

NOTICE

Decision filed 05/14/12, corrected 5/16/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 110408-U

NO. 5-11-0408

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

AMANDA MOSLEY,
Plaintiff-Appellant,

v.

MEGAN K. HACKNEY,
Defendant-Appellee.

) Appeal from the
) Circuit Court of
) Christian County.
)
) No. 08-L-13
)
) Honorable
) Jeffrey Kelly,
) Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Wexsten concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred in ruling that it could not consider parole evidence to determine whether the Release of All Claims constituted the complete settlement agreement and the intentions of the parties on this motion to enforce a settlement agreement.

¶ 2 On May 5, 2008, the plaintiff, Amanda Mosley, filed an action in the circuit court of Christian County to recover damages for personal injuries she suffered when the vehicle in which she was riding was hit in the rear by the vehicle following it. That vehicle had been pushed into the plaintiff's vehicle by a vehicle driven by the defendant, Megan K. Hackney. Summary judgment was entered in favor of the plaintiff on the issue of liability and the cause was set for trial on the issue of damages. On July 22, 2011, the plaintiff filed a motion seeking vacatur of the trial setting and notifying the court that the parties had reached a settlement. The motion was granted.

¶ 3 On August 8, 2011, the parties filed a stipulation for dismissal stipulating that the cause of action had been fully compromised, settled, and released and stating that the cause could be dismissed with prejudice to the plaintiff. On that same date, the circuit court entered an order dismissing the case with prejudice for the reason that all claims had been settled in good faith.

¶ 4 On September 6, 2011, the plaintiff filed a motion to reinstate the case and enforce the settlement agreement. The motion alleges that on July 27, 2011, during settlement negotiations, a letter was sent from the defendant's counsel to the plaintiff's counsel,

"confirm[ing] the settlement of the above referenced matter for a payment of new money in the amount of \$3,500.00 and a waiver of the medical pay lien of \$4,391.00. Proof of the medical pay lien is enclosed herewith. I assume you want one-third of the pay lien, which I figure to be \$1,463.66, made payable to you and not you and your client. If I am incorrect in this regard, please advise. ***"

¶ 5 Plaintiff's counsel responded in an email on August 8, 2011, agreeing to the correctness of the letter's representations, agreeing to the settlement, and giving directions as to the drafting of checks. On that same date, the defendant's counsel responded by email, "I am on it." Based upon the settlement agreement, and the defendant's counsel's apparent authority to enter into it, the plaintiff dismissed her cause of action.

¶ 6 On September 2, 2011, the defendant's counsel sent an email to the plaintiff's counsel advising:

"Yesterday I was told by American Family that the waiver of the medical pay lien is exactly that. They advised you will not be getting a check for one-third of the medical pay lien. They advised that as they are not receiving any money but simply waiving

the lien, they have not recouped the lien. When we settled the case, I had no idea that this would happen and they just told me of this yesterday."

¶ 7 On September 6, 2011, the plaintiff's counsel responded: "That was not the deal [*sic*] I want to back out of the deal. I want an agreed motion to reinstate the case." The defendant's counsel responded, "I agree that wasn't the deal but not sure I can agree to reinstate."

¶ 8 In her motion, the plaintiff asked the court to reinstate the case and enforce the settlement agreement, or alternatively, to reinstate the case and set the matter for trial. In the latter event, the plaintiff asked for an award of reasonable attorney fees and costs, "for duplicative efforts which will have to be made to prepare for trial."

¶ 9 The defendant filed a response to the motion pointing out that, on August 4, 2011, the plaintiff executed a "Release of All Claims" which provides, in pertinent part, as follows:

"AMANDA MOSLEY, in consideration of the payment made by AMERICAN FAMILY MUTUAL INSURANCE COMPANY for and on behalf of MEGAN K. HACKNEY, of the sum of \$3,500.00 (THREE THOUSAND FIVE HUNDRED AND NO ONE HUNDREDTHS DOLLARS), **and** a waiver of the medical payment lien in the amount of \$4,391.00 (FOUR THOUSAND THREE HUNDRED NINETY-ONE AND NO ONE HUNDREDTHS DOLLARS), in settlement of the said claim, *and other good and valuable considerations*, receipt of all considerations recited herein being hereby acknowledged, has released, acquitted and discharged, and by these presents does hereby release, acquit and forever discharge the said MEGAN K. HACKNEY, and AMERICAN FAMILY MUTUAL INSURANCE COMPANY ***." (Emphasis added.)

¶ 10 Interestingly, in her pleading the defendant omitted from her recitation of the

Release of All Claims the italicized words, "and other good and valuable considerations." The Release, which admittedly was signed by the plaintiff, did not expressly reference the payment of \$1,463.66 to the plaintiff's attorney.

¶ 11 In her response, the defendant argues that the Release of All Claims constitutes a contract and must be construed as are all contracts, that it is not ambiguous, and therefore parol evidence may not be admitted to determine its meaning and intent. The defendant argues that the plaintiff cannot introduce parol evidence of the agreement to pay \$1,463.66 to the plaintiff's attorney to vary the terms of the written Release of All Claims.

¶ 12 The defendant further argues that in any event the plaintiff's counsel is not entitled to payment of \$1,463.66 as a matter of law because the "common fund doctrine" does not apply. Because both parties are insured by the same insurer, no fund was created.

¶ 13 In her reply to the defendant's response, the plaintiff alleges that the defendant's omission from her response of the italicized words regarding other good and valuable considerations was not made in good faith. Accordingly, the plaintiff sought attorney fees for her attempt to enforce the settlement agreement.

¶ 14 The matter came on for hearing on September 19, 2011. No evidence was presented but each party presented argument. Plaintiff's counsel argued that he was entitled to the \$1,463.66 under the common fund doctrine and that, because the defendant had omitted the italicized language from the Release of All Claims as recited in her response, the plaintiff is entitled to recover attorney fees and costs pursuant to Supreme Court Rule 137 (eff. Feb. 1, 1994). The defendant responded that the plaintiff was not entitled to recovery of the \$1,463.66, because, both parties being insured by the same insurer, no common fund was created.

¶ 15 On September 19, 2011, the circuit court denied the plaintiff's motion to reinstate the case and enforce the settlement, finding that the settlement took place outside the jurisdiction of the court and without court approval. The court held that the Release of All Claims sets forth the settlement agreement of the parties and that it must be construed as any contract. The court found the Release to be "clear and explicit" and that therefore parol evidence was inadmissible to modify or vary the terms of the agreement. Accordingly, the court denied the plaintiff's motion. The plaintiff appeals.

¶ 16 We begin, as always, with the standard of review. Like a summary judgment motion, a circuit court's decision to grant or deny a motion to enforce a settlement agreement, which is made on the pleadings and attachments, without holding an evidentiary hearing, is reviewed *de novo*. *City of Chicago v. Ramirez*, 366 Ill. App. 3d 935, 946 (2006).

¶ 17 The circuit court was correct that the ordinary rules of contract construction apply to settlement agreements, and that ordinarily parol evidence may not be used to ascertain the meaning of a contractual term when the terms are clear and unambiguous. *Northern Trust Co. v. Brentwood North Nursing & Rehabilitation Center, Inc.*, 225 Ill. App. 3d 1039, 1042 (1992). However, parol evidence is admissible to show a condition precedent to the existence of a contract, and the words of a release will not prevent inquiry into the circumstances to ascertain whether the release was fairly made and accurately reflects the intentions of the parties. *Id.* Where a contract is not expressive of the complete agreement and understanding of the parties, consideration of the antecedent proceedings does not serve to vary the contract terms, but rather exemplifies the terms of the agreement. *Id.* All relevant evidence may be considered to determine whether a particular writing is the complete

agreement of the parties. *Id.*

¶ 18 Furthermore, we find that the inclusion in the Release of All Claims of the words, "and other good and valuable considerations" renders the Release ambiguous for purposes of the plaintiff's motion to enforce it. The Release clearly implies that some other, unspecified consideration has been given in return for the plaintiff's release of all claims, and the plaintiff's motion to enforce seeks to compel payment of that consideration. Where the defendant denies any such other consideration, surely, parol evidence should be admissible to determine what, if anything, that consideration is. As the plaintiff points out, a court construes a contract strongly against the drafter, and the risk of ambiguity and lack of clarity is on the drafting party, in this case, the defendant. *Gassner v. Raynor Manufacturing Co.*, 409 Ill. App. 3d 995, 1009 (2011). Accordingly, we hold that the circuit court erred as a matter of law in ruling that it could not consider the "parol evidence" offered, and in denying on that basis the plaintiff's motion to reinstate the case and enforce the settlement agreement.

¶ 19 Because our review is *de novo*, we need not remand this cause to the circuit court for a determination of what the complete agreement between the parties actually was. There can be no doubt that the inclusion in the settlement of a payment of \$1,463.66 to the plaintiff's counsel was a condition precedent to the plaintiff's acceptance of the settlement. It is equally clear that in this respect the Release of All Claims does not reflect the complete agreement, or the intentions, of the parties. Accordingly, pursuant to the power granted us by Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we hereby grant the plaintiff's motion to reinstate the case and enforce the settlement agreement.

¶ 20 In doing so, we reject the defendant's argument that the plaintiff is not entitled

to monies from a "common fund" where no such fund was created. We find this argument to be irrelevant to the enforcement of a settlement agreement which the defendant freely and knowingly entered into. The defendant agreed to pay the plaintiff's counsel the sum of \$1,463.66, as part of the settlement agreement. Whether it came from a "common fund" created by the plaintiff's counsel is irrelevant to the parties' agreement. The defendant agreed to pay it, and pay it they must.

¶ 21 We also reject the defendant's argument that, because the payment of \$1,463.66 was to be made to the plaintiff's counsel, it could not possibly have been a condition precedent for, or part of the complete agreement of, the *plaintiff*. The defendant argues that this payment did not benefit the *plaintiff*, but only benefitted the plaintiff's counsel. To the contrary, and as the defendant well knows, the payment to the plaintiff's counsel of \$1,463.66 reduced the amount of attorney fees owed by the plaintiff from the \$3,500 she received in the settlement. Accordingly, the payment to the plaintiff's counsel did benefit the plaintiff directly and was a condition precedent for, and part of the complete agreement of, the plaintiff.

¶ 22 The defendant is hereby ordered to pay to the plaintiff's counsel the sum of \$1,463.66, pursuant to the settlement agreement of the parties.

¶ 23 On appeal, the plaintiff argues that the defendant's conduct in opposing enforcement of the settlement agreement amounts to frivolous conduct meant to harass, delay, or cause undue expense to the plaintiff, in violation of Supreme Court Rule 137. She points specifically to the defendant's omission from her response to the motion to reinstate the case and enforce settlement in which she omits from her recitation of the Release of All Claims the language, "and other good and valuable considerations." She also argues that the defendant has engaged in gamesmanship and that sanctions should be imposed to deter such conduct. She asks for an award

of attorney fees and costs. In her reply brief on appeal, she expands on this argument to ask for not only attorney fees and costs incurred in the circuit court, but also attorney fees and costs incurred on appeal. We note that the defendant has not filed a motion to strike this portion of the reply brief, or otherwise filed a response thereto.

¶ 24 Supreme Court Rule 137 provides that the court may impose an appropriate sanction, which may include an order to pay to the other party the amount of reasonable expenses, including reasonable attorney fees, incurred because of the filing of a pleading, motion, or other paper which is not well grounded in fact or warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, or which is interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Ill. S. Ct. R. 137 (eff. Feb. 1, 1994). The circuit court may impose such a sanction either upon motion or upon its own initiative. *Id.*

¶ 25 Supreme Court Rule 375 similarly provides that this court may, upon motion or on its own initiative, impose a sanction where an appeal or other action is frivolous or was not taken in good faith or was taken for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Ill. S. Ct. R. 375 (eff. Feb. 1, 1994). An action will be deemed frivolous where it is not reasonably well grounded in fact and is not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. *Id.* An action will be deemed to have been taken for an improper purpose where the primary purpose of the action is to delay, harass, or cause needless expense. *Id.* The sanction may include an order to pay damages, the reasonable costs resulting from the action, or any other expenses necessarily incurred by the action, including reasonable attorney fees. *Id.*

¶ 26 Pursuant to power granted us by Supreme Court Rule 366(a)(5), we hereby find that the defendant's opposition to the plaintiff's motion to reinstate the case and enforce settlement was not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and was interposed for the improper purpose of harassing the plaintiff and increasing her costs of litigation. Accordingly, as a sanction against such conduct, we order that the plaintiff be awarded her reasonable attorney fees and costs incurred in bringing and litigating the motion to reinstate her case and enforce the settlement.

¶ 27 We further find that the defendant's conduct in defending the appeal was frivolous and was taken for the improper purpose of harassing the plaintiff and increasing her costs of litigation. Accordingly, we order that the plaintiff be awarded her reasonable attorney fees and costs incurred in prosecuting her appeal.

¶ 28 We remand this cause to the circuit court of Christian County for an evidentiary hearing on the amount of such attorney fees and costs to be awarded.

¶ 29 For the foregoing reasons, the judgment of the circuit court of Christian County is hereby reversed, judgment is entered, and this cause is remanded for a hearing on the amount of reasonable attorney fees and costs to be awarded.

¶ 30 Judgment reversed; judgment entered; cause remanded.