

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GREGORY HALL and LISA HALL,

Plaintiffs-Appellees,

v

WOLVERINE BANK,

Defendant,

and

RONALD ROBBINS and ANDREW J.  
NEUMANN,

Defendants-Appellants.

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UNPUBLISHED

June 17, 2008

No. 276471

Bay Circuit Court

LC No. 06-003341-CH

Before: Bandstra, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendants, Ronald Robbins and Andrew J. Neumann, appeal as of right from the trial court's denial of their motion for summary disposition based on their assertion of governmental immunity. We affirm in part and reverse in part.

This action arises from flooding, which occurred on residential property owned by plaintiffs, Gregory and Lisa Hall. Plaintiffs purchased a 13.73-acre parcel in Beaver Township in March 2002 with the intent of building a home. Plaintiffs hired a builder, Kent Russell of Russell Log Homes to construct the residence<sup>1</sup> and obtained financing from defendant, Wolverine Bank.<sup>2</sup> Purportedly, in August 2002, a flood determination was conducted and

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<sup>1</sup> Russell Homes, while not a party to this appeal, was named a non-party at fault by stipulation of the parties in accordance with MCR 2.112(K).

<sup>2</sup> Defendant, Wolverine Bank, was granted summary disposition on February 7, 2007, and is not a party to this appeal.

provided to plaintiffs by Wolverine Bank, which represented that their property was not located in a flood zone.

Russell oversaw construction of the home from July through October 2002 and procured all building permits for the construction, with the exception of permits for installation of a septic system and well, which plaintiffs obtained. In order to procure the building permit, Russell met with Neumann, the building inspector for Beaver Township, on two or three separate occasions. Neumann completed and signed the building permit, inspected the home site and sporadically monitored the construction of the residence.

Plaintiffs alleged that their property began to experience repetitive annual flooding beginning in March 2004. Plaintiffs further indicated that a FEMA National Flood Insurance Program Evaluation Certificate, issued during the summer of 2004, noted their home was located within a flood plain. Plaintiffs filed a complaint alleging, in relevant part, that Robbins, as the zoning administrator, and Neumann, as the building inspector for Beaver Township were grossly negligent in failing to ascertain that plaintiffs' home was located in a flood zone before the issuance of the building permit. Specifically, plaintiffs argued that both Robbins and Neumann failed to properly apprise themselves of their job responsibilities and the existence of ordinances and maps requiring their identification of flood zones prior to issuance of a building permit. Although plaintiffs acknowledged Robbins' status as a Township employee, they also asserted an alternative claim for ordinary negligence against Neumann, claiming he was acting as an independent contractor. Plaintiffs contended that the damage suffered encompassed not only the flooding and resultant harm to their residence, but also their subsequent inability to sell the home because of its location in a flood zone. In plaintiffs' appellate brief they indicate their attempt to sell their home, two years following its construction, in 2004 was precluded when a potential purchaser was required to obtain a survey of the property and an independent flood plain determination. Noteworthy is plaintiffs' contention that it was the use of this survey, combined with use of the Township's FEMA maps that "pinpointed [the home] as being located in a floodplain."

Defendants filed a motion for summary disposition, pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10), and asserted, as a defense, their preclusion from liability based on governmental immunity. Defendants denied that any errors or omissions on their part were sufficient to comprise gross negligence. Finally, defendants contended that any acts or omissions on their part were not the proximate cause of plaintiffs' alleged injuries. The trial court denied defendants' motion, stating in relevant part:

I think that one, there are questions of fact here that need to be resolved and that it's the jury's responsibility to determine them. There are issues as to question of fact as to Mr. Neuman's [sic] status, is he a contractor, an employee, what's the standard that applies to him, gross negligence or ordinary negligence, questions of fact of whether the conduct of these two Defendants in failing to be cognizance [sic] of their responsibilities and issuing a permit that obviously shouldn't [sic] been issued whether that constitutes negligence, ordinary negligence, or gross negligence and those are material issues of fact for the jury to look at . . . . [L]ooking at the evidence in light most favorable to the – to the plaintiff here, you know there is substantial compelling evidence of gross negligence on behalf of

both Defendants in not being aware of their responsibilities in issuing a permit without care of the consequence.

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[T]here's a question of fact that the jury is going to have to sort out what was the proximate cause whether it was the flood or the fact that the permit was issued and the house ended up being placed where it is . . . . I agree with the Plaintiffs' argument myself that the harm here is the house is placed where it is and the proximate cause of it being placed there is the issuance of the building permit that should not have been issued. But for that, the house never would have been built there. It would have been illegal to build it there and the only way it would have happened was the responsibility of the two Defendants to see that the house was not built there and they abdicated that responsibility.

A trial court's decision to grant or deny summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion 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 filed or submitted by the parties." *Glancy v Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). The applicability of governmental immunity also comprises a question of law that we review de novo. *Baker v Waste Mgt of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995). In addition, a motion for summary disposition submitted pursuant to "MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone." *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The grant of summary disposition in accordance with MCR 2.116(C)(10) is proper when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

In evaluating the trial court's denial of summary disposition with regard to Robbins, we note that neither party disputes his status as an employee of Beaver Township as the zoning administrator. Consequently, he is entitled to governmental immunity absent a demonstration of gross negligence. MCL 691.1407(2)(c). Specifically, a governmental employee, who is acting within the scope of his authority, is immune from tort liability unless he was grossly negligent and his gross negligence was the proximate cause of the alleged injury. MCL 691.1407(2)(a)-(c). Gross negligence is statutorily defined to comprise "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). "Simply alleging that an actor could have done more is insufficient [to establish gross negligence] under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Rather, an assertion of gross negligence implies a willful disregard of precautions or efforts to assure safety and an exceptional disregard of the substantial risks entailed. *Id.*

Plaintiffs contend, and the trial court concurred, that a question of fact existed, which would permit a reasonable jury to conclude that Robbins' failure to know his job responsibilities and to educate himself regarding existing ordinances, particularly with regard to zoning and flood plain determinations, comprised gross negligence. Plaintiffs contend the position of zoning

administrator and building inspector were linked and were to be performed by one individual. Robbins had exceptionally limited experience in the building trades and little to no training in zoning administration. Robbins testified that he understood his duties as zoning administrator as primarily involving enforcement of the anti-blight ordinance and issuance of special use permits pertaining to excavations and land splits. Robbins typically would await a query regarding zoning and would then read the relevant ordinances to respond to the question but was not generally knowledgeable regarding existing ordinances. He was allegedly unaware of any additional responsibilities as zoning administrator and did not believe it was within the scope of his duties to assure that individuals did not build in the flood zone, contrary to the content of a Township resolution and corresponding ordinance, which indicated the building inspector was responsible for the review of all building permits to ascertain whether a building would be reasonably safe from flooding. When deposed, Robbins acknowledged that he did not review or sign building permit applications, was unaware of the existence of flood plain maps for the area, and was not familiar with the Township's ordinance procedure, which indicated that the zoning administrator was the building inspector and was responsible for evaluating building permits.

Defendants responded by noting that plaintiffs acknowledged they had little to no contact with Robbins regarding the construction of their home. Notably, defendants contend Robbins did not issue the building permit and did not review the permit application. While acknowledging that Robbins' failure to educate himself regarding the responsibilities and duties of his position may demonstrate a level of incompetence and ordinary negligence, we agree with defendants' contention that it is insufficient to find the existence of gross negligence. As previously noted by this Court, "[e]vidence of ordinary negligence does not create a question of fact regarding gross negligence." *Xu v Gay*, 257 Mich App 263, 271; 668 NW2d 166 (2003). "[D]efendant's mere ignorance does not constitute conduct so reckless as to demonstrate a substantial lack of concern for whether an injury resulted." *Id.* Consequently, the trial court erred in failing to grant Robbins' motion for summary disposition based on his claim of governmental immunity.

Our review of the trial court's denial of Neumann's request for summary disposition must initially address concerns regarding whether this defendant enjoys the status of an employee of Beaver Township or is merely an independent contractor before considering what level of negligence must be demonstrated for liability to ensue. An independent contractor is defined as "one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished." *Candelaria v BC Gen Contractors, Inc.*, 236 Mich App 67, 73; 600 NW2d 348 (1999) (citations omitted). Typically, the economic reality test is used to determine an individual's status as an employee or independent contractor. *Rakowski v Sarb*, 269 Mich App 619, 625; 713 NW2d 787 (2006). The following factors have been identified as relevant to the economic reality test: (a) control of the duties performed by the worker; (b) the payment of wages; (c) the right to hire, fire and discipline the worker, (d) the worker's performance of duties directed toward the achievement of a common goal; (e) whether the worker provides his own tools, materials or equipment to perform his duties; and (f) whether the worker holds himself out to the public as ready and capable of performing certain tasks. *Coblentz v City of Novi*, 475 Mich 558, 578-579; 719 NW2d 73 (2006). In making this determination, no single factor is controlling. Rather, it is the totality of the circumstances that must be considered. *Id.* at 579.

Neumann asserted he understood that he was an employee of the Township and did not recall having signed any agreement as an independent contractor to function as the Township's building inspector. Neumann was paid a monthly fee of \$200 by the Township and received additional monies for each permit issued once the construction was completed. He asserted that the Township controlled his assignments and maintained authority to fire him at any time. Neumann, while acknowledging having received little training or instruction when he began as the building inspector, indicated that when questions arose he sought out the guidance of Robbins and others in positions of authority.

In contrast, plaintiffs assert Neumann was an independent contractor because he worked only part-time and determined his own schedule in performing building inspections for the Township while simultaneously working for other employers. Although Neumann was uncertain whether the Township paid him on a W-2 or 1099 form, he acknowledged the Township did not withhold taxes. Neumann indicated he received minimal training before assuming his position, as the Township's building inspector, and implied oversight was limited, as he did not routinely seek supervisory approval of the building permits issued. This suggests a commonality of purpose only in the outcome to be achieved regarding the completion of necessary inspections for issuance of building permits, while leaving Neumann with a high level of autonomy in determining how the actual work was to be performed and resulting in a commensurate relinquishment of control or oversight by the Township.

Because each party provided evidence pertaining to different factors relevant to the economic reality test, we concur with the trial court's finding that a genuine issue of material fact existed regarding Neumann's employment status with the Township and the denial of summary disposition with regard to this defendant. Because an issue of fact exists regarding Neumann's employment status, we need not determine whether his actions or omissions constituted ordinary or gross negligence or address the issue of proximate cause.

We affirm in part and reverse in part. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ Michael J. Talbot  
/s/ Bill Schuette