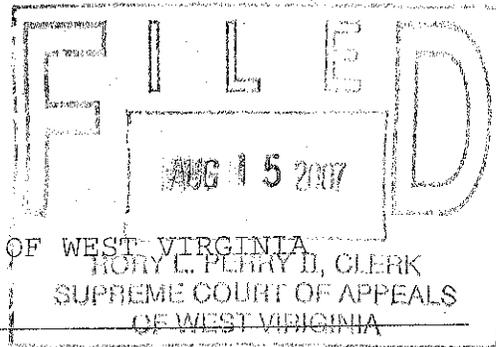


No. 33458



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON

IN RE:

Civil Action No.: 06-P-122

PETITION FOR APPOINTMENT OF
TRUSTEES FOR WOODLAWN CEMETERY

APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
HONORABLE FRED L. FOX, II, JUDGE

REPLY BRIEF OF THE APPELLANT, WOODLAWN CEMETERY
COMPANY BY AND THROUGH ITS BOARD OF
DIRECTORS AND ITS PRESIDENT, JACK LEE DECKER

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

GREGORY H. SCHILLACE WWSB #5597

Counsel for Appellant, Woodlawn
Cemetery Company by and through its
Board of Directors and its President,
Jack Lee Decker

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA

I. WEST VIRGINIA CODE § 35-5-1 ET SEQ. DOES NOT APPLY TO
CEMETERIES OWNED BY PRIVATE CORPORATIONS.

In Concerned Loved Ones and Lot Owners Association v. Pence,
181 W.Va. 649, 383 S.E.2d 831 (1989), this Court very clearly held
that West Virginia Code § 35-5-1 did not apply to cemeteries owned
by private corporations. West Virginia Code § 35-5-1, which the
appellee relied upon to remove the board of directors of the
Woodlawn Cemetery Company specifically delineates those types of
cemeteries to which it applies. By its express language and by
this Court's interpretation of that language, cemeteries owned by
private corporations are not included.

In Concerned Loved Ones, this Court recognized that Article 5A of Chapter 35 demonstrates a legislative intent to distinguish between entities that own and operate any cemetery and entities that operate a cemetery as trustees or as an association for a religious, benevolent or similar type of organization. Id. S.E.2d at 834. Article 5 of Chapter 35 only applies to those entities who operate cemetery as an association for a religious, benevolent or similar type of organization.

II. THE APPELLEES FAILED TO PROPERLY SERVE WOODLAWN CEMETERY COMPANY, A WEST VIRGINIA CORPORATION, IN ACCORDANCE WITH THE WEST VIRGINIA RULES OF CIVIL PROCEDURE.

The appellees assert that service by publication was appropriate under these circumstances pursuant to Rule 4(e)(1)(E) of the West Virginia Rules of Civil Procedure. However, the appellees failed to comply with the express requirements of Rule 4(e), therefore, as Woodlawn Cemetery Company was not properly served the Circuit Court orders must be reversed.

The appellees did not file an affidavit establishing that the Woodlawn Cemetery Company was a foreign corporation or a non-resident. There is no evidence that the appellees used due diligence to ascertain the residence or the whereabouts of Woodlawn Cemetery Company or that the Sheriff of Marion County attempted to serve the Woodlawn Cemetery Company. Even if there are individuals interested in the subject matter who may be unknown, the known entities such as the Woodlawn Cemetery Company must be properly

served.

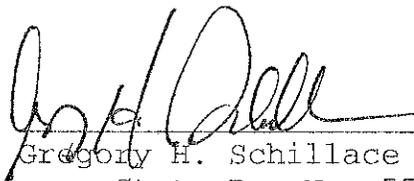
III. THE ALLEGED VIOLATION OF WEST VIRGINIA CODE § 35-5A-2 DOES NOT PERMIT THE REMOVAL OF THE BOARD OF DIRECTORS OF A PRIVATE CORPORATION.

Even if Woodlawn Cemetery Company was in violation of West Virginia Code § 35-5A-2, the appropriate remedy is not replacing a valid and appropriate West Virginia corporation with a board of trustees selected by the Circuit Court. There is no authority in Article 5A of Chapter 35 for the replacement of a private corporation board of directors with a board of trustees.

CONCLUSION

For all the foregoing reasons the appellant, Woodlawn Cemetery Company, by and through its Board of Directors and its President, Jack Lee Decker, respectfully requests that this Court reverse the Orders of the Circuit Court of Marion County, West Virginia entered on December 15, 2006 and January 18, 2007, respectively, and remand this case for entry of judgment in favor of the Woodlawn Cemetery Company.

Dated this 14th day of August, 2007.



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CERTIFICATE OF SERVICE

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA

I hereby certify that on the 14th day of August, 2007, I served the foregoing REPLY BRIEF OF THE APPELLANT, WOODLAWN CEMETERY COMPANY BY AND THROUGH ITS BOARD OF DIRECTORS AND ITS PRESIDENT, JACK LEE DECKER upon all opposing parties by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

Neal J. Hamilton, Esquire
Attorney at Law
Post Office Box 509
Fairmont, West Virginia 26555-0509

