STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY GRANT and SUSAN GRANT,

Plaintiffs-Appellants,

v

MICHAEL G. PANKOFF,

Defendant/Cross-Plaintiff/
Cross-Appellant

and

DANNY OGLE, d/b/a LAKESIDE TOWING,

Defendant/Cross-Defendant/
Appellee/Cross-Appellee.

UNPUBLISHED
April 11, 1997

No. 184621
Oakland Circuit Court
LC No. 93-447133-NO

Before: Marilyn Kelly, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition to defendant Danny Ogle regarding plaintiffs' negligence claim. Defendant/cross-plaintiff Michael G. Pankoff cross-appeals as of right, challenging two orders granting summary disposition to defendant Ogle regarding Pankoff's indemnification claims. We affirm in part and reverse in part.

I

This case arises out of an accident that occurred on December 31, 1990. Two cars were involved in an accident in White Lake Township. Plaintiff [1] was not employed by Ogle, the owner of a towing company. Rather, plaintiff was employed by another towing company, Lakeside Sunoco. Plaintiff and another of Ogle's drivers were dispatched to the accident. The other driver hooked up one

---

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

of the cars involved in the accident and towed it from the area. Plaintiff towed the other car to the side of the road and began to clear the road of debris. As he was in the process of cleaning the road, plaintiff was hit by another car and seriously injured. Pankoff was a police officer who had also been dispatched to the car accident.

In their amended complaint filed against Pankoff, plaintiffs alleged that Pankoff was grossly negligent in failing to divert traffic from the site of the clean-up, or in failing to use warning flares or other lights to protect plaintiff. Ultimately, plaintiffs settled their claim with Pankoff for $60,000 in February 1994. After filing suit against Pankoff, plaintiffs were permitted to add Ogle as a defendant. The basis of the claim against Ogle was a contract between Ogle and White Lake Township concerning towing services. Specifically, plaintiffs alleged Ogle was negligent in failing to initiate, maintain, and supervise safety precautions at the accident site, and left the site before the area was secured and safe. Pankoff then filed a cross-claim against Ogle for indemnification.

Ogle filed a motion for summary disposition regarding plaintiffs' claims pursuant to MCR 2.116(C)(8) and (10). Immediately thereafter, Pankoff filed a motion for summary disposition regarding his claims against Ogle pursuant to MCR 2.116(C)(7), (9), and (10). The trial court granted Ogle's motion for summary disposition regarding plaintiffs' claims, ruling that Ogle's employees were not in control of the towing site and that no special relationship existed between the parties giving rise to a duty on Ogle's part to protect Grant from the negligence of third parties. The trial court later granted summary disposition in favor of Ogle with respect to Pankoff's indemnification claims.

In the appeal, plaintiffs raise two issues. They claim that the trial court erred in granting summary disposition in favor of Ogle because Ogle owed plaintiff a duty to protect him from harm by third persons. In the cross-appeal, Pankoff raises three issues. Pankoff argues that he is entitled to common-law and contractual indemnification, and that he established his claim for breach of contract because he was an intended third-party beneficiary of Ogle's contract with White Lake Township.

II

Plaintiffs argue that the trial court erred in determining that, as a matter of law, Ogle owed no duty to plaintiff. The trial court granted summary disposition in favor of Ogle, ruling that he owed no duty to plaintiff as a matter of law[2]. We review a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(8) de novo. *Garvelink v Detroit News*, 206 Mich App 604, 607; 522 NW2d 883 (1994). MCR 2.116(C)(8) permits summary disposition in favor of a defendant when the plaintiff has failed to state a claim upon which relief can be granted. *Id.* A motion pursuant to MCR 2.116(C)(8), therefore, determines whether the plaintiff's pleadings allege a prima facie case. *Id.* Only the pleadings may be considered when the motion is based on MCR 2.116(C)(8). MCR 2.116(G)(5). A court may grant a motion under subrule (C)(8) only where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Garvelink, supra,* p 608.

Plaintiffs' claim is premised on the contract between Ogle and White Lake Township. The contract provides in relevant part:

> The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the work. He shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to (1) all employees on the work and other persons who may be affected thereby, ...

It is plaintiffs' contention that this contractual provision created a duty on behalf of Ogle to protect plaintiff. Although it is undisputed that plaintiff is not, and never has been, an employee of Ogle's (i.e. Lakeside Towing), we find that the contractual language is so broad that it does impose a duty on Ogle to protect plaintiff.

Because the contract states that Ogle was to "take all reasonable precautions for the safety of" and "provide all reasonable protection to . . . other persons who may be affected [on the work]," the contract imposed a duty on Ogle to take reasonable care regarding plaintiff's safety. Plaintiff was another person who was affected by the work (towing cars involved in an accident for the township). Such a duty of care may properly arise under a contract. *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967) (the duty of care may arise out of a contractual relationship, "the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract"); see also *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 707-708; 532 NW2d 186 (1995).

Ogle's argument that he must have been in a position of control over the situation at the accident scene in order for him to have a legal duty to protect Grant is inapposite, because this argument is based upon case law imposing a legal duty of due care based on social policy considerations and a special relationship of control between the parties, *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499-500; 418 NW2d 381 (1988), not the law surrounding Ogle's contract, which presents a separate and distinct theory of tort liability. *Osman, supra*, pp 707-710.

Accordingly, we find that the trial court erred in ruling that Ogle did not owe plaintiff a duty as a matter of law and we reverse the grant of summary disposition in favor of Ogle pursuant to MCR 2.116(C)(8) in this regard. We emphasize that there is nothing to preclude Ogle from raising a motion for summary disposition pursuant to MCR 2.116(C)(10) on the issue whether plaintiffs have alleged facts sufficient to show that Ogle was actually negligent, this issue not being raised below or on appeal.

III

In the cross-appeal, Pankoff first argues that the trial court erred in granting Ogle summary disposition regarding Pankoff's common law and implied contractual indemnification claims.

Our Supreme Court has held that an action for indemnification can be maintained only on the basis of an express contract, or in the case of common-law or implied contractual indemnification, by a

party who is free from negligence or fault. *Williams v Litton Systems, Inc*, 433 Mich 755, 760; 449 NW2d 669 (1989). Further, where the complaint in the underlying action does not contain allegations of derivative or vicarious liability, a claim of implied indemnification is precluded. *Employers Mutual Casualty Co v Petroleum Equipment, Inc,* 190 Mich App 57, 65-66; 475 NW2d 418 (1991).

Plaintiffs did not allege that Ogle was free from negligence and plaintiffs' complaint in the underlying action alleges active negligence on the part of Pankoff as well. As a matter of law, Pankoff was therefore not entitled to common law or implied contractual indemnity. *Id.; Universal Gym Equipment, Inc v Vic Tanny Int'l, Inc*, 207 Mich App 364, 372; 526 NW2d 5 (1994), vacated in part on other grounds on rehearing 209 Mich App 511; 531 NW2d 719 (1995). Accordingly, the trial court did not err in granting summary disposition in favor of Ogle with regard to Pankoff's claims of common-law and implied contractual indemnification.

IV

Pankoff next argues that the trial court erred in granting summary disposition in favor of Ogle regarding Pankoff's express contractual indemnification claim.

Where an indemnity contract is clear and unambiguous, its interpretation is a question of law for the trial court to decide. *Walbridge Aldinger Co v Walcon Corp,* 207 Mich App 566, 572; 525 NW2d 489 (1994). On the other hand, where the indemnity agreement is unclear or ambiguous, the intent of the parties is to be determined by a trier of fact. *Sherman v DeMaria Bldg Co*, 203 Mich App 593, 596; 513 NW2d 187 (1994). Further, indemnity contracts are to be construed in accordance with the rules for the construction of contracts in general. *Triple E Produce Corp v Mastronardi Produce, Ltd,* 209 Mich App 165, 172; 530 NW2d 772 (1995). Indemnity contracts should be construed to effectuate the intent of the parties, which may be determined by considering the language of the contract, the situation of the parties, and the circumstances surrounding the making of the contract. *Id.* An indemnity contract will be construed strictly against the party who drafts the contract and the party who was the indemnitee. *Id.*

The indemnification clause in the contract provides:

> The Contractor shall indemnify the Township and its agents and employees from and against all claims, damages, losses, and expenses including attorney's fees arising out of or resulting from the performance of the work such as, but not limited to, damage to, theft from, or misuse of any vehicle, during the transporting or while in the custody of the Contractor.

This contractual language is so broad and ambiguous that we must conclude that a trier of fact will have to ascertain the intent of the parties. Since the indemnification is to include *all* claims arising out of or resulting from the performance of work *such as, but not limited to* damage, theft, or misuse of any vehicles, the above contractual language is broad enough to possibly include a claim relating to personal injury resulting from the work of clearing an accident site. However, because the language is unclear, we believe that there is a question of fact for the trier of fact to determine the intent of the parties.

Whether Ogle intended to indemnify Pankoff, an employee of the township, under these circumstances, will have to be determined by a trier of fact in considering the language of the contract, the situation of the parties, and the circumstances surrounding the making of the contract.

Accordingly, we find that the trial court erred in granting Ogle summary disposition with respect to Pankoff's claim of express contractual indemnification. Given the broad and unclear language in the contract, a trier of fact must resolve the intent of the parties regarding indemnification.

V

Pankoff last argues that the trial court erred in granting summary disposition in favor of Ogle regarding Pankoff's claim that he was an intended third-party beneficiary of an insurance clause in the contract between Ogle and White Lake Township. That clause provides in relevant part:

> The Contractor shall purchase and maintain such insurance as will protect him from claims under Workmen's Compensation Acts and other employee benefit acts, from claims for damages because of bodily injury, including death, and from claims for damages to property which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by himself or by any Subcontractor or anyone directly or indirectly employed by any of them.

We fail to see how this provision can be the basis of a breach of contract claim by Pankoff as against Ogle. The clause merely requires that Ogle is to purchase and maintain worker's compensation and other employee benefits insurance, and for claims for bodily injury or property damage arising out of operations under the contract.

The trial court properly ruled that Pankoff is not a third-party beneficiary and could not maintain a claim for breach of contract. While Pankoff is an employee of White Lake Township, Pankoff is nowhere mentioned in the contract as a person for whose benefit insurance would be obtained, nor is there any other indication that he was an intended third-party beneficiary of the agreement to insure White Lake Township. Therefore, viewing the contract language objectively, as a matter of law Pankoff was not a third-party intended beneficiary of the insurance clause in Ogle's contract. *Paul v Bogle*, 193 Mich App 479, 491-492; 484 NW2d 728 (1992). Pankoff's argument based on *Cenovski, Inc v Michigan Mutual Ins Co*, 200 Mich App 725, 729; 504 NW2d 722 (1993), is inapposite because, in the instant case, unlike *Cenovski*, the insurance contract specifically states which party's losses the insurance is to cover.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Marilyn Kelly
/s/ Kathleen Jansen
/s/ Meyer Warshawsky

[1] Because Susan Grant's claims in this case are wholly derivative, the use of "plaintiff" in this opinion will refer solely to Jeffrey Grant.

[2] There is some question whether the trial court granted summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) or MCR 2.116(C)(10) (no genuine issue regarding any material fact and moving party entitled to judgment as a matter of law). The trial court specifically found that Ogle owed no duty to plaintiff. Whether a defendant owes any duty to a plaintiff to avoid negligent conduct is a question of law for the court to determine. *Simko v Blake*, 448 Mich 648, 655; 532 NW2 842 (1995). Where no legal duty exists, the plaintiff has failed to state a claim upon which relief can be granted and summary disposition in favor of the defendant is appropriate under MCR 2.116(C)(8). *Schmidt v Youngs*, 215 Mich App 222, 224-225; 544 NW2d 743 (1996). Therefore, because the trial court ruled that Ogle owed no duty as a matter of law, we consider this issue under MCR 2.116(C)(8).