STATE OF MICHIGAN

COURT OF APPEALS

PIERRE AUBUCHON,

Plaintiff-Appellant,

v

FARMERS INSURANCE EXCHANGE,

Defendant-Appellee.

UNPUBLISHED
June 23, 1995

No. 182797
LC. No. 89 367487 CK
ON REMAND

Before: Taylor, P.J., and Hood and Reilly, JJ.

PER CURIAM.

In lieu of granting leave to appeal, the Supreme court has reversed this Court's prior majority opinion and remanded the case for consideration of plaintiff's substantive issues.[1] Aubuchon v Farmers Ins Exchange, unpublished opinion per curiam of the Court of Appeals decided June 1, 1994, rev'd 448 Mich 859 (1995). In the prior opinion, the majority concluded that plaintiff's appeal was precluded by his acceptance of a settlement offer, entrance of a consent judgment, and execution of a satisfaction of judgment. In its order of remand, the Supreme Court ruled that that holding was erroneous. On consideration of the issues following remand, we vacate the order of satisfaction of judgment.

This is a first-party no-fault case wherein the parties entered into a consent judgment for defendant insurer's payment of plaintiff's wage loss and medical expenses claims. Defendant issued a check for part of the judgment to an out-of-state clinic that treated plaintiff for his accident related injury and claimed a lien on any insurance proceeds for medical treatment rendered to plaintiff. Plaintiff contends on appeal that the lien was invalid, the payment violated the terms of the consent judgment, he was entitled to interest on that portion of the money judgment not paid to him, and that he was deprived of his property without due process of law.

On July 24, 1990, defendant advised plaintiff's counsel by letter that plaintiff's account with the clinic had been settled for $3,912.36. A copy of a release in the amount of $10,912.36, constituting "full and final settlement of this lawsuit" was enclosed. Defendant indicated that upon return of the release, a dismissal order would be prepared and two checks would be issued, one in the amount of $7,000 to be paid for the wage loss claim, and another in the amount of $3,912.36 payable to the clinic as well as the plaintiff and his attorney. There is nothing in the record to indicate that plaintiff responded to the letter. On August 10, 1990, defendant offered in writing to stipulate to entry of judgment against itself in the amount of $10,912.36, including "interest and costs now accrued" pursuant to MCR 2.405. Plaintiff accepted that offer in writing. On August 29, 1990, a consent judgment was entered. It provided:

> IT IS HEREBY ORDERED that Judgment enter in this matter against the Defendant and in favor of the Plaintiff in the amount of TEN THOUSAND NINE HUNDRED TWELVE AND 36/100 ($10,912.36), including interest and costs.

No mention was made in the offer of judgment, the acceptance, or the consent judgment that the judgment could be satisfied as outlined in defendant's letter of July 24, 1990.

Defendant sent plaintiff one check for $7,000, payable to plaintiff and his attorney, and one check for $3,912.36 payable to plaintiff, his attorney, and Straub Clinic. Plaintiff cashed the check for $7,000, but refused to endorse the other check. He later unsuccessfully attempted to collect the remaining $3,912.36 by means of garnishment and execution. Defendant moved for entry of an order of satisfaction of judgment, contending it had negotiated a settlement of the clinic's claim against plaintiff and had advised plaintiff of that fact when it made the offer of settlement. The trial court determined that the clinic's claim was equivalent to a mechanic's lien and entered the order as requested.

On appeal, defendant contends that because the plaintiff's attorney signed the order approving it as to form and substance, plaintiff effectively consented to the terms of the order and cannot now appeal. We disagree. Under the circumstances presented here we cannot conclude that the parties resolved their differences and that plaintiff consented to the satisfaction of judgment by payment directly to Straub Clinic. His signature represented only a recognition that the proposed order was legally formulated, and contained in substance the decision as orally announced by the court. Kirn v Ioor, 266 Mich 335; 253 NW 318 (1934); Longo v Minchella, 343 Mich 373, 377-378; 72 NW2d 113 (1955).

In response to plaintiff's arguments, defendant also claims that it has no alternative but to honor liens of medical providers, because failure to do so could result in being required to pay certain medical bills twice. However, defendant has provided no law to support its claim that a valid lien exists, or that it must pay plaintiff's medical provider directly rather than pay plaintiff for medical expenses incurred.

The trial court resolved the controversy by determining, as a matter of law, that the clinic was entitled to a lien the same as a mechanic, whether or not the clinic was situated in Michigan. This case presents an issue of law which we review de novo. Alexander v Riccinto, 192 Mich App 65, 70; 481 NW2d 6 (1991).

We conclude that the trial court erred in its determination that the consent judgment was satisfied by direct payment of plaintiff's medical bills because we find no basis for the imposition of a lien on insurance payments for medical services. Liens can only be created by agreement, or by some fixed rule of law. It is not one of the functions of courts to create them. Wiltse v Schaeffer, 327 Mich 272, 282; 42 NW2d 91 (1950). Unlike a number of other states, Michigan has no "hospital lien" statute authorizing a lien on tort recovery for medical services rendered to an injured person. See, e.g., West Nebraska General Hospital v Farmers Ins Exchange, 239 Neb 281, 475 NW2d 901 (1991); Dade County v Pavon, 266 So 2d 94 (Fla App, 1972). Because there is no basis in Michigan law for the imposition of a lien on insurance payments for medical expenses, defendant was under no obligation to pay the clinic directly rather than pay the medical benefits to its insured.

Moreover, under the no-fault act, personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his or her death, to or for the benefit of the injured person's surviving spouse or dependents. If there is doubt about the proper person to receive the benefits, the insurer may apply to the circuit court for an appropriate order. MCL 500.3112; MSA 24.13112; Geiger v DAIIE, 114 Mich App 283, 287; 318 NW2d 833 (1982); Commire v Automobile Club, 183 Mich App 299, 302; 454 NW2d 248 (1990). Defendant did not seek an order authorizing payment directly to the clinic. Rather, defendant agreed to a money judgment in favor of plaintiff with no provision for partial payment of the judgment to the clinic. Defendant should be bound by the clear and unambiguous terms of its agreement.

The consent judgment is binding on the parties. Absent fraud, mistake, or unconscionable advantage, a consent judgment cannot be set aside or modified by the parties. Walker v Walker, 155

Mich App 405, 406-407; 399 NW2d 541 (1986); Trendell v Solomon, 178 Mich App 365, 367-369; 443 NW2d 509 (1989). Defendant has not sought to set aside the consent judgment for any of those reasons. Consequently, defendant is bound by its terms.

Plaintiff also contends that the trial court erred by refusing to award postjudgment interest on the consent judgment. We agree. The consent judgment states that the amount "includ[es] interest and costs," thereby precluding prejudgment interest. However, there is no provision to stay enforcement. Accordingly, in lieu of a waiver by plaintiff, satisfaction of the judgment should have occurred within twenty-one days, MCR 2.614(A)(1), and interest runs until the judgment is paid in full. MCL 600.6013; MSA 27A.6103. Madison v Detroit, 182 Mich App 696, 701; 452 NW2d 883 (1990). The payment of $7,000 to plaintiff and his attorney stopped the accrual of interest only with respect to that amount, not with respect to the $3,912.36 that was also due. Niggeling v Transportation Dept, 195 Mich App 163, 168; 488 NW2d 791 (1992).

The order of satisfaction of judgment is vacated and the case is remanded for further proceedings consistent with this opinion.

/s/ Harold Hood
/s/ Maureen Pulte Reilly

[1] Judge Harold Hood has been substituted for visiting circuit Judge Michael Talbot on remand.

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TAYLOR, P.J. (dissenting.)

I respectfully dissent. As I view this case, plaintiff is attempting to rescind a settlement agreement. However, tender of consideration received is a condition precedent to the right to repudiate a contract of settlement. Stephanac v Cranbrook Educational Community (Aft Rem), 435 Mich 155, 166; 458 NW2d 56 (1990).

> Where a party to a compromise desires to set aside or avoid the same and to be remitted to his original rights, he must place the other party *in statu quo* by returning or tendering the return of whatever has been received by him under such compromise, in case it is of any value, and so far as possible any right lost by the other party because thereof. This rule obtains even though the contract was induced by the fraud or false representations of the other party, or was obtained under duress, or was made under a mistake of fact or as to the law; and until this is done the settlement will constitute a good defense. By electing to retain the property, a party must be held to be bound by the settlement. The rule applies to actions *ex contractu* as well as *ex delicto*. [Id. at 166 (quoting Kirl v Zinner, 274 Mich 331, 335; 264 NW 391 (1936)).]

The Stephanac court also held that the consideration must be tendered back even if the release was obtained improperly (with the only exception to this being fraud in the execution). Stephanac, supra, at 165. Because this exception has not been raised by plaintiff, he is not relieved of his obligation to tender back.

Pursuant to Stephanac, I would require plaintiff to repay the $7,000 and return the draft for $3,912.36 to defendant before allowing him to raise these issues.

/s/ Clifford W. Taylor