IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, et al.,

Appellants,

vs.

WADE POWELL, et ux., et al.,

Appellees. /

CASE NO. 67, 755

INITIAL BRIEF OF APPELLANT/INTERVENOR

STATE OF FLORIDA

On Appeal From the Circuit Court of the Fifth Judicial Circuit
In and for Marion County, Florida
of Issue Certified to be of Great Public Importance
by the District Court of Appeal
Fifth District of Florida.

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STATEMENT OF THE CASE AND FACTS

This cause was initiated by the filing of a Complaint and subsequent Amended Complaint by Appellees White as surviving parents and next-of-kin of James E. White, a deceased child (R. 1-17, 18-34).[1] Originally named as a Defendant herein, Appellant State of Florida was, by stipulation of the parties, dismissed from this action and granted the status of intervenor (R. 50-1).

Subsequently, this cause was consolidated with a similar action filed by Appellees Powell as surviving parents and next-of-kin of Anthony Wayne Powell, their son (R. 931-2).

As it is pertinent of this appeal, this consolidated cause involves challenges to the constitutionality of §732.9185, Fla. Stat. (See, R. 23-7; 813-15). By order dated August 23, 1985, the trial court granted Appellees' Motions for Summary Judgment on this issue, and declared §732.9185, Fla. Stat. unconstitutional on its face as being violative of the due process clauses of the Fifth and Fourteenth and Article I, Section 9 of the Florida Constitution, the equal protection clause of the Fourteenth Amendment and Article I, Section 2 of the Florida Constitution, the constitutional right to privacy, and Article X, Section 6(a) of the Florida Constitution (R. 732-43; 760-68). In so ruling, the court below made the following findings of fact:

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[1]The symbol (R.) shall refer to the appropriate page of the record of appeal.

1. On June 15, 1983, James E. White, age 15, drowned while swimming in the Rainbow River at the Dunnellon City Beach in Marion County, Florida.

2. Plaintiffs Erwin and Susan White are the surviving parents and next of kin of James E. White.

3. The body of James E. White was taken to Munroe Regional Medical Center in Ocala, Florida, where Defendant Keith Gauger, an investigator for the Medical Examiner's Office for the Fifth Medical Examiners District of the State of Florida, had a conversation with Erwin White prior to the body of James E. White being transferred to Leesburg, Lake County, Florida.

4. During that conversation, Erwin White inquired of Defendant Gauger whether or not there was any indication of any foul play or any struggle and, according to Erwin White, 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 accidential drowning ..." (Deposition of Erwin White page 18, line 9, et seq.). After learning this, Erwin White advised Defendant Gauger that he did not want an autopsy performed on the body. Notwithstanding this objection to an autopsy, Defendant Guager advised Erwin White that an autopsy was required under state law. (Erwin White deposition page 17, line 7, et. seq. and page 21, lines 1-22.) Defendant Gauger testified at his deposition that his recollection of this conversation was different from that of Erwin White.

5. That Assistant State Attorney James W. Phillips, sometime between April and October, 1983, made a request that autopsies be performed on all drowning victims in Marion County, Florida, and

testified that his authority for this request was section 925.09, Florida Statutes.

6. That Assistant State Attorney Phillips had no knowledge of the facts and circumstances surrounding the death of James E. White prior to the autopsy being performed on his body.

7. Notwithstanding the objection of Erwin White to an autopsy being performed on the body of James E. White, a full autopsy was performed by Defendant Techman.

8. That Defendant Techman did not know the corneae had been removed from the body of Jams E. White until it had been delivered to him in Leesburg, Florida, and the corneae were removed prior to the body being transported to Leesburg.

9. On July 11, 1983, at approximately 2:00 a.m., Anthony Wayne Powell, a 20 year old single male, and the son of Plaintiffs. WADE and FREDA POWELL, was severely injured as a passenger in a motor vehicle collision. He was admitted to Defendant, MUNROE REGIONAL MEDICAL CENTER, at approximately 4:49 a.m. and pronounced dead at that time.

10. Plaintiff, WADE POWELL, after being notified of his son's accident, identified the body of Anthony W. Powell at the hospital at approximately 5:15 a.m. on July 11, 1983, and thereafter he and his wife, FREDA POWELL, went into an adjacent waiting room where they remained until 7:30 a.m.

11. At approximately 6:30 a.m., the corneas of Anthony Wayne Powell were removed by a technician under the direction of Defendant District Medical Examiner, WILLIAM H. SHUTZE, at Defendant, MUNROE REGIONAL MEDICAL CENTER, while the Plaintiff parents,

WADE and FREDA POWELL, waited in an adjacent waiting room.

12. No one asked the Plaintiff parents, WADE and FREDA POWELL, whether they had any objection to the removal of their son's cornea, or whether they consented to same.

13. Had they been asked, the Plaintiff parents, WADE and FREDA POWELL, would have objected to and would not have consented to removal of their son's cornea.

14. At approximatelyu 7:30 a.m., Plaintiffs, WADE and FREDA POWELL, left the hospital, unaware their son's cornea had been removed.

15. That it is the policy of the Office of the Medical Examiner not to solicit objections to corneals removal or to advise next of kin of the intent to remove corneae.

16. That no one associated with the Office of the Medical Examiner knew of a patient in need of a cornea except that the Intervenor eye banks had disseminated information that there is always a need for corneae for transplant.

17. That one of the corneae removed from the body of James E. White was not used for transplantation but for some other purpose and the other was transported to the State of New York and transplanted into a patient in that state. (R. 733-35).

On September 5, 1985, Appellant State of Florida timely noticed the appeal of the lower court's finding regarding the constitutionality of §732.9185, Fla. Stat. to the District Court of Appeal for Fifth District of Florida (R. 769-70). By Order dated October 9, 1985, the Fifth District Court Appeal, certifying that this question is an issue of great public importance and one which will have a great effect on the proper administration of justice throughout the state, requested that this Honorable Court accept jurisdiction pursuant to Fla.R.App.P. 9.125 (R. 799-800). This Honorable Court has accepted jurisdiction herein, and this appeal ensues.

SUMMARY OF ARGUMENT

Initially, Appellant submits that §732.9185, Fla. Stat. is constitutional for the simple reason that it infringes upon no constitutional rights of either the decedents within its purview or the next-of-kin of those decedents. That is, neither the decedents nor their next-of-kin enjoy any constitutional property interest or privacy right in the remains of the decedent such as would render the reasonable exercise of the state's police power occasioned by the Cornea Removal Statute unconstitutional.

Appellant submits the Cornea Removal Statute clearly has a legitimate public purpose in the promotion of the health and welfare of the citizens of Florida. Indeed, restoring vision to the sightless is, as recognized by the court below, perhaps one of the most laudable and noble of purposes. The state's interest in fostering and promoting this goal is clear, compelling, and indisputably within the sphere of the legitimate exercise of legislative authority. Further, the means chosen by the legislature in enacting §732.9185 are clearly rationally related to the accomplishment of this legitimate state purpose.

Appellant recognizes and concedes that Appellee's have a right under Florida law to dispose of their decedent as they deem appropriate. However, this right is simply not of a constitutional magnitude. Accordingly, the trial court's declaration of unconstitutionality must be reversed.

Finally, even assuming some vaguely defined constitutional right of Appellee's or their decedent is impinged by §732.9185, it is submitted that the minimal intrusion caused by the statute is amply justified by the overwhelming and compelling public good which it is intended to and does promote.

For these reasons, Appellant urges this Court to declare §732.9185, Fla. Stat. constitutionally sound.

ARGUMENT

THE TRIAL COURT ERRED IN DECLARING §732.9185, FLA. STAT. (1983) FACIALLY UNCONSTITUTIONAL

In its Order of August 23, 1985, the Court below found §732.9185, Fla. Stat. (1983) facially unconstitutional essentially because the statute did not require either inter vivos consent by the donor, or notice to or consent by the next-of-kin following the death of the donor. More specifically, the Court based its determination on the following findings:

> (a) Appellees have a "personal and fundamental" property right to receive, possess and dispose of the bodies of their sons in the same condition as death left them, except for the results of a lawful autopsy;
>
> (b) By not providing notice or an opportunity to be heard with respect to the removal of corneal tissue, §732.9185 deprives Appellees of this right without affording them procedural or substantive due process of law guaranteed by the 5th and 14th Amendments to the United States Constitution and Article I, Section 9 of the Florida Constitution and creates and places Appellees in an invidious classification composed of the next of kin of persons who die under circumstances which subject the remains to a lawful autopsy;
>
> (c) This invidious classification deprives Appellees of equal protection of law as guaranteed by the Federal and Florida Constitutions;
>
> (d) Removal of corneal tissue under the circumstances permitted by §732.9185 is

> an unconstitutional invasion of Appellees' rights of privacy under the Federal and Florida Constitutions;
>
> (e) Removal of corneal tissue constitutes an impermissible taking of private property prohibited by Article X, Section 6(a) of the Florida Constitution, and;
>
> (f) There is no such compelling state interest such as would outweigh the foregoing rights of Appellees. (R. 732-43).

Appellant State of Florida respectfully submits that for the reasons hereinafter set forth, the lower court erred in declaring §732.9185, Fla Stat. facially unconstitutional.

Originally enacted by the Florida Legislature in 1977, §732.9185, Fla. Stat. provides:

> (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.

A. Section 732.9185, Fla. Stat. Does Not Violate Procedural Due Process, Substantive Due Process, or Article X, §6(a) of the Florida Constitution Because Appellants Have No Property Right In The Remains of a Decedent.

In its Order of August 23, 1985, the Court below found §732.9185 facially unconstitutional in part because of perceived violations of due process guarantees and the guarantee that private property shall be taken only for a public purpose upon the payment of full compensation. Appellant submits that these findings of the Court below are clearly in error.

It is fundamental that in order to be entitled to constitutional protection, a person must demonstrate a legally cognizable interest in the matter to be protected. In the context of property interests, such are not created by the Constitution, but rather are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

Appellant contends that under contemporary Florida law, Appellees have no cognizable property interest in the remains of their decedents such as would entitle them to constitutional protection.

In Dunahoo v. Bess, 200 So. 541 (Fla. 1941), this Court reversed the dismissal of a claim by a surviving spouse pertaining to the negligent embalming of his wife, and in so doing opined that "there is a property right in the corpse..." Id. at 543. Subsequently, however, this Court clarified this determination by finding that this "right" is limited to "possession of the body for the purpose of burial, sepulture or other lawful disposition...." Kirksey v. Jernigan, 45 So.2d 188, 189 (Fla. 1950).

More recently, in Jackson v. Rupp, 228 So.2d 916 (Fla. 4th DCA 1969), the District Court recognized that a survivor's "right" in the remains of his decedent is based upon "the personal right of the decedent's next-of-kin to bury the body rather than any property right in the body itself." Id. at 918 (emphasis added). On appeal, this Court "agree[d] with the District Court's decision in all respects" in holding that an "unauthorized autopsy will support.... a tort action." Rupp v. Jackson, 238 So.2d 86, 89 (Fla. 1970).

As the foregoing authorities make clear, Florida has joined those jurisdictions which hold that survivors have a "right" to lawfully dispose of their decedent, but this right is in the nature of tort rather than a property interest protectable under the Constitution. See, e.g., Dougherty v. Mercantile Safe Deposit & Trust Co., 387 A.2d 244 (Md. Ct. App. 1978); Lawyer v. Kernodle, 721 F.2d 632 (8th Cir. 1983); Sullivan v. Catholic

Cemetories, Inc., 317 A.2d 430 (R.I. 1974); W. Prosser, The Law of Torts, 58-9 (4th Ed. 1971).

Equally clear, as earlier recognized by the Court below, is that a decedent has no constitutional interest in his remains (R. 383). Silkwood v. Kerr-McGee Corp., 637 F.2d 743 (10th Cir. 1980), cert. denied, 454 U.S. 833 (1983); Roe v. Wade, 410 U.S. 113 (1973); Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979).

Based on the foregoing, Appellant submits that Appellees have no cognizable property interest in the remains of their sons, either individually or as representatives of the decedents' estates, such as would entitle them to either procedural due process or the protection afforded property rights of a constitutional magnitude by Article X, Section 6 of the Florida Constitution.

In addition to finding that the Cornea Removal Statute violates procedural due process, the Court below further found a violation of substantive due process as guaranteed by the Fifth and Fourteenth Amendments and Article I, Section 9 of the Forida Constitution. Appellant submits that this finding of the trial Court is clearly in error.

In order to satisfy the substantive aspect of the due process clause, the challenged legislation must have a legitimate public purpose based on promotion of the public welfare, health, or safety, and be rationally related to the accomplishment of

that legitimate state purpose. Dirt, Inc. vs. Mobile County Commission, 739 F.2d 1562, 1565 (11th Cir. 1984); see also, Johns v. May, 402 So.2d 1166 (Fla. 1981). Further, where the state provision does not violate a fundamental right, the burden is not upon the state to demonstrate its rationality, but upon the challenger to show ihat the enactment is wholly arbitrary. Wood v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979).

In the instant case, the legitimate public purpose of the Cornea Removal Statute is clear. As stated by the lower court, this purpose is to:

> [P]rovid[e] high quality cornea tissue to those in need of same. It helps supply and restore sight to the very young, the sick, accidental and disease victims, and the very old. The gift of sight is one of the most precious of life. (R. 735)

Appellant submits that the legitimate governmental and public interests served by the Corneal Removal Statute are among the most compelling imaginable, and the means which the legislature has chosen to accomplish this goal among the most effective. Indeed, corneal tissue obtained through the operation of §732.9185 accounts for approximately 90% of the tissue used for cornea transplants in Florida (R. 572). This result is due in great part to the fact that affirmative consent by the next-of-kin is not required under the statute, and hence, much otherwise usable tissue is not lost through delay and/or the inability to contact next-of-kin in order to obtain consent (R. 583). Given

these facts, it is clear that the Corneal Removal Statute both serves a legitimate public interest and does so in a manner rationally related to the accomplishment of this interest. Accordingly, the requirements of substantive due process are amply satisfied by this enactment.

B. Section 732.9185, Fla. Stat., Neither Creates an "Invidious Classification" Nor Violates Equal Protection

It is well established that classifications resulting from state statutes which do not involve suspect classes such as race, nationality, alienige, or religion or fundamental constitutional rights need only bear a rational relation to a legitimate public interest intended to be served by the statute. See, e.g., Graham v. Richardson, 403 U.S. 365 (1971).

Clearly, the classification effected by §732.9185 - i.e., those decedents (and their next of kin) who fall within the jurisdiction of the medical examiner pursuant to §406.11, Fla. Stat. as opposed to those who do not - does not involve a suspect class. Equally clear is that the statute does not affect a fundamental right such as would subject it to strict judicial scrutiny. Indeed, as this Court has recently noted, such fundamental rights "have been carefully and narrowly defined by the Supreme Court of the United States" to include uniquely private matters such as abortions and procreation, the right to vote, the right of interstate travel, and first amendment freedoms. In re Estate of Greenberg, 390 So.2d 40, 43 (Fla. 1980), appeal dismissed, 450 U.S. 961 (1981). Thus, in order to satisfy the

equal protection clause, §732.9185 need only bear a rational relation to the legitimate public interest sought to be served by the statute. This inquiry is accomplished by answering two questions: (1) Does the challenged legislation have a legitimate purpose? and; (2) Was it reasonable for lawmakers to believe that use of the challenged classification would promote that purpose? Western and Southern Life Insurance Co. v. State Board of Equalization of California, 451 U.S. 648, 668 (1981).

With respect to the first prong of the foregoing test, the legitimate purpose of §732.9185 is manifest. This purpose is, as earlier stated, to provide an abundant supply of high quality corneal tissue for transplantation and in so doing, to promote the health and welfare of the public and to relieve the tremendous fiscal drain caused by curable blindness.

As to the second focus of inquiry, it is equally clear that lawmakers could reasonably believe that the subject classification would promote this laudable purpose. That is, by including within its scope only those decedents already subject to the oftentimes massive intrusion caused by an autopsy, it is clear that the statute provides for a reasonable and rational means of achieving this purpose. In effect, therefore, §732.9185 actually treats similarily situated persons in a similar fashion, while those for whom an autopsy is not required are not within the purview of the statute. Such a classification in no way infringes upon equal protection rights, and given the manifestly

apparent rational relation between §732.9185 and the legitimate public interest sought to be served, the trial court's finding in this respect must be reversed.

C. Section 732.9185, Fla. Stat. Infringes Upon No Cognizable Right to Privacy.

In addition to the foregoing, the court below found §732.9185 violative of the right to privacy secured by the Federal and Florida Constitutions. Once again, Appellant contends that this finding is in error.

As earlier stated, it is apparent that a person's individual federal constitutional rights terminate at death. Whitehurst v. Wright, supra. Silkwood v. Kerr-McGee Corp., supra. Similarly, the right to privacy secured by Article I, Section 23 of the Florida Constitution is limited to "natural persons" and protects against intrusions into "private life" (emphasis added). Such a right is purely personal to the individual asserting it. Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla.), cert. denied, 459 U.S. 865 (1982); Jones v. Smith, 278 So.2d 339 (Fla. 4th DCA 1973).

Relatedly, the next-of-kin have no "privacy right" in the remains of their deceased family members. As earlier recognized by the Court below, constitutionally protected privacy rights are limited to personal actions and relationships among living spouses and families. (See, R. 384, and cases cited therein). Clearly, there is no authority for extending such rights to a decedent's next-to-kin, and in the absence of such authority,

extension of the right by this Court is both improvident and unwarranted.

In Tillman v. Detroit Receiving Hospital, 360 N.W. 2d 275 (Mich. App. 1984), the Court of Appeals of Michigan was presented with an identical challenge to an almost identical cornea removal statute. In rejecting this challenge, the Court stated:

> 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. Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 505, 242 N.W.2d 3 (1976). 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, Deeg v. Detroit,, 345 Mich. 371, 375, 76 N.W.2d 16 (1956), 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. Id.
>
> We do not find this common law right to be of constitutional dimension. The privacy right encompasses the right to make decisions concerning the integrity of one's body. Roe v. Wade, supra. 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. Hubenschmidt v. Shears,

> 403 Mich. 486, 489, 270 N.W.2d 2 (1978); McLean bv. Rogers, 100 Mich.App. 734, 737, 300 N.W.2d 389 (1980). Accordingly, we reject plaintiff's constitutional challenge predicated on the right to privacy.

As in Michigan, contemporary Florida law recognizes no property right of the next-of-kin in a family members corpse. Kirksey v. Jernigan, supra.; Jackson v. Rupp, supra. Accordingly, Appellant would urge that this Court adopt the well reasoned conclusion of Tillman and conclude that Florida's Corneal Removal Statute affects no cognizable right to privacy of either the decedent or his survivors.

Finally, even assuming a recognized right to privacy is affected by the statute, Appellants submit that the compelling state interest in public health and welfare far outweighs any such right and the minimal intrusion occasioned by §732.9185. Accordingly, no constitutional infirmity exists. Carey v. Population Services International, 431 U.S. 678 (1977).

CONCLUSION

In summary Appellant submits that the "rights" relied upon by the lower court to invalidate Florida's Cornea Removal Statute are, under closer scrutiny, not rights of a constitutional magnitude. Accordingly, the trial courts declaration of §732.9185 as unconstitutional in that it violates these "rights" is erroneous and must be reversed by this Honorable Court.

Furthermore, to the extent which surviving next-of-kin do possess a right of less than constitutional magnitude to possession of a deceased's body for the purpose of lawful burial, the minimal intrusion authorized by the statute is far outweighed by the great public good which it is intended to and does promote. That is, the presumptive validity to which this enactment is entitled has not been overcome. Accordingly, Appellant would urge that the trial court's order declaring §732.9185, Fla. Stat. facially unconstitutional be reversed in all respects.

WHEREFORE, for the foregoing reasons Appellant STATE OF FLORIDA would pray that the judgment of the Circuit Court be reversed and that §732.9185, Fla. Stat. be declared constitutionally valid and permissible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF APPELLANT, STATE OF FLORIDA, has been furnished by FEDERAL EXPRESS to JEROME BORNSTEIN, ESQUIRE, MARK P. LANG, ESQUIRE, Staff Counsel American Civil Liberties Union, 125 South Court Avenue, Orlando, Forida 32801; JACK SINGBUSH, P.A., Post Office Box 906, Ocala, Florida 32678; and JAMES T. REICH, P.A., 606 S.W. Third Avenue, Ocala, Florida 32670; and by U.S. Mail to JANET W. ADAMS, ESQUIRE, Adams, Hill & Fulford, 333 North Ferncreek Avenue, Orlando, Florida 32803; ROBERT A. GINSBURG, ROBERT L. BLAKE, Assistant County Attorney, Public Health Trust Division, Jackson Memorial Hospital, Suite C West Wing 108, Miami, Florida 33136; RICHARD B. COLLINS, ESQUIRE, CRAIG A. DENNIS, ESQUIRE, Perkin & Collins, Post Office Drawer 5386, Tallahassee, Florida 32314; ALAN C. SUNBERG, ESQUIRE, GEORGE N. MEROS, JR., ESQUIRE, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Post Office Drawer 190, Tallahassee, Florida 32302; ANDREW G. PATTILLO, JR., ESQUIRE, State Attorney, Fifth Judicial Circuit, 19 N.W. Pine Avenue, Ocala, Florida 32670; and DONALD W. WEIDNER, ESQUIRE, 760 Riverside Avenue,Jacksonville, Florida 32204, this 4th day of November, 1985.

Kenneth McLaughlin
KENNETH McLAUGHLIN