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Rising from the Dead: A Jurisprudential Review of Recent Cemetary and Human Rights Cases

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Rising from the Dead: A Jurisprudential Review of Recent Cemetery and Human Remains Cases[1]

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I. INTRODUCTION

According to the United States Centers for Disease Control and Prevention, the number of resident deaths in the United States in 2014 was approximately 2.6 million.[4] Indeed, today, the United States population is dying at a rate of 0.65 to 1 (deaths to births).[5] Considering the high rates of death to live births in the United States, it is not surprising that lawsuits related to death issues abound in one form or another. However, because of the wide variety of suits related to death matters, it is often difficult to follow

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4. Kenneth D. Kochanek et al., *Deaths: Final Data for 2014*, 65(4) NAT'L VITAL STAT. REPS. 1, 1 (2016), https://www.cdc.gov/nchs/data/nvsr/nvsr65/nvsr65_04.pdf.

5. *Id.* (depicting the where the calculated data derived from); Brady E. Hamilton et al., *Births: Final Data for 2014*, 64(12) NAT'L VITAL STAT. REPS. 1, 2 (2015), https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf.

any precedential threads.[6] Among the types of various issues that arise with regard to death that may, and sometimes do, lead to litigation in the United States include desecration,[7] mishandling or losing human remains,[8] control of remains,[9] property disputes,[10] regulatory issues,[11] and the mismanagement of cemetery trust funds.[12] Indeed, death care matters such as those discussed here are currently on the Supreme Court of the United States' docket for the October 2018 term.[13] Not only is the law of the dead complex in its breadth,

6. *See, e.g.*, Ryan M. Seidemann, *How Do We Deal with All the Bodies? A Review of Recent Cemetery and Human Remains Legal Issues*, 3 U. BALT. J. LAND & DEV. 1, (2013).

7. *See, e.g.*, *6 Things to Know About the Cemetery Vandalism in West Bridgewater*, WICKED LOC. (Mar. 16, 2016, 8:01 PM), bridgewaterwest.wickedlocal.com/article/20160315/NEWS/160316892 (discussing cemetery vandalism in Massachusetts); *Attorney for Neighbors of Desecrated African-American Cemetery: No Proof There is a Cemetery There*, GREENWICH FREE PRESS (Sept. 23, 2016), greenwichfreepress.com/news/government/attorney-for-neighbors-of-desecrated-africanamerican-cemetery-no-proof-there-is-a-cemetery-there-73657/ (describing a dispute over the historic location of a cemetery in Greenwich, Connecticut, and its relationship to a later development).

8. *See, e.g.*, Faimon A. Roberts, III, *Human Skulls, Bones and Animal Bones, Blood Found by Slidell Police on Home's Makeshift Altar*, NEW ORLEANS ADVOC. (Apr. 4, 2016, 1:49 PM), www.theadvocate.com/new_orleans/news/communities/st_tammany/article_a4cda606-bc1a-52fb-921d-b0f7cd79f2df.html (recounting the discovery of a seeming ritualistic altar in South Louisiana that contained human remains); Michelle R. Smith, G*rave Error: Rhode Island Cemetery Puts Men in Wrong Plots*, WAOW NEWSLINE 9 (Aug. 16, 2016, 1:45 PM), www.waow.com/story/32771894/grave-error-rhode-island-cemetery-puts-men-in-wrong-plots (reporting incorrect placement of human remains within a cemetery in Rhode Island).

9. *See, e.g.*, Carrie Salls, *Father Extends Fight to Control Late Son's Remains Up to Louisiana Supreme Court*, LA. REC. (June 14, 2016, 4:14 PM), louisianarecord.com/stories/510856523-father-extends-fight-to-control-late-son-s-remains-up-to-louisiana-supreme-court (recounting a Louisiana citizen's efforts to maintain exclusive control over his son's human remains); Meagan Flynn, *John O'Quinn's Former Lover Sues Funeral Home After It Transports His Body to Louisiana*, HOUS. PRESS (Mar. 29, 2016, 9:00 PM), www.houstonpress.com/news/john-oquinns-former-lover-sues-funeral-home-after-it-transports-his-body-to-louisiana-8280826 (noting problematic situation regarding the control of human remains).

10. *See, e.g.*, Jim Thompson, *Routing Greenway Through Cemetery is Sensitive Issue*, *Athens-Clarke Commissioners Told*, ONLINE ATHENS: ATHENS BANNER-HERALD (Aug. 10, 2016, 2:00 PM), onlineathens.com/mobile/2016-08-10/routing-greenway-through-cemetery-sensitive-issue-athens-clarke-commissioners-told (noting the sensitive nature of even seemingly harmless changes or impacts to a Georgia cemetery); Shirley Ruhe, *Church and Preservationists Clash over Graveyard: Preserving Cemetery Would Affect Expansion Plans*, ARLINGTON CONNECTION (Nov. 2, 2016), www.connectionnewspapers.com/news/2016/nov/02/church-and-preservationists-clash-over-graveyard/ (discussing troubles of development and cemeteries interacting in Virginia).

11. *See, e.g.*, David J. Mitchell, *State Cemetery Board Members Recuse Themselves in Dispute Over License*, ADVOC. (May 24, 2016, 8:34 AM), http://www.theadvocate.com/csp/mediapool/sites/Advocate/assets/templates/FullStoryPrint.csp? (discussing the Louisiana Cemetery Board's decision to wholesale recuse itself when allegations of bias were raised related to a pending licensure hearing); Lucy Berry, *Alabama Cemetery Owner Files Federal Lawsuit Challenging State's Casket Sales Law*, ALA. MEDIA GROUP (Apr. 4, 2016, 3:50 PM), www.al.com/business/index.ssf/2016/04/alabama_cemetery_owner_files_f.html (discussing regulation of cemetery merchandise in Alabama).

12. *See, e.g.*, Jenna Siffringer, *Both Owners of Lamesa Memorial Park Now Behind Bars,* KCBD NEWS CHANNEL 11 (Sept. 15, 2016, 9:56 PM), www.kcbd.com/story/33107527/both-owners-of-lamesa-memorial-park-now-behind-bars (discussing allegations of and arrests regarding misappropriation of cemetery merchandise funds).

13. Knick v. Twp. of Scott, 862 F.3d 310, 314 (3d Cir. 2017).

as this article demonstrates, but it is also spawning high-profile litigation. This article is a review of the recent United States and Canadian jurisprudence related to death matters with commentary and analysis aimed at assisting practitioners faced with such cases in situating their issues within the larger North American precedential structure of such cases.

II. THE JURISPRUDENCE

A. Torts and the Dead

According to the facts in the matter of *Coon v. Medical Center, Inc.*[14], on February 8, 2011, at thirty-seven weeks pregnant, Amanda Coon "went for a routine prenatal examination at her obstetrician-gynecologist's office in Columbus, Georgia."[15] At some point during the examination, Coon was informed "that her unborn baby did not have a heartbeat."[16] The next day, Coon delivered a stillborn baby.[17] Sometime after "delivery, the hospital's bereavement coordinator spoke with Coon and her father, who [told] the coordinator that the [baby's remains] were to be released" to an Opelika, Alabama, funeral home.[18] The baby stayed in the room with Coon for a period of time until Coon's mother told the coordinator that the baby could be removed.[19] Thereafter, "the coordinator [put the] baby in a . . . holding room . . . until someone could take the baby to the hospital morgue."[20] In the holding room, there was also a stillborn "baby boy, who was less than 20 weeks in gestation" and much smaller.[21] When Coon's baby was put in the holding room, the hospital was in the middle of a shift change and a new nurse whose shift had just begun volunteered to bring the two babies down to the morgue.[22] Before transporting the babies, "identification tags [had to be] placed on the arm and leg of [the] baby and on the outside of the cadaver bag" per hospital policy.[23] When the security guard arrived at the holding room to help the nurse bring the babies to the morgue, she had still not finished putting the tags on the babies.[24] Although he had never done so before, the security guard began tagging the babies, but apparently swapped the tags when placing them on the babies.[25] "The security guard [put] a tag on the outside

14. 780 S.E.2d 118 (Ga. Ct. App. 2015).
15. Coon v. Med. Ctr., Inc., 780 S.E.2d 118, 120 (Ga. Ct. App. 2015).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Coon*, 780 S.E.2d at 120-21.
21. *Id.* at 121.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Coon*, 780 S.E.2d at 121.

of the cadaver bag for Coon's baby, but did not want to 'fool' with the tags on the baby's body" even though "the nurse repeatedly told [him] that he [must put] the . . . tags on the [baby's] body."[26] The people working at the morgue logged in the wrongly tagged remains and, as such, the wrong baby was mistakenly released to the funeral home.[27]

Coon did not discover that the morgue released and the funeral home buried the wrong baby until the hospital's chief executive officer contacted her on February 23, 2011, eleven days after the baby's funeral.[28] Coon might have made this discovery sooner, but on advice of the funeral home "given the condition of the remains," Coon did not view the baby before or after the service.[29] The next day, the baby's remains were exhumed from the Opelika cemetery and delivered to a different funeral home in Columbus.[30] During that trip, the funeral director also went to the hospital to retrieve Coon's baby.[31] However, upon return to the Opelika funeral home, the director found "that the cadaver bag contained nothing but a blanket."[32] He returned once more "to the hospital morgue to [collect] Coon's baby", where he discovered that the morgue log book contained no documentation of when "Coon's baby or the exhumed baby were returned to the morgue or . . . when the switch occurred and who was involved."[33] Someone eventually located the baby and Coon subsequently buried the baby in the Opelika cemetery with the "hospital pa[ying] the costs associated with the exhumation of the misidentified baby and the . . . burial of the correct remains."[34]

Shortly thereafter, "Coon filed [suit] against the hospital, seeking damages for emotional distress."[35] "[T]he hospital [then] moved for summary judgment [on the basis that] Coon's emotional distress claims failed under Georgia law because Coon suffered no physical injury or pecuniary loss and the conduct of the hospital was not intentional, reckless, extreme, or outrageous."[36] Coon countered with the argument that Alabama law, rather than Georgia law, applied because she suffered the relevant emotional distress when "she learned of the hospital's mistake after the funeral service, burial, exhumation, and reburial had occurred," which was in Opelika.[37] Furthermore, Coon asserted, "she was not required to prove physical injury,

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Coon*, 780 S.E.2d at 121.
31. *Id.*
32. *Id.*
33. *Id.* at 121-22.
34. *Id.* at 122.
35. *Coon*, 780 S.E.2d at 122.
36. *Id.*
37. *Id.*

pecuniary loss, or intentional or reckless misconduct to support an emotional distress claim for the mishandling of human remains" under Alabama law.[38] Initially, the trial court found that Alabama law would govern the emotional distress claims and, as a result, denied the hospital's motion for summary judgment.[39] However, the trial court later revisited the issue and decided that "application of Alabama law would [violate] Georgia public policy because Alabama . . . does not [impose] an 'impact rule'" on plaintiffs seeking damages for emotional distress arising from "the negligent mishandling of human remains."[40] Accordingly, the trial court granted summary judgment in favor of the hospital, finding that Coon's claim for emotional distress failed due to the fact that she could not show physical injury, pecuniary loss, or sufficiently outrageous misconduct by the hospital.[41]

On appeal, the issue was whether a hospital's erroneous mislabeling of a stillborn baby's remains and delivery of a different stillborn baby to the funeral home amounted to conduct that was so egregious or outrageous as to support a claim for intentional infliction of emotional distress.[42] First, the appellate court addressed the issue of which state's laws applied to the matter.[43] "Under Georgia law, choice-of-law issues in tort cases are controlled by the rule of *lex loci delicti*, which requires courts to apply the 'substantive law of the place where the tort or wrong occurred.'"[44] Generally, "the place of the wrong [(i.e., the *locus delicti*)] is the place where the injury was suffered rather than the place where the act was committed, or [rather,] the place where the last event necessary to make an actor liable for an alleged tort takes place."[45] Pursuant to the rule in *Alexander v. General Motors Corp.*,[46] under the public policy exception of *lex loci delicti*, Georgia courts will not apply the law of the place where the injury was sustained if it would conflict with Georgia's public policy.[47] Here, the appellate court found that Georgia law applies to Coon's claims based on the Georgia public policy.[48]

Secondly, "under Georgia's impact rule, 'recovery for [negligent infliction of] emotional distress is allowed only where there is some impact on the plaintiff, and that impact must be a physical injury.'"[49] Furthermore,

38. *Id.*
39. *Id.*
40. *Coon*, 780 S.E.2d at 122.
41. *Id.*
42. *Id.* at 124.
43. *Id.* at 122.
44. *Id.* at 122 (citing Int'l. Bus. Mach. Corp. v. Kemp, 536 S.E.2d 303, 306 (Ga. Ct. App. 2000)).
45. *Coon*, 780 S.E.2d at 122 (citing Risdon Enter. v. Colemill Enter., 324 S.E.2d 738, 740 (Ga. Ct. App. 1984)).
46. Alexander v. Gen. Motors Corp., 478 S.E.2d 123, 123 (Ga. 1996).
47. *Coon*, 780 S.E.2d at 123 (citing *Alexander*, 478 S.E.2d at 123).
48. *Id.*
49. *Coon*, 780 S.E.2d at 123 (citing Lee v. State Farm Mut. Ins. Co., 533 S.E.2d 82, 86 (Ga. 2000)).

while Georgia law allows for an exception to pecuniary losses, the exception only applies to those losses that result from a non-physical injury.[50] Here, Coon herself did not experience physical impact and "the funeral and burial expenses incurred by Coon were not a direct result of the emotional injury experienced by [her], but [rather] were the result of having a stillborn child."[51] Accordingly, "the funeral and burial expenses [incurred were] not sufficient to overcome the impact rule requirement."[52]

Lastly, for claims of intentional infliction of emotional distress, a person must show the following: "'(1) the conduct at issue was intentional or reckless; (2) the conduct was extreme and outrageous; (3) there was a causal connection between the wrongful conduct and the emotional distress; and (4) the resulting emotional distress was severe.'"[53] In order to succeed on an intentional infliction of emotional distress claim, the character in question must be "'so outrageous in character, and so extreme in degree, as to go beyond all [bounds of possible] decency, and to be [considered] atrocious and utterly intolerable in a civilized community.'"[54] The appellate court found that while the hospital's conduct was a tragic mistake, it did not rise to the level of egregiousness or outrageousness necessary to succeed on the claim.[55] Therefore, the appellate court affirmed the trial court's decision to grant defendant's motion for summary judgment.[56] As noted by others, because most intentional infliction of emotional distress claims related to human treatment are unsuccessful, this result is not surprising.[57] However, with this fact pattern, it is virtually inconceivable what a court would consider egregious or outrageous.[58] Such cases are almost guaranteed money-losers for attorneys and seldom result in the sought-after closure for families.

According to the facts in *Shipley v. City of New York*,[59] on January 9, 2005, seventeen-year-old high school student, Jesse Shipley, "was killed in an automobile accident in Staten Island, New York."[60] During the autopsy, the medical examiner removed the brain, "fixed" it in formalin, "labeled with

50. *Coon*, 780 S.E.2d at 123.
51. *Id.*
52. *Id.*
53. *Coon*, 780 S.E.2d at 124 (quoting Canziani v. Visiting Nurse Health Sys., Inc., 610 S.E.2d 660, 662 (Ga. Ct. App. 2005)).
54. *Id.*
55. *Id.*
56. *Coon*, 780 S.E.2d at 124.
57. *See, e.g.*, Ryan M. Seidemann, *How Do We Deal with All the Bodies? A Review of Recent Cemetery and Human Remains Legal Issues*, 3 U. BALT. J. LAND & DEV. 1, 7 (2013).
58. *Coon,* S.E.2d at 124. In this regard, as the following cases demonstrate, what is considered egregious must vary widely from one judge to the next, as some of these cases, while rare, are successful. *See supra* Section A.
59. 37 N.E.3d 58, 59 (N.Y. 2015).
60. Shipley v. City of New York, 37 N.E.3d 58, 59 (N.Y. 2015).

decedent's name and [autopsy date], and placed in a cabinet in the autopsy room" at Richmond County Mortuary.[61] It was routine practice for the medical examiner "to wait until the cabinet had accumulated at least six specimens before contacting a neuropathologist . . . who would . . . travel to Staten Island in order to conduct a[n] examination of the [tissue]."[62] Upon completion of the autopsy, "funeral home personnel retrieved Jesse's body and a funeral was held on January 13, 2005."[63]

Less than two months later, "[i]n March 2005, forensic science students from [Jesse's former] high school were on a field trip to the Richmond County Mortuary" and saw the specimen jar containing Jesse's brain during a tour of the autopsy room.[64] The story of this discovery ended up getting back to Jesse's sister, who then informed her parents.[65]

"The Shipleys commenced [an] action against the City of New York and the Office of the New York City Medical Examiner, . . . alleging negligent infliction of emotional distress resulting from the display and alleged mishandling and withholding of their son's brain."[66] "[The City moved for summary judgment to dismiss the complaint on the basis that the Shipleys had failed to state a cause of action.[67] "The City argued that the medical examiner had the authority to conduct the autopsy . . . and that the removal and retention of the brain by the medical examiner was authorized by law."[68] "The Shipleys [argued] that, even [if] the medical examiner had the authority to conduct the autopsy, he had 'mishandled' [Jesse's] organs and 'unlawfully interfered' with the Shipleys' right to [Jesse's] 'whole body.'"[69] The Supreme Court denied the City's motion for summary judgment, reasoning that they failed to establish that they lawfully retained Jesse's brain and, furthermore, "that a question of fact existed as to whether the City interfered with the Shipleys' right of sepulcher when it failed to apprise the Shipleys before their son's burial that his brain had been removed and was in the possession of the medical examiner."[70]

On appeal, the appellate court held that Jesse's autopsy was authorized "because the medical examiner had the statutory authority to exercise his discretion in performing the autopsy and removing and retaining organs for

61. *Id.* at 59-60.
62. *Id.* at 60.
63. *Id.*
64. *Id.*
65. *Shipley*, 37 N.E.3d at 60.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Shipley*, 37 N.E.3d at 60.

further examination and testing."[71] However, that court noted that "the medical examiner had 'the mandated obligation, pursuant to Public Health Law [section] 4215 (1) and the next of kin's common-law right of sepulcher, to turn over [Jesse's] remains to the next of kin for preservation and proper burial once the legitimate purposes for the retention of those remains [had] been fulfilled.'"[72]

Following this appeal, "the case . . . proceeded to trial [to determine] whether the medical examiner returned [Jesse's] body to the Shipleys without informing them that the medical examiner had retained [Jesse's] brain".[73] Following trial, the lower court awarded "a verdict of one million dollars for the Shipleys."[74] "The [a]ppellate [d]ivision affirmed the judgment entered upon the Shipleys' stipulation to a reduced [damage award]."[75]

The New York State Court of Appeals granted certiorari on the issue of whether the common law right of sepulcher imposed a duty on the medical examiner to notify the family of remains retained for later analysis.[76] "The common-law right of sepulcher affords the deceased's next of kin an 'absolute right to the immediate possession of a decedent's body for preservation and burial . . . and damages may be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body.'"[77] "[T]he right of sepulcher is premised on the next of kin's right to possess the body for preservation and burial . . . and is geared toward affording the next of kin solace and comfort in the ritual of burying or otherwise properly disposing of the body."[78] Therefore, "it is the act of depriving the next of kin of the body, and not the deprivation of organ or tissue samples within the body, that constitutes a violation of the right of sepulcher."[79] Here, Jesse's body was returned to his family as soon as the autopsy had been conducted and "was thus made available to the Shipleys for preservation and burial."[80] The absence of the Jesse's brain did not prevent the Shipleys from having possession of the his body nor did it interfere with their ability to properly dispose of his remains through burial or cremation.[81] Thus, the court held that the family received Jesse's body within a reasonable

71. *Id.* at 61.
72. *Id.* (citing N.Y. PUB. HEALTH LAW § 4215(1) (McKinney)).
73. *Shipley*, 37 N.E.3d at 61.
74. *Id.*
75. *Id.* at 62.
76. *Id.* at 59.
77. *Id.* at 63 (citing Mack v. Brown, 82 A.D.3d 133, 137 (N.Y. 2011)).
78. *Shipley*, 37 N.E.3d at 63.
79. *Id.*
80. *Id.*
81. *Id.*

period of time, and as a result, satisfied the family's ability to provide for a speedy burial (i.e., the right of sepulcher).[82]

The fact that the claim of the right of sepulcher was denied is not surprising, because, as the court correctly noted, the medical examiner returned the body for burial. What is surprising about this case is that the court upheld the damage award for the medical examiner's failure to notify the family that Jesse's brain had been removed.[83] This decision is contrary to the general disallowance of emotional distress claims.

According to the facts of the recent New Jersey case, *Gately v. Hamilton Memorial Home, Inc.*,[84] on October 16, 2009, Kathleen Cousminer and John M. Gately's son, John R. Gately, was killed in a car accident.[85] Cousminer and John M. Gately divorced in the 1980s and both remarried.[86] The son lived with Cousminer in New Jersey at the time, and John M. Gately lived in Florida.[87] Following her son's death, Cousminer and her husband met with a licensed intern of Cellini Funeral Home to make cremation arrangements.[88] Cousminer signed a Cremation Authorization and Disposition Order, which stated that Cousminer was "'of mature age and alone [has] the right [to] give this authorization and direction for said cremation, and that no other person has such right[.]'"[89] Although the arrangements were made without a licensed funeral director in the room, present in the adjoining room was director Joe D'Errico.[90] Upon completion of the arrangements, Cousminer spoke with her ex-husband who allegedly informed her that "he did not want their son to be cremated.[91] However, according to testimony, Cousminer never told the funeral home that "Gately had objected to the cremation."[92] The funeral took place on October 22, 2009, and their son was cremated, following the services, that same day.[93]

The father filed suit in August 2011 against the funeral home and the intern, alleging intentional infliction of emotional distress, negligent infliction of emotional distress, a claim of punitive damages, and a loss of

82. *Id.* at 67.

83. *Shipley*, 37 N.E.3d at 61-62, 67 (noting that the trial resulted in a verdict of one million dollars to the Shipleys. There was then a stipulation for a reduced award of damages. At present, the New York State Court of Appeals dismissed the complaint in its entirety.).

84. 125 A.3d 747 (N.J. Super. Ct. 2015).

85. Gately v. Hamilton Mem'l Home, Inc., 125 A.3d 747, 749 (N.J. Super. Ct. 2015).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Gately*, 125 A.3d at 749.

91. *Id.*

92. *Id.*

93. *Id.* at 750.

consortium.[94] The defendants denied any liability and "invoked the immunity provisions set forth in the New Jersey Cemetery Act,[95] and the Mortuary Science Act ("MSA")."[96] After hearing the case, "[t]he jury returned a unanimous verdict in favor of defendants as to all counts in the complaint."[97]

On appeal, the issue was whether the laws of New Jersey regarding qualified immunity provisions were intended to cover interns employed in the funeral business.[98] "To become a licensed funeral director in New Jersey, a person must, among other requirements, 'complete[] 2 years of practical training and experience as a registered trainee[.]'"[99] According to the statutory definition, an "'intern' is 'a person registered with the Board who is engaged in learning to practice as a practitioner of mortuary science under the supervision of a Board licensee, and includes registered trainees.'"[100] The aforementioned laws "recognize that interns are granted legal authority to make funeral arrangements," specifically noting that New Jersey Administrative Code section 13:36–8.9 "mandates that '[n]o unlicensed person shall be permitted to make funeral arrangements on behalf of any licensed practitioner of mortuary science, except that interns may make such arrangements pursuant to N.J.S.A. 45:7–47.'"[101] The appellate court found that interns were encompassed within the term "funeral director" under the laws of New Jersey and, thus, were qualified by law to engage in funeral directing.[102]

The court then looked into whether the father's objection to cremation provided "reasonable notice".[103] According to the court, one of the important functions of those who work in the death care industry is "assuring the proper disposition of each decedent's remains, whether by burial or by cremation."[104] "This time-sensitive function is guided by the previously-expressed intentions of the decedent or, in the absence of such instructions, by the direction of the decedent's next of kin."[105] Here, the court found "that where there are two surviving parents, a single parent alone does not have the

94. *Id.*
95. N.J. STAT. ANN. § 45:27-1.
96. *Gately*, 125 A.3d at 750 (citing N.J. STAT. ANN. §§ 45:7-32 – 45:7-95).
97. *Id.* at 752.
98. *Id.* at 752 (citing N.J. STAT. ANN. § 45:27–22(d); N.J. STAT. ANN. § 45:7–95).
99. *Id.* (quoting N.J. STAT. ANN. § 45:7-49(a)(2)).
100. *Id.* at 753 (quoting N.J. ADMIN. CODE § 13:36-1.2).
101. *Gately*, 125 A.3d at 753; *see also* N.J. STAT. ANN. § 45:7–47 (exempting "registered trainee[s] working under the direct supervision of a practitioner of mortuary science" from the MSA's general licensure requirements).
102. *Id.* (citing N.J. STAT. ANN. § 45:7–34(c); § 45:7–47; N.J. ADMIN. CODE § 13:36–8.9).
103. *Id.* at 758.
104. *Id.* at 754.
105. *Gately*, 125 A.3d at 754.

unilateral right to control disposition."[106] However, it also noted that funeral directors do not have a positive obligation to obtain authorizations from "all parties who have a right to control disposition," but rather are allowed to "proceed with the written authorization provided by a surviving parent who 'claims to be and is believed to be entitled to make the decision,' subject to the 'reasonable notice' caveat . . . ."[107]

In joining the two principles together, the court explained that both the MSA[108] and the Cemetery Act[109] "confer qualified immunity for the disposition of remains in accordance with an authorization received from the decedent's next of kin, unless the [funeral director] had 'reasonable notice' that the representations made by the surviving relative were 'untrue' or that the person 'lacked the right to control' the disposition."[110] When a funeral director is not "timely provided with 'reasonable notice' of disagreement among the survivors or a lack of valid authority by the relative who is making the funeral arrangements," the director is immune from liability for acting in accordance with the directions given.[111] However, "if such 'reasonable notice' [was] expressed but ignored, then the [funeral director] faces potential liability if the other elements for a cause of action are established."[112] Thus, the law provides a "limited shield" from liability, "contingent upon whether there is persuasive proof of reasonable notice."[113]

Altogether, the court reasoned that, "from a functional perspective, it made sense for the statutory immunity to extend to such supervised interns."[114] This is because without such a shield, funeral homes and funeral directors would presumably be wary to hire interns . . . or would be reluctant to delegate tasks to the interns that could spawn future litigation.[115] Here, the court found evidence that the funeral director supervised the intern with respect to the funeral arrangements.[116] Therefore, the court held that the intern was entitled "to the qualified protection conferred by [New Jersey law], assuming that 'reasonable notice' of the father's objections to the cremation had not been provided."[117]

The result of this case is logical. Those in the death care industry should be required to exercise due diligence to ensure they have obtained the proper

106. *Id.* at 755.
107. *Id.* at 756 (quoting N.J. STAT. ANN. § 45:7–95).
108. N.J. STAT. ANN. § 45:7–1.
109. N.J. STAT. ANN. § 45:27–1.
110. *Gately*, 125 A.3d at 757 (quoting § 45:7–95; N.J. STAT. ANN. § 45:27–22(d)).
111. *Id.* at 758.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Gately*, 125 A.3d at 758.
116. *Id.*
117. *Id.*

disposition authorizations. However, this requirement does not mandate that such service providers undertake independent investigation of their clients' assertions regarding their authority. In other words, when reasonably relying on the representations of those directing disposition, funeral directors should not be liable in tort for untruths told by their clients.

The case of *Rugova v. City of New York*[118] raised issues that sound in both tort and regulatory liability. Briefly, the facts of this case are that on "April 20, 2008, at about 1:00am, New York City Police Officers . . . responded to a radio call for an accident on the Bronx River Parkway."[119] Darden Binakaj's vehicle apparently struck a tree; the impact ejected him through the sunroof, and emergency medical personnel subsequently declared him dead on the scene.[120] Following this discovery, the police and medical examiner slowly undertook their standard duties, documenting the site and performing an autopsy.[121] By the time the family learned of Binakaj's death some 36-hours later, the medical examiner already performed the autopsy, which was prohibited by their Islamic faith.[122] As the family saw it, the autopsy damaged Binakaj's body and violated his and his family's Muslim religion and rites.[123]

In July 2008, the family brought action for

> breach of duty to notify them of [Binakaj's] death, an interference with their right to immediate possession of the body, the conduction of an autopsy in the absence of any compelling public necessity, and the deprivation of the next of kin's opportunity to claim the body and object to the performance of the autopsy in violation Public Health Law [section] 4214 (1).[124]

The family further asserted that all of the City's failures and omissions caused them "serious emotional suffering and distress, anxiety, and mental anguish."[125] The defendant, City of New York, moved for summary judgment, arguing that: (1) the police investigation and the handling of Binakaj's body by the medical examiner did not result in an actionable claim due to the plaintiffs' failure to prove a special relationship with City officials; (2) the medical examiner did not require consent to perform the autopsy as the medical examiner deemed the autopsy necessary; and (3) "there was

118. 132 A.D.3d 220 (N.Y. App. Div. 2015).
119. Rugova v. City of New York, 132 A.D.3d 220, 222 (N.Y. App. Div. 2015).
120. *Id.*
121. *Id.* at 222-23.
122. *Id.* at 224.
123. *Id.*
124. *Rugova*, 132 A.D.3d at 225 (citing N.Y. PUB. HEALTH LAW § 4214(1) (McKinney)).
125. *Id.*

neither an unreasonable passage of time nor an improper burial" so as to support the family's claims for negligent interference with Binakaj's right to a proper burial.[126] The family "cross-moved for partial summary judgment on the issue of liability with respect to the loss of the right of sepulcher, the performance of an unauthorized autopsy, and the interference with [Binakaj's] right to a proper burial."[127] The trial court granted the City's motion in part, granted the family's cross motion in part, and "dismissed the family's claims for negligent performance of an autopsy," noting that "the 'authority to conduct an autopsy derives solely from statute.'"[128]

On appeal, the issue was whether the "36-hour delay in informing the next of kin that they could take possession of [Binakaj's] remains caused any interference with the family's burial rights" so as to trigger a loss of sepulcher.[129] Under New York law, "the [m]edical [e]xaminer has extensive authority to perform autopsies within the exercise of professional discretion . . . including where . . . circumstances indicate that the death was accidental . . . ."[130] Moreover, "compelling public necessity" is only required "where the [m]edical [e]xaminer has received an objection on religious grounds from a surviving friend or relative or has reason to believe that an autopsy is contrary to the decedent's religious beliefs."[131] Here, the appellate court noted that the family "obviously could not make such an objection" as to the autopsy because "they had not been informed of [Binakaj's] death."[132] However, even so, "the [m]edical [e]xaminer's office was not obligated to wait [for] an objection before performing the autopsy."[133]

The common-law right of sepulcher gives the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial, and damages may be awarded "to the next of kin for the 'solely emotional injury' experienced as a result of the interference with their ability to properly bury their [loved one]" and "against any person who unlawfully interfere[d] with that right or improperly deal[t] with the decedent's body."[134] As explained in *Melfi v. Mount Sinai Hospital*,[135] "[i]nterference can arise either by unauthorized autopsy or by disposing of the remains inadvertently,

126. *Id.*
127. *Id.*
128. *Id.* at 226.
129. *Rugova*, 132 A.D.3d at 231.
130. *Id.* at 226 (citing N.Y. PUB. HEALTH LAW §§ 4210 – 14 (McKinney)).
131. *Id.* at 226-27 (citing Harris-Cunningham v. Med. Exam'r, 261 A.D.2d 285 (N.Y. App. Div. 1999)).
132. *Id.* at 227.
133. *Id.*
134. Kennedy-McInnis v. Biomedical Tissue Servs., 178 F. Supp. 3d 97, 102 (W.D.N.Y. 2016) (citing *Shipley*, 37 N.E.3d at 63).
135. Melfi v. Mount Sinai Hosp., 64 A.D.3d 26, 39 (N.Y. App. Div. 2009).

or . . . by failure to notify the next of kin of the death."[136] The appellate court here reasoned that the City argued, "that any mental anguish resulting from the delay in learning of [Binakaj's death] was minimal," but such a distinction goes to the measure of damages, not the overall right of recovery.[137] As a matter of law, this means that just because the family suffered minimal mental anguish due to the defendants' failure to notify, does not mean that the family is precluded altogether from recovering for their suffering.[138]

According to the court in *Tinney v. City of New York*,[139] "where City defendants '[have] all the necessary identifying documents,'" as to the decedent and their next of kin, negligence for failure to timely inform the next of kin of their loved one's death–was considered a breach of a ministerial function rather than a discretionary act shielding City defendants from liability.[140] As the appellate court previously held in *Melfi*, "interference with the next of kin's right to immediate possession of a decedent's body may arise from the municipality's failure to notify them of the death presumes a ministerial duty owed directly to the immediate family."[141] Thus, the court found that the family had the standing necessary to bring this action and to claim such damages for the disturbance of the right of sepulcher.[142] The appellate court affirmed the judgment of the lower court, which

> denied the City's motion for summary judgment insofar as it sought dismissal of [the family's] claim for the loss of the right of sepulcher, granted [the family's] cross motion for partial summary judgment as to liability on that claim, and granted [the City's] motion insofar as it sought summary judgment dismissing [the family's] claim for negligent performance of an autopsy . . . .[143]

In other words, the appellate court held that the family was entitled to recover for loss of the right of sepulcher, but was not entitled to recover for the negligent performance of an autopsy.

The result in this case should serve as a cautionary tale for first responders and medical examiners to make reasonable efforts to notify the family prior to conducting autopsies that are not absolutely necessary. Certainly, the result here would have been different if the medical examiner had no identifying information or if there had been a compelling public policy reason

136. *Rugova*, 132 A.D.3d at 230 (citing *Melfi*, 64 A.D.3d at 39).
137. *Id.* at 230.
138. *Id.*
139. Tinney v. City of New York, 94 A.D.3d 417 (N.Y. App. Div. 2012).
140. *Rugova*, 132 A.D.3d at 231 (citing *Tinney*, 94 A.3d at 471).
141. *Id.* (citing *Melfi*, 64 A.D.3d at 31).
142. *Id.*
143. *Id.*

to conduct the autopsy. However, the presence of such information and the lack of a necessity added up to a liability claim essentially for a lack of compassion.

B. Property Rights and Wrong Spaces

As was set forth in the matter of *Kirschner v. Service Corp. International,*[144] on April 1, 1979, Jeanine Kane was inurned in a niche in the columbarium section at Eden Memorial Park Cemetery in Mission Hills, California, purchased previously by her family.[145] Her family recalled the niche being adjacent to the one in which the remains of the famous comedian Groucho Marx were inurned.[146] In 1985, Service Corporation International ("SCI") purchased the cemetery from the former owners.[147] When Ms. Kane's husband died in 2011, the family went to the cemetery to make arrangements for the inurnment of his remains.[148] When a cemetery employee showed the family the proposed niche, they noticed that the indicated niche (the one belonging to their mother) was not the one that they had recalled.[149] In an attempt to resolve the situation, the cemetery showed the family the file kept for their mother's inurnment.[150] The family noticed that the original niche number had been crossed out and a different number now took its place, which concerned them because they believed that to mean the cemetery moved Ms. Kane's remains without their permission.[151] Cemetery employees explained that questionable things occurred at the cemetery under the former ownership, but that those individuals no longer worked there.[152] This action, alleging intentional infliction of emotional distress, negligence, and tortious interference with a dead body, based upon the supposed unauthorized relocation of Ms. Kane's remains, resulted.[153] In this case, the family alleged that their suffering resulted from the former owner's long-time irresponsibility and tampering in the handling of remains and that the former owners moved Ms. Kane's remains to a different niche due to "its proximity to that of Groucho Marx in order to resell" the former space for a greater profit.[154]

144. 2015 WL 5458336 (Cal. Ct. App. 2015).
145. Kirschner v. Serv. Copr. Int'l, 2015 WL 5458336, at *1 (Cal. Ct. App. 2015).
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Kirschner*, 2015 WL 5458336, at *1.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*

The cemetery presented records—going back for years prior to Ms. Kane's inurnment—showing that another family purchased the interment right for the space that Ms. Kane's family thought was hers.[155] Further records showed that, some two years before Ms. Kane's inurnment, someone else purchased the interment right for Groucho Marx's niche.[156] Finally, the cemetery's records reflected that, on April 1, 1979, Ms. Kane's family purchased her interment right for the spot below Groucho Marx's niche and four columns to the right.[157] As the family stated in their petition, there was, in fact, a thick vertical strike-out covering what seemed to be a single digit on the interment records.[158] The purchaser index card also reflected the purchase of Row E, Niche 15, where plaintiffs' mother was inurned on June 3, 1979.[159] Contrary to the family's allegations, there was no premium paid for any of the inurnment rights near Groucho Marx, but rather $275 for families who purchased rights in Rows E and F and $300 for those who purchased in Rows G and H.[160]

Plaintiff, Stephanie Kirschner, stated that she went to her mother's niche "twice in 1979 and once in June 1981," but did not return until 2011 when she was making plans for her father's disposition.[161] Plaintiff, Brad Kane, said that he visited the niche twice in 1979 and once in 1982, but that he also did not return until 2011.[162] Kane also explained that "he had a strong memory of a visit in 1982 after hearing a report that the remains of Groucho Marx's had been stolen . . .," and that when he visited his mother's niche, he noticed a new nameplate welded directly above Marx's niche in order to prevent future thefts.[163] The trial court granted the cemetery's motion for summary judgment finding that the evidence was overwhelming that the family's mother was buried in one location at all relevant times and that there was no evidence that she was ever moved or that she was ever in any place other than Row E, Niche 15.[164] The family appealed.[165]

On appeal, the issue was whether the trial court erred in granting the cemetery's motion for summary judgment and whether the testimony and evidence presented by the plaintiffs that the cemetery relocated Ms. Kane's remains from one niche to another was sufficient to raise a triable issue of

155. *Kirschner*, 2015 WL 5458336, at *1.
156. *Id.* at *2.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Kirschner*, 2015 WL 5458336, at *2.
161. *Id.*
162. *Id.*
163. *Id.* at *3.
164. *Id.* at *4.
165. *Kirschner*, 2015 WL 5458336, at *4.

fact.[166] The appellate court noted that, in ruling on a summary judgment motion, "the trial court determine[d] only whether triable issues of fact existed," but it was not the court's duty to resolve those issues.[167] "'If any evidence or interference therefrom show[ed] or implie[d] the existence of the required element(s) of a cause of action [or defense], the court must deny a . . . motion for summary judgment or summary adjudication because a reasonable trier of fact could find for the [opposing party].'"[168] Here, the appellate court found a great deal of evidence that cast doubt on the recollections of Ms. Kane's family.[169] Although the court appeared to lean towards finding the cemetery's evidence sufficient to show that there was no mistake as to the location of Ms. Kane's remains, the court determined that the matter needed to go to trial in order for a fact-finder to properly hear the testimony and make a judgment on the merits.[170]

Although the issue concluded procedurally, with the court finding that a summary proceeding was not the proper mechanism through which to decide this matter and remanding the matter to the district court for more testimony evidence, the appellate court did note that no documentation existed in the record that demonstrated that anything out of the ordinary happened to Ms. Kane's remains.[171] Instead, the appellate court largely chalked the dispute up to a misremembering by the family that brought the lawsuit.[172]

The other important issue in this case is the question of how long can someone wait to bring one of these claims. The mother in this case was placed in this mausoleum in 1979 and the plaintiffs waited to bring this more than thirty year later.[173] The defendants in this case argued that the family waited too long, but the court rejected that argument and said that the right to bring a suit like this begins to run from the time that someone has knowledge of the problem.[174] Further, the court stated that there is no obligation for someone to visit their loved one in a cemetery at regular intervals, so the fact that these plaintiffs may not have visited their mother's grave in more than thirty years did not impact their ability to bring this case.[175] Such a ruling is important because cemetery complaints often occur many years after

166. *Id.*
167. *Id.* at *5 (citing *EHP Glendale, LLC v. Cty. of L.A.*, 193 Cal. App. 4th 262, 270 (2011)).
168. *Id.* (quoting *Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463, 1474 (2005)).
169. *Id.*
170. *Kirschner*, 2015 WL 5458336, at *5.
171. *Id.* at *6.
172. *Id.* at *5.
173. *Id.* at *3.
174. *Id.* at *6.
175. *Kirschner*, 2015 WL 5458336, at *6.

interment. The court here is consistent with other legal concepts such as *contra non valentum*.[176]

The property rights at issue in *City of Sandy Springs v. Mills,*[177] relate to the legal effect of the cemetery dedication.

> On February 20, 1900, John S. Heard executed a deed in favor of about eight named individuals [including Carl Heard] to a one-acre tract of land, for the purposes of [creating] a family burial ground and to be used for said purposes only. . . . A tax deed shows that on December 5, 2006, the acre tract was sold at a sheriff's sale for delinquent property taxes, the grantors being "Carl C. Heard, Jr. and Mary H. Ellis, ("Owners") by and through . . . the Sheriff." The tax deed was filed and recorded on January 10, 2007.[178]
>
> * * *
>
> On December 21, 2007, "MARY H. ELLIS A.K.A. MARY ANN ELLIS ELSNER" executed an "Affidavit of Descent," stating that her sibling Carl C. Heard, Jr., had died intestate on June 15, 1992, had never married and had no children, and all of the debts of his estate had been fully paid. That same day, "MARY H. ELLIS A.K.A. MARY ANN ELLIS ELSNER, individually and as Sole Surviving Heir of CARL C. HEARD JR." executed in favor of Henry Cline an "Assignment of Rights for Tax Parcel" regarding the acre tract. Further, "MARY H. ELLIS A.K.A. MARY ANN ELLIS ELSNER . . . INDIVIDUALLY AND AS THE SOLE SURVIVING HEIR OF CARL C. HEARD, JR. DECEASED" executed a quitclaim deed, conveying the acre tract to Cline "for and in consideration of the sum of TEN AND 00/100 ($10.00) Dollars and other good and valuable consideration."[179]
>
> In addition to the quitclaim,

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176. *Doctrine of contra non valentem*, BLACK'S LAW DICTIONARY (10th ed. 2014).

> The common-law rule that a limitations or prescriptive period does not begin to run against a plaintiff who is unable to bring an action, usu. because of the defendant's culpable act, such as concealing material information that would give rise to the plaintiff's claim. — Often shortened to contra non valentem . . . .

Id.

177. 771 S.E.2d 405, 408 (Ga. Ct. App. 2015).

178. *Id*. at 406.

179. *Id*. at 406-407.

> Cline paid the redemption price to the entity that had purchased the property in the tax sale, and that entity. . . "in turn issued a quitclaim deed in favor of Carl C. Heard, Jr. and Mary H. Ellis, who had already quitclaimed their purported interest in the Property to Mr. Cline." On July 31, 2012, Cline conveyed the property by quitclaim deed to his daughter and her husband, Christopher Mills, "for and in consideration of the sum of ONE AND NO/100 U.S. Dollars ($1.00)."
>
> In December 2011, Mills and his wife initiated communication with the City about building a single-family residence on the "raw land" portion of the property or, in other words, that portion of the acre tract upon which there were no graves. It [wa]s undisputed that twenty or more human graves were situated on the property, "neatly arranged in clusters and rows," that the graves covered approximately 0.20 acres of the northwestern portion of the acre tract, and that the most recent human burial identifiable on the tract had occurred in 1971. The City declined to issue Mills a residential single-family building permit, on the basis that the acre lot was encumbered by a "cemetery use restriction," and would not be permitted for any other use. In August 2012, Mills [instituted this lawsuit] for declaratory judgment, naming the City as the defendant, and asserting that, for various reasons, the restriction on the use of the entire acre tract as a family burial ground was no longer enforceable or, alternatively, that the City had "effectuated a taking of the Property by enforcing an unenforceable restriction covenant, . . . entitling Mills to just compensation."[180]

The City answered, "denying therein the 'existence of a cause of action for which Mills would have redress before court to seek a declaratory judgment.'"[181] Following the answer, the City and the purported descendants asked the trial court to,

> grant summary judgment in their favor regarding Mills's complaint "on the ground that the Heard Family Cemetery has been perpetually dedicated as a private burial ground and, therefore, [Mills] cannot appropriate it for any other purpose, including constructing a single family residence." The City and the purported descendants "[a]dditionally" sought a "declaratory judgment that legal title to Heard Family Cemetery rests in the hands of . . . John Heard's heirs

180. *Id.* at 407.
181. *Id.*

> as descended through the individuals named in the February 20, 1900 deed, which perpetually established Heard Family Cemetery as a private burial ground"; the appellee challenged the validity of the tax sale and deed.[182]

"The trial court denied the motion for summary judgment, concluding that 'alleged descendants of a prior owner of the Property' had an 'easement in the Cemetery Limits.'"[183] This result is consistent with other such cases, finding that the cemetery dedication is not tantamount to ownership in fee, but rather is a restriction on the use of property.[184] However, the trial court's recognition of the transfer of the property by tax title is in conflict with general principles of cemetery law, which forbids the seizure and sale of property in which human remains are interred.[185]

The main issue on appeal was whether the trial court erred in holding that material issues of fact existed when the trial court determined whether defendant actually "abandoned" portions of Heard Cemetery.[186] The court rightly recognized that, "[w]hen a family burial plot is established, it creates an easement against the fee, and while the naked legal title may pass, it passes subject to the easement [so] created."[187] The court noted that, "[t]he easement and rights created thereunder survive until the plot is abandoned either by the person establishing the plot or his heirs, or by removal of the bodies by the person granted statutory authority."[188] For a cemetery to be deemed "abandoned," it must show signs of neglect including: "unchecked growth of vegetation, repeated and unchecked acts of vandalism, or the disintegration of grave markers or boundaries and for which no person can be found who is legally responsible and financially capable of the upkeep of such cemetery."[189] This characterization of the elimination of the cemetery dedication seems to derive from Jackson's writings in the 1930s and is cited by other courts.[190] However, it is an incorrect interpretation of the law and

182. *City of Springs*, 711 S.E.2d at 407.

183. *Id.*

184. *See, e.g.*, Huxfield Cemetery Ass'n v. Elliott, 698 S.E.2d 591, 594 (S.C. 2010) (citing 14 AM. JUR. 2D *Cemeteries* § 17).

185. *See, e.g.*, In re Provident Gen. Corp., 32 B.R. 594, 594 n.1 (Bankr. W.D. La. 1983) (citing the Louisiana law holding cemeteries exempt from most taxation); Rosedale Cemetery Ass'n. v. Linden, 63 A. 904, 905 (N.J. 1906) (noting that New Jersey law exempts most cemetery lands from taxation).

186. *City of Sandy Springs*, 771 S.E.2d at 408.

187. *Id.* at 408 (citing Walker v. Ga. Power Co., 339 S.E.2d 728, 730 (Ga. Ct. App. 1986)).

188. *Id.*

189. *Id.* (citing GA. CODE ANN. § 36–72–2(1) (2018)).

190. Ryan M. Seidemann, *Requiescat in Pace: The Cemetery Dedication and its Implications for Land Use in Louisiana and Beyond*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 895, 910-11 (2018) (quoting PERCIVAL E. JACKSON, THE LAW OF CADAVERS AND OF BURIALS AND BURIAL PLACES 206 (1936)).

represents bad precedent.[191] The historical sources of the cemetery dedication do not condition the dedication on whether the land is kept clean.[192] The only inquiry should be whether human remains, once interred or entombed, are removed from the property.[193] If not, the land is still dedicated.[194] The court missed the mark here, presumably by relying on Jackson or other sources that relied on his work.

"None of the descendants had averred in their affidavits that they were legally responsible and financially capable of the upkeep of such cemetery."[195] "The trial court found (and the evidence showed) . . . that Cline maintained the property after he purchased it in the tax sale, the undeveloped portion of the acre tract contained mature trees, and there were 'remnants' of a fence that appeared to have enclosed the cemetery."[196] As such, there was evidence that the descendants abandoned the one-acre tract of land that had been conveyed for the purposes of a family burial ground, and Mills met his burden on summary judgment by pointing to specific evidence giving rise to a triable issue of fact.[197] Thus, the court found that, "the trial court did not err by denying the appellants' motion for summary judgment as to Mills' complaint for declaratory judgment."[198]

The recent Mississippi case of *McGriggs v. McGriggs*[199] considered issues related to the disinterment of the dead from a particular tract. According to this case, on January 22, 2014, Alfred McGriggs passed away.[200] Three days later, he was buried on family land in Claiborne County, Mississippi, in accordance with his wishes.[201] "One of Alfred's twelve siblings, Lee McGriggs, Sr., objected to Alfred's body being interred in the family land."[202] Lee subsequently filed suit to exhume his brother's body, naming two of his siblings as defendants.[203] Lee alleged that they buried Alfred in "'violation of the cemetery laws of the State of Mississippi'" and that his body should be exhumed and moved to the Seven Star Cemetery in Utica and buried where the siblings' parents are.[204] However, five of Alfred's siblings uncontradicted testimony stated Alfred wanted to be buried on his

191. *Id.* at 911.
192. *Id.*
193. *Id.* at 914.
194. *Id.*
195. *City of Sandy Springs*, 771 S.E.2d at 408.
196. *Id.*
197. *Id.* at 408-09 (citing GA. CODE ANN. §§ 36–72–2(1); 9–4–6 (2018)).
198. *Id.* at 409.
199. 192 So. 3d 350, 352 (Miss. Ct. App. 2015).
200. McGriggs v. McGriggs, 192 So. 3d 350, 351 (Miss. Ct. App. 2015).
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*

family's land in Claiborne County.[205] The trial judge determined that Alfred's burial did not violate state law and therefore denied Lee's petition.[206]

On appeal, the overarching issue was whether sufficient evidence of an illegal burial on family land existed to warrant disturbing a decedent's remains.[207] The court specifically analyzed whether it was illegal to inter a body on private property without the authorization of a county board of supervisors.[208] The law,[209] on which Lee's argument relied, did not give the board of supervisors the power to prevent the establishment of a private family cemetery.[210] Rather, the law "'gives the board the authority to establish or designate the location of a private family cemetery when petitioned and requested to do so.'"[211] The court reasoned that, while a property owner may want to file such a petition in order to get a property tax exemption, the "interment of a body on private property does not require that a landowner petition for the permission of the board of supervisors."[212] As the court noted, citing the case of *Hood v. Spratt*,[213] there exists a strong presumption against the removal of human remains.[214] When considering the place of interment of a decedent, a court may look at the preferences of the next of kin in order of their relation to the decedent, which order may be "modified by circumstances of special intimacy or association with the decedent."[215] The court in *Hood*, consistent with the law of most states, explained that the "surviving spouse has the paramount right to designate the burial site . . . [but] in the absence of a surviving spouse, the right goes to the next of kin in order of their relation to the decedent."[216] The *Hood* court recognized factors that a court should consider in allowing disinterment and removal of a body, including:

> public interest, wishes of the decedent, rights and feelings of those entitled to be heard by reason of relationship, rights and principles of religious bodies or other organizations that granted interment in the first burial site, and whether consent was given to interment in the first burial site . . . by the one claiming the right of removal.[217]

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205. *McGriggs*, 192 So. 3d at 352.
206. *Id.* at 353.
207. *Id.*
208. *Id.*
209. MISS. CODE. ANN. § 41-43-1 (2018).
210. *McGriggs*, 192 So. 3d at 353-54 (citing 96 Miss. Op. Att'y Gen. 0077 (1996), 1996 WL 88818).
211. *Id.*
212. *Id.* at 354 (citing MISS. CODE. ANN. § 27-31-1 (2018)).
213. Hood v. Spratt, 357 So. 2d 135, 137 (Miss. 1978).
214. *McGriggs*, 192 So. 3d at 354 (citing *Hood*, 357 So. 2d at 137).
215. *Id.*
216. *Id.*
217. *Id.* at 354-55.

Courts are to take these factors into account when making determinations regarding disinterment, along with regard to public welfare, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association.[218]

In this case, the court found that because the desires of the decedent as to the place of burial usually prevail over the objections of any person, especially when the decedent's wishes are strongly and recently expressed, there was no legal basis for exhuming Alfred's remains.[219] Here, five of Lee's siblings presented uncontradicted testimony that Alfred wanted to be buried exactly where he was and Lee failed to present any evidence sufficient to show otherwise.[220] While Lee and Alfred were brothers, there was clearly no close connection between them like there was between Alfred and the five defendant siblings.[221] According to the law, the next of kin most closely related to the decedent controls the right to burial.[222] In this situation, the next closest sibling to Alfred followed his brother's desire to be buried on the property in Claiborne County.[223] Moreover, emphasizing the *Hood* factors, there was no public interest in removing Alfred's body from his preferred place of burial on private property.[224] The court denied Lee's petition and affirmed the judgment of the lower court due to the fact that Lee failed to meet his burden of proof to present evidence sufficient to justify the extraordinary relief sought.[225] This result is the proper one under the law and circumstances, and it seems like preserving a higher property value of co-owned land interested Lee McGriggs more than protecting his brother's eternal rest.

C. Regulatory Issues and Liability

Cases in recent years reveal that regulators of the death care industries face several interesting situations. The cases reported here are a few examples of the risks and pitfalls of being a regulator or government actor in that industry, as well as some of the recurring themes of situations in which private parties attempt to seek retribution against regulators for lawfully carrying out their job duties.

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218. *Id.* at 355.
219. *McGriggs*, 192 So. 3d at 355 (citing *Hood*, 357 So. 2d at 137).
220. *Id.*
221. *Id.*
222. *Id.* (citing *Hood*, 357 So. 2d at 137).
223. *Id.*
224. *McGriggs*, 192 So. 3d at 355
225. *Id.* at 356.

The first of these cases is the matter of *Newton v. SCI Texas Funeral Services, Inc*.[226] This Texas case addresses the liability of both employers and regulatory bodies when allegations of defamation are made. In this case, "SCI Texas Funeral Services employed Lisa Newton as a funeral director at its Forest Park East Funeral Home [location] in Webster, Texas."[227] In addition to regular funeral director duties, "SCI paid [their] directors a 10% commission on each flower sale" in an effort to "encourage [their] directors to actively sell floral arrangements" supplied by a local vendor.[228] Directors were supposed to complete the order forms, fax the forms to the vendor, and then afterwards, they were to total the orders and attach the forms to their weekly time sheets in order to claim the commission for their sales.[229] In early 2010, an internal SCI audit identified discrepancies in the employees' flower order forms, which prompted a thorough internal audit of all funeral contracts, order forms, employee timesheets, and invoices from the local flower vendor.[230] "The audit revealed that several Forest Park East employees [including Newton] had committed fraud by submitting duplicate flower orders, altering flower order forms, and ordering flowers that families did not pay for in order to receive a higher bonus than was actually due."[231] The audit found that Newton received $225 dollars in bonuses of which she was not due.[232] Upon this discovery, SCI went to the Webster Police Department with the findings from the audit report.[233] Based upon this information, the Webster Police arrested Newton and charged with a misdemeanor offense of theft, which was subsequently dismissed.[234] Newton later filed suit against SCI alleging defamation, malicious prosecution, intentional infliction of emotional distress, and breach of contract.[235] SCI then moved for summary judgment on Newton's claims, which the trial court granted except for the motion as to Newton's breach of contract claim.[236]

On appeal, the main issue was whether SCI's act of presenting evidence of fraud to the Webster Police Department constituted defamation against Newton.[237] In order to prove a cause of action for defamation, a plaintiff must prove that: "(1) the defendant published a statement of fact about the plaintiff;

226. No. 01-13-01065-CV, 2015 WL 1245583, at *1 (Tex. App. 2015).
227. Newton v. SCI Texas Funeral Servs., Inc., No. 01-13-01065-CV, 2015 WL 1245583, at *1 (Tex. App. 2015).
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Newton*, 2015 WL 1245583, at *1.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Newton*, 2015 WL 1245583, at *2.

(2) the statement was defamatory; (3) the statement was false; (4) the defendant acted negligently in publishing the false and defamatory statement; and (5) the plaintiff suffered damages as a result."[238] "For a statement to be actionable as defamation, it must refer to an ascertainable person,"[239] and the "statement must 'point to the plaintiff and to no one else.'"[240] "Defamatory statements are conditionally or qualifiedly privileged and therefore not actionable when 'made in good faith on any subject matter in which the author has an interest, or with reference to which he has a duty to perform to another person having a corresponding interest or duty.'"[241] This type of privilege applies to statements made in circumstances where the author believes that the information is of important interest to the public or the public is entitled to know the information.[242] There is one exception to the defamation claim: actual malice.[243] "[P]roof that a statement was motivated by actual malice existing at the time of publication defeats the privilege."[244] For defamation purposes, "a statement is made with actual malice when it is made with knowledge of its falsity or with reckless disregard as to its truth."[245] To invoke a privilege, "an employer must conclusively establish that the allegedly defamatory statement was made [without] malice."[246]

In this case, the court found that SCI only furnished the internal audit report to the police with the intent to seek law enforcement assistance in determining whether the police believed that sufficient evidence existed to bring criminal charges against Newton.[247] SCI argued that, it never made any statement that it knew was false or was made with reckless disregard as to its truth throughout the police interaction.[248] The appellate court found that "SCI conclusively established that its alleged defamatory statement to the Webster Police Department was made without malice and, therefore, was qualifiedly privileged."[249] Malicious prosecution is a type of intentional tort wherein a plaintiff must prove:

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238. *Id.* at *2 (citing WFAA–TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998); Brown v. Swett & Crawford of Texas, Inc., 178 S.W.3d 373, 382 (Tex. App. 2005)).

239. *Id.* at *3 (citing Robertson v. Sw. Bell Yellow Pages, Inc., 190 S.W.3d 899, 902 (Tex. App. 2006); Double Diamond, Inc. v. Van Tyne, 109 S.W.3d 848, 854 (Tex. App. 2003)).

240. *Id.* at *3 (citing Newspapers, Inc. v. Matthews, 339 S.W.2d 890, 894 (Tex. 1960)).

241. *Id.* at *5 (citing TRT Dev. Co.–KC v. Meyers, 15 S.W.3d 281, 286 (Tex. App. 2000)).

242. *Newton*, 2015 WL 1245583, at *5 (citing Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 646 (Tex. 1995)).

243. *Id.*

244. *Id.* (citing *Randall's Food Mkts., Inc.*, 891 S.W.2d at 646; Marathon Oil Co. v. Salazar, 682 S.W.2d 624, 631 (Tex. App. 1984)).

245. *Id.* (citing generally Hagler v. Proctor & Gamble Mfg. Co., 884 S.W.2d 771 (Tex. 1994)).

246. *Id.* (citing Jackson v. Cheatwood, 445 S.W.2d 513, 514 (Tex. 1969); Goodman v. Gallerano, 695 S.W.2d 286, 287–88 (Tex. App. 1985)).

247. *Newton*, 2015 WL 1245583, at *5.

248. *Id.*

249. *Id.* at *6 (citing *Jackson*, 445 S.W.2d at 514).

> (1) commencement of a criminal prosecution against the plaintiff; (2) initiated or procured by the defendant; (3) termination of the prosecution in the plaintiff's favor; (4) the plaintiff's innocence; (5) the defendant's lack of probable cause to initiate the proceedings; (6) malice in filing the charge; and (7) damage to the plaintiff.[250]

In this particular instance, the court paid a great deal of attention to the fifth element of probable cause.[251] Probable cause is defined as, "'the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the . . . [complainant], that the person charged was guilty of the crime for which he was prosecuted.'"[252]

Essentially, the question here was "whether a reasonable person would believe that a crime had been committed, given the facts that the complainant, before initiating the criminal proceedings, honestly and reasonably believed to be true."[253] When a person "has probable cause to report a crime, there can be no malicious prosecution, even if the subsequent report fails to fully disclose all relevant facts."[254] The appellate court found there was no disputable fact as to whether a reasonable person believed a crime was committed.[255] The undisputed evidence showed that probable cause existed for SCI to initiate the prosecution of Newton based on:

> (1) the internal audit revealed that several Forest Park East employees were committing fraud by claiming larger amounts of flower sales than were actually ordered; (2) Newton admitted that she had submitted duplicate flower order forms and received bonuses that she was not owed; (3) an SCI employee stated that he honestly and reasonably believed that Newton had committed theft based on the facts before him; and (4) Newton understood how SCI could be concerned about duplicate flower orders.[256]

Thus, the court found that Newton's malicious prosecution claim entitled SCI to summary judgment in its favor.[257]

The important lesson learned from this case is that when employers and regulators have a reasonable basis to believe that wrongdoing is occurring, they should not be subject to a defamation or wrongful prosecution claim for

250. *Id.* (citing Richey v. Brookshire Grocery Co., 952 S.W.2d 515, 517 (Tex. 1997)).
251. *Id.*
252. *Newton*, 2015 WL 1245583, at *6 (quoting Akin v. Dahl, 661 S.W.2d 917, 921 (Tex. 1983)).
253. *Id.* (citing *Richey*, 952 S.W.2d at 517).
254. *Id.* (citing First Valley Bank of Los Fresnos v. Martin, 144 S.W.3d 466, 470 (Tex. 2004)).
255. *Id.* at *7.
256. *Id.* at *8.
257. *Newton*, 2015 WL 1245583, at *8 (citing *Richey*, 952 S.W.2d at 518–20; Arrendondo v. Rodriguez, 2011 WL 304070, at *8 (Tex. App. 2011)).

reporting those suspicions in good faith. This, of course, does not mean that such claims will never be brought, but it does stand for the notion that they should not stick.

A common regulatory theme in recent years is the "not in my backyard" aspect of the siting of funeral homes and crematories. This was the case in the matter of *Scott v. City of Knoxville*.[258] In this case, in July 2010, Gentry–Griffey Funeral Home "began the process of applying for a building permit to add a crematory to its existing funeral home in Fountain City, Tennessee."[259] The funeral home was located in an O–1 zone, which is considered to be an "area designated for professional and business offices and related activities."[260] "On August 23, 2011, the City of Knoxville Building Inspections and Plans Review Department . . . issued the requested permit to Gentry–Griffey to construct the crematory as an accessory use of the funeral home establishment."[261] Presumably because no one particularly likes the thought of a crematory nearby, in December 2011, several of the city's residents appealed the issuance of the permit to the City's Board of Zoning Appeals ("BZA"), arguing that the addition of a crematory to the property should not be allowed because such use is industrial.[262] "The BZA voted unanimously to deny the appeal."[263] The "petitioners then appealed to the Knoxville City Council."[264] Following a hearing, the City Council permitted the proposed construction of a crematory as an accessory use for an existing funeral home.[265] Petitioners then filed a petition with the trial court, who later found "that the City Council had not exceeded its jurisdiction, [followed an unlawful procedure,] acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision."[266]

The central issue on appeal was whether the erection and operation of a crematory is considered an "accessory use" of existing funeral home property.[267] Under Tennessee law, "funeral directing" is defined as the "practice of directing or supervising funerals or the practice of preparing dead human bodies for burial by any means, other than by embalming, or the disposition of dead human bodies."[268] The appellate court pointed out that, in prior jurisprudence, it held that the practice of funeral directing includes

258. No. E2014-01589-COA-R3-CV, 2015 WL 3545948 (Tenn. Ct. App. 2015).
259. Scott v. City of Knoxville, No. E2014-01589-COA-R3-CV, 2015 WL 3545948, at *1 (Tenn. Ct. App. 2015).
260. *Id.*
261. *Id.*
262. *Id.* at *1, 6.
263. *Id.* at *1.
264. *Scott*, 2015 WL 3535948, at *1.
265. *Id.* at *2, 4.
266. *Id.* at *4.
267. *Id.* at *6.
268. *Id.* at *7 (quoting TENN. CODE ANN. § 62– 5–101(6)(A)(i)).

the operation of a crematory.[269] "Thus, cremation services are customarily incidental to the operation of an undertaking establishment or funeral home."[270] Because such activity was incidental to funeral directing, and Gentry-Griffey was simply trying to provide cremation as an expansion of the services already offered to customers, the zoning board properly viewed cremation as an accessory use of the existing facility and did not require a variance.[271] The appellate court ultimately affirmed the trial court's judgment holding, "the City Council had not exceeded its jurisdiction or acted illegally, arbitrarily, or fraudulently" in granting the permit to construct the crematory as an accessory use of the funeral home establishment.[272] This result is not particularly surprising and likely serves more as a cautionary tale against wasting money on such challenges, as recent history shows that they seldom succeed.

The matter of *Roman Catholic Diocese of Rockville Center v. Incorporated Village of Old Westbury*[273] is a long-term zoning dispute regarding the siting of a cemetery. In the 1990s, the Diocese in this case sought zoning approval for the development of a new cemetery.[274] The Village denied the request, taking the position that while religious uses of land would fit the zoning allowances for the area where the cemetery would be located, they did not consider a cemetery a "religious use."[275] The appellate court disagreed with the Village, ruled that a cemetery use of property is a religious use of land for zoning purposes, and ordered the Village to issue the Diocese's zoning permit.[276] Although a subsequent appeal removed the directive to issue the permit,[277] the basic ruling maintained that an authorized use of land as a religious use includes a cemetery.[278] These court machinations lasted from 1994 through 2001.[279]

Prior to the Diocese's efforts to move forward with the development of its cemetery, the Village changed its zoning laws in a manner such that thwarted the Diocese's plans to proceed with the development of its cemetery.[280] Among other things, the Village required the Diocese to

269. *Scott*, 2015 WL 3545948, at *7 (citing BMC Enters. v. City of Mt. Juliet, 273 S.W.3d 619, 626 (Tenn. Ct. App. 2008)).
270. *Id.*
271. *Id.*
272. *Id.* at *7-8.
273. 128 F. Supp. 3d 566, 571 (E.D.N.Y. 2005).
274. Roman Catholic Diocese of Rockville Ctr. v. Inc. Vill. of Old Westbury, 128 F. Supp. 3d 566, 573 (E.D.N.Y. 2005).
275. *Id.*
276. *Id.* at 573-74.
277. *Id.* at 574.
278. *Id.*
279. *Roman Catholic Diocese of Rockville Ctr.*, 128 F. Supp. 3d at 573-74.
280. *Id.* at 575, 579.

undertake prohibitive environmental engineering and monitoring activity in order to secure its zoning permit.[281] In response to the Village's efforts, the Diocese challenged the constitutionality of the Village's new zoning law.[282] The court in this matter found that the law was not unconstitutional,[283] holding that the law did not violate the establishment of religion clause[284] and that the law met the rational basis standard for regulatory zoning activity.[285]

Focusing on the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the Diocese argued that the arbitrary nature and unreasonableness of the terms used in the existing zoning permit and the terms intended to prevent the Diocese from carrying out its religious purposes.[286] The Village filed a motion for summary judgment on the Diocese's RLUIPA claim.[287] The court rejected the Village's efforts to dismiss the Diocese' claim under RLUIPA that the establishment of a cemetery is the free exercise of religion under the First Amendment.[288] However, the court dismissed the Diocese's argument because they lacked evidence to support that the Village treated them differently from secular entities with regard to the Village's zoning activities.[289] The court pretermitted until trial the Village's efforts to obtain summary judgment on the allegations that the zoning regulation violated (and was thus superseded by) RLUIPA, but noted that the Diocese had a strong likelihood of success on this claim at trial.[290]

Although this case had other components, the above discussion covers most of the cemetery-related issues. This case is important because it highlights the length that certain parties will go to in order to avoid having a cemetery in their community. However, the court in this matter clearly telegraphed that unreasonable regulation against such land uses will not be allowed. Accordingly, because government actions done under color of law can result in substantial tort liability, this case—though no reported final resolution exists—should stand as a warning about pushing the aversion to the dead to extreme lengths.

The United States court system is not the exclusive venue for zoning problems of late. In the recent British Columbia case of *Paldi Khalsa Diwan*

281. *Id.* at 577-78.
282. *Id.* at 571.
283. *Id.* at 597.
284. *Roman Catholic Diocese of Rockville Ctr.*, 128 F. Supp. 3d at 583.
285. *Id.* at 584.
286. *Id.* at 571, 585.
287. *Id.* at 585.
288. *Id.* at 587.
289. *Roman Catholic Diocese of Rockville Ctr.*, 128 F. Supp. 3d at 587, 589.
290. *Id.* at 591.

Society v. Cowichan Valley,[291] zoning related to crematory siting was also at issue. In the 1960's, at a time when there was no zoning in the Cowichan Valley, the appellant Crematorium built a wood-fueled crematorium on Lot 1.[292] In 1998, the Cowichan Valley Regional District ("CVRD") passed Bylaw No. 1840, whereby "[l]ot 1, on which the crematorium already existed, was included in the newly-created 'P-1 Zone - Parks and Institutional.'"[293] "All of the surrounding properties were zoned 'R-2 - Suburban Residential.'"[294] In 2010, the crematory "owners applied for and obtained a building permit for the construction of a gas-fueled crematorium on Lot 1."[295] They completed the building of the new crematorium in late 2010.[296] Pursuant to the Cremation, Interment, and Funeral Services Regulation,[297] the crematory operator applied for a license to operate the crematorium in early 2011.[298] Although the appellant sought to complete the application to operate a crematory and the obtain a building permit, confusion arose regarding whether the permit should actually issue, resulting in this suit.[299] The lower court found that the permitted use of property in the P-1 zone did not include use as a crematorium.[300]

The issue on appeal was whether a crematorium may be a permitted as an "institution" within a parks and institutional zone and if so, whether it may be operated as a commercial enterprise in the P-1 zone.[301] Under the zoning bylaws, commerce is defined as, "the selling, servicing and repair of goods or, the provision of services and commercial office functions that are carried on for the purpose of earning income."[302] The appellate court noted that nothing in the wording of the P-1 zone prohibited "the provision of services . . . carried on for the purpose of earning income."[303] On the other hand, the bylaws defined "institutions" to include cemeteries, arenas, colleges, and stadiums, which all typically operate by offering services to the public for a fee, regardless whether on a non-profit or profit basis.[304] Furthermore, the court found no evidence that by providing cremation services, the new

291. 2014 BCCA 335, para. 1 (Can. Br. Col.).
292. Paldi Khalsa Diwan Soc'y v. Cowichan Valley, 2014 BCCA 335, para. 4 (Can. Br. Col.).
293. *Id.* at para. 5.
294. *Id.*
295. *Id.* at para. 6.
296. *Id.*
297. Cremation, Interment, and Funeral Services Regulation, R.S.B.C. Reg. 298/2004 (Can.).
298. *Paldi Khalsa Diwan Soc'y*, 2014 BCCA 335, para. 7.
299. *See id.* at para. 7-10, 14-17.
300. *Id.* at para. 25.
301. *Id.* at para. 1, 26.
302. *Id.* at para. 48 (citing Bylaw No. 1840, *Electoral Area "E" - Cowichan Station/ Sahtlam/Glenora Zoning Bylaw* (1998)).
303. *Paldi Khalsa Diwan Soc'y*, 2014 BCCA 335, para. 49.
304. *Id.* at para. 50.

crematorium impacted traffic, air pollution, or overall neighborhood activity.[305] Therefore, the appellate court reasoned that the crematorium's continued operation as a commercial enterprise in the P-1 zone is a permitted use.[306]

It is a bit surprising that the court here did not simply allow the new crematory to be operated by being a grandfathered use of the property already burdened with a crematory. Nonetheless, as is usually the case, the court allowed the crematory to operate.[307] While the public often finds such uses repugnant, they are not, in fact, substantial property burdens nor are they "industrial" uses in the colloquial sense (i.e., plants and factories, etc.).

In the matter of *Simmons v. State*,[308] the Louisiana Fourth Circuit Court of Appeal faced matters of regulatory liability when a child in foster care died and allegations were made by his birth parents of improper handling of the remains. In February 2013, "the Simmons' children were removed from the physical care and control of their parents by [a Louisiana state agency] and placed in foster care."[309] In April 2013, the agency informed the parents that someone brought their son, Eli, to Children's Hospital in New Orleans.[310] Eli died by the time the parents arrived at the hospital.[311] The parents filed a lawsuit alleging, "that the coroner's office received Eli's body on April 10, 2013, to perform an autopsy . . . but failed to do so or to provide proper information as to the cause of death . . . that Eli's body was misplaced by the coroner's office," and that, despite court orders to the contrary, upon discovering the body the coroner's office wrongfully cremated him and buried his cremains in an undisclosed location.[312] The parents asserted that these alleged acts and omissions of the coroner's office constituted gross and/or intentional negligence, as well as intentional infliction of emotional distress on the family.[313] The district court disagreed, finding "[t]he duty imposed upon the coroner is for the benefit of the public, not a private individual."[314]

On appeal, the issue was whether a coroner may be held liable in tort for losing a body or for wrongful cremation.[315] Specifically, in this case, the

305. *Id.* at para. 51.
306. *Id.* at para. 52.
307. *Id.* at para. 52.
308. 171 So. 3d 1147, 1149 (La. Ct. App. 2015).
309. Simmons v. State, 171 So. 3d 1147, 1149 (La. Ct. App. 2015).
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *Simmons*, 171 So. 3d at 1150.
315. *See id.* at 1153.

coroner's office relied on decisions rendered in two other cases[316] in which the courts concluded that "no cause of action [may lie] against the coroner's office because 'the duty statutorily imposed upon the coroner is for the benefit of the sovereign, and not the private individual or the individual's private interest.'"[317] However, the court in this case disagreed, explaining that the conclusions in *Lejuene* and *Sharp* are contrary to the statutory language found in Louisiana Revised Statutes section 13:5713(L)(3), that "states the coroner's immunity is limited to only those activities within the course and scope of his duties that are reasonably related to legitimate government objectives . . . and should not be construed 'to reestablish any immunity based on the status of sovereignty.'"[318] Furthermore, the court here found that a coroner's immunity does not extend to acts or omissions that constitute "willful, outrageous, reckless, or flagrant misconduct."[319] Here, the court found that the parents' allegations provided clear evidence of outrageous and flagrant misconduct by the coroner's office, specifically in the office's failure to investigate the incident, perform an autopsy, and provide information as to Eli's cause of death.[320] Moreover, the court held that the coroner's office's act of losing Eli's body and then cremating and burying his remains without notifying the family supported claims of both negligence and intentional infliction of emotional distress.[321]

According to Louisiana law, "[a] coroner is statutorily required to investigate the cause and manner of death in all cases involving . . . 'suspicious, unexpected, . . . unusual, . . . [s]udden, or violent deaths. . . . [or] [a]ny death from natural causes occurring in a hospital under twenty-four hours of admission.'"[322] "As part of his investigation, the coroner has the discretionary authority to perform an autopsy and 'may hold any dead body for any length of time that he deems necessary.'"[323] Here, Eli's death occurred shortly after his admission to the hospital, which clearly warranted an investigation or autopsy by the coroner.[324] This failure to conduct an autopsy serves to establish the first two elements of a negligence claim (i.e., duty and breach of duty).[325] Likewise, the coroner's misplacement of Eli's body for nine months and the subsequent wrongful cremation and burial

316. Sharp v. Belle Maison Nursing Home, Inc., 960 So. 2d 166, 169 (La. Ct. App. 2007); LeJeune v. Causey, 634 So. 2d 34, 37 (La. Ct. App. 1994).
317. *Simmons*, 171 So. 3d at 1152 (quoting *LeJeune*, 634 So. 2d at 37; *Sharp*, 960 So. 2d at 169).
318. *Id.* at 1153 (quoting LA. REV. STAT. ANN. § 13:5713(L)(2)(c)).
319. *Id.* (quoting § 13:5713(L)(2)(b)).
320. *Id.*
321. *Id.*
322. *Simmons*, 171 So. 3d at 1151 (quoting § 13:5713(A)).
323. *Id.* (quoting § 13:5713(B)).
324. *Id.* at 1153.
325. *Id.*

without notification to the family—which prevented them from conducting an independent autopsy or providing a burial according to their religious beliefs—clearly proves the remaining elements of a negligence claim (i.e., cause-in-fact, scope of liability, and damages).[326]

While a coroner does have the statutory power to hold a body for as long as he deems proper, an abuse of that power, which the court found in this situation, constitutes the first element necessary for an intentional infliction of emotional distress claim (i.e., extreme and outrageous conduct).[327] Because the family was also deprived of a religious burial of their child and they still had not been provided with the location of his remains, the second element (i.e., severe emotional distress) was met.[328] Lastly, because the family constantly notified the coroner's office as to their wishes to preserve Eli's body, the coroner's actions indicate that the coroner knew or should have known that the acts or omissions of his office would inflict severe emotional distress upon the parents (which is the last element for a claim of intentional infliction of emotional distress).[329] Therefore, the appellate court reversed the trial court's judgment and instead found that the parents "sufficiently allege[d] causes of action for negligence and intentional infliction of emotional distress."[330]

This case stands as an extreme example of outrageous conduct that may be recoverable in tort when the mistreatment of dead bodies is alleged. As noted by authors previously,[331] claims of emotional distress, while often alleged, are seldom successful.[332] This case is an exception to that rule largely because of its outrageous facts. This case should serve as a warning to regulators and government actors not to neglect legitimate requests and complaints from the public, especially those of descendants and family. Immunity is not certain and regulators and government actors need to be cautious of careless or wantonly callous actions when interacting with the public.

The recent California case of *Crawford v. Moore*[333] stands as a polar opposite of the *Simmons* case from a regulatory standpoint. Whereas *Simmons* represents outrageous behavior by government actors, the *Crawford* case represents government actors doing their jobs properly and being sued

326. *Id.*

327. *Simmons*, 171 So. 3d at 1153-54 (quoting § 13:5713(B)(3); citing White v. Monsanto Co., 585 So. 2d 1205, 1209-10 (La. 1991)).

328. *Id.* at 1154.

329. *Id.* (citing *White*, 585 So. 2d at 1209).

330. *Id.* at 1154.

331. Seidemann, *supra* note 57, at 7.

332. *Id.*

333. No. 2:14-cv-2725 JAM AC(PS), 2015 WL 1637993, at *1 (E.D. Cal. 2015).

for acting reasonably.[334] This case centers around individuals already working in the funeral industry as apprentice funeral directors in 1999 when they were grandfathered into the system as funeral directors due to work experience.[335]

In this case, Crawford worked in the funeral industry for nearly fourteen years before applying for a funeral director's license.[336] When he applied for the license, he was denied by the California Cemetery and Funeral Bureau ("CFB") due to his past criminal convictions.[337] Crawford alleged that the CFB has racially discriminatory policies, practices, procedures, and administrative regulations, and that Lisa Moore, the CFM Chief and defendant in this case, denied him a funeral license because he is African American.[338] An administrative law judge accepted Crawford's application and advised him that he would issue his license upon the successful completion of the funeral director exam, with the additional requirement that he be put on probation for three years.[339] On appeal, the issue was whether any of the causes of action alleged against CFB were actually viable in a license denial suit.[340]

Title VII of the Civil Rights Act of 1964 "prohibits employers, employment agencies, and labor unions from discriminating on the basis of, among other things, race or color."[341] "Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')."[342] Although he urged violations of this law, the court found that "[Crawford did] not state a Title VII claim against the sole defendant, Moore, because Moore [was] not alleged to be [Crawford]'s employer (nor [was] she alleged to be an employment agency or a labor union)."[343] "Rather, Moore was the head of a licensing agency, and allegedly discriminated against Crawford while working in that capacity.[344] "Title VII does not apply to licensing agencies in their role of granting or denying licenses."[345] Because

334. *Simmons*, 171 So. 3d at 1153; *see also* Crawford v. Moore, No. 2:14-cv-2725 JAM AC(PS), 2015 WL 1637993, at *6 (E.D. Cal. 2015).
335. *Crawford*, 2015 WL 1637993, at *1.
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. *Crawford*, 2015 WL 1637993, at *4.
341. *Id.* (citing 42 U.S.C. § 2000e–2).
342. *Id.* (citing Ricci v. DeStefano, 557 U.S. 557, 577 (2009)).
343. *Id.*
344. *Id.*
345. *Crawford*, 2015 WL 1637993, at *4 (citing Haddock v. Bd. of Dental Exam'rs of California, 777 F.2d 462, 463 (9th Cir. 1985)).

Crawford acknowledged that, "Moore was never his employer . . . his Title VII claim against her could not be cured," and the court dismissed his claim.[346] Although a Title VII cause of action was not viable, Crawford made other allegations.[347]

Under 42 U.S.C. section 1981, "discriminatory private conduct as well as such conduct taken under color of state law" is prohibited.[348] "To state a prima facie case under [s]ection 1981, a plaintiff must allege, at a minimum, facts showing that: (1) he is a member of a protected class; (2) he attempted to contract for certain services; and (3) he was denied the right to contract for those services."[349] "'[T]he prohibition on discrimination by a state or its officials contained in [section] 1981 can be enforced against state actors only by means of [section] 1983,' and thus, [s]ection 1981 'does not create a private right of action' against state actors."[350] Since the court barred this claim as a matter of law, they dismissed Crawford's claim under this law with prejudice.[351]

> Section 1983 "creates a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the Constitution." "In order to allege a claim upon which relief may be granted under § 1983, a plaintiff must show that he or she has been deprived of a 'right secured by the Constitution and . . . law of the United States' and that the deprivation was 'under color' of state law."[352]

Here, Crawford alleged a "of his Due Process and Equal Protection Rights." The court observed that,

> Pursuant to the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." "A section 1983 claim based upon procedural due process thus has three elements: (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; (3) lack of process." . . .

346. *Id.* (citing Schmier v. Ninth Cir., 279 F.3d 817, 824 (9th Cir. 2002)).
347. *Id.* at *5.
348. *Id.* at *4 (citing Pittman v. Oregon, Emp't Dept., 509 F.3d 1065, 1068 (9th Cir. 2007)).
349. *Id.* (citing Lindsey v. SLT Los Angeles, LLC, 447 F.3d 1138, 1145 (9th Cir. 2006)).
350. *Crawford*, 2015 WL 1637993, at *5 (citing *Pittman*, 509 F.3d at1068, 1073).
351. *Id.* at *4 (citing *Schmier*, 279 F.3d at 824).
352. *Id*. at *5 (internal citations omitted).

> The complaint [did] not state a procedural Due Process claim against Moore. According to the complaint, [Crawford] applied for a license, was denied, and was granted a hearing to challenge the denial. The hearing resulted in a ruling that he would get his license as soon as he passed the exam, although he would be placed on probation for three years. Plaintiff does not allege that he was deprived of a meaningful opportunity to be heard, and he does not indicate what about this process [wa]s deficient, nor what additional process was due him.[353]

Here, Crawford did

> not dispute that he was initially denied a license because of his convictions, but that after a hearing, he was notified that he would be granted the license—despite the convictions—although he would be placed on probation for three years. Plaintiff does not allege that this result is arbitrary and unreasonable, or that it has no substantial relation to the public health and safety, and it does not appear to be so on its face.[354]

Therefore, the court dismissed Crawford's due process claim.[355]

Altogether, the court granted CFB's motion to dismiss for failure to state a claim, but granted Crawford leave to amend his section 1983 claims arising under the Fourteenth Amendment Due Process and Equal Protection clauses of the United States Constitution.[356] This case instructs that it is not unreasonable for a regulatory body to refuse to grant an application when, in its discretion, the applicant does not meet the requirements for licensure. In other words, it is not enough for an applicant to allege racial bias when there is no evidence of such bias and when there is evidence that the regulator exercised reasonable discretion under the law.

As reported in the recent case of *Grassle v. City of Davenport*,[357] the Davenport Police Department officer filled out a trespass notice and delivered it to plaintiff, Douglas Grassle, alleging, based upon the complaint of a private citizen, (who was also the operator of Oakdale Cemetery)[358] that "any permission or license he had to enter the Oakdale Cemetery—a non-profit cemetery in Davenport—had been revoked and withdrawn."[359] Grassle then

353. *Id*. at *5 (internal citations omitted).
354. *Id.* at *6.
355. *Crawford*, 2015 WL 1637993, at *6
356. *Id.* at *8.
357. No. 15-0065, 2015 WL 5970055, at *1 (Iowa Ct. App. 2015).
358. Grassle v. City of Davenport, No. 15–0065, 2015 WL 5970055, at *1 (Iowa Ct. App. 2015).
359. *Id.*

brought suit, alleging that "the notice was illegally issued and was in violation of his due process rights under the federal and state constitutions."[360] The district court found that Grassle failed to prove that when the police acted on the complaint of a private citizen, that the City of Davenport took any action in violation of Grassle's due process rights when its police officers acted on a complaint.[361]

On appeal, the question was "whether the district court correctly applied the law in determining that the facts were insufficient to constitute state action" against the City.[362] Per the constitutions of both the United States and Iowa, state action is limited in that it may not deprive a person of property without due process of law.[363] "In order to be considered a state action, there must first be a constitutional deprivation caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or a person for whom the state is responsible."[364] Additionally, "[t]he party charged with the deprivation must also be a person who may fairly be said to be a state actor."[365] Such:

> [a]ction by an individual may constitute state action . . . : (1) where a state acts directly through its officer or agent; (2) where the state acts in conjunction with business in a profit-making field; (3) where the state by its action (or inaction) encourages or creates an atmosphere in which private citizens deprive others of their constitutional rights; (4) where the state affirmatively orders or approves the action in the course of its regulatory rule-making; and (5) where functions traditionally performed by the state are delegated to or performed by private interests.[366]

In this case, the "police officer did not cause or encourage the trespass notice to be issued, but rather only acted on the request of a private citizen in filling out and issuing the trespass notice."[367] It was the private citizen who made the decision to revoke or withdraw Grassle's permission or license to enter the cemetery and it was the private citizen who signed his name to the trespass notice.[368] The appellate court agreed with the district court's finding that "'the mere issuance of a trespass notice by a state actor does not rise to the

360. *Id.*
361. *Id.*
362. *Id.*
363. *Grassle*, 2015 WL 5970055, at *1 (citing Green v. Racing Ass'n of Cent. Iowa, 713 N.W.2d 234, 238 (Iowa 2006)).
364. *Id.* (citing Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999)).
365. *Id.*
366. *Id.* at *1-2 (citing Jensen v. Schreck, 275 N.W.2d 374, 385 (Iowa 1979)).
367. *Id.* at *2.
368. *Grassle*, 2015 WL 5970055, at *2.

level of state action required to support a due process violation.'"[369] Thus, this case is instructive of the notion that a government entity acting in good faith pursuant to a complaint from the public should not be in danger of violating people's constitutional rights when carrying out its lawful duties.

D. Perpetual Care and Merchandise Issues

In *Monument Builders of New Jersey, Inc. v. Roman Catholic Archdiocese of Newark*,[370] the plaintiffs were several companies that build, design, and sell cemetery monuments and mausoleums.[371] The "[d]efendant, the Roman Catholic Archdiocese of Newark, [was] a religious organization [that] operates ten cemeteries."[372] In 2006, the Archdiocese of Newark ("Archdiocese") created a "Private Mausoleum Program" wherein individuals and families of parish members could be entombed and the Archdiocese "would own the mausoleum and be responsible for maintenance, repairs, and restoration."[373] Any money made from the program would be deposited into a fund to pay for the continual care and upkeep of the cemeteries.[374]

"Prior to this program, [the Archdiocese] had never sold monuments through its cemetery."[375] However, in June 2013, it "began selling inscription rights for monuments."[376] The program also allowed any person who purchased an interment right from the Archdiocese to also purchase an inscription for a headstone.[377] However, the Archdiocese informed purchasers of the interment right that they still had a right to purchase a monument from any other dealer.[378] Also of note is that, "defendant did sell rights of entombment in one cemetery to individuals from the Coptic Church, after a decision was made that the Coptic Church [was] 'in communion' with the Catholic Church"—the only exception to the aforementioned parish members only restriction.[379]

The plaintiffs sought to "enjoin [the Archdiocese] from selling monuments, inscriptions of monuments, and private mausoleums in its

369. *Id.*
370. No. C-124-13, 2015 WL 3843706, at *1 (N.J. Super. Ct. 2015).
371. Monument Builders of New Jersey, Inc. v. Roman Catholic Archdiocese of Newark, No. C-124-13, 2015 WL 3843706, at *1 (N.J. Super. Ct. 2015).
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. *Monument Builders of New Jersey, Inc*., 2015 WL 3843706, at *1.
377. *Id.*
378. *Id.*
379. *Id.*

cemeteries."[380] The district court rejected the monument dealers' request.[381] On appeal, the plaintiffs argued that the trial court erred when it held that the Archdiocese "had the statutory authority to sell monuments and inscription rights, that its cemeteries were private, and that the Program did not violate public policy."[382] The plaintiffs also argued that the "sale of interment rights to members of the Coptic Church established [the Archdiocese] as a 'cemetery company,'" and thus subjected it to additional regulation.[383] The appellate court disagreed with the plaintiffs' arguments and affirmed the trial court's judgment.[384]

The issue raised by the monument dealers' action was whether the Archdiocese had the statutory authority to sell monuments and inscription rights.[385] The New Jersey Cemetery Act:

> regulates cemetery companies and defines such a company as 'a person that owns, manages, operates, or controls a cemetery, directly or indirectly, but does not include a religious organization that owns a cemetery which restricts burial to members of that religion or their families unless the organization has obtained a certificate of authority for the cemetery.'[386]

The statute expressly prohibits cemetery companies from the manufacture or sale of memorials or private mausoleums.[387]

The Archdiocese "derives its authority to operate its cemeteries from [New Jersey law], which allows [it] to manufacture, sell or inscribe memorials and private mausoleums."[388] Due to the fact that the Archdiocese's "cemeteries are restricted to members of the Catholic faith and their immediate families, those cemeteries are not considered public cemeteries" under New Jersey law.[389] Moreover, the Archdiocese "is not restricted to holding lands for use as a cemetery, but is permitted to '[a]cquire, purchase, receive, erect, have, hold and use . . . hereditaments suitable for any or all' of the purposes of a cemetery."[390] In this case, the court found that "[t]his broad grant of authority allowed [the Archdiocese] to construct and

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380. *Id.*
381. *Monument Builders of New Jersey, Inc*., 2015 WL 3843706, at *1.
382. *Id.* at *2.
383. *Id.*
384. *Id.*
385. *Id.*
386. *Monument Builders of New Jersey, Inc.*, 2015 WL 3843706, at *2 (citing N.J. STAT. ANN. § 45:27–1).
387. *Id.* (citing § 45:27–16c(1)-(2)).
388. *Id.* (citing N.J. STAT. ANN. § 16:15–11).
389. *Id.* at *3.
390. *Id.* (citing § 16:15–11).

maintain mausoleums, purchase memorials for placement on graves, and sell inscription rights for memorials."[391]

Regarding the argument that the Archdiocese be classified as a cemetery company due to the burial of Coptics in one of its cemeteries, the court found that such an arrangement did not invalidate the program.[392] New Jersey law[393] specifically exempts religious organizations that restrict burial to members of that religion. The Archdiocese acknowledged that "it sold burial rights in one of its cemeteries to members of the Coptic Church and did so as an exception to its otherwise restricted burial policy."[394] "[The Archdiocese] agreed to do so after its Office of Divine Worship determined that members of the Coptic faith are in 'communion with' the Roman Catholic Church."[395] The court's review of the record revealed "no indication that [the Archdiocese] was otherwise failing to adhere to the religious restriction in the operation of its cemeteries, and testimony was presented that it was the Archdiocese's policy to restrict burial to Roman Catholics and their family members."[396] The court was loathe to pass judgment on matters of religious interpretation and accordingly deferred to the church's decision on the Coptic issue.[397]

"The trial court considered that the plain language of the Cemetery Act excludes religious organizations from the definition of cemetery company and, [thus], from the prohibition against such entities selling memorials and private mausoleums."[398] The appellate court agreed that the "plain language of the Cemetery Act exclude[d the Archdiocese] from the definition of cemetery company and the attendant prohibition on the sale of monuments and private mausoleums."[399] This case is instructive, as it shows that courts will generally refrain from making religious decisions. In this regard, regulators should likely follow suit when it is not unreasonable to defer to the religious entities.

According to the facts in the matter of *Strader v. Marshall*,[400] Milton Marshall acquired Greenhills Memorial Gardens of Christian County, Inc. in Kentucky in December 1978. Marshall operated the company until he sold it to Jason and Taunya Strader in 2012.[401] Marshall also owned a cemetery in Clarksville, Tennessee called Resthaven Memorial Gardens.[402] During the

391. *Monument Builders of New Jersey, Inc.*, 2015 WL 3843706, at *3.
392. *Id.*
393. N.J. STAT. ANN. § 45:27–2 (2018).
394. *Monument Builders of New Jersey, Inc.*, 2015 WL 3843706, at *3.
395. *Id.*
396. *Id.* at *4.
397. *Id.* at *3.
398. *Id.* at *2.
399. *Monument Builders of New Jersey, Inc.*, 2015 WL 3843706, at *2.
400. No. 5:14-CV-00013-GNS, 2015 WL 1638470, at *1 (W.D. Ky. 2015).
401. Strader v. Marshall, No. 5:14-CV-00013-GNS, 2015 WL 1638470, at *1 (W.D. Ky. 2015).
402. *Id.*

acquisition process, an accounting firm assured the Straders that Greenhills' trust funds were in full compliance with Kentucky law.[403] However, it is apparent that this was not the case.[404]

At some point after the acquisition of the company, the Straders brought suit against Marshall, alleging that Marshall carried out a number of schemes during his ownership of Greenhills, an enterprise composed of Marshall and his wife.[405] The Straders alleged the following claims of substantial wrongdoing on the part of the cemetery with regard to trust funds: (1) diverting consumer trust funds to personal accounts of the owner; (2) selling lawn crypts, but never installing them; (3) selling mausoleum spaces in mausoleums that did not exist; and (4) using the names of living individuals whose money was in a trust to wrongfully withdraw money from the trustee bank, which was supposed to release the funds after the purchaser of a crypt died and his or her remains were laid to rest as contracted.[406] The Straders asserted that all of the foregoing schemes by the Marshalls created trust fund shortfalls of $2,974,449 dollars.[407]

The primary question in this case was whether the federal court had jurisdiction due to the allegation that the activity amounted to a RICO violation.[408] RICO provides both criminal penalties and civil remedies for racketeering activity.[409] Accordingly, the court found that, "a claim for civil remedies pursuant to RICO provides a jurisdictional basis for [a federal court] to hear such a [case]."[410] In addition, the court could also "elect to exercise supplemental jurisdiction over [the Straders'] state law claims pursuant to 28 U.S.C. [section] 1367(a), assuming that the state-law claims 'form[ed] part of the same case or controversy.'"[411] "'To state a RICO claim, a plaintiff must plead the following elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'"[412] "For the purposes of RICO, 'enterprise' is defined as 'any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . .'"[413]

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403. *Id.*
404. *Id.*
405. *Id.*
406. *Strader*, 2015 WL 1638470, at *1.
407. *Id.*
408. *Id.* at *2.
409. *Id.* (citing 18 U.S.C. §§ 1962–64).
410. *Id.* (citing Williams v. Duke Energy Int'l, Inc., 681 F.3d 788, 799–803 (6th Cir. 2012); Riverview Health Inst. LLC v. Med. Mut. of Ohio, 601 F.3d 505, 511 (6th Cir. 2010); Brown v. Cassens Transp. Co., 546 F.3d 347, 363 (6th Cir. 2008)).
411. *Strader*, 2015 WL 1638470, at *2 (citing 28 U.S.C. § 1367(a)).
412. *Id.* (quoting Ouwinga v. Benistar 419 Plan Servs., Inc., 694 F.3d 783, 791 (6th Cir. 2012) (internal quotation marks omitted) (citation omitted)).
413. *Id.* (citing 18 U.S.C. § 1961(4)).

As to whether this case qualified as racketeering under RICO, the court first looked to whether there was an "enterprise."[414] In this regard, the court noted the mere statement that Marshall's wife was a member of the enterprise without presenting any evidence of supporting this allegation was conclusory and did not support RICO jurisdiction.[415] Second, simply alleging that Marshall acquired Resthaven wrongfully from proceeds of racketeering was insufficient.[416] Taken together, the court found the factual allegations insufficient to make a valid RICO claim against the Marshalls as the evidence did not make for a plausible argument that they functioned together toward a common purpose as members of the alleged enterprise.[417]

Additionally, in order to allege a valid RICO claim, a plaintiff must show not only that the predicate act is a "but for" cause of plaintiff's injuries, but also that it is a proximate cause.[418] While the Straders

> provided information about the customers allegedly harmed in the scheme. . .they [did] not specif[y] the statements which they contended [we]re fraudulent. The statement that a letter confirming the false contract was sent to each alleged victim is not sufficient, nor is an allegation that [Marshall] used the U.S. mail to make claims against the trustee bank. Additionally, no date or even a date range has been given for any of these letters.[419]

The court found that, "[n]either a RICO claim nor mail fraud [were] properly pled as a predicate act, leaving no independent basis for federal jurisdiction."[420] Because "'[a] federal court should typically decline to exercise pendent jurisdiction over a plaintiff's state-law claims after dismissing the plaintiff's federal claims,'" the court declined to exercise its jurisdiction over the Straders' remaining state law claims after finding that the federal claims failed.[421]

This case is interesting in that it highlights the difficulties of making a prima facie RICO case in cemetery contexts. Although some commentators have urged regulators to look to RICO as an alternative mechanism to check

414. *Id.*
415. *Id.* at *3.
416. *Strader*, 2015 WL 1638470, at *3.
417. *Id.*
418. *Id.* (quoting Heinrich v. Waiting Angels Adoption Servs., Inc., 668 F.3d 393, 404 (6th Cir. 2012)).
419. *Id*. at *4.
420. *Id.*
421. *Strader*, 2015 WL 1638470, at *4.

wrongdoing in the cemetery industry,[422] this case shows that such efforts are easier said than done.[423]

In the recent California case of *Safina v. Sorensen*,[424] at issue was who has the right to control memorialization merchandise for a deceased person. At the time of Michael Safina's death on April 4, 2012, he had three living siblings (William, Abraham, and Bertha) and was in a forty-eight-year relationship with Geraldine Freeman.[425] "[Before] his death, Michael amended his trust to disinherit [his brothers] and to name Freeman as the sole beneficiary."[426] Michael's brothers filed an action to contest the decision and invalidate the amendment, which was still pending at the time of this case.[427] At the time of Michael's death, "Sorenson [was] the temporary trustee of Michael's trust and the special executor of his estate."[428] After they interred Michael at Santa Barbara Cemetery, William and Abraham planned to place a headstone on his grave.[429] The two proposed the headstone read "Our Beloved Brother" on the inscription, but Freeman requested "Our Beloved Mike."[430] Almost two years after Michael's death, Sorenson, with Freeman's approval, sent an e-mail to William's attorney requesting, "that they erect a headstone simply bearing Michael's name and the dates of birth and death."[431] The following day, William made the decision to place a headstone on Michael's grave that included Michael's name, dates of birth and death, the words "BELOVED BROTHER," and a Masonic symbol.[432] The headstone's placement and inscriptions deeply offended Freeman, arguing that it insulted her relationship with Michael, it conflicted with the brothers' actual relationship, and that it "infringe[d] on her rights as holder of his health care power of attorney."[433] Again, Sorenson proposed to inscribe something "neutral" on the headstone and even offered to cover the cost with the trust, but William refused.[434] Sorenson and Freeman then sought court authority to modify the headstone by deleting the inscription and Masonic symbol.[435] The probate court ordered that, "'[t]he headstone . . . be changed to that proposed

422. Poul H. Lemasters, Address at the North American Death Care Regulators Association Annual Conference, (2009).

423. *Strader*, 2015 WL 1638470, at *3.

424. 2d Civil No. B259237, 2015 WL 7736702, at *2 (Cal. Ct. App. 2015).

425. Safina v. Sorensen, 2d Civil No. B259237, 2015 WL 7736702, *1 (Cal. Ct. App. 2015).

426. *Id.* (One of the brothers (Abraham) died in the early stages of this dispute, leaving only William to prosecute this matter).

427. *Id.*

428. *Id.*

429. *Id.*

430. *Safina*, 2015 WL 7736702, at *1.

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. *Safina*, 2015 WL 7736702, at *1.

by Mr. Sorenson" with Michael's trust paying the cost.[436] William moved to vacate the court's order, but the court refused to change its ruling, noting that it provided an equitable result.[437]

On appeal, the issue was whether a surviving sibling's right to control disposition of remains may be enforced so as to give him the power to dictate the headstone's inscription, even when he is not the sole surviving sibling and when he did not properly notify or receive approval from the remaining surviving sibling.[438] Under California law, the right to control disposition of remains also authorizes the control of funeral goods and services.[439] Section 7100 of California's Health and Safety Code establishes "a hierarchy . . . of nine categories of persons authorized to control the disposition of the remains" in order to ensure that those who dispose of remains make a proper disposition.[440] The categories are: (1) holder of a power of attorney for healthcare; (2) competent surviving spouse; (3) sole surviving competent adult child of the decedent or, if there is more than one competent adult child of the decedent, the majority of the surviving competent adult children; (4) surviving competent parent or parents of the decedent; (5) the sole surviving competent adult sibling of the decedent or, if there is more than one surviving competent adult sibling of the decedent, the majority of the surviving competent adult siblings; (6) surviving competent adult person or persons respectively in the next degrees of kinship; (7) conservator of the person appointed under Part 3; (8) conservator of the estate appointed under Part 3; and (9) public administrator when the deceased has sufficient assets.[441]

As it pertains to this case, only the first and fifth categories above are relevant.[442] The first category, however, is inapplicable due to the fact that "Freeman's power of attorney for Michael's health care was not notarized or witnessed in accordance with the Probate Code."[443] The fifth category, which would apply to William, includes a provision that explains:

> 'less than the majority of the surviving competent adult siblings shall be vested with the rights and duties of this section if they have used reasonable efforts to notify all other surviving competent adult siblings of their instructions and are not aware of any opposition to

436. *Id.* at *2.
437. *Id.*
438. *Id.*
439. *Id.* (citing CAL. HEALTH & SAFETY CODE § 7100(a) (Deering 2012)).
440. *Safina*, 2015 WL 7736702, at *2 (citing § 7100; Benbough Mortuary v. Barney, 196 Cal. App. 2d Supp. 861, 865 (1961)).
441. *Id.*
442. *Id.* (citing § 7100(a)).
443. *Id.* (citing CAL. PROB. CODE § 4673(a)(3) (Deering 2018)).

> those instructions by the majority of all surviving competent adult siblings.'[444]

Thus, although William argued that he had the sole power to control the disposition of his brother's remains and to make merchandise decisions, the court disagreed, primarily because his sister, Bertha, was still alive.[445] The appellant put on no evidence suggesting that William ever used reasonable efforts to contact Bertha with his memorialization plans or that he ever received her agreement as to the inscription, as required by section 7100.[446] In fact, Bertha submitted a declaration that she received a copy of the trustee's motion regarding the headstone and the placement of neutral language on her brother's headstone, which she understood the court granted, and which she fully supported.[447] The court used this statement to support its finding that the majority of the surviving siblings never agreed to grant William power to control the disposition of his brother's remains under section 7100 or merchandise decision-making authority.[448] Accordingly, the court found that William did not prove that the "adoption of [Sorenson's] compromise was arbitrary or unreasonable under the circumstances," and it affirmed the trial court's judgment in holding that the content Sorenson submitted was "neutral," did not favor either party, and both Freeman and Michael's sibling, Bertha, endorsed it.[449]

This case is somewhat unique because of the facts (i.e., Freeman's lack of a valid power of attorney and William's failure to obtain unanimity among the siblings).[450] However, it is also illustrative of the bad blood among families that often becomes exacerbated by a death, and the reality that a neutral arbiter (here the trustee and the court) is often required to bring reasonableness to such matters. It is unlikely for a regulator and a neutral arbiter to be in opposition, but this case suggests that attorneys representing clients in such disputes should perhaps consider arbitration as a means to ratchet down animosity and to bring about a resolution in such matters.

The case of *Listecki v. Official Committee of Unsecured Creditors*,[451] importantly considers the classification of cemetery trust funds in bankruptcy scenarios. Specifically at issue in this case was the classification of cemetery

444. *Id.* (citing § 7100(a)(5)).
445. *Safina*, 2015 WL 7736702, at *2
446. *Id.*
447. *Id.* at *3.
448. *Id.*
449. *Id.*
450. *Id.* at *1, 2-3 ("[N]othing in the record relating to the petition suggests William obtained Bertha's agreement to the inspection or that he 'used reasonable efforts to notify' her of his intention, as required by section 7100, subdivision (a)(5).").
451. 780 F.3d 731, 734 (7th Cir. 2015).

trust funds of the Archdiocese of Milwaukee, and whether those funds are considered assets of the Archdiocese's estate in a bankruptcy matter filed due to the impacts of sex abuse scandals.[452] In 2007, after two sex abuse suits against them, the Archdiocese transferred fifty-five million dollars from its general accounts to its cemetery trust accounts.[453] The Archdiocese filed for bankruptcy protection in 2011.[454] The bankruptcy creditors argued that the Archdiocese fraudulently transferred this amount to shield monies from them and that it should be reversed.[455] The Archdiocese countered with the argument that it had a religious obligation to provide for the perpetual care of its cemeteries and that forcing it to invade its perpetual care trust would violate its religious freedom under the First Amendment and the Religious Freedom Restoration Act ("RFRA").[456] The court easily did away with the RFRA defense.[457] The court noted that RFRA only applies if the government is involved in a dispute with a religious entity.[458] Finding that the bankruptcy creditor's committee is not "the government" as contemplated by RFRA, the court found the Archdiocese could not use RFRA as a shield to protect its actions of transferring funds in this matter.[459]

The court then turned to the issue of First Amendment rights.[460] The issue under the First Amendment was whether an order commanding the Archdiocese to make funds available to creditors was a violation of the free exercise of religion clause of the Constitution.[461] The court acknowledged the reality that a firmly held religious conviction that cemeteries must be protected is a factor that triggers the protections of the First Amendment.[462] Even though this was a suit between two private parties (the Archdiocese and a creditor's committee in a bankruptcy adversary proceeding), the court recognized the applicability of the First Amendment.[463] However, the court noted that the First Amendment protections are not absolute.[464] The court here noted that if there is a compelling governmental interest in violating the free exercise provision, the provision can be violated.[465] Further, the court

452. Listecki v. Official Comm. of Unsecured Creditors, 780 F.3d 731, 734 (7th Cir. 2015).
453. *Id.*
454. *Id.*
455. *Id.*
456. *Id.* at 735.
457. *Listecki*, 780 F.3d at 736 (noting that the court "previously said in dicta that 'RFRA is applicable only to suits in which the government is a party.'").
458. *Id.* at 736.
459. *Id.* at 737-38.
460. *Id.* at 742.
461. *Id.*
462. *Listecki*, 780 F.3d at 742.
463. *Id.* at 741-42.
464. *Id.* at 742-43 (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014); City of Berne v. Flores, 521 U.S. 507 (1997); Emp't Div. v. Smith, 494 U.S. 872, 879-80 (1990)).
465. *Id.* (citing Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531-32 (1993)).

noted that if the law (in this case, bankruptcy law) is of neutral application, its application to a religious situation does not offend the First Amendment.[466]

The Seventh Circuit then embarked on a review to determine exactly what religious matter was the subject of this case. In this regard, the court found that it could not make determinations about whether the protection of cemeteries is a reasonably held religious belief,[467] finding such a determination is outside of a secular court's authority.[468] However, this did not end the court's inquiry. The Seventh Circuit did find that it has the authority to make determinations regarding whether the funds transfer was fraudulent when it stated, "the court need not interpret any religious law or principles to make that determination."[469] Following this latter conclusion, the Seventh Circuit determined that the question of fraud is fair game for secular courts and is not something protected by the First Amendment.[470]

This analysis did not end the inquiry into the court's authority in this matter. The next question was whether the Bankruptcy Code represented a neutral application of the law.[471] Finding that the Code itself is neutral, the court observed that, "[t]he purpose of the Bankruptcy Code's avoidance and turnover provisions 'is to maximize the bankruptcy estate and thereby maximize the recovery for creditors.'"[472] The court further observed that, "[t]he Challenged Provisions and the Code as a whole are generally applied to all entities with equal force—be it a church, synagogue, deli, bank, city or any other qualifying debtor."[473] Accordingly, the Bankruptcy Code does not prohibit the practice of religion nor does it "single out only religious practice."[474] Thus, the Seventh Circuit found that the Bankruptcy Code is neutral, voiding a First Amendment defense by the Archdiocese in this case.[475] Further, the court here found that the protection of creditors' rights is such a compelling government interest that, even if the application of the Code to this matter was not neutral, it would not allow a violation of the First Amendment.[476]

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466. *Id.* at 742-43 (citing *Burwell*, 134 S. Ct. at 2761; *City of Berne*, 521 U.S. at 507; *Emp't Div.*, 494 U.S. at 879-80; *Church of Lukumi Babalu Aye*, 508 U.S. at 531-32).

467. *Listecki*, 780 F.3d at 742 (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012); McCarthy v. Fuller, 714 F.3d 971, 975 (7th Cir. 2013); Korte v. Sebelius, 735 F.3d 654, 683 (7th Cir. 2013)).

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.*

472. *Listecki*, 780 F.3d at 743 (quoting *Tort Claimants Comm. v. Roman Catholic Archbishop* (*In re Roman Catholic Archbishop*), 335 B.R. 842, 864 (Bankr. D. Or. 2005)).

473. *Id.*

474. *Id.* at 744.

475. *Id.* at 743.

476. *Id.* at 745-46.

A major shortcoming of this case is that it does not consider the implications of the decision on the consumers who purchased interment rights covered by the trust funds at issue. As is the case in most perpetual care cemeteries, the consumers were likely sold cemetery spaces with a representation of perpetual care—a highly regulated area of the law in most states.[477] This highly regulated nature of cemetery trust funds suggests that other governmental interests are implicated in cemetery situations in bankruptcy besides creditor protection. It is disappointing that no regulatory entity was a party to this matter arguing for the preservation of the trust funds inasmuch as once these monies are transferred to the trust funds, they are no longer available to the debtor for any purpose other than cemetery maintenance.[478] In other words, while the logic of this decision, in a vacuum, is sound, the potential ramifications of failing to consider the policy behind the sacred nature of cemetery trust funds is troubling.

The Tennessee case of *Wofford v. M.J. Edwards & Sons Funeral Home, Inc.*,[479] provides an interesting glimpse into how courts occasionally fudge the basic rules of law in cases where someone is coping with the death of a loved one. In this case, the plaintiff appeared dissatisfied with the funeral home's handling of her father's remains.[480] Following the filing of suit, the funeral home invoked the arbitration clause of the funeral contract, arguing that the plaintiff agreed not to sue in the event of a dispute over the contract.[481] Although the arbitration clause was in all capital letters in the contract,[482] the plaintiff claimed that she only read the portion of the agreement that contained the prices to make sure that they were correct.[483]

The court here noted that arbitration is favored under Tennessee law,[484] and that because the arbitration clause is clear and unambiguous, under normal circumstances it would be enforceable.[485] However, the court also observed that parties cannot be forced to arbitrate something that they never

477. 14 C.J.S. *Cemeteries* § 25 (2018).

478. *Listecki*, 780 F.3d at 734-35 (The Archdiocese created a trust fund to maintain the cemeteries and he submitted an affidavit as such explaining that he had a duty "to 'properly maintain [] in perpetuity' the cemeteries and mausoleums, and '[i]f the Committee is successful in converting the [Funds] into property of the Debtor's estate, there will be no funds . . . for the perpetual care of the Milwaukee Catholic Cemeteries.").

479. 490 S.W.3d 800, 806 (Tenn. Ct. App. 2015).

480. *Id.* at 804-05.

481. *Id.* at 805.

482. *Id.* at 803-04. During discovery, it came to light that only a reference to the arbitration clause was contained in the contract provided to the consumer when she signed the document. The actual clause was not contained therein. *Id.*

483. *Wofford,* 490 S.W.3d at 804.

484. *Id.* at 808.

485. *Id.* at 808-09 (citing D & E Constr. Co. v. Robert J. Denley Co., 38 S.W.3d 513, 518 (Tenn. 2001)).

agreed to arbitrate.[486] In this case, the court put great emphasis on the differing positions of the parties—a sophisticated funeral home versus a consumer who had never contracted with a funeral home before.[487] Further, by the time the plaintiff became aware of the actual arbitration language, the funeral home already begun work to prepare her father's body for the funeral and, thus, the process was likely already past the point of no return.[488] Certainly, as the court observed, other funeral homes in the area did not have arbitration requirements in their contracts.[489] However, as the court notes, by the time the plaintiff knew of the arbitration clause, the plaintiff "had 'no realistic choice but to acquiesce' in signing the Contract."[490] For this reason, the court held that the contract at issue here was a contract of adhesion, which lends to a finding of unenforceability.[491] In order to fully find the arbitration clause unenforceable, the court must also determine whether the arbitration clause in the contract is unconscionable.[492] The court here found that the clause is unconscionable because the funeral home did not give the consumer an opportunity to question the terms of the contract or to negotiate for anything.[493]

It is doubtful that such a finding could be obtained outside of a situation in which a consumer is dealing with the death of a loved one. However, this case is a strong indication that anti-consumer contract provisions are at risk of being stricken in funeral and cemetery contracts.

The matter of *Midwest Memorial Group LLC v. Citigroup Global Markets*[494] is an offshoot lawsuit from a massive swindle in the cemetery industry much documented by the press.[495] This case does not consider the actual original problem covered in the press. Instead, the fallout from the original matter and its implications for an accounting firm is the subject of this case.[496] The question before this Michigan court was whether an accounting firm that conducted an audit of cemetery trust funds prior to the embezzlement of sixty million dollars in trust funds should be held liable for

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486. *Id.* at 809 (quoting Frizzell Constr. Co. v. Gatinburg, L.L.C., 9 S.W.3d 79, 84 (Tenn. 1999)).
487. *Id.* at 811-12.
488. *Wofford,* 490 S.W.3d at 816.
489. *Id.* at 815.
490. *Id.* at 816 (quoting Wallace v. Nat'l Bank of Commerce, 938 S.W.2d 684, 687 (Tenn. 1996)).
491. *Id.* at 816-17.
492. *Id.* at 817 (quoting Buraczynski v. Eyring, 919 S.W.2d 314, 320 (Tenn. 1996)).
493. *Wofford*, 490 S.W.3d at 824.
494. No. 322338, 2015 WL 5519398, at *3-4 (Mich. Ct. App. 2015).
495. Midwest Mem'l Grp. LLC v. Citigroup Glob. Mkts., No. 322338, 2015 WL 5519398, at *1 (Mich. Ct. App. 2015); *see also* Roger Parloff, *Stealing from the Dead*, FORTUNE (Aug. 13, 2007, 9:59 AM), http://archive.fortune.com/2007/08/10/news/funeral_home.fortune/index.htm (recounting the theft of trust funds from cemetery trust funds in Michigan and Tennessee).
496. *Midwest Mem'l Grp. LLC*, 2015 WL 5519398, at *3-4.

the replacement of the missing funds.[497] One of the subsidiaries of the embezzling company hired Plante Moran, an independent counting firm, to perform an audit.[498] Plante Moran did not catch any of the embezzlement activity in its audit and was later sued for malpractice in having missed what, in hindsight, should have been an obvious crime.[499] The district court found that Plante Moran should not be held liable for missing the embezzlement in its audit.[500] The subsidiary specifically tailored Plante Moran's contract to provide an audit of the subsidiary's compliance with cemetery operation laws in 2004, and the embezzlement occurred elsewhere in the corporate structure.[501] The subsidiary also retained Plante Moran after the embezzlement occurred.[502] The contract never specifically tasked Plante Moran with attempting to identify fraud nor to look at the looted firms.[503] Despite Plante Moran's victories (and, frankly, the logic of them) at the district court, the appellate court refused to let the auditing firm completely off the liability hook in a summary proceeding.[504] The appellate court, though substantially agreeing that the scope of the audit, did not look at trust fund discrepancies and found unanswered questions regarding whether the trust funds of the looted companies were something audited by Plante Moran—questions that could not be answered in a summary proceeding.[505] Thus, though standing in good stead heading into evidentiary portions of this dispute, Plante Moran remained a party to the dispute to ensure that it did not share in liability following a review of the relevant evidence.[506] This case is not overly instructive of anything related to cemeteries or the dead. Instead, it stands for the proposition that in fraud scenarios, it is unlikely that parties with potential knowledge of fraudulent activity can extricate themselves easily.

In the matter of *In re Estate of Love*,[507] the question before the court was who gets to control the substance of an engraving on a grave marker. In this case, the deceased's husband and adult children ordered a grave marker with their wife's/mother's biological last name engraved on the stone.[508] The deceased's adoptive father objected to this use of the biological last name and

497. *Id.* at *1.
498. *Id.* at *3-4.
499. *Id.* at *4.
500. *Id.* at *7.
501. *Midwest Mem'l Grp. LLC*, 2015 WL 5519398, at *15-16.
502. *Id.* at *47.
503. *Id.* at *16-17.
504. *Id.* at *49.
505. *Id.* at *49-50.
506. *Midwest Mem'l Grp. LLC*, 2015 WL 5519398, at *49-50.
507. No. W2014-02507-COA-R3-CV, 2015 WL 5511318, at *3-4 (Tenn. Ct. App. 2015).
508. *In re* Estate of Love, No. W2014-02507-COA-R3-CV, 2015 WL 5511318, at *1 (Tenn. Ct. App. 2015).

brought an action to have the marker replaced.[509] According to the appellate court, under Tennessee law, control of the engraving on a grave marker follows the scheme of individuals who hold the right to control the disposition of the deceased's remains.[510] The reasoning for this holding is the specific phrasing of the relevant Tennessee law, which gives the party authorized to make disposition decisions the authority to both dispose of the remains and to make "arrangements for funeral goods and services . . . ."[511] One line of attack raised by the adoptive father was that the court should use the law regulating cemeteries in Tennessee rather than that regulating the disposal of the dead, which would somehow change the outcome from that under the disposition of remains statute.[512] The court rejected this argument, noting that this case does not deal with the regulation of cemeteries, but rather with the right of disposition and memorialization, a right clearly falling under the disposition statute.[513] Under this reasoning, both the surviving husband and the surviving children outrank the surviving adoptive father, meaning that the latter does not have standing to contest the contents of a grave marker.[514] The court concluded that this reasoning was sound because to rule "otherwise would potentially mean that an individual cannot control what is written on his or her own headstone."[515]

The adoptive father's other line of attack in this case was that the use of the decedent's biological name, rather than her adopted name, was an "illegal change of the decedent's name after her death."[516] The appellate court quickly rejected this argument, as a grave marker does not represent any sort of recognized official, legal document on which it would be unlawful to make a postmortem name change.[517]

The result in this case is not surprising, but the case, in itself, is indicative of the tense familial relationships that can surface upon someone's death. The lesson to be gleaned from this case is that it is not financially sound to challenge a grave marker inscription in the absence of actual libel or in the absence of being an individual with the right to control disposition.

509. *Id.*
510. *Id.* at *4-5 (citing TENN. CODE ANN. § 62-5-703 (2018)).
511. *Id.* at *5.
512. *Id.* at *7-8 (citing TENN. CODE ANN. § 46-1-102 (2018)).
513. *In re Estate of Love*, 2015 WL 5511318, at *8.
514. *Id.* at *13.
515. *Id.* at *11 (citing TENN. CODE ANN. § 62-5-703 (2018)).
516. *Id.* at *12.
517. *Id.* at *12-13.

E. Human Remains Issues

The Florida case of *Wilson v. Wilson*,[518] is a dispute over the disposition of someone's remains. In this case, the plaintiff and defendant had a twenty-three-year-old son who died in an automobile accident.[519] The son was single, had no children, and left no will nor verbal instructions as to the disposition of his body.[520] Both the plaintiff and defendant were considered "co-personal representatives of their son's estate, [as well as] the sole beneficiaries."[521] Following his death, the plaintiff and defendant agreed to have their son cremated, but could not come to an agreement regarding the final disposition of his ashes.[522] The defendant wanted the ashes buried in West Palm Beach, Florida, whereas the plaintiff wanted the ashes placed in a family burial plot in Blue Ridge, Georgia.[523] In his petition, the father argued that the ashes should be declared "property" subject to partition under the probate code of Florida, which would allow both he and his son's mother to dispose of their half of the ashes as they wished.[524] The mother staunchly opposed this partition of her son's ashes for religious reasons.[525]

Following a hearing on the matter, the trial court denied the father's petition by determining that the ashes could not be considered "property" subject to partition.[526] Furthermore, the trial court directed the parents to, within thirty days, come to an agreement regarding the disposition of their son's remains.[527] If the two did not come to an agreement, the trial court stated that it would appoint a curator to carry out the disposition.[528] On appeal, the mother argued that the ashes are not considered "property" subject to ownership, but rather the law only gives "a limited possessory right to the [next of kin] for disposition purposes."[529] The father disagreed.[530]

Florida's "probate code defines 'property' as 'both real and personal property or any interest in it and anything that may be the subject of ownership.'"[531] Consistent with common law and civil law principles, the

518. 138 So. 3d 1176, 1177 (Fla. Ct. App. 2014).
519. *Id.*
520. *Id.*
521. *Id.*
522. *Id.*
523. *Wilson*, 138 So. 3d at 1177.
524. *Id*.
525. *Id.*
526. *Id.*
527. *Id.*
528. *Wilson*, 138 So. 3d at 1177.
529. *Id.*
530. *Id.* (arguing that "the ashes fit within the plain meaning of 'property' as defined by section 731.201(32)").
531. *Id.* at 1178 (quoting FLA. STAT. § 731.201(32) (2012)).

Florida Supreme Court in *State v. Powell*,[532] held that "the next of kin have no property right in the remains of a decedent."[533] The "right to the remains is limited to 'possession of the body for the purpose of burial, sepulture, or other lawful disposition.'"[534] Essentially, "there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition."[535] However, the "claim of entitlement is not a property right, nor does such a claim make the remains 'property.'"[536]

Because, historically, cremated remains are treated in the same manner as a body, neither of which constitute "property," the appellate court correctly held that the decedent's remains is not considered "property."[537] Thus, because the cremated remains are not "property," they are not subject to partition between two parties.[538] Accordingly, the appellate court affirmed the trial court's judgment, which essentially agreed with the mother's argument that while a right to control or possess remains for disposition purposes belongs to the next of kin, the remains are not to be considered "property."[539] The outcome of this case is correct and consistent with long-standing legal notions regarding the nature of human remains.[540]

At issue in the recent Florida case of *SCI Funeral Services of Florida v. Borja*[541] was the question of who controls disposition of human remains in the absence of a testament.[542] According to the facts, following Franklin Burr's death on March 12, 2014, Burr's daughter, Janet Masching, sent his body to Moss-Feaster Funeral Home and Cremation Services.[543] Burr's will designated William Borja as the personal representative of his estate, but was "silent as to [Burr's] preferred method of disposition."[544] Shortly after their father's death, Janet Masching and Franklin Burr II began to dispute the method for disposition of their father's remains.[545] Accordingly, Moss-Feaster filed a petition for declaratory judgment asking the court to determine "which party had the authority to authorize disposition of Burr's remains," as

532. State v. Powell, 497 So. 2d 1188, 1191 (Fla. 1986).
533. *Wilson*, 138 So. 3d at 1178 (quoting *Powell,* 497 So. 2d at 1191).
534. *Id.* (quoting *Powell*, 497 So. 2d at 1191-92).
535. *Id.* (quoting Crocker v. Pleasant, 778 So. 2d 978, 988 (Fla. 2001)).
536. *Id.*
537. *Id.* (citing Cohen v. Guardianship of Cohen, 896 So. 2d 950, 954 (Fla. Ct. App. 2005)).
538. *Wilson*, 138 So. 3d at 1179.
539. *Id.*
540. Seidemann, *supra* note 190, at 903.
541. No. 14-004275-CI, 2015 Fla. Cir. LEXIS 27633 (Fla. Cir. Ct. 2015).
542. SCI Funeral Servs. Of Fla. v. Borja, No. 14-004275-CI, 2015 Fla. Cir. LEXIS 27633, at *3 (Fla. Cir. Ct. 2015).
543. *Id.* at *1-2.
544. *Id.* at *2.
545. *Id.*

well as the "ultimate method of disposition for the decedent's remains . . ."[546]

In determining which party has the authority to act as the responsible party in the disposition of human remains, the Florida law set out a priority of persons classified as the "legally authorized person."[547] As it applies to this case, priority does to the "'written inter vivos authorizations and directions' of the decedent himself and then a lower priority of the decedent's son or daughter who is eighteen years of age or older."[548] Above all, the intent of the decedent is paramount, regardless whether that intent is written or made orally.[549] In this matter, the court found the evidence presented reliable that decedent created written inter vivos directives for disposition by cremation.[550] Under Florida law, these directives take priority over all other legally authorized persons' wishes.[551] Because the decedent prepared written inter vivos directions (though not contained in his testament), he thus directed the posthumous disposition of his own body.[552]

In this case, the evidence of the decedent's wishes derived from a contract between Burr and Calvary Catholic Cemetery and Chapel Mausoleum "for the purchase of two side-by-side cremation niches" (one for Burr's late wife and one for Burr).[553] The contract further outlined "the engraving of his late wife's name on one niche . . . and [Burr's] own name on the adjacent niche."[554] Additionally, Burr wrote emergency instructions that indicated his intent to be cremated and placed in the prepaid mausoleum niche at Calvary Catholic Cemetery and Chapel Mausoleum.[555] The appellate court here determined that such "evidence is sufficient to constitute inter vivos written directives of the decedent under [Florida law]".[556] Lastly, because Burr did not leave a writing with detailed instructions to effectuate his disposition, the court designated a party to carry out his wishes.[557] Citing the irreconcilable dispute between Burr's children, the court determined that Borja was the appropriate party to carry out Burr's wishes.[558]

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546. *Id.* at *1.
547. *SCI Funeral Servs. of Fla.*, 2015 Fla. Cir. LEXIS 27633, at *2-3 (citing FLA. STAT. § 497.005(39) (2018)).
548. *Id.* at *3.
549. Arthur v. Milstein, 949 So. 2d 1163, 1166 (Fla. Ct. App. 2007); Cohen v. Cohen, 896 So. 2d 950, 955 (Fla. Ct. App. 2005).
550. *SCI Funeral Servs. of Fla.*, 2015 Fla. Cir. LEXIS 27633, at *4-5.
551. *Id.* *3-4 (citing *Arthur*, 949 So. 2d at 66; Cohen, 896 So. 2d at 955).
552. *Id.*
553. *Id.* at *4.
554. *Id.*
555. *SCI Funeral Servs. of Fla.,* 2015 Fla. Cir. LEXIS 27633, at *4-5.
556. *Id.* at *5.
557. *Id.* at *6.
558. *Id.* at *6-7.

The matter of *Rinnier v. Gracelawn Mem'l Park Inc.*[559] was a review of the general disfavor of the disinterment of human remains. According to the facts of this case, on June 19, 2008, Laura Bowdoin was found dead in her home and was survived by her mother, Mary Rinnier, her husband, George, and her twelve-year-old daughter.[560] Laura's manner of death was "undetermined" (i.e., "the medical examiner could not conclude . . . whether the death was accidental or intentional.").[561] Following the autopsy, Laura's body was subsequently embalmed and interred at Gracelawn Memorial Park Cemetery on June 27, 2008.[562] Ms. Rinnier, Laura's mother, believed that the death was a homicide and in 2011 brought an action to exhume Laura's body in order to conduct another autopsy to determine the manner of death.[563] After four years, the case went to trial, where "both sides presented expert testimony regarding" whether a second autopsy of Laura's body "was likely to produce any new information about the cause or manner of her death."[564]

The issue in this case was whether human remains may be exhumed in order to have a second autopsy done to make a more final decision as to the cause and manner of death.[565] Under Delaware law, with regard to the exhumation of human remains, two conditions must be met in order to justify an autopsy after burial.[566] Those two conditions are as follows:

> It must appear that, through no fault of the [claimant] it was impracticable to demand and perform the autopsy before interment, and secondly, it must be reasonably certain that an examination of the body will reveal something bearing on the rights of the parties which could not otherwise be discovered.[567]

The court in this case noted that, through a seemingly harmless act, the standard to exhume remains "is high because the search for 'the truth' cannot overlook issues of religion, the decedent's wishes, the effect on loved ones, or the public interest."[568] The court explained that Rinnier met the first element because there was no way for her to foresee the need for the second autopsy before Laura was buried.[569] Yet, the court held that Rinnier did not

559. No. 6473-ML, 2015 WL 7568363 (Del. Ch. 2015).
560. Rinnier v. Gracelawn Mem'l Park Inc., No. 6473-ML, 2015 WL 7568363, at *2 (Del. Ch. 2015).
561. *Id.* at *3.
562. *Id.* at *4.
563. *Id.* at *5.
564. *Id.* at *7.
565. *Rinnier*, 2015 WL 7568363, at 7.
566. *Id.* at *23 (citing McCulloch v. Mutual Life Ins. Co. of New York, 109 F.2d 866 (4th Cir. 1940)).
567. *Id.* at *23-24.
568. *Id.* at *24 (citing Petition of Sheffield Farms Co., 126 A.2d 886, 891 (N.J. 1956)).
569. *Id.* at *24.

show with reasonable certainty that a second autopsy would reveal information regarding Laura's manner or cause of death that had not already been discovered.[570] Altogether, the court determined that while it felt remorse for Rinnier's grief due to the uncertainty of her daughter's cause of death and understood her strong desire to have a final conclusion, the court found no evidence presented that met the high standard required to exhume remains, nor did the circumstances of the case sway the court to believe that such disturbance of the deceased's remains would yield fruitful results.[571] By denying Rinnier's request, this court joined a long line of cases that hold sacrosanct the quiet of the grave and generally rebuff efforts to exhume human remains.

In another disinterment case, *Manson v. Manson*,[572] a New York court was asked to weigh in on a parent's wish to relocate his son. According to the facts, on June 2, 1976, John William Manson died in a car accident at age three.[573] Many years after his interment, the three-year-old's father brought an action to disinter his son's body and relocate him to a different resting place.[574] The father wished to relocate his son's body so that he and his son could rest somewhere other than the plots owned by he and the son's mother, which, at the time of this case, the father found undesirable for reasons relating to the divorce between himself and John's mother.[575] The father purchased three adjoining plots in Riverside Cemetery so that John could be buried between his mother and father, but the mother could only be buried alongside John on the condition that she agreed to the relocation.[576] Both the mother and the Roman Catholic Community of Morristown, Hammond, and Rossie ("the Parish"), who operated the cemetery where John was originally interred, opposed the father's request.[577] The Parish argued that after so many years, and due to the uncertainty as to whether his casket was sealed in a vault, the son's remains may not still be intact; and furthermore, due to the fact that the father and mother are owners of five interment rights in that cemetery, the father may already be able to have what he seeks without a disinterment.[578] The mother further argued that granting relief to the father

570. *Rinnier*, 2015 WL 7568363, at *25.
571. *Id.* at *25-26.
572. No. CV-2015-0146170, 2015 N.Y. Mics. LEXIS 4864 (N.Y. Sup. Ct. 2015).
573. Manson v. Manson, No. CV-2015-0146170, 2015 N.Y. Mics. LEXIS 4864, at *1 (N.Y. Sup. Ct. 2015).
574. *Id.*
575. *Id.*
576. *Id.* at *1-2.
577. *Id.* at *2.
578. *Manson*, 2015 N.Y. Misc. LEXIS 4864, at *2.

would only cause her "incalculable pain in having to bury her child twice," to which the son's surviving siblings agreed.[579]

The issue was, thus, whether good and substantial reasons exist to support the disturbance of a long-at-rest decedent's grave.[580] The court noted here that in certain situations there may be a need to disturb the repose of the deceased; but even then, there must be a substantial public reason or superior private right in order to convince a court to allow an act that is traditionally considered "desecration."[581] Here, neither of the parents possessed a superior right over the other as to their son's place of burial.[582] Thus, according to the court, its ability to grant permission to disinter human remains rests on a discretionary determination of whether such an act would cause great distress to loved ones' emotions.[583] The court denied the father's request, reasoning that the evidence produced—specifically the existence of the plots already jointly owned by the parents—failed to show good and substantial reasons as to why his son should be disinterred, and further proved no just cause in this situation, rather a showing of a family dispute.[584] Thus, consistent with the Delaware court in the *Rinnier* matter, the New York court again upheld the sanctity of the grave and became another in a long line of cases where courts disfavor disinterment.

The recent Wisconsin case of *Olejnik v. England*[585] is something of an anomaly, but one that is prescient of late in other jurisdictions. In this case, from 2007 to January 17, 2012, Traci England was an Oneida County Medical Examiner.[586] At some point during her term as medical examiner, England decided to train her own dog to locate human remains—but not for use in connection with her job as a medical examiner.[587] On May 16, 2011, David Olejnik died at the age of 38.[588] The following day, England ordered an autopsy, which was then performed in a neighboring county.[589] Olejnik's parents accepted the autopsy as necessary to discover what exactly caused the death of their son.[590] At some point during the autopsy, England "took a piece of gauze covered with visceral fat from a biohazard waste container," which

579. *Id.* at *2-3.
580. *Id.* at *4 (citing Briggs v. Hemstreet-Briggs, 256 A.D.2d 894 (N.Y. App. Div. 1998)).
581. *Id.* at *3 (citing *In re* Ackermann, 124 A.D. 684, 685 (N.Y. App. Div. 1908)).
582. *Id.* at *3-4.
583. *Manson*, 2015 N.Y. Misc. LEXIS 4864, at *4 (citing Yome v. Gorman, 152 N.E. 126, 128 (N.Y. 1926)).
584. *Id.*, at *5 (quoting Currier v. Woodlawn Cemetery, 90 N.E.2d 18, 18 (N.Y. 1949)).
585. 147 F. Supp. 3d 763 (W.D. Wis. 2015).
586. *Id.* at 767.
587. *Id.*
588. *Id.* at 768.
589. *Id.*
590. *Olejnik*, 147 F. Supp. 3d at 768.

she was unauthorized to do.[591] "In November and December 2011, England took her dog to two cadaver dog training sessions "and also brought some human tissue to the session to serve as a training aid.[592] England explained that the material only contained "her daughter's placenta and [the] visceral fat from Olejnik," but Olejnik's parents contended that it also contained one of Olejnik's organs.[593] Furthermore, "some participants at the session recall England describing it as an 'organ,'" of which the participants divided among themselves to take home and use to train their dogs.[594]

On January 3, 2012, an Oneida County sheriff's deputy learned that England removed materials from two autopsies conducted that day and arrested and charged her with misconduct in office and theft the next day.[595] As part of the criminal investigation, law enforcement procured the material that England gave out at the previous cadaver dog training session, and the state crime lab detected Olejnik's DNA in the material.[596] Subsequently, England pleaded to the charges based on the materials taken from the autopsies and was sentenced to three years of probation, community service, and one year of jail time (imposed but withheld).[597] Olejnik's parents "filed suit in state court, asserting four federal constitutional claims pursuant to 42 U.S.C. § 1983 and four state law claims."[598] The matter was removed to federal court,[599] and the county's insurer intervened and sought a declaration that the parents' claims were not covered by county policy.[600]

The critical liability issue here was whether England was a government official acting under color of state law in removing bodily material from a deceased individual to use in unauthorized cadaver training, so as to subject her to liability under 42 U.S.C. § 1983.[601] The parents brought federal constitutional claims under 42 U.S.C. § 1983, which authorizes suits for damages against individual government officials who violate civil rights under the United States Constitution or a federal statute.[602] To prevail on their section 1983 claims, the parents must "demonstrate: (1) that England's wrongful conduct was taken 'under color of law;' and (2) that England deprived them of rights protected by federal law."[603] In determining whether

591. *Id.* at 769.
592. *Id.*
593. *Id.*
594. *Id.*
595. *Olejnik*, 147 F. Supp. 3d at 769.
596. *Id.*
597. *Id.*
598. *Id.*
599. *Id.*
600. *Olejnik*, 147 F. Supp. 3d at 769.
601. *Id.* at 770.
602. *Id.* at 769.
603. *Id.* (citing Windle v. City of Marion, 321 F.3d 658, 661 (7th Cir. 2003)).

a government official acted "under color of law," courts most commonly consider the following two factors: (1) "whether the wrongful acts furthered an officer's official duties," and/]or (2) "whether the official invoked his authority or deployed indicia of his authority when committing the wrongful acts."[604] "Under color of law" basically means "under pretense of law," thus the acts of officials in the ambit of their personal pursuits are plainly excluded from section 1983 liability.[605]

To find that plaintiffs are deprived of their protected rights, courts will turn to an analysis of the Due Process Clause of the Fourteenth Amendment, which prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law[.]"[606] To prevail on a procedural due process claim under section 1983, "plaintiffs must demonstrate that they: (1) have a cognizable property interest; (2) have suffered a deprivation of that interest; and (3) were denied due process."[607] First, it must be determined whether the plaintiffs have a cognizable property interest at stake.[608] "Under Wisconsin law, a family's interest in the remains of its deceased loved ones is simply too contingent to constitute a protected property interest."[609] Wisconsin law "provides that the next-of-kin's right to control final disposition of a loved one's remains is subject to the medical examiner's powers and duties 'with respect to the reporting of certain deaths, performance of autopsies, and inquests . . . .'"[610] "A medical examiner is authorized to 'take for analysis any and all specimens, body fluids and any other material which will assist him or her in determining the cause of death,'" and "a medical examiner may, in her discretion, order an autopsy for purposes of determining how an individual died if she has reason to believe that death 'may have been due to suicide or unexplained or suspicious circumstances.'"[611] The court found that, under Wisconsin law, "a family's right to dispose of the remains of its deceased loved ones is not 'securely and durably' theirs and, thus, it does not rise to the level of a constitutionally protected property interest."[612] Furthermore, the Wisconsin Supreme Court recognized "that the family's right to the remains of its decedents is not a

604. *Id.* at 771 (citing Wilson v. Price, 624 F.3d 389, 392 (7th Cir. 2010); Honaker v. Smith, 256 F.3d 477, 484–85 (7th Cir. 2001)); Latuszkin v. City of Chicago, 250 F.3d 502, 505–06 (7th Cir. 2001)).

605. *Olejnik*, 147 F. Supp. 3d at 771 (citing Screws v. United States, 325 U.S. 91, 111 (1945)).

606. *Id.* at 772 (quoting U.S. CONST. amend. XIV, § 1).

607. *Id.* at 772 (citing Khan v. Bland, 630 F.3d 519, 527 (7th Cir. 2010)).

608. *Id.* at 772-73.

609. *Id.* at 773.

610. *Olejnik*, 147 F. Supp. 3d at 773 (citing WIS. STAT. § 154.30(3)(a)(2) (2017)).

611. *Id.* at 773-74 (citing WIS. STAT. § 979.01(3) (2017); WIS. STAT. § 979.02 (2017); WIS. STAT. § 979.04 (2017)).

612. *Id.* at 774.

property right but is rather a 'personal right of the family of the deceased to bury the body.'"[613]

Second, the court must determine whether the plaintiffs suffered some deprivation of the aforementioned cognizable property interest.[614] The court explained that even if it assumed that Wisconsin law does create a "constitutionally protected [ ] entitlement to bury a loved one's remains free from mutilation, [the parents here did not] demonstrate that England deprived [them] of that entitlement when she ordered Olejnik's autopsy," as "an authorized autopsy does not constitute 'mutilation' or interference with a loved one's remains because it is not an 'improper act.'"[615] Accordingly, the presupposed "state-created interest does not protect against all interference with a loved one's remains . . . ."[616] Rather, "it protects only against unwarranted mutilation and is subordinate to a medical examiner's authority to order an autopsy."[617] In the present case, "England did not exceed her authority" due to the fact that:

> '[a] medical examiner only acts outside [of her authority] when [s]he orders or conducts an autopsy either without having made a subjective determination that there is any reason to believe that any of the statutory circumstances justifying an autopsy exists or having made a subjective determination that there is no reason to believe that any of the statutory circumstances justifying an autopsy exists.'[618]

Here, England stated in her testimony that due to the fact that Olejnik was a relatively young man and died due to unexplained and possibly suspicious reasons, she felt it necessary to order an autopsy to make a definitive determination as to the cause of his death.[619] Based on this reality, the court found no evidence showing that "England acted outside of her authority when she ordered the autopsy."[620]

Lastly, in section 1983 matters, an examination must be made as to whether plaintiffs were denied any process to which they were due.[621] In this case, the court specifically addressed England's removal of Olejnik's bodily material.[622] "'In procedural due process claims, the deprivation by state action of a constitutionally protected interest in life, liberty, or property is not,

613. *Id.* (quoting Scarpaci v. Milwaukee Cty., 292 N.W.2d 816, 820-21 (Wis. 1980)).
614. *See id.* at 774.
615. *Olejnik*, 147 F. Supp. 3d at 773 (quoting *Scarpaci*, 292 N.W.2d at 820-21).
616. *Id.* at 774.
617. *Id.*
618. *Id.* at 775 (quoting *Scarpaci*, 292 N.W.2d at 831).
619. *Id.*
620. *Olejnik*, 147 F. Supp. 3d at 775
621. *Id.*
622. *Id.*

in itself, unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*.'"[623] "[In determining] whether a constitutional violation occurred, a court must 'ask what process the state provided, and whether it was constitutionally adequate.'"[624] In situations where no process is given to plaintiffs before an act occurs, "post-deprivation remedies [may be] sufficient to safeguard individuals' due process rights."[625] "When a deprivation is random and unauthorized, post-deprivation tort remedies are often sufficient to address the resulting loss."[626] Here, the court explained that even if England "acted outside of her statutory authority when she ordered Olejnik's autopsy, [her] actions would be random and unauthorized," in that they were "impossible to predict or preempt, not a proper exercise of her state-delegated power, and not facilitated by established state procedures."[627] The court held, "England's taking of material from the Olejnik autopsy is [exactly the] unpredictable[,] random[,] and unauthorized conduct that a government can neither predict nor prevent with pre-deprivation process."[628] However, given the circumstances, post-deprivation remedies works to give the parents a sufficient process.[629] The court found that Wisconsin law provides for post-deprivation remedies, therefore the parents *did* receive the process to which they were due, even though it occurred after the fact.[630]

Altogether, the court reasoned that, even though the medical examiner took Olejnik's remains because she was present at the autopsy, she was not acting in her official capacity as an examiner when she undertook those actions and, therefore, England was not acting under color of law when she misappropriated Olejnik's remains for her own private use in cadaver dog training.[631] Accordingly, the court determined that the county could not be held liable under section 1983 for England's alleged constitutional violations stemming from the misappropriation.[632] This case is a good example of the reality mentioned herein that it is difficult for families to recover for the mistreatment of human remains. More interesting, however, is that, within a year of this case, the Louisiana Legislature passed a bill that effectively sanctions such use of human remains.[633]

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623. *Id.* (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990)) (emphasis in original).
624. *Id.* (quoting *Zinermon*, 494 U.S. at 126).
625. *Olejnik*, 147 F. Supp. 3d at 775.
626. *Id.* (citing *Zinermon*, 494 U.S. at 132).
627. *Id.* at 776.
628. *Id.*
629. *Id.*
630. *Olejnik*, 147 F. Supp. 3d at 776 (emphasis added).
631. *Id.* at 772.
632. *See id.* at 772.
633. *See* LA. STAT. ANN. § 9:1551 (2016).

Pursuant to Acts 2016, No. 628, coroners in Louisiana can now remove pieces of the deceased and provide these pieces to cadaver dog trainers without notice or permission from families or descendants.[634] While superficially repugnant, under the *Olejnik* analysis of similar uses it is unlikely that liability will lie against the coroners, either officially or personally, for such actions. However, this new law does not (and constitutionally cannot) avoid the potential problem raised when a family's religious beliefs prohibit such tampering with remains, as in the *Rugova* matter.[635] In this regard, it is strongly recommend that Louisiana coroners under Act 2016, No. 628 use only donated remains to fulfill requests in order to avoid running afoul of religious proscriptions on such human remains uses.

In the matter of *Jensen v. U.S. National Park Service*,[636] Leyah Jensen, the plaintiff, allegedly "found 'exposed human remains' in a sewer drain at a National Historic Landmark on Nantucket Island, Massachusetts."[637] After this discovery, she filed a police report and notified the United States National Park Service ("NPS") to make the NPS aware that the exposed remains were what she believed to be a violation of Native American Graves Protection and Repatriation Act ("NAGPRA").[638] Jensen never heard back from the NPS, which she alleged caused her "'two years of financial, mental, emotional, and physical stresses of attempting to maintain lawful protocols while awaiting response from the [NPS]," in addition to causing "'irreparable damage to American history.'"[639] Jensen filed suit, pro se, for damages under these arguments.[640] The NPS argued that the court should "dismiss Jensen's [c]omplaint for lack of jurisdiction, [as well as] her failure to state a claim on which relief may be granted," further asserting that she lacked the standing necessary to bring a claim under NAGPRA and that she did not allege the required elements for a NAGPRA claim.[641]

The issue here is whether Jensen is a proper party to bring action under the NAGPRA.[642] First, "'[f]ederal courts lack jurisdiction over claims against the United States unless the government has waived its sovereign immunity.'"[643] "The Federal Tort Claims Act (FTCA) comprises a limited waiver of federal sovereign immunity, which allows the government to be

634. § 9:1551(F).
635. *See Rugova*, 132 A.D.3d at 225.
636. 113 F. Supp. 3d 431 (D. Mass. 2015).
637. *Id.* at 433 (D. Mass. 2015).
638. *Id.*
639. *Id.*
640. *Id.*
641. *Jensen*, 113 F. Supp. 3d at 433.
642. *Id.*
643. *Id.* (quoting Sanchez v. United States, 740 F.3d 47, 50 (1st Cir. 2014)).

held liable for certain tortious acts and omissions."[644] "However, prior to permitting suit against the United States, a litigant is required to file an administrative claim with the agency having jurisdiction."[645] Here, Jensen failed to present evidence that she was in compliance with this procedural prerequisite and, as such, the court lacked subject-matter jurisdiction over her claim.[646]

Nonetheless, to ensure completeness, the court also analyzed standing under NAGPRA.[647] To demonstrate standing for NAGPRA purposes, an individual must "'allege [ ] such a personal stake in the outcome of the controversy' as to warrant [the] invocation of federal-court jurisdiction and to justify the exercise of the court's remedial powers on [her] behalf.'"[648] Furthermore, a person must show an injury is: (1) "'concrete, particularized, and actual or imminent;'" (2) "'fairly traceable to the challenged action;'" and (3) "'redressable by a favorable ruling.'"[649] NAGPRA also established "rights of tribes and lineal descendants to obtain repatriation of human remains and cultural items from federal agencies and museums, and protects human remains and cultural items found on federal public and tribal lands."[650]

Jensen was neither a tribal claimant nor a descendant claimant of human remains, did not "discover the human remains on tribal or federal lands," and "fail[ed] to identify the remains as Native American."[651] First, in order to assert a valid claim under NAGPRA, a person must be, "a tribal or descendant claimant of the remains, [which is] a requisite for standing within the 'zone of interests' protected by NAGPRA."[652] Second, "there are no tribal lands on the Island of Nantucket," so as to validate Jensen's claim that she found the remains on tribal land within the meaning of NAGPRA.[653] Likewise, the lands along the north shore of Nantucket are not considered federal, but rather are municipal or state-owned.[654] Lastly, a person who discovers remains must identify the remains as Native American of a currently existing tribe, which Jensen failed to do.[655] Therefore, "Jensen lack[ed the] standing [necessary]

644. *Id.* at 434 (citing 28 U.S.C. § 1346(b)(1) (2018)).
645. *Id.* (citing 28 U.S.C. § 2675(a) (2018)).
646. *Jensen*, 113 F. Supp. 3d at 434.
647. *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 498-99 (1975)).
648. *Id.*
649. *Id.* (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013)).
650. *Id.* (citing 25 U.S.C. § 3001 (2018); Thorpe v. Borough of Thorpe, 770 F.3d 255, 262 (3d Cir. 2014)).
651. *Jensen*, 113 F. Supp. 3d at 434-35.
652. *Id.* at 434 (Bonnichsen v. United States, 357 F.3d 962, 970 (9th Cir. 2004)).
653. *Id.*
654. *Id.* at 434-35.
655. *Id.* at 435 (citing 43 C.F.R. § 10.2(d); *Bonnichsen*, 367 F.3d at 875–76).

to invoke NAGPRA," and subsequently, "the court . . . lack[ed] subject-matter jurisdiction to [hear her] claim" on the matter.[656]

This case is useful in that it reviews the basics of standing under NAGPRA. However, the case is also illustrative of NAGPRA's narrow scope, as it only applies to Native American remains and federal/tribal property.[657] Because Jensen met neither of these elements, she did not have standing under NAGPRA.[658] It is unclear from these facts whether a state version of NAGPRA may have applied to this scenario. As it seems from the facts, Jensen was merely upset by the erosion of remains from a drainage slough and thought the NPS should deal with the matter.[659] In such a case, there is likely no cause of action for erosion under the Massachusetts version of NAGPRA, as such laws do not generally apply to exposure of remains by natural or semi-natural processes.[660] Instead, it seems that, perhaps, a small amount of coddling by NPS regarding the progress of the matter may have avoided the expense of this suit.

The recent case of *Thorpe v. Borough of Jim Thorpe*,[661] is another example of the limited utility of NAGPRA. Multi-sport Olympic gold medalist, Jim Thorpe, died in 1953 without a will.[662] Thorpe's "estate was assigned to his third wife, Patricia ("Patsy"), who eventually buried him in what is now Jim Thorpe, Pennsylvania ("the Borough") . . . . over the objections of several children from his previous marriages.[663] The merger of the boroughs Mauch Chunk and East Mauch Chunk created Jim Thorpe, Pennsylvania and specifically named as a condition of Thorpe's burial in the town.[664] Because "Thorpe was a Native American of Sauk heritage and a member of the Sac and Fox Nation of Oklahoma," Thorpe's eight children protested their father's burial in Pennsylvania, "advocating that he be reburied on Sac and Fox tribal land in Oklahoma."[665] In 2010, John Thorpe (son of Thorpe and his second wife) sued the Borough for failure to comply with the inventory and repatriation provisions in NAGPRA because the Borough is the situs of Thorpe's burial.[666] The district court found, "that the Borough was a 'museum' within the meaning of NAGPRA," and as such,

656. *Jensen*, 113 F. Supp. 3d at 435.
657. *Id.* (citing 25 U.S.C. § 3001).
658. *Id.* (quoting *Bonnichsen*, 357 F.3d at 970).
659. *Id.* at 433.
660. MASS. ANN. LAWS ch. 9 § 26A (LexisNexis 2018).
661. 770 F.3d 255 (3d Cir. 2014).
662. *Id.* at 257 (3d Cir. 2014).
663. *Id.*
664. *Id.* at 257, 258.
665. *Id.* at 257.
666. *Thorpe*, 770 F.3d at 257.

"required the Borough to disinter Thorpe's remains and [repatriate] them to the Sac and Fox tribe as requested by John Thorpe."[667]

On appeal, the issue was whether a town may be considered a "museum" within the meaning of NAGPRA so as to warrant the exhumation and relocation of human remains that had been buried there.[668] "NAGPRA requires museums and federal agencies possessing or controlling holdings or collections of Native American human remains to inventory those remains, notify the affected tribes, and, upon the request of a known lineal descendent of the deceased Native American or of the tribe, return such remains."[669] Under NAGPRA, a "museum" is defined as "'any institution or state or local government agency (including any institution of higher learning) that receives federal funds and has possession of, or control over, Native American [remains].'"[670] Here, "[t]he Borough is a local government entity that maintains Jim Thorpe's burial site . . . [and] has 'possession of, or control over' [his] remains."[671] While "[t]he district court found that the Borough was a museum because the record showed that the Borough received federal funds after the enactment of NAGPRA," the appellate court found that the Borough is not actually a "museum" as NAGPRA intends, therefore it is "not required to comply with NAGPRA's procedural requirement of providing an inventory of Thorpe's remains," nor was it "subject to the statute's requirement that his remains be 'returned' to Thorpe's descendants for 'repatriation' at their request."[672]

"'The purpose of [NAGPRA] is to protect Native American burial sites and the removal of human remains' . . . . [and to] shield against further injustices to Native Americans."[673] The Third Circuit noted, "[i]t was not intended to be wielded as a sword to settle familial disputes within Native American families," and that it is an inappropriate extension of the law if the court were to enforce NAGPRA's repatriation provisions in this situation.[674] "Section 3003 [of NAGPRA] applies to a 'museum which has possession or control over holdings or collections of Native American human remains' . . . [which] implies that the statute assumes that a museum is holding or collecting the remains for the purposes of display or study, as opposed to serving as an original burial site."[675] Furthermore, NAGPRA's text "requires

667. *Id.*
668. *Id.* at 259.
669. *Id.* at 257 (citing 25 U.S.C. §§ 3003, 3005 (2018)).
670. *Id.* at 262 (quoting 25 U.S.C. § 3001(8) (2018)).
671. *Thorpe*, 770 F.3d at 262.
672. *Id.* at 262-63.
673. *Id.* at 260, 265 (quoting Kickapoo Traditional Tribe of Texas v. Chacon, 46 F. Supp. 2d 644, 649 (W.D. Tex. 1999)).
674. *Id.* at 265.
675. *Thorpe*, 770 F.3d at 266 (citing 25 U.S.C. § 3003 (2018)).

that remains be 'returned' . . . [which] assumes that the human remains were moved from their intended final resting place."[676] However, "Thorpe was buried in the Borough by his wife, [who] had the legal authority to decide where he would be buried."[677] As such, "there is nowhere for Thorpe to be 'returned' to," because his wife intended to bury Thorpe in the Borough, and that is where he remains.[678] Altogether, the Third Circuit concluded Congress did not intend a literal application of the NAGPRA text as interpreted by Thorpe's children, and as a result the Borough is not considered a "museum" under NAGPRA, which if plainly read, would have required the repatriation of Thorpe's remains to his descendants.[679] Writs on this matter were denied by the United States Supreme Court.[680] The result reached in this case is a correct analysis of NAGPRA. Had the Third Circuit upheld the district court's decision, innumerable public cemeteries nationwide would be subject to NAGPRA repatriation demands that would, undoubtedly, conflict with the wishes of the deceased regarding their final resting place. Such a result would be absurd and could turn lawful interment laws into unnecessary legal battlegrounds.

The matter of *White v. Univ. of California*,[681] presents an interesting twist on the standard NAGPRA trope. Somewhat in the vein of the *Bonnichsen v. United States*[682] matter, a group of anthropologists brought suit against the University of California to stop the planned repatriation of a collection of roughly 9000-year-old Native American skeletal remains.[683] Although they had done some scientific assessment of the remains—enough to conclude that the remains were those of Native Americans—the anthropologists argued that this ancient sample needed additional study before repatriation.[684] Further, despite the analysis done, no conclusion could be drawn to link the remains to any specific existing tribe.[685] In the absence of any identifying information, the University wanted to provide the remains to the current nearest (geographic) tribe.[686] Unlike the *Bonnichsen* case, a bellwether for NAGPRA cases regarding ancient remains,[687] this case never really got past

676. *Id.* at 265 (citing 25 U.S.C. § 3005 (2018)).
677. *Id.* at 266.
678. *Id.*
679. *Id.* (quoting § 3001(13); § 3003).
680. Sac & Fox Nation v. Borough of Jim Thorpe, 136 S. Ct. 84, 84 (2015).
681. 765 F.3d 1010 (9th Cir. 2014).
682. Bonnichsen v. United States, 367 F.3d 864, 868 (9th Cir. 2004).
683. White v. Univ. of California, 765 F.3d 1010, 1015-16 (9th Cir. 2014).
684. *See id.* at 1020.
685. *See id.* at 1018, 1020.
686. *See id.* at 1018.
687. *See generally* Ryan M. Seidemann, *Time for a Change? The Kennewick Man Case and its Implications for the Future of the Native American Graves Protection and Repatriation Act*, 106 W. VA. L. REV. 149, 150 (2003) (reviewing the *Bonnichsen* case and others similar).

procedural hurdles.[688] In this case, the plaintiffs claimed that the University of California system violated NAGPRA by failing to make a valid finding that the remains were Native American and should be repatriated, breached public trust by refusing to allow the continued analysis of the remains, and violated the anthropologists' First Amendment rights by restricting them from expressing themselves through their research on the remains.[689] In fact, the crux of the legal issues in this case turned on whether a NAGPRA suit may proceed without affected tribes as parties.[690] The court did not consider any of the plaintiffs' of the substantive allegations.[691]

Shortly after filing suit, the university system moved to dismiss the case, stating that the tribes that it intended to return the remains to were necessary parties and that, due to sovereign immunity, they could not be sued.[692] The court found that the tribes were necessary parties.[693] The court further found that the tribes, as sovereign nations, were immune from suit unless they waived their immunity or Congress waived it for them.[694] Because neither of these things occurred and the tribes did not intervene in the case, the matter could not proceed.[695] Part of this finding determined that NAGPRA is not such a congressional waiver of sovereign immunity.[696] In the absence of necessary parties, the case could not go on.[697]

With this ruling, the Ninth Circuit created a bizarrely circular scenario whereby determinations of Native American ancestry and decisions to repatriate human remains can never be challenged if tribes do not want them to be challenged.[698] In order to avoid scrutiny of NAGPRA decisions to repatriate all the tribes need do is assert immunity and they will win every time. It is similarly disappointing that the court did not address any of the substantive issues raised by the scientists in this case, as most of them are *res nova* issues. However, both the subject matter jurisdiction issue (i.e., immunity) and the substantive issues are too complex for this brief review and should be the subject of a more intensive review and debate.

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688. See *White*, 765 F.3d at 1029 (case was dismissed because the Repatriation Committee was entitled to immunity and had not waived their immunity by filing another lawsuit in California).

689. *Id.* at 1021-22.

690. *Id.* at 1015.

691. *See id.* at 1022, 1029.

692. *Id.* at 1022.

693. *White*, 765 F.3d at 1029.

694. *Id.*

695. *Id.*

696. *Id.*

697. *Id.*

698. *White*, 765 F.3d at 1030 (Murguia, J., dissenting) (hinting at the notion of a party being able to stifle the rights of others through its absence).

III. DISCUSSION AND CONCLUSIONS

The nature of a nationwide jurisprudential review of an ever-evolving area of the law is it is difficult to make any overarching conclusions regarding the matters herein discussed. As noted in a similar, prior article:

> [t]he cases reviewed herein clearly indicate that cemeteries and human remains, from a legal perspective, cannot be pigeonholed as contracts or property cases (or both) in any traditional sense. Once the grief component is added to any set of straightforward laws and facts, the dynamics change. Cemetery and human remains law can best be seen as a form of quasi-property law. Many of the terms used and concepts referred to are property concepts. However, the unique nature of the subject - i.e., the dead and the special treatment of the dead in Western culture - means that the judicial and legislative systems view the traditional property concepts through the lens of grief and alter some of those traditional property law concepts to fit this special niche of the law.[699]

Not much has changed in the way of conclusory statements since those were printed in 2013. The law of the dead continues to defy classification under any broad legal regime and, with the rise in the number of problems related to the dead noted in the introduction, such cases will only continue to proliferate. Reviews such as this are necessary to corral the disparate threads of the law of the dead in order to allow practitioners to find their way in the dark while navigating these complex and sensitive matters.

699. Seidemann, *supra* note 57, at 69-70.