WHAT LIES BENEATH: A JURISPRUDENTIAL REVIEW OF RECENT CEMETERY AND HUMAN-REMAINS CASES

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ABSTRACT

Although most practitioners will never specialize in anything that could be considered "the law of the dead," it is not unusual, especially for solo practitioners, to encounter an occasional tort, contract, or property dispute that contains an issue related to a cemetery or a funeral matter. Because these types of cases are seldom the specialty of any one attorney, but also because these cases contain unique themes that pervade aspects of numerous practice areas, periodic reviews of the trends of such cases are warranted. In this review, recent jurisprudence from around the United States is considered in a nationwide context of a "law of the dead" in order to both introduce readers to this often unique and bizarre area of legal practice as well as to serve as a guide to practitioners if and when a client raises such issues.

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I. INTRODUCTION

When Benjamin Franklin famously commented that "nothing is certain but death and taxes,"[1] he could hardly have known that a close certainty behind death some 200 years later would be the certainty of lawsuits emanating from those deaths. This Article is not about the innumerable wrongful death lawsuits filed every year but rather a whole different flavor of litigation resulting from death: lawsuits over the dead themselves.

Although it would seem lawsuits related to the actual dead would be a rare occurrence, the volume of news stories relating to problems with the dead should quickly dissuade this misbelief. These stories range from the rather mundane reports of stolen grave markers[2] to the more sinister-sounding possible desecration of African American graves.[3] Cases all along the spectrum between these two stories play out in U.S. courtrooms daily, meaning general practitioners are increasingly likely to be involved in these matters during their careers. This Article is a review of the recent nationwide jurisprudence that has been published in one form or another (regardless of whether formally or informally reported), and it is intended to provide both a flavor of the typical lawsuits arising from the dead and instruction to practitioners for how to avoid pitfalls when involved in such cases.

1. Fred Shapiro recently suggested that this oft-quoted (or misquoted) comment appears to derive from a letter penned by Franklin in 1789 in which he stated, "Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes." Fred Shapiro, *Quotes Uncovered: Death and Taxes*, FREAKONOMICS (Feb. 17, 2011, 1:30 PM), http://freakonomics.com/2011/02/17/quotes-uncovered-death-and-taxes/.

2. *Grave Marker Stolen from Historical Site in Crofton*, WJZ-TV 13 CBS BALT. (June 9, 2016), https://baltimore.cbslocal.com/2016/06/09/grave-marker-stolen-from-historical-site-in-crofton/.

3. *Attorney for Neighbors of Desecrated African-American Cemetery: No Proof There Is a Cemetery There*, GREENWICH FREE PRESS (Sept. 22, 2016), https://greenwichfreepress.com/news/government/attorney-for-neighbors-of-desecrated-african-american-cemetery-no-proof-there-is-a-cemetery-there-73657/.

II. THE JURISPRUDENCE

The following cases are roughly organized into categories along the lines of their major themes. Although, not every case fits perfectly into its designated category. Much like this rather unique area of the law, the cases that result from the strange facts often defy classifications.

A. *Torts and the Dead*

Consistent with the broad category of actions considered to be torts under the general law, a wide range of torts related to the dead exists. Such cases largely center around families who are upset about the postmortem treatment of their loved ones[4] but also include, as with the first case in this Section, people who sustain injuries while visiting mourning sites.[5]

According to the facts in the matter of *Amos v. DiPrizio*, on April 18, 2008, plaintiff Matias Amos, an overweight high school sophomore, was intoxicated and visiting the gravesite of a deceased friend at the Queen of Heaven Cemetery in Illinois.[6] According to the court, Amos sat atop the gravestone of Joseph and Vito DiPrizio, which fell down and injured him.[7] Amos alleged his injury was a direct result of the negligence of the cemetery and the DiPrizio family.[8] He also named the monument companies, Sure-Set and Bertacchi & Sons, as defendants.[9] Amos argued "Bertachhi had a duty 'to fabricate and install [its] gravestones/grave markers such that they would not topple upon [and]/or injure plaintiff, and other similarly situated individuals, who happened to be in the vicinity thereof'"[10] and "Sure-Set breached [its] duty when it '[f]ailed to properly fabricate [its] gravestones/ grave markers to preclude the likelihood of them becoming unbalanced and[/]or toppling onto mourners moving thr[ough] the cemetery in and around their vicinity.'"[11]

4. *See, e.g.*, Palladino v. Michael Hegarty Funeral Home, Inc., No. A-0946-15T1, 2016 WL 1706051, at *1 (N.J. Super. Ct. App. Div. Apr. 29, 2016).

5. Amos v. DiPrizio, No. 1-15-0698, 2016 WL 1284079, at *2 (Ill. App. Ct. Mar. 31, 2016).

6. *Id.* at *1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* (second alteration in original) (quoting Plaintiff's Nov. 23, 2012, complaint).

11. *Id.* at *2 (second and third alterations in original) (quoting Plaintiff's July 12, 2011, complaint).

In 2014, Sure-Set filed a motion for summary judgment, arguing it was not the proximate cause of the injuries in this matter because the plaintiff had shown no evidence of a breach of duty or a deviation from industry standards with respect to Sure-Set's installation of the gravestone.[12] Sure-Set bolstered its claim by adding that the work was completed over six years prior to the incident in question.[13] The trial judge granted Sure-Set's motion for summary judgment, reasoning that the cemetery monument Amos sat on and was injured by was not a bench or a chair.[14] Thus, there was no duty attributable to Sure-Set for Amos's own negligence in sitting on the monument and tipping it over onto himself.[15] Furthermore, the judge explained, just as there was no duty imposed on the defendants, there was also no proximate cause shown by the plaintiff.[16]

On appeal, the issue was whether a monument company owed a duty to a person who sustained injuries from sitting on a monument that was not intended to be a chair.[17] Amos argued it was foreseeable for a graveside monument that was not set properly to cause injury by toppling on top of a person who sat on it for less than 10 minutes.[18] However, the court responded that if it were to extend this argument to other fact scenarios, really anything could be found to be "foreseeable."[19] The court noted that just because "something 'might conceivably occur' does not make it foreseeable."[20] The court expressed this distinction saying, "[S]omething is foreseeable only if it is 'objectively reasonable to expect.'"[21] To support a lack of foreseeability, the court noted Sure-Set's owner testified that, in 40 years of work, none of his grave markers had ever fallen and he had never received so much as a complaint from a consumer.[22] Furthermore, the court observed that even if Amos's argument were accepted as foreseeable, it was not foreseeable that someone weighing 150 pounds more than the average person would sit on

12. *Id.* at *6.
13. *Id.*
14. *Id.* at *7.
15. *Id.*
16. *Id.*
17. *Id.* at *9.
18. *Id.*
19. *Id.*
20. *Id.* (quoting Bruns v. City of Centralia, 21 N.E.3d 684, 694 (Ill. 2014)).
21. *Id.* (quoting *Bruns*, 21 N.E.3d at 694).
22. *Id.*

such a monument.[23] Thus, the court held that Amos did not satisfy the foreseeability factor of tort suits and that Sure-Set had no way of being prepared for someone of Amos's size to sit on the monument.[24] Regarding the necessary showing of a "likelihood of injury," the court explained that it found no evidence in this case that grave markers "fall upon visitors in a cemetery with any frequency."[25] As a result, the court determined the likelihood of injury was minimal and Amos had not proved this factor, which was necessary in order to find a duty on behalf of the monument dealer.[26]

The monument dealer's testimony also elicited that his job was to install, not maintain, the DiPrizio gravestone.[27] He further stated it was not normal for him to be asked to maintain, repair, or inspect gravestones he had already installed.[28] The court explained that if it were to find Sure-Set had a duty to Amos, that finding would impose a duty on Sure-Set that it had never contracted for with its clients, and imposing such a duty was not something typically done in the monument industry.[29] The court held this would be too great of a burden on Sure-Set.[30] The court also examined the use of the gravestone as a bench.[31] At the time of his injury, Amos was using the gravestone as a place to sit, which was not its intended purpose.[32] As a result, Amos was not deemed to be an "intended user" of the gravestone.[33] Taking all of the factors into consideration, the appellate court affirmed the trial court's grant of summary judgment because it found the defendants did not owe the plaintiff a duty with respect to the gravestone and, as a result, were not liable for negligence.[34]

Although this is an unsurprising result, the court's observation that such situations are uncommon[35] may have been a bit hasty. People are often

23. *Id.*
24. *Id.*
25. *Id.* at *10.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at *11.
35. *Id.* at *10.

injured by falling grave markers,[36] thus making this case particularly instructive for other courts in the future.

In *Capps v. Cremation Options, Inc.*, the decedent had allegedly executed forms entitled Appointment of Health Care Agent and Advance Care Plan that designated his stepdaughter as the person authorized to make any health care decisions on his behalf if he became unable to do so.[37] In the Advance Care Plan section entitled Other Instructions, such as burial arrangements, hospice care, etc., there was a handwritten word: *cremation*.[38] One day after the decedent's death, a LeConte Medical Center employee informed the decedent's biological daughter that there was no advance care directive on file, but there was an Advance Care Plan in the records.[39] In their complaint, the decedent's biological children explained that they were very familiar with their father's handwriting and that the handwriting of the word *cremation* on the Advance Care Plan was not his own.[40] Furthermore, they stated their father never indicated to them that he wished to be cremated.[41]

Pursuant to the Advance Care Plan, an employee of Cremation Options met with the stepchildren to plan the decedent's cremation.[42] According to the employee, the stepchildren informed him there were no other children, and the decedent was cremated that day.[43]

In their petition, the biological children alleged intentional and negligent infliction of emotional distress, trespass on the right to possess a body for burial, and conversion of cremains.[44] The defendant, Cremation Options, argued they were entitled to summary judgment because they relied in good faith on the stepchildren's representations and on the decedent's Advance Care Plan form, which indicated cremation as his

36. *E.g.*, Conner v. Norman Sosebee Funeral Home, 693 S.E.2d 534, 536 (Ga. Ct. App. 2010); Michelle Rindels, *Boy, 4, Dies After Tombstone Falls on Him in Utah*, YAHOO! NEWS (July 6, 2012), https://news.yahoo.com/boy-4-dies-tombstone-falls-him-utah-005642460.html.

37. Capps v. Cremation Options, Inc., No. 3:12-CV-545-TAV-HBG, 2016 WL 123425, at *1 (E.D. Tenn. Jan. 11, 2016).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at *2.

43. *Id.*

44. *Id.*

desired disposition.[45] The lower court granted the defendant's motion for summary judgment.[46]

On appeal, the issue was whether the evidence established the reasonableness of Cremation Options' reliance on the documents presented and the representations of the decedent's stepchildren.[47] To address this issue, the *Capps* court cited a recent Tennessee Supreme Court case, which provided the following order of priority indicating who will have legal control over the disposition of a decedent's remains:

> 1) the decedent, pre-mortem, including through any party designated in writing by the decedent to make the decision postmortem; 2) the spouse of the decedent; 3) adult children of the decedent; 4) parents of the decedent; 5) adult siblings of the decedent; 6) adult grandchildren of the decedent; 7) grandparents of the decedent; and 8) an adult who exhibited special care and concern for the decedent.[48]

The *Capps* court also recognized that recent statutes had been enacted to codify this priority scheme.[49] Though these statutes were too new to apply to this case, the new statutes aligned with the existing jurisprudence, and the Tennessee Supreme Court's order of priority in *Seals v. H & F, Inc.* governed the *Capps* case.[50]

In this appeal, the plaintiffs also asserted summary judgment should have been denied because the forms that were the substantive basis of the ruling were not specific enough under the law.[51] The lack of specificity in the existing forms related to the reality that the decedent neither specified who would "control the *disposition* of his remains or possess his remains following his cremation."[52] The court agreed with this argument, explaining the plaintiffs had presented sufficient evidence to indicate the forms did not explicitly provide for either.[53] The court indicated that, under Tennessee law, standing to assert a claim for trespass against a person's right to possess human remains for the purpose of a "decent burial are those who have the

45. *Id.* at *2, *4.
46. *Id.* at *2.
47. *Id.* at *4.
48. *Id.* at *6 (quoting Seals v. H & F, Inc., 301 S.W.3d 237, 246 (Tenn. 2010)).
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*

right to control the disposition of the decedents body."[54] In the absence of these crucial facts, the appellate court held summary judgment was inappropriate because the plaintiff presented evidence demonstrating a material question of fact regarding who possessed the power to control disposition of the body.[55]

This case underscores the importance of strictly following the existing priority of people who have the right to control remains.[56] In this case, it was apparent that the crematory was provided with incorrect information regarding living descendants.[57] Generally, a crematory is not required to undertake an independent genealogical investigation.[58] However, as this case demonstrates, the defense of such cases cannot always be constrained to the pleadings alone, and adherence to the existing priority scheme is not always self-evident.[59]

Perhaps the more significant result from this case is that the court ultimately dismissed the biological children's claim for emotional distress.[60] This claim was based on the idea that because the biological children wanted their father to be interred, the stepchildren's directive to cremate caused them distress.[61] To this point, the court stated, "'[S]ome degree of transient and trivial emotional distress is a part of the price of living among people,' and the law only intervenes 'where the distress is so severe that no reasonable [person] could be expected to endure it.'"[62] Accordingly, the court did not find that this action rose to the level of outrageousness required to amount to emotional distress.[63] This reality is consistent with the high bar other courts have placed on emotional distress claims in the past.[64]

54. *Id.* at *7 (citing Crawford v. J. Avery Bryan Funeral Home, Inc., 253 S.W.3d 149, 159–60 (Tenn. Ct. App. 2007)).

55. *Id.*

56. *See id.* at *6.

57. *See id.* at *2.

58. *See id.* at *5.

59. *See id.* at *7.

60. *Id.*

61. *Id.* at *5.

62. *Id.* (quoting Miller v. Willbanks, 8 S.W.3d 607, 615 n.4 (Tenn. 1999)).

63. *Id.* at *6.

64. *See generally* Ryan M. Seidemann, *How Do We Deal with All the Bodies? A Review of Recent Cemetery and Human Remains Legal Issues*, 3 U. BALT. J. LAND & DEV. 1, 13–15 (2013) (noting a 2012 Florida case in which the emotional distress claim was not rejected as an unusual example).

In *Kennedy-McInnis v. Biomedical Tissue Services, Ltd.*, children of the decedent filed suit against Biomedical Tissue Services (BTS), Serenity Hills Funeral Home, Inc. (Serenity Hills), and others.[65] The children alleged that Serenity Hills acted without the children's consent and allowed BTS, a human-tissue recovery firm, to harvest some of the decedent's tissues prior to cremation for resale and later transplantation into living persons.[66] Allegedly, after BTS finished with its harvesting procedures, it supplied the body parts to several tissue banks, one of which was Regeneration Technologies, Inc. (RTI).[67]

The issue in this case was whether an organ reseller owes a duty of care to the family of a decedent that would make it negligent when body parts end up somewhere other than the location expected by the family.[68] Before analyzing the plaintiffs' negligence claim, the court addressed claims made under the common law right of sepulcher.[69] Under New York law, the court noted, "The common-law right of sepulcher affords the deceased's next of kin an 'absolute right to the immediate possession of a decedent's body for preservation and burial . . . and damages may be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body.'"[70] The court explained, "Interference can arise either by unauthorized autopsy, or by disposing of the remains inadvertently, or . . . by failure to notify next of kin of the death."[71] The court here found:

> [B]ecause the right of sepulcher is premised on the next of kin's right to possess the body for preservation and burial (or other proper disposition), and is geared toward affording the next of kin solace and comfort in the ritual of burying or otherwise properly disposing of the body, it is the act of depriving the next of kin of the body, and not the deprivation of organ or tissue samples within the body, that constitutes a violation of the right of sepulcher.[72]

65. Kennedy-McInnis v. Biomedical Tissue Servs., Ltd., 178 F. Supp. 3d 97, 100 (W.D.N.Y. 2016).

66. *Id.* at 99–100.

67. *Id.* at 100.

68. *Id.* at 101–02.

69. *Id.* at 102.

70. *Id.* (quoting Shipley v. City of New York, 37 N.E.3d 58, 63 (N.Y. 2015) (quoting Mack v. Brown, 919 N.Y.S.2d 166, 169 (App. Div. 2011))).

71. *Id.* at 103 (quoting Melfi v. Mount Sinai Hosp., 877 N.Y.S.2d 300, 309 (App. Div. 2009)).

72. *Id.* at 102–03 (quoting *Shipley*, 37 N.E.3d at 63).

In this case, unauthorized removal of organs or tissue samples did not amount to a violation of the right of sepulcher, absent interference with possession of the body itself.[73] Thus, the court found the interference necessary to prove violation of a party's right of sepulcher was neither alleged nor proven.[74]

As to the negligence claim, the court relied on precedent that found liability cannot lie in the absence of a legal duty owed to the alleged victim even when the tortious act is careless or foreseeable.[75] According to the court, where there is no duty, there is no breach; and without breach, there can be no liability.[76] The court here found that RTI did not breach a contractual duty to audit and inspect BTS's compliance with accreditation requirements.[77] The court determined there was no reasonable relationship between the parties, and furthermore, the reseller had a right to reasonably rely on the consent forms of their supplier.[78] Thus, RTI was not liable in negligence for BTS's alleged unlawful harvesting of human body parts and tissue.[79]

Additionally, the court found the defendants were protected from liability by the Uniform Anatomical Gift Act (UAGA),[80] which provides relief for parties acting in good faith.[81] The court found that RTI provided evidence showing it acted in good faith and that the plaintiffs did not rebut that evidence with their own.[82] While evidence showed BTS and RTI did business together and BTS admitted to faking consent forms, there was no indication RTI had any reason to believe the consent forms supplied by BTS were fraudulent.[83] The court held, "[I]f the record on summary judgment . . . reveals no genuine issue of material fact concerning compliance with the UAGA's requirements, then summary judgment should

73. *Id.* at 103.
74. *Id.*
75. *Id.* at 102 (quoting Lauer v. City of New York, 733 N.E.2d 184, 187 (N.Y. 2000)).
76. *Id.* (quoting Pulka v. Edelman, 358 N.E.2d 1019, 1020 (N.Y. 1976)).
77. *Id.* at 104.
78. *Id.* at 105.
79. *Id.*
80. *See* N.Y. PUB. HEALTH LAW § 4300 (McKinney 2019).
81. *Kennedy-McInnis*, 178 F. Supp. 3d at 105, 108 (citing PUB. HEALTH § 4300).
82. *Id.* at 106–07.
83. *Id.* at 107.

be entered for the party asserting good faith."[84] Based on the evidence submitted, the court found no factual issues existed and concluded RTI was immune from suit under the good-faith provision of the UAGA.[85]

The fact pattern in the *Kennedy-McInnis* case is likely representative of things to come. Other recent cases have revolved around allegations of wrongful organ harvesting and wrongful cremation.[86] Thus, it stands to reason that tort suits against all parties in the chain of custody of body parts will also increase. This case supports the pragmatic notion that good faith should protect those further down the organ-procurement chain when the parties doing the harvesting have done so under dubious circumstances.[87]

In *Tippins v. City of Dadeville*, the limits of governmental liability at issue involved a somewhat unique factual scenario.[88] In 2011, the plaintiff's, 19-month-old son, Ian, died by accidental drowning.[89] Two days later, Ian's godmother and coplaintiff, Geneva Heard, spoke with the Dadeville city clerk, Sharon Harrelson, about the family's desire to purchase a burial plot in the Dadeville Cemetery.[90] Helping families find cemetery plots was not a part of Harrelson's job duties.[91] However, she met with the Tippins family in the place of an employee who had been reassigned to assist with cleanup from a recent tornado.[92] The Dadeville Cemetery is comprised of an old section, dating back to the 1800s, and a newer section.[93] According to the city's history and those familiar with the cemetery, African Americans were typically buried on the left side of the old section of the cemetery, whereas

84. *Id.* at 108 (quoting Geary v. Stanley Med. Research Inst., 939 A.2d 86, 92 (Me. 2008)).

85. *Id.*

86. *E.g.*, Andre v. Regents of Univ. of Cal., No. B211748, 2010 WL 3127672 (Cal. Ct. App. Aug. 10, 2010); Lane v. Regents of Univ. of Cal., No. B213048, 2010 WL 3127865 (Cal. Ct. App. Aug. 10, 2010); Cohen v. Nuvasive, Inc., Nos. B194078, B196905, 2010 WL 1380447 (Cal. Ct. App. Apr. 7, 2010); Regents of Univ. of Cal. v. Superior Court, 107 Cal. Rptr. 3d 637 (Ct. App. 2010); Seals v. H & F, Inc., 301 S.W.3d 237 (Tenn. 2010).

87. *See Kennedy-McInnis*, 178 F. Supp. 3d at 108.

88. Tippins v. City of Dadeville, No. 3:13-CV-368-WKW, 2016 WL 1264136, at *2 (M.D. Ala. Mar. 31, 2016).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

white families were buried on the right side of the old section.[94]

Harrelson advised Tippins that there were spots available in the new section of the cemetery.[95] However, Tippins did not want a spot in the new section because the monument she wanted would not be allowed in that particular section.[96] Because her monument choice required the burial to occur in the old section, Tippins requested a spot in that part of the cemetery.[97] Harrelson informed Tippins that there were no available plots on that side, but she offered to double-check.[98] Heard asked Harrelson if she could check the availability and call them back that afternoon, but Harrelson said it would have to be the following day.[99] At that point, Tippins was upset because she needed to find a burial plot that day and felt Harrelson was not doing enough to make that happen.[100] The Tippins family alleged that, at several times during the meeting, Harrelson made the comments that "[this] was not her job" and that she was "supposed to be on her lunch break."[101] The family left and went to Hillview Cemetery, where Tippins found and purchased burial plots for Ian, her husband, and herself at roughly 3:30 p.m.[102] Meanwhile, Harrelson had asked the mayor, Mike Ingram, to assist her in taking a map to the Dadeville Cemetery to attempt to find an available space for Tippins.[103] After going to the cemetery and then checking the located spots with the deed history, Harrelson called Heard around 3:35 p.m. to inform her of the availability of several plots in the cemetery.[104] During the call, Mayor Ingram also spoke with Heard and informed her of the following: "[D]own from the fence from the white side down through the black side over in the front of IGA, that spot y'all was looking at over there in the shaded area is available."[105] Heard called Tippins to tell her of the availability of the shady spot on the right side that Tippins was interested in, but Tippins told her she had already purchased plots in Hillview Cemetery.[106]

94. *Id.*
95. *Id.* at *3.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at *2.
102. *Id.* at *4.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*

Almost two years later, the family brought suit against the City of Dadeville, Alabama, Mayor Mike Ingram, and Sharon Harrelson, alleging the following: (1) the "[d]efendants discriminated against [them] and denied them accommodations on the basis of race . . . by 'refus[ing] to allow them to purchase a burial plot on the "white side" of the cemetery'" and (2) "Mayor Ingram and Harrelson 'conspired . . . for the purpose of depriving, either directly or indirectly, [the family] . . . who are African-Americans and part of a protected class, of the equal protection of the laws or of equal privileges and immunities.'"[107] The defendants responded with a motion to dismiss, arguing cemeteries are not places of "public accommodation" as that term is defined by 42 U.S.C § 2000a, meaning at least some of the family's civil rights claims could not apply to this situation.[108] The court granted this motion.[109] The defendants also filed a motion for summary judgment, asserting the family could not show that their ability to purchase a cemetery plot was denied or hindered on the basis of race.[110]

The case hinged on whether an individual from a protected class can succeed on a Civil Rights Act claim on the basis that the individual was denied a space in the "white" section of a cemetery when no actual evidence can be produced that there was a denial of the right to purchase a plot based on the individual's race.[111] To prevail on a claim under 42 U.S.C. § 1982, an individual must show he or she was denied the ability to purchase a cemetery plot on the basis of race.[112] Furthermore, the individual "must allege facts to show that: (1) the plaintiff is a racial minority; (2) the defendant intended to discriminate on the basis of race; and (3) the discrimination concerned activities addressed in § 1982."[113] In this case, the family was unable to purchase the specific plot it desired due to Harrelson and the Mayor's inability to confirm the plot's availability before Tippins had already purchased another plot in a different cemetery.[114] The court noted that while "the delay in confirming the plot [may have been] sufficient to constitute a deprivation of Tippins's right to purchase property," there was "no evidence

107. *Id.*
108. *Id.* at *5.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* (citing 42 U.S.C. § 1982 (2012)).
113. *Id.* (quoting Lawrence v. Courtyards at Deerwood Ass'n, 318 F. Supp. 2d 1133, 1150 (S.D. Fla. 2004)).
114. *Id.* at *6.

that either Harrelson or Mayor Ingram delayed the plot purchase . . . on the basis of race."[115] The court acknowledged that Harrelson may have been rude and insensitive, but it further noted there was no evidence that her rudeness was correlated to any reluctance to help the family on the basis of their race or the race of the decedent.[116] Furthermore, the court observed that Harrelson's failure to provide on-the-spot confirmation of plot availability was not the product of racial discrimination; rather, it resulted from poor record-keeping and limited knowledge of the cemetery itself.[117] Lastly, the family alleged Mayor Ingram's use of the terms "white side" and "black side" during his phone call with Heard signaled racial animus.[118] However, the court found no evidence that these terms signaled racial animus or that the terms were part of a refusal to sell a plot on the basis of race.[119] In fact, Mayor Ingram's assistance actually helped in the cemetery-plot search and enabled Harrelson to confirm plot availability that day.[120] Furthermore, evidence submitted by family members of both Tippins and Heard explained that the terms had been commonly used by the community to refer to different areas of the cemetery and that they had even used the terms to refer to the sides.[121] Ultimately, the court found Tippins had provided no evidence establishing she was ever prevented from purchasing a cemetery plot on the basis of her race, and thus, the defendants were entitled to summary judgment on the claim.[122]

The *Tippins* case appears, more than anything, to be one of heightened emotions that often surround death-related matters and the consequences for death-care workers when they do not demonstrate an appropriate level of sympathy. The outcome of this case appears to be legally correct but for the costs it likely took for the city to defend the case. The *Tippins* case should stand as a lesson in customer service to government employees that interact with the grieving public.

115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at *7.
121. *Id.* at *6.
122. *Id.* at *7.

B. *Property Rights and Contracts*

Other broad areas of the law touched by the dead are property and contract law. The bulk of these cases, which are common nationwide, revolve around descendants seeking and being denied access to cemetery property that is now landlocked. One such case is reviewed here.[123] The other case relates to contractual obligations under funeral contracts.[124]

At issue in the case of *Ambrose v. Ward* was what level of reasonable access to a cemetery must be permitted under the law.[125] While not actually situated on the Wards' property, the private cemetery in this case, Ambrose Cemetery, was located next to their land.[126] The easiest way to access the cemetery was via Elias Herd Road, which traversed the Wards' property.[127] Evidence presented showed that the former owner of the land had allowed access to the cemetery across his land and that this route became customary for visitors wishing to access the cemetery.[128] The evidence also showed there was another route that could be used to access the cemetery, but that road often flooded and became dangerous.[129] The appellants here brought an action seeking to enjoin the Wards from blocking the Elias Herd Road access route to the cemetery.[130]

At the trial court, those seeking access across the Wards' property prevailed on their motion for a directed verdict.[131] This outcome meant that the court found the existence of an easement for cemetery access on the Wards' property.[132] The court stopped short of ruling in such a manner as to place any restrictions on the access easement.[133] The trial judge granted all people with loved ones in the cemetery conditional access to the cemetery.[134] The trial court also ordered that all parties were to agree amongst

123. *See generally* Ambrose v. Ward, Nos. 2013-CA-000814-MR, 2013-CA-001000-MR, 2016 WL 447753 (Ky. Ct. App. Feb. 5, 2016).

124. Palladino v. Michael Hegarty Funeral Home, Inc., No. A-0946-15T1, 2016 WL 1706051, at *1 (N.J. Super. Ct. App. Div. Apr. 29, 2016).

125. *Ambrose*, 2016 WL 447753, at *1.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

themselves on the placement of the easement as well as the restrictions on its use, and if the parties could not come to such an agreement, the court would hold a subsequent hearing.[135]

After the parties could not agree, a hearing occurred wherein the Wards served a set of proposed rules and regulations, while the parties advocating access presented nothing as to the easement.[136] The court then entered an order that included the Wards' restrictions on the use of the easement.[137]

On appeal, one party, believing the easement created an entitlement to unfettered, free access to the cemetery, challenged the Wards' rules as being too onerous.[138] Another party advocating access argued a prescriptive easement existed.[139]

Thus, the focus of the appeal in this matter was on the reasonableness of the conditions the Wards placed on the use of the easement.[140] In other words: Does a landowner have to allow unfettered passage across a piece of property when there is a cemetery on someone else's adjacent property?[141] Under Kentucky law, individuals possess the right to visit the grave of a deceased relative, and this right has been classified as an easement.[142] Nevertheless, "[T]he rights of those visiting [a] cemetery must be balanced against those of the subservient landowner."[143] As the subservient landowners, the Wards have the right to erect gates and fences on their land, to establish the exact location of the easement, and to determine and change the location of the easement without the consent of the appellants, so long as they do not change the beginning and ending points of the easement and so long as the change does not result in a material inconvenience to the rights of those entitled to use it.[144] The court observed that the Wards' interest in keeping their livestock safe with the use of locked gates on their property did not violate the appellants' rights to access the graves of loved ones at

135. *Id.*
136. *Id.* at *2.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at *3.
141. *See id.*
142. *Id.* at *4 (citing Dep't of Fish & Wildlife Res. v. Garner, 896 S.W.2d 10, 12–13 (Ky. 1995)).
143. *Id.* (citing *Garner*, 896 S.W.2d at 12–13).
144. *Id.*

Ambrose Cemetery.[145] The appellants were not entitled to unqualified, unrestricted access to the cemetery.[146] Restrictions relating to the reasonable use of the easement are appropriate, and the appellate court therefore held the trial court did not err in placing reasonable restrictions on the use of the easement to access Ambrose Cemetery.[147] Further, the appellate court determined the appellant's failure to create terms of use effectively bound them to the Wards' properly proposed terms.[148]

The outcome of this case is consistent with the general principles of cemetery access that have existed at common law for centuries. This case is another example of those principles, now definitively extending this tradition to Kentucky jurisprudence.

In *Palladino v. Michael Hegarty Funeral Home, Inc.*, the plaintiff alleged that, when she arranged for her mother's funeral with the defendant funeral home, the defendant failed to properly prepare her decedent mother for viewing and burial.[149] The funeral home filed a motion to compel arbitration based on a clause in the funeral contract.[150] The plaintiff challenged this attempt to force her into arbitration, claiming she signed a one-page, handwritten Statement of Funeral Goods and Services Selected (which did not contain an arbitration clause) prior to signing the final agreement (which did contain an arbitration clause in bold type), and therefore, only the former contract applied to her situation.[151]

Because the terms and conditions page of the more formal document included a statement that read, "This Agreement replaces all other discussions and agreements, whether oral or written, relating to those goods and services,"[152] the trial court held there was no evidence that the initial, handwritten document was a contract; it was rather a statement of services.[153] The judge further explained the formal purchase order (the one containing the arbitration clause) was the controlling contract, and there had been no

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. Palladino v. Michael Hegarty Funeral Home, Inc., No. A-0946-15T1, 2016 WL 1706051, at *1 (N.J. Super. Ct. App. Div. Apr. 29, 2016).
150. *Id.*
151. *Id.*
152. *Id.* at *2.
153. *Id.*

evidence submitted substantiating the plaintiff's claim that she was defrauded into signing the contract or that there was no mutual assent as to the terms.[154] Altogether, the judge concluded there is a strong public policy favoring arbitration, and the arbitration clause was therefore enforceable as written.[155] The judge granted the defendant's motion to compel arbitration, and the plaintiff appealed.[156]

On appeal, the issue was whether an arbitration clause in a funeral service statement can be enforced.[157] Agreeing with the reasoning of the trial court, the appellate court explained New Jersey has a strong public policy favoring the enforcement of valid arbitration agreements.[158] Further, as a matter of law set forth in the New Jersey Board of Mortuary Science's consumer protection regulations, funeral homes must first provide prospective consumers with a written statement of services.[159] Only after providing that statement to the consumer can a funeral home in New Jersey offer and enter into a contract with that consumer.[160]

Here, the first document contained all of the price and service information required by New Jersey Administrative Code Section 13:36-1.9 and contained no contractual language.[161] The final document, however, was presented to the plaintiff as a separate contract, consisting of (1) "a formal, typed version of the [s]tatement;" (2) "a formal purchase agreement;" (3) "an integration clause unambiguously stating that the agreement 'replace[d] all other discussions and agreements, whether oral or written, relating to those goods and services;'" and (4) "a clear and conspicuous arbitration clause."[162] Therefore, the appellate court held the initial document was not an enforceable contract because the final document replaced the initial one and became the actual contract between the parties once signed.[163]

154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at *3.
158. *Id.* at *2, *4 (quoting Delta Funding Corp. v. Harris, 912 A.2d 104, 110 (N.J. 2006)).
159. *Id.* at *3 (citing N.J. ADMIN. CODE §§ 13:36-1.9, -9.8(a) (2019)).
160. *Id.* (citing ADMIN. §§ 13:36-1.9, -9.8).
161. *Id.*
162. *Id.* at *3–4.
163. *Id.* at *3.

Essentially, when the plaintiff signed the final document, she submitted to any clauses included therein, regardless of whether she realized it.[164]

In this case, the plaintiff attempted to argue she was in a vulnerable state when the original contract was created; therefore, she should not be bound by the later documents that contained the language distasteful to her.[165] The court rejected this notion, holding the funeral home's strict adherence to mandatory contracting requirements absolved it of any allegations of improper consumer practices.[166]

The *Palladino* outcome presents an example of when strict adherence to the law absolves a death-care practitioner of certain claims. Of course, it is not known whether arbitration followed this decision, and if it did, what its outcome was. However, this case demonstrates the protection afforded to funeral homes for adhering to the law, even in times of grief when courts might be willing to bend a bit in favor of the bereaved.

C. *Crimes Against the Dead*

Criminal prosecutions related to the dead are few and far between. The usual reasons for these low numbers are that district attorneys are overloaded with felonies and that crimes against the dead often are misdemeanors.[167] The cases in this Section demonstrate that crimes against the dead can often be used to upcharge the accused for additional jail time or other penalties. This suggests that prosecutors should think twice before casting aside criminal charges related to the dead because prosecutors could build more substantial cases by using these seemingly minor crimes to enhance prosecutorial options.

The case of *State v. Stephens* is an example of the use of human remains and cemetery laws to enhance criminal charges.[168] In this case, David Stephens killed his ex-wife, Tonya Stephens, at her home in Hale County, Alabama.[169] After killing Tonya, David put her body in his truck, drove to Pickens County, wrapped her body in a blanket, and buried it on his father's

164. *Id.* at *4.

165. *See id.*

166. *See id.* at *3, *4.

167. Ryan M. Seidemann, *Requiescat in Pace: The Cemetery Dedication and Its Implications for Land Use in Louisiana and Beyond*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 895, 905 (2018).

168. *See* State v. Stephens, 203 So. 3d 134, 136 (Ala. Crim. App. 2016).

169. *See id.*

property.[170] Once Tonya was reported missing, the police, as well as David's father, suspected David had something to do with her disappearance.[171] Ten days after Tonya's death, David's father told him that he was going to let cadaver dogs search his property.[172] This prompted David to return to Tonya's burial site, partially dismember her body, and then set her body on fire.[173] Shortly thereafter, the police arrested David, and he confessed to his part in Tonya's death.[174] David Stephens was convicted in Hale County on counts of manslaughter and abuse of a corpse.[175] For these convictions, David received a 25-year sentence (comprised of a 15-year sentence for manslaughter and a 10-year sentence for abuse of a corpse).[176]

After being convicted in Hale County, David filed a motion to dismiss a separate indictment against him for abuse of a corpse in Pickens County, arguing that trying him in Pickens County for abuse of a corpse after he had already been convicted in Hale County of abusing the same corpse would be a violation of double jeopardy.[177] The trial court issued an order granting David's motion to dismiss the indictment, which prompted the State to appeal.[178]

The issue in this case was whether prosecution for abuse of a corpse—after the defendant has already been convicted of this offense with the same corpse in another county—violates the Double Jeopardy Clause.[179] The Fifth Amendment to the United States Constitution protects a criminal defendant from being prosecuted twice for the same offense.[180] In order for this prohibition on double jeopardy to be triggered, the crimes must arise out of the same act or transaction.[181] However, the court indicated that the Double Jeopardy Clause does not attach when the offenses are "discrete acts violative of the same statutory offense, but separated by sufficient indicia of

170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 137.
178. *Id.*
179. *Id.*
180. *Id.*; U.S. CONST. amend. V.
181. *Stephens*, 203 So. 3d at 138 (quoting R.L.G. v. State, 712 So. 2d 348, 359 (Ala. Crim. App. 1997)).

distinctness."[182] In order to determine if conduct is unitary and bars multiple convictions, courts often use the New Mexico *Herron v. State* test, which examines "(1) temporal proximity of the acts; (2) location of the victim(s) during each act; (3) existence of an intervening event; (4) sequencing of acts; (5) defendant's intent as evidenced by his conduct and utterances; and (6) number of victims."[183]

Here, the appellate court found that David's acts amounted to two separate events of abusing a corpse: the first when he crossed county lines with the body and buried it and the second when he dug up the body and burned it.[184] While it is true that the location for both acts was the same, the second act took place 10 days after the first act and was separated from the first act by intervening events, such as David's father telling him that cadaver dogs would be searching his property for Tonya's body.[185] Furthermore, the two acts were subject to proof by different evidence.[186] In the first act, the required proof was that the body had been buried without the authority of Tonya's family (thus in violation of their right of sepulcher), while the second act did not require the State to prove that David had buried her body but rather that he had dug up her body, partially dismembered it, and then set it on fire.[187]

Additionally, using double jeopardy as a defense can only work when it is applied to an offense that "is the same in law and fact as the former one relied on under the plea."[188] Here, while the Pickens County indictment was the same in law as the one in Hale County, the two were not the same in fact.[189] In this case, double jeopardy would have prevented the State from prosecuting David for the burial twice.[190] However, the defense of double jeopardy, while precluding a second prosecution for the unauthorized burial, did not preclude prosecution for the later disinterment, dismemberment, and burning.[191] As a result, the appellate court reversed the judgment of the trial court, holding that prosecution for abuse of a corpse after a defendant

182. *Id.* (quoting Swafford v. State, 810 P.2d 1223, 1233 (N.M. 1991)).
183. *Id.* at 138–39 (citing State v. Bernard, 355 P.3d 831, 840 (N.M. Ct. App. 2015)).
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 140 (quoting *Ex parte* Godbolt, 546 So. 2d 991, 994 (Ala. 1987)).
189. *Id.* at 141.
190. *Id.*
191. *Id.*

has already been convicted of separate abuse of the same corpse does not violate the Double Jeopardy Clause.[192]

In the matter of *People v. Reid*, Reid broke into a mausoleum building in California, broke into nine separate cremation niches, and removed the urns.[193] After discarding the contents of the nine urns, Reid sold the metal urns for their scrap value.[194] Months later, a friend of Reid's went to the cemetery and told the staff they should check with Reid regarding the missing urns.[195] Reid was arrested, and although the cremated remains and the urns were never recovered,[196] Reid was convicted of 11 counts of removing human remains, 11 counts of grand theft, and 1 count of vandalism.[197]

Because the thefts all occurred at one time, on appeal, Reid argued that they were a single event and that convicting him for multiple acts was a violation of his rights under the Double Jeopardy Clause.[198] The court in *Reid*, quoting the United States Supreme Court, observed, "The Double Jeopardy Clause 'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'"[199] The court rejected Reid's argument, finding Reid's acts were separate offenses and that this case did not involve the reprosecution of the same act—against which the Double Jeopardy Clause was intended to protect.[200]

Reid also challenged his conviction for 11 counts rather than 9 counts of grand theft. The basic premise of Reid's argument on this point was that there was no showing that the stolen human remains had a sufficient value to support a conviction for grand theft.[201] Indeed, because the remains had no value at all, the 11 counts of grand theft could not be sustained, and the

192. *Id.*

193. People v. Reid, 201 Cal. Rptr. 3d 295, 298 (Ct. App. 2016). Within the nine urns were the remains of 11 distinct individuals, thus raising the number of people disturbed by Reid's acts. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 297.

198. *Id.*

199. *Id.* at 301 (quoting Brown v. Ohio, 432 U.S. 161, 165 (1977)).

200. *Id.* at 302.

201. *Id.*

court vacated the conviction on the two extra counts.[202] Further attacking the grand theft conviction, Reid argued that the *People v. Bailey*[203] rule applied because all of his acts of removing the urns were effectively one continuous event of planning and execution.[204] The appellate court explained that it applies the *Bailey* rule "as a matter of law only in the absence of any evidence from which the jury could have reasonably inferred that the defendant acted pursuant to more than one intention, one general impulse, or one plan."[205] Contrary to the events at the heart of the *Bailey* case, which revolved around a conviction for grand theft for unlawfully taking welfare benefits over a 17-month period and for which the California Supreme Court upheld the jury's finding of a single intent and plan,[206] the court in this case found that the act of breaking into each individual mausoleum niche constituted a separate intent and a separate act.[207] When distinguishing Reid's acts from those in the *Bailey* case, the court also found it relevant that the urns were separately owned (as opposed to the taking from one welfare source in *Bailey*), meaning that Reid's crimes were directed against a series of individuals rather than one entity.[208] Reid did win a minor victory in his challenge to the multiple convictions when he convinced the appellate court to reduce his grand theft convictions from 11 counts to 9 counts.[209] Effectively, Reid succeeded in arguing that he could not be convicted for the presence of multiple individuals within each urn when he had only stolen nine urns. On this point, the court agreed, but it still maintained that he had unlawfully taken the cremated remains of 11 people and could be convicted of the full 11 counts of removal of human remains.[210]

Taken together, the *Stephens* and *Reid* cases stand for the proposition that courts do not look kindly on the criminal disruption of the dead when those cases are actually prosecuted.[211] In many cases (such as in *Stephens*), an individual desecration charge may amount to only a misdemeanor.[212]

202. *Id.*
203. People v. Bailey, 360 P.2d 39 (Cal. 1961).
204. *Reid*, 201 Cal. Rptr. 3d at 302.
205. *Id.* (quoting People v. Jaska, 123 Cal. Rptr. 3d 760, 770 (Ct. App. 2011)).
206. *Bailey*, 360 P.2d at 39, 42.
207. *Reid*, 201 Cal. Rptr. 3d at 304.
208. *Id.* at 304–05 (quoting People v. Church, 264 Cal. Rptr. 49, 53 (Ct. App. 1989)).
209. *Id.* at 305.
210. *Id.*
211. *See id.*; State v. Stephens, 203 So. 3d 134, 141 (Ala. Crim. App. 2016).
212. *Stephens*, 203 So. 3d at 136–37.

However, both of these cases stand for the proposition that prosecutors should be thinking broadly in terms of how to make desecration-like misdemeanors work for them—either through enhancing the charges available for other crimes, e.g., by adding more than 10 additional years to Stephens's sentence,[213] or by consolidating multiple small charges to make one large one, e.g., the *Reid* case.[214] Simply, crimes against the dead should not be dismissed out of hand as not worth the time in criminal matters because the rancor that they often engender in judges and juries are likely worth the effort.

Unlike the *Stephens* and *Reid* cases, the matter of *State v. McLendon-Brown* does not involve unlawful acts upon the dead (although the case did involve some corpse mistreatment). Rather, this North Carolina case revolves around fraud by false pretenses.[215] In this case, the defendant was a funeral-home operator who had simply begun to take decedents' bodies, as well as the money from their families to provide funerals and cremations, and never followed through with the services.[216] In fact, by the time the police were called for the defendant's failure to deliver cremated remains to one family, at least three bodies were found unattended and unrefrigerated in her now-closed funeral home.[217] According to the court:

> [The] Defendant falsely represented . . . that she would provide cremation services for [the decedent's] body and deliver [the decedent's] remains to [the family] when, "in reality," Defendant intended to defraud [the family] "by simply taking [the money]," taking possession of [the decedent's] body, not providing any cremation services, and not returning [the] body, [the] remains, or the [money] to [the family].[218]

The jury in this matter seemed to have no trouble reaching a conviction on charges of fraud by false pretenses.[219] On appeal, the court found no error with this outcome, stating that the facts presented by the State in this matter

213. *See id.* at 136.

214. *Reid*, 201 Cal. Rptr. 3d at 305.

215. State v. McLendon-Brown, No. COA15-302, 2016 WL 409642, at *1 (N.C. Ct. App. Feb. 2, 2016).

216. *See id.* at *1–2.

217. *Id.* at *2.

218. *Id.* at *7.

219. *See id.* at *1.

led directly to a reasonable finding of false pretenses by the jury.[220] This case is significant because building a fraud case related to the provision (or lack thereof) of funeral services is often difficult, especially where such cases are based on contractual fraud.[221] However, these North Carolina prosecutors succeeded where others have failed, and this case is worthy of close examination to assist in succeeding on analogous allegations in the future.[222]

D. *Perpetual-Care and Merchandise Issues*

One area of death-related wrongdoing that is often hard to identify involves acts violative of the perpetual-care (or endowed-care) and merchandise-fund laws. Because this area of the law is often regulated by state governments, it is unusual for the party with standing to bring an action under these laws as a private person. However, because these special trusting laws help ensure general consumer protection and maintenance of cemetery property in perpetuity—rather than inuring to the benefit of single consumers—governments often have greater reach in bringing regulatory or *parens patriae* actions against cemeteries or banks that have violated these special trusting laws.[223]

The litigation in the matter of *Kagan v. Waldheim Cemetery Co.* centered around provisions of the Illinois Cemetery Care Act (Care Act),[224] which regulates the handling of cemetery-care funds.[225] The basic notion of Care Act cemeteries is that they are specially licensed as endowed or perpetual-care cemeteries (which can be a selling point for consumers), but in order to be so licensed under the law, they must establish a trust fund to hold a portion of the sales price of cemetery spaces to be used for the permanent care and upkeep of the cemetery.[226] Illinois law allows for cemeteries to operate as their own Care Act trustees—but only up to a point.

220. *Id.* at *9.

221. *Id.*

222. *Compare id.* (noting the evidence was sufficient to establish the defendant made misrepresentations), *with* Johnson v. State, 513 S.W.3d 190, 201 (Tex. App. 2016) (noting the evidence was insufficient to establish the defendant's prior convictions), *rev'd*, 560 S.W.3d 224 (Tex. Crim. App. 2018).

223. *See, e.g.*, Kagan v. Waldheim Cemetery Co., 53 N.E.3d 259 (Ill. App. Ct. 2016).

224. 760 ILL. COMP. STAT. ANN. 100/1 (West 2016).

225. *Kagan*, 53 N.E.3d at 263 (citing Union Cemetery Ass'n of City of Lincoln v. Cooper, 110 N.E.2d 239, 244 (Ill. 1953)).

226. *Id.* (citing First of Am. Bank, Rockford, N.A. v. Netsch, 651 N.E.2d 1105, 1111 (Ill. 1995)).

Once the trust exceeds $500,000, the cemetery that was acting as its own trustee must contract with an independent trustee for any overages.[227]

In 2000, when Rosemont Cemetery's care funds exceeded $500,000, the cemetery's vice president entered into such a trust agreement with LaSalle Bank.[228] In 2005, Rosemont began to experience troubles with mismanagement of its trust fund when it began making transfers out of the trust account, resulting in the depletion of the trust principal by 2009.[229] Because of the fund's depletion, the cemetery began to appear in a state of disrepair.[230] Further compounding its problems, Rosemont neglected its legal obligations to provide annual accountings of its trust accounts to the Illinois Comptroller.[231] All of the reporting failures and fund depletions came to a head in 2009, when the Comptroller served a notice of audit and Rosemont admitted to its violations of the law.[232]

Because of Rosemont's mismanagement, it could not continue to maintain its cemeteries, and in 2011, Rosemont sold its cemetery properties to Waldheim Cemetery Co. (Waldheim) for $10.[233] After replenishing the trust funds that Rosemont had unlawfully withdrawn, Waldheim, through its subsidiary, Zion, notified the holders of perpetual-care contracts that their agreements for perpetual care with Rosemont (and the subsequent purchasers) were no longer valid.[234] Waldheim and several consumers then filed suits against each other and the bank that originally authorized the withdrawals.[235] These suits were dismissed by the district court.[236]

In June 2011, two consumers filed class action suits against the corporate entities, seeking redress for themselves and others who purchased perpetual-care services from Rosemont.[237] The consumer complaints alleged "conversion, common law breach of fiduciary duty, violations of the Illinois Cemetery Oversight Act and the Care Act and violations of the Consumer

227. *Id.*
228. *Id.*
229. *Id.* at 264.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* at 264–65.
236. *Id.*
237. *Id.*

Fraud Act."[238] Zion also attempted to recoup some of its losses around the same time by bringing suit against LaSalle Bank, alleging claims that the bank breached the trust agreement, violated the Care Act, and illegally withheld funds.[239]

On appeal, the issue before the court was whether the bank owed a fiduciary duty to the consumers to disallow the trust-fund withdrawals.[240] When answering this question, the court found the contractual relationship between the consumers and Rosemont requiring Rosemont to act as a fiduciary did not create a relationship between the consumers and the bank.[241] The consumers argued the Care Act created a fiduciary relationship between them and the bank.[242] The court rejected this argument, stating the trust agreement between the bank and Rosemont was acceptable under the Care Act but did not establish any beneficiary or fiduciary relationship in favor of the consumers.[243]

This outcome is particularly surprising because it is contrary to the purposes for the establishment of these funds. Consumers pay into these funds, and their sole purpose is for the consumers' benefit—not for the benefit of a cemetery or bank.[244] In this matter, the consumers, suing the bank as a class, were effectively acting as parens patriae for all such consumers.[245] This use of private plaintiffs as private attorneys general is not unusual[246] and should have been permitted to proceed to fulfill the purposes for which the trust was created.

This case raised another issue of whether the Care Act created a right

238. *Id.* at 264.

239. *Id.* at 265.

240. *Id.* at 265–66.

241. *Id.* at 267.

242. *Id.*

243. *Id.*

244. Barry D. Fraser, *Cemetery Board*, CAL. REG. L. REP., Winter 1994, at 37, 39 (noting the consumer-protection nature of perpetual-care funds).

245. *Parens Patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *parens patriae* as "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit").

246. *See, e.g.*, Ann K. Wooster, Annotation, *Private Attorney General Doctrine—State Cases*, 106 A.L.R.5th 523 (2003) (discussing the application of the private attorney general doctrine in the jurisprudence).

for private parties to sue the bank for violations of the Act.[247] In this regard, although the case did not so state, it seems the bank was liable for violations of the Care Act.[248] Waldheim and the consumers believed shoehorning themselves into a claim against the bank for violations of the Care Act would allow them to recover for their losses.[249] The court rejected this argument as well and found that the Care Act authorized the regulatory agency to revoke a license for violations of the Act but did not give private parties a right of action.[250] The regulator concluded it had no cause of action against the bank but that Waldheim might have.[251] The court let the consumers' and Waldheim's cases survive for their claims of violations of the Consumer Fraud Act and remanded the matter for further consideration.[252]

Again, this limiting role of the banks as interpreted by the court is disappointing. By way of comparison, Louisiana law authorizes regulators to target anyone who violates the cemetery trusting requirements[253]—a mechanism that can require all parties in the chain of handling such funds to answer for their replenishment should they permit unauthorized activities, such as those seen in this case.

In a recent merchandise case, *Roman Catholic Archdiocese of Newark v. Christie*, the Catholic church challenged the constitutionality of a 2014 New Jersey law that essentially prohibited private religious cemeteries from selling cemetery monuments.[254] In their complaint, the plaintiffs challenged the constitutionality of the law, arguing that it violated the Due Process, Equal Protection, Contracts, and Privileges and Immunities Clauses of the Constitution.[255]

The Archdiocese operated 11 nonprofit cemeteries in New Jersey that were private and reserved for the interment of those of the Catholic faith and their families. [256] Under the "inscription-rights program," developed in

247. *See Kagan*, 53 N.E.3d at 268.
248. *See id.*
249. *See id.*
250. *Id.* at 269.
251. *Id.*
252. *Id.* at 275.
253. *See* LA. STAT. ANN. § 8:451 (2018).
254. Roman Catholic Archdiocese of Newark v. Christie, No. 15-5647 (MAS) (LHG), 2016 WL 1718676, at *2 (D.N.J. Apr. 29, 2016).
255. *Id.* at *1.
256. *Id.*

2006, the Archdiocese offers monuments to its members.[257] If the members opt for an Archdiocesan-provided monument, the Archdiocese maintains ownership of the monuments and provides for installation and perpetual maintenance of the monuments.[258] This program ran from 2006 to 2013 and was only available for private family mausoleums belonging to the Archdiocese.[259] However, in 2013, the program was expanded to other types of monuments, including headstones.[260] This expansion caused the Monument Builders Association of New Jersey to file suit against the Archdiocese for unfair competition.[261] At the district court, the judge found nothing illegal or improper regarding the inscription-rights program.[262]

On appeal, the issue was whether a ban on a private religious entity's ability to sell monuments was constitutional.[263] The challenged law:

> [P]rohibits private religious cemeteries from:
>
> (1) "ownership, manufacture, installation, sale, creation, inscription, provision[,] or conveyance, in any form, of memorials";
>
> (2) "ownership, manufacture, installation, sale, creation, provision[,] or conveyance, in any form, of vaults, including vaults installed in a grave before or after the sale and including vaults joined with each other in the ground"; and
>
> (3) "ownership, manufacture, installation, sale, creation, provision[,] or conveyance, in any form, of a mausoleum intended for private use, which shall not include a mausoleum built for use by or sale to the general public membership of a religious organization."[264]

In order for an individual to succeed on a Due Process Clause claim, the individual must show that the challenged law either "(1) has an illegitimate governmental purpose; or (2) there is no rational relationship between the [law's] legitimate purpose and the means chosen by the

257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *See id.* at *2–3.
264. *Id.* at *2 (alteration in original) (citation omitted).

[government] to accomplish that purpose."[265] The analysis for the plaintiffs' Equal Protection Clause claim is essentially the same as the one for the Due Process Clause because the plaintiffs "do not allege that they are in a suspect class or that a fundamental right is involved."[266] Thus, for both claims, the court analyzed whether the law rationally furthered any legitimate state objective.[267]

The court relied heavily on the recent Louisiana case, *St. Joseph Abbey v. Castille*, which involved government regulation of religious casket makers and provides an example of a case in which the rational basis test applied to show that there are times when the government's objectives are not rational or legitimate.[268] In *St. Joseph Abbey*, the court applied a rational basis level of review to examine a state government's interest in requiring a license to sell caskets, which the federal Fifth Circuit subsequently rejected as being irrational.[269] The *Roman Catholic Archdiocese of Newark* court, relying on *St. Joseph Abbey*, observed that, although all legislation is presumed constitutional, a party can rebut that presumption by showing that the law "is arbitrary and unreasonable, having no substantial relationship to public health, safety, morals or general welfare."[270] The court, relying on *St. Joseph Abbey* several times throughout the opinion, implicitly recognized that there was no valid public purpose for the restriction of Catholic churches selling cemetery monuments.[271] However, the court did not strike down the law on this basis altogether.[272]

Although the Contracts Clause states that "[n]o State shall . . . pass any . . . law impairing the obligation of contracts,"[273] the court here observed that minor impairments of contracts are not sufficient to run afoul of the Constitution. Rather, only substantial impairments of contracts qualify as violations of a party's constitutional rights.[274] If a court finds that legislation causes a substantial impairment, then it must be asked "whether the law at

265. *Id.* (citing Sammon v. N.J. Bd. of Med. Exam'rs, 66 F.3d 639, 645 (3d Cir. 1995)).
266. *Id.* (citing Maimed v. Thornburg, 621 F.2d 565, 569 (3d Cir. 1980)).
267. *Id.*
268. *Id.* at *4 (citing St. Joseph Abbey v. Castille, 712 F.3d 215, 223 (5th Cir. 2013)).
269. *Id.* (citing *St. Joseph Abbey*, 712 F.3d at 223).
270. *Id.* (quoting Santos v. City of Houston, 852 F. Supp. 601, 607 (S.D. Tex. 1994)).
271. *Id.* at *3.
272. *Id.* at *4 (citing *St. Joseph Abbey*, 712 F.3d at 223).
273. U.S. CONST. art. I, § 10, cl. l.
274. *Roman Catholic Archdiocese of Newark*, 2016 WL 1718676, at *4 (citing Gen. Motors Corp. v. Romein, 503 U.S. 181, 186 (1992)).

issue has a legitimate and important public purpose and whether the adjustment of the rights of the parties to the contractual relationship was reasonable and appropriate in light of that purpose."[275] In *Roman Catholic Archdiocese of Newark*, the plaintiffs argued the challenged law "violate[d] the Contracts Clause because it [made] it unlawful for the Archdiocese to honor its contractual obligations with respect to the six hundred inscription-rights contracts that predate the Amendment."[276] The defendants argued contrarily that the law was not to be applied to pre-existing inscription-rights contracts but rather was to only operate prospectively, and the court agreed.[277] Nevertheless, the court believed this portion of the case had not matured and declined to rule definitively on the Archdiocese's motion for summary judgment regarding due process and equal protection.[278] Following further development of the record, on a reurged motion for summary judgment in 2018, the court ruled that the law change, if applied only prospectively, did not violate the Archdiocese's due process or equal protection rights.[279]

Thus, contrary to the *St. Joseph's Abbey* decision, not every attempted regulation of religious entities' forays into the death-care industry will be rebuffed by the courts. The significance of this case is likely more a commentary on the *St. Joseph's Abbey* case than on the actual dispute itself. Essentially, the fact that New Jersey was able to meet the minimal rational basis burden to maintain the constitutionality of its challenged regulations speaks volumes to the draconian and superfluous nature of Louisiana's law that was challenged and stricken in *St. Joseph's Abbey*.

E. *Taxes and Cemeteries*

Cemeteries occupy an odd legal location in the property-law scheme. As noted above, even private cemeteries cannot simply be gated to restrict public access. The same can be said of cemeteries in the property-tax world. Often cemeteries—or at least the portions of them in which burials occur—are exempt from ad valorem taxation.[280] Nonetheless, as the cases here

275. Transp. Workers Union of Am., Local 290 *ex rel.* Fabio v. Se. Pa. Transp. Auth., 145 F.3d 619, 621 (3d Cir. 1998).

276. *Roman Catholic Archdiocese of Newark*, 2016 WL 1718676, at *4.

277. *Id.*

278. *Id.* at *5.

279. Roman Catholic Archdiocese of Newark v. Christie, No. 15-5647 (MAS) (LHG), 2018 WL 1041036, at *12 (D.N.J. Feb. 23, 2018).

280. F. P. Renner, Annotation, *Scope and Application of Exemption of Cemeteries*

demonstrate, disagreements over the extent of these exemptions are common.

According to the court in the matter of *Mt. Lebanon Cemetery Co. v. Board of Property Assessment*, at some point in 2013, the Board of Property Assessment, Appeals, and Review (BPAAR) assessed values of two parcels of land owned by Mt. Lebanon Cemetery Co..[281] The values for tax years 2003–2012 were found to be $1,450,900 for Parcel 141-C-100 and $398,500 for Parcel 141-C-100-01.[282] The values for tax years 2013–2015 were found to be $2,238,907 for Parcel 141-C-100 and $70,500 for Parcel 141-C-100-01.[283] Following BPAAR's assessment, the cemetery appealed the easement to the Allegheny County Board of Viewers (ACBV).[284] Upon conclusion of the hearing, ACBV issued its report, assessing Parcel 141-C-100 at $500,000 for tax years 2003–2013 and Parcel 141-C-100-01 at $398,500 for tax years 2003–2012 and $70,500 for 2013.[285] Following ACBV's determination, the tax beneficiary—the local school district—filed objections to ACBV's report, asserting that the ACBV erred when it failed to set forth its rationale for reducing the assessed property value in its report.[286] On behalf of the school district, a certified appraiser used the income approach to valuation and opined that cemetery property should be taxed as leased facilities with tenants paying rent.[287] This analogy seems to be a poor fit. While a family may not have full ownership of a cemetery space, it is also not a lessee.

On behalf of the cemetery, a certified public accountant and the tax manager for the cemetery opined that the cost approach and the sales-comparison approach to property valuation could not reasonably be applied to cemeteries because there is no comparable type of property.[288] He further opined, "[O]nly the business line review can be employed for valuation purposes. . . . [Because] when the land is sold, it is gone and the land no longer belongs to the cemetery but to the decedent enshrined in that land."[289]

from Taxation, 168 A.L.R. 283 Art. III(a) (1947).

281. Mt. Lebanon Cemetery Co. v. Bd. of Prop. Assessment, No. 2245 C.D.2014, 2016 WL 379917, at *1 (Pa. Commw. Ct. Jan. 28, 2016).

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at *2.

288. *Id.* at *1.

289. *Id.*

After examining the positions of the cemetery and the school district, the trial court rejected them both.[290]

On appeal, the issue was whether the trial court erred by making credibility determinations that were within the sole and exclusive purview of the ACBV.[291] As stated in the General County Assessment Law Act,[292] as well as in *Koppel Steel Corp. v. Board of Assessment Appeals of Beaver County*,[293] "[A]ll tax assessment appeals . . . must be assigned to a board of viewers."[294] Only after such a hearing may a court review taxing decisions.[295] The main duty of the reviewing court is to determine the current market value of the subject property based upon a review of the testimony and opinions of the experts.[296]

On review, the appellate court agreed with the trial court's holding and found that the failure by the complaining property owner (the cemetery) to present conflicting evidence on fair market value to that presented by the taxing authority meant that the taxing BPAAR's values could stand.[297] Additionally, with regard to the cemetery's approach, the cemetery did not consider the value of openings and closings for unused cemetery property even though these costs would surely be an increased value to prospective purchasers.[298] However, such an observation by the court clearly confuses the legal issues presented for review. The current challenge relates to property tax and not services taxation, which is the classification under which openings and closings would be taxed.[299] Another thing the cemetery failed to consider was that even once a body is placed in a niche in a mausoleum, there are still other places to be sold, thus altering the property value.[300]

290. *See id.*

291. *Id.* at *4.

292. 72 PA. STAT. AND CONS. STAT. ANN. § 5020-518.1 (West 2019).

293. Koppel Steel Corp. v. Bd. of Assessment Appeals of Beaver Cty., 849 A.2d 303 (Pa. Commw. Ct. 2004).

294. *Mt. Lebanon Cemetery Co.*, 2016 WL 379917, at *4 (citing *Koppel Steel Corp.*, 849 A.2d at 307).

295. *See id.*

296. *Id.* (citing Gilmour Props. v. Bd. of Assessment Appeals of Somerset Cty., 873 A.2d 64, 66 n.3 (Pa. Commw. Ct. 2005)).

297. *Id.* at *5.

298. *Id.* at *3.

299. *Id.* at *1.

300. *Id.* at *3.

What can be taken from this case is the court's conclusion that cemeteries are unique properties, but that uniqueness does not exempt them from all taxation.[301] The court affirmed the trial court's decision in reasoning that the cemetery failed to overcome its burden to offer competent evidence to rebut BPAAR's assessment, and as a result, the trial court acted within its authority to make credibility determinations regarding evidence presented before ACBV.[302]

In *West Beit Olam Cemetery Corp. v. Board of Assessors of Wayland*, the Jewish Cemetery Association of Massachusetts, Inc. (JCAM) purchased property in Wayland, Massachusetts, in 1998 with the intention of creating the Beit Olam Cemetery; they also secured a right of first refusal on the adjoining parcel (Lot 1A).[303] Lot 1A was adjacent to the existing cemetery's border and contained the residence.[304] Following this acquisition by several years, JCAM made some additional contiguous property acquisitions, including land from Janette Howland.[305] With regard to Howland's property, JCAM agreed to pay her and effectively hire her to maintain the cemetery by way of a Cemetery Caretaker Agreement.[306] The agreement gave Howland and her family the right to live for seven years rent free in the Lot 1A house, which was referred to "as consideration for the sale of the [Howland] Property."[307] Howland and her family moved onto the property and began acting as the cemetery's caretakers in 2010.[308]

JCAM applied for a tax exemption in 2012 for Lot 1A, arguing that the land was dedicated to burial of dead and buildings owned and used exclusively in administration of cemeteries, tombs, and rights of burial and thus was exempt from taxation pursuant to law.[309] JCAM's request was denied by the assessor, leading to an appeal to the Appellate Tax Board (Board).[310] The Board found that a portion of Lot 1A was exempt because it had been specifically reserved for cemetery purposes throughout the

301. *See id.* at *3–4.
302. *Id.* at *5.
303. W. Beit Olam Cemetery Corp. v. Bd. of Assessors of Wayland, 53 N.E.3d 1277, 1279 (Mass. App. Ct. July 7, 2016).
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 1280.
308. *Id.*
309. *Id.* at 1279 n.2.
310. *Id.*

duration of the Cemetery Caretaker Agreement, but the rest of the property was taxable.[311] From the Board's decision, West Beit Olam appealed to the Court of Appeals, arguing that all of Lot 1A was exempt.[312]

On appeal, the issue was whether all of Lot 1A was considered to be "dedicated to the burial of the dead" during the 2012 tax year.[313] Despite the reality that Lot 1A had undoubtedly been purchased for future use as a cemetery, because there had been no interments on Lot 1A in 2012 and because the property had been used by Howland for residential purposes,[314] the appellate court held that the Board properly denied the Lot 1A tax exemption.[315]

The result in this case is unsurprising. Consistent with other decisions, land owned by a cemetery—but not currently used for the interment of the dead—is not exempt from taxation.

F. *Human-Remains Issues*

Some of the most heartrending cases revolving around the dead are those related to the mortal remains of the deceased in general. Similar to a recent Louisiana case,[316] the Washington case of *Braun v. Selig* highlights the heightened emotional tension of all cases related to the dead.[317]

In *Braun*, Kyril Faenov took his own life in 2012 after a battle with mental illness and repeated psychiatric treatment.[318] He left behind his wife, Lauren Selig, as well as his two young children.[319] Prior to his death, Faenov never made known any of his desires as to the disposition of his remains.[320] This led his next of kin, Selig, to arrange for him to be buried at the Hills of Eternity Cemetery in Seattle.[321] Martin Selig, Lauren's father, paid $13,200

311. *Id.* at 1281.
312. *Id.* at 1279.
313. *Id.* at 1281.
314. *Id.* at 1281–82.
315. *Id.* at 1279.
316. *See, e.g.*, Sonnier v. Catholic Found. of the Diocese of Lafayette, 261 So. 3d 965 (La. Ct. App. 2018).
317. *See, e.g.*, Braun v. Selig, 376 P.3d 447 (Wash. Ct. App. 2016).
318. *Id.* at 448.
319. *Id.*
320. *Id.*
321. *Id.*

to cover the costs of Faenov's burial.[322] In 2014, Faenov's mother, Marina Braun, filed suit seeking court permission to allow her to exhume her son's remains and reinter them in Portland, Oregon.[323] Following a hearing on the matter, the superior court denied Braun's petition.[324]

On appeal, Braun argued that statutory law creates a level playing field regarding decisions as to disinterment of human remains that would effectively allow parents' wishes to supersede the directives of a spouse depending on a court's view of the equities.[325] Under Washington's General Cemetery Act:

> [T]he right to control the disposition of human remains, in the absence of evidence of a decedent's express wishes . . . "vests in" an "order named" that places the decedent's surviving spouse at a higher level of statutory kinship priority than the decedent's surviving parent. When a private request for exhumation of human remains is made, a corollary statute provides that the same kinship hierarchy governs the request.[326]

The court explained these requirements stating:

> [I]f the decedent has not given directions or made prearrangements with a funeral establishment, the right to control disposition of the remains vests . . . in the following order: (a) the surviving spouse, (b) the surviving adult children of the decedent, (c) the surviving parents of the decedent, (d) the surviving siblings of the decedent, and (e) [the] person acting as a representative of the decedent under the signed authorization of the decedent.[327]

Taking into consideration prior case law, in addition to statutory law, the court here reasoned that because the provisions place Faenov's surviving spouse at a higher level of priority as next of kin than Faenov's mother, the

322. *Id.*
323. *Id.*
324. *Id.*
325. *See id.*
326. *Id.* at 447 (citing WASH. REV. CODE ANN. §§ 68.50.160(3), 68.50.200 (West 2019)).
327. *Id.* at 456 (quoting Whitney v. Cervantes, 328 P.3d 957, 960 (Wash. Ct. App. 2014)).

lower court was correct in dismissing Braun's petition for exhumation of Faenov's remains.[328] Overall, the court held, in the absence of established testamentary intent by the decedent, the decedent's mother did not possess the necessary authority to request a court order authorizing the exhumation of her son's remains over an objection of his surviving spouse.[329]

The result in this case is also unsurprising and is consistent with numerous other cases.[330] Simply, courts disfavor disinterment, and unless a client meets the specific legal classification requirements to authorize exhumation, such suits are, with near certainty, to be a waste of the client's time and money.

III. DISCUSSION AND CONCLUSIONS

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

> The cases reviewed herein clearly indicate that cemeteries and human remains, from a legal perspective, cannot be pigeonholed as contracts or property cases (or both) in any traditional sense. Once the grief component is added to any set of straightforward laws and facts, the dynamics change. Cemetery and human remains law can best be seen as a form of quasi-property law. Many of the terms used and concepts referred to are property concepts. However, the unique nature of the subject—i.e., the dead and the special treatment of the dead in Western culture—means that the judicial and legislative systems view the traditional property concepts through the lens of grief and alter some of those traditional property law concepts to fit this special niche of the law.[331]

Not much has changed in the way of conclusory statements since those were printed in 2013. The law of the dead continues to defy classification under any broad legal regime, and with the rise in the number of problems

328. *Id.*

329. *Id.* at 456–57.

330. T. SCOTT GILLIGAN & THOMAS F.H. STUEVE, MORTUARY LAW 49–53 (10th rev. ed. 2008) (noting disinterment is generally disfavored); Seidemann, *supra* note 64, at 55–62 (citing cases nationwide that also say disinterment is disfavored); *see also* Unger v. Berger, 76 A.3d 510, 515 (Md. Ct. Spec. App. 2013) (noting the law's disfavor of disinterment); *In re* Estate of Myers, No. C-940828, 1995 WL 763554, at *2 (Ohio Ct. App. Dec. 29, 1995) (noting the same general disfavor).

331. Seidemann, *supra* note 64, at 69–70.

related to the dead noted in the introduction, such cases will only continue to proliferate. Reviews such as this are necessary to aid in the understanding of the disparate threads of the law of the dead to ensure that practitioners can find their way in the dark while navigating these complex and sensitive matters.