FILED
SID J. WHITE
JAN 14 1994
CLERK, SUPREME COURT
By
Chief Deputy Clerk

THE SUPREME COURT OF FLORIDA

JESUS GONZALEZ, et ux.,

Petitioners,

vs.

METROPOLITAN DADE COUNTY, etc.,

Respondent,

______________________________/

CASE NO.: 82,838

DISTRICT COURT OF APPEAL
3RD DISTRICT - NO. 92-1462

BRIEF OF PETITIONERS

ON APPEAL FROM THE DISTRICT COURT
OF APPEAL, THIRD DISTRICT

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STATEMENT OF CASE

This is a case arising out of a mix-up caused by the Respondent and a co-defendant in the lower tribunal, RIVERO FUNERAL HOME, INC., that led to the burial of a wrong baby. As a result of said mix-up the Petitioners, JESUS GONZALEZ and ZOILA GONZALEZ, filed an action against Respondent JACKSON MEMORIAL HOSPITAL, hereinafter referred to as JACKSON, and RIVERO FUNERAL HOME, INC., hereinafter referred to as RIVERO.

The Amended Complaint filed by Petitioners on April 9, 1991 states the following causes of actions:

A. Count I: Gonzalez v. Rivero, Tortious Negligent Interference with a Dead Body;

B. Count II: Gonzalez v. Rivero, Negligent Infliction of Emotional Distress;

C. Count IV: Gonzalez v. Jackson, Tortious Interference with a Dead Body;

D. Count VI: Gonzalez v. Jackson, Infliction of Emotional Distress.

CIRCUIT COURT

On April 15, 1992 the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida entered an order of Summary Judgment in favor of both JACKSON and RIVERO. A copy is attached to Petitioners Appendix as Exhibit "A".

On that same day April 15, 1992, the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida inadvertently entered another order of Summary Judgment which appeared to be inconsistent with the previous order. A copy is

attached to Petitioners Appendix as Exhibit "B".

On April 23, 1992 the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida entered an order Vacating Summary Judgment and entering Corrected Final Summary Judgment, again in favor of both JACKSON and RIVERO. A copy is attached to Petitioners Appendix as Exhibit "C".

On May 29, 1992 the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida entered an order denying Petitioners Motion for a Rehearing as to JACKSON. Said order vacated the Summary Judgment entered in favor of RIVERO. A copy is attached to Petitioners Appendix as Exhibit "D".

An appeal of the Summary Judgment order in favor of JACKSON ensued.

THIRD DISTRICT COURT OF APPEAL

On November 9, 1993 the Third District Court of Appeal filed an opinion in this cause affirming the summary judgment entered in the Circuit Court of Dade County, but certified the following question to this Honorable Court as one of great public importance:

> WHETHER FLORIDA SHOULD ADOPT SECTION 868 RESTATEMENT (SECOND) OF TORTS, RECEDING FROM THE HOLDING IN DONAHUE v. BESS, 146 Fla. 182, 200 So. 541 (1941), THAT THE LAW OF FLORIDA WILL NOT SUSTAIN AN ACTION FOR MENTAL ANGUISH CAUSED BY NEGLIGENT HANDLING OF A DEAD BODY IN THE ABSENCE OF PHYSICAL INJURY.

STATEMENT OF THE FACTS

On or about October 29, 1988 the Appellant, ZOILA GONZALEZ gave birth to a baby girl named Maria, at JACKSON.

On or about November 7, 1988 baby girl Maria died at JACKSON.

On or about November 7, 1988, JESUS GONZALEZ and ZOILA GONZALEZ contracted the services of RIVERO, and burial services for baby girl Maria were scheduled for November 9, 1988.

On or about November 9, 1988 the funeral services and burial for baby girl Maria were performed, and unbeknown to the Petitioners JESUS GONZALEZ and ZOILA GONZALEZ, the body of another newborn was buried, instead of the body of baby girl Maria.

On or about January 9, 1989, the Petitioners, JESUS GONZALEZ and MARIA GONZALEZ received a telephone call from RIVERO, and they were advised of the fact that the body of baby girl Maria had not been buried on November 9, 1988, and in fact the body of another baby had been buried by RIVERO.

The body of baby girl Maria remained in a refrigerated drawer at the morgue of JACKSON from November 9, 1988 until on or about January 9, 1989; and during this time the Petitioners, JESUS GONZALEZ and ZOILA GONZALEZ were neither notified of the mix-up, nor told where the body of baby girl Maria was.

The body of baby girl Maria was buried January 24, 1989.

POINTS ON APPEAL

POINT I

QUESTION CERTIFIED BY THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, AS ONE OF GREAT PUBLIC IMPORTANCE:

WHETHER FLORIDA SHOULD ADOPT SECTION 868 RESTATEMENT (SECOND) OF TORTS, RECEDING FROM THE HOLDING IN DONAHUE v. BESS, 146 Fla. 182, 200 So. 541 (1941), THAT THE LAW OF FLORIDA WILL NOT SUSTAIN AN ACTION FOR MENTAL ANGUISH CAUSED BY NEGLIGENT HANDLING OF A DEAD BODY IN THE ABSENCE OF PHYSICAL INJURY.

POINT II

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR SINCE MATERIAL ISSUES OF FACT WERE PRESENT WHICH PRECLUDED THE ENTRY OF SUMMARY JUDGMENT

SUMMARY OF ARGUMENT

At the time of the hearing on the motion for the entry of a Final Summary Judgment, the Circuit Court made the following findings:

> "For the record, my review of these matters indicated to me that both Defendants, by definition of Florida Law, fell below the standard of care, and thus if there is any question presented, there is sufficient information to cause a jury to determine whether or not their standard of care fell below the conduct required of like institutions, both the hospital and the funeral home. However, the conduct clearly does not approach any gross misconduct on the part of either agencies or their employees or servants. And my understanding of Florida law for a person seeking damages in cases of this nature for emotional distress, et cetera, to which these Plaintiffs have suffered, and the Court finds that they suffer emotional distress, that they must prove intentional conduct and gross misconduct..."; A copy of the transcript of the hearing of April 9, 1992 is attached to Petitioners Exhibit "E" in the Appendix. Reference at page 5.

> "I'm giving you a good vehicle for appeal. I'm giving a finding that both of them were negligent. I made a finding that your people suffered emotional distress, but I find that it was not intentional on their part, I do not find it willful on their part, I do not find it grossly negligent on their part." at pages 7-8.

Traditionally, an individual making a claim to recover damages for mental pain and suffering, or emotional distress, unconnected with physical injury in an action for tortious interference with a dead body and/or infliction of emotional distress, needed to plead and prove conduct that is extreme and outrageous, so as to imply malice and justify the imposition of punitive damages. This is the so called "impact rule".

Recent Florida case law holds that cases involving the tortious interference with a dead body are excluded from said "impact rule", Williams v. City of Minneola, 575 So.2d 683 (Fla.

5th DCA 1991) rev. denied, 589 So.2d 289 (Fla. 1991); Mallock v. Southern Memorial Park, Inc., 561 So.2d 330 (Fla. 3rd DCA 1990); Halpin v. Kraeer Funeral Homes, Inc., 547 So.2d 973 (Fla. 4th DCA 1989), rev denied, 557 So.2d 35 (Fla. 1990).

The question presented in this appeal is whether Petitioners may recover damages for emotional distress caused by a tortious interference with a dead body on either a theory of negligent infliction of mental distress and/or tortious negligent interference with a dead body, absent a physical impact.

The modern trend of allowing recovery for negligent tortious interference with a dead body, absent physical impact, which is the view supported by the Restatement (Second) of Torts, Section 868 (1979), is generallly said to be the better rule.

Based on such, the Third District Court of Appeal certified the question in the instant appeal. In his concurring opinion, the Honorable Judge Gerald B. Cope, Jr. opined as follows:

> "I concur that affirmance is required by Kirsey v. Jernigan, 45 So. 2d 188 (Fla. 1950), and concur in the certification of the question. In my view Restatement (Second) of Torts section 868 (1979) represents **the better rule**, see generally State v. Powell, 497 So. 2d 1188, 1191-92 & n.3 (Fla. 1986), cert. denied, 481 U.S. 1059 (1987), but adoption of the Restatement position must come from the Supreme Court rather than this court."

Public policy requires that the courts provide a vehicle for recovery for individuals that have suffered mental damages for the negligent handling of a dead body in the absence of physical impact. No rule that results in the complete denial of a legitimate legal right and remedy in all cases should be retained.

ARGUMENT ONE

CASES INVOLVING THE TORTIOUS
INTERFERENCE WITH A DEAD BODY ARE
EXCLUDED FROM THE IMPACT RULE

FLORIDA SHOULD ADOPT SECTION 868
RESTATEMENT (SECOND) OF TORTS, RECEDING FROM
THE HOLDING IN DONAHUE v. BESS, 146 Fla. 182,
200 So. 541 (1941), THAT THE LAW OF FLORIDA
WILL NOT SUSTAIN AN ACTION FOR MENTAL ANGUISH
CAUSED BY NEGLIGENT HANDLING OF A DEAD BODY IN
THE ABSENCE OF PHYSICAL INJURY.

The right of a next of kin of a deceased to control the burial or other disposition of a deceased's body is widely recognized, and the interference with that right is an actionable wrong.

Florida courts have recognized a valid cause of action based on the mishandling of a corpse, Scherer v. Rubin Memorial Chapel, Ltd., 452 So.2d 574 (Fla. 4th DCA 1984); for unauthorized or wrongful embalming, Scheuer v. Wille, 385 So.2d 1076 (Fla. 4th DCA 1980), for an unauthorized autopsy, Jackson v. Rupp, 228 So.2d 916 (Fla. 4th DCA 1969); for infliction of emotional distress for failure of defendant to dispose of decedent's ashes in accordance with specific instructions, Smith v. Telophase National Cremation Society, Inc., 471 So.2d 163 (Fla. 2nd DCA 1985); for ejecting a family from the cemetery while attempting to hold memorial services for the deceased, Mallock v. Southern Memorial Park, Inc., 561 So.2d 330 (Fla. 3rd DCA 1990); and

for the wrongful exhibition of photographs and videotape of autopsy of suspected drug overdose victim, Williams v. City of Minneola, 573 So.2d 683 (Fla. 5th DCA 1991), rev. denied, 589 So.2d 289 (Fla. 1991).

In their complaint Petitioners filed an action for Tortious Negligent interference with a Dead Body, and Negligent Infliction of Emotional Distress. The underlying conduct alleged as a basis for said tort actions is that of negligence. Florida courts have recognized said torts where negligence is the underlying conduct. In the case of Eagle Pitcher Industries v. Cox, 481 So. 2d 517 (Fla. 3rd DCA 1985), the Third District Court of Appeal recognized that negligent infliction of emotional distress is a viable theory of recovery.

The Restatement of Torts 2d., Section 868, also recognized negligent conduct as a viable theory of recovery, and states as follows:

> "One who intentionally, recklessly or **negligently** removes, **withholds**, mutilates or operates upon 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."

Negligence has been defined as the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances or the doing of what a reasonable and prudent person would not have done under the circumstances, resulting in injury to another. DeWald v. Quainstrom, 60 So.2d 919 (Fla. 1952); Florida Railroad Co. v. Sturky, 48 So. 34 (Fla. 1909). Three elements are required: a duty, a failure of the defendant to perform the duty and injury or damage resulting therefrom.

As indicated above, through the discovery process it has been established that Respondent owed a duty to the Petitioners of properly identifying the remains of their infant girl. It is clear that said duty was breached by their failure to properly identify the body which led to the mix-up. The breach of said duty was the proximate cause of the mental damages here complained of.

A principal issue affecting liability in this regard as indicated earlier is that of whether a plaintiff is entitled to recover damages for mental anguish suffered in the absence of an accompanying physical injury (the so called "impact rule"). Recent Florida case law demonstrates that cases involving the tortious interference with a dead body are excluded said the "impact rule", Williams v. City of Minneola, 575 So.2d 683 (Fla. 5th DCA 1991), rev. denied, 589 So.2d 289 (Fla. 1991); Mallock v. Southern Memorial Park, Inc., 561 So.2d 330 (Fla. 3rd DCA 1990); Halpin v. Kraeer Funeral Homes, Inc., 547 So.2d 973 (Fla. 4th DCA 1989), rev. denied, 557 So.2d 35 (Fla. 1990).

Traditionally, the accompanying physical impact requirement, or the so called "impact rule", was one to afford a guarantee that the mental distress is genuine. The above cases indicate that in torts involving the interference with a dead body there are adequate assurances that the resulting mental disturbance is not fictitious.

As the Reporter's Note on the Restatement (Second) of Torts, Section 868 (1982), points out, "[t]he older rule was that there was no liability for mere negligence, as distinguished from

intentional or "wanton" interference. (cases omitted). **A majority of the more recent cases have allowed recovery for negligence** resulting in the type of interference with the body that justifies liability for intentional interference (cases omitted). (at pg. 76).

This modern trend has also been recognized by Professors Willaim L. Prosser & W. Page Keeton, TORTS Section 54, at pg. 362:

> "There are by now, however, a series of cases allowing recovery for negligent embalming, negligent shipment, running over the body, and the like, without such circumstances of aggravation. What all of these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serve as a guarantee that the claim is not spurious. There may perhaps be other such cases. **Where the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery**.(Citations ommitted)."

Other authors have also recognized this modern trend. J.D. Lee & Barry A. Lindahl, in MODERN TORT LAW, LIABILITY & LITIGATION, Rev. ed., 1990, indicate at page 151 as follows:

> "It has been correctly observed that the impact doctrine 'has been thoroughly repudiated by the English courts which initiated it, rejected by a majority of American jurisdictions, abandoned by many which originally adopted it, and diluted, through numerous exceptions, in the minority which retained it. (citations ommitted)'.
>
> **The current trend is to allow recovery for the consequences of fright negligently inflicted, notwithstanding the absence of contemporaneous physical contact**. (citations ommitted)".

This so called "impact rule" first originated in England in the case of Victorian Railways Commissioners v. Coultas, 13 App Cas 222 (PC 1888). In said case an action had been filed for

damages arising from a mere sudden terror unacompanied by any actual physical injury. The House of Lords declared that said "mental damages" could not be considered a consequence of the defendants acts. The court stated that this "would be extending the liability for negligence beyond what that liability has heretofore been held to be" and open a field of "imaginary claims."

The impact rule was repudiated 13 years later in Dulieu v. White, 2 KB 669 (1901), but by then the impact rule had made its way into the United States. In Dulieu, the plaintiff because of fright which occurred when the defendant's vehicle drove into the tavern where she was employed, sustained injuries, resulting in her giving birth to an "idiot". The "impact rule" soon thereafter lost stature in England.

Dean Pound has provided an important explanation of the origin of the impact rule:

> "In view of the danger of imposition, the courts, on a balance of the interests involved, refused to go beyond cases where there was a voucher for the truth of the plaintiff's claim, either in the intention of the defendant to bring about such a result or in a physical impact which in ordinary experience was known to have such results. With the rise of modern psychology the basis of this caution in securing an important element of the interest of personalty was removed. But in the meantime a legal conception had come into being. The doctrine had been rested upon a conception of the right of physical integrity as including integrity of the physical person but not mere peace of mind. This conception had been verified historically and the rule now stood intrenched. To show the falsity of the assumption that nothing physical was involved in fright made no difference. We were not dealing with the facts of human life but with conceptions that were self-sufficient."
> Pound, Interpretations of Legal History, 120.

Public policy requires that the courts provide a vehicle for recovery for individuals that have suffered mental damages for the negligent handling of a dead body in the absence of physical impact. No rule that results in the complete denial of a legitimate legal right and remedy in all cases should be retained. As Lee & Lindahl, supra, point out:

> "Courts that have abandoned the impact rule are willing to deal not only with the difficulties of proof, but also with the possibility that spurious actions will be brought. Although fraud and additional causes of action are possible, that is no reason for a court to decline recognition of deserving complaints... Fraud and speculation are possibilities that exist in almost all types of litigation. yet such possibilities do not mean that the courtroom doors are to be closed to this particular litigation. Otherwise, courts are not serving their purpose. **No rule which results in the denial of a legal right and remedy in all cases should be retained simply because in some cases a fictitious injury may be urged or a difficult problem of proof presented. Public policy requires the courts to resolve this problem, if in fact it is a problem.** Advances in the medical profession will aid the courts in considerable degree. Psychiatry and clinical psychology now provide sufficiently accurate tests for such claims. Computing damages is no more difficult than in actions, for example, for defamation, or for physical injury. Similarly, there is often no more difficulty in proving or assessing damages where there is no impact than where there is slight impact."

This older rule was first questioned in Florida in the case of Estate of Harper v. Orlando Funeral Home, Inc., 366 So.2d 126 (Fla. 1st DCA 1979). In said case the First District Court of Appeals opined:

> "Plaintiffs maintain that the foreseeable sickening consequences of a casket falling apart should be compensable in civilized societies. On the other hand, defendants contend that damages for mental pain and suffering are not recoverable absent physical impact

unless plaintiffs fall within the narrow exception to the impact doctrine by alleging conduct exceeding all bounds reasonably tolerated by society such as to imply malice or the entire want of care or great indifference, which they have not and cannot do.

Because the "impact rule" is still the law in this state we reluctantly agree with defendants as to recovery for mental pain and suffering, being of the view, **however, that the doctrine should be re-examined**."

Said doctrine was re-examined in the case of Halpin v. Kraeer Funeral Homes, Inc., 547 So.2d 973 (Fla. 4th DCA 1989), and in that case the Court opined that tortious interferences with rights involving dead human bodies is excluded from the impact rule. See also, Williams v. City of Minneola, 575 So.2d 683 (Fla. 5th DCA 1991), rev. denied, 589 So.2d 289 (Fla. 1991).

An underlying reason for said holding is enunciated in Williams, supra, where the court stated:

"Our society, as reflected for example in decisions of the courts of Florida cited earlier in this opinion, shows a particular solitude for the emotional vulnerability of survivors regarding improper behavior toward the dead body of a loved one, and the special deference paid by courts to family feelings where rights involving dead bodies are concerned is central to our decision. This area is unique, and once it is entered, behavior which in other circumstances might be merely insulting, frivolous, or careless becomes indecent, outrageous and intolerable. One obvious reason is that the bereaved are already suffering psychic trauma because of the loss of the loved one and are especially sensitized to any disrespect or indignity directed at the deceased's body or a representation of it. The potential for severe emotional distress is enormously increased in that situation."

As pointed out above the underlying rationale behind the impact rule has been the prevention of spurious or fraudulent actions. In the case at bar, said underlying concern serves no purpose as the trial court, in an effort to provide an adequate

avenue for an appeal, made some specific findings of fact.

The trial court made a factual finding in the record that:

a) there was negligence, and

b) Petitioners suffered emotional distress.

At pages 7 and 8 of the transcript of the hearing on the motion for summary judgment which is attached to Petitioners Appendix in Exhibit "E", the trial court indicated:

> "I'm giving you a good vehicle for appeal. I'm giving a finding that both of them were negligent. I made a finding that your people suffered emotional distress, but I find that it was not intentional on their part, I do not find it willful on their part, I do not find it grossly negligent on their part. And for those reasons, the Court is Granting Summary Judgment".

Petitioners assert that based on all of the above the trial court erred in entering a summary judgment.

ARGUMENT TWO

THE TRIAL COURT COMMITTED REVERSIBLE ERROR SINCE MATERIAL ISSUES OF FACT WERE PRESENT WHICH PRECLUDED THE ENTRY OF SUMMARY JUDGMENT

A. NEGLIGENCE BEING A VIABLE THEORY OF RECOVERY, MATERIAL ISSUES OF FACT ARE PRESENT WHICH PRECLUDE THE ENTRY OF SUMMARY JUDGMENT.

A Summary Judgment may be rendered only where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a Judgment as a matter of law. Florida Rule of Civil Procedure, 1.510(c).

A Summary proceeding is not a trial by affidavit or deposition, and such a proceeding is not designed to conduct a trial of the issues drawn, and on a motion for summary judgment, all evidence must be viewed in light most favorable to the party against whom the motion is made, and if there is a genuine issue of material fact, the motion should be denied. Weinstein v. General Acc., Fire and Life Ass. Co., 145 So.2d 318 (Fla. 1st DCA 1962).

The burden is on the movant for summary judgment to show conclusively the nonexistence of genuine issues of material fact. If the existence of such issues, or the possibility of their existence, is reflected by the record, or the record even raises the slightest doubt in this regard, summary final judgment cannot

be granted. Williams v. Bevis, 509 So. 2d 1304 (Fla. 1 DCA 1987); Williams v. Florida Realty & Management Company, 272 So. 2d 176 (Fla. 3rd DCA 1973); Demaggio v. Brasserie Restaurant, 320 So. 2d 49 (Fla. 3d DCA 1975). It was recognized in Williams, supra, at page 177:

> "When a defendant moves for summary judgment, the trial court does not determine whether the plaintiff can prove (his) case but only whether the pleadings, depositions and affidavits conclusively show that (he) cannot prove (his) case"

Summary Judgment must be constructed on a granite foundation of uncontradicted material facts, and even where evidence is uncontradicted, the trial court lacks authority to enter summary judgment is such evidence is reasonably susceptible of conflicting inferences. Megs v. Lear, 210 So2d 479 (Fla. 1st DCA 1968).

Further, even if some facts are not in dispute, where different inferences might be drawn from some of the undisputed facts, summary judgment is precluded. Clark v. Munroe, 407 So.2d 1036 (Fla. 1st DCA 1981), Dawson v. Sheben, 351 So. 2d 367 (Fla. 4th DCA 1977).

Therefore, the objective to be accomplished by the trial court on a motion for summary judgment is to determine whether a material factual issue exists, and if such an issue is present, the motion for summary judgment should be denied. Jones v. Stoutenburgh, 91 So.2d 299 (Fla. 1957). In accomplishing this objective, all doubts regarding the existence of an issue of material fact are resolved against the movant, and the evidence

presented at the hearing plus all favorable inferences reasonably justified thereby, are liberally construed in favor to the opponent of the motion. Harvey Building, Inc. v. Haley, 175 So.2d 780 (Fla. 1965).

Summary Judgment cannot be granted "if there exists any controverted issue of material fact or if the proofs supporting the motion fail to overcome the very theory upon which, under the pleadings, the adversary's position might be sustained." Sakowitz v. Marshall 146 So.2d 105, 107 (Fla. 3d DCA 1962).

The summary judgment procedure "is necessarily in derogation of the constitutionally protected right to trial." Holl v. Talcott, 191 So. 2d 40 (Fla. 1966). Great caution should be exercised therefore, in any summary judgment proceeding, not to deny a litigant ample opportunity to demonstrate that he is entitled to the benefit of trial. Stephens v. Dichtenmueller, 216 So. 2d 448 (Fla. 1968).

More specifically, in tort actions, the question of negligence is usually one to be resolved by the jury from the facts and circumstances of the case, and courts therefore should be cautious in granting summary judgments. Farrey v. Bettendorf, 96 So. 2d 889 (Fla. 1957), Cassel v. Price, 396 So. 2d 258 (Fla. 1st DCA 1981).

In order to prevail on a motion for summary judgment in a tort action where negligence is the underlying alleged conduct, a defendant must show either no negligence on his part proximately resulting in injury to the plaintiff, or that plaintiff's negligence was the sole proximate cause of his injury.

Clark v. Lumberman's Mutual Insurance Company, 465 So. 2d 552 (Fla. 1st DCA 1985).

B. THE ISSUES OF FACT

A review of the discovery material, including the Responses to the Requests for Admissions, the Responses to the Requests to Produce, the Answers to the Interrogatories, and all of the depositions, demonstrate the existence of material issues of fact. The denial of the existence of certain facts, the inconsistencies in the testimony of witnesses, the inconsistencies in the testimony of witnesses when compared to the Defendants' respective responses to interrogatories, and a certain degree of finger-pointing between the Defendants to shift responsibility, present a myriad of issues of fact, all of which point to the fact that the lower court erred and this cause should be decided by a jury.

a) THE DELIVERY OF THE WRONG BABY'S REMAINS

The discovery has revealed that on the day of the release of the wrong body, there were three employees of JACKSON working as attendants at the morgue. Their names are James McPhee, Jacob Kelly, and Rafael Ravelo. (See answer to interrogatory # 9, and Response to Request to Produce # 13 propounded to Jackson on October 24, 1991.) All three of these employees deny being the one that delivered the wrong baby's remains to an employee of

RIVERO. It was the policy of JACKSON to require the morgue attendant to sign a log kept at the morgue to indicate the name of the attendant who delivered the body, and the date and time it was delivered. The funeral home picking up the body was also required to sign the log upon receipt of the body (Deposition of James McPhee, pages 12 and 14). A review of the log for the day in question indicates that whoever was the morgue attendant who released the baby's remains, failed to sign the log as required by JACKSON's policy. The log only shows that an Ellis Robinson, an employee of RIVERO at the time in question, was the person who picked up the baby's remains (McPhee, pages 27-29, 53). RIVERO contradicts said evidence and states in response to interrogatory number 11 propounded on October 24, 1991, that it was both Mr. Robinson and the morgue attendant who signed the log. "Mr. Robinson and the morgue attendant then signed a log kept in the morgue" (Int. 11).

The denial by all of Jackson's employees, the contradiction above stated, and the failure of the log (at least at the present time) to indicate who released the body, leaves us with a quandary: Who released the wrong baby's body?

- James McPhee denies he was the one. Although disciplinary proceedings are instituted against him by JACKSON, Mr. McPhee fights the proceedings, and he prevails. In fact, Mr. McPhee testifies that he established that at the exact time the body was released he was out to lunch (McPhee, 29).

He inculpates the other two. Mr. McPhee also states that he confronted Ellis Robinson and Mr. Robinson refused to say who was the attendant with whom he dealt with on the day in question, yet Mr. Robinson did state that he was sure it was not Mr. McPhee. "I know that it was not you, McPhee that released the Boy Gonzalez to me,...I refuse to say anything at this time" (McPhee, 14).

- Jacob Kelly denies he was the one (Deposition of Jacob Kelly, pg. 14).
- Rafael Ravelo denies he was the one (Deposition of Rafael Ravelo, pg. 11).

b) THE PICK-UP OF THE WRONG BABY'S REMAINS BY RIVERO

We know from the log kept at the morgue at JACKSON that it was Ellis Robinson, an employee of RIVERO, who went on the day in question, to the morgue at JACKSON and in fact picked up the wrong baby's body. The issue is now presented as to whose responsibility was it to match the body at JACKSON's morgue with the release documents brought in by RIVERO for the pick-up of said body. When each defendant was asked said question, a different response is given by each.

RIVERO's response: It was "Jackson Memorial Hospital personnel('s)" responsibility. (See Answer to Interrogatory number 13). RIVERO also blame the Plaintiffs. "Since the Plaintiffs identified the remains as their baby and since there was to be no embalming there was no need to unwrap the body to

inspect it." (See Answer to Interrogatory Number 19).

JACKSON's response: "The Public Health Trust, through its employees at the morgue, negligently but unintentionally delivered the wrong baby to the Rivero Funeral Home which, along with plaintiff, also acted negligently in failing to correctly identify the body." (See Answer to Interrogatory number 15). JACKSON also goes on to say through the deposition of one of its employees, Kamlesh Oza, the Administrator of Pathology Services, that it was the responsibility of RIVERO to also identify the body. Mr. Oza testified that the reason behind the requirement of the signature in the log at the morgue was to attest that the funeral home verified the body they were picking up is in fact the body they came for (Deposition of Kamlesh Oza, pg. 30).

It should be pointed out that RIVERO recedes from its original position in its answer to interrogatories that it was only JACKSON who had the responsibility of properly identifying the remains for its release. Enrique Rivero, the person tendered at deposition as the one with "the most knowledge of Rivero's procedures for the picking up and identification of bodies from the morgue" (Deposition of Enrique Rivero, pg 5) testifies after the answers to interrogatories are submitted, and there is a change in RIVERO's position. Although at first Mr. Rivero vacillates in his response, he goes on to state that it was the procedure of RIVERO to properly identify the remains of a body at a morgue. He indicated that all of his employees were required to follow said procedure. In a supplemental interrogatory RIVERO

also responded in the affirmative to the following question:

> "4. Did Rivero Funeral Home owe a duty towards the Plaintiffs of properly identifying the remains of baby girl Maria.
> A. Yes as per the procedures testified to by Enrique Rivero and Ellis Robinson."

Ellis Robinson also admits in his deposition that RIVERO required its employees to make an independent identification apart from the morgue attendant to verify the pickup of the correct body. He also indicated that JACKSON also required the independent identification by the funeral home; which is why the funeral home had to sign the log, to attest the verification (Deposition of Ellis Robinson, pg. 43).

It should be pointed out that Leopoldo Rivero gives a different account than Enrique Rivero in his deposition. Leopoldo Rivero takes a position consistent with RIVERO's original position when the Interrogatories are answered:

> "Q. Did you require Rivero employees to make a positive identification of the body at the morgue?
> A. In the morgue of the hospital?
> Q. Yes.
> A. No, we don't need that.
> Q. Why?
> A. Because the hospital knows what they are handling over. <u>They are the ones responsible</u>".

<u>c) THE FAILURE TO PROPERLY IDENTIFY THE REMAINS</u>

Through the discovery process we have learned that the Plaintiff, Zoila Gonzalez, gave birth at JACKSON to twins, a baby boy and a baby girl. Through request for admissions JACKSON has admitted that after the death of the baby girl on November 7,

1988, the remains were tagged "Gonzalez (Zoila) B, Girl B." We have also learned that on October 31, 1988 a stillborn boy died at JACKSON. Through request for admissions JACKSON has admitted that after the death of the stillborn boy the remains were tagged "Boy Gonzalez".

It was the stillborn boy who died on October 31, 1988, tagged "Boy Gonzalez" that was delivered, picked up, and buried in error.

Rafael Ravelo, a morgue attendant from JACKSON, testified that on or about November 10, 1988, a funeral home with an indigency contract with the County, went to pick up the remains of the abandoned stillborn "Boy Gonzalez". Mr. Ravelo testified that when he went to retrieve the body of "Boy Gonzalez" he discovered that the body was not there (Ravelo, 10-11). It was then, that it was discovered that the remains of "Gonzalez (Zoila) B, Girl B.", who were supposed to have been released one or two days before, were still at the morgue (Deposition of Julio Gonzalez, pg. 15).

James McPhee testified as to JACKSON's procedure upon the death of an infant. He indicated that on each case a Postmortem kit would be requested, and that the remains of each infant is tagged with 3 identical yellow tags which not only identify the infant's remain by name, but also include the hospital's identification number. Along with the 3 tags, each body has an arm band which again includes the same identification information. One tag is placed alongside the arm band, a second

is placed in one of the toes, and the third in the torso area attached to the "shroud", a white cloth in which the baby's remains are wrapped in (McPhee, 6-8, 48).

It is obvious that neither the arm band nor the tags were read, which is what led to the mix-up.

Since no morgue attendant has come forward and claimed responsibility, the mystery still remains as to what attempts were made to identify the remains for the release by the morgue attendant.

RIVERO gives the following account in its response to Interrogatories, in which the jurat page is executed by Enrique Rivero:

> "There is supposed to be a tag attached to the body and also a tag on the outer wrapping. In regard to the body delivered to Rivero on 11/8/88 the body was not unwrapped by Rivero personnel and we are unsure as to what, if any, tag was on the wrapped body."
>
> "...The body was wrapped in a white fabric and had been refrigerated. The body was returned to Rivero and placed in refrigerated storage. It was then removed for viewing and identification by the Plaintiffs. After a positive identification it was returned to storage until it was removed and placed in the casket for burial on 11/9/88... there was no need to unwrap the body to inspect it..."

Enrique Rivero and Nelsy Gonzalez also provided testimony along the same lines and indicated that the body was not unwrapped.

Contrary to what is indicated in the answer to the interrogatories and the deposition testimony, Mr. Ellis Robinson, who at the time of the taking of his deposition was no longer employed by RIVERO , gave a different account of events.

Mr. Robinson tells an unlikely and simply unbelievable story. He states that he in fact read the tag on the infant's remains, and it coincided with the release papers. As a matter of fact, he goes on to state that even the hospital identification number in the tag, coincided with those in the release documents. (Robinson, 22-23) Again, an unlikely story.

Mr. Robinson was quick to point out though, that he did not tell anyone from RIVERO, and specifically Enrique Rivero, 1) that he was "unsure as to what, if any, tag was on the wrapped body", and 2) that JACKSON's morgue attendant also signed the log as he had. As it has been pointed out above, Mr. Robinson's testimony directly contradicts the answers given by Enrique Rivero in the Interrogatories (Robinson, 34-35).

There is also a failure on the part of RIVERO to discover the mistake once the body was delivered to the funeral home.

Enrique Rivero testified that RIVERO has a follow-up identification procedure that is to be followed at the funeral home once the body arrives. RIVERO's employees are to again check the identification tags to make sure they have the right body (Enrique Rivero, pg. 63). This procedure was obviously not followed.

Again, this testimony provided by Enrique Rivero of a follow-up identification contradicts RIVERO's prior answer in interrogatories were it is indicated that the body was not unwrapped. If it is not unwrapped, how can they make an I.D., or tell whether it is a boy or a girl?

Enrique Rivero is also asked to detail all of the procedures that RIVERO's employees are to follow from the time the body arrives at the funeral home. Mr. Rivero merely states that once the body is brought in, it is placed inside a casket, and then placed in a refrigerator.

Enrique Rivero cleverly attempts to leave out one very important step in this process. Once the baby's body is brought in, the body must be washed down with germicidal soap.

Mr. Ellis Robinson was very candid in this regard and explains the procedure:

> "No embalming? You take whatever it is, if it's an adult or baby, you take the baby, you wash it down and what have you, for identification for the family.
> Q. In the case, more specifically of an infant, what would you do?
> A. I just told you, wash the baby down.
> Q. How would you go about washing the baby down?
> A. You take the wrapping off the baby, you put your gloves on, which is normal, you take germicidal soap on the sponge and you wash the baby down, clean it up."
> (Robinson, pg. 16).

A review of the discovery including all of the depositions demonstrate that it is obvious:

1. That JACKSON and RIVERO failed to make a proper match with the release documents and the identification tags;

2. That JACKSON and RIVERO failed to notice that the tag read "Boy Gonzalez", instead of "Gonzalez (Zoila) B, Girl B";

3. That JACKSON and RIVERO failed to notice they were releasing or picking up a body in which the Hospital identification numbers in the tag were not the same as those in

the release papers;

4. That JACKSON and RIVERO failed to notice that instead of the body of a baby girl they had the body of a baby boy.

5. That JACKSON and RIVERO failed to notice that the baby boy they were releasing and picking up had no autopsy performed, yet they were coming to pick up a baby girl with in which an autopsy had been performed.

6. That even more astonishing is the fact, that RIVERO also failed to notice all of the above while the remains were in their care at the funeral home. Even, while RIVERO was washing down the baby's remains as required, it still failed to discover the mistake.

As Julio Gonzalez aptly summed it up:

> "...And by the sex also. I mean, that's something very obvious. And besides, baby boy was not supposed to have an autopsy and baby girl did have an autopsy. That is something very major that you can detect a mile away". (Julio Gonzalez, pgs. 15-16)

(d) THE DRESSING OF THE BABY'S REMAINS WITH CLOTHING BROUGHT BY PLAINTIFFS

Petitioners testified at their deposition that they brought to RIVERO some yellow baby's clothing. At the funeral home, just before their departure to the cemetery, they requested to see the remains of their infant baby. They indicated that RIVERO allowed a short viewing, and they observed part of the baby's body and same was dressed with the clothing they had brought (Deposition of Jesus Gonzalez, pg. 29, Zoila Gonzalez, pg. 18).

RIVERO was asked in the initial interrogatories the following:

"19 (b) Did you dress baby girl Maria with the clothes brought to you by the relatives.
ANSWER: No."

RIVERO was asked the following in a supplemental interrogatory:

"5. Did the Plaintiffs or any of their relatives bring to Rivero Funeral Home any baby clothing to dress the remains of baby girl Maria.
ANSWER: Unknown, not to our knowledge.

Nelsy Gonzalez, a Funeral Director from RIVERO who was present during the viewing of the infant's remains at the funeral home, contrary to what the Plaintiffs testified, denied that the baby was dressed in baby clothes, "No. I don't recall it being dressed, no" (Deposition of Nelsy Gonzalez, pg. 22).

It is obvious that if the baby was dressed with the clothes brought by the family, then the body must have been unwrapped, and RIVERO should have discovered the mistake. It is this writers' opinion that RIVERO denies dressing the baby for obvious reasons. RIVERO failed to discover they had the wrong body, they failed to notice the incorrect arm band and identification tags, the fact that it was the body of a boy instead of a girl, and the fact there was no evidence of an autopsy in said body.

When Nelsy Gonzalez was asked the percentage of babies buried with clothes brought by the family. She responded, "hardly ever" (Nelsy Gonzalez, pg 22).

When Ellis Robinson was asked the same question, the

percentage of babies buried with clothes brought by the family, he indicated that most are dressed (Robinson, pg. 18-19).

e) PRIOR INCIDENTS

RIVERO has denied the existence of similar incidents in the past like the one here complained of.

JACKSON personnel has provided conflicting accounts.

Kamlesh Oza, the Administrator of Pathology Services, testified by way of deposition that he conducted an investigation and as a result of said investigation he found no prior incidents like the one here complained of (Oza, pg. 10). He did point out that he did find several instances were JACKSON's policy was not followed. In a disciplinary letter to James McPhee, the morgue supervisor who was suspended for five days as a result of this case, Mr. Oza stated:

> "In investigating this incident, it was proven that there were at least fifty seven instances since July, 1988, where no one from the morgue signed the release form. This shows that **the violation of the above policy in the November incident was not an exception, rather it was being violated by morgue employees on a recurrent basis.**"

Contrary to what Mr. Oza indicated in his deposition, Ira Clark, the President of JACKSON, indicated in an article in the Miami Herald, appearing on January 21, 1989 and filed for record, that in fact similar occurrences had happened in the past. Although a Request for Admission was submitted to JACKSON pertaining to the statements made by Ira Clark, JACKSON denied said Request for Admission.

James McPhee testified that there had been approximately four or five similar incidents in the past. In fact, Mr. McPhee testified that there had been a prior mix-up one week before the one here complained of, and he "wrote up" Rafael Ravelo. No such documents have been provided by JACKSON in discovery (McPhee, pgs.38-40)

Mr. Kamlesh Oza denies that McPhee informed him of prior similar occurrences (Oza, pg. 10).

Mr. Oza also denies that Denise Moody, a supervisor for the admitting office at JACKSON which oversees the postmortem department, also informed him of prior similar occurrences. Mr. Oza stated:

> "Q. Did Ms. Moody ever tell you that while she was employed at Jackson, on or about 1987, there was such an incident that she recalls?
> A. No, no. And that I can tell you categorically, I mean, I would have remembered that absolutely. No, she did not say any such thing to me.
> Q. Do you remember asking her?
> A. Yes..."
> (Oza, pgs. 11-12).

Denise Moody did testify by way of deposition that she was familiar with a similar prior incident pertaining the mix-up of the body of a baby in 1987.(Deposition of Denise Moody, Pgs. 6-8).

f) NOTICE OF THE MIX-UP

RIVERO claims that it first received notice of the mix-up on January 4, 1989. (See response to Interrogatory 6, and Deposition of Maria Maspons pgs. 21-22).

JACKSON first claimed that it learned of the incident on November 10, 1988, and it did not notify RIVERO until on or about January 3, 1989. JACKSON has filed an Amended Answer to Interrogatories and now claims that it learned of the incident on November 10, 1988, but it first notified RIVERO on November 10, 1988 and/or November 11, 1988.

Julio Gonzalez, a morgue attendant at JACKSON testified that he personally called RIVERO on November 10, 1988 or November 11, 1988 and notified RIVERO of the mix-up. Mr. Gonzalez testifies that he believes that he recognized the voice as that of Mr. Enrique Rivero.(Julio Gonzalez, pgs. 20-21). Mr. Gonzalez stated:

> "...I told them that we had a mix up on the bodies and that we had the body of the girl. And they told me it couldn't be possible, because the baby was buried the day before. And I said, "Okay, let's wait for the proper people from the hospital to call you".
> Q. And?
> A. They didn't want to recognize it at that point.
> Q. Why do you say that?
> A. Because they told me that it couldn't be possible. And I said, 'Oh, yes, it is possible'."
> (Julio Gonzalez, pgs. 20-21).

Both JACKSON and RIVERO knew about the mix-up the day after the burial, yet they failed to notify the Plaintiffs for nearly <u>two months</u>.

Mr. Enrique Rivero denies Julio Gonzalez's testimony and states that the first time he received notice was around January 4, 1989 (Enrique Rivero, pgs. 6-7). Mr. Rivero was asked:

> "Q. Did you, yourself, talk to anyone from Jackson Memorial Hospital pertaining to the mix up?
> A. No, sir."

Ellis Robinson, an employee of RIVERO at the time, did

testify that he learned of the mix-up in November of 1988 (Robinson, pg. 27).

g) THE DELAY IN NOTIFYING THE PLAINTIFFS OF THE MIX-UP

RIVERO takes the position that it did not get notice of the mix-up until on or about January 4, 1989. Enrique Rivero and Maria Maspons attest this. They say that it was after said date when they received a letter from JACKSON that they called the Plaintiffs.

Ellis Robinson, as indicated above, states that he learned of the mix-up on or about November of 1988. James McPhee testifies that he spoke with Ellis Robinson on or about said time.

Julio Gonzalez testifies that he called RIVERO on or about November 10, 1988, or November 11, 1988. As indicated above he believes he spoke to Enrique Rivero, and "they did'nt want to recognize it at that point.".

Steve Bard, of Risk Management at JACKSON, testified that it was the responsibility of RIVERO to notify the family of the mix-up. JACKSON "felt that it was the funeral home's responsibility primarily because they already established a client relationship with them that we did not have" (Deposition of Steve Bard, pgs. 11-12).

Mr. Bard also states that RIVERO's failure to act, in not acknowledging the mistake and notifying the Plaintiffs, prompted

him to write the January 3, 1989 letter.

Mr. Bard wrote in the January 3, 1989 letter:

> "Insofar as you have had intimate contact with the family, we request that you approach said to explore this possibility. Certainly, whereas we share equal liability in this matter, the Public Health Trust will be willing to contribute 50% of cost exhume and rebury this infant."

CONCLUSION

Based on the foregoing, Petitioners respectfully request this Honorable Court to reverse the decision of the Third District Court of Appeal, and to vacate the order of the trial court of Summary Judgment and to remand this cause for further proceedings.

DATED: 1/12/94

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law was mailed to Ronald J. Bernstein, Esq., Metro Dade Center, Suite 2800, 111 N.W. First Street, Miami, Florida 33130, and Esther E. Galicia, Esq., George, Hartz, Lundeen, Flagg & Fulmer, 4800 LeJeune Road, Coral Gables, FLorida 33146, this 12 day of Janauary, 1994.

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