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UNPUBLISHED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.

SHAPIRO, J. (*dissenting*).

I respectfully dissent as I believe there are questions of fact for the jury as to gross negligence and as to which of the two defendants' actions constituted the proximate cause. Having reviewed the record, I do not agree with the majority that the trial court's conclusions were erroneous. To the contrary, the trial court provided a thorough and accurate review of the law governing these questions and its conclusion was consistent with that law.

Rather than attempting to reformulate Judge Butzbaugh's well-reasoned analysis, I adopt the following text from his opinion:

> **Duty**
>
> "[T]he question whether the defendant owes an actionable legal duty to the plaintiff is one of law which the court decides after assessing the competing policy considerations for and against recognizing the asserted duty." [*Miller v*

Ford Motor Co (Certified Question from the 14th Dist Court of Appeals of Texas), 479 Mich 498, 504; 740 NW2d 206 (2007), quoting *Friedman v Dozoroc*, 412 Mich 1, 22; 312 NW2d 585 (1981); internal quotation marks omitted.]

> When a court determines whether to impose a common-law duty, it considers (1) the relationship of the parties, (2) the foreseeability of the harm, (3) the degree of certainty of injury, (4) the closeness of connection between the conduct and injury, (5) the moral blame attached to the conduct, (6) the policy of preventing future harm, and (7) finally, the burdens and consequences of imposing a duty on the resulting liability for breach. The inquiry is ultimately a question of fairness involving a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution. [*Rakowski v Sarb*, 269 Mich App 619, 629-630; 713 NW2d 787 (2006) (internal quotation marks, brackets, and citations omitted).]

Complaint

In their First Amended Complaint, Plaintiffs' pertinent allegations are as follows:

> 49. . . . Gaul represented to the Plaintiffs that all appropriate inspections were being performed and that those inspections represented that the construction was both in conformance with the plans and specifications as well as with the applicable building codes then in effect in Chikaming Township, Berrien County, Michigan.
>
> 50. That to their detriment, Plaintiffs relied on the representations made to them by . . . Gaul.
>
> * * *
>
> 52. That in the performance of granted [sic] of permits and inspections, . . . Gaul [was] grossly negligent in the performance, duties and obligations and engaged in conduct so reckless so as to demonstrate a substantial lack of concern for whether an injury would result.
>
> 53. That the acts and omissions of Chikaming Township and/or Howard Gaul are otherwise exempt from the immunity otherwise provide[d] to townships pursuant to MCL 691[.]1407(1).
>
> * * *
>
> 55. That the construction defects and construction code violations were open and obvious to . . . Gaul at the time of the performance of . . . his inspections. Despite the defects, all inspections were

approved and/or no notations of obvious defects were made to the Plaintiffs.

MCR 2.116(C)(7) and (10) Evidence Findings

For the purpose of Defendants' motions for summary disposition under sub-rules (C)(7) and (10), viewing the evidence, and making inferences therefrom, in the light most favorable to Plaintiff, I find that the following evidence would be admissible at trial.

1. Gaul was a building inspector for Chikaming Township at the pertinent times in this litigation. Before construction began, Gaul approved the plans to build Plaintiff's residence.

2. Lippens Construction built the roofing portion of the residence in violation of the approved plans, and in violation of the applicable building code, some of which were:

> The plans were "very specific . . . in all of the detail" for materials. Baldwin dep, 25 [Footnote omitted]. The plans called for laminated veneer lumber, glue laminated ridge beams, and a steel beam. Instead, as built, nominal dimension lumber was used.
>
> The plans and the Building Code required spacing between rafters to be 16 inches on center. As built, the spacing between rafters was 24 inches on center.
>
> The Building Code required set-off between opposing rafters of no more than 1.5 inches. As built, the off-set was 4 to 5 inches.
>
> For wood construction, the Building Code required a minimum of 1.5 inches of material beneath the ceiling joints. As built, that was omitted.
>
> Where the plan and the Building Code required a bearing connection, as built, a nail connection was used.
>
> The plans and Building Code did not allow for a load-bearing hip-rafter. As built, a load-bearing hip-rafter was used.

3. Gaul visually inspected the site after rough framing was complete. *Id.*, 37.

4. The violations of the plans and building code were pervasive, open and obvious. *Id.*, 66.

* * *

5. The violations were such that they were likely to result in roof collapse.

* * *

6. When visiting the building site, Ira Gordon met with Gaul. Ira Gordon was informed that the purpose of the inspections was to ensure that construction was in compliance with the plans and the Building Code. Ira Gordon relied on the inspections for that purpose. Ira Gordon affidavit dated June 22, 2009.

7. Had Gaul stopped construction upon his visit to the site after rough framing was completed, Plaintiffs could have corrected the violations then. Since Plaintiffs did not learn of the violations until after the residence was built and a deflection in the roof occurred, the consequences from the violations are greater.

* * *

Discussion

Duty

To be liable for negligence, a defendant must owe a duty[3] to the plaintiff.

> "Only if the law recognizes a duty to act with due care arising from the relationship of the parties does it subject the defendant to liability for negligent conduct." [*Miller*, (479 Mich at) 506 quoting *Friedman*, (412 Mich at) 22.]

Duty means a legally recognized obligation to conform to a particular standard of conduct toward another. *Rakowski*, [269 Mich App at] 629.

Here, Plaintiff claims:

> Gaul is the township building inspector who has responsibility to approve building plans, inspect on-going construction at the building site, and to monitor and enforce compliance with the approved plans and building code[.]
>
> [T]he common law imposes a duty on Gaul not to engage in negligent conduct in performance of his responsibilities, which duty is enforceable by Plaintiffs, the owners of the property for which a township building permit was issued[4].

Considering the *Rakowski* factors, I find that, in this factual setting, the common law does impose such a duty.

(1) The relationship of the parties

> Defendant is a government official charged with approving building plans and periodically monitoring, inspecting and approving construction, to assure that construction is consistent with the plans and the Building Code.

Plaintiffs are the owners of the residence for which the building permit was granted, who will be living in the residence and subject to harm if dangerous construction is allowed. Before issuing the permit, Gaul reviewed and approved the plans. The plans and the building code expressly set forth certain specifications. During construction, Gaul made an on-site inspection after rough framing was complete. Plaintiff Ira Gordon talked with Gaul and relied on Gaul to ensure that construction did not violate the plans and Building Code.

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[3] MCL 691.1497 does not create a cause of action; to be liable, a government employee must owe a common law duty to the plaintiff. *Beaudrie v Henderson*, 465 Mich 124, 139 n 12; 631 NW2d 308 (2001).

[4] Brief in Support of Plaintiffs' Response to Gaul's Motion, Exhibit 3, Bates # 001001.

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(2) The foreseeability of the harm

The foreseeability of the harm which resulted was great. See Findings 3-5.

(3) The degree of certainty of injury

In Chikaming Township, Michigan, with lake effect snow, roof failure was likely to occur. See Finding 5.

(4) the closeness of connection between the conduct and injury

The roof deflection was a direct result of the failure of the inspector to stop construction following his inspection at the rough framing stage, at which he should have observed the violations of plan and Building Code. Finding 7.

(5) the moral blame attached to the conduct

There is no moral blame.

(6) the policy of preventing future harm

A building inspector is utilized for the welfare of the public. If a building inspector is not held responsible at some level, the building inspector may suffer little consequence for poorly performing his/her job, more likely resulting in harm to others.

(7) the burdens and consequences of imposing a duty and the resulting liability for breach

The duty will not be unduly burdensome. Under MCL 691.1407(2)(c), a building inspector can be liable only if

> the conduct is gross negligence (conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results[5]), and
>
> the conduct is the proximate cause of the injury (the one more immediate, efficient, and direct cause of the injury or damage[6]).

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[5] MCL 691.1407(7)(a)

[6] *Robinson v City of Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).

Gaul claims that a special relationship must exist before a duty in negligence can be imposed on a building inspector, citing *Jones v Wilcox*, [190 Mich App 564, 568; 476 NW2d 473 (1991)].

> "Absent a special relationship between the parties, a public official owes a duty to the general public and not to any one individual in society." [*Id.*], citing *Markis v Grosse Point Park*, 180 Mich App 545, 558; 448 NW2d 352 (1989) (in which the plaintiff claimed that a police officer had stopped a driver who was visibly intoxicated, the police officer did not detain the driver, and 2 hours later the driver killed plaintiff's decedent in a motor vehicle accident. [*Markis*, 180 Mich App at] 549).

Jones, and unpublished cases cited by Gaul, were decided before our Supreme Court decided *Beaudrie v Henderson*, 465 Mich 124, 141; 631 NW2d 308 (2001), which limited the application of the "special relationship" analysis to alleged failure to provide police protection. Also, see *Rakowski*, [269 Mich App at] 627 ("In *Beaudrie* . . . our Supreme Court declined to extend the public duty doctrine to protect all governmental employees from liability for the failure to perform or the inadequate performance of a duty owed to the public.") Since *Beaudrie*, I have found no published case which cites *Jones* for the "special relationship" requirement in the context of the allegations against Gaul here. It is clear that the relationship between the parties is important in analyzing the duty requirement, but the pre-*Beaudrie* "special relationship" is not required.

Gaul has cited 2 post-*Beaudrie* published cases as to duty upon which he relies. In *Rakowski*, the plaintiff was an invited guest at a residence who was injured when a ramp handrailing was inadequately secured: the nails were too short and a vertical baluster was not used. The *Rakowski* Court found no duty: the plaintiff, a house guest, had no direct or indirect relationship with the building inspector, she did not own or live in the home, she had not talked with the building inspector about the ramp, the inspector make only a visual assessment, and a guest to a home would not reasonably expect a municipal building inspector

to protect the guest. Here, the violations were pervasive, open and obvious, and the violations endangered the entire roof system Plaintiffs are the homeowners, not guests; and Ira Gordon spoke directly with [] Gaul, the inspector.

In *Cummins v Robinson Township*, [283] Mich App [677, 693]; [770] NW2d [421] (2009) cited by Defendant, the Court of Appeals held as to duty, "Nothing in the [Single State Construction Code Act], however, suggests that a front-line building official should face future tort liability for not approving building plans that are the least costly to the applicant." The case before us is not for Gaul's failure to approve plans.

The parties have cited several unpublished[7] cases, 2 of which I will discuss. In *Sedlar v Thompson*,[8] the plaintiffs alleged that the building inspector "affirmatively or by his silence indicated to [the contractors] that they need not comply with the requirements of the . . . Building Code." *Id.*, [p] 6. The trial court held that the plaintiffs were required "to show a special relationship before the building inspector could be found to have any duty to them as owners of the inspected building." *Id*. [p] 5. The *Sedlar* Court held that the trial court erred. "Under these circumstances, plaintiffs need not show a special relationship because the alleged breach involves a duty owed directly to plaintiffs." *Id.*

In *Bayberry Group, Inc v Novak*[9], the Building Code prohibited installation of a B-vent gas fireplace in a hotel guest sleeping room. During installation, upon an on-site inspection but before issuance of the certificate of occupancy, the building inspectors approved the fireplaces in guest sleeping rooms. Guests occupied the rooms and the fireplaces emitted smoke and soot. On final inspection, the building inspectors violated the fireplaces, and the hotel owner sued for the cost of removing and replacing the fireplaces. The *Bayberry* Court distinguished the facts from *Rakowski* and held that the building inspectors owed a duty to the hotel owner at the time of the rough-in inspection. *Id.*, [p] 14.

I find that Gaul owed a common law duty to Plaintiffs.

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[7] Unpublished decisions are not precedentially binding. MCR 7.215(C)(1).

[8] *Sedlar v Thompson*, unpublished [opinion per curiam of the Court of Appeals, issued] November 18, 2003 [Docket No. 243712].

[9] *Bayberry Group, Inc. v Novak*, unpublished [opinion per curiam of the Court of Appeals, issued] March 22, 2007 [Docket No. 271463].

Immunity

Gaul was a government employee acting within the scope of his authority for a governmental agency which was discharging a governmental function[10]; he is immune from liability unless his conduct was gross negligence as the proximate cause of Plaintiffs' damages. MCL 691.1407(2)(c). *Costa v Community*

Emergency Med Serv, Inc, 475 Mich 403, 411; 716 NW2d 236 (2006). An exception to governmental immunity is to be narrowly construed. *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003).

The parties have presented for consideration the Baldwin deposition and affidavits from Gaul, Ira Gordon and Nicolas Barnitz. If reasonable minds can differ on whether Gaul's conduct was gross negligence as the proximate cause, it is a question for the jury. If reasonable minds cannot differ for either gross negligence or the proximate cause, then the motion for summary disposition should be granted. *Jackson v Saginaw Co*[], 458 Mich 141, 146; 580 NW2d 870 (1998).

[10] At the hearing, Plaintiffs did not contest MCL 691.1407(2)(a) and (b).

Gross Negligence

Gross negligence is defined in MCL 691.1407(7)(a) [as "] conduct so reckless as to demonstrate a substantial lack of concern for whether injury results." "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence. Rather, a plaintiff must adduce proof of conduct 'so reckless as to demonstrate a substantial lack of concern for whether an injury results.'" *Maiden* [*v Rozwood*], 461 Mich [109,] 122[; 597 NW2d 817 (1999)] (internal citation omitted).

For purposes of this motion, I find: Gaul visually inspected Plaintiffs['] home after rough framing was completed; plan and Building Code violations in the roofing system were pervasive, open and obvious; and the violations were likely to result in roof collapse. See Findings 3, 4 and 5. That conduct is sufficient for a reasonable juror to find gross negligence.

The Proximate Cause

Under MCL 691.1407([2])(c), the proximate cause means "the one most immediate, efficient, and direct cause of the injury or damage." *Robinson v City of Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000).

The determination of which conduct was the proximate cause is between the conduct of the contractor, Jim Lippens Construction, Inc, and that of Gaul. (See Findings). Lippens Construction constructed the Plaintiffs' residence in pervasive violation of the plan and Building Code in:

> the materials used; rafter spacing, which was overspanned by at least 35%; and the configuration, which was built as if meant to fail.

Gaul, the building inspector, made a visual inspection of the site after rough framing; he failed to report any of the pervasive, open and obvious violations, the likes of which Baldwin had not seen in his 39 years as a building inspector; for

Gaul's failure to report the violations, Baldwin had no explanation; if the violations had then been reported, construction would have stopped, and the resulting roof-failure would not have occurred.

Between those 2 choices, a reasonable juror, required to select only 1, could select either as the one most immediate, efficient, and direct cause of the roof system failure. It is up to the jury to decide which is the proximate cause.

Conclusion

Gaul owed a common law duty to Plaintiffs in his inspection for plan and Building Code violations on the construction of Plaintiffs' residence. Reasonable jurors could differ as to whether Gaul's conduct was gross negligence as the proximate cause of Plaintiffs' damages.

* * *

Having concluded that Judge Butzbaugh's opinion properly resolves the case, I would affirm.

/s/ Douglas B. Shapiro