# STATE OF MICHIGAN

# COURT OF APPEALS

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PENNY A. PADDOCK, Individually and as Personal Representative of the Estate of LARRY JOEL SHANE HEYD, Deceased, CHAD LYNN HEYD, and ROBERT LEE HEYD,

Plaintiffs-Appellants,

v

CITY OF RICHMOND, STAN DOBRUK, MARY DOBRUK, JOAN DEMEREST, DONNA HOFMAN, JAMES LANG, and LORI RIX,

Defendants,

and

KNIGHTS OF COLUMBUS, CHAPTER NO. 2667, and DYCK SECURITY SERVICE, INC.,

Defendants-Appellees.

UNPUBLISHED
February 3, 1998

No. 192160
Macomb Circuit Court
LC No. 93-004311-NO

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PENNY A. PADDOCK, Individually and as Personal Representative of the Estate of LARRY JOEL SHANE HEYD, Deceased, CHAD LYNN HEYD, and ROBERT LEE HEYD,

Plaintiffs-Appellants,

v

CITY OF RICHMOND, STAN DOBRUK, MARY DOBRUK, JOAN DEMEREST, DONNA HOFMAN, JAMES LANG, LORI RIX, and KNIGHTS OF COLUMBUS, CHAPTER NO. 2667,

No. 192161
Macomb Circuit Court
LC No. 93-004311-NO

Defendant-Appellees,

and

DYCK SECURITY SERVICE, INC.,

Defendant.

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PENNY A. PADDOCK, Individually and as Personal Representative of the Estate of LARRY JOEL SHANE HEYD, Deceased, CHAD LYNN HEYD, and ROBERT LEE HEYD,

Plaintiffs-Appellants,

v

No. 197695
Macomb Circuit Court
LC No. 93-004311-NO

CITY OF RICHMOND, STAN DOBRUK, MARY DOBRUK, JOAN DEMEREST, DONNA HOFMAN, JAMES LANG, and LORI RIX,

Defendants-Appellees,

and

KNIGHTS OF COLUMBUS, CHAPTER NO. 2667, and DYCK SECURITY SERVICE, INC.,

Defendants.

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Before: Markman, P.J., and McDonald and Cavanagh, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs appeal as of right in Docket Nos. 192060 and 192161 and by leave granted in Docket No. 197695 from orders of summary disposition granted in favor of defendants. These claims arise out of an incident in which plaintiffs' decedent, who was twenty years old, attended the annual "Good Old Days Fair" in the City of Richmond, consumed beer in a concessions tent operated by the Knights of Columbus (KOC), subsequently became embroiled in an altercation outside the tent at or near the edge of the fairgrounds and, during his pursuit of an individual involved in the altercation was fatally shot by that individual outside the fairgrounds. We affirm.

In Docket Nos. 192160 and 192161, plaintiffs contend that the trial court erred in granting summary disposition in favor of Dyck Security Services, Inc. (Dyck), and subsequently denying their motion for reconsideration on their negligence claims. The trial court's grant of summary disposition is reviewed de novo to determine if Dyck was entitled to judgment as a matter of law. *G&A, Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). Although the trial court did not specify the subrule of MCR 2.116(C) upon which its decision was based, we have reviewed the issue under the standards for MCR 2.116(C)(10)(no genuine issue of material fact). See *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 524; 542 NW2d 912 (1995); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Because matters outside the pleadings were considered by the trial court, it does not appear that any party was misled by the court's analysis.

The trial court's denial of plaintiffs' motion for reconsideration is reviewed for an abuse of discretion. *Michigan Bank-Midwest v D J Reynaert, Inc*, 165 Mich App 630, 645-646; 419 NW2d 439 (1988). Under these standards, plaintiffs have failed to demonstrate any basis for vacating either of the trial court's decisions.[1] Although plaintiffs' negligence claim was based on security services being provided by Dyck, the proofs presented in support of and in opposition to the motion established a relatively narrow contractual undertaking on the part of Dyck, pursuant to an oral agreement with KOC, to check identifications at the entrance to KOC's beer tent during hours when access to the tent was restricted to individuals who were at least twenty-one years of age. Although a contractual undertaking can give rise to liability when the actor has assumed an obligation or intended to render services for the benefit of another, *Smith v Allendale Mutual Ins Co*, 410 Mich 685; 303 NW2d 702 (1981), common sense determines the scope of an assumed duty to provide security. *Scott v Harper Recreation, Inc*, 444 Mich 441, 450; 506 NW2d 857 (1993). Even accepting that Dyck's undertaking to check identifications gave rise to a general duty owed to individuals under twenty-one years of age, plaintiffs failed to oppose the motion for summary disposition with evidence that Dyck breached this duty relative to the decedent since the evidence established that decedent entered the tent before Dyck personnel came on duty.

The only arguable material factual dispute established by plaintiffs at the hearing on Dyck's motion for summary disposition concerned whether Dyck had an obligation to participate in a police sweep of the KOC tent to remove underage individuals after access to the tent was restricted. Dyck's proofs filed in opposition to plaintiffs' motion for reconsideration questioned whether the deponent relied upon by plaintiffs to establish this factual issue had the requisite personal knowledge needed to show a genuine issue of material fact. See *SSC Associates Ltd Partnership v General Retirement System*, 192 Mich App 360, 364; 480 NW2d 275 (1991) (disputed factual issues must be established by admissible evidence) and MRE 602 (witness may not testify on a matter unless evidence introduced is sufficient to support a finding that a witness has personal knowledge of the matter). However, even assuming that Dyck had a contractual obligation to participate in the sweeps, and that genuine issues of material fact existed on whether Dyck failed to perform this duty, there was no genuine issue of material fact shown on whether the failure to remove the decedent from the tent was a proximate cause of the decedent being shot. Reasonable minds, in our judgment, could not differ in concluding that it was unforeseeable that the decedent would be shot under the circumstances in this case as a result of the failure to remove the decedent (or any other underage individual) from the tent. *Rogalski v Tavernier*,

208 Mich App 302, 306; 527 NW2d 73 (1995).[2] Hence, we uphold the trial court's grant of summary disposition as well as its denial of reconsideration.

Plaintiffs next contend that the trial court erred in summarily dismissing their claims against KOC. Because plaintiffs acknowledge that the trial court correctly dismissed their dramshop claim against KOC under MCL 436.22; MSA 8.993, as the licensee who furnished the beer in the tent, we limit our review to whether the trial court erred in refusing to give plaintiffs an opportunity to amend the third amended complaint to add a negligence count against KOC pursuant to MCR 2.116(I)(5). *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997).

We find that any claim based on dramshop-related facts (i.e., the furnishing of the beer in the tent) is barred by 436.22(11); MSA 8.993(11). *Tennille v Hackney*, 225 Mich App 66; 570 NW2d 130 (1997). We also find that plaintiffs' claim of inadequate security against KOC, based on the services provided by Dyck, would be futile. Further, a negligence claim against KOC based on premises liability would also be futile because there is no evidence that KOC had possession and control of the premises outside of its tent. *Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 565; 563 NW2d 241 (1997), and the circumstances of this case do not establish a basis for imposing a duty upon KOC beyond its premises for the peril that the decedent confronted when he became embroiled in the altercation that led to his shooting. *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 131; 463 NW2d 442 (1990); *Swartz v Huffmaster Alarms Systems, Inc*, 145 Mich App 431; 377 NW2d 393 (1985). Plaintiffs' reliance on *Upthegrove v Myers*, 99 Mich App 776; 299 NW2d 29 (1980), is misplaced because the decedent was not a passer-by injured as a result of a danger posed by a condition on the KOC premises. *Ward, supra*, at 132. Further, the circumstances of this case do not involve either the affirmative actions of defendant or their knowledge of an obvious and imminently dangerous situation which could give rise to liability in negligence for a shooting that took place well outside the KOC tent. *Schneider v Nectarine Ballroom, Inc (On Remand)*, 204 Mich App 1, 7; 514 NW2d 486 (1994).

Because plaintiffs cannot succeed on the issue of liability against KOC, the arguments raised by plaintiffs and KOC on whether Penny Paddock can recover damages for the physical manifestations of her emotional distress resulting from the death of her son are moot. Hence, we decline to address these arguments.

In Docket No. 197695, plaintiffs raise two additional issues. The scope of our review is limited to the particular defendants who are the subject matter of each issue, namely, the City of Richmond in the first and the individual committee members of the fair in the second. *Williams v City of Cadillac*, 148 Mich App 786, 790; 384 NW2d 792 (1985).

In the first issue, plaintiffs contend that the trial court erred in summarily dismissing their claims against the City of Richmond based on governmental immunity. Although the trial court failed to specify the particular subrule of MCR 2.116(C) upon which its decision was based, we have reviewed the trial court's decision under the standards for MCR 2.116(C)(7), which tests whether a claim is barred because of immunity granted by law. *Butler, supra*, at 524; *Mollett, supra*, at 332. See also *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994); *Turner v Mercy Hosps &*

*Health Services of Detroit,* 210 Mich App 345, 348; 533 NW2d 365 (1995). Upon de novo review of the trial court's determination, we find that the trial court correctly granted summary disposition because the City was engaged in the exercise or discharge of a governmental function, namely an activity expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law, when it provided police services on the fairgrounds. MCL 691.1401(f); MSA 3.996(101)(f) and MCL 691.1407(1); MSA 3.996(107)(1); *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 501; 418 NW2d 381 (1988); *Ross v Consumers Power (On Rehearing),* 420 Mich 567, 661; 363 NW2d 641 (1984). The preservation of the public peace and order, preventing crime, and protecting the rights of other persons are the types of activities that come within the exercise or discharge of a governmental function. *Ross*, *supra*, at 661. The fact that a private security company could have been voluntarily hired by the fair to provide protection does not make the police protection provided by the City any less of a truly governmental function. Plaintiffs' reliance on the governmental essence test in *Trommater v Michigan,* 112 Mich App 459, 464; 316 NW2d 459 (1982), is misplaced because this test was repudiated in *Ross, supra*. Because the City was entitled to governmental immunity as a matter of law, we do not address plaintiffs' arguments on the elements of causation and Penny Paddock's damages, which have also been briefed by plaintiffs relative to their claims against the City.

In their second issue, plaintiffs argue that the trial court erred in summarily dismissing their claims against the individual committee members of the fair. The only question briefed by plaintiffs relative to the committee members is whether they are entitled to governmental immunity. Plaintiffs have failed to brief the specific basis of the trial court's oral opinion, which appears to indicate that the trial court granted summary disposition in favor of the committee members based only on the absence of causation. Only the City was specifically granted summary disposition based on governmental immunity. As the trial court observed:

> I am going to grant the motion on the basis of causation as far as the City of Richmond is concerned, on the basis of governmental immunity and causation. . . . *The Court feels that no reasonable mind could conclude that any actions on the part of the committee* or the city or the security people was – *has any causation in connection with the injury that was eventually sustained by the deceased*. There is just no factual basis that would allow a trier of fact to logically conclude there is a casual connection within-- between-- what happened on the ground and the injury that the plaintiff suffered; there just isn't. [Emphasis added.]

Because plaintiffs have not addressed an issue that must be reached, the relief that they seek-- to have the order of summary disposition set aside-- cannot be granted.[3] *Roberts & Son Contracting, Inc v North Oakland Development Co*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Mark J. Cavanagh

[1] There is no support in the record for plaintiffs' claim that the trial court misconstrued their negligence claim against Dyck as a dramshop action.

[2] It is also noteworthy that there was no claim or evidence that the shooter had been inside of the "beer tent." Rather, plaintiffs claim only that individuals in the "beer tent" and, in particular, the decedent, became violent due to having been furnished alcoholic beverages.

[3] Although the joint appellate brief of the City and committee members suggests otherwise, we have not found where the plaintiffs have properly briefed any issue on causation relative to the committee members. There is some mention in plaintiffs' brief, at 15, of genuine issues of material of fact existing regarding "each defendant's responsibilities at the fair, especially as those responsibilities pertain to the protection of fair patrons." However, this argument is made without any discussion of any committee member's particular responsibilities and is presented within a subargument addressing the grant of summary disposition on the claims against the City. The second issue set forth in plaintiffs' statement of questions presented is discussed at pages 19 to 21 of their appellate brief. It concerns the grant of summary disposition in favor of committee members but there is no discussion of causation in that issue.