STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN INTERNATIONAL RECOVERY, INC., CMI-CAST-PARTS, INC. and CMI INTERNATIONAL, INC.,

Plaintiffs-Appellants,

v

UNITED POWER SERVICES, INC.,

Defendant-Appellee.

UNPUBLISHED
October 9, 1998

No. 201735
Wexford Circuit Court
LC No. 95-011552 CK

Before: Murphy, P.J., and Gribbs and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant summary disposition pursuant to MCR 2.116(C)(10) regarding their breach of contract claim, and an order granting defendant summary disposition pursuant to MCR 2.116(C)(8) regarding their common law and implied contract indemnification claims. We affirm.

Plaintiffs contracted with defendant to test high voltage transformers at plaintiffs' worksite. The employee of defendant assigned to perform the work was electrocuted and killed while sampling and testing transformer fluid. The decedent's estate filed a wrongful death suit against plaintiffs and eventually settled for $475,000. Subsequently, plaintiffs filed this suit against defendant.

Plaintiffs first contend that the trial court erred by dismissing their implied contract indemnification claim. However, in *Williams v Litton Systems, Inc*, 433 Mich 755; 449 NW2d 669 (1989), the Supreme Court explained that for a party to succeed on an indemnification action based on a contract, an express contract of indemnification must exist:

> It is one thing to enforce an employer's express agreement to indemnify where the employer has clearly and unambiguously assumed that liability. It is quite another to impose liability on an employer who, while he promised to take certain actions, did not expressly agree that the consequence of the failure to do so would be the assumption of

> liability for damages suffered by an injured worker, although liability therefor has been abrogated by statute. [*Id.* at 759.]

Plaintiffs never contended that there was an express contract for indemnification between them and defendant. Therefore, we conclude that the trial court correctly dismissed this claim.

Plaintiffs next argue that because the decedent's estate in its wrongful death action alleged that plaintiffs had been both actively and passively negligent, the trial court erred when it dismissed their claim for common law indemnity against defendant. We review de novo the trial court's grant of summary disposition. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997).

Under the Workers' Disability Compensation Act, MCL 418.101 *et seq*.; MSA 17.237(101) *et seq*., the exclusive remedy provision, MCL 418.131; MSA 17.237(131), generally shields an employer from liability to his employee for negligence on the job. However, Michigan courts have in some instances allowed a third party to obtain indemnification from an employer for the employer's negligence to its employee. *Diekevers v SCM Corp*, 73 Mich App 78, 80-81; 250 NW2d 548 (1976); *Nanasi v General Motors Corp*, 56 Mich App 652, 656-661; 224 NW2d 914 (1974). The Supreme Court in *Williams, supra*, indicated that for a third party to recover from the employer, the plaintiff in the original action must have pleaded only that the third party was vicariously liable for the employer's negligence. *Id*. at 760-761. The *Williams* majority only speculated as to the result that would obtain when the plaintiff in the underlying action pleaded both active negligence *and* vicarious liability. *Id*. at 761 n 10.

Plaintiffs claim that the decedent's estate alleged in its wrongful death action, in addition to alleging plaintiffs' active negligence, that plaintiffs were vicariously liable for certain negligent conduct of defendant. While the decedent's estate's complaint did allege both "[plaintiffs'] own negligence" and "vicarious[]" negligence, the complaint also indicated that the decedent had been engaged in "inherently hazardous and dangerous work" at the time of his death. In *Oberle v Hawthorne Metal Products Co*, 192 Mich App 265, 270-271; 480 NW2d 330 (1991), this Court held that liability for inherently dangerous activity constitutes active negligence, not passive or vicarious negligence. The *Oberle* Court reasoned that, because the principal has a nondelegable duty to see that the work is done with the requisite degree of care, the principal has breached its own precautionary duty when the contractor fails in fulfilling its duty of care. *Id.* at 270, quoting *Witucke v Presque Isle Bank*, 68 Mich App 599, 610; 243 NW2d 907 (1976). Therefore, we conclude that because the decedent's estate's complaint alleged a violation of the inherently dangerous activity doctrine,[1] and thus active negligence, *id*. at 271, the trial court properly granted defendant summary disposition regarding the common law indemnification count of plaintiffs' complaint. *Williams, supra* at 760-761.

Finally, plaintiffs argue that the trial court erred in dismissing their breach of contract claim for damages that flow naturally and foreseeably from defendant's breach. We disagree. The parties stipulated to have the breach of contract claim dismissed in order to expedite appeal. However, no stipulation to that effect appeared on the order granting defendant summary disposition. Under the invited error doctrine, a party may not request a certain action in the trial court and then argue on appeal

that it was error for the trial court to grant the request. *Joba Construction Co, Inc v Burns & Roe, Inc*. 121 Mich App 615, 629; 329 NW2d 760 (1982). Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Accordingly, because plaintiffs stipulated to the dismissal of the breach of contract claim, we consider this issue waived.

Affirmed.

/s/ William B. Murphy
/s/ Roman S. Gribbs
/s/ Hilda R. Gage

[1] "Inherently dangerous" work "involves the use of instrumentalities, such as fire or high explosives, which require constant attention and skillful management in order that they may not be harmful to others." 2 Restatement Torts, 2d, § 427, comment c. We find that work involving high voltage, energized transformers falls into this category. Because the decedent was involved in testing transformer insulating fluids, he was engaged in an inherently dangerous activity.