NO. 97995-2

SUPREME COURT OF THE STATE OF WASHINGTON

KEITH DAHL,

Petitioner,

v.

GINA M. FINO; PACIFIC NORTHWEST FORENSIC PATHOLOGISTS,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

Jennifer D. Koh, WSBA #25464
Michele C. Atkins, WSBA #32435
Attorneys for Respondents
FAIN ANDERSON VANDERHOEF ROSENDAHL O'HALLORAN SPILLANE, PLLC
701 Fifth Avenue, Suite 4750
Seattle, WA 98104
(206) 749-0094

TABLE OF CONTENTS

I. IDENTITY OF RESPONDING PARTIES 1

II. COURT OF APPEALS DECISION 1

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW 2

IV. COUNTERSTATEMENT OF THE CASE 3

A. Factual Background. 3

B. Procedural Background. 4

V. ARGUMENT WHY REVIEW SHOULD BE DENIED 9

A. The Decision of the Court of Appeals as to Mr. Dahl's Professional Negligence Claim Is Not in Conflict with Any Decision of this Court 9

B. The Proper Application of Existing Washington Law to All Four of Mr. Dahl's Claims by the Court of Appeals Does Not Involve Any Issue of Substantial Public Interest. 10

1. Mr. Dahl fails to show any basis for overturning precedent as to intentional misuse of a corpse and nothing in the facts of this case warrants its extension to negligent conduct. 11

2. The Court of Appeals properly concluded that Mr. Dahl did not identify evidence to raise a genuine issue of material fact for trial as to whether Dr. Fino intentionally misused a corpse by dissecting the brain. 15

3. Mr. Dahl fails to show any basis for overturning precedent as to the essential element of presence in claims for intentional or negligent infliction of emotional distress. 16

4. Mr. Dahl fails to show any basis for overturning precedent as to the public duty doctrine. 18

5. The Court of Appeals properly concluded that Mr. Dahl did not identify evidence to raise a genuine issue of material fact for trial as to whether Dr. Fino owed a duty to him as an individual rather than the general public, a necessary element of his professional negligence claim. 19

VI. CONCLUSION 20

TABLE OF AUTHORITIES

STATE CASES **Page(s)**

Adams v. King County,
164 Wn.2d 640, 192 P.3d 891 (2008) 1, 2, 12, 13, 14, 16, 17

Gadbury v. Bleitz,
133 Wash. 134, 233 P. 299 (1925) 2, 12

Gain v. Carroll Mill Co.,
114 Wn.2d 254, 787 P.2d 533 (1990)..... 18

Honcoop v. State,
111, Wn.2d 182, 759 P.2d 1188 (1988) 20

In re Rights to Waters of Stranger Creek,
77 Wn.2d 649, 653 466 P.2d 508 (1970) 11

Lund v. Caple,
100 Wn.2d 739, 675 P.2d 226 (1984) 18

Munich v. Skagit Emergency Commc'ns Ctr.,
175 Wn.2d 871, 288 P.3d 328 (2012)..... 3, 9, 10, 18, 20

Pendergrast v. Matichuk,
186 Wn.2d 556, 379 P.3d 96 (2016) 11

Reid v. Pierce County,
136 Wn.2d 195, 961 P.2d 333 (1998) 2, 16, 17

Schurk v. Christensen,
80 Wn.2d 652, 497 P.2d 937 (1972) 17-18

Taylor v. Stevens County,
111 Wn.2d 159, 759 P.2d 447 (1988) 20

W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters,
180 Wn.2d 54, 322 P.3d 1207 (2014) 11

Wright v. Beardsly
46 Wash. 16, 89 P. 172 (1907) 13

FEDERAL CASES

K.N. v. Life Time Fitness, Inc.:16-cv-39,
2018 U.S. Dist. LEXIS 209661, 2018 WL 6505395
(D. Utah Dec. 11, 2018) 16

STATUTES AND RULES

RCW 68.50.010 ..... 15, 19
RCW 68.50.015 ..... 5, 14, 15, 16
RCW 68.50.100 ..... 3, 15, 19
RCW 68.50.105(1)..... 19
RCW 68.50.106 ..... 3, 5, 14, 15, 16
RCW 68.50.160(3)(e)..... 19
RAP 9.12 8
RAP 13.4(b)(1) 9, 10
RAP 13.4(b)(4) 9, 16, 20

OTHER AUTHORITIES

Restatement (Second) of Torts
§ 868 (1979) 11

Restatement (Third) of Torts
§ 47 (2012) 17

I. IDENTITY OF RESPONDING PARTIES

Respondents Dr. Gina Fino and Pacific Northwest Forensic Pathologists submit this Answer to Mr. Dahl's Petition for Review.[1]

II. COURT OF APPEALS DECISION

In this personal injury action arising out of the statutorily authorized autopsy performed by Dr. Fino[2] as part of the Mason County Coroner's official investigation into the death of Brandon Dahl which occurred in the Mason County Jail, Division II, in an unpublished decision issued September 10, 2019, reversed the trial court's denial of summary judgment dismissal of Brandon's father, Keith Dahl's claims of professional negligence, misuse of a corpse, and negligent and intentional infliction of emotional distress.[3] As to the professional negligence claim, Division II concluded that Mr. Dahl failed to identify a genuine issue of material fact for trial to demonstrate that Dr. Fino owed him a duty beyond that which she owed to the general public. As to the misuse of a corpse claim, Division II, consistent with *Adams v. King County*, 164 Wn.2d 640, 192 P.3d 891 (2008), concluded that (1) Mr. Dahl failed to identify a genuine issue of material fact for trial to demonstrate intentional conduct unauthorized by

[1] This brief cites the Amended Petition for Review, filed December 20, 2019, as "*Pet*."
[2] This brief refers to Dr. Gina Fino and her employer, Pacific Northwest Forensic Pathologists, collectively as Dr. Fino.
[3] In referring to Keith Dahl as Mr. Dahl and to his son as Brandon, no disrespect is intended.

statute and (2) Washington does not recognize a claim for negligent misuse of a corpse. As to the intentional and negligent infliction of emotional distress claims, Division II, consistent with *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998), concluded that Mr. Dahl failed to identify a genuine issue of material fact for trial as to the essential element of presence at the injury-causing event.

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Where there has been no clear showing that the current rule is incorrect and harmful or that the legal underpinnings of its precedents have changed or disappeared altogether, should this Court decline the invitation to overrule its decisions in *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925), and *Adams v. King County*, 164 Wn.2d 640, 192 P.3d 891 (2008), in order to create a new claim in Washington for *negligent* misuse of a corpse?

2. Where there has been no clear showing that the current rule is incorrect and harmful or that the legal underpinnings of its precedents have changed or disappeared altogether, should this Court decline the invitation to overrule its decision in *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998), in order to eliminate the essential element of presence from claims of negligent or intentional infliction of emotional distress for cases involving a corpse?

3. Where there has been no clear showing that the current rule is incorrect and harmful or that the legal underpinnings of its precedents have changed or disappeared altogether, should this Court decline the invitation to overrule several of its decisions, such as *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 288 P.3d 328 (2012), in order to abolish the public duty doctrine?

4. Did the Court of Appeals properly conclude that Mr. Dahl failed to identify evidence to raise a genuine issue of material fact for trial as to whether Dr. Fino intentionally exceeded her statutory authority under RCW 68.50.100 and RCW 68.50.106, an essential element of his claim of intentional misuse of a corpse?

5. Did the Court of Appeals properly conclude that Mr. Dahl failed to identify evidence to raise a genuine issue of material fact for trial as to whether Dr. Fino owed a duty to him beyond the duty she owed to the general public, an essential element of his claim of professional negligence?

IV. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

When Brandon Dahl died at the Mason County Jail on September 16, 2015, Mason County Coroner Wes Stockwell took jurisdiction of the body and directed Dr. Fino to conduct an autopsy. CP 145-46, 174-75, 180, 182-83; *Slip Op.* at 2-3. Dr. Fino dissected the body, removed, weighed,

and dissected the internal organs, including the brain, obtained postmortem radiographs and photographs, reserved some tissue samples, returned the dissected organs to the body, and closed the body for burial. CP 146, 174-78, 202, 207-08, 220-21. Dr. Fino prepared a report for the Mason County Coroner's Office detailing her examination and stating her conclusions that the cause of death was asphyxia due to hanging and the manner of death was suicide. CP 146, 174-78; *Slip Op*. at 3.

After Coroner Stockwell released the body to the family, Mr. Dahl retained Dr. Bennet Omalu, who conducted a second autopsy. CP 202. Although he agreed with Dr. Fino's conclusions regarding the cause and manner of death as asphyxia due to hanging and suicide, Dr. Omalu strongly criticized Dr. Fino's autopsy, stating, among other things, that she failed to fully investigate evidence of traumatic brain injury, retained too few tissue samples, and dissected the brain in an "irregular" and "indiscernible" manner. CP 221-22, 227-28, 365-66. Importantly, Dr. Omalu did not suggest that Dr. Fino should not have dissected the brain, did not opine that Dr. Fino exceeded her statutory authority in any way, did not offer general opinions on the usual condition of organs following dissection, and did not use the word "mutilate" in his reports. CP 202-31, 357-66.

B. Procedural Background.

Mr. Dahl sued Dr. Fino, identifying four causes of action: (1)

"professional negligence," (2) interference with a dead body, (3) negligent infliction of emotional distress, and (4) outrage. CP 4-8. Dr. Fino sought summary judgment dismissal of his suit, arguing that Mr. Dahl failed to identify evidence to support a prima facie case on any of his four claims.[4] CP 149-64. In her motion for summary judgment, Dr. Fino pointed out the public government purpose in the coroner's statutory investigation into suspicious or unusual deaths, including those occurring in a jail, CP 149-50, the public's interest in "an independent and efficient process" for investigating death, CP 153-54, the lack of a cause of action for a family member of a deceased individual to challenge a coroner's exercise of discretion within the authority of RCW 68.50.106, CP 154-58, and cases from other jurisdictions explicitly holding that coroners owe duties to "the public at large" when conducting autopsies, but not necessarily to family members of deceased individuals whose bodies are under their jurisdiction, CP 159-64.

Regarding the professional negligence claim, Dr. Fino explicitly challenged the factual and legal basis for an actionable duty. CP 148, 164-66, 376-77. Dr. Fino argued that Mr. Dahl's bare reference to her medical

[4] Dr. Fino also argued that she was entitled to immunity from civil liability under RCW 68.50.015, but Division II did not reach the issue of immunity. *Slip Op*. at 1-2 & n.2. Mr. Dahl does not seek review of that aspect of the opinion, *see Pet*. at 1-2 & n.1, and Dr. Fino is not seeking review on any issue.

license in his complaint did not establish that she owed a duty to Mr. Dahl individually and that her performance of an autopsy at the request of the coroner and under his statutory jurisdiction and authority was not for the benefit of Brandon Dahl or his family members and could not cause him any injury that a personal representative or family member could litigate. CP 164-66. As to the claim of intentional misuse of a corpse, Dr. Fino pointed out the lack of evidence that she willfully misused the body in any way beyond her statutorily authorized dissection. CP 167, 377-78.

In response, Mr. Dahl conceded that his professional negligence claim was not based on Dr. Fino's medical license, but claimed that "his interest in the proper treatment of his son's body" gave rise to a duty. CP 192. Mr. Dahl did not identify any evidence supporting the existence of a duty beyond (1) Dr. Omalu's reports, CP 186-87, and (2) his own *personal belief* that Brandon's brain was "mutilated" when it was dissected, CP 187; *see also* CP 303, 305. He did not identify any evidence or legal theory suggesting that his interest in the proper treatment of his son's body created a duty requiring Coroner Stockwell to ensure that each dissected organ in a corpse under his statutory jurisdiction is sufficiently preserved for the family to obtain additional privately-funded autopsies. *Compare* CP 3, ¶ 15.d *with* CP 185-95.

At the hearing before the trial court, Dr. Fino emphasized the public

nature of her role in Coroner Stockwell's official government investigation of Brandon Dahl's death, RP 11-13, and pointed out that the central factual problem in the case is that Mr. Dahl's mere "characterization" of an official government "authorized dissection" of a brain as a "mutilation" is not *evidence* that Dr. Fino intentionally exceeded her statutory authority. RP 18-19. Dr. Fino also pointed out that Dr. Omalu did not identify any conduct "outside of her authority," did not claim that she "destroyed any part of the body intentionally," and "did not characterize her autopsy as a mutilation." RP 22. Mr. Dahl did not contest the public nature of Coroner Stockwell's investigation or Dr. Fino's role in it, nor did he identify any legal or factual basis to conclude that Dr. Fino owed him a duty as an individual or to conclude that she intentionally exceeded her statutory authority. RP 19-21.

The trial court denied Dr. Fino's motion for summary judgment, but certified its ruling for immediate review. CP 425-27. Division II granted Dr. Fino's motion for discretionary review. *Slip Op*. at 4.

In briefing submitted to Division II, the parties disputed whether Dr. Fino owed a duty to Mr. Dahl individually, an essential element of his professional negligence claim, and discussed Washington case authority on the public duty doctrine. *App*. *Br*. at 33-40; *Resp*. *Br*. 32-37; *Reply Br*. at 19-23. Mr. Dahl did not suggest in his briefing or at oral argument that Dr.

Fino failed to challenge the factual or legal basis for such a duty before the trial court. *Id.* Instead, for the first time in a motion for reconsideration submitted to Division II after issuance of its opinion, Mr. Dahl claimed that RAP 9.12 prevented the panel from considering Washington case authority on the public duty doctrine. *Mot. for Recon.* at 1-5. In answering the motion, Dr. Fino demonstrated that both parties understood, throughout the proceedings before the trial court and the Court of Appeals prior to the issuance of the opinion, that her initial motion for summary judgment established the absence of material facts to show that she owed a duty to Mr. Dahl, an essential element of his professional negligence cause of action, such that he had the burden to identify *evidence* raising a genuine issue for trial to prevent summary judgment dismissal of that claim. *Appellants' Answer to Mot. for Recon.* at 1-7. Dr. Fino argued, among other things, that Division II should deny reconsideration because (1) Mr. Dahl failed to meet his burden to present *evidence* to the trial court in response to Dr. Fino's properly supported summary judgment motion, and (2) his failure to meet that burden did not turn on whether the parties discussed additional Washington authority on the public duty doctrine before the Court of Appeals. *Id*. at 7-18. Division II denied reconsideration in an order entered on November 19, 2019.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Mr. Dahl cites RAP 13.4(b)(1) in seeking review of Division II's decision on his professional negligence claim, and RAP 13.4(b)(4) in seeking review of its decision on all four of his claims. *See Pet*. at 6, 7, 12, 17. Because Division II's decision is not in conflict with any decision of this Court so as to warrant review under RAP 13.4(b)(1) and does not involve any issue of substantial public interest as to warrant review under RAP 13.4(b)(4), Mr. Dahl's petition for review should be denied.

A. The Decision of the Court of Appeals as to Mr. Dahl's Professional Negligence Claim Is Not in Conflict with Any Decision of this Court.

Mr. Dahl claims, *Pet*. at 7, that Division II's decision is in conflict with the concurring opinion of Justice Chambers in *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 885-95, 288 P.3d 328 (2012), regarding the public duty doctrine, which he claims, "creates special immunities and privileges" contrary to the legislature's waiver of sovereign immunity as well as the Washington Constitution, *Pet*. at 2, 20 & n.10. However, Mr. Dahl fails to explain his claim, offer any cogent argument, or identify anything in Division II's analysis or holding that conflicts with any statement in the *Munich* concurrence or majority opinion or any other opinion of this Court addressing the public duty doctrine. *See Pet*. at 1-20.

Division II's decision is not in conflict with, but rather is based upon, several of this Court's decisions on the use of the public duty doctrine

as a focusing tool to evaluate the essential element of duty required to establish an actionable negligence claim. *Slip Op*. at 5-8. As the concurring opinion in *Munich* makes clear, the public duty doctrine is not "a tort of its own imposing a duty on any government that gives assurances to someone," nor "some sort of broad limit on all governmental duties," but "simply a tool" used "to ensure that governments are not saddled with greater liability than private actors as they conduct the people's business."[5] *Munich*, 175 Wn.2d at 886 (J. Chambers, concurring). Here, Division II properly used the public duty doctrine as "a focusing tool" to determine whether Mr. Dahl met his burden of establishing that Dr. Fino owed a duty to him individually, rather than to the public at large during the statutorily authorized dissection of the body, which "was a governmental function performed for a public purpose." *Slip Op*. at 6-7. Review is not warranted under RAP 13.4(b)(1).

B. The Proper Application of Existing Washington Law to All Four of Mr. Dahl's Claims by the Court of Appeals Does Not Involve Any Issue of Substantial Public Interest.

In his petition for review, Mr. Dahl asks this Court to overturn its precedent and create new law regarding intentional misuse of a corpse, *Pet*. at 9-11, intentional and negligent infliction of emotional distress, *Pet*. at 12-

[5] This is consistent with the lead opinion in *Munich*, signed by eight justices, that used the public duty doctrine as a focusing tool to determine whether the plaintiff showed that the County, in carrying out specific duties mandated by statute, "owed a duty to a nebulous public" or to the plaintiff. *Munich*, 175 Wn.2d at 878 & n.2 (internal quotations omitted).

14, and the public duty doctrine, *Pet*. at 20. This Court has stated that it "will not overturn precedent without either 'a clear showing than an established rule is incorrect and harmful,' or a clear showing that the legal underpinnings of the precedent have been eroded." *Pendergrast v. Matichuk*, 186 Wn.2d 556, 565, 379 P.3d 96 (2016) (first quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653 466 P.2d 508 (1970); and then citing *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)). Mr. Dahl does not acknowledge this rule in his petition and does not make either showing for any of his requests to overturn precedent.

Mr. Dahl also fails to explain how the summary judgment dismissal of his claims under the unique and limited circumstances of this case involves any issue of public interest. This Court should deny review.

1. Mr. Dahl fails to show any basis for overturning precedent as to intentional misuse of a corpse and nothing in the facts of this case warrants its extension to negligent conduct.

Mr. Dahl claims, *Pet*. at 9-12, it is "time" for this Court to adopt the Restatement (Second) of Torts § 868 (1979) and recognize a cause of action for negligent misuse of a corpse. In a footnote, *Pet*. at 12 n.6, he claims, without explanation, that such a cause of action is a "matter of substantial public concern, affecting nearly every single Washington resident." Rather than identifying any incorrect and harmful aspect of Washington law or

discussing any of the underpinnings of Washington precedent, Mr. Dahl merely (1) points out that "more than 20" other states recognize a cause of action for negligent misuse of a corpse, and (2) provides a two-page block quote from an opinion of the Illinois Supreme Court addressing "Illinois jurisprudence." *Pet*. at 10-11.

This Court need not look to Illinois or any other state for direction on this issue, because it has repeatedly declined to recognize a cause of action for negligent misuse of a corpse. In *Adams v. King County*, 164 Wn.2d 640, 657 n.9, 192 P.3d 891 (2008), this Court refused to revisit its holding in *Gadbury v. Bleitz*, 133 Wash. 134, 136, 233 P. 299 (1925), that the tort of misuse of a corpse was limited to circumstances involving a "wilful wrong" because "recovery is premised on mental suffering." In *Adams*, the plaintiff alleged that the medical examiner, while conducting an autopsy on the body of a young man who died suddenly and unexpectedly, retained the brain and various tissue and blood samples for donation to a research organization without permission of the family of the deceased. *Adams*, 164 Wn.2d at 645-47. In analyzing the plaintiff's claim for misuse of a corpse, this Court described the tort as allowing "recovery for mental suffering derived from willful misuse of a body," and clarified that the "action is not based on a property interest in the body itself, but rather an interest in the proper treatment of the body." *Id*. at 658. As stated by this

Court in *Wright v. Beardsly*, 46 Wash. 16, 19, 89 P. 172 (1907), "[T]he action is for a wrong against the feelings of the plaintiffs inflicted by the wrongful and improper burial of their dead."

In *Adams*, the plaintiff asked this Court to adopt the Restatement, "presumably to include claims of negligence," but failed to demonstrate "why the facts of this case warrant extension of the tort to cover negligent conduct." *Adams*, 164 Wn.2d at 657 n.9. Further, the Court observed that similar claims of negligence would likely be covered by the immunity provision of the Washington Uniform Anatomical Gift Act. *Id.*

Here, Mr. Dahl fails to acknowledge or address the potential differences between the Illinois court's view of the basis of the action as a possessory right rather than the infliction of emotional distress, *see Pet.* at 10, and this Court's focus on the wrong against the feelings of persons with an interest in the proper treatment of a body, *see Adams*, 164 Wn.2d at 658. And, he fails to identify anything in this Court's analysis that should be revisited since it decided *Adams*.

Similarly, Mr. Dahl fails to demonstrate that the facts of this case warrant extension of the tort to negligent conduct. Despite Mr. Dahl's expansive description of Dr. Omalu's criticisms of other aspects of Dr. Fino's performance of the autopsy, *see Pet.* at 8-9, the only allegation relevant to a claim of misuse of a corpse is the condition of the brain

following Dr. Fino's statutorily authorized dissection of that single organ.[6] Although Mr. Dahl claims, without citation to the record, that the details in Dr. Omalu's description of the condition of the brain following the initial dissection "are not the normal sequences of an autopsy," *Pet.* at 8, nothing in the record before the trial court established that any person who lawfully dissects an organ has a duty to ensure that the dissected organ remains in a condition that would allow a complete second dissection, according to whatever standard that could involve. Moreover, the discretion afforded to the coroner by RCW 68.50.106 to "cause to be made an analysis of the stomach contents, blood, organs, or tissues of a deceased person and secure professional opinions thereon and retain or dispose of any specimens or organs of the deceased which in his or her discretion are desirable or needful for anatomic, bacteriological, chemical, or toxicological examination," would likely preclude a negligence claim in any case.[7] In addition, the immunity provided to coroners and medical examiners in RCW 68.50.015

[6] Mr. Dahl does not explain how failing to retain a ligature, describe a ligature in the autopsy report, perform microscopic examinations, preserve additional tissue, take additional photographs, or wait for a toxicological analysis before completing her report could be actionable as misuse of a corpse. *Pet.* at 8-9. While such allegations may be relevant to a claim of professional negligence to the extent a defendant owed an actionable duty to an individual plaintiff, Mr. Dahl fails to identify any case where such allegations could support a claim for misuse of a corpse in any jurisdiction, let alone Washington.

[7] As this Court recognized in *Adams*, RCW 68.50.106 would have allowed the medical examiner to retain an organ if there was "some compelling reason for further examination" related to the proper government purpose of the autopsy. *Adams*, 164 Wn.2d at 660.

would likely apply to claims of negligence based on their discretionary decisions in determining the cause and manner of death.[8]

2. The Court of Appeals properly concluded that Mr. Dahl did not identify evidence to raise a genuine issue of material fact for trial as to whether Dr. Fino intentionally misused a corpse by dissecting the brain.

Mr. Dahl claims, *Pet*. at 8-9, that Dr. Omalu's allegations of negligence attributed to Dr. Fino during her performance of the autopsy overall, taken together, raise an inference that she "intentionally mutilated" the brain. But, such an inference is not reasonable in this context and is not supported by the record in this case. As Division II correctly observed, nothing in the evidence submitted to the trial court, including Dr. Omalu's reports, suggested that Dr. Fino intentionally misused or mutilated the brain or body in any manner other than dissecting it. *Slip Op*. at 10. It was also undisputed that (1) Dr. Fino intentionally dissected the brain, (2) Dr. Fino had the statutory authority and discretion to dissect the brain without the consent of the family according to RCW 68.50.010, 68.50.100, 68.50.106, (3) dissection of the brain was an appropriate and necessary part of the investigation of the cause and manner of death,[9] (4) Dr. Fino returned the

[8] Although Division II did not address the application of RCW 68.50.015 to this case and no party is seeking review of that decision, the fact that the immunity provision exists weighs against expanding liability to negligent conduct.

[9] Dr. Omalu never suggested that Dr. Fino should not have dissected the brain; he criticized her for failing to retain additional samples of the brain tissue. CP 366. In other words, Dr. Omalu suggested Dr. Fino should have returned less of the brain to the body for burial.

dissected brain to the body, and (5) Dr. Omalu conducted a second autopsy and reached the same conclusions regarding cause and manner of death as Dr. Fino. Unlike the circumstances in *Adams*, where the plaintiff stated a cause of action for intentional misuse use of a corpse by a medical examiner for conduct explicitly authorized by RCW 68.50.106 – retaining an organ – because it was done for an unauthorized purpose – donation for scientific research without a compelling need for further investigation related to the cause and manner of death, *see Adams*, 164 Wn.2d at 660; the circumstances here involve explicitly authorized conduct for an admittedly authorized purpose and no evidence of an unauthorized purpose. *Slip Op*. at 11.

Because Mr. Dahl fails to argue or establish that the unique circumstances of this case are likely to recur, specifically in light of the immunity provided by RCW 68.50.015 that may be applied in other cases, review is not warranted under RAP 13.4(b)(4).

3. Mr. Dahl fails to show any basis for overturning precedent as to the essential element of presence in claims for intentional or negligent infliction of emotional distress.

Mr. Dahl claims, *Pet*. at 12-14, that this Court's decision in *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998), is "wrong." Relying on a single federal district court memorandum opinion, *K.N. v. Life Time Fitness, Inc.*, 2:16-cv-39, 2018 U.S. Dist. LEXIS 209661, 2018 WL 6505395 (D. Utah Dec. 11, 2018), Mr. Dahl suggests the adoption of

Restatement (Third) of Torts § 47 (2012) to eliminate the presence requirement for "specified categories of activities, undertakings, or relationships." *Pet.* at 12-13. Alternatively, Mr. Dahl suggests that this Court follow the West Virginia approach and adopt a "dead body exception" to the rule that "liability may not be predicated upon negligence where the damage is limited to mental or emotional disturbance without accompanying physical injury." *Pet.* at 13-14.

However, Mr. Dahl offers no analysis of the law of Utah, any other state that may have considered adoption of that restatement section, or West Virginia as to whether any of those jurisdictions had, like Washington, recognized a separate intentional tort of misuse of a corpse and had repeatedly refused to expand that tort to cover negligent conduct. *See Adams*, 164 Wn.2d at 656-60; *see also supra* Section V.B.1. Because Washington already recognizes a separate tort for claims of emotional distress caused by misuse of a corpse, there is no need to change more general torts or create new exceptions to them for such claims.

Moreover, Mr. Dahl offers no principled reason for treating claims for intentional or negligent infliction of emotional distress involving corpses differently than the claims involving injuries to living persons addressed in the cases upon which this Court relied in *Reid*, including *Schurk v. Christensen*, 80 Wn.2d 652, 656-57, 497 P.2d 937 (1972)

(precluding mother's outrage claim regarding molestation of her daughter), *Lund v. Caple*, 100 Wn.2d 739, 675 P.2d 226 (1984) (precluding husband's outrage claim based on sexual relationship of his wife), and *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 260-61, 787 P.2d 533 (1990) (precluding father's and brother's negligent infliction of emotional distress claim based on death of state trooper in car accident).

4. Mr. Dahl fails to show any basis for overturning precedent as to the public duty doctrine.

Mr. Dahl claims, *Pet.* at 20 & n.10, that the public duty doctrine "creates special immunities and privileges that directly contradict the legislature's broad waiver of sovereign immunity." But, he fails to offer any cogent explanation of this claim or why he believes that the decision of the Court of Appeals in this case is vulnerable to such a critique. As discussed above, *see supra* Section V.A., Division II, consistent with this Court's precedent, as well as both the lead and concurring opinions in *Munich*, simply used the public duty doctrine as a focusing tool to determine whether Mr. Dahl met his burden to show that Dr. Fino owed a duty to him as an individual, apart from the duty she owed to the general public to determine cause and manner of death by performing an autopsy under Coroner Stockwell's jurisdiction and statutory authority and at Mason County's expense. *Slip Op.* at 5-9.

5. The Court of Appeals properly concluded that Mr. Dahl did not identify evidence to raise a genuine issue of material fact for trial as to whether Dr. Fino owed a duty to him as an individual rather than the general public, a necessary element of his professional negligence claim.

Mr. Dahl claims, *Pet*. at 14-15, that the legal question of whether Dr. Fino owed Mr. Dahl an actionable duty depends on whether she is a "competent pathologist" under RCW 68.50.100. No authority supports this claim. And, it makes no sense. A lawsuit for professional negligence against Dr. Fino cannot be the proper forum to litigate whether Coroner Stockwell properly exercised his discretion under RCW 68.50.100 by appointing her.

Mr. Dahl next claims, *Pet*. at 15-19, that a *special relationship* arose between Mason County and Mr. Dahl as the father of a deceased individual under the jurisdiction of Coroner Stockwell solely by express statements of *legislative intent* in the following statutes: RCW 68.50.010, regarding vesting jurisdiction over bodies in certain circumstances; RCW 68.50.100, allowing referral to competent pathologist; RCW 68.50.105(1), referring to family members; and RCW 68.50.160(3)(e), referring to parents. Even ignoring his inexplicable conflation of the two exceptions to the public duty doctrine litigated by the parties and discussed by the Court of Appeals, *see Slip Op*. at 7-9, Mr. Dahl fails to identify any facts to establish a duty that Dr. Fino owed to him "as an individual" and not merely "to the public in

general." *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988); *Slip Op*. at 5-6. Because Mr. Dahl did not produce any evidence of direct contact or privity with Coroner Stockwell or Dr. Fino to set himself apart from the general public or any evidence that he relied on any assurance in any way, he cannot raise a question of fact as to the special relationship exception. *See Munich*, 175 Wn.2d at 879; *Slip Op*. at 7. Similarly, the statutory provisions identified by Mr. Dahl evidence a clear legislative intent to protect public health and welfare generally rather than a particular and circumscribed class of persons. *Slip Op*. at 8-9; *Honcoop v. State*, 111, Wn.2d 182, 188-89, 759 P.2d 1188 (1988). Mr. Dahl's series of questions about what the law could be and his opinions on how statutes requiring the coroner to investigate suspicious and unusual deaths regardless of the wishes of family members of the deceased could be interpreted to include benefits to parents, *Pet*. at 15-19, do not raise any issue of public interest warranting review under RAP 13.4(b)(4).

VI. CONCLUSION

For all these reasons, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 21st day of January, 2020.

FAIN ANDERSON VANDERHOEF ROSENDAHL
O'HALLORAN SPILLANE, PLLC

s/Jennifer D. Koh

Jennifer D. Koh, WSBA #25464
Michele C. Atkins, WSBA #32435
Attorneys for Appellants
701 Fifth Ave., Suite 4750
Seattle, WA 98104
Ph: (206) 749-0094
Email: jennifer@favros.com
michele@favros.com

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 21st day of January, 2020, I caused a true and correct copy of the foregoing document, "Respondents' Answer to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Appellants:
Noah C. Davis, WSBA #30939
IN PACTA PLLC
33530 1st Way S, Suite 102
Federal Way, WA 98003-7332
Ph: (206) 709.8281, ext 101
Email: nd@inpacta.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

DATED this 21st day of January, 2020, at Seattle, Washington.

s/Carrie A. Custer
Carrie A. Custer, Legal Assistant

FAVROS LAW

January 21, 2020 - 11:48 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97995-2
Appellate Court Case Title:	Keith Dahl v. Gina Fino; Pacific NW Forensic Pathologists
Superior Court Case Number:	17-2-07011-0

The following documents have been uploaded:

- 979952_Answer_Reply_20200121095235SC878771_7484.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Respondents Answer to PFR.PDF

A copy of the uploaded files will be sent to:

- michele@favros.com
- nd@inpacta.com

Comments:

Sender Name: Carrie Custer - Email: carrie@favros.com
Filing on Behalf of: Jennifer D. Koh - Email: jennifer@favros.com (Alternate Email: carrie@favros.com)

Address:
701 Fifth Ave
Suite 4750
SEATTLE, WA, 98104
Phone: (206) 749-0094

Note: The Filing Id is 20200121095235SC878771