University of Baltimore Journal of Land and Development

Volume 3
Issue 1 *Fall 2013*

Article 2

2013

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ARTICLE

HOW DO WE DEAL WITH ALL THE BODIES? A REVIEW OF RECENT CEMETERY AND HUMAN REMAINS LEGAL ISSUES

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I. Introduction

The world's population is somewhere in the neighborhood of seven billion people.[2] One thing is certain about every one of these seven billion living inhabitants of Earth: they will all die sometime. Then what? The disposal of the dead has been treated differently by different cultures throughout time.[3] However, one fairly constant popular mechanism for dealing with the sheer numbers of dead people is to inter them in the ground.[4] This method of disposal, while typically putting human remains out of sight and out of mind, creates problems of its own. Where do we put all of these people? What happens (legally) to the land when we put people in it? What happens when we do something wrong with the bodies? What happens when Mother Nature interferes with our plans for the disposition of our dead?

These issues may be morbid, but they are ever-increasing realities that regulators and attorneys are having and will have to address. Ex-

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2. United States Department of Commerce, United States Census Bureau, *U.S. and World Population Clock* http://www.census.gov/popclock/ (last visited Oct. 23, 2013).
3. *See generally* Kenneth V. Iserson, DEATH TO DUST: WHAT HAPPENS TO DEAD BODIES? Tucson (1993).
4. David Charles Sloan, THE LAST GREAT NECESSITY: CEMETERIES IN AMERICAN HISTORY, 1-9, (1991).

amples of the problems noted above are multitude. When Hurricane Isaac rolled ashore in Louisiana in 2012, hundreds of previously-interred humans were uprooted and distributed across the landscape.[5] First responders had to deal with the collection and identification of these remains in a manner consistent with the law and they had to do it as carefully and efficiently as possible.[6] Seven years out from Hurricane Katrina's wrath on the Gulf Coast, the Federal Emergency Management Agency is still dealing with numerous issues related to conflicts between reconstruction and having found cemeteries that no one remembered.[7]

The issues of reconstruction and identification are not limited to the Gulf Coast and they are not limited to storms. Cemeteries are being impacted by development all across the country. How do you handle the balance between the needs of the living (i.e., development) and the needs of the dead (i.e., preservation)? In instances where development threatens cemetery property, emotions run high. In many situations, the expense and public relations nightmare created by such situations are enough to dissuade the development.[8] These cases are not rare. Recently, in Ohio, it was learned that the markers for a historic cemetery had been removed in the 1920s to allow for farming and that, over time, as the cemetery faded from memory, the property was slated for neighborhood development.[9] In Alabama, a historic cemetery that likely extends beyond its marked boundaries has threatened to halt Wal-Mart development on adjacent property.[10] Similar scenarios whereby cemeteries are found or alleged to be somewhere previously unknown are playing out nationwide: in a historic home demolition drama and railroad construction in Pennsylvania (two different projects),[11] in road development in Iowa,[12] in a

5. Benjamin Alexander-Bloch, *Searching for their final resting place: Work continues to identify coffins, tombs unearthed by Isaac's surge*, TIMES-PICAYUNE B, Nov. 16, 2012, *available at* 2012 WLNR 24389120.
6. *Id.*
7. R. Stephanie Bruno, *School district razes two more N.O. buildings: Lafon, Kennedy won't be replaced*, TIMES-PICAYUNE B, Septt. 4, 2011, *available at* 2011 WLNR 17491645. *See also* Op. Att'y Gen. Nos. 10-0018; 10-0258; 10-0259 (2010).
8. *See e.g.*, Robbie Brown, *Slave Graves, Somewhere, Complicate a Wal-Mart's Path*, N.Y. TIMES A15, May 16, 2012, *available at* 2012 WLNR 10297614; Julia Reynolds, *Man Wants to Build Home on Sandy Springs Cemetery Property*, FOX 5 NEWS – ATLANTA (Sept. 24, 2012), http://www.myfoxatlanta.com/story/19626034/man-wants-to-build-home-on-sandy-springs-burial-site.
9. Erin Kelly, *Homes May be Built on Wood County Cemetery*, WTOL (Mar. 9, 2012), http://www.toledonewsnow.com/story/17125075/.
10. Robert Palmer, *Cemetery Evidence Could Stall Walmart*, TIMES DAILY (Apr. 2, 2012) *available at* http://www.timesdaily.com/archives/articles_e7bb306d-e9e7-517d-a8f0-a4e18e9e8da.html?mode=image&photo=0.
11. Ron Devlin, *Cemetery Claim Might End Demolition Plan in Maxatawny*, READING EAGLE (KRTBN) (PA), August 12, 2012, *available at* 2012 WLNR 16187599; Anonymous, *Duffy Dig Ends*, Ir. Voice 18, Nov. 2, 2011 *available at* 2011 WLNR 24440994.

church construction project in Hawaii,[13] in Indiana at the site of a proposed convention center,[14] in California at the site of a proposed dam and cultural center (two different projects),[15] in Illinois for an airport expansion,[16] for a reservoir project in Utah,[17] and for residential developments in Missouri and Mississippi.[18]

Naturally, the more shocking cemetery and human remains issues are those involving desecration. There is no geographic limit to the cemetery desecration reported in recent years. In 2012, federal and state law enforcement arrested individuals on charges of desecrating a Native American burial mound in Mississippi.[19] In Florida, one man was arrested on desecration charges when he dug up a seventy-five-year-old grave and was found in possession of human remains.[20] Although the motives for the latter example are unknown,[21] the former was an effort to extract artifacts for sale.[22] In California, four men were arrested for stealing metal name plaques off of Chico-area graves to sell as scrap metal.[23] Kennedy and Astor graves were among some

12. Magdalene Landegent, *Archaeologists Join Crews at Road Work Sites*, LEMARS DAILY SENTINEL (Oct. 12, 2011) http://www.lesmarssentinel.com/story/1772909.html.
13. Andrew Gomes, *Lawsuit Again Stops Kawaiaha'o Work*, HONOLULU STAR-ADVERTISER (Nov. 25, 2011), http://www.staradvertiser.com/s?action=login&f=y&id=134481458&id=134481458.
14. *Graves Dating to 1800s Found in S. Ind. City Park*, POST TRIBUNE (Dec. 12, 2011, 10:57 PM), http://posttrib.suntimes.com/news/9206966-418/graves-dating-to-1800s-found-in-s-ind-city-park.html.
15. Miriam Raferty, *Viejas Granted Restraining Order to Protect Sacred Burial Ground*, EAST COUNTY MAGAZINE (June 8, 2010) http://eastcountymagazine.org/node/3493; Sanra Ritten, *Unearthed Cemetery Halts L.A. Cultural Center Construction*, INDIAN COUNTRY (Jan. 24, 2011), http://indiancountrytodaymedianetwork.com/article/unearthed-cemetery-halts-l.a.-cultural-center-construction-13186.
16. David Schaper, *O'Hare Growth May Mean Moving a Cemetery*, NPR (Nov. 19, 2005 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=5020426.
17. John Hollenhorst, *Modern-day Project Disrupts Ancient Burial Site*, KSL (Feb. 7, 2011 10:05 PM), http://www.ksl.com/?sid=14297785.
18. Chris Joyner, *Cemeteries on Family Land Raise Problems*, 9/30/10 CLARION-LEDGER (Sept. 30, 2010 12:32 AM), www.clarionledger.com/article/20100930/NEWS/9300349/Cemetaries-family-land-raise-problems; Chris Joyner, *Family Cemeteries Conflict with Land Development*, USA TODAY (Oct. 5, 2010 2:28 PM), http://usatoday30.usatoday.com/news/nation/2010-10-05-family-burial-plots_N.htm.
19. Wayne Hereford, *Indian Mounds in Monroe County Desecrated*, WTVA (Mar. 19, 2012 10:42 AM), http://www.wtva.com/news/local/story/Indian-mounds-in-Monroe-County-desecrated/o77kECW2LUS9c9MM0ShU-g.cspx.
20. Josh Poltilove, *Grave Robbed, Vandalized*, TAMPA TRIBUNE (May 20, 2010), http://tbo.com/apps/pbcs.dll/article?avis=TB&date=20100520v&category=ARTICLE&lopenr=305209996&Ref=AR&profile=1070.
21. *Id.*
22. Hereford, *supra* note 19.
23. *Four Arrested for Grave Desecration*, BREMERTON PATRIOT (Nov. 16, 2011 8:51 PM), http://www.bremertonpatriot.com/news/134013508.html.

300 tombstones that were toppled in a Rhode Island cemetery in 2011 in an incident that seems to have stemmed from random delinquency.[24] These are merely examples of the numerous desecration stories recently reported.

People have fought over the control of cemeteries in Alabama,[25] Indiana,[26] and Florida.[27] Zoning matters have been at the heart of cemetery disputes in Alabama.[28] In matters of general torts related to cemeteries and human remains, a child in Utah was killed when a grave marker fell on him[29] and a dispute arose when a grave space was moved without notifying the family in Texas.[30] Finally, as discussed at length herein, regulatory matters, such as whether licenses are needed to sell caskets, arose in Louisiana.[31]

The sum total of these issues in recent years demonstrates that cemeteries and human remains issues are a matter of constant, if not growing, concern for regulators and the legal community (not to mention the descendant communities).[32] It is with this prevalence of problems in mind that this review is here undertaken.

II. Cemeteries and Human Remains in the Courts

A. Tort cases regarding cemeteries and human remains

As is evident from the previous section of this paper, things often go wrong in cemeteries or with human remains. These problems are

24. Ian MacDougal, *Vandalism in Old Newport Cemetery Provokes Outrage*, CNS NEWS (June 5, 2011 12:28 PM), http://cnsnews.com/news/article/vandalism-old-newport-cemetery-provokes-outrage.
25. Kala Kachmar, *Trial to Decide Ownership of Lincoln Cemetery*, MONTGOMERY ADVERTISER (Sep. 26, 2012 2:14 AM), http://www.montgomeryadvertiser.com/article/20120926/NEWS01/309260050/.
26. Marc Chase, *North Township Trustee Takes Ownership of Troubled Oak Hill Cemetery*, NWI TIMES (Jun. 25, 2012), http://www.nwitimes.com/news/local/lake/hammonoVnorth-township-trustee-takes-ownership-of-troubled-oak-hill-cemetary/articl3dc69d66-7e91-5b44-be0f-5704ce608c34.html.
27. Gordon Jackson, *Plot Sales Banned in Historic Portion of St. Marys Cemetery*, Nov. 14, 2010, FLA. TIMES UNION (Jacksonville). *See also*, Justin Sacharoff, *Quarrels Over Where Loved Ones are Buried Brings Attention to Burial Rights in Florida*, Mar. 17, 2011, FLA. TIMES UNION (Jacksonville).
28. Jay Reeves, *Ala. Man Fights to Keep Wife Buried in Front Yard*, YAHOO! NEWS, (Aug. 20, 2012), http://news.yahoo.com/ala-man-fights-keep-wife-buried-front-yard-153303814.html.; Jay Reeves, *James Davis Front Yard Grave: Court Won't Stop Removal of Ala. Man's Buried Wife*, THE HUFFINGTON POST, (Aug. 22, 2012), http://www.huffingtonpost.com/2012/08/22/james-davis-alabama-front-yard-grave_n_n1822871.html.
29. Michelle Rindels, *Boy, 4, Dies After Tombstone Falls on Him in Utah*, YAHOO! NEWS (Jul. 6, 2012).
30. Morgan Smith, *After Grave is Moved, Regulations are Scrutinized*, Dec. 17, 2010, N.Y. TIMES, at A29.
31. Ramon Antonio Vargas, *Covington Monks Win Right to Sell Caskets*, Jul. 21, 2011, TIMES-PICAYUNE (New Orleans).
32. *Id.*

sometimes a result of negligence and sometimes of intentional acts.[33] This section of the paper is an amalgamation of recent tort cases that are the result of such intentional and negligent acts.

In *Conner v. Norman Sosebee Funeral Home*,[34] a funeral home was sued for injuries sustained by a seven-year-old when a 400 pound marker fell on his foot in the funeral home's parking lot.[35] As noted in the section above, toppling markers are sometimes a problem in cemeteries.[36] Thus, even though this case arises from events that occurred in a parking lot, it is relevant to the subject matter of this paper.[37]

In this case, the appellate court found the funeral home liable for the injuries that ultimately resulted in the amputation of several of the child's toes.[38] The marker in this case was a display model kept at the funeral home which was not secured to its base, nor was the base secured to the ground.[39] The court found that the unsecured marker was inherently unsafe.[40] Although this reality does not specifically make a property owner negligent, the owner's knowledge in this case that children regularly played on the display markers and that the markers were unsecured did impute negligence to the owner.[41]

This case was not a review of the merits of the case, per se.[42] Rather, it was an appellate court's review of a granting of summary judgment in favor of the funeral home.[43] Thus, the appeals court, finding that negligence did exist on the part of the funeral home, overturned the summary judgment and left for a jury the question of whether the child had been adequately warned about the hazards of the markers so as to mitigate the funeral home's damages.[44] Nonetheless, this case clearly stands for the proposition that cemetery markers, wherever they are located, must be properly set and secured to avoid injuries and premises liability.[45]

In *Rogers v. Louisville Land Co.*,[46] Ms. Rogers sued a cemetery company for distress due to the alleged failure to maintain the cemetery in which her son was buried.[47] The district court awarded Ms. Rogers

33. *Id.*
34. Conner v. Norman Sosebee Funeral Home, 693 S.E. 2d 534 (Ga. App. 2010).
35. *Id.*
36. *Id.*
37. *See generally Id.*
38. *Id.* at 535-36.
39. *Id.* at 536.
40. *See id.* at 538.
41. *See id.*
42. *Id.* at 534.
43. *See id.* at 538.
44. *Id.* at 538-39.
45. *See id* at 538.
46. Rogers v. Louisville Land Co., No. E22010-00991-COA-R3-CV, 2011 WL 2112766 at *1 (Tenn. App. 2011).
47. *Id.* at *1.

over $330,000, $250,000 of which was for punitive damages and $45,000 of which was for intentional infliction of emotional distress ("IIED").[48] On appeal, the court found that Ms. Rogers had not proven IIED and reversed the IIED and punitive damages awards.[49] The testimony presented at trial included information on the lack of mowing, the failure to maintain roads, and the failure to do repairs to monuments.[50] Much of the jurisprudence cited by the plaintiff on appeal, in an effort to maintain her success at the district court, related to emotional distress in "mutilation, negligent embalming, and wrongful disinterment" cases.[51] The court did not find any of these cases persuasive for the notion that poor cemetery maintenance could cause emotional distress on the level of corpse mutilation.[52] Although the court noted its sympathy for the plaintiff's plight, it found actual evidence of her emotional distress to be "at best sparse."[53] Based on the lack of evidence of severe emotional distress on the record, the court overturned that judgment.[54] The punitive damages award, which was based on the IIED award, also fell.[55]

In *Leathermon v. Grandview Memorial Gardens, Inc.*,[56] plaintiffs in a class action suit brought claims against a cemetery based upon the alleged improper installation of lawn crypts (and the resulting damages to their loved ones' remains).[57] An example of the damage alleged is the assertion that "[to] the family's horror, Fred Leathermon's body and casket were significantly and prematurely deteriorated because of water that had pooled in the improperly installed lawn crypt."[58] However, the court declined to permit a negligent infliction of emotional distress ("NIED") claim for situations that did not include family witnessing a death or serious bodily injury.[59] The court similarly rejected claims for tortious interference with a dead body, noting that this tort allowed recovery for emotional distress and was merely a veiled NIED claim for which the plaintiffs

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at *4.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at *5. On appeal, the Tennessee Supreme Court considered and made pronouncements related to some of the tort theories raised in this case. Rogers v. Louisville Land Co., 367 S.W.3d 196, 204-210 (Tenn. 2012). However, none of these pronouncements have any bearing on the cemetery or human remains issues in this case and are thus not reviewed here. The holdings of the appellate court discussed herein were affirmed. *Id.* at 216-217.
56. Leathermon v. Grandview Memorial Gardens, Inc., No. 4:07-cv-137-SEB-WGH, 2011 WL 2445980 (S.D. In. 2011).
57. *Id.* at *5.
58. *Id.*
59. *Id.* at *6.

had no standing to bring.[60] Further, finding no evidence of intent, the court rejected the plaintiffs' IIED claims.[61] The court rejected the plaintiffs' fraud claims as lacking the requisite specificity.[62] Finally, the court did find enough merit to allow the plaintiffs to amend their petition for a deceptive trade practices act claim that basically stated that the cemetery knew that the lawn crypts were defective or improperly maintained and thus they should be liable under state law for concealing these defects.[63] Although the deceptive trade practices act claims had tolled by the time of the suit, the court allowed the claims to be brought on allegations that the cemetery had concealed the evidence until after the statute of limitations had run.[64] At the time of this writing, there is no decision as to the validity of the one surviving claim in this suit.[65]

The substance of the *Rogers* and *Leathermon* cases instruct us that claims for emotional distress for cemetery maintenance will likely fail as a tort theory.[66] It is very difficult to prove that maintenance problems rise to the level of tortious conduct. Such claims must be brought, when available, on contract (express or implied) breach or state law violation theories.[67] In the absence of such bases and without wanton recklessness and disregard by the cemetery, tort claims for the failure to maintain cemetery property largely seem to be unsupportable.[68]

In *Kogelshatz v. Gendernalik Funeral Home, Inc.*,[69] the court was presented with several tort claims for alleged delays in the interment of cremated remains.[70] In this case, the decedent's family sued a funeral home and cemetery that were in charge of the interment of their loved one's cremated remains.[71] In this case, the remains were not lost. Rather, the cemetery placed the remains within a temporary mausoleum niche awaiting instructions as to the final disposition of the remains from the funeral home.[72] The delay from cremation to burial was less than a year.[73] The family sued the funeral home and cemetery alleging that the defendants owed obligations to the family

60. *Id.* at *7.
61. *Id.*
62. *Id.* at *8.
63. *Id.* at *8-9.
64. *Id.*
65. *Id.*
66. *See id.;* Rogers v. Louisville Land Co., No. E22010-00991-COA-R3-CV, 2011 WL 2112766 (Tenn. App. 2011).
67. *See Rogers,* 2011 WL 2112766 at *1.
68. *Id. See also Leathermon,* 2011 WL 2445980.
69. Kogelshatz v. Gendernalik Funeral Homes, Inc., 2010 WL 4628678 (Mich. Ct. App. 2010).
70. *Id.* at *1
71. *Id.* at *2.
72. *Id.* at *1-2.
73. *Id.* at *2.

to inform them of any delays in the interment process.[74] The family alleged that the defendants' failure to notify them of the delay constituted negligence.[75] The court disagreed, finding no evidence of reckless conduct by the cemetery, but rather alluding to the reality that the cemetery did the right thing by waiting for instructions regarding interment from the funeral home.[76]

In this case, the family also brought NIED claims against the cemetery, alleging that they were in "extreme shock" when they were made aware that their mother's ashes were not where they thought they were.[77] Not surprisingly, the court rejected the NIED claims, as there was no evidence that the family had witnessed the alleged shocking event.[78]

Finally, the family alleged conversion when they were not refunded for the cremation and interment services.[79] However, because the cemetery cremated the remains and interred them, the court found no conversion.[80] The court also summarily rejected allegations of deceptive trade practices and breach of contract.[81]

This case is interesting but not likely very important. It is certainly indicative of the heightened sensitivity of grieving families.[82] It is also indicative of the importance of following internal protocols, as the court repeatedly noted that the cemetery properly followed reasonable rules and procedures related to the temporary and permanent interment of the remains in the case.[83]

In *Martin v. Hodges Chapel, L.L.C.*,[84] an Alabama appellate court was presented with the question of when families' rights to bring a tort action against a cemetery expire.[85] In this case, the plaintiffs interred their relatives between 1990 and 2004, but did not file suit alleging that the cemetery had not kept records of interment locations until 2010.[86] The major point of this case for the purposes of this paper is whether the family's rights to sue the cemetery had expired.[87] In Alabama, there is a 20 year rule of repose that, in matters related to burials, creates a hold on normal statutes of limitations for a period of 20 years following the occurrence of harm related to an interment.[88]

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74. *Id.* at *3.
75. *Id.*
76. *Id.*
77. *Id.* at *4.
78. *Id.*
79. *Id.* at *5.
80. *Id.*
81. *Id.* at *6-7.
82. *Id.* at *3-4.
83. *See id.*
84. Martin v. Hodges Chapel, L.L.C., 89 So.3d 756 (Al. Civ. App. 2011).
85. *See id.*
86. *Id.* at 759.
87. *See id.* at 760.
88. *Id.* at 760.

In *Martin*, the cemetery defendant alleged that the rule of repose ran from the burial of each individual and that, at least as to the early burials, that time had run by the time suit was filed.[89] The court disagreed stating that the rule of repose period will,

> begin to run at different times for different types of claims. For example, because damages are an essential element of a tort claim, the rule of repose does not begin to run as to a tort claim until "the defendant's tortious act proximately causes the plaintiff to suffer an actual injury." . . . "A suit on a breach-of-contract claim, on the other hand, may be commenced as soon as the defendant breaches the contract, regardless of whether the plaintiff has suffered an actual injury."[90]

Thus, in this case, where the plaintiffs only learned that their loved ones' graves could not be located until inquiring as to their locations in 2009, the rule of repose ran from 2009 as to tort claims.[91] For the breach of contract claims, the court recognized that the event triggering the beginning of the statute of limitations occurred when the cemetery did not keep adequate records and not from the time of the plaintiffs' discovery of this shortcoming.[92]

In *Warden v. Dudley Hoffman Mortuary*,[93] a plaintiff sued a crematory alleging that his wife's remains were cremated with those of another person and that the crematory stole the gold from her dental crowns before cremation.[94] A jury ruled in favor of the crematory, finding no evidence of the allegations.[95] On appeal, the plaintiff alleged that the cremation contract he signed with the crematory was "unconscionable" because the provisions dealing with the removal of dental work was disturbing and it was in small print.[96] The court noted that, for a contract to be unconscionable, it must be oppressive and cause surprise.[97] The court, in spite of the small print and the fact that the plaintiff was upset by the dental work removal, did not find that the contract met the standards for being unconscionable.[98] The court also noted that the plaintiff's "fragile emotional state at the time he entered into the contract, while understandable, is not relevant to a determination of whether it is unconscionable."[99] The appellate

89. *Id.*
90. *Id.* at 762 (internal citations omitted).
91. *Id.* at 763-64.
92. *Id.* at 764.
93. Warden v. Dudley Hoffman Mortuary, 2010 WL 1531407 (Ca. Ct. App. Apr. 19, 2010).
94. *Id.* at *1.
95. *Id.*
96. *Id.* at *2.
97. *Id.*
98. *Id.* at *3.
99. *Id.*

court never reached the substantive issue of the allegations of commingled remains, as it found that the evidence to support these allegations was properly excluded by the trial court.[100]

The importance of this case is that the reality that prosthetics and dental work must be removed in advance of cremations[101] is not, per se, actionable as shocking or unconscionable as long as it is disclosed in the contract with the family.[102] There is likely little precedential value to this case, as it relies heavily on California legal principles, but it is interesting, nonetheless.[103]

In another cremation case, *Seals v. H&F, Inc.*,[104] the Tennessee Supreme Court was faced with a tort suit that rested on whether a crematory had proper authority to conduct a cremation.[105] In this case, the decedent left no directions for the disposition of his remains.[106] The decedent was cremated upon a request by his fiancée and minor son and the decedent's mother sued for wrongful cremation.[107]

The crematory defended against the mother's claims by asserting that, although the law recognizes the superior position of the mother's right to control the disposition of remains (as a surviving parent when there is no spouse or minor child), it relied on the fiancée's and child's assurances that the decedent's parents were dead, that a minor child had rights to control the disposition of his father's remains, and that, because the crematory did not operate maliciously, it was immune under state law.[108]

The Court recognized that, in the absence of written direction to the contrary from the decedent, the statutory provision governing disposition of the dead must control.[109] In this case, that law recognized the mother as the proper party to control disposition of the deceased.[110] The court rejected the crematory's argument that the law of intestate succession, which does provide rights to minor children, should apply, as those laws deal with the disposition of the decedent's material things, not the decedent's body.[111] Another interesting component of this analysis is that the court recognized that human remains are not property in a traditional sense, thus meaning that the

100. *Id.* at *6-7. .
101. *Id.*
102. *Id.* at *2-3.
103. *Id.* Some portions of this case were appealed again and are reported at *Warden v. Dudley Hoffman Mortuary*, 2012 WL 1572125 (Cal. Ct. App. 2012). However, the issues raised were largely related to attorneys fees and are thus not relevant to this review.
104. Seals v. H & F, Inc., 301 S.W.3d 237 (Tenn. 2010).
105. *Id.* at 239-40.
106. *Id.* at 240.
107. *Id.* at 239-40.
108. *Id.* at 240.
109. *Id.* at 246-47.
110. *Id.* at 247.
111. *Id.* at 245-46.

law related to the disposition of a decedent's property cannot apply to the body itself.[112] The court also discussed the state's anatomical gift act as a possible proxy for control of the body of the deceased, but found that law inapplicable due to the specific nature of the law regarding the actual disposition of remains and because that law also did not give any authority to minor children.[113]

As to whether state law provided some immunity to the crematory because it did not act maliciously, the court found that this immunity was not absolute.[114] The court noted that the crematory must adhere to the law related to the right to control disposition of remains in order to avail itself of the immunity.[115] Because minors cannot control disposition, the court found that the crematory's reliance on the minor's disposition instructions barred it from availing itself of the limitation of liability.[116]

None of the outcomes of this case are surprising. As the court, itself, noted, the law on control of disposition is clear and it merely applied the clear law to this case.[117]

Before the Eastern District of Wisconsin in *Jackson v. McKay-Davis Funeral Home, Inc.*,[118] were questions of liability for several parties when cremated remains were lost in transit.[119] In this case, a wife and daughter of the deceased brought an action alleging breach of fiduciary duty, negligent handling of human remains, and NIED when the deceased's remains were apparently taken from the family's front porch after delivery from out-of-state by a courier.[120] In this decision, which was the result of a preliminary hearing regarding the plaintiffs' standing, the court recognized that standing for remains mistreatment allegations is afforded, in Wisconsin, to those "who have suffered emotionally or physically from the defendant's negligent conduct,"[121] rather than based upon some theory related to someone who has quasi-property rights in the deceased's body.[122] The court also rejected a theory that standing should be limited to those with the legal right to disposition of a body.[123] Although this superficially appears to be in conflict with the Tennessee decision in *Seals, supra*, it is

112. *Id.* at 243.
113. *Id.* at 245.
114. *Id.* at 249.
115. *Id.*
116. *Id.* at 253.
117. *Id.*
118. Jackson v. McKay-Davis Funeral Home, Inc., 830 F.Supp.2d 635 (E.D. Wis. 2011).
119. *Id.* at 642.
120. *Id.* at 639.
121. *Id.* at 644-45.
122. *Id.*
123. *Id.*

not.[124] In *Seals*, the court looked to who had the right to control disposition, not, as in *Jackson*, who had the right to recover for alleged mistreatment.[125] The former is clearly set by statute in most cases, as the *Jackson* court recognized,[126] and the latter is not.[127]

Aside from standing, which the court here found the plaintiffs to have,[128] the court analyzed whether the funeral home owed the decedent's family a fiduciary duty with regard to the shipment of the cremated remains at issue.[129] Although the court recognized that the plaintiffs had placed trust in the funeral home in a colloquial sense, it did not find this trust to rise to the level of creating a fiduciary duty such that liability for the loss of the remains would lie as against the funeral home.[130]

In *Jackson*, the court noted the difficulty of proving NIED claims and indicated that success on these claims was unlikely in this case,[131] but it also found that the defendants did not meet their burden of showing that damage had not occurred and deferred this matter to a trial on the merits.[132] Similarly, with regard to the negligent mistreatment of remains claim, the court found that the defendants had not met the burden for summary dismissal of the claims and deferred these issues to the trial.[133] With this claim, the court may have tipped its hand as to its perspective at trial when it noted the ease of avoiding the loss of remains in this case had there simply been a "signature upon delivery" required in the delivery of the remains.[134]

One lesson from this case appears to be that the right to bring suit for injury from mistreatment of remains is broader than just who may have a right to dispose of remains.[135] It is probable that this idea will be implemented elsewhere. Another lesson is to make sure that, when shipping human remains, the "signature upon delivery" box is checked on the shipping form to ensure that the remains are not left on a doorstep to be stolen.[136]

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124. *See* Seals v. H & F, Inc., 301 S.W.3d 237, 252-53 (Tenn. 2010) (describing the right to control exclusively).
125. *Id.*; *See also Jackson*, 830 F.Supp.2d at 644-45.
126. *See* Jackson, 830 F.Supp.2d at 643 (Describing the case law dependent on disposition).
127. *See id.* (noting that Wisconsin Courts have not addressed the issue and are facing two different sources of law).
128. *Id.* at 647.
129. *Id.* at 647-48.
130. *Id.* at 649-50.
131. *Id.* at 650-56.
132. *Id.* at 655-56.
133. *Id.*
134. *Id.* at 655.
135. *Id.* at 650-56.
136. *Id.* at 655.

In the Utah case of *Jones v. Norton*,[137] the plaintiffs claim that the defendant mortuary caused them to suffer IIED when its employee allegedly made an unsightly cut on the deceased's neck.[138] Not surprisingly, as with the other cases reviewed in this article, the court did not find sufficient evidence of outrageous conduct to support an IIED claim.[139] Specifically, the court could not find evidence suggesting any intent by the defendant's employee, nor could the court identify reasonable evidence of the extent of the cut to determine whether it was shocking or not.[140] Accordingly, the plaintiff's IIED claims were dismissed on summary judgment.[141]

The recent Florida case of *Mellette v. Trinity Memorial Cemetery, Inc.*[142] represents an unusual example of a claim for emotional distress that was not rejected by the courts.[143] In this case, over a widow's express objection, a cemetery disinterred her deceased husband on a request by his mother and provided for the transfer of the remains from Florida to Texas.[144] In this case the mother had paid for the interment space, so the cemetery did not check the files to determine whether the mother was the next of kin.[145] In this situation, under Florida law, the widow, even though she had remarried, was the next of kin.[146] In addition, the widow had warned the cemetery that she was concerned that the mother might try to have the remains moved.[147]

When the widow learned of the move, she brought suit against the cemetery for both tortuous interference with a dead body and reckless infliction of emotional distress.[148] The district court granted summary judgment in favor of the cemetery, finding, as a matter of law, that the

137. Jones v. Norton, No. 2:09–cv–730–TC, 2012 WL 3062022 (D. Utah Mar. 29, 2013).

138. *Id.* at *1.

139. *Id.* at *4.

140. *Id.* at *2-4.

141. *Id.* at *4. The plaintiffs in this matter also tried later to repackage their tort claims under the guise of "negligence, gross negligence, and professional malpractice." *Jones v. Norton*, No. 2:09-cv-730-TC, 2012 WL 3985645 at *1 (D. Utah Sept. 11, 2012). However, the court rebuffed that attempt noting that, "[i]f the court were to [allow such an amendment], then the entry of summary judgment in a defendant's favor would be meaningless." *Id.* The court also poignantly noted that "not every wrong is legally redressable" when considering the plaintiffs attempts to reassert their original claims. *Id.*

142. Mellette v. Trinity Memorial Cemetery, Inc., 95 So.3d 1043 (Fla.App. 2 Dist. 2012).

143. *Id.* at 1044.

144. *Id.* at 1045-1046.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

facts did not support either claim.[149] The appellate court reversed the district court on both counts.[150]

With respect to the tortuous interference claim, the court noted that the cemetery was required to demonstrate that the wrongdoing that it had admitted to (i.e., breaking Florida law by permitting someone other than the next of kin to direct a disinterment) "was not willful or wanton as a matter of law."[151] Comparing the admitted actions to another case in which tortuous interference was found when a funeral home withheld a body for the failure to pay embalming fees, the court here held that,

> [c]ertainly, a surviving spouse's right to direct the disposition of her deceased's body is no less invaded when the party to whom she has entrusted the body disinters it and ships it out of state without her knowledge and against her expressed wishes.[152]

The court then noted that,

> [w]e cannot conclude as a matter of law that Trinity's conduct did not exhibit an "entire want of care of attention to duty" or was not so wanton as to render it liable for intentionally interfering with a dead body.[153]

Thus, the court reversed the tortuous interference decision so that the case could go to trial.[154]

On the same facts, the court in this case also held that "we cannot say that as a matter of law Trinity's conduct did not reach the level of outrageousness required to support" a claim for emotional distress.[155] The basic standard that the court applied was "whether the recitation of facts was such that an average member of the community would exclaim 'outrageous!'"[156] The court believed that the cemetery's conduct fit the requirements for this tort as well and remanded the case for further proceedings.[157]

This case is something of an anomaly in those reported here. The court actually favored the elusive finding of reckless infliction of emotional distress.[158] It is hard to say that this case is a bellwether considering the substantial jurisprudence that dissuades such findings. However, the case is certainly a cautionary tale suggesting that ceme-

149. *Id.* at 1046.
150. *Id.* at 1044-45.
151. *Id.* at 1046.
152. *Id.* at 1047.
153. *Id.*
154. *Id.*
155. *Id* at 1048.
156. *Id.* at 1049 (quoting Restatement (Second) of Torts § 46 (1965)).
157. *Id.*
158. *Id.*

teries that negligently or intentionally violate the law may be held accountable in tort.[159]

In a case stemming from the Tri-State Crematory scandal,[160] *Akers v. Prime Succession of Tennessee, Inc.*,[161] a Tennessee appeals court considered matters of fraud and remains mishandling.[162] One of the major problems in this case was that the decedent's remains, due to the nature of the Tri-State scandal, could never be positively identified.[163] Thus, without evidence (i.e., a body), the question presented to the court was: could the family of the deceased maintain an action for the mishandling of remains?[164] The trial court let the matter go to trial and the jury found in favor of the family.[165]

On appeal, despite the fact that no remains attributable to the deceased could be definitively identified, the appellate court found that sufficient corroborating evidence existed to support the mishandling claims.[166] The appellate court also found, consistent with the jury's findings, that the Tri-State's conduct was intentional, outrageous, and caused "serious mental injury."[167] These holdings were subsequently upheld by the Tennessee Supreme Court.[168]

The result of the *Akers* case is not surprising, considering the enormity of the Tri-State scandal. It is doubtful and unlikely that the Tri-State cases, such as *Akers*, have much precedential effect outside of egregious fraud cases.[169] However, due to the egregious nature of this case, it is likely that, in the future, courts may rely on the logic of *Akers* to allow damages claims to proceed when positive identification of actual remains is impossible.[170]

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159. *Id.*

160. *See generally, Officials End Search of Georgia Crematory*, N.Y. TIMES, Mar. 7, 2002, at A25. Explaining that the Tri-State Crematory scandal refers to the Georgia crematory that, in 2002, was discovered to have been disposing of bodies on its property rather than cremating them per agreements with local funeral homes. In the end, more than three hundred bodies were discovered in varying states of decomposition hidden in every portion of the crematory's property, including a small lake.

161. Akers v. Prim Succession of Tenn., Inc., et al., 2011 WL 4908396 (Tenn. App. 2011).

162. *Id.* at 2.

163. *Id.* at 2-13.

164. *Id.*

165. *Id.* at 16.

166. *Id.* at 18.

167. *Id.* at 22-23.

168. Akers v. Prime Succession of Tenn., Inc., 387 S.W.3d 495 (Tenn. 2012), *cert. denied* Marsh v. Akers, 133 S.Ct. 1464 (2013).

169. *See generally id.* at 504 (the opinion implies that the fraud was intentional or reckless and established Intentional Infliction of Emotional Distress).

170. *See generally id.* at 500, 504 (the jury found Marsh liable for intentional infliction of emotional distress and upheld the damages to Akers although Dr. Berryman could not scientifically determine whether the cremations belonged to Akers or someone else).

In the North Carolina case of *Birtha v. Stonemor, North Carolina, LLC*,[171] the North Carolina Court of Appeals reviewed the trial court's dismissal of a litany of claims stemming from a cemetery's alleged moving of grave markers and losing grave spaces.[172] The bulk of the claims in this case were barred due to the tolling of various statutes of limitations.[173] The plaintiffs' claims in this case were based on negligence and breach of contract.[174] Regarding the negligence claim, the court found that the cemetery's failure to adhere to a law mandating the maintenance of interment records was not negligence because the plaintiffs were not the class of individuals intended to be protected by such a law.[175]

This assessment by the court, which seems to place the only standing to assert a claim for a violation of this law with the North Carolina Cemetery Commission, is preposterous.[176] Such laws exist to protect the public.[177] While violations of these laws may permit regulatory action against a cemetery, such violations similarly create standing for private individuals who are affected by the violations.[178] These laws create not only a regulatory responsibility, they also create a public protection duty on behalf of the cemeteries that is actionable as a tort.[179] The court in this case said as much later in the opinion when it noted that,

> [i]t is well-settled that a "violation of a statute designed to protect persons or property is a negligent act, and if such negligence proximately causes injury, the violator is liable. This is an appropriate allegation on the first cause of action based on negligence. . .[180]

Thus, the court here internally conflicts with its own opinion.[181]

The court in this case also fails to find a "continuing wrong" caused by the cemetery's action, finding that no continual unlawful acts occurred.[182] Further, the court did not allow the use of the "discovery rule" to allow an extension of the standard statute of limitations, because the court did not believe that these alleged actions fit the class

171. Birtha v. Stonemor, North Carolina, LLC, 727 S.E.2d 1(N.C.App. 2012), *review denied* 738 S.E.2d 373 (N.C. 2013).
172. *Id.* at 4.
173. *Id.* at 7-9.
174. *Id.* at 4.
175. *Id.* at 8.
176. *See id.*
177. *Contra id.* at 8.
178. *Contra id.*
179. *Contra id.*
180. *Id.* at 9.
181. *See id.*
182. *Id.* at 7.

of harms contemplated to be encompassed within the discovery rule.[183]

In this case the court dismissed the bulk of the contract claims based upon prescription.[184] However, for the non-prescribed contract claims the court held that the cemetery's violation of the law does not constitute a breach of contract.[185] Finally, the court also rejected the plaintiffs' fraud claims.[186] The court here did not find that the plaintiffs were defrauded by any actions of the cemetery and affirmed the trial court's dismissal of their claims.[187]

Aside from the erroneous interpretation of the nature of cemetery regulatory laws,[188] this case is instructive in at least one other point. Prescription is a real problem with cemetery tort claims, and to ensure that your rights are protected as a descendant of a buried individual, you must visit the grave often and report and act on problems quickly – an unlikely scenario and likely an unreasonable standard.[189]

B. Dedication of and Access to Cemeteries

Issues related to the legal implications of a cemetery's presence on a piece of property and matters related to access to cemeteries have been the subject of some litigation lately.[190] The former is a concept known as the cemetery dedication.[191] This is a property concept that exists both in common and civil law jurisdictions and restricts the use of property containing human remains for any purpose other than as a cemetery.[192]

In *Shilling v. Baker*,[193] the Virginia Supreme Court was required to determine whether a cemetery actually existed to which a dedication applied and, if so, whether a zoning ordinance applied to the property as a cemetery.[194] The particular tract began as an area for the scattering of cremated remains of members of the Baker family.[195] The remains of four people were scattered on the property between the 1940s and the 1990s.[196] In addition, the area was fenced and con-

183. *Id.*
184. *Id.* at 9.
185. *Id.*
186. *Id.* at 9-10.
187. *Id.*
188. *See id.* at 8.
189. *See id.* at 6-7.
190. *See infra* discussion on pp. 22-39.
191. Cemeteries, La. Att'y Gen. Op. No. 10-0275 (Feb. 1, 2011).
192. *Id.*; Graceland Park Cemetery Co. v. City of Omaha, 114 N.W.2d 29 (Neb. 1962) (citing Fidelity Union Trust Co. v. Union Cemetery Ass'n, 104 N.J. Eq. 326 (N.J. Ct. Chan. 1929).
193. Shilling v. Baker, 691 S.E. 2d 806 (Va. 2010).
194. *Id.* at 807.
195. *Id.*
196. *Id.*

tained memorial plaques commemorating each of the people.[197] In the late 1990s, another family member's ashes, in an urn, were interred at the site.[198]

The trouble began when the current owner (not a Baker family member) decided to sell the tract that contained the property where the fence and cremated remains were placed.[199] Part of the sale agreement included a relocation of the "Baker Cemetery" by 500 feet.[200] As an intervening problem to the question of whether the scattering of cremated remains created a cemetery in this case, a local zoning ordinance was passed in 1984 defining a cemetery.[201] The trial court determined that the ordinance was controlling and did not contemplate the establishment of a cemetery by anything other than the interment "of a dead body."[202] Thus, the trial court found that this fenced area of scattered remains was not a cemetery and rejected the family's invitation to apply the common law concept of a cemetery to the property.[203]

In *Shilling*, the Virginia Supreme Court reviewed several examples of cemeteries and concluded that a cemetery is, "a permanent resting place either underground or in a confined space or container."[204] The court rejected the concept that a scattering of remains could create a cemetery.[205] Although this is consistent with the idea that general scatterings do not create cemeteries,[206] it does seem contrary to the concept of whether an area blocked-off and indentified as a cemetery is not a cemetery (e.g., scattering gardens).[207]

In *Narragansett Improvement Co. v. Wheeler*,[208] the Rhode Island Supreme Court was presented with the question of whether a governmental preservation entity's identifications of cemeteries on private property constituted a slander of the private party's title.[209] The identified cemeteries were Native American burial mounds that were documented on private property to assist in their protection.[210] The court noted that because the documentation of these mounds was not a legal registration and because the government entity was an advisory commission only and could merely document and make recommendations for action with regard to cemeteries, that no constitutional

197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 808.
202. *Id.* at 809.
203. *Id.*
204. *Id.* at 810.
205. *Id.*
206. *See, e.g.*, Cemeteries, La. Att'y Gen. Op. No. 10-0275 (Feb. 1, 2011).
207. *See id.*
208. Narragansett Improvement Co. v. Wheeler, 21 A.3d 430 (R.I. 2011).
209. *Id.* at 432.
210. *Id.* at 442-43.

claims could lie against it.[211] Further, the court found that there was no slander of title by recommending the preservation of these sites, as the recommendations were not false and they identified actual features on the property (i.e., the cemeteries) that, if they devalued the property, they did so regardless of the government's recommendations.[212] This outcome absolved the government of liability[213] and is consistent with the idea that burials are generally inviolate and that you acquire property subject to the existence of burials on the property.[214]

In *Meisel v. Lawyers Title Insurance Corp.*,[215] a purchaser of property brought an action against a title insurance company and a seller when, after the close of the sale, the purchaser learned that several Native American mounds were present on the property, at least one of which was likely a cemetery.[216] In this case, one insurer asserted that the existence of a cemetery constituted a defect not covered by its policy because the defect occurred as a result of the exercise of police power.[217] In other words, the insurer was essentially saying that, but for governmental protections of cemeteries there would be no defect to the property and the purchaser could do as it pleased (including, presumably, destroying the cemetery).[218] Along with the claim against the title insurance company, the purchaser submitted to binding arbitration in its claims against the seller.[219] The arbitrator found that the presence of the cemetery devalued the property by more than half the amount paid by the purchaser.[220] Nonetheless, the seller was only cast judgment for $40,000.00 of a total purchase price of $680,000.00.[221] The district court, in the claim against the insurer, found that any devaluation of the property value was covered by the title policy, thus negating the argument that the police power was the basis for the devaluation.[222] In fact, the district court found that the presence of information regarding the mounds' existence in the Office of the State Archaeologist constituted evidence of the defect in the public records which was constructively known to the seller and

211. *Id.* at 439-41.
212. *Id.* at 441-42.
213. *See id.*
214. *See e.g.*, Choppin v. Labranche, 20 So. 681, 682 (La. 1896) (discouraging the disturbance of the dead except for "lawful necessary purposes"); *see also,* T. SCOTT GILLIGAN & THOMAS F.H. STUEVE, MORTUARY LAW 49-53 (9th ed. 2005) (noting that disinterment is generally disfavored).
215. Meisel v. Lawyers Title Ins. Corp., A10-342, 2010 WL 5071294 (Minn. Ct. App. Dec. 14, 2010).
216. *Id.* at *1.
217. *Id.* at *2.
218. *See id.* at *2.
219. *Id.*
220. *Id.* at *4.
221. *Id.* at *2.
222. *Id.* at *3.

title insurer.[223] Thus, this was a known defect that should have been disclosed.[224] The district court granted the purchaser $250,000.00 in damages (which was the difference between the property value with and without the mounds) less the $40,000.00 arbitration award.[225]

On appeal, the district court's decision that the arbitration award did not collaterally estop the purchasers from making a separate claim against the title insurer was determined to be erroneous.[226] The appellate court reasoned that the arbitrator considered all of the issues and that the claims against the insurers were, effectively, a relitigation of a previously decided matter.[227] The appellate court did not reach the same merits as the district court case.[228]

The district court's finding that a state archaeologist's files constitute public records, a finding not upset on appeal, may open an entirely new area of public records review to title attorneys.[229] Access to these records may vary from state to state, but they are often much more comprehensive than mortgage or conveyance records when it comes to the existence of cemeteries and archaeological sites that might affect what someone can do with their property. Thus, in jurisdictions where this information is available to the public, it may be prudent for title attorneys to check these records before warranting title.

In *Huxfield Cemetery Association v. Elliott*,[230] two separate parties were vying for control of a cemetery.[231] In this case, the court spent considerable time discussing the reality that cemeteries do not adhere to the general concepts of property law.[232] Also in this case, because the parties stipulated that the cemetery association had maintained the cemetery from 1881 to 2006, it acquired the right to operate the cemetery.[233] This case is unique in that there seems to be little factual dispute about the nature of the property as a cemetery and who historically maintained the property.[234] Thus, there are no shocking legal revelations in the case.[235] However, the case is useful in its review of the primacy of cemetery law over general property law and for the fact that title to property often does not give the title holder the right to control the cemeteries that may be located thereon.[236]

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223. *Id.* at *2-3.
224. *Id.* at *3.
225. *Id.*
226. *Id.* at *4.
227. *Id.* at *5.
228. *Id.* at *4.
229. *See id.* at *3.
230. Huxfield Cemetery Ass'n v. Elliot, 698 S.E. 2d 591 (S.C. 2010).
231. *Id.*
232. *Id.* at 594.
233. *Id.* at 595.
234. *Id.* at 593.
235. *See id.*
236. *Id.* at 591.

In *Dumbarton Improvement Association, Inc. v. Druid Ridge Cemetery Co.*,[237] a cemetery owner sought to sell 36 acres of cemetery property for development as residential homes.[238] The 36 acre tract at issue was owned by the cemetery, but had not been used for burials.[239] The district court ruled that a restrictive covenant transferring the property and creating the cemetery in 1913 did not restrict the sale of this property and that the changing character of the surrounding area since 1913 made any restriction against the use of the property for development unenforceable.[240] The appeals court found no error with the original holding and affirmed.[241]

This case is somewhat contrary to the general principles of cemetery dedication.[242] Although the 1913 documents did not explicitly dedicate all of the property for cemetery use, the language stating "[t]hat the said property be maintained and operated as a cemetery," clearly indicates the intent of the parties.[243] Even if this would not act as a dedication until there was an actual interment, it is clearly a restriction on the development of the property.[244] This case was clearly results-driven rather than law-driven.[245] The court gave great weight to testimony about the changing character of the neighborhood since 1913, and quoted an expert as saying that "[l]eaving this as surplus cemetery land from a public policy perspective doesn't make much sense."[246] Such extrinsic evidence regarding contractual terms is inappropriate.[247] Since the property at issue was not yet used for burials, it does not appear that this case impacts the dedication concept.[248] However, the court's holding creates some uncertainty into the long-term viability of restrictive covenants and by using a "changing character" standard, it also risks setting precedent that may be used in the future to undermine cemetery dedications.[249]

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237. Dumbarton Improvement Ass'n v. Druid Ridge Cemetery Co., 5 A.3d 1133 (Md. Ct. Spec. App. 2010).

238. *Id.* at 1135.

239. *Id.* at 1138.

240. *Id.* at 1135.

241. *Id.*

242. *See generally* 14 Am. Jur. 2d *Cemeteries* §18 (2009) (stating that the owner's intent to dedicate their land for a public cemetery coupled with public acceptance and continued use is enough to establish the dedication of land as a cemetery).

243. *Dumbarton*, 5 A.3d at 1135.

244. *Id.*

245. *Id.* at 1139.

246. *Id.*

247. *See e.g.*, Tricat Industries, Inc. v. Harper, 748 A.2d 48 (Md. App. 2000) (noting that extrinsic evidence in the interpretation of contracts is disfavored except in situations where the contractual language is unclear).

248. *Dumbarton*, 5 A.3d at 1138, 1141.

249. *Id.* at 1140.

In *Stokes v. Jackson County Memorial Park*,[250] a Mississippi appeals court was faced with a question of whether a lien could attach to unplatted cemetery property.[251] This case originated with an automobile accident.[252] The cemetery owner was the subject of a $525,000.00 default judgment in the accident case, and when his cemetery company went into receivership a year later, the plaintiff claimed that her judgment against the owner now attached to his property (i.e., the cemetery company) and that she had a lien against the cemetery.[253] The district court in this case found that the subject property, though not all "officially platted or dedicated as a cemetery, [] nevertheless had been de facto dedicated and was being held in trust by [the owner] for the benefit of the public."[254] The district court also put great weight on the assessment of the property as tax-exempt cemetery property.[255] The property to which the plaintiff was attempting to attach a lien was off-limits as it was cemetery property.[256] The appellate court partially disagreed, noting that,

> that portion of [the owner's] property which has never been officially platted and dedicated as a public cemetery has not become a public cemetery, nor has it been impressed with a constructive trust for the benefit of the public simply because it has been accorded tax-exempt status.[257]

This case highlights an important distinction between two types of cemetery property: used or officially dedicated property and unused and undedicated property (that is owned by the cemetery).[258] The appellate court seemed to implicitly acknowledge that property that has been used for burials or officially dedicated as a cemetery is insusceptible to liens.[259] However, the court rejects the idea that all unused cemetery property is dedicated and thus insusceptible of liens.[260] Although this may be technically correct, the court does not consider any policy ramifications of its decision.[261] The primary means for a cemetery to generate the funds necessary to sustain itself – especially for long-term maintenance – is through the sale of burial spaces.[262] If a cemetery is already in receivership, it is in financial trouble and needs all of the help it can get.[263] By failing to recognize undevel-

250. Stokes v. Jackson County Memorial Park, 38 So.3d 668 (Miss. App. 2010).
251. *Id.*
252. *Id.* at 668.
253. *Id.* at 668-69.
254. *Id.* at 669.
255. *Id.*
256. *Id.*
257. *Id.* at 670.
258. *Id.*
259. *Id.* at 673.
260. *Id.* at 670.
261. *See id.*
262. *Id.* at 671.
263. *Id.*

oped land as subject to a cemetery's protection (i.e., nontaxable and unseizable), the court has done a disservice to the public with burials in the dedicated portion by substantially diminishing the source of support (i.e., future burial spaces) available for the cemetery (by affecting the financial support for the maintenance of existing burials).[264] Hopefully, such policies will either be considered by courts in the future or recognized by legislatures such that protection for these areas may be instituted.

In *Orla Holman Cemetery, Inc. v. Robert W. Plaster Trust*,[265] the Missouri Supreme Court considered whether to protect access to a rural cemetery.[266] In this case, the cemetery was owned by the county and the access road was owned by the Village of Evergreen.[267] Although the cemetery had been used for more than 100 years, and the access road since the 1950s, the Village enacted an ordinance to close the road in 2002 based on its allegations of "littering, loitering, poaching of cattle and vandalism."[268] Further aggravating the situation was the reality that, although the county owned the cemetery and the road, the Village owned all of the other surrounding property.[269] With regard to the road, although the Village argued that its police powers grant it the authority to regulate the road, the court disagreed.[270] Interestingly, the court did not rely on the litany of law that allows reasonable access to cemeteries as the basis for its judgment.[271] Rather, it simply found that the county, as the owner, can control road access.[272]

Another matter at issue in the *Orla Holman* case was whether cemetery visitors could use a grassy (Village-owned) area adjacent to the cemetery for parking.[273] For the most part, the court refused to consider the issue of the parking area until trial.[274] However, again, the court did not analyze, or even mention, the existence of the general laws providing for cemetery access.[275] Thus, it is questionable

264. *Id.*
265. Orla Holman Cemetery, Inc. v. Robert W. Plaster Trust, 304 S.W.3d 112 (Mo. 2010).
266. *Id.*
267. *Id.* at 114, 114-15.
268. *Id.* at 115.
269. *Id.* at 114-15.
270. *Id.* at 117, 117-118.
271. *See, e.g.*, Hon. Thomas H. McVea, La. Op. Att'y Gen. No. 08-0186 (2008).
272. *Orla Holman*, 304 S.W.3d at 116-17. This case is not isolated, as another road access case arose in Kentucky during the same period. In *Griffin v. Union County*, No. 2010-CA-001169-MR, 2011 WL 6003889 (Ky. Ct. App. Dec. 2, 2011), a landowner disputed whether a particular cemetery access road was public or private. Although the case was dismissed on other grounds, it is apparent that the parties and the court accepted that, regardless of the classification of the road, access to the cemetery, itself, at least for some family members, would be mandatory. Id. at 3.
273. *Orla Holman*, 304 S.W.3d at 118-19.
274. *Id.*
275. *Id.* at 119-120.

whether a decision on the merits would even be complete.[276] On the whole, this case is not overly useful aside from noting the lack of reference to general cemetery law in the decision and some of the problems that it can cause.[277]

In another case dealing with who has the right to control or use a cemetery, *Brennon v. Perryman Cemetery, Ltd.*,[278] a court found that a cemetery's history of public accessibility impliedly dedicated it to public use.[279] In this case, families of those buried in a historic (but still operating) Georgia cemetery sued each other for control of the cemetery.[280] The court, in addition to noting that deeds referencing the cemetery suggested that it was to be open for public use (the deeds were created some 40 years after the first use of the cemetery), found that the conduct of the community suggested that anyone could be buried there and that it was not the private cemetery of the deed holders.[281] This case supports the general notion that history and implication is often just as important when determining who has the right to be buried in a cemetery as any written record.[282]

In *In Re: Guite*,[283] the Vermont Supreme Court was called upon to decide, after the fact, whether someone could use a cemetery on his own property.[284] At the district court, the landowner argued that the cemetery was part of his property and that he rightfully buried his parents there.[285] The cemetery was used by the Aldrich family since their acquisition of the property in 1853.[286] They did not transfer ownership of the cemetery and thus contended that the current landowner could not make use of it simply because he owned the surrounding property.[287]

The Vermont Supreme Court agreed with the Aldrichs, overturning the district court judgment, and finding that the subject cemetery had been specifically carved out of the 1853 sale and that it did not devolve with the ownership of the surrounding property.[288] In its decision, the court reviews the history of the nature of whether the 1853 deed reserved a fee interest to the Aldrichs or just a burial easement on the cemetery property.[289] This distinction is important because if

276. *See id.*
277. *Id.*
278. Brennon v. Perryman Cemetery, Ltd., 709 S.E.2d 33, 36 (Ga. Ct. App. 2011).
279. *Id.*
280. *Id.* at 34.
281. *Id.* at 35-36.
282. *Id.* at 36.
283. In Re: Guite, 24 A.3d 1192 (Vt. 2011).
284. *Id.* at 1193.
285. *Id.*
286. *Id.*
287. *Id.* at 1193-94.
288. *Id.* at 1198.
289. *Id.* at 1195.

all that was reserved was an easement, then the Aldrichs could bury their dead in the cemetery, but would not own it nor could they restrict its use.[290] Historically, the Vermont Supreme Court had held that "at common law the establishment of a family burial plot created an easement against the fee."[291] However, in this case, the court found a clear and explicit intent in the 1853 deed for the reservation of the cemetery in fee to the Aldrichs.[292] The court based this conclusion on the specificity of the property description in the Aldrich deed: the cemetery was specifically described by measurements and specifically exempted that measured property from the 1853 sale.[293] This reality is oddly complicated by a 1983 stipulation by the then-owner of the surrounding property in a sale that mandated that the owners of the surrounding property must maintain the cemetery.[294] This later requirement could certainly lead to confusion about the nature of the cemetery's ownership and its access for public use.[295] However, the court rejected the notion that this agreement created any right to access for burial on subsequent owners of the surrounding property and also found that the current landowner's interment of his parents' remains in the cemetery was done without permission or authority.[296] The court did not go so far as to order disinterment, but the ruling certainly leaves that possibility open on remand.[297]

It is hard to say whether this case is an anomaly or the beginning of a trend. The court in *Guite* takes great pains to point out how the circumstances of this case differ so significantly from general common law concepts of cemetery ownership and use that it is hard to envision this case being a bellwether for the future limitation of the use of family cemetery property.[298] However, the case certainly stands for the proposition that real estate lawyers should carefully scrutinize the language of any cemetery's creation evident in property transactions.[299] It is possible, considering the analysis of this case, that occasionally a cemetery does not transfer with the surrounding property and that it is not always a given that subsequent owners have a right to use a cemetery on their property.[300]

In *Dohle v. Duffield*,[301] among several property disputes between two families was the right of one family to access their cemetery which was

290. *See id.*
291. *Id.* (citing *In re: Estate of Harding*, 878 A.2d 201 ¶ 11 (Vt. 2005)).
292. *Id.* at 1196.
293. *Id.*
294. *Id.* at 1193-1194
295. *See id.* at 1194.
296. *Id.* at 1198.
297. *See id.*
298. *Id.* at 1195-96.
299. *See id.*
300. *See id.* at 1198.
301. Dohle v. Duffield, 396 S.W.3d 780 (Ark. App. 2012).

wholly contained within the other family's property. Although the Duffields owned their family cemetery, because of a foreclosure and sale of some of their property in the 1980s, it was now completely surrounded by Dohle land.[302] In addition to owning the cemetery, the Duffields also owned an access road across the Dohles' property to get to the cemetery.[303] However, during inclement weather, that access road becomes impassable.[304] Thus, in times of bad weather, the Duffields simply crossed Dohle property at another location to reach their cemetery.[305]

Rather than examining the question of access to the cemetery through the age-old right to access cemeteries for visitation and maintenance purposes, the parties and the court in this case looked to whether the Duffields had acquired a right to the alternate access route to the cemetery by way of adverse possession.[306] Although the trial court found that the Duffields had successfully adversely possessed the alternate route to the cemetery, the appellate court disagreed, finding that the Duffields' own testimony undermined this theory.[307] It is unclear from this case why the Duffields did not simply assert a right to access the cemetery across the Dohles' property. In times when the usual route is impassible, it is reasonable to expect that descendants should be provided a gratuitous right of access to their families' graves, thus making the analysis and outcome of this case odd.[308]

A somewhat unique law was at issue regarding a cemetery dedication in the Texas case of *Levandovsky v. Targe Resources, Inc.*[309] In this case a one-acre family cemetery had over time become surrounded by an industry.[310] The industry sought the removal of the cemetery dedication and the relocation of the interred individuals, alleging that the cemetery was abandoned and that visiting a cemetery in an industrial site was unsafe for the public.[311] The descendants challenged this action and lost on a motion for summary judgment in the district court.[312] The district court found that the cemetery had been abandoned under the law because no one from the family knew of its existence and had not visited it in more than 30 years.[313] Because Texas law permits the removal of a cemetery dedication by a property owner

302. *Id.* at 782.
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.* at 758-86.
307. *Id.* at 768.
308. *See generally id.*
309. Levandovsky v. Targe Resources, Inc., 375 S.W.3d 593 (Tx. App. 2012).
310. *Id.* at 595.
311. *Id.*
312. *Id.* at 596.
313. *Id.*

when the cemetery is abandoned,[314] and because the family had not visited the cemetery, the district court ruled that the cemetery could be moved.[315]

In this case, the appellate court noted that the cemetery did not meet the definition of an abandoned cemetery,[316] and thus the industrial landowner could not avail itself of the law allowing for the removal of the cemetery's dedication as an abandoned cemetery.[317] Ironically enough, under a regulation that defines abandoned cemeteries, it was the industry's own actions that kept the cemetery from being abandoned.[318] Under 13 Tex. Admin. Code § 22.1, to be abandoned, a cemetery must: "(1) contain one or more graves; (2) ha[ve] cemetery elements for which no cemetery organization exists; *and* (3) is not otherwise maintained by *any* caretakers."[319] In this case, the record reflected that the industry had maintained the cemetery for many years, thus defeating its own claim that the cemetery was abandoned.[320]

It is clear that this regulation saved this particular cemetery from relocation.[321] Although, from a historic preservation perspective, it is a bit troubling that a cemetery can so easily be undedicated in Texas (i.e., it seems to be left up to the discretion of the landowner, with little or no consideration given to the integrity of the historical record or to the proscription against exhumation), it does appear that the industry in this case was going to appropriately accomplish the disinterments.[322] It is doubtful that this scenario will often repeat itself, as such cemeteries are seldom cared for.[323]

Cemetery access was also at issue in the case of *Prewitt v. Terry*.[324] This case involved a rural cemetery on private property to which the members of a cemetery association were being denied access.[325] The access being denied was not by the landowner on whose property the cemetery was situated, but rather an adjacent landowner across whose property it was apparently easier to pass through in order to reach the

314. TEX. HEALTH & SAFETY. CODE ANN. § 711.010(b) (West 2013).
315. *Levandovsky*, 375 S.W.3d at 596.
316. *Id.* at 597-98
317. *Id.*
318. *Id.*
319. *Id.* at 597 (emphasis added).
320. *Id.* at 595.
321. *Id.*
322. *See id.* at 595-97 (Cemetery was only incidentally saved from disinternment by landowner and not families' continued upkeep of the grave sites).
323. *See generally, Oak Grove Cemetary: Bones and Caskets Popping out at Iowa Graveyards (Video and Photos)*, HUFFINGTON POST (Oct. 20, 2011), http://www.huffingtonpost.com/2011/10/20/oak-grove-cemetary_n_1022017.html. (Caretakers discuss an inability to maintain gravesites that have been disturbed or destroyed due to time or environment, because of cumbersome state protocol requiring finding next of kin.)
324. Prewitt v. Terry, 2012 WL 4052135 (Tx. App. Austin 2012).
325. *See id.* at *1.

cemetery.[326] The court in this case did not analyze any of the allegations with respect to the general maxim that access to isolated cemeteries for maintenance and visitation must be permitted (within reason).[327] It is unclear whether the court did not consider this theory because the plaintiffs did not raise it or because the court determined the principle inapplicable. More likely, it is the former, as it appears that the plaintiffs were asserting access rights via title or various implicit easement theories.[328] The court rejected each of the title and easement theories based on a lack of evidence.[329] Had the court reached the cemetery right of access issue, it should have found that such a principle was inapplicable.[330] That principle does not permit passage over anyone's property to reach a cemetery, but rather only across the cemetery owner's property.[331] Because the defendant in this matter was not the owner of the cemetery property, the imposition of such a burden on him would likely be unreasonable.[332] Because the ruling in this case was interlocutory, it is possible that this issue will arise in the future and, should that occur, the court should reject this theory of access.[333]

In *Richardson v. Bd. of Commissioners of Owen County*,[334] Owen County in Indiana was sued by family members alleging that they were injured by the County's failure to maintain a road that accessed a cemetery, as such lack of maintenance made it more difficult for them to visit their daughter's grave.[335] Because the trial court found that several other access routes were available, it did not find that the family was aggrieved under the law and thus lacked standing to challenge the County's abandonment of the road.[336] The appellate court agreed.[337] In addition, the appellate court found that the County had actually abandoned the subject road for at least 30 years and that the family could not articulate a cause of action to force the County to reassume maintenance of the abandoned road.[338] The court put no small amount of emphasis on the family's ability to access (and, in fact, the reality that they were accessing) the cemetery by alternate means.[339]

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326. *Id.*
327. *Id.* at *2-5.
328. *Id.*
329. *Id.*
330. *See generally*, Dohle v. Duffield, 2012 Ark. App. 217 (Ark. Ct. App.2012).
331. *Id.*
332. *Id.*
333. *See Prewitt*, 2012 WL 4052135.
334. *Richardson v. Bd. of Comm'rs of Owen Cnty*, 965 N.E.2d 738 (In. Ct. App. 2012), *transfer denied* 977 N.E.2d 353 (Ind. 2012).
335. *Id.* at 739.
336. *Id.* at 742.
337. *Id.* at 744.
338. *Id.* at 743-44.
339. *Id.* at 744.

C. Perpetual care and merchandise issues

In addition to the more disturbing cemetery and human remains cases discussed herein, cemeteries also encompass aspects of financial matters when it comes to the regulation and protection of cemeteries' perpetual care and merchandise trust funds. Although somewhat unrelated to the land use and tort issues in this paper, these cases are nonetheless important and are reviewed as part of the broader treatment of cemetery law.

In *Man-Hung Lee v. Hartsdale Canine Cemetery, Inc.*,[340] a small claims court in New York was called upon to sort out a dispute in which a pet owner sued the cemetery where her dog was interred for wrongful disinterment and cremation and was then countersued by the cemetery for breach of contract for failure to pay upkeep fees to the cemetery.[341] In the arrangements for the dog's burial, the owner opted for annual care payments over a perpetual care payment.[342] Four years' worth of invoices for annual care went unpaid, despite written warnings that nonpayment would result in disinterment.[343] Following these notices, absent payment, the dog was disinterred and cremated.[344] From a legal standpoint, the court looked to whether the cemetery had adhered to the notice requirements of the law by properly notifying the owner of the annual care/perpetual care options at the time the arrangements were made and the ramifications of failing to pay for annual care.[345] The court found that the notice provided was adequate.[346] In this case, the court relied heavily on the language in the contract executed by the owner, which referred to "annual general care" at annual costs.[347]

Of further interest was the court's refusal to recognize the cemetery's continued upkeep of the grave space and monument in the absence of payment as an implied conversion of annual care to perpetual care such that the nonpayment could not result in disinterment.[348] In this regard, although some language in the contract supported the reality that a grave space right holder may obtain some perpetual interest in the space by maintaining a marker thereon, the court deferred to the cemetery's general rules (by which the contract required annual care to get any perpetual benefits).[349] In other

340. Man-Hung Lee v. Harsdale Canine Cementary, Inc., 899 N.Y.S. 2d 823 (White Plains City Court 2010).
341. *Id.* at 824.
342. *Id.* at 826.
343. *Id.* at 827.
344. *Id.*
345. *Id.* at 830.
346. *Id.* at 831.
347. *Id.*
348. *Id.* at 831-32.
349. *Id.* at 834.

words, "perpetual" lasted only as long as annual care payments were made.[350]

Perhaps most important about this case is the fact that the court placed the burden on the owner to prove that the cemetery had been notified of her change in address.[351] In other words, the court did not require the cemetery to undertake any investigation into why the payments had not been made, but rather placed the burden on the owner to ensure that she was being properly billed for her annual care.[352] Accordingly, the court refused to find that the cemetery wrongfully disinterred the dog and it found that the owner breached the contract by failing to pay her annual care fees.[353] Although interesting, it is doubtful that such conduct by a cemetery (i.e., disinterment) would be taken in stride by a court when the remains are human rather than canine, based on courts' general disfavor for exhumation.[354]

In *Foshee v. Forethought Federal Savings Bank*,[355] the court was presented with questions regarding obligations of perpetual care trustees.[356] In this case, the trustee used perpetual care funds to purchase life insurance policies on the perpetual care policy holders from its subsidiary without the consent of the perpetual care policy holders.[357] The actual decision reviewed here is simply a decision on a motion to dismiss and not a decision on the merits.[358]

The policy holders in this case alleged that they were injured by a breach of a fiduciary duty through the bank's unauthorized use of their perpetual care trust funds.[359] The bank countered by stating that the policy holders neither "sought any services based on their" policies, nor had the policy holders shown that the trust contained inadequate funds to cover its obligations.[360]

The court noted that the bank's positions that no services were requested and no showing of inadequate funding was made were misplaced because the policy holders were not suing for a breach of contract (the cause of action implied by the bank's defenses), but rather that the unauthorized "alleged mismanagement and resulting

350. *See id.* at 832.
351. *Id.* at 833.
352. *See id.* at 833-34.
353. *Id.* at 834.
354. *See e.g.*, Choppin v. Labranche, 20 So. 681, 682 (La. 1896) (discouraging the disturbance of the dead except for "lawful necessary purposes"); T. Scott Gilligan & Thomas F.H. Stueve, Mortuary Law 49-53 (9th ed., 2005) (1940) (noting that disinterment is generally disfavored).
355. Foshee v. Forethought Federal Sav. Bank, No. 09-2674-JPM-DKV, 2010 WL 2650733 (W.D. Tenn. July 1, 2010).
356. *Id.*
357. *Id.* at *2.
358. *Id.*
359. *Id.* at *5.
360. *Id.*

depletion of the trust corpus"[361] were claims of a breach of fiduciary duty to the policy holders and claims of breaches of state preneed law.[362] Ultimately, the court sided with the policy holders, noting that the unauthorized use of the perpetual care funds had nothing to do with whether the policy holders' contracts could or would be honored.[363] Because the claims were clearly related to a breach of fiduciary duty and a breach of state law the court held that the suit could go forward regardless of whether the policy holders could actually be made whole as to their contract terms.[364]

Despite the fact that the case is only a decision on a preliminary matter, it is important for cemetery regulators.[365] This is because it reaffirms the primacy of perpetual care laws and fiduciary obligations over contract agreements and whether a cemetery can actually perform or has actually performed on its contractual obligations to the consumers.[366] Rather, compliance with the perpetual care laws is mandatory and while a cemetery can avoid contract liability by making good on its obligations to consumers, it must avoid running afoul of regulatory provisions to be in good standing from a regulatory standpoint (and possibly free from criminal and civil liability for regulatory breach).[367]

In *Midwest Memorial Group, LLC v. International Fund Services (Ireland), Ltd.*,[368] a New York federal court was faced with the question of how long the statute of limitations for the recovery of mismanaged cemetery trust funds was.[369] This case presented an exceptional set of circumstances whereby several people conspired to defraud a cemetery's trust fund.[370] Although this case was brought in New York, it involved a cemetery in Michigan.[371] Upon institution of a conservatorship over the cemetery, Michigan regulators indentified $60 million in unaccounted-for cemetery trust funds. In this case, the third party purchaser of the cemetery from the Michigan conservator attempted to recover the missing funds.[372] The New York suit arose when a Michigan court found that it lacked jurisdiction over the New York defendant.[373]

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361. *Id.*
362. *Id.*
363. *Id.* at *6.
364. *Id.* at *8.
365. *Id.*
366. *Id.* at *9.
367. *Id.* at *5-9.
368. Midwest Mem'l Grp. V. Int'l Fund Services (Ir.), No. 10 Civ. 8660(PAC), 2011 WL 4916407, at *1 (S.D.N.Y. Oct. 17, 2011).
369. *Id.* at *3.
370. *Id.* at *1.
371. *Id.*
372. *Id.* at *2.
373. *Id.*

In this case, the New York defendant attempted to cover up its acquisition of some of the misappropriated funds substantially later than the time of the alleged misappropriations.[374] Hoping to take advantage of this later date to avoid the tolling of prescription, the plaintiff/purchaser argued that its ability to recover its share of the funds should run from the time of the cover up.[375] The court disagreed, finding that any claim for the misappropriated funds related back to the actual conversion of the funds, not the concealment.[376]

It is difficult to tell whether this case is a bellwether for other trust fund misappropriation cases because of its unique fact scenario. However, it certainly supports the notion that acting fast to recover misappropriated trust funds is essential.[377]

In *Savannah Cemetery Group, Inc. v. Depue-Wilbert Vault Co.*,[378] a Georgia appellate court affirmed a lower court's finding that a private cemetery's restriction on the use of concrete vaults constituted a violation of the state's cemetery laws and unreasonably interfered with third party contracts.[379] In this case, the court acknowledged that Georgia's cemetery law allowed cemeteries "to establish reasonable rules and regulations regarding the type, material, design, composition, finish, and specifications of any and all merchandise to be used or installed in the cemetery."[380] However, because the complained-of rule immediately banned the use of concrete vaults in the cemetery at issue, the court found that the rule was not reasonable as an undue burden on consumers and other businesses that had already contracted for such vaults.[381] The court in this case also refused to defer to the private cemetery's rule simply because the cemetery could point to some reasons for implementing it.[382]

In addition to the interference with contract theory that the court used to strike down this private cemetery's rule, the court also found that the pro-consumer policies of the state cemetery law were violated by the rule because it "effectively den[ied] consumers the freedom to make decisions about burial vault materials."[383] This is a particularly interesting holding, as it seems to suggest that such a rule is approaching an anticompetitive restriction.[384]

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374. *Id.* at *3.
375. *Id.*
376. *Id.* at *4.
377. *See id.*
378. Savannah Cemetery Group, Inc. v. Depue-Wilbert Vault Co.,704 S.E. 2d 858 (Ga. App. 2010).
379. *Id.* at 861.
380. *Id.* at 862.
381. *See id.* at 863.
382. *Id.* at 864.
383. *Id.* at 867.
384. *Id.* at 862.

This case could be fairly important because it not only limits a cemetery from imposing merchandise rules that impact existing contracts, but it also restricts rules that limit consumers' choices.[385] In this case, those choices involved the vault building materials.[386] However, it is conceivable that this case could stand for the proposition that consumer choice should be favored over private property owners' limitations on the use of their own property in other merchandise contexts.[387] The case is further important as it illustrates that such activity need not be brought by the government or a regulatory entity.[388] In this case, it was impacted merchandise providers who brought the action to protect their own businesses, thus standing for the proposition that even private parties may use cemetery consumer protection laws to protect themselves and the public at large and they need not always wait for the government to act.[389]

Other recent important merchandise cases are represented here by three decisions from the same case: *St. Joseph Abbey v. Castille.*[390] The *St. Joseph Abbey* cases deal with the question of whether Louisiana's laws restricting the sale of caskets to licensed funeral directors is constitutional.[391] The original suit was brought by a group of monks who wanted to make simple wooden caskets to sell to support their monastery.[392] Under the existing Louisiana law, for the monks to do this, they would have to become licensed funeral directors and the monastery would have to be a funeral home.[393]

The first of the rulings in this case was on a motion to dismiss the monks' suit by the Louisiana State Board of Embalmers and Funeral Directors (the "Embalmers Board").[394] The court denied this motion, finding that the monks did have a legitimate legal question, thus allowing the suit to proceed.[395]

The second ruling was the actual substance of the decision at the district court.[396] In this case, the federal court in New Orleans struck down the law, finding such a protectionist restriction on casket sales to be "in contravention of the Due Process Clause and the Equal Protection Clause of the United States Constitution."[397] The court recog-

385. *Id.* at 867.
386. *Id.*
387. *Id.* at 862-63.
388. *Id.* at 858-59.
389. *Id.* at 861.
390. St. Joseph Abbey v. Castille, No. 10-2717, 2011 WL 1361425, at *1 (E.D. La. 4/8/11); St. Joseph Abbey v. Castille, 835 F. .Supp.2d 149, 149-50 (E.D. La. 2011), *appeal filed*, 700 F.3d 154 (5th Cir. 2012).
391. *Castille*, 2011 WL 1361425, at *1.
392. *Id.*
393. *Id.* at *2.
394. *Id.* at *1.
395. *Id.* at *9.
396. *St. Joseph Abbey*, 835 F.Supp.2d at 149-50.
397. *Id.* at 151.

nized that consumer protection and the protection of health and safety is a legitimate government purpose.[398] However, and importantly for this review, the court did not find any public health or safety basis for the law requiring a funeral directors' license to sell caskets.[399]

The court also found no rational relationship between the stated goals of the law and the means for accomplishing those goals.[400] In other words, although there may be unique aspects to the casket sale industry, the court could not find any reason that someone needed to be a licensed funeral director to figure out those issues.[401]

At the time of this writing, this case has yet to be resolved.[402] In 2012, the United States Fifth Circuit Court of Appeals issued a ruling in this case.[403] Although the court indicated its likelihood of agreeing with the district court's decision regarding the validity of the Louisiana casket sale restriction,[404] it declined to definitively speak to the constitutionality of the challenged law absent the resolution of a threshold issue by the Louisiana Supreme Court.[405] The threshold issue, identified for the first time by the Fifth Circuit during this appeal, was the question of whether the Embalmers Board even has authority to regulate casket sales by anyone other than funeral directors in the first instance.[406] In other words, the court noticed that the entire case under review assumes that the Legislature provided the Embalmers Board with the authority to regulate casket sales; whereas the law authorizing the Embalmers Board only appears to provide that body with the authority to regulate funeral directors, funeral homes, and embalmers – not sales of any kind that are not undertaken by these entities.[407] Thus, if the Embalmers Board has no authority to regulate casket sales by those other than funeral directors, funeral homes, and embalmers, there is no one to enforce the challenged law

398. *Id.* at 156.
399. *Id.*
400. *Id.* at 158-59.
401. *Id.* at 160.
402. *See generally*, St. Joseph Abbey v. Castille, 700 F.3d 154, 155 (5th Cir. 2012) (the Fifth Circuit Court of Appeals found that the question at issue was one of state law and certified the question to the Louisana Supreme Court for determination); *See also* St. Joseph Abbey v. Castilee, 106 So. 3d 542, 543 (La. 2013) (the Louisana Supreme Court declined to rule on the certified question; *See also*, St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013) (the Fifth Circuit upheld District Court's ruling); *cert. denied*, 82 U.S.L.W. 3214 (U.S. Oct. 15, 2013)(No. 13-91).
403. *St. Joseph Abbey*, 700 F.3d 154 (5th Cir. 2012).
404. *Id.* at 161, 164-165. In this regard, the court harshly observed, when considering the "legitimate purposes" for the challenged law put forth by the Embalmers Board, that, "[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for naked transfers of wealth." Id. at 165.
405. *Id.* at 167-68.
406. *Id.* at 167.
407. *Id.*

and a constitutional determination need not be made.[408] Finding that the question of the scope of the Embalmers Board's authority was one of state law, the Fifth Circuit certified the question to the Louisiana Supreme Court for determination.[409] That court declined to rule on the certified question.[410]

A somewhat divergent decision on the constitutionality of a funeral board's regulation was reached in the Kentucky case of *Reynolds Enterprises, Inc. v. Kentucky Bd. of Embalmers and Funeral Directors.*[411] In this case, the plaintiff operated a crematory and it was cited and fined when it was found that it had transported a deceased's body to its cremation facility.[412] Kentucky law allows for the transportation of human remains only by licensed funeral directors[413] or, under some circumstances, by others with a coroner's permission.[414] The plaintiff in this case had neither.[415]

Because the plaintiff believed that the inability to transport dead bodies affected its business, it challenged the constitutionality of the transport restrictions.[416] The plaintiff alleged that the restrictions violated its due process and equal protection rights.[417] Unlike in the *St. Joseph Abbey* cases, discussed *supra,* the Kentucky courts did not find that there were any constitutional problems with limiting the transportation of human remains to funeral directors.[418] This case was one of economic concerns, thus the challenged laws were afforded only the rational basis scrutiny as to whether they constituted infringements on the plaintiff's rights.[419] The courts in this case found the concerns regarding the public health hazards and the additional training required of funeral directors to be a rational basis upon which to treat crematoria differently and refused to find that the challenged laws were unconstitutional.[420]

Taken together, the *St. Joseph Abbey* cases and this case seem to stand for the proposition that even the slightest legitimate public health concern will overcome constitutional challenges that restrict certain activities concerning the dead.[421] It just happened that no real public

408. *Id.*
409. *Id.* at 168-69.
410. St. Joseph Abbey v. Castille, 106 So.3d 542 (La. 2013).
411. Reynolds Enterprises, Inc. v. Kentucky Bd. Of Embalmers and Funeral Directors, 382 S.W.3d 47 (Ky. Ct. App. 2012).
412. *Id.* at 49.
413. KY. REV. STAT. ANN. §§ 316.010(5) (LexisNexis 2013).
414. KY. REV. STAT. ANN. §213.081(1) (LexisNexis 2013).
415. *Reynolds Enterprises, Inc.,* 382 S.W.3d at 49.
416. *Id.*
417. *Id.*
418. *Id.* at 50.; *see supra* note 403 and accompanying text.
419. *Reynolds Enterprises, Inc.,* 382 S.W.3d at 50.
420. *Id.* at 50-51.
421. *See supra* notes 404-05, 426 and accompanying text.

health risk could reasonably be articulated in the *St. Joseph Abbey* case.[422]

Perpetual care obligations and general contract and tort theories were at the heart of the recent Indiana appellate case of *Barrett v. City of Logansport*.[423] In that case, a family sued the city-operated cemetery under numerous theories when maintenance activities on a neighboring plot allegedly caused their son's grave to retain rainwater, making it, "mushy and gooshy."[424] In this case, the decedent's family claimed that the cemetery's allowing an adjacent grave space owner to bring in fill dirt to beautify and stabilize his family plot caused a change in drainage patterns that caused their son's grave to pool water.[425] One theory of recovery was that the cemetery's guarantee of perpetual care extended to ensuring proper drainage.[426] Both the district and appellate courts rejected this theory without substantial discussion.[427] This lack of analysis is disappointing, but, in rejecting the plaintiffs' motion for summary judgment, it is apparent that the trial court accepted and the appellate court affirmed, the cemetery's testimony that, "the term 'perpetual care' as used in the cemetery ordinance did not include keeping a gravesite well-drained."[428]

In addition to the perpetual care claim (which was styled as a breach of contract claim), the plaintiffs alleged that they were victims of fraud or constructive fraud by being enticed to purchase a plot purportedly under the promise that the grave space would never flood.[429] The courts rejected these claims, noting that both require "misrepresentation of past or existing facts."[430] However, because the fill material was added after the plaintiffs' purchase, the courts correctly observed that the plaintiffs would have,

> to establish that, at the time the parties entered into the burial agreement. . ., [that the City] could have predicted that a nearby grave owner would coordinate with the Cemetery for improvements and, as a consequence of those potential future improvements, the [plaintiffs] would somehow become disgruntled or damaged.[431]

The speculative and future nature of this possibility at the time of the sale of the grave space made the fraud claims untenable.[432]

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422. St. Joseph Abbey v. Castille, 835 F. Supp. 2d 149, 158-59 (E.D. La. 201
423. Barrett v. City of Logansport, No. 09A02-1103-PL-252, (Ind. App. Jan. 11, 2011) (WestLaw, 961 N.E.2d 70), *transfer denied* 978 N.E.2d 416 (Ind. 2012).
424. *Id.* at *1-2.
425. *Id.*
426. *Id.* at *1, *3.
427. *Id.* at *3, *8.
428. *Id.* at *1.
429. *Id.* at *8.
430. *Id.*
431. *Id.*
432. *Id.* at *8-9.

Finally, the plaintiffs alleged negligent infliction of emotional distress.[433] However, citing the general nonapplicability of mental anguish claims to grave space problems, the courts also rejected this claim.[434]

This case is fairly consistent with the others in terms of the NIED claims and the fraud claim. It is unfortunate that the court did not analyze the perpetual care claim, as that would have been informative. It is also unfortunate that the court did not address one further matter in this case. The plaintiffs sought to have an expert visit the grave site just prior to the trial, but were rebuffed by the trial court.[435] The plaintiffs argued that, because the cemetery was open to the public, the expert should have been free to visit the grave.[436] Rather than examining this interesting and important issue of cemetery access, the court focused on whether discovery on the eve of trial was appropriate, thus, again, leaving a significant cemetery law matter unaddressed.[437]

D. Regulatory Issues & Regulatory Liability

The financial aspects of cemetery problems merge into the regulatory challenges related to these special places.[438] In that regard, there have been several recent instructive cases covering both regulatory issues as well as possible liability concerns for cemetery regulators.[439]

In *Mount Vernon Cemetery Co. v. Pennsylvania Dept. of State*,[440] the issue was whether a cemetery that had been in existence since 1856 and had not sold grave spaces since 1969 had been in violation of the Real Estate Licensing and Registration Act and the Burial Grounds Act for failing to be a registered cemetery since 1982.[441] An administrative hearing officer had found that such a violation had occurred because the cemetery had still conducted "cemetery business" in violation of the law.[442] The "cemetery business" that the cemetery was found to have conducted was the interment of remains and cremains in grave spaces that had been sold prior to 1969.[443] On appeal, because the cemetery had not sold grave spaces since 1969, the appellate court held that the cemetery was not required to be licensed.[444]

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433. *Id.* at *14.
434. *Id.* at 15.
435. *Id.* at *9-10.
436. *Id.* at *4.
437. *Id.* at *10.
438. *See* Barrett v. City of Logansport, 961 N.E.2d 70 (Ind. Ct. App. 2012), *transfer denied*, 978 N.E.2d 416 (Ind. 2012).
439. *Id.* at 15.
440. *See* Smith Barney v. Stonemor Operating, LLC, 55 A.3d 1274 (Pa.comm.Ct. 2012).
441. *Id.* at 1275-76.
442. *Id.*
443. *Id.*
444. *Id.* at 1276-1277.

This case is one of statutory interpretation that examines what is meant by the term "cemetery company."[445] Because the definition of that term under Pennsylvania law uses present tense verbs, the court held that the cemetery must be currently selling or offering grave spaces for sale to qualify as a cemetery company.[446] States with wording in their laws similar to that in Pennsylvania's should take heed of this decision.

In *Smith Barney v. Stonemor Operating, LLC*,[447] a mortuary was placed into a receivership at the request of a regulatory body.[448] The basis for the receivership was the alleged misappropriation of millions of dollars in trust fund money.[449] Upon acquiring control, the receiver sued Smith Barney, "alleging that it had participated in the plundering of the trust funds."[450] Smith Barney attempted to defend the suit by arguing that its contractual relationship with the mortuary contained a mandatory arbitration clause[451] and that the receiver could not access the courts without exercising the arbitration clause.[452]

In this case, although the receiver was now operating the mortuary, the court refused to impute the mortuary's contractual agreements with Smith Barney to the receiver.[453] Thus, with no contractual privity between Smith Barney and the receiver, the receiver was not bound to arbitrate disputes with Smith Barney and could proceed directly to court.[454] This result resembles certain authority granted to a trustee and to the court in bankruptcy proceedings in that it seeks to maximize the authority of the entity charged with restoring the mortuary and to unencumber the receiver from bad or questionable decisions that are now problematic.[455] This case should be useful in future cases questioning regulatorily-installed receivers' powers and limitations to control and restore beleaguered cemeteries.[456]

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445. *Id.* at 1276.
446. *Id.* at 1277-78.
447. Smith Barney v. Stonemor Operating, LLC, 959 N.E.2d 309 (Ind. Ct. App. 2011) (this case was a rehearing of the matter that was originally reported at 953 N.E.2d 554 (Ind. Ct. App. 2011), and reached the same result); *transfer denied* 967 N.E.2d 1036 (Ind. 2012), and *cert. denied,* Citigroup Global Markets Inc. v. StoneMor Operating LLC, 133 S. Ct. 758, 184 L. Ed. 2d 499 (U.S. 2012). A more comprehensive factual recitation of this situation exists in *Gray v. Bush*, 628 F. 3d 779 (6th Cir. 2010). Because this case deals with largely procedural matters, it is mentioned in the interest of completeness and for a factual background to the *Smith Barney* case.
448. *Smith Barney*, 959 N.E. 2d at 310.
449. *Id.*
450. *Id.*
451. *Id.* at 310-11.
452. *Id.*
453. *Id.* at 312.
454. *Id.* at 312-13.
455. *Id.*
456. *Id.* at 314-15.

In *Enos v. State of Hawaii*,[457] a descendant claimed that two state agencies were negligent and liable to her for erroneously issuing a disinterment permit.[458] In this case, the plaintiff claimed that the permit was issued without compliance with the state's burial laws and contributed to her claims of emotional distress at the disinterment of her grandmother.[459] The court in this case rejected the plaintiff's claims against the agencies, noting that the state's general tort liability act barred such claims when remedies were available elsewhere in the law.[460] Here, the "elsewhere" was the state burial law, which provided the plaintiff with the authority to stop the disinterment through injunctive relief, which she did not do (although she did have ample notice of the disinterment).[461] In other words, the court found that the State of Hawai'i had not waived its sovereign immunity and had consented to be sued for money damages for erroneous issuances of disinterment permits.[462] Instead, the only available relief is to seek injunctive relief against the disinterment.[463] Importantly, the court did note that it did not intend for this ruling to apply to situations where advance notice of disinterment did not exist.[464]

The *Enos* case is important because it generally supports the notion that government actors may make mistakes based on bad information, but that the public should not be responsible for those errors.[465] This case represents jurisprudential support for a shield to regulatory liability for state agencies.[466]

In *Palmore v. City of Pacific*,[467] a plaintiff brought claims against both public and private defendants seeking damages for alleged violations of local ordinances related to burial procedures, for allegations that the City refused access to cemetery records, and for refusing to allow him to speak at an open meeting.[468]

This memorandum ruling by the court only considers the claims against the governmental defendants.[469] The claims against the City were brought under 42 U.S.C. 1983, alleging that the City had violated

457. Enos v. State Dep't of Land & Natural Res., No. 28125 (Haw. App. July 26, 2010) (Westlaw).
458. *Id.* at *1.
459. *Id.*
460. *Id.* at *5.
461. *Id.* at *4-5.
462. *Id.* at *3.
463. *Id.* at *5.
464. *Id.* at *4. The court did not foreclose the same result in those situations, but would not extend this ruling without considering the specific facts of a different case. *Id.*
465. *See id.*
466. *See id.*
467. Palmore v. City of Pac., 851 F. Supp. 2d 1162 (E.D. Mo. 2010). .
468. *Id.* at 1162.
469. *See id.*

several of the plaintiff's constitutional rights.[470] The alleged constitutional violations in this matter were due process, equal protection, and First Amendment violations.[471] With regard to the City's liability for alleged torts (for which the plaintiff claimed damages for constitutional violations), the court noted that a municipality is not liable merely because it "employs the alleged tort-feasor."[472] The court further noted that, in order for a question of a municipality's liability to even be considered under 42 U.S.C. 1983, there must first be a finding of unconstitutional acts by the municipal employee and 42 U.S.C. 1983 must not attach for employee negligence.[473] In order to make even an intentional violation attach liability to the municipality, an isolated incident does not cause liability to attach to a municipality.[474] Instead, for liability to attach, there must be a showing that the "alleged misconduct was so persistent among the rank-and-file employees of the municipality as to constitute a "custom" with the "force of law."[475] There also must be a showing that "alleged misconduct must be 'pervasive constitutional violations'; thus, liability for an unconstitutional custom or practice cannot arise from a single act."[476]

In this case, the court found that the due process allegations (i.e., that the City engaged in efforts "to 'silence' him" regarding his allegation of failure to adhere to the burial laws), were insufficient to support a cause of action against the municipality.[477] Basically, the court found that although the plaintiff had to jump through a few hoops to gain access to the cemetery and the cemetery records, these hoops constituted mere "inconveniences" that did not rise to the level of constitutional violations.[478]

The court similarly found no equal protection problem.[479] The court simply found that the plaintiff failed to show that he had been treated differently than any other citizen.[480]

The First Amendment claim revolved around whether the plaintiff's public comments at a public meeting were limited to 5 minutes because he was an outspoken critic of the City.[481] The court recognized that, although allegations of First Amendment violations are at the core of 42 U.S.C. 1983 actions,[482] these allegations may be tempered

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470. *Id.* at 1166.
471. *Id.*
472. *Id.* at 1174.
473. *Id.*
474. *Id.* at 1174-75.
475. *Id.* at 1175.
476. *Id.*
477. *Id.* at 1169.
478. *Id.* at 1169-70.
479. *Id.* at 1171.
480. *Id.*
481. *Id.*
482. *Id.* at 1172.

by a government's reasonable time, place, and manner limitations.[483] The court found that the time limit was, "at best . . .a de minimus injury,"[484] and that the plaintiff's ability to raise his criticisms was not violated.[485]

Based upon the above findings and the limitation of liability for municipalities under 42 U.S.C. 1983 actions,[486]this is an important case for public bodies and regulators, as it reaffirms the limited liability of these entities for monetary damages and the general allowance for such entities to reasonably conduct their meetings without having to suffer a meeting hijacking by disgruntled citizens.[487]

In another case examining regulatory liability, *Grayson v. Pacesetter Capital Group*,[488] a case arising out of the Burr Oak Cemetery scandal in Illinois,[489] the plaintiffs named the Village of Alsip as a defendant on allegations that the Village should have indentified the Burr Oak problem long before it came to light.[490] Basically, the plaintiffs alleged that the Village's purported or constructive knowledge of the Burr Oak problems without stopping the problems constituted "aiding and abetting and. . .civil conspiracy with the Burr Oak defendants in the suit."[491]

The alleged knowledge of the Village arose from several complaints to the police "over a 10-year period in which Alsip police were told about allegedly suspicious activity at the cemetery."[492] Based upon these complaints, the plaintiffs alleged that the Village knew about the broader Burr Oak scheme and were involved in and profiting from the scheme.[493] The court noted that "[t]he alternative explanation is that Alsip police, despite receiving a few possible clues, never became aware of the scheme, never quite connected the dots from these reports."[494] The court found that the plaintiffs' allegations against the Village were simply too vague and speculative to support a "larger conclusion that Alsip police were involved in [a] massive criminal scheme

483. *Id.*
484. *Id.* at 1173.
485. *Id.*
486. *Id.*
487. *Id.*
488. Grayson v. Pacesetter Capital Group, No. 09 C 4464, 2011 U.S. Dist. LEXIS 53177 (D. Ill. May 18, 2001).
489. Lauren Fitzpatrick, *Historical Society Plans Memorial for Burr Oak Crime Scene*, SOUTHTOWN STAR, Aug. 9, 2009, at A3, available at 2009 WLNR 16538 838. The Burr Oak Cemetery scandal refers to the 2009 discovery of a Chicago-area cemetery whose employees had, for some time, been "digging up graves, dumping remains on piles or in shallow graves and then reselling the plots." *Id.*
490. Grayson, 2011 U.S. Dist. Lexis 53177, at *3.
491. *Id.*
492. *Id.* at *9.
493. *Id.*
494. *Id.*

over a long period of time."[495] The court also recognized that contract law held municipalities free from liability for a "failure to supply general police or fire protection."[496] The court thus dismissed the claims against the Village.[497]

This case is also a potentially important one for regulatory entities. Vague complaints of cemetery-related wrongdoing are common.[498] However, when these complaints lack specific information to support the claim of wrongdoing, knowledge of the complaints does not impute liability or collusion to a regulatory entity when it fails to take action on vague or unsupported complaints.[499] In addition, this case also raises the likelihood that general limitation of liability statutes for failure to provide enforcement should also apply to failure to regulate claims against regulatory entities.[500]

In *City of Tarpon Springs v. Planes*,[501] a family bought multiple spaces in a City-owned cemetery, and agreed to be bound by the cemetery's rules.[502] Subsequent to their purchase, the family changed their burial plans and sought a variance from the City's rules for the cemetery in order to accommodate their new plans.[503] The City denied the family's request and the family sued the City, seeking an order and mandamus commanding the City to participate in dispute resolution regarding the variance denial.[504] Because both the City's decision not to participate in arbitration and the City's decision not to grant the variance were both discretionary duties, the court found that mandamus was not an available remedy to the family.[505]

The utility of this case is somewhat limited. However, it does stand for the notion that government-run cemeteries' decisions not to deviate from their rules are not likely actionable.[506]

Another court also addressed the liability of a municipality in tort for problems stemming from the operation of its cemetery.[507] In *Thompson v. Germantown Cemetery*, the municipal cemetery mistakenly sold two plots to two different parties.[508] The problem was not recognized until after the interment of the second purchasers of the spaces.[509] The first purchaser demanded disinterment of the second

495. *Id.* at *14-15.
496. *Id.* at *10.
497. *Id.* at *25-26.
498. *See id.* at *3.
499. *Id.* at *3, *8.
500. *Id.*
501. City of Tarpon Springs v. Planes, 30 So. 3d 693 (Fla. Dist. Ct. App. 2010).
502. *Id.* at 693.
503. *Id.* at 694.
504. *Id.* at 694-95.
505. *Id.* at 695.
506. *Id.* at 693.
507. Thompson v. Germantown Cemetery, 188 Ohio App.3d 132 (2010).
508. *Id.* at 958.
509. *Id.*

purchasers and brought an action against the municipality for damages resulting from negligence, breach of contract, and emotional distress.[510]

The court was required, in this case, to determine whether any of the damages alleged occurred as a result of mere negligence or whether they were intentional and with malice.[511] Under Ohio law, it is only the latter from which a municipality is not immune.[512] The Court determined that the municipality's actions were not intentional and thus that it was immune from the negligence claims.[513] However, the municipality was not immune from the breach of contract claims.[514] The court refused to address whether the breach encompassed emotional distress, as that was not before it in this matter.[515]

In another case, *Foshee v. Forethought Federal Savings Bank* case,[516] a Tennessee federal court stayed a federal suit in the large preneed fraud lawsuit already discussed under the Burford Abstention Doctrine.[517] The basics of this matter are that individuals who had been defrauded in a widespread trust fund scheme associated with several cemeteries sought recompense from financial institutions that held some of those funds.[518] The receiver appointed to manage those cemeteries had ongoing suits under the Tennessee Cemetery regulatory scheme in state court and sought federal court abstention on the private claims until the state action was complete.[519]

Finding that the Burford elements were met, based largely on the state's comprehensive regulatory scheme for cemeteries, the federal court granted the receiver's request and stayed the federal claims pending a completion of the state proceedings.[520] The probable utility of this case for the regulatory community is that it may support staying or remanding cemetery cases in federal court to let a state regulatory scheme run its course in administrative proceedings or state court actions before or in lieu of federal court jurisdiction.[521] Further, the case reaffirms, at least implicitly, the primacy of receivership proceedings to protection of cemeteries in general over individual claims of descendants.[522]

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510. *Id.*
511. *Id.* at 960.
512. *Id.* at 960-61.
513. *Id.*
514. *Id.* at 961.
515. *Id.* at 963.
516. Foshee v. Forethought Federal Savings Bank, No. 09-2674-JPM-DKV, 2010 WL 3239272 (W.D. Tenn. Aug. 10, 2010).
517. *Id.* at *7.
518. *Id.* at *1.
519. *Id.* at *5.
520. *Id.* at *9.
521. *Id.* at *11.
522. *See id.* at *5, *7. *See also id.* at *11.

In the case *City of Boerne v. Vaughan*,[523] the City of Boerne appealed a decision finding that it was not immune from suit in a cemetery case.[524] In this case, the original plaintiff alleged that the City, through its agent, Vaughan, had sold her a plot for the interment of her husband that was already sold to another person.[525] Upon realizing its error, eight years after the interment of the plaintiff's husband, the City, again through its agent, disinterred and moved the deceased to another space in the cemetery.[526] The plaintiff sued the agent and the City for breach of contract and for damages.[527]

The City claimed that it was immune from suit in this matter even though it readily admitted that it provided the erroneous information that led to the interment in the wrong place.[528] The trial court refused the City's plea of immunity.[529] On appeal, although it was clear that the appellate court did not like its own decision for reasons of equity,[530] it found that the Texas Legislature had clearly provided for: (1) immunity for municipalities exercising governmental functions;[531] and (2) cemetery operations to be classified as a governmental function.[532] Thus, although the City was the cause of the problem in this case, it was found to be immune.[533]

It is unclear in this ruling whether the City's agent will be able to avail himself of the City's immunity, but it seems unlikely (because the court at least tangentially addressed this issue in passing).[534] It is also unclear how applicable the immunity found in this case will be outside of Texas.[535] The answer to this question will vary from state to state depending on statutory immunity in each jurisdiction.[536]

The recent case of *Range v. Douglas*[537] is perhaps the most shocking of the cases reviewed here. This case largely deals with regulator liability and immunity.[538] The *Range* case arises from a morgue attendant's convictions for having sex with at least three dead bodies during his 14-year tenure with the Hamilton County (OH) Coroner's Office.[539] This case deals with the liability, under federal and state law,

523. City of Boerne v. Vaughan, 2012 WL 2839889 (Tx.Ct.App., San Antonio 2012).
524. *Id.* at *1.
525. *Id.*
526. *Id.*
527. *Id.*
528. *Id.*
529. *Id.*
530. *Id.* at *4.
531. *Id.* at *2.
532. *Id.* at *3.
533. *Id.* at *4.
534. *Id.* at *2.
535. *See generally id.*
536. *See generally id.*
537. Range v. Douglas, 878 F. Supp. 2d 869 (S.D. Ohio 2012).
538. *Id.*
539. *Id.* at 873-74.

of the county and its agents and employees (not including the convicted individual) in their official and individual capacities for the shocking acts of Mr. Douglas.[540]

Under 42 U.S.C. 1983, the families of the deceased assert that their constitutional rights were violated by the county.[541] The plaintiffs raise two substantive due process theories in this case. First, they assert that the county had a duty to protect the corpses of their loved ones.[542] Second, the plaintiffs allege that the fact that Douglas' acts "shock the conscience" gives rise to a substantive due process cause of action.[543]

Because the court found that the alleged duty to protect was one that arose under state law and because it found that the United States Supreme Court had held that substantive due process cannot supplant state tort theories of recovery, it found no constitutional duty to support the plaintiffs' claims.[544] With respect to the "shocking" substantive due process theory, the court found that "[t]he act of having sex with a dead body is certainly shocking conduct."[545] However, the court also found that, to support this substantive due process theory, because the county did not do the shocking thing, it must have been foreseeable to the county's supervisory employees that Douglas would do such acts and that their failure to prevent him from doing these acts shocks the conscience.[546] The court was not willing to impute such a large series of assumptions to the county.[547]

The plaintiffs' procedural due process theory was one based on *respondeat superior*.[548] Very simply, the court noted that such liability does not give rise to an action under 42 U.S.C. 1983 and it rejected that claim.[549]

The court similarly found that liability did not attach to the county itself here.[550] In reaching this conclusion, the court noted that, for such liability to attach to the government, there must be a showing of deliberate indifference on the part of the employees, something that the court did not find here.[551] Thus, the court dismissed all of the plaintiffs' claims under the federal constitution.[552]

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540. *Id.* at 874-75.
541. *Id.* at 877.
542. *Id.*
543. *Id.* at 878.
544. *Id.*
545. *Id.*
546. *Id.* at 878, 880-81.
547. *Id.* at 880-81.
548. *Id.* at 884.
549. *Id.*
550. *Id.* at 884, 885-86.
551. *Id.* at 885.
552. *Id.* at 896.

The state law claims did find more traction with the court.[553] The state law claims in this matter were IIED and NIED against the county's employees and for NIED, negligent supervision, and negligent retention against the county.[554]

The court found the employees immune in their individual capacity from the emotional distress claims under state law, finding no bad faith or corrupt motive in their actions.[555] The court also found that the employees were immune from the negligent supervision claims in their individual capacity.[556] However, the county was found not to be entitled to immunity from the negligent retention claims.[557] As to the official capacities of these parties, the court did find that issues of material fact were outstanding that prohibited a ruling on summary judgment.[558] The court also found that the employees were not immune from suits in their individual capacity because such immunity depends on whether the employees acted in a wanton and reckless manner, which is a question of fact that is not proper for consideration in a motion for summary judgment.[559]

This case is informative, albeit shocking, of the potential personal liability of government actors.[560] Although this case does not reach the ultimate conclusion of whether these employees are liable, it also does not simply reject the plaintiffs' claims outright.[561] In the end, as with so many cases reviewed herein, this case instructs that those working with the dead are in a position of heightened emotions where general legal rules may not apply.[562] As employers, governmental or private, close scrutiny of employee actions will help to mitigate potential liability.[563]

A unique, but likely to recur, case is *Casouras v. Department of California Highway Patrol*.[564] In this case, a family brought suit against the Department of California Highway Patrol ("DCHP"), whose officers e-mailed graphic photographs of a fatal automobile accident to nongovernmental employees for purposes not related to any investigation.[565] In short, as the court stated, the officers "e-mailed nine gruesome

553. *Id.* at 886.
554. *Id.*
555. *Id.* at 887-88.
556. *Id.* at 888.
557. *Id.* at 893.
558. *Id.* at 893-94.
559. *Id.* at 891-93.
560. *Id.* at 892-93.
561. *Id.* at 896.
562. *Id.* at 895.
563. *Id.* at 896.
564. 181 Cal. App. 4th 856 (Ca. Ct. App. 4 Dist., Div. 3 2010). An appeal of portions of this case in 2011 did not affect the outcome of the decision reported here. *Catsouras v. Reich*, 2011 WL 2040871 (Ca. Ct. App. 4 Dist., Div. 3 2011).
565. *Id.* at 863.

death images to their friends and family members on Halloween for pure shock value."[566] These images went viral on the internet and eventually found their way back to the deceased's family.[567]

The family brought suit against the DCHP, under various theories, including emotional distress, invasion of privacy, and a violation of the right to control remains.[568] This case may have substantial implications for cemetery regulators who take photographs containing human remains during the course of various investigations or for cemeteries, funeral directors, or coroners who take photographs of deceased individuals during the course and scope of their employment if the photographs are used in a manner inconsistent with an investigation or a teaching scenario.[569]

The court first found that the DCHP was not immune to suit for the actions of its officers with regard to this matter.[570] In order to determine whether there was an invasion of privacy, the court had to determine whether the family had an actual privacy interest of the deceased in death images.[571] Finding that such an interest does exist,[572] the court had to consider whether there was an exemption that would have allowed the transmission of the subject photographs (i.e., investigation or education).[573] In finding that there was no such exemption, the court held that the officers' actions were those of "pure morbidity and sensationalism without legitimate public interest or law enforcement purpose."[574]

The court also found that the district court improperly dismissed the plaintiff's claims that DCHP's actions were the equivalent of IIED.[575] However, the court did recognize that DCHP was negligent for failing to supervise its employees, and, as such, was likely liable for the negligence claims of the plaintiffs.[576] In finding such negligence, the California court noted that DCHP "owed a duty of care to plaintiffs not to place decedent's death images on the Internet for the lurid titillation of persons unrelated to official CHP business."[577]

This case is not clearly determinative of the issues of whether liability exists for those that would distribute photographs of deceased indi-

566. *Id.*
567. *Id.*
568. *Id.* at 865-66.
569. *Id.* at 874.
570. *Id.* at 889-90.
571. *Id.* at 868.
572. *Id.* at 872-73.
573. *Id.* at 874.
574. *Id.*
575. *Id.* at 875.
576. *Id.* at 884. It is important to note that this case does not completely decide any substantial issues; rather it deals with challenges to the district court's dismissal of the plaintiff's claims. The substantive issues, presumably, will be dealt with on remand. *See id.*
577. *Id.* at 886.

viduals for reasons other than investigation or educational purposes.[578] From an intellectual property perspective, this case vests a property right in decedents' family members of images of the deceased when copyright law would generally vest all property right in such images in the creator of the image.[579] The combination of these factors suggests that those with control over such images should be careful to control access to and use of such images due to the generally shocking nature.[580]

E. Rights to burial spaces and burials in the wrong place

A particularly disturbing area of the law from the perspective of family relations and from the perspective of cemetery management is when people fight over who has the right to be buried where. The following cases review a few recent examples of such problems.

In *Poe v. Gaunce*,[581] a family fought over the ownership of two grave spaces and a monument all within one family plot in Kentucky.[582] The dispute arose when one family faction, the Gates, decided to move the remains of their direct ascendants.[583] The other faction, the Gaunces, prior to the disinterment (which neither side opposed), removed the communal monument from the plot and refused to replace it.[584] The Gates, despite not having any sort of deed or title to the spaces from which they were removing their relatives (the specific people being disinterred were allowed to use the spaces based on consanguinity to the Gaunces) asserted that they could now do with the empty spaces as they saw fit.[585]

The *Poe* court correctly noted that intermit rights in Kentucky, as in most other jurisdictions, are not equivalent to fee ownership of the actual burial spaces, but are more akin to easements allowing the use of the spaces for burial.[586] Because of the similarity of this property right in Kentucky to analogous rights in other jurisdictions, this case presents a useful review of the nature of interment rights and the appropriate results of various claims to those rights.[587] The *Poe* court goes on to note that the easement acquired by the interment right owner confers upon that person the right to decide who is interred in

578. *See id.* at 864, 874.
579. 17 U.S.C. § 201 (2006).
580. *See Catsouras*, 181 Cal. App. 4th at 864.
581. Poe v. Gaunce, 371 S.W.3d 769 (Ky. Ct. App. 2011).
582. *Id.* at 770-71.
583. *Id.* at 771.
584. *Id.* at 771-72
585. *See id.* at 772.
586. *Id* at 773.
587. A.M. Swarthouse, Annotation, *Deed as Conveying Fee or Easement*, 136 A.L.R. 379, 399-404 (1942).

the space.[588] Absent a specific legacy, this right devolves to the owner's heirs upon the owner's death.[589]

In affirming the trial court's holding that the Gaunce heirs controlled all rights of interment in the family plot, the *Poe* court found that the evidence supported title in the Gaunce family alone.[590] Further, the fact that there had been Gates buried in the Gaunce plot for a long time did not confer ownership to the Gates family in those specific spaces, as the burials were made with the permission of the Gaunce patriarch.[591] The court commented that "[i]t is a well settled rule that use of property by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription. . ."[592] For this reason, the *Poe* court rejected the Gates' claim of adverse possession of the subject spaces.[593]

The court also held that the specific Gates family members who were interested in the plot did not acquire any interest in the space.[594] The court observed that these people were essentially given limited easements for their own burials from the interment right owner.[595] These easements did not extend to other family members.[596]

As to the monument removed by the Gaunce heirs, even though the two Gates names were engraved on it, the actual monument was purchased by the Gaunce patriarch and thus devolved as part of his patrimony to his heirs.[597] The Gates heirs gained no interest in the monument and the Gaunces could do with it as they pleased.[598]

In *King v. French*,[599] the Arkansas Court of Appeals was faced with a dispute concerning encroaching burials between two families' plots (the Kings and the Keys).[600] In this case, the King family sought disinterment as a remedy for the encroachment.[601] Although the King family contended that three members of the Key family were buried within their plot, they sought disinterment of only the most recent burial.[602] The reason for this distinction is that the first two encroaching burials seemed to be accidental as a result of poor surveying;[603]

588. *Poe*, 371 S.W.3d at 773.
589. *Id.*
590. *Id.* at 774.
591. *Id.* at 775.
592. *Id.* A similar outcome would obtain at civil law through the concept of precarious possession. LA. CIV. CODE ANN. art. 3473 (2013).
593. *Poe*, 371 S.W.3d at 775.
594. *Id* at 776.
595. *Id.*
596. *Id.*
597. *Id.*
598. *Id.*
599. King v. French, 383 S.W.3d 426 (Ark. Ct. App. 2011).
600. *Id.*
601. *Id.*
602. *Id.* at 428-29.
603. *Id.* at 429.

however, the third Key burial was made after the Kings had notified the Keys of the problem.[604] Thus, argued King, this most recent burial must be moved.[605]

For some reason (unknown to the court), the King family waited two decades following the last Key burial to bring this suit.[606] Because of this delay, the court found that the Kings had lost their rights to repel the encroaching burials due to laches.[607] Although the court's decision in this case appears to be strictly based on the inordinate passage of time from when the burials occurred and when the Kings brought suit, an argument can be made that the court, while commenting that "[t]he special consideration given to burial plots requires that in some respects they not be treated as subject to the laws of ordinary property,"[608] might have found as it did even if the Key burials had been made recently, as the court seemed to indicate that it was loathe to order disinterment.[609]

The *King* case is also interesting because it seems to carve out another unique attribute of cemetery law from the broader arena of property law. One thing that the litigants in this case were seeking was the declaring of a boundary between their two burial plots.[610] Both at common law and at civil law, the right to bring a boundary determination action is imprescriptible.[611] However, the *King* case seems to suggest, by indicating that the right to repel the encroaching burials has been extinguished due to the passage of time, that the ability to fix the boundary between these two plots has also evaporated.[612] The court never specifically mentions this possibility, but considering the holding, it cannot be ruled out as a new cemetery-specific exception to general property law regimes.[613]

In *Service Corporation International* ("SCI") v. *Guerra*,[614] the Texas Supreme Court was faced with a question of what damage, if any, is appropriate when a cemetery operator puts a grave in the wrong place.[615] In this case, the cemetery accidentally buried the deceased in a space sold to someone else.[616] Despite the family's refusal to authorize moving the deceased to the correct space, the cemetery moved him anyway.[617] A jury found the cemetery liable for damages and the

604. *Id.*
605. *Id.*
606. *Id.* at 431-32
607. *Id.* at 431.
608. *Id.*
609. *Id.*
610. *Id.* at 427.
611. 11 C.J.S. Boundaries § 192 (2013); La. Civ. Code Ann. Art. 788 (2013).
612. *King*, 383 S.W. 3d at 431-32.
613. *See generally id.*
614. Serv. Corp. Int'l v. Guerra, 348 S.W.3d 221 (Tx. 2010).
615. *Id.*
616. *Id.* at 226.
617. *Id.*

Texas Supreme Court reversed and remanded the matter for a new trial.[618]

The actual movement of the deceased was only one of 12 to 18 inches away from the wrong space (in which it seemed merely to encroach and not actually completely use).[619] The movement of the deceased was noticed by the family when they saw disturbed earth over the grave.[620] The error resulted in SCI being cast in judgment by a jury for $6.2 million, mostly for mental anguish.[621]

One of the issues on appeal was whether SCI and its subsidiaries were liable for these damages or whether it was just the subsidiaries, as the parties who caused the error.[622] On this issue, the court limited the liability to the employer (the local cemetery with actual supervision over the employees that caused the error) and did not impute that liability to the larger parent company.[623]

On the issue of mental anguish, the court agreed that some harm was caused.[624] Indeed, although mental anguish (emotional distress) is typically only awarded when the claiming party actually witnesses the event – which the Guerras clearly did not in this case – the court thought it appropriate to extend those rights to family that did not witness the complained of event when the claims involved "the mishandling of a corpse."[625] Even with this extension, the court's review of the evidence did not identify any harm to the decedent's daughters.[626] It did, however, find evidence of harm to the decedent's widow.[627]

Interestingly, the court also examined the question of whether the Guerras could introduce evidence of SCI's well-publicized similar problems in some of its other cemeteries.[628] In finding that this evidence had been erroneously admitted at the trial court, the Supreme Court stated that there was an insufficient ". . .connection between the events in this case and the allowed actions of other lawsuits. . ."[629] In short, because the Guerras could not show that double selling plots was an SCI scheme instead of isolated errors, the evidence of other such errors was inadmissible.[630]

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618. *Id.*
619. *Id.* at 227.
620. *Id.*
621. *Id.*
622. *Id.* at 227-231.
623. *Id.*
624. *Id.* at 231.
625. *Id.*
626. *Id.* at 232.
627. *Id.* at 232-33.
628. *Id.* at 235-37.
629. *Id.* at 235.
630. *Id.* at 235-37.

However, finding that there were reversible errors, the Texas Supreme Court remanded the matter for a new trial.[631] Following the retrial of the *Guerra* case, a new jury again found that SCI had committed fraud with regard to the above space sales and moving of remains.[632] Unlike the original trial, the jury in the retrial also found that all but one of the plaintiffs' claims in this matter had lapsed due to the tolling of the statute of limitations.[633] The trial court disregarded this latter finding and rendered judgment in favor of all of the plaintiffs.[634] The appellate court, while noting that some circumstances allow for a trial court to overrule a jury's finding of prescription, agreed with the jury's finding that all but one of the plaintiffs filed their suits too late, thus overturning the verdict in favor of all but one of the plaintiffs.[635] As to the one plaintiff remaining, the appellate court found that the jury was incorrect in finding that she had suffered compensable mental anguish from the defendants' acts.[636] Simply, the appellate court was not convinced that the remaining plaintiff's complaints that she was troubled by her father's disinterment were sufficient to meet the legal burden for recovery for mental anguish.[637] Because this basis for recovery was rejected on appeal, the punitive damages that were tied to this theory were also rejected.[638] The appellate court also rejected the jury's fraud finding based on a lack of evidence to support the finding.[639] Thus, this case becomes another example of the difficulties of proving mental anguish and fraud in a cemetery context.[640] The case is also illustrative of the effects of a cemetery case on a jury verdict as opposed to a bench trial – the emotion has an impact.[641]

In the Missouri case of *Carson v. Dixon Cemetery*,[642] an interesting procedural question arose as to when someone's cause of action accrues as to ownership of a cemetery space that is disputed.[643] In this case, there were multiple sales of the same cemetery plot,[644] leading to a scenario in which three parties were claiming an ownership right to the same plot.[645] One of the parties, believing that she held title to the space, did not become involved in the litigation between the other

631. *Id.* at 239.
632. Serv. Corp. Int'l v. Leal, 2012 WL 4854754, 2 (Tx.App. 2012).
633. *Id.*
634. *Id.*
635. *Id.* at *5.
636. *Id.* at *6-8.
637. *Id.* at *6.
638. *Id.* at *8.
639. *Id.* at *9.
640. *Id.*
641. *Id.*
642. Carson v. Dixon Cemetery, 357 S.W.3d 288 (Mo.App. 5 Dist., Div 2 2012).
643. *Id.* at 289.
644. *Id.* at 289-90.
645. *Id.* at 290.

parties.[646] Once the ownership of the disputed space was adjudicated, the nonjoined party filed suit for fraudulent misrepresentation for the cemetery's failure to tell her that she did not own the cemetery space.[647] The district court dismissed the latter suit on a motion for summary judgment based upon prescription of the plaintiff's fraud claims, finding that she should have filed her fraud claims when the other suit was ongoing.[648] Because she did not so file, the fraud claims were barred by the statute of limitations.[649] On appeal, the court reversed this finding, stating that, until there was a judgment in the original suit that determined ownership of the cemetery space, the plaintiff's claims had not yet even accrued.[650] For this reason, the plaintiff's cause of action had not prescribed as it did not run from the filing of the suit to which she was not a party, but rather from the judgment in that case that was adverse to her ownership rights.[651]

The significance of the *Carson* case is that all possible claimants to a disputed cemetery space should be joined in a single litigation in order to resolve all ownership questions in one proceeding.[652] In addition, this case also implies that rights of action for cemetery space ownership can arise subsequent to adverse judgments from other parties, thus meaning that such claims can remain alive much longer than a simple read of the statute of limitations might suggest.[653]

The case of *Bernstein v. Mount Ararat Cemetery, Inc.*,[654] presents a unique twist on the problem of burials being put in the wrong place.[655] In this case, the plaintiff sued the cemetery for placing her sister in the wrong grave space, thus disrupting her own ability to be buried next to her husband when the time came.[656] The plaintiff's claims sounded in both contract and tort.[657] The contract claim revolved around the contractual agreement when the plaintiff purchased a series of grave spaces that included a requirement to obtain consent from the plaintiff prior to placing a body in one of the spaces.[658] Here, the erroneous burial occurred because no such consent was obtained or sought prior to the problematic burial.[659] The defendant cemetery did not dispute that it did not obtain such con-

646. *Id.*
647. *Id.*
648. *Id.*
649. *Id.* at 291.
650. *Id.* at 292.
651. *Id.*
652. *See id.*
653. *See id.*
654. Bernstein v. Mount Ararat Cemetery, Inc., No. 11 CV 68 (DRH)(WDW), 2012 WL 3887228, at *1 (E.D.N.Y. Sept. 7, 2012).
655. *Id.* at *1.
656. *Id.*
657. *Id.*
658. *Id.* at *3.
659. *Id.*

sent, but claimed that the plaintiff's refusal to consent to an exhumation of her sister in order to correct the error meant that she had failed to mitigate the damages for breach and thus either could not recover or should not recover as much as she was seeking.[660] The court in this case disagreed and found that the failure to get consent was a breach and that the plaintiff had fully performed under the contract (i.e., she paid), thus the failure to mitigate was not a viable defense.[661] The court did reject the plaintiff's claims for recovery as a third party beneficiary of her sister's interment contract, simply finding that she had no standing in this regard.[662]

As to the plaintiff's negligence claims, for which she sought damages for emotional distress for the incorrect interment of her sister and the fact that she cannot be buried next to her husband, the plaintiff alleged that these claims were based on duties of cemeteries and undertakers to ensure the proper handling of remains.[663] In this case, the court agreed with the defendant, stating that, because the duties alleged to be owed to the plaintiff were identical to the defendant's contractual obligations, there was no separate tort cause of action available to the plaintiff.[664] As to the plaintiff's tort claim resulting from her inability to be buried with her husband, the court refused to recognize this as an actionable claim under New York law.[665]

This case is particularly instructive because it contains a meaningful review of the "right of sepulcher" under common law.[666] In this case, the court observed that the right of sepulcher is "[t]he common-law right . . . [that] gives the next of kin the absolute right to the immediate possession of a decedent's body. . ."[667] The court noted that disturbances of this right are, unlike many emotional distress claims, often actionable.[668] This observation is particularly significant in light of the large numbers of cases reported here in which claims of emotional distress, as a nonspecific tort, have been rejected.[669] However, in this case, after reviewing the concept of the right of sepulcher, the court rejected the plaintiff's claims for recovery thereunder.[670] In doing so, the court noted that this right is one to be exercised by the family of the deceased, not by the pre-deceased prior to being dead.[671] The court held that, "[d]amages are therefore only recover-

660. *Id.*
661. *Id.* at *4.
662. *Id.* at *5.
663. *Id.* at *1.
664. *Id.* at *6.
665. *Id.*
666. *See id.*
667. *Id.*
668. *Id.*
669. *Id.*
670. *Id.* at *7.
671. *Id.*

able by close relatives who have suffered emotional trauma as a result of the deprivation of that right."[672]

In addition to the above analysis, the court also rejected the plaintiff's argument that the right of sepulcher allows her to recover for the incorrect placement of her sister's remains.[673] As the court notes, although she is in a proper position to benefit from the right of sepulcher as a close relative of her sister, the right of sepulcher deals with recovery for harms to the body, not to the gravesite as the plaintiff claimed in this case.[674]

Interestingly, on reconsideration, although the court did not vacate its earlier analysis of the right of sepulcher, nor did it overrule itself on the outcome of the original decision, it did note that it incorrectly classified the plaintiff's claims as a claim to a right of sepulcher rather than a general negligence claim.[675] However, as with other cases dealing with the negligent handling of the dead, the court reached the same decision in this review of the plaintiff's claims as it had before: the plaintiff did not have a viable standing claim in this matter.[676] This determination was based largely on the premise that, because such claims for general negligence (in this case, emotional distress) may be brought by the decedent's sons and because such individuals are necessary parties to any such litigation, the plaintiff cannot assert such claims in the absence of all necessary parties.[677]

F. Disinterment and desecration

Although there have recently been a handful of reported cases dealing with the rights of various parties to undertake disinterments, there have not been as many dealing with desecration as the reports of this activity in the media would suggest occur.[678] Personal experience suggests that this discrepancy is more a reflection of the lack of desecration and vandalism prosecutions brought due to difficulties of proof and a general lack of interest among law enforcement for such crimes. Recent cases on disinterment and desecration are combined here because they both relate to some postmortem meddling with burials (whether legal or illegal).[679]

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672. *Id.*
673. *Id.*
674. *Id.*
675. Bernstein v. Mount Ararat Cemetery, Inc., 2013 WL 1820911 at *1-2 (E.D.N.Y. Apr. 30, 2013).
676. *Id.* at *3-4.
677. *Id.*
678. *See generally supra* Part I of this article.
679. *See* Hiller v. Washington Cemetery, 2010 WL 520475 (N.J. Super. Ct. App. Div. Feb. 16, 2010), cert. denied 997 A.2d 231 (N.J. 2010) (suing decedent's brother and the cemetery so that decedent's remains could be disinterred, cremated, and spread pursuant to decedent's wishes); *See also* Estate of Puder, 2011 WL 112424 (N.J. Super. Ct. App. Div. Jan. 14, 2011) (mother arguing that decedent should be disinterred from a Jewish ceme-

In *Hiller v. Washington Cemetery*,[680] a cemetery and benevolent society were both dragged into a family dispute over the disposition of a man's remains.[681] The man's girlfriend sought his disinterment for cremation – apparently the disposition that the man had directed.[682] However, the man's brother, who was responsible for the interment, believed that he should not be cremated, in accordance with restrictions of Orthodox Judaism.[683] The cemetery and benevolent society were named as third parties by the brother, "in essence demanding that each entity maintain the decedent's grave and defend against any interference with it."[684]

Contrary to his brother's wishes, the decedent in *Hiller* made arrangements for his own cremation prior to his death.[685] However, when he died, the brother, as the closest adult relative had taken control of the remains and had them buried.[686] Ultimately, the New Jersey Superior Court found that the will was controlling and that the deceased's wishes must be honored, even noting that such wishes may not need to be reduced to writing.[687] The Supreme Court affirmed the trial court's order for disinterment and cremation.[688]

Interestingly, the trial court found, and the Supreme Court agreed, that the naming of the cemetery and benevolent society in this matter was frivolous and costs were awarded to those entities.[689] Essentially,

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tery, where she was buried by her spouse, and buried in a Greek Orthodox mausoleum); In re John G. and Marie Stelly Kennedy Memorial Foundation, 315 S.W. 3d 519 (Tx. 2010) (woman suing to exhume the decedent for a paternity test); Brewer v. American Medical Alert Group, 2010 WL 280986 (M.D. Tenn. Jan. 20, 2010) (the Court granting a request in the wrongful death case for a disinterment and autopsy); Afalonis v. Afalonis, 90 A.D. 3d 917 (N.Y.S. 2d 2011) (refusing to permit an exhumation); Robinson v. Forest Creek L.P., 712 S.E.2d 895 (N.C. Ct. App. 2011) (a family suing developer for alleged damage to a historic family cemetery on the developer's property); State of Tennesee v. McClain, 2010 WL 3244897 (Tenn. Crim. App. Aug. 17, 2010) (denying the request of an admitted cemetery vandal that sought a reduction in his sentence and restitution); Huntsman v. State, 971 N.E. 2d 215 (In. Ct. App. 2012) (refusing to reduce the sentence of the defendant who dug five feet of dirt from above a grave of a recently deceased individual, ". . .with the intent of attempting to resurrect. . ." the deceased and proceed to urinate in the plot); Childers v. Brelje, 2012 WL 1970090 (Minn. Ct. App. Jun. 4, 2012) (approving the mother's request to exhume her son and bury him in a different plot so that the mother could be buried next to her son).

680. *Hiller*, 2010 WL 520475.
681. *Id.* at *1.
682. *Id.*
683. *Id.* at *3.
684. *Id.*
685. *Id.* at *2.
686. *Id.* at *3.
687. *Id.* at *2-4.
688. *Id.* at *4.
689. *Id.* at *2, 4

the courts found that no such duties to preserve under the circumstances existed on behalf of these entities.[690]

A similar religious dispute was at issue in the disinterment suit of *Estate of Puder*.[691] In this case, the court was faced with considering the rights of parties with no statutory classification as a stakeholder under New Jersey's disinterment law.[692] In this case, the decedent, who was raised as a Greek Orthodox, married a Jew against the wishes of her mother.[693] Upon her death, the decedent was interred in a Jewish cemetery and the mother brought an action for her disinterment and removal to a Greek Orthodox mausoleum.[694] Notably, the decedent's will did not provide for her funeral or burial.[695] In this case, the court spent little time in rejecting the mother's claims for disinterment on the grounds that she had no statutory right to control same.[696] The court recognized that under New Jersey law, the only time a surviving spouse's wishes for the deceased (in absence of a testament) will be scrutinized by a court is when an equally qualified party (in New Jersey, a majority of the adult children of the deceased) object to the spouse's decision.[697] Most important is the court's recognition of the policy that all cemetery-related statutes are intended "to allow the deceased to lie at rest."[698] This is a consistent theme nationwide, whereby the courts generally disfavor disinterment.[699]

Taking the disfavoring of disinterment further was the recent Texas case of *In re: John G. and Marie Stelly Kennedy Memorial Foundation*.[700] In this case, some sixty years after the interment of the deceased, a woman came forward to assert her claim as an heir to the deceased's estate.[701] She obtained an exhumation order from a probate court in order to perform genetic tests to prove her affiliation to the deceased.[702] The Texas court considered various iterations of the woman's claims to an inheritance, ultimately finding that a decades-old judgment holding that the deceased died testate and with no surviving children was unassailable.[703] The Texas Supreme Court further

690. *Id.* at *1-2.
691. Estate of Puder, 2011 WL 112424 (N.J. Sup. Ct. 2011).
692. *Id.* at *1.
693. *Id.* at *1-2.
694. *Id.* at *2.
695. *Id.* at *1.
696. *Id.* at *3.
697. *Id.* at *5.
698. *Id.* at *5.
699. *See e.g.*, Choppin v. Labranche, 20 So. 681, 682 (La. 1896) (discouraging the disturbance of the dead except for "lawful necessary purposes"); T. Scott Gilligan & Thomas F.H. Stueve, Mortuary Law 49-53 (9th ed., 2005) (1940) (noting that disinterment is generally disfavored).
700. In re: John G. and Marie Stelly Kennedy Memorial Foundation, 315 S.W. 3d 519 (Tex. 2010).
701. *Id.* at 520.
702. *Id.* at 521.
703. *Id.* at 521-522.

found that a probate court lacked jurisdiction to order an exhumation and that, because even a positive paternity result would not allow for the woman to recover (due to the earlier final judgment), it would be an abuse of discretion to order an exhumation.[704]

In the Tennessee case of *Brewer v. American Medical Alert Group*,[705] the court reiterated the general anti-disinterment principle when it noted that, "[i]t is well settled that '[t]he quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is sanctioned.'"[706] In this case, the court, though noting this general principle and stating that when requests for autopsies subsequent to burial are supported by evidence of a "reasonable probability that the true cause of death would be revealed,"[707] granted a request in this wrongful death case for a disinterment and autopsy.[708] This case does not provide much guidance as to what such evidence may look like and it seems to leave a considerable amount of room for interpretation in future cases. However, its recapitulation of the concept that disinterments are disfavored is informative.[709]

In a second autopsy case, *Afalonis v. Afalonis*,[710] a New York court, commenting more forcefully than the Tennessee court on the disfavored nature of disinterment,[711] did not authorize an exhumation.[712] The New York court noted that "it must exercise a benevolent discretion"[713] when deciding whether to "disturb [the] repose" of the dead.[714]

In *Robinson v. Forest Creek L.P.*,[715] a family brought an action for civil desecration against a developer for alleged damage to a historic family cemetery on the developer's property.[716] This case contains several interesting components: access to cemeteries, civil desecration, and proof of desecration.[717] As an initial matter, the family in this case sought and received an order allowing them the authority to enter the developer's property to search for a cemetery believed to exist thereon.[718] This fact alone seems to expand descendant's rights to

704. *Id.* at 522-523.
705. Brewer v. Am. Med. Alert Group, 2010 WL 280986 (M.D. Tenn. 2010).
706. *Id.* at *2.
707. *Id.* at *2.
708. *Id.* at *6.
709. *Id.* at *2.
710. Afalonis v. Afalonis, 90 A.D. 3d 917 (N.Y. Sup. Ct. 2d Dep't. 2011).
711. *Id.* at 918.
712. *Id.*
713. *Id.*
714. *Id.*
715. Robinson v. Forest Creek L.P., 712 S.E. 2d 895 (N.C. Ct. App. 2011).
716. *Id.* at 895.
717. *Id.* at 896.
718. *Id.* at 895.

access the property of others to visit and maintain existing graves.[719] The latter is a well-recognized right of the descendant community in many jurisdictions.[720] However, it is quite a distance from accessing someone else's property to clean a known cemetery in comparison to accessing it to search for a suspected cemetery.[721] Such a holding (were it that) might prove useful to preservationists nationwide.[722] However, there is no substantive discussion of this issue in the reported case aside from a mention that the access was granted by way of a consent judgment.[723]

In this case, the family claimed that the developer desecrated a family cemetery by bulldozing a fence and at least two above-ground markers.[724] Although with the help of an archaeologist the family was able to locate the missing burials, the fence and markers, which had been witnessed within the preceding decade, were gone.[725] From these facts, the civil desecration claim arose.[726]

Civil desecration is distinguished from criminal desecration, as it seeks civil penal relief.[727] In addition, unlike criminal proceedings, civil desecration can be brought by members of the public.[728] In this case, the North Carolina Appeals Court specifically examined the claim of civil desecration and determined it to be a viable cause of action in North Carolina, even though it noted that no elements to prove such action exist in the law.[729]

Filling in the gaps, the court noted that the threshold element of civil desecration is the actual desecration itself.[730] In this case, although the fence and markers were undeniably absent, the court was unable to find any evidence that the developer was the cause of their absence.[731] Thus, although the court arguably provided some dicta supporting the ability to access property to search for missing cemeteries and recognized that the cause of action of civil desecration is viable in North Carolina, it did not find that such desecration occurred – at least not at the hands of the developer.[732]

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719. *Id.*
720. *See, e.g.*, Cemeteries, La. Att'y Gen. Op. No. 08-0186, (Aug. 19, 2008).
721. *See id.*
722. *See Robinson*, 712 S.E.2d 895.
723. *Id.* at 895.
724. *Id.* at 896.
725. *Id.*
726. *See id.*
727. *See* TRACY BATEMAN FARRELL, AM. JUR. 2D *Cemeteries* § 43-46 (2013).
728. *See id.*
729. *Robinson*, 712 S.E.2d at 897.
730. *Id.*
731. *Id.* at 897-898.
732. *Id.*

In *State of Tennessee v. McClain*,[733] the appellate court was presented with an admitted cemetery vandal seeking a reduction in his sentence and restitution.[734] At issue in this case was $60,000.00 worth of cemetery damage occasioned by five men on an apparent drunken bender.[735] The vandal seeking a reduction was the driver, who appeared to take no active part in the cemetery damage.[736] For his involvement, the trial court sentenced him to 150 days in jail, six years of probation, and $5,000.00 in restitution.[737]

In considering whether to grant some leniency, the trial court noted that, "[t]he circumstances of the offense are horrendous. I've already described how the [c]ourt views them. It is something that is senseless, no justification. It wasn't just a youthful indiscretion."[738] Then citing numerous other factors, the trial court rejected the request for leniency and the appellate court affirmed.[739] Further, the appellate court held that, despite the vandal's prospects of only a minimum wage job upon his release from prison, the restitution award was not unreasonable.[740]

The only other reviewed criminal desecration case is that of *Huntsman v. State*.[741] Although the case is unreported,[742] it is worthy of review. In this case, the defendant pled guilty to having dug five feet of dirt from above a grave of a recently-deceased individual, ". . .with the intent of attempting to resurrect. . ." the deceased.[743] While digging, the defendant also urinated in the grave.[744]

On appeal, the defendant was seeking a reduction of his sentence of one year, which, in Indiana, was the maximum sentence for the misdemeanor of "cemetery mischief."[745] The appellate court affirmed the maximum sentence, commenting that the severity of the crime was shocking.[746]

Although this case is unreported, it is illustrative of the disturbing nature of desecration.[747] It and *McClain* are also illustrative of the lack of remorse that the courts show when faced with these crimes,

733. State of Tennessee v. McClain, No. M2009-00942-CCA-R3-CD, 2010 WL 3244897 (Tenn. Cir. Ct. App. 2010).
734. *Id.* at *1.
735. *Id.*
736. *Id.*
737. *Id.* at *3.
738. *Id.* at *5.
739. *Id.* at *5-6.
740. *Id.* at *9-10.
741. Huntsman v. State, No. 57A03-1201-CR-14, 2012 WL 3028286 (Ind. Ct. App. 2012).
742. *Id.*
743. *Id.*
744. *Id.* at *1.
745. *Id.*
746. *Id.* at *2.
747. *See id.*

perhaps suggesting that such cases may not be a waste of prosecutors' time.[748] The *McClain* and *Huntsman* cases are instructive in their rarity over a three-year period.[749] Even though the court in *McClain* noted that the acts were "horrendous"[750] and the news stories in Part I of this article indicate that these acts occur constantly, there is little in the appellate record to demonstrate the enforcement of desecration laws.[751] Whether this is a function of plea agreements or lack of enforcement in general is not known.[752]

The Minnesota appellate case of *Childers v. Brelje*[753] presents a unique problem related to disinterment.[754] In this case, the child of an unmarried couple succumbed to cancer and was interred, on the decision of both parents, with the father's family.[755] Because the father's family plot was full, the mother could not be interred next to her child as she desired and she sought an order authorizing the son's disinterment from the agreed-upon grave and his reinterment in the same cemetery, but in an area where adjacent spaces were available.[756] The father opposed the disinterment, citing the general presumption against exhumation and the earlier agreement of the parents (prior to their estrangement) to bury the child in his current location.[757]

In this case, the court recognized the presumption against disinterment and also the equal footing of both parents to make burial decisions.[758] The court then noted that Minnesota law requires, in cases of opposed disinterments, an eight-part inquiry into whether disinterment is proper.[759] The court then proceeded to review those factors and the district court's interpretation of them.[760] The appellate court, as did the district court before it, found it significant that there was no space in the father's family plot for additional interments, thus stymieing the mother's wishes to be eventually buried alongside her child.[761] Because the son would be reinterred in the same cemetery, just in a different space, both courts found that the mother's desire overcame the presumption against disinterment.[762]

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748. *See id.; see also* State of Tennessee v. McClain, No. M2009-00942-CCA-R3-CD, 2010 WL 3244897 (Tenn. Cir. Ct. App. 2010).
749. *See Huntsman,* 2012 WL 3028286; *see also McClain,* 2010 WL 3244897.
750. *McClain,* 2010 WL 3244897 at *5.
751. *See* discussion *supra* Part I, pp. 2-4.
752. *See Huntsman,* 2012 WL 3028286; *see also McClain,* 2010 WL 3244897; *See* discussion *supra* Part I, pp. 2-4.
753. Childers v. Brelje, 2012 WL 1970090 (Minn.App. 2012).
754. *See id.*
755. *Id.* at *1.
756. *Id.*
757. *Id.*
758. *Id.* at *2.
759. *Id.* at *2-3.
760. *Id.*
761. *Id.* at *3.
762. *Id.*

Although some of the facts in this case are fairly unique, it certainly provides some informative guidance regarding certain disinterments.[763] On the whole, this case suggests that disinterments for reburial in the same cemetery for reasons of proximity of burial may reasonably overcome the general presumption against disinterment.[764]

G. Human Remains Issues

The recently-reported cases on issues related to the treatment of human remains can be divided into two subsections: Organs gone awry and unmarked burial disturbances.[765] The latter subcategory is distinguished from the earlier discussed desecration cases because it relates to what to do with the remains after they have been disturbed or discovered (or both) as opposed to the penalties for disturbances.[766]

Four recent organs cases arise from the anatomical donations programs associated with the University of California system.[767] Each of these cases involve the same basic facts and conclusions[768] and are thus discussed here jointly. In these cases, family members of deceased who had donated their bodies to the University of California system for research or teaching purposes brought suit against the system following revelations that the remains may have been used in for-profit research, used in studies found objectionable by the families, or that the cremated remains of the deceased were not disposed of according to the families' understandings.[769] In each of these cases, the courts looked to the terms of California's Uniform Anatomical Gift Act and to the agreements signed by the deceased when donating their bodies.[770] These instruments were determined to be controlling

763. *See generally id.* at *2-3.

764. *Id.* at 2 (finding that disinternment would cause the father no "additional travel or time expenditures" when he desired to visit his son's burial plot).

765. *Id.* at 2 (finding that disinternment would cause the father no "additional travel or time expenditures" when he desired to visit his son's burial plot).

766. *See* discussion *infra* Part III.G pp. 91-96.

767. *See* Andre v. Regents of the Univ. of Cal., No. B211748, 2010 Cal. App. LEXIS 6330 (Cal. Ct. App. Aug. 10, 2010); Lane v. Regents of Univ. of Cal., No. B213048, 2010 Cal. App. LEXIS 6328 (Cal. Ct. App. Aug. 10, 2010); Cohen v. Nuvasive, No. B194078, 2010 Cal App. LEXIS 2528 (Cal. Ct. App. Apr. 7, 2010); Regents of Univ. of Cal. v. Superior Court, 107 Cal. Rptr. 3d 637 (2010).

768. *See Andre*, 2010 Cal. App. LEXIS 6330; *Lane*, 2010 Cal. App. LEXIS 6328; *Cohen*, 2010 Cal App. LEXIS 2528; *Regents*, 107 Cal. Rptr. 3d 637.

769. *See Andre*, 2010 Cal. App. LEXIS 6330; *Lane*, 2010 Cal. App. LEXIS 6328; *Cohen*, 2010 Cal App. LEXIS 2528; *Regents*, 107 Cal. Rptr. 3d 637.

770. *Andre*, 2010 Cal. App. LEXIS 6330 at *2; *Lane*, 2010 Cal. App. LEXIS 6328 at *2; *Cohen*, 2010 Cal App. LEXIS 2528 at *8; *Regents*, 107 Cal. Rptr. 3d at 758.

in all circumstances.[771] They controlled how the remains were used irrespective of the verbal wishes of the deceased, the expectations of the families, or even the manner in which the remains would be used as communicated by UC system employees.[772] The courts did not find any legal or contractual obligation for the UC system to use the remains in any particular manner, nor did they find any contractual directive for the disposition of the cremated remains of the deceased.[773]

In *Memorial Properties, LLC v. Zurich American Insurance, Co.*,[774] at issue was whether an insurance company was liable for damages suffered by families of decedents when its client, a crematory, illegally harvested and sold the organs and body parts of the deceased.[775] In this case, it was the actual crematory suing its insurance carrier trying to recover for the former's losses due to the wrongdoings of its employees.[776] In this case, the acts were ostensibly covered by one of the insurance carriers as "property damage,"[777] but the court found that the damage itself (here held to have occurred when the families learned of the damage) occurred outside of the coverage period.[778] As for the remaining insurer, the court found that the policy excluded "improper handling of a deceased body,"[779] and thus agreed that coverage was properly denied by the carrier.[780]

The United States Fifth Circuit Court of Appeals and the Texas Supreme Court reviewed similar insurance-related matters in *Evanston Ins. Co. v. Legacy of Life, Inc.*[781] In this case, a Texas woman allowed Legacy of Life, Inc. ("Legacy"), to harvest certain of her mother's organs after the latter's death.[782] The harvesting was, according to the plaintiff's state court petition, made with the understanding that the organs would be used for nonprofit purposes.[783] When the plaintiff learned that Legacy had instead transferred the organs to a for-profit

771. *Andre*, 2010 Cal. App. LEXIS 6330 at *2; *Lane*, 2010 Cal. App. LEXIS 6328 at *2; *Cohen*, 2010 Cal App. LEXIS 2528 at *8-11; *Regents*, 107 Cal. Rptr. 3d at 758.
772. *Andre*, 2010 Cal. App. LEXIS 6330 at *2; *Lane*, 2010 Cal. App. LEXIS 6328 at *2; *Cohen*, 2010 Cal App.LEXIS 2528 at *8-11; *Regents*, 107 Cal. Rptr. 3d at 758.
773. *See Andre*, 2010 Cal. App. LEXIS 6330 at *35-6; *Lane*, 2010 Cal. App. LEXIS 6328 at *28; *Cohen*, 2010 Cal. App. LEXIS 2528 at *10-11; *Regents*, 107 Cal. Rptr. 3d at 757.
774. Mem'l Props., LLC v. Zurich Am. Ins. Co., No. A-0109-09T2, 2011 N.J. Super LEXIS 587 (N.J. Super Ct. App. Div. Mar 10, 2011).
775. *Id.* at *1.
776. *See id.* at *2.
777. *Id.* at *2-3.
778. *Id.* at *12.
779. *Id.* at *5.
780. *See* Mem'l Props., LLC v. Zurich Am. Ins. Co., 46 A.3d 525 (N.J. 2012) (affirmed on appeal).
781. Evanston Ins. Co. v. Legacy of Life, Inc., 645 F.3d 739 (5th Cir. 2011).
782. *Id.* at 741.
783. *Id.*

entity that subsequently sold them at a profit to various hospitals, she sued Legacy under various theories (similar to the California cases noted above).[784] The *Evanston* case arose as a federal suit between an insurer (Evanston) and it's insured (Legacy) regarding who was responsible for defending the state court suit.[785]

The primary questions presented in this case were: (1) was the plaintiff's state court claim for emotional distress covered by the insurance policy as part of the term "bodily injury"?;[786] and (2) was the alleged mishandling of organs covered under the insurance policy's coverage of "property damage?"[787] The former question, which is not overly important to this review, was certified to the Texas Supreme Court as a state law question.[788] The latter question is interesting, as Evanston alleged that "a deceased human's body parts are not 'tangible property.'"[789] Although the parties and the court recognized that human organs are, colloquially, tangible,[790] Evanston argued that, in an insurance sense, they are not tangible as quasi property and are thus not covered by the policy issued to Legacy.[791] The Fifth Circuit, while admitting that this question is also one of state law, alluded to the possibility that, because of "advances in organ transplants and medical research," organs may now be something more than quasi property.[792] Because of the state law nature of this issue, the Fifth Circuit certified to the Texas Supreme Court the questions of whether an insurance policy's "property damage" provisions, under Texas law, covered the state court plaintiff's "loss of use of her deceased mother's tissues, organs, bones, and body parts."[793] The Texas Supreme Court held that it did not.[794] Because of the answers to these two certified questions, the Fifth Circuit held that Evanston did not owe Legacy any duty to defend it against the plaintiff's state law claims.[795]

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784. *Id.* at 742.

785. *Id.* at 740.

786. *Id.* at 743.

787. *Id.*

788. *Id.* at 746-47.; *See also* Evanston Ins. Co. v. Legacy of Life, Inc., 2012 WL 3641641 at *164 (5th Cir. 2012) (citing Evanston Ins. Co. v. Legacy of Life, Inc., 370 S.W.3d 377 (Tex. 2012)) (The Texas Supreme Court responded that emotional distress was not covered by the term "bodily injury" under Texas law).

789. *Evanston Ins. Co.*, 645 F.3d at 747.

790. *Id.* at 748.

791. *Id.*

792. *Id.* (citing to Texas decision regarding human embryos as well as to the Texas Anatomical Gift Act, the latter of which grants some rights in organs to the "next of kin.").

793. *Id.* at 751.

794. Evanston Insurance Company v. Legacy of Life, Inc., No. 10-50267, 2012 WL 3641641(5th Cir. Aug. 24, 2012).

795. *Id.* at *2.

The cases *Commonwealth v. Garzone*,[796] and *Commonwealth v. Mastromarino*[797] share related facts dealing with the theft and sale of human body parts.[798] The basic facts giving rise to both of these cases are that the defendants were implicated in and convicted of allegations that, through the operations of their human tissue sales business and crematorium, they harvested human organs for sale into the transplant market from over 200 individuals who had not given consent to same and who had not passed medical history screens.[799] Basically, the defendants would harvest the organs before cremation, falsify medical documentation, and then return the remainder of the remains – cremated – to the families of the deceased, who were none the wiser of the scheme.[800]

In *Garzone*, the matter at issue on appeal was fairly straightforward: could Pennsylvania recover the costs of the investigation and prosecution from the defendant as part of his sentence.[801] The court in this case found that the provision for the legal and investigation expenses of the Commonwealth were not recoverable, both because such recovery was not provided by statute[802] and because the actions for which Pennsylvania sought reimbursement were, while "particularly heinous," within the ambit of the government's "usual services," thus not justifying any special treatment.[803]

In *Mastromarino*, the mastermind of the above-noted scheme challenged the severity of his sentence.[804] The sentence was an aggregation of 53 consecutive sentences, totaling 25 to 58 years in prison.[805] The court spent a considerable amount of time recounting Mastromarino's deeds and commenting on its general distaste for them,[806] however the actual decision was fairly simple: the court did not find the sentence unreasonable.[807]

These two cases are morbid curiosities from a literary perspective, but do not present much substantive legal analysis of import. *Garzone* is interesting in that it supports the notion that, when enacting legislation for regulatory enforcement, states should make efforts to include reimbursement provisions.[808] Taken together, the real lesson of these

796. Commonwealth v. Garzone, 993 A.2d 1245 (Pa. Super. Ct. 2010), *aff'd*, 34 A.3d 67 (Pa. 2012).
797. Commonwealth v. Mastromarino, 2 A.3d 581 (Pa. Super. 2010), *appeal denied*, 14 A.3d 825 (Pa. 2011).
798. *See Garzone*, 993 A.2d at 1246; *Mastromarino*, 2 A.3d at 583.
799. *See Garzone*, 993 A.2d at 1246; *Mastromarino*, 2 A.3d at 583.
800. *See Garzone*, 993 A.2d at 1247; *Mastromarino*, 2 A.3d at 583.
801. *Garzone*, 993 A.2d at 1255.
802. *Id.* at 1255, 1256.
803. *Id. aff'd* 34 A.3d 67 (Pa. 2012) (The decision was affirmed on appeal).
804. *Mastromarino*, 2 A.3d at 585.
805. *Id.*
806. *Id.* at 582-591.
807. *Id.* at 589.
808. *See Garzone*, 993 A.3d at 317-21.

cases is that stealing and selling human organs is generally frowned upon.[809]

In the case of *Kaleikini v. Thielen*,[810] the Hawaii Supreme Court was faced with questions regarding who had proper standing and who should be consulted regarding the treatment of human remains identified during construction activities.[811] In this case, Native Hawaiian human remains were encountered during construction of a shopping center and a dispute arose as to whether the project should have been redesigned to avoid the remains or whether a removal plan was appropriate.[812] When the O'ahu Island Burial Council ("OIBC") voted to approve the removal plan, a descendant of those whose remains were discovered objected and sought a contradictory hearing on the matter.[813] The request for a contradictory hearing was denied and appeals ensued.[814]

With no small amount of foresight, the Hawaii Supreme Court noted that "it would seem desirable for this court to provide an authoritative determination providing future guidance for public officials" and that such guidance was advisable because "it seems probable that [human remains] will continue to be unearthed at future construction projects."[815] Although much of this case deals with procedural matters not overly important to cemetery or human remain matters, what is interesting is that the court recognizes that the regulatory review board, the OIBC, did not properly consult with the plaintiff and because the court also found that the plaintiff's claims to lineal descendancy were valid, she had standing not only to be consulted, but also to bring an action for review of the consultation process.[816] If nothing else, this case suggests that, for the purposes of consultation when making decisions under state unmarked burial protection laws, both regulators and the regulated (in this case the developer) would have been better served had they erred on the side of more consultation than to fight standing on the back end.[817] In this case, nearly four years were lost during legal battles over whether consultation was necessary.[818] This waste of time and resources should give pause to those attempting to shortcut or sidestep the regulatory process when human remains are involved.[819]

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809. *See Garzone*, 993 A.2d 306, *see also Mastromarin*, 2 A.3d 581.
810. Kaleikini v. Thielen, 237 P. 3d 1067 (Haw. 2010).
811. *Id.* at 1071-1078.
812. *Id.* at 1071-1072.
813. *Id.*
814. *Id.* at 1073.
815. *Id.* at 1079.
816. *Id.* at 1093. *See also* Kaleikini v. Yoshioka, 283 P.3d 60 (Haw. 2012); Hall v. Dep't of Land and Natural Res., 290 P.3d 525 (Haw. Int. App. 2012).
817. *Kaleikini*, 237 P. 3d at 1093
818. *See id.* at 1071-78. The case began in public meetings in 2006 and was decided by the Hawaii Supreme Court in 2010. *See id.*
819. *See id.*

In *Hall v. Department of Land and Natural Resources*,[820] a Native Hawaiian sued the State and a church over the church's plans to expand the footprint of the structures on its property.[821] The area for the expansion was known to have been used as a cemetery since the 1800s and the church itself qualified as a historic property.[822] In spite of the likelihood that burials would be impacted by the construction project, the state authorized construction without an archaeological survey.[823] During various construction activities, 69 burials were impacted before the state stopped the construction to reassess matters.[824]

In 2009, Hall filed a complaint seeking declaratory and injunctive relief against the state and the church.[825] Hall's primary argument was that the project could not go forward because the required archaeological work had not been done.[826] As in *Kaleikini, supra*, Hall's standing was challenged and was upheld.[827] The district court did not find that an archaeological survey was mandated by law and also found that Hall's cited laws on cemetery preservation and historic preservation to be mutually exclusive.[828] Finally, the district court did allow Hall to amend her petition with the all-important cemetery dedication argument.[829] This argument, which was later raised by Kaleikini in a separate action against the state and the church, essentially alleged that the project area was a known cemetery and until the dedication was removed, the property could not be used for anything but a cemetery.[830] A separate district court judge granted Kaleikini's cemetery dedication request, essentially providing Hall the denied relief.[831] On the appeal of Hall's case, the court found that the cemetery protection and historic preservation laws to be complementary, thus reversing the district court on this point.[832] Interestingly, the appellate court examined the nature of the use of the cemetery at issue.[833] Part of the cemetery was known and marked and was not subject to impacts from the project.[834] Part of the same cemetery was unmarked and under laid a cement slab.[835] The court did not find

820. *Hall*, 290 P.3d 525, *cert. denied* 2013 WL 2450773 (Haw. 2013) (Plaintiff's request for cert.), *cert. granted* 2013 WL 3064928 (Haw. 2013) (State's request for cert.).
821. *Id.* at 527.
822. *Id.*
823. *Id.*
824. *Id.* at 530.
825. *Id.*
826. *Id.*
827. *Id.* at 535.
828. *Id.* at 532.
829. *Id.* at 530-32.
830. *Id.* at 531.
831. *Id.* at 531-32.
832. *Id.* at 540.
833. *Id.* at 537.
834. *Id.*
835. *Id.*

this to be a problem for the application of cemetery protection laws that exempt known, marked cemeteries.[836] The court simply noted that different laws applied to different parts of the cemetery.[837] The areas of the cemetery that were unmarked were controlled by the cemetery protection laws for unmarked cemeteries and the areas that were marked were not.[838]

This is a practical, but perhaps difficult means for dealing with this common problem.[839] This case and the other Hawai'i cases reviewed here clearly place Hawai'i at the forefront of jurisprudence implementing unmarked cemetery protection.[840]

In 2012, Kaleikini brought another challenge regarding burials in the Hawai'i Supreme Court case of *Kaleikini v. Yoshioka*.[841] In this case, the plaintiff challenged the thoroughness of efforts to identify and protect Native Hawaiian burial sites in the planning process of a rail project in the Honolulu area.[842] The defendant challenged the plaintiff's standing, alleging that she could point to no irreparable injury sufficient to challenge the rail plan.[843] The court disagreed, noting that although no Native Hawaiian burials had yet been identified in the planning process, the high probability of disturbing such burials coupled with the plaintiff's cultural affiliation (and thus general interest) in the Native Hawaiians likely to be disturbed was a sufficient "threatened irreparable injury" to constitute standing.[844]

One major problem in this case for the government actors was the fact that the project had been approved prior to the completion of an archaeological impact survey.[845] Thus, as approved, the government could not say with certainty that burials would not be disturbed.[846] The court found that partial completion of such surveys did not equate to complying with the legal obligations to protect and avoid cultural and historical sites (including burials) because once the project was underway based upon a partially-complete survey, no-build and alternative options to mitigate or avoid impacts were effectively foreclosed.[847]

This case includes a lengthy discussion of non-cemetery historic preservation and regulatory matters that are not relevant to this arti-

836. *Id.*
837. *Id.*
838. *Id.*
839. A similar approach has been suggested, but never litigated in Louisiana. *See, e.g., Ms. Lucy L. McCann*, La. Op. Att'y Gen. No. 07-0183 (2007).
840. *See generally Hall*, 128 Haw. 455.
841. Kaleikini v. Yoshioka, 128 Haw. 53, 283 P.3d, *reconsid. denied*, 128 Haw. 199, 285 P.3d 1013 (2012).
842. *Id.* at 63.
843. *Id* at 75.
844. *Id.* at 76-77.
845. *Id.* at 77.
846. *Id.*
847. *Id.* at 77.

cle.[848] However, this case strongly suggests that the likelihood of cemetery disturbance for a project without reasonable steps to mitigate such disturbances can create standing to challenge such projects from the descendant communities.[849] This is a logistical reality that regulators and developers should incorporate into their project planning processes.[850]

The final case in this section is *Geronimo v. Obama*.[851] This case deals with whether a suit can go forward under the Native American Graves Protection and Repatriation Act ("NAGPRA")[852] between those claiming to be the lineal descendents of the "legendary Apache warrior, Geronimo"[853] and the United States and Yale University for the return of remains buried by the Army and allegedly stolen and retained by Yale's Order of Skull and Bones.[854] The court in this case quickly dismissed the claims against the United States because it observed that the United States enjoys sovereign immunity from suit and that NAGPRA does not waive that immunity.[855] The court also observed that NAGPRA does contain a waiver of sovereign immunity under the Administrative Procedures Act ("APA").[856] However, because the United States had no hand in the alleged acquisition of the remains by Yale, there was no available APA claim.[857] Finally, as to the claims against Yale, the court noted that, because the complaint did not allege that the remains were acquired after the 1990 effective date of NAGPRA, there was no available cause of action as to the private defendants either.[858]

III. Discussion and Conclusion

Because this article was designed as a review, it is difficult to make any overarching conclusions regarding the matters herein discussed. This is the nature of a nationwide jurisprudential review of an ever-evolving area of the law.

The cases reviewed herein clearly indicate that cemeteries and human remains, from a legal perspective, cannot be pigeonholed as contracts or property cases (or both) in any traditional sense.[859] Once

848. *See generally id.*
849. *See generally id.*
850. *See generally id.*
851. Geronimo v. Obama, 725 F. Supp. 2d 182 (D.D.C. 2010).
852. *Id.* at 183-84.
853. *Id.* at 184.
854. *Id.* at 183-84.
855. *Id.* at 184.
856. *Id.* at 185-86.
857. *Id.* at 186.
858. *Id.* at 186-87.
859. *See* Savannah Cemetery Group, Inc. v. Depue-Wilbert Vault Co., 704 S.E.2d 858 (Ga. Ct. App. 2010); *see also* Seals v. H&F, Inc., 301 S.W.3d 237 (Tenn. 2010).

the grief component is added to any set of straightforward laws and facts, the dynamics change. Cemetery and human remains law can best be seen as a form of quasi-property law.[860] Many of the terms used and concepts referred to are property concepts.[861] However, the unique nature of the subject – i.e., the dead and the special treatment of the dead in Western culture – means that the judicial and legislative systems view the traditional property concepts through the lens of grief and alter some of those traditional property law concepts to fit this special niche of the law.[862]

860. *See* Evanston Ins. Co. v. Legacy of Life, Inc., 645 F.3d 739 (5th Cir. 2011).
861. There are certainly contracts components to cemeteries and human remains issues as well. However, most of these cases revolve around the "res" of cemeteries and human remains – the property – and thus build off of those concepts.
862. *See* King v. French, 383 S.W.3d 426 (Ark. Ct. App. 2011).