

STATE OF MICHIGAN
COURT OF APPEALS

RUTH VOLID,

Plaintiff-Appellant,

v

ROY HENDERSON, RUSSELL JERVIS, LISA
NAGY, GERTRUDE PETERSON, HARRIS
RITTOFF, FORREST MCCANCE, and the
VILLAGE OF MICHIANA,

Defendants-Appellees.

UNPUBLISHED

June 16, 2000

No. 215160

Berrien Circuit Court

LC No. 97-003020-NO

Before: Zahra, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiff Ruth Volid appeals as of right an order granting defendants' motion for summary disposition in this personal injury case. We affirm.

Plaintiff went to the recycling center located in the Village of Michiana for the purpose of depositing newspapers, bottles and other recyclables in the recycling containers. Upon returning to her car, plaintiff stepped into a hole in the pavement. She fell backwards and struck her head against the pavement and broke the femur and the tibia in her left leg. She filed a complaint against all general council members of the Village of Michiana, the superintendent of public works and street administrator, and the Village of Michiana, alleging gross negligence in permitting the hole to exist and in providing inadequate lighting.

First, plaintiff argues that the trial court improperly held that defendant council members were entitled to absolute immunity regardless of whether the act of maintaining the village's parking lot was a legislative activity or a discretionary or a ministerial governmental function. A claim subject to the defense of governmental immunity is properly dismissed by summary disposition on the basis that the claim is barred. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The applicability of governmental immunity is a question of law which is reviewed de novo on appeal. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

First, MCL 691.1407(5); MSA 3.996(107)(5) provides that

[j]udges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or executive authority.

In this case there is no dispute that the council members of the Village of Michiana were the elective legislative and executive officials of that level of government. Also, Article III, § 3.01 of the charter of the Village of Michiana states that

[t]he Council shall constitute the legislative and governing body of the Village and shall have power and authority, except as otherwise provided in the Charter or by statute, to exercise all power conferred upon or possessed by the Village, and shall have the power and authority to adopt such laws, ordinances, and resolutions as it shall deem proper.

Therefore, in order for the council members to be immune from tort liability, it must next be determined whether the council members were acting within the scope of their authority because they are not immune from tort liability if the acts are not within their executive authority. *Marrocco v Randlett*, 431 Mich 700, 711; 433 NW2d 68 (1988). To determine whether particular acts are within their authority, the court must consider a number of factors including: “the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official’s authority, and the structure and allocation of powers in the particular level of government.” *Id.* In this case, pursuant to Article I, § 2.04(d) and Article III, § 3.01, the village council has the power and authority to maintain and operate village property. Therefore, maintaining the parking lot of the recycling center that is owned by the village is within the scope of the council members’ authority.

Although plaintiff argues that the council members are immune from tort liability only when they perform discretionary-decision, as opposed to ministerial-operational acts, plaintiff is incorrect for two reasons. First, the 1986 amendment to the statute, MCL 691.1407; MSA 3.996(107), eliminated this discretionary/ministerial distinction as follows:

(2) Except as otherwise provided in this section, and **without regard to the discretionary or ministerial nature** of the conduct in question [Emphasis added.]

Second, plaintiff confuses this section of the statute, § 2, which grants limited liability to lower level governmental officers and employees, with the appropriate section of the statute, § 5, that pertains to the elective executive officials of all levels of government. Therefore, because the village council members are the elective executive officials of the Village of Michiana and because maintaining the property of the recycling center is within the scope of the council members’ executive authority, the council members are absolutely immune from tort liability.

Next, plaintiff argues that the superintendent of public works and street administrator was not entitled to absolute immunity because he was not the highest executive official in the level of government in which he was employed. As discussed above, pursuant to MCL 691.1407(5); MSA 3.996(107)(5), the Legislature provides for “immunity for judges, legislators, elective officials, and the highest appointive executive officials when they are acting within the scope of the judicial, legislative, or executive authority.” *American Transmissions, Inc v Attorney General*, 454 Mich 135, 140 n 5; 560 NW2d 50 (1997). Defendant Forrest McCance held the positions of superintendent of public works and street administrator for the Village of Michiana. He was appointed to these positions by the village council. As superintendent of public works, he is responsible for managing all public places and property and reports to the executive officer of the village who, in this case, is the president of the council. As street administrator he is in charge of maintaining, preserving and planning the public streets. According to the charter of the Village of Michiana, the superintendent of public works and the street administrator are officials who are among the highest appointive executive officials in that level of government. Therefore, because there is no dispute that maintaining the recycling center parking lot was in the scope of McCance’s executive authority the trial court properly held that McCance was immune from tort liability.

Next, plaintiff argues that the trial court erred in granting defendants’ motion for summary disposition because questions of fact existed regarding whether McCance was grossly negligent in carrying out his duties as street superintendent. However, the gross negligence exception to which plaintiff refers in her argument only applies to lower level governmental employees pursuant to MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). *American Transmissions, Inc, supra* at 140 n 5. The gross negligence exception to governmental immunity does not exist for judges, legislators, elective officials, and the highest appointive executive officials. *Id.* These officials have always been provided with absolute immunity whenever they are acting within the scope of their judicial, legislative, or executive authority. *Marrocco, supra* at 706-707.

Finally, plaintiff argues that the trial court erred in granting defendants’ motion for summary disposition because discovery was not yet complete. Summary disposition may be appropriate even when discovery is incomplete if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party’s position. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 482; 531 NW2d 715 (1994). Further discovery would not alter the governmental status of defendants and it is that status that provides them with immunity and bars plaintiff’s suit. Therefore, we find no error.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Joel P. Hoekstra