Illinois Official Reports

Appellate Court

Al-Any v. Harshaw, 2025 IL App (2d) 230392

Appellate Court Caption	JASEMIN AL-ANY, Plaintiff-Appellant, v. SAMANTHA HARSHAW, Defendant-Appellee.
District & No.	Second District No. 2-23-0392
Filed	February 5, 2025
Decision Under Review	Appeal from the Circuit Court of Lake County, No. 22-LA-193; the Hon. Luis A. Berrones, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	James M. Urtis, of Chicago, for appellant. Marc L. Srodulski, of Beverly & Pause, of Chicago, for appellee.
Panel	JUSTICE HUTCHINSON delivered the judgment of the court, with opinion. Justice Birkett concurred in the judgment and opinion. Presiding Justice Kennedy dissented, with opinion.

OPINION

¶ 1 Plaintiff, Jasemin Al-Any, appeals from a judgment finding that a written release was valid and thus barred her from seeking relief for injuries suffered in a vehicular accident. Plaintiff contends that the release was based on a mutual mistake of fact. We affirm.

¶ 2 I. BACKGROUND

¶ 3 Plaintiff filed a complaint alleging negligence against defendant, Samantha Harshaw, in the Lake County circuit court. The complaint alleged that, on April 21, 2021, defendant's vehicle struck the rear end of plaintiff's vehicle, injuring plaintiff and damaging her vehicle. The complaint sought damages for medical expenses, pain and suffering, lost wages, and damage to plaintiff's vehicle.

¶ 4 Defendant filed a motion to dismiss under section 2-619(a)(6) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(6) (West 2020)). Defendant sought dismissal based on a written release from State Farm Mutual Automobile Insurance Company (State Farm), which was the insurer for both parties, and signed by plaintiff on April 22, 2021.

¶ 5 Defendant attached to her motion the release in question. It was titled "Agreement and Release," in large bold print. It purported to release defendant

> "from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, both to person and property, and particularly on account of all injuries, known and unknown, sustained by [plaintiff], which have resulted or may in the future develop as a result of [the accident]."

The consideration for the release was State Farm's payment of $800 and its promise to pay plaintiff up to $15,000 in reasonable and necessary medical expenses incurred as a result of the accident. The release further stated that "all parties to this instrument have carefully read the contents of this Agreement and Release and the signatures below are the voluntary and free act of each." The release was signed by plaintiff and dated April 22, 2021.

¶ 6 Plaintiff filed a response to defendant's motion to dismiss. She argued that the release should be set aside because "there was a mutual mistake of fact relative to [her] injures [*sic*] as the release was issued before she had ever been examined by a healthcare provider." Thus, "she did not know, and neither did State Farm, what the nature and extent of her injuries were." Plaintiff also argued that the release "should be invalidated as *** unconscionable." She elaborated that "[i]t is unconscionable for an insurer to send a release of all claims (buried in an 'agreement and release') to an insured involved in a motor vehicle collision less than 24 hours after its occurrence who is unrepresented by legal counsel." She added that "[i]t is even more unconscionable because [she] is herself a State Farm insured."

¶ 7 Attached to plaintiff's response was her affidavit. She averred that, at about 8:30 p.m. on April 21, 2021, she was rear-ended while stopped at a light. She immediately called the police to report the accident. When the police arrived, they asked her for proof of insurance. Because plaintiff did not have her insurance card, she called her insurer, State Farm, to obtain proof of insurance. The State Farm agent asked her for information regarding the accident. When plaintiff told the agent that she was at the accident scene and the police were waiting to see her proof of insurance, the agent e-mailed her the proof of insurance and told her that someone from State Farm's claim department would contact her on April 22, 2021.

¶ 8 Plaintiff averred that, the next day, April 22, 2021, she awoke in "immense pain." She went to work and took Advil and Tylenol to manage the pain. While she was at work, someone from State Farm's claim office called and "asked [her] about [her] bodily injury." She "responded that [she] had not been examined by a doctor[,] so [she] did not know the nature and extent of [her] bodily injury." In response, the State Farm representative told her that State Farm would pay her medical bills but that she needed to sign a "claim form" for them to do so. Plaintiff agreed to sign the form.

¶ 9 Plaintiff further averred that, at approximately 5:21 p.m. on April 22, 2021, State Farm sent her an e-mail with a "claim form" attached and a subject line that read, " 'signature needed for claims document(s).' " Plaintiff attached the e-mail to her affidavit. The first line of the message read: "Hi Jasemin, We need your signature on the Claims document(s) by April 29, 2021." Inside a box at the bottom of the e-mail was the text: "Please review and sign within a timely manner to avoid any delays. *** Failure to complete the signing in the allotted time may result in a delay in the processing and/or payment of your claim."

¶ 10 Plaintiff averred that she "immediately" signed the "claim document" because she believed that (1) State Farm needed her signature to pay her medical expenses and (2) "signing a 'claim document' to 'to avoid delays' was standard protocol."

¶ 11 Plaintiff further averred that, at 11:27 p.m. on April 22, 2021, she went to the emergency room, complaining primarily of neck pain. "Thereafter, [she] followed with a specialist for persistent neck pain and, on May 12, 2021, underwent a cervical MRI which revealed, among other things, a herniated cervical disc at C5-C6." Subsequently, a chiropractor treated plaintiff for her neck pain. Plaintiff "believe[d] that the herniated disc was caused by the motor vehicle collision." Plaintiff attached to her affidavit the May 13, 2021, final report of the MRI results. The report stated that plaintiff "present[ed] with low back pain." Although the MRI report referred to views of the lumbar spine, it did not mention the cervical spine.

¶ 12 Plaintiff averred that she incurred $16,253.60 in expenses for treatment as of the date of her affidavit. According to plaintiff, State Farm had paid only $2,675 of her medical expenses.

¶ 13 Plaintiff further averred that she received the release within 24 hours of the accident. When she received the release, she "had not been examined by any healthcare provider," and thus, neither she nor State Farm knew the extent of her injuries. She added that, "[a]t the time that the release was issued to [her], the release was not explained to [her] but rather [she] was instructed to sign same to avoid delays in processing [her] claim."

¶ 14 Defendant filed a reply in support of her motion to dismiss. Attached to the reply was the affidavit of State Farm claim representative Meg Henaughan. According to Henaughan, at about 4:20 p.m. on April 22, 2021, State Farm claim representative Aaron Haney received a phone call from plaintiff. Haney explained the "traditional bodily injury process to [plaintiff] and the potential for an Agreement and Release." According to Henaughan, plaintiff told Haney that she was "receptive to an Agreement and Release but had not sought treatment yet but planned to that evening." Haney explained to plaintiff that State Farm was offering an $800 lump sum payment plus an additional maximum of $15,000 for subsequent medical expenses. According to Henaughan, plaintiff told Haney that she understood and "would probably accept after she got checked out later that day."

¶ 15 Henaughan explained that, after Haney's conversation with plaintiff, State Farm sent plaintiff an e-mail on April 22, 2021, containing the release for her signature. According to an

electronic certificate, plaintiff viewed the release at 2:34 p.m. on April 23, 2021, and returned the signed release at 2:36 p.m. that same day.

¶ 16 Henaughan further averred that, on April 28, 2021, State Farm claim specialist Layne Pekarek sent plaintiff a letter. In that letter, attached to Henaughan's affidavit, Pekarek stated that State Farm had settled plaintiff's bodily injury claim for $800 in lost wages and noneconomic damages. According to Pekarek, the settlement also included, per the release, $15,000 for reasonable and necessary medical expenses related to the accident. That portion of the settlement would "remain on reserve at State Farm pending receipt of reasonable, necessary, and related medical bills for review for reimbursement." Pekarek's letter further advised plaintiff to forward any medical bills related to the accident for State Farm's review.

¶ 17 According to Henaughan's affidavit, on May 19, 2021, State Farm received a letter of representation and an attorney lien from a law firm representing plaintiff. On December 22, 2021, plaintiff's attorney sent State Farm medical bills totaling $16,253 and requested that State Farm contact the attorney to discuss settlement. On December 30, 2021, a State Farm claim representative corresponded with plaintiff's attorney, recounting the terms of the release and asking the attorney to indicate which bills should be paid per the release. According to Henaughan, State Farm received no communication from that attorney regarding which bills should be paid.

¶ 18 Henaughan further averred that, as of the date of her affidavit, State Farm had tendered, per the release, the $800 lump sum and $2,675 for medical bills submitted.

¶ 19 The trial court issued a written order granting defendant's motion to dismiss. In doing so, the court noted that it was not considering Henaughan's affidavit because (1) defendant should have attached it to her motion to dismiss rather than produce it for the first time in her supporting reply and (2) Henaughan relied extensively on hearsay and documents for which no foundation was provided.

¶ 20 As relevant to this appeal, the trial court found that there was no mutual mistake of fact, because State Farm was unaware of the nature and extent of plaintiff's injuries. "If someone does not know a fact, they cannot make a mistake of fact as to that fact." According to the court, plaintiff "was the only party who had any information regarding the nature and extent of her injury since she is the one who woke[ ]up the next morning following the accident 'in immense pain.' " The court concluded that plaintiff had "made a self-induced, unilateral mistake [of fact]" about the nature and extent of her injuries. The court then addressed and rejected plaintiff's independent argument that the release was unconscionable.

¶ 21 We note that, in its recitation of the facts, the trial court found that plaintiff signed the release *after* she went to the emergency room. This finding is difficult to reconcile with the order of events plaintiff recounts in her affidavit. Plaintiff averred that she received the release at 5:21 p.m. on April 22, 2021, and, after reviewing it, signed it "immediately." The *next* event she relates is her 11:27 p.m. visit to the emergency room—implying that she signed the release *before* her visit. (According to Henaughan's affidavit, plaintiff signed the release on April 23, 2021, the day *after* she visited the emergency room, but the trial court disregarded Henaughan's affidavit.) Evidently, the reason the trial court found that plaintiff signed the release after visiting the emergency room is that the court misread plaintiff's affidavit as stating that she visited the emergency room at "11:27 *a.m.*" (emphasis added) on April 22, 2021—several hours before she received the release. As we explain in our analysis, whether plaintiff signed the release before or after her emergency room visit makes no difference.

¶ 22 Plaintiff filed a motion to reconsider, which the court denied. Plaintiff, in turn, filed this timely appeal.

¶ 23 II. ANALYSIS

¶ 24 On appeal, plaintiff contends that the release should be set aside and that the trial court erred in granting defendant's motion to dismiss.

¶ 25 We begin our analysis by clarifying that defendant was not a party to the release. The record is silent as to whether she even knew of the existence of the release. To challenge a facially valid release, State Farm would be a necessary party. Without being a party, State Farm had no way to defend or justify its actions. Defendant was not State Farm's agent here.

¶ 26 We next clarify what plaintiff is arguing on appeal. A point not argued in the appellant's opening brief is forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing. Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020); see *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010). A point is not properly argued unless it is supported by reasons and citations of authority. Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020). Thus, an issue merely listed or included in a vague allegation of error is not deemed argued. *Vancura*, 238 Ill. 2d at 370. Plaintiff's argument on appeal is that the release is invalid because there was a mutual mistake of fact as to the nature and extent of her injuries. Although she employs the term "unconscionable," she uses that term only in the context of her argument on mutual mistake of fact. For example, the concluding sentence in the argument portion of her opening brief is: "Because there was a mutual mistake of material fact which resulted in an unconscionable agreement, the release in this case should be set aside." She does not raise a separate, distinct claim that the release was unconscionable, and accordingly, any argument regarding unconscionability is forfeited. As the dissent notes, "Illinois case law is clear that a mutual mistake of fact is only the first part of a two-part test: the mistake must be found to exist *before* analyzing whether enforcement of a release of liability would cause an unconscionable result." (Emphasis in original.) *Infra* ¶ 68 n.4 (citing *DeMarie v. Baltimore & Ohio Chicago Terminal R.R. Co.*, 79 Ill. App. 3d 50, 53-54 (1979), and *Simmons v. Blauw*, 263 Ill. App. 3d 829 832-33 (1994)). Despite noting this, the dissent then goes on to seemingly argue unconscionability on behalf of plaintiff. This is improper. The appellate court "is not merely a repository into which an appellant may dump the burden of argument and research." (Internal quotation marks omitted.) *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009). As plaintiff has not sufficiently argued unconscionability, that issue is forfeited.

¶ 27 We further note that, in her reply brief, plaintiff asserts for the first time that it was "detestable" and "against public policy" for State Farm to have attempted to obtain a release of all claims within 24 hours of the accident. The issue is forfeited for two reasons. First, plaintiff raises it for the first time in her reply brief. See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020); *Franciscan Communities, Inc. v. Hamer*, 2012 IL App (2d) 110431, ¶ 19. Second, plaintiff cites no authority for the proposition that an attempt to obtain a release of a claim within 24 hours of an accident violates public policy. See *Vancura*, 238 Ill. 2d at 369.

¶ 28 We next address the standard of review. A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. *Krilich v. American National Bank & Trust Co.*, 334 Ill. App. 3d 563, 569-70 (2002). Section 2-619 permits a dismissal based on issues of law or easily proved issues of fact. *Id.* at

570. On appeal from a section 2-619 dismissal, the reviewing court must consider *de novo* whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal was proper as a matter of law. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008).

¶ 29 Section 2-619(a)(6) of the Code (735 ILCS 5/2-619(a)(6) (West 2020)) provides for the involuntary dismissal of a complaint where, among other reasons, the claim in the complaint has been released. "A release is the abandonment of a claim to the person against whom the claim exists." (Internal quotation marks omitted.) *Borsellino v. Putnam*, 2011 IL App (1st) 102242, ¶ 103. "Once the defendant establishes the existence of a release, legal and binding on its face, the burden shifts to the plaintiff to prove it invalid by clear and convincing evidence." *Simmons*, 263 Ill. App. 3d at 832.

¶ 30 A release may be voided where its execution was obtained through, among other things, mutual mistake. *Hurd v. Wildman, Harrold, Allen & Dixon*, 303 Ill. App. 3d 84, 91 (1999). However, a unilateral or self-induced mistake is not sufficient to void a clear and unambiguous release. *Simmons*, 263 Ill. App. 3d at 832 (citing *Rakowski v. Lucente*, 104 Ill. 2d 317, 324 (1984)). The mistake of fact must be mutual, be material to the transaction, and affect its substance. *Id.* at 833.

> "[C]ases which have determined the validity of releases based on a mistake of fact with respect to the nature and extent of the plaintiff's injuries have been treated [as] *sui generis*, and the rules governing releases from liability for nonpersonal injury torts or breaches of contracts do not apply. [Citation.]" *Id.* at 832.

¶ 31 As to personal injury cases, "releases have been voided where there appears to be a mutual mistake as to the nature and extent of the injury sustained and where enforcement of the release produces an unconscionable result in light of the facts as they are finally determined." *Id.* at 833.

> "In assessing whether a mutual mistake of fact existed, courts will examine whether (1) the parties believed the plaintiff had recovered at the time of the release, (2) the condition was one which ordinary X rays and customary examination did not reveal, and (3) the evidence justified the conclusion that the plaintiff acted with reasonable diligence in ascertaining the extent of injury. [Citation.]" *Id.*

¶ 32 The release here was facially valid, despite the dissent's contentions to the contrary. The dissent argues that the release itself is invalid because plaintiff pleaded facts showing she did not have knowledge of the release's meaning. We do not agree with this analysis. In determining the validity of a written instrument, the intention of the parties to a contract must be determined from the instrument itself. *Id.* at 832. The dissent appears to look beyond the release in determining that it is invalid. Further, plaintiff did not argue in her brief that the release itself was invalid. Rather, she argued that the release could be avoided because of a mutual mistake of fact, which automatically rendered the release unconscionable.

¶ 33 Since the release here was facially valid, plaintiff had the burden of proving a mutual mistake of fact by clear and convincing evidence. Plaintiff failed to do so. Plaintiff reiterates her argument below that there was a mutual mistake of fact because, when the release was signed, neither she nor State Farm was aware of the nature and extent of her injuries, as a healthcare provider had not examined her. We reject the argument. As we explain, there is a difference between unknown injuries and mistakes as to the consequences of known injuries. It was precisely *because* plaintiff and State Farm knew so little about her injuries that neither

party could have been mistaken about those injuries when plaintiff signed the release. Notably, since the trial court based its decision on plaintiff's affidavit alone and refused to consider Henaughan's affidavit, we consider only plaintiff's affidavit, and we note Henaughan's affidavit only for context.

¶ 34 Regarding the first *Simmons* factor, the record does not show that plaintiff believed she had recovered when she signed the release. The record is unclear whether plaintiff signed the release before or after she went to the emergency room—plaintiff's affidavit indicates she signed the release before she went to the emergency room, whereas the trial court's June 13, 2023, memorandum order indicates she signed the release after she went to the emergency room. We conclude, however, that the timing makes no difference under this factor. Since plaintiff did not indicate any diagnosis or treatment she received from emergency room personnel, we cannot determine how that visit may have impacted her beliefs, if indeed she went there before signing the release. Nonetheless, it is significant that plaintiff experienced "immense pain" upon waking on April 22, 2021, the day after the accident, and that she went to the emergency room at 11:27 p.m. complaining of "neck pain." Her symptoms and late-night emergency room visit suggest that, at whatever point she signed the release that day, she did not believe she had recovered from the accident.

¶ 35 Even if plaintiff mistakenly believed that she had recovered when she signed the release, this can be characterized only as a unilateral mistake. Where an injured party, conscious of the possibility of future consequences from an injury, investigates the nature and extent of the injury and the prospect of future complications and then compromises her claim by executing an unreserved release, she is bound thereby. *Id.* at 834. Thus, even if plaintiff mistakenly believed that she had recovered, that mistake was merely unilateral.

¶ 36 More importantly, there was no evidence that State Farm believed that plaintiff had in fact recovered and would not suffer further injuries resulting from the accident. Plaintiff averred that, when a State Farm representative contacted her on the day after the accident and "asked [her] about [her] bodily injury," she "responded that [she] had not been examined by a doctor[,] so [she] did not know the nature and extent of [her] bodily injury." While this might imply that plaintiff told the representative about her "bodily injury," plaintiff did not relate what, if any, specific information she gave State Farm. Thus, we cannot conclude that plaintiff made State Farm aware of the nature and extent of her injuries or, moreover, that State Farm could have believed when she signed the release that she had recovered. Thus, the first *Simmons* factor favors defendant.

¶ 37 The second *Simmons* factor also favors defendant because plaintiff's condition was discoverable through ordinary medical means. According to plaintiff, her cervical herniation was discovered on an MRI that she underwent about three weeks after the accident. Her earlier emergency room visit is not determinative of whether that condition was discoverable through ordinary medical means. She did not relate any diagnosis from that visit or indicate what kind of examination she was given.

¶ 38 Finally, the third *Simmons* factor favors defendant as well. The record shows that plaintiff did not act with reasonable diligence in ascertaining the nature and extent of her injuries before she signed the release. As noted, the record is unclear on whether she went to the emergency room before or after she signed the release. Even if she went before signing, we could not conclude what the visit revealed about her physical condition, because her affidavit is silent on

what she learned during the visit. Significantly, she did not seek additional medical examination or treatment before signing the release.

¶ 39 Plaintiff asserts that the e-mail accompanying the release gave her the impression that she needed to sign the release quickly to have her claim processed. However, the e-mail, dated April 22, 2021, advised plaintiff that her signature was needed by April 29, 2021. That gave her a week to obtain any additional medical examinations. More importantly, the e-mail did not state that her claim would be denied if she did not sign within one week but, rather, urged her to sign promptly to avoid any delay in the processing or payment of her claim. The e-mail also directed plaintiff to call or reply to the e-mail if she had any questions. Plaintiff did not contact State Farm with any questions. Instead, she signed the release even though she had at least another week to do so. Nothing suggests that State Farm prevented plaintiff from acting with due diligence in determining the nature and extent of her injuries.

¶ 40 Under the *Simmons* factors, we cannot say that there was a mutual mistake of fact invalidating the release. Again, the release was facially valid and enforceable. For it to be set aside because of a mutual mistake of fact regarding plaintiff's injuries, there must be clear and convincing evidence of a material misunderstanding by both parties as to the nature and extent of plaintiff's injuries. The record clearly established that neither party knew the true nature and extent of plaintiff's injuries when she signed the release. What both parties *did* know was that the nature and extent of plaintiff's injuries were *not* clearly established, and the language of the release reflected that understanding. Thus, there was no mutual mistake of fact to justify setting aside the release.

¶ 41 Finally, we note that plaintiff relies heavily on *Newborn v. Hood*, 86 Ill. App. 3d 784 (1980). That reliance is misplaced. In *Newborn*, the plaintiff was injured when her vehicle was struck by the defendant's vehicle. *Id.* at 785. The plaintiff suffered several cuts, bruises, and musculoskeletal injuries. *Id.* The plaintiff's medical bills totaled $300, and her attorney offered to settle the case for $1,200. *Id.* The defendant's insurer accepted the offer, and the plaintiff signed a release. *Id.* Several months later, the plaintiff was admitted to a hospital with chest pains, and it was determined that she suffered from congestive heart failure caused by secondary trauma. *Id.* Her treating physician opined that her heart condition was most likely caused by the auto accident. *Id.* The plaintiff accrued additional medical expenses of just over $8,000. *Id.*

¶ 42 The plaintiff sued the defendant, and the defendant raised the release as an affirmative defense. *Id.* The plaintiff asserted that the release was invalid because of a mutual mistake of fact. *Id.* The trial court denied the defendant's motion for a judgment on the pleadings, and the defendant appealed. *Id.* at 785-86.

¶ 43 On appeal, the Third District held that the release was invalid because it was premised on a mutual mistake of fact. *Id.* at 786-87. There was a mutual mistake of fact because the parties

> "[had] stipulated that at the time of the settlement neither [the] plaintiff nor [the] defendant's insurance adjuster had any knowledge that [the] plaintiff had suffered a trauma that would eventually cause her to suffer a heart attack and that [the] plaintiff and her physician had acted reasonably and that because of the nature of the injury to the heart the effect may lie dormant for some time." *Id.*

Further, the plaintiff's attorney, in seeking $1,200 to settle, forwarded to the insurer the plaintiff's doctor's initial report that the injuries were minor. *Id.* at 787. Thus, it was clear that both sides mistakenly considered the plaintiff's injuries to be minor. *Id.*

¶ 44 Our case is entirely different from *Newborn*. In *Newborn*, the parties were mistaken as to the full consequences of a known injury. Here, there was no such mutual mistake regarding the nature and extent of plaintiff's injuries. As discussed, neither plaintiff nor State Farm had reason to believe that the nature and extent of plaintiff's injuries had been determined when she signed the release. Indeed, the cervical condition she was eventually diagnosed with was not an unlikely possibility from a rear-end collision. Because, unlike in *Newborn*, there was no unexpected medical issue related to the accident that the parties did not contemplate, this case is clearly distinguishable from *Newborn*.

¶ 45 Before concluding, we note that plaintiff implies that State Farm had an obligation to disclose to plaintiff that both parties to the accident were its customers before she signed the release. There is nothing in the record to support this implication. We cannot speculate what State Farm would say in response or opine as to the status of the law on this issue. Plaintiff never brought State Farm into this suit, and we are limited to the facts contained in the record. Accordingly, we decline to offer an advisory opinion on the matter, as that would violate our duty to remain fair and unbiased. See *Madison Park Bank v. Zagel*, 91 Ill. 2d 231, 235 (1982) ("This court will not review cases merely to establish a precedent or guide future litigation.").

¶ 46 We recognize that this result may seem harsh, but we cannot set aside a facially valid release between plaintiff and State Farm when State Farm is not a party to the underlying suit and has not been given an opportunity to defend its actions.

¶ 47 III. CONCLUSION

¶ 48 For the foregoing reasons, the release here was not based on a mutual mistake of fact regarding the nature and extent of plaintiff's injuries. Accordingly, it was not rendered unconscionable by such a mistake. Thus, the trial court properly dismissed plaintiff's complaint under section 2-619(a)(6) of the Code, and we affirm the judgment of the circuit court of Lake County.

¶ 49 Affirmed.

¶ 50 PRESIDING JUSTICE KENNEDY, dissenting:

¶ 51 I respectfully dissent because dismissal at the pleading stage here was improper. Questions of fact concerning the validity of the release and its surrounding circumstances indicated that the release was invalid, there was a mutual mistake of fact, and the result of enforcing the release was unconscionable. An important factor in this case is the role of plaintiff's insurer, State Farm, which hastily obtained a release on behalf of the tortfeasor, its other insured, in order to limit its exposure in a case where liability was clear, its communications to plaintiff were unclear and even misleading, and the effect was to cap plaintiff's recovery to a figure below the amount of her medical bills.

¶ 52 Dismissal at the pleading stage is a drastic sanction. *Environmental Protection Agency v. Celotex Corp.*, 168 Ill. App. 3d 592, 597 (1988). Dismissal under section 2-619 should be granted only when it is clearly apparent that no set of facts can be proven that would entitle a plaintiff to relief. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8. Courts must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Id.* In this case, plaintiff's complaint and affidavit raise issues of fact concerning the validity of the

release, mutual mistake, and unconscionability, making dismissal inappropriate.

¶ 53 I. The Release Was Not Valid in the First Instance

¶ 54 Plaintiff has consistently maintained that she did not understand she was entering into a release of liability. A threshold question in a case such as this is "whether there was a release at all." *Gutierrez v. Schultz*, 109 Ill. App. 3d 372, 376 (1982). A release of personal injury liability is " 'the abandoning of a claim to the person against whom the claim exists and[,] where the release is *executed with knowledge of its meaning*, causes of action covered by the release are barred.' " (Emphasis added.) *Kiest v. Schrawder*, 56 Ill. App. 3d 732, 734-35 (1978) (quoting *Ogren v. Graves*, 39 Ill. App. 3d 620, 622 (1976)). This court has held that "[i]n Illinois the words of a release will not prevent inquiry into the circumstances to ascertain whether the release was fairly made and accurately reflected the intentions of the parties." *Willis v. Reum*, 64 Ill. App. 3d 146, 147 (1978). Initially, a defendant bears the burden of establishing the existence of a release that is legal and binding on its face before the burden shifts to the plaintiff to prove it is invalid by clear and convincing evidence. *Simmons v. Blauw*, 263 Ill. App. 3d 829, 832 (1994). The existence of a valid release in a personal injury case is a question of fact. *DeMarie v. Baltimore & Ohio Chicago Terminal R.R. Co.*, 79 Ill. App. 3d 50, 53 (1979).

¶ 55 Here, plaintiff has adequately pleaded facts showing that, at the time she signed the release, she did not have "knowledge of its meaning." Plaintiff's affidavit established that she believed her own insurer was merely asking her to sign forms in order to expedite payment of her interim medical expenses. The day after the accident, plaintiff's insurer called her to ask about her injuries, and she told them she had not yet been examined by a doctor; she averred that then "the State Farm claims rep advised that they would pay for my medical bills and that I needed to sign a claim form for them to do so, to which I agreed." This is a clear statement that she believed she was releasing only *information* to have her bills paid by her insurer as they came in, not releasing *liability* for all third parties for all damages arising out of the accident. Under the particular circumstances of this case, including the misleading communications by her own insurer, plaintiff's understanding of what she was signing was not unreasonable.

¶ 56 Plaintiff called her insurer from the scene of the accident, a State Farm "agent" told her someone from State Farm's claim department would follow up by phone the next day, and someone did, assuring plaintiff State Farm would pay her medical bills and immediately thereafter presenting her with "claims documents." According to her complaint and affidavit, plaintiff did not know that State Farm was wearing two hats or had a conflicting interest in representing the person who caused the accident, nor did State Farm disclose this information to her. It was reasonable for plaintiff to rely on statements by her insurer leading her to believe she was merely signing a routine document for it to pay her medical bills.

¶ 57 Bolstering plaintiff's reliance on her insurer's verbal assurances that her signature was required merely so that they could pay her bills promptly, the e-mail containing the release was misleadingly labeled "signature needed for claims document(s)."[1] State Farm emphasized to

[1]An analogous situation is when an insurer presents a plaintiff with a check containing language to indicate that his or her signature constitutes acceptance of a full release but the plaintiff did not understand it as such; our courts have repeatedly found a question of fact existed as to whether both

plaintiff that it needed her signature promptly, stating in the body of that e-mail, "we need your signature on the claims documents by April 29, 2021," "[p]lease review and sign within [*sic*] a timely manner to avoid any delays," and "[f]ailure to complete the signing in the allotted time may result in a delay in the processing and/or payment of your claim." As this was for *her* insurer, she had no reason to suspect that the document was anything other than a routine form, so she opened and signed it in less than three minutes.[2] This situation was not a negotiation "between parties of equal sophistication dealing with each other at arm's length," given that State Farm undertook to effectively "represent and protect the interests of both the injured party and its [other] insured [(the tortfeasor)] during settlement negotiations." See *McCarter v. State Farm Mutual Automobile Insurance Co.*, 130 Ill. App. 3d 97, 102 (1985) (upholding an injured plaintiff's direct complaint for bad faith and fraudulent inducement against State Farm as his insurer when plaintiff and the tortfeasor (named Couch) in the underlying personal injury claim were both insured by State Farm, State Farm had obtained a settlement release from plaintiff using various false verbal assurances, and the court found that plaintiff was justified in relying on State Farm's representations to "relinquish his cause of action against Couch for less than its full value").

¶ 58 Here, the communications from State Farm were consistent with plaintiff's sworn statement that she did not understand that the document conveyed to her by e-mail was a release of third-party liability. While the majority is content to tell plaintiff she should have carefully read and fully understood the document, this admonition cannot be fairly applied to a situation where an injured person is hurriedly relying on representations made by her own insurer and where that insurer has allegedly failed to disclose to her its divided loyalties. For these reasons and as discussed more fully below regarding the circumstances evidencing a mutual mistake, a question of fact exists as to plaintiff's knowledge of the meaning of the document she signed, which precludes its enforcement and further precludes dismissal of plaintiff's complaint at the pleading stage. *Cf. Sexton v. Southwestern Auto Racing Ass'n*, 75 Ill. App. 3d 338, 340 (1979) (whether plaintiff who signed preinjury release form "knew or should have known that what he was signing was a release of liability was a question of fact for the jury," which must consider the circumstances surrounding the execution of the release, "especially the haste

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parties intended a full and complete release in those circumstances. See, *e.g.*, *Iloh v. Stein*, 226 Ill. App. 3d 644, 646, 648 (1992) (holding that plaintiff's endorsement of a check labeled " 'IN PAYMENT OF': 'Settlement of claim under Bodily Injury coverage arising from accident' " was language that merely "could conceivably be disregarded by plaintiff as a company memorandum" and was not a bar to plaintiff's complaint); *Gutierrez*, 109 Ill. App. 3d at 376-78 (holding that plaintiff's endorsement of a check labeled " '[i]n payment of any and all claims' " was not a full release where "plaintiff understood the check to be partial payment of his claim, and not final and complete payment"); *cf. Schultheis v. McWilliams Electric Co.*, 219 Ill. App. 3d 571, 577 (1991) (plaintiff admitted knowing that check was intended to " 'fully settle' " the claim).

[2] The majority improperly credits the affidavit of State Farm's claim representative, Meg Henaughan (*supra* ¶¶ 15-19), which defendant attached only to her reply brief and which the trial court disregarded as both untimely and inadmissible double (and even triple) hearsay. It must be noted, however, that the affidavit nonetheless fails to establish that plaintiff knew that what she was signing was indeed a release of third-party liability, that there was adequate consideration for the release, or that either party knew the extent and severity of her injuries at the time.

involved in securing the release").

¶ 59 II. A Mutual Mistake of Fact Existed as to the Nature and Extent of Plaintiff's Injuries

¶ 60 Even if it were fair under these circumstances to charge plaintiff with knowledge of the meaning of the document she signed so shortly after the accident, a mutual mistake of fact existed, in that both parties lacked knowledge of the nature and extent of plaintiff's injuries.

> "When determining the validity of a release, the controlling issue is whether the circumstances surrounding the settlement clearly indicate that the release was executed under a mutual mistake of fact as to plaintiff's injuries so that the trial court, in the exercise of its equitable powers, should set aside the release in order to prevent an unconscionable result." *DeMarie*, 79 Ill. App. 3d at 53.

See *Willis*, 64 Ill. App. 3d at 147. Cases determining the validity of releases based on a mistake of fact with respect to the nature and extent of the plaintiffs' injuries have been treated *sui generis*, and the rules governing releases from liability for nonpersonal injury torts or breaches of contracts do not apply. *Meyer v. Murray*, 70 Ill. App. 3d 106, 111 (1979); see *Antal v. Taylor*, 146 Ill. App. 3d 863, 868 (1986) ("Under the law of Illinois, where there was a mistake as to the scope and extent of the known injuries, a clause in the release covering unanticipated consequences should not be a bar to setting aside the release.").

¶ 61 While the majority correctly notes that "[t]he record clearly established that neither party knew the true nature and extent of plaintiff's injuries" (*supra* ¶ 40), it incorrectly concludes from this fact that "[i]t was precisely *because* plaintiff and State Farm knew so little about her injuries that neither party could have been mistaken." (Emphasis in original). *Supra* ¶ 33. The majority goes on to reason that plaintiff "did not believe she had recovered" and, even if she "mistakenly believed that she had," it was a unilateral mistake on her part. *Supra* ¶¶ 34-35. But this short line of reasoning contradicts a long line of our case law.

¶ 62 Since 1925, Illinois courts have invalidated releases in personal injury cases where the parties at the time of the release had insufficient information of the extent and severity of the injuries at issue. See, *e.g.*, *Munnis v. Northern Hotel Co.*, 237 Ill. App. 50, 52, 55, 57 (1925) (setting aside settlement release because of a "mistake of fact as to the nature and extent of the actual injuries of the complainant" where plaintiff and adjuster were "reasonably justified in believing that his injuries were not serious and permanent" when plaintiff signed a release "the morning after the accident"). Courts are in fact *required* to consider facts that were unknown to the parties at the time. *Newborn v. Hood*, 86 Ill. App. 3d 784, 786 (1980) ("[I]t is clear that all the facts, including those which become known after the release has been executed, must be considered in determining whether there was a mutual mistake of fact and whether or not the settlement is unconscionable."). Our courts have repeatedly held in cases like this that it is the very lack of knowledge by both parties at the time that constitutes the mutual mistake of fact. See, *e.g.*, *Antal*, 146 Ill. App. 3d at 868; *Newborn*, 86 Ill. App. 3d at 786 (parties "stipulated that at the time of the settlement neither plaintiff nor defendant's insurance adjuster had any knowledge that plaintiff had suffered a trauma that would eventually cause her to suffer a heart attack"); *Reede v. Treat*, 62 Ill. App. 2d 120, 132 (1965) ("[T]he mistake of fact was as to the condition actually existing at the time of the settlement. Since there was a mistake as to the scope and extent of the known injuries, the clause as to unanticipated consequences should not be a bar to setting aside the release."). Moreover, "our courts do not distinguish

between: (1) separate and distinct injuries which were not known or considered at the time the settlement was approved, and (2) known injuries resulting in unknown and unexpected consequences." *Meyer*, 70 Ill. App. 3d at 111 (citing *Scherer v. Ravenswood Hospital Medical Center*, 21 Ill. App. 3d 637, 639, 640 (1974)).[3]

¶ 63 Here, as plaintiff had not received any medical treatment at the time of the release, she could not possibly have known the extent or severity of her injuries. It naturally follows that State Farm could not possibly have known this either, which defendant admits in her brief: "State Farm and their representatives had no knowledge as to the nature and extent of her alleged injuries, if any." See *Ruggles v. Selby*, 25 Ill. App. 2d 1, 19 (1960) ("The insurer of necessity does not contend that it knew the nature and extent of Mr. Ruggles' injuries; to do so would be tantamount to an admission of fraud on its part."). Even if plaintiff had been to the emergency room prior to signing the release, at the time neither plaintiff nor State Farm had any reason to believe that she had actually suffered more than a soft-tissue injury, much less that she had suffered a herniated disc, which would be diagnosed just a few weeks later. This is exactly the mutual lack of knowledge as to the extent and severity of a plaintiff's actual injuries at the time of the release that qualifies as a mutual mistake under our case law. *Id.*; *Florkiewicz v. Gonzalez*, 38 Ill. App. 3d 115, 120 (1976) ("[T]he controlling issue is whether or not there was a mutual mistake of fact with respect to the injuries suffered by the plaintiff."). Curiously, defendant argues that the mistake at issue in this case was plaintiff's failure to understand *the release*. This argument mistakes the evidence that plaintiff did not knowingly sign a binding third-party release of liability (and effectively concedes that defendant failed to establish the existence of a valid release in the first place) for the definition of "mistake" in these types of cases: both parties mutually failed to apprehend *the level of injury*.

¶ 64 Moreover, the reason that both parties lacked knowledge of the extent of plaintiff's injuries is because of the haste with which the release was secured. "Undue haste in securing a release from a person still suffering from an injury is frowned upon and casts suspicion on the validity of the release." *Florkiewicz*, 38 Ill. App. 3d at 120. Plaintiff was presented with a release (misleadingly labeled as "claim documents") within 61 minutes of speaking to her own insurer, only 1 day after the accident, which she signed only 3 minutes after opening. As discussed, the immediacy of plaintiff's signature is consistent with her sworn statement that her insurer's representative did not explain that it was a release of her rights or a release of State Farm's third-party liability on behalf of the driver who rear-ended her but instead led her to believe that it was merely a routine form needed to expedite payment for medical bills. Moreover, the swiftness of obtaining the release prevented both parties from discovering before its execution the true extent of plaintiff's injuries.

¶ 65 Illinois courts have frequently set aside releases for mutual mistake of fact where the releases were obtained too quickly for the parties to understand the extent of injuries. See, *e.g.*, *Meyer*, 70 Ill. App. 3d at 109 (release signed "a few hours" after accident, subsequent heart attack); *Florkiewicz*, 38 Ill. App. 3d at 120 (signed "less than three days" after accident, later discovered a skull fracture); *Reede*, 62 Ill. App. 2d at 122-23 (signed 47 days after accident,

[3]For purposes of determining a mutual mistake of fact as to the nature and extent of injuries, there is absolutely no "difference between unknown injuries and mistakes as to the consequences of known injuries," as the majority mistakenly claims. See *supra* ¶ 33. On this point, the majority misstates the law and ignores over a half-century of our precedents.

ruptured disc discovered months later); *Smith v. Broscheid*, 46 Ill. App. 2d 117, 120 (1964) (signed 13 days after accident, cervical disc injury); *Fraser v. Glass*, 311 Ill. App. 336, 338 (1941) (signed "[t]wo days after the accident," infection more severe than known at time); *Munnis*, 237 Ill. App. at 57 (release signed "the morning after the accident," contusions and lacerations later found to be fractures). Even in cases with much longer timeframes between injury and settlement, courts have found mutual mistake where injuries were later found to be more severe than known at the time of the release. See, *e.g.*, *Antal*, 146 Ill. App. 3d at 865 (voiding release where plaintiff signed 2½ months after accident but before discovering "a ruptured disc requiring surgery"); *Newborn*, 86 Ill. App. 3d at 785-86 (signed more than six months postaccident, eventual heart attack); *Ruggles*, 25 Ill. App. 2d at 8 (signed approximately three months after accident, head contusion turned out to have developed into undiscovered subdural hematoma); *Clancy v. Pacenti*, 15 Ill. App. 2d 171, 173 (1957) (signed 69 days after accident, later discovered two herniated discs). It is noteworthy that four of the above cases involve undiscovered disc injury, as occurred in the instant case, which is not commonly diagnosed without specific diagnostic testing or imaging studies, additionally weighing in favor of a finding of a mutual mistake of fact. See *supra* ¶ 31.

¶ 66 The majority attempts to distinguish *Newborn* by saying that in the instant case "there was no unexpected medical issue related to the accident that the parties did not contemplate." *Supra* ¶ 44. This ignores the undiscovered—and thus obviously "unexpected"—disc injury here, but it also misses the holding of *Newborn*, in which the court found a mutual mistake of fact when "neither plaintiff nor defendant's insurance adjuster had any knowledge that plaintiff had suffered a trauma that would eventually cause her to suffer a heart attack." *Newborn*, 86 Ill. App. 3d at 786. Thus, the court in *Newborn*, as in the other cited cases above, found that the parties' ignorance of the *extent* of injury, not the *type* of injury, is the primary consideration for the court. Further, nowhere in our case law is there support for terms like "unexpected" or "not an unlikely possibility," as used by the majority today. To the contrary, the majority's formulation directly contradicts cases holding mutual mistake where the mistake was as to "unanticipated consequences" of accident injuries. See, *e.g.*, *Antal*, 146 Ill. App. 3d at 868; *Reede*, 62 Ill. App. 2d at 125.

¶ 67 The majority's reliance on *Simmons* is also misplaced, as it is easily distinguishable. The circumstances of obtaining the release in that case were very different, most significantly because the plaintiff there was represented by experienced counsel who conducted negotiations on her behalf. *Simmons*, 263 Ill. App. 3d at 831. Moreover, the plaintiff was treated by her physician for three months before being discharged from treatment after obtaining "the diagnosis and prognosis of her own doctor." *Id.* at 830, 834. She signed the release four months after medical discharge and *more than seven months* after the accident. *Id.* at 830-31. Finally, the amount Simmons settled for was three times the amount of her medical expenses and lost wages at the time. *Id.* at 831. The court concluded that those circumstances indicated both parties knew the plaintiff had not recovered and would "suffer further injuries as a result of the accident"; therefore there was no mutual mistake of fact. *Id.* at 833-34.

¶ 68 The plaintiff in *Simmons* clearly had every opportunity to know the extent and severity of her injuries at the time she executed the release, she was represented by counsel, she signed the release after treatment and seven months postaccident, and she ultimately agreed to an amount that far exceeded her special damages. These facts, taken together, showed that the parties had knowingly settled the case in a manner that consciously allocated the risk of further

injuries. These facts stand in stark contrast to the circumstances in the instant case, in which both sides could not have known of the existence of the disc injury, the release was obtained almost immediately after the accident and before treatment or diagnostic testing, and the amount was inadequate to compensate plaintiff even for her medical expenses. A mutual mistake of fact clearly existed here, warranting analysis of the unconscionability of this release.[4]

¶ 69 III. Enforcement of the Release Would Be Unconscionable

¶ 70 Finally, enforcement of this release under these circumstances would be unconscionable. The consideration for this release was illusory, and there was a great disparity between the amount paid and the amount of plaintiff's actual damages, once the facts were discovered.

¶ 71 A release will be invalidated where "the facts, when finally known, present an unconscionable result" "in accord with the purpose of the law, which is to do justice under the circumstances of each case." *Meyer*, 70 Ill. App. 3d at 113. As such, the question of whether to set aside a release to prevent an unconscionable result is a question of law for a court to determine using its equitable powers. *DeMarie*, 79 Ill. App. 3d at 53.

¶ 72 Despite defendant's characterization of the terms of the release as "generous," the amounts to be paid were wholly inadequate to compensate plaintiff for her injuries. Plaintiff was to be paid only $800 for all nonmedical damages. Further, her medical expenses were not paid by a lump sum settlement but, instead, were capped at $15,000, to be paid only upon submission and approval of bills as they came in. This is clearly insufficient not only to cover her medical bills for the herniated disc, which were ongoing and already exceeded $15,000, but also to compensate her for any pain and suffering or lost wages (not to mention possible disability or loss of normal life). See *Reede*, 62 Ill. App. 2d at 129-30 ("the amount paid plaintiff in settlement amounted to hardly more than the immediate out of pocket expense, her doctor bill and loss of time"); see also *Antal*, 146 Ill. App. 3d at 867 (describing settlement for property damage only and no medical expenses or lost wages as "grossly unjust"); *Ruggles*, 25 Ill. App. 2d at 18-19. The cap on what State Farm would have to pay under the release was also conditional, to be paid only if and when plaintiff submitted proof of "reasonable, necessary, and related medical bills for review for reimbursement." The "Agreement and Release" was not mutual, either. In fact, State Farm reserved their right to "pursue available legal remedies against" plaintiff, while completely foreclosing her rights to pursue additional compensation.

¶ 73 When the facts became known about the extent of plaintiff's injuries, the consideration for the release was shown to be clearly insufficient to fully compensate her for her injuries and thus was unconscionable. As our courts have held repeatedly in cases like this, we should not

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[4]The majority correctly faults plaintiff for unartfully framing her argument on unconscionability. Plaintiff's briefs appear to presume that a mutual mistake of fact is, *ipso facto*, unconscionable. However, Illinois case law is clear that a mutual mistake of fact is only the first part of a two-part test: the mistake must be found to exist *before* analyzing whether enforcement of a release of liability would cause an unconscionable result. *DeMarie*, 79 Ill. App. 3d at 53-54; see *Simmons*, 263 Ill. App. 3d at 832-33 ("releases have been voided where there appears to be a mutual mistake as to the nature and extent of the injury sustained and where enforcement of the release produces an unconscionable result in light of the facts as they are finally determined"). Thus, plaintiff is incorrect to argue that mutual mistake is automatically unconscionable.

bind any plaintiff to such an unjust result. This is particularly so under these circumstances, where plaintiff alleges she was misled by the actions of her own insurer in immediately foreclosing her claim against its other insured.

¶ 74 For the foregoing reasons, I would reverse the judgment of the trial court and remand for further proceedings.