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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re the Reinterment of the Remains of Kyril Faenov

MARINA BRAUN,

Appellant,

v.

LAUREN SELIG, MARTIN SELIG and TEMPLE DE HIRSCH SINAI,

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The trial court erred when it dismissed Marina Braun's Petition for Reinterment because there are genuine issues of material fact regarding the merits of the case. Rather than ruling on the narrow issue of law that had been extensively briefed in relation to Respondents' Motion to Dismiss, the trial court inexplicably ruled on the merits after denying Ms. Braun any discovery in the matter or giving her the opportunity to adequately refute Respondents' biased and self-serving version of the facts. This Court should reverse the dismissal and remand the case to the Superior Court for discovery and a fair trial on the merits.

Marina Braun petitioned under RCW 68.50.200 to have the remains of her son, Kyril Faenov, transferred from a cemetery in Seattle, Washington to her family cemetery plot in Portland, Oregon. Ms. Braun filed the Petition because two years after his death, her son was still interred in an unmarked grave in a Seattle cemetery; because her son no longer had any family living in Seattle; because her son's widow forcibly opposed all efforts to memorialize his gravesite; and because his widow took affirmative steps to erase his name and good memory. Ms. Braun wants to transfer her son's remains where he can be surrounded in memoriam by his extended family, his memory can be respectfully and

befittingly honored, and his grave can be maintained with a permanent headstone in accordance with Jewish law and practice.

The Petition was opposed by Kyril's widow, Lauren Selig, her father, Martin Selig, (who paid for the Seattle burial plot), and the Temple de Hirsch Sinai, the owner of the Hills of Eternity cemetery.

The Seligs brought a Civil Rule 12(b)(6) motion to dismiss the Petition based on the narrow legal argument that the trial court did not have authority to grant the Petition under RCW 68.50.200, because reinterment would violate the terms of a written contract, which is impermissible under the statute.[1] The Seligs argued that reinterment would violate the purchase agreement Mr. Selig signed for the burial plot because it stated he was granted the "right of perpetual interment" for Kyril's remains.

The trial court granted the Seligs' Motion for a Protective Order and barred Ms. Braun from conducting any discovery in the case until after the court ruled on the motion to dismiss, reasoning that no discovery was necessary to respond to the narrow legal issue before the court.

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[1]The trial court converted the Seligs' motion to dismiss to a motion for summary judgment because Lauren Selig and Martin Selig filed declarations, with exhibits, in support of their CR 12(b)(6) motion. (CP at 284-85.)

The parties filed extensive briefing focused on how RCW 68.50.200 and related statutes should be interpreted.[2] At the hearing on the motion, however, the trial court ultimately ignored the legal issue the parties briefed, failed to properly evaluate the equitable merits of the reinterment Petition, and then improperly dismissed the Petition without having a complete record or even permitting Ms. Braun to conduct any discovery.

The court failed to give Ms. Braun any notice that it was considering a ruling on the merits, therefore depriving her of an opportunity to present her evidence and arguments demonstrating why dismissal on the merits would be improper. The court's error was compounded because it barred Ms. Braun from conducting any discovery before the hearing, and then denied her motion under Civil Rule 56(f) to conduct discovery and present additional evidence to the Court.

Ms. Braun therefore appeals the trial court's orders dismissing the Petition and denying her right to conduct discovery.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to apply the proper equitable analysis to determine the merits of the Petition for Reinterment.

[2] The Temple de Hirsch joined in the Motion to Dismiss and filed its own briefs.

2. The trial court erred when it dismissed Ms. Braun's reinterment Petition without providing her with adequate notice and opportunity to be heard on the facts, circumstances and equities at issue.
3. The trial court erred when it granted summary judgment to Respondents when the record was incomplete, and genuine issues of material fact and credibility existed.
4. The trial court erred when it barred Ms. Braun from conducting any discovery before dismissing the Petition on its merits.
5. The trial court erred when it denied Ms. Braun's request for discovery under CR 56(f), and discovery was needed to develop the relevant equitable facts and circumstances, and to resolve important issues regarding Ms. Selig's veracity.

III. STATEMENT OF THE CASE

A. Ms. Braun's Petition Sets Forth Compelling Reasons for Reinterment.

Kyril Faenov died on May 25, 2012, a victim of suicide. (CP at 55.) He was buried at the Hills of Eternity Cemetery, in the Queen Anne neighborhood of Seattle. (CP at 55.) Rights to the funeral plot were purchased by his father-in-law, Martin Selig. (CP at 55.) The cemetery was selected and funeral arrangements were made by Ms. Selig without

consulting with Ms. Braun, or with Mr. Faenov's father, Anatoly Faenov. (CP at 55, 462-463, 499-500.)

More than two years later, Ms. Braun filed a Petition pursuant to RCW 68.50.200 to have her son's remains reinterred to the family's cemetery plot in Portland, Oregon. Ms. Braun filed the Petition so that her son could be buried near close family members, and to ensure that her son's grave would be memorialized with a permanent headstone in accordance with Jewish law, and faithfully maintained and preserved in the future. (CP 1; 6; 8-9; 56-57). The Petition was supported by declarations from Ms. Braun, Eugene Luskin, and Rabbi Joshua Stamper. (CP at 53-78.) These declarations set forth compelling facts and circumstances supporting reinterment.

1. After Kyril Died, Ms. Selig Distanced Herself and Her Children from His Name and His Memory.

After Kyril's death, Ms. Selig took affirmative steps to separate herself and Kyril's two children from him and all memories of him. (CP at 55.) Shortly after the funeral, she shut down Kyril's personal website, "Faenov.com." (CP at 55.) Soon thereafter, she eliminated all public access to the website memorial "imorial.com/kyrilfaenov," where more than a hundred heartfelt tributes were posted during the first few weeks after Kyril's death. (CP at 55.)

Less than two months after Kyril died, Ms. Selig changed her three and six year old daughters' last names from Faenov to Selig. (CP at 55 and 62-63.) About three months after Kyril died, Ms. Selig formally registered a new movie production business in Beverly Hills, California, and in October of 2012 she purchased a home there. (CP at 466-467, 488-498.)[3] Ms. Selig moved with the children to Beverly Hills. This left Mr. Faenov with no family members in Seattle. (CP at 55.)

2. Ms. Selig Left Mr. Faenov's Grave Unmarked.

In 2013, Eugene Luskin, a good friend of Kyril's, contacted Ms. Selig to ask when she was going to unveil Kyril's headstone at the gravesite. (CP at 72.) (According to the Jewish tradition, this unveiling is supposed to happen on or around the one-year death anniversary.) Ms. Selig did not respond to these inquiries. (CP at 72.)

Ms. Braun organized a one-year anniversary memorial on May 25, 2013 with friends to place flowers on Kyril's grave and to honor his memory. (CP at 55.) No headstone had been placed on Kyril's grave. (CP at 55, 65, 67, 73.)

Sometime after the one year anniversary had passed, Mr. Luskin contacted Mr. Selig and received permission to install a headstone for

[3] There is strong circumstantial evidence that Ms. Selig had made plans to move to California before Mr. Faenov died. (CP at 466-67, 488-498.)

Kyril's grave. (CP at 72.) Mr. Luskin and other friends of Kyril then purchased an appropriate headstone and had it installed in late September or early October of 2013. (CP at 72-75.)

3. Ms. Selig Forcibly Removed the Headstone and Left Mr. Faenov's Grave Unmarked Again.

On March 4, 2014, Ms. Braun visited her son's grave on the occasion of his 40th birthday. (CP at 56.) To her great distress, she discovered that the headstone installed by Kyril's friends had been removed. (CP at 56.) All that was left was a barren space where the gravestone had been. (CP at 56, 69.)

Ms. Braun spoke to Mr. Luskin and Dan, the cemetery's groundskeeper. Both reported that they had received threatening calls from Ms. Selig demanding that the headstone be removed. (CP at 56, 73.) Dan put Ms. Braun in touch with the company that made the headstone, Quiring Monuments. (CP at 56.) Ms. Braun was told by an employee there that Ms. Selig had called and threatened them with a lawsuit if they did not remove the headstone, and they felt they had no choice but to comply. (CP at 56.)

Ms. Braun returned to Seattle on May 25, 2014, for the two year anniversary of Kyril's death. (CP at 56.) The grave still remained unmarked, except for a very small white object that the cemetery placed there to provide some measure of dignity to the unmarked grave. (CP at 56, 71.)

Because Kyril had strong ties to Portland and his closest family members are buried there, Ms. Braun filed a petition to transfer Kyril's remains to the Neveh Zedek Jewish Cemetery in Portland. Kyril, his mother, and his grandparents all emigrated from Russia and settled in the Portland, Oregon area. (CP at 53.) Kyril resided in Portland until 1998. (CP at 53-54.) In 1998, Microsoft purchased a start-up company founded by Kyril. As a result, Kyril became a Microsoft employee and moved to Seattle. (CP at 54.) While living in Seattle, Kyril remained close to his family living in Portland. (CP at 54.) His grandparents and stepfather, who died in the last decade, are all buried together in the Neveh Zedek Jewish Cemetery in Portland. (CP at 54.) Ms. Braun, who was diagnosed with cancer in 2012, will be buried in the same cemetery next to her husband and parents. (CP at 54.) Prior to filing the Petition, Ms. Braun secured an available plot for her son next to his grandparents. (CP at 57.) She also obtained approval for the reinterment of Kyril's remains from the Portland cemetery and the synagogue that operates it.[4] (CP at 57.)

[4] According to Rabbi Joshua Stampfer from the Portland synagogue, it is a long and reverently observed Jewish tradition for family members to be buried in close proximity to each other, and in a location that living family members can frequently visit. (CP at 77.) According to Rabbi Stampfer, historically bodies have been transported many thousands of miles and reinterred in new gravesites to allow family members to be brought together. (CP at 77). Under Jewish law and practice, a headstone or monument is to be placed on all graves so that the dead may be remembered and honored. (CP at 78.)

B. The Seligs Moved to Dismiss the Petition on Narrow Legal Grounds.

The Seligs opposed Ms. Braun's Petition for Reinterment by filing a Motion to Dismiss under Civil Rule 12(b)(6) on August 6, 2014.

As previously discussed, the Seligs' Motion to Dismiss was premised on the legal argument that the Court did not have the legal authority to grant the Petition under RCW 68.50.200 because doing so would violate the terms of the written purchase agreement between Mr. Selig and the Cemetery. (CP at 88 and 139.) The Seligs specifically argued that "based on this written contract, the Petition fails as a matter of law and it should be dismissed with prejudice." (CP at 88.)

This very narrow legal issue was presented as the sole ground for dismissal. The Seligs wrote "[b]ased on this written contract, the Petition fails as a matter of law." (CP at 88.) They also argued "[t]he Interment Agreement is a legally enforceable set of promises that will be violated if the Petition is granted, [which] is impermissible under RCW 68.50.200." (CP at 97.)

Declarations from Ms. Selig, Mr. Selig, and their counsel (CP 82-139) were filed with the Motion to Dismiss, which led the court to convert

the motion to dismiss to a motion for summary judgment. (CP at 284-85.)[5]

The Seligs considered their legal argument based upon the language of RCW 68.50.200 and the existence of the burial agreement to be so simple and clear that they requested sanctions against Ms. Braun and her counsel for filing a petition that was so obviously "fatally flawed from the outset." (CP at 92, 96-98.)[6]

The Seligs' Motion to Dismiss did not include any sort of request that the court rule on the factual or equitable merits of the underlying Petition. (CP 84-98.)

C. Ms. Braun was Barred from Conducting Any Discovery Because the Motion to Dismiss Was Supposed to Be Limited to a Single Legal Issue.

On August 13, 2014, Ms. Braun served interrogatories and requests for production on Lauren Selig, Martin Selig, and the Temple de Hirsch Sinai. (CP 228-251.) Ms. Braun also noted the depositions of Martin

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[5] In her declaration, Ms. Selig offered explanations for some of her conduct following Mr. Faenov's death. She said, for example, that she changed her three and six year old daughters' last names from Faenov to Selig because that is what the children wanted. (CP at 135.) She also said that she did not mark the grave for over two years because she was waiting until her children were old enough to help her design a headstone. (CP at 135.) She did not dispute the allegations that she threatened those responsible for putting up a headstone or that she had it removed, or that she took down Mr. Faenov's website and on-line memorial. (CP 132-135.)

[6] The sanctions argument had no merit, and the Seligs did not pursue the request in further briefing or oral argument on the Motion to Dismiss.

Selig, the groundskeeper "Dan" at the Temple de Hirsch Sinai, and a CR 30(b)(6) representative of the Temple. (CP at 228-251, 272-73.)

The Seligs filed a Motion for a Protective Order on all discovery, on the ground that no discovery was needed to resolve the narrow legal arguments raised by their motion. (CP at 259-268.) Specifically, the Seligs argued they should not have to provide discovery that would have "no relevance to the single issue presented by the Motion to Dismiss, namely whether the terms of the Interment Agreement, which are incorporated by reference into the Petition, bar relief under RCW 68.50.200." (CP at 262.)[7] Because discovery was not needed to resolve this single statutory issue, the Seligs requested that all discovery be stayed until the court ruled on the motion to dismiss. (CP at 262, 266-268.)

The Temple joined in the Seligs' Motion for a Protective Order (CP at 271-275), arguing that discovery be stayed because the Seligs' Motion to Dismiss was based on a discrete narrow issue of law. (CP at 272, 274.) "[G]iven the pending Motion to Dismiss, which TDHS understands is based on a legal issue related to the contract for Mr.

[7] In the same pleading, the Seligs reiterated that "the Motion to Dismiss addressed a single issue: "Does RCW 68.50.200 permit the Court to override Ms. Selig's decision...if such an outcome violates the terms of a written contract?" (CP at 266.)

Faenov's interment, it appears that the discovery sought...is premature." (CP at 272.)[8]

On September 5, 2014, the trial court issued its "Order Granting Motion to Stay Discovery Pending Resolution of Defendants' Motion to Dismiss." (CP at 354-358.) The court reasoned that "a brief stay of discovery need not prejudice any party ...." (CP at 356.) "In short", the Court said it was "willing to test the Seligs' argument that the case can be adjudicated without discovery...." (CP at 357.)

In that same order, the trial court requested supplemental briefing on four questions relating to the Seligs' Motion to Dismiss. (CP at 356-357.)[9]

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[8] Ms. Braun opposed the motion, arguing that she should at least be able to conduct discovery relevant to the issues raised by the motion to dismiss. (CP at 288-298.)

[9] The court's four questions were:

> 1) Can the Agreement of Interment ("Agreement") between Temple De Hirsch Sinai ("Temple") and Martin Selig be breached if there is no act or omission by the Temple or by Mr. Selig that constitutes a breach of the contract?
>
> 2) Can an act or omission by a person who is not a party to the agreement be legally deemed to constitute a "breach" of the agreement?
>
> 3) Assuming that every person at the Temple's cemetery have been interred pursuant to a written agreement with terms that are basically identical to the terms of the Agreement, would every disinterment necessarily be a breach of such an agreement? If so, when, if ever, would any court be permitted to exercise the statutory discretion conferred on the Court under RCW 68.50.200 to allow disinterment?

D. The Court's Questions for Supplemental Briefing Had Nothing to Do with the Factual or Equitable Merits of Reinterment.

The court's request for supplemental briefing did not put Ms. Braun on notice that the court was going to rule at the upcoming hearing on the overall factual or equitable merits of the underlying Petition. (CP 357.) The first three questions related to the Seligs' legal arguments regarding RCW 68.50.200. (CP at 356-357.) The fourth question asked whether Ms. Braun had waived her right to object to her son's interment in the Seattle cemetery.[10]

Because Ms. Braun was never given the opportunity to conduct discovery, she was limited in her ability to rebut many of the inaccurate and misleading statements made by Ms. Selig in her August 5, 2014, declaration. With regard to the alleged waiver issue raised by Ms. Selig, Ms. Braun noted that waiver generally presents a question of fact for trial, and provided declarations from Ms. Braun (CP at 462-498) and Anatoly Faenov (CP at 499-509) to demonstrate that no waiver occurred. Ms. Braun's declaration also addressed certain inaccurate and misleading

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4) Did Petitioner waive her right to object to the interment of Mr. Faenov's remains at the Hills of Eternity Cemetery in 2012?

[10] From this fourth question, one can reasonably conclude that the Court had read and given some credence to Ms. Selig's Declaration, wherein she stated that she discussed the choice of the Hills of Eternity Cemetery with Ms. Braun before the funeral and Ms. Braun did not object at that time. (CP at 133.)

statements in Ms. Selig's August 5, 2014 declaration which should have cast doubt on Ms. Selig's credibility (CP at 462-467).[11]

E. Ms. Braun Brought in an Expert in Cemetery Law to Assist the Court in Interpreting the Statutes at Issue in the Motion to Dismiss.

In opposition to the Motion to Dismiss, Ms. Braun also filed a detailed Declaration of Professor Tanya Marsh from the Wake Forest University School of Law. (CP at 406-461.) Professor Marsh is an expert in the laws of cemeteries, disinterment and reinterment. (CP at 406-407, 423-428.) This declaration was submitted in order to provide the court with the common law and historical background for the Washington statutes at issue, along with an analysis of similar states' statutes. (CP at 392-393, 406.)

Based upon this largely historical analysis, Professor Marsh concluded that the Washington statutes at issue permitted reinterment in cases such as this. (CP at 408, 421-422.) After an extensive discussion of reinterment under the common law (CP at 408-413) and under a highly analogous state statutory scheme (CP 414-418), Professor Marsh showed that the burial contract Mr. Selig signed was likely not the type of "written

[11] Without any discovery, Ms. Braun provided evidence from her own knowledge and limited investigation that Ms. Selig's statements regarding her alleged conversations with Ms. Braun before the funeral, her communications with Ms. Braun after the funeral, the timing of her decision to move to California, and her decision to change the names of her daughters were all false or misleading. (CP at 462-498.)

contract" the Washington Legislature was concerned about, or would be violated by reinterment. (CP at 418-422.)[12]

F. The Court Failed to Give Ms. Braun Notice that it Intended to Rule on the Merits.

The narrow legal issue of statutory interpretation raised by the Seligs' Motion to Dismiss remained the focus of all the proceedings leading up to the November 21, 2014, hearing. Likewise, the briefing by all parties focused on the narrow question of law upon which the Seligs based their Motion to Dismiss. None of the Respondents' arguments sought dismissal based upon the factual or equitable merits of the Petition.[13] And at no time before it issued its oral ruling dismissing the Petition did the court ever indicate that it was considering ruling on the merits.

On August 13, 2014, Ms. Braun moved to continue the hearing date on the Motion to Dismiss because her counsel had scheduling conflicts. (CP at 141-147.) The Seligs vigorously opposed the continuance, arguing that their motion to dismiss posed a simple,

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[12] The Seligs and the Temple moved to strike Professor Marsh's declaration on the ground that she was giving improper expert opinions (CP at 550-551, 566-567), but the Court denied that motion. (RP at 26:15-24.)

[13] On November 17, 2014, the Temple and the Seligs submitted reply briefs on the Motion to Dismiss and the Court's supplemental questions. (CP at 548-556; 562-571.) The Seligs once more argued that the petition should be dismissed based on RCW 68.50.200 and the Interment Agreement. (CP at 563.) The Temple similarly stated that the petition should be dismissed based purely on the statutory framework as set out in RCW 68.50.200 and RCW 68.50.160. (CP at 549.)

straightforward "discrete question of law" that did not require additional time to analyze. (CP at 207.) The Seligs wrote: "[t]he Petition rises and falls on the plain language of RCW 68.50.200" (CP at 207), and their Motion to Dismiss does not require consideration of matters "beyond the pleadings." (CP at 208.)

On August 25, 2014, the trial court granted the Motion to Continue, agreeing that Ms. Braun should be given a reasonable opportunity to complete some factual discovery before being required to respond to the Selig's motion, but ruled that because the Motion to Dismiss included declarations, it would be considered a motion for summary judgment under Civil Rule 56. (CP at 284-285.) Ten days later, the court reversed itself, concluding that a Protective Order and effective stay of discovery would save expense to the parties if the Seligs were correct that their motion could be granted based "purely on the legal arguments." (CP at 354-356.)

Subsequently, Ms. Braun filed a detailed declaration pursuant to Civil Rule 56(f) to ensure that the court would not consider dismissal without allowing her the benefit of discovery, requesting that if there was any consideration given to granting the motion that the court first grant discovery on a number of designated topics. (CP 510-515.) Importantly, and consistent with counsel's understanding of the issues before the court,

the Civil Rule 56(f) declaration did not seek to describe all the areas of discovery that would be relevant to all the factual and the equitable issues involved in ruling on the merits of the Petition.[14]

G. A Ruling on the Merits Was Unforeseen and Constitutes Reversible Error.

On November 21, 2014, the trial court heard oral argument from the parties on the narrow legal questions raised by the Seligs' Motion to Dismiss. (RP at 6:13 to 43:21.) Counsel for the Seligs argued that "the questions we're going to discuss today have purely legal answers and those answers are dictated by the unambiguous terms of the statute RCW 68.50.200 and a very limited set of undisputed facts." (RP at 20:15-18.) Counsel for the Temple likewise argued that the court did not have the authority to order reinterment based on its interpretation of RCW 68.50.200. (RP at 36:19 to 37:8.)

Counsel for Ms. Braun argued that the Respondents' statutory interpretations were wrong, and urged the Court to rely upon the learned declaration of Professor Marsh as to how the statute ought to be interpreted. (RP at 41:10 - 42:13.) Counsel further urged the court to

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[14] As the Rule 56(f) declaration stated, "[p]etitioner respectfully submits that the Court has sufficient briefing and evidence before it to deny the Motion to Dismiss. In the event that the Court does not agree or is considering granting the motion, then Petitioner provides the following descriptions of the areas of discovery that should be covered before the Court decides the Motion." (CP at 511.) (Emphasis added.)

deny the motion and "allow us to continue to the court's equitable discretionary jurisdiction." (RP at 43:18-20.)

Immediately following oral argument the court stated it would "grant the motion to dismiss and deny the petition." (RP at 44:11-12.) The court indicated that RCW 68.50.200 and the Interment Agreement were not a bar to its authority to order reinterment, thus essentially siding with Ms. Braun (and Professor Marsh) and disagreeing with Respondents on the very issues posed by the Motion to Dismiss. (RP at 44:20 to 47:6.) "[T]he court does have equitable authority to do anything so long as it doesn't allow one party to violate or breach its own contract with the other party."[15] (RP at 47:20-23.) Despite these pronouncements, the court indicated that it did not need to "interpret the provision that everyone is struggling with." (RP at 44:18-19.)

The court then ruled on the ultimate factual and equitable merits of the Petition in favor of the Respondents:

> Here I think the cemetery's argument and also the Seligs' is persuasive. I think moving remains is a decision that can't be made lightly and should not be allowed, absent some compelling circumstances in which equity requires it. And here is an equitable matter, and based on the facts and the circumstances that I see in the record, I don't see a sufficient reason, I don't see a necessity or a compelling

[15] The court also stated its position that RCW 68.50.200 preserved the court's equitable powers to order reinterment regardless of whether the surviving spouse or the cemetery consents. (RP at 45:5-12.)

> equitable reason to disturb the decision of Lauren Selig, the surviving spouse, as its been implemented in the interment agreement that her father signed.
>
> And I think I have to be very careful and respectful of the surviving spouse, and also the agreement itself, even though I believe I do -- the Court does have equitable authority to do anything so long as it doesn't allow one party to violate or breach its own contract with the other party.
>
> So I will grant the motion to dismiss the case.

(RP at 47:7-24.)

The court also confirmed that it was denying the motion for relief under CR 56(f), stating "I don't think I need any further information to make this decision." (RP at 49:4-8.)

Counsel for Ms. Braun then expressed his great surprise with the court's ruling, and asked to supplement Petitioner's CR 56(f) motion on the grounds that until the court issued its oral ruling, Ms. Braun had no knowledge the court was considering ruling on the merits. (RP at 49:9-18.) Counsel also stated that if he had such knowledge, he would have briefed the matter differently and requested time to conduct additional discovery to address the merits. (RP at 49:19 to 51:11.) The Court disagreed, stating:

> But I do think that I have everything that both sides could provide factually in -- with respect to the circumstances of this case. I don't see a need to look at years of records from

the cemetery or other additional facts or testimony besides what's been presented.

(RP 50:14-18.)

IV. ARGUMENT

A. Standards of Review.

Washington appellate courts review *de novo* a trial court's decision to grant summary judgment. *Lakey v. Puget Sound Energy*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). The Court of Appeals will engage in the same inquiry as the trial court and will affirm summary judgment only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The Court reviews the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. *Id.*

Denial of a motion under Civil Rule 56(f) will be reviewed under the abuse of discretion standard. *Gross v. Sunding*, 139 Wn. App. 54, 67-68, 161 P.3d 380 (2007). A trial court's determinations regarding the scope of discovery are likewise reviewed under the abuse of discretion standard. *John Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991).

B. The Court Did Not Properly Evaluate the Equitable Merits of a Reinterment Petition.

The court improperly ruled that the Petition would be dismissed because it did not see a "necessity" or a "compelling equitable reason" to disturb Ms. Selig's decision to bury Mr. Faenov at Hills of Eternity Cemetery. (RP at 47:14-15.)[16]

RCW 68.50.200 provides that human remains may be removed from a plot in a cemetery, but if the required consent cannot be obtained, the superior court of the county where the cemetery is situated is authorized to order reinterment. Under Washington law, courts evaluating reinterment petitions are ***required to balance a variety of equitable factors***.

In *Wood v. E.R. Butterworth & Sons*, 65 Wash. 344, 118 P. 212 (1911), the Washington Supreme Court upheld the trial court's equitable determination that Mr. Wood's remains were to be moved from Washington to South Dakota for burial over the objection of his spouse, who wanted him buried in Seattle. The Supreme Court ruled that the merits of a reinterment petition:

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[16] The court may have been relying on "necessity" language used by the Temple in its reply brief on the Motion to Dismiss. (CP at 552-553.) This language was used without any direct citation to applicable case law, and did not purport to set out the applicable standard for the court's ultimate determination of the equities in the matter. (*Id.*)

> must be determined by principles of equity and such considerations of propriety and justice as arise out of the particular circumstances of the case. No general rule to be applied absolutely in all cases can be laid down upon the subject, for what is fit and proper to be done in each case must depend upon the special circumstances of the case.

Id. at 347-48.[17] *See also In re Disinterment of Frobose*, 163 Ohio App.3d 739, 743, 840 N.E.2d 249 (2005) (in considering a request for disinterment, courts apply an equity standard, considering and weighing some seven factors); *Novelli v. Carroll*, 278 Pa.Super. 141, 147, 420 A.2d 469 (1980) (lower court erred in requiring a showing of "exceptional circumstances" before allowing reinterment; holding the appropriate standard is "reasonable cause" after a careful weighing of the equities and a variety of factors); *Spadaro v. Catholic Cemeteries*, 330 N.W.2d 116, 118-119 (Minn. 1983) (trial court erred in granting summary judgment on reinterment petition without considering eight equitable factors); *Tozer v. Warden*, 101 Ark.App. 396, 399, 278 S.W.3d 134 (2008)

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[17] The proper fact-based equitable analysis set forth in the *Wood* case is echoed in other Washington Supreme Court opinions describing how trial courts are to determine the merits of equitable claims and defenses. *See* e.g., *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.3d 735 (2001) (*En Banc*) (equitable claims arising out of a meretricious relationship "must be analyzed under the specific facts presented in each case); *Hemenway v. Miller*, 116 Wn.2d. 725, 734, 807 P.2d 863 (1991) (*En Banc*) (court must examine all of the circumstances and conduct of the parties in ruling on an equitable suretyship defense); *Honey v. Davis*, 131 Wn.2d 212, 224, 930 P.2d 908 1997) (*En Banc)* (subrogation is equitable principle dependent upon the particular facts and circumstances of each case); and *Ferrell v. Lord*, 43 Wash 667, 86 P.1060 (1906) (court is to carefully consider all the facts and surrounding circumstance of each case when evaluating the equitable defense of laches.)

(trial court should have made findings of fact on seven equitable factors before resolving reinterment petition at bench trial); and *Spanich v. Reichelderfer*, 90 Ohio App.3d 148, 153-155, 628 N.E.2d 102 (1993) (the court should consider whether seven factors are present in order to decide the case "in equity on its own merits.").

Among the numerous equitable factors to be considered, courts give great weight and credence to where other members of the decedent's family are buried. *See, e.g., Weinstein v. Mintz*, 148 Misc.2d 820, 823, 562 N.Y.S.2d 917 (New York 1990), *citing Yome v. Gorman*, 242 N.Y. 395, 403, 152 N.E. 126 (1926) (removal permitted "to satisfy a longing that those united during life shall not be divided after death"). Here, not only did the trial court fail to consider where the rest of Kyril's family remains are interred, but barred any discovery on whether any members of Ms. Selig's family are buried (or have plans to be buried) at the Hills of Eternity Cemetery. (CP at 354-358).

Another important factor that courts consider is the strength of the relationship that the interested parties had with the decedent. *See, e.g., Spanich*, 90 Ohio App.3d at 153 (the state of the marriage is a factor to be weighed when comparing the interests of the spouse relative to other family members); *Feller v. Universal Funeral Chapel, Inc.*, 124 N.Y.S.2d

546, 551 (1953) (when the decedent and the next of kin do not enjoy normal familial relations at the time of death, the next of kin's right to determine the place of burial will not necessarily control). Here again, the court had no evidence regarding the status of the marriage relationship at the time of Kyril's death and barred any discovery on the issue.

Because Ms. Braun was never given notice of the issue that would prove dispositive on summary judgment, the court was never briefed on the appropriate legal analysis, or presented with all the relevant evidence and testimony on the critical equitable issues. The Court should therefore reverse the trial court's grant of summary judgment.

C. The Trial Court Erred When It Granted Summary Judgment on an Issue Not Raised by Respondents or by the Court.

The court committed reversible error when it granted summary judgment on its own accord, on a ground never raised by the Respondents, and without giving any prior notice to Ms. Braun that it was considering such a ruling. As emphatically stated by Ms. Braun's counsel at the hearing, the Court's ruling on the merits came as a complete surprise. (RP at 49:13 to 51:11.)

Under the analogous federal summary judgment rule, while the trial court has the power to timely raise an issue for summary judgment on its own, it may not make a summary judgment determination without

providing the party against whom judgment will be entered adequate notice and an opportunity to be heard.

> Rather, the question raised by the court's action is whether the party against whom the judgment will be entered was given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted. If no opportunity is provided, then obviously summary judgment should not be entered.

10 A Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 3d, Sec. 2720 at 339-345 (1998) and cases collected therein. *See e.g.*, *Costello v. Grundon*, 651 F.3d 614, 629 (7th Cir. 2011) (if the moving party does not raise an issue in support of its motion for summary judgment, the nonmoving party is not required to present evidence on that point, and the court should not rely on that ground in its decision); *Smith's Estate v. Tarrant County Hosp. Dist.*, 691 F.2d 207, 209 (5th Cir, 1982); and *Williams v. City of St. Louis*, 783 F.2d 114, 116 (8th Cir. 1986).

The importance of notice and an opportunity to be heard is the basis of the corollary Washington rule that "[a] trial court may not grant summary judgment to the moving party on issues that are first raised in rebuttal." *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 616, 15 P.3d 210 (2001). It is error for a trial court to consider an issue first raised in a reply brief as a basis for granting summary judgment. *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 169, 810 P.2d 4 (1991).

"Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond." *Id.* at 168.

Here, Respondents did not move for dismissal on the merits of the petition, and they never raised that ground for dismissal in their supplemental briefing or their reply briefs in support of the Motion to Dismiss. If an issue first raised in rebuttal or reply is not properly considered by the court as the basis for a summary judgment ruling, then surely an issue never raised by the parties (or the court) should not be the basis of the court's decision to grant summary judgment.

Ms. Braun was deprived of an opportunity to be heard on the issues on which the court dismissed her case. Under these circumstances, the court's decision on summary judgment was in error.

D. The Trial Court Erred When it Resolved Issues of Fact and Credibility in Favor of the Moving Party on Summary Judgment.

The trial court erred when it granted summary judgment on the limited record before it. On a motion for summary judgment, the court does not sit as trier of fact. The court merely determines whether any disputed material fact exists and whether the moving party is entitled to judgment as a matter of law. *Hudesman v. Foley,* 73 Wn.2d 880, 886-87, 441 P.2d 532 (1968). Where material facts averred in an affidavit are

particularly within the knowledge of the moving party, summary judgment should be denied. The matter should proceed to trial so that the opponent may attempt to disprove the alleged facts by cross-examination and by the demeanor of the witness while testifying. *Michigan Nat'l Bank v. Olson,* 44 Wn. App. 898, 905, 723 P.2d 438 (1986); *Balise v. Underwood,* 62 Wn.2d 195, 199-200, 381 P.2d 966 (1963).

On summary judgment, the trial court is required to review the evidence in the light most favorable to the nonmoving party and to draw all reasonable inferences in her favor. *Lakey v. Puget Sound Energy, supra,* 176 Wn.2d at 922. Summary judgment is improper when credibility issues involving more than a collateral matter exist. *Morinaga v. Vue,* 85 Wn. App. 822, 828, 935 P.2d 637 (1997); *Balise v. Underwood, supra,* 62 Wn.2d at 200 (contradictory evidence creates an issue of credibility and should preclude summary judgment).

For these reasons, fact-based equitable decisions cannot typically be decided on summary judgment. In *Vasquez v. Hawthorne,* 145 Wn.2d 103, 33 P.3d 735 (2001) (*En Banc*), the Washington Supreme Court ruled that summary judgment on the merits of a case involving equitable claims arising out of a meretricious relationship was improperly granted. The court held that "equitable claims must be analyzed under the specific facts presented in each case." *Id.* at 107. In particular, "where the relationship

between the parties is both complicated and contested, the determination of which equitable theories apply should seldom be decided by the court on summary judgment." *Id.* at 107-108. Courts in other states have similarly ruled that it is improper to grant summary judgment on the equitable merits in reinterment cases. *See e.g. Matter of Briggs v. Hemstreet-Briggs*, 256 A.D.2d 894, 894-895, 681 N.Y.S.2d 853 (1998); *Matter of Dutcher v. Paradise*, 217 A.D.2d 774, 775, 629 N.Y.S.2d 501 (1995); and *Spadaro v. Catholic Cemeteries, supra*, 278 S.W.3d at 118-119 (2008).

Here, the trial court not only granted summary judgment on the merits of the reinterment petition, it did so without stating which facts were dispositive. Instead, it simply stated that its ruling was based on the "facts and circumstances" of the case. (RP at 47:12-13.) The "facts and circumstances" before the court, however, were incomplete. Ms. Braun was effectively hamstrung in her presentation of evidence on the merits by the court's failure to provide of any notice of its intention to consider the merits of the Petition at the hearing, and its preclusion of all discovery.

The court reasoned that it needed to be "very careful and respectful of the surviving spouse." (RP at 47:18-19.) The court also stated its belief that Ms. Selig had suffered "pain and heartbreak...when she read the

Petition." (RP at 44:4-6.) These comments indicate that the court found Ms. Selig's declaration to be credible and deserving of greater weight.

On summary judgment, the court should not have given any weight to the testimony of Lauren Selig. All of the facts presented by Ms. Braun should have been accepted by the court at face value, and all reasonable inferences from those facts should have been drawn in the light most favorable to Ms. Braun and to reinterment. *Lakey v. Puget Sound Energy, supra*, 176 Wn.2d at 922.

For purposes of summary judgment, the court should have considered all of the following "facts and circumstances" to be true: 1) Ms. Selig and Mr. Faenov's marriage was broken at the time of his death; 2) Ms. Selig made plans to move to California and start a new business and life without Mr. Faenov before he died; 3) Ms. Selig actively and vigorously attempted to erase the memory of Mr. Faenov when she took down his website and the public online memorial that was filled with comforting messages from his friends, family and colleagues; 4) Ms. Selig quickly changed the names of her daughters from Faenov to Selig in a further effort to distance herself and the children from Mr. Faenov and his memory; 5) Ms. Selig deliberately chose to leave Mr. Faenov's grave unmarked as part of her effort to erase his name and memory; 6) Ms. Selig removed the gravestone lovingly installed by Mr. Faenov's friends in her

determined efforts to leave the grave unmarked; 7) Ms. Selig had no intention of ever installing a gravestone or memorializing Mr. Faenov's grave in any way; and 8) if the Petition was denied, Mr. Faenov would be buried in the Seattle cemetery forever without any family members beside him, and in contradiction of Jewish custom and practice.

Given these facts and circumstances, under any kind of equitable balancing test, the court should have denied the motion for summary judgment.

E. The Court Abused Its Discretion When It Dismissed the Petition on Its Merits Without Permitting Any Discovery to Petitioner.

Granting summary judgment to Respondents was improper without first giving Ms. Braun the opportunity to conduct discovery. The decision to grant reinterment under RCW 68.50.200 requires the court to evaluate competing equitable principles and facts. While some of the relevant facts were presented to the court in declarations, many more facts were not put before the court because Ms. Braun was not permitted to conduct any discovery, particularly regarding Ms. Selig's veracity and facts available only to Respondents.

The right to discovery is implicit in the fundamental right of access to the courts. As the Washington Supreme Court has explained:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163. 2 L.Ed. 60 (1803). The people have a right of access to courts; indeed, it is the bedrock foundation upon which rest all the people's rights and obligations. *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991). This right of access to courts includes the right of discovery authorized by the civil rules. *Id.* As we have said before, it is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claims or a defendant's defense. *Id.* at 782.

Putman v. Wenatchee Valley Medical Center, P.S., 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (internal quotations omitted, emphasis added).

Further, the trial court has a duty to give parties a reasonable opportunity to complete the record before ruling on a motion for summary judgment. *Turner v. Kohler, supra,* 54 Wn.App. at 693. In the absence of an opportunity to discover relevant evidence, summary judgment is premature and constitutes reversible error. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 524, 20 P.3d 447 (2001).

F. The Trial Court Abused its Discretion by Denying Petitioner's Request for Discovery under 56(f) and Granting Summary Judgment.

Summary judgment is improper when credibility issues involving more than collateral matters exist. *Morinaga, supra,* 85 Wn. App. at 828. If there is contradictory evidence on a material issue and credibility is at issue, summary judgment should be denied. *Balise, supra,* 62 Wn.2d at

200. Further, when the facts put forth in an affidavit are particularly within the knowledge of the moving party, the case should proceed to trial so that the opposing party can disprove such facts through cross-examination. *Hulse v. Driver*, 11 Wn. App. 509, 517, 524 P.2d 255 (1974).

As part of her opposition to the motion to dismiss, Ms. Braun moved to conduct discovery pursuant to Civil Rule 56(f). (CP at 404, 510-515.) This CR 56(f) request, however, was for discovery relating to the issues raised by Motion to Dismiss. (*Id.*) At the close of the hearing, Ms. Braun's counsel attempted to orally supplement this CR 56(f) motion by explaining that the discovery requested would have been substantially different if the court had provided notice that it was going to rule on the equitable merits of the Petition. (RP at 49:9 to 51:11.) In her Motion for Reconsideration, Ms. Braun reiterated this point and provided several examples of important areas of discovery that she would have requested under CR 56(f) if the court had provided proper notice of its intention to rule on the merits on summary judgment. (CP at 592.)

The trial court abused its discretion when it denied petitioner's CR 56(f) requests for relief. CR 56(f) states that,

> should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court

> may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The trial court can deny a request for a CR 56(f) continuance if "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." *Gross*, *supra,* 139 Wn. App. at 68, *citing Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989). None of these reasons for denying relief apply here.

Ms. Braun did not obtain the desired evidence because the trial court granted a Protective Order precluding all discovery on the grounds that the Motion to Dismiss raised a simple legal issue and that by delaying discovery the parties might be saved some expense. (CP at 356.) The trial court then side-stepped the narrow legal question raised by the Motion to Dismiss and dismissed the Petition on the merits without allowing for any discovery.

The requested discovery and desired evidence would have raised additional genuine issues of material fact. While the evidence requested in counsel's CR 56(f) declaration was directed at issues related to the Motion to Dismiss, many of the listed topics would also have been relevant to a

ruling on the equitable merits of the reinterment Petition. Even without any discovery, there were significant issues raised concerning the veracity of statements made by Ms. Selig, and a number of factual issues the court should have considered in evaluating the merits of the Petition.

In Ms. Braun's declaration filed with the Petition, she set forth specific facts showing that Ms. Selig had no interest in honoring or preserving Kyril's memory. (CP at 15-19; 462-467.)[18] Ms. Braun also put forth testimony demonstrating that familial connections and the fundamental tenets of the Jewish faith weigh heavily in favor of having Kyril's remains reinterred in Portland. (CP at 15-19; 462-467.)[19] Rabbi Joshua Stamper's supporting declaration corroborated the fact that Jewish law and tradition weigh in favor of reinterment. (CP at 34-36.)

Ms. Selig denied that she was not interested in honoring Kyril's memory, and offered up reasons why she changed her daughters' names from Faenov to Selig so quickly, why she did not provide a headstone and why she removed the headstone Kyril's friends honored him with. Ms.

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[18] These facts included: Ms. Selig changing the last names of her children, closing down his website and on-line memorial, leaving Kyril's grave unmarked, and even going so far as to remove a gravestone purchased and installed by his friends. (CP at 465-467.)

[19] Ms. Braun explained that Mr. Faenov had no family in Seattle, and that in Portland, he would be buried alongside his stepfather, his grandparents (and eventually his mother) with whom Kyril was extremely close. (CP at 16.) Further, Ms. Braun stated that Jewish law and tradition require that a grave be marked with a headstone and that family members should preferably be buried together. (CP at 17-19.)

Selig alleged she was acting in accordance with the tenets of the Jewish faith in not putting in a headstone for over two years. (CP at 134-135.) Ms. Selig also testified to facts regarding Kyril's connection to Seattle and supporting his interment there. (CP 132-133.)

Ms. Braun filed a second declaration in which she directly refuted Ms. Selig's testimony that she consulted with Ms. Braun about her choice of the Seattle cemetery for Kyril's remains, and that Ms. Braun did not object to that location. (CP at 462-463.) Ms. Braun testified that Ms. Selig did not, in fact, discuss the burial location with her at all and that she only learned of the burial site the day before her son's funeral via an email that someone else forwarded to her. (CP at 462-463.)

Ms. Braun also refuted other statements made by Ms. Selig, including how many times they communicated after Kyril's funeral; her allegation that Ms. Braun was voluntarily "absent" from the lives of Ms. Selig and the grandchildren after Kyril died; the reasons she gave for changing the children's names to Selig; the timing of her decision to move to Los Angeles; the reasons she gave for her decision to move to Los Angeles; and her suggestion that the Jewish faith only called for the

installation of a headstone sometime after a year had passed from a person's death. (CP at 464-467, 475-498.)[20]

Discovery was needed to effectively resolve these veracity issues, and to determine the equities of the case. For example, if discovery showed that Ms. Selig was on the verge of divorcing Kyril before he died and had already made plans to move to California without him; that Ms. Selig intentionally changed her children's names, took down the on-line memorial and refused to place a headstone on her husbands' grave in order to erase his name and memory; and that neither Ms. Selig nor any other members of her family have plans to be buried near Kyril, summary judgment should have been denied.

The trial court improperly denied Ms. Braun's CR 56(f) motion without allowing any discovery on the important equitable and credibility issues in the case. This was an abuse of discretion. This Court should reverse and remand so that Ms. Braun can obtain this discovery and return to the trial court for a full and fair equitable trial on the merits.

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[20] Even without Ms. Braun providing contrary evidence, some of the statements Ms. Selig made were not credible, including that she changed her three and six year old children's last names several weeks after their father died because they genuinely wanted the change, and that she left her former husband's grave unmarked for more than two years because she was waiting for the same children to be old enough to help her design a suitable gravestone. (CP at 135.)

V. CONCLUSION

For all of the reasons stated above, Ms. Braun requests that the Court reverse the trial court's November 21, 2014 Order Dismissing the Petition and remand to the trial court.

RESPECTFULLY SUBMITTED this 5th day of June, 2015.

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