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**IN THE  
COURT OF APPEALS OF INDIANA**

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DANIEL E. NOVAK, )

Appellant-Defendant, )

vs. )

CREDIT BUREAU COLLECTION SERVICE, )

Appellee-Plaintiff. )

No. 71A04-0703-CV-136

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APPEAL FROM THE ST. JOSEPH SUPERIOR COURT  
The Honorable Jenny Pitts-Manier, Judge  
Cause No. 71D05-0511-CC-01056

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**DECEMBER 13, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**GARRARD, Senior Judge**

On August 21, 2002, David Novak was transported by ambulance to Saint Joseph Regional Medical Center – South Bend Campus. At the time he was unconscious and was suffering from a brain aneurysm. A successful surgery was performed, and Novak remained in the hospital until he was discharged on October 23, 2002. He recovered and is able to do his normal life’s activities.

Novak did not pay the bill he received from the hospital and, eventually, the hospital assigned its claim to Credit Bureau Collection Services (CBCS). CBCS filed suit on account alleging that Novak had entered into an agreement with the hospital for the medical services rendered. Novak answered in denial and asserted the Statute of Frauds as an affirmative defense.

The case was tried to the court without any request for special findings. At the conclusion of plaintiff’s case Novak rested. In entering its judgment the court made several findings.<sup>1</sup> It determined that Novak has impliedly consented to the presentation to the court of Novak’s liability under equity as well as under law. The court found that “[t]he Defendant was brought to the hospital by ambulance after suffering a brain aneurysm. He was unconscious; it was not possible to secure his consent to treatment. Treatment was necessary to prevent serious injury, if not death. Upon regaining consciousness, Defendant did not voice objection to the treatment he received, did not attempt to leave the hospital and actively participated in applications for financial

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<sup>1</sup> Pursuant to Ind. Trial Rule 52(D) these control the matters they address, but the general judgment controls as to any other issues.

assistance with the cost of treatment. Under these facts, the Plaintiff is entitled to recovery of a reasonable fee for the services provided. The only evidence as to a reasonable fee is that presented by Plaintiff.”

Accordingly, the court entered judgment for the plaintiff.

In this appeal Novak challenges the right to recovery based on the equitable doctrine of unjust enrichment or *quantum meruit*. No objection is raised concerning the value of the services rendered by the hospital or the amount of the award.

Novak’s first argument contends that the plaintiff had an adequate remedy at law and therefore equitable relief was inappropriate.

The complaint alleged that Novak had “entered into an agreement with the hospital for the medical services.” At trial the witness for the hospital testified that she believed consents had been signed; that this was standard procedure. No signed consents were offered in evidence, however, nor was any reason proffered as to why they were unavailable. Accordingly, recovery on the “agreement “ was barred by the statute of frauds, Ind. Code § 31-21-1-1(b)(6), which requires a writing signed by the person to be charged in an action to recover for medical care or treatment.<sup>2</sup> The result is that plaintiff failed to prove the remedy at law that it brought suit on.

Ignoring this consequence Novak argues that there was an adequate remedy at law because of the alleged agreement. The argument misperceives the nature of the axiom that equity will not intervene where there is an adequate remedy at law.

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<sup>2</sup> The general judgment covers this failure of proof.

The direct answer to Novak's argument is that the plaintiff failed to establish a remedy at law because it failed to establish a valid contract.

Thus, in *Town of New Ross v. Ferretti*, 815 N.E.2d 162, 168 (Ind. Ct. App. 2004) the court held, "Because there is a valid express contract for the construction of the fire station, Ferretti is precluded from recovering under the theory of quantum meruit." On the other hand, cases such as *King v. Terry*, 805 N.E.2d 397, 400 (Ind. Ct. App. 2004) note that the absence of a contractual relationship allows a claim in *quantum meruit*.

The argument could be taken as claiming that when the plaintiff sued on contract, it made an election of remedies that precluded reliance on equity. It is clear that under modern rules of practice no such election occurs. Thus, Ind. Trial Rule 8(E)(2) provides in pertinent part "A pleading may also state as many separate claims or defenses as the pleader has regardless of consistency and whether based on legal or equitable grounds."

Of course, the plaintiff did not plead counts of both law and equity, but T.R. 15(B) provides that when additional issues are tried by the express or implied consent of the parties, they are to be treated in all respects as if they had been raised in the pleadings. In other words, since the plaintiff could have pled counts in both contract and equity at the outset, it was perfectly proper to allow an amendment presenting the equitable claim.

Finally, Novak argues that plaintiff is not entitled to a judgment based upon equity because he did not expressly or impliedly request the medical services that were provided. He cites cases such as *Kelly v. Levandoski*, 825 N.E.2d 850, (Ind. Ct. App. 2005) and *Wright v. Pennamped*, 657 N.E.2d 1223,1230 (Ind. Ct. App. 1995) which state

the rule that recovery under quasi-contract requires the plaintiff to establish that the defendant impliedly or expressly requested the benefit that was conferred.

A more accurate version of the rule was set forth by the court in *Galloway v. Methodist Hospital*, 658 N.E.2d 611, 612 (Ind. Ct. App. 1995) when the court stated,

To recover on the basis of quasi-contract, the party seeking recovery must demonstrate that a benefit was rendered to the other party, under circumstances which equity demands compensation in order to prevent unjust enrichment. [citations omitted].

Novak points out, however, that the Galloways voluntarily went to the hospital's emergency room for care when Mrs. Galloway experienced toxemia and an emergency caesarian section had to be performed. He contends that *Galloway* should be distinguished because there the Galloways intentionally sought medical care, while he was unconscious when transported to the hospital. Thus, he went without his knowledge or consent. He contends that he neither expressly, nor impliedly, requested that the care be given so he should not be charged in equity.

In response the trial court found, correctly we believe, that Restatement (First) of Restitution (1937), §116 applied. That section provides,

A person who has supplied things or services to another, although acting without the other's knowledge or consent, is entitled to restitution therefore from the other if

- (a) he acted unofficiously and with intent to charge therefore, and
- (b) the things or services were necessary to prevent the other from suffering serious bodily harm or pain, and
- (c) the person supplying them had no reason to know that the other would not consent to receiving them, if mentally competent, and
- (d) it was impossible for the other to give consent or, because of extreme youth or mental impairment, the other's consent would have been immaterial.

In Kovak's case, as in *Galloway*, a benefit was rendered to Kovak to prevent serious bodily injury or death under circumstances where equity demands compensation in order to prevent unjust enrichment.

The trial court correctly so found.

Affirmed.

MAY, J., and CRONE, J., concur.