WARREN & SALINE RIVER RAILROAD COMPANY *v.* WILSON.

4—2594

Opinion delivered June 13, 1932.

1. EVIDENCE—PAROL EVIDENCE OF CONSIDERATION.—Where a contract of release in a personal injury suit recited that, for a consideration of $4,000, the plaintiff released the defendants from all claim for damages therein, testimony of a parol agreement that defendants would in addition pay the plaintiff's attorney's fee *held* admissible as not contradicting the written release.
2. ATTORNEY AND CLIENT—LIEN OF ATTORNEY.—An attorney has a lien on his client's cause of action, under Crawford & Moses' Dig., § 628, and any one settling with the plaintiff without the knowledge of his attorney does so at his own risk, and the court will give the attorney a lien for that percentage of the proceeds which his contract with the plaintiff entitled him to receive.

3. ATTORNEY AND CLIENT—LIEN OF ATTORNEY.—Where a client agreed to pay his attorney a fee of 50 per cent., the defendant, settling with the client for a stipulated sum and agreeing to pay the attorney's fee, must pay the attorney a like sum.
4. EVIDENCE—TESTIMONY OF PARTY.—The trial court could accept that part of plaintiff's testimony which it believed to be true and reject that part which it believed to be untrue.

Appeal from Bradley Circuit Court; *Patrick Henry,* Judge; affirmed.

STATEMENT BY THE COURT.

This is an appeal by defendants from a judgment of the circuit court in favor of attorneys for plaintiff in a proceeding to recover attorneys' fees for services rendered in an action by plaintiff against defendants to recover damages for personal injuries.

J. R. Wilson and Aubert Martin were attorneys for W. A. Smith in an action brought by him against the Warren & Saline River Railroad Company and the Bradley Lumber Company to recover damages for personal injuries. Before the case came to trial, defendant Warren & Saline River Railroad Company settled with Smith without the knowledge of his attorneys. The contract of settlement was in writing and substantially recites that W. A. Smith, for the consideration of $4,000 cash in hand, releases the Bradley Lumber Company and the Warren & Saline River Railroad Company from all claim for damages by reason of a suit against them in the circuit court of Bradley County, Arkansas, whereby he seeks to recover the sum of $75,000 for personal injuries alleged to have been sustained on account of the negligence of the defendants while he was in their employ. The sum of $4,000 was paid to Smith, and his suit was dismissed. The attorneys were employed by Smith on a percentage basis as is evidenced by a written contract dated May 8, 1930. The agreement recites that, in consideration of the services of the attorneys in a damage suit against the Warren & Saline River Railroad Company and the Bradley Lumber Company for personal in-

juries, he agrees to pay them fifty per cent. of the net amount recovered, whether by suit or by compromise.

While the suit was pending in the circuit court, Joe L. Reaves, representing the Warren & Saline River Railroad Company, approached W. A. Smith with a view of compromising and settling the lawsuit. Smith told Reaves that his attorneys had offered to settle the suit for $8,000. Reaves replied that he was not authorized to pay that much, but would have to consult the president of his company. After doing this, Reaves told Smith that he could give him $4,000 cash and pay his attorneys. After further negotiations, Reaves agreed in addition to cancel an indebtedness of about $800 owed by Smith to the Bradley Lumber Company and also to allow him to receive $1,000, proceeds of an insurance policy taken out by his employer for payment of injuries received by Smith as an employee.

According to the testimony of Smith, the defendants were to take care of his attorneys on the basis that he was paid. He told Reaves that he had a fifty-fifty contract with his attorneys. Again, Smith stated in his testimony that they were to take care of his attorneys. Smith had understood that they were agreeing to pay his attorneys the amount he had received. On cross-examination, he again stated that he thought his attorneys were to get the same amount that he received. He admitted that he had not paid his attorneys anything, but, on the other hand, that they had gone his security for advances in the sum of about $1,100. Smith further testified that he paid his medical expenses amounting to about $1,900 out of the $4,000 received by him in settlement of the suit.

The attorney for the defendants who prepared the written release testified that he informed Reaves and Smith that the defendants in the suit could be made to pay the attorneys' fees of Smith if the latter did not pay them. Smith said the question of liability to his attorneys didn't bother him, all that he wanted to know was if he had a right to settle. The attorney for the

defendants told Smith and Reaves that the attorneys for the plaintiff should be informed of the settlement.

According to the testimony of Joe L. Reaves, there was no other consideration for the settlement than the payment by the defendants to the plaintiff of $4,000. This was understood to be in full settlement of the suit. Smith told Reaves that he was going to fix it so his attorneys couldn't get a cent of what he received. Smith denied this, and said that he had always been on good terms with his attorneys, and expected them to be paid by the defendants.

Other evidence was introduced tending to corroborate the respective theories of the plaintiff and of the defendant to this lawsuit, but we do not deem it necessary to abstract it because the evidence recited above is sufficient to present the issue raised by the appeal.

The case was tried by the circuit court sitting as a jury; and from the finding and judgment in the sum of $4,000 against it the Warren & Saline River Railroad Company has prosecuted this appeal.

Coleman & Riddick, D. A. Bradham and *Clary & Ball,* for appellant.

D. L. Purkins, for appellee.

HART, C. J., (after stating the facts). The record shows that the consideration recited in the release agreement between Smith and the defendant was the sum of $4,000, which was paid to and received by Smith in full discharge and final settlement of his claim against said defendant in a damage suit brought by him against it for personal injuries in the circuit court.

It is earnestly insisted by counsel for appellant that to allow the attorneys to prove that there was an additional consideration that their fee should be paid would be in violation of the well-known rule that parol evidence is not allowed, in so far as the terms of the consideration are contractual, and the writing must control. They rely upon the case of *Williams* v. *Chicago, Rock Island & Pacific Railroad Company,* 109 Ark. 82, 158 S. W. 967,

and on other cases decided by this court deciding a similar principle.

We do not think the cases cited are applicable under the facts of this case. In the case just cited, Williams settled a claim for damages with the railroad company for a stipulated amount of money and testified at the trial that the release merely recited a part of the consideration for the settlement, and that it was agreed that he was to have a lifetime job with the railroad company. The court held that this could not be done because the part of the consideration proved by parol was contractual in its nature and tended to contradict the very terms of the settlement by the railroad with the plaintiff. The court recognized, however, the well-known rule that parol proof is admissible to establish the fact that other considerations not recited in the instrument of writing were agreed to be had where such proof does not contradict the terms of the writing. It was distinctly held that an additional consideration, based upon the same subject-matter, might be proved without varying the terms of the writing.

The admission of the parol proof of Smith did not tend in any way to contradict or vary the terms of the written release and settlement by himself with the defendant. It only recited an additional consideration that the defendant was to pay his attorneys whatever he had agreed to pay them.

Another reason why the testimony was admissible is that, under our statute, the attorney has a lien on his client's cause of action, of which all the world must take notice, and any one settling with the plaintiff without the knowledge of his attorney does so at his own risk. It is true that the existence of the lien under the statute does not permit the plaintiff's attorney to stand in the way of a settlement; but the lien operates as security, and, if a settlement is made in disregard of it, the court will interfere and give the attorney a lien for that percentage of the proceeds which his contract with his client entitled him to receive. *St. Louis, Iron Mountain &*

Southern Railway Company v. *Hays & Ward,* 128 Ark. 471, 195 S. W. 128.

This view was again adopted in the case of *Arkansas Foundry Company* v. *Poe,* 181 Ark. 497, 26 S. W. (2d) 584. In the latter case, it was held that all of the cases recognize the rule that the amount for which the parties have in good faith agreed to settle is binding on the attorneys, but they disagree as to what this amount is. Some of the cases hold to the view that the amount paid the client is the amount on which the attorney's percentage is to be computed where there is a contingent fee. Other cases hold that the amount paid the client is not the whole of the settlement, but only the client's part thereof, and that the whole amount of the settlement on which the attorney's percentage is to be computed is an amount bearing such a proportion to the amount paid to the client as the whole bears to the fraction represented in the client's share. In other words, under our statute, if the defendants are required to pay the attorney's fees as a part of the settlement, they will be deemed to have agreed to pay the plaintiff's attorney the amount the latter was entitled to receive under the contract of employment. This was the view of the law adopted in the Poe case; and it was expressly held that, where a client agreed to pay attorney a fee of fifty per cent., the defendant, settling with the client for a stipulated sum and agreeing to pay the attorney, must pay the attorney a like sum.

The undisputed facts in this case are that the defendant knew at the time it made the settlement that the plaintiff had agreed to pay his attorneys a contingent fee on a percentage basis, and knew the terms thereof. Smith, the plaintiff in the damage case, testified that they agreed to pay his attorneys on the basis on which he was paid. Now the release and settlement show that he was paid the sum of $4,000, and the court found that the attorneys were entitled to recover a like amount. The finding and judgment of the court shows that it did not take into consideration the fact that other sums in addi-

tion to the $4,000 were to be received by the plaintiff from the defendant in the settlement of the case. The court was at liberty to accept that part of the plaintiff's testimony which it believed to be true, and to reject that part that it believed to be untrue.

We find no reversible error in the record, and the judgment will therefore be affirmed.