

STATE OF MICHIGAN
COURT OF APPEALS

PETER BORMUTH and CARL BORMUTH,

Plaintiffs-Appellants,

v

HILLCREST MEMORIAL PARK, JOYCE
PIERSON and GEORGE PIERSON,

Defendants-Appellees.

UNPUBLISHED
October 16, 1998

No. 204010
Jackson Circuit Court
LC No. 96-078507 NI

Before: Whitbeck, P.J., and McDonald and T. G. Hicks*, JJ.

MEMORANDUM.

Plaintiffs appeal as of right the trial court's grant of summary disposition to defendants under MCR 2.116(C)(7), based on res judicata. We decide this appeal without oral argument pursuant to MCR 7.214(E). We reverse.

Plaintiffs' circuit court complaint alleges that defendants tortiously violated the cremains of Elsa Bormuth, the mother of Peter Bormuth and wife of Carl Bormuth. The actions giving rise to the plaintiffs' cause of action at one point involved the ashes of Mrs. Bormuth being reinterred by defendant cemetery, for which plaintiffs refused to pay. The cemetery filed an action for the reinterment fee in small claims court, which plaintiffs defended only on a theory that managerial personnel at the cemetery had lied to them about the sequence of events.

Since plaintiffs did not rely on their present tort claim either in defense of or as a counterclaim to the prior small claims action, res judicata does not preclude them from now suing on that claim. *Ternes Steel Co v Ladney*, 364 Mich 614, 618-619; 111 NW2d 859 (1961); *Kellepourey v Burkhart*, 163 Mich App 251, 257; 413 NW2d 758 (1987).

Reversed.

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

/s/ William C. Whitbeck

/s/ Gary R. McDonald

/s/ Timothy G. Hicks