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STATE OF WASHINGTON

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No. 82041-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROBINETTE AMAKER,

Plaintiff/Appellant,

v.

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

Defendants/Appellees.

ON CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

Defendants' APPELLEES' ANSWERING BRIEF

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I. INTRODUCTION AND SUMMARY

This case comes to the Court by way of an Order Certifying Questions to the Washington Supreme Court (“Order”) entered by the United States Court of Appeals for the Ninth Circuit in *Amaker v. King County*, 540 F.3d 1012 (9th Cir. 2008). The Order certified three questions for consideration:

(1) Whether only those individuals identified as “next of kin” as defined by RCW § 68.50.160 at the time of the decedent’s death have standing to bring a claim for tortious interference with a corpse?

(2) If the answer to the above question is “no,” whether Amaker, the decedent’s sister, is within the class of plaintiffs that may bring a claim for tortious interference with a corpse?

(3) Whether the Washington Anatomical Gift Act, RCW § 68.50.520 *et seq.*, creates an implied private right of action upon which Amaker may state a claim?

Id. at 1019. This Court’s recent decision in *Adams v. King County*, 192 P.3d 891 (2008), answers the third question in the negative. *Adams* holds that the former version of the Washington Anatomical Gift Act (“WAGA”)—the same version at issue here—does not provide an implied statutory cause of action. *Adams* at *1, 12-16.

For the reasons explained below, the answer to the first question is “yes.” Washington follows the long-standing majority rule that standing to sue for tortious interference with a dead body is limited to the next of

kin who—at both common law and by statute—has exclusive rights to custody and control over the deceased’s remains. This rule conforms to the traditional tort principle that liability flows only from a duty owed to a foreseeable plaintiff; and, at the same time, it provides certainty and predictability to those in our society responsible for handling and making final arrangements for the dead. As the Court recognized in *Adams*, WAGA gives family members no additional rights or remedies in the context of organ donation, and thus cannot expand the common law rule. Amaker’s other arguments are without merit. Because the first question should be answered in the affirmative, the second question is moot.

II. STATEMENT OF THE CASE

A. Factual Background.¹

Bradley Gierlich’s Death. On October 13, 1998, Bradley Gierlich, then age 41, died of a heroin overdose in his Seattle apartment. ER 118-121. Bradley was single and had no children. His mother had died in 1995. ER 130 (p. 19). His father, Robert Gierlich, was retired and living on his own in a retirement community in Florida. ER 290 (p. 28). Robert took care of himself (ER 289 (p. 25)), drove a car (ER 135-136 (pp. 73-

¹ The Ninth Circuit’s summary of material facts appears in its Order at 540 F.3d at 1013-1015. Citation to the “ER” refers to the Excerpts of Record, which is part of the certified record filed in this Court on August 27, 2008.

74)), and was under no legal disability (ER 290 (p. 29)). Bradley was also survived by his sister, Robinette Amaker, who also lived in Florida, and his aunt, Teresa Wright. Ms. Wright lived in Seattle and had far more contact with Bradley in the last years of his life than either Robert Gierlich or Amaker. ER 124 (p. 25). Indeed, Amaker described Ms. Wright as being like a sister to Bradley. ER 132 (p. 52). At the time of Bradley's death, Amaker had not seen her brother for more than a year, nor spoken with him in over six months. ER 133-134 (pp. 64-69).

On October 14, 1998, the King County Medical Examiner's Office ("KCMEO") was dispatched to investigate Bradley Gierlich's death. ER 118-121. KCMEO is part of the King County Department of Public Health. It is authorized by law to assume the jurisdiction over the bodies of all persons who die suddenly in King County when they otherwise were in apparent good health and were without medical attendance within the 36 hours preceding death. ER 77-78; RCW 68.50.010. Because the circumstances indicated a drug-related death, KCMEO assumed jurisdiction over Bradley's body. A KCMEO investigator went to the scene, recovered Bradley's body and personal effects and transported them to the medical examiner's office. ER 118-121.

Stanley Medical Research Institute. Stanley Medical Research Institute ("SMRI"), a non-profit charitable organization, supports research

on the causes and treatment of schizophrenia and bipolar disorder. Schizophrenia and bipolar disorder are severe psychiatric disorders, affecting more than four million people in the United States. ER 93-94. SMRI provides postmortem brain tissue from persons who were affected by these diseases, as well as unaffected control specimens, to researchers around the world without charge. SMRI has sent more than 200,000 blocks and sections of frozen and fixed tissue to over 170 researchers in furtherance of this valuable research. ER 94. SMRI began research on these diseases in 1989 and has since provided over \$200 million to make this research possible. *Id.* Dr. E. Fuller Torrey is a psychiatrist and director of Stanley. ER 93.

For approximately eleven years, SMRI collected brain tissue with the assistance of participating medical examiners. ER 94. From 1994 through 2004, KCMEO was a recipient of a grant from SMRI. *Id.*; ER 111-117. The grant funded a full-time pathologist position as well as expenses related to the research program. Only 25 percent of the pathologist's time was spent on the SMRI program; the remainder of his or her time was spent on other tasks for KCMEO, including performing autopsies. ER 78-79, 99. Of the over 1,000 autopsies performed by the KCMEO in 1998, the year of Bradley's death, tissues from only about 20 individuals were donated to SMRI. *Id.* When a donation was made to

SMRI through this program, SMRI would prepare a neuropathology report for KCMEO, which became part of the decedent's autopsy file. ER 78, 94, 100-101. At the time of Bradley's death the SMRI-funded pathologist at KCMEO was Dr. Sigmund Menchel. ER 98-99.

Bradley's Donation and Cremation. Dr. Menchel performed Bradley Gierlich's autopsy on October 16, 1998. ER 223-227. Dr. Menchel contacted Ms. Wright, and she provided information about Bradley's background and medical history, as well as the names and phone numbers of his relatives, including Robert Gierlich. ER 101. When asked about the issue of tissue donation, Ms. Wright assured Dr. Menchel that Robert Gierlich would consent. *Id.* Although Ms. Wright would later testify that she did not recall speaking to Dr. Menchel in that time frame (ER 127 (pp. 62-63)), his contemporaneous notes show that this conversation occurred (ER 104-108). Dr. Menchel then attempted to contact Robert by phone several times, but was unsuccessful. ER 101. Dr. Menchel eventually sent Robert a consent form by mail. ER 101. Believing that written consent was forthcoming, and time being of the essence, Dr. Menchel collected Bradley's brain and associated tissues and sent them to SMRI. *Id.* SMRI prepared a neuropathology report for inclusion in Bradley's autopsy file. ER 229-230.

Upon learning of his death, Amaker and Robert Gierlich agreed that Amaker would go to Seattle to retrieve Bradley's cremated remains, while Robert would fly to Minnesota where the family planned to have a memorial service. ER 135 (pp. 72-73). Amaker traveled to Seattle the same day that Bradley's autopsy was conducted. ER 136 (p. 75). Bradley's body was released to a funeral home for cremation on or about the afternoon of October 16, 1998. ER 265. Amaker arranged for the cremation of Bradley's body (ER 138 (p. 85)), and signed an agreement with the funeral home confirming that her father, Robert Gierlich, was Bradley's next of kin (ER 150). Robert knew this as well; several weeks later, Robert faxed a letter to KCMEO authorizing Ms. Wright to pick up Bradley's personal belongings. ER 141. On October 17, 1998, Amaker left Seattle with her brother's remains to travel to Minnesota. ER 136 (pp. 74-75). Robert Gierlich flew by himself to Minnesota to attend the services. ER 136 (p. 74).

Plaintiff Learns of Bradley Gierlich's Donation. Robert Gierlich passed away in 2004. ER 130 (pp. 19-20). In early 2005, a newspaper reporter contacted Amaker by email and asked her whether she knew whether Bradley's brain had been used for research. ER 143 (pp. 110-111). They spoke several more times on the phone, and eventually Amaker authorized the reporter to obtain copies of Bradley's autopsy

records. ER 143 (pp. 112-113). Teresa Wright also had conversations with the same reporter. ER 303 (pp. 114-116).

After a newspaper story appeared referencing Bradley Gierlich's donation, SMRI reached out to Amaker. In response, Amaker requested SMRI to test Bradley brain tissue for CADASIL. ER 95; ER 144 (pp. 122-123). CADASIL is an acronym for a genetic disease that results in recurrent strokes as well as cognitive deficits that eventually lead to dementia. ER 95. This testing was important to Amaker because her father had been diagnosed with CADASIL in the years after Bradley's death (ER 289 (p. 22)), and Amaker was concerned that she too may be at risk for the disease. ER 136 (p. 76). The tests arranged by SMRI indicated that Bradley had early stages of CADASIL and, as a result, Amaker has received treatment to ward off the effects of the disease. ER 145. Only after Amaker received SMRI's help did she file suit.

B. Procedural History.

Amaker brought an action against King County, SMRI, and Dr. Torrey in Pierce County Superior Court on August 19, 2005 alleging tortious interference with a dead body, outrage, negligent infliction of emotional distress, negligence, conversion, civil conspiracy, invasion of privacy, violation of WAGA and the CPA. Defendants removed the case to federal district court on the basis of diversity and, following discovery,

moved for summary judgment. Amaker voluntarily relinquished her claims for outrage, negligent infliction of emotional distress, negligence, conversion, and violation of the CPA.

The district court granted Defendants' motion with respect to Amaker's remaining claims. The court dismissed Amaker's invasion of privacy and civil conspiracy claims because there was no "publicity" and no evidence that SMRI and KCMEO agreed to unlawfully remove organs without donor consent. *Amaker v. King County*, 479 F. Supp. 2d 1151, 1157-59 (W.D.Wash. 2007). In a subsequent order, the court held that Amaker lacked standing to pursue the tortious interference claim because she was not Bradley Gierlich's next of kin at the time of his death. *Amaker v. King County*, 479 F. Supp. 2d 1159 (W.D.Wash. 2007). The district court also concluded that WAGA did not create an implied private right of action. *Amaker v. King County*, 479 F. Supp. 2d 1162 (W.D. Wash. 2007). Amaker appealed to the Ninth Circuit.

On August 26, 2008, the Ninth Circuit disposed of Amaker's invasion of privacy and conspiracy claims in an unreported memorandum opinion. In a separate Order issued the same day, the court stayed final disposition of the case and certified three questions to this Court. *Amaker*, 540 F.3d at 1018-1019. As explained above, the third question—whether there is an implied cause of action under WAGA—was answered in the

negative by this Court's subsequent decision in *Adams v. King County*. The certified record of the Ninth Circuit proceedings was filed in this Court on August 27, 2008.

III. ARGUMENT

A. The Answer To The First Certified Question Is "Yes." Only The Next Of Kin As Defined By RCW 68.50.160(3) Has Standing To Sue For Tortious Interference With A Dead Body.

Amaker lacks standing to sue Defendants on a common law theory for tortious interference with a dead body. The common law, the terms of RCW 68.50.160(3), and good public policy all demonstrate that standing to bring such a claim is limited to only those next of kin vested with a legal right to control the disposition of the deceased's remains. Here, that person was Bradley Gierlich's father, Robert Gierlich—not Bradley's distant sister Amaker. Neither the provisions of WAGA nor the inapplicable "discovery rule" alter this result. Because the answer to the first certified question is "yes," this Court does not need to reach the second question or other issues raised in Amaker's brief.

1. Washington Common Law Limits Standing To Sue For Tortious Interference With A Dead Body To The Lawful Custodian Of The Deceased's Remains.

In *Adams v. King County*, this Court described the contours of Washington's common law action for tortious interference with a dead body, but did not reach the issue of standing. *See Adams* at *21 ("as

mother of the deceased, Adams falls within the recognized category of plaintiff who can maintain a claim”). The Court did, however, reaffirm the continuing vitality of its earlier decisions in *Wright v. Beardsley*, 46 Wash. 16, 89 P. 172 (1907), and *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925). *Adams* at *17. And, indeed, in declining to adopt the Restatement (Second) of Torts § 868 (1979), the Court explained that it was reluctant to expand the traditional scope of the common law tort. *Id.* at *18 n. 9. For the same reason, this Court should look to the common law to determine whether Amaker falls within the recognized class of persons entitled to sue for tortious interference with a dead body.

This Court does not need to look any further than its seminal decision in *Wright v. Beardsley*. In *Wright*, the parents of a deceased infant brought an action against the undertakers who wrongfully buried the infant’s body in the same grave as another child. 46 Wash. at 17-18. The Court upheld the verdict in favor of the parents and, in so doing, adopted the common law rule that answers the question of standing here: “The persons who are the *lawful custodians* of a deceased body may maintain an action for its desecration.” *Id.* at 18 (emphasis added); *also id.* at 19 (relative with “right of custody of the corpse” may bring claim). As discussed below, both the common law and RCW 68.50.160(3) define the “lawful custodian” as the closest next of kin with the legal “right to

custody” of the body, and that definition does not include Amaker. *Wright* remains good law and provides the answer to the first certified question.

To avoid the common law rule, Amaker relies on a single sentence from *Adams* in which the Court stated that the right to sue includes “relatives of the deceased and those who control the right to dispose of the body.” Appellant’s Br. 18 (quoting *Adams* at *19). Although dicta to the Court’s holding, Amaker argues that the Court intended to radically expand the scope of common law standing to include *any relative* of the deceased. *Id.* at 18-20. Defendants do not believe the Court intended such a result, but rather intended to restate the common law rule. Notably, as authority for its statement, the Court cited *Gadbury v. Bleitz* and RCW 68.50.160(3), neither of which can be construed to confer standing on relatives of the deceased who are not the next of kin.

With respect to *Gadbury*, the Court held that a mother had standing to bring a tortious interference claim even though her dead son was an adult. 133 Wash. at 138-139. The Court did not discuss, let alone expand, the common law rule because, as in *Adams*, the mother was the next of kin and lawful custodian of her child’s remains. Indeed, the *Gadbury* court cited favorably to *Koerber v. Patek*, 102 N.W. 40 (Wis. 1905), in which the Wisconsin Supreme Court held that standing to sue resides only with those with a “right of custody and burial” of the deceased. *Koerber*, 102

N.W. at 45. Of course, that is the same rule the Court adopted two decades earlier in *Wright* (which also cited favorably to *Koerber*, see *Wright*, 46 Wash. at 18-19). The same common law rule applies today.

With respect to RCW 68.50.160(3), as discussed in the next section, the statute does not expand the class of persons who has standing to sue for tortious interference with a dead body; it narrowly limits that class to the closest living next of kin. If anything, this Court's favorable citation to RCW 68.50.160(3) in the context of standing demonstrates that it—like the district court and Ninth Circuit—views the statute as the modern corollary to the traditional common law rule.

2. The Next Of Kin With Lawful Custody Over The Deceased's Remains Is Defined By RCW 68.50.160(3).

Under *Wright* and *Gadbury*, the issue of whether a relative has standing to sue for common law interference turns on whether he or she was the “lawful custodian” with a “right of custody” of the deceased's remains. See *Wright*, 46 Wash. at 18-19. As the district court and Ninth Circuit recognized, Washington law defines that person by statute, in RCW 68.50.160(3). See *Amaker*, 540 F.3d at 1016. That conclusion is correct because the “right of custody over and interest in a dead body and the disposal of the body” has long been a “matter of statute” in Washington and other states. *Herzl Congregation v. Robinson*, 142 Wash. 469, 471, 253 P. 654 (1927). In any event, the statute merely codifies the

common law rule that the closest next of kin has sole custody and control over the remains of the deceased. *Id.* at 473 (“right, in the absence of testamentary disposition, belongs exclusively to the next of kin”).

Specifically, RCW 68.50.160(3) expressly identifies which living next of kin possesses exclusive rights and liabilities concerning the remains of the deceased. The statute reads in pertinent part:

If the decedent has not made a prearrangement . . . , ***the right to control the disposition of the remains of a deceased person vests in***, and the duty of disposition and the liability for the reasonable cost of preparation, care, and disposition of such remains devolves upon the following ***in the order named***:

- (a) The surviving spouse.
- (b) The surviving adult children of the decedent.
- (c) ***The surviving parents of the decedent.***
- (d) ***The surviving siblings of the decedent.***
- (e) A person acting as a representative of the decedent under the signed authorization of the decedent.

RCW 68.50.160(3) (emphasis added). Bradley died without any will or instructions. He had no spouse or children. It is undisputed, therefore, that Robert Gierlich—Bradley’s living father—was the next of kin vested with exclusive custody of Bradley’s remains. Amaker understood this well; when making arrangements with the funeral home, she expressly acknowledged that Robert was Bradley’s closest next of kin (ER 150), a fact she later conceded at her deposition. *See* ER 138-139 (pp. 85-86) (“Did you understand when you were here that your father was your

brother's closest next of kin? ... Yes.”). If there was a claim for tortious interference, it was Robert Gierlich's alone.²

The fact that Amaker helped make arrangements for Bradley's cremation does not change this analysis. The rights granted to the lawful custodian are superior to, and exclusive of, the interests of other family members, without regard to who actually handles the arrangements. RCW 68.50.160(3) (right “devolves upon the following in the order named ...”). As discussed below, this is true even where WAGA gives another family member authority to consent to a donation of the deceased's organs. Ultimately, standing turns on the next of kin's exclusive rights of control and custody over the deceased's remains. If that were not the rule, and Amaker's theory accepted, then anyone who made final arrangements for the deceased—even remote relatives or friends—could claim standing to sue. The tort would be stretched beyond recognition.

Amaker's self-serving claim that Robert Gierlich lacked capacity is likewise irrelevant. Appellant's Br. 7-8, 22-23. At least absent the

² Because the right to sue was personal to Robert Gierlich, it extinguished upon his passing. An example illustrates why that result is no different than any number of similar situations. If Person A intentionally slanders Person B, Person B could bring a cause of action in tort. But if Person B dies before learning of the slander, neither his estate nor his family would have a cause of action for the simple fact that Person B never suffered any damages. This case is no different. Indeed, had he responded to Dr. Menchel's comments, there is no evidence that Robert would have disapproved of the donation.

appointment of a guardian or a power of attorney (“POA”), the rights afforded Robert Gierlich under RCW 68.50.160(3)—including the right to bring an action for tortious interference—remained his, to the exclusion of anyone else. And even if Robert were legally incapacitated, standing would not automatically devolve to Amaker through RCW 68.50.160(3). Rather, the guardian or POA would have a duty to pursue those rights *on behalf of Robert* if doing so would be in his best interests. *See, e.g.*, RCW 4.08.060 (court shall appoint guardian for incapacitated party plaintiff); RCW 11.92.040 (duties of a guardian). Neither Amaker nor anyone else claimed Robert was incapacitated during this period. ER 290 (p. 29)

Regardless, the undisputed facts demonstrate that Robert Gierlich was not incapacitated.³ At the time of Bradley’s death, Robert lived alone in a retirement community, took care of himself, and had a driver’s license. ER 135-136 (pp. 73-74); ER 289 (p. 25); ER 290 (pp. 28-29). When told of Bradley’s death, Robert agreed that Amaker would make arrangements for Bradley’s cremation, while Robert would travel to Minnesota where Bradley would be interred. Robert asked Amaker if she needed help, and she declined. ER 135-136 (pp. 71-75). Indeed, several

³ Amaker’s declaration contained a single and conclusory sentence on this issue, devoid of any factual support. ER 266 (“My father’s CADASIL had advanced to the state that he would not have been capable of consenting even if he had been contacted by Dr. Menchel.”).

weeks after the funeral, Robert has no difficulty writing KCMEEO to authorize it to release Bradley's personal belongings to Ms. Wright because he "live[d] in Florida and [was] unable to retrieve these items." ER 151. It was not until almost two years later that Robert first moved into an assisted living community. ER 289 (p. 24). The Ninth Circuit rejected Amaker's incapacity argument, and refused to even acknowledge it in its lengthy opinion. This Court should as well.

3. WAGA Does Not Expand The Limited Class Of Persons With Standing To Sue For Tortious Interference With A Dead Body.

The Ninth Circuit held that if the common law rule applies, and only the next of kin defined by RCW 68.50.160(3) can bring an action for tortious interference, then Amaker lacks standing. *See Amaker*, 540 F.3d at 1016. For the reasons described above, Washington law dictates this result. Amaker argues, however, that if the Court defines standing by reference to RCW 68.50.160(3), it would create conflict with WAGA. *See Appellant's Br. 20-24*. In reality, Amaker asks this Court to expand common law standing to include any person entitled to consent to an organ donation under WAGA. Even putting aside the adverse implications of such a rule (*see* Section III.B), it is clear that the statutes do not conflict. They were enacted at different times for entirely different purposes, and the legislature created different rights for family members under each.

As discussed above, RCW 68.50.160(3)—which was first enacted in 1943 in nearly its current form (*see* Rem. Supp. 1943 § 3778-29)—is primarily concerned with the final disposition of the deceased’s remains. In situations where the deceased does not make prearrangements, the statute (like the common law) gives the closest living next of kin exclusive control over, as well as liability for, burial or cremation arrangements. *See* RCW 68.50.160(3); *see also Herzl*, 142 Wash. at 473 (“right, in the absence of testamentary disposition, belongs exclusively to the next of kin”). In this way, the statute promotes finality and exclusivity by giving the closest family member ultimate decision-making authority over the deceased’s remains.

Washington’s version of the AGA, which was enacted in 1993, reflects an entirely different set of interests. WAGA was intended to “increase the number of anatomical gifts available for donation” for purposes of transplant and research. RCW 68.50.520.⁴ To achieve this goal, and in contrast to RCW 68.50.160(3), the act promotes expediency and flexibility over finality and exclusivity. RCW 68.50.550 prioritizes those who may consent to a donation as follows:

⁴ As this Court recognized in *Adams*, the former version of WAGA has been repealed and replaced. Laws of 2008, ch. 139, § 31. All references here are to the former version of WAGA.

(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 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:

- (a) The appointed guardian of the person of the decedent at the time of death;
- (b) The individual, if any, to whom the decedent had given a durable power of attorney that encompassed the authority to make health care decisions;
- (c) The spouse of the decedent;
- (d) A son or daughter of the decedent who is at least eighteen years of age;
- (e) Either parent of the decedent;
- (f) A brother or sister of the decedent who is at least eighteen years of age;
- (g) A grandparent of the decedent.

(2) ***An anatomical gift may not be made by a person listed in subsection (1) of this section if:***

- (a) ***A person in a prior class is available at the time of death to make an anatomical gift;***

Id. (emphasis added). WAGA gives a more remote relative limited authority to consent to a donation when a closer relative is not "available" to make a decision. The comments to the 1987 version of the Uniform Anatomical Gift Act, upon which WAGA was based, explains that this flexibility, "tak[es] into account the very limited time available following death for the successful removal of ... critical tissues ..." 8A U.L.A., Unif. Anatomical Gift Act, comment to § 3 (1987). If asked, the donation

decision is the only one that a more remote relative is authorized to make; the legislature was careful to assure that no other rights, obligations or liabilities flowed from that very limited role.

The two statutes carefully balance public and private interests. In the immediate aftermath of death, a donation must be obtained quickly to ensure the medical or scientific usefulness of organs and other tissues. The public interest is best advanced by allowing remote family members to quickly consent to a donation when the next of kin is not available. RCW 68.50.550. But after a donation, or where no donation is made, the public interest ebbs. At this point, the deceased's final resting place is primarily a private matter, and here the law gives the next of kin exclusive rights over the deceased's remains. RCW 68.50.160(3); *Herzl*, 142 Wash. at 473. The right to sue has always been connected to this private interest, and WAGA does nothing to disrupt or expand that right.

This Court recognized this in *Adams*. Regarding the intersection of WAGA and RCW 68.50.160(3), the Court concluded that "WAGA does not create the family members' right to authorize a gift," because that authority arose from the "right to control the disposal of a deceased relative" pursuant to RCW 68.50.160(3) and the common law. *See Adams* at *14. Inasmuch as WAGA creates no new rights, there is no conflict between it and RCW 68.50.160(3). Moreover, as noted in *Adams*, had the

legislature intended WAGA to provide a new remedy, it would have created a cause of action under WAGA itself. *Id.* The legislature did not do so because it recognized that “the common law provides remedies.” *Id.* (citing UAGA, § 18, cmt., 8A U.L.A. 70 (2006) (Supp. 2008)). For the same reason, WAGA should not be construed to expand the limited class of family members with a common law right to sue.

In sum, Amaker has no standing even if she had a right to consent to a donation under WAGA. One has nothing to do with the other. The legislature purposely cast a wider net when defining who can consent to a donation. That authority, however, is limited and inferior to the next of kin’s exclusive right to control the final disposition of the remains. Only the latter matters for purposes of a tortious interference claim. If that were not the case, and Amaker’s theory accepted, then anyone who *could* consent to a donation would also have standing to sue for interference. Extending the common law rule in this manner would chill, rather than encourage, hospitals, medical examiners and other agencies from facilitating donations. *See* Section III.B below.

4. The Discovery Rule Does Not Give Amaker Standing Where It Otherwise Does Not Exist.

Robert Gierlich passed away in 2004, more than five years after Bradley’s death. ER 130 (pp. 19-20). A year later, Amaker learned that Bradley’s brain and other tissues had been donated to SMRI. ER 143 (pp.

110-111). Amaker argues that because she was Bradley's next of kin when she discovered the donation, she has standing to sue—even though she was not Bradley's next of kin at the time of his death. Appellant's Br. 24-32. The Ninth Circuit has already considered and rejected this argument. It held, “[i]f only the ‘next of kin’ may bring a claim for tortious interference with a corpse in Washington, Amaker does not have standing.” *Amaker*, 540 F.3d at 1016. This holding implicitly recognizes that the “discovery rule” did not confer Amaker status as Bradley's “next of kin” for purposes of standing and, indeed, the Ninth Circuit did not include that issue among its certified questions. *Id.* at 1019.

This Court does not need to consider this issue. But if it does, it is clear that Amaker's argument ignores (and would eviscerate) the common law standing rule described above, and is totally unprecedented in the law. The statute of limitations has no applicability here, and Amaker cites to no authority remotely suggesting that the discovery rule concept can be used to shift standing from one party to another or to create standing where it otherwise does not exist. Where it applies, the rule does not *create* a cause of action; it merely *extends the time* in which a cognizable claim can be brought. *See 1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 576, 146 P.3d 423 (2006). In other words, the discovery rule cannot

alter Washington law that standing is determined when the alleged wrongful act occurs, not when that act was discovered.

Amaker does not have standing to assert a claim of interference because she was owed no duty in connection with the disposition of Bradley's remains at the time of his death. *See Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976) (tort liability arises from duty owed to plaintiff). The duty imposed on Defendants with respect to Bradley's remains—at both common law and RCW 68.50.160(3)—was owed to Robert Gierlich alone, as Bradley's next of kin at the time of death. *See* Sections III.A.1 & A.2, *supra*.⁵ And to the extent RCW 68.50.160(3) or WAGA confers Amaker with any present rights over Bradley's remains, Amaker has no claim because she does not allege that Defendants interfered with Bradley's remains after Robert died (or at any point subsequent to the original donation to SMRI). In short, Amaker does not claim a continuing tort for which she would have independent standing to bring suit.

⁵ Nor can Amaker assert claims on behalf of Robert. Amaker is not the personal representative of Robert's estate. ER 291; RCW 4.20.046 ("causes of action by a person ... shall survive to the personal representatives"). And, even if she was, there is no evidence that Robert suffered injury during his lifetime from conduct which Amaker alleges and which he knew nothing about. *Otani ex rel. Shiggki v. Broudy*, 151 Wn.2d 750, 758, 92 P.3d 192 (2004) (personal representative can recover only "damages ... suffered by a decedent prior to death").

Amaker's reliance on *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998) is misplaced. *Green* has nothing to do with standing. There, the plaintiff wife suffered injuries from toxic exposure to DES while in utero. The injuries were unknown until years later—after she was married and attempted to have children. The plaintiff husband brought a claim for loss of consortium stemming from the wife's difficult pregnancy. On this issue, the Court stated the traditional rule as, “a loss of consortium claim does not lie when the injury to the spouse that caused the loss of consortium occurred prior to the marriage.” *Id.* at 101. The Court rejected the rule as unfair under the specific facts of an unknown injury. *Id.* at 101-102. The Court reasoned that the husband could not “marry a lawsuit” nor “assume the risk”—rationales underlying the traditional rule—if neither spouse knew of the injury at the time of marriage. *Id.*

The question of standing was not raised nor questioned. There was no dispute that the husband had standing to sue for loss of consortium based on injuries to his wife. *Id.* at 101 (citing *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 733 P.2d 530 (1987)). Indeed, the Court expressly recognized that the husband was among the class of persons who could bring such a claim: “it is surely foreseeable that a future spouse or close relative might suffer loss of consortium damages. The class of potential plaintiffs is therefore quite limited, confined to those who might some day

be in consortium with an injured party.” *Id.* at 101-102. In other words, the Court did not create standing where it otherwise did not exist. It merely found it unfair to prevent the husband from raising an existing and cognizable claim solely because it was based on a pre-marital injury.

The circumstances are far different here. Unlike the husband in *Green*, Amaker was never among the foreseeable class of persons with standing to sue for the alleged interference with Bradley’s remains. She was not Bradley’s next of kin—a fact that Amaker readily acknowledged when filling out the paperwork for his cremation. ER 150. It therefore makes no difference when that claim accrued or when she discovered the donation. Neither concept creates standing or allows it to spring from one person (who has standing) to another (who does not). Neither *Green*, nor any other case, holds that standing to sue can be premised on one’s discovery of facts when he or she cannot satisfy the underlying elements of the claim. The bottom line is that Amaker had no claim when the alleged interference occurred because Defendants owed her no duty. And, even if Defendants owe her a duty now, Amaker has no claim because she does not allege any new or different tortious conduct.⁶

⁶ Amaker’s apparent argument that a different rule ought to apply because Defendants “concealed” their conduct (Appellant’s Br. 24) is specious. No such claim was plead, and there is no evidence of concealment. In fact, SMRI approached Amaker about Bradley’s
(continued . . .)

B. This Court Should Not Expand Standing To Sue For Tortious Interference With A Dead Body Beyond The Next Of Kin.

The common law rule that only the next of kin has standing to sue for tortious interference with a dead body reflects good public policy and provides needed certainty to those in our society responsible for making final arrangements for the deceased. The rule properly limits the right to sue to the person who possesses exclusive rights and responsibilities over the deceased's remains. In this way, the rule is not a remnant of some ancient notion that a corpse is property, but rather reflects contemporary tort concepts that liability flows only from a duty owed to foreseeable plaintiffs—especially in cases of emotional harm. *See Hegel v. McMahon*, 136 Wn.2d 122, 126, 960 P.2d 424 (1998) (defendant has duty to avoid inflicting emotional harm to “foreseeable plaintiffs”). RCW 68.50.160(3) defines the duty and the class of foreseeable plaintiffs where, as here, the tort arises from an alleged interference with the remains of the dead.⁷

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donation and agreed to arrange CADASIL testing for her benefit. Similarly, Amaker's suggestion that KCMEO hid the fact of Bradley's donation while she “stood in KCME[O]'s office” is nonsense. Amaker could not even remember if she went to KCMEO at all. ER 138 (p. 84).

⁷ Washington's rule is in no way unique. It reflects the clear majority rule. *See, e.g., Crawford v. J. Avery Bryan Funeral Home, Inc.*, 253 S.W.3d 149, 159-160 (Tenn. App. 2008); *Perry v. St. Francis Hosp. and Med. Ctr., Inc.*, 865 F. Supp. 724, 726-27 (D.Kan 1994); *Morton v. Maricopa County*, 865 P.2d 808, 812 (Ariz. App. 1994); *Whitehair v. Highland Memory Gardens, Inc.*, 327 S.E.2d 438, 443 (W.Va. 1985);

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Just as important, the rule lends itself to predictability and limited liability. When one dies without a will, difficult decisions are left to the family—decisions that must be made quickly and under difficult circumstances. Those circumstances sometimes create turmoil and disagreement. It is precisely for this reason that coroners, funeral homes, cemeteries and the like rely on RCW 68.50.160(3) to determine which family member has the right to speak for the deceased. Indeed, Washington law *requires* funeral directors, embalmers and others to obtain consent from the next of kin before carrying out their duties.⁸ If standing

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Dumouchelle v. Duke University, 317 S.E.2d 100, 103 (N.C. App. 1984); *Burns v. Anchorage Funeral Chapel*, 495 P.2d 70, 73 (Alaska 1972); *O’Dea v. Mitchell*, 213 N.E.2d 870, 872 (Mass. 1966); *Steagall v. Doctors Hosp.*, 171 F.2d 352, 353 (D.C.Cir. 1948). *See also* Restatement (Second) of Torts § 868 (1979); 22A Am.Jur.2d *Dead Bodies*, § 137 (1988); 25A C.J.S. *Dead Bodies*, § 9, pp. 520-21 (1966).

⁸ *See* RCW 18.39.215 (“No licensed embalmer shall embalm human remains without first having obtained authorization from the individual or individuals that have the right to control the disposition under RCW 68.50.160.”); RCW 11.88.150 (“Consent for such arrangement shall be secured according to RCW 68.50.160.”); RCW 68.50.185 (“A person authorized to dispose of human remains shall not cremate or cause to be cremated more than one human remains at a time unless written permission, after full and adequate disclosure regarding the manner of cremation, has been received from the person or persons under RCW 68.50.160 having the authority to order cremation.”); WAC 246-500-030 (“Funeral directors, embalmers, and others assisting in the preparation of human remains for final disposition may delay refrigeration ... [at the direction of] persons acting according to the directions of the deceased or the person having the right to control the disposition of the remains under RCW 68.50.160 ...”); WAC 308-48-040 (“No licensee
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to sue were untethered from the right to control the disposition of the deceased, industry participants could no longer unqualifiedly act on the next of kin's consent and, if they did, they could face suit (and perhaps liability) from family members who happen to disagree with the decision.

The negative consequences of expanding the common law rule are especially acute in the context of organ donation. The goal of WAGA is to “increase the number of anatomical gifts available for donation” for transplant and research. RCW 68.50.520. As this Court recognized in *Adams*, any rule that increases the risk of liability for those participating in the donation process runs directly counter to that goal and frustrates the Act's intent. *See Adams* at *16 (immunity “encourag[es] potential donees to seek anatomical gifts without increasing the risk of liability”); *also Sattler v. NW Tissue Ctr.*, 110 Wn. App. 689, 694, 42 P.3d 440 (2002) (“[w]ithout the protection from liability ... organizations would likely hesitate to seek needed donations”). In *Adams*, the Court concluded that “[i]mplying a cause of action would be inconsistent with the effort to encourage the increased procurement of anatomical gifts.” *Id.*

(. . . continued)

will, directly or indirectly, assume control of any human remains without having first obtained authority from the person(s) having the right to control the disposition of the human remains under RCW 68.50.160 ...”).

This reasoning applies with equal force to the question of standing. Under WAGA, where there is no guardian or POA, the next of kin has primary authority to consent to a donation; but if the next of kin is not “available,” potential donees may ask more distant relatives for consent. RCW 68.50.550(1) & (2)(a). If these more distant relatives have standing to sue, the issue of consent becomes treacherous for donees. Consent by the next of kin will not preclude other family members from bringing suit. Similarly, where the next of kin is not “available,” lack of unanimity among family members could also lead to suits. *See Whaley v. City of Saginaw*, 941 F. Supp. 1483, 1491 (E.D.Mich. 1996) (“To hold that the siblings have standing would mean that medical examiners must obtain the consent of all those in the statutory hierarchy to donate the body or its organs.”). Either way, donees will have far less certainty, and the increased risk of liability will undoubtedly chill potential donations.

Confining standing to the next of kin does not reward wrongdoers, nor does it deprive family members a claim in appropriate circumstances. Tortious interference with a dead body remains a viable cause of action in Washington based on the special rights owed to the next of kin. But even where the next of kin does not bring such an action, other family members have standing to assert other claims. *Perry v. St. Francis Hosp. & Med. Ctr., Inc.*, 865 F. Supp. 724, 727-28 (D.Kan. 1994) (only surviving spouse

had standing to sue for tortious interference, but children could bring claims for outrage, breach of contract, and negligence). Indeed, Amaker brought various other tort claims here. ER 34-44 (outrage, negligence, invasion of privacy, CPA, conversion, conspiracy). She abandoned most of these claims, and the federal courts rejected the rest—not because she lacked standing, but because she could not satisfy the requisite elements.

Finally, there is no good reason to alter long-standing Washington common law to give Amaker a claim. She was not close to Bradley; at the time of his death, she had not seen him for more than a year, nor spoken with him in over six months. ER 133-134 (pp. 64-69). When Amaker came to Seattle to arrange for Bradley’s cremation, she did so as an accommodation to her father Robert Gierlich—not because she believed she had a legal right or responsibility. She acknowledged in writing to the funeral home that Robert was Bradley’s “next of kin” (ER 150), and later admitted the same thing in deposition. ER 138-139 (pp. 85-86); *also* RCW 68.50.170 (“person signing any authorization for the ... cremation of any human remains warrants the truthfulness of any fact set forth in the authorization”). Indeed, in none of Bradley’s previous trips to the hospital had he ever identified Amaker as a next of kin. ER 146-148. Ironically, the conduct about which she complains—the donation of Bradley’s brain tissues for research—helped Amaker learn with greater certainty of her

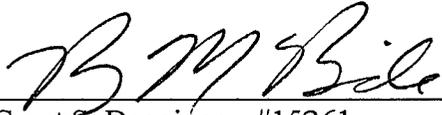
own propensity for CADASIL, so that she might begin receiving treatment for the disease. ER 95; ER 144 (pp. 122-123); ER 145 (pp. 138-139).

IV. CONCLUSION

Standing to sue for tortious interference with a dead body has always been limited to the closest next of kin. There is no compelling reason to depart from this sound and predictable rule. The Court should answer the first certified question, "yes." The other questions are moot.

RESPECTFULLY SUBMITTED this 17th day of October, 2008.

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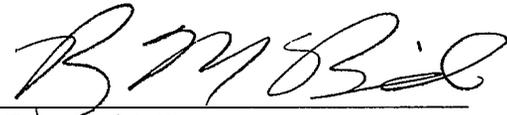
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I hereby certify that I filed and served the foregoing Appellees' Answering Brief on October 17, 2008, by causing the original and one copy thereof to be delivered to the Washington Supreme Court, and by causing a true and correct copy thereof to be hand-delivered to Appellant's attorney at the following address:

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