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SUPREME COURT
STATE OF WASHINGTON

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NO. 82041-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROBINETTE AMAKER,

Appellant,

vs.

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

Respondents.

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

PLAINTIFF'S
APPELLANT'S REPLY BRIEF

STEPHEN L. BULZOMI, WSB NO. 15187
JEREMY A. JOHNSTON, WSB NO. 34149
MESSINA BULZOMI CHRISTENSEN, P.S.
5316 Orchard Street West
Tacoma, WA 98467-3633

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I. INTRODUCTION

The defense has tried to twist RCW 68.50.160(3) into a hindrance to justice supported neither by the intent of the legislature nor any decision of this court. As this court has held for over 100 years, a claim of tortious interference with a corpse seeks redress for harm to the feelings of the survivors of the deceased inflicted by wrongful treatment of their dead. As this brief will demonstrate, Robinette Amaker falls within the class of persons the cause of action protects. As the sister and only surviving family member of Bradley Gierlich alive when the wrongdoing came to light, Amaker has standing to sue for the tortious interference with his remains.

II. ARGUMENT

A. **Standing to Sue for Tortious Interference with a Corpse Rests with the Relatives of the Deceased and Those Who Control the Right to Dispose of the Body**

Washington common law has supported a claim for tortious interference with a corpse for over 100 years. *Wright v. Beardsley*, 46 Wash. 16, 89 P. 172 (1907); *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925); *Reid v. Pierce County*, 136 Wn.2d 195, 961

P.2d 333 (1998). In *Adams v. King County*, — Wn.2d —, 192 P.3d 981(Docket No. 81028-1, September 25, 2008), this court surveyed the law, clarified the elements of the tort and defined the class of those who may sue, as follows, at 192 P.3d 900-901 (emphasis added, footnotes omitted):

The tort of interference with a dead body allows recovery for mental suffering derived from the willful misuse of a body. *Gadbury*, 133 Wash. at 136 (“[I]f [mental] suffering is the direct result of a wilful wrong as distinguished from one that is merely negligent, then there may be a recovery.”). The action is not based on a property interest in the body itself, but rather an interest in the proper treatment of the body. See *Herzl Congregation v. Robinson*, 142 Wash. 469, 471, 253 P. 654 (1927) (recognizing generally that “there is a right of custody over, and interest in, a dead body, and the disposal of the body”); *Wright*, 46 Wash. at 19 (“the action is for a wrong against the feelings of the plaintiffs inflicted by a wrongful and improper burial of their dead”). **The interest extends to relatives of the deceased and those who control the right to dispose of the body.** See *Gadbury*, 133 Wash. at 139 (“those persons who by relationship have a peculiar interest in seeing that the last sad rites are properly given the deceased may maintain the action”); RCW 68.50.160(3).

While the parameters of the misuse that gives rise to a cause of action for tortious interference might be difficult to grasp firmly, this court may have best described it as misuse “**in such a manner as to cause the relatives or persons charged with its**

decent sepulture to naturally suffer mental anguish." *Wright*, 46 Wash. at 20. Furthermore, we need not attempt to define more precisely the nature of such misuse as the extent or nature of the interference alleged generally does not bar recovery. See *Gadbury*, 133 Wash. at 137-38 ("[T]he extent or degree of the misuse ought not to prevent recovery.").

This court first recognized an actionable claim of the tort for an improper burial in *Wright*, where an undertaker had buried the corpse of a child in the same grave as another body and only six inches from the surface. 46 Wash. at 17. The court denied liability under a breach of contract theory for failing to bury the child according to agreement because the plaintiffs' based their claim for damages on mental suffering. Nevertheless, the court went on to conclude that "it would shock the sensibilities to hold that there was no remedy for such a wrong." *Id.* at 20. The court noted that the tort of wrongful interference traditionally related to the mutilation of a corpse, but concluded that an improper burial equated to a mutilation for purposes of raising an actionable claim. *Id.* (recognizing that a cause of action for wrongful mutilation "applies as well to a case such as the one at bar where the wrong consists of the manner of burial").

Later, in *Gadbury*, this court upheld a claim where an undertaker withheld a body from the mother of the deceased as collateral for payment of funeral expenses. 133 Wash. 134. While the court noted that a party cannot recover for mental suffering based solely on a claim of negligence, it held that intentionally withholding the proper burial of a body constituted a willful misuse of the body. *Id.* at 137. The court determined that willful delay in providing a burial was equivalent to the improper burial at issue in

Wright for purposes of the tort. *Id.* Like *Wright*, the court focused on the emotional effect of the treatment of the corpse rather than the extent of misuse. *Id.* at 137-38 ("The misuse in one case may be greater in degree, but nevertheless it is a misuse."); see *Wright*, 46 Wash. at 20.

We believe that the unauthorized removal of a brain for use in scientific research involves the same kind of interference that causes mental suffering as would an improper burial or use of a body as collateral for payment of a debt. The permanent removal of the entire brain certainly can be considered a mutilation of the body. Furthermore, as mother of the deceased, Adams falls within the recognized category of plaintiff who can maintain a claim for mental suffering from such misuse. See *Wright*, 46 Wash. at 20 ("That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument." (quoting *Larson v. Chase*, 47 Minn. 307, 312, 50 N. W. 238 (1891))).

Adams reaffirms the following:

That the cause of action for tortious interference with a corpse remains viable;

That the cause of action exists to protect the loved ones of the deceased from emotional distress and mental suffering resulting from intentional mistreatment of the deceased's remains;

That the relatives of the deceased and those who control the right to dispose of the body have standing to sue.

Adams does not support the defense assertion at p. 12 that

“standing to sue for common law interference turns on whether he or she was the ‘lawful custodian’ with a ‘right of custody’ of the deceased’s remains.” Contrary to the assertions of the defense, nothing in *Wright, Gadbury and Adams* suggests that **only** the next of kin with the right of custody to the remains of the deceased can sue for tortious interference. Rather, the class of plaintiffs includes that person, and includes others as well.

This conclusion finds support from *Wright*, where the court stated, at p. 20, the following (emphasis added):

Where one person agrees to give a dead body decent burial, and under such agreement obtains possession of the body, and in violation of his duty casts the body by the way, or wrongfully mutilates it, or disposes of it, or deposits it in the grave without covering, in such a manner as to cause **relatives or persons charged with its decent sepulture to naturally suffer mental anguish, it would shock the sensibilities to hold that there was no remedy for such a wrong.**

The court described the class of those who could sue in the disjunctive; “relatives or persons charged with . . . sepulture” Persons charged with sepulture obviously refers to the one entitled to disposition of the remains of the deceased. If the law limited standing only to such persons, the court would not have included

“relatives”¹ in the class. Thus, the court clearly thought to protect the sensibilities of relatives **and** the statutory next of kin. The plaintiffs in *Wright* came within that class, so they had the right to sue. Nothing in *Wright* circumscribes the class of plaintiffs at all.

In *Gadbury*, the defendant claimed that the plaintiff mother lacked capacity to maintain the action. This court rejected that argument, as follows, at 138-139 (emphasis added):

At the time of granting the dismissal, respondent also urged a want of capacity of plaintiff to maintain the action. The evidence showed that the appellant’s husband had left her more than two years prior to the bringing of the action, and that she had not heard from him during that time. It also showed that she was the one who had made the arrangement for the funeral and had paid the debt. We think there was sufficient showing of the wife to maintain the action without joining the husband, under the authority of *Marston v. Rue*, 92 Wash. 129, 159 Pac. 111, and *Wampler v. Beinert*, 125 Wash. 494, 216 Pac. 865.

It is also urged that, since the appellant’s son was of age, therefore no duty devolved upon the mother, and that she could not bring the action, but it has been held in many cases **that those persons who by relationship have a peculiar interest in seeing that the last sad rights are properly given**

¹ A “relative” is “a person connected with another by blood or marriage. Kinsman or kinswoman.” Webster’s New World Dictionary of the American Language, second college edition (1982).

the deceased may maintain the action. In *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40, 68 L. R. A. 956, this question is completely answered as follows:

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

Again, this court in *Gadbury* did not rule that **only** those with the statutory right to the remains had standing to sue for tortious interference. Instead, the court ruled that a mother had standing to do so notwithstanding the failure of her husband and son to join the suit and that notwithstanding the fact that her son was of age at the time of his death. If anything, the court may have broadened the scope of plaintiffs by stating that “those persons who by relationship have a peculiar interest in seeing that the last sad rights are properly given the deceased may maintain the action.” *Gadbury*, at 139. This class of plaintiffs exceeds those with the statutory right to possession of the body for burial.

This court in *Adams*, consistent with *Wright* and *Gadbury*, held that the “interest” “for a wrong against the feeling of the plaintiffs inflicted by a wrongful and improper burial of their dead” “extends to relatives of the deceased **and** those who control the right to dispose of the body.” *Adams*, at 192 P.3d 900 (emphasis added). The court described the class of plaintiffs in this manner because “[t]he action is not based on a property interest in the body itself, but rather an interest in the proper treatment of the body.” *Id.* Limiting standing only to those with the statutory right to custody of the remains ignores that others besides that person will suffer harm from the improper treatment of the remains of a deceased relative.

The defense, at p. 11, claims that Amaker seeks to “expand the scope of common law standing” to sue for tortious interference with a corpse. Actually, Amaker requests that the court apply longstanding Washington law and permit her to seek redress for the mistreatment of her brother’s remains. This court obviously reviewed *Wright* and *Gadbury* carefully, and did not state that “relatives” of the deceased may pursue the claim if it did not mean

just that. In reality, it is the defense that seeks to change the common law by trying to preclude relatives from suing.

The defense contends, at pp. 25-26, footnote 7, that the “clear majority rule” restricts standing to the person with the statutory right to custody of the remains. It cites several out of state cases to support this shaky contention. Actually, just as many or more states permit family members besides the person with statutory right to custody of the remains to sue for tortious interference with a corpse.² These cases track more closely with

² See, e.g. *Levite Undertakers Company v. Griggs*, 495 So.2d 63 (Ala. 1986) (widow and adult children sue for tortious interference with body of husband/father); *Wilson v. Houston Funeral Home*, 42 Cal.App. 4th, 1124, 50 Cal. Rptr. 2d 169 (Cal. 1996) (wife, daughter and sister sue for tortious interference); *Quesada v. Oak Hill Improvement Company*, 213 Cal.App. 3d 596, 261 Ca. Rptr. 769 (Cal. 1989) (decedent’s sister and niece sue for tortious interference); *Sherer v. Rubin Memorial Chapel, Ltd.*, 452 So.2d 574 (Fla. Dist. Ct. App. 1984) (“relatives” of the deceased sue); *Stephens v. Waits*, 53 Ga.App. 44, 184 S.E. 781 (Ga. Ct. Appeals 1936) (decedent’s brothers and sisters sue for tortious interference); *Guth v. Freeland*, 96 Haw.147, 28 P.3d 982 (Ha.2001) (“immediate family members,” meaning “the decedent’s surviving spouse , reciprocal beneficiary, children, parents, siblings, or any other person who in fact occupies an equivalent status” under Hawaii statutes may sue for tortious interference); *Blanchard v. Brawley*, 75 So.2d 891 (La. Ct. App. 1954) (decedent’s brother, mother and sisters permitted to sue for tortious interference); *Golsten v. Lincoln Cemetery, Inc., et al*, 573 S.W. 2d 700 (Mo. Ct. App. 1978) (children and sister of decedent may sue for tortious interference); *Contreras v. Michelotti-Sawyers*, 271 Mont. 300, 896 P.2d 1118 (Mont.1995) (decedent’s children and grandchildren, as close family members, for whom funeral services were intended, had standing to sue for funeral homes’ negligent handling of dead body); *Cercelli v. Wein*, 60 Misc.2d 345, 303 N.Y.S.2d 316 (New York 1969) (widow and children permitted to sue for tortious interference); *Brownlee v. Pratt*, 77 Ohio App. 533, 68 N.E.2d 798, 33 O.O. 356 (Ohio Ct. App. 1946) (father died, surviving second wife next of

Wright, Gadbury and Adams.

The defense, at p. 11, exaggerates the risk of “any relative of the deceased” having standing to sue for tortious interference. If the court deems this risk realistic, it can follow the approach of the Supreme Court of Hawaii in *Guth v. Freeman*, 96 Haw. 147, 28 P.2d 982. In that case, the decedent’s children sued the defendants for mishandling their mother’s corpse, causing it to decompose prior to a planned open casket funeral. The case raised issues of first impression in Hawaii, which the Supreme Court resolved in favor of a cause of action. In defining standing, the court followed the lead of the California Supreme Court in *Christensen v. Superior Court*, 54 Cal.3d 868, 2 Cal.Rptr.2d 79, 820 P.2d 181 (1999).

In *Christensen*, the California Supreme Court held that the class of plaintiffs who could sue mortuaries and crematoria for

kin. Decedent’s daughter sued step mother to remove step mother’s second husband from family crypt and for damages for tortious interference); *Carney v. Knollwood Cemetery Ass’n.*, 33 Ohio App.3d 31, 514 N.E.2d 430 (Ohio Ct. Appeals 1986) (sister and grandchildren of decedent permitted to sue for tortious interference); *City of Gladewater v. Pike*, 727 S.W.2d 514 (Tex. 1987) (father and nine brothers and sisters of deceased boy permitted to sue for tortious interference); *Whitehair v. Highland Memory Gardens, Inc.*, 174 W.Va. 458, 327 S.E.2d 438 (W. Va. 1985) (plaintiff sued for loss or damage to bodies of deceased sister, two aunts, uncle and father).

abusing the corpses of decedents included “close family members who were aware that funeral and/or crematory services were being performed, and on whose behalf or for whose benefit the services were rendered.” 820 P.2d at 183. The Hawaii Supreme Court cited *Christensen* with approval, and partially adopted it, at 28 P.3d 990 as follows:

We believe that limiting recovery to immediate family members who are aware that the funeral, burial or crematory services are being performed and for whose benefit the services are being performed is a reasonable limitation on the class of potential plaintiffs and that to extend the class further could encourage “vexatious suits and fictitious claims.” Therefore, we hold the duty to use reasonable care in the preparation of a body for funeral, burial or crematory services or in the rendition of those services, runs to the decedent’s immediate family members who are aware of the services and for whose benefit the services are being performed. We define “immediate family members” as the decedent’s surviving spouse, reciprocal beneficiary, children, parents, siblings, or any other person who in fact occupies an equivalent status. *CF.* HRS § 663-3(b)(Supp. 2000) (stating that a wrongful death action may be brought “by the surviving spouse, reciprocal beneficiary, children, father, mother and by any person wholly or partly dependent upon the deceased person”).

If this court feels the need to restrict the class of plaintiffs, it could follow the approach of the California and Hawaii Supreme

Courts. This would ease any concerns about an over expansive class of plaintiffs.

In summary, in over 100 years of jurisprudence, this court has never limited standing to sue for tortious interference with a corpse to those with the statutory right to custody of the remains. Instead, the court has acknowledged that mistreatment of the dead causes mental suffering and emotional distress to surviving family members. Where tortfeasors have tried to interpose technicalities based on standing arguments, this court has brushed them aside and permitted the bereaved relatives to hold wrongdoers accountable. *See, Wright, Gadbury and Adams.*

The court should answer question number one “no,” and rule that Robinette Amaker has standing to sue for the tortious interference with Bradley Gierlich’s corpse.

B. RCW 68.50.160(3) Does Not Control Standing to Claim for Tortious Interference with a Corpse

The defense contention that RCW 68.50.160(3) controls standing to sue for tortious interference with a corpse ignores the purpose of the statute and will lead to absurd consequences.

Statutes such as RCW 68.50.160, which govern the

disposition of human remains, do not reflect a legislative intent to protect from emotional trauma that may result from mistreatment or desecration of human remains. Rather, the statutory scheme only establishes an orderly process by which to ensure that human remains receive proper disposition. *Christensen v. Superior Court of Los Angeles County, et al, supra.*

Christensen involved a suit by a class of plaintiffs consisting of surviving spouses, relatives and designated representatives of decedents whose remains suffered mishandling by the defendant mortuaries and crematoria. The defendants, like the defendants in the case at bench, argued that only those with the statutory right to possession of the decedents' remains could sue. The California Supreme Court rejected the mischaracterization of that statute, at 820 P.2d 197 as follows:

[The defendants] seek to limit liability to the statutory right holders to those who contract for funeral related services on the basis that the policy of the state recognizes only the rights of those persons.

We disagree. Provision by statute for the disposal of human remains, and the imposition of duties and recognition of priority of right (§§ 7100, 7151), does not reflect the legislative intent or policy to protect only the §7100 right holder or contracting

party from the emotional trauma that result from mistreatment or desecration of human remains. The statutory scheme establishes only an orderly process by which to ensure that proper disposition is made of human remains.

The court emphasized the limits of *California Health & Saf. Code* § 7100³ regarding disposition of human remains in footnote 24, at 820 P.2d 197 as follows:

The statutory duty to bury the dead, and right to control the disposition of remains, evolved from a common law obligation to insure the right of every person to a "decent Christian burial." The right to compel the next of kin to dispose of a body is now an exercise of the police power having its basis in both public health and sanitation, and the interest of the state to avoid the expense and involvement in the supervision of burying abandoned dead. [Citation omitted]. This history does not support the assumption inherent in the opinion of [concurring and dissenting] Justice Kennard that the legislature had in mind the likelihood of emotional distress when it designated order of priority.

³ *California Health & Saf. Code*, §§ 7100 and 7151 perform the same function as RCW 68.50.160.

In a like manner, nothing supports the defense's assumption that the legislature contemplated the likelihood of emotional distress from abusing the remains of the deceased when it designated the order of priority set forth in RCW 68.50.160(3). As in California, the statute exists solely to provide "an orderly process by which to ensure that proper disposition is made of human remains."⁴

Beyond this, defense's interpretation of RCW 68.50.160(3) will lead to absurd consequences. RCW 68.50.160(1) authorizes a person to control the disposition of his or her own remains without the predeath or postdeath consent of another person. A properly executed written document expressing the decedent's wishes suffices. Under RCW 68.50.160(2), if a person prepays for such arrangements, or files them with a licensed funeral establishment or cemetery authority, survivors cannot cancel or substantially revise them. The hierarchy set forth in RCW 68.50.160(3) only comes into play if the decedent has not made a

⁴ The defense agrees: "As discussed above, RCW 68.50.160(3) – which was first enacted in 1943 in nearly its current form (see Rem. Supp. 1943 § 3778-29) – is primarily concerned with the final disposition of the deceased's remains." Appellee's Answering Brief, p. 17.

prearrangement as set forth in subsection (2), or the costs of executing the decedent's wishes exceeds a reasonable amount, or where the decedent has given no directions.

Consequently, in cases where the decedent acts under RCW 68.50.160(1) and (2), no one will ever have the right to control the remains pursuant to subsection (3). If that occurred, then no one would have the right to sue for tortious interference, even if a tortfeasor mishandled or mutilated the corpse.

Further, what if the person who had RCW 68.50.160(3) custody of the deceased mutilated or mishandled the corpse himself or herself? Under the defendants' view of standing, family members who suffered emotional harm as a result of such conduct would have no redress.

Another example illustrates the weakness of the defense argument. Suppose that a husband and wife with children have made no prearrangements under RCW 68.50.160(1) and (2). Suppose further that they became involved in a collision that killed the wife and seriously injured the husband. Assume that, at the scene of the collision, emergency workers or others mistreated the

corpse of the wife and that the husband died five hours later in the hospital. Under the defendants' view of standing, only the husband would have the right to sue for mistreatment of his wife's corpse. After he died from his injuries, the defendants' theory would mandate that the right to sue for tortious interference with the corpse of his wife died with him. Any children who suffered emotional distress as a result of the mistreatment of their mother's remains would have no cause of action because their father had the only right to sue. Culpable tortfeasors would walk away with no accountability to genuinely bereaved and injured survivors. No rational policy supports such an arbitrary, unrealistic and unfair state of affairs.

As these examples illustrate, the defense argument that RCW 68.50.160(3) extends the reach of the statute beyond its intent, and fosters absurd or strange circumstances. Washington courts avoid construing statutes to reach such results. *Wright v. Engum*, 124 Wn.2d 343, 351-352, 878 P.2d 1198 (1994).

The court should follow the lead of the California Supreme Court and rule that RCW 68.50.160(3) does not define the class of

claimants with standing to sue for tortious interference with a corpse, and answer question number one “no.”

C. If RCW 68.50.160(3) Controls Standing, Then the Court Should Determine Standing at the Time the Cause of Action Accrues

The defense asserts, at pp. 21-22, without citation to any authority, that under Washington law “standing is determined when the alleged wrongful act occurs, not when that act was discovered.”⁵ *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998) contradicts this argument.

The defendants attempt to distinguish *Green* by declaring, at p. 23, “[T]here was no dispute that the husband had standing to sue for loss of consortium based on injuries to his wife . . .”, citing *Green* at 101. The passage cited actually supports the conclusion that Joshua Green gained standing to sue for loss of consortium at the time his cause of action accrued (*Green*, 136 Wn.2d at 101):

⁵ The defense seeks to discourage this court from resolving this issue, arguing that the Ninth Circuit did not include the issue among its certified questions. Appellee’s Answering Brief, p. 21. However, the Ninth Circuit emphasized that it did not wish that its framing of the questions restrict this court’s consideration of the issues. “The Washington Supreme Court, in its discretion, may choose to reformulate the questions presented.” *Amaker v. King County*, 540 F.3d 1012, 1019 (9th Cir. 2008).

Washington recognizes loss of consortium as a separate, not derivative claim. *Reichelt*, 107 Wn.2d at 776. Mr. Green's cause of action for loss of consortium, as a separate and independent claim, accrued when he first experienced injury due to loss of consortium. *Id.*

This passage directly belies the defense assertion "that standing is determined when the alleged wrongful act occurs, not when that act was discovered." The "wrongful act" of DES exposure that injured Joshua Green's wife occurred as she gestated in her mother's womb. If the defendants are right, then Joshua Green gained standing before his wife's birth and before their marriage. This notion makes no sense and the court should reject it out of hand.

The court should revisit the context in which it analyzed Joshua Green's claims. In resisting summary judgment, Green claimed that the statute of limitations for his loss of consortium claim accrued in January 1992 when his wife discovered that she had a T-shaped uterus. The defendants did not argue the statute of limitations. Rather, they argued that Green could not sue because he had not married Ms. Green at the time of the tortious conduct. *Green v. American Pharm. Co.*, 86 Wash.App. 63, 68,

935 P.2d 652 (1997).

This court's analysis of Green's claim did not turn on the expiration of the statute of limitations. Rather, the court applied the concept of accrual to reject the defense argument that Green could not marry a cause of action. The court also found it unfair to prohibit loss of consortium damages where the injured spouse did not know or could not know of the injury. *Green*, 136 Wn.2d at 101-102.

Thus, the court applied the concept of accrual outside the context of the statute of limitations to determine whether Joshua Green had a claim. This contradicts the defense argument that accrual only applies to statute of limitations issues. In essence, the court ruled that Joshua Green gained standing when he suffered injury from loss of consortium and his claim accrued. See *Green*, at 102, footnote 9. Hence, the court determined standing at the time of accrual, and not at the time of the tortious act.

The same principle should apply in the case at bench. Robert Gierlich's claim for tortious interference with a corpse never accrued during his lifetime. Robert never knew what had

happened to Bradley's body before Robert died in 2004. As a result, he had no basis to sue before his death.

In 2005, Robinette Amaker had the statutory right to custody of Bradley's remains under RCW 68.50.160(3). Once she learned the facts, the cause of action accrued. *Green*, at 95. Consequently, if RCW 68.50.160(3) controls standing to sue for tortious interference, Robinette Amaker had such standing at the time the cause of action accrued.

For these reasons, if the court answers question one "yes," it should answer question two "yes."

III. CONCLUSION

Amaker respectfully requests that this court answer question one "no." In the event the court answers question one "yes," it should answer question number two "yes."

DATED this _____ day of November 2008.

MESSINA BULZOMI CHRISTENSEN

By

STEPHEN L. BULZOMI	15187
JEREMY A. JOHNSTON	34149

Attorneys for Appellant