempt.

[1] Plaintiff disagrees with Walgreens's Preliminary Statement, but as that section of Walgreens's brief is not identified in Rule 341, and is really just additional argument, Plaintiff will address those points within his Argument section.

As part of investigations into that practice, receipts were produced from various Walgreens in Chicago. A Walgreens spokesman was subsequently quoted as saying that Walgreens had "corrected the issue" and that "[o]ur stores are charging the correct tax on these items." (R. C00005 at ¶¶17-19; A-34.)

On multiple occasions in 2015, Plaintiff purchased carbonated bottled water from various Walgreens locations in Chicago. Specifically, Plaintiff purchased LaCroix, Perrier and Smeraldina on multiple occasions in various Chicago locations near his home, his work, and his friends' apartments that he frequently visited. On those occasions, Plaintiff was charged the Bottled Water Tax on each of those purchases, even though those purchases were for carbonated, flavored or mineral water, which is exempt from the Bottled Water Tax. (R. C00007 at ¶¶20-22; A-35.)

Walgreens knew that it was not entitled to collect the Bottled Water Tax on those purchases, but deceptively represented that it could through its conduct, and then in fact collected the monies from Plaintiff. Walgreens intended for its customers to rely upon Walgreens's conduct in charging and collecting the Bottled Water Tax. (R. C00010 at ¶¶33-37; A-38.)

At the time of purchase, Plaintiff did not expect or bargain to be unlawfully charged the Bottled Water Tax, and did not realize he had been improperly charged. Only after reports of Walgreens's unlawful conduct surfaced did Plaintiff realize that he may have been affected. (R. C00007 at ¶¶24-25; A-35.)

C. The Litigation

Plaintiff filed a putative class action, alleging that Walgreens's conduct was unfair and deceptive in violation of the ICFA, and seeking to recover damages. (R. C00003-12;

A-31-A-40.) Walgreens moved to dismiss pursuant to Section 2-619(a)(9), contending that Plaintiff's claim is barred by the voluntary payment doctrine. (R. C00036-68; A-39-A-50.) Walgreens raised no other defenses, and did *not* file a Section 2-615 motion challenging the sufficiency of the Complaint.

The circuit court granted Walgreens's Section 2-619 motion and dismissed this case with prejudice, relying on *Lusinski v Dominick's Finer Foods*, 136 Ill. App. 3d 649 (1st Dist. 1985). (R. C00118; A-51.) Plaintiff appealed.

The appellate court reversed, holding that the voluntary payment doctrine does not apply to ICFA claims based on a deceptive practice or fraud. (A-1-A-12 at ¶17.) The court found that Plaintiff met this standard: Plaintiff sufficiently alleged that Walgreens had engaged in a deceptive act by representing to its customers that the Bottled Water Tax applied to the products being purchased, when in fact the products were exempt from the tax, and that Walgreens intended for its customers to rely on those representations. (*Id*. at ¶20.)

The appellate court's original opinion was unpublished. Plaintiff moved the Court to publish its opinion. (A-25.) Walgreens opposed that motion. Walgreens argued that the publication criteria were not satisfied, stating "the Court neither created a new rule of law or modified, explained, or criticized an existing rule of law" and that the decision did not "discuss or address any conflict within the Appellate Court." (SA-02.) The appellate court granted Plaintiff's motion.

Walgreens then filed a petition for leave to appeal to this Court, and reversed its previous position that the appellate court's decision did not satisfy Rule 23's criteria that it explain an existing rule of law or discuss or address any conflicts. Instead, Walgreens

argued that the appellate court's decision "eviscerates the voluntary payment doctrine, an important and longstanding part of common law" and that it "conflicts with settled precedent." (A-55-A56.) This Court granted Walgreens's petition.

STANDARD OF REVIEW

The standard of review on appeal for motions brought under Section 2-619 is *de novo*. *Solaia Tech., LLC v. Specialty Publ. Co.*, 221 Ill. 2d 558, 579 (2006); *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004). For a motion brought under 2-619, "the trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *Borowiec*, 209 Ill. 2d at 383. "In ruling on a section 2-619 motion, a court must accept as true all well-pleaded facts in plaintiff's complaint and all inferences that can reasonably be drawn in plaintiff's favor . . . . We will grant the motion to dismiss only if the plaintiff can prove no set of facts that would support a cause of action." *Pavlik v. Kornhaber*, 326 Ill. App. 3d 731, 738 (1st Dist. 2001) (citations and quotations omitted).

ARGUMENT

Walgreens would have this Court overrule years of precedent holding that ICFA fraud claims are an exception to the voluntary payment doctrine, in favor of a new rule that permits retailers to escape any fraud claim—at the pleading stage—based on a defense that the defrauded party should have figured out the fraud at the time of purchase. Such an unwarranted expansion of a common law defense would eviscerate the statutory protections provided by the ICFA. Illinois precedent does not support that result; the language of the ICFA does not support that result, and public policy does not support that result. This Court should affirm the Illinois Appellate Court's unanimous opinion.

I. The voluntary payment doctrine does not apply to Plaintiff's ICFA claim.

"The voluntary payment doctrine provides that, *absent fraud, misrepresentation or mistake of fact*, money that is voluntarily paid under a claim of right to the payment and with full knowledge of the facts by the payer cannot be recovered unless the payment was made as a result of compulsion." *Flournoy v. Ameritech*, 351 Ill. App. 3d 583, 587 (3d Dist. 2004) (emphasis added). In *Flournoy*, the plaintiff alleged that the defendant was collecting telephone calling fees and then prematurely terminating collect phone calls, thereby causing plaintiff to pay additional fees, and that such a practice was deceptive. The court concluded that the plaintiff alleged a deceptive practice "in the nature of fraud" and therefore the voluntary payment doctrine did not bar the plaintiff's claim. *Id*. at 587.

Here, Walgreens engaged in fraud and misrepresentations and, hence, the voluntary payment doctrine does not apply. And that is what the appellate court held in reversing the circuit court, holding that the "voluntary payment doctrine does not apply where the plaintiff has asserted a Consumer Fraud Act claim based on a deceptive practice or act." (A-6 at ¶11.) The appellate court was correct.

The appellate court meticulously analyzed Illinois law concerning the voluntary payment doctrine. In doing so, the appellate court cited to its recent decision in *Nava v. Sears, Roebuck and Co.*, 2013 IL App (1st) 122063—another unanimous appellate court decision—that also found the voluntary payment doctrine did not apply.

In *Nava*, the plaintiff brought an ICFA claim alleging that defendant improperly assessed sales tax on the entire purchase amount of a digital television converter box, even though federal vouchers subsidized a portion of the retail cost. 2013 IL App (1st) 122063, at ¶1. The defendant argued that the voluntary payment doctrine precluded plaintiff's

claim. *Id.* at ¶24. The Illinois Appellate Court for the First District held that "although the voluntary payment doctrine bars suits against retailers for tax refunds, ***it does not apply where the payment was procured by deception or fraud***." *Id.* (emphasis added). The court elaborated, "because the doctrine cannot apply to impede causes of action based on statutorily defined public policy, this court has held that it should not apply to claims brought under [ICFA]." *Id.* (citing *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 805 n.2 (3d Dist. 2007)). The same result should apply here.

The appellate court went on to discuss two additional cases in support of its holding. The court cited favorably to *Flournoy*, 351 Ill. App. 3d at 587, *supra*, which held that because the plaintiff "alleged a deceptive practice" under ICFA, his cause of action was "in the nature of fraud" and, accordingly, the voluntary payment doctrine did not bar his claim. And the appellate court cited to *Ramirez*, where it held on appeal that the voluntary payment doctrine did not apply to a consumer fraud act claim brought by a plaintiff asserting that the defendant medical record copying service overcharged patients for its service. In both of those cases, just as in *Nava*, plaintiffs sued to recover overcharges that they paid to defendant, based on defendant's misrepresentations. In all three of those cases, the appellate court determined that the plaintiff's claims were not barred by the voluntary payment doctrine. So too here.

Walgreens would disregard all of these more recent cases—and the twelve appellate justices who wrote or joined those four unanimous opinions—in favor of an appellate court

case from 1985, which is what swayed the trial court.[2] But that case, *Lusinski v. Dominick's Finer Foods*, 136 Ill. App. 3d 640 (1st Dist. 1985), has no application here.

In *Lusinski*, the plaintiff sued four retail grocery stores for a refund of the use tax (*i.e.*, sales tax paid by consumers) collected by those stores on non-reimbursable coupons (coupons for which the retailer was not reimbursed by the manufacturer for the value of the coupons). 136 Ill. App. 3d at 641-42. The case arose following a determination by the Illinois Supreme Court in an earlier case, *Saxon-Western Corp. v. Mahin*, 81 Ill. 2d 559 (1980), that the stated value of non-reimbursable coupons should not be included in gross receipts upon which the use tax was collected from customers. In light of that ruling, the plaintiff sought a tax refund of the use tax that had been collected for the *prior* ten years by the retailers on that portion of sales that included non-reimbursable coupons in the retailers' gross receipts. It was undisputed that the retailers had remitted to the State of Illinois the amount corresponding to the use tax they had collected.

The *Lusinski* court found that, in order to obtain a sales tax refund for monies paid to the State, the plaintiff had to file under the Protest Fund Act, which the plaintiff did not do. 136 Ill. App. 3d at 644. Because the plaintiff failed to follow that procedure, the plaintiff had to show that he could state a cause of action under *Getto v. City of Chicago*, 86 Ill. 2d 39 (1981), and show that he paid without knowledge of facts sufficient to form a protest, or under duress. The plaintiff could not meet that standard, and the appellate court affirmed the dismissal.

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[2] Walgreens attempts to evade *Flournoy* by noting that it involved a telephone calling fee, as opposed to a tax. That is irrelevant. The issue is that the retailer (here Walgreens) is representing that the charge—be it a fee, a tax, or something else—is required and that it must be paid as part of the transaction.

Importantly, there was ***no*** allegation of fraud or deceptive conduct in *Lusinski*. Rather, the plaintiff was trying to recoup taxes that had been remitted to the State that the Supreme Court had subsequently determined had been collected in error, and thus the Protest Fund Act was the appropriate vehicle for that situation. Here, on the other hand, Plaintiff alleges that Walgreens knew it was not supposed to charge or collect the Bottled Water Tax on Plaintiff's purchases, yet Walgreens deceptively represented that it could, and then in fact collected the monies from Plaintiff. In addition, unlike in *Lusinski*, which involved the use tax (a component of the Illinois state sales tax regime and subject to the Protest Fund Act), the tax at issue here is a City tax, with no corresponding recovery mechanism to follow. The only way for Plaintiff to recoup the monies wrongfully collected from him by Walgreens is via this lawsuit.

The other cases cited by Walgreens are even further removed. In *Vine St. Clinic v. HealthLink, Inc.*, physicians attempted to recover fees they shared with administrators on the grounds that the fee agreements were illegal, and made no fraud allegations. 222 Ill. 2d 276, 298 (2006) ("Plaintiffs have not alleged that the money paid to HealthLink was a result of fraud, misrepresentation or mistake of fact."). In *Freund v. Avis Rent-A-Car Sys., Inc.*, the plaintiffs challenged the way in which the tax was calculated (which was fully disclosed), not the authority to charge the tax in the first place. 114 Ill. 2d 73, 77 (1986). And in *Hagerty v. General Motors Corp.*, the plaintiffs asserted unjust enrichment when the retailer incorrectly charged the state use tax, and remitted that to the State, rather than

collecting and remitting the state service tax; there was no claim of fraud or deception. 59 Ill. 2d 52, 60 (1974).[3]

The ICFA expressly provides for a cause of action for deceptive and unfair conduct: "Any person who suffers actual damages as a result of a violation of this Act committed by any other person may bring an action against such person." 815 ILCS 505/10a(a). The ICFA provides the following acts are unlawful:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.

815 ILCS 505/2.

Applying the voluntary payment doctrine here would render meaningless the fraud exception to the voluntary payment doctrine and would neuter the ICFA. And that is precisely what the appellate court in this case, and in *Nava* and *Flournoy* determined.[4] To

[3] Walgreens also relies on *Karpowicz v. Papa Murphy's Int'l, LLC*, 2016 IL App (5th) 150320-U, which is an *unpublished* opinion and may not be cited by Defendant for support. Ill. Sup. Ct. R. 23(e)(1).

[4] The *Nava* court, in ruling that the voluntary payment doctrine did not apply to a deception or fraud claim, had *Lusinski* firmly in mind. In the penultimate paragraph of its ruling in which the court holds that the voluntary payment doctrine cannot apply to ICFA claims, the *Nava* court cites *Lusinski*, and then makes the distinction between suits for tax refunds and suits based on deception or fraud. 2013 IL App (1st) 122063, at ¶24. The same distinction applies here—Plaintiff has asserted an ICFA claim for *deception*, ***not*** a claim for a state sales tax *refund*.

the extent that *Lusinski* is read as Defendant insists it must and is in conflict with this case, *Nava*, *Flournoy* and *Ramirez*, it should be overruled.

II. Plaintiff alleges Walgreens violated the ICFA, not committed a mistake.

Throughout its brief, Walgreens repeatedly characterizes its deceptive conduct in charging a fee that it knew it was not entitled to collect as a "mistake." But there is not a single allegation of any mistake, nor did Walgreens assert any affirmative matter concerning its "mistake."[5] To the contrary, Plaintiff alleges that Walgreens "knowingly overcharged taxes to Plaintiff and the other Class members" and that this conduct deceived Plaintiff. (R. C00010 at ¶34; A-38.) While at trial Walgreens is free to make its mistake argument and dispute Plaintiffs' allegations, here on a Rule 2-619 motion Walgreens must accept Plaintiffs' allegations as true. *See Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, at ¶35 ("A motion to dismiss under section 2-619 *admits the legal sufficiency of the complaint* but asserts a defense that defeats it.") (emphasis added); *Gajda v. Steel Solutions Firm, Ins.*, 2015 IL App (1st) 142219, at ¶29.

Similarly, Walgreens also tries to cast this case as one "based on mere mutual mistakes of law." (Br. 26.) But there is also no allegation or evidence of a legal mistake by either party. With respect to Plaintiff, as noted, Plaintiff's Complaint makes zero mention of any mistake—Plaintiff relied on Walgreens's representation that the Bottled Water Tax applied to his transaction. As for Walgreens, there is also no evidence that Walgreens made any legal mistake: Walgreens did not submit any affirmative matter with its Rule 2-619 motion that it misinterpreted the law, or that it thought the Bottled Water Tax applied to

[5] Walgreens uses the word "mistake" ***fifty-seven*** times in its brief. That word appears ***zero*** times in the Complaint.

the products purchased by Plaintiff. While the reason why Walgreens charged and collected the Bottled Water Tax awaits discovery, it is equally likely, indeed more likely given that Walgreens has its own in-house legal department and the City of Chicago published clear guidance, that Walgreens programmed its point of sale units incorrectly to charge the Bottled Water Tax on exempt products, as opposed to some type of mistaken legal advice.

In any event, even if Walgreens could demonstrate—and it has not so far—that it made some sort of innocent mistake, that does not immunize it from an ICFA claim. Under ICFA, even an innocent misrepresentation that is the result of a mistake is actionable. *Duran v. Leslie Oldsmobile, Inc.,* 229 Ill. App. 3d 1032, 1039 (2nd Dist. 1992) ("The Consumer Fraud Act eliminated the requirement of scienter, and innocent misrepresentations are actionable as statutory fraud."). For example, in *Aliano v. Sears, Roebuck and Co.*, the First District Appellate Court recently affirmed a trial court's finding of an ICFA violation, at trial, based upon evidence that the defendant was aware that the sales tax should not be charged on the purchase in question, but failed to institute an automated system at its retail stores to exempt the item at issue from the calculation of sales tax. 2015 IL App (1st) 143367, at ¶15. Nothing more was required to establish deception. While whether something similar happened in this case will await discovery, Walgreens's unsupported pleas of mistake cannot bar this case from moving forward.

III. Whether Walgreens remitted the tax to the City of Chicago is irrelevant.

Related to its mistake argument, Walgreens repeatedly argues a variation of (a) it remitted the Bottled Water Tax to the City of Chicago, or (b) it did not gain anything from

collecting the Bottled Water Tax. (*E.g.*, Br. 3, 5, 7-8, 10, 14, 16, 22, 24.) That argument is misplaced for three reasons.

First, Walgreens cites a line of cases from the 1970s that arose from challenges to the collection and calculation of state use, service and occupation taxes in the wake of sales tax changes from the adoption of the Illinois Constitution in 1970. In those cases, while the remission of taxes to the State was relevant, the rulings turned on a statutory provision in the Use Tax Act that prohibited customers from recovering those taxes from retailers if the taxes had been remitted to the State and instead required such challenges be made via the Protest Fund Act. That statutory regime has no application to this case, with the result that cases such as *Adams v. Jewel Companies, Inc.*, 63 Ill. 2d 336 (1976) and *Hagerty*, 59 Ill. 2d 52, provide no guidance here. Nor do those cases factually align with this case. Those state tax cases involve challenges to the calculation of sales tax following changes to the tax regime and typically involved claims of unjust enrichment and the like as the rules were being developed for how the taxes were to be calculated and applied. Here, Plaintiff alleges Walgreens knew his purchases were exempt from the Bottled Water Tax but charged it anyway.

Second, the evidence of Walgreen's compliance—a conclusory affidavit that has never been subjected to cross examination (no discovery has taken place) and provides scant details—does not extend as far as Walgreens aspires. In the affidavit, Walgreens's Manager, Sales & Use Tax Compliance, contends that Walgreens paid the Bottled Water Tax to Chicago, in advance, for all products shipped from its own warehouse.[6] She also

[6] It also seems odd that Walgreens would be paying taxes in advance, prior to making a retail sale, as presumably not every product shipped to a Walgreens location actually gets sold prior to expiration. Walgreens curiously also says nothing about whether

contends that Walgreens paid the Bottled Water Tax directly to vendors who supplied products to Walgreens, and that the vendor paid the tax to the City of Chicago on behalf of Walgreens. However, Walgreens did not submit any evidence from any vendor that it had paid such taxes, nor provides any basis for how this Walgreens manager had personal knowledge that every Walgreens vendor had paid the Bottled Water Tax. Indeed, Walgreens does not even identify who these vendors are, how many such vendors exist, and the percentage of sales that are sourced by vendors. As a result, to the extent Walgreens seeks to make that an element of the voluntary payment doctrine, more is needed than just its say so on a motion to dismiss.

Third, Walgreens's claim of tax remittance is really a merits defense. Walgreens is claiming that because it remitted the tax to Chicago, it was not engaged in fraud or a deceptive practice. Perhaps, but that is not a voluntary payment doctrine issue. The *Bartolotta* case, upon which Walgreens places much weight, illustrates this plainly, and provides a useful counterpoint to this case. *Bartolotta v. Dunkin' Brands Group, Inc.*, No. 16 CV 4137, 2016 WL 7104290 (N.D. Ill. Dec. 6, 2016). In *Bartolotta*, the plaintiff alleged that Dunkin' Donuts was overcharging the tax on packaged coffee. The defendant submitted evidence that it had relied on legal counsel in interpreting the applicable statute—which the court found to be ambiguous—and that it charged the higher tax rate on packaged coffee based on that legal advice. Not surprisingly, the court found that in that situation, there was no deception or fraud. *Id*. at *7. Here by contrast, Walgreens does not argue that there is some ambiguity in the Bottled Water Tax, or that it thought it was

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it does the same with other taxes, such as the sales tax, that it would also collect upon a sale of bottled water. Most business enterprises pay taxes when they actually become due, not in advance.

charging the correct amount. In fact, the situation is the opposite—Chicago provides specific examples of products, including those purchased by Plaintiff, for which the Bottled Water Tax does not apply. Nor does Walgreens offer any evidence that it relied on legal counsel as a basis for charging the Bottled Water Tax to Plaintiff, or for that matter any evidence for why it charged what it did.

IV. Walgreens waived any pleading challenges to Plaintiff's fraud allegations.

On appeal, in both its Supreme Court brief and its appellate response brief, Walgreens repeatedly attacks the sufficiency of the Complaint on its face by arguing that Plaintiff has not sufficiently alleged his claim under the ICFA. (Def. Sup. Br. 18-25; Def. App. Br. 7-8, 15, 18-20.) Even if the allegations of Plaintiff's Complaint are insufficient to allege an ICFA claim (they are not), Walgreens did not raise—and the trial court did not consider—this argument as a basis for its dismissal. Indeed, Walgreens's memorandum in support of its motion to dismiss in the circuit court was *six pages* (as compared to its 20 page appellate brief and its 35 page brief to this Court). Accordingly, the argument is waived on appeal and should not be entertained by this Court. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 413 (2002) (declining to address argument where the party "never raised this argument in the trial court, and therefore, it is waived"); *Wells Fargo Bank, N.A. v. Maka*, 2017 IL App (1st) 153010, at ¶24 (declining to reach merits of defendant's argument where it "failed to raise this issue before the circuit court").

"It is axiomatic that questions not raised in the trial court are deemed waived and may not be raised for the first time on appeal." *Western Cas. & Sur. Co. v. Brochu*, 105 Ill. 2d 486, 500 (1985); *People v. Estrada*, 394 Ill. App. 3d 611, 626 (1st Dist. 2009) (same). Here, Walgreens moved to dismiss the Complaint pursuant to 735 ILCS 5/2-619(a)(9) on

the purported basis that the voluntary payment doctrine bars Plaintiff's claim. (C.R.00036-44.) A proper 2-619 motion "admits *both* that that complaint's allegations are true *and* that the complaint ***states a cause of action***[.]" *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, at ¶35 (emphasis added); *Smith v. Waukegan Park Dist.*, 231 Ill. 2d 111, 121 (2008) ("a defendant moving for dismissal under section 2-619(a)(9) otherwise admits the legal sufficiency of the plaintiff's cause of action"). Walgreens could have attacked the sufficiency of the Complaint by filing a 2-615 motion to dismiss. It did not, but rather chose to file its motion to dismiss solely pursuant to 2-619, which concedes that Plaintiff's Complaint adequately sets forth his ICFA claim. That decision has consequences.

If Walgreens wished to argue that Plaintiff's pleading is defective on its face, then Walgreens should have raised that issue in a 2-615 motion before the circuit court. Had Walgreens done so, the court would have had the opportunity to consider those arguments. And if the court had agreed with Walgreens, the remedy would be for Plaintiff to amend the complaint to add whatever additional detail the court found necessary, not a dismissal with prejudice. But Walgreens chose not to do so, and thus the circuit court did not consider that argument. Walgreens has forfeited any argument that Plaintiff's pleading is defective, and this Court should deem those arguments waived. *Maka*, 2017 IL App (1st) 153010, at ¶24 ("It is well settled that a party that does not raise an issue in the trial court forfeits that issue and may not raise it for the first time on appeal"); *Church Yard Commons Limited P'ship v. Podmajersky, Inc.*, 2017 IL App (1st) 161152, at ¶33 (declining to address argument that "was not raised in the circuit court and, therefore, will not be considered on appeal"); *People v. Thompson*, 337 Ill. App. 3d 849, 854 (4th Dist. 2003) ("a party waives

its right to challenge an issue on appeal by having failed to raise the issue in the trial court").[7]

Although the appellate court below rejected Plaintiff's waiver argument, and considered Walgreens's inadequate pleading arguments, the court's discussion of the waiver issue is sparse. The appellate court found that "[A]n appellee may raise any argument in support of the circuit court's judgment, even if the argument was not raised in the circuit court, as long as the argument has a sufficient factual basis in the record." (A-10 at ¶18 (quoting *BMO Harris Bank, N.A. v. LaRosa*, 2017 IL App (1st) 161159, at ¶16).) But in *LaRosa* the "new" argument was based on a statutory bar to the underlying petition to vacate a foreclosure deficiency judgment; it did not raise an issue that was capable of being corrected in the underlying pleading in the trial court. *Id*. at ¶¶12-17. And in any event, the *LaRosa* court did not base its decision upon the new argument. *Id*. at ¶17.

Furthermore, for the language from *LaRosa* quoted by the appellate court here, *LaRosa* relied upon *People v. Coyne*, 2014 IL App (1st) 123105, which in turn relied upon *People v. Pinkonsly*, 207 Ill. 2d 555 (2003). In neither of those cases did the court permit arguments not raised in the trial court. *See Coyne*, 2014 IL App 123105, at ¶20 ("The State's argument raised for the first time on appeal is forfeited"); *Pinkonsly*, 207 Ill. 2d at 564 (finding the State forfeited its timeliness argument by raising it for the first time on appeal, and that had the State raised its argument with the trial court, the defendant would have had an opportunity to amend his pleading).

[7] To the extent that Walgreens may argue that it raised this issue in its *reply* brief before the circuit court, the issue is nonetheless waived because "new arguments shall not be offered in a reply brief." *Pajic v. Old Republic Ins. Co.*, 394 Ill. App. 3d 1040, 1051-52 (1st Dist. 2009); *People v. Cortez*, 361 Ill. App. 3d 456, 470 (2d Dist. 2005) ("It is improper to raise a new argument in a reply brief, and such argument will be deemed waived").

Walgreens should have addressed any pleading defects it found with Plaintiff's ICFA claim with the circuit court, where the court could have considered those arguments and provided Plaintiff with an opportunity to cure any such deficiencies. Walgreens waived that argument by failing to do so.

V. Plaintiff's ICFA claim meets the voluntary payment doctrine's fraud exception.

Despite not filing a Rule 2-615 motion, Walgreens now claims that Plaintiff fails adequately to state an ICFA violation. The Illinois Appellate Court made short shrift of this argument, summarizing Plaintiff's complaint as follows:

> Disregarding all of the numerous legal conclusions in plaintiff's complaint, he alleged that at the time he purchased Perrier, LaCroix, and Smeraldina from defendant, he did not know that his purchases were exempt from the bottled water tax. He further alleged that defendant (1) represented to purchasers of bottled beverages that the total purchase price included taxes required and allowable by law, (2) charged customers the bottled water tax on purchases of beverages that were exempt from the tax, (3) intended for its customers to rely on its representation that the total purchase price included required and allowable taxes, and (4) made its representations in the course of trade or commerce. Plaintiff further alleged that he and other customers suffered injuries and actual damages that were proximately caused by defendant's conduct.

A-11 at ¶19.

The appellate court then held that Plaintiff sufficiently alleged a deceptive act, and had adequately pled that Walgreens intended Plaintiff to rely upon that act as a natural and predictable consequence of Walgreens's deception. *Id*. at ¶20. Walgreens attempts to evade the consequences of its conduct by focusing on the receipt itself, arguing that the receipt disclosed the tax. Walgreens is looking at the tree, and missing the forest. Although the receipt is evidence of the damage caused by the deception (it provides the amount), the deception is that Walgreens, *by its conduct of charging and collecting the tax*, represented that the tax was due and could be lawfully collected. To argue otherwise is to ignore

commercial reality. Consumers make purchases daily, and rely upon the retailer charging them correctly. And if the retailer knowingly overcharges them, or knowingly adds their purchases incorrectly, or charges them for things they did not receive, consumers should be permitted to prove they were cheated.[8]

The cases offered by Walgreens in support of its argument that the voluntary payment doctrine applies when the challenged charge was on a piece of paper (such as a ticket or a receipt) do not apply here. (Br. 13.) In *Freund v. Avis Rent-A-Car Sys., Inc.*, 114 Ill. 2d 73, 77 (1986), the plaintiffs challenged the calculation of the tax—not the applicability—and the defendants did not concede that the amount of taxes they charged was improper. Here, there is no dispute that Walgreens improperly charged the Bottled Water Tax on items exempt from the tax. In *Isberian v. Vill. of Gurnee*, 116 Ill. App. 3d 146, 147 (1st Dist. 1983), the plaintiff challenged the authority of the Village of Gurnee to impose a tax under the Illinois constitution—there was *no* allegation of fraud or deception, as is the case here. While *Harris v. ChartOne*, 362 Ill. App. 3d 878, 82-83 (5th Dist. 2005) did involve a fraud argument, the court rejected that argument because the plaintiff did not allege that he discovered information after his purchase that demonstrated the tax at issue was false, which was necessary for such a claim; Plaintiff does so allege here. And in *Tudor v. Jewel Food Stores, Inc.*, 288 Ill. App. 3d 207, 210-11 (1st Dist. 1997), the defendant's

[8] Retailers know how to designate charges that are not required. For example, many retailers ask for consumers to make a voluntary $1 payment for a particular charity, or to "round up" to the nearest dollar amount and provide the change to charity; those charges are typically noted as voluntary donations on receipts, not as required payments. *See* Susan Thurston, *Donate a dollar the register? Checkout charity is a big business for nonprofits*, TAMPA BAY TIMES (Sept. 2, 2013), *available at* https://www.tampabay.com/news/business/retail/donate-a-dollar-at-the-register-checkout-charity-is-big-business-for/2139533.

receipt provided a money back guarantee in the event an item was scanned improperly, which vitiated any consumer fraud claim; the voluntary payment doctrine was not even an issue.

Under Walgreens's theory, if it deliberately added up multiple items for a total bill that resulted in an inflated sum (*e.g.*, $3.95 plus $2.95 plus $1.95 = $9.00, instead of $8.85), a consumer's claim for being overcharged would be barred under the voluntary payment doctrine because the underlying items were disclosed. This would make a mockery of the ICFA. And that is why the voluntary payment doctrine does not apply to deception or fraud claims. In the inflated sum hypothetical, the consumer can sue Walgreens for misrepresenting that the total sum is due and owing—because Walgreens would be engaged in a deceptive practice by deliberately miscalculating the amounts—and the voluntary payment doctrine provides no defense to such a lawsuit. Unless, that is, this Court accepts Walgreens's argument here. Because there is no daylight between this case and that hypothetical: In both situations, all of the underlying charges are disclosed on the receipt. Here, Walgreens represents it can lawfully charge and collect the Bottled Water Tax; there Walgreens represents that the total amount has been calculated correctly. In Walgreens's world, in both situations the consumers should evaluate and investigate those representations at the point of sale or forever lose their rights to challenge such determinations.[9] In the hypothetical, Walgreens would have the consumer stop and

[9] In this regard, it is also worth noting that this case is different from cases relied upon by Walgreens where the taxing authority sends a demand for tax payments, or a defendant sends an invoice, and the plaintiff, after having ample time to research the demand for payment, moves forward and makes the payment, and does not do so under protest. *See, e.g.*, *Goldstein Oil Co. v. Cook County*, 156 Ill. App. 3d 180, 182 (1st Dist. 1987); *Harris*, 362 Ill. App. 3d at 879. Consumers at point of sale transactions have no realistic opportunity to do so.

independently add up all of the items being purchased (which could be hundreds of items at the grocery store); in this case, Plaintiff should have researched whether the Bottled Water Tax could be applied to his purchase, and for that matter, if the other tax rates were calculated correctly as well. Commerce would grind to a halt if that were the standard, and the ICFA would be eviscerated.

In a further challenge to the sufficiency of the Complaint, Walgreens argues that its act of charging and collecting the Bottled Water Tax is not a representation that it was entitled to do so: "And a store informing its customer that it is charging a five-cent tax on a particular beverage is not the same thing as the store affirmatively representing that the tax was required and allowable by law." (Br. 20.) Yes it is. Walgreens, and indeed all retailers, charge taxes to consumers, with the reasonable assumption by the consumer that the retailer, by charging the tax, has correctly calculated the tax and it is due on the item being purchased. The alternative is *caveat emptor*, and that all consumers are to question all retail taxes being charged by the retailers—because the retailers are not making any representation that they are entitled to charge the taxes. The corollary, if Walgreens's argument is to be taken seriously, is that Walgreens charges consumers taxes with no basis at all to do so, which itself is a deceptive act.

Walgreens also claims that Plaintiff has not sufficiently supported his allegation that Walgreens intended for Plaintiff to rely on Walgreens's conduct in charging the Bottled Water Tax. But what more is there to say? Walgreens charged Plaintiff, and the putative class, a price for bottled water; Walgreens assessed and calculated taxes upon that retail price; and Walgreens collected that price and those taxes in exchange for the products purchased by Plaintiff. The ***only*** reason Walgreens has for even communicating the taxes

to Plaintiff and the class is so that Walgreens can collect them. And setting that aside—if Walgreens were to have some reason to tell Plaintiff about the Bottled Water Tax other than to collect it from Plaintiff, and did not intend for Plaintiff to rely upon its acts—that would raise a fact issue concerning intent, which is beyond the scope of Walgreens's pleading motion.

Similarly, Walgreens argues that it would make no sense for it to wrongly charge the Bottled Water Tax and remit the tax to Chicago, because this would raise the price of its product as compared to its competitors. (Br. 22.) Not really. Because the Bottled Water Tax is not revealed until the point of purchase, anyone doing comparison shopping for a particular bottled water product or making a buying decision would not consider the Bottled Water Tax at all, because reasonable consumers would assume—since the Bottled Water Tax, like other retail taxes, is mandatory—that the taxes charged by retailers within the same locations would be the same. Thus, the comparison would be only among retail prices on the shelves. A reasonable consumer would assume that all retailers are complying with the law, and collecting taxes, in a uniform manner.

VI. Walgreens's parade of horribles is illusory.

Walgreens equates the refusal to apply the voluntary payment doctrine to claims involving fraud or deception to the creation of *per se* liability for retailers over incorrect tax collection. That is an overstatement. The exception at issue is quite narrow—it only applies to cases involving fraud or deceit. If Plaintiff is ultimately unable to prove that Walgreens's conduct was deceptive or that he was defrauded, he will lose. There is no public policy reason to permit Walgreens to avoid that allegation merely based on its say so that it did not engage in deceptive conduct or fraud. That is a fact issue.

Walgreens also invokes the recent litigation concerning Chicago's short-lived and controversial sweetened beverage tax. Those cases provide an easy contrast. There, cases were filed immediately after the collection of a new sales tax that was ambiguous and subject to differing interpretations over how it was to be applied. As a result, there was confusion over how and when to apply the tax. Indeed the tax was so flawed and unpopular that it was immediately repealed. Here, on the other hand, the Bottled Water Tax has been in place since 2008 and no one—not Walgreens nor its trade association *amici*—claims that there is any ambiguity in the ordinance or that there were interpretation issues with how the Bottled Water Tax is to be applied.[10] Nor is there any evidence that Walgreens or its trade association *amici* ever sought any guidance from Chicago in the eight years preceding this lawsuit. It was and always has been clear the items purchased by Plaintiff are exempt from the Bottled Water Tax. No one argues otherwise.

Finally, Walgreens trots out an efficient tax collection argument. Walgreens argues it would be better to err on the side of collecting the Bottled Water Tax, and that if it does so incorrectly, it should be protected by the voluntary payment doctrine. But that again assumes that Walgreens made a legal mistake—that there was some ambiguity in whether the tax was to be collected (like in the sweetened beverage context or in *Bartolotta* with the packaged coffee tax). As noted above, those are neither the facts nor the allegations here; there is no contention by anybody that the Bottled Water Tax should have been

[10] As a result, *Loeffler v. Target*, 324 P.3d 50, 62-63 (Cal. 2014), provides no guidance here. In *Loeffler*, the law was unclear about the taxation of "to go" coffee, and how to apply the rules to customers who consumed "to go" coffee on the premises. No such issues exist here.

assessed and collected on the product sales at issue. The case here has nothing to do with efficient tax collection.

In addition, allowing companies to defraud consumers because it involves extra tax receipts possibly going to the taxing authority is not a reason to allow the voluntary payment doctrine to shield Walgreens's conduct. With only modest exaggeration, Walgreens's theory is the same as allowing bank robbers to claim the robbery should be excused because they gave the stolen money to charity. That is not a valid defense or good public policy.[11] If Walgreens and its *amici* wish to be immunized from civil liability for all monies it collects and remits to the taxing authority, that is for the legislature, not this Court.

And while it is beyond the scope of the issue before this Court, valid policy reasons exist against such a rule. Permitting retailers to charge taxes that were not due provided the retailers remitted those taxes to the taxing authority provides the wrong incentives. Because, as noted above, retailers compete on the shelf price, retailers would be incented to spend little money on sales tax compliance, programming its point of sales systems, and auditing those systems, in favor of a system where it just erred on the side of overcharging taxes and sending them to the taxing authorities. This would cost consumers more money and would effectively act as a non-legislated tax increase.

In addition, as a matter of public policy, an expansion of the voluntary payment doctrine, or frankly the continuation of the doctrine, is unwarranted. Applying the antiquated voluntary payment doctrine frustrates the purpose of the consumer fraud

[11] Walgreens also cites cases from other states (Br. 31), claiming that those states do not permit their consumer fraud statutes to be used to recover sales taxes. None of those cases apply the voluntary payment doctrine, which is the only issue here.

statutes, which are a recent and statutory recognition of the public policy against consumer fraud. Several states (including Missouri, Georgia, Nevada and Washington) have recently restricted the application of the voluntary payment doctrine as a defense to consumer claims. *See* John E. Campbell and Oliver Beatty, *Huch v. Charter Communications, Inc.: Consumer Prey, Corporate Predators, and a Call for the Death of the Voluntary Payment Doctrine Defense*, 46 VAL. U. L. REV. 501, 517-18, 520-26 (2013). As one commentator recently noted:

> As the House of Lords and several U.S. state supreme courts have stated, the VPD has no place in modern jurisprudence. The VPD was born in an era of commerce and mercantilism when the consumer may have known as much as or more than the seller and deals were carried out face to face over a handshake. Thus, the VPD is outdated and ill-suited to the modern, mass transaction, automated world.

Id. at 526. This Court should follow long-standing Illinois precedent holding that fraud and deception is an exception to the voluntary payment doctrine, and should decline Walgreens's and its *amici's* invitations to expand the doctrine and erode the consumer protections provided by the Illinois legislature in the ICFA.

CONCLUSION

Plaintiff-Appellee McIntosh respectfully requests that this Court affirm the ruling of the Illinois Appellate Court, rule that the voluntary payment doctrine does not bar Plaintiff's ICFA claim, and remand the case to the circuit court for further proceedings.

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Dated: January 30, 2019

Respectfully submitted,

/s/ Todd L. McLawhorn

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CERTIFICATE OF COMPLIANCE WITH RULE 341

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages (or words) contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 26 pages.

/s/ Todd L. McLawhorn
Todd L. McLawhorn

SUPPLEMENTAL APPENDIX

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Carolyn Taft Grosboll
SUPREME COURT CLERK

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No. 17-0362

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DESTIN MCINTOSH, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. WALGREEN BOOTS ALLIANCE, INC., a Delaware corporation, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County, Illinois, Chancery Division Circuit Case No. 16-CH-10738 Hon. Diane J. Larsen

DEFENDANT-APPELLEE WALGREENS BOOTS ALLIANCE, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO PUBLISH THE COURT'S MARCH 26, 2018 ORDER

Defendant-Appellee Walgreens Boots Alliance, Inc. ("Walgreens") submits this opposition to Plaintiff-Appellant Destin McIntosh's Motion to Publish the Court's March 26, 2018 Order. For the reasons that follow, the motion should be denied.

1. The Court filed an unpublished order in this case pursuant to Supreme Court Rule 23 on March 26, 2018. 2018 IL App. (1st) 170362-U. On April 6, 2018, McIntosh filed a motion to publish the Court's decision.

2. Under Rule 23(a), a case may be decided by published opinion only if (1) the decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law; or (2) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court. Ill. Sup. Ct. Rule 23(a).

3. The Court's order in this case does not satisfy either of these criteria. Instead, the Court's decision applies two previous, published decisions of this Court to the facts of this case, *see Nava v. Sears Roebuck & Co.*, 2013 IL App. (1st) 122063, and *Flournoy v. Ameritech*, 351 Ill. App.3d 583 (1st Dist. 2004). *McIntosh* 2018 Ill. App. (1st) 170362, ¶¶ 18-22.

4. Walgreens respectfully disagrees with the Court's decision in this case. But in relying on its own prior published decisions, the Court neither created a new rule of law or modified, explained, or criticized an existing rule of law. To support his argument, McIntosh points to the Court's discussion of the Third District's decision in *Ramirez v. Smart Corp.*, 371 Ill. App.3d 797 (3d Dist. 2007). But the Court makes clear that, to the extent the *dicta* in *Ramirez* implies that a voluntary payment defense can never apply to an ICFA claim, *Ramirez* did not involve "an existing rule of law." *McIntosh* 2018 Ill. App. (1st) 170362, ¶ 17. Nor does the Court's decision discuss or address any conflict within the Appellate Court. As such, the Court's order decision does not meet the criteria for publication under Rule 23(a).

For the foregoing reasons, Walgreens requests that the motion to publish the Court's decision be denied.

Dated: April 11, 2018

Respectfully submitted,

Walgreens Boots Alliance, Inc.

By: */s/ Kenneth M. Kliebard*

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Certificate of Service

I, Kenneth M. Kliebard, an attorney, certify that I caused a copy of the foregoing document to be served by e-mail and U.S. Mail on all counsel of record, this 11th day of April 2018.

/s/ Kenneth M. Kliebard

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

DESTIN McINTOSH, individually and on behalf of all others similarly situated,	)	
Plaintiff-Appellee,	)	
v.	)	No. 123626
WALGREENS BOOTS ALLIANCE, INC.,	)	
Defendant-Appellant.	)	

The undersigned, being first duly sworn, deposes and states that on January 30, 2019, there was electronically filed and served upon the Clerk of the above court the Brief of Appellee and that on the same day, a pdf of same was e-mailed to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that there will be sent to the above court thirteen copies of the Brief bearing the court's file-stamp.

/s/ Todd L. McLawhorn
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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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