STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM BEAUMONT HOSPITAL,

Plaintiff-Appellee,

v

GARDEN CITY OSTEOPATHIC HOSPITAL,

Defendant-Appellant.

UNPUBLISHED
July 8, 2004

No. 245584
Oakland Circuit Court
LC No. 00-027605-CK

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right, following a bench trial, from a judgment in favor of plaintiff. We affirm.

The parties entered into an agreement allowing a resident in neurosurgery, Dr. Brent Peterson, to visit at plaintiff hospital from August 1, 1995, to October 31, 1995. This agreement expressly provided that defendant hospital would continue to maintain the salary and malpractice insurance for Dr. Peterson during the rotational assignment. Before the assignment began, defendant sent a written confirmation delineating the limits of the insurance policy governing Dr. Peterson.

During the rotation, Dr. Peterson was involved in the treatment of a patient, who later died. The decedent's family filed a medical malpractice action against plaintiff hospital. The family initially focused on the actions of the supervising neurosurgeon on the case, Dr. Karol Zakalik, the actions of Dr. Peterson, and the attending nurses. Representatives for plaintiff contacted defendant regarding the litigation. The parties decided, as a matter of strategy, to present a unified defense and did not disclose Dr. Peterson's rotational status to the attorney representing the decedent's family. This decision was based, in part, on a substantial verdict in a different case obtained by the decedent's attorney against defendant hospital. Additionally, the parties wanted to avoid the possibility of a transfer to venue in Wayne County. Based on this

agreed strategy, the possibility of shared responsibility for costs and attorney fees was discussed, but a definitive agreement was not reduced to writing and signed by the parties to be charged.[1]

The decedent's attorney decided not to pursue the malpractice allegations against Dr. Zakalik and did not obtain experts to render an opinion regarding nursing malpractice. After this decision, the deposition of Dr. Peterson was taken, and his association with defendant hospital was learned. The allegations against Dr. Peterson proceeded to trial, and the defense was handled by plaintiff's legal counsel. A verdict of no cause of action was obtained. During and after the verdict, plaintiff attempted to receive contribution for the cost of the defense of the action. After defendant refused, this lawsuit was filed. The trial court awarded plaintiff a judgment of $57,052.17 based on the theory of unjust enrichment.

Defendant first alleges that plaintiff was not entitled to relief based on unjust enrichment where an unambiguous written agreement addressed the terms and conditions of Dr. Peterson's rotational assignment. We disagree. The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). The goal of contract construction is to determine and enforce the parties' intent from the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). Equitable issues are also reviewed de novo, but factual findings rendered in support of an equitable decision are reviewed for clear error. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

Unjust enrichment occurs where the defendant receives a benefit from the plaintiff, and it would be inequitable for the defendant to retain the benefit without compensating the plaintiff. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 327; 657 NW2d 759 (2002). Under those circumstances, a contract is implied in law to prevent unjust enrichment. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003). A contract will not be implied under the doctrine of unjust enrichment where a written contract governs the parties' transaction. *King v Ford Motor Credit Co*, 257 Mich App 303, 327; 668 NW2d 357 (2003). However, the plaintiff may recoup the benefits lost where recovery is requested for items not contemplated in the original contract. *Cascade Electric Co v Rice*, 70 Mich App 420, 426; 245 NW2d 774 (1976).

Under the circumstances of this case, we cannot conclude that the trial court's application of the unjust enrichment doctrine was improper; nor can we conclude that the factual findings were clearly erroneous. *Webb*, *supra*. While the agreement governing Dr. Peterson's rotational assignment addressed the source of the malpractice insurance, this document did not address the parties' strategic agreement to remain silent regarding Dr. Peterson's rotational status with defendant. Relying on this agreement, plaintiff advised its counsel to present a unified defense

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[1] Defendant's representative, Jamie Rollstin, testified that any discussion addressed the possibility of settlement only and did not include a discussion regarding costs and attorney fees. Moreover, Rollstin testified that plaintiff's counsel retained control of the litigation whereas she would have preferred independent counsel. Plaintiff presented witnesses to testify to the contrary, and the trial court expressly found that Rollstin's testimony "lacked credibility."

and did not file a third party complaint against defendant. Based on the factual findings, the trial court did not clearly err in concluding that the dispute in this case was not controlled by the rotational resident contract. *Webb, supra*.

Defendant next alleges that plaintiff was not entitled to equitable relief because there were adequate remedies available at law. We disagree. "An equitable remedy is neither necessary nor appropriate where a resolution under law is available." *Everett v Nickola*, 234 Mich App 632, 637; 599 NW2d 732 (1999). But "[j]urisdiction of courts of equity is recognized where 'the facts involved in litigation are such that a claimed legal remedy, although available, will not afford adequate relief.'" *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 561; 492 NW2d 246 (1992),[2] quoting *Wild v Wild*, 360 Mich 270, 276-277; 103 NW2d 607 (1960). "A legal remedy cannot be said to give full and ample relief if it is not as effectual as that which equity affords." *Mooahesh, supra*.

"Generally, indemnity is available to a party who faces vicarious liability for the negligent acts of another." *Sawka v Prokopowycz*, 104 Mich App 829, 833; 306 NW2d 354 (1981); see also *North Community Healthcare, Inc v Telford*, 219 Mich App 225, 227, 229; 556 NW2d 180 (1996). In *Sawka*, however, this Court held that the defendant hospital was *not* entitled to "indemnification for costs and attorney fees" incurred in defending a claim of vicarious liability where the hospital also had to appear and defend itself from claims that it was directly negligent in employing the allegedly-incompetent doctor. *Sawka*, *supra* at 833-834. In other words, although the hospital eventually prevailed on the direct negligence claim, "[i]ndemnification [wa]s not proper . . . because the claims made by the principal plaintiff against the hospital were not purely vicarious." *Id.* at 834.

Additionally, common-law indemnification is not available to a party "where there is a specific finding of no negligence." *North Community Healthcare*, *supra* at 228. In *North Community Healthcare*, a hospital incurred costs and attorney fees to defend a malpractice action; the plaintiff eventually settled with the doctor, but the doctor did not admit fault, and the hospital paid no part of the settlement. *Id.* at 229. In that situation, this Court held that the hospital was *not* held vicariously liable for the wrongful acts of another and, therefore, could not state a claim for common-law indemnification. *Id.* In dicta, the Court added that "[o]ther equitable doctrines may be available to a party who incurs attorney fees solely to defend a vicarious liability claim caused by another's wrongful acts." *Id.*

In this case, as in *Sawka*, the claims asserted against plaintiff were *not* purely vicarious and, therefore, plaintiff was not entitled to make a claim for indemnification. More significantly, the malpractice case resulted in a verdict of no cause of action in plaintiff's favor and, therefore, it clearly was *not* held vicariously liable for any alleged negligence. Thus, as in *North Community Healthcare*, plaintiff could not assert an indemnification claim. Accordingly, there is no merit to defendant's claim that plaintiff had an adequate remedy at law through the theory of indemnification.

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[2] Overruled on other grounds by *Silverman v Univ of Mich Board of Regents*, 445 Mich 209, 215-217; 516 NW2d 54 (1994).

Defendant correctly argues that plaintiff never tendered the defense of the malpractice case to defendant's insurance carrier. However, the duty to defend does not run to third parties, such as plaintiff, who are not named insureds. Rather, "an insurer has a duty to defend *its insured* and a duty to indemnify *its insured* . . . aris[ing] from the policy language." *Oakland Co Bd of Co Rd Comm'rs v Michigan Property and Casualty Guaranty Ass'n*, 456 Mich 590, 600 n 6; 575 NW2d 751 (1998) (emphasis added). The fact that the insurer "might *pay* third-parties, directly or indirectly, is irrelevant." *Id.* at 600 (emphasis original). It is undisputed that plaintiff was not the named insured on defendant's insurance policy. While the insurer presumably had a duty to defend defendant and Dr. Peterson, neither was named as a party to the malpractice action. Therefore, plaintiff's claim for unjust enrichment was not precluded by its failure to tender its defense to defendant's insurance carrier.[3]

Defendant also argues that the trial court's determination, that plaintiff was entitled to recover under an unjust enrichment theory, is against the great weight of the evidence. We disagree. A new trial may be granted where the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). A new trial is warranted "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 635, 642, 647; 576 NW2d 129 (1998). Due regard is to be given to the trial court's special opportunity to evaluate the credibility of witnesses who appeared before it. *Morris v Clawson Tank Co*, 459 Mich 256, 271; 587 NW2d 253 (1998). "A court acting in equity 'looks at the whole situation and grants or withholds relief as good conscience dictates." *McFerren v B & B Investment Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002).

In this case, it is clear that, while defendant never expressly agreed to pay for costs and attorney fees associated with the malpractice action, it continuously proposed and encouraged a joint strategy whereby plaintiff refrained from volunteering Dr. Peterson's employment status with defendant to the plaintiff in the underlying malpractice action. Plaintiff also refrained from interpleading defendant or filing a cross-claim against it. We agree with the trial court that defendant benefited from this joint strategy by not being named as a party in the malpractice case. Regardless of whether defendant would have ultimately prevailed in the malpractice action, it benefited by not having to incur the costs and expenses of mounting a full-fledged defense, and by not having to risk relying on defense theories such as the statute of limitations or the loaned servant doctrine. Additionally, defendant benefited because plaintiff agreed not to file any potential third-party claim or cross-claim against it, which could have led to further expense in defending. The verdict was not against the great weight of the evidence, but rather was premised on credibility assessments that the trier of fact resolved in favor of plaintiff. We cannot conclude that the factual findings upon which the verdict was based were clearly erroneous. *Morris, supra*.

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[3] Defendant's citation to the borrowed servant doctrine is also without merit. The trial court did not rule on any such theory. Moreover, this theory was not presented in the underlying case because of the strategic decision to hide Dr. Peterson's rotational status. Defendant cannot insulate itself from plaintiff's equitable claim by relying on a legal doctrine that, due to plaintiff's cooperation, it never had to raise.

Lastly, defendant argues that recovery under the equitable doctrine of unjust enrichment was improper because defendant did not have clean hands. See *Rose v National Auction Group*, 466 Mich 453, 462; 646 NW2d 455 (2002). Defendant alleges that plaintiff had unclean hands because it did not mention, in its answers to interrogatories issued in the malpractice case, that Dr. Peterson was covered by defendant's malpractice insurance. However, the pertinent interrogatory question inquired about the existence of insurance "as to each defendant." Because Dr. Peterson was not a named defendant, plaintiff was not required to disclose the existence of insurance with regard to Dr. Peterson. Accordingly, this issue is without merit.

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood