STATE OF MICHIGAN

COURT OF APPEALS

KATHERYN MCKINNEY and FREDERICK MCKINNEY, Personal Representatives of the Estate of ROZALYN MARSHALL, deceased,

Plaintiffs-Appellees/
Cross Appellants,

v

ESTHER L. HAMPTON, Personal Representative of the Estate of GLORIA RICHARDSON, deceased, and THOMAS L. PATTEN,

Defendants-Appellants,

and

ROBERT GENDJAR,

Defendant/Cross-Appellee.

UNPUBLISHED
June 11, 1996

No. 149232
LC No. 87-723705-NO

Before: Gribbs, P.J., and White and J.F. Foley, * JJ.

PER CURIAM.

Defendants appeal by right a $1,950,000 judgment in favor of plaintiffs in this wrongful death and negligence action. Plaintiffs' decedent, Rozalyn Marshall, was murdered by Edward Ellis, Jr. (Ellis), shortly after he was paroled for the second time. Defendants Richardson and Patten are Michigan Department of Corrections (DOC) parole board members who voted to grant Ellis' second parole in August 1985. Defendant Gendjar, who was granted a directed verdict by the trial court, was Ellis' parole agent. Gendjar supervised both Ellis' first and second paroles. We affirm in part and reverse in part.

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* Circuit judge, sitting on the Court of Appeals by assignment.

The trial court erred by failing to hold, as a matter of law, that defendants Richardson and Patten are entitled to governmental immunity in this case.

This cause of action accrued before July 1986, and thus is controlled by *Ross v Consumers Power Co (On rehearing)*, 420 Mich 567; 363 NW2d 641 (1984). Under the three-pronged test, articulated in *Ross*, lower level governmental employees and agents are immune when they are:

> (1) acting during the course of their employment and, acting, or reasonably believed that they are acting, within the scope of their authority;
>
> (2) acting in good faith, and
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> (3) performing discretionary as opposed to ministerial acts. Id at 663-664.

While individual governmental immunity standards are set forth by statute, MCL 691.1407; MSA 3.996(107), the statute is not applicable to causes of action "arising" before July 1, 1986.

Ross provided for two tiers of individual governmental immunity - absolute immunity for judges, legislators and the highest executive official when acting within their authority and qualified immunity for lower level officials when they comport with the three requisites cited above. A previous panel of this Court determined that the defendant parole board members here did not qualify for absolute immunity. However, qualified immunity applies in this case. Thus, the controlling issue here is whether the defendant parole board members were performing discretionary, as opposed to ministerial acts. Id.

However, rather than decide this legal issue itself, the trial court in this case instructed the jury to decide whether defendants were performing discretionary or ministerial acts, over defense objection. This was clear error.

All Michigan cases evaluating an activity to determine whether such activity was discretionary or ministerial, have held that judgment is a question of law for the Court. Cf *Green v Berrien General Hospital Auxiliary Inc*, 437 Mich 1; 464 NW2d 703 (1990); *Abraham v Jackson*, 189 Mich App 367; 473 NW2d 699 *159 Mich*(1991); *Gilliam v Lloyd*, 172 Mich App 563; 432 NW2d 356 (1988); *King v Arbic*, 159 Mich App 452; 406 NW2d 852 (1987).

For example, in *Gilliam*, supra, one of plaintiff's claims charged that a deceased probation officer was guilty of negligence. In affirming the decision of the trial court for a directed verdict for the probation officer, this Court held:

> In most cases a defendant's entitlement to governmental immunity turns on the question of whether defendant's actions were discretionary or ministerial. This determination is a question of law for the court. [*Gilliam*, supra at 576; emphasis added. See also *Ross*, supra, pp 634-635, 640, 650-651.]

In *King*, supra, the question was whether or not the defendant, a Michigan State Police trooper, was liable for negligently filling out an incident report. This Court stated:

> The specific issue the Court is faced with at this juncture is whether the way defendant Arbic filled out the incident report was discretionary-decisional or ministerial-operational. This is clearly a question of law which should be decided by the Court. As the Court of Appeals said in the recent case of *Tobias v Phelps*, 144 Mich App 272, 281-82; 375 NW2d 365 (1985), "we recognize that the distinction between discretionary and ministerial acts may pose great conceptual difficulties in cases in which the same defendant carried out his or her own discretionary determinations." Surely the Court could not have intended such conceptually difficult questions to be the province of a law factfinder. [*King*, 159 Mich App at 462, footnote omitted, emphasis added.]

We find that the trial court here, in submitting the question of immunity to the jury instead of deciding it as a question of law, committed clear legal error.

Nor do we agree that the error was harmless in this case. The standard for determining discretionary and ministerial acts is well settled:

> As accurate shorthand summation of the *Ross* discretionary ministerial issue is contained in the recent case of *Rathbone v Starr Commonwealth for Boys*, 145 Mich App 303, 309; 377 NW2d 872 (1985). There the Court said;
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> "In defining discretionary and ministerial acts, the Court transformed these words into the hyphenated 'discretionary-decisional' and 'ministerial-operational' form. If a particular activity involves personal deliberation, decision, and judgment, it will be considered a discretionary act for which an employee will be immune from tort liability. On the other hand, the execution or implementation of a decision is considered a ministerial act which, if performed in a tortious manner, will result in liability. *Ross*, supra, 420 Mich 634-635. [Emphasis added.] [*King*, supra, 159 Mich App at 462-463.]

In *Canon v Thumudo*, 430 Mich 326; 422 NW2d 688 (1988), the Supreme Court expressly rejected the argument presented in that case that "any act of a professional which deviates from professional standards is, ipso facto, ministerial" in nature:

> To adopt such a definition for "ministerial" would come close to eliminating all immunity for professionals by confusing the issues of immunity and negligence. The distinction is significant. If every act which deviates from a professional norm were to be categorized as 'ministerial,' immunity would seldom shield professional discretion. Nothing in *Ross*, supra, hints at such a drastic limitation on the scope of individual immunity. To the contrary, in *Ross*, we cited with approval Justice EDWARDS'

observation in *Williams v Detroit*, 364 Mich 231, 261-262; 111 NW2d 1 (1961), that "'[d]iscretion implies the right to be wrong.'" *Ross*, supra, p 628. The very concept of immunity presupposes that the activities complained of may have been negligently performed - i.e., in violation of the requisite standard of care. In protecting significant decision making on the part of public employees from tort liability, *Ross* intended "to ensure that a decision-maker is free to devise the best overall solution to a particular problem, undeterred by the fear that those few people who are injured by the decision will bring suit." *Ross*, supra, p 631. Courts should take care not to confuse their separate inquiries into immunity and negligence. [Id at 335, footnotes omitted, emphasis added.]

Thus, even if the parole board in this case deviated from their statutory authority or negligently performed statutory duties, such deviation is only relevant to a claim of negligence. Such a claim of negligence does not avoid governmental immunity. Defendants' alleged deviation from the "professional standards" set forth in the administrative rules was not enough to categorize their act as ministerial. Indeed, it is hard to imagine a matter requiring more "personal deliberation, decision and judgment" than a parole decision. *Ross*, supra at 634-635.

Ellis had a history of assaultive behavior and parole violation. However, the record also indicates that Ellis was enrolled in group counseling in prison and was eventually recommended for transfer to a minimum security facility. An examining psychologist acknowledged Ellis' hard work in therapy and positive progress. Ellis was approved for furlough to his father's residence, and no misconducts were reported during his ten 48-hour furloughs. During his frequent furloughs, Ellis continued to see Marshall. Marshall herself contacted a parole board member and asked for Ellis' early release. When interviewed for possible parole, Ellis acknowledged problems with his temper and with alcohol, and indicated his willingness to attend Alcoholics Anonymous after parole. Defendants were fully aware of Ellis' entire criminal history and of Ellis' assaultive relationships with both Marshall and his previous girlfriend. Defendants had reviewed a great deal of relevant information. Indeed, defendant Richardson testified that plaintiffs' counsel had not presented her with any additional information at trial that would have led her to a different conclusion with respect to Ellis' parole.

Although the language of Department of Corrections Rule R791.7715, requires a review of fourteen factors, the rule itself is replete with judgmental and discretionary considerations and evaluations to be made by the parole board members. The guidelines require an evaluation of the resident's "potential for violence", "willingness", "likelihood", "readiness", "recognition of critical personal problems", "progress", "performance", "release readiness", "mental stability", and provision of a "suitable and realistic parole plan". Although defendants may have been negligent in weighing the requisite factors before granting parole in this case, the decision making process was clearly a matter of discretion.

Indeed, the statute providing for a parole board specifically reveals the highly discretionary nature of defendant's parole board duties:

> The time of the prisoner's release on parole shall be discretionary with the parole board. The action of the parole board in granting or denying a parole shall be appealable to the circuit court by leave of the court. [MCL 791.234(5); MSA 28.2304(5), emphasis added.]

In this case, after reviewing the complete trial transcript, it appears that both defendants Richardson and Patten had a clear picture of Ellis' history. They opted for his release based on his good behavior during his twelve-month reincarceration, Marshall's letter of support, and the fact that he was to be strictly monitored once paroled. This decision seems to have been premised on all the evidence presented and, even if negligent, was simply an exercise of discretionary judgment for which immunity should attach. We remand for entry of a directed verdict in defendants' favor.

In light of our conclusion that defendant parole board members' activities fell within the scope of immunity, we find that the questions of duty and proximate cause need not be considered in this case. See *Canon*, supra, 430 Mich at 355.

Because of our conclusion that defendants should prevail in this matter. We find that the award of attorney fees to plaintiff was improper and shall be reversed.

On cross-appeal, plaintiffs argue that the court erred in granting parole agent Gendjar's motion for directed verdict on the basis that his duties with respect to Ellis were discretionary. We disagree.

Motions for directed verdict are reviewed in the light most favorable to the nonmovant. *Davis v Wayne Sheriff*, 201 Mich App 572, 579; 507 NW2d 751 (1993). If reasonable jurors could honestly reach different conclusions, the motion should be denied and the case should be decided by the jury. *Mourad v Auto Club*, 186 Mich App 715, 721; 465 NW2d 395 (1991).

As a parole agent, Gendjar qualifies as a lower-level government employee under *Ross*, immune from liability for discretionary activity. The court did not err in concluding that Gendjar's acts were discretionary. Ellis was on parole for about one month when he murdered Marshall. Gendjar was aware of the five special conditions of Ellis' release: 1) prohibiting assaultive, abusive, threatening, or intimidating behavior; 2) prohibiting possession of controlled substances and narcotics paraphernalia or being in the company of any person who does; 3) prohibiting consumption or possession of intoxicants, and entry into establishments dispensing intoxicants; 4) requiring that Ellis voluntarily seek and participate in treatment programs recommended and approved by the parole board and/or agent; and 5) requiring that he submit urine specimens on a regular basis, frequency and time to be determined by the parole agent. Ellis' parole required "intensive" supervision.

Gendjar testified he interpreted these conditions as requiring one or two contacts with Ellis per month, either face-to-face or by telephone. Gendjar met with Ellis two days after he was paroled, and encouraged Ellis to join AA and to obtain counseling regarding his problems relating to women. Gendjar saw Ellis again on October 3, 1985, and made two unsuccessful attempts to contact Ellis by phone on October 15. Ellis turned himself in for killing Marshall on October 16.

William Hudson, chairman of the parole board, testified to the discretionary nature of Gendjar's job in terms of when and under what circumstances to violate a parolee. Plaintiff presented no statutory or regulatory authority indicating the particular duties involved were ministerial. There were no time parameters attached to the special conditions of Ellis' parole.

The trial court did not err in granting defendant Gendjar's motion for directed verdict. The judgment against defendants Richardson and Patten is reversed. The award of attorney fees is reversed. The trial court's grant of directed verdict to defendant Gendjar is affirmed.

Reversed in part, affirmed in part, remanded for entry or a directed verdict in defendants' favor.

/s/ Roman S. Gribbs
/s/ John F. Foley