

STATE OF MICHIGAN
COURT OF APPEALS

HOWARD P. LEVY, D.O.,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 196300

Macomb Circuit Court

LC No. 96-001322-CK

CORPORATE HEALTH SYSTEM, INC., ROBERT
AMSLER, JOHN JOHNSON, ROBERTY
KILGORE, and MICHAEL TAWNEY, jointly and
severally,

Defendants-Appellees.

Before: Murphy, P.J., and Michael J. Kelly and Gribbs, JJ.

MICHAEL J. KELLY (concurring).

I concur in result only. While I agree that plaintiff's case was properly dismissed because he did not attempt to return any of the consideration defendants paid for the release, see *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 164-165; 468 NW2d 56 (1990), I respectfully disagree with the majority's conclusion that plaintiff was obligated to return to defendants the \$120,000 that had been paid for plaintiff's Corporate Health Services (CHS) stock.

Pursuant to plaintiff's decision to disaffiliate himself from defendants, the parties executed a contract entitled "Settlement Agreement and Mutual Release," which contained the following provision: "CHS has delivered to [plaintiff] a promissory note in the amount of \$120,000.00 . . . *for the purchase of his stock*" (emphasis added). The contract also contained provisions whereby defendants agreed to pay plaintiff severance pay of \$330,000, and all parties agreed to a mutual release of liability. In light of the contract's specificity regarding the stock transaction, I believe that the \$120,000 defendants paid for plaintiff's stock was not consideration for the release, but rather separate consideration for the stock transaction. Moreover, because one of the primary purposes of the tender doctrine is to place the opposing party *in statu quo*, *Stefanac, supra* at 164, tender of the stock purchase price is not appropriate. If defendants were to recoup the money they paid plaintiff for his CHS stock, which defendants subsequently sold to Occu-System at a substantial profit, defendants would obviously be placed in a far better position than they were before the parties executed the release agreement. For

these reasons, I would hold that plaintiff was not obligated to return the stock purchase price to defendants as a prerequisite to commencing suit.

As to all other aspects of the majority opinion, I concur.

/s/ Michael J. Kelly