STATE OF MICHIGAN

COURT OF APPEALS

NEN VAN NGUYEN,

Plaintiff-Appellant,

v

PROFESSIONAL CODE INSPECTIONS OF MICHIGAN, INC., CHARLES DYK, CITY OF GRANDVILLE, and DAN JOHNSON,

Defendant-Appellees.

UNPUBLISHED
July 15, 2004

No. 247584
Kent Circuit Court
LC No. 02-001260-CZ

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying his motion for partial summary disposition as to defendant Johnson and granting summary disposition to defendants Johnson and the City of Grandville pursuant to MCR 2.116(C)(7), (8), and (10), as well as an order granting summary disposition to defendants Dyk and Professional Code Inspections of Michigan (PCI) pursuant to MCR 2.116(C)(8) and (10). We affirm in part, reverse in part, and remand for trial as to defendant Johnson.

General Growth Properties (GGP) owns Rivertown Crossings Mall in the city of Grandville. Grandville has a zoning ordinance, § 8-6(E)(2)(a)(i), limiting the location of exterior entrances within malls only to anchor stores, theaters, and standard restaurants.[1] In May 1999, GGP requested Grandville grant it a variance to add five additional exterior entrances and entrance signs to stores located in the mall. It is not disputed that this variance was, in fact, granted at a May 19, 1999 public hearing of Grandville's Zoning Board of Appeals (ZBA). However, because of an error in transcription or clumsy wording, the official minutes from this meeting did not reflect that a variance had been granted for additional exterior entrances.[2] The

[1] City of Grandville Zoning Ordinance, § 8-6(E)(2)(a)(i), states: "Customer access to stores within a mall structure shall be only from the interior of such mall structure, except that an *anchor store*, theater, or *standard restaurant* may also provide for customer access to the use directly from the exterior of the mall structure."

[2] It should be noted, however, the minutes must be read in the context of existing knowledge
(continued…)

official minutes read as follows: "Motion by Al Cronheim, supported by John Voss, CARRIED 5-1 (De Witt opposed) to grant the request for five (5) additional exterior entrance signs for customer access to limited specialty retail stores attached to the mall and as presented in the locations depicted in the applicant's site plan."

On May 15, 1999, plaintiff entered into a written lease agreement with GGP for space to open a nail salon. The space was located on the outside of the mall and could not be accessed from the mall's inside corridor. Therefore, the space was to have an exterior entrance. According to plaintiff, he hired an architect to prepare plans for improvements to the space including an exterior entrance. He also hired a construction company to complete the improvements. The plans were submitted to Grandville to obtain a building permit. Defendant Dyk, Grandville's building official, granted the permit. Dyk is also an employee of PCI that contracted with Grandville to provide "technical and consultation services" to assist Grandville and Dyk, in his official capacity, in the inspection of plans and construction within Grandville for compliance with state and local construction codes and the issuance of permits. After obtaining the permit, plaintiff's construction company began the renovations on the space at Rivertown Mall.

In June 2000, defendant Johnson, who had become the assistant city manager for Grandville in April 2000 and who was not present at the May 19, 1999 zoning board meeting, conducted an inspection of plaintiff's space and discovered the exterior entrance. According to Johnson, upon reviewing § 8-6(E)(2)(a)(i) and the minutes from the May 19, 1999 zoning board meeting, he determined the exterior door was in violation of the ordinance and that a variance had not been granted. He instructed Dyk to issue a stop work order to plaintiff's contractor.

Randy Zimmerman, who is employed by GGP as the senior general manager of the mall, testified in a deposition that he and other GGP representatives informed Johnson that the minutes were erroneous and that the variance for the outside entrance had, in fact, been issued. Zimmerman also testified that Dyk stated he believed the variance had been granted, and that he had only issued the stop work order pursuant to Johnson's instruction. Johnson stated in his affidavit that he ultimately located audiotapes from the May 19, 1999 zoning board meeting sometime at the end of 2000 or the beginning of 2001 and that his review of the tapes indicated the variance for the doors had been granted. Johnson testified that he then prepared corrected minutes and presented them to the zoning board for approval. However, it appears from the record that, at least as of the hearing on the motions for summary disposition, the zoning board had not adopted the corrected minutes and Johnson had not removed the stop work order.

Because of the stop work order, plaintiff ultimately entered into another lease with GGP for a more expensive space inside the mall. Also, according to plaintiff, he was required to pay his contractor approximately $40,000 for improvements made before the stop work order was issued that were not transferable to the new space. He also asserts that ninety percent of his damages were suffered after Johnson reviewed the tapes and determined the error.

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concerning the mall, the application for variance, notice, and meeting description. At that time, GGP sought five additional exterior entrances and signage for those entrances on space outside the mall that were not accessible from the mall's inside corridor.

In June 2002, plaintiff commenced the present action by filing a three-count complaint. In count I, plaintiff alleged that Dyk, and CPI (that he alleged was vicariously liable for Dyk) had both been negligent in their review of plaintiff's construction plans because they should have been aware that the exterior entrance would violate Grandville's zoning ordinance and, thus, should not have granted the building permit. Count II alleged that Johnson, and Grandville (that he alleged was vicariously liable for Johnson) were liable for gross negligence because Johnson had ordered Dyk to issue the stop work order and had failed to withdraw it after being informed by GGP of the variance and that the minutes from the May 19, 1999 zoning board meeting were incorrect. And, because Johnson had not reviewed the tape recordings of the meeting that would have revealed the variance was in fact granted, and that the stop work order had been improperly issued. Finally, in count III, plaintiff alleged misrepresentation on the part of all defendants based on his assertions that defendants had either expressly or impliedly warranted and represented that the plans and specifications were in compliance with Grandville's zoning ordinance when they approved them, and that he suffered damages due to his reliance on those warranties and representations. The trial court ultimately granted summary disposition in favor of defendants on the basis of governmental immunity, failure of gross negligence, lack of duty to plaintiff under the public duty doctrine, and proximate cause. The trial court denied plaintiff's motion for partial summary disposition as to defendant Johnson. This appeal followed.

I

Plaintiff first asserts that the trial court erred in granting summary disposition to Grandville based on governmental immunity. We review the grant or denial of a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The applicability of governmental immunity is a question of law we also review de novo. *Cain v Lansing Housing Comm*, 235 Mich App 566, 568; 599 NW2d 516 (1999). Although Grandville and Johnson requested summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), and the trial court agreed, because Grandville only asserted it was entitled to summary disposition based on governmental immunity, MCR 2.116(C)(7) is the appropriate rule for our review. See *Poppen v Tovey*, 256 Mich App 351, 353; 664 NW2d 269 (2003).

"'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.'" *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003), quoting *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998). All well-pleaded allegations are to be accepted as true and must be construed in the light most favorable to the nonmoving party. *Wade v Dep't of Corrections*, 439 Mich 158; 483 NW2d 26 (1992). "In order to survive a motion for summary disposition under MCR 2.116(C)(7), the plaintiff must allege facts in the complaint 'justifying application of an exception to governmental immunity.'" *Suttles v Dep't of Transportation*, 457 Mich 635, 642; 578 NW2d 295 (1998), quoting *Wade, supra*, 163. A motion for summary disposition under MCR 2.116(C)(7) is appropriately granted when "no factual development could provide a basis for recovery." *Atkinson v Detroit*, 222 Mich App 7, 12; 564 NW2d 473 (1997).

"Absent a statutory exception, a governmental agency is immune from tort liability when it exercises or discharges a governmental function." *Maskery, supra*, 613, citing MCL 691.1407(1). Plaintiff first asserts the trial court erred in determining Grandville was entitled to governmental immunity because it was not engaged in the exercise or discharge of a

governmental function.[3] We disagree. A governmental function is defined by MCL 691.1401(f) as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." *Id*. at 613-614. "The term 'governmental function' is to be broadly construed, and the statutory exceptions are to be narrowly construed." *Id*. at 614, citing *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

MCL 125.581(1) provides that cities may regulate the use of land and structures. Also, MCL 117.4i(c) of the Home Rule City Act, MCL 117.1 *et seq*., states that a city may provide in its charter for the establishment of districts or zones within which it may regulate the use of land and structures, the height, area, size, and location of buildings by ordinance. In the present case, City of Grandville Zoning Ordinance, § 8-6 sets forth the C-4 Commercial Shopping Center District, and states:

> (A) It is the intent of the C-4—Commercial Shopping Center District to provide for the development of planned regional commercial centers that will, by virtue of their size, service not only the city, but also the surrounding market area . . . . The regulations contained in this article will facilitate shopping center development in a planned, orderly fashion, so as to protect the public health, safety, and general welfare, especially as it relates to vehicular and pedestrian traffic.

Thus, we conclude Grandville's enactment of § 8-6 (E)(2)(a)(i) limiting customer access within a mall to interior entrances, and its enforcement of that ordinance, was a governmental function as defined in MCL 691.1401(f). See *City of Rochester Hills v Six Star, Ltd, Inc*, 167 Mich App 703, 707-708; 423 NW2d 322 (1988); *Randall v Delta Charter Twp*, 121 Mich App 26, 32; 328 NW2d 562 (1982).

Plaintiff next asserts the trial court erred in granting summary disposition to Grandville based on his contention that the proprietary function exception to governmental immunity may be applicable here because Grandville contracts its building inspection and certain zoning administration duties to PCI. We disagree. MCL 691.1413 states that governmental immunity does not preclude an action for bodily injury or property damages arising out of a governmental agency's performance of a proprietary function. Two tests must be satisfied in order for an activity to be considered a proprietary function: "[t]he activity (1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees." *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998).

Plaintiff presented no evidence that Grandville enacted and enforced the ordinance limiting external entrances in shopping malls for the primary purpose of raising a pecuniary profit rather than for the primary purpose of protecting the public health, safety, and general

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[3] Plaintiff did not raise this issue below and, therefore, has failed to preserve it for review. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003). Nonetheless, in the present case, we choose to exercise our discretion to address this issue because it is one of law and the facts necessary for its resolution have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

welfare of patrons within the C4-Commercial Shopping Center District. City of Grandville Zoning Ordinance, § 8-6(A). Plaintiff argues that the trial court should not have granted Grandville's motion for summary disposition because he had made discovery requests seeking to determine whether it made a profit through its zoning regulations and enforcement. However, despite his assertion, plaintiff was required to allege facts justifying the application of the proprietary function exception in order to survive a motion under MCR 2.116(C)(7). *Suttles, supra,* 642. Plaintiff did not do so. Moreover, the fact that Grandville's promulgation and enforcement of zoning ordinances may generate a profit, and that any profit may have increased because of its contract with CPI, would not be dispositive and would only serve as evidence of intent. *Coleman, supra,* 621.

With regard to whether an activity cannot normally be supported by taxes and fees, our Supreme Court has stated that "it is important to consider the type of activity under examination." *Coleman, supra,* 622. Plaintiff presented no evidence to show that the promulgation and enforcement of zoning regulations within its own boundaries is an activity the city cannot normally support by taxes and fees. *Coleman, supra,* 622-623. The trial court correctly granted summary disposition to Grandville.

II

Plaintiff next argues that the trial court erred in denying his motion for partial summary disposition against Johnson brought pursuant to MCR 2.116(C)(10), and by granting summary disposition to Johnson pursuant to MCR 2.116(C)(7), (8), and (10). The trial court, in granting summary disposition, determined that Johnson did not owe plaintiff a duty, that Johnson's actions did not amount to gross negligence, and a failure of proximate cause. The legal standards to be applied to a motion for summary disposition brought under MCR 2.116(C)(8) and MCR 2.116(C)(10) are as follows:

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections,* 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163. When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).
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> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co,* 451 Mich 358; 547 NW2d 314 (1996). [*Maiden, supra,* 119-120.]

We first address plaintiff's assertion that the trial court erred in determining Johnson did not owe a duty to plaintiff. Throughout the lower court proceedings the trial court labored under the misconception that the public duty doctrine applies to the instant case, and that Johnson did not owe a duty to plaintiff unless a special relationship existed between them. However, in *Beaudrie v Henderson*, 465 Mich 124, 138-142; 631 NW2d 308 (2001), our Supreme Court concluded that the Legislature expressed its intent to subject lower-level government employees to liability for actions equating to gross negligence through its enactment of MCL 691.1407(2), and that the traditional common-law duty analysis applicable to private individuals is to be used for determining the liability of public employees other than police officers. Thus, the public duty doctrine is not applicable.

Whether a duty exists is a "'question of whether the defendant is under any obligation for the benefit of the particular plaintiff' and concerns 'the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other.'" *Buckzkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992), quoting *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 585 (1981). The first factor that is generally examined is whether the risk was foreseeable. However, other considerations are usually more important. *Id*. at 101. Such factors can include the relationship between the parties, the nature of the risk presented, and the burden on the defendant. *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 707; 597 NW2d 506 (1999), quoting *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). Moreover, a "duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to the public, of which the plaintiff is a part. *Cipri v Bellingham Foods, Inc*, 235 Mich App 1, 15; 596 NW2d 620 (1999), quoting *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967).

The trial court's conclusion that Johnson did not owe a duty to plaintiff is flawed. Johnson described by affidavit that part of his duties as the assistant city manager involves inspecting premises such as those being rented by plaintiff in order to determine whether they are in violation of Grandville's zoning ordinances and, if so, to enforce those ordinances by taking measures such as issuing a stop work order. Johnson argues that he had no relationship with plaintiff because plaintiff had not requested the variance. However, he knew that plaintiff had leased the space when he went to inspect it, that the variance was therefore for the plaintiff's benefit, and also that it was reasonably foreseeable that his issuing a stop work order would cause injury to plaintiff. Moreover, as Johnson already performs inspections and enforces the ordinances respecting buildings such as the mall, Johnson owes a duty to members of the public that rent space within the mall, of which plaintiff is a part. Also, because Johnson already performs the inspections and handles enforcement, this Court's holding that he owes a duty to persons renting space within the mall to act reasonably in enforcing zoning ordinances would not place any undue burden upon him. Because Johnson did owe such a duty to plaintiff our inquiry next addresses whether Johnson breached that duty and, if so, whether his breach amounted to gross negligence.

The parties do not dispute that, as the assistant city manager, Johnson is a government employee. "Governmental employees are immune from liability for injuries they cause during the course of their employment if their 'conduct does not amount to gross negligence that is the proximate cause of the injury or damage.'" *Poppen, supra*, 356, quoting MCL 691.1407(2). MCL 691.1407(2) defines gross negligence as "conduct so reckless as to demonstrate a

substantial lack of concern for whether an injury results." Based on the plain language of MCL 691.1407(2), the liability of governmental employees is limited "to situations where the contested conduct was substantially more than negligent." *Maiden, supra*, 122. Therefore, presenting evidence of ordinary negligence is not sufficient to survive a motion for summary disposition. Instead, a plaintiff must present evidence sufficient to create a material question of fact as to whether gross negligence occurred. *Id*. at 122-123. Where reasonable jurors could differ as to whether the defendant's conduct equated to gross negligence on the basis of the evidence presented, summary disposition is inappropriate. *Harris v Univ of Michigan Bd of Regents*, 219 Mich App 679, 694; 558 NW2d 508 (1996).

Plaintiff asserts that Johnson was grossly negligent in issuing the stop work order despite the fact that the variance had been granted. However, Johnson testified in his affidavit that he issued the stop work order after reviewing the zoning ordinance and reviewing the minutes from the May 19, 1999 ZBA meeting, that he claimed did not indicate a variance had been granted. The other record evidence on this point is subject to interpretation and proof.

First, the minutes relied on are ambiguous. Reading the minutes in the context of the proposed variance calls Johnson's interpretation into question. The minutes of the ZBA, "grant five additional *exterior* signs for *customer access to limited specialty retail stores attached to the mall as presented in the locations depicted in the applicant's site plan."* [Emphasis added.] The zoning ordinance calls for interior access to shops like plaintiff's salon. Why would one seek an exterior sign for customer access to a shop with an interior entrance? The notice of hearing on the variance request references entrances. The suspect minutes identify the matter as a request for entrances for customer access. The site plan may provide information, but it is neither contained in the record on appeal, nor, referenced as reviewed in Johnson's affidavit. Johnson had been informed by GGP employees that the minutes were erroneous and that a variance had, in fact, been issued. Zimmerman testified in his deposition that he and two other GGP employees had conversations with Johnson concerning the variance, and further stated that he presented Johnson with a copy of the minutes from the May 19, 1999 meeting along with a copy of the application GGP had submitted in order to get the variance and explained that the minutes were erroneous and that a variance had been granted for both exterior entrance signs and exterior entrances. In his affidavit, Johnson acknowledges having communicated with representatives from GGP, but disputes confirmation of entrance approval. Additionally, audiotapes of the ZBA meeting were available and an internal memorandum, dated June 17, 1999, confirming the variance grant was in the possession of the ZBA's attorney. Finally, plaintiff produced evidence that Johnson refused to lift the stop work order after having reviewed the audiotapes and determining that the variance for the exterior doors had, in fact, been granted.

In *Kitchen v Ferndale City Council*, 253 Mich App 115, 124-127; 554 NW2d 918 (2002), this Court concluded that audiotapes made of a public meeting constitute part of the minutes of that meeting. Therefore, we believe that Johnson would have been justified in lifting the stop order after listening to the audiotapes and concluding that the variance had, in fact, been granted without first seeking approval from the zoning board. However, in Johnson's affidavit, he testified that after reviewing the audiotapes and determining that the written minutes were erroneous, he "drafted corrected minutes of the May 19, 1999 Board of Zoning Appeals meeting. However, these meeting minutes were never formally approved by the City of Grandville Zoning Board of Appeals." After reviewing the evidence in the light most favorable to plaintiff, clearly

the evidence presented and the inferences fairly attributable to the evidence create questions of material fact from which a jury may conclude or refute gross negligence on the part of Johnson.

In order for a governmental employee's gross negligence to constitute the proximate cause of a plaintiff's injury, thus stripping the employee of the immunity granted him by the Legislature, his gross negligence must be "the one most immediate, efficient, and direct cause of the injury or damage . . . ." *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). Because the determination of gross negligence on the part of Johnson is a question of fact for the jury, so too, is the question of proximate cause. *Transportation Dep't v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998). Specifically, once Johnson determined that the variance had been granted, the fact that the meeting minutes were incorrectly typed, or that Dyk issued a building permit despite the erroneous minutes would be irrelevant. And, as plaintiff asserts, a jury may conclude that Johnson's failure to lift the stop work order would be the most immediate cause of plaintiff's damages.

We conclude the trial court appropriately denied plaintiff's motion for partial summary disposition and inappropriately granted summary disposition in favor of defendant Johnson.

III

Plaintiff asserts the trial court erred in granting summary disposition as to defendants Dyk and PCI based on its determination that they are entitled to governmental immunity. PCI and Dyk moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The trial court did not specify which sub rule it relied on in granting PCI and Dyk's motion. Moreover, it is not clear from either the trial court's oral ruling or written order whether it relied on materials outside the pleadings. Nonetheless, the determination of whether PCI and Dyk are entitled to governmental immunity requires the consideration of the contract between Grandville and PCI, as well as Dyk's affidavit. Thus, MCR 2.116(C)(10) is the appropriate rule for review of this issue.

Relying on *Vargo v Sauer*, 457 Mich 49; 576 NW2d 656 (1998), plaintiff argues the trial court erred in holding that Dyk was entitled to the protection of governmental immunity because he is not an employee of Grandville, but is an employee of PCI, a private entity. PCI and Dyk, argue that, as Grandville's appointed building official pursuant to the contract between PCI and Grandville, Dyk is entitled to immunity under MCL 691.1407(2).[4] MCL 691.1407(2) states that "each *officer* or employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the *officer*, employee, or member while in the course of employment or service . . . if all of the following are met." [Emphasis added.] Thus, PCI and Dyk assert that the plain language of the statute expressly provides that officers and

[4] Dyk makes no attempt to claim absolute immunity pursuant to MCL 691.1407(5), that is available only to highly ranked officials. Rather, he seeks to assert qualified immunity under MCL 691.1407(2), that is available to lower level officials, and requires that he fulfill all of the criteria set forth in subsection (a) through (c) in addition to merely being a government official. See *Spruyette v Owens*, 190 Mich App 127, 130-135; 475 NW2d 382 (1991).

employees are distinct, and therefore, the statute does not require Dyk be an employee of Grandville in order to be entitled to immunity.

Plaintiff's reliance on *Vargo* is misplaced. Specifically, in *Vargo*, our Supreme Court did not address the question of whether a defendant doctor was a government official, it addressed whether he could be considered an employee of a private hospital at the time he committed alleged negligent acts in addition to being an employee of Michigan State University, a governmental agency. Our Supreme Court focused on an "examination of the *employment status* of the individual seeking immunity," stating that "[b]y its very terms, [MCL 691.1407(2)] grants immunity only to an individual who is an 'employee of a governmental agency . . . while in the course of employment.'" *Vargo, supra,* 67-68. Dyk is not asserting that he is entitled to immunity because he was a governmental employee acting within the course of his employment when he allegedly committed the negligent acts, rather he is asserting that, at the time of the allegedly negligent acts, he was a government official acting within the scope of his authority. Moreover, the defendant in *Vargo* was an employee of a governmental agency, and our Supreme Court's opinion centered on the determination of whether he could also be considered an agent of the private hospital at the time he was performing the duties that were the subject of the plaintiff's negligence claim. Here, Dyk is an employee of a private entity, and the question is whether he can also be considered as a public official for purposes of immunity because he was performing duties on behalf of Grandville at the time he committed the acts.

The primary purpose of statutory construction is to discern and give effect to the intention of the Legislature. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). In doing so, the first step is to review the language of the statute itself. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Moreover, "[i]t is a maxim of statutory construction that every word of a statute should be read in such a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory," and "a court should refrain from speculating about the Legislature's intent beyond the words employed in the statute." *MCI, supra,* 414-415. Furthermore, unless they are defined within the statute, every word or phrase therein is to be construed according to its plain and ordinary meaning. *Id.,* citing MCL 8.3a and *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 539; 565 NW2d 828 (1997). In order to do so, the court may consult dictionary definitions. *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001). "Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent." *Sun Valley, supra,* 236.

MCL 691.1407(2) is unambiguous, and based on its plain language, Dyk is entitled to immunity. Specifically, the statute provides that immunity applies to employees *and officers* for injuries caused by them while in the course of employment *or service*, so long they either were, or reasonably believed that they were, acting within the scope of their authority for a governmental agency that was engaged in the exercise of a governmental function, and so long as their conduct does not equate to gross negligence. "Officer" is defined as "a person appointed or elected to some position of responsibility or authority in some organization," and "official" is defined as "a person appointed or elected to an office or charged with certain duties,"

"appointed, authorized, or approved by a government or organization." *Random House Webster's College Dictionary* (1997), 907. "Service" is defined, in part, as "an act of helpful activity; help, aid," "the providing or a provider of accommodation and activities required by the public," "employment in any duties or work for a person, organization, government, etc.," "a department of public employment, or the body of public servants in it," "the duty or work of public servants," or "the performance of any duties or work for another." *Id*. at 1182. Although the definition of "service" shows that it can involve employment, it does not appear to expressly require it in all situations. Therefore, based on the plain language of MCL 691.1407(2), an official need not be an employee of the governmental agency to assert qualified immunity, he need only be appointed or elected to some position of responsibility or authority within the governmental agency, be charged with certain duties, and fulfill the other requirements set forth in MCL 691.1407(2)(a) through (c).

Grandville appointed Dyk as its public building official. By contract with PCI, Dyk was obligated to perform certain construction code functions, assume duties and responsibilities in inspecting plans and construction within the City for compliance with the applicable City or State Construction Codes, and issue permits. His performance was predicated on his qualification through training, experience, and state registration. Further, he was prohibited from engaging in any construction work within Grandville involving his particular inspection function. Finally, as the building official, Dyk was responsible for enforcing any uncorrected violations of city or state building codes through notices to the permit holder, orders to appear and show cause why the construction should not be stopped, by stop work orders, by application to the circuit court for injunctive or other relief, by complaint and warrant against the violator, and by other remedies allowed by law, construction code or ordinance, all of which proceedings were to be brought by Dyk in the name of Grandville and at its expense.

Because Dyk, as the appointed building official, was responsible for performing such duties on behalf of Grandville, we conclude that he is entitled to governmental immunity under the plain language of the statute so long as his actions do not equate to gross negligence. MCL 691.1407(2)(c).

Plaintiff, however, argues that Dyk acted with gross negligence by issuing the stop work order despite his belief that the variance had been granted. Plaintiff did not assert in either his complaint or amended complaint gross negligence on the part of Dyk for his actions in issuing the stop work order and, thus, he has waived this assertion. *ISB Sales Co*, *supra,* 532-533. Also, we do not believe that remanding this case for a jury determination on the issue of gross negligence would be appropriate because this Court has recognized that "[a] trial court does not have the authority to grant relief based on a claim that was never pleaded in a complaint or requested at any time before or during trial" absent a motion by the plaintiff to amend the complaint or upon implied or express consent of the parties. *Reid v Michigan*, 239 Mich App 621, 630; 609 NW2d 215 (2000) (citations omitted). Plaintiff did not seek leave to amend his complaint to allege gross negligence on the part of Dyk for issuing the stop work order and, despite the fact that Dyk and PCI have responded to plaintiff's claims of gross negligence in their brief to this Court, they have not impliedly consented to plaintiff's claim of gross negligence on behalf of Dyk being tried in the circuit court.

Moreover, even if this issue were preserved, remand would be inappropriate. The parties do not dispute that Dyk issued the stop work order only on the instruction of Johnson, the

assistant city manager. Dyk's contract with Grandville made him subordinate to Johnson and he provided by affidavit that he was obligated to follow Johnson's instructions because Johnson had authority over the issue. Plaintiff has not offered any evidence to refute the affidavit. Reasonable jurors could not, therefore, differ in concluding that Dyk's conduct in issuing the stop work order upon Johnson's instruction did not amount to "conduct so reckless as to demonstrate a substantial lack of concern" for whether an injury resulted to plaintiff. MCL 691.1407(2)(c); *Stanton, supra,* 375. We conclude the trial court appropriately granted summary disposition as to Dyk.

Finally, plaintiff asserts the trial court erred in granting summary disposition to PCI based on governmental immunity because PCI is not a governmental agency as provided in MCL 691.1407(1). Plaintiff's assertion is correct. MCL 691.1401(d) defines a "governmental agency" as "the state or a political subdivision." It is not disputed that PCI is not part of the state or a political subdivision. PCI, however, attempts to argue that it, along with Dyk, is an official pursuant to its contract with Grandville. PCI's assertion is without merit. Specifically, paragraph one of PCI's contract with Grandville does not appoint it as an official, but rather states:

> The City hereby retains the Company to provide technical and consultation services to assist the City and the aforesaid public officials in the performance of said officials [sic] duties and responsibilities in inspecting plans and construction within the City for compliance with the applicable City or State Construction Codes enforced by the City, and in issuing permits thereunder.

Pursuant to the contract, PCI is merely hired by Grandville as an independent contractor to assist Grandville and the public officials it has appointed, such as Dyk. PCI is not entitled to governmental immunity.

Nevertheless, we find that the trial court's grant of summary disposition to PCI was appropriate. Plaintiff alleged that PCI is vicariously liable for Dyk's actions. This Court has recognized that vicarious liability is derivative. *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). Because Dyk is immune from liability, we believe that the trial court correctly granted summary disposition to PCI. Further, plaintiff did not allege any separate acts of negligence or gross negligence on the part of PCI in his complaint for separate consideration. Summary disposition as to PCI was therefore, appropriate. Although this was not the basis of the trial court's grant of summary disposition to PCI, we nonetheless affirm its grant because it reached the right result, albeit for the wrong reason. *Pro-Staffers v Premier Mfg,* 252 Mich App 318, 322; 651 NW2d 811 (2002).

Affirmed in part, reversed in part, and remanded for trial as to defendant Johnson. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello