

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD COSTA and CINDY COSTA,
Plaintiffs-Appellees/Cross-
Appellees/Cross-Appellants,

FOR PUBLICATION
September 21, 2004
9:00 a.m.

v

COMMUNITY EMERGENCY MEDICAL
SERVICES, INC., DAVE HENSHAW and
SCOTT MEISTER,

No. 247983
Wayne Circuit Court
LC No. 02-202463-NH

Defendants-Appellees,

and

DONALD FARENGER,

Defendant-Cross-Appellant/Cross-
Appellee,

and

LISA SCHULTZ,

Defendant-Appellant/Cross-
Appellee,

and

JOHN DOE and JANE DOE,

Defendants.

RICHARD COSTA and CINDY COSTA,
Plaintiffs-Appellees/Cross-
Appellants,

No. 248104
Wayne Circuit Court
LC No. 02-202463-NH

v

COMMUNITY EMERGENCY MEDICAL

Official Reported Version

SERVICES, INC., DAVE HENSHAW and
SCOTT MEISTER,

Defendants-Appellants/Cross-
Appellees,

and

DONALD FARENGER,

Defendant-Cross-Appellee,

and

LISA M. SCHULZ, JANE DOE and JOHN DOE,

Defendants.

Before: Saad, P.J., and Talbot and Borrello, JJ.

BORRELLO, J. (*concurring in part and dissenting in part*).

I concur with the majority that the trial court's decision to deny defendant's motions for summary disposition was error requiring reversal for the reasons stated by the majority.

However, I strongly dissent from the majority's attempt to enlarge the scope of this Court's jurisdiction. I additionally dissent because I believe that this Court correctly asserted the application of the court rules at issue in *Newton v State Police*, 263 Mich App ___; ___NW2d ___ (2004), as I explained in my dissent in *Walsh v Taylor*, 263 Mich App ___; NW2d ___ (2004).

Because my reason for dissenting in this case is identical to my reason for dissenting in *Walsh, supra*, I quote from my previous dissent:

The majority contends that when a trial court denies a motion for summary disposition on *any* basis where the defense of governmental immunity *could* be raised, this Court acquires jurisdiction to review *all* matters under MCR 7.203(A) and MCR 7.202(6)(a)(v). The majority states:

"We do not believe that our Supreme Court intended the court rule to be read so restrictively that governmental bodies would be *forced* through discovery and trial whenever their motion for dismissal is denied on grounds other than MCR 2.116(C)(7), *merely because the plaintiff contends that the governmental agency is not immune*. [Slip op. 6 (emphasis added).]"

Impliedly, if not outrightly stated, the majority believes that plaintiffs allege facts outside the scope of governmental immunity simply to avoid governmental immunity, and not because the cause of action is based in law or fact. Whether intended or not, the clear message of the majority is that this Court must now act as a guardian against a perceived onslaught of frivolous litigation that our trial courts are seemingly ill-equipped to discover. Accordingly, I reject the majority's contention that plaintiff is filing a frivolous claim simply to avoid the defense of governmental immunity. Even assuming an onslaught of frivolous litigation, the trial courts—not this Court—are empowered to be the initial adjudicators of such perceived frivolous claims. However, the majority would have this Court become the court of initial jurisdiction to decide matters that may not have been raised at the trial court level, giving rise to another implied belief of the majority—that this Court should become a trier of fact. The concept of questions of fact being tried by the trier of fact, and not by panels of this Court, is still the jurisprudence of this state.

Thomas Jefferson understood the problems inherent when courts attempt to expand their statutory authority when he wrote:

"Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps. Their maxim is *boni judicis est ampliare jurisdictionem* [good justice is broad jurisdiction], and their power the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves. [Lipscomb & Bergh, eds, *The Writings of Thomas Jefferson* (Washington, D.C.; Thomas Jefferson Memorial Ass'n, 1903-1904), vol 15, p 277, Letter by Thomas Jefferson to William C. Jarvis, 1820.]"

This Court has taken great pains to distinguish between a motion brought under MCR 2.116(C)(7), (C)(8), and (C)(10). *Wilson v Alpena Co Rd Comm*, 263 Mich App ___; ___ NW2d ___ (2004). Similarly, the panel in *Newton, supra*, stated:

"The plain language of these court rules, interpreted in a common-sense fashion, lead us to conclude that this exception applies only to situations where the denial of summary disposition is directly based on a finding that the moving party is not entitled to government[al] immunity and not to a situation where, although a claim of governmental immunity has been asserted, the trial court denies a summary disposition motion because the party opposing summary disposition has stated a sufficient factual case to avoid summary disposition – in other words, as in this case, where the motion is actually disposed of as a MCR 2.116(C)(10) motion rather than a (C)(7) motion. [*Newton, supra* at ____.]"

The *Newton* Court understood that there are differences between C(7) and C(10) motions. The majority in this case would eliminate such distinctions. This Court in *Newton* correctly stated and decided the case, in part, on these distinctions. As this Court stated in *Newton, supra* at ___:

"In our opinion, the trial court did not make a legal determination concerning whether defendant was entitled to claim governmental immunity. Instead, the trial court made a determination that there were genuine issues of material fact to be resolved by the trier of fact. Therefore, the appeal in this case was taken from a (C)(10) determination rather than a (C)(7) determination. The order from which defendant claimed an appeal was therefore not a final order under MCR 7.202(7)(a)(v) and MCR 7.203(A)(1). Accordingly, defendant was required by the court rules to file an application for leave to appeal rather than a claim of appeal."

Thus, where a trial court has not made a finding whether a defendant is governmentally immune, it is premature for this Court to do so. However, the defendants in *Newton* were not precluded from raising the defense of governmental immunity. They could have asked for this Court to decide the issue by filing an application for leave to appeal. Accordingly, I dissent. [*Walsh, supra* at ___ (emphasis in original).]

/s/ Stephen L. Borrello