

No. 121200

In the
Supreme Court of Illinois

DONNA COCHRAN,

Plaintiff-Appellee,

v.

SECURITAS SECURITY SERVICES USA, INC.,

Defendant-Appellant.

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

**AMICUS CURIAE BRIEF OF THE ILLINOIS TRIAL LAWYERS
ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE**

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INTRODUCTION

The Illinois Trial Lawyers Association submits this *amicus curiae* brief in support of the plaintiff Donna Cochran. This court will for the first time decide whether a cause of action exists for the *negligent* interference with the next of kin's well-recognized right to possession of a decedent's body. Additionally, this appeal raises the important difference between a freestanding claim for negligent infliction of emotional distress and a claim for other personal tort which causes emotional distress. Further guidance from this court regarding the distinction between these two types of actions will clearly have meaningful implications for all Illinois citizens who suffer emotional injury caused by another's negligence and for attorneys prosecuting and defending such cases. This *amicus* brief is intended to offer a larger perspective on these issues and their historical significance that may not be described in detail by the parties' briefs.

ARGUMENT

The appellate court should be affirmed. Cochran's claim for emotional distress damages will permit recovery to next of kin when a tortfeasor's negligence has interfered with the body of a deceased family member without encouraging fraudulent or frivolous claims. Cochran's emotional distress damages are not a freestanding claim but, instead, are anchored directly to the tort that Securitas committed against her when Securitas negligently interfered with Cochran's unquestioned right to possess her son's body for purposes of proper burial. Injury to the decedent's body is a recognized source of emotional distress to the next of kin. The emotional distress damages in this situation are, by definition, limited to the next of kin. The claim for emotional distress damages is

also limited because the decedent's body must be harmed or its proper deposition prevented for the next of kin to prevail. These limited, special circumstances resolve any concerns about fraudulent or frivolous claims for negligent infliction of emotional distress. For these reasons, the appellate court should be affirmed and Cochran should be permitted to prosecute her negligence action against Securitas.

I. A Decedent's Next Of Kin Is Entitled To Recover Emotional Distress Damages Caused By The Wrongful Interference With The Right To Take Possession Of The Decedent's Body

Illinois common law recognizes the right of the next of kin to take possession of a decedent's body for appropriate disposition, whether by burial or otherwise. *Leno v. St. Joseph Hospital*, 55 Ill. 2d 114, 117, 302 N.E.2d 58, 59-60 (1973). Interference with this right is an actionable wrong and the plaintiff is entitled to recover damages for the mental suffering caused by the defendant's conduct. *Mensing v. O'Hara*, 189 Ill. App. 48, 55 (1914). "That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that remains of a deceased [relative] had been mutilated is too plain to admit of argument [citation]." *Cochran v. Securitas Sec. Servs. USA, Inc.*, 2016 IL App. (4th) 150791, ¶ 36, 59 N.E.3d 234 at 243. "Without the element of mental distress the action would be impotent of results and of no significance or value [citation]." *Id.*

II. Cochran's Claim For Emotional Distress Is Not Freestanding But Is Anchored To Defendant's Wrongful Interference With Her Right To Possess Her Son's Body

Cochran asserts Securitas interfered with her right to take possession of her son's body and make an appropriate disposition. Plaintiff further asserts that Securitas'

wrongful interference caused her to suffer personal injuries including severe emotional distress and mental suffering. *Cochran*, 2016 IL App (4th) ¶ 9, 59 N.E.3d at 239.

Significantly, Plaintiff's claim for emotional distress damages is a not freestanding cause of action for negligent infliction of emotional distress but is anchored to the negligent violation of her well-recognized right to take possession of her son's body. In *Clark v. The Children's Memorial Hospital*, 2011 IL 108656, 955 N.E.2d 1065 (2011), this court permitted parents of a disabled child to seek emotional distress damages caused by the defendant doctors' professional negligence. The parents' claim for emotional distress damages was allowed because the damages arose from a tort already committed against them; the wrongful birth of their severely disabled child. *Clark*, 2011 IL 108656, ¶¶ 104-106, 111-113, 955 N.E.2d 1065 at 1086-1089 (2011).

III. *Clark v. Children's Memorial* Supports A Claim For Emotional Distress Arising From Defendant's Negligent Interference With Cochran's Right Of Possession

Cochran's claim of emotional distress damages is analogous to the injured parents' in *Clark*. Cochran's emotional distress damages are anchored to a tort already committed against her – Defendant Securitas negligently interfered with a mother's right to possess her son's body after his death.

This court's decision in *Clark* explains the importance of this distinction. In cases where the claim of emotional distress is freestanding and not anchored to any other tort, courts have applied special restrictions such as the "zone of danger" rule. *Clark*, 2011 IL 108656 ¶ 106-107, 955 N.E.2d at 1086-1087. In *Clark*, this court identified limitations on freestanding claims for negligent infliction of emotional distress out of concern for

fraudulent claims or frivolous litigation. *Id.* These special restrictions, however, have no logical bearing where a tort has already been committed against the plaintiff. *Id.* (See also; J. Garman specially concurring in *Schweih's v. Chase Home Finance, LLC*, 2016 IL 120041, ¶¶ 66-88).

Likewise, a special restriction limiting Cochran's recovery to willful and wanton conduct is unnecessary. Her recovery for emotional distress damages is already limited by the "special circumstances" of Defendant's negligent interference with her well-recognized right to take possession of her son's body. As the appellate court in this case recognizes, violation of this right is also well understood to proximately cause the next of kin to experience *real* mental distress and anguish.

Permitting Cochran to pursue a negligence action for the mishandling of her son's body would provide her *the same, and not a greater right* of emotional distress recovery as the parents of the living child in *Clark*. For these reasons, this court should affirm the appellate court and allow Cochran to seek emotional distress damages resulting from the Defendant's negligent interference with her right to possess her son's body.

IV. Required Proof Of Willful And Wanton Conduct To Recover Emotional Distress Damages For Wrongful Interference With Possession Of A Corpse Is Not Well-Enscinded In Illinois Law

A. *Mensing* did not preclude recovery of emotional distress caused by negligent interference

While the next of kin's right to take possession of a decedent's body is well recognized, the requisite degree of fault to permit recovery for emotional distress resulting from the wrongful interference with this right is not well settled. Defendant

Securitas, like many previous litigants and judges, cites *Mensing* v. *O'Hara*, 189 Ill. App. 48 (1914) for the premise that the next of kin's right to recover emotional distress damages is limited to cases where the defendant is guilty of willful and wanton misconduct. This is an over-reading of *Mensing*. In *Mensing*, the appellate court did allow recovery for emotional distress resulting from willful and wanton interference. However, as clearly stated in *Courtney v. St. Joseph Hospital*, 149 Ill. App. 3d at 398, 500 N.E.2d at 704 (1st Dist. 1986), *Mensing* **did not** decide whether recovery can also be had for emotional distress resulting from negligent interference.

The court [*Mensing*] **expressly declined** to decide whether recovery may be had for mental suffering alone, in the absence of any allegation or proof of willful or wanton misconduct. (emphasis supplied). *Id.*

Illinois courts first began to explore this issue over 100 years ago in *Palenzke v. Bruning*, 98 Ill. App. 644 (1900). Palenzke sought to recover damages for pain and anguish of the mind for the allegedly wanton, malicious, and wrongful mutilation of his son's body and disposal of his organs. *Palenzke*, 98 Ill. App. at 648. The trial court dismissed the father's case. The appellate court reversed, ruling the father was undoubtedly entitled to bring an action for damages because his son's remains were not preserved "for proper burial." "For such violation of the appellant's rights an action for damages can, we think, be maintained." *Palenzke*, 98 Ill. App. at 651.

This macabre issue returned to the appellate court in *Mensing* when a widower sued the undertakers who wrongfully cut his deceased wife's hair and otherwise mutilated her body rendering it unfit for viewing. *Mensing*, 189 Ill. App at 49-50. Mr. Mensinger further alleged as a result of the defendants' wrongful acts "great

indignity, insult, and humiliation were put on him.” *Mensinger*. 189 Ill. App. at 50. The trial court dismissed the case. The appellate court reversed.

Initially the appellate court considered whether plaintiff’s claim that defendants “wrongfully and unlawfully procured” his dead wife’s hair was an allegation of willful or wanton misconduct and determined “the averments of the declaration amount to a charge of willful misconduct on the part of the defendants.” *Mensinger*, 189 Ill. App. at 50-51. The appellate determined these actions were willful. *Id.*

Next, the appellate court favorably discussed precedents from other states allowing mental suffering damages for the willful and wanton interference with the next of kin’s right of possession of a decedent’s body. The opinion concluded by agreeing with the previous result in *Palenzke* allowing recovery for malicious mutilation. “We are of the opinion that the decision in that case is fully supported by the great weight of authority, and that the present case is one *which upon the pleadings before us*, is governed by the same legal principles in that case. (emphasis supplied).” *Mensinger*, 189 Ill. App. at 56.

However, *Mensinger* also acknowledged the “Texas doctrine” which allowed recovery of mental suffering damages caused by a telegraph company’s negligent failure to promptly deliver a message of a death or funeral. *Mensinger*, 189 Ill. App at 56. *Mensinger* clearly did not decide whether the “Texas doctrine” allowing recovery for negligently caused emotional distress should be recognized in Illinois. The appellate court noted:

Whether the so-called Texas doctrine is supported by the better reason and authority *we need not stop to inquire*. That doctrine has no necessary or controlling application to the facts of this case, where the wrongful act is alleged to have been intentionally committed. (emphasis supplied). *Id.*

B. *Courtney* recognized the merits of a negligence action for interference with the next of kin's right to possess the decedent's body

Eighty years later, in *Courtney v. St. Joseph Hospital*, 149 Ill. App. 3d 397, 500 N.E.2d 703 (1st Dist. 1986), plaintiff sued to recover damages for emotional distress when her husband's body decomposed after the hospital's morgue refrigeration unit negligently malfunctioned. The case reached the appellate court on the certified question; "whether Illinois recognizes a cause of action for emotional distress arising from the negligent mishandling of a corpse". *Courtney*, 149 Ill. App. 3d at 398, 500 N.E.2d at 703.

The appellate court began its opinion with a discussion of *Mensinger's* agreement with recovery for mental suffering caused by any "willful or wanton infringement of this recognized right by the intentional mutilation of the body of the deceased". *Courtney*, 149 Ill. App. 3d at 398, 500 N.E.2d at 704. The appellate court correctly stated that in *Mensinger*, "The court expressly declined to decide whether recovery may be had for mental suffering alone, in the absence of any allegation or proof of willful or wanton misconduct." *Id.* Apparently realizing *Mensinger* did not answer the certified question; "whether Illinois recognizes a cause of action for emotional distress arising from the negligent mishandling of a corpse" the appellate court engaged in further analysis.

Since their research did not disclose any Illinois decision recognizing a cause of action for mental distress caused by a negligent mishandling of a corpse, the appellate court looked toward this court's opinion in *Rickey v. Chicago Transit Authority*. See *Courtney*, 149 Ill. App. 3d at 399, 500 N.E.2d at 704. The appellate court noted *Rickey's* discussion of the general reluctance to allow recovery for purely mental or emotional distress. "According to *Rickey*, 'courts have given as reasons for this reluctance apprehensions that the door would be opened for fraudulent claims, that damages would be difficult to ascertain and measure, that emotional injuries are hardly foreseeable and that frivolous litigation would be encouraged' [citation]." *Id.*

The appellate court doubted whether any of the concerns stated in *Rickey* were present in a claim for emotional distress resulting from the mishandling of a corpse. "However, we *seriously question* whether these apprehensions are well founded where the mishandling of a corpse is concerned." (emphasis supplied). *Courtney*, 149 Ill. App. 3d at 399, 500 N.E.2d at 704. *Courtney* then supported its position with a review of *Prosser and Keaton on the Law of Torts*, and the *Restatement (Second) of Torts* and expressly determined that recognizing a negligence action would not open the door to fraudulent claims or frivolous litigation. "In view of the 'special circumstances' to which Prosser and Keaton refer *we do not believe that recognizing a cause of action for the negligent mishandling of a corpse would open the door for fraudulent claims or encourage frivolous litigation.*" (emphasis supplied). *Courtney v. St. Joseph Hospital*, 149 Ill. App. 3d at 400, 500 N.E.2d at 705.

The appellate court further determined that emotional injuries caused the mishandling of a corpse are “highly foreseeable” and are comparable to the commonplace determination of money damages for pain and suffering:

[W]e note that ...our supreme court in *Knierim v. Izzo* (1961), 22 Ill. 2d 73, 174 N.E.2d 157, observed that “[i]t is equally difficult ... to compute the money value of pain and suffering for which damages are allowed by juries each day in personal injury actions. *Id.*

At the conclusion of their analysis, the appellate court stated that they were inclined permit to the plaintiff to seek damages for mental suffering and emotional distress caused the negligent mishandling of a corpse but felt that *Rickey* precluded such a ruling:

Were we writing on a clean slate, we would be inclined to permit the complaint in this case to stand. However, we believe that recognition of plaintiff’s cause of action is foreclosed by our supreme court’s decision in *Rickey v. Chicago Transit Authority* (1983), 98 Ill. 546, 75 Ill.Dec. 211, 457 N.E.2d 1. (emphasis supplied) *Id.*

Courtney was decided in 1986 before this court’s ruling in *Clark v. The Children’s Memorial Hospital*, 2011 IL 108656, 955 N.E.2d 1065, (2011). In *Clark* this court ruled that *Rickey’s* zone of danger limitation did not apply in cases where a tort has already been committed against the plaintiffs and they assert emotional distress as an element of damages for that tort. *Clark*, 2011 IL 108656, ¶¶ 104-106,111-113, 955 N.E.2d at 1086-1089. “We... specifically hold that the zone of danger rule applies only in cases where the plaintiff’s theory of liability is the negligent infliction of emotional distress.” It does not apply where... a tort has already been committed against the plaintiffs and they

assert emotional distress as an element of damages for that tort.” *Clark*, 2011 IL 108656, ¶113, 955 N.E.2d at d1088.

Other cases cited by Securitas in support of its claim that the willful and wanton requirement is well-ensconced in Illinois law lack the detailed analysis found in *Courtney*. These cases instead simply and incorrectly state that *Mensing* affirmatively restricted the next of kin’s recovery for emotional distress to cases of willful and wanton interference:

- *Drakeford v. University of Chicago Hospitals*, 2013 IL (1st) 111366, 994 N.E.2d 119 (1st Dist. 2013) cites *Kelso v. Watson*, 204 Ill. App. 3d 727, 562 N.E.2d 975 (3d Dist. 1990) with no real analysis.
- *Kelso* cites *Mensing* but omits any discussion of its actual limited holding.
- *Hearon v. City of Chicago*, 157 Ill. App. 3d 633, 510 N.E.2d 1192 (1st Dist. 1987) does the same.

In *Rekosh v. Parks, et al.*, 316 Ill. App. 3d 58, 510 N.E.2d 1192 (2nd Dist. 2000), like *Courtney*, the appellate court ruled that plaintiff’s claim for infliction of emotional distress damages caused by defendants’ negligent cremation of the decedent was foreclosed by *Rickey*. *Rekosh* was also decided prior to *Clark*’s detailed explanation of the proper limitation of *Rickey* to cases where the plaintiff’s theory of liability is negligent infliction of emotional distress .

Limitation of recovery of emotional distress to cases of willful and wanton interference is not well-ensconced in Illinois law but is the result of a misunderstanding of *Mensing* and *Rickey*. In *Courtney*, the appellate court explained that *Mensing* did not limit recovery to willful and wanton interference. *Courtney* further reasoned that

emotional distress damages caused by negligent interference are appropriate and in the appellate court's well-reasoned "clean slate" opinion should be allowed. In *Clark*, this court explained that *Rickey* is limited to cases where the plaintiff's theory of liability is negligent infliction of emotional distress. In this case, Cochran seeks recovery for emotional distress arising from Securitas' tort of negligent interference with her right to possess and bury her son's body. Accordingly, the appellate court's decision allowing Cochran's cause of action for negligent interference with the right to possession of her son's body is properly affirmed.

V. Special Circumstances Warrant Recognition Of A Cause Of Action For Negligent Interference With The Right To Possess A Decedent's Body

Actions for negligent infliction of emotional distress can raise concerns of fraudulent and frivolous claims. This court has addressed these concerns in *Rickey*, *Clark* and *Schweih's*. However, Cochran is not pursuing a freestanding action for negligent infliction of emotional distress. Instead, she seeks recovery for emotional distress as an element of damages in her tort action against Securitas who negligently interfered with her right to possess her son's body. Well-reasoned authorities recognize that emotional distress damages resulting from the mishandling of a corpse are necessarily anchored to "special circumstances" that override concerns of fraudulent, spurious claims.

In *Bushers v. Graceland Cemetery Association, et al.*, 171 F. Supp. 205 (1958), plaintiffs brought suit against the cemetery association and drilling contractor

responsible for erecting an oil well within 69 feet of their son's grave. Illinois law was controlling in this diversity action. *Bushers*, 171 F. Supp. at 211 (1958).

The Bushers sought both injunctive relief and damages for mental anguish caused by the presence of the oil well in the cemetery. After seeing the operating well near her son's grave, Mrs. Bushers became "quite sick and nervous, did not sleep well and suffered from headaches. Her disposition changed and she became irritable toward her husband and three children. She could do no housework for about a year and a half. She was treated by Dr. Peters, an osteopathic physician. Mr. Bushers was also disturbed and irritated". *Bushers*, 171 F. Supp at 208. The district court ruled that the mental anguish suffered by the Bushers was proximately caused by the presence of the oil well in the cemetery. *Id.*

The defendants argued the Bushers could not recover mental anguish damages because they were not physically injured. The district court rejected that argument and determined the Bushers were entitled to seek recovery for their mental anguish. *Bushers*, 171 F. Supp. at 213. This ruling was based in part on the nature of the plaintiffs' claim. Bushers' suit was not a simple negligence action for emotional distress but sought emotional distress damages for the tort of cemetery trespass which had been committed against them. *Bushers* 171 F. Supp at 212. "In a simple negligence action under the rule in Illinois the plaintiff is not entitled to recover for mental anguish unless there is physical contact. *In the instant case there was a continuing trespass* upon the plaintiff's easement. . . [T]hus depriving plaintiffs of their right to visit the grave of their

deceased son...amid surroundings proper to a place devoted to final and peaceful repose of the dead.” (emphasis supplied), *Bushers*, 171 F. Supp. at 213 (1958).

The district court in *Bushers* realized plaintiffs’ claim for emotional distress was anchored in the trespass already committed against them. *Bushers* correctly forecasted and is clearly consistent with this court’s holding *Clark*. Both cases recognize the appropriateness of permitting plaintiffs to seek emotional distress when those damages are not a freestanding theory but are anchored to and arise from a tort already committed against the plaintiff. This reasoning was also acknowledged in *Courtney* where the appellate court favorably noted Prosser’s and Keaton’s recognition of “special circumstances” for emotional distress damages arising from the negligent mishandling of a corpse. These special circumstances answer concerns raised by freestanding claims for negligent infliction of emotional distress. For these reasons the decision of the appellate court must be affirmed.

VI. Additional Authorities Support Cochran’s Negligence Action

“One who intentionally, recklessly or negligently removes, withholds, mutilates, or operates on the body of a dead person or prevents its proper internment or cremation is subject to liability.” *Restatement (Second) of Torts* § 869 (1979). “Thus...the driver who negligently collides with the hearse and dumps the corpse out on the highway will be subject to liability, if the result is harm to the body or prevention of its proper burial or cremation.” *Restatement (Second) of Torts* §868 cmt. d (1979). This section of the Restatement (Second) has not been adopted by this court. “Nevertheless, it provides persuasive authority for the position asserted by the plaintiff - that she may maintain an

action based on allegations of negligent interference with her right to possession of her son's body without circumstances of aggravation." *Cochran*, 2016 IL App (4th) ¶ 50, 59 N.E.3d at 247. Additionally, courts in; Oregon, Missouri, California, West Virginia, Ohio, Arizona, New Jersey, Texas, Idaho, Louisiana, Montana, New York, Hawaii, Massachusetts, Indiana, Connecticut, Tennessee, Nevada, and Kentucky, now permit recovery in cases of alleged negligent mishandling of a decedent's body without circumstances of aggravation". *Cochran*, 2016 IL App (4th) ¶ 50, 59 N.E.3d at 247.

VII. Cochran Does Not Have A Statutory Remedy Against Securitas

Securitas is not a "crematory authority" licensed to operate a crematory and to perform cremations. Therefore, Securitas is not subject to the provisions of the *Crematory Regulation Act, 410 ILCS 18/1 et seq.* and is immune from any remedy provided by the Act. Securitas voluntarily assumed the responsibility to identify and release bodies from the Memorial Medical Center morgue. Securitas should not escape the consequences of its negligence simply because the funeral home decided to acknowledge its statutory failure and settled with Cochran.

Deterrence is an important policy of tort law. *Siemienec v. Lutheran General Hospital*, 117 Ill.2d 230, 258, 512 N.E.2d 691, 705 (1987) *overruled on other grounds* by *Clark v. The Children's Memorial Hospital*, 2011 IL 108656, 955 N.E.2d 1065 (2011). A primary justification for imposing liability for negligence "is to give actors appropriate incentive to engage in safe conduct." *Zokhrabov v. Jeung-Hee Park*, 2011 IL App (1st) 102672 ¶ 9, 963 N.E.2d 1035, 1040 (1st Dist. 2011). The potential liability,

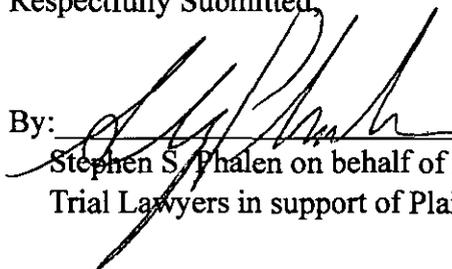
which promotes the actor's adoption of appropriate precautions, consequently improves social welfare and advances broad economic goals. *Id.*

Securitas accepted the responsibility to identify and facilitate transport of the dead as part of its business. Clearly social welfare mandates that Securitas perform these sacred tasks with appropriate precautions. This especially true here, in these special circumstances where negligent acts and omissions are well known to cause real emotional distress. Permitting Cochran's negligence action against Securitas will encourage necessary precautions and help deter similar mistakes in the future.

CONCLUSION

For the reasons herein stated, Plaintiff Cochran respectfully requests that this court affirm the appellate court's judgment and remand this case to the trial court for further proceedings on her Third Amended Complaint.

Respectfully Submitted,

By: 
Stephen S. Phalen on behalf of Illinois
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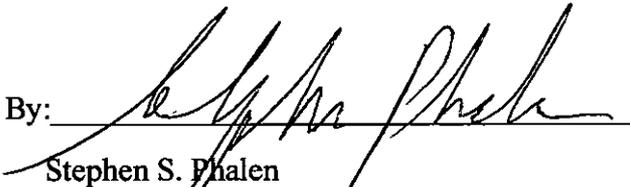
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Certificate Of Compliance

I, Stephen S. Phalen, certify that this brief conforms to the requirements of Rules 341 (a) and (b) and 345 (a) and (b). The length of this brief is 18 pages.

Dated: 3.14.17

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