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NO. 51455-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KEITH DAHL,

Respondent,

v.

GINA M. FINO; PACIFIC NORTHWEST FORENSIC
PATHOLOGISTS,

Appellants.

BRIEF OF APPELLANTS

Jennifer D. Koh, WSBA #25464
Michele C. Atkins, WSBA #32435
FAIN ANDERSON VANDERHOEF
ROSENDAHL O'HALLORAN
SPILLANE, PLLC
Attorneys for Appellants

701 Fifth Ave., Suite 4750
Seattle, WA 98104
(206) 749-0094

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I. INTRODUCTION

Keith Dahl sued pathologist Dr. Gina Fino and her employer Pacific Northwest Forensic Pathologists (hereinafter collectively “Dr. Fino”), claiming that she negligently performed an autopsy at the direction and under the authority of the Mason County Coroner on the body of his son, Brandon Dahl, who died in jail as the result of an apparent hanging. In particular, Mr. Dahl¹ characterized Dr. Fino’s dissection of the body and organs, and more specifically, the brain, as a “mutilation,” causing him emotional distress and mental suffering.

Dr. Fino sought summary judgment dismissal based on (1) the immunity from civil liability for “determining the cause and manner of death” provided by RCW 68.50.015 to persons acting the capacity of coroners and medical examiners; and (2) Mr. Dahl’s failure to produce evidence to support each essential element of a prima facie case of any cause of action he alleged. Without identifying any ambiguity in RCW 68.50.015 or describing its plain meaning, the trial court denied the motion, concluding that the immunity does not extend to a coroner’s performance of an autopsy but “is more limited to a particular type of civil liability.” The trial court also stated generally that Mr. Dahl raised material issues of fact for trial in his “pleadings.”

¹ This brief refers to Keith Dahl as Mr. Dahl and to his son as Brandon. No disrespect is intended.

Because the unambiguous plain language of RCW 68.50.015, as well as its structure, context, and legislative history, reveals a legislative intent to provide immunity from civil liability to those acting as coroners and medical examiners for their activity of investigating cause and manner of death, the trial court erred as a matter of law by refusing to apply that immunity to preclude Mr. Dahl's claims against Dr. Fino. And, because Mr. Dahl failed to identify evidence to raise a genuine issue of material fact for trial as to (1) whether Dr. Fino owed him a duty, the breach of which would support a cause of action for negligence; (2) whether Dr. Fino exceeded her statutory authority when conducting the dissection; and (3) his presence at the injury-causing incident, Dr. Fino is entitled to summary judgment dismissal of all his claims as a matter of law, regardless of whether the immunity provided by RCW 68.50.015 applies.

II. ASSIGNMENT OF ERROR

The trial court erred in entering its January 12, 2018 order denying Dr. Fino's motion for summary judgment dismissal, CP 426-27.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does the immunity from civil liability provided by RCW 68.50.015 to coroners and medical examiners and persons acting in that capacity for "determining the cause and manner of death," necessarily include actions performed within the discretion of such an individual

during an autopsy, the procedure for determining cause and manner of death authorized by RCW 68.50.100 and RCW 68.50.106?

2. Does the public duty doctrine preclude any claim for professional negligence in the performance of an autopsy of a body under the jurisdiction of the coroner and in the interests of the public welfare?

3. Where a coroner has the authority and discretion to dissect a body under RCW 68.50.106, may a plaintiff state a claim for intentional misuse of a corpse as described in *Adams v. King County*, 164 Wn.2d 640, 192 P.3d 891 (2008) (holding that unauthorized donation for scientific research of entire brain can be considered intentional interference with corpse), by merely alleging a personal belief that an authorized dissection of a particular bodily organ was a “mutilation”?

4. Under *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998) (holding that plaintiffs who were not present when employees of medical examiner’s office engaged in arguably outrageous conduct could not maintain cause of action for either negligent or intentional infliction of emotional distress), must claims of negligent and intentional infliction of emotional distress be dismissed as a matter of law when it is undisputed that the plaintiff was not present at the injury-causing event?

IV. STATEMENT OF THE CASE

A. Factual Background

After Brandon Dahl died as the result of an apparent hanging while in custody at the Mason County Jail, the Mason County Coroner took jurisdiction of the body and directed Dr. Fino to perform an autopsy. CP 145-46, 174-75, 180, 182-83. Dr. Fino dissected the body and internal organs, including the brain, determined that the cause of death was asphyxia due to hanging and the manner of death was suicide, reserved some tissue samples, returned the dissected organs to the body, and closed the body for burial; the coroner then released the body to the family. CP 146, 174-78, 202, 207-08, 220-21.

Thereafter, Keith Dahl, the father of the deceased, retained a different pathologist, Dr. Bennet Omalu, who conducted a second autopsy a month later and provided a report criticizing Dr. Fino's autopsy as deviating from the standards of practice. CP 202, 364-66. Without suggesting that dissection of the brain was in any way unnecessary, Dr. Omalu claimed, among other things, that Dr. Fino (1) reported no evidence of traumatic brain injury, while he found significant evidence in the second autopsy; (2) failed to fully examine the brain and saved too few tissue samples for further analysis; and (3) dissected the brain in an "irregular" and "indiscernible" manner. CP 221-22, 227-28, 365-66.

B. Procedural Background

Mr. Dahl sued Dr. Fino for professional negligence, intentional misuse of a corpse, and both negligent and intentional infliction of emotional distress. CP 4-8. At the center of each claim is his *allegation* that Dr. Fino's dissection of the brain was a "mutilation." *Id.*

1. Dr. Fino's motion for summary judgment based on RCW 68.50.015 immunity and a lack of evidence.

Dr. Fino filed a motion for summary judgment, arguing that Mr. Dahl's claims must be dismissed because, under the plain language of RCW 68.50.015, Dr. Fino is immune from civil liability for performing a statutorily authorized autopsy, the undisputed method and procedure for determining cause and manner of death. CP 149-64.

Dr. Fino pointed out that the parties did not dispute that (1) the coroner took jurisdiction of the body as required by RCW 68.50.010 and, as authorized by RCW 68.50.100(1), directed Dr. Fino to conduct an autopsy, CP 149-50, 175; (2) Dr. Fino's statutory authority to conduct the autopsy necessarily included, under RCW 68.50.106, the exercise of discretion in dissecting the body and its internal organs, CP 149-50; (3) she dissected the body and internal organs, including the brain, during the autopsy, CP 146, 150, 156, 174-78; and (4) the sole purpose of her dissection of the brain was "determining the cause and manner of death," the very activity protected by the immunity provided by RCW 68.50.015,

CP 150, 153-54, 174. Dr. Fino argued that the Legislature unambiguously provided complete immunity in RCW 68.50.015 for the dissection of organs during an autopsy and that such immunity cannot be defeated by the mere characterization of a statutorily authorized dissection of an organ as a “mutilation” or the opinion of a professional who would have performed the autopsy differently. CP 154-59.

Dr. Fino also argued that Mr. Dahl could not present a prima facie case (1) as to his professional negligence claim because he lacked standing to challenge Dr. Fino’s performance of her statutory duty owed to the public at large to conduct an autopsy under RCW 68.50.100(1) and RCW 68.50.106, CP 159-66; (2) as to the claim of intentional misuse of a corpse because Mr. Dahl did not identify any evidence to establish that Dr. Fino exceeded her authority under RCW 68.50.106 by intentionally dissecting the brain for a purpose other than determining the cause and manner of death, unlike *Adams v. King County*, CP at 167; and (3) as to his negligent and intentional infliction of emotional distress claims because he could not establish the essential element of presence of the plaintiff during the injury-causing event as required under *Reid v. Pierce County*, CP 167-68.

In response, despite alleging in his complaint that the cause of Brandon Dahl’s death “remains unclear” because of Dr. Fino’s autopsy, CP 3, Mr. Dahl stated that he was not challenging Dr. Fino’s

determination of the cause and manner of death, CP 185. Instead, he argued that his claims were based on the “mutilation of his son’s body,” and that RCW 68.50.015 does not provide immunity “from suits based on a grossly negligent autopsy and mutilation of a body.” CP 185, 188. Mr. Dahl claimed that the immunity created by RCW 68.50.015 “extends only to suits based on determinations of ‘the cause and manner of death,’” but he did not (1) identify any ambiguity in the statute; (2) offer a definition of “determining” or “determination” or any reason to distinguish performing an autopsy from “determining the cause and manner of death”; or (3) cite any Washington authority to support his narrow reading. CP 188-89.

Mr. Dahl claimed that Washington must recognize a cause of action for professional negligence against a coroner for lack of skill in conducting an autopsy because he has a “protectable interest” in the proper treatment of his son’s body. CP 192. In support, Mr. Dahl relied solely on *Gould v. Reay*, 39 Wn. App. 730, 731-32, 965 P.2d 126 (1984), in which the plaintiff alleged that the county medical examiner was “careless and incompetent in his performance of the autopsy” on a body found in a park and produced evidence to show that he “failed to fully investigate all the facts and circumstances and overlooked evidence contrary” to his findings as to manner of death. Mr. Dahl suggested that his personal belief that dissection of the brain was a “mutilation” and Dr.

Omalu's critiques of Dr. Fino's technique was sufficient evidence to overcome summary judgment. CP 192.

As to the claim of intentional interference with a corpse, Mr. Dahl argued that the evidence he provided of his mental suffering was sufficient to require a jury to decide whether Dr. Fino intentionally mutilated his son's brain by dissecting it during the autopsy.² CP 192-93. As to the claims of negligent and intentional infliction of emotion distress, Mr. Dahl suggested that Washington courts would not require the plaintiff's presence at the injury-causing incident as stated in *Reid v. Pierce County* as an element of his claims because it "would be extremely unlikely that any family member would be present during an autopsy." CP 194.

In reply, Dr. Fino reiterated that the meaning of RCW 68.50.015 is a question of law and that well-settled principles of statutory interpretation require courts to derive and give effect to the Legislature's intent based on the plain language of an unambiguous statute. CP 371-72. To the extent the language could be viewed as ambiguous, Dr. Fino presented legislative history materials, including bill reports, descriptions of committee testimony, and statements made by the committee chair when the bill was passed, to demonstrate that the Legislature intended the immunity provision to supersede the holding in *Gould*. CP 370-76, 381-93.

² Mr. Dahl produced a psychological evaluation report to show his mental anguish and emotional injuries. CP 297-311.

Moreover, Dr. Fino pointed out that nothing in the *Gould* decision, or any other authority, justified Mr. Dahl's attempt to distinguish between the performance of an autopsy and the act of "determining the cause and manner of death." CP 369-70. Because the medical examiner's conduct during the autopsy was at the center of the plaintiff's claims in *Gould*, Dr. Fino argued that the Legislature's disapproval of the case demonstrated that the phrase "determining the cause and manner of death" necessarily includes the performance of autopsies. CP 370-74.

Finally, Dr. Fino reiterated that the Legislature's decision to provide immunity without requiring a showing of reasonableness or good faith suggests a conscious policy choice against creating a remedy for exceptional circumstances. CP 374-75; *see also* CP 152-54, 157-58. The Legislature's intent to "make clear" policy cannot be overcome by a plaintiff's mere characterization of a dissection of a body part for a properly authorized governmental purpose as a *mutilation* or evidence that another pathologist would have performed it differently. *Id.*

2. Mr. Dahl's motion to strike portions of counsel's declaration describing legislative history.

Mr. Dahl filed a motion to strike portions of a declaration from Dr. Fino's counsel describing Senate proceedings on the bill that was codified as RCW 68.50.015, complaining that counsel did not provide a recording

or transcript of the proceedings. CP 382-85, 407-08. In response, Dr. Fino provided a working transcript of hearing testimony as well as audio recordings, in both CD and digital form, of the Senate proceedings, and also pointed out that the audio recording of Senate Floor proceedings was available online at the website provided in the reply. CP 410-13, 415-24.

3. The trial court's ruling refusing to apply RCW 68.50.015 immunity and certification for immediate review.

At the hearing, the trial court denied the motion to strike, RP 9-10, and refused to apply RCW 68.50.015, stating that it applies only in “very limited circumstances with particular civil liability,” RP 23. Without identifying any circumstances in which it would apply, the trial court stated that “[i]f the Legislature wanted this statute to be as broad as” Dr. Fino contended, “then they would have basically said so.” *Id.* Stating that Mr. Dahl “raised a number of material issues of fact,” but without identifying anything other than what was “laid out” in his “pleadings,” the trial court denied summary judgment. RP 24.

Dr. Fino asked the trial court to reconsider its decision, pointing out that “we cannot interpret legislative intent by saying what we think they should have said,” but must discern legislative intent from “their words” enacted in statutes and “what the legislative history shows that they considered.” RP 27. In light of the legislative history materials

establishing that the Legislature specifically considered and rejected the *Gould* decision, Dr. Fino argued the statute was intended to prevent such claims of professional negligence against coroners for their performance of autopsies. RP 26-27. The trial court refused to reconsider, stating that it “looked at” RCW 4.16.080 and “a number of cases in formulating a decision,” rather than “just relying on” *Gould*, but signed an order certifying its ruling for immediate review. RP 24, 27-28; CP 425-27.

4. Dr. Fino’s motion for discretionary review.

Dr. Fino then sought discretionary review under RAP 2.3(b)(1) and (4), arguing that the trial court erred in its interpretation of RCW 68.50.015 and by concluding that Mr. Dahl identified sufficient facts to raise a genuine issue for trial as to all the essential elements of his claims. Commissioner Eric Schmidt granted Dr. Fino’s motion for discretionary review under RAP 2.3(b)(4).

V. STANDARD OF REVIEW

Appellate courts review summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if there is any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 775 (1971). The party opposing summary judgment dismissal cannot rely on allegations made in pleadings, but must present affidavits or declarations

based on personal knowledge showing that the affiant is competent to testify to the matters therein and setting “forth specific facts showing that there is a genuine issue for trial” in order to defeat the motion. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989); CR 56(e). The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value. *Wash. Fed. Sav. v. Klein*, 177 Wn. App. 22, 27-28, 311 P.3d 53 (2013), *review denied*, 179 Wn.2d 1019 (2014).

The meaning of a statute is a question of law that is also subject to de novo review. *Christensen v. Atl. Richfield Co.*, 130 Wn. App. 341, 343, 122 P.3d 937 (2005). “Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.” *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

VI. ARGUMENT

A. The text, structure, purpose, and history of RCW 68.50.015 show that the Legislature intended to provide coroners, medical examiners, and their designees with immunity from civil liability for alleged negligence in their performance of statutorily authorized dissections conducted for the purpose of determining cause and manner of death.

Without identifying any ambiguity in RCW 68.50.015 or anything in its plain language to suggest that it is only “determinations,” and not all the coroner’s conduct in “determining cause and manner of death” that is protected, the trial court concluded that the immunity was not so “broad”

as to extend to Dr. Fino's conduct when dissecting a body during an authorized autopsy for the official government purpose of "determining the cause and manner of death." RP 23. This was error. The trial court also erred to the extent it adopted Mr. Dahl's reasoning that (1) application of the immunity to a coroner's conduct during an autopsy would be inconsistent with the statute of limitations for actions against coroners provided by RCW 4.16.080(5); and (2) the immunity only precludes lawsuits challenging the coroner's specific "findings" or determinations as to cause and manner of death, such as Dr. Fino's determinations of asphyxiation due to hanging as the cause of death and suicide as the manner of death. RP 19-20, 23, 27. Because the interpretation of RCW 68.50.015 adopted by the trial court is not reasonable or supported by its plain language and is contradicted by principles of statutory construction, legislative history, and relevant case law, and because Dr. Fino's proposed interpretation is the only reasonable interpretation, this Court should reverse the trial court's order denying summary judgment and direct entry of summary judgment dismissal of all Mr. Dahl's claims.

1. By its plain language, RCW 68.50.015 provides immunity for "determining" and judicial review of "determinations."

Well-settled principles of statutory interpretation guide courts to execute legislative intent by implementing the plain language of a statute.

Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001). “If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself.” *Id.* Statutory language is unambiguous when it is susceptible to only one interpretation. *State v. Delgado*, 148 Wn.2d 723, 726-27, 63 P.3d 792 (2003). An unambiguous statute “does not require construction,” and courts will follow its plain language without considering outside sources or adding words or clauses “when the legislature has chosen not to include that language,” assuming the Legislature “means exactly what it says.” *Id.* at 727-28 (quotations omitted). Courts must not add words the Legislature chose not to include and must give all language effect so that no portion is rendered meaningless or superfluous. *In re Reinterment of Remains of Faenov*, 194 Wn. App. 42, 48, 376 P.3d 447 (2016) (quotations omitted).

RCW 68.50.015 first provides: “A county coroner or county medical examiner or persons acting in that capacity shall be immune from civil liability for determining the cause and manner of death.” This sentence unambiguously grants an immunity “from civil liability” when a person (1) is acting in the capacity of coroner or medical examiner; and (2) is “determining the cause and manner of death.” RCW 68.50.015. *See, e.g., Lockner v. Pierce County*, 190 Wn.2d 526, 532, 415 P.3d 246 (2018) (relevant statute provides qualifications for immunity).

The second sentence in RCW 68.50.015 provides: “The accuracy of the determinations is subject to judicial review.” This Court has described this sentence as creating the sole “remedy” for “family members who are not satisfied with the coroner’s explanation of the autopsy ... findings” by allowing a challenge to “the accuracy of the coroner’s determination[s]” in court. *Thompson v. Wilson*, 142 Wn. App. 803, 814, 819, 175 P.3d 1149 (2008); *see also* RCW 68.50.105 (requiring coroner to meet with family members to discuss findings of autopsy).

Here, the parties do not dispute that, when she dissected the body, Dr. Fino was (1) acting in the capacity of a coroner, and (2) “determining the cause and manner of death.” The parties also agree that (1) Dr. Fino is entitled to any immunity created by RCW 68.50.015; (2) Mr. Dahl is not seeking “judicial review” of any “determinations” as to the death; and (3) Mr. Dahl is seeking to impose civil liability upon Dr. Fino for the way she dissected the body. CP 145-70, 185-96, 367-80. Instead, the parties dispute whether, as Dr. Fino argued, the immunity precludes claims for civil liability for a coroner’s conduct during an autopsy performed solely for the purpose of determining cause and manner of death or, as Mr. Dahl claimed and the trial court concluded, only precludes lawsuits challenging the accuracy of the coroner’s ultimate autopsy findings. Dr. Fino’s interpretation is the only reasonable one for several reasons.

First, the Legislature used different words to describe the extent of the immunity and to create a separate opportunity for judicial review. Specifically, the immunity applies to “determining cause and manner of death,” while judicial review is available only for “determinations.” A “fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms.” *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (because legislature chose to use the term “in a reckless manner” in certain statutes and the term “reckless driving” in another, the court “must recognize that a different meaning was intended by each term”). Because the Legislature chose to use the different terms “determining” and “determinations,” this Court must recognize that it intended a different meaning by each term.

Second, the use of a verb to describe the extent of the immunity and a noun to describe the subject of judicial review demonstrates the different meanings intended. Use of the verb “determining” in its present participle form “connotes a continuing process or activity, not one that has a finite beginning and end.” *Detention of J.R.*, 80 Wn. App. 947, 956, 912 P.2d 1062 (1996). For example, in *Detention of J.R.*, this Court confronted the question of whether an “examining physician” was required by statute to conduct an additional “examination” in support of a request for civil commitment. *Id.* at 954-57. Because the use of the

present participle form of the verb “examining” as an adjective in the statute could not be treated as a noun simply to justify requiring a separate examination, and because of the connotation of a continuing process, this Court concluded that the Legislature’s use of the present participle verb indicated that it intended to include a doctor who is familiar with the patient by way of ongoing informal evaluations when referring to an “examining” physician as well as a doctor who conducts a single, isolated, mental status examination. *Id.* at 956-57. In other words, the contrast between the use of the verb form in one phrase and the noun form in another indicated a more expansive definition was intended by the verb form – one including “an ongoing, continuing, comparative process” that was consistent with the objectives of the statute at issue. *Id.* at 957.

Similarly, use of the present participle verb form of “determining” in RCW 68.50.015 connotes an ongoing process or activity, that is more expansive and can be read to include both the coroner’s process of evaluating or investigating evidence relevant to cause and manner of death and the ultimate result of that process, the decision as to what to write down on the death certificate.³ Thus, the use of “determining” in the first sentence of RCW 68.50.015 indicates that the Legislature intended to

³ *See, e.g.*, RCW 68.50.100 (coroner has discretion to conduct or direct autopsy in any case in which coroner has jurisdiction of a body); RCW 68.50.106 (coroner authorized to dissect, retain, and dispose of organs desirable or needful for examination).

preclude civil immunity for a coroner's investigatory process, conduct, or activity performed for the purpose of forming his or her ultimate determinations as to cause and manner of death as well as those ultimate determinations themselves. In contrast, the later use of "determinations," a noun with a more limited and finite scope, means that only the final result of the investigative process will be subject to the limited remedy of "judicial review" for accuracy. *See e.g., In re Dependency of D.L.B.*, 188 Wn. App. 905, 915-18, 355 P.3d 345 (2015) (rejecting interpretation conflicting with the verb tense in statutory subsection; legislature's use of specific temporal language is not inadvertent).

Third, the structure of RCW 68.50.015 also suggests that a different meaning was intended by the different terms "determining" and "determinations." *See, e.g., Roggenkamp*, 153 Wn.2d at 626-27 (because structure of statutes at issue demonstrated that different terms were used to describe alternatives, court assumed legislature meant for each alternative to be distinct). In particular, the immunity from civil liability is fully defined in the initial independent sentence; nothing in the first sentence imposes any condition on the application of the immunity other than the person is acting in the capacity of the coroner and is determining the cause and manner of death. The second sentence does not illuminate, modify, or limit the immunity created in the first sentence in any way. It does not

impose any additional condition or qualify the application of the immunity. Instead, the second sentence creates a separate and distinct procedure: “judicial review” of the “accuracy” of “the determinations.” The second sentence relies on the first sentence to identify the subject matter and context of “the determinations” to which it refers, as well as the identity of the person making them. Obviously, “the determinations” subject to “judicial review” as to their “accuracy” are the conclusions as to cause and manner of death made by a person acting in the capacity of a coroner or medical examiner as a part of the process of “determining the cause and manner of death.” Thus, the first independent sentence fully defines an immunity from civil liability to include both the process and the ultimate conclusions, and the second separate, yet dependent, sentence creates a distinct, more limited form of relief as an alternative to civil liability and solely for a dispute as to accuracy of the ultimate conclusions.

Contrary to the plain language of RCW 68.50.015 and these fundamental rules of statutory construction, the interpretation proposed by Mr. Dahl and adopted by the trial court requires completely ignoring the difference between “determining” and “determinations” and treating the terms as interchangeable. Indeed, immediately after quoting the language of RCW 68.50.015 providing immunity for “*determining the cause and manner of death,*” CP 188 (italics in original), Mr. Dahl claimed in a

section heading of his brief in response to Dr. Fino’s summary judgment motion that the immunity “extends only to suits based on *determinations* of “the cause and manner of death.”” CP 189 (italics added). However, Mr. Dahl did not offer, in that section or anywhere else in his brief, any acknowledgment of or explanation for his substitution of the word “determinations,” which does not even appear in the first sentence of RCW 68.50.015 creating the immunity. And, he did not cite any Washington authority suggesting that courts may choose to treat different words interchangeably, substituting nouns for verbs to interpret a statute.

Similarly, there is no support in the plain language of RCW 68.50.015 for the trial court’s conclusion that Dr. Fino’s interpretation conflicts with RCW 4.16.080(5)⁴ or that its immunity only extends to certain types of lawsuits. First, nothing in the plain language of RCW 68.50.015 suggests that it applies to *all* conduct in the scope of the coroner’s official duties. RP 17-18, 20. On the contrary, the immunity only applies when the person acting in the capacity of coroner is “determining the cause and manner of death.” RCW 68.50.015. Chapter 68.50 RCW assigns other official duties to coroners; acts or omissions

⁴ RCW 4.16.080 provides in pertinent part: “The following actions shall be commenced within three years: ... (5) An action against a ... coroner ... upon a liability incurred by the doing of an act in his or her official capacity and by virtue of his or her office, or by the omission of an official duty, including the nonpayment of money collected upon an execution.”

related to such other duties could potentially give rise to civil liability that would justify the need for a statute of limitations.⁵

In addition, a coroner could potentially incur civil liability for conduct during an autopsy not related to determining the cause and manner of death. *See, e.g., Adams*, 164 Wn.2d at 659-60 (medical examiner could incur civil liability for intentional tort of misuse of a corpse by donating brain for purpose unrelated to investigating cause and manner of death); *see infra* Section VI.C. Because the Legislature was aware, when enacting RCW 68.50.015, that coroners could be subject to civil liability in other circumstances, the mere existence of the statute of limitations does not conflict with its plain language. *See Faenov*, 194 Wn. App. at 48 (legislature is presumably aware of its past legislation).

Second, nothing in the plain language of the statute suggests that the immunity is limited to certain causes of action identified by a plaintiff or depends on whether the gravamen of a particular lawsuit is a challenge to the coroner's methods of performing an autopsy or merely a challenge to the coroner's ultimate conclusions. It simply precludes any claim seeking "civil liability." In other words, the immunity precludes any claim seeking payment of money damages for any injuries sustained as a

⁵ *See, e.g.,* RCW 68.50.040 (coroner must catalogue personal effects of decedent); RCW 68.50.105 (coroner must maintain confidentiality of autopsy records); RCW 68.50.115 (coroner not liable for improper release of information only when acting "in good faith in attempting to comply with the provisions of" chapter 68.50 RCW).

result of the coroner's activity of "determining cause and manner of death," no matter how the claim is described or presented. Where, as here, a statutory immunity is stated in terms that do not specify any particular cause of action or type of lawsuit, Washington courts will not create such a limitation. *See, e.g., Lockner*, 190 Wn.2d at 536-37.

For example, in *Lockner*, the plaintiff contended that the statutory recreational use immunity, which provides that a qualified landowner "shall not be liable for unintentional injuries," applies only to premises liability actions and did not preclude her common law negligence action. *Lockner*, 190 Wn.2d at 536. The Supreme Court rejected her narrow reading because it had no support in the statute's plain language and would "undermine the legislative purpose of recreational use immunity as it would do little to limit a landowner's liability." *Id.* at 536-37.

Here, in the same way, the trial court's narrow reading of the first sentence of RCW 68.50.015 to create an immunity only from certain types of lawsuits challenging a coroner's "determinations" is not supported by its plain language. And, to allow the application of an immunity from civil liability to turn on a plaintiff's self-serving characterization of his claim would undermine the legislative purpose of RCW 68.50.015 and chapter 68.50 RCW as a whole and do little to limit the liability of persons acting in the capacity of the coroner while determining cause and manner

of death. *See infra* Section VI.A.2. Because the plain language of RCW 68.50.015 is susceptible to only one reasonable interpretation, that presented by Dr. Fino, the trial court erred as a matter of law by refusing to apply the immunity and dismiss Mr. Dahl's claims.

2. The trial court's reading of RCW 68.50.015 is incompatible with the text, structure, and purpose of chapter 68.50 RCW.

Although this Court need not look beyond the unambiguous plain language of RCW 68.50.015 to conclude that Dr. Fino's interpretation is the only reasonable understanding of the Legislature's intent, its purpose and context in chapter 68.50 RCW also demonstrate that the trial court's conclusions are unreasonable. A statutory provision's context and the whole statutory scheme shed light on that provision's meaning. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). When deciding the meaning of a statute, courts consider statutes relating to the same subject matter, presuming that the Legislature is aware of its past legislation and any judicial interpretations thereof. *Faenov*, 194 Wn. App. at 48-49.

The purpose of chapter 68.50 RCW is to regulate the possession, examination, and disposal of human remains and to provide for the determination of the cause of death when persons die "suddenly when in apparent good health" or where circumstances indicate a death occurred "by unnatural or unlawful means." *In re Marriage of Newlon*, 167 Wn.

App. 195, 202, 272 P.3d 903 (2012); RCW 68.50.010. The “quintessential role and paramount duty of a county coroner in handling human remains and investigating deaths is delineated in chapter 68.50 RCW.” *Lee v. Jasman*, 183 Wn. App. 27, 56, 332 P.3d 1106 (2014), affirmed, *Grant County Prosecuting Atty. v. Jasman*, 183 Wn.2d 633, 354 P.3d 846 (2015).

The Court of Appeals has described RCW 68.50.010, the initial section of chapter 68.50 RCW, as “replete with references to criminality, unclear causes of death, threats to the public health, and a coroner’s investigative function,” demonstrating the historically “public” purposes of the coroner’s role in determining the cause and manner of death. *Faenov*, 194 Wn. App. at 57. Relevant here, RCW 68.50.010 requires and authorizes the coroner to take jurisdiction over a body in order to investigate the cause and manner of death when a “death apparently results from ... hanging.” RCW 68.50.010; *Newlon*, 167 Wn. App. at 203. The very next section, RCW 68.50.015, provides the immunity at issue in this case, while later sections describe the coroner’s authority to conduct that investigation, including a dissection of a body, without the consent of family members and at the expense of the county. In particular, the coroner may, “in his or her discretion,” direct a “pathologist, toxicologist, or physician to conduct an autopsy or postmortem” “for the purpose of ascertaining the cause of death.” RCW 68.50.100(1). A pathologist

performing an autopsy or postmortem, with costs to be borne by the county, “may,” “upon his or her own authority,”

make or cause to be made an analysis of the stomach contents, blood, or 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.

RCW 68.50.106 (italics added).

Given the statutory context of the immunity provision within chapter 68.50 RCW, the public purpose of dissections of bodies under the coroner’s jurisdiction, the coroner’s broad discretion in ordering and conducting dissections, as well as the central role that a dissection plays in the coroner’s process of investigating death, it would be unreasonable to conclude that the Legislature intended the immunity to apply only to a coroner’s final determinations while allowing claims for money damages based on criticisms of the coroner’s discretionary methods of investigation leading to the formation of those determinations. That interpretation would frustrate the legislative purpose for the immunity. *See, e.g., Dang v. Ehredt*, 95 Wn. App. 670, 977 P.2d 29 (1999).

For example, in *Dang v. Ehredt*, the Court of Appeals rejected a similar interpretation of a different immunity statute, former RCW 4.24.510, providing that one who “communicates a complaint or

information” to a government agency “shall be immune from civil liability on claims based upon the communication to the agency.” *Id.* at 680; *see also* CP 13-15. The Court rejected the plaintiff’s claim that “immune from civil liability on claims based upon the communication” means that the defendant bank was entitled to immunity only for its call to police to report her suspected counterfeiting, but not its attempt to keep her at the branch until the police arrived, because “[a]llowing a cause of action for negligence in the investigation which leads to a report to the police would be tantamount to allowing a cause of action for error in the report,” thereby “thwart[ing] the policies and goals underlying the immunity statute.” *Id.* 681-683 (quotations omitted). “Moreover,” the Court held, “no meaningful distinction can be drawn between the cause of action based on the bank’s communication to the police and a cause of action based on the method of arriving at the content of the communication.” *Id.* The Court also rejected her argument that the immunity only applies to defamation claims, but not her claim of false imprisonment, which did not involve a communication, because interpreting “the statute so that immunity turns on the characterization of the claim would make little sense in light of the clear purpose of the statute” to prohibit “civil liability” in favor of encouraging “communication between citizens and law enforcement agencies.” *Id.* at 685.

The same reasoning applies here. Allowing a claim for civil liability based on the coroner's manner of dissecting a body for the purpose of determining cause and manner of death is tantamount to allowing a claim for civil damages for inaccurate determinations of cause and manner of death. And, allowing claims for money damages by family members who are dissatisfied with a coroner's method of dissection or condition of the body following dissection based solely on a plaintiff's characterization of the claim or the opinion of a professional who would have performed the dissection differently would undermine the Legislature's purpose to prohibit civil liability in favor of encouraging coroners to thoroughly investigate suspicious deaths. This is an absurd result, which courts must avoid as presumably unintended. *Faenov*, 194 Wn. App. at 64 (courts must avoid interpretations resulting in "unlikely, strained, or absurd consequences").

Moreover, chapter 68.50 RCW also includes a separate immunity statute, RCW 68.50.115, providing that the coroner, medical examiner, or his or her designee is not liable for injuries based on violations of RCW 68.50.105, which imposes a duty to maintain the confidentiality of autopsies records, as long as that person "acted in good faith in attempting to comply with the provisions of this chapter." Such a grant of conditional or partial immunity, by recognizing "the need for protection against

liability” while “simultaneously” recognizing that such “immunity should be limited,” implies that the Legislature intended to allow a civil remedy in certain circumstances. *See Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 678, 398 P.3d 1108 (2017) (unlike a complete immunity, the grant of partial immunity may, in some circumstances, imply a cause of action for statutory violation). In contrast, RCW 68.50.015 is a grant of complete immunity, in that does not provide an exception for any act or omission lacking good faith. Such a complete immunity cannot be interpreted as a legislative intent to create a remedy for exceptional circumstances. *Id.*

The lack of a good faith requirement is significant, representing a conscious policy decision on the part of the Legislature. For example, when in 2002 the Legislature removed a good faith requirement contained in a former version of RCW 4.24.510, providing immunity from civil liability for persons communicating a complaint to a government entity, the Court of Appeals concluded that the Legislature intended to focus on protecting advocacy to government “regardless of content or motive.” *Bailey v. State*, 147 Wn. App. 251, 261-63, 191 P.3d 1285 (2008). The interest in encouraging people to communicate with government was more important than allowing civil lawsuits when reports are made without reasonable investigation, or with knowledge of falsity, or in bad faith. *Id.*

Here, the lack of a good faith requirement demonstrates a

legislative intent to focus on providing an independent and efficient process for investigating the cause and manner of death occurring under unusual or suspicious circumstances for the purposes of public welfare, regardless of the motive or methods of the person conducting the investigation. The policy decision to limit the remedies of dissatisfied family members to requesting a meeting with the coroner under RCW 68.50.105 and/or seeking judicial review under RCW 68.50.015 demonstrates that the Legislature views the coroner's official government role in investigating suspicious deaths as more important than allowing civil lawsuits where, as here, it is alleged that a coroner has conducted a negligent autopsy. The Legislature is entitled to make public policy choices and grant statutory immunity against civil liability regardless of the foreseeability of particular harms or the practical consequences in specific cases, and courts will not create exceptions. *See Ruiz v. State*, 154 Wn. App. 454, 459-60, 225 P.3d 458 (2010) (despite attraction of plaintiff's argument, "particularly on the facts here that underscore a collision between" important public policies, the legislature, not the court, made public policy choice by adopting clear statute providing immunity).

3. The legislative history of RCW 68.50.015 is also consistent with Dr. Fino's interpretation.

The Legislature enacted RCW 68.50.015 to reject, on policy

grounds, the holding in *Gould v. Raey*, 39 Wn. App. at 731-32, that a coroner could be subject to civil liability under a professional negligence theory for “careless and incompetent” performance of an autopsy and for negligently “signing the death certificate which indicated the manner of death was suicide.” CP 367-74, 381-93, 410-13, 415-24.

In *Gould*, the trial court dismissed the plaintiff’s case based on qualified immunity without reaching the question of whether his alleged acts or omissions could support a negligence claim. 39 Wn. App. at 732. On appeal, aside from a challenge to an evidentiary ruling, the only other legal question considered was whether the coroner was entitled to the “extremely limited exception” of discretionary governmental immunity. *Id.* at 732-33. The Court held that the medical examiner is “subject to the tort standard applicable to professional negligence,” because the decision as to manner of death is “made at an operational as opposed to executive level,” requiring “professional evaluation” but not “a balancing of risks and advantages” like policy-making. *Id.* at 732.

However, it is clear from the opinion that the Court did not examine the question of whether the plaintiff had standing to seek money damages from the coroner for negligence in his performance of a public duty, which is a separate question. *Id.* at 731-33; *see infra* Section VI.B. Moreover, it is also clear that the *Gould* Court did not distinguish between

the plaintiff's claim of negligent conduct by the coroner during the autopsy and her claim that his conclusion of suicide as the manner of death was incorrect. *Gould*, 39 Wn. App. at 731. Instead, the Court viewed her claims regarding the medical examiner's "performance of the autopsy," that is, his investigatory process and conduct, and his "determination of the manner of death," that is, his ultimate conclusion, as one and the same for the purposes of describing the "theory" of her cause of action; the "theory of negligent determination of the manner of death" encompassed all the conduct she challenged as well as the accuracy of the conclusion stated on the death certificate. *Id.* at 731, 733.

Legislative history materials including bill reports, committee testimony, and remarks on the Senate floor demonstrate that the Legislature did not agree with the result in *Gould* and intended to set a different policy as to the "theory of negligent determination of the manner of death" that it recognized. CP 367-74, 381-93, 410-13, 415-24. For example, the chair of the Senate committee that recommended the bill ultimately codified in RCW 68.50.015 stated on the Senate floor, "We couldn't believe that that would be appropriate policy." CP 374, 384-85, 387,411, 416, 424. And, the Legislature clearly viewed the conduct or activity involved in investigating a death, that is "determining" or "making" a "determination" as a broader process than simply entering a

“determination” on a death certificate. CP 367-74, 381-93, 410-13, 415-24. This view is evident in the text of RCW 68.50.015. The Legislature addressed both kinds of claims raised in *Gould*, providing an immunity from civil liability for all the coroner’s evidence-gathering activity and decision-making process and ultimate decisions, as well as a separate method for obtaining judicial review solely to address the accuracy of the conclusions as to cause and manner of death ultimately entered on death certificates and maintained for official government purposes. See discussion *supra* Sections VI.A.1, 2.

“The Legislature ‘does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment.’ *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 769, 10 P.3d 1034 (2000) (quoting *John H. Sellen Constr. Co. v. Dep’t of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976)). If the Legislature’s objective was to embrace the *Gould* court’s holding that a family member could sue a coroner for professional negligence in the investigation of the cause and manner of death, as Mr. Dahl claims, then the use of the phrase “determining the cause and manner of death” in the first sentence of RCW 68.50.015 to encompass the whole process and official result while using a more limited term, “determinations,” to describe only that official result as written on the death certificate as the subject of judicial review for

accuracy, was unnecessary and meaningless. If, however, the Legislature intended all the language of the provision to have some significant purpose, as this Court must presume, the only possible intention was to reject *Gould's* underlying policy of allowing claims for money damages against a coroner for professional negligence involving a body under his or her jurisdiction, regardless of whether such claims are based on the coroner's conduct during the investigation or the accuracy of the findings.

In sum, the interpretation of RCW 68.50.015 adopted by the trial court is unreasonable and frustrates its clear purpose. The unambiguous plain language of RCW 68.50.015 requires dismissal of all Mr. Dahl's claims seeking to impose civil liability on Dr. Fino for the manner in which she dissected the brain, or any other part of the body, because she was acting in the capacity of the county coroner and determining the cause and manner of death when she performed the dissection.

B. Regardless of the scope of RCW 68.50.015 immunity, Mr. Dahl's claim for professional negligence must be dismissed because Dr. Fino did not owe him a duty as a matter of law.

In response to Dr. Fino's argument that he lacked standing to assert a claim for professional negligence against her, CP 164-66; *see also* CP 159-63, 376-77, Mr. Dahl did not point to any statutory or common law duty that a coroner owes to individual family members of a decedent, claiming instead that his interest "in the proper treatment of" the body of a

deceased family member identified in *Adams v. King County* was sufficient to establish his standing, in that he had a “protectable interest that has been invaded or is about to be invaded,” *Orion Corp. v. State*, 103 Wn.2d 441, 455, 693 P.2d 1369 (1985); CP 192. But, Mr. Dahl cannot rely on the existence of a cause of action for interference with a corpse, which, as discussed in *Adams*, *see infra* Section VI.C., is an intentional tort, to demonstrate that Dr. Fino owed him a duty of care forming the basis of an actionable negligence claim. Because Mr. Dahl cannot establish that Dr. Fino owed to *him*, rather than to the public in general, a duty, as he claims, “to conduct an autopsy of his son’s body in accordance with the degree of skill, ability, and learning common to forensic pathologists,” CP 192, Dr. Fino is entitled to dismissal of his negligence claim as a matter of law.

To establish actionable negligence, a plaintiff must demonstrate “(1) the existence of a duty owed to the complaining party; (2) a breach of the duty; (3) resulting injury; and (4) that the breach was the proximate cause of the injury.” *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998). Because “a negligence action will not lie if a defendant owed a plaintiff no duty of care, the primary question is whether a duty of care existed.” *Id.* “The existence of a duty is a question of law.” *Id.*

“Whether the defendant is a governmental entity or a private person, to be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general.” *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). Under this “basic principle of negligence law,” known as the “public duty doctrine,” “no liability may be imposed” unless “the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.*, a duty to all is a duty to no one).” *Id.* (quotations omitted). The plaintiff in a negligence action has the burden of establishing that the defendant breached a duty owed to him or her individually, rather than to the public at large. *Sunshine Heifers, LLC v. Dep’t of Agric.*, 188 Wn. App. 960, 966, 355 P.3d 1204 (2015). The public duty doctrine reflects the policy choice that statutory schemes designed to serve the public welfare “should not be discouraged by subjecting a governmental entity to unlimited liability.” *Id.* at 967.

For example, in *Sunshine Heifers*, the owner of cattle that had been wrongfully sold sued the Department of Agriculture for negligence, alleging that by improperly inspecting cattle, the Department erroneously allowed another party to sell the owner’s cattle. *Id.* at 962-65. This Court considered the owner’s claim that the public duty doctrine did not apply because the Department was performing a “proprietary function,” that is,

businesslike activity normally performed by private enterprise for special benefit or profit, rather than a governmental function, that is, an activity “generally performed exclusively by governmental entities” “for the public welfare.” *Id.* at 965-67. In particular, the owner claimed that performing inspections was a proprietary function because the Department had broad power over privately owned cattle, protected cattle owners from theft, and charged a fee for inspections. *Id.* at 968-71.

This Court disagreed, holding that (1) “exercising power over property without the owner’s consent is a function generally performed exclusively by governmental entities”; (2) the inspections are for the common good of all because they prevent theft to promote public welfare; and (3) the fees charged merely funded the inspections, thereby benefiting all taxpayers. *Id.* Thus, the fact that individual cattle owners received a benefit from the Department’s inspections did not transform their function from governmental to proprietary and did not prevent application of the public duty doctrine. And, this Court noted that the public policy underlying the public duty doctrine also supports a rule that the inspections should not give rise to an actionable duty to individuals; subjecting the Department to liability for negligently failing to discover that cattle were stolen would discourage the Legislature from authorizing the Department to inspect cattle for the public welfare. *Id.* at 970 n.6.

Here, Mr. Dahl cannot identify any material disputed facts as to the application of the public duty doctrine. The coroner had jurisdiction of the body under RCW 68.50.010 and directed Dr. Fino to conduct an autopsy with the costs to be borne by the county under RCW 68.50.100 and RCW 68.50.106. In this context, Dr. Fino's dissection of the body was a governmental function for a public purpose and Mr. Dahl cannot establish that she owed a duty to him individually, rather than to the public at large.

Again, RCW 68.50.010 demonstrates the historically "public" purposes of the coroner's role in determining the cause and manner of death. *Faenov*, 194 Wn. App. at 57, 65; *see also*, discussion *supra* Section VI.A.2. Similarly, RCW 68.50.100, which provides that the coroner has discretion to authorize an autopsy without obtaining consent from a family member, RCW 68.50.104 and RCW 68.50.106, requiring the county to pay costs of autopsies authorized by the coroner, and statutes such as chapter 70.58 RCW and chapter 43.70 RCW requiring the maintenance of vital records documenting cause and manner of death all demonstrate that autopsies directed by the coroner are generally performed exclusively by governmental entities for the public welfare.

Neither the fact that family members may authorize autopsies for private purposes nor the fact that family members are authorized by RCW 68.50.105 to review reports and records of autopsies and request a meeting

with the coroner to discuss autopsy findings transforms the governmental function into a proprietary function or prevents the application of the public duty doctrine. And, the policy underlying the public duty doctrine also supports its application to autopsies conducted under the authority of the coroner for the purposes of public welfare. If the coroner could face liability for negligence because a family member suffers emotional distress based on a subjective personal belief that the dissection of a bodily organ is a “mutilation” of a body it would discourage the Legislature from authorizing the coroner to conduct dissections during “an investigation into an individual’s cause of death, potential criminality, or a threat to the public health.” *Faenov*, 194 Wn. App. at 65; *Sunshine Heifers*, 188 Wn. App. at 970 n.6.

Moreover, Mr. Dahl’s reliance on *Gould v. Reay*, 39 Wn. App. at 732, to establish such a duty is misplaced for at least two reasons. First, the Court did not address the public duty doctrine in *Gould*, presumably because the parties did not raise it. *Id.* at 731-32. Although the *Gould* Court relied on *State v. Peterson*, 100 Wn.2d 421, 435, 671 P.2d 230 (1983), holding that a psychiatrist employed by the State is not entitled to discretionary governmental immunity when treating patients at a state mental hospital, to conclude that a medical examiner was not entitled to qualified immunity for alleged negligence in performing an autopsy on a

body under his jurisdiction, it did not acknowledge or address the initial question considered and decided by the *Peterson* Court: whether the defendant owed a legal duty to the plaintiff, “an essential element in any negligence action.” *Compare Peterson*, 100 Wn.2d at 425-29 with *Gould*, 39 Wn. App. at 731-33. In particular, although a person has no duty to prevent a third party from causing physical injury to another under the common law, because the doctor-patient relationship, under the special relationship exception to the rule of nonliability, was sufficient to support the imposition of an affirmative duty on the defendant for the benefit of third persons, the *Peterson* Court determined that the defendant doctor owed a duty to the plaintiff *before* considering whether “the State is immune from liability for the breach of the duty.” *Peterson*, 100 Wn.2d at 425-29, 432-35.

Obviously, the doctor-patient relationship creating a duty in *Peterson* is not present here. And, neither *Gould* nor any other Washington authority suggests that a coroner has a special relationship with a body under his or her jurisdiction or individual family members of the deceased giving rise to a duty distinct from the duty he or she owes to the public under the various provisions of chapter 68.50 RCW.

Second, the legislative history of RCW 68.50.015 demonstrates that the Legislature concluded that *Gould* was not “appropriate policy”

and intended to supersede its holding. *See supra* Section VI.A.3. Because the Legislature amended chapter 68.50 RCW by creating a new statutory immunity specifically to reject the holding in *Gould*, an interpretation of the provision as legislative acquiescence is precluded by the rules of statutory interpretation which eliminate the need for the Legislature to spend its time codifying judicial interpretations. *Cf.*, *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009) (courts presume failure to amend statute following judicial decision to indicate legislative acquiescence in that decision).

- C. Regardless of the scope of RCW 68.50.015 immunity, Mr. Dahl's claim for interference with a dead body must be dismissed because he cannot raise an issue for trial as to intentional conduct beyond the statutory authority of RCW 68.50.100 and RCW 68.50.106.

Aside from generally stating that Mr. Dahl raised issues of fact for trial in his “pleadings,” the trial court did not directly address the question of whether Mr. Dahl presented evidence to support a prima facie claim for the intentional tort of interference with a dead body. RP 23-24. The only potentially relevant evidence Mr. Dahl presented in response to Dr. Fino’s motion for summary judgment was Dr. Omalu’s medical-legal report, CP 357-66, and autopsy report, CP 202-31, and the report of Mr. Dahl’s psychological evaluation, CP 297-311. It is undisputed that this evidence includes nothing more than criticisms of the manner in which Dr. Fino

dissected the body and a psychologist's opinion as to the extent of Mr. Dahl's claimed injuries. Because such evidence cannot establish *intentional* conduct by Dr. Fino that went *beyond her statutory authority to dissect the body*, Mr. Dahl's claim for interference with a corpse must be dismissed as a matter of law.

A claim for interference with a dead body is an intentional tort based on "an interest in the proper treatment of" a corpse and allows recovery for the plaintiff's mental suffering "directly result[ing] from a willful wrong and not merely a negligent act." *Whitney v. Cervantes*, 182 Wn. App. 64, 73, 328 P.3d 957 (2014). "Washington law does not recognize an action for negligent interference with a dead body." *Id.* at 74. Our Supreme Court has explicitly declined opportunities to expand the cause of action to include negligent conduct. *Adams*, 164 Wn.2d at 656-57 & n.9 (noting that it had never adopted Restatement (Second) of Torts § 868, which permits liability for negligent interference with a corpse, and had previously "rejected a claim of negligent misuse because recovery is premised on mental suffering").

In *Adams*, the Court acknowledged that "the parameters of the misuse that gives rise to a cause of action for tortious interference might be difficult to firmly grasp," but refused to define the nature of the misuse beyond "a manner as to cause the relatives or persons charged with its

decent sepulture to naturally suffer mental anguish,” because the “extent or nature of the interference generally does not bar recovery.” *Adams*, 164 Wn.2d at 658 (quoting *Wright v. Beardsley*, 46 Wash. 16, 20, 89 P. 172 (1907) and *Gadbury v. Bleitz*, 133 Wash. 134, 137-38, 233 P. 299 (1925)). Instead, the Court compared the facts and circumstances involved in earlier Washington cases involving the burial of a child in a shallow grave with another body, *Wright*, 46 Wash. at 17, and an undertaker withholding a body as collateral for payment of funeral expenses, *Gadbury*, 133 Wash. at 134, with that of the medical examiner’s “unauthorized” “permanent removal” of the brain for the purpose of scientific research unrelated to investigating the cause and manner of death and concluded that the medical examiner’s conduct could be considered an actionable “mutilation” or “misuse” of a body. *Adams*, 164 Wn.2d at 658-60.

However, given the context of the dissection of a body under the jurisdiction and authority of the medical examiner, the *Adams* Court acknowledged that conduct authorized by RCW 68.50.106 is not actionable as tortious interference with a corpse. *Id.* at 659-60. In particular, the medical examiner argued that his removal of the brain was proper and consistent with the authority granted by RCW 68.50.106 “to remove organs while conducting an autopsy.” *Id.* at 660. The Court distinguished the conduct at issue giving rise to the claim as “retain[ing]

the brain and merely return[ing] a veritable shell of the skull to the family for burial, absent some compelling reason for further examination.” *Id.* Because “the medical examiner found no abnormality in the brain and gave it to [the research facility] for its own private research,” the facts supported an action for intentional interference with a corpse. *Id.* In other words, evidence of some intentional conduct for an *unauthorized purpose* is required to proceed on a claim of interference with a corpse based on the dissection of a body by a coroner who has statutory jurisdiction and authority to conduct an autopsy. The Court’s focus in *Adams* on the evidence of an unauthorized purpose is particularly justified in light of the coroner’s explicit authority granted by RCW 68.50.106 to “retain or dispose of any ... organs of the deceased which in his or her discretion are desirable or needful for ... examination.”

Here, Mr. Dahl’s lack of evidence of any intentional conduct for an unauthorized purpose is fatal to his claim. Obviously, there is no question that Dr. Fino intentionally dissected the body. But, it is also undisputed that Dr. Fino had statutory authority to dissect the body without obtaining consent from the family of the deceased based on the circumstances surrounding the death. CP 175, 180, 182-84; RCW 68.50.010; RCW 68.50.100; RCW 68.50.106. Thus, her dissection of the body, the brain, or any other organ, without more, cannot support an action for intentional

interference with a corpse. *Cf. Adams*, 164 Wn.2d at 659-60. Like the plaintiff in *Adams*, Mr. Dahl had the burden of producing some evidence of intentional conduct, not merely negligent acts or omissions, and beyond the removal or dissection or retention or disposal of an organ, in which Dr. Fino engaged for an unauthorized purpose. The plaintiff in *Adams* presented evidence that the medical examiner intentionally retained the whole brain for an unauthorized purpose; Mr. Dahl presented evidence that he claimed would demonstrate that Dr. Fino negligently performed an authorized dissection for an authorized purpose.

Indeed, Mr. Dahl's evidence, if believed, could support only a finding of negligent conduct during an authorized dissection, not willful, intentional conduct other than the dissection itself. Dr. Omalu identified "deviations from the generally accepted standards of practice," CP 364-66, and described "[p]rosected and dissected remnants of the brain" that were "previously prosected in an irregular indiscernible fashion" and "markedly autolysed, friable and pulverized, with near-complete obliteration of the anatomic detail," CP 221-22, but offered no evidence or opinion that Dr. Fino intentionally misused or mutilated in the brain or body in any manner other than dissecting it.

And, no evidence in the record suggests that Dr. Fino dissected the body, the brain, or any other organ for an unauthorized purpose. All the

evidence presented to the trial court, including Dr. Fino's autopsy report and Dr. Omalu's reports, demonstrates that she dissected the body and organs, obtained photographs and radiographs, and preserved certain tissue samples, all for the purpose of investigating the cause and manner of death and preparing her autopsy report. CP 174-78, 202-31, 357-66. Mr. Dahl's purely subjective characterization of an authorized dissection as a "mutilation," "pulverization," or "misuse" of the body that "destroyed" the brain is not *evidence* that it was conducted without authority or for an unauthorized purpose and cannot overcome Dr. Fino's motion for summary judgment dismissal. CP 185, 187, 193; *Young*, 112 Wn.2d at 225-26; *Wash. Fed. Sav.*, 177 Wn. App. at 27-28; CR 56(e). Nothing in *Adams* suggests that a plaintiff is entitled to a trial on a claim for intentional interference with a corpse based solely on his own self-serving use of the words "mutilation" and "misuse" to describe a coroner's authorized dissection of a body for an authorized purpose.

Moreover, contrary to Mr. Dahl's claim before the trial court, CP 192-93; RP 20-21, a plaintiff cannot raise a genuine issue of material fact for trial as to whether a coroner's dissection was authorized or conducted for an authorized purpose merely by producing evidence that he or she suffered mental anguish after learning of another pathologist's opinion that the dissection was performed in a negligent manner. *Adams* makes

clear that the kind of evidence that will prevent summary judgment dismissal of a claim of intentional interference of a corpse in the context of a statutorily authorized autopsy is evidence that establishes some intentional act for an unauthorized purpose; the Supreme Court did not even consider the extent of the alleged injury its review of the summary judgment order in *Adams*. *Adams*, 164 Wn.2d at 658-60. Because Mr. Dahl failed to present evidence of intentional conduct for an unauthorized purpose during the autopsy performed by Dr. Fino, his claim for intentional misuse of corpse must be dismissed as a matter of law.

D. Regardless of the scope of RCW 68.50.015 immunity, Mr. Dahl's claims for negligent and intentional infliction of emotional distress must be dismissed because he cannot raise an issue for trial as to the essential element of presence at the injury-causing incident.

Although the trial court did not reach this issue, Dr. Fino is entitled to dismissal of Mr. Dahl's claims of intentional and negligent infliction of emotional distress because Mr. Dahl was not present when Dr. Fino committed the allegedly tortious acts, that is, when she dissected the body. *Reid*, 136 Wn.2d at 201-04.

Negligent infliction of emotional distress includes the "established concepts of duty, breach, proximate cause, and damage or injury." *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976). The intentional tort of outrage, which is also known as intentional infliction of

emotional distress, includes three elements: “(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress.” *Kloepfel v. Bokor*, 149 Wn.2d 192, 193 & n.1, 195, 66 P.3d 630 (2003). To establish a prima facie case of either cause of action, the plaintiff must be present at the time of the conduct at issue. *Reid*, 136 Wn.2d at 202-04.

In *Reid*, the plaintiffs sued the county and employees of the medical examiner’s office, alleging outrage and negligent infliction of emotional distress, among other claims, for retaining photographs of corpses to show at cocktail parties and to create personal scrapbooks. *Id.* at 198. Because the plaintiffs conceded they were not present when the employees appropriated or displayed pictures of their deceased relatives, the Supreme Court affirmed the dismissal of their claims of outrage and negligent infliction of emotional distress. *Id.* at 203-04. The Court held that even if the plaintiffs were the direct objects of outrageous conduct, they “were simply not present when the conduct occurred,” and the Court found no authority to support “overlook[ing] the presence element” established in Washington law. *Id.* at 204. Also following its precedent limiting recovery for negligent infliction of emotional distress, the Court held that ““mental suffering by a relative who is not present at the scene of the injury-causing event is unforeseeable as a matter of law.”” *Id.* (quoting

Gain v. Carroll Mill Co., 114 Wn.2d 254, 260, 787 P.2d 553 (1990)).

As the plaintiffs in *Reid*, Mr. Dahl cannot raise a genuine issue of fact for trial to prevent summary judgment dismissal of his claims for outrage and negligent infliction of emotional distress because he was not present when Dr. Fino conducted the autopsy, dissected the organs and tissues, returned the organs to the body, or prepared the body for release for burial. As such, his “mental suffering” regarding the condition of the dissected brain or any other dissected organs or tissues “is unforeseeable as a matter of law” and cannot support a prima facie claim under either cause of action as recognized in Washington. *Id.* at 204. Under *Reid*, Dr. Fino is entitled to summary judgment dismissal of these claims as a matter of law. *Id.* at 203-04; CR 56(c).

In response to Dr. Fino’s reliance on *Reid* before the trial court, Mr. Dahl claimed that “[c]ases predicated on negligence or tortious interference with a dead body” are based on “the family member’s knowledge, and not on the sensory impact, of the damage to a loved one’s remains,” and therefore “unlike *Reid* or other bystander cases that are predicated on the witnessing of a breach of duty to a loved one.” CP 194. In support, Mr. Dahl cited several cases from other states, none of which defines or establishes the essential elements of any cause of action

recognized under Washington law.⁶ CP 194-95.

This Court should decline Mr. Dahl's invitation to ignore Washington law. As a decision of the Washington Supreme Court, *Reid's* statement of personal presence as an essential element of both intentional and negligent infliction of emotional distress is binding on all lower courts in the state. *Fondren v. Klickitat County*, 79 Wn. App. 850, 856, 905 P.2d 928 (1995). This Court is not at liberty to ignore or modify the rule in *Reid*. Moreover, as described above, Washington recognizes a separate claim, consisting of different elements, for tortious interference with a corpse and has clearly rejected attempts to expand that cause of action to include claims of negligent conduct. *See supra* Section VI.C. Having failed to provide sufficient evidentiary facts to support a prima facie case

⁶ *See Lacy v. Cooper Hosp. Univ. Med. Ctr.*, 745 F. Supp. 1029, 1033-34 (D.N.J. 1990) (where parties disagreed "as to what tort is at issue," federal district court analyzed elements of claims under New Jersey law where "mishandling of a corpse is actionable only as a cause of action for intentional or negligent infliction of emotional distress"); *Green v. Southern Transplant Serv.*, 698 So. 2d 699, 701 (La. Ct. App. 1997) (refusing to follow "out-of-state decisions" and concluding specific Louisiana statute "is broad enough to encompass compensation for" claims of emotional distress for desecration of a body); *Alderman v. Ford*, 72 P.2d 981, 984 (Kan. 1937) (holding that Kansas law allowed widow's claim for mental suffering resulting from treating physicians' unauthorized autopsy as invasion of right to dead body of husband in condition it was when he died where circumstances did not warrant an autopsy under the authority of the coroner); *Everett v. Southern Transplant Serv.*, 700 So. 2d 909, 910-12 (La. Ct. App. 1997) (vacating in part and amending in part trial court's order requiring coroner and organ transplant company to produce records to plaintiff's attorney for evaluation of numerosity issue to support class action according to Louisiana statutory law), reversed in part by *Everett v. Southern Transplant Serv.*, 1998 La. LEXIS 585 (La. Feb. 20, 1998) (unpub.); *Christian v. Superior Court*, 820 P.2d 181, 186-87, 190-204 (Cal. 1991) (under California statutes and case law, certain plaintiffs had standing to sue mortuaries and crematoria for emotional distress based on mishandling of human remains under a negligence theory but not for intentional infliction of emotional distress).

of that separate cause of action, Mr. Dahl cannot prevent summary judgment dismissal of his claims for intentional and negligent infliction of emotional distress simply by demonstrating that other states analyze and define causes of action involving corpses differently.

Because *Reid* is controlling and Mr. Dahl was not present for the dissection, dismissal of his claims for intentional and negligent infliction of emotional distress is required as a matter of law.

VII. CONCLUSION

For the foregoing reasons, the trial court's order denying summary judgment dismissal should be reversed and the case remanded for entry of summary judgment dismissal of all Mr. Dahl's claims.

RESPECTFULLY SUBMITTED this 31st day of August, 2018.

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
(206) 749-0094
jennifer@favros.com
michele@favros.com

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 31st day of August, 2018, I caused a true and correct copy of the foregoing document, "Brief of Appellants," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Respondent:

Ryan D. Dreveskracht, WSBA #42593
Bree R. Black Horse, WSBA #47803
GALANDA BROADMAN. PLLC
8606 35th Avenue NE, Suite L1
P.O. Box 15146
Seattle, WA 98115
Ph: 206.909.3842
Email: ryan@galandabroadman.com
bree@galandabroadman.com

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

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