

STATE OF MICHIGAN
COURT OF APPEALS

HURLEY MEDICAL CENTER,

Plaintiff/Counter-Defendant-
Appellant,

v

GEORGE R. HAMO, P.C.,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED
July 24, 2012

No. 304235
Genesee Circuit Court
LC No. 10-093822-CK

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Hurley Medical Center (“Hurley”) appeals as of right from a circuit court opinion and order denying its motion for summary disposition and granting summary disposition¹ in favor of George R. Hamo, P.C. (“Hamo”) in this action involving entitlement to attorney fees from a recovery of no-fault benefits. We vacate the trial court’s order and remand for further proceedings.

The parties agree that the trial court’s opinion is substantially accurate in setting forth the following pertinent facts:

The facts of this case are generally uncontested. Reality Edwards was injured in an auto accident that occurred on February 23, 2009, and was treated at Hurley Medical Center. The medical bills totaled \$17,541.93. On October 9, 2009, Hurley contracted with Advomas, Inc., to investigate the accident, determine the no-fault insurer, and secure payment for its medical bills. On November 26, 2009, Tonya Jones, on behalf of her minor daughter, Ms. Edwards, entered into a contingent fee agreement with[] George R. Hamo[] to secure no-fault personal injury protection benefits. On January 20, 2010, Hamo sent a letter to Hurley advising of his representation of Ms. Edwards, and essentially asserting that he would also be representing Hurley’s interests. Hurley, through Advomas,

¹ MCR 2.116(C)(10).

responded to Hamo's letter and informed him that Advomas represented Hurley in the matter, thereby rejecting Hamo's offer to represent Hurley's interests.²

The insurer of the vehicle at the time of the accident was Praetorian Insurance Co. Hamo contacted Praetorian on or about January 12, 2010, and submitted documentation of the bills resulting from the accident. On or about the same date, Advomas contacted Praetorian and informed the insurer that it was working for Hurley and assisting patients in resolving insurance problems. On January 18, 2010, Hurley, through Advomas, filed suit against Praetorian in order to preserve the one-year statute of limitations to collect personal injury protection benefits.³ The complaint was never served. Advomas also collected records and had contact with Praetorian's adjuster, Cecilia Arce. Hamo also exchanged various documents with Ms. Arce in mid-January, and, in February, Hamo confirmed the extension of the statute of limitations with Praetorian.

On March 30, 2010, Praetorian issued a check in the amount of \$17,541.93 in payment of the medical bills owed to Hurley. The check was made payable to "George Hamo and Associates" and contained a note that it was for "Hurley Medical Center DOS 2/23/09-2/24/09 PIP Payment Reality Edwards."

Hurley brought this action seeking a determination that Hamo was not entitled to any attorney fees from the portion of the insurance proceeds attributable to the medical expenses incurred by Hurley and that Hurley is entitled to the entire amount paid by the insurer for reimbursement of the hospital expenses. The parties agreed to have the trial court decide the dispute on cross-motions for summary disposition. Ultimately, the trial court determined that because of Hamo's substantial efforts, which exceeded those of Advomas, Hamo was entitled to recover attorney fees from the insurance proceeds under the "common-fund exception" to the American rule.

Hurley argues that the trial court erred in applying the common-fund exception when granting summary disposition in Hamo's favor. We agree. Hurley contends that Hamo is not entitled to an attorney fee from the portion of insurance proceeds attributable to Hurley's medical expenses because the insurer's payment was voluntary and Hurley expressly declined Hamo's representation or assistance.

The trial court resolved this matter by deciding cross-motions for summary disposition.⁴ Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." This

² Hurley clarifies that Advomas's letter to Hamo was sent as a result of the adjuster identifying Hamo as Edwards's attorney.

³ MCL 500.3145.

⁴ MCR 2.116(C)(10).

Court reviews a trial court's decision on a motion for summary disposition de novo.⁵ Although this matter involves an award of attorney fees, which we generally review for an abuse of discretion, the correct application of the common-fund exception presents a question of law, which we review de novo.⁶

Under the American rule, "attorney fees are not ordinarily recoverable [from another party] unless a statute, court rule, or common-law exception provides to the contrary."⁷ One recognized exception is the common-fund exception, which is based on equitable principles.⁸ The common-fund exception:

generally only applies when a prevailing party creates or protects a common fund that benefits itself as well as others. In such a case, courts of equity have traditionally held that it is unfair to allow others to benefit at the expense of the prevailing party without contributing to the costs incurred in securing the common fund.⁹

The effect of the common-fund exception is to require those benefitted by the fund to contribute to the payment of the attorney fees for the prevailing party.

In *Miller v Citizens Ins Co*,¹⁰ this Court applied the common-fund exception as a basis for permitting the plaintiff's attorneys to collect fees from no-fault insurance benefits attributable to the plaintiff's medical expenses. In that case, this Court explained that a medical provider (the DMC) was a beneficiary of a settlement and "[i]t would be unfair to allow the DMC, and other medical providers, to benefit from the efforts of plaintiff's attorneys without contributing to the costs incurred in securing insurance proceeds and the common fund."¹¹ Thus, this Court indicated that the DMC must contribute to the payment of the plaintiff's attorneys and implicitly endorsed the reduction of the plaintiff's bill as the means of contributing to the fees.

The Michigan Supreme Court subsequently reversed in part this Court's decision in *Miller* and expressly rejected this Court's reliance on the common-fund exception, explaining:

This is an attorney fee dispute arising out of an action for benefits under the no-fault act, MCL 500.3101 *et seq.* As the Court of Appeals implicitly

⁵ *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

⁶ *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

⁷ *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994).

⁸ *Id.* at 475.

⁹ *Id.*; See also *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 38 n 11; 576 NW2d 641 (1998).

¹⁰ *Miller v Citizens Ins Co*, 288 Mich App 424; 794 NW2d 622 (2010), *aff'd in part and rev'd in part*, 490 Mich 904 (2011).

¹¹ *Id.* at 438.

recognized, the Detroit Medical Center (DMC) is not liable for plaintiff's attorney's fees under the no-fault act. We agree that plaintiff is responsible for payment of her attorney fees consistent with the contingency fee agreement. Consistent with the common-law American rule, the no-fault act generally requires each party to pay its own attorney fees. Plaintiff's reliance on MCL 500.3112 is unavailing because that provision, which permits equitable apportionment of personal protection insurance benefits among payees, does not encompass an award of attorney fees to an insured's counsel. However, the Court of Appeals' reliance on the common-fund exception to the American rule was erroneous because no common fund was created.

Of concern to this Court is that the circuit court's order, and the Court of Appeals' affirmance, could be mistakenly interpreted as extinguishing the DMC's contractual right to payment for its services. We wish to make clear that this is not the case. No-fault benefits are "payable to or for the benefit of an injured person. . . ."^{12]} In this case, through settlement, the benefits were paid to plaintiff, and her attorney asserted an attorney's charging lien over the settlement proceeds. Thus, the effect of this was only to settle claims as between the insurer, plaintiff, and her attorney. The circuit court's order of dismissal pursuant to the settlement agreement did not have the effect of extinguishing the DMC's right to collect the remainder of its bill from plaintiff. Such a result could not have been achieved without an explicit waiver, or at least unequivocal acquiescence, by the DMC, which was not obtained.¹³

The basis for the Supreme Court's approval of the payment of the plaintiff's attorney fees is significant. The payment of the plaintiff's attorney fees from the insurance proceeds attributable to the plaintiff's medical expenses was permitted because that payment was consistent with the settlement agreement of the insurer, the plaintiff, and her attorney's charging lien. The Supreme Court, however, rejected the view that the DMC had any equitable or legal obligation to contribute to the plaintiff's attorney fees by reducing its own bill. Rather, the Court emphasized that the DMC retained its contractual right for full payment of its services.

The Court expressly rejected the application of the common-fund exception because "no common fund was created." A common fund is one that benefits the prevailing party and others. As emphasized by the Supreme Court, the DMC had a contractual right to recover the full cost of its services from the plaintiff. As a creditor, the DMC's right to payment was not contingent on litigation and the recovery of a common fund. The recovery of payment from the insurer benefited the DMC only by providing a source from which the plaintiff could choose to pay the DMC. This is merely an incidental benefit that would be equally conferred on other creditors with no relationship to the litigation. The Supreme Court's rejection of the common-fund

¹² MCL 500.3112.

¹³ *Miller v Citizens Ins Co*, 490 Mich 904; 804 NW2d 740 (2011).

exception in these circumstances is consistent with the majority view in other jurisdictions.¹⁴

In the present case, the trial court determined that Hamo was entitled to collect its attorney fee from the no-fault benefits because Hamo's substantial efforts warranted application of the common-fund exception to the American rule that litigants pay their own fees. The trial court's approach was consistent with this Court's decision in *Miller*,¹⁵ but that approach has now been rejected by the Supreme Court.¹⁶ Hurley was not a beneficiary of a common fund. Hurley is a creditor whose contractual right to payment for its services to Hamo's client is undisputed. Hamo's work on behalf of its client to collect no-fault benefits from the insurer provided an incidental benefit to Hurley because it offered funds that the client could use to pay Hurley. That incidental benefit, even if it is the only realistic hope for payment, does not make Hurley liable under a common-fund theory for payment of attorney fees owed to Hamo by its client.

Because the parties' arguments and the trial court's decision were premised on an understanding of the common-fund exception that the Supreme Court rejected,¹⁷ we vacate the trial court's order granting summary disposition to Hamo and remand for further proceedings consistent with the Supreme Court's order in *Miller*.¹⁸

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Deborah A. Servitto
/s/ Michael J. Kelly

¹⁴ See Reporter's Note, 1 Restatement (Third) of Restitution and Unjust Enrichment, § 29, p 457 (the majority view holds that "an ordinary creditor [including one whose claim has been reduced to a judgment] cannot be liable on a common-fund theory to contribute to the cost of successful litigation by the debtor, notwithstanding that debtor's tort claim might be creditor's only realistic hope of payment").

¹⁵ *Miller*, 288 Mich App 424.

¹⁶ *Miller*, 490 Mich 904.

¹⁷ *Id.*

¹⁸ *Id.*