STATE OF MICHIGAN

COURT OF APPEALS

CONNIE SMART and ASHLEY SMART, Plaintiffs-Appellants, v NATIONWIDE MUTUAL INSURANCE COMPANY, Defendant-Appellee.	UNPUBLISHED May17, 2007 No. 266797 Berrien Circuit Court LC No. 03-003401-CZ

Before: Hoekstra, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order dismissing with prejudice plaintiffs' claim for uninsured motorist benefits on the ground that the parties reached an enforceable settlement agreement. We affirm.

On May 29, 2000, plaintiff Connie Smart and her daughter, plaintiff Ashley Smart, were injured when their vehicle collided with a vehicle driven by David Fleisher. Plaintiffs were insured under a no fault automobile insurance policy issued by defendant Nationwide Mutual Insurance Company. Fleisher's insurer was insolvent. Plaintiffs initiated this action against defendant seeking benefits under the uninsured motorist provision of their insurance policy. Plaintiffs alleged that Fleisher was negligent in causing the accident, that Fleisher was uninsured or underinsured because his liability insurer "may have become insolvent," and that defendant was aware of the status of Fleisher's insurer and it refused to pay, or was expected to refuse to pay, uninsured or underinsured motorist coverage benefits to plaintiffs in accordance with the insurance policy.

Defendant ultimately admitted that the policy under which plaintiffs were insured contained an uninsured motorist provision and that "Fleisher was insured by an insolvent insurance policy, potentially giving rise to coverage under the uninsured motorist provision of

the plaintiffs' policy of insurance."[1] On February 22, 2005, the parties reached a settlement agreement. Plaintiffs' counsel recited the following, in open court:

> Connie and Ashley Smart have agreed to settle their *uninsured motorists claims only* against defendant Nationwide for a one time prompt payment of $10,000 and a waiver of any and all unpaid or outstanding costs or sanctions awarded in this case to Nationwide. [Emphasis added.]

Defense counsel added the following, without any objection by plaintiffs:

> And since the policy language coverage is phrased in terms of *uninsured and/or underinsured*, I would just add that *under either of those clauses of the policy this settlement will absolve all claims*. [Emphasis added.]

On May 31, 2005, plaintiffs moved to set aside the settlement agreement. Plaintiffs alleged that, at the time of the settlement conference, "Connie was extremely worn out and in a great amount of pain." They alleged that Connie did not understand the terms of the settlement agreement and mistakenly believed that defendant was obligated to pay her personal protection insurance ("PIP") benefits as part of the settlement. Defendant responded that the present action did not resolve any issues regarding plaintiffs' PIP benefits, and that nothing in the settlement agreement precluded plaintiffs from seeking PIP benefits from defendant. The trial court denied plaintiffs' motion to set aside the settlement agreement and dismissed plaintiffs' action with prejudice.

Plaintiffs contend that the trial court erred in denying their motion to set aside the settlement agreement. We review a trial court's denial of a motion to set aside a settlement agreement for an abuse of discretion. See *Groulx v Carlson*, 176 Mich App 484, 493; 440 NW2d 644 (1989). The existence and interpretation of a contract are questions of law that we review de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001).

MCR 2.507(G)[2] provides as follows:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in

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[1] Defendant also admitted that, under the terms of the insurance policy, it was obligated to "pay reasonable medical expenses incurred for necessary medical . . . services because of bodily injury caused by accident; and sustained by an insured." As of May 5, 2004, defendant had paid approximately $125.024 for plaintiffs' medical treatments. However, defendant denied that the payments were evidence that the treatments were reasonable or necessary medical expenses arising out of the accident.

[2] Formerly MCR 2.507(H).

> writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

There is no dispute that the settlement agreement in this case was "made in open court." The settlement agreement was therefore enforceable against plaintiffs if it fulfilled "the requirements of contract principles." *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484-485; 637 NW2d 232 (2001).

"'An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts.'" *Kloian v Domino's Pizza, LLC*, 273 Mich App 449; 452 NW2d ____ (2006), quoting *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). "[A] contract requires mutual assent or a meeting of the minds on all the essential terms." *Id.* "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 558; 487 NW2d 499 (1992).

Plaintiffs argue that there was no meeting of the minds in this case because plaintiffs believed that, under the terms of the settlement agreement, defendant would not only pay them $10,000, but also would pay PIP benefits to them. However, the record reflects that the parties clearly and unambiguously agreed to settle plaintiffs' claims, under the uninsured motorist provision of the insurance policy *only*, for $10,000. A party's "'intention must be gathered not from what a party now says he then thought but from the contract itself.'" *Fletcher v Bd of Ed of School Dist Fractional No 5*, 323 Mich 343, 348; 35 NW2d 177 (1948) (citation omitted). In the present suit plaintiff was not seeking the payment of PIP benefits. The settlement agreement was silent regarding the payment of PIP benefits. Nothing in the record indicates that the agreement affected plaintiffs' rights to pursue PIP benefits under the insurance policy after the agreement was entered. In fact, both parties conceded below that the present case did not involve any issues regarding the payment of PIP benefits but, rather, involved only a claim for benefits under the insurance policy's uninsured motorist provision. The record clearly supports a finding that there was a meeting of the minds regarding the essential terms of the settlement agreement.

Moreover, the express words of the parties' attorneys as recited on the record indicate that the parties agreed to accept the terms of the unambiguous agreement. An attorney has the apparent authority to settle a lawsuit on behalf of his client. *Nelson v Consumers Power Co*, 198 Mich App 82, 90; 497 NW2d 205 (1993). Moreover, "a longstanding principle derived from agency law is that a client is bound by the actions and inactions of that client's attorney that occurred within the scope of the attorney's authority." *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 331; 712 NW2d 168 (2005). Thus,

> a third party who reaches a settlement agreement with an attorney employed to represent his client in regard to the settled claim is generally entitled to enforcement of the settlement agreement *even if the attorney was acting contrary to the client's express instructions*. In such a situation, the client's remedy is to sue his attorney for professional malpractice. [*Nelson, supra* at 90 (citation omitted; emphasis added).]

Courts are required to enforce unambiguous contracts according to their terms. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 370; 666 NW2d 251 (2003); *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). "Under usual contract principles, plaintiff is bound by the settlement agreement absent a showing of mistake, fraud, or unconscionable advantage." *Plamondon v Plamondon*, 230 Mich App 54, 56; 583 NW2d 245 (1998). Plaintiffs do not argue on appeal that the settlement agreement was procured by fraud, duress, or unconscionable advantage.

Rather, plaintiffs contend that the settlement agreement is the result of a mistake. "Generally, rescission of a contract will not lie except for mutual mistake or unilateral mistake induced by fraud." *Windham v Morris*, 370 Mich 188, 193; 121 NW2d 479 (1963); *Marshall v Marshall*, 135 Mich App 702, 708; 355 NW2d 661 (1984). The record does not support a finding that the parties made a mutual mistake. "Plaintiff is at most arguing a unilateral mistake, and this Court does not consider a unilateral mistake sufficient to modify a previously negotiated agreement." *Hilley v Hilley*, 140 Mich App 581, 585-586; 364 NW2d 750 (1985). See also *Farm Bureau Mut Ins Co of Michigan v Buckallew*, 471 Mich 940; 690 NW2d 93 (2004). "Once a contract to settle legal claims has been entered into, a unilateral change of mind is not a ground for excusing performance." *Reed v Citizens Ins Co of America*, 198 Mich App 443, 447; 499 NW2d 22 (1993), overruled on other grounds in *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 540; 697 NW2d 895 (2005). Moreover, there was no basis for permitting plaintiffs to unilaterally incorporate a provision regarding the payment of PIP benefits into the agreement. See *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999).

Finally, plaintiffs assert that Connie suffered an alleged traumatic brain injury that diminished her cognitive skills and that she was "extremely worn out and in a great deal of pain" on the day the settlement agreement was made. They assert that, because Connie did not testify, there was no basis for the trial court to conclude that she knowingly, understandingly, and voluntarily entered into the agreement. Although plaintiffs presented the results of a cognitive skills evaluation performed on Connie in 2003, plaintiffs failed to establish that Connie lacked the mental capacity to contract on February 22, 2005.

> The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged. To avoid a contract it must appear not only that the person was of unsound mind or insane when it was made, but that the unsoundness or insanity was of such a character that the person had no reasonable perception of the nature or terms of the contract. [*In re Estate of Erickson*, 202 Mich App 329, 332; 508 NW2d 181 (1993).]

Plaintiffs failed to establish that Connie was of unsound mind or insane when the settlement agreement was made or that the unsoundness or insanity was of such a character that Connie had no reasonable perception of the nature or terms of the agreement. *Id.* The 2003 evaluation is not relevant to a determination whether Connie lacked the mental capacity to contract on February 22, 2005. This Court will not search the record for factual support for a party's claims. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

The settlement agreement was made in open court, MCR 2.507(G), and fulfilled the requirements of contract principles. Moreover, plaintiffs failed to demonstrate grounds to set

aside the settlement agreement. Thus, the trial court did not abuse its discretion in denying plaintiffs' motion to set aside the settlement agreement, *Michigan Mut Ins Co, supra* at 484-485, and it properly dismissed plaintiffs' action against defendant.

Plaintiffs also contend that their trial counsel was ineffective for failing to confirm that Connie understood the terms of the settlement agreement. "[I]ssues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). We decline to address this unpreserved issue. We note, however, that this issue is without merit. Although the Sixth Amendment affords a criminal defendant the right to the effective assistance of counsel in criminal prosecutions, it has no applicability to civil proceedings. See US Const, Am VI; Const 1963, art 1, § 20; *United States v $100,375.00 in United States Currency*, 70 F 3d 438, 440 (CA 6, 1995); *Haller v Haller*, 168 Mich App 198, 199-200, 423 NW2d 617 (1988).

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens