

SUPREME COURT OF FLORIDA

John Crocker, et al.)
)
 Petitioner,)
v.)
)
Richard Pleasant, etc., et al.) District Court of Appeal,
)
 Respondent,)
_____)

CASE NO. 95,148

District Court of Appeal,
4th District - No. 98-00633

RESPONDENT PALM BEACH COUNTY'S ANSWER BRIEF

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Undersigned counsel for the Respondents hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

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(Appellate Judge)

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Fifteenth Judicial Circuit
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This brief is typed using 12 point Courier New.

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STATEMENT OF CASE AND FACTS

The County agrees generally with Petitioners' Statement of Case and Facts, but objects to all reference in Petitioners' Initial Brief, both in this section and in the argument sections, to all sources not provided to this court in Petitioners' Appendix.

For the convenience of this court, the following is a statement of relevant facts as it relates to the County. Petitioners brought suit against West Palm Beach Officer Richard Pleasant, the City of West Palm Beach, and the County, for, among other things, their alleged failure to make reasonable effort to notify Petitioners of their son's death and subsequent burial. Appendix, pp. 4-15. As to the County, Petitioners sued pursuant

to 42 U.S.C. section 1983, alleging that the County made no effort to contact them prior to burying their son. Appendix, pp. 11-12. This, Petitioners alleged, deprived them of a constitutionally protected property right without procedural due process. Id. The trial court granted the County's motion for judgment on the pleadings, and the Fourth District Court of Appeal affirmed, Crocker v. Pleasant, 727 So. 2d 1087 (Fla. 4th DCA 1999), but certified the following question as one of great legal importance:

DOES POWELL PRECLUDE ALL SECTION 1983 CLAIMS GROUNDED ON
INTERFERENCE WITH AN INTEREST IN A DEAD BODY?

On March 19, 1999, Petitioners filed a notice to invoke this court's discretionary jurisdiction. On March 29, 1999, this court entered an order postponing its decision on jurisdiction and ordering briefs to be filed on the merits.

SUMMARY OF ARGUMENT

I. At issue in this case is whether there exists a constitutionally protected property interest in the remains of a deceased relative cognizable under 42 U.S.C. section 1983. In State v. Powell, 497 So.2d 1188 (Fla. 1986), cert. denied, 481 U.S. 1059 (1987), this court explicitly ruled that such a right does not exist, explaining instead that one has only a limited right to possess the remains of a deceased relative for the purpose of burial or other lawful disposition. This reasoning

follows the prevailing law on the issue in the overwhelming majority of courts in the United States and remains consistent with the best interests of the public health and welfare. Petitioners forward no basis for disturbing the well reasoned opinion in Powell.

The Sixth Circuit stands alone in finding a constitutionally protected property right in the remains of a deceased relative. The two Sixth Circuit opinions that created this right are not binding on this court and are likewise unpersuasive. In determining whether an interest deserves constitutional protection, courts look first to the laws of the state. In both Sixth Circuit opinions, however, the court ignored the absence of an underlying substantive right under state law and instead created out of thin air a constitutionally protected property interest. In so doing, the court overlooked the well-established principle that the state provides the basis for an underlying property interest. The court also acted contrary to repeated admonitions by the United States Supreme Court by transforming what were traditionally state-based tort actions into federal constitutional violations. Finally, following the precedent of the Sixth Circuit would call into question a variety of statutes dealing with disposition of dead bodies, not the least of which

is section 732.9185, concerning removal of corneas. This statute, according to Powell, forwards the laudable objective of providing tissue for corneal transplants.

Petitioners are incorrect in arguing that the Fifth and Eighth Circuits also recognize constitutionally protected property interests. In each of the opinions cited by Petitioners out of these circuits, the courts found no cause of action cognizable under section 1983 because there existed adequate state remedies. Florida also provides adequate remedies for the wrongs alleged here. Indeed, several state-based actions aimed at co-defendants in this case remain pending in the trial court. That Petitioners elected to limit their case against the County to an action without legal basis is no reason to create a constitutional right were none exists today.

Beyond reference to the Sixth Circuit, and inappropriate reliance on the Fifth and Eighth Circuits, Petitioners cite no other authority whatsoever in support of their argument.

That Powell involved the constitutionality of a statute is a distinction without a difference for the purposes of this case. Powell was correctly based on the principle that there can be no protected property interest in the remains of a decedent. This court in Powell could not have agreed with the lower court's

finding that section 732.9185 violated a protected property right, but still determine that the statute was constitutional. Nor can Petitioners contend that the limited possessory interest in the remains of their son is constitutionally protected, but not as it relates to unauthorized removal of the corneas from the body. Finally, Petitioners' argument that they would have no remedy if denied a section 1983 claim is sheer speculation, inconsistent with their own actions, given the outstanding claims still pending at trial, and inconsistent with case law on the subject.

II. Elevating a decedent relative's right to possess the body to a constitutionally protected property interest would be inconsistent with sound public policy. The religious, moral and philosophical underpinnings of the right and duty of a relative to take custody of a deceased's remains is not consistent with the notion that a loved one merely becomes chattel upon death. To characterize this solemn right and duty as a property interest is demeaning and offensive. Considering the remains of a loved one to be property also runs contrary to state and federal laws prohibiting purchase or sale of organs or human tissue. Altering the universally accepted state of the law on this subject as urged by Petitioners would lead to the very real prospect of an

open market for human tissue -- organs for life-giving transplants sold to the highest bidder. The creation of a constitutionally protected property interest in the remains of a decedent relative would wreak havoc on the way government administers disposition of dead bodies and facilitates organ transplants.

III. A section 1983 claim will not lie because Petitioners were not deprived of an interest due any constitutional protection. In addition, Petitioners cannot forward a section 1983 claim because the state provides adequate remedies for the wrongs alleged. Florida recognizes a cause of action for the wrongs alleged in this case, and Petitioners continue to pursue such actions at the trial level against co-defendants. That Petitioners elected not to pursue additional claims against the County does not negate the existence of such remedies. Petitioners alleged that the County disregarded state law designed to protect the relative's interest in receiving their son's remains. Under these circumstances, a section 1983 claim will not lie because adequate state-remedies, such as a cause of action in tort, already exist.

ARGUMENT I

**THE FOURTH DISTRICT COURT OF APPEAL DID NOT ERR IN
HOLDING THAT POWELL PRECLUDED A SECTION 1983 CLAIM
WHERE THE POWELL COURT EXPLICITLY HELD THAT FLORIDA
DOES NOT RECOGNIZE A CONSTITUTIONALLY PROTECTED
PROPERTY INTEREST IN THE REMAINS OF A DECEASED RELATIVE**
[restated by Respondent]

Petitioners brought suit against Respondent Palm Beach County pursuant to 42 U.S.C. section 1983, alleging that the County failed to take reasonable efforts to notify Petitioners prior to their son's burial. This, Petitioners allege, deprived them of a constitutionally protected property right in their son's body without procedural due process and in violation of section 245.07, Florida Statutes.¹ Petitioners' Appendix, pp.11-12.

Section 1983 does not forward substantive rights. Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979). Thus, in order to forward such a claim, Petitioners must show that the interest asserted, in this case a property interest in the remains of a deceased relative, is an interest secured by the United States Constitution or laws of the United States. 42 U.S.C. §1983; see, e.g., Parratt v. Taylor, 451 U.S. 527, 535

¹The statute in pertinent part provides that, "prior to having any body buried...the county shall make a reasonable effort to determine the identity of the body and shall further make a reasonable effort to contact any relatives of the deceased person." §245.07, Fla. Stat. (1997).

(1981). "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

In State v. Powell, 497 So. 2d 1188 (Fla. 1986), cert. denied, 481 U.S. 1059 (1987), this court unquestionably determined that Florida does not recognize a constitutionally protected property right in the remains of a decedent. Id. at 1191. This court went on to explain that relatives have the limited right to possess the remains of a deceased relative for the limited purpose of burial or other disposition, but that this right is by no means a property right. Id. at 1192 (citations omitted).

Petitioners assert that Powell "seemed to imply" that section 1983 claims were barred under the facts of our case, and assert repeatedly that Powell did not include a section 1983 claim. Initial Brief, at pp. 7,9,17. Petitioners have misread Powell. Contrary to Petitioners' assertions, Count IV of the complaint in Powell was indeed an action alleging a civil rights

violation under section 1983 and the United States Constitution. Id. at 1194 (Shaw, J., dissenting). In determining whether the plaintiff's claim was cognizable under section 1983, the Powell court correctly looked first to whether the interest at stake is afforded any constitutional protection. As explained in Powell:

All authorities generally agree that the next of kin have no property right in the remains of a decedent. Although, in Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941), this Court held that a surviving husband had a 'property right' in his wife's body which would sustain a claim for negligent embalming, id. at 183, 200 So. at 542, we subsequently clarified our position to be consistent with the majority view that the right is limited to 'possession of the body ... for the purpose of burial, sepulture or other lawful disposition,' and that interference with this right gives rise to a tort action [footnote omitted]. Kirksey v. Jernigan, 45 So. 2d 188, 189 (Fla. 1950). More recently, we affirmed the district court's determination that the next of kin's right in a decedent's remains is based upon 'the personal right of the decedent's next of kin to bury the body rather than any property right in the body itself.' Jackson v. Rupp, 228 So. 2d 916, 918 (Fla. 4th DCA 1969), affirmed, 238 So. 2d 86 (Fla. 1970). The view that the next of kin has no property right but merely a limited right to possess the body for burial purposes is universally accepted by courts and commentators. (citations omitted).

Powell, 497 So. 2d at 1191-92. Having found no constitutionally protected right at stake, this court correctly explained that it was not necessary to address the argument that the statute at issue violated the plaintiffs' procedural due process rights. Id. at 1193 (citing Board of Regents v. Roth, 408 U.S. 564

(1972)).

It is beyond argument that a case which fails to implicate a constitutionally protected interest cannot support a claim under section 1983. As such, the Powell court did not merely imply that a claim of property interest in a dead body was not cognizable under section 1983. On the contrary, this court quite clearly explained that the plaintiffs in Powell could not assert a constitutionally protected interest in the remains of their decedent relative. Accordingly, the plaintiffs in Powell could not prevail under any count in their complaint, including Count IV, brought under section 1983. In our case, Petitioners assert precisely the same claim. But as this court has already stated in Powell, there is no constitutionally protected interest in the remains of a deceased relative. Therefore, there can be no claim under section 1983. The question certified by the Fourth District -- Does Powell preclude all section 1983 claims grounded on interference with an interest in a dead body? -- must be answered in the affirmative.

A. THIS COURT'S REASONING IN POWELL SHOULD BE UPHELD NOTWITHSTANDING NON BINDING DECISIONS OF A FEDERAL CIRCUIT COURT [restated by Respondent]

Petitioners argue that this court should recede from its decision in Powell based on decisions from the Fifth, Sixth and

Eighth Circuits. The decisions of Federal Circuit Courts of Appeal, however, are not binding on courts of this state. See, e.g., State v. Dwyer, 332 So. 2d 333, 334-35 (Fla. 1976) (reversing lower court opinion which held that United States Fifth Circuit Court of Appeals controlled question despite contrary ruling by Supreme Court of Florida); Board of County Commissioners of Lee County v. Dexterhouse, 348 So. 2d 916, 918 (Fla. 2d DCA 1977) ("the only federal decisions binding upon the courts of our state are those of the United States Supreme Court"). Petitioners' argument that the Fourth District Court of Appeal erred in not following the precedent of federal circuit courts is accordingly without merit. The cases cited by Petitioners here are at best persuasive.

In Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991), the Sixth Circuit correctly explained that courts must first look to the laws of the state in determining whether the interest deserves constitutional protection of "property." Id. at 480 (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978)). The court went on to explain that, "[s]tate supreme court decisions are the controlling authority for such determinations." Id. (citing Clutter v. Johns Manville Sales Corp., 646 F.2d 1151, 1153 (6th Cir. 1981)).

In contrast to the state of the law in Florida where Powell controls, the Brotherton court did not have the benefit of a definitive ruling on the issue from the Ohio Supreme Court. 923 F. 2d at 480. Instead, the Brotherton court looked to, then ignored, decisions from Ohio's lower courts which uniformly ruled that there is no constitutionally protected property interest in a relative's body. See Everman v. Davis, 54 Ohio App.3d 119, 561 N.E.2d 547 (right to possess the body for preparation, mourning and burial does not constitute a protected property right), appeal dismissed, 43 Ohio St.3d 702, 539 N.E.2d 163 (1989); Carney v. Knollwood Cemetery Ass'n, 33 Ohio App.3d 31, 514 N.E.2d 430, 435 (1986). In disregarding these decisions, the Sixth Circuit explained: "Although the existence of an interest may be a matter of state law, whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the due process clause is determined by federal law." Brotherton, 923 F.2d at 481-82. Curiously, the court explained earlier in the opinion that whether an interest "rises to the level of a 'legitimate claim of entitlement' protected by the due process clause, we must examine the laws of the state." Id. at 480. In each instance, the Brotherton court referred to Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1,9 (1978). In Craft, the

Court explained unremarkably that while an underlying substantive interest is created by state law, federal constitutional law determines whether the interest created is protected by the Due Process Clause. Id. In Craft, the Court correctly followed Tennessee decisional law, see 436 U.S. at 8. The Brotherton court, however, did not.

Ohio courts in both Carney and Everman rejected the existence of such an underlying substantive right, but the court in Brotherton nevertheless declared that what was described by these courts deserve constitutional protection. Brotherton, 923 F.2d at 482.² As noted by one critic: "[T]he court, in what can only be described as a tautological mission, and over a well-reasoned dissent supported by Ohio case law, defined plaintiffs' interest in the dead body as sufficient to conclude that the coroner had violated due process protection afforded by the United States Constitution." Crothers, A Proposal for Presumed

²The Brotherton court also stated that the statutes adopted from the Uniform Anatomical Gift Act contributed to the creation of this protected property interest. The procedural provisions of the statutes give some rights to next of kin in the remains of a dead relative. But the mere fact that such procedures exist cannot by itself give rise to a constitutionally protected property interest. Indeed, in Board of Regents v. Roth, 408 U.S. 564 (1972), state procedures were in place to protect the rights of state-hired college professors, but the mere existence of such rules did not give the plaintiff a constitutional right.

Consent Organ Donation Policy in North Dakota, 68 N.D.L.Rev. 637 (1992).

Specifically, the Sixth Circuit noted that Carney recognized a claim for disturbance of the body, id. (citing Carney, 33 Ohio App.3d at 37, 514 N.E.2d at 430); and that Everman recognized a right to possess the body for burial, id. (citing Everman, 54 Ohio App.3d at 121,, 561 N.E.2d at 547). These so called rights have long been recognized, but never before elevated to the status of a constitutionally protected property interest. As explained by this court in Powell, courts and treatises allow for a cause of action for interfering with a relative's right to receive a body for burial (as in Everman), and for mishandling a corpse (as in Carney), but these so called rights cannot be considered property in the constitutional sense. 497 So. 2d at 1191-92(citations omitted). Similarly, the Ohio courts in Everman and Carney determined as a substantive matter that relatives have no property interest in the remains of a decedent. Despite the Supreme Court precedent in Craft which requires courts to look to the state for the underlying substantive right, the court in Brotherton ignored the *absence* of a substantive right under state law and created out of thin air a constitutionally protected property interest.

Moreover, the Brotherton court transformed what were state-based actions, traditionally remedied by tort law, into federal constitutional violations, contrary to the repeated admonitions of the Supreme Court. See, e.g., Parratt v. Taylor, 451 U.S. 527 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986); Paul v. Davis, 424 U.S. 693, 701 (1976). In County of Sacramento v. Lewis, 523 U.S. 833 (1998), the Court more recently explained this concept as follows in rejecting a substantive due process claim brought by the parents of a motorcycle passenger killed in a high-speed police chase:

Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. In Paul v. Davis, [citation omitted], for example, we explained that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States," and in Daniels v. Williams, [citation omitted], we reaffirmed the point that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. See Daniels v. Williams, *supra*, at 328, 106 S.Ct., at 663; see also Davidson v. Cannon,

474 U.S. 344, 348, 106 S.Ct. 668, 670-671, 88 L.Ed.2d 677 (1986)(clarifying that Daniels applies to substantive, as well as procedural, due process).

523 U.S. at ___, 118 S.Ct. 1708, 1717-18. While Lewis involved a substantive due process claim, the passage quoted above clearly applies to procedural due process claims as well.

Petitioners note correctly that Florida recognizes a variety of actions associated with a relative's interest in a deceased's body. Initial Brief, p. 10-11. But as the Supreme Court explained: the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States." Paul, 424 U.S. at 701. In our case, Petitioners similarly attempt to elevate their traditional state-based tort claims into federal claims,³ contrary to the rule in Paul v. Davis and its progeny.

In addition, should this court choose to follow the precedent in Brotherton, it would be required to overrule its decision in Powell, which in turn would jeopardize the continued existence of section 732.9185, Florida Statutes, regarding

³In their complaint, Petitioners bring only the constitutional claim against Palm Beach County, but in additional counts allege tortious interference with rights and outrageous conduct against West Palm Beach Police Officer Pleasant, and negligence against the City of West Palm Beach. Petitioner's Appendix, pp. 9-15.

corneal removal. Brotherton and Powell concerned similar state laws, both adopted from the Uniform Anatomical Gift Act, allowing health officials to remove corneas from corpses without first seeking permission from the next of kin. In Powell, this court found that section 732.9185, "achieves the permissible legislative objective of providing sight to many of Florida's blind citizens. 497 So. 2d at 1192. If Brotherton is correct, as Petitioners assert, then the constitutionality of section 732.9185, along with this court's decision in Powell is suspect. Petitioners' argument that this court can simply recede from Powell based on the decision in Brotherton is puzzling. Overturning Powell would endanger the laudable purpose of section 732.9185.

In sum, Brotherton strayed from the precedent established in Craft by creating a constitutional right despite the complete absence of state-based determinations creating any underlying substantive right. In addition, Brotherton elevated traditional tort claims to federal constitutional claims contrary to the rule in Paul v. Davis and its progeny. Finally, following Brotherton would call into question section 732.9185, Florida Statutes, which, according to this court, greatly improves the chances of restoring sight to the functionally blind. Powell, 497 So. 2d at

1190-91. This court should not follow the reasoning of the Sixth Circuit in Brotherton.

In Whaley v. County of Tuscola, 58 F.3d 1111 (6th Cir. 1995), also cited by Petitioners, the Sixth Circuit similarly found that Michigan law gives rise to a constitutionally protected property right in the remains of a decedent relative. The facts and applicable state laws were similar to that court's opinion in Brotherton and raises like concerns. The Whaley court, for example, also disregarded state court precedent finding no constitutionally protected property interest in the remains of a decedent relative. See, e.g., Deeq v. Detroit, 76 N.W.2d 16 (Mich. 1956); Tillman v. Detroit Receiving Hospital, 360 N.W.2d 275 (Mich.Ct.App. 1985).

Interestingly, Michigan state courts continue to deny the existence of a protected property right in the remains of a decedent as it relates to state constitutional claims. Dampier v. Grace Hospital Corp., 592 N.W.2d 809(Mich.App. 1999). Moreover, the Sixth Circuit, in an unpublished opinion, recently narrowed the reach of its holdings in Brotherton and Whaley. In Collins v. Crabbe, 172 F.3d 872, 1999 WL 55279 (6th Cir. 1999)(unpublished), the court acknowledged that it found a constitutionally protected property interest in the remains of a decedent relative in

Brotherton and Whaley, but in this instance affirmed a trial court's dismissal because Plaintiffs could not demonstrate that this right was "clearly established" for the purposes of a qualified immunity analysis. Id. at *2. As stated by the court: "Assuming arguendo, that Tennessee has created the same sort of property right as this court concluded had been created by Michigan and Ohio, we think it plain that the right was not 'clearly established' so as to defeat qualified immunity for the defendants here. As plaintiff's counsel himself conceded at oral argument, no Tennessee Supreme Court case 'clearly defines' such a property right, or even 'explicitly' addresses it." Id. at *3.

Petitioners argue incorrectly that in addition to the Sixth Circuit in Brotherton and its later opinion in Whaley, the Fifth and Eighth Circuits also recognize a constitutionally protected interest in the remains of a decedent relative. Initial Brief, at p. 9-10. In Fuller v. Marx, 724 F.2d 717 (8th Cir. 1984), the court identified only a "quasi-property" right which existed in Arkansas, and not, as Petitioners assert, a constitutionally protected right. In Fuller, the plaintiff sued under section 1983 claiming a violation of a constitutional property right when the state medical examiner failed to return her husband's organs to the corpse after an autopsy. Id. at 719. The court explained

that Arkansas law provided a procedure by which the plaintiff could have recovered the organs. According to the court:

Any quasi-property rights Mrs. Fuller had in her husband's internal organs, if protected by the Constitution, were also protected by the Arkansas statute. Mrs. Fuller could have assured the return of the organs by complying with Arkansas law. The statute is a reasonable one providing simple and adequate process. *Thus, we find no unconstitutional invasion of any property right.*

724 F.2d at 719(emphasis supplied). The Petitioners are incorrect in arguing that the Eighth Circuit and the state of Arkansas recognize a constitutionally protected property right in the interest at issue here. See also Riley v. St. Louis County, 153 F.3d 627 (8th Cir. 1998)(Eighth Circuit affirms dismissal of section 1983 claim, rejecting argument that right of sepulchre is a constitutionally protected property interest); Teasley v. Thompson, 204 Ark. 959, 165 S.W.2d 940, 942 (1942).

In Arnaud v. Odom, 870 F.2d 304 (5th Cir.), cert. denied sub nom., Tolliver v. Odom, 493 U.S.855 (1989), the court similarly found a "quasi-property" right in the remains of a decedent relative, but like the court in Fuller, found no constitutional deprivation because adequate state-based remedies existed. Id. at 309. In Arnaud, the court explained that Louisiana allows for actions to recover from the wrongs complained of and that the

plaintiffs had in fact initiated such state-based proceedings against the defendant. Id. As stated by the court in Arnaud: “Thus, since adequate state post-deprivation process is available to remedy the injuries asserted by the Arnauuds in their complaint against Dr. Odom, we must conclude that the Arnauuds *have not suffered a constitutional invasion of any property right pursuant to section 1983.*” Id. (emphasis supplied).

As with Fuller above, the Petitioners are also incorrect here in arguing that the Fifth Circuit, and for that matter, Louisiana, recognizes a constitutionally protected property interest in the remains of a decedent relative. In fact, aside from the Sixth Circuit’s decisions in Brotherton and Whaley, Petitioners cite no authority whatsoever that recognizes a constitutionally protected property interest in the remains of a decedent that would support a claim under section 1983.

B. THAT POWELL CONCERNED THE CONSTITUTIONALITY OF A STATE LAW IS NOT RELEVANT TO THE ISSUE OF WHETHER TO RECOGNIZE A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN THE REMAINS OF A DECEASED RELATIVE. [Restated by Respondent]

Petitioners argue that the County’s alleged failure to take reasonable steps to notify next of kin before burial is more egregious than removing the corneas from a deceased’s body

without a relative's consent. The question of degree of interference with a relative's right to possess the body, however, is not relevant to this case.⁴ At issue is here is whether there exists a constitutionally protected property interest in the remains of a decedent relative. If such a property right exists, any interference with that right would give rise to a valid section 1983 cause of action. Cf. Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419, 436 (1982)(physical invasion of property, however small, constitutes taking of property). Had the Powell court determined such an interest

⁴In certifying the question to this court, the Fourth District cites a number of cases involving what it termed more egregious examples of interference with burial. Crocker v. Pleasant, 727 So.2d 1087(Fla. 4th DCA 1999). Not one of these cases, however, finds a cause of action cognizable under section 1983. Arnaud, 870 F.2d at 309 (finding no constitutional deprivation in light of available state-based remedies); Fuller, 724 F.2d at 719 (same); Floyd v. Lykes Bros. Steamship Co., 844 F.2d 1044 (8th Cir. 1988)(holding maritime law trumps state-based tort remedies in tort action for burial at sea); Perry v. Saint Francis Hospital and Med. Ctr., 865 F.Supp. 724 (D.Kan. 1994)(section 1983 not at issue; recognizing action for interference with next of kin right to possess the body for burial); Mansaw v. Midwest Organ Bank, 1998 WL 386327 No. 9700271 CV-W-6 (W.D. Mo. July 8, 1998)(unreported)(agreeing with Brotherton majority finding a property interest, but still affirming dismissal of a 1983 claim based on overriding public interest in availability of organs for transplant). On August 13, 1998, just after Mansaw, the Eighth Circuit determined that Missouri *did not* recognize a constitutionally protected property right to possess the body for the purpose of burial. Riley v. St. Louis County, 153 F.3d 627, 630 (8th Cir. 1998), cert.denied, ___U.S.___, 119 S.Ct. 1113 (1999).

existed, the plaintiffs in that case would have been able to maintain a cause of action under section 1983. Petitioners argue that removing decedent's corneas is a minor intrusion, but if the property right in the remains of a decedent exists, such a taking is compensable in any event.

Removing corneas, therefore, as currently allowed by Florida law, would implicate a constitutional property interest. While Petitioners argue that cornea removal is less intrusive than temporary interference with their possessory interests as alleged here, see, e.g., Initial Brief, at p.17, both would implicate a constitutionally protected property interest. Petitioners cannot contend that the limited, possessory interest in the remains of their son is constitutionally protected, but not as it relates to the removal of the corneas from the corpse without prior authorization from a relative.

While it is true that Powell is distinguishable in that it involved the constitutionality of a statute, it is a distinction without a difference for the purposes of this case.⁵ In Powell, this court clearly rejected the trial court's finding that the

⁵Petitioners apparently agree that their case is not distinguishable from Powell when urging this court to reverse the Fourth District's decision based upon Brotherton and Whaley, both of which involved statutes similar to the one at issue in Powell.

statute at issue deprived the plaintiffs of a constitutionally protected property right. 497 So. 2d at 1191. This court went on to explain:

In view of our finding that the appellees have no protectable liberty or property interest in the remains of their decedents, we need not address the argument that section 732.9185 violates procedural safeguards guaranteed by the due process clause.

Id. at 1193 (citing Board of Regents v. Roth, 408 U.S. 564 (1972)). It simply defies logic to assert, as Petitioners have done, see Initial Brief, at p. 24, that the Powell court could have agreed with the trial court's finding that section 732.9185 violates protected property rights, but still determine that the statute was constitutional.

Finally, Petitioners also argue under this point that if there can be no cause of action under section 1983, they will have no other remedy at all "no matter how egregious the level of interference with their loved one's remains." Initial Brief, at p. 24. Petitioners cite no law in support of this notion, nor can they. Not only is it sheer speculation to assert that Petitioners have no remedy at all without the aid of section 1983, but it is inconsistent with Petitioners' own actions in this case. Petitioners alleged, and still have pending, additional state-based claims against West Palm Beach and West

Palm Beach Police Officer Pleasant. Petitioners' Complaint, Appendix pp. 9-10, 13. Petitioners can hardly claim that they have no other remedy when they are presently pursuing these claims in circuit court. That Petitioners elected to file only a section 1983 cause of action against the County does not mean that no other remedy exists. Clearly, Florida provides a cause of action for interference with the right to possession of a body for purposes of burial, Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950), precisely the wrong alleged by Petitioners here.

Finally, the fact that state actors may enjoy some level of immunity, as Petitioners speculate here but fail to allege in their complaint, does not change this analysis. See generally Parratt v. Taylor, 451 U.S. 527, 543-44 ("Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under §1983, that does mean that the state remedies are not adequate to satisfy the requirements of due process."); Powell v. Georgia Dept. of Human Resources, 114 F.3d 1074, 1082 (11th Cir. 1997)(fact that state may invoke immunity under State Tort Claims Act does not render state law post-deprivation remedy inadequate under Parratt).

ARGUMENT II

ELEVATING A DECEDENT RELATIVE'S RIGHT TO POSSESS THE BODY FOR THE PURPOSE OF BURIAL TO A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IS INCONSISTENT WITH SOUND PUBLIC POLICY AND PREVAILING LAW IN THE UNITED STATES [added by Respondent]

This court in Powell wisely reasoned that while next of kin have a right to possession of the body for "burial, sepulture or other lawful disposition," this right does not rise to the level of a constitutionally protected property interest. 497 So. 2d at 1192. As explained by Justice Shaw in his dissent, the duties and rights of the next of kin to take custody of the remains of a deceased relative has long been grounded on religious, moral and

philosophical grounds. 497 So. 2d at 1195 (Shaw, J., dissenting). It is for this very reason, however, that such rights and duties should not give rise to an interest in property of any sort, let alone a constitutionally protected one. To characterize this interest as one of property is to demean it. The religious, moral and philosophical underpinnings supporting the right to possess a relative's remains are not consistent with the notion that a loved one merely becomes chattel upon death.

The idea that deceased relatives become property of the next of kin also runs contrary to the state's prohibition of the purchase or sale of human organs and tissue. See §§ 872.01; 245.16; ch. 873, Fla. Stat. (1997). It would also violate the National Organ Transplant Act (NOTA) which prohibits the sale of human organs. 42 U.S.C. §274e (1994). The legislative history of NOTA is entirely consistent with the commonly accepted principle that the remains of a decedent should not be treated as property. "[H]uman body parts should not be treated as commodities." S.Rep. No. 382, 98th Cong., 2d Sess. 16, reprinted in 1984 U.S. Code Cong. & Admin. News 3975, 3982.

Had the County failed to return the body to the Petitioners in our case, could they have alleged a taking of personal

property? ⁶ And if so, how could a court legally fashion just compensation for such a taking in light of the ban against placing a price on human remains?

Recognizing a protected property interest in a relative's remains would open the door to a market for purchase and sale of body parts. While a free market economy can be an effective, self-regulating mechanism, it has nothing at all to do with the religious, moral and philosophical factors that give people a possessory interest in the remains of their relatives. As explained by one author questioning the wisdom of the Sixth Circuit opinion in Whaley:

Whaley has the dangerous potential of creating a catch-22 in the organ donation system. Few people will donate as an altruistic act because they know that they can receive compensation for the organs. However, the state itself may not be legally permitted to compensate them because compensation seems to be in direct violation of a federal statute. Before legislatures or courts finally break-up this gridlock in the ability to obtain an adequate organ supply, hundreds of people will needlessly die while awaiting a readily obtainable organ.

O'Carroll, Over My Dead Body: Recognizing Property Rights in

⁶Petitioners seek damages against the County only for emotional anguish, emotional distress, and additional costs for burial, Appendix, at p. 12, but do not seek damages representing the value of the body for the time Petitioners were deprived of it.

Corpses, 29 J. Health & Hosp. L. 4:238, 243 (1992). O'Carroll goes on to explain that the creation of such a property right could give rise to bidding wars for essential organs. "Such time consuming auctioning of vital body parts results in an unjust enrichment to the relatives of the deceased and delays relief to those desperately awaiting transplants. In lower income families, compensation could even be seen as an entitlement tempting them to withdraw or withhold treatment sooner than might ordinarily be the case." Id. at 244.

It is clear that whatever interests the next of kin enjoy in Florida, these interests are heavily regulated by the state. Chapter 732, Florida Statutes, authorizes next of kin to donate organs of a decedent, either to the medical community for those in need of transplants, or to further medical research. §732.9216, Fla. Stat. (1997); see also ch. 245, Fla. Stat. (1997). But as already noted above, one cannot sell organs of a decedent relative. Nor can one simply choose to keep the remains of a deceased relative as one pleases. See, e.g., §470.315; §§382.007-008, Fla. Stat.(1997). While relatives enjoy some limited right of possession, it is only for the purpose of burial or other legal disposition. Powell, 497 So.2d at 1192.

Should this possessory interest suddenly become a

constitutionally protected property interest, a number of state laws regulating disposition of dead bodies would raise serious constitutional questions. To cite a few examples: As already discussed above, section 732.9185, which allows health officials to remove corneas for use in transplants, would now be constitutionally suspect. In addition, a medical examiner's decision to perform an autopsy, or to do so upon request of the state attorney,⁷ could cause interference with a constitutionally protected interest. As such, a medical examiner's decision to investigate suspicious circumstances surrounding a death would be tempered by the possibility that doing so could result in a civil rights violation. Finally, the donee of an anatomical gift under section 732.912, Florida Statutes, can be a state agency and therefore potentially liable under section 1983 should its acceptance of an anatomical gift interfere with a relative's right to possess the body.⁸

Establishing a constitutionally protected property interest in the remains of a decedent relative would wreak havoc on the

⁷See §406.11, Fla. Stat. (1997)

⁸Section 732.912 forbids a donee from accepting a gift if the donee knows of a relative's objection. Section 732.9185 similarly forbids cornea removal if the medical examiner is aware of an objection. The same provision can be found in the Ohio statute which was at issue in Brotherton.

way government administers disposition of dead bodies and facilitates organ transplants. Such a decision furthermore would run contrary to the understanding of property in all jurisdictions save for the Sixth Circuit. Finally, such a decision would run afoul of the common law, as well as common sense.

As explained by this court Powell:

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

497 So. 2d at 1192 (quoting Dougherty v. Mercantile-Safe Deposit & Trust Co., 282 Md. 617, 620, 387 A.2d 244, 246 n.2; see also 22A Am.Jur.2d Dead Bodies §2(and cases cited therein)("at common law there is no property right in the dead body of a deceased person, and courts continue to recognize that there can be no property right in a dead body in the commercial sense..."));

accord Lanigan v. Snowden, 938 S.W.2d 330 (Mo.Ct.App. 1997); Culpepper v. Pearl Street Bldg. Inc., 877 P.2d 877 (Colo. 1994)(rejecting theory that a property right exists to support a conversion claim); Georgia Lions Eye Bank Inc. v. Lavant, 255 Ga. 60, 335 S.E.2d 127 (1985); cf. Tafoya v. Bobroff, 865 F.Supp. 742 (D.N.M. 1994)(no constitutionally protected liberty interest in the remains of decedent relative).

This reasoning continues to reflect the prevailing law on the issue in the overwhelming majority of courts in the United States.⁹ Affirming this position here is in the best interests of the public health and welfare. Moreover, Petitioners have failed to articulate any principled rationale for overturning Powell beyond the conclusory allegation that it would be unfair and unjust to deny them protection under section 1983. That Petitioners elected to limit their case against the County to a single but invalid theory, however, is no reason for this court

⁹In addition to the cases cited in the text of this Brief, see, e.g., Georgia Lions Eye Bank, Inc. v. Lavant, 335 S.E.2d 127,128 (Ga. 1985); Sullivan v. Catholic Cemeteries, Inc., 317 A.2d 430 (R.I. 1974); Simpkins v. Lumbermans Mut. Casualty Co., 20 S.E.2d 733 (S.C. 1942); Spiegel v. Evergreen Cemetery Co., 117 N.J.L. 90, 186 A.585 (N.J. 1936); Sacred Heart of Jesus Polish Nat'l Catholic Church v. Sokoloski, 159 Minn. 331, 199 N.W. 81 (1924); Finley v. Atlantic Transport, Inc., 220 N.Y. 249, 115 N.E. 715 (1917); Floyd v. Atlantic Coast Line Ry., 83 S.E. 12 (N.C. 1914); Pettigrew v. Pettigrew, 207 Pa. 313, 56 A. 878 (1904).

to create a constitutional right where none exists today.
Furthermore, it is beyond dispute that a section 1983 claim will
not lie in this case as there exists adequate state-based
remedies to address the alleged wrong.

ARGUMENT III

PETITIONERS CANNOT FORWARD A CAUSE OF ACTION COGNIZABLE UNDER SECTION 1983 WHERE THE STATE PROVIDES ADEQUATE REMEDIES

There can be no section 1983 action in this case because Petitioners were not deprived of an interest due any constitutional protection. In addition, there can be no section 1983 action here because the state provides adequate remedies. As explained in Point I.A. of this Response Brief, the Fifth Circuit in Arnaud and the Eighth Circuit in Fuller found no constitutional wrong pursuant to section 1983 because each state offered adequate state-based remedies. Like Arkansas and Louisiana, Florida law also provides adequate remedies. As Petitioners concede, Florida already recognizes a cause of action for the wrongs alleged by the Petitioners. See Initial Brief, at p. 10-11. See, e.g., Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950)(recognizing cause of action for interference with the right to possession of body for purposes of burial). Indeed, just as the plaintiffs in Arnaud, Petitioners alleged, and continue to pursue, additional state-based claims against the City of West Palm Beach and West Palm Beach Police Officer Pleasant. Petitioners' Complaint, Appendix pp.9-10,13.

Also analogous to Arnaud, Petitioners cannot assert a constitutional deprivation of any property right pursuant to §1983 because, as to the County, adequate state-based remedies exist to address their claim. In their complaint, the Crockers allege that the County violated their rights to procedural due process, protected by the Fourteenth Amendment to the U.S. Constitution. Petitioners' Complaint, Appendix pp. 11-12. According to the Supreme Court:

The constitutional violation actionable under §1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Zinermon v. Burch, 494 U.S. 113, 126 (1990). The Zinermon Court explained that, where possible, adequate pre-deprivation remedies should be in place to adequately protect procedural due process rights. In cases where it is impractical to anticipate negligent deprivation of a protected right, however, the state need only provide an adequate post-deprivation remedy. Parratt v. Taylor, 451 U.S. 527, 541 (1981). In Hudson v. Palmer, 468 U.S. 517, 533-34 (1984), the Court extended this rationale to intentional

acts insofar as the practicality of anticipating unlawful deprivations is concerned. In addition, the rule in Parratt and Hudson does not consider the value of the established pre-deprivation safeguards. Whether the deprivation at issue is the product of a negligent or intentional act, "no matter how significant the private interest at stake and the risk of its erroneous deprivation, [citation omitted] the State cannot be required constitutionally to do the impossible by providing pre-deprivation process." Zinermon, 494 U.S. at 129.

In our case, state law provides adequate pre-deprivation safeguards by requiring the County to make a reasonable attempt to notify next of kin before burial. §245.07, Fla. Stat. (1997). It would be impractical for the state to anticipate that state actors would disregard the mandate of this law. By way of illustration, the statute at issue in Brotherton allows the coroner to remove corneas without regard to consent, as long as the coroner is unaware of a relative's objection. As such, the coroner would always remove the corneas before inspecting medical records or other paperwork to see if an objection was recorded. 923 F.2d at 479. The court explained that this intentional ignorance was induced by the statute. Id. at 482. To the Brotherton court, this state-provided procedure cried out for

adequate pre-deprivation safeguards because it encouraged state actors following Ohio law to disregard whatever due process rights relatives of the deceased may have had.¹⁰ In contrast, section 245.07, Florida Statutes, *requires* state actors to endeavor to contact next of kin *before* burial. Petitioners allege that the County made no effort to contact next of kin. Appendix, at p. 12. The state in our case cannot reasonably be required to anticipate that state actors would disregard a law designed to prevent such abuse. See, e.g., Parratt, 451 U.S. at 541; Hudson, 468 U.S. at 533; Hinkle v. City of Clarksburg, 81 F.3d 416, 423 n.5 (4th Cir. 1996) (noting that section 1983 action would not lie where adequate post-deprivation remedies existed and state agent was not acting pursuant to established state law, but rather acted pursuant to local informal policy). As alleged by Petitioners, it was County custom or practice to violate

¹⁰Zinermon similarly concerned an established state procedure which allowed state hospital workers to admit people as voluntary mental patients without first determining whether they were competent to give consent in the first place. Again, the context of the deprivation calls for a pre-deprivation procedure. According to the Court: "It is hardly unforeseeable that a person requesting treatment for mental illness might be incapable of informed consent, and that state officials with the power to admit patients might take their apparent willingness to be admitted at face value and not initiate voluntary placement procedures." 494 U.S. at 137. Unlike the state established procedure in Zinermon, section 245.07, Florida Statutes, mandates a pre-deprivation procedure.

section 245.07, not an established state procedure, Appendix, at p. 12.¹¹ Petitioners acknowledge as well that the Respondents did not follow the law or their own rules or procedures. Initial Brief, at pp. 22-23. Where, as in our case, the act complained of is random, or unauthorized, or where the act was taken pursuant to an informal policy and against established procedure, a claim under section 1983 will not lie where adequate post-deprivation remedies exist. See, e.g., Hudson, 468 U.S. at 532-33; Arnaud, 870 F.2d at 309; Fuller, 724 F.2d at 719.

In Florida, adequate post-deprivation remedies clearly exist to address the wrongs alleged against the County by Petitioners in this case. The state recognizes a cause of action in tort for interfering with the right to possession of the body for the purpose of burial. Powell, 497 So. 2d at 1191-92 (citing Kirksey v. Jernigan 45 So. 2d 188, 189 (Fla. 1950); Jackson v. Rupp, 228 So. 2d 916, 918 (Fla. 4th DCA 1969), affirmed, 238 So. 2d 86

¹¹The Eleventh Circuit distinguishes "custom and practice" as used in Monell v. Department of Social Services, 436 U.S. 658 (1978), in determining whether municipality may be vicariously liable for actions of its agents, from "established state procedure" as used in Parratt when referring to an established mechanism that effects or contributes to a deprivation. The court explains that in any event the key issue is the context in which the deprivation occurs in determining the feasibility of a pre-deprivation remedy. See Rittenhouse v. DeKalb County, 764 F.2d 1451 (11th Cir. 1985).

(1970)); see also Boatman v. Town of Oakland, 76 F.3d 341 n. 10(11th Cir. 1996)(court takes judicial notice that state-provided circuit court is a court of general jurisdiction which has the authority to compensate those wronged with money damages, citing Fla. Const. Art.V, §5(b), § 20(c)(3); §26.012, Fla. Stat.) Petitioners allege nothing more against the County.

In our case, the State of Florida provides Petitioners all the process they are due as to their claim against the County. As such, Petitioners failed to state a claim against the County cognizable under section 1983. While the trial court's decision in this case was based solely on the precedent of Powell, this court has the ability to affirm the trial court's correct decision on other grounds. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1153 (Fla. 1979)("Even when based on erroneous reasoning, a conclusion of a trial court will generally be affirmed if the evidence or an alternative theory supports it"). In addition to the fact that Powell precludes Petitioners' claim, it is apparent that under any circumstances, the Petitioners have failed to bring a claim against the County cognizable under section 1983 due to the availability of adequate state-based remedies.

CONCLUSION

Based upon the foregoing arguments, the question certified to this Court by the Fourth District Court of Appeal should be answered in the affirmative.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was served by U.S. Mail, postage pre-paid, this ____ day of June, 1999, to V. Lynn Whitfield, Esq., Whitfield & Mosley, 224 Datura Street, Suite 918, P.O. Box 34, West Palm Beach, Florida 33402; Dea Abramschmitt, Esq., Lakeshore Office Park, Suite 224, 2669 Forest Hill Boulevard, West Palm Beach, Florida 33406; Don Stephens, Esq., Olds & Stephens, 711 N. Flagler Drive, West Palm Beach, Florida 33401; and Mayra Rivera-Delgado, Esq., City Attorney's Office, P.O. Box 3366, West Palm Beach, Florida 33402.

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