

Nova Scotia

Court overturns discipline for funeral director who cremated wrong body

Issue: Affirmative duties imposed by statute

The Supreme Court of Nova Scotia, in a March 15 decision, overturned the license revocation of a funeral director who had cremated the wrong body, holding that the province's Board of Registration of Embalmers and Funeral Directors had not shown that the licensee had an affirmative duty to identify the body after it was delivered to him (*Curry v. Nova Scotia Board of Registration of Embalmers and Funeral Directors*, 2023 NSSC 95).

In December 2021, Joseph Curry, the funeral director of a crematorium, cremated the wrong body, an action that initiated an investigation by the Board. Following a hearing, the Board found that Curry had committed professional misconduct, revoked his license, and suspended his crematorium's license for two months. Curry appealed, asking the Court to overturn the decision.

At least part of the fault for the mistaken cremation lay with the Nova Scotia Medical Examiner's Office, which had affixed the wrong identification label to the body, which should not have been delivered to Curry in the first place. Prior to the cremation, Curry never opened the plastic bag in which the body had been sealed, and, in his testimony before the Board, Curry stated that he had relied on the experience and detailed protocols of the Medical Examiner's Office when assuming that the body was the one identified by the label.

On appeal, Curry argued that the Nova Scotia Embalmers and Funeral Directors Act does not impose a positive duty on licensees to identify a body before cremation, challenging the reasoning of the Board, which stated that Curry's revocation was the result of his failure to exercise due diligence in identifying the body to be cremated.

The Court, in an opinion by Justice Timothy Gabriel, agreed with Curry, holding that the Act did not impose such a duty. The relevant section of the Act, which reads, "Every person who holds a funeral home license shall . . . ensure that every person transporting human remains is satisfied as to the identity of the remains at the time of initial pickup and at delivery to the intended destination," did not clearly impose a positive duty on Curry to identify the body, the justice concluded.

In addition, Justice Gabriel noted that regulations did not specify any positive steps required of licensees, and the Board was also unable to provide specifics as to what steps Curry should have taken to identify the remains. "The implication of this appears to be that the [Board] takes the position that Funeral Directors are under an ad hoc duty to improvise methods of body identification, but in relation to the contents of that duty, the Board has nothing to say. This . . . results in absurdity."

"Does he examine dental records?" the justice continued. "Obtain DNA for analysis? Check for fingerprint records? Is he to bring the next of kin to the funeral home before cremation, after whatever post-mortem procedures have been implemented at the Medical Examiner's Office, to once again identify their loved one?"

"The interpretation of the Act in a manner which imposes the duty, asserted by the Board upon funeral directors, would leave them in a paradoxical position. An individual would never know whether he/she is in compliance with that duty, until their conduct is subsequently reviewed by the board (and a ruling is made), with the benefit of hindsight, as to whether the funeral director's conduct, in the circumstances of the case, was sufficient."

In addition to the issue of whether the Act required positive identification of the body by Curry, the Court took issue with a finding by the Board that Curry had not maintained a standardized chain of custody, as required by law. Justice Gabriel took several pages to note examples from the record of Curry's process for chain of custody, in contravention to the Board's statements, and wrote that the Board did not explain in its decision why it discounted those examples. Additionally, The Board had also found that Curry had not notified the proper authorities of the mistaken cremation, but Justice Gabriel, reviewing the evidence, rejected that assertion, noting that Curry "set in motion the chain of events through which the Board was notified." The justice noted that the Board had not explained why it imposed the harshest penalty possible on Curry.

Last, Gabriel objected to a decision by the Board to discipline Curry for maintaining that he had done nothing wrong. "It is indeed troubling that the Board appears to have treated Mr. Curry's failure to acknowledge that he was guilty of professional misconduct at the outset, and that he maintained this position throughout the hearings, as evidence of additional blameworthiness or misconduct."

Georgia

License revocation under inapplicable rules overturned

Issue: Rule for new applicants improperly applied to renewal

In a March ruling, a Georgia appellate court overturned a decision by a county sheriff's office to deny the license renewal of a bondsperson under newly-created rules that did not actually apply to license renewals (*The Bondsman, Inc. v. Taylor*, 367 Ga.App. 213).

The individual licensee in the case, John Nevil II, operates The Bondsman, a bail bonds company in Gwinnett County, Georgia, where licenses for bondspersons are handled by county sheriff offices. In 2021, Keybo Taylor, the newly-elected Gwinnett County sheriff, sent Nevil a set of newly-revised rules for bondspersons and requested a meeting prior to the renewal of the company's license. Nevil claimed that, during the meeting, the sheriff presented a list of outstanding liens owed to the county, including some from which Nevil claimed he had already been released from liability.

The next month, Sheriff Taylor denied the company's renewal application and revoked Nevil's authority to issue bonds, citing a diminishing demand for bonds in the county as a reason for the decision, but also noting the unpaid liens and mismanagement of the company and stating that Nevil was in violation of Georgia code and failed to meet the minimum qualifications for a license.

In response, Nevil sought a court order forcing the Sheriff to renew his license. After a trial court granted summary judgment for the Sheriff's Office, the case went before the Court of Appeals of Georgia, which issued a judgment in favor of Nevil on March 13.

During court proceedings, the Sheriff's office conceded that the rule that it cited to show that the company was in violation of professional standards was, on its face, only applicable to new license applicants and did not actually apply to license renewals. Nevertheless, the Sheriff maintained that the company's failure to pay its liens justified the denial, citing, for the first time on appeal, one of the newly-implemented rules requiring repayment in order to maintain licensure.

The Court rejected the Sheriff's arguments, holding that it had violated state law. Because Nevil and the company were established licensees seeking renewal,