STATE OF MICHIGAN

COURT OF APPEALS

RANDY SEGUIN,

Plaintiff-Appellant,

v

BENZIE COUNTY, BENZIE COUNTY SHERIFF PAUL STILES, JOHN BRAZASKI and BETH BAESCH,

Defendants-Appellees.

UNPUBLISHED
May 9, 1997

No. 194387
Benzie Circuit Court
LC No. 95-004599-NI

Before: Taylor, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition, pursuant to MCR 2.116(C)(7) and (8), to defendants. We affirm in part, reverse in part, and remand.

In his first amended complaint, plaintiff, a civilian, alleged that a car/deer accident occurred near his residence and he went to the scene. After plaintiff arrived at the scene, he claimed that he was "authorized and/or permitted" to direct traffic by defendants, who are sheriff's deputies that responded to the accident. While plaintiff was directing traffic, he was struck by an oncoming vehicle being driven through the accident scene. Plaintiff alleged that defendants breached their duty to him by "allowing an inexperienced, poorly equipped pedestrian to assist in the administration of the accident scene . . . ." Plaintiff further alleged that the responding deputies failed to "properly position" their county-owned patrol vehicles so as to block traffic headed through the scene, and operated the vehicles' overhead flashing lights in a manner that reduced visibility.

Defendants' motion for summary disposition was granted by the trial court pursuant to MCR 2.116(C)(7) and (8).[1] The trial court ruled that defendants did not owe a duty to plaintiff to protect him from being struck by the oncoming traffic under the "public-duty" doctrine and therefore defendants were entitled to summary disposition under MCR 2.116(C)(8) on that claim. The court rationalized that the deputies' duty to control the accident scene was owed to the public at large, not to any single individual. The trial court also ruled that plaintiff's allegations regarding the improper positioning and

lighting of their patrol cars did not come within the "motor vehicle" exception to governmental immunity and therefore defendants were entitled to summary disposition under MCR 2.116(C)(7) on those claims.

I

Plaintiff argues that the trial court erred in ruling that he failed to plead sufficient facts to establish that a "special relationship" existed between him and defendants to overcome the "public-duty" doctrine. We agree.

This Court reviews the trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(8) de novo. *Eason v Coggins Memorial Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995). A motion under MCR 2.116(C)(8) relies on the pleadings alone, and all well-pleaded factual allegations in a complaint are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). A motion for summary disposition under MCR 2.116(C)(8) should be granted "only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Id.* at 487. Summary disposition under this rule is appropriate in a negligence action if it is determined that, as a matter of law, the defendant did not owe a duty to the plaintiff according to the alleged facts. *Eason*, *supra*.

An essential element of a negligence claim is the existence of a duty owed by the defendant to the plaintiff. *Koenig v City of South Haven*, ___ Mich App ___; ___ NW2d ___ (Docket No. 180870, issued 2/21/97), slip op p 9; *Chivas v Koehler*, 182 Mich App 467, 475; 453 NW2d 264 (1990). Whether a duty exists is a question of law for the court. *Koenig*, *supra*. A public official is regarded as owing his duty to the public in general and not to a specific individual. *Id.*; *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 456-460; 487 NW2d 799 (1992). This rule applies unless a special relationship exists between the official and the individual such that performance by the official would affect the individual in a manner different in kind from the way performance would affect the public. *Id*.

Applied to police officers, the public-duty doctrine insulates 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). In *White*, the Supreme Court adopted a test for examining the relationship between police officers and private individuals. *Id.* at 320. The elements of the test are:

> (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. . . . [*Id.* at 320-321 (quoting *Cuffy v City of New York*, 69 NY2d 255, 260; 513 NYS 2d 372; 505 NE2d 937 (1987).]

In his first amended complaint, plaintiff alleged that defendants had "authorized and/or permitted" him to direct traffic at the accident scene. Accepting plaintiff's allegation and all reasonable inferences or conclusions therefrom as true, plaintiff sufficiently pleaded that a special relationship existed between him and defendants to abrogate the public-duty doctrine. *White*, *supra*; *Peters*, *supra*. Accordingly, the trial court erred in granting defendants summary disposition under MCR 2.116(C)(8) on this claim.

Defendants allege that discovery, which occurred subsequent to the motion for summary disposition, revealed that, at the time plaintiff got involved at the accident scene, he was not only uninvited, but was ordered to "get out of the road" by one of the responding deputies. We decline to consider this evidence because it was not before the trial court at the time of the motion for summary disposition. Defendant might well succeed in obtaining a grant of summary disposition when discovery material is properly presented to the trial court. However, this Court's review is limited to the record developed by the trial court. MCR 7.210(A)(1); *Harkins v Dep't of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994). Furthermore, such discovery is not properly considered under a MCR 2.116(C)(8) motion, which tests the legal sufficiency of a claim by the pleadings alone. *Peters*, *supra*.

II

Plaintiff next argues that he pleaded sufficient allegations to establish that the "motor vehicle" exception to governmental immunity was applicable to this case. We disagree.

Summary disposition may be granted under MCR 2.116(C)(7) for a claim that is barred because of immunity granted by law. When reviewing a grant of summary disposition on the ground that the claim is barred by governmental immunity, this Court considers all documentary evidence submitted by the parties. *Codd v Wayne County*, 210 Mich App 133, 134; 537 NW2d 453 (1995). All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. *Id.* To survive a motion for summary disposition, brought under MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Id.* at 134-135.

MCL 691.1407; MSA 3.996(107), addressing governmental immunity from tort liability, provides:

Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function.

MCL 691.1405; MSA 3.996(105), which creates an exception to governmental immunity, 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 . . .

The motor vehicle exception to governmental immunity must be narrowly construed against the broad grant of general immunity found in MCL 691.1407; MSA 3.996(107). *Wade v Dep't of Corrections*, 439 Mich 158, 166; 483 NW2d 26 (1992).

In his first amended complaint, plaintiff alleged that defendants were grossly negligent by failing to properly position their patrol vehicles "so as to prevent traffic from flowing through [the] accident scene in a dangerous manner." Plaintiff further alleged that defendants were negligent in "operating overhead lights on [the patrol cars] in a manner that . . . caused reduced visibility and an increase in potential hazards to plaintiff . . . ."

Here, the dispositive question is whether plaintiff's injury was caused by defendants' negligent operation of their patrol cars. See *Peterson v Muskegon Co Bd of Co Rd Comm'rs*, 137 Mich App 210, 213-214; 358 NW2d 28 (1984). However, the gravamen of plaintiff's complaint is not that the deputies' patrol cars were negligently operated, but that the control of the traffic flow through the accident scene was inadequately accomplished. As such, the complaint does not sufficiently allege that plaintiff's injury was caused by the negligent operation of the patrol cars. *Id.* We further note that plaintiff's claim that defendants' operation of the overhead lights on the patrol cars "caused reduced visibility" at the accident scene is meritless. Police officers' activation of the overhead flashing lights at the scene of an automobile accident is one of presumed purposes for equipping patrol vehicles with such lights. The trial court properly granted defendants summary disposition as to these allegations under MCR 2.116(C)(7).

We reverse the trial court's determination with regard to Count I only (plaintiff's allegation that is predicated on the existence of a special relationship between plaintiff and defendants) and remand for further proceedings consistent with this opinion. Otherwise, we affirm.

Affirmed in part, reversed in part, and remanded. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full. We do not retain jurisdiction

/s/ Harold Hood
/s/ Roman S. Gribbs

[1] "Defendants" as used *infra* does not include defendant Paul Stiles, the Benzie County Sheriff. The trial court dismissed the claims against Stiles upon a finding that he was immune from any tort liability because his office was an elected position. Plaintiff does not challenge this determination on appeal.