Replaces petition for review filed at the COA on 12/19/19

97995-2

No. 51455-9-II

SUPREME COURT

OF THE STATE OF WASHINGTON

KEITH DAHL, Appellant,

v.

GINA M FINO, PACIFIC NORTHWEST FORENSIC PATHOLOGISTS, Respondents.

AMENDED PETITION FOR REVIEW

NOAH DAVIS, WSBA #30939
Attorney for KEITH DAHL, Appellant
IN PACTA PLLC
33530 1st Way S, Ste 102
Federal Way WA 98003
206-709-8281
nd@inpacta.com

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A. IDENTITY OF PETITIONER

Keith Dahl (Keith) respectfully requests that the Supreme Court accept review of the Court of Appeals decision terminating review as designated in Part B of this Petition. Keith was the Plaintiff in the trial court and initially the Respondent on appeal. He is the father of his deceased child for which this case and appeal is based.

B. COURT OF APPEALS DECISION

Keith seeks review of the Court of Appeals decision dated September 10, 2019, which reversed the trial court's denial of a motion for summary judgment (filed by Dr. Gina M. Fino and Pacific Northwest Forensic Pathologists ("Fino" and "PNFP") A copy of the Court of Appeals decision is attached in the Appendix at pages A-1 through A-13. A timely Motion for Reconsideration was filed with the Court of Appeals on September 30, 2019 and after "Calling for a Response" on October 8, 2019, the Court of Appeals ultimately denied the Motion for Reconsideration on November 19, 2019. A copy of the Order Denying Reconsideration is attached in the Appendix at page A-14.

C. ISSUES PRESENTED FOR REVIEW[1]

[1] An issue not raised in this Petition for Review as it was not decided by Division II is whether a private doctor performing an autopsy at the direction of a County coroner is entitled to immunity from any and all civil claims (liability) regardless of whether she engages in gross negligence or even intentional or abusive conduct unrelated to the

No. 1 Whether Washington should adopt the Restatement (Second) of Torts §868 (1979) and recognize a claim for negligent interference with a corpse; and if not, whether the facts here are sufficient to at least create an inference of intentional interference sufficient to survive summary judgment.

No. 2 Whether Washington should modify its law on the tort of negligent infliction of emotional distress to allow the "dead body" exception.

No. 3 Whether the father of a deceased may bring a claim for professional negligence against a county coroner (or, as here, a private physician acting in that capacity) for the method and actions that were used prior to and after determining the cause of death – or whether the Public Duty doctrine shields the coroner from liability[2]

No. 4 Whether the Public Duty doctrine is contrary to the Washington Constitution and the waiver of sovereign immunity.

D. STATEMENT OF THE CASE

1. Events leading up to Death and ensuing Autopsy

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determination of cause of death. If Fino and/or PNPF raise this issue in an Answer, then the Petitioner will file a Reply addressing that issue (and any other newly raised issue).

[2] Although the "Public Duty doctrine" defense was not raised in the trial court), the Court of Appeals made it a substantive part of its decision despite it also not having been discussed during the appellate oral arguments. And as stated in the Motion for Reconsideration, the Court of Appeals was missing the necessary record (from Plaintiff) to properly decide this issue (which is part of the point of having this issue raised in the trial court). (See Motion for Reconsideration A15-25)

On September 13, 2015, Brandon Dahl (Brandon) was arrested and booked in the Mason County Jail. CP 13 At first he was housed in solitary confinement. CP 13, 328 However, after he angered a jailer, he was moved by jail staff to a cell shared with other prisoners for an "attitude adjustment". CP 2, 13, 328 Some of the prisoners in that cell were known to have already attacked other prisoners. CP 2, 13, 359

While confined, the same three inmates that had attacked other inmates, now attacked Brandon, resulting in serious physical injury, including cranial contusions and hemorrhaging CP 13-16 Jail staff then transferred Brandon back to solitary confinement without providing medical care. CP 13 Three days after his arrest, on September 16, 2016, Brandon was dead. CP 3, 13, 359 The Mason County Jail (and coroner) alleged the death to be as a result of suicide by hanging. (A1-13 at A2-3)

2. Dr. Fino's Autopsy

Mason County chose to retain an outside coroner for the autopsy; and pursuant to RCW 68.50.106, requested Fino (of PNFPs) to conduct the examination. (A1-13 at A3) On September 17, 2015, Fino dissected the body and internal organs, including the brain and determined the cause of death to be asphyxia by hanging and that the death was suicide. (*Id*.) After Fino closed the body, the Mason County coroner released Brandon's body to his family for burial. (*Id*.)

3. Second Autopsy

Keith Dahl, Brandon's father, then arranged for a second autopsy with Dr. Bennet Omalu. (*Id*.) Dr. Omalu's report strongly criticized the work and report of Fino and opined that Fino had mutilated Brandon's brain to such a degree as to make a finding of the cause of death impossible, as she had "pulverized, with near complete obliteration of the anatomic detail." CP 3, 6, 20, 40-41, 185-187, 200, 221-222 The "residual brain had been previously prosected in an irregular [and] indiscernible fashion." CP 40

Among the major missteps were Fino's failure to save Brandon's brain in the stock tissue (CP 4, 20, 200, 366), failure to take autopsy tissue histology slides and paraffin tissue blocks (CP 4, 146, 186), failure to photograph (or record) the autopsy and failure to perform a post-mortem radiological evaluation of Brandon's body. CP 19, 186, 365 Fino also failed to wait for toxicological analysis before completing her report, an analysis which is "a vital and indispensable component of a complete forensic autopsy." CP 18, 186, 364

This was no normal autopsy. In fact, <u>it was the worst</u> autopsy Dr. Omalu had ever seen. CP 124, 187, 305 Fino had failed to follow the most basic protocols and procedures for an autopsy. No ligature (i.e. means of death) accompanied the body for autopsy, nor was any described in the

autopsy report. CP 14 Nor did Dr. Fino perform any correlation between the missing ligature and the alleged ligature-indentation marks. *Id*. She also failed to perform any histological or microscopic examinations, (CP 16), and where Dr. Fino had identified only six external injuries to the body, Dr. Omalu was able to identify 20. CP 124

There are standards of practice, even in an autopsy. Standards of practice that Fino was required to follow but which Fino "**grossly deviated**" from. CP 18-20 Indeed, she exhibited "a pattern of deviations that critically undermines the validity and accurateness of the autopsy in this case as a methodology of science." CP 20

4. Keith Dahl files suit

Based on Dr. Omalu's findings, Brandon's father Keith filed suit against Fino and her employer (PNFP). Keith Dahl made claims for professional negligence, misuse of a corpse, and intentional and negligent infliction of emotional distress. In response, Fino and PNFP moved for summary judgment dismissal of all claims, asserting immunity from civil liability under RCW 68.50.015, and asserting that Keith Dahl could not make a prima facie case for his claims. The trial court denied the Motion

> This is a summary judgment motion which means the Court has to look at the facts in the light most favorable to the nonmoving party; and if there are any material issues of fact, then it defeats the summary judgment motion . . . Counsel for the moving party relied on RCW 68.50.015 which we read into the record, and this statute makes it very

> clear that a county coroner or medical examiner or persons acting in that capacity shall be immune from civil liability for determining the cause and manner of death. If the Legislature wanted this statute to be as broad as the moving party asserts, then they would have basically said so . . . I would have to agree with the nonmoving party that RCW 68.50.015 is very limited circumstances with particular civil liability that immunes the coroner, and that defeats the summary judgment motion because the nonmoving party has raised a number of material issues of fact and only one is needed.

(Pierce County Superior Court, Summary Judgment Hearing: RP 23-24)

The Defendants/Respondents appealed, however, and were successful in convincing Division II that their summary judgment should have been granted. (A1-14) This Petition for Review now follows.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Petition for Review should be accepted because at least one if not two of the four bases for review under RAP 13.4(b) are present:

- The Petition for Review involves issues of significant and substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4)) (¶¶ 1,2,3,4) (with respect to recognizing the tort of Negligent Interference with a Corpse; clarifying, modifying or limiting the Public Duty doctrine (and aligning it with the legislatures' waiver of sovereign immunity); and updating and modernizing the prior limitations of "presence" or "zone of danger" to recognize a "dead body" exception for infliction of emotional distress);

➢ The decision of the Court of Appeals is (arguably) in conflict with a decision of the Supreme Court (RAP 13.4(b)(1)) (¶¶3-4) (with respect to the Public Duty Doctrine and Justice Chambers' concurrence in ***Munich v. Skagit Emerg. Comm'n Ctr.***, 175 Wn.2d 871, 288 P.3d 328 (2012)

The paragraph numbers cited above (for these bases for review) correspond to the paragraphs numbered below.

1. Keith Dahl's claim for Intentional or Negligent Misuse of a Corpse

Although this claim was not foreclosed by the public duty doctrine (discussed infra), the Court of Appeals nevertheless held as a matter of law that Keith Dahl failed to support the tort of intentional misuse of a corpse and concluded that Washington law does not recognize a claim for negligent misuse of corpse.

> A claim for intentional misuse of a corpse is an intentional tort based on an interest in the proper treatment of a corpse and allowing recovery for the plaintiff's mental suffering 'directly result[ing] from a willful wrong and not merely a negligent act.' *Whitney v. Cervantes*…'Washington law does not recognize an action for negligent interference with a dead body.' *Whitney*... Our Supreme Court has explicitly declined the opportunity to expand the cause of action to include negligent conduct. *Adams v. King County*.. (noting that it had not adopted the Restatement (Second) of Torts § 868 (1979), which permits liability for negligent interference with a corpse, and had previously 'rejected a claim of negligent misuse because recovery is premised on mental suffering').

(Ct App A1-13 at 10) (full cites omitted)

i. Intentional Misuse of a Corpse

While the Court of Appeals found no intentional conduct by Fino to mutilate (or unnecessarily and excessively or grossly interfere with) a corpse, the evidence suggests otherwise as Dr. Omalu did in fact offer evidence through his medical opinion that Fino had intentionally mistreated (or mutilated) Brandon's brain in a manner other than just dissecting it for purposes of an autopsy. The "residual brain had been previously prosected [dissection of a human corpse] ***in an irregular [and] indiscernible fashion***." CP 40-41 (emphasis added). There was "near-complete obliteration of the anatomic detail." CP 41 The brain had been pulverized. CP 41 These are not the normal sequences of an autopsy. And, Fino failed to follow the most basic protocols and procedures for an autopsy. No ligature – supposedly the means of death – accompanied the body for autopsy. CP 14 Nor was any described in the autopsy report. *Id*. Nor, did Fino perform any correlation between the missing ligature and the alleged ligature-indentation marks. *Id*. Nor did she perform any histological or microscopic examinations. CP 16 She failed to preserve Brandon's brain in stock tissue. CP 20 She failed to photograph the autopsy. CP 19 She failed to wait for a toxicological analysis before completing her report. CP 18. And where she identified only six external injuries to the body, Dr. Omalu identified 20. CP 18 In simple fact, this

was the worst autopsy – if indeed you can call it that – Dr. Omalu had ever seen. CP 124 There are standards of practice that Fino was required to follow. CP 18-20 Fino committed "gross deviations" from those standards. CP 19 Indeed, she exhibited "a pattern of deviations that critically undermine[d] the validity and accurateness of the autopsy in this case as a methodology of science." CP 20 Finally, and despite a statutory requirement to do so (RCW 68.50.105(3)), Fino refused to cooperate with the second doctor to perform the second autopsy. CP 121-22, 187, 302-03

These facts, taken all together, and viewed in the light most favorable to Dahl – as the trial court did – established that genuine issues of material fact exist on whether Fino intentionally[3] mutilated Brandon's brain to prevent a second opinion and prevent judicial review (as set forth in the statute: RCW 68.50.015)[4]

ii. Negligent Interference with a corpse

Although the above facts provide evidence of intentional conduct, it also time for Washington to adopt the Restatement (Second) of Torts §868 (1979) and recognize a claim for negligent interference with a corpse

[3] Intentional conduct can also be non-actions or willful and wanton misconduct. See *Jones v. United States*, 693 F.3d 1299 (9th Cir. 1982)

[4] And at page 11 of its opinion (A-11), the Court of Appeals appears to shift the burden on summary judgment to the non-moving party (Keith Dahl) to prove by a preponderance of the evidence that Dr. Fino intentionally misused a corpse. This shifting of the burden also failed give every reasonable inference to Keith Dahl in defending the summary judgment. Certainly taken together, a reasonable juror could infer intent (intent to mutilate, to not document the destruction of evidence, and to prevent a 2nd autopsy challenge to her findings (and judicial review thereof).

as have more than 20 other States, and as was recently discussed by the Illinois Supreme Court.

> As we already have discussed, interference with the right to possess a decedent's remains is a distinct and independent tort that has a settled place in Illinois jurisprudence. It arises from the next of kin's common-law right to possess and make appropriate disposition of a decedent's remains and from the correlative duty not to interfere wrongfully with that right. And while the plaintiff in such cases is entitled to recover damages for the mental suffering that is proximately caused by the defendant's misconduct, the actionable wrong in such cases is the interference with the plaintiff's right to possess the decedent's remains, not the infliction of the resulting mental distress. In this sense, tortious interference with the right to possess a corpse is analogous to wrongful birth, where the infliction of emotional distress is not itself the wrong that was committed but rather is part and parcel of the damage that results from the wrong that was committed. Accordingly, just as we have concluded that parents in a wrongful birth case may recover damages for the resulting emotional distress, we likewise conclude that such damages are recoverable in cases involving negligent interference with the right to possess a corpse.
>
> **In reaching this result, we note that today's decision brings Illinois into conformity with what has emerged both as the blackletter standard and as the majority rule among courts that have addressed this issue directly.** As the appellate court below correctly recognized, while section 868 of the first Restatement of Torts suggested that the recovery of emotional distress damages in cases like this required proof of wilful and wanton misconduct (Restatement of Torts, § 868 (1939)), the second restatement now makes clear that such recovery is available upon proof of ordinary negligence:
>
> > 'One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.'…
>
> Restatement (Second) of Torts § 868 (1979)

> This point is reiterated in the comments to section 868, which stress that '(t)he rule stated in this Section applies not only to an intentional interference with the body itself or with its proper burial or cremation, but also to an interference that is reckless or merely negligent.' Restatement (Second) of Torts § 868 cmt. d (1979). In similar fashion, the most recent edition of Prosser and Keeton on Torts explains the following with respect to claims involving the mishandling of a corpse:
>
> > '(T)he traditional rule has denied recovery for mere negligence, without circumstances of aggravation. There are by now, however, a series of cases allowing recovery for negligent embalming, negligent shipment, running over the body, and the like, without such circumstances of aggravation. What all of these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious. Where the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery.'
>
> Prosser and Keeton on the Law of Torts § 54, at 362 (W. Page Keeton et al. eds., 5th ed. 1984).

Cochran v. Securitas Sec. Servs. USA, Inc., 2017 IL 121200, 93 N.E.3d 493, 502-503 (Ill. 2017)[5] (emphasis added)

If not willful and wanton and rising to the level of intentional conduct, Fino's actions were nevertheless negligent (if not grossly so) and the Supreme Court of Washington should adopt the Restatement (Second) of Torts, recognize the tort of Negligent Interference with a Corpse and remand this case to the trial court.[6]

[5] *Cf Cochran v. Securitas Sec. Servs. USA, Inc*., 59 N.E.3d 234, 405 Ill.Dec. 941 (Ill. App. 2016) (discussing the evolution of the law relating to the negligent mishandling of a corpse, including the change in the Restatement (Second) of Torts and citing to approximately 20 jurisdictions that now permit recovery in cases involving the alleged negligent mishandling of a decedent's body without circumstances of aggravation).

2. Washington law on Intentional and/or Negligent Infliction of Emotional Distress should be modified to permit an exception when involving a corpse.

> The intentional tort of outrage, also known as intentional infliction of emotional distress, includes three elements: "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress." *Kloepfel v. Bokor*,…. Negligent infliction of emotional distress includes the "established concepts of duty, breach, proximate cause, and damage or injury." *Hunsley v. Giard*,... To establish a prima facie case for either cause of action, the plaintiff must be present at the time of the alleged conduct at issue. *Reid v. Pierce County*, …(holding that plaintiffs who were not present when employees of a medical examiner's office engaged in arguably outrageous conduct could not maintain cause of action for either intentional or negligent infliction of emotional distress). It is undisputed that Dahl was not present when Fino conducted the autopsy of Brandon's body; therefore, he has no cause of action for either intentional or negligent infliction of emotional distress under well-established case law.

(Ct App A1-13 at A12) (internal cites omitted)

While the Court of Appeals was correct in applying the law to this claim, our law is wrong. And with the evolving norms and decency of society the public deserves a modification and update to our jurisprudence. Some more than twenty years have passed since the court's decision in *Reid v. Pierce County*, *supra*. And in the intervening time, the Restatement (Third) of Torts §48 (2012) has adopted a modified approach:

> An actor who negligently causes sudden serious bodily injury to a third person is subject to liability for serious emotional harm caused thereby to a person who:

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[6] Protection of these rights, and our loved ones are matter of substantial public concern, affecting nearly every single Washington resident. (RAP 13.4(b)(4))

(a) perceives the event contemporaneously, and

(b) is a close family member of the person suffering the bodily injury.

The Restatement (Third) of Torts § 47 (2012) also provides for recovery for emotional harm even absent bodily injury or the risk thereof:

> An actor whose negligent conduct causes serious emotional harm to another is subject to liability to the other if the conduct:
>
> (a) places the other in danger of immediate bodily harm and the emotional harm results from the danger; or
>
> (b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm.
>
> Under § 47(b), recovery is appropriate for harm caused by conduct occurring in the course of certain relationships and activities, even absent the danger of bodily harm or contemporaneous perception. For example, "courts have imposed liability on hospitals and funeral homes for negligently mishandling a corpse and on telegraph companies for negligently mistranscribing or misdirecting a telegram that informs the recipient, erroneously, about the death of a loved one." Id. cmt. b. And "[r]ecovery may be available under Subsection (b) regardless of whether the claim would also satisfy § 48." Id. cmt. a.

K.N. v. Life Time Fitness, Inc. 2:16-cv-39 (D. Utah 2018) (Order Denying Motion for Partial Summary Judgment and Request for Certification)

Alternatively, the Washington Supreme Court should adopt a special exception for a limited situation as West Virginia has.

> [T]here [exists] an exception to the rule that liability may not be predicated upon negligence where the damage is limited to mental or emotional disturbance without accompanying physical injury. This exception which is often referred to as the '**dead body exception**' permits recovery for emotional damages upon proof of the negligent

mishandling of a corpse.

Ricottilli v. Summersville Memorial Hosp., 425 S.E.2d 629, 634-635 (W.Va. 1992)[7] (emphasis added)

3. The Public Duty Doctrine Does not bar a father's professional negligence claims against a coroner's bad acts

i. Competency is a statutory requisite

RCW 68.50.010 provides jurisdiction to the county coroner for suspicious deaths, including those occurring in a jail or prison. And, pursuant to RCW 68.50.100(1), the county coroner "may make or cause to be made by a **competent pathologist**...or physician, an autopsy...in any case in which the coroner has jurisdiction of the body.

While Keith Dahl takes no issue with respect to the statutory "jurisdiction of the body", there is issue with whether the pathologist was "**competent**" to conduct the autopsy – an issue that involves Fino's gross mismanagement of the Brandon's organs and the autopsy itself. The question of competency is a factual one (that can only be resolved by the trier of fact). Was the pathologist free from conflict/bias (such as political, monetary, health and drug/alcohol ones) and otherwise "competent" at the

[7] (But finding that on the record before it, that Court could not "conclude that the appropriate guarantees against spuriousness are present sufficient to warrant an extension of the 'dead body exception' to this case. However, we do suggest that if the record below ultimately demonstrates facts sufficient to guarantee that the emotional damage claim is not spurious, Appellant may be able to recover damages for her alleged emotional disturbance arising from the alleged negligence surrounding the autopsy and extraction of tissue samples. Accordingly, we hold that an individual may recover for the negligent infliction of emotional distress upon a showing of facts sufficient to guarantee that the emotional damage claim is not spurious).

time of the autopsy to perform the autopsy requested of her (i.e. capable to meeting or exceeding the standard of care)? This issue of whether Dr. Fino was a competent pathologist/physician as required by the statute is an unresolved issue that must be addressed in the trial court.

Thus, Supreme Court should accept Review (and then reverse and remand for a trial court determination on this issue). If Fino was not competent, then she shouldn't be entitled to the protections of the public duty doctrine as she doesn't meet the statutory minima for public coroners.

ii. Keith Dahl's claim for Professional Negligence

With respect to Keith Dahl claim for professional negligence, the Court of Appeals held that Mr. Dahl cannot establish that Fino owed him (specifically) a duty to exercise reasonable care when performing the autopsy. The Court came to this conclusion based upon the elements of a claim for negligence together with the Public Duty Doctrine:

> In order to sustain a claim for negligence, a party must satisfy four elements: (1) the existence of a duty owed to the complaining party, (2) a breach of that duty, (3) resulting injury, and (4) that the breach was the proximate cause of the injury. *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998)…[Determining] the existence of a duty is a question of law. *Folsom*, 135 Wn.2d at 671

(Ct App A1-14 at A-5)

Perhaps one could begin this analysis by asking whether the county coroner (or county hired coroner) would ever owe a duty to anyone? Would she owe the county (or taxpayers) a duty to act (to act at all)? Does

that duty require that she act with reasonable care? What about the deceased, or the estate or to the family of the deceased? Does the county coroner owe the heirs or family members a duty to act with reasonable care? Not surprisingly, in answering these questions, the Court of Appeals framed its analysis through the lens of Public Duty doctrine:

> 'Under the public duty doctrine,' which is a 'basic principle of negligence law,' liability may not be imposed unless 'the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one).' *Taylor*, 111 Wn.2d at 163 …

(Ct App A1-14 at A-5)

The Court of Appeals then found as a matter of law that no duty ran to the father as a member of the public. But can we all not agree that the father of the deceased is not simply "the public in general". Doesn't he have a special interest in the autopsy?

> The right to the next of kin to control and direct the burial of a corpse and arrange for its preservation is not only a natural right, embracing a high order of sentiment, but has become to be well recognized as a legal right...Absent a decedent's testamentary disposition stating otherwise, the right to control burial belongs exclusively to the next of kin.... '(T)here is a quasi property right in a dead human body inherent in the immediate relatives of the deceased.

Whitney v. Cervantes, 328 P.3d at 960 (internal citations omitted)[8]

But determining the cause of death and thus assigning

[8] And what of the beneficiaries of the estate or the personal representative? Putting aside the emotional and moral justifications of the special relationships, if the deceased was murdered while in jail custody, then mustn't we recognize that there is a special duty to the beneficiaries, the personal representative and the estate under the wrongful death statute? Why would we treat the father differently then?

fault/responsibility is a matter of substantial public concern. (RAP 13.4(b)(4)) The public, our justice system and our society needs to bring murderers and tortfeasors to justice and to do so, we must ensure that autopsies are free of bias, performed correctly (and are capable of judicial review – i.e. replication by 2nd exam). If the coroner fails to act with reasonable care, then the estate, the heirs and beneficiaries and the family of the deceased are likely left without the true and accurate cause of death and without a remedy against the perpetrator(s) that caused the death. These are significant public matters.

While that remedy, that set of rights that are dependent on the coroner's report and gives rise to the special relationship, there are also the statutes themselves found in RCW Chapter 68.50. RCW 68.50.010 provides the county the initial, exclusive jurisdiction over the family's loved one, preventing the family from its own private autopsy (and/or a religious or other burial). Thus, right away, a special relationship arises because the family's rights are subordinated to the county coroner's who acts as if a bailee over the deceased, and who must exercise reasonable care over the deceased. This relationships is special and is clearly one that the public does not have. The public cannot authorize the second autopsy, take possession of the deceased, choose the method of burial, nor have a claim for a wrongful death.

Although the Court of Appeals noted the four exceptions to the public duty doctrine, it failed to recognize their application to this case.

> (1) legislative intent, (2) failure to enforce,[9] (3) the rescue doctrine, and (4) a special relationship. *Munich v. Skagit Emergency Commc'n Ctr.*,. If any one of the exceptions applies, (the defendant) is held as a matter of law to owe a duty to the plaintiff. *Munich*

(Ct App A1-13 at A6) (full citations omitted)

> A special relationship . . . will exist and thereby give rise to an actionable duty, if three elements are established: (1) direct contact or privity between the [defendant] and the plaintiff that sets the plaintiff apart from the general public, (2) an express assurance given by the [defendant], and (3) justifiable reliance on the assurance by the plaintiff." *Munich*… All three elements must be met. *Munich*,…If one element is not satisfied, the exception does not apply. *Munich*… As to the second element, Dahl argues that he had an implied assurance under Chapter 68.50 RCW that Fino "would perform the autopsy on his son competently and in a way that did not interfere with his specifically vested rights." Br. of Resp 35. However, a government duty cannot arise from an implied assurance. See *Taylor*... Because Dahl does not identify any express assurance given to him by either Fino or the Mason County Coroner or any other public official, the second element is not met. Because this element is not met, the special relationship exception to the public duty doctrine does not apply.

(Ct App A1-14 at A-7) (full citations omitted)

Unlike much of the Public Duty jurisprudence involving first

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[9] The "failure to enforce" and "legislative intent" exception would also seemingly apply in terms of the "competency" of the pathologist directed by the county coroner to perform the autopsy. If the pathologist was grossly negligent or willful in her actions, in destroying evidence or failing to preserve it, then she would not qualify as competent in performing the autopsy and the statute (RCW 68.50.100(1) would not have been enforced. And if the pathologist was not competent to perform the autopsy, then the legislative intent of Chapter 68.50.100 and the public trust in the coroner's office of providing the true and actual cause of death would be compromised. Plus, by the express language of the statute, the legislature recognized certain relationships and clearly intended to give special rights to the family members, including the parents.

responders and the rescue doctrine, here, we have the county taking jurisdiction over the body ("is hereby vested in the county coroner" RCW 68.50.010). That vesting by its nature gives rise to express assurances "**providing how** the bodies shall be brought to and cared for at the morgue", RCW 68.50.010, and that a "**competent pathologist**….or physician [is to perform] an autopsy". The statute provides the assurance and parameters for its custody and control over the decedent to the exclusion of the family. Thus perhaps this is akin to an in-custody type case, the duty to provide reasonable safeguards for the person's health and safety, or, at the very least, a commitment to preserve evidence.

RCW 68.50.105(1) also provides for a class of persons that may review the autopsy report. That class **expressly includes** the personal representative and family members of the decedent. "Family" is further defined in RCW 68.50.105 to include a parent. And moreover RCW 68.50.160(3)(e) provides that the surviving parents of the decedent have a right to control the disposition of the remains of a deceased persons.

Thus, the statutes, either by carving out a legislative intent or by expressly assuring a special relationship, make clear that the father of a deceased does in fact have a special relationship – which he in turn may seek accountability for – accountability that we ought not immunize by way of a judicially created doctrine.

4. THE PUBLIC DUTY DOCTRINE SHOULD BE ABOLISHED BECAUSE IT IS INCONSISTENT WITH THE WAIVER OF SOVEREIGN IMMUNITY

Based on the law as it currently stands, a plaintiff must fall within one of the established exceptions to the public duty doctrine in order to demonstrate that he or she was owed a duty of care by a governmental entity. *Cummins v. Lewis County*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006). Thus, the application of the judicially created public duty doctrine blocks plaintiffs with otherwise meritorious claims from bringing suit merely because a party being sued is a public entity. *J & B Dev. Co.,* 100 Wn.2d 299, 305-306, 669 P.2d 468 (1983) It creates special immunities and privileges that directly contradict the legislature's broad waiver of sovereign immunity.[10]

F. CONCLUSION

The Supreme Court should accept review, adopt the Restatement (Second) of Torts, modify the requirement of "presence" in "dead body" cases, modify the Public Duty and reverse and remand.

Respectfully submitted this 19th day of December 2019.

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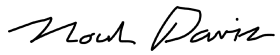
[10] The Legislature abrogated sovereign immunity decades ago. RCW 4.92.090; RCW 4.96.010 and the public duty doctrine has been criticized in several opinions by former Justice Robert Utter. *See, e.g., Taylor v. Stevens County*, 111 Wn.2d 159, 172, 759 P.2d 447 (1988) (Utter, J., concurring); *Bailey v. Forks*, 108 Wn.2d 262, 267, 737 P.2d 1257 (1987) (Utter, J., writing for majority). Following this reasoning, a number of states have abrogated the public duty doctrine, including Alaska, Arizona, Colorado, Louisiana, Nebraska, Oregon, and Wisconsin); see also Justice Chambers' concurrence in *Munich v. Skagit Emerg. Comm'n Ctr.*, 175 Wn.2d 871, 288 P.3d 328 (2012)



Noah Davis, IN PACTA, WSBA #30939
Attorney for Keith Dahl, Appellant
33530 1st Way S, Ste,. 102, Federal Way WA 98003
Ph. 206.709.8281, Fx. 206.860.0178
nd@inpacta.com
www.inpacta.com

APPENDIX

(TO PETITION FOR REVIEW)

DAHL V. FINO ET AL

COURT OF APPEALS CASE NO. 51455-9-II

Filed
Washington State
Court of Appeals
Division Two

September 10, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KEITH DAHL, Respondent, v. GINA M. FINO; PACIFIC NORTHWEST FORENSIC PATHOLOGISTS, Appellants.	No. 51455-9-II UNPUBLISHED OPINION

SUTTON, J. — Dr. Gina M. Fino and Pacific Northwest Forensic Pathologists[1] (collectively Fino) appeal the superior court's order denying their motion for summary judgment. Fino argues that the trial court erred because (1) she is entitled to immunity from civil liability for performing a statutorily authorized autopsy using the undisputed method and procedure for "determining the cause and manner of death" as provided by RCW 68.50.015, (2) she did not owe Keith Dahl, the father of the decedent, a duty as a matter of law, (3) Dahl cannot raise a genuine issue of material fact as to Fino's intentional conduct beyond the statutory authority of RCW 68.50.100 and RCW 68.50.106 for the claim of intentional misuse of a corpse, and (4) Dahl cannot raise a genuine issue of material fact as to the essential element of presence at the injury-causing incident for the

[1] Pacific Northwest Forensic Pathologists was named as a defendant because it employed Dr. Fino who, at the time she conducted the autopsy at issue, acted at the direction of the Mason County coroner.

claims of intentional and negligent infliction of emotional distress. Dahl argues that RCW 68.50.015 provides Fino with limited immunity that does not bar any of his claims and that the superior court properly denied the motion for summary judgment.

We hold that Dahl cannot demonstrate that Fino owed him a duty beyond that which was owed to the general public under the public duty doctrine and there are no genuine issues of material fact on this issue. Fino is entitled to summary judgment on the negligence claim, the intentional and negligent interference of a corpse claims, and the intentional and negligent infliction of emotional distress claims.[2] Thus, the superior court erred by denying Fino's summary judgment motion. We reverse the order denying summary judgment and remand for entry of an order of judgment in favor of Fino and dismissing with prejudice Dahl's claims against Fino.

FACTS

On September 13, 2015, Brandon Dahl[3] was arrested and booked into the Mason County Jail. Several inmates attacked him and beat him, resulting in hemorrhages, contusions, and abrasions to Brandon's head and body. The jail transferred him to a different unit without providing any medical care for his injuries. Three days after his arrest, Brandon died as a result of an apparent hanging.

After Brandon's death, the Mason County coroner, under RCW 68.50.010, took jurisdiction over the body to investigate the cause and manner of death because the death was

[2] Based on our disposition, we do not reach the issue of immunity.

[3] For clarity this prehearing refers to Brandon Dahl by his first name and as the decedent. We mean no disrespect.

allegedly the result of hanging. The coroner directed Dr. Fino, a forensic pathologist, to conduct an autopsy under the authority of RCW 68.50.106.[4] Fino dissected the body and internal organs, including the brain, and determined that the cause of death was asphyxia due to hanging and the manner of death was suicide. She closed the body for burial. The coroner then released the body to the family.

Dahl, Brandon's father, arranged for a second autopsy to be performed by pathologist Dr. Bennet Omalu. Omalu issued a report in which he strongly criticized many aspects of Fino's autopsy.

Dahl sued Fino and her employer, Pacific Northwest Forensic Pathologists, for professional negligence, intentional misuse of a corpse, and both intentional and negligent infliction of emotional distress alleging that Fino's dissection of the brain was a "mutilation" which resulted in emotional distress to him. Clerk's Papers (CP) at 4.

Fino and her employer filed a motion for summary judgment on all claims. Fino alleged that she was immune from civil liability under RCW 68.50.015 for performing a statutorily authorized autopsy which was the undisputed method and procedure of determining the cause and manner of death. Fino also alleged that Dahl failed to produce evidence to support a prima facie

[4] Under RCW 68.50.106, "In any case in which an autopsy or postmortem is performed, the coroner or medical examiner, upon his or her own authority or upon the request of the prosecuting attorney or other law enforcement agency having jurisdiction, 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 or upon lawful request are needed or desired for evidence to be presented in court. Costs shall be borne by the county."

case on the claims and that she was entitled to summary judgment dismissal of all claims as a matter of law. The superior court denied the motion for summary judgment, reasoning that RCW 68.50.015's grant of immunity "is not as broad as the moving party asserts but is more limited to a particular type of civil liability as testified [to] in the statute itself." Report of Proceedings (RP) at 26. The superior court certified its order for immediate review under RAP 2.3(b)(4). CP at 425. A commissioner of this court granted discretionary review.[5]

ANALYSIS

I. STANDARDS OF REVIEW

We review a superior court's ruling on summary judgment de novo. *Schibel v. Eymann*, 189 Wn.2d 93, 98, 399 P.3d 1129 (2017). "Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Schibel*, 189 Wn.2d at 98; CR 56(c). When evaluating the evidence on summary judgment, we view all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Piris v. Kitching*, 185 Wn.2d 856, 861, 375 P.3d 627 (2016).

The party opposing summary judgment dismissal cannot rely on allegations made in pleadings, but must present evidence, usually in the form of affidavits or declarations based on personal knowledge, showing that the affiant is competent to testify to the matters therein and setting "'forth specific facts showing that there is a genuine issue for trial'" in order to defeat the motion. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989) (quoting CR 56(e)).

[5] Ruling Granting Review (May 10, 2018).

The meaning of a statute is a question of law that is also subject to de novo review. *Williams v. Tilaye*, 174 Wn.2d 57, 61, 272 P.3d 235 (2012).

II. PUBLIC DUTY DOCTRINE

Fino argues that Dahl cannot establish that she owed a duty to *him* "'to conduct an autopsy of his son's body in accordance with the degree of skill, ability, and learning common to forensic pathologists,'" rather than to the public in general. Br. of Appellants at 34 (quoting CP at 192). Therefore, Fino argues, she is entitled to dismissal of Dahl's negligence claim as a matter of law. We hold that the superior court erred by denying Fino's motion for summary judgment for the negligence claim because Dahl cannot demonstrate that Fino owed him a duty beyond that which was owed to the general public, and the public duty doctrine bars Dahl's claim.

To establish actionable negligence, a plaintiff must demonstrate the following: "(1) the existence of a duty owed to the complaining party, (2) a breach of that duty, (3) resulting injury, and (4) that the breach was the proximate cause of the injury." *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998). Because "a negligence action will not lie if a defendant owed a plaintiff no duty of care, the primary question is whether a duty of care existed." *Folsom*, 135 Wn.2d at 671. "The existence of a duty is a question of law." *Folsom*, 135 Wn.2d at 671.

"Whether the defendant is a governmental entity or a private person, to be actionable, the duty must be one owed to the injured plaintiff, and *not* one owed to the public in general." *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988) (emphasis added). "Under the public duty doctrine," which is a "basic principle of negligence law," liability may not be imposed unless "'the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.*, a duty to all is a duty to no one).'" *Taylor*, 111

Wn.2d at 163 (quoting *J & B Dev. Co. v. King County*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983). "The public duty doctrine is a focusing tool used to determine whether the defendant owed a duty to the public or a particular individual." *Fabre v. Town of Ruston*, 180 Wn. App. 150, 159, 321 P.3d 1208 (2014). The plaintiff in a negligence action has the burden of establishing that the defendant breached a duty owed to him or her individually, rather than to the public at large. *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 738, 150 P.3d 633 (2007).

"There are four exceptions to the public duty doctrine: (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship." *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 879, 288 P.3d 328 (2012). "If any one of the exceptions applies, [the defendant] is held as a matter of law to owe a duty to the plaintiff." *Munich*, 175 Wn.2d at 879.

Here, the coroner had jurisdiction of Brandon's body under RCW 68.50.010[6] and directed Fino to conduct an autopsy with the costs to be borne by the county under RCW 68.50.100[7] and RCW 68.50.106. In this context, Fino's dissection of the body was a governmental function

[6] Under RCW 68.50.010, "The jurisdiction of bodies . . . where the circumstances of death indicate death was caused by unnatural or unlawful means; . . . [or] where death apparently results from . . . hanging . . . ; [or] where death occurs in a jail or prison; . . . is hereby vested in the county coroner, which bodies may be removed and placed in the morgue under such rules as are adopted by the coroner with the approval of the county commissioners, having jurisdiction, providing therein how the bodies shall be brought to and cared for at the morgue and held for the proper identification where necessary."

[7] Under RCW 68.50.100(1), "The right to dissect a dead body shall be limited to cases specially provided by statute or by the direction or will of the deceased; cases where a coroner is authorized to hold an inquest upon the body, and then only as he or she may authorize dissection; . . . PROVIDED, [t]hat the coroner, in his or her discretion, may make or cause to be made by a competent pathologist, toxicologist, or physician, an autopsy or postmortem in any case in which the coroner has jurisdiction of a body[.]"

performed for a public purpose. As a result, unless an exception applies, the public duty doctrine bars Dahl's claim.

A. SPECIAL RELATIONSHIP EXCEPTION

Dahl argues that the special relationship exception to the public duty doctrine applies because he was a reasonably foreseeable plaintiff under the statutory framework governing Fino's work related to Brandon's autopsy. We disagree.

"A special relationship . . . will exist and thereby give rise to an actionable duty, if three elements are established: (1) direct contact or privity between the [defendant] and the plaintiff that sets the plaintiff apart from the general public, (2) an express assurance given by the [defendant], *and* (3) justifiable reliance on the assurance by the plaintiff." *Munich*, 175 Wn.2d at 879 (emphasis added). All three elements must be met. *Munich*, 175 Wn.2d at 879. If one element is not satisfied, the exception does not apply. *Munich*, 175 Wn.2d at 879.

As to the second element, Dahl argues that he had an *implied* assurance under Chapter 68.50 RCW that Fino "would perform the autopsy on his son competently and in a way that did not interfere with his specifically vested rights." Br. of Resp't at 35. However, a government duty cannot arise from an *implied* assurance. *See Taylor*, 111 Wn.2d at 166. Because Dahl does not identify any express assurance given to him by either Fino or the Mason County Coroner or any other public official, the second element is not met. Because this element is not met, the special relationship exception to the public duty doctrine does not apply.

Because the elements required for the special relationship exception to the public duty doctrine are not met, the special relationship exception does not apply here. Accordingly, we hold

that Dahl cannot establish that Fino owed him a duty under the special relationship exception to the public duty doctrine.

B. LEGISLATIVE INTENT EXCEPTION

Dahl argues that even if there is not a special relationship here, there is a legislative intent in the statutory scheme governing Fino's actions to protect a certain class of people—family members of decedents—under the jurisdiction of coroners and medical examiners. Dahl cites RCW 68.50.105(3)(b) and RCW 68.50.150(3)(e) in support of his position.[8] We disagree.

The legislative intent exception to the public duty doctrine applies where a "statute by its terms evidences a clear legislative intent to identify and protect a particular and circumscribed class of persons." *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988). In addition to family members, RCW 68.50.105(1)[9] provides that

> [r]eports and records of autopsies or postmortems shall be confidential, except that the following persons may examine and obtain copies of any such report or record: The personal representative of the decedent as defined in RCW 11.02.005, any family member, the attending physician or advanced registered nurse practitioner, the prosecuting attorney or law enforcement agencies having jurisdiction, public health officials, the department of labor and industries in cases in which it has an interest under RCW 68.50.103, or the secretary of the department of children, youth, and families or his or her designee in cases being reviewed under RCW 74.13.640.

[8] RCW 68.50.105(3) does not contain further subsections and RCW 68.50.150 was repealed in 2005, LAWS OF 2005, ch. 365, § 161. Presumably, Dahl intended to cite RCW 68.50.160(3)(e) which establishes that the surviving parents of the decedent have a right to control the disposition of the remains of a deceased person.

[9] The legislature amended RCW 68.50.105 in 2019. LAWS OF 2019, ch. 470, § 14(1). Because these amendments are not relevant here, we cite to the current version of this statute.

Under the plain language of the statute, RCW 68.50.105 does *not* evidence a clear legislative intent to identify and protect a particular class of persons.

Additionally, RCW 68.50.160(3) does not address any duty of the coroner, but merely prioritizes those who may direct disposition of human remains. Under RCW 68.50.160(3)(e),

> If the decedent has not made a prearrangement . . . or the costs of executing the decedent's wishes regarding the disposition of the decedent's remains exceeds a reasonable amount or directions have not been given by the decedent, 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:
>
> . . . .
>
> (e) The surviving parents of the decedent[.]

Under the plain language of the statute, RCW 68.50.160(3) does not evidence a clear legislative intent to identify and protect a particular class of persons; it merely lists the order in which responsibility falls to various people in relation to the decedent.

Because neither RCW 68.50.105 nor RCW 68.50.160 contemplate a specific duty regarding the performance of an autopsy to a particular and circumscribed class of persons, the legislative intent exception does not apply here. Accordingly, we hold that Dahl cannot establish that Fino owed him a duty under the legislative intent exception to the public duty doctrine.

Dahl cannot demonstrate that Fino owed him a duty beyond a duty owed to the general public; therefore, the superior court erred by denying Fino's motion for summary judgment based on the public duty doctrine.

III. INTENTIONAL AND NEGLIGENT MISUSE OF A CORPSE

Fino argues that because there is no genuine issue of material fact as to the intentional conduct and there is no recognized claim for negligent misuse of a corpse, the superior court erred by not dismissing Dahl's claim for intentional misuse of a corpse. We agree.

A claim for intentional misuse of a corpse is an intentional tort based on an interest in the proper treatment of a corpse and allowing recovery for the plaintiff's mental suffering "directly result[ing] from a willful wrong and not merely a negligent act." *Whitney v. Cervantes*, 182 Wn. App. 64, 73, 328 P.3d 957 (2014). "Washington law does not recognize an action for negligent interference with a dead body." *Whitney*, 182 Wn. App. at 74. Our Supreme Court has explicitly declined the opportunity to expand the cause of action to include negligent conduct. *Adams v. King County*, 164 Wn.2d 640, 657 n.9, 192 P.3d 891 (2008) (noting that it had not adopted the Restatement (Second) of Torts § 868 (1979), which permits liability for negligent interference with a corpse, and had previously "rejected a claim of negligent misuse because recovery is premised on mental suffering").

In response to Fino's motion for summary judgment, Dahl presented Omalu's medico-legal report and autopsy report along with the report of Dahl's psychological evaluation. Omalu's two reports criticized the manner in which Fino dissected Brandon's body and the psychologist offered an opinion about Dahl's mental state. However, Omalu's report offered no evidence or opinion that Fino had intentionally misused or mutilated the brain or body in any manner other than dissecting it.

There is no question that Fino intentionally dissected the body. However, it is also undisputed that Fino had the statutory authority and the discretion to dissect the body without

obtaining the consent from the family based on the circumstances surrounding Brandon's death. RCW 68.50.010, RCW 68.50.100, RCW 68.50.106.

Dahl analogizes this case to *Adams v. King County.* He argues that the alleged pulverization of the decedent's brain "is effectively no different than 'removal of the entire brain,'" as was at issue in *Adams*. Br. of Resp't at 40-41 (quoting *Adams,* 164 Wn.2d at 659). However, this case is factually distinct from *Adams*. The coroner in that case removed the brain from the body of the decedent, kept the brain for scientific research, and returned the body to the decedent's family. *Adams,* 164 Wn.2d at 646. Our Supreme Court held in that case that such conduct "causes mental suffering as would an improper burial or use of a body as collateral for payment of a debt." *Adams,* 164 Wn.2d at 659.

Here, Fino performed a statutorily authorized autopsy to determine and manner and cause of death and determined that the cause of death was asphyxia due to hanging and the manner of death was suicide.

Because the evidence Dahl provided cannot establish intentional conduct by Fino for an unauthorized purpose, Dahl's claim for intentional interference with a corpse fails. Because Dahl cannot raise a genuine issue of material fact to support his claim for intentional interference with a corpse and there is no cognizable claim for negligent interference, Fino is entitled to judgment as a matter of law on these claims. We hold that the superior court erred by denying Fino's motion for summary judgment of the intentional and negligent misuse of a corpse claims.

IV. PRESENCE AT ALLEGED INJURY-CAUSING EVENT

Fino argues that the superior court erred by denying summary judgment on Dahl's claims for intentional and negligent infliction of emotional distress because Dahl cannot raise a genuine

issue of material fact as to the essential element of presence at the injury-causing incident. We agree.

The intentional tort of outrage, also known as intentional infliction of emotional distress, includes three elements: "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress." *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). Negligent infliction of emotional distress includes the "established concepts of duty, breach, proximate cause, and damage or injury." *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976). To establish a prima facie case for either cause of action, the plaintiff must be present at the time of the alleged conduct at issue. *Reid v. Pierce County*, 136 Wn.2d 195, 203-04, 961 P.2d 333 (1998) (holding that plaintiffs who were not present when employees of a medical examiner's office engaged in arguably outrageous conduct could not maintain cause of action for either intentional or negligent infliction of emotional distress).

It is undisputed that Dahl was not present when Fino conducted the autopsy of Brandon's body; therefore, he has no cause of action for either intentional or negligent infliction of emotional distress under well-established case law. *Reid*, 136 Wn.2d at 203-04. The superior court erred by denying Fino's motion for summary judgment of these claims.

CONCLUSION

We hold that Dahl cannot demonstrate that Fino owed him a duty beyond that which was owed to the general public under the public duty doctrine, and there are no genuine issues of material fact on this issue. Fino is entitled to summary judgment on the negligence claim, the intentional and negligent interference of a corpse claims, and the intentional and negligent

infliction of emotional distress claims. Thus, the superior court erred by denying Fino's summary judgment motion. We reverse the order denying summary judgment and remand for entry of an order of judgment in favor of Fino and dismissing with prejudice Dahl's claims against Fino.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

Melnick, J.

MELNICK, P.J.

Glasgow, J

GLASGOW, J.

Filed
Washington State
Court of Appeals
Division Two

November 19, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KEITH DAHL, Respondent, v. GINA M. FINO; PACIFIC NORTHWEST FORENSIC PATHOLOGISTS, Appellants.	No. 51455-9-II ORDER GRANTING MOTION TO EXTEND TIME TO ANSWER MOTION FOR RECONSIDERATION AND ORDER DENYING MOTION FOR RECONSIDERATION

Respondent moves for a one-week extension of time to file its answer to Appellant's motion for reconsideration of the unpublished opinion filed September 10, 2019, in the above entitled matter. Upon consideration, the Court grants Respondent an extension to October 25, 2019. Because Respondent's response to the motion was received by that date, it is accepted for filing.

Appellant moves for reconsideration of the Court's unpublished opinion filed September 10, 2019. Upon consideration the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. MELNICK, SUTTON, GLASGOW

FOR THE COURT:

SUTTON, JUDGE

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KEITH DAHL, Respondent, v. GINA M. FINO and PACIFIC NORTHWEST FORENSIC PATHOLOGISTS, Appellants.	No. 51455-9 MOTION FOR RECONSIDERATION

I. Identity of Moving Party & Relief Requested

Respondent Keith Dahl asks this Court to reconsider its decision reversing the trial court and dismissing his case.

II. Points of Law and Fact this Court has Overlooked or Misapprehended. RAP 12.4.

A. This Court has overlooked or misapprehended RAP 9.12.

As relevant here, RAP 9.12 (this Court's "Special Rule for Order on Summary Judgment") provides that this Court will not consider issues not called to the trial court's attention:

> On review of an order granting or denying a motion for summary judgment the appellate court will consider only . . . issues called to the attention of the trial court.

This RAP codified preexisting law. *See, e.g.*, Tegland, WASH. PRAC., *RULES PRAC.*, RAP 9.12 (7th Ed. 2011 & 2018 Pct. Prt.); WASH.

APPELLATE PRAC. DESKBOOK § 9.11(3) (4th Ed. 2016); ***Am. Univ. Ins. Co. v. Ranson***, 59 Wn.2d 811, 370 P.2d 867 (1962). It is routinely applied, precluding review of issues not raised on summary judgment in the trial court. *See, e.g.*, ***Nelson v. McGoldrick***, 127 Wn.2d 124, 140, 896 P.2d 1258 (1995) (this Court engages in *the same* inquiry on summary judgment, so issues not raised in the trial court are not reviewed on appeal); ***Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt.***, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993) (same); ***Bldg. Indus. Ass'n of Wash. v. McCarthy***, 152 Wn. App. 720, 749 & n.12, 218 P.3d 196 (2009) (RAP 9.12 "limits our review to issues brought to the trial court's attention") (citing ***Coronado v. Orona***, 137 Wn. App. 308, 318, 153 P.3d 217 (2007)); ***Sourakli v. Kyriakos, Inc.***, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *rev*. *denied*, 165 Wn.2d 1017 (2009) (same); ***Haueter v. Cowles Publ'g Co.***, 61 Wn. App. 572, 590, 811 P.2d 231 (1991) (same)); ***Green v. Cmty. Club***, 137 Wn. App. 665, 678-79, 151 P.3d 1038 (2007) (RAP 9.12 is "mandatory").

The language of the rule also confirms that it is mandatory. The RAPs use "will" or "may" when referring to an act of the appellate court. RAP 1.2(b). Since "may" is permissive, and two different words are used, "will" is mandatory. *See, e.g.*, ***Farmers Ins. Exch. v. Dietz***,

121 Wn. App. 97, 103 & n.18, 87 P.3d 769 (2004) ("different words used within the same rule are presumably meant to mean different things") (citing ***Terry v. City of Tacoma***, 109 Wn. App. 448, 457, 36 P.3d 553 (2001) ("'It is well established that when different words are used in the same statute we will presume that the legislature intended a different meaning to attach to each word'")); ***State v. Greenwood***, 120 Wn.2d 585, 592, 845 P.2d 971 (1993) ("The principles of statutory construction also apply to the interpretation of court rules")). Thus, this Court will not – *i.e.*, ***cannot*** – review unraised issues when reviewing a summary judgment.

This Court will search in vain through Fino's Motion for Summary Judgment for any reference to Washington's public duty doctrine. CP 145-70. Our public duty doctrine was *not* cited or argued in the trial court.[1] This Court should have declined to consider this issue. RAP 9.12. It should withdraw its opinion, reconsider, and issue a new decision, or remand to the trial court for consideration of this argument in the first instance under RAP 9.11.

[1] There is a tangential reference to a different state's rationale for immunizing Coroners, but no reference whatsoever to any applicable Washington law on the public duty doctrine. *Cf.* CP 159-64.

RAP 9.12 is a salutary rule, as this case demonstrates. The undersigned has checked the oral argument recording, but finds no discussion of the public-duty argument, and no questions about it from the bench, presumably because it was a secondary or even tertiary argument in Fino's opening brief that she did not argue orally. Because it also was not raised below (which the undersigned would have mentioned had the issue arose in argument) Dahl should have been safe in trusting that this Court would not consider it under RAP 9.12, much less largely rest its decision upon it.

Perhaps more importantly, had Fino raised this issue in the trial court, Dahl could have responded. He would have presented his deposition testimony to the effect that before the autopsy, the Mason County Coroner (Stockwell) specifically advised him to get a "good lawyer" because something is wrong with how Brandon died. He further would have sworn that when he asked something like, "what aren't you telling me," the Coroner mentioned Brandon's "black eyes," and then he personally reassured Dahl not to worry, it would all come out in the autopsy. When it did not all come out in the autopsy, Dahl sought a second opinion, which revealed that Fino had destroyed the evidence.

Obviously, such facts evidence a special relationship between Dahl and the Mason County Coroner or (at the very least) raise a genuine issue of material fact on whether such a relationship existed. This Court should withdraw its opinion, reconsider, affirm, and remand for trial.

B. This Court overlooks or misapprehends the issue: *mutilation of Brandon's brain*.

This Court apparently also overlooks or misapprehends the relevant issue. Its Opinion focuses on *the autopsy*, which has little to do with Dahl's claim. Slip Op. at 6-7. His claim is for *mutilation of his son's brain*. As further discussed *infra*, whether Fino committed that horrendous act is genuinely at issue. Regardless of whether Fino owed the public a duty *to conduct an autopsy*, it would be grotesque to suggest that she owed the public a duty to mutilate Brandon's brain. This Court's focus is misplaced.

Similarly, this Court says RCW 68.50.160(3)(e) does not "contemplate a specific duty *regarding the performance of an autopsy* to a . . . circumscribed class." Slip. Op. at 9 (emphasis added). True but irrelevant. Rather, Dahl is in a very circumscribed class that has *the right to control the disposition of Brandon's remains*. Not an autopsy. ***Mutilation of a corpse***. This Court's

analysis entirely misapprehends the point. It should withdraw its opening, reconsider, and remand.

C. This Court overlooks or misapprehends *Munich* and crucial facts relevant to the legislative intent exception.

This Court's decision apparently overlooks Justice Chambers' concurrence in ***Munich v. Skagit Emerg. Comm'n Ctr.***, 175 Wn.2d 871, 288 P.3d 328 (2012), cited at BR 33. He carefully laid out why the public duty doctrine does not apply, where, as here, the duty is created at common law. *See also* BR 31-35 (citing and discussing ***Gould v. Reay***, 39 Wn. App. 730, 695 P.2d 126 (1984); ***Adams v. King Cy.***, 164 Wn.2d 640, 192 P.3d 891 (2008); and ***Munich***). Simply put, applying the public duty doctrine to common-law torts, under which *everyone* owes a duty to *all* foreseeable plaintiffs, would eviscerate the Legislature's specific waiver of sovereign immunity for torts under RCW 4.92.090 ("Washington . . . shall be liable <u>for damages arising out of its tortious conduct</u> to the same extent as if it were a private person") (emphasis added). This Court should withdraw its opinion, reconsider on this independently sufficient ground, affirm, and remand for trial.

Moreover, this Court apparently overlooks or misapprehends that the Legislature did in fact clearly create a circumscribed class of

persons under RCW 68.50.160(3)(e).[2] Slip Op. at 8-9. The statute specifically identifies family members. *Id*. While it is true that it also identifies other specific people, this hardly contradicts the fact that the Legislature intended to recognize family members as within the circumscribed class of those who have the "right to control" the disposition of Brandon's remains. A circumscribed class need not exclude everyone else. Here, all the world is excluded, except for the listed people. They form a circumscribed class, and Dahl is, tragically, a member of that class for Brandon. This Court should withdraw its opinion, reconsider, affirm, and remand for trial.

D. This Court has overlooked or misapprehended that Dahl raised a genuine issue of material fact regarding intentional mutilation of Brandon's brain.

This Court has overlooked or misapprehended that Dr. Omalu did in fact offer "evidence or opinion that Fino had intentionally mistreated or mutilated [Brandon's] brain . . . in [a] manner other than dissecting it." Slip Op. at 10. This was discussed in oral argument: the "residual brain had been previously prosected [dissection of a human corpse] ***in an irregular [and] indiscernible fashion***." CP 40

[2] Dahl appreciates this Court's correction of counsel's error in citing the prior statute. Slip Op. 8 n.8. The undersigned counsel, who did not write the briefs, apologizes for not correcting that error.

(emphasis added). It was markedly autolyzed (*i.e.*, self-digested); friable (*i.e.*, easily reduced to power); and pulverized (destroyed by smashing it into fragments). CP 41; *see also* WEBSTER'S THIRD NEW INT'L DICTIONARY 148, 910, 1841 (1993). There was "near-complete obliteration of the anatomic detail." CP 41. These are not normal sequelae of an autopsy.

Moreover, Fino otherwise failed to follow the most basic protocols and procedures for an autopsy. No ligature – supposedly the means of death – accompanied the body for autopsy. CP 14. Nor was any described in the autopsy report. *Id*. Nor, obviously, did Fino perform any correlation between the missing ligature and the alleged ligature-indentation marks. *Id*. Nor did she perform any histological or microscopic examinations. CP 16. She failed to preserve Brandon's brain in stock tissue. CP 20. She failed to photograph the autopsy. CP 19. She failed to wait for a toxicological analysis before completing her report. CP 18. And where she identified only six external injuries to the body, Dr. Omalu identified 20. CP 18. In simple fact, this was the worst autopsy – if indeed you can call it that – Dr. Omalu had ever seen. CP 124.

There are standards of practice that Fino was required to follow. CP 18-20. Fino committed "gross deviations" from those

standards. CP 19. Indeed, she exhibited "a pattern of deviations that critically undermines the validity and accurateness of the autopsy in this case as a methodology of science." CP 20.

These facts, taken all together, and viewed in the light most favorable to Dahl – as the trial court did – obviously establish that genuine issues of material fact exist on whether Fino intentionally mutilated Brandon's brain. They preclude summary judgment. This Court should withdraw its opinion, reconsider, affirm, and remand for trial.

III. Conclusion

This Court should reconsider. It should withdraw its Opinion. It should either remand for an actual hearing on the public duty doctrine, or affirm and remand for trial.

RESPECTFULLY SUBMITTED this 30th day of September 2019.

MASTERS LAW GROUP, P.L.L.C.

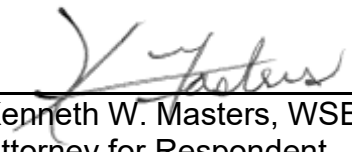
Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **MOTION FOR RECONSIDERATION** on the 27th day of September 2019 as follows:

Counsel for Appellants

Fain Anderson VanDerhoef Rosendahl O'Halloran Spillane, PLLC Jennifer D. Koh Michele C. Atkins 701 – 5th Avenue, Suite 4750 Seattle, WA 98104 jennifer@favros.com michele@favros.com carrie@facvros.com	___ _x_ ___	U.S. Mail E-Service Facsimile



Kenneth W. Masters, WSBA 22278
Attorney for Respondent

MASTERS LAW GROUP

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Appellate Court Case Number:	51455-9
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Chapter 68.50 RCW
HUMAN REMAINS

Sections

RCW 68.50.010

Coroner's jurisdiction over remains.

The jurisdiction of bodies of all deceased persons who come to their death suddenly when in apparent good health without medical attendance within the thirty-six hours preceding death; or where the circumstances of death indicate death was caused by unnatural or unlawful means; or where death occurs under suspicious circumstances; or where a coroner's autopsy or postmortem or coroner's inquest is to be held; or where death results from unknown or obscure causes, or where death occurs within one year following an accident; or where the death is caused by any violence whatsoever, or where death results from a known or suspected abortion; whether self-induced or otherwise; where death apparently results from drowning, hanging, burns, electrocution, gunshot wounds, stabs or cuts, lightning, starvation, radiation, exposure, alcoholism, narcotics or other addictions, tetanus, strangulations, suffocation or smothering; or where death is due to premature birth or still birth; or where death is due to a violent contagious disease or suspected contagious disease which may be a public health hazard; or where death results from alleged rape, carnal knowledge or sodomy, where death occurs in a jail or prison; where a body is found dead or is not claimed by relatives or friends, is hereby vested in the county coroner, which bodies may be removed and placed in the morgue under such rules as are adopted by the coroner with the approval of the county commissioners, having jurisdiction, providing therein how the bodies shall be brought to and cared for at the morgue and held for the proper identification where necessary.
[1963 c 178 § 1; 1953 c 188 § 1; 1917 c 90 § 3; RRS § 6042. Formerly RCW 68.08.010.]

RCW 68.50.015

Immunity for determining cause and manner of death—Judicial review of determination.

A county coroner or county medical examiner or persons acting in that capacity shall be immune from civil liability for determining the cause and manner of death. The accuracy of the determinations is subject to judicial review.
[1987 c 263 § 1.]

RCW 68.50.050

Removal or concealment of body—Penalty.

(1) Any person, not authorized or directed by the coroner or medical examiner or their deputies, who removes the body of a deceased person not claimed by a relative or friend, or moves, disturbs, molests, or interferes with the human remains coming within the jurisdiction of the coroner or medical examiner as set forth in RCW 68.50.010, to any undertaking rooms or elsewhere, or any person who knowingly directs, aids, or abets such unauthorized moving, disturbing, molesting, or taking, and any person who knowingly conceals the human remains, shall in each of said cases be guilty of a gross misdemeanor.

(2) In evaluating whether it is necessary to retain jurisdiction and custody of human remains under RCW 68.50.010, 68.50.645, and 27.44.055, the coroner or medical examiner shall consider the deceased's religious beliefs, if known, including the tenets, customs, or rites related to death and burial.

(3) For purposes of this section and unless the context clearly requires otherwise, "human remains" has the same meaning as defined in RCW 68.04.020. Human remains also includes, but is not limited to, skeletal remains.

[2016 c 221 § 1; 2011 c 96 § 48; 1917 c 90 § 7; RRS § 6046. Formerly RCW 68.08.050.]

NOTES:

Findings—Intent—2011 c 96: See note following RCW 9A.20.021.

RCW 68.50.100

Dissection, when permitted—Autopsy of person under the age of three years.

(1) The right to dissect a dead body shall be limited to cases specially provided by statute or by the direction or will of the deceased; cases where a coroner is authorized to hold an inquest upon the body, and then only as he or she may authorize dissection; and cases where the spouse, state registered domestic partner, or next of kin charged by law with the duty of burial shall authorize dissection for the purpose of ascertaining the cause of death, and then only to the extent so authorized: PROVIDED, That the coroner, in his or her discretion, may make or cause to be made by a competent pathologist, toxicologist, or physician, an autopsy or postmortem in any case in which the coroner has jurisdiction of a body: PROVIDED, FURTHER, That the coroner may with the approval of the University of Washington and with the consent of a parent or guardian deliver any body of a deceased person under the age of three years

over which he or she has jurisdiction to the University of Washington medical school for the purpose of having an autopsy made to determine the cause of death.

(2) Every person who shall make, cause, or procure to be made any dissection of a body, except as provided in this section, is guilty of a gross misdemeanor.

[**2007 c 156 § 21; 2003 c 53 § 307; 1963 c 178 § 2; 1953 c 188 § 2; 1909 c 249 § 237;** RRS § 2489. Formerly RCW **68.08.100**.]

NOTES:

Intent—Effective date—2003 c 53: See notes following RCW **2.48.180**.

RCW 68.50.101

Autopsy, postmortem—Who may authorize.

Autopsy or postmortem may be performed in any case where authorization has been given by a member of one of the following classes of persons in the following order of priority:

(1) The surviving spouse or state registered domestic partner;

(2) Any child of the decedent who is eighteen years of age or older;

(3) One of the parents of the decedent;

(4) Any adult brother or sister of the decedent;

(5) A person who was guardian of the decedent at the time of death;

(6) Any other person or agency authorized or under an obligation to dispose of the remains of the decedent. The chief official of any such agency shall designate one or more persons to execute authorizations pursuant to the provisions of this section.

If the person seeking authority to perform an autopsy or postmortem makes reasonable efforts to locate and secure authorization from a competent person in the first or succeeding class and finds no such person available, authorization may be given by any person in the next class, in the order of descending priority. However, no person under this section shall have the power to authorize an autopsy or postmortem if a person of higher priority under this section has refused such authorization: PROVIDED, That this section shall not affect autopsies performed pursuant to RCW **68.50.010** or **68.50.103**.

[**2007 c 156 § 22; 1987 c 331 § 57; 1977 c 79 § 1; 1953 c 188 § 11.** Formerly RCW **68.08.101**.]

RCW 68.50.105

Autopsies, postmortems—Reports and records confidential—Exceptions.

(1) Reports and records of autopsies or postmortems shall be confidential, except that the following persons may examine and obtain copies of any such report or record: The personal representative of the decedent as defined in RCW 11.02.005, any family member, the attending physician or advanced registered nurse practitioner, the prosecuting attorney or law enforcement agencies having jurisdiction, public health officials, the department of labor and industries in cases in which it has an interest under RCW 68.50.103, or the secretary of the department of children, youth, and families or his or her designee in cases being reviewed under RCW 74.13.640.

(2)(a) Notwithstanding the restrictions contained in this section regarding the dissemination of records and reports of autopsies or postmortems, nor the exemptions referenced under RCW 42.56.240(1), nothing in this chapter prohibits a coroner, medical examiner, or his or her designee, from publicly discussing his or her findings as to any death subject to the jurisdiction of his or her office where actions of a law enforcement officer or corrections officer have been determined to be a proximate cause of the death, except as provided in (b) of this subsection.

(b) A coroner, medical examiner, or his or her designee may not publicly discuss his or her findings outside of formal court or inquest proceedings if there is a pending or active criminal investigation, or a criminal or civil action, concerning a death that has commenced prior to January 1, 2014.

(3) The coroner, the medical examiner, or the attending physician shall, upon request, meet with the family of the decedent to discuss the findings of the autopsy or postmortem. For the purposes of this section, the term "family" means the surviving spouse, state registered domestic partner, or any child, parent, grandparent, grandchild, brother, or sister of the decedent, or any person who was guardian of the decedent at the time of death.

[2019 c 470 § 14; 2013 c 295 § 1; 2011 c 61 § 1. Prior: 2007 c 439 § 1; 2007 c 156 § 23; 1987 c 331 § 58; 1985 c 300 § 1; 1977 c 79 § 2; 1953 c 188 § 9. Formerly RCW 68.08.105.]

NOTES:

Effective date—2013 c 295: See note following RCW 68.50.115.

RCW 68.50.106

Autopsies, postmortems—Analyses—Opinions—Evidence—Costs.

In any case in which an autopsy or postmortem is performed, the coroner or medical examiner, upon his or her own authority or upon the request of the prosecuting attorney or other law enforcement agency having jurisdiction, 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 or upon lawful request are needed or desired for evidence to be presented in court. Costs shall be borne by the county.
[**1993 c 228 § 19; 1987 c 331 § 59;** 1975-'76 2nd ex.s. c 28 § 1; **1953 c 188 § 10.** Formerly RCW **68.08.106**.]

RCW 68.50.107

State toxicological laboratory established—State toxicologist.

There shall be established in conjunction with the chief of the Washington state patrol and under the authority of the state forensic investigations council a state toxicological laboratory under the direction of the state toxicologist whose duty it will be to perform all necessary toxicologic procedures requested by all coroners, medical examiners, and prosecuting attorneys. The state forensic investigations council, after consulting with the chief of the Washington state patrol and director of the bureau of forensic laboratory services, shall appoint a toxicologist as state toxicologist, who shall report to the director of the bureau of forensic laboratory services and the office of the chief of the Washington state patrol. Toxicological services shall be funded by disbursement from the spirits, beer, and wine restaurant; spirits, beer, and wine private club; spirits, beer, and wine nightclub; spirits, beer, and wine VIP airport lounge; and sports entertainment facility license fees as provided in RCW **66.08.180** and by appropriation from the death investigations account as provided in RCW **43.79.445**.
[**2011 c 325 § 9; 2009 c 271 § 11.** Prior: **1999 c 281 § 13; 1999 c 40 § 8; 1995 c 398 § 10; 1986 c 87 § 2; 1983 1st ex.s. c 16 § 10;** 1975-'76 2nd ex.s. c 84 § 1; **1970 ex.s. c 24 § 1; 1953 c 188 § 13.** Formerly RCW **68.08.107**.]

NOTES:

Effective date—1999 c 40: See note following RCW **43.103.010**.

Effective date—1986 c 87: See note following RCW **66.08.180**.

Effective date—1983 1st ex.s. c 16: See RCW **43.103.901**.

*State forensic investigations council: Chapter **43.103** RCW.*

RCW 68.50.115

Coroner and medical examiner liability—Release of information.

No coroner, medical examiner, or his or her designee shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of any information related to his or her findings under RCW 68.50.105 if the coroner, medical examiner, or his or her designee acted in good faith in attempting to comply with the provisions of this chapter.
[2013 c 295 § 2.]

NOTES:

Effective date—2013 c 295: "This act takes effect January 1, 2014." [2013 c 295 § 3.]

RCW 68.50.160

Right to control disposition of remains—Liability of funeral establishment or cemetery authority—Liability for cost. *(Effective until May 1, 2020.)*

(1) A person has the right to control the disposition of his or her own remains without the predeath or postdeath consent of another person. A valid written document expressing the decedent's wishes regarding the place or method of disposition of his or her remains, signed by the decedent in the presence of a witness, is sufficient legal authorization for the procedures to be accomplished.

(2) Prearrangements that are prepaid, or filed with a licensed funeral establishment or cemetery authority, under RCW 18.39.280 through 18.39.345 and chapter 68.46 RCW are not subject to cancellation or substantial revision by survivors. Absent actual knowledge of contrary legal authorization under this section, a licensed funeral establishment or cemetery authority shall not be held criminally nor civilly liable for acting upon such prearrangements.

(3) If the decedent has not made a prearrangement as set forth in subsection (2) of this section or the costs of executing the decedent's wishes regarding the disposition of the decedent's remains exceeds a reasonable amount or directions have not been given by the decedent, 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 person designated by the decedent as authorized to direct disposition as listed on the decedent's United States department of defense record of emergency data, DD form 93, or its successor form, if the decedent died while serving in military service as described in 10 U.S.C. Sec. 1481(a) (1)-(8) in any branch of the United States armed forces, United States reserve forces, or national guard;

(b) The designated agent of the decedent as directed through a written document signed and dated by the decedent in the presence of a witness. The direction of the designated agent is sufficient to direct the type, place, and method of disposition;

(c) The surviving spouse or state registered domestic partner;

(d) The majority of the surviving adult children of the decedent;

(e) The surviving parents of the decedent;

(f) The majority of the surviving siblings of the decedent;

(g) A court-appointed guardian for the person at the time of the person's death.

(4) If any person to whom the right of control has vested pursuant to subsection (3) of this section has been arrested or charged with first or second degree murder or first degree manslaughter in connection with the decedent's death, the right of control is relinquished and passed on in accordance with subsection (3) of this section.

(5) If a cemetery authority as defined in RCW **68.04.190** or a funeral establishment licensed under chapter **18.39** RCW has made a good faith effort to locate the person cited in subsection (3)(a) through (g) of this section or the legal representative of the decedent's estate, the cemetery authority or funeral establishment shall have the right to rely on an authority to bury or cremate the human remains, executed by the most responsible party available, and the cemetery authority or funeral establishment may not be held criminally or civilly liable for burying or cremating the human remains. In the event any government agency or charitable organization provides the funds for the disposition of any human remains, the cemetery authority or funeral establishment may not be held criminally or civilly liable for cremating the human remains.

(6) The liability for the reasonable cost of preparation, care, and disposition devolves jointly and severally upon all kin of the decedent in the same degree of kindred, in the order listed in subsection (3) of this section, and upon the estate of the decedent.

[**2012 c 5 § 1; 2011 c 265 § 2; 2010 c 274 § 602; 2007 c 156 § 24; 2005 c 365 § 141; 1993 c 297 § 1; 1992 c 108 § 1; 1943 c 247 § 29;** Rem. Supp. 1943 § 3778-29. Formerly RCW **68.08.160**.]

NOTES:

Intent—2010 c 274: See note following RCW **10.31.100**.

*Disposal of remains of indigent persons: RCW **36.39.030**.*

*Order of payment of debts of estate: RCW **11.76.110**.*

RCW 68.50.200

Permission to remove human remains.

Human remains may be removed from a plot in a cemetery with the consent of the cemetery authority and the written consent of one of the following in the order named:

(1) The surviving spouse or state registered domestic partner.
(2) The surviving children of the decedent.
(3) The surviving parents of the decedent.
(4) The surviving brothers or sisters of the decedent.

If the required consent cannot be obtained, permission by the superior court of the county where the cemetery is situated is sufficient: PROVIDED, That the permission shall not violate the terms of a written contract or the rules and regulations of the cemetery authority.

[**2007 c 156 § 25; 2005 c 365 § 144; 1943 c 247 § 33;** Rem. Supp. 1943 § 3778-33. Formerly RCW **68.08.200**.]

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This is the Amended Petition for Review combined with Appendix (the original was filed yesterday 12/19/19). This Amended Petition is intended to replace yesterday's Petition and relate back to the 12/19/19 filing. An Errata sheet for changes will follow.

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Address:
33530 1ST WAY S, SUITE 102
FEDERAL WAY, WA, 98003-7332
Phone: 206-709-8281 - Extension 101

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COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

KEITH DAHL, Respondent, v. GINA M. FINO; PACIFIC NORTHWEST FORENSIC PATHOLOGISTS Appellants.	)	Ct App#: No. 51455-9-II ERRATA Amending Petition For Review

ERRATA:

On 12/19/19, the Petition for Review was filed with the Court of Appeals.

On 12/20/19, the Amended Petition for Review was filed with the Court of Appeals.

The Amended Petition for Review makes no substantive changes, but does make the following scrivener edits:

To the Table of Contents:

1. Updating the page numbers for Item E

To the Appendix:

1. Adding a Cover Page
2. Adding the RCW 68.50, Selected Statutes

To the Table of Authorities:

1. Changing the placement of the J&B Dev. Co case
2. Adding a page number for Reid v. Pierce County
3. Deleting referenced to RCW 68.15.050 and adding 68.50.160

To the Body of the Brief:

1. Changing RCW 68.15.050 to RCW 68.50.015

And finally, combining the Petition for Review and Appendix into a single document (as opposed to separately filed documents.

So certified, this 20th day of December 2019,

s/Noah C. Davis
Noah C. Davis, WSBA#30939
33530 1st Way, S. Ste #102
Federal Way WA 98003
206.709.8281
nd@inpacta.com

PROOF OF SERVICE:

I certify that on 12/20/19, I filed the foregoing ERRATA with the Court using the Court's electronic filing system which sent an electronic copy to the Appellants' attorneys (Jennifer Koh and Michele Atkins of Fain Anderson Vanderhoef)

- carrie@favros.com
- jennifer@favros.com
- michele@favros.com

So certified, this 20th day of December 2019,

s/Noah C. Davis
Noah C. Davis, WSBA#30939
33530 1st Way, S. Ste #102
Federal Way WA 98003
206.709.8281
nd@inpacta.com

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KEITH DAHL, Respondent, v. GINA M. FINO; PACIFIC NORTHWEST FORENSIC PATHOLOGISTS Appellants.	)	Ct App#: No. 51455-9-II Proof of Service

PROOF OF SERVICE:

I, Noah Davis, certify that on 12/19/19, I filed the PETITION FOR REVIEW AND THE APPENDIX with the Court using the Court's electronic filing system which sent an electronic copy to the Appellants' attorneys (Jennifer Koh and Michele Atkins of Fain Anderson Vanderhoef)

- carrie@favros.com
- jennifer@favros.com
- michele@favros.com

And, I further certify that on 12/20/19, I filed the AMENDED PETITION FOR REVIEW WITH APPENDIX with the with the Court using the Court's electronic filing system which sent an electronic copy to the Appellants' attorneys (Jennifer Koh and Michele Atkins of Fain Anderson Vanderhoef)

- carrie@favros.com
- jennifer@favros.com
- michele@favros.com

So certified, this 20th day of December 2019,

s/Noah C. Davis

Noah C. Davis, WSBA#30939
33530 1st Way, S. Ste #102
Federal Way WA 98003
206.709.8281
nd@inpacta.com

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