

STATE OF MICHIGAN
COURT OF APPEALS

JOHN W. UNGER, Court-Appointed Receiver for
STEVEN CHARLES KEHRER,

UNPUBLISHED
May 26, 2005

Plaintiff-Appellant,

V

No. 252967
Charlevoix Circuit Court
LC No. 03-174719-CK

BOYNE CITY SCHOOL DISTRICT and BOYNE
CITY BOARD OF EDUCATION,

Defendants-Appellees.

Before: Murray, P.J. and O’Connell and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the lower court’s order denying the receiver’s claim for indemnification and granting summary disposition to defendants pursuant to MCR 2.116(C)(10).¹ Because Steven Kehrer’s actions in molesting a fifteen-year-old child were neither performed in his capacity as a liaison officer, nor were performed in the course or scope of his employment with defendants, we affirm.

Plaintiff first argues that the trial court erred by considering defendants’ motion for summary disposition under MCR 2.116(C)(10) as opposed to analyzing it under MCR 2.116(C)(8). Because this issue was not raised below, our review is only for plain error affecting plaintiff’s substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838

¹ Unger, the receiver, was appointed for the judgment creditor, Megan Woods, to attempt to enforce a claim of indemnity claimed by debtor, Kehrer, against defendants. Counsel for the receiver was also counsel for Woods in other civil claims as well as the drafter of Kehrer’s unsatisfied judgment. Kehrer approved and admitted in the unsatisfied judgment that, “[his] actions against Woods were intentional and willful and carried out with malicious intent; and were done maliciously and committed without just cause or excuse knowing that substantial harm would result.” Woods settled a separate civil action against defendants. Kehrer was additionally convicted of criminal sexual conduct, 4th degree, MCL 750.520e, arising from his actions with Woods.

(2000). Plaintiff's argument relies primarily on *First Public Corp v Parfet*, 468 Mich 101; 68 NW2d 477 (2003), in which our Supreme Court held that Michigan law does not recognize a "joint enterprise" as a "distinct commercial business relationship." *Id.* at 105. Contrary to plaintiff's assertions, nothing in *First Public Corp* reasonably supports plaintiff's argument.

Also, the apparent premise of plaintiff's argument, that a trial court may not resolve an issue of law in connection with interpreting a contract through application of MCR 2.116(C)(10), is incorrect. In evaluating a motion for summary disposition under MCR 2.116(C)(10), a trial court considers whether "the proffered evidence fails to establish a genuine issue regarding any material fact, [so that] the moving party is entitled to judgment as a matter of law." *Nastal v Henderson & Associates Investigations, Inc*, 471 Mich 712, 721; 691 NW2d 1 (2005). It is inherent in determining whether a party is entitled to judgment as a matter of law under this standard that a trial court may determine issues of law in deciding whether to grant summary disposition under MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint" with the trial court being expected to "consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Nastal, supra* at 721. In contrast, in deciding whether to grant a motion for summary disposition under MCR 2.116(C)(8), a trial court considers only "the legal sufficiency of the complaint" with "[a]ll well-pleaded factual allegations [being] accepted as true." *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004), quoting *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A review of the record revealed that defendants' motion for summary disposition relied on documentary evidence beyond the pleadings. As such, the trial court appropriately considered the motion under MCR 2.116(C)(10) rather than under subrule (C)(8). Plaintiff has not demonstrated plain error.

Plaintiff next argues that the trial court erred by granting summary disposition in favor of defendants in part on the ground that they had no contractual duty to defend Kehrer with regard to the underlying litigation. We review the trial court's grant of summary disposition de novo. *Nastal, supra* at 720. Further, the proper interpretation of a contract is a question of law that is reviewed de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

The relevant contractual language required defendants to defend Kehrer in a legal action brought against him "in his capacity as Liaison Officer for the district" and to hold him harmless or adequately insure him against all liability resulting from performance "in the course and scope of his employment as Liaison Officer." The conduct alleged in the underlying criminal and civil cases against Kehrer consisted of allegations of conduct by Kehrer involving his sexual molestation of Woods and related intentional misconduct. Such conduct cannot reasonably be considered to have occurred in Kehrer's capacity as a liaison officer or to have been in the course or scope of that employment. Thus, by the plain language of the contract, defendants had no obligation to defend Kehrer in the underlying criminal and civil litigation. See *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 590; 683 NW2d 233 (2004) ("Under ordinary contract principles, contract language should be given its ordinary and plain meaning.").

Plaintiff similarly argues that the trial court erred by holding that defendants had no obligation to provide liability insurance coverage to Kehrer with regard to the allegations in the underlying litigation. However, the relevant contractual provision required defendants to provide liability coverage with regard to Kehrer's "functioning as Liaison Officer." Since the

allegations in the underlying litigation were not part of his functioning as a liaison officer, defendants had no contractual obligation to provide liability insurance to Kehrer that would have provided coverage against such allegations. *Lawsuit Financial, LLC, supra* at 590.

Alternatively, plaintiff argues that defendants were liable to provide indemnification for him under a vicarious liability theory. Because this issue was not raised below, our review is only for plain error affecting plaintiff's substantial rights. *Kern, supra* at 336. We conclude there was no error, plain or otherwise because the doctrine of vicarious liability is inapplicable. In effect, plaintiff argues that defendants were required to indemnify Kehrer with regard to his own alleged tortious conduct toward Woods under the doctrine of vicarious liability. But, to the contrary, the law allows a party that is only subject to vicarious liability to recover indemnity from the person who is actively negligent. *St. Luke's Hospital v Giertz*, 458 Mich 448, 454; 581 NW2d 665 (1998). To illustrate, if hypothetically Woods had sued defendants based on Kehrer's tortious conduct under a theory of vicarious liability related to defendants' employment of Kehrer and obtained a recovery, then defendants would have had a claim against Kehrer to recover from him the amount they were required to pay Woods. It follows that Kehrer, as the party who was held directly responsible for tortious conduct against Woods in the underlying litigation, has no right to hold defendants liable for his own actively tortious conduct under the doctrine of vicarious liability. See also *Rogers v J.B. Hunt Transport, Inc*, 466 Mich 645, 652; 649 NW2d 23 (2002) ("a master's liability is derivative of the servant's").

Finally, plaintiff argues that the trial court erred by concluding that public policy precludes defendants from being held liable to provide indemnification to Kehrer under the contractual indemnification provisions at issue. In light of our conclusion that defendants had no obligation to provide indemnification under the plain language of the relevant contractual provisions, we need not reach this issue.

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Pat M. Donofrio