

STATE OF MICHIGAN
COURT OF APPEALS

GARY KOGELSHATZ, WILLIAM
KOGELSHATZ, and LINDA HAUER,

UNPUBLISHED
November 16, 2010

Plaintiffs-Appellants,

V

No. 293977
Macomb Circuit Court
LC No. 2008-002689-NO

GENDERNALIK FUNERAL HOME, INC.,

Defendant,

and

WHITE CHAPEL MEMORIAL CEMETERY,

Defendant-Appellee.

Before: SERVITTO, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of defendant's motion for summary disposition pursuant to both MCR 2.116(C)(8) and (C)(10).¹ Because plaintiffs have not established that a genuine issue of material fact exists with regard to their causes of action including negligence/gross negligence, negligent infliction of emotional distress, conversion, violation of the Michigan Consumer Protection Act (MCPA), MCL 445.903, and breach of contract, we affirm.

I

¹ While the trial court states in the conclusion of its opinion and order that it granted defendant's motion for summary disposition "under MCR 2.116(C)(8) and (C)(1)," it appears that the "(C)(1)" is a typographical error. Defendant brought its motion pursuant to MCR 2.116(C)(8) and/or (C)(10), the trial court set out the standards of review for both MCR 2.116(C)(8) and (C)(10), and there is no mention of MCR 2.116 (C)(1) which concerns jurisdiction, by the parties or the trial court.

Plaintiffs are siblings. Their mother, Virginia Kogelshatz, passed away on April 23, 2007 of natural causes. That same day, plaintiffs contracted with Gendernalik Funeral Home² to perform funeral services and to arrange for the cremation and burial of Mrs. Kogelshatz at defendant cemetery. The contract also sets out crematory charges for defendant cemetery in the amount of \$200 and cemetery charges of \$530 for defendant cemetery. The contract sets out a date of funeral service as April 26, 2007. Plaintiff William Kogelshatz also signed an “Authorization for Cremation” form dated April 23, 2007, that was prepared by the funeral home and signed by Patricia Gendernalik, the funeral director. The form stated that “the disposition of cremated remains shall be carried out in thirty days after cremation. The cremated remains are to be: X interred at White Chapel Memorial Cemetery”

Carol Daniels, an employee at defendant cemetery, testified via deposition that she spoke with Patricia Gendernalik at the funeral home to arrange the cremation services as well as the interment of the cremated remains at defendant cemetery. She testified that she filled out a Cremation Order and an Interment Order with information provided to her by Patricia Gendernalik from the funeral home. Daniels stated that the Interment Order directs that the cremated remains be buried in defendant cemetery’s Garden of Victorious Faith, Section E-222. Daniels stated that she left the exact space in which the cremated remains were to be buried blank because Patricia Gendernalik did not provide the specific location. The Cremation Order lists the location to be buried as “E-222, _____, Vic Faith.” Plaintiffs had no contact with defendant cemetery during the arrangements.

Gendernalik Funeral Home provided a check in the amount of \$730 to defendant cemetery on April 26, 2007 for cremation services and opening and closing for the interment of the cremated remains. Defendant cemetery received the body of Mrs. Kogelshatz on April 26, 2007 and cremation occurred at defendant cemetery also on April 26, 2007. Phillip Moschenrose, an employee of defendant cemetery, testified in his deposition that because the Interment Order was incomplete based on the information Daniels received from Gendernalik Funeral Home, the Interment Order was placed into a pending file awaiting a Consent to Interment form. According to Moschenrose, the cremated remains were stored at the mausoleum awaiting further instruction.

Plaintiffs’ family has owned two spaces in the Guardian of Victorious Faith section of defendant cemetery since 1993. Mrs. Kogelshatz’s husband predeceased her in 1993 and Mrs. Kogelshatz purchased the two spaces at that time. Mr. Kogelshatz was not cremated and was buried in one of the spaces in a casket. Steven Prykucki, an employee at defendant cemetery, testified that based on the configuration of the two plots, the cremated remains of Mrs. Kogelshatz could have been placed into the same space as Mr. Kogelshatz or could have been placed in the second plot. Prykucki also testified that the burial of the ashes at defendant

² Gendernalik Funeral Home, Inc. was a defendant in the trial court proceedings, however, the trial court dismissed Gendernalik by stipulation, and thus, the funeral home is not a party to this appeal.

cemetery was dependent on direction from the family on their choice of placement and that was the reason why defendant's burial of the cremation remains was delayed.

Moschenrose testified that as a result of a customary cemetery procedure to check the status of cremated remains shelved in the mausoleum every three to six months, a mausoleum employee called him to notify him that the cremated remains of Mrs. Kogelshatz were still in the mausoleum awaiting burial. Moschenrose then reviewed the file and discovered the missing Consent to Inter form. Shortly thereafter, in February 2008, Moschenrose called plaintiff William Kogelshatz and informed him of the missing form and that the cremated remains of Mrs. Kogelshatz were still awaiting burial. Moschenrose also faxed a Consent to Inter form to plaintiff William Kogelshatz. Moschenrose also testified that the length of time cremation remains were shelved in the mausoleum varied greatly depending on the circumstances and remains could be shelved in the vault for several months. After receiving the signed Consent to Inter form, defendant cemetery interred the cremated remains on February 22, 2008, in the same grave as her late husband, leaving the second space empty.

Plaintiffs then filed suit against defendant cemetery on September 16, 2008 alleging gross negligence, negligence, negligent infliction of emotional distress, breach of contract, conversion, and violation of the Michigan Consumer Law Act. Defendant filed a motion for summary disposition which the trial court entertained on June 6, 2009. The trial court granted defendant's motion for summary disposition as to all counts in an opinion and order on July 16, 2009. Plaintiffs now appeal as of right.

II

Defendant cemetery moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Both parties, in their briefs, relied on evidence outside of the pleadings, such as documents and depositions. As a result, this Court reviews the record as if the motion for summary disposition was brought under MCR 2.116(C)(10). *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). We review a motion for summary disposition de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005).

A trial court should grant a motion brought pursuant to MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). The nonmoving party may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

III

A. Negligence/Gross Negligence

Plaintiffs first argue that the trial court erred in granting defendant cemetery's motion for summary disposition because plaintiffs failed to establish that defendant cemetery's actions were negligent or grossly negligent. In order to state a negligence claim on which relief may be granted, plaintiffs must prove: "(1) that defendant owed (plaintiffs) a duty of care, (2) that defendant breached that duty, (3) that plaintiffs were injured, and (4) that defendant's breach caused plaintiffs' injuries." *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). Plaintiffs have not presented an analysis of the elements of negligence or any legal support buttressing their argument. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

In any event, there is no support in the record for plaintiffs assertion that defendant cemetery was "obliged to promptly inform [plaintiffs] if performing the contract for burial and funeral services would be impossible, impracticable, or delayed prior to accepted money consideration for the services and burial arrangements." But plaintiffs have presented no law or facts establishing that defendant cemetery owed any legal duty to plaintiffs to promptly bury the cremation remains. The facts show that plaintiffs had no contact with defendant cemetery during the funeral, cremation, and burial arrangements. Plaintiffs met with staff at Gendernalik Funeral Home and signed all the documents there. Gendernalik forwarded several signed forms as well as payment for services to defendant cemetery. However, Gendernalik Funeral Home did not forward a Consent for Interment form signed by plaintiffs or provide specific information with regard to the exact location where the remains were to be buried. Because of the missing information, defendant cemetery filed the paperwork in a pending file and safely stored the cremation remains in their mausoleum awaiting further instruction. Through its customary review, when defendant cemetery discovered that the cremation remains were shelved for many months, defendant cemetery promptly contacted plaintiffs seeking further instruction. There was uncontroverted deposition testimony in the record that it was not uncommon for cremation remains to be stored at defendant cemetery for long periods of time while families determine what they want to do with cremation remains. Plaintiffs have not stated a negligence claim on which relief may be granted. *Henry*, 473 Mich at 71-72.

With regard to gross negligence, "gross negligence" has been defined in many contexts as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003); see MCL 691.1407(7)(a) (Governmental Immunity) and MCL 324.81131(11) (Natural Resources and Environmental Protection Act.) Plaintiffs have presented no evidence to establish that defendant cemetery's conduct was so reckless that it showed a substantial lack of concern for whether an injury resulted. To the contrary, the evidence shows that defendant cemetery was waiting to bury the cremation remains of Mrs. Kogelshatz until it received the proper documentation. Defendant cremated Mrs. Kogelshatz's body on the day it received the body and then stored the cremation remains in an urn in the mausoleum awaiting further burial instructions. After plaintiffs signed and submitted the Consent to Inter form faxed to them by Moschenrose, defendant cemetery immediately interred the cremation remains at the designated location in the family plot.

Plaintiffs have presented no evidence that defendant cemetery was grossly negligent in its handling of the cremation remains. *Xu*, 257 Mich App at 269.

The trial court did not err when it granted summary disposition to defendant cemetery on plaintiffs' counts of negligence and gross negligence.

B. Negligent Infliction of Emotional Distress

Plaintiffs next argues that the trial court erred when it granted defendant's motion for summary disposition because plaintiffs failed to establish that defendant cemetery's actions resulted in negligent infliction of emotional distress. The elements of this claim are: (1) a serious injury is threatened or inflicted on a third person, (2) the nature of the injury is such as to cause severe mental disturbance to the plaintiff, (3) the shock results in actual physical harm, (4) the plaintiff is a member of the third person's immediate family, and (5) the plaintiff is present at the time the third person is injured or suffers shock fairly contemporaneously with that injury. *Taylor v Kurapati*, 236 Mich App 315, 360; 600 NW2d 670 (1999).

The operable facts of this case do not fit into the framework of a claim for negligent infliction of emotional distress. Plaintiffs state that they had visited the cemetery many times and believed that their mother's remains had been interred in the family plot with their father. When they found out that the remains were instead awaiting burial in the mausoleum they suffered an extreme shock. Claims for negligent infliction of emotional distress are not predicated simply upon some negligent action that causes a plaintiff to suffer severe emotional distress. Rather, the claim is predicated on a plaintiff's witnessing of a negligent injury to an immediately family member and suffering severe mental distress resulting in actual physical harm. *Duran v Detroit News, Inc*, 200 Mich App 622, 629; 504 NW2d 715 (1993); *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75, 81; 385 NW2d 732 (1986). Unfortunately, in the case, plaintiffs' mother had already passed away and had been cremated by the time of the alleged shocking event. Thus, plaintiffs could not have witnessed a negligent injury being threatened or inflicted on their mother who had already passed away and been cremated. Further there is no record support for the proposition that any of the three plaintiffs suffered actual physical harm as a result of learning that their mother's remains had not yet been buried. In fact, all three testified at their depositions that the shock of learning that their mother's cremation remains had not been interred caused them "stress" or "sleeplessness." None of them treated with a physician or could document a physical injury directly resulting from a shocking event related to the delayed burial of their mother.

After reviewing the record, we conclude that the trial court properly found that plaintiffs failed to meet their burden of proof to sustain a claim for negligent infliction of emotional distress because none of the three plaintiffs actually witnessed a negligent injury being threatened or inflicted on their mother who had already passed away and been cremated or suffered actual physical harm as a result of the delayed burial of their mother's cremation remains. *Taylor*, 236 Mich App at 360.

C. Conversion

Next, plaintiffs contend that the trial court erred in granting defendant cemetery's motion for summary disposition because plaintiffs failed to establish a claim of conversion. In particular, plaintiffs assert that while they had no personal property interest in the body of their deceased mother, defendant cemetery failed to return the fees paid for cremation and interment services. In order to maintain an action for conversion, the plaintiff must have an enforceable interest in the property at issue. See *Thomas v Watt*, 104 Mich 201, 207; 62 NW 345 (1895) (the plaintiff must prove "[p]roperty in herself, and a right of possession at the time of the conversion"); *Hance v Tittabawassee Boom Co*, 70 Mich 227, 231; 38 NW 228 (1888) ("the plaintiff must prove his ownership, absolute or qualified, of the property"). If the defendant's right to possession is greater than that of the plaintiff, a claim for conversion will not lie because a person cannot convert his own property. *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992); *Rohe Scientific Corp v Nat'l Bank of Detroit*, 133 Mich App 462, 468; 350 NW2d 280 (1984), *modified in part on other grounds* 135 Mich App 777 (1984).

There is a common-law tort of conversion and a statutory tort of conversion. *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591-593; 683 NW2d 233 (2004). The common-law tort "is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co*, 439 Mich at 391. Statutory conversion consists of (1) another person steals or embezzles property or converts property to his own use or (2) another person buys, receives, possesses, conceals or aids in the concealment of stolen, embezzled, or converted property knowing that the property had been stolen, embezzled, or converted. MCL 600.2919a.

After reviewing the record, we conclude that the trial court properly found that plaintiffs failed to meet their burden of proof to create a justiciable question of fact on their claim for conversion. Plaintiffs have presented no evidence that defendant cemetery wrongfully converted the cremation fee or interment fee. Plaintiffs have testified that the services provided by defendant cemetery were untimely, but none testified or provided evidence that the services were not performed. Further, plaintiffs present no legal authority supporting the proposition that the fees should be refunded to plaintiffs. As such, plaintiffs have not presented sufficient proof to establish with common law or statutory conversion.

D. Michigan Consumer Protection Act

Plaintiffs next maintain that the trial court erred in granting defendant cemetery's motion for summary disposition because plaintiffs failed to establish a violation of the Michigan Consumer Protection Act (MCPA), MCL 445.903. In plaintiffs' brief on appeal, they set out the following sections of MCL 445.903:

(1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:

(b) Using deceptive representations or deceptive designations of geographic origin in connection with goods or services.

(q) Representing or implying that the subject of a consumer transaction will be provided promptly, or at a specified time, or within a reasonable time, if the merchant knows or has reason to know it will not be so provided.

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

(u) Failing, in a consumer transaction that is rescinded, canceled, or otherwise terminated in accordance with the terms of an agreement, advertisement, representation, or provision of law, to promptly restore to the person or persons entitled to it a deposit, down payment, or other payment, or in the case of property traded in but not available, the greater of the agreed value or the fair market value of the property, or to cancel within a specified time or an otherwise reasonable time an acquired security interest.

(bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is

Again, aside from merely listing sections of the MCPA, plaintiffs do not explain or provide authority in support of their argument that defendant cemetery made misrepresentations to plaintiffs, misled plaintiffs, and deceived plaintiffs. “It is not sufficient for a party ‘simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.’” *Wilson*, 457 Mich at 243, quoting *Mitcham*, 355 Mich at 203.

After reviewing the record, we have not located any evidence that defendant cemetery engaged in deceptive practices with regard to plaintiffs. The tardiness of the interment of the cremation remains was not due to any wrongdoing or misrepresentation on the part of defendant cemetery but instead was as a result of defendant cemetery not receiving a signed Consent to Inter form. When defendant’s staff discovered that the remains had been shelved for several months, defendant contacted plaintiffs, notified them of the situation and asked for direction. Furthermore, plaintiffs admitted that none of them had any contact with defendant cemetery until defendant cemetery contacted them about the status of the remains. Plaintiffs could have contacted defendant cemetery at any time to find out what date the interment would take place or to confirm that it had taken place. Again there is testimony in the record that it was not uncommon for families to store cremation remains at defendant cemetery’s mausoleum until they

decide where, how, and when to permanently place a loved one's cremation remains. On this record, plaintiffs have not established a valid cause of action under the MCPA.

E. Breach of Contract

Finally, plaintiffs argue that the trial court erred when it found that defendant was not liable for breach of contract because no contract existed between the parties. In particular, plaintiffs assert on appeal that they contracted with defendant cemetery for a funeral service, cremation services, and burial of their mother's cremation remains through Gendernalik Funeral Home, who acted as the "conduit" for the transaction. The essential elements of a valid contract are "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005), quoting *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). In order for a contract to be completed, there must be an offer and acceptance. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Without an unambiguous acceptance in strict conformance with the offer, no contract is formed. *Id.* A contract requires mutual assent or a meeting of the minds on all the essential terms. *Id.* at 453.

Plainly, no contract existed between the parties. Plaintiffs admittedly contracted with Gendernalik Funeral Home for their mother's funeral, cremation, and interment. Gendernalik made all the arrangements. None of the three plaintiffs ever spoke to anyone at defendant cemetery. Our review of the record reveals that plaintiffs have presented no documentary evidence or testimonial evidence that a contract existed between plaintiffs and defendant cemetery. Because no contract existed, there can be no breach, and thus, the trial court properly granted summary disposition on plaintiffs' breach of contract claim.

IV

Because plaintiffs have not established, through the presentation of evidence, that a genuine issue of material fact exists with regard to any of plaintiffs' causes of action, the trial court properly granted summary disposition on all of plaintiffs' counts including: negligence/gross negligence, negligent infliction of emotional distress, conversion, violation of the MCPA, and breach of contract.

Affirmed. Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Deborah A. Servitto
/s/ Brian K. Zahra
/s/ Pat M. Donofrio