

IN THE SUPREME COURT
OF FLORIDA

CASE NO. SC01-2206

RICHARD AND MIRIAM WARNER, et al.,

Appellants,

vs.

CITY OF BOCA RATON,

Appellee.

On Certification from the
United States Court of Appeals for the Eleventh Circuit

AMENDED AMICUS CURIAE BRIEF OF THE
INTERNATIONAL CEMETERY AND FUNERAL ASSOCIATION
IN SUPPORT OF APPELLEE CITY OF BOCA RATON

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Statement of the Case

Amicus Curiae, the International Cemetery and Funeral Association (“ICFA”), adopts the Statement of the Case of appellee, the City of Boca Raton, as set forth in its answer brief.

Statement of the Facts

Amicus Curiae, the International Cemetery and Funeral Association (“ICFA”), adopts the Statement of the Facts of appellee, the City of Boca Raton, as set forth in its answer brief.

Summary of Argument

A finding adverse to the appellee City of Boca Raton in the present case would severely undermine the authority of municipal cemeteries in Florida (and ultimately nationwide) to assure consumers who purchase burial spaces in memorial parks that the concept and design of such burial grounds or sections thereof will be maintained in the future. A memorial park is a cemetery in which the grave markers are horizontal and do not extend above the ground.

In the present case, a minority of lot owners who purchased burial spaces at a time when they could observe the memorial park design of the cemetery, subsequently affixed to these spaces the very types of vertical monuments that the memorial park design seeks to avoid and, in some cases, contrary to the cemetery

rules, even installed borders around the graves and replaced the sod on top of the graves with shrubs, gravel or other substances. While these individuals were apparently motivated by sincerely held religious beliefs, their actions deprived the majority of other lot owners and their families of the type of cemetery they purposefully selected.

The City's cemetery regulations in question, Sections IX and XIV, are content-neutral. They do not single out religious objects or decorations, but prohibit all above-ground items of any nature. Purchasers in memorial parks rely upon the cemetery's authority to enforce these restrictions without regard to the ethnic customs or religious beliefs of the lot owners and such rules have been upheld by the courts for decades.

These regulations become especially important when a cemetery is dedicated as a non-sectarian burial ground, owned and operated by a government entity, as is the case in Boca Raton. If individual lot owners become entitled to ignore cemetery regulations to do whatever they wish in the name of religious beliefs, they would effectively disenfranchise the rights of all the other lot owners and undercut the cemetery's ability to properly manage its grounds, resulting in a chaotic cemetery environment.

Argument

Background and Public Policy Concerns

The ICFA was founded in 1887 and is a voluntary trade association of nearly 6,000 members including, nonprofit, for-profit, religious, and municipal (approximately 50) cemeteries, funeral homes, crematories, and memorial retailers. The ICFA's activities include educational conferences and workshops on all phases of the funeral, interment, and memorialization industries. The ICFA also takes an active role in advancing the public interest involving industry issues and encourages its members to meet the needs of consumers. To that end, the ICFA actively promotes consumer choices, the prearrangement of funeral and burial decisions, and open competition among providers of these services.

The present litigation has attracted substantial attention and concern among the ICFA's membership because the adjudication of the claims asserted here may potentially have a far-reaching effect on long-established and nationally respected cemetery practices throughout the United States. Approximately 140 cemeteries located in the state of Florida (some are multiple locations) are members of the ICFA, including the Boca Raton Municipal Cemetery. The legal authority of cemeteries to enact and enforce content-neutral regulations for the overall benefit of the cemetery, its lot owners, related family members, and the community-at-large

has been well established for decades. As discussed below, cemeteries have the right to promulgate various restrictions and prohibitions concerning the use of cemetery property, including the size and proportions of grave markers and related ornaments. The issues raised in this litigation challenge this long-established and accepted authority and threaten to undermine the ability of publicly operated cemeteries to manage their properties in an orderly, fair, and fiscally-sound manner for the common good of those who have purchased spaces in the expectation that established cemetery rules will be followed.

The Purchase of Burial Spaces

When a person acquires ownership of a burial space, typically through a purchase directly from the cemetery, the individual acquires a limited right to use the designated space or spaces for the interment of human remains, subject to the rules and regulations of the cemetery as currently enacted and subsequently amended. The late Raymond Louis Brennan, a nationally recognized legal specialist on cemetery regulations, stated, “The right of burial or interment carries with it the right to erect a fitting memorial. This right is subject to reasonable rules and regulations adopted by the (cemetery) association....” (Brennan, *The Law Governing Cemetery Rules and Regulations*, 1936, revised 1951, pp. 155-156, parenthesis added). The written terms of the sale condition the transaction on the

purchaser's agreement to conform with cemetery regulations, which are usually incorporated by reference into the agreement. Although the purchaser is commonly called a "lot owner," the burial space acquired is actually in the nature of an easement, with the owner of the fee simple, i.e., the cemetery, remaining in full possession and control of the land. (See 14 *American Jurisprudence 2nd*, Cemeteries §31; see also Robert Shay, *The Cemetery Lot: Rights and Restrictions*, 109 U. Pa. L. Rev. 378, 382 (1961), and Cunningham, Richard B., Thompson on Real Property, "*Real Property Aspects of Graves and Cemeteries*," (1994)) .

Cemetery regulations, by their very nature, are a series of restrictions and prohibitions over the activities permitted by lot owners, next of kin, heirs, and even visitors to the cemetery regarding the use of burial spaces. Since the nineteenth century, American courts have upheld various restrictions when they were reasonable in nature and fairly administered. (*Rosehill Cemetery Company v. Hopkinson*, 114 Ill. 209, 29 N.E. 685 (Ill. 1885); *Thompson v. Deeds*, 93 Iowa 228, 61 N.W. 842 (Iowa 1895); *Farely v. Metairie Cemetery Assn. Et al.*, 44 La. Ann. 28, 10 So. 386 (La. 1891); *Hollman v. City of Platteville et al.*, 101 Wisc. 94, 76 N.W. 1119 (Wis. 1898); *Dutton v. Greenwood Cemetery Company*, 80 N.Y.S. 780 (N.Y. 1903); *Roanoke Cemetery Company v. Goodwin et al.*, 101 Va. 605, 44 S.E.

769 (Va. 1903); *Brown et al. v. Hill et al.*, 284 Ill. 286, 119 N.E. 977 (Ill. 1918); *Donahue et al. v. Fitzsimmons et al.*, 95 N.J.Eq. 125, 122 Atl. 617 (N.J. 1923)).

The restrictions may sometimes seem mundane, but they are important because they seek to create an environment which is hospitable to those who come to the cemetery to mourn and remember the deceased. For example, many cemeteries prohibit the placement of plastic or silk flowers on grave sites during the growing season. To some lot owners and visitors, this restriction may seem unfair, however, the regulation is reasonable because plastic flowers are potentially dangerous if caught in lawnmowers and turned into projectiles. Silk flowers tend to become nesting grounds for mosquitoes that irritate visitors to grave sites. Thus, similar to the regulations that are issued by a homeowners' association to preserve the integrity of a community, cemetery regulations are designed to preserve the environment and common good of all who have an interest in the cemetery. While some individual lot owners may believe that their respective "rights" have been diminished, courts uphold restrictions that contribute to the sound operation of the cemetery as anticipated by the majority of lot owners. (14 *Am. Jur. 2d.*, §34).

The Memorial Park Concept

Nearly a century ago, in 1917, the concept of a "memorial park" was developed by Dr. Hubert Eaton, general manager of Forest Lawn Cemetery,

Glendale, California. Eaton described his vision of a memorial park and contrasted it with conventional cemeteries by stating that a memorial park would be “devoid of misshapen monuments and other customary signs of earthly death, but filled with towering trees, sweeping lawns....” (Eaton, *The Comemoral*, 1954, renewed 1994).

By the 1930s, this revolutionary concept in cemetery design became widespread in at least 600 cemeteries and has since proved enduringly popular among the American public. (Jackson, *The Law of Cadavers*, 1937). Contemporary statistics of cemeteries in the United States does not distinguish between traditional “upright” cemeteries and memorial parks. However, of the nearly 23,000 cemeteries with mailing addresses, a vast number are memorial parks based upon their names or based on sections dedicated to the memorial park design. (Deborah M. Burek, editor, *Cemeteries of the U.S.*, 1994).

The memorial park concept gained acceptance throughout the U.S. as a reaction against the austere and dark “graveyard” landscape of traditional cemeteries. Central to this memorial park design is the use of flat markers and memorials combined with borderless grave sites. This effect makes the grounds appear less forbidding to many people and creates a park-like environment that pleases many who wish to memorialize their loved ones. Through the years, even existing “upright” monument cemeteries have found the demand for memorial parks

sufficient to dedicate new areas exclusively to this design and memorial parks have likewise dedicated sections for monuments. Thus, it is not unusual to find cemeteries that contain different sections; one section utilizing flat markers, and the other section using upright monuments.

Whether an entire cemetery has been designed as a memorial park or only sections of it, central to the memorial park concept is the restriction that no vertical markers or similar fixtures may be installed on any grave site, in order to preserve the park-like atmosphere which is at the core of its aesthetic. Consumers who purchase burial sites in memorial parks do so with the understanding and expectation that the horizontal, borderless design will be maintained and enforced in the future.

The design also impacts a memorial park's long-term fiscal planning, and the expenses incurred by the lot purchasers. Deposits to care trust funds are calculated on the less maintenance-intensive demands of ground level markers, and compliance with worker safety regulations such as the OSHA standards are simplified in memorial parks. For example, the necessity of shoring up tilting or sinking monuments is eliminated and the grounds of memorial parks are safer for visitors. The importance of maintaining the aesthetic of the memorial park concept is underscored by the fact that memorial parks even forego financial benefits they

could accrue if they sold the more expensive vertical monuments. Integrity of design drives the memorial park concept. Deviation from that design destroys the concept, no matter how well motivated a person may be in constructing vertical decorations at the grave site.

Viewed as a consumer issue, potential purchasers of burial spaces are placed on notice concerning the restrictive nature of a memorial park, not only by their written agreement to observe the cemetery's rules and regulations, but simply by observing the distinctive layout of the cemetery itself. (See *Reeves et al v. Edge et al.*, 225 Ga. 615, 484 S.E. 2d 498 (Ga. App. 1997) where the court noted that purchasers of burial spaces "were obligated to exercise their duty of due diligence by attempting to ascertain the cemetery's current rules and regulations prior to their installing a marker at their mother's grave...." 225 Ga. 615 at 618). Cemeteries are contractually obligated to preserve this design on behalf of their customers and generations of families have depended upon the owners and managers of our nation's memorial parks to maintain this distinctive design in perpetuity. Likewise, purchasers are obligated to take no action that will alter or detract from the memorial park appearance.

Content-Neutral Regulations Should Be Upheld

The ICFA is concerned that a finding adverse to the appellee City of Boca Raton in the present case would severely undermine the authority of municipal cemeteries in Florida (and ultimately nationwide) to assure consumers who purchase burial spaces in memorial parks that the concept and design of such burial grounds will be maintained in the future.

In the present case, a minority of lot owners who purchased burial spaces at a time when they could observe the memorial park design of the cemetery, subsequently affixed to these spaces the very types of vertical monuments that the memorial park design seeks to avoid and, in some cases, contrary to the cemetery rules, even installed borders around the graves and replaced the sod on top of the graves with shrubs, gravel or other substances. (Def. Exhs. 6A, 6B, 17B, 31A). While these individuals were apparently motivated by sincerely held religious beliefs, their actions deprived the majority of other lot owners and their families of the type of cemetery they purposefully selected.

The City's cemetery regulations in question, Sections IX and XIV (Def. Exh. 21), are content-neutral. They do not single out religious objects or decorations, but prohibit all above-ground items of any nature. Purchasers in memorial parks rely upon the cemetery's authority to enforce these restrictions without regard to

the ethnic customs or religious beliefs of the lot owners and such rules have been upheld by the courts for decades. In *Zimmer et al. v. Congregation Beth Israel, et al.*, 203 Cal. 203, 263 P. 232 (Cal. 1928) the Supreme Court of California upheld a cemetery's restrictions on the type and size of markers to be placed on a Jewish grave because the restrictions were uniform in nature and equally applied to all burial sites in the cemetery.

These regulations become especially important when a cemetery is dedicated as a non-sectarian burial ground, owned and operated by a government entity, as is the case in Boca Raton. If individual lot owners become entitled to ignore cemetery regulations to do whatever they wish in the name of religious beliefs, they would effectively disenfranchise the rights of all the other lot owners and undercut the cemetery's ability to properly manage its grounds, resulting in a chaotic cemetery environment.

Conclusion

For the reasons discussed above, the ICFA respectfully urges the Court to answer the 11th Circuit Court of Appeals' certification in favor of appellee City of Boca Raton.

Respectfully submitted,

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I, the undersigned, do hereby certify that this Amicus Curiae Brief complies with the type limitations set out in Rule 9.210(a), Florida Rules of Appellate Procedure. This Amicus Curiae Brief uses a Times New Roman 14-point font.

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