

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KARNI WARDA FRANK, M.D.,

Plaintiff-Appellant,

v

HENRY FORD HEALTH SYSTEM, and METRO  
GROUP, d/b/a HENRY FORD HEALTH SYSTEM,

Defendant-Appellees,

and

SUSAN SCHOOLEY,

Defendant.

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UNPUBLISHED

March 26, 1999

No. 201419

Wayne Circuit Court

LC No. 96-629037 NZ

Before: Kelly, P.J., and Hoekstra and Young, Jr., JJ.

KELLY, J. (dissenting).

I respectfully dissent although plaintiff's counsel conceded at oral argument that tender back of consideration did not operate to rescind the release. I think a strong argument to the contrary can be made. The Michigan Supreme in *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155; 458 NW2d 56 (1990) relied in part on *Kirl v Zinner*, 274 Mich 331; 264 NW 391 (1936) stating:

“Where a party to a compromise desires to set aside or avoid the same and to be remitted to his original rights, he must place the other party *in statu quo* by returning or tendering the return of whatever has been received by him under such compromise, in case it is of any value, and so far as possible any right lost by the other party because thereof. [*Id.* at 166.]

Defendant's motion for summary disposition was filed while interrogatories and request for documents were pending. Defendant's motion was decided by the trial court under MCR 2.116(C)(8)

prior to any discovery and without appropriate inquiry into the representations made by defendant's agent.

The majority decides that *Stefanac, supra*, and *Kirl v Zinner, supra*, have been superseded or overruled by *Taylor Group v ANR Storage Co*, 452 Mich 561; 550 NW2d 258 (1996) to the extent that the plaintiff must make an additional showing of meritorious grounds for rescission. In *Cushman v Avis*, 28 Mich App 370, 372-373; 184 NW2d 294 (1970) this Court said:

Rescission abrogates the contract completely. After a binding election to rescind, a party cannot insist on former contract rights. It is as if no such contract had been made. 17A CJS Contracts §440, pp 551-552; 1 Black on Rescission and Cancellation (2d Ed), § 1; *Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938); *Travelers Insurance Company v Carey*, 24 Mich App 207; 180 NW2d 68 (1970).

Even if that is the case and the majority's interpretation is correct, I believe that remand to the trial court for an evidentiary hearing is necessary to decide the merits of plaintiff's contention that defendant's agent, Lee Salo, represented to her that the release was conditional, that she had the right to change her mind by returning the consideration and have her claims litigated. Plaintiff claims she relied on that representation to her detriment, but the trial court refused to consider it in a light most favorable to plaintiff because plaintiff had not filed a motion to amend its complaint prior to the time the motion for summary disposition was decided. However, plaintiff raised the issue orally and the motion should have been at least considered at appellant's timely motion for rehearing. *Citizen's Insurance Company of America v Buck*, 216 Mich App 217; 548 NW2d 680 (1996). In fact, I believe it was an abuse of discretion to deny appellant's request to amend her complaint when it was properly included in her motion for reconsideration. See, *Jackson v White Castle System, Inc*, 205 Mich App 137; 517 NW2d 286 (1994).

I would reverse.

/s/ Michael J. Kelly