OA 12-3-85

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IN THE SUPREME COURT OF FLORIDA
CASE NUMBER 67,755

STATE OF FLORIDA, et al.,

Appellants,

-vs-

WADE POWELL, et ux., et al.,

Appellees.

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ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT,

MARION COUNTY, FLORIDA,

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# ANSWER BRIEF OF APPELLEE'S ERWIN WHITE

# AND SUSAN WHITE

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## PRELIMINARY STATEMENT

The following abbreviations are used in this brief:

R.....Record on Appeal

App.....Appendix to Brief

References in this brief to "Appellees" or "Plaintiffs" will refer only to Erwin White and Susan White. Appellants William H. Shutze, M.D., Thomas M. Techman, M.D., and Keith Gauger will be referred to as "Appellants" or as "Defendants". Intervenors will be referred to as "Intervenors" or as "Eye Banks", "State of Florida", or "Dade County". Fla. Stat. Section 732.9185 will be referred by number or as the Corneal Removal Law. Discussions of Due Process and Equal Protection are intended to include those rights under both the United States and Florida Constitutions since Appellees concur with Appellants that the standards and principles are the same under both. References to the Record on Appeal will be designated by "(R. ____)".

## STATEMENT OF THE CASE

Appellees accept as essentially correct the proceedings in the lower court as recited by Appellants Shutze, Techman and Gauger entitled in their brief "Proceedings and Disposition in Court Below". However, Appellees note that the Order entered by the Trial Court on August 22, 1985 (R. 760-768) made a finding that the autopsy Statute, Section 406.11, Fla. Stat., is constitutional on its face and was constitutionaly applied in these cases. The same Order denied Appellants' Motion for Summary Judgment on COUNT III, the declaratory action on the constitutionality of said Statute. That apparent inconsistency has been dealt with by the Trial Court in proceedings subsequent to the filing of the NOTICE OF APPEAL filed in this Appeal and the only portion of the above-mentioned Order of the Trial Court being considered in this Appeal is the holding that the Corneal Removal Law, Fla. Stat. Section 732.9185, is facially unconstitutional.

## STATEMENT OF FACTS

Appellees accept as essentially correct the Statement of Facts set forth by Appellants Shutze, Techman and Gauger in that portion of their Brief entitled "Statement of Facts" but supplement those facts as follows:

Erwin White's recollection of the conversation he had with Defendant Keith Gauger at the Munroe Regional Medical Center shortly after his son's death is different from that set forth in the initial Brief of Defendants. During that conversation, Erwin White inquired of Defendant Gauger whether or not there was any indication of any foul play or any struggle and was told by Defendant Gauger that there was no such indication and that the death, according to the Police Report and the Rescue Squad Report was just a simple accident. (R. 953.)

After learning this, Erwin White advised Defendant Gauger that he did not want an autopsy performed on his son's body but was then advised by Defendant Gauger that an autopsy was required under State Law. (R. 952 and 956.)

Defendant Gauger is the designee of Defendant Shutze under Sub-Section (1) of the Corneal Removal Law and has had no training in ophthalmologic techniques.

Notwithstanding that Defendants Shutze and Techman have testified that Assistant State Attorney James Phillips requested prior to James White's death that autopsies be performed on all victims of apparent drownings, Assistant State Attorney Phillips denies that he ever made any such

request or directed either Defendant to perform such autopsies. (R. 992-993.) Further, the decision to perform a full autopsy was not made by Defendant Techman until he first observed the body of James E. White on June 16, 1983, at which time the cornea had already been removed.

In order to be suitable for transplant, corneal tissue must be removed within a matter of hours.

Of the two corneae removed from the body of James E. White, one was used for research purposes and the other was shipped to the State of New York and implanted in a patient in that State. (R. 766.)

Appellees take exception to the STATEMENT OF THE CASE AND FACTS included in the initial Brief of the Eye Banks in that it is argumentative and contains conclusions of fact and conclusions of law which have not yet been decided by any Court. For example, no Court has construed the Corneal Removal Law to require that there merely be "persons in need of tissue" as opposed to a specific patient in need of corneal tissue and that the decedent can provide a cornea suitable for that transplant. A plain reading of the Statute seems to require the latter construction but no case or other source gives the construction gratuitously assumed by the Eye Banks.

## SUMMARY OF ARGUMENT

The Florida Cornea Removal Law, Fla. Stat. Section 732.9185, is unconstitutional on its face because it violates both procedural and substantive due process. It is clear that Florida Law recognizes that the next of kin of a decedent has the right to possess, protect and dispose of the remains. This right has been identified as a property right and it cannot be taken away without both substantive and procedural due process. Further, that right is a personal and fundamental one deeply rooted in our society's tradition and basic understandings developed over the centuries. This right or entitlement cannot be taken away without due process, either procedural or substantive. The Corneal Removal Law deprives Plaintiffs of this right as to their son arbitrarily and without any safeguards whatsoever for the protection of that right and, therefore, in violation of both procedural and substantive due process.

Further, Plaintiffs right to privacy is violated by the Statute since their personal, basic and fundamental right to possess, protect and dispose of the remains of their son is taken away from them without any meaningful opportunity to object and without their consent and in contravention of their wishes and desires. The State has no compelling interest in the non-consentual removal of corneae from deceased persons in order to provide tissue for

transplant to another person whose blindness may be cured thereby.

The Statute also denies Plaintiffs equal protection of the Law in that it creates an involuntary classification into which Plaintiffs fell by reason of no action of their own. The classification is not rationally related to a legitimate governmental objective or purpose. If the State has a compelling interest in providing suitable corneae for transplant, then restricting the removal of corneae without consent of the next of kin to those circumstances where the decedent is the subject of an autopsy impedes rather than promotes that objective since it restricts the source of potentially healthy corneal tissue.

Appellees' have fundamental property interests and rights in the remains of their deceased minor child. Those rights are constitutionally protected from abridgment by the Corneal Removal Statute.

The Trial Court Order appealed is internally consistent.

Therefore, the corneal removal Statute, Fla. Stat. Section 732.9185, is facially unconstitutional.

## ARGUMENT

### I. SECTION 732.9185 VIOLATES FLORIDA AND FEDERAL DUE PROCESS.

#### A. Procedural Due Process

It is well settled that, "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Board of Regents, v. Roth, 40 U.S. 564, 570, 92 S.Ct. 2701, 2705, 33 L. Ed. 2d 548 (1972). If the interest is protected, it matters not whether it is characterized as a "property interest" or a "liberty interest". It is sufficient if the interest or entitlement is "....grounded in State law..." Logan v. Zimmerman Brush Co., 455 U.S. 420, 431, 102 S.Ct. 1148, 1155 (1982), or "....so rooted in the traditions and conscience of our people as to be ranked fundamental." Scholl v. Martin, N.Y., 104 S.Ct. 2403, 2412 (1984), citing Snyder v. Massachusetts, 291 U.S. 97, 105 54 S.Ct. 330, 332 (1934) and Leland v. Oregon, 343 U.S. 790, 798, 72 S.Ct. 1002, 1007 (1952).

The Supreme Court, "....has not attempted to define with exactness the liberty...guaranteed [by the

Fourteenth Amendment], ..." Board of Regents of State College v. Roth, Supra, 2706, but it has succinctly stated:

> In a Constitution for a free people,there can be no doubt that the meaning of "liberty" must be broad indeed. (Id. 2707).

and

> "Liberty" and "property" are broad and majestic terms. They are among the "[g]reat" [constitutional] concepts... purposely left to gather meaning from experience....[They] relate to the whole domain of social and economic fact, and the Statesmen who founded this Nation knew too well that only a stagnant society remains unchanged. (Id., 2706).

Likewise, "...the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.' " Logan v. Zimmerman Brush Co., Supra, 1155, citing Board of Regents v. Roth, Supra, and others.

Appellees do indeed have an interest or entitlement with respect to their son's body. In the case of Dunahoo v. Bess, 200 So. 541 (Fl. 1941), this Court said:

> For the decision of this case we feel called upon to consider two questions. First, does the surviving spouse have a property right in the corpse...sufficient to

> predicate an action for a trespass or wrong committed thereon? Second, will the law of Florida sustain an action by the surviving spouse for mental anguish unconnected with physical injury under the stated facts?
> [1] The first question is easily answered in the affirmative. The right of the surviving spouse to have, protect and dispose of the remains...is a right recognized by law. Id., 542.

Later in that same opinion, the Court noted, "we have held there is a property right in the corpse...."

If the controlling factor in determining whether or not the right, interest or entitlement claimed by appellees is entitled to the due process protection of the Fourteenth Amendment is whether or not it is characterized as "property" by State Law, then the language in Dunahoo seems to be conclusive. The right has continued to be recognized by the Courts of this State. Kirksey v. Jernigan, 45 So.2d. 188 (Fl. 1950), Kimple v. Riedel, 133 So.2d 437 (2d DCA Fla. 1961), Rupp v. Jackson, 238 So.2d 86 (Fla. 1970).

Appellants urge upon this Court that the right of the next of kin to possess, protect and dispose of the remains of a decedent has somehow been changed by this Court and that the characterization of that right as property is no longer valid. In support of this contention, they cite Kirksey v. Jernigan, supra, and Rupp v. Jackson, supra.

However, each of those decisions clearly recognizes the malicious interference with the right identified in Dunahoo as actionable. Nowhere in either Kirksey or Rupp is there any indication that the characterization of the right is different from that contained in Dunahoo.

Further, the issue decided in Kirksey was whether or not an action founded solely in tort would support damages for mental pain and anguish and punitive damages. Kirksey v. Jernigan, supra, 189. Rather than recede from or alter any holding in Dunahoo, the Court specifically acknowledged and reaffirmed Dunahoo's holding:

> This Court is committed to the rule, and we reaffirm it here, that there can be no recovery for mental pain and anguish unconnected with physical injury in an action arising out of the negligent breach of a Contract whereby simple negligence is involved. Id., citing Dunahoo v. Bess, supra.

The Plaintiff in that case filed her action in three Counts. The first Count was based on the wrongful withholding of the body, the second on the same ground and, further, the unauthorized embalming and the holding of the body as security for the payment of the embalming fee and the third for charging an excessive embalming fee and holding the body as security for payment of same. Each of these actions sounds in intentional tort and the Court,

distinguishing the cause of action in Dunahoo and noting the rule announced therein that an action founded in contract would not support a claim for damages for mental pain and anguish, refused,

> "...to extend this rule to cases founded purely in tort, where the wrongful act is such as to reasonably imply malice, or where, from the entire want of care or attention to duty, or great indifference to the persons, property or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages. Id.

No where in that opinion is there a modification of the holding in Dunahoo but there is specific acknowledgement of that holding and of the right identified therein.

Appellants reliance upon the decision in Jackson v. Rupp, 228 So.2d 916 (4th DCA Fla. 1969) and the subsequent adoption of that decision by this Court in Rupp v. Jackson, 238 So.2d 86 (Fla. 1970) is similarly misplaced. The specific holding in that case was:

> [1] In an action for an unauthorized autopsy founded solely in tort in order for recovery to be effected for damages resulting from mental pain and anguish unconnected with the physical injury, the wrongful act must be such as to reasonably imply

> malice or such that from the entire want of care or attention to duty or great indifference to the person, property, or rights of others such malice would be imputed as would justify assessment of exemplary or punitive damages. Id., 918-919, citing Kimple v. Riedel, supra. [emphasis added.]

The requirement that an action must sound in tort and that the circumstances must be such that malice, either actual or implied, exists before damages for mental pain and anguish or punitive damages are recoverable does nothing to disturb the characterization of the right of the next of kin to possess, protect and dispose of their decedent as a property right. Neither Kimple, Kirksey, Rupp, or the following cases cited by Defendants do anything but reaffirm similar damages issues. McKinnon v. Pengree, 455 So.2d 1134 (Fla. DCA 1984); Sherer v. Rubin Memorial Chapel, Ltd., 44 So.2d 1176 (4th DCA Fla. 1984); Scheuer v. Wille, 385 So.2d 1076 (4th DCA Fla. 1980); Przybyszewski v. Metropolitan Dade County, 363 So.2d 388 (3rd DCA Fla. 1978); Brooks v. South Broward Hospital District, 325 So.2d 479 (4th DCA Fla. 1975).

Even if the property right identified in Dunahoo is not property in the traditional commercial sense, surely that right can fit within the definition of property necessary to a changing society as noted in Roth. It may be intangible but this is not fatal to its status as a

property right protected by the procedural due process of the Fourteenth Amendment. Logan v. Zimmerman Brush Co., supra, 2706.

Appellees rights, as the next of kin, to possess, protect and dispose of the remains of their son is entitled to Fourteenth Amendment due process protection as a "liberty" interest as well as a "property" interest. The term "liberty" described by the United States Supreme Court is clearly sufficient to include that right since it is one so deeply "...rooted in the traditions and conscience as to be ranked fundamental". Scholl v. Martin, New York, supra, 2412. It is only an advancement of medical science and technology that has caused this right to be threatened by state action.

The fact that the right has not been specifically identified by the Courts as fundamental and therefore protected by Fourteenth Amendment procedural due process is no compelling reason to deny that protection. There simply was no need for the inclusion of this right in the "majestic" term of "liberty", Board of Regents v. Roth, supra, 2706, until the medical technology to transplant organs and other tissues developed. Now, societal rules to protect the right must be formulated.

A guide as to what type of rights are basic, intimate, personal, fundamental and implicit in the concept

of ordered liberty and protected by various provisions of the Constitution has been provided by the United States Supreme Court: Moore v. City of Cleveland, 431 U.S. 494, 97 Supreme Court 1932, 52 L.Ed.2d 531 (1977), (Right of extended family to share household; Rowe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), (Woman's right to decide whether to have an abortion; Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), Freedom to marry of another race; Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), (Right to use contraceptives); Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed.2d 1655 (1942); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, (1925), (Parents' right to send children to private schools); Myer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), (Parents' right to have children instructed in a foreign language).

Griswold v. Connecticut, supra, is another example of societal rules having to be formulated in order to protect the right of a person to decide whether or not to conceive a child. Advancement in techniques of contraception and increased availability of contraceptive methods placed the issue of whether the state could determine who could receive such information and methods or whether that decision was more properly left to the

individual. The Court concluded that the individual was entitled to make that decision. In a free society no other result could have been reached.

Similarly, the issue in this case is whether or not the government or the next of kin, in a free society, is entitled to make the decision as to whether or not a part of the remains of a decedent is to be removed for transplant.

Further, it is clear from the mere existence of Section 732.9185 that the right of the next of kin to require consent before removal of the corneae is a right that existed prior to enactment of the Statute. The Statute recognizes the right. Since there was no specific statutory provision granting that right and no specific holding by any Florida or Federal Court, it is clear that the genesis of the right is the deeply rooted traditions, practice and custom of our society. It must, therefore, come within the broad definition of a "liberty interest" protected by Fourteenth Amendment procedural due process recited in Board of Regents v. Roth, supra, 2706.

It is clear from the above that Appellees, as the next of kin of their son, have a right, interest or entitlement protected by Fourteenth Amendment due process whether it is characterized as "property" or "liberty".

Determining whether or not a Statute is constitutional in light of the procedural due process

requirements of the Fourteenth Amendment is a two-step process. The first step is to determine whether or not a protected interest has been deprived and then to determine what process is due as to said interest. Logan v. Zimmerman Brush Co., supra, 1154. As the U.S. Court has said:

> To put it as plainly as possible the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement. Board of Regents v. Roth, supra, 1157.

and,

> If a clearer holding is needed, we provide it today. The point is straightforward: The due process clause provides that certain substantive rights - life, liberty, and property - cannot be deprived except pursuant to Constitutionally adequate procedures.

The Statutory scheme in Section 732.9185 recognizes the right of Appellees to object to the corneal removal and then takes the right away by not requiring any attempt by the Medical Examiner or any of his associates or employees to notify any person who has the right, of the intent to remove. In fact, it is designed specifically to defeat the

exercise of the right to object. It encourages silence by a State Officer when that Officer is directly confronted by those who have the right. It encourages the surreptitious taking of the corneae that occurred in both cases in this Appeal. In both instances the next of kin had face to face contact with the person authorizing the removal within the time frame after death critical to the suitability for transplant of corneal tissue. The only reason notice of intent to remove would not be given under those circumstances is an assumption that consent would be denied and an objection stated. This approaches a state of mind of taking in the face of an objection. This scheme does not even attempt to provide the minimal protection of giving the person who has a protected interest an "....opportunity to present his claim of entitlement...."Board of Regents v. Roth, supra. Appellees submit that, at the very least, a good faith effort to obtain consent and notify the next of kin of intent to remove corneae is required. Even a scheme which provided that the law would imply consent after reasonable attempts to give notice and obtain consent might be sufficient but to completely ignore the right is a violation of the Fourteenth Amendment procedural due process.

B. Substantive Due Process

In addition to the procedural safeguards as set forth above, the due process clause of the Fourteenth Amendment likewise protects substantive aspects of liberty against impermissable government restrictions. Harrah Independent School District v. Martin, 440 U.S. 194, 197, 99 S.Ct. 1062, 1063, 59 L.Ed.2d 248 (1979). A state, in the exercise of its police power for the general welfare, health or safety of the public has broad discretion. However, that power cannot be exercised arbitrarily or capriciously. City Commission of City of Ft. Pierce vs. State, ex rel Altenhoff, 143 So.2d 879 (2d DCA Fla. 1962); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972). The general rule is that legislation enacted pursuant to the police power must bear a "...reasonable relation to a permissable legislative objective...., Johns v. May, 402 So.2d 1166, 1169 (Fla. 1981), The standard of review when fundamental rights are transgressed is the strict scrutiny standard. Sotto v. Wainwright, 601 F.2d 184 (1979); Woods v. Holycross Hospital, 591 F.2d 1164 (5th Cir. 1979). Regulations limiting fundamental rights may be justified only if there is a compelling state interest. Roe v. Wade, supra 728; Zablocki v. Redhail, 434 U.S. 374, 388, 98 S.Ct. 673, 682, 54 L.Ed.2d 1618 (1978). The fundamental nature of the right asserted by Appellees herein exists

because of the intensely personal and intimate family relationship which existed between themselves and their son. While that relationship itself terminated upon the death of their son and their right to make certain inter vivos decisions affecting his moral and academic education, upbringing and well being became impossible, a new relationship, that of next of kin of a decedent with its own personal, substantive rights, arose. The significance and nature of these new rights have special meaning for the surviving parents of a minor child since the nature of the rights resulted from the intimate personal relationships giving rise to the fundamental rights already recognized and identified by the Courts. (Section A., supra.)

> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity and decisions to begin and maintain the affiliation, and exclusion of others in critical aspects of the relationship. Roberts v. United States Jaycees, 104 S.Ct. at 1350-1351.

Appellees are not asking this Court to extend the scope of substantive due process to mere sentiment and

recollection of their relationship with their son during his life although it is that sentiment and the personal closeness they had with their son that caused their emotional reaction to a removal of a part of his body without their consent or knowledge. It is their right to possess, protect and dispose of his remains as they see fit, a right which is theirs because they are his next of kin by virtue of his conception, gestation and birth that they ask this Court to preserve. It is this final aspect of their relationship with their son that they seek to protect from the State.

As the Court said in Moore v. City of East Cleveland, Ohio, supra, 1937-1938:

> Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and], solid recognition of the basic value that underlie our society...."

In their Brief, Defendants cautioned this Court against broadening the concept of substantive due process to include the rights asserted herein by Appellees because to do so would be to embark upon a course over unchartered terrain, the destination of which is unknown. Appellees submit that the Courts in a free society should be not only willing but anxious to expand the concept of fundamental liberty. Appellants contend that no person has the right to

prevent any part of the remains of a decedent from being removed by the State and disposed of as the State desires. Since that right is not "property" or "fundamental", there is no judicially created constitutional niche to place it in to protect it from transgression by the State. To perceive the Constitution as a vault in which is located, safe from State intervention, a series of small boxes into which the Courts place rights is to misapprehend that document. Rather, it embodies a large solid mass of protected rights some of which have been judicially identified and some which have not yet been recognized but which exist nonetheless. Some of these rights are chipped away from the solid mass by the chisel of the police power and the hammer of compelling State interest. That is a hammer that should be swung very selectively in a free society. Not only corneae but hearts, lungs, kidneys, and other organs can now be transplanted. If this Court accepts appellants' position, the legal precedent will be set to authorize the removal of these body parts without notice or consent. There will be no legal bar to such action because there would be no person with authority to stop it. This is most certainly a treacherous course upon which to embark since the destination is easily discernible by logical extension of such a principle.

The restoration of sight to persons who are blind is advanced by appellants as a compelling state interest

justifying the taking of cornea from decedents without consent or notice. Certain statistics regarding the expenditure of 138 million dollars per year to help the blind and the increase in the number of successful corneal transplants are the main factors upon which Appellants rely to demonstrate this compelling interest. However, the record and appendices to Appellants' Brief, including the Affidavit of Mary Ann Gallagher, fail to disclose to this Court what per cent of the population is blind, what portion of the 138 million dollars expended is spent to aid persons suffering from corneal disease or what percent of Florida's blind citizens are blind because of corneal disease. It also fails to disclose what part of that expenditure is the result of increased availability of corneal tissue.

The fact that the quality and quantity of corneal tissue suitable for transplant is increased by the Statute does not demonstrate that the problem of blindness is being significantly alleviated. It demonstrates only that more persons are receiving corneal transplants in the State of Florida. No interest of the State of Florida, compelling or otherwise, is served by removing corneae pursuant to 732.9185 and then sending one to New York and using the other for research. And yet that is what happenned to James White's corneae under that law.

Therefore, the corneal removal law violates Appellees rights to substantive due process since it destroys a basic, personal, intimate and fundamental right, serves no compelling State interest and benefits only a limited group or class of citizens.

## II. SECTION 732.9185, FLORIDA STATUTES DENIES APPELLEES EQUAL PROTECTION OF THE LAW.

The equal protection clause of the Fourteenth Amendment does not prohibit the States from passing laws which have the inevitable affect of treating some people differently from others. Parham v. Hughes, 441 U.S. 347, 351, (1979). But there are constitutional limitations. There are two standards of judicial review for Statutes which treat different persons differently:

> 1. If the Statute affects fundamental rights or is defined by some suspect criteria, the legislation is subject to strict judicial scrutiny.

> 2. A Statute which does not affect fundamental rights and is not defined by suspect criteria can be sustained under the equal protection laws if it bears a rational relationship to a legitimate public purpose and under that minimal standard a classification will be upheld if

> the legislature "could have reasonably concluded that the challenged classification would promote a legitimate State purpose." Exxon Corp. v. Eagerton, 103 S.Ct. at 2308.

Appellees have already demonstrated that the right taken from them by Section 732.9185 is a fundamental one so the strict scrutiny standard applies in evaluating the classification created. Further, the classification is based upon criteria which are immutable and over which Appellees had no control or ability to change. One of the important criteria in determining whether or not a statutory classification violates equal protection is whether or not the persons affected have some means of determining whether or not they come within the affected class. Parham v. Hughes, supra, 351.

The classification created by the corneal removal law is set forth in the order of the trial court:

> This classification is a statutory scheme which causes the next of kin of persons who die under circumstances which cause the decedent to come under the jurisdiction of the Medical Examiner and which subject the remains to an autopsy to suffer the consequences of having a part of those remains removed without notice and without their consent and therefore deprives them of their right to receive, possess and dispose of those remains in the same condition as death left them, while the next of kin of persons

> who die under circumstances which do not cause the decedent to come under the jurisdiction of the Medical Examiner and which do not subject those remains to an autopsy do not suffer the consequences of having a part of those remains removed without notice and without their consent and they are not deprived of their right to receive, possess and dispose of those remains in the same condition as death left them. (R. 766.)

Appellants assert that the legitimate governmental purpose served by the Statute is to increase the quantity and quality of corneal tissue available for transplant into Florida citizens who are blind because of corneal tissue disease. Assuming for the sake of argument, but not conceding, that this is a legitimate governmental purpose, the classification, whether subject to strict judicial scrutiny or the minimal rational basis test, must promote that interest.

> For over a century, the Court has engaged in a continuing and occasionally almost metaphysical effort to identify the precise nature of the equal protection clauses guarantees. At the minimum level, however, the Court "consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." Schweiker v. Wilson, 450 U.S. 221, 230, 101 S. Ct. 1074, 1080, 67 L.Ed.2d 186 (1981).

> As the Court said in Logan: This is a difficult standard for a state to meet when it is attempting to act sensibly and in good faith. But the "rational basis standard is 'not a toothless one,' " [citations omitted]; the classifactory scheme must "rationally advanc[e] a reasonable and identifiable governmental objective. Logan v. Zimmerman Brush Co., supra, 1159-1160, concurring opinion.

In other words, the different treatment accorded decedents which creates two classes of surviving next of kin, one of which is affected by the Statute and one which is not, must promote the supposedly legitimate purpose of procuring corneae in order to withstand an attack on equal protection grounds. It is clear that restricting the class from which corneae can be taken without consent and without notice to those persons described in the Statute does not promote corneae procurement. In fact, it impedes that procurement by excluding all other persons who die as a source of cornea which can be taken without consent or notice.

In addition to having a rational basis to a legitimate government purpose, a Statute, in order to comport with equal protection of the law, must serve the public welfare in general and not merely a particular segment thereof:

> The State's police powers, however, are not absolute and any legislation resting on the police power, to be valid, must serve the public welfare as distinguished from the welfare of a particular group or class. State v. Lee, 356 So.2d 276, 279 (Fla. 1978).

Cf., State v.Champ, 373 So.2d 974 (Fla. 1978); United Gas Pipe Line Company v. Bevis, 336 So.2d 560 (Fla. 1976).

So Section 732.9185 fails in all three of the most important criteria in an equal protection context. First, there is no compelling State interest to deprive Appellees of their basic, intimate, personal and fundamental rights. Secondly, the classification created does not promote a legitimate governmental purpose. Thirdly, it does not serve the public welfare in general but only a particular group or class. Whether these criteria are viewed under the strict scrutiny or rational basis standard, the statute wholly fails under the equal protection clause.

## III. SECTION 732.9185 VIOLATES APPELLEES RIGHTS TO PRIVACY UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS

### A. United States Constitution Right to Privacy

That there is a right of privacy under the United States Constitution is well settled.

> The Constitution does not explicitly mention any right of privacy. In a line a decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, [citations omitted];in the Fourth and Fifth Amendments, [citations omitted]; in the penumbras of the Bill of Rights, [citations omitted]; in the Ninth Amendment, [citations omitted]; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, [citations omitted]. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), are included in this guarantee of personal privacy. they also make it clear that the right has some extension to activities relating to marriage [citation omitted]; procreation, [citations omitted]; contraception, [citations omitted]; family relationships, [citations omitted]; and child rearing and education, [citations omitted]. Roe v. Wade, supra, 726.

The fundamental nature of the right of Plaintiff as respects the remains of their son has been discussed above

and will not be repeated here. However, that discussion is incorporated in this argument that the right is protected under the privacy rights of the United States Constitution. Regardless of which Amendment is the source of the right, it surely is broad enough to include the right of the next of kin of a decedent to dispose of the remains without governmental intrusion.

As the Griswold Court said:

> The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred in Mapp v. Ohio, 367 U.S. 643, 656, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people'. Griswold v. Connecticut, supra, 1681 - 1682.

Appellants urge this Court to adopt the position of the Michigan Courts in Tillman v. Detroit Receiving Hospital, 360 NW 2d 275 (Mich. App. 1984), that the right of the next of kin to possess, protect and dispose of the remains of a decedent is not protected by any notions of privacy under the United States Constitution. Of course, this Court is not bound by that decision and further, there is no compelling reason to restrict the rights of the

citizens of Florida in the same manner the Michigan Courts have restricted the rights of the citizens of Michigan. Further, Appellees submit that the analysis by the Court of Appeal, Second District, of the State of California, in the case of People v. Roehler, 213 Cal. Rptr. 353 (Cal. App. 2 Dist. 1985) is the better reasoned analysis of the privacy interest of a next of kin in a corpse and that the result is more consistent with the description of the privacy rights of the Supreme Court in Roe and Griswold.

People v. Roehler, id., is a criminal case wherein Roehler was charged with First Degree Murder of his wife and step-son on January 2, 1981. On January 3, 1981, an autopsy was performed on the bodies by the coroner for Ventura County who concluded that each death had occurred as a result of accidental drowning. The bodies were then released to a private mortician in Los Angeles County. On January 8, 1981, the Sheriff - Coroner of Santa Barbara County obtained a warrant for the bodies of the decedents which had been preserved by the mortuary and a deputy proceeded to the mortuary and took possession of the bodies and transported them to Santa Barbara County. A second autopsy was performed by the Santa Barbara County Medical Examiner who concluded that the deaths were the result of a homicide and not accidental. Among other issues, Roehler contended that the second autopsy was unlawful and

unauthorized by California State Law and that he, as the next of kin, had a right of privacy in the bodies. The Court said:

> What is presented is a novel constitutional law issue concerning the parameters of permissable governmental intrusion into the lives of citizens when a death has occurred. Id, 365.

After reciting the Fourth Amendment, the Court continued:

> In the case at bench, the Attorney General argues that there are no property rights in dead bodies, and thus presumably a seizure and search of them would not fall within the constitutional provisions just described. It is true that dead bodies are not regarded as "property" in the traditional sense of the word, connoting legally protected rights of ownership. Neither are they ephemeral, however. Lenghthy analyses, both ecclesiastical and legal, has produced the term, "quasi-property" (14 Cal.Jur.2d 49). Under California law, there are statutory provisions giving both the right to control disposition of the remains and the financial responsibility for burial to surviving kin (Health & Saf. Code, Section 7100). It has also been recognized that a cause of action for emotional distress may arise on behalf of a living person as a consequence of asserted mistreatment of a body of a decedent [citations omitted].
>
> We conclude that there is a reasonable expectation of privacy

> with respect to dead persons, and a right of privacy could appropriately be asserted by the Defendant, as next of kin. Id., 367-368.

In Florida as in California, the right to possess and control the disposition of the remains of a decedent resides in the next of kin and Florida recognizes a cause of action for emotional distress which may arise on behalf of a living person as a consequence of mistreatment of the body of a decedent. Dunahoo v. Bess, supra; Kimple v. Riedel, supra; Kirksey v. Jernigan, supra; Rupp v. Jackson, supra. This Court, like the California Court, should recognize Appellees rights and interests as being protected by the privacy protections of the United States Constitution whether such right be deemed property or otherwise. The non-consentual removal of the corneae from the body of their son is a violation of these rights.

B. Florida Constitutional Privacy

Article I, Section 23 of the Florida Constitution plainly says:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This Section shall not be construed to limit the publics right of access to public

records and meetings as provided by law.

This provision clearly includes any privacy rights discussed above which have been recognized under the United States Constitution. However, it is, unlike the privacy of the United States Constitution, specifically provided. There is no need to find "penumbras" or "zones of privacy" emanating from other constitutional provisions. In fact, it has been held that the scope of privacy guaranteed by Florida's Constitution, at least as to informational disclosure, is greater than that provided by the Federal Constitutional. Winfield v. Division of Parimutuel Wagering, Department of Business Regulation, 10 F.L.W. 548, 550 (Fla. 1985). Appellees submit that the same is true as to the right of privacy for personal autonomy.

Since the rights asserted by Appellees are fundamental, basic, personal and implicit in the concept of ordered liberty, a compelling State interest must be shown in order to justify governmental transgression of those rights. As discussed above, there is no compelling State interest demonstrated in the instant case. Thus, the Corneal Removal Law violates Appellees right to privacy under the Federal Constitution. It also violates their explicit right to privacy under the Florida Constitution.

## IV. SECTION 732.9185, FLORIDA STATUTES, AUTHORIZES AND CONSTITUTES A TAKING OF PRIVATE PROPERTY FOR A NON-PUBLIC PURPOSE

In our free and civilized society, the assertion that parents' rights in the earthly remains of their children simply do not exist or fail to rise to constitutionally protected property interests is stark, if not calloused.

### A. Appellees' Rights in the Corneal Tissue And Other Remains of Their Deceased Child is Property

The next of kins' interests in a deceased are property interests entitled to Constitutional protections from a public taking for non-public purposes and from unreasonable, arbitrary or capricious exercise of the police power of the State of Florida.

As previously detailed in this Brief, Florida's jurisprudence is that next of kin have vested and **fundamental** property rights in the remains of their deceased. Dunahoo v. Bess; Kirksey v. Jernigan, supra.

It is clear from a reading of these cases that Florida's Supreme Court has held as a matter of law that property rights in a deceased's remains both exist in the

next of kin, and may be defended by them even to the extent of suing for damages occasioned by tortious interference of those rights by third-parties.[1]

It is of no import that the next of kin's property interests in a deceased's remains may not extend to the right to engage in commercial traffic of the decedent's remains or parts thereof. Indeed, it is the public policy, and the law[2] of Florida that the commercial disposition of the remains of a deceased human being is proscribed and is a criminal offense.

Although early English common law did not recognize a property right in the body of a decedent (such matters then being reserved to ecclesiastial courts) no such

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1 See Kimple v. Riedel (DCA 2nd, 1961, rehearing Denied October 20, 1961), 133 So.2d 437; Jackson v. Rupp (DCA 4th, 1969, rehearing Denied Jan. 5, 1970) 228 So. 2d 916; and Rupp v. Jackson, (Fla. 1970), 238 So. 2d 86.

2 Section 872.01, Florida Statutes (1983) makes it a first degree misdemeanor to buy, sell, or traffic in the dead body of a human being.

rights now exist, it is clear that Florida's jurisprudence and judicial system is distinctly different and more progressive than the law and courts of Normans.

This distinction, in recognition of a free people's fundamental rights, is easily understood in the comparison of archaic structure of laws favoring the crown of conquerors as opposed to free citizens of modern times enjoying the blessings of liberty under a Republican form of government that is limited by and derrives its powers from a Constitution.

Under modern law there can be no doubt that Appellees' rights sound squarely in the law of property entitled to constitutional protections.

> "The Constitutional right of private property embraces every species of property recognized by law with all rights incident thereto, and is not limited to the protection of tangible property, but extends to intangible property as well." 16A Corpus Juris Secundum, Section 507, City of Winter Haven v. A.M. Klemm & Son, 181 So. 153, 132 Fla. 334, rehearing Denied 182 So. 841, 132 Fla. 533; and State v. Greer, 102 So. 739, 88 Fla. 249.

The mere objective expectancy of a continuance of an interest initially recognized or conferred by the State is sufficient to be encompassed by the term "property" entitled to Constitutional protections. (Id. at page 610).

Furthermore, the term "property..." "is broad enough to embrace all character of vested rights whether or not they may technically be called property rights." 16C Corpus Juris Secundum, Section 983.

Courts have held property interests entitled to the protections of State and Federal Constitutions do not end with ownership of realty, chattels, or money, but also reach any significant property interest, including the rights of possession, control, and the right to make any legitimate use or disposal of a thing owned. Fuentes v. Shevin, Fla., 92 S.Ct. 1983, 407 U.S. 67, rehearing Denied 93 S.Ct. 177, 409 U.S. 902; [other citations omitted].

> "As protected by the various Constitutions, property is more than a mere thing which a person owns; indeed, "property" in the Constitutional sense, is not the physical thing itself but is rather the group of rights which the owner of the thing has with respect to it." 16A Corpus Juris Secundum, Section 507 [citations omitted].

Appellees' property rights asserted herein embrace the normal incidents of ownership in property interests, including the rights of possession, use and disposition thereof subject to such reasonable and lawful restrictions, limitations and duties attendant thereto without abridgment

by the sovereign as to quality or quantity of such interests unless according to appropriately Constitutional law.

Florida Courts have declared the right of use of property to be, in and of itself, a property right, State Ex Rel Helseth v. DuBose, et al, (Fla. 1930) 128 So. 4, 99 Fla. 812; and have broadened the concept of property to include such an interest in property as a **prospective** assignee of a lease agreement may have so as to entitle such prospective assignee to bring inverse condemnation proceedings against a County. Pinellas County v. Brown, (DCA 2nd, 1984) 450 So.2d 240.

It has been held that ..."the rights of parents over their children are in the nature of property rights" entitled to Constitutional guarantees and the protections of due process. 16C Corpus Juris Secundum, Section 986, citing Brooks v. DeWitt (Texas) 178 S.W. 2d 718, reversed on other grounds 182 S.W. 2d 687, 143 Tex. 122, cert denied 65 S.Ct. 1196, 325 U.S. 862.

This Court has held that the right of Florida's citizenry to use their property is a fundamental right guaranteed by both the Florida and United States Constitutions, Palm Beach Mobile Homes, Inc. v. Strong, (Fla. 1974), 300 So.2d 881, and constitutional protections of property rights are not dependent on the amount of

property held. Hamilton v. Williams, (Fla. 1941), 200 So. 80, 145 Fla. 697.

B. Government May Interfere with Private Property Rights Under Certain Circumstances

Florida citizens' rights of private property, albeit guaranteed by the State and Federal Constitutions, are not rights in the absolute.

The exercise of property rights must be limited so as not to damage the rights of others, and may be fairly limited, restricted and regulated by the State as may be reasonably necessary to protect and preserve the public health, safety, morals, and welfare through the lawful exercise of its police powers. 10 Fla. Jur. 2d, Section 220; 16A Corpus Juris Secundum, Section 508; 16C Corpus Juris Secundum, Section 987.

The soverign retains the power of eminent domain within the limitations and prohibitions imposed upon its exercise by. Art. X, Section 6, Florida Constitution of 1968.

The distinctions between the State's exercise of its police powers and eminent domain, in regard to regulation and appropriation of private property were clearly articulated by this Court in State Plant Board v. Smith, (Fla., 1959), 110 So.2d 401.

There the Court also acknowledged that the Constitution of this State and the United States secure property rights from unreasonable, oppressive, or arbitrary restraint or interference by the State.

C. Corneal Removal Statute Violates Article X, Section 6(a) Florida Constitution, and Amendment 5 to U.S. Constitution

The unrebutted facts in this case clearly show that Appellees' property rights in and to the remains of their son were taken, indeed confiscated, for a non-public and denied them without Notice or opportunity to be heard, and without full compensation paid therefor.

Appellees believe that their property rights were unconstitutionally interferred with by reason of the existence and operative effects of Section 732.9185, Florida Statutes, because the State of Florida deprived them of their fundamental property interests and diminished those property rights by taking the corneae of their deceased child, thence giving said corneae to a private legal entity for non-public uses. Further, said Statute authorized without their permission or consent, a public officer to delegate to private persons the decisions affecting:

1. Whether said corneae were suitable for the purposes expressed in the Statute here scrutinized; and

2. Whether there actually existed a patient in need of Appellees' son's cornea; and

3. The disposition of corneal tissue not employed for transplant purposes otherwise authorized by the Statute. (App. 1-7).

The subject legislation which authorizes a taking of Appellees' property interests without notice or consent, and without just compensation therefore, constitutes an impermissible exercise of eminent domain.

Further, Appellees believe that the subject legislation authorizes a constitutionally impermissible exercise of the State's police powers resulting in an arbitrary, unusual and unnecessary interference with, and confiscation of their protected property interests.

It is well settled that an act of the legislature may be declared unconstitutional because it conflicts with the express or implied limitations imposed upon the powers of the State. 10 Fla. Jur. 2d, Section 153.

In the instant case, it is clear from the Appellants' Briefs and the Record that the Statute under review is one which attempts to provide a public benefit, i.e., restoration of sight to the blind. If this is so, then the proper vehicle for the State to reach its objective is through eminent domain proceedings provided for by Art. X, Section 6, of Florida's Constitution.

As indicated by this Court in Graham v. Estuary Properties, Inc., (Fla. 1981, rehearing denied 6/16/81), 399 So.2d 1374, (citing State Plant Board, supra), when there is created (by Statute here, by agency regulations there) ..."a public benefit, it is more likely an exercise of eminent domain, whereas if a public harm is prevented it is more likely an exercise of the police power." Id., at 1381.

D. Taking of Private Property Must be For Public Purpose

As stated in Baycol v. Downtown Development Authority of Fort Lauderdale, 315 So.2d 451, 455 (Fla. 1975).

> "We have long been committed in a consistent series of cases to the proposition that eminent domain cannot be employed to take private property for a predominantly private use; it is, rather, the means provided by the constitution for an assertion of the ublic interest and is predicated upon the proposition that the private property sought is for a necessary public use. It is this public nature of the need and necessity involved that constitutes thejustification for the taking of private property, and without which proper purpose the private property of our citizens cannot be confiscated, for the private ownership and possession of property was one of the gret rights preserved in our constitution and for which our forefathers fought and died; it must be jealously preserved within the reasonable limits prescribed by law. Quoted with approval in City of Miami v.

Coconut Grove Marine Properties, Inc., (3rd DCA, 1978 rehearing denied 6/16/1978) 358 So.2d 1151.

The Legislature has clearly overstepped the boundaries of Constitutional Law in the Statute under review.

> Our government was founded upon the firm foundation that private property cannot be taken except when it will serve a public purpose. State v. Town of North Miami, (Fla. 1952), 59 So.2d 779. There are certain limits beyond which the Legislature cannot go. It cannot authorize a municipality to spend public money or lend or **donate**, directly or indirectly, public property for a purpose which is not public. Id. at page 785.

This is true in every instance where the State's power to take private property is employed ..."in aid of any private enterprise, however laudable its purose or useful its encouragement." Id., State v. Town of North Miami, at 786.

Plainly, Section 732.9185, Florida Statutes, and any other statute purporting to authorize the State to take private property for private uses must be striken down as violative of our Constitution, even where incidental benefits may accrue to the public from the taking. Adams v. Housing Authority of City of Daytona Beach, (Fl. 1952), 60 So.2d 663; Lewis v. Peters, (Fl. 1953), 66 So.2d 489.

Our Constitution requires a **public purpose** for the taking of private property by the State. Art. X, Section 6(a), Florida Constitution. A public purpose is not the same as a public "use" or public "benefit" ..."when it comes to spending the taxpayers money or taking his property..." Grubstein v. Urban Renewal Agency of City of Tampa, (Fla. 1950), 115 So.2d 745.

A taking which is for private persons' use is not made a ublic use for a public purpose because the public may have a theoretical use or receive a prospective or incidental benefit therefrom. Fountain Park Co. v. Hensler, 115 N.E. 465, 199 Ind. 95; Adams, supra.

Public works projects such as public highways, city sewer and water systems, electric utilities easements and water management projects are manifestly public purposes for which a public taking of private property would be permissible.

In this case however, it cannot be said that the facts support the proposition that a public taking for a valid public purpose occurred.

Never has this State sought to or allowed its agents and employees to utilize the bodies of a class of decedents dying in Florida as "hanger queens" to be scavenged for spare parts deemed from time to time appropriate for the taking by our legislature. Equally, this State has never

sanctioned the gifting of body parts to private individuals for their own private uses following a taking thereof by the exercise of state action in obtaining such body parts.

Even were such conduct appropriate in the view of this Court, the subject statute does not comport with the essential requirements of Article X, Section 6 of Florida's Constitution or the Fifth Amendment of the Constitution of the United States.

The conduct authorized by the Statute does not merit constitutional approval because it fails to provide any due process, or just compensation for the property interest deprived, or promote a recognized public purpose or use.

It is especially suspect because it authorized a relatively isolated public officer beholden to a State Agency the right to assert the Statute's power.

> "The exercise of the power of eminent domain is one of the most harsh proceedings known to law and therefore, when the sovereign delegates the power to a political unit or agency a strict construction will be given against the agency asserting the power." Brest v. Jacksonville Expressway Authority, (DCA 1st, 1967) 194 So. 2d 658.

> "The Legislature cannot under the guise of exercising sovereign power of eminent domain, which can only be exerted for a public purpose, take a citizen's property without his consent and give or sell it to another for private use, even though compensation is paid therefore, for to do so would be in

> violation of the Constitution of the United States Amendment 14." Id., Brest.

The State clearly may exercise its police power to in the protection and preservation of the public health, so long as that power is reasonably and fairly exercised and not abused. Varholy v. Sweat, (Fla., 1943) 15 So. 2d 267.

> ..."[I]t has been recognized that the preservation of the public health is one of the prime duties of the State or municipality, and thus the enactment of necessary and reasonable health laws and regulations is a legitimate exercise of police power..." [emphasis supplied] State Ex Rel. Furman v. Searcy, (DCA 4th 1969), 225 So.2d 225; and SEE Corneal v. State Plant Board, (Fla. 1957), 95 So.2d 1.

The Courts, in testing the validity of a Statute allowing such police powers, determine whether the end sought to be obtained is the maintenance and promotion of the public health. If the answer is "No", then a property owner affected is held to be subjected to unreasonable restrictions under the guise of police power. Furman, supra, at page 433.

It is equally clear that Florida's jurisprudence will not permit an invocation of the police power which favors one class of citizens as opposed to the general public. Liquor Store, Inc. v. Continental Distilling

Corp., (Fla., 1949), 40 So.2d 371. Nor, as previously stated, may the State expend public funds where the primary purpose is to make property available for private uses. State v. Miami Beach Redevelopment Agency, (Fla., 1980, rehearing denied 1981), 392 So.2d 875. In the instant case, it is clear tht the only purpose of the State is to promote private uses by means of public taking.

Constitutionally protected property rights cannot be unreasonably, or arbitrarily interefered with through the guise of protecting the public's interests, nor may such property be confiscated under such circumstances. 16C Corpus Juris Secundum, Section 508; 10 Fla. Jur. 2d, Section 268.

As stated, a public taking must be reasonably necessary for a proper public purpose. In the instant case there is no necessity shown for the taking authorized by the Corneal Removal Statute.

For the above-stated reasons it is submitted the Section 732.9185, Fla. Stat., constitutes an impermissable and constitutionally repugnant public taking of Appellees' property interests for unnecessary, non-public purposes and for private uses by a select few at the expense of Appellees' and the general public, through the exercise of an arbitrary, unreasonably and oppressive abuse of the police power of the State.

As this Court has stated:

> ..."we hope we never become insensitive to the clear and indefeasible property rights of the people guaranteed by our state and federal organic law, nor forgetful of the principle of universal law that the right to own property is an indispensable attribute of any so-called "free government" and that all other rights become worthless if the government possesses an untrammeled power over the property of its citizens." Corneal v. State Plant Board, (Fla., 1957) 95 So.2d 1, at page 6.

## V. THE TRIAL COURT ORDER UNDER REVIEW IS INTERNALLY CONSISTENT

The Order under review is internally consistent.

Proceedings subsequent to the filing of the Notice of Appeal resolved any internal inconsistency in the Order appealed.

That Order's adjudications that Section 406.11, Fla. Stat. is constitutional on its face, while Section 732.9185, Fla. Stat., is facially unconstitutional, is not inconsistent since the purposes of each section are distinct from and mutually exclusive of the other.

A further discussion of Section 732.9185 is not necessary.

Section 401.11, Fla. Stat., provides a mandate to and authority for Florida's Medical Examiners to make investigations, examinations and autopsies as may be deemed necessary on the occasion of a death of a human being in Florida under certain specified circumstances.

A plain reading of the Statute reveals its purose as an appropriate exercise of the State's police power in protecting and promoting the health and safety of Florida's citizens by requiring a public officer to determine the cause of death of a decedent falling with the enumerated classifications of suspect circumstances.

Through the Statute's proper employment, the citizens of this State can safeguard their health from communicable disease, environmental hazard, or tainted foodstuffs. Murder can also be detected, forewarning us all of danger from within our ranks. Further examples of the Statutes beneficial public purposes are unnecessary.

The able trial Judge wrote a well reasoned and internally consistent Order placed now before your review.

## CONCLUSION

It is clear from the foregoing that Section 732.9185, makes no attempt to protect any interests of Appellees in the remains of their deceased son. This is true notwithstanding that Florida Law very clearly grants those rights and notwithstanding that those rights are basic, intimate, personal, fundamental and implicit in the concept of ordered liberty. The taking of these rights without the consent, knowledge or meaningful opportunity to assert them is repugnant to the Constitutional protections of procedural and substantive due process and equal protection. Further, the Statute invades the privacy of Appellees under both the United States and Florida Constitutions.

Further, the Statute authorizes a taking of the property of Appellees for a non-public purpose and without any compensation whatsoever in violation of Article X, Section 6 (a), Constitution of the State of Florida. There is no internal inconsistency in the Order of the Trial Court in upholding the Constitutionality of Section 406.11 and declaring Section 732.9185 unconstitutuional on its face because the state interests served by Section 406.11 is totally different from the interests allegedly served by 732.9185.

The Order of the Trial Court should be affirmed by this Court in all respects.

Respectfully submitted,

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