STATE OF MICHIGAN

COURT OF APPEALS

EMPLOYERS REINSURANCE CORPORATION,

Plaintiff/Third Party
Defendant-Appellant,

v

WOODLAND EQUIPMENT INC.,

Defendant/Third-Party
Plaintiff-Appellee.

UNPUBLISHED
July 30, 1996

No. 183251
LC No. 92-004890

Before: Hood, P.J., Markman and A.T. Davis, Jr.*, JJ.

PER CURIAM.

Following a bench trial, plaintiff, Employers Reinsurance Corporation, appeals as of right the circuit court's judgment of no cause of action in favor of defendant, Woodland Equipment Company. We affirm.

This appeal stemmed from First National Underwriters' (FNU) failure to secure insurance for defendant from Citizens Insurance Company (Citizens) for the years 1988 through 1990. During this time, FNU issued certificates of motor vehicle insurance and sent non-itemized bills to defendant, which defendant paid. However, the bills were for premiums due on other policies. Defendant was never billed for motor vehicle insurance during 1988 through 1990. In October 1990, one of defendant's drivers was the cause of a multi-fatality accident. Plaintiff was FNU's malpractice insurance carrier. Plaintiff paid insurance premiums in the amount of $102,236 to Citizens in order to get Citizens to adjust defendant's claim. Plaintiff then brought suit against defendant seeking reimbursement for the premiums. Defendant responded by filing a third-party complaint against FNU and Citizens claiming damages for their failure to insure. The third-party complaint was subjected to court-ordered mediation. On June 23, 1994, the trial court entered an order of judgment with regard to defendant's third-party complaint, awarding $14,246 pursuant to the mediation evaluation defendant had accepted, and dismissing the third-party claims with prejudice.

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

Defendant is a retailer of logging equipment in Iron River, Michigan. Its principals, Ronald Beauchamp and John Lofgren, also own an associated business, Lake Superior Leasing, Inc. Lofgren is also the sole owner of Allied Industries, Inc. For many years, FNU handled all the insurance needs of these three companies which involved approximately $50,000 worth of premium payments per year. Representatives from FNU would meet with Lofgren and Beauchamp annually to renew their policies. FNU also had authority to sign insurance policy applications in Lofgren's name, but did not always send copies of the policies to defendant. FNU furnished defendant with certificates of motor vehicle insurance on an as-needed basis. Blank certificates were provided to FNU by Citizens and were signed by an officer of Citizens.

FNU routinely issued non-itemized billing statements that simply stated an amount due but did not provide a breakdown of the amounts due on each policy or which policies were being paid on. Peter Saigh, the owner of FNU, stated that approximately 40 to 50 bills per year for premiums were sent to defendant. Although defendant paid all the bills it received form FNU, Saigh stated that those bills did not include the premiums for the unrenewed policies during 1988-1990. Therefore, defendant had not been billed for and had not paid for motor vehicle or general property insurance during that time. Saigh did not notice that the premiums were not being billed or paid because of the volume of business that FNU was doing with Beauchamp and Lofgren.

On October 2, 1990, a vehicle owned by defendant was involved in a serious multiple fatality in Wisconsin in which defendant's pickup truck hit a senior citizens' transportation van. Lofgren immediately reported the accident to FNU. Several days later, FNU informed defendant that it had not obtained or issued policies for general liability or motor vehicle insurance for defendant for 1988 through 1990. Defendant demanded that FNU and Citizens mange the accident claims.

Citizens filed suit, seeking a declaratory judgment against defendant and FNU. The suit resulted in a settlement agreement signed on May 31, 1991. Defendant was not a party to the settlement agreement. The agreement provided that Citizens would retroactively issue policies of insurance with coverage identical to the coverage defendant had prior to FNU's failure to renew and adjust the accident claims under those policies. In exchange, plaintiff would make an initial payment of $50,000 in estimated premiums that defendant would have paid during 1988 through 1990. FNU agreed to provide any information necessary to complete an audit of defendant in order to determine the actual amount of premiums that would have been due. In addition, plaintiff agreed to indemnify Citizens for any claims defendant might have against it. In return, Citizens assigned their right to premium payments to plaintiff. Citizens subsequently settled the claims arising out of the accident for $75,000.

Kelly Havinga, Citizens' general manager for the Upper Peninsula, testified that in 1988 the insurance industry changed the way it calculated premiums for general liability insurance for businesses. As a result of the change in rate calculations, the actual premiums Citizens claimed were owed for the policies issued to cover defendant for the years 1988-1991 amounted to $102,236. Plaintiff sent Citizens a check for $52,236 after its demands to defendant to pay the premium were rebuffed. Plaintiff

then sued defendant in the instant case, claiming it owed $102,236 in premiums that plaintiff had paid on defendant's behalf.

In resolving the matter, the court stated:

> The plaintiff's complaint is broken down into four counts. Count I is for Money Had and Received. This count clearly fails as there are no proofs, nor for that matter any allegations, that Woodland had money in its possession which belonged to Employers Reinsurance or its subrogee or its assignor. Count III is entitled "Assignment" and alleges that Employers Reinsurance has received an assignment from Citizens Insurance Company which would enable Employers to recover any money due Citizens from Woodland. The assignment is valid. However, the only theory of recovery to enable Employers Reinsurance to prevail is if Woodland owed Citizens the premium amount for the three year period. Count IV of Employers' complaint is entitled "Subrogation". Employers Reinsurance is subrogated to recover anything from Woodland that Woodland would owe First National Underwriters Insurance Agency. If that subrogation agreement has any effect whatsoever there must be a decision that Woodland owed an obligation to First National Underwriters Insurance Agency as a result of the issuing of the three years of coverage. It should be noted that the policies of insurance for the three year period have never been delivered to Woodland although two policies have been sent by Citizens to First National Underwriters. This conforms to the conduct of Woodland and First National Underwriters for several years as policies of Citizens' were never delivered to Woodland from First National Underwriters. In regard to motor vehicle coverage only the certificates of insurance for the vehicle were delivered.
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> Count II of plaintiff's complaint is entitled "Breach of Implied Contract/Assumpsit". At the conclusion of plaintiff's proofs Woodland made a motion for dismissal of this count. The Court granted the defendant's motion to dismiss the breach of implied-in-fact agreement but denied defendant's motion to dismiss as to the theory of implied-in-law agreement. The Court found no evidence whatsoever of a meeting of minds between Woodland and the plaintiff which is a necessary element to find a breach of an implied-in-fact contract. . . .
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> Therefore, the only theory remaining for the plaintiff is to prove that there was a contract implied-in-law and that Woodland breached that contract by a preponderance of the evidence. . . . The essential element of quasi-contractual obligation, on which a recovery may be had, is the receipt of a benefit by a defendant from a plaintiff, which it is inequitable for the defendant to retain. *Moll v County of Wayne*, 332 Mich 274 (1952).

The court summarized the financial transactions as follows:

> To recapitulate the financial aspects involved the Court finds that Employers Reinsurance Corporation has paid approximately $117,000 to Citizens which settled the Wisconsin accident claim against Woodland for $75,000. First National Underwriters was or is entitled to receiving [sic] a commission from Citizens on the $102,236 premium and was allowed to continue as an agent for the Citizens which meant approximately $75,000 a year in commissions. Now Employers Reinsurance seeks to recover $102,236 from Woodland which would mean that it would be out approximately $15,000 minus whatever premium First National Underwriters paid it to obtain the Errors and Omissions policy. If Employers is successful, the only substantial loser would be Woodland who would be out $102,236.

The court concluded that, considering the totality of the circumstances, the benefit derived by defendant "pales when weighed against the damage caused to Woodland because of the failure if First National . . . to provide proper coverage on its motor vehicle to Woodland." The court indicated that defendant's damages included its losses from reorganizing its business operations, which were an attempt to insulate it from possible liability, and its loss of sales due to its reluctance to take on additional debt in the face of a potential judgment against it. On this basis, the court found that because defendant had not been unjustly enriched, it had no obligation to Citizens or FNU. Therefore, plaintiff's claims based on subrogation and assignment could not be sustained.

On appeal, plaintiff first argues that the trial court erred in failing the find that the conduct of the parties established a contract implied-in-fact. The question of whether there is a contract implied in fact is a question of fact and is reviewed for clear error. *In re Estate of Morris*, 193 Mich App 579, 582; 484 NW2d 755 (1992).

A contract implied in fact arises "when services are performed by one who at the time expects compensation from another who expects at the time to pay therefor." *In re Estate of Lewis*, 168 Mich App 70, 75; 423 NW2d 600 (1988). John Monnich, who represented plaintiff in the negotiations with Citizens and at trial, admitted that defendant never agreed to pay the premium. We therefore conclude that the trial court did not clearly err in concluding that no contract implied in fact existed. On the contrary, we agree completely with the rationale set forth by the trial court in its ruling.

This issue also presents the question of whether plaintiff had any right to expect compensation from defendant. It is established that insurance agents of brokers are liable for any damages that result from the failure to provide insurance or renew a policy where they are under an obligation to maintain insurance.[1] See generally *Khalaf v Bankers & Shippers Ins* Co, 404 Mich 134, 143; 273 NW2d 811 (1978); 43 Am Jur 2d, Insurance, §§ 139, 140; 29 ALR2d 171 § 24; 64 ALR3d 398, §1(a). FNU was therefore liable for the damages defendant could have been held responsible for in connection with the accident. Consequently, the insurance plaintiff purchased from Citizens, although in defendant's

name, was for the ultimate benefit of FNU where it limited the potential damages for which FNU was liable.

In addition, Michigan courts have held that where a special relationship exists between the insured and his agent, a higher standard of care is imposed upon the agent in advising the insured. See *Stein v Continental Co*, 110 Mich App 410, 417; 313 NW2d 299 (1981). FNU and defendant had a special relationship of trust where FNU handled defendant's insurance needs for a period of years and defendant completely relied on FNU for its insurance needs. The *Stein* Court held that "[w]here the duty to advise has been breached, the insurance agent is liable for any damages resulting from the breach." *Id.*, p 417.

Moreover, plaintiff's argument that the purchase of the insurance policies placed defendant in the position it would have been in if FNU had not been negligent is without merit. This argument ignores the fact that defendant was denied the opportunity to decide whether it wanted to continue with Citizens in the face of a substantial increase in premiums. Defendant presented evidence at trial that it could have obtained substitute insurance elsewhere for considerably less money. Furthermore, although the settlement agreement called for Citizens to provide insurance only through the date that defendant acquired substitute coverage, Citizens failed to ascertain whether the policies would overlap with the substitute coverage. There was, in fact, a five-month overlap of coverage. Additionally, because the policies were retroactive, the risk assumed by the insurer was substantially less than that assumed with a prospective policy. Accordingly, the premiums charged for the policies were arguably excessive in view of the reduced risk assumed. FNU's ongoing business relationship with defendant provided it with motivation for protecting defendant's interests. However, in view of the cost of and the overlap in coverage procured by plaintiff, it is questionable whether plaintiff took defendant's interests into account when negotiating with Citizens. Therefore, plaintiff's substituted performance varied materially from the initial performance FNU was to have rendered, and plaintiff has cited no authority to support the proposition that defendant was obligated to accept such performance. On the contrary, it is established that a party is not obligated to accept a substitute performance that varies materially from the performance originally contracted for. See *Kingston v Markward & Karafilis, Inc*, 134 Mich App 164, 171-173; 350 NW2d 842 (1984).

Because plaintiff's performance differed materially from that which FNU failed to render, the only applicable theories of recovery are accord and satisfaction or novation. A claim founded on a tort may be discharged thereby. *Belrose v Kanitz*, 284 Mich 497, 502; 280 NW 33 (1938). However, there is no indication that an accord and satisfaction was reached in this case. "An accord is a contract whereby the obligee agrees to discharge a preexisting duty in exchange for some substituted performance." *Stefanac v Cranbrook Educational Community*, 435 Mich 155, 171; 458 NW2d 56 (1990). "[W]hether a particular set of facts amount to an accord and satisfaction is generally a question if fact for the fact finder." *Fritz v Marantette*, 404 Mich 329, 334-335; 273 NW2d 425 (1978). An essential requirement is a "meeting of the minds." *Id.*, p 335; *Grettenberger Pharmamcy, Inc v Blue Cross & Blue Shield of Michigan*, 98 Mich App 1, 13; 296 NW2d 589

(1980). We conclude that the trial court did not clearly err in finding that there was no meeting of the minds where the testimony overwhelmingly supported this conclusion.

Further, Michigan cases have consistently required the presence of the following elements to establish novation: (1) parties capable of contracting; (2) a valid prior obligation to be displaced; (3) the consent of all parties to the substitution based upon sufficient consideration; and (4) the extinction of the old obligation and the creation of a valid new one. *Devitt v Quirk*, 105 Mich App 94, 97; 306 NW2d 405 (1981). In this case, no novation occurred because the trial court found that defendant never agreed to pay for substitute policies. Moreover, there was no consideration for the substitution where FNU was under a preexisting duty to pay defendant's losses from the accident.

Plaintiff next argues that the trial court erred in concluding that defendant had not been unjustly enriched by its payment of the premium, i.e. that there was a contract implied in law. We disagree.

Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Kammer Asphalt Paving Co, Inc v East China Township Schools*, 443 Mich 176, 185; 504 NW2d 635 (1993). The remedy is one by which "the law sometimes indulges in the fiction of a quasi or constructive contract, with an implied obligation to pay for benefits received" to ensure that "exact justice" is obtained. *Id.*, pp 185-186. The essential elements of such a claim are: (1) receipt of a benefit by the defendant from the plaintiff and, (2) an inequity resulting to the plaintiff because of the retention of the benefit of the defendant. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991). However, "the mere fact that a benefit has been conveyed does not necessarily indicate that it is unjust for the party to retain that benefit." *Kammer, supra*.

In this case, the trial court did not determine the actual value of the benefit conferred on defendant nor the precise amount of damages suffered by defendant. However, we find that sufficient evidence was introduced at trial that would have justified a conclusion that the detriment suffered by defendant was equal to or greater than the amount plaintiff was seeking in compensation. Beauchamp testified that after he was informed that defendant might not be covered for the accident, he immediately cashed in some certificates of deposit held in defendant's name to reduce that company's available assets in the event it was sued. Beauchamp stated that as a result of this action, defendant incurred an extra $57,000 in taxes. Evidence was also introduced showing that defendant's gross sales fell approximately two million dollars during the period of April 1990 to March 1991 which amounted to a loss in profitability of approximately $40,000 to $50,000. Beauchamp also testified that the drop was due to his unwillingness to take on additional debt in the face of potential litigation. He also invested approximately $16,000 of his personal time in managing the consequences of the lack of insurance. Additionally, Lofgren stated that defendant lost some of its key employees to its competitors "because the word was all over town . . . [that] Woodland had a hell of a bad accident and they [sic] might not be in business next year when the lawsuits get done with 'em." Given the evidence presented, the trial court reasonably concluded that the detriment to defendant equaled or outweighed the benefit it received. Accordingly, plaintiff failed to establish the second element of an implied in law contract. We

therefore conclude that the trial court did not clearly err in concluding that no contract should be implied in law.

Plaintiff further argues that the trial court erred in failing to recognize the doctrine of res judicata. The applicability of res judicata is a question of law which is reviewed de novo on appeal. *Husted v Auto Owners Ins, Co*, 213 Mich App 547, 555; 540 NW2d 743 (1995).

The Michigan Supreme Court outlined the differences between res judicata and collateral estoppel in *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37; 191 NW2d 313 (1971).

> [Under the doctrine of res judicata,] [i]f a judgment is rendered in favor of the plaintiff, the cause of action upon which the judgment is based is merged in the judgment, and the plaintiff cannot thereafter maintain an action on the original cause of action. If the judgment is rendered in favor of the defendant on the merits, the original cause of action is barred by the judgment. In either case the original cause of action is extinguished by the judgment no matter what issues were raised and litigated in the action, or even if no issues were raised or litigated and judgment was rendered by default.
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> On the other hand, where the subsequent action is based upon a different cause of action from that upon which the prior action was based, the effect of the judgment is more limited. The judgment is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment. It is not conclusive as to questions which might have been but were not litigated in the original action. This is the doctrine of collateral estoppel. [*Id*., pp 41-42.]

We find that the cause of action in this case is different from the cause of action resolved through the mediation award. The cause of action in this case is plaintiff's claim for nonpayment of premiums. The cause of action resolved through the mediation award was defendant's claim for breach of contract and failure to insure. "The subject matter involved in a litigation is the right which one party claims as against the other, and demands the judgment of the court upon." *Van Pembrook v Zro Mfg Co*, 146 Mich App 87, 101; 380 NW2d 60 (1985). Because two rights are involved, the doctrine of res judicata is inapplicable.

Likewise, we note that the doctrine of collateral estoppel may not be applied to the issue of defendant's damages because the issue was not actually litigated. Collateral estoppel does not apply to consent judgments. *Howell*, *supra*, p 42.

Plaintiff finally argues that the trial court erred in considering damages allegedly incurred by defendant that are not recoverable on a breach of contract claim. Because this issue was not raised below, it is not properly preserved for appellate review. *Adams v Sylan Glynn Golf Course*, 197 Mich App 95, 98; 499 NW2d 791 (1992).

Even if we reviewed this issue, we would find that it is without merit. The court stated:

> [D]amages includes [sic] the business reorganization of Woodland in order to attempt to insulate itself from possible liability due to the Wisconsin accident with no insurance in place and the loss of sales for Woodland because it did not want to go into debt to replenish its inventory and equipment because of the potential liability of an uninsured serious automobile accident.

The trial court did not consider emotional damages in making its decision. Further, plaintiff failed to cite any instances where the court considered Beauchamp or Lofgren's emotional damages. Additionally, because Beauchamp arguably did what any reasonable businessperson would do when faced with the potential of financially devastating liability, plaintiff's argument that defendant's financial damages were unforeseeable is without merit.

Affirmed.

/s/Harold Hood
/s/ Alton T. Davis

[1] *Although Haji v Prevention Insurance Agency*, 196 Mich App 84, 87; 492 NW2d 460 (1992), is factually similar to the instant case involving an insurance agent's failure to procure additional coverage requested by the insured, the issue in that case was whether summary disposition of the plaintiff's claim was appropriate. Consequently, that case contributes little to the analysis of the situation, in which a bench trial was held.