STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY MENHENNICK, d/b/a HARVEY MOTORS, and ILEAN MENHENNICK,

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF CHOCOLAY, IVAN FENDE, and MARK MAKI,

Defendants-Appellees.

UNPUBLISHED
June 11, 1999

No. 208584
Marquette Circuit Court
LC No. 94-030321 NZ

Before: Whitbeck, P.J., and Markman and O'Connell, JJ.

PER CURIAM.

Defendants cited plaintiffs for displaying cars in the highway right-of-way abutting plaintiffs' used-car lot in violation of their zoning permit. The district court dismissed the citation, holding that defendants were without authority to regulate the use of state highway rights-of-way. Plaintiff then filed this action, alleging malicious prosecution, plus intentional and negligent infliction of emotional distress. The trial court granted defense motions for summary disposition on all claims, on the ground of governmental immunity. Plaintiffs appeal as of right and we affirm.

Plaintiffs first argue that defendants Maki and Fende were engaged in *ultra vires* acts, or activity beyond their proper scope of authority, when they attempted to enforce the township zoning ordinances within the highway right-of-way, and that governmental immunity accordingly did not apply to those acts. This Court reviews de novo a trial court's decision on a motion for summary disposition as a matter of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; ___ NW2d ___ (1999). A motion for summary disposition based on governmental immunity is decided by examining all documentary evidence submitted by the parties, accepting all well-pleaded allegations as true, and construing all evidence and pleadings in the light most favorable to the nonmoving party. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 133-134; 545 NW2d 642 (1996).

Governmental employees are immune from tort liability where they are acting or reasonably believe they are acting within the scope of their authority in pursuit of a governmental function, unless their actions constitute gross negligence. MCL 691.1407(2); MSA 3.996(107)(2). A "governmental

function" is "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). Because *ultra vires* acts are those not expressly or impliedly mandated by law, they do not fall within the protection of the immunity statute. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 591; 363 NW2d 641 (1984).

In this case, the pleadings do not allege any overt act on the part of defendant Fende concerning the disputed zoning citation. At best, Fende appeared to be fully aware of the dispute regarding plaintiffs' use of the highway right-of-way but took no direct action against plaintiffs. However, the failure to take action, whether intentional or not, cannot constitute an *ultra vires* act. *Epperson v Crawford Co Rd Comm*, 196 Mich App 164, 167; 492 NW2d 455 (1992). Thus, Fende's failure to act cannot be deemed *ultra vires*. *Id.* Thus, the trial court properly granted summary disposition with regard to Fende.

We further conclude that defendant Maki acted within the scope of his governmental authority. Plaintiffs argue that enforcing local zoning ordinances with respect to the state highway right-of-way is not authorized by law, and is therefore not a governmental function. This argument is without merit. The inquiry into whether an activity is a governmental function focuses on the general activity, not necessarily on the specific conduct involved with the alleged tort. *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995). Enforcement of zoning ordinances is a governmental function. *Rochester Hills v Six Star, Ltd*, 167 Mich App 703, 708; 423 NW2d 322 (1988). Throughout the proceedings leading to this lawsuit, defendant Maki was attempting to enforce the township zoning ordinances—an activity that he, as zoning administrator, was authorized to perform.

Further, our state constitution generally reserves reasonable control of highways, streets, and alleys to townships, counties, cities, and villages. Const 1963, art 7, § 29. Additionally, § 2 of the township zoning act, MCL 125.271 *et seq.*; MSA 5.2963(1) *et seq.*, grants townships the authority to establish zoning ordinances. The act does not include enforcement of zoning ordinances among its specific exceptions to the general authority that townships enjoy under the statute. Clearly enforcement of zoning ordinances is a governmental function implicating the immunity statute.

Plaintiffs contend that enforcement of zoning ordinances concerning a state highway right-of-way is preempted by the state vehicle code, MCL 257.1 *et seq.*; MSA 9.1801 *et seq.* We disagree. A municipal ordinance is preempted by state law where the state law completely occupies the area that a local ordinance is attempting to regulate, or if the ordinance is in direct conflict with a state statute. *Rental Property Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). Section 676a of the Motor Vehicle Code provides in pertinent part as follows:

> (1) Except as otherwise provided in this section, a person, firm, or corporation who sells or offers for sale, or displays or attempts to display for sale, goods, wares, produce, fruit, vegetables, or merchandise within the right-of-way of a highway outside of the corporate limits of a city or village, or within the right-of-way of a state trunk line highway, is responsible for a civil infraction.

> (2) This section shall not interfere with a permanently established business presently located on or partially on private property or grant to the owner of that business additional rights or authority that the owner may not now possess, or diminish the legal rights or duties of the authority having jurisdiction of the right-of-way.

This legislation does not preempt defendants' zoning enforcement authority. Subsection (2) clearly recognizes that other laws, rights, or duties may trump this provision and is not an attempt at complete regulation of highway rights-of-way. Further, the local ordinance does not directly conflict with this provision; subsection (2) expressly states that other authorities may have jurisdiction over the rights-of-way and that such jurisdiction takes priority.

Finally, plaintiffs' argument that Maki's actions amounted to gross negligence is without merit. Regardless of his alleged personal feelings toward plaintiffs, the record indicates that Maki carried out his duties in a professional manner. There is no evidence of gross negligence. Plausible differences of opinion on the legalities of zoning regulation do not constitute "gross negligence," that is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

Affirmed.

/s/ William C. Whitbeck
/s/ Stephen J. Markman
/s/ Peter D. O'Connell