IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

SCOTT SMITH, an individual,

Plaintiff/Appellant,

v.

MARICOPA COUNTY, a political subdivision of the State of Arizona; JASON CLOUSE and JENNIFER CLOUSE, husband and wife; DOMINION REAL ESTATE PARTNERS, LLC, an Arizona limited liability company,

Defendants/Appellees.

No. 1 CA-CV 12-0733
FILED 11-5-2013

Appeal from the Superior Court in Maricopa County
No. CV2008-028216
The Honorable Randall H. Warner, Judge
The Honorable Hugh Hegyi, Judge

AFFIRMED

COUNSEL

Beus Gilbert, PLLC, Phoenix
By Franklyn D. Jeans, Cory L. Broadbent

Counsel for Plaintiff/Appellant

Maricopa County Attorney, Phoenix
By Bruce P. White, Anne C. Longo

Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Margaret H. Downie joined.

T H O M P S O N, Judge:

¶1 Scott Smith (Smith) appeals from the grant of summary judgment on his negligence claim against Maricopa County (the County). The superior court entered this judgment following three amendments to the complaint and three years of discovery. Finding no legal error or genuine issue of material fact, we affirm.

BACKGROUND[1]

A. Smith Takes Possession On August 16, 2007

¶2 Smith purchased property in Scottsdale (the Property) in July 2007. The Property's improvements included a new house built by Clouse Construction (Clouse) and certified for occupancy by the County's Planning Department. Smith took possession on August 16, 2007.

¶3 The house came without an operational water heater or air conditioning/heating system. From the beginning, Smith also contended

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[1] We view the evidence in the light most favorable to Smith, and give him the benefit of all favorable inferences fairly arising from it. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997).

with water leaks, and had to immediately redirect water from the Property by installing culverts and ditches. Richard Anderson, a professional engineer hired by Smith, later determined that the Property lies within a floodplain, and other evidence indicated that the finished floor is 2.5 feet below where it was supposed to be.

B. County Inspection in August 2007

¶4 According to Smith, a County employee named "Chuck" visited the Property and inspected its propane tank in "August 2007." In response to Smith's questions, Chuck acknowledged that he had signed off on the Property and approved issuance of its certificate of occupancy despite the absence of functional heating and cooling systems. Chuck explained that he had relied on Clouse's promise to resolve the problems before Smith moved in. Smith contends that he bought the Property in reliance upon the certificate of occupancy.

C. Septic System Authorization on February 20, 2007

¶5 In addition to raising these habitability issues, Smith contends that his septic system is located within twenty-five feet of a wash in violation of County requirements. *See* Ariz. Admin. Code R18-9-A312(C)(table). The County's Environmental Services Department authorized the operation of a septic system on the Property on February 20, 2007.

¶6 Prior to authorization, Laura Carpenter (Carpenter), an inspector from the County Environmental Services Department, visited the Property and issued a report on October 12, 2006. This inspection report contains Carpenter's handwritten query: "Question on wash running over trenches. No tag at site (need to consult). RTV at site." Carpenter also noted "mailed red tag" for the Property.

¶7 Thomas Hanson, another County Environmental Services Department inspector, conducted a follow-up inspection on November 21, 2006. Hanson's report noted: "Ground graded over and 25' around system." Another notation on the report, dated "2/8/07," records a meeting between Environmental Services Department manager Ryan Nielsen and Jenny Vitale (Vitale), a professional engineer, concerning the need for an as-built plan showing the septic system was 25 feet from "S. wash." According to Arizona Revised Statutes (A.R.S.) section 32-

152(B)(2008),[2] "as built plans" are "plans that document the registered or certified professional's final plans and that include all changes made to the plans in the actual project construction."

¶8 The County obtained the requested as-built plan and a letter from Vitale. Vitale's letter provides that "the small drainage depression observed by your inspector is discontinuous and intermittent," and did not constitute a wash. Vitale's plan was sealed, which signified that she was professionally responsible for the document. *See* A.R.S. § 32-125(B) (2007) (requiring that all plans by a registered engineer be submitted under seal); A.R.S. § 25-125(E) (2007) (providing that an engineer is responsible for a sealed document). Based upon Vitale's documentation, the County issued the authorization to operate the septic tank on February 20, 2007.

D. Notices of Claim on October 10 and December 12, 2008

¶9 On October 10, 2008, Smith filed a notice of claim concerning the floodplain and elevation issues with the County. Subsequently, on December 12, 2008, Smith filed a second notice of claim complaining of the County's negligence in issuing a certificate of occupancy and approving construction of the septic system.

¶10 On December 17, 2008, Smith filed this action against the County, the Maricopa County Flood Control District (District), and several other defendants in connection with the Property's condition. The County moved for summary judgment on Smith's negligence claim based upon: (1) Smith's failure to file a timely notice of claim with respect to the house's habitability, and (2) the County's qualified immunity with respect to its location of the septic tank.

¶11 Following briefing and oral argument, the superior court granted the County's summary judgment motions in a Rule 54(b) judgment. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2012).

[2] We cite the current version of the statute absent material change after the date at issue.

DISCUSSION

A. As a Matter of Law, A.R.S. § 12-821.01(A) (2012) Bars Smith's Habitability Claim.

¶12 Summary judgment is appropriate when "the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We review the grant of summary judgment de novo. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). Likewise, we review de novo the superior court's application of A.R.S. § 12-821.01 (Supp. 2012). *Jones v. Cochise County*, 218 Ariz. 372, 375, ¶ 7, 187 P.3d 97, 100 (App. 2008).

1. Issuance of Certificate of Occupancy

¶13 Smith contends that his claims concerning habitability, contained in the December 12, 2008 notice of claim, were timely. He further argues that he lacked sufficient proof of the County's negligence, as demonstrated by its failure to comply with floodplain regulations, until he received Anderson's report on June 23, 2008.

¶14 Sections 12-821 (2003) and 12-821.01(A) provide that a person with a claim against a public entity or public employee must file (1) a notice of claim within 180 days of the cause of action's accrual, and (2) a complaint within one year of accrual. Failure to comply with these requirements bars a claim. *Id.*; *see Salerno v. Espinoza*, 210 Ariz. 586, 589, ¶ 11, 115 P.3d 626, 629 (App. 2005).

¶15 Accrual is triggered "when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." A.R.S. § 12-821.01(B). Arizona courts interpret this language to create a discovery rule. *Little v. State*, 225 Ariz. 466, 469, ¶ 9, 240 P.3d 861, 864 (App. 2010). The "core question" accordingly is "whether a reasonable person would have been on notice" to investigate whether negligent conduct had caused the person's injury. *Walk v. Ring*, 202 Ariz. 310, 316, ¶ 24, 44 P.3d 990, 996 (2002).

¶16 This rule does not require a plaintiff to "know *all* the facts underlying a cause of action." *Doe v. Roe*, 191 Ariz. 313, 323, ¶ 32, 955 P.2d 951, 961 (1998) (emphasis in original). Rather, "accrual requires only actual or constructive knowledge of the fact of damage, rather than of the total extent or calculated amount of damage." *CDT, Inc. v. Addison,*

Roberts & Ludwig, C.P.A., P.C., 198 Ariz. 173, 176, ¶ 11, 7 P.3d 979, 982 (App. 2000) (citation omitted).

¶17 Smith's habitability claim against the County accrued no later than August 31, 2007. By that date, Smith had learned from "Chuck" that the County had issued a certificate of occupancy, notwithstanding the absence of functional heating and cooling systems. Smith already knew that he had bought the Property in reliance upon that certificate and that he had water leaks. Yet Smith waited more than one year before raising the habitability issue in his December 12, 2008 notice of claim. Accordingly, Smith's habitability claims are barred under the 180-day limitation period of A.R.S. § 12-821.01(A).

¶18 Smith did not need Anderson's report to know that he was sold a house that was not habitable, suffered from water leaks, and for which a certificate of occupancy had been improperly issued. *See Thompson v. Pima County*, 226 Ariz. 42, 46-47, ¶¶ 13-14, 243 P.3d 1024, 1028-29 (App. 2010) (finding the accrual period commenced before receipt of an expert's report because the plaintiff had driven over two potholes and suspected they caused her injury). Nor was it necessary for Smith to realize the full extent of damage, including the alleged floor elevation problem, in order for his habitability claim to accrue. *See CDT*, 198 Ariz. at 176, ¶ 11, 7 P.3d at 982; *Little*, 225 Ariz. at 470, ¶ 13, 240 P.3d at 865 (the accrual rule "does not provide or suggest that a plaintiff first must receive an expert . . . opinion . . . .").

2. Failure to Comply With Floodplain Regulation

¶19 Smith counters that his October 10 and December 12, 2008 notices were timely because his habitability claim is also premised upon damages from the defective floor elevation. Specifically, Smith "did not discover the cause/source (*i.e.* the County), or importantly, the condition (*i.e.* the elevation of the finished floor) that caused his damages until he received Mr. Anderson's report on June 23, 2008."

¶20 Smith's attempt to conflate the District's alleged liability for floor elevation issues with the County's liability is unavailing. His Third Amended Complaint's only reference to elevation/floodplain regulations appears in its allegations against the District, a non-party to this appeal.

¶21 Likewise, nothing in Smith's initial notice of claim suggests that the County had any role in the alleged negligent approval of the Property's elevation. Smith describes how a District chief inspector

approved and issued a certificate of elevation dated August 30, 2006, notwithstanding that District employee Michael Smith had issued a "failed" finding after inspecting the Property's elevation on August 18, 2006.

¶22 Finally, we note that the Third Amended Complaint contains an ambiguous reference to County liability:

> Maricopa County, and *in particular the Flood Control District*, owed duties to the Plaintiff, including, but not limited to, a duty to ensure that the finished floor for Plaintiff's residence was above the 100-year flood plain and at a minimum of 2477.7 feet.
>
> As a part of this duty, the Maricopa County [sic] had an obligation to conduct an "In-Progress" inspection to verify that the residence for the Property would be above the Regulatory Flood Elevation.

(Emphasis added.) But the County has no role in adopting and enforcing floodplain regulations. That role belongs to the District. *See* A.R.S. § 48-3603(D) (Supp. 2012) (directing the County Flood Control District to "adopt and enforce floodplain regulations"). The District is a separate jural entity from the County, with distinct powers, privileges, and taxing authorities. *Compare* Ariz. Const. art. 12, § 1 (designating the county as a "body politic and corporate") *and* A.R.S. § 11-202(A) (2012) (County possesses powers expressly provided in the state constitution and laws and powers necessarily implied therefrom) *with* A.R.S. § 48-3601(1) (Supp. 2012) (defining the District's area of jurisdiction to include incorporated and unincorporated county areas, excluding those in which cities and towns "have elected to assume floodplain management powers and duties") *and* A.R.S. § 48-3603(A) (Supp. 2012) (listing the District's powers and designating it as a political taxing subdivision of the state with the powers, privileges, and immunities generally granted to municipal corporations). Accordingly, Smith's effort to conflate these entities' liabilities fails.

B. As a Matter of Law, Qualified Immunity Bars Smith's Claim Concerning Approval of the Septic System

¶23 Smith also challenges the grant of summary judgment arising out of the County's qualified immunity for its approval of the house's septic system under A.R.S. § 12-820.02(A) (2003). We review this issue de novo. *Badia v. City of Casa Grande*, 195 Ariz. 349, 352, ¶ 11, 988 P.2d 134, 137 (App. 1999).

¶24 Section 12-820.02(A) provides that "[u]nless a public employee acting within the scope of the public employee's employment intended to cause injury or was grossly negligent, neither a public entity nor a public employee is liable for" the issuance, or the "failure to revoke or suspend any permit, license, certificate, approval, order or similar authorization" or for "[t]he failure to discover violations of any provision of law when inspections are done of property other than property owned by the public entity in question." A.R.S. § 12-820.02(A)(5-6).

¶25 A public entity is "grossly or wantonly" negligent when it "acts or fails to act when [it] knows or has reason to know facts which would lead a reasonable person to realize that [the] conduct not only creates an unreasonable risk of bodily harm to others but also involves a high probability that substantial harm will result." *Walls v. Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 595, 826 P.2d 1217, 1221 (App. 1991). The existence of gross negligence ordinarily is a factual issue for the jury, but a court may find as a matter of law that the party was not grossly negligent if the plaintiff does not produce evidence that is "more than slight and [that does] not border on conjecture." *Armenta v. City of Casa Grande*, 205 Ariz. 367, 373, ¶ 21, 71 P.3d 359, 365 (App. 2003) (affirming grant of summary judgment on gross negligence claim against the city in part because regular inspections would not have disclosed a problem with the weld on a soccer goal) (citation omitted); *DeElena v. S. Pac. Co.*, 121 Ariz. 563, 569, 592 P.2d 759, 765 (1979) (holding that the operation of an engine in reverse created no triable issue on gross negligence). The superior court implicitly concluded that Smith had failed to discharge this evidentiary burden.

¶26 Two County inspectors investigated concerns about whether a wash was affecting the septic system. The County withheld approval of the installation and authorization for use until Vitale, a professional engineer, submitted a letter and sealed as-built document showing that a wash did not affect the septic system. In view of these actions, we agree with the superior court that, as a matter of law, this evidence fails to

establish gross negligence (and note that the Third Amended Complaint does not even allege gross negligence). Accordingly, summary judgment was warranted. *See Bell v. Jones*, 523 A.2d 982, 997 (D.C. 1986) (holding an architect not contributorily negligent for relying upon a surveyor's work); *see also Valles v. Pima County*, 776 F. Supp. 2d 995, 1005 n.8 (D. Ariz. 2011)(holding that a county's approval of plans and assurances, and enforcement of assurances, was shielded by A.R.S. § 12-820.02); *see generally Walls*, 170 Ariz. at 595-96, 826 P.2d at 1221-22 (granting summary judgment due to insufficient evidence, which consisted of the police officer's failure to act quickly enough to immediately stop a driver suspected of driving drunk before a collision); *Badia*, 195 Ariz. at 350, 354, 357, ¶¶ 2, 17, 30-31, 988 P.2d at 135, 139, 142 (holding that conclusory expert opinions, without more, failed to create a triable issue of fact on gross negligence by police officers).

¶27 *Rourk v. State* is instructive, by way of contrast. 170 Ariz. 6, 821 P.2d 273 (App. 1991). In *Rourk*, a severely depressed teenager sued the state for gross negligence in licensing and supervising her foster home. *Id*. at 9, 821 P.2d at 276. The plaintiff was injured after accepting a ride from a drunk driver as she was leaving a drinking party. *Id.* at 8-9, 821 P.2d at 275-76. This court found sufficient aggregate evidence of gross negligence from the plaintiff's placement in a lower level of care home against a psychologist's recommendation. *Id*. at 13, 821 P.2d at 280. The state had received numerous reports concerning the foster children partaking in alcohol and the foster parents' general failure to supervise. *Id.* In addition, the foster father had a drinking problem. *Id.*

¶28 Unlike *Rourk*, this case does not involve a series of separate negligent acts, any one of which could have caused the plaintiff's damages. Rather, two County inspectors and an engineer investigated whether a wash was in proximity to the septic system. Only when the engineer submitted a sealed as-built plan did the County issue its authorization. The County's actions and reliance upon Vitale do not reflect awareness of a high probability that significant bodily harm will result. Therefore, the County's actions are shielded by A.R.S. § 12-820.02(A)(5-6).

¶29 Equally unavailing is Smith's reliance upon *Southern Pacific Transportation Co. v. Lueck*, 111 Ariz. 560, 567-70, 535 P.2d 599, 606-09 (1975). This case contains no evidence comparable to the willful and intentional conduct by a company that had failed to install adequate gates at the railroad crossing. *Id*.

CONCLUSION

¶30 We affirm the grant of summary judgment in all respects. The County is entitled to costs on appeal contingent upon its compliance with Arizona Rule of Civil Appellate Procedure 21(a).