STATE OF MICHIGAN

COURT OF APPEALS

JOHN CIBULAS and RANDEE CIBULAS,

Plaintiff-Appellee,

v

BAYSIDE HOMES, LLC,

Defendant

and

ROBERT MATHEWS,

Defendant-Appellant.

UNPUBLISHED
May 11, 2004

No. 247738
Macomb Circuit Court
LC No. 2001-000198-CK

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant Robert Mathews[1] appeals as of right from a trial court order denying his motion for summary disposition. On appeal, defendant argues that the trial court erred in denying his motion for summary disposition because he is entitled to governmental immunity. We reverse and remand for entry of summary disposition in favor of defendant.

Plaintiffs contracted with Bayside Homes, L.L.C., to build a home at 54481 Autumn Drive, New Baltimore, Michigan. On July 8, 1997, defendant, the building inspector for New Baltimore, reviewed the 54481 Autumn View home, and issued a correction list, which included an instruction that the builders install ice shields on the roof. On December 10, 1997, defendant, on behalf of New Baltimore, issued a certificate of occupancy. Subsequently, plaintiffs moved into the 54481 Autumn View home and had problems with the workmanship. On June 8, 1998, defendant reinspected the home, and found various violations including the failure to install an ice shield on the roof.

[1] Throughout this opinion Mathews will be referred to as defendant and Bayside Homes, L.L.C., who is not a party to this appeal, will be referred to by name.

On January 11, 2001, plaintiffs filed a complaint alleging, with regard to defendant, that the issuance of the certificate of occupancy by defendant constituted gross negligence because he willfully and wantonly disregarded structural defects and building code violations.[2] On January 16, 2003, defendant filed a motion for summary disposition contending that he was immune from liability under MCL 691.1407(5), or in the alternative under MCL 691.1407(2) because his actions did not constitute gross negligence. Plaintiffs responded on February 25, 2003, contending that defendant is not protected by absolute immunity based on *Armstrong v Ross Township*, 82 Mich App 77, 84-85; 266 NW2d 674 (1978); because a building inspector's act of issuing a certificate of compliance is ministerial, immunity is precluded when the alleged conduct is grossly negligent.

On March 3, 2003, a hearing was conducted on defendant's motion for summary disposition. During this hearing, defendant argued that he was entitled governmental immunity because he was the highest ranking executive official within the building department as the head of the building and engineering department for New Baltimore. Defendant further argued that in the event the trial court did not find absolute immunity there were some workmanship problems only that needed to be corrected, except for the ice shield, and if defendant was negligent for not climbing up the ladder and pulling back the shingles to see if there was no ice shield it was not gross negligence or reckless misconduct as described in the statute because it is repairable and was not based on a willful disregard. Plaintiffs replied that defendant was not absolutely immune because a building inspector's obligation in issuing permits is ministerial as determined in *Armstrong*, *supra*. Plaintiffs also argued that there was gross negligence and willful disregard because defendant acknowledged that the only way you would know if the ice shield was installed was to go up on the roof and lift shingles. The trial court, in denying defendant's motion, provided the following:

> I think that's sufficient for a question of fact for the jurors. If the only way to determine is to actually climb up, look for the ice shield, and he said that he knew that was the only way and he didn't go up and he didn't do it, it's sufficient to survive your motion for summary disposition. I do believe that issuance of a building permit pursuant to that *Armstrong* case is a ministerial act and absolute immunity does not apply.

Defendant contends that the trial court erred in determining that he was not entitled to summary disposition under MCR 2.116(C)(7) and (8) because he is entitled to governmental immunity. We agree.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition brought pursuant to "MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence

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[2] On April 9, 2001, the parties filed a stipulation dismissing defendant with prejudice. Subsequently, plaintiffs filed a motion requesting that case be reinstated against defendant. On March 21, 2002, trial court entered an order reinstating the case against defendant.

filed or submitted by the parties." *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998).[3] All well-pleaded allegations are construed in favor of the nonmoving party. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). To survive a motion for summary disposition, brought under MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Id.* The applicability of governmental immunity is a question of law that is also reviewed de novo on appeal. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995). A claim subject to 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).

Defendant contends that he is absolutely immune from liability under MCL 691.1407(5). MCL 691.1407(5) provides:

> A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

To benefit from the immunity granted to highly ranked officials, an individual must be a judge, a legislator, or the highest executive official in the level of government in which he is employed. See *Eichhorn v Lamphere School Dist*, 166 Mich App 527, 539; 421 NW2d 230 (1988). An executive should have broad-based jurisdiction or extensive authority similar to that of a judge or a legislator. *Chivas v Koehler*, 182 Mich App 467, 471; 453 NW2d 264 (1990).[4] Whether the highest executive official of local government was acting within his authority depends on a number of factors, including the nature of the acts, the position held by the official, the local law defining his authority, and the structure and allocation of powers at that particular level of government. *American Transmissions, Inc v AG*, 454 Mich 135, 141; 560 NW2d 50 (1997). The employee must have been acting within the scope of the reasonable power delegated to him to accomplish the business of his employer under the circumstances and the actions must have been taken in furtherance of the employer's purpose. See *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 407-409; 605 NW2d 690 (1999).

Defendant was the building inspector for New Baltimore and, thus, contends he was the highest ranking executive official within the building department as the head of the building and engineering department. Here, there is no contention that defendant acted outside the scope of

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[3] Because MCR 2.116(C)(7) specifically applies to motions brought on the basis of immunity, we will review defendant's motion under that subrule.

[4] This Court has found that executive immunity applies to a school board member, a school superintendent, *Nalepa v Plymouth-Canton Community Schools*, 207 Mich App 580, 587; 525 NW2d 897 (1994), a municipal police chief, *Payton v Detroit*, 211 Mich App 375, 394; 536 NW2d 233 (1995), a county prosecutor, *Bischoff v Calhoun County Prosecutor*, 173 Mich App 802, 806; 434 NW2d 249 (1988), a county clerk, *Gracey v Wayne County Clerk*, 213 Mich App 412, 416-417; 540 NW2d 710 (1995), abrogated on other grounds *American Transmissions, Inc v AG*, 454 Mich 135; 560 NW2d 50 (1997), and the director of the department of corrections, *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 452; 487 NW2d 799 (1992).

his authority. Plaintiffs assert that defendant was grossly negligent under MCL 691.1407(2). But the gross negligence exception does not apply to employees immune pursuant to MCL 691.1407(5). See *Nalepa, supra* at 588-589. However, plaintiffs assert that under *Armstrong, supra*, defendant's activities resulting in the complaint were ministerial rather than discretionary and, thus, absolute immunity does not apply and defendant is subject to the gross negligence provision of MCL 691.1407(2). The trial court agreed with plaintiffs that pursuant to *Armstrong, supra*, absolute immunity does not apply.

Defendant contends that if this Court finds, as plaintiffs urge and the trial court found, that he is not entitled to immunity under MCL 691.1407(5), he still is immune under MCL 691.1407(2), which provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
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> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

With regard to MCL 691.1407(2), the only disputed issue is whether defendant met MCL 691.1407(2)(c); i.e., whether he was grossly negligent. If reasonable jurors could honestly reach different conclusions as to whether conduct constitutes gross negligence under MCL 691.1407(2)(c), the issue is a factual question for the jury. *Jackson v Saginaw County*, 458 Mich 141, 146-147; 580 NW2d 870 (1998). But, if reasonable minds could not differ, the issue may be determined by summary disposition. *Jackson, supra* at 146-147; *Stanton v Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999); see also *Patterson, supra* at 431-435. "Gross negligence" requires more than ordinary negligence. *Jackson, supra* at 150-151. Evidence of ordinary negligence does not create a material question of fact with regard to gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

We disagree with plaintiffs and the trial court in that, based on the evidence, reasonable jurors could not conclude that the actions of defendant in the issuance of the certificate of occupancy constituted gross negligence; thus, summary disposition of this claim was proper.

Plaintiffs' complaint alleges that defendant issued a certificate of occupancy with knowledge of structural defects and building code violations. Plaintiffs further allege that defendant's conduct constituted willful and wanton disregard because the defects and violations will harm plaintiffs. The parties apparently narrowed down these allegations to whether defendant's failure to check if the ice shield was installed constitutes gross negligence.[5] The trial court found that defendant's failure to climb the ladder and check for the ice shield raised a question of fact with regard to whether defendant was grossly negligent. The following colloquial, explaining defendant's inspection, is from plaintiffs' deposition of defendant:

> *Q.* Okay. If there was a code violation would you issue an occupancy permit?
>
> *A.* Not if I knew it, no.
>
> * * *
>
> *Q.* If you had known that there was a code violation such as you indicated here, there being no ice shield . . . would you have issued an occupancy permit at that time?
>
> *A.* No.
>
> *Q.* Okay. Do you recall when you did your final inspection seeing any ice shields on the house?
>
> * * *
>
> *A.* No, you can't see them unless you get up on the roof and look.
>
> *Q.* Well, did you inspect for the ice shield?
>
> *A.* No.
>
> *Q.* Okay. Is that something you normally do in a final inspection, is to see that there's an ice shield?
>
> *A.* No.
>
> *Q.* Okay. If you don't do that inspection how are you able to verify whether or not it's up to code or not?
>
> *A.* Well, it's not - - it's not an inspection that you are normally required to do.

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[5] We note that the other items requiring correction were, apparently, workmanship items and plaintiffs do not dispute that the lack of an ice shield on the roof was the only building code violation. The workmanship errors, which have not received much attention from either party or from the trial court appear to support ordinary negligence, at best.

* * *

Q. So what I'm trying to find out is how you would determine whether it's up to code or not on any house if you don't go up on the roof to inspect it?

A. Well, it's something that we don't do. We don't go up on the roof.

Plaintiffs alleged that defendant, with knowledge, willfully and wantonly disregarded the building code violation. The documentary evidence presented by defendant contradicted plaintiffs' allegations because the documentary evidence indicated that defendant did not have knowledge of the violation at the time he granted the certificate of compliance. There was no reason for defendant to believe or suspect that the original correction list he issued had not been complied with. Plaintiffs have submitted nothing that contradicts defendant's deposition testimony that building inspectors normally are not required to check if the ice shield is installed on the roof. Defendant's failure to check for the ice shield did not result in gross negligence. The structural defect allegations and the building code violation allegations, at best, only support ordinary negligence.

The documentary evidence submitted by the parties, when viewed in a light most favorable to plaintiffs, only raised issues of ordinary negligence and not gross negligence. The evidence when viewed in a light most favorable to plaintiffs indicates that defendant did not know there was a code violation when he issued the certificate of occupancy, but that if he had checked under the shingle he would have found that the ice shield was missing, which is a building code violation. The evidence further supports that checking the roof for ice shields was not something defendant usually done during his compliance inspections or is required to do during is compliance inspections. Defendant's conduct, when viewed in a light most favorable to plaintiffs cannot be described as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." See *Stanton, supra* at 374-375, quoting MCL 691.1407(2)(c). While the evidence may have raised a question of fact regarding defendant's ordinary negligence, "evidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden, supra* at 122. Because plaintiffs failed to allege facts in their complaint or come forward with evidence in opposition to defendant's motion for summary disposition that would allow a reasonable jury to conclude that defendant's conduct amounted to gross negligence, the trial court erred in denying defendant's motion for summary disposition under MCR 2.116(C)(7) because he is entitled to immunity pursuant to MCL 691.1407(2). See *Stanton, supra* at 375.

Because we find that there was no question of fact regarding whether defendant acted in a grossly negligent manner, we need not address defendant's argument that he was entitled to absolute immunity under MCL 691.1407(5); as the highest appointed executive official of a level of government.[6]

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[6] Nonetheless, we note that it appears that defendant would be absolutely immune under MCL 691.1497(5). There does not appear to be much dispute surrounding whether defendant was (continued…)

(…continued)

highest executive official in the level of government in which he is employed as plaintiffs did not even dispute this before the trial court and only briefly dispute it in their brief on appeal by pointing out that defendant did not cite case law supporting absolute immunity applies to building inspectors. Instead, plaintiffs contend that defendant is not entitled to governmental immunity because in *Armstrong, supra* at 84-85, this Court determined that a building inspector deciding whether to issue a *building permit* was performing a ministerial duty rather than a discretionary duty and, thus, was not immune. (Emphasis added.) But, we note that in *Stemen v Coffman*, 92 Mich App 595; 285 NW2d 305 (1979) (involving issuance of a *certificate of compliance*) this Court determined that the employees determination as to whether a building complied with the building code and whether a *certificate of compliance* should be issued were discretionary, not ministerial, and the individuals were entitled to the protection of the governmental immunity. (Emphasis added.) In *Stemen, supra* at 598, this Court distinguished *Armstrong, supra*, in finding that inspectors involved in *Stemen* had a greater degree of discretion and independent judgment than the inspector in *Armstrong*.

We believe reliance on either *Stemen, supra*, or *Armstrong supra*, would be improper because it was not until 1984 that high level officials and lower level officials were distinguished for governmental immunity purposes. See, generally, *Nalepa, supra* at 584-586. In 1984, our Supreme Court in *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 592; 363 NW2d 641 (1984), determined that the highest executive officers of all levels of government are absolutely immune "whenever they are acting within their respective judicial, legislative, and executive authority," and that lower level officials are immune from tort liability when they are acting or reasonably believe they are acting within the scope of there authority, acting in good faith, and "performing discretionary-decisional, as opposed to ministerial-operation, acts." Subsequently, in 1986, the Legislature enacted 1986 Public Act 175 which amended MCL 691.1407. See *Nalepa, supra* at 585. The current language of MCL 691.1407 does not support plaintiffs distinguishing between ministerial acts and discretionary acts, as the statute (comparable to our Supreme Court in *Ross, supra*, and parallel with regard to immunity extended to the highest executive at a level of government) provides that absolute immunity is proper for the highest appointed officials "if he or she is acting within the scope of his or her judicial, legislative, or executive authority," not based on whether actions were ministerial or discretionary.

A panel of this Court has also indicated that distinguishing between ministerial acts and discretionary acts for highly appointed executive officials is not valid noting two reasons in providing, "[a]lthough 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 . . . eliminated this discretionary/ministerial distinction" . . . . [and] [s]econd, 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." *Volid v Henderson*, unpublished opinion per curiam of the Court of Appeals, issued June 16, 2000 (Docket No. 215160). We view this case as persuasive, because of the limited case law, but note that unpublished opinions are not binding under the rules of stare decisis. MCR 7.215(C)(1).

Plaintiffs did not dispute at the trial court level that defendant was acting within the scope of his authority as the building inspector for New Baltimore. Nor did plaintiffs dispute, in response to defendant's motion for summary disposition, that defendant was the highest ranking executive official within the building department as the head of the building and engineering department for New Baltimore. Thus, it appears that plaintiff did not allege facts in response to defendant's motion for summary disposition warranting application of an exception to

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Reversed and remanded for entry of summary disposition in favor of defendant.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot

(…continued)

governmental immunity, which makes summary disposition proper under MCR 2.116(C)(7) because defendant was entitled to governmental immunity under MCL 691.1407(5). See *Smith, supra* at 616.