STATE OF MICHIGAN

COURT OF APPEALS

ST. LUKE'S HOSPITAL,

Plaintiff–Appellant,

v

TAMARA J. GIERTZ, Personal Representative of the estate of A. Timothy Truman, deceased,

Defendant–Appellee.

UNPUBLISHED
November 5, 1996

No. 183199
LC No. 93-56303-CZ

Before: McDonald, P.J., and White and P. J. Conlin*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition for defendant pursuant to MCR 2.116(C)(8) and (10). Plaintiff filed the present suit seeking indemnification and/or contribution for a settlement it paid in the case of LeRoux verses Estate of A. Timothy Truman, Surendra Kaul and plaintiff (LeRoux case). We reverse in part and affirm in part.

The LeRoux Complaint alleged both vicarious negligence based on respondeat superior and active negligence on the part of plaintiff. Truman was dismissed in the LeRoux case because he was believed to be an employee of plaintiff. Plaintiff argues that since it can be proven that LeRoux only had a viable claim as to the vicarious liability, it should be entitled to indemnity from defendant. Defendant argues that it would be inequitable to allow plaintiff to take the tactical advantage of its failure to defend the claims of active negligence in the underlying case and force defendant to assume the position of LeRoux as to plaintiff's negligence.

In *Williams v Litton Systems, Inc*, 433 Mich 755; 449 N.W.2d 669 (1989), the Court held that where a plaintiff had only alleged active negligence, the defendant could not seek indemnification from a third party. *Id*. at 761. In dicta, the Court stated that where both active and vicarious negligence are alleged the defendant would be entitled to indemnification from third parties. *Id*., n 10. Since a policy favoring settlement is to be preferred, plaintiff is entitled to sue for indemnification from defendant.

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

Plaintiff argues that the trial court made impermissible findings of fact when it held that plaintiff had not met the requirements of the contribution statute, MCL 600.2925a; MSA 27a.2925. Since plaintiff could not produce any evidence that it had informed defense counsel about the settlement hearing or invited defense counsel to participate in the hearing, plaintiff did not meet the requirement of the contribution statute that requires that the contributee be given a reasonable opportunity to participate in the settlement negotiations. MCL 600.2925(3)(c); MSA 27a.2925(3)(c).

Plaintiff also argues that the trial court improperly granted summary disposition as to its unjust enrichment claim. The trial court properly granted summary disposition of plaintiff's claim of unjust enrichment. In *Dumas v Auto Club Ins Ass'n*, 437 Mich 521; 473 N.W.2d 652 (1991), the Court stated that the elements of unjust enrichment are "(1) receipt of a benefit by defendant from plaintiff and, (2) which benefit it is inequitable that defendant retain." Id. at 546. The *Dumas* Court further held that even if a person has received a benefit from another, he is only liable if the retention of such benefit is unjust. *Id*. In this case, plaintiff settled the underlying case for its own benefit. Although defendant was dismissed from the case, he was dismissed without prejudice. Thus, any benefit to him was unintended. Since this benefit was not unjust, defendant is not liable to plaintiff.

Reversed in part and affirmed in part. No costs to either party.

/s/ Gary R. McDonald
/s/ Patrick J. Conlin