STATE OF MICHIGAN

COURT OF APPEALS

IRA GORDON and YOLANDA GORDON,

Plaintiffs-Appellees,

v

JIM LIPPENS CONSTRUCTION, INC. and JIM LIPPENS,

Defendants-Appellees,

and

CHIKAMING TOWNSHIP,

Defendant,

and

HOWARD GAUL,

Defendant-Appellant.

UNPUBLISHED
November 30, 2010

No. 293084
Berrien Circuit Court
LC No. 2006-003082-CK

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant, Howard Gaul, appeals as of right the trial court order denying his motion for summary disposition that was based, in part, on governmental immunity. Because Gaul's conduct was not "the" proximate cause of plaintiffs' injuries, he was entitled to governmental immunity. We therefore reverse and remand for entry of an order granting summary disposition in Gaul's favor.

Plaintiffs contracted with defendants, Jim Lippens Construction, Inc., and Jim Lippens, for the construction of a single-family residence in Chikaming Township. The house was to be constructed according to architectural plans, and was subject to periodic inspections by the township building inspector.

Defendant, Howard Gaul is, and was at the time plaintiffs' house was built, the Chikaming Township building official, plan reviewer, and building inspector. Gaul inspected

the framing of plaintiffs' home as it was being built, and approved the framing in early 2004. Gaul issued a certificate of occupancy for the home in January 2005.

In early 2006, plaintiffs noticed a deflection in the slope of their roof. They retained consultants, who advised that the home, particularly the framing and structure of the roof, had not been built in accordance with the architectural plans or the applicable building code, and was not constructed in a workmanlike manner. Plaintiffs thereafter initiated the instant lawsuit, setting forth various claims against Jim Lippens Construction, Inc., and Jim Lippens, and asserting that Chikaming Township and Gaul were grossly negligent in performing their proprietary functions.

Both Chikaming Township and Gaul moved for summary disposition claiming, among other things, governmental immunity. The trial court granted the Township's motion, but denied Gaul's motion, opining that Gaul owed a common law duty to plaintiffs and that a reasonable juror could find that Gaul was both grossly negligent in the execution of his duties, and was the one most immediate and direct cause of the roof system failure. Gaul (hereafter "defendant") now appeals the trial court's decision.

This Court reviews summary disposition rulings de novo. *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 647; 761 NW2d 414, 417 (2008). Summary disposition under MCL 2.116(C)(7) is proper when a claim is barred by immunity granted by law to a defendant. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). In reviewing a motion under subrule (C)(7), we accept the plaintiffs' well-pleaded allegations as true and consider any affidavits, depositions, admissions, and other documentary evidence submitted by the parties. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The plaintiff has the burden to allege facts that justify applying an exception to governmental immunity. *Tarlea v Crabtree*, 263 Mich App 80, 87-88; 687 NW2d 333 (2004). "[W]hen no reasonable person could find that a governmental employee's conduct was grossly negligent," summary disposition is properly granted. *Id.* at 88. Because the claims in this case involve the governmental immunity act, MCL 691.1401 et seq., we are presented with issues of statutory construction which, being questions of law, we also review de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

Defendant first contends that he is entitled to governmental immunity pursuant to MCL 691.1407(2) because he was not "the" proximate cause of plaintiffs' injuries. We agree.

MCL 691.1407(2) provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force 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 or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

The Legislature's reference to "the proximate cause"-as opposed to "a proximate cause"- is significant and means that the employee's gross negligence must be more than just *a* proximate cause (such as when there are several tortfeasers) of the injury in order to meet the requirements of the exception to the governmental employee's immunity. See, *Lameau v City of Royal Oak,* ___ Mich App ___; ___ NW2d ___ (Docket No.'s 290059 and 292006, issued July 13, 2010). The "Legislature's use of the definite article 'the' [in the statute] clearly evinces an intent to focus on one cause." *Robinson v Detroit,* 462 Mich 439, 458-459; 613 NW2d 307 (2000).[1] Thus, to be "the" proximate cause of an injury, gross negligence of a government employee must be "the *one* most immediate, efficient and direct cause of the injury or damage." Id. at 462 (emphasis added).

In *Rakowski v Sarb,* 269 Mich App 619, 636; 713 NW2d 787 (2006), an individual was injured when a railing on a ramp of a friend's home gave way. The injured party brought suit against various persons and entities, including the building inspector who had approved the allegedly defectively built structure. This Court, citing *Robinson,* held that even if the building inspector's approval of that structure constituted gross negligence, the inspector's gross negligence still could not be deemed the proximate cause of the injury because the inspector's alleged misconduct was not "the one most immediate, efficient, and direct cause" of the injury. The *Rakowski* court explained*:*

> . . . it is beyond dispute that the loose handrail caused Ms. Rakowski to fall and sustain injuries. Regardless of whether, six months before her injury, Mr. Sarb correctly approved the ramp during his inspection, his conduct could not be "the one most immediate, efficient, and direct cause" of Ms. Rakowski's injury. Therefore, the trial court should have granted summary disposition to Mr. Sarb. *Id*. at 636.

Here, in similar fashion, plaintiffs' claim of injury is the faulty construction of their home--which arose directly and most substantially from the work done by the construction company. The risk of harm was *created* by the construction company. The allegation against defendant is essentially that he failed to find the defects and deficiencies after they already existed. The damages are the result of the poor construction, not the result of the failure to

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[1] In 1986, the Legislature amended MCL 691.1407(2)(c) to require that a government employee's actions be "the" proximate cause of the plaintiff's injury, rather than "a" proximate cause of the injury. 1986 PA 175; *Miller v. Lord,* 262 Mich App 640, 644; 686 NW2d 800 (2004).

discover the poor construction. Had defendant discovered the alleged roof defects upon inspection, the defects would have needed to be corrected upon discovery rather than at a later point in time. In any event, the roof would have needed additional work performed regardless of the defendant's findings. At most, defendant's actions may have contributed to an increased cost of repair. Further, if the faulty workmanship had not been in existence, due to the actions of the construction company, there would have been no tort to which defendant could have contributed. Thus, "the one most immediate, efficient, and direct cause" of the damages was the poor workmanship of the construction company. Because defendant's conduct may have been *a* proximate cause, but was not *the* proximate cause of plaintiffs' injuries, he is entitled to immunity under MCL 691.1407(2) and his motion for summary disposition should have been granted.

As plaintiffs point out, this case does differ from *Rakowski*, in that the inspector in *Rakowski* had no direct or indirect relationship with the injured party, the injured party was an invitee of the homeowner, and the inspector's role in conducting the inspection was to visually assess the completed ramp for code violations. Here, in contrast, defendant had at least one conversation with the homeowners (the subject of which is disputed), the homeowners are the injured parties, and defendant inspected the construction during the framing of the home. However, the relationship between the parties is more determinative of whether defendant owed a common law duty to plaintiffs, not whether his inspection was the one most direct proximate cause of plaintiffs' injuries. And, the fact that defendant inspected the home during its construction and issued an approval is not of significance. Again, absent the allegedly shoddy workmanship and code violations by the construction company in existence before defendant conducted his inspections, there would have been no alleged injuries or the instant cause of action.

Given our findings concerning "the" proximate cause issue, we need not consider whether defendant owed a common law duty to plaintiffs or whether defendant was grossly negligent. Even assuming a duty existed, or that defendant engaged in grossly negligent conduct, the proximate cause element is lacking. Because defendant's actions were not *the* proximate cause of plaintiffs' alleged injuries, defendant is entitled to immunity under MCL 691.1407(2).

Reversed and remand for entry of an order granting summary disposition in defendant's favor. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Deborah A. Servitto