IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

UNITED AUTOMOBILE INSURANCE COMPANY, a Florida Corporation,

Appellant,

-versus-

SILVER HILLS HEALTH & REHAB CLINIC, INC., a/a/o Penny Panteli,

Appellee.
_____/

CASE NO.: 2010-CV-000006-A-O
LOWER COURT CASE NO: 2008-SC-3700

Appeal from the County Court,
for Orange County,
Wilfredo Martinez, Judge.

Thomas L. Hunker, Esquire,
for Appellant.

Herbert V. McMillan, III, Esquire,
for Appellee.

Before RODRIGUEZ, LUBET and O'KANE, JJ.

PER CURIAM.

ORDER REVERSING FINAL JUDGMENT AND DENYING APPELLEE'S MOTION FOR COUNSEL FEES

I. INTRODUCTION

This is a PIP case.[1] The appellee and plaintiff below, Silver Hills Health and Rehab

[1] "PIP" is an acronym for "personal injury protection." With limited exception, "each motor vehicle owner or registrant required to be licensed in Florida is required to carry a minimum amount of personal injury protection, or PIP insurance, for the benefit of the owner and

Clinic, Inc. ("Silver Hills" or "appellee"), filed a small claims action seeking payment of PIP benefits from the appellant and defendant below, United Automobile Insurance Company ("United" or "appellant").[2] The issue in this appeal is whether a medical provider cashing a PIP benefit check marked "full and final payment" was an accord and satisfaction precluding the provider from seeking further benefits. Appellant sought summary judgment on the grounds that because its check for payment of PIP benefits bore the notation in capital letters, "FULL AND FINAL PAYMENT," Silver Hills' act of cashing this check constituted an accord and satisfaction of Silver Hills' claim.

In opposition to United's summary judgment motion, Silver Hills argued that an accord and satisfaction can only arise from the parties' mutual intent and that such intent is absent here or, at the very least, there exist issues of material fact in this regard. Silver Hills also sought summary judgment on the accord and satisfaction issue. The county court denied both summary judgment motions. It concluded that there were genuine and material factual issues as to whether or not both parties intended for the cashing of the check tendered by United to be a full satisfaction of Silver Hills' claim. United then consented to the granting of the Silver Hills' motion for summary judgment and entry of a corresponding Final Judgment in the amount of $1,961.00 plus interest, as claimed by Silver Hills. From that Final Judgment, United appeals.

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other designees." *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1094 (Fla. 2005). This coverage includes benefits for accident-related medical expenses, disability (lost wages) and death. § 627.736(1)(a),(b),(c), Fla. Stat. (2005).

[2] Silver Hills is the assignee of PIP benefits due Penny Panteli whom it treated for

We have jurisdiction over this appeal pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A).[3] We dispense with oral argument. Fla. R. App. P. 9.320.

Under the facts here, we conclude that there was an accord and satisfaction and reverse.

II. FACTS

Penny Panteli received treatment at Silver Hills for injuries she says she sustained in a motor vehicle accident. She assigned her PIP benefits to Silver Hills. On January 30, 2007, a United adjuster contacted Silver Hills by phone and asked a Silver Hills representative whether it would be willing to negotiate Ms. Panteli's outstanding bills. Silver Hills unequivocally said no. In a letter to Silver Hills dated February 22, 2007, the adjuster wrote that she had thoroughly reviewed the bills submitted by Silver Hills for services between September 20, 2006 and October 30, 2006, in the amount of $8,430. United advised that of this amount, it was allowing only $2,572. It further stated:

> On 10/31/06 [Penny Panteli] was examined by Dr. Khosrow Maleki MD. The Independent Medical Examination (IME) physician has advised us that in his/ her opinion, any further treatment on or after 10/31/06 would not be reasonable, related or medically necessary. Any services rendered by a md or diagnostic tests referred by a md are not reasonable, necessary or related and therefore not payable.

(Pl. Mot. Sum. J. Ex. A).

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injuries Panteli claims she suffered in an auto accident.

[3] Appellee made a motion to dismiss this appeal. It argued that we lacked jurisdiction because 1) the appeal is untimely; and 2) the appellant seeks review of an interlocutory order. That motion was denied. Appellee makes these same arguments in its Answer Brief. We previously rejected them in our order denying appellee's motion to dismiss the appeal. We see no reason to revisit that ruling.

United sent Silver Hills a check, dated February 19, 2007, for $2,572.00. The check stated:

Pay to the Order of SILVER HILLS HEALTH & REHAB F/A/O PENNY PANTELI DOS 9/20/06 - 10/30/06 FOR FULL AND FINAL PAYMENT *****2,572.00

Silver Hills cashed the check which cleared United's bank on March 6, 2007. (Pl. Mot. Sum. J. Ex. C).

About a year after these events, United received a demand letter from Silver Hills' lawyer seeking $1,643.00 for services rendered to Ms. Panteli between September 20, 2006 and October 30, 2006 - the same period noted on United's "full and final payment" check. United responded in a letter denying the claim and explaining that it had provided a "full and final payment" check to Silver Hills on February 17, 2007 and the check had been negotiated on March 6, 2007. Silver Hills then filed this action seeking PIP benefits for its treatment of Ms. Panteli between September 19, 2006 and October 30, 2006.

III. PARTIES' ARGUMENTS

On appeal, United again contends, as it did below, that by cashing the check it tendered, Silver Hills accepted this payment in full satisfaction of the claim for benefits relating to treatment of Ms. Panteli between September 20, 2006 and October 30, 2006.

Silver Hills again urges that there are issues of fact concerning whether the parties mutually intended for United's check to be full payment of its claim. Further, Silver Hills argues that United is precluded from asserting the accord and satisfaction argument because, it says, on this appeal United relies upon common law accord and satisfaction but in the county court

appellant only relied upon section 627.3111, Florida Statutes, for its accord and satisfaction defense. In this same vein, Silver Hills argues that United abandoned its statutory defense inasmuch as it argued only a common law defense in its initial brief.

IV. STANDARD OF REVIEW

The standard of review for a summary judgment is *de novo.* *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

V. DISCUSSION

First, we find no merit in Silver Hills' argument that United's failure to raise common law accord and satisfaction precludes appellant from asserting it in this court. Similarly, we reject the related contention that United has abandoned its argument based on statutory accord and satisfaction. Under the heading "Affirmative Defenses," United stated in its Answer: "**Accord and Satisfaction**: On February 18, 2007, United delivered [its draft] to Plaintiff and Plaintiff accepted from United in full satisfaction of Plaintiff's claim, and thereby waived the right to further payment." (Ans. ¶ 20.) This statement alone put Silver Hills on notice that an accord and satisfaction defense is in issue. In addition, we read United's motion for summary judgment as raising both common law and statutory accord and satisfaction. Further, we do not see, and appellee does not explain, any substantive distinction between statutory and common law accord and satisfaction under Florida law. The comments to section 673.3111, Florida Statutes, say that this provision "follows the common law rule with some minor variations to reflect modern business conditions" and that it "is based on a belief that the common law rule produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged."

§673.3111, Fla. Stat. (2006) (UCC cmt. 3).[4] Silver Hills, at every step of this proceeding, knew it was facing an accord and satisfaction defense and the label, statutory or common law, has made no difference in how Silver Hills has attempted to meet that defense.

We agree, therefore, with United's argument that we must "look to *both* the UCC provisions *and* the common law precedent." (Appellant Rep. Br. 3.) On the issue presented in this appeal, Silver Hills does not demonstrate that section 673.3111 changes the common law and Florida cases have not so held.

As to the merits, we conclude that by cashing United's check, Silver Hills accepted it, as the check indicated, in full satisfaction of its claim.

This case is very much like *United Automobile Insurance Company v. Palm Chiropractic Center, Inc*., 51 So. 3d 506 (Fla. 4th DCA 2011). There, as here, a PIP carrier advised a provider that, based on its IME, it would not pay the full amount claimed. It tendered a check stating, in

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[4] The statute provides in relevant part that:

(1) If a person against whom a claim is asserted proves that that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, that the amount of the claim was unliquidated or subject to a bona fide dispute, and that the claimant obtained payment of the instrument, the following subsections apply.

(2) Unless subsection (3) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

§673.3111, Fla. Stat. (2007).

Neither party asserts that subsection (3) applies.

capital letters, that it was "FOR FULL & FINAL PAYMENT OF PIP BENEFITS." *United Auto. Ins. Co. v. Palm Chiropractic Ctr., Inc.*, 51 So. 3d 506, 507 (Fla. 4th DCA 2011). The chiropractor cashed the check. The fourth district court of appeal held that the circuit court, sitting in its appellate capacity, erred when it affirmed both the county court's entry of summary judgment in favor of the chiropractor and its denial of the insurer's motion for summary judgment. The carrier argued that the acceptance of the check constituted an accord and satisfaction. The *Palm Chiropractic* court explained that "[a]n accord and satisfaction results as a matter of law 'when the creditor accepts payment tendered on the expressed condition that its receipt is deemed to be a complete satisfaction of a disputed issue.'" *Id*. at 509 (*quoting St. Mary's Hospital, Inc. v. Scocoff*, 725 So. 2d 454, 456 (Fla. 4th DCA 1999)). Noting that "[a]t the time the check was tendered in this case, there were sessions for which United Auto was not offering to pay," the *Palm Chiropractic* court stated that "[t]his court has long held that cashing a check containing language that it is in full payment of the debtor's obligations creates an accord and satisfaction with regard to the claim for which payment was tendered." *United Auto. Ins. Co. v. Palm Chiropractic Ctr., Inc.*, 51 So. 3d at 509.

The parties agree that the case of *St. Mary's Hospital, Inc. v. Schocoff*, 725 So. 2d 454 (Fla. 4th DCA 1999) is "binding authority." (Appellee Ans. Br. 20.) We find Silver Hills' reliance on *St. Mary's Hospital* to be misplaced. *St. Mary's Hospital* does not control in this case because, unlike here, the tendered check in *St. Mary's Hospital* did not contain limiting language which made explicit, without question, the insurer's position that "there are no further benefits due under the policy and it does not intend to make any further payments." *St. Mary's Hosp., Inc. v. Schocoff*, 725 So. 2d at 456. We find it unmistakable here that not only did United think it had

no obligation to make further payments but that, in fact, it would not make any further payments for the dates of service in question. United's draft, unlike the one in *St. Mary's Hospital*, "expressly stated that the check constituted payment in full of [United's] obligations." *Id.* The necessity, indeed, even the possibility of future performance was unequivocally ruled out. We conclude that the instant case closely resembles *Palm Chiropractic* and differs from *St. Mary's Hospital* in a factually significant way.

"Further, strong public policy supports the use of accord and satisfaction. Accord and satisfaction is a convenient and valuable tool for resolving disputes informally without litigation." *Martinez v. South Bayshore Tower, L.L.L.P.*, 979 So. 2d 1023, 1024 (Fla. 3d DCA 2008).

The county court did not have the benefit of *Palm Chiropractic* which makes clear that Silver Hills' acceptance and negotiation of the "full and final payment" check when there was an outstanding dispute over benefits was an accord and satisfaction as a matter of law. United is entitled to a judgment in its favor.

VI. APPELLATE COUNSEL FEES

Silver Hills requests an award of its attorneys' fees on appeal. In view of our disposition of this appeal, that motion must be denied.

Based upon the foregoing, it is hereby **ORDERED and ADJUDGED** that the County Court's Judgment of January 20, 2010, be and hereby is **REVERSED** and this matter is **REMANDED** to the County Court for entry of an Order vacating the Judgment entered on

January 20, 2010, in favor of the Appellee, Silver Hills Health & Rehab Clinic a/a/o Penny Panteli, and granting summary judgment to the Appellant, United Automobile Insurance Company and **IT IS FURTHER ORDERED and ADJUDGED** that application of appellee, Silver Hills Health & Rehab Clinic a/a/o Penny Panteli, for appellate attorney's fees be and hereby is **DENIED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, on this _30th_ day of _November, 2012.

/S/_____
JOSE R. RODRIGUEZ
Circuit Judge

/S/_____
MARC L. LUBET
Circuit Judge

/S/_____
JULIE H. O'KANE
Circuit Judge

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished via U.S. mail or hand delivery to:

Thomas L. Hunker, Esq.,
UNITED AUTOMOBILE INSURANCE COMPANY
Office of the General Counsel
P.O. Box 694260
Miami, Florida 33269-9854; and

Herbert V. McMillan, Esq.
LAW OFFICE OF HERBERT V. McMILLAN, P.A.
P.O. Box 608033
Orlando Florida 32860

on this 30th day of November, 2012.

/S/_____
Judicial Assistant