

STATE OF MICHIGAN
COURT OF APPEALS

HENRY FORD HEALTH SYSTEM,

Plaintiff-Appellee,

v

ACT-1 GROUP, INC., 9008 GROUP, INC., d/b/a
ACT-1 PERSONNEL SERVICES, INC., ACT-1
SERVICES, INC., and ALTERNATIVE CARE
STAFFING, INC.,

Defendants-Appellants.

UNPUBLISHED
February 21, 2013

No. 305849
Wayne Circuit Court
LC No. 10-010519-CZ

Before: RIORDAN, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Defendants appeal as of right an order granting summary disposition to plaintiff. We affirm.

I. FACTUAL BACKGROUND

A wrongful death suit was initiated against plaintiff in 2008, brought by Ronald Brown as plaintiff and personal representative of the estate of Gloria Brown. The lawsuit alleged counts of negligence and vicarious liability against plaintiff, based on acts performed by the nursing staff. The nurses involved in Gloria's care were employees provided to plaintiff through defendants.

Plaintiff and defendants had entered into a contract, whereby defendants agreed to indemnify plaintiff for acts performed by defendants' employees. Specifically, the indemnification provision stated:

(a) Act-1 shall defend and hold harmless [plaintiff] against all demands, class actions, or causes of action based upon or arising out of the acts or omissions of Act-1, its employees, CONTRACT AND TEMPORARY PERSONNEL or agents, and hereby agrees to indemnify [plaintiff] against all damages and costs (including reasonable attorney's fees) resulting therefrom.

Pursuant to this indemnification agreement, plaintiff informed defendants of the Brown litigation and attached the summons and complaint. Plaintiff also informed defendants of the scheduled

facilitation and formally requested that defendants participate. Despite this notice, defendants did not participate in the facilitation.

A settlement was eventually reached between plaintiff and Brown, with plaintiff agreeing to pay \$575,000 and assume responsibility for an outstanding Health Alliance Plan (HAP) lien in the amount of \$197,402.06. The trial court entered an order approving the settlement. Plaintiff sought indemnification from defendants for the amount of the settlement and attorney fees, costs, and expenses, and the total amount sought was \$877,247.03. Defendants refused to indemnify plaintiff.

As a result of this refusal, plaintiff filed a complaint against defendants, alleging counts of contractual indemnification, common law indemnification, and contribution. Plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no genuine issue of material fact regarding the applicability of the indemnification clause, which entitled it to judgment as a matter of law. Defendants, however, argued that there were questions of fact regarding whether the settlement was reasonable and, therefore, whether plaintiff was entitled to indemnification. The trial court agreed with plaintiff, and granted its motion for summary disposition. Defendants now appeal.

II. INDEMNITY AGREEMENT

A. Standard of Review

Defendants argue that the trial court improperly granted summary disposition to plaintiff pursuant to MCR 2.116(C)(10).

We review de novo a trial court's decision on a motion for summary disposition. In reviewing a motion for summary disposition under subrule (C)(10), we consider the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. We also review de novo issues involving the interpretation of statutes. [*Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; ___ NW2d ___ (2012) (quotation marks and citations omitted).]

B. Analysis

Defendants argue that there is a genuine issue of material fact regarding whether the settlement was reasonable and, thus, whether they were required to indemnify plaintiff. We disagree.

“If an indemnitor has notice of an action and declines the opportunity to defend it, the general rule is that the indemnitor will be bound by any reasonable, good faith settlement the indemnitee might thereafter make.” *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 353; 686 NW2d 756 (2004). Moreover, if the indemnitor had notice of the claim and refused to defend it, then the indemnitee need only demonstrate *potential* liability to the claimant rather than *actual* liability. *Id.* at 355. As this Court has explained:

To recover under these circumstances the indemnitee must show that the fact situation of the original claim is covered by the contract of indemnity and that the settlement is reasonable.

Potential liability actually means nothing more than that the indemnitee acted reasonably in settling the underlying suit. The reasonableness of the settlement consists of two components, which are interrelated. The fact finder must look at the amount paid in settlement of the claim in light of the risk of exposure. The risk of exposure is the probable amount of a judgment if the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed. If the amount of the settlement is reasonable in light of the fact finder's analysis of these factors, the indemnitee will have cleared this hurdle. [*Id.* at 355-356 (quotation marks and citation omitted).]

In other words, "the indemnitee need only show that it had potential liability and that the settlement amount was reasonably related to the liability exposure and the employee's injuries." *Id.* at 358-359.

Liability issues are "properly considered in weighing the reasonableness of a settlement." *Grand Trunk Western R, Inc*, 262 Mich App at 357. Thus, "[t]he fact that the original claim may have been successfully defended by a showing of contributory negligence, lack of negligence, or otherwise is part of the reasonableness analysis." *Id.* However, this Court will not engage in a plenary review of liability issues. *Id.* at 359-361. A "plenary consideration of liability issues in the underlying litigation . . . would contravene the policy of encouraging the settlement of lawsuits." *Id.* at 361.

In the instant case, defendants argue that there was a question of fact regarding whether the settlement was reasonable. As defendants had the "burden of producing evidence that the suit would have been successfully defended[,]" *Grand Trunk Western R, Inc*, 262 Mich App at 360, they highlight the deposition testimony of Brown's expert and plaintiff's expert. Specifically, defendants argue that the underlying suit would not have succeeded because Brown's expert would have been excluded, as he did not provide a scientific basis for his opinion. Defendants also emphasize that testimony from plaintiff's expert about the debate within the field of neurosurgery about whether earlier surgical intervention would have changed the outcome. According to defendants, since Brown's expert testimony was inadmissible or was at least rebutted by plaintiff's expert testimony, the risk of exposure would have been zero, and any settlement was unreasonable or would have been less.

Though defendants attempt to frame this issue as one of admissibility, it is more properly characterized as an issue of credibility. Analogous is *Ykimoff v Foote Memorial Hospital*, 285 Mich App 80, 100; 776 NW2d 114 (2009), where the defendant argued that the trial court erred in admitting expert testimony because the expert's "opinion did not meet the reliability criteria of MCL 600.2955 because he did not cite or rely on professional treatises or publications." This Court held that the defendant was "confusing the admissibility of the testimony with the weight to be attributed to the expert's opinion." *Id.* at 101. This Court explained that the "defendant's criticism regarding the scientific or theoretical basis" for the expert's opinion was "more

properly confined to challenge during cross-examination rather than attempting to invalidate his overall qualification.” *Id.*

Likewise in the instant case, defendants argue that Brown’s expert did not provide a scientific basis for his opinion, which implicated the admissibility of his testimony. As we found in *Ykimoff*, 285 Mich App at 101, this argument pertains to the weight of the expert’s opinion, not its admissibility. Thus, there is no basis to find that Brown’s expert’s testimony would have been excluded.¹ Similarly, defendants’ argument that plaintiff’s expert was more credible is also an issue of credibility, not admissibility.

Moreover, taking into account the credibility issues, we find that the settlement was reasonable. As noted above, since defendants had notice of the claim and refused to defend it, plaintiff only had the burden of establishing *potential* liability. *Grand Trunk Western R, Inc*, 262 Mich App at 355. Furthermore, the reasonableness inquiry focuses on the risk of exposure, which is a balance between the probable amount of a judgment if Brown succeeded and the possibility that plaintiff would have prevailed. *Grand Trunk Western R, Inc*, 262 Mich App at 355-356. In regard to the probable amount of judgment if Brown succeeded, Brown was seeking \$872,891 in damages. There also was the issue of the HAP lien of \$197,402.06, even though Brown hypothesized that the HAP lien would be waived. Plaintiff settled for \$772,402.06, a portion of which was for the assumption of the HAP lien. Hence, plaintiff settled for less than what Brown was seeking. Defendants offered no evidence that the amount of damages would have been reduced at trial if Brown had prevailed, other than their argument that Brown’s expert would have been excluded, which we already addressed above. Hence, defendants have not established that the probable amount of the judgment would have been less had Brown succeeded at trial.

Also, in regard to the possibility that plaintiff would have prevailed, while defendants argue that plaintiff’s expert witness was more credible than Brown’s expert witness, they offer nothing but supposition to this effect. See *Detroit v Gen Motors Corp*, 233 Mich App 132, 139-140; 592 NW2d 732 (1998) (quotation marks and citation omitted) (“[p]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact.”). We can only speculate regarding who may have prevailed in a battle of the experts. The jury very well could have found that Brown’s expert witness was credible and plaintiff’s witness was not, especially after more evidence was adduced at trial regarding the qualifications of Brown’s expert witness. Further, as discussed above, because defendants failed to defend, plaintiff only had to establish that it was potentially liable, not that it was actually liable, in order to prevail in its summary disposition motion. See *Grand Trunk Western R, Inc*, 262 Mich App at 355. In any event, further evidence of the reasonableness of the settlement was that it was within defendants’ insurance limits and was approved by the trial court.

Hence, because the settlement was reasonable, the trial court properly granted summary disposition to plaintiff.

¹ Also, if asked, the expert may have been able to provide a scientific basis for his testimony.

III. CONCLUSION

Because the settlement between Brown and plaintiff was reasonable, the trial court properly granted summary disposition to plaintiff regarding defendants' obligations of indemnification. We affirm.

/s/ Michael J. Riordan

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell