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No. 59951-8-1

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

NANCY ADAMS and MATTHEW
ADAMS, wife and husband,

Plaintiff/Appellant,

v.

KING COUNTY, a municipal corporation;
STANLEY MEDICAL RESEARCH INSTITUTE; and
E. FULLER TORREY,

Defendants/Respondents.

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STATE OF WASHINGTON
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ON APPEAL FROM KING COUNTY SUPERIOR COURT
(HON. JOAN DUBUQUE)

BRIEF OF APPELLANT

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I. INTRODUCTION

Nancy Adams brings this appeal of the trial court's dismissal of her lawsuit against the King County Medical Examiner's Office (KCME), Stanley Medical Research Institute (SMRI) and E. Fuller Torrey, MD.

As this brief will demonstrate, the trial court erroneously ruled that an undesignated anatomical gift of "any organs" on a decedent's driver's license permits donees other than hospitals to take and receive any body part of the decedent.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its order dismissing Nancy Adams's claims against Defendants on April 26, 2007.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in ruling that Jesse Smith's undesignated anatomical gift authorized the respondents to take and receive his body parts where:

- a. RCW 68.50.570(2) restricts donees of undesignated anatomical gifts to "any hospital," and neither respondent constitutes such a "hospital;" and

b. The word "may" as used in the statute simply gives a "hospital" the right to accept or refuse an undesignated anatomical gift.

2. Whether the trial court erred in failing to equitably estop the defense from claiming that Jesse Smith's undesignated anatomical gift justified their appropriation of his body parts where:

a. The respondents did not know of the anatomical gift and instead sought consent from Nancy Adams;

b. Nancy Adams relied upon the representations from the respondents;

c. Nancy Adams has suffered injury because the trial court allowed the respondents to contradict or repudiate their actions in obtaining her consent.

3. Whether the trial court erred in dismissing Nancy Adams' claims for common law interference with the corpse of her son where the defendants affirmatively misled her about the scope of the donation, and took and received far more body parts than they stated that they would.

4. Whether the court should adopt the Restatement (Second) of Torts § 868 (1965) to govern claims for wrongful interference with or misuse of a corpse.

5. Whether the Washington Anatomical Gift Act, RCW 68.50, *et seq*, supports an implied cause of action for damages.

6. Whether the trial court erred in dismissing Nancy Adams' claims for fraud where, in seeking donation of the remains of Jesse Smith, the respondents knowingly made false statements upon which Nancy Adams relied in granting consent.

7. Whether the trial court erred in dismissing Nancy Adams' claim for violation of privacy where:

a. KCME engaged in egregious misrepresentations to induce Nancy Adams to consent to turn over tissue from Jesse Smith for scientific research; and

b. The defendants took and received far more body parts than that for which they gained consent.

8. Whether the conduct of KCME and SMRI in combining to facilitate organ donation through unlawful misrepresentations supports a claim for civil conspiracy.

IV. STATEMENT OF THE CASE

A. Procedural History.

Plaintiffs Nancy and Matthew Adams originally filed this case in Pierce County Superior Court on August 25, 2005. See CP 154-

168. Defendants SMRI and Torrey filed their answer on January 3, 2006, and an amended answer on January 9, 2006. CP 174-175.

Defendant KCME answered on October 21, 2005. CP 53-57.

Plaintiffs filed an amended complaint on March 14, 2006. CP 186-198. All three defendants answered on May 11, 2006. CP 199-204.

On October 7, 2005, defendants SMRI and Torrey moved to _change venue from Pierce County_ to King County. CP 123-140.

KCME joined in the motion. CP 118. Plaintiffs opposed the motion. CP 74-115. On October 21, 2005, the court granted the motion to change venue. CP 50-52.

On March 23, 2007, defendants moved for summary judgment. CP 293-315, 205-292. The defendants' primary argument urged that Jesse Smith's designation of himself as an organ donor when he renewed his driver's license authorized KCME to take his body parts and send them to SMRI notwithstanding consent of his next-of-kin. CP 299-301. The defense also argued that they did not commit fraud, they did not violate the right to privacy, they did not violate the common law prohibition against interference with a dead body and did not engage in a civil conspiracy. CP 312-314.

In resisting the motion, Mrs. Adams argued that Jesse Smith's anatomical gift did not designate a recipient. Therefore, pursuant to RCW 68.50.570(2) only "any hospital" could accept the gift. Neither KCME nor SMRI were a hospital. CP 323-324. Mrs. Adams also argued that any donation of Jesse Smith's remains required the consent of his next-of-kin. Because KCME only sought a gift of "brain tissue," and actually took far more, Mrs. Adams contended that it did not obtain the requisite consent and faced liability for her damages under several theories. These included violation of Washington's Anatomical Gift Act (WAGA), common law interference with a corpse, the Restatement (Second) of Torts § 868, fraud, violation of right to privacy and civil conspiracy. CP 327-337. Mrs. Adams did not resist dismissal of claims based on violation of the consumer protection act, conversion, outrage and any claim for Matthew Adams. CP 322.

The trial court granted the motion and dismissed the case on April 27, 2007. CP 575-576. On May 7, 2007, Plaintiff filed a timely Notice of Appeal to this court. CP 577-580.

B. Statement of Facts.

1. The King County/ Stanley Contract.

SMRI is located in Bethesda, Maryland. It supports research on the causes and treatment of mental illness. Between 1994 and

2005, SMRI collected brains from medical examiners around the country. From 1994 through 2004, KCME supplied brains to SMRI. CP 560-561.

In 1994, KCME and SMRI entered into a written agreement. CP 347, 355, 366-379. The agreement provided that SMRI would pay for a full-time pathologist to work at KCME. In return, the pathologist would devote 25 percent of his or her time to obtaining and processing donations for SMRI. CP 366-369.

SMRI sought the entire brain, liver and spleen portions, glands, blood samples and fluids from decedents whose remains passed through the King County Medical Examiner's Office. CP 401-410.

Between 1994 and 2004, KCME sent SMRI body parts from the remains of 270 decedents. CP 347-348, 353-354, 365.

Nabila Haikal, MD worked as the SMRI pathologist at KCME from 2001 to 2004. CP 222.

2. The Death of Jesse Smith and Solicitation of His Remains.

Nancy Adams' 21 year-old son, Jesse Smith, passed away unexpectedly because of heart problems in the early morning of May 21, 2003. CP 424-426. Between 4:00 and 5:00 in the evening, Dr. Haikal called Mrs. Adams. CP 224, 436, 468. Dr. Haikal requested

that Mrs. Adams agree to donate some of Jesse's remains to SMRI for research into mental illness. CP 224, 439-441. The call lasted about 20 minutes. CP 436.

Dr. Haikal does not recall the conversation. Nonetheless, she claims that she would have followed a "custom and practice" in soliciting the donation. CP 224. On the other hand, Mrs. Adams, and her husband Matthew Adams, who also participated in the conversation, specifically recall the telephone call. Their testimony differs markedly from what Dr. Haikal claimed she would have done.

Nancy Adams testified that Haikal told her that she sought only "brain tissue" for research involving mental illness. CP 441. Mrs. Adams told Dr. Haikal that her son did not suffer from any mental illness. Dr Haikal=stated=that=she=sought=tissue=from=normal=patients for use as controls. Mrs. Adams told Dr. Haikal that she did not think they could participate because the family planned an open-casket funeral. Dr. Haikal responded that taking a piece or sample of brain tissue would not change their ability to have an open-casket funeral. CP 436.

Mrs. Adams inquired about the size of the sample. Dr. Haikal responded that the sample would be very small, no more than an inch. CP 441, 448. Mrs. Adams asked if she could defer the decision

to a later date. Haikal insisted that Mrs. Adams decide immediately. CP 437-438. Mrs. Adams described Dr. Haikal as very persistent, acting like a salesman that would not take no for an answer. CP 443. Mrs. Adams told Dr. Haikal about three times that she did not think they could participate in the study because they did not fit. CP 442.

After five minutes of this conversation, Matthew Adams came upstairs to the room where his wife was engaged in the conversation with Dr. Haikal. CP 468. It appeared to him that Mrs. Adams was arguing with the person on the other end of the line. Mrs. Adams said, "I'm going to let you talk to my husband because I can't deal with this." She told her husband that someone from the medical examiner's office had called, and that they wanted a piece of Jesse Smith's-br-ain-. C-P 468-46g.

Matthew Adams took the phone and introduced himself as Nancy Adams' husband. Dr. Haikal identified herself as a representative of KCME. She told Mr. Adams that KCME was affiliated with a study with respect to mental illness. Dr. Haikal asked if Mrs. Adams would donate brain tissue from Jesse Smith to participate in the study. CP 469.

As this conversation transpired, Nancy Adams sat with her head in her hands. She looked up at her husband and said that she

did not understand what they wanted, whether they sought the whole brain or just part of the brain. CP 469. Mr. Adams asked Dr. Haikal to clarify what she meant by "brain tissue." He asked, "Do you want to take his whole brain or do you want a sample of the brain like that would fit on a slide?" As Matthew said this, Mrs. Adams said, "They can't have his brain."

Mr. Adams told Dr. Haikal that Mrs. Adams did not wish to donate Jesse's whole brain. CP 469, 471.

Matthew Adams again asked Dr. Haikal if by "tissue" she meant something that would fit on a slide, or the whole brain. Dr. Haikal responded, "We just want a small piece of the brain," or words to that effect. CP 469. Mr. Adams told his wife that they just wanted a_piec_e,_and_hel_d_up_his_f_inger_s about an_inch apart, denoting a piece that would fit on a slide. CP 469. He told her that Haikal had asked for an "inch" of tissue. CP 448. Mrs. Adams said, "Well, if they just want a piece, that's okay." CP 469. Mr. Adams told Dr. Haikal that it was okay with his wife if they took a piece of Jesse's brain. CP 469.

Dr. Haikal asked to talk with Nancy Adams again. CP 469. He handed the phone to his wife. CP 469. Mrs. Adams reviewed and confirmed what Haikal had told her and Matthew and what Haikal had

assured them. She then agreed to give consent for them to take a tissue sample. CP 438.

Dr. Haikal did not tell Mrs. Adams that KCME intended to take liver and spleen samples. CP 436.

Dr. Haikal, and her assistant, Joe Frisino, then completed some KCME/SMRI paperwork documenting the purported consent. CP 224, 234-235, 439. Dr. Haikal then proceeded to ship Jesse Smith's brain, portions of his liver and spleen, blood and cerebrospinal fluid to SMRI. CP 224-225.

3. Jesse Smith's **Decision to Become an Organ Donor.**

Jesse Smith renewed his driver's license on March 28, 2003. In doing so, he agreed to make an anatomical gift to take effect upon his death. He designated that he would donate an organ. CP 268-269, 432. Jesse had discussed his intent on becoming an organ donor with his mother. He intended to get on the bone marrow registry. If he were to die, he wanted to have his organs transplanted so another human being could live. CP 431-432.

Dr. Haikal does not claim that she relied upon Jesse Smith's anatomical gift in soliciting consent from Nancy Adams and in processing and shipping portions of his remains to SMRI. CP 225.

The evidence supports the inference that Haikal neither knew of the designation nor relied upon it.

4. Nancy Adams' Discovery of the Defendants' Misconduct.

In the spring of 2005, Mr. and Mrs. Adams learned that KCME had harvested Jesse Smith's entire brain, and sent it to SMRI for research. KIRO TV broadcast a story about the KCME/SMRI brain harvesting scheme. Matthew Adams' coworker viewed it. The coworker told Mr. Adams who checked with the reporter: The reporter verified that he had information indicating that KCME sent Jesse's body parts to SMRI. CP 449-450.

Following Jesse's death, Nancy Adams suffered from grief and depression which required medical and psychological treatment. CP 452-455. After learning what the defendants had done with Jesse's remains, she returned to psychiatric care and received a doubling of her medication. CP 291-292, 455-456.

V. ARGUMENT

A. The Standard of Review.

Appellate courts review summary judgment de novo, engaging in the same inquiry as the trial court. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007).

The court should grant a motion for summary judgment only if there exists no genuine issue as to any material fact and the moving party shows entitlement to judgment as a matter of law. CR 56(c). The party moving for summary judgment bears the burden of showing the absence of an issue of material fact. *Crippen v. Bellevue*, 61 Wn.App. 251, 257, 810 P.2d 50 (1991). The court must view the facts and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Berger v. Sonneland*, 144 Wn.2d 91, 102-103, 26 P.3d 257 (2001).

B. Jesse Smith's Anatomical Gift Did Not Authorize KCME and SMRI to Ship and Receive His Body Parts Because Neither Entity Constitutes "Any Hospital."

RCW 68.50.570(1) Lists Numerous Donees of Anatomical Gifts. RCW 68.50.570(2) Limits the Receipt of an-Undesignated-Anatomical-Gift to "Any Hospital." The Difference Reflects the Legislature's Intent to Restrict the Recipient of an Undesignated Anatomical Gift.

RCW 68.50.570(1) governs who may become a donee of an anatomical gift. The statute provides:

The following persons may become donees of anatomical gifts for the purposes stated: (a) a hospital, physician, surgeon, or procurement organization for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science; (b) an accredited medical or dental school, college, or university for education, research, or advancement of medical or dental science; or (c) a designated individual

for transplantation or therapy needed by that individual.

RCW 68.50.570(2) governs who may accept an anatomical gift

if the donor does not designate a specific donee:

An anatomical gift may be made to a designated donee or without designating a donee. If a donee is not designated or if the donee is not available or rejects the anatomical gift, the anatomical gift may be accepted by any hospital.

The WAGA defines a hospital as follows (RCW 68.50.530(6)):

"Hospital" means a facility licensed under Chapter 7041 RCW; or as a hospital under the law of any state or facility operated as a hospital by the United States government, a state, or a subdivision of a state.

Jesse Smith did not designate a donor to receive his anatomical gift. CP269. Therefore, RCW 68.50.570(2) controlled the determination of a donee who might receive his gift. The statute limited such an undesignated gift to "any hospital." Neither KCME nor SMRI meet the statutory definition of "any hospital." Therefore, neither had the right to take and receive an anatomical gift of Jesse's remains. As a result, Jesse's anatomical gift does not excuse the defendants' wrongful removal and retention of Jesse Smith's body parts.

Our courts have long held that where a statute is clear on its face, courts ascertain its meaning from the statute alone. *A.M. Cont.*

Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). In that case, the court stated "[a]n unambiguous statute is not subject to judicial construction, and [the court] will not add language to an unambiguous statute even if [the court] believes that the legislature intended something else but did not adequately express it." *Id.*

Where the legislature uses certain language in one instance, and different language in another, there exists a clear difference in legislative intent. *Seeber v. Wash. Pub. Disclosure Comm'n.*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981).

A general principle of statutory construction provides that where a statute specifically designates things or classes of things upon which it operates, an inference arises in law that all things or classes-of-things-omitted- -were-intentionally-omitted-by-the-legislature. *State v. Swanson*, 116 Wn.App. 67, 75, 65 P.3d 343 (2003). In other words, courts deem such omissions exclusions. *State v. Williams*, 29 Wn.App. 86, 91, 627 P.2d 581 (1981).

This method or maxim of statutory construction is known as *expressio unis est exclusio alterius*. Our Supreme Court in *In Re: Det. of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002) applied the maxim to RCW 71.09, which governs sexually violent predator commitment proceedings. In that case, the State sought to have several sex

offenders involuntarily committed as sexually violent predators. RCW 71.09 operates under principles of civil law. The State sought orders compelling the accused predators to undergo pre-commitment CR 35 examinations. The accused predators resisted, arguing that RCW 71.09 did not authorize such examinations before commitment.

Applying *expressio unis est exclusio alterius*, our Supreme Court denied the CR 35 examinations, as follows, at 490-491 (emphasis in original):

In order to interpret a statute, each of its provisions "should be read in relation to the other provisions, and the statute should be construed as a whole." [Citations omitted].

RCW 71.09.040 and .050 set out the commitment proceedings to determine whether the person is a sexually violent predator - including a probable cause hearing, transfer **for** evaluation, confinement, and trial. Apart from the evaluation to be conducted when the probable cause determination is made, these sections are silent about mental examinations during discovery.

In contrast, a subsequent section of the statute specifically addresses the parties' rights at a show cause hearing following a petition for conditional release or unconditional discharge of a person who has been committed as a sexually violent predator:

[T]he committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded to the person at the initial commitment proceeding. The

prosecuting agency or the Attorney General if requested by the County shall represent the State and shall have a right to a jury trial *and to have the committed person evaluated by experts chosen by the State.* The committed person shall also have the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment.

Former RCW 71.09.090(2) (1995) (emphasis added).

~~-The- legislature-has expressly provided- that evaluations by experts are allowed in the proceeding following commitment as a sexually violent predator. In the absence of such statutory language for pre-trial discovery, it can be inferred that the legislature did not intend for the State to conduct such evaluations before commitment. Under *expressio unis est alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. *Landmark Dev.. Inc.-v City-of-Roy*, 1-38-W- -n.2d-561, 57-1-, 908-P-.2d 1234 (1999). Omissions are deemed to be exclusions. *State v. Williams*, 29 Wn.App. 86, 91, 627 P.2d 581 (1981).~~

The statute expressly provides for post commitment evaluation, but makes no mention of evaluations during pre-trial discovery. CR 35 is inconsistent with the special proceedings set out in Chapter 71.09 RCW. We hold that the mental examination by the State's experts of a person not yet determined to be a sexually violent predator is limited to the evaluation required under RCW 71.09.040(4).

Our Supreme Court applied the principle again in *State v. Delgado*, 148 Wn.2d 723, 63 P.3d 792 (2003). In that case, the State

prosecuted the defendant for first degree rape of a child and first degree child molestation. The trial court entered a judgment finding the defendant guilty of both charges. In sentencing, the court treated the two convictions as one offense because they encompassed the same criminal conduct. The court also declined to count the defendant's prior statutory rape condition as a "strike" for purposes of classifying the defendant as a persisting offender under the two strikes provisions of RCW 9.94A, the Persistent Offender Accountability Act.

The Supreme Court had to consider whether to read a "comparability analysis" into former RCW 9.94A.030(27)(1998). The State contended that the statute presented an ambiguity, requiring the court to construe the statute to include as strikes offenses not listed in the statute, that bore factual similarity to those listed in the statute. *Delgado*, at 727. The Supreme Court refused to interpret the statute to require a comparability analysis, at 727-729, as follows:

We disagree that a comparability analysis is warranted. When statutory language is unambiguous, we look only to that language to determine the legislative intent without considering outside sources. "Plain language does not require construction." *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). When we interpret a criminal statute, we give it a literal and strict interpretation. *Wilson*, 125 Wn.2d at 217. We cannot add words or clauses to an unambiguous

statute when the legislature has chosen not to include that language. We assume the legislature "means exactly what it says." *Davis v. Dept of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999). Here, the legislature unambiguously did not include a comparability clause in the two strike statute in effect when Delgado committed his offense. Former RCW 9.94A.030(27)(b)(i)(1998). Our inquiry, thus, ends with the plain language before us.

*

Our conclusion is further supported by a comparison of the two strike statute in effect at the time of Delgado's offense with the immediately preceding three-strike statute. Significantly, the legislature included a comparability clause in the° three=strike-offender definition. To be sentenced as a three-strike persistent offender, an offender must be convicted of a most serious offense and have "been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses." Former RCW 9.94A.030(27)(a)(i)-(ii)(1998). "Most serious offenses" include, in relevant part

Any felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a most serious offense under this subsection . . .

Former RCW 9.94A.030(23)(u)(1998). Thus, the legislature knew how to include comparable offenses in the definition of a persistent offender. Yet, the legislature neither directly included a comparability clause, nor incorporated the definition of "most serious offense," into the definition of two-strike persistent offenders directly following the three-strike definition.

"Under *expressio unis est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other. *In re. Del. of Williams*, 47 Wn.2d 476, 491, 55 P.3d 597 (2002). We therefore presume the absence of such language in the two-strike scheme was intentional.

In a like manner, the legislature's inclusion of a list of potential donees in RCW 68.50.570(1), and the exclusion of all but one of such donees in RCW 68.50.570(2), gives clear evidence of legislative intent. The legislature knew the differences between the classes of donees; and chose only one donee to receive undesignated anatomical gifts. The court should presume that the legislature did so intentionally, and that the statute "means exactly what it says."

Consequently, Jesse Smith's undesignated anatomical gift did not give KCME and SMRI a right to ship and receive his body parts.

Accordingly, his anatomical gift does not exculpate their misconduct in misleading his mother. This court should reverse and remand.

2. The Legislature's Use of the Term "May" in RCW 68.50.570(2) Refers to the Right of "Any Hospital" to Accept or Decline an Undesignated Anatomical Gift.

RCW 68.50.570(2) provides that an undesignated anatomical gift "may be accepted by any hospital." Adams contends that the term "may" in the statute refers to the hospital's right to accept or decline

an undesignated anatomical gift. Obviously, the legislature did not use the word "shall" instead of "may" because it did not intend to force hospitals to accept undesignated anatomical gifts. This would lead to an obviously troublesome state of affairs placing needless burden and expense upon hospitals that did not wish to accept an anatomical gift.

SMRI and KCME contended that ". . . the use of `may' and not 'shall' indicates that the provision is permissive and not binding, while the use of 'shall' indicates a mandatory obligation." They contend "[h]ere, the use of `may' indicates that a hospital is one of the potential donees that can accept an anatomical gift" and "it does not state that the gift *may only* be accepted by a hospital." (Emphasis in original). CP 509, 510.

In-other-words-the-respondents-contend that the-list-of donees set forth in RCW 68.50.570(1) also applies to RCW 68.50.570(2) despite clear statutory language demonstrating contrary legislative intent. Under the respondents' scenario, the court should read RCW 68.50.570(2) as follows (with the respondents' additional suggested language in bold):

An anatomical gift may be made to a designated donee or without designating a donee. If a donee is not designated or if the donee is not available or rejects the anatomical gift, the anatomical gift may be accepted by any hospital, **physician, surgeon, or procurement**

organization for transplantation, therapy, medical or dental education, research, or advancement or dental science, an accredited medical or dental school, college, or university for education, research, or advancement of medical or dental science, or a designated individual for transplantation or therapy needed by that individual.

Our Supreme Court rejected such an attempt to rewrite a statute in *Seeberv. PDC*, supra. In that case, the Public Disclosure Commission sought to subpoena certain financial records from a lobbyist. The lobbyist resisted. Our Supreme Court had to analyze the requirements of RCW 42.17.170, which governed reporting of expenditures. Our Supreme Court reversed the trial court's order enforcing the subpoena, at 139-140 as follows:

It is an elementary rule that where certain language is used in one instance, and different language-in-another,-there-is-a-differ-enee-in-legislative intent. [Citations omitted]. Applying this rule to the present case, we conclude that the act restricts the Commission's authority to require information from lobbyists. As indicated above, the PDC may compel candidates, public officials, campaign committees and lobbyists' employers to divulge whatever information it deems necessary to carry out the purposes of the act. The absence of similar rule-making provisions to obtain additional information regarding lobbyists, however, leads us to believe that lobbyists need report only that information specified in RCW 42.17.170.

We are mindful both of the need to effectuate open government and the injunction of RCW 42.17.920 that "The provisions of this act are to be liberally

construed to effectuate the policies and purposes of this act." See also RCW 42.17.010. Nonetheless, we find nothing in the act which has as its policy or purpose the requirement that a lobbyist bound by the provisions of RCW 42.17.150-.230 disclose more than is mandated by the act. We do not believe the provisions of RCW 42.17.360(4), (5) and RCW 42.17.370(3), (5) give the PDC a warrant to subpoena lobbyists' records other than those specifically connected with the reporting requirements of RCW 42.17.170(2)(a)(c).

Seeber demonstrates that even in view of compelling policy considerations such as fostering open access to records, courts will not rewrite statutes. This court should not add language to RCW 68.50.570(2) expanding the choice of donees for an undesignated anatomical gift. The legislature's use of differing language in RCW 68.50.570(1) and (2) reflects a differing legislative intent. If the legislature intended that any entity other than a hospital could accept an undesignated anatomical gift, it would have stated so clearly. That the legislature did not do so evidences the intent to restrict undesignated anatomical gifts to hospitals.

This conclusion finds added support from the legislature's goal that the WAGA facilitate organ transplantation. First, RCW 68.50.520(1) provides as follows, in pertinent part (emphasis added):

The legislature finds that:

(1) The demand for donor organs and body parts exceeds the available supply for **transplant**.

The legislature declares that it is in the best interest of the citizens of Washington to provide a program that will increase the number of anatomical gifts available for donation, . . .

Also, the legislature designated hospitals, the only institutions equipped to handle transplants, the default recipients of any undesignated anatomical gift RCN-68:50.570(2). -To further this end, RCW 68.50.500 requires hospitals to create programs to identify and encourage anatomical gifts:

Each hospital shall develop procedures for identifying potential anatomical parts donors. The procedures shall require that any deceased individual's next of kin or other individual, as set forth in R.C.W. 68.50.550, and the medical record does not specify the deceased as a donor, at or near the time of notification of death be asked whether the deceased was a part donor. If not, the family shall be informed of the option to donate parts pursuant to the uniform anatomical gift act. With the approval of the designated next of kin or other individual, as set forth in RCW 68.50.550, the hospital shall then notify an established procurement organization including those organ procurement agencies associated with a national procurement transportation network or other eligible donee, as specified in RCW 68.50.570, and cooperate in the procurement of anatomical gift or gifts. The procedure shall encourage reasonable discretion and sensitivity to the family circumstances in all discussions regarding donations of parts. The procedures may take into

account the deceased individual's religious beliefs or obvious non suitability for an anatomical parts donation...

RCW 68.50.600 places additional organ donation duties on hospitals as follows:

Each hospital in this state, after consultation with other hospitals and procurement organizations, shall establish agreements or affiliations for coordination for procurement and use of human bodies and parts.

This legislative emphasis upon the rights and duties of hospitals clearly demonstrates that the legislature knew the difference -- - between a hospital and other donees. The legislature chose hospitals to receive undesignated anatomical gifts in order to increase the supply of organs available for transplantation. Hospitals, and not research organizations or medical examiners, facilitate organ transplantation. The court should advance the legislature's intent and reject the defense's attempts to rewrite the statute.

The trial court therefore erred when it ruled that Jesse Smith's anatomical gift gave any "donee" carte blanche to solicit, accept and use his remains for any purpose. Under RCW 68.50.570(2) only "any hospital" could receive that anatomical gift. This court should reverse.

C. Jesse Smith's Anatomical Gift Did Not Authorize a Donation That Exceeded "Any Organ."

Even if one were to ignore RCW 68.50.570(2), and assume that Jesse Smith's undesignated anatomical gift permitted a donation to a donee other than "any hospital," Jesse Smith limited his donation to "any organ." CP 269. The donation, however, exceeded "any organ." The donation included Jesse Smith's brain, portions of his liver and spleen, blood and cerebrospinal fluid. CP 224-225.

RCW 68.50.530(1) defines "anatomical gift" as "a donation of all or part of a human body to take effect upon or after death." RCW 68.50.530(7) defines "part" as "an organ, tissue, eye, bone, artery, blood, fluid, or other portion of a human body." Because the donation exceeded "any organ," Jesse Smith's undesignated anatomical gift does not exculpate KCME and SMRI's conduct. In order to procure and receive donation, KCME and SMRI needed to seek and obtain permission from Jesse Smith's next-of-kin for the donation. As explained below, this failure supports several causes of action. This Court should reverse and remand.

D. The Court Should Equitably Estop KCME and SMRI From Asserting That They Never Needed Nancy Adams' Consent

KCME and SMRI never relied upon Jesse Smith's anatomical gift in harvesting, shipping and receiving his body parts. Instead, the

defendants sought Nancy Adams' consent for an anatomical gift of a piece of Jesse Smith's "brain tissue." They proceeded under RCW 68.50.550, which governs anatomical gifts by a person other than a decedent. That statute sets forth a hierarchy of individuals other than a decedent who may make an anatomical gift "of all or a part of the decedent's body for an authorized purpose . . ." RCW 68.50.550(1). The statute permits a parent of a decedent to make such an anatomical gift in the absence of an appointed guardian, a person with power of attorney or a spouse or a child of the decedent. RCW 68.50.550(1)(a)-(e), (2).

The evidence leads to the in-disputable conclusion that Jesse Smith's anatomical gift bore no relation to the solicitation of his -remains-from his mother. -Dr. Haikal-never-testified_ that she knew of or relied upon Jesse's gift. Fortuitously, during discovery, the respondents learned that Jesse Smith had designated himself as an organ donor. They tried to capitalize on that organ donation to exculpate themselves.

The court should equitably estop the defense from asserting *that* Jesse Smith's anatomical *gift excuses* their behavior. In *Heg v. Alldredge*, 157 Wn.2d 154, 165, 137 P.3d 9 (2006), our Supreme Court described the elements of equitable estoppel as follows:

[E]quitable estoppel requires a showing that the party to be estopped (1) made an admission, statement or act which was inconsistent with his later claim; (2) that the other party relied thereon; and (3) that the other party would suffer injury if the party to be estopped were allowed to contradict or repudiate his earlier admission, statement or act.

With respect to the first element, the respondents made both a "statement" and an "act" inconsistent with the claim that they now assert. Seeking Nancy Adams' consent runs contrary to the position that they now assert - that Jesse Smith's designation as an organ donor allowed them to take any and all organs without the consent that they sought. In addition, their promise to Nancy Adams that they would only take a small piece of brain- contradicts-the -position that Jesse Smith's anatomical gift gave them authority to take all of the - body parts that they-took.-- - -

Regarding the second element, Nancy Adams relied on the actions of the defendants and understood that she had the right to limit the anatomical gift. She further relied on Dr. Haikal's assurances that the donation involved only a small piece of brain tissue. If she had known that the defendants planned to take more, she would not have consented. Mrs. Adams expressly refused to donate Jesse's entire brain. CP 469-471.

Finally, the facts satisfy the third element. The defendants' misbehavior injured Nancy Adams. See CP 291-292, 455-456. Moreover, if the respondents can repudiate or contradict their position that they needed her consent, Mrs. Adams will find herself with no remedy for her injuries.

The respondents never knew of or relied upon Jesse Smith's anatomical gift. Instead, they affirmatively misled Nancy Adams into consenting to donate a small piece of brain tissue, but took far more than they said they would. Under these circumstances, equitable estoppel should preclude them from shifting their position after the fact.

E. Nancy Adams Brought an Actionable Claim under Washington's Existing Common Law for Tortious -- -Interference-or Misuseof Her-Son's --Corpse . - - - - -

Nancy Adams also sued for tortious interference and misuse of her son's corpse. Washington courts have long recognized this theory. Our Supreme Court most recently confirmed the cause of action in *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998), where the Court stated:

It is clear that had the County employees physically mutilated or otherwise physically interfered with the corpses of the Plaintiffs' relatives, liability would certainly exist. See *Wright v. Beardsley*, 46 Wash. 16,

20, 89 P. 172 (1907); *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299, 44 A.L.R. 425 (1925).

136 Wn.2d, at 207.

In *Wright v. Beardsley*, 46 Wash. 16, 89 P. 172 (1907), the plaintiffs' infant child died. The plaintiffs hired the defendants to handle burial arrangements. The defendants buried the child six inches under the ground in a rough box. The plaintiffs sued. The Court characterized the action as seeking redress "for a wrong against the feelings of the plaintiffs inflicted by a wrongful and improper burial of their dead; in other words a tort or injury against the person." 46 Wash., at 19.

In *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925), the defendant accepted the body of plaintiff's son for a funeral and cremation, and took payment. 133 Wash., at 135. After the funeral occurred, the defendant refused to proceed with burial unless the payment was made to the defendant for services supplied to another relative 15 months earlier. *Id.* The Court recognized that holding a body as a guarantee or security for payment of some indebtedness is making a misuse of the body, just the same as mutilation or improper burial. *Id.*, at 137. The Court noted that "the misuse in one case may be greater in degree, but nevertheless it is a misuse." *Id.*,

at 137-138. The Court held that the decedent's mother had an actionable claim for the misuse of her son's body. *Id.*, at 138. In recognizing the right of a mother to bring a claim for the misuse of her deceased son's body, the Court quoted *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40, 68 A.L.R. 956, where that court stated:

There is neither solecism nor unreason in the view that the right of custody of the corpse of a near relative for the purpose of paying the last rites of respect and regard is one of those relative rights recognized by the law as springing from the domestic relation, and that a willful or wrongful invasion of that right is one of those torts for which damages for injury to feelings are recoverable as in independent element.

Id., at 139.

In this case, the defendants misrepresented the scope of the donation. Nancy Adams did not consent to donate all that the defendants took. These facts establish that the defendants tortiously misused the corpse of Jesse Smith. This Court should reverse the trial court's dismissal of the action.

F. The Court Should Adopt the Restatement (Second) of Torts § 868 (1965).

In addition to Washington case law supporting a common law tort for the interference or misuse of a corpse, the Restatement (Second) of Torts § 868 (1965) also supports such an action. That section provides:

One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.

Restatement (Second) of Torts § 868 (1965), as one might expect, simply restates the already existing common law in Washington that was set forth in *Wright* and *Gadbury*, and more recently confirmed in *Reid*.

Washington Courts have often looked to the Restatement (Second) of Torts to create legal duties in tort. See *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286(1997); *Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983); *Bernethy v. Walt Failors, Inc.*, 97 Wn.2d 929, 653 P.2d 280 (1982); *Flemming v. Stoddard Wendle Motor Co.*, 70 Wn.2d 465, 423 P.2d 926 (1967). Preventing misuse of corpses and holding accountable those who do so furthers sound public policy. The Court should adopt Restatement (Second) of Torts § 868 to clarify the elements of such a claim. Because Nancy Adams' testimony establishes a claim under § 868, the court should reverse the trial court's dismissal of the action.

G. Washington's Anatomical Gift Act, RCW 68.50, Supports an Implied Cause of Action for Damages.

RCW 68.50.550 governs anatomical gifts by persons other than the decedent. It provides, in part:

(1) A member of the following classes of persons, in the order of priority listed, absent contrary instructions by the decedent, may make an anatomical gift of all or a part of the decedent's body for an authorized purpose, unless the decedent, at the time of death, had made an unrevoked refusal to make that anatomical gift:

(e) Either parent of the decedent;

(3) An anatomical gift by a person authorized under subsection (1) of this section must be made by__
(a) a document of gift signed by the person or (b) the person's telegraphic, recorded telephonic, or other recorded message, or other form of communication from the person that is contemporaneously reduced to writing and signed by the recipient of the communication.

As the mother of Jesse Smith, RCW 68.50.550(1)(e) authorized Nancy Adams to make an anatomical gift to SMRI. KCME and SMRI acted under the statute in seeking her consent for donation from Jesse's body. Their misrepresentations regarding the scope of donation give rise to claims for damages under the statute.

The Washington Supreme Court, in *Bennett v. Hardy*, 113 Wn.2d 912, 920-921, 784 P.2d 1258 (1990), set forth a three-part test to determine whether to imply a statutory cause of action:

First, the court must determine if the plaintiff is within the class for whose "especial" benefit the statute was enacted. Next, the court must decide whether legislative intent, explicitly or implicitly, supports creating or denying a remedy. Finally, the court must find out whether implying a remedy is consistent with the underlying purpose of the legislation.

In *Bennett*, the plaintiffs sued for age discrimination. Their employer employed fewer than eight persons. The trial court dismissed the case because RCW 49.60.040 defined an employer as a firm employing eight or more persons. On appeal, the Washington Supreme Court held that RCW 49.44.090 implied a cause of action for age discrimination. The court applied the-three-part test, at 921, as follows:

Plaintiffs, employees who are aged sixty and sixty-one at the time of their discharges, are clearly part of the class of persons entitled to the protection of RCW 49.44.090. The statute creates a right on the part of employees within the protected class to be free from age discrimination by their employers, but does not indicate explicitly an intent to create a remedy. However, as noted above, we may rely on the assumption that the legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights. Moreover, the purpose of this legislation is obviously to confront the problem of age discrimination by

employers, and according a private right of action to persons within the protected class is consistent with this underlying legislative purpose.

Therefore, we hold that because RCW 49.44.090 makes it an unfair employment practice to discriminate against an employee who is between the ages of 40 and 70 based upon her age, but provides no expressed methods of redress against an employer who has engaged in such an unfair practice, there is an implied right of action for plaintiffs alleging violations of that statute.

The Washington Supreme Court in *Tyner v. Department of Social and Health Services*, 141 Wn.2d 68,-1 P.3d-1148, (2000); applied *Bennett* in a case against the State for negligent investigation of allegations of child abuse. In *Tyner*, the plaintiff parents sought to sue for the State's failure to properly conduct a statutorily mandated child abuse investigation under RCW 26.44.050. The State conceded that the statute created a duty to a child victim, but disputed that the duty flowed to the child's parents. *Tyner*, at 76-77.

Applying the first prong of the *Bennett test*, the court analyzed whether a parent fell within the class for whose "especial" benefit the legislature enacted the statute. Citing statutory provisions that expressed "the legislature's strong views regarding the importance of the family," the court concluded that the parents fell within the protected class, at 79 as follows:

The statutory provisions are not facially inconsistent. They merely dictate a necessary hierarchy of interest. Those of the children prevail in cases of conflict. However, the legislature has recognized the importance of the family unit and the inextricable link between a parent and child. During its investigation the State has the duty to act reasonably in relation to all members of the family. The procedural safeguards of RCW 26.44.050 protect both children and family members; children are protected from potential abuse and needless separation from their families and family members are protected from unwarranted separation from their children.

With respect to the second and third prongs of the *Bennett* test, the court held as follows, at 80-81:

The second prong of the test asks this court to determine if legislative intent, explicitly or implicitly, supports creation of a remedy. In this case, the statute itself is silent as to this point, but this court "can assume that the legislature is aware of the doctrine of implied statutory causes of action. . . ." *Bennett*, 113 Wn.2d at 919 (quoting *McNeal*, 95 Wn.2d at-277).= The State does not dispute that the governing statutes imply a cause of action, but argues against extending duty only to parents and other persons suspected of abuse. RCW 26.44.050 places an affirmative duty of investigation on the State. At the same time, the legislature has emphasized that the interest of a child and parent are closely linked. RCW 26.44.010. Thus by recognizing the deep importance of the parent/child relationship, the legislature intends a remedy for both the parent and the child if that interest is invaded.

An implied tort remedy in favor of a parent is also consistent with the underlying purposes of RCW 26.44.050, thereby satisfying the third prong of the *Bennett* test. RCW 26.44.050 has two purposes: to protect children and to preserve the integrity of the

family. The *Babcock* court noted that "[t]he existence of some tort liability will encourage DSHS to avoid negligent conduct and leave open the possibility that those injured by DSHS's negligence can recover." *Babcock*, 116 Wn.2d at 622. "Accountability through tort liability . . . may be the only way of assuring a certain standard of performance from governmental entities." *Bender v. City of Seattle*, 99 Wn.2d 582, 590, 664 P.2d 492 (1983).

Tyner illustrates the trial court's error in the case at bench. In applying the *Bennett* prong, the *Tyner* court carefully analyzed the various statutes governing the subject matter to define the class the statute protected. The trial court disregarded the numerous provisions under the WAGA defining the class the statute protected to promote the increase in the organ supply.¹ The legislature intended to protect the interests of all involved in the anatomical gift/organ donation process, including donors, their families, and procurers.

¹ RCW 68.50.520(4) requires procurers to use "discretion and sensitivity in seeking anatomical gifts." Hospitals must inquire of next-of-kin whether a deceased was a donor. If not, the hospital must tell "the family" of the option to donate. Hospital must use "reasonable discretion and sensitivity to family circumstances in all discussions regarding donations of parts." RCW 68.50.500. RCW 68.50.540(6) authorizes a donor to amend or revoke an anatomical gift. RCW 68.50.550(1) sets forth a hierarchy of next-of-kin who may make an anatomical gift. RCW 68.50.570(3) prevents donees of anatomical gifts from receiving them where the donee knows that the decedent or next-of-kin refuses to make an anatomical gift. RCW 68.50.580(2) authorizes an "interested person" to examine or copy a document of gift in the custody of another. RCW 68.50.610 bars the purchase or sale of anatomical gifts.

The facts meet the second prong of the *Bennett* test as well. The legislative intent of the WAGA clearly supports creating a remedy. In *Tyner*, the court noted the special importance of the parent/child familial relationship and acknowledged the legislative intent to protect that relationship. In the case at bench, the legislature noted the intersection of interests between donors, procurers, families, and donees and sought to balance them. The trial court's ruling ignored and upset that balance and promoted the rights of wrongdoing procurers and donees at the expense of donors and their families.

The court "can assume that the legislature is aware of the doctrine of implied statutory causes of action...." *Bennett*, at 919; *Tyner*, at 80. By investing the WAGA with provisions protecting donors and their families, the legislature surely intended a remedy if their interests suffered invasion.

The third *Bennett* prong requires analysis of whether implying a tort remedy concurs with the underlying purpose of the WAGA. Implying a tort remedy will facilitate organ donation by assuring integrity and accountability in the system. Under the district court's ruling, procurers and donees may simply ignore the WAGA without

any accountability. Without accountability, donors and their families will feel disinclined to give, reducing the supply of organs.

As stated in *Tyner*, tort liability facilitates accountability and a certain standard of performance from governmental entities and others. The WAGA provides no government oversight of the actions of procurers and their donees. Only the tort system can provide such needed oversight and accountability. Without oversight, procurers can freely trample the rights of donors and their families without consequence.

Finally, the legislature obviously contemplated liability for violation of the WAGA when it granted good faith immunity pursuant to RCW 68.50.620(3). The immunity only applies to those who act "in accordance with [the WAGA] or with the applicable anatomical gift law of another state or a foreign country . . ." RCW 68.50.620(3). If these statutes do not imply a remedy, then the immunity protects those to whom it applies from nothing.

In *Sattler v. Northwest Tissue Center*, 110 Wn.App. 689, 42 P.3d 440 (2002), the court analyzed a cause of action where the defendant asserted the WAGA good faith immunity. The husband of the decedent brought a claim against Northwest Tissue Center, alleging that he did not give permission to donate any part of his

deceased wife's eyes. *Id.* at 691. The Court cited ROW 68.50.550, stating that the Act authorizes a spouse to make an anatomical gift of all or part of the decedent's body. *Id.*, at 693. The Court analyzed whether the good faith immunity defense provided in RCW 68.50.620(3) required dismissal. *Id.* The Court denied the motion because the parties disputed the content of the consent conversation, creating an issue of fact for trial. *Id.*, at 700. Given the Court's holding and reasoning, it is evident that the Court recognized that the WAGA created an implied cause of action.

In conclusion the WAGA supports a cause of action for damages. This court should reverse the trial court's dismissal of the case.

H. Nancy Adams Brought an Actionable Claim for Fraud.

1. Nancy Adams Properly Pleaded Her Fraud Claim.

Nancy Adams also brought an actionable claim for fraud. The defendants responded to that claim by arguing that she did not plead the fraud claim with "the requisite specificity to determine exactly what their fraud claim is." CP 303. CR 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." "Particularity" does not require that the word "fraud" be used in the Complaint, as long as

facts are pleaded sufficient to present the question of fraud.

Pederson v. Bibioff, 64 Wn. App. 710, 721, 828 P.2d 1113 (1992).

Nancy Adams' Amended Complaint alleges the following:

X. FRAUD

10.1 Plaintiffs reallege paragraphs I through IX as though fully set forth herein.

10.2 Agents and employees of the Defendants knowingly and falsely represented to Plaintiff Nancy Adams the scope, nature and result of the procedure that would be performed upon the remains of Jesse Aaron Smith.

10.3 Defendants made the false representations for the purpose of inducing Plaintiff Nancy Adams to agree to the taking of tissue from Jesse Aaron Smith, whereupon Defendants intended instead to harvest the entire brain and other organs from the decedent, Jesse Aaron Smith.

10.4 In justifiable reliance upon the false representations of the agents and employees of Defendants, Plaintiff Nancy Adams agreed to the taking of a brain tissue sample from Jesse Aaron Smith.

10.5 Defendants, and the agents and employees of the Defendants, knew that false representations were made to Plaintiff Nancy Adams, or acted in reckless disregard as to the truth or falsity of the false representations.

10.6 As direct and proximate result of the Defendants' outrageous conduct, Plaintiffs suffered severe emotional distress.

10.7 As a consequence of their wrongful conduct, defendants are liable to Plaintiffs for damages in an amount to be determined at trial.

CP 482-483.

Nancy Adams' Amended Complaint not only uses the word "fraud" but also identifies the specific transaction which constituted fraud. In addition, the Amended Complaint specifically identifies the alleged fraudulent representation and the circumstances of the representation that induced Nancy Adam's agreement. Nancy Adams has provided more than CR 9(b) requires. See *Pederson*, 64 Wn. App. at 721 (holding that Complaint was sufficient to satisfy the requirements of CR 9(b) where the term "fraud" was used in the Complaint and the Complaint apprised the opposing party of the transaction in which fraud was alleged).

2. Haikal's Conduct in Misleading Nancy Adams Establishes Fraud.

Fraud generally presents an issue of fact. See, e.g., *Duke v. Boyd*, 133 Wn.2d 80, 83, 942 P.2d 351 (1997). A party asserting fraud must establish the nine elements, with clear, cogent and convincing evidence. The elements include: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge if its falsity; (5) speaker's intention that it shall be acted upon by the

plaintiff; (6) plaintiff's ignorance of falsity; (7) reliance; (8) the right to rely; and (9) damages. *Douglas Northwest v. O'Brien & Sons Constr.*, 64 Wn.App. 661, 678, 828 P.2d 565 (1992).

The facts in the case at bench meet the elements of fraud. Haikal misrepresented a material existing fact, when she told Nancy and Matthew Adams that she only intended to take a small piece of brain tissue. Haikal knew that she intended to take the whole brain, plus other body parts and fluids. Haikal made her representations to induce Mrs. Adams to donate from Jesse's remains. Mrs. Adams had no idea that Haikal intended to take far more than she stated. In consenting , Mrs. Adams relied upon Haikal's statement that she intended to only take an inch or so of "brain tissue." Mrs. Adams had the right to rely upon Haikal's explanation of the donation. Finally, Mrs. Adams suffered damage as a result of the misrepresentation.

Consequently, material issues of fact precluded dismissal of the fraud claim. This court should reverse and remand.

The Trial Court Erred in Dismissing the Claims for Violation of the Right to Privacy Because the Egregiousness of the Misconduct Outweighs the Limited Disclosure.

KCME and SMRI claimed that Nancy Adams failed to state a cause of action for invasion of privacy. CP 307-308.

Washington has adopted the Restatement (Second) of Torts § 652D (1977). *Reid vPierce County*, 136 Wn.2d 195, 205-208, 961 P.2d 333 (1998). This section creates a cause of action for invasion of privacy for giving publicity about the private life of another, if the matter publicized (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

In *Reid*, relatives of deceased persons who received autopsies at the Pierce County Medical Examiner's Office (PCME) sued for damages. *Reid*, 136 Wn.2d at 198-200. They claimed that PCME employees wrongfully appropriated and displayed autopsy photos of their deceased relatives b_yshowing them to_friends and coworkers. *Id.*

The Court agreed with the plaintiffs that Section 652D of the Restatement applied and created an actionable right of privacy for the plaintiff survivors. *Reid*, 136 Wn.2d at 210. The Court held as follows (*Reid*, 136 Wn.2d, at 212):

We hold that the immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent. That protectable privacy interest is grounded in maintaining the dignity of the deceased.

The Court found support for its holding in RCW 68.50.105, which declares a public policy that autopsy records regarding deceased

persons remain confidential and can be distributed only to a select few. *Id.* at 211. The records remain confidential even after disclosure to those select few. *Id.* (citing *State v Peterson*, 47 Wn.2d 836, 838, 289 P.2d 1013 (1955)).

KCME and SMRI argued that the disclosure and sending Jesse Smith's remains to a research institution did not constitute "publicity" sufficient to warrant a cause of action for violation of privacy. CP 307. They ignore that the amount of publicity necessary to maintain a violation of privacy claim depends upon the egregiousness of the matters disclosed. *See Fisher v. Dept of Health* 125 Wn. App. 869 879 106 P 3d 836 (2005). For example in *Reid*, a former coroner's employee displayed autopsy photographs to his friends. Despite the limited disclosure, the Court found that due to the highly offensive nature of the material, trial on the matter was necessary. *Fisher*, at 879-880, citing *Reid*, 136 Wn.2d at 199-200.

The trier of fact could easily find that turning Jesse Smith's body parts and confidential records over to another for analysis and research extremely offensive. The trier of fact could find the highly sensitive nature of the disclosure outweighed its scope.

Consequently, genuine issues of material fact precluded dismissal of the privacy claim.

J. The Defendants Engaged in Civil Conspiracy by Combining to Accomplish a Lawful Purpose by Unlawful Means.

In order to establish a civil conspiracy, the plaintiff must prove by clear, cogent, and convincing evidence that "(1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy." *All Star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 740, 998 P.2d 367 (2000). A finding of civil conspiracy may flow from circumstantial evidence, although the circumstances must be inconsistent with a lawful or honest purpose and reasonably consistent with only the existence of the conspiracy. *Sterling v. Thorpe*, 82 Wn.App. 446, 451-452, 918 P.2d 531 (1996).

Defendants argue that no civil conspiracy exists because, in their opinion, they did not enter into an illegal contract. Actually, Mrs. Adams argues that defendants combined to accomplish a lawful purpose (i.e., donation for research) by unlawful means (failing to obtain voluntary consent).

In obtaining telephonic consent, defendants used a consent form. The forms have been part of the agreement since 1994. CP 394-395. The forms significantly deviate from the standard operating procedures for SMRI's donation program. The forms describe the donation as "brain tissue," when the donation actually consisted of the entire brain, portions of the spleen and liver, the pituitary gland, the pineal gland, blood samples, and fluids. CP 394-394, 402-411.

By procuring donations using forms that were inconsistent and significantly deviated from the standard operating procedures for SMRI's donation program, defendants knowingly obtained donations without providing sufficient information for the next-of-kin to make a voluntary consent. In other words, defendants combined to accomplish a lawful purpose (i.e. donation for research) by unlawful means (failing to obtain consent).

While public policy may favor organ donation, public policy certainly does not favor organ donation without obtaining the necessary consent. This court should reverse the trial court's dismissal of the civil conspiracy claim.

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VI. CONCLUSION

For the reasons stated above, this court should reverse the dismissal, and remand this case for trial.

DATED this 30th day of August, 2007.

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