

OPINIONS OF THE SUPREME COURT OF OHIO

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Reynolds et al. v. Physicians Insurance Company of Ohio, Appellee; Zornow, Appellant.

[Cite as Reynolds v. Physicians Ins. Co. of Ohio (1993), Ohio St.3d .]

Physicians -- Medical malpractice action against two physicians alleging negligence in the medical care and treatment of a patient -- No implied contract of indemnity exists when no relationship existed between the physicians, and each had distinct and separate duties in caring for such patient.

In a medical malpractice action against two physicians alleging negligence in the medical care and treatment of a patient, there is no implied contract of indemnity when no relationship existed between the physicians and each had distinct and separate duties in caring for such patient.

(No. 92-1545 -- Submitted September 29, 1993 -- Decided December 8, 1993.)

Appeal from the Court of Appeals for Lucas County, No. L-91-148.

Matthew Edward Reynolds was born on March 15, 1979. The physician who delivered Matthew was Dr. Oktay Mete, an obstetrician. Care for Matthew after delivery was provided by appellant, Dr. Eva Zornow, a pediatrician.

On January 5, 1984, Matthew, through his father, Edward D. Reynolds, filed a medical malpractice action against Dr. Mete, alleging that Dr. Mete was negligent in his medical care and treatment during the birth and delivery of Matthew. The case went to arbitration in January 1985. A majority of the arbitration panel found that Dr. Mete was negligent in the delivery of Matthew and that he departed from accepted standards of medical practice. The majority of the arbitration panel also found that a significant portion of the injuries suffered by Matthew Reynolds were attributable to Dr. Zornow's pediatric care.

On January 27, 1986, the trial court reviewed the arbitration decision and authorized its admission in the upcoming jury trial. Several days later, Dr. Mete filed a third-party complaint against Dr. Zornow, seeking contribution and indemnification. Dr. Mete then entered into a settlement

agreement with Matthew Reynolds. Accordingly, Dr. Mete's medical malpractice insurer, appellee, Physicians Insurance Company of Ohio ("PICO"), was substituted as the defendant and third-party plaintiff in place of Dr. Mete.

On October 21, 1988, Matthew Reynolds, through his parents, filed a separate medical malpractice action against appellant Dr. Zornow. The medical malpractice actions were consolidated by the court. On April 24, 1989, appellant Dr. Zornow moved to dismiss the third-party complaint of PICO. PICO opposed the motion. Because the issues went beyond the pleadings, the trial court treated the motion as one for summary judgment. The trial court initially granted Dr. Zornow a partial summary judgment, finding that Dr. Zornow was not liable for contribution to PICO, but that the claim for indemnity would be tried to the jury.

Dr. Zornow then filed a motion to reconsider. That motion was initially denied by the trial court. However, on March 26, 1991, the trial court sua sponte vacated its prior order. On April 10, 1991, the court reconsidered Zornow's motion for summary judgment on the issue of indemnification, granted the motion, and dismissed PICO's claim for indemnity.

The court of appeals reversed the trial court's grant of summary judgment on the claim for indemnity. PICO did not appeal the dismissal of the contribution claim.

This matter is now before this court upon an allowance of a motion to certify the record.

Manahan, Pietrykowski, Bamman & DeLaney, Cormac B. DeLaney and Jeffrey J. Madrzykowski, for appellee.

Jacobson, Maynard, Tuschman & Kalur Co., L.P.A., Daniel S. Cody, James M. Tuschman and Robert C. Maynard, for appellant.

Francis E. Sweeney, Sr., J. The sole issue is whether an implied contract of indemnity exists between two physicians, each physician having distinct and separate duties in caring for an infant patient. For the following reasons, we answer "no," and accordingly, reverse the judgment of the court of appeals.

Appellee PICO, contends that its cause of action is based on an implied contract of indemnity theory. The rule of indemnity provides that "where a person is chargeable with another's wrongful act and pays damages to the injured party as a result thereof, he has a right of indemnity from the person committing the wrongful act, the party paying the damages being only secondarily liable; whereas, the person committing the wrongful act is primarily liable." *Travelers Indemn. Co. v. Trowbridge* (1975), 41 Ohio St.2d 11, 14, 70 O.O.2d 6, 8, 321 N.E.2d 787, 789. When a person is secondarily liable due to his relationship to the other party, and is compelled to pay damages to an injured party, he may recoup his loss for the entire amount of damages paid from the one who is actually at fault, and who, in fact, caused the injuries. See *Globe Indemn. Co. v. Schmitt* (1944), 142 Ohio St. 595, 603, 27 O.O. 525, 529, 53 N.E.2d 790, 794.

An implied contract of indemnity should be recognized in situations involving related tortfeasors, where the one committing the wrong is so related to a secondary party as to

make the secondary party liable for the wrongs committed solely by the other. See *Losito v. Kruse* (1940), 136 Ohio St. 183, 185, 16 O.O. 185, 186, 24 N.E.2d 705, 706. Relationships which have been found to meet this standard are the wholesaler/retailer, abutting property owner/municipality, independent contractor/employer, and master/servant. *Id.* at 185-186, 16 O.O. at 186-187, 24 N.E.2d at 706-707. Indemnification is not allowed when the two parties are joint or concurrent tortfeasors and are both chargeable with actual negligence. *Globe Indemn. Co. v. Schmitt*, supra, 142 Ohio St. at 599, 27 O.O. at 527, 53 N.E.2d at 792.

In the present case, we find that no relationship exists between the two physicians that would give rise to primary and secondary liability. There are two physicians here with separate and distinct duties. Dr. Mete was responsible for the delivery of infant Reynolds. Dr. Zornow was responsible for providing pediatric care after the birth of the infant. They acted independently of one another and are, therefore, responsible only for the results of their own negligence, if negligent at all. Thus, this is a joint and concurrent tortfeasor situation to which no right of indemnity lies.

Dr. Mete voluntarily entered into a settlement agreement with the Reynoldses based on his belief as to his own liability. Dr. Mete was not legally obligated to enter into that agreement. It would be unjust to demand that an unrelated party, Dr. Zornow, indemnify Dr. Mete for the entire amount of that settlement agreement.

Accordingly, we conclude that in a medical malpractice action against two physicians alleging negligence in the medical care and treatment of a patient, there is no implied contract of indemnity when no relationship existed between the physicians and each had distinct and separate duties in caring for such patient.

The judgment of the court of appeals is reversed, and the judgment of the trial court is reinstated.

Judgment reversed.

Moyer, C.J., A.W. Sweeney, Douglas, Wright, Resnick and Pfeifer, JJ., concur.