

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH EDWARD MOSKWA, III and NANCY
ANN MOSKWA,

UNPUBLISHED
May 1, 2008

Plaintiffs-Appellees,

v

No. 277439
Lapeer Circuit Court
LC No. 04-033960-CK

ROGER JOHN GRACIK,

Defendant,

and

ALMONT TOWNSHIP and PAUL M. WILCOX,

Defendants-Appellants.

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

PER CURIAM.

Appellants Almont Township and Paul Wilcox appeal as of right the trial court's order granting appellees' motion for relief from a previous order granting summary disposition in favor of appellants. We affirm in part and reverse in part. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This action arises out of appellees' purchase of a newly constructed house in Almont Township. The house was subsequently discovered to have numerous construction and building defects.¹ Wilcox, the building inspector for Almont Township, was required to conduct inspections of the house prior to issuing a certificate of occupancy.

The claims against Almont Township and Wilcox were dismissed as the result of a summary disposition motion asserting governmental immunity as a bar to appellees' claims. However, appellees were allowed to amend their complaint to include allegations of gross negligence. Appellants renewed their motion for summary disposition on the basis that Almont

¹ The house was constructed by defendant Gracik, who is not a party to this appeal.

Township was a governmental agency performing a governmental function and that Wilcox's actions were not grossly negligent. Based on appellees' apparent failure to produce sufficient evidence of gross negligence to overcome governmental immunity, the trial court again granted summary disposition in favor of Almont Township and Wilcox. The issue as to whether appellants' conduct was the proximate cause of appellees' damage was not addressed in appellants' renewed motion.

Following the second entry of summary disposition in favor of Almont Township and Wilcox, the State of Michigan commenced an investigation into the Township's building inspection practices. The investigation was triggered by complaints from appellees and other homeowners in the area. As a result of the investigation, the director of the Bureau of Construction Codes and Fire Safety issued a recommendation to withdraw authority for Almont Township (and therefore Wilcox) to inspect or certify homes. The recommendation was based on evidence accumulated during the investigation that showed substantial defects in the policies and practices of Almont Township leading to failures of its building inspector, who was doubted to be familiar with the current building code or to even have inspected certain areas of appellees' home at all. The Construction Commission adopted the recommendation and issued a notice of intent to withdraw construction code authority to the Township.

Appellees filed a motion for relief from the order granting summary disposition in favor of appellants. Appellees' motion asserted that this newly discovered evidence demonstrated the existence of a genuine issue of material fact, and as such, the renewed summary disposition motion had been improperly granted. The trial court granted appellees' motion and reinstated their claims against Almont Township and Wilcox.

We review a trial court's decision on a motion for relief from judgment or order for an abuse of discretion. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 404; 651 NW2d 756 (2002). An abuse of discretion occurs when a court chooses an outcome that is not within the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

A trial court may relieve a party from a judgment or order upon motion within a reasonable time, not to exceed one year, on the basis of newly discovered evidence. MCR 2.612(C)(1)(b), (C)(2). Four requirements must be met for newly discovered evidence to support a motion for postjudgment relief: (1) the evidence itself, not merely its materiality, must be newly discovered; (2) the evidence must not be merely cumulative; (3) the party moving for relief must be found not to have been able to produce the evidence with reasonable diligence; and, (4) the newly discovered evidence must be such that it is likely to change the result. *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000).

Appellees have clearly satisfied the first three criteria. The investigation by the State which produced the evidence relied upon by appellees to support their motion for relief did not commence until after the dismissal of this case. This evidence was not in existence at the time the renewed motion for summary disposition was decided. Thus, the evidence was newly discovered, not merely cumulative, and could not have been produced by appellees with reasonable diligence. However, the parties dispute whether the newly discovered evidence satisfied the final requirement.

Appellants contend that the evidence was not likely to change the result because appellees would still be unable to demonstrate that the alleged gross negligence on the part of Wilcox and Almont Township was the proximate cause of their damage. Appellants further contend that without this showing, appellees' claims would be barred; therefore, the outcome would remain the same. However, as noted above, the issue of proximate cause was not addressed in appellants' renewed motion for summary disposition. Moreover, the issue of proximate cause is generally a question of fact for the jury. *Helmus v Michigan Dep't of Transportation*, 238 Mich App 250, 256, 604 NW2d 793 (1999).

In order to prevail, appellees are required to demonstrate that the outcome of the motion for summary disposition would likely change as a result of the newly discovered evidence. In order to do so, appellees have to demonstrate the existence of a genuine issue of material fact. The trial court initially granted appellants' renewed motion for summary disposition because appellees failed to produce sufficient evidence to create a genuine issue of material fact as to whether the gross negligence exception applied. In light of the substantial evidence supplied by appellees regarding the questionable policies and practices uncovered by the State investigation, the trial court did not abuse its discretion by concluding that genuine issues of material fact existed as to appellees' claims of gross negligence as to Wilcox and, thereby allowing the reinstatement of appellees' claims against Wilcox.

Appellants also argue that the outcome was unlikely to change as to Almont Township because the newly discovered evidence does not negate the fact that the Township is immune from tort liability as a governmental agency engaged in the exercise of a governmental function. We agree.

Unless a narrow statutory exception applies, a governmental agency is immune from tort liability if the agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). A governmental function is defined as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local ordinance, or other law." MCL 691.1401(1)(f). State law provides local units of government the enabling authority to administer and enforce recognized model building codes within their political boundaries. MCL 125.1507 *et seq.* Because the performance of inspections was authorized by statute, Almont Township was engaged in the exercise or discharge of a governmental function, and because appellees have not claimed that a statutory exception applies in this case, Almont Township is immune from tort liability.²

While it is true that the State investigation resulted in a notice of intent to withdraw authority for Almont Township to perform building inspections, the newly discovered evidence provided by appellees in their motion for relief does not contradict the fact that the Township was a governmental agency engaged in the exercise or discharge of a governmental function at

² The statutory gross negligence exception to governmental immunity applies to employees and agents of governmental agencies, but not the agencies directly. See *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995), abrogated on other grounds *American Transmissions, Inc v Attorney Gen*, 454 Mich 135 (1997).

the time appellees' claims arose. Nor did any of the newly discovered evidence provide a basis for a claim that one of the statutory exceptions to governmental immunity is applicable to the present case. Therefore, the trial court abused its discretion in granting appellees' motion for relief from the previous order and allowing the reinstatement of the claims against Almont Township. We reverse that portion of the trial court's order.

Affirmed in part and reversed in part.

/s/ Helene N. White

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski