

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

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COVENANT HEALTHCARE SYSTEMS, f/k/a  
SAGINAW GENERAL HOSPITAL,

UNPUBLISHED  
May 31, 2005

Plaintiff-Appellant,

v

No. 252473  
Saginaw Circuit Court  
LC No. 02-045104-CZ

M. HASAN FAKIH, M.D.,

Defendant-Appellee.

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Before: Fort Hood, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition and denying plaintiff's motion for summary disposition. We reverse and remand.

Plaintiff and defendant were co-defendants in an underlying medical malpractice action. During trial, defendant entered into a settlement agreement, resolving the medical malpractice claim. However, defendant alleged that he did not execute a release, but rather, a covenant not to sue. Trial proceeded against plaintiff hospital. There was no finding of active negligence on the part of plaintiff hospital. However, the jury concluded that defendant was negligent and that plaintiff was responsible based on the parties' relationship. Pursuant to a high-low agreement, plaintiff was responsible for \$210,000, despite the fact that the jury returned a verdict of \$1,500,000. Plaintiff agreed to waive any appellate remedies in exchange for the agreement. Following payment of the verdict, plaintiff filed this suit against defendant seeking indemnification. Defendant challenged the litigation, alleging that plaintiff had unclean hands when it entered into the high-low agreement without consulting with defendant and waiving his rights to appeal. Following cross-motions for summary disposition, the trial court granted defendant's motion for summary disposition and denied plaintiff's motion for summary disposition.

Plaintiff first alleges that the trial court erred in granting defendant summary disposition based on the clean hands doctrine. We agree that the court's conclusion was in error. We review de novo a trial court's ruling on a motion for summary disposition. *In re Capuzzi*, 470 Mich 399, 402; 684 NW2d 677 (2004). The ultimate conclusion involving an equitable determination, such as unclean hands, is reviewed de novo, but supporting factual findings are reviewed for clear

error. *Michigan National Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992).

Indemnification is an equitable action that is subject to application of the clean hands doctrine. *St Luke's Hospital v Giertz*, 458 Mich 448, 453; 581 NW2d 665 (1998); *Stachnik v Winkel*, 394 Mich 375, 453; 382; 230 NW2d 529 (1975).

“[The clean hands maxim] is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be ‘the abettor of iniquity.’ *Bein v Heath*, 6 How [47 US] 228, 247 [12 L Ed 416 (1848)].” [*Stachnik, supra* at 382, quoting *Precision Instrument Mfg Co v Automotive Maintenance Machinery Co*, 324 US 806, 814; 65 S Ct 993; 89 L Ed 1381 (1944).]

“[A]ny willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean.” *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 466; 646 NW2d (2002).

Defendant alleges that plaintiff acted in bad faith when it entered into a litigation agreement that waived any right to post-judgment relief with the concurrent intent to seek indemnification from defendant. However, there is no requirement that a potential indemnitee pursue an action through final judgment or that it pursue post-judgment relief. “A person legally liable for damages who is entitled to indemnity may settle the claim and recover over against the indemnitor, even though he has not been compelled by judgment to pay the loss.” *St Luke's Hospital, supra* at 454. Whether an indemnitee settles or proceeds to judgment does not affect the right to indemnity, it only affects the burden of proof. *Id.* at 455.

Given that plaintiff was not bound to pursue the action through final judgment or pursue post-judgment relief, the trial court erred in concluding that plaintiff entered into the litigation agreement in bad faith. Prior to the agreement, plaintiff had previously moved for and been denied dismissal of the vicarious liability claim. It was not bad faith for plaintiff to elect not to challenge the merit of the claim once again in a post-judgment motion or in an appeal, especially in light of the fact that it did so in exchange for an agreement of limited liability. If not for the litigation agreement, plaintiff, and by virtue of indemnity, defendant, would have been obligated to pay the full \$1,500,000 verdict, rather than the reduced amount of \$210,000, inclusive of all costs, case evaluation sanctions, and interest. As plaintiff aptly explained, “The remote possibility that the hospital could have reversed this three-time determination on appeal cannot render the decision to place a cap on damages in exchange for deciding not to appeal to be ‘unclean hands.’”

Moreover, it is unreasonable for defendant to allege that it was bad faith<sup>1</sup> for plaintiff to elect not to pursue post-verdict remedies when it was defendant who chose to settle out of the action. Contrary to defendant's contention, there is no due process right to appeal or otherwise challenge a final judgment. *Moore v Spangler*, 401 Mich 360, 368; 258 NW2d 34 (1977). Regardless, defendant was afforded the opportunity to challenge its liability during the underlying proceedings, but he elected to settle instead. Absent a showing of mistake, fraud, or unconscionable advantage, a plaintiff is bound by a settlement agreement. *Plamondon v Plamondon*, 230 Mich App 54, 56; 583 NW2d 245 (1998). Therefore, even absent the litigation agreement, defendant would not be entitled to appeal.

In light of his decision to settle, defendant is not in a position to now object to plaintiff's strategy in negotiating the litigation agreement or to challenge plaintiff's trial strategy in the malpractice action. Although defendant was within his rights to settle the claims against him, he pursued that legal strategy at his own risk. See *Eller v Metro Industrial Contracting, Inc*, 261 Mich App 569, 576; 683 NW2d 242 (2004). Neither is defendant in a position to now contest his agency relationship with plaintiff. Defendant "does not cite any authority holding that an indemnitor is entitled to relitigate an underlying claim for which it had notice but chose not to participate." *Id.* at 575. In sum, the trial court erred in concluding that the litigation agreement was improper or constituted unclean hands.

The court's initial conclusion, that plaintiff was entitled to seek indemnification despite the estate's allegations of active negligence, was correct. Indemnification shifts the entire burden of judgment from one tortfeasor who has been compelled to pay it but is guilty of only passive negligence or vicarious liability, to another whose active negligence is the primary cause of the harm. *St Luke's Hospital, supra* at 453-454. In other words, indemnity is not available to a party who is actively negligent. *Id.* at 456; *Feaster v Hous*, 137 Mich App 783, 787; 359 NW2d 219 (1984). Generally, if the complaint alleges active negligence, there is no entitlement to common-law indemnity. *Feaster, supra* at 787-788. However, our Supreme Court has stated that a party may seek indemnification if he first obtains summary disposition regarding his active fault. *St Luke's Hospital, supra* at 453, 457. Although plaintiff's active negligence was dismissed by directed verdict, the standard of inquiry is essentially the same as that used in the context of summary disposition. See *Skinner v Square D Co*, 445 Mich 153, 165 n 9; 516 NW2d 475 (1994). Therefore, the trial court correctly found that because plaintiff was relieved of active negligence, it was entitled to seek indemnification for the *Henton* judgment.

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<sup>1</sup> Defendant alleges that bad faith was established by examination of the jury verdict form and closing argument. Following review of the record and examination of the statements in context, this challenge is without merit. Plaintiff admitted that either defendant or Dr. Bridge was negligent. However, during the proofs presented at trial, defendant's expert conceded that if Dr. Bridge had provided the symptoms to defendant, he should have come to the aid of the patient immediately. Indeed, it was noteworthy that Dr. Bridge would not have tracked defendant, her superior, to report that the patient was fine. Moreover, based on the terms of the high-low agreement, plaintiff had an incentive to obtain a no cause of action or to limit damages below \$200,000. The record, therefore, does not support this argument.

Plaintiff next alleges that the court erred in denying plaintiff summary disposition when plaintiff was entitled to common law indemnification from defendant as a matter of law. We agree.

Where, as here, the case proceeds to judgment and the indemnitor had notice of, and in fact participated in the case, the judgment is binding on the indemnitor, absent a showing of fraud. *Eller, supra* at 575; *Michigan Gas Utilities v Public Service Comm*, 200 Mich App 576, 581; 505 NW2d 27 (1993). Here, plaintiff was adjudged liable for \$210,000 in the underlying malpractice action and defendant had notice of – in fact, he was a party to – the malpractice action. The fact that defendant settled out of the case is irrelevant. Defendant had an opportunity to participate in the proceedings, but chose to pursue the legal strategy of settlement. *Eller, supra* at 576. Therefore, plaintiff is entitled to indemnification from defendant, including costs and attorney fees related to defending the malpractice action, as a matter of law.<sup>2</sup> See *Warren v McLouth Steel Corp*, 111 Mich App 496, 507-509; 314 NW2d 666 (1981); *Hayes v General Motors Corp*, 106 Mich App 188, 199-202; 308 NW2d 452 (1981).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Patrick M. Meter

/s/ Bill Schuette

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<sup>2</sup> However, we note that the reasonableness of any requested costs and attorney fees is not at issue on appeal because the trial court did not decide it.