STATE OF MICHIGAN

COURT OF APPEALS

EDWARD NELSON HUNT,

Plaintiff-Appellant,

v

JAMES HOLTON, ROBERT HENKEL, ST. JOSEPH COUNTY, MATT LORI, Individually and in his Capacity as Sheriff of St. Joseph County, JEFFREY C. MIDDLETON, Individually and in his Capacity as Prosecuting Attorney of St. Joseph County,

Defendants-Appellees,

and

GARY APPLEGATE, NORMA APPLEGATE, ST. JOSEPH COUNTY SHERIFF'S DEPARTMENT, ST. JOSEPH COUNTY PROSECUTOR'S OFFICE, MICHAEL JERMEAY, TROOPER HAWVER, STATE OF MICHIGAN, and MICHIGAN DEPARTMENT OF STATE POLICE,

Defendants.

UNPUBLISHED
January 7, 2000

Nos. 205727, 208702
St. Joseph Circuit Court
Calhoun Circuit Court
LC Nos. 93-000342 CZ
94-001256 CZ

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

Plaintiff Edward Nelson Hunt appeals as of right the court's grant of defendants' motions for summary disposition. We affirm.

Plaintiff contends that the trial court improperly granted summary disposition as to St. Joseph County. We disagree. In deciding a motion for summary disposition brought pursuant to MCR 2.116(C)(7) (governmental immunity), a court must consider all documentary evidence submitted by the parties. *Terry v Detroit*, 226 Mich App 418, 428; 573 NW2d 348 (1997). The court accepts all well-pleaded allegations as true and considers them in a light most favorable to the nonmoving party in determining whether the defendant is entitled to judgment as a matter of law. *Id.* The plaintiff must allege facts giving rise to an exception to governmental immunity in order to defeat the motion for summary disposition. *Id.* We review the trial court's grant of summary disposition de novo. *Id*. at 423.

Plaintiff first contends that the court erred in granting summary disposition with respect to his claim that St. Joseph County violated his right to equal protection of the laws under Const 1963, art 1, § 2 by providing law enforcement in a racially discriminatory manner. Plaintiff made no allegation that liability was based on anything other than the alleged constitutional violation.

Generally, governmental agencies enjoy a broad grant of immunity from tort liability in cases where the governmental agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); MSA 3.996(107)(1); *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 134; 545 NW2d 642 (1996). A limited exception to governmental immunity exists for claims that a custom or policy of the government violates the state constitution. *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). Provisions of the Michigan Constitution that protect individual rights do not "require implementing legislation in order to operate as a limitation on the exercise of governmental power." *Dampier v Wayne Co*, 233 Mich App 714, 731; 592 NW2d 809 (1999), quoting *Detroit Branch, NAACP v Dearborn*, 173 Mich App 602, 614; 434 NW2d 444 (1988). However, in order for an independent cause of action to lie for a violation of individual rights guaranteed by the Michigan Constitution, there must be no other means by which to vindicate the rights allegedly violated. *Cremonte v Mich State Police*, 232 Mich App 240, 250-252; 591 NW2d 261(1998).

Defendants argue that plaintiff failed to allege specific facts sufficient to establish a "custom or policy" in violation of the constitution. However, we need not decide that question because the Michigan's Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*., provides a means by which to vindicate the rights plaintiff asserts. The act prohibits the denial of public service because of religion, race, color, national origin, age, sex, or marital status. MCL 37.2302(a); MSA 3.548(302)(a). A person alleging a violation of the act may bring an action for damages. MCL 37.2801(1); MSA 3.548(801)(1). Because plaintiff had a statutory means by which to bring his claim, his claim based solely on Const 1963, art 1, § 2 must fail.

Plaintiff next contends that the dismissal of St. Joseph County was erroneous because St. Joseph County was vicariously liable for the acts or omissions of Henkel and Holton. For reasons we will discuss *infra*, Henkel and Holton could not be held liable on the claims alleged by plaintiff. As a result, St. Joseph County cannot be held vicariously liable.

Plaintiff argues that the court erred in granting summary disposition as to Lori and Middleton. We disagree. Both Lori, the St. Joseph County Sheriff, and Middleton, the St. Joseph County

Prosecuting Attorney, are the highest officials in their respective governmental agencies. See Const 1963, art 7, § 4. As such, they are immune from tort liability for injuries to persons or damages to property when acting within the scope of their executive authority. MCL 691.1407(5); MSA 3.996(107)(5). Plaintiff alleged that Middleton decided not to prosecute Applegate for racially discriminatory reasons, and that Lori ran his department in a way that deprived plaintiff of equal protection of laws. The actions alleged by plaintiff go directly to actions taken in the scope of Lori and Middleton's executive authority. Plaintiff contends that racially discriminatory actions cannot be in the scope of their authority. However, there is no "malevolent-heart" exception to immunity for the highest executives of public agencies. *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997). The court did not err in dismissing plaintiff's claims against Lori and Middleton.

Plaintiff contends that the trial court erred in granting summary disposition to Henkel and Holton. We disagree. A government employee may be held liable for intentional torts or gross negligence, which is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). Liability of police officers is further limited by the public-duty doctrine, which will not hold an officer liable for breach of a duty to the public at large; only a breach of a duty to an individual will support an individual action for damages. *White v Beasley*, 453 Mich 308, 316 (Brickley, C.J.), 325 (Boyle, J.); 552 NW2d 1 (1996). To determine whether the action is a public duty or a private duty, Michigan utilizes the "special-relationship" exception, which requires that a four-part test be satisfied:

> (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, citing *Cuffy v City of New York*, 69 NY2d 255, 260; 513 NYS2d 372; 505 NE2d 937 (1987); see, also, *Gazette v Pontiac (On Remand)*, 221 Mich App 579, 582-583; 561 NW2d 879 (1997).]

Henkel had direct contact with plaintiff concerning the dispute with Applegate. However, Henkel refused to take any action to seek a warrant for Applegate's arrest. He offered to take plaintiff's statement if plaintiff would come to the police station; however, plaintiff never did so. Because Henkel took no affirmative action on plaintiff's behalf, plaintiff could not justifiably rely on the action taken by Henkel. Summary disposition was proper as to Henkel.

Applying the four-part test above to Holton, we conclude that, even assuming that evidence has been presented to support the first three prongs of the special-relationship exception, the fourth prong has not been satisfied. Plaintiff has not shown that he justifiably relied on Holton's representations. A

promise by police to arrest an individual within a certain period of time cannot justifiably be relied upon after the period of time has expired. See *Cuffy, supra*, 69 NY2d 263-264. Applegate did not shoot plaintiff until nearly nine weeks after Holton's encounter with plaintiff. Holton's promise to plaintiff was only to arrest Applegate if he found any evidence during the search; once Holton had not arrested Applegate, plaintiff could no longer rely on the assurance of an arrest. Moreover, when plaintiff characterized Applegate and his wife as liars when Holton informed him of their alibi, it is clear that plaintiff did not believe that he was safe from Applegate. Thus, we conclude that plaintiff could not justifiably rely on Holton's assurances; the fourth prong of the special-relationship test was not satisfied. Summary disposition was proper as to Holton.

We affirm.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter

Judge Markman did not participate.