STATE OF MICHIGAN

COURT OF APPEALS

EMPLOYERS REINSURANCE CORPORATION,

Plaintiff/Third-Party
Defendant-Appellant,

v

WOODLAND EQUIPMENT, INC.,

Defendant/Third Party
Plaintiff-Appellee.

UNPUBLISHED

No. 183251
LC No. 92-004890-CK

Before: Hood, P.J., and Markman and A. T. Davis,* JJ.

MARKMAN, J. (dissenting).

I respectfully dissent. Because I believe that defendant was unjustly enriched through his dealings with plaintiff, I would find that there was a contract implied in law between plaintiff and defendant.[1] Put simply, I do not believe that defendant was entitled to receive the benefit of the retroactive payment of three years of liability coverage without paying for it. In my judgment, defendant properly demanded and received retroactive liability coverage but improperly refused to pay for it. While such retroactive coverage may not truly have made defendant "whole," in light of the interim economic injuries which it suffered, its recourse in regard to such injuries was to seek redress from FNU which had failed to obtain coverage in a timely manner. Plaintiff, in fact, did this and reached a settlement of $14,246 with FNU. Although the settlement amount appears inadequate in light of the economic harm allegedly suffered by defendant, I believe that the settlement represents full compensation for defendant's economic injuries.

To recover under an implied contract theory, a plaintiff must demonstrate that another party received a benefit from plaintiff and that it would be unjust for the other party to retain that benefit. *Kammer Asphalt Paving v East China Twp Schools*, 443 Mich 176, 185-6; 504 NW2d 635 (1993). In such instances, the law implies a contractual obligation in order to prevent unjust enrichment. *Martin v East Lansing School District*, 193 Mich App 166, 177; 483 NW2d 656 (1992).

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

Contracts implied-in-law are not contractual but equitable obligations imposed upon a party in order to avoid an unjust result. *Matter of Estate of Morris*, 193 Mich App 579, 582; 848 NW2d 755 (1992). The elements of unjust enrichment are (1) receipt of a benefit by the defendant from the plaintiff; and (2) an inequity resulting to plaintiff because of the retention of the benefit. *Dumas v Auto Club Insurance Assn*, 437 Mich 521, 546; 473 NW2d 652 (1991). However, the "mere fact that a benefit has been conveyed does not necessarily indicate that it is unjust for the party to retain the benefit." *Kammer*, *supra* at 198.

I believe that these two elements of an implied contract-in-law have been satisfied here. First, defendant received a benefit from plaintiff. In order to have Citizens Insurance adjust the claim against defendant for the fatal accident, plaintiff, the malpractice insurance carrier for FNU, paid insurance premiums to Citizens in the amount of $102,236. Second, it would be inequitable to allow defendant to obtain the benefit of the insurance purchased by these premiums without concomitantly requiring defendant to compensate plaintiff for the premiums.

There was no contract-in-fact here because defendant never clearly assented to the payment of premiums by plaintiff. Nevertheless, there is sufficient evidence that defendant was aware that premium payments were being made, aware that they were being made on his behalf, aware of why they were being made on his behalf and aware that plaintiff expected to be reimbursed for such payments. Defendant was also aware that, under circumstances in which defendant was reasonably obliged to inform plaintiff that it had no intention of reimbursing plaintiff, it said and did nothing to alter plaintiff expectations. Further, plaintiff's expectations as an insurer were entirely reasonable ones: in exchange for retroactively obtaining the insurance which FNU had negligently failed to obtain, it was to be reimbursed the necessary premiums. Under these circumstances, I believe that it is unjust for defendant to enjoy the benefit of plaintiff's backpayment of premiums at no cost to himself. Had FNU properly obtained defendant's liability insurance, defendant would have been responsible for the premiums; he should be placed in no more favorable a position by this Court because it was necessary that he obtain redress through legal processes.

While defendant may understandably feel that it has suffered considerable detriment because of its insurer's failure to satisfy its obligations to provide the contracted-for insurance, I do not agree with the majority that plaintiff, as FNU's malpractice carrier, is responsible, either directly or indirectly, for this suffering. The only rationale for defendant's third-party claim against FNU was to obtain compensation for the suffering which it incurred because of FNU's failure to obtain liability insurance. Similarly, the only rationale for defendant's eventual settlement with FNU was to provide compensation for such suffering.

Having failed to achieve what appears to be an adequate settlement with FNU, I do not believe that defendant can later seek to supplement this settlement by refusing to pay plaintiff for premiums which it has proffered on defendant's behalf. Essentially, defendant is seeking double recovery for its damages, first from FNU in its settlement, second from plaintiff by refusing to reimburse it for the back premiums. For purposes of defendant's liability insurance coverage, plaintiff has fully lived up to its

obligations as an Error and Omissions insurer to FNU (and defendant) by paying three years of retroactive premiums. The majority opinion cites no case law that such an insurer is also liable for the indirect injuries which were the subject of the settlement between defendant and FNU. Rather, I believe that plaintiff's liabilities are limited to restoring to defendant the insurance coverage that it would have enjoyed had FNU lived up to its original contractual obligations. That defendant has suffered additional, less proximate injuries because of FNU's negligence to pay defendant's premiums is a matter for resolution between defendant and FNU not between defendant and plaintiff.

Because I believe that several outstanding questions of fact remain concerning the reasonableness of the specific premium amount paid by plaintiff, several of which have been set forth by the majority in the course of distinguishing plaintiff's substituted performance from the contracted-for performance between defendant and FNU, I would remand this matter to the trial court for reconsideration of the reasonableness of the $102,236 premium amount.[2] Therefore, I would reverse the trial court's order finding that defendant was not "unjustly enriched" by plaintiff's payment of premiums and remand for a recalculation of the amount of damages.

/s/ Stephen J. Markman

[1] Although defendant suffered considerable economic damage as the result of his insurer's (FNU) failure to obtain insurance in a timely manner, defendant's recourse in this regard was against his insurer. Defendant's settlement with FNU arising from its third-party complaint, in which it was awarded $14,246, seems inadequate in light of the damages that it apparently suffered. Nevertheless, plaintiff should not be held responsible for damages that are attributable to FNU's dereliction. While defendant has not been "unjustly enriched" in terms of the entirety of the transaction which took place, I believe that it has been "unjustly enriched" in terms of its dealings with plaintiff.

[2] Included among these issues are whether or not to discount the $102,236 amount to reflect the fact that defendant never had the opportunity to respond to, or attempt to negotiate with, FNU concerning increases in premiums; costs attributable to the fact that, at the time of the fatal accident, defendant had not yet received the benefit of retroactive insurance coverage and thereby incurred additional expenses; costs to defendant of overlapping substitute coverage during various periods of time; assessment of whether the after-the-fact risks incurred by defendant's liability insurer were less substantial than they are presumed to have been at the time that the insurance was initially contracted for; and similar considerations.