STATE OF MICHIGAN

COURT OF APPEALS

MARK MANOR and ROSA MANOR,

Plaintiffs-Appellants,

v

SPRINGPORT TOWNSHIP ZONING COMMISSION, BUTCH LINCOLN and STEVE ROLLAND,

Defendants-Appellees.

UNPUBLISHED
March 23, 1999

No. 203877
Jackson Circuit Court
LC No. 96-77507-CE

Before: White, P.J., and Markman and Young, Jr., JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's summary disposition of their claims against defendants Springport Township Zoning Commission, township supervisor Butch Lincoln and township building inspector Steve Rolland. We affirm.

Plaintiffs essentially allege that defendant Rolland is liable for gross negligence and creating a nuisance per se because he issued a building permit and certificate of occupancy which allowed plaintiffs' neighbors, Dale and Tina Marsh, to construct a garage next to plaintiffs' property in violation of the Springport Township zoning ordinance.[1] Plaintiffs also claim that defendant Lincoln was grossly negligent and responsible for creating the nuisance per se because he allowed the permit and certificate to be issued and failed to have the nuisance abated. Finally, plaintiffs allege that defendant township is vicariously liable for the acts of its agents, Lincoln and Rolland. The trial court determined that plaintiffs claims against all three defendants were barred by governmental immunity and therefore granted defendants' motion for summary disposition.

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing the grant of summary disposition on the ground that the claim is barred by governmental immunity, all well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. *Codd v Wayne Co*, 210 Mich App 133, 134; 537 NW2d 453 (1995). To survive a motion for summary

disposition, the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Id*. at 134-135.

Plaintiffs first argue that defendants Lincoln and Rolland were grossly negligent in issuing the building permit and occupancy certificate. Plaintiffs claim, therefore, that governmental immunity does not apply and that the trial court erred in granting summary disposition in favor of these defendants. We disagree. Duty is a necessary element to set forth a cognizable claim of negligence. *Jones v Wilcox*, 190 Mich App 564, 568; 476 NW2d 473 (1991). Where, as here, the duty of a public official arises from his official authority, the duty is for the benefit of the public at large. *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 456; 487 NW2d 799 (1992). "This rule applies unless a special relationship exists between the official and the individual such that performance by the official would affect the individual in a manner different in kind from the way performance would affect the public." *Koenig v South Haven*, 221 Mich App 711, 730; 562 NW2d 509 (1997), lv gtd 458 Mich 864 (1998).[2]

This Court has held that no special relationship exists between governmental employees such as defendants Lincoln and Rolland and members of the public. For example, this Court in *Jones* held that no special relationship existed between city fire inspectors and victims who perished in an apartment fire, because the inspection of buildings for code violations is a duty owed to the public at large and not to individuals. *Jones, supra* at 568-569. Likewise, in *Hobrla v Glass*, 143 Mich App 616; 372 NW2d 630 (1985), this Court held that summary disposition was proper when the plaintiff brought suit against the Secretary of State and several employees for negligently issuing a driver's license to an individual who caused an accident, because the review of a person's qualifications for the issuance of a driver's license is a duty owed to the public at large and not to any particular individual. *Id*. at 625-626.

Likewise in this case, defendants Lincoln and Rolland were responsible for enforcing the zoning ordinance for the benefit of the public, just as the building inspectors in *Jones* enforced the city's ordinance and the state employees in *Hobrla* enforced the laws regarding driver's license qualifications. Because defendants Lincoln and Rolland did not owe plaintiffs a duty, they cannot be liable to plaintiffs for gross negligence. Accordingly, we hold that the trial court properly dismissed plaintiffs' gross negligence claims against defendants Lincoln and Rolland.

Moreover, because vicarious liability is derivative, the trial court properly dismissed plaintiffs' gross negligence claims brought against defendant township. See *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420-421; 540 NW2d 710 (1995), overruled on other grounds *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997). In any case, even assuming that defendants Lincoln and Rolland could be found to have been grossly negligent, defendant township would still be immune from liability. If the activity in which a governmental employee "was engaged at the time the tort was committed constituted the exercise of a governmental function (*i.e.*, the activity was expressly or impliedly mandated or authorized by constitution, statute, or other law), the agency is immune" from liability. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 625; 363 NW2d 641 (1984). Here, enforcement of defendant township's zoning ordinance is a governmental function authorized by the Township Rural Zoning Act, MCL 125.271 *et seq.*; MSA 5.2963(1) *et seq*. *Rochester Hills v Six Star, Ltd, Inc*, 167 Mich App 703, 708; 423 NW2d 322

(1988). Therefore, defendant township would be immune from liability for any alleged gross negligence on the part of defendants Lincoln and Rolland in issuing the building permit and certificate of occupancy. "Improper performance of an activity authorized by law is, despite its impropriety, still 'authorized' within the meaning of the *Ross* governmental function test." *Richardson v Jackson Co*, 432 Mich 377, 385; 443 NW2d 105 (1989).

Plaintiffs also argue that defendants are liable for creating a nuisance per se when they issued the building permit in violation of the township's zoning ordinance and further that they are not immune from such a claim. Again, we disagree. We need not address the immunity issues raised by the parties because plaintiffs in the first place have not presented a colorable claim against defendants for creating a nuisance per se. Cf. *Li v Feldt (After Second Remand)*, 439 Mich 457, 477; 487 NW2d 127 (1992). A governmental entity is not liable for damage caused by a nuisance unless that entity has either created the nuisance, owned or controlled the property from which the nuisance arose, or employed another that it knows is likely to create a nuisance. *Kuriakuz v West Bloomfield Twp*, 196 Mich App 175, 177; 492 NW2d 757 (1992). Liability may not be imposed when the entity's only action was to issue a building permit enabling another to create the nuisance. *Id.*; *McSwain v Redford Twp*, 173 Mich App 492, 499; 434 NW2d 171 (1988). Here, plaintiffs have failed to allege sufficient causation or control to impose liability on defendants, because defendants' sole connection to the alleged nuisance was their issuance of a building permit and certificate of occupancy which allowed plaintiffs' neighbors to construct the garage. Accordingly, we hold that the trial court properly dismissed plaintiffs' nuisance claims against defendants.

Finally, plaintiffs argue that defendant township is not entitled to governmental immunity because its agents, defendants Lincoln and Rolland, committed an illegal act in issuing the building permit. We disagree. As stated, municipalities are immune from tort liability "in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1); MSA 3.996(107)(1). A governmental function is defined as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f); MSA 3.996(101)(f). Here, the issuance of the building permit and certificate of occupancy, although allegedly improper, was nevertheless a governmental function. *Richardson*, *supra*.

Affirmed.

/s/ Helene N. White
/s/ Stephen J. Markman
/s/ Robert P. Young, Jr.

[1] Plaintiffs originally filed suit against Dale and Tina Marsh for creating the alleged nuisance but later entered into a stipulation to dismiss them. As a result, the owners of the property where the alleged nuisance is located are not parties to this appeal.

[2] The so-called "public duty doctrine" protects governments from unreasonable interference with policy decisions and also protects governmental employees from unreasonable liability. *White v Beasley*, 453 Mich 308, 317; 552 NW2d 1 (1996).