[Cite as *In re Disinterment of Glass*, 2022-Ohio-28.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

IN RE: DISINTERMENT OF IRENE J. GLASS, DECEASED	:	
	:	Appellate Case Nos. 29160 and 29161
IN RE: DISINTERMENT OF MARION J. GLASS, DECEASED	:	
	:	Trial Court Case Nos. 2020-MSC-00382 and 2020-MSC-00383
	:	(Appeal from Probate Court)

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O P I N I O N

Rendered on the 7th day of January, 2022.

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WELBAUM, J.

{¶ 1} These consolidated cases are before the court on the appeal of The Calvary Cemetery Association of Dayton, Ohio ("Calvary") from probate court orders denying Calvary's motion to quash a subpoena and notice to take Civ.R. 30(B)(5) depositions of Calvary's employees. According to Calvary, the probate court erred in denying its motions to quash because Calvary is immune from liability for damages under R.C. 2108.83. Calvary contends that this alleged immunity protects it, as a nonparty, from providing discovery and assisting in litigation.

{¶ 2} After considering Calvary's arguments, we find them to be without merit. These cases involve applications for disinterment, which were brought under R.C. 517.23 and R.C. 517.24. In contrast, R.C. 2108.83 deals with rights to the original disposition of a body, and it does not apply.

{¶ 3} Furthermore, even if R.C. 2108.83 were relevant, any immunity from damages it grants does not preclude nonparties from being subpoenaed for discovery. Civ.R. 45 specifically requires nonparties to provide information in litigation. Under that rule, nonparties can challenge discovery requests where they create an undue burden or involve matters like privilege, and that is the proper method for obtaining relief. Accordingly, Calvary was not exempt from providing discovery and was required to use standard means to quash or modify a subpoena.

{¶ 4} Finally, the probate court did not abuse its discretion when it found that Calvary had failed to establish that the subpoena imposed an undue burden. Calvary's sole assignment of error, therefore, will be overruled.

I. Facts and Course of Proceedings

{¶ 5} On December 14, 2020, Appellee Roger Glass filed two applications for an order to disinter remains. One application (designated as Montgomery P.C. No. 2020-MSC-00382) concerned the remains of Roger's father, Marion J. Glass, who died in March 2006. The other (designated as Montgomery P.C. No. 2020-MSC-00383) concerned the remains of Roger's mother, Irene J. Glass, who died in January 2000.[1] In an attachment to the applications, Roger listed the next of kin, who were himself and his sisters, Carol Pollock (an Illinois resident) and Kathy Glass (a Florida resident). While Carol consented to the applications, Kathy objected.

{¶ 6} On April 22, 2021, the probate court consolidated the two cases. Subsequently, Calvary entered the cases as a nonparty in order to file motions to quash a subpoena and notice to take Civ.R. 30(B)(5) depositions of representatives of Calvary. In the motions, Calvary noted that Irene and Marion were both interred in Calvary Cemetery, and that on February 4, 2021, Kathy had issued subpoenas duces tecum to Calvary seeking extensive documentation.

{¶ 7} In response to the subpoenas, Calvary had produced its entire file regarding Irene and Marion but had opposed any participation in depositions. Calvary contended that the proposed depositions subjected it to undue burden and sought privileged information, for which Kathy could not show a substantial need. Motion to Quash Subpoena (Apr. 23, 2021), p. 4. Calvary further argued that it had no duty to comply with

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[1] For purposes of convenience and clarity, we will refer to documents in the docket of the case involving Roger's father. Also, because various family members have the same last name, we will refer to the parties by their first names.

discovery in the dispute based on statutory authority (R.C. 517.23, R.C. 517.24, R.C. 2108.83, and R.C. 2108.85). *Id*.

{¶ 8} On May 6, 2021, the case was referred to mediation. The following day, Kathy filed a response to the motions to quash, contending that she sought only limited deposition information on five topics from Calvary, which had been refused. These topics concerned four Glass family crypt spaces, the rights to those spaces (two of which were empty), Roger's plans to construct a new mausoleum at Calvary, designs for the mausoleum, and Roger's purchase of ground at Calvary for the mausoleum and associated sales documents. Memorandum in Opposition to Motion to Quash (May 7, 2021), p. 5. On May 14, 2021, Calvary filed a reply in support of its motions to quash.

{¶ 9} The probate court denied the motions to quash on May 17, 2021. In its decision, the court distinguished between disputed final dispositions under R.C. 2108.70 to R.C. 2108.99 and disinterment under R.C. 517.23 and R.C. 517.24.[2] Entry Denying Calvary Motion to Quash Subpoena and Notice to Take Ohio Civil Rule 30(B)(5) Depositions of Representative(s) of Calvary ("Entry") (May 17, 2021), p. 5-6. The court, therefore, held that R.C. 2108.83 and R.C. 2108.85 did not apply and that neither R.C. 517.23 nor R.C. 517.24 provided any basis for Calvary's refusal to participate in discovery in a contested disinterment action. *Id.* at p. 6.

{¶ 10} Furthermore, the court found that Calvary had failed to establish that the depositions would be an undue burden or that the information in question was privileged.

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[2] The statutes in question are actually only R.C. 2108.70 through R.C. 2108.90. There are no intervening statutes between R.C. 2108.90 and R.C. 2108.99. This latter statute deals with the penalty for violating R.C. 2108.18(A) and R.C. 2108.19, which concern unlawful acts done for gain in the context of anatomical gifts and removal or disposal of body parts.

Id. at 9-10. Accordingly, the court denied the motion to quash. At the end of the entry, the court included a Civ.R. 54(B) certification. *Id*. at p. 11. On June 11, 2021, Calvary appealed from the probate court's entry in both cases (Montgomery App. Nos. 29160 and 29161).

{¶ 11} On June 18, 2021, Appellees Roger and Carol filed a motion to dismiss the appeals based on lack of jurisdiction due to the alleged lack of a final appealable order. On August 25, 2021, Kathy filed a motion for expedition of the appeals, and Calvary opposed the expedition motion on August 31, 2021. We then consolidated the appeals on our own motion. *See In re Disinterment of Marion J. Glass, Deceased, and In re Disinterment of Irene J. Glass*, 2d Dist. Montgomery Nos. 29160 and 29161 (Order, Oct. 28, 2021).

{¶ 12} Previously, when Roger and Carol filed their appellate brief, they argued that we lacked jurisdiction over the appeals, based on the absence of a final appealable order. We addressed both expedition and the final appealable order issue by granting expedition and declining to dismiss the appeal. *See In re Disinterment of Marion J. Glass, Deceased* and *In re Disinterment of Irene J. Glass*, 2d Dist. Montgomery Nos. 29160 and 29161 (Decision & Entry, Nov. 2, 2021), p. 2. While we were not convinced that the entry on appeal resulted from a special proceeding as outlined in R.C. 2505.02(B)(2), we did find that the subpoenas' issuance fit within the definition of a provisional remedy under R.C. 2505.02(B)(4). *Id*. at p. 13-14.

{¶ 13} We further held that the probate court's order determined the provisional remedy because it required Calvary's representative to sit for a deposition. *Id*. at p. 14. And while we found satisfaction of the third prong (denial of a meaningful remedy absent

appeal) "more difficult," we held that Calvary had made a "colorable claim" that R.C. 2108.83 applied and that an appeal after judgment would not afford an adequate remedy. *Id*. at p. 15-18. We stressed that this standard was not "particularly high." *Id*. at p. 17. In addition, we remarked that the parties failed to direct us to any case law on how R.C. 2108.83 should be interpreted. As a result, we hesitated to reject Calvary's argument on the merits at that point in the appeal. *Id*. at p. 18.

{¶ 14} With this background in mind, we will consider Calvary's sole assignment of error.

II. Relationship between R.C. Chap. 2108 and Disinterment Statutes

{¶ 15} Calvary's sole assignment of error states that:

> The Probate Court Erred in Denying Calvary's Motion to Quash Because R.C. 2108.83 Afforded Calvary, as a Cemetery Organization, Discretion Whether to Assist Regarding the Glass Family Dispute Concerning the Final Disposition for Irene and Marion Glass, as the Disinterment Applications under R.C. 517.23 and R.C. 517.24 Concern a Matter of Final Disposition Under Chapter 2108 of the Ohio Revised Code.

{¶ 16} Under this assignment of error, Calvary argues that the probate court erred in overruling its motion, as a nonparty, to quash discovery. Specifically, Calvary contends that R.C. Chap. 517 and R.C. Chap. 2108 should be applied harmoniously, and that under R.C. 2108.83 and R.C. 2108.85, Calvary did not have any obligation to participate in the dispute between the Glass family as to the final disposition of Marion and Irene. In addition, Calvary argues that because this is a question of law, we should

apply de novo review of the probate court's decision.

{¶ 17} Roger and Carol's brief only discusses jurisdiction, and we have already disposed of that issue. However, Kathy contends that an abuse of discretion standard applies, that Calvary waived discovery arguments by providing discovery in the probate court, and that R.C. 2180.83 does not apply to disinterment.

A. Standards of Review

{¶ 18} As a general rule, "discovery orders are reviewed under an abuse-of-discretion standard." *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13. "However, where a trial court's order is based on an erroneous standard or a misconstruction of the law, it is not appropriate for a reviewing court to use an abuse of discretion standard. In determining a pure question of law, an appellate court may properly substitute its judgment for that of the trial court, since an important function of appellate courts is to resolve disputed propositions of law." *Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership*, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (2d Dist.1992).

{¶ 19} In the case before us, the probate court's decision was initially based on whether a particular statute applied to a discovery matter. This was not a factual decision, but involved questions of law. Consequently, de novo review is appropriate. Conversely, the court's decision on undue burden does not involve legal questions, and an abuse of discretion analysis should be applied.

B. Application of R.C. Chap. 2108

{¶ 20} As noted, Calvary's position is that it should not have been made to participate in discovery due to the shield granted by R.C. 2108.83.[3] The probate court disagreed with this assertion, concluding that the statutes on disinterment apply and do not provide Calvary with any rights or immunities. Entry (May 20, 2021), at p. 5-6.

{¶ 21} R.C. 2108.83 was enacted in 2006 and states that:

> In the event of a dispute regarding the right of disposition, a funeral home, funeral director, crematory operator, cemetery operator, cemetery organization, or other person asked to assist with a declarant's or deceased person's funeral, burial, cremation, or other manner of final disposition shall not be liable for damages of any kind for refusing to accept the remains, refusing to inter, cremate, or otherwise dispose of the remains, or refusing to complete funeral or other arrangements pertaining to final disposition until such funeral home, funeral director, crematory operator, cemetery operator, cemetery organization, or other person receives a court order or a written document that is executed by a person that the funeral home, funeral director, crematory operator, cemetery operator, cemetery organization, or other person reasonably believes has the right of disposition and that clearly expresses how the right of disposition is to be exercised.

{¶ 22} There is no case law in Ohio addressing in detail the relationship between this section and R.C. 517.23 and R.C. 517.24. R.C. 2108.83 is contained within a group

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[3] Calvary also mentions R.C. 2108.85, but that section does not provide immunity from damages relating to the interment process; it provides criminal and civil immunity for failing to bring an interment action, which is not relevant. Therefore, we will primarily consider R.C. 2108.83.

of statutes (R.C. 2108.70 through R.C. 2108.90) that are entitled, collectively, as "Disposition of Remains and Purchase of Goods and Services Related to Funeral." This heading has no legal effect as law. *E.g.*, R.C. 1.01.

{¶ 23} R.C. 2108.70(B) (also enacted in 2006 as part of the same set of statutes) provides that:

> An adult who is of sound mind may execute at any time a written declaration assigning to a representative one or more of the following rights:
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> (1) The right to direct the disposition, after death, of the declarant's body or any part of the declarant's body that becomes separated from the body before death. This right includes the right to determine the location, manner, and conditions of the disposition of the declarant's bodily remains.
>
> (2) The right to make arrangements and purchase goods and services for the declarant's funeral. This right includes the right to determine the location, manner, and condition of the declarant's funeral.
>
> (3) The right to make arrangements and purchase goods and services for the declarant's burial, cremation, or other manner of final disposition. This right includes the right to determine the location, manner, and condition of the declarant's burial, cremation, or other manner of final disposition.

{¶ 24} A "declarant" is defined as "an adult who has executed a written declaration." R.C. 2108.70(A)(2). This is obviously a right that is personal to a decedent, since the statute refers to a declarant's "body," and the declaration is executed by the declarant/potential decedent before death. R.C. 2108.70(C) also lets declarants

designate a successor representative. The right of disposition vests at the time of the declarant's death. R.C. 2108.71.

{¶ 25} In two situations, R.C. 2108.81 establishes a priority order (similar to intestate succession) of persons who can exercise the final disposition rights in R.C. 2108.70. These situations are: (1) where an adult fails to execute a written declaration that is in effect at the time of death; and (2) where everyone to whom the right was assigned or reassigned has been disqualified. R.C. 2108.81(A)(1) and (2). Where this occurs, the right of disposition is assigned by operation of law to one of the listed persons. R.C. 2108.81(B).

{¶ 26} The priority list begins with the decedent's surviving spouse and then descends to the sole surviving child, or if more than one child exists, to the children collectively. The right then further descends to the decedent's surviving parents, and so forth, ending with public officers or employees responsible for arranging for disposition of indigent persons. *See* R.C. 2108.81(B)(1)-(10).

{¶ 27} R.C. 2108.72 lists the content and requirements for the written declaration for disposition, and it contains a sample declaration form, on which the declarant agrees that any of a number of entities, such as a cemetery organization, funeral director, embalmer, and so on, may act under the declaration. R.C. 2108.72(B). Included in the sample declaration is a liability statement, which says that "No person who acts in accordance with a properly executed copy of this written declaration shall be liable for damages of any kind associated with the person's reliance on this declaration." *Id*.

{¶ 28} Certain individuals are statutorily disqualified from serving as representatives or successor representatives. These include declared incompetents;

former spouses (unless designated or reaffirmed after termination of marriage); and persons charged with certain crimes, unless the person is acquitted or the charges are dismissed. R.C. 2108.75, R.C. 2108.76, and R.C. 2108.77. R.C. 2108.79(A) further indicates that where a group of people are designated as those in whom the right of disposition has vested, majority rule governs if there is disagreement. Under R.C. 2108.79(C), if a majority cannot decide, then the probate court makes the decision in accordance with criteria established in R.C. 2108.82.

{¶ 29} As noted, in the event of disputes about disposition, R.C. 2108.83 grants immunity from liability for damage to various entities, including cemetery organizations, "for refusing to accept the remains, refusing to inter, cremate or otherwise dispose of the remains, or refusing to complete funeral or other arrangements pertaining to final disposition" until the organization receives a court order or a written document executed by a person the organization "reasonably believes" has the right of disposition and that clearly expresses how disposition is to be exercised. Where disputes exist, a funeral home or other party asked to assist with a funeral, burial, "or other matter of final disposition," must "embalm or refrigerate and shelter the remains to preserve them and may add the cost of embalming, refrigeration, and sheltering to the final disposition costs." R.C. 2108.84.

{¶ 30} And finally, the other statute Calvary mentions, R.C. 2108.85, allows funeral homes, cemetery organizations and others assisting with a funeral to add legal fees and court costs, if they bring a legal action for purposes of R.C. 2108.83 or 2108.84. And, as noted, these parties are not criminally or civilly liable if they fail to bring an action.

{¶ 31} "Where the language of a statute is plain and unambiguous and conveys a

clear and definite meaning, there is no need to apply rules of statutory interpretation." *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96, 573 N.E.2d 77 (1991), citing *Meeks v. Papadopulos*, 62 Ohio St.2d 187, 190, 404 N.E.2d 159 (1980). The above statutes are not ambiguous and clearly provide for procedures relating to the original disposition of a decedent, not to disinterment. All the references are to events that occur immediately after death, such as "refusing to accept remains," refusing to complete funeral arrangements, preserving remains by embalming or refrigeration during disputes, and so on. In fact, disinterment is mentioned nowhere in these statutes.

{¶ 32} We also note that R.C. Chap. 2108 does not define final disposition. However, R.C. Chap. 4717 (located in Title 47 of the Ohio Revised Code relating to occupations and professions) does contain a definition. R.C. Chap. 4717 covers embalmers, funeral directors, and crematory facility operators. The definitions for that chapter define "final disposition" as having "the same meaning as in division (J) of section 3705.01 of the Revised Code." R.C. 4717.01(G). In turn, R.C. 3705.01(J), states that " 'Final disposition' means the interment, cremation, removal from the state, donation, or other authorized disposition of a dead body or a fetal death." Again, this definition relates to events that occur immediately after death, like interment and cremation. It does not refer to "disinterment."

{¶ 33} In view of the preceding discussion, any rights that R.C. 2108.83 or R.C. 2108.85 grant apply only to situations related to the original disposition of a dead body (which generally is "final"), not to disinterment.

{¶ 34} Unlike the above statutes on disposition, R.C. 517.23 and R.C. 517.24 are located in a separate part of the Ohio Revised Code (R.C. Chap. 517) which is related to

"Cemeteries." The statues in this chapter cover "Township Cemeteries," "Abandonment and Sale of Cemeteries," and "Miscellaneous Provisions." The two statutes in question here are located within the subchapter devoted to "Abandonment and Sale of Cemeteries." Again, these headings are not part of the law. *E.g.*, R.C. 1.01.

{¶ 35} Under R.C. 517.23, the directors of a cemetery association are required to disinter any remains in the cemetery in two situations. The first occurs upon a surviving spouse's application made in accord with R.C. 517.24(A) and payment of the disinterment's reasonable costs and expenses. *See* R.C. 517.23(A)(1). The second instance occurs where a court issues an order under R.C. 517.24(B), and the person applying for disinterment pays the reasonable costs and expenses of the disinterment. *See* R.C. 517.23(A)(2).

{¶ 36} The second situation is involved here. Under R.C. 517.24(B), a person who is not the decedent's surviving spouse may file an application in the probate court of the county in which the decedent is buried asking the court to issue an order for disinterment of the decedent's remains. In this situation, notice is given to all persons who would have been entitled to inherit from the decedent under R.C. Chap 2105 if the decedent had died intestate. R.C. 517.24(B)(2)(a).

{¶ 37} After a hearing, the probate court may issue a disinterment order if good cause is shown. R.C. 517.24(B)(3)(a). A hearing is not required if all persons who are entitled to be given notice consent to the disinterment. R.C. 517.24(B)(3)(b). When courts decide contested requests for disinterment, they apply a "flexible, multifactor-equitable standard." *In re Estate of Eisaman*, 2018-Ohio-1112, 110 N.E.3d 96, ¶ 13 (3d Dist.), citing *In re Disinterment of Swing,* 2014-Ohio-5454, 26 N.E.3d 827, ¶ 16 (6th Dist.).

We need not discuss these factors, as they only involve whether disinterment will ultimately be allowed. Here, we are only concerned with a discovery issue.

{¶ 38} In contrast to the statutes involved in the original disposition of a body, R.C. 517.23 and R.C. 517.24 do not extend any type of immunity from liability concerning a decedent's disinterment. The reason for this is likely that disinterment occurs only by application of a surviving spouse (who would be the person having paramount rights concerning the decedent) or by court order. And, in the event that another party opposes a surviving spouse's wishes, that would also be decided by court order. *See* R.C. 517.23(E) (allowing applications to prevent disinterment by a surviving spouse); *In re Disinterment of Frobose*, 163 Ohio App.3d 739, 2005-Ohio-5025, 840 N.E.2d 249, ¶ 2 (6th Dist.) (decedent's son filed application in probate court to prevent surviving spouse's attempt to disinter decedent).

{¶ 39} The probate court would also decide cases involving a cemetery association's refusal to disinter or grant permission to a surviving spouse who has applied for disinterment. *See* R.C. 517.25 (requiring the probate court to issue a writ of mandamus requiring disinterment or granting permission for disinterment). Again, this section of R.C. Chap. 517 does not provide for any immunity from liability.

{¶ 40} In view of the separate legislative treatment of disinterment situations and the lack of ambiguity in any of these statutes, we agree with the probate court that R.C. 2108.83 and R.C. 2108.85 do not apply here and do not provide Calvary with any rights.

{¶ 41} As indicated, Calvary argues that the statues for disposition should be read in harmony. As support, Calvary cites a dissenting opinion in *Albrecht v. Treon*, 118 Ohio St.3d 348, 2008-Ohio-2617, 889 N.E.2d 120. Appellant's Brief, p. 6, and 7, citing

Justice Pfeifer's dissent in *Albrecht* at ¶ 63 and 64.

{¶ 42} In *Albrecht*, the Supreme Court of Ohio considered a question certified by a federal court on "whether the next of kin of a decedent upon whom an autopsy has been performed have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing." *Id*. at ¶ 1. In that case, the coroner had released a son's body to his parents but had retained the brain for further examination to decide the cause of death. *Id*. at ¶ 5. The court concluded that "the next of kin of a decedent upon whom an autopsy has been performed do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the corner for forensic examination and testing." *Id*. at ¶ 43.

{¶ 43} In its opinion, the court commented that while R.C. 313.14 does give the next of kin a right to dispose of a body, this right does not arise until after a coroner completes an examination. *Id*. at ¶ 36. The court also observed that "nothing in the United States Constitution, the Ohio Constitution, Ohio statutes, or common law establish a protected right in autopsy specimens in Ohio. R.C. 313.14 simply clarifies whom the coroner should contact to make funeral arrangements." *Id*. at ¶ 41.

{¶ 44} In his dissent, Justice Pfeifer focused on the fact that the rights in the case should be decided on law existing before R.C. 313.123 was enacted, as that statute was

not in effect when the events in question occurred. *Id.* at ¶ 47 (Pfeifer, J., dissenting).[4] As part of his argument, Justice Pfeifer then referenced "Ohio's Anatomical Gift Act, R.C. Chapter 2108," which gives next of kin the power to make gifts of a decedent's body or to oppose gifts made by less closely-related kin. *Id*. at ¶ 54. In discussing this Act, Justice Pfeifer further remarked, in one of the paragraphs cited by Calvary, that "in R.C. 2108.02(B), the General Assembly sets forth the right of family members to the disposition of a decedent's body, giving family members the right to make anatomical gifts and also the right to prevent an anatomical gift." *Id*. at ¶ 63.

{¶ 45} As noted by Calvary, Justice Pfeifer further stated that "[a]ll together, Ohio statutes grant next of kin important rights regarding the remains of a family member – the rights to possess, to control the disposition of, and to prevent the disposition of the remains." *Id*. at ¶ 64. There is no doubt that Ohio statues grant disposition rights to the next of kin. However, this was a general statement and obviously referred to the particular statutes involved in *Albrecht*.

{¶ 46} Furthermore, for the reasons previously mentioned, *Albrecht* and Justice Pfeifer's dissent are irrelevant. First, the provisions for anatomical gifts are found in R.C. Chap. 2108, not R.C. Chap. 517. *See* R.C. 2108.02 through R.C. 2108.40. Again, R.C. Chap. 2108 deals with the initial disposition of bodies, not with disinterment. Consistent with this point, the Ohio Anatomical Gift Act concerns rights to designate anatomical gifts,

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[4] R.C. 313.123, which was enacted in 2006, states that "retained tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy are medical waste." R.C. 313.23(B)(1). The statue further says that except for DNA specimens retained for "diagnostic, evidentiary, or confirmatory purposes," "if the coroner removes any specimens from the body of the deceased person, the coroner shall return the specimens, as soon as is practicable, to the person who has the right to the disposition of the body." R.C. 313.123(B)(1) and (3).

which are taken from a decedent shortly after death and have nothing to do with disinterment. *E.g.*, R.C. 2108.04 and R.C. 2108.09 (gifts may be made during the donor's life or after death, by listed persons); R.C. 2108.14(A) (discussing referral by hospital employee or agent of individuals "at or near death to a procurement organization").

{¶ 47} Calvary also relies on *Swing*, 2014-Ohio-5454, 26 N.E.3d 827, as support for the fact that R.C. 2108.83 and R.C. 517.23 should be construed harmoniously. Appellant's Brief at p. 7. However, there is no disharmony, as these statues deal with different subjects.

{¶ 48} *Swing* involved an application by a decedent's son, who sought to disinter his father's cremains. These cremains were originally given to the grandparents and had later been placed inside the grandmother's casket when she was buried. *Id*. at ¶ 3-5. This was done without the son's knowledge and in contravention of cemetery policy. *Id*. at ¶ 5-6. After the probate court granted the disinterment, the grandfather and an uncle appealed. *Id*. at ¶ 6-8.

{¶ 49} The first assignment of error concerned the probate court's alleged failure "to apply the equitable factor-based test" that the Sixth District Court of Appeals had previously adopted in *Frobose*, 163 Ohio App.3d 739, 2005-Ohio-5025, 840 N.E.2d 249. *Id*. at ¶ 13. After discussing each factor, the court of appeals found no abuse of discretion in the probate court's decision to allow disinterment. *Id.* at ¶ 14-25.

{¶ 50} The second assignment of error concerned the appellants' argument "that under R.C. 2108.81, Swing, Sr. and Jean, as Swing, Jr.'s surviving parents, were vested with a right of disposition over Swing, Jr.'s cremains." *Id*. at ¶ 28. The appellants noted

that "although appellee is Swing, Jr.'s sole surviving child, he is not entitled to the right of disposition because he is not a 'mentally competent *adult*.' Moreover, appellants contend that the right of disposition encompasses the decision to place Swing, Jr.'s cremains inside Jean's casket prior to burial, a decision that cannot now be undone through a request for disinterment under R.C. 517.23." (Emphasis sic.) *Id*.

{¶ 51} In resolving the matter, the court of appeals made the following comments:

> Appellee, for his part, acknowledges that Jean and Swing, Sr. were entitled to dispose of Swing, Jr.'s body after his death under R.C. 2108.81. However, appellee argues that R.C. 2108.81 is inapplicable to this proceeding because the right was exercised when Jean and Swing, Sr. decided to cremate Swing, Jr. Appellee contends that the right of disposition was extinguished at that moment, and suggests that any other interpretation of the statute would involve expanding the right of disposition into a right of perpetual *redisposition*. Further, appellee asserts that disinterment would not encroach upon the surviving parents' right of disposition, because it was Michael [the uncle] who placed the cremains into the casket, not Jean or Swing, Sr.
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> Whether a person's right of disposition under R.C. 2108.81 precludes a probate court from granting a third party's application for disinterment under R.C. 517.23 appears to be a matter of first impression in Ohio. However, our decision in *Frobose* is helpful in resolving this question. In *Frobose*, a case that predates the enactment of R.C. 2108.81, we concluded that a surviving spouse's right of disposition with regard to burial

> of her husband did not automatically entitle her to have her husband's remains disinterred. Specifically, we stated that a surviving spouse's right of disposition, for purposes of burial, "is not absolute, but is subject to judicial control." *Frobose*, 163 Ohio App.3d 739, 2005-Ohio-5025, 840 N.E.2d 249 at ¶ 15. We went on to examine the merits of the surviving spouse's request for disinterment through the use of several equitable factors. Ultimately, we found that the probate court did not abuse its discretion when it denied the surviving spouse's application for disinterment. *Id*. at ¶ 26.
>
> In light of our statements in *Frobose*, we conclude that the right of disposition under R.C. 2108.81 does not preclude a probate court from granting an application for disinterment where the equities weigh in favor of doing so. While we recognize that our decision in *Frobose* did not involve an examination of a right of disposition under R.C. 2108.81 (which had not yet been enacted), we are not persuaded that R.C. 2108.81 nullifies the equitable standard embodied in the decision. Accordingly, appellants' second assignment of error is not well-taken.

Swing, 2014-Ohio-5454, 26 N.E.3d 827, at ¶ 29-31. *Swing* is the only Ohio case discussing this point at all, and, as we indicated, the discussion is not very detailed.

{¶ 52} R.C. 2108.70 through R.C. 2108.90 were enacted as new sections of the Ohio Revised Code in 2006. *See* Sub.H.B. 426, 2006 Ohio Laws 139. The purpose was to amend various sections of the Ohio Revised Code and "to enact sections 2108.70 to 2108.90, and 2117.251 of the Revised Code regarding the assignment of the right to

direct the disposition of an adult's remains after death and to make arrangements and purchase goods and services related to an adult's funeral, cremation, burial, or other manner of final disposition." *Id*.

{¶ 53} When the above statutes were enacted in 2006, R.C. 517.23 and its predecessors, allowing for disinterment, had existed for many years. A predecessor statute, G.C. 3467, had provided that "the trustees or board of any cemetery association, or other officers having control and management thereof, 'shall disinter or issue a permit for disinterment, and deliver and body [sic] buried in such cemetery, on application of the next of kin of the deceased * * *.' " *Hardin v. Ehring*, 22 Ohio App. 437, 439, 155 N.E. 153 (2d Dist.1926), quoting G.C. 3467. In *Hardin*, the court noted that:

> [G.C. 3467] is a mandatory statute, but its operation depends upon the scope of the words 'next of kin.' These words have been variously construed by different courts, some holding that 'next of kin' means only the blood relatives, while others hold that the term is broad enough to include the husband or wife of a decedent. We are of opinion that the courts of this state adopt the broader meaning and include within the term the husband, or wife, as well as the blood relatives, in cases where there are no children.

Id. at 439.

{¶ 54} In the case before us, our decision on whether a final appealable order existed also noted that a May 14, 1894 statute was substantially similar to G.C. 3467, and appeared "to be the genesis point of a statutory action for disinterment in Ohio." *Glass*, 2d Dist. Montgomery Nos. 29160 and 29161 (Decision & Entry, Nov. 2, 2021), at p. 4-5, citing 91 Ohio Laws 231. We further remarked that, before 1894, "disinterment was still

regulated and appears to have been allowed where the next of kin or an appropriate governmental entity approved." *Id*. at p. 5. In this regard, we referenced an 1846 " 'Act to secure the inviolability of places of human sepulture.' " *Id*., quoting 44 vol. Stat. 77.

{¶ 55} The point here is that statutory provisions allowing disinterment existed long before R.C. 2108.83 and R.C. 2108.85 were enacted. In addition, entitlement to apply for disinterment was not reserved just to the party who arranged for the original interment.

{¶ 56} The concept is well-established that "the legislature is presumed to be aware of existing statutes and to know the status of the law relating to the subjects with which it is dealing." *Harris v. J.A. Schultz & Son, Inc.*, 6th Dist. Wood No. WD-86-81, 1987 WL 14229, *3 (July 17, 1987), citing *In re Tonsic's Estate*, 13 Ohio App.2d 195, 197, 235 N.E.2d 239 (9th Dist.1968), and *State ex rel. Cromwell v. Myers*, 80 Ohio App. 357, 368, 73 N.E.2d 218 (2d Dist.1947). Thus, the legislature would have been aware of existing law concerning disinterment. If the legislature intended to restrict or change the disinterment law by enacting new sections R.C. 2108.70 through R.C. 2108.90, it would have said so and would have amended or repealed the existing statutes.

C. Legal Responsibility to "Assist" with Litigation

{¶ 57} While the preceding discussion resolves the issue of whether R.C. 2108.83 applies, Calvary argues that this statute, with its grant of immunity, absolves a cemetery organization from any liability and therefore removes any obligation to assist with litigation until a court order is received. We disagree.

{¶ 58} Even if R.C. 2108.83 applied, it has nothing to do with refusing to provide discovery. R.C. 2108.83 simply indicates that various parties are not liable for damages

for refusing to take certain actions concerning a body's original disposition without a court order or "a written document * * * executed by a person that the * * * cemetery organization, or other person reasonably believes has the right of disposition and that clearly expresses how the right of disposition is to be exercised." Certainly, litigation could arise over whether a cemetery organization actually held a reasonable belief that a person had the right of disposition. In that situation, parties like Calvary might be subject to litigation, even if, ultimately, they established a reasonable belief. Calvary's position, therefore, lacks even a preliminary basis.

{¶ 59} More importantly, nonparties are routinely subjected to discovery. Civ.R. 45, which governs subpoenas, clearly indicates that the rule is directed towards nonparties. Specifically, Civ.R. 45(A) states that "[a] subpoena may not be used to obtain the attendance of a party or the production of documents by a party in discovery. Rather, a party's attendance at a deposition may be obtained only by notice under Civ.R. 30, and documents or electronically stored information may be obtained from a party in discovery only pursuant to Civ.R. 34." The purpose of a subpoena, therefore, is to elicit information from individuals and organizations who are not involved in the lawsuit. *E.g.*, *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198 (1998) ("attendance of a non-party witness deponent should be compelled by the use of subpoena as provided by Civ.R. 45"); *HRM, L.L.C. v. Shopsmith*, *Inc*., 2d Dist. Montgomery No. 25374, 2013-Ohio-3276, ¶ 17 (Civ.R. 45 subpoena and Civ.R. 34(C) are the proper avenues for obtaining documentation from nonparties).

{¶ 60} Civ.R. 45 also provides protection to nonparties, by letting them file motions to quash or modify subpoenas based on matters like privilege, undue burden, failure to

allow adequate response time, or disclosure of facts or opinions of experts retained in anticipation of litigation. Civ.R. 45(C)(3)(a)-(d).

{¶ 61} Consequently, even if the immunity provisions in R.C. 2108.83 applied here, they would not absolve Calvary from being compelled to provide discovery.

D. Burden and Need for discovery

{¶ 62} Calvary's final argument relates to the merits of the probate court's order. On this issue, we do apply an abuse of discretion standard, because the arguments are not merely issues of law. *Trick v. Scherker*, 2d Dist. Montgomery No. 14CV3077, 2015-Ohio-2972, ¶ 8. An abuse of discretion " 'implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " (Citations omitted.) *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "[M]ost instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary." *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp*., 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). "A decision is unreasonable if there is no sound reasoning process" to support it. *Id*.

{¶ 63} Here, Calvary's first argument is that because it is protected by immunity, it has no legal obligation to assist; providing discovery, therefore, is an undue burden. For the reasons previously stated, we reject that argument.

{¶ 64} Calvary further argues that Kathy does not need testimony from its representatives because Calvary has already produced its entire file and testimony would simply be duplicative. In its decision, the probate court did not address the issue of need because it found no undue burden on Calvary since Kathy had agreed to limit depositions

to five areas. Entry at p. 9. We agree with this analysis.

{¶ 65} As indicated, after being served with a subpoena, a nonparty may move to quash or modify it based on several grounds, including "undue burden." Civ.R. 45(C)(3)(d). A movant has the initial burden of proving that complying with a subpoena would result in an undue burden. *Future Communications, Inc. v. Hightower*, 10th Dist. Franklin No. 01AP-1175, 2002-Ohio-2245, ¶ 17. "Courts have recognized an undue burden as one that is ' * * * excessive, immoderate, [or] unwarranted.' " *Hoerig v. Tiffin Scenic Studios, Inc*., 3d Dist. Seneca No. 13-11-18, 2011-Ohio-6103, ¶ 23, quoting *Bonewitz v. Red Ferris Chevrolet, Inc*., 9th Dist. Wayne No. 01CA0006, 2001 WL 1094537, *2 (Sept. 19, 2001).

{¶ 66} After reviewing the record, there is no indication that the limited type of inquiry to which Kathy agreed would excessively burden Calvary. Accordingly, the probate court did not abuse its discretion in denying Calvary's motion to quash.

{¶ 67} Based on the preceding discussion, Calvary's sole assignment of error is overruled.

III. Conclusion

{¶ 68} Calvary's sole assignment of error having been overruled, the judgment of the probate court is affirmed in each of the two cases.

. . . . . .

TUCKER, P.J. and EPLEY, J., concur.

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