

STATE OF MICHIGAN
COURT OF APPEALS

KELLY NELSON, Personal Representative of the
ESTATE OF ERIC ROGER JOHNSON, JR.,
Deceased,

UNPUBLISHED
December 14, 2006

Plaintiff-Appellant,

v

WAYNE COUNTY, WAYNE COUNTY
SHERIFF, and ROBERT FICANO,

No. 270852
Wayne Circuit Court
LC No. 06-600518-NO

Defendants-Appellees.

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's decedent, Eric Johnson, Jr., was shot and killed by Bibia Redd, a Wayne County Sheriff's deputy, on the front porch of Redd's home. Plaintiff obtained a \$300,000 default judgment against Redd in a separate proceeding. Plaintiff subsequently filed this lawsuit, alleging that Redd was acting in the course of her employment when she shot Johnson and seeking to hold defendants liable for alleged gross negligence in failing to properly train, supervise, and monitor their employees, including Redd. Plaintiff also sought to hold defendant Wayne County vicariously liable for the \$300,000 judgment obtained against Redd by asserting that she was an intended third-party beneficiary of the indemnification provision of the collective bargaining agreement between defendant Wayne County and Redd's union, Local 502 of the Service Employees International Union.

Defendants moved for summary disposition pursuant to MCR 2.117(C)(7) and (8). The trial court granted the motion finding the negligence claim was barred by governmental immunity and plaintiff was not an intended third-party beneficiary of the indemnification

provision. On appeal, plaintiff challenges only the portion of the judgment dismissing her claim that she is a third-party beneficiary of the collective bargaining agreement.¹

Plaintiff argues that the indemnification provision of the collective bargaining agreement between defendant and its employees sets forth a clearly defined class of beneficiaries of which plaintiff, as the holder of a judgment against defendant's employee, is a member, and that she is therefore entitled to enforce the indemnification provision as a third-party beneficiary. We disagree.

A trial court's grant of summary disposition under MCR 2.116(C)(8) is reviewed de novo. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). When reviewing such a motion, only the pleadings are considered, and no documentary evidence may be examined. *Id.* All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from those facts, and the facts are construed in the light most favorable to the opposing party. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003).

Pursuant to MCL 600.1405, a person is a third-party beneficiary of a contract "only when that contract establishes that a promisor has undertaken a promise directly to or for that person." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003). Only intended, not incidental, third-party beneficiaries may sue for a breach of a contractual promise in their favor. *Id.* at 427. When a contract is primarily for the benefit of the signatories, the fact that a third party would incidentally benefit from performance of the contract does not give him the right to sue for its breach. *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 190; 504 NW2d 635 (1993).

Whether the promisor undertook to do something directly for the person claiming third-party beneficiary status is an objective inquiry that is based on the form and meaning of the contract itself. *Schmalfeldt, supra* at 428. For a third party to enforce a contract, the contractual language must demonstrate that the parties "are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract..." *Id.* Although a third-party beneficiary need not be referenced by name and may be a member of a class that includes a person not yet in being or ascertainable, "the class must be sufficiently described." *Brunsell v City of Zeeland*, 467 Mich 293, 297; 651 NW2d 388 (2002). It must be "something less than the entire universe" and cannot encompass "the public" as a whole. *Id.*

The indemnification provision at issue states:

Whenever an employee covered by this Collective Bargaining Agreement becomes subject to a claim, a liability, a judgment, or a monetary imposition or fine resulting from any action taken by him or her within the scope of his or her

¹ Although defendants Evans and Ficano are named as parties to this appeal, the question presented involves a claim made only against defendant Wayne County. For this reason, all subsequent references to "defendant" will refer only to Wayne County.

employment and during the course of his or her employment, the Employer agrees to defend, and hold harmless and to indemnify him or her including all reasonably related costs, except in a criminal proceeding in which the employee is found guilty of a crime.

We conclude that this provision does not create a reasonably identified class of potential beneficiaries. Any member of the public could become the holder of a claim or judgment against a county employee, and “the public as a whole is too expansive a group” to qualify as a third-party beneficiary under MCL 600.1405. *Brunsell, supra* at 298.

Further, an objective analysis of the indemnification provision indicates that it is intended to benefit the employees covered by the collective bargaining agreement rather than to protect third parties. See *Brunsell, supra* at 299. The provision defines and limits the extent of coverage that defendant will provide to employees who are subject to a claim or judgment. It does not establish that defendant undertook an obligation “directly” to plaintiff, as required by MCL 600.1405. See *Schmalfeldt, supra* at 428. Therefore, we conclude that plaintiff is only an incidental beneficiary of the indemnification provision and is not entitled to enforce the contract as a third-party beneficiary.²

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly

² In light of our resolution on this issue, we need not address plaintiff’s additional argument.