STATE OF MICHIGAN

COURT OF APPEALS

CORNELIUS G. BACHUS, Personal Representative of the Estate of DEBORAH JANE BACHUS, Deceased,

Plaintiff-Appellant,

v

SHIRLEY FOLEY,

Defendant-Appellee.

UNPUBLISHED
June 14, 2005

No. 252686
Alcona Circuit Court
LC No. 02-011062-NO

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition. We affirm.

Plaintiff's sole issue on appeal is that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) because an issue of material fact existed regarding whether defendant's inaction constituted gross negligence or wilful and wanton misconduct. We disagree.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In ruling on a summary disposition motion, the trial court must determine whether an issue of material fact existed or whether the moving party was entitled to a judgment as a matter of law. *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating such a motion, the trial court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Corley v Detroit Board of Education*, 470 Mich 274, 278; 681 NW2d 342 (2004). All reasonable inferences must be resolved in favor of the nonmoving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995).

Under the Recreational Land Use Act, MCL 324.73301(1), generally, a cause of action may not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping,

camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or wilful and wanton misconduct of the owner, tenant, or lessee. MCL 324.73301(1); *Neal v Wilkes* 470 Mich 661, 664, 685 NW2d 648 (2004). Gross negligence requires that the defendant acted negligently after the plaintiff negligently contributed to his own peril. *Ellsworth v Highland Lakes Development Associates,* 198 Mich App 55, 61; 498 NW2d 5 (1993). Wilful and wanton misconduct exists when the defendant has: (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; and (3) the failure to use such care and diligence when to the ordinary mind it is apparent that the result is likely to prove disastrous to another. *Burnett v City of Adrian,* 414 Mich 448, 463; 326 NW2d 810 (1982). One who wilfully injures another, or whose conduct is so wanton or reckless as to be wilful, is guilty of more than negligence or a high degree of carelessness. *Id.* at 455. Wilful and wanton misconduct requires an intent to harm or such indifference to whether harm will result as to be the equivalent of a willingness that it does. *Id.* Mere negligence cannot be cast as "wilfulness" simply for the purposes of bringing a complaint. *Ellsworth, supra* at 61. Wilful negligence is quasi-criminal and manifests an intentional disregard for another's safety. Omissions to act are not usually wilful and wanton misconduct. *Id.* at 61-62.

Viewing the facts in a light most favorable to plaintiff, we find that plaintiff has failed to present sufficient facts to prove gross negligence or wilful and wanton misconduct on the part of defendant. First, nothing in the record indicates that defendant was grossly negligent (i.e., acted negligently after the decedent negligently contributed to her own peril). *Ellsworth, supra* at 61. The decedent entered defendant's property on May 27, 2000, some four years after defendant initially purchased the property. Before the purchase, Robert Krumbach was the caretaker of the property. During Krumbach's time as the caretaker, the cable that caused the decedent's injury was strung between two trees on the property. The cable was placed there by loggers hired to construct a road to the property. The cable was used to prevent vehicular traffic from entering the property. The loggers used a padlock to affix the cable between the trees and gave Krumbach the key to the padlock. The loggers also placed "No Trespassing" signs on the two trees where the cable was attached. The evidence indicates that defendant rarely walked around the property after the purchase and it was primarily used by her sons to hunt. Krumbach showed defendant the cable strung between the trees and defendant was given the keys to the padlock at the time of the purchase Therefore, the cable was strung between the trees at the time defendant purchased the property. However, the cable was in place some four years before the decedent's accident on defendant's property. The record is void of any evidence that defendant's negligent act followed the decedent's alleged negligent contribution to her own peril (i.e., the decedent driving the off-road vehicle onto defendant's property). In other words, defendant's negligence would have preceded the decedent's own act of going on the property, and thus, there is no evidence of gross negligence on defendant's part.

Second, the decedent's injury was not caused by defendant's wilful and wanton misconduct. Defendant's conduct was not so reckless that it showed a substantial lack of concern for whether an injury would result. *Burnett, supra* at 455. Viewing the facts in a light most favorable to plaintiff, the factual allegations presented support a finding that defendant knew of the cable strung between the trees and had reason to know of the danger it created.

Defendant was told of the cable at the time she purchased the property and Krumbach showed her the cable. Plaintiff alleged that defendant had the ability to avoid the harm by removing the cable entirely, moving the cable to a more visible position, or clearly marking the cable by placing flags on it. Therefore, there was sufficient factual allegations to support a finding that defendant had the ability to avoid the harm. Although defendant had knowledge of the cable strung between the trees on her property and could have avoided the harm caused by the cable, the record indicates that she did not possess an intent to harm or such indifference to whether harm would result as to be the equivalent of a willingness that it does. *Id.*

Plaintiff contends that defendant's lack of action in making the cable more conspicuous demonstrated wilful and wanton misconduct. However, omissions to act are not usually wilful and wanton misconduct. *Ellsworth, supra* at 61-62. Plaintiff presented no evidence that defendant intended to injure anyone or that defendant's action, or lack of action, was so reckless as to show a lack of concern for whether an injury would result. The record reflects that the reason defendant kept the cable between the trees was to prevent others from driving onto the property. On review de novo, we find that the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly