No. 121200

In the
Supreme Court of Illinois

DONNA COCHRAN,

Plaintiff-Appellee,

v.

SECURITAS SECURITY SERVICES USA, INC.,

Defendant-Appellant.

On Appeal from the Appellate Court of Illinois,
Fourth Judicial District, No. 4-15-0791.
There Heard on Appeal from the Circuit Court of the Seventh Judicial Circuit, Sangamon County, Illinois, Case No. 2012-L-245,
The Honorable **Peter C. Cavanaugh**, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

Plaintiff Donna Cochran field suit on September 13, 2012 against Defendants Memorial Medical Center, Securitas Security Services USA, Inc., and Butler Funeral Homes for wrongful interference with the next-of-kin's right to possession of the decedent. Mrs. Cochran alleged that the wrongful acts and/or omissions of Defendants had caused the wrongful cremation of her son's body, which interfered with her right to determine the time, manner, and place of her son's burial. Mrs. Cochran further alleged that the wrongful cremation deprived her of the ability to have an autopsy performed to determine her son's cause of death. Mrs. Cochran requested money damages and ultimately settled with Defendants Memorial Medical Center and Butler Funeral Homes.

The circuit court dismissed Mrs. Cochran's claim against Defendant Securitas pursuant to Sections 2-615 and 2-619 of the Code of Civil Procedure by finding that Securitas did not owe Plaintiff a duty of care. Mrs. Cochran appealed to the Fourth District Appellate Court where she argued that Defendant had a duty not to interfere with her right to possession and, further, that she should be allowed to pursue this matter under a negligence standard because the willful and wanton standard used by Illinois courts was a "legal anachronism that is no longer consistent with the current state of the law." Mrs. Cochran relied, in part, on Section 868 of the Restatement (Second) of Torts, which adopted the negligence standard in 1979. The Fourth District agreed and issued an opinion reversing the circuit court's order and remanding for further proceedings.

This Court allowed Defendant Securitas' petition for leave to appeal.

JURISDICTION

The circuit court dismissed Plaintiff's Third Amended Complaint in its entirety on September 23, 2015. (C723-24). Plaintiff filed a timely Notice of Appeal. (C725). The appellate court had jurisdiction pursuant to Supreme Court Rules 301 and 303. The appellate court issued its opinion on August 3, 2016. Defendant Securitas filed a timely petition for leave to appeal, which was granted on November 23, 2016. This Court has jurisdiction pursuant to Supreme Court Rule 315(a).

ISSUES PRESENTED FOR REVIEW

1. Whether Defendant Securitas Security Services USA, Inc., owed a duty of care to Plaintiff Donna Cochran not to interfere with her right to possession of her son's body, which included the right to determine the time, manner, and place of burial.

2. Whether the facts contained in the Third Amended Complaint sufficiently alleged that Defendant breached its duty of care through willful and wanton misconduct where it failed to follow industry standards and written policies, which resulted in the wrongful cremation of Plaintiff's decedent.

3. Whether Illinois should continue to follow the willful and wanton standard where it has been abandoned by a majority of jurisdictions and where it is no longer consistent with Illinois tort law, which follows the negligence standard in all but a handful of well-defined areas where there are countervailing factors that are not present here.

STANDARD OF REVIEW

Orders entered pursuant to Sections 2-615 and 2-619 of the Code of Civil Procedure are reviewed *de novo*. *Solaia Technology v. Specialty Publishing Co.*, 221 Ill. 2d 558, 852 N.E.2d 825, 839 (2006).

STATEMENT OF FACTS

I. BACKGROUND

Walter Andrew Cochran died unexpectedly at his home on September 12, 2010. (Vol. III, C600). He was 39 years old at the time of his death and was survived by his mother, Donna Cochran. (Vol. III, C600, 605). Walter's body was transported to the Moultrie County morgue where the coroner was unable to determine the cause of death. (Vol. III, C600-01). The body was then transported to the Memorial Medical Center in Springfield pursuant to a coroner's investigation so that a full autopsy could be performed to determine the cause of death. (Vol. III, C601). Mrs. Cochran also desired that an autopsy be performed so that she would know why her son died. (Vol. III, C605).

Walter's body arrived at the Memorial Medical Center morgue on September 14, 2010. (Vol. III, C601). It was received by employees of Securitas Security Services USA, Inc. ("Securitas") (Vol. III, C601). Securitas was an independent contractor hired by Memorial Medical Center to provide security services to the hospital. (Vol. III, C601). Securitas was responsible for receiving, tracking, and releasing bodies processed through the hospital's morgue. (Vol. III, C601). Securitas employees also were responsible for maintaining a log book recording the identity and location of bodies in the morgue. (Vol. III, C603). Employees of Securitas were required to follow written "Security Policies" in connection with their duties in the morgue. (Vol. III, C602). These security policies contained provisions related to identification of bodies as well as the procedures for releasing bodies. (Vol. III, C602).

On September 16, 2010, representatives from Butler Funeral Home arrived at Memorial Medical Center to pick up the body of a man named William Carroll, which was scheduled to be cremated. (Vol. III, C601). Securitas personnel did not retrieve the body of William Carroll. (Vol. III, C602). Instead, Securitas personnel retrieved Walter's body and released it to Butler Funeral Homes, representing that it was the body of William Carroll. (Vol. III, C602). The Butler employees transported Walter's body to the funeral home and cremated it before the error could be discovered. (Vol. III, C602). As a result, no autopsy was performed and the cause of Walter's death was never determined. (Vol. III, C605).

II. THIRD AMENDED COMPLAINT

Donna Cochran, as next-of-kin of Walter Cochran, filed suit on September 13, 2012. (Vol. I, C2). The original complaint named three defendants: Securitas Security Services USA, Inc., Butler Funeral Homes & Cremation Tribute Center, P.C., d/b/a Butler Funeral Home; and Memorial Medical Center. (Vol. I, C2). Plaintiff alleged that the Defendants had interfered with her right to possession of the body of her decedent. (Vol. I, C4). Plaintiff settled with Defendants Butler Funeral Home and Memorial Medical Center and the trial court entered an order for good faith finding on June 8, 2015. (Vol. III, C598). On June 15, 2015, Plaintiff filed a Third Amended Complaint with Defendant Securitas as the sole remaining defendant. (Vol. III, C500). The single count complaint alleged that Defendant Securitas wrongfully interfered with Donna Cochran's right to possession of her decedent. (Vol. III, C600).

In support of her claim, Plaintiff alleged that Defendant violated both industry standards and written hospital policies in its handling of Walter's body. (Vol. III, C602-03). Plaintiff alleged that when Securitas received the body they did not ensure that it had a visible identification tag. (Vol. III, C602). Securitas employees also placed Walter's body in a Ziegler case (a solid case used for decomposing bodies), which was not labeled. (Vol. III, C602). Securitas employees then wrongfully recorded the identity of the body inside the Ziegler case as that of William Carroll. (Vol. III, C602-03). Securitas employees relied on the erroneous log book entry to determine the identity of the body in the Ziegler case and did not check for any identification tags or attempt to make a visual identification of the body prior to releasing it to Butler Funeral Homes for cremation. (Vol. III, C604).

Plaintiff further alleged that at the time of this incident, there was in place a "Security Policies" contract between Securitas and Memorial Medical Center. (Vol. III, C602). Security Policies Nos. 1014 and 1014-2 pertained to the procedures for receiving and releasing bodies in the morgue and established as follows: "The Security officer must also make sure that an identification tag is left visible with/on the body." (Vol. III, C602). Security Policy No. 1014-2 stated that "[a] coroner's case cannot be released to a funeral home until verbal confirmation to do so has been received from the Memorial Pathologist and the Coroner's office." (Vol. III, C603).

In its responses to Plaintiff's Supreme Court Rule 216 Requests to Admit Facts, Defendant admitted that Security Policies Nos. 1014 and 1014-2 were in force at the time of this incident. (Vol. IV, 687). Defendant further admitted that its employees did

not place an identification tag on Mr. Cochran's body when it arrived in the morgue. (Vol. IV, C688). Defendant also admitted that its employees did not place an identification tag on the exterior of the Ziegler case that contained Walter's body when it was released to Butler Funeral Home. (Vol. IV, C688).

III. DEFENDANT'S COMBINED MOTIONS TO DISMISS

Defendant responded to the Third Amended Complaint by filing a combined Section 2-615 and 2-619 motion to dismiss. (Vol. III, C610). Defendant's motion contained numerous arguments, including the allegation that Plaintiff's Third Amended Complaint "is a blatant attempt in violation of 735 ILCS 5/2-619 and Illinois Supreme Court Rule 137 to confuse the court and fails to state a cause of action upon which relief can be granted." (Vol. III, C620). Defendant further argued that Plaintiff was required to plead willful and wanton misconduct and that she had failed to do so, (Vol. III, C623), that Defendant was not a proximate cause of harm to Plaintiff, (Vol. III, C624), and that Plaintiff had failed to state a claim for recovery of emotional distress because she had not pled either that she had suffered a physical manifestation of her injury or that she was within a zone of physical danger, (Vol. III, C629).

Plaintiff responded to Defendant's combined motion to dismiss on July 28, 2015. (Vol. IV, C660). Plaintiff noted that "[f]or more than 100 years, the state of Illinois has recognized that next-of-kin have a right to possession of the remains of the decedent, including the right to determine the time, manner, and place of burial." (Vol. IV, C669). Plaintiff explained that Defendant wrongfully interfered with this right when its actions led to the misidentification and wrongful cremation of Walter's body. (Vol. IV, C670).

Plaintiff argued that she had pled facts supporting a finding of willful and wanton negligence on behalf of the Defendant, or, alternatively, that the willful and wanton standard was no longer justified pursuant to the current state of tort law. (Vol. IV, C671). Plaintiff also noted that she had not attempted to plead a cause of action for either intentional or negligent infliction of emotional distress and had merely requested emotional distress as an element of damages for the tort of wrongful interference. (Vol. IV, 679-80).

Defendant attached a number of documents to its motion and reply brief, including a copy of a "Security Services Agreement" between Securitas and Memorial Medical Center. (Vol. III, C641-55). Defendant also attached post-incident reports prepared by Securitas employees. (Vol. IV, C716-18). One report stated that Butler Funeral Homes personnel informed investigators that the body they picked up from the Memorial Medical Center morgue on September 16, 2010 did not "have any kind of identification on it." (Vol. IV, C718). Another report stated that Securitas personnel "did NOT see any type of ID or body tag on the Ziegler case." (Vol. IV, C716). Defendant also attached copies of the Memorial Medical Center morgue log book. (Vol. IV, C719-22). The entry for William Carroll contained the notation "Ziegler" as well as the handwritten note, "ERROR." (Vol. IV, C722). The entry for William Carroll also stated: "Permission to release given by Dr. Ralsten." (Vol. IV, C722). The corresponding entry for Walter Cochran was blank, indicating that his body had not been released by the coroner. (Vol. IV, C721).

The trial court heard oral argument on Defendant's combined motions on August 19, 2015. (Vol. IV, C36). There is no transcript of the motion hearing. The trial court subsequently entered an order of dismissal on September 23, 2015. (Vol. IV, C76). The trial court's written order stated as follows:

> The Defendant's Motion to Dismiss pursuant to 735 ILCS 5/2-615 is hereby granted with prejudice, the court having found that the Plaintiff has failed to plead sufficient facts to support the allegation of a duty allegedly owed by the Defendant, Securitas Security Services USA, Inc., to the Plaintiff, Donna Cochran.
>
> The Defendant's Motion to Dismiss Pursuant to 735 ILCS 5/2-619 is also hereby granted with prejudice, this court having found that there [sic] is no set of facts by which the Plaintiff may demonstrate a duty owed on the part of the Defendant, Securitas Security Services USA, Inc. to the Plaintiff, Donna Cochran.

(Vol. IV, C723-24; A3-1-2).

Plaintiff filed a Notice of Appeal on October 7, 2015. (Vol. IV, C736).

IV. FOURTH DISTICT APPELLATE COURT OPINION

The Fourth District agreed with Plaintiff that adoption of a negligence standard was appropriate for claims for wrongful interference. *Cochran v. Securitas Security Services USA, Inc.*, 2016 IL App (4th) 150791, ¶ 34. The Fourth District noted that the "legal landscape has slowly changed" and Illinois courts have "enlarged rather than restricted" the circumstances under which a plaintiff may claim damages for emotional distress. *Id.* at ¶ 42. The Fourth District held that "although the courts have traditionally been reluctant to allow negligence actions where only emotional damages are claimed, the more modern view supports the position taken by plaintiff in the instant case and recognizes an ordinary negligence cause of action arising out of the next of kin's right to

possession of a decedent's remains." *Id.* at ¶ 52. The Fourth District also noted that the tort for negligent infliction of emotional distress is independent from the tort for wrongful interference. *Id.* at ¶¶ 40, 47.

The Fourth District also addressed the issue of proximate cause and found Plaintiff had alleged sufficient facts to demonstrate that Defendant was a proximate cause of harm. *Id.* at ¶ 60. The appellate court noted that the factual allegations contained in Plaintiff's Third Amended Complaint "were sufficient to show that defendant's failure to follow security policies played a substantial role in the release of decedent's body to Butler," and that "it was foreseeable that the failure to follow security policies regarding the handling of deceased individuals in Memorial's morgue could result in the misidentification of a decedents remains and, in turn, the wrongful disposition of those remains and emotional harm to a decedent's next of kin." *Id.* at ¶ 60. The Fourth District reversed the trial court's judgment and remanded for further proceedings. ¶ 63. Defendant filed a timely petition for leave to appeal, which was granted by this Court on November 23, 2016. This appeal follows.

ARGUMENT

The trial court granted Defendant's combined motions to dismiss by finding that Defendant did not owe a duty to the Plaintiff and that no set of facts could be proven that would demonstrate Defendant owed a duty to the Plaintiff. (Vol. IV, C723-24). The Fourth District reversed the circuit court. *Cochran v. Securitas Security Services USA, Inc.*, 2016 IL App (4th) 150791. Plaintiff respectfully requests that this Court affirm the Fourth District's opinion for the following reasons: 1) Defendant had a duty not to interfere with Donna Cochran's right to possession of her son's body; 2) Plaintiff properly pled sufficient facts to support a cause of action premised on willful and wanton misconduct; and 3) the Fourth District correctly adopted the negligence standard because the willful and wanton standard is not consistent with Illinois law.

Defendant argues for a contrary result by analogizing this matter to the common law tort of negligent infliction of emotional distress. Defendant's argument is misguided. For more than 100 years, Illinois courts have recognized that the next-of-kin have an intrinsic right to possession of the body of their decedent, which includes the right to determine the time, manner, and place of burial. Interference with this right gives rise to a cause of action under common law tort. Illinois courts, as well as the authoritative texts, recognize that this is a freestanding tort with its own distinct elements of proof and damages. Further, this tort is distinguishable from those limited areas where evidence of enhanced negligence is required. Therefore, Plaintiff respectfully requests that this Court affirm the Fourth District's opinion and remand for further proceedings in the circuit court.

I. THE FOURTH DISTRICT CORRECTLY HELD THAT THE TRIAL COURT ERRED WHEN IT DISMISSED PLAINTIFF'S THIRD AMENDED COMPLAINT PURSUANT TO DEFENDANT'S COMBINED MOTIONS TO DISMISS.

A motion to dismiss pursuant to Section 2-615 of the Code of Civil Procedure challenges the legal sufficiency of the complaint by alleging defects on its face. 735 ILCS 58/2-615. The reviewing court must accept as true all well-pleaded facts in the complaint as well as all reasonable inferences that may be drawn from those facts. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill.2d 1, 607 N.E.2d 201, 205 (1992). The court also will construe the allegations in the complaint in the light most favorable to the plaintiff. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 11-12, 828 N.E.2d 1155 (2005). A cause of action should not be dismissed pursuant to Section 2-615 unless it is clear that no set of facts can be proven that would entitle the plaintiff to recovery. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 856 N.E.2d 1048, 1053 (2006).

The purpose of a Section 2-619 motion to dismiss is to dispose of issues of law and easily proven facts at the outset of litigation. *Zedella v. Gibson*, 165 Ill. 2d 181, 185, 650 N.E.2d 1000 (1995). The moving party admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter exists that will serve to defeat the plaintiff's claim. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115, 619 N.E.2d 723 (1993). A Section 2-619 motion is similar to a Section 2-615 motion in that the court accepts as true all well-pleaded facts in the complaint as well as all reasonable inferences that may be drawn from those facts. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189, 680 N.E.2d 265 (1997). The court also must interpret all

pleadings and supporting documents in the light most favorable to the non-moving party. *Id.*

Defendant focuses its argument on whether it was entitled to dismissal pursuant to Section 2-615 and argues that there is no need for this Court to consider Defendant's motion pursuant to Section 2-619. (Br. pg. 17). Plaintiff agrees that this matter is appropriate for resolution pursuant to Section 2-615. This Court should view the facts alleged in the Third Amended Complaint in the light most favorable to the Plaintiff and the Fourth District opinion should not be reversed unless there is no set of facts that can be proven that would entitle Plaintiff to recover. Plaintiff further asserts that the trial court erred when it dismissed the Third Amended Complaint pursuant to Section 2-615 for the following reasons: 1) Plaintiff properly alleged that Defendant owed a duty of care to Plaintiff not to interfere with her right of possession; and 2) the facts alleged in the Third Amended Complaint properly stated a cause of action premised on willful and wanton misconduct. Therefore, Plaintiff respectfully requests that this Court affirm the Fourth District opinion and remand for further proceedings in the circuit court.

A. Defendant Securitas Security Services USA, Inc. Owed a Duty of Care to Plaintiff Donna Cochran not to Interfere with Her Right to Possession of the Decedent.

For more than 100 years, the State of Illinois has recognized that there is a general duty not to interfere with the next-of-kin's right to possession of their decedent, and that this right includes the right to determine time, manner, and place of burial. *Palenzke v. Bruning*, 98 Ill. App. 644 (1901); *In re Medlen*, 286 Ill. App. 3d 860, 864, 677 N.E.2d 33 (2d Dist. 1997). Nonetheless, the circuit court held that Defendant Securitas

Security Services USA, Inc. did not owe a duty of care to Plaintiff Donna Cochran and dismissed Plaintiff's Third Amended Complaint pursuant to Sections 2-615 and 2-619 of the Code of Civil Procedure. (Vol. IV, C723-24; A3-1-2). This ruling was inconsistent with Illinois law. Therefore, the trial court erred when it held that Defendant Securitas did not owe a duty to Plaintiff Donna Cochran, and Plaintiff respectfully requests that the Fourth District's opinion reversing the trial court order be affirmed.

In order to state a cause of action for negligence, a plaintiff must establish the following elements: 1) the existence of a duty owed by the defendant to the plaintiff; 2) conduct that constitutes a breach of that duty; and 3) an injury proximately caused by the breach of duty. *Ward v. K Mart Corp.*, 136 Ill.2d 132, 140, 554 N.E.2d 223 (1990). The existence of a duty is established where the defendant and plaintiff stand in such a relationship to each other that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff. *Id. See also Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 525, 513 N.E.2d 387 (1987). Thus, the duty analysis focuses on the relationship between the parties and not on their conduct. *See for e.g. Marshall v. Burger King*, 856 N.E.2d 1048 (2006) (noting that the nature of the relationship determines whether there is a duty of reasonable care; whether the defendant breaches that duty under the particular circumstances of the case is a separate inquiry, and one that generally is reserved for the trier of fact).

The "relationship" between the plaintiff and defendant need not be a direct relationship between the parties. *Jane Doe-3 v. McLean County Unit District No. 5*, 2012 IL 112479, ¶ 21 (noting that where a duty exists "such a duty does not depend upon

contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons"). Rather, the court will look to the following four factors to determine whether a duty exists: 1) the foreseeability of the injury, 2) the likelihood of the injury, 3) the magnitude of guarding against the injury, and 4) the consequences of placing that burden on the defendant. *Gouge v. Central Illinois Public Service Co.*, 144 Ill.2d 535, 582 N.E.2d 108, 111-12 (1991). Whether a duty exists is a question of law to be determined by the court. *Kirk*, 117 2d. at 525.

The question in this matter is whether Defendant and Plaintiff stood in such a relationship to one another that Defendant owed a duty to Plaintiff not to interfere with her right to possession of her son's body. There is no common law property right in a dead body. *In re Estate of Medlen*, 286 Ill. App. 3d 860, 864, 677 N.E.2d 33 (1997). However, the next of kin have a quasi-property right to the possession of a decedent's remains in order to make appropriate disposition. *Rekosh v. Parks*, 316 Ill. App. 3d 58, 68, 735 N.E.2d 765 (2d Dist. 2000); *Leno v. St. Joseph Hospital*, 55 Ill. 2d 114, 117, 302 N.E.2d 58 (1973). "In Illinois, this has been construed to give the next of kin the right to determine the time, manner, and place of burial." *In re Estate of Medlen*, 286 Ill. App. 3d at 864. The courts have explained that this is not merely a legal right, but an intrinsic moral imperative:

> "[I]t is . . . true that the nearest relative of the deceased are and have been in all ages, so far as known, except under ecclesiastical law, recognized as legally entitled to its custody, to lay it away in burial. It is the duty no less than the right of such relatives to protect it from unnecessary violation, and any infringement upon that right, except where made necessary for the discovery and punishment of a crime, violates the tenderest sentiments of humanity."

Palenzke v. Bruning, 98 Ill. App. Ct. 644 (1901).

As such, a general duty is placed on all individuals not to interfere with the next-of-kin's right to possession of their decedent. *Drakeford v. University of Chicago Hospitals*, 2013 IL App (1st) 111366, ¶ 14. This duty is widely recognized and has been described in the authoritative texts as follows:

> One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or who prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.

Restatement (Second) of Torts, § 868 (1979).

Plaintiff alleges in her Third Amended Complaint that the body of her son, Walter Cochran, was transported to the Memorial Medical Center Morgue in Springfield in order for an autopsy to be performed. (Vol. III, C601). Employees of Defendant were responsible for receiving bodies delivered to the Memorial Medical Center morgue, as well as for releasing them for their final disposition. (Vol. III, C601). Defendant failed to follow written hospital policies with regard to the identification of bodies within the morgue. (Vol. III, C602). Defendant also failed to properly record the location of bodies within the morgue log book, which led to Walter Cochan's body being misidentified as the body of a man named William Carroll. (Vol. III, C603). Defendant then released Walter's body to Butler Funeral Homes in place of the body of William Carroll. (Vol. III, C603).

As is noted above, Illinois recognizes a general duty on all individuals not to interfere with the next-of-kin's right to possession. The facts alleged in Plaintiff's Third

Amended Complaint establish that Defendant was the sole entity responsible for tracking the identity and location of bodies in the Memorial Medical Center Morgue. The failure to follow industry policies and procedures led to the wrongful cremation of Walter's body. This harm was foreseeable as evidenced by the hospital's adoption of written policies intended to prevent the misidentification or wrongful release of bodies from the morgue. Further, the likelihood of injury was high as the failure to properly identify bodies leading to their wrongful release is certain to interfere with the next-of-kin's right to possession.

Contrastingly, the magnitude of guarding against the injury was minimal, as the act of ensuring that a body is properly identified requires no specialized training, expert knowledge, or extraordinary measures. The consequence of placing the burden on defendant also was minimal. Defendant had been hired specifically to receive, track, and release bodies in the morgue and was in the best position to prevent the type of harm that occurred in this matter. As such, after comparing the allegations contained in the Third Amended Complaint to the factors to be considered by this Court, it is clear that the parties stood in such a relationship as to create a duty on Defendant not to interfere with Plaintiff's right to possession of the decedent. Therefore, the trial court erred when it dismissed Plaintiff's claim for a failure to establish duty.

Defendant's brief does not separately address the question of duty. Defendant instead intertwines the concepts of duty and breach into a single argument by stating that the only duty owed by Defendant "is the duty to refrain from willful and wanton interference." (Brief, pg. 6). In a very abstract sense, that is a correct statement.

However, it is not technically accurate. This Court has drawn a clear distinction between the elements of duty and breach. The question of whether a defendant owed a duty to the plaintiff is a discrete legal inquiry from the question of whether defendant's conduct breached that duty. *Marshall v. Burger King*, 222 Ill. 2d 422, 856 N.E.2d 1048, 1053-54 (2006). The former is a question of law, while the latter generally is a question of fact. *Id. See also Espinoza v. Elgin, Joliet, and East Railway Co.*, 165 Ill. 2d 107, 649 N.E.2d 1323, 1326 (1995).

To the extent Defendant's brief implicitly asks this Court to merge the duty and breach inquiries into a single analysis, Defendant is advocating for an approach that this Court has discouraged. In *Marshall v. Burger King*, this Court noted that where a defendant requests that the court determine whether its particularized conducted was a violation of duty, "they are actually requesting that we determine, as a matter of law, that they did not *breach* their duty of care" (emphasis in original). *Id.* at 1061. This Court warned that "[i]t is inadvisable to conflate the concepts of duty and breach in this manner," and went on to explain that the issue of whether a particular act or omission constitutes a breach of a recognized duty is wholly separate from the question of whether a general duty exists. *Id.* (noting that the issue of breach cannot be decided at the pleadings stage). *See also Jane Doe-3 v. McLean County Unit District No. 5*, 2012 IL 112479, ¶ 45 (noting that while the court found the existence of a duty as a matter of law, "[w]e express no opinion on whether defendants have breached their duty of care, whether defendants acted willfully and wantonly, and whether defendant's breach was

a proximate cause of plaintiff's injuries, which are factual matters for the jury to decide.")

The question of whether Defendant owed a duty of reasonable care to Plaintiff is a separate inquiry from whether Defendant's conduct breached that duty. The facts alleged in Plaintiff's Third Amended Complaint establish that the Plaintiff and Defendant stood in such a relationship as to create a duty for Defendant not to interfere with Plaintiff's right to possession of her son's body. Thus, the trial court erred when it dismissed Plaintiff's Third Amended Complaint. Therefore, Plaintiff respectfully requests that this Court affirm the Fourth District's opinion, and remand to the circuit court for further proceedings.

B. Defendant Breached its Duty when it Engaged in Willful and Wanton Misconduct by Disregarding Written Safety Policies Intended to Prevent Misidentification of Bodies in the Morgue.

Defendant argued below that Plaintiff's Third Amended Complaint did not allege facts sufficient to support a claim premised on willful and wanton misconduct. In response, Plaintiff argued in the alternative as follows: 1) that the allegations contained in the Third Amended Complaint support a cause of action for willful and wanton misconduct; and/or 2) that the willful and wanton standard is no longer consistent with Illinois law, public policy, or a majority of jurisdictions, and that the court should instead follow a negligence standard. The Fourth District was persuaded by Plaintiff's second argument that the willful and wanton standard was a "legal anachronism that is no longer consistent with the current state of the law," and adopted the negligence standard set forth in Section 868 of the Restatement (Second) of Torts. However,

Plaintiff continues to maintain that regardless of the outcome of that argument here, the allegations contained in the Third Amended Complaint rise to the level of willful and wanton misconduct. Therefore, the trial court erred when it dismissed Plaintiff's Third Amended Complaint, and Plaintiff respectfully requests that this Court affirm the Fourth District opinion and order.

There is no separate and independent tort of willful and wanton misconduct. *Ziarko v. Soo Line R.R. Co.*, 161 Ill.2d 267, 274, 641 N.E.2d 402 (1994). Rather, willful and wanton misconduct is regarded as an aggravated form of negligence. *Krywin v. Chicago Transit Authority*, 238 Ill.2d 215, 938 N.E.2d 440, 452 (2010). To recover damages based on a defendant's negligence involving willful and wanton conduct, the plaintiff must allege and prove that the defendant owed a duty to the plaintiff, that the defendant breached that duty through willful and wanton misconduct, and that the breach was a proximate cause of the plaintiff's injury. *Id.* Whether certain conduct rises to the level of willful and wanton misconduct depends on the facts of each case. *Drakeford*, ¶ 11. Thus, the question of whether conduct is willful and wanton generally is a question of fact for the jury to decide. *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 123, 927 N.E.2d 137 (1st Dist. 2010).

Willful and wanton misconduct encompasses a wide range of conduct, covering the area between negligence and intentional wrongdoing and sharing many characteristics with acts of ordinary negligence. *Drakeford*, ¶ 10. In the context of a common law tort, willful and wanton misconduct is defined as "a course of action that shows utter indifference to or conscious disregard for the safety or property of others."

Pfister v. Shusta, 167 Ill.2d 471, 421-22, 657 N.E.2d 1013 (1995). Willful and wanton misconduct may be proven where there is a failure, "after a knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care." *Ziarko*, 161 Ill. 2d at 273 (*quoting Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569, 69 N.E.2d 293 (1946)).

Illinois courts first discussed the nature of the tort for wrongful interference with the next-of-kin's right to possession in *Mensinger v. O'Hara*, 189 Ill. App. 48 (1914). The plaintiff, Frederick Mensinger, alleged that his right to possession was violated after he entrusted the body of his deceased wife to the undertaker defendants for burial. *Id.* at 49. Plaintiff alleged that his wife had "a beautiful head of hair, very thick and of great length," and that without his consent the defendants had cut his wife's hair, which rendered the remains "unfit to be viewed by the plaintiff and his relatives and friends." *Id.* at 49-50. Mensinger alleged that because of the conduct of the defendants he "suffered greatly, both in mind and in body, and great indignity, insult and humiliation were put upon him." *Id.* at 50. The trial court entered a demurrer and dismissed plaintiff's complaint. *Id.* at 49. The appellate court reasoned that "a large and heavy head of hair cannot be 'cut off and removed' from a dead body by mere negligence," and concluded that plaintiff had alleged sufficient facts to support his claim, which was premised in willful misconduct. *Id.* at 51-52. On that basis, the appellate court reversed the dismissal of the trial court and remanded for further proceedings. *Id.* at 57.

In the intervening years, Illinois courts have relied on *Mensinger* to require plaintiffs follow a willful and wanton standard, and the courts have found the presence of willful and wanton misconduct under a variety of factual scenarios. For example, in *Rekosh v. Parks*, 316 Ill. App. 3d 58, 735 N.E.2d 765 (2d Dist. 2000), the plaintiff alleged that his right to possession of the remains of his deceased father was interfered with by his father's ex-wife, a funeral home, and a cemetery. Plaintiff alleged that shortly after the death of his father the ex-wife met with representatives of the funeral home, told them she was the decedent's current wife, and arranged for the decedent to be cremated. *Id.* at 770. Plaintiff filed suit against the ex-wife, the funeral home that arranged the cremation, and the cemetery that performed the cremation for wrongful interference with the right of the next-of-kin with possession of the decedent, as well as for negligent and intentional infliction of emotional distress. *Id.* The trial court dismissed the complaint in its entirety pursuant to a motion to dismiss filed by the defendants. *Id.* at 771.

With regard to the claim for wrongful interference with the right to the possession of the decedent, the appellate court reversed the order as it pertained to the ex-wife and the funeral home. *Id.* at 775-76. The court held that there were sufficient facts to conclude that the ex-wife was aware that she did not have the legal right to determine the final disposition of the decedent's body and that her conduct constituted willful and wanton misconduct. *Id.* at 775. With regard to the claim against the funeral home, the court concluded that the facts alleged showed a "conscious disregard of the rights of plaintiff" because the funeral home knew plaintiff existed, knew that he had a

right to possession of the decedent, and did not verify that he consented to the cremation. *Id.* at 776-77. The court held that the factual allegations contained in the complaint were sufficient to support plaintiff's complaint premised on willful and wanton misconduct against the funeral home. *Id.* at 777. However, the appellate court affirmed the dismissal against the cemetery finding that the cemetery's reliance on what appeared to be a valid cremation authorization form did not exhibit "conscious disregard" for plaintiff's rights, even though the form ultimately was found to be faulty. *Id.*

More recently, the First District considered willful and wanton misconduct in the context of a wrongful burial. *Drakeford v. University of Chicago Hospitals*, 2013 IL App (1st) 111366. The plaintiff, Alexandria Drakeford, filed a complaint against the defendant hospital alleging medical malpractice and wrongful interference with the right to the possession of the decedent after the death of her infant daughter. *Id.* at ¶ 1. Drakeford alleged that the defendant interfered with her right to possession when it buried her daughter's body in a mass, unmarked grave without consent and without performing a requested autopsy. *Id.* at ¶ 2. Plaintiff presented evidence at trial that an employee of the hospital failed to follow mandatory hospital policies and procedures concerning the handling of remains of deceased patients. *Id.* at ¶ 9. The jury returned a verdict in favor of defendant on the medical malpractice claim, but found in favor of the plaintiff for wrongful interference with her right to possession of the decedent. *Id.*at ¶ 2. The defendant appealed, arguing that the trial court erred in denying its motion for a

judgment notwithstanding the verdict and by alleging that the evidence presented at trial did not support a finding of willful and wanton misconduct. *Id.* at ¶ 5.

The appellate court held that the trial court did not err in denying the defendant hospital's motion for a judgment notwithstanding the verdict. *Id.* at ¶ 18. The court noted that there was conflicting evidence regarding the issue of whether plaintiff consented to the hospital's disposition of her daughter's remains. *Id.* at ¶ 15. However, there was sufficient testimony from which the jury could conclude that the hospital staff failed to follow mandatory hospital policies and that this amounted to willful and wanton misconduct because it demonstrated a conscious disregard for, or indifference to, plaintiff's right to possession of her deceased daughter's remains. *Id.* at ¶ 17. The appellate court noted that "a person can be guilty of willful and wanton conduct not only through an error in judgment but also from a failure to exercise judgment." *Id.*

These cases are instructive in this matter. *Rekosh* establishes that more than one party may be responsible for interference with the right to possession, a conclusion that is consistent with Illinois tort law. *See also Nelson v. Union Wire Rope Corp.*, 31 Ill.2d 69, 88, 199 N.E.2d 769 (1964) (noting that "it is fundamental in the law of negligence that there may be more than one proximate cause of injury"). *Drakeford* establishes that a failure to follow mandatory policies and procedures put into place to protect the rights of the next-of-kin constitutes willful and wanton misconduct. As such, both of these cases are similar to the facts of this case where Plaintiff alleged in her Third Amended Complaint that Defendant Securitas put into action a chain of events that began with its misconduct and ended with the wrongful cremation of Walter Cochran's body by Butler

Funeral Homes. Specifically, Plaintiff has alleged that Defendant was responsible for receiving bodies delivered to the Memorial Medical Center morgue and could only release them from the morgue after completion of the appropriate forms and with the permission of the coroner. (Vol. III, C601). Defendant also was responsible for ensuring that bodies were properly labeled when they arrived at the morgue and for maintaining a log book that accurately recorded the location of bodies. (Vol. III, C601).

Defendant failed to follow any of these safety procedures. (Vol. III, C601). Defendant did not ensure that Walter's body had a visible identification tag when it was received at the morgue. (Vol. III, C602). Defendant did not properly record the location of Walter's body in the morgue log book. (Vol. III, C603). Defendant did not have the proper forms or the consent of the coroner to release Walter's body (Vol. III, C603). Nevertheless, not only did Defendant release Walter's body, it affirmatively misidentified it as the body of a man named William Carroll. (Vol. III, C603). This caused representatives of Butler Funeral Homes to transport the body to their facility where it was cremated before Defendant's errors could be discovered. (Vol. III, C603).

The facts contained in Plaintiff's Third Amended Complaint, when accepted as true for the purposes of a Section 2-615 motion to dismiss, support the conclusion that Defendant's failure to follow mandatory safety precautions and industry standards was not the result of mere negligence, but showed an utter disregard for the rights of Donna Cochran. As such, the trial court erred when it dismissed Plaintiff's Third Amended Complaint because the complaint properly stated a cause of action premised on willful and wanton misconduct against Defendant Securitas. Therefore, Plaintiff respectfully

requests that the Fourth District opinion be affirmed, and that this matter be remanded to the circuit court for further proceedings.

II. ADOPTION OF THE NEGLIGENCE STANDARD IS CONSISTENT WITH ILLINOIS LAW AS WELL AS THE AUTHORITATIVE TREATISES AND A MAJORITY OF JURISDICTIONS.

Illinois courts have followed the willful and wanton standard since *Mensinger* was decided in 1914, and there has been little discussion over the last 100 years as to whether this is the appropriate standard. *See for e.g. Kelso v. Watson*, 204 Ill. App. 3d 727, 562 N.E.2d 975, 978 (3d Dist. 1990). The reliance on *Mensinger* to support this rule of law is somewhat perplexing as *Mensinger* itself did not expressly adopt the willful and wanton standard. *Mensinger* instead focused on whether the plaintiff had alleged facts to support his allegations that the defendants had acted intentionally or willfully. 189 Ill. App. at 51-52. *Mensinger* acknowledged that a line of cases already existed that allowed plaintiffs to recover for mental suffering where the alleged misconduct constituted ordinary negligence. *Mensinger, Id.* at 56-57.[1]

However, *Mensinger* declined to consider whether a cause of action could be sustained on mere negligence because that question was not at issue. *Id.* at 57 ("That doctrine has no necessary or controlling application to the facts of this case, where the wrongful act is alleged to have been intentionally committed.") Nevertheless, *Mensinger* has been repeatedly cited in support of the proposition that a plaintiff may only recover for willful and wanton misconduct. *See for e.g. Kelso v. Watson*, 204 Ill. App. 3d 727,

[1] *Mensinger* referred to this as the "Texas Doctrine," because it was described by the Texas Supreme Court in *So Relle v. Western U. Tel. Co.*, 55 Tex. 308. *Id.* (noting similar decisions in Alabama, Kentucky, North Carolina, Tennessee, and Iowa).

731, 562 N.E.2d 975 (3d Dist. 1990); *Hearon v. City of Chicago*, 157 Ill. App. 3d 633, 637, 510 N.E.2d 1192 (1st Dist. 1987).

Plaintiff argued below that even if the willful and wanton standard was appropriate when *Mensinger* was decided, it is a relic of the past that no longer reflects the current state of Illinois law. The Fourth District agreed. *Cochran v. Securitas Security Services USA, Inc.*, 2016 IL App (4th) 150791. In adopting the negligence standard, the Fourth District noted that while the willful and wanton standard historically was preferred, "the more modern view supports the position taken by plaintiff in the instant case and recognizes an ordinary negligence cause of action arising out of the of the next of kin's right to possession of a decedent's remains." *Id.* at ¶ 52. The Fourth District further noted that cases to the contrary "do not take into account the evolution of the law in this area and fail to persuade us to accept defendant's argument that circumstances of aggravation are necessary." *Id.* Plaintiff requests that this Court affirmatively adopt the view taken by the Fourth District and recognize that an injured party may pursue recovery for negligent interference with the next-of-kin's right to possession of the decedent.

At the time *Mensinger* was decided it appears that the willful and wanton standard was common, as is reflected by the Restatement of Torts, § 868 (1939), which defined the tort for wrongful interference with the next-of-kin's right to possession as follows:

> A person who wantonly mistreats the body of a dead person or who without privilege intentionally removes, withholds or operates upon the dead body is liable to the member of the

> family of such person who is entitled to the disposition of the body.

Restatement (First) of Torts, § 868 (1939).

However, the law evolved and Section 868 was revised to encompass claims for negligent conduct in the Restatement (Second):

> One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or who prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.

Restatement (Second) of Torts, § 868 (1979).

The comments to the revised Section 868 explain as follows:

> The technical basis of the cause of action is the interference with the exclusive right of control of the body, which frequently has been called by the courts a 'property' or a 'quasi-property' right. This does not, however, fit very well into the category of property, since the body ordinarily cannot be sold or transferred, has no utility and can be used only for one purpose of internment or cremation. In practice the technical right has served as a mere peg upon which to hang damages for the mental distress inflicted upon the survivor; and in reality the cause of action has been exclusively one for the mental distress. . . There is no need to show physical consequences of the mental distress.

Restatement (Second) of Torts, § 868, cmt. a (1979).

The 5th edition of *Prosser and Keaton on Torts* explained that the approach taken by Section 868 of the Restatement (Second) of Torts was a well-recognized exception to the general rule that where the only damages caused by a defendant's wrongful conduct are emotional or mental in nature, the plaintiff cannot recover without proof of an accompanying physical injury or illness:

> In two special groups of cases, however, there has been some movement to break away from the settled rule and allow recovery for mental disturbance alone. . . . [One] group of cases has involved the negligent mishandling of corpses. Here, the traditional rule has denied recovery for mere negligence, without circumstances of aggravation. There are by now, however, a series of cases allowing recovery for negligent embalming, negligent shipment, running over the body, and the like, without such circumstances of aggravation.

Prosser and Keaton on Torts, § 54, 361-62 (W. Page Keeton, et. al, eds., 5th ed. 1984). It went on to explain that in such instances where the injury is "is undoubtedly real and serious," then "there may be no good reason to deny recovery." *Id.*

Illinois has broadly relied on the provisions of the Restatement (Second) of Torts to guide evolution of the common law. Thus, the Fourth District's reliance on Section 868 to support adoption of a negligence standard was consistent with the long-standing practice of viewing the Restatement (Second) as an authoritative source of the law. *See for e.g. Cunis v. Brennan*, 56 Ill. 2d 372, 308 N.E.2d 617 (1974) (§ 282: Negligence); *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 146, 554 N.E.2d 223 (1990) (§ 343: Premises Liability); *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (§ 402A: Strict Liability for Defective Products); *McGrath v. Fahey*, 126 Ill. 2d 78, 533 N.E.2d 806 (1988) (§ 46: Intentional Infliction of Emotional Distress); *Lovgren v. Citizens First National Bank of Princeton*, 126 Ill. 2d 411, 534 N.E.2d 987 (1989) (§ 652: Privacy Torts); *Kuwik v. Starmark Star Marketing and Admin. Inc.*, 156 Ill. 2d 16, 619 N.E.2d 129 (1993) (§§ 593-99: Privileged Communications); *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 680 N.E.2d 265 (1997) (§§ 519-20: Ultra-Hazardous Activities; §822: Private Nuisance); *Frye v. Medicare-Claser Corp.*, 153 Ill. 2d 26, 605 N.E.2d 557 (1992) (§ 323: Voluntary

Undertaking); *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 605 N.E.2d 493 (1992) (§ 337: Trespassers).

Defendant briefly references in its argument that the First District reached a contrary conclusion 30 years ago in *Courtney v. St. Joseph Hospital*, 149 Ill. App. 3d 397, 500 N.E.2d 703 (1st Dist. 1986). In *Courtney*, the First District noted that it did not believe that recognizing a cause of action for negligent interference with right to the possession of the decedent would "open the door for fraudulent claims or encourage frivolous litigation." *Id.* at 400. The court noted that the damages experienced by the next-of-kin were "highly foreseeable," and were no less calculable then damages for pain and suffering. *Id.* The First District opined that adoption of a negligence standard was appropriate based on the evolution of the law. *Id.* However, the First District ultimately concluded that it was prohibited from adopting a negligence standard by this Court's ruling in *Rickey v. Chicago Transit Authority*, 98 Ill.2d 546, 457 N.E.2d 1 (1983), where the Court adopted the zone of danger test. As such, *Courtney* held that the plaintiff had failed to state a cause of action for negligent infliction of emotional distress because she had not alleged that she was within the zone of danger. *Id.* at 402.

This Court has since clarified that the zone of danger test applies only to cases where the plaintiff is alleging a claim premised on negligent infliction of emotional distress and not to cases where the plaintiff is claiming emotional distress as an element of damages for claims arising out of a separately recognized common law tort. *See for e.g. Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶111 (noting that "[w]hen it comes to mental or emotional distress, the usual rule allows free recovery of emotional

distress damages to any victim of a personal tort.") (*quoting* 2 Dan B. Dobbs, Law of Remedies, § 8.2 at 413-14 (2d ed. 1993)). *See also Schweihs v. Chase*, 2016 IL 120041, ¶ 80 (J. Garman, *specially concurring*) ("In light of our reasoning in *Clark* and the majority opinion in the present case, it should be clear that when a plaintiff claims NIED, she must allege a contemporaneous physical impact or injury as a direct result of the defendant's conduct or else that she was a bystander in the zone of physical danger. If, however, she states a claim for a tort other than NIED, no such additional pleading requirement applies.") Thus, the zone-of-danger test has no application to this matter because Plaintiff has not alleged negligent infliction of emotional distress, but instead has claimed emotional distress as an element of damages for the tort of wrongful interference with the next-of-kin's right to possession. Because of this distinction, adoption of the negligence standard in this matter will not conflict with this Court's prior rulings as they pertain to claims for negligent infliction of emotional distress.

Of course, Defendant does not argue that Plaintiff should be required to plead that she was within the zone of danger in order to state a cause of action for wrongful interference with the next-of-kin's right to possession. (Indeed, such a requirement would bar recovery in all but the most bizarre of factual scenarios.) Defendant instead argues that the tort for wrongful interference with the next-of-kin's right to possession should be treated differently than every other common law tort (where the plaintiff may freely pursue damages for emotional distress for negligent misconduct) because, in many instances, emotional distress may be the only element of proven damages for wrongful interference. Defendant argues that where mental anguish or emotional

distress is the only proven element of damages, a plaintiff should be denied recovery absent evidence of enhanced negligence.

This is a novel theory that has no existing counterpart in Illinois law, where the willful and wanton standard is reserved for a handful of well-defined situations. The areas where Illinois has adopted a willful and wanton standard can be divided into three general categories:

- Punitive Damages. A plaintiff must allege willful and wanton misconduct in order to recover punitive damages for a claim premised on negligent conduct. *Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 563 N.E.2d 397 (1990).
- Tort Immunity. The willful and wanton standard is used where the legislature has limited liability, generally to provide immunity to public entities or to individuals providing emergency services. *See for e.g.* 745 ILCS 10/et. seq. (Local Governmental and Governmental Employees Tort Immunity Act); 210 ILCS 50/17 (Emergency Medical Services Systems Act); 50 ILCS 750-15.1 (Emergency Telephone System Act); 745 ILCS 49/et. seq. (Good Samaritan Act).
- Assumption of Risk. The courts will use the willful and wanton standard where the injured party engages in behavior that increases the risk of harm. For example, a plaintiff must allege willful and wanton misconduct in order to recover damages against a landowner where the plaintiff was injured while trespassing on the defendant's property, *Rodriguez v. Norforlk & W. Railway Co.*, 228 Ill. App. 3d 1024, 593 N.E.2d 597 (1st Dist. 1992), or where

> the plaintiff is an illegal hitchhiker in a vehicle and brings suit against the driver, 625 ILCS 5/10-201. Illinois also requires a willful and wanton standard under the contact sports exception to the general negligence standard that applies to individuals injured during sporting activities. *See Pfister v. Shusta*, 167 Ill.2d 417, 657 N.E.2d 1013, 1017 (1995) ("Participants in team sports, where physical contact among participants is inherent and virtually inevitable, assume greater risks of injury than nonparticipants or participants in noncontact sports.").

See also IPI—CIVIL, 140.00 (2017).

None of these scenarios are analogous to the present case. Defendant is not entitled to governmental immunity. Defendant was not providing emergency medical services. Plaintiff did not assume a risk of harm through her conduct. To the contrary, Plaintiff attempted to reduce the likelihood of harm by entrusting her son's body to the proper authorities. Finally, Plaintiff is not seeking enhanced damages; rather, she merely is seeking fair compensation for the actual damages that she experienced. Thus, there is no precedent under Illinois law supporting Defendant's argument that Plaintiff should be required to plead enhanced negligence in order to recover for the damages caused by Defendant's wrongful conduct when it interfered with her right to possession.

Outside the limited exceptions where the willful and wanton standard is imposed, Illinois follows the negligence standard. The negligence standard is premised on the "well-settled proposition" that every person owes to all other persons "a duty to exercise ordinary care to guard against injury which naturally flows as a reasonably

foreseeable consequence of his act." *Jane Doe-3 v. McLean County Unit District No. 5*, 2012 IL App 112479, ¶ 30 (*quoting Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 32, 605 N.E.2d 557 (1992)). The negligence standard applies to all classes of individuals, including drivers, hospitals, physicians, architects, engineers, lawyers, accountants, landowners, etc., all of whom must conform their conduct to a negligence standard. *See Holton v. Memorial Hospital*, 176 Ill.2d 95, 679 N.E.2d 1202 (1997) (medical negligence); *Maple v. Gustafson*, 151 Ill.2d 445, 603 N.E.2d 508 (1992) (automobile driver); *Miller v. DeWitt*, 37 Ill.2d 273, 226 N.E.2d 630 (1967) (architect); *Ward v. K Mart Corp.*, 136 Ill.2d 132, 554 N.E.2d 223 (1990) (landowner); *Normoyle-Berg & Associates, Inc. v. The Village of Deer Creek*, 39 Ill. App. 3d 744, 350 N.E.2d 559 (3d Dist. 1976) (engineer); *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 856 N.E.2d 389 (2006) (lawyer); *Brumley v. Touche Ross & Co.*, 123 Ill. App. 3d 636, 463 N.E.2d 1195 (1984) (accountant).

If this Court were to follow Defendant's argument, entities that handle human remains would be immune from liability unless found guilty of enhanced negligence. Meanwhile, a physician performing surgery would be liable for acts that constitute mere negligence. There is no rational justification for this discrepancy. Thus, the negligence standard adopted by the Fourth District does not expand liability, but rather ensures that entities handling human remains are held to the same standard of care as all other individuals under Illinois law. Therefore, Plaintiff respectfully requests that this Court affirm the opinion and order entered by the Fourth District and remand to the circuit court for further proceedings.

A. A Majority of Jurisdictions have Adopted the Negligence Standard.

Adoption of the negligence standard by this Court would not be breaking new ground. As was noted by the Fourth District, the negligence standard is the legal standard that has been adopted by the majority of jurisdictions for the tort of wrongful interference, including the following states: Arizona, California, Connecticut, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, Nevada, New Jersey, New York, Ohio, Oregon, Tennessee, Texas, and West Virginia. *Cochran*, 2016 IL App 150791, ¶ 51. *See also Perry v. Saint Francis Hospital and Medical Center, Inc.*, 865 F. Supp. 724 (Dist. Kan. 1994); *Walser v. Resthaven Memorial Gardens, Inc.*, 633 A.2d 466 (Md. App. 1993); *Whaley v. County of Saginaw*, 941 F.Supp. 1483 (E.D. Mich. 1996). This is not a recent trend. Adoption of the negligence standard by other jurisdictions dates back to at least the 1960s. *See for e.g. Hovis v. City of Burns*, 415 P.2d 29 (Ore. 1966). Thus, the Fourth District's adoption of a negligence standard was not novel or experimental, but built upon the deliberate evolution of the common law in the United States.

The states that have adopted the negligence standard did so by recognizing the important public policy implications of allowing recovery for negligent conduct that interferes with the next-of-kin's right to the possession of their decedent. For example, the United States District Court for the Eastern District of Michigan noted that "[f]ew things are more cherished, respected, or sacred than the right to bury our dead," and that there is a "cognizable and compensable" interest that is violated absent the knowledge that "the deceased has been given a comfortable and dignified resting

place." *Vogelaar v. United States*, 665 F.Supp. 1295, 1306 (E.D. Mich. 1987) (holding that there was a genuine issue of material fact with regard to whether the federal government violated its duty of reasonable care in the misidentification of the remains of plaintiff's son who was killed in the Vietnam war).

The California Court of Appeals also noted that entities handling human remains should be subjected to a negligence standard of care as a matter of public policy. *Allen v. Jones*, 104 Cal. App. 3d 207, 214-15 (Ct. App. Calif. 1980). The California court further stated that the law should protect the public against "the psychological devastation likely to result from any mistake which upsets the expectations of the decedent's bereaved family." *Id.* The court went on to explain that "mental distress is a highly foreseeable result of such conduct and in most cases the only form of damage likely to ensue," and, as a result, "recovery for mental distress is a useful and necessary means to maintain the standards of the profession and the only way in which victims may be compensated for the wrongs they have suffered." *Id.*

Defendant concedes that a majority of states have adopted a negligence standard, but argues instead that the handful of states that continue to follow the willful and wanton standard represent the "better reasoned" decisions. Defendant cites to six states it argues support this argument: Florida, Georgia, Kansas, Pennsylvania, South Dakota, and Washington. However, a review of the cases cited by Defendant finds them to be lacking in their persuasiveness. Two of the states cited by Defendant declined to adopt Second 868 because it represented the "minority" view. *See Burgess v. Perdue*,

721 P.2d 239, 245 (Kan. 1986); *Chisum v. Behrens*, 283 N.W.2d 235, 239 (S.D. 1979). While that may have been true at one point in time, it clearly is no longer the case.

Three other cases cited by Defendant do not squarely address the question of whether it was appropriate for the court to adopt the negligence standard. *See Justice v. SCI Georgia Funeral Services, Inc.*, 765 S.E.2d 778, 781-82 (Ga. Ct. App. 2014) (noting that Georgia followed a willful and wanton standard with regard to interference with burial rights and briefly explained the burden of pleading for negligent versus willful and wanton conduct without considering whether to adopt a negligence standard); *Whitney v. Cervantes*, 328 P.3d 957 (Wash. App. 2014) (appellate court declined to consider plaintiff's argument in favor of adoption of a negligence standard because it was not timely); *Weilery v. Albert Einstein Medical Center*, 51 A.3d 202 (Pa. Super. 2012) (court declined to consider adoption of negligence standard because any expansion of law "must come from the Supreme Court itself, through express adoption of the 1977 Restatement (Second) revision of Section 868."). Thus, they do not provide strong support for Defendant's argument that this Court should choose to maintain the willful and wanton standard.

The final case cited by Defendant, *Gonzalez v. Metropolitan Dade City Public Health Trust*, 651 So. 2d 673 (Fla. 1995), declined to adopt Section 868 of the Restatement (Second) of Torts. However, it did not exclude all claims for negligent interference with right to possession of the decedent. *Id.* at 676. It merely required that a plaintiff prove either physical injury or willful and wanton conduct, which is consistent with Florida law for recovery of damages for emotional distress. *Id.* ("An action for

mental anguish based on negligent handling of a dead body requires proof of either physical injury or willful or wanton misconduct.") In a concurring opinion, Justice Kogan noted that the physical injury requirement was not likely to be an impediment to recovery because these types of claims have "serious potential to be a highly disturbing event to relatives and loved ones." *Id.*

Additionally, the Florida requirement that a plaintiff plead physical injury in order to recover for emotional distress is not consistent with Illinois law, which only requires proof of physical injury for individuals seeking to recover as a direct victim of negligent infliction of emotional distress. *See Schweihs v. Chase*, 2016 IL 120041, ¶ 44. *See also Corgan v. Muehling*, 574 N.E.2d 602 (1991). Thus, *Gonzalez* is of limited utility because it was premised on a legal requirement that has been abandoned by Illinois. Therefore, Plaintiff respectfully requests that this Court affirm the Fourth District's opinion and order and remand to the circuit court for further proceedings.

B. Wrongful Interference with the Next-of-Kin's Right to Possession is a Well-Recognized, Freestanding Tort.

Defendant argues that adoption of a negligence standard "would give plaintiffs in such cases a broader right of emotional distress recovery than exists under Illinois law for conduct directly involving a live person." (Br. 11). Defendant attempts to bolster this argument by analogizing this matter to claims premised on negligent infliction of emotional distress, which requires direct victims to allege contemporaneous physical injury or impact in order to recover. (Br. 12). Defendant fails to recognize that these claims are not analogous. Illinois law recognizes that a claim for negligent infliction of emotional distress is a separate and distinct tort from a claim for wrongful interference

with the next-of-kin's right to possession. The only similarity between the two claims is the type of damages that might be claimed by the plaintiff.

This lack of similarity is clear from Defendant's argument. Defendant does not argue that Plaintiff should be subjected to the same pleading requirements that are present in a claim for negligent infliction of emotional distress. Defendant does not argue that Plaintiff must plead that she was a direct victim who experienced physical injury or impact, or that she was a bystander within the zone of danger. These are essential elements for a claim for negligent infliction of emotional distress, but have no practical application here where the Plaintiff was not present when Defendant's actions interfered with her right to possession. Defendant instead argues that because a claim for wrongful interference and a claim for negligent infliction of emotional distress have similar damages, the Plaintiff should be required to plead enhanced negligence in order to recover for wrongful interference. (Meanwhile, individuals who plead a claim for negligent infliction of emotional distress are not required to plead willful and wanton misconduct and may proceed under an ordinary negligence standard.) This makes no logical sense.

A more rational outcome will be found by recognizing that these two claims are separate and distinct, and that the outcome of this case must be focused on the specific nature of this tort and the foreseeable harm resulting from a defendant's wrongful conduct. In claims for wrongful interference the courts have long recognized that in order to protect a next-of-kin's right to possession, they must allow recovery for emotional distress. *See Beaulieu v. Great Northern Railway Co.*, 103 Minn. 47, 114 N.W

353, 355 (Minn. 1907) ("Without the element of emotional distress, the action would be impotent of results and of no significance or value as a remedy for the tortious violation of the legal right of possession and preservation.")

This Court might also find useful guidance by referring to the law on property. As is noted above, while a body is not property *per se*, the cause of action for wrongful interference may be characterized as quasi-property in its nature. The distinguishing feature is that the ordinary measure of damages for property is the fair market value at the time of the loss and bodies have no extrinsic value. *See Long v. Arthur Rubloff & Co.*, 27 Ill. App. 3d 1013, 1025, 327 N.E.2d 346 (1st Dist. 1975). However, the law recognizes that there are some items of personal property that have no market value, such as heirlooms, photographs, trophies, and pets. *Janoski v. Preiser Animal Hospital, Ltd.*, 157 Ill. App. 3d 818, 820, 510 N.E.2d 1084 (1st Dist. 1987). In those instances the plaintiff is not denied recovery or subjected to a higher burden of proof. Rather, the plaintiff may "demonstrate its value to him by such proof as the circumstances admit" and the jury may award a verdict reflecting the property's "actual value to the plaintiff." *Long*, 27 Ill. App. 3d at 1026. These damages might properly characterized as the emotional distress caused to the plaintiff by the loss of the property.

A similar rationale can be applied here. Defendant, through its wrongful acts, has deprived Donna Cochran of her right to possession of her son's body. There is an intrinsic value to Mrs. Cochran's loss that is no less real or palpable than an individual who has suffered the loss of a family heirloom due to the negligence of another individual. While this type of damage is not readily calculated, it is no less compensable

than other forms of damages. Thus, it is consistent with Illinois law for a jury to compensate Mrs. Cochran for the value of her loss without requiring her to prove enhanced negligence.

Of course, this comparison is not directly on point. Nor should it be. Wrongful interference is a separate, freestanding tort based on a long-standing and well-recognized right of the next-of-kin to possession. This is referred to as a quasi-property right because it is similar to, but not the same as, a right to property. The law recognizes that wrongful interference is an independent tort with its own distinct elements of proof and damages. The fatal flaw in Defendant's argument is that it fails to recognize this factor and, in so doing, advances an argument that would lead to illogical and inequitable results. Donna Cochran suffered a real and cognizable harm because of the misconduct of Defendant Securitas. She should not be denied recovery simply because her damages are similar to the damages that may be sought by individuals who are the victims of the tort for negligent infliction of emotional distress. Therefore, Plaintiff respectfully respects that this Court affirm the opinion of the Fourth District, and remand to the circuit court for further proceedings.

C. Illinois Courts Do Not Deny Recovery for Proven Harm merely because Damages Might be Difficult to Calculate.

Defendant next argues that Donna Cochran should be denied the ability to recover for her damages because separating the grief caused by her son's death from the harm caused the wrongful cremation of Walter's body might be a "herculean" task. (Br. 13). Defendant does not cite any Illinois cases in support of this argument, and for good reason. Illinois courts have never denied a plaintiff recovery for proven damages

simply because their calculation might be difficult. *See Corgan v. Muehling*, 574 N.E.2d 602 (1991) (noting that in the 30 years since it abandoned the physical manifestation requirement to recover for claims of intentional infliction of emotional distress "this [C]ourt has not lost its faith in the ability of jurors to fairly determine what is, and is not, emotional distress.") *See also Snover v. McGraw*, 172, Ill.2d 438, 667 N.E.2d 1310, 1315 (1996) (noting that "[a]n award for pain and suffering is especially difficult to quantify," but that it nonetheless falls to the purview of the jury to do so). Further, juries are frequently tasked with determining the proper award for emotional distress damages and there is no reason to conclude that they would be any less capable of doing so in a matter involving wrongful interference. Therefore, Plaintiff respectfully requests that this Court affirm the Fourth District opinion, and remand to the circuit court for further proceedings.

D. Evolution of the Law should be Rational and Orderly, Not Based on Fear or Emotion.

Defendant next argues that adopting a negligence standard would "open the floodgates of litigation." This is an *ad terrorem* or "appeal to fear" argument. These use of this type of argument is relatively common, but it should rarely be persuasive because it asks the court to rule based on fear or emotion instead of a rational and methodical legal process. Further, Plaintiff in this matter is not asking this Court to adopt a novel or untested theory of liability, but merely to follow a legal standard that has not resulted in a litigation crisis in the jurisdictions where it currently is in use. Therefore, Plaintiff respectfully requests that this Court affirm the Fourth District opinion, and remand to the circuit court for further proceedings.

The fear of illegitimate claims should not act as a bar to recovery for legitimate harm. This Court in *Amann v. Faidy*, 415 Ill. 422, 114 N.E.2d 412 (1953) addressed this concern and noted that the "argument *ad terrorem* should have no weight to prevent legitimate claims from being heard." *Id.* at 431. The Court went on to explain that "[f]raud can be dealt with in this class of case, just as in others, and the detection and elimination of faked contentions present no novel question to judicial bodies." *Id.* Further, the *ad terrorem* argument is a well-recognized logical fallacy that asks the listener to focus on what is possible, not what is probable, and valid claims should not be legally prohibited based on mere possibilities. *See for e.g. Williams v. Fischer*, 221 Ill. App. 3d 117, 581 N.E.2d 744 (5th Dist. 1991) (J. Chapman, *specially concurring*) ("It is unfortunate that almost every time an aggrieved person seeks recourse, the age-old threat of 'opening a Pandora's box' or the more recent and ecologically frightening 'opening the floodgates of litigation' is summoned up to deny access to the courts. Sound empirical support for such claims is as rare as the threats are frequent.") In this matter, Donna Cochran has suffered a real and palpable harm. Her access to justice should not be limited because of some action that might be taken at some point in the uncertain future by some other individual who is not related to this case.

Additionally, Plaintiff is not asking this Court to adopt a new, novel, or experimental legal theory. The negligence standard for this type of claim has been in existence for more than 50 years. Of the 22 states that have adopted the negligence standard, there is no evidence that any of them have reversed their decision due to a litigation crisis. Indeed, a search of the reported cases where the negligence standard is

in use shows that Defendant's fears are not well founded. For example, the Supreme Court of Oregon allowed emotional damages for negligent interference with the right to the possession on the decedent in 1966. *Hovis v. City of Burns*, 415 P.2d 29 (Ore. 1966). Since then, *Hovis* has been cited by Oregon courts in conjunction with a claim for wrongful interference just two times, a rate of less than one case every 25 years. *See Burrough v. Twin Oaks Memorial Garden*, 822 P.2d 740 (Ct. App. Ore. 1991); *Bash v. Fir Grove Cemeteries, Co.*, 581 P.2d 75 (Ore. 1978).[2]

The California Supreme Court recognized this claim in 1980 and similarly has yet to be overwhelmed by lawsuits. *Allen v. Jones*, 104 Cal. App. 3d 207 (Ct. App. Calif. 1980). *Allen* has been cited by California courts in a similar context approximately five times since it was decided. *See Binns v. Westminster Memorial Park*, 171 Cal. App. 4th 700 (Ct. App. Cal. 2009); *Saari v. Jongordon Corp.*, 5 Cal. App. 4th 797 (Ct. App. Cal. 1992); *Christensen v. Superior Court of Los Angeles County*, 820 P.2d 181 (1991); *Quesada v. Oak Hill Improvement Co.*, 213 Cal. App. 3d 596 (Cal. Ct. App. 1989); *Ross v. Forest Lawn Memorial Park*, 153 Cal. App. 3d 988 (Ct. App. Cal. 1984).[3] This makes for a slightly more robust rate of one case every nine years, but nowhere near approaching what one might characterize as a "flood."

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[2] This list is limited to cases where *Hovis* is cited in the context of a claim for wrongful interference. It does not include cases involving other legal issues or cases from jurisdictions outside of Oregon.

[3] This list is limited to cases where *Allen* is cited in the context of a claim for wrongful interference. It does not include cases involving other legal issues or cases from jurisdictions outside of California.

In Illinois, *Mensinger* has been cited six times in wrongful interference cases since it was decided in 1914. *See Cochran v. Securitas Security Services USA, Inc.*, 2016 IL App (4th) 150791; *Drakeford v. University of Chicago Hospitals*, 2013 IL App (1st) 111366; *Kelso v. Watson*, 204 Ill. App. 3d 727; 562 N.E.2d 975 (3d Dist. 1990); *Hearon v. City of Chicago*, 157 Ill. App. 3d 633; 510 N.E.2d 1192 (1st Dist. 1987); Courtney *v. St. Joseph Hospital*, 149 Ill. App. 3d 397, 500 N.E.2d 703 (1st Dist. 1986); *Leno v. St. Joseph Hospital*, 55 Ill. 2d 114; 302 N.E.2d 58 (1973). Thus, in the unlikely event that a negligence standard increased the number of wrongful interference cases filed in Illinois, the overall number would still be comparatively low.

The lack of a proliferation of lawsuits is not unexpected. It is reasonable to predict that most entities that handle human remains fully understand the sensitive nature of their undertaking and take great precautions to ensure that the right to possession is preserved. In this matter Memorial Medical Center had instituted a number of policies in order to prevent the misidentification or wrongful release of bodies from its morgue. Unfortunately, Defendant Securitas did not follow them. Nevertheless, those policies were put into place to protect the next-of-kin's right to possession and to prevent the type of harm that occurred here. Self-regulation by entities that handle human remains reduces the likelihood of conduct that will give rise to claims for wrongful interference. Further, the number of potential plaintiffs is relatively small. The right to possession belongs to the next-of-kin. That right does not extend to everyone who is grieving the loss of the loved one or who might be upset by

the wrongful disposition of a relative or a friend's body. As such, the potential number of claims is limited by the restricted nature of the pool of potential plaintiffs.

Finally, the jury serves as the ultimate safeguard against a proliferation of frivolous lawsuits. A plaintiff cannot successfully recover in a case for wrongful interference unless the plaintiff convinces a jury that he or she has suffered damages above and beyond the grief experienced due to the relative's death. Because these damages are not readily calculated, this presents a substantial challenge to an injured plaintiff and reduces the likelihood of recovery in all but the most obvious of cases. As a result, Defendant's concerns are not well-founded and adoption of a negligence standard is unlikely to have a noteworthy impact on the number of lawsuits filed in Illinois. Therefore, Plaintiff respectfully requests that this Court affirm the Fourth District's order and opinion and remand this matter to the circuit court for further proceedings.

E. The Crematory Regulation Act Does Not Abrogate Claims for Wrongful Interference.

Defendant finally argues that this Court should not adopt the negligence standard because "the Illinois legislature has provided a remedy in cremation cases by enacting the Crematory Regulation Act, 410 ILCS 18/1 *et. seq.*" (Br. 15). Defendant notes that in *Rekosh v. Parks*, the First District upheld a trial court's dismissal of a cemetery for the wrongful cremation of a body under the common law willful and wanton standard, but reversed dismissal of the cemetery pursuant to a claim brought under the Crematory Regulation Act. (Br. 16). Missing from Defendant's argument is the acknowledgement that Plaintiff cannot recover under the Crematory Regulation Act for

the wrongful actions of Defendant Securitas. Defendant Securitas does not own or operate a crematorium. Defendant Securitas did not cremate Walter's remains. As such, Plaintiff cannot pursue a cause of against Defendant Securitas under the Crematory Regulation Act and the Act does not provide an alternative avenue of recovery for Plaintiff in this matter.

Defendant notes that Plaintiff also pursued a cause of action against Butler Funeral Homes under the Act. (Br. 17) Defendant argues that because a cause of action exists under the Crematory Regulation Act, "liability for a negligent cremation should properly fall on the entity that cremated the body without proper authority to do so." (Br. 17). This argument is problematic for two reasons. First, it ignores the fact that more than one party may be a proximate cause of harm. Second, it overlooks the following language contained in the Crematory Regulation Act:

> There shall be no liability for a crematory authority that cremates human remains according to an authorization, or that releases or disposes of the cremated remains according to an authorization, except for a crematory authority's gross negligence, provided that the crematory authority performs its functions in compliance with this Act.

410 ILCS 18/20(d).

It is entirely possible in a scenario similar to this matter that a jury could conclude a funeral home did not act with gross negligence when a body was misidentified by the actions of a third party and when the funeral home had a valid authorization form for the body it reasonably believed was in its possession. If recovery were limited solely to violations of the Act, then the next-of-kin would be left without any avenue of recovery. This is not an equitable outcome where there is a strong public

policy interest in ensuring that individuals who handle human remains are held to a high standard of care. Finally, Defendant's argument does not address the numerous factual scenarios where a defendant's wrongful conduct deprives the next-of-kin of their right to possession in a manner that does not result in wrongful cremation. Therefore, Plaintiff respectfully requests that this Court affirm the opinion of the Fourth District and remand to the circuit court for further proceedings.

III. THE TRIAL COURT ERRED WHEN IT DIMISSED PLAINTIFF'S THIRD AMENDED COMPLAINT BECAUSE DEFENDANT DID NOT ALLEGE THE EXISTENCE OF AN AFFIRMATIVE MATTER PURSUANT TO SECTION 2-619.

Defendant argues that there is no need for this Court to consider its Section 2-619 motion to dismiss. Plaintiff agrees. The purpose of a Section 2-619 motion to dismiss is to dispose of issues of law and easily proven issues of fact at the outset of litigation. *Zedella v. Gibson*, 165 Ill. 2d 181, 185, 650 N.E.2d 1000 (1995). The moving party admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter exists that will serve to defeat the plaintiff's claim. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill.2d 112, 115, 619 N.E.2d 723 (1993). Plaintiff noted at the appellate court that this matter was not appropriate for resolution pursuant to Section 2-619 because Defendant did not argue the existence of an affirmative matter that defeated Plaintiff's claim. The Fourth District agreed and held that because the record did not show the presence of any affirmative matter, the circuit court erred in dismissing Plaintiff's Third Amended Complaint pursuant to Section 2-619. *Cochran*, 2016 IL App (4th) 150791, ¶ 27.

In conjunction with Plaintiff's argument regarding the Section 2-619 motion to dismiss, Plaintiff objected to the documents attached to Defendant's motion for failure to comply with Supreme Court Rule 191(a). Defendant briefly raises the issue of Plaintiff's objection in its brief by arguing that any objection was forfeited on appeal. (Br. 17). Plaintiff notes here that contrary to Defendant's argument, there is no clear consensus with regard to forfeiture of a Rule 191(a) objection. This Court previously has held that the provisions of Rule 191(a) must be strictly enforced. *See Robidoux v. Oliphant*, 201 Ill.2d 324, 775 N.E.2d 987 (2002). Some of the appellate courts have adopted a forfeiture rule. *Landeros v. Equity Property and Development*, 321 Ill. App. 3d 57, 747 N.E.2d 391, 399 (1st Dist. 2001) ("Thought plaintiffs now contend this affidavit does not comply with Supreme Court Rule 191, they failed to raise that issue in the trial court. They cannot raise it for the first time on appeal.") However, others have held that the appellate court itself may raise the issue *sua sponte*, even where the issue was not raised by the parties at the trial court level or on appeal. *Hayward v. C.H. Robinson Co.*, 2014 IL App (3d) 130530; *Essig v. Advocate Bromenn Medical Center*, 2015 IL App (4th) 140546. This is an area that may require additional clarification in the future. However, because the parties agree that this matter is properly resolved pursuant to Section 2-615, resolution of this issue is not essential to the outcome of this case.

CONCLUSION

Plaintiff Donna Cochran was deprived of her intrinsic right to determine the time, manner, and place of her son's burial when the wrongful acts of Defendant Securitas Security Services USA, Inc., led to the wrongful cremation of her son's body. Defendant now seeks to avoid responsibility for its actions by asking this Court to continue to follow an archaic legal standard that is no longer consistent with the current state of the law or public policy. Illinois follows a negligence standard in all but a handful of well-defined areas. As a result, adoption of the negligence standard for the tort of wrongful interference will not expand liability or grant Plaintiff greater privileges under the law. To the contrary, it will ensure that Plaintiff receive fair compensation for the foreseeable harm caused by Defendant's misconduct.

Therefore, Plaintiff Donna Cochran respectfully requests that this Court affirm the opinion of the Fourth District Appellate Court, and remand to the circuit court for further proceedings. Alternatively, even if this Court maintains the willful and wanton standard, Plaintiff respectfully requests that the circuit court order be reversed because the trial court did not find that Plaintiff failed to state a claim premised on willful and wanton conduct. The circuit court dismissed Plaintiff's Third Amended Complaint with prejudice by finding that Defendant did not owe a duty to Plaintiff. This was contrary to Illinois law, which maintains that all individuals have a duty not to interfere with the next-of-kin's right to possession. Therefore, Plaintiff respectfully requests in the alternative that this Court remand to the circuit court for further proceedings consistent with its opinion.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14,008 words.

Amelia S. Buragas, attorney for
Plaintiff-Appellee Donna Cochran