STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS R. KUEHL and VICKIE S. KUEHL,

Plaintiffs-Appellants,

v

GARY WEBSTER and ASSOCIATED GOVERNMENT SERVICES, INC.,

Defendants-Appellees.

UNPUBLISHED
July 22, 1997

No. 195456
Kalamazoo Circuit Court
LC No. 95-002632 CZ

Before: Taylor, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Plaintiffs appeal as of right the May 28, 1996 order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8), and denying plaintiffs' motion to amend their complaint pursuant to MCR 2.116(I)(5). We affirm.

Defendant Gary Webster is a registered building inspector and the president of defendant company Associated Government Services, Inc. [Associated]. Lockport Township has contracted with Associated to act as building official and enforce certain building codes. On September 10, 1992 plaintiffs contracted with a construction company to build plaintiffs' residential home in Lockport Township. Webster, as an employee of Associated, conducted certain inspections of plaintiffs' home and issued a certificate of occupancy dated February 15, 1993. After issuance of the certificate of occupancy, plaintiffs were informed that their home was unsafe for occupancy because it did not meet certain building code requirements.

Plaintiffs contend that defendants owed them a duty to conduct a competent inspection and to issue a certificate of occupancy only if the residential structure met applicable codes and was fit for occupancy. Plaintiffs filed suit against defendants on September 21, 1995 alleging that defendants negligently breached this duty by certifying that the home met the required building codes when in fact it did not. Plaintiffs further alleged that defendants were grossly negligent because their conduct was so reckless as to demonstrate a substantial lack of concern for plaintiffs' safety. Defendants denied owing

plaintiffs a duty, pursuant to the public duty doctrine, and therefore denied that their conduct was negligent or grossly negligent.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8). Several days later, plaintiffs filed a motion to amend their complaint, seeking to allege that a special relationship existed between plaintiffs and defendants such that defendants owed plaintiffs a duty to conduct a competent inspection of plaintiffs' residential structure. Following a hearing, the trial court granted defendants' motion for summary disposition and denied plaintiffs' motion to amend their complaint on the grounds that the public duty doctrine precludes plaintiffs' claim. The judge ruled that plaintiffs' complaint failed to state a claim upon which relief could be granted pursuant to MCR 2.116(C)(8) and that plaintiffs' proposed first amended complaint was legally insufficient on its face and would therefore be futile pursuant to MCR 2.116(I)(5).

I.

Plaintiffs first contend that because defendants were inspecting plaintiffs' private residential dwelling, a "special relationship" exists between the parties such that the public duty doctrine does not apply. The public duty doctrine provides protection from tort liability in cases in which a duty is owed to the general public and not to particular individuals. *Ludwig v Learjet, Inc*, 830 F Supp 995, 999 (ED Mich, 1993). Under the public duty doctrine, a public official normally owes no duty to any specific individual member of the general public, and owes such a duty only when a "special relationship" exists between the public employee and the individual. *White v Beasley*, 453 Mich 308, 316-319; 552 NW2d 1 (1996). A public official, such as a police officer, is regarded as owing his duty to the public in general and not to a specific individual unless a special relationship exists between the official and the individual such that the performance by the public official would affect the individual in a manner different in kind from the way performance would affect the public. *Gazette v Pontiac*, 212 Mich App 162, 170; 536 NW2d 854 (1995). [1] At a minimum, the existence of a special relationship requires some contact between the government agency or official involved and the victim and reliance by the victim upon the promises or actions of the government agency or official. *Id*.

This Court has held that the inspection of buildings for code violations is a duty owed to the public at large and not a duty owed to individuals. *Jones v Wilcox*, 190 Mich App 564, 569; 476 NW2d 473 (1991). Plaintiffs seek to create a distinction between the inspection of buildings open to the general public and the inspection of private dwellings. Plaintiffs argue that a special relationship exists when a housing inspector inspects a private dwelling, satisfying the exception to the public duty doctrine.

As noted in the trial court's order, the Michigan State Construction Code, MCL 125.1501 *et seq*.; MSA 5.2949(1) *et seq*., contains a provision which requires statewide construction inspections. MCL 125.1512(1); MSA 5.2949(12)(1) provides:

> An enforcing agency shall periodically inspect all construction undertaken pursuant to a building permit issued by it to insure that the construction is performed in accordance with conditions of the building permit and is consistent with requirements of the code and other applicable laws and ordinances.

A stated objective of the construction code is to impose "reasonable requirements for the health, safety, and welfare of the occupants and users of buildings and structures," MCL 125.1504(3)(c); MSA 5.2949(4)(3)(c), and to "adequately protect the health, safety, and welfare of the people," MCL 125.1504(3)(e); MSA 5.2949(4)(3)(e). Such language indicates that the code was designed to protect the general public and does not distinguish between the inspection of public buildings and the inspection of private dwellings. Therefore, unless plaintiffs had a relationship with defendants which was different in kind from defendants' relationship with all homeowners, a special relationship does not exist imposing on defendants a duty to plaintiffs. *Gazette, supra*, 170.

Plaintiffs argue that it is their status as residential homeowners which creates the special relationship with defendants. Plaintiffs have not established a contact between themselves and defendant, or a promise by defendants invoking reliance by plaintiffs, such that defendants' inspection of plaintiffs' home would affect plaintiffs in a manner different from that in which such an inspection would affect any other homeowner. *Id.* As the trial court noted, "to accept plaintiffs' argument would create a potential cause of action any time a building inspector inspects a private residence." Therefore, a special relationship does not exist between defendants as municipal building inspectors and plaintiffs as owners of a private, residential dwelling, and defendants owed no duty to plaintiffs.

Because defendants owed no duty to plaintiffs pursuant to the public duty doctrine, their negligence claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Gazette, supra*, 170. The trial court properly granted defendants' motion for summary disposition based on plaintiffs' failure to state a claim upon which relief can be granted.

II.

Next, plaintiffs argue that the public duty doctrine should not apply to a claim of gross negligence, and that such an application of the public duty doctrine is contrary to sound public policy and societal interests. As plaintiffs recognize, Michigan courts have applied the public duty doctrine to claims of gross negligence. See, e.g., *Rose v Mackie*, 22 Mich App 463, 468; 177 NW2d 633 (1970), overruled in part on other grounds in *Bush v Oscoda Area Schools*, 72 Mich App 670; 250 NW2d 759 (1976); *Markis v Grosse Pointe Park*, 180 Mich App 545, 558-559; 448 NW2d 352 (1987); *Ludwig, supra*, 830 F Supp 999. These cases do not distinguish application of the public duty doctrine to gross negligence claims from ordinary negligence claims. However, as stated in *Ludwig*, the public duty doctrine provides protection from tort liability in cases in which a duty is owed to the general public and not to particular individuals. *Id.* It is the lack of a duty owed to individuals that precludes a tort claim against public officials.

Like plaintiffs' negligence claim, their claim of gross negligence also requires the showing of a duty owed by defendants to plaintiffs. *Markis, supra*, 550, 558. Because the public duty doctrine precludes the imposition of a duty on public officials absent a special relationship, the doctrine applies with equal force to gross negligence claims. Current Michigan law which holds that the public duty doctrine applies to claims of gross negligence is not contrary to sound public policy and societal interests.

III.

Finally, plaintiffs argue that if this Court reverses the lower court's summary disposition order, then leave to amend plaintiffs' complaint should be granted. While leave to amend is to be freely given pursuant to MCR 2.118(A)(2), leave may be denied where an amendment would be futile. *Gonyea Motor Parts Fed v Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991); MCR 2.116(I)(5). An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Id*.

Plaintiffs' initial complaint did not address the public duty doctrine nor allege a special relationship between plaintiffs and defendants. Therefore, the complaint was legally insufficient because plaintiffs alleged that defendants were negligent, yet the complaint failed to establish a duty owed by defendants to plaintiffs. Plaintiffs proposed an amended complaint which alleged that "a special relationship is established between defendants and plaintiffs when defendants are inspecting a private residential dwelling for the purpose of issuing an occupancy permit" to show that defendants owed plaintiffs a duty. As stated in Issue I, a special relationship does not exist between defendants as municipal building inspectors and plaintiffs as owners of a private, residential dwelling, and defendants owed no duty to plaintiffs. Therefore, the proposed amended complaint is legally insufficient on its face, and would be futile pursuant to MCR 2.116(I)(5) and 2.118(A)(2).

Affirmed.

/s/ Clifford W. Taylor
/s/ Harold Hood
/s/ Roman S. Gribbs

[1] We note that in *Beasley, supra,* 453 Mich at 320-321, our Supreme Court adopted an even more strict special relationship test to be used if the public official is a police officer. The Court declined to decide whether the same or different special relationship test should apply to other public employees. *Id,* at 315 n 3. We conclude that the *Gazette* test should apply to the instant individual defendant.