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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

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LeeAnn Bailey; Charlotte Cali; Candy Chhoeun;
Stephanie Simpkins, individually and
as next friend of T.S., a minor; Jennifer Friedman;
Robert Friedman; Teresa Jones; and Kevin Muir

v.

City of Leeds

Appeal from St. Clair Circuit Court
(CV-18-36)

EDWARDS, Judge.

LeeAnn Bailey; Charlotte Cali; Candy Chhoeun; Stephanie
Simpkins, individually and as next friend of T.S., a minor;

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Jennifer Friedman; Robert Friedman; Teresa Jones; and Kevin Muir (hereinafter collectively referred to as "the plaintiffs") have relatives who are buried in the Cedar Grove Cemetery ("the cemetery"), which is owned and operated by the City of Leeds ("the City"). The plaintiffs appeal from an order entered by the St. Clair Circuit Court ("the trial court") granting the City's motion for a summary judgment regarding the plaintiffs' claims that the City's employees wrongly entered onto the cemetery plots containing the graves of the plaintiffs' relatives ("the cemetery plots") and wrongly removed and wrongly damaged various personal-property items ("the adornments") that had been placed on the cemetery plots of those relatives.¹ The deceased relatives at issue are, in relation to the plaintiffs: Bailey's mother (died in 2014), father (died in 2000), and sister (died in 1985); Cali's mother (died in 2012); Chhoeun's daughter (died in 2005); Jennifer Friedman, Robert Friedman, and Simpkins's

¹For purposes of this opinion, we use the term "adornments" to distinguish the personal-property items at issue from the headstone or footstone that is intended to permanently mark the location of a decedent's grave; from the casket, vault, or urn in which a decedent's body is placed for burial; and from a crypt or other permanent structure intended to contain the casket or the cremated remains of a decedent.

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mother (died a few years before 2017), who also is T.S.'s grandmother (Simpkins is T.S.'s mother); Jones's mother (died in 2010) and father (died in 1996); and Muir's grandmother (died in 2015) and grandfather (died in 2001) (hereinafter collectively referred to as "the respective relatives"). The type of adornments at issue differed among the cemetery plots and collectively included items such as concrete benches, some of which had been personalized with small plaques or other similar sentimental items or decorations; a wooden cross that was eventually replaced by a headstone; concrete or ceramic angels, statutes, or planters placed on a headstone or near a headstone or footstone; glass or transparent angels or crosses that illuminated and were hung from "sticks"; "shepherd's hooks" on which were hung items such as birdhouses, baskets containing silk flowers, or wind chimes; and small vases, either freestanding or that had been placed on a headstone.

It is undisputed that the cemetery originally belonged to the Cedar Grove Baptist Church, that the cemetery was eventually expanded and transferred to the City in the 1950's or 1960's, and that the City thereafter owned and operated the

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cemetery. Also, based on the deposition-testimony excerpts from the respective depositions of the plaintiffs, certain of the plaintiffs purchased a cemetery plot for burying a respective relative and those plaintiffs received a corresponding deed from the City to such plot; other of the plaintiffs are purportedly interested next of kin of one of the respective relatives, but did not purchase the cemetery plot where the respective relative is buried.²

On December 4, 2017, the plaintiffs filed a complaint in the trial court against the City and David Miller, in his individual capacity; Miller was the City's mayor when the events purportedly giving rise to the plaintiffs' claims occurred. The plaintiffs later voluntarily dismissed their claims against Miller, which the trial court acknowledged in its final order issued on May 13, 2019. Regarding the plaintiffs' claims against the City, the complaint alleged that, on March 6, 2017, the City Council of Leeds ("the city council") passed a resolution regarding the cemetery ("the

²No party has argued that the documents associated with the transfer of the cemetery to the City or with the City's subsequent sale and transfer of the cemetery plots include any language pertinent to the resolution of this case.

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2017 resolution") and that, on or about March 17, 2017,³ the City's employees entered the cemetery and (1) trespassed on the graves of the respective relatives without proper notice to the plaintiffs and without the plaintiffs' consent; (2) desecrated those graves "by removing irreplaceable items such as benches, monuments, and other decorative and symbolic markers," i.e., the adornments, see note 1, supra; and (3) negligently removed and "carelessly dumped" the adornments into a lot owned by the City, resulting in damage to, destruction of, or loss of those adornments. The plaintiffs' complaint included counts of negligence and trespass against the City, and the plaintiffs' sought compensatory damages in an unspecified amount for alleged "physical pain, emotional distress, mental anguish, loss of irreplaceable personal property, and the loss of solace in visiting the graves." The plaintiffs also sought punitive damages, injunctive relief, and other "just and proper" relief.

The City filed an answer to the plaintiffs' complaint, generally denying the pertinent allegations thereof and

³The actual date of the cleanup apparently was March 16, 2017.

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asserting various affirmative defenses, including municipal immunity pursuant to Ala. Code 1975, § 11-47-190.⁴ On April 11, 2019, the City filed a motion for a summary judgment. According to the City, no disputed material facts existed regarding the plaintiffs' claims. The City argued that the 2017 resolution reflected a proper exercise of the City's power to regulate cemeteries pursuant to Ala. Code 1975, § 11-47-40 et seq., that the city council had properly and unanimously passed the 2017 resolution, and that the city council did not have to comply with the "publication and notice requirements" governing ordinances, see Ala. Code 1975, § 11-45-8, when passing the 2017 resolution. Regarding the

⁴Section 11-47-190 states that

"[n]o city ... shall be liable for damages for injury done to or wrong suffered by any person ..., unless such injury or wrong was done or suffered through the neglect, carelessness, or unskillfulness of some agent, officer, or employee of the municipality engaged in work therefor and while acting in the line of his or her duty"

See Cremeens v. City of Montgomery, 779 So. 2d 1190, 1201 (Ala. 2000) ("A municipality cannot be held liable for the intentional torts of its employees. See Ala. Code 1975, § 11-47-190."); Town of Loxley v. Coleman, 720 So. 2d 907, 909 (Ala. 1998) (same as to wanton misconduct); see also Ala. Code 1975, § 6-11-26 (prohibiting an award of punitive damages against a municipality).

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plaintiffs' negligence claims, the City argued that the plaintiffs had no evidence to support the conclusion that the City had breached any duty it might have owed to the plaintiffs and that, as a matter of law, the plaintiffs were not entitled to damages for mental anguish or emotional distress because they had suffered no physical injury and because they had not been placed in immediate risk of physical harm by the alleged wrongful conduct at issue. The City also argued that the plaintiffs could not establish a claim of trespass because, it said, they did not own the land on which the respective cemetery plots were located and because only some of plaintiffs -- Bailey, Cali, Chhoeun, and Jennifer Friedman -- held deeds to any of the cemetery plots. The City further argued that its employees had had a right to enter and maintain the cemetery plots and that its employees had not unlawfully entered those plots. Finally, the City argued that Ala. Code 1975, § 6-11-26, precluded the plaintiffs from recovering punitive damages against the City. In support of its motion for a summary judgment, the City submitted a copy of the 2017 resolution; a copy of a resolution purportedly passed by The Cemetery Advisory Board of the City of Leeds on

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March 10, 2011 ("the 2011 advisory-board resolution"); a copy of "Rules and Regulations of the Cemeteries of the City of Leeds" that were purportedly "Revised: March 10, 2011" ("the 2011 regulations"); an affidavit from Miller; and deposition-testimony excerpts from the depositions of the respective plaintiffs, Miller, and Bradley Watson, who was the zoning administrator for the City at all times pertinent to this case.

On May 2, 2019, the plaintiffs filed a response opposing the City's motion for a summary judgment. The plaintiffs argued that there was no evidence indicating that the 2011 regulations had been adopted by the city council before the passage of the 2017 resolution and that the 2017 resolution purporting to adopt the 2011 regulations was void ab initio because those regulations were in the nature of an ordinance and the city council had failed to satisfy the requirements for passing an ordinance when it passed the 2017 resolution. Specifically, the plaintiffs contended that the city council had failed to comply with the notice and publication requirements for enacting an ordinance under § 11-45-8. Accordingly, the plaintiffs argued, the City's employees had

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had no authority to remove or to damage the adornments. Further, the plaintiffs argued that, even if the 2017 resolution was properly enacted, genuine issues of material fact existed regarding the notice provided regarding the 2011 regulations and their implementation and enforcement, regarding whether the City's employees' actions were a proper enforcement of the 2011 regulations, and regarding whether the City's employees had authority "to lose and/or break [the adornments] belonging to [p]laintiffs" or had a duty to exercise due care in handling the items at issue. The plaintiffs also argued that damages for mental anguish were available to them because the City's employees had desecrated the graves of the respective relatives. Regarding the trespass claim, the plaintiffs further argued that they were not required to have deeds to the cemetery plots at issue in order to maintain that claim. The plaintiffs did not respond to the City's argument that punitive damages could not be awarded against the City. In support of their response to the City's motion for a summary judgment, the plaintiffs submitted, among other documents, the same documents submitted by the City in support of its motion; a copy of "Cemetery

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Guidelines" that had purportedly been issued by the City before the 2011 regulations ("the undated cemetery guidelines"); additional deposition-testimony excerpts; copies of photographs of some of the purportedly damaged adornments; and a copy of the minutes for the respective meetings of the city council on February 20, 2017, and on March 20, 2017.

On May 6, 2019, the City filed a reply to the plaintiffs' response to the City's motion for a summary judgment. On May 13, 2019, the trial court entered a summary judgment in favor of the City regarding the plaintiffs' claims against the City. The plaintiffs appealed to the Alabama Supreme Court, which transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.

When reviewing an order granting a motion for a summary judgment,

"we use the same standard the trial court used in determining whether to deny or to grant the summary-judgment motion. We must determine whether the evidence presents a genuine issue of material fact and whether [the City], the movant, was entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P. If [the City] makes a prima facie showing that no genuine issue of material fact exists, the burden then shifts to [the plaintiffs] to present substantial evidence creating such a genuine issue of material fact. Bass v. SouthTrust Bank, 538 So. 2d 794, 798 (Ala. 1989). Evidence is

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'substantial' if it is of 'such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). This Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant."

Glass v. Birmingham Southern R.R., 905 So. 2d 789, 792-93 (Ala. 2004).

Before addressing the plaintiffs' arguments, we will discuss some of the evidence regarding the material facts. As noted above, the undated cemetery guidelines are titled "Cemetery Guidelines." The undated cemetery guidelines are approximately one and one-half pages in length. Under the heading "Landscape Regulations," the undated cemetery guidelines state, in part, that "[n]o personal items are allowed and will be removed without notice"; that "[d]ead or unsightly flower arrangements will be removed by our cemetery staff after an appropriate period of time"; that "bulbs/flowers may be planted at or around the headstone, however, the remained[er] of the area must be clear for mowing"; that "[t]he Cemetery reserves the right to remove any tree, plant, or shrub at any time without notice"; that "[t]he

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Cemetery reserves the right to disturb or remove the sod on any lot or change the grade of any lot and restore such lot, using the seed and hay method, without notice"; that "[c]ement products of all kinds are prohibited above the ground on any lot"; that "[n]o rocks, stone, gravel, wood or like material will be allowed on any lot"; and that "[a]ll benches must have the City's approval."

Miller stated in his deposition testimony that he was unsure where the undated cemetery guidelines had come from and that he did not know if those guidelines were "ever enacted into an actual resolution or regulation." Watson stated in his deposition testimony that the undated cemetery guidelines were "familiar. It's some of the same information that was given to me back in 1990" when Watson had purchased his parents' cemetery plots. Watson then added that "up until the late 1990's everybody was given a copy of those at the time they received their deed."

Only three of the cemetery plots were purchased before 2000: Jones's parents' cemetery plots, which were purchased by Jones's mother when Jones's father died in 1996, and Bailey's sister's cemetery plot, which was purchased by

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Bailey's mother after the sister died in 1985. Bailey purchased the cemetery plot for her father in 2000. Bailey testified that she did not believe that her mother received a copy of any guidelines and that Bailey did not receive a copy of the undated cemetery guidelines. Jones testified that she and her husband had purchased cemetery plots for themselves when her mother purchased the cemetery plots for herself and Jones's father. Jones stated that she had not seen the undated cemetery guidelines until a few days before March 16, 2017 (the date of the cleanup, see note 3, supra), when she obtained a copy from a box at the cemetery; the box was near a sign or banner that the City had erected to advertise that changes were going to be made regarding the cemetery. As to what transpired after the late 1990's, Chhoeun's daughter died in 2005, and Chhoeun, when she was asked about the undated cemetery guidelines in conjunction with her purchase of the cemetery plot for her daughter, stated that "nothing was given to us." Also, the other plaintiffs who were asked about their knowledge of the undated cemetery guidelines denied having been provided the guidelines.

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Watson admitted in his deposition testimony that the undated cemetery guidelines were the guidelines placed in a box underneath a banner at the cemetery that the City used to advertise the upcoming changes to the cemetery in March 2017. The colloquy between counsel for the plaintiffs and Watson continued:

"Q: So is it accurate to say that, at the time the[] [undated cemetery] guidelines were -- placed in the box under the banner, they were the outdated guidelines that were no longer in effect that were being given to the public?

". . . .

"A: My understanding of this is these were the last known regulations to have been approved by the city council.

"Q: Well, now, in 2011 these were supplanted by these [apparently referencing the 2011 regulations]; correct?

"A: Were these passed by the city council?

"Q: In 2011?

"A: Do we have a copy of the resolution?"

The City's counsel then referenced the 2011 advisory-board resolution and Watson stated: "Nope, not that one. . . . That's the cemetery board."

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In 2011, the Cemetery Advisory Board of the City of Leeds passed the 2011 advisory-board resolution, which states:

"WHEREAS, The Cemetery Advisory Board of the City of Leeds has been charged with reviewing and recommending action regarding the cemeteries operated by the City to the [c]ity [c]ouncil, and;

"WHEREAS, the Board has determined that certain actions by the [c]ity [c]ouncil would be beneficial to the cemeteries in the City ...;

"IT IS therefore resolved that the City should:

"1. Adopt the Rules and Regulations of the Cemeteries of the City ... as approved by the Board."

The record contains no resolution from the city council accepting the recommendation of the advisory board, and, at a minimum, a genuine issue of material fact exists regarding whether the city council adopted the 2011 regulations before it passed the 2017 resolution. As hereinafter discussed, the 2017 resolution itself states that "the City previously adopted and approved Cemetery Guidelines in 2011," that "the current Guidelines and Rules are in need of update and modernization," and that "[t]he attached City Cemetery Rules and Guidelines [apparently referencing the 2011 regulations] are hereby approved and adopted." However, Watson testified

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that no modifications were made to the 2011 regulations when they purportedly were passed pursuant to the 2017 resolution.

The 2011 regulations are approximately 20 pages in length. The 2011 regulations state that "[t]he City reserves the right to compel all persons coming into the [c]emetery to obey all Rules and Regulations adopted by the City" and:

"29. The City shall take reasonable precautions to protect against loss or damage to property or rights within the [c]emetery; but it expressly disclaims all responsibility for loss or damage from causes beyond its reasonable control, and specifically, but not by way of limitation, from loss or damage caused by the elements, an act of God, common enemy"

(Emphasis added.) The 2011 regulations further state:

"GENERAL REGULATIONS

"....

"58. No boxes, shells, toys, glassware, sprinkling cans, receptacles, or similar items (other than vases meeting the City's specifications which have been placed with the City's permission) will be permitted to be placed on any interment space or elsewhere within the [c]emetery, and if placed, the City may remove any such items.

"59. The City is not responsible for theft or damage to any personal property, including

artifacts, personal effects, etc., placed on or near interment spaces or elsewhere in the [c]emetery.^[5]

"60. No benches, chairs or like items shall be permitted to be brought upon the [c]emetery grounds, unless authorized in writing by the City.

".....

"65. All floral decorations, whether natural or artificial, shall be subject to the City's written policies concerning same as are posted or on file and available for inspection in the City's Hall. The City may remove all floral designs (artificial or natural), flowers, weeds, trees, shrubs or plants of any kind from the [c]emetery as soon as, in the judgment of the City management, they become unsightly or diseased, or if they do not conform to the City's policies.

".....

"68. The City reserves to itself and to those lawfully entitled thereto, a perpetual right of ingress and egress over interment spaces for the purpose of passage to and from other interment spaces. All persons are strictly forbidden to break or injure any tree or shrub, or mar any landmark, marker or memorial or in any way deface the grounds of the [c]emetery."

According to the 2011 regulations, "[t]he term 'memorial' shall mean ... a monument, tombstone, grave marker, tablet or

⁵Paragraph 59 clearly must be read in pari materia with paragraph 29, quoted above.

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headstone identifying a grave or graves"⁶ The terms "marker," "monument," and "person" are not defined in the 2011 regulations. The 2011 regulations continue:

"OUTER BURIAL CONTAINERS, MEMORIALS, FOUNDATIONS
AND INSTALLATION

"74. In order that the improvements and appearance of the [c]emetery be kept uniform, the City reserves and shall have the right to regulate the land, size, design, quality and material of all outer burial containers, memorials and foundations which are placed in the [c]emetery."

The 2011 regulations do not define the terms "outer burial containers" or "foundations," although the regulations define "outer burial chambers" as "the rigid outer container used to surround a casket or a cremated remains container, and shall include the products commonly know as vaults and grave liners." The 2011 regulations continue:

⁶Paragraph 83 of the 2011 regulations states:

"Only one memorial may be placed on any one interment space, with the exception of one footstone, except with the express written permission of an authorized representative of the City. The name and inscription on each memorial must correspond with the legal name of the deceased interred in the interment space or memorialized on that interment space, where there is no interment. All memorials shall be set on uniform lines as prescribed by the City, to conform to the general plan of the City."

"75. The Specifications for outer burial containers, memorials and foundations prescribed by the City are filed in the City Hall and will be furnished upon request. All outer burial containers, memorials and foundations placed in the [c]emetery must be in accordance with the specifications of the City then in effect. Written approval by an authorized representative of the City must be secured before any outer burial container, memorial or foundation may be placed or constructed in the [c]emetery. The City reserves the right to reject and prevent the placement or construction of any outer burial container, memorial, foundation, embellishment⁷ or other item or structure which does not conform with these Rules and Regulations and the specifications of the City then in effect.
...

"76. No outer burial container, memorial or foundation shall be placed on or removed from the [c]emetery without the prior written authorization of both the [o]wner of the particular interment space and the deceased's next-of-kin, or their respective authorized representative(s), except if and to the extent necessary for purposes of routine maintenance and landscaping.

"....

"78. In the event an outer burial container, memorial, foundation or other object is placed or constructed in the [c]emetery without the authorization of the City and other appropriate persons as provided herein, the City reserves and shall have the right, at the [o]wner's expense, to remove any unauthorized outer burial container, memorial or other object.

⁷The term "embellishment" is not defined in the 2011 regulations.

"79. The City reserves and shall have the right to correct any error that may be made in the location of an interment space or placing of an outer burial container, memorial, foundation or other embellishment within the [c]emetery. ...

".....

"82. The City reserves the right to prohibit the placement of memorial benches^[8] or to restrict such benches to certain areas of the [c]emetery. No bench may be placed which, in the opinion of the City's management, is unsightly or injurious to the appearance of the surrounding area. Every bench shall have a suitable foundation and meet the specifications on file in the City Hall. The City reserves the right to remove any bench which does not comply with this Section.

".....

"84. If any memorial, structure, or any inscription to be placed on same, or any embellishment whatsoever, shall be determined by the City to be offensive or improper, the City reserves and shall have the right to (a) refuse to authorize the placement of such memorial or object; or (b) if already in place, the City shall have the right to remove, change or correct, at the [o]wner's expense, any such offensive or improper memorial, object or inscription.

"85. Should any memorial become unsightly, dilapidated or a nuisance, the City shall have the right to repair the memorial or, at its option, to remove and replace same. The cost of any repair, removal or replacement shall be paid by the [o]wner of the [i]nterment [r]ights.

⁸The term "memorial benches" is not defined in the 2011 regulations.

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"86. Except as otherwise provided herein, no memorial may be removed from an interment space within the [c]emetery without the prior written consent of the [o]wner and next-of-kin of the deceased or their respective authorized representative(s). Any such removal shall be made in accordance with the applicable requirements of the City relating to installation and removal of memorials."

Apparently no plaintiff had received a copy of the 2011 regulations before the March 16, 2017, cleanup, and the issue of the purported constructive notice that the plaintiffs might have received in the weeks leading up to the passage of the 2017 resolution is somewhat uncertain. Watson testified that before he became the City's zoning administrator he was the supervisor of the City's street department, which apparently was charged with maintaining the cemetery directly or through contracts with third parties. Watson stated that after he was appointed to supervise the zoning department the City hired George Keating to supervise the street department. Watson testified in his deposition that Keating had sought his advice and assistance regarding the publication of notice of the proposed changes regarding the cemetery:

"The -- resolution was scheduled to come before the city council either the first or second meeting in January -- so we had ordered the signs in anticipation that the ordinance could go into effect

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and give it a certain amount of time. But we put the signs up February the 15th."

According to Cali's deposition testimony, the sign at the cemetery "said there were going be some new rules and regulations coming into effect for the cemetery later that month," "[a]nd it did have a thing where you could take a paper, but there was no papers in it." Cali stated that she also saw that there was "some sort of string or rope tied around my mother's bench, and it was almost like hazard tape or something like that, but it didn't have that writing on it," "[a]nd I thought, well that's weird, and as I looked around I noticed all of the benches had that on there."⁹ It is not clear when Cali saw the sign and taped benches, although it appears to have been in late February or early March 2017 because Cali added:

"So I called Carol Reed at the City office and asked her what was going on, and she said that there were some issues going on, that they may be wanting to have all of the benches removed, and that was the only thing that she said, just the benches. And I said, so do I need to get someone to come and remove my mother's bench? She said no, do not do that, there's going to be a meeting around the 27th of that month, which was March, and there's going to be

⁹According to Watson, Keating had placed tape or ribbons on purportedly noncompliant items that were to be removed from the cemetery.

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a discussion, and then we will know -- call after that meeting, and I will give you an answer to that, but right now don't do anything."

Carol Reed was the City's employee who handled cemetery-plot sales.¹⁰

Watson testified in his deposition that "[w]e were trying to give as much notice as possible to folks that there was going to be a change in policy. That's what was articulated to me." Watson was unaware whether the City sent any letter

¹⁰The plaintiffs submitted deposition testimony that would support the conclusion that Cali was not the only plaintiff who purportedly had received misinformation from Reed. For example, Jennifer Friedman testified that, when she purchased the cemetery plot for her mother, Reed

"said I just needed to pay for the plot, and I paid for the plot, the opening and the closing at that time. I asked her what was acceptable as far as, you know, headstones, what I could put out there, and she said there were no guidelines at that point, to keep whatever we put out there in our area, our, I guess, four foot by eight foot plot. So I purchased it, and then later on we purchased the headstone, bench and some other stuff, which I'm sure will come up."

Also, Watson testified in his deposition that Keating had spoken with Reed about information she was "giving out" regarding what items were allowed in the cemetery. Watson stated: "I can recall one incident -- I can't tell you when it was -- of [Keating] complaining about her telling people you could do this and that." According to Watson, that incident occurred "well before the cleanup."

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to cemetery-plot owners or next of kin regarding the 2017 resolution, but he stated that the 2017 resolution and the 2011 regulations were posted online and in four places where the City was "legally required to post" before the March 6, 2017, city-council meeting. Miller likewise testified in his deposition that, during the period leading up to the passage of the 2017 resolution, the 2011 regulations were "[n]oticed through fliers and signs" indicating that "the rules were going to be enforced." Miller testified that the City posted banners at the cemetery for "a little over a month" before the March 16, 2017, cleanup and that the City also posted a copy of the 2017 resolution at "[a]ll the places that we post all of our notices," including "City Hall, the [City's] website, the library, the Chamber of Commerce, and I think there may be others." However, the minutes from the February 20, 2017, city-council meeting state that "Jonathan Hayes ... spoke of receiving a letter regarding the Cemetery Guidelines and asked if Cemetery Guidelines would be addressed at this meeting. [Miller] informed Mr. Hayes that Guidelines are being revised and will be presented soon."

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The 2017 resolution was adopted at the March 6, 2017, city-council meeting; the minutes from that meeting were not submitted in support of the City's motion for a summary judgment. The 2017 resolution states:

"RESOLUTION IN ADOPTION OF CEMETERY GUIDELINES

"WHEREAS, All cities and towns of this state have been granted the power to own, regulate, improve, lay out, and control town or city cemeteries according to, among other things, § 11-47-40 et seq., Code of [Ala.] 1975; and

"WHEREAS, the City previously adopted and approved Cemetery Guidelines in 2011; and

"WHEREAS, there exist certain activities on the Cemetery property that result in large amounts of litter, in potential damage to maintenance equipment, in damage to adjoining plots, and in the inability to properly mow and maintain the [c]emetery; and

"WHEREAS, the current Guidelines and Rules are in need of update and modernization.

"NOW THEREFORE, BE IT RESOLVED, by the City Council of the City of Leeds that:

"1. The Recitals above are true, correct and included herein as if fully set forth.

"2. The attached City Cemetery Rules and Guidelines are hereby approved and adopted.

".....

"4. The Mayor and staff shall have the full authority to do those things, perform those

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functions, make such decisions, and to sign necessary documentation in order to carry out and fully complete the actions so authorized herein."

The 2017 resolution indicates that the members of the city council voted unanimously in favor of the 2017 resolution. Purportedly, a copy of the 2011 regulations was attached to the 2017 resolution.

Watson explained that the City had adopted the 2017 resolution because two City employees had been injured while operating mowing equipment in the nine months before March 6, 2017. One of the injured employees suffered severe burns over 70 percent of his body after the gas tank on his riding mower caught on a bench and ruptured. The other injured employee lost an eye when a piece of wire "shot out from underneath" his mower and "went through the plastic of his eyeglasses." Watson also stated that at one point the City had used a third party to perform the cemetery maintenance, but, he said, that third party did not offer to renew its contract with the City, in part, because of issues regarding the benches and "tombstones," "[a]nd they also had an employee who was injured by flying debris after hitting -- the weed eater hitting it on something that was placed on a monument."

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According to Watson, the City terminated Keating's employment "approximately four or five days before the clean up." Watson testified that he did not know the name of the individual who would have stepped in to manage the street department and the cleanup on March 16, 2017, although he said it would have been the most senior ranking employee within the street department. Watson testified that before Keating's employment was terminated Keating had "talk[ed] with some of his employees" and discussed "how to attack the project." The colloquy between counsel for the plaintiffs and Watson continued:

"Q: After [Keating] left, did you undertake to instruct the employees on the cleanup?

"A: My involvement with the cleanup -- there were two elements. Just the morning of it was on the board. [Keating] had already planned out the next two weeks worth of work at the time of his separation from the City. That was already on the board and scheduled. My involvement on a daily basis was really to go down and make sure that everyone was there, the equipment was in place. And then after they left in the morning, I did not typically see them again unless an issue came up.

"On the day of the cleanup, I did receive a call from Brian Parsons with the street department who asked a question about flowers. He was asking what to do with the flowers that were on the ground. And I told him the -- my interpretation of the resolution that was passed by the city council that

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there should not be anything on the ground but to leave anything that was attached to a marker in any way on it.

". . . .

"Q: ... Did you undertake to explain any other provisions other than the flowers?

"A: Not to my knowledge."

Watson stated that the City employees were "to remove anything that presented a hazard to staff while they are maintaining the cemetery."

On March 16, 2017, the adornments purportedly were removed from the cemetery plots by the City's employees and then lost, destroyed, or otherwise damaged. Regarding whether certain of the adornments were proper, Watson testified in his deposition that concrete items were not allowed in the cemetery "prior to 2011," but his understanding was that there was no longer a prohibition against concrete in the cemetery. He further acknowledged that there was no prohibition on a concrete angel, "depending on its placement and how it is secured to the ground," and that a vase could be placed on top of a monument "[a]s long as that vase is secured and is not subject to falling into the prohibited space." The colloquy between counsel for the plaintiffs and Watson continued:

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"Q: As a general rule, ... are [granite and concrete benches] -- those are permitted --

"A: Subject to being within ... the defined area that we talked about earlier on being a headstone.

"Q: Or subject to being approved?

"A: Correct. Correct.

"Q: And can we agree that the regulation itself speaks to -- on number 82, says, 'The City reserves the right to prohibit the placement of memorial benches or to restrict such benches to certain areas in the cemetery?'

"A: Correct.

"Q: Can we agree that there is no language in there addressing benches that are already in existence?

"A: I think that -- not think -- I know that that is addressed in the sections dealing with items that are not maintained or have fallen into disrepair. ...

"Q: And, again, there are regulations addressing things that have fallen into a state of disrepair. A concrete or granite bench that has not fallen into a state of disrepair, can we agree that there's no regulation addressing benches that are not in a state of disrepair, that have been there for many years already in existence?

"A: If they're in existence and are placed within the areas that we discussed, no, I cannot -- I cannot see a reason why they would not be permitted."

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The colloquy between counsel for the plaintiffs and Watson also includes the following:

"Q: I'm trying to see if I understand. Are you saying that because -- if an item was outside of the imaginary box, that it would present a hazard?

"A: Yes, I am.

"Q: Whereas, if it was in the imaginary box, it would not present a hazard?

"A: Absolutely correct.

"Q: But, again, moving an otherwise acceptable item into the imaginary box is a violation of city policy?

"A: In the -- in the sense. We've got to go back, again and get clarification. You can't make a broad statement with that. If it is a granite monument, no, we will not touch those because we don't have the equipment to move them. They would either damage them or damage themselves moving. If it's something smaller that could be moved, of course, that would be reasonable for -- to hope that they would put it into that box."

Watson added that the determination whether to move an item into an acceptable location was made by the "boots on the ground," not the supervisor. Further, we note that Miller affirmed in his deposition that "with regard to a burial artifact -- specifically, take, for instance, a [concrete] angel," "it would depend on where it was placed as to whether it would be in compliance with" the 2011 regulations. Miller

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agreed that "under no circumstances should there have been a [concrete] angel artifact removed from on top of a tombstone in [the cemetery] as part of this cleanup."

Miller admitted in his deposition testimony that he had stated that the City's employees did "not do what they were supposed to do" during the March 16, 2017, cleanup, although he characterized those statements as "referring to the nature, not the legal right." Miller also admitted that the City had paid claims of some citizens for the value of property that had been destroyed during the cleanup. Miller stated that the City "felt that we needed to compensate people ... for what was taken ... from the graves" and that, in his opinion, although the "taking of the items" was proper, the destruction of the items was not proper. Miller then agreed that the City's employees "handled the cleanup improperly, and property was destroyed as a result."

After the cleanup on March 16, 2017, the city council held a regularly scheduled meeting on March 20, 2017, at which it addressed complaints about the cleanup. The minutes of the March, 20, 2017, city-council meeting state that, during the "Public Participation" portion of the meeting,

"... Miller addressed the Cedar Grove Cemetery matter and apologized for the actions that were taken at the cemetery. ...

"[Miller] described the plan for the cemetery cleanup. Some mementos were destroyed and ... Miller expressed his deep regret for the actions taken. [Miller] further stated that the current policies will be reviewed and looked at common sense laws. [Miller] recognized the people who would like to speak and gave direction as to how the process would be handled. ... Miller also stated that a city employee misinformed people about what was acceptable to be placed in the cemetery and apologized for that misinformation.

"....

"... Devoris Ragland Pierce ... commented that the [C]ity approved the new rules and asked if the rules were not reviewed before they were approved. ... Pierce commented that a mailing should be done when rules have changed. [Miller] agreed there should have been a letter sent; however, [Miller] also spoke of the difficulties of keeping current addresses as lots could have been given, traded or sold to other entities. ... Miller commented that the cemetery has been there a long time and there are periods of bad records.^[11]

"....

¹¹When asked in his deposition whether the City had maintained a record of the owners of interment rights, Miller responded: "My knowledge of that is that many of the records of the City were lost in a flood, and as far as I know, there was a log, but the log would not have reflected people who made transfers without notifying the City." Miller believed that the flood occurred before 2000. Miller later added that the City did not "have a record of lot owners that was even remotely complete."

"Ray Middlebrook ... indicated that he attended the city council meeting when the rules were adopted. ... Middlebrook asked when the letters were sent out with the Mayor responding that is the problem. ... Middlebrook advised against punishment of the employees for doing their job as the rules were approved without sufficient time to pass the message to the people. ... [Miller] responded that would be taken into consideration.

"....

"Councilmember Linda Miller spoke of having relatives buried in the cemetery. [Councilmember] Miller apologized for the action that was taken and spoke of finding a way to bridge the gap and asks for forgiveness and work to a solution.

"Mr. Kelly ... asked how the reimbursement will be handled. ... Kelly commented that some city employees do not have respect for the dead and don't have pride for their work. Mayor states the city is working on that matter.

"Miller stated that nobody instructed the employees in the manner in which the action was taken.

"....

"Councilmember [Kenneth] Washington stated that the action taken by the City employees was not the way it was supposed to be done. The intention was to clean it up. Washington spoke of being asked in the council meetings to clean it up. Washington spoke of instructing the young workers to do the work and they do not have the same respect as some older folks. There was a lapse of supervision to help educate the employees to show respect at the cemetery. Washington spoke of the supervisor's responsibility to teach the respect which should be given."

(Emphasis added.)

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Before addressing the plaintiffs' specific arguments regarding their trespass claims and negligence claims, we will first address their argument regarding the 2017 resolution because that issue is pertinent to the City's rights and duties regarding the cemetery plots. The plaintiffs contend that, as a matter of law, the City was required to enact the 2011 regulations as an ordinance -- rather than by a resolution¹² -- and that the City's employees therefore had no authority to remove the adornments pursuant to those regulations. Specifically, the plaintiffs argue that the 2017 resolution is void because an ordinance relates to matters of permanent operation; the 2011 regulations address matters of permanent operation; and, therefore, the 2011 regulations should have been passed as an ordinance, including compliance with the publication requirements for an ordinance under Ala. Code 1975, § 11-45-8. However, the fact that an ordinance may relate to a matter of permanent operation does not mean that a resolution might not also relate to a matter of permanent

¹²See Rushing v. City of Georgiana, 374 So. 2d 253, 255 (Ala. 1979) (expressing that it is "unfortunate" that "sometimes the word 'ordinance' is used interchangeably with the word 'resolution'").

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operation, and the legislature has clearly indicated that a resolution may concern a matter of permanent operation. See Ala. Code 1975, § 11-45-2(b) ("[n]o ordinance or resolution intended to be of permanent operation shall be adopted by the council at the same meeting at which it is introduced, unless");¹³ see also City of Prichard v. Moulton, 277 Ala. 231, 238, 168 So. 2d 602, 609 (1964) ("Ordinances or resolutions of permanent operation are those which continue in force until repealed."). Thus, we conclude that the fact that a matter of permanent operation is at issue does not require the use of an ordinance, rather than a resolution.

The plaintiffs also rely on Rushing v. City of Georgiana, 374 So. 2d 253 (Ala. 1979), in support of their ordinance argument. In Rushing, the supreme court described a

"distinction between a resolution and an ordinance. McQuillin in his treatise on Municipal Corporations states the following:

" ... The term "ordinance" means something more than a mere verbal motion or resolution, adopted, subsequently reduced to writing, and entered on the minutes and made a part of the record of the acting body. It must be invested, not necessarily

¹³The plaintiffs do not argue that the 2017 resolution failed to satisfy the requirements of § 11-45-2.

literally, but substantially, with the formalities, solemnities, and characteristics of an ordinance, as distinguished from a simple motion or resolution.

"A resolution in effect encompasses all actions of the municipal body other than ordinances. Whether the municipal body should do a particular thing by resolution or ordinance depends upon the forms to be observed in doing the thing and upon the proper construction of the charter. In this connection it may be observed that a resolution deals with matters of a special or temporary character; an ordinance prescribes some permanent rule of conduct of government, to continue in force until the ordinance is repealed. An ordinance is distinctively a legislative act; ...' McQuillin, [Municipal Corporations,] § 15.02 [(3d ed. 1968)]."

374 So. 2d at 254-55.

The plaintiffs' reliance on Rushing is misplaced. As the supreme court explained in Tutwiler Drug Co. v. City of Birmingham, 418 So. 2d 102 (Ala. 1982), Rushing should not be read as requiring all of a municipality's legislative acts to take the form of an ordinance:

"In Rushing, a city employee brought an action against the city to recover 'disability' salary or compensation which had been approved by the council's passing of a motion. ... In Rushing, despite a lengthy discussion of the traditional conflict in the definitions and uses of the terms

'motion,' 'resolution,' and 'ordinance,' the city council's action was held to be without effect because a specific statute ... requires that compensation for city employees, if not previously fixed by law, be fixed by ordinance. This Court expressly narrowed the effect of the Rushing decision by stating:

"We hold that authority to pay this type of compensation to employees of cities or towns must be found in an ordinance and not merely a motion or resolution.' (Emphasis supplied.) Rushing, 374 So. 2d at 255.

"We find, however, that [Ala. Code 1975,] § 11-45-1[,] provides:

"Municipal corporations may from time to time adopt ordinances and resolutions not inconsistent with the laws of the state to carry into effect or discharge the power and duties conferred by the applicable provisions of this title and any other applicable provisions of law and to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of the inhabitants of the municipality, and may enforce obedience to such ordinances.'

"We find further, that Alabama case law, consistent with this statutory mandate, permits the enactment of laws by ordinance or resolution in the absence of a statutory requirement for a specific mode of enactment. Tucker v. City of Robertsedale, 406 So. 2d 886 (Ala. 1981). See, also, McQuillen, Municipal Corporations, Vol. 5 (3rd ed., 1981), § 15.06.

"The statute whereby the city council and mayor were empowered to act in the instant case, [Ala. Code 1975,] § 24-2-1, et seq., does not require a

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specific mode of enacting the laws by which redevelopment or renewal projects are initiated."¹⁴

418 So. 2d at 105-06.

As discussed in Tutwiler Drug Co., Ala. Code 1975, § 11-45-1, authorizes a municipality to

"from time to time adopt ordinances and resolutions not inconsistent with the laws of the state to carry into effect or discharge the powers and duties conferred by the applicable provisions of this title and any other applicable provisions of law and to provide for the safety, preserve the health, promote

¹⁴The Rushing court reached the conclusion that the authority to pay the type of compensation at issue required the passage of an ordinance

"for the following reasons: (1) granting compensation to the employee of a municipality is a legislative function and legislative functions require adoption of an ordinance; and (2) since [Ala. Code 1975,] § 11-43-7[,] requires an ordinance for prescription of salaries or fees, that section would also require an ordinance to prescribe disability compensation for a municipal employee."

374 So. 2d at 255. However, Tutwiler Drug Co. also involved the execution of a legislative function by the mayor and city council of the City of Birmingham, see 418 So. 2d at 106, and the Tutwiler Drug Co. court effectively further narrowed the holding in Rushing by relying on the latter reason in Rushing (statutory requirement) and by discounting the former reason in Rushing (legislative function) in determining that a resolution could be utilized to enact the law at issue in Tutwiler Drug Co. In other words, based on the rationale of Tutwiler Drug Co., legislative action may be by resolution absent a statutory requirement to the contrary. See 418 So. 2d at 105-06.

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the prosperity, and improve the morals, order, comfort, and convenience of the inhabitants of the municipality, and may enforce obedience to such ordinances."¹⁵

The 2017 resolution states that the City "ha[s] been granted the power to own, regulate, improve, lay out and control [the] ... cemeter[y] according to, among other things, Ala Code [1975,] § 11-47-40 et seq." Section 11-47-40, Ala. Code 1975, states that "[a]ll cities and towns of this state shall have the power to own, regulate, improve, lay out, and control town or city cemeteries and permit additions thereto and the establishment of new ones ..., and to sell burial lots in the

¹⁵We recognize that Tutwiler Drug Co. was addressing the issue of the availability of legislative immunity to the city council and the mayor of Birmingham, not whether the subject matter of the resolution itself was legislative in nature. See Jackson v. City of Florence, 294 Ala. 592, 596, 320 So. 2d 68, 71 (1975) (noting the historical distinction between functions that are governmental and functions that are ministerial, corporate, or proprietary). Compare Rushing, 374 So. 2d at 255 ("It is a general principle of law that: '... all acts that are done by a municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters upon which the municipal corporation desires to legislate must be put in the form of an ordinance. ...' McQuillin, [Municipal Corporations,] § 15.02 [(3d ed. 1968)]."). Nevertheless, in light of the language of § 11-45-1 and § 11-45-2(b), and the Tutwiler Drug Co. court's treatment of Rushing, we cannot conclude that the resolution-versus-ordinance issue may be resolved merely in terms of whether the subject matter of a resolution is of a legislative nature.

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same" See Garland v. Clark, 264 Ala. 402, 405, 88 So. 2d 367, 370 (1956) ("A municipal corporation may hold property in trust for a public burial ground, or in a private or proprietary character as a private corporation." (citing the predecessor statute to § 11-47-40)); see also Alosi v. Jones, 234 Ala. 391, 393, 174 So. 774, 776 (1937) ("Under its police power the state may provide for the establishment and discontinuance of cemeteries, and regulate their use. This power may be delegated to municipalities within their corporate limits or police jurisdiction." (emphasis omitted)). Section 11-47-40 did not require the City to use a particular form of legislative action when enacting the 2011 regulations.¹⁶ Thus, we reject the plaintiffs' argument that

¹⁶Section 11-47-41, Ala. Code 1975, states that

"[a]ny incorporated city or town ... owning a cemetery or burial ground may make and enter into a contract with any interested party or parties obligating and binding the city or town to forever protect, maintain, and properly care for such cemetery or burial ground or for graves of individuals in the cemeteries or burial grounds owned by such city or town, upon terms and conditions as may be agreed upon and for such compensation as it may see fit to accept."

(Emphasis added.) Also, Ala. Code 1975, § 11-47-42, states that

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the 2011 regulations were not enforceable because they were not adopted pursuant to the laws applicable to the passage of an ordinance.

Having concluded that the City could enact the 2011 regulations through a resolution, we next address whether the trial court erred by entering a summary judgment regarding the plaintiffs' trespass claims. As the supreme court stated in

"[a]ll contracts made under the provisions of Section 11-47-41 shall be by ordinance, which shall state all the terms and conditions of the contract, and the same shall be passed and approved as other ordinances of such city or town and recorded upon the minutes thereof."

(Emphasis added.)

The plaintiffs have not argued that the City entered into a contract "with any interested party or parties obligating and binding the city ... to forever protect, maintain, and properly care for [the] cemetery," § 11-47-41. Thus, we do not consider whether § 11-47-42 might provide support for the plaintiffs' argument that an ordinance was required to enact the 2011 regulations.

Also, we reject the plaintiffs' argument that Ala. Code 1975, § 11-45-8(c), supports its argument that the City was required to pass an ordinance to enact the 2011 regulations. Section 11-45-8(c) permits a municipality to use the ordinance procedure to "adopt by reference thereto, without setting the same out at length in the ordinance, rules[] and regulations which have been printed as a code in book or pamphlet form." Section 11-45-8(c) does not purport to address when an ordinance, rather than a resolution, is required for a particular type of action.

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Smith & Gaston Funeral Directors v. Dean, 262 Ala. 600, 607,
80 So. 2d 227, 232 (1955):

"The sentiment of all civilized peoples regards the resting place of the dead as hallowed ground, and requires that in some respects it be not treated as subject to the laws of ordinary property. It follows that an interest in a burial lot is of a somewhat peculiar nature."

(Quoting 10 Am. Jur. Cemeteries § 22, pp. 503, 504.)

"The rule followed in Alabama is stated at 14 C.J.S. Cemeteries § 25, as follows:

"... ordinarily, the purchaser of a lot in a cemetery, although under a deed absolute in form and containing words of inheritance, is regarded as acquiring only a privilege, easement, or license to make interments in the lot purchased, exclusively of others, so long as the lot remains a cemetery, and the fee remains in the grantor subject to the grantee's right to the exclusive use of the lot for burial purposes. The lot owner's title to the lot is a legal estate, and his interest is a property right entitled to protection from invasion, but only in a restricted sense does it constitute an interest in real property...."

Whitesell v. City of Montgomery, 355 So. 2d 701, 702 (Ala. 1978); see also, e.g., Ebenezer Baptist Church, Inc. v. White, 513 So. 2d 1011, 1013 (Ala. 1987); Dean, 262 Ala. at 606, 80 So. 2d at 232 ("When [the lot owner's property] right is violated, the owner is as certainly entitled to all the

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remedies which the law affords as if he owned a fee simple. ... [A] lot owner's remedy is commensurate with his rights. ...'" (quoting Brunton v. Roberts, 265 Ky. 569, 97 S.W.2d 413, 415 (1936)).

In addition to protecting the interests of the cemetery plot owner, the law protects interests of the next of kin of a decedent who is buried in a cemetery plot. See White, 513 So. 2d at 1013 ("This easement or privilege ... entitles the next of kin of the deceased to maintain an action against the owners of the fee (in this case the church or its trustees) or strangers who, without right, desecrate or invade the burial lot of another."); Bessemer Land & Improvement Co. v. Jenkins, 111 Ala. 135, 146, 18 So. 565, 567 (1895) ("Blackstone in his Commentaries, referring to the subject, says: '... the heir has a property [interest] in the monuments and escutcheons of his ancestors'" (quoting 2 William Blackstone, Commentaries on the Laws of England 429 (1765))). See generally 14 Am. Jur. 2d Cemeteries § 35 (2009) (stating that, generally, the right of "making mounds over and erecting stones and monuments at the graves" "necessarily carries with

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it the right to protect them from desecration, spoliation, or unauthorized removal" (footnotes omitted)). Thus,

"the right to visit and decorate a grave is not confined to the owner of the cemetery lot but extends to other relatives of the deceased as well. After burial, the relatives of the deceased acquire certain rights that permit them to go to the grave of the deceased and give it attention, care for it, and beautify it."

14 Am. Jur. 2d Cemeteries § 38 (2009) (footnotes omitted); see also, e.g., Jacobus v. Congregation of Children of Israel, 107 Ga. 518, 33 S.E. 853, 855 (1899); Chariton Cemetery Co. v. Chariton Granite Works, 197 Iowa 403, 197 N.W. 457, 458 (1924); and Mansker v. City of Astoria, 100 Or. 435, 453-54, 198 P. 199, 205 (1921).

Likewise, the City, as the owner of the cemetery and as the municipality in which the cemetery is located, has certain rights regarding the cemetery. Those rights include the authority to enact and to enforce reasonable regulations regarding the cemetery plots and the maintenance of those plots. See discussion, supra; see also Ala. Code 1975, § 11-47-40; Dean, 262 Ala. at 606, 80 So. 2d at 232 ("This right of sepulture is a property right, subject to reasonable rules and regulations governing the cemetery and, of course, to be

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controlled by the state in the exercise of its police powers.'" (quoting Brunton v. Roberts, 265 Ky. 569, 97 S.W.2d 413, 415 (1936)); see also, e.g., Nicholson v. Daffin, 142 Ga. 729, 83 S.E. 658, 660 (1914).

Based on the foregoing, the fact that the plaintiffs do not own the real estate on which the cemetery plots are located is not determinative of the plaintiffs' trespass claims, nor is the fact that only some of the plaintiffs are deed holders determinative of those claims.¹⁷ See White, 513 So. 2d at 1013; Dean, 262 Ala. at 605, 80 So. 2d at 230 (describing the claim as "trespass quare clausum fregit"); Black's Law Dictionary 1811 (11th ed. 2019) (stating of "trespass quare clausum fregit," "[t]his tort consists of doing any of the following without lawful justification: (1) entering on to land in the possession of another, (2) remaining on the land, or (3) placing or projecting any object on it"). However, the plaintiffs' possessory rights regarding

¹⁷Except for the City's argument that only some of the plaintiffs held interment rights under the deeds to the cemetery plots, the City made no argument to the trial court, and it makes no argument to this court, that some other factual or legal distinction existed among the plaintiffs that would support a summary judgment against some, rather than all, of the plaintiffs.

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the cemetery plots were not exclusive, and the City's employees had a right to enter upon the cemetery plots for purposes of fulfilling their maintenance duties under the 2011 regulations. The plaintiffs' evidentiary submissions included some evidence that the City's employees disturbed the land on which the cemetery plots were located during their maintenance work, but those disturbances were limited in nature and were consistent with the maintenance work to be performed.¹⁸ We do not believe that such evidence will support a trespass claim in light of our precedents indicating that such a claim generally involves the removal of or damage to the deceased's body, damage to the casket or vault, or the removal or destruction of the headstones or footstones such that the grave cannot not be located, all of which involve substantial

¹⁸For example, Jones testified that her mother's grave was "caved in" near the headstone, but she later testified that the resulting gouge in the earth was approximately nine inches wide and "about a foot" deep and that the City had replaced the soil in the damaged area. Jones offered no evidence indicating that her mother's body, vault, or casket had been damaged. Likewise, Jennifer Friedman testified that there were equipment-track marks and "giant massive holes in the ground where they took the bench" from her mother's cemetery plot, but she admitted that she had no evidence indicating that her mother's body or casket or anything below the surface of the ground had been damaged.

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interference with the possessory interest in the cemetery plot itself.¹⁹ See Rhodes Mut. Life Ins. Co. v. Moore, 586 So. 2d 866, 872 (Ala. 1991) ("The tendencies of the evidence were such that the jury could have found that ... [Bob Moore's] gravestone was removed and carried away; that new graves are now located on or about his grave site; and that his grave was disturbed while Rhodes [Mutual Life Insurance Co.] owned the cemetery."); Smith & Gaston Funeral Dirs. v. Dean, 262 Ala. at 603, 80 So. 2d at 229 (finding a jury question regarding a trespass claim when the cemetery owner "cleared that part of the cemetery where Will [Dean]'s grave was located of an accumulation of weeds, grass and vines" and, during that process, broke his grave slab in several places and caused the

¹⁹Conceptually, a claim for the loss or destruction of items like the adornments would appear to be more in the nature of a conversion claim. See Poff v. Hayes, 763 So. 2d 234, 238 (Ala. 2000) (discussing the distinction between trespass to chattels and conversion); cf. Williams v. Bisson, 141 Me. 117, 119, 39 A.2d 662, 662 (1944) ("[T]itle [to the cut timber] remains in the licensee despite the fact that his failure to remove the wood from the land [before the expiration of his license] constitutes a wrong for which the landowner may have his remedy. Accordingly it is held that the owner of the soil who forbids the licensee to remove his property exercises such a dominion over it that he is guilty of a conversion.").

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slab to settle, apparently to the point of not being visible); Smith & Gaston Funeral Dirs. v. Wilson, 262 Ala. 401, 402, 79 So. 2d 48, 49 (1955) (finding a jury question regarding a trespass claim when the cemetery owner destroyed the concrete marker designating the decedent's grave such that decedent's family member could not identify where decedent was buried); Payne v. Alabama Cemetery Ass'n, Inc., 413 So. 2d 1067, 1071 (Ala. 1982) ("Plaintiff's action [based on a sunken grave that revealed missing bodily remains] is grounded upon the legal rights vested in the next of kin to maintain an action for unwarranted interference with a buried body. We hold that such an action may be grounded in a non-trespass tort as well as in trespass."); Holder v. Elmwood Corp., 231 Ala. 411, 412, 165 So. 235, 236 (1936) (discussing an action for trespass against Elmwood Corporation for "unlawfully breaking into the [cemetery plot where James F. Holder was buried] and having the remains of one F.W. Antagnoli buried thereon"); Bessemer Land & Improvement Co. v. Jenkins, 111 Ala. at 148, 18 So. at 568 (involving the disinterment, relocation, and reinterment of a child's body). See also Whitt v. Hulsey, 519 So. 2d 901, 906 (Ala. 1987) (stating that the "evidence [was] sufficient to support the claim of outrageous conduct, where the alleged

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act was the desecration and destruction of a portion of a family burial ground," including plowing the cemetery ground and destroying monuments).²⁰ Accordingly, we conclude that the trial court did not err in entering a summary judgment in favor of the City regarding the plaintiffs' trespass claims.

Regarding the plaintiffs' negligence claims, the plaintiffs argue that, assuming the 2017 resolution is valid and the 2011 regulations are enforceable, the City had no legal right to damage the adornments upon their removal, i.e., it had at least some duty to preserve the adornments either by moving them to an acceptable area on the cemetery plot or by not directly causing damage to the adornments. In its motion for a summary judgment, the City argued that the existence of a duty is a question of law to be determined by the trial court and that it had breached no legal duty it owed to the plaintiffs regarding the adornments. See State Farm Fire &

²⁰The plaintiffs reference Ala. Code 1975, § 13A-7-23.1(a) and (b), in support of their "grave desecration" argument. Section 13A-7-23.1(c) states that "subsections (a) and (b) shall not apply ... to anyone operating a cemetery under standard rules and regulations and maintenance procedures ..., nor shall subsections (a) and (b) apply to any person authorized to take any action on municipal property."

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Cas. Co. v. Owen, 729 So. 2d 834, 839 (Ala. 1998). Owen

itself indicates that that principle is easily oversimplified:

"[T]he question of duty is a judgment whether the law will impose responsibility on a party for its conduct toward another. '[T]he concept of duty amounts to no more than "the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection" from the harm suffered.' [Stuart M. Speiser et al., The American Law of Torts] § 9:3, at 1008 [(1985)]. That judgment is at heart one that requires an analysis informed by precedent and principles. In other words, a duty analysis is inherently a legal analysis that entails an intellectual process of identifying, weighing, and balancing a number of competing factors -- the existing law of the jurisdiction, the practicability of imposing a duty, the demands of justice, and the interests of society. That is an analysis our legal system recognizes is best undertaken by a judge.

"Of course, the concept of duty does not exist in a vacuum. It requires a relationship between two or more parties, a relationship that can be shown only through a history of contacts, conversations, and circumstances. Determining whether there is a duty necessarily requires analyzing the factual background of the case. In that sense, whether a duty exists is a mixed question of law and fact. Nevertheless, duty analysis does not become a jury function simply because fact questions are implicated in the analysis."

729 So. 2d at 839. As the supreme court stated in Garner v. Covington County, 624 So. 2d 1346 (Ala. 1993), "[a]lthough the existence vel non of a duty is ordinarily a question of law for the court," id. at 1350, "[w]here the facts upon which

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the existence of a duty depends[] are disputed, the factual dispute is for resolution by the jury.'" Id. at 1349-50 (quoting Alabama Power Co. v. Brooks, 479 So. 2d 1169, 1175 (Ala. 1985), quoting in turn Alabama Power Co. v. Alexander, 370 So. 2d 252, 254 (Ala. 1979)); see also Ex parte City of Muscle Shoals, 257 So. 3d 850, 856 n.1 (Ala. 2018) (noting that Garner abrogated the principle "that the existence of a duty is always a question of law for the Court"). In other words, "the jury is allowed to determine ... the disputed facts upon which the alleged duty rests, [but] not the existence of the duty itself." Owen, 729 So. 2d at 840.

The City's position, in essence, is that, despite the property rights of the plaintiffs in the adornments placed on the cemetery plots of the respective relatives, upon passage of the 2017 resolution (if not earlier), the adornments essentially were forfeited to the City for purposes of any legal obligation it might have had to the plaintiffs regarding the adornments. However, because the undisputed facts do not establish that the City provided actual notice to the plaintiffs of the intended removal of the adornments, all of which had already been placed on the cemetery plots, and because genuine issues of material fact exist regarding the

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previous information that had been provided by the City concerning what items could be placed on the cemetery plots and where,²¹ acceptance of the City's position requires the following conclusions: (1) that the constructive notice the City provided regarding the 2011 regulations was adequate notice to the plaintiffs as a matter of law and under the circumstances of this case and (2) that the 2011 regulations were unambiguous regarding the issues whether the adornments could be placed on the cemetery plots (and, if so, where on the plots they could be placed) and, more importantly, whether any adornments already placed on a cemetery plot on March 6, 2017 (the date the 2017 resolution was passed), were required to have been removed immediately or the adornments otherwise would be subject to destruction, i.e., forfeited. See City of Russellville v. Vulcan Materials Co., 382 So. 2d 525, 527 (Ala. 1980) (discussing the issue of reasonableness in regard

²¹The misinformation purportedly provided by Reed is a factor in the duty analysis. As to that issue, the City is not estopped by Reed's purported misstatements. See City of Orange Beach v. Benjamin, 821 So. 2d 193 (Ala. 2001); see also Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1294 (S.D. Fla. 1999), aff'd, 420 F.3d 1308 (11th Cir. 2005). However, the City's knowledge that Reed had provided misinformation regarding what items could be placed on the cemetery plots is pertinent to the determination of the extent of the City's duty.

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to the exercise of the police power); cf. City of Birmingham v. Stephens & Kerr, 167 Ala. 666, 667, 52 So. 590, 590 (1910) (stating that a city may not destroy property based on the violation of an ordinance when the ordinance does not provide for that penalty). After carefully considering the evidentiary materials described above, particularly the 2011 regulations, the deposition testimony of Watson and Miller, and the minutes from the March 20, 2017, city-council meeting, we must reject the City's argument that the undisputed facts support the conclusion that it had no duty to prevent damage to the adornments upon their removal. In particular, we note that the 2011 regulations do not expressly address the issue whether "removal" of the adornments meant simply moved off of the cemetery plot or whether that term meant the item at issue could be or would be discarded by the City. As to that issue, paragraph 29 of the 2011 regulations states that "[t]he City shall take reasonable precautions to protect against loss or damage to property or rights within the Cemetery; but it expressly disclaims all responsibility for loss or damage from causes beyond its reasonable control" Further, statements made by Miller and Watson would support the

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conclusions that at least some of the adornments were acceptable for placement on a cemetery plot, that such adornments could have been moved to an acceptable location on the cemetery plot, that the destruction of at least some of the adornments was improper, and that the City's employees had not performed as the City intended when they damaged the adornments. Accordingly, in light of our precedents regarding the special nature of cemetery plots and viewing the evidence in the light most favorable to the plaintiffs, we must conclude that a resolution of disputed facts is required to determine the extent, if any, of the City's duty in the present case. To be clear, we are not holding that the City had a duty not to discard the adornments, we are holding that genuine issues of material fact prohibit us, and prohibited the trial court, from determining that the City had no such duty. Thus, the trial court erred in entering a summary judgment for the City regarding the negligence claims, specifically as to the damage to, destruction of, or loss of the adornments. The plaintiffs did not present substantial evidence that would support an award of mental-anguish or emotional-distress damages, as the City correctly argued in

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its motion for a summary judgment. See Hamilton v. Scott, 97 So. 3d 728, 731 (Ala. 2012); AALAR, Ltd. v. Francis, 716 So. 2d 1141 (Ala. 1998).

Conclusion

Based on the foregoing, we conclude that the trial court did not err by granting the City's motion for a summary judgment regarding the plaintiffs' trespass claims but that the trial court did err by granting the City's motion for a summary judgment regarding the plaintiffs' negligence claims, particularly as to the cost of the adornments.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Moore, Donaldson, and Hanson, JJ., concur.

Thompson, P.J., concurs in the result, without writing.