

STATE OF MICHIGAN
COURT OF APPEALS

JOHN MICHAEL DOBIAS,

Plaintiff,

v

GARY HOUSE EXCAVATING, INC. a/k/a GARY
HOUSE TRUCKING, INC.,

Defendant/Third-Party Plaintiff-Appellant,

and

OLSON FIRESTONE, INC.

Third-Party Defendant-Appellee

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Defendant/third-party plaintiff Gary House Excavating, Inc., appeals by right from an order granting summary disposition to third-party defendant Olson Firestone, Inc. pursuant to MCR 2.116(C)(8). We affirm.

This case involves a negligence suit and the question whether a defendant may bring a third-party action for indemnification and contribution against a third-party defendant who employs the principal plaintiff. Third-party plaintiff argues the trial court erred in granting summary disposition on its claims of indemnification and contribution against third-party defendant. In its view, a third-party plaintiff may seek indemnification and contribution from a third-party defendant who is otherwise shielded from liability under the worker's compensation act, MCL 418.131; MSA 17.237(131). It argues that despite the principal plaintiff's employer being immune from negligence liability in the principal suit because of the worker's compensation act, an employer may be liable for indemnification and contribution in a third-party action. Because third-party plaintiff's claims involve a question of law,

we review the matter de novo. *State Treasurer v Schuster*, 215 Mich App 347, 350; 547 NW2d 332 (1996).

Third-party plaintiff first argues that it is entitled to indemnification, relying on *Dale v Whiteman*, 388 Mich 698; 202 NW2d 797 (1972). Third-party plaintiff maintains that *Dale* allows indemnification where a party's sole liability is predicated on the motor vehicle owner's liability statute, MCL 257.401; MSA 9.92101. In *Dale*, a third-party plaintiff sued a third-party defendant for indemnification following an accident where the third-party defendant's employee ran into a co-worker. The principal plaintiff sued the third-party plaintiff as the owner of the car and recovered. Our Supreme Court held that, irrespective of the worker's compensation statute, a third-party plaintiff could maintain an action for indemnification where it was a purely passive party whose liability arose only through owning the vehicle involved in the accident. *Id.*, 704-709.

In our view *Dale, supra*, is inapplicable to third-party plaintiff's claims. As *Dale, supra*, makes clear, common-law indemnification arises in one of two ways, either expressly or impliedly. *Id.*, 704-705. In *Dale*, there was implied indemnification. Here, there was no express indemnification because there was no contractual agreement or other understanding between these parties. *Id.* There was also no implied or "passive party" indemnification, which arises when a third-party is liable to the principal plaintiff despite the absence of any fault on its part. *Williams v Litton Systems*, 433 Mich 755, 759; 449 NW2d 669 (1989). In this regard, "liability is not based on the third-party defendant's breach of duty to the [principal] plaintiff . . . but rather the breach of an undertaking to the third-party plaintiff." *Id.*, 755. Such facts are simply not present in this case. Here, third-party plaintiff's agent drove a truck, owned by third-party plaintiff, over the legs of third-party defendant's employee. Third-party plaintiff was not a passive party; it caused the accident. According to *Dale, supra*, the only way indemnification could have been imposed, barring an express agreement, would have been if third-party defendant's employee had been driving the truck that ran over the principal plaintiff. *Id.*, 704-705. Therefore, the trial court did not err in granting summary disposition on third-party plaintiff's claims of indemnification.

Third-party plaintiff next argues that the trial court erred in dismissing its claim for contribution. The worker's compensation act, MCL 418.131; MSA 17.237(131), precludes any contribution from a third-party defendant where both the third-party plaintiff and the third-party defendant are joint tortfeasors and the principal plaintiff's claim is based on negligence. Here, the exclusive remedy provision of the worker's compensation act bars contribution from third-party defendant because, if it had been the only party sued, it could never have been liable in negligence because of the exclusive remedy provision. *Williams, supra*, 433 Mich 760.

Accordingly, since third-party plaintiff was entitled to neither indemnification nor contribution, its third-party complaint failed to state a claim upon which relief could be granted. Summary disposition pursuant to MCR 2.116(C)(8) was therefore proper.

Affirmed.

/s/ David H. Sawyer

/s/ Harold Hood

/s/ Joel P. Hoekstra