

STATE OF MICHIGAN
COURT OF APPEALS

TAROLINE LITTLE, WARREN WILLIAMS,
NEDRA WILLIAMS, CASSANDRA RICKETT,
DEBORAH LINDSAY, AUDREY THORPE,
TYRONE WASHINGTON, and JOYCE
MARTIN,

Plaintiffs-Appellees,

v

SWANSON FUNERAL HOME, INC., and
O'NEIL D. SWANSON,

Defendants-Appellants,

and

MEADOWCREST MEMORIAL CEMETERY &
CREMATORIUM ASSOCIATION, INC.,

Defendant.

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

UNPUBLISHED
March 28, 2006

No. 258417
Wayne Circuit Court
LC No. 03-328077-NO

I. Introduction

Plaintiffs are surviving relatives of Willie Williams, who died in 2003. Plaintiff Taroline Little entered into a contract with defendants Swanson Funeral Home, Inc., and its director, O'Neil Swanson, for burial and funeral services, but defendants mistakenly had the decedent's body cremated. Plaintiffs sued defendants for negligence and malpractice, and with their complaint filed a motion for partial summary disposition on liability. The trial court granted

plaintiffs' motion for partial summary disposition on the issue of liability, thereby leaving the only issue for trial the determination of plaintiffs' damages.¹

This Court peremptorily reversed that order, holding that plaintiffs had not submitted sufficient evidence with their motion to obtain a judgment as a matter of law on liability. We further held that only plaintiff Little could sue for breach of contract, and that defendants had not presented adequate case law to establish that the decedent's stepchildren did not, as a matter of law, have standing.

On remand, plaintiffs filed another motion for partial summary disposition, again arguing that liability existed as a matter of law. This time, however, plaintiffs supported their motion with requests to admit and deposition testimony. Defendant also sought partial summary disposition, arguing that only plaintiff Little could maintain a negligence claim, and that O'Neil D. Swanson could not be held liable for professional negligence. The trial court again held that defendants were liable as a matter of law, that all the plaintiffs had standing, and that a professional negligence claim could be brought against the individual defendant. This Court granted defendants' interlocutory application for leave to appeal, which only challenged the trial court's ruling on standing and the legal viability of a professional negligence claim against a funeral director.² We affirm in part and reverse in part.

II. Analysis

This Court reviews a trial court's decision on summary disposition *de novo*. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although plaintiffs moved for summary disposition under MCR 2.116(C)(9) and (10), the trial court did not state under which subrule it was granting plaintiffs' motion. However, because the trial court considered evidence outside the pleadings, we will review the decision as if it was made under MCR 2.116(C)(10).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

¹ Defendant Meadowcrest Memorial Cemetery & Crematorium Association, Inc., was dismissed as a party after it settled with plaintiffs.

² In their brief on appeal, defendants list only two arguments for our consideration: (1) "Only Taroline Little can make out a *prima facie* claim of general negligence against Swanson Funeral Home" and (2) "No plaintiff can make out a *prima facie* claim of professional negligence or malpractice against O'Neil D. Swanson personally." Issues not set forth in the statement of issues presented, or contained in separate arguments, are not properly before this Court. MCR 7.212(C)(5); *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003).

Defendants argue that because plaintiff Taroline Little is the only plaintiff who contracted for funeral and burial services, any duty to properly handle the decedent's body is owed only to her and, accordingly, she is the only plaintiff who has standing to pursue a claim for negligent disposal of a body. "Whether a party has standing is a question of law," which this Court reviews de novo. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001). We conclude that defendants had a common-law duty that extends to all of the decedent's natural children, as the decedent's next of kin, but this duty did not extend to the decedent's stepchildren.³

There is no dispute that plaintiffs Taroline Little, Warren Williams, Nedra Williams and Cassandra Rickett are the decedent's natural children, and that plaintiffs Deborah Lindsay, Audrey Thorpe, Tyrone Washington and Joyce Martin are his stepchildren by marriage. Although only plaintiff Taroline Little contracted with defendants for the funeral and burial services, in *Deeg v Detroit*, 345 Mich 371, 375-377; 76 NW2d 16 (1956), our Supreme Court explained why a decedent's next of kin have a cause of action for the mutilation of a loved one's dead body:

It seems to be settled by the great weight of authority that the unlawful and intentional mutilation of a dead body gives rise to a cause of action on behalf of the person or persons entitled to the possession, control, and burial of such body. In *Keyes v Konkel*, 119 Mich 550 (44 LRA 242, 75 Am St Rep 423), it was held that an action of replevin would not lie for the recovery of a dead body, the common-law principle that there is no property right therein being applied. In discussing the situation presented in said case, it was said (p 551):

"Recovery for the refusal of the right to bury or for mutilation of the body is rather based upon an infringement of a right than upon the notion that the property of plaintiff has been interfered with. The recovery in such cases is not for the damage to the corpse *as property*, but damage to the next of kin by infringement of his right to have the body delivered to him for burial without mutilation."

In *Doxtator v Chicago & West Michigan R Co*, 120 Mich 596 (45 [LRA] 535, 6 Am Neg Rep 293), it was held that defendant was not liable to plaintiff for damages because portions of the limbs of her husband, who received injuries causing death as a result of being run over by cars of the defendant, were amputated and subsequently burned by employees of the hospital in which the operation was performed. The proofs indicated that defendant's physician and surgeon was not responsible for such disposition of the amputated members. In commenting on the general principles involved in such case, it was said (p 597):

"The plaintiff sues to recover damages on account of having been deprived of the right to give the remains of her deceased husband a Christian burial, and

³ Plaintiffs do not argue in their brief that our order in the prior appeal constitutes law of the case.

alleges that she was deprived of this right by the wrongful act of the defendant. At the common law there was said to be no property in a dead body, and in one sense this may still be deemed an accurate technical statement; but it has been held in a number of well-considered American cases that the one whose duty it is to care for the body of the deceased is entitled to possession of the body as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it in any way. *Larson v Chase*, 47 Minn 307 (50 NW 238, 28 Am St Rep 370); *Foley v Phelps*, 1 App Div 551 (37 NYS 471); *Burney v Children's Hospital*, 169 Mass 57 (47 NE 401, 61 Am St Rep 273); 8 Am & Eng Enc Law (2d ed), 834. This right is conceded."

As to who could bring such a lawsuit, the *Deeg* Court held it could be one or more of the decedent's next of kin:

As pointed out in *Keyes v Konkel*, *supra*, a cause of action of this nature is not based on the theory of an injury to property rights, nor does it involve a negligent injury to the person. The action rests on the theory that a personal right of the plaintiff *or plaintiffs* has been deliberately and wrongfully invaded. Such a cause of action was not assignable at common law, nor did it survive the death of either the plaintiff or the defendant. [*Id.* at 377-378 (emphasis added).]

More recently, in *Dampier v Wayne Co*, 233 Mich App 714, 728; 592 NW2d 809 (1999), we followed *Deeg* by holding:

"Michigan jurisprudence recognizes a common law cause of action on behalf of the person *or persons* entitled to the possession, control, or burial of a dead body for the tort of interference with the right of burial of a deceased person without mutilation." *Tillman v Detroit Receiving Hosp*, 138 Mich App 683, 687; 360 NW2d 275 (1984). [Emphasis added.]

Thus, according to *Deeg* and subsequent case law, a cause of action for mutilation of a dead body generally is vested in the person or persons who have a right to possess, control, or bury the body. See *Whaley v Tuscola Co*, 58 F3d 1111, 1115 (CA 6, 1995). *Deeg* does not hold that only the person who arranges for funeral or burial services may have a cause of action in tort, but rather that the cause of action belongs to those persons who have the *right* to possess, control, and bury the body. The right to bury a decedent extends only to the next of kin, which typically means a blood relative or the nearest blood relative. *MacDonald v Quimby*, 350 Mich 21, 31; 85 NW2d 157 (1957). See, also, *Whaley v Saginaw Co*, 941 F Supp 1483, 1490-1491 (ED Mich, 1996). If there is no surviving spouse of the decedent, the decedent's children have the right to dispose of the body. See 22A Am Jur 2d, Dead Bodies, §§ 21-22, pp 26-27, § 107, pp 90-91, and 25A CJS, Dead Bodies, § 23, pp 132-133.

In light of the foregoing, we conclude that the decedent's natural children, Taroline Little, Warren Williams, Nedra Williams, and Cassandra Rickett, have standing to bring this action, regardless of whether they each personally contracted or arranged with defendants for funeral and burial services, because a person need only have the *right* to dispose of the body to have standing to bring an action for the negligent handling of a body. Moreover, defendants have

provided no law suggesting that whoever happens to go to the funeral home to make arrangements is “the” next of kin entitled to bring a lawsuit. As a result, we conclude that the decedent’s stepchildren, Deborah Lindsay, Audrey Thorpe, Tyrone Washington, and Joyce Martin, do not have standing.

Defendants next challenge the trial court’s decision granting summary disposition in favor of plaintiffs against defendant O’Neil Swanson on the issue of professional liability. In this regard, defendants argue that Michigan does not recognize a claim for professional malpractice against funeral directors or morticians. Although defendants did not preserve this specific issue by raising it in the trial court or in their application for leave to appeal, *ISB Sales Co v Dave’s Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003); *Marshall v D J Jacobetti Veterans Facility (On Remand)*, 205 Mich App 540, 546; 517 NW2d 855 (1994), rev’d on other grounds 447 Mich 544 (1994), we can decide the issue because it is a question of law.

Defendants rely on *Dennis v Robbins Funeral Home*, 428 Mich 698, 705; 411 NW2d 156 (1987), to argue that Michigan does not recognize a claim for professional malpractice against funeral directors or morticians. In *Dennis*, the Supreme Court held that because a malpractice claim against funeral directors or morticians was not recognized at common law, the Legislature did not intend for the two-year period of limitations for malpractice claims to apply to claims against a funeral home and its director. Nonetheless, the Court recognized that a person engaged in mortuary science is practicing a profession, even if the malpractice statute of limitations does not apply. *Dennis, supra* at 705. Although the Court held that the malpractice statute of limitations did not apply to the defendants, it applied the three-year limitations period for death or injury to a person or property. The effect of the Court’s holding in *Dennis* was to recognize that funeral directors may be liable as professionals for negligence, but are not protected by the shorter limitation period for malpractice. Moreover, plaintiffs have not cited appropriate authority supporting their argument that funeral directors, although licensed professionals, may be liable for malpractice. As such, the trial court should have dismissed plaintiffs’ claim of malpractice against the individual defendant.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio