STATE OF MICHIGAN

COURT OF APPEALS

JANE RASMUSSEN, Personal Representative of the Estate of LARRY ROGERS RASMUSSEN,

Plaintiff-Appellant,

v

STAMBAUGH CEMETERY ASSOCIATION, CHRIS STACHOWICZ, and JOHN WYTONICK,

Defendants-Appellees,

and

WILLIAM YOST,

Defendant.

UNPUBLISHED
August 5, 2004

No. 249552
Iron Circuit Court
LC No. 01-002063-NZ

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

I. Overview

Plaintiff Jane Rasmussen, personal representative of the estate of her late husband Larry Rasmussen, appeals as of right from a trial court order granting summary disposition under MCR 2.116(C)(7) on the ground of governmental immunity. The case arose when defendants Stambaugh Cemetery Association, Chris Stachowicz, and John Wytonik buried Larry Rasmussen in the wrong place within a cemetery lot, allegedly disturbing the remains of a baby who had previously been buried in that location, and then re-buried the coffin in the proper location but without first obtaining a statutorily required permit. Defendants moved to dismiss the case on the basis that they were protected by governmental immunity, among other grounds. Jane Rasmussen raised the exceptions of gross negligence and trespass-nuisance. The trial court granted summary disposition on the ground that the trespass-nuisance exception did not apply. We affirm.

II. Basic Facts And Procedural History

In August of 1948, the clerk of the Stambaugh Cemetery issued a cemetery deed for Lot 227, Block 4, to Larry Rasmussen. This lot contained places for four graves. In 1950, two twins

were buried in the northeast quadrant, and in 1955, according to Jane Rasmussen, a baby was buried in a casket and cement vault in the southeast quadrant.

Larry Rasmussen died in January of 1999. Wytonick, who was the cemetery sexton, claimed that Brian Kaye, the Rasmussens' funeral director, told him that Larry Rasmussen was to be buried in the southeast quadrant of the lot. Kaye denied ever having that conversation with Wytonick. In any event, in May of 1999, Wytonick buried Rasmussen in the southeast quadrant, the same plot where the baby had allegedly been buried in 1955. Wytonick testified that he would have encountered something if the baby had been buried there, and he denied encountering any evidence that the southeast quadrant of the lot was occupied. Jane Rasmussen admitted she had no direct knowledge that the baby had actually been buried there. However, the trial court ruled, and defendants conceded for the purpose of their motion, that the baby had been in the southeast quadrant.

Jane Rasmussen first learned of the mislocation of Larry Rasmussen's body approximately one year later. She first confronted Wytonick, then attempted to rectify the situation through City Hall. In September, with the situation still unresolved, she went to see Stachowicz, who was then the superintendent of the Stambaugh Cemetery Association, and told him that Larry Rasmussen was in the wrong grave. Eventually, Jane Rasmussen received a telephone call from Stachowicz indicating that they were going to move Larry Rasmussen's casket to the proper location. At her deposition, Jane Rasmussen agreed that she had "asked somebody to make it right." Stachowicz stated that Jane Rasmussen had asked for Larry Rasmussen's body to be moved, and at the motion hearing Jane Rasmussen admitted that she had asked for her husband's body to be relocated.

Jane Rasmussen then discovered, however, that defendants had moved the body without a permit. Stachowicz and Wytonick both exercised their Fifth Amendment right to remain silent when asked about the body relocation. Although she had requested that Larry Rasmussen's body be moved to the correct plot, she testified that she was angry because the relocation was done illegally.[1]

Jane Rasmussen filed suit against the Stambaugh Cemetery Association in October of 2001, and later amended her complaint to add Stachowicz and Wytonick as parties. Defendants moved for summary disposition on several grounds, including governmental immunity, statute of limitations, failure to state a claim, and the speculative nature of some of the alleged injuries. Jane Rasmussen did not argue that defendants were not within the general coverage of MCL 691.1407, the governmental immunity statute, but rather argued that there were applicable exceptions, specifically, trespass-nuisance and gross negligence. The trial court noted that the limitations period had run for Wytonick, but that it was irrelevant because governmental immunity applied. Accordingly, the trial court dismissed the case under MCR 2.116(C)(7).

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[1] Moving a dead body without legal authority is a felony. MCL 750.160.

III. Exceptions To Governmental Immunity

A. Standard Of Review

In response to defendants' motion for summary disposition, Jane Rasmussen argued two exceptions to governmental immunity: trespass-nuisance and gross negligence. The trial court did not consider the gross negligence exception, but because it was raised before the trial court, we may nevertheless review it.[2] We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7) de novo,[3] considering all documentary evidence that the parties submit.[4]

B. Trespass-Nuisance[5]

Trespass-nuisance is defined as

> trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage. To establish trespass-nuisance the plaintiff must show condition (nuisance or trespass), cause (physical intrusion), and causation or control (by government).[6]

Jane Rasmussen argues on appeal that a trespass occurred when Larry Rasmussen was buried in the wrong place, and that this trespass interfered with the use or enjoyment of the land, thus constituting a nuisance. While we believe that the improper burial might well have been a nuisance, our reading of the lower court record indicates that Jane Rasmussen is raising the nuisance argument for the first time on appeal. Although the complaint specifically alleges that defendants committed trespass, it does not use the term "nuisance," nor was a nuisance theory explicitly argued at the motion hearing. Accordingly, we limit our review to the question whether the trespass-nuisance exception was satisfied because a trespass occurred.[7]

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[2] *Peterman v DNR*, 446 Mich 177, 183; 521 NW2d 499 (1994).

[3] *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

[4] *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW2d 897 (1998).

[5] We note that the Michigan Supreme Court has eliminated the trespass-nuisance exception to governmental immunity. See *Pohutski v City of Allen Park*, 465 Mich 675, 689-690, 697, 699; 641 NW2d 219 (2002). However, because *Pohutski* was only applicable prospectively, it does not apply to this case, which was filed before the elimination of the trespass-nuisance exception became effective.

[6] *Continental Paper & Supply Co, Inc v City of Detroit*, 451 Mich 162, 164; 545 NW2d 657 (1996).

[7] See *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987) (issues raised for the first time on appeal are not properly before this Court).

The Michigan Supreme Court has defined a "trespasser" in the property context as "a person who enters upon another's land, without the landowner's consent."[8] Therefore, the issue is not whether defendants did some wrongful act on the property, but whether they had permission to be there. It is uncontested that defendants entered onto Jane Rasmussen's property. However, defendants had Jane Rasmussen's consent to be on the property both to bury Larry Rasmussen and to disinter him for reburial. Therefore, we conclude that the trial court did not err in granting the summary disposition motion on the ground that the trespass portion of the trespass-nuisance exception to governmental immunity was not established.

C. Gross Negligence

Jane Rasmussen also contends that the wrongfulness of defendants' acts in a cemetery context amounts to gross negligence.[9] Gross negligence is a statutory exception to governmental immunity.[10] It is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."[11] With respect to the initial mis-burial, Jane Rasmussen argues that Wytonick was grossly negligent because he buried the body in the southeast quadrant despite the existence of a cemetery map indicating that the baby was already buried in that plot. While this might suffice to prove ordinary negligence, we conclude that it is not sufficient to establish that Wytonick was grossly negligent. There is no allegation, for example, that Wytonick referred to the cemetery map but disregarded it, or that he buried Larry Rasmussen despite having seen physical evidence of the baby's remains. Without more, the contention that the body could not have been improperly buried absent gross negligence is in the nature of a res ipsa loquitur argument, which the Michigan Supreme Court has explicitly rejected as a means to prove gross negligence.[12] Simply put, although ordinary negligence can be inferred, gross negligence cannot be inferred.

With respect to the moving of the body without obtaining the statutorily required permit, even presuming that a violation of the statute would constitute negligence per se in this case, violation of a statutorily imposed duty only constitutes ordinary negligence, not gross negligence.[13] "Evidence of ordinary negligence does not create a material question of fact concerning gross negligence."[14] No other wrong has been alleged regarding defendants' movement of the body. Further, that they were moving the body pursuant to Jane Rasmussen's request suggests they were not acting in disregard of any harm they might cause, but, rather, that

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[8] *James v Alberts*, 464 Mich 12, 19; 626 NW2d 158 (2001).

[9] The trial court did not rule on this issue.

[10] *Maiden v Rozwood*, 461 Mich 109, 118, 121-122; 597 NW2d 817 (1999).

[11] MCL 691.1407(2)(c).

[12] *Maiden*, *supra* at 127.

[13] *Poppen v Tovey*, 256 Mich App 351, 358; 664 NW2d 269 (2003).

[14] *Maiden*, *supra*, 461 Mich at 122-123.

they were acting out of a concern for correcting harm already caused. We conclude that, under these circumstances, defendants' conduct does not rise to the level of gross negligence.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello