

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANTS *PRO SE*

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Clearwater Beach, Florida

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IN THE COURT OF APPEALS OF INDIANA

Penelope Stillwell and William
Stillwell,

July 6, 2018

Court of Appeals Case No.
49A02-1708-CT-1919

Appellants-Plaintiffs,

v.

Eagle-Kirkpatrick Management
Company, Inc., Kirkpatrick
Management Company, Inc.,
G.T. Services, Inc., d/b/a Green
Touch Services, Inc., and
Sycamore Springs Section C
Homeowners Association, Inc.,

Appellees-Defendants,

v.

Cohen & Malad, LLP,

Appellee-Intervenor.

Appeal from the Marion Superior
Court

The Honorable John F. Hanley,
Judge

Trial Court Cause No.
49D11-1110-CT-41092

Friedlander, Senior Judge

[1] On December 13, 2011, William Stillwell (“Dr. Stillwell”) slipped and fell on the front steps of his home located in the Sycamore Springs development in Indianapolis. Dr. Stillwell subsequently filed a lawsuit against Eagle-Kirkpatrick Management Company, Inc., Kirkpatrick Management Company, Inc., G.T. Services, Inc. d/b/a Green Touch Services, Inc., and Sycamore Springs Section C Homeowners Associations, Inc (collectively “the Defendants”). Dr. Stillwell’s wife, Mrs. Stillwell, pursued a claim for loss of consortium. The Stillwells retained attorney Daniel S. Chamberlain to represent them in their lawsuit. At some point during the course of the lawsuit, Chamberlain moved to the law firm Cohen & Malad. The Stillwells allowed

Chamberlain to continue to represent them after his move to Cohen & Malad.¹ Cohen & Malad had a contingency fee agreement with the Stillwells in which it was entitled to one-third of any recovery and reimbursement for advanced expenses.

[2] Meanwhile, the trial court scheduled the jury trial for August 2, 2016. As the trial date was approaching, the Defendants filed a motion to exclude testimony of one of the Stillwells' witnesses or, as an alternative, a motion to continue the trial in order to conduct additional discovery. The trial was continued to January 10, 2017.

[3] Shortly after the continuance, the parties engaged in settlement discussions. In August of 2016, Cohen & Malad presented the Stillwells with a memorandum of understanding outlining the terms of the settlement. In the fall of 2016, the parties formalized the settlement by signing the memorandum. The Defendants agreed to pay the Stillwells \$200,000 as full settlement of all claims. Per the agreement, the parties also worked over the subsequent months to resolve issues concerning possible third-party interests in the settlement.²

[4] As the parties continued to discuss the issues related to the payment of medical bills, the new trial date approached. Due to the settlement, Cohen & Malad, on

¹ On May 3, 2017, Chamberlain assigned his rights to recover attorney fees and expenses under the contract to Cohen & Malad.

² Medicare and Anthem had interests in the settlement because they paid some of the relevant medical bills.

behalf of the Stillwells, filed the memorandum of understanding with the court on December 7, 2016. The trial court subsequently removed the January trial date from its calendar. In mid-January 2017, the parties finally worked out all of the details of the settlement except for release language related to the Medicare issue.

- [5] On February 15, 2017, Cohen & Malad notified the Defendants that they would be filing a motion to withdraw as counsel for the Stillwells. As the settlement checks had been negotiated, Sycamore Springs and Green Touch sought to prevent Cohen & Malad from withdrawing, and also filed motions to enforce the settlement. By March 1, 2017, the Stillwells had filed *pro se* appearances and the trial court had scheduled a hearing for April 10, 2017.
- [6] On April 10, 2017, all parties except the Stillwells appeared by counsel. The Stillwells had been ordered to appear in person, but failed to do so. Mrs. Stillwell appeared telephonically, but Dr. Stillwell did not participate. After the hearing, the trial court allowed Cohen & Malad to withdraw their representation of the Stillwells, and further allowed Cohen & Malad to deposit the settlement funds with the clerk. The trial court also granted the motions of Sycamore Springs and Green Touch to enforce the settlement agreement.
- [7] On July 11, 2017, the trial court held a hearing on various motions. The Stillwells failed to appear at the hearing in any manner, despite being ordered to attend in person. On July 26, 2017, the trial court signed an order entering judgment, dismissing the case with prejudice as to the Defendants, and

otherwise enforcing the settlement agreement reached between the parties. The trial court also ordered the clerk to distribute the requested fees³ and expenses⁴ to Cohen & Malad and the remainder of the funds to the Stillwells.

- [8] The Stillwells raise several restated issues on appeal: (1) whether the trial court properly enforced the settlement agreement; (2) whether the trial court abused its discretion in allowing Cohen & Malad to intervene; and (3) whether the trial court acted within its discretion in ordering that Cohen & Malad be paid for their fees and expenses.

I. Settlement Agreement

- [9] The Stillwells contend that the trial court erred when it found that the settlement agreement between the parties was enforceable. “Indiana strongly favors settlement agreements.” *Georgos v. Jackson*, 790 N.E.2d 448, 453 (Ind. 2003). A settlement is a contract between two or more parties to amicably settle or adjust their differences on terms to which they agree. *Vance v. Lozano*, 981 N.E.2d 554 (Ind. Ct. App. 2012). It is well-established that if a “party agrees to settle a pending action, but then refuses to consummate [his or her] settlement agreement, the opposing party may obtain a judgment enforcing the agreement.” *Georgos*, 790 N.E.2d at 453. Generally, a settlement agreement is

³ Specifically, Cohen & Malad was entitled to \$66,666.67 under its agreement with the Stillwells (one-third of the \$200,000 recovery), but voluntarily reduced its fee to \$54,042.14 (not including expenses).

⁴ Despite the fact that Cohen & Malad incurred an additional \$4000 in expenses after the settlement recap was signed, the firm agreed to accept \$36,560.35 in expenses instead of \$40,560.35.

not required to be in writing. *MH Equity Managing Member, LLC v. Sands*, 938 N.E.2d 750 (Ind. Ct. App. 2010), *trans. denied*. “Settlement agreements are governed by the same general principles of contract law as other agreements.” *Id.* at 757.

[10] The existence of a contract is a question of law. *Batchelor v. Batchelor*, 853 N.E.2d 162 (Ind. Ct. App. 2006). To be valid and enforceable, a contract must be reasonably certain and definite. *Zukerman v. Montgomery*, 945 N.E.2d 813 (Ind. Ct. App. 2011). “All that is required to render a contract enforceable is reasonable certainty in the terms and conditions of the promises made, including by whom and to whom; absolute certainty in all terms is not required.” *Id.* at 819. Only essential terms are necessary for a contract to be enforceable. *Id.*

[11] In this case, the parties agreed to essential terms regarding the following topics in their memorandum of understanding. Specifically, the memorandum contained the following terms:

1. Defendants shall pay, or cause to be paid to, the Plaintiffs a total of Two Hundred Thousand Dollars (\$200,000.00) as full settlement of all claims, subject to the terms in this Memorandum of Understanding.
2. The Plaintiffs shall sign an appropriate release, or releases, at a later date formalizing the terms and conditions of the resolution of this matter.
3. The Plaintiffs shall sign a Stipulation of Dismissal and this case shall be dismissed with prejudice.
4. The Plaintiffs agree to provide the Defendants documentation of reduction to any lien(s) and/or subrogation interest(s) from the

respective lienholder(s) and/or subrogee(s). The Defendants shall prepare separate drafts to each lienholder and/or subrogee, with the remaining balance being issued to the Plaintiffs and their counsel.

Appellees' Joint App. Vol II pp. 28–29.

[12] The Stillwells confirmed the settlement in a settlement recap that they executed with Cohen & Malad on August 22, 2016. This recap outlined the gross recovery, fees and expenses, liens, and the ultimate recovery. The recap also stated that “we have accepted the settlement offer after serious reflection and deliberation . . . [and] have concluded that this offer is in our own best interests.” Appellees' Joint App. Vol. II p. 136. The only issue that was not fully addressed in the settlement agreement was the language of the release for Medicare. The language regarding the release(s), however, was not a material part of the agreement. It is clear from the terms of the memorandum that the main issue, the settlement between the parties for the Stillwells' claims, was unambiguously resolved. “A court will not find that a contract is so uncertain as to preclude specific enforcement where a reasonable and logical interpretation will render the contract valid.” *Conwell v. Gray Loon Outdoor Mktg. Group, Inc.*, 906 N.E.2d 805, 813 (Ind. 2009). The trial court did not err in finding that an enforceable settlement agreement existed.

II. Intervenor Status

[13] The Stillwells also argue that the trial court abused its discretion when it allowed Cohen & Malad to intervene. We review a trial court's ruling on a

motion to intervene pursuant to Indiana Trial Rule 24 for an abuse of discretion and assume that all facts in the motion are true. *Himes v. Himes*, 57 N.E.3d 820 (Ind. Ct. App. 2016), *trans. denied*. “An abuse of discretion occurs when the trial court’s decision is against the logic and effect of the facts and circumstances before the court or the reasonable and probable inferences to be drawn therefrom.” *Granite State Ins. Co. v. Lodholtz*, 981 N.E.2d 563, 566 (Ind. Ct. App. 2012), *trans. denied*.

[14] Indiana Trial Rule 24 (A) provides in relevant part as follows:

Upon timely motion anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to a property, fund or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest in the property, fund or transaction, unless the applicant’s interest is adequately represented by existing parties.

Here, the evidence shows that Cohen & Malad had the right to intervene because it had a charging lien and an interest in the settlement funds pursuant to the terms of its agreement with the Stillwells. A charging lien “is the equitable right of attorneys to have the fees and costs due [to] them for services in a suit secured out of the judgment or recovery in that particular suit.” *Wilson v. Sisters of St. Francis Health Servs. Inc.*, 952 N.E.2d 793, 796 (Ind. Ct. App. 2011). Because Cohen & Malad had a charging lien—a valid interest under Indiana Trial Rule 24(A)—at the time that it filed its motion to intervene, the trial court did not abuse its discretion when it allowed Cohen & Malad to intervene.

III. Fees and Expenses

[15] Finally, the Stillwells argue that the trial court abused its discretion when it ordered that Cohen & Malad be paid for their fees and expenses. “We review the trial court’s decision to award attorney fees under an abuse of discretion standard.” *Bacompt Sys., Inc. v. Ashworth*, 752 N.E.2d 140, 146 (Ind. Ct. App. 2001), *trans. denied*. The record shows that Cohen & Malad had a contingency agreement that specified that it would be entitled to a one-third contingency fee if the Stillwells obtained a judgment or settlement on their personal injury claim. The fee agreement further provided that Cohen & Malad would be reimbursed for any expenses advanced. The Stillwells were provided with detailed documentation of Cohen & Malad’s expenses and approved such expenses when they signed the settlement recap in August of 2016. Specifically, the settlement recap stated, “We hereby acknowledge that the above settlement is accurate and in accordance with our contract with the offices of Cohen & Malad.” Appellees’ Joint App. Vol. II p. 233. The Stillwells make several arguments regarding lavish and improper spending by Cohen & Malad, but those claims are not supported by any evidence in the record. Moreover, there is no evidence to suggest that Cohen & Malad was not entitled to its fees and expenses in accordance with its contract with the Stillwells. The Stillwells have failed to establish that the trial court abused its discretion in awarding Cohen & Malad’s fees and expenses.

[16] Judgment affirmed.

Robb, J., and Mathias, J., concur.

STATE OF INDIANA) IN THE MARION COURT SUPERIOR COURT NO. 11
)SS:
 COUNTY OF MARION) CAUSE NO.: 49D11-1110-CT-041092

WILLIAM STILLWELL)
 and PENELOPE STILLWELL,)
 Individually and as Husband and)
 Wife)

Plaintiffs,)

v.)

EAGLE-KIRKPATRICK MANAGEMENT)
 COMPANY, INC., KIRKPATRICK)
 MANAGEMENT COMPANY, INC., G.T.)
 SERVICES, INC. d/b/a GREEN TOUCH)
 SERVICES, INC. and SECTION C)
 HOME OWNERS ASSOCIATION, INC.)

Defendants.)

FILED

JUL 26 2017

Mr. R. Edwards

ORDER ENTERING JUDGEMENT AGAINST THE PLAINTIFFS

Defendants, Eagle-Kirkpatrick Management Company, Inc., Kirkpatrick Management Company, Inc., Section C Homeowners Association, Inc., and G.T. Services, Inc., d/b/a Green Touch Services, Inc., (collectively "Defendants"), by counsel filed their motion to enforce/compel the settlement and for sanctions against Plaintiffs for their failure to conclude the settlement reached in this matter.

The Court finds and enters judgment against William Stillwell and Penelope Stillwell as follows:

1. The settlement to be enforced is set forth in the Memorandum of Understanding filed December 7, 2016, and more fully illustrated in the global release agreed upon by all parties.
2. Plaintiffs' continued refusal to execute such settlement documents is a violation of the settlement agreement reached among the parties and filed with this Court.

3. The Court incorporates its order of May 2, 2017 finding the settlement agreement enforceable as against William Stillwell and Penelope Stillwell.

4. Judgement is hereby entered in favor of the Defendants and against William Stillwell and Penelope Stillwell as follows:

4.1. FOR THE SOLE CONSIDERATION of the combined payment of: a) One Hundred Thousand Dollars (\$100,000.00) by Motorists Mutual Insurance Company on behalf of G.T. Services, Inc. d/b/a Green Touch Services, Inc. (hereafter "Green Touch") plus, b) Four Thousand Dollars and No Cents (\$4,000.00) to "Anthem Blue Cross and Blue Shield" by State Farm Fire and Casualty Company on behalf of Section C Homeowners Association, Inc. (hereafter "Section C"), Eagle-Kirkpatrick Management Company, Inc. and Kirkpatrick Management Co., Inc. (hereafter collectively "Kirkpatrick") plus, 3) Nineteen Thousand Six Hundred Seventy Two Dollars and Ninety Nine Cents (\$19,672.99) to "Medicare" by State Farm Fire and Casualty Company on behalf of Section C and Kirkpatrick and plus, 4) Seventy Six Thousand Three Hundred Twenty Seven Dollars and One Cent (\$76,327.01) by State Farm Fire and Casualty Company on behalf of Section C and Kirkpatrick, the receipt, payment and sufficiency of all such payments is hereby acknowledged, the Defendants and their respective insurers (including without limitation Motorists Mutual Insurance Company and State Farm Fire and Casualty Company), agents, employees, successors, assigns, officers, directors, shareholders, partners and members liable or who might be claimed to be liable are released, acquitted, and forever discharged from any and all claims, demands, damages, actions, causes of action, or suits of any kind or nature whatsoever, particularly on account of all injuries, known and unknown, both to person and property, which have resulted or may in the future develop from a slip and fall on ice/snow by William Stillwell that occurred on or about the 13th day of December, 2010 at the

Sycamore Springs Subdivision, Section C, Marion County, Indiana, (the "Incident") all of which is more specifically described in a Complaint filed against the Defendants pending in the Marion County Superior Court, under cause no. 49D11-1110-CT-041092 (hereafter the "Litigation").

4.2. All payments have been made as set forth herein and the Defendants have fulfilled their obligations for payment to the Plaintiffs.

4.3. The Stillwells are jointly and severally liable for payment of any existing or future medical lien or liens of any type relating to William Stillwell and shall defend, indemnify and save harmless the Defendants and their respective insurers, agents, employees, assigns, officers, directors, shareholders, partners, members liable or who might be claimed to be liable from any claim (specifically, any claim by or on behalf of William Stillwell or Penelope Stillwell) brought as a result of any treatment, injuries, or damages, including, but not limited to, attorney fees incurred to defend such claims and all other costs.

4.4. William Stillwell and Penelope Stillwell acknowledge the following:

4.4.1. They have considered the interests of Medicare/Secretary of Human Services as required by federal law;

4.4.2. They have an obligation to Medicare/Secretary of Human Services that an incident was the subject of a settlement, judgment or award;

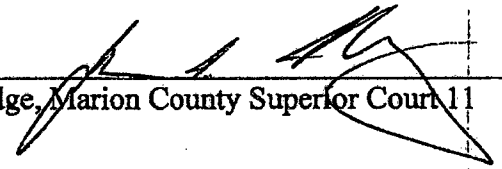
4.4.3. They have an obligation to reimburse Medicare/Secretary of Human Services for medical services rendered to date in this matter;

4.4.4. They have complied with all known obligations pursuant to the Medicare/Secretary of Human Services rules; and

4.4.5. Their future medical care shall not be affected by the terms and conditions of this Document.

5. The claims of William Stillwell and Penelope Stillwell against the Defendants are hereby dismissed, in full, with prejudice, each party to bear their own costs.
6. The lawfirm of Cohen & Malad has previously deposited with the Clerk of the Court any settlement funds on deposit in its IOLTA Trust Account remaining after direct payments to lienholders. The Court shall separately direct the disbursement of these remaining funds.
7. The Court specifically finds that there is no just reason for delay and the Clerk is ordered to enter this judgment in favor of the Defendants and against William Stillwell and Penelope Stillwell immediately.
8. This is a final and appealable judgment that determines all issues as between the Defendants, William Stillwell and Penelope Stillwell.

Date: July 26, 2017



Judge, Marion County Superior Court 11

Distribution:

All parties and counsel of record by IEFS.

In the
Indiana Supreme Court

Penelope Stillwell and William Stillwell,
Appellant(s),

v.

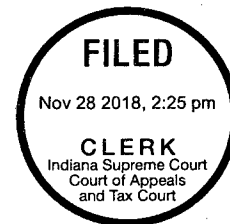
Eagle-Kirkpatrick Management Company,
Inc., Kirkpatrick Management Company,
Inc, G.T. Services, Inc., d/b/a Green
Touch Services, Inc., Sycamore Springs
Section C Homeowners Association, Inc.,
Cohen & Malad, LLP,
Appellee(s),

v.

Cohen & Malad, LLP,
Appellee-Intervenor.

Court of Appeals Case No.
49A02-1708-CT-01919

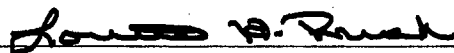
Trial Court Case No.
49D11-1110-CT-41092



Order

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

Being duly advised, the Court DENIES the petition to transfer.
Done at Indianapolis, Indiana, on 11/28/2018.


Loretta H. Rush
Chief Justice of Indiana

All Justices concur.