STATE OF MICHIGAN

COURT OF APPEALS

LILLIAN BULLARD,

Plaintiff-Appellant,

v

INKSTER HOUSING & REDEVELOPMENT COMMISSION, TONY LOVE, MELODY COFFEE, LEONTINE MONTGOMERY, FLOYD SIMMONS, and ERNESTINE CARTER,

Defendants-Appellees.

UNPUBLISHED
March 20, 2007

No. 265095
Wayne Circuit Court
LC No. 03-341181-CZ

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's order granting summary disposition in favor of defendant Inkster Housing & Redevelopment Commission ("IHRC"), and individual defendants Tony Love, Melody Coffee, Leontine Montgomery, Floyd Simmons, and Ernestine Carter, pursuant to MCR 2.116(C)(7) (governmental immunity) and (C)(10), with respect to plaintiff's claims for noneconomic damages. We affirm.

Plaintiff brought this action against the IHRC and several employees of the IHRC after she was physically and sexually assaulted by an unknown assailant inside her apartment at the Twin Towers, a public housing complex operated by the IHRC and subsidized by the United States Department of Housing and Urban Development ("HUD"). Plaintiff sought recovery of noneconomic damages for breach of her residential lease agreement, gross negligence, and violation of the Michigan Consumers Protection Act ("MCPA"), MCL 445.901 *et seq.* The trial court granted defendants' motion for summary disposition and dismissed each of these claims.[1]

We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Guerra v Garratt*, 222 Mich App 285,

[1] The trial court allowed a breach of contract claim for economic damages to proceed, but, on the day of trial, plaintiff conceded that she had incurred no economic damages and the case was dismissed.

288; 564 NW2d 121 (1997). The trial court granted defendants summary disposition under MCR 2.116(C)(7) (governmental immunity) and (C)(10) (no genuine issue of fact).

When reviewing a dismissal on the basis that a claim is barred because of governmental immunity, MCR 2.116(C)(7), this Court must accept all well-pleaded allegations as true, unless contradicted by documentary evidence, and construe them in favor of the nonmoving party. *Maiden, supra* at 119; *Guerra, supra* at 289. If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred is an issue of law. *Maiden, supra* at 122; *Guerra, supra* at 289.

When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the court must examine the documentary evidence and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The party opposing the motion may not rest on the mere allegations or denials contained in the pleadings, but rather has the burden of establishing—through affidavits, depositions, admissions, or other documentary evidence—that a genuine issue of disputed material fact exists. *Id.*

Plaintiff argues that the trial court erred in determining that she was not entitled to recover noneconomic damages for her breach of contract claim, and that there is a question of fact whether her noneconomic damages were caused by the IHRC's breach of the lease agreement.

A party alleging breach of contract may recover "'those damages that arise naturally from the breach, or which can *reasonably* be said to have been in contemplation of the parties at the time the contract was made.'" *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 13; 516 NW2d 43 (1994), quoting *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 419; 295 NW2d 50 (1980) (emphasis in original; footnote omitted). This is an objective test. *Lawrence, supra* at 13. Thus, damages are recoverable if there is evidence for a reasonable person to conclude that the parties knew or had reason to know that the plaintiff's damages would result from a breach of the contract. *Id.* at 13, 15-16; see also *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003) (party may recover damages that are the direct, natural, and proximate result of the breach).

As plaintiff observes, "it is generally held that damages for emotional distress cannot be recovered for the breach of a commercial contract" because such damages are not reasonably foreseeable at the time the contract is made. *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 693-694; 588 NW2d 715 (1998); see also *Phinney v Perlmutter*, 222 Mich App 513, 530; 564 NW2d 532 (1997). "However, [in *Stewart v Rudner*, 349 Mich 459, 469; 84 NW2d 816 (1957),] our Supreme Court . . . recognized that damages for emotional distress may be recovered for the breach of a contract in cases that do not involve commercial or pecuniary contracts, but involve contracts of a personal nature." *Lane, supra* at 693. The *Stewart* Court stated:

> When we have a contract concerned not with trade and commerce but with life and death, not with profit but with elements of personality, not with pecuniary aggrandizement but with matters of mental concern and solicitude, then a breach of duty with respect to such contracts will inevitably and necessarily result in

> mental anguish, pain and suffering. In such cases the parties may reasonably be said to have contracted with reference to the payment of damages therefor in event of breach. Far from being outside the contemplation of the parties they are an integral and inseparable part of it. [*Stewart*, *supra* at 471.]

"In such case the party sought to be charged is presumed to have contracted with reference to the payment of damages of that character in the event such damages should accrue on account of his breach of the contract." *Id*. at 472. "Examples of personal contracts include a contract to perform a cesarean section, a contract for the care and burial of a dead body, a contract to care for the plaintiff's elderly mother and to notify the plaintiff in the event of the mother's illness, and a promise to marry." *Lane*, *supra* at 693-694 (citations omitted). A contract to care for one's child is also a personal contract. *Id*. at 694.

In the present case, plaintiff fails to cite any legal authority to support her argument that a residential lease agreement is a personal contract that may give rise to noneconomic damages in the event of a breach. We further conclude that this case is controlled by *McDowell v Detroit*, 264 Mich App 337; 690 NW2d 513 (2004), lv gtd 474 Mich 999 (2006). In *McDowell*, a fiduciary sued the city of Detroit and the housing commission after a fire in a public housing project killed six children and injured an adult and another child. The plaintiff alleged that the fire was caused by a faulty electrical system, about which the lessee had repeatedly complained, and asserted a claim for breach of contract premised on the lease agreement. *Id*. at 341-342, 355. The trial court denied the defendants' motion for summary disposition, finding that, under *Mobil Oil Corp v Thorn*, 401 Mich 306; 258 NW2d 30 (1977), the plaintiff could "maintain a *tort* action predicated upon a breach of contract to keep the premises in reasonable repair." *McDowell*, *supra* at 354-355 (emphasis added).

On appeal, this Court stated:

> [W]e conclude that the [plaintiff's] claims are in fact merely recapitulations of the tort claims. . . . *Mobil Oil* stands for the proposition that lessees can recover *in tort* for personal injuries in actions sounding in contract. In applying *Mobil Oil* to this case, we are again left with the conclusion that although plaintiff's cause of action "sounds in contract" the issues are plainly tort issues. Accordingly, the trial court should have . . . tested whether the claims were barred by governmental immunity." [*Id*. at 355-356 (emphasis in original).]

In this case, although plaintiff's cause of action "sounds in contract," substantively her claims are tort issues. Therefore, because the IHRC is a governmental entity, it is immune from tort liability if engaged in the exercise or discharge of a governmental function. MCL 691.1407(1).

In *McDowell*, the Court held that the defendants, in operating a public housing project, were engaged in the discharge of a governmental function. *McDowell*, *supra* at 356; MCL 125.602. The Court also observed that, under the governmental immunity act, there are only five exceptions to the rule that government agencies are immune from tort liability (highway, motor vehicle, public building, proprietary function, and government hospital), none of which applied to the operation of a public housing project. The Court concluded that without an applicable

exception to governmental immunity, the plaintiff's claims failed and summary disposition should have been granted to the defendants under MCR 2.116(C)(7). *McDowell, supra* at 356.

The same result applies here. In operating the Twin Towers apartments, the IHRC was engaged in the discharge of a governmental function. Further, although plaintiff's claim sounds in contract, we agree that the noneconomic damages she seeks are plainly tort damages. Therefore, the IHRC is immune from liability and the trial court properly granted summary disposition with respect to plaintiff's breach of contract claim for noneconomic damages.

In light of our resolution of this issue, it is unnecessary to consider the applicability of any "preexisting duty doctrine" defense or plaintiff's argument that she was an intended third-party beneficiary to a contract between the IHRC and HUD. See *McDowell, supra* at 356.

Plaintiff also argues that the trial court erred in determining that there was no genuine issue of material fact whether the individual defendants were grossly negligent and whether their alleged negligence was the proximate cause of her injuries.

MCL 691.1407(2) provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is *the proximate cause* of the injury or damage. [Emphasis added.]

Because the question of proximate cause is dispositive, we need only address that issue.

In *Robinson v Detroit*, 462 Mich 439, 445-446; 613 NW2d 307 (2000), our Supreme Court held that the phrase "the proximate cause" means that the employee's gross negligence must be "the one most immediate, efficient, and direct cause," not merely *a* proximate cause.

In the present case, it is clear that "the one most immediate, efficient, and direct cause" of plaintiff's injuries was the intruder who broke into her apartment and assaulted her. Because the individual defendants' alleged gross negligence was not *the* proximate cause of plaintiff's

injuries, the trial court properly granted their motion for summary disposition. Therefore, the issue of gross negligence need not be reached.

Lastly, plaintiff argues that the trial court erred in dismissing her claims under the MCPA because defendants are not immune from liability for violations of the act.

Plaintiff alleges that defendants violated MCL 445.903(1)(g), (s), and (bb), which prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce" in the following respects:

> (g) Advertising or representing goods or services with intent not to dispose of those goods or services as advertised or represented.
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> * * *
>
> (s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.
>
> * * *
>
> (bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.

However, MCL 445.904(1)(a) provides that the MCPA does not apply to

> [a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

Contrary to what plaintiff argues, an allegation that defendants engaged in conduct that could be considered illegal is insufficient to avoid application of this exemption. In *Smith v Globe Life Ins Co*, 460 Mich 446, 465; 597 NW2d 28 (1999), our Supreme Court held that, in adopting this exemption, the Legislature "intended to include conduct the legality of which is in dispute." In determining whether the exemption applies, "the relevant inquiry is not whether the specific misconduct alleged by the plaintiff is 'specifically authorized[,]' . . . [but] whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Id.*

MCL 125.653 authorizes a city to create a housing commission, such as defendant IHRC. Such a commission is specifically authorized to "operate any housing project," MCL 125.657(b), and the commission "shall have complete control of the entire housing project or projects including the construction, maintenance and operation as fully and completely as if said commission represented private owners." MCL 125.662. "[E]ach commission shall manage and operate, or cause to be managed and operated, its housing projects in an efficient manner so as to enable it to fix the rentals for dwelling accommodations at the lowest possible rates consistent with its providing decent, safe, and sanitary dwelling accommodations, and that no commission

shall construct or operate any project for profit." MCL 125.677(1). The commission "may rent or lease to a tenant dwelling accommodations consisting of the number of rooms, but no greater number, which it deems necessary to provide safe and sanitary accommodations to the proposed occupants thereof, without overcrowding." MCL 125.694(c). The commission is also empowered to adopt use and occupancy rules, among others. MCL 125.694b.

Because it is clear that the general transaction involved here, the operation of a public housing project, was authorized under laws administered by defendant housing commission under statutory authority, the MCPA does not apply. Therefore, the trial court properly dismissed plaintiff's MCPA claims.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Kirsten Frank Kelly