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No. 59951-8-1

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

NANCY ADAMS and MATTHEW
ADAMS, wife and husband,

Plaintiffs/Appellants,

v.

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

Defendants/Respondents.

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

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Respondents Stanley Medical Research Institute (SMRI) and the King County Medical Examiner (KCME) (defendants) have submitted their Answering Brief. In an attempt to dodge accountability for their misrepresentations to Nancy Adams, defendants argue that even though they sought her permission, her permission was not necessary to take Jesse Smith's body parts for research. This reply brief is submitted to respond to the arguments raised by defendants.

II. REPLY TO DEFENSE STATEMENT OF FACTS

A. **The SMRI Neuropathology Report Had Nothing to Do with Determining the Cause of Death**

The defendants, at pp. 6-7, set forth their version of the relationship between SMRI and KCME. They state that when KCME facilitated delivery of a brain to SMRI, SMRI would "prepare a detailed pathology report for the KCME, which became a part of the decedent's autopsy file." Respondent's Brief, p.7.

These facts do not tell the whole story. SMRI did not prepare a neuropathology report to assist KCME in determining the decedent's cause of death. In the case at bench, the neuropathology report provided nothing to assist KCME in determining the cause of Jesse Smith's death. Nothing about the condition of Jesse Smith's brain caused his death. CP 497-498.

B. The Defense Never Asked Whether Jesse Smith Was an Organ Donor and Nancy Adams Had No Duty to Tell Them

The defense argues repeatedly that Nancy Adams did not tell anyone that Jesse Smith was an "unrestricted organ donor...." See Respondent's Brief, pp.7-8. The passage insinuates that Mrs. Adams withheld her son's organ donation status from Dr. Haikal, or that she had a duty to reveal it when Dr. Haikal called. Nothing in the facts or law supports this assertion. In fact, when asked by a paramedic or police officer, Mrs. Adams readily revealed that Jesse was an organ donor. CP 41. The record simply does not support any inference of wrongful withholding of Jesse's status as an organ donor. If that status bore such importance, the court should place the obligation upon Dr. Haikal, the procurer, to make the inquiry, and not a grieving, distressed mother.

III. ARGUMENT

A. RCW 68.50.570(2) Does Not Provide That A Donee Other than "Any Hospital" May Accept an Undesignated Anatomical Gift

Defendants do not dispute that Jesse Smith's anatomical gift did not designate a donee. Nonetheless, they claim that RCW 68.50.570(2), which controls receipt of undesignated anatomical gifts, does not apply because Jesse did not die in a hospital. The argument will require the court to impermissibly rewrite the statute.

Recognizing that RCW 68.50.570(2) only permits "any hospital" to accept an undesignated anatomical gift, defendants urge that RCW 68.50.570(2) only applies when a donor dies in a hospital. Defendants' essentially ask the court to rewrite RCW 68.50.570 to read as follows (with the respondents' added language in bold):

(1) The following persons may become donees of anatomical gifts for the purposes stated:

- (a) A hospital, physician, surgeon, or procurement organization for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science; or
- (b) An accredited medical or dental school, college, or university for education, research, or advancement of medical or dental science; or
- (c) A designated individual for transplantation or therapy needed by that individual.

An anatomical gift may be made to a designated donee or without designating a donee. If a donee is not designated and the donor does not die in a hospital, the anatomical gift may be accepted by any hospital, physician, surgeon, or procurement organization for transplantation, therapy, medical or dental education, research, or advancement or dental science, an accredited medical or dental school, college, or university for education, research, or advancement of medical or dental science.

(2) An anatomical gift may be made to a designated donee or without designating a donee. If a donee is not designated or if the donee is not available or rejects the anatomical gift, the anatomical gift may be accepted by any hospital. **This provision of RCW 68.50.570 only applies where the donor dies in a hospital. It does not apply in cases where the donor does not die in a hospital.**

(3) If the donee knows of the decedent's refusal or contrary indications to make an anatomical gift or that an anatomical gift made by a member of a class having priority to act is opposed by a member of the same class or prior class under RCW 68.50.550(1), the donee may not accept the anatomical gift.

Defendants' attempt to re-write RCW 68.50.570 ignores all rules of statutory construction. A court may not even attempt to construe or interpret a statute unless the plain language of the statute presents an ambiguity. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452-53, 90 P.3d 26 (2004). RCW 68.50.570 does not contain any ambiguity, particularly with respect to whom may accept an undesignated anatomical gift where there is no designation. The statute clearly permits "any hospital" to accept anatomical gifts if a donee is not designated. It does not allow any other donees to accept an undesignated anatomical gift.

Defendants recognize that the clear and plain language of RCW 68.50.570(2) eliminates their defense and respond with some breathtaking broken field running. Ignoring that Jesse Smith made an undesignated anatomical gift, they argue that RCW 68.50.570(1), and

not subsection (2), controls because Jesse did not die in an hospital. However, nothing in RCW 68.50.570(2) suggests that the legislature restricted application of the statute to instances where the donor dies in a hospital. If the legislature truly intended to so limit the statute, they would have said so directly. They did not, and no amount of wishful thinking can change that fact.

The application of RCW 68.50.570(1) or (2) depends on whether the donor of an anatomical gift designates a donee. If the donor selects a donee that falls within RCW 68.50.570(1), then such donee may receive the anatomical gift. If the donor designates no recipient, then the legislature simply and directly declared that "any hospital" may receive the gift. The application of the statutes does not depend upon the location of death. No rational construction of the statute can lead to such a conclusion.

In their efforts to sidetrack the court, the defendants ignore that in situations where the legislature uses certain language in one instance, and different language in another, there exists a clear difference in legislative intent. *Seeber v. Wash. Pub. Disclosure Comm'n*, 96 Wn.2d 135, 139, 634 P.2d 303 (1981). Defendants also ignore that under the maxim *expressio unius est exclusio alterius*, a canon of statutory construction, the express mention of one thing implies the exclusion of another. *Kreidler v. Eikenberry*, 111 Wn.2d

828, 834, 766 P.2d 438 (1989). See Brief of Appellants, pp. 14-19.

Even though the legislature knew of the potential class of donees, it chose to limit receipt of undesignated anatomical gifts to "any hospital.' The legislature's expansive list of all potential donees in RCW 68.50.570(1), and its restriction of all but one donee subsection (2), demonstrates that the latter excludes any recipient but "any hospital."

Instead of following the rules of statutory construction, defendants proclaim that the origins of the Uniform Anatomical Gift Act (UAGA) mean that RCW 68.50.570(2) applies only to deaths in hospitals. Defendants cite to Section 4(c) of the 1968 version of the UAGA,² Section 6(b) of the 1987 version of the UAGA³ (which is

This decision of the legislature is consistent with the primary purpose of Washington's Anatomical Gift Act (WAGA), to increase the supply of organs available for transplant. RCW 68.50.520(1); See also Comment to Section 6 of the 1987 version UAGA, providing that transplantation is the primary purpose of the UAGA. Instead, hospitals are the institutions equipped to handle transplants. The legislature's requirement that any hospital" receive undesignated anatomical gifts will help increase the supply of organs available for transplant, the primary goal of the UAGA. In fact, the legislature felt so strongly about facilitating transplants that it required hospitals to create programs to identify and encourage anatomical gifts. See RCW 68.50.570(2), 68.50.500.

² Section 4(c) of the 1968 version of the UAGA provides:

The gift may be made to a specified donee or without specifying a donee. If the later, the gift may be accepted by the attending physician as donee upon or following death. If the gift is made to a specified donee who is not available at the time and place of death, the attending physician upon or following death, in the absence of any expressed indication that the donor desired otherwise, may accept the gift as donee. The physician who becomes a donee under this subsection shall not participate in the

identical to RCW 68.50.570(2)) and the Comments to these sections.⁴ Defendants argue that, given these sections and comments, "on its face," it is clear that RCW 68.50.570(2) only applies to situations where a donor dies in a hospital and does not exclude other donees.

The flaw in the argument results from the fact that, on their "face," the statute and the UAGA say nothing of the sort. The UAGA

procedures for removing or transplanting a part.

⁵ Section 6(b) of the 1987 version of the UAGA provides:

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

⁴ The Comment to Section 4(c) of the 1968 version of the UAGA provides, in part:

Also important are the provisions of Subsection (c) that permit the attending physician upon or following death to be the donee when no donee is named or when the named donee is not available. The donee physician cannot participate personally in removing or transplanting a part, but he can, of course, make a further gift to another person for any authorized purpose.

The Comment Section to 6(b) of the 1987 version of the UAGA provides, in part:

Subsection (b) is a restatement of Subsection 4(c) of the original Act which provided that the attending physician would be the donee under specified circumstances. Hospitals are substituted for the attending physician. This will facilitate coordination of procurement and utilization of the gift pursuant to Section 9.

Section 9 of the 1987 version of the UAGA provides:

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

only provides that "any hospital" (in the case of the 1989 version) and the "attending physician" (in the case of the 1968 version) may accept an undesignated anatomical gift. The UAGA does not state that any other donee may initially accept an undesignated anatomical gift. Undeterred, the defendants ignore the plain and unambiguous language of the UAGA, as they have done with RCW 68.50.570(2).

Continuing their relentless run at legislating, the defendants also argue that the comments to the UAGA sections support their position. Actually, the comments do not address or suggest that donees other than "any hospital" or the "attending physician" have permission to initially accept an undesignated anatomical gift. In fact, the only comment that mentions donees other than "any hospital" or the "attending physician" suggests otherwise. The Comment to Section 4(c) of the 1968 version of the UAGA provides that "[t]he donee physician cannot participate personally in removing or transplanting a part, but he can, of course, make a further gift to another person for any authorized purpose." If a donee other than "attending physician" were permitted to initially accept an undesignated gift, there would be no need for the drafters of the 1968 UAGA to provide a Comment explaining that the "attending physician" may make a further gift. Other donees could simply accept the gift initially instead of requiring a further gift by the

"attending physician."⁵

Finally, in a last ditch effort to convince the Court to ignore the law, defendants argue that the legislature's use of the word "may" in RCW 68.50.570(2) is permissive, but non-exclusive, suggesting that the broad list of donors in RCW 68.50.570(1) also applies. This argument, as with all of defendants' arguments, ignores the rules of statutory construction. In particular, it ignores the canon of statutory construction *expressio unius est exclusio alterius*, as discussed prior. The argument would also make the language of RCW 68.50.570(2) superfluous. Why would the legislature specifically grant hospitals permission to accept an undesignated anatomical gift if, as

⁵ Defendants have suggested that Plaintiff is arguing that undesignated anatomical gifts could never be realized in deaths where the medical examiner is involved or where donors do not die in a hospital. Plaintiff makes no such argument. Plaintiff simply cites the plain language of the statute that provides that "any hospital" may accept an undesignated anatomical gift. There is absolutely no reason why "any hospital" could not accept an anatomical gift from an undesignated donor under the jurisdiction of the medical examiner. Further, while the statute does not directly address the issue, the comments to the 1968 version of the UAGA would certainly support the argument that "any hospital" may then make a further gift to another donee under RCW 68.50.570(1). What is clear from the statute, however, is that the legislature gave only "any hospital" permission to initially accept an undesignated anatomical gift.

Defendants also suggest that interpreting the statute as written would seriously undermine the Act's purpose of facilitating organ donation for research purposes. Defendants ignore that the primary purpose of the Act is not to facilitate donations for research, but to increase the supply of organs available for transplant. RCW 68.50.520(1); See also Comment to Section 6 of the 1987 version UAGA. In fact, the most recent version of the UAGA specifically provides that undesignated gifts may only be used for "transplantation or therapy." See 2006 version of UAGA, Section 11(e). Apparently the drafters of the UAGA do not have the same concerns that defendants raise. If such concerns existed, surely the drafters would have addressed them.

defendants' interpretation would provide, RCW 68.50.570(1) already gave them this power? The court should not deem any clause or individual words of a statute superfluous. *Cole v. Washington Utilities and Transp. Commission*, 79 Wn.2d 302, 308, 485 P.2d 71 (1971).

The Court should decline defendants' invitation to legislate. Jesse's anatomical gift gave only "any hospital" the right to accept his donation. Neither defendant fits the definition of "any hospital." Hence, Jesse's anatomical gift did not give KCME and SMRI the right to take and receive Jesse's body parts without first obtaining permission from Nancy Adams. Therefore, Jesse Smith's anatomical gift does not exculpate the defendants.

B. Jesse Smith's Anatomical Gift Only Allowed a Gift of "Any Organ" and Did Not Authorize the Gift to SMRI, Which Exceeded Any Organ

Even if the Court accepted defendants' invitation to re-write RCW 68.50.570(2), SMRI did not have authority to accept a donation that exceeded the scope of Jesse Smith's anatomical gift without obtaining permission from Nancy Adams. Jesse limited the gift to "Any Organ." CP 269. Defendants argue that by making a gift of "Any Organ," Jesse indicated his intent to donate all his organs and tissues to the fullest extent permitted by the AGA. This claim fails.

First, Jesse Smith, in making his anatomical gift, intended to

donate organs for transplanting.' CP 431-432. No evidence from any source suggests that Jesse Smith intended to donate his blood, fluid, arteries, or other parts, which are not organs, for use for any purpose.

Next, according to Washington law, Jesse Smith's donation was not unrestricted as defendants suggest. RCW 68.50.530(1) defines "anatomical gift" as "a donation of all or part of a human body to take effect upon or after death." "Any Organ" does not mean the entire human body. RCW 68.50.530(7) differentiates between an organ, tissue, eye, bone, artery, blood, and fluid.

Defendants appear to recognize this problem and argue that "Any Organ" really means an unrestricted donation or any "body part or fluid..." They argue that because the consent form that Jesse Smith used had only two choices, a box to check indicating "Any Organ" or a box marked "Specifically," his choice of the "Any Organ" box means a wholesale gift of his entire body.

The argument also makes no sense. What if a donor only wanted to donate organs, as in this case? Apparently, defendants are suggesting that Jesse Smith should have marked "Specifically"

⁵ The Court must accept all the facts and reasonable inferences in the light most favorable to plaintiff. See *Berger v. Sonneland*, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001) (all facts and reasonable inferences must be viewed in the light most favorable to the non-moving party).

and written in "Any Organ." This argument cannot withstand scrutiny.

SMRI's harvest exceeded "Any Organ." In particular, it included blood and fluids. CP 224-225. As such KCME and SMRI needed to obtain permission from Nancy Adams prior to removing and receiving Jesse's body parts.

C. Plaintiff Properly Pleaded a Common Law Cause of Action for Tortious Interference

Washington is a notice pleading state. CR 8(a) only requires a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for the relief claimed. It is well - - established that courts must liberally construe pleadings.-- *State-v.- Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987). Their purpose is to facilitate proper decisions on the merits, not to erect formal and burdensome impediments to the litigation process. If a complaint states facts entitling the plaintiff to relief, it is immaterial by what name the action is called. Furthermore, initial pleadings which may be unclear may be clarified during the course of summary judgment. *Id.*

Plaintiff's Amended Complaint provides, in part (CP 188-189, 194):

VIII.

Jesse Aaron Smith died on May 21, 2003. His body was taken to a facility owned, operated, and

controlled by the King County Medical Examiner's Office. Agents and/or employees of King County and/or SMRI contacted Plaintiff Nancy Adams and requested permission to harvest tissue samples from the brain of her deceased son, Jesse Aaron Smith. Plaintiff Nancy Adams granted consent only for harvesting of brain tissue samples, and did not consent to harvesting tissue from any other organ, and did not consent to the removal of any organ from the body of Jesse Aaron Smith.

IX.

Agents and employees of King County or SMRI illegally, wrongfully, tortiously and without consent removed the entire brain of Jesse Smith and all or part of his liver and spleen, and sent them to the SMRI facilities located in Maryland. SMRI paid King County for the illegal, wrongful, tortious, unauthorized removal, shipment -and-delivery-of-Jesse-Aaron-Smith's-brain- -- and there tissue.

XV.

Tortious Interference with a Dead Body Restatement (Second) of Torts § 868

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

15.2 Plaintiffs, as the surviving next of kin of the decedent Jesse Aaron Smith, had the right to the remains of Jesse Aaron Smith.

15.3 Plaintiffs' right was to their son's body in the same condition as it existed at the time of his death, subject to a lawful autopsy.

15.4 Defendants had a duty not to intentionally recklessly mutilate, mishandle, destroy or otherwise damage any part of the body of Jesse Aaron Smith without the express permission of Plaintiffs.

15.5 Defendants intentionally, recklessly, and/or negligently breached duty by causing removal of Jesse Aaron Smith's brain and other organs or tissue without the permission of plaintiffs and/or legal justification for doing so.

Defendants incorrectly protest that plaintiff elected to bring an interference claim exclusively under Restatement § 868. Section XV of plaintiff's Amended Complaint references "Tortious Interference with a Dead Body" and on a separate line references "Restatement (Second) of Torts § 868." Instead of accepting the fact that plaintiff brought claims under both the common law and under Restatement (Second) of Torts § 868, defendants distort the Amended Complaint.

Defendants' position is puzzling given the fact that both claims flow from the exact same facts. Further, defendants had attempted to raise this same argument in two other cases involving similar allegations and in both cases the Court disagreed with the defendants' position. CP 329, 491-494, 499-502. Defendants certainly had "fair notice" of plaintiff's common law claim. If there was any doubt as to whether plaintiff brought a common law claim, all doubt was clarified in Plaintiffs' Response to Defendants' Motion for Summary Judgment. CP 316-339.

D. KCME's Authority to do an Autopsy Does Not Preclude Claims for Wrongful Conduct in Removing and Receiving Jesse Smith's Body Parts

Defendants also argue that plaintiff's complaint fails because

"she based her claim exclusively on the *removal* of Jesse Aaron Smith's brain and other organs and tissues without permission of plaintiff's and/or any legal justification for doing so'," citing to CP 193 (paragraph 15.5 of Plaintiff's Amended Complaint). Respondent's Brief, p. 28. However, paragraph 15.1 provided "Plaintiffs reallege paragraphs I through IX as though fully set forth herein." CP 193.

Paragraph IX of the complaint makes it clear Plaintiff faults the defendants for removing, shipping and receiving Jesse Smith's body parts (CP 188-189):

Agents and employees of King County and/or SMRI illegally, wrongfully, tortiously and without consent removed the entire brain of Jesse Aaron Smith and all or part of his liver and spleen, and sent them to the SMRI facilities located in Bethesda, Maryland. SMRI paid King County for the illegal, wrongful, unauthorized and tortious removal, shipment and delivery of Jesse Aaron Smith's brain and other tissue.

The court should reject the defendants' semantic gambit. Plaintiff has never disputed that King County had authority to perform an autopsy. Plaintiff's Amended Complaint involves wrongful conduct outside the scope of the autopsy. The court should disregard this pointless hair splitting and reverse the trial court's dismissal of the case.

E. The Law Supports Implying a Cause of Action under the Anatomical Gift Act

The defense, at pp. 30-36, offers a one-sided and selective reading of Washington statutes addressing the disposition of the remains of a deceased person to support a suggestion that the court should not imply a cause of action under the Anatomical Gift Act. The gist of the argument offers that the Anatomical Gift Act seeks only to promote organ donation, that any protections of the rights of donors and their families present incidental nuisances with which the court should not trifle. In reality, Washington's statutes relating to treatment of the dead reflect a careful balancing of the rights of the decedents and their families, against greater social interests involving organ donation, public health, civil rights and other interests. No one interest controls.

The defense, at p. 35, cites RCW 68.50.902 and then proceeds to disregard it. The statute provides that courts shall comply and construe the AGA to effectuate its general purpose to make uniform the law with respect to the subject of this act among the states enacting it.'

Out of state courts have actually carefully balanced the

' The defense argues at pp. 36, that of the 50 states, no court has ever found and implied right of action of the UAGA." The defense fails to mention that no case in the country has considered the issue and rejected it. Implying a cause of action under the Anatomical Gift Act remains an issue of first impression.

interests of those affected by the UAGA and have refused to adopt an approach that shuts out the interests of the donors and their families.

For example, the court in *Christensen v. Superior Court of Los Angeles County*, 54 Cal. 3d 868, 820 P.2d 181, 3 Cal. Rptr. 2d 79 (1991) acknowledged the legislative protection of the rights of decedents and their families. In that case, relatives and representatives of decedents brought a class action against mortuaries, crematoriums, and a biology supply company for mistreatment of the remains of the plaintiffs' loved ones. The plaintiff class consisted of relatives of surviving spouses, relatives, and designated representatives of the decedents whose remains the defendants had mishandled and abused. The court examined the interplay of statutes addressing the disposition of human remains, including those governing anatomical gifts. The court stated the following, at 820 P.2d 198:

Other statutes reflect a policy of respecting the religious, ethical, and emotional concerns of close relatives and others having an interest in assuring that the disposition of human remains is accomplished in a dignified and respectful manner. Of particular significance is Section 7054.7 which prohibits, absent consent by the statutory right holder, both multiple cremations and the commingling of cremated remains. Provision for consent demonstrates that the state has no interest itself in preventing multiple cremations or commingling of cremated remains. The prohibition

evidently exists out of respect for the sensibilities of the surviving relatives.

Section 7152 limits anatomical gifts if it is known that the decedent was a "known member of religion, church, sect, or denomination which relies solely upon prayer for the healing of disease or which has religious tenets that would be violated by the disposition of the human body or parts thereof.... Again, a policy of respecting religious beliefs with regard to the disposition of human remains is manifest.

Similar recognition that the sensibilities of all survivors merit protection is found in other legislation. Section 7050.5 prohibits of desecration of human buried remains, and makes special provision for proper disposition of Native American remains discovered during an excavation. The legislature's findings include express recognition of Native Americans' "concerns regarding the need for sensitive treatment and disposition" of such remains. (citation omitted).

Section 8115 permits cities and counties to establish standards governing interment in order to ensure, inter alia, "decent and respectful treatment of human remains," and Section 8101 prohibits interference with persons engaged in funeral services or interments.

Defendants' conduct transgresses this clearly expressed state policy giving recognition to, and imposing on providers of funeral related services a duty to respect, the expectations of both the decedents and their survivors that the remains will be accorded dignified and appropriate treatment.

Imposition of civil liability for misconduct of the type alleged is consistent with the degree of moral blame attached to that conduct, and with the goal of deterring future harm of a similar nature.

The defense ignores that Washington's Anatomical Gift Act provides similar protection to the interest of donors and their

survivors. In addition, like California, the Washington Legislature has enacted numerous statutes controlling the conduct of those who deal with human remains and that protect the interests of the deceased and their survivors.'

Moreover, the UAGA serves to maintain respect for the social, cultural, and legal rights of those involved in and affected by the organ procurement process. *Terry v. St. Francis Hosp. & Medical Ctr.*, 886 F.Supp. 1551, 1557 (D.C. Kansas 1995). In that case, the district court acknowledged the requirement to balance the interest of all involved in the organ donation process. Further, the court emphasized that the goal of increasing the organ supply requires respecting the interest of donors and families at 1559-1560 as follows (emphasis added):

Finally, this is not a case where the public policy behind UAGA compels a finding of immunity. Nothing in its history suggests that UAGA was intended to cutoff liability when physicians or hospitals knowingly or recklessly mislead family donors and frustrate the donors actual and expressed witnesses. **Moreover, it seems that UAGA policy goals are served when a**

⁸ See e.g., RCW 68.50.035 (unlawful to refuse burial to a non-caucasian); RCW 68.50.050 (unlawful to remove or conceal the body of the deceased without authority; punishable as a gross misdemeanor); RCW 68.50.120 (unlawful to hold a body to secure a debt); RCW 68.50.130 (unlawful to improperly dispose of human remains); RCW 68.50.140 (unlawful to open grave and steal the body of the deceased); RCW 68.50.145 (unlawful to remove any part of any human remains from place of interment); RCW 68.50.150 (unlawful to mutilate, disinter or remove remains from place of interment); RCW 68.56.010(3) (unlawful to interfere with person carrying human remains to cemetery, funeral home, or engage in funeral service or interment).

family donor's consent is informed. The knowing misrepresentation of information needed to make a thoughtful and deliberate decision to donate is not conduct on the part of a hospital that publically encourages the making of anatomical gifts or that protects and balances the conflicting interests "consistent with prevailing customs and desires in this country." 8A U.L.A. 15.

The court in *Lyon v. United States*, 843 F.Supp. 531, 536

[D.C. Minnesota (1994)] stated the following:

The Uniform Anatomical Gift Act is clearly designed to balance two competing policy interests. There is a need for donations of eyes and other organs for transplantation and research purposes. Time is usually of the essence in securing organs at the time of the donor's death. The Act allow hospitals and physicians to ascertain with a high degree of certainty when someone is willing to donate organs, and to arrange for prompt removal and preservation of donated organs. The Act also recognizes the religious and moral sensibilities of those who do not wish to donate organs. The act does not compel organ donations, nor does it establish a presumption that organs will be donated.

Both *Terry* and *Lyon* affirm that the Anatomical Gift Act protects donors and their families. The lone Washington case that has analyzed RCW 68.50 cited both cases with approval. *Sattler v. Northwest Tissue Center*, 110 Wn.App. 689, 695-698, 442 P.3d 440 (2002).

The court should reject defense arguments that Nancy Adams did not fall within the class that the Anatomical Gift Act protects. It should also reject the argument that the Anatomical Gift Act does

not support a remedy in favor of the plaintiff. Implying an action under RCW 68.50 will serve the Anatomical Gift Act's policy goals by deterring procurers from deceptive, misleading, and overreaching tactics in securing anatomical gifts. Implying a cause of action will protect and balance the conflicting interests at issue and advance the salutary goal of increasing the supply of organs available for donation.

F. Dr. Haikal's False Statements of Material Fact Support a Fraud Claim

The defense offers two arguments to support the contention that the trial court properly dismissed Plaintiff's fraud claim. First, they propose that Jesse Smith's unrestricted donations rendered Haikal's misrepresentations immaterial. As stated previously, Jesse's undesignated anatomical gift did not exculpate the defendants, because neither fit the definition of "any hospital."

Second, the defense claims, at p. 37, that "[t]he evidence shows that Dr. Haikal made no false statements whatsoever." This assertion has no accuracy, especially when the court reviews the facts most favorably to the appellant, Nancy Adams, the non-moving party.

First of all, Dr. Haikal told Nancy Adams that she sought "brain tissue" from Jesse for research involving mental illness. CP 441.

She told Mrs. Adams that taking a piece or sample of brain tissue would not change their ability to have an open casket funeral. CP 436. Dr. Haikal said that the brain tissue sample would be very small, no more than an inch. CP 441, 448.

Matthew Adams told Dr. Haikal that Nancy Adams did not wish to donate Jesse's whole brain. CP 469, 471. He asked Dr. Haikal if "tissue meant something that would fit on a slide, or the whole brain." Dr. Haikal responded that she just wanted a "small piece of the brain," or words to that effect. CP 469. Mr. Adams told Dr. Haikal that his wife agreed that they may take "a piece" of Jesse's brain. CP 469.

Dr. Haikal did not tell Mrs. Adams that she intended to take liver and spleen samples to send to Stanley either. CP 436.

Despite what Haikal told the Adams to persuade Mrs. Adams to donate, she actually took Jesse's whole brain, portions of his liver and spleen, blood and spinal fluid and shipped it to SMRI. CP 224-225.

Consequently, the record unequivocally demonstrates that Dr. Haikal did make "false statements" to induce Nancy Adams to donate.

The Court should reverse the trial Court's dismissal.

VII. CONCLUSION

Nancy Adams respectfully requests that this court reverse the trial court and remand for trial on all issues.

DATED this 29th day of October, 2007.

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