

STATE OF MICHIGAN
COURT OF APPEALS

PAUL D. BUTLER, d/b/a IMPRESSIVE
IMPRINTS, and REDFORD RECREATION
BAR, INC.,

UNPUBLISHED
June 3, 2008

Plaintiffs-Appellants,

v

MICHIGAN CONSOLIDATED GAS
COMPANY,

No. 278063
Wayne Circuit Court
LC No. 04-404979-NI

Defendant,

and

DETROIT WATER & SEWERAGE
DEPARTMENT,

Defendant-Appellee.

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant Detroit Water & Sewerage Department (DWSD), a "branch" of the city of Detroit. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The complaint alleged that the DWSD performed excavation or backfill work on a sidewalk immediately adjacent to plaintiffs' businesses and damaged a natural gas distribution line. The natural gas leaked and ignited, causing an explosion and fire that damaged the premises. The complaint included separate counts for negligence and breach of implied warranty. The trial court determined that the negligence count was barred by governmental immunity because the operation of the DWSD "is a non-proprietary governmental function," and dismissed the breach of implied warranty count because the DWSD "did not make any implied warranties to Plaintiffs."

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiffs argue that the trial court erred in dismissing the negligence count because the DWSD was engaged in a proprietary function, thereby bringing the negligence claim within an exception to governmental immunity, MCL 691.1413. We disagree. As this Court found in *Davis v Detroit*, 269 Mich App 376, 379; 711 NW2d 462 (2005), Detroit's "operation of the water department is not a proprietary activity." See also *State Farm Fire & Cas Co v Corby Energy Services, Inc*, 271 Mich App 480, 485 n 3; 722 NW2d 906 (2006). Plaintiffs have not offered any basis for this Court to reach a contrary result in this case.

Plaintiffs also argue that the trial court erred in dismissing the implied warranty claim. Plaintiff cites *Nash v Sears Roebuck & Co*, 383 Mich 136; 174 NW2d 818 (1970), for the proposition that "[t]here is a common-law implied warranty in connection with the rendering of a service contract that the service contract will be performed in a safe and skillful manner." However, *Nash* does not recognize an implied *warranty* in connection with a service contract. Rather, the Court recognized an implied *duty* in every contract for work or services, the breach of which may form the basis for an action in tort. As this Court observed in *Co-Jo, Inc v Strand*, 226 Mich App 108, 114-115; 572 NW2d 251 (1997), superseded by statute on other grounds as stated in *Compuware Corp v Moody's Investor Services, Inc*, 499 F3d 520, 532 (CA 6, 2007), whether negligent performance of a service contract may constitute a breach of an implied warranty is a distinct question. As in *Co-Jo, Inc*, any negligent performance of a service contract does not establish breach of an implied warranty.

Affirmed.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering