

8/028-1

No. 59951-8-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

NANCY ADAMS and MATTHEW ADAMS,
husband and wife,

Plaintiffs/Appellants,

v.

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

Defendants/Respondents.

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ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Joan Dubuque)

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I. INTRODUCTION

Washington's Anatomical Gift Act ("AGA") was enacted to encourage and facilitate the donation of organs for transplant and research purposes. Under the AGA, when a person makes an anatomical gift during his or her life, that gift cannot be revoked after death by members of that person's family - - even if they disagree with it. Jesse Smith, Plaintiff Nancy Adams's son, made such a gift here; just weeks before he suddenly and tragically died, while renewing his driver's license, he made an unrestricted anatomical gift of "any organ." That expansive gift was unrevoked at the time of Jesse's death. This is not disputed.

Jesse's unrestricted and unrevoked gift made Adams's consent to a donation unnecessary. But the medical examiner's office could not have known that; at the time of Jesse's death, there was no computerized database identifying organ donors. So on the day of Jesse's autopsy, Adams was asked if she would consent to a donation of Jesse's corneas for transplant. She agreed. Later that day she was asked if she would agree to a donation of his tissues for research purposes. She agreed again. More than a year after that, she would once again specifically request that Jesse's tissues be used for research. This is not disputed either.

To Adams, however, none of this matters. Years later, ignoring both her son's anatomical gift and her own donations of Jesse's organs and

tissues to others, she accused Defendants of taking more of Jesse's tissues for research purposes than they should have. When Defendants refused to give her money, she sued. Adams claims she is entitled to a trial on various causes of action because she says there is a genuine dispute about the scope of her consent. But her consent did not matter then, and does not matter now. Jesse's consent is what matters.

Under the AGA, Jesse's unrestricted anatomical gift expressly permitted Defendants to remove and use Jesse's organs and tissues for research purposes. The trial court properly rejected all of Adams's claims on this basis, and this Court should as well. Simply put, Adams cannot revoke Jesse's unambiguous gift. To hold otherwise would undermine the AGA's goal of encouraging organ donations. For this reason, and the others set forth below, the trial court's grant of summary judgment for Defendants should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

Plaintiff Nancy Adams's assignment of error raises the following issues:

1. Under the Washington Anatomical Gift Act, did the decedent donor's unrestricted and unrevoked document of anatomical gift, signed and attached to his driver's license, (a) authorize Defendants to use

the donor's brain and other tissues for medical research purposes, and (b) preclude all of Adams's claims as a matter of law?

a. Did the donor's unrestricted anatomical gift of "any organ" authorize not only the donation of entire organs, but also the donation of samples of organs, blood and other fluids?

b. Were Defendants proper donees of the donor's unrestricted anatomical gift even though neither is a "hospital" within the meaning of RCW 68.50.570(2)?

c. Was the donor's unrestricted anatomical gift revoked or otherwise invalidated, through the principle of equitable estoppel, when Defendants - without knowledge of the gift - contacted Adams regarding consent for a donation?

2. Whether the trial court properly dismissed Adams's claim for tortious interference with the decedent's body under Restatement (Second) of Torts § 868 or Washington's common law where:

a. The donor made an unrestricted and unrevoked gift of his entire body prior to death;

b. The Restatement (Second) of Torts § 868 has not been adopted in Washington and, if adopted, it would reverse a century of contrary precedent;

c. Adams did not raise a claim of common law interference until she filed her brief in opposition to Defendants' motion for summary judgment; and

d. The sole act forming the basis of Adams's tortious interference claim - the removal of the donor's brain - was authorized by law and would have occurred as part of ordinary autopsy procedure?

3. Did the trial court properly grant summary judgment on Adams's claim for an *implied* right of action under Washington's Anatomical Gift Act where (a) Adams had no rights under the Act given the donor's unrestricted anatomical gift, (b) the Act's purpose is to benefit society at large, but not any particular class of individuals, and (c) the Act provides broad civil immunity to facilitate the Act's purpose of increasing the number of organ donations?

4. Did the trial court properly grant summary judgment on Adams's fraud claim where the donor's unrestricted anatomical gift prior to death rendered any representations made to Adams concerning a donation unnecessary and immaterial as a matter of law?

5. Did the trial court properly grant summary judgment on Adams's claim for invasion of privacy where (a) the donor's unrestricted anatomical gift authorized the sharing of his tissues and medical records

between Defendants and (b) the donor's private affairs were never disseminated to the public?

Did the trial court properly grant summary judgment on Adams's civil conspiracy claim where (a) there was no evidence that Defendants conspired to obtain consent for donations through unlawful means and (b) Adams gave consent telephonically and did not see the consent form that she claims Defendants utilized to carry out the alleged conspiracy?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

1. Jesse Smith's unrestricted and unrevoked anatomical gift.

Decedent Jesse Smith was the son of Plaintiff Nancy Adams ("Adams") and her former husband Trent Smith. In March of 2003, several months before his death, Jesse renewed his Washington State Driver's License. In conjunction with his renewal, Jesse informed the Department of Licensing that he was an organ donor by signing an organ donor authorization card that was attached to his license. CP 268-269. The authorization card stated, "I hereby make an anatomical gift to take effect upon my death." CP 269. Jesse placed no restrictions on his donation; he expressly checked the box on the authorization card

indicating that he wanted his gift to include "Any Organ." *Id.* This anatomical gift was in effect and unrevoked at the time of his death.

2. The relationship between Defendants Stanley Medical Research Institute and the King County Medical Examiner's Office.

Defendant Stanley Medical Research Institute ("SMRI") is a non-profit charitable organization that supports research on the causes and treatment of mental illness, including schizophrenia and bipolar disorder. Schizophrenia and bipolar disorder are severe psychiatric disorders, affecting more than four million people in the United States. CP 138. SMRI provides postmortem brain tissue from persons who were affected by these diseases, as well as unaffected control specimens, to researchers around the world. CP 139. SMRI has sent more than 200,000 blocks and sections of frozen and fixed tissue to over 170 researchers in furtherance of research to develop new treatments for these disorders. *Id.* SMRI began research on these diseases in 1989 and has since provided over \$200 million in grants to make this research possible. *Id.*

For approximately eleven years, SMRI collected brain tissue with the assistance of participating medical examiners around the country. CP 139. From 1994 through 2004, the King County Medical Examiner's Office (the "KCMEO") was a recipient of a grant from SMRI for this purpose. *Id.; also* CP 388-399. The grant funded a full-time pathologist

position as well as expenses related to the research program. Approximately 25 percent of the pathologist's time was spent on the SMRI program; the remainder was spent on performing services for the KCMEO. CP 222-223. When a donation was made to SMRI through this program, SMRI would prepare a detailed neuropathology report for the KCMEO, which became part of the decedent's autopsy file. CP 223. At the time of Jesse Smith's death, the SMRI-funded pathologist at the KCMEO was Dr. Nabila Haikal. CP 222-224.

3. Jesse Smith's unexpected death, organ and tissue donation and autopsy.

On May 21, 2003, Jesse Smith died unexpectedly; he was 21 years old. CP 474. Given the circumstances of Jesse's sudden death, the local police contacted the KCMEO. David Delgado of the KCMEO went to the home, undertook an investigation at the scene, and explained to Adams and her husband that an autopsy would be performed. CP 243-244 (pp. 54-55; 62-64). Although she knew that her son was an unrestricted organ donor, Adams did not inform Delgado of this fact. CP 431 (pp. 65-68).

There was no computerized registry of organ donors at the time of Jesse's death. CP 206. Unaware of Jesse's unrestricted anatomical gift, several people contacted Adams requesting donations of Jesse's organs. Early in the afternoon of May 21, 2003, the Northwest Lions Eye Bank

contacted Adams about donating Jesse's corneas for transplant. CP 432-433 (pp.72-74). Adams provided telephonic consent to the donation. *Id.* Later that same day, Dr. Haikal contacted Adams to ask if she would donate Jesse's brain and other tissues for purposes of SMRI's research. CP 224. Because Jesse had no documented mental illness, his brain could be used as a "control" for research purposes. *Id.*

Although the parties have different accounts of the conversation, there is no dispute that Adams gave telephonic consent to Dr. Haikal for a donation to SMRI, but she failed to mention the fact that Jesse had already executed an unrestricted anatomical gift. CP 188; CP 224; CP 439 (p. 99). Adams's consent was confirmed over the telephone by Joe Frisino, another KCMEIO investigator. A form documenting telephonic consent was signed by Dr. Haikal and Mr. Frisino. CP 234-235. Indeed, the autopsy report stated unequivocally that "the brain . . . is donated to the Stanley Foundation by the family's permission for neuropathological research." CP 274.¹

Adams claims not to have learned about the donation of Jesse's brain until later news reports led her to that discovery. The autopsy report, however, made the scope of Jesse's gift clear. Adams had ample opportunities to review the autopsy report, requested that copies of it be sent to various physicians and researchers in July 2003 and again in September 2004, but allegedly refused to look at the report herself. CP 248 (p. 107); CP 437 (pp. 90-91); CP 443 (p. 115); CP 445 (122-124).

Jesse's autopsy was performed the next day. CP 224. Pursuant to RCW 68.50.106, as in any autopsy performed by the KCMEO, all of Jesse's major organs were removed, weighed, sectioned and examined, including his brain. CP 223. Jesse's brain, as well as small samples of his liver and spleen, blood, and cerebrospinal fluid were retained and sent to SRMI. CP 224. SMRI examined those tissues and provided a neuropathology report to the KCMEO that was included in Jesse's autopsy file. CP 224-225; CP 474-477. More than a year later, Adams requested the KCMEO to send samples of Jesse's tissues, which the KCMEO had retained as part of its ordinary autopsy procedures, to a researcher for genetic study on cardiac arrhythmia - - a possible cause of Jesse's death. CP 445 (pp. 121-122).

On April 1, 2005, a colleague of Adams's husband sent him an email with a link to a television news story which falsely reported that King County had "sold" brains. CP 249 (p. 134); CP 275; CP 449 (pp. 138-139). Neither Adams nor her husband contacted the KCMEO or SMRI to ask about the story. CP 450 (pp. 143-144). Instead, they retained counsel, and filed this lawsuit on August 25, 2005. CP 153-156.

B. Procedural History.

Adams and her husband, Matt Adams (Jesse Smith's step-father), filed suit in Pierce County Superior Court. CP 154-168. Defendants

moved to change venue to King County. CP 118; 123-140. Adams opposed the motion. CP 74-115. The Pierce County Superior Court granted Defendants' motion on October 21, 2005, and the case was thereafter transferred to King County. CP 50-52.

Adams and her husband filed an Amended Complaint on March 14, 2006. CP 186-198. The Amended Complaint asserted claims for fraud, negligent infliction of emotional distress, outrage, negligence, invasion of privacy, tortious interference with a dead body under Restatement (Second) of Torts § 868, violation of the Washington Anatomical Gift Act, violation of the Washington Consumer Protection Act ("CPA"), conversion, and civil conspiracy. *Id.* Defendants answered on May 11, 2006. CP 199-204.

Defendants moved for summary judgment as to all claims of Adams and her husband on March 23, 2007. CP 293-315; 205-392. Defendants argued that Jesse Smith's unrestricted and unrevoked anatomical gift made summary judgment appropriate for all of Adams's claims. Defendants additionally demonstrated that no genuine issues of material fact existed regarding Adams's claims. CP 293-313. Finally, Defendants argued that all of Matt Adams's claims must be dismissed because he lacked standing to sue Defendants. CP 313-315.

In her April 16, 2007 response to Defendants' motion (CP 316-505), Adams abandoned her claims of negligent infliction of emotional distress, outrage, negligence, violation of the CPA, and conversion. CP 322. She also did not oppose dismissal of all of Matt Adams's claims (*id.*, fn. 6), and he is not party to this appeal. Adams did oppose dismissal of her fraud, invasion of privacy, Restatement (Second) of Torts § 868, Washington Anatomical Gift Act, and civil conspiracy claims. CP 316-339. In her opposing papers, she also asserted for the first a claim for tortious interference with a dead body under Washington common law. CP 329-330. Defendants replied on April 19, 2007. CP 506-518.

Oral argument was heard on April 26, 2007, but not transcribed. CP 574. During argument, Adams agreed to dismiss her claims against Defendant Dr. E. Fuller Torrey. *Id.* As to Defendants the KCMEO and SMRI, the trial court granted Defendants' motion in its entirety and dismissed Adams's remaining claims on April 26, 2007. CP 574-576. Adams appealed to this Court. CP 577-580.

IV. ARGUMENT

A. Standard of Review.

This court reviews a grant of summary judgment *de novo*, applying the same standard as the trial court. *Shields v. Morgan Fin. Inc.*, 130 Wn. App. 750, 755, 125 P.3d 164 (2005). Summary judgment is appropriate if

the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show no issues of material fact exist and that the moving party is entitled to judgment as a matter of law. CR 56(c). This court may affirm the trial court's decision on any ground sufficiently developed in the record. RAP 2.5(a).

B. The Trial Court Properly Granted Defendants Summary Judgment On The Grounds That Jesse Smith's Unrestricted And Unrevoked Anatomical Gift Precludes All Of Adams's Causes of Action.

All of Adams's causes of action are premised on a claim that she did not give Defendants consent to remove Jesse Smith's brain and other tissues for purposes of medical research. CP 186-198 (Amended Complaint). But under Washington's Anatomical Gift Act ("AGA"), Adams's consent was not required; prior to his death, Jesse himself made an anatomical gift of all his organs without restriction. Adams correctly concedes (as she did below) that if Jesse authorized the donation at issue, all of her causes of action necessarily fail. Op. Br. 28; CP 328 (Adams's Response to Defendants' Motion for Summary Judgment).

For the reasons explained below, Jesse's unrestricted anatomical gift did, in fact, authorize Defendants to use Jesse's brain and other tissues for research purposes without Adams's consent. Adams's statutory and equitable arguments to limit the scope of Jesse's gift are without merit

and, indeed, were Adams's arguments accepted, the AGA's goal of encouraging organ donation would be seriously undermined. Adams cannot avoid the preclusive effect of Jesse's gift on her claims. This Court should affirm the trial court's grant of summary judgment on this basis.

1. Jesse Smith's anatomical gift was unrestricted and irrevocable, and did not require Adams's consent after his death.

Washington's AGA was created to encourage organ and tissue donation for transplant and research purposes. *See* RCW 68.50.520 ("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"). Among other things, the Act empowers anyone who is at least 18 years old to "(a) make an anatomical gift for any of the purposes stated in RCW 68.50.570(1), (b) limit an anatomical gift to one or more of those purposes, or (c) refuse to make an anatomical gift." RCW 68.50.540(1). One may make an anatomical gift by signing a document of gift attached to or imprinted on the donor's driver's license. *See* RCW 68.50.540(3).

Jesse Smith made such an unrestricted anatomical gift in this case. A mere two months before he died, Jesse (who was 21 years old at the time) renewed his Washington State Driver's License. In conjunction with this renewal, Jesse indicated that he was an organ donor by signing a donor authorization card attached to his license. CP 268-269. The

authorization card stated, "I hereby make an anatomical gift to take effect upon my death." CP 269. Jesse placed no restrictions on the scope of his donation; he expressly indicated that he wanted his gift to include "Any Organ." *Id.* Under the AGA, this unrestricted anatomical gift constituted "a donation of all or part of" Jesse's body. RCW 68.50.530(1).

SMRI was a proper recipient of Jesse's gift. The Act identifies what donees can receive an anatomical gift. They include, among others persons and institutions, hospitals, or physicians for transplantation, therapy, medical education, research or advancement of medical science. *See* RCW 68.50.570(1). It is not disputed that SMRI is a qualified donee under the Act. SMRI is a charitable research institution that supports and conducts medical research on the causes and treatment of schizophrenia and bipolar disorder. It collects brain tissue to conduct this research itself, and to provide it to other researchers. CP 138-139.

Adams had no right to limit or otherwise withhold consent to Jesse's unrestricted gift. The AGA provides in relevant part:

An anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of a person after the donor's death.

RCW 68.50.540(8). Similarly, RCW 68.50.550(1) allows family members to make an anatomical gift only "absent contrary instructions by the decedent." Jesse did not revoke this gift before his death. In sum,

therefore, Jesse's expansive gift authorized Defendants to use Jesse's brain and other tissues for SMRI's medical research. This lawsuit, and every issue Adams raises on appeal, represent Adams's effort to avoid the effect of this gift. But as the trial court correctly recognized, the AGA prevents Adams from revoking Jesse's unrestricted gift in this manner. All of her claims must be dismissed as a matter of law.

2. Jesse's unrestricted gift of "Any Organ" includes his brain and other tissues removed by Defendants for research purposes.

Even though Jesse expressly gave consent to an anatomical gift of "Any Organ," Adams incredibly claims that Jesse intended to limit his donation. Op. Br. 25. Adams makes the paradoxical argument that Defendants *exceeded* the scope of Jesse's gift because the donation included *something less* than entire organs in Jesse's case, i.e., specifically, samples of his liver and spleen, as well as blood and cerebrospinal fluid. *Id.*; CP 224-225. Adams's argument ignores the plain language of the AGA and the undisputed facts surrounding Jesse's gift. Indeed, Adams herself repeatedly authorized the donation of samples of Jesse's tissues to various research organizations. It is all to no avail. Jesse's gift was unrestricted and authorized Defendants to remove the tissues at issue.

At the time Jesse authorized his donation, there was no computerized database recording organ donor information. CP 206. Persons wanting to make an anatomical gift in connection with a driver's license renewal did so on the consent form attached to the license itself. *Id.* The form gave the donor two choices; the donor could check the box marked "Any Organ," or the box marked "Specifically." CP 269. Donors wishing to make an unrestricted gift would check the "Any Organ" box; donors wanting to limit the organs and tissues they wished to donate, or the purpose or recipient of the donation, would check the "Specifically" box and then write the limitation in the space provided. *Id.*; CP 206. Here, it is undisputed that Jesse did not check the "Specifically" box, nor did he describe any limits to his donation on the form.

Rather, by checking the "Any Organ" box, Jesse indicated his intent to donate all his organs and tissues to the fullest extent permitted by the AGA. The form itself uses the term "anatomical gift," which is defined in the Act as "all or part of a human body." RCW 68.50.530(1). Indeed, the term "part" is defined further as "an organ, tissue, eye, bone, artery, blood, fluid or other portion of a human body." RCW 68.50.530(8). The form's use of the term any "organ" was certainly not intended to place a limitation on the scope of an otherwise unrestricted donation; the Department of Licensing did not construe the form that way (CP 269), and

neither would any donor. The donation at issue was plainly within the scope of Jesse's unrestricted gift.

3. Defendants were proper donees under the AGA.

Adams also argues that Jesse's unrestricted donation was invalid because neither the KCMEO nor SMRI are "hospitals" within the meaning of RCW 68.50.570(2). Op. Br. 12-24. But the controlling provision is RCW 68.50.570(1), not RCW 68.50.570(2). The latter applies only where the donor dies in a hospital, making organ transplantation a viable option; it does not apply in cases like this one, where the donor never makes it to a hospital. In effect, in her zeal to find an avenue to recovery in this case, Adams asks this Court not only to ignore Jesse's unambiguous gift, but to construe the Act in a way that would lead to *fewer* organ donations instead of more.² Indeed, under Adams's construction, an unrestricted organ donation could never be accepted by a medical examiner or other non-

² Once again, Adams's argument rings particularly hollow given her own undisputed conduct. Adams never objected to the KCMEO sending Jesse's tissues or to the SMRI receiving them. She admits that she consented to a donation to SMRI; she only disputes the scope of her consent. CP 188 (Amended Complaint). She also agreed to a donation of Jesse's corneas to the Northwest Lions Eye Bank and his tissues to a genetic heart disease researcher. CP 432-433 (pp. 72-74); CP 445 (pp. 121-122). That none of these donees were "hospitals" was of no concern to Adams at that time.

hospital and, more importantly, never be used for medical research. Such a result is absurd, and contrary to the AGA's plain language and purpose.

As noted above, RCW 68.50.570(1) identifies the persons and organizations that are qualified donees under the AGA. It states in part:

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) ...

RCW 68.50.570(1). This list is extremely broad and, consistent with the purpose of the AGA, includes donees who both facilitate transplants and engage in medical research. *Id.* Adams does not dispute that Defendants are permissible donees under this expansive list, but contends that RCW 68.50.570(1) is irrelevant anytime the donor fails to specify a particular donee. For the millions of donors where that is the case, Adams argues that the only possible donee is a "hospital." Op. Br. 19. Putting aside for the moment the absurd consequences of this interpretation, it is clear that neither the history nor language of RCW 68.50.570(2) compels this result.

The limited application and intent of RCW 68.50.570(2) is obvious when its origins are traced to the Uniform Anatomical Gift Act

("UAGA"), the uniform law upon which Washington's AGA is based. The AGA is fashioned after the 1987 version of the UAGA and, indeed, RCW 68.50.570(2) is identical to Section 6(b) of the uniform act. *See* 8A U.L.A. Unif. Anatomical Gift Act, § 6(b) (1987). The term "hospital" first appears in the 1987 version of the UAGA. The drafters' comments note that § 6(b) is largely a restatement of § 4(c) of the 1968 version of the UAGA, except the older act used the term "attending physician," not hospital. *Id.*, comment to § 6. The 1968 UAGA stated that "the gift may be accepted by the attending physician as donee upon or following death." 8A U.L.A. Unif. Anatomical Gift Act, § 6(b) (1968).

On its face, it is clear that this section necessarily applied only where the donor died in a hospital; after all, that was the only place where he or she would have an attending physician present. The comment to this section further stressed that it was not intended to limit the ultimate recipients or uses of a donation: "The donee physician . . . can, of course, make a further gift to another person for any authorized purpose." *Id.*, comment to § 6. The substitution of "hospital" for "attending physician" in the 1987 UAGA (adopted in 68.50.570(2)) did not signify a different meaning or intent; the change was meant to encourage coordination between hospitals for purposes of transplants in this limited situation. *See* 8A U.L.A. Unif. Anatomical Gift Act, § 6(b), comment (1987).

Importantly, nothing in the text or comments of either uniform act indicates that this provision prohibits other qualified donees from accepting or receiving donations.

The fact that RCW 68.50.570(2) simply allows a hospital to accept and facilitate an undesignated donation when a donor dies under its care, but does not exclude other donees under the Act, is further demonstrated by the statute's language. RCW 68.50.570(2) says that hospitals "may" accept an undesignated anatomical gift. It does not use the word "shall" (even though other aspects of the AGA do), nor does it say that undesignated donations may "only" be accepted by hospitals.³ Either variation would be more consistent with Adams's construction, but nothing in the Act suggests the legislature had such intent. To the contrary, the permissive and non-exclusive language of RCW 68.50.570(2) shows that it applies where the donor dies in a hospital, making organ transplantation possible. Where, on the other hand, the donor dies away from a hospital, RCW 68.50.570(1)'s broad list of authorized donees controls.

³ See *Scannell v. City of Seattle*, 97 Wn.2d 701, 704-05, 656 P.2d 1083 (1982) ("Where a provision contains both the words 'shall' and 'may,' it is presumed that the lawmaker intended to distinguish between them, 'shall' being construed as mandatory and 'may' as permissive.").

Adams's interpretation of RCW 68.50.570, if accepted, would seriously undermine the AGA's purpose of facilitating organ donations for medical and research purposes. For one, the unrestricted gifts of donors like Jesse Smith, who are taken directly to a medical examiner's office, could never be realized since the medical examiner's office is not a hospital; donations for research purposes and even corneal transplants would be squandered. And even where a donor dies in the hospital, Adams's interpretation would prevent the hospital from making a further gift to a procurement organization, medical school, research institution or any other donee; if there was not a patient ready for immediate transplant, the donor's anatomical gift could not be used for any other valid purpose. Such an interpretation can be rejected because it leads to absurd result that is contrary to the legislature's plain intent. *See State v. Azpitarte*, 140 Wn.2d 138, 141-42, 995 P.2d 31 (2000); *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994). As with her other arguments, Adams would have this Court limit the broad scope of the Act so that she can have a viable cause of action here. This Court should refuse to do so.

4. The doctrine of equitable estoppel does not permit Adams to ignore and revoke Jesse's unrestricted anatomical gift.

Finally, the doctrine of equitable estoppel does not salvage Adams's claims. As an initial matter, the doctrine may act only as shield,

not a sword; it cannot be used to create a cause of action. *See Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 902, 691 P.2d 524 (1984); *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 258-59, 616 P.2d 644 (1980). It may be the case that equitable estoppel can prevent a defendant from asserting an affirmative defense to defeat an otherwise viable cause of action, but that is not what Adams is trying to do here.⁴ Adams admits that if Jesse's consent is valid (which it is), she has no viable cause of action in the first place. Op. Br. 28. Thus, in asking the Court to ignore Jesse's consent, which is the relief that Adams seeks (Op. Br. 25-28), Adams asks this Court not to *preserve* an existing cause of action, but to *create* one. The doctrine cannot be used as a sword in this manner, and it can be rejected on this basis alone.

In any event, Adams cannot prove each element by clear, cogent and convincing evidence. *See Robinson v. City of Seattle*, 119 Wn.2d 34, 81, 830 P.2d 318 (1992). To start, Adams's alleged reliance was unreasonable. "[T]he party claiming to have been influenced by the

⁴ Indeed, equitable estoppel is almost always raised by defendants as an affirmative defense, not the other way around. The most common exception arises where the plaintiff seeks to estop the defendant from asserting a statute of limitations defense *See, e.g., Peterson v. Groves*, 111 Wn. App. 306, 310-311 (2002). Even in that situation, the doctrine does not create a cause of action; it merely permits the plaintiff to bring an already existing claim that otherwise would be time-barred.

conduct, silence or declarations of another [must] either lack[] knowledge of the true facts or could not acquire them." *Ellis v. William Penn Life Assur. Co. of America*, 124 Wn.2d 1, 15, 873 P.2d 1185 (1994). Adams was aware that Jesse was an unrestricted organ donor (CP 432 (pp. 69-70)); she therefore knew or should have known that Dr. Haikal did not need her consent. At the very least, by concealing the fact of Jesse's donation from Dr. Haikal, Adams herself was at fault. Without clean hands, Adams cannot benefit from equity. *See Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 651, 757 P.2d 499 (1988) (one "may not base a claim of estoppel on . . . representations induced by his own conduct, concealment, or representations").

Further, Adams cannot show that she suffered a detrimental change in position as a result of Dr. Haikal's alleged statements. Adams claims she has been injured because, absent estoppel, she cannot sue Defendants. Op. Br. 28. But Adams has no claims in this case not because of anything Dr. Haikal said or did after Jesse's death, but because Jesse made an unrestricted and unrevoked donation before his death. This is not a case where the plaintiff delayed filing suit or took some other detrimental action in reliance on the defendant's inequitable conduct. Indeed, had Dr. Haikal never called Adams at all, Jesse's donation still would have been entirely proper, and Adams still would not have any claims in this case.

That Dr. Haikal called Adams, in good faith, cannot change that. At the end of the day, Adams's equitable estoppel argument is nothing more than another effort to make an end-run around the AGA. Adams never had a claim in this case, and equitable estoppel cannot be used to create one.

C. Adams Has No Cause of Action For Tortious Interference With A Dead Body Under Either The Restatement (Second) Of Torts Or The Common Law.

Adams has no cause of action for tortious interference with a dead body under the Restatement (Second) of Torts or Washington's common law. For the reasons discussed above, Jesse's unrestricted donation authorized the gift at issue and defeats Adams's interference claim as a matter of law. After all, the donation of Jesse's brain and other tissues cannot be wrongful where Jesse himself authorized it; under the AGA, Adams's interest in Jesse's body vested only *after* the lawful removal of his organs. *See* RCW 68.50.590 ("After removal of the part, custody of the remainder of the body vests in the person under obligation to dispose of the body."). But even were the Court to reach a contrary conclusion on the issue of Jesse's consent, dismissal of Adams's interference claim was proper for each of the additional reasons discussed below.

1. No Washington court has recognized the Restatement (Second) of Torts § 868, and this court should not do so here.

Adams's tortious interference claim relies exclusively on the Restatement (Second) of Torts § 868. CP 193-194. This cause of action does not exist in Washington. The Washington Supreme Court has not adopted Section 868, nor has any court of appeals. Indeed, in the only published opinion addressing the issue, a federal district court refused to recognize Restatement (Second) of Torts § 868 as a viable theory under Washington law. *See Amaker v. King County*, 479 F.Supp.2d 1151, 1157 (W.D. Wash. 2007) (Pechman, J.). This Court should similarly decline Adams's invitation to expand Washington law in this area.

Although it is true that Washington courts have looked to and adopted aspects of the Restatement (Second) of Torts, they reject those parts of the Restatement that are contrary to long-standing Washington law and public policy. *See Sikking v. National R.R. Passenger Corp.*, 52 Wn. App. 246, 249-50, 758 P.2d 1003 (1988) (rejecting Restatement (Second) of Torts § 334); *cf. MacMeekin v. Low Income Housing Inst., Inc.*, 111 Wn. App. 188, 207, 45 P.3d 570 (2002) (rejecting Restatement (Third) of Property § 4.8(3)). Section 868 should be rejected on this basis as well. It does not simply restate or elaborate upon the existing common law in Washington, as Adams contends. Op. Br. at 31. Rather, its

adoption would result in a fundamental and contradictory expansion of settled Washington law.

Washington's common law claim for tortious interference with a dead body is narrow; liability for emotional distress exists only if one *intentionally* interferes with the body. *See Wright v. Beardseley*, 46 Wash. 16, 89 P.2d 172 (1907); *Gadbury v. Bleitz*, 133 Wash. 134, 136, 233 P. 299 (1925) ("we have adopted the rule that if such [mental] suffering is the direct result of a willful wrong as distinguished from one that is merely negligent, then there may be a recovery"). Section 868, on the other hand, diverges sharply from Washington law; it expands liability to anyone who "intentionally, *recklessly or negligently* removes, withholds, mutilates or operates on the body of a dead person." Restatement (Second) of Torts § 868 (emphasis added). Damages for emotional distress are available even if the interference is merely negligent. *Id.*, comment a. Section 868 reflects the minority view in this regard, and it has been rejected in jurisdictions that follow a similar common law rule as Washington. *See Gonzalez v. Metro. Dade Co. Pub. Health Trust*, 651 So.2d 673 (Fla. 1995); *Burgess v. Perdue*, 721 P.2d 239 (Kan. 1986); *Chisum v. Behrens*, 283 N.W.2d 235 (S.D. 1979).

This Court also should refuse to expand Washington common law for similar reasons. The distinction between intentional and negligent

conduct in interference cases strikes a reasonable and workable balance that has long been adhered to in Washington. As the Supreme Court of Florida reasoned, "While we recognize that cases involving negligent mishandling of corpses entail real and palpable injury to feelings, . . . there is no accurate method of separating the natural grief resulting from the death of a loved one from the additional grief suffered as a result of mishandling of the body." *Gonzalez*, 651 So.2d at 676. Adams offers no basis to depart from this well-reasoned rule generally or in this case specifically. Adams has no cause of action under Restatement § 868.

2. **Adams has no common law claim for tortious interference because that claim was not properly raised below and, even if it were, the KCMEO had legal authority to remove Jesse's organs for autopsy purposes.**

As noted, Washington recognizes a common law claim for tortious interference with a dead body. *See Wright and Gadbury, supra*. The problem with that claim here is that Adams failed to properly raise it below. Adams elected to bring an interference claim exclusively under Restatement § 868. CP 193-194. She did not plead a common law claim, nor did she amend the complaint to add it. Adams first raised the claim in *an opposition* brief to Defendants' motion for summary judgment. CP 329-330. It is well-established, however, that a party cannot raise a new theory in response to a motion for summary judgment when it deprives the

other of fair notice. *See Camp Finance, LLC v. Brazington*, 133 Wn. App. 156, 162, 135 P.3d 946 (2006); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 469-472, 98 P.3d 827 (2004). Given the significant difference between the two theories (*see above*), Defendants had no fair notice of Adams's common law claim. This Court should refuse to allow Adams to assert that claim now.

Moreover, Adams's tortious interference claim (under either the common law or Restatement § 868) is defective on the merits. Adams's claim is limited; she did not allege interference in connection with Defendants' alleged use of Jesse's remains for medical research. Rather, she based her claim exclusively on the "*removal* of Jesse Aaron Smith's brain and other organs or tissue without the permission of plaintiffs and/or any legal justification for doing so." CP 193 (emphasis added). Here, however, the KCMEO had jurisdiction over Jesse's body and the authority to remove his organs as part of the autopsy process. *See* RCW 68.50.010; 68.50.100; CP 223. RCW 68.50.106 provides in pertinent part:

In any case in which an autopsy or post mortem is performed, the coroner or medical examiner, upon his or her own authority . . . may make or cause to be made an analysis of the stomach contents, blood, or organs, or tissues of a deceased person and secure professional opinions thereon and retain or dispose of any specimens or organs of the deceased which in his or her discretion are desirable or needful for anatomic, bacteriological, chemical, or toxicological examination

It is undisputed that as part of a typical autopsy, the KCMEO removes all major organs, including the brain, from the body for examination and analysis. CP 223-224.⁵ In short, the removal of Jesse's brain and other organs was not only justified, it would have occurred without Adams's consent as part of ordinary autopsy procedure.

For this reason, Adams's tortious interference claim fails as a matter of law. The undisputed evidence shows that Adams's consent (or alleged lack thereof) had no bearing on the scope of Jesse's autopsy, or the quantity or character of the organs removed; Jesse's brain and other tissues would have been removed in any event. At bottom, therefore, Adams's interference claim rests solely on conduct that was undertaken pursuant to the KCMEO's statutory mandate, and for which it has absolute immunity from civil liability. *See* RCW 68.50.015 (medical examiner has immunity from civil liability when performing autopsy). The trial court's judgment should be affirmed on this basis as well.

⁵ Adams's husband (who was on the phone with Dr. Haikal when the issue of Jesse's donation was discussed), who is an attorney, knew that organs were removed as part of an autopsy, although he did not share that fact with his wife at the time. CP 243 (pp. 53, 56).

D. Adams Has No Implied Private Right of Action Under Washington's Anatomical Gift Act.

Washington's AGA, RCW 68.50.520 *et seq.*, includes no express private right of action, nor has any Washington court ever imposed civil liability for violation of the Act. Nevertheless, Adams argues that the court below should have *implied* a right of action in her favor, and then let her proceed to trial on that theory. Op. Br. 32-39. But the trial court did not have to reach this issue - and neither does this Court - because Adams's rights under the AGA were not implicated or violated in this case. In light of Jesse Smith's unrestricted and unrevoked anatomical gift (*see* Section IV.B), Adams had no role to play in the donation process and no right to consent after Jesse's death. *See* RCW 68.50.540(8); RCW 68.50.550(1). Summary judgment was proper on this basis.

The trial court's judgment was proper for the separate reason that Adams has no implied cause of action under the AGA, even if her consent were necessary. Washington courts use a three-part test to determine whether an implied right of action exists:

[F]irst, whether the plaintiff is within the class for whose "especial" benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Bennett v. Hardy, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990) (citations omitted). All three factors weigh squarely *against* implying a private right of action here. In fact, a federal district court, applying Washington law, considered and rejected the same theory Adams advances here. *See Amaker v. King County*, 479 F.Supp.2d 1151 (W.D. Wash. 2007) (Washington AGA did not contain implied cause of action). If it reaches this issue, the Court should come to the same conclusion.

1. Adams is not within the class of persons that the Anatomical Gift Act was intended to benefit.

Adams argues that the AGA was especially "intended to protect the interests of all involved in the anatomical gift/organ donation process . . ." Op. Br. 36. No so. The unambiguous text of the Act shows that the legislature did not intend to confer a benefit on any particular class of persons, but rather sought to increase the number of donations for the benefit of society as a whole. The Act could not be clearer on this point:

The legislature declares that it is in the best interests of the citizens of Washington to provide a program that will increase the number of anatomical gifts available for donation, and the legislature further declares that wherever possible polices and procedures required in this chapter shall be consistent with the federal requirements.

RCW 68.50.520. To advance this benevolent goal, the AGA empowers individuals to consent to gifts before death (RCW 68.50.540); requires hospitals to encourage patients to donate (RCW 68.50.560); allows

hospitals, doctors, research institutions, and others to accept donations, and coordinate for that purpose (RCW 68.50.570 & .600); and creates an organ and tissue donor registry (RCW 68.50.635). Except where the State has jurisdiction over the deceased, the "rights of a donee created by an anatomical gift are superior to rights of others." RCW 68.50.590(1).

In contrast, the family's interests are limited. The only right given to the family under the AGA is ability to consent to a donation in the absence of instructions from the decedent. *See* RCW 68.50.550. Even here, their authority is lesser than that of the donor's guardian or a person with a power of attorney. *Id.* Even if consent does fall to the family, that authority is not exclusive. The closest next of kin can consent if he or she is "available"; otherwise, a relative of a lower kinship can make the donation. RCW 68.50.550(2). Regardless, the ability to consent has no teeth; one family member cannot sue another if they disagree. *See* RCW 68.50.620(4) (one "who makes an anatomical gift under . . . 68.50.550. . . [is] not liable for injury or damage that may result"). In short, family members are not benefited by the AGA; they merely play a role, along with many others, in facilitating donations for the benefit of all.

This is even more apparent when one compares the AGA to the statutes at issue in *Tyner v. Department of Social and Health Services*, 141 Wn.2d 68, 1 P.2d 1148 (2000), the case Adams primarily relies upon. In

ruling that RCW 26.44.050 - which requires the State to investigate possible instances of child abuse - implied an action in favor of the parent, the Court looked to the act's declaration of purpose section, which reads:

The Washington state legislature finds and declares: The bond between a child and his or her parent . . . is of paramount importance, and *any intervention into the life of a child is also an intervention into the life of the parent* . . .

Id. at 78 (*quoting* RCW 26.44.010) (emphasis added). On this basis, the Court concluded that the statute's protections necessarily extended beyond the child to encompass the parent. *Id.* at 78-80. No similar legislative intent is apparent here; the AGA expressly identifies its beneficiaries as "the citizens of Washington." RCW 68.50.520. *See Amaker v. King County*, 479 F.Supp.2d 1162, 1163 (W.D. Wash. 2007) ("[AGA] was not enacted to benefit Adams. The statute was enacted to encourage the process of organ donation"); *cf. Crisman v. Pierce County*, 115 Wn. App. 16, 23, 60 P.3d 652 (2002) (no implied action where legislative intent is "protecting the public rather than any individual"). Adams does not satisfy the first part of the *Bennett* test.

2. **Nothing in the Anatomical Gift Act supports implying a remedy in favor of Adams.**

The legislature did not explicitly or implicitly intend the AGA to give rise to a private right of action. Rather, its plain language, as well as the uniform act upon which it is based, show that the legislature wanted to

limit, rather than create, civil liability. Specifically, the Act confers immunity on anyone who attempts to comply with the law in good faith:

A hospital, physician, surgeon, coroner, medical examiner, local public health officer, enucleator, technician, or other person, who acts in accordance with RCW 68.50.520 through 68.50.630 and 68.50.901 through 68.50.904 or with the applicable anatomical gift law of another state or foreign country or attempts in good faith to do so, is not liable for that act in a civil action or criminal proceeding.

RCW 68.50.620(3). As noted, the Act also immunizes the conduct of anyone who consents to a donation. *See* RCW 68.50.620(4); *also* RCW 68.50.560(6) ("person who fails to discharge the duties imposed by this section is not subject to criminal or civil liability"). The legislature would not be explicit on the issue of civil immunity, yet silent on the issue of civil liability, if it intended liability to attach. Indeed, the legislature expressly engrafted criminal penalties into the Act (*see* RCW 68.50.610), further demonstrating that its omission of civil penalties was intentional.

Adams tries to turn the significance of the immunity clause on its head by arguing that the clause would be meaningless if liability were not implicit under the Act. Op. Br. 38. The clause, however, provides immunity from any "civil action," and thus is intended to shield persons from *common law* liability. This is explicit in the comments to latest version of the UAGA, which retains the same immunity clause adopted in Washington as RCW 68.50.620(3). The drafters wrote:

This [act] retains the meaning of the term of "good faith" in the 1968 Act in order to encourage and facilitate transplantation. On the other hand, if a person acts in subjective "bad faith," *the common law provides remedies.*

8A U.L.A. Revised Unif. Anatomical Gift Act, comment to § 18 (2006) (emphasis added). Not surprisingly, every court that has considered immunity under the UAGA has done so in the context of a *common law claim*. See, e.g., *Carey v. New England Organ Bank*, 843 N.E.2d 1070 (Mass. 2006) (negligence, interference with a body, infliction of emotional distress); *Andrews v. Alabama Eye Bank*, 727 So.2d 62 (Ala. 1999) (negligence and outrage). For this reason, Adams's fear that wrongdoers will ignore the AGA absent an implied remedy is unfounded. Op. Br. 38. Where there is no immunity, accountability is found in the common law.

The legislatures and courts of every state agree on this issue, a factor which this Court must consider. The Washington AGA expressly requires that it be construed in uniformity with other states' versions of the UAGA (RCW 68.50.902); and Washington courts similarly will look to case law from other jurisdictions that have modeled their laws on the UAGA. See *Sattler v. NW Tissue Ctr.*, 110 Wn. App. 689, 694, 42 P.3d 440 (2002). All 50 states have enacted the 1968 or 1987 version of UAGA and *none* have included an express private cause of action regarding family members' authority to consent to donations. See 8A

U.L.A. Unif Anatomical Gift Act (1968) & (1987), at pp. 3, 107 (Supp. 2003). Just as important, no court has ever found an implied right of action under the UAGA.⁶ This Court should likewise refuse to find one here. Adams cannot satisfy the second part of the *Bennett* test.

3. An implied private right of action is inconsistent with the purpose of the Anatomical Gift Act.

Finally, implying a cause of action would be contrary to the underlying intent of the AGA. The Act's express purpose is to increase the number of anatomical gifts. *See* RCW 68.50.520. From its enactment in 1993, through all of its amendments, the legislature has never found it necessary to provide express civil remedies to further that purpose. Similarly, the Act is based on the 1987 version of the UAGA, which is one of three drafted by the National Conference of Commissioners. *See* H.R. 53-1993, 1st Spec. Sess., at 5-6 (Wn. 1993); 1993 Final Legis. Rep., SHB 1012. None of the iterations of the UAGA (1968, 1987, or 2006) include, nor do their comments suggest, a private right of action. To the contrary, like Washington's AGA, they immunize those who act in good faith from

⁶ Adams claims that the court of appeals recognized an implied cause of action under the AGA in *Sattler*. Op. Br. at 38-39. This is wrong. The issue in *Sattler* was whether the AGA's immunity clause shielded the defendant from civil liability on plaintiffs' *common law* claims; the court never discussed - let alone recognized - an implied right of action under the Act.

civil liability. *See* 8A U.L.A. Unif. Anatomical Gift Act § 7 (1968); *id.* at § 11 (1987); *id.* at § 18 (2006).

The legislature provided immunity under the Act because it wanted to encourage more organizations and others persons to vigorously participate in the donation process without substantial risk of liability. *See Sattler*, 110 Wn. App. at 694 ("[w]ithout the protection from liability provided by the good faith defense, . . . organizations would likely hesitate to seek needed donations"). More participants means more donations, which furthers the purpose of the AGA. Any rule that *increases* the prospect of liability for those who participate in the donation process runs directly counter to that goal and frustrates the Act's intent. Adams fails to satisfy the third *Bennett* factor. If it reaches this issue, the Court should hold that there is no implied right of action under the AGA.

E. Adams's Fraud Claim Fails Because Jesse Smith's Unrestricted Donation Renders Defendants' Alleged Misrepresentations Immaterial As A Matter Of Law.

The trial court's grant of summary judgment on Adams's fraud claim was proper and must be affirmed. Adams alleged that in seeking Adams's permission to use Jesse Smith's organs and tissues for research purposes, Dr. Haikal misrepresented the amount and types of tissues that would be removed from Jesse's body. CP 482-83; Op. Br. 42. The evidence shows that Dr. Haikal made no false statements whatsoever. CP

224 (Haikal Decl.); CP 274 (Autopsy Report) ("brain . . . is donated to the Stanley Foundation by the family's permission"). But regardless of whether there is a genuine dispute about what was said during that conversation, Adams's fraud claim still fails because Dr. Haikal's alleged misrepresentations were irrelevant and immaterial as a matter of law.

As explained in Section IV.B above, Jesse's unrestricted donation was unrevoked at the time of his death, and did not require Adams's consent. It was therefore unnecessary for Dr. Haikal to call Adams, although she was unaware of that fact at the time (a computer database did not yet exist (CP 206)). For this reason, whatever Dr. Haikal said in that call was immaterial on the issue of Jesse's donation. *See Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d 915, 920, 425 P.2d 891 (1967) (fraud requires showing of materiality). This is so because even had Adams known the supposed truth, and refused consent, it would have made no difference; Defendants had the authority to process Jesse's donation in exactly the manner they did. To hold otherwise effectively would allow Adams to revoke Jesse's gift with a claim of fraud regarding a telephone call that never needed to occur. Even worse, it would expose Defendants to liability for doing exactly what Jesse wanted, what the AGA authorizes, and what Washington public policy encourages. Summary judgment on Adams's fraud claim was proper.

F. Adams Has No Invasion of Privacy Claim Because Jesse Smith Consented To The Conduct At Issue And, In Any Event, There Was No Publicity Of Jesse Smith's Private Affairs.

Adams claims that her privacy interests were violated when the KCMEO sent Jesse Smith's tissues and records to SMRI for research purposes. CP 192-93; Op. Br. 42-44. Although *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998), does give a family member a limited privacy interest in the autopsy records of a deceased relative, *Reid* does not provide Adams with an avenue for recovery here. The trial court's dismissal of Adams's invasion of privacy claim can be affirmed on two separate and independent grounds.

First, Jesse's unrestricted donation gave Defendants express authority to do what Adams complains about, i.e., transfer and study Jesse's organs and tissues. It is well-established that consent is a defense to common law intentional torts (*see Morgan v. Johnson*, 137 Wn.2d 887, 897 fn.3, 976 P.2d 619 (1999)), including claims for invasion of privacy. *See Hawkins v. Multimedia, Inc.*, 344 S.E.2d 145, 146 (S.C. 1986); W. Page Keeton, *et al.*, *Prosser & Keeton on the Law of Torts* § 117, at 867 (5th ed. 1984) (no invasion of privacy if plaintiff consented).⁷ By

Indeed, in *Douglas v. Stokes*, 149 S.W. 849 (Ky. 1912), the case primarily relied upon by the Washington Supreme Court in *Reid*, the
(continued ...)

becoming an organ donor, Jesse consented to the "publicity" Adams complains about. That Adams claims *she* did not consent is of no consequence. She did not have a right to limit or revoke Jesse's gift, and thus her interest in Jesse's private affairs can be no greater than Jesse's. If that were not the rule, a relative could bring an invasion of privacy action anytime he or she disagreed with an otherwise valid anatomical gift. Summary judgment on Adams' invasion of privacy claim was proper on this basis.

Second, the sending and use of Jesse's organs and tissues for research purposes did not constitute "publicity," an element of Adams's privacy claim. *See Reid*, 136 Wn. at 205. Publicity "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Fisher v. Dep't of Health*, 125 Wn. App. 869, 879, 106 P.3d 836 (2005) (citation omitted). There is no publicity where medical matters are shared by medical professionals in a confidential manner. *See Mayer v. Huesner*, 126 Wn. App. 114, 122, 107 P.3d 152 (2005); *Berger v. Sonneland*, 101 Wn. App. 141, 155-56, 1 P.3d 1187

(... continued)

Kentucky Supreme Court held that the plaintiffs' rights were invaded only when the defendant "exceeded his authority." *Id.* at 850.

(2000) (*rev'd on other grounds* 144 Wn.2d 91 (2001)). That is all that occurred here. It is undisputed that Jesse's private affairs have not been publicized. Jesse's tissues and records were sent to SMRI confidentially, where they have remained. CP 139. Other than the neuropathologist at SMRI who examined Jesse's tissues for purposes of preparing a neuropathological report, his tissues and associated records have remained completely private. CP 224-25.

The district court's decision in *Amaker v. King County* is particularly instructive on this issue. The facts are nearly identical; the plaintiff argued that her right to privacy was violated when the KCMEO shipped her brother's brain and other tissues, as well as medical records, to SMRI without consent. 479 F.Supp.2d at 1157-58. In granting Defendants' motion for summary judgment, Judge Pechman reasoned:

Defendants' actions of harvesting and shipping Bradley's brain and tissue to SMRI, a non-profit organization supporting and conducting medical research, are not sufficient "publicity" to state a cause of action. KCMEO sent Bradley's brain and other tissue to a single organization, not to the public at large. . . . Defendants further assert that they kept all confidential information private and did not disclose any information about Bradley to the public. Plaintiff has not contradicted this assertion.

Id. at 1158 (internal citations omitted). The undisputed facts are on all-fours with *Amaker*. There was no publicity incident to this donation. This too supports the trial court's grant of summary judgment on this claim.

G. The Trial Court Did Not Err In Dismissing Adams's Civil Conspiracy Claim Because There Was No Evidence Raising Even An Inference Of Unlawful Means.

Adams's contention that Defendants conspired to carry out a lawful purpose (organ donation) by unlawful means is unfounded. The only evidence Adams cites to support her theory is the fact that Defendants' consent form used different terms than the donation protocol; the form used the term "brain tissue" (CP 394-395), whereas the protocol called for removal of the entire brain and other tissues (*id.* 401-411). This singular, and benign, fact is insufficient to carry Adams's burden on summary judgment. Evidence of conspiracy "must be inconsistent with a lawful or honest purpose and reasonably consistent only with [the] existence of the conspiracy." *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 529, 424 P.2d 290 (1967). There is no evidence that Defendants purposely used different terms in the consent form, let alone that they did so for improper reasons. Indeed, the evidence raises a contrary inference. If Defendants had a scheme to misrepresent the scope of Jesse's donation, they would not have provided Adams with an autopsy report stating unequivocally that "the brain . . . is donated to the Stanley Foundation by the family's permission for neuropathological research." CP 274.

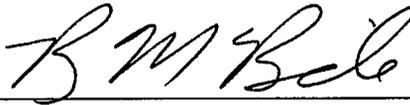
In any event, one cannot recover damages merely upon proof of a conspiracy; the conspiracy itself must have caused the plaintiff's damages. *See Couie v. Local Union No. 1849 United Brotherhood of Carpenters and Joiners of America*, 51 Wn.2d 108, 116, 316 P.2d 473 (1957). Even if there were a conspiracy, Adams can make no such showing here for the fundamental reason that *she never even saw the consent form at issue* until after litigation commenced; her consent was obtained over the telephone. CP 224; CP 234; CP 462 (p. 189). Indeed, Dr. Haikal did not even read from the form in her telephone conversation with Adams. CP 497 (p. 91). In the end, it would make no difference even had Adams seen the form. As described above, her consent was not required in light of Jesse's unrestricted and unrevoked donation (*see* Section IV.B); any alleged conspiracy to improperly obtain consent was irrelevant in Adams's case. Adams's conspiracy claim was properly dismissed.

V. CONCLUSION

This Court should affirm the trial court's judgment in its entirety.

RESPECTFULLY SUBMITTED this 2~~S~~ day of September, 2007.

LANE POWELL PC

By 

Grant S. Degginger, #15261

June K. Campbell, #11427

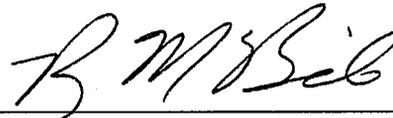
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing Respondents' Answering Brief on September 28, 2007, by causing the original and one copy thereof to be delivered to the Washington State Court of Appeals (Division I) Clerk's Office, and that I served the same on Appellants on September 28, 2007, by causing a true and correct copy thereof to be mailed by First-Class mail on that date to their attorney at the following address:

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