STATE OF MICHIGAN

COURT OF APPEALS

MARLENE PIASECKI, Personal Representative of the Estate of JOSEPH K. PIASECKI, Deceased,

Plaintiff-Appellant,

v

MICHIGAN EDUCATION ASSOCIATION-NEA, WASHTENAW-LIVINGSTON EDUCATION ASSOCIATION-MEA/NEA, and CHELSEA EDUCATION ASSOCIATION,

Defendants-Appellants.

UNPUBLISHED
October 15, 1999

No. 208757
Washtenaw Circuit Court
LC No. 95-2378 NO

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiff appeals of right the circuit court's orders granting summary disposition to defendants pursuant to MCR 2.116(C)(8) and (C)(10), clarifying its ruling on defendants' motion, and denying plaintiff's cross-motion for reconsideration, in this wrongful death action alleging negligence, vicarious liability, and breach of a third-party beneficiary contract. We affirm the dismissal of the vicarious liability and third-party beneficiary contract claims, and reverse the dismissal of the negligence claim.

I

This case arises from the shooting death of Joseph Piasecki (Piasecki), the Superintendent of the Chelsea School District, by Stephen Leith, a teacher at Chelsea High School, on December 16, 1993. Leith was a member of defendant Michigan Education Association (MEA), which was a party to a collective bargaining agreement (CBA) with the Chelsea School District Board of Education. The shooting occurred during the course of a grievance proceeding against the school administration, instituted by the MEA on Leith's behalf.

Plaintiff's complaint alleged that sometime before January 1992, Leith began to experience depression and a tendency toward anti-social behavior, for which he sought psychiatric treatment. The complaint alleged that as a result of Leith's behavior on the job, the school administration pursued

various disciplinary proceedings against him, at which various MEA agents represented him, including Mark Jenkins, an employee of the MEA and MEA's representative for the Chelsea School District, Phillip Jones and Joseph Beard. The complaint alleged that at all pertinent times, Jenkins was the MEA's agent and acting within the scope of his employment with the MEA. The complaint further alleged that in early November 1993, the administration summoned Leith to a disciplinary proceeding based on inappropriate conduct toward students. On November 23, 1993, Leith, Jenkins, Jones, and Beard traveled to Lansing to meet with an attorney to consider Leith's legal rights with regard to these disciplinary proceedings. Plaintiff's complaint alleged that the MEA agents at the Lansing meeting either knew or should reasonably have known that Leith was armed with a gun at the meeting, that the MEA had notice that Leith was considering a dangerous and perhaps lethal criminal attack in connection with his grievance, and that he had the means to carry out such an attack.

The complaint alleged that on the afternoon of December 16, 1993, after school, a proceeding on Leith's grievance against the administration was held in Piasecki's office, and attended by Piasecki, Leith and Jones. The complaint alleged that the grievance proceeding was a protected concerted union activity and that during the course of the proceeding, Leith became upset and left the meeting. The complaint alleged that while the proceeding continued, Leith drove home with his wife, Alice Leith. It further alleged that while at home, Leith reviewed documents relating to the grievance; became enraged, grabbed a loaded gun from the second story of his home, and charged down the stairs past his wife and into his car, heading back to Chelsea High School. The complaint alleged that during or after Leith's review of the grievance documents, Mrs. Leith called Jenkins at his MEA office. The complaint alleged that because Jenkins was unavailable, Mrs. Leith spoke with Caroll Sypniewski, an MEA agent with duties similar to Jenkins', telling her that her husband was headed back to the grievance proceeding, armed with a gun, and with the intention of doing serious if not fatal harm to Piasecki, and perhaps other grievance participants. The complaint further alleged that Sypniewski asked a secretary to contact Jenkins, and after Jenkins was located in Hartland, Sypniewski informed Jenkins that Leith was headed to Piasecki's office with a gun, with the apparent intention of shooting him. Plaintiff's complaint alleged that neither Jenkins nor Sypniewski made any attempt to contact law enforcement, and that Sypniewski did not contact anyone in the Chelsea School District Administration (administration) to warn of Leith's apparent intentions and approach. It further alleged that after concluding his telephone conversation with Sypniewski, Jenkins made an unsuccessful attempt to contact the administration, had to again call Sypniewski to verify the proper phone number, and then called Piasecki's office. The complaint alleged that

> 33. When Jenkins finally reached [Piasecki], he informed him that Leith had become angry and threatened Piasecki.
>
> 34. During their telephone conversation, Jenkins did not give Mr. Piasecki any specific details regarding the nature of Leith's threat, did not mention the fact that Leith was armed with a gun, and did not mention Leith's apparent intent to shoot Mr. Piasecki, instead suggesting, after initially "beating around the bush" for a while, that if it were left up to Jenkins, "Maybe I'd leave the office and see what happened."

Plaintiff's complaint alleged that, prior to the shooting, the MEA had knowledge that Leith was dangerous and could foresee that Leith would injure the grievance procedure participants, that Jenkins was in a unique position to prevent the harm to Piasecki by communicating the urgency and the severity of the impending danger from Leith, and was in the position to contact law enforcement officials who could intervene and protect the participants in the grievance proceeding.

Plaintiff's complaint also alleged that defendant was vicariously liable for the battery perpetrated by Leith on Piasecki. The third-party beneficiary claim alleged that the MEA owed a number of the duties stated above to the administration, as a participant in the grievance proceeding, and breached them, and that Piasecki was an intended and anticipated third-party beneficiary of the duties defendant owed the Administration.

A

In lieu of filing an answer to plaintiff's complaint, defendants moved for summary disposition, seeking dismissal of the negligence and vicarious liability claims pursuant to MCR 2.116(C)(8), and the breach of third-party beneficiary contract claim under MCR 2.116(C)(10). Plaintiff's response to defendants' motion requested leave to amend should the circuit court conclude the claims were inadequately pleaded.

The circuit court granted summary disposition of the negligence and vicarious liability claims under (C)(8) and the third-party beneficiary contract claim under (C)(10):

> When all of this is boiled down, it seems to me that plaintiff must first establish that there is this duty on the part of the union to warn or intervene between Mr. Leith and Mr. Piasecki. And in order to do so they must establish either that there is a special relationship, special circumstances or assumption of this duty.

The circuit court noted:

> . . . . Murdock [*v Higgins*, 454 Mich 46; 559 NW2d 639 (1997),] talks about the rationale behind imposing a duty to protect in special relationships again is based on control.
>
> In those situations it is always where one person entrusts himself to the control and protection of another with a consequent loss of the control to protect themselves.
>
> Under these, [sic] facts, even in the light most favorable to the non-moving party, it cannot be said that the decedent lost control to protect himself. He was given a warning, and chose not to heed that warning and went back into the situation he was told was dangerous. And, clearly, by his own actions it was not a situation where he had lost the control of himself.

> The Court is not persuaded with the argument that because he had agreed to a collective bargaining discussion or a disciplinary hearing that he could not, under a situation of warning, go back into a situation or lost control to protect himself.
>
> Secondarily, I'm not persuaded that the union had a duty to protect the – Mr. Piasecki, that that relationship existed where there had been that degree of entrustment between the two.
>
> As to the assumption of risk [sic duty], there is no question that there may be situations when a person voluntarily attempts to aid the victim and takes control of the situation that there can be an assumption of risk.
>
> Again, there was no – no indication here that, in fact, the control had transferred over and that they had, in fact, by doing that somehow increased the risk. If anything, regardless of what we say about the degree of the warning, the risk was decreased.
>
> There are, of course, all these issues of proximate cause. Even if there was a duty, even if the – we can all surmise what might have happened had Mr. Piasecki attempted to leave, etcetera. But the focus of the motion today is what duty, if any, existed.
>
> Under both C-8 and C-10 this Court finds that under the facts in this case in the light most favorable to the non-moving party that the union owed no duty to Mr. Piasecki, had not exerted sufficient control such that this court can impose liability on the union.

B

Defendants filed a motion for clarification requesting the basis of the circuit court's ruling on the claims other than the negligence claim. Plaintiff filed a cross-motion for reconsideration, arguing that the circuit court invaded the jury's province by making the factual determination that Piasecki had not lost control to protect himself and the determination that "regardless of what we say about the degree of warning, the risk was decreased." Plaintiff argued that this was error for two reasons: because the plaintiff was not legally required to demonstrate increased risk and, second, because even if plaintiff were required to prove increased risk, that would be a question for the jury:

> The question before this Court is whether a union which has knowledge that a specific union member is headed to a specific administrator's office at a specific time and date, <u>with a gun,</u> is required to communicate that information to the intended victim. Marlene Piasecki is confident that the public policy of this State does require a union to affirmatively reveal its specific knowledge that an employee is immediately headed into his employer's office with a gun. She is also confident that even if no such affirmative duty were to exist, once the union begins to talk to the intended victim about what might happen, it must reveal that which it knows to be imminent, and specifically, the crucial fact that the impending attack involves a firearm. "Under these circumstances, to say that" the MEA "had no duty . . . would be 'shocking to humanitarian considerations'

> and fly-in-the-face of 'the commonly accepted code of social conduct'." Farwell v Keaton, supra, 396 Mich at 291, 292, citing Hutchinson v Dickie, 162 F2d 103, 106 (6th Cir 1947); Prosser, supra, § 53, p. 327. This Court should have found, and is now asked to find that the MEA could owe a duty to Joseph Piasecki, because "reasonable men would recognize and agree that it exists." *Id.* It should be for the jury to determine whether the necessary elements for a duty to be imposed are present, whether the duty was breached, and whether Joseph Piasecki's death was the proximate result of that breach.

Plaintiff argued that even in the absence of a special relationship which would give rise to a legal duty, plaintiff's negligence claim sufficiently rested on duties which arise from special circumstances or defendants' own assumption of duty.

Regarding the contract claim, plaintiff's motion for reconsideration argued that the pertinent allegations were based on the CBA, which, it argued, was made for the benefit of teachers, through the MEA, on one side, and administrators, through the District, on the other side. Plaintiff argued that the express purpose of the CBA was "promoting harmonious relations" between the parties, furthering "their mutual aim(s)," and asserted:

> The Union failed to warn Joseph Piasecki that its own grievant was headed into the grievance with a loaded gun, failed to promote harmonious relations, failed to further the mutual aims of the parties, and acted inconsistently with the terms of the Agreement. . . it breached the Agreement, the main purpose of which was to provide peaceful relations between the Union and the Administration. Joseph Piasecki was an intended beneficiary of that Agreement, and suffered as a result of the breach.

The circuit court's order of clarification dismissed the negligence and vicarious liability claims pursuant to MCR 2.116(C)(8), and the breach of third-party beneficiary contract claim pursuant to MCR 2.116(C)(10). This appeal ensued.

II

Plaintiff argues that the circuit court improperly dismissed her negligence claim under MCR 2.116(C)(8). Plaintiff alleged that defendants were negligent by virtue of the existence of special circumstances, which include a special relationship between defendants and Piasecki and defendants and Leith, and defendants' assumption of a duty by undertaking performance, i.e., making a call to Piasecki to warn him of danger, and performing the duty negligently.

We review the circuit court's grant of summary disposition de novo. *Beaty v Hertzberg & Golden, PC,* 456 Mich 247, 253; 571 NW2d 716 (1997). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The factual allegations in the complaint must be accepted as true, as well as any inferences that can reasonably be drawn therefrom. *Blackwell v Citizens Ins Co,* 457 Mich 662; 579 NW2d 889 (1998). Summary disposition is proper only if the

claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995).

In order to state an action for negligence, the plaintiff has the burden of adequately alleging that the defendant owed a legal duty to plaintiff, a breach of that duty, that plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered. *Schneider v Nectarine Ballroom Inc, (On Remand)*, 204 Mich App 1, 4; 514 NW2d 486 (1994). "In negligence cases, the duty is always the same, to conform to the legal standard of reasonable conduct in light of the apparent risk." *Sponkowski v Ingham Road Comm*, 152 Mich App 123, 127-128; 393 NW2d 579 (1986), citing Prosser, Torts (4th ed), § 37, p 206.

As a general rule, a private person has no duty to protect another from a criminal attack by a third person absent some special relationship or circumstance. *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997); *Roberts v Pinkins*, 171 Mich App 648, 652; 430 NW2d 808 (1988); see also Anno: *Comment note—Private Person's Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person*, 10 ALR3d 619, § 2, p 623, (noting that "[i]n the absence of special circumstances, such as a special relationship between the parties or knowledge by the defendant of an extraordinary danger, there is no duty to protect another from criminal attack."). "'Duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Buczkowski v McKay*, 441 Mich 96, 100-101; 490 NW2d 330 (1992). In determining whether a special circumstance or relationship exists it is necessary to:

> . . . balance the societal interests involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence, and the relationship between the parties. Other factors which may give rise to a duty include the foreseeability of the criminal activity, the defendant's ability to comply with the proposed duty, the victim's inability to protect himself from the criminal activity, the costs of providing protection, and whether the plaintiff had bestowed some economic benefit on the defendant. [*Roberts v Pinkins*, 171 Mich App 648, 652-653; 430 NW2d 808 (1988).]

A special relationship can be either between the defendant and the victim or the defendant and the third party who caused the injury. *Murdock*, 454 Mich at 54.

Plaintiff's complaint alleged:

> 35. Although he undertook a duty to warn Mr. Piasecki that Leith posed a threat to the grievance participants, Jenkins' warning was inadequate, incomplete, and left out the crucial detail that Leith was returning to the grievance with a lethal weapon.
>
> 36. The incomplete and untruthful character of the warning was motivated in part by a desire to protect the MEA's own member, Stephen Leith, from possible professional and/or criminal culpability.

37. After getting off the phone with Jenkins, Mr. Piasecki reported that Jenkins had "suggested that Steve was going to do some harm to me," and had "basically made a threat to me," although nothing in Mr. Piasecki's demeanor suggested a threat of immediate harm or knowledge of a gun being involved.

38. Approximately five minutes after the telephone call between Jenkins and [Piasecki], Leith returned to the grievance with a fully-loaded weapon and opened fire on [Piasecki], hitting him with four bullets, one of which was fatal.

39. After shooting Mr. Piasecki, Leith then opened fire on Ronald Mead and Phillip Jones, wounding both of them.

40. The first telephone call that day to the Chelsea Police Department . . . was received by the Chelsea dispatcher from employees of the Chelsea High School sometime immediately after the shooting had occurred.

41. Neither the MEA nor its agents took any action whatsoever, except the limited and inadequate actions described above, to intervene in the impending attack by Leith upon the grievance participants.

* * *

44. Prior to the above-described shooting, the MEA had knowledge that Leith was dangerous and could foresee that Leith would injure some or all of the remaining participants in the grievance proceeding.

45. The MEA was in a unique position to prevent the harm done to [Piasecki] by communicating the urgency and the severity of the impending danger from Leith, including the fact that Leith was returning to the grievance proceeding armed and with an apparent intent to shoot the participants, and further was in the position of taking steps to contact law enforcement officials who could intervene and protect the participants in the grievance proceeding.

46. *Based upon the special relationship which exists between a labor union and an employer, in this case the District Administration, and based upon the special circumstances which exist during the course of protected concerted activities such as grievance proceedings, and based upon the assumption of duties already undertaken through partial action by its agents, the MEA owed the following duties to [Piasecki]:*

a. A duty to warn of the impending danger with immediacy and without delay;

b. A duty to refrain from unnecessary discussion and conferencing within the ranks of the union prior to taking protective action;

c. A duty to provide an adequate, complete, and detailed warning, relaying to the intended victims all crucial and pertinent facts regarding Leith's threat, including the fact that he was seen carrying a gun, the fact that he was known to be headed to Joseph K. Piasecki's office, the fact that he appeared intent upon shooting participants in the grievance proceeding, and including but not limited to the fact that Leith's threat and the danger which he posed was an urgent matter which appeared immediate and imminent;

* * *

f. A duty to avoid unnecessary delay in placing the telephone call to Joseph K. Piasecki;

g. A duty to avoid unnecessary delay in communicating the fact and explicit details of the threat to [Piasecki] after telephone contact had finally been established, rather than down-playing the immediacy and lethal nature of the impending harm;

h. A duty to contact law enforcement officials and to seek intervention upon receiving knowledge of the threat. [Emphasis added.]

The pleadings alleged that Jenkins was aware before the shooting of Leith's mental problems and alleged misconduct toward students, and had knowledge that the administration had initiated disciplinary proceedings against Leith for the alleged inappropriate conduct. Defendants were Leith's bargaining representative, and Jenkins, the MEA's representative for the Chelsea District, had a relationship with Leith as to the specific grievance which was the subject of the grievance proceeding on the day of the shooting. Jenkins had driven with Leith to Lansing several weeks before the shooting to determine Leith's legal rights regarding a grievance the MEA instituted on his behalf against the administration, of which Piasecki was the head. The grievance at issue in the Lansing meeting arose out of the disciplinary proceedings resulting from Leith's misconduct toward students, incidents which were the subject of the December 16th grievance proceeding. *Plaintiff's complaint further alleged that Jenkins had actual knowledge of Leith's imminent arrival at Piasecki's office with a gun and Leith's intent to harm Piasecki.* When Mrs. Leith called Jenkins on the afternoon of December 16, 1993, Piasecki, Mead, the principal of Chelsea High School, and Jones, an MEA representative were continuing Leith's grievance proceeding in Piasecki's office. Under the CBA, there was an ongoing relationship between defendants and Piasecki in that the union and administration had to comply with the provisions of the CBA regarding grievance proceedings; Piasecki, as the Superintendent, or his designee, was obligated to be present at the second level of grievance proceedings and meet with the grievant and a union representative;[1] and no grievance could be adjusted absent prior notice and opportunity given for a union representative to be present.

Under these circumstances, the severity of the risk, the likelihood of occurrence, and the foreseeability of the harm were high, while the burden on defendant was minimal, as was Piasecki's ability to protect himself without adequate warning. *Roberts, supra* at 652-653. Jenkins had actual knowledge of an identified imminent threat of catastrophic harm to a particular individual at a particular location from a particular person. He also knew that there was no reason to believe that Piasecki knew

of the danger. He had the ability to promptly and adequately warn Piasecki of Leith's imminent attack and the ability to promptly contact law enforcement. Thus he had the ability to discharge the proposed duty at little or no cost. Piasecki was unable to protect himself from the harm posed by Leith given that he was unaware that Leith was armed with a gun. Further, while Piasecki was conferring no direct economic benefit on defendant, Piasecki and Jenkins, as designated representatives of the union and the administration, were involved in a joint undertaking for the mutual economic and other benefit of their principals. This joint undertaking involved the face-to-face resolution of grievances outside of a courtroom setting, and the attendant possibility that some grievants might lose control of their emotions and become violent. Where such an event occurred and defendant had actual knowledge that the subject of an ongoing grievance procedure was about to attack the participants in this joint undertaking with a gun, there is a special relationship or circumstance so as to lead the law to say that Piasecki was entitled to the protection of being informed by defendant that Leith was returning to the meeting with a gun and with an apparent intent to do physical harm. A balancing of the societal interests involved weighs in Piasecki's favor. He was an administrator required by the CBA to attend the instant grievance proceeding. Persons required under CBA's to participate in such proceedings as part of a joint undertaking must be able to do so with a sense that actual, specific, imminent threats to their lives by other participants in the process will not be inadequately communicated to them.

We conclude that plaintiff's negligence claim was improperly dismissed pursuant to MCR 2.116(C)(8). Plaintiff's complaint alleged the requisite elements of negligence and adequately stated a claim that a special relationship existed between Piasecki and defendants, and that defendants' agents assumed the duty to warn Piasecki of the danger Leith posed, and performed the duty negligently by cloaking the gravity of the impending danger by being indirect and by failing to inform Piasecki that Leith was armed with a gun.

We therefore conclude that the circuit court improperly dismissed plaintiff's negligence claim on the basis of failure to state a claim.

III

Plaintiff also argues that the circuit court erred in dismissing her claim that defendants were vicariously liable for Leith's battery.

The parties agree that in order to survive summary disposition, plaintiff must have adequately alleged that the MEA participated in, authorized, or ratified Leith's criminal conduct. *Sowels v Laborers' Int'l Union of N America*, 112 Mich App 616, 622; 317 NW2d 195 (1981). Plaintiff alleged that Jenkins' and Sypniewski's willfully shielding the grievance participants from knowledge of Leith's impending attack and willfully choosing not to intervene or seek help from law enforcement established that defendants effectively participated, ratified, or authorized the shooting.

Under *Sowels*, unions and their officers and members participating or interested in a labor dispute cannot be held liable for unlawful acts of union officers, members, or agents, except on clear proof of actual participation in or authorization of the acts, or ratification of the acts after actual knowledge thereof. "Participation" means to take part in, to receive or have a part or share of, or to be

engaged in an activity. See *Burrell v Ford Motor Co*, 386 Mich 486, 494; 192 NW2d 207 (1971). "Ratification" is the affirmance by a person of a prior act which did not bind him, but which was done or professed to be done on his account. Restatement Agency, 2d, § 82, p 210; *Cudahy Bros Co v West Michigan Dock & Market Corp*, 285 Mich 18, 25; 280 NW 93 (1938).

We conclude that plaintiff did not sufficiently allege facts from which it could be inferred that defendants actually participated, authorized, or ratified Leith's actions. We find no error in the circuit court's dismissal of the vicarious liability claim.

IV

Plaintiff's final argument is that the circuit court erred in dismissing her breach of third-party beneficiary contract claim. We review the circuit court's grant of summary disposition de novo. *Baker v Arbor Drugs*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis of a plaintiff's allegations. *Id.* The circuit court must consider and view the pleadings, affidavits, depositions, admissions, and any documentary evidence in favor of the nonmoving party. The moving party has the initial burden of supporting its position by affidavits, depositions, admissions or other documentary evidence. *Smith v Globe Life Ins*, 460 Mich 446, 455; 597 NW2d 28 (1994), citing *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). The burden then shifts to the nonmovant to establish that a genuine issue of material fact exists. *Id.*

The rights of third-party beneficiaries are addressed in MCL 600.1405; MSA 27A.1405, which provides:

> 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 has undertaken to give or to do or refrain from doing something directly to or for said person.

The law presumes that a contract has been executed for the benefit of the parties, and plaintiff has the burden of proving that Piasecki was an intended beneficiary of the contract between defendant and the Chelsea School District Board of Education. *Oja v Kin*, 229 Mich App 184, 193; 581 NW2d 739 (1998). When determining whether the parties to the contract intended to make a third person a third-party beneficiary, a court should examine the contract using an objective standard. *Dynamic Construction Co v Barton Malow Co*, 214 Mich App 425, 427; 543 NW2d 31 (1995). A person who may be incidentally benefited by the contract does not have rights as a third-party beneficiary. *Alcona Schools v Michigan*, 216 Mich App 202, 205; 549 NW2d 356 (1996). Calamari & Perillo, Contracts (3d ed), Third Party Beneficiaries, ch 17, p 701, states that in order to qualify as an intended beneficiary, the third party must meet two requirements, otherwise he is an incidental beneficiary:

> . . . . (1) The third party must show that recognition of a right to performance in the beneficiary "is appropriate to effectuate the intention of the parties." (2)(a) "[T]he performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary" or (b) "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

Plaintiff's complaint alleged in pertinent part:

> 61. Upon information and belief, the MEA was party to a collective bargaining agreement between it and the Chelsea District Administration which gave rise to certain express and implied contractual duties, upon information and belief including but not limited to the following:
>
> a. A duty to take steps to insure the safe and efficient handling of protected concerted union activities, including grievance proceedings;
>
> b. A duty to warn the Administration of violent threats made by union members;
>
> c. A duty to maintain a policy placing the personal safety of Administrators over the labor-related interests of any other individual;
>
> d. A duty to contact law enforcement officials and/or take such other action to intervene in situations which would foreseeably jeopardize the safety of participants to grievance proceedings;
>
> e. A duty to take whatever steps were necessary to insure and protect participants in a grievance proceeding once it learned of a specific threat posed by a particular union member; and
>
> f. Such other duties as may appearing during the course of discovery and trial of this matter.

Plaintiff asserts that the CBA was made for his benefit since the Board of Education employs the administration of which he was a part, and the union members on one side and the administration on the other side were the respective intended beneficiaries of the CBA, which had the express purpose of "promoting harmonious relations" between them and furthering "their mutual aim(s).[2]

Plaintiff failed to establish that he was more than an incidental beneficiary of the promise to promote harmonious relations. Further, the express provision in the CBA upon which plaintiff relies – the preamble's recitation of an interest in promoting harmonious relations between the teaching staff and administration - - is not tantamount to a contractual commitment to undertake the duties set forth in paragraph 61 of plaintiff's complaint. While the CBA and Piasecki's status as administrator are facts relevant to the determination whether there was a special relationship sufficient to support a duty under

the facts of this case, as discussed in section II, *supra*, Piasecki's status does not establish him a a third party beneficiary of the CBA.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Martin M. Doctoroff
/s/ Helene N. White

[1] Article XIX of the CBA, entitled "Grievance Procedure," provided in pertinent part:

> Paragraph A: A grievance shall be an alleged violation of the terms of this contract or written Board policy which concerns teachers' wages, hours, and working conditions.
>
> * * *
>
> No grievance shall be adjusted without prior notification to the Association and opportunity for an Association representative to be present, *nor shall any adjustment of a grievance be inconsistent with the terms of this agreement. . .*
>
> * * *
>
> **LEVEL TWO:** If the Grievant and/or the Association is not satisfied with the disposition at Level One . . . the Grievant and/or the Association may appeal the grievance within five (5) additional school days by *filing it with the Superintendent*. Within three (3) school days from the receipt of the written grievance, the *Superintendent or his designee shall meet with the grievant* and a representative of the Association to attempt to resolve the grievance. The *Superintendent or his designee shall render his/her decision* within three (3) days after such meeting.
>
> * * *
>
> If an individual teacher has a personal complaint which he desires to discuss with a supervisor, he/she is free to do so without recourse in the grievance procedure. However, no grievance shall be adjusted without prior notification to the Association and opportunity for an Association representative to be present, *nor shall any adjustment of a grievance by inconsistent with the terms of this agreement.* In the administration of the grievance procedure, the interests of the teachers shall be the sole responsibility of the Association. [Emphasis added.]

[2] The preamble of the collective bargaining agreement provided in pertinent part:

WHEREAS, The Board and the Association recognize and declare that providing a quality education for the children of the Chelsea School District is their mutual aim, and that the character of such education is influenced by the quality and morale of the teaching service, and

WHEREAS, *The parties hereto are interested in promoting harmonious relations among the teaching staff, administration, Association and the Board,* and

WHEREAS, Pursuant to the Provisions of Act 336 of the Michigan Public Acts of 1947, as amended by Act 379 of the Michigan Public Acts of 1965, the Association and the Board desire to contract in respect to wages, hours, or other conditions of employment.

NOW, THEREFORE, in consideration of the premises and the respective agreement of the Board and the Association herein contained, the Board and the Association agree as follows . . . [Emphasis added.]