

STATE OF MICHIGAN  
COURT OF APPEALS

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DONNA HIAR,

Plaintiff-Appellant,

v

BOB STRONG, STRONG LANDSCAPING &  
EXCAVATING, INC.,

Defendants-Appellees,

and

TOWNSHIP OF BLISS,

Defendant.

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UNPUBLISHED

April 26, 2007

No. 274247

Emmet Circuit Court

LC No. 03-7699 NO

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the grant of defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). We affirm.

This matter was previously before this Court,<sup>1</sup> and was remanded for further proceedings with respect to defendants Strong and Strong's Landscaping<sup>2</sup> to address the question of whether Strong was entitled to qualified governmental immunity.

Defendant Strong was appointed sexton for Bliss Township by the township board on April 24, 1990, and has served in that capacity since that date. As sexton, defendant Strong digs graves, fills them in, and keeps track of the records indicating who is buried in the cemetery, for which tasks he is paid by the funeral home or the families of the decedents.

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<sup>1</sup> Docket number 257918, reported at *Hiar v Strong*, 2006 Mich App LEXIS 702 (2006). In that case, Bliss Township was also a defendant, and the lower court's grant of summary disposition to the Township was affirmed.

<sup>2</sup> According to defendant Strong, Strong Landscaping & Excavating does not exist as a corporation.

In September, 2002, the township clerk contacted Strong with a request to move a vault. Strong made arrangements for payment with the family of the deceased buried in the vault, and contracted with Cheboygan Cement to move the vault. He then dug two holes (where the vault then rested and the adjacent site where it would be moved) on either September 21 or 22. He contacted Cheboygan Cement again on the morning of September 23, but the cement company informed him they would not be able to move the vault until the next day. Strong testified that it was typical for him to dig a grave and leave it open for two or three days, during which time the open holes were not marked.

On September 23, as plaintiff walked through the cemetery, looking for a family member's grave, she stepped into the open hole and was injured. According to plaintiff, it was a sunny summer day, and she was looking off into the distance at tombstones rather than at the ground. Plaintiff stated in her deposition that she had "been in enough cemeteries to know that there's danger," but also stated that there was nothing at all to indicate that this hole was there, not even a pile of dirt.

On remand, defendants moved for summary disposition, claiming governmental immunity pursuant to MCL 691.1407(2). The trial court granted the motion, stating that it found "no dispute that the Defendant was within the scope of his authority and engaging in a governmental function in digging the grave in question."

Plaintiff argues on appeal that defendant Strong is not entitled to governmental immunity because he was not acting in his capacity as an officer of Bliss Township when he dug the grave where plaintiff was injured. Plaintiff asserts that Strong was acting as a contractor because he dug the graves at the request of the family and was paid by the family.

This Court reviews de novo the trial court's denial of a defendant's motion for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999).

MCL 691.1407(2) provides:

Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

It appears undisputed that Strong's appointment as sexton made him an officer of Bliss Township, and that as sexton, Strong reasonably believed he was acting within the scope of his authority in digging the graves. The issue is whether he was engaged in the exercise or discharge of a governmental function.

During the hearing on the motion for summary disposition, plaintiff's counsel argued that there was a question of whether defendant Strong was entitled to governmental immunity because Strong "wears two hats," one as the sexton of the Township, and one as a contractor "hired by families and or [sic] the funeral home to actually excavate the graves, and then bury individuals in those graves." This exchange followed:

The Court: Doesn't he have to be the sexton to perform those functions?

Plaintiff's Counsel: According to the Township documents, yes, that is true, Your Honor.

The Court: Okay. So even if I would agree with you that he's not an employee or he's perhaps a co-employee because he's paid by the funeral homes or the families, the governmental immunity extends not just to employees but also the officers of the government. And he's clearly an officer, is he not?

Plaintiff's Counsel: Well, Your Honor, that is true.

Plaintiff's counsel went on to argue that despite the admission that Strong is an officer of Bliss Township, because the work of digging graves is done pursuant to contracts with individuals or funeral homes, it does not fall within his duties as an officer of the Township, but rather his duties as a contractor.

Strong testified in his deposition that the typical pattern for his grave digging work as sexton started with a call from a funeral home, informing him that a new grave was needed, at which point he would dig a hole. Either the funeral home or the family would pay him for this service. Bliss Township's Cemetery Rules include these two entries in the Funerals and Interments section:

2. No interment shall take place without a Burial Permit which [sic] shall be presented by the funeral director upon arrival at the cemetery.
3. Funeral directors making arrangements for burials shall be responsible for all interment charges.

Read together, these provisions suggest that the funeral director is required to contract for and pay for services related to burial in accordance with the township's rules. The rules therefore require that the business of digging graves and completing burials be executed by private contract. However, by plaintiff's own admission during the hearing on the summary disposition motion, one must be sexton of the township in order to perform these tasks, excavating and burying. It seems apparent then that the "two hats" worn by defendant Strong are essentially one hat, in that, in accordance with the township's rules, he effectuates his governmental functions as sexton pursuant to private contracts.

We agree with the trial court that Strong was acting in his capacity as an officer of Bliss Township when he dug the graves, and governmental immunity therefore applies.

Plaintiff next argues that summary disposition was inappropriate because reasonable minds could differ as to whether Strong's conduct in leaving the hole unmarked was grossly negligent. We disagree.

Gross negligence means "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). The determination whether a governmental employee's conduct constituted gross negligence under MCL 691.1407 is generally a question of fact, but if reasonable minds could not differ, a court may grant summary disposition. *Tarlea v Crabtree*, 263 Mich. App. 80, 88; 687 N.W.2d 333 (2004). Strong's deposition testimony indicated that in the time he had served as sexton, since 1990, it had been his practice to dig new graves two to three days before they would be used, and that these open holes were never marked. Strong also stated that the former sexton had explained the processes of the job, and that Strong followed those processes.

When this matter was considered by this Court before, this Court found that "[t]he average person making a casual inspection of the area would have noticed the large hole in the ground and the danger presented," and therefore concluded that the danger was open and obvious. Plaintiff argues that the trial court erred in finding as a matter of law that Strong was not grossly negligent because the hazard was open and obvious. Plaintiff is correct that Strong is not entitled to the protection of the open and obvious doctrine. However, we find that the trial court did not decide the question of gross negligence based on the open and obvious doctrine. Rather, the court simply made a logical connection between the open and obvious nature of the large hole in the ground, and the lack of recklessness that inhered in leaving it unmarked:

So the record here establishes beyond dispute that the open grave was something that a reasonable person should have discovered. And the risk associated with it was open and obvious. And also, the reason that Plaintiff fell in and was injured, by her own testimony, is that she was looking elsewhere as she was walking.

On the facts of this case, reasonable minds could not differ. Defendant Strong's conduct was not so reckless as to demonstrate a substantial lack of concern for whether injury results.

Presumably, the trial court assumed that Strong believed the size of the hole was marker enough, and reasoned that he therefore did not leave it unmarked because he did not care whether anyone

was injured, but because he did not believe there was a reasonable possibility that anyone would be injured.

We agree. Although the open and obvious doctrine does not protect defendant Strong, the fact that the hole was so open and so obvious a hazard suggests that it was not grossly negligent to leave it unmarked. Reasonable minds might differ as to whether Strong was negligent<sup>3</sup> in leaving the hole unmarked, but we find that they could not differ as to whether his conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury results. There was no material question of fact as to gross negligence, and the trial court did not err in granting summary disposition on that ground.

Affirmed.

/s/ William C. Whitbeck

/s/ William B. Murphy

/s/ Jessica R. Cooper

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<sup>3</sup> Even if we did find Strong's conduct was negligent, evidence of ordinary negligence does not create a question of fact regarding gross negligence. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).