STATE OF MICHIGAN

COURT OF APPEALS

RICHARD L. DESPRES, DDS, Plaintiff/counter-Defendant-Appellant,	UNPUBLISHED October 20, 2016
v	No. 328529 Kent Circuit Court
SARAH PALMER, DDS, and SARAH PALMER DDS, PC, Defendant/Counter-Plaintiff-Appellee.	LC No. 14-008574-CK

Before: K. F. KELLY, P.J., and O'CONNELL and BOONSTRA, JJ.

PER CURIAM.

Plaintiff/counter-defendant/appellant, Richard L. DesPres, D.D.S. (plaintiff), appeals as of right from an order granting summary disposition in favor of defendants/counter-plaintiffs/appellees, Sarah Palmer, D.D.S. and Sarah Palmer D.D.S., P.C. (defendant) in plaintiff's breach of contract action against defendant. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

This case involves a professional relationship between two dentists. The record reveals that in 2008 plaintiff hired defendant as an independent contractor to provide dental services to plaintiff's patients. Plaintiff paid for all overhead expenses related to the practice and did not supervise defendant's treatment of patients. Other than particular tools that defendant liked to use, plaintiff provided all equipment and staffing. Defendant received 30% of billing and carried her own professional malpractice insurance.

Plaintiff was nearing retirement age while defendant was a relatively new dentist. They had hoped to negotiate a deal whereby defendant would purchase plaintiff's dental practice. However, the parties were unable to agree upon the terms of sale. Defendant decided that she would leave plaintiff's practice and start her own practice. Defendant last treated plaintiff's patients in January 2013. Following her departure, plaintiff demanded that defendant reimburse him for the cost of performing "corrective work" on patients that defendant had treated. Defendant refused.

On September 12, 2014, plaintiff filed a complaint against defendant, alleging that defendant owed him $180,200 for corrective work. The complaint alleged the following counts:

- Count I: breach of express contract.
- Count II: breach of an implied-in-fact contract based on "the understanding between the parties and the course of conduct between the parties whereby the Defendant would compensate the Plaintiff for the dental procedures referred to above."
- Count III: common law indemnification claim based on plaintiff now being responsible for defendant's negligence.
- Count IV: indemnification implied in law
- Count V: declaratory judgment that plaintiff is entitled to payment for all repair or corrective procedures.

In response, defendant filed a counterclaim. Defendant denied that there was an agreement between the parties regarding reimbursement. The counterclaim alleged that plaintiff still owed $2,500 as her last paycheck.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) on May 14, 2015. Defendant argued that Count I (breach of express contract) had to be dismissed because plaintiff acknowledged that there was never any signed agreement between the parties. Defendant further argued that plaintiff's implied contract claims did not satisfy the statute of frauds, MCL 566.132(1)(a), because the contract could not be performed within one year. Defendant pointed to language in plaintiff's complaint that corrective work would have to be performed into the "unknown future" as well as plaintiff's testimony that there was no time limit on the corrective work.

Defendant further argued that plaintiff's indemnification claims were merely a regurgitation of plaintiff's contract-based claims and, because the statute of frauds prevented any claim in the absence of a written agreement, plaintiff's indemnity claims must likewise fail. Additionally, defendant argued that plaintiff could not make a claim for indemnification absent a showing that he had been "held liable" to third parties. Plaintiff identified over 150 patients that he believed he would need to perform corrective work on, yet he had performed no work on 126 of them. None of the patients filed suit or made a claim with an administrative agency. Plaintiff could not seek indemnification because he had not been deemed legally liable.

In his response, plaintiff failed to address defendant's claim that the statute of frauds barred the action. Plaintiff argued that he was entitled to common law indemnification because he was correcting the professional mistakes defendant committed. Plaintiff also maintained that he was entitled to indemnification implied in law. He added that because these claims were claims in equity, the statute of frauds was inapplicable. Plaintiff pointed out that he had already performed some corrective work and, therefore, he had been "held liable" and was forced to provide remedial work due to defendant's negligence. Plaintiff claimed that he was entitled to

declaratory relief because he was unable to ascertain the exact extent of his liability for defendant's improper and substandard work.

At the June 5, 2015 hearing, plaintiff stipulated that there was no breach of express contract. Plaintiff's counsel also admitted that he "blew it" by failing to respond to defendant's contention that the statute of frauds applied because the contract could not be performed in a year. Counsel noted that the contract had the *possibility* of being performed in one year.

The trial court issued a written opinion and order on June 9, 2015 granting defendant summary disposition on all counts of plaintiff's complaint. Defendant voluntarily dismissed her counterclaim. Plaintiff now appeals as of right.

II. STANDARD OF REVIEW

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and is reviewed de novo on appeal. *Urbain v Beierling*, 301 Mich App 114, 121; 835 NW2d 455 (2013).

> In evaluating a motion for summary disposition brought under Subrule (C)(10), a reviewing court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Summary disposition is properly granted if the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. [*Klein v HP Pelzer Auto Sys, Inc*, 306 Mich App 67, 75; 854 NW2d 521 (2014), lv den 497 Mich 959 (2015) (internal citations omitted).]

Additionally, interpretation of a contract is a question of law that this Court reviews de novo. *Calhoun Co v Blue Cross Blue Shield Mich*, 297 Mich App 1, 12; 824 NW2d 202 (2012).

III. IMPLIED IN FACT CONTRACT FOR INDEMNITY

There was no express written contract. Instead, the parties had a loose oral agreement whereby plaintiff would provide the facilities, staffing, and equipment and, in return, defendant would treat patients and receive 30% of the billing while maintaining her own professional malpractice insurance. Other terms included the days and hours that defendant would work. Defendant does not dispute that an oral agreement for services existed, as manifested by the parties' subsequent conduct. However, there was never any discussion regarding indemnification for repairs performed as a result of defendant's allegedly faulty initial work. Therefore, there was no express contract—written or oral—regarding indemnification. Plaintiff maintains that such an agreement was implied in fact.

> A contract implied in fact arises under circumstances which, according to the ordinary course of dealing and common understanding, of men, show a mutual intention to contract. A contract is implied in fact where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties,

> language used or things done by them, or other pertinent circumstances attending the transaction. [*Erickson v Goodell Oil Co*, 384 Mich 207, 211–212; 180 NW2d 798 (1970).]

However, an implied in fact contract cannot be based upon subjective expectations; rather, it must be based upon the common understanding or mutual intent to contract between the parties. *Ford v Blue Cross & Blue Shield of Michigan*, 150 Mich App 462, 467; 389 NW2d 114 (1986).

"The essential elements of a valid contract are the following: (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005) (internal quotation marks omitted). "[A] fundamental tenet of all contracts is the existence of mutual assent or a meeting of the minds on *all* essential terms of a contract." *Burkhardt v Bailey*, 260 Mich App 636, 655; 680 NW2d 453 (2004) (emphasis added). Therefore, the "unilateral subjective intent of one party cannot control the terms of a contract." *Id*. at 656. In fact, "[i]t is beyond doubt that the actual mental processes of the contracting parties are wholly irrelevant to the construction of contractual terms." *Id*. (internal citation omitted). Instead, "[a] meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Calhoun Co v Blue Cross Blue Shield Michigan*, 297 Mich App 1, 13; 824 NW2d 202 (2012). Additionally, "[t]he burden is on plaintiffs to show the existence of the contract sought to be enforced, and no presumption will be indulged in favor of the execution of a contract since, regardless of the equities in a case, the court cannot make a contract for the parties when none exists." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992), quoting *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960).

During his deposition, plaintiff admitted that there was no written agreement between the parties. However, he alleged that towards the end of defendant's period of service, they had "discussions about what it's going to cost to fix some of her work" and that an agreement for indemnification was implied. The following exchange took place:

> *Q*. [by defendant's attorney]: All right. So I want to talk about this agreement that you've sued Dr. Palmer under. I've read your Complaint about this corrective work. Let me just, for the record, I've seen your Answers to Requests for Admissions.
>
> There was no written contract with Dr. Palmer, correct?
>
> *A*. Yes.
>
> *Q*. Okay. And there was no signed agreement with Dr. Palmer, correct?
>
> *A*. Yes.
>
> *Q*. All right. So what I'm trying to figure out was what was the agreement? I'm speaking about this corrective work that she's supposed to –

A. The agreement, if – if she's going to do some dental work the dental work would be done properly. I mean, it's unfathomable that it would be okay just to do work not done under the standard of care or not done properly.

Q. . . .

So what happens if she didn't do something to the standard?

A. Then it has to get fixed.

* * *

Q. Okay. So then I think what I hear you saying is, in this lawsuit, you're suing Dr. Palmer because she made a promise to you that she would provide continuing dental treatment or care for your patients that received her care, if the care was not done up to the standard of care required rework?

A. I'm not sure what the promise means, but if she didn't do it right and it needs to get fixed, yeah, she's going to pay for it.

* * *

A. The agreement is that if she was going to do something, she'd do it right. And if it was done faulty, of course she would have to pay to fix it.

Q. Okay, all right. And that's the agreement?

A. Yes.

Q. All right. So when was this agreement made?

A. I would think when the very first time she came in to do work.

Q. Okay. And tell me about the negotiations for the agreement.

A. We didn't have negotiations.

Q. Did you have discussions for the agreement?

A. It would be unfathomable to me for Sarah to say, "I can do this work as absolute sloppy as I feel like doing, and if it fails, it's okay." I just – that is not even in the realm of thinkable.

* * *

Q. And then tell me what was discussed and how it was communicated, the agreement was made. What communications did you have where the agreement was made?

A. That she was going to do 30 percent of the work – that she would receive 30 percent pay for her production, and I'd provide the – the equipment and all the necessary – the office, and so on and so forth. And it was absolute[ly] implied that it [would] be done right.

Q. Okay, okay. So it was implied, it wasn't expressly agreed to, correct?

A. Yes.

Q. Okay. So then if it was implied, then there were no negotiations back and forth between the two of you to form this agreement, correct?

A. Not until towards the end, when she was leaving, and we talked about there was some work that was faulty, that I'm simply not paying for her faulty work and she said okay, and that was fine. And I showed her several of the patients. And we talked about her paying for it. And then we've got several more together, and had probably three different times she came to the office, and I laid out some of the wrong things – or some of the faulty work.

Q. Okay. So but – so prior to December of 2012, or about the timeframe -

A. Okay.

Q. – when she told you she was leaving, there were no negotiations or express communications regarding this agreement, it was purely implied, correct?

A. There was at least one time when she just left a whole bunch of decay under one of her core materials, and I deducted the cost to do my core, and I'll think of the name of the patient, and I charged her back for the cost of the core. One was just blatant with so much decay. And I showed her the x-ray.

There is no implied contract for indemnification in this case because there is no evidence of a mutual intent to create such a term. Nothing in the parties' words or deeds objectively evidenced an intent for defendant to indemnify plaintiff for corrective work. Evidence that defendant did not object when plaintiff allegedly withheld funds from her on a previous occasion falls far short of evincing an agreement to be so obligated in the future. In fact, there is no evidence that defendant even knew that such a withholding occurred, especially in light of her fluctuating compensation that was based on the amount of billing. Nor did text messages evince defendant's agreement to indemnify plaintiff. The mere fact that defendant was willing to entertain plaintiff's claim and discuss the issue of reimbursement does not result in defendant's agreement to indemnify plaintiff. Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract. *Kamalnath*, 194 Mich App at 549.

While there is no question that there was an agreement for services between the parties, plaintiff seeks to include a material term (indemnification) that was not specifically contemplated. In so doing, plaintiff asks this Court to craft the terms that he failed to exact in an express (written or oral) agreement. Of course implied in every contract is an agreement to

perform "skillfully, carefully, diligently, and in a workmanlike manner," *Nash v Sears, Roebuck & Co*, 383 Mich 136, 142; 174 NW2d 818 (1970), but an agreement to indemnify is an affirmative undertaking that should not simply be read into the contract.

Plaintiff further argues that he was nevertheless entitled to the reasonable value of his partial performance for work already done. However, there was no express or implied contract to indemnify plaintiff. Additionally, as defendant aptly notes, plaintiff never pleaded claims for unjust enrichment or quantum meruit. In his reply brief, plaintiff concedes: "True, Dr. DesPres did not make this argument below, but his brief to this Court explains why the argument is available to him now, and Dr. Palmer does not dispute that explanation." Issues, let alone new causes of action, raised for the first time on appeal are not ordinarily subject to review. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

IV. COMMON LAW AND IMPLIED IN LAW INDEMNIFICATION

"Michigan courts have recognized three possible sources of a right to indemnity: the common law, an implied contract, and an express contract." *Skinner v D-M-E Corp*, 124 Mich App 580, 584; 335 NW2d 90 (1983). As previously discussed, there is no express or implied in fact contract for indemnification.

A. COMMON LAW INDEMNIFICATION

Our Supreme Court has held that "[t]he right to common-law indemnification is based on the equitable principle that where the *wrongful act of one party results in another being held liable*, the latter party is entitled to restitution. This Court has repeatedly defined common-law indemnification 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, 228–229; 556 NW2d 180 (1996) (internal citation and quotation marks omitted: emphasis in original). Importantly, "there is no equitable right to common-law indemnification unless the alleged indemnitee is 'held liable' for another's wrongful acts." *Id*. at 229. In *North Community Healthcare*, a hospital incurred costs and attorney fees to defend a malpractice action. The plaintiff settled with the doctor, but the doctor never admitted fault, and the hospital was under no obligation to pay any part of the settlement. *Id*. In that situation, this Court held that the hospital had not been held vicariously liable for the wrongful acts of another and, therefore, could not state a claim for common law indemnification.

The same is true here. Plaintiff has not been held liable to any third party. Plaintiff reviewed the charts of all prior patients and identified whom he believed would need future repair work. When asked if he was out of pocket, his response was "not yet" but "this will be done. . . .I would have no damages, but I would not let those go." Plaintiff argues that he had already performed corrective work, but he also testified that he did so, not out of legal obligation, but because it was, in his opinion, "the right thing to do." That voluntary undertaking does not entitle plaintiff to indemnification. As discussed below, defendant was undeniably an independent contractor for which plaintiff had no vicarious liability. All he had to do was send the patients to defendant for corrective work. Any moral obligation (and undoubtedly his interest in maintaining his own patient base) notwithstanding, plaintiff has failed to show that he is legally obligated to the patients. No patient made any demands on plaintiff. Instead, plaintiff

voluntarily undertook the corrective work and then reviewed defendant's old files, at which time he speculated what additional repair would be needed in the future. This subjective review involved nothing more than speculation.

In order to be entitled to common-law indemnification, a party must show that it has been *held liable* for another's acts. Common-law indemnity only exists where there has been an actual adjudication of liability, not when there is mere speculation that liability may arise in the future. Even assuming that defendant's work was inadequate in some instances, there is no guarantee that the patients would develop problems as a result. If there are no damages to a third party, there can be no indemnification.

B. IMPLIED IN LAW INDEMNITY

"In order to establish an implied contract to indemnify, there must be a special relationship between the parties or a course of conduct whereby one party undertakes to perform a certain service and impliedly assures indemnification." *Palomba v City of E Detroit*, 112 Mich App 209, 217; 315 NW2d 898 (1982). However, with some exceptions, "[i]t has been long established in Michigan that a person who hires an independent contractor is not liable for injuries that the contractor negligently causes." *DeShambo v Nielsen*, 471 Mich 27, 31; 684 NW2d 332 (2004). These exceptions include whether the work is inherently dangerous and whether the party retains and exercises control over the contractor. *Reeves v Kmart Corp*, 229 Mich App 466; 582 NW2d 841 (1998).

> The test for whether a worker is an independent contractor or an employee is whether the worker has control over the method of his or her work: If the employer of a person or business ostensibly labeled an 'independent contractor' retains control over the method of the work, there is in fact no contractee-contractor relationship, and the employer may be vicariously liable under the principles of master and servant. In other words: *An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods,* and without being subject to control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work. [*Campbell v Kovich*, 273 Mich App 227, 234; 731 NW2d 112 (2006).]

Here, there is no question that defendant was an independent contractor. Although she used plaintiff's facilities, staff and equipment, plaintiff, by his own admission exercised no control over defendant's work. In fact, when defendant initially claimed to have been plaintiff's employee, plaintiff vigorously argued otherwise.

On appeal, plaintiff argues that a right to indemnification still exists in this case regardless of defendant's status as an independent contractor because the patients at plaintiff's dental clinic could not have guessed that defendant was an independent contractor. He cites *Grewe v Mt Clemens Gen Hosp*, 404 Mich 240, 250–251; 273 NW2d 429 (1978) as an analogous situation. In *Grewe*, the Michigan Supreme Court held:

> Generally speaking, a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and merely uses the hospital's facilities to render treatment to his patients. However, if the individual looked to the hospital to provide him with medical treatment and there has been a representation by the hospital that medical treatment would be afforded by physicians working therein, an agency by estoppel can be found. [*Id*. at 250-251.]

In *Grewe*, the patient looked to the hospital for his treatment and the hospital provided the physicians for his care. While those physicians were independent contractors and only had privileges at the hospital, the Court held that an agency relationship existed such that the plaintiff could sue not only the individual physician, but the hospital. Here, plaintiff believes that because plaintiff provided the facilities, staffing, and equipment the patients would naturally assume that defendant was an employee of the dental clinic, especially where no attempts were made to distinguish defendant as an independent contractor. However, even if the agency principles discussed in *Grewe* applied to the case at bar, the fact remains that no patients have filed suit or made any demands on plaintiff. At most, plaintiff has voluntarily undertaken to perform some corrective work, though not legally obligated to do so. Ironically, if any of these patients come forward in the future, plaintiff has admitted vicarious liability. In seeking retribution against defendant and arguing that *Grewe* is applicable, plaintiff has placed himself in greater legal peril.

In any event, this Court recently decided *Laster v Henry Ford Health System*, __ Mich App __ (2016), which expressly held that a hospital is not vicariously liable for the conduct of an independent contractor physician where the hospital "did not retain any, much less sufficient, control and direction of Dr. Lim's actual work, i.e., his practice of medicine." (footnote omitted). Key to this Court's decision was the fact that the hospital did not have "the right to address or control how any on-call physician, including Dr. Lim, diagnoses or treats a patient." The same holds true here: plaintiff did not have the right to address or control how defendant diagnosed or treated her patients. Thus, because, as in *Laster*, any claim relating to defendant's patient treatment would be "predicated on [defendant's] exercise of professional judgment, over which [plaintiff] had no control or influence," there could be no implied contract of indemnification premised on the retention and exercise of control over an independent contractor.

V. DECLARATORY JUDGMENT

MCR 2.605(A)(1) provides: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." "The language of MCR 2.605 is permissive rather than mandatory; thus, it rests with the sound discretion of the court whether to grant declaratory relief." *PT Today, Inc v Comm'r of Office of Fin & Ins Services*, 270 Mich App 110, 126; 715 NW2d 398 (2006). "The existence of an 'actual controversy' is a condition precedent to the invocation of declaratory relief" and a declaratory judgment action cannot simply present abstract questions of law that do not rest upon existing facts or rights. *Id*. at 127.

> Generally, an actual controversy exists where a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve the plaintiff's

> legal rights. What is essential to an "actual controversy" under the declaratory judgment rule is that plaintiff plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised. Generally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist. [*Citizens for Common Sense in Gov't v Attorney Gen*, 243 Mich App 43, 55; 620 NW2d 546 (2000) (internal quotation marks and citations omitted).]

Here, plaintiff's claim "is based not on actual harm, but on its speculation" of what will occur in the future. *Id*. As such, there was no actual controversy and the trial court properly granted defendant summary disposition on plaintiff's declaratory judgment request.

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Mark T. Boonstra