

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

NICOLE M. BEAUDRIE,

Plaintiff-Appellee,

v

PAULINE HENDERSON,

Defendant-Appellant,

and

CITY OF DEARBORN and DEARBORN POLICE
DEPARTMENT,

Defendants.

Before: Gage, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order of the lower court denying her motion for summary disposition pursuant to MCR 2.116(C)(8). We reverse and remand.

In April 1994, plaintiff was abducted and sexually assaulted by a perpetrator who was later convicted of several crimes arising from the incident. Plaintiff thereafter filed this suit, alleging in part the negligence of defendant, a police dispatcher who had been contacted at her place of employment by the perpetrator's mother, defendant's friend, during the approximately twenty-four hour period in which plaintiff was held captive. In her amended complaint, plaintiff alleged that defendant was grossly negligent in intentionally and actively failing to carry out her duty to notify the police of the whereabouts of plaintiff's captor and in acting in concert with her friend to withhold information from authorities. Defendant argued that she did not owe plaintiff a duty under the public-duty doctrine and moved for summary disposition pursuant to MCR 2.116(C)(8), but the trial court denied defendant's motion.

UNPUBLISHED
December 4, 1998

No. 202304
Wayne Circuit Court
LC No. 96-614930 NZ

We review de novo a lower court's decision concerning a motion for summary disposition. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). Summary disposition pursuant to MCR 2.116(C)(8) is appropriately granted in a negligence action if the court determines that, as a matter of law, the defendant did not owe a duty to the plaintiff according to the alleged facts. *Smith v Kowalski*, 223 Mich App 610, 613; 567 NW2d 463 (1997). Whether a duty exists is a question of law for the court. *Id.*

In *White v Beasley*, 453 Mich 308, 313, 316; 552 NW2d 1 (1996), our Supreme Court reaffirmed that the public-duty doctrine applies in Michigan. This doctrine provides that a public official's duty is owed to the public as opposed to a particular individual. *Id.* at 316. See also *Koenig v City of South Haven*, 221 Mich App 711, 730; 562 NW2d 509 (1997), lv granted; *Gazette v City of Pontiac (On Remand)*, 221 Mich App 579, 582; 561 NW2d 879 (1997). Thus, if defendant's duty as a police dispatcher is a duty owed to the public, then application of the doctrine to this case means that defendant is insulated from tort liability arising from her alleged failure to perform that duty.

Plaintiff argues that the public-duty doctrine insulates only police officers from tort liability and therefore is inapplicable here. In support of this proposition, plaintiff relies on a footnote in *White*, *supra* at 315 n 3, in which our Supreme Court declined to decide what test should be used in applying an exception of the public-duty doctrine to government employees other than police officers. This footnote does not support plaintiff's proposition. The Court did not state that it was declining to decide whether the doctrine should be applied to government employees other than police officers. Indeed, this Court has applied the doctrine in several cases where the defendant was not a police officer. See *White v Humbert*, 206 Mich App 459, 462; 522 NW2d 681 (1994) (police dispatcher), rev'd on other grounds in *White v Beasley*, *supra*; *Reno v Chung*, 220 Mich App 102; 559 NW2d 308 (1996) (county medical examiner), lv granted; *Koenig*, *supra* (municipal employees); *Smith*, *supra* (prison guards and officials). Here, too, we find that defendant is a public official and may avail herself to the protection of the public-duty doctrine.

Plaintiff also argues that the public-duty doctrine applies only to cases involving nonfeasance (passive inaction or the failure to actively protect others from harm) and that the doctrine does not apply to cases involving misfeasance (active misconduct causing personal injury). See *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498; 418 NW2d 381 (1988). Plaintiff rests her argument on the reasoning of the concurring opinion in *White*, *supra* at 329 (Boyle, J.). However, reasoning not endorsed by a majority of the Court is not binding authority under the doctrine of stare decisis. *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976). Therefore, there is no controlling precedent deciding whether the public-duty doctrine applies in cases of misfeasance.

We are not required to decide the merits of plaintiff's argument because even assuming that the public-duty doctrine is inapplicable in cases of misfeasance, defendant is nonetheless entitled to summary disposition because plaintiff's amended complaint fails to allege sufficient facts constituting misfeasance by defendant. Plaintiff alleged that defendant intentionally and actively failed to carry out her duties as a police dispatcher and instead acted in concert with the mother of plaintiff's captor to withhold information from authorities. We agree with plaintiff that defendant acted in a manner inconsistent with her duties as a police dispatcher; however, plaintiff's allegations do not establish that

defendant engaged in active misconduct that caused plaintiff's personal injuries. In other words, plaintiff did not establish that defendant created a new risk of harm to plaintiff, only that defendant failed to actively protect her from harm.

Last, plaintiff argues that the facts of this case fit within the special-relationship exception to the public-duty doctrine. This exception provides that the existence of a special relationship between a public official and the particular individual exposes the public official to liability for the official's actions. See *White*, *supra* at 319, 325-326; *Koenig*, *supra*; *Reno*, *supra*. Even accepting the allegations in plaintiff's complaint as true, we find that plaintiff failed to allege sufficient facts to show the existence of a special relationship between herself and defendant that would preclude application of the public-duty doctrine. Plaintiff's amended complaint contains no allegation of any contact between defendant and plaintiff nor any reliance by plaintiff on any promises or actions of defendant.

Therefore, because the public-duty doctrine shields defendant from liability for the charged conduct and the facts in this case do not establish a special relationship between the parties, plaintiff's claim was "so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Peters*, *supra* at 487. Accordingly, the lower court improperly denied defendant's motion for summary disposition pursuant to MCR 2.116(C)(8).

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra