IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, et al.,

Appellants,

v. CASE NO. 67,755

WADE POWELL, et ux.,
et al.,

Appellees.

INITIAL BRIEF OF APPELLANTS
MEDICAL EYE BANK, INC., NORTH FLORIDA
LIONS EYE BANK, INC., AND
FLORIDA LIONS EYE BANK, INC.

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PRELIMINARY STATEMENT

The following abbreviations are used in this brief:

R	....	Record on Appeal
App	....	Appendix to Brief

References to affidavits are cited by referring to the name of the affiant and to the Appendix page on which the affidavit is found. (For example, "Gallagher aff. at App ---.)

STATEMENT OF THE CASE AND FACTS[1]

Blindness imposes a staggering burden on the State of Florida. Floridians spend $138,000,000 each year to help the blind. These persons cannot drive, engage in regular employment, or otherwise lead fully productive lives. The state, therefore, must provide the basic necessities of life for them. This burden will only increase without innovative medical efforts to restore sight. (R 573; Gallagher Aff., App 12).

Corneal transplantation can help to ease this burden. Developed in the 1930's, corneal transplantation surgery has become a highly effective procedure for restoring sight to the functionally blind. (R 575; Griffith aff., App 14). Moreover, the number of people benefiting from corneal transplants has increased markedly in the last five years due to rapid scientific advances in the field. Just a few years ago, infants seldom received corneal transplants due to the poor prognosis for vision. Now, however, with progress in tissue selection, preservation, suturing materials and medications, that picture has changed dramatically. Successful transplants are now being performed on babies as young as five weeks of age. (R 579; Stern aff., App 18).

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[1]The facts in the above statement are uncontested, arising either from the trial court order under review or from affidavits submitted in support of the parties' motions for summary judgment.

The key to successful corneal transplantation is the availability of donor tissue. As more advances are made in the field, the number of surgical candidates will increase, thereby raising the demand for suitable corneal tissue. (R 579; Stern aff., App 18). Elderly people, like the very young, have added to the increased need for corneal tissue. Since the general population now lives longer, more people are likely to develop eye problems. Indeed, corneal blindness often results from age-related causes such as gradual degeneration of the cells of the cornea. If the older population is to enjoy the benefits of corneal transplantation, an adequate supply of tissue must be found. (R 579; Stern aff., App 18).

The most important modern development in corneal transplantation has been the passage of "Medical Examiner" legislation. Now in effect in at least ten states, the law has served to substantially increase the available supply of corneal tissue. In 1975, before passage of the legislation, only 12,000 corneal transplants were performed in the United States. Last year, in contrast, 25,000 transplants were performed. (R 576; Griffith aff., App 15).

The Medical Examiner's law has increased both the supply and quality of corneal tissue. A qualitative difference exists between corneal tissue obtained through outright donation and tissue obtained pursuant to the Medical Examiner's law. Tissue donated by individuals is often unusable because of the advanced

age of the donor at death. In contrast, a high percentage of tissue obtained through medical examiners is suitable for transplant. High-quality tissue is particularly important for recipients with difficult corneal problems such as chemical burns. (R 580; Stern aff., App 19).

In 1977, the Florida Legislature passed the Medical Examiner's law, codified as Section 732.9185, Florida Statutes. It reads:

> (1) In any case in which a patient is in need of corneal tissue for a transplant, a district medical examiner or an appropriately qualified designee with training in ophthalmologic techniques may, upon request of any eye bank authorized under s. 732.918, provide the cornea of a decedent whenever all of the following conditions are met:
>
> > (a) A decedent who may provide a suitable cornea for the transplant is under the jurisdiction of the medical examiner and an autopsy is required in accordance with s. 406.11
> >
> > (b) No objection by the next of kin of the decedent is known by the medical examiner.
> >
> > (c) The removal of the cornea will not interfere with the subsequent course of an investigation or autopsy.
>
> (2) Neither the district medical examiner nor his appropriately qualified designee nor any eye bank authorized under s. 732.918 may be held liable in any civil or criminal action for failure to obtain consent of the next of kin.

Florida's experience since 1977 confirms the national experience: the Medical Examiner's law increases both the supply and quality of corneal tissue. In 1976, only 500 corneas were obtained in Florida for transplant. Since then, primarily as a result of Section 732.9185, the eye banks in Florida have been able to furnish corneal tissue for approximately 58 transplants each week. This year alone, over 3,000 persons in Florida will have their sight restored through corneal transplantation. Nonetheless, the demand for tissue exceeds the supply. (R 572; Gallagher aff., App 11).

That the passage of Section 732.9185 has improved the quality of corneal tissue in Florida is best exemplified by comparing New York's experience with Florida's. New York did not have a Medical Examiner's law from 1978 to 1982. The average age of donor tissue obtained during that time was 70 years of age. Only 35% of that tissue was surgically suitable, and many of the recipients needed additional surgery. These patients waited an average of four and one-half months for tissue. In Florida, on the other hand, tissue obtained through medical examiners has an average age of 30 years. Over 80-85% of that tissue is surgically suitable. Florida patients wait only one to two weeks for a cornea. (R 573; Gallagher aff., App 12).

Section 732.9185 contains safeguards designed to limit corneal removal to those instances where the public's interest

is greatest and the impact on next of kin the least. The first such safeguard is the requirement that a demonstrated need exist for corneal tissue. Medical examiners may not remove tissue from all decedents; rather, they must be aware that there are persons in need of tissue.

Perhaps the most important safeguard in 732.9185 is the limitation that corneas may be removed only if an autopsy is required under Florida law. Because an autopsy is a surgical dissection of a body, it necessarily results in a massive intrusion into the decedent. Corneal removal, by comparison, requires an infinitesimally small intrusion, since only the very outer surface of a portion of each eye is removed. (R 582; Hegert aff., App 21).

Corneal removal does not affect the appearance of the decedent. The eyes depend for their shape on the vitreous humor, a gel-like fluid that fills the eye. Upon death the vitreous humor recedes, causing the eyes to lose their shape. Embalmers place a cap over each eye to maintain their normal contour and to keep the eyelids closed. With or without corneal removal, the eyes of the decedent must be capped to maintain a normal appearanace. (R 582; Hegert aff., App 21).

Section 732.9185 does not place a duty upon medical examiners to seek out the next of kin and obtain consent for corneal removal because prior experience demonstrates that such a duty would cripple the benefits of the law. Before

California's passage of a Medical Examiner's law, the Los Angeles County Medical Examiner's office sought to obtain consent by contacting the family of any decedent who would be a suitable corneal donor. The vast majority of those contacted (75-80%) responded positively. The program broke down, however, because it was impossible to contact about 80% of the families while there was still time to make a donation. Whether because of no phone number or the wrong phone number, or because the family was away visiting friends or relatives, people did not learn that they could donate corneas for transplant. Since California passed the Medical Examiner's law in 1984, the availability and quality of tissue has substantially improved. While people used to wait up to six months for a cornea, today there is little or no wait. (R 584; Ward aff., App 23).

On June 15, 1983, James E. White drowned while swimming at the city beach in Dunnellon, Marion County, Florida. One day later, Associate Medical Examiner Thomas Techman, M.D., performed an autopsy on the body of James White at Leesburg Community Hospital. On July 11, 1983, Anthony W. Powell died in a motor vehicle accident in Marion County. Dr. William H. Shutze, Medical Examiner for the Fifth District, performed an autopsy on the decedent later that same day. In both instances corneal tissue was removed prior to autopsy under the authority of Section 732.9185, Florida Statutes.

In 1983 Appellees, who are the parents of James White and Anthony Powell, brought separate actions against Appellants Shutze, Techman, Gauger and Munroe Regional Medical Center in the Circuit Court for Marion County. Appellees claimed damages for the alleged wrongful removal of the decedents' corneas. (R 1). Count II of each complaint sought a declaratory judgment declaring unconstitutional Section 732.9185. These Appellants, The Medical Eye Bank, Inc., North Florida Lions Eye Bank, Inc. and Florida Lions Eye Bank, Inc. were granted intervention as parties in support of the constitutionality of 732.9185. A number of other interested parties also intervened in Count II. The cases were later consolidated before Judge Swigert for purposes of deciding the constitutional validity of the Medical Examiner's law. (R 931)

In response to motions for summary judgment filed by Appellants and Appellees, on August 23, 1985, the trial court declared Section 732.9185 unconstitutional on its face. (R 760; App 8). The court held that the statute violates substantive and procedural due process, the right to privacy, and the right to equal protection of the law. (App 6). Appellants timely appealed, and the District Court of Appeal, Fifth District, has certified the cause as one of great public importance requiring immediate resolution by this Court. (R 799; App 9).

SUMMARY OF ARGUMENT

Florida's Medical Examiner's law (Restoration of Sight Act) is constitutional because it serves a noble and legitimate public purpose without unreasonably impinging on the rights of others.[2] Specifically, the Act comports with state and federal notions of due process because it bears a reasonable relationship to the permissible state objective of restoring sight to the blind. It satisfies procedural due process because next of kin do not have a cognizable property right in a deceased family member. The statute does not unconstitutionally invade privacy interests since the decedent's right to privacy terminated at death, and next of kin do not have a personal right of privacy in the remains of a decedent. In addition, the Act is consistent with the equal protection clause because its classification is rationally related to a permissible state objective. Georgia and Michigan have recently passed upon the constitutionality of their Medical Examiner's laws. In both instances, the courts have found the statute constitutional.

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[2]Appellants will refer to the statute under consideration, Section 732.9185, as the "Medical Examainer's law" and the "Restoration of Sight Act," as it was known by the 1977 Legislature which passed the Act. The trial court order refers to that statute as the "Cornea Removal Law." Although the trial court order passes upon the validity of Section 406.11, Florida Statutes, and refers to 406.11 as the Medical Examiner's law, that statute is not the subject of this appeal.

The Act gives far more than it takes away. In carefully limited situations, it affords the people of Florida a means by which to make the blind see. It transforms the tragedy of death into a process of creation and renewal.

ARGUMENT

I. SECTION 732.9185, FLORIDA STATUTES COMPORTS WITH FEDERAL AND FLORIDA DUE PROCESS.

The trial court erred in finding that Section 732.9185 violates substantive and procedural due process. A consistent line of Florida and federal[3] decisions demonstrate that the statute fully complies with due process requirements.

A. The Statute is Reasonably Related to a Permissible State Objective.

The Court's scrutiny of Section 732.9185 must begin with the accepted principle that the Act "is endowed with a presumption of legislative validity." The burden is on Appellees to prove the absence of any rational connection between the provisions of the Act and legitimate state

[3]Florida and federal due process will be discussed interchangeably because the standards in this area are the same in both jurisdictions. Florida Canners Ass'n v. State, Dept. of Citrus, 371 So.2d 503 (Fla. 2d DCA 1979), aff'd, 406 So.2d 1079 (Fla. 1981), appeal dismissed, 456 U.S. 1002 (1982).

objectives. Harrah Independent School District v. Martin, 440 U.S. 194, 198 (1979). Put another way, Section 732.9185 satisfies due process if it bears a "reasonable relation to a permissible legislative objective." Johns v. May, 402 So.2d 1166, 1169 (Fla. 1981).

One can scarcely imagine a more permissible state objective than the restoration of sight to Florida citizens. Uncontested facts demonstrate the severe burdens imposed by blindness. Taxpayers must spend hundreds of millions of dollars each year to provide for the blind's basic needs. The state's loss from the unemployment and decreased productivity suffered by the blind is incalculable. Equally important, blindness prevents thousands of persons from living independent, full lives. The restoration of sight to even a small percentage of these people will ease the economic drain and will enhance the productivity and well-being of the citizenry.

Section 732.9185 bears a direct and fundamental relation to Florida's goal of restoring sight by increasing both the supply and quality of corneal tissue available for transplantation. The statute's effect of increasing the supply of tissue is attributable to the fact that it does not impose a duty on medical examiners to seek out and obtain consent for corneal removal. National experience proves that in states where medical examiners must obtain consent to remove tissue,

the family cannot be reached in time to save the decedent's corneas (even though experience also proves that the majority of families would have consented had they been contacted in time). By permitting the removal of corneas unless the medical examiner knows of an objection, Section 732.9185 has greatly increased the supply of tissue in Florida. Whereas hopeful corneal recipients in some states must wait months or years for tissue, by virtue of Section 732.9185, Floridians wait only a matter of weeks.

Section 732.9185 has also enhanced the quality of corneal tissue in Florida. In states without Medical Examiner laws, the only available method of obtaining corneas is through donation under the Uniform Anatomical Gift Act. Tissue thus obtained, however, is typically of poor quality because it comes from elderly donors. Tissue received from medical examiners, on the other hand, comes from younger and healthier persons. The corneas are in better condition and more suitable for successful transplantation.

The trial court itself found that 732.9185 "has as its purpose the commendabale and laudable objective of providing high quality cornea tissue to those in need of same. It helps supply and restore sight to the very young, the sick, accidental and diseased victims, and the very old. The gift of sight is one of the most precious of life." (Order at p. 5; App 5; R 764). Because it promotes that objective by

increasing the supply and quality of corneal tissue, Section 732.9185 comports with state and federal substantive due process.

B. Section 732.9185, Florida Statutes, Does not Contravene Due Process Simply Because it Affects Rights Conferred by Common law.

The trial court also appears to hold that the Act is violative of substantive due process because it deprives Appellees of a right to which they were entitled at common law--the right to direct the disposition of the remains of the decedent. See Kirksey v. Jernigan, 45 So.2d 188 (Fla. 1950).

Even if Section 732.9185 does modify Appellees' common law rights, recent decisions of the United States Supreme Court indicate that the loss of a common law right by legislative act does not operate as a deprivation of due process. In Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), the Court held that legislation changing the rights of former coal miners and granting them a right of recovery against mine operators did not constitute a denial of due process. The Court noted that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." Id. at 16. In Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978), the Court upheld the validity of legislation which substituted limited statutory liability for the unlimited liability at common law of operators of nuclear power plants to victims of a nuclear accident. The Court commented:

> The remaining due process objection to the liability-limitation provision is that it fails to provide those injured by a nuclear accident with a satisfactory *quid pro quo* for the common law rights of recovery which the Act abrogates. Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute recovery.

438 U.S. at 87-88 (emphasis in original). The Court supported the above statement with this footnote:

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the common law." *Second Employers Liability Cases*, 223 U.S. 1 . . . (1912) . . . . The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative objective," *Silver v. Silver*, 280 U.S. 117 . . . (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Company*, 428 U.S. 1 . . . (1976).

Id. at 88 n.32. Following these decisions, the United States Court of Appeals, in *Morris v. Hotel Riviera, Inc.*, 704 F.2d 1113 (9th Cir. 1983), upheld a Nevada statute which changed the common law and limited innkeepers' liability for loss for theft of the property of their guests. The *Morris* court held:

> [C]ommon law rights may be abolished to attain a permissible legislative objective, and an individual has no vested interest in a common law rule.

Id. at 1114.

As already shown, Section 732.9185 serves a permissible legislative objective. Thus, even if it affects Appellees' common law rights, it does not offend due process.

C. The Act Does not Violate Procedural Due Process Because Appellees Have no Property Right in the Remains of a Decedent.

Beyond question, due process entitles one to certain procedural rights before state action can materially affect his property. Just as certainly, however, a person cannot claim procedural rights if he does not have a property interest in the matter affected. See Board of Regents v. Roth, 408 U.S. 564 (1972).

Appellees are not entitled to procedural rights in the removal of their decedents' corneas because they do not have a property right in the remains. Historically, a few courts described the next of kin's right to direct the disposition of a corpse as a "quasi-property" right in the corpse. Modern decisions make clear, however, that the right actually sounds in tort rather than property. Prosser describes the true nature of the next of kin's right in this way:

> A number of decisions have involved the mishandling of dead bodies. . . . In these cases the Courts have talked of a somewhat

> dubious "property right" to the body, usually in the next-of-kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such "property" is something evolved out of thin air to meet the occasion, and that it is in reality the personal feelings of the survivors which are being protected, under a fiction likely to deceive no one but a lawyer.

W. Prosser, The Law of Torts, 43, 44 (2d ed. 1955).

The American Law Institute has also characterized the next-of-kin's rights to direct the disposition of a corpse as tort rights. The Restatement 2d of Torts, Section 868, sets forth a tort of interfering with the "right of burial" as follows:

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

Numerous decisions from jurisdictions outside Florida confirm that the next of kin do not have a property right in the remains of their family member. Perhaps the clearest holding is found in Dougherty v. Mercantile-Safe Deposit & Trust Co., 387 A.2d 244, 246 n.2 (Md. Ct. App. 1978):

> It is universally recognized that there is no property in a dead body in a

> commercial or material sense. "[I]t is not part of the assets of the estate (though its disposition may be affected by the provision of the will); it is not subject to replevin; it is not property in a sense that will support discovery proceedings; it may not be held as security for funeral costs; it cannot be withheld by an express company, or returned to the sender, where shipped under a contract calling for cash on delivery; it may not be the subject of a gift _causa mortis_; it is not common law larceny to steal a corpse. Rights in a dead body exist ordinarily only for purposes of burial and, except with statutory authorization, for no other purpose." _Snyder v. Holy Cross Hosp._, 30 Md.App. 317 at 328 n. 12, 352 A.2d 334 at 340, quoting P.E. Jackson, _The Law of Cadavers and of Burial and Burial Places_. (2nd ed. 1950) (emphasis in original).

Accord, _Lawyer v. Kernodle_, 721 F.2d 632, 634 (8th Cir. 1983); _Sinai Temple v. Kaplan_, 127 Cal. Rptr. 80, 85 (Ct. App. 1976); _Sullivan v. Catholic Cemeteries, Inc._, 317 A. 2d 430, 432 (R.I. 1974); _Finn v. City of New York_, 335 N.Y.S.2d 516, 520 (Civ. Ct. 1972), _rev'd on other grounds_, 350 N.Y.S. 2d 552 (Sup. Ct. 1973).

Florida law is in accord with this national consensus. While an early decision incorrectly described the next of kin's right as a "property right," the Florida Supreme Court later clarified that the right is "founded _purely in tort_," and is limited to "possession of the body of a deceased person for the purpose of burial, sepulture or other lawful disposition which they may see fit." _Kirksey v. Jernigan_, 45 So.2d 188, 189 (Fla. 1950) (emphasis added). Even more

recently, the Florida Supreme Court affirmed a decision that described the right as a "personal right of the decedent's next of kin to bury the body rather than any property right in the body itself." Jackson v. Rupp, 228 So.2d 916, 918 (Fla. 4th DCA 1969) (emphasis added), aff'd, 238 So.2d 86, 89 (Fla. 1970).

Less than 30 days ago, in an almost identical case, the Georgia Supreme Court held that state's Medical Examiner's law to be constitutional. In Georgia Lions Eye Bank, Inc. v. Lavant, #42351, ___ So.2d ___ (App 25), a trial court judge had earlier held Georgia's statute unconstitutional as "violative of due process in that it deprives a person of a property right in the corpse of his next-of-kin, and fails to provide notice and an opportunity to object." (Op at 2; App 26). The Georgia Supreme Court reversed the trial court's summary judgment and directed the entry of summary judgment for appellant eye bank. The Court flatly rejected the notion that the next of kin have a property right in a decedent that would give rise to constitutional protection. Its holding is unequivocal:

> In the earlier days of the common law, so Blackstone avers, no property right existed relative to a dead body, and matters concerning corpses were left to the ecclesiastical courts. "But though the heir has a property in the monuments and escutcheons of this ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains, when dead

> are buried." 2 W. Blackstone, Commentaries *429 (T. Cooley, ed. 1899).
>
> Because there were no ecclesiastical courts in this country to resolve matters relating to corpses, the courts conceived the notion of "quasi-property right," when referring to the interest of relatives in the bodies of their next-of-kin. Dean Prosser noted: "It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer." W.L. Prosser and W.P. Keeton, _Prosser and Keeton on Torts_, p. 63 (5th ed. 1984).
>
> . . .
>
> Thus, it can be seen that in Georgia, there is no _constitutionally_ protected right in a decedent's body. Rather, the courts have evolved the concept of quasi property in recognition of the interests of surviving relatives in the possession and control of decedents' bodies. _We do not find this common law concept to be of constitutional dimension_.

Op at 2-3; App 26-27) (emphasis added).

Florida law does not confer upon Appellees a property right in the remains of their children. Accordingly, due process did not entitle them to procedural rights when their decedents' corneas were removed. This Court should join the Georgia Supreme Court and find Florida's Medical Examiner's statute constitutional.

II. APPELLEES HAVE NO CONSTITUTIONAL RIGHT OF PRIVACY IN THE CORNEAL TISSUE OF DECEDENTS UNDERGOING AUTOPSIES.

A. The Right of Sepulture Does not Rise to Constitutional Privacy Dimensions.

A recognizable constitutional right of privacy only arises when personal rights can be deemed "fundamental" or "implicit in the concept of ordered liberty." Roe v. Wade, 410 U.S. 113, 152 (1973). Personal rights which traditionally warrant constitutional privacy protections relate to marriage, Loving v. Virginia, 388 U.S. 1 (1967), procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942), contraception, Griswold v. Connecticut, 381 U.S. 479 (1965), or parental selection of religious education, Pierce v. Society of Sisters, 268 U.S. 510 (1925).

Appellants submit that the right of sepulture, recognized as a right of action by Kirksey, does not rise to the constitutional dimensions of personal rights traditionally protected under privacy concepts. This is true for both the federal and state constitutional privacy concepts, which adhere only to basic and fundamental rights. Because Florida did not even recognize a cause of action for interference with the right of sepulture until 1941, see Dunahoo v. Bess, 200 So. 541 (Fla. 1941), this cause of action can hardly be deemed implicit in fundamental concepts of liberty. Certainly not every

familial claim warrants privacy protection. For example, a federal court has held that no fundamental right warranting constitutional privacy protections was implicated within the family relationship when adopted children sought to force disclosure of their biological parents. Alama Society, Inc. v. Mellon, 459 F. Supp. 912 (S.D.N.Y. 1978) (requiring only rational relationship standard to uphold constitutionality), aff'd, 601 F.2d 1225 (2d Cir. 1979), cert. denied, 444 U.S. 995 (1979).

When a statute primarily concerns health and safety, as does the Florida Medical Examiner law, no fundamental right of privacy is at stake. See Wilson v. California Health Facilities Commission, 110 Cal. App. 3d 317, 167 Cal. Rptr. 801 (Cal. App. 1980). When the state asserts an important interest concerning the public health, courts are reluctant to support asserted privacy interests, recognizing that health issues are of vital legislative concern to the states. See Whalen v. Roe, 429 U.S. 589 (1977) (state is accorded wide latitude in constitutional privacy terms to control health); Roe v. Wade, 410 U.S. 113, 154 (1973) (when state asserts effort to safeguard health, review is less exacting). Even under the explicit privacy protections of California's state constitution, a presumption of constitutionality was found when a statute concerned health. People v. Privitera, 23 Cal. 3d 697, 153 Cal. Rptr. 431, 591 P.2d 919 (Cal.), cert. denied, 444

U.S. 949 (1979) (right to Laetrile not a fundamental right protected by privacy).

A recent decision of the Michigan Court of Appeals makes clear that surviving parents have no privacy rights in their children's remains. In Tillman v. Detroit Receiving Hospital, 360 N.W.2d 275 (Mich. Ct. App. 1984), application for leave to appeal denied, Docket No. 75442 (Mich. June 3, 1985), the court was confronted with an almost identical constitutional challenge to Michigan's Restoration of Sight Act. The Michigan court rejected the privacy claim:

> The threshold question is whether plaintiff has privacy rights which are implicated here. Only rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in the guaranty of the right of personal privacy. Plaintiff claims that as next of kin she has an inherent, fundamental right to bury her decedent's body without mutilation. While there is no property right in the next of kin to a dead body, Michigan jurisprudence recognizes a common law cause of action on behalf of the person or persons entitled to the possession, control, or burial of a dead body for the tort of interference with the right of burial of a deceased person without mutilation.
>
> We do not find this common law right to be of constitutional dimension.

Id. at 277 (emphasis added, citations omitted). Indeed, if the right of parents to sepulture, which is founded in tort, rises to constitutional privacy dimensions, then by analogy parental

rights to damages for tortious injury to their child must, in general, be afforded equal privacy protections. Surely, such was not the intent of Griswold or Article I, Section 23 of the Florida Constitution.

B. No Reasonable Expectation of Privacy Exists Under the Circumstances of an Autopsy.

Second, Appellees can have no reasonable expectation of privacy in the corneal tissue of decedent's body which is the subject of an involuntary autopsy, authorized under Section 406.11, Florida Statutes. Since an autopsy typically involves the gross invasion of the decedent's body and removal of various major organs, it is unrealistic to expect a privacy right in the indistinguishable corneal tissue. In the context of an autopsy performed by the medical examiner under Section 406.11, removal of corneal tissue is relatively inconsequential, and indisputably does not alter the appearance of the decedent in the least. See App 21.

Neither federal nor state privacy provisions protect an individual from every governmental intrusion into one's private life. See Florida Board of Bar Examiners Re: Applicant, 443 So.2d 71, 74 (Fla. 1983). A preliminary question under both federal and state constitutional protections is whether a reasonable expection of privacy exists. Winfield v. Division of Pari-Mutuel Wagering, 10

F.L.W. 548 (Fla. Oct. 11, 1985). In light of involuntary autopsies performed under the jurisdicton of the medical examiner and the auspices of the state, no reasonable expection of privacy can exist in corneal tissue on autopsied bodies. If Section 732.9185 implicates privacy concerns, then the much more intrusive and equally vital autopsy statute, Section 406.11, must be subject to the same expansive constitutional challenges. See Snyder v. Holy Cross Hospital, 352 A.2d 334 (Md. Ct. Spec. App. 1976) (autopsy statute upheld even against religious objection). Such is not an acceptable interpretation of constitutional privacy interests.

C. Privacy Rights Terminate Upon Death.

The United States Supreme Court made clear in Roe v. Wade that the right to bodily privacy emanated from a right to control one's own body. Federal courts have consistently held, however, that "[a]fter death, one is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived." Accord Roe v. Wade, 410 U.S. 113 (1973); Silkwood v. Kerr-McGee Corp., 637 F.2d 743 (10th Cir. 1980), cert. denied, 454 U.S. 833 (1983); Guyton v. Phillips, 606 F.2d 248 (9th Cir. 1979), cert. denied, 445 U.S 916 (1980). A privacy right of bodily privacy ends with death and may not be claimed by survivors.

Moreover, in the recent Michigan case dealing with a similar statute, the court recognized that any privacy right was limited to decisions about one's own body, and did not survive death:

> The privacy right encompasses the right to make decisions concerning the integrity of one's body. This right is, however, a personal one. It ends with the death of the person to whom it is of value. It may not be claimed by his estate or his next of kin. Accordingly, we reject plaintiff's constitutional challenge predicated on the right of privacy.

360 N.W.2d at 277 (citations omitted). Because privacy rights regarding control of one's body are derived from notions of personhood, once a person dies any privacy rights surrounding control of bodily tissue also terminate. See McLean v. Rogers, 300 N.W.2d 389 (Mich. Ct. App. 1980) (right of privacy ends with death and may not be claimed by next of kin).

III. EVEN IF APPELLEES HAVE SOME PRIVACY INTERESTS IN DECEDENTS' CORNEAL TISSUE, THE STATUTE IS CONSTITUTIONAL BECAUSE THE STATE HAS AN OVERRIDING AND COMPELLING INTEREST IN RESTORING THE SIGHT OF ITS CITIZENS.

Assuming this Court finds that survivors have some privacy interests in the corneal tissue of deceased kin, Appellants submit that these interests are de minimis compared to the socially essential privacy rights associated with procreation or child rearing. See Roe v. Wade; Griswold v.

Connecticut; Pierce v. Society of Sisters. Moreover, Section 732.9185 imposes no serious burden on the right of sepulture and any associated privacy rights.[4] Because the survivors have the right to bury a body which is visually unaltered, the basic rights of burial are not disturbed.

Unless "state regulation entirely frustrates or heavily burdens the exercise of constitutional rights," the regulation should be upheld if a rational relation exists between the statute and a legitimate state goal. Carey v. Population Services International, 431 U.S. 678, 705 (1977) (Powell, J., concurring). Because of the uncontested success of the Restoration of Sight Act in providing large amounts of usable corneal tissue to sightless citizens, the statute unquestionably bears a rational relationship to improving the general visual health. Such a standard of review is particuarly appropriate since the statute deals with an issue of public health. See Whalen v. Roe.

Moreover, the state's interest in providing sight to its blind citizens can also pass the more demanding constitutional test of compelling state interest. Even when fundamental rights are heavily burdened, a statute is

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[4]This is especially apparent when one realizes that the right of sepulture is already heavily regulated by other Florida Statutes. See, e.g., Section 872.03 (illegal to cremate body within 48 hours of death); Sections 382.14, 382.39 (illegal to transport or inter body without permit); 382.081 (death certificate required before burial).

constitutional if it fulfills a compelling state interest by a focused means. This Court has held that the Board of Bar Examiners has a compelling state interest in obtaining sensitive personal information to screen applicants to the Bar, and that the information demanded was not overly intrusive. See Florida Board of Bar Examiners Re: Applicant, 443 So.2d 71 (Fla. 1983). This compelling state interest, accomplished through the least intrusive means, overcame privacy interests under the Florida Constitution. See also Prince v. Massachusetts, 321 U.S. 158 (1944); President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964), cert. denied, 377 U.S. 978 1883 (1964).

This Court has recently decided that the state has a compelling interest in investigation of the pari-mutuel wagering industry, allowing access to a citizen's bank records over privacy objection based on the Florida Constitution. See Winfield. Surely if the investigatory needs of the state in Winfield amount to a compelling interest, the well-documented need of the state to provide corneal transplant tissue to its blind citizens qualifies as a compelling interest:

> The right of sepulture, however, is not absolute, but must yield when in conflict with the public good. . . .

Tkaczyk v. Gallagher, 222 A.2d 226, 228 (Conn. Super. Ct. 1965), appeal dismissed, 224 A.2d 753 (Conn. 1966). Appellants

submit that the public good of restoring sight to the sightless far outweighs the rights of persons to bury vital corneal tissue.

Further, the statute has chosen the least intrusive means of providing corneal tissue for its citizens. The Legislature was acutely aware of its decision in passing Section 732.9185, twice rejecting attempts to add a consent requirement. See House of Rep. J. 826-27 (May 27, 1977); House Bill 698 (1978); Senate Bill 682 (1978). This attests that the Legislature was aware of the medically recognized impracticality of requiring consent due to the short useful life of corneal tissue.[5] Indeed, the Legislature chose the only practical means available for ensuring a supply of corneal tissue to restore sight and ameliorate serious societal suffering and waste.

Section 732.9185, therefore, meets the compelling state interest of relieving blindness and accomplishes this through a statute closely tailored to effectuate this goal.

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[5]About ten other states have also recognized that the only practical means of supplying useful corneal tissue is through similar statutes which do not require consent for corneal removal in an autopsy situation. See, e.g., Cal. Gov. Code §27491.47 (West Supp. 1985); Mich. Comp. Laws. Ann. §333.10201-02 (Callaghan Supp. 1985-86); Md. Estate & Trust Code Ann. §4-501.1 (1975).

IV. FLORIDA'S MEDICAL EXAMINER'S LAW DOES NOT DEPRIVE APPELLEES OF EQUAL PROTECTION.

In its Order Granting Summary Judgment, the trial court held that Section 732.9185 creates an invidious classification, and that such classification violated Appellees' rights to equal protection. (App 7; R 766). Careful analysis reveals, however, that Section 732.9185 does not create any invidious classification, and the statute does not otherwise deprive Appellees of their right to equal protection.

The Equal Protection Clause does not afford relief from laws felt to be ill advised. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979). Indeed, state laws are entitled to a presumption of validity in the face of equal protection challenges:

> State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause . . . . Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently than others. . . .

Parham v. Hughes, 441 U.S. 347, 351, (1979).

Only in those instances where a state classification (1) affects fundamental rights, or (2) is defined by "suspect criteria", will state legislation be subject to strict judicial scrutiny under the Equal Protection Clause. In that event the

state must demonstrate a compelling state interest in creating such classification, and that the classification employs the least restrictive means possible. Dunn v. Blumstein, 405 U.S. 330, 335-42 (1972). If the state classification does not affect fundamental rights or is not defined by suspect criteria, it need only satisfy the traditional rationality standard employed by courts to assess equal protection challenges. That standard requires only that the state classification bear a rational relationship to a legitimate public purpose. Exxon Corp. v. Eagerton, 103 S. Ct. 2296 (1983); Florida v. Matthews, 526 F.2d 319, 325 (5th Cir. 1976).

The federal and Florida judiciary have narrowly defined the fundamental rights and suspect classifications giving rise to strict scrutiny. The only rights deemed to be fundamental for equal protection analysis are voting, interstate travel, and first amendment freedoms, such as speech, freedom of the press and exercise of religion. See Dunn v. Blumstein, 405 U.S. at 336; Florida v. Matthews, 526 F.2d at 325. With regard to suspect criteria, classification by race is a classic example of a suspect criterion. Other suspect classifications, based upon unchanging human characteristics such as national origin, alienage, illegitimacy and gender, will subject legislation to strict scrutiny. Personnel Administrator of Massachusetts v. Feaney, 442 U.S. 256 (1979); Parham v. Hughes, 441 U.S. 347 (1979).

Florida's Restoration of Sight Act does not affect the type of fundamental rights or classify based upon the type of suspect criteria mentioned above. The statute does nothing more than create a class of deceased persons whose bodies come under the jurisdiction of a medical examiner for autopsy, and which are available for corneal removal according to the provisions of the statute. That classification scheme does not affect the fundamental rights of deceased persons and is not based upon any unchanging human characteristic. Equally important, the deceased persons in this class cannot complain of the classification, because the deceased lose their constitutional rights at death. Roe v. Wade, 410 U.S. 113 (1973); Silkwood v. Kerr-McGee Corp., 637 F.2d 743 (10th Cir. 1980).

Section 732.9185 does not, as the trial court order suggests, create a classification regarding the next of kin of deceased persons. Any classification is limited to those who come under the jurisdiction of the medical examiner. The statute's effect on next of kin is, at worst, incidental. Even if the statute could be construed to create a class of next of kin, however, Appellees' equal protection argument would nonetheless fail. Appellees may well have a common law right to direct the disposition of the remains of their loved one. They cannot show, however, that their common law right is a fundamental one, such as the right to first amendment freedoms,

or that the statute classifies them based upon any unchanging human characteristic. Thus, no matter how the class is defined, Section 732.9185 does not give rise to strict judicial scrutiny.

The proper analysis is whether 732.9185 and any classifications created by that law reasonably relate to a permissible state objective. Appellees would surely concede that the statute satisfies this standard. There can be no more permissible or noble goal than the restoration of sight to those who are blind. Section 732.9185 has been proven to be rationally related to this goal by improving the quality and quantity of corneal tissue available for transplantation.

Indeed, even if this Court were to believe that Section 732.9185 should be subject to strict scrutiny, the statute passes constitutional muster because of the compelling state interest in restoring sight to Florida citizens. The facts stated at the outset of this brief demonstrate the economic and social burdens imposed by blindness. It reduces the finances, productivity and social welfare of the citizenry. It is a scourge that organizations such as the eye banks have labored to eradicate. Section 732.9185 not only helps to eradicate that scourge, it does so through the least restrictive means possible. It permits corneal removal only if an autopsy is otherwise required, and only if no objection of next of kin is known.

In sum, Florida's Medical Examiner's law ably promotes the health and welfare of the citizens of the State of Florida, and does so in a rational and effective way. It does not create a classification giving rise to strict or exacting judicial scrutiny. Even if it did, the state's interest in mitigating the burden of blindness and restoring sight to citizens is sufficiently compelling to justify the classification. Under any standard, Section 732.9185 satisfies the requirements of the Equal Protection Clause.

V. SECTION 732.9185, FLORIDA STATUTES, DOES NOT CONSTITUTE A TAKING OF PRIVATE PROPERTY FOR A NON-PUBLIC PURPOSE.

The error in the trial court's holding that Section 732.9185 effects an unconstitutional taking of private property is explained on pages 15-19 of this brief. That section demonstrates that Appellees do not have a property interest in the remains of the decedents. Hence, no private property has been taken by state action. Moreover, the use of healthy corneal tissue to restore sight and improve the productivity of the citizenry is a manifestly public purpose recognized by Article X, Section 6(a) of the Florida Constitution. _See City of Miami v. Coconut Grove Marine Properties, Inc._, 358 So.2d 1151 (Fla. 3d DCA 1978), _cert. denied_, 372 So.2d 932 (Fla. 1979); _Hanna v. Sunrise Recreation_, 94 So.2d 597 (Fla. 1957).

VI. THE TRIAL COURT ORDER UNDER REVIEW IS INTERNALLY INCONSISTENT.

The error in the order under review is best exemplified by its internal inconsistency. In a single stroke, the court holds Florida's autopsy statute, Section 406.11, constitutional, yet finds Section 732.9185 unconstitutional. Those rulings cannot be reconciled.

Section 406.11 directs the performance of an autopsy when a death occurs under certain enumerated circumstances, including death by accident. That statute requires (1) a massive, mutilating intrusion of the decedent, (2) without affording any opportunity to next of kin to object or consent, (3) which eliminates the next of kin's common law right to control disposition of the remains, (4) but does so to further the health and welfare of the state. Section 732.9185, on the other hand, (1) permits an infintesinally small intrusion of the body <u>only when</u> an autopsy is otherwise required, (2) permits removal only if the medical examiner is not aware of an objection, (3) modifies common law rights only in limited instances, and (4) does so to restore sight and thereby enhance the health and welfare of the state. If one of these statutes is constitutional, so too is the other.

Indeed, both Sections 406.11 and 732.9185 promote vital public interests in a rational and unobtrusive way.

While Appellees may disagree with the propriety of those enactments, their concerns are legislative, not constitutional, in nature.

CONCLUSION

Vision is our most precious sense. For over seven years, Florida's Restoration of Sight Act has successfully provided the essential supply of corneal tissue necessary to restore sight to thousands of blind persons. Certainly, the federal and state constitutions do not mandate that such vital tissue be committed to the ground. Section 732.9185 is constitutional, and the trial court's order to the contrary should be reversed, and this cause remanded to the trial court with directions to enter summary judgment in favor of Appellants, upholding the law as constitutional.

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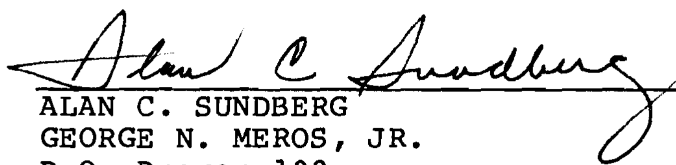

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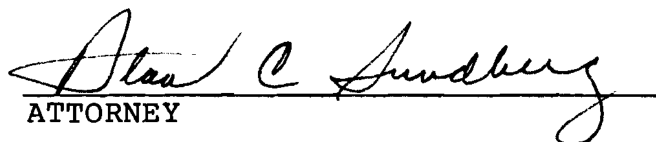

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