[Cite as *McDonald v. Corning*, 2015-Ohio-3002.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BARBARA MCDONALD	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
THE VILLAGE OF CORNING	:	Case No. 14-CA-00027
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 10-CV-00136
JUDGMENT:	Affirmed/Reversed in Part and Remanded
DATE OF JUDGMENT:	July 17, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
SHAWN J. ORGAN ERIK J. CLARK 1330 Dublin Road Columbus, OH 43215	MICHAEL J. VALENTINE ZACHARY B. PYERS 65 East State Street, 4th Floor Columbus, OH 43215

Farmer, J.

{¶1} On March 26, 2010, appellee, Barbara McDonald, filed a complaint against appellee, The Village of Corning, claiming vandalism, desecration, negligence, intentional infliction of emotional distress, outrage, negligent infliction of emotional distress, and conversion. Appellee claimed appellant misplaced the remains of her deceased infant child who had been buried fifty-eight years ago. Appellant operates Oakwood Cemetery, then known as Millerton Methodist Cemetery. Appellant claimed there were no records to indicate that the child had been buried at the cemetery. No one possessed a deed to reflect the purchase of a burial plot, although appellee had paid the Carl W. Hermey Funeral Home to handle all of the arrangements, including the purchase of a burial plot.

{¶2} On August 25, 2011, appellant filed a motion for summary judgment. By entry filed August 30, 2013, the trial court granted the motion, finding no evidence that appellee paid for a burial plot and therefore appellant did not owe appellee a legal duty regarding the infant's remains. This decision was reversed on appeal. *McDonald v. The Village of Corning,* 5th Dist. Perry No. 13-CA-00011, 2014-Ohio-1614.

{¶3} On June 26, 2014, appellant again filed a motion for summary judgment. By judgment entry filed November 12, 2014, the trial court denied the motion, finding reasonable minds could come to more than one conclusion on the issues raised in appellant's motion: 1) statutory immunity, 2) statute of limitations, and 3) serious emotional distress.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ERRED WHEN IT DENIED THE VILLAGE OF CORNING'S MOTION FOR SUMMARY JUDGMENT ON THE APPLICATION OF STATUTORY POLITICAL SUBDIVISION IMMUNITY."

II

{¶6} "THE TRIAL COURT ERRED WHEN IT DENIED THE VILLAGE OF CORNING'S MOTION FOR SUMMARY JUDGMENT ON THE APPLICATION OF THE STATUTE OF LIMITATIONS."

III

{¶7} "THE TRIAL COURT ERRED WHEN IT DENIED THE VILLAGE OF CORNING'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF-APPELLEE'S EMOTIONAL DISTRESS CLAIM."

I, II, III

{¶8} Appellant claims the trial court erred in denying its motion for summary judgment.

{¶9} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

> Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that

> reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.

{¶10} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35 (1987).

{¶11} From our review of the summary judgment motion, the response by appellee, and the trial court's decision, we find three issues raised by this appeal: 1) whether the action was timely filed vis-à-vis the discovery rule, 2) if so, whether R.C. 2744.02(A)(1) applies in this case, and 3) if so, whether the claims for intentional tort, punitive damages, and attorney fees are viable.

ACCRUAL OF THE CAUSES OF ACTION

{¶12} Appellant argues appellee's claims of vandalism, desecration, negligence, and conversion are barred by the two year statute of limitations. R.C. 2305.10; R.C. 2744.04.

{¶13} Appellee claims the accrual of the causes of action occurred in the summer of 2009 when, desiring to place a headstone on her child's grave, she was informed that appellant could not find the burial location of her child and perhaps he was

buried over. B. McDonald depo. at 41-45. Prior to this time, appellee had always visited the same area where she had been told her infant child had been buried. *Id.* at 28-31, 38. From 1957 until sometime in the 1980s, a metal stake with the infant's name, birth date, and date of death marked the place where appellee visited. *Id.* at 28-29, 37. Appellee visited the grave two to three times a year at first, but then the visits decreased as time passed. *Id.* at 31-32. The visits became more infrequent in the 2000s, but during those visits, appellee noticed that although there was still an open area, there were other grave markings nearby and/or encroaching the area where she was told her child had been buried. *Id.* at 38-41.

{¶14} In *Norgard v. Brush Wellman,* 95 Ohio St.3d 165, 2002-Ohio-2007, ¶ 8-10, the Supreme Court of Ohio explained the following:

> Generally, a cause of action accrues and the statute of limitations begins to run at the time the wrongful act was committed. *Collins v. Sotka* (1998), 81 Ohio St.3d 506, 507, 692 N.E.2d 581. However, the discovery rule is an exception to this general rule and provides that a cause of action does not arise until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, that he or she was injured by the wrongful conduct of the defendant. *Id.,* citing *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 4 OBR 335, 447 N.E.2d 727.
>
> In *O'Stricker,* the court emphasized that the discovery rule entails a two-pronged test—i.e., discovery not just that one has been injured but also that the injury was "caused by the conduct of the defendant"—and

> that a statute of limitations does not begin to run until both prongs have been satisfied. *O'Stricker,* 4 Ohio St.3d at 86, 4 OBR 335, 447 N.E.2d 727, paragraph two of the syllabus.
>
> Since the rule's adoption, the court has reiterated that discovery of an injury alone is insufficient to start the statute of limitations running if at that time there is no indication of wrongful conduct of the defendant. Moreover, the court has been careful to note that the discovery rule must be specially tailored to the particular context to which it is to be applied. *Browning v. Burt* (1993), 66 Ohio St.3d 544, 559, 613 N.E.2d 993.

{¶15} We find the only evidence of appellee's personal knowledge of an error happened after she was informed in 2009 that there was no record of her child's burial plot. Given that the complaint was filed on March 26, 2010, the cognizable event was well within the two year statute of limitations for the causes of action listed.

R.C. 2744.02(A)(1) SOVEREIGN IMMUNITY AND VIABLE CLAIMS

{¶16} Given that the causes of action were timely filed, does R.C. 2744.02(A)(1) apply to this action since the error giving rise to the claims occurred prior to the enactment of the statute (November 20, 1985), but the discovery of the error occurred after said date?

{¶17} In the August 30, 2013 entry of the trial court granting the motion for summary judgment (reversed on appeal), the trial court found the operation of a cemetery was not a governmental function but a proprietary one:

The Village of Corning does not have sovereign immunity pursuant to Ohio Revised Code §2744.02 regarding negligence. Pursuant to Ohio Revised Code §2744.02(B)(2), a political subdivision is liable for loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions. According to Ohio Revised Code §2744.01(G)(2)(b), a proprietary function includes "the design, construction, reconstruction, renovation, repair, maintenance and operation of a public cemetery other than a township cemetery." The Village of Corning, therefore, would not be protected by sovereign immunity for negligent acts as it relates to the Oakwood Cemetery.

{¶18} In reversing the trial court's decision, this court stated the following:

The trial court found that appellee was not immune from the instant action based on the doctrine of sovereign immunity. Appellee has not challenged this finding by way of cross assignment of error or cross appeal. App.R. 3(C)(1) provides, "A person who intends to defend a judgment or order against an appeal taken by an appellant and who also seeks to change the judgment or order or, in the event the judgment or order may be reversed or modified, an interlocutory ruling merged into the judgment or order, shall file a notice of cross appeal within the time allowed by App.R. 4." Although appellee is defending the order of the court, appellee seeks to change the ruling of the court on the issue of

sovereign immunity in the event we reverse the summary judgment of the court on the issue of existence of a legal duty. Because appellee has not challenged this finding by way of cross appeal or cross assignment of error, we decline to consider this argument. See *Ware v. King*, 187 Ohio App. 3d 291, 931 N.E. 2d 1138, 2010-Ohio-1637, ¶19.

McDonald v. The Village of Corning, 5th Dist. Perry No. 13-CA-00011, 2014-Ohio-1614, ¶ 27.

{¶19} We find the law of the case doctrine applies:

Briefly, the doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.***Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law.

The doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results.***However, the rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the

Ohio Constitution.*** *Nolan v. Nolan,* (1984), 11 Ohio St.3d 1, 3, (1984). (Citations omitted.)

{¶20} Therefore, appellee's negligence claims are viable.

{¶21} The next inquiry is whether R.C. 2744.02 et seq. applies to appellee's intentional tort claims (vandalism, desecration, intentional infliction of emotional distress, outrage, and conversion).

{¶22} We note appellee's March 26, 2010 complaint at ¶ 5 cites several statutes for jurisdiction including R.C. 2744.01 et seq.

{¶23} In *Van Fossen v. Babcock & Wilcox Company,* 36 Ohio St.3d 100, 105 (1988), the Supreme Court of Ohio addressed the issue of retroactive application of a statute and noted: "This rule has been embodied in Ohio law by R.C. 1.48 which states: '[a] statute is presumed to be prospective in its operation unless expressly made retrospective.' " Thus, where " 'there is no clear indication of retroactive application, then the statute may *only* apply to cases which arise subsequent to its enactment.' " *Id.* at 106, citing *Kiser v. Coleman,* 28 Ohio St.3d 259, 262 (1986). Therefore, we find R.C. 2744.02 to be prospective.

{¶24} The intentional tort claim of intentional infliction of emotional distress was predicated upon appellee's final knowledge or discovery that her child's remains were moved/lost. Per appellee's own assertions, she did not learn of this until 2009 when she met with cemetery committee member John Hashman and discovered there was no record of the grave. We therefore conclude R.C. 2744.02 et seq. applies to her injuries for intentional infliction of emotional distress as a result of that discovery and is

therefore barred. We also find the tort of outrage is really a claim for intentional infliction of emotional distress and is therefore barred as well. *Haefka v. W.W. Extended Care,* 9th Dist. Lorain No. 01CA007863, 2001-Ohio-1796.

{¶25} We concur with the trial court that the vandalism, desecration, and conversion claims are not covered under R.C. 2744.02 et seq. at this time, as the record leaves in doubt whether those actions arose prior to the effective date of R.C. Chapter 2744 (November 20, 1985). Therefore, we find them to be viable.

{¶26} As for appellee's claims for punitive damages and attorney fees, we find them to be barred by R.C. 2744.05(A) which states the following in pertinent part:

> Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function:
>
> (A) Punitive or exemplary damages shall not be awarded.

{¶27} "In the absence of statutory authorization, neither punitive damages nor attorney fees can be awarded against a municipal corporation.***" *Hunsche v. City of Loveland,* 133 Ohio App.3d 535, 542 (1st Dist.1999). (Citations omitted.)

{¶28} That leaves whether genuine issues of material fact exist relative to appellee's claim of serious emotional distress.

{¶29} Appellee testified she has not consulted a physician or received treatment relative to her claim. B. McDonald depo. at 81. However, there is an indication in appellee's deposition that she suffered sleeplessness, anxiety, and stress about the loss of her infant child's remains. *Id*. at 81-82. In her October 11, 2011 response to appellant's August 25, 2011 motion for summary judgment, appellee filed an affidavit, attached as Exhibit O, averring the following at ¶ 2:

> Ever since Mr. John Hashman and Mrs. Ruth Fergusin told me, in the Summer of 2009, that they did not believe that my son, Michael, would be found in the Oakwood Cemetery (the "Cemetery") because he had likely been buried over, I have felt and experienced sadness, anger, and frustration. Further, I was horrified by the thought and I have cried several times thinking about my baby had been buried over.

{¶30} In *Carney v. Knollwood Cemetery Association,* 33 Ohio App.3d 31, 33-34 (8th Dist.1986), our brethren from the Eighth District explained the following:

> Appellants contend that the appellees' evidence was insufficient to make out a case for serious emotional distress, when measured against the "factors" set out in *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 6 OBR 114, 451 N.E.2d 759, a case involving a series of automobile accidents. Paragraph three of the *Paugh* syllabus states:

"3. Where a bystander to an accident states a cause of action for negligent infliction of serious emotional distress, the emotional injuries sustained must be found to be both serious and reasonably foreseeable, in order to allow a recovery."

The foreseeability factor is further elucidated in Paragraph 3b of the syllabus:

"3b. The factors to be considered in order to determine whether a negligently inflicted emotional injury was reasonably foreseeable include: (1) whether the plaintiff was located near the scene of the accident, as contrasted with one who was a distance away; (2) whether the shock resulted from a direct emotional impact upon the plaintiff from sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and (3) whether the plaintiff and victim (if any) were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship."

This court is not convinced that the factors listed therein necessarily control the foreseeability of emotional injury in a case such as the one at bar, in which a grave has been desecrated. Legal authorities have long acknowledged the likelihood of mental anguish resulting from the mishandling of dead bodies. See *infra.* The syllabus law in *Paugh, supra,* does not lay down mandatory requirements, but rather "factors" to be considered in a similar accident case. The syllabus law must be read in

the context of "the facts of the specific case before the Court for adjudication." Supreme Court Rule for the Reporting of Opinions 1(B).

{¶31} We concur with this analysis and find at this stage in the proceeding, sufficient evidence of serious emotional distress has been raised to overcome the summary judgment motion.

{¶32} Upon review, we find the trial court erred in denying the motion for summary judgment as to appellee's claims for intentional infliction of emotional distress, outrage, punitive damages, and attorney fees. These claims are dismissed. The claims for vandalism, desecration, negligence, negligent infliction of emotional distress, and conversion remain.

{¶33} Assignment of Error I is granted in part. Assignments of Error II and III are denied.

{¶34} The judgment of the Court of Common Pleas of Perry County, Ohio is hereby affirmed in part and denied in part.

By Farmer, J.

Gwin, P.J. and

Baldwin, J. concur.

SGF/sg 609