IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28214

KATHY A. SCHAEFER

Plaintiff and Appellant,

vs.

SIOUX SPINE AND SPORT, PROF. LLC,

Defendant,

and

NATHAN J. FLANDERS,

Defendant and Appellee

and

HERBERT TOLLEFSON

Third-Party Defendant and Appellee.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN R. PEKAS, CIRCUIT JUDGE

BRIEF OF APPELLANT KATHY A. SCHAEFER

ATTORNEYS FOR APPELLANT:

A. Russell Janklow
Ronald A. Parsons, Jr.
Sara E. Show
JOHNSON, JANKLOW, ABDALLAH, REITER, & PARSONS, LLP
P.O. Box 2348
Sioux Falls SD 57101-2348
(605) 338-4304

ATTORNEY FOR DEFENDANT AND APPELLEE NATHAN FLANDERS:

Ms. Melanie L. Carpenter
WOODS, FULLER, SHULTZ & SMITH, P.C.
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
605-336-3890

ORDER GRANTING DISCRETIONARY APPEAL FILED: MAY 12, 2017

ATTORNEY FOR APPELLEE AND THIRD-PARTY DEFENDANT HERBERT TOLLEFSON:

Ms. Heidi Thoennes
AMERICAN FAMILY INSURANCE
LEGAL DEPARTMENT
4200 Corporate Drive, #120
West Des Moines, IA 50266
605-362-5368

ATTORNEY FOR DEFENDANT SIOUX SPINE AND SPORT:

Mr. Edwin E. Evans
Ms. Melinda Folkens
EVANS, HAIGH & HINTON, LLP
101 N. Main Avenue, Suite 213
Sioux Falls, SD 57101-2790
(605) 275-9599

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

PRELIMINARY STATEMENT.....1

STATEMENT OF JURISDICTION.....1

REQUEST FOR ORAL ARGUMENT.....1

STATEMENT OF THE ISSUES.....2

ARGUMENT.....11

I. GENUINE ISSUES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT ON SCHAEFER'S UNDUE INFLUENCE CLAIM. 11

A. THE MATERIAL FACTS REGARDING WHETHER SCHAEFER WAS SUSCEPTIBLE TO UNDUE INFLUENCE ARE DISPUTED. 13

B. PARRIS HAD AN OPPORTUNITY TO EXERT UNDUE INFLUENCE OVER SCHAEFER.....15

C. THERE ARE DISPUTED MATERIAL FACTS AS TO WHETHER PARRIS HAD A DISPOSITION TO EXERT UNDUE INFLUENCE. 15

D. SCHAEFER PRESENTED THE TRIAL COURT WITH FACTS DEMONSTRATING A RESULT CLEARLY SHOWING THE EFFECTS OF UNDUE INFLUENCE.....17

II. GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO WHETHER THE STERNAL FRACTURE WAS A KNOWN INJURY AT THE TIME THAT SCHAEFER SIGNED THE RELEASE. 19

III. THE TRIAL COURT ERRED IN HOLDING THAT THE STERNAL FRACTURE WAS CONTEMPLATED BY SCHAEFER AND PARRIS IN ENTERING INTO THE SETTLEMENT AGREEMENT. 23

IV. THE TRIAL COURT ERRED IN DETERMINING THAT THE RELEASE EXPRESSLY WAIVED UNKNOWN INJURIES. 25

TABLE OF CONTENTS (Cont.)

V. THE TRIAL COURT'S FAILURE TO RULE ON SCHAEFER'S MOTION TO SUPPLEMENT THE RECORD WAS IN ERROR. 26

CONCLUSION 27

CERTIFICATE OF COMPLIANCE 30

APPENDIX 31

TABLE OF AUTHORITIES

Cases

Adrian v. Vonk, 2011 S.D. 84, 807 N.W.2d 119 10

Boman v. Johnson, 83 S.D. 265, 158 N.W.2d 528 (1968) ..... passim

Delany v. Delany, 402 N.W.2d 701 (S.D. 1987) 11, 15

Hamilton v. Sommers, 2014 S.D. 76, 855 N.W.2d 855 ..... 2, 17

Highmark Fed. Credit Union v. Hunter, 2012 S.D. 37, 814 N.W.2d 413 10

In re Donald Hyde Trust, 2014 S.D. 99, 858 N.W.2d 333 12

In re Estate of Pringle, 2008 S.D. 38, 751 N.W.2d 277 12

In re Estate of Smid, 2008 S.D. 82, 756 N.W.2d 1 12

In re Metz Estate, 100 N.W.2d 393 (S.D. 1960) 15

Joyce v. Comm'r of Soc. Sec., 2016 WL 7048692 (6th Cir. Dec. 5, 2016) 4

Kase v. French, 325 N.W.2d 678 (S.D.1982) 16

Matter of Estate of Unke, 1998 S.D. 94, 583 N.W.2d 145 13

Matter of Zech's Estate, 285 N.W.2d 236 (S.D. 1979) 15

Morris Family, LLC ex rel. Morris v. S. Dakota Dep't of Transp., 2014 S.D. 97, 857 N.W.2d 865 10

Morton v. Farmers Co–Op. Business Ass'n, 510 N.W.2d 326 (Neb. 1993) 20

Neugebauer v. Neugebauer, 2011 S.D. 64, 804 N.W.2d 450 ..... 13, 16

Parkhurst v. Burkel, 1996 S.D. 19, 544 N.W.2d 210 ..... passim

Quinn v. Farmers Ins. Exch., 2014 S.D. 14, 844 N.W.2d 619 10

Reed v. Heath, 383 N.W.2d 873, 874 (S.D. 1986) 2, 27

Robinson v. Ewalt, 2012 S.D. 1, 808 N.W.2d 123 18

Spruiell v. Robinson, 582 So. 2d 508 (Ala. 1991) 14

TABLE OF AUTHORITIES (Cont.)

State v. Nathan Flanders Civ 13-392 (Lincoln County) 6

Stern Oil Co., Inc. v. Brown, 2012 S.D. 56, 817 N.W.2d 395 18

Stockwell v. Stockwell, 2010 S.D. 79, 790 N.W.2d 52 12

Statutes

20 C.F.R. 12.02(A)(2) 5

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05C 4

SDCL 15-26A-10 ..... 2, 27

SDCL 15-6-56(c) 2

SDCL 20-7-11 ..... 25, 26

SDCL 53-4-1 11

SDCL 53-4-7 11

PRELIMINARY STATEMENT

References to the settled record as reflected by the Clerk's Index are designated as "R." References to the Appendix to this brief are designated as "App." There is one transcript in this appeal. References to the transcript of the summary judgment hearing held on January 23, 2017 are designated as "HT."

STATEMENT OF JURISDICTION

Kathy Schaefer respectfully appeals from the Order Granting Defendant Nathan Flanders and Third Party Defendant Herbert Tollefson's motions for summary judgment dated March 20, 2017. (R. 398-412). The Court additionally signed a "Summary Judgment" dated March 28, 2017. (R. 424-25).

Notice of entry of judgment was served by U.S. mail on Schaefer on March 31, 2017. (R. 428-450). Schaefer requested permission to file a discretionary appeal pursuant to SDCL 15-26A-3(6) on April 6, 2017, which the Court granted on May 12, 2017. (R. 453-54). This Court has appellate jurisdiction pursuant to SDCL 15-26A-3(6) and 10.

REQUEST FOR ORAL ARGUMENT

Kathy Schaefer respectfully requests the privilege of appearing before this Court for oral argument.

STATEMENT OF THE ISSUES

I. Did the circuit court err in granting summary judgment where the facts were disputed and by weighing the facts instead of viewing them in the light most favorable to the non-moving party as it purported to do?

The trial court granted summary judgment in favor of Defendants Flanders and Tollefson.

- SDCL 15-6-56(c)
- *Hamilton v. Sommers*, 2014 S.D. 76, 855 N.W.2d 855
- *Boman v. Johnson*, 83 S.D. 265, 158 N.W.2d 528 (1968)
- *Parkhurst v. Burkel*, 1996 S.D. 19, 544 N.W.2d 210

II. Did the circuit court err in not ruling on Plaintiff's motion to supplement the record?

The trial court did not rule on Plaintiff's motion to supplement the record.

- SDCL 15-26A-10
- *Reed v. Heath*, 383 N.W.2d 873, 874 (S.D. 1986)

STATEMENT OF THE CASE

This is a civil action initiated by Kathy Schaefer on January 19, 2015 in Minnehaha County of the Second Judicial Circuit against Sioux Spine and Sport, Prof. L.L.C. (R. 1-5). Schaefer alleged that Defendant Sioux Spine and Sport, Prof. L.L.C. and its sole owner Dr. Wade T. Scheurenbrand, M.D. committed medical malpractice. (R. 2-5). After conducting some initial discovery, Schaefer amended her complaint to add Nathan J. Flanders as a party alleging that his negligence caused injuries to her. (R. 19-23). Flanders thereafter filed an answer and cross-claimed against Sioux Spine and Sport, Prof. LLC. (R. 42-45). Flanders also filed a third party complaint against Herbert Tollefson for negligence. (R. 51-53).

On December 12, 2016, Flanders filed a motion for summary judgment seeking judgment in his favor and arguing that two releases signed by Schaefer precluded her claim against him. (R. 74). Tollefson joined the motion for summary judgment. (R.199). A hearing was held before the Hon. John R. Pekas, Circuit Judge, in Sioux Falls on January 23, 2017. (HT 1). On March 17, 2017, the trial court issued its memorandum decision granting Flanders and Tollefson's motions for summary judgment and holding that the releases were "valid and controlling" and that they were "not the product of undue influence" or the result of a mutual mistake. (R. 411). On March 28, 2017, the trial court signed its summary judgment and filed it that same day. (R. 424-25).

Schaefer timely petitioned this Court for an order allowing an intermediate appeal. On May 12, 2017, this Court granted Schaefer's petition and allowed this appeal to proceed. (R. 453-54).

STATEMENT OF THE FACTS

Kathy Schaefer was 55 years old on June 9, 2013, when she was a passenger in her boyfriend Herbert Tollefson's vehicle and it was rear-ended by Nathan Flanders's vehicle. (R. 133, 330-32). Schaefer has a tenth grade education and does not have any understanding of insurance or the claims process. (R. 244; 297). Just a few months before the collision, Schaefer applied for social security disability benefits and a memory and IQ test were completed as part of that process.[1] (R. 316). Her memory scores were noted to be in the "'below extremely low' range." (R. 316). She was further noted for "poor judgment insight." (R. 316). The report went on to note,

> IQ testings show the [claimant's] VIQ was 70; PIQ 79 and FSIQ 68. [Claimant] noted for poor judgement insight. Impulsivity problems. The [Claimant's] hair was noted to be dirty and bangs fell over her face. Difficulty with following instructions. Questions needed to be explained at times. Mood was mildly depressed and anxious. She was able to concentrate and attend at a normal level. Cognitively, the

[1] In granting disability benefits, the Social Security Administration looks at developmental disability in addition to physical limitations. *See Joyce v. Comm'r of Soc. Sec.*, 2016 WL 7048692, at *3 (6th Cir. Dec. 5, 2016) ("In particular, Joyce claims he satisfies listing 12.05C, which covers "intellectual disability," formerly referred to as "mental retardation." 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05C. The listing includes three requirements: (1) 'significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested" before age 22; (2) a valid IQ score between 60 and 70; and (3) a physical or mental impairment "imposing an additional and significant work-related limitation of function.' *Id.*").

> provider notes the [Claimant] is not functioning very well. Memory is not good. The [Claimant] is noted to rely on her boyfriend for daily functioning tasks. She appeared to be very dependent in nature.

(R. 316).

On February 5, 2013, Dr. Doug Soule evaluated Schaefer and provided findings in her disability case. (R. 317-329). Dr. Soule stated that she met the criteria for 20 C.F.R. 12.02(A)(2), which states "[d]emonstration of a loss of specific cognitive abilities or affective changes and the medically documented persistence of at least one of the following:…2. Memory impairment, either short-term (inability to learn new information), intermediate, or long-term (inability to remember information that was known sometime in the past)." (R. 317); 20 C.F.R. 12.02(A)(2). Dr. Soule further stated that the categories upon which the medical disposition was based are "Organic Mental Disorders, Mental Retardation, Anxiety-Related Disorders, Personality Disorders, and Substance Addiction Disorders." (R. 317). Dr. Soule determined that Schaefer's intellectual disability was demonstrated by a FSIQ score of 68. (R. 321). The Department of Social Services granted Schaefer's request for disability benefits, which she mistakenly believes are solely attributable to her alcoholic cirrhosis and a surgery on her wrist. (R. 158, 243, 329). Schaefer was receiving these disability benefits on the day of the collision. (R. 243).

The Collision

On June 9, 2013, Schaefer was a passenger in the front seat of a vehicle driven by Tollefson. (R. 330-31). Schaefer and Tollefson were looking for a new apartment at the time. (R. 249). Tollefson was waiting to turn left onto 85th Street in Sioux Falls

when he was rear-ended by a vehicle driven by Nathan J. Flanders. (R. 330-31). Tollefson was attempting to make a left turn from a through traffic lane when there was a left turn lane available. (R. 330-31). Flanders stated he was attempting to accelerate and looked down at his speedometer and when he looked up saw that Tollefson's vehicle was stopped. (R. 331). He collided with Tollefson's vehicle. (R. 331). Law enforcement cited Tollefson for unsafe lane usage and cited Flanders for careless driving. (R. 330-31). Flanders ultimately pleaded guilty to following too closely. *See State v. Nathan Flanders* Civ 13-392 (Lincoln County).

Schaefer's Injuries

At the scene of the crash, Schaefer reported injuries to her neck and back to law enforcement. (R. 330-31). An ambulance transported her to Avera McKennan Hospital. (R. 332). At Avera, Schaefer complained of "neck pain [and] a mild amount of rib pain." (R. 133). She denied "headache, midsternal chest pain, nausea, vomiting, fever, chills, abdominal pain, back pain or extremity pains." (R. 133). While at Avera, the treating physician ordered a chest x-ray, which was noted as "clear." (R. 134, 137, 158). The doctors diagnosed Schaefer with "acute cervical sprain" and a "mild chest wall contusion" and sent her home with some pain medications. (R. 134). Schaefer's understanding was that the medical professionals did not find any evidence of injury on her chest x-ray. (R. 251). Schaefer did not continue to experience any chest pain and did not complain of chest pain when she met with the insurance adjuster two weeks after the accident. (R. 114, 119, 256, 288, 299).

Chiropractor Visit

On July 10, 2013, Schaefer visited Dr. Wade T. Scheurenbrand at Sioux Spine and Sport in Sioux Falls for treatment for the neck pain she had been experiencing from the collision. (R. 158; 263). While Dr. Scheurenbrand was performing a manipulation on Schaefer, she felt severe sharp pain in her right shoulder and neck. (R. 158, 260-63). The pain continued after she left Dr. Scheurenbrand's office. (R. 158). On July 18, 2013, she went back to the emergency room due to the continuous pain since her July 10 chiropractic visit. (R. 158). Schaefer reported that the pain radiated up to her neck area as well as down her arm into the chest wall. (R. 158). Doctors in the emergency room took a CT of Schaefer's neck and chest. (R. 159). The chest CT showed a nondisplaced sternal fracture and body fracture with associated hematoma. (R. 159-60). Schaefer was admitted to the hospital. (R. 160).

While in the hospital, Schaefer developed a staph infection and an abscess. (R. 333). She underwent sedation for irrigation and debridement of the wound several times. (R. 336-45). One doctor described her "multiple medical and infectious disease disorders" as requiring a "high level of medical decision making." (R. 357-60). Furthermore, this infection significantly increased her risk of death and other possible complications. (R. 357-60). Schaefer's medical bills for the broken sternum and resulting infection totaled over $400,000. (HT at 22).

The Release

Two days after the collision, Dustin Parris, claims adjuster for Farmers Insurance Group[2] spoke to Schaefer. (R. 186-87). Parris noted that Schaefer suffered from neck and back pain as well as "Chest pain from seatbelt." (R. 186). On June 25, 2013, a mere sixteen days after the collision, Parris met with Schaefer and discussed her claim. (R. 183). According to Parris, Schaefer stated that she was "still having pain in the neck and upper traps on both sides." (R. 183). Parris did not note her describing any chest pain. (R. 183). He discussed a potential settlement of the claim with Schaefer and solicited a demand from her. (R. 184). She responded that she had "no prior claims knowledge." (R. 184). Parris then offered Schaefer $500 for her generals and future medications and made an allowance of $3,000 for her initial treatment. (R. 184).

Schaefer dutifully signed the release without ever speaking to an attorney. (R. 257). At that time, Schaefer had a copy of her medical bills[3] showing that the cost of her ER visit alone was higher than the $3,000 Parris offered. (R. 182-84). The document presented to Schaefer purported to release not only Farmers Insurance's client and Farmers Insurance, but also Herb Tollefson and his insurance company

---

[2] At times, this entity is referred to as "Mid Century Insurance Company" which is apparently an affiliate or subdivision of Farmers Insurance Group. For ease of reference, Schaefer will refer to Flanders's insurance as "Farmer's Insurance" which is meant to encompass Mid Century Insurance Company and all other entities under the Farmers Insurance Group.

[3] Parris notes in his claims file that Schaefer had a copy of the bills but had not reviewed the bills, but had sent the bills to American Family Insurance. (R. 183).

American Family Insurance. (R. 189-90). That same day, Parris sent Schaefer a letter stating that he would be "in contact" with her "periodically to see how" she was "progressing." (R. 188).

After obtaining the signed release, Parris received the emergency room bill and made the following note "Recvd the ER bill which totals $5046.18, this is well over the est amount and allowance in the release. The clmnt never advised that she had a CT scan only X-rays. Additionally she had a copy of the bill and never advisd that it was above the $3000 allowed for medicals." (R. 182). Thereafter, Parris had a round table with his field claims supervisor. (R. 180-81; 294). Parris noted that he would be contacting Schaefer again and have her sign a new release allowing for up to $8,000 in previous medical bills to be paid. (R. 181). On June 28, 2013, Parris called Schaefer to discuss signing the new release. (R. 181). Schaefer agreed to meet on July 1, 2013 and sign a new release, which she did nineteen days before her sternal facture was discovered. (R. 181; 191).

Summary Judgment

Parris and Tollefson filed for summary judgment asserting that the releases were valid. (R. 74-99; 199). Schaefer responded and argued that the releases were the result of undue influence and a mutual mistake between her and Parris. (R. 204-231). As such, Schaefer submitted that the releases did not apply to her sternum fracture, which was an unknown and uncontemplated injury. (R. 204-231). On January 19, 2017, four days before the summary judgment hearing, Flanders filed a motion to strike Schaefer's SSDI records arguing that such records lacked foundation and were

hearsay. (R. 365-66). In response, Schaefer filed a motion to supplement the record and asked the Court to allow Schaefer time to obtain an affidavit to serve as foundation for the records. (R. 388-92).

After a hearing, the trial court issued summary judgment in favor of Flanders and Tollefson and did not rule on the motion to strike or motion to supplement. (R. 398-412). In granting summary judgment, the trial court found that the releases were not the product of undue influence and that mutual mistake was not applicable to void the releases because the releases covered unknown injuries and Schaefer's fractured sternum was an unknown consequence of a known injury. (R. 405-10).

STANDARD OF REVIEW

Summary judgment is examined *de novo*. *Highmark Fed. Credit Union v. Hunter*, 2012 S.D. 37, ¶ 7, 814 N.W.2d 413, 415 (quoting *Adrian v. Vonk,* 2011 S.D. 84, ¶ 8, 807 N.W.2d 119, 122). This Court gives no deference to the trial court's rulings on a summary judgment motion. *Id.* This Court "affirms a grant of summary judgment only if 'there are no genuine issues of material fact and the legal questions have been correctly decided.'" *Morris Family, LLC ex rel. Morris v. S. Dakota Dep't of Transp.*, 2014 S.D. 97, ¶ 11, 857 N.W.2d 865, 869 (quoting *Quinn v. Farmers Ins. Exch.*, 2014 S.D. 14, ¶ 13, 844 N.W.2d 619, 623).

ARGUMENT

The trial court erred in granting summary judgment on the issues of undue influence and mutual mistake. Viewing the evidence in the light most favorable to the non-moving party, there was ample evidence for a jury to determine that the releases were the result of mutual mistake or the result of undue influence.

I. GENUINE ISSUES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT ON SCHAEFER'S UNDUE INFLUENCE CLAIM.

The trial court should not have granted summary judgment on Schaefer's undue influence claim because there were genuine issues of disputed material fact. An apparent consent to a contract is not real or free and is voidable when obtained through fraud or undue influence. *See Delany v. Delany*, 402 N.W.2d 701, 705 (S.D. 1987) (citing SDCL 53-4-1). South Dakota law recognizes three types of undue influence, any of which, if proven, allow for rescission of the contract:

> (1) In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; or
>
> (2) In taking an unfair advantage of another's weakness of mind; or
>
> (3) In taking a grossly oppressive and unfair advantage of another's necessities or distress.

SDCL 53-4-7. Subsection (2) applies in this case. This Court has found that four elements of undue influence are required to be proven by the greater weight of the evidence:

> (1) susceptibility to undue influence;

(2) opportunity to exert such influence and effect the wrongful purpose;

(3) a disposition to do so for an improper purpose; and

(4) a result clearly showing the effects of undue influence.

In re Estate of Smid, 2008 S.D. 82, ¶ 33, 756 N.W.2d 1, 12 (quoting *In re Estate of Schnell,* 2004 SD 80, ¶ 21, 683 N.W.2d 415, 421 (additional citations omitted)). Importantly, "[u]ndue influence is a question of fact." *In re Donald Hyde Trust*, 2014 S.D. 99, ¶ 37, 858 N.W.2d 333, 345 (citations omitted).

This Court has never held that undue influence only applies where there is a confidential relationship; rather, the Court applies a burden shifting analysis when a confidential relationship exists. *See Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 31, 790 N.W.2d 52, 63 ("A presumption of undue influence arises 'when there is a confidential relationship between the testator and a beneficiary who actively participates in preparation and execution of the will and unduly profits therefrom'") (quoting *In re Estate of Pringle,* 2008 S.D. 38, ¶ 39, 751 N.W.2d 277, 289). Schaefer never alleged a confidential relationship existed between her and Parris, but instead alleged that she proffered facts to meet all four elements of undue influence.

Here, genuine issues of material fact existed as to all of these factors. Properly viewed in the light most favorable to Schaefer as the non-moving party, a reasonable jury could have found that the releases were the result of undue influence. Thus, summary judgment should not have been granted.

A. The material facts regarding whether Schaefer was susceptible to undue influence are disputed.

Under South Dakota law, physical and mental strength are a consideration in the determination of whether a person is susceptible to undue influence. *Matter of Estate of Unke*, 1998 S.D. 94, ¶ 21, 583 N.W.2d 145, 149. Moreover, "[s]usceptibility to undue influence may be established through such evidence of a party's limited education and business experience." *Neugebauer v. Neugebauer*, 2011 S.D. 64, ¶ 18, 804 N.W.2d 450, 455.

There are several disputed material facts whether Schaefer was susceptible to undue influence. Here, Schaefer asserted at the trial court level that she was susceptible to undue influence due to her low IQ. (R. 218-20). Schaefer presented evidence to the trial court demonstrating that less than four months before she signed the release, a doctor stated that Schaefer demonstrated that her memory scores were "'below extremely low' range." (R. 316). Schaefer provided information that she had "poor judgment insight" and "impulsivity problems." (R. 316). Additionally, that her "[m]emory is not good" and that she was "not functioning very well." (R. 316). Furthermore, Schaefer presented the trial court with information that Dr. Soule determined that Schaefer had a FSIQ score of 68 indicating an intellectual disability. (R. 321).

Schaefer also presented evidence that she had a copy of the hospital bill when she settled her claim for less than that bill. (R. 182); (HT at 28). In addition, Parris admitted that it would be wrong to have a person with cognitive deficits sign a

release. (R. 298). Furthermore, Schaefer provided the trial court with her testimony showing that she did not know what she was signing in those releases:

> MS. CARPENTER: Kathy, can you tell me, in your own words, what you understand those releases to mean?
>
> MS. SCHAEFER: No.
>
> MS. CARPENTER: Okay. At the time you signed them did you know what they meant?
>
> MS. SCHAEFER: Because I do remember when they were there at my apartment, they just told me to sign and I signed.
>
> MS. CARPENTER: And you knew you were going to settle your claims against Nate Flanders; right?
>
> MS. SCHAEFER: I guess so. And the only one that I can think of that would have any of these papers is not me. Herb would have them all.

(R. 364). Despite all of this evidence, the trial court made factual determinations on summary judgment that Parris "was not aware of any purported susceptibility" and had not "exploited any purported susceptibility." (R. 410). But nowhere in the elements of undue influence does the party asserting undue influence have to demonstrate knowledge on behalf of the person influencing another. Viewing the facts in the light most favorable to Schaefer, which the trial court did not do, a jury could, and likely would, have determined that her inability to remember and low IQ made her susceptible to undue influence. *See Spruiell v. Robinson*, 582 So. 2d 508, 510 (Ala. 1991) (upholding the trial court's finding of undue influence when a party had an IQ of 67).

B. Parris had an opportunity to exert undue influence over Schaefer.

Opportunity to exert undue influence does not require that the person be in any special position other than being able to carry out the undue influence. *See Matter of Zech's Estate*, 285 N.W.2d 236, 240 (S.D. 1979); *Delany*, 402 N.W.2d at 705. Here, Schaefer presented undisputed evidence that Parris met with her on a couple of occasions and ultimately obtained a signed release from her. (R. 180-92). Thus, Schaefer presented facts that if taken in the light most favorable to her a jury could find that Farmer's Insurance had the opportunity to exert undue influence and that she met the second prong of the undue influence test.

C. There are disputed material facts as to whether Parris had a disposition to exert undue influence.

The parties dispute whether Parris had a disposition to exert undue influence. This Court has found that persistent efforts to gain control and possession of a testator's property is evidence of a disposition to influence for an improper purpose. *See In re Metz Estate*, 100 N.W.2d 393, 398 (S.D. 1960). Here, there is evidence that Parris was persistent in his attempts to secure a signed release from Schaefer. Schaefer presented facts demonstrating that Parris contacted Schaefer shortly after the collision and sought a quick settlement of these claims. (R. 183-86). Schaefer further presented evidence that Parris convinced her to sign the release before he even had copies of the initial medical bills. (R. 181). Parris provided a letter to Schaefer at their first meeting stating that he would be in contact with her periodically

to see how she was progressing, when, in fact, Parris admitted that this statement was false. (R. 296-97).

Schaefer further presented evidence that she told Parris that she had no understanding of insurance of the claims process when he solicited her for a "demand," a concept that Schaefer did not understand. (R. 184-85). There was also evidence that Parris did not inform her to contact an attorney and that Schaefer never sought the consultation of an attorney. *Neugebauer*, 2011 S.D. 64, ¶ 22, 804 N.W.2d at 455–56 ("neither Lincoln nor his attorney advised Pearl to seek legal representation. '[T]he presence of independent legal advice [is] an important factor to be considered in determining whether undue influence exists.'") (quoting *Kase v. French,* 325 N.W.2d 678, 681 (S.D.1982)); (R. 257). The trial court viewed the fact that Parris "unilaterally took action to execute a second Release upon receiving the emergency room bill weighs strongly against a finding of undue influence." (R. 410). More likely, a jury would view that action as evidence of a guilty conscience by an insurance adjuster who knew he was taking advantage of a person with mental impairments and was seeking to cover his tracks. In any event, the trial court improperly weighed this fact against all of the facts presented by Schaefer to grant summary judgment. Summary judgment is not the stage at which disputed facts are weighed and resolved. As this Court has made clear, weighing the evidence to come to a conclusion and grant of summary judgment is reversible error:

> The circuit court then went on to weigh evidence and resolve disputed evidence to conclude that Hamilton participated in the alleged conspiracy and, therefore, would not have prevailed in the Underlying

> Lawsuit. The judge's function at the summary judgment stage, however, is not to weigh the evidence and determine the matters' truth. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). But, it appears that is what the court did here. Weighing the evidence to derive its conclusion that Hamilton would not have prevailed in the Underlying Lawsuit was reversible error.

Hamilton v. Sommers, 2014 S.D. 76, ¶ 42, 855 N.W.2d 855, 868. The trial court's summary judgment determination should be reversed because there are disputed material facts. The trial court improperly weighed and adjudicated the facts on this issue amounting to reversible error.

D. Schaefer presented the trial court with facts demonstrating a result clearly showing the effects of undue influence.

Flanders and Tollefson dispute that the result of the settlement clearly showed the effects of undue influence. The parties disagree whether there was any negotiation that took place regarding the settlement. (HT at 13, 20) (R. 184). Flanders alleged that there was "back and forth" negotiating between Schaefer and Parris, a fact that Schaefer strongly denied. (HT at 5, 13, 20) (R. 184). The initial settlement document provided that in exchange for Schaefer's waiver of her claims against not only Flanders but Tollefson as well, Farmers Insurance would pay her already-incurred medical bills up to $3,000 and give her $500 for future medical bills and general damages. (R. 184). At the time Schaefer purportedly agreed to that offer, Tollefson had medical payments coverage up to $5,000, which would have covered the $3,000 in this initial settlement and any other medical bills incurred after the settlement up to a total of $5,000. (R. 182, 361).

After receiving her medical bills, Parris had Schaefer sign another release[4] allowing up to $8,000 in already-incurred medical bills to be paid. (R. 191-92). This amount only covered another $3,000 for her past medical bills over the $5,000 that Tollefson's medical payments insurance would have already covered. (R. 361). Based upon the facts presented, a reasonable jury could have found under these facts that the result clearly showed undue influence. *See Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 13, 817 N.W.2d 395, 400 ("[a] disputed fact is ... material [if] it would affect the outcome of the suit under the governing substantive law in that a reasonable jury could return a verdict for the nonmoving party") (quoting *Robinson v. Ewalt,* 2012 S.D. 1, ¶ 10, 808 N.W.2d 123, 126). Had the trial court viewed these facts in the light most favorable to Schaefer, a jury could have found that the essentially $500 she received for her future medical bills and pain and suffering showed the effects of undue influence. Furthermore, the fact that Schaefer not only released Flanders but also unilaterally released Tollefson for less than Tollefson's medical payments coverage was evidence clearly showing the effects of undue influence.

Thus, Schaefer submits that the trial court erred when it weighed the evidence and granted summary judgment in Flanders and Tollefson's favor on the issue of undue influence. Schaefer respectfully asks that this Court reverse and remand this

[4] The second release appears to fail for want of consideration because Schaefer had already purportedly released her rights with regard to the collision and therefore, offered nothing in exchange for the additional $5,000 in medical payments. *See* SDCL 53-6-5. This rationale is in addition to the other reasons that this release is void as discussed herein.

case and allow a jury to decide whether the releases were the result of undue influence and therefore, voidable.

II. GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO WHETHER THE STERNAL FRACTURE WAS A KNOWN INJURY AT THE TIME THAT SCHAEFER SIGNED THE RELEASE.

Schaefer also disputes Flanders and Tollefson's assertion that the injury was known and contemplated as part of the releases at the time that they were signed and therefore contends that the releases are the product of a mutual mistake. South Dakota law allows a party to void a general release for a mutual mistake. *See Parkhurst v. Burkel*, 1996 S.D. 19, ¶ 15, 544 N.W.2d 210, 213. Here, the trial court misapplied this Court's holdings in *Parkhurst,* 1996 S.D. 19, 544 N.W.2d 210 and *Boman v. Johnson,* 158 N.W.2d 528 (S.D. 1968) when it essentially held that pain, no matter how minor, demonstrated a known injury.

While in *Parkhurst* this Court found that the plaintiff's injury was known at the time of the release, this Court remained consistent in its opinion that a release may be voided if an injury is unknown at the time the release is signed. *See id.* A plaintiff can avoid a release by showing "clear and convincing proof that a substantial injury, *which was not discovered until after the settlement,* had in fact been sustained in the accident and existed at the time of the settlement. That unknown and unexpected consequences resulted from known injuries is not sufficient.'" *Id.* (emphasis in original). Here, the trial court's de facto holding was that pain, no matter how slight, in the general area where an injury is later discovered creates a known injury. Under that logic, if a

person has aches or pains in any general area after a collision but does not continue to suffer pain, they are imputed to have a known any injury to any general area where those aches and pains were. Schaefer submits that such a rationale is not consistent with this Court's holdings in *Boman* and *Parkhurst*.

Neither *Boman* nor *Parkhurst* held that mere pain in an area creates a known injury. The facts of *Parkhurst* are distinguishable and the facts of this case are much closer to those in *Boman*. In *Parkhurst*, it was clear that the plaintiff had discovered her injury prior to her signing the March 1993 release. Continuously for the time before she signed the release, Parkhurst had been having pain in her right hip. *Id.* at ¶ 10. "[I]n October or November of 1992, some three to four months after the accident and five to six months before she executed the release, she was having severe pain in her right hip and her 'leg locks up.'" *Id.* After being in pain in her hip for months, she released the defendant driver eight months after the collision in exchange for $1,000. *Parkhurst*, 1996 S.D. 19, at ¶ 2, 544 N.W.2d at 211. A separate agreement also allowed for payment of Parkhurst's medical and vehicle expenses. *Id.*

This Court cited the Nebraska Supreme Court's rationale with approval that an injury was known where the "plaintiff's condition remained unchanged from the date of the accident and since the date of the release, and the only difference pre- and post-release was that the plaintiff found a physician who diagnosed her symptoms." *Id.* at ¶ 18, 544 N.W.2d at 214 (citing *Morton v. Farmers Co–Op. Business Ass'n*, 510 N.W.2d 326 (Neb. 1993)) (internal citations omitted). Clearly, Parkhurst was aware of her continuous ongoing pain throughout the time leading up to her signing the

release. In contrast, Schaefer's condition was asymptomatic after the date of the collision when she had a "mild amount of rib pain" until the date of the release. (R. 133, 299). Immediately after the collision, Schaefer denied "headache, midsternal chest pain, nausea, vomiting, fever, chills, abdominal pain, back pain or extremity pains." (R. 133). An x-ray was performed and it was noted as "clear." (R. 134, 137). On June 9, 2013, the doctors diagnosed Schaefer with "acute cervical sprain" and a "mild chest wall contusion" and sent her home with some pain medications. (R. 134). Thereafter, Schaefer did not suffer any pain in her chest area until Dr. Scheurenbrand performed a manipulation during the chiropractic visit. (R. 114, 119-20, 256, 288).

Only after the releases were signed did she experience new pain in her sternum. (R. 158). Additionally, unlike in *Parkhurst*, where there was only a unilateral mistake, both Schaefer and Parris were under the mistaken impression that the only injury to her chest was a bruise and that otherwise Schaefer was only minimally injured. (R. 256, 288, 300). The records indicate that Schaefer complained to the emergency room staff of a "mild amount of rib pain." (R. 133). At the ER she denied "midsternal chest pain." (R. 133). The injury that Schaefer asserts was an unknown injury is a "sternal fracture." (R. 160).

Schaefer relayed that she only had a little bit of pain because the seat belt that was tight but indicated that her neck injury was the only injury she had at that time. (R. 250, 256). Tollefson also recalled that Schaefer did not complain about chest pain

at the emergency room but instead recalled her complaining of back and neck pain. (R. 120). A bruise and a fractured sternum are two different injuries.

The origin of Schaefer's pain when she was taken to the ER as either a bruise or a sternum fracture is a disputed fact question, which the jury should be allowed to resolve. While the trial court specifically stated that it was "viewing the evidence in the light most favorable to Schaefer," it did not do so. (R. 405, 407). Had the trial court viewed the conflicting facts in the light most favorable to Schaefer, it would have found that a jury could determine that Schaefer had a separate, unknown, sternum fracture as opposed to a known mild contusion from the seat belt. That determination is a jury question requiring denial of the summary judgment motions.

At the time the releases were signed, both Schaefer and Parris were under the mistaken belief that she suffered a chest bruise as opposed to a sternum fracture. Schaefer did not tell Parris on the day he came to have the release signed about any chest pain. (R. 183, 288). In fact, Parris admitted that his settlement calculation only include amounts for chiropractor visits. (R. 305-06). Based upon the record, the trial court erred in granting summary judgment because Schaefer submitted facts demonstrating a mutual mistake by Schaefer and Parris on behalf of Farmers Insurance and neither Schaefer nor Parris contemplated the sternum fracture at the time of the release. *See Parkhurst*, 1996 S.D. 19, ¶ 17, 544 N.W.2d at 214 ("This Court has long held that, under certain circumstances, a general release may be voided on grounds of mutual mistake. The mutuality, however, must be between opposing parties") (citations omitted).

III. THE TRIAL COURT ERRED IN HOLDING THAT THE STERNAL FRACTURE WAS CONTEMPLATED BY SCHAEFER AND PARRIS IN ENTERING INTO THE SETTLEMENT AGREEMENT.

The parties disputed whether Parris and Schaefer contemplated such injury when the releases were signed. Schaefer presented testimony from Parris that at the time he entered into the release with her, Schaefer and Parris believed her injuries were very minimal:

> MR. JANKLOW: Being out and meeting with someone who is involved in a pretty – in an accident, is it pretty routine that Farmers is having people sign releases within two weeks of an accident?
>
> MR. PARRIS: It happens, yes.
>
> MR. JANKLOW: And usually if that's' happening and you're having them sign a release that fast, it's usually regarding a situation where both the person who is injured as well as, from your perspective, that person is very minimally injured. Is that fair?
>
> MR. PARRIS: That is correct.
>
> MR. JANKLOW: And that neither you or them are contemplating any serious medical injury nor any serious medical treatment coming up from it. Is that fair?
>
> MR. PARRIS: That's fair.

(R. 298-99). Parris also indicated that Schaefer was no longer complaining about injuries with her chest when Parris and Schaefer met two weeks later on June 25, 2013. (R. 299). Based upon the record that the parties believed the injury to be minimal, the undisputed evidence is that Schaefer and Parris did not contemplate a sternum fracture at the time of the release.

This Court indicated that an unconscionably low settlement agreement made near the time of a collision could be evidence that the parties did not contemplate a later-discovered injury. *See Parkhurst*, 1996 S.D. 19, ¶ 16, 544 N.W.2d at 213-14 ("the plaintiff exchanged her release for an unconscionably low amount nearly contemporaneous to the auto accident … This Court affirmed judgment for the plaintiff, relying on the premise that compensation for the release was so minimal a question of fact arose as to whether unknown injuries existed which were not within the parties' contemplation when they entered into the settlement"). In *Boman*, the collision was on August 20, 1962 and the release was signed seventeen days later on or about September 5, 1962. 158 N.W.2d at 529. Here, the collision was on June 9, 2013 and Schaefer executed the first release seventeen days later on June 25, 2013. (R. 189-90). Further, in *Boman*, the plaintiff settled her claim for $200, when the jury later awarded $3,650, over eighteen times the amount in the settlement. *Boman*, 158 N.W.2d at 529.

Schaefer received $500 for her general damages and future medications and had up to $8,000 in past medical bills paid as a result of the releases. (R. 189-92). If allowed to proceed to trial, Schaefer will seek a judgment more than $400,000 for her medical bills alone, as well as additional amounts for pain and suffering related to the chest injury. (HT at 22). For example, if a jury compensated Schaefer for her medical bills and pain and suffering with a very conservative award of $500,000, this would be over 58 times what she received as a result of this settlement. Without question, Schaefer received an unconscionably low settlement, which is evidence that neither

Parris nor Schaefer contemplated the fractured sternum at the time of the settlement. *Boman*, 158 N.W.2d at 530 ("even though a release expressly covers unknown injuries, it is not a bar to an action for such unknown injuries if it can be shown that such unknown injuries were not within the contemplation of the parties when the settlement was agreed upon, but that, if the parties did in fact intentionally agree upon a settlement for unknown injuries, such release will be binding"). Because there are disputed issues of fact on whether the parties contemplated the sternum fracture at the time of the releases, the trial court erred in granting summary judgment.

IV. THE TRIAL COURT ERRED IN DETERMINING THAT THE RELEASE EXPRESSLY WAIVED UNKNOWN INJURIES.

The parties also disputed whether the release covered unknown injuries. "Whether the parties intended the release to cover unknown injuries is usually a question of fact.'" *Boman*, 158 N.W.2d at 530. Schaefer presented the trial court with disputed material facts that if viewed in the light most favorable to her precluded summary judgment on the issue of whether the general release contemplated unknown injuries.

The trial court found from the language of the release that it contemplated unknown injuries. The releases do not specifically state that it releases Flanders and Tollefson from "unknown" injures. (R. 189-192). The releases, instead, are in the nature of a general release, which South Dakota law specifically states does not release unknown injuries. *See* SDCL 20-7-11 ("A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of

executing the release, which if known by him must have materially affected his settlement with the debtor"). Thus, the trial court erred as a matter of law when it held, that the general releases were effective against unknown injuries. (R. 407).

Based upon these facts and the law, Schaefer respectfully asks that this Court reverse the trial court's summary judgment decision and remand this case for trial to allow a jury to resolve the multiple questions of fact. Alternatively, if this Court determines that the releases are general releases, then as a matter of law, the releases do not release unknown injuries. SDCL 20-7-11.

V. THE TRIAL COURT'S FAILURE TO RULE ON SCHAEFER'S MOTION TO SUPPLEMENT THE RECORD WAS IN ERROR.

Before the summary judgment hearing, in addition to opposing Flanders's motion to strike, Schaefer moved to supplement the record with additional foundation for the Social Security records introduced as part of Schaefer's opposition to the motion for summary judgment. The trial court never ruled on this motion, simply ignoring it along with the motion to strike.

Schaefer submitted an affidavit in support of this motion showing that the Social Security records had been obtained from Flanders's counsel. (R. 391-92). This affidavit further asserted that Schaefer was in the process of attempting to contact Dr. Soule whose records were in the report and that Schaefer was required to follow federal rules with regard to obtaining testimony or an affidavit from Dr. Soule. (R. 391-92). Schaefer moved to supplement the record with additional foundation and

asked the trial court if it was appropriate to hold any such foundation until such time that the trial court made its decision. (HT at 32-33).

The trial court indicated that Schaefer should hold onto such information until such time as the trial court ruled on such motion. (HT at 33). Ultimately, the trial court did not rule on Schaefer's motion to supplement the record, however, such a decision not to rule on this motion is reviewable by this Court. *See* SDCL 15-26A-10 ("When the appeal is from any order subject to appeal, the Supreme Court may review all matters appearing on the record relevant to the question of whether the order appealed from is erroneous"); *Reed v. Heath*, 383 N.W.2d 873, 874 (S.D. 1986) ("This court may review all matters appearing on the record relevant to whether the order appealed from is erroneous"). Thus, Schaefer respectfully asks that this Court grant her the opportunity to supplement the record if necessary.

CONCLUSION

For all the reasons stated herein, Schaefer respectfully requests that this Honorable Court reverse the trial court's grant of Flanders and Tollefson's motions for summary judgment. There are disputed questions of material fact on Schaefer's argument that the releases are voidable as the product of undue influence. Furthermore, genuine issues of material fact exist as to whether the releases are unenforceable with respect to the sternal fracture because both parties did not contemplate the unknown injury of a sternal fracture. Based upon these facts and law, Schaefer respectfully requests that this Court reverse and remand for further proceedings and allow a jury to decide whether the releases are void or voidable.

Dated this 13th day of July, 2017.

JOHNSON, JANKLOW, ABDALLAH, REITER & PARSONS L.L.P.

BY: */s/ Sara E. Show*
A. Russell Janklow
Ronald A. Parsons, Jr.
Sara E. Show
P.O. Box 2348
Sioux Falls, SD 57101-2348
(605) 338-4304

Attorneys for Kathy Schaefer, Plaintiff and Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via electronic mail upon the following:

Mr. Edwin E. Evans
Ms. Melinda Folkens
Evans, Haigh & Hinton, LLP
101 N. Main Avenue, Suite 213
P.O. Box 2790
Sioux Falls, SD 57101-2790
Email: eevans@ehhlawyers.com

Attorneys for Defendant Sioux Spine and Sport, Prof. L.L.C.

Ms. Melanie L. Carpenter
Woods, Fuller, Shultz & Smith, P.C.
300 South Phillips Avenue, Suite 300
P.O. Box 5027
Sioux Falls, SD 57117-5027
Email:
melanie.carpenter@woodsfuller.com

Attorneys for Defendant and Appellee Nathan Flanders

American Family Insurance Legal Department
Ms. Heidi Thoennes
4200 Corporate Drive, #120
West Des Moines, IA 50266
Email: hthoenne@amfam.com

Attorney for Defendant and Appellee Herbert Tollefson

on this 13th day of July, 2017.

/s/ Sara E. Show
Sara E. Show

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 6510 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Sara E. Show
Sara E. Show

APPENDIX

Memorandum Decision and Order Granting Defendant's Motion for Summary Judgment ..... App. 1

Summary Judgment in Favor of Defendants Flanders and Tollefson ..... App. 16

Flanders and Tollefson's Statements of Undisputed Material Facts ..... App. 18

Plaintiff's Objection to Defendants' Statements of Undisputed Material Facts ..... App. 25

Plaintiff's Statement of Disputed Material Facts ..... App. 29

STATE OF SOUTH DAKOTA) SS COUNTY OF MINNEHAHA	)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

KATHY A. SCHAEFER, Plaintiff, vs. **SIOUX SPINE AND SPORT, PROF. L.L.C.,** Defendant, and **NATHAN J. FLANDERS**, Defendant/Third-Party Plaintiff vs. **HERBERT TOLLEFSON**, Third-Party Defendant	CIV. 15-204 **MEMORANDUM OPINION AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court upon the motion of Defendant Nathan Flanders ("Flanders") for summary judgment. The Court held a hearing on January 23, 2017. Plaintiff Kathy Schaefer ("Schaefer") appeared with her counsel Shannon Falon and Sara Show. Flanders was represented by his counsel Melanie Carpenter. Third-Party Defendant Herbert Tollefson ("Tollefson") was represented via phone by his counsel Heidi Thoennes. Defendant Sioux Spine and Sport Professional LLC ("Sioux Spine") was represented by their counsel Melinda Folkens.

After fully reviewing the parties' arguments, reading all of the written submissions and relevant authorities, and carefully considering the issues presented, the Court grants Defendants' motion for summary judgment.

FACTUAL BACKGROUND

On June 9, 2013 Schaefer was involved in a car collision in Sioux Falls, S.D. Schaefer was the passenger in a vehicle driven by Tollefson. Tollefson was traveling south on Minnesota Avenue and attempted to turn left onto eastbound 85th Street. Tollefson attempted the turn from the southbound lane rather than from the left hand turn lane at the intersection. As Tollefson attempted the left hand turn, he was hit from behind by a vehicle driven by Flanders. Both Tollefson and Flanders were cited by law enforcement. Tollefson pled guilty to unsafe lane usage and Flanders pled guilty to following too closely.

Schaefer reported neck and back pain at the scene. She was taken by ambulance to Avera McKennan. In the ambulance, she reported neck pain and mild chest pain, which she attributed to the seat belt. At the hospital Schaefer complained of neck pain and a mild amount of rib pain, but denied headache, midsternal chest pain, nausea, vomiting, fever, chills, abdominal pain, back pain, or extremity pains. Schaefer had a CT scan of her neck and a chest x-ray both of which came back clear. She was discharged with pain medications.

Flanders was insured by Mid-Century Insurance Company[1] and his claim was handled by Dustin Parris ("Parris"). Schaefer and Parris spoke on June 11, 2013. Parris explained the claims process and they discussed Schaefer's injuries. Schaefer reported neck, back, and chest

[1] The brief submitted by Flanders states he was insured by Mid-Century, but the brief submitted by Schaeffer states he was insured by Farmers Insurance. The Release at issue is under the heading of Farmers Insurance, yet states Mid-Century in the body of the Release.

pain along with whiplash. She indicated she was taking over the counter medications and did not plan on further treatment.

Parris met with Schaefer at her apartment on June 25, 2013. Again, they discussed the claims process and Schaefer's injuries. Schaefer reported pain in her neck and upper traps. She also indicated she was planning on treatment with Sioux Spine soon. Chest pain was not discussed at this time.

Parris solicited a demand from Schaefer, who indicated she had no prior claims knowledge. Parris estimated Schaefer's bills between $2,100 and $2,500 and offered a Release with a $3,000 ceiling on medical expenses and $500 for general damages. Schaefer agreed to this settlement without discussing it with an attorney and she signed the Release. The Release released not only Farmers Insurance and Flanders, but also American Family Insurance and Tollefson.

The following day Mid-Century received Schaefer's ER bill, which totaled $5,046.18. Parris noted that Schaefer had not advised she had a CT scan or that she had a copy of the bill at the time the first Release was executed. Parris consulted with his supervisor and determined Mid-Century should increase the amount of medical bills it would pay. On July 1, 2013 Parris again met with Schaefer and executed a new release. The second Release was identical to the first except the ceiling on medical bills was set at $8,000.

The language of the Release releases Flanders, Farmers Insurance, Tollefson, and American Family Insurance from:

> [A]ny and all claims, causes of action, actions, rights, demands, bodily injuries, personal injuries, damages including but not limited to any and all medical expenses wherever incurred and loss of wages and/or income, loss of consortium, loss of any services, other costs and expenses, and any other compensation of any kind, which the undersigned has incurred on account of or which are in any way

> related to an accident that occurred on or about June 9, 20913 at or near Sioux Falls, South Dakota.

Additionally, it provided that the released parties had no further obligation to pay for any other item or any other damage incurred after the release. Schaefer expressly acknowledged her injuries may be permanent and the extent of recovery may be uncertain.

Following the accident, Schaefer treated with Dr. Scheurenbrand of Sioux Spine on two separate occasions. She sought chiropractic treatment for her sore neck. The first visit was on July 8, 2013 and was uneventful. The second visit was on July 10, 2013 and Schaefer alleges that Dr. Scheurenbrand injured her on this visit. Subsequent to the visit, Schaefer alleged new pain in her shoulders, neck, and chest.

On July 18, 2013 Schaefer went to the hospital via ambulance. She reported she was injured when Dr. Scheurenbrand performed a chest compression. Schaefer was diagnosed with a fractured sternum and spent approximately a month in the hospital following surgery.

Schaefer brought suit against Sioux Spine on January 22, 2015. On February 19, 2016 Plaintiff amended her complaint to include Flanders. The claim against Sioux Spine is for professional negligence, and the claim against Flanders is for negligence. Flanders filed a third party complaint alleging Tollefson was the cause of or a contributing factor to the accident.

AUTHORITIES AND ANALYSIS

Releases Generally

"A release is a contract, and if a contract is unambiguous, we rely on the language of the contract to ascertain and give effect to the parties' intent." *Gores v. Miller*, 2016 S.D. 9, ¶ 8, 875 N.W.2d 34, 36 (citing *Fenske Media Corp. v. Banta Corp.*, 2004 S.D. 23, ¶ 8, 676 N.W.2d 390, 393). The law of contracts governs releases. *Johnson v. Rapid City Softball Ass'n*, 514 N.W.2d 693,

697 (S.D. 1994) (Citing *Erck v. Bachand*, 10 N.W.2d 518, 520 (S.D. 1943)). The South Dakota Supreme Court "has consistently indicated it favors the compromise and settlement of disputed claims outside of court." *Parkhurst v. Burkel*, 1996 S.D. 19, ¶ 12, 544 N.W.2d 210, 212 (citing *Flynn v. Lockhart*, 526 N.W.2d 743, 746 (S.D. 1995)). The terms of the release control if the language is unambiguous, despite subjective intent or failure to obtain full satisfaction. *Gores*, 2016 S.D. 9, ¶ 8, 875 N.W.2d at 36 (citing *Flynn*, 526 N.W.2d at 746). Contract interpretation is reviewed de novo. *Id.* (citing *Tri-City Assocs., L.P. v. Belmont, Inc.*, 2014 S.D. 23, ¶ 9, 845 N.W.2d 911, 915).

A valid release "'must be fairly and knowingly made.'" *Johnson*, 514 N.W.2d at 697 (citation omitted). "A release is not fairly made and is invalid if the nature of the instrument was misrepresented or there was other fraudulent or overreaching conduct." *Id.* (citation omitted). Releases are "subject to rescission under the same grounds as any other contract, including mistake of fact." *Parkhurst*, 1996 S.D. 19, ¶ 12, 544 N.W.2d at 212 (Citing *Nilsson v. Krueger*, 9 N.W.2d 783 (S.D. 1943)).

To determine the parties' intentions, a release should be read as a whole. *Fenske Media Corp.*, 2004 S.D. 23, ¶ 10, 676 N.W.2d at 393. Language releasing claims of any nature is unambiguous. *Gores*, 2016 S.D. 9, ¶ 10, 875 N.W.2d at 37. Additionally, it is the terms of a release that control, not a party's belief about the release. *Flynn*, 526 N.W.2d at 746.

(1) Mistake

"[A] general release may be voided on grounds of mutual mistake." *Parkhurst*, 1996 S.D. 19, ¶ 17, 544 N.W.2d 210, 214 (citing *Flynn*, 526 N.W.2d at 746).

> [M]utual mistake as to a material fact inducing the execution of a contract may be ground for relief from its enforcement [and] is recognized as applicable in the situation where one has executed a release of claim for personal injuries seeks to

> avoid its effect on the ground that the release was given and taken under a mutual mistake as to the nature and extent of the releasee's injuries.

Boman v. Johnson, 158 N.W.2d 528, 529 (S.D. 1968). A mere change in diagnosis of known injuries does not equate to the mistake necessary to void a release. *See Parkhurst*, 1996 S.D. 19, ¶ 18, 544 N.W.2d at 214 (citing *Morton v. Farmers Co-Op. Business Ass'n*, 510 N.W.2d 326 (Neb. App. 1993)). Rather, the release must present "'clear and convincing proof [of] a substantial injury which was not discovered until after the settlement[.]'" *Id.* at ¶ 19, 544 N.W.2d at 214 (citation omitted) (alterations in original). "A miS.D.iagnosed injury does not equate with 'unknown injury' . . ." *Id.*

There are two decisions in South Dakota that discuss the effect of mistake on a release. *See Parkhurst*, 1996 S.D. 19, 544 N.W.2d 210; *Boman*, 158 N.W.2d 528. In the latter case, the plaintiff did not believe she was seriously injured. *Boman*, 158 N.W.2d at 529. Following the collision, she was taken to her home but was treated later that evening. *Id.* Four days after the accident she was hospitalized for two days. *Id.* During the accident, plaintiff "heard [her] neck snap and had some dizziness and pain in [her] neck." *Id.* Plaintiff signed a release shortly thereafter, stating she "feel[s] good now except for an occasional headache." *Id.* Approximately six months later, plaintiff continued to suffer headaches and was diagnosed with whiplash and cervical myositis resulting from the collision. *Id.* at 529-30.

The case was presented to a jury despite the release that plaintiff had signed. *See id.* (describing testimony given at trial and holding case "was properly submitted to the jury"). The Court found the release in *Boman* "was for an amount grossly inadequate for the injuries actually sustained and there was evidence that plaintiff did not know their actual nature and extent." *Id.* at 530. It held "'injuries which the claimant does not know about or suspect to exist when a general release is given, are not included in the settlement if they are later found to be such that

they would have affected the settlement had they been known.'" *Id.* (quoting *Peterson v. Kemper*, 18 N.W.2d 294). The Court additionally determined that "'[w]hether the parties intended the release to cover unknown injuries is usually a question of fact.'" *Id.* (citation omitted).

Furthermore, the court determined in another case the plaintiff acknowledged "severe pain in her right hip and her 'leg lock[ing] up'" approximately five or six months prior to signing the release. *Parkhurst*, 1996 S.D. 19, ¶ 10, 544 N.W.2d at 212. Prior to signing the release, plaintiff's "physicians had assured her [the hip pain] was related to her pregnancy." *Id.* at ¶ 11, 544 N.W.2d at 212. However, eventually plaintiff was diagnosed with a chip fracture and corrective surgery was performed. *Id.* at ¶ 10, 544 N.W.2d at 212.

The Court found plaintiff was certainly aware of the injury at the time of release, specifically noting "she described her injury to no less than six different medical providers, attributing the commencement of the symptoms to a time prior to her executing the release." *Id.* at ¶ 17, 544 N.W.2d at 214. Although plaintiff made a mistake in believing the pain was related to her pregnancy, she was unable to attribute any mistake to the opposing party. *Id.* "[A] release may be voided on grounds of *mutual mistake*." *Id.* (citing *Flynn*, 526 N.W.2d at 746) (emphasis added). To avoid a release, the litigant must provide clear and convincing proof that the injury now complained of is substantial and was not discovered until after the release was signed. *Id.* at ¶ 19, 544 N.W.2d at 214. "[U]nexpected consequences of known injuries" are not sufficient to invalidate a proper release. *Id.*

The determinative factor today appears to be whether the injury itself was unknown at the time of release or if it is merely the consequences of injury that were unknown. *Fenske Media Corp.*, 2004 S.D. 23, ¶ 16, 676 N.W.2d at 395 (citing *Parkhurst*, 1996 S.D. 19, ¶ 14, 544 N.W.2d

at 214) ("Nonetheless, for a claim of mutual mistake to prevail in these circumstances, it is necessary to distinguish between claims involving unknown injuries and claims involving unknown consequences of known injuries."). Flanders argues that the collision never caused or contributed in any way to Schaefer's fractured sternum. However, assuming *arguendo* that it is related, he contends that both Schaefer and Parris had knowledge of a chest injury prior to Schaefer executing the release. He notes that Schaefer complained of chest pain to the ambulance crew, complained of "a mild amount of rib pain" upon arriving at the hospital, and told Parris in their initial conversation that she had chest pain. Flanders contends under the *Parkhurst* analysis, Schaefer's complaint is only of unexpected consequences and she cannot avoid the release because of it. Additionally, Flanders notes that Schaefer never made a demand to rescind the Release prior to this lawsuit.

Schaefer counters her only complaint regarding chest pain was mild bruising, believed to be caused by her seatbelt. Schaefer also notes that she denied "midsternal chest pain" upon being admitted to the hospital following the accident. She argues that neither she nor Parris believed her chest was injured beyond "some bruising from her seatbelt." Schaefer contends she had no symptoms of a chest fracture and did not experience pain in her chest until after the release was signed, making this an unknown injury.

After viewing the evidence in a light most favorable to Schaefer, this Court finds that there was no mutual mistake in regard to her injuries. She was aware of the potential chest injury. Schaefer complained of some amount of chest pain in the ambulance, at the hospital, and in her initial conversation with Parris. Similarly, Parris was aware that Schaefer had been experiencing a chest injury. Schaefer cannot avoid the Release on the basis of mutual mistake. Under *Parkhurst*, Schaefer was obligated to provide clear and convincing proof that the injury

now complained of is substantial and was not discovered until after the release was signed. Schaefer has not done so. This Court also notes that Schaefer never attempted to rescind the Release prior to this lawsuit.

(2) Release: Unknown Injury

The *Boman* Court additionally examined the ability of a party to release another for unknown injuries. *See Boman*, 158 N.W.2d at 530. The Court adopted the reasoning of a Minnesota decision which held that "'even though a release expressly covers unknown injuries, it is not a bar to an action for such unknown injuries if it can be shown that such unknown injuries were not within the contemplation of the parties when the settlement was agreed upon . . . .'" *Id.* (quoting *Aronovitch v. Levy*, 56 N.W.2d 570 (Minn.)). The same court held, however, that "'if the parties did in fact intentionally agree upon a settlement for unknown injuries, such release will be binding.'" *Id.* (quoting *Aronovitch*, 56 N.W.2d 570).

Schaefer argues that the Release was not intended to cover unknown injuries. She argues the Release does not state that she was waiving her right to seek reimbursement for unknown injuries. Schaefer additionally points to the following section:

> The Undersigned further acknowledges and agrees to that the Released Party(ies) will only pay for reasonable and necessary medical and/or dental expenses, and only if the examination, diagnosis, and/or treatment is for an injury that was caused by the accident referred to above.

She contends this section evidences the intent for Mid-Century to pay for all medical bills arising from the accident, including those for her previously unknown injury that is the subject of this dispute.

Conversely, Flanders contends that Schaefer's chest injury was known and existing at the time of executing the Release because she had previously complained of chest pain.[2] Flanders also points out that although the *Boman* Court discussed a release for unknown injuries, its decision was reached on the basis of the settlement being grossly inadequate. Here, Flanders argues the settlement is not grossly inadequate because Schaefer was given up to $8,000 in medical expenses and $500 for general damages.

After viewing the evidence in a light most favorable to Schaefer, the Court finds that a chest injury was known at the time of entering the release. Regardless, this Court also finds the Release contemplates unknown injuries. It provides that Schaefer entered the release wholly in reliance on her own judgment and belief regarding her injuries. The Release also states that it is a full and final compromise, including as to questions of liability, injuries, and damages. Although the Release does state Mid-Century will pay for reasonable and necessary medical expenses, this statement is qualified by the preceding paragraph which states Mid-Century is agreeing to pay for expenses already incurred.

(3) Undue Influence

Undue influence can be shown by one of three things:

> (1) In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; or
> (2) In taking an unfair advantage of another's weakness of mind; or
> (3) In taking a grossly oppressive and unfair advantage of another's necessities or distress.

S.D.C.L. 53-4-7. The litigant arguing there was undue influence has the burden to prove each of the four elements "by the greater weight of the evidence." *In re Estate of Smid*, 2008 S.D. 82, ¶ 33, 756 N.W.2d 1, 12. The four elements are:

[2] These arguments are for the purpose of this Motion only as Defendant still contends that any purported chest injury was caused by Dr. Scheurenbrand at Sioux Spine.

(1) [] susceptibility to undue influence;
(2) opportunity to exert such influence and effect the wrongful purpose;
(3) a disposition to do so for an improper purpose; and
(4) a result clearly showing effects of undue influence.

Id. (citing *In re Estate of Schnell*, 2004 S.D. 80, ¶ 21, 683 N.W.2d 415, 421). "[U]ndue influence is a non-technical, fact-based inquiry that requires the circuit court to examine the parties' states of mind and motives, [therefore the South Dakota Supreme Court] reviews a circuit court's application of law to the facts under a clearly erroneous standard." *Neugebauer v. Neugebauer*, 2011 S 64, ¶ 12, 804 N.W.2d 450, 453 (citing *Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 16, 790 N.W.2d 52, 58).

More than merely being stressed must be shown to evidence one was susceptible. *Id.* A material consideration in determining susceptibility is the physical and mental strength of the individual. *Matter of Estate of Unke*, 1998 S.D. 94, ¶ 21, 583 N.W.2d 145, 149 (quoting *In re Estate of Elliot*, 537 N.W.2d 600, 665 (S.D. 1995)). However, the South Dakota Supreme Court "has not required medical evidence to prove susceptibility to undue influence." *Neugebauer*, 2011 S.D. 64, ¶ 17, 804 N.W.2d at 454 (citing *In re Estate of Metz*, 100 N.W.2d 393, 398 (S.D. 1960)). An individual who remains "competent and completely capable of making her own decisions" is unlikely to be found susceptible to undue influence. *Unke*, 1998 S.D. 94, ¶ 22, 583 N.W.2d at 149.

An individual's "limited education and business experience" may establish his or her susceptibility. *Neugebauer*, 2011 S.D. 64, ¶ 18, 804 N.W.2d at 454 (citing *Delany v. Delany*, 402 N.W.2d 701, 705-06 (S.D. 1987)). In *Neugebauer*, the Court found the fact that the individual "had an eighth-grade education, and she lacked experience in business and legal transactions" was relevant in determining her susceptibility. *Id.* Additionally, it noted her general dependency on others to handle her business and legal matters. *Id.* The person's

susceptibility was further evidenced by her lack of understanding of the document she had signed. *Id.*

The opportunity to exert influence generally centers on a relationship of trust and confidence. *See id.* at ¶ 20, 804 N.W.2d at 455. The disposition to exert influence looks to factors such as whether any steps were taken to ensure comprehension, what explanations were given, or whether a party advised the other to seek legal representation. *Neugebauer*, 2011 S.D. 64, ¶ 22, 804 N.W.2d at 455. Showing a party had individual advice before entering a contract tends to rebut undue influence. *See In re Estate of Pringle*, 2008 S.D. 38, ¶ 43, 751 N.W.2d 277, 289. Subsequent conduct, such as encouraged secrecy, can also be indicative of disposition to exert influence. *Neugebauer*, 2011 S.D. 64, ¶ 23, 804 N.W.2d at 456. Schaefer alleges that she was highly susceptible to undue influence due to her mental impairment. She contends she had no understanding of what the Release was or what it accomplished. Schaefer argues that Mid-Century had the opportunity to exert influence because Parris met with her twice at her home. She additionally argues that Mid-Century had the disposition to exert undue influence because Parris attempted a settlement quickly and the terms of the settlement waived liability for Farmers as well as Tollefson and American Family Insurance. Lastly, Schaefer contends the execution of the first Release clearly demonstrates undue influence because the amount was less than what she knew she owed. Flanders contends that every time Parris interacted with Schaefer, he went over the claims process with her and discussed her injuries. He also argues that $8000 for medicals and $500 for general damages was a reasonable settlement for Plaintiff's complaints. There is no evidence in the record to suggest the Parris would have known Schaefer had any sort of cognitive impairment when he met with her.

After viewing the evidence in a light most favorable to Schaefer, the Court finds that no undue influence was exerted over her. The record does not indicate that Parris was aware of any purported susceptibility or that he exploited any purported susceptibility. Parris and Schaefer were dealing at arms length. They were not in a trust-centered relationship such as that of parent/child, doctor/patient, or fiduciary/client. The fact that Parris unilaterally took action to execute a second Release upon receiving the emergency room bill weighs strongly against a finding of undue influence.

(4) Unconscionable

Unconscionable contracts generally do "not provide an opportunity for negotiati[on]" and involve "disparate and wholly unequal bargaining power." *See Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 24, 731 N.W.2d 184, 194. Often, these are adhesion contracts. *See id.* (citations omitted). To determine whether a contract is unconscionable, the Court will generally look to two things: (1) the actual terms of the agreement; and (2) the bargaining power between the parties. *Id.* at ¶ 25, 731 N.W.2d at 194-95 (citing *Scotland Vet Supply v. ABA Recovery Serv., Inc.*, 1998 S.D. 103, ¶ 13, 583 N.W.2d 834, 837. This is often referred to as substantive unconscionability and procedural unconscionability. *Id.* at ¶ 25, 731 N.W.2d at 195. If a contract, or provision of a contract, is determined to be unconscionable the court can refuse to enforce it. *Id.* at ¶ 29, 731 N.W.2d at 195. "Adhesive clauses, exacted by the overreaching of a contracting party who is in an unfairly superior bargaining position, are always subject to the defense of unconscionableness." *Id.* at ¶ 29, 731 N.W.2d at 196 (quoting 8 Samuel Williston and Richard A. Lord, *A Treatise on the Law of Contracts*, § 18:5 at 28 (4th ed. 1998)) (internal quotation marks omitted) (emphasis omitted). Merely entering into a bad bargain does not make the contract unconscionable. *Parsley v. Parsley*, 2007 S.D. 58, ¶ 33, 734 N.W.2d 813, 822.

Schaefer argues that the terms of the Release are overly harsh and one-sided. She argues that the $8000 for medical expenses should not be considered as Tollefson's medical pay coverage would have likely paid for her hospital bills regardless. Schaefer contends it is unconscionable to waive her right to any claim for future injury and for pain and suffering for $500 compensation.

After viewing the evidence in a light most favorable to Schaefer, the Court does not find anything in the record evidencing that Schaefer was in any sort of economic duress when she signed the Release or that the Release was presented to her as a "take it or leave it" contract of adhesion. Tollefson's medical pay coverage was capped at $5,000. It is undisputed that Schaefer had medical bills paid in excess of $5,000 so her argument that his coverage would have paid regardless is not persuasive. The Court finds that Schaefer was free to consult an attorney or negotiate the terms of the Release. Her voluntary decision not to do so does not mean she is free to avoid the bargain she made. The terms of the Release are not unconscionable.

CONCLUSION

In summation, the Court has found the Release is valid and controlling. It was entered into voluntarily by Schaefer, is a fair bargain, and was not the product of undue influence. Schaefer has not provided clear and convincing evidence that her substantial chest injury was unknown at the time of executing the Release and caused by the collision with Flanders. The fact that Schaefer originally brought suit against Sioux Spine and Sport evidences that is highly likely that the injury was caused at a later date. However, assuming the chest injury is a result of the collision, Schaefer complained of chest pain on multiple occasions prior to signing the Release.

ORDER

Based upon the foregoing, it is ordered:

1. Defendant Flanders and Defendant Tollefson's Motion for Summary Judgment is GRANTED.
2. The court adopts this Memorandum Opinion and Order as its Findings of Fact and Conclusions of Law. S.D.C.L. 15-6-52(2).
3. Counsel for Flanders will prepare a Judgment consistent with this Memorandum Opinion and Order.

Dated this 17th day of March, 2017.

BY THE COURT:

Honorable John Pekas
Circuit Court Judge

ATTEST: Angelia M. Gries, Clerk of Courts

By: _____
DEPUTY

FILED
MAR 20 2017
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

KATHY A. SCHAEFER,	:	CIV. 15-204
Plaintiff,	:	
vs.	:	
SIOUX SPINE AND SPORT, PROF. LLC,	:	
Defendant,	:	
and NATHAN J. FLANDERS,	:	**SUMMARY JUDGMENT**
Defendant/Third Party Plaintiff,	:	
vs.	:	
HERBERT TOLLEFSON,	:	
Third Party Defendant.	:	

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

On December 12, 2016, Nathan J. Flanders filed a motion for summary judgment. On January 12, 2017, Herbert Tollefson filed a joinder in Flanders' motion for summary judgment. On January 23, 2017, a hearing on Flanders' motion for summary judgment and Tollefson's joinder was held before the Honorable John Pekas, in the Minnehaha County courthouse, in Sioux Falls, South Dakota. Nathan Flanders appeared by Woods, Fuller, Shultz & Smith, PC and Melanie L. Carpenter, his attorneys; Plaintiff Kathy Schaefer appeared by Johnson, Janklow, Abdallah, Reiter & Parsons, LLP, and Shannon R. Falon and Sara E. Show, her attorneys;

Case Number: 15-204
Summary Judgment

Defendant Sioux Spine and Sport, Prof. LLC appeared by Melinda J. Folkens, its attorneys; and Third Party Defendant Herbert Tollefson appeared by Heidi N. Thoennes, his attorneys.

After considering the written briefs, the arguments of counsel, all of the materials on file, and otherwise being fully advised, the Court entered its Memorandum Opinion and Order Granting Defendants' Motion for Summary Judgment. The Court's Order Granting Defendants' Motion for Summary Judgment is incorporated herein by reference.

Accordingly, it is hereby

ORDERED AND ADJUDGED that judgment be awarded against Plaintiff and in favor of Defendant Nathan J. Flanders, and that Defendant Nathan Flanders be awarded his costs and disbursements in the amount of $ 493.77 to be inserted by the Clerk of this Court; it is further hereby

ORDERED AND ADJUDGED that judgment be awarded against Plaintiff and in favor of Third Party Defendant Herbert Tollefson, and that Herbert Tollefson be awarded his costs and disbursements in the amount of $_____ to be inserted by the Clerk of this Court.

Dated this 28 day of March, 2017.

BY THE COURT:

Honorable John Pekas
Circuit Court Judge

ATTEST:

Angelia Gries, Clerk
By _____
Deputy

FILED
MAR 28 2017
Minnehaha County, S.D.
Clerk Circuit Court

{02573184.1}

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

KATHY A. SCHAEFER,	:	CIV. 15-204
Plaintiff,	:	
vs.	:	
SIOUX SPINE AND SPORT, PROF. LLC,	:	
Defendant,	:	
and NATHAN J. FLANDERS,	:	**DEFENDANT'S STATEMENT OF UNDISPUTED FACTS**
Defendant/Third Party Plaintiff,	:	
vs.	:	
HERBERT TOLLEFSON,	:	
Third Party Defendant.	:	

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

Defendant Nathan Flanders, by and through his undersigned counsel, offers the following Statement of Undisputed Facts pursuant to SDCL § 15-6-56(c)(1).

1. On June 9, 2013, Schaefer was a passenger in a vehicle that was travelling south on Minnesota Avenue in Sioux Falls, South Dakota. (Am. Cmplt. ¶ 5.)

2. The vehicle was being driven by Herbert Tollefson, Schaefer's boyfriend. (Schaefer Dep. II 7:12-24.[1]) Schaefer and Tollefson were driving south to go look for a different apartment in which to live. (*Id.*)

[1] Cited portions of Schaefer's deposition are attached as Exhibit A to the Affidavit of Melanie Carpenter

3. Tollefson was stopped at the intersection of Minnesota Avenue and 85th Street, attempting to turn left onto eastbound 85th Street. (Tollefson Dep. 8:16-22.[2])

4. Although there was a left hand turn lane at the intersection, Tollefson was not in it, and was instead stopped in the inside southbound lane of Minnesota Avenue. (*Id.* at 9:7-24.)

5. Tollefson testified the car was stopped at the intersection just prior to the accident. (*Id.* at 10:17-20.)

6. Schaefer testified that she was telling Tollefson where to go, because he was not familiar with Sioux Falls, and that Tollefson made a last minute turn at Schaefer's direction. (Schaefer Dep. II 8:21-25; 12:19-23.)

7. After slowing or stopping in the driving lane of Minnesota Avenue, Tollefson's vehicle was hit from behind by a vehicle being driven by Flanders. (Tollefson Dep. 8:16-22.)

8. Tollefson pled guilty to unsafe lane usage. (*Id.* at 17:21-24.)

9. After the accident, Schaefer told Tollefson that her neck and back hurt. (*Id.* at 16:4-6.)

10. After the police arrived, an ambulance came for Schaefer. (Schaefer Dep. II 19:1-12.)

11. According to the medical records from Rural Metro Ambulance, Schaefer complained of neck pain and mild right chest pain that she attributed to the seat belt. (Ex. D AMH 001973-001976.)

12. Upon arriving at the Avera McKennan Emergency Room, Schaefer complained of neck pain and a mild amount of rib pain. (Ex. E AMH 001948-001972.)

---

[2] Cited portions of Tollefson's deposition are attached as Exhibit B to the Affidavit of Melanie Carpenter

13. A CT of Schaefer's neck showed no fracture or subluxation, and her chest x-ray was clear. (*Id.*)

14. She was discharged the same day with Vicodin and Valium for pain. (*Id.*)

15. Flanders was insured by Mid-Century Insurance Company ("Mid-Century"). Dustin Parris handled the claim on behalf of Mid-Century and contacted Schaefer to handle her potential claim. (Parris Dep. 9:2-4.[3])

16. Parris spoke with Schaefer on the phone on June 11, 2013. (*Id.*; Claim File pg. 23.) Parris discussed the claims process and the injuries Schaefer sustained from the accident. (Claim File pg. 23.[4])

17. Schaefer reported that she had neck and back pain, chest pain from seat belt, and whiplash. (Parris Dep. 13:16-21; Claim File pg. 23.)

18. Schaefer told Parris that she was taking over the counter medications and did not plan on any further treatment. (Parris Dep. 14:6-9.)

19. Parris met with Schaefer in person for approximately 20 to 30 minutes on June 25, 2013, at Schaefer's apartment in Sioux Falls. (Parris Dep. 14:10-14; 15:17-20; Claim File pg. 22.)

20. Parris again discussed the claim and Schaefer discussed her current complaints. (Parris Dep. 15:21-16:1.) Schaefer reported that she was still having pain in her neck and upper traps on both sides. (*Id.*)

---

[3] Cited portions of Parris's deposition are attached as Exhibit C to the Affidavit of Melanie Carpenter

[4] A copy of the redacted Claims File produced in discovery is attached as Exhibit F to the Affidavit of Melanie Carpenter.

21. Schaefer indicated she planned on treatment with Sioux Spine as soon as possible. (*Id.* at 16:11-25.)

22. Parris provided Schaefer with a letter enclosing a medical authorization form that would allow Mid-Century to obtain Schaefer's medical records and medical bills. (Parris Dep. 24:2-25:2; Ex. G.) Parris and Schaefer discussed the medical authorization form and Schaefer signed the form. (Claim File pg. 22.) Parris advised Schaefer that he would send in the form to her medical providers to obtain her medical records and bills as soon as possible. (*Id.*)

23. Parris and Schaefer then discussed settling Schaefer's claim. (Parris Dep. 18:14-18; Claim File pg. 23.)

24. Parris and Schaefer discussed the use of a scheduled release for payment of the medical bills Schaefer had incurred through that date. (*Id.*) Parris estimated that Schaefer's medical bills likely were between $2,100 and $2,500 based on the treatment that Schaefer indicated she had received. (*Id.*) The ceiling was eventually placed at $3,000 to make Schaefer feel more secure with a potential settlement. (*Id.*)

25. As reflected in the June 25, 2013 Release, Mid-Century agreed to pay up to $3,000 for medical expenses that had been incurred by Schaefer up to that date, plus $500 for general damages. (Parris Dep. 18:14-20; Ex. H.)

26. The next day, on June 26, Mid-Century received Schaefer's ER bill, which totaled $5,046.18, which was more than the amount Mid-Century agreed to pay in the initial Release. (Parris Dep. 21:17-22.; Claim File pg. 21)

27. On June 27, Parris discussed the issue with Sharon Page, his supervisor. (Parris Dep. 22:1-5; Claim File pg. 20.)

Filed: 12/12/2016 4:10:15 PM CST Minnehaha County, South Dakota 49CIV15-000204

28. The decision was made that Parris would call Schaefer back and increase the amount of medical bills Mid-Century was willing to pay. (Parris Dep. 22:14-17; Claim File pg. 20.)

29. To that end, on July 1, 2013, Parris returned to Schaefer's apartment to meet with Schaefer to sign a new Release. (Parris Dep. 22:19-23; Claim File pg. 19.)

30. The second Release, signed and executed by Schaefer on July 1, was identical to the first Release, except $8,000 was included for the ceiling on Schaefer's medical bills instead of $3,000. (Parris Dep. 22:24-23:5; Ex. I.)

31. Like the first Release, the second Release included $500 for general damages. (*Id.*)

32. The Release provided that in exchange for the payment of $500, plus up to $8,000 in medical expenses, Schaefer agreed to release Flanders from:

> any and all claims, causes of action, actions, rights, demands, bodily injuries, personal injuries, damages including but not limited to any and all medical expenses wherever incurred and loss of wages and/or income, loss of consortium, loss of any services, other costs and expenses, and any other compensation of any kind, which the undersigned has incurred on account of or which are in any way related to an accident that occurred on or about June 9, 2013 at or near Sioux Falls, South Dakota.

(Ex. I.)

33. The Release provided that except for the agreement to pay those medical expenses that had been previously incurred as a result of the accident, the released parties had "no obligation to pay for any other item, or any other general damages or other damage of any nature whatsoever, emotional distress, cost or expense of any kind which the Undersigned incurs at any time after this Release is signed." (*Id.*)

34. Schaefer expressly acknowledged and agreed that "her injuries caused by the accident identified above are or may be permanent, and that the extent of recovery from those injuries is/may be uncertain and indefinite." (*Id.*)

35. According to her medical records, Schaefer treated with Dr. Scheurenbrand on two occasions after the accident: July 8, 2013 and July 10, 2013. (Ex. J.)

36. Schaefer decided to seek chiropractic treatment because her neck was sore. (Schaefer Dep. I 22:10-13.)

37. The first visit was uneventful. (Schaefer Dep. II 30:22-23.)

38. However, Schaefer alleges that Dr. Scheurenbrand injured her on the second visit. (*Id.* at 30:24-31:1.)

39. Schaefer claims that she experienced new pain in her shoulders, neck, and chest after the second treatment. (*Id.* at 33:8-34:22.)

40. On July 18, 2013, about eight days after the second treatment with Dr. Scheurenbrand, Schaefer went to the hospital via ambulance. (Schaefer Dep. I 29:5-16.)

41. According to her medical records, Schaefer stated that she was hurt when Dr. Scheurenbrand did a compression of her chest. Schaefer was diagnosed with a fractured sternum (Ex. E AMH 001986-001989.)

42. Schaefer spent approximately one month in the hospital after a surgery was performed on her chest. (Schaefer Dep. I 33:4-5.)

Dated this 12th day of December, 2016.

WOODS, FULLER, SHULTZ & SMITH P.C.

By _____

Melanie Carpenter
300 South Phillips Avenue, Suite 300
PO Box 5027
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Email: melanie.carpenter@woodsfuller.com
Attorneys for Defendant/Third Party Plaintiff
Nathan Flanders

STATE OF SOUTH DAKOTA) :ss COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
KATHY A. SCHAEFER, Plaintiff, vs. SIOUX SPINE AND SPORT, PROF. L.L.C., Defendant, and NATHAN J. FLANDERS, Defendant/Third Party Plaintiff, vs. HERBERT TOLLEFSON, Third-Party Defendant.	Civ. 15-204 **PLAINTIFF'S RESPONSE TO DEFENDANT'S AND THIRD PARTY DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiff Kathy A. Schaefer, by and through her undersigned counsel of record, hereby submits this response to Defendant and Third Party Defendant's Statement of Undisputed Material Facts. Exhibits referenced herein shall be referred to "Show Aff. Ex." Exhibits referenced that are attached to the Affidavit of Melanie Carpenter shall be identified herein as "Carpenter Aff. Ex."

1. No Objection.
2. No Objection.
3. No Objection.
4. No Objection.

5. No Objection.
6. Objection. Kathy directed Tollefson where to turn and testified that "[i]t was kind of a last-minute turn when I told him so." Kathy did not direct Tollefson to "make" the last minute turn. (Carpenter Aff. Dep. II 8:21-25; 12:19-23). Further, Tollefson was stopped at the intersection when Flander's rear-ended him and therefore, the turn cannot be characterized as a "last minute" turn. (Carpenter Aff. Ex. B Tollefson Dep. 8:16-22).
7. No Objection.
8. No Objection.
9. No Objection.
10. No Objection.
11. No Objection.
12. No Objection.
13. No Objection.
14. No Objection.
15. No Objection. Kathy notes that nowhere on the release is "Mid Century insurance company" listed. The insurance company listed is Farmers Insurance Group.
16. Objection. Kathy disputes whether Parris spoke with her on the phone on June 11, 2013. *See* SUMF ¶ 16; (Show Aff. Ex. 7 Deposition of Kathy Schaefer II at 38).
17. No Objection.
18. No Objection.
19. No Objection.

20. No Objection.

21. No Objection.

22. No Objection.

23. Objection. Kathy and Parris did not "discuss" settling the claim, Parris solicited a demand to which Kathy replied that she had no idea and has no prior claims knowledge. Carpenter Aff. Ex. F Claims File at 23. Parris then offered $500 and to pay up to $3000 in medical bills. *Id.*

24. Objection. While Parris may have "believed" that a $3,000 settlement offer would "make Schaefer feel more secure with a potential settlement," Kathy testified that she had no knowledge of the claims settlement process and Kathy ultimately agreed to Parris's first offer acknowledging that she had no claims experience. *See* Carpenter Aff. Ex. F Claims File at 23.

25. No Objection.

26. No Objection.

27. No Objection.

28. No Objection.

29. No Objection.

30. No Objection.

31. No Objection.

32. Objection. The release Kathy signed not only released Flanders but also released Tollefson and his insurance company as well as, Melinda Flanders, Alexandria Flanders, James Flanders, Abigail Flanders, Herbert Tollefson, American Family Mutual

Insurance Company, and his/her/their agents, successors, heirs, executors, administrators, and assigns." Carpenter Aff. Ex. I.

33. No Objection.

34. Objection. Agree that such language was contained in the release but Kathy disputes that she "expressly acknowledged and agreed" to such statement. Further, Kathy points out that this section does not cover "unknown injuries."

35. No Objection.

36. No Objection.

37. No Objection.

38. Objection. Kathy has alleged that Dr. Scheurenbrand either injured her or exacerbated an injury that occurred during that motor vehicle collision.

39. No Objection.

40. No Objection.

41. No Objection.

42. No Objection.

Dated this 16th day of January, 2017.

JOHNSON, JANKLOW, ABDALLAH, REITER & PARSONS L.L.P.
BY: */s/ Sara E. Show*
A. Russell Janklow (russ@janklowabdallah.com)
Sara E. Show (sara@janklowabdallah.com)
P.O. Box 2348
Sioux Falls, SD 57101-2348
(605) 338-4304

Attorneys for Kathy Schaefer, Plaintiff

STATE OF SOUTH DAKOTA) :ss COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
KATHY A. SCHAEFER, Plaintiff, vs. SIOUX SPINE AND SPORT, PROF. L.L.C., Defendant, and NATHAN J. FLANDERS, Defendant/Third Party Plaintiff, vs. HERBERT TOLLEFSON, Third-Party Defendant.	Civ. 15-204 **PLAINTIFF'S STATEMENT OF DISPUTED MATERIAL FACTS**

Plaintiff Kathy A. Schaefer, by and through her undersigned counsel of record, hereby submits Plaintiff's Statement of Disputed Material Facts. Exhibits referenced herein shall be referred to "Show Aff. Ex." Exhibits referenced that are attached to the Affidavit of Melanie Carpenter shall be identified herein as "Carpenter Aff. Ex."

1. Kathy's condition was asymptomatic after the date of the accident until the date of the release. *See* (Show Aff. Exhibit 2 Deposition of Dustin Parris at 27).

2. Kathy disputes whether Parris spoke with her on the phone on June 11, 2013. *See* SUMF ¶ 16; (Show Aff. Ex. 7 Deposition of Kathy Schaefer II at 38).

3. Kathy's chest injury was unknown and not contemplated by the release. (See Carpenter Aff. Exs. H and I); *see also* (Show Aff. Ex. 2 Deposition of Dustin Parris at 33-34).

4. Both Kathy and Parris on behalf of Farmers Insurance made the agreement in the release based upon the mistake of fact that Kathy's chest was not injured in this collision other than some bruising from her seatbelt. See Show Aff. Ex. 1 Deposition of Kathy Schaefer at 13, 17

5. Kathy's settlement offer was extremely low. *See* Carpenter Aff. Ex. F Claims File 19-26.

6. Kathy did not have any symptoms of a fracture in her chest and after the initial collision did not continue to experience pain in her chest. See (Show Aff. Ex. 1 Deposition of Kathy Schaefer at 13, 17);(Show Aff. Ex. 2 Deposition of Dustin Parris at 33-34).

7. The release did not cover unknown injuries. See (Carpenter Aff. Exs. H and I).

8. The release is the result of undue influence.

9. No rational person not subject to undue influence would have settled for less than what they knew they owed in medical bills. *See* (Deposition of Dustin Parris at 17, 21-23).

10. The breadth of the release shows the effects of undue influence. See (Carpenter Aff. Exs. H and I).

11. The release is unconscionable because its terms are harsh and one-sided.

12. The true amount Kathy received for waiving her right to reimbursement for all medical bills and other damages was $500, an unconscionably low settlement.

Dated this 16th day of January, 2017.

JOHNSON, JANKLOW, ABDALLAH, REITER & PARSONS L.L.P.
BY: */s/ Sara E. Show*
A. Russell Janklow (russ@janklowabdallah.com)
Sara E. Show (sara@janklowabdallah.com)
P.O. Box 2348
Sioux Falls, SD 57101-2348
(605) 338-4304

Attorneys for Kathy Schaefer, Plaintiff

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28214

KATHY A. SCHAEFER

Plaintiff and Appellant,

vs.

SIOUX SPINE AND SPORT, PROF. LLC,

Defendant,

and

NATHAN J. FLANDERS,

Defendant and Appellee

and

HERBERT TOLLEFSON

Third-Party Defendant and Appellee.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN R. PEKAS, CIRCUIT JUDGE

BRIEF OF APPELLEE HERBERT TOLLEFSON

ORDER GRANTING DISCRETIONARY APPEAL FILED: MAY 12, 2017

ATTORNEYS FOR APPELLANT:
A. Russell Janklow
Ronald A. Parsons, Jr.
Sara E. Show
JOHNSON, JANKLOW, ABDALLAH, REITER, & PARSONS, LLP
P.O. Box 2348
Sioux Falls SD 57101-2348
(605) 338-4304

ATTORNEY FOR APPELLEE AND THIRD-PARTY DEFENDANT HERBERT TOLLEFSON:
Ms. Heidi Thoennes
AMERICAN FAMILY INSURANCE LEGAL DEPARTMENT
4200 Corporate Drive, #120
West Des Moines, IA 50266
605-362-5368

ATTORNEY FOR DEFENDANT AND APPELLEE NATHAN FLANDERS:
Ms. Melanie L. Carpenter
WOODS, FULLER, SHULTZ & SMITH, P.C.
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
605-336-3890

ATTORNEY FOR DEFENDANT SIOUX SPINE AND SPORT:
Mr. Edwin E. Evans
Ms. Melinda Folkens
EVANS, HAIGH & HINTON, LLP
101 N. Main Avenue, Suite 213
Sioux Falls, SD 57101-2790
(605) 275-9599

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES ii

JURISDICTIONAL STATEMENT 1

STATEMENT OF LEGAL ISSUES 1

INTRODUCTION 1

STANDARD OF REVIEW 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 6

A. NO GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING THE CLAIM OF UNDUE INFLUENCE AND SUMMARY JUDGMENT WAS APPROPRIATE 6

1. SSDI records and statements of Dr. Soule were inadmissible hearsay and did not create a genuine issue of material fact 6

2. No evidence exists that Parris exerted undue influence over Schaefer 8

B. THE RELEASE IS AN UNAMBIGUOUS CONTRACT AND THERE WAS NO MUTUAL MISTAKE MADE BY THE PARTIES TO THE RELEASE THAT WOULD NEGATE ITS VALIDITY 9

CONCLUSION 12

CERTIFICATE OF SERVICE 14

CERTIFICATE OF COMPLIANCE 15

TABLE OF CASES AND AUTHORITIES

CASES

Boman v. Johnson, 158 N.W.2d 528 (S.D. 1968) 11, 12

Estate of Metz, 100 N.W.2d 393 (S.D. 1960).....8

Flynn v. Lockhart, 526 N.W.2d 743 (S.D. 1995) 10

Gores v. Miller, 2016 SD 9, 875 N.W.2d 34 .....1, 9

Highmark Fed. Credit Union v. Hunter, 2012 S.D. 37, 814 N.W.2d 413 1

Johnson v. Norfolk, 82 N.W.2d 656 (S.D. 1957) 10

Johnson v. O'Farrell, 2010 SD 68, 787 N.W.2d 307.....7

Luther v. City of Winner, 2004 SD 1, 674 N.W.2d 339.....6, 7

Neugebauer v. Neugebauer, 2011 S.D. 64, 804 N.W.2d 450 1

Parkhurst v. Burkel, 1996 S.D. 19, 544 N.W.2d 210 .....1, 10, 11

Stockwell v. Stockwell, 2010 S.D. 79, 790 N.W.2d 52.....1

STATUTES

SDCL 15-6-56(c) 1

SDCL 15-6-56(e) 6

SDCL 19-19-801(c) 7

SDCL 19-19-803.....7

SDCL 53-4-7(2).....6

JURISDICTIONAL STATEMENT

Tollefson has no objection to Schaefer's Jurisdictional Statement.

STATEMENT OF LEGAL ISSUES

I. Whether the Trial Court erred in granting summary judgment to Defendants Flanders and Tollefson when no genuine issues of material fact existed regarding undue influence or mutual mistake of fact to negate the validity of the release signed by the Schaefer?

The trial court granted summary judgment in favor of Flanders and Tollefson.

- SDCL 15-6-56(c)
- Parkhurst v. Burkel, 1996 S.D. 19, 544 N.W.2d 210
- Gores v. Miller, 2016 SD 9, 875 N.W.2d 34

INTRODUCTION

The Plaintiff/Appellant will be referred to by her last name "Schaefer." The Defendant/Appellee's will be referred to by their respective last names, "Flanders" and "Tollefson." Defendant Sioux Spine and Sport, Prof. LLC will be referred to as "Sioux Spine." References to the record are designated as "R" followed by the page number. The Appellant's Appendix will be referred to as "App.," followed by the page number.

STANDARD OF REVIEW

A ruling on a grant of summary judgment is reviewed de novo, with no deference to the circuit court's ruling. Highmark Fed. Credit Union v. Hunter, 2012 S.D. 37, ¶7, 814 N.W.2d 413, 415. A determination of undue influence is a non-technical, fact-based inquiry that requires the circuit court to examine the parties' states of mind and motives, a circuit court's application of law to the facts is reviewed under the clearly erroneous

standard. Neugebauer v. Neugebauer, 2011 S.D. 64, ¶ 12, 804 N.W.2d 450, 453 (citing Stockwell v. Stockwell, 2010 S.D. 79 ¶ 16, 790 N.W.2d 52, 58).

STATEMENT OF THE CASE AND FACTS

This case arises out of lawsuit filed by Kathy Schaefer in Minnehaha County, the Second Judicial Circuit and involves allegations made in connection with two separate incidents. (R. 1-5). Schaefer was in an accident on June 9, 2013 in Sioux Falls when she was a passenger in Tollefson's vehicle. (R. 20). Flanders was traveling south on Minnesota Avenue and Tollefson was stopped and waiting to make a left turn. *Id.* Flanders rear-ended the back of the Tollefson vehicle and Schaefer received injuries from the collision. (R. 21).

Thereafter, Schaefer started treating chiropractically with Dr. Scheurenbrand at Sioux Spine for accident injuries. (R. 158, 263). Schaefer was treating with Dr. Scheurenbrand on July 10, 2013 when he performed a manipulation on her causing her significant pain that was diagnosed as a chest wall hematoma and subclavian thrombus and importantly, a fractured sternum. (R. 158, 260-63, 159-60).

Schaefer sued for recovery against Sioux Spine and Flanders. (R. 1-5). Flanders thereafter asserted a third-party claim against Tollefson for contribution and indemnity for any judgment awarded against Flanders. (R. 51-58).

Schaefer executed a release of claims following the motor vehicle accident and resolved her claims against Flanders, Tollefson, and their respective insurers on July 1, 2013. (R. 192-93). The Circuit Court found that the release was valid and dismissed the claims against Flanders and Tollefson. (R. 398-412).

Motor vehicle accident on June 9, 2013 and release.

The motor vehicle accident occurred on June 9, 2013 involving two vehicles driven by Flanders and Tollefson. (R. 19-20). After the accident, Schaefer complained to Tollefson that her neck and back hurt. (R. 120). She was taken by ambulance to Avera Mckennan Emergency Room. (R. 121, 130). She had complaints of neck pain and a mild amount of rib pain. (R. 134). She underwent a CT of her neck which did not show fracture or subluxation. (R. 137). She also had an x-ray of her chest that was clear. (R. 138). She was discharged on July 9, 2013 and prescribed medication for her pain. (R. 148).

Flanders was insured by Farmer's Insurance/Mid-Century Insurance Company ("Mid-Century") at the time of the accident and adjuster Dustin Parris handled this claim for Mid-Century. (R. 283-85). In that capacity, Parris contacted Schaefer by phone on June 11, 2013. (R. 187). He went through the claims process with Schaefer during that phone call. *Id*. The injuries she identified for Parris were neck and back pain, chest pain from the seat belt, and whiplash. *Id*. She advised him of the medication she was taking (only over-the-counter) and also advised she had no further treatment anticipated for her injuries. *Id*. Schaefer and Parris thereafter had an in-person meeting on June 25, 2013 at Schaefer's apartment in Sioux Falls. (R. 184). The meeting took between twenty and thirty minutes and included Schaefer advising Parris about her complaints and injuries. (R. 288). She identified pain in her neck and upper traps on both sides. (R. 288-89). She was planning to go to Sioux Spine for treatment as soon as she could. (R. 289). Parris requested that Schaefer execute a medical authorization form so Mid-Century would be able to gather her medical records and bills. (R. 290). The medical authorization was

attached to a letter that outlined the fact that Schaefer actually had three years to settle her claim. (R. 189).

It was at this first in-person meeting that Parris and Schaefer agreed to a settlement that allowed for payment of up to $3,000 in medical expenses and $500 in general damages. (R. 291). The release was signed on June 25, 2013 and was based upon the estimate of medical bills believed at that time to be between $2,100 and $2,500. (R. 190). However, the very next day, June 26, 2013, Parris received the ER bill for $5,046.18 and thereafter discussed the issue with his supervisor. (R. 161-62). They determined that the amount of the settlement should be increased to cover the amount of the medical bills. (R. 162). Parris went once again to Schaefer's apartment to meet with her about increasing the settlement amount and provided her with a new release with the increased amount. *Id*. That release was executed by Schaefer and released:

> any and all claims, causes of action, actions, rights, demands, bodily injuries, personal injuries, damages including but not limited to any and all medical expenses wherever incurred and loss of wages and/or income, loss of consortium, loss of any services, other costs and expenses, and any other compensation of any kind, which the undersigned has incurred on account of or which are in any way related to an accident that occurred on or about June 9, 2013 at or near Sioux Falls, South Dakota.

(R. 325-26).

The release stated that the payments made were on behalf of Nathan Flanders, Melinda Flanders, Alexandria Flanders, James Flanders, Abigail Flanders, Herbert Tollefson, American Family Mutual Insurance Company, their agents, successors, heirs, executors, administrators, and assigns. *Id*. Further, the release stated that the released parties had "no obligation to pay for any other item, or any other general damages or other damage of any nature whatsoever, emotional distress, cost or expense of any kind

which the Undersigned incurs at any time after this Release is signed." *Id*. Schaefer agreed in the release that "her injuries caused by the accident identified above are or may be permanent, and that the extent of recovery from those injuries is/may be uncertain and indefinite." *Id*.

Treatment and Injury at Sioux Spine.

Schaefer initiated treatment at Sioux Spine with Dr. Scheurenbrand on July 8, 2013. (R. 194). At the start of her treatment, she was seen because of a sore neck. (R. 257). On the date of the second treatment two days after her first treatment, Schaefer states that she had new pain in her shoulder, neck and chest. (R. 115). She described that during a visit to Dr. Scheurenbrand he "squeezed me so hard and he cracked my sternum, he—he just hurt me so bad." (R. 114). She stated that he used his hands and "pounded on her" and that as she left his office, she was "literally bent over." *Id*. After that treatment, she was taken to the hospital by ambulance on July 18, 2013. *Id*. She described the fact that before she went to the chiropractor for treatment in July 2013, she was okay. (R. 115).

Her complaints on July 18, 2013 at the emergency room were that Dr. Scheurenbrand injured her chest upon doing a compression of her chest during treatment. (R. 159). The record described that Schaefer had been in pain for the last 10 days. *Id*. The record goes on to confirm that Schaefer had been in a minor motor vehicle accident on June 9. *Id.* The record also states that she had an x-ray of the neck and chest at the time of the motor vehicle accident which were unremarkable. *Id.* She was diagnosed with a fractured sternum and was hospitalized for a month after having surgery on her chest. (R. 161).

ARGUMENT

A. NO GENUINE ISSUES OF MATERIAL FACT EXISTS REGARDING THE CLAIM OF UNDUE INFLUENCE AND SUMMARY JUDGMENT WAS APPROPRIATE.

1. SSDI records and statements of Dr. Soule were inadmissible hearsay and did not create a genuine issue of material fact.

Schaefer asserts that she is entitled to a rescission of the release under SDCL 53-4-7(2). Specifically, Schaefer's claim is that the release obtained by Parris took an unfair advantage of Schaefer and that she has met the four requirements of undue influence.

Schaefer claims that she was susceptible to undue influence because of her low IQ and that there were several disputed material facts pertaining to this issue that should have prevented summary judgment. The submission made by Schaefer in an effort to present facts to the Circuit Court supportive of this claim was comprised of inadmissible evidence. The SSDI records that were submitted were hearsay evidence and as such were not admissible in Court. Schaefer asserts that she didn't receive a ruling on the motion to supplement the record and that should impact the decision on summary judgment. However, Schaefer did submit the SSDI records to the Court and there is no indication that those records were stricken by the Circuit Court. Moreover, the decision of the Circuit Court clearly did consider the allegation that Schaefer was susceptible to undue influence due to mental impairment. (App. 12).

SDCL 15-6-56(e) requires that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Schaefer was required to submit admissible evidence to create a genuine issue of fact. Luther v. City of Winner, 2004 SD 1, ¶ 11, 674 N.W.2d 339, 344. Hearsay is an

out of court statement offered into evidence to prove the truth of the matter asserted in the statement. SDCL 19-19-801(c). The SSDI records submitted contained statements of Dr. Soule. (R. 317-R.330). Schaefer did not present any foundation for the records or statements of Dr. Soule and as such, any statements of Dr. Soule would be considered hearsay within hearsay and not admissible.

In order to establish that the SSDI records qualified as a business record and were not subject to the hearsay exclusion, Schaefer needed to lay a proper foundation through the testimony of a custodian or other qualified witness. SDCL 19-19-803. Moreover, the hearsay found within the hearsay document would also need to have an exception apply in order for it to be admissible. Johnson v. O'Farrell, 2010 SD 68, ¶ 15, 787 N.W.2d 307, 312. Schaefer has not laid foundation to support a determination that the SSDI records are a qualified business exception to the hearsay exclusion. (R.391). The SSDI records were provided to Schaefer in June 2016. *Id*.

Schaefer doesn't make the claim that any hearsay exceptions apply to the SSDI records or to the statements of Dr. Soule. Rather, Schaefer makes the blanket assertion that there were disputed material facts pertaining to Schaefer's IQ, memory, judgment, and impulsivity, and cites to the inadmissible evidence. In fact, there was no admissible evidence presented in that regard that would have precluded summary judgment.

In contrast to the assertions questioning Schaefer's capacity are the pleadings that establish this lawsuit was brought in Schaefer's name alone. Schaefer's capacity in that regard is apparently not an issue. Also, Schaefer has acted on her own behalf throughout this case, including during her deposition. No record has been made, either written or

verbal identifying any lack of capacity on Schaefer's part to pursue the present lawsuit. Schaefer does not dispute that fact in her brief.

2. No evidence exists that Parris exerted undue influence over Schaefer.

Schaefer argues that Parris had the opportunity to exert undue influence over her because he met with her on a couple of occasions and obtained a signed release from her. Schaefer also argues that there is a dispute about whether Parris had a disposition to exert undue influence. The record establishes that there is no support for the claim of undue influence.

This Court has stated "[i]nfluence, to be undue, must be of such character as to destroy the free agency of the testator and substitute the will of another person for his own." Estate of Metz, 100 N.W.2d 393, 394 (S.D. 1960). This standard is not met in this case.

Parris initially met with Schaefer and reached an agreement that established a cap on the amount of medical bills to be paid in connection with the settlement of $3,000 and an additional $500 to be paid to Schaefer. (R. 184-85). That agreement, which was reduced to writing and is evidenced by the first executed release, was made based upon information that Schaefer provided to Parris about her medical treatment. (R. 185, 190-91). Schaefer does not dispute that Parris thereafter obtained medical records, revisited the settlement amount, and ultimately increased the amount to pay up to $8,000 in medical expenses. (R.183, 192-93).

The conduct of Parris does not establish that he was substituting his will for Schaefer's own will. To the contrary, the conduct of Parris shows that he diligently was attempting to resolve Schaefer's claims from the motor vehicle accident. Schaefer now

casts the diligence of Parris as a show of undue influence. In a similar manner, Schaefer alleges that the increase in the settlement money paid to cover all the medical bills from the accident should be viewed as evidence of a guilty conscience by an insurance adjuster. This speculation has no bearing on the actual facts presented in this case.

None of the evidence in this case supports the claim of undue influence, the Circuit Court correctly found that there were no issues of material fact in that regard.

B. THE RELEASE IS AN UNAMBIGUOUS CONTRACT AND THERE WAS NO MUTUAL MISTAKE MADE BY THE PARTIES TO THE RELEASE THAT WOULD NEGATE ITS VALIDITY.

The release was unambiguous and because of that, the language of the release is the sole place for the Court to determine the parties' intent. Gores v. Miller, 2016 SD 9 ¶ 8, 875 N.W.2d 34, 37.

Schaefer executed a release of her claims arising out of the June 9, 2013 motor vehicle accident. The release had no ambiguity and provided for the release of Flanders, Farmer's Insurance, Tollefson and American Family Mutual Insurance Company from:

> [A]ny and all claims, causes of action, actions, rights, demands, bodily injuries, personal injuries, damages including but not limited to any and all medical expenses wherever incurred and loss of wages and/or income, loss of consortium, loss of any services, other costs and expenses, and any other compensation of any kind, which the undersigned has incurred on account of or which are in any way related to an accident that occurred on or about June 9, 2013 at or near Sioux Falls, South Dakota.

(R. 192-93).

Additionally, the released parties would be under no obligation to pay for other items or damage incurred after the release. *Id*. The release also acknowledged that the injuries may be permanent and her recovery may be uncertain. *Id*. The release barred all

future claims, for any injuries arising from the accident whether those injuries were known, that arose after the execution of the release.

Schaefer claims that the sternal fracture injury was not known and contemplated at the time of the release and therefore the releases executed were a product of mutual mistake. In support of that contention, she relies on Parkhurst v. Burkel, 1996 S.D. 19 ¶ 15, 544 N.W.2d 210, 213. Parkhurst is directly analogous to the present case and controlling. In Parkhurst, Plaintiff had been involved in a motor vehicle accident on July 9, 1992. *Id*. at ¶ 2. She suffered personal injuries and settled her claims, releasing the tortfeasor Burkel from any and all claims in exchange for $1,000. *Id*. In July 1993, she was diagnosed with a chip fracture in her right hip and had corrective surgery in August 1993. *Id*. at ¶ 3. Parkhurst initiated legal action in September 1993 for additional damages she sustained she alleged were caused by the July 1992 accident. *Id*. Her increased medical expenses totaled $8240. *Id*.

Summary judgment was granted against Parkurst. *Id*. ¶ 4. On appeal, she claimed that whether her right hip chip fracture was an unknown injury was a genuine issue of material fact. *Id*. ¶ 7. The medical evidence established that Parkhurst had been having right hip pain for a year since the time she was in the motor vehicle accident. *Id*. ¶ 10. Parkhurst argued that she had been assured that it was related to her pregnancy and therefore it was a mistake of fact which invalidates the release. *Id*. ¶11.

The Court confirmed that it has consistently favored the compromise and settlement of disputed claims outside of court. *Id*. ¶ 12 citing Flynn v. Lockhart, 526 N.W.2d 743, 746 (S.D. 1995); and Johnson v. Norfolk, 82 N.W.2d 656, 660 (S.D. 1957). The court found that Parkhurst's reliance on opinions from her doctor that her hip pain

was related to her pregnancy was a unilateral mistake and not attributable to Burkel. Parkhurst, 1996 S.D. 19 at ¶ 13.

In the present case, Schaefer released parties from any and all claims arising from the underlying automobile accident. (R. 192-93). At the time she executed the release, she had knowledge of a chest injury, and she even underwent an x-ray of her chest as a result of the accident. (R. 135). Both Schaefer and Parris had information about Schaefer's chest x-ray and claim of chest pain made during her treatment from the motor vehicle accident at the time the settlement was reached. (R. 135, 187). The settlement included payment for those bills and the medical records and bills were obtained by Parris. (R. 183). The chest x-ray was noted to be clear. (R. 135).

Even assuming for argument sake that the sternum fracture was related in some manner to the motor vehicle accident, under Parkhurst it would be considered an unexpected consequence of known injuries and would not be a basis to invalidate the release. Parkhurst, 1996 S.D. 19 at ¶ 19.

In the present case, the parties to the release were apprised of the injuries claimed and the medical tests that had been completed on Schaefer when she was treated for the accident. Interpreting the facts in favor of Schaefer, just as in Parkhurst, Schaefer's diagnosis and subsequent chest surgery, represent the unexpected consequences of known injuries and do not act to invalidate the release.

Finally, the amount of the settlement is alleged to be unconscionably low and Schaefer argues that this is also evidence that the parties did not contemplate a late-discovered injury. In support of this argument, Schaefer points to the Boman case where the plaintiff settled for $200 and later, after a jury trial, was awarded $3,650. Boman v.

Johnson, 158 N.W.2d 528, 529 (S.D. 1968). This argument is premised purely on speculation about the value of Schaefer's case. Schaefer speculates that even a conservative award could be $500,000, an amount more than 58 times than the settlement. There is simply no basis in fact for the conclusion that Schaefer's injuries from the motor vehicle accident would conservatively be worth $500,000, any more than there is a basis for the conclusion that Schaefer could receive an amount that is less than the settlement if her case were decided by a jury.

Schaefer alleges she will seek a judgment of more than $400,000 for her medical bills and an additional amount for pain and suffering for her chest injury. She has sued the chiropractor who treated her and alleged that he injured her during treatment – so even though she is asserting that she will claim those damages, a jury would be left to determine who caused any injuries to Schaefer. All of this argument is based upon speculation and is not grounded in any material facts.

CONCLUSION

The release signed by Schaefer was unambiguous and released her claims pertaining to the motor vehicle accident. There are no genuine issues of material fact and Schaefer's arguments of undue influence or mutual mistake are unsupported in this case. Schaefer's records submitted to the Court to supplement the record were never stricken from the record, and her request in that regard is moot and no further action need be taken.

Considering all of the facts in a light favorable to Schaefer, the claims against Flanders and Tollefson are barred by the release and should be dismissed. Tollefson

respectfully requests the South Dakota Supreme Court to affirm the grant of summary judgment.

Dated this 28th day of August, 2017.

Attorney for Appellee Tollefson:

/s/ Heidi N. Thoennes

Heidi N. Thoennes
Attorney at Law
4200 Corporate Drive, Suite 120
West Des Moines, IA 50266
(800) 692-6326, Ext. 61145
Email: hthoenne@amfam.com
Attorney for Herb Tollefson

ORAL ARGUMENT IS WAIVED

Appellee Tollefson is not requesting oral argument in this case.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of Tollefson's APPELLEE'S BRIEF, was served via electronic mail upon the following:

A. Russell Janklow
Shannon R. Falon
Sara E. Show
JOHNSON, JANKLOW, ABDALLAH,
BOLLWEG & PARSONS, LLP
PO Box 2348
Sioux Falls, SD 57101-2348
sara@janklowabdallah.com
ATTORNEYS FOR PLAINTIFF & APPELLANT
KATHY A. SCHAEFER

Melanie Carpenter
WOODS, FULLER, SHULTZ & SMITH
300 South Phillips Avenue, Suite 300
PO Box 5027
Sioux Falls, SD 57117-5027
melanie.carpenter@woodsfuller.com
ATTORNEY FOR DEFENDANT/THIRD PARTY
PLAINTIFF & APPELLEE NATHAN FLANDERS

Edwin E. Evans
Melinda J. Folkens
101 N. Main Avenue, Suite 213
PO Box 2790
Sioux Falls, SD 57101-2790
eevans@ehhlawyer.com
ATTORNEYS FOR DEFENDANT
SIOUX SPINE AND SPORT, PROF. LLC

/s/ Heidi N. Thoennes
Heidi N. Thoennes
Attorney at Law
4200 Corporate Drive, Suite 120
West Des Moines, IA 50266
(800) 692-6326, Ext. 61145
Attorney for Defendant & Appellee
Tollefson

CERTIFICATE OF COMPLIANCE

In compliance with SDCL 15-26A-66(4), I hereby certify that the font size used in Appellee Tollefson's Brief is Times New Roman 12. The total word count for Appellee Tollefson's Brief is 3,540.

Dated this 28th day of August, 2017.

/s/ Heidi N. Thoennes

Heidi N. Thoennes
Attorney at Law
4200 Corporate Drive, Suite 120
West Des Moines, IA 50266
(800) 692-6326, Ext. 61145
hthoenne@amfam.com
Attorney for Defendant & Appellee Tollefson

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 28214

KATHY A. SCHAEFER,

Plaintiff/Appellant,

vs.

SIOUX SPINE AND SPORT, PROF. LLC,

Defendant,

AND NATHAN J. FLANDERS,

Defendant/Third-Party Plaintiff/Appellee,

vs.

HERBERT TOLLEFSON,

Third-Party Defendant/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE JOHN R. PEKAS, CIRCUIT COURT JUDGE

BRIEF OF APPELLEE NATHAN J. FLANDERS

Melanie L. Carpenter
Joel E. Engel
Woods, Fuller, Shultz & Smith P.C.
PO Box 5027
Sioux Falls, SD 57117-5027
(605) 336-3890
Attorneys for Defendant/Third Party Plaintiff/Appellee Nathan J. Flanders

A. Russell Janklow
Ronald A. Parsons, Jr.
Sara E. Show
Johnson, Janklow, Abdallah,
Reiter & Parsons LLP
PO Box 2348
Sioux Falls, SD 57101-2348
(605) 338-4304
Attorneys for Plaintiff/Appellant

Edwin E. Evans
Melinda J. Folkens
Evans, Haigh & Hinton, LLP
101 N. Main Ave., Suite 213
Sioux Falls, SD 57101-2790
(605) 275-9599
Attorneys for Defendant Sioux Spine and Sport

Heidi N. Thoennes
In-House Counsel
American Family Insurance
4200 Corporate Drive, Ste. 120
West Des Moines, IA 50266
(800) 692-6326 Ext. 61145
Attorneys for Third Party Defendant/Appellee Herbert Tollefson

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 1

REQUEST FOR ORAL ARGUMENT 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

1. The accident. 3

2. Schaefer signs a Release releasing Flanders from all future claims. 4

3. Schaefer treats with Dr. Scheurenbrand at Sioux Spine. 6

STANDARD OF REVIEW 7

ARGUMENT 8

I. Schaefer is not entitled to rescind the Release under the doctrine of mutual mistake. 8

A. This Court's decision in *Parkhurst* precludes rescission on the basis of mutual mistake in this case. 10

B. The Release was intended to cover unknown injuries. 14

C. Public policy strongly supports the finality of releases. 15

II. Schaefer voluntarily executed the Release, and she failed to submit admissible evidence to support her undue influence claim. 17

A. Schaefer presented no admissible evidence that she was susceptible to undue influence. 19

B. Schaefer presented no evidence that Parris had the opportunity to exert undue influence. 21

C. Schaefer presented no evidence that Parris had a disposition to exert undue influence. 22

D. The Release does not clearly show the effects of undue influence. 24

III. Any error by the circuit court in not expressly ruling on Schaefer's motion to supplement was harmless 26

A. The motion to supplement was meritless. 28

B. Any error in not expressly ruling on the motion was harmless. 29

CONCLUSION 29

CERTIFICATE OF COMPLIANCE 31

CERTIFICATE OF SERVICE 32

APPENDIX I

TABLE OF AUTHORITIES

Page

Cases

Alberts v. Giebink,
299 N.W.2d 454 (S.D. 1980) 17

Berbos v. Krage,
2008 S.D. 68, 754 N.W.2d 432 7

Boman v. Johnson,
158 N.W.2d 528 (S.D. 1968) 1, 13, 14

Bordeaux v. Shannon County Sch.,
2005 S.D.117, ¶ 14, 707 N.W.2d 123 19

Coomer v. Helps,
172 S.W.3d 389 (Ky. 2005) 16

Dakota Industries, Inc. v. Cabela's.Com, Inc.,
2009 S.D. 39, 766 N.W.2d 510 18

Estate of Lien v. Pete Lien & Sons, Inc.,
2007 S.D. 100, 740 N.W.2d 115 7

Estate of Schnell,
2004 S.D. 80, 683 N.W.2d 415 18

Estate of Smid,
2004 S.D. 80, 756 N.W.2d 1 ..... 1, 2, 18, 20

Estate of Unke,
1998 S.D. 94, 583 N.W.2d 145 20

Fenske Media Corp. v. Banta Corp.,
2004 S.D. 23, 676 N.W.2d 390 13

Gores v. Miller,
2016 S.D. 9, 875 N.W.2d 34 ..... 1, 9, 28

Heitmann v. Am. Fam. Mut. Ins. Co.,
2016 S.D. 51, 883 N.W.2d 506 7

Johnson v. O'Farrell,
2010 S.D. 68, 787 N.W.2d 307 ..... 2, 19, 20

Kendrick v. Barker,
15 P.3d 734 (Wyo. 2001) 15, 16

Kimball Investment Land, Ltd. v. Chmela,
2000 S.D. 6, 604 N.W.2d 289 7

Kuehl v. Horner Lumber Co.,
2004 S.D. 48, 678 N.W.2d 809 8

LPN Trust v. Farrar Outdoor Adver., Inc.,
1996 S.D. 97, 552 N.W.2d 796 20

Luther v. City of Winner,
2004 S.D. 1, 674 N.W.2d 339 7

Maglin v. Tschannerl,
800 A.2d 486 (Vt. 2002) 16

Neugebauer v. Neugebauer,
2011 S.D. 64, 804 N.W.2d 450 ..... 21, 23, 25

Parkhurst v. Burkel,
1996 S.D. 19, 544 N.W.2d 210 ..... 1, 10, 11, 12, 13, 14, 15, 17

Peterson v. Kemper,
18 N.W.2d 294 (S.D. 1945) 11

Roden v. General Cas. Co.,
2003 S.D. 130, 671 N.W.2d 622 7

Stern Oil Co. v. Brown,
2012 S.D. 56, 817 N.W.2d 395 ..... 8, 19

Stockwell v. Stockwell,
2010 S.D. 79, 790 N.W.2d 52 18

Zephier v. Catholic Diocese of Sioux Falls,
2008 S.D. 56, 752 N.W.2d 658 18

Statutes

SDCL § 15-26A-15(1) 26

SDCL § 15-26A-66(b)(4) 31

SDCL § 15-6-56(c) 1, 2

SDCL § 15-6-56(e) ..... 2, 7, 8, I

SDCL § 15-6-56(f) 28
SDCL § 15-6-61 ..... 2, 29, I
SDCL § 15-6-61(a) 29
SDCL § 19-19-801 I
SDCL § 19-19-801(c) 2, 19, 29
SDCL § 53-4-7(2) 17

JURISDICTIONAL STATEMENT

The Memorandum and Opinion and Order granting the Defendant's Motion for Summary Judgment was filed on March 20, 2017. (R. at 398.) Summary Judgment was entered by the circuit court on March 28, 2017. (R. at 424.) Notice of Entry of Order Granting Defendant's Motion for Summary Judgment and Summary Judgment was served and filed on March 31, 2017. (R. at 428.)

On April 6, 2017, the Plaintiff served her Petition for Permission to Take Discretionary Appeal, which this Court granted on May 12, 2017. (R. at 453.)

REQUEST FOR ORAL ARGUMENT

Nathan J. Flanders respectfully requests oral argument on all of the issues set forth herein.

STATEMENT OF THE ISSUES

1. In *Parkhurst v. Burkel*, this Court held that the unexpected consequences of known injuries cannot act to invalidate a release under the doctrine of mutual mistake. *Parkhurst v. Burkel*, 1996 S.D. 19, ¶ 19, 544 N.W.2d 210, 213. In this case, the undisputed evidence demonstrates that both Schaefer and Parris were aware Schaefer had a chest injury prior to executing the Release. Is Schaefer entitled to rescind the validly executed Release under the doctrine of mutual mistake?

The circuit court concluded (1) that Schaefer was aware of her chest injury prior to executing the Release; (2) that the Release covered unknown injuries; and (3) that Schaefer was not entitled to rescind the Release under the doctrine of mutual mistake.

Parkhurst v. Burkel, 1996 S.D. 19, 544 N.W.2d 210
Boman v. Johnson, 158 N.W.2d 528 (S.D. 1968)
Gores v. Miller, 2016 S.D. 9, 875 N.W.2d 34
SDCL § 15-6-56(c)

2. In *Estate of Smid*, this Court held that undue influence may be shown by demonstrating (1) susceptibility to undue influence; (2) opportunity to exert such influence and effect a wrongful purpose; (3) a disposition to do so for an improper purpose; and (4) a result clearly showing the effects of undue influence. *Estate of Smid*, 2004 S.D. 80, ¶ 33, 756 N.W.2d 1, 12. In this case, Schaefer submitted no

competent or admissible evidence in support of each of the required elements. Can Schaefer create an issue of fact precluding summary judgment on the absence of undue influence?

The circuit court concluded that Schaefer did not present evidence supporting the four elements from *Smid* and that the Release was not the result of undue influence.

Estate of Smid, 2008 S.D. 82, 756 N.W.2d 1
SDCL § 15-6-56(c)

3. In response to Flanders' Motion for Summary Judgment, Schaefer cited to records from her Social Security Disability File to support her contention that she had a low I.Q. and diminished capacity. Flanders filed a Motion to Strike the SSDI records on the basis that they were inadmissible hearsay. Schaefer then filed a Motion to Supplement the Record, seeking leave to supplement the record with affidavits from medical providers to attempt to provide foundation for the documents. Did the circuit court err by not expressly ruling on the Motion to Supplement Record?

The circuit court heard argument from counsel regarding the SSDI records and granted Flanders' Motion for Summary Judgment, but did not expressly grant or deny the Motion to Supplement Record.

Johnson v. O'Farrell, 2010 S.D. 68, 787 N.W.2d 307
SDCL § 19-19-801(c)
SDCL § 15-6-56(e)
SDCL § 15-6-61

STATEMENT OF THE CASE

This lawsuit was commenced by Schaefer in Minnehaha County, South Dakota. Schaefer filed her Complaint on January 22, 2015, and named Sioux Spine Sport, Prof. L.L.C. ("Sioux Spine"), as the sole Defendant. (R. at 2.) Schaefer brought a claim for professional negligence against Sioux Spine, alleging that Schaefer suffered a fractured sternum on July 10, 2013, when Dr. Scheurenbrand performed a manipulation on her. *Id.*

On February 19, 2016, despite having already released all claims against Flanders in the Release, Schaefer filed an Amended Complaint, which added a negligence claim against Flanders. (R. at 19.) Flanders filed an Answer denying liability, affirmatively

alleging that Schaefer had released any and all claims against him and that Schaefer's claims were barred by the doctrines of payment and accord and satisfaction. (R. at 42.)

On December 12, 2016, Flanders filed a Motion for Summary Judgment on the basis that Schaefer's claim was barred by the previously executed Release. On January 23, 2017, Circuit Court Judge John Pekas held a hearing on the motion. (R. at 398; HT at 1-3.) Argument was presented by counsel for the parties, and the circuit court took the motion under advisement. (HT at 32.) On March 17, 2017, the circuit court signed its Memorandum Opinion and Order Re: Defendants' Motion for Summary Judgment, in which the circuit court granted the motion, concluding the Release was valid and controlling. (R. at 398.) Summary Judgment was entered on March 28, 2017, and this appeal followed. (R. at 424.)

STATEMENT OF FACTS

1. The accident.

On June 9, 2013, Schaefer was a passenger in a vehicle travelling south on Minnesota Avenue in Sioux Falls, South Dakota. (R. at 76.) Herbert Tollefson, Schaefer's boyfriend, was driving the vehicle, and the two were on their way to look for a new apartment. (*Id.*) Tollefson was stopped at the intersection of Minnesota Avenue and 85th Street, and was waiting to turn left onto 85th Street. (R. at 77.) Although there was a left hand turn lane at the intersection, Tollefson was not in it and was instead stopped in the inside southbound travel lane of Minnesota Avenue. (*Id.*)

Tollefson testified the car was stopped at the intersection just prior to the accident. (R. at 77.) Schaefer testified she was telling Tollefson where to go because he was not familiar with Sioux Falls and that Tollefson made a last minute turn at Schaefer's direction. (*Id.*) After slowing or stopping in the driving lane of Minnesota Avenue,

Tollefson's vehicle was hit from behind by a vehicle driven by Flanders. (*Id.*) Tollefson subsequently pled guilty to unsafe lane usage. (*Id.*)

After the accident, Schaefer told Tollefson that her neck and back hurt. (R. at 77.) According to the medical records from Rural Metro Ambulance, Schaefer complained of neck pain and right chest pain that she attributed to the seat belt. (*Id.*) Upon arriving at the Avera McKennan Emergency Room, Schaefer complained of neck pain and rib pain. (*Id.*) A CT of Schaefer's neck showed no fracture or subluxation. (R. at 78.) A chest x-ray was taken and came back clear. (*Id.*) She was discharged the same day with medication for pain. (*Id.*)

2. Schaefer signs a Release releasing Flanders from all future claims.

At the time of the accident, Flanders was insured by Mid-Century Insurance Company, a division of Farmers Insurance. (R. at 78.) Dustin Parris was employed by Farmers and contacted Schaefer to discuss her potential claim. Parris first spoke with Schaefer on the phone on June 11, 2013. (*Id.*) Schaefer reported that she had neck and back pain, chest pain from the seat belt, and whiplash. (*Id.*) At that time, Schaefer told Parris that she was taking over-the-counter medications and did not plan on any further treatment. (*Id.*)

Parris then met with Schaefer in person on June 25, 2013, at Schaefer's apartment in Sioux Falls. (R. at 78.) Parris met with Schaefer for approximately twenty to thirty minutes. (*Id.*) Parris discussed the claims process, and Schaefer discussed her current complaints. (*Id.*) Parris provided Schaefer with a letter enclosing a medical authorization form that would allow Farmers to obtain Schaefer's medical records and medical bills. (R. at 79.) The letter explained that Schaefer had three years from the date of the accident to settle her claim and provided an explanation of the claims process. (*Id.*)

Parris and Schaefer then discussed Schaefer's potential claim and her current complaints. (R. at 78.) Schaefer reported that she was still having pain in her neck and upper traps on both sides. (*Id.*) She indicated she planned on treating with Sioux Spine as soon as possible. (R. at 79.) They then discussed settling Schaefer's claim and discussed the use of a scheduled release for payment of the medical bills Schaefer had incurred through that date. (*Id.*) Based on the treatment that Schaefer told Parris she had received, Parris estimated that Schaefer's medical bills likely were between $2,100 and $2,500. (*Id.*) She indicated she had an x-ray rather than a CT scan at the hospital. The ceiling was eventually placed at $3,000 to make Schaefer feel secure with the potential settlement. (R. at 79.) As reflected in the June 25, 2013 Release, Farmers agreed to pay up to $3,000 for medical expenses that had been incurred by Schaefer up to that date, plus $500 for general damages. (*Id.*)

The next day, on June 26, 2013, Farmers received Schaefer's ER bill, which totaled $5,046.18, and which, due to the CT scan, was more than the amount Farmers agreed to pay in the initial Release. (R. at 79.) On June 27, Parris discussed the issue with Sharon Page, his supervisor. (*Id.*) The decision was made that Parris would call Schaefer back and increase the amount of medical bills Farmers would pay. (R. at 80.) To that end, on July 1, 2013, Parris returned to Schaefer's apartment to meet with Schaefer to sign a new Release. (*Id.*) The second Release, signed and executed by Schaefer on July 1, was identical to the first Release, except $8,000 was included for the ceiling on Schaefer's medical bills instead of $3,000. (*Id.*.) Like the first Release, the second Release included $500 for general damages. (*Id.*)

The Release provided that in exchange for the payment of $500, plus up to $8,000 in medical expenses, Schaefer agreed to release Flanders from:

> any and all claims, causes of action, actions, rights, demands, bodily injuries, personal injuries, damages including but not limited to any and all medical expenses wherever incurred and loss of wages and/or income, loss of consortium, loss of any services, other costs and expenses, and any other compensation of any kind, which the undersigned has incurred on account of or which are in any way related to an accident that occurred on or about June 9, 2013 at or near Sioux Falls, South Dakota.

(R. at 80.) The Release provided that except for the agreement to pay those medical expenses that had been previously incurred as a result of the accident, the released parties had "no obligation to pay for any other item, or any other general damages or other damage of any nature whatsoever, emotional distress, cost or expense of any kind which the Undersigned incurs at any time after this Release is signed." (*Id.*) Schaefer expressly acknowledged and agreed that "her injuries caused by the accident identified above are or may be permanent, and that the extent of recovery from those injuries is/may be uncertain and indefinite." (R. at 81.)

3. Schaefer treats with Dr. Scheurenbrand at Sioux Spine.

According to her medical records, Schaefer treated with Dr. Scheurenbrand on two occasions after the accident: July 8, 2013 and July 10, 2013. (R. at 81.) Schaefer decided to seek chiropractic treatment because her neck was sore. (*Id.*) The first visit was apparently uneventful. (*Id.*) However, Schaefer alleges that Dr. Scheurenbrand injured her on the second visit. (*Id.*) Schaefer claims that she experienced pain in her shoulders, neck, and chest after the second treatment. (*Id.*)

On July 18, 2013, about eight days after the second treatment with Dr. Scheurenbrand, Schaefer went to the hospital via ambulance. (R. at 81.) According to her medical records, Schaefer stated that she was hurt when Dr. Scheurenbrand did a

compression of her chest. (*Id.*) Schaefer was diagnosed with a fractured sternum. (*Id.*) Schaefer spent approximately one month in the hospital after a surgery was performed on her chest. (*Id.*) Schaefer later testified that Dr. Scheurenbrand fractured her sternum. (R. at 81, 113.)

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *Heitmann v. Am. Fam. Mut. Ins. Co.*, 2016 S.D. 51, ¶ 8, 883 N.W.2d 506, 508. When reviewing a grant of summary judgment, the Court decides "whether genuine issues of material fact exist and whether the law was correctly applied." *Id.* If no material facts are in dispute, the "review is limited to determining whether the trial court correctly applied the law." *Id.* This Court "will affirm a circuit court's decision so long as there is a legal basis to support its decision." *Id.* "[S]ummary judgment is a preferred method for disposing of any legally inadequate claim." *Berbos v. Krage*, 2008 S.D. 68, ¶ 8, 754 N.W.2d 432, 435. "Cases involving the interpretation of written documents are particularly appropriate for disposition by summary judgment, such interpretation being a legal issue rather than a factual one." *Estate of Lien v. Pete Lien & Sons, Inc.*, 2007 S.D. 100, ¶ 10, 740 N.W.2d 115, 119 (quoting *Kimball Investment Land, Ltd. v. Chmela*, 2000 S.D. 6, ¶ 7, 604 N.W.2d 289, 292.

Pursuant to SDCL § 15-6-56(e), the nonmoving party in a summary judgment proceeding "must set forth specific facts showing that there is a genuine issue for trial." *See Roden v. General Cas. Co.*, 2003 S.D. 130, ¶ 31, 671 N.W.2d 622, 629 (quoting SDCL § 15-6-56(e)). A nonmoving party may not rest on mere conclusory statements. *Id.* Instead, the nonmoving party must submit admissible evidence to create a genuine issue of fact. *Luther v. City of Winner*, 2004 S.D. 1, ¶ 11, 674 N.W.2d 339, 344-45. The

focus in summary judgment proceedings "centers on the existence of admissible and probative evidence to support the challenged claim or defense." *Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401. "Parties cannot rely on recitations of hearsay in affidavit form without also laying a foundation for an exception to the hearsay rule." *Kuehl v. Horner Lumber Co.*, 2004 S.D. 48, ¶ 13, 678 N.W.2d 809, 813.

ARGUMENT

This case is a professional negligence claim against Sioux Spine for injuries Schaefer allegedly sustained as a result of chiropractic treatment she obtained from Dr. Wade Scheurenbrand. (R. at 2-4.) Schaefer originally alleged that she suffered a fractured sternum when Dr. Scheurenbrand performed a manipulation on her on July 10, 2013. (R. at 3.) Schaefer herself maintains that she believes her sternum fracture was caused by Dr. Scheurenbrand. (R. at 81, 113.)

Schaefer's appeal is premised on an alternative scenario in which her sternum was fractured in the automobile accident that occurred on June 9, 2013, a month before her visit with Dr. Scheurenbrand, and nearly six weeks before she went to the emergency room for chest and shoulder pain on July 18, 2013. While Flanders denies that Schaefer fractured her sternum in the automobile accident, his arguments accept that allegation as true for the sake of argument solely for purposes of his motion for summary judgment and this appeal.

I. Schaefer is not entitled to rescind the Release under the doctrine of mutual mistake.

The Release signed by Schaefer expressly and unambiguously releases and discharges all claims against Flanders. "A release is a contract, and if a contract is unambiguous, we rely on the language of the contract to ascertain and give effect to the

parties' intent." *Gores v. Miller*, 2016 S.D. 9, ¶ 8, 875 N.W.2d 34, 37-38. "If the language is unambiguous, neither the releasor's subjective intent nor the failure to obtain full satisfaction in the settlement governs: the terms of the release control." *Id.* Contract interpretation is a legal question for the Court to resolve. *Id.*

Schaefer does not contend that the language of the Release is ambiguous. As such, the Court must look solely to the language of the Release to ascertain the parties' intent. *Gores*, 2016 S.D. 9, ¶ 8, 875 N.W.2d at 37. The Release provided that in exchange for $500 plus payment of up to $8,000 in medical expenses incurred prior to the date of the Release, Schaefer forever released Flanders from "any and all claims, causes of action, actions, rights, demands, bodily injuries, personal injuries, damages including but not limited to any and all medical expenses wherever incurred and loss of wages and/or income, loss of consortium, loss of any services, other costs and expenses, and any other compensation of any kind" that Schaefer had incurred "on account of which or which are in any way related to an accident that occurred on or about June 9, 2013, at or near Sioux Falls, SD." (R. at 191.)

Schaefer further agreed that, other than the $500 in general damages plus up to $8,000 in medical expenses incurred by Schaefer prior to July 1, 2013, Flanders had "no obligation to pay for any other item, or any other general damages or other damage of any nature whatsoever, emotional distress, cost or expense of any kind which the Undersigned incurs *at any time after this Release is signed*." (*Id.*) Finally, Schaefer expressly acknowledged and agreed that any injuries she sustained in the accident "may be permanent," and that "the extent of recovery from those injuries is/may be uncertain and indefinite." (*Id.*)

The unambiguous language of the Release that Schaefer voluntarily signed demonstrates that the Release was a full and final release of all claims against Flanders, with the clear understanding that Schaefer would not be permitted to bring any future claims for damages of any nature after July 1, 2013. It is undisputed that Schaefer's pending claim against Flanders is barred by the unambiguous language of the Release.

Schaefer instead contends that the Release was the product of mutual mistake and that she is therefore entitled to void the Release. (App. Brief, pg. 19.) Schaefer's argument is flawed for two primary reasons. First, by arguing that there is an issue of fact as to whether her sternal fracture was a known injury at the time she signed the Release, Schaefer confuses the existence of an unknown injury with the unknown or unanticipated consequences of a known injury. Second, arguing the Release was not intended to cover unknown injuries, Schaefer ignores the unambiguous language of the Release that precludes recovery for *any* future claims for injuries that arose after execution of the Release.

A. This Court's decision in *Parkhurst* precludes rescission on the basis of mutual mistake in this case.

This Court faced similar arguments from a plaintiff in *Parkhurst v. Burkel*, 1996 S.D. 19, 544 N.W.2d 210. Parkhurst suffered personal injuries in an automobile accident on July 9, 1992. *Id.* at ¶ 2. On March 23, 1993, Parkhurst released Burkel from any and all claims in exchange for $1,000. *Id.* Then, in July 1993, Parkhurst was diagnosed with a chip fracture in her right hip and surgery was performed the following month. *Id.* at ¶ 3. On September 15, 1993, Parkhurst sued Burkel to recover additional damages for personal injuries she claimed were caused by the July 9, 1992 accident. *Id.* Parkhurst

claimed to have incurred approximately $8,240 in additional medical expenses after the March 1993 release. *Id.*

The trial court granted Burkel's motion for summary judgment, and Parkhurst appealed. *Parkhurst*, 1996 S.D. 19, ¶ 4, 544 N.W.2d at 211. The issue as framed by this Court on appeal was "[w]hether rescission of a contract designated as a release is permitted upon an unilateral mistake based upon misunderstanding of the consequences of an injury?" *Id.* at ¶ 5. Parkhurst contended she had a claim for unilateral mistake of fact, arguing that her reliance on her physicians' assurance that her hip pain was related to her pregnancy precluded any binding effect of the release. *Id.* at ¶ 11.

In analyzing the issue, the Court first noted that it "has consistently indicated it favors the compromise and settlement of disputed claims outside of court." *Parkhurst*, 1996 S.D. 19, ¶ 12, 544 N.W.2d at 212. Relying on its prior precedent, this Court explained:

> Where, as they did here, the parties make a settlement by which, in consideration of the payment of a specified sum, all claims for damages, then existing or thereafter arising on account of the injuries sustained in the accident, are satisfied and discharged, the settlement is binding and conclusive, although subsequent events disclose that the injuries produced effects which were neither known nor anticipated when the settlement was made.

Id. at ¶ 15 (quoting *Peterson v. Kemper*, 18 N.W.2d 294, 297 (S.D. 1945)). "The parties are presumed to have had in mind the uncertainty as to the after effects of the injuries, and to have elected to make a final settlement which should be binding and conclusive whether such after effects should prove to be either more or less serious than anticipated." *Id.* (quoting *Peterson*, 18 N.W.2d at 297.)

This Court reasoned that Parkhurst's injury was discovered prior to the March 1993 release. *Parkhurst*, 1996 S.D. 19, ¶ 17, 544 N.W.2d at 214. This Court found that Parkhurst had discussed her hip pain with several medical providers, and, as such, her injuries were not new or undiscovered. *Id.* at ¶ 19. The Court concluded that Parkhurst's diagnoses and subsequent injuries "represent[ed] the unexpected consequences of *known* injuries and cannot act to invalidate her release." *Id.* (emphasis added).

This Court's holding in *Parkhurst* dictates the same result in this case. It is undisputed that Schaefer complained of neck pain and right chest pain to the Rural Metro Ambulance personnel. (R. at 77.) Schaefer attributed this pain to her seat belt. (*Id.*) It is also undisputed that Schaefer was diagnosed at the emergency room with a mild chest wall contusion after complaining of neck pain and a mild amount of rib pain. (R. at 77, 134.) She had diagnostic testing to evaluate this chest injury. Additionally, when Schaefer first spoke with Parris on the phone, she reported that she had neck and back pain, chest pain from the seat belt, and whiplash. (R. at 78.) As such, both Parris and Schaefer had knowledge of an injury to Schaefer's chest, and thus the injury was not "unknown" as claimed by Schaefer.[1] Schafer knew she injured her chest in the accident; she just did not know the diagnosis – sternum fracture. Similarly, the plaintiff in *Parkhurst* knew she injured her hip in the accident; she just did not know the diagnosis – chip fracture.

[1] In her arguments to the circuit court, Schaefer noted that an x-ray of her chest was taken the date of the accident, "which was noted as 'clear' meaning there was nothing noted on the chest x-ray." (R. at 208.) Schaefer then contended that the broken sternum that was revealed by the CT scan on July 18, 2013, was caused by the accident, her chiropractor, or, somehow, a "combination of both." (R. at 209.) It thus appears that Schaefer agrees that her fracture would not be visible on the date of the accident because it was not there, and the accident did not cause it, which is Flanders' position. However, even assuming for the purposes of Flanders' motion for summary judgment only that the sternum fracture was somehow related to the accident, both Schaefer and Parris had knowledge of a chest injury before the Release was signed.

Like the plaintiff in *Parkhurst*, Schaefer released Flanders from any and all claims arising from the underlying automobile accident. Also like the plaintiff in *Parkhurst*, Schaefer had a subsequent surgery after executing her Release. Schaefer objects to the circuit court's conclusion that Schaefer was aware of her chest injury, arguing such a conclusion is contrary to *Parkhurst* and *Boman v. Johnson*, 158 N.W.2d 528 (S.D. 1968). She contends that her condition was "asymptomatic" after the date of the collision and that she did not suffer any pain in her chest until Dr. Scheurenbrand performed a manipulation. (App. Brief, pg. 21.) But this argument ignores the fact that Schaefer complained of chest pain after the accident, both to her medical providers and to Parris. (R. at 77-78, 134.)

As such, the sternum fracture, if indeed it existed prior to the chiropractic manipulation, was an unexpected consequence of a known injury. Pursuant to this Court's holding in *Parkhurst*, any unexpected consequences of that injury "cannot act to invalidate her release." 1996 S.D. 19, ¶ 19, 544 N.W.2d at 213-14. *See Fenske Media Corp. v. Banta Corp.*, 2004 S.D. 23, ¶ 16, 676 N.W.2d 390, 395 ("[F]or a claim of mutual mistake to prevail in these circumstances, it is necessary to distinguish between claims involving unknown injuries and claims involving unknown consequences of known injuries.")

Schaefer's reliance on *Boman* is misplaced. As explained by this Court in *Parkhurst*, *Boman* involved an unconscionably low settlement amount of $200, which is not the case here. *Boman*, 158 N.W.2d at 529; *see Parkhurst*, 1996 S.D. ¶ 16, 544 N.W.2d at 213. Here, Schaefer was allowed up to $8,000 in medical expenses incurred through the date of the Release, plus an additional $500 in general damages. (R. at 191.)

This was not a "grossly inadequate" amount for the injuries Schaefer actually sustained in the accident. (*See, infra*, § II(D).) Moreover, unlike the plaintiff in *Boman,* both Schaefer and Parris were actually aware of her injuries. (R. at 77-78.) Parris and Schaefer not only discussed Schaefer's injuries, but the likely amount of Schaefer's medical bills, with Parris initially increasing the ceiling on the medical bills from $2,500 to $3,000 to make Schaefer feel more secure with the settlement. (*Id.*)

This case falls squarely within the ambit of *Parkhurst*. Any subsequent symptoms that Schaefer sustained or diagnoses that she was given as a result of the accident were, at best, unknown or unexpected consequences of known injuries. *Parkhurst*, 1996 S.D. 19, ¶ 16, 544 N.W.2d at 213. Therefore, Schaefer is not entitled to rescind the Release, and her claims against Flanders were properly dismissed.

B. The Release was intended to cover unknown injuries.

The circuit court correctly concluded that the Release contemplates unknown injuries. (R. at 440.) Even in *Boman*, this Court held, "if the parties did in fact intentionally agree upon a settlement for unknown injuries, such release will be binding." 158 N.W.2d at 530. The Release expressly provided that in exchange for $8,000 in medical bills and $500 in general damages, Schaefer agreed to release Flanders from *"any and all claims*" that were "in any way related to an accident that occurred on or about June 9, 2013." (R. at 191.) The Release further provided that other than the agreement to pay medical expenses incurred before the date of the Release, Flanders had "no obligation to pay for *any other item*, or *any other general damages* or other damage of any nature, emotional distress, cost or expense of *any kind* which the Undersigned incurs at any time after this Release is signed. (*Id.*) (emphasis added).

As such, while the Release does not use the specific term "unknown injuries," the plain language of the Release makes clear that Schaefer was releasing *any and all* claims against Flanders of whatever cause of origin including unknown injuries. Even if this Court concluded that the sternum fracture was an unknown injury, which Flanders disputes, any claim for damages related to the sternum fracture was released by Schaefer through the Release.

C. Public policy strongly supports the finality of releases.

While reliance on *Parkhurst* alone is sufficient to affirm the circuit court's grant of summary judgment, it is also worth noting that other jurisdictions have rejected arguments similar to Schaefer's out of deference to the strong public policy supporting the finality of releases. For example, in *Kendrick v. Barker*, the plaintiff argued that after settling with the defendant, she was diagnosed with a closed head injury and argued that mutual mistake precluded enforcement of the agreement. *Kendrick v. Barker*, 15 P.3d 734, 737 (Wyo. 2001). The court rejected that argument, holding it had long been the policy of the court to encourage settling claims without litigation. *Id.* at 739. "This court has considered the settlement of claims prior to litigation to be in the public interest." *Id.* "There is no reason in principle why an improvident settlement made before trial is any more to be set aside than a judgment rendered upon a verdict that hindsight later proves to have been obtained too soon and for too little." *Id.*

The court further reasoned that public policy supported "requiring persons of legal age and capacity to contract to stand by their covenants, including bargains containing an element of chance." *Kendrick*, 15 P.3d at 739. The court concluded, "If from the particular language of the release or from the circumstances of the negotiated settlement, there was a conscious and deliberate intention to discharge liability from all

consequences of an accident, the release will be sustained and bar any future claims of previously unknown injuries." *Id.* at 740.

The Kentucky Supreme Court used a similar rationale in *Coomer v. Helps*, 172 S.W.3d 389 (Ky. 2005). There, the plaintiff was injured when her left knee was struck by the defendant's car. *Id.* at 390. The next day, the defendant's insurer contacted the plaintiff to settle the claim, offering $250. *Id.* The plaintiff rejected that amount, but instead accepted $500 in exchange for her release. *Id.* at 391. One week after the accident, the plaintiff discovered that her doctor misdiagnosed her injury as a bruised knee when in fact her leg had been fractured. *Id.* She then sued the defendant for that injury, and on appeal argued the release should be rescinded under the doctrine of mutual mistake. *Id.*

The court rejected that argument, holding that to retreat from the rule that mistake was an insufficient ground on which to invalidate a general release "would cast great doubt on the finality of releases in this state and unnecessarily complicate settlement considerations." *Coomer*, 172 S.W.3d at 391. The court explained that the general rule upholding such releases "favors the orderly settlement of disputes and avoids multiplicity of suits and the chaos which would result if the releases were not treated seriously by the courts." *Id.; see also Maglin v. Tschannerl*, 800 A.2d 486, 490 (Vt. 2002) (rejecting the plaintiff's argument that the defendant's insurance agent was in a more powerful bargaining position, and reasoning that the plaintiff could have chosen not to sign the release at all, or at the very least could have delayed signing the release until she had consulted a lawyer or doctor).

The same policy considerations are at issue in this case. This Court has long supported the compromise and settlement of disputed claims. *See Parkhurst*, 1996 S.D. 19, ¶ 12, 544 N.W.2d at 212. Permitting Schaefer to now attempt to rescind the Release would open the door for all potential plaintiffs to attempt to rescind their settlements when they experience buyer's remorse and would be contrary to the public policy encouraging full and final releases.

II. Schaefer voluntarily executed the Release, and she failed to submit admissible evidence to support her undue influence claim.

Schaefer first argued that the Release was the result of undue influence in her opposition to Flanders' Motion for Summary Judgment. (*See* R. at 218-22.) Schaefer never disclosed an expert witness to opine that Schaefer lacked capacity or even had diminished capacity. Schaefer did not solicit any information regarding her capacity from Tollefson, her live-in boyfriend of several years, nor did Schaefer's counsel solicit such information from Schaefer herself. She does not have a legal guardian or conservator. Indeed, there is no evidence that Schaefer was unable to care for herself or that she required assistance from others to handle her finances or other personal decisions. On the contrary, Schaefer brought this lawsuit solely in her own name, establishing she was competent to retain counsel and pursue litigation.

Schaefer argues on appeal that she is entitled to rescission of the Release pursuant to SDCL § 53-4-7(2). (Appellant's Brief, pg. 11.) Schaefer did not bring a claim for rescission nor did she include rescission of the Release in her prayer for relief in her Amended Complaint. (R. at 19-23.) Her Amended Complaint ignores the very existence of the Release. She cannot now ask this Court to award her relief that was not pled or requested. *See Alberts v. Giebink*, 299 N.W.2d 454, 456 n.4 (S.D. 1980) ("Plaintiff,

however, did not plead fraud and concealment, and we cannot reach that issue on appeal.")

As the party asserting the Release was the result of undue influence, it was Schaefer's burden to prove each of the four elements of undue influence. *Estate of Smid*, 2008 S.D. 82, ¶ 33, 756 N.W.2d 1, 12. The elements include:

(1) susceptibility to undue influence;

(2) opportunity to exert such influence and effect the wrongful purpose;

(3) a disposition to do so for an improper purpose; and

(4) a result clearly showing the effects of undue influence.

Id. (quoting *Estate of Schnell,* 2004 S.D. 80, ¶ 21, 683 N.W.2d 415, 421. "For influence to be undue, it must be of such a character as to destroy the free agency of the testator and substitute the will of another for that of the testator." *Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 35, 790 N.W.2d 52, 64. Schaefer concedes there was no confidential relationship between herself and Parris. (App. Brief, pg. 12.) Accordingly, she is not entitled to any presumption of undue influence and bears the burden to meet all four elements. *See Stockwell,* at ¶ 31.

As the nonmoving party, Schaefer bore the burden of proof to make a sufficient showing in support of each element of her undue influence claim. *Dakota Industries, Inc. v. Cabela's.Com, Inc.*, 2009 S.D. 39, ¶ 11, 766 N.W.2d 510, 513. "Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* (quoting *Zephier v. Catholic Diocese of Sioux Falls,* 2008 S.D. 56, ¶ 6, 752 N.W.2d 658, 662. "[T]hose resisting summary judgment must

show that they will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof." *Id.* (quoting *Bordeaux v. Shannon County Sch.*, 2005 S.D.117, ¶ 14, 707 N.W.2d 123, 127.) If this Court concludes that Schaefer failed to meet her burden as to any one element, it must affirm the grant of summary judgment.

A. Schaefer presented no admissible evidence that she was susceptible to undue influence.

Like her argument before the circuit court, Schaefer's primary argument on appeal regarding her susceptibility to undue influence is based on the inadmissible SSDI records. (App. Brief, pg. 13.) When Schaefer filed her Brief in Opposition to Defendant's Motion for Summary Judgment, she also filed an Affidavit of Sara E. Show, to which she attached copies of documents from her Social Security Disability File. (R. at 233; 316-29.) These records are inadmissible hearsay under SDCL § 19-19-801(c), as Schaefer is attempting to use them to prove the truth of their contents, i.e., that she has a low IQ and a poor memory. (App. Brief, pg. 13.)

It is a core principle that Schaefer may not submit inadmissible evidence to create an issue of fact. *Stern Oil*, 2012 S.D. 56, ¶ 16, 817 N.W.2d 395, 401. Instead of properly identifying Dr. Soule as a potential expert witness and obtaining a duly sworn affidavit from Dr. Soule based on his own personal knowledge, as required by SDCL § 15-6-56(e), Schaefer simply attached medical records to the Affidavit purporting to show a diagnosis for a low IQ. Even if she would have submitted an Affidavit to provide foundation for the assertion that the medical records were business records, they still would have been inadmissible as they contain hearsay within hearsay, because she relies on Dr. Soule's statements within those records. *Johnson v. O'Farrell*, 2010 S.D. 68, ¶

15, 787 N.W.2d 307, 312 (hearsay included within hearsay must be excluded unless each part of the combined statements "conforms with an exception to the hearsay rule.").

The remainder of Schaefer's arguments on susceptibility are conclusory statements that Schaefer did not know what she was signing. Schaefer, however, testified that she understood once she signed the Release she knew she was giving up her claims against Flanders. (R. at 382.) A party who voluntarily signs a contract cannot later claim she did not know what she was signing. "[O]ne who accepts a contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation or other wrongful act by another contracting party." *Smid*, 2008 S.D. 82, ¶ 17, 756 N.W.2d at 7 (quoting *LPN Trust v. Farrar Outdoor Adver., Inc.*, 1996 S.D. 97, ¶ 13, 552 N.W.2d 796, 799). "To permit a party . . . to admit that he signed [a contract] but did not read it or know its stipulations would absolutely destroy the value of all contracts." *Id.*

As noted above, there was no evidence presented to the circuit court demonstrating that Schaefer was incompetent nor unable to handle her own affairs. On the contrary, the evidence suggests that Schaefer was competent and complexly capable of making her own decisions. An individual who remains "competent and completely capable of making her own decisions" is not susceptible to undue influence. *See Estate of Unke*, 1998 S.D. 94, ¶ 22, 583 N.W.2d 145, 149.

Schaefer failed to present admissible evidence demonstrating that she was susceptible to undue influence. As such, the circuit court correctly concluded that Schaefer could not meet her burden as to the susceptibility element.

B. Schaefer presented no evidence that Parris had the opportunity to exert undue influence.

Schaefer fundamentally misunderstands the second element of an undue influence claim. Schaefer argues that this element is met simply by showing that Parris met with Schaefer on a "couple occasions and ultimately obtained a signed release from her." (App. Brief, pg. 15.) If this was the standard, then the opportunity element would be met in any case where two parties enter into an agreement. This Court's analysis of the opportunity element in *Neugebauer v. Neugebauer* is instructive on this point. *Neugebauer v. Neugebauer*, 2011 S.D. 64, ¶ 20, 804 N.W.2d 450, 455. In *Neugebauer*, Pearl Neugebauer brought an action against Lincoln Neugebauer, Pearl's son, for rescission of a contract for deed, under which her son had purchased her farm. *Id.* at ¶ 1.

In analyzing the opportunity element, the Court noted the relevance of the parties' subjective knowledge when executing a contract. The mother testified that Lincoln was her son and someone with whom she had lived for many years; "[s]omeone she trusted to 'do right.'" *Neugebauer*, 2011 S.D. 64, ¶ 20, 804 N.W.2d at 455. Lincoln conceded that on the date that Pearl signed the contract for deed, he knew "Pearl trusted him and had confidence that he would treat her fairly in his business dealings with her." *Id.* This Court concluded, "This type of trust and confidence by a mother in her son was sufficient to prove opportunity." *Id.*

Unlike *Neugebauer*, Schaefer had no reason to place her trust and confidence in Parris, whom she had never met, and with whom she was dealing with at arms-length. As noted by the circuit court, Parris had no reason to believe that Schaefer was unable to handle her own affairs or that she had any sort of cognitive impairment. There was no evidence that Parris sought to exploit any purported susceptibility. In sum, Schaefer

failed to produce evidence showing that Parris had an opportunity to exert undue influence. The circuit court correctly concluded that Schaefer could not meet her burden as to the opportunity element.

C. Schaefer presented no evidence that Parris had a disposition to exert undue influence.

Schaefer's claim that Parris had the disposition to exert undue influence is baseless and is not supported by any evidence. The undisputed evidence demonstrates that Parris explained the claims process to Schaefer and provided her with a letter providing additional information. (R. at 79.) Parris gathered information from Schaefer regarding the nature and extent of her injuries on multiple occasions, first in a phone call on June 11, 2013, and then during their first in-person meeting on June 25, 2013. (R. at 78.) Parris and Schaefer discussed settling her claim with a scheduled release for payment of the medical bills Schaefer had incurred through that date.

Based on the treatment Schaefer indicated she received after the accident, Parris estimated her medical bills likely were between $2,100 and $2,500, but placed the ceiling at $3,000 to make Schaefer feel more secure with the potential settlement. (R. at 79.) As embodied in the June 25 Release, Farmers agreed to pay up to $3,000 for medical expenses that had been incurred by Schaefer up to that date, plus $500 for general damages. (*Id.*)

The next day, on June 26, Farmers received Schaefer's ER bill, which totaled $5,046.18 and was over $2,000 more than the amount Farmers agreed to pay in the original Release. (R. at 79.) On June 27, Parris discussed the issue with his supervisor, and the decision was made that Parris would call Schaefer back and increase the amount of medical bills Farmers was willing to pay. (R. at 80.) Parris then returned to

Schaefer's apartment on July 1 and met with Schaefer to sign a new Release. (*Id.*) The second Release was identical to the first, but the $3,000 ceiling was replaced with an $8,000 ceiling. (*Id.*)

Evidence of conduct after the execution of a contract may be relevant to show disposition to exercise undue influence at the time the contract was executed. *Neugebauer*, 2011 S.D. 64, ¶ 23, 804 N.W.2d at 456. Here, Parris's post-execution conduct demonstrates he did not have the disposition to exert undue influence, and Schaefer engages in wild speculation when she asserts that Parris's actions were evidence of a "guilty conscience." (App. Brief, pg. 16.) Parris himself testified that, "If somebody was incompetent and not able to sign the document legally, they were mentally handicapped, et cetera, then I wouldn't have them sign the document." (R. at 298.)

Schaefer objects to the circuit court's language regarding Parris's post-execution conduct, where it stated that the fact that Parris "unilaterally took action to execute a second Release upon receiving the emergency room bill weighs strongly against a finding of undue influence." (App. Brief. 16; R. at 410.) Schaefer argues this conclusion constitutes improper weighing of facts at the summary judgment stage. (App. Brief, 16.) While perhaps imprecise, the circuit court's conclusion is entirely appropriate given the complete lack of evidence proffered by Schaefer to show Parris's disposition for undue influence. Stated differently, the fact Parris unilaterally took action is undisputed – Schaefer is instead asking for the unreasonable inference from this undisputed fact that Parris had a "guilty conscience." The courts cannot automatically impute improper motive to any individual working for an insurance company. This inference is

unreasonable and unwarranted, and the circuit court properly concluded the undisputed evidence demonstrated Parris did not have a disposition to exert undue influence.

Prompt resolution of a claim where the injured party reports minimal injuries and only seeks chiropractic care is not evidence of a disposition to exert undue influence. Setting aside her conclusory statements regarding Parris's motivations, Schaefer presented the circuit court with no evidence to show Parris had a disposition to exert undue influence. As such, the circuit court correctly concluded that Schaefer could not meet her burden as to the disposition element.

D. The Release does not clearly show the effects of undue influence.

Schaefer's argument that the Release shows the effects of undue influence is essentially a restatement of the unconscionability argument she presented to the circuit court when resisting Flanders' motion for summary judgment and which she has now abandoned. (*See* R. at 222-23.) Schaefer argues that the $8,000 she received for her medical bills, plus the $500 she received for her general damages, was too low. She restates the argument that Tollefson's "med pay coverage" would have provided coverage of up to $5,000, and therefore claims that the subsequent $8,000 settlement only covered another $3,000 for Schaefer's medical bills. (App. Brief, pg. 18.) As noted by Flanders below, Tollefson's insurer did not actually pay anything under the med-pay coverage. (R. at 386.) Thus, this argument is a red herring. Farmers agreed to and did pay up to $8,000 in medical bills in exchange for the Release of all claims.

Schaefer's arguments regarding the settlement amount demonstrate the limits of the alternative scenarios she asks the Court to accept. The settlement amount is completely appropriate for the minor injuries Schaefer sustained in the accident. After the accident on June 9, 2013, Schaefer went to the emergency room via ambulance. (R.

at 77.) She complained of neck pain and a mild amount of rib pain, but both her CT and x-ray came back as clear, and she was discharged the same day. (*Id.*) Several days later, Schaefer spoke with Parris on the phone, and informed him that she was taking over-the-counter pain medications and did not plan on any further treatment. (*Id.*) On June 25, when she met Parris in person, Schaefer complained of some pain in her neck and upper traps, but only indicated she was going to obtain chiropractic treatment. (R. at 79.) A net settlement of $8,500 was therefore a reasonable amount for the settlement.

The settlement amount only looks small when compared to the $400,000 in medical bills she incurred as a result of the staph infection and abscess that she sustained after she was admitted to the hospital on July 18, 2013, nearly a month after signing the first Release. (App. Brief, pg. 7.) Even if one assumes that the underlying sternum fracture existed at the time the Release was signed, the superseding events of the staph infection, abscess, and subsequent surgeries demonstrate that the settlement amount was entirely reasonable at the time it was entered into.

This Court's analysis in *Neugebauer* is again instructive on this point. There, this Court noted that Pearl sold her property for $580,000 less than its value. *Neugebauer*, 2011 S.D. 64, ¶ 27, 804 N.W.2d at 457. Moreover, the thirty-year payment term would have required Pearl to live to 114 years-of-age to receive all of the payments. *Id.* This Court concluded that this evidence demonstrated a result showing the effects of undue influence. *Id.* Unlike *Neugebauer*, in this case the settlement amount was proportional to the injuries Schaefer sustained in the accident. Schaefer provided no other evidence that the Release showed the effects of undue influence. The circuit court correctly concluded

that Schaefer could not meet her burden as to a result showing effects of undue influence element.

III. Any error by the circuit court in not expressly ruling on Schaefer's motion to supplement was harmless.

Before addressing the final issue raised by Schaefer, it should be noted that it does not appear that this issue is properly before the Court. This appeal is the result of this Court's grant of Schaefer's Petition for Discretionary Appeal. (R. at 453-54.) However, Schaefer's Petition for Discretionary Appeal, which contains a "Statement of the Questions" to be raised on appeal pursuant to SDCL § 15-26A-15(1), makes no reference to whether the circuit court erred by failing to expressly rule on Schaefer's motion to supplement. Schaefer also filed a Docketing Statement, which also lists only two issues intended to be presented for review, neither of which reference the motion to supplement. (R. at 463-67.) As such, this issue has not been appropriately raised.

Flanders moved for summary judgment on December 12, 2016. (R. at 74-75.) Two days later, Flanders served a Notice of Hearing notifying Schaefer that the motion would come on for hearing before the circuit court on January 23, 2017. (R. at 196.) Almost 6 weeks later, on January 16, 2017, Schaefer filed her Brief in Opposition to Schaefer's Motion for Summary Judgment, along with a Response to Schaefer's Statement of Undisputed Material Facts and a Statement of Disputed Material Facts. (R. 204-32.) In her Brief in Opposition, Schaefer cited to several records from her Social Security Disability File to support her contention that she had a low I.Q. and diminished capacity. (R. at 205-06, 218-19.) Those records were then attached to the Affidavit of Sara E. Show as Exhibit 3 and filed on January 17. (R. at 233-34, 316-29.)

On January 19, 2017, Flanders moved to strike the SSDI records from the record as well as any references to the SSDI records in Schaefer's summary judgment papers. (R. at 365-66.) Flanders argued that the SSDI records lacked foundation and were inadmissible hearsay. (R. at 369-70.) Flanders filed his Reply Brief in Support of Motion for Summary Judgment that same day. (R. at 372-81.)

The next day, on January 20, after briefing on the pending motion for summary judgment had closed and only two days before the hearing, Schaefer filed her Motion to Supplement Record. (R. at 388-89.) Schaefer's counsel conceded that the SSDI records had been in their possession since June 20, 2016, nearly six months before Flanders filed his motion for summary judgment. (R. at 388, 391.) Nonetheless, Schaefer asked the Court to "allow her to supplement the record with Affidavits from SSA and any providers identified therein." (R. at 389.)

At the beginning of the hearing on January 23, 2017, the circuit court acknowledged the pending motions regarding the SSDI records. (R. at 476.) Flanders' counsel also presented argument regarding the motion to supplement, explaining that even if the SSDI records were admitted as a business record, they would still be hearsay within hearsay. (R. at 484.) Flanders' counsel also noted that Schaefer had ample time to obtain admissible evidence to resist the motion for summary judgment, and simply failed to do so. (R. at 477, 484-85.) Schaefer's counsel also presented argument on the motion, arguing "it's just we need a little more time." (R. at 491.) Schaefer's counsel closed by stating, "So we would ask that you give us the opportunity to supplement the record and make sure the documents that are Exhibit 3, the Social Security Disability Record, get into the record through other affidavits[.]" (R. at 498-99.)

At the conclusion of the hearing, the circuit court stated that it would take the matter under advisement. (R. at 505.) The following exchange then took place between Schaefer's counsel and the circuit court:

> MS. SHOW: Your Honor, if we do get those records in the meantime, do you want us to hold onto them until your decision is --
>
> THE COURT: Hold on to them please. Okay. Thanks.

(R. at 505-06.) In its memorandum opinion, the circuit court noted Schaefer's arguments that she was "highly susceptible to undue influence due to her mental impairment. She contends she had no understanding of what the Release was or what it accomplished." (R. at 409.)

A. The motion to supplement was meritless.

The motion to supplement was meritless because it was not filed in a timely fashion nor was it a proper motion. If Schaefer wanted to present additional affidavits in resistance to the motion for summary judgment, she had recourse through SDCL § 15-6-56(f). While Schaefer's counsel did submit an affidavit in support of her motion, it made no reference to Rule 56(f) and instead was postured as a motion to supplement the record, not as a motion for a continuance as contemplated by Rule 56(f). Additionally, the motion was mere days before the summary judgment hearing, and the circuit court was well within its discretion to deny the motion. *See Gores*, 2016 S.D. 9, ¶ 14, 875 N.W.2d at 39 ("A circuit court's refusal to grant additional discovery prior to awarding summary judgment is reviewed for abuse of discretion.") Schaefer failed to make a showing why she had failed to obtain any affidavits she was seeking in the six months after the SSDI records were initially obtained.

B. Any error in not expressly ruling on the motion was harmless.

Under SDCL § 15-6-61, no act or omission by the circuit court is grounds for vacating or modifying a judgment or order unless "refusal to take such action appears to the court inconsistent with substantial justice." SDCL § 15-6-61(a). "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." *Id.*

The circuit court heard argument regarding the content of the SSDI records both in the parties' briefs and during oral argument at the summary judgment hearing. The circuit court ultimately granted the motion for summary judgment but did not expressly grant or deny the motion to supplement. However, the Court noted Schaefer's arguments and factual allegations regarding her diminished capacity in its memorandum opinion, and further noted there was no evidence that Parris would have known Schaefer had any cognitive impairment when he met her. (R. at 409.) It would be moot to reintroduce that evidence because it was already considered by the circuit court.

Additionally, as noted above, even if Schaefer obtained affidavits establishing foundation for the records, the statements she is attempting to rely on would still constitute hearsay under SDCL § 19-19-801(c). (*See infra* at § II(A).) Had the circuit court granted the motion, Schaefer still would not have been entitled to use the statements contained in the SSDI records to prove any mental impairment. Any error in failing to expressly rule on the motion to supplement was harmless.

CONCLUSION

Flanders respectfully requests this Court affirm the circuit court's grant of summary judgment. There are no disputed questions of material fact relating to the scope and effect of the Release that Schaefer voluntarily executed, and the circuit court

correctly concluded that Schaefer failed to meet her burden as to her undue influence claim.

Dated this 30th day of August, 2017.

WOODS, FULLER, SHULTZ & SMITH P.C.

By _____

Melanie L. Carpenter
Joel E. Engel III
300 South Phillips Avenue, Suite 300
PO Box 5027
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Email: melanie.carpenter@woodsfuller.com
Email: joel.engel@woodsfuller.com
Attorneys for Appellee Nathan Flanders

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 8,417 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 30th day of August, 2017.

WOODS, FULLER, SHULTZ & SMITH P.C.

By_____

Melanie L. Carpenter
Joel E. Engel III
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Melanie.Carpenter@woodsfuller.com
joel.engel@woodsfuller.com
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August, 2017, I served a true and correct copy of the foregoing Brief of Appellee Nathan J. Flanders via electronic mail on the following:

A. Russell Janklow
Ronald A. Parsons, Jr.
Sara E. Show
Johnson, Janklow, Abdallah, Reiter & Parsons, LLP
101 S. Main, Ste. 100
PO Box 2348
Sioux Falls, SD 57101-2348
Attorneys for Plaintiff/Appellant
russ@janklowabdallah.com
ron@janklowabdallah.com
sara@janklowabdallah.com

Edwin E. Evans
Melinda J. Folkens
Evans, Haigh & Hinton, LLP
101 N. Main Ave., Ste. 213
PO Box 2790
Sioux Falls, SD 57101-2790
Attorneys for Defendant Sioux Spine & Sport, Prof. LLC
eevans@ehhlawyers.com
mfolkens@ehhlawyers.com

Heidi N. Thoennes
In-House Counsel
American Family
4200 Corporate Drive, Ste. 120
West Des Moines, IA 50266
Attorneys for Third Party Defendant/Appellee Herbert Tollefson
hthoenne@amfam.com

_____
One of the attorneys for Defendant/Third Party Plaintiff/Appellee Nathan Flanders

APPENDIX

SDCL § 19-19-801 ……. App. 1-2

SDCL § 15-6-56(e) ……. App. 3

SDCL § 15-6-61 …….. App. 4

South Dakota Codified Laws
Title 19. Evidence (Refs & Annos)
Chapter 19-19. South Dakota Rules of Evidence (Refs & Annos)
Article VIII. Hearsay

SDCL § 19-19-801
Formerly cited as SD ST § 19-16-1; § 19-16-2; § 19-16-3.

19-19-801. Definitions that apply to this article--Exclusions from hearsay

Currentness

The following definitions apply under this article:

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) The declarant does not make while testifying at the current trial or hearing; and

(2) A party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements that are not hearsay. A statement that meets the following conditions is not hearsay:

(1) A declarant-witness's prior statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) Is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) Is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) Identifies a person as someone the declarant perceived earlier.

(2) An opposing party's statement. The statement is offered against an opposing party and:

(A) Was made by the party in an individual or representative capacity;

(B) Is one the party manifested that it adopted or believed to be true;

(C) Was made by a person whom the party authorized to make a statement on the subject;

(D) Was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) Was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Credits

Source: SL 1979, ch 358 (Supreme Court Rule 78-2, Rule 801); SDCL §§ 19-16-1 to 19-16-3; SL 2016, ch 239 (Supreme Court Rule 15-55), eff. Jan. 1, 2016.

Notes of Decisions (111)

S D C L § 19-19-801, SD ST § 19-19-801
Current through 2017 Regular and Special Session Laws, Executive Order 17-2, and Supreme Court Rules effective as of July 5, 2017

End of Document

South Dakota Codified Laws
Title 15. Civil Procedure
Chapter 15-6. Rules of Procedure in Circuit Courts (Refs & Annos)
VII. Judgment
15-6-56--Summary Judgment (Refs & Annos)

SDCL § 15-6-56(e)

15-6-56(e). Form of affidavits for summary judgment--Further testimony--Defense required

Currentness

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in § 15-6-56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Credits
Source: SD RCP, Rule 56 (e), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966.

Notes of Decisions (46)

S D C L § 15-6-56(e), SD ST § 15-6-56(e)
Current through 2017 Regular and Special Session Laws, Executive Order 17-2, and Supreme Court Rules effective as of July 5, 2017

End of Document

South Dakota Codified Laws
Title 15. Civil Procedure
Chapter 15-6. Rules of Procedure in Circuit Courts (Refs & Annos)
VII. Judgment
15-6-61--Harmless Error

SDCL § 15-6-61

15-6-61. Harmless Error

Currentness

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Credits
Source: SD RCP, Rule 61, as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966.

Notes of Decisions (27)

S D C L § 15-6-61, SD ST § 15-6-61
Current through 2017 Regular and Special Session Laws, Executive Order 17-2, and Supreme Court Rules effective as of July 5, 2017

End of Document

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28214

KATHY A. SCHAEFER

Plaintiff and Appellant,

vs.

SIOUX SPINE AND SPORT, PROF. LLC,

Defendant,

and

NATHAN J. FLANDERS,

Defendant and Appellee

and

HERBERT TOLLEFSON

Third-Party Defendant and Appellee.

APPEAL FROM THE SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN R. PEKAS, CIRCUIT JUDGE

REPLY BRIEF OF APPELLANT KATHY A. SCHAEFER

ORDER GRANTING DISCRETIONARY APPEAL FILED: MAY 12, 2017

ATTORNEYS FOR APPELLANT:

A. Russell Janklow
Ronald A. Parsons, Jr.
Sara E. Show
JOHNSON, JANKLOW, ABDALLAH, REITER, & PARSONS, LLP
P.O. Box 2348
Sioux Falls SD 57101-2348
(605) 338-4304

ATTORNEY FOR DEFENDANT AND APPELLEE NATHAN FLANDERS:

Ms. Melanie L. Carpenter
Mr. Joel E. Engel
WOODS, FULLER, SHULTZ & SMITH, P.C.
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
605-336-3890

ATTORNEY FOR APPELLEE AND THIRD-PARTY DEFENDANT HERBERT TOLLEFSON:

Ms. Heidi Thoennes
AMERICAN FAMILY INSURANCE
LEGAL DEPARTMENT
4200 Corporate Drive, #120
West Des Moines, IA 50266
605-362-5368

ATTORNEY FOR DEFENDANT SIOUX SPINE AND SPORT:

Mr. Edwin E. Evans
Ms. Melinda Folkens
EVANS, HAIGH & HINTON, LLP
101 N. Main Avenue, Suite 213
Sioux Falls, SD 57101-2790
(605) 275-9599

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

REPLY ARGUMENT 1

I. REVERSAL OF THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IS APPROPRIATE ON SCHAEFER'S RESCISSION CLAIM BECAUSE GENUINE ISSUES OF MATERIAL FACTS STILL EXIST. 1

A. Schaefer presented evidence that the sternum fracture was unknown at the time the release was signed. 1

B. Schaefer has presented evidence that she and Parris did not contemplate a sternal fracture when entering into the agreement. 5

C. The parties dispute whether the settlement amount was unconscionably low. 5

D. The General Releases cannot exclude unknown injuries under South Dakota Law.....7

II. THE TRIAL COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT ON SCHAEFER'S UNDUE INFLUENCE CLAIM AS GENUINE ISSUES OF MATERIAL FACT EXISTED ON THAT CLAIM. 8

A. Schaefer presented genuine issues of material fact as to whether she was susceptible to undue influence. 8

B. Genuine issues of material fact exist as to whether Parris had the opportunity to exert undue influence over Schaefer.....10

C. Schaefer presented evidence that Parris had the disposition to exert undue influence. 10

D. Genuine issues of material fact exist as to whether the amount settled for shows the effects of undue influence. 12

III. THE SSDI RECORDS ARE PROPERLY INCLUDED IN THE RECORD FOR PURPOSES OF THIS APPEAL BECAUSE THE TRIAL COURT

DID NOT RULE ON THE MOTION TO STRIKE OR MOTION TO SUPPLEMENT THE RECORD.....13

A. The SSDI records are already part of this record and the Court may consider the trial courts failure to rule on the motion to supplement and motion to strike. 13

B. Schaefer complied with the requirements of SDCL 15-6-56(e) and 15-6-56(f) and therefore, supplementation was appropriate. 14

IV. Schaefer was not required to request rescission of the release in her Complaint. 15

CONCLUSION.....16

CERTIFICATE OF COMPLIANCE.....19

TABLE OF AUTHORITIES

Cases

Boman v. Johnson, 158 N.W.2d 528 (S.D. 1968) ..... passim

Ctr. Ice of DuPage, Inc. v. Burley's Rink Supply, Inc., No. 96 C 5537, 1997 WL 534256, at *4 (N.D. Ill. Aug. 20, 1997) 16

E. Side Lutheran Church of Sioux Falls v. NEXT, Inc., 2014 S.D. 59, ¶ 15, 852 N.W.2d 434, 440 3

Fugman v. Aprogenex, Inc., 961 F.Supp. 1190, 1198 (N.D.Ill.1997) 16

In re Estate of Elliott, 537 N.W.2d 660, 665 (S.D.1995) 8

In re Estate of Zech, 285 N.W.2d 236, 246, (S.D. 1979) 9

In re Metz' Estate, 78 S.D. 212, 221, 100 N.W.2d 393, 398 9

Matter of Estate of Borsch, 353 N.W.2d 346, 349 (S.D. 1984) 9

Matter of Estate of Unke, 1998 S.D. 94, ¶ 22, 583 N.W.2d 145, 149 8

Parker v. Frazer's, Inc., 1998 WL 811425, at *2 (Ark. Ct. App. 1998) 16

Parkhurst v. Burkel, 1996 S.D. 19, 544 N.W.2d 210 ..... 2, 4

State v. Stanley, 2017 S.D. 32, ¶ 12, 896 N.W.2d 669, 675 13

Tregenza v. Great Am. Communications Co. ., 12 F.3d 717, 718 (7th Cir.1993) 16

Veith v. O'Brien, 2007 S.D. 88, ¶ 50, 739 N.W.2d 15, 29 13

Statutes

SDCL 15–26A–60(6) 13

SDCL 15-6-56(e) 14

SDCL 15-6-56(f) 14, 15

SDCL 20-7-11 7

REPLY ARGUMENT

Because there are several genuine issues of material fact remaining in this case, the trial court erred in granting summary judgment. Kathy Schaefer respectfully asks this Court to reverse the grant of summary judgment, remand this case, and allow a jury to determine whether the releases are subject to rescission and whether they were the product of undue influence.

I. REVERSAL OF THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IS APPROPRIATE ON SCHAEFER'S RESCISSION CLAIM BECAUSE GENUINE ISSUES OF MATERIAL FACTS STILL EXIST.

A. Schaefer presented evidence that the sternum fracture was unknown at the time the release was signed.

Schaefer presented evidence that neither she nor Parris contemplated the sternum fracture at the time she signed the release. In his brief, Nathan Flanders argues that the sternum fracture was unknown consequence of a known injury at the time the release was signed. There are facts in the record, however, upon which a reasonable jury could determine that Schaefer did not have knowledge of a sternum fracture at the time she signed the release. The record is clear that in the emergency room, Schaefer "denied midsternal chest pain." (R. 133). This evidence is more than enough to create a question of fact as to whether Schaefer was experiencing pain in her sternum.

Flanders's arguments as to whether the injury was unknown or unknown consequences of a known injury are proper arguments for a jury, however, the trial court was required to view the facts in the light most favorable to the non-moving

party, in this case, Schaefer and resolve all disputed facts in Schaefer's favor. Had the trial court done so, it would have found that for summary judgment purposes Schaefer's sternum fracture was a unknown injury because Schaefer specifically denied "midsternal chest pain" following the collision. (R. 133).

The facts here are much more like those in *Boman v. Johnson*, 158 N.W.2d 528 (S.D. 1968) than in *Parkhurst v. Burkel*, 1996 S.D. 19, 544 N.W.2d 210. While Schaefer agrees that typically there should be finality in settlements, it is not often that a settlement agreement is challenged for mutual mistake and the Court should not condone taking advantage of those with limited information and bargaining experience in these types of matters. This Court has only reviewed cases of mutual mistake in a settlement agreement twice in nearly fifty years, *Boman* in 1968 and *Parkhurst* in 1996. It has been over twenty years since this Court has had the opportunity to review a similar fact pattern. Thus, a decision under these facts does not appear that it would open the floodgates to parties challenging releases signed as settlement of claims or detract from this Court's history of encouraging the finality of settlement agreements. While there appears to be a vast difference in the facts between *Boman* and *Parkhurst*, the facts here are much more closely related to those in *Boman* than *Parkhurst*.

In *Boman*, after the collision, the plaintiff heard her neck snap and had some dizziness and pain in her neck. *Boman*, 158 N.W.2d at 529. She was hospitalized for two days. *Id.* . She was treated and told the insurance company in a signed statement that she only continued to have an occasional headache. *Id.* After signing the release,

Boman consulted numerous doctors due to continuing pain in her neck and headaches. *Id.* Ultimately, the doctors were able to determine she suffered a whiplash injury in the collision. *Id.* at 529-30. In *Boman*, this Court essentially held that temporary pain in an area immediately after a collision does not equate to knowledge of a serious injury. The *Boman* case is consistent with this Court's decision in parallel cases such as *E. Side Lutheran Church of Sioux Falls v. NEXT, Inc.*, 2014 S.D. 59, ¶ 15, 852 N.W.2d 434, 440, where this Court held that it is for a jury to decide whether notice of a construction defect in one area of a church was enough to put the business on notice of construction defects in other areas:

> Whether that actual notice is enough to put East Side on constructive notice of its structural design error and construction error claims (making the structural design error and construction error claims accrue prior to July 2004), and whether that determination is a question of fact or law, is the heart of this case. Because what a reasonably prudent person should inquire into when learning of water infiltration can differ depending on the circumstances, we conclude there is a genuine issue of material fact as to when East Side's structural design error and construction error claims accrued

Id. This case presents an analogous question: whether notice of generalized pain in one area, Schaefer's chest, is enough to put Schaefer on notice of a sternum fracture, where there is evidence that she denied pain in her sternum but had temporary pain in her chest.

Just as the plaintiff in *Boman* had temporary pain in a generalized area after the collision, here, Schaefer had temporary "chest" pain and denied "midsternal chest pain." (R. 133). Conversely, in *Parkhurst*, the plaintiff had continuous pain in her hip

for five to six months before she signed a release. 1996 S.D. 19, at ¶ 10, 544 N.W.2d at 212.

Similar to Schaefer, the plaintiff in *Boman* signed the release within weeks after the collision. *See Boman*, 158 N.W.2d at 529 (Collision was August 20, 1962 and the release was signed seventeen days later on September 5, 1962); (R. 189-90) (the collision was on June 9, 2013 and Schaefer executed the first release seventeen days later on June 25, 2013). Thus, Flanders and Tollefson's reliance upon *Parkhurst* is unpersuasive in light of the fact that Schaefer's facts are much more similar to those in *Boman*.

Additionally, Flanders's argument that Schaefer knew of her injuries at the time she signed the release is contradicted by the fact that Flanders argues that the collision did not cause Schaefer's fractured sternum. Schaefer's medical records have been thoroughly reviewed and Flanders has asserted throughout this case that Schaefer did not have a fractured sternum at the time of the collision. While it is true that in many cases a party can assume facts are true for purposes of a motion that they would otherwise dispute, here, Flanders cannot even definitively say at this time whether Schaefer had a fractured sternum at the time she signed the release.

If Flanders, Tollefson, and their respective counsel cannot even determine from all the medical records whether Schaefer's sternum was fractured in the collision, then how can they expect Schaefer to have known her sternum was fractured and call such a "known injury." Flanders's Brief at 12 FN1 ("It thus appears that Schaefer agrees that her fracture would not be visible on the date of the

accident because if was not there, and the accident did not cause it, which is Flanders' position").[1] Flanders and Tollefson should not be allowed to hold Schaefer to a higher standard of knowledge than they are held about whether her injuries were the result of the collision. Whether Schaefer had an unknown injury is for a jury to decide and therefore, summary judgment was inappropriate in this case.

B. Schaefer has presented evidence that she and Parris did not contemplate a sternal fracture when entering into the agreement.

Schaefer submitted evidence in the form of Parris's deposition testimony showing that neither she nor Parris contemplated a sternum fracture at the time the release was signed. (R. 298-99; 364 ("Q. Did you think you were pretty much done with your treatment? A. Yeah. I think.")). This evidence alone should have been enough for the trial court to deny summary judgment as it clearly showed that the parties had not contemplated a sternum fracture.

C. The parties dispute whether the settlement amount was unconscionably low.

The parties dispute whether the amount received by Schaefer to waive her claims against both Flanders and Tollefson was unconscionably low. Flanders argues that Schaefer was "allowed up to $8,000 in medical expenses incurred through the date of the Release, plus an additional $500 in general damages." (Flanders's Brief at 13). Flanders fails to admit that initially Schaefer was only given $3,000 for her

[1] Schaefer disputes Flanders's contention that the collision did not cause the sternum fracture and asserts that it should be for a jury to decide whether the fracture was present after the collision and if so, what caused the fracture.

medical bills and $500 in general damages. At the time Schaefer signed the first Release, Tollefson was already required to pay up to $5,000 in Schaefer's medical expenses. (R.361). Consequently, when Parris and Schaefer first agreed to the $3,000 in initial medical bills plus $500 in general damages, Schaefer was essentially settling the claim for $1,500 less than what Herb Tollefson's insurance was already responsible to pay for her medical expenses. (R.361). Thus, Schaefer has presented facts upon which a jury could reasonably find that amount Schaefer received was unconscionably low and further demonstrating that the parties did not contemplate the sternum fracture.

Even looking at the second Release signed by Schaefer, the amount provided to her was only $8,000 for her initial medical bills and $500 for general damages. The evidence demonstrates that the initial medical bills only totaled $5,046.18. (R.182). Thus, Schaefer would only have been responsible for $46.18 after Tollefson's insurance paid the initial $5,000. (R. 361, 182). Even if the second settlement is factored into this, Schaefer settled this claim for $546.18[2] to cover all future chiropractic treatment and general damages including pain and suffering. It hardly can be said that the parties contemplated $500 to compensate Schaefer with the pain, suffering, and future medical bills associated with a sternum fracture. Consequently,

[2] This amount includes the $500 paid to Schaefer for general damages plus the $46.18 of medical bills left after Tollefson's medical payments coverage would have paid $5,000 of the medical bills from the emergency room visit.

[Footnote continued on next page]

even if the Court accepts the argument that a typical sternum fracture treatment does not cost $400,000,[3] the amount of the settlement plainly is unconscionably low. The trial court should have weighed this fact in favor of Schaefer as further evidence that the parties were not contemplating the sternum fracture at the time the releases were signed.

D. The General Releases cannot exclude unknown injuries under South Dakota Law.

The parties dispute whether the releases intended to cover unknown injuries. The broad language cited by Flanders is in the very nature of a general release. (Flanders's Brief at 14). As Schaefer has previously explained and has gone unaddressed by the Appellees, South Dakota Law clearly holds that a general release does not extend to unknown claims. *See* SDCL 20-7-11. Thus, Flanders's recitation of the broad general language of the release only proves that this is a general release, which does not release unknown claims. Furthermore, even if the release did include release of unknown claims, the *Boman* case holds that the unknown injuries must still be within the contemplation of the parties when the settlement is agreed upon:

> 'Further that, even though a release expressly covers unknown injuries, it is not a bar to an action for such unknown injuries if it can be shown that such unknown injuries were not within the contemplation of the parties when the settlement was agreed upon, but that, if the parties did in fact intentionally agree upon a settlement for unknown injuries, such release will be binding. Whether the parties intended the release to cover unknown injuries is usually a question of fact.' *See also Simons v. Schiek's, Inc.*, 275 Minn. 132, 145 N.W.2d 548.

---

[3] Neither Tollefson nor Flanders can direct the Court to anywhere in the record demonstrating what costs are associated with a typical sternum fracture.

Boman, 158 N.W.2d at 530. As previously stated, Schaefer has presented evidence tending to show that the parties did not intend to release the unknown injury (the sternum fracture) at the time of the release. Flanders's argument that the release covered unknown injuries is meritless.

II. THE TRIAL COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT ON SCHAEFER'S UNDUE INFLUENCE CLAIM AS GENUINE ISSUES OF MATERIAL FACT EXISTED ON THAT CLAIM.

There are genuine issues of material fact on whether the releases were the result of undue influence and therefore, the trial court erred in granting summary judgment on this issue.

A. Schaefer presented genuine issues of material fact as to whether she was susceptible to undue influence.

Schaefer presented the trial court with evidence creating genuine issues of material fact on whether she was susceptible to undue influence. Flanders argues that *Matter of Estate of Unke*, 1998 S.D. 94, ¶ 22, 583 N.W.2d 145, 149, held that where a person is "'competent and completely capable of making her own decisions' is not susceptible to undue influence." (Flanders's Brief at 20) (quoting *Unke*, 1998 S.D. 94 at ¶ 22). In *Unke,* this Court did not hold that a person who is competent and completely capable of making their own decision is never susceptible to undue influence. Rather it held that "'[t]he physical and mental strength of a testator is material regarding the question of the testator's susceptibility to undue influence and fraud.'" *Unke*, 1998 S.D. 94, at ¶ 21, 583 N.W.2d at 149 (quoting *In re Estate of Elliott,* 537 N.W.2d 660, 665 (S.D. 1995)).

Both Flanders and Tollefson confuse competence or capacity to contract with undue influence. As the difference between the two has been explained:

> Competence, however, does not preclude a finding of undue influence; in fact, without proof of competence, undue influence is not possible. Hence, testimony as a whole painted a picture of a man who was competent, but because of various circumstances outlined above, was malleable and easily led. He was a perfect target for undue influence.

In re Estate of Zech, 285 N.W.2d 236, 246, (S.D. 1979); *see also Matter of Estate of Borsch*, 353 N.W.2d 346, 349 (S.D. 1984) (quoting *In re Metz' Estate*, 78 S.D. 212, 221, 100 N.W.2d 393, 398 ("mental competence is not dispositive of this issue. 'Susceptibility to influence does not mean mental or testamentary incapacity. In fact, the application of undue influence presupposes mental competency.'").

Schaefer has never argued that she was incompetent or lacked the capacity to contract. Instead, she alleges that she was "malleable and easily led." *Id.*; (HT at 21). The only other argument Flanders and Tollefson make on susceptibility is that Schaefer's evidence concerning susceptibility was not "admissible." (Flanders's Brief at 19-20). Both Tollefson and Flanders argue that this is inadmissible hearsay. The trial court did not strike the SSDI records and therefore, it remains part of the record. Furthermore, the SSDI records are business records within the exception of the hearsay rule and even if the statements by Dr. Soule were inadmissible double hearsay, the fact that Schaefer was granted Social Security Disability Benefits for a low IQ would not be double hearsay and would be evidence that she was susceptible to undue influence. Based upon the record, there are genuine issues of material fact on whether Schaefer was susceptible to undue influence.

B. Genuine issues of material fact exist as to whether Parris had the opportunity to exert undue influence over Schaefer.

Flanders argues that Parris did not have the opportunity to exert undue influence over Schaefer because she allegedly did not put any trust or confidence into Parris. There are disputed issues of fact on this element as well. The record clearly demonstrates that Schaefer was relying upon Parris to explain medical payments, the settlement process, and she even confided in Parris that she had no prior claims knowledge. (R. 183-85). Flanders admits that Parris "explained the claims process to Schaefer." (Flanders's Brief at 22) (citing R. 79). After settling with Schaefer, Parris provided her a letter explaining the settlement process and telling her that he would be in contact with her periodically to see how she was progressing, which was a false statement. (R. 296-97, 315).

Because the record contains evidence that Parris was informing Schaefer of the claims process and Schaefer was relying upon Parris to guide her through this process, there are disputed material facts upon which a reasonable jury could find that Parris had the opportunity to exert undue influence over Schaefer.

C. Schaefer presented evidence that Parris had the disposition to exert undue influence.

Schaefer presented evidence that Parris had a disposition to exert undue influence. Throughout his brief, Flanders attempts to cast the discussion had by Parris and Schaefer prior to settlement as a negotiation between two equal parties. (Flanders's Brief at 14). The record, however, demonstrates otherwise. Parris alone

estimated her bills to be $2,100 on the low end and potentially up to $2,500. (R. 184). At that time, however, Parris was also aware that the initial bills that he was agreeing to pay had already been sent to American Family for medical payments coverage. (R. 183). If Parris was truly estimating the bills to be between $2,100 and $2,500 then he knew that Schaefer was only receiving $500 over what American Family was already going to pay for her medical bills. (R. 184).

Further evidence of Parris's disposition to exert undue influence is his push for a quick settlement. Parris could have waited until they had all the initial medical bills, but instead tried to rush a settlement. (R. 182-85). In fact, Parris received the medical bills the day after he settled with Schaefer. (R. 182-85). Additionally, after being told that Schaefer had no claims experience, Parris never told Schaefer that she should seek out the advice of counsel to explain any of this to her, and instead gave her an extremely low offer knowing that she did not know about the claims process and would likely take this offer. (R. 183-85, 257). Essentially, Flanders asks this Court to ignore the fact that Parris had a motive to obtain a quick, favorable settlement agreement for the insurance company.

Here, the trial court erred by weighing all the facts in the record and placing emphasis on evidence that Parris "unilaterally took action to execute a second Release upon receiving the emergency room bill." (R. 410). Such a weighing of evidence on summary judgment is reversible error. *Hamilton v. Sommers*, 2014 S.D. 76, ¶ 42, 855 N.W.2d 855, 868. A jury should be allowed to determine whether Parris exerted undue influence after examining all of his actions. Flanders and the trial court both

relied heavily upon the fact that Parris unilaterally increased the medical bills payment cap from $3,000 to $8,000. As Parris states in his notes, however, "we have agreed to pay all the accident related care which would include the ER bill." (R. 181). One could argue that Parris was simply keeping his end of the bargain he already made with Schaefer to "pay all the accident related care." (R. 181). The fact that Parris unilaterally increased the offer is a fact that should be weighed against all of Parris's other actions and a jury should decide whether Parris exerted undue influence.

D. Genuine issues of material fact exist as to whether the amount settled for shows the effects of undue influence.

Schaefer has submitted facts demonstrating that the settlement agreement was unconscionably low. Flanders continues to argue that Schaefer received a "net" settlement of $8,500. (Flanders's Brief at 25). Schaefer did not receive a net settlement of $8,500. Schaefer received $5,546.18, as her medical bills were $5,046.18 and she received $500 for general damages such as future medical bills and pain and suffering. The argument that the medical bills would have been paid by Tollefson's insurance is not a red herring, as the Appellees suggest, because the Release also included a release of Tollefson and his medical payments coverage. (R. 189-92).

At the time Schaefer signed this release, her medical bills would have already been paid by Tollefson's $5,000 in medical payments coverage and she would only have been responsible at that time for $46.18 in medical bills from the initial ER visit. (R. 182, 361). Thus, Schaefer settled her claims against Flanders and Tollefson for a mere $546.18. Flanders cannot cite to any evidence in the record about medical bills

associated with a fractured sternum. The only evidence is that Schaefer's medical bills are currently over $400,000. (HT at 22). Thus, Flanders cannot argue this amount was proportional to any treatment she should have sustained. Because genuine issues of material fact exist as to whether the amount Schaefer settled for shows the effects of undue influence and as to all other elements of undue influence, the trial court erred in granting summary judgment.

III. THE SSDI RECORDS ARE PROPERLY INCLUDED IN THE RECORD FOR PURPOSES OF THIS APPEAL BECAUSE THE TRIAL COURT DID NOT RULE ON THE MOTION TO STRIKE OR MOTION TO SUPPLEMENT THE RECORD.

A. The SSDI records are already part of this record and the Court may consider the trial courts failure to rule on the motion to supplement and motion to strike.

The trial court did not rule on the motion to strike or on the motion to supplement the record, thus the SSDI records are part of the record before this Court. Furthermore, Schaefer is not bound by the issues raised in her docketing statement as even the docketing statement form tells parties that they will not be bound by the issues raised. *See* S.D. R. of App. P. Form 5. Flanders does not cite any case law holding that parties are bound by the issues raised in their petition for discretionary appeal. Failure to cite authority for an argument waives that argument. *See Veith v. O'Brien*, 2007 S.D. 88, ¶ 50, 739 N.W.2d 15, 29 (citing SDCL 15–26A–60(6)) (holding failure to cite supporting authority waives argument); *see also State v. Stanley*, 2017 S.D. 32, ¶ 12, 896 N.W.2d 669, 675.

Schaefer has cited two sources for the proposition that the Court may review all matters relevant to the question of whether the order is erroneous. *See* SDCL 15-26A-10 ("When the appeal is from any order subject to appeal, the Supreme Court may review all matters appearing on the record relevant to the question of whether the order appealed from is erroneous"); *Reed v. Heath*, 383 N.W.2d 873, 874 (S.D. 1986) ("This court may review all matters appearing on the record relevant to whether the order appealed from is erroneous"). Thus, Schaefer submits that the SSDI records are in the record at this time and therefore, are available for the Court's review. Further, the Court has discretion to review the fact that the trial court did not allow Schaefer to supplement the record with additional foundation for the records.

While Flanders asserts that Schaefer erred in submitting these records, the fact remains that the records were obtained from Flanders's counsel and Flanders used an affidavit to place into evidence several of Schaefer's medical records. (R. 129-61, 391). Because the trial court did not rule on either the motion to strike or the motion to supplement, the SSDI records are a part of this appellate record and may be considered for purposes of this appeal. Furthermore, it was harmless error not to rule on these motions and to leave the SSDI records admissible.

B. Schaefer complied with the requirements of SDCL 15-6-56(e) and 15-6-56(f) and therefore, supplementation was appropriate.

Schaefer complied with SDCL 15-6-56(e) and 15-6-56(f). Rule 56(e) gives the trial court discretion to allow supplementation of the record. SDCL 15-6-56(e) ("The

court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits"). Additionally, the trial court had wide discretion under Rule 56(f) to allow supplementation:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

SDCL 15-6-56(f). The last sentence of this statute gives the trial court broad discretion, including discretion to allow supplementation of the record. *Id.*

Here, the parties had already fully briefed all matters by the time the motion to strike was filed on January 19, 2017 at 4:35 p.m., less than four days before the hearing. (R. 365-71). Schaefer immediately attempted to locate Dr. Soule and obtain an affidavit from the custodian of the records, but could not obtain this information in time for the hearing. (R.391-93); (HT at 32-33). Thus, Schaefer timely made a motion to supplement the record. (R. 388-94). Schaefer now respectfully asks that summary judgment on the undue influence claim be reversed and remanded with permission to allow Schaefer to supplement the record and provide foundation for the SSDI records.

IV. Schaefer was not required to request rescission of the release in her Complaint.

While Flanders now asserts for the first time in his Reply Brief that Schaefer had a duty to plead undue influence and rescission in her Complaint, he has not demonstrated that the Rules of Civil Procedure require a defense to a defense to be

pleaded. Flanders does not cite any rule of pleading that requires Schaefer to anticipatorily plead rescission or undue influence as a response to an affirmative defense. It does not appear that this Court has ever addressed what is required when asserting a defense to a defense. Other courts in addressing this issue have held that the defense to the defense just must be raised before trial:

> Under similar circumstances we have held that, while a plaintiff has no duty to file a pleading in response to a defendant's defenses (such as the limitation of liability defense asserted by Batesville Casket Company in the case at bar), a plaintiff who wishes to assert a defense to a defense (such as appellants' assertion that the limitation of liability provision is unconscionable) must at the very least bring the issue to the trial court's attention before trial. *Nash v. Scott*, 62 Ark.App. 8, 966 S.W.2d 936 (1998).

Parker v. Frazer's, Inc., 1998 WL 811425, at *2 (Ark. Ct. App. 1998); *see also Ctr. Ice of DuPage, Inc. v. Burley's Rink Supply, Inc.*, No. 96 C 5537, 1997 WL 534256, at *4 (N.D. Ill. 1997) (citing *Tregenza v. Great Am. Communications Co.*, 12 F.3d 717, 718 (7th Cir. 1993) ("in general a plaintiff is not obligated to negate affirmative defenses in the complaint."); *Fugman v. Aprogenex, Inc.*, 961 F.Supp. 1190, 1198 (N.D.Ill. 1997)). Thus, Schaefer properly argued rescission and undue influence in its briefing and argument before the trial court.

CONCLUSION

Because the trial court weighed evidence and did not view the facts in the light most favorable to Schaefer, she respectfully requests that this Honorable Court reverse the trial court's grant of Flanders and Tollefson's motions for summary judgment. As Schaefer has demonstrated, genuine issues of material fact exist on

rescission and undue influence. As such, summary judgment was not appropriate in this case.

Dated this 22nd day of September, 2017.

JOHNSON, JANKLOW, ABDALLAH, REITER & PARSONS L.L.P.

BY: */s/ Sara E. Show*
A. Russell Janklow
Ronald A. Parsons, Jr.
Sara E. Show
P.O. Box 2348
Sioux Falls, SD 57101-2348
(605) 338-4304

Attorneys for Kathy Schaefer, Plaintiff and Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via electronic mail upon the following:

Mr. Edwin E. Evans
Ms. Melinda Folkens
Evans, Haigh & Hinton, LLP
101 N. Main Avenue, Suite 213
P.O. Box 2790
Sioux Falls, SD 57101-2790
Email: eevans@ehhlawyers.com

Attorneys for Defendant Sioux Spine and Sport, Prof. L.L.C.

Ms. Melanie L. Carpenter
Mr. Joel E. Engel
Woods, Fuller, Shultz & Smith, P.C.
300 South Phillips Avenue, Suite 300
P.O. Box 5027
Sioux Falls, SD 57117-5027
Email: melanie.carpenter@woodsfuller.com

Attorneys for Defendant and Appellee Nathan Flanders

American Family Insurance
Legal Department
Ms. Heidi Thoennes
4200 Corporate Drive, #120
West Des Moines, IA 50266
Email: hthoenne@amfam.com

Attorney for Defendant and Appellee Herbert Tollefson

on this 22nd day of September, 2017.

/s/ Sara E. Show
Sara E. Show

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 4419 words from the Reply Argument through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Sara E. Show
Sara E. Show