IN THE COURT OF APPEALS OF IOWA

No. 2-1121 / 12-0560
Filed February 27, 2013

JACK ROBERT CROWLEY and VERONICA CROWLEY,
Plaintiffs-Appellants,

vs.

KNUTSON CONSTRUCTION COMPANY and WILLIAM KIRK,
Defendants-Appellees.

Appeal from the Iowa District Court for Cedar County, Mary E. Howes, Judge.

Plaintiffs appeal from summary judgment in favor of defendants. **AFFIRMED.**

Gregg Geerdes, Iowa City, for appellants.

Donald Thompson and Kevin Papp of Bradley & Riley, P.C., Cedar Rapids, for appellee Knutson Construction.

Douglas Simkin of Douglas W. Simkin Law Firm, P.C., Tipton, for appellee William Kirk.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

Plaintiffs Jack and Veronica Crowley (Jack) appeal from the district court's grant of summary judgment in favor of defendant Knutson Construction Company (Knutson). They contend the court erred in failing to find Knutson vicariously liable for the actions of its employee, William Kirk, for damages arising from Kirk's placement of concrete barriers across the access road to their property. We affirm.

I. Background Facts and Proceedings

Since at least 1983 Jack Crowley and his brother John have been involved in disputes over ownership of about twenty acres of property in Cedar County, Iowa. Defendant William Kirk is Jack and John's nephew. Initially the dispute was a boundary dispute between the Crowley family (including Jack, John, and their father John) and B.L. Anderson. The court resolved the dispute by summary judgment in favor of Anderson. At the time, Jack owned about 4.5 acres bordering the disputed parcel. Jack and his wife moved onto his property in 1982. In 1988 after his divorce, Jack conveyed his 4.5 acres to his father, who conveyed it to John in 1995. Jack rented the property from his brother John until 2009, when he moved at his brother's request when his six-year lease expired.

Even though the court determined the twenty-acre parcel belonged to Anderson, the Crowley family ignored the ruling and used the property for recreation, livestock, and crops. In 2001 Jack and his wife Veronica purchased the property from Anderson's successor-in-interest. Access to John's 4.5 acres where Jack lived was by a lane through Jack's twenty-acre parcel. In May 2009 John installed a barbed wire fence along the south side of the lane, effectively

cutting off the southern portion of Jack's twenty-acre tract from the Cedar Bluff-Mechanicsville Road. At the end of May 2009 John's nephew, William Kirk, at John's request, placed concrete road barriers across the entrances to the lane at the Cedar Bluff-Mechanicsville Road, cutting off all access to Jack's twenty-acre tract. At the time, Kirk was employed by Knutson Construction, and he used a company vehicle to place the barriers (owned by Knutson) across the entrances to the lane. Jack built a new access road into his property.

Jack filed a petition for possession of his twenty-acre tract and an application for a temporary and permanent injunction. John filed a counterclaim, alleging adverse possession of the twenty acres. After a hearing on the injunction in October 2009, the court found John had "improperly impeded" the use of the access lane, issued an injunction prohibiting the fence along the lane and any barriers at the entrances from the Cedar Bluff-Mechanicsville Road, and ordered the removal of the fence and barriers. Following a trial on the petition for possession in October 2010, the court found Jack owned the twenty-acre parcel and John had an easement by acquiescence across Jack's land to John's 4.5 acre parcel. The court issued a writ of possession to Jack and ordered John to pay Jack damages in the amount of $1500.

In March 2011 Jack filed a seven-count suit against Knutson Construction for damages based on Kirk's use of a company truck and crane to place the barriers on the access lane to his property. The petition alleged the company was vicariously liable based on (1) negligence, (2) nuisance, (3) operation of a motor vehicle with consent, (4) intentional infliction of emotional distress,

(5) conspiracy, and (6) negligent entrustment. The petition also alleged entitlement to punitive damages.

In January 2012 Knutson moved for summary judgment on all seven counts. The motion came on for hearing in February. In March, the court issued its ruling, granting summary judgment in favor of Knutson on all seven counts.

II. Scope and Standards of Review

We review the trial court's grant of summary judgment for correction of errors at law. *McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 371 (Iowa 2012). Summary judgment is appropriate "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Seneca Waste Solutions, Inc. v. Sheaffer Mfg.*, 791 N.W.2d 407, 411 (Iowa 2010) (quoting Iowa R. Civ. P. 1.981(3)). "A genuine issue of material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Wilkins v. Marshalltown Med. & Surgical Ctr.*, 758 N.W.2d 232, 235 (Iowa 2008). When reviewing the trial court's decision to grant summary judgment, "we examine the record in the light most favorable to the nonmoving party, and we draw all legitimate inferences the evidence bears in order to establish the existence of questions of fact." *Kragnes v. City of Des Moines*, 714 N.W.2d 632, 637 (Iowa 2006).

III. Merits

A. Iowa Code section 321.493. The Crowleys contend Knutson is liable for damages under Iowa Code section 321.493 (2009). That section provides, in

relevant part, "in all cases where damage is done by any motor vehicle by reason of negligence of the driver, and driven with the consent of the owner, the owner of the motor vehicle shall be liable for such damage." Iowa Code § 321.493(2)(a). The Crowleys argue factual issues exist concerning whether Kirk used the truck with consent and whether he drove or "operated" the truck. They also assert the truck was a "motor vehicle," Kirk was negligent, and the truck caused them damage.

The trial court concluded damages could not be awarded under this section for several reasons. First, Kirk's action in placing the concrete barriers was an intentional act, not a negligent act. Second, Kirk was not "operating" the truck when the damage occurred. Third, there is no liability under the statute unless there is damage done by the motor vehicle. The court concluded:

> If there is any nexus between Kirk's actions and the Plaintiffs' alleged damages, it is a result of Kirk's intentional use of the crane which is mounted on the boom truck to place concrete barriers on and across private drives, not the alleged negligent operation of the motor vehicle upon which the crane was mounted.

Viewing the evidence in the light most favorable to the Crowleys, we agree with the trial court's determination there is no liability under section 321.493. The evidence supports a finding the truck is a motor vehicle, and it was driven with the consent of Knudson construction. However, Kirk's actions were intentional, if misguided, not negligent. At the time Kirk placed the concrete barriers, he was operating a crane mounted on the truck and powered through the power-take-off from the truck's engine. The "motor vehicle," however, was parked and held suspended off the ground by the outriggers. We, like the trial court, decline to extend the term "operating" as used in criminal, operating-while-intoxicated cases

to include Kirk's actions at the time he was placing the barriers. He was not "operating" or driving the truck. *See id.* ("motor vehicle . . . *driven* with the consent of the owner" (emphasis added)). Furthermore, any alleged damages were not caused by the motor vehicle, but by the concrete barriers blocking access to the property. We affirm the grant of summary judgment on this claim.

B. Nuisance. The Crowleys contend Knutson is liable because its barriers and vehicle were used to create a nuisance, and Knutson knowingly chose to continue the nuisance. They argue Kirk intentionally created a nuisance as defined in Iowa Code section 657.2(5), and once Knutson was informed of the situation, it ordered the barriers be left in place until a court ordered their removal.

The trial court concluded Kirk was not acting within the scope of his employment when he blocked the access lane and Knutson did not authorize or ratify Kirk's actions.

"Under the doctrine of respondeat superior, an employer is liable for the negligence of an employee committed while the employee is acting within the scope of his or her employment." *Riniker v. Wilson*, 623 N.W.2d 220, 231 (Iowa Ct. App. 2000).

> ["Scope of employment"] refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.
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> . . . It has been said that in general the servant's conduct is within the scope of his employment if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master.

Vlotho v. Hardin Cnty., 509 N.W.2d 350, 354 (Iowa 1993) (citations omitted). We conclude the trial court correctly determined Kirk was not acting within the scope of his employment when he used Knutson's truck and barriers to block access to his uncle's property.

The Crowleys also argue Knutson "substantially participated in continuing or maintaining the nuisance," but acknowledge the trial court did not address this issue in its ruling. Issues must be both raised and decided by the trial court to preserve error. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). If the trial court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). We find no evidence the Crowleys raised this issue in a motion under Iowa Rule of Civil Procedure 1.904(2) and obtained a ruling. This issue is not preserved for our review. We affirm the trial court's grant of summary judgment on the nuisance claim.

C. Negligent Supervision. The Crowleys contend Knutson was negligent in failing to supervise Kirk and in allowing him unrestricted access to the materials used to damage them. No claim for negligent supervision appears in the petition. The trial court's ruling does not address this new claim of negligent supervision. We do not consider issues raised for the first time on appeal, and therefore decline to address this claim. *Meier*, 641 N.W.2d at 537.

D. Ratification of Kirk's Actions. The Crowleys contend Knutson is liable because it ratified both Kirk's negligent acts and his creation of the nuisance. In ruling on Count I (negligence), the trial court found Knutson did not

ratify or approve Kirk's actions. When Kirk told his employer in October 2009 about his actions placing the barriers in May 2009, Knutson's vice-president and general manager of the Iowa City location where Kirk worked expressed his displeasure Kirk had involved Knutson in a family dispute. Although Knutson continued to employ Kirk for a time, it later terminated him because of his actions. Although an employer can be liable for an employee's negligent acts if the employer ratifies those acts, merely continuing to employ an individual is not sufficient to indicate ratification. *See Everingham v. Chicago, B. & Q. R. Co.*, 127 N.W.2d 1009, 1010-11 (1910) ("When there is no original liability for the act of a servant, because at the time of the negligence the servant was acting in his own personal business, the master does not become liable merely by reason of the fact that he thereafter retains the servant in his employ."). The Crowleys failed to demonstrate Knutson's "intent, either express or implied, to ratify" Kirk's acts. *See King v. Gustafson*, 459 N.W.2d 651, 653-54 (Iowa Ct. App. 1990) (listing the basic elements of ratification).

The Crowleys argue Knutson's decision not to remove the barriers after Kirk explained what he had done constitutes ratification of the nuisance. They assert there is evidence Knutson knew beforehand of Kirk's plans. They point to Kirk's October 2009 testimony in the injunction proceeding between the Crowleys, where Kirk claimed he told his employer about the placement of the barriers. The Crowleys suggest this testimony creates a fact issue as to when Knutson knew of Kirk's actions. In his testimony, Kirk did not indicate when he told his employer or what he said. In its summary judgment ruling the trial court concluded Knutson was not aware of Kirk's use of the barriers until October

2009, several months after their placement. There is no genuine issue of fact concerning when Knutson learned of Kirk's actions.

The Crowleys also argue Knutson "knowingly allowed the nuisance caused by its barriers to continue even though it had full authority and ability to abate this statutory nuisance by simply retrieving these barriers." They go so far as to assert Knutson "*ordered* that the barriers remain even though this was contrary to a previous court order which Knutson arrogantly concluded was 'improper.'" (Emphasis added.) As we noted above in our analysis of the Crowleys' nuisance claim, they acknowledge the trial court did not address their contention Knutson "substantially participated in continuing or maintaining the nuisance," in its ruling. We conclude rephrasing the earlier argument does not change the conclusion it is not preserved for our review.

E. Punitive Damages. The Crowleys contend Knutson is liable for punitive damages. They assert (1) Knutson knew beforehand of Kirk's intent to place the barriers and did not stop him, (2) Knutson knew placing the barriers on Jack's property was contrary to the legal rights established by a previous court order, and (3) Knutson decided to continue the nuisance even though it had full control over the barriers.

The trial court framed the question as whether the Crowleys could prove, Knutson's conduct "constituted a willful and wanton disregard for the rights of [the Crowleys] and caused them damage." *See* Iowa Code § 668A.1(1). The court noted Iowa follows the restrictive rule in the Restatement (Second) of Torts, section 909 (1979), which allows for punitive damages against an employer for the willful acts of an employee if the employee was acting within the scope of

employment and either was in a managerial capacity or company management ratified or approved the employee's actions. *See Briner v. Hyslop*, 337 N.W.2d 858, 861, 867 (Iowa 1983) (adopting the Restatement rule). Having previously determined Kirk was not acting within the scope of his employment and Knutson did not approve of or ratify Kirk's actions, the court concluded Knutson was entitled to summary judgment on this claim.

We have affirmed the trial court's determination Kirk was not acting within the scope of his employment when he placed the barriers. We also have affirmed the court's determination Knutson did not ratify or approve of Kirk's actions. Accordingly, there is no basis for an award of punitive damages. *See Briner*, 337 N.W.2d at 867.

IV. Summary

The trial court committed no error in granting summary judgment in Knutson's favor. The Crowleys' claims concerning continuing or ratifying the nuisance and negligent supervision are not properly before us on appeal. We affirm the trial court's summary judgment order.

AFFIRMED.