IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, et al.,

Appellants,

v. CASE NO. 67,755

WADE POWELL, et ux.,
et al.,

Appellees.
_____/

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

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
ALAN C. SUNDBERG
GEORGE N. MEROS, JR.
F. TOWNSEND HAWKES
P.O. Drawer 190
410 First Florida Bank
Tallahassee, FL 32302
(904) 224-1585

Attorneys for Eye Banks

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INTRODUCTION

Notice carefully what Appellees do not do in their answer briefs:

(1) They do not confront the uncontested fact that the Restoration of Sight Act, Section 732.9185, has dramatically improved the quality of corneal tissue in Florida, and that this higher-quality tissue has enhanced the likelihood of successful transplantation;

(2) They do not confront or distinguish the recent appellate decisions from Michigan and Georgia, which rejected the identical constitutional challenges raised here;

(3) They do not explain why the virtual dissection of a human body under the autopsy statute is consistent with constitutional principles, while corneal removal is not;

(4) Perhaps most revealing, Appellees do not confine themselves to the facts and argument raised below. They now attempt, for the first time, to interject religion as an issue. Appellees' complaints do not contain a single allegation concerning religious beliefs, and the issue was never argued below or mentioned in the trial court order granting summary judgment.

Instead, Appellees remove the case to a theoretical plane and ask this Court to create novel social and constitutional policy based on hypothetical facts and hypothetical rights.

The facts and law cannot, of course, be ignored. Section 732.9185 has ably served the fundamentally important goal of restoring sight to Florida citizens. It has done so in a sensitive and balanced way, affording next of kin a right to object without imposing upon medical examiners the affirmative duty to seek out consent. This balance was struck because the legislature found, and the record in this case confirms, that an absolute requirement of consent would nullify the benefits of the law.

A state must often make hard choices in its efforts to improve public health. Florida made such a choice here. In the absence of clear constitutional prohibition, the judiciary should respect that policy choice.

FACTS

The Eye Banks reiterate the following facts in order to correct certain misstatements found in the answer briefs[1]:

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[1]Appellees protest that the Eye Banks have failed to prove many of the facts found in the initial brief. Appellees forget that the Eye Banks submitted detailed affidavits in support of their motion for summary judgment (see appendix to Eye Banks' initial brief). Those affidavits fully explain the facts surrounding corneal transplantation and the benefits of corneal removal legislation in Florida and in the nation. Appellees did not counter that evidence with opposing affidavits. Since they were uncontested, the facts in these affidavits now constitute a part of the record before this Court. See Harvey Building, Inc. v. Haley, 175 So.2d 780 (Fla. 1965); Gay Brothers Construction Co. v. Florida Power and Light, 427 So.2d 318 (Fla. 5th DCA 1983); Noack v. Watters, 410 So.2d 1375 (Fla. 5th DCA 1982).

(1) Section 732.9185 permits corneal removal only if there exists a need for such tissue, the decedent must in any event undergo an autopsy, and no objection of next of kin is known by the medical examiner. If the medical examiner knows that the next of kin object to corneal removal, the procedure cannot be performed;

(2) Corneal tissue must be removed within a few hours after death. If not, the tissue becomes useless (R 577);

(3) Section 732.9185 has dramatically improved the quality of tissue in Florida. In New York, where no medical examiner legislation exists, only 35% of corneal tissue retrieved from donors is suitable for transplantation. In contrast, 85% of tissue obtained in Florida is suitable. (R 572-574).

(4) The increased supply of corneal tissue resulting from medical examiner legislation can spell the difference between sight and permanent blindness for persons suffering from perforations of the eye. If the cornea is perforated due to trauma or infection, fluid in the eye begins to leak. A new cornea must be transplanted within 12 to 24 hours to stop the leakage, or the entire eye will be lost (R 580).

(5) Medical examiners do not receive a penny in compensation for retrieval of corneal tissue. The Eye Banks receive only a processing fee, which covers no more than two-thirds of the actual cost of procuring and processing the tissue (R 573-574).

ARGUMENT

A. THE RIGHT TO FREE EXERCISE OF RELIGION IS NOT AN ISSUE IN THIS CASE. IF IT WERE, 732.9185 WOULD NONETHELESS BE CONSTITUTIONAL.

1. Appellees Do Not Have a Factual Record or the Requisite Standing to Raise a Free Exercise Claim.

To reiterate, the operative complaints do not contain a single allegation concerning the existence, vel non, of Appellees' religion or the religious beliefs to which they might subscribe. The affidavits filed in support of the motions for summary judgment are silent on the issue. Appellees did not advance any legal argument to the trial judge on the Free Exercise Clause, and the order under review makes no mention of it. In sum, there is not a single word in the record to establish that Appellees subscribe to any religious beliefs, or that those beliefs have been affected by the Restoration of Sight Act. Appellees, thus, have neither a record nor standing on which to base a Free Exercise claim.

In Wisconsin v. Yoder, 406 U.S. 205 (1972), the United States Supreme Court held that constitutional claims concerning the Free Exercise Clause cannot rest on hypothetical religious beliefs. The person claiming a violation must show that the conduct the state is affecting is based on a "legitimate religious belief." Id. at 215. This Court has interpreted that standard to require a factual showing that a party sincerely subscribed to the beliefs

of a religion, and that the conduct or beliefs affected by state action were an integral part of that religion. Town v. State ex rel. Reno, 377 So.2d 648, 650 (Fla. 1979).

In a closely analogous case, State v. Chambers, 477 A.2d 110 (Vt. 1984), a father asserted that his religious beliefs were violated when a medical examiner performed an autopsy on his deceased child. The Supreme Court of Vermont rejected the argument because the father failed to prove by competent evidence that burying the dead without autopsy was an integral part of his religion. After citing from Wisconsin v. Yoder, the court stated:

> 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. . . ." Id. 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. at 112.

This record, of course, does not contain any evidence to show that 732.9185 has affected Appellees' religious beliefs. The Free Exercise claim must therefore fail.

Additionally, Appellees cannot raise a Free Exercise claim because they have no standing to do so. A litigant cannot assert the hypothetical constitutional rights of a person not a party to the case. Adams v. Askew, 511 F.2d 700, 704 (5th Cir 1975). Because these Appellees are, at best, raising a hypothetical claim of non-parties, they have no standing to assert a Free Exercise claim. Lasky v. State Farm Insurance, 296 So.2d 9 (Fla. 1974); Flast v. Cohen, 392 U.S. 83 (1968); Tileston v. Ullman, 318 U.S. 44 (1943).

2. Section 732.9185 Does Not, in Any Event, Violate The Free Exercise Clause.

The freedom to hold religious beliefs is absolute. But the freedom to act on those beliefs, or to prevent others from acting, is not:

> [T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. . . . [L]egislative power over mere opinion is forbidden but it may reach people's action when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion.

Braunfeld v. Brown, 366 U.S. 599, 603-604 (1961). Both federal and state courts, including the Florida Supreme Court, have held that a state may restrict religious practices that interfere with public health. Town v. State ex rel. Reno, 377 So.2d 648 (Fla. 1979); Custody of a Minor, 379 N.E. 2d 1053 (Mass 1978); State v. Perricone, 37 N.J. 463, 181 A.2d 751, cert denied 371 U.S. 890

(1962); People ex rel Wallace v. Labrenz, 411 Ill 618, 104 N.E. 2d 769, cert denied, 344 U.S. 824 (1952) In re Sampson, 65 Misc. 2d 658, 317 N.Y.S. 2d 641 (N.Y.Fam. Ct 1970); aff'd, 29 N.Y. 2d 900, 328 N.Y.S. 2d 686, 278 N.E. 2d 918 (1972). Jehovah's Witnesses v. King County Hosp. Unit No. 1, 278 F. Supp 488 (W.D. Wash 1967), aff'd, 390 U.S. 598 (1968).

Notably, the United States Supreme Court has permitted states to pursue important state objectives even when those objectives restrict religious practices. In Reynolds v. United States, 98 U.S. 145 (1879), the Supreme Court upheld the polygamy conviction of a Mormon, even though an accepted doctrine of that faith imposed a duty upon males to practice polygamy. And in Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944), the Court upheld a statute prohibiting a child from selling periodicals in public places, even though the child believed that it was her religious duty, under the Jehovah's Witnesses faith, to sell periodicals. See also Braunfeld, 366 U.S. 599,606.

The U.S. Court of Appeals for the Eighth Circuit has recently rejected a Free Exercise claim in an almost identical case. In Fuller v. Marx, 724 F.2d 717 (8th Cir. 1984), the wife of a decedent contended that a medical examiner violated her rights to Free Exercise of Religion by not returning her husband's organs to the body after autopsy. Arkansas law required physicians to dispose of bodily organs after autopsy. Physicians were not under a duty to seek out consent from next of kin, but the family was permitted to obtain the organs if a written request were made.

The Eighth Circuit found this to be a reasonable and constitutional accommodation of all interests involved.

The appropriate test by which to assess a Free Exercise claim is the following: (1) does the act have a secular legislative purpose, (2) is the primary effect one that advances or hinders religion, and (3) does the act excessively entangle the government in religion. Wallace v. Jaffree, --- U.S. ---, 105 S.Ct. 2479 (1985). Measured by this standard, 723.9185 is manifestly constitutional. The restoration of sight to blind persons is clearly a secular purpose, the primary effect of the act is on the health of Florida citizens, not their religion, and the Act does not require any governmental contact or entanglement with religion.

Finally, all parties would concede that even substantial legislative interference with religious beliefs is permissible if required by a compelling state interest. Appellants steadfastly maintain that 732.9185 does not materially encroach upon religious beliefs, but even it if did, the Act would be constitutional because it serves a compelling state interest. The preservation and improvement of public health has been acknowledged to be a compelling matter of state concern. Snyder v. Holy Cross Hospital, 352 A.2d 334 (Md Ct. Sp. App 1976). The Eye Banks rely on their initial brief to demonstrate that blindness, like other disabling diseases, has imposed a dreadful cost on Florida citizens. Section 732.9185 has greatly reduced those costs in ways that voluntary donation could not.

B. THE RIGHT OF SEPULTURE DOES NOT AMOUNT TO A PROTECTED LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE.

Appellees assert that a parent's right of sepulture, the right to control disposition of the body, rises to the level of a "liberty" interested protected by Due Process. This recharacterization of the right of sepulture is merely an effort to avoid the inescapable conclusion that a parent has no ownership or property right in the dead body of offspring. See Tillman v. Detroit Receiving Hospital, 360 N.W. 2d 275 (Mich. App. 1984). The right is only a tortious cause of action for wrongful interference with the body. It is not a property right, it is not a liberty right, and it is not a privacy right.

Freedom of bodily movement has always been the core of "liberty" protected by due process from arbitrary governmental intrusion. See Youngberg v. Romeo, 457 U.S. 307,316 (1982). Although the concept of liberty protected by the Due Process Clause has been extended in limited circumstances beyond concerns of bodily restraint, the range of interests protected is not infinite. See Ingraham v. Wright, 430 U.S. 651 (1977). Every right does not involve a liberty interest, Jago v. VanCuren, 454 U.S. 14 (1981), and courts have repeatedly rejected "the notion that any grevious loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." Meachum v. Fano, 427 U.S. 215, 224 (1976). "The question is not merely the 'weight' of the individual's interest,

but whether the nature of the interest is within the contemplation of the 'liberty or property language of the Fourteenth Amendment'". Jago, 454 U.S. at 17. The nature of the liberty interest asserted by Appellees is the right to be free from arbitrary governmental interference with family relationships. In this context, the "liberty interest" is indistinguishable from the asserted right of privacy. This has been made clear in Roe v. Wade, 410 U.S. 113 (1973), where the Supreme Court stated that the right to privacy was founded in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action." Id at 153.

Since the asserted liberty interest is merely a guise for the constitutional right of privacy, Appellants would rely on their original arguments that, under the circumstances of this case, survivors have no right of privacy in the remains of decedents. There is no right of privacy because the interest at hand, a tortious cause of action for wrongful interference with a body, does not rise to constitutional dimensions.

Further, concepts of privacy apply only to ongoing familial relationships. Pierce v. Society of Sisters, 268 U.S. 510 (1925). That relationship has necessarily ended in these cases due to the death of the family member. Therefore, a familial relationship to which significant privacy interests can attach no longer exists. Hence the use of the term "familial relationship" to describe the survivors' feelings for decedents is inappropriate.

C. SURVIVORS HAVE NO REASONABLE PRIVACY INTEREST IN THE CORNEAL TISSUE OF DECEDENTS.

For a constitutional right of privacy to attach, the interest involved must be fundamental. Palko v. Connecticut, 302 U.S. 319, 325 (1937). The only interest here which has been legally recognized is the right to sepulture and the tortious cause of action to recover for interference with that right. Under constitutional privacy principles, this interest is not implicit in the concept of ordered liberty.

Losing sight of privacy concepts under the First and Fourteenth Amendments, Appellees travel into the realm of Fourth Amendment criminal law seeking support for their claim of privacy in decedents' bodies. Citing unsupported dicta from a California intermediate court, Appellees argue that the court in People v. Roehler 213 Cal.Rptr. 353 (Cal. App. 2d Dist. 1985), found such a reasonable expectation of privacy in a dead body. Appellees ignore the entirely disparate criminal search and seizure context, as well as the court's ultimate vindication of the search based on compelling governmental interests:

> As sensitive as the feelings of the living next-of-kin may be on the occasion of death, the societal interest must prevail.

Id. at 371 (citation omitted). Moreover, even within the search and seizure context, other courts have found no privacy expectation in a dead body. See Gardner v. Meyers, 491 F.2d 1184 (8th Cir. 1974) (drawing blood from corpse did not violate Fourth

Amendment); Hubenschmidt v. Shears, 403 Mich. 486, 270 N.W. 2d 2 (1978) (nonconsensual blood extraction from dead body not illegal search and seizure as right of privacy is personal, ending with death).

Merely invoking the trauma that follows the death of relatives does not create a constitutionally protected right of privacy in corneal tissue of the decedents. See Hazelwood v. Stokes, 483 S.W.2d 576 (Ct. App. Ky 1972) (widow has no right of privacy in husband's body; no privacy violated by nonconsensual taking of blood sample). Every conceivable right deriving from the family does not amount to a protected privacy right. See Doe v. Kelly, 106 Mich. App. 169, 307 N.W. 2d 438 (1981) (no right of privacy infringed by statute prohibiting payment related to adoption). Because the interest asserted by Appellees is not fundmental to the concept of freedom, it is not within constitutional privacy protections.

D. APPELLEES HAVE NO PROPERTY RIGHT IN THE BODY.

Notably, Appellees are less than vigorous in their assertion that the right to direct disposition of a body is the type of property interest entitled to procedural due process. Their reticence is understandable in view of the unequivocal holding in Jackson v. Rupp, 228 So.2d 916 (Fla. 4th DCA 1969). Comment (a) to Section 868 of the Restatement (Second) of Torts should dispel any remaining doubt:

> One who is entitled to the disposition of the body of a deceased person has a cause of action in tort against one who intentionally, recklessly or negligently mistreats or improperly deals with the body, or prevents its proper burial or cremation. The technical basis of the cause of action is the interference with the exclusive right of control of the body, which frequently has been called by the courts a "property" or a "quasi-property" right. This does not, however, fit very well into the category of property, since the body ordinarily cannot be sold or transferred, has no utility and can be used only for the one purpose of interment or cremation. In practice the technical right has served as a mere peg upon which to hang damages for the mental distress inflicted upon the survivor; and in reality the cause of action has been exclusively one for the mental distress.

The Whites respond by arguing that their common law right to direct disposition is at least an "incident of ownership" deserving of formal procedural protections. (White brief at 36). The U.S. Supreme Court, however, has held precisely to the contrary. In Duke Power Co. v. The Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978), the Court noted that "[o]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law." Id. at 88, n. 32 (emphasis added).

E. CALIFORNIA'S EXPERIENCE DEMONSTRATES THE NECESSITY OF FLORIDA'S RESTORATION OF SIGHT ACT.

Counsel for the Powells states that California law requires a diligent search for consent from the next of kin before corneal removal is permitted. (Powell brief at 29). Counsel overlooked, however, the 1985 supplement. California law now mirrors

Florida's, giving the next of kin an opportunity to object, but not requiring that the medical examiner seek out consent. §27491.47, West's Ann. Calif. Government Code (Supp 1985).

The point is far from frivolous. It is raised to demonstrate that the imposition of a duty upon medical examiners to obtain consent from next of kin would nullify the benefits of Section 732.9185. The uncontested affidavit of Donald Ward (Eye Banks brief at App 22-24) shows that prior to the revision of California's statute, that state's program of retrieving corneal tissue broke down because of the consent requirement. Indeed, in 80% of the cases, the families could not be reached in time to make a donation. The corneal tissue perished with the decedent, even though 80% of the families ultimately contacted would have consented (R 584). California adopted Florida's approach to corneal removal in order to correct this problem. Now, in California as in Florida, the quality and availability of corneal tissue has improved dramatically (R 584).

CONCLUSION

The restoration of sight is a gift of light into a life of darkness. It deserves the respect of society and of this Court. Those who oppose Florida's Restoration of Sight Act have failed to show that it violates established principles of constitutional law. This Court, therefore, should reverse the order on appeal.

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.

ALAN C. SUNDBERG
GEORGE N. MEROS, JR.
F. TOWNSEND HAWKES
P.O. Drawer 190
410 First Florida Bank
Tallahassee, FL 32302
(904) 224-1585

Attorneys for Eye Banks

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by regular U.S. Mail this 27th day of November, 1985, to:

JIM SMITH, Attorney General
LOUIS F. HUBENER, ESQUIRE
Assistant Attorney General
Department of Legal Affairs
The Capitol - Suite 1502
Tallahassee, FL 32301

DONALD W. WEIDNER, ESQUIRE
Associate General Counsel
760 Riverside Avenue
Jacksonville, FL 32204

JACK SINGBUSH, P.A.
Post Office Box 906
Ocala, Florida 32670

RICHARD B. COLLINS, ESQUIRE
CRAIG A. DENNIS, ESQUIRE
Perkins & Collins
Post Office Drawer 5286
Tallahassee, FL 32314

ROBERT L. BLAKE, ESQUIRE
Assistant County Attorney
Public Health Trust Division
Jackson Memorial Hospital
Suite C - West Wing 108
Miami, FL 33136

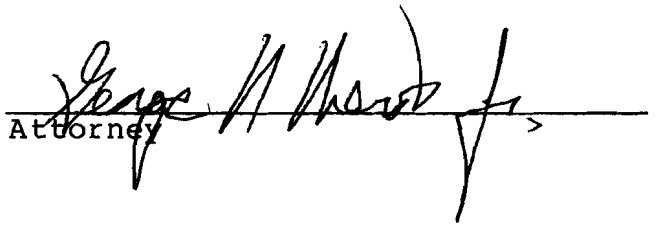
JANET W. ADAMS, ESQUIRE
333 North Ferncreek Ave.
Orlando, FL 32803

JAMES T. REICH, ESQUIRE
606 Southwest Third Avenue
Ocala, FL 32670

JEROME J. BORNSTEIN, ESQUIRE
MARK P. LANG, ESQUIRE
Staff Counsel
American Civil Liberties
125 South Court Avenue
Orlando, FL 32801

ANDREW G. PATTILLO, JR., ESQUIRE
RUSSELL W. LAPEER, ESQUIRE
P.O. Box 1450
Ocala, FL 32678

STEPHEN T. MAHER, ESQUIRE
University of Miami School of Law
Post Office Box 248087
Coral Gables, Florida 33124


Attorney