

STATE OF MICHIGAN
COURT OF APPEALS

ST. LUKE'S HOSPITAL, a Michigan Non-Profit
Corporation,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 183199

LC No. 93-056303 CZ

TAMARA J. GIERTZ, Personal Representative of the
Estate of A. Timothy Truman, M.D., Deceased,

Defendant-Appellee.

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

White, J. (concurring in part and dissenting in part).

I agree with the majority that St. Luke's Hospital's indemnity claim was improperly dismissed. The underlying complaint alleged both active and passive negligence, and the hospital pleaded freedom from active fault. *Reed v St. Clair Rubber Co.*, 118 Mich App 1; 324 NW2d 512 (1982); *Nanasi v General Motors*, 56 Mich App 652; 224 NW2d 914 (1974).

I dissent from the majority's affirmance of the circuit court's dismissal of the hospital's contribution claim. The circuit court erroneously concluded that the hospital failed to meet the requirements of MCL 600.2925a(3)(a)(b) and (c) as a matter of law. As to subsection (a), the failure of the release to expressly mention the estate does not mean that the estate's liability was not extinguished. The estate's liability to the underlying plaintiff is based on Dr. Truman's liability, and the release covered the hospital's "agents, servants, employees, indemnitors. . . medical staff members, . . . and consultants, past and present." As to subsections (b) and (c), the deposition testimony of Ms. Majzoub, counsel for St. Luke's, created genuine issues regarding whether a reasonable effort was made to notify Dr. Truman's estate of the pendency of the settlement negotiations and whether the estate was given a reasonable opportunity to participate in the settlement negotiations. Further, although not expressly stated as a statutory requirement, there was a genuine issue whether the estate had adequate notice that it was a potential contributtee.

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

Klawiter v Reurink, 196 Mich App 263; 492 NW2s 801 (1992), upon which the circuit court relied, is distinguishable. In *Klawiter*, the underlying action was a suit by the contribution defendant against the contribution plaintiffs for injuries suffered by the contribution defendant and her child in a car accident. The case was settled through mediation without any indication by the underlying defendants/contribution plaintiffs that they would be looking to the underlying plaintiff/contribution defendant for contribution based on her role as a driver of one of the cars involved in the accident. This Court concluded that the circuit court properly granted summary disposition. While the contribution defendant was aware of the proceedings by virtue of her status as the underlying plaintiff, she was not put on notice that she might be subject to contribution and was not afforded an opportunity to negotiate as a potential contributee. *Id.* at 269. In contrast, in the instant case, Majzoub's testimony regarding her communications with counsel for the estate provided sufficient evidence to support a finding that the estate had adequate notice of its potential liability as a contributee.

Lastly, I concur in the affirmance of the grant of summary disposition on the equitable unjust enrichment/restitution claim.

/s/ Helene N. White