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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 3, 2026 Session

TIMOTHY KELLY v. BETH BHATNAGAR ET AL.

Appeal from the Chancery Court for Davidson County
No. 22-0824-IV Russell T. Perkins, Chancellor

No. M2025-01354-COA-R3-CV

A property owner relocated several monuments from a historic family burial ground located on his property and later filed a petition seeking to terminate the land's use as a burial ground. The defendants, who are other descendants of those identified on the monuments, denied that the burial ground should be closed and filed a counterclaim seeking injunctive relief. After a bench trial, the court found that the statutory requirements for closure were not met and dismissed the petition. The trial court entered an injunction ordering the return of the monuments and the honoring of a defendant's wish to be buried there. We reverse the portion of the order regarding the defendant's burial rights. Finding no other reversible error, we affirm in all other respects.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed
in Part and Reversed in Part**

ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., C.J., and JOHN W. MCCLARTY, P.J., E.S., joined.

Sean R. Aiello, Franklin, Tennessee, for the appellant, Timothy Kelly.

Elizabeth Boston Malloy and David J. Zeitlin, Nashville, Tennessee, for the appellees, Bill Kelly, Carole Kelly, and Katheryn Anne McCurdy-Ivey.

MEMORANDUM OPINION¹

FACTUAL AND PROCEDURAL BACKGROUND

This is an intrafamily dispute over a historic burial ground, known as “Scruggs Cemetery,” on Timothy Kelly’s property in Davidson County. Mr. Kelly² describes himself as “a believed descendant” of several Scruggs family members whose monuments were part of the burial ground. In June 2022, Mr. Kelly filed a petition in Davidson County Chancery Court seeking to close the “Scruggs Cemetery” as a burial ground pursuant to Tenn. Code Ann. § 46-4-101 to -104. The petition alleged that the burial ground formerly contained the following monuments: a box tomb for William Scruggs (died in 1859), a box tomb for Sarah W. Scruggs (died in 1856), a “tall spire” for Sarah Scruggs (died 1849),³ and a headstone for Rachel Waldron (died 1851). The petition further alleged that Mr. Kelly relocated monuments from their original location on the property, that no human remains had been transferred at that time, and that the “location of the original burial site containing the associated remains, if any ever existed, is unknown.” According to the petition, the monuments had been clustered around a large tree. The tree had been damaged by a storm, causing it to fall around the monuments. Mr. Kelly had relocated the monuments to Mount Hope Cemetery “to preserve the memorials and prevent future damage.”

The petition went on to state that, after the relocation of the monuments, Mr. Kelly had hired a company to perform ground-penetrating radar (“GPR”) on the property two separate times and that both GPR reports found that “no leading indicators of a burial were identified.” The petition also stated that the Tennessee Historical Commission (“THC”) had investigated the property and that THC agreed with the GPR company’s findings. Therefore, the petition alleged, “no human remains were ever located or intended to be located in the Scruggs Cemetery and . . . its classification as a ‘cemetery’ under Title 46 is incorrect,” meaning the cemetery should be declassified. Alternatively, the petition sought closure based on the burial ground’s alleged abandoned or neglected status. Mr. Kelly listed as defendants other descendants of the Scruggs lineage, including Beth

¹ Tennessee Court of Appeals Rule 10 provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION”, shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

² Because the primary parties in this dispute share a surname, for the sake of clarity we will refer to Timothy Kelly as Mr. Kelly and Bill Kelly by his full name.

³ Sarah W. Scruggs was William Scruggs’s wife, and according to Mr. Kelly, Sarah Scruggs was William and Sarah W. Scruggs’s “favorite daughter-in-law.”

Bhatnagar, Sarah Young, Ellen Woolaver, Bill Kelly, Carole Kelly, Patrick McCurdy, Michael McCurdy, Katheryn Anne McCurdy-Ivey, and all unknown descendants of William Scruggs, Sr., Sarah W. Scruggs, Sarah Scruggs, and Rachel Waldron (collectively, “Defendants”). Mr. Kelly also provided THC with notice of the petition.

The next month, Defendants filed an answer and counterclaim against Mr. Kelly, alleging that he had wrongfully removed the monuments from the Scruggs Cemetery and seeking an order requiring him to return the monuments at his expense or a judgment for the cost of returning them. The counterclaim alleged that, in early 2022, Mr. Kelly had moved the monuments from the Scruggs Cemetery to Mount Hope Cemetery in Williamson County without family or court approval and that this violated Tenn. Code Ann. § 46-8-103.⁴

A final hearing was held over July 29–30, 2024. The testimony given at the trial showed the following: the property had been in Mr. Kelly’s family since the 1800s and the monuments were for “the founding ancestors, Great Uncle Billy and his wife and their favorite stepdaughter.” The cemetery also contained a monument for Rachel Waldron; however, it was unknown what her relation to the family was, and testimony was given that her monument “was always leaning against the tree like somebody had the idea to put it here.” Prior to their removal, there were two box graves, an obelisk, and the Waldron headstone. In late 2021, a tornado damaged an adjacent tree, causing it to fall on the monuments. Mr. Kelly then began considering relocating the monuments to the family’s plot at Mount Hope Cemetery and had a contractor transfer the monuments. Mr. Kelly testified that he did not believe there were any human remains under the monuments and believed that the site had been wrongly classified as a cemetery.

George Perry, the historic cemetery preservation specialist at THC, testified that he had visited the property and reviewed the GPR results. Mr. Perry created a site report (“the THC report”) based on his visits to the property, the GPR reports, and his research on the burial ground. The THC report, which was admitted as an exhibit, stated that:

Perry consulted with Ben Nance at the Tennessee Department of Archeology for the department’s professional opinion, since Perry has only limited

⁴ Mr. Kelly filed a motion to dismiss the counterclaim, asserting that the statutes cited by Defendants were inapplicable to the proceedings and that they did not provide a private cause of action. While this motion was still pending, in September 2022, Mr. Kelly filed a motion for partial summary judgment regarding whether the Scruggs Cemetery was properly classified as a cemetery or burial ground under the statute and whether its status as a burial ground should be terminated. After a hearing on the motions, the trial court denied the motion for summary judgment, finding that genuine disputes of material fact remained regarding whether the Scruggs Cemetery was used or intended to be used as a burial ground for human remains. The trial court partially granted the motion to dismiss as to two statutes pursuant to which Defendants purported to bring their action but denied it as to the remaining statute. Mr. Kelly filed a motion to alter or amend, and the trial court denied this motion.

knowledge regarding GPR interpretation. Mr. Nance advised that although there were some minor aspects he would have liked to have seen in the report, the report contained what it needed to show that there were no reliable signs of burials in the 2 areas surveyed. This may corroborate the claim that the originally [sic] markers located on the Scruggs Cemetery plat were perhaps memorials rather than graves and that the actual cemetery may have been nearby but not within the current cemetery plat boundaries.

The THC report stated its conclusion as:

After consulting with the Department of Archeology, the Tennessee Historical Commission's Cemetery preservation specialist Graham Perry supports the findings as presented in the second report issued by GPRS tendered to this office in rough draft form (GPRS report available upon request). This does not mean however that the Scruggs Cemetery does not exist on the property elsewhere as tax maps are notoriously inaccurate and it is acknowledged by several sources to exist. Had markers and the tree remained at the site prior to THC's involvement, additional clarity would have been likely.

Ultimately, Mr. Perry testified that he believed that the burials associated with the Scruggs Cemetery were likely located elsewhere on the property. Mr. Perry also testified that the inscriptions on the monuments were sandblasted, which he opined was not available in the 1850s. Because of this, he stated that he believed that "they were placed later, probably, I mean, at least 10 to 20 years later," and that the monuments were possibly memorials rather than grave markers. Phil Hodge, an employee of the Tennessee Department of Environment and Conservation and the State Archeologist for Tennessee; Russell Grubb, an employee of the GPR service used; and Bill Kelly also testified.

The trial court entered a final order in August 2025, dismissing Mr. Kelly's amended petition and finding that the Scruggs Cemetery had not been abandoned, that it was not in an abandoned or neglected condition, and should therefore maintain its status as a burial ground. Based upon testimony from the expert witnesses, the court found that there could be human remains on the property, although their exact location was unknown. The trial court found in favor of Defendants on their counterclaim and declared that Mr. Kelly "wrongfully relocated the family monuments now situated at Mt. Hope Cemetery during 2022 without notice to his family or court approval." The trial court denied Defendants' request that Mr. Kelly be ordered to move the markers back to the Scruggs Cemetery and ordered that Bill Kelly be allowed to be buried in the Scruggs Cemetery upon his death and that an appropriate marker be placed. Defendants filed a motion to alter or amend the order, requesting that it be amended to direct the markers to be returned to the property. The court entered an order modifying the previous order, directing Mr. Kelly to return the markers at his expense. Mr. Kelly timely appealed and presents the following issues:

1. Whether the trial court erred in denying Mr. Kelly’s request to terminate and otherwise delist the “Scruggs Cemetery” as a historic burial ground and tax-exempt cemetery plot under Tenn. Code Ann. § 46-4-103 and the applicable burial codes.
2. Whether the trial court erred in ordering Mr. Kelly to return the monuments and markers from Mt. Hope Cemetery to their original location on his property at his own expense.
3. Whether the trial court erred in ordering Defendant Bill Kelly’s preference to be buried in the “Scruggs Cemetery” should be honored and that an appropriate Marker should be placed where his body is interred when he passes away.

STANDARD OF REVIEW

After a bench trial, we review the trial court’s findings of fact de novo upon the record with a presumption of correctness, unless the preponderance of the evidence is otherwise. TENN. R. APP. P. 13(d); *Lovlace v. Copley*, 418 S.W.3d 1, 16 (Tenn. 2013). Appellate courts afford “considerable deference” to factual findings by a trial court based on witness credibility and will not reverse a trial court’s “credibility-based factual findings” unless there is clear and convincing evidence to the contrary. *Easley v. City of Memphis*, 699 S.W.3d 268, 270 (Tenn. 2024) (quoting *Mansell v. Bridgestone Firestone N. Am. LLC*, 417 S.W.3d 393, 399 (Tenn. 2013)). This case will also necessarily call upon us to interpret the relevant statutes. Interpretation of a statute presents a question of law, which we review de novo upon the record with no presumption of correctness. *Flade v. City of Shelbyville*, 699 S.W.3d 272, 281 (Tenn. 2024).

ANALYSIS

I. Closure of the Scruggs Cemetery

We first address the trial court’s finding that the Scruggs Cemetery should not be closed. We begin with a discussion of the relevant statutes and then turn to whether their requirements were met. Finding that they were not, we affirm.

A. Closure generally

The sanctity of burial grounds has long been recognized. *See State ex rel. Comm’r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 745-46 (Tenn. Ct. App. 2001). Nevertheless, “American common law recognized that human remains could be disinterred and reinterred elsewhere when their burial place is no longer under the care of the living or has lost its character as a burial ground.” *Id.* at 746. Although the “rules and principles governing burials and the disposition and reinterment of human remains were [previously] chiefly court-made,” in 1949, the General Assembly passed legislation

governing burial grounds in this state. *Id.* at 749-50. As relevant here, the legislature passed Tenn. Code Ann. § 46-4-101, which authorizes:

[C]losure and reinterment (1) when the burial ground was abandoned [Tenn. Code Ann. § 46-4-101(1)], (2) when the burial ground was in a neglected or abandoned condition [Tenn. Code Ann. § 46-4-101(2)], (3) when “conditions or activities about or near the burial ground . . . render the further use of same . . . inconsistent with due and proper reverence or respect for the memory of the dead” [Tenn. Code Ann. § 46-4-101(3)], and (4) when the continued use of the property as a burial ground became “unsuitable” for any other reason [Tenn. Code Ann. § 46-4-101(3)].

Id. at 750. The statute has changed little since its original enactment. *See* Tenn. Code Ann. §§ 46-4-101 to -104. This Court previously stated the procedure for terminating land for use as a cemetery thusly:

The statutory procedure devised by the General Assembly for closing a burial ground is straightforward. Any “interested person or persons” or any municipality or county in which the burial ground is situated may file suit in the chancery court sitting in the county where the burial ground is located. Tenn. Code Ann. § 46-4-103(a). The plaintiff or plaintiffs must name as defendants (a) “interested persons” who are not plaintiffs and (b) the owners of the land or of any right or interest in the land. Tenn. Code Ann. § 46-4-103(b). Following a hearing, the trial court “shall” grant the request to close the burial ground if the following four conditions are met:

- (1) any one of the conditions specified in Tenn. Code Ann. § 46-4-101 exist;
- (2) the property is unsuitable for use as a burial ground for any reason or the continued use of the property as a burial ground is inconsistent with due and proper reverence or respect for the memory of the dead;
- (3) definite and suitable arrangements have been made or will be made for the reinterment of the human remains; and
- (4) the removal and reinterment of the human remains will be “done with due care and decency, and that suitable memorial or memorials will be erected at the place of reinterment.”

Id. at 750-51 (quoting Tenn. Code Ann. § 46-4-104). The trial court found that none of the conditions contained in Tenn. Code Ann. § 46-4-101 existed, thus preventing closure of the cemetery.

B. The Scruggs Cemetery

The crux of Mr. Kelly's argument is that the trial court erred in finding that he did not offer persuasive evidence that the conditions found in Tenn. Code Ann. § 46-4-101 existed. He points to various pieces of evidence he submitted and asserts that, on the whole, these show that the trial court's decision "was arbitrary." We must respectfully disagree.

When interpreting a statute, "[w]e give the words of a statute their 'natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose.'" *State v. Deberry*, 651 S.W.3d 918, 925 (Tenn. 2022) (quoting *Ellithorpe v. Weismark*, 479 S.W.3d 818, 827 (Tenn. 2015)). Mr. Kelly notes that the statute does not provide standards for determining when a cemetery is in fact abandoned or in an abandoned or neglected state. When a statute does not provide definitions, "we look to authoritative dictionaries published around the time of a statute's enactment." *Id.*

The word "abandoned" is defined as "given up: deserted, forsaken." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3rd ed. 1961). "Neglected" means "not properly or sufficiently attended to or cared for" or having a condition "that evidences improper or insufficient attention or care." *Id.* Therefore, a burial ground that has been abandoned has been deserted. A burial ground is in a neglected or abandoned condition when it is in a condition showing that it has been deserted or that it has been insufficiently attended to with due care or attention.⁵

Applying the foregoing to the facts of this case, we conclude that the Scruggs Cemetery was not abandoned. Mr. Kelly's own actions show as much. The burial ground was on an actively managed and cared-for property. For instance, when a nearby tree fell onto the monuments, Mr. Kelly hired a company to remove it. At a truly abandoned burial ground, such a fallen tree would linger in dereliction, fated to remain until it decayed away. This was not the case here, and it would be somewhat nonsensical to find that an actively cared for burial ground was abandoned. Mr. Kelly concedes that he was actively caring for the property, asserting that it was proven at trial that "[n]o family members, *other than Mr. Kelly*, took care of the monuments in the area, contributed financially, or otherwise assisted in cutting grass, clearing vines, or other maintenance." Further, Mr. Kelly concedes that a family reunion was held on the property in 2016 and that Bill Kelly visited the site in 2019. Evidence of visitation within the last decade (a relatively short time given the cemetery's age) also indicates that the burial ground had not been abandoned.

⁵ Tennessee Code Annotation section 46-4-101 also provides that closure may be based upon the court finding that activities or conditions around the cemetery render the property unsuitable for continued use for interment. It is unclear from Mr. Kelly's briefing whether he is relying specifically on this subsection. As discussed in this opinion, the conditions around the burial ground certainly did not render the property unfit. Further, the record reflects that there were no activities around the property that would render it unfit.

We further conclude that the burial ground was not in an abandoned or neglected condition. It may be fairly stated that the monuments were not in pristine condition prior to their relocation. However, the burial ground was far from being in an abandoned or neglected condition. As Mr. Kelly conceded, he was taking care of the property. It is hard to conclude that the burial ground was in an abandoned or neglected state when Mr. Kelly concedes that he was paying for “cutting grass, clearing vines, [and] other maintenance.”

The other evidence to which Mr. Kelly directs us goes towards his stated motivation for seeking the closure of the cemetery: his belief that there were no human remains present and his desire to change its status to match his perceived understanding of the property. Mr. Kelly asserts that the Scruggs Cemetery was wrongly classified as a burial ground years ago; however, whether the cemetery was incorrectly classified is irrelevant to the closure statute’s demands. Regarding the presence of remains, Mr. Kelly asserts that he proved at trial that his father “told him unequivocally” that no human remains were there and that the GPR testing found no evidence of graves. However, after Mr. Kelly relocated the monuments, the area surrounding the burial ground was disturbed, thereby making the exact location of the monuments difficult to determine. Further still, he asserts that the monuments might have been placed as memorials rather than actual graves. It is unclear what relevance this has—for memorials exist in burial grounds just as readily as graves. The question of whether there were human remains in the Scruggs Cemetery does not go towards whether the burial ground met the requisite conditions for closure, and we need not determine whether the proof showed if remains were present. Therefore, we agree with the trial court that the proof introduced at trial was insufficient and affirm.⁶

II. Injunctive relief

Mr. Kelly’s remaining issues both relate to the injunctive relief the trial court granted. He asserts that the trial court erred in ordering him to return the monuments and in ordering that Bill Kelly’s desire to be buried in the Scruggs Cemetery be honored. For the reasons discussed below, we conclude that the trial court erred in ordering that Bill Kelly’s wish be honored but discern no other reversible error.

A. *Standards governing injunctions*

The trial court entered a permanent mandatory injunction against Mr. Kelly. Mandatory injunctions “alter[] the status quo and order[] the defendant to take action to remedy the alleged wrong.” *Fisher v. Hargett*, 604 S.W.3d 381, 394-95 (Tenn. 2020). The entry of a mandatory injunction is an extraordinary remedy and should only be done in

⁶ Mr. Kelly also points out that the monuments have since been moved. However, the relocation of the monuments has no bearing on the burial ground’s existence. As Mr. Perry opined, “you can’t just move monuments and hope a cemetery disappears.” Further still, allowing a property owner to move monuments from a cemetery and use that to terminate the burial ground’s status would completely contravene the purpose of the termination statute.

“exceptional circumstances.” *Id.* at 395. We review the decision to grant or deny a permanent injunction under the abuse of discretion standard. *Curb Recs., Inc. v. McGraw*, No. M2011-02762-COA-R3-CV, 2012 WL 4377817, at *3 (Tenn. Ct. App. Sept. 25, 2012). “A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.” *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).

A court deciding whether to grant permanent injunctive relief typically “has ruled in favor of the applicant on the merits and must determine whether permanent injunctive relief is an appropriate remedy.” *McGraw*, 2012 WL 4377817, at *4 (citing *Vintage Health Res., Inc. v. Guiangan*, 309 S.W.3d 448, 467 (Tenn. Ct. App. 2009)). The general rule is that a mandatory injunction should only be granted in “extreme cases and when courts of law are unable to afford adequate redress, or when the injuries cannot be compensated in damages.” *Franklin Square Towne Homeowners Ass’n Inc. v. Kyles*, No. W2016-02018-COA-R3-CV, 2017 WL 1952833, at *7 (Tenn. Ct. App. May 10, 2017) (quoting *Morrison v. Jones*, 430 S.W.2d 668, 673 (Tenn. Ct. App. 1968)).

B. Return of the monuments

The trial court initially declined to require Mr. Kelly to return the monuments, despite finding that he had “wrongfully relocated the family monuments now situated at Mt. Hope Cemetery during 2022 without notice to his family or court approval.” The court found that “[a]s a matter of equity and the applicable statute,” it “probably” had authority to order Mr. Kelly to return the monuments to their original location but declined to do so. Bill Kelly and Katheryn McCurdy-Ivey filed a motion to alter or amend, which the court granted and amended the final order to “order, direct, and enjoin” Mr. Kelly to return the monuments to their original location in the Scruggs Cemetery at his expense. The court concluded that, upon reflection, “mere declaratory relief” was insufficient “to remedy the wrong adjudicated by the Court to have been committed” by Mr. Kelly.

The trial court awarded injunctive relief under Tenn. Code Ann. § 46-8-103, which is titled “Protection of gravesites from disturbance; transfer of remains,” and provides as follows:

- (a) A deed for real property that indicates the presence of a gravesite or crypt containing human remains on the property conveyed obligates the immediate and future buyer or buyers of the property to protect the gravesite or crypt from disturbance. The owner of real property has the responsibility for taking appropriate action, prior to conveying the property, to ensure that the deed reflects the presence of the gravesite or crypt on the property.
- (b) Real property that has a deed that reflects the presence of human remains on the property is protected from disturbance or development as follows:

- (1) A gravesite may not be disturbed in the area of ten feet (10') surrounding the perimeter of the gravesite; and
- (2) A crypt may not be disturbed in the area of five feet (5') surrounding the perimeter of the crypt.
- (c) The owner of real property that has a deed that reflects the presence of human remains on the property has the option of transferring the remains, at the owner's expense, pursuant to the procedure for termination of use as a cemetery in chapter 4 of this title. However, prior to filing any action in chancery court to transfer the remains located in a gravesite or crypt, the proponent of the action shall first publish a notice in a newspaper of general circulation within the county in which the gravesite or crypt is located. The notice shall include the name of the proponent of the action, the location of the property where the remains are located and any name that can be discerned from the site of any person there interred. Upon complete transfer of all human remains from the property that are properly described on the deed, the buyer has the right to the use of the area previously containing the remains as is consistent for the remainder of the property.

Id. The chapter the foregoing statute is located in provides that it is “intended to provide notice to buyers of property with known burial grounds and gravesites.” *Id.* § 46-8-101.

Regarding the injunctive relief, Mr. Kelly first asserts that Tenn. Code Ann. § 46-8-103 did not provide Defendants with a private right of action upon which the court could base its injunctive relief. However, we conclude that we need not determine whether this statute provided defendants with a private right of action because we conclude that the return of the monuments was the appropriate relief based on the trial court's finding that the Scruggs Cemetery should not be closed. Therefore, we conclude that this issue is pretermitted. *See Com. Painting Co. Inc. v. Weitz Co. LLC*, --- S.W.3d ---, No. W2019-02089-SC-R11-CV, 2025 WL 1588451, at *2 (Tenn. June 5, 2025) (defining a pretermitted issue as “one that a court purposely disregards because it can resolve the case on other grounds”). Based on Mr. Kelly's failure to prove that the burial ground should be closed, we conclude that the return of the monuments was the right result. *See Innerimages, Inc. v. Newman*, 579 S.W.3d 29, 44 (Tenn. Ct. App. 2019) (quoting *Shutt v. Blount*, 249 S.W.2d 904, 907 (Tenn. 1952)) (“[A]ppellate courts have the authority to affirm a trial court's decision if it ‘reached the right result for the wrong reason.’”).⁷

⁷ We recognize that Defendants did not present this basis for relief to the trial court. Nevertheless,

“[f]ailure to make the argument before the trial court is not the proper focus of the right result for the wrong reason doctrine. Consideration of the facts in the record and whether additional factual presentation is necessary to resolve the newly-advanced reason is the proper focus of the application of the doctrine.”

Newman, 579 S.W.3d at 44 (quoting *Perry v. Commonwealth*, 280 Va. 572, 701 S.E.2d 431, 436 (2010));

We agree with the trial court that allowing Mr. Kelly's wrongful removal of the monuments would be an inequitable and unjust result. Tennessee has long protected burial grounds from wrongful interference. *See Hines v. State*, 149 S.W. 1058, 1060 (Tenn. 1911). Indeed, "[t]he early common law protected the sanctity of the grave by recognizing the 'right' to a decent burial and the 'right' to undisturbed repose." *Medicine Bird*, 63 S.W.3d at 746 (quoting *Carney v. Smith*, 437 S.W.2d 246, 247 (Tenn. 1969)). Decades ago, our Supreme Court stated that "[o]rdinarily equity will enjoin an unauthorized encroachment upon, or use of, lands dedicated to public burial purposes." *King v. Elrod*, 268 S.W.2d 103, 105 (1953).⁸ The Court further recognized that "[i]t is universally recognized that the sentiment of mankind, the right to decent burial is well guarded by the law, and relatives of a deceased are entitled to insist upon legal protection for any disturbance or violation of this right." *Id.*

It is often said that "[e]quity does not permit a wrong to be suffered without a remedy and will devise a remedy appropriate to the situation." *State ex rel. Flowers v. Tenn. Coordinated Care Network*, No. M2003-01658-COA-R3-CV, 2005 WL 427990, at *13 (Tenn. Ct. App. Feb. 23, 2005). Further still, "Tennessee courts have long recognized that '[e]quity regards that as done which in good conscience ought to be done.'" *Holt v. Holt*, 995 S.W.2d 68, 71 (Tenn. 1999) (quoting *McCann Steel Co. v. Third Nat'l Bank*, 337 S.W.2d 886, 891 (Tenn. 1960)). In this case, Mr. Kelly moved monuments from a burial ground and only then initiated a lawsuit to obtain court approval for delisting the burial ground. The trial court found that Mr. Kelly's actions were wrongful, and Mr. Kelly does not deny that he took these actions. Because of the unique, and hopefully uncommon, nature of Mr. Kelly's actions, we conclude that this relief was appropriate based on Mr. Kelly's failure to prove that closure of the Scruggs Cemetery was appropriate. Mr. Kelly's actions have effected a wrong, and Mr. Kelly has not provided this Court with a reason to find an abuse of discretion in the trial court's decision when the principles of equity so emphatically support it. No amount of monetary damages provide adequate relief, thereby justifying the injunctive relief awarded.

C. Burial rights

As to the portion of the injunction ordering that Bill Kelly's burial rights be honored, we agree with Mr. Kelly that this issue was not tried, either expressly or by implied consent.

see also TENN. R. APP. P. 13(b) (providing that this Court may exercise its discretion to "consider other issues in order, among other reasons: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process").

⁸ Mr. Kelly asserts that *King* does not support the imposition of an injunction requiring the return of the monuments. However, in *King*, the burial ground at issue was "completely obliterated, the gravestones graded off." 268 S.W.2d at 106. This the Court found, created the "obvious inference" that the burial ground "was no longer there." *Id.* This is not the same as the present case where the monuments have only been relocated, not obliterated.

We agree with Mr. Kelly that Defendants' pleadings did not expressly raise this issue. The statute cited by Defendants, Tenn. Code Ann. § 46-8-103, makes no mention of burial rights. Nowhere in their pleadings do Defendants ask the court for a declaration that Bill Kelly should be allowed to be buried in the Scruggs Cemetery. Defendants assert that the issue was before the trial court because Mr. Kelly stated in an affidavit that he wished to be buried there and testified that he had thought about starting a tradition of being buried there. None of what Defendants point to is included in a pleading such that the issue was directly before the trial court.

Defendants assert that, even if the issue was not directly included in a pleading, it was tried by consent. Rule 15.02 of the Tennessee Rules of Civil Procedure provides in pertinent part that “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” Courts find an issue has been tried by consent ““where the party opposed to the amendment knew or should reasonably have known of the evidence relating to the new issue, did not object to this evidence, and was not prejudiced thereby.”” *Abdur’Rahman v. Parker*, 558 S.W.3d 606, 622 (Tenn. 2018) (quoting *Zack Cheek Builders, Inc. v. McLeod*, 597 S.W.2d 888, 890 (Tenn. 1980)). Trial by consent will not be found, however, based on the “presentation of evidence that is relevant to both a pleaded issue and an unpleaded issue.” *Id.* The only evidence Defendants point to in support of the claim that this issue was tried by implied consent is Bill Kelly’s testimony. However, this testimony readily goes towards whether the burial ground was abandoned, which was a pleaded issue. Therefore, we conclude that this evidence was insufficient to support a finding of implied consent, and we reverse the portion of the order regarding Bill Kelly’s burial rights.⁹

CONCLUSION

The judgment of the trial court is affirmed in part and reversed in part. Costs of this appeal are assessed against the appellant, Timothy Kelly, for which execution may issue if necessary.

/s/ Andy D. Bennett

ANDY D. BENNETT, JUDGE

⁹ Defendants assert that “as a matter of common sense” this issue was before the trial court because if the Scruggs Cemetery continued to be classified as a burial ground, then Bill Kelly would have a right to be buried there. While this issue could be inferred from the finding that the Scruggs Cemetery should not be closed, the issue of burial rights was not before the trial court. A claim, possibly inferred from somewhat minimal evidence, was insufficient to try the issue by consent. Further still, an order mandating that he be allowed to be buried there and that a marker be placed at his grave was certainly not, even as a matter of common sense, put before the trial court.

We also do not agree with Defendants’ assertion that without the court’s order, Bill Kelly’s purported right to be buried in the Scruggs Cemetery will be unprotected. Mr. Kelly did not definitively seek to establish this right in his pleadings or even ask the court for this relief in a pleading. As reflected in this opinion, the burial ground will remain should he seek to properly put this claim before a court.