STATE OF MICHIGAN

COURT OF APPEALS

CLEMENT C. SUTTMAN and HOLLY C. SUTTMAN,

Plaintiff-Appellants,

v

RICHARD P. DERKS, STEVEN SCHWARZ, WILLIAM HOXIE and COUNTY OF LEELANAU,

Defendant-Appellees.

UNPUBLISHED
April 1, 1997

No. 188701
Leelanau Circuit Court
LC No. 95-003647-CZ

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal by right from an order granting summary disposition for defendants pursuant to MCR 2.116(C)(7) and (8). We affirm. Plaintiffs are a married couple who purchased a house in Leelanau County from another married couple. Upon occupying the house, plaintiffs allegedly discovered dangerous structural defects necessitating thousands of dollars' worth of repairs. Defendants are the individual building inspectors who had originally approved the house as suitable for occupancy, as well as their employer, Leelanau County.

I

With regard to the individual defendants, we note that, pursuant to the public duty doctrine, a public official normally owes no duty to any specific individual member of the general public, and owes such a duty only when a "special relationship" exists between the public employee and the individual. *White v Beasley*, 453 Mich 308, 316-319; 522 NW2d 1 (1996). Plaintiffs argue that the individual defendants owed them a "special duty" to properly inspect their house prior to approving it for occupancy. We disagree. It is initially important to note plaintiffs' subtle semantic error. As noted above, an exception to the public duty doctrine arises when there is a special *relationship* between a public employee and the individual. When such a special *relationship* exists, a duty is owed to the individual despite the main thrust of the public duty doctrine. Thus, to the extent plaintiffs argue that the

individual defendants owed them a "special *duty*" (as opposed to whether a special *relationship* existed that gave rise to a duty), plaintiffs frame the issue incorrectly.

Furthermore, we find that no special relationship ever existed between plaintiffs and the individual defendants. This Court has previously discussed the test for such a special relationship with regard to public employees in general:

> [A] special relationship exists between the official and the individual such that the performance by the public official would affect the individual in a manner different in kind from the way performance would affect the public. [*Gazette v Pontiac*, 212 Mich App 162, 170; 536 NW2d 854 (1995).]

We note that in *Beasley*, *supra*, 453 Mich at 320-321, our Supreme Court adopted an even more strict special relationship test to be used if the public official is a police officer, holding that, when the public official is a police officer, no special relationship will be found absent, inter alia, the *affirmative promise* by the officer to act on behalf of the injured party. The Court declined to decide whether the same or different special relationship test should apply to other public employees. *Id*., at 315 & n 3. We conclude that the two-part *Gazette* test should apply to the instant individual defendants.

The *Gazette* Court determined that a finding of a special relationship requires (1) some contact between a public official and the individual, and (2) reliance by the individual upon the promises or actions of the official. *Id*. at 170-171. In other words, there is no duty where there is only a "speculative possibility of a tortfeasor's injuring an unidentified member of the general public." *White v Humbert*, 206 Mich App 459, 462-463; 522 NW2d 681 (1994), reversed on other grounds sub nom *Beasley*, *supra*, 453 Mich 308. In particular, this Court has previously held that the duty to inspect buildings for code violations is owed to the general public and not to individuals. *Jones v Wilcox*, 190 Mich App 564, 569; 476 NW2d 473 (1991).

Plaintiffs nonetheless contend that a special relationship existed between them and the individual defendants. Plaintiffs' argument proceeds as follows: (1) as subsequent buyers of the house in question, plaintiffs were obviously particularly injured by the individual defendants' negligent failure to properly inspect the house; (2) therefore, the individual defendants' alleged negligence affected plaintiffs in a manner different than the general public; (3) therefore, the individual defendants had a special relationship with plaintiffs; and (4) therefore, the individual defendants owed plaintiffs a duty of care in accordance with the "special relationship" exception to the public duty doctrine. In accordance with plaintiffs' logic, the individual defendants' alleged negligence actually serves to generate the duty of care by which such alleged negligence must necessarily be evaluated. However, the special relationship necessary to give rise to a duty cannot logically commence after the alleged negligence has already occurred, and plaintiffs' argument therefore fails.

Since the individual defendants owed no duty to plaintiffs as a matter of law, plaintiffs' claim against the individual defendants was clearly unenforceable, and summary disposition for the individual

defendants was therefore proper. See *Ladd v Ford Consumer Finance Co*, 217 Mich App 119, 124-125; 550 NW2d 826 (1996).

II

With regard to defendant Leelanau County, we note that governmental agencies, including political subdivisions of the state, MCL 691.1401(d); MSA 3.996(101)(d), are generally immune from tort liability. MCL 691.1407(1); MSA 3.996(107)(1). Exceptions to this rule arise only with regard to (1) defective highways, MCL 691.1402; MSA 3.996(102); (2) government-owned vehicles, MCL 691.1405; MSA 3.996(105); (3) public buildings, MCL 691.1406; MSA 3.996(106); and (4) proprietary functions of government, MCL 691.1413; MSA 3.996(113), none of which plaintiffs alleged in their complaint. Summary disposition for defendant Leelanau County was therefore proper. See *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996).[1]

Furthermore, we note and reject plaintiffs' contention that, by allegedly failing to conduct "final" inspections of the house *at all*, defendants did not engage in an "activity" as contemplated by the definition of "governmental function" in the immunity statute. See MCL 691.1401(f); MSA 3.996(101)(f). Plaintiffs' argument was not addressed to the trial court and is therefore unpreserved for appeal. *Ali v Detroit*, 218 Mich App 581, 587; 554 NW2d 384 (1996). In any event, the word "activity" as used in the statute denotes whatever endeavor an agency is authorized to undertake, i.e., its "function." Plaintiffs' contrary contention, that the word "activity" contemplates the distinction between being physically astir as opposed to being physically idle, is clearly inconsistent with legislative intent.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Michael R. Smolenski

[1] We note that plaintiffs urge this Court to hold that (1) building inspectors may be held liable under the alleged circumstances despite the clear operation of the public duty doctrine, and (2) a defendant county may be held liable despite statutory immunity from tort liability, both of which are allegedly done in certain foreign jurisdictions. However, such is clearly without the province of this Court to do. See *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993) ("[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until [the Supreme] Court takes such action, the Court of Appeals and all lower courts are bound by that authority.").