

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UNPUBLISHED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.

WHITE, J. (*concurring*).

Plaintiff, asserting the rights of Community Health Center, advances a position that has found considerable support in other jurisdictions,¹ and that rationally differentiates between the nature of the first tortfeasor's responsibility for the original injury and the nature of its responsibility for the aggravation due to subsequent malpractice. Nevertheless, the Michigan Supreme Court has consistently adhered to a strict active/passive negligence test in determining whether indemnification is available. Under these circumstances, the decision whether to relax

¹ See, e.g., *New Milford Bd of Ed v Juliano*, 219 NJ Super 182; 530 A2d 43 (1987); *Missouri ex rel Tarrasch v Crow*, 622 SW2d 928 (Mo Sup, 1981); *Gertz v Campbell*, 55 Ill 2d 84; 302 NE2d 40 (1973); *Herrero v Atkinson*, 227 Cal App 2d 69; 38 Cal Rptr 490 (1964), and other cases cited in Anno: *Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant aggravating injury or causing new injury in course of treatment*, 72 ALR4th 231.

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

the requirement that a common-law indemnitee be free from active fault in the context of successive tortfeasors² should be left to the Supreme Court. I therefore concur in the reversal.

/s/ Helene N. White

² The situation is most likely to arise in the case of subsequent malpractice aggravating an earlier injury. It may also arise in the context of an enhanced injury case, where there is a collision caused by the fault of a driver, and an enhanced injury caused by a defective seat-belt. The applicability of our contribution statutes in these situations would seem to be of some importance in determining whether a right to indemnification should be recognized.