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.

D

COURT

On Appeal From The Fifth Judicial Circuit,
Marion County, Florida

REPLY BRIEF OF APPELLANTS WILLIAM H. SHUTZE, M.D., THOMAS M. TECHMAN, M.D., AND KEITH GAUGER

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In this Reply Brief, Appellees Wade and Freda Powell and Erwin and Susan White, are referred to as 'Plaintiffs' (as they were in the trial court), or as 'the Powells' and 'the Whites'. Similarly, Appellants, William H. Shutze, M.D.; Thomas M. Techman, M.D.; and Keith Gauger, are referred to as 'Defendants'. References to the record on appeal are designated by '(R._____)'. References to briefs of Appellees or Amicus Curiae are designated by '(Answer Brief at ______)' and '(Amicus Brief at ______)'.

ARGUMENT

I. PLAINTIFFS HAVE NO FUNDAMENTAL INTEREST WHICH IS DENIED BY THE CORNEA REMOVAL STATUTE.

The principal issue in these appeals concerns the nature of Plaintiffs' sepulture interest, admittedly recognized under Florida law, in possessing and disposing of the remains of their sons without malicious interference. Although that interest is a limited possessory one, with a corresponding tort right of action, because the cornea removal statute, Fla. Stat. § 732.9185, is rationally related to accomplishing a legitimate public purpose, the limitation of that right, by the statute, is constitutionally permissible.

Plaintiffs contend (and the trial court erred in so ruling, R. 760, ¶¶ 2b, 2c, 2d, 2f) that their right is one of fundamental constitutional character, requiring a compelling interest to justify the statute. On that premise hinge Plaintiffs' due process, equal protection, and right of privacy attacks. It is the cornerstone of those constitutional challenges. Without it, Plaintiffs cannot carry their burden against the arguably rational relationship of the statute to legitimate public purposes, making the statute presumptively constitutional.

A. No Fundamental Liberty or Privacy Protected By the Due Process and Equal Protection Clauses

That Florida decisional law grants Plaintiffs a right to possess and dispose of the remains of their sons without malicious interference does not mean that right is one of fundamental,

constitutional dimension. Not every recognized legal right is one of constitutional character, much less fundamental.

Both the Whites (Answer Brief at 12-13) and the Powells (Answer Brief at 23-28) acknowledge the line of decisions from the United States Supreme Court which have recognized fundamental rights of personal liberty protected from unreasonable government intrusion by the Due Process and Equal Protection Clauses. Those cases do indeed furnish guidance concerning the nature of the interests that have been accorded the protected status of fundamental liberty (Whites' Answer Brief at 12-13); and there is a theme throughout them that freedom of choice for fundamental decisions is protected from governmental interference (Powells' Answer Brief at 27).

Throughout those decisions, it is only freedom of choice concerning personal matters involved in existing, ongoing relationships among living persons that has been recognized as fundamental or essential to the pursuit of happiness by free persons, and so implicit in the liberty safeguarded by the Due Process Clause. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S.Ct. 2481 (1983) (right of woman to decide whether to give birth); Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (right of persons supporting minor children, not in their custody, to marry); Carey v. Population Services Int'l, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (right to decide whether to allow or prevent conception); Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (right of extended, non-nuclear

family to live together); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (right of woman to decide whether to give birth); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (parents' right to practice their religious beliefs in choosing education for children); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (right of unwed father to raise children); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (right to decide whether to allow or prevent conception); Loving v. Commonwealth of Va., 388 U.S. 1, 87 S.Ct. 1817 (1967) (right of persons of different races to marry); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (right to decide whether to allow or prevent conception); Skinner v. State of Oklahoma, 316 U.S. 535, 62 S.Ct. 1110 (1942) (right to decide whether to become sterilized); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (parents' right to choose education for children in parochial and private schools); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (parents' right to choose subjects of education for children).

The Whites acknowledge that the "family relationship which existed between themselves and their son . . . 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." (Answer Brief at 17-18) Likewise, the Powells admit that the decision which they believe "should be protected from governmental veto in this case is not how the child should be educated in preparation for life,"

but concerns disposition of "the child's remains in death." (Answer Brief at 21).

Nevertheless, Plaintiffs urge that the scope of fundamental liberty protected by the Due Process Clause should be expanded to include their relationship to the remains of their deceased sons, because of their past relationship with the deceaseds, when they were living. Indisputably, there are strong and deep human feelings and emotions, intertwined with moral, philosophical and religious sentiments, that underlie this argument. Were that to be the basis for recognizing fundamental, constitutional rights, the nonliving unborn--for whom all of the potential of life and living relationships and choices lies ahead--would seem to have a more compelling claim. Yet, the Court has refused to endorse such a view.

Instead, the coordinates marking the limits of the Court's decisions concerning fundamental liberty--personal matters involved in ongoing relationships among living persons--are rational ones: only amongst the living can there be rights "essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. at 399, 43 S.Ct. at 626. To depart from those boundaries of fundamental liberty under the Due Process Clause would be to abandon the sound and steady ground that history and reason have carved out, for the slippery slopes of subjective emotion, sentiment, and belief.

If (as Plaintiffs contend) the right to possess and dispose of the remains of their decedents were a fundamental one, it conflicts with those decisions which have upheld the massive

intrusion of that right by full-scale autopsies, without requiring a compelling interest and narrowly restricted conditions for such autopsies. Yet, that is precisely what this Court approved "in all respects," Rupp v. Jackson, 238 So.2d 86, 89 (Fla. 1970), in agreeing with the decision of the court of appeal:

> In spite of the fact that an exclusive right does vest in the surviving spouse, relative, or next of kin to dispose of a corpse, autopsies may be authorized by public authorities for the protection of health or the discovery of crimes.

Jackson v. Rupp, 228 So.2d 916, 919 (Fla. 4th D.C.A. 1969). In fact, that is exactly the way the trial court ruled in the cases at hand, in upholding, both facially and as applied, the constitutionality of the medical examiner statute, Fla. Stat. § 406.11, authorizing the two autopsies in these cases (R. 764).

However, if no compelling interest, narrowly implemented, is required for the relatively enormous infringement on Plaintiffs' right that an autopsy constitutes, then that same right is not transformed into one of fundamental liberty in the face of the comparatively minimal impingement from removing corneal tissue when (as the statute provides) an autopsy is required under Fla. Stat. § 406.11.

Like performing an autopsy, or removing blood from a corpse, removal of cornea abridges no fundamental right of liberty or privacy. Being personal in nature, the right dies with the person benefitted by it; and it neither inures to, nor may be claimed by, his next of kin or his estate.[1] Tillman v. Detroit Receiving Hospital, 360 N.W. 2d 275, 277 (Mich. App. 1984). Accord,

Hubenschmidt v. Shears, 270 N.W.2d 2, 4 (Mich. 1978); Bufford v. Brent, 320 N.W. 2d 323, 325 (Mich. App. 1982); McLean v. Rogers, 300 N.W.2d 389, 391 (Mich. App. 1980); J. H. Rose Trucking Co. v. Bell, 426 P.2d 709, 713 (Okla. 1967); Zenith Transport, Ltd. v. Bellingham Nat'l Bank, 395 So.2d 498, 500 (Wash. 1964); Fretz v. Anderson, 300 P.2d 642, 646 (Utah 1956). See Jones v. Smith, 278 So.2d 339, 342 (Fla. 4th D.C.A. 1973): "The right of privacy is a right that is purely personal to the individual asserting such right" (emphasis in original).

The cornea removal statute creates a classification consisting of the remains of persons who died under circumstances where autopsies are required. Because the classification is comprised of bodies of deceaseds, and is defined by the conditions of death, it is in that respect truly an immutable one and not subject to change. But since the remains of deceased people have no legal rights, fundamental or otherwise, there can be no discriminatory effect from the classification.

While the statute's classification of dead bodies in many cases will indirectly affect the next of kin, the effect of the classification upon the next of kin is not unalterable. The expression of an objection will at once exclude the body of the deceased from the statute's classification and eliminate any effect upon the next of kin.

To see that the statute's classification encompasses not the next of kin (as the trial court, R. 766, and Plaintiffs suppose), but decedents' remains, one need only consider those situations where a person dies, without any next of kin, in circumstances

that necessitate an autopsy. There is no next of kin to be affected by the statute, yet the body of the deceased falls within the statute's classification.

Although the Whites deny it (Answer Brief at 20-21, 24), the Powells (Answer Brief at 28), like the trial court (R. 764), acknowledge that the legislative interest and public purpose of the statute, in restoring sight to the blind, is a laudable one. That interest is no less a public purpose because only four persons, at most, could receive the benefit of transplant from Plaintiffs' deceased sons. Neither is it less of a public purpose because one of the recipients was in New York, rather than in Florida, nor because one of the cornea, microscopically found unsuitable for transplant, was used for medical research. Plaintiffs' disagreement with these particular results does not invalidate the statute as lacking a reasonable relationship to a legitimate public purpose.[2]

Much as hearts, livers, kidneys, and other organs are provided from out-of-state sources for transplant to needy patients in Florida, the legislature could reasonably conclude that furnishing, from time to time, corneal tissue, available as a result of the statute, to needy patients outside of the state will, in turn, be met by importation of corneal tissue, from time to time, for transplant to needy patients in Florida. Similarly, the legislature could reasonably conclude that corneal tissue obtained under the statute, but found to be microscopically unsuitable for human transplant, can still benefit the public by providing knowledge through medical research about the causes and

cures of blindness. Cf. Western & Southern Life Ins. Co. v. State Board of Equalization of Calif., 451 U.S. 648, 671-72, 101 S.Ct. 2070, 2085, 68 L.Ed.2d 514 (1981); Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 466, 101 S.Ct. 715, 725, 66 L.Ed.2d 659 (1981).

> The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . . When social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude, . . . and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

City of Cleburne, Tex. v. Cleburne Living Center, 105 S.Ct. 3249, 3254 (1985).

In fact, the cornea removal statute actually achieves its intended purpose of reducing blindness and its socio-economic impact. A greater number of corneal tissue, of more youthful and higher quality, is available for use, decreasing patient waiting time for, and increasing the success rate of, transplant surgery. Since it is only for the blind and vision-impaired that cornea transplants are needed, the statute's effect on blindness, by increasing the supply of usable corneal tissue for transplant, is unmistakable. Nevertheless,

> States are not required to convince the courts of the correctness of their legislative judgments. Rather 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision makers.' . . . [T]hey cannot prevail so long as 'it is evident from

all considerations presented . . . that the question is at least debatable.'

Minnesota v. Cloverleaf Creamery Co., 449 U.S. at 464, 101 S.Ct. at 724.

B. No Fundamental Religious Liberty Protected By the Free Exercise Clause

For the first time in this case, Plaintiffs have asserted that the interest of the next of kin, in possessing and disposing of the remains of deceaseds, is a constitutionally recognized fundamental one, based on and derived from the liberty to exercise religious faith guaranteed by the First Amendment Free Exercise Clause.[3]

First, there simply is no indication in the record that the opposition of either Plaintiffs, to the statutorily authorized removal of cornea from the bodies of their deceased sons, is premised on any tenets of established religious faith or practice.[4] Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707, 713, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981); Wisconsin v. Yoder, 406 U.S. at 215-16, 92 S.Ct. at 1533; Grosz v. City of Miami Beach, 721 F.2d 729, 735-36 (11th Cir. 1983), cert. denied 105 S.Ct. 108 (1984). Second, the void of evidence in the record is matched by the absence of any such claim in the trial court, either in Plaintiffs' pleadings (R. 259-85, 809-18), or in their arguments before the trial court (R. 1039-84, 1155-84). Constitutional claims and theories, not presented to the trial court below, may not be raised for the first time on appeal.[5] Sanford v. Rubin, 237 So.2d 134, 137

(Fla. 1970); Love v. Hannah, 72 So.2d 39, 43 (Fla. 1954); Bethesda Radiology Associates v. Yaffee, 437 So.2d 189, 191 (Fla. 4th D.C.A. 1983).

Finally, Plaintiffs' claim that this right of the next of kin, to possess and dispose of the remains of their deceased, is a fundamental freedom guaranteed by the Free Exercise Clause, cannot succeed as a matter of constitutional law.

> [T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interest.

Wisconsin v. Yoder, 406 U.S. at 215-16, 92 S.Ct. at 1533.

In State v. Chambers, 477 A. 2d. 110 (Vt. 1984), the defendant appealed his conviction for burying his dead daughter, without a burial permit, because of his opposition to an autopsy, necessary before a burial permit would be issued. He had "refused to allow an autopsy, claiming that his religious beliefs forbade the performance of an autopsy on his child." Id. at 111. Like the Plaintiffs in the case at hand, the defendant based his free exercise of religion claim upon the United States Supreme Court's decision in Wisconsin v. Yoder: "That a state may impinge upon the practice of a sincere religious belief only if the state's interest is of 'sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.'" Id. at 112, quoting Wisconsin v. Yoder. The Vermont Supreme Court

rejected that claim: "Before determining the importance of a state's interest, the party claiming a violation of his or her free exercise rights must show that the conduct the state is interfering with is based on a legitimate religious belief and not on 'purely secular considerations.'" Id., quoting Wisconsin v. Yoder.

> The evidence in this case does not support the defendant's claim that his conduct 'is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group' . . . The defendant has failed to show that his church believes in the practice of burying the dead without autopsies. The record shows that the tenets of the defendant's church do not prohibit the performance of autopsies. Rather, the defendant claims only that he was opposed to this particular autopsy. Thus, the defendant's decision not to allow an autopsy was an individual one, based on this particular situation and not on a fundamental belief of the members of his church. Therefore, we hold that the defendant's conduct is not protected by the free exercise clauses of either the United States or the Vermont Constitutions.

Id. Similarly, there is no evidence that the views of Plaintiffs (and of amicus curiae, the Reverend Price), opposing removal of corneal tissue for human transplant, under the cornea removal statute, are based on any "fundamental tenets of their religious beliefs." Wisconsin v. Yoder, 406 U.S. at 218, 92 S.Ct. at 1534.

The personal preferences of individual beliefs, no matter how sincerely held, inevitably lead to the kind of subjective relativism which is neither contemplated by, nor entitled to the protection of, the Free Exercise Clause. Plaintiffs concede as

much: "The nature of the religious liberty interest infringed by the intrusion will necessarily differ from individual to individual, depending upon the belief." (Powells' Answer Brief at 19.)

In Fuller v. Marx, 724 F.2d 717 (8th Cir. 1984), the court of appeals affirmed the dismissal of a claim by the plaintiff-widow that disposal of the internal organs of her husband's body, after autopsy, violated "a first amendment right to bury her husband in a manner consistent with her religious beliefs." Id. at 719. The court found this First Amendment argument to be without merit. The Arkansas statute in issue authorized the medical examiner to dispose of internal organs removed during the course of an autopsy, unless the person claiming the body submitted a written request.

> We do not question the sincerity of [the plaintiff's] religious belief that in order to provide a decent Christian burial the organs as well as the body must be buried. We do not agree, however, that she was hindered in the free exercise of this belief. Arkansas law, as discussed above, requires physicians to safely dispose of body organs after autopsies. Ark. Stat. Ann. § 82-434. This law is a reasonable way to protect public health. Religious beliefs such as [the plaintiff's] are accommodated by the provision which allows anyone claiming a body to also claim the body's organs if a written request is made. No religious test is required as a condition for retrieval of the organs. We consider the statute to be a reasonable limit on First Amendment rights, and find no violation of or interference with [the plaintiff's] right to freely exercise her religious beliefs.

Id. at 720. Like the Arkansas statute, the Florida cornea removal statute implicitly allows for corneal tissue to remain

with the deceased's body, if an objection is voiced to, or known by, the medical examiner or eye bank. Hence, like the Arkansas statute, the Florida cornea removal statute is "a reasonable limit on first amendment rights," including the freedom to exercise religious faith and practice.

Plaintiffs' right under Florida law is to possess and dispose of the remains of their deceased sons; but unless that right is a fundamental, constitutional one, Plaintiffs' attacks upon the cornea removal statute cannot prevail. The statute is a legislative choice, rationally related to achieving legitimate public purposes. It is therefore presumptively valid. Plaintiffs' views in opposition to the statute, rooted in human emotion and in their moral, philosophical, or religious sentiments, are improperly voiced in the Court: they must be addressed to the elected representatives of society who passed this statute, and who enact laws both to benefit society and to reflect its prevailing views and wishes.

II. PLAINTIFFS HAVE NO GENUINE PROPERTY INTEREST WHICH IS DEPRIVED BY THE CORNEA REMOVAL STATUTE.

Florida common law confers a right of action for malicious interference with the next of kin's interest in possessing and disposing of a deceased's remains. That does not mean that this right is a property interest created by state law, and protected by the essential safeguards of procedural due process.[6]

Despite the assertion to the contrary (Whites' Answer Brief at 11), the clarification in Kirksey v. Jernigan 45 So.2d 188 (Fla. 1950), and Rupp v. Jackson, supra, of Plaintiffs' interest, as a right of action for malicious interference with possession and disposition of their deceaseds' remains, necessarily suggests that the nature of the right is to be free from such malicious interference, and not a property right in the corpses.

If the language of the decision in Dunahoo v. Bess, 200 So. 541 (Fla. 1941) were conclusive that Plaintiffs have a property interest in the bodies of their decedents, as they suppose (White's Answer Brief at 8), then the language of the court of appeal in Jackson v. Rupp, 228 So.2d at 918, is at variance with that conclusion. Moreover, if Plaintiffs' supposition were correct, this Court would hardly have "agree[d] with [that] decision in all respects." Rupp v. Jackson, 238 So.2d at 89.

> [T]here is a cause of action for an unauthorized autopsy. The basis for recovery is found in the 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 at 918.

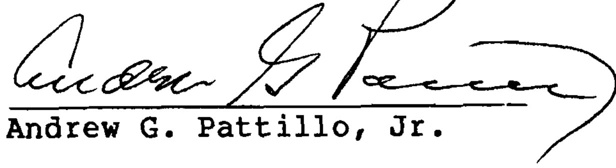
Plaintiffs' entreaty that "at the very least, a good faith effort to obtain consent and notify the next of kin of intent to remove the cornea is required" (Whites' Answer Brief at 16), is simply their disagreement with the legislative conditions chosen for authorizing the removal of corneal tissue. It furnishes no authority for the Court to dictate to the legislature that the statute's conditions must conform to Plaintiffs' notion of what should be required. The repeated rejection of attempts to amend the statute by adding such a condition as Plaintiffs urge reflects the legislature's determination to the contrary. Moreover, that determination is reasonable in the light of the relatively short time--four to six hours--in which corneal tissue may be removed and made available for transplant.

In any event, the statute does not encourage silence, it simply does not require active solicitation of consent. But it surely does not permit "removal of corneas even where the decedent's family has an objection" (Amicus Brief at 4). Where an objection is voiced or known, a condition of the statute is not met, and no corneae may be removed. Like the Arkansas statute in Fuller v. Marx, 724 F.2d at 719, this condition of the statute "is a reasonable one providing simple and adequate process," and constitutes "no unconstitutional invasion of any property right." Id.

CONCLUSION

The trial court's ruling, that the cornea removal statute is unconstitutional, should be reversed.

Respectfully submitted,



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FOOTNOTES

[1] Insofar as People v. Roehler, 213 Cal. Rptr. 353, 367-68 (Cal. App. 1985) reflects a different view under California law, it is out of step with the majority of jurisdictions (see cases cited at text accompanying this footnote). If it purports to express federal constitutional law, however, it is incorrect. See, e.g., Gardner v. Meyers, 491 F.2d 1184, 1189 (8th Cir. 1974).

[2] The legitimacy of this public purpose and legislative interest underlying the cornea removal statute puts to rest the notion that the transplant of corneal tissue to a living patient is a nonpublic, solely private use.

[3] In fairness, it is the Powells' Answer Brief that has squarely and directly raised in this Court, for the first time in this case, the claim that the interest of the next of kin, in possessing and disposing of the remains of deceaseds, is a fundamental liberty of faith and practice, protected constitutionally by the Free Exercise Clause. See Answer Brief at 18-22. "The nature of the legal relationship between the family and the deceased cannot be determined without reference to religious and family values." (Answer Brief at 16).

> The theological, moral and ethical questions raised by the taking of organs from human remains without permission of next of kin should not be swept aside in the constitutional analysis of the validity of statutes which authorize such takings. (Answer Brief at 18).

"The religious interests present here are similar to, and at least as compelling as, those at issue in Wisconsin v. Yoder." (Answer Brief at 20). "The situation presented here is similar to Yoder and Pierce in several respects. Both involved the relationship between parent and child and both involved important aspects of religious belief." (Answer Brief at 21).

> The nature of the religious liberty interest infringed by the intrusion will necessarily differ from individual to individual, depending on belief. Although religious beliefs differ, it is a fair statement to say that individuals do object to removal of tissue and organs from their deceased family members on religious grounds," [citing Deuteronomy 21.22-23 for what is purported to be the orthodox Jewish position]. (Answer Brief at 19).

"[I]t is clear that the next of kin have a liberty interest in their deceased which is constitutionally protected. . . . 'only those interests of the highest order and those not otherwise

served can overbalance legitimate claims to the free exercise of religion.'" (Answer Brief at 22, quoting Wisconsin v. Yoder.)

Likewise, the Amicus Curiae Brief of the Reverend Thomas J. Price asserts the same basis in religious faith and practice for the position that the Plaintiffs' right, to possession and disposition of their deceased sons' bodies, is a fundamental, constitutional liberty. "Spiritual values should be considered in determining how to approach the process of organ and tissue donation." (Amicus Brief at 7). "[T]he taking of corneae without even attempting to determine whether the next of kin objects to such an intrusion is simply not consistent with the family and spiritual values involved." (Amicus Brief, Conclusion, at 9).

4 Far from being based on any deeply held tenets of religious faith, Plaintiffs' opposition to the cornea removal statute, at least insofar as they charge that the corneal tissue is their private property, which has been taken from them, and for which they have not received the value in compensation, is at least secular, and at most mercenary.

5 Generally, the failure to raise an alternative theory in the trial court results in its waiver for purposes of appellate review. See Cowart v. City of West Palm Beach, 255 So.2d 673, 674-75 (Fla. 1971), rev'g on grounds consistent with this principle 241 So.2d 748, 749-50 (Fla. 1st D.C.A. 1970). While "fundamental error" is an exception to this rule, it is not involved in this case.

> Constitutional issues, other than those constituting fundamental error, are waived unless they are timely raised.
>
> 'Fundamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action. The Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly.

Sanford v. Rubin, 237 So.2d at 137.

In any event, Plaintiffs assert no error in this appeal. While an appellee may, without cross-appealing, assert and rely on alternative grounds presented in the record below to support a trial court's ruling, even though such grounds were not discussed by the trial court, they must nonetheless have been raised in the trial court record. See MacNeill v. O'Neal, 238 So.2d 614, 615 (Fla. 1970), rev'g 216 So.2d 465 (Fla. 3d D.C.A. 1968); Cerniglia v. C & D Farms, Inc., 203 So.2d 1, 2-3 (Fla. 1967); Hall v. Florida Board of Pharmacy, 177 So.2d 833, 835 (Fla. 1965); Szabo v. Ashland Oil Co., 448 So.2d 549, 551 (Fla. 3d D.C.A. 1984), rev. denied sub nom. Exxon Corp. v. Szabo, 453 So.2d 43 (Fla. 1984); Hester

v. Moss, 206 So.2d 692, 695 (Fla. 2d D.C.A. 1968). Here, the Free Exercise Clause, as a basis for invalidating the cornea removal statute, has never been mentioned until the Answer Brief of the Powells and the Amicus Curiae Brief of the Reverend Price.

> The record is devoid of a single fact which would indicate that this question was ever before the trial court. It is a rule of long standing that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the pleadings or ruled upon by the trial court will not be considered by this court on appeal. Lipe v. City of Miami, 141 So.2d 738, 743 (Fla. 1962).

[6] Of those states with cornea removal statutes substantially the same as Florida's, the only ones to encounter constitutional challenges to their statutes have rejected the view that the next of kin's sepulture right is a property interest under state law, and therefore protected by procedural due process. Georgia Lions Eye Bank v. Lavant, ___ S.E.2d ___ (Ga. 1985); Tillman v. Detroit Receiving Hospital, 360 N.W. 2d 275, 277 (Mich. App. 1984).

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that the original and seven copies of the foregoing Reply Brief have this 25th day of November, 1985 been delivered to, and filed with, the Clerk of the Supreme Court of the State of Florida; and a copy served by U.S. Mail this 25th day of November, 1985, upon the following:

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