

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT MARKLEY, SR., as Personal
Representative of the ESTATE OF SALLY
MARKLEY, Deceased, as Assignee of
COMMUNITY HEALTH CENTER OF BRANCH
COUNTY,

Plaintiff-Appellee,

v

OAK HEALTH CARE INVESTORS OF
COLDWATER, INC., d/b/a THE LAURELS OF
COLDWATER, f/k/a CARRIAGE INN
CONVALESCENT CENTER

Defendant-Appellant.

UNPUBLISHED
April 6, 2001

No. 220494
Branch Circuit Court
LC No. 98-012850-NH

Before: White, P.J., and Talbot and R.J. Danhof*, JJ.

PER CURIAM.

Defendant Oak Health Care Investors of Coldwater, Inc., d/b/a The Laurels of Coldwater, f/k/a Carriage Inn Convalescent Center (OHC), appeals as of right from the trial court's order granting summary disposition for plaintiff, as assignee of Community Health Center of Branch County (Community), on his common-law indemnification claim against OHC. We reverse.

The basic facts are undisputed. In 1994, the decedent was admitted to Community where her diagnosis and treatment eventually led to a large bowel resection and left leg amputation. The decedent's family cared for her until she was admitted to OHC's nursing facility in February 1996. On April 7, 1996, an OHC nurse increased the prescribed infusion rate for her intravenous feedings in a manner that caused her to go into respiratory distress. The decedent was transported to Community, where she died shortly thereafter as a result of cardiac arrest and congestive heart failure.

On February 21, 1997, plaintiff as personal representative of the estate of the decedent (his wife) brought a wrongful death/medical malpractice action against Community and members of its medical staff. Plaintiff alleged that Community, both directly and through its medical staff,

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

failed to properly and timely diagnose and treat the decedent's "vascular occlusion" which resulted in Community having to perform the large bowel resection and leg amputation in 1994. Plaintiff also alleged that the decedent passed away about two years later "*as a result of the deterioration and/or complications of the aforesaid injuries and or amputations.*" OHC was not a party to the lawsuit against Community and there were no allegations in the complaint that plaintiff sought to hold Community liable for any acts or omissions of OHC.

In July 1997, plaintiff filed a separate wrongful death/medical malpractice action against OHC and one of its nurses. Plaintiff claimed that the decedent was admitted to OHC's nursing facility on February 16, 1996; that on April 7, 1996, the nurse negligently increased the prescribed "infusion rate" for her intravenous feedings in a manner that caused her to go into respiratory distress; and, that the decedent was taken to Community the same day where she "passed away . . . as a result of cardiac arrest and congestive heart failure."¹ OHC apparently failed to respond to plaintiff's complaint with an affidavit or meritorious defense, inspiring the trial court to grant plaintiff partial summary disposition pursuant to MCR 2.116(C)(9) (failure to state a valid defense) and (C)(10) (no genuine issue of material fact). The trial court ruled that OHC was liable for the death as a matter of law and limited for the trial the issue of plaintiff's damages.

In July or August of 1998, plaintiff settled the initial action against Community, executing a release and settlement agreement with respect to all claims.² Under the terms of the settlement Community (1) paid \$460,000 to plaintiff (2) paid \$80,000 to the State of Michigan which had intervened in the case³ and (3) assigned plaintiff:

. . . any and all claims, demands, rights, and causes of action of whatsoever kind and nature, that [Community] has had, now has, or may have against [OHC] . . . or any other persons or entities, arising out of any and all claims made or that could have been made against [Community] . . . including, but not necessarily limited to, any and all amounts of money expended or incurred in the settlement, satisfaction, or defense of such claims."

¹ There was no allegation that Community was negligent when the decedent was hospitalized there on this occasion.

² The lower court record for the case against Community was not submitted to this Court. The lower court record that was submitted, however, contains a letter from OHC's attorney to the trial court. In the letter, the OHC attorney states that his examination of the file for the case against Community revealed that plaintiff had filed a motion for summary disposition on the issue of liability on the basis that Community failed to file an affidavit of meritorious defense; however, "apparently either the case was settled before there was a ruling or the order was never entered with the Court." There is no indication that plaintiff challenged the accuracy of this representation below.

³ The sum was for reimbursement of medical expenses paid on behalf of decedent.

The trial court entered an order for distribution of proceeds consistent with the settlement between Community and plaintiff. After deducting \$14,532.99 in costs, the order allocates \$220,000 to “the legal theory arising from the Wrongful Death of [the decedent]” and \$240,000 to the “legal theory arising from conscious pain and suffering from the injuries to [the decedent] during her lifetime.”

On December 7, 1998, plaintiff filed the instant action against OHC alleging that, as Community’s assignee, it was entitled to common-law indemnification from OHC for the amount Community paid pursuant to the settlement. Plaintiff alleged that Community’s malpractice ultimately caused the decedent to be placed in OHC’s nursing facility, where negligent treatment proximately caused the decedent’s death. Based on the assignment of rights in plaintiff’s settlement with Community, plaintiff alleged that OHC, as the party responsible for the decedent’s death, was required to indemnify him for the damages Community incurred in his wrongful death/medical malpractice suit against it.

Plaintiff subsequently filed a motion for entry of default judgment or summary disposition, claiming that OHC’s failure to timely file an answer entitled plaintiff to a default judgment. Plaintiff alternatively argued that he was entitled to summary disposition pursuant to MCR 2.116(C)(9) and (C)(10) because OHC (1) did not and could not provide an affidavit of meritorious defense with respect to its alleged negligence and (2) no genuine issues of material fact existed regarding whether plaintiff was entitled to recover \$200,000 (i.e., “the amount which [the trial court] deemed reasonable in settlement of [Community’s] liability for [the decedent’s death] at the time [the court] entered its ‘Order for Distribution of Proceeds.’”⁴ With respect to the latter contention, plaintiff argued that “although not actively negligent in causing [the decedent’s] death,” Community nonetheless faced liability for it “by application of the principle that a tortfeasor is liable for all foreseeable consequences of his tortious act, including that another may subsequently act negligently in rendering care related to plaintiff’s original injury”; that payment of the \$220,000 amount thereby extinguished Community’s liability to plaintiff for the decedent’s death; and, that plaintiff was entitled to indemnity from OHC for the amount Community paid to plaintiff in the settlement.

OHC opposed plaintiff’s motion by requesting that the default be set aside and contesting summary disposition. In response to the motion for summary disposition, OHC argued that (1) it did not need to file an affidavit of meritorious defense in an indemnification action and that (2) plaintiff could not seek indemnification as Community’s assignee because plaintiff’s counsel “made allegations of active negligence against . . . [Community] in the underlying medical

⁴ Although plaintiff alleged in the complaint that he was entitled to recover the entire amount Community paid pursuant to the settlement (\$540,000), in his motion he only claimed that he was entitled to the amount apportioned for the wrongful death (\$220,000).

malpractice case which precludes common law indemnification”⁵ and “has admitted [that Community] was actively negligent.” OHC further stated that “since plaintiff has admitted that [Community] was actively negligent, and [that it was] undisputed that their act of negligence caused the loss of a large portion of [the decedent’s] bowel and caused her consequential problems related thereto, the active negligence of plaintiff’s assignor [Community] was a substantial factor and a proximate cause of [the decedent’s death]”⁶

Plaintiff argued in reply that although a party seeking common-law indemnity must be free from active negligence, Michigan cases applying the “active negligence” bar to indemnity have been limited to claims involving joint tortfeasors. Noting that the negligent acts of Community occurred two years before those committed by OHC, plaintiff argued that a claim for indemnity by initial tortfeasors against successive tortfeasors has been recognized as fundamentally different. In response, OHC maintained that the cases cited by plaintiff, where there was an aggravation of the original injuries caused by the initial tortfeasor or where there were new injuries, were distinguishable. Unlike those cases, OHC argued, both OHC and Community were responsible for the single, indivisible death of the decedent (i.e., the active negligence of Community caused the decedent’s loss of bowel and leg and was also a substantial factor and proximate cause of the decedent’s death). According to OHC, therefore, plaintiff was not entitled to common-law indemnity because plaintiff alleged that the active negligence of both Community and OHC proximately caused the death.

After oral argument, the trial court granted plaintiff’s motion for summary disposition with respect to the indemnification claim.⁷ The trial court determined that plaintiff was entitled to indemnification for the wrongful death damages Community paid to plaintiff pursuant to the settlement because OHC acted independently in causing the decedent’s death. The trial court specifically ruled in part:

⁵ In support of this contention, OHC cited to the following general allegations contained in the complaint plaintiff filed in the lawsuit against Community:

20. That on April 7, 1996, Plaintiff’s decedent, Sally Markley, passed away as a result of the deterioration and/or complications of the aforesaid injuries and/or amputations.

21. That this action is brought pursuant to the Michigan Wrongful Death Statute for all damages contemplated therein.

OHC also stated that the complaint also contained numerous allegations of “independent, or active claims of negligence against [Community]”, which must be distinguished from the additional allegations of claims of passive or vicarious negligence.

⁶ In support of its contention, OHC submitted the affidavit of a board-certified family practitioner in which he opined that the problems the decedent suffered at Community’s hands was a substantial factor and proximate cause of her death.” OHC also attached the affidavit of an attorney attesting that plaintiff’s claim for indemnification lacked merit based upon “the facts and decisions of numerous Michigan cases involving claims of common law indemnity.”

⁷ The trial court denied plaintiff’s motion for entry of default judgment.

. . . . [S]tanding in the shoes of the hospital, [plaintiff] is entitled to indemnification for the subsequent negligence of the defendant. Negligence that, while, perhaps, initially triggered by the hospital's own negligence, was, to the Court's mind, totally unrelated to that negligence. It, in no way, reflected on any of the previously alleged act of negligence of the hospital. The bifurcation in time, the Court feels, while, perhaps, not specifically dismissed in the settlement by the underlying plaintiff against the hospital, was, by reason of fact, separated sufficiently that the subsequent negligence of [OHC] here acted independently of any negligent [sic], active or passive, of the hospital, to cause the death of [the decedent].

And that the hospital in settling its claim, sought indemnification and then assigned that indemnification to [plaintiff] that's standing in the hospital's shoes. He has a right to obtain back here that which, in essence, he had relinquished at the time of that settlement. That there is no issue of fact upon which this Court can see any further discovery or trial necessary to resolve.

The Court would find that – try as I might just to see if there would be any need to determine a proration of responsibility – that the responsibility that the hospital had, that led and triggered the placing in the nursing home, was separated in time and fact to a sufficient degree that it is, indeed, a separate cause of action. And that the \$220,000 assignment would stand and would not be reduced.

The trial court entered a judgment in favor of plaintiff for \$220,000, the amount that Community agreed to pay for the decedent's wrongful death.

OHC argues on appeal that the trial court erred in concluding that plaintiff, as the assignee of an actively negligent party, is entitled to common-law indemnity. Plaintiff, on the other hand, argues that an initial tortfeasor may seek indemnification from a successive tortfeasor that committed an act of negligence separate and distinct from the initial tortfeasor's negligence.

We review the trial court's grant of summary disposition under MCR 2.116(C)(10)⁸ de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The trial court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence in the light most favorable to the party opposing the motion. *Id.*, citing *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The moving party bears the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Id.* at 455. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455.

⁸ Plaintiff brought his motion pursuant to MCR 2.116(C)(9) and (C)(10) and the trial court did not specify which section it relied on for the basis of its decision. Because it appears that the trial court relied on documentary evidence beyond the pleadings to support the motion for summary disposition, we construe the motion as having been granted pursuant to MCR 2.116(C)(10). *Wayne Co v Plymouth Charter Twp*, 240 Mich App 479, 480; 612 NW2d 440 (2000).

“Generally, indemnification is an equitable doctrine that shifts the entire burden of judgment from one tortfeasor who had been compelled to pay it, to another whose active negligence is the primary cause of the harm.” *St. Luke’s Hosp v Giertz*, 458 Mich 448, 453; 581 NW2d 665 (1998). Indemnification is distinguished from contribution, which is defined as “the partial payment made by each or any of jointly or severally liable tortfeasors who share a common liability to an injured party.” *Id.* “Therefore, while contribution distributes the loss among tortfeasors, each bearing his pro-rata share, indemnity seeks to transfer the entire loss imposed on a tortfeasor to another, who in equity should pay.” The rationale behind indemnification is that “liability should fall on the party best situated to adopt preventative measures.” *Swindlehurst v Resistance Welder Corp*, 110 Mich App 693, 698; 313 NW2d 191 (1981).

Michigan courts recognize three possible sources of a right to indemnification: an express contract, an implied contract, and the common law. *Transportation Dep’t v Christensen*, 229 Mich App 417, 425; 581 NW2d 807 (1998); *Paul v Bogle*, 193 Mich App 479, 490; 484 NW2d 728 (1992). Common-law indemnification, at issue here, is defined “as the equitable right to restitution of a party held liable for another’s wrongdoing,” *North Community Healthcare, Inc v Telford*, 219 Mich App 225, 226; 556 NW2d 180 (1996), and requires that the person seeking indemnification be completely free from active negligence, *Bogle, supra* at 491. As more fully explained by our Supreme Court:

It has long been held in Michigan that the party seeking indemnity must plead and prove *freedom from personal fault*. This has been frequently interpreted to mean that the party seeking indemnity must be *free from active or causal negligence*. *Provencal v Parker*, 66 Mich App 431; 239 NW2d 623 (1976); *Indemnity Ins Co of North America v Otis Elevator Co*, 315 Mich 393; 24 NW2d 104 (1946); *Husted v Consumers Power Co*, 376 Mich 41; 135 NW2d 370 (1965); *Liberty Mutual Ins Co v Curtis Noll Corp*, 112 Mich App 182; 315 NW2d 890 (1982). If a party breaches a direct duty owed to another and this breach is the proximate cause of the other’s injury, that is active negligence. Where the active negligence is attributable *solely* to another and the liability arises by operation of law, that is passive negligence. [*Langley v Harris Corp*, 413 Mich 592, 596-597; 321 NW2d 662 (1982) (emphasis added).]

To determine whether the indemnitee was “actively” or “passively” negligent, the court examines the allegations contained in the primary plaintiff’s complaint. *Feaster v Hous*, 137 Mich App 783, 787-788; 359 NW2d 219 (1984); *Pontious v E W Bliss Co*, 102 Mich App 718, 721; 302 NW2d 293 (1981). Where the complaint alleges active negligence, as opposed to derivative liability, the plaintiff-indemnitee is not entitled to common-law indemnity. *Feaster, supra* at 787-788. *State Farm Fire & Cas Co v Super City, Inc*, 125 Mich App 65, 68; 335 NW2d 714 (1983).

OHC maintains that the principles set forth above operate to bar plaintiff’s indemnification claim because plaintiff’s complaint against Community alleged that it was actively negligent in causing the decedent’s death. Plaintiff, however, maintains that the active-

passive rule described above applies only in cases involving joint tortfeasors and does not apply where the putative indemnitee is liable only under a theory of successor liability. We disagree.

Assuming without deciding that the trial court properly determined that Community and OHC were successive independent tortfeasors, we hold that the traditional and well established principles of common-law indemnity apply to the circumstances of this case. Plaintiff has not cited, nor have we found, any Michigan authority to support the proposition that the law requiring that a putative indemnitee be completely free of liability does not apply in the successive tortfeasor context. Nor do we believe there to be any persuasive rationale for exempting successive tortfeasor situations from the general rule, and, thus permitting original tortfeasors to seek indemnification from foreseeable successive tortfeasors. The foundational premise for common-law indemnification – that the putative indemnitee was not actively negligent and was nevertheless forced to pay damages only by operation of law – is wholly inapplicable to such a situation. If, as must be the case in a successive tortfeasor situation, the initial tortfeasor committed a tort, then it is actively negligent to some degree and is not completely blameless. As such, the law of common-law indemnity is inapplicable and affords no relief.

The position urged by plaintiff and adopted by other jurisdictions sounds in comparative indemnity, a doctrine which our Supreme Court has expressly rejected. See *Williams v Litton Systems*, 433 Mich 755, 761; 449 NW2d 669 (1989) (rejecting defendant’s request that a doctrine of comparative indemnity be adopted); see also *Ingram v Interstate Motor Freight Systems*, 115 Mich App 559, 569; 321 NW2d 731 (1982) (holding that indemnification of one tortfeasor by another based on comparative common-law indemnity is not available under Michigan law); *Swindlehurst, supra* at 696-700 (holding that partial indemnification of one tortfeasor by another based on comparative fault is not available under Michigan law). We therefore decline to adopt a rule permitting initial tortfeasors to seek common-law indemnity from successive tortfeasors and hold, in accordance with Michigan precedent, that common-law indemnity cannot apply unless the indemnitee is completely devoid of culpability.

In this case, a fair reading of plaintiff’s complaint against Community indicates that plaintiff claimed that Community was itself actively negligent for the decedent’s bowel resection and her leg amputation which both led to her death. Plaintiff alleged that the suit against Community was brought pursuant to the wrongful death statute and that the decedent passed away as a result of “the deterioration and/or complications of the aforesaid injuries and/or amputations.” The complaint contained no allegations that Community was liable by operation of law for the conduct of OHC. The order of distribution of proceeds that the trial court entered with respect to the settlement apportioned nearly half of the damages as compensation “based on the legal theory arising from the wrongful death of [the decedent].” Further, in the present action, plaintiff alleged that Community’s negligence caused decedent to be at the nursing home, which resulted in a second negligent act. Because plaintiff alleged that Community’s active negligence was associated with the decedent’s death, he had no right to common-law

indemnification. Accordingly, we hold that the trial court erred in granting plaintiff's motion for summary disposition.

In light of our disposition, we need not address OHC's remaining argument on appeal.

Reversed.

/s/ Michael J. Talbot

/s/ Robert J. Danhof