

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

PHYLIS E. JOSEPH,	)	CIVIL CASE NO.: SX-16-CV-317
	)	
	)	
v.	)	ACTION FOR DAMAGES
	)	
DIVINE FUNERAL SERVICES LLC.,	)	
	)	
Defendant.	)	2019 VI Super 107

MEMORANDUM OPINION

¶ 1 This matter came on for bench trial on May 28, 2019 and, due to the health of a witness, was continued and concluded on June 11, 2019. *Pro se* Plaintiff Phylis E. Joseph characterized her hand-written Complaint as an “Action for Negligence,” alleging that Defendant Divine Funeral Services, LLC “took my husband Rudolph A. Joseph and buried him without my consent (sic).” At the conclusion of trial, both parties were given the opportunity to submit additional evidentiary material and supplemental argument within 21 days, following which each party would have an additional 14 days within which to respond to any filing of the other. Defendant filed its Motion to Submit Additional Evidentiary Material (Supplemental Filing) on July 15, 2019, attaching Affidavit of Michael A. Joseph, Esq., brother of Rudolph Joseph. On July 16, 2019, Plaintiff submitted a handwritten letter with attached copy of a document from the Territorial Court probate action regarding the father of Rudolph Joseph, under the caption: “In the Matter of the Estate of C. Lloyd W. Joseph” (SX-1977-PB-138), entitled “Hand Written Will,” dated August 31, 1972. Neither party has filed a response to the filing of the other.

BACKGROUND

¶ 2 Rudolph Joseph died intestate on February 19, 2014 in Puerto Rico. The Joseph family promptly sought and arranged for the transport of Mr. Joseph to St. Croix for burial, with the assistance of the Virgin Islands Department of Human Services and James Memorial Funeral Home. At the request of Phylis Joseph, the body was subsequently delivered to Divine.

¶ 3 On February 27, 2014, Phylis Joseph, Clarence Joseph (adult son of Phylis and Rudolph) and Fern McAlpin (sister of Rudolph) met with Linda Rey, one of the owners of Divine, and

entered into an agreement. A written contract was provided by Divine and signed by the three family members.¹ By the contract, it was agreed that Divine would prepare Rudolph Joseph's body for funeral service and burial, in exchange for an agreed fee for services. Neither party introduced the written agreement at trial. Divine co-owner Eldon Rey testified that Divine maintains a file on every case, including "prearrangements," but that Divine's file for this case cannot be located, and may be one of the files that "got wet during the hurricane." (June 11, 2019, Tr. 38.) Defendant's counsel advised that he had seen the agreement but that it had been lost during the pendency of the action.

¶ 4 Clarence Joseph described the written agreement with Divine signed by himself, Phylis Joseph and Fern McAlpin:

Yeah, the written agreement was the agreement that we signed; and then the agreement from Divine Funeral Home as their representative explaining to us exactly what they can do and what they couldn't do. And they said that they could do it and that's the reason we went with them....

Q: ... I'm asking what the document that you signed whether it contained any language about who was going to be representing the family in the communications with Divine; do you remember?

A: I do not remember, sir, to my knowledge because I did not have a copy of it, so to my knowledge, no.

May 28, 2019, Tr. 40-41, 43.

¶ 5 Fern McAlpin² also testified describing the February 2014 meeting with Divine and contract execution:

We met at Divine. My brother died in Puerto Rico. The body was brought home. It was sent to Divine Funeral Services for burial and that's when we met with them. It was Phylis, my nephew Clarence, myself and Mrs. Rey who sat together....

Q: Okay. In a nutshell, what transpired?

¹ Phylis Joseph testified that the agreement between the Joseph family and Divine was verbal and not written, and that a Divine contract with her signature, that had been previously displayed to her but was not introduced at trial, had been forged. Clarence Joseph and Fern McAlpin both testified, and the Court finds, that, together with Phylis Joseph, Clarence Joseph and Fern McAlpin entered into a written agreement with Divine on February 27, 2014, the date of Divine's receipt to Phylis Joseph for her payment of \$480. (Pl. Ex. 6.)

² Michael Joseph, "blood brother of Rudolph Joseph," referred to "our sister Fern McAlpin - whom Rudolph considered his closest sibling bar none." (Supplemental Filing, Affidavit M. Joseph.)

A: We made arrangements for Divine to handle the funeral and pretty much figured out what the cost would be so that whatever his widow and son couldn't pick up, I would just go ahead and pay for because it was my brother. Mrs. Rey brought a contract. We all signed the contract.

There was some discussion about other people coming in to make changes and arrangements that Mrs. Rey told us about because she said this has been the experience at the funeral home so she wanted to make sure that we told her who would be allowed to make changes in the arrangements for – can I say –

Q: Who had authority?

A: Yes. So that's what we did. And when we signed the contract, the signatures on the contract were Phylis, Clarence, and me.

Q: So, you were the three persons with authority to speak to Divine about your brother's burial.

A: Exactly.

June 11, 2019, Tr. 5-6.³

¶ 6 Phylis Joseph instructed Divine that the burial would take place pursuant to her husband's wishes, on his private property at Plot 42 Estate La Grange. However, certain issues prevented obtaining the necessary permits to conduct the burial on the designated private property. Divine's secretary delivered paperwork to the Virgin Islands Department of Health to initiate the permitting process, and Department of Health representatives accompanied Phylis Joseph to the property to inspect the proposed burial site. The inspection revealed that the site was in a flood zone, making permitting impossible. Further, during the inspection, it became apparent that the property in issue was not owned by Rudolph Joseph as had been represented by Phylis Joseph but was rather in probate.⁴ Accordingly, for that reason also the Department of Health advised that no permit could issue.

³ Notwithstanding the leading question, this testimony is accepted in the Court's discretion as necessary to develop the witness's testimony. *See* V.I. R. Evid. 611(c); 5 V.I.C. § 734.

⁴ The Court takes judicial notice of the records of the Superior Court in the matter of the Estate of C. Lloyd W. Joseph (SX-77-PB-138), specifically: the Order Appointing Personal Representative, entered March 19, 2015, appointing Phylis E. Joseph as personal representative of the Estate of Rudolph Joseph for the sole purpose of representation pertaining to the Estate of C. Lloyd W. Joseph; and Partial Adjudication entered February 25, 2016 adjudicating Remainder Plot 42 Estate La Grange, West End Quarter, St. Croix, Virgin Islands, consisting of 5.35 U.S. acres, more or less, as shown on OLG Drawing No. 4104 dated July 16, 1982 to the heirs of C. Lloyd W. Joseph in shares including, *inter alia*, a 2/33rds share to "Phylis E. Joseph, Administrator of Rudolph Joseph." Thereafter, Phylis Joseph filed her appeal of that Partial Adjudication by Petition for Review filed March 9, 2016 (SX-16-RV-001). That appeal has not been decided, and Motion to Dismiss Petition, Renewed Motion to Dismiss Petition, and Renewed Motion to Dismiss Petition, filed by co-heirs on March 29, 2017, February 9, 2018 and May 1, 2019, respectively, remain pending.

¶ 7 Attorney Michael Joseph, brother of Rudolph, also inquired regarding permitting and was “informed by the Department of Property and Natural Resources [sic]” that the burial could not take place in the location sought by Phylis Joseph “because it was prone to catastrophic flooding.” Attorney Joseph so informed Phylis Joseph and also discussed the matter with Attorney Martial Webster, with whom Phylis Joseph had consulted. (Supplemental Filing, Affidavit M. Joseph.)

¶ 8 The funeral was necessarily delayed on account of the uncertainties in fulfilling the intentions of Phylis Joseph with regard to the burial site, so on March 4, 2014, the family held a memorial service on the beach adjacent to the Frederiksted fort before the children of Rudolph Joseph were required to return to their homes in the U.S. mainland. Following the memorial service, Mr. Joseph’s remains were returned to the funeral home to await the permits for burial.

¶ 9 Conversations continued over the following weeks between Divine and Phylis Joseph as to the status of permitting for the burial. At some time after March 4, 2014, Phylis Joseph contacted Attorney Martial Webster “because I couldn’t understand why they were holding my husband’s body, okay? They wanted what, 300 or 2,000 or some kind of money.... and they called him [Attorney Webster] and they asked me if I’m gonna pay this money, and I said no because you told me there was no charge, okay?” (May 28, 2019 Tr., 13.)

¶ 10 By May 2014, Fern McAlpin had been hearing from her siblings (other children of C. Lloyd W. Joseph) and neighbors of the property of C. Lloyd W. Joseph at Plot 42 La Grange, none of whom wanted Rudolph Joseph buried at that property. Fern McAlpin was concerned that the Department of Human Services would “claim my brother’s body and bury him in a pauper’s grave someplace because we had not taken any action these four, five months.” (June 11, 2019 Tr., 9.)

¶ 11 Michael Joseph had similar concerns. “Because I knew Rudolph’s body had been laying in the funeral home for an unusually long time, I visited and spoke with its director who informed me that his body should have long been laid to rest and therefore was in jeopardy of being taken possession of by the Department of Humans Services [sic] to be given a pauper’s burial without further notice or any formal proceedings.” (Supplemental Filing, Affidavit M. Joseph.)

¶ 12 As a result of these concerns, Fern McAlpin went to Divine to make necessary arrangements, paid the fees, obtained a Public Works permit and built a tomb in the Frederiksted Cemetery in a family plot where Rudolph Joseph’s son and namesake was buried. She told her

brothers of her plans, all of whom who agreed with the plan, including Michael Joseph, who stated that he would tell Phylis. Fern McAlpin spoke with Michael Joseph on the morning of Saturday, May 17, 2014 and confirmed that the funeral would take place at 1:00 pm that afternoon. Neither Fern McAlpin nor Michael Joseph had a phone number for Phylis Joseph, and Fern asked Michael to visit Phylis' home to inform her of the ceremony, which he did.

¶ 13 Phylis Joseph arrived at the funeral late, when the ceremony had almost concluded. She was so angry and upset that she screamed and cursed at those assembled, and a physical altercation ensued between Phylis Joseph and Fern McAlpin's aunt Alda Francis. Phylis Joseph did not know before that day that her husband was to be buried and was extremely hurt and offended when she arrived at the cemetery. Following the service, Fern McAlpin spoke with the sons of Phylis Joseph and told them that if and when their mother was able to get permission to have their father buried on the property at 42 La Grange that she would pay to have the body exhumed and reburied there.

¶ 14 Phylis Joseph did not claim at trial or produce evidence that she had obtained a permit or otherwise secured authorization to allow the burial of Rudolph Joseph at Plot 42 Estate La Grange. Phylis Joseph remains angry and complains that Divine did not have her permission to bury her husband where and when they did and seeks damages for the emotional distress it has caused her.

DISCUSSION

¶ 15 As noted, the Court finds that Phylis Joseph, Clarence Joseph, Fern McAlpin and Divine Funeral Services did enter into a contractual agreement with regard to the burial of Rudolph Joseph. Plaintiff Phylis Joseph's Complaint seeks damages from Divine as an action in negligence.⁵ Therefore, the first question to be addressed is whether this tort claim can survive notwithstanding the contractual agreement between the parties, or whether such a claim is precluded by the gist of the action doctrine.

⁵ "It is well-established that *pro se* litigants are entitled to greater leeway in matters of pleading and procedure. [W]hen a litigant chooses to represent himself, it is the duty of the ... court to insure fairness, allowing reasonable accommodations for the *pro se* litigant so long as no harm is done an adverse party. And as we have repeatedly cautioned, it is the substance, and not the caption, of a document that controls the legal standard that the Court should apply." *Smith v. Gov't of the Virgin Islands*, 67 V.I. 797, 802 (V.I. 2017) (internal quotations and citations omitted).

Gist of the Action Doctrine.

¶ 16 This Court has previously conducted a *Banks* analysis confirming the applicability of the gist of the action doctrine in the Virgin Islands. See *Pollara v. Chateau St. Croix, LLC*, 2016 V.I. LEXIS 49, at *16 (V.I. Super. 2016). The gist of the action doctrine addresses “the concern that tort recovery should not be permitted for contractual breaches.” *Addie v. Kjaer*, 60 V.I. 881, 898 (3d Cir. 2013). “[T]he gist of the action doctrine precludes tort suits for the mere breach of contractual duties unless the plaintiff can point to separate or independent events giving rise to the tort.” *Id.* at 899.

¶ 17 “[T]he ‘gist of the action’ doctrine ‘is designed to maintain the conceptual distinction between breach of contract claims and tort claims [by] precluding plaintiffs from recasting ordinary breach of contract claims into tort claims.’ The ... difference between contract and tort claims [is] as follows: ‘Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals.’” *Pollara v. Chateau St. Croix, LLC*, 2016 V.I. LEXIS 49, at *22-23 (citing *Williams v. Hilton Group PLC*, 93 Fed. Appx. 384, 386 (3d Cir. 2004) (other citations omitted)).

¶ 18 “The gist of the action doctrine applies to claims ‘(1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract or the success of which is wholly dependent on the terms of a contract.’” *Id.* (citing *Addie v. Kjaer*, 60 V.I. at 898).

¶ 19 In this case, although the existence of a contract between the parties is established, the contract itself was lost and not presented to the Court. As such, it is necessary to look to the evidence presented at trial to determine the contract terms and whether the gist of the action doctrine may be seen to apply to the claims of Phylis Joseph. The first consideration is whether the claims are properly seen as “arising solely from a contract between the parties.” While Phylis Joseph testified that there was no written agreement between the family and Divine regarding the burial of Rudolph Joseph, Fern McAplin and Clarence Joseph testified that they and Phylis Joseph did sign just such a written agreement with Divine at the funeral home. From the totality of the

evidence as set forth above, the Court has found the existence of a written agreement wherein Divine agreed to bury Rudolph Joseph in exchange for payment in an amount unclear from the evidence, and that Phylis Joseph, Clarence Joseph and Fern McAlpin were all authorized to speak on behalf of the family. However, because neither the contract nor evidence as to its specific terms was presented at trial, including when and where Rudolph Joseph was to be buried, the Court cannot find that Phylis Joseph's claims arise solely from the contract.

¶ 20 The second and third gist of the action factors similarly do not apply. Without the contract or evidence as to its terms, the Court cannot find that "the duties allegedly breached were created and grounded in the contract itself" or that the purported "liability stems from a contract."

¶ 21 Lastly, the gist of the action doctrine may apply "where the tort claim essentially duplicates a breach of contract or the success of which is wholly dependent on the terms of a contract." Phylis Joseph seeks damages because Divine caused her emotional distress by burying her husband in a place and manner contrary to her instructions. Without evidence as to whether the contract of the parties included terms relating to the place and manner of burial, the tort claim cannot be deemed duplicative of a claim of contract breach or dependent upon contract terms that remain undefined.

¶ 22 In light of the foregoing, the Court finds that the gist of the action doctrine does not apply to the claim of Phylis Joseph in this matter, which will be considered as a tort claim under the common law.

Common law tort claim.

¶ 23 Although Phylis Joseph characterizes her claim as sounding in negligence, she primarily complains that Divine deprived her of her right as surviving spouse to control the body and burial of her husband. Title 15 of the Virgin Islands Code relating to intestate estates is instructive in confirming that Virgin Islands law places high regard for the rights of a surviving spouse.

Administration of the estate of an intestate shall be granted and letters thereof issued, to – the widow or next of kin, or both, in the discretion of the court...

15 V.I.C. § 236(a)(1).

If the deceased was a married woman, the administration of her estate shall in all cases be granted to her husband, if he is qualified and competent for the trust and applies therefor within thirty days from her decease, unless by force of a marriage settlement or otherwise she has made some testamentary disposition of her property

which renders it necessary and proper to grant the administration to some other person.

15 V.I.C. § 237.

In 1994, the Territorial Court held that the Equal Protection Clause of the U.S. Constitution required that the statutory language be expanded to apply to surviving spouses without regard to gender. *In re Estate of Smith*, 31 V.I. 3 (V.I. Terr. 1994).

¶ 24 No statutory law in the Virgin Islands addresses the issue of the rights of a surviving spouse or any other person with regard to authority to determine the disposition of the physical remains of a person who died intestate. Accordingly, it is appropriate to conduct a *Banks* analysis to determine whether Virgin Islands law should accord such rights to a surviving spouse, by reviewing (1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands. *Simon v. Joseph*, 59 V.I. 611, 623 (V.I. 2013) (citations omitted).

¶ 25 No Virgin Islands courts (federal or local) have previously addressed the issue at hand, such that this is deemed to be a case of first impression, and the analysis is determined by the second and third *Banks* factors. Reviewing the position taken by a majority of courts from other jurisdictions, it is noted that: “The general rule as to the rights of the surviving spouse is stated in American Jurisprudence, vol. 15, p. 834, § 9, in this language: ‘It is generally conceded that on the death of a husband or a wife, the primary and paramount right to possession of the body and to control the burial or other legal disposition thereof is in the surviving spouse.’” *Teasley v. Thompson*, 165 S.W.2d 940, 941 (Ark. 1942).

¶ 26 In *Teasley*, the Supreme Court of Arkansas surveyed the state of the law nationwide. “...From a reading of all the decisions from the American courts, it seems to be the law... that, in case of a husband and wife, the right of possession [of the body of a deceased spouse] is in the surviving spouse, provided the husband and wife were living together at the time of the demise.” *Id.* at 942 (quoting *Southern L. & Health Ins. Co. v. Morgan*, 105 So. 161, 167 (Ala. App. 1925), cert. denied 105 So. 168 (Ala. 1925)).

¶ 27 “The general, if not universal, doctrine is that this right belongs to the surviving husband or wife or to the next of kin; and, while there are few direct authorities upon the subject, yet we

think the general tendency of the courts is to hold that, in the absence of any testamentary disposition, the right of the surviving wife (if living with her husband at the time of his death) is paramount to that of the next of kin. This is in accordance, not only with common custom and general sentiment, but also, as we think, with reason. The wife is certainly nearer in point of relationship and affection than any other person. She is the constant companion of her husband during life, bound to him by the closest ties of love, and should have the paramount right to render the last sacred services to his remains after death.” *Larson v. Chase*, 50 N.W. 238, 239 (Minn. 1891).

¶ 28 The legal right of a surviving spouse to control the disposition of her deceased spouse gives rise to an action for damages in the event of a third party’s interference with such right. “As against a wrongdoer, the nearest relation of the dead person present may maintain an action for an unwarranted interference with the burial of the body. The action is for a tort giving rise to an action irrespective of any contract in relation to the preparation for the burial. This plaintiff being the nearest relation present is a proper party plaintiff.” *Southern Life & Health Ins. Co. v. Morgan*, 105 So. at 165. Further, “[t]he person having this duty to bury the deceased also has the concomitant right to give the body a ‘decent’ burial, and the unlawful and unwarranted violation of this right constitutes a tort. This right of burial ordinarily includes the right to determine the time, manner and place of burial.” *Habersham Mem’l Park, Inc. v. Moore*, 297 S.E.2d 315, 319 (Ga. App. 1982) (citations omitted).

¶ 29 Regarding allowable damages in such a tort action, the Court of Appeals of Georgia reversed as clearly erroneous the trial court’s limitation on damages to actual out of pocket expenses incurred by the next of kin, holding that with regard to the “cause of action against the defendants, arising out of their right to bury the body... and the tort committed by the defendants, in preventing them from exercising this right,... [t]he main injury in this case was the mental distress occasioned to the plaintiffs by the unwarranted and outrageous conduct of the defendants.” *Wright v. Hollywood Cemetery Corp.*, 38 S.E. 94, 97 (Ga. App. 1901). In a similar action arising from the disinterment and reburial of siblings, the Georgia Supreme Court held that “[w]here such an action is maintainable, the injury to the natural feelings of the plaintiff may be taken into consideration in estimating the damages which he has sustained.” *Jacobus v. Congregation of*

Children of Israel. 33 S.E. 853, 855 (Ga. 1899). More than three-quarters of century later, the Court of Appeals of Georgia affirmed as proper a trial court's instructions to the jury: "In some torts the entire injury is to the peace, happiness or feelings of the party, of the Plaintiff generally speaking, and in this case certainly." *Habersham Mem'l Park, Inc. v. Moore*, 297 S.E.2d at 319.

¶ 30 Other courts in other jurisdictions have held similarly regarding the availability of emotional distress damages. In a case where the defendant trespassed disturbing the remains of the plaintiff's buried son, the Massachusetts Supreme Court held: "Under such circumstances, the natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate as well as in other actions of tort," noting that such acts "often inflict a serious wound upon the feelings, when the injury done to property is comparatively trifling." *Meagher v. Driscoll*, 99 Mass. 281, 285 (Mass. 1868). Similarly, the Supreme Court of Minnesota upheld judgment in favor of a widow whose right to exclusive control over the body and burial of her husband was interfered with by defendant's acts where the only damages alleged were mental suffering and nervous shock. "Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated, is too plain to admit of argument." *Larson v Chase*, 50 N.W. at 240.

¶ 31 The last factor in *Banks* considers which approach represents the soundest rule for the Virgin Islands. Given the preference in Virgin Islands law for the surviving spouse with regard to administration of intestate estates, and the long-recognized general consensus in multiple jurisdictions that a surviving spouse who has lived together with a deceased spouse has priority over all others with regard to the burial of the deceased, the Court finds that the soundest rule for the Virgin Islands is to recognize an action for tortious interference with a surviving spouse's right to make decisions with regard to the burial of a deceased spouse. Consistent with the law of other jurisdictions, "an unlawful interference with these rights is a basis for suit for damages," including emotional distress and mental suffering. *Teasley v. Thompson*, 165 S.W.2d at 942.

¶ 32 Here, Phylis Joseph had "the right to determine the time, manner, and place" of her

husband's burial. *Habersham Mem'l Park, Inc. v. Moore*, 297 S.E.2d at 319. As she possessed the legal right to bury her husband, she may maintain this action for mental distress against Divine for failing to accede to her wishes and instructions regarding the burial of her husband, but rather burying Rudolph Joseph at a time and place according to instructions received from Fern McAlpin.

Waiver.

¶ 33 The right of a surviving spouse to control the disposition of the physical remains of her spouse is not absolute. The final inquiry is whether Phylis Joseph waived her right to be the exclusive decision maker concerning the burial of Rudolph Joseph. "Where the wife is not living with her husband at the time of his death or neglects or refuses to assume the trust incident to her right, a waiver of that right is implied and the right and duty immediately descends to the next of kin present and acting." *Teasley v. Thompson*, 165 S.W.2d at 942. There is no evidence that Phylis Joseph was separated from her husband at the time of his death. Indeed, she was with him in Puerto Rico when he died. She made efforts to secure permits to bury her husband at 42 La Grange as she testified that he desired. After meeting with Divine in late February 2014, Phylis Joseph had at least one subsequent communication with Divine directly and through her attorney. In light of her consistent interest and efforts regarding her husband's burial, it cannot be said that Phylis Joseph "neglected or refused to assume the trust incident to her right."

¶ 34 However, together with her son Clarence Joseph and her sister-in-law Fern McAlpin, Phylis Joseph did meet and enter into a contract with Divine on February 27, 2014, just over one week after her husband's passing. Although no waiver of her rights regarding the burial of her husband may be implied by her neglect or inaction, the question arises whether Phylis Joseph explicitly waived her rights to exclusively control decisions regarding the burial through the contract with Divine. That contract was lost and not presented at trial, nor were any standard form contract or the specific substance of the contract terms introduced into evidence. As such, the answer to the question of whether Phylis Joseph waived the right to control of her husband's burial depends upon whether the record includes sufficient extrinsic evidence of the contract terms to determine whether she expressly waived those rights.

¶ 35 "Virgin Islands courts have generally declined to consider extrinsic evidence when... the written terms of a contract appear unambiguous." *White v. Spenceley Realty, LLC*, 53 V.I. 666,

678 (V.I. 2010) (citations omitted). Despite denials of Phylis Joseph as to its existence, the Court has found that a contract existed between the parties. Because it was not presented at trial, all its terms are necessarily ambiguous in the record, and we must consider extrinsic evidence to determine the contract terms. “Before making a finding concerning the existence or absence of an ambiguity, we consider the contract language ... and the extrinsic evidence offered in support of each interpretation. Extrinsic evidence may include ... the conduct of the parties that reflects their understanding of the contract’s meaning.” *Id.*

¶ 36 Fern McAlpin testified that when they signed the contract, Divine’s representative explained the need for the three signatures on the contract, describing past experiences where “other people” came in “to make changes and arrangements.” Because of those past experiences, it was necessary that the family “told her who would be allowed to make changes in the arrangements.” The family contract signatories – Phylis Joseph, Clarence Joseph and Fern McAlpin - were agreed to be the persons who had authority to speak with Divine about Rudolph Joseph’s burial. (June 11, 2019 Tr., 5-6.)

¶ 37 At that meeting, those three family members paid Divine for the funeral costs. Phylis Joseph received a receipt from Divine for her payment of \$480 that people had collected to contribute to the funeral. (Pl. ex. 6.) The total cost and breakdown of payments of the balance due Divine is unclear from the evidence. Clarence Joseph charged some portion of the Divine bill on his credit card, and Fern McAlpin paid the balance, described inconsistently at trial as some amount between \$1,020 and \$2,200.

¶ 38 In addition to contributing the largest amount to the payment of Divine’s bill, Fern McAlpin actively participated in the March 4, 2014 memorial service, following which Clarence Joseph and his siblings returned to the U.S. mainland. Thereafter, Fern McAlpin maintained contact with Divine over the following weeks that attempts to secure permits to bury Rudolph Joseph on private land failed. By May 2014, after Divine’s manager informed Michael Joseph that the body should have long been laid to rest, hearing from siblings and neighbors of the La Grange property, and sharing Michael Joseph’s concern that her brother’s body was in jeopardy of being buried in a pauper’s grave at Kingshill, Fern McAlpin returned to the funeral home, got the required permits from Public Works, and prepared a tomb at the family plot in the Frederiksted

Cemetery, advising her siblings of the plans. All of these facts, including especially the willingness of Divine to release the body to Fern McAlpin for burial are sufficient to permit a finding that the missing contract included the terms described by Fern McAlpin at trial. Specifically, the Court finds that the contract executed between Divine and Phylis Joseph, Clarence Joseph and Fern McAlpin on February 27, 2014 included a provision authorizing Divine to rely upon and act upon instructions from each of the three Joseph family member signatories to the contract, and only those three, concerning the burial of Rudolph Joseph.

¶ 39 Accordingly, the Court finds that by execution of the Divine contract, Phylis Joseph waived her right to be the exclusive decision maker with regard to her husband's burial, giving Divine the contractual right to rely upon instructions from any of the contract signatories. As such, Divine is not liable in tort to Phylis Joseph for damages claimed as a result of Divine acting pursuant to the instructions Fern McAlpin.

¶ 40 For the reasons set forth herein, Plaintiff's Complaint will be dismissed with prejudice by Judgment Order entered together herewith.

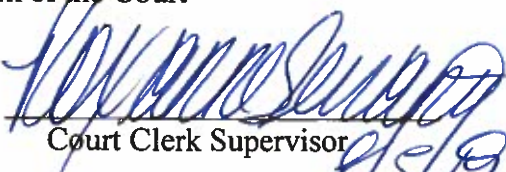
DATED: August 5, 2019.


DOUGLAS A. BRADY, JUDGE

ATTEST:

ESTRELLA H. GEORGE
Clerk of the Court

By:


Court Clerk Supervisor
8/5/19