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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.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The issue in this case is whether a family member of a deceased individual may assert claims for civil liability against a pathologist acting under the statutory authority of the coroner for alleged negligence during an autopsy conducted solely for a proper governmental purpose based on dissatisfaction with the condition of the body after the autopsy. Although Mr. Dahl repeatedly mischaracterizes his allegations of negligent acts and omissions as constituting intentional conduct that was “unnecessary” to determining the cause and manner of death, he does not contend that Dr. Fino had any unauthorized intent when she conducted the autopsy.

The immunity provided by RCW 68.50.015 precludes Mr. Dahl’s claims because Dr. Fino was “acting in” the “capacity” of the “county coroner” and “determining the cause and manner of death” when she dissected the brain and performed other acts within her statutory discretion during the autopsy. RCW 68.50.015 does not provide exceptions and Mr. Dahl fails to identify any authority to justify disregarding a plain language reading of the statute or adding conditions to its text. This Court is not required to evaluate the wisdom of the Legislature’s policy choices.

As to the four specific causes of action identified in his complaint, Mr. Dahl has conceded, *Resp. Br.* at 41, that dismissal of two of those claims, intentional infliction of emotional distress and negligent infliction

of emotional distress, is proper as a matter of Washington law as stated in *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998). Because *Reid* is binding on this Court, the trial court's order must be reversed. As to Mr. Dahl's claim for intentional interference with a corpse, dismissal is required under RCW 68.50.010, RCW 68.50.100, RCW 68.50.106, and *Adams v. King County*, 164 Wn.2d 640, 192 P.2d 891 (2008), because there is no evidence that Dr. Fino *intentionally* exceeded her statutory authority or dissected the brain for an *unauthorized purpose*. And, as to his professional negligence claim, dismissal is required because Dr. Fino did not owe a duty of care to Mr. Dahl, rather than to the public at large.

Because all Mr. Dahl's claims must be dismissed, either as precluded by the immunity or for the lack of evidence, this Court should reverse the trial court's order denying summary judgment and remand with instructions to enter summary judgment dismissal.

II. FACTUAL REPLY

To establish the facts regarding the alleged conduct at issue in this case, the parties presented the following evidence to the trial court: (1) Dr. Fino's autopsy report, CP 174-78; (2) the Mason County Coroner's Autopsy Request/Authorization, CP 180; (3) Investigator J. Pentz's report, CP 182-84; (4) Dr. Bennet Omalu's Medico-Legal Report, CP 357-66; and (5) Dr. Omalu's Autopsy Report, CP 202-31. Although Dr. Omalu opined

that the autopsy included “gross deviations” “from the generally accepted standards of practice,” he did not suggest that Dr. Fino acted with any improper purpose or that she exceeded her statutory authority, and he did not disagree with her determination that the cause of death was “[a]sphyxia by hanging.” CP 359, 362, 364-66.

This is important because Mr. Dahl’s claims cannot survive summary judgment unless he is able to produce *evidence* showing that Dr. Fino’s conduct during the autopsy did not constitute “determining the cause and manner of death,” but instead involved intentionally exceeding her statutory authority. *App. Br.* at 11-13, 15, 33-46; *see supra* Sections III.A.3, III.B.3. If she was “determining the cause and manner of death,” she is immune from civil liability; if she did not exceed her statutory authority, Mr. Dahl cannot present a triable issue of fact on any claim. *Id.*

In his brief, Mr. Dahl has identified the following alleged acts and omissions that he claims were “unnecessary to determine the cause and manner of death” as the bases for his claim: (1) causing “unnecessary damage” to the body, and particularly the brain; (2) failing to preserve tissue; (3) failing to take photographs; and (4) failing to “expeditiously order a toxicology analysis.” *Resp. Br.* at 19-20. But, as Dr. Fino pointed out to the trial court, *see* RP 13-14, 18-19, 21-22, Mr. Dahl’s characterizations of her dissection of the body and/or brain as a

“mutilation” or “desecration,” *see, e.g., Resp. Br.* at 7, are not actually supported by any evidence. Inflammatory terms in legal briefs are not *evidence*. *See App. Br.* at 11-12. And, his repeated bare assertions that Dr. Fino’s manner of dissecting the brain and her discretionary decisions as to methods of investigation were “unnecessary,” *see, e.g., Resp. Br.* at 19-20, are conclusory opinions, not *evidence*. Ultimately, because Mr. Dahl failed to present the kind of evidence that may support a claim against a coroner who conducted a statutorily authorized autopsy, *see, e.g., Adams*, 164 Wn.2d at 660, his claims must be dismissed.

III. ARGUMENT IN REPLY

A. Because RCW 68.50.015, by its plain language, provides immunity for “determining the cause and manner of death” and Dr. Fino was “determining the cause and manner of death” when she dissected the body, Mr. Dahl’s claims against Dr. Fino must be dismissed.

1. Mr. Dahl’s interpretation of RCW 68.50.015 depends on ignoring the Legislature’s use of different words to communicate different meanings contrary to well-settled principles of statutory interpretation.

Ignoring Dr. Fino’s authority and argument, *App. Br.* at 13-18, 21-22, 27-29, Mr. Dahl claims that the dictionary definitions of “determination” and “determine” somehow yield the only reasonable interpretation of RCW 68.50.015. *Resp. Br.* at 10-14. He claims that because “determination” can be defined as the “act of deciding something officially,” and “determining” is the present participle of “determine,”

which can be defined as “to fix conclusively or authoritatively,” the immunity provided by RCW 68.50.015 is “limited” to “[d]amages arising from” Dr. Fino’s “determination” that the cause of Brandon Dahl’s death was asphyxiation and manner of death was suicide. *Resp. Br.* at 12-13.

Mr. Dahl fails to explain how his reliance on the dictionary alone requires this conclusion. Even the definitions he identifies suggest that an immunity for “determining” or “fix[ing] conclusively or authoritatively,” refers to action, activity, and an ongoing process that is different from and certainly broader than the subject of judicial review, which is expressly limited to a consideration of the “accuracy” of “determinations” or “official[]” decisions. *See, e.g., Detention of J.R.*, 80 Wn. App. 947, 956-57, 912 P.2d 1062 (1996) (use of verb in present participle form “connotes a continuing process or activity”); *see also App. Br.* at 13-23.

Not only is his conclusion a non sequitur, Mr. Dahl’s reasoning violates settled rules of statutory interpretation. When giving meaning to an undefined term, courts “consider the statute as a whole,” read the term “in harmony with other statutory provisions” and “in the context of the statute,” but “not in isolation or subject to all possible meanings found in a dictionary.” *Citizens All. For Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 437, 359 P.3d 753 (2015). Our courts hold that the Legislature’s use of different words demonstrates a different intent,

State v. Roggenkamp, 153 Wn.2d 614, 625, 106 P.3d 196 (2005); *In re Swanson*, 115 Wn.2d 21, 27, 793 P.2d 962 (1990), that statutes must be read according to the normal rules of grammar with every word given meaning, *State v. Wilson*, 170 Wn.2d 682, 687-88, 244 P.3d 950 (2010), and that the use of a verb, as opposed to a noun, as well as the use of specific temporal language, cannot be ignored, *Detention of J.R.*, 80 Wn. App. at 955-57; *In re Dependency of D.L.B.*, 188 Wn. App. 905, 917, 355 P.3d 345 (2015) (rejecting interpretation that “conflicts with the verb tense used in the text”), *aff’d*, 186 Wn.2d 103, 117-18, 376 P.3d 1099 (2016) (references to both past and present circumstances indicates intentional “use of the present tense”); *see also App. Br.* at 12-33.

According to these clear principles, this Court must presume that the Legislature intended different meanings when it used “determining” in the first sentence of RCW 68.50.015 establishing the immunity and “determinations” in the second sentence to identify the reach of judicial review. Mr. Dahl’s interpretation must be rejected as contrary to the text of RCW 68.50.015 as well as the rules of statutory interpretation.

2. A plain language result in this case is not absurd.

Although he does not explicitly argue that Dr. Fino’s interpretation of RCW 68.50.015 leads to an absurd result in this case, Mr. Dahl claims that a plain language reading would allow coroners to evade civil liability

for “[a]cts of cannibalism and necrophilia.” *Resp. Br.* at 13. He is wrong. Because such activity obviously has nothing to do with “determining the cause and manner of death,” the immunity would not apply according to the plain language of RCW 68.50.015.

Mr. Dahl has not identified any conduct by Dr. Fino that was performed for some purpose other than determining cause and manner of death. *Cf.*, *Adams*, 164 Wn.2d at 660 (medical examiner’s purpose for donating entire brain had nothing to do with investigating cause of death). Instead, all the conduct he identifies, including dissecting the brain, taking only certain pictures, saving only certain tissue samples, and performing only certain tests, had a single purpose: investigating the death.

Moreover, courts cannot ignore unambiguous statutory language on the pretense of avoiding an absurd result “just because [they] question the wisdom of the legislature’s policy choice.” *D.L.B.*, 186 Wn.2d at 119. Mr. Dahl’s doubts as to the wisdom of the Legislature’s policy choice do not justify disregarding the text of RCW 68.50.015.

3. Mr. Dahl’s attempt to read a condition of “necessity” into RCW 68.50.015 must be rejected.

Mr. Dahl claims that the immunity provided by RCW 68.50.015 does not reach conduct that is “unnecessary” to determining cause and manner of death and that his allegation that Dr. Fino “unnecessarily and

intentionally maimed and destroyed [the] body” and Dr. Omalu’s report that portions of the brain appeared “pulverized” after dissection raise a question of fact for a jury. *Resp. Br.* at 4, 6, 13-14, 19-20. But, Mr. Dahl fails to identify any authority allowing this Court to read into the statute a condition of necessity that the Legislature did not include. Courts “cannot add words or clauses to an unambiguous statute,” but must assume that the Legislature “means exactly what it says.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (quoting *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)). “[T]he drafting of a statute is a legislative, not a judicial, function,” *State v. Enloe*, 47 Wn. App. 165, 170, 734 P.2d 520 (1987); the Legislature “is the body that gets to make policy” decisions and courts “have no authority to read a new exception into [a] statute on policy grounds,” *Saucedo v. John Hancock Life & Health Ins. Co.*, 185 Wn.2d 171, 180, 369 P.3d 150 (2016).

The plain language of RCW 68.50.015 and its position in Chapter 68.50 RCW establish that the Legislature intentionally chose to create an immunity for county coroners and those acting in that capacity that does not include any exception requiring a showing of necessity. First, Mr. Dahl’s interpretation requires reading the word “necessary” into the first sentence of RCW 68.50.015 despite the fact that the Legislature did not include it. Second, the Legislature demonstrated its ability to make a

different policy choice in RCW 68.50.115, by providing immunity to the coroner for claims based on the release of information protected by the confidentiality requirements of RCW 68.50.105 only when he or she acts “in good faith.” This Court must presume that the Legislature knows how to create an exception to an immunity statute. *In re Reinterment of Remains of Faenov*, 194 Wn. App. 42, 48-49, 376 P.3d 447 (2016).

Moreover, the addition of a condition of necessity would undermine the Legislature’s explicit policy choice to grant county coroners broad authority and discretion to formulate the manner in which they carry out their statutory duty to investigate death regardless of the wishes or rights of any family member of the deceased.¹ *Id.* at 57 (coroner retains jurisdiction over human remains to investigate death for public purposes). Under Chapter 68.50 RCW, the coroner is required to investigate cause and manner of death and has broad discretion to dissect, analyze, 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.

¹ *See, e.g.*, RCW 68.50.010 (coroner’s jurisdiction over remains); RCW 68.50.100 (coroner may authorize autopsy without consent of deceased or family); RCW 68.50.101 (consent not required for coroner’s autopsy); RCW 68.50.104 (county to bear cost of coroner’s autopsy); RCW 68.50.106 (coroner has discretion to dissect as desirable or needful); RCW 68.50.108 (misdemeanor to embalm or cremate body under coroner’s jurisdiction without coroner’s consent).

And, by its plain language, RCW 68.50.015 provides immunity from civil liability as long as the coroner is exercising that discretion when “determining the cause and manner of death.” Allowing a plaintiff to litigate the *necessity* of those discretionary choices would mean that the immunity would provide no benefit; instead, any family member of a decedent could obtain a trial on a claim for civil liability simply by challenging the necessity of the coroner’s discretionary decisions during the autopsy. The Legislature made a different policy choice; Mr. Dahl’s interpretation must be rejected.

4. Application of the immunity cannot turn on the “target” of an individual plaintiff’s claims for civil liability.

Mr. Dahl’s claim that RCW 68.50.015’s immunity does not preclude suits seeking damages for acts or omissions of a coroner during an autopsy, *Resp. Br.* at 10-11, 19-20, must be rejected for the same reason. The Legislature chose to preclude claims for “civil liability,” not to distinguish between types of lawsuits seeking money damages. A statutory immunity for “civil liability” necessarily includes any civil action seeking money damages, but excludes civil proceedings seeking other relief. *See, e.g., Emmerson v. Weilep*, 126 Wn. App. 930, 936-37, 110 P.3d 214 (2005) (statutory immunity from “civil liability” precluded any civil action for damages, but not a petition for a temporary protection

order); *Port of Longview v. Int'l Raw Mats.*, 96 Wn. App. 431, 445-46, 979 P.2d 917 (1999) (statutory immunity from “civil liability” did not preclude an unlawful detainer proceeding). Mr. Dahl’s characterization of the target of his claims is irrelevant. *See, e.g., Lockner v. Pierce County*, 190 Wn.2d 526, 536-37, 415 P.3d 246 (2018) (where plain language of immunity turned on type of injury, to hold that immunity applied only to premises liability actions rather than negligence actions would undermine legislative purpose); *see also App. Br.* at 21-23.

Mr. Dahl claims that the reasoning of *Dang v. Ehredt*, 95 Wn. App. 670, 977 P.2d 29 (1999), described by Dr. Fino, *App. Br.* at 25-26, is not helpful on this point because (1) the statutory language at issue was different; (2) the underlying policy was different; and (3) the cause of action and facts were different. *Resp. Br.* at 14-20. These differences are obvious, as Dr. Fino acknowledged. *App. Br.* at 25. But, it is the court’s *reasoning* in interpreting a statutory immunity in *Dang* that is particularly instructive. In *Dang*, because the immunity applied to injuries resulting from a communication, the court concluded that its purpose would be frustrated if plaintiffs could avoid its application by simply characterizing their claims as challenging the defendant’s investigation leading up to the protected communication, rather than the protected communication itself. 95 Wn. App. at 681-83. In other words, a plaintiff cannot control the

application of the statute by simply characterizing his lawsuit as seeking civil liability for something other than the protected conduct. Allowing Mr. Dahl to avoid application of the immunity by characterizing his lawsuit as “targeting” the activities Dr. Fino admittedly performed solely for the purpose of *investigating* or *making* determinations rather than the ultimate determinations themselves, *Resp. Br.* at 3, would frustrate the Legislature’s purpose. *See also Whaley v. State*, 90 Wn. App. 658, 669-670, 956 P.2d 1100 (1998) (rejecting claim that statutory immunity for reporting of child abuse is limited “to the initial telephone call” because follow-up report “was inseparable from the making of the report itself” and was, therefore, “protected by the same immunity”).

5. Examples of alternative language the Legislature could have used cannot justify ignoring the language it actually used in RCW 68.50.015.

Throughout his brief, Mr. Dahl describes the immunity provided by RCW 68.50.015 as “narrow” and “limited,” and then misstates Dr. Fino’s plain language reading of the text, denouncing it as too “broad.” *Resp. Br.* at 1-3, 8-10, 12-13, 15-16, 20-21, 23, 25-32. This is nothing more than *ipse dixit*, which does not justify a different interpretation. Dr. Fino has consistently argued that RCW 68.50.015, by its plain terms, only “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.” *App. Br.* at 15; *see also* CP 149-59, 367-76, 410-11; RP 14-15, 17-18, 22-23. This Court should reject Mr. Dahl’s invitation to analyze the legal questions in this case based solely on subjective labels.

This Court should also disregard Mr. Dahl’s discussion of qualified immunity, other common law immunity doctrines, other statutes providing immunity to government officials, and immunity statutes in other jurisdictions as examples of what he claims would be more appropriate language to provide an immunity “broad” enough to preclude his lawsuit. *Resp. Br.* at 3, 9-10, 27-32. Courts do not “read into a statute matters which are not there or modify a statute by construction.” *Rhoad v. McLean Trucking Co.*, 102 Wn.2d 422, 426, 686 P.2d 483 (1984). And, “[d]ecisions from other jurisdictions are generally not helpful because they interpret different statutes.” *Sappenfield v. Dep’t of Corr.*, 127 Wn. App. 83, 89, 110 P.3d 808 (2005) (rejecting reliance on foreign case where statute lacked requirement at issue); *see also Rhoad*, 102 Wn.2d at 429.

This Court’s role is to read the words the Legislature actually used in RCW 68.50.015, within the context of the overall statutory scheme, discerning and implementing legislative intent as expressed in their plain meaning. *Faenov*, 194 Wn. App. at 48-49. Imagining alternative words that would satisfy Mr. Dahl’s unsupported objections is not required.

6. Mr. Dahl's analysis of the legislative history of RCW 68.50.015 is wrong.

Referring to statements in the legislative history materials, Mr. Dahl claims that the immunity must be limited to lawsuits challenging the coroner's ultimate "determinations," rather than the coroner's conduct for "determining," simply because legislators acknowledged that some parties had sued coroners to challenge the accuracy of determinations in the past. *Resp. Br.* at 20-23. He also offers an elaborate mischaracterization of *Gould v. Reay*, 39 Wn. App. 730, 965 P.2d 126 (1984), to support his claim that references in the legislative record to "determining" or "making determinations" indicate that the Legislature intended to subject coroners to civil liability for their conduct when determining cause and manner of death. *Resp. Br.* at 23-27. But, even if the language ultimately codified in RCW 68.50.015 were ambiguous, which it is not, the legislative history does not support a reading so contrary to the text.

First, Mr. Dahl's logic is faulty. He simply presumes his conclusion in order to reach it. He presumes that "determining" and "making determinations" mean the same thing as "determinations," *see supra* Section III.A.1, and he presumes that any mention of a particular type of lawsuit means that the speaker intended the immunity to only cover that type of lawsuit. Logically invalid arguments cannot justify

reading an implicit limitation into an unambiguous statute that contains explicit conditions for its application. *See, e.g., Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 748 & n.4, 257 P.3d 586 (2011) (rejecting logically flawed argument that explicit statement against an obligation to accommodate on-site medical marijuana use required reading into statute an implicit obligation to accommodate off-site use).

Second, Mr. Dahl's focus on whether a lawsuit against a coroner "targets" conduct during an autopsy or the accuracy of the determination ultimately certified on a death certificate² ignores the fact that the Legislature focused on "civil liability," not on the particular kinds of allegations a plaintiff could assert against a coroner. Obviously, a suit challenging the coroner's conduct during an autopsy and seeking money damages, like Mr. Dahl's case, is a claim for "civil liability." *See, e.g., Gould*, 39 Wn. App. at 731 (plaintiff sought damages for coroner's "careless and incompetent ... performance of the autopsy").

However, a plaintiff alleging an error in the determinations listed on a death certificate will often seek relief other than money damages. For example, in *Vanderpool v. Rabideau*, 16 Wn. App. 496, 497-99, 557 P.2d 21 (1976), family members of a woman who was found dead from a

² As an example, Brandon Dahl's death certificate is attached as Appendix A. As the Court can observe, the certificate provides for entry of cause and manner of death. *See also*, CP 371-72, 382, 395-401.

gunshot wound sought a writ of mandamus compelling the coroner to change his designation as to cause of death. *See also State ex rel. Murray v. Shanks*, 27 Wn. App. 363, 364, 618 P.2d 102 (1980) (widow sought writ of mandamus to change cause of death on husband's death certificate from "suicide" to "accidental"); *cf.*, *Thompson v. Wilson*, 142 Wn. App. 803, 807, 175 P.3d 1149 (2008) (disagreeing with determination of manner of death, plaintiff sought judicial review, writ of mandamus, writ of certiorari, and declaratory judgment). Such suits are not precluded by a "civil liability" immunity. *See, e.g., Emmerson*, 126 Wn. App. at 936-37; *Port of Longview*, 96 Wn. App. at 445-6; *see supra* Section III.A.4.

And, of course, as was the case in *Gould*, 39 Wn. App. at 126-27, a plaintiff could seek money damages from the coroner for claims of *both* negligence in the autopsy and a claimed error in the determinations listed on the death certificate. Because this Court must presume that the Legislature was aware that family members had sued coroners for money damages based on alleged (1) improper conduct during an autopsy; (2) inaccurate conclusions on the death certificate; or (3) *both* the "determining" and the "determinations" of cause and manner of death, *Faenov*, 194 Wn. App. at 48-49, Mr. Dahl's claim that the immunity was intended to prevent only one possible type of claim must be rejected.

Third, Mr. Dahl misunderstands the significance and meaning of Senator Talmadge's remarks and the actual policy choice confronting the Legislature. While a single legislator's statements "cannot be used to conclusively establish the intent of the Legislature as a whole," the remarks of a prime sponsor can show a change in policy where "the legislative record does not reflect any contrary intent," particularly where the statement supports "the plain meaning of the statute." *In re Marriage of Kovacs*, 121 Wn.2d 795, 854 P.2d 629 (1993) (considering legislator's statements clarifying intent to reverse previously existing presumption without implying that replacement factor need not be considered); *Roe*, 171 Wn.2d at 749-50 (describing consideration of a legislator's statement as to the meaning of statutory language where no contradictory evidence existed and statement supported plain language of statute in *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997)).

Senator Talmadge chaired the Senate committee recommending the bill and made his statement on the Senate floor immediately before the vote passing the bill. *See* CP 374, 384-85, 387. Nothing in the legislative record contradicts his statement as to the meaning of the bill's language. Therefore, to the extent his statement is interpreted in a manner consistent with the plain language of the statute, it is appropriate to consider. *Roe*, 171 Wn.2d at 749-50; *Duke*, 133 Wn.3d at 87; *Kovacs*, 121 Wn.2d at 807.

However, his statements cannot be used to eliminate or contradict the language of the statute or to justify adding conditions that do not appear in the text. *See, e.g., Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 260, 11 P.3d 762 (2000) (“the court should not embrace a construction causing redundancy or rendering words superfluous”); *Delgado*, 148 Wn.2d at 726-28 (courts cannot add words or clauses or borrow analysis employed by other statutes).

In particular, Senator Talmadge stated a clear intention to reject the result in *Gould* allowing a claim for civil liability against a county coroner on policy grounds. CP 374, 384-85. Although Mr. Dahl accuses Dr. Fino of “misapprehend[ing]” “the holding in *Gould*” and claims to give a “thorough account” of that holding,³ *Resp. Br.* at 24, he fails to appreciate that Senator Talmadge’s remarks illustrate an intent to make a *policy choice* regarding the *result* of *Gould* with regard to *civil liability*, not to distinguish between the different types of claims plaintiffs might think to assert against a coroner when seeking civil liability. The plaintiff in *Gould* sought money damages for *both* the manner in which the coroner conducted the autopsy *and* for his ultimate conclusion that the manner of

³ Nothing in the record suggests an intention to reverse the court’s *holding* regarding qualified immunity. In fact, the *Gould* court’s particular analysis of qualified immunity is completely irrelevant to the proper interpretation of a bill specifically intended to change the *result* of the case as to the *potential for civil liability*. *See also App. Br.* at 29-33, 38-40

death was suicide. *Gould*, 39 Wn. App. at 731. Senator Talmadge clearly intended to create a statute that would state a new policy under which a county coroner would not be subject to civil liability for either of the two types of allegations in *Gould*. This Court should reject Mr. Dahl's illogical and unsupported claims as to the legislative history of RCW 68.50.015 as well as the relevance of *Gould*.

B. Because Mr. Dahl cannot identify evidence to support a prima facie case on any claim, summary judgment dismissal is required.

1. Mr. Dahl concedes that Dr. Fino is entitled to dismissal of his emotional distress claims.

Mr. Dahl has conceded that he cannot present a prima facie case of negligent or intentional infliction of emotional distress under *Reid*, 136 Wn.2d at 201-04. *Resp. Br.* at 41-44; *see also App. Br.* at 46-50. This Court should accept his concession, reverse the trial court's order denying summary judgment, and remand with instructions to dismiss these claims.

2. Under the public duty doctrine, Mr. Dahl's professional negligence claim must be dismissed because Dr. Fino did not owe him a duty as an individual, as opposed to a statutory duty to the general public.

This Court should reject Mr. Dahl's claim that a common law duty owed by coroners to family members of decedents under their jurisdiction can be found in *Whaley v. State*, 90 Wn. App. at 672 (negligence claim against private day care provider for using controversial communication technique with disabled children), and/or *Munich v. Skagit Emergency*

Commc'ns Ctr., 175 Wn.2d 871, 886-87, 288 P.3d 328 (2012) (J. Chambers, concurring) (noting that the Supreme Court had not applied the public duty doctrine to limit a common law duty). *Resp. Br.* at 33. Neither case establishes such a duty. *Whaley* did not (1) involve a coroner or any other state actor; (2) raise any question as to whether a coroner owes any duty to family members of a decedent; or (3) address the public duty doctrine. 90 Wn. App. at 671-74. *Munich* involved the special relationship exception to the public duty doctrine in the context of the statutory duty owed by a county “to the general public” to provide for emergency management to protect lives and property. *Munich*, 175 Wn.2d at 874, 878 & n.2. Nothing in *Munich* suggests that the public duty doctrine does not apply in this case, where it is undisputed that the dissection of a body under the jurisdiction of a county coroner, at the county’s expense, for the public purpose of investigating potential “criminality, unclear causes of death,” and “threats to the public health” is a duty imposed by statute. *Faenov*, 194 Wn. App. at 57; RCW 68.50.010; RCW 68.50.100(1); RCW 68.50.106; *see also App. Br.* at 37-38.

Mr. Dahl next claims that Dr. Fino owed him an actionable duty under two exceptions to the public duty doctrine. *Resp. Br.* at 33-37. The four exceptions are “(1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship.” *Munich*, 175 Wn.2d at

879. He claims that the first and fourth apply. He is wrong.

The legislative intent exception applies where a “statute by its terms evidences a clear legislative intent to identify and protect a particular and circumscribed class of persons.” *Honcoop v. State*, 111 Wn.2d 182, 188-89, 759 P.2d 1188 (1988) (State cannot be held liable where statute’s clear legislative intent is to protect public health and welfare rather than a specific class of individuals). Mr. Dahl does not, and cannot, claim that “a particular and circumscribed class of persons” is identified and protected by the statutory provisions imposing the particular duty at issue in this case, that is, the duty to perform an autopsy at the county’s expense for the purpose of investigating cause of death on a body under the jurisdiction of the coroner as described in RCW 68.50.010, RCW 68.50.100(1), and RCW 68.50.106.

Instead, he points to two specific provisions, RCW 68.50.105(3) and RCW 68.50.160(3)(e)⁴, to support his claim that the Legislature intended to identify and protect a class of “family members of decedents under the jurisdiction of coroners and medical examiners.” *Resp. Br.* at 36. But, RCW 68.50.105, by its terms, requires the coroner to allow

⁴ Although Mr. Dahl identifies RCW 68.50.105(3)(b) and RCW 68.50.150(3)(e), *Resp. Br.* at 36, RCW 68.50.105(3) does not contain further subsections and RCW 68.50.150 was repealed in 2005, Laws of 2005, ch. 365, § 161.

access to autopsy records and reports to various classes of individuals *after* an autopsy is completed and does not evidence a clear intent to circumscribe a particular class to whom the coroner owed a duty while performing the autopsy. In addition to family members, RCW 68.50.105 permits the personal representative of the decedent, the attending physician, law enforcement personnel, and public health officials to examine autopsy reports. And, RCW 68.50.160 does not describe any duty of the coroner, but merely prioritizes those who may direct disposition of human remains. Clearly, these provisions do not contemplate a specific duty regarding the performance of an autopsy to a particular and circumscribed class.

A special relationship gives rise to an actionable duty where (1) “direct contact or privity” between a public official and the plaintiff sets the plaintiff apart from the general public, (2) the public official gives an express assurance, and (3) the plaintiff justifiably relies on the assurance. *Munich*, 175 Wn.2d at 879. As to the first element, Mr. Dahl does not suggest that he had any direct contact with Dr. Fino before or during her performance of the autopsy, but claims he had privity with her “because he was a reasonably foreseeable plaintiff under the statutory framework governing” her work, particularly RCW 68.50.105 and RCW 68.50.160(3)(e). *Resp. Br.* at 35. But, Mr. Dahl ignores the requirement

that direct contact or privity must actually “set [him] apart,” or differentiate him, from the general public. *Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 458 (2006). The mere existence of a statutory duty assigned to the coroner to be performed once an autopsy is completed does not set Mr. Dahl apart from the general public with respect to Dr. Fino’s statutory duty to perform the autopsy in the first place.

Similarly, Mr. Dahl fails to identify any express assurance given to him by Dr. Fino or the Mason County Coroner or any other public official. He claims that he “had an implied assurance under Chapter 68.50 RCW” that Dr. Fino “would perform the autopsy on his son competently and in a way that did not interfere with his specifically vested rights.” *Resp. Br. at* 35. But, a government duty cannot arise from an *implied* assurance. *Taylor v. Stevens County*, 111 Wn.2d 159, 166, 759 P.2d 447 (1988).

Because Mr. Dahl cannot identify any facts that set him apart from the public or establish that a public official gave him any express assurance as to Dr. Fino’s discretionary choices during the autopsy or the condition of any dissected body part following the autopsy, he cannot claim the application of the special relationship exception to the public duty doctrine. Because he cannot raise a genuine issue of material fact as to the necessary element of duty in this case, Mr. Dahl’s claim of professional negligence must be dismissed. *See App. Br. at* 33-40.

3. Because Mr. Dahl cannot identify any intentional act by Dr. Fino that exceeded her authority under RCW 68.50.106, his claim of interference with a corpse must be dismissed.

Despite acknowledging that *Adams v. King County* is controlling authority as to claims of intentional interference with a corpse asserted against a coroner for conduct during an autopsy of a body under his or her jurisdiction, *Resp. Br. at 37-41*, Mr. Dahl completely ignores its reasoning and holding with regard to the discretionary authority provided by RCW 68.50.106, *see App. Br. at 40-46*. The Supreme Court acknowledged in *Adams* that RCW 68.50.106 provided the medical examiner with a potential defense. *Adams*, 164 Wn.2d at 659-60. This makes sense, because the coroner has the statutory authority and discretion to delay and/or limit the right of family members to possession of or access to any corpse within his or her jurisdiction. *See infra* Section III.A.3 & n.1; RCW 68.50.106 (coroner has discretion to dispose of organs or tissues); *Faenov*, 194 Wn. App. at 56-57 (noting coroner's jurisdiction to retain authority over human remains in interests of public health).

However, because RCW 68.50.106 did not authorize the medical examiner to retain an entire organ "absent some compelling reason for further examination," the Court concluded that the plaintiff had identified sufficient facts to establish a prima facie case of intentional interference with a corpse. *Adams*, 164 Wn.2d at 659-60; *see also App. Br. at 40-46*.

Here, it is undisputed that Dr. Fino had a compelling reason, specifically, her investigation of the cause and manner of death, for (1) dissecting the brain and (2) making discretionary decisions with regard to preserving tissue samples, taking pictures, and ordering toxicology analysis. Unlike *Adams*, there is no evidence that Dr. Fino exceeded her authority or lacked authority to investigate the death in the manner she did. Mr. Dahl cites no authority to support his claim that he is entitled to challenge the “necessity” of Dr. Fino’s discretionary actions under RCW 68.50.106. *Resp. Br. at 39. Adams* certainly does not support his view. *See also, supra* Section III.A.3.

Because he cannot identify evidence to support a prima facie case of intentional interference with a corpse as in *Adams* by simply expressing dissatisfaction with the condition of the body following a properly authorized autopsy under the statutory jurisdiction and discretion of the coroner, his claim must be dismissed.

IV. CONCLUSION

For the foregoing reasons and all those in the Brief of Appellants, the trial court’s order denying summary judgment dismissal should be reversed and the case remanded with instructions to enter summary judgment dismissal of all Mr. Dahl’s claims.

RESPECTFULLY SUBMITTED this 21st day of November, 2018.

FAIN ANDERSON VANDERHOEF ROSENDAHL
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s/Jennifer D. Koh

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APPENDIX A

STATE OF WASHINGTON
DEPARTMENT OF HEALTH

CERTIFICATE OF DEATH

CERTIFICATE NUMBER: 2015-026401

DATE ISSUED: 09/25/2015

FEE NUMBER: 2309252015

GIVEN NAMES: BRANDON KENNETH
LAST NAME: DAHL

COUNTY OF DEATH: MASON
DATE OF DEATH: SEPTEMBER 16, 2015
HOUR OF DEATH: 07:30 P.M. FOUND
SEX: MALE
AGE: 31 YEARS

PLACE OF DEATH: OTHER PLACE
FACILITY OR ADDRESS: MASON COUNTY JAIL
CITY, STATE, ZIP: SHELTON, WASHINGTON 98584

SOCIAL SECURITY NUMBER: [REDACTED]

RESIDENCE STREET: [REDACTED]
CITY, STATE, ZIP: [REDACTED]
INSIDE CITY LIMITS? YES
COUNTY: MASON
TRIBAL RESERVATION: NOT APPLICABLE
LENGTH OF TIME AT RESIDENCE: 25 YEARS

HISPANIC ORIGIN: NO, NOT HISPANIC
RACE: WHITE

FATHER: KEITH DAHL
MOTHER: TINA BONNIN

BIRTHDATE: [REDACTED]
BIRTHPLACE: OLYMPIA, THURSTON CNTY, WASHINGTON

MARITAL STATUS: NEVER MARRIED
SPOUSE: NOT APPLICABLE

METHOD OF DISPOSITION: CREMATION
PLACE OF DISPOSITION: MCCOMB & WAGNER CREMATORY
CITY, STATE: SHELTON, WA
DISPOSITION DATE: SEPTEMBER 29, 2015

OCCUPATION: EQUIPMENT OPERATOR
INDUSTRY: LOGGING/CONSTRUCTION
EDUCATION: SOME COLLEGE CREDIT, BUT NO DEGREE
US ARMED FORCES? NO

FUNERAL FACILITY: MCCOMB & WAGNER FUNERAL HOME AND CREMATORY
ADDRESS: 718 W RAILROAD AVE-PO BOX 179
CITY, STATE, ZIP: SHELTON WA 98584
FUNERAL DIRECTOR: RAND M. WAGNER

INFORMANT: KEITH DAHL
RELATIONSHIP: FATHER
ADDRESS: 72 E. 3RD STREET, UNION, WA 98592

CAUSE OF DEATH:

- A. ASPHYXIA
INTERVAL: MINUTES
- B. STRANGULATION BY LIGATURE
INTERVAL: MINUTES
- C.
INTERVAL:
- D.
INTERVAL:

OTHER CONDITIONS CONTRIBUTING TO DEATH:

DATE OF INJURY: SEPTEMBER 16, 2015
HOUR OF INJURY: 07:30 P.M. FOUND
INJURY AT WORK? NO
PLACE OF INJURY: MASON COUNTY JAIL

MANNER OF DEATH: SUICIDE
AUTOPSY: YES
AVAILABLE TO COMPLETE THE CAUSE OF DEATH? YES
DID TOBACCO USE CONTRIBUTE TO DEATH? NO
PREGNANCY STATUS, IF FEMALE: NOT APPLICABLE

LOCATION OF INJURY: 411 N 4TH ST
CITY, STATE, ZIP: SHELTON, WASHINGTON 98584
COUNTY: MASON

ME/CORONER: WESLEY STOCKWELL
TITLE: CORONER
ME/CORONER:
ADDRESS: 414 NORTH 5TH STREET
CITY, STATE, ZIP: SHELTON WA 98584
DATE SIGNED: SEPTEMBER 24, 2015

DESCRIBE HOW INJURY OCCURRED:
HUNG SELF WITH SHEET TIED TO BUNK BED

STATUS OF DECEDENT, IF A TRANSPORTATION INJURY:
NOT APPLICABLE

CASE REFERRED TO ME/CORONER: YES
FILE NUMBER: 0131-15
ATTENDING PHYSICIAN:
NOT APPLICABLE

ITEM(S) AMENDED: INJURY DATE

NUMBER(S): 2015071790
DATE(S): 09/25/2015

LOCAL DEPUTY REGISTRAR:
KIMBERLY KNAPP
DATE RECEIVED: SEPTEMBER 24, 2015



CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 21st day of November, 2018, I caused a true and correct copy of the foregoing document, "Reply Brief of Appellants," to be delivered in the manner indicated below to the following counsel of record:

Respondent:

Keith Dahl
PO Box 188
Union WA 98592

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Dated this 21st day of November, 2018, at Seattle,
Washington.

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

FAVROS LAW

November 21, 2018 - 2:44 PM

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