

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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NORTH OAKLAND MEDICAL CENTER,

Plaintiff-Appellant,

v

STERLING GROUP, INC.,

Defendant-Appellee.

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UNPUBLISHED

July 5, 1996

No. 177530

LC No. 93-467163

Before: Murphy, P.J., and Griffin and E.R. Post,\* JJ.

PER CURIAM.

Plaintiff hospital appeals as of right a trial court order granting summary disposition in favor of defendant. We affirm.

Plaintiff and defendant entered into a contract under which defendant agreed to provide physicians to staff plaintiff's Emergency Department. The contract contained an indemnification provision which provided that defendant would indemnify plaintiff for judgments and for settlements sustained or incurred by plaintiff "by reason or in consequence of [defendant's] or any physician whose services are furnished hereunder, act or omission to act, negligence, malpractice . . . after obtaining written agreement from [defendant's] attorneys regarding such settlement." The personal representatives of the estate of Bernice Zink subsequently brought a wrongful death action against plaintiff for the alleged negligent treatment of Zink in plaintiff's emergency room by plaintiff's agents, servants, and employees. Plaintiff settled the Zink claim without the written agreement of defendant's attorneys.

On December 8, 1993, plaintiff filed a complaint against defendant seeking contractual indemnification as well as common law indemnification. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) [failure to state a claim upon which relief can be granted] and MCR 2.116(C)(10) [no genuine issue as to any material fact]. The trial court granted defendant's motion without citing upon which subrule summary disposition was appropriate. Regarding plaintiff's

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\* Circuit judge, sitting on the Court of Appeals by assignment.

contractual indemnification claim, the trial court held that the indemnification provision clearly and unambiguously required defendant's written approval for plaintiff to receive indemnification for a settlement and that plaintiff had failed to obtain defendant's written approval of the settlement. Regarding plaintiff's common law indemnification claim, the trial court stated: "With respect to the claim for common law indemnity, it's my understanding that an implied contract cannot be enforced where the parties have made an express contract covering the same subject matter."

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Jackson v Oliver*, 204 Mich App 122, 125; 514 NW2d 195 (1994). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Id.*

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 650; 513 NW2d 441 (1994). The trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. *Smith v General Motors Corp*, 192 Mich App 652, 654; 481 NW2d 819 (1992). Then, giving the benefit of any reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed which would leave open an issue upon which reasonable minds might differ. *Id.*

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition of plaintiff's common law indemnification claim. We note that the trial court apparently failed to distinguish between common law indemnification and implied indemnification, and we question the trial court's conclusion that plaintiff cannot bring a claim for common law indemnity when the parties' contract contains an express indemnification provision. See *Nanasi v General Motors Corp*, 56 Mich App 652; 224 NW2d 914 (1974) (in which this Court implicitly recognized the propriety of a plaintiff bringing claims for both contractual and common law indemnification by affirming the trial court's denial of the defendant's motion for summary disposition of the plaintiffs' claims for contractual and common law indemnification). Even if the trial court erred in concluding that plaintiff could not bring claims for both common law and contractual indemnification, however, we conclude that summary disposition was nonetheless appropriate, and this Court will not reverse a decision in which the trial court reached the right result for the wrong reason. *In re Powers*, 208 Mich App 582, 591; 528 NW2d 799 (1995).

A party is not entitled to common law indemnification if that party has engaged in active negligence. *Paul v Bogle*, 193 Mich App 479, 491; 484 NW2d 728 (1992). In ascertaining whether the party seeking indemnification is actively negligent, we examine the primary plaintiff's complaint. *Feaster v Hous*, 137 Mich App 783, 787; 359 NW2d 219 (1984); *Johnson v Bundy*, 129 Mich App 393, 399; 342 NW2d 567 (1983). If the primary complaint alleges active negligence, the plaintiff is not entitled to common law indemnification. *Feaster, supra*, 787-788; *Johnson, supra*, 399. After carefully examining the primary complaint, we conclude that the complaint alleges only active negligence on plaintiff's part and contains no allegations of derivative or vicarious liability. Accordingly, plaintiff

failed to state a cause of action for common law indemnification, and the trial court properly granted summary disposition in favor of defendant. *Johnson, supra*, 399.

Plaintiff also argues that the trial court erred in granting defendant's motion for summary disposition of plaintiff's contractual indemnification claim before the completion of discovery of disputed issues. We disagree. Generally, it is premature to grant a motion for summary disposition before discovery on a disputed issue is complete. *Bayn v Dep't of Natural Resources*, 202 Mich App 66, 70; 507 NW2d 746 (1993). However, summary disposition may be proper before discovery is complete if further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion. *Id.*

Here, summary disposition was proper because further discovery did not stand a fair chance of uncovering factual support for plaintiff's position. Plaintiff filed its complaint for indemnification on December 8, 1993. On February 27, 1994, the trial court issued a scheduling order which set July 11, 1994, as the cutoff date for discovery. Defendant moved for summary disposition on March 28, 1994, and the trial court granted the motion on June 22, 1994, less than three weeks before the discovery cutoff date. Plaintiff therefore had almost four months, from February 27, 1994, until the trial court granted defendant's motion for summary disposition on June 22, 1994, to conduct discovery. Because plaintiff failed to uncover factual support for its claim for contractual indemnification during the first four months of discovery, we do not believe that plaintiff had a fair chance of uncovering factual support for its position even if given an additional three weeks to conduct discovery. The contractual indemnification provision clearly and unambiguously required defendant's written approval before defendant would be required to indemnify plaintiff for any settlements. It is undisputed that plaintiff did not obtain defendant's written approval before settling the Zink claim. Accordingly, it was not premature for the trial court to grant defendant's motion for summary disposition because there was no genuine issue as to any material fact. Defendant was therefore entitled to judgment as a matter of law pursuant to MCR 2.16(C)(10).

Affirmed.

/s/ William B. Murphy  
/s/ Richard Allen Griffin