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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 314154
Consolidated with 314758

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

BRIEF OF RESPONDENTS

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I. SUMMARY OF ARGUMENT

Lawrence Wilhalm's attorney Cecelia Cervantes requested burial services from Respondents Rick and Ann Phillips d/b/a Telford's Chapel of the Valley (collectively "Phillips"), and furnished them with a copy of Wilhalm's "Burial Instructions," and a letter from the attorney for Deaconess Hospital where Wilhalm had died, both of which appeared to authorize Cervantes (as Personal Representative of the Wilhalm Estate) to have burial services performed by Respondents. After receiving Wilhalm's body and beginning preparations for his funeral service, Appellants Whitney and Sands, who claimed to be Wilhalm's nieces, contacted Phillips asserting that they, not Cervantes, had the right to control Wilhalm's funeral arrangements. Facing these competing claims, and in light of Wilhalm's written and signed "Burial Instructions" and Cervantes' apparent authority as Wilhalm's Personal Representative, Phillips followed Wilhalm's written instructions regarding his funeral and burial services as requested by Cervantes.

Following Wilhalm's funeral, Appellants sued Cervantes and Phillips. Appellants claim that Phillips: (1) intentionally interfered with next-of-kin's right to control and direct burial of a family member's corpse; (2) tortiously interfered with a dead body; and 3) was negligent (based on the same conduct underlying Appellants' other claims). The

trial court concluded that none of Appellants' claims could survive as a matter of law because Appellants were unable to show that Phillips acted with the intent required to maintain any of these causes of action. Appellants now contend that this ruling was in error, but they are still unable to show that Phillips intentionally interfered with any of their rights. The trial court properly dismissed their claims as a matter of law, and this Court should affirm that decision.

II. RESTATEMENT OF ISSUES FOR REVIEW

1. Did the trial court correctly determine that Appellants' claim for intentional interference with a next-of-kin's right to control and direct burial failed as a matter of law where there was a written directive from the decedent controlling burial arrangements and Appellants were unable to show Phillips intentionally interfered with any of their legal rights?

2. Did the trial court correctly dismiss Appellants' claim alleging tortious interference with a dead body when there is no evidence Phillips intentionally engaged in any "misuse" of decedent's remains?

3. Did the trial court correctly dismiss Appellants' negligence where Phillips acted in accordance with statutory obligations and Washington has refused to adopt a negligence standard for the claims asserted by Appellants.

III. STATEMENT OF THE CASE

Phillips first met Wilhalm at the funeral service for his attorney's (Cecilia Cervantes) mother. CP 43. Cervantes later informed Phillips that Wilhalm wanted Phillips to handle his funeral arrangements when the time came. CP 43. In the fall of 2010, Wilhalm was involved in a serious car accident and was hospitalized until passing away on January 13, 2011. CP 70. Before he died, Wilhalm left very specific written directions regarding the handling of his body. CP 46.

Wilhalm listed several insurance policies in his August 1999 will that would pay the costs of his burial, and stated that arrangements had been made with the Nicoles Funeral Home regarding the details of his funeral. CP 35-36. Wilhalm also stated that any changes in these arrangements would be set forth in a separate "Letter of Interment." CP 36. In his Will, Wilhalm nominated Esther Marie Kirby as the Personal Representative of his estate. CP 35, 39. However, the Will also provided that if Kirby was unable or unwilling to serve, Cervantes would be Personal Representative. CP 39. There is no evidence in the record to suggest that Kirby was able and willing to serve as the Personal Representative.

As contemplated in his Will, Wilhalm provided more details regarding his funeral arrangements. CP 46. In a document titled "Burial

Instructions: Lawrence E. Wilhalm” dated August 10, 2010, Wilhalm indicated that his Personal Representative was to arrange for his “burial and transportation and interment of [his] remains through Telford’s Funeral Home or other facility within her discretion.” *Id.* This document was signed by Wilhalm. *Id.*

Following Wilhalm’s death, Cervantes contacted Phillips, explained that she was acting as Wilhalm’s Personal Representative, and requested burial services. CP 44. Cervantes provided Phillips with a copy of Wilhalm’s “Burial Instructions” stating that the Personal Representative was to arrange for his burial. CP 44. Phillips learned that Wilhalm’s body was at Deaconess Hospital in Spokane, and Cervantes presented Phillips with a letter from the hospital’s attorney dated January 21, 2011, approving the release of Wilhalm’s body to Respondents based on Cervantes “status as Personal Representative,” Wilhalm’s “specific burial instructions designating Telford’s Funeral Home,” and Cervantes’ representations that Wilhalm “had no pre-paid funeral plan at Nicoles Funeral Home.” CP 44, 48.

Before Wilhalm’s funeral took place, Appellant Whitney contacted Phillips. CP 44. According to Whitney, she told Phillips that she was Wilhalm’s niece, that Cervantes was not related to Wilhalm, and that Wilhalm may have made arrangements for burial services through Nicoles

Funeral Home. CP 71. Phillips then faced a choice between taking direction from Cervantes, whom Phillips knew to be Wilhalm's attorney and believed to be his Personal Representative, as well as having a written burial instructions signed by Wilhalm which provided ample documentation of Cervantes' authority to direct Wilhalm's burial in accordance with his own Burial Instructions, or taking direction from Appellants, based on Whitney's representations that she was his niece. CP 44. Phillips relied on the representations and documents provided by Cervantes and moved ahead with Wilhalm's funeral service. CP 44, 73. Although Cervantes planned the service, Appellants attended their uncle's funeral. CP 73, 87.

On June 21, 2012, Appellants filed a complaint for damages against Cervantes and Phillips. CP 4-18. Appellants' claims against Phillips were all based on the allegations that Phillips interfered with their right as "next of kin" to direct the disposition of their uncle's remains, including their claimed right to plan their uncle's funeral services. CP 12-14. Phillips moved for summary judgment on all of Appellants' claims, highlighting the fact that Appellants had no legal right to direct the burial of Wilhalm in light of his written directive and the remoteness of Appellants' familial relationship to Wilhalm. CP 23-24. There is no evidence either of the Appellants was a personal representative, or that

they were in any way designated by Wilhalm as authorized to act with respect to his funeral arrangements. Appellants were unable to show any “misuse” of Wilhalm’s body by Phillips – an element required for their second cause of action. CP 26-27. Phillips also demonstrated that Appellants could not show that Phillips had any legal duty to confer with them about Wilhalm’s funeral arrangements, precluding Appellants’ negligence claim as a matter of law. CP 29-31.

In a written decision filed November 6, 2012, the Honorable John Hotchkiss granted Respondents’ motion for summary judgment on all claims. CP 184-90. In that same decision, the trial court also addressed the CR 12(b)(6) motion by Cervantes to dismiss Appellants’ claims against her, which are not at issue in this appeal. CP 184-88. In the portion of his decision unrelated to Respondents, Judge Hotchkiss concluded that Cervantes used invalid documents to take possession and control of Wilhalm’s body, including a power of attorney document that was no longer effective after Wilhalm’s death and “a copy of the first page of an invalid will.” CP 185.

The trial court also concluded that neither Cervantes nor Appellants fell into any of the categories of people designated in RCW 68.58.160 as having authority to control the disposition of a decedent’s remains. CP 186. Central to this finding was the trial court’s

conclusion that Wilhalm's "Burial Instructions" failed to comply with the requirements of a "valid written document expressing the decedent's wishes" under RCW 68.50.160(1), because the document was not witnessed. Based on this perceived flaw, the trial court concluded that Cervantes was not a "designated agent" of Wilhalm under RCW 68.50.160(3)(b). CP 189. Absent a valid written directive, or any individual otherwise qualified to direct Wilhalm's burial under RCW 68.50.160, the court concluded that caselaw established prior to the enactment of RCW 68.50.160 should guide the court's determination of the parties' respective legal rights. CP 186.

Turning to the claims asserted against Phillips, and common law principles the trial court concluded that Appellants had failed to "establish[] an intentional act" by Phillips. CP 189. Despite the trial court's conclusion that Wilhalm's Burial Instructions were not valid under RCW 68.50.160, the court specifically noted that "the statute appears to have several instances which allow for reasonable reliance by a funeral establishment." CP 189. The court found that Phillips "could have, and probably should have, required Cervantes or someone else to be appointed personal representative."¹ CP 189. Despite this possibility, the trial court

¹ Although the court did not expressly state this in its Decision, having an individual appointed as personal representative would have qualified that individual to direct Wilhalm's burial under the provisions of Wilhalm's Will that did comply with the

concluded that Phillips “had the right to rely on the false documents presented by Cervantes, along with the letter from the attorney for Deaconess Hospital.” CP 190.

The trial court further concluded that Appellants could not maintain an action based in negligence against Phillips because, although Appellants may be able, “at best,” to demonstrate some negligence, “tortious interference with a dead body requires intent. The State of Washington has not adopted § 868 of the RESTATEMENT OF TORTS which allows for negligence.” CP 190. Along with this decision, the trial court also entered an order granting Phillips’ motion for summary judgment. CP 191-92.

Appellants then moved for reconsideration of dismissal of their claims against Phillips. CP 193-207. In opposing the motion for reconsideration, Phillips pointed out that the trial court’s interpretation of RCW 68.50.160(1) as requiring burial instructions to be witnessed was erroneous where the statute simply states that a witnessed document is “sufficient legal authorization” and does not state that such a document is required to be witnessed or is deemed invalid if it is not witnessed. CP 232. The trial court denied Appellants’ motion for reconsideration

witness requirement of RCW 68.50.160(3), thus making the personal representative the “designated agent” of the decedent referred to in RCW 68.50.160(3)(b).

without comment or revision of the court's earlier decision. CP 241. On January 17, 2013, the parties stipulated to entry of final judgment as to less than all parties (CP 242-45) and on February 11, 2013, the trial court entered final judgment dismissing all claims against Phillips (CP 249-51). This appeal followed, with Appellants assigning error to the trial court's dismissal of each of Appellants' three claims against Phillips.

IV. ARGUMENT

The trial court's decision on summary judgment is reviewed *de novo* on appeal and this Court will "engage in the same inquiry as the trial court." *Swinehart v. City of Spokane*, 145 Wn. App. 836, 843, 187 P.3d 345 (2008). "Summary judgment is proper if the record before the court shows that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citing CR 56(c); *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)). This Court may affirm the trial court's decision to dismiss Appellants' claims as a matter of law on any basis supported by the record on appeal. *Id.* at 349.

Here, the trial court concluded that Appellants were unable to show that Phillips intentionally interfered with Appellants' legal rights to direct the disposition of their uncle's remains, and were unable to show any intentional "misuse" by Phillips that could form the basis of Appellants' tortious interference claim. CP 189-190. If the Burial

Instructions executed by Wilhalm during his life were valid, under RCW 68.50.160(1) that instrument would have divested any other individual of the legal right to direct Wilhalm's burial, and Appellants' claims would fail as a matter of law. In addition, the record demonstrates that Respondents did not engage in any "misuse" as required by law to maintain Appellants' common law tortious interference claim, and the trial court's dismissal of that claim may properly be affirmed on this basis as well.

Finally, Appellants' claim based in negligence was properly dismissed because Washington law does not recognize any "negligence" based claim for interference with a dead body. Moreover, under RCW 68.50.160(5) Respondents were entitled to rely on Cervantes' representations as the "most responsible party available" to direct Wilhalm's burial. Dismissal of this claim should similarly be affirmed.

A. The Trial Court Correctly Dismissed Appellants' First Cause of Action Against Respondents.

Appellants alleged that Phillips intentionally, willfully and negligently refused to allow them to plan their uncle's funeral service and burial, and that this conduct amounts to intentional interference with the next-of-kin's right to control and direct the burial of a family member. CP 12. Central to this claim are the elements of "intentional interference" by Phillips, and

the legal right with which the Appellants' allege such interference. Appellants cannot show any intentional act by Phillips to interfere with any of Appellants' purported rights, and Phillips maintains that Appellants had no right to direct or control Wilhalm's burial. Dismissal of this cause of action was therefore proper and should be affirmed.

1. Appellants had no legal right to control or direct Wilhalm's burial.

Appellants' legal right to control or direct their uncle's burial is crucial to their claim of intentional interference with that right. *See, e.g., Herzl Congregation v. Robinson*, 142 Wash. 469, 253 P. 654 (1927); *Guilliume v. McCulloch*, 173 Wash. 694, 24 P.2d 93 (1933). Here, Appellants cannot show that they possessed this right, because the common law in *Herzl* and *Guilliume* has been replaced by RCW 68.50.160(1), which establishes that "[a] person has the right to control the disposition of his or her own remains." Wilhalm exercised that right when he executed his Burial Instructions directing the arrangements for his "burial and transportation and interment of [his] remains through Telford's Funeral Home." CP 46. This directive is precisely the type of "valid written document expressing the decedent's wishes" contemplated in RCW 68.50.160(1). Wilhalm held and exercised his own right to direct

the details of his burial, and in light of this directive, Appellants did not have the legal right to make any other arrangements.

The trial court concluded that Wilhalm's Burial Instructions were invalid because the document was not witnessed. CP 189. This ruling ignores the plain language of RCW 68.50.160(1), which demonstrates that the written directive may be witnessed, but having the document witnessed is not required. RCW 68.50.160(1) states that a written document evidencing the decedent's wishes "signed by the decedent in the presence of a witness, is sufficient legal authorization for the procedures to be accomplished." The statement that a witnessed writing is sufficient authorization means just that – a witnessed document is "good enough" to be legally binding. In the context of the entire paragraph, the term "sufficient" cannot fairly be interpreted as requiring a witnessed writing even when the decedent was clear with regard to disposition of his remains. Such a requirement would essentially nullify the creation of an individual's right in the first sentence of RCW 68.50.160(1).

Because Wilhalm executed a written document exercising his own right to plan and direct his burial, the Appellants had no legal right to make any other arrangements. Respondents cannot be held liable for following the directions included in Wilhalm's Burial Instructions and

Appellants' cannot demonstrate that they had any legal right to usurp Wilhalm's authority to control his own funeral and burial services.

2. Even if RCW 68.50.160 does not control, Appellants cannot show any "intentional act" by Respondents.

Appellants argue again on appeal, that Wilhalm's Burial Instructions failed because the document was not witnessed. CP 186; App. Br. at 16. If so, given that neither Appellants nor Cervantes otherwise qualify under any of the categories in RCW 68.50.150(3), Appellants argue that the right to arrange for Wilhalm's burial reverts back to his "next of kin." App. Br. At 9, 15-16. Even if Appellants can demonstrate that they, not Wilhalm or Cervantes as his Personal Representative, possessed the right to direct and control Wilhalm's burial, Appellants are simply unable to show any action on the part of Phillips that would satisfy the "intentional interference element required to maintain this cause of action.

As the trial court noted, Respondents "had the right to rely" on the representations of Cervantes that she had the authority to direct Wilhalm's burial. CP 189-90. Respondents had no reason to question Cervantes' authority as Wilhalm's personal representative, and Respondents already knew Cervantes to be Wilhalm's attorney. CP 44. In addition, Cervantes provided a letter from the attorney for the Deaconess Hospital indicating

that Wilhalm's body was to be released to Respondents under Cervantes' authority as Wilhalm's Personal Representative. CP 44, 48. In light of all of this information, Appellants suggest that Respondents should have investigated further, but what Appellants cannot show is that Respondents acted intentionally to interfere with any right by Appellants.

As the trial court made clear, Appellants had the burden to demonstrate that Respondents acted intentionally to deny Appellants some legal right. This showing simply cannot be made here. Instead, facing competing claims of authority, Respondents relied on the person with the most apparent authority and who appeared to be the "most responsible party available" at the time. See RCW 68.50.160(5). This decision was a far cry from the type of intentional wrongful conduct present in *Herzl*, 142 Wash. at 470 (cemetery's refusal to permit disinterment of a body after family obtained all required permits), *Guilliume*, 173 Wash. at 694-95 (non-relative "intentionally despoiled the next of kin...of their legal rights"), and *Wright v. Beardsey*, 46 Wash. 16, 17-18, 89 P. 172 (1907) (burial of infant contrary to instructions of parents and in grave with another child, six inches from surface of the ground).

Even if this Court determines that RCW 68.50.160 does not apply here and Appellants' claims are governed by caselaw that predates this statute, Appellants are still unable to meet their burden to show any

conduct that was intended to interfere with any rights held by Appellants.

Summary judgment dismissal of this claim should be affirmed.

B. The Trial Court Properly Dismissed Appellants' Second Cause of Action Because Respondents Did Not Intentionally Misuse Wilhalm's Remains.

Appellants conflate their first and second causes of action on appeal, claiming that Phillips' interference with Appellants' legal right to control Wilhalm's burial, and withholding the body from the party with the legal right to possess it, constitutes an intentional "misuse." App. Br. at 23. To demonstrate intentional interference with a body, Appellants have the burden to show a willful or intentional misuse of the body. *Adams v. King Co.*, 164 Wn.2d 640, 657-58, 192 P.3d 891 (2008).

The court in *Adams* declined to define with precision the level of conduct required to trigger liability, but made it clear that the tort required some "misuse" of a body.

The tort of interference with a dead body allows recovery for mental suffering derived from the willful misuse of a body.

...

While the parameters of the misuse that gives rise to a cause of action for tortious interference might be difficult to grasp firmly, this court may have best described it as misuse "in such a manner as to cause the relatives or persons charged with decent sepulture to naturally suffer mental anguish." *Wright*, 46 Wash. at 20. Furthermore, we need not attempt to define more precisely the nature of such misuse as the extent or nature of the interference alleged generally does not

bar recovery. See *Gadbury*, 133 Wash. at 137-38 (“[T]he extent or degree of the misuse ought not to prevent recovery.”)

Id. at 658 (emphasis added).

In *Wright v. Beardsley*, 46 Wash. at 17-18, the undertaker buried a child’s body on top of the coffin of another child within six inches of the ground’s surface. In *Gadbury v. Bleitz*, 133 Wash. 134, 135-36, 233 P. 299 (1933), the undertaker was hired to cremate a body but held the body after the time for cremation had passed in order to force the decedent’s mother to pay a prior bill. In *Adams*, 164 Wn.2d at 646-47, the decedent’s brain was removed without authorization. None of these circumstances bear any resemblance to the facts in this case. Here the alleged “misuse” is following the decedent’s written burial instructions and the wishes of his designated personal representative with respect to funeral arrangements and not following directions of two nieces. This fails to constitute “misuse” of a body under any interpretation of the law.

The emphasis on some misuse of the body is consistent with § 868 of the RESTATEMENT (SECOND) OF TORTS, which states as follows:

One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.

The court in *Adams* emphasized that Washington had not and would not adopt § 868 because the interference of a dead body cause of action does

not extend to negligent conduct in Washington. 164 Wn.2d at 656-57, n. 9. However, the court also suggested that the only difference between § 868 and the common law cause of action was liability for negligence. *Id.* at 657. Thus, the RESTATEMENT'S formulation of the cause of action is significant because it specifically itemizes the different types of misuse and abuse of a body that is actionable. The implication is that other types of conduct involving a dead body are not actionable.

Here, Appellants contend that Phillips acted willfully or intentionally by making a "conscious and purposeful decision" to follow Cervantes' direction instead of Appellants'. App. Br. at 19. Appellants are confusing "deliberate" conduct with "willful" conduct. Clearly it was not an "accident" that Phillips deferred to Cervantes' authority. That decision was deliberate. However, the tortious interference cause of action requires willful or deliberate misuse of the body, not just deliberate decision making as is present here. The term "willful" refers to an intent to act wrongfully with regard to the decedent's remains. There is no evidence or even allegation that Phillips intended to act wrongfully in its handling of Wilhalm's body. The trial court saw this, and correctly concluded that because "tortious interference with a dead body requires intent" and none was demonstrated here, summary judgment in favor of Phillips was proper. CP 190.

C. The Trial Court Properly Dismissed Appellants' Third Cause of Action Because Washington Law Does Not Permit an Action Against Respondents Based in Negligence.

Washington courts have refused to recognize a claim for negligent interference with a dead body. *See Adams*, 164 Wn.2d at 656-57, n. 9. Appellants nonetheless contend that their claims against Phillips should proceed to trial. App. at 26. The cause of action Appellants attempt to pursue simply does not exist under Washington law and dismissal on summary judgment was proper.

Appellants contend that Respondents were negligent in their decision to rely on Cervantes as the person with authority to direct Wilhalm's burial, but the plain language of RCW 68.50.160(5) gives Respondents the "right to rely on an authority ... executed by the most responsible party available." The trial court recognized that Phillips had the right to rely on Cervantes' representations, and under RCW 68.50.160(5) Phillips "may not be held criminally or civilly liable for burying or cremating the human remains." If Cervantes did something improper to intentionally interfere with some right of Appellants, they can pursue their claims against her; however, nothing Phillips did in this case would subject him to liability under any of Appellants' theories.

Thus, this Court should affirm dismissal of Appellants' negligence-based claims because these claims are precluded by

RCW 68.50.160(5) to the extent they relate to Phillips' burial of Wilhalm. To the extent Appellants attempt to bring a claim for negligent interference with their rights or with a body, these claims simply do not exist under Washington law and this Court should affirm the decision of the trial court on this basis as well.

IV. CONCLUSION

For the reasons set forth above, Phillips respectfully requests that this Court affirm dismissal of Appellants' claims against Phillips. Funeral homes faced with competing demands of distant relatives and legally authorized personal representatives are faced with a Hobson's choice, and are certain to offend the party whose wishes are not honored. However, Washington law does not impose liability on a funeral home like Phillips, who makes a mistake or gets it wrong based on legal documents presented they believe to be correct. Liability follows only when a funeral home intentionally and knowingly ignores a party's rights. This Court should affirm the trial court's decision to dismiss Appellants claims as a matter of law because Appellants' cannot show any basis in law or fact to maintain any of their three causes of action against Phillips.

Dated this 25th day of September, 2013.

Respectfully submitted,

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DECLARATION OF SERVICE

I declare that on this 25th day of September, 2013, I caused a true and correct copy of the BRIEF OF RESPONDENT to be delivered to the following individuals in the manner described below:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.


Gina A. Mitchell