STATE OF MICHIGAN

COURT OF APPEALS

STEPHANIE M. KURNCZ,

Plaintiff-Appellant,

v

MARK HETFIELD,

Defendant-Appellee.[1]

UNPUBLISHED
March 30, 1999

No. 204096
Shiawassee Circuit Court
LC No. 95-005394 NI

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting summary disposition in favor of defendant Mark Hetfield pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff first argues the trial court erroneously granted summary disposition to defendant based on its finding that the public-duty doctrine applied to this case. In her complaint, plaintiff essentially claimed that Hetfield's actions and inactions resulted in her injuries. In order to prevail on her negligence claim plaintiff must prove that defendant owed her a legal duty. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993).

The public-duty doctrine is a doctrine of tort law which determines whether a duty in tort exists. *White v Beasley*, 453 Mich 308, 323; 552 NW2d 1 (1996). The public-duty doctrine insulates police officers from tort liability for the negligent failure to provide police protection unless an individual satisfies the special-relationship doctrine. *Id.* at 316; *Gazette v City of Pontiac (On Remand)*, 221 Mich App 579, 582; 561 NW2d 879 (1997). A special relationship exists between police officers and a plaintiff if four elements are met:

> (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. . . . [*White, supra* at 320, citing *Cuffy v City of New York*, 69 NY2D 255; 513 NYS2d 372; 505 NE2d 937 (1987); *Gazette, supra* at 582-583.]

We find that plaintiff failed to present sufficient evidence to show a special relationship existed between Officer Hetfield and herself because she concedes she cannot meet the fourth element of the test. Plaintiff produced no evidence that she justifiably relied on any undertaking of Officer Hetfield. At her deposition, plaintiff testified that she had no recollection of the events of the evening other than that she was too intoxicated to drive. Moreover, in her brief, plaintiff concedes that her intoxicated condition made it impossible for her to justifiably rely on any promises Officer Hetfield may have made. Accordingly, plaintiff has failed to satisfy the special-relationship exception to the public-duty doctrine and; therefore, has failed to show that a duty was owed to her.

Plaintiff also argues the trial court improperly granted summary disposition on her claim that Officer Hetfield was grossly negligent. We disagree. We have already determined that Officer Hetfield is insulated from tort liability for any negligent failure to provide police protection because plaintiff could not satisfy the special-relationship exception. Because Hetfield did not owe plaintiff a duty pursuant to the public-duty doctrine, her claim for gross negligence is barred. Without a duty, negligence cannot be found. See *Koenig v City of South Haven*, 221 Mich App 711, 729; 562 NW2d 509 (1997).

Plaintiff also argues that Officer Hetfield violated his statutory duty to take her into protective custody pursuant to MCL 333.6501; MSA 14.15(6501), which states in relevant part:

> (1) An individual who appears to be incapacitated in a public place shall be taken into protective custody by a law enforcement officer and taken to an approved service program, or to an emergency medical service, or to a transfer facility pursuant to subsection (4) for subsequent transportation to an approved service program or emergency medical service. When requested by a law enforcement officer, an emergency service unit or staff shall provide transportation for the individual to an approved service program or an emergency medical service. This subsection shall not apply to an individual who the law enforcement officer reasonably believes will attempt escape or will be unreasonably difficult for staff to control.

However, Hetfield did not owe plaintiff a duty pursuant to MCL 333.6501; MSA 14.15(6501). The determination of city police officers whether to take an intoxicated person into protective custody constitutes a discretionary determination that governmental immunity was designed to protect. *Morse v City of Mount Pleasant*, 431 Mich 888; 432 NW2d 298 (1988), citing with approval *Morse v City of Mount Pleasant*, 160 Mich App 741, 748-749 (Sawyer, J., dissenting); 408 NW2d 541 (1987); see also *Markis v City of Grosse Pointe Park*, 180 Mich App 545, 559; 448 NW2d 352 (1989). Therefore, police officers are immune from tort liability for failing to take an intoxicated person into protective custody pursuant to MCL 333.6501; MSA 14.15(6501).

Morse, supra. Because Hetfield did not owe plaintiff a duty pursuant to MCL 333.6501; MSA 14.15(6501), the trial court did not err in granting summary disposition on this claim.

Affirmed.

/s/ Gary R. McDonald
/s/ Kathleen Jansen
/s/ Michael J. Talbot

[1] Pursuant to a stipulation of the parties, this Court entered an order dismissing defendant City of Corunna from this appeal. *Kurncz v City of Corunna*, unpublished order of the Court of Appeals, entered December 29, 1998 (Docket No. 204096).