STATE OF MICHIGAN

COURT OF APPEALS

TOLICE LAWRENCE,

Plaintiff,

v

GROUP ADMINISTRATION AGENCY, INC.,

Defendant/Third-Party-Plaintiff/Cross-Defendant-Appellant,

and

DETROIT DISTRICT DENTAL SOCIETY,

Defendant/Third-Party-Plaintiff/Cross-Plaintiff-Appellee,

and

LEXINGTON INSURANCE COMPANY,

Third-Party-Defendant,

and

C.M. VERBIEST & ASSOCIATES, INC.,

Cross-Defendant-Appellant.

UNPUBLISHED
December 11, 2001

No. 223573
Wayne Circuit Court
LC No. 97-727980-CK

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

In this suit involving denial of benefits under a policy of major medical insurance, cross-defendant Group Administration Associates, Inc. (GAA), and third-party defendant C.M. Verbiest & Associates, Inc. (Verbiest), appeal as of right from the trial court's order granting third-party plaintiff and cross-plaintiff, Detroit District Dental Society (DDDS), summary disposition on its indemnity claims. We reverse.

DDDS is a non-profit corporation comprised of dentists practicing in the Wayne County area. In an effort to provide its members and their employees with an affordable group health insurance plan, DDDS contracted with Verbiest to design and administer a comprehensive group policy of insurance. The plan initially developed under this agreement was offered through the Durham Life Insurance Company. However, when Durham ceased offering group medical insurance coverage DDDS adopted a self-funded plan backed by a reinsurance contract held with third-party defendant Lexington Insurance Company.[1] According to DDDS, under its agreement with Lexington, Lexington was required to reimburse the DDDS plan for claims that exceeded a set aggregate amount.

While insured under the self-funded DDDS plan, plaintiff Tolice Lawrence incurred medical expenses for which she was denied coverage by GAA, as administrator of the plan,[2] on the basis of alleged misrepresentations made by Lawrence on her application for insurance. According to GAA, although Lawrence had denied any history of liver, stomach, or kidney disease when applying for coverage, she had in fact previously suffered from a tumor in her right kidney.

Alleging breach of contract, Lawrence brought suit against DDDS and GAA for failure to pay her claims under the terms of the DDDS policy. DDDS in turn filed a cross-claim and third-party complaint, respectively seeking indemnification from GAA and Verbiest for any damages payable by DDDS to Lawrence. GAA and DDDS each then filed third-party complaints against Lexington, alleging that under its contract for reinsurance Lexington was ultimately responsible for payment of Lawrence's claims.

Shortly thereafter, DDDS moved under MCR 2.116(C)(10) for summary disposition of its indemnity claims against GAA and Verbiest, contending that because a judgment in favor of Lawrence would necessarily rest upon a finding that her claims were wrongfully denied, it was entitled to indemnification from GAA and Verbiest, as it was GAA alone, acting under the DDDS contract with Verbiest, that denied the claim. Without explanation, the trial court granted the motion on the basis of common-law and/or implied indemnity. Although the underlying action was then resolved pursuant to a settlement agreement under which GAA and Verbiest agreed to pay DDDS a specified sum, neither GAA nor Verbiest acknowledged any wrongdoing or liability under the agreement, but expressly reserved the right to appeal the indemnity issue.

We review the trial court's grant of summary disposition de novo to determine if defendant was entitled to judgment as a matter of law. *North Community Healthcare, Inc v Telford*, 219 Mich App 225, 227; 556 NW2d 180 (1996). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual basis of a claim. *Verna's Tavern, Inc v Heite*, 243 Mich App 578, 585; 624 NW2d 738 (2000). When this Court reviews a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(10), it considers all relevant affidavits, deposition, admissions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Id*. We then determine whether there

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[1] Neither Lexington nor plaintiff Tolice Lawrence are a party to this appeal.

[2] Although under its agreement with DDDS, Verbiest was to be "solely responsible for the enrollment, solicitation, premium collection and claim administration of all policies," GAA, as Verbiest's parent company, actually provided such services.

exists a genuine issue of material fact on which reasonable minds could differ or whether the moving party is entitled to judgment as a matter of law. *Id*.

In Michigan, a right to indemnity may arise from three sources: 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). However, except where the right is based upon an express contract, a right to indemnity may be enforced only where liability arises either vicariously, or by operation of law, from the wrongful acts of the party from whom indemnity is sought. *Id*.

Thus, the trial court could properly have found GAA liable as an indemnitor of DDDS only upon a determination that DDDS' liability to Lawrence arose out of some "wrongful act" by GAA. Although the trial court did not explain its reasoning, apparently it concluded that, if DDDS was in fact obligated to Lawrence under the insurance contract, GAA necessarily acted wrongfully in denying her claim because of the perceived misrepresentation on her application for insurance. However, as administrator of the DDDS plan, GAA certainly was obliged to question Lawrence (and other insurance claimants) regarding representations made in securing insurance and other matters affecting the validity of coverage. Further, GAA was obliged to deny claims that it reasonably considered to be invalid. Doing those things as administrator of the insurance plan cannot themselves constitute "wrongful conduct" by GAA. Certainly, GAA would be practically unable to ever question or deny a claim if, upon a later determination that the claim was valid, it, rather than DDDS, would be liable for the claim. Under the apparent reasoning of the trial court, GAA could not function as a plan administrator.

Further, "[a] party may not seek indemnity under the common law or an implied contract where the primary complaint alleges active, rather than passive, liability." *Oberle v Hawthorne Metal Products Co*, 192 Mich App 265, 270; 480 NW2d 330 (1991).[3] In this case, the primary complaint filed by Lawrence against DDDS alleges contractual liability for her medical expenses based on the group health plan issued to her by DDDS. Given DDDS' express and deliberate undertaking of such contractual liability, we find that its liability for Lawrence's claims was actively, rather than passively incurred, regardless of its ultimate role in administering the plan. Thus, DDDS was not legally entitled to seek either common-law or implied indemnification. *Id*.[4] Accordingly, we hold that the trial court erred as a matter of law in finding either GAA or Verbiest liable to DDDS in indemnity.[5]

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[3] Although many of the precedents considering the availability of common-law and implied contractual indemnity couch the relevant allegations in terms of active versus passive "negligence" or "fault," see, e.g., *Farmer v Christensen*, 229 Mich App 417, 426-427; 581 NW2d 807 (1998), it is clear that the central issue in such cases is whether the indemnity claimant's *liability* in the underlying suit is claimed to result simply from its relationship with the indemnitor, or because the indemnitee has itself engaged in conduct from which liability may arise. Further, none of these cases involved a situation where, as here, the primary complaint alleged liability solely on the basis of contractual breach.

[4] In reaching this conclusion, we reject DDDS' claim that because Lexington would have reimbursed the plan had GAA not delayed resolution of this matter by 'wrongfully' denying Lawrence coverage, DDDS' liability under the primary complaint arises not from its direct contractual obligations with Lawrence, but rather derivatively from GAA's wrongful conduct. In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence.

(continued…)

We reverse.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff

(…continued)

Neubacher v Globe Furniture Rentals, 205 Mich App 418, 420; 522 NW2d 335 (1994). Here, DDDS has failed to meet this burden as there is no such evidence on this record to support its claim that Lexington would have been required to reimburse the plan if not for GAA's denial of coverage, or that such denial was wrongful. Contrary to DDDS' contentions, the unsworn assertions of its counsel at oral argument below do not qualify as the required support. See *id*.

In any event, even if this DDDS claim was sufficiently supported by the record, the fact would remain that while DDDS may have lost a right to reimbursement from Lexington as a result of GAA's conduct, its liability to Lawrence under the primary complaint arises not passively as a result of its relationship with GAA, but rather from its express contractual obligations which it actively undertook as plan holder. *Oberle*, *supra*.

[5] In reaching this conclusion we do not suggest that GAA and Verbiest cannot be held liable to DDDS under any other legal theory. For example, factual proofs might establish that they did not reasonably perform their contractual obligations regarding the Lawrence claim and that they are liable to DDDS for damages.