

FILED
Court of Appeals
Division II
State of Washington
10/8/2018 4:58 PM

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 RESPONDENT

GABRIEL S. GALANDA, WSBA #30331
RYAN D. DREVESKRACHT, WSBA #42593
R. JOSEPH SEXTON, WSBA # 38063
BREE R. BLACK HORSE, WSBA # 47803
GALANDA BROADMAN, PLLC
8606 35th Avenue NE, Ste. L1
P.O. Box 15146
Seattle, WA 98115
(206) 557-7509
Attorneys for Plaintiff/Respondent

TABLE OF CONTENTS

I. INTRODUCTION	1
II. STATEMENT OF THE CASE.....	2
A. BACKGROUND.....	4
1. Facts Regarding Brandon Dahl’s Death.....	4
2. Allegations Regarding Dr. Fino’s Autopsy Of Brandon Dahl.....	5
B. SUMMARY JUDGMENT.....	7
III. ARGUMENT.....	8
A. RCW 6.50.015 Provides Dr. Fino With A Limited Immunity That Does Not Bar Any Claim In Mr. Dahl’s Lawsuit.....	8
1. The Plain Language Of RCW 68.50.015 Supports The Trial Court’s Ruling On Appellants’ Motion For Summary Judgment.	10
a. The plain meaning of RCW 68.50.015 does not immunize Dr. Fino from Mr. Dahl’s claims because he is not suing her for determining the cause and manner of Brandon’s death.	10
b. The common law Appellants cite supports the Superior Court’s interpretation of the plain meaning of RCW 68.50.015’s immunity language.	14
2. The Legislative History of RCW 68.50.015 Supports The Trial Court’s Ruling On Appellants’ Motion For Summary Judgment.	20

a.	The Senate Bill Report and Senator Talmadge’s testimony on RCW 68.50.015’s policy show no support for the broad immunity appellants claim they are entitled to. .	20
b.	Gould v. Reay reveals the limited policy the legislature sought to reject in codifying the immunity contained in RCW 68.50.015.....	23
3.	Other Jurisdictions’ Immunity Statutes Show That RCW 68.50.015 Does Not Confer The Broad Immunity Appellants’ Claim.	29
B.	The Superior Court Properly Denied Dr. Fino’s Motion For Summary Judgment.	32
1.	Dr. Fino Owed A Duty To Keith Dahl.	32
2.	The Superior Court Properly Ruled That Mr. Dahl Advanced Adequate Evidence To Present To A Jury On His Interference With A Dead Body Claim.....	37
3.	The Presence Element of Outrage And Negligent Infliction Of Emotional Distress Should Not Apply To Mr. Dahl’s Claims Because They Are Predicated On The Violation Of A Right Held By, And a Duty Owed Directly to, Mr. Dahl.	41
IV.	CONCLUSION	44

TABLE OF AUTHORITIES

Washington Cases

<i>AllianceOne Receivables Mgmt., Inc. v. Lewis</i> , 1 80 Wn.2d 389, 325, P.3d 904 (2014)	11
<i>Adams v. King Cty.</i> , 164 Wn.2d 640, 192 P.3d 891 (2008)	32, 37-38, 40
<i>Beal v. City of Seattle</i> , 134 Wn.2d 769, 954 P.2d 237 (1998)	34
<i>Bender v. Seattle</i> , 99 Wn.2d 582, 664 P.2d 492 (1983)	24
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997)	36
<i>Campbell v. Bellevue</i> , 85 Wn.2d 1, 530 P.2d 234 (1975)	34
<i>Chambers-Castanes v. King Cty.</i> , 100 Wn.2d 275, 669 P.2d 451 (1983)	34
<i>Cummins v. Lewis Cty.</i> , 156 Wn.2d 844, 133 P.3d 458 (2006)	34
<i>Dang v. Ehredt</i> , 95 Wn. App. 670, 977 P.2d 29 (1999)	14-19
<i>Fagg v. Bartells Asbestos Settlement Tr.</i> , 184 Wn. App. 804, 339 P.3d, 207 (2014)	13
<i>Gadbury v. Bleitz</i> , 133 Wash. 134, 233 P. 299 (1925)	37-38
<i>Gould v. Reay</i> , 39 Wn. App. 730, 965 P.2d 126 (1984)	21, 23-26, 31-32

<i>Grimsby v. Samson</i> , 85 Wn.2d 52, 530 P.2d 291 (1975)	41
<i>Halvorson v. Dahl</i> , 89 Wn.2d 673, 574 P.2d 1190 (1978)	34-35
<i>Keck v. Collins</i> , 184 Wn.2d 358, 357 P.3d 1080 (2015)	36
<i>Kitsap Cty. v. Allstate Ins. Co.</i> , 136 Wn.2d 567, 964 P.2d 1173 (1998)	11
<i>Lallas v. Skagit Cty.</i> , 144 Wn. App. 114, 182 P.3d 443 (2008)	9
<i>Medina v. Pub. Util. Dist. No. 1 of Benton Cty.</i> , 147 Wn.2d 303, 53 P.3d 993 (2002)	11
<i>Michaels v. CH2M Hill, Inc.</i> , 171 Wn.2d 587, 257 P.3d 532 (2011)	28
<i>Munich v. Skagit Emergency Comm’n Ctr.</i> , 175 Wn.2d 871 (2012)	33-34
<i>Petersen v. State</i> , 100 Wn.2d 421, 671 P.2d 230 (1893)	25-26
<i>Rathvon v. Columbia Pac. Airlines</i> , 30 Wn. App. 193, 633 P.2d 122 (1981)	13
<i>Reid v. Pierce Cty.</i> , 136 Wn.2d 195, 961 P.2d 333 (1998)	37, 41
<i>Segaline v. State, Dep’t of Labor & Indus.</i> , 169 Wn.2d 467, 238 P.3d 1107 (2010)	16
<i>State v. Chester</i> , 133 Wn.2d 15, 940 P.2d 1374 (1997)	11
<i>State v. Kintz</i> , 169 Wn.2d 537, 238 P.3d 470 (2010)	11

<i>Taylor v. Stevens Cty.</i> , 111 Wn.2d 159, 759 P.2d 447 (1988)	33-34
<i>Twelker v. Shannon & Wilson, Inc.</i> 88 Wn.2d 473, 564 P.2d 1131 (1977)	9-10
<i>Whaley v. State, Dep't of Soc. & Health Servs.</i> , 90 Wn. App. 658, 956 P.2d 1100 (1998)	33
<i>Whidbey Gen. Hosp. v. State</i> , 143 Wn. App. 620, 180 P.3d 796 (2008)	12
<i>Whitney v. Cervantes</i> , 182 Wn. App. 64, 328 P.3d 957 (2014)	37
<i>Wright v. Beardsley</i> , 46 Wash. 16, 89 P. 172 (1907)	37-38
<i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989)	36
<i>Valdez-Zontek v. Eastmont Sch. Dist.</i> , 154 Wn. App. 147, 225 P.3d 339 (2010)	16

Federal Cases

<i>Boyd v. Vill. of Carol Stream</i> , No. 99-6514, 2000 WL 1700124 (N.D. Ill. Nov. 13, 2000)	9
<i>Burns v. Reed</i> , 500 U.S. 478, 111 St. Ct. 1934, 114 L.Ed.2d 547 (1991)	9
<i>Forrester v. White</i> , 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988)	9
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982)	26

<i>Siddiqui v. Univ. of Wash.</i> , 2014 WL 4265789 (W.D. Wash. Aug. 27, 2014)	17
---	----

Washington Statutes

RCW 4.16.080	8
RCW 4.24.510	14, 16
RCW 4.24.470	15, 27
RCW 68.50.015	1-3, 7-8, 10-16, 19-23, 27-32, 43
RCW 68.50.105	34-36
RCW 68.50.106	14
RCW 68.50.150	35
RCW 82.04.4297	12

Other Authorities

<i>Aldrewman v. Ford</i> , 146 Kan. 698, 72 P.2d 981 (1937)	43
BLACK’S LAW DICTIONARY (10th ed. 2014)	12
<i>Christensen v. Super. Ct.</i> , 54 Cal.3d 868, 2 Cal.Rptr.2d 79, 820 P.2d 181 (1991)	43
DEL. CODE ANN. tit. 16, § 2707 (1886)	29
<i>Devis v. Bank of Am.</i> , 65 Cal.App.4th 1002, 77 Cal.Rptr.2d 238 (1998)	17-19
<i>Everett v. S. Transplant Serv., Inc.</i> , 700 So.2d 909 (La. Ct. App. 1997)	43
<i>Green v. S. Transplant Serv., Inc.</i> , 698 Sp.2d 699 (La. Ct. App. 1997)	42

IND. CODE § 17-3-17-15	29
<i>Kichnet v. Butte-Silver Bow Cty.</i> , 364 Mont. 347, 274 P.3d 740 (Mont. 2012)	29
<i>Lacy v. Cooper Hosp. Univ. Med. Ctr.</i> , 745 F.Supp. 1029 (D.N.J. 1990)	42
<i>Lee v. Weston</i> , 402 N.E.2d 23 (Ind. Ct. App. 1980)	29
ME. STAT. TIT. 22, § 3033(B)	29
MICH. COMP. LAWS § 52.205(7)	30
MONT. CODE ANN. § 46-4-104 (2009)	30
N.J. REV. STAT. § 26:6A-6	30
<i>Parker v. Quinn-McGowen Co.</i> , 262 N.C. 560, 138 S.E.2d 214 (1964)	42
S. B. Rep. 590 (Wash. 1987)	20-23, 26, 27
<i>Scarpaci v. Milwaukee Cty.</i> , 96 Wis. 2d 663 (Wis. 1980)	30-31
<i>Sheridan v. City of Janesville</i> , 164 Wis. 2d 420, 427 (Wis. Ct. App. 1991)	30-31
THE MERRIAM-WEBSTER DICTIONARY (1989)	12

I. INTRODUCTION

Appellant Dr. Fino enjoys limited statutory immunity “from civil liability for determining the cause and manner of death” while performing autopsies in her capacity as a county medical examiner or coroner under RCW 68.50.015. Appellee Keith Dahl (“Mr. Dahl”) sued Appellants for actions and omissions that Dr. Fino took before, during, and after performing an autopsy on Keith Dahl’s son, Brandon Dahl. Mr. Dahl’s lawsuit does not challenge Dr. Fino’s determining the cause or manner of death for Brandon Dahl. Because the plain language of RCW 68.50.015 is unambiguous, Mr. Dahl’s claims are not barred.

The Superior Court properly denied Dr. Fino’s summary judgment motion, ruling that Dr. Fino does not enjoy absolute immunity from Mr. Dahl’s suit for alleged acts and omissions that occurred during Dr. Fino’s autopsy of his son. Mr. Dahl also succeeded in establishing in his opposition to Dr. Fino’s summary judgment motion, and the Superior Court correctly found, that genuine issues of material fact also precluded summary judgment in favor of Dr. Fino. Under Washington law, Dr. Fino in fact owes Mr. Dahl a duty of reasonable care of his son’s remains. Further, Mr. Dahl provided adequate evidence supporting his claims of interference with a dead body, as well as his claims for negligent and intentional infliction of emotional distress. Consequently, this Court should affirm the Superior Court’s denial of Dr. Fino’s Motion for Summary Judgment.

II. STATEMENT OF THE CASE

Washington State has decided that county coroners, medical examiners, or people acting in the capacity of a coroner or medical examiner are immune “from civil liability for determining the cause and manner of death. The accuracy of the determinations is subject to judicial review.” RCW 68.50.015.

The two operative sentences in this statute are consistent with and complement each other. The first sentence does not furnish Dr. Fino with immunity in all aspects of her work as a coroner, or even in all acts and omissions taken when she conducts an autopsy. If this were the case, the first sentence would unambiguously grant such broad immunity. It clearly does not. Conversely, statutory language indicating that “a county coroner or county medical examiner or persons acting in that capacity shall be immune from civil liability” would have conferred the absolute immunity Dr. Fino claims. The first sentence of RCW 68.50.015 does not, however, end with the words “civil liability.” In fact, the first sentence qualifies the immunity by limiting it to the particular type of civil liability the immunity bars—“civil liability for determining the **cause and manner** of death.” RCW 68.50.015 (emphasis added).

The Superior Court’s reading of the plain language of the second sentence of RCW 68.50.015—that the “accuracy of the determinations is subject to judicial review[,]”—indicates that the statutory language at issue here is unambiguous. *Id.* Put another way, the first sentence of the

statute insulates coroners and people acting in that capacity from civil liability targeting their determinations as to the cause and manner of death. The second sentence provides a means of recourse to challenge those determinations.

Lawsuits based on other aspects of coroners or medical examiners' work in performing autopsies are not barred by the limited immunity codified in this statute. If Dr. Fino's interpretation of RCW 68.50.015 was correct, she or any other coroner or medical examiner could take any action whatsoever, or fail to take any action whatsoever, yet would never be subject to civil liability as long as she claimed she was doing it in "determining the cause and manner" of a person's death. In short, if the Legislature had intended to grant the broad immunity Dr. Fino claims, it would have said as much. It purposefully did not. The statute insulates coroners and medical examiners from civil liability only with regards to challenges based on their ultimate findings as to cause and manner of death. This Court need go no further than the plain language of RCW 68.50.015 in affirming the Superior Court's decision.

Although this Court's analysis should stop with the plain language of RCW 68.50.015, common law, statutory framework, and legislative history of RCW 68.50.015 all reveal that Dr. Fino's arguments still lack merit. Simply put, the Superior Court was correct in finding that Mr. Dahl did not assert a claim against Dr. Fino based on her determination of the

cause and manner of Brandon's death. The statutory immunity asserted by Dr. Fino is therefore entirely inapplicable.

The Superior Court also correctly denied Appellants' summary judgment motion on other grounds. Mr. Dahl presented adequate evidence supporting his claims. On appeal, Dr. Fino has unsurprisingly mischaracterized Mr. Dahl's evidence in a way that benefits her appeal. But looking past her subjective characterizations, this Court will find an expert review stating that Dr. Fino unnecessarily and intentionally maimed and destroyed Brandon's body, among other acts and omissions that were both willful and intentional, as well as negligent. This Court also will find that Mr. Dahl's damages have been medically documented, as presented in opposition to Appellants' summary judgment motion. Mr. Dahl supplied evidence adequate to withstand summary judgment on his claims against Appellants. Remaining questions are for the jury.

A. BACKGROUND

1. Facts Regarding Brandon Dahl's Death.

Brandon Dahl was arrested and booked into the Mason County Jail on September 13, 2015. CP at 13. The jail housed Brandon in a segregation unit called "M-Tank," where inmates are kept in their cells alone for up to 23 hours every day. *Id.*; *see also* CP at 328. A jailer later moved Brandon to J-Tank for an "attitude adjustment" after Brandon angered that jailer. *Id.* at 2. Before Brandon's transfer to J-Tank, three inmates housed in J-Tank assaulted two other inmates in that same holding

unit, but the jailers did not remove those violent inmates from J-tank. *Id.* at 2, 13, 359.

Within hours of the jailers moving Brandon to J-Tank, those same three inmates jumped and beat Brandon. *Id.* As a result of this beating, Brandon suffered repeated blows to the head, neck, and body. *Id.* These blows caused hemorrhages, contusions, and abrasions that were evident on Brandon's head, face, neck, torso, and legs. *Id.* at 13-16. Jail staff then transferred Brandon back to a solitary confinement cell in M-Tank. *Id.* at 13. The jail did not provide Brandon with any medical care for his injuries, which included, among other things, cranial contusions and hemorrhaging to the head and body. *Id.* at 13-16.

Brandon died in M-Tank three days later on September 16, 2016. *Id.* at 3, 13, 359.

2. Allegations Regarding Dr. Fino's Autopsy Of Brandon Dahl.

Mr. Dahl does not challenge Dr. Fino's determining Brandon Dahl's cause and manner of death. *Id.* at 4-8. Rather, Mr. Dahl has sued Dr. Fino because she performed the autopsy of Brandon negligently and took other intentional and willful actions and omissions during the autopsy, irrespective of her findings, and these acts and omissions caused damages to Mr. Dahl. *Id.* At no point in Mr. Dahl's prayer for relief does he request declaratory relief overturning Dr. Fino's actual determinations of cause and manner of death or declaring she negligently made them. *Id.* at 9. Nor does Mr. Dahl demand Dr. Fino be held civilly liable for those

determinations. *Id.* at 4-8. Rather, his lawsuit is based principally on his claims that Dr. Fino acted and failed to act—both intentionally and negligently—in a way that had absolutely nothing to do with determining Brandon’s cause and manner of death.

Dr. Fino performed an autopsy on Brandon’s body on or about September 17, 2015. *Id.* at 174-78. The manner in which Dr. Fino performed this autopsy left Brandon’s brain in a condition such that it was—according to a second attempted autopsy—“pulverized, with near-complete obliteration of the anatomic detail.” *Id.* at 3, 6, 40-41, 185-187, 221-222. Dr. Fino also failed to save Brandon’s brain in the stock tissue. *Id.* at 4, 20, 200, 366. Dr. Fino further failed to photograph the autopsy and failed to perform a post-mortem radiological evaluation of Brandon’s body. *Id.* at 19, 186, 365. Dr. Fino marred Brandon’s brain and body in a way that made a second opinion and autopsy impossible to perform effectively. *Id.* at 20, 200. Dr. Fino failed to take autopsy tissue histology slides and paraffin tissue blocks. *Id.* at 4, 146, 186. Dr. Fino also failed to wait for toxicological analysis before completing her report, an analysis which is “a vital and indispensable component of a complete forensic autopsy.” *Id.* at 18, 186, 364.

Mr. Dahl contends that Dr. Fino’s multitude of failures and other willful and intentional acts and omissions regarding Brandon’s autopsy breached the applicable standard of care and precluded a complete second autopsy from being performed, causing Mr. Dahl injury. Further, when

Mr. Dahl sought a second opinion, Dr. Fino refused to cooperate with the selected pathologist. *Id.* at 121-22, 187, 302-03. Mr. Dahl's pathologist reported that Dr. Fino's autopsy was the worst he had ever seen. *Id.* at 124, 187, 305.

Dr. Fino's autopsy of Brandon and the natural consequences flowing from it have traumatized Mr. Dahl. *Id.* at 123-130, 304-311. As a result of Dr. Fino's autopsy and her desecration of and failure to preserve Brandon's body, particularly his brain, Mr. Dahl has developed both Major Depressive Disorder, Moderate with Anxious Distress, and Posttraumatic Stress Disorder with Dissociative Symptoms, Derealization Type, all of which interfere with his daily function, in both social and occupational domains. *Id.*

B. SUMMARY JUDGMENT

At the conclusion of the summary judgment hearing, the Superior Court held:

This is a summary judgment motion which means the Court has to look at the facts in the light most favorable to the nonmoving party; and if there are any material issues of fact, then it defeats the summary judgment motion . . . Counsel for the moving party relied on RCW 68.50.015 which we read into the record, and this statute makes it very clear that a county coroner or medical examiner or persons acting in that capacity shall be immune from civil liability for determining the cause and manner of death. If the Legislature wanted this statute to be as broad as the moving party asserts, then they would have basically said so . . . I would have to agree with the nonmoving party that RCW 68.50.015 is very limited circumstances with particular civil liability that immunes the coroner, and that defeats the summary judgment motion because the nonmoving party has raised a number of material issues of fact and only one is needed.

RP at 23-24.

The Superior Court reiterated that its “determination is also based on the facts, the material issues of fact laid out by the nonmoving party . . . in her pleadings.” *Id.* at 24. After counsel for Dr. Fino acted, in her own words, “out of order,” in offering additional argument and demanding the Superior Court clarify its ruling, the Superior Court again explained “[t]his Court’s ruling said [RCW 68.50.015] is not as broad as the moving party asserts This Court is finding that it is not as broad as the moving party asserts but is more limited to a particular type of civil liability as testified in the statute itself.” *Id.* at 25. The Superior Court then specifically pointed out to Dr. Fino’s counsel that it had examined RCW 68.50.015 and compared that statute with the language of RCW 4.16.080, “a number of cases in formulating a decision in regards to this matter” as well as “the law as a whole.” *Id.* at 27. The Superior Court also noted that its denial of Dr. Fino’s summary judgment motion was based on “the material issues of facts laid out by the nonmoving party.” *Id.* at 24.

III. ARGUMENT

A. RCW 6.50.015 PROVIDES DR. FINO WITH A LIMITED IMMUNITY THAT DOES NOT BAR ANY CLAIM IN MR. DAHL’S LAWSUIT.

Appellants demand this Court to read RCW 68.50.015 in a way that would bar all civil lawsuits for negligence, willful, or intentional conduct in performing an autopsy while acting in the capacity of a county coroner or a medical examiner. Dr. Fino is, in effect, demanding absolute

immunity where the Legislature specifically conferred only limited immunity. At the summary judgment hearing, the Superior Court posed the following question to counsel for Appellants, and counsel indicated the immunity Appellants claim here is absolute as far as civil liability is concerned:

THE COURT: So are you saying that if a coroner, in doing an autopsy to determine the manner or cause and manner of death, totally mutilates or destroys the decedent that the coroner is immune from liability?

MS. KOH: From civil liability.

THE COURT: Civil.

MS. KOH: Yes, I'm saying that, Your Honor.

Id. at 14.

“Absolute immunity is strong medicine that is justified only when the danger of officials being deflected from effective performance of their duties is very great.” *Lallas v. Skagit Cty.*, 144 Wn. App. 114, 117, 182 P.3d 443 (2008), *aff'd*, 167 Wn.2d 861, 225 P.3d 910 (2009) (citing *Forrester v. White*, 484 U.S. 219, 230, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988)). Thus, “[a]ccording public officials absolute immunity for their acts” is generally “disfavored.” *Boyd v. Vill. of Carol Stream*, No. 99-6514, 2000 WL 1700124, at *3 (N.D. Ill. Nov. 13, 2000) (citing *Burns v. Reed*, 500 U.S. 478, 487, 111 St. Ct. 1934, 114 L.Ed.2d 547 (1991)). This

is particularly true where an alternate, adequate remedy is not available.

As the Washington Supreme Court made clear in *Twelker v. Shannon & Wilson, Inc.*:

Absolute immunity, it seems, should be confined to cases where there is supervision and control by other authorities, such as courts of justice, where proceedings are under the able and controlling influence of a learned judge, who may reprimand, fine, and punish as well as expunge from records statements of those who exceed proper bounds, and who may themselves be disciplined when necessary. The same is true in federal and state legislatures, and their committees, where the decorum is under the watchful eye of presiding officers, and records may be stricken and the offending member punished.

88 Wn.2d 473, 476-77, 564 P.2d 1131 (1977).

1. The Plain Language Of RCW 68.50.015 Supports The Trial Court’s Ruling On Appellants’ Motion For Summary Judgment.

a. The plain meaning of RCW 68.50.015 does not immunize Dr. Fino from Mr. Dahl’s claims because he is not suing her for determining the cause and manner of Brandon’s death.

Appellants are right about one thing—the plain language of RCW 68.50.015 is unambiguous and should control this Court’s analysis. Appellants are wrong insofar as they claim that same plain language supports their appeal. The statute states “[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.” RCW 68.50.015. The plain language of RCW 68.50.015 makes clear that the immunity conferred here is limited. It only immunizes Dr. Fino from civil liability for determining cause and manner of death—in this case,

determining the cause of Brandon’s death to be asphyxiation and manner of death as suicide. CP at 174. Damages arising from any such *determination* are barred by this statute. Damages arising from other acts and omissions Dr. Fino took during the course of her autopsy of Brandon are not immunized under RCW 68.50.015.

Appellants spend four pages of their brief arguing that there is a meaningful difference between the words “determining” and “determinations,” and why the distinction between a verb and its noun form resolves the central question before this Court. Appellants’ Brief at 16-19. Appellants also argue that the word “determinations” in the second sentence of the two-sentence statute cannot be used to shed light on the word “determining” in the first sentence. *Id.* at 18-19. Relatedly, although Appellants use the words “define” or “definition” seven times in their brief, they offer no actual definition of the words “determining” and “determinations” appearing in RCW 68.50.015 to aid this Court in deciding the validity of her arguments. *See* Appellants’ Brief at 7, 17-19, 41, 48, 50.

When a statute does not define a word, the court gives that word its ordinary meaning. *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 395, 325 P.3d 904 (2014) (citing *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997)). Courts determine the plain meaning of a word undefined in a statute by looking first to its dictionary definition. *Id.* (citing *State v. Kintz*, 169 Wn.2d 537, 547, 238 P.3d 470 (2010)). This

Court and the Washington Supreme Court have used both Black's Law Dictionary and Webster's Dictionary to define words in statutes and contracts at issue in litigation. *See, e.g., Kitsap Cty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 582–83, 964 P.2d 1173 (1998) (turning to Webster's Deluxe Unabridged and Third New International dictionaries to define a term in an insurance policy); *Medina v. Pub. Util. Dist. No. 1 of Benton Cty.*, 147 Wn.2d 303, 314–15, 53 P.3d 993 (2002) (referencing both Black's Law Dictionary and Webster's Third New International Dictionary to define toll as used in RCW 4.96.020); *Whidbey Gen. Hosp. v. State*, 143 Wn. App. 620, 628–29, 180 P.3d 796 (2008), *as corrected*, (Apr. 22, 2008) (using Black's Law Dictionary to define “employee benefit plan” as referenced in RCW 82.04.4297).

Black's Law Dictionary defines “determination” as “[t]he act of deciding something officially; esp., a final decision by a court or administrative agency . . . —, determine vb.” BLACK'S LAW DICTIONARY (10th ed. 2014). This determination is simply a noun form of “determine,” both of which mean, in essence, the act of deciding something. Black's Law Dictionary does not separately define the word “determine.” Merriam-Webster's Dictionary defines “determine” and its present participle: “determining” as “to fix conclusively or authoritatively.” THE MERRIAM-WEBSTER DICTIONARY (1989).

The plain meaning of RCW 68.50.015 therefore provides Dr. Fino limited immunity. The plain meaning of “determining” does not include

all acts and omissions taken that can possibly be ascribed as occurring in the course of conducting an autopsy. If Dr. Fino's argument is correct, a coroner could literally destroy a decedent's body, commit any act of horridness to it, and be free of any civil liability to the family of a decedent for such outrageous conduct. Acts of cannibalism and necrophilia would be immunized from civil liability under Dr. Fino's reading of the statute. This cannot be the case.

Using the definition of "determining," the statute indicates that in cases where Dr. Fino is acting in the capacity of a coroner or medical examiner she is "immune from civil liability for [the act of fixing conclusively or authoritatively (i.e., determining)] the cause and manner of death." The statute does not furnish her with immunity for all acts and omission she takes in the process of "fixing conclusively" or "deciding something officially." The same root word used in noun form in the second sentence, *i.e.*, determination, does in fact "illuminate" the limited nature of the immunity Dr. Fino has under this statute—providing that the "accuracy of the determinations is subject to judicial review." The sentence itself begs the question—which determinations does this sentence reference? The answer, of course, is that the determinations of the cause and manner of death indicated in the first sentence defining the limited immunity under RCW 68.50.015 are subject to judicial review, even if civil liability will not be assessed against a coroner. Dr. Fino can argue that destroying nearly all of Brandon's brain was part of "determining the

cause and manner of death,” but that involves a question of fact for the jury. *Fagg v. Bartells Asbestos Settlement Tr.*, 184 Wn. App. 804, 811–12, 339 P.3d 207 (2014) (mixed questions of fact and law require denial of a motion for summary judgment) (citing *Rathvon v. Columbia Pac. Airlines*, 30 Wn. App. 193, 633 P.2d 122 (1981)).

On its face, the plain meaning of the word “determine” indicates that Dr. Fino is not immune from civil liability regarding her alleged negligence or her willful and intentional conduct performing an autopsy. Dr. Fino has determined the cause of death to be “asphyxia due to hanging.” CP at 174. And, Dr. Fino determined the manner of death to be “suicide.” *Id.* The immunity conferred by RCW 68.50.106 does not permit Dr. Fino to conduct a negligent autopsy or willfully or intentionally mutilate Brandon’s body and avoid civil liability.

b. The common law Appellants cite supports the Superior Court’s interpretation of the plain meaning of RCW 68.50.015’s immunity language.

Appellants’ reliance on *Dang v. Ehredt*, 95 Wn. App. 670, 977 P.2d 29 (1999), is misplaced for three reasons. First, the statutory language of the grant of immunity at issue in *Dang* is significantly different than the immunity conferred by RCW 68.50.015. The statutory immunity language in *Dang* provides that:

A person who in good faith communicates a complaint or information to any agency of federal, state, or local government regarding any matter reasonably of concern to that agency **shall be immune from civil liability on claims based upon the communication to the agency.**

RCW 4.24.510 (emphasis added). The term “based upon” was a key factor in that court disagreeing with the argument that the immunity was inapplicable to acts or omissions apart from the actual communication:

A more reasoned interpretation, and the one that is in keeping with the purpose for which the statute was enacted, is that the term ‘based upon’ as used in RCW 4.24.510 refers to the starting point or foundation of the claim.

Dang, 95 Wn. App. at 682. Conversely, RCW 68.50.015 does not contain the term “based upon.” Instead, RCW 68.50.015 provides expressly limited immunity language for “determining the cause and manner of death”—not from claims “based upon” an autopsy or “based upon” Dr. Fino determining the manner and cause of death. Furthermore, as discussed in detail, *infra* at § 2.c, regarding statutory history, the Legislature enacted amendments to two statutory frameworks, codifying two separate immunities in 1987 when RCW 68.50.015 was enacted. *See* RCW 4.24.470. In one of those statutes, the Legislature used broad language. *Id.* It purposefully elected not to use the same broad language, at the same time, in RCW 68.50.015, and again, it refrained from broadening the immunity to include “all claims based upon” the performance of an autopsy. In short, the significant difference in language between the statute before the court in *Dang*, and the statute before this Court, undermines Appellants’ argument.

Second, the public policy at issue and the facts of *Dang* are entirely different. The public policy in *Dang* was rooted in the “recognition of the fact that information provided by citizens concerning

potential wrongdoing is vital to effective law enforcement” and that the threat of liability “could be a deterrent to citizens who wish to report such information to law enforcement agencies.” *Dang*, 95 Wn. App. at 670.¹ Although Dr. Fino can argue that the Legislature sought to immunize coroners and medical examiners recognizing the fact that determinations of the causes and manners of death in certain cases is vital to the public interest, she cannot use that argument given the statutory language and its legislative history to claim *absolute immunity* for *any* action or inaction she takes in performing an autopsy, whether intentionally or negligently. The expansive view of protecting all acts and omissions that possibly relate to determining the cause and manner of death is unsupported by the plain language of RCW 68.50.015. Moreover, that sort of expansive reading of immunity is not even supported in the common law interpreting RCW 4.24.510. See *Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn. App. 147, 167, 225 P.3d 339 (2010) (noting “the statute does not provide immunity for other acts that are not based upon the communications”). Here, Mr. Dahl’s lawsuit is based on other acts that do not involve Dr. Fino’s determining the cause and manner of his son’s death.

¹ The Supreme Court described the policy underlying RCW 4.24.510 somewhat differently, noting “[t]he legislature was concerned with civil lawsuits that were being used to intimidate citizens from exercising their First Amendment rights and rights under art. I, sect. 5 of the Washington State Constitution (‘strategic lawsuits against public participation,’ or SLAPP suits), particularly when that speech involved reporting potential wrongdoing to government agencies.” *Segaline v. State, Dep’t of Labor & Indus.*, 169 Wn.2d 467, 473, 238 P.3d 1107 (2010).

Third, the application of the immunity to the facts in *Dang* is entirely consistent with the sort of immunity the Superior Court held is conferred by RCW 68.50.015. The court in *Dang* cited two California cases regarding a similar anti-SLAPP immunity for communicating information to law enforcement. 95 Wn. App. at 682. In discussing one of the case’s holdings, the *Dang* court noted that the plaintiff’s claims were, “at heart” based on the communication to law enforcement and not just the process undertaken leading to the communication:

The court noted that without the bank's communication to the police and the subsequent arrest, the plaintiff would have suffered no harm. Thus, the court concluded, the plaintiff's complaint was “at heart one based on the Bank's report to the police,” since the damages claimed were allegedly caused by the plaintiff's arrest and incarceration. The court rejected the plaintiff's argument that the immunity statute did not apply to negligence claims based on action other than the actual call or report to the police.

Id. at 682-83 (quoting *Devis v. Bank of Am.*, 65 Cal.App.4th 1002, 77 Cal.Rptr.2d 238 (1998)). This distinction between allegations “at heart” being about the “communication” to law enforcement, and about damages that would not have been caused but for the communication has been found significant elsewhere. *See, e.g., Siddiqui v. Univ. of Wash.*, No. C14-349RAJ, 2014 WL 4265789, at *3 (W.D. Wash. Aug. 27, 2014) (noting that defendant’s reliance on *Dang* was misplaced because *Dang* cited a “California court” where the immunity regarding communications to law enforcement applied because without that “report to the police . . . the plaintiff would have suffered no harm”).

The *Dang* and *Devis* cases would only be analogous to the case before this Court if Mr. Dahl's claims were "at heart" "based on" Dr. Fino's determination of the cause and manner of Brandon's death, and if, without the specific determination of suicide Dr. Fino made, Mr. Dahl would have suffered no harm. This is not, however, the case with Mr. Dahl's claims. His claims, at heart, are not related to Dr. Fino's determination. They are, at heart, related to the acts and omissions Dr. Fino took that were unnecessary to making her determination.

Appellants attempt to construct another bridge of analogy between *Dang* and the case before this Court—arguing that "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." Appellants' Brief at 27. This is not true. A claim based on Dr. Fino's negligent acts and omissions—none of which were necessary for "determining the cause and manner of death"—is not tantamount to "allowing a claim . . . for inaccurate determinations of cause and manner of death." The decision in *Dang* is instructive in this regard. Quoting the California court deciding *Devis*, the *Dang* court noted that "[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." *Dang*, 95 Wn. App. at 683 (quoting *Devis*, 77 Cal.Rptr.2d at 243). The *Dang* court continued its analysis of what the

plaintiff's claims were ultimately rooted in—and based upon: the communication ultimately made to the police. The court explained:

Moreover, as in *Devis*, 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. All of the actions of which Ms. Dang complains and all of the damages she claims to have suffered stem from that is, are “based upon”) the bank's telephone call to the police.

Dang, 95 Wn. App at 683–84.

Quite simply, unlike in *Dang* and *Devis*, where the liability all resulted from *communication* to the authorities, Mr. Dahl's case has nothing to do with Dr. Fino's *determinations*. Mr. Dahl is not suing based on an alleged “error” in Dr. Fino's determinations. He's not suing because of the acts Dr. Fino took that were necessary to determine the manner and cause of his son's death. Rather, Mr. Dahl is suing because Dr. Fino is liable for acts and omissions that are entirely separate and apart from determining the cause and manner of his son's death. He is suing Dr. Fino because of the unnecessary damage she caused to Brandon's body, which was unrelated to the acts she needed to take to determine the cause and manner of Brandon's death. He is suing because of Dr. Fino's failure to preserve the tissue, which again—according to Mr. Dahl's evidence and allegations—was unnecessary to determine the cause and manner of Brandon's death. He is suing because of Dr. Fino's failure to take photographs, which was unnecessary and wholly unrelated as a matter of objective fact to determine the cause and manner of Brandon's death.

And, he is suing because of Dr. Fino's failure to expeditiously order a toxicology analysis, which was unnecessary and wholly unrelated to the act of determining the cause and manner of death. CP at 3-4, 13-20.

Mr. Dahl brings claims against Dr. Fino for performing the autopsy of Brandon in a negligent, intentional, and/or willful manner that cannot be explained by any accepted practices in any medical field, and in a way that caused Mr. Dahl damages. *Id.* at 3-4. None of his claims challenge Dr. Fino's determination of the cause and manner of Brandon's death. Thus, Mr. Dahl's claims do not fall within the immunity prescribed by RCW 68.50.015.

2. The Legislative History of RCW 68.50.015 Supports The Trial Court's Ruling On Appellants' Motion For Summary Judgment.

a. The Senate Bill Report and Senator Talmadge's testimony on RCW 68.50.015's policy show no support for the broad immunity appellants claim they are entitled to.

Because the plain meaning of RCW 68.50.015 supports the Superior Court's denial of Appellants' summary judgment motion, Appellants are left arguing that there is an ambiguity in the statute requiring the Court to look to legislative history or elsewhere to decipher some sort of support for their appeal. An examination of the legislative history leading to the codification of the immunity in RCW 68.50.015, however, cuts against Appellants' argument for absolute immunity, which, again, is not present in the statute's plain language.

The Washington State Senate Bill Report of March 31, 1987, indicates that the immunity at issue here is related to civil suits seeking to

hold coroners and medical examiners liable for their determinations. The report states that members of decedents' families:

occasionally contest **the findings** of the examiner or coroner and have brought suit for negligence **in determining the cause of death**. This can occur when family believes that death was by homicide or accident but the examining official certifies that suicide was the cause of death.

CP at 390 (emphasis added).

This legislative history shows the intent of RCW 68.50.015 was to immunize coroners and medical examiners against civil liability “for negligence in determining the cause of death” from people who would sue to “contest the findings [i.e., that determinations] of the examiner or coroner.” The language of the first sentence of what would become RCW 68.50.015 mirrors this concern regarding people suing coroners and medical examiners over the findings of the cause and manner of death.

Appellants cited Senator Phil Talmadge’s testimony in their briefing below. CP at 374. Appellants do not cite Senator Talmadge in their brief on the merits here, but what Senator Talmadge’s testimony reveals is helpful to determining the legislative history of RCW 68.50.015. In fact, this testimony exposes fatal flaws in Appellants’ argument for an expansive reading of the immunity in RCW 68.50.015 beyond the plain language of the statute. Senator Talmadge indicated that the policy of codifying limited immunity was catalyzed by the Washington State Court of Appeals opinion in the *Gould* case:

I believe [*Gould* is] a Court of Appeals opinion in which the Court of Appeals indicates that the county coroner **can**

be subject to liability for determining the cause of death in a particular case. We couldn't believe that that would be appropriate policy. And **this amendment is designed to make clear that a county coroner, in making the determination of how someone died, is not subject to civil liability for that medical determination.**

CP at 374, 423 (emphasis added).

Other testimony provided in support of RCW 68.50.015 shows that Appellants are wrong on the legislative history of the immunity. Barbara Hodley of the King County Medical Examiner's office actually represented Dr. Reay at the March 30, 1987 senate hearing because "Dr. Reay . . . was not able to come down himself." CP at 419. Barbara Hodley testified that the bill "would give coroners and medical examiners immunity from personal liability **for certifying the manner and cause of death.**" *Id.* (emphasis added). Mike Redman, of the Washington Association of Prosecuting Attorneys also testified in favor of RCW 68.50.015. He noted that the immunity was for the ultimate determination, and that people would still have a remedy outside of civil liability to challenge the determination under the statute:

Let me make it clear that we are not in this amendment seeking to remove the authority of somebody that questioned the accuracy of the coroner's call, the determination of death is suicide, accident or homicide has some important implications for insurance companies and others, but if a loved one feels that that's a bad call, and they want to challenge it judicially, how a public official makes a decision ought to be able to justify that decision and if it takes a litigation to get a judge to pass on it, fine and dandy. What we are, what the _____ is directing to is the **immunity from damages against the allegation**

of making a wrong call.

Id. at 421 (emphasis added). Jim Goche of the Association of County Officials likewise testified in favor of the amendment codified at RCW 68.50.015. He put the narrow nature of the proposed immunity at issue, which also is at issue in this appeal, in clear focus:

One, [coroners and medical examiners] have to determine medically why somebody died and two, if somebody did it, they have to determine who did it and recommend to the prosecutor that he take, that he or she take appropriate actions. **For strictly that narrow act, that clause and judicial act of determining medically why the person died and who did it, we're recommending to you this immunity.**

Id. at 419 (emphasis added).

Two important things are made clear from this testimony. First, the legislature wanted to reverse the policy advanced in the *Gould* decision. Second, the policy set forth in *Gould* was that a medical examiner or a coroner could be held civilly liable for negligently making a determination of the manner or cause of a person's death.

b. Gould v. Reay reveals the limited policy the legislature sought to reject in codifying the immunity contained in RCW 68.50.015.

Gould illustrates that the Superior Court's decision was correct as a matter of law. *Gould v. Reay*, 39 Wn. App. 730, 732, 695 P.2d 126 (1984). If this Court accepts that *Gould* was the impetus for the immunity in dispute here, it follows that the negligence alleged in *Gould* is what the legislature sought to immunize under RCW 68.50.015. If the claims in

Gould were that the coroner was probably correct in determining the manner and cause of Victor Gould's death, but conducted the autopsy in such a negligent and willfully destructive manner as to cause separate injury to Harriet Gould, then Appellants' arguments on *Gould* and the legislative history of RCW 68.50.015 would have some merit.

But that is not what *Gould* was about.

Contrary to Appellants' argument, *Gould* offers scant support for their arguments. Appellants frame *Gould's* holding in a way that conflates the theory of liability in that case with Mr. Dahl's multiple theories of liability, but Appellants ignore the key distinctions between these two cases in terms of the central claims of liability. Appellants misapprehend the holding in arguing that the Court of Appeals "viewed" *Gould's* claims regarding the medical examiner's "performance of the autopsy" and his "determination of the manner of death" as "one and the same for the purposes of describing the 'theory' of [Gould's] cause of action." CP at 370. The holding in *Gould* does not support this.

The crux of *Gould's* holding was the applicability of a "court-created rule of immunity . . . limited only to those high level discretionary acts exercised at a truly executive level." *Gould*, 39 Wn. App. at 732 (quoting *Bender v. Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983)). Because of this governmental immunity, the Court of Appeals distinguished between the King County Medical Examiner's (Reay's) findings and "high level discretionary acts exercised at a truly executive level"

immunized under the court-created qualified governmental immunity. Appellant's selective quoting of this language cannot be leveraged to carve out significantly more expansive immunity than the legislature chose to codify following the *Gould* decision.

The plaintiff in *Gould* sued the medical examiner based on an allegation that the medical examiner "was negligent in signing the death certificate which indicated the manner of death was suicide." *Gould*, 39 Wn. App. at 731. Therefore, although the plaintiff in *Gould* alleged incompetence and carelessness in the "performance of the autopsy," her negligence claim arose expressly and exclusively from *Reay's* determining the manner of Victor Gould's death as suicide when she claimed evidence pointed to another manner of death. *Id.*

Appellants argue that the holding in *Gould* was that the medical examiner in the case was subject to professional negligence claims "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." Appellants' Brief at 30 (internal quotations omitted). This is not a thorough account of the holding. Instead, Dr. Fino's rendition is truncated to suggest that the legislature following *Gould's* decision was seeking to immunize coroners and medical examiners from every act or omission they make in arriving at a determination, rather than simply immunizing coroners and medical

examiners for those determinations. The un-excerpted language of the holding illuminates better the gravamen of *Gould's* lawsuit:

The medical examiner's determination of the manner of death, although requiring professional evaluation, does not involve a balancing of risks and advantages in the process of determining a policy. Rather, it is a decision made at an operational as opposed to executive level. It is therefore subject to the tort standard applicable to professional negligence. See *Petersen [v. State]*, 100 Wn.2d 421, 435, 671 P.2d 230 (1893).] The trial court erred in finding Dr. Reay immune from liability and in granting his motion to dismiss at the end of *Gould's* case.

Gould, 39 Wn. App. at 732.

The key language running through this holding is “the medical examiner's determination of the manner of death.” This term is repeated in describing the nature of the determination—“**it** is a decision” and “**it** is therefore subject to the tort standard applicable to professional negligence.” *Id.* (emphasis added). “It” is what the legislature sought to immunize coroners and medical examiners from civil liability, and nothing else. This is made clear in Senator Talmadge describing the Court of Appeals' decision in *Gould* as a holding “that the county coroner **can be subject to liability for determining the cause of death in a particular case**” and noting that RCW 68.50.015 is “designed to make clear that a county coroner, **in making the determination of how someone died, is not subject to civil liability for that determination.**” CP at 374, 385 (emphasis added).

Gould served as the catalyst for a limited immunity from civil liability for determinations coroners and medical examiners make on a

cause or manner of death. This is all that the legislature sought to protect. *See Nixon v. Fitzgerald*, 457 U.S. 731, 755, 102 S. Ct. 2690, 73 L. Ed. 2d 349 (1982) (“[T]he sphere of protected action must be related closely to the immunity's justifying purposes.”). Mr. Dahl does not seek to hold Dr. Fino liable for determining the cause or manner of Brandon’s death, and therefore, the limited immunity codified to address a judicial policy announced in *Gould* is entirely inapplicable.

c. Qualified government immunity, which was considered at the same time that RCW 68.50.015 was legislated, further supports the Superior Court’s denial of Appellants’ motion for summary judgment.

In 1987, as the Legislature considered limited immunity for coroners and medical examiners, it was simultaneously legislating on immunity for certain government officials. In the Final Bill Report for HB 590 (C 264 L 87), the Legislature provided the following summary of these twin immunity bills:

Appointed officials of special purpose districts are afforded the same immunity from civil liability for damages arising from actions performed within the scope of their official duties that is granted to elected officials of special purpose districts.

County coroners or county medical examiners are immune from civil liability for determining the cause and manner of death. The accuracy of such a determination is subject to judicial review.

CP at 389-90. The qualified government official immunity at issue at the time RCW 68.50.015 was being legislated was codified at RCW 4.24.470. The immunity language tracks the summary in the bill report noted *supra*:

An appointed or elected official or member of the governing body of a public agency is immune from civil liability for damages for any discretionary decision or failure to make a discretionary decision within his or her official capacity, but liability shall remain on the public agency for the tortious conduct of its officials or members of the governing body.

RCW 4.24.470.

Appellants argue that RCW 68.50.015 immunizes Dr. Fino from civil liability regarding any discretionary decision or failure to make a decision in the course of performing an autopsy with the purpose ultimately of determining the cause and manner of a person's death. The legislative history of RCW 68.50.015 shows the Legislature was considering immunity for a different group of officials using language that would arguably give Dr. Fino the immunity she demands this Court read into RCW 68.50.015.

But, of course, RCW 68.50.015 does not read that Dr. Fino "shall be immune from civil liability for any discretionary decision or failure to make a discretionary decision within his or her official capacity as a coroner or medical examiner." The decision of the Legislature in 1987 to use language that is more limited in RCW 68.50.015 cuts against Appellants' argument that RCW 68.50.015 should be read expansively to immunize Dr. Fino from civil liability for any action or inaction taken in the course of her work as a coroner or medical examiner performing autopsies.

The *Gould* case establishes that, at common law, Dr. Fino is liable for professional negligence claims even while occupied by determining the cause and manner of death. The Court must strictly construe laws granting immunity in derogation of the common law. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 600, 257 P.3d 532 (2011). Accordingly, the legislative history of the immunity at issue here shows that the legislature chose to use more limiting language than immunity for a separate group of government officials contemporaneously codified as an amendment to a separate statute. Because the immunity here is in derogation of common law, the Legislature's decision to use more limiting language must be used to strictly construe the immunity Dr. Fino enjoys. This favors the Superior Court's decision refusing to give the immunity a more expansive reading than either the plain language or the statutory history provide.

3. Other Jurisdictions' Immunity Statutes Show That RCW 68.50.015 Does Not Confer The Broad Immunity Appellants' Claim.

A survey of the immunity for medical examiners and coroners in other jurisdictions is instructive in this case. Unlike Washington State, several states have codified broad immunity for coroners and medical examiners, precluding any civil liability (and in some cases criminal liability) for all acts and omissions in performing an autopsy. Delaware, for example, has codified language providing that a "licensed physician conducting the postmortem examination shall not be liable in damages for any action taken in making such postmortem examination." DEL. CODE ANN. tit. 16, § 2707 (1886); *see also Lee v. Weston*, 402 N.E.2d 23, 25

(Ind. Ct. App. 1980) (Indiana law provides “immunity from civil suits for damages in ordering **or performing** such medical examinations or autopsies”) (citing IND. CODE § 17-3-17-15) (emphasis added); *Kichnet v. Butte-Silver Bow Cty.*, 364 Mont. 347, 352, 274 P.3d 740 (Mont. 2012) (Montana law provides that “[n]o **criminal or civil action** may arise against a licensed physician **for performing an autopsy** authorized by this chapter) (citing MONT. CODE ANN. § 46-4-104 (2009)) (emphasis added).

Other states, unlike Washington, have carved out exceptions to broad immunity for gross negligence, simple negligence, or require good faith to apply immunity. For instance, Maine has codified specific immunity for pathologists “performing an autopsy at the request of a medical examiner or the Chief Medical Examiner,” noting that such pathologists “may not be held liable for damages for any injury or damage” resulting from the performance of duties “unless it can be shown that the injury or damage resulted from the gross negligence of the pathologist.” ME. STAT. TIT. 22, § 3033(B); *see also* MICH. COMP. LAWS § 52.205(7) (providing for broad immunity for good faith performance of duties except for negligent acts or omissions); N.J. REV. STAT. § 26:6A-6 (providing immunity for, *inter alia*, licensed health care practitioners in performing autopsies when acting “in good faith and in accordance with currently accepted medical standards.”).

It is clear that legislatures enacting policies of broad immunity have been competent enough to codify express language in their laws when vesting actors like Dr. Fino with broad immunity. Washington State did not see fit to include such broad language enacting absolute immunity for coroners and medical examiners under RCW 68.50.015 when they perform autopsies. Wisconsin's policy mirrors Washington's on the issue of immunity for coroners and medical examiners. This immunity, as the Wisconsin Supreme Court explained, does not apply to discretionary decisions made in the performance of autopsies:

The defendants' acts in performing the actual procedure of an autopsy are discretionary in nature, but the discretion is medical, not governmental. The theory underlying the creation of immunity for government officials is that immunity will foster the fearless, vigorous and effective administration of policies of the government. That theory is not applicable to the exercise of normal medical discretion during an autopsy. The theory behind immunity for quasi-judicial decisions does not dictate an extension of the immunity to cover the medical decisions of medical personnel employed by a governmental body.

Scarpaci v. Milwaukee Cty., 96 Wis. 2d 663, 686-87 (Wis. 1980); *see also Sheridan v. City of Janesville*, 164 Wis. 2d 420, 427 (Wis. Ct. App. 1991) (there is no immunity for “*the manner* in which the autopsy was performed”). Although Wisconsin's statute on coroner immunity is distinct from RCW 68.50.015 in the language codified, the policy underlying the codification of RCW 68.50.015 reflects the reasoning in *Scarpaci* on limited immunity.

The *Gould* decision found a coroner could be held liable, under common law theories of negligence, for erroneously determining the cause

and manner of death. *Gould*, 39 Wn. App. at 732. Like Wisconsin, the Washington State Legislature thereafter decided that this quasi-governmental function of determining the cause and manner of death should be immunized from civil liability. Senator Talmadge's testimony described *supra* at §2.a shows that public policy supports limited immunity for coroners and medical examiners for their determinations of the cause and manner of death to advance the government policies of justice and criminal investigation. The legislature did not include language supporting Dr. Fino's claims of broad immunity.

B. THE SUPERIOR COURT PROPERLY DENIED DR. FINO'S MOTION FOR SUMMARY JUDGMENT.

1. Dr. Fino Owed A Duty To Keith Dahl.

Mr. Dahl alleges, in part, that Dr. Fino was negligent in performing the autopsy of Brandon, and she unnecessarily destroyed and damaged his son's body causing him injury. CP at 4-8. In Washington, a medical examiner's actions are subject to the tort standard applicable to professional negligence. *Gould*, 39 Wn. App. at 732; *see also Adams v. King Cty.*, 164 Wn.2d 640, 658, 192 P.3d 891 (2008). In enacting the immunity found in RCW 68.50.015, the Legislature overruled the holding in *Gould* only to the extent directly contrary to that limited statutory immunity. The rules and reasoning set forth in *Gould* remain intact unless otherwise repudiated by statute or common law. Accordingly, *Gould's* holding that a coroner could be held liable for negligence for claims that

are not protected by qualified immunity remains intact, unless now precluded by the statutory immunity under RCW 68.50.015.

Mr. Dahl does not bring claims against Dr. Fino involving a “balancing of risks and advantages in the process of determining a policy,” which would be barred under the rule announced in *Gould*. Nor does Mr. Dahl’s lawsuit advance claims that Dr. Fino’s determination of the manner and cause of his son’s death was negligent, which would be barred by the immunity in RCW 68.50.015. To be clear, RCW 68.50.015 does not overrule the duty the *Gould* court found was owed by coroners and medical examiners to the families of decedents subject to their autopsies.

Because Washington *common law* has long held that coroners and medical examiners owe a duty to family members of decedents subject to autopsies, Dr. Fino’s reliance on the public duty doctrine is misplaced. *Cf. Whaley v. State, Dep’t of Soc. & Health Servs.*, 90 Wn. App. 658, 672, 956 P.2d 1100 (1998) (the existence of a common law duty “does not depend on legislation”); *Munich v. Skagit Emergency Comm’n Ctr.*, 175 Wn.2d 871 (2012) (“[T]he only governmental duties we have limited by application of the public duty doctrine are duties imposed by a statute, ordinance, or regulation. This court has never held that a government did not have a common law duty solely because of the public duty doctrine.”). But even if the common law duty to family members owed by coroners and medical examiners conducting autopsies did not exist, two exceptions to the public duty doctrine are applicable here. Dr. Fino cites to *Taylor v.*

Stevens Cty., 111 Wn.2d 159, 759 P.2d 447 (1988), for the proposition that the duty element of a negligence claim “must be one owed to the injured plaintiff, and not one to the public in general.” See Appellant’s Brief at 35. The Washington Supreme Court in *Taylor* also announced that the “public duty rule of nonliability does not apply where the Legislature enacts legislation for the protection of persons of the plaintiff’s class.” 111 Wn.2d at 164. This is one of four recognized exceptions to the public duty rule in Washington, which also include “legislative intent” (*i.e.*, protection of the plaintiff’s class), failure to enforce, the rescue doctrine, and a special relationship. *Munich*, 175 Wn.2d at 879. “If any one of the exceptions applies, [the defendant] is held as a matter of law to owe a duty to the plaintiff.” *Id.*

A special relationship exception to the public duty doctrine permits claims of negligence in the performance of public duties “if the plaintiff can prove circumstances setting his or her relationship with the government apart from that of the general public.” *Cummins v. Lewis Cty.*, 156 Wn.2d 844, 854, 133 P.3d 458 (2006) (citing *Taylor*, 111 Wn.2d at 166). Courts find a special relationship between plaintiff and defendant when (1) there is privity between a defendant and an injured plaintiff, setting “the latter apart from the general public”; and (2) there are assurances offered; which (3) leads to the plaintiff’s justifiable reliance to his or her detriment. *Cummins*, 156 Wn.2d at 854 (quoting *Beal v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998)). The term privity, as

used in the context of this exception to the public duty doctrine, “is used in the broad sense of the word” and refers to the relationship between a defendant “and any reasonably foreseeable plaintiff.” *Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 286–87, 669 P.2d 451 (1983) (internal quotations omitted). Regarding the second element, “the assurances need not always be specifically averred, as some relationships carry the implicit character of assurance.” *Id.* (citing generally *Halvorson v. Dahl*, 89 Wn.2d 673, 676–77, 574 P.2d 1190 (1978) and *Campbell v. Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975)). Mr. Dahl has privity with Dr. Fino because he was a reasonably foreseeable plaintiff under the statutory framework governing Dr. Fino’s work. *See, e.g.*, RCW 68.50.105 (requiring Dr. Fino, upon request, to meet with the family, including surviving parents, of decedents to discuss the autopsy of their loved one); and RCW 68.50.150(3)(e) (vesting Mr. Dahl specifically with the right to control disposition of his son’s remains). The statutory framework and common law create assurances running to the family members of decedents given, for example, their specific statutory right to control the disposition of their loved one’s remains following an autopsy. In this case, Mr. Dahl 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. Mr. Dahl reasonably relied on those assurances to his detriment.

Even if there is no special relationship found here, there is a legislative intent in the statutory scheme governing Dr. Fino's actions to protect a certain class of people—family members of decedents under the jurisdiction of coroners and medical examiners. In *Halvorson*, the Washington Supreme Court noted that liability may arise if a law “by its terms evidences a clear intent to identify and protect a particular and circumscribed class of persons.” *Halvorson*, 89 Wn.2d at 676. As noted above, RCW 68.50.105(3)(b) creates a statutory right vested in a protected, particular, and circumscribed class of persons, *i.e.*, members of a decedent's family. This specific class of people has the right to meet with the coroner or medical examiner “to discuss the findings of the autopsy or postmortem.” *Id.* The statute expressly defines “family” to include any “parent.” *Id.* Furthermore, the law specifically vests Mr. Dahl with the right to control the disposition of his son's remains, and therefore, had a right to seek a private second opinion by virtue of another pathologist's examination. *See* RCW 68.50.150(3)(e). Unfortunately, because of willful, deliberate, and/or negligent acts of Dr. Fino, she deprived a specific, protected class member of his right to ultimately control the disposition of his son's remains after he died alone, in jail in solitary confinement, after he was beaten and sustained traumatic brain injury. CP at 13-20. Because Keith Dahl is Brandon's father, and because the legislature showed a “clear intent” to protect family members of

decedents like Mr. Dahl, Dr. Fino owed Mr. Dahl a duty for purposes of negligence claims related to her autopsy of Brandon.

2. The Superior Court Properly Ruled That Mr. Dahl Advanced Adequate Evidence To Present To A Jury On His Interference With A Dead Body Claim.

The argument that Mr. Dahl has not stated a *prima facie* case of intentional interference with a dead body is meritless. In the context of this appeal of an order contrary to a party moving for summary judgment, all evidence must be construed in favor of the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015) (citing *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989)). This is consistent with the “overriding responsibility” of courts “to interpret the rules in a way that advancing the underlying purpose of the rules, which is to reach a just determination in every action.” *See Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498, 933 P.2d 1036 (1997), *as amended on denial of reconsideration* (Jun. 5, 1997) (finding an abuse of discretion in the imposition of discovery sanctions and exclusion of expert witness testimony).

Washington courts have long recognized a common law action for tortious interference with a dead body. *Wright v. Beardsley*, 46 Wash. 16, 20, 89 P. 172 (1907); *Gadbury v. Bleitz*, 133 Wash. 134, 136, 233 P. 299 (1925); *Reid v. Pierce Cty.*, 136 Wn.2d 195, 207, 961 P.2d 333 (1998); *Adams*, 164 Wn.2d at 656; *Whitney v. Cervantes*, 182 Wn. App. 64, 73, 328 P.3d 957 (2014). Mr. Dahl’s tortious interference claim is based on his “interest in the proper treatment of [his son’s] body,” and such claims,

if successful, permit Mr. Dahl to recover for *his* mental suffering derived from the willful misuse of his son's body. *Adams*, 164 Wn.2d at 658. The mental suffering must directly result from a willful wrong. *Whitney*, 182 Wn. App. at 74.

Dr. Fino argues that there was no evidence of willful misuse presented to withstand her motion for summary judgment. This is not accurate. The term "misuse" supporting tortious interference with a dead body claims in Washington means to misuse a body "in such a manner as to cause the relatives or persons charged with [the body's] decent sepulture to naturally suffer mental anguish," including when a person "wrongfully mutilates" a body. *Wright*, 46 Wash. at 20. The Washington Supreme Court's position on tortious interference is in accord with this rule, noting that:

While the parameters of the misuse that gives rise to a cause of action for tortious interference might be difficult to grasp firmly, this court may have best described it as misuse "in such a manner as to cause the relatives or persons charged with its decent sepulture to naturally suffer mental anguish."

Adams, 164 Wn.2d at 658. The Washington Supreme Court has also refused to define "misuse" with any more particularity, highlighting the fact-specific nature of such claims varying from case to case and reasoning that it "need not attempt to define more precisely the nature of such misuse as the extent or nature of the interference alleged generally does not bar recovery." *Id.* (citing *Gadbury*, 133 Wash. at 137-38 ("[T]he extent or degree of the misuse ought not to prevent recovery.")). When

determining whether willful misuse has occurred, courts “focus[] on the emotional effect of the treatment of the corpse rather than the extent of misuse.” *Id.* at 659 (citing *Wright*, 46 Wash. at 20, and *Gadbury*, 133 Wash. at 137- 38).

Mr. Dahl alleges Dr. Fino committed willful and intentional acts and omissions during her autopsy of Brandon that resulted in detrimental emotional injuries. Among these willful and intentional acts was the unnecessary destruction of Brandon’s brain to such a degree that further examination was impossible. Dr. Fino now characterizes the issue before this Court on Mr. Dahl’s tortious interference claim as whether a plaintiff “may state a claim for intentional misuse of a corpse by merely alleging a personal belief that an authorized dissection of a particular bodily organ was a ‘mutilation?’” Appellants’ Brief at 3. This is not a fair characterization of the issue. A more balanced framing of the issue is— “whether evidence presented from a pathologist showing that Dr. Fino needlessly (i.e., beyond the scope of that which was necessary to determine the cause and manner of Brandon’s death) mutilated and/or discarded Brandon’s brain causing emotional injury to Keith Dahl—which injuries were also supported by evidence—is adequate evidence to support the Superior Court’s denial of the motion for summary judgment dismissal of Mr. Dahl’s tortious interference claim?” Given the applicable law, the question must be answered in the affirmative.

Mr. Dahl advanced far more than a mere “personal belief” that Dr. Fino mutilated his son’s body. Dr. Omalu, an expert pathologist who conducted a second autopsy of Brandon at Mr. Dahl’s behest, presented evidence in the record that only small and “random pieces of the brain were saved” and that this was a “gross deviation from the standards of practice of the forensic autopsy involving possible brain trauma.” CP at 13-20. Dr. Omalu continued by describing Dr. Fino’s destruction of Brandon’s brain tissue, which for a variety of reasons—including the inability of Dr. Omalu to conduct further analysis into what transpired before Brandon’s death while he was in custody—caused Mr. Dahl diagnosed and evident mental trauma:

There are specific and selective topographic regions of the brain that must be examined, analyzed and saved for further immunohistochemical analyses None of these regions of the brain were saved in this case. Dr. Fino completely failed to identify traumatic brain injury in this case, and deviated from the standards of practice in failing to save these regions of the brain in formalin. I could not perform the immunohistochemical stains I had wanted to perform in order to more accurately evaluate, quantify and time the severe traumatic brain injury that Brandon Dahl suffered.

Id. at 20; *see also id.* at 127-30. Dr. Omalu’s autopsy report supplied evidence that the minimal brain material left after Dr. Fino destroyed most of it, was “pulverized, with near-complete obliteration of the anatomic detail.” *Id.* at 40-41. The Washington Supreme Court has noted that “permanent removal of the entire brain certainly can be considered a mutilation of the body.” *Adams*, 164 Wn.2d at 659. Certainly, destruction of the vast majority of Brandon’s brain and pulverization of what

remained is effectively no different than “removal of the entire brain,” and therefore validly characterized as “mutilation” under Washington law. Further examination of Brandon’s brain—which was Mr. Dahl’s right—proved impossible according to the evidence Mr. Dahl presented. In short, the only way Dr. Fino can prevail on this issue in her appeal is if this Court declines to consider the evidence Mr. Dahl presented at all. Of course, the law requires this Court not only consider Mr. Dahl’s evidence, but consider it in his favor. Based on this, the Superior Court’s order denying Dr. Fino’s motion for summary judgment to dismiss Mr. Dahl’s tortious interference claims should be affirmed.

3. The Presence Element of Outrage And Negligent Infliction Of Emotional Distress Should Not Apply To Mr. Dahl’s Claims Because They Are Predicated On The Violation Of A Right Held By, And a Duty Owed Directly to, Mr. Dahl.

Mr. Dahl concedes Dr. Fino has correctly identified the presence element requirement for an outrage and negligent infliction of emotional distress claim in Washington—“the plaintiff must be . . . present at the time of such conduct.” *Reid*, 136 Wn.2d at 202 (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59-60, 530 P.2d 291, 293 (1975)). Mr. Dahl urges this Court to find that the unique facts of this case warrant a modification to existing law—that Washington should align itself with other jurisdictions, as set forth below, who have progressed from a rule like the presence requirement, which can and does spawn injustice in certain circumstances, such as the case before this Court. Put another way, Mr. Dahl hereby preserves for the record his objection to the current unjust

state of the law in Washington on the presence element requirement for outrage and negligent infliction of emotional distress claims. This is a nonfrivolous argument for modifying or reversing existing law, and establishing a new and just state of the common law on the torts of outrage and negligent infliction of emotional distress.

Reid involved suits brought by the family members of decedents against the county for negligent infliction of emotional distress, outrage, and invasion of privacy based on allegations that county employees had appropriated and displayed photographs of related decedents' corpses. *Id.* The Washington Supreme Court held that the decedents' family members could not recover on outrage and negligent infliction of emotional distress claims because they were not present when the county employees appropriated and displayed the photographs. *Id.* at 203-04.

There is no case Mr. Dahl is aware of in Washington, however, barring claims predicated on the outrage and emotional distress resulting from the unnecessary mutilation of a deceased loved one to the point that further examination is impossible. A rule that presence is required in this context effectively functions as a total bar on outrage and negligent infliction of emotional distress claims for any coroner or medical examiner's mistreatment of a dead body. Family members are generally not be present during an autopsy because many "regard an autopsy with extreme aversion." *See Parker v. Quinn-McGowen Co.*, 262 N.C. 560, 562, 138 S.E.2d 214 (1964). And, moreover, it is unclear whether a

family member would even be permitted to be present during an autopsy should they desire to be present.

Cases predicated on negligence or tortious interference with a dead body rest on the breach of a duty to the claimant, unlike the facts in other bystander cases that are predicated on the witnessing of a breach of duty to a loved one. Other jurisdictions have held that this distinguishing factor gives rise to an exception to the presence requirement for outrage and negligent infliction of emotional distress claims. *See, e.g., Lacy v. Cooper Hosp. Univ. Med. Ctr.*, 745 F.Supp. 1029, 1035 (D.N.J. 1990) (bystander cases do not apply where a negligent infliction of emotional distress claim arises from an unauthorized postmortem procedure because such a claim is based on a defendant's breach of a duty to the plaintiff and not to the decedent); *Green v. S. Transplant Serv., Inc.*, 698 Sp.2d 699, 701 (La. Ct. App. 1997) (such claims are for damages sustained directly by the claimants and not to be considered in the category of derivative claims for emotional distress resulting from physical harm to a third party); *Aldrewman v. Ford*, 146 Kan. 698, 702, 72 P.2d 981 (1937) (emotional distress "would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had ben mutilated"); *Everett v. S. Transplant Serv., Inc.*, 700 So.2d 909, 912 (La. Ct. App. 1997) (injury is not physical damage to the body of the decedent but "to the survivors in the form of emotional distress arising out of the knowledge that the desecration has occurred"); *cf. Christensen v. Super.*

Ct., 54 Cal.3d 868, 894, 2 Cal.Rptr.2d 79, 820 P.2d 181 (1991) (mishandling of a corpse is “likely to cause serious emotional distress to members of the decedent’s immediate family regardless of whether they observe the actual negligent conduct or injury to the remains of their decedent”).

IV. CONCLUSION

Appellants have failed to carry their burden. The Superior Court properly denied Appellant’s summary judgment motion. The Superior Court properly found the scope of immunity conferred by RCW 68.50.015 did not bar Mr. Dah’s claims. The Superior Court also did not commit obvious error in denying Dr. Fino’s summary judgment motion pursuant to CR 56 based on issues of material fact. Accordingly, this Court should affirm the decision of the Superior Court.

Respectfully submitted this 8th day of October 2018.



Gabriel S. Galanda, WSBA #30331
Ryan Dreveskracht, WSBA #42593
R. Joseph Sexton, WSBA # 38063
Bree R. Black Horse, WSBA # 47803
Galanda Broadman, PLLC
8606 35th Avenue NE, Ste. L1
P.O. Box 15146
Seattle, WA 98115
(206) 557-7509
Attorneys for Plaintiff/Respondent

CERTIFICATE OF SERVICE

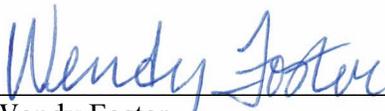
I, Wendy Foster, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.
2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Ste. L1, Seattle, WA 98115.
3. Today I served the foregoing document, via email on the following parties:

Michele C. Atkins
Jennifer D. Koh
FAVROS Law
701 Fifth Avenue, Suite 4750
Seattle, WA 98104
Michele@favros.com
Jennifer@favros.com

The foregoing Statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, on October 8, 2018.



Wendy Foster

GALANDA BROADMAN

October 08, 2018 - 4:58 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51455-9
Appellate Court Case Title: Keith Dahl, Respondent v. Gina Fino and Pacific NW Forensic Pathologists, Appellants
Superior Court Case Number: 17-2-07011-0

The following documents have been uploaded:

- 514559_Briefs_20181008165828D2610217_8924.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 10.08.18 Dahl v. Fino Brief .pdf

A copy of the uploaded files will be sent to:

- bree@galandabroadman.com
- carrie@favros.com
- jennifer@favros.com
- joe@galandabroadman.com
- michele@favros.com
- ryan@galandabroadman.com
- wendy@galandabroadman.com

Comments:

Sender Name: Wendy Foster - Email: wendy@galandabroadman.com

Filing on Behalf of: Gabriel Steven Galanda - Email: gabe@galandabroadman.com (Alternate Email:)

Address:
PO Box 15146
Seattle, WA, 98115
Phone: (206) 557-7509

Note: The Filing Id is 20181008165828D2610217