SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947
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April 16, 2014

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RE: Brenda Currence v. Aerin Hastings & Chase Martin
C. A. No: S13C-04-024

Upon Defendant's Motion for Summary Judgment. **GRANTED**

Submitted: March 28, 2014
Decided: April 16, 2014

Dear Counsel:

In June 2013 Aerin Hastings ("Defendant") filed a Motion for Summary Judgment. Defendant argues that she is entitled to judgment as a matter of law because Brenda Currence ("Plaintiff") executed a release with Defendant's insurance carrier, extinguishing Plaintiff's right to pursue litigation against Defendant. Plaintiff opposed the Motion because there had not been an opportunity for discovery. With

the benefit of discovery and additional briefing by the parties, the matter is now ripe for a decision. This is the Court's decision finding that the release executed by the Plaintiff bars her lawsuit, and therefore summary judgment is **GRANTED.**

BACKGROUND[1]

On November 29, 2011 a motor vehicle collision occurred in Seaford, Delaware wherein Defendant's vehicle rear ended the vehicle operated by Plaintiff. The police report notes that the Officer "observed both vehicles and due to heavy rain, I was unable to see any visible damage to either vehicle. It is my opinion that if there is any damage to either vehicle , it is of a minor nature." Later it is noted "Vehicle two operator [Plaintiff] complained of having possible pain in her neck, but refused for an ambulance to respond to the scene. No other injuries reported."

Later that same day, Plaintiff reported to Nanticoke Memorial Hospital Emergency Room. The time on the hospital records was 5:37 p.m. Plaintiff complained of neck pain, lower back pain, and pain going down her left arm and neck. After a CT Scan was performed, Plaintiff was released with a diagnosis of cervical sprain and back sprain.

On December 15, 2011 Plaintiff was seen by Dr. Joseph P. Olekezyk, an Ear,

[1] The facts found by the Court are based upon the affidavits and the Plaintiff's medical records as to what was known at the time of the release was executed.

Nose and Throat doctor, who saw her for a number of pre-existing medical issues. She reported experiencing migraines as a result of her whiplash injury.

On January 19, 2012 Plaintiff saw Dr. Kennedy Yalamanchili ("Dr. Yalamanchili") at Delaware Neurosurgical Group in Newark, Delaware. He noted "the patient returns after an extended absence with complaint of progressively worsening neck pain following a motor vehicle accident on November 29, 2011." He further notes "she reports she has been having progressively worsening neck pain mainly in the posterior aspect that radiates to her upper thoracic area around her left shoulder blade and sometimes to the anterior left side of her rib cage. She also reports significant left sided shoulder pain with intermittent sharp shooting pain down the left side of her upper extremity. She reports significant numbness that is constant in her left hand in all fingers." He further notes "she reported excellent recovery from a prior lumber fusion surgery in May 2010." An MRI was ordered for further evaluation of her progressively worsening cervical conditions. On January 25, 2012 the MRI was performed.

On February 6, 2012 Plaintiff returned to Dr. Yalamanchili. His report notes that she has a "history of cervical disk disease though she reports an automobile accident that occurred in November seem[s] to aggravate her symptoms." Noteworthy, the report stated "she reports she recently has accepted a settlement for

her accident although as yet the full injury has yet to be determined."

During the above period of time when Plaintiff saw her doctors and reported her progressively worsening pain, she was also in communication with Defendant's insurance claims adjuster. That adjuster executed an affidavit containing the following:

> (a) On December 15, 2011 the adjuster and Plaintiff spoke. Plaintiff indicated she wanted her claim settled as soon as possible.
>
> (b) On January 10, 2013 another conversation took place with Plaintiff who threatened to go to an attorney if her claim was not settled soon.
>
> (c) On January 27, 2012 the adjuster reviewed the company's file and entered into settlement negotiations with Plaintiff. Plaintiff demanded $1,500.00 for settlement of her claim. The adjuster counter offered at $1,350.00. Plaintiff stayed at $1,500.00. The parties agreed to settle the claim for $1,500.00. A release was sent to the Plaintiff.

The release states, in relevant part, that for $1,500.00 Plaintiff releases all claims against Defendant including "all known and unknown" damages. Furthermore, the release states "I/we hereby acknowledge and assume all risk, chance or hazzard that said injuries or damages may be or become permanent, progressive, greater, or more extensive than is now known, anticipated, or expected." Finally, the

release notes the settlement is a compromise of a disputed claim.

Plaintiff signed the release on February 1, 2012, before a notary, and returned it to the adjuster. The release was received on February 6, 2012, and a check was then sent to Plaintiff for $1,500.00. Plaintiff decided not to cash the check.

Thereafter, Plaintiff was in another motor vehicle accident and filed a consolidated law suit in April 2013.

PARTIES' CONTENTIONS

Defendant argues that the executed release forecloses Plaintiff's claim, and the fact that Plaintiff subsequently chose not to negotiate or cash the settlement check does not void the settlement, nor make the settlement voidable.

Plaintiff responds that the release does not operate to foreclose her claim because there was a mutual mistake of fact because the extent of her injuries were not known when the release was executed. Therefore, if Plaintiff did not know the extent of her injuries, neither did Defendant by way of the insurance adjuster's knowledge. Plaintiff also argues that by not cashing the check there was a lack of consideration.

STANDARD OF REVIEW

Pursuant to Rule 56(c) of the Superior Court Rules of Civil Procedure the party moving for summary judgment must show that no genuine issue of material fact remains in dispute and that she is entitled to a judgment as a matter of law. On

consideration of the Motion, this Court views the evidence in the might most favorable to the nonmoving party.[2]

DISCUSSION

Ironically, the parties' briefing closed on March 28, 2014. The next day this Court read a recent decision by the Delaware Supreme Court with a similar fact pattern. In *Hicks v. Parks*[3] the Supreme Court reviewed the black letter law as to what constitutes a mutual mistake of fact. The Supreme Court stated:

> To establish a mutual mistake of fact, the plaintiff must show by clear and convincing evidence that (1) both parties were mistaken as to a basic assumption, (2) the mistake materially affects the agreed-upon exchange of performances, and (3) the party adversely affected did not assume the risk of the mistake. [T]he mutual mistake "must relate to a past or present fact material to the contract and not to an opinion respecting future conditions as a result of present facts."[4]

The Supreme Court found that under similar facts no mutual mistake of fact existed. There, Plaintiff Hicks ("Hicks") claimed that her post-release injuries were materially different than those contemplated in the release, amounting to a mistake of fact.[5] The Supreme Court stated:

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[2] *See Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[3] 2014 WL 1233698 (Del. Mar. 25, 2014) (ORDER).

[4] *Id.*, at *2 (citations omitted).

[5] *Hicks v. Sparks*, 2013 WL 5788403 (Del. Super. Ct. Sept. 25, 2013).

> A release will bar suit for a plaintiff's subsequently discovered injuries unless the injuries are materially different from the parties' expectations at the time the release was signed. Mutual mistake will invalidate the release where both parties are mistaken as to the presence or extent of the plaintiff's injuries at the time they executed the release. **If the plaintiff knew that "an *indicia* of injuries exist[ed] at the time [she] signed the release," the release will bar suit and a court will not invalidate it by mutual mistake.** Even though the plaintiff might be unaware of "the exact degree of injuries with medical certainty," knowledge of the existence of an injury will preclude a finding of mutual mistake.[6]

The Supreme Court noted, "[a]lthough Hicks may have been mistaken as to the future effect of her injury, both parties were aware that Hicks injured her neck in the accident. This can reasonably be considered an "indicia of injuries" existing at the time of the release."[7] "Hicks assumed the risk that her injuries were more serious than she believed and that her symptoms could worsen and require further treatment."[8] Hence, she cannot now claim mutual mistake because she assumed this risk.[9]

Likewise, this Court finds that there was no mutual mistake of fact in the

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[6] *Hicks v. Sparks*, 2014 WL 1233698, at *2 (Del. Mar. 25, 2014) (ORDER) (emphasis added) (citations omitted).

[7] *Id.*, at *3.

[8] *Id.*

[9] *Id.*

present case. Following the motor vehicle accident, Plaintiff pushed for a settlement, stating "she wanted her claim settled as soon as possible" and "demanded $1,500.00 for settlement." Plaintiff told her doctors her pain was progressively worsening, and she knew from her medical history she was vulnerable. She discussed treatment options with her doctors and settled on exercise. She had consulted with her doctors, and she knew she had not made a full recovery. Furthermore, Plaintiff's medical reports evidence that she was making complaints that her pain was progressively getting worse. Since both parties were aware that Plaintiff complained of injuries arising from the accident and that she was more knowledgeable about her medical condition, there can be no mutual mistake of fact. Whether Plaintiff was mistaken about the future effect of her injury, it cannot be said to be a mutual mistake based on her superior knowledge.

The facts at issue herein are not similar to *Webb v. Dickerson*.[10] There, the claims adjuster "pounced" on the injured party the day following the accident and made a $1,300.00 settlement offer.[11] Here, Plaintiff met with her doctors, the settlement came two months after the accident and it was Plaintiff that initiated and pushed for the settlement.

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[10] 2002 WL 388121 (Del. Super. Mar. 11, 2002).

[11] *Id.*

Alternatively, the record reflects that Plaintiff fully assumed any risk of a mistake by the clear and ambiguous language in the release. The language of the release makes it abundantly clear that Plaintiff acknowledged that her injuries "may become progressive and more extensive than now known." As noted in *Hicks v. Sparks*, because she assumed this risk it cannot be a basis to claim a mutual mistake.

THE LACK OF CONSIDERATION

It is evident the parties reached a settlement agreement. Plaintiff executed a release for the agreed upon settlement amount of $1,500.00. The Defendant's insurance carrier mailed her the check for $1,500.00. There is no evidence that this was anything other than an unconditional check (*i.e.* a negotiable instrument). As such, it had a monetary cash value of $1,500.00.

Plaintiff argues that she can unwind the agreed upon settlement and release by simply not cashing the check and mailing it back to Defendant's insurance carrier. One can only imagine the havoc that would take place if such conduct could undo deals. For example, would sellers remorse following a real estate settlement mean that by not cashing the settlement check the seller could take back the property? It is settled law that "[c]onsideration does not fail or become void merely because a

party refuses to cash a check tendered as payment in the performance of a contract."[12]

Plaintiff cites *Smith v. Nationwide Mutual Insurance Company*[13] for the proposition that the Plaintiff's decision to not cash the check results in a failure of consideration. However, the *Smith* case must stand on its own facts. First, there was a mutual mistake as to whether New York law or Canadian law would be applicable.[14] Second, the Court found that there had only been a "proposed settlement."[15] Again, this Court holds a deal does not become undone merely because a party decides to return the settlement check (monetary consideration).[16]

Simply put, Plaintiff entered into a settlement agreement, whether it was a reasonable settlement or not is not what this Court must decide. Plaintiff knew her medical history and her current medical circumstances. She had the opportunity to meet with multiple doctors prior to making her $1,500.00 settlement demand. In fact, Plaintiff knew more about her medical condition than the claims adjustor. She is therefore bound by the release she executed.

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[12] *Motschman v. Bridgepoint Mineral Acquisition Fund LLC*, 2011 ND 46, 795 N.W.2d 327, 331.

[13] N.Y. Supr. 546 N.Y.S.2d 522 (1989).

[14] *Id.*

[15] *Id.*

[16] *Matter of Estate of Helwig*, 1996 WL 117659 (Del. Ch. Mar. 8, 1996).

CONCLUSION

The Court finds that the release was not a product of mutual mistake. The release Plaintiff executed with Defendant's insurance in enforceable and bars Plaintiff's claim against Defendant. Therefore, Defendant's Motion for Summary Judgment is **GRANTED.**

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves

THG/ymp

pc: Prothonotary