

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH DOMIN, as Personal Representative of
the Estate of JAMES DOMIN,

UNPUBLISHED
May 9, 1997

Plaintiff-Appellant,

v

No. 190479
Oakland Circuit Court
LC No. 94-488309-NO

CITY OF NOVI, TIMOTHY HARPER and
VICTOR LAURIA,

Defendants-Appellees.

Before: Sawyer, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). We affirm.

This case stems from an automobile accident that occurred on December 15, 1992. Plaintiff's decedent was an employee of Keford's Novi Towing. Keford's Novi Towing was under contract with the City of Novi to provide wrecking services in the case of automobile accidents occurring within the city. Pursuant to this contract, plaintiff's decedent arrived at the scene of the accident to clean away the debris and tow any vehicles that needed to be removed from the scene of the accident.

The accident occurred on the west side of a sloping, two-lane road, near the crest. When plaintiff's decedent arrived at the scene of the accident, City of Novi police officers Victor Lauria and Timothy Harper were already present. Officers Lauria's and Harper's patrol cars were both parked on the same side of the road, staggered between the two vehicles involved in the crash. The flashers of both officers' cars were active. While standing in the street, plaintiff's decedent was struck and killed by a car driven by Rebekah Dawn Bauer. Plaintiff asserts that, at the time of the accident, plaintiff's decedent was clearing debris from the road. Defendants argue that he negligently stepped backward into the roadway and was consequently struck by Bauer's automobile.

Plaintiff thereupon filed the present action against both the officers and the City of Novi, alleging that the city was liable to plaintiff's decedent under a third-party beneficiary contract theory, that the

police officers' failure to protect plaintiff's decedent constituted gross negligence, and that the City of Novi's governmental immunity was further abrogated under the motor vehicle exception. The trial court determined that plaintiff's decedent was not a valid third-party beneficiary to the contract between Keford's Novi Towing and the City of Novi, defendants were not grossly negligent and the motor vehicle exception for governmental immunity did not apply in the present case and thus, granted defendants' motion for summary disposition.

Plaintiff first asserts that the trial court erred in granting defendants' motion for summary disposition as to her claim for breach of contract. We disagree.

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Industrial Machinery & Equipment Co, Inc v Lapeer Co Bank & Trust*, 213 Mich App 676, 678; 540 NW2d 781 (1995). The party moving for summary disposition pursuant to MCR 2.116(C)(10) is entitled to judgment as a matter of law only if there is no genuine issue of any material fact. *Bourne v Farmers Ins Exchange*, 449 Mich 193, 196-197; 534 NW2d 491 (1995). When reviewing a motion pursuant to MCR 2.116(C)(10), this Court may consider all the pleadings, affidavits and admissions, granting the benefit of the doubt to the non-moving party. *Bourne, supra*, at 197, citing *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

A motion for summary disposition under MCR 2.116(C)(8) is tested by the pleadings alone. Only the legal sufficiency of the complaint is reviewed. This Court accepts as true all factual allegations pleaded, as well as any reasonable inferences that may be drawn therefrom. The motion may be granted only when the claim is so clearly unenforceable that as a matter of law no factual development could possibly justify recovery. *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 728; 476 NW2d 506 (1991).

In the present case, plaintiff fails to present any support demonstrating that plaintiff's decedent was a direct party to the contract. The contract was entered into between the City of Novi and Keford's Novi Towing. Consequently, plaintiff's decedent, as an employee of Keford's Novi Towing, was not a party to the contract. Moreover, plaintiff's allegation that defendants breached an implied contract likewise must fail. An implied contract requires mutual assent of the parties as well as consideration. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). In the present case, both these elements are lacking. Therefore, plaintiff's breach of contract claim can only stand if plaintiff's decedent was a third-party beneficiary of the contract at issue.

The rights of third-party beneficiaries are codified in MCL 600.1405; MSA 27A.1405, which 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 has undertaken to give or to do or refrain from doing something directly to or for said person.

When determining whether the parties to a contract intended to make a third person a third-party beneficiary, this Court must examine the contract using an objective standard. *Dynamic Const Co v Barton Malow Co*, 214 Mich App 425, 427; 543 NW2d 31 (1995). Third-party beneficiary status requires an express promise to act to the benefit of the third party; where no such promise exists, that third party cannot maintain an action for breach of the contract. *Id.* at 428. Thus, a person who incidentally benefits from the performance of some duty required under a contract has no rights under the contract. *Id.* Looking at the contract at issue, we find that it does not contain any express provision by which the City of Novi promises to confer any benefit upon plaintiff's decedent. There is no express provision in the contract that police were to protect the wrecker driver who was working under the towing contract. Consequently, any duty owed by defendants to plaintiff's decedent was incidental, and thus, plaintiff has no claim for breach of contract. *Dynamic, supra* at 428.

Plaintiff next asserts the trial court erred by finding that pursuant to the public-duty doctrine, neither Officer Lauria nor Harper owed any duty to plaintiff's decedent and were not liable. We disagree.

The public-duty doctrine provides that, if the duty that the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual, injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. *White v Beasley*, 453 Mich 308, 316; 552 NW2d 1 (1996). A police officer owes a duty to an individual if a special relationship exists between the officer and the individual. *Id.*; *Gazette v City of Pontiac*, __ Mich App __; __ NW2d __ (Docket No. 200391, issued February 18, 1997, slip op pp 2-3). In determining whether a special relationship exists, the Supreme Court adopted the test provided in *Cuffy v City of New York*, 69 NY2d 255; 513 NYS2d 372; 505 NE2d 937 (1987). A special relationship exists between police officer and a plaintiff when there is: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agent that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking. *White, supra* at 320 (citation omitted).

Determination of whether a special relationship exists is not a question of fact, but rather a question of law for the court to decide. *Hoffman v Warden*, 184 Mich App 328, 339; 457 NW2d 367 (1990).

While this case is somewhat different than the usual public-duty doctrine case, in that the victim was called by and assisting the police officers, when analyzed using the *Cuffy* test, we fail to find that a special relationship existed between plaintiff's decedent and the officers. There were no allegations, or evidence indicating, that plaintiff's decedent was killed as a result of justifiably relying on the actions of

the officers, i.e., parking their vehicles on the side of the road with flashers activated. We find no affirmative undertaking on the part of the officers to protect plaintiff's decedent on which plaintiff's decedent could have justifiably relied when clearing the accident scene. Therefore, the trial court did not err as a matter of law in ruling that Officers Lauria and Harper did not owe a duty to plaintiff's decedent because of the lack of a special relationship, and thus were not liable in accordance with the public-duty doctrine.

Plaintiff's final argument on appeal is that the officers' failure to properly position one of their patrol cars east of the crest in the road with overhead flashers on to protect the decedent from oncoming traffic constitutes negligent operation of a motor vehicle, which is statutorily exempted from governmental immunity. We disagree.

Plaintiff seeks to circumvent the City of Novi's governmental immunity through application of the motor vehicle exception, which provides:

Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner. . . [MCL 691.1405; MSA 3.996(105).]

Plaintiff's claim is essentially that the officers failed to protect plaintiff's decedent from oncoming traffic and were therefore negligent. However, as previously indicated, because there was no special relationship between the officers and plaintiff's decedent, the officers had no duty to protect plaintiff's decedent. Therefore, the officers could not have been negligent by failing to do so. Accordingly, because the officers could not have been negligent, the City of Novi cannot be liable. Consequently, the trial court did not err in granting summary disposition.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Mark J. Cavanagh