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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 314154
Consolidated With 314758

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

THERESA WHITNEY, a married woman in her individual capacity, and
ROSE ANN SANDS, a single woman,

Appellant,

vs.

RICK PHILLIPS AND ANN PHILLIPS,
husband and wife,
d/b/a Telford's Chapel of the Valley,

Respondents.

BRIEF OF APPELLANT

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I.
INTRODUCTION

Legal disputes involving dead bodies are rare, but when they do arise they are often confounding. They are confounding because, as the Washington Supreme Court recently noted in a footnote, “[a] corpse in some respects is the strangest thing on earth.” *Adams v. King County*, 164 Wn.2d 640, 658, 192 P.3d 891 (2008)(footnote ten, citation omitted).

In nearly every culture and religious tradition, funerals play an essential role in helping the bereaved mourn the dead. In recognition of the vulnerability of mourners, American courts have long recognized a legal right of next of kin to bury or otherwise dispose of their deceased family members. The instant case involves an infringement of the next of kin’s right to plan, schedule and otherwise arrange a funeral service for their deceased family member.

Respondent Phillips owns and operates a funeral home. In 2011 he took possession of Mr. Lawrence Wilhalm’s body. Mr. Wilhalm’s next of kin, Appellant Theresa Whitney and RoseAnn Sands (hereafter referred to collectively as “Appellate Whitney”), and Mr. Wilhalm’s former attorney, Cecilia Cervantes, both sought to control the disposition of Mr. Wilhalm’s

body. Faced with competing claims, Respondent Phillips gave Ms. Cervantes control of Mr. Wilhalm's body.

Appellant Whitney maintains that Respondent Phillips committed an actionable wrong when he deprived her of the opportunity to schedule, plan, and otherwise control her uncle's funeral service.

II.
ASSIGNMENT OF ERROR

Appellant assigns the following errors:

1. The trial court erred in granting the funeral home director's motion for summary judgment and dismissing all of Appellant's claims against the funeral home director.

III.
STATEMENT OF ISSUES:

- 1 Whether the trial court erred when it granted the funeral home director's Motion for Summary Judgment and dismissed all of Appellant Whitney's claims against the funeral home director?

IV.
STATEMENT OF THE CASE

For over sixty-five years Theresa Whitney and RoseAnn Sands had a close, familial relationship with their uncle, Lawrence Wilhalm, who had no children and was not married. CP 68; CP 84. They regularly visited with him in person and on the phone. CP 69; CP 85.

In approximately 2005 Appellant Whitney became concerned about his relationship with an Ephrata attorney named Cecilia Cervantes.

CP 69; CP 85. Specifically, Appellant Whitney was concerned that Ms. Cervantes was financially exploiting their elderly uncle¹. CP 69; CP 85.

In January 2011 at the ripe age of 95 Mr. Lawrence Wilhalm died. CP 70. At the time of his death Appellant Whitney was his next of kin. CP 70; CP 86.

Mr. Wilhalm's body was transported to a funeral home known as Telford's Chapel of the Valley, of which Respondent Rick Phillips is the owner/operator. CP 43.

As Mr. Wilhalm's next of kin, Appellant Whitney assumed she would be planning, scheduling, and otherwise controlling her uncle's funeral and thus she contacted Respondent Phillips and advised him that she was Mr. Wilhalm's next of kin and that her uncle had orally advised her that he had made funeral arrangements with a different funeral home. CP 71.

Consistent with his oral representations, Mr. Wilhalm had specified in his Last Will and Testament as follows: "I have made the following arrangements with the Nicoles Funeral Home in Ephrata, Washington." CP 76. Mr. Wilhalm also specified in his Will what casket he was to be buried in. CP 76. He also expressed his desire to be buried in his

¹ Appellants filed a complaint against Ms. Cervantes with the Washington State Bar Association. They have alleged, among other things, that Ms. Cervantes financially exploited their uncle during the last years of his life. The WSBA's investigation is on-going. See WSBA Investigation No. 12-00604.

brown suit and to have certain music played at his funeral service. CP 77.

Appellant Whitney assumed Respondent Phillips would guide her (and her family members) through the process of planning, scheduling, and arranging her uncle's funeral service in accord with her uncle's wishes. CP 71. She assumed wrong.

Respondent Phillips advised Appellant Whitney that Ms. Cervantes had already contacted him was claiming to be "in charge" of the disposition of Mr. Wilhalm's body. CP 71. When Appellant Whitney pressed Respondent Phillips for an explanation, he advised her that Ms. Cervantes had presented him with documents, which she claimed gave her authority to control the disposition of Mr. Wilhalm's body. CP 71. Appellant Whitney pointed out that Ms. Cervantes had no familial relationship with Mr. Wilhalm and challenged Ms. Cervantes' claim that she was "in charge." CP 71-72. She asked Respondent Phillips to elaborate on the documents Ms. Cervantes had provided to him, but he declined to provide her any information, and instead told her the documents were "in order." CP 71. Respondent Phillips then told Appellant Whitney that he was giving Ms. Cervantes control over the disposition of Mr. Wilhalm's body, which stunned Appellant Whitney. CP 71-72

Over the course of the next few days Appellant Whitney continued

to contact Mr. Phillips and beseeched him to reconsider his decision. CP 72. She reiterated to him that Ms. Cervantes had no familial relation with Mr. Wilhalm and continued to reiterate that Ms. Cervantes lacked legal authority to control the disposition of Mr. Wilhalm's body. CP 72.

Mr. Phillips ignored Appellant Whitney's pleas. CP 72.

In addition to ignoring Appellant Whitney's pleas, Respondent Phillips failed to explain why Mr. Wilhalm's body was at Respondent Phillips' facility rather the funeral home Mr. Wilhalm had specified in his Will and refused to provide Appellant Whitney and her family with any details regarding the disposition of their uncle's body. CP 72. Respondent Phillips advised Appellant Whitney that Ms. Cervantes had arranged for a "private service." CP 72. Respondent Phillips explained that if Appellant Whitney and her extended family wanted to attend their loved one's funeral they would need to obtain the information (time, date, location) from Ms. Cervantes. CP 72.

Appellant Whitney repeatedly made efforts to contact Ms. Cervantes by telephone to obtain pertinent information, but Ms. Cervantes refused to speak with Appellant Whitney. CP 72.

Appellant Whitney and her family members were at a loss to understand why Respondent Phillips had given control of their loved one's body to Ms. Cervantes, and they assumed they would never be informed

of the location, time, or date of the funeral. CP 72.

Appellant Whitney received an unsolicited phone call from a parishioner at the church where Ms. Cervantes had scheduled Mr. Wilhelm's funeral ceremony. CP 72. The caller disclosed to Appellant Whitney that the funeral was the next day at a Catholic church in Ephrata. CP 72. Appellant Whitney and her family quickly made last second arrangements to travel long-distances to attend the funeral. CP 72.

At the funeral Appellant Whitney found it impossible to grieve and mourn the loss of her uncle because Ms. Cervantes, who Appellant Whitney believed had financially exploited her uncle, was controlling and orchestrating the funeral service. CP 73.

Post-funeral Appellant Whitney commenced a lawsuit against Ms. Cervantes and Mr. Phillips. CP 1-18. With respect to Mr. Phillips, she brought the following claims: 1) Intentional Interference With Next-of-Kin's Right to Control and Direct Burial of a Family Member's Corpse; 2) Common Law Action for Tortious Interference With A Dead Body; and 3) Negligence. CP 1-18.

Mr. Phillips moved for dismissal of all claims against him pursuant to Civil Rule 56. CP 19-32. In support of his motion Mr. Phillips submitted a single declaration, the Declaration of Richard Phillips. CP 43-48.

In his declaration Mr. Phillips explained why he had allowed Ms. Cervantes, rather than Mr. Wilhalm's next of kin, to have possession of Mr. Wilhalm's body. CP 43-44. He testified he allowed Ms. Cervantes to take control of Mr. Wilhalm's body because she had told him she was "acting as the personal representative of Mr. Wilhalm's estate" and because he had "no reason to question her authority to act as a representative of Mr. Wilhalm." CP 44.

Appellant Whitney and Appellant Sands each submitted a declaration in opposition to Respondent Phillip's motion for summary judgment. CP 68-97. Respondent Phillips did not submit any testimony in reply to the testimony Appellant Whitney and Appellant Sands offered.

The trial court (Honorable John Hotchkiss) rejected Respondent Phillips argument that, as a matter of law, Appellant Whitney had failed to state a claim against him. "[Respondent] Phillips . . . argues that there is no cause of action against [him] . . . for intentional inference with next of kin's right to control and direct burial of a family member and/or action for tortious interference with a body. . . . [T]he Court believes there is." CP 189 (line 1-6).

The trial court also found that the "burial instructions" Respondent Phillips claimed to have relied upon were invalid on their face because they were not witnessed, as required under the law. CP 189 (line 11 - 14).

The trial court specifically found that Respondent Phillips should have required Ms. Cervantes to provide written proof that the Court had appointed her as the Personal Representative of Lawerence Wilhalm's Estate. CP 189. However, the trial court nevertheless granted the funeral home's motion to dismiss all of Appellant Whitney's claims against the funeral home, including the negligence claim, because "tortious interference with a dead body requires intent" and Appellant Whitney "[had], at best, shown negligence on behalf of the funeral establishment." CP 189-90.

Appellant Whitney moved for reconsideration. CP 193. The trial court denied the motion for reconsideration CP 193-207.

This appeal followed.

V. ARGUMENT

On appeal of summary judgment, the standard of review is *de novo*, and the appellate court performs the same inquiry as the trial court. *Nivens v. 7-11 Hoagy's Corner*, 133 Wash.2d 192, 197-98, 943 P.2d 286 (1997). When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wash.2d 891, 897, 874 P.2d 142 (1994). A court may grant summary

judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wash.2d 697, 703, 887 P.2d 886 (1995); *see also* CR 56(c).

In moving for summary judgment, Respondent Phillips made a number of arguments. As the Court's review is *de novo*, Appellant Whitney will address the arguments Respondent Phillips made in his motion for summary judgment, the first of which is that Appellant Whitney did not have a legal right to control the disposition of her uncle's body notwithstanding her next of kin status.

A. In the Absence of Testamentary Instructions to the Contrary, Next of Kin Have a Right to Direct and Control the Disposition of Their Family Member's Body.

Respondent Phillips' primary argument in his motion for summary judgment is that Appellant Whitney did not have a legal right to bury her uncle, and thus as a matter of law she did not suffer a compensable harm. CP 22. Respondent Phillips' argument is without merit.

Under the common law, absent a testamentary instruction to the contrary, the right to bury a corpse belongs exclusively to the next of kin. See *Guilliume v. McCullough*, 173 Wash. 694, 697-98, 24 P.2d 93 (1933); *see also*, *Gadbury v. Bleitz*, 133, Wash. 134, 139, 233 P. 299

(1925) (“There is neither solecism nor unreason in the view that the right of custody of the corpse of a near relative for the purpose of paying the last rites of respect and regard is one of those relative rights recognized by the law as springing from the domestic relation . . .”); see also, 22A Am.Jur.2d *Dead Bodies*, §20 (2008) (“If a decedent leaves no direction on this matter and if there is no surviving spouse or the surviving spouse has waived the right, the right of burial of a dead body is in the next of kin in the order of their relation to the decedent.”).

As a general proposition, the right of next of kin to the possession, custody, and control of their loved one’s body for the purpose of burial is within the protection of the law, and a willful violator of those rights may become liable for damages. 22A Am.Jur.2d *Dead Bodies*, §111 (2012).

The Washington Supreme Court has recognized this general proposition for almost one hundred years. In 1927 the Court held as follows:

The right to bury a corpse and to preserve its remains is a legal right, which the courts will recognize and protect, and that such right, in the absence of testamentary disposition, belongs exclusively to the next of kin.

Herzl Congregation v. Robinson, 142 Wash. 469, 471, 253 P. 654 (1927).

Six years later the Court held that:

The right of next of kin to control and direct the burial of a corpse and arrange for its preservation is not only a natural right, embracing a high order of sentiment, but has become a well recognized legal right.

Guillume v. McCullough, 173 Wash. 694, 697, 24 P.2d 93 (1933). The *Guillume* court further described the scope of next of kin's right to control and direct the burial of their family member:

The right relates to the whole plan for the funeral and preservation of the remains, as well as to the body itself, either before or after burial, and a deprivation of any substantial portion of that plan is as reprehensible as creating a loss of all of it.

Id. at 698.

On the record before the Court, it is undisputed Appellant Whitney was Mr. Wilhalm's next of kin. It is also undisputed there is no provision contained within Mr. Wilhalm's Will specifying that someone other than his next of kin would be responsible for controlling the disposition of his body. Thus, under the common law, Appellant Whitney, as Mr. Wilhalm's next of kin, had a legally protected right to plan, schedule, and arrange the funeral.

Many states have codified the common law, but in Washington there is no statute that directly addresses the issues of who among the living has a legal right to dispose of a corpse. Respondent Phillips will

dispute this and will direct the Court's attention to RCW 68.50.160, but a careful parsing of the statute will demonstrate that Respondent Phillips' argument is without merit.

Respondent Phillips claimed in his motion to dismiss that RCW 68.50.160(1) "makes it clear that [Appellants] have no . . . right [to plan and schedule their uncle's funeral service]." CP 22 (line 5-7). RCW 68.50.160(1) does no such thing.

RCW 68.50.160(1) does nothing more than acknowledge that a living person can designate the **place and/or method** of his disposition.

- (1) A person has the right to control the disposition of his or her own remains without the predeath or postdeath consent of another person. A valid written document expressing the decedent's wishes regarding the **place or method** of disposition of his or her remains, signed by the decedent in the presence of a witness, is sufficient legal authorization for the procedures to be accomplished. (Emphasis added).

In the instant case, Mr. Wilhalm specified in his Last Will and Testament, which he signed in the presence of witnesses, both the place and method of disposition ("I wish to be buried in space E-6-1 in the Saint Rose Lima Catholic Cemetary"). CP 90. This constitutes sufficient authorization for someone who survived Mr. Wilhalm to effectuate his wishes. What Mr. Wilhalm did not specify in his Will is who was to effectuate his wishes,

and nothing in RCW 68.50.160(1) gives any guidance with respect to whom, as between Ms. Cervantes or Appellant Whitney, had the legal right to ensure Mr. Wilhalm's wishes were effectuated.

RCW 68.50.160(2) prohibits those who survive the decedent from cancelling or revising prearrangements that are paid for by the decedent during his lifetime. Nothing in subsection two resolves the issue of who among the living had a legal right to effectuate Mr. Wilhalm's wishes.

RCW 68.50.160(3) provides an order of hierarchy to determine who is entitled to control the disposition of a body, but the hierarchy contained in subsection three is applicable only if one of three conditions is satisfied. The hierarchy contained in subsection three is applicable "if the decedent has not made a prearrangement . . . or the costs of executing the decedent's wishes regarding disposition exceeds a reasonable amount or directions have not been given by the decedent" (Emphasis added). With respect to the first condition, it is undisputed that Mr. Wilhalm made prearrangements. As for the second condition, there is no evidence in the record that Mr. Wilhalm's preferred disposition was too expensive. As to the third condition, it is undisputed Mr. Wilhalm gave explicit directions in his Will with respect to his disposition (e.g. bury me in a particular casket, in a particular suit, in a particular cemetery, and play particular music at my funeral). As none of the conditions precedent is satisfied, the

music at my funeral). As none of the conditions precedent is satisfied, the hierarchy set forth in subsection three is inapplicable.

Although the hierarchy contained in subsection three is inapplicable, even if one assumes *arguendo* it is applicable, it does not resolve the issue of who, as between Cecilia Cervantes and Appellant Whitney, was entitled to control the disposition of Mr. Wilhalm's body. The order of hierarchy in subsection three is as follows: A) person designated on a federal form (armed forces); B) the designated agent of the decedent as directed through a written document signed and dated by the decedent in the presence of witnesses; C) surviving spouse; D) majority of surviving adult children; E) surviving parents of decedent; F) majority of surviving siblings; and G) a court appointed guardian. Ms. Cervantes does not fall within any of these categories, and Appellant Whitney does not fall within any of these categories.

RCW 68.50.160(4) is a "slayer statute" and thus provides no guidance with respect to whether Ms. Cervantes or Appellant Whitney had the legal right to ensure Mr. Wilhalm's wishes were effectuated.

RCW 68.50.160(5) provides no guidance on the issue of how to resolve the issue of whom among the living had a legal right to effectuate Mr. Wilhalm's wishes. The purpose of the subsection five is to provide a "safe harbor" for funeral home directors who are faced with a scenario

where no one has stepped forward to claim a body. The statute provides that if the funeral director has “made a good faith effort to locate the person cited in subsection (3)(a) through (g) of this section or the legal representative of the decedent’s estate,” the funeral director may not be held criminally or civilly liable for burying or cremating a body. In the instant case, locating a person to control the disposition of Mr. Wilhalm’s body was not the problem Respondent Phillips faced. The problem Respondent Phillips faced was that he had “located” two people, both of whom were claiming they were entitled to control the disposition of Mr. Wilhalm’s body.

RCW 68.50.160(6) allocates liability for the cost of the disposition. It offers no guidance on the issue of whether Ms. Cervantes or Appellant Whitney was legally entitled to control the disposition of Mr. Wilhalm’s body.

In summary, RCW 68.50.160 does not resolve the issue of who, as between Ms. Cervantes and Appellant Whitney, had the legal right to control the disposition of Mr. Wilhalm’s body. Given absence of any statutory guidance, the common law controls, and the common law is clear—absent a testamentary instruction to the contrary, the right to bury a corpse belongs exclusively to the next of kin. See *Guilliume v. McCullough*, *supra*; see also, 22A Am.Jur.2d *Dead Bodies*, §20 (2008).

As there was not a testamentary instruction to the contrary Appellant Whitney had a legal right to bury her uncle's body.

In moving for summary judgment, Respondent Phillips also argued that the "Burial Instructions" document (CP 46) he received from Ms. Cervantes deprived Appellant Whitney of her right as next of kin to bury her uncle's body because the "Burial Instructions" state that Mr. Wilhalm's "Personal Representative" shall arrange his funeral service. The trial court summarily rejected this argument (and so should this court) because the "Burial Instructions" failed to comply with the law and were thus invalid. In order to have any legal effect, burial instructions must be "signed by the decedent in the presence of a witness." RCW 68.50.160(3)(b) also refers to a "written document signed and dated by the decedent in the presence of a witness" On the record before the Court it is undisputed the "Burial Instructions" in the record (CP 46) were not signed in the presence of a witness.

In moving for summary judgment, Respondent Phillips attempted to persuade the court that Ms. Cervantes and Appellant Whitney were identically situated with respect to legal authority to dispose of Mr. Wilhalm's body. His argument is, in effect, "I did nothing wrong in allowing Ms. Cervantes to control the disposition of Mr. Wilhalm's body

because both Ms. Cervantes and Appellant Whitney were equally situated in terms of their authority to control the disposition of Mr. Wilhalm's body." That argument necessarily fails because it cannot be the case that no one had the legal authority to control the disposition of Mr. Wilhalm's body for the all too obvious reason—the dead do not bury themselves. Someone had to possess the authority to arrange for transportation of the corpse; choose a time and date for a funeral service; choose who would officiate at funeral service; choose someone to offer a eulogy; choose whom to invite; decide whether the casket would be opened or closed; and address a myriad of other issues related to a funeral service. To accept Respondent Phillips' argument would mean that anyone—any stranger on the street—could take control of directing an entire funeral as long as they were willing to follow the decedent's instructions. Such an interpretation has no grounds in the law or in history.

Pursuant to the common law, Appellant Whitney was legally entitled to control the disposition of her uncle's body, and yet on the record before the Court it is undisputed Respondent Phillips gave control of Mr. Wilhalm's body to Ms. Cervantes. Appellant Whitney has sought to remedy these wrongs by bringing three causes of action against Respondent Phillips.

B. The Court Should Deny the Funeral Home's Motion to Dismiss Appellant Whitney's Tortious Interference Claims.

Tortious interference with a dead body is a cause of action courts will rarely, if ever, encounter. Thus, a brief overview of the cause of action and its theoretical underpinnings is necessary.

The tort found its genesis in Washington in cases decided early in the last century. See *Wright v. Beardsley*, 46 Wash. 16, 89 P. 172 (1907); *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925). The *Wright* court noted that “[T]he right of custody of the corpse of a near relative for the purpose of paying the last rites of respect and regard is one of those relative rights recognized by the law as springing from the domestic relation, and that a willful or wrongful invasion of that right is one of those torts for which damages for injury to feelings are recoverable as an independent element.” *Wright, supra*, at 19. The action is not based on a property interest in the body itself, but rather an interest in the proper treatment of the body. See *Herzl Congregation v. Robinson*, 142 Wash. 469, 471, 253 P. 654 (1927) (recognizing generally that “there is a right of custody over, and interest in, a dead body, and the disposal of the body”). The Wisconsin Supreme Court succinctly explained in 1905 the conceptual underpinnings of the action:

We can imagine no clearer or dearer right in the gamut of civil liberty and security than to bury our dead in peace and unobstructed; none more sacred to the individual, . . .

The basis of recovery of damages is found not in a property right in a dead body but in the personal right of the family of the deceased to bury the body . . .

The law is not primarily concerned with the extent of the physical injury to the bodily remains but whether there were any improper actions and whether such actions caused emotional or physical suffering to the living kin. (Emphasis added).

Koerber v. Patek, 102 N.W. 40, 43 (Wis. 1905).

In the record before this Court, it is undisputed that Respondent Phillips was aware of the competing claims for possession of Lawrence Wilhalm's body. The undisputed testimony is that Appellant Whitney contacted the funeral home repeatedly and voiced her objections and challenged Ms. Cervantes' alleged authority. She put the funeral home on notice that Ms. Cervantes' claims were false, and yet the funeral home nevertheless took no action to determine whether Ms. Cervantes had been appointed as Personal Representative of Lawrence Wilhalm's estate and simply gave Ms. Cervantes possession of the body.

The funeral home made a conscious and purposeful decision to give Ms. Cervantes possession of Mr. Wilhalm's body. That decision

cannot be characterized as accidental or inadvertent. The decision was in conscious disregard of Appellant Whitney's legal right as next of kin to plan, schedule and otherwise arrange her uncle's funeral. The act of giving Ms. Cervantes control of Mr. Wilhalm's body is the basis of Plaintiffs' interference with a dead body cause of action.

Reasonable people could differ on whether the funeral home intentionally chose to give Ms. Cervantes, rather than Appellant Whitney, exclusive control of Mr. Wilhalm's body. Reasonable people could conclude the funeral home made a purposeful/intentional decision to give Ms. Cervantes possession of the body. Therefore, dismissal of the claims at the summary judgment stage would be inappropriate.

As the Wisconsin Supreme Court noted, the basis of recovery is the personal right of the family of the deceased to bury the body. See *Koerber, supra*. Here, it is undisputed that Mr. Wilhalm's next of kin were deprived of the opportunity to effectuate their loved one's wishes. The right to possession, custody and control of the body for purposes of burial are within the protection of the law and damages will be awarded against any person who unlawfully interferes with these rights. See 22A Am.Jur.2d *Dead Bodies*, §28 (2012). It is interference with the right of a person to bury the body of his or her kin that is an actionable wrong. See 22A Am.Jur.2d *Dead Bodies*, §28 (2012). Damages may be recovered for

mental anguish resulting from willful acts involving the wrongful detention or withholding of a dead body. 22A Am.Jur.2d *Dead Bodies*, §117 (2012).

Whether the funeral home's actions were negligent, reckless, or willful is a jury question. Reasonable people could reach a number of different conclusions and draw various inferences from the following facts:

- After Lawrence Wilhalm's body arrived at the funeral home, a woman named Cecilia Cervantes advised the funeral home she was entitled to possession of the body. CP 44 (paragraph 3).
- The funeral home knew Cervantes did not have a familial relationship to the decedent; it knew she was Mr. Wilhalm's former attorney. CP 44 (paragraph 4); CP 72 (paragraph 20).
- At the same time Cervantes was claiming she was entitled to possession of the body, Plaintiffs contacted the funeral home and advised it that they were Mr. Wilhalm's next of kin and wanted to make funeral arrangements for their loved one. CP 71 (paragraph 14 and 15).
- Plaintiffs advised the funeral home that Cervantes had no legal authority to possess the body and make funeral arrangements. CP 71 (paragraph 16).
- Plaintiffs subsequently contacted the funeral home on multiple occasions and voiced their objections and demanded an explanation. CP 71 and 72.
- The funeral home relied on, among other things, a document entitled "Burial Instructions: Lawrence Wilhalm," which stated that the "Personal Representative" of Mr. Wilhalm's estate was to make his funeral arrangements. CP 44 (paragraph 3).

- Ms. Cervantes represented to the funeral home that she was the Personal Representative of the Estate of Lawrence Wilhalm, but at no time did the funeral home ask her to provide Letters Testamentary or any other legal document evidencing her status as Personal Representative. CP 44 (paragraph 4).
- Plaintiffs asked the funeral home to provide them with copies of the documents Ms. Cervantes had presented to the funeral home. The funeral home refused. CP 71-72.
- Plaintiffs pleaded with the funeral home to provide them with the time, date and location of their loved one's funeral. The funeral home refused to do so. CP 72 (paragraph 21).
- At the conclusion of the funeral, the funeral home director approached Plaintiffs and demanded that they give the "guest book" to Ms. Cervantes. CP 73 (paragraph 24).

A funeral home's effectuating a burial of a body by someone who is not legally entitled to possess the body, while knowing that next of kin is present and demanding possession of the body, may reasonably be regarded as conduct that is reckless or willful (going beyond all possible bounds of decency). Simply put, reasonable people could reach different conclusions on how to characterize the funeral home's actions. Hence, this case is ill-suited for resolution at the summary judgment stage.

Respondent Phillips contended in his motion for summary judgment that the tortious interference claims must be dismissed as a matter of law because the tort requires "misuse" of a corpse and "Phillips clearly did not 'misuse' Wilhalm's body." CP 26.

This argument demonstrates a fundamental misunderstanding of the tort and the claim brought against Respondent Phillips. What Respondent Phillips fails to appreciate is that it is interference with the right of a person to bury the body of his or her kin that is an actionable wrong. See 22A Am.Jur.2d *Dead Bodies*, §28 (2012). The cultural imperative to bury one's dead is rooted in thousands of years of civilization. When those possessing the right to bury the dead are deprived of that right, a cause of action arises. The tort does not require a misuse of a body.

Furthermore, intentionally withholding the body from the person who possesses the legal right to possess the body can be characterized as a "misuse" of the body.

This court upheld a claim where an undertaker withheld a body from the mother of the deceased While the court noted that a party cannot recover for mental suffering based solely on a claim of negligence, it held that *intentionally withholding the proper burial of a body constituted a willful misuse of the body. . . .* The court determined that willful delay in providing a burial was equivalent to the improper burial . . . for purposes of the tort. (Citations omitted)(Emphasis added).

Adams v. King County, 164 Wn.2d 640, 659, 192 P.3d 891 (2008)(citing *Gadbury v. Bleitz*, 133 Wn. 134, 233 P. 299, (1925)); see also, *Guillume*

v. McCulloch, supra, at 697. (“The right relates, of course, to the whole plan for the funeral and preservation of the remains, as well as to the body itself, . . . and a deprivation of any substantial portion of that plan is a reprehensible as creating a loss of all of it.”)

C. The Court Must Deny Respondent’s Motion to Dismiss Appellant Whitney’s Negligence Claim Because Whether Respondent Phillips Breached His Duty Is a Jury Question.

In determining whether to grant Respondent Phillips’ motion for summary judgment, the Court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Humleker v. Gallagher Bassett Servs. Inc.*, 159 Wash.App. 667, 674, 246 P.3d 249, review denied, 171 Wash.2d 1023, 257 P.3d 662 (2011). Summary judgment is proper only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.* at 674. On appeal from a grant of summary judgment, this court must resolve doubt in favor of the nonmoving party. *See Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment must be denied “if the record shows any reasonable hypothesis which entitles the nonmoving party to relief.” *Mostrom v. Pettibon*, 25 Wash.App. 158, 162, 607 P.2d 864 (1980).

Based on the testimony in the record, reasonable people could conclude that Respondent Phillips acted negligently. It is undisputed that despite numerous protestations from Appellant Whitney, Respondent Phillips made no effort to ascertain the legitimacy of Ms. Cervantes' representations. It is undisputed that he chose rely on her representation because he knew that Ms. Cervantes was an attorney who had represented Mr. Wilhalm. The Court must consider how little effort Mr. Phillips would have needed to invest—"Ms. Cervantes, Mr. Wilhalm's family members are claiming you do not have any legal authority to control the disposition of their uncle's body. Would you please provide me with a copy of your Letters Testamentary?" The result of such an inquiry would have revealed Ms. Cervantes complete absence of legal authority to control the disposition of Mr. Wilhalm's body.

The trial court actually found that the funeral establishment could have, and probably should have, required Cervantes or someone else to be appointed as personal representative of the Estate. CP 189. Furthermore, trial court found that Appellant Whitney had shown for purposes of summary judgment negligence by the funeral establishment. CP 190. This Court should similarly conclude, and having reached such a conclusion, summary judgment cannot be granted to Respondent Phillips.

A jury should decide whether the funeral home breached its duty to Appellant Whitney. Based on the evidence in the record, the trial court erred in dismissing Plaintiffs' negligence claim against the funeral home.

CONCLUSION

Given the nature of the claims and the evidence in the record a jury should decide whether the funeral home should be held accountable for its role in depriving Appellant Whitney and her family of the opportunity to plan, schedule, and otherwise arrange a funeral for their uncle.

Ms. Cervantes likely misled, deceived, hoodwinked, and possibly lied to Respondent Phillips. However, Respondent Phillips' defense of "I was entitled to rely on Ms. Cervantes' representations because she was Mr. Wilhelm's attorney," is no defense and certainly is not a basis for dismissal of Appellant Whitney's claims at the summary judgment stage.

To the extent the funeral home believes it is entitled to relief, it should initiate cross-claims against Ms. Cervantes and seek indemnification from her.

Respectfully submitted this 10th day July, 2013.

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By:  _____

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