S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PARNELL LEE, Personal Representative of the Estate of TIMOTHY FIKES, Deceased,	UNPUBLISHED August 30, 2005
Plaintiff,	
v	No. 261223 Wayne Circuit Court
DETROIT EDISON,	LC No. 03-306125-NI
Defendant/Cross-Plaintiff-Appellant,	
and	
MAP TRANSPORTATION and JOSE CASTRO, a/k/a JOSE DAMINGO,	
Defendants/Cross-Defendants-Appellees.	

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this wrongful death action, defendant Detroit Edison Company (Edison) appeals the trial court's order that granted summary disposition to cross-defendants on Edison's cross-claim. Edison also challenges the trial court's dismissal of Edison's third-party complaint and its denial of Edison's motion for entry of a default judgment. We affirm.

I. Facts and Procedural History

On October 15, 2002, Jose Castro drove a semi tractor-trailer owned by his employer, MAP Transportation Corp., and struck a utility pole while he attempted to make a u-turn in a vacant field. The next day, the downed power lines electrocuted the decedent when he rode his bicycle across the field. The personal representative of decedent's estate brought a wrongful death action against Edison, and alleged that Edison failed to repair or make safe the downed power lines.

Edison filed a third-party complaint against MAP and Castro and alleged that Castro's negligence proximately caused the electrocution. The trial court summarily dismissed the third-party complaint under MCR 2.116(C)(8), and characterized the third-party claim as one for contribution, which the court concluded is no longer a viable claim under Michigan's tort reform legislation. Thereafter, plaintiff amended his complaint to add MAP and Castro as defendants, and Edison filed a cross-claim against MAP and Castro, arguing they were liable to Edison based on theories of allocation of fault, equitable subrogation, and indemnity. MAP and Castro filed a motion to dismiss the cross-claim under MCR 2.116(C)(8). The court initially granted the motion with respect to the claim for allocation only.

On the first day of trial, the parties announced their intention to settle. However, plaintiff informed the trial court that cross-defendants' settlement was contingent on the dismissal of Edison's cross-claim, which Edison refused to do. MAP and Castro then orally renewed their motion for summary disposition. The court granted the motion, thereby dismissing the remaining cross-claims for equitable subrogation and indemnity. MAP then entered a settlement with plaintiff for $200,000. Edison initially argued that its own settlement agreement with plaintiff was contingent on the continuation of the cross-claim. However, Edison then entered a settlement with plaintiff for $1,500,000.

II. Analysis

A. Third-Party Complaint

Edison contends that the trial court erred when it dismissed the third-party complaint because MAP and Castro were liable under MCR 2.204(A)(1). Alternatively, Edison argues that the trial court erred because, in the event that it reached a settlement with plaintiff, its third-party complaint preserved a claim for contribution under MCL 600.2925a. We see no merit in either argument.

We review de novo a trial court's grant of summary disposition based upon a failure to state a claim. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).[1] This issue involves the interpretation of a court rule, which is also reviewed de novo on appeal. *St George Greek Orthodox Church v Laupmanis Associates, PC*, 204 Mich App 278, 282; 514 NW2d 516 (1994).

MCR 2.204(A)(1) provides that "a defending party, as a third-party plaintiff, may serve a summons and complaint on a person not a party to the action who is or may be liable to the third-

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[1] A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The motion may not be supported with documentary evidence, *id.*, and should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, *Adair*, *supra* at 119. Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action. *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

party plaintiff for all or part of the plaintiff's claim." Our Supreme Court has held that the previous version of MCR 2.204 (GCR 1963, 204) did not establish a substantive cause of action and merely provided a procedure for governing third-party practice. *Sziber v Stout*, 419 Mich 514, 523-524; 358 NW2d 330 (1984). GCR 1963, 204 provided in relevant part that "'a defendant may . . . serve a summons and complaint upon a person not a party to the action who is or may thereafter be liable to such third-party plaintiff, by right of contribution or otherwise, for all or part of the plaintiff's claim against him.'" *Sziber, supra* at 523 n 3, quoting GCR 1963, 204(1). Similarly, MCR 2.204 merely provides a third-party plaintiff with the ability to add a third party "who is or may be liable*"* to it.

The analysis of *Sziber* is equally applicable here. Because the relevant language of MCR 2.204 is substantially similar to GCR 1963, 204, *Sziber* is persuasive, if not binding, authority for the proposition that MCR 2.204 does not create a substantive cause of action. See also *Kokx v Bylenga*, 241 Mich App 655, 663-664 n 5; 617 NW2d 368 (2000) (observing that because the third-party defendant law firm could not be held liable for more than its pro-rata share of damages under the relevant statutes, the firm could not seek contribution under MCR 2.204). Accordingly, Edison cannot claim that MAP and Castro are liable to it under MCR 2.204.

As for Edison's assertion that its third-party complaint should be allowed because Edison was preparing to seek contribution under MCL 600.2925a in the event of settlement, we note that MCL 600.2925c(4) allows tortfeasors to commence a contribution action against other responsible tortfeasors after a settlement and within one year of payment. Thus, there is no requirement to preserve a claim for contribution in the manner suggested by Edison. Further, while a tortfeasor who has settled with a plaintiff is not barred by the 1995 tort reform legislation from seeking contribution under MCL 600.2925a through 600.2925d, *Gerling Konzern Allgemeine Versicherungs AG v Lawson,* 472 Mich 44, 53; 693 NW2d 149 (2005), MCL 600.2925c[2] clearly indicates that this right is barred until the party seeking contribution has discharged the debt by payment of the common liability. Here, Edison had not yet settled with plaintiff when its third-party complaint was dismissed.

B. Equitable Subrogation

Edison also argues that the trial court improperly dismissed its equitable subrogation cross-claim against MAP and Castro. Again, we disagree. "Subrogation denotes two different

[2] MCL 600.2925c(4) provides as follows:

> If there is not a judgment for the injury or wrongful death against the tort-feasor seeking contribution, his right to contribution is barred unless he has discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within 1 year after payment, or unless he has agreed while action is pending against him to discharge the common liability and has, within 1 year after the agreement, paid the liability and commenced his action for contribution.

kinds of rights, those that are transferred in effect by way of contractual assignment and those that arise by operation of law from the relations of various involved parties under equitable principles." *Citizens Ins Co of America v Buck*, 216 Mich App 217, 225-226; 548 NW2d 680 (1996). "It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a 'mere volunteer.'" *Commercial Union Ins Co v Medical Protective Co*, 426 Mich 109, 117; 393 NW2d 479 (1986). In addition, the payment of the subrogated liability is ordinarily a prerequisite to attaining subrogation rights. *Associated Truck Lines v Employers' Fire Ins Co of Boston, Mass*, 275 Mich 74, 76; 265 NW 780 (1936) ("[s]ubrogation rights follow and do not precede payment").

> This doctrine is best understood as allowing a wronged party to stand in the place of the client, assuming specific conditions are met. Those conditions are: (1) a special relationship must exist between the client and the third party in which the potential for conflicts of interest is eliminated because the interests of the two are merged with regard to the particular issue where negligence of counsel is alleged, (2) the third party must lack any other available legal remedy, and (3) the third party must not be a 'mere volunteer,' i.e., the damage must have been incurred as a consequence of the third party's fulfillment of a legal or equitable duty the third party owed to the client. [*Beaty v Hertzberg & Golden, PC,* 456 Mich 247, 254-255; 571 NW2d 716 (1997).]

Here, Edison failed to allege a special relationship between itself and plaintiff and, inexplicably, alleged that a special relationship existed between itself and cross-defendants. No facts alleged in the complaint support the proposition that Edison had a relationship with the decedent, the purported subrogor. Moreover, Edison has an available legal remedy, i.e., if Edison proceeded to trial, the 1995 tort reform legislation guarantees that it would not be required to pay damages in an amount greater than its percentage of allocated fault. MCL 600.6304(4); *Gerling Konzern*, *supra* at 51. Finally, Edison is not required by law or equity to pay cross-defendants' alleged debt to plaintiff. Accordingly, Edison has failed meet any of the necessary preconditions to properly state a claim for equitable subrogation.

C. Default Judgment

Edison also claims that the trial court erred in refusing to enter a default judgment against Castro.[3] We disagree. Prior to the entry of either settlement agreement, Edison moved for entry of default judgment against Castro for failing to appear.[4] Without ruling on this motion, the

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[3] This Court reviews a trial court's decision on a default motion for abuse of discretion. *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000). "An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias." *Phillips v Jordan*, 241 Mich App 17, 29; 614 NW2d 183 (2000).

[4] Plaintiff had previously issued a subpoena ordering Castro to appear.

court proceeded to enter the settlement agreement between plaintiff and MAP. When Edison entered its settlement with plaintiff, Edison reminded the court that it had failed to rule on its motion for default against Castro. MCR 2.506(F) is clearly discretionary and gives a trial court several options for sanctioning a party for failing to attend, including refraining from sanction. We believe the court's refusal to enter a default falls far short of an action that is "palpably and grossly violative of fact and logic." *Id.* The case was not proceeding to trial and plaintiff agreed to a settlement with Castro's employer. Accordingly, the trial court did not abuse its discretion.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey