STATE OF MICHIGAN

COURT OF APPEALS

JAYNE UBER, a Minor, by her Next Friend CHARLES UBER, LINDA UBER, and TRACEY UBER, Plaintiffs-Appellants,	UNPUBLISHED March 20, 2001
v	No. 211685 Court of Claims
DEPARTMENT OF NATURAL RESOURCES, Defendant-Appellee.	LC No. 97-016722

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

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I Facts

On March 25, 1996, defendant Department of Natural Resources entered into a concessions contract with Thomas Santo of Professional Services, Inc. ("PSI") for the operation of a riding stable at defendant's Brighton Recreation Area. The preface of the concessions contract states in relevant part:

> The State of Michigan, Department of Natural Resources (the "Department") has provided facilities for the use and enjoyment of the public. The responsibility of the Department is to operate or contract for the operation of the facilities so as to maximize service and benefit to the public according to approved standards. The facilities included in this Contract are made available to the Contractor with the intent the Contractor will operate them according to those standards to provide maximum use, service, and benefit to the public.

The contract then set forth various provisions governing the use and operation of the stable and the parties respective obligations under the contract. Specifically, § I of the contract, entitled "Insurance" states in pertinent part:

I1. The Contractor [PSI] shall purchase, maintain, and provide proof of insurance protection for claims set forth below which may arise out of or result from the Contractor's operations on the premises, whether such operations be by the Contractor or by any subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable.

I1a. Worker's compensation insurance for claims under Michigan's Workers Compensation Act or other similar employee benefit act of any other state act applicable to an employee, along with Employer's Liability Insurance for claims for damages because of bodily injury, occupational sickness or disease or death of an employee when workers compensation may not be an exclusive remedy, subject to a limit of liability of not less than $100,000 each accident.

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I1c. General liability insurance for claims for damages because of bodily injury or death of any person, other than the contractor's employees, or damages to tangible property of others, including loss of use resulting therefrom to the extent that such kinds of liability are insurable under general liability insurance, subject to the following minimum limits:

-General Aggregate: $500,000 Occurrence: $500,000

-Product Aggregate: $500,000 Personal Injury: $500,000

Property Damage: $500,000

including as additional insured - State of Michigan and its Commission of Natural Resources, Department of Natural Resources and their several officers, servants, agents and employees.

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I2. Insurance required shall be in force during the period of the Contract and shall be written for not less than the limits of liability specified above. The Contractor is responsible for making each subcontractor comply with these insurance requirements. Certificates of Insurance acceptable to the Department of Natural Resources shall be filed with the Department prior to the Contractor's occupancy of the premises. The certificates shall contain a provision that coverages afforded under the policies will not be modified or canceled until after at least 10 days written notice to the Department.

The riding stable began operating on April 15, 1996. On May 16, 1996, defendant received from PSI a certificate of general liability insurance with a limit of $300,000, and an expiration date of May 18, 1997. On August 30, 1996, PSI provided defendant with a new certificate of insurance that provided for a $1,000,000 general liability limit.

Plaintiff Jayne Uber ("Uber") was hired by the concession as a wrangler on or about July 4, 1996.[1] On September 7, 1996, while Uber was riding down a trail on one of the stable's horses, she was thrown from and crushed by the horse sustaining a spinal cord injury that rendered her paralyzed. On August 1, 1997, plaintiffs filed a three-count complaint against defendant. Plaintiffs first alleged breach of contract due to defendant's failure to require PSI to carry worker's compensation and the requisite amount of general liability insurance prior to PSI occupying the premises. Plaintiffs contended that Uber was entitled to recover damages from defendant as an intended third-party beneficiary of the contract between defendant and PSI because the provisions in the contract were intended to benefit the public, including Uber. Second, plaintiffs Charles Uber, Linda Uber, and Tracey Uber, asserted a claim for loss of consortium, also under the third party beneficiary theory of recovery. Third, plaintiffs asserted a claim under the Worker's Disability Compensation Act ("WDCA"), MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.*, claiming that Uber was entitled to damages because of defendant's failure to enforce PSI's obligation to comply with the insurance provisions of the Act.

Defendants moved for summary disposition under MCR 2.116(C)(7) and (10). After a hearing on defendant's motion, the trial court concluded as a matter of law that Uber was not a third-party beneficiary of the concessions contract between defendant and PSI because the general purpose of the contract was to provide horse back riding opportunities to the public, and the insurance provisions were required to protect defendant, not to provide compensation to injured persons. The trial court stated that the fact that injured persons would indirectly benefit from the contractual provisions did not make them third-party beneficiaries. Further, the trial court noted that the contract contained no language indicating that defendant promised to do or refrain from doing something for the direct benefit of Uber. Finally, the trial court held that the WDCA was inapplicable because it related to *employers* who violate the act and PSI, not defendant, was Uber's employer at the time of her accident. Accordingly, the trial court granted defendant's motion for summary disposition on all three counts.

II Standard of Review

We review a trial court's grant or denial of summary disposition under MCR 2.116(C)(10) de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 370; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* This Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it to determine whether the moving party is entitled to judgment as a matter of law. *Id.* at 337; *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995).

III Legal Analysis

A

Plaintiffs argue that the trial court erred by granting summary disposition to defendant on the basis that Uber was not a third-party beneficiary of the contract between defendant and PSI.

Assuming, without deciding, that Uber was a third party beneficiary of the contract, we hold that the trial court's alternative finding that PCI, not defendant, breached the contract was sufficient to grant defendant summary disposition.

For an individual to sue on a contract to which the individual is not a party, it must be determined that the individual was an intended third-party beneficiary of the contract. In Michigan, the rights of third-party beneficiaries are prescribed by statute. MCL 600.1405; MSA 27A.1405, provides in pertinent part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.
>
> (2)(a) The rights of a person for whose benefit a promise had been made, as defined in (1), shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary.

Assuming that Uber was a third-party beneficiary of the contract, under Michigan law, a third-party beneficiary of a promise stands in the shoes of the *promisee* and is afforded the right to enforce the promise against the *promisor*. See MCL 600.1405; MSA 27A.1405; *Koppers Co, Inc v Garling & Langlois*, 594 F2d 1094, 1098 (CA 6, 1979) (emphasis added). Thus, a third-party beneficiary has only the same right to enforce the contract as would the *promisee*. See *Riemersma v Riemersma*, 29 Mich App 485; 185 NW2d 556 (1971). According to the Restatement Contracts, 2d, § 2, pp 8-9, the person manifesting an intention to act in a specified way is the promisor, and the person to whom the manifestation is addressed is the promisee.

Here, the contract between PSI and defendant involved a set of mutual promises by one entity to another. Those promises included the insurance provisions listed in § I of the contract which specifically stated that "[t]he Contractor [PSI] shall purchase, maintain, and provide proof of insurance protections for claims set forth below. . . ." Giving this language its plain meaning, PSI "promised" to obtain the required insurance as part of its exchange for the right to run the riding stable. Simply stated, PSI was the "promisor" of this promise, and defendant was the "promisee" (i.e., the entity to whom the manifestation was addressed). Restatement Contracts, 2d, § 2, p 9. Nothing in the contract indicated a promise on defendant's part to ensure that PSI complied with its promise to procure insurance. Rather, the contract merely stated that if PSI failed to "comply with any provisions, stipulation or condition herein contained" defendant may terminate the contract. Thus, if Uber was permitted to enforce the contract as a third-party beneficiary, she would stand in defendant's shoes and would only have rights to enforce the

promise against the promisor, PSI. In this regard, plaintiffs' third-party beneficiary claim against *defendant* does not make legal sense. Specifically, plaintiffs have sued the wrong party. See *Kammer*, *supra* at 190; *Reed & Noyce, Inc v Municipal Contractors, Inc*, 106 Mich App 113, 119; 308 NW2d 445 (1981); *Malone v SCM Corp*, 63 Mich App 11; 233 NW2d 872 (1975). Accordingly, summary disposition was appropriate.

B

Plaintiffs also argue that the trial court erred in prematurely granting summary disposition because discovery had just begun. We disagree.

In their brief on appeal, plaintiffs list fourteen fact issues that they allege were in dispute at the time of the motion. This Court has held that summary disposition may be premature if granted before discovery on a disputed issue had been completed. See, e.g., *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996); *Adams v Perry Furniture Co (On Remand)*, 198 Mich App 1; 497 NW2d 514 (1993). However, this Court has also held that a party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists. *Michigan National Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993). Alternatively, a plaintiff must show that further discovery would uncover factual support for the plaintiff's position. *Aetna Casualty*, *supra* at 446. Therefore, plaintiffs still had the burden to prove that a factual dispute existed in this case or would be uncovered by further discovery.

Upon review of plaintiffs' allegations, we conclude that while some of the factual issues raised in the complaint may have in fact been in dispute, such allegations were not material to the dispositive issue, that is, whether Uber, as a third-party beneficiary of the contract, could sue defendant. *State Farm*, *supra* at 267. As noted above, because defendant was the promisee of the promise to obtain worker's compensation and liability insurance under the concessions contract, and since an alleged third-party beneficiary stands in the shoes of the promisee and has rights only against the promisor, plaintiffs' lawsuit against defendant, the promisee, is legally deficient. Thus, giving plaintiffs the benefit of reasonable doubt, we conclude that no record could be developed that would leave open an issue upon which reasonable minds could differ on the third-party beneficiary claim. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). Accordingly, summary disposition was properly granted to defendant.

IV Conclusion

For the foregoing reasons, we conclude that Uber's breach of contract claim against defendant fails as a matter of law. Accordingly, we affirm the trial court's grant of summary disposition under MCR 2.116(C)(10) in favor of defendant.

Affirmed.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

[1] Apparently, there was some dispute amongst the parties regarding whether Uber was an employee or an independent contractor of PSI at the time of the accident. However, because defendant conceded for purposes of its motion for summary disposition that Uber was an employee of PSI, we will assume, without deciding, that Uber was employed by PSI at the time of her accident.