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COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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.

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF REPLY

This Court is tasked with determining whether a jury should be given the opportunity to decide whether a funeral home director, Phillips, should be held legally accountable for depriving Whitney of her legally protected right to dispose of her uncle's remains.

The most telling aspect of the funeral home director's Response is the following: "Washington law does not impose liability on a funeral home like Phillips, who makes a mistake or gets it wrong . . ."

Respondent's Brief, page 19. Phillips implicitly concedes in his Response that he erred in giving Cervantes control of Mr. Wilhalm's body, but Phillips is not concerned about admitting he "got it wrong" because he is convinced that all reasonable people would characterize his conduct in this matter as negligent, as opposed to intentional or reckless. According to Phillips, funeral directors who only act negligently, as opposed to intentionally or recklessly, are immune from being held legally accountable for their actions. According to Phillips, "liability follows only when a funeral home intentionally and knowingly ignores a party's rights," and he did not "intentionally and knowingly" deprive Whitney of control of her uncle's body. See *Respondent's Brief*, page 19.

Whitney maintains that reasonable people viewing the facts and circumstances in this case could place Phillips' conduct anywhere on the behavioral spectrum. Reasonable people could conclude Phillips' conduct was at the willful/wanton end of the spectrum, at the negligent end of the spectrum, or someone in the middle of the spectrum (reckless). Therefore, Whitney should be allowed to present her case to a jury.

If the Court agrees with Phillips' contention that reasonable people could only characterize Phillips' conduct as negligent, Whitney asks the Court to adopt §868 of the *Restatement (Second) of Torts*, the effect of which would be to provide a legal remedy to those people who have a legal right to dispose of their loved one's body but who are prevented by a funeral home director from doing so. If the Court declines to adopt §868 of the *Restatement (Second) of Torts*, the Court should nevertheless allow Whitney to present her claim to jury because the Legislature has imposed a duty upon funeral home directors to act in "good faith" when determining who is entitled to control the disposition of the dead and whether Phillips acted in "good faith" in this matter is a question of fact.

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II. LEGAL ARGUMENT

A. As Between Whitney and Ms. Cervantes, Whitney Had the Legal Right to Plan, Schedule, and Otherwise Control the Disposition of Her Uncle's Body.

Phillips correctly points out that under Washington law a decedent's next of kin does not automatically have the right to effectuate the disposition of the decedent's body. He points out that the living can designate in their Last Will or Testament (or in another properly executed document) who is to be in charge of effectuating the disposition of the deceased's body.

Although a person can designate whom they want to control, plan, and otherwise schedule the disposition of their remains that did not happen in the instant case. Mr. Wilhalm did not include in his Last Will and Testament or any other properly executed document a provision identifying who he wanted to effectuate his wishes regarding disposition of his body.

Phillips discussed at length in his Response a document entitled "Burial Instructions," which was purportedly signed by Lawrence Wilhalm and which states that Mr. Wilhalm's "Personal Representative" shall arrange and otherwise control his burial. However, the document (CP 46) does not have any legal validity. The document has no legal

validity because there is no evidence in the record it was signed in the presence of a witness, which is a requirement under the law. RCW 68.50.160(1) provides as follows:

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).

Lacking any evidence that the “Burial Instructions” were signed in the presence of a witness, Phillips half-heartedly argued in his Response that the Legislature intended to make the signing in the presence of a witness optional. This argument cannot be reconciled with the plain language of RCW 68.50.160(1). The “Burial Instructions” document is not legally valid.

For the reasons discussed at length in Appellant’s brief (pg. 9 – 17), as next of kin Whitney had the legal right to bury her uncle’s body.

B. Based on the Record Before the Court, A Reasonable Person Could Find that the Funeral Home’s Actions Were Intentional or Reckless.

Phillips’ primary argument in his Response is that even if Whitney, as next of kin, had a right to control disposition of Mr. Wilhalm’s body, Whitney has no claim against him because Whitney is “simply unable to

“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.” *Respondent’s Brief*, pg 13. This argument is predicated on a mischaracterization of Phillips’ conduct and demonstrates a fundamental misunderstanding of the nature of Whitney’s claim.

Although Phillips characterizes his behavior as merely negligent, reasonable people might disagree with Phillips’ characterization.

It is undisputed Phillips had possession of Mr. Wilhalm’s body. It is undisputed that Whitney repeatedly contacted Phillips and told him that she, as opposed to Cervantes, was entitled to control the disposition of her uncle’s body. Nevertheless, Phillips intentionally and purposefully refused to give Whitney possession of Mr. Wilhalm’s body. By refusing to give Whitney possession of Mr. Wilhalm’s body, Phillips intentionally interfered with Whitney’s legal right to dispose of their loved one’s body and to ensure his last wishes were followed.

Phillips also fails to appreciate that the technical basis of the cause of action is the interference with the exclusive right of control of the body. Whitney’s claim is predicated on a wrong against Whitney’s feelings. Phillips’ actions denied Whitney the opportunity to plan, schedule, and otherwise control the disposition of her loved one’s body. It is the mental suffering associated with being deprived of the exclusive right of control

that is the actionable wrong. While the parameters of the misuse that gives rise to a cause of action for tortious interference with a dead body might be difficult to grasp firmly, over one hundred years ago the Washington Supreme Court described it as misuse “in such a manner as to cause the relatives or persons charged with its decent sepulture to naturally suffer mental anguish.” *Wright v. Beardsley*, 46 Wash 16, 20, 89 P. 172 (1907). More recently, the Washington Supreme Court held it did not need to define more precisely the nature of the misuse because the extent or nature of the interference alleged generally does not bar recovery. *Adams v. King County*, 164 Wn.2d 640, 658, 192 P.3d 891 (2008).

If the extent and nature of the interference generally does not bar recovery, then Whitney must be allowed to proceed to trial where a finder of fact can determine what damages, if any, Whitney is entitled to receive. It would shock sensibilities to hold there was no remedy for the type of wrong that occurred in this case.

In terms of “intentional interference,” Washington courts have established standards that clarify what an intentional act means for purposes of legal culpability. In *Adkisson v. Seattle*, 42 Wn.2d 676, 682, 258 P.2d 461 (1953), the Court distinguished an intentional act from mere negligence by stating that “negligence conveys the idea of *neglect* or *inadvertence*, as distinguished from . . . *formed intention*.” (emphasis

added). The Court went on to define wanton misconduct as follows:

Wanton misconduct is not negligence, since it involves intent rather than inadvertence, and is positive rather than negative. It is the intentional doing of an act, or intentional failure to do an act, in reckless disregard of the consequences, and under such surrounding circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in substantial harm to another.

Id. at 687.

Here, Phillips made a positive act, *i. e.*, he gave Ms. Cervantes control of the body, without conducting any sort of investigation or even asking a simple question—“Would you please provide me with a copy of your Letters Testamentary or your Letters of Administration.” His decision was not inadvertent. A reasonable funeral director in these circumstances would know, or have reason to know, the gravity of his decision. Namely, a reasonable funeral director would know there was a high degree of probability the next of kin would suffer substantial emotional harm if he chose wrongly. As such, Phillips’ conduct in this case could be characterized by a finder of fact as reckless or intentional, as opposed to merely negligent.

Phillips’ argument is also problematic because it is predicated on his use of willful blindness as a shield. It was Phillips’ willful blindness that prohibited him from knowing with certainty whether Ms. Cervantes

was being truthful. Whitney placed him on notice that Ms. Cervantes had no authority to take possession of their uncle's body and put him on notice that they, as their uncle's next-of-kin, had such right. Fully aware of what was at stake, Phillips nevertheless chose to take Ms. Cervantes at her word that she had been appointed as the Personal Representative of Mr. Wilhalm's estate.

In attempting to justify his actions, Respondent points out that under RCW 68.50.160(5) he had the right to rely on the "most responsible party available." RCW 68.50.160(5) provides in relevant part as follows:

If a . . . funeral establishment licensed under chapter 18.39 RCW 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 establishment shall have the right to rely on an authority to bury or cremate the human remains, executed by *the most responsible party available*, and the . . . funeral establishment may not be held criminally or civilly liable for burying or cremating the human remains. (Emphasis added.)

Phillips acted in "good faith" only if making no effort constitutes good faith. It is undisputed Phillips made no effort to verify if Ms. Cervantes had in fact been appointed as Personal Representative of Mr. Wilhalm's estate. Moreover, there is certainly a question of fact whether Phillips relied on "the most responsible party available."

C. If the Court Concludes that All Reasonable People Would Find Phillips Acted Negligently, as Opposed to Intentionally or Recklessly, the Court Should Adopt §868 of the Second Restatement of Torts to Hold Funeral Home Directors Accountable in Situations Involving The Disposition of Dead Bodies.

In defining a standard for tortious interference with a body, many jurisdictions have adopted §868 of the *Restatement (Second) of Torts*, which states, in part, as follows: “One who intentionally, recklessly, or negligently. . . withholds. . . the body of a dead person. . . is subject to liability to a member of the family of the deceased who is entitled to disposition of the body.” Washington has recognized a common law action for tortious interference with a dead body, but has not adopted §868. *Adams, supra*, at 656. The only difference between the common law action and §868 is that §868 permits liability for negligence, whereas the common requires something more than negligence. *Adams, supra*, at 657.

The *Adams* court was asked to adopt §868 but declined to do so because the plaintiff had not demonstrated why the facts of the case warranted an extension of the tort to cover negligent conduct and because a claim of negligent conduct was precluded under a different statute. *Adams, supra*, footnote 9. Here, the facts warrant adoption of §868 of the

Restatement (Second) of Torts and unlike *Adams, supra*, adoption of this standard is not pointless.

In tort actions courts have traditionally been reluctant to allow recovery for mental distress not accompanied by physical injury. However, as Professor Prosser states: "It is now more or less generally conceded that the only valid objection against recovery for mental injury is the danger of vexatious suits and fictitious claims, which has loomed very large in the opinions as an obstacle." Prosser, *Law of Torts* (4th ed. 1971) p. 328 (footnotes omitted). Prosser observes that the majority of jurisdictions now permit recovery for negligence by funeral home directors:

The traditional rule has denied recovery for mere negligence, without circumstances of aggravation. There are by now, however, a series of cases allowing recovery for negligent embalming, negligent shipment, running over the body, and the like without such circumstances of aggravation. What all these cases appear to have in common is an *especial likelihood of genuine and serious mental distress, arising from special circumstances, which serves as a guarantee that the claim is not spurious. . . .* Where the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery. (Emphasis added).

See *W. Page Keeton et al.*, Prosser and Keeton on the Law of Torts § 54, at 362 (5th ed. 1984)(emphasis added)(footnotes omitted).

The modern rule is well illustrated by the case of *Lott v. State of New York*, 32 Misc.2d 296, 225 N.Y.S.2d 434 (1962). Mrs. Lott and Mrs. Tumminelli, patients at the same state hospital, died at about the same hour. Through the hospital's negligence, the body of Mrs. Lott was given to the undertaker for the Tumminelli family and prepared for burial in accordance with the customs and practices of the Roman Catholic faith, while the body of Mrs. Tumminelli was given to the Lott's undertaker and prepared for burial in accordance with the Jewish faith. The surviving relatives of both decedents brought an action against the state for mental distress suffered upon learning of the mistake. Awarding damages, the court held: "The temporary deprivation of the right to the bodies of Rose Lott and Mary Tumminelli for burial, the unauthorized embalming of the body of Rose Lott and the resultant mental suffering of the claimants as next of kin are wrongs for which the defendant is liable." *Id.* at 437.

From a public policy standpoint, not allowing a person to proceed with a claim against a funeral home director who acts negligently is inconsistent with one of American's most sacred and longstanding cultural traditions — allowing loved ones to properly mourn and bury their dead. Public policy requires that funeral home directors adhere to a high standard of care in view of the psychological devastation likely to result from any mistake that upsets the expectations of the decedent's bereaved

family. As mental distress is a highly foreseeable result of such conduct and in most cases the only form of damage likely to ensue, recovery for mental distress is a useful and necessary means to maintain the standards of the funeral home profession and is the only way in which the victims may be compensated for the wrongs they have suffered. The nature of the wrongful conduct that must be present in this type of case provides sufficient assurance of the genuineness of a claim for emotional distress.

Where a funeral home deprives next of kin who possess the legal authority to dispose of their loved one's body of the opportunity to do so, there is a pronounced likelihood of genuine and serious mental anguish. *See, e.g., Rollins v. Phillips*, 554 So. 2d 1006, 1008 (Ala. 1989) ("It is a matter of common knowledge in civilized society that close relatives and friends possess deep-seated feelings and emotions regarding the remains of their dead. The person or persons with the duty of burying a loved one have the right to see that the body is preserved and their feelings in relation thereto protected."). This same principle was espoused eloquently long ago in *Louisville & N.R.R. v. Wilson*, 123 Ga. 62, 63, 51 S.E. 24, 25 (1905).

Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is

visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope. It must be laid away. And the law—that rule of action which touches all human things—must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber and pig iron. And yet the body must be buried or disposed of. If buried, it must be carried to the place of burial. And the law, in its all-sufficiency, must furnish some rule, by legislative enactment or analogy, or based on some sound legal principle, by which to determine between the living questions of the disposition of the dead and rights surrounding their bodies. In doing this the courts will not close their eyes to the customs and necessities of civilization in dealing with the dead and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes.

Adoption of §868 of the *Restatement (Second) of Torts* is also consistent with the Legislature's insertion in RCW 68.50.160(5) of a negligence standard for funeral directors. RCW 68.50.160(5) provides as follows:

If a . . . a funeral establishment . . . *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 establishment shall have the right to rely on an authority to bury or cremate the human remains, executed by the most responsible party available, and the cemetery authority or funeral establishment may not be held criminally or civilly liable for burying or cremating the human remains. (Emphasis added).

There is a safe harbor for funeral directors who make a good faith effort to identify the person who has a legal right to control the disposition of a body, of which the corollary is that those funeral directors who fail to act in good faith are subject to civil liability. The Legislature recognized that funeral directors need to be held to a certain a standard of care. The “good faith” protection the Legislature is rendered superfluous if there is no redress when a funeral director fails to act in good faith. There is no point in creating a “good faith” standard if a funeral home director’s negligence is immaterial, as Phillips’ claims.

In deciding whether to adopt §868 of the *Restatement (Second) of Torts*, the Court should also note that a funeral director who has voluntarily assumed possession of a body controls his own destiny. In the face of competing claims, a funeral home director can avoid liability as long as he acts reasonably. He is shielded from liability as long as he makes a “good faith” effort.

Here, Phillips did not make a good faith effort to determine whether Cervantes or Whitney was entitled to have possession of Mr. Wilhalm’s body. In fact, the trial court found that “the funeral establishment could have, and probably should have, required Cervantes or someone else to be appointed as personal representative, which only takes a few days . . .” CP 189 (line 18-22).

Given the totality of the circumstances, it is proper to hold a funeral home director responsible if he negligently deprives those entitled to possession of the body from possessing the body. Adoption of §868 of the *Restatement (Second) of Torts* will effectuate this outcome.

Even if the Court is unwilling at this time to adopt *Restatement [Second] of Torts* §868 in its entirety, Whitney nevertheless maintains that she should be allowed to proceed with a negligence action because of the express language in RCW 68.50.160(5). In enacting RCW 68.50.160(5), the Legislature attempted to balance the practical realities faced by funeral homes while imposing a standard of care upon funeral homes. As previously noted, under RCW 68.50.160(5) a funeral home must make a “good faith effort” to locate the person who has the authority to possess and dispose of the dead body in order to avoid be held civilly liable. On the record before it, this Court cannot find that reasonable people would all conclude Phillips acted in “good faith” and is thus immune from civil liability.

There is no downside to adopting §868 of the *Restatement (Second) of Torts*. There will not be an avalanche of litigation by individuals claiming mental distress because the factual context is so narrow. Only those with the right to control the disposition of the body may bring the claim and the claim arises only in the context of disposal of

dead bodies. Tortious interference with a dead body claims are exceedingly rare. Adoption of §868 of the *Restatement (Second) of Torts* will allow for a specific type of claim (negligence) in an extremely narrow context (funeral director's handling of dead bodies).

CONCLUSION

Whitney was legally entitled to control the disposition of her uncle's body. Despite Whitney's protestations to the contrary, the funeral home director chose to accept at face value the oral representations Ms. Cervantes made to him, i.e., "I am the Personal Representative of the Estate." Choosing instead to remain willfully blind to the facts, the funeral home director gave Ms. Cervantes control of the body and in so doing deprived Whitney of the opportunity to schedule a funeral service on a date most convenient for family and friends and otherwise deprived Whitney of the opportunity to plan, schedule and organize their beloved uncle's funeral. As a result of the funeral director's actions Whitney was also deprived of the opportunity to ensure their uncle's express wishes were followed.

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A funeral home director who “gets it wrong” should be held legally accountable for his error. The common law has always endeavored to provide a legal remedy to those who have been genuinely wronged, and Phillips has genuinely wronged Whitney.

Whitney respectfully request that this Court reverse the trial court’s decision to summarily dismiss all of their claims against Phillips.

Respectfully submitted this 10th day of December, 2013.

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