288 Ga.App. 473
Court of Appeals of Georgia.

EMERGENCY PROFESSIONALS
OF ATLANTA, P.C.
v.
WATSON et al.

No. A07A1305. | Nov. 19, 2007.
| Certiorari Denied April 21, 2008.

Synopsis

Background: Medical staffing agency that had provided physician for hospital's emergency room brought action for contribution and indemnity against physician and other third-party defendants, following entry of default judgment against agency in a medical malpractice case involving emergency room care provided by physician. The Superior Court, Fulton County, Russell, J., entered summary judgment in favor of third-party defendants, and agency appealed.

Holdings: The Court of Appeals Johnson, P.J., held that:

[1] agency voluntarily paid default judgment, and thus agency was not entitled to contribution or non-contractual indemnity, and

[2] physician agreement between agency and physician did not require physician to indemnify agency.

Affirmed.

West Headnotes (13)

[1] Contribution
Defenses
Indemnity
Voluntary Payment by Indemnitee; Necessity of Compulsory Payment
Indemnity
Defenses

Medical staffing agency voluntarily paid default judgment in underlying medical malpractice case involving alleged negligent treatment by physician it had provided for hospital's emergency room, and thus was not entitled to contribution or non-contractual indemnity against physician, hospital, and other alleged tortfeasors, where agency was held liable on basis of respondeat superior and failed to assert as a defense to the underlying claim that physician was an independent contractor, not its employee; although agency was required to pay default judgment once it was entered, it had failed to assert defense that would have defeated claim.

2 Cases that cite this headnote

[2] Contribution
Payment or Discharge of Common Liability

Generally, a tortfeasor who pays a judgment enjoys a right of contribution against other tortfeasors.

Cases that cite this headnote

[3] Contribution
Payment or Discharge of Common Liability

Contribution among joint tortfeasors is enforceable where one has paid more than his share of the common burden which all are equally bound to bear.

Cases that cite this headnote

[4] Indemnity
Right of One Compelled to Pay Against Person Primarily Liable

An action for indemnity allows one who has been required to pay damages caused by the tort of a third party to recover against that party; indemnification contemplates imputed liability arising from the torts of another.

Cases that cite this headnote

[5] Indemnity
Voluntary Payment by Indemnitee; Necessity of Compulsory Payment

No indemnity claim exists where the party seeking indemnity was not legally obligated to make the payment.

4 Cases that cite this headnote

[6] **Indemnity**
Persons Entitled to Sue and Parties

Indemnity
Pleading

In the absence of allegations showing a legal necessity for payment by a third-party plaintiff to the injured party, it must be assumed that such payment was made voluntarily and not under the compulsion of law; and such being true, the third-party plaintiff had no standing to seek indemnity from a third-party defendant.

1 Cases that cite this headnote

[7] **Contribution**
Defenses

Indemnity
Defenses

Indemnity
Settlement with Third Party as Bar to Action

Where an action brought by an injured person against an alleged tortfeasor results in the alleged tortfeasor compromising the claim or being cast in judgment, no indemnification or contribution can be recovered by the alleged tortfeasor from a third party if the alleged tortfeasor had a defense available which would have defeated the action but failed to assert it.

1 Cases that cite this headnote

[8] **Contribution**
Defenses

Indemnity
Voluntary Payment by Indemnitee; Necessity of Compulsory Payment

In determining whether a defendant claiming indemnification or contribution against a third party made a voluntary or compulsory payment to an injured party, the voluntariness of the payment does not turn on whether payment was made pursuant to a settlement versus a default or other type of judgment; a defendant's payment to an injured party is considered “voluntary” if it was made in the absence of allegations showing a legal necessity for payment.

3 Cases that cite this headnote

[9] **Contribution**
Defenses

Any defense showing the lack of a defendant's legal compulsion to pay an injured party is sufficient to defeat the defendant's claim for contribution against a third party.

Cases that cite this headnote

[10] **Indemnity**
Personal Injury Liability

Indemnity
Defenses

Physician agreement between medical staffing agency and emergency room physician, in which physician agreed to indemnify agency for liability arising from services performed by physician pursuant to agreement, did not require physician to indemnify agency for default judgment entered against agency on the basis of respondeat superior on medical malpractice claim arising from allegedly negligent care given by physician, where agency failed to assert defense to underlying claim that physician was an independent contractor, not agency's employee.

Cases that cite this headnote

[11] **Indemnity**
Indemnitee's Own Negligence or Fault

Indemnity
Indemnitee's Own Negligence or Fault, in General

Unless a contract for indemnification explicitly and expressly states that the negligence of the indemnitee is covered, a court will not interpret such an agreement as a promise to save the indemnitee from his own negligence.

1 Cases that cite this headnote

[12] Indemnity
Indemnitee's Own Negligence or Fault

Indemnity
Indemnitee's Own Negligence or Fault, in General

Due to public policy concerns, unless there is explicit language to the contrary, an indemnity agreement cannot be interpreted to hold an indemnitee harmless from its own negligence.

1 Cases that cite this headnote

[13] Indemnity
Liberal or Strict Construction

The words of a contract of indemnification must be construed strictly against the indemnitee.

1 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

JOHNSON, Presiding Judge.

***473** This appeal is from the trial court's grant of summary judgment in favor of the third-party defendants in an action for contribution and indemnity. We hold that the third-party plaintiff was not entitled to contribution and indemnity. Therefore, we affirm the grant of summary judgment.

Emergency Professionals of Atlanta, P.C. ("EPA"), provides physicians to staff emergency medical facilities. Matthew Watson, M.D., and EPA executed a "Physician Agreement" in which Watson agreed to provide physician services in emergency rooms and EPA agreed to pay him for the work. The agreement indicated that Watson was an independent contractor and stated that EPA had no control over the method or manner in which he performed his professional services.

Pursuant to the agreement, Watson was working as a physician in the emergency room of Northside Hospital when Lucy Skaggs came in with shortness of breath and an elevated temperature. ***474** Watson examined Skaggs and consulted Dr. Brinkley Goodson, a specialist on call to the emergency department. Watson evaluated, treated and discharged Skaggs from the emergency room. The next morning, Skaggs collapsed at home and died.

Skaggs' heirs and estate (collectively, "Skaggs") filed a medical malpractice and wrongful death action against Watson, Goodson, their professional corporations, Northside Hospital, Inc., and Georgia Baptist Health Care System, Inc., alleging the defendants were negligent in the manner in which they treated and discharged Skaggs. Skaggs sued EPA based on a theory of respondeat superior, alleging Watson was acting ****436** as EPA's agent or employee when he treated Skaggs.

EPA's registered agent was served in December 2003. All of the defendants except EPA filed timely answers to the complaint. In April 2004, Skaggs moved for a default judgment against EPA. The trial court entered default judgment against EPA, noting that EPA failed to file an answer or move to open the default within 15 days of the January 30 default date. [1]

A few days later, EPA moved to set aside the default judgment and to open the default based on excusable neglect or, alternatively, because a proper case had been made for it to be opened. [2] EPA filed with the motions an answer denying the allegations in the complaint, including the allegation that Watson was acting as its employee or agent. The answer was not verified, and there was no affidavit showing a meritorious defense to the action. After a hearing, the trial court denied the motion because EPA failed to include sworn testimony establishing a meritorious defense. [3]

After default judgment was entered on the issue of EPA's liability, a jury trial was held on the issue of damages. The jury found EPA liable to Skaggs for $900,000 in damages plus additional costs. EPA paid the judgment entered on the jury's verdict.

Having obtained a default judgment against EPA, Skaggs dismissed her action against the other defendants. EPA filed a cross-claim for contribution and indemnity against Watson, Goodson, their professional corporations, Northside Hospital and Georgia Baptist Health Care System. EPA also claimed Watson was required to indemnify it based on the indemnification provision in the physician agreement. The third-party defendants moved for summary judgment contending, among other things, that the indemnification and contribution claims were barred by EPA's failure to assert available ***475** defenses which would have prevented the entry of default judgment against it. Watson argued, in addition, that the indemnity provision in the physician agreement did not apply to a default judgment entered against EPA. The trial court granted summary judgment to all of the third-party defendants. EPA appeals.

[1] 1. EPA contends the trial court erred in granting summary judgment to the third-party defendants on the contribution and noncontractual indemnity claims. We disagree.

[2] **[3]** **[4]** Generally, a tortfeasor who pays a judgment enjoys a right of contribution against other tortfeasors.[4] Contribution among joint tortfeasors is enforceable where one has paid more than his share of the common burden which all are equally bound to bear.[5] An action for indemnity allows one who has been required to pay damages caused by the tort of a third party to recover against that party; indemnification contemplates imputed liability arising from the torts of another.[6]

[5] **[6]** **[7]** However, no indemnity claim exists where the party seeking indemnity was not legally obligated to make the payment.[7] In the absence of allegations showing a legal necessity for payment by the third-party plaintiff to the injured party, we must assume that such payment was made voluntarily and not under the compulsion of law; and such being true, the third-party plaintiff had no standing to seek indemnity from the third-party defendant.[8] This same principle applies to a claim for indemnification.[9] Moreover, where an action brought by an ****437** injured person against an alleged tortfeasor results in the alleged tortfeasor compromising the claim or being cast in judgment, no indemnification or contribution can be recovered by the alleged tortfeasor from a third party if the alleged tortfeasor had a defense available which would have defeated the action but failed to assert it.[10]

In this case, EPA had a defense available to it which would have defeated the action but failed to assert that defense. Skaggs sued EPA based on the doctrine of respondeat superior or agency, stating that Watson was acting as an agent or employee of EPA, and that EPA was therefore liable for Watson's acts or omissions. In his answer, Watson stated that he was an independent contractor and denied being an ***476** agent or employee of EPA. The physician agreement executed by EPA and Watson indicated that Watson was an independent contractor. In the answer EPA filed in connection with the motions to set aside and open the default, EPA denied that Watson was an agent or employee of EPA. The trial court recognized that there was no dispute that Watson was an independent contractor and that such would be a complete defense to EPA being held liable for Watson's conduct.[11]

[8] **[9]** EPA urges that its payment to Skaggs was compulsory inasmuch as it was made pursuant to a default judgment. Therefore, EPA argues, the rule that indemnification is unavailable to a party who made a voluntary payment is inapplicable.[12] This argument misses the point. As is clear from the *GAF*[13] case, the "voluntariness" issue does not turn on whether payment was made pursuant to a settlement versus a default or other type of judgment. Instead, a defendant's payment to an injured party is considered "voluntary" if it was made in the absence of allegations showing a legal necessity for payment.[14] Any defense showing the lack of a legal compulsion to pay is sufficient to defeat a claim for contribution.[15] While it is true that EPA's payment was compulsory once judgment was entered against it, it is clear that EPA had a defense which would have defeated the claim, and it could have avoided having the judgment entered against it by asserting the defense. EPA failed to raise a legal defense that would have defeated the claim, so it was not legally compelled to pay Skaggs.[16] The trial court did not err in granting the third-party defendants' motions for summary judgment on EPA's contribution and non-contractual indemnification claims.

[10] 2. EPA contends the trial court erred in granting summary judgment to Watson on the indemnity cross-claim which was based on the physician agreement. We disagree.

The physician agreement which Watson and EPA executed contained a clause in which Watson agreed to indemnify EPA for "any claims, loss, damage, cost, expense, including

reasonable attorney fees, or liability arising out of or relating to the services performed by [Watson] or acts or omissions by him pursuant to this Agreement."

***477** As EPA points out, the contract provision in question is clear and unambiguous. However, the provision, which would obligate Watson to indemnify EPA against any claims or liability arising out of or relating to the agreement, does not require indemnification in this case.

EPA's liability to Skaggs arose not out of Watson's conduct, but out of EPA's own conduct: EPA is liable because it failed to assert a valid defense which would have absolved it of any liability in the matter. It is undisputed ****438** that EPA could not have been held liable for the acts of Watson, an independent contractor. As discussed in Division 1, EPA had no legal compulsion to pay Skaggs. In failing to answer Skaggs' complaint and then failing to properly move to open the default or set aside the default judgment, EPA authored its own fate.

[11] **[12]** **[13]** Furthermore, unless a contract for indemnification explicitly and expressly states that the negligence of the indemnitee is covered, this Court will not interpret such an agreement as a promise to save the indemnitee from his own negligence.[17] Due to public policy concerns, unless there is explicit language to the contrary, an indemnity agreement cannot be interpreted to hold an indemnitee harmless from its own negligence.[18] The words of a contract of indemnification must be construed strictly against the indemnitee.[19] The indemnity clause in this case does not expressly, plainly, clearly, and unequivocally state that Watson would indemnify EPA from its own negligence.[20] Accordingly, the trial court did not err in declining to make Watson indemnify EPA for EPA's own negligence in the absence of express language requiring such.[21]

Judgment affirmed.

PHIPPS and MIKELL, JJ., concur.

Parallel Citations

654 S.E.2d 434, 07 FCDR 3636

Footnotes

1 See OCGA § 9-11-55(a).
2 See OCGA § 9-11-55(b).
3 See *Rapid Taxi Co. v. Broughton*, 244 Ga.App. 427, 429(2), 535 S.E.2d 780 (2000).
4 OCGA § 51-12-32(a); *Crawford v. Johnson*, 227 Ga.App. 548, 549(1), 489 S.E.2d 552 (1997).
5 *Tenneco Oil Co. v. Templin*, 201 Ga.App. 30, 35(2), 410 S.E.2d 154 (1991).
6 *Auto-Owners Ins. Co. v. Anderson*, 252 Ga.App. 361, 363(1), 556 S.E.2d 465 (2001).
7 Id. at 364(2), 556 S.E.2d 465.
8 *GAF Corp. v. Tolar Constr. Co.*, 246 Ga. 411, 271 S.E.2d 811 (1980).
9 Id. at 412, 271 S.E.2d 811.
10 Id.; *City of Albany v. Pippin*, 269 Ga.App. 22, 26-27, 602 S.E.2d 911 (2004).
11 See generally *Fieldstone Center v. Stanley*, 216 Ga.App. 803, 805(3), 456 S.E.2d 61 (1995).
12 See *GAF*, supra (defendant cannot seek indemnity from third party where defendant knowingly failed to raise a valid defense and payment of the judgment was therefore deemed voluntary).
13 Id.
14 See id. at 411, 271 S.E.2d 811; *Auto-Owners Ins. Co.*, supra at 364(2), 556 S.E.2d 465.
15 *City of Albany*, supra at 27, 602 S.E.2d 911.
16 See id.
17 *Southern R. Co. v. Union Camp Corp.*, 181 Ga.App. 691, 692(1), 353 S.E.2d 519 (1987).
18 *Park Pride Atlanta v. City of Atlanta*, 246 Ga.App. 689, 690-691(1), 541 S.E.2d 687 (2000).
19 Id. at 691(1), 541 S.E.2d 687.
20 See id.
21 See id.; *The Svc. Merchandise Co. v. Hunter Fan Co.*, 274 Ga.App. 290, 297(3), 617 S.E.2d 235 (2005).

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