Allison MacKenzie et al
P.O. Box 646
Carson City, NV 89702

Case No. 99-01370A

Dept. No. I

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DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

CARSON-TAHOE HOSPITAL,
a county public hospital and
political subdivision of
Carson City, state of Nevada,

Plaintiff,

vs.

THOMAS MERRY, M.D.
individually,

Defendant.
_____/

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL ORDER**

This matter came before the Court for trial on March 10, 2000 and continued on March 13, 2000. Plaintiff was represented by Michael Pavlakis, Esq. and Defendant was represented by Michael K. Johnson, Esq. Following the presentation of evidence and arguments of counsel, the matter was submitted for decision.

I. FINDINGS OF FACT

CARSON-TAHOE HOSPITAL (HOSPITAL) loaned twenty-five thousand dollars ($25,000.00) to DR. MERRY in September 1996 for the purpose of helping DR. MERRY establish a full-time clinic or group practice with Mountain Meadows Medical Group (Mountain

Meadows) in Minden, Nevada at the Minden Medical Center. For several years prior to the time in question, DR. MERRY had been practicing in Minden. See Pl.'s Ex. 1, 2.

The Minden Medical Center was a new Minden-Gardnerville branch operation of CARSON-TAHOE HOSPITAL in Carson City. This facility, and one operated by Barton Memorial Hospital, were competitors in the Minden-Gardnerville area. The HOSPITAL was having difficulty filling all the available space in the new facility and needed to increase its occupancy.

After receiving the loan, DR. MERRY began and continued to practice with Mountain Meadows, a group that occupied a large amount of the Minden Medical Center. By late 1998, Mountain Meadows was experiencing severe financial difficulties and faced only two real options: either sell the practice, or file for bankruptcy protection. ProMedCo, a national health care provider, began making inquiries concerning the purchase of Mountain Meadows. The physicians practicing with Mountain Meadows started to examine the options available to them. At this time, Mountain Meadows owed considerable rent to Minden Medical Center and the group vacated the facility.

DR. MERRY, among others, entered into negotiations with ProMedCo. At the same time, he was approached by Dr. Basil Chryssos, a member of the HOSPITAL Board of Trustees. Dr. Chryssos suggested that DR. MERRY enter into an agreement with the HOSPITAL to help the HOSPITAL entice two prominent local physicians, Drs. Cottrell and Johnson, to move their practices into the Minden Medical Center. It was suggested that perhaps DR. MERRY could join them. The HOSPITAL wanted the doctors in

the Minden Medical Center because Drs. Cottrell and Johnson had a large, reputable family medical practice, which could encourage other specialists to move into the facility for the doctors' referral practice.

DR. MERRY testified that he subsequently met with Steve Smith, the CEO of the hospital, and Dr. Chryssos. His recollection of what transpired at that meetings, and subsequent meetings with other HOSPITAL personnel, was markedly different from the recollections of Steve Smith, Dr. Basil Chryssos, and the others.

Dr. Chryssos and Steve Smith expressed that the objective behind the negotiations was to have DR. MERRY recruit Drs. Cottrell, Johnson, and others to occupy space within the Minden Medical Center. In order to achieve this objective, the HOSPITAL and DR. MERRY agreed to have a proposed agreement drawn up which would guarantee a portion of DR. MERRY'S salary, and to submit it to the HOSPITAL Board of Trustees for consideration. The agreement was necessary because the HOSPITAL was also independently attempting to attract the two Doctors into the facility and did not want to be responsible for guaranteeing DR. MERRY'S salary without his assistance in recruiting those doctors. Therefore, the agreement, in the HOSPITAL'S point of view, provided that DR. MERRY was to use his best efforts to attract Drs. Cottrell and Johnson into Minden Medical Center and to assist in bringing other physicians into the facility.

When drawing up the agreement, legal counsel for the HOSPITAL was concerned about the possibility of Federal law violations by paying certain types of incentives to doctors.

Agreements between Hospitals and physicians have to be carefully formulated to avoid serious legal problems. As a result, two separate documents were drafted. See Pl.'s Ex. 9. One agreement contemplated DR. MERRY'S assistance in bringing the doctors into Minden Medical Center, with lease provisions and a possible salary guarantee for DR. MERRY if he joined the other two doctors. Id. The second agreement was a consulting agreement, whereby DR. MERRY would receive one hundred twenty-five thousand dollars ($125,000) over three years for consulting with the HOSPITAL in bringing other physicians to Minden Medical Center, as well as providing some seminars, training and representation. Id. From the HOSPITAL'S point of view, these agreements were intertwined. Hence, if DR. MERRY was not able to recruit Drs. Cottrell and Johnson, the HOSPITAL was not interested in any other performance by DR. MERRY.

On the other hand, DR. MERRY'S testimony is quite different. He believed that he had finalized negotiations with the HOSPITAL on February 15, 1999, and as a result, he and the HOSPITAL had formed two separate, distinct agreements. The first agreement afforded that he would attempt to engage the named doctors. The second was a consulting agreement, which obligated him to assist the HOSPITAL with other recruiting efforts in Minden, and provide some consulting services. For the second agreement, he was to receive the consulting fee.

DR. MERRY testified that when Mountain Meadows was selling to ProMedCo, ProMedCo offered him sixty thousand dollars ($60,000.00) as a signing bonus, a percentage of his accounts receivable, twenty-five thousand dollars ($25,000.00) a year for

management services, and his expected salary from his patient billings. DR. MERRY attested that he turned ProMedCo's offer down, but only because he had received a better offer from the HOSPITAL. In fact, DR. MERRY, a Reserve Naval Officer, testified that when he asked, "If I jump the ship I'm on (ProMedCo), will you (CARSON-TAHOE HOSPITAL) pick me up?", he was assured that would happen. From February 15, 1999 until the Board of Trustees meeting on March 25, 1999, DR. MERRY was involved in discussions with various members of the HOSPITAL administration over the agreements.

The Board of Trustees met on March 25, 1999. As a result of that meeting, minutes were generated. See Pl.'s Ex. 10. These minutes contained a set of conditions which the Board of Trustees imposed upon the proposed agreement between the HOSPITAL and DR. MERRY. See Pl.'s Ex. 10 at 13. DR. MERRY testified, and his counsel asserted, that the conditions prescribed at the meeting and contained within the written minutes, constituted the contract, and that, ultimately, DR. MERRY had fulfilled all of the conditions of the contract.

Counsel for the HOSPITAL introduced the tapes of that meeting, and played the actual discussion between the Trustees and DR. MERRY, as well as the motions made and approved. It was very apparent from listening to the tape, and reading the minutes, that the Trustees were examining two proposed contracts with DR. MERRY, as well as some other agreements. Clearly, the Trustees were imposing the conditions in the minutes, in addition to the provisions already included in the proposed contracts.

At the meeting, the HOSPITAL Trustees essentially approved

the idea of hiring DR. MERRY as a consultant, and paying him one hundred twenty-five thousand dollars ($125,000.00) over three years with an initial payment of thirty-three thousand dollars ($33,333.00). They also approved the other agreement regarding DR. MERRY associating with the other Doctors and renting space Minden Medical Center. However, it was clear that the Board's final approval would not be forthcoming until DR. MERRY paid back his previous loan to the HOSPITAL. Apparently, he was delinquent. The negotiations and the meeting of March 25, 1999 also reveal that it was only after the Trustees gave final approval that the written contracts would be executed.

The next day DR. MERRY appeared at the office of Steve Smith. Steve Smith had issued a check in the amount of thirty-three thousand dollars ($33,000.00) to DR. MERRY. Steve Smith testified that shortly after he issued the check, he realized he had done so erroneously, since the contracts were neither finally approved, nor executed. Steve Smith further attested that he immediately called DR. MERRY and informed him of the error. According to Steve Smith's testimony, initially DR. MERRY realized that the check was issued too soon and accepted the Hospital's position, but later declined to return the money.

Very shortly after the check was issued, it became apparent to the hospital that DR. MERRY was not going to be able to bring the other doctors into Minden Medical Center with himself. The 7,000 square feet they had anticipated being able to lease to the doctors would remain substantially vacant. When both parties realized the other doctors were not coming, they tried to find other available physicians to rent space in Minden Medical

Center. This was unavailing, and over the next several months it became clear that the HOSPITAL'S major purpose in contracting with DR. MERRY would not be able to be realized.

It is also clear that DR. MERRY, for a brief period of time not exceeding four weeks, began performing some of the conditions of the contract. He attempted to recruit the desired doctors. When he was unable to do so, he actively sought to recruit other doctors who might be willing to re-locate their practice to the Minden Medical Center. He made himself available to conduct whatever seminars and training the HOSPITAL wanted him to do, but the HOSPITAL did not assign him any such duties. It had become clear to the HOSPITAL that DR. MERRY could not complete the conditions necessary for approval of both agreements by bringing in the other doctors. The proposed contracts were never finally approved by the Trustees or executed by the parties. Subsequently, the HOSPITAL clearly informed DR. MERRY that they did not consider the parties to have a contract.

Thereafter, DR. MERRY did not move his practice into the Minden Medical Center. Instead he leased premises from Barton Memorial Hospital in their facility in the Gardnerville-Minden area. He also started appearing in advertisements promoting Barton Memorial Hospital and their local facility.

Early on, the HOSPITAL asked DR. MERRY to return the money. They asserted the check was issued by mistake because the contracts were not finalized and Steve Smith was without authority to issue the check in the absence of the Trustees' final approval. DR. MERRY refused to return the money, and this suit followed.

II. CONCLUSIONS OF LAW

A. CONTRACT FORMATION

One of the cornerstone principles of contract law is that mutual assent creates contracts. D'Angelo v. Gardner, 107 Nev. 704, 743 (1991). "A contract is founded upon the meeting of the minds of the parties as to ascertainable terms." Back Streets, Inc. v. Campbell, 95 Nev. 651, 652 (1979)(citing Smith v. Recrion Corp., 91 Nev. 666 (1975)). If the parties do not mutually assent to material terms of a proposed agreement, there has been no meeting of the minds and a binding contract cannot exist. See Roth v. Scott, 112 Nev. 1078, 1083 (1996)(Even though each party had intent to enter into binding arbitration agreement, when no written agreement signed by the parties could be produced containing the essential conditions each party asserted were included, there was no mutual assent); Tropicana Hotel Corp. v. Speer, 101 Nev. 40, 42 (1985)(Where parties did not agree on terms of stock transfer, there was no meeting of the minds and hence, no contract).

It is very apparent from the evidence that there was no mutually binding agreement between the parties. DR. MERRY testified that he believed the contract was a consulting agreement which only contained the conditions explained in the minutes of the Board meeting. However, it is very clear that what the Trustees were considering as the contract between the parties was the proposed agreements they were examining at the meeting, and the conditions they had imposed on those contracts

at the meeting. See. Pl.'s Ex. 9, 10.

The two proposed contracts contain significant language which explains the rights and obligations of each of the parties. For example, the proposed consulting agreement requires DR. MERRY to rent space in the Minden Medical Center. It contains a number of terms that DR. MERRY must complete. The other proposed agreement requires DR. MERRY to bring the named Doctors into the Minden Medical Center. It is also apparent from the meeting tapes that the HOSPITAL considered both of those agreements as a combined matter, and the HOSPITAL was not interested in performance of only one of the contracts separately.

Plainly, there was no mutual assent sufficient to form a contract and bind both parties. Neither side actually agreed to the material terms of the contract. In the absence of such agreement, the Court specifically finds that there was not a valid agreement between the parties.

Although it is asserted by DR. MERRY that he had an oral contract which was memorialized by the minutes of the meeting, "where the circumstances indicate that a particular manner of contract formation is contemplated by the parties, a binding contract is not formed in the absence of compliance with the contemplated procedure." Jim L. Shetakis Distributing Co., Inc. v. Centel Communications Company, 104 Nev. 258, 261 (1988)(When both parties contemplated manner of contract formation which required execution by customer, no contract was formed when agent of customer did not sign sales agreement). In fact in order for a binding contract to exist under circumstances when negotiations are not yet completed in the contemplated manner, there must

clear and convincing evidence, which is not subject to any other reasonable interpretation, that the parties intended to be *presently* bound. Id.; see also Dolge v. Masek, 70 Nev. 314, 319 (1954).

Although DR. MERRY testified that he thought the parties had a binding contract as early as February 15, 1999, he was well aware that the HOSPITAL could not take any formal action without final approval by the Board of Trustees, and a written agreement, in conformity with federal and state law, signed by the parties. DR. MERRY also knew that any action taken by the HOSPITAL without a public meeting would violate the open meeting law. See NRS 241.020. Plainly, there exists no evidence that the HOSPITAL intended to be presently bound at any point in time prior to the actual execution of the written contracts, finally approved by the Trustees. Therefore, DR. MERRY is unable to assert that an oral agreement was reached by the parties without the contemplated written agreements and final approval of the HOSPITAL Board of Trustees.

The HOSPITAL had raised a Statute of Frauds defense to DR. MERRY'S argument that the parties had formed an oral contract. Although the Statute of Frauds would be specifically applicable to the proposed service contracts, it does not operate as a defense in this case because this Court has found that neither written nor oral contract was actually formed between the parties. Not only did the parties intend on culminating the negotiations with written agreements, but there in fact existed no mutual assent to the material terms of the proposed agreements.

B. ESTOPPEL

"The doctrine of 'equitable estoppel operates to prevent a party from asserting legal rights that, in equity and good conscience, they should not be allowed to assert because of their conduct.'" NGA #2 Limited Liability Co. v. Rains, 113 Nev. 1151, 1159 (1997)(quoting Nevada State Bank v. Jamison Partnership, 106 Nev. 792, 799 (1990)). The Defendant contends he is entitled to keep the money advanced on equitable estoppel. He claimed that the HOSPITAL was estopped to deny the existence of the contract because he relied upon their representations concerning the contract, materially changed his position, and lost the opportunity to pursue other options. Therefore, according to DR. MERRY, equity requires that the HOSPITAL be responsible for the injuries he has suffered.

However, DR. MERRY'S equitable estoppel position is not legally supportable. The elements of equitable estoppel are as follows:

> (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped.

Rains, 113 Nev. at 1160; Cheqer, Inc. v. Painters & Decorators, 98 Nev. 609, 614 (1982). Furthermore, it must be demonstrated that the reliance was reasonable. Great American Ins. Co. v. General Builders, Inc., 113 Nev. 346, 352 (1997)(Reasonable reliance is necessary element of equitable estoppel).

As stated earlier, it is clear before any contract could be reached with the HOSPITAL, the Board of Trustees would have to approve the agreement. The facts establish that DR. MERRY, and everyone involved, were aware that only the Board of Trustees could enter into a valid, binding contract on behalf of the Hospital. The HOSPITAL never made any false or misleading statements to DR. MERRY. Although the erroneously issued check might have led DR. MERRY to believe the HOSPITAL thought there was an agreement, he was quickly apprised of the mistaken issuance of the check. Therefore, even assuming that DR. MERRY was not apprised of the facts, the question becomes whether or not DR. MERRY reasonably relied on the representations of a member of the Board of Trustees and the Chief Executive Officer to his detriment.

First, under Nevada law, the approval of any agreement for employment by a public body has to be made in an open meeting. NRS 241.020. Any contract executed in violation of the open meeting law is invalid. Second, DR. MERRY claimed that he was told that the Board of Trustees had been polled, and all, except one, would agree to the contract. Steve Smith stated he did not make such a statement. The Court finds that the evidence favors Mr. Smith's testimony. As the evidence shows, DR. MERRY did not, and legally could not, rely on anything other than the action of the Board of Trustees. Everything else was only negotiations.

Nor could DR. MERRY rely on statements made by Steve Smith or Dr. Chryssos as binding the HOSPITAL as its authorized agents. Neither Steve Smith nor Dr. Chryssos is vested with the actual authority to enter into a binding contract for the HOSPITAL

without the Board of Trustees' approval. Not only did they not have the actual authority, but apparent authority cannot be shown to exist.

"A party claiming apparent authority of an agent as a basis for contract formation must prove (1) that he subjectively believed that the agent had authority to act for the principal and (2) that his subjective belief in the agent's authority was objectively reasonable." Great American Insurance Co. v. General Builders, Inc., 113 Nev. 346, 352 (1997). It is clear from the evidence that the limitations of authority of Dr. Chryssos and Steve Smith were apparent to Dr. Merry. Even if he subjectively believed they could act as the HOSPITAL'S authorized agents, his belief was not objectively reasonable. A reasonable person in DR. MERRY'S position, would not have believed that either Steve Smith or Dr. Chryssos, a single Board member, had the authority to bind the HOSPITAL to the contract. Not only would that be a violation of the open meeting law, but the action would be taken without the approval of the rest of the Board of Trustees.

Moreover, it is clear that very early on after the payment was made, Dr. Merry not only ceased performance, but he also engaged in actions contrary to the best interest of the Hospital. When he did not move into Minden Medical Center, he started advertising for the HOSPITAL'S competitor, Barton Memorial Hospital. At that point, he very clearly ended any expectation he might have had concerning a continued relationship with the HOSPITAL, or any entitlement to funds.

"In seeking equity, a party is required to do equity." Overhead Door Company of Reno, Inc. v. Overhead Door Corp., 103

Nev. 126, 127-28 (1987)(Would be inequitable to require discontinuation of use of plaintiff's trademark name on all materials used by defendant, while at same time leaving defendant with $30,000.00 worth of material with plaintiff's name that may not be used). Dr. Merry cannot expect the HOSPITAL to pay him to assist it's main competitor in the Minden-Gardnerville area. Equity does not allow him to claim the benefits of a contract, act against the interest of that contract, and then expect payment.

C. RECOVERY IN QUANTUM MERUIT

The question remains whether DR. MERRY is entitled to keep a portion of the payment made by Carson-Tahoe to him because of the services he performed under the perceived contract. This matter was not addressed by the parties in the legal context in which it seems exists in this case.

Recovery in *quantum meruit* is based on the theory that "a party has received from another a benefit which unjust for him to retain without paying for it." Thompson v. Herrmann, 91 Nev. 63, 68 (1975). Generally, if no express contract exists between the parties and one party renders services with the other's knowledge and acquiescence, it is appropriate to imply a promise to pay the reasonable value of those services. Bangle v. Holland Realty Investment Co., 80 Nev. 331, 336 (1964)(Where no express contract existed, real estate broker was entitled to reasonable commission for sale of 28 homes, for which owner stipulated broker was responsible).

The evidence is clear that no contract existed between the parties at the time the HOSPITAL mistakenly paid DR. MERRY the $33,000.00 check. But, it is also clear that DR. MERRY, for a brief period of time, not exceeding four weeks, began performing some of the conditions of the contract with the HOSPITAL'S knowledge. He attempted to recruit the desired doctors. When he was unable to do so, he actively sought to recruit other doctors who would be willing to locate in the Minden Medical Center. Also, DR. MERRY made himself available to conduct whatever seminars and training the HOSPITAL would assign him.

The HOSPITAL was aware of DR. MERRY'S efforts. In fact, by May 17, 1999, it became clear to the HOSPITAL that DR. MERRY could not complete the terms of both of the agreements. DR. MERRY was clearly informed by the HOSPITAL that they did not consider there was a contract between the parties. From that time forward, DR. MERRY did not have a legitimate expectation of payment for services.

It is the Court's opinion that Dr. Merry is entitled to compensation under the anticipated contract for the amount of time he worked before notification that the Hospital was not contractually bound. There is an implied promise to pay him the reasonable value of his services during that time. Hence, he is entitled to keep one month of the agreed compensation, or two thousand seven hundred fifty dollars ($2,750.00).

However, the remainder is being unjustly retained and must be returned to the HOSPITAL. The amount to be paid back to the HOSPITAL is thirty thousand two hundred fifty dollars ($30,250.00) with interest at the statutory rate, accruing from

the date the complaint was filed, October 6, 1999. See NRS 17.130.

III. CONCLUSION

In summary, this Court specifically finds that there existed no mutual assent upon which to base the contract. The parties could not reach a meeting of the minds as to the material terms of the agreements, and hence, no contract was formed, either orally or in writing.

Furthermore, even if the parties had agreed to the terms of the contract, a written contract, approved by the Board of Trustees, was not executed by the parties. The evidence clearly demonstrates that a written contract, approved by the Board, was the only method of formation contemplated by the parties. Therefore, an oral agreement could not have been formed between the parties because they only contemplated a written agreement, and the HOSPITAL expressed no intent to be presently bound by any oral representations.

It was argued that the HOSPITAL should be estopped from denying the existence of the contract. But the requisite elements of equitable estoppel could not be established by DR. MERRY. Not only was he well aware of the true facts, but he is unable to show reasonable reliance upon a representation of the HOSPITAL. Therefore, DR. MERRY is not entitled to retain the mistakenly issued funds at law or equity. He must pay the HOSPITAL thirty thousand two hundred fifty dollars ($30,250.00) with interest at the statutory rate, accruing from the date of

the complaint.

However, DR. MERRY did perform some services for the HOSPITAL. In the absence of a contract between the parties, DR. MERRY is entitled to recovery in *quantum meruit* for the value of his services in the amount of two thousand seven hundred fifty dollars ($2,750.00).

IV. FINAL ORDER

THEREFORE, good cause appearing;

IT IS HEREBY ORDERED that DR. MERRY is to pay CARSON-TAHOE HOSPITAL thirty thousand two hundred fifty dollars ($30,250.00) with interest at the statutory rate, accruing from the date of the complaint.

IT IS SO ORDERED.

DATED this 30 day of March, 2000.

Michael R. Griffin

MICHAEL R. GRIFFIN
DISTRICT JUDGE

cc: Michael Pavlakis, Esq.
Michael K. Johnson, Esq.

REQUESTED BY
Allison MacKenzie ef
IN OFFICIAL RECORDS OF
DOUGLAS CO., NEVADA

2000 MAY 10 AM 9:37

LINDA SLATER
RECORDER

$23.00 PAID K2 DEPUTY

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CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my offices.

Date: May 8, 2000

ALAN GLOVER, City Clerk and Clerk of the First Judicial District Court and the State of Nevada, in and for Carson City

SEAL

By Penny Deputy