

STATE OF MICHIGAN
COURT OF APPEALS

SHARON BROOKS, Personal Representative of
the Estate of DOMINIQUE WADE, Deceased,

Plaintiff-Appellant,

v

STARR COMMONWEALTH,

Defendant/Cross-Defendant-
Appellee,

and

BRIDGEWAY SERVICES, L.L.C.,

Defendant/Cross-Plaintiff-Appellee.

UNPUBLISHED
May 28, 2009

No. 277469
Oakland Circuit Court
LC No. 2005-065114-NO

SHARON BROOKS, Personal Representative of
the Estate of DOMINIQUE WADE, Deceased,

Plaintiff,

v

STARR COMMONWEALTH,

Defendant/Cross-Defendant-
Appellee,

and

BRIDGEWAY SERVICES, L.L.C.,

Defendant/Cross-Plaintiff-Appellant.

No. 277539
Oakland Circuit Court
LC No. 2005-065114-NO

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiff Sharon Brooks filed this wrongful death action against defendants Starr Commonwealth (“Starr”) and Bridgeway Services, L.L.C. (“Bridgeway”). Bridgeway filed a cross-claim against Starr for indemnification. In Docket No. 277469, plaintiff appeals as of right, challenging the trial court’s order granting Starr’s motion for summary disposition pursuant to MCR 2.116(C)(10).¹ In Docket No. 277539, Bridgeway appeals as of right, challenging the trial court’s order granting Starr’s motion for summary disposition of Bridgeway’s cross-complaint. We affirm in part and reverse in part.

I. Facts

This case arises out of the murder of Dominique Wade by Michael Kirksey on September 12, 2002. Kirksey was 16 years old at the time. He committed the offense after escaping on September 1, 2002, from Starr’s residential program for adjudicated juvenile offenders in Albion, Michigan. Starr’s facility is a medium security facility, which means that it is not locked and does not have a secured perimeter. Bridgeway has a contract with Wayne County for the “clinical treatment and risk management” of adjudicated juveniles under the county’s supervision. Starr and Bridgeway have a contract under which Starr agrees to accept offenders assigned by Bridgeway for participation in its program, which is a program in compliance with the Bridgeway-Wayne County contract.

Before being assigned to Starr, Kirksey had a significant criminal history and a history of escape from juvenile facilities. In July 2002, a juvenile court ordered that Kirksey be placed in a medium security facility. On July 10, 2002, Kirksey was placed at Starr. Kirksey escaped from Starr on July 10, July 30, and August 28, 2002, despite bed checks every 15 minutes. After his last escape, Bridgeway decided to place Kirksey in a more secure facility. But before Kirksey was reassigned, he escaped again on September 1, 2002, at 10:38 p.m., with three other residents. After jumping out a window, the escapees walked to Albion, where Kirksey stole a van with the aid of a screwdriver that he stole from a Starr staff office. The Starr staff began looking for the residents and notified the police of their escape at 12:19 a.m.. It appears that the only action taken by police was to file missing person reports and to enter the escapees’ information in the LEIN system. On September 12, 2002, 11 days after he escaped from Starr, Kirksey killed the decedent in Pontiac.

II. Standards of Review

This Court reviews de novo a trial court’s decision regarding a motion for summary disposition. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). This Court also reviews de novo questions of contract interpretation. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. A court must consider the pleadings, affidavits, depositions, admissions,

¹ The trial court also granted Bridgeway’s motion for summary disposition, but plaintiff does not challenge that ruling on appeal.

and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if “there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law.” MCR 2.116(C)(10).

III. Plaintiff’s Complaint

Plaintiff argues that the trial court erred in granting Starr summary disposition on claim for negligence per se based on the violation of a statute, and her claim for negligence based on the Restatement of Torts, 2d, § 319. The statute allegedly violated in the present case is MCL 803.306a, that provides:

(1) If a public ward described in subsection (2) escapes from a facility or residence in which he or she has been placed, other than his or her own home or the home of his or her parent or guardian, the individual at that facility or residence responsible for maintaining custody of the public ward at the time of the escape shall immediately notify 1 of the following of the escape or cause 1 of the following to be immediately notified of the escape:

(a) If the escape occurs in a city, village, or township that has a police department, that police department.

(b) If subdivision (a) does not apply, 1 of the following:

(i) The sheriff department of the county in which the escape occurs.

(ii) The department of state police post having jurisdiction over the area in which the escape occurs.

(3) A police agency that receives notification of an escape under subsection (1) shall enter that notification into the law enforcement information network without undue delay.

(4) As used in this section, “escape” means to leave without lawful authority or to fail to return to custody when required.

The use of a statutory violation to establish negligence is a matter of judicial discretion, and evidence of a violation of a penal statute creates a rebuttable presumption of negligence. *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78, 86-87; 393 NW2d 356 (1986). The same rules apply when a party is alleged to have violated a safety statute. *Id.* That is, the trial court must examine the statute to determine if it was intended to protect against the result of the violation, if the plaintiff was within the class intended to be protected, and if the evidence would support a finding that the violation was a proximate contributing cause of the event. *Id.* at 87.

The mere fact that a defendant’s conduct may have violated a statute does not demonstrate that a plaintiff owed a duty of care. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 16; 596 NW2d 620 (1999). Rather, once a duty is found, the violation of the statute

may demonstrate prima facie evidence of negligence. Thus, the plaintiff's use of a statute to impose a duty of care upon the defendant is contingent upon the statute's purpose and the class of persons it was designed to protect. *Id.* In *Cipri*, environmental law was examined to determine if it imposed a duty of care, actionable in tort, on the general public. It was noted that the purpose of the law was to prevent environmental contamination and to promote compensation for remediation. Thus, it was held that the statutes were intended to prevent precisely this type of environmental injury alleged and that the plaintiff was within the class of persons to be protected. *Id.* at 16-17.

Once evidence of a statutory violation is presented, this presumption of negligence may be rebutted by evidence of a legally sufficient excuse for the statutory violation. *Klanseck, supra* at 86. In the absence of evidence to support such an excuse, the jury may infer negligence on the basis of the violation. *Id.* "It is then for the jury to determine whether violation of the statute was a proximate cause." *Id.*

In the present case, Kirksey had an extensive history of assaultive behavior as well as a history of escapes from the Starr facility. Before his presentation at Starr, it was determined in a delinquency hearing that Kirksey presented a serious risk to public safety and to the community and was active in gangs. While at Starr, Kirksey sexually assaulted a teacher and threatened others as well as himself. Despite this history, Kirksey was kept at an unlocked cottage at Starr despite the presence of two locked units on the premises. Kirksey was not placed in the locked units although designated for escapees, and he was never disciplined for the escapes.

Review of the plain language of the statute at issue reveals that it requires the individual charged with monitoring the public ward to *immediately* report an escape. If statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning, and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). The immediacy requirement seemingly indicates that a prompt report increases the likelihood of immediate apprehension, to place law enforcement to be on the lookout for the escapee, and to prevent harm to the public. In the present case, plaintiff alleges that the report did not comply with the statute. In fact, it is alleged that Starr waited over 100 minutes to report the escape. In light of the fact that the immediacy requirement of the statute was designed to prevent harm to the public, and plaintiff was within the class to be protected, the issue is one for the jury. *Klanseck, supra*.

With regard to the common law negligence action, the plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). We cannot conclude that the trial court erred in dismissing this action in light of the fact that there is no general duty to prevent the criminal acts of third parties. *Brown v Brown*, 478 Mich 545, 553-554; 739 NW2d 313 (2007). However, plaintiff may present the statutory violation to the jury.

IV. Bridgeway's Cross-Claim

Bridgeway argues that the trial court erroneously granted Starr's motion for summary disposition of its cross-claim because it misinterpreted the indemnification provision in the parties' contract. The indemnification provision states:

Provider shall indemnify and hold harmless CMO [Bridgeway] and Wayne County . . . from and against any and all demands, claims, actions, causes of action, assessments, losses, suits, judgments, damages, liabilities, costs and expenses (including without limitation the fees and expenses of attorneys, expert witnesses and other consultants) which arise or are asserted against, or are imposed upon or incurred by CMO or Wayne County . . . resulting from, relating to, or arising out of any act or omission of Provider, its . . . subcontractors or any entity (either now existing or to be created) associated, affiliated or subsidiary to CMO and the agents and employees of such entity in rendering Covered Services or in the performance of any obligation, either express or implied, under this Agreement or the Wayne County Contract, including but not limited to, professional liabilities, comprehensive general liabilities and intentional torts.

The trial court found that this provision did not apply because plaintiff's claims against Bridgeway were independent from her claims against Starr.

An indemnity contract is construed in the same manner as contracts generally to ascertain the intention of the parties. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997). The parties' intent is manifested by the words used in the contract. *Id.* at 603-604. Unambiguous language is enforced as written. Consideration of evidence outside the clear contractual language is not permitted. *Id.* at 604.

Bridgeway argues that the indemnity provision has two requirements. First, an action or claim must be asserted against it, which plaintiff's complaint satisfied. Second, the claim must have related to, arose out of, or resulted from an act or omission by Starr. Bridgeway contends this second requirement was satisfied because plaintiff's complaint alleged numerous claims against Starr. Starr argues that only those claims for which Bridgeway's liability depends solely on Starr's liability are entitled to indemnification under the contract provision. Thus, Starr asserts that the provision does not apply in this case because plaintiff only alleged claims against Bridgeway that were independent from the claims alleged against it.

Essentially, we must determine whether the indemnity provision provides indemnification to Bridgeway for its own negligence and whether plaintiff's claims against Bridgeway are independent from the claims she alleges against Starr. An indemnity clause need not expressly mention the indemnitee's own acts to provide coverage for them, but such coverage is not assumed.² Rather, a court must determine the parties' intent from other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the

² "Michigan courts have discarded the additional rule of construction that indemnity contracts will not be construed to provide indemnification for the indemnitee's own negligence unless such an intent is expressed clearly and unequivocally in the contract." *Sherman v DeMaria Bldg Co*, 203 Mich App 593, 596-597; 513 NW2d 187 (1994).

parties. *Badiee v Brighton Area Schools*, 265 Mich App 343, 353; 695 NW2d 521 (2005), citing *Sherman v DeMaria Bldg Co*, 203 Mich App 593, 596-597; 513 NW2d 187 (1994).³

The first question is the scope of the indemnity provision. The instant provision applies to “all demands, claims, actions . . .” imposed on or asserted against Bridgeway “resulting from, relating to, or arising out of any act or omission” of Starr, Starr’s agents, subcontractors, employees, any entity associated, affiliated, or subsidiary to Bridgeway, and the agents and employees of such entity. “[T]he use of the term ‘all’ in an indemnity clause has been interpreted to provide for the broadest possible indemnification.” *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 173; 530 NW2d 772 (1995). It is clear that the provision here was intended to be broad. However, it was not intended to provide indemnification for Bridgeway’s own negligence.

“[B]road, all-inclusive indemnification language may be interpreted to protect the indemnitee against its own negligence if such intent can be ascertained from other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties.” *Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448, 452; 403 NW2d 569 (1987). The provision expressly lists from whose acts or omissions Bridgeway is entitled to indemnification. Generally, the express mention of one thing implies the exclusion of another. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 248; 704 NW2d 117 (2005) (explaining the general contract interpretation principle of “*expressio unius est exclusio alterius*”). Entities related to Bridgeway are included, but not Bridgeway. Similarly, Wayne County is entitled to indemnification for the acts or omissions of those persons listed, but the list does not include Wayne County. Thus, the provision’s unambiguous language evinces an intent to limit indemnity coverage for only the acts and omissions of those persons listed.

The circumstances surrounding the execution of the contract also do not support a finding that the provision intended to provide indemnification for Bridgeway’s own negligence. Although Bridgeway’s and Starr’s employees interacted, they were not on site together and had distinct roles. There does not appear to be any contemplation that a loss would result from

³ There is a legal difference between an injury caused by Bridgeway’s “own negligence” and one that was caused as a result of Bridgeway’s “sole negligence.” Bridgeway’s “own negligence” pertains to an injury for which Bridgeway was at least potentially comparatively liable. If comparatively negligent, it was not solely negligent. *Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448, 452; 403 NW2d 569 (1987). Bridgeway could not be entitled to indemnification under the contract for its sole negligence because such provisions are prohibited by MCL 691.991, which provides, in relevant part:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building . . . purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable. [MCL 691.991.]

Bridgeway's negligence. Therefore, we hold that the instant indemnity provision does not provide indemnification for Bridgeway's own negligence.⁴

The next question is whether plaintiff's complaint alleged active or passive negligence by Bridgeway. In order to determine whether the indemnification provision applies, it is necessary to characterize plaintiff's claim. Plaintiff alleged that Bridgeway owed a duty separate from Starr and breached that duty. Therefore, plaintiff's claims involved active negligence and were independent from those alleged against Starr. Bridgeway was required to defend against these claims regardless of Starr's liability. Because the indemnification provision does not cover Bridgeway's own negligence, the trial court did not err in granting Starr summary disposition on this basis.

Affirmed in part, reversed in part. We do not retain jurisdiction.

/s/ Stephen L. Borrello

/s/ Karen M. Fort Hood

⁴ See *Badiee, supra*, *Ormsby v Capital Welding, Inc*, 255 Mich App 165, 192-193; 660 NW2d 730 (2003), rev on other grounds 471 Mich 45 (2004), and *MSI Constr Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340; 527 NW2d 79 (1995), in which the courts found no indemnification. Compare *Sherman, supra*, *Fischbach-Natkin, supra*, *Paquin v Harnischfeger Corp*, 113 Mich App 43; 317 NW2d 279 (1982), *Pritts v J I Case Co*, 108 Mich App 22; 310 NW2d 261 (1981), and *Gartside v YMCA*, 87 Mich App 335; 274 NW2d 58 (1978), in which the courts found indemnification.

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Before: Borrello, P.J., and Murray and Fort Hood, JJ.

MURRAY, J. (*concurring in part, dissenting in part*).

I concur in the majority's resolution of the appeal in docket no. 277539, and with its resolution of the "common law negligence" claim in docket no. 277469. However, with all due respect to my colleagues, I would affirm the trial court's order granting Starr Commonwealth's motion for summary disposition as to the "negligence per se" claim.

Plaintiff argues in docket no. 277469 that the trial court erred in granting Starr's motion for summary disposition on her claim for negligence per se based on the violation of a statute. The trial court dismissed this claim on the grounds that Starr had no duty to protect plaintiff, and that there was no proximate cause between plaintiff's decedents death, and Starr's violation of the statute. On appeal, however, plaintiff merely argues that the trial court erred in finding that Starr's alleged negligence was not a proximate cause of the decedent's death because Kirksey's criminal act was not foreseeable. Plaintiff has not challenged the duty based ruling of the trial court's decision. This is a necessary issue because, even if the trial court erred in its analysis of the proximate cause issue, there can be no liability if there is no duty in the first instance. Plaintiff's failure to address this necessary issue precludes appellate relief. *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

Additionally, although the majority does a fine job explaining why a duty exists in this case, the cases relied upon by the majority can be found nowhere in plaintiff's brief. Indeed, plaintiff cites no case law on how a duty is established, and therefore fails to make anything other than a conclusory argument that touches on only one of the relevant legal factors, and provides no substantive analysis of the evidence in light of the relevant factors. In other words, plaintiff has not come close to "priming the pump" so that the appellate well can properly flow. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); *Blazer Foods, Inc v Restaurant Properties*, 259 Mich App 241, 253; 673 NW2d 805 (2003). We simply cannot make the arguments for plaintiff.

For these reasons, I would affirm the trial court in all respects.

/s/ Christopher M. Murray