

IN THE SUPREME COURT OF FLORIDA  
SUPREME COURT CASE NO. 95,148  
DISTRICT COURT CASE NO. 98-00633  
CIRCUIT COURT CASE NO. CL-96-8738 AD

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JOHN CROCKER and BETTY CROCKER,

Petitioners,

vs.

CITY OF WEST PALM BEACH and  
PALM BEACH COUNTY,

Respondents.

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ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT  
COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

**ANSWER BRIEF  
OF  
RESPONDENT CITY OF WEST PALM BEACH**

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**PRELIMINARY STATEMENT**

Respondent, City of West Palm Beach, will be referred to as the City. References to the Record are designated (R.\_\_\_\_). References to Respondent's Appendix are designated (A.\_\_\_\_). Respondent, Palm Beach County, will be referred to as the County. Petitioners, John Crocker and Betty Crocker, will be referred to as the Petitioners. References to Petitioners' Appendix are designated (PA.\_\_\_\_).

This will certify that the size and style of type used in this brief is 12 point Courier New, a font that is not proportionately spaced.

**STATEMENT OF CASE AND FACTS**

Each of the courts below has treated the allegations of Petitioners' Amended Complaint as true for purposes of judicial review. Accordingly, for the limited purpose of review by this Court, the City accepts Petitioners' Statement of the Case and Facts. To further assist this Court in its review, the following is a supplemental statement of the case and relevant facts which relate to the City.

Counts I and II of Petitioners' Amended Complaint are state tort claims against City of West Palm Beach Police Officer Richard Pleasant. In Count I of the Amended Complaint, Petitioners allege that:

21. The failure of the Defendant Pleasant to notify the Plaintiffs denied them of their rights as the next of kin of Jay Crocker to have possession of his body for burial. The Defendant Pleasant knew or should have known that his failure to notify the Plaintiffs would cause mental pain and anguish and emotional distress on the Plaintiffs once they learned of their son's death."

(A.1) In Count II of the Amended Complaint, Petitioners allege that:

24. Defendant's, Pleasant, causing a second teletype to be sent to the Miami Shores Police advising that no extra effort was necessary to notify the Plaintiffs in person a note to contact him would suffice and the Defendant's Pleasant, failure to notify the Miami Shores Police Department that this was regarding the death of the Plaintiffs' son, was conduct which would shock the conscience of the community and was therefore outrageous.



Id.

On September 18, 1998, the trial court entered its Order Granting Defendant's Motion for Final Summary Judgment. (A.2) In Paragraph 3 of that Order, the Court said:

[3] The Court also finds, based upon the undisputed facts and the lawful inferences which might be drawn therefrom, that nothing in the record reveals that Defendant **PLEASANT** was acting outside the course and scope of his employment or in bad faith, or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Therefore, as a matter of law, Defendant, **PLEASANT**, cannot be held personally liable in tort or named as a party defendant in this action. The Court's finding is compelled, inter alia, by Florida Statute 768.29(9)(a) and Hutchinson v. Miller, 548 So.2d 883 (Fla. 5th DCA 1989).

No appeal of this order has been taken by the Petitioners.

### SUMMARY OF ARGUMENT

Notwithstanding Petitioners' statements to the contrary, this Court did review Section 1983 claims in State v. Powell, 497 So.2d 1188 (Fla. 1986), cert. denied, 481 U.S. 1059 (1987). Moreover, this Court engaged in a constitutional analysis that examined the nature of a next of kin's entire interest in a decedent's body, not just the interest in removal of corneal tissue.

Consistent with the majority view, this Court determined that the next of kin have no property right in the remains of a decedent. This Court emphasized that the State of Florida recognizes a next of kin's tort claim for interference with a dead body. Significantly, however, this Court concluded that the right of the next of kin to a tort claim for interference with burial does not rise to the constitutional dimension of a fundamental right under the United States or Florida constitutions.

Powell adopted the prevailing view regarding a next of kin's interest in a dead body. Powell continues as the prevailing view today. The federal decisions Petitioners urge this Court to substitute for Powell represent a limited minority view. The dissent in Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991) a Sixth Circuit Court of Appeals decision on which Petitioners rely, cites Powell as being "clearly correct." The Fifth and Eighth

Circuit decisions which Petitioners ask this court to follow both refused to find a constitutionally protected interest in the decedent's remains. More importantly, this Court did not make its decision in Powell in a vacuum, without benefit of a federal decision. And, Justice Shaw, in a detailed dissent, offered a legal analysis which mirrors the Sixth Circuit's conclusion.

There is no justification which supports reversal of this Court's determination that next of kin have no constitutionally protected interest in a dead body. Powell does preclude all Section 1983 claims grounded on interference with a dead body. Accordingly, this Court should answer "yes" to the question certified by the court below.

**I. THIS COURT'S DECISION IN POWELL DOES PRECLUDE ALL SECTION 1983 CLAIMS GROUNDED ON INTERFERENCE WITH A DEAD BODY.**

Petitioners argue that State v. Powell, 497 So.2d 1188 (Fla. 1986), cert. Denied, 481 U.S. 1059 (1987) did not involve a Section 1983 claim and that this Court did not have the benefit of certain federal decisions when it decided Powell in 1986. A simple review of Powell and its content demonstrates that Petitioners' argument is flawed.

**A. THIS COURT CONSIDERED SECTION 1983 CLAIMS IN POWELL AND, CONSISTENT WITH THE MAJORITY VIEW, CONCLUDED THAT THE NEXT OF KIN HAVE NO PROPERTY RIGHT IN A DECEDENT'S REMAINS.**

Powell involved review of amended complaints filed by the parents of James White and the parents of Anthony Powell. 497 So.2d at 1189, 1190. Each brought actions claiming damages for alleged wrongful removal of their sons' corneas and for a judgment declaring Section 732.9185, Florida Statutes, unconstitutional. Id. The actions were consolidated and judgment entered on the consolidated claims. Id. at 1190.

The trial court declared Florida's corneal removal statute unconstitutional on grounds that the statute "deprives survivors of their fundamental personal and property right to dispose of their deceased next of kin in the same condition as lawful autopsies left

them, without procedural or substantive due process of law." Id.<sup>1</sup>

As Justice Shaw noted in his dissent, Count IV of the White's amended complaint was an "action alleging violation of rights under Title 42, U.S.C. Sec. 1983 and the United States Constitution."

Id. at 1194. Specifically, in Count IV the Whites alleged:

41. This is an action under Title 42, U.S.C. 1983 for violation of Plaintiffs' civil rights.

and

43. The performance of the autopsy upon and the removal of the corneae from the remains of their son was a violation of Plaintiffs' Civil Rights guaranteed them by the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States of America as follows:  
. . . .

and

44. In further support of the allegations of the violation of Plaintiffs' Civil Rights as set forth in paragraph 43., Plaintiffs say further:

(A) Plaintiffs have a cognizable **property right in the remains** of their son which is theirs by virtue of their being his parents and next of kin.

Whites' amended complaint, (A.3)

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<sup>1</sup>The trial court included additional grounds on which it based its declaration that the statute is unconstitutional which do not relate to the issue in this appeal. They were: "(2) creates an invidious classification which deprives survivors of their right to equal protection; and (3) permits a taking of private property by state action for a non-public purpose, in violation of article X, Section 6(a), of the Florida Constitution."

Similarly, the Powells alleged in Count I of their First Amended Complaint:

11. Plaintiffs have a cognizable **property right in the remains** of their son which is theirs by virtue (sic) of their being his parents and next of kin.

and

14. As a proximate and direct result of the arbitrary, capricious and unlawful autopsy upon and corneal removal from the remains of their son, Plaintiffs have suffered a violation of their protected rights set forth herein and have further suffered damages by reason of extreme mental and emotional pain and anguish.

In Count II of their First Amended Complaint, the Powells alleged at paragraph 16.B.:

Said statute violates the Fifth and Fourteenth Amendments to the Constitution of the United States, in that it deprives Plaintiffs of their property, including their property rights in the physical remains of their son's body, without due process of law.

Powells' amended complaint, (A.4)

This Court began its analysis in Powell by acknowledging that if any constitutional rights exist, they belong to a decedent's next of kin. Id. at 1190. In addressing whether Section 732.9185 deprived the Whites and Powells of a "fundamental property right," this Court observed:

All authorities generally agree that the next of kin have no property right in the remains of a decedent.

and

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.

Id. at 1191.

These observations directly address the Whites' and Powells' allegations that they had a constitutionally protected property right in the remains of their sons.

It must be emphasized that this Court's conclusion that the next of kin have no property right in a decedent's remains was not a conclusion that the next of kin have no remedy. On the contrary, this Court expressly acknowledged its position that interference with the right of next of kin to "possession of the body ... for the purpose of burial, sepulcher or other lawful disposition" gives rise to an action in tort. Id.

Both the Whites' amended complaint and the Powells' amended complaint involved constitutional claims based on Section 1983. Admittedly, the Powells did not specifically cite Section 1983 as their cause of action. Nonetheless, the Powells' constitutional claims are indistinguishable from the Whites' constitutional claims which were expressly based on Section 1983. Petitioners are simply mistaken when they state that Powell did not involve Section 1983 claims. Moreover, reading Powell to include claims grounded on

Section 1983 accurately reflects the exact issues before this Court at that time.

**B. THIS COURT DID NOT LIMIT ITS INQUIRY TO WHETHER CONSTITUTIONAL PROTECTION EXISTS ONLY FOR CORNEA TISSUE REMOVAL BASED ON A FLORIDA STATUTE; RATHER, IT DETERMINED THAT THERE IS NO CONSTITUTIONALLY PROTECTED INTEREST IN THE REMAINS OF A DECEDENT UNDER THE UNITED STATES OR FLORIDA CONSTITUTIONS.**

As indicated above, the amended complaints reviewed by this Court in Powell were not limited to removal of corneal tissue. While it is clear that the state statute permitting corneal removal was involved, the constitutional claims of both sets of parents were grounded on their alleged **property right** in the **entire remains** of their sons.

According to this Court, both the Whites and Powells argued that their right to control the disposition of their decedents' remains is a "fundamental right of personal liberty protected against unreasonable governmental intrusion by the due process clause." After reciting the authorities on which appellees relied, this Court stated simply: "We reject appellees' argument." This Court went on to state:

We find that the right of the next of kin to a tort claim for interference with burial, established by this Court in Dunahoo, does not rise to the constitutional dimension of a fundamental right traditionally protected under either the United States or Florida Constitution.

Id. at 1193.



In addition to the claim by the Whites and Powells that they had a protectable liberty or property interest in their sons' remains, their amended complaints included allegations that Section 732.9185 was unconstitutional because it violated the due process clause of the United States Constitution. (A.3,4). This Court had already concluded that the next of kin have no property right in a decedent's remains; that the right of the next of kin to a tort claim for interference with burial is not a fundamental right protected by the United States and Florida constitutions; and that the statute's effect on the next of kin is incidental and does not offend equal protection. Thus, as to the remaining due process violation alleged, this Court said:

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.

It is clear from reading the amended complaints of the Whites and Powells, including their allegations made regarding Section 1983, and from reading this Court's careful analysis in Powell, that Powell was not limited to a review of corneal tissue removal. This Court conducted a comprehensive evaluation of the constitutional rights of both sets of parents in the entire remains of their sons. This evaluation considered both the "fundamental

property right" alleged, as well as the fundamental "liberty" right claimed.

The court below asked this Court to determine whether Powell precludes all Section 1983 claims grounded on interference with a dead body. This Court made that determination in 1986. It expressly reviewed Section 1983 claims grounded on interference with a decedent's remains and determined that next of kin do not have a constitutionally protected interest in such remains. The certified question posed by the court below must be answered "yes."

**II. THERE IS NO JUSTIFICATION FOR SUBSTITUTING THIS COURT'S DECISION IN POWELL WITH A NON-BINDING FEDERAL DECISION**

Petitioners claim that this Court's analysis in Powell as to whether the next of kin had a property interest in a dead body "did not have the benefit" of more recent federal decisions on that question. Initial Brief at 16. As indicated in the discussion above, Petitioners were mistaken in arguing that there was no Section 1983 claim before this Court in Powell. Petitioners are equally mistaken regarding this Court's benefit of federal decisions in reaching its conclusions in Powell.

**A. THIS COURT'S DECISION IN POWELL RESTED ON NUMEROUS AUTHORITIES, INCLUDING A FEDERAL COURT OF APPEALS DECISION**

Once again, a careful reading of Powell is all that is needed to address Petitioners' claims regarding the benefit of federal

decisions. Specifically, at page 1192 of its opinion, this Court stated:

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.

In making this very precise statement regarding the nature of the next of kin's interest in a decedent's body, the first authority cited for this proposition is Lawyer v. Kernodle, a decision rendered in 1983 by the **Eighth Circuit** Court of Appeals. See Lawyer, at 721 F.2d 632.

In Lawyer, the decedent's husband sought damages for negligent diagnosis of the cause of death under Missouri law and damages under Section 1983 for an alleged denial of due process caused by Dr. Kernodle's "erroneous" and "premature" communications of the cause of death of Diana Lawyer. Id. at 633. Looking at the underlying law of Missouri, the Eighth Circuit said:

The imposition of the duty to bury the dead carries with it the conferring on the person charged therewith of such rights as may be necessary to a proper performance. In the sense in which the word "property" ordinarily is used, one whose duty it becomes to bury a deceased person has no right of ownership over the corpse; but, in the broader meaning of the term, he has what has been called a '**quasi property right**' which entitles him to the possession and control of the body for the single purpose of decent burial. If the deceased person leave [sic] a widow, such right belongs to her. ...

Id. at 634, citing Rosenblum v. New Mt. Sinai Cemetery Association, 481 S.W.2d 593, 594-595 (Mo. App. 1972)(Emphasis supplied). The Eighth Circuit upheld the district court's conclusion that there was "no liability under the civil rights law" when physicians or coroners have acted within the permissible discretion of their authority and there was no allegation that the defendants acted outside that permissible scope. Id. at 635.

In deciding Powell, this Court obviously had the benefit of a federal decision. While that effectively negates Petitioners' argument to the contrary, there is a more important distinction to be made. Powell relied on and cited authorities that represented the prevailing view in 1986 and continue to represent the prevailing view today. Powell, at 1192.

In 1986, this Court could also have relied on reasoning from the Seventh Circuit Court of Appeals in Ravellette v. Smith, 300 F.2d 854 (7th Cir. 1962), where the court characterized a next of kin's interest in a dead body as follows:

...'while there cannot be said to be property in the bodies of the dead in the general sense of property, they are the subject of rights which the courts ought to and will respect by proper actions.' It appears from the cases cited in Orr and other cases that the rights which the courts will respect are the right to possession and custody of the body for burial, the right to have the body remain undisturbed in its sepulcher, and the right to maintain an action to recover damages for any outrage or indignity to the body.

and

Thus, consistent with the holding in *Meek*, plaintiff's interest in decedent's body is only a limited interest which is considered to be in the nature of a property right for burial purposes and for allowing recovery for outrages committed against the body. We hold that the taking of a blood sample without plaintiff's consent was not a violation of a protected property interest within the meaning of Article 1, Section 11 of the Indiana Constitution.

Id. at 858.

Today, this Court need only consider the authorities it reviewed in 1986 as well as the legion of authorities that have followed the prevailing view announced in Powell. See, e.g. Riley v. St. Louis County, 153 F.3d 627 (8th Cir. 1998); Shults v. U.S., 995 F.Supp. 1270 (D. Kan. 1998); Culpepper v. Pearl Street Bldg., Inc., 877 P.2d 877 (Colo. 1994); Brown v. Matthews Mortuary, Inc., 801 P.2d 37 (Idaho, 1990); Contreras v. Michelotti Sawyers, 896 P.2d 1118 (Mont. 1995); Roach v. Stern, 675 N.Y.S.2d 133 (N.Y. 1998); Jobin v. McQuillen, 609 A.2d 990 (Vt. 1992); Scarpaci v. Milwaukee County, 292 N.W.2d 816 (Wis. 1980); Ramirez v. Health Partners of South Arizona, 972 P.2d 658 (Ariz. App. 1998), rev. denied, March 19, 1999; Massey v. Duke University, 503 S.E. 2d 155 (N.C.App. 1998); Lanigan v. Snowden, 938 S.W.2d 330 (Mo.Ct.App. 1997); Walser v. Resthaven Memorial Gardens, Inc., 633 A.2d 466 (Md.App. 1992), cert. denied, 638 A.2d 753 (Md. 1994); Dampier v.

Wayne County, 1999 WL 55150 (Mich. App. 1999)(to be reported at 592 N.W.2d 809).

As explained by the Idaho Supreme Court in Brown, supra:

In the early cases dealing with the mishandling of dead bodies, most courts based the cause of action on interference with a "property right" to the body, usually in the next of kin... However, as time went on courts began to disregard the property right basis for recovery and began to recognize that the tort is in reality the infliction of mental distress.

(citing Prosser, Law of Torts, relied on and cited by this Court in Powell).

In Culpepper, supra, the Colorado Supreme Court further explained the evolution from quasi-property right to tort as follows:

Historically, the notion of a quasi-property right arose to facilitate recovery for the negligent mishandling of a dead body. If the plaintiff could show that his property right had been harmed, he would avoid the burden of proving that his emotional distress was accompanied by physical injury. In reality, however, the primary concern of the right is not the injury to the dead body itself, but whether the improper actions caused emotional or physical pain or suffering to surviving family members. The injury is seldom pecuniary; rather, damages are grounded in the mental and physical injuries of survivors.

877 P.2d at 880.

This Court's decision in Powell is consistent with the modern trend recognized by an overwhelming majority of courts. There simply is no justification for substituting this Court's amply

supported decision in Powell with the limited minority view that Petitioners advance.

**B. THE FEDERAL DECISION ON WHICH PETITIONERS PRIMARILY RELY IS A DEPARTURE FROM REQUIRED SECTION 1983 ANALYSIS AND IGNORES UNDERLYING STATE LAW.**

Petitioners urge this Court to abandon its decision in Powell and adopt instead the reasoning of the Sixth Circuit Court of Appeal in Brotherton v. Cleveland, 923 F.2d 447 (6th Cir. 1991) and Whaley v. County of Tuscola, 58 F.3d 111 (6th Cir. 1995). A close reading of each of these decisions reveals that the Sixth Circuit departed from the required constitutional analysis to determine Section 1983 liability and simply ignored underlying state law.

In Brotherton, the decedent's wife appealed the dismissal of her Section 1983 claim for wrongful removal of her deceased husband's corneas. The district court dismissed her complaint after determining that Ohio does not give a surviving custodian a property interest in the body of a decedent. *Id.* at 479.

The Sixth Circuit correctly acknowledged that to determine whether Deborah Brotherton had a "legitimate claim of entitlement" to her husband's corneas, it must look to state law. *Id.* As instructed by the United States Supreme Court in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972):

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.<sup>2</sup>

Roth, at 577, Brotherton at 480, citing to only a portion of the Court's statement quoted above.

The Ohio Supreme Court had not ruled on the "precise issue" according to the court of appeals. Significantly, two Ohio appellate courts had expressly "avoided characterizing" the nature of the right in a dead body as a quasi-property right. Id. At 480. See, also Carney v. Knollwood Cemetery Ass'n, 33 Ohio App.3d 31,514 N.E.2d 430 ( 1986) and Everman v. Davis, 54 Ohio App.3d, 561 N.E.2d 547 (1989).

In Carney, the appellate court said that calling the right to control the dead body of a relative a "quasi property right" would create a legal fiction and:

This court rejects the theory that a surviving custodian has quasi-property rights in the body of the deceased, and acknowledges the cause of action for mishandling of

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<sup>2</sup>See also Mitchell v. W.T. Grant Company, 416 U.S. 600, 604 (1974)("the definition of property rights is a matter of state law"); and Phillips v. Washington Legal Foundation, 524 U.S. 156, \_\_\_, 118 S.Ct. 1925, 1930 (1998)("Because the constitution protects, rather than creates, property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'")



a dead body as a subspecies of the tort of infliction of emotional distress.

Carney, at 37, quoted in Brotherton at 480. The Carney appellate court did determine that the appellees had standing to bring a claim for "outrageous disturbance" of the decedent's remains.

Similarly, in Everman, the appellate court said:

There is no issue in this case of the possessory right of a spouse or other appropriate member of the family of a deceased for the purposes of preparation, mourning and burial. This right is recognized by law and by the decisions. This is not to say that a person has a property right in the body of another, living or dead or that a corpse may not be temporarily held for investigation as to the true cause of death.

Brotherton, at 480,481, citing Everman at 122.

Rejecting both these statements of Ohio law, the Sixth Circuit said, instead:

Thankfully, we do not need to determine whether the Supreme Court of Ohio would categorize the interest in the dead body granted to the spouse as property, quasi-property or not property. **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.** (Emphasis supplied.)

Based on this inexplicable departure from Section 1983 state law analysis, the court held that "the aggregate of rights granted by the state of Ohio to Deborah Brotherton" rises to the level of a legitimate claim of entitlement in Steven Brotherton's body,

including his corneas, protected by the due process clause of the fourteenth amendment. Id. at 482.

The dissent did not mince words. Citing Ohio authority dating back to 1893, Senior District Judge Joiner said: "Ohio law has made it very clear that there is no property right in a dead person's body." Id. at 483. The dissent concluded by saying that:

Thus, the court is wrong in its holding that the procedural requisites for dealing with non-property can rise to become property and be protected by the fourteenth amendment. Nor can the grant of procedures to enhance the health and well being of others in society and the imposition of duties on persons (coroners or hospitals) grant property rights protected by the fourteenth amendment in favor of the decedent's relatives.

Id. at 484. As noted above, Powell is also cited in the Brotherton dissent, together with a case decided by the Georgia Supreme Court. According to the dissent, these cases are "clearly correct, as it is hard to envision a 'property' right in another person's remains." Id. at 483.

Four years after Brotherton, the Sixth Circuit rendered the second opinion Petitioners ask this Court to adopt. See, Whaley, supra. This Section 1983 case involved removal of corneal tissue under a Michigan state law. In this instance, the Sixth Circuit indicated that the existence of a property interest for due process

purposes depends "in large part" on state law. Id. at 1113, 1114.

Then the court went on to say:

All parties agree that the existence under Michigan law of a constitutionally protected property interest in a dead relative's body turns on our opinion in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991) where we found that such a property interest exists in Ohio.

Id. Once again, the district court dismissed the Whaleys' claims by concluding that the underlying state law did not recognize a constitutionally protectable property right. In this regard the district court said:

Michigan law is sufficiently different from Ohio law to render the result different from that in *Brotherton*. Michigan has expressly declined to recognize a property interest in the body of a deceased person, but rather, has carefully chosen to provide recovery in tort only when the right of burial of a deceased person without mutilation is violated.

Id. at 1116.

This time, the Sixth Circuit sidestepped the obvious underlying state law by declaring:

We believe the district court **mistakenly focused on the label** attached to the right rather than its substance. Although Michigan has repeatedly emphasized that 'recovery in such cases is not for the damage to the corpse as property, but damage to the next of kin by infringement of his right to have the body delivered to him for burial without mutilation,' this is not dispositive. Id. (Emphasis supplied.)

Nonetheless, the Sixth Circuit may have recognized that by making this sidestep it might create confusion under well-defined constitutional principles. The court, after ruling that Michigan law was "not dispositive," took pains to make this clarification:

In reaching today's conclusion, we are mindful of the Supreme Court's admonition in *Paul v. Davis*, that not every tort by a state official is a constitutional violation, and that the Fourteenth Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the State.' **It is therefore important to note the limits of this decision.** Although both Ohio and Michigan describe the cause of action for damaging a corpse as a personal injury tort, neither this case nor *Brotherton* suggest in any way that personal injury torts in general by state actors amount to constitutional violations. (Internal citations omitted) (Emphasis supplied.)

Whaley was decided in 1995. In April, 1999, a Michigan Court of Appeals decision was announced in Dampier v. Wayne County, 592 N.W.2d 809 (Mich.App.1999). Like the dissent in Brotherton, the appellate court did not mince words. It said:

However, we hold that plaintiffs' constitutional claim fails because Michigan does not recognize a property right in a dead body. As plainly stated by this Court, "there is no property right in the next of kin to a dead body." Furthermore, this Court in *Tillman* determined that the common-law right of burial of a deceased person without mutilation, discussed earlier, is not of constitutional dimension.

Id. at 817. The City acknowledges that the appellate court reversed that portion of the decision below that denied plaintiffs' motion to file a second amended complaint to assert a Section 1983

claim. Id. at 822. Such reversal, however, does not cure the Sixth Circuit's departure from required Section 1983 analysis and its choosing to ignore Ohio and Michigan state law.

**C. WHILE THE ADDITIONAL FEDERAL DECISIONS ON WHICH PETITIONERS RELY ACKNOWLEDGED A QUASI-PROPERTY CONCEPT, NONE OF THE DECISIONS FOUND CONSTITUTIONALLY PROTECTED INTERESTS UNDER SECTION 1983.**

Petitioners also argue that decisions in the Fifth and Eighth Circuits support their argument that this Court decided Powell without the benefit of federal decisions. Specifically, Petitioners direct this Court to: Fuller v. Marx, 724 F.2d 717 (8th Cir. 1984); and Arnaud v. Odom, 870 F.2d 304 (5th Cir. 1989). Curiously, neither of these decisions support Petitioners' argument.

As discussed above, this Court in Powell specifically cited the Eighth Circuit decision in Lawyer, supra, in its opinion. Fuller does not depart from the legal principles contained in Lawyer. The court explained that under Arkansas law, the next of kin does have a quasi-property right in a dead body. Id. at 719. The court continued:

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.

Id. The dismissal by the district court was affirmed.

While Petitioners' inclusion of the Fifth Circuit and Eighth Circuit decisions in its argument is curious, it is equally curious that the Petitioners did not cite this Court to the most recent decision from the Eighth Circuit dealing with this issue.

In late 1998, the Eighth Circuit issued its opinion in Riley v. St. Louis County of Missouri, 153 F.3d 627 (8th Cir. 1998). Sharon Riley brought Section 1983 claims against numerous defendants claiming that her deceased son was photographed while he lay in his coffin after the funeral and that the photographs were later displayed at a public gathering with the comment that her son's involvement in gang-related activities had caused his death. Id. at 629.

Dismissal of Riley's Section 1983 claim with prejudice was affirmed by the Eighth Circuit. Id. at 631, 632. In analyzing the Section 1983 relief sought, the court explained:

Riley urges this court to recognize a constitutionally protected property interest based upon Missouri's common law right of sepulchre. However, 'Missouri courts have abandoned the early fiction that the cause of action for interference with the right of sepulchre rested on the infringement of a quasi property right of the nearest kin to the body.' Instead, Missouri courts base the cause of action on the mental anguish of the person claiming the right of sepulchre.

Id. at 630.

According to the court, Riley did not allege any physical insult to the deceased nor any interference with the visitation, funeral or burial. Id. The court concluded that photographing the body after visitation and later displaying the photographs did not deprive Riley of her right of sepulchre under Missouri law. Id.

Riley also claimed that the conduct violated her substantive due process rights as well as her right to privacy. In this regard, the court said:

Riley has failed to allege either type of substantive due process claim. First, no fundamental liberty interest of Riley has been infringed because Riley's right for the Department to refrain from photographing the deceased, displaying his picture at a public assembly, and making slanderous comments regarding the deceased's alleged gang activities is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'

and

Second, we cannot conclude that the Department's actions, despite being insensitive and the result of poor judgment, rise to the level of sufficiently outrageous conduct that shocks the conscience. Therefore, Riley has not alleged a violation of her constitutional right to substantive due process.

Id. at 631.

While the Eighth Circuit may be willing to describe the interest of the next of kin in a decedent's remains as a "quasi-property right," none of the Eighth Circuit decisions extends

constitutional protection to such interest. Similarly, the Fifth Circuit in Arnaud recognized the existence of a "quasi-property" right, but declined to extend constitutional protection to that right. Arnaud, at 870 F.2d 304.

In Arnaud, Dr. Charles Odom, the Deputy Coroner of Lafayette Parish, Louisiana, experimented on the infant bodies of Kendall Felix and Christina Arnaud in anticipation of providing expert testimony to a grand jury in Hawaii on an unrelated case. Id. at 306. His experiment consisted of taking the corpse of each infant to the back of the laboratory, holding the corpse by the feet and then dropping the corpse head-first from a predetermined height of one meter onto a surface of virtually smooth concrete. Id. He would then x-ray the skull of the infant and record the results. Id.

Against the backdrop of these facts, the Fifth Circuit evaluated claims by the Felix' and Arnauds that they were deprived of a constitutional property or liberty interest without procedural and substantive due process. Id. at 306, 307. Both sets of parents' claims were characterized as being deprivations of the right to possess the body of one's next of kin in the same condition as death left that body, free from unwarranted state-occasioned mutilation. Id. at 307.



Louisiana, by statute, allows actions to seek recovery for intentional torts. Id. at 309. Additionally, Louisiana provides a cause of action to recover damages for the unauthorized tampering of a corpse. Both state law claims were initiated against Dr. Odum. Id.

Having determined the state postdeprivation process available, the Fifth Circuit concluded that the Arnauds "have not suffered a constitutional invasion of any property right pursuant to Section 1983." Id. Moreover, the court went on, the adequacy of state postdeprivation remedies is "equally applicable to any alleged constitutional deprivation of a liberty interest possessed by the Arnauds in the body of their daughter." Id.

Having declined to extend constitutional protection to the parents' procedural due process claims, the Fifth Circuit then reviewed the substantive due process allegations. In this regard, the court concluded:

As intimate as the right is of next of kin to possess the body of a loved one in the same condition as the body was at death, we are unable to **extend over that right the constitutional umbrella of substantive due process on the facts of the instant case.** In this regard, it is observed that, by creating a quasi-property right of survivors in the body of a deceased relative and providing state tort claims to protect that right, the State of Louisiana has recognized the intimacy and sanctity of that right. (Emphasis supplied.)

Id. at 311. The district court's dismissal of the Arnauds' claims was affirmed.

In summary, this Court in Powell clearly had the benefit of federal decisions. The Sixth Circuit decision on which Petitioners rely is a departure from Section 1983 reasoning and ignores Ohio and Michigan law. The decisions from the Fifth and the Eighth Circuit Courts of Appeal do not support Petitioners' claims. In fact, their conclusions defeat Petitioners' claims.

The court below suggested that this Court determine whether Powell is limited to corneal removal or precludes Section 1983 claims "where the interference is more egregious." Powell involved an autopsy and corneal removal. This Court did not find a constitutionally protected interest under Section 1983. Similarly, no constitutionally protected interest was found based on facts involving destruction of body organs (Fuller), photographing a dead body and making comments about it (Riley), and dropping an infant's body on its skull (Arnaud).

In the case at bar, there was no physical contact with or intrusion upon the decedent's remains whatsoever. Notification of death was attempted and was not completed. This Court should not extend over existing tort rights of next of kin the constitutional umbrella of substantive due process on the facts of the instant

case. The certified question before this Court is whether Powell precludes all Section 1983 claims grounded on interference with a dead body. The answer to that question is yes.

#### **CONCLUSION**

For the reasons set forth in this brief, the City respectfully requests that this court affirm the decision of the court below and answer the certified question in the affirmative.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was sent by U.S. Mail to: V. LYNN WHITFIELD, Attorney for Petitioners, P. O. Box 34, West Palm Beach, FL 33402; DEA ABRAMSCHMITT, Attorney for Petitioners, Lakeshore Office Park, Suite 224, 2669 Forest Hill Boulevard, West Palm Beach, Florida 33406, DON STEPHENS, Attorney for Pleasant, 711 North Flagler Drive, West Palm Beach, FL 33401, and LEONARD BERGER, Assistant County Attorney, Attorney for County, P. O. Box 1989, West Palm Beach, FL 33402, and CARL E. BRODY, JR., Attorney for Fla. Assoc. Of County Attorneys, 315 Court Street, Clearwater, FL 33756 this \_\_\_\_\_ day of June, 1999.

Respectfully submitted.

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