COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1052 **Cir. Ct. No. 98CV001035**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

MARY A. CRUZ, JOHNNY RAY WARD,
DARYL W. HOKSBERGEN AND MICHAEL PORCARO,

PLAINTIFFS,

V.

ALL SAINTS HEALTHCARE SYSTEM, INC.,

DEFENDANT-APPELLANT,

MIDWEST MEDICAL RECORD ASSOCIATES,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. All Saints Healthcare System, Inc., appeals from a judgment dismissing its cross-claims against the respondent, Midwest Medical Records Associates (MMRA). All Saints sought damages from MMRA after a class action lawsuit was commenced against both of them, alleging that they charged unreasonable fees for providing health care records. The trial court granted summary judgment dismissing All Saints' cross-claims against MMRA. We affirm the judgment.[1]

¶2 This action arises from a contract entered into by All Saints and MMRA in 1997. Pursuant to the contract, MMRA was required to provide release of information (ROI) services for All Saints, including maintaining All Saints' medical records and responding to requests for copies of medical records. The contract specified the rates to be charged to records requesters for various services, and expressly provided that "[n]o additional fees or changes in this fee structure may occur without the knowledge and written consent of" the All Saints medical centers. The contract further provided that "MMRA will follow all state and federal regulations in regards to release of information," and that "[e]ither party may terminate this agreement upon thirty (30) days prior to (sic) written notice."

¶3 In the class action lawsuit, the plaintiffs sued All Saints for damages and injunctive relief on the ground that it was charging unreasonable and exorbitant fees for certain ROI services in violation of WIS. STAT. § 146.83(1)(b) (1997-98).[2] All Saints cross-claimed against MMRA, alleging breach of contract,

[1] All Saints settled the class action lawsuit against it. This appeal relates only to the dismissal of its cross-claims against MMRA.

[2] All references to WIS. STAT. § 146.83 are to the 1997-98 version of the Wisconsin Statutes. All other references to the Wisconsin Statutes are to the 2001-02 version.

breach of the implied duty of good faith and fair dealing, breach of fiduciary duty, unjust enrichment, and the right to equitable contribution and/or indemnification. The trial court granted MMRA summary judgment dismissing all of the cross-claims.

¶4 We review a trial court's grant or denial of summary judgment de novo. ***Waters v. United States Fid. & Guar. Co.***, 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995). We will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). In our review we, like the trial court, are prohibited from deciding issues of fact; our inquiry is limited to determining whether a material factual issue exists. ***Id.*** Any reasonable doubt as to the existence of a factual issue must be resolved against the moving party. ***Maynard v. Port Publ'ns, Inc.***, 98 Wis. 2d 555, 563, 297 N.W.2d 500 (1980).

¶5 With some exceptions which are inapplicable here, WIS. STAT. § 146.83(1)(b) provides that, upon submitting a statement of informed consent, a patient or other person may "[r]eceive a copy of the patient's health care records upon payment of reasonable costs." The trial court ruled that § 146.83(1)(b) does not apply to MMRA because it is not a health care provider. This ruling is not challenged by All Saints in this appeal. However, All Saints claims that MMRA breached its contract with All Saints by warranting that it would follow all state and federal regulations in regard to release of information, and then charging unreasonable fees in violation of § 146.83(1)(b), a ROI statute.

¶6 The trial court properly concluded that no material issue of fact existed as to the breach of contract claim, and that MMRA was entitled to judgment dismissing it as a matter of law. All Saints negotiated and entered into a contract with MMRA which specified the rates to be charged by MMRA for providing medical records. Because MMRA charged the rates provided in the contract, it cannot be deemed to have breached the contract by doing so.

¶7 Notwithstanding MMRA's compliance with the fee schedule set forth in the contract, All Saints contends that MMRA breached a warranty under the contract. It contends that MMRA warranted that the rates set forth in the contract were reasonable when it stated that it would follow all state and federal regulations regarding release of information. "A 'warranty' is an assurance by one party to a contract of the existence of a fact upon which the other party may rely." ***Dittman v. Nagel***, 43 Wis. 2d 155, 160, 168 N.W.2d 190 (1969) (citation omitted). All Saints contends that when MMRA stated that it would follow all state regulations, it in effect warranted that the fee schedule in the contract was reasonable in compliance with WIS. STAT. § 146.83(1)(b). All Saints contends that MMRA's warranty relieved it of the duty of ascertaining whether the rates were reasonable, and amounted to a promise to indemnify All Saints for any loss if the warranted fact proved untrue. It contends that the matter must be remanded for trial to determine if the rates were, in fact, reasonable.

¶8 The trial court properly rejected All Saints' argument. Since the contract set the rates to be charged for ROI services, and provided that MMRA could not change the rates without All Saints' consent, it cannot be construed to include a warranty that MMRA would charge rates other than those specified in the contract. As noted by the trial court, All Saints had no obligation to accept the rates proposed by MMRA in the proffered contract, and could have demanded

other rates if it deemed the proposed rates to be unreasonable. MMRA could not and did not unilaterally set the rates to be charged for record requests. Rather, the rates were agreed to by both parties by contract. All Saints could not negotiate a contract and consent to the rates specified in it, and then claim that different rates should have been charged by MMRA in order to satisfy All Saints' statutory responsibility to provide copies of health care records upon payment of reasonable costs.[3]

¶9 Because MMRA charged the rates specified in the contract, All Saints' second claim for breach of the implied duty of good faith and fair dealing also fails. Where, as here, a contracting party complains of acts of the other party which are specifically authorized by their agreement, a breach of the duty of good faith is not established. *See* ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis. 2d 568, 577, 431 N.W.2d 721 (Ct. App. 1988).[4]

¶10 All Saints' third claim, alleging breach of a fiduciary duty, is equally without merit. In support of this claim, All Saints alleges that MMRA was its agent for providing ROI services and, as an agent, owed All Saints a fiduciary

[3] All Saints contends that it never investigated and negotiated the rates to be charged for ordinary record requests under the contract. This argument contrasts with the affidavit of All Saints' director of medical records, Sonya Bigley, who testified that before selecting MMRA, All Saints compared MMRA's charges to those of other providers, and determined that they were comparable. In any event, All Saints could have used an attorney to draft provisions for indemnification or contribution, or attempted to negotiate different rates before agreeing to the contract. Its failure to do so does not give rise to a claim that MMRA breached the contract or a warranty under the contract by charging the rates specified in the contract.

[4] All Saints cites ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995), for the proposition that a party may be liable for a breach of the implied contractual duty of good faith even though all the terms of the written agreement have been fulfilled. ***Foseid*** is distinguishable because if MMRA had charged rates other than those specified in the contract, it would have violated the terms of the contract, rather than fulfilling its terms.

duty which it breached by charging unreasonable rates. However, even accepting All Saints' contention that MMRA was its agent, as its agent MMRA was required to charge the rates set forth in the contract executed by All Saints, and could not change those rates without All Saints' consent. The trial court therefore properly dismissed this claim.[5]

¶11 The trial court also properly dismissed All Saints' claim for indemnification or contribution. The contract contained no provision for either. Absent a contractual right to indemnification, any right to indemnification must be based on equity. ***Brown v. LaChance***, 165 Wis. 2d 52, 64, 477 N.W.2d 296 (Ct. App. 1991). Indemnification shifts the loss from one person who has been compelled to pay to another who, based on equitable principles, should bear the loss, as where one person is exposed to liability by the wrongful act of another in which he or she did not join. ***Id.*** To establish a right to equitable indemnification, All Saints would have to establish its payment of damages and its lack of liability. *See* ***id.*** All Saints cannot show a lack of liability because the rates were set in a contract it negotiated and voluntarily entered. It thus joined in the act which it now alleges was wrong.

¶12 All Saints also has no right to contribution for payments made by it to the class action plaintiffs. The right to contribution is founded on the equitable principle that one should not pay more than his or her fair share of a joint liability. *See, e.g.,* ***Wagner v. Daye***, 68 Wis. 2d 123, 125, 227 N.W.2d 688 (1975). A contribution claim requires liability on the part of the entity from whom

[5] All Saints' punitive damages claim was based upon its claim that MMRA breached its fiduciary duty. Because we conclude that the trial court properly dismissed the breach of a fiduciary duty claim, we need not address the punitive damages argument.

contribution is sought. *See* ***Brown***, 165 Wis. 2d at 64. Because MMRA has no liability to the class action plaintiffs under WIS. STAT. § 146.83, All Saints cannot prevail on a contribution claim.[6]

¶13 All Saints' final claim of unjust enrichment also fails. Unjust enrichment does not apply when the parties have entered into a contract. ***Greenlee v. Rainbow Auction/Realty Co.***, 202 Wis. 2d 653, 671, 553 N.W.2d 257 (Ct. App. 1996). Because the parties entered into a contract which established the rates to be charged by MMRA for ROI services, All Saints cannot prevail on a claim that MMRA was unjustly enriched when it charged those rates. Summary judgment dismissing All Saints' cross-claims was therefore properly granted.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[6] We have addressed All Saints' contribution claim because in the "Statement of Issues Presented for Review" in its appellant's brief, All Saints contended that an issue existed for trial as to whether MMRA was liable under a theory of equitable contribution. However, in the argument section of its brief, it discusses equitable subrogation rather than equitable contribution. It contends that subrogation is an equitable doctrine, not dependent on contract or privity, which is available when someone other than a mere volunteer pays a debt or demand which equity mandates should have been satisfied by another. *See* ***Lee v. Threshermen's Mut. Ins. Co.***, 26 Wis. 2d 361, 363-64, 132 N.W.2d 534 (1965). All Saints contends that it settled with the class action plaintiffs for a claim that should have been paid by MMRA. However, as with a claim for equitable contribution, because WIS. STAT. § 146.83 does not apply to MMRA, it has no liability to the class action plaintiffs and All Saints cannot prevail on a claim that it involuntarily satisfied a debt that should have been paid by MMRA.