

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

THOMAS J. GERSTLEY, JR., TRISHA J. )  
COLLINGS, MARGARET D. GERSTLEY, )  
JAMES R. WARRINGTON, and )  
RUTH E. TAYLOR, )

Plaintiffs, )

v. )

C.A. No. N12C-10-126 EMD

FRANK MAYER, III, and )  
SPICER-MULLIKIN FUNERAL HOMES, )  
INC. )

Defendants. )

Submitted: November 14, 2014

Decided: February 11, 2015

*Upon Consideration of Defendants' Motion for Summary Judgment*  
**GRANTED, IN PART, and DENIED, IN PART**

*Upon Consideration of Defendants' Motion to Exclude the Expert Testimony of Richard Callahan - DENIED*

Jonathan B. O'Neill, Esquire, Kimmel, Carter, Roman & Peltz, P.A., Newark, Delaware and Karen M. Enright, Esquire, McNabola Law Group, Chicago, Illinois, Attorneys for Plaintiffs.

Colin M. Shalk, Esquire, Casarino Christman Shalk Ransom & Doss, Wilmington, Delaware, Attorney for Defendants.

**DAVIS, J.**

**I. INTRODUCTION AND PROCEDURAL HISTORY**

Plaintiffs Thomas J. Gerstley, Jr., Margaret D. Gerstley, Trisha J. Collings, James R. Warrington, and Ruth E. Taylor (collectively, the "Plaintiffs") filed a Complaint against Defendants Spicer-Mullikin Funeral Homes, Inc. (the "Funeral Home") and Frank Mayer, III

based on the accidental cremation of their relative, Cora V. Foy. In the complaint, Plaintiffs assert claims for breach of express and/or implied contract, negligence, gross negligence and/or recklessness, and interference with the right to burial. Plaintiffs seek special damages, general damages, and punitive damages, including for pain and suffering, and emotional distress.

The Funeral Home and Mr. Mayer filed an Answer on January 3, 2013. Thereafter, the parties engaged in discovery. On January 27, 2014, the Funeral Home and Mr. Mayer filed Defendants' Motion for Summary Judgment (the "Summary Judgment Motion"). Plaintiffs filed an Answering Brief on March 17, 2014. On March 18, 2014, the parties entered a Partial Stipulation of Dismissal as to all claims against Mr. Mayer. As such, the Court understands that Mr. Mayer is no longer a defendant and the sixth point of the Motion will not be considered by the Court. On March 31, 2014, the Funeral Home filed a Reply Brief.

Additionally, on March 20, 2014, the Funeral Home and Mr. Mayer filed Defendants' Motion to Exclude the Expert Testimony of Richard Callahan (the "Motion to Exclude"). Plaintiffs responded on May 23, 2014.

A hearing was held on all of these motions on November 14, 2014. After the hearing, the Court took the Motion to Exclude and the Summary Judgment Motion under advisement.

For the reasons set forth below, the Summary Judgment Motion is **GRANTED IN PART** and **DENIED IN PART**, and the Motion to Exclude is **DENIED**.

## **II. FACTUAL BACKGROUND**

In June 2011, the decedent, Ms. Foy, and her family contacted Mr. Mayer, and met with Mr. Mayer at Ms. Foy's residence to discuss her future funeral arrangements. Plaintiff Thomas Gerstley, Jr., Ms. Foy's grandson, and Plaintiff Margaret Gerstley, Ms. Foy's daughter-in-law and primary caregiver, were present during the meeting. When Mr. Gerstley asked Ms. Foy if

she wished to be cremated, Ms. Foy responded “no.” Mr. Mayer reiterated Ms. Foy’s decision not to be cremated to her to ensure that he understood correctly. Ms. Foy arranged to be buried in a plot alongside her late husband.

Ms. Foy passed away from natural causes on August 7, 2011. Mr. Gerstley is Ms. Foy’s sole personal representative. Ms. Foy is survived by Plaintiffs. All Plaintiffs are Ms. Foy’s close relatives. Mr. Gerstley and Ms. Collings are Ms. Foy’s grandchildren. Ms. Foy resided with Ms. Gerstley, who is Ms. Foy’s daughter-in-law. Ms. Gerstley was also Ms. Foy’s primary caregiver during the time period before her passing. Mr. Warrington and Ms. Taylor are Ms. Foy’s surviving siblings.

On August 8, 2011, Ms. Gerstley, the Funeral Home and Mr. Mayer signed a contract laying out the basic services and procedures for the funeral, and for the preparation of Ms. Foy’s body for burial. As was Ms. Foy’s desire, the contract specifically stated that Ms. Foy would be embalmed. Cremation services were not involved. No one ever filled out the requisite form that would authorize the Funeral Home to cremate Ms. Foy.

On August 12, 2011, the date that Ms. Foy’s funeral was scheduled to take place, Ms. Gerstley, Mr. Gerstley, and Ms. Collings went into a room to view Ms. Foy’s body. At this time, Ms. Gerstley, Mr. Gerstley, and Ms. Collings discovered that the body lying in the coffin, wearing Ms. Foy’s clothes and surrounded by Ms. Foy’s pictures and jewelry was not in fact Ms. Foy. The casket contained the wrong body.

Mr. Mayer was present in the room and immediately realized that, instead of being embalmed, the Funeral Home had cremated Ms. Foy. It appears that on the day that Ms. Foy was brought to the Funeral Home, a second body was also brought to the Funeral Home. Mark Belmont, an employee of the Funeral Home, did not immediately tag the bodies of Ms. Foy and

the other person as they came into the Funeral Home. Mr. Belmont then mixed up the tags, placing the wrong tag on Ms. Foy's body. As a result, the Funeral Home embalmed a person that was supposed to be cremated and cremated Ms. Foy who was supposed to be embalmed. Moreover, the Funeral Home buried the cremated remains of Ms. Foy, before her funeral, in the other person's burial plot.

Mr. Mayer presented Ms. Gerstley, Mr. Gerstley, and Ms. Collings with two options: postpone the service for one day or proceed, but with a closed casket. Ms. Gerstley, Mr. Gerstley, and Ms. Collings chose to proceed with the service that day. After the funeral, Mr. Mayer required Ms. Gerstley to execute a document stating that the cremation of Ms. Foy was approved. Ms. Gerstley did not wish to sign this document, but was told that she needed to execute it in order to have the remains exhumed. The Funeral Home then exhumed Ms. Foy's ashes, placed the ashes in an urn and prepared the ashes for another burial. On August 15, 2011, Plaintiffs attended a separate burial service where Ms. Foy's remains were buried in their proper place.

### **III. THE SUMMARY JUDGMENT MOTION**

#### **A. PARTIES' CONTENTIONS**

##### **1. The Funeral Home**

The Funeral Home makes a number of arguments in support of the Summary Judgment Motion. The Funeral Home first contends that Ms. Gerstley, Ms. Collings, Mr. Warrington and Ms. Taylor, have no standing to bring claims arising from the right to burial of the decedent, including: interference with the right to burial, and negligent and/or careless mishandling of the body. Second, the Funeral Home also argues that Plaintiffs, as a whole, have failed to state a claim upon which relief can be granted.

Third, the Funeral Home claims that the breach of contract claims must be dismissed, as the Funeral Home did not charge Plaintiffs for the services, and the claims circumvent the Delaware statute providing rights for these causes of action. Fourth, the Funeral Home alternatively contends that the Court should dismiss the breach of contract claims of Ms. Collings, Mr. Warrington, Ms. Taylor and Mr. Gerstley for lack of standing because these parties were not party to the contract of burial.

Fifth, the Funeral Home contends that the gross negligence and recklessness claims for failing to follow Plaintiffs' instructions must be dismissed as they fail to state a claim for which relief can be granted under Delaware law.

Sixth, the Funeral Home argues that the breach of contract claims against defendant Mr. Mayer must be dismissed, as he was not a party to the contract.

## **2. Plaintiffs**

Plaintiffs oppose all of the Funeral Home's contentions except the sixth contention (dismissal of Mr. Mayer). Plaintiffs contend that Ms. Gerstley, Ms. Collings, Mr. Warrington and Ms. Taylor have standing to bring claims dealing with interference with the right to burial. Plaintiffs also argue that they have alleged sufficient facts in their complaint to establish more than mere negligence, and therefore have stated a claim for which relief can be granted.

Plaintiffs contend that they can recover on their claims for breach of contract. Plaintiffs also argue that there is a material issue of fact as to whether Mr. Gerstley, Ms. Collings, Mr. Warrington and Ms. Taylor are intended beneficiaries to the contract between Ms. Gerstley and the Funeral Home. They further contend that contractual damages are generally a question of fact for a jury to decide and that, in the instant case, a jury could find that the Plaintiffs were not put in a position as if the contract had been correctly performed.

In addition, Plaintiffs contend that they have stated a claim for which relief can be granted with respect to the Funeral Home's purported gross negligence and recklessness in ignoring the instructions of Ms. Foy and Ms. Gerstley to embalm rather than cremate Ms. Foy's body.

As stated above, Plaintiffs agree that the breach of contract claim against Mr. Mayer should be dismissed.

## **B. STANDARD OF REVIEW**

The standard of review on a motion for summary judgment is well-settled. The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."<sup>1</sup> Summary judgment will be granted if, after viewing the record in a light most favorable to a non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.<sup>2</sup> If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.<sup>3</sup> The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.<sup>4</sup> If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for the resolution by the ultimate fact-finder.<sup>5</sup>

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<sup>1</sup> *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del.Super. Ct. 1973).

<sup>2</sup> *Id.*

<sup>3</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962). See also *Cook v. City of Harrington*, 1990 WL 35244 at \*3 (Del. Super. Ct. Feb. 22, 1990)(citing *Ebersole*, 180 A.2d at 467)("Summary judgment will not be granted under any circumstances when the record indicates ... that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").

<sup>4</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970)(citing *Ebersole*, 180 A.2d at 470).

<sup>5</sup> See *Brzoska v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).

## C. DISCUSSION

### 1. Ms. Gerstley, Ms. Collings, Mr. Warrington and Ms. Taylor have standing to bring claims arising from the right to burial of the decedent, including: interference with the right to burial, and negligent and/or careless mishandling of the body.

Standing to maintain a lawsuit “refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or redress a grievance.”<sup>6</sup> In deciding whether a party has standing to bring a claim, the court shall “consider who is entitled to bring a lawsuit rather than the merits of the particular controversy.”<sup>7</sup>

In Delaware, the right to bury a relative, is defined by the statute which governs the rights relating to the disposition of a decedent’s last remains.<sup>8</sup> Under the statute, the right to bury a decedent, or otherwise dispose of their last remains, belongs to the person, or persons, who have the first right under the statute.<sup>9</sup> The order is the persons who have this right is as follows: (1) the decedent if acting through a declaration instrument (2) the surviving spouse of the decedent, if not legally separated from the decedent (3) the appointed personal representative or administrator of the decedent’s estate etc.<sup>10</sup>

The Funeral Home contends that because Ms. Gerstley, Ms. Collings, Mr. Warrington and Ms. Taylor do not have any rights to dispose of the body, they cannot bring a claim for interference of the right to burial, and negligent and/or careless mishandling of the body. This theory is based on an English common law “quasi-property” right to bury the dead, which was limited to the person who had the right to the disposition of the body.<sup>11</sup> This case does not involve a dispute over who has a right to dispose of Ms. Foy’s remains. Plaintiffs’ cause of

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<sup>6</sup> *Omicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1168 (Del. Ch. 2002).

<sup>7</sup> *Id.* at 1168.

<sup>8</sup> 12 *Del. C.* § 264.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 264(a)(1)-(3).

<sup>11</sup> *Carney v. Knollwood Cemetery Ass’n*, 33 Ohio App.3d 31, 35 (1986).

action, therefore, does not derive from this quasi-property right. Instead, Plaintiffs assert a claim for the improper disposition of Ms. Foy's remains.

This cause of action, and standing to bring this cause of action, was discussed by the Superior Court of Delaware in *Boyle v. Chandler*.<sup>12</sup> In *Boyle*, the surviving husband and children of the deceased brought an action against an undertaker for improper and indecent burial.<sup>13</sup> The plaintiffs had selected a specific coffin for the decedent, and charged the undertaker with preparing the body for transportation to the city of burial.<sup>14</sup> Before the body was placed on the train, the undertaker removed the decedent from the first coffin, and placed the body in a cheaper coffin, in the process damaging the corpse.<sup>15</sup> The undertaker argued that the husband and children cannot be joined together in their suit, because it is the husband alone who has the legal right to sue.<sup>16</sup> However, the court disagreed and stated that the claim of the husband and children is not founded on any legal liability of the husband to bury his deceased wife, nor upon his right to inherit her estate.<sup>17</sup> Rather, the husband and children were legally joined as plaintiffs because they are the surviving members of the deceased's family, they had the legal right and duty of burying the deceased and were entitled to the solace of giving her body a decent and proper burial.<sup>18</sup>

Additionally, in *Fahey-Hosey v. Capano*, the Court reiterated that surviving family members have standing to pursue a claim for the mishandling or mistreatment of a corpse.<sup>19</sup> In that case, it was the siblings of the decedent who had standing to pursue such a cause of action.<sup>20</sup>

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<sup>12</sup> *Boyle v. Chandler*, 13 A. 273 (Del. Super. Ct. 1927).

<sup>13</sup> *Id.* at 274.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 275.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Fahey-Hosey v. Capano*, No. 98C-06-299 1999 WL 743985 at \*4 (Del. Super. Ct. Aug. 31, 1999) (citing *Boyle*, 138 A. at 275).



Likewise in this case, Ms. Gerstley, Ms. Collings, Mr. Warrington and Ms. Taylor, who were Ms. Foy's daughter-in-law and primary caregiver, granddaughter, and surviving siblings respectively, were entitled to the solace of giving Ms. Foy's body a decent and proper burial. Therefore, they have standing to bring claims arising from the right to burial of Ms. Foy, interference with the right to burial, and negligent and/or careless mishandling of the body.

**2. The parties have pled sufficient facts to state a claim upon which relief can be granted.**

Delaware law recognizes a cause of action for the mishandling or mistreatment of a corpse.<sup>21</sup> In order to recover for such a claim, Plaintiffs must allege something more than mere negligent conduct.<sup>22</sup> In *Boyle*, the Court instructed that if the jury felt the actions of the defendant were not only careless and negligent, but wanton, willful and fraudulent or grossly negligent and done in reckless disregard of the consequences to plaintiffs, the verdict should be in favor of the plaintiffs.<sup>23</sup>

In this case, Plaintiffs contend that the Funeral Home was grossly negligent and acting with reckless disregard. Gross negligence occurs when there is an extreme departure from the ordinary standard of care.<sup>24</sup> Recklessness is a conscious indifference to the rights of others by taking action where the risk of harm is foreseeable but the actor consciously takes the risk.<sup>25</sup> Sometimes gross negligence and recklessness are treated similarly.<sup>26</sup> A review of Delaware decisions discussing "recklessness" in the context of punitive damages shows that the acts and

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<sup>20</sup> *Fahey-Hosey*, 1999 WL 743985 at \*1.

<sup>21</sup> *Id.* at \*4 (citing *Boyle*, 138 A. 273 and *Nagle v. Riverview Cemetery Co.*, 86C-MR-92 (Del. Super. Ct. 1989)).

<sup>22</sup> *Fahey-Hosey*, 1999 WL 743985 at \*4; *Boyle*, 138 A. at 276.

<sup>23</sup> *Boyle*, 138 A. at 276.

<sup>24</sup> *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990).

<sup>25</sup> *JardelCo., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987).

<sup>26</sup> *See, e.g., Zimmerman v. Crothall*, C.A. No. 6001-VCP, 2012 WL 707238, at \*7 (Del. Ch. Ct. Nov. 17, 2011) ("recklessness is conduct similar or equal to 'gross negligence'").

state of mind constituting recklessness are different from those constituting gross negligence.<sup>27</sup> Recklessness requires “conscious indifference” and “conscious indifference” amounts to an “I don’t care” attitude.<sup>28</sup> An “I don’t care attitude” involves a state of mind that shows “the harm was ‘reasonably apparent but consciously ignored.’”<sup>29</sup>

The evidence shows that before her death, Ms. Foy advised the Funeral Home that she did not wish to be cremated. The funeral contract specifically stated that the Funeral Home was to embalm and not cremate Ms. Foy. The Funeral Home cremated Ms. Foy because Mr. Belmont mistagged Ms. Foy’s remains when she arrived at the Funeral Home. After the cremation, the Funeral Home required Ms. Gerstley to sign a document stating that she had permitted cremation, and the Funeral Home advised Ms. Gerstley that if she refused to sign the document, the Funeral Home would not be able to get the decedent’s ashes back.

Based on this evidence, a jury may find that an extreme departure from the standard of care took place, and the defendants acted with gross negligent. As this is a question of fact, the issue of whether the Funeral Home was grossly negligence should be presented to a jury, and the Summary Judgment Motion is denied on this point.

However, there is no evidence in the record that the Funeral Home acted with conscious indifference to the rights of others by taking action where the risk of harm is foreseeable. The facts do not demonstrate that Mr. Belmont or Mr. Myers took an “I don’t care attitude” with respect to Ms. Foy’s remains. Therefore, the Summary Judgment Motion is granted to the extent that Plaintiffs assert a separate recklessness claim.

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<sup>27</sup> See *Craig v. A.A.R. Realty*, 576 A.2d 688, 698 (Del. 1989); *Cloroben Chemical Corp. v. Comegys*, 464 A.2d 887, 891 (Del. 1983).

<sup>28</sup> *Craig*, 576 A.2d at 698.

<sup>29</sup> *Id.*

### **3. Plaintiffs may pursue breach of contract claims.**

To recover on a breach of contract claim, a party must prove the existence of an enforceable contract; the party performed or was ready to perform; that the other contracting party failed to perform; and that the failure to perform caused damages.<sup>30</sup> The appropriate measure of damages in a breach of contract action is that amount which will return the damaged parties to the position they would have been in had the breach not occurred.<sup>31</sup> Those damages include those which might have been foreseen or anticipated as being likely to flow from the breach.<sup>32</sup>

The Funeral Home contends that the breach of contract claims must be dismissed, because the Funeral Home did not collect any money for the services they completed and because the claims allegedly circumvent the Delaware Statute providing rights for these causes of action. The Funeral Home's argument fails.

As to Ms. Gerstley's contract claim, Ms. Gerstley and the Funeral Home had a contract, and Ms. Gerstley performed her portion of the contract by tendering the remains of the decedent and paying the embalming and funeral costs. The Funeral Home breached the contract by cremating Ms. Foy. In that circumstance, return of the consideration may not fully compensate for the breach of the contract. For example, Ms. Gerstley may have incurred additional expenses when working with the Funeral Home to get Ms. Foy properly buried or in setting up and attending the second funeral of Ms. Foy. The record is incomplete on this issue and does not seem developed enough to allow the Court to apply the law to the factual record. The Court

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<sup>30</sup> See, e.g., *VLIW Tech., LLC v. Hewlett-Packard, Co.*, 840 A.2d 606, 612 (Del. 2003).

<sup>31</sup> *Delaware Limousine Servs., Inc. v. Royal Limousine Serv., Inc.*, C.A. No. 87C-FE-104, Goldstein, J. (Del. Super. Ct. April 5, 1991), letter op. at 7, (citing *J.J. White, Inc. v. Metropolitan Merchandise Mart, Inc.*, 107 A.2d 892, 894 (Del. Super. Ct. 1954).

<sup>32</sup> *McClain v. Faraone*, Del. Super., 369 A.2d 1090, 1092 (Del. Super. Ct. 1977) (citing *Clemens v. Western Union Telegraph Co.*, 28 A.2d 889 (Del. Super. Ct. 1942).

holds that there are genuine issues as to material facts on Ms. Gerstley's breach of contract claim and any damages flowing from the breach and, therefore, summary judgment is not appropriate at this time.<sup>33</sup>

As was discussed *supra*, the claims of the remaining Plaintiffs do not arise from 12 *Del. C.* § 264, which pertains to the right to dispose of a body. Instead the claims arose from the tort of interference with the right to burial, and negligent and/or careless mishandling of the body as discussed in *Boyle*. Therefore, Plaintiffs are not circumventing a Delaware statute which provides rights for these causes of action, and the Summary Judgment Motion is denied on this point.

**4. There is an enforceable contract between Ms. Gerstley and Defendants only.**

As stated above, in order to pursue a breach of contract claim, the plaintiff must demonstrate that: (1) an express or implied contract exists, (2) the defendant breached an obligation imposed by the contract, and (3) the plaintiff suffered damages as a result of the breach.<sup>34</sup> Recovery under an implied contract is permitted only if there is "no express contract which governs the parties' rights and obligations."<sup>35</sup>

Here, it is undisputed that an express contract exists between Ms. Gerstley and the Funeral Home. Ms. Gerstley and Mr. Mayer, on behalf of the Funeral Home, signed the "Statement of Funeral Goods and Services Selected" which provided that the Funeral Home agreed to, *inter alia*, embalm the decedent's body for viewing in a specific casket in exchange for Ms. Gerstley's promise to make full payment. Because a written contract governs the

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<sup>33</sup> The Court notes, however, that Ms. Gerstley carries the burden of proof on damages. If Ms. Gerstley does not present evidence of damages beyond the contract price (which was not paid), then the Court may have to direct a verdict in favor of the Funeral Home at trial.

<sup>34</sup> *VLW Tech.*, 840 A.2d at 612.

<sup>35</sup> *Good v. Moyer*, 2012 WL 4857367 at \*5 (Del. Super. Oct. 10, 2012).

parties' rights and obligations in this matter, the Plaintiffs cannot recover under an implied contract theory.

Furthermore, Ms. Gerstley is the only plaintiff in this case with standing to sue for breach of the written contract. Generally, only the parties to a contract have enforceable rights and obligations and may sue for breach of that contract.<sup>36</sup> However, a third party beneficiary may recover contractual damages if the underlying contract was made for that third party's benefit.<sup>37</sup>

A third party beneficiary is created where: (1) the contracting parties intended that the third party would benefit from the contract, (2) the benefit is intended to be a gift or in satisfaction of a pre-existing obligation to the third party, and (3) the intent to benefit the third party is a material part of the contracting parties' purpose in entering into the contract.<sup>38</sup> The Court will look to the language of the contract to determine whether an intended third party beneficiary is created.<sup>39</sup> A third party who may well benefit from a contract, but is not part of any beneficial intent by the contracting parties, is an incidental beneficiary with no enforceable rights under the contract.<sup>40</sup>

Ms. Gerstley is the only plaintiff who is a party to the contract. Only her name is on the contract and she is the only plaintiff who signed the contract. Although additional family members were present when Ms. Gerstley and the Funeral Home executed the contract, those family members are not intended third party beneficiaries. There is no evidence in the record that Ms. Gerstley or the Funeral Home intended the written contract to benefit Mr. Gerstley, Ms. Collings, Mr. Warrington, or Ms. Taylor. The contract does not mention Mr. Gerstley, Ms.

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<sup>36</sup> *Triple C Railcar Serv., Inc. v. City of Wilm.*, 630 A.2d 629, 633 (Del. 1993); *Maglione v. BCBSD, Inc.*, 2003 WL 22853421 at \* 3 (Del. Super. July 29, 2003).

<sup>37</sup> *Global Energy Finance, LLC v. Peabody Energy Corp.* at 2010 WL 4056164, \*25 (Del. Super. Ct. Oct. 14, 2010).

<sup>38</sup> *State Dept. of Transp. v. Figg Bridge Engineers, Inc.*, 2011 WL 5593163 at \*2 (Del. Super. Ct. Nov. 9, 2011).

<sup>39</sup> *Bromwich v. Hanby*, 2010 WL 8250796 at \*2 (Del. Super. Ct. July 1, 2010) (granting summary judgment as to a breach of contract claim where the contract did not refer to the plaintiffs by name, general reference, or otherwise contain language that demonstrated an intent to confer third party beneficiary status upon the plaintiffs).

<sup>40</sup> *McClements v. Savage*, 2007 WL 4248481 at \* 1 (Del. Super. Ct. Nov. 29, 2007).

Collings, Mr. Warrington, or Ms. Taylor. Moreover, both Ms. Gerstley and Mr. Mayer have been deposed and neither testified that they entered into the contract intending to benefit Mr. Gerstley, Ms. Collings, Mr. Warrington, or Ms. Taylor. The Court will not extend a breach of contract claim to selected family members absent evidence that they were intended third party beneficiaries. Under these circumstances only Ms. Gerstley has a breach of contract claim against Defendants.

**5. Plaintiffs have pled sufficient facts for the gross negligence claim to go forward to a jury.**

The Funeral Home contends that the claims for gross negligence and recklessness should be dismissed as Plaintiffs have failed to state a claim for which relief can be granted, and because the Funeral Home claims that these are merely breach of contract claims worded differently.

As discussed *supra*, Plaintiffs have presented sufficient evidence that a jury may find that an extreme departure from the standard of care took place, and the Funeral Home acted with gross negligence. However, Plaintiffs have not presented sufficient evidence that a jury may find that the Funeral Home acted recklessly, therefore the Summary Judgment Motion is granted on this point.

Finally, also as discussed *supra*, Plaintiffs' claims of interference with the right to burial, and negligent and/or careless mishandling of the body arise in tort, and therefore are not merely breach of contract claims worded differently.

**6. The breach of contract claim against Mr. Mayer is moot.**

The parties have dismissed this claim against Mr. Mayer, therefore this issue is moot.

## IV. THE MOTION TO EXCLUDE

### A. PARTIES' CONTENTIONS

The Funeral Home contends that the testimony of Richard Callahan, Plaintiffs' expert, should be excluded because Mr. Callahan did not draft the Expert's Report, and because Mr. Callahan's conclusions were based on authorities which Mr. Callahan admitted to not utilizing. The Funeral Home also argues that Mr. Callahan's opinions should be excluded because the opinions are not the product of reliable principles and methods.

Plaintiffs contend that Mr. Callahan meets all the requirements of the Delaware rules on expert testimony because the Expert's Report was drafted based on Mr. Callahan's opinions, and because Mr. Callahan utilized Delaware Code Sections 3157 and 3159, as well as the National Funeral Directors Association Code of Ethics in reaching his opinions.

### B. STANDARD OF REVIEW

In the State of Delaware, expert testimony is governed by Delaware Rule of Evidence 702, which reads as follows:

Testimony by experts. If scientific, technical *or other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>41</sup>

When applying Rule 702, Delaware Courts follow the standards determined by the US Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*,<sup>42</sup> which requires the trial judge to

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<sup>41</sup> Del. R. Evid. 702 (emphasis added).

<sup>42</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

act as gatekeeper and determine whether the expert testimony is relevant and reliable and whether it will assist the trier of fact.<sup>43</sup>

In *Jolly v. State*,<sup>44</sup> the Delaware Supreme Court clarified that Rule 702 “allows opinion testimony by an expert only if it will assist the trier of fact.... If jurors, without the assistance of the expert, are as capable of answering a question as an expert, then the expert’s opinion would not be helpful and is not admissible.”<sup>45</sup>

In *Cunningham v. McDonald*,<sup>46</sup> the Delaware Supreme Court adopted a five-step test to determine the admissibility of scientific, technical other specialized knowledge testimony. The trial court must decide whether (1) the witness is qualified as an expert by knowledge, skill, experience, training or education; (2) the evidence is relevant and reliable; (3) the expert’s opinion is based upon information reasonably relied upon by experts in the particular field; (4) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and (5) the expert testimony will not create unfair prejudice or confuse or mislead the jury.<sup>47</sup>

### C. DISCUSSION

Plaintiffs’ claims are based on the Funeral Home’s alleged failures to adhere to the appropriate standards of care for a funeral home and for a funeral director. Given the nature of the claims, the Plaintiffs seek to present expert testimony that can establish the industry standards for each standard of care that the Plaintiffs allege was violated, and to provide expert opinion that the Funeral Home’s actions violated the standard of care.

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<sup>43</sup> *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999); *Brown v. United Water Delaware, Inc.*, WL 4716251 \*2, (Del. Super. Ct. 2011); *See also Goodridge v. Hyster Co.*, 845 A.2d 498, 503 (Del. 2004).

<sup>44</sup> *Jolly v. State*, 670 A.2d 1338 (Table) (Del. 1995).

<sup>45</sup> *Id.* at \*1.

<sup>46</sup> *Cunningham v. McDonald*, 689 A.2d 1190 (Del. 1997).

<sup>47</sup> *Id.* at 1193.



Plaintiffs selected Mr. Callahan as their expert on the issues of liability. Mr. Callahan has 30 years experienced in the funeral industry, is the past president of the Los Angeles County Funeral Director Association and a former board member of the California Funeral Directors Association and a member of its Ethics and Professionalism Committee. Mr. Callahan has been a licensed funeral professional since 1981 and he is board certified. Mr. Callahan signed a report (the “Expert’s Report”) that contains the opinions he reached in this case.

In preparation for his deposition and testimony Mr. Callahan reviewed: the complaint, the answers, the interrogatories and answers, the Delaware Code Annotated Section 3157, The National Funeral Directors Association Code of Ethics, The Guidelines for the Cremation Association of North America, The Delaware Ethics for Coroners, The Delaware Funeral Directors and Embalmers Licensing and Disciplinary Board, the depositions of the Plaintiffs and Defendants, and the funeral contract.

The Funeral Home’s first objection is that the Court should exclude Mr. Callahan’s opinion testimony at trial because the Expert’s Report was drafted by Plaintiffs’ counsel and not by Mr. Callahan. Mr. Callahan stated that the Expert’s Report was drafted only after he had extensive conversations with Plaintiffs’ counsel about his professional opinion. Mr. Callahan also stated that he reviewed the Expert’s Report, that it is an accurate reflection of his opinions and that he signed it only after reviewing the Expert’s Report. Mr. Callahan did not object to counsel drafting the Expert’s Report, because he believed that that was the requirement in this jurisdiction. As the Expert’s Report is a true representation of Mr. Callahan’s views, and was

drafted after consultation with Mr. Callahan, Mr. Callahan's opinion testimony will not be excluded on the basis that the Expert's Report was drafted by Plaintiffs' counsel.<sup>48</sup>

The Funeral Home's next objection involves the fact that Mr. Callahan stated at his deposition that the Guidelines for the Cremation Association of North America, the Delaware Ethics for Coroners, and the Delaware Funeral Directors and Embalmers Licensing and Disciplinary Board Provisions provided "no assistance" to him in reaching his opinions. However, earlier in the deposition, Mr. Callahan stated that he reviewed these guidelines before he gave his opinion. Mr. Callahan also stated separately in his deposition that the Delaware Code Sections 3157 and 3159, as well as the National Funeral Directors Association Code of Ethics were instrumental in developing his opinions. There is no requirement that an expert rely on all of the guideline documents which he considers before stating his opinion. The requirement is simply that "the expert's opinion is based upon information reasonably relied upon by experts in the particular field."<sup>49</sup> Mr. Callahan relied on Delaware Code Sections 3157 and 3159, as well as the National Funeral Directors Association Code of Ethics, which is information reasonably relied upon by experts in his field.

In their motion, the Funeral Home points out that Mr. Callahan admitted in his deposition testimony that his report was mistaken in its conclusion that multiple plaintiffs had the right to the disposition of the last remains. However, at the deposition, Mr. Callahan corrected himself and stated that in his experience, there is only one person at any given time that has that primary right of disposition.

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<sup>48</sup> The Court's decision that Mr. Callahan can provide opinion testimony does not mean that the actual physical Expert's Report is admissible. Generally, expert reports are not admissible as evidence as the report constitutes hearsay.

<sup>49</sup> *Id.*

The Funeral Home contends that the last paragraph on page 2 of the Expert's Report through the second full paragraph on page 3 of the Expert's Report is inadmissible because it contains conclusions drafted by Plaintiffs' counsel that were based on authorities that Mr. Callahan did not utilize. According to the Expert's Report, these paragraphs are based on the Delaware Funeral Code of Ethics Section on Cremation and on the National Funeral Directors Association Code of Professional Conduct. The Delaware Funeral Code of Ethics Section on Cremation is Delaware Code Sections 3157 and 3159 which Mr. Callahan stated at his deposition were instrumental in developing his opinions. The National Funeral Directors Association Code of Professional Conduct appears to be the National Funeral Directors Association Code of Ethics, which was also cited by Mr. Callahan as instrumental in reaching his conclusions. Based on this, the Court rejects the Funeral Home's argument that Mr. Callahan cannot testify as to his opinions contained on pages 2 and 3 of the Expert's Report.

The Funeral Home next states that Mr. Callahan could not point to any law which would help determine the duties of the embalmer who mistakenly tagged the remains of the decedent, but rather that Mr. Callahan believed that it was the industry standard, based on his personal experience, education and training. In essence, the Funeral Home contends that Mr. Callahan's opinions are not admissible because his industry standard opinions are based on 30 years of experience instead of statutory or case law establishing the standards.

Mr. Callahan has 30 years of experience, has specialized knowledge, is familiar with both the relevant statutory law and codes of conduct, and has reviewed the facts surrounding this case. Based on the foregoing, it is clear that Mr. Callahan's opinions are based upon information reasonably relied upon by persons with specialized knowledge in the particular field, and that the testimony will assist the trier of fact in understanding the appropriate standards of care for a

funeral home and for a funeral director. As such, the Defendants' Motion to Exclude the Expert Testimony of Richard Callahan is denied.

**V. CONCLUSION**

For the foregoing reasons Defendants' Motion for Summary Judgment is **DENIED in PART and GRANTED in PART**, and Defendants' Motion to Exclude the Expert Testimony of Richard Callahan is **DENIED**.

**IT IS SO ORDERED.**

/s/ *Eric M. Davis*  
Eric M. Davis  
Judge