

**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UNPUBLISHED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.

EDWARD R. POST, J. (dissenting).

I dissent from the majority's decision to affirm the trial court's order dismissing North Oakland Medical Center's common law indemnification claim against Sterling Group, Inc.

I agree that a party is not entitled to common law indemnification if that party has engaged in active negligence. I also agree that where the complaint in the underlying action alleges only active negligence, common law indemnification is precluded.

However, in this case, the complaint in the underlying action alleged both active negligence and vicarious liability. Moreover, in the underlying action, North Oakland Medical Center steadfastly maintained that it was not actively negligent. North Oakland agreed to settle its claim against Sterling Group, Inc., only on the theory of vicarious liability.

Where vicarious liability is plead in the underlying action, the mere allegation of active negligence as an alternative theory should not deprive defendant in the underlying action of the right to obtain common law indemnification.

The mere allegation of active negligence by plaintiffs in the underlying action as an alternative theory against North Oakland may be devoid of factual support. It would be unfair and unreasonable to

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

conclude that the mere allegation of active negligence in the underlying action, when accompanied by a count in vicarious liability, should deprive defendant in the underlying action of the right to claim common law indemnification. In *Universal Gym Equipment, Inc v Vic Tanny Int'l, Inc*, 207 Mich App 364, 372; 526 NW2d 5 (1994), aff'd on reh, 209 Mich App 511; 531 NW2d 719 (1995), the Court held that "where the complaint in the underlying action does not contain allegations of derivative or vicarious liability, a claim of implied indemnification is precluded." The corollary should be that where the complaint in the underlying action does contain allegations of vicarious liability, common law indemnification should not be precluded. However, anyone seeking common law indemnification would have to prove freedom from active negligence.

I would affirm in part and reverse in part, remanding the case to the trial court for further proceedings on North Oakland's common law indemnification claim against Sterling Group, Inc.

/s/ Edward R. Post