

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the Estate of JACQUELINE M.
PONKE, Deceased.

DENNIS R. LUTZ, as Personal Representative of
the Estate of JACQUELINE M. PONKE, Deceased,

Plaintiff-Appellee,

v

OXFORD POLICE DEPARTMENT, OXFORD
EMERGENCY SAFETY BOARD, CHIEF JOHN
LEROY, SERGEANT MALCOLM, OFFICER
BRIAN RUSSELL, SERGEANT CRICHTON,
OFFICER BURNHAM and OFFICER
SPADAFORE,

Defendants-Appellants.

Before: Talbot, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendants appeal by leave granted from the circuit court order denying in part their motion for summary disposition. We reverse.

Plaintiff Dennis Lutz is the personal representative of the estate of Jacqueline Marie Ponke, who was killed at her office by her husband, Raymond Ponke. Plaintiff brought this wrongful death suit against defendants, the Oxford Police Department, the Oxford Emergency Safety Board and individual Oxford police officers on the basis that they failed to adequately protect Jacqueline Ponke. The trial court granted summary disposition as to defendants police department and safety board, but denied summary disposition as to the individual defendants.

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LC No. 95-489828 CZ

On appeal, defendants argue that the trial court erred in denying their motion for summary disposition because there was no special relationship between Jacqueline Ponke and defendants. Defendants argue they did not make any assurances to protect her and that she did not justifiably rely on any such assurances. We agree.

This Court reviews the grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo. *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co*, 220 Mich App 347, 352; 559 NW2d 93 (1996). A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim and permits summary disposition when except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. *Id.* The reviewing court must consider the pleadings, affidavits, depositions, and admissions, and grant the benefit of any reasonable doubt to the opposing party. *Id.*

The public-duty doctrine insulates police officers from tort liability for the negligent failure to provide police protection unless an individual plaintiff satisfies the special-relationship exception. *White v Beasley*, 453 Mich 308, 316; 552 NW2d 1 (1996). The underlying rationale of the public duty doctrine is that “police officers should not be liable ‘for failing to protect a member of the general public from a criminal act of which they were not aware but should have anticipated and prevented.’” *Id.* at 318, citations omitted. “Because of the unusual and extraordinary nature of police work, it is unfair to allow ‘a jury of laymen with the benefit of 20/20 hindsight to second-guess the exercise of a policeman’s discretionary professional duty’”. *Id.* at 321, citations omitted. Thus, plaintiff has no cause of action unless the facts of this case establish a special relationship between the individual officers and decedent.

In Michigan, a special relationship exists when there is:

- (1) an assumption by the police officer, 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 police officer that inaction could lead to harm;
- (3) some form of direct contact between the police officer and the injured party; and
- (4) that party’s justifiable reliance on the police officer’s affirmative undertaking. [*Gazette v Pontiac (On Remand)*, 221 Mich App 579, 582-583; 561 NW2d 879 (1997).]

In this case, the trial court incorrectly determined that there was a question of fact whether a special relationship existed between Jacqueline Ponke and defendants. First, plaintiff did not allege facts sufficient to suggest that the police officers assumed an affirmative duty to act on behalf of Jacqueline. When defendant Officer Russell first spoke to Jacqueline after he observed Raymond speeding and followed him home, the officer learned that Raymond had a drinking problem and that Jacqueline was planning to seek a divorce. The officer asked Jacqueline whether Raymond had ever hurt her. She replied that he had not and that he would not. Officer Russell gave Jacqueline his business card with his

home phone number and told her to call him anytime. The officer did not, however, promise to protect her and, as noted previously, Jacqueline did not indicate any need for protection.

Jacqueline subsequently contacted the Oxford Police Department on three different dates. There was no previous history of family trouble and no separation or divorce papers were filed during this time. On the first occasion, Jacqueline reported that Raymond had taken their daughter, and she wanted him arrested for kidnapping. However, defendant Officer Spadafore told Jacqueline that Raymond could not be arrested because she gave him permission to take the child. The second time Jacqueline called the police, she reported that Raymond had destroyed the marital home and that she wanted him arrested. Officer Spadafore told her that he did not know if it was a crime for Raymond to destroy his own property and refused to arrest him. Finally, Jacqueline called to obtain assistance in removing some personal items from the marital home. She was accompanied by Officer Russell and defendant Sergeant Malcolm. Officer Russell made a report and requested that an arrest warrant be sought against Raymond for malicious destruction of property but there is no evidence that anyone promised Jacqueline that Raymond would be arrested.

Nor did plaintiff allege facts sufficient to suggest that the police officers had knowledge that inaction could lead to harm. The officers asked Jacqueline on more than one occasion whether Raymond had harmed her and she replied that he had never done so and that she did not believe he would. Police officers should not be liable for failing to protect a member of the general public from a criminal act of which they were not aware, but which they allegedly should have anticipated and prevented. *Gazette, supra* at 583.

Finally, plaintiff did not allege sufficient facts to suggest that Jacqueline justifiably relied on any affirmative undertaking by the police. As noted previously, the officers responded whenever they were called but they never assumed any affirmative undertaking to protect Jacqueline. Whenever the officers asked her if Raymond had injured her, Jacqueline replied that he had not and that she did not believe that he would harm her. She stated that she wanted him arrested solely for destroying their house. There is no evidence that Jacqueline was ever told that Raymond would be arrested. Although a police report was filed and an arrest warrant was requested, officers told her that it might not be a crime for Raymond to destroy his own personal property. Hence, Jacqueline had no basis to expect that the officers would arrest Raymond, much less that they would do so immediately. We find no genuine issue of material fact concerning a special relationship between defendants and Jacqueline Ponke. The trial court erred in refusing to grant defendants' motion for summary disposition.

Defendants also argue that plaintiff did not allege sufficient facts to suggest that defendants were grossly negligent and therefore not immune from tort liability. Gross negligence is conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. MCL 691.1407(2); MSA 3.996(107)(2). Plaintiff contends that the officers were reckless in disregarding Raymond's escalating violence, as demonstrated by his destruction of the marital home, and that it was grossly negligent for defendants not to immediately seek a warrant for Raymond's arrest.

The police officers' conduct here was not so reckless as to demonstrate a substantial lack of concern for whether an injury resulted to Jacqueline. The officers came to Jacqueline's aid whenever

they were called and they watched for signs of trouble whenever they drove by her house. Jacqueline repeatedly assured the police that she did not believe Raymond was capable of harming her. The trial court improperly considered the tragic events of this matter with the “benefit of 20/20 hindsight,” *White, supra*, at 321, and erred in denying defendants’ motion for summary disposition.

Reversed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Michael R. Smolenski