



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-17-00068-CV

CHARLETTE (NECOLE) TANNER-STARR AND MARCIE TANNER, APPELLANTS

V.

WILLIE LEE GRIFFIN, JR., D/B/A GRIFFIN MORTUARY, APPELLEE

On Appeal from the 99th District Court
Lubbock County, Texas
Trial Court No. 2015-515,009, Honorable Edward Lee Self, Presiding

February 20, 2019

MEMORANDUM OPINION

Before CAMPBELL and PIRTLE and PARKER, JJ.

Appellants Charlette Necole Tanner-Starr and her sister Marcie Tanner sued appellee Willie Lee Griffin, Jr., d/b/a Griffin Mortuary, alleging his various acts of negligence in the disposition of their father's remains proximately caused them mental anguish. At trial, after appellants rested, the court directed a verdict for Griffin on the ground that he could have no liability for negligently inflicted emotional distress. It accordingly rendered judgment that appellants take nothing. On appeal, appellants contend the trial court erred by granting a directed verdict for Griffin and abused its

discretion by denying them leave to file an amended petition adding a negligence per se count. We will sustain appellants' first issue, reverse the court's judgment and remand the case for further proceedings.

Background

Pastor Charles Tanner was not married at the time of his death but was survived by five adult children including appellants. During the latter stages of his illness Pastor Tanner lived with his sister, Willie Moore. Following Pastor Tanner's death, Moore contacted Griffin to make funeral arrangements. Trial testimony showed Griffin and Pastor Tanner had been acquainted for over thirty years. Griffin was aware there was a "rift" between Moore and appellants. Moore agreed to pay Pastor Tanner's funeral expenses but, according to the testimony of Tanner-Starr, was "reimbursed" for the cost. According to Griffin's testimony, Moore signed an authorization to embalm¹ as well as a funeral service contract.

Griffin testified that after Pastor Tanner's death Tanner-Starr told him in a telephone conversation she lacked the money to pay for a funeral so Moore would pay for the funeral and make the arrangements. Griffin testified he acted with the consent of Tanner-Starr, Marcie Tanner, and two of their siblings, and believed by virtue of those four children's consent Moore was responsible for making Pastor Tanner's final arrangements.

¹ The document identifies Moore as Pastor Tanner's sister and beneath Moore's signature appears the type-written statement, "Signature of next-of-kin or Person Responsible for making arrangements for final disposition."

Tanner-Starr and Marcie Tanner were out of town when their father died. Evidence showed Tanner-Starr had eleven telephone conversations with Griffin prior to the funeral concerning her requirements for the ceremony. She specified that the funeral not be conducted according to particular practices of her father's denomination; that the casket remain open during the funeral service; that the children be allowed to view the body at the front of the church's sanctuary; and those attending the funeral should view the body as they passed the casket at the end of the service. According to the testimony of Tanner-Starr, Griffin told her she could "rest assured" these requirements would be met. Griffin agreed in testimony that Tanner-Starr spoke for herself and Marcie Tanner. Griffin testified that Moore did not instruct him to conduct the funeral in a manner contrary to Tanner-Starr's instructions.

Appellants' trial evidence was to the effect Pastor Tanner's funeral service was not conducted according to the directions Tanner-Starr gave Griffin. Denominational officials were allowed to control the service. At the service's outset, Griffin directed appellants to leave their seats and give Moore and her party the front seats. The casket was closed for viewing at the conclusion of the ceremony and Griffin also denied Tanner-Starr's request that he open the casket for viewing before the family left the church, and denied the request again at the cemetery. As a result, appellants were not able to view their father's remains. According to appellants' evidence, Griffin refused them the opportunity to bid their father goodbye. Both testified they suffered mental anguish, including depression, as a result of Griffin's refusal to allow them to see their father's remains.

Appellants sued Griffin alleging they sustained compensable mental anguish. They claimed no physical injury. When the case was tried before a jury, Griffin moved for

a directed verdict after appellants rested. Griffin argued he owed appellants no legal duty under *Boyles v. Kerr*.²

Griffin also requested a directed verdict on the affirmative defense of statutory immunity under Texas Health and Safety Code section 711.002(i).³ After an overnight recess to consider the parties' arguments and authorities, the trial court directed a verdict in Griffin's favor. The court agreed that appellants could not recover mental anguish damages; it expressly declined to rule on Griffin's immunity defense.

Analysis

In their first issue appellants argue the trial court erred in directing a verdict for Griffin. A directed verdict is properly granted if the substantive law does not authorize the plaintiff to recover on the cause of action alleged. *Cook v. Neely*, No. 04-14-00518-CV, 2015 Tex. App. LEXIS 7799, at *5 (Tex. App.—San Antonio July 29, 2015, pet. denied) (mem. op.) (citing *Lively v. Adventist Health System/Sunbelt, Inc.*, No. 02-02-00418-CV, 2004 Tex. App. LEXIS 6937, at *15-16 (Tex. App.—Fort Worth July 29, 2004, no pet.) (mem. op.) (holding the trial court properly granted directed verdict based on the lack of a recognized cause of action for breach of implied warranty to keep premises safe)). When, as here, a ruling on a directed verdict involves a question of law, we review that aspect of the ruling under a de novo standard. *McCullough v. Scarbrough, Medlin & Assocs.*, 435 S.W.3d 871, 885 (Tex. App.—Dallas 2014, pet. denied). We of course do not weigh the evidence but consider all of the evidence in a light most favorable to the

² 855 S.W.2d 593 (Tex. 1993).

³ TEX. HEALTH & SAFETY CODE ANN. § 711.002(i) (West 2017).

party against whom the verdict was directed and disregard all contrary evidence and inferences. *Coastal Transp. Co. v. Crown Cent. Petro. Corp.*, 136 S.W.3d 227, 234 (Tex. 2004). We indulge all reasonable inferences created by the evidence in favor of the losing party. *Id.*

The question whether the defendant owed the plaintiff a legal duty is a question of law determined by the court from the particular facts of the case. *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 289 (Tex. 1996). Texas does not recognize a general legal duty to avoid negligently inflicting mental anguish. *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993). Our supreme court has noted two primary reasons why courts may not permit mental anguish as a compensable damage element. *City of Tyler v. Likes*, 962 S.W.2d 489, 494-95 (Tex. 1997). First, predictability is difficult. That is, the transgression of a legal right may cause one person extreme mental suffering while another experiences essentially no damage. *Id.* at 495. This inconsistency makes it “difficult for the law to distinguish between those instances when mental anguish is reasonably foreseeable from particular conduct and those when it is so remote that the law should impose no duty to prevent it.” *Id.* Second, even under circumstances where mental anguish is a foreseeable consequence of a wrongful act, “its existence is inherently difficult to verify.” *Id.* So the law applies seemingly “artificial evidentiary barriers” as safeguards because “the law has not yet discovered a satisfactory empirical test for what is by definition a subjective injury.” *Id.*

Our courts nevertheless recognize certain categories of cases “in which the problems of foreseeability and genuineness are sufficiently mitigated that the law should allow recovery for anguish.” *Likes*, 962 S.W.2d at 495. One such category consists of

cases involving a breach of duty arising out of certain special relationships. *Id.* at 496 (citing *Boyles*, 855 S.W.2d at 600). A special relationship exists between the next of kin of a decedent and one to whom the decedent's remains have been entrusted for disposition. See *SCI Texas Funeral Services v. Nelson*, 540 S.W.3d 539 (Tex. 2018) (special relationship arises between person disposing of decedent's remains and decedent's next of kin); *Likes*, 962 S.W.2d at 496 (preparation of a corpse for burial) (citing *Pat H. Foley & Co. v. Wyatt*, 442 S.W.2d 904 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.)); *Boyles*, 855 S.W.2d at 597, 600 (funeral home's negligent handling of a corpse) (citing *Wyatt*, 442 S.W.2d 904).

In the trial court, Griffin's primary contention in support of his no-duty argument was based on the absence of contractual privity between Griffin and appellants. Presenting the same argument on appeal, Griffin's cited cases include *Noah v. Univ. of Texas Med. Branch at Galveston*, 176 S.W.3d 350, 356 (Tex. App.—Houston [1st Dist.] 2004, pet. denied), in which the court listed "a contractual relationship between the parties" among the common elements generally present in special relationship cases.⁴

At trial, however, the parties and trial court lacked the benefit of the 2018 opinion of the Texas Supreme Court in *Nelson*, 540 S.W.3d 539. Cody Nelson, the adult son of the decedent, sued a funeral home for mental anguish damages he allegedly sustained because the funeral home cremated his mother's body without his authorization. *Id.* at 542. Nelson did not complain in his suit of the cremation of the body, and acknowledged

⁴ See also *Lions Eye Bank of Tex. v. Perry*, 56 S.W.3d 872, 877 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (setting out same elements), *disapproved in part by Nelson*, 540 S.W.3d at 547-48 (as to requirement of contractual relationship).

he would not have done differently. Rather, he claimed mental anguish damages “for having been denied the opportunity to pay his last respects to his mother.” *Id.* The cremation was carried out on the authorization of other family members when Nelson could not be contacted immediately on his mother’s death. In addressing whether mental anguish damages may be recovered for mishandling a corpse, absent a contractual relationship, the court noted its historic recognition of a “quasi-property right” of next of kin to possess their decedent’s body and control the burial. *Id.* at 545; *Burnett v. Surratt*, 67 S.W.2d 1041, 1042 (Tex. Civ. App.—Dallas 1934, writ. ref’d), *superseded by statute on other grounds*, Act of Feb. 27, 1934, 43rd Leg., 2d C.S., ch. 66, § 1, 1934 Tex. Gen. Laws 146, 157-158 (current version codified at TEX. HEALTH & SAFETY CODE ANN. § 711.002(a)). The primary concern of this right is not injury to the corpse but whether its negligent handling “caused emotional or physical pain or suffering to surviving family members.” *Id.* (quoting *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 383-84 (Tex. 2012)). The court reiterated that mental anguish damages are available for mishandling a corpse. *Id.* at 546. Furthermore, the court explained, the special relationship existing between a person disposing of a decedent’s remains and the next of kin is not dependent on contractual privity. 540 S.W.3d at 546-47. “The relationship between a person disposing of a decedent’s remains and the next of kin is special, even without a contract.” *Id.* at 547. In the case before us, no one contends Griffin had a contract with appellants, but the *Nelson* opinion makes clear the trial court’s directed verdict must have some other foundation if we are to affirm it.

As noted, the other ground for directed verdict Griffin presented was an immunity defense based on Health and Safety Code section 711.002(i). The trial court declined to

rule on this ground and, apart from passing reference in a footnote in Griffin's brief, it is not briefed by the parties. However, a directed verdict must be affirmed on appeal if the record establishes any ground entitling the movant to judgment as a matter of law, even if it was not raised in the motion. *Elloway v. Pate*, 238 S.W.3d 882, 889 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Health and Safety Code section 711.002(i) provides:

(i) a funeral director . . . shall not be liable for carrying out the directions of any person who represents that the person is entitled to control the disposition of the decedent's remains.

TEX. HEALTH & SAFETY CODE ANN. § 711.002(i). Appellants argued to the trial court that the evidence raised a fact issue whether Moore represented to Griffin that she was the person entitled to control the disposition of her brother's remains, given Griffin's knowledge that five adult children survived Pastor Tanner.⁵ We do not assess that argument, but even if the record were viewed as establishing conclusively that Moore made such a representation, we agree with appellants' trial contention the record does not establish their suit sought to impose liability on Griffin for carrying out her directions. There is no testimony that Moore directed Griffin's actions of which appellants complain in their suit. The directed verdict cannot be sustained on Griffin's claim to the statutory immunity defense.

Finally, on appeal, Griffin argues strongly that appellants' stated complaints are for mishandling a "funeral service" rather than mishandling a corpse. The argument was not

⁵ See TEX. HEALTH & SAFETY CODE ANN. § 711.002(a) (listing by priority those entitled to control the disposition of decedent's remains, absent decedent's written direction).

well developed in the trial court, and Griffin does not explain how appellants' evidence he denied them the opportunity to view their father's remains before burial legally distinguishes this case from other negligent handling cases.

In *Wyatt*, negligent handling of a corpse involved the funeral director's failure to advise the plaintiff mother against opening her son's casket at the funeral because the corpse had an offensive odor. The court of civil appeals affirmed a judgment based on jury findings that the funeral director's failure was negligence proximately causing the mother mental anguish. This, despite the jury's finding the funeral director was not negligent in the manner of embalming. *Wyatt*, 442 S.W.2d at 905-06.⁶ See also *Nelson*, 540 S.W.3d at 545 (referring to general right of next of kin to "control the burial"); *Rader Funeral Home, Inc. v. Chavira*, 553 S.W.3d 10 (Tex. App.—El Paso 2018, no pet.) (affirming a jury award of mental anguish damages sustained by the decedent's next of kin when, shortly before their decedent's wake was to begin, they discovered the defendant funeral home had shipped the wrong corpse across the state); *Lancaster v. Mebane*, 247 S.W. 926 (Tex. Civ. App.—Texarkana 1923, writ ref'd) (affirming judgment awarding mental anguish damages where railroad unloaded coffin containing decedent at the wrong location, delaying the funeral from morning until late afternoon and causing decedent's son mental anguish).

We cannot conclude this record establishes that the substantive law would not authorize appellants to recover mental anguish damages. See *Cook*, 2015 Tex. App.

⁶ See *Nelson*, 540 S.W.3d at 547 (discussing *Wyatt* holding).

LEXIS 7799 (standard for directed verdict). Accordingly, finding we may not affirm the trial court's directed verdict, we sustain appellants' first issue.

Denial of Leave to File Amended Petition

In their second issue, appellants assert the trial court abused its discretion by denying their request for leave to file an amended petition adding a claim of negligence per se. Because our disposition of appellants' first issue requires we reverse the court's judgment and remand the case, and because their second issue does not seek greater appellate relief, discussion of appellants' second issue is unnecessary to the disposition of the appeal. TEX. R. APP. P. 47.1.

Conclusion

Having sustained appellants' first issue, we reverse the judgment of the trial court and remand the case for further proceedings. TEX. R. APP. P. 43.2(d).

James T. Campbell
Justice