STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH A. HUGHES,

Plaintiff/Counter-Plaintiff/Appellant-Cross-Appellee,

v

RONALD A. WOOD, WALTER ROE, DONALD WILLIAMS, COUNTY OF ATRIM and ARLEN TURNER,

Defendants-Appellees-Cross-Appellants,

and

CECIL P. DUNN and ROBERT DUNN,

Defendants-Appellees,

and

DIANE DUNN,

Defendant,

and

CECIL P. DUNN CONSTRUCTION, INC.,

Defendant/Counter-Defendant-Appellee.

UNPUBLISHED
March 11, 2008

No. 274487
Antrim Circuit Court
LC No. 05-008127-NZ

Before: Fitzgerald, P.J., Smolenski and Beckering, JJ

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendants Ronald Wood, Walter Roe, Donald Williams, and Arlen Turner (the individual county defendants) on the basis of governmental immunity, and in favor of defendant Antrim County on

the ground that a contract did not exist between plaintiff and the county. The trial court found that the individual county defendants owed plaintiff a duty, but that there was no gross negligence on the part of Wood, Roe and Turner, and no proximate cause as to any of the individual county defendants. The trial court also found no contract between plaintiff and Antrim. Defendants Antrim, Turner, Wood, Roe and Williams cross-appeal the trial court's finding that they owed plaintiff a duty and that Turner was not entitled to absolute immunity as the head of the Antrim County Building Department. We affirm.

In April 2003, plaintiff contracted with defendant Dunn Construction to build her a log home in Antrim County for the price of $156,153. Plaintiff paid all but $22,662.50, withholding that amount because of defects and deficiencies in the house. Defendant Turner inspected the home and issued a certificate of occupancy in January 2004.

In August 2004, plaintiff's home was randomly selected for re-inspection based on an audit by the State Bureau of Construction Codes. Inspectors from the Michigan Department of Labor performed the re-inspections. According to their affidavits, they found 44 code violations, many of which would require substantial repair.

Defendant brought suit to recover the amount plaintiff had withheld, and plaintiff brought a counter-complaint for breach of contract, negligent construction, and similar counts. A few months later, plaintiff filed a complaint alleging that Arlen Turner and Antrim County were grossly negligent for failing to discover and report the numerous code violations. The circuit court consolidated those two cases and subsequently granted summary disposition to the county on the ground of governmental immunity. Plaintiff then filed another complaint, this time against the individual county employees against whom she alleged gross negligence. The court ordered that this suit be consolidated with the others. Plaintiff subsequently amended her complaint to allege a breach of contract claim against the county. Plaintiff seemed to be arguing that a contract was created between Dunn Construction and the county when Dunn took out building permits and paid fees for them, and that plaintiff was a third-party beneficiary of that contract.

The individual defendants moved for summary disposition on the ground of governmental immunity and the county moved for summary disposition of the breach of contract claim. The court delivered its opinion from the bench following the January 9, 2006, hearing. The court accepted that the inspectors missed numerous violations, but concluded that except for Williams, about whom "[t]here was some evidence that he chose not to enforce parts of the code he didn't agree with," there was no evidence of gross negligence. The court said that further, "the primary cause of the bad construction job, if that's what it was, was Dunn constructing it improperly. The building inspectors not doing something about it are not the primary, immediate and direct cause of the injuries." The court concluded that the failure of the individual defendants to properly inspect plaintiff's house was not the proximate cause of the defects and

deficiencies that need repair.[1] With regard to the breach of contract claim, the court concluded that no evidence existed to support the claim that the county entered into a contract with plaintiff.

We review de novo a trial court's decision on summary disposition. *Kisiel v Holz*, 272 Mich App 168, 170; 725 NW2d 67 (2006). The applicability of governmental immunity is a question of law that is also reviewed de novo. *Davis v Detroit*, 269 Mich App 376, 378; 711 NW2d 462 (2005). In reviewing an order granted under MCR 2.116(C)(7), this Court considers affidavits, depositions, admissions, and all other documentary evidence filed by the parties to determine if the defendants are entitled to immunity. *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004). The plaintiff has the burden to allege facts that justify applying an exception to governmental immunity. *Id.* at 87-88. "[W]hen no reasonable person could find the governmental employee's conduct was grossly negligent," summary disposition is properly granted. *Id.* at 88.

Under MCL 691.1407(2)(c), a governmental employee is immune from tort liability where his "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." For the purpose of employee immunity, gross negligence is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). To be the proximate cause of an injury, gross negligence of a government employee must be "the one most immediate, efficient and direct cause of the injury or damage." *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).

This Court's opinion in *Rakowski v Sarb*, 269 Mich App 619, 636; 713 NW2d 787 (2006), is dispositive of the governmental immunity issue in this case. In that case, the plaintiff was hurt when a railing on a handicap ramp at her parents' house gave way. Among others, she sued Sarb, the municipal building inspector who had inspected the ramp after it was built, contending that he was negligent or grossly negligent when he conducted the inspection of the ramp. In his motion for summary disposition, Sarb argued that he owed no duty to Rakowski, that he was not grossly negligent and that his conduct was not the proximate cause of her injury.

This Court first observed that in *Beaudrie v Henderson*, 465 Mich 124, 139 n12; 631 NW2d 308 (2001), our Supreme Court "made clear that MCL 691.1407 'does not *create* a cause of action' and that a plaintiff must first establish that a governmental employee defendant owed a common-law duty to the plaintiff." (Emphasis in original.) This Court then engaged in an analysis of whether Sarb owed Rakowski such a duty and ultimately concluded that he did not. This Court came to that conclusion in part on the ground that there was "no direct or indirect relationship" between her and Sarb because she was "merely an invitee on the date of the accident, which occurred more than six months after Mr. Sarb's inspection, and she neither owned nor lived in the house at which the ramp was built." *Id.* at 630. This Court then addressed the foreseeability aspect of a duty analysis:

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[1] The court also discussed whether building inspectors even have a duty to the owner of property and noted that there were no published cases on that point. The court concluded though that there should be a duty because owners "are the obvious people who will be injured if the inspector doesn't do his job properly."

> Thus, though Mr. Sarb could arguably foresee that a third party might lean against the railing of the structure, our inquiry necessarily takes into account Mr. Sarb's limited role in the sequence of events at issue, his minimal responsibility for the condition, and his limited control over the risk of harm. Further, when evaluating the comparably limited role of the municipal building inspector and the more pervasive role of the owner or contractor, we must determine whether it is prudent to conclude that the building inspector must foresee this type of injury to an invitee caused by this defect.
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> Mr. Sarb did not conduct the inspection on behalf of Dearborn Heights as a warranty to the homeowner. Mr. Sarb performed the limited function of visually assessing the ramp for code compliance. [*Id*. at 631.]

The present case is obviously different in that the relationship at issue is not that between a building inspector and a "mere invitee," but rather between the inspector and the homeowner. There is language in *Rakowski* that would both support and defeat a finding of duty in the present situation. However, it is unnecessary to engage in a duty analysis because, even assuming a duty existed, the element of proximate cause is lacking.

Some of the conclusions in the foreseeability analysis in *Rakowski* are useful in addressing the question of proximate cause because they reflect the same concerns as are present when considering that matter. This Court noted that

> there is, at best, a tenuous relationship between Mr. Sarb's conduct and Ms. Rakowski's injury. The 'degree of certainty" of injury here is directly related to the builder's work product or the homeowner's failure to complete or maintain the structure. Again, the municipal building inspector's role is so limited and so directed to minimal building code enforcement, for the benefit of the entire community, that there is a minimal causal nexus to justify the imposition of a duty.
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> Moreover, because the primary risk of harm arose directly and most substantially from the construction of the ramp, a matter squarely within the responsibility and control of the builder and homeowner, policy considerations favor a finding that Mr. Sarb owed no duty to Ms. Rakowski. [*Id.* at 632-633 (internal cite omitted).]

Thus, this Court found that a building inspector has a limited role, "minimal responsibility for the condition" and has "limited control over the risk of harm." Further, the court found "a minimal causal nexus" between Sarb's conduct and Rakowski's injury, and also determined that the "primary risk of harm arose directly and most substantially" from the work of the contractor. Those findings are echoed in this Court's assessment of whether proximate cause had been shown in that case:

> Here it is beyond dispute that the loose handrail caused Ms. Rakowski to fall and sustain injuries. Regardless of whether, six months before her injury, Mr. Sarb

> correctly approved the ramp during the inspection, his conduct could not be "the one most immediate, efficient, and direct cause" of Ms. Rakowski's injury. [*Id.* at 636.]

In the present case, the harm at issue is the faulty construction of plaintiff's home which "arose directly and most substantially" from the work done by Dunn Construction. The allegation against the individual defendants is essentially that they failed to find the defects and deficiencies after they already existed. The damages (i.e., the cost of repair) are the result of the bad construction, not the result of the failure to discover the bad construction. Thus, "the one most immediate, efficient, and direct cause" of the damages was the work that Dunn Construction either did poorly or not at all.

Plaintiff also argues that the trial court erred in granting summary disposition of plaintiff's breach of contract claim. She asserts that she is a third-party beneficiary of an implied contract between Dunn Construction and Antrim County.

Summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. A trial court considers the documentary evidence presented in the light most favorable to the prosecution to determine whether a genuine issue of material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the evidence does not create a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden, supra* at 120.

There are two kinds of implied contracts: implied in law and implied in fact. Although plaintiff does not allege which of those was established here, her allegations do not fit under an "implied in law" theory." So, if there is any basis for recovery in contract, it must be under the theory of contract implied in fact. Such a contract arises

> "when services are performed by one who at the time expects compensation from another who expects at the time to pay therefore." The issue is a question of fact to be resolved through the consideration of all the circumstances, including the type of services rendered, the duration of the services, the closeness of the relationship of the parties, and the express expectations of the parties. [*In re McKim Estate*, 238 Mich App 453, 458; 605 NW2d 30, quoting *In re Lewis Estate*, 168 Mich App 70, 74; 423 NW2d 600 (1988) (citations omitted).]

Plaintiff's breach of contract claim is not well delineated. She does say that Dunn Construction received permits from Antrim County and paid fees for them, and so is apparently trying to shoehorn her argument into the implied-in-fact theory. The "service" alleged here is the issuance of permits and the "compensation" alleged is the fees paid for those permits. But that theory seems to allow recovery when the expectation of the party that rendered the service is thwarted by the failure of the other party to provide the compensation, even though the other party expected to pay for them. Thus, the contract that is implied is compensation that both parties expected to be paid in return for services, even though there is nothing orally or in writing that would meet the formal requirements for the formation of a contract. In the present case, plaintiff seems to be alleging that payment of the permit fees imposed a contractual obligation on the part of Antrim County to conduct a proper inspection. It is a bit of a stretch to characterize the issuance of a building permit as a "service" as that term is used in the above quote. But even

if it can be fairly characterized that way, the exchange was a fee for a permit, not a fee for a specific quality of inspection.

We conclude that the trial court did not err in concluding that "[t]here is no evidence to support the claim that Antrim County actually did make a contract with the plaintiff." Because a contract was not formed, there is nothing to which plaintiff could be a third-party beneficiary. "To qualify as a third-party beneficiary . . . plaintiff is required at the very least to show that there was a contract." *Uniprop, Inc v Morganroth*, 260 Mich App 442, 448; 678 NW2d 238 (2004).[2]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski
/s/ Jane M. Beckering

[2] In light of our resolution, we need not address defendant's arguments on cross-appeal regarding the existence of a duty to plaintiff and whether Turner was entitled to absolute immunity.