STATE OF MICHIGAN

COURT OF APPEALS

MARY FACEN, as Personal Representative of the Estate of JAMES FACEN, Deceased,

Plaintiff-Appellant,

v

JOHN AUGUSTYN and CHARLES HARTHUN, Individually and in their capacity as City of Detroit Police Officers,

Defendants-Appellees.

UNPUBLISHED
December 18, 1998

No. 200448
Wayne Circuit Court
LC No. 94-414320 NO

Before: Wahls, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

Plaintiff, as personal representative of the estate of her son James Facen, deceased, appeals as of right an order granting defendants' motion for summary disposition. We reverse.

I. FACTS AND STANDARD OF REVIEW

A. Factual and Procedural History

On May 3, 1991, defendants, while acting in their capacity as uniformed Detroit police officers, were dispatched to an apartment building located at 8868 Wyoming, Detroit. The police had received reports of a fight at that address. After approximately ten minutes, the two officers left the apartment building. Immediately thereafter, the two officers were again dispatched to the apartment, this time in response to reports of shots being fired. During their second visit to the scene, defendants encountered the decedent lying in the hallway of the apartment building. Plaintiff contends that her son, who had been severely beaten, was obviously in need of medical attention. In her complaint, plaintiff alleged that her son had visible contusions and bruises about his head, that his right eye and nose were severely hemorrhaging and that his breathing was shallow and labored. Plaintiff further alleged that defendants told several of the building's occupants that they would send Emergency Medical Services to render the necessary medical assistance for her injured son. According to plaintiff, the officers also told the building's occupants that they would be arrested if they called the police again. Conversely, defendants

deny that they ever indicated in any way that they would summon medical assistance. Further, defendants assert that they spoke with the decedent during their second visit, and that the decedent told the officers that he was all right. The decedent died of his injuries on May 3, 1991.

In April 1994, plaintiff initiated this case of action by bringing suit against defendants, the City of Detroit, and William Hart, in his capacity as Chief of Police for the City of Detroit. Plaintiff asserted claims for gross negligence and deprivation of state constitutional rights. On October 20, 1991, the trial court summarily dismissed the claims against the City of Detroit and William Hart. Next, the trial court granted partial summary disposition to defendants' on January 12, 1996, finding that defendants had no duty to personally provide the decedent with medical care. Following the Michigan Supreme Court's decision in *White v Beasly*, 453 Mich 308; 552 NW2d 1 (1996), defendants filed a third motion for summary disposition. Defendants argued that pursuant to the holding in *White*, plaintiff's remaining claims were barred by the public-duty doctrine. The trial court agreed, and on December 20, 1996, it summarily dismissed all of plaintiff's remaining claims. It is from this order that plaintiff now appeals. Plaintiff does not challenge the grant of summary disposition with respect to the claim of deprivation of state constitutional rights.

B. Standard of Review

Defendants' third motion for summary disposition was made pursuant to MCR 2.116(C)(8) and (C)(10). "A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews the trial court's decision on a motion brought under this rule de novo to determine if the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Smith v Kowalski*, 223 Mich App 610, 612-613; 567 NW2d 463 (1997) (citation omitted). "[F]or purposes of deciding if the lower courts correctly ruled on the motion, we accept all well-pleaded facts in plaintiff's complaint as true." *White, supra* at 313.[1]

II. PUBLIC-DUTY DOCTRINE

Plaintiff's arguments all center around the public-duty doctrine, which provides

> "[t]hat if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages." [*White, supra* at 316, quoting 2 Cooley, Torts (4th ed), § 300, pp 385-386) (Brickley, C.J.).]

As "[a]pplied to police officers, the public-duty doctrine insulates officers from tort liability for the negligent failure to provide police protection unless an individual satisfies the special-relationship exception to the doctrine." *Gazette v Pontiac (On Remand)*, 221 Mich App 579, 582; 561 NW2d 879 (1997). The special-relationship test adopted in *White* was taken from *Cuffy v City of New*

York, 69 NY2d 255; 513 NY2d 372; 505 NE2d 937 (NY App, 1987). The *Cuffy* test states that a special-relationship exists between a police officer and a specific individual when there has been:

> "(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, quoting *Cuffy, supra* at 260.]

A. Adoption of the Public-Duty Doctrine in Michigan

First, plaintiff argues that the trial court erred when granting defendants' motion for summary disposition because it erroneously relied on the public-duty doctrine. Plaintiff argues that a majority of the Michigan Supreme Court has never held that the doctrine applies in Michigan. We disagree. A close reading of all of the opinions in *White* reveals that the Court did indeed hold that the doctrine applies in Michigan. *White, supra* at 316 (Brickley, C.J., joined by Riley and Weaver, JJ.), 325 (Boyle, J., concurring), 330 (Cavanagh, J., concurring in part and dissenting in part, joined by Mallett, J.). See also *Murdock v Higgins*, 454 Mich 46, 48 n 1; 559 NW2d 639 (1997); *Kowalski, supra* at 613; *Gazette, supra* at 582. Accordingly, plaintiff's first argument is without merit.

B. Applicability of the Public-Duty Doctrine to the Case at Hand

Plaintiff next argues that, even if the doctrine applies in Michigan, it does not apply to the facts of this case. Plaintiff asserts that under Justice Brickley's lead opinion in *White*, the public-duty doctrine only applies to negligence claims involving police officers when those claims are based either on (1) an alleged violation of a city ordinance or a state statute, or (2) the failure of the police to anticipate and prevent criminal activity. Because her complaint does not allege either circumstance, plaintiff argues that the public-duty doctrine is inapplicable.

We disagree that application of the public-duty doctrine is limited in the manner suggested by plaintiff. The portions of Justice Brickley's opinion cited by plaintiff are found in an examination of the pubic policy justifications for the public-duty doctrine. This public policy exposition does not serve to define the reaches of the doctrine, but rather to touch on the reasons for its existence. Thus, in context, Justice Brickley's observations concerning "shielding governmental units from liability 'when its employees act, or refuse to act, so as to conform to a municipal ordinance and/or state statute,'" *White, supra* at 318 (quoting *Sawicki v Village of Ottawa Hills*, 37 Ohio St 3d 222, 226; 525 NE2d 468 [1998]), serves to illustrate his point that the public-duty doctrine "protects governments from unreasonable interference with policy decisions." *Id.* at 317. Further, his observation that "[p]olice officers should not be liable 'for failing to protect a member of the general public from a criminal act of

which they were not aware but should have anticipated and prevented,'" *id.* at 318 (quoting *De Long v Erie Co*, 60 NY2d 296, 304; 469 NY2d 611; 457 NE2d 717 [1983]), supports his earlier assertion that the public-duty doctrine "protects government employees from unreasonable liability." *Id.* at 317.

We also disagree with plaintiff's assertion that because defendants' alleged misconduct amounts to misfeasance instead of nonfeasance, the public-duty doctrine does not apply. Plaintiff's assertion is based upon Justice Boyle's *White* concurrence, in which she indicated that the special-relationship test adopted by the lead opinion should be applied only in cases of nonfeasance. *White, supra* at 325-326.

Plaintiff's argument is predicated on a misreading of the distinction between nonfeasance and misfeasance as drawn by Justice Boyle in her *White* concurrence. "In theory the difference between [misfeasance and nonfeasance] . . . is fairly clear; but in practice it is not always easy to draw the line and say whether conduct is active or passive." Prosser & Keeton, Torts (5th ed), § 56, p 374. Accord *White, supra* at 330 (Boyle, J., *concurring*). According to Justice Boyle, a police officer's promise to perform some future act does not transform the failure to act on that promise into "active misfeasance." Instead, Justice Boyle opined that the failure to act on the promise amounts to nothing more than "passive inaction," or nonfeasance. *White, supra* at 329. According to Justice Boyle, the *Cuffy* "test, by its own terms, can only be applied in an instance where the officer *failed to carry out a promise or an assumed duty to act*." *Id.* (emphasis added). These are the exact circumstances that plaintiff alleged occurred in the case at hand. Accordingly, the *Cuffy* test applies.[2]

C. Applicability of the Special-Relationship Exception

The only element of the *Cuffy* test at issue is in the case at hand is the "reliance" element. As the *Cuffy* Court observed,

> the reliance element provides the essential causative link between the "special duty" assumed by the municipality and the alleged injury. Indeed, at the heart of most of these "special duty" cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced him either to relax his own vigilance or to forgo other available avenues of protection. [*Cuffy, supra* at 261.[3]]

Defendants argue on appeal that the reliance element of the test cannot be satisfied by a showing that the bystanders in the apartment building and not the decedent had relied on defendants' alleged promise that they would summon emergency medical help. In support of this proposition, defendants cite to this Court's holding in *Gazette*.

The essential facts of *Gazette* are as follows. After the decedent did not return home from a trip to a local car wash, members of her family called the police. The police told the decedent's daughter that after investigating the matter, they found no evidence that her mother's disappearance was do to any wrongdoing. However, the police had not actually pursued any of the avenues of investigation that they said they had. Two days later, the decedent's body was found in the trunk of a car pulled over during a routine traffic stop. *Gazette, supra* at 581. The *Gazette* Court concluded that the

plaintiff failed to allege facts sufficient to establish that the decedent had "justifiably relied on any affirmative action taken by the police department. In fact, because [the decedent] . . . herself never contacted the police, she had no knowledge of a promise on which she could rely." *Gazette, supra* at 583.

We believe that the facts of *Gazette* distinguish it from the case at hand. First, unlike *Gazette*, there is evidence in the case at hand that there was direct contact between the decedent and defendants. Second, in the case at hand, plaintiff alleges that the police used the threat of arrest to effectively cut off any further attempts to summon assistance. There is no indication of similar behavior by the police in *Gazette.*

Also, we do not read *Gazette* as standing for the proposition that the direct contact and reliance elements of the *Cuffy* test are inextricably linked. In *Gazette*, the Court observed that the lack of direct contact between the victim and the police meant that the victim could not have relied upon any promise made by the officer. *Gazette, supra* at 583. The Michigan Supreme Court made the same point in *White. White, supra* at 325 ("Because decedent never directly contacted the police, she had no knowledge of a promise on which she could rely."). These observations recognize, and indeed are predicated on the close relationship that exist between the direct contact and reliance elements of the *Cuffy* test. *Kircher v City of Jamestown*, 74 NY2d 251, 257; 544 NY2d 995; 543 NE2d 443 (1989). However, the *White* and *Gazette* Courts' comments about the link between the two elements should not be read as establishing a per se rule that applies regardless of the evidence in a given case. The *White* and *Gazette* Courts' observations were made in the context of the particular circumstances and evidence involved in each of those case. The situation in the case at hand is markedly dissimilar to either *Gazette* and *White.* See *De Long, supra* at 306 (observing "that whether the municipality has acted reasonably depends upon the circumstances of the particular case").

In other words, the existence of such a relationship between the two elements does not mean that the presence of direct contact between a police officer and a victim is either a necessary or sufficient condition for the occurrence of reliance in all cases. While direct contact can increase the likelihood that reliance will occur, it is by no means assured that reliance will result in all cases where direct contact is made. Further, we cannot assume that simply because there is a demonstrable reliance that there must have been direct contact. For example, the *Cuffy* Court concluded that while two of the plaintiffs actually had not had any direct contact with the officer who promised that the family would be protected by the police, "the 'special duty' undertaken by the City through its agent must be deemed to have run to them. It was their safety that . . . all concerned had in mind" when the promise was made. *Cuffy, supra* at 262. See also *Sorichetti v City of New York*, 65 NY2d 461, 471; 492 NY2d 591; 482 NE2d 70, 76-77 (1985) (holding that although a six-year old girl did not have direct contact with the police, "a special relationship existed between the police [and the girls' mother's] . . . such that the jury could properly consider whether the police conduct satisfied the duty of care owing to" the child).

Defendants also cite to *Kircher, supra*, in support of their position. In *Kircher*, the victim was assaulted and abducted by a man who had approached her in a drug store parking lot. The events in the parking lot were witnessed by two bystanders, who attempted to follow defendant as he drove away from the scene with the victim. After loosing sight of the speeding car, the bystanders approached

a police officer "who was giving assistance to the driver of a disabled municipal vehicle." The officer told the two that he would report the incident. The bystanders made no further effort to report the incident to the police. *Kircher, supra* at 253-254. The *Kircher* Court concluded that the bystanders' reliance on the officer's assurance could not be transferred to the victim "for the obvious reason that proof of their reliance does not satisfy the policy concern underlying the reliance requirement—providing the 'essential causative link' between the municipality and the alleged injury. . . . Absent evidence of reasonable detrimental reliance by the victim, the consequences of the municipality's failure to act become far too speculative to allow as the basis of liability." *Id.* at 258-259. "It is readily apparent," the *Kircher* majority continued, "that [the reliance element] . . . is not satisfied on these facts since the helpless and isolated plaintiff could not even communicate with the police, much less rely on any promise of protection the police might have offered." *Id.* at 258.

In addition to the fact that *Kircher* has no binding effect on this Court, we also find that *Kircher* is distinguishable for the same reasons as *Gazette*: in *Kircher* there was no evidence of any direct contact between the decedent and the police or of any coercive threat that effectively cut off other avenues of assistance. We also disagree with the reasoning followed by the *Kircher* majority. As previously noted, the *White* Court observed that "there are two basic justifications for retaining the public duty doctrine. First, the doctrine protects governments from unreasonable interference with policy decisions, and second, it protects government employees from unreasonable liability." *White, supra* at 317. In the case at hand, the police were twice dispatched to the scene. Accordingly, because the decision to act had already been made, there was no unreasonable interference with policy judgments concerning allocation of police resources. Further, we do not believe that the imposition of liability under these circumstances would either dissuade the passage of state legislation or municipal ordinances addressing the allocation of police resources, or somehow lead to a self-imposed police proscription on responding to calls for assistance by the general public.

Additionally, the imposition of liability on these defendants would not undermine the goal of protecting police officers from unreasonable liability. Accepting as true plaintiff's allegation that the decedent's dire circumstances were evident, this is not a situation where defendants' liability is predicated on "a criminal act of which they were not aware but should have anticipated and prevented." *De Long, supra* at 304. If reliance can be established, we do not believe that the imposition of liability in these circumstances could be characterized as unreasonable.

As for the issue of reliance, we believe that the causal link between the assumed duty to act and the ultimate injury can be established by the apartment dwellers' reliance on defendants' assurance that medical help would be summoned, coupled with defendants' threat that further calls to the police would result in arrest of those placing the calls can establish. See *Kircher, supra* at 260-271 (Hancock & Bellacosa, JJ., dissenting in separate opinions). Arguably, defendants' actions had advanced to the point where they had gotten themselves "into such a relation with the" decedent, that they had "begun to affect the interests of the plaintiff adversely, as distinguished from merely failing to confer a benefit upon him." Prosser & Keeton, Torts (5th ed), § 56, p 375.

Therefore, because plaintiff has alleged facts sufficient to satisfy the *Cuffy* test, plaintiff has stated a claim on which relief can be granted. Accordingly, the trial court erred when granting defendants' summary disposition motion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] The order granting defendants' motion does not specify under which subrule the motion was granted. We conclude that although factual issues are involved, the essence of defendants' motion is that plaintiff has failed to state a claim upon which relief can be granted. Therefore, we review the trial court's grant under MCR 2.116(C)(8). See, e.g., *Smith, supra*, 223 Mich App at 612 n 2.

[2] Plaintiff also raises an argument based on Justice Cavanagh's *White* opinion, in which the justice proposed an alternative to the *Cuffy* test. *White, supra*, 453 Mich at 333-335. Because Justice Cavanagh's test was not adopted, we need not address plaintiff's argument, which is predicated on that test.

[3] As the Court of Appeals of New York observed in *De Long*:

> "If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward." [*De Long, supra* at 305, quoting Judge Cardozo's opinion in *HR Moch Co v Rensseler Water Co*, 247 NY 160, 167; 159 NE 896 (1928).]

See also 2 Restatement Torts, 2d, § 324, p 139.