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STATE OF WASHINGTON  
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Supreme Court No. 98514-6

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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

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ROBERT FOX,

Plaintiff,

v.

CITY OF BELLINGHAM, a municipal corporation,

Defendant.

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**DEFENDANT CITY OF BELLINGHAM'S REPLY BRIEF**

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## I. INTRODUCTION

The Plaintiff's case rests solely and feebly on dicta in *Adams v. King County*, 164 Wn.2d 640, 192 P.3d 891 (2008). Indeed, the Plaintiff's entire argument rests on a passing comment in *Adams* that had nothing to do with the issue addressed by the court in that case. In the process of arguing that dicta from *Adams* supports his position, the Plaintiff misconstrues established precedent in this state that limits standing to the next of kin, those responsible for the burial of the body. And, the Plaintiff ignores well-reasoned tort law and tort principles in asking this Court to extend standing for the tort at issue to limits not recognized in Washington. Because the Plaintiff's arguments to extend standing in this case are unsupported by law, the Court should reject the Plaintiff's arguments.

## II. ARGUMENT

### A. Precedent gives standing to the next of kin, not "close relatives."

The Plaintiff argues that precedent shows that standing for tortious interference of a dead body extends to "close relatives" and that he therefore has standing. Pl. Resp. Br. at p. 6. But the Plaintiff's argument fails because it misconstrues the prior caselaw. The plain language and holdings in *Wright v. Bardsley*, 46 Wash. 16, 89 P. 172

(1907), and *Gadbury v. Bleitz*, 133 Wash.134, 233 P. 299 (1925), demonstrate that the courts limited standing to those who had a legal responsibility to bury the body, and not “close relatives.”

In *Wright*, the Supreme Court established the tort of tortious interference with a dead body and in so doing addressed the elements of the tort and placed parameters on would-be plaintiffs. *Wright* at 18. The *Wright* court plainly stated: “The persons who are the lawful custodians of a deceased body may maintain an action for its desecration.” *Wright* at 19. The Court went on to say that “relatives or persons charged with decent sepulture to naturally suffer mental anguish” have standing to bring a claim. *Id.* at 20.

This rule was addressed specifically in *Gadbury*. There, the court was presented with the precise issue of whether the mother had standing to sue for tortious interference with her son’s deceased body. *Gadbury* at 138-139. The court held that standing is conferred upon persons who have a “peculiar interest in seeing the last sad rites are properly given may maintain the action.” *Id.* at 139.

*Wright* and *Gadbury* did not say that “close relatives” or any “relative” has standing. Rather, the courts limited standing to persons responsible for the burial, i.e. persons who are “lawful custodians” of the body, “charged with decent sepulture,” and have a “peculiar

interest” in the burial. In legal terms, people who are responsible for burial, have a special interest in burial, and are the “lawful custodians” of the body are called the next of kin. See RCW 68.50.160. A “close relative” who is not a “lawful custodian” or “responsible for decent sepulture” is not responsible for burial and does not have standing under *Wright* and *Gadbury*.

Lest there be any doubt as to the language used by the *Wright* and *Gadbury* courts, the courts relied on the reasoning and holding in *Korber v. Patek*, 123 Wis. 453, 102 N.W. 40 (1905). The *Korber* case limits standing to the next of kin. See *Korber*, 102 N.W. at 42. The issue before the *Korber* court was whether “any relative” has a cause of action for desecration of a corpse. *Korber* at 456. The court held that the “nearest relative” who is vested with performing the burial has the right to bring a cause of action. *Id.* at 459. The court further stated, in quoting Minnesota law, that the “custodian” in charge of burial has standing to bring the claim for desecration or interference with the dead body. *Id.* at 462-463, quoting *Larson v. Chase*, 47 Minn. 307, 50 N.W. 238 (1891). Thus, there is no ambiguity in the rule established by the Supreme Court in *Wright* and *Gadbury* that only persons responsible for the burial (next of kin) have standing under the facts in this case.

The final case from the *Wright* era, *Herzl Congregation v. Robinson*, 142 Wash. 469, 253 P. 654 (1927), further affirms the standing limits here. While the Plaintiff argues that *Herzl Congregation* does not involve a claim for tortious interference of a dead body and is therefore not applicable (Pl. Resp. Br. at p. 11), the court did rule that only the next of kin have authority over the deceased. *Herzl Congregation* at 473. While the Plaintiff does not find *Herzl Congregation* to be applicable, the case that makes up the basis of his argument, *Adams*, cites to *Herzl Congregation* with approval in the context of tortious interference of a dead body. *Adams* at 657. Given the issue in *Herzl Congregation* involved the rights of the next of kin and given the *Adams* court's citation with approval to *Herzl Congregation*, the court's holding is relevant and controlling.

Despite the court's language, the Plaintiff argues that all relatives and persons who care about the person who died have a "peculiar interest" and have standing. See Pl. Resp. Br. at p. 10-11. This interpretation of the court's language is absurd because it ignores that the courts limited the "interest" to persons responsible for "decent sepulture" and who are "lawful custodians" of the body. And, the Plaintiff's interpretation would confer standing on anyone

who alleged that they were interested in the burial of the deceased. The only logical interpretation, given the context of the caselaw and the courts' limiting language, is that only those relatives who have the unique or "peculiar" legal responsibility to bury the body, i.e. the next of kin, have standing to maintain the action. After all, the tort is based on the next of kin's interest in the proper treatment of the body for burial. See *Adams* at 657. Thus, a "close relative" who has no responsibility or charge to bury the body cannot have standing to file a claim for violating burial rights.

Accordingly, the Plaintiff's argument that Washington precedent confers standing on him as a "close relative" fails.

**B. The language in *Adams* relied on by the Plaintiff is dicta, does not give standing to "close relatives," and did not alter the rule established in *Wright*.**

The Plaintiff argues that *Adams v. King County* "reaffirmed" prior holdings that "close relatives" had standing to sue for tortious interference with a dead body. Pl. Resp. Br. at p. 6. This argument fails for four reasons. First, as argued above, prior precedent does not extend standing to "close relatives."

Second, the language at issue in *Adams* does not "reaffirm" prior precedent or articulate a rule on standing. The issue presented

to the *Adams* court was a pleading issue: whether the plaintiff properly plead a claim for tortious interference under the common law when the plaintiff had cited to *The Restatement (Second) of Torts* in the complaint. *Adams* at 656. The *Adams* court provided an overview of the common law tort and then ruled that the plaintiff had sufficiently plead the claim in the complaint under the recognized pleading standards. *Id.* at 657. Notably, the court did not address standing or rule on standing.

Because the passage in question was not part of the holding in *Adams*, it is dicta. *Amalgamated Transit v. State*, 142 Wn.2d 183, 262 n. 25, 11 P.3d 762 (2000) (J. Sanders, Dissent) (defining “dicta” as “observations or remarks...not necessarily involved in the case or essential to its determination.”) Dicta cannot establish or change the law. *State v. Miller*, 185 Wn.2d 111, 116, 371 P.3d 528 (2016). Only an “intervening appellate case that overturns a prior appellate decision that was determinative of a material issue” can change the law or overrule precedent. *Miller* at 115. Because standing was not addressed by the *Adams* court or determinative in the *Adams* court’s decision, the language the Plaintiff relies on is dicta and cannot overrule or alter the holdings in *Wright* and *Gadbury*, the seminal cases that outline the elements for the tort in Washington. If anything,

the passage the Plaintiff relies on looks favorably on the prior rulings on standing in *Wright* and *Gabury*. Indeed, the *Adams* court cited to *Wright*, *Gadbury*, and *Herzl Congregation* and RCW 68.50.160, which defines who is the next of kin, with approval.

Third, the Plaintiff argues that because the *Adams* court declined to adopt *The Restatement (Second) of Torts* § 868, the court was at the same time adopting a rule that extended standing beyond the next of kin. Pl. Resp. Br. at p. 9. This is an incorrect reading of *Adams*. The *Adams* court analyzed a pleadings issue and resolved it without having to formally address the question as to whether *The Restatement of Torts* § 868 should be adopted. *Adams* at 656-657. And, neither party had asked the court to take that step. *Id.* Contrary to the Plaintiff's arguments, the *Adams* court did not articulate disfavor for the "traditional rule" articulated in *The Restatement (Second) of Torts*. Nor did the court state it favored a rule that would extend standing to any "close relative." This is not surprising, because whether *The Restatement* should be adopted as a formal rule was not before the court.

Additionally, the Plaintiff's argument that *The Restatement (Second) of Torts* § 868 is disfavored in Washington is specious and unsupported. As argued above, *Wright*, *Gadbury*, and *Herzl*

*Congregation* all held that the standing was confined to those responsible for burial, i.e. the next of kin, not close relatives. While the Supreme Court has never formally adopted *The Restatement (Second) of Torts* § 868, Washington caselaw is consistent with the rule in *The Restatement* and the rule has never been called into question in Washington.

Fourth, the Plaintiff's arguments pay no regard to stare decisis. See *City of Federal Way v. Koenig*, 167 Wn.2d 341, 346-347, 217 P.3d 1172 (2014) (stare decisis promotes evenhanded, predictable legal principles and contributes to the integrity of the judicial process). *Wright* established tortious interference with a dead body in Washington and expressly stated that "lawful custodians" had standing. *Gadbury* addressed the specific standing issue and corroborated *Wright*. No case has overruled *Wright* or *Gadbury*. Further, the Plaintiff has failed to show that the rule stated in *Wright* and its progeny is incorrect or harmful. See *City of Federal Way* at 346-347, (there must be a clear showing that an established rule is incorrect and harmful before it is abandoned). Thus, the language in *Adams* does not overrule the holdings of *Gadbury* and *Wright* and those cases should be relied on and upheld to limit standing to the next of kin.

**C. The Plaintiff advocates for expansive standing not recognized in Washington and is bad policy.**

The Plaintiff's argument, that standing should be conferred on any "close relative" of the deceased person that is the subject of a tortious interference with a dead body claim, is inconsistent with the law in Washington. In fact, Washington tort law generally restricts standing according to the next of kin determination and to those who were present when the tort was committed. Extending standing for tortious interference with a dead body to undefined "close relatives" is a radical idea and contrary to well-settled tort principles in Washington.

For example, in an action for wrongful death, only the spouse or partner and children have standing to bring suit through the estate. RCW 4.20.010 and RCW 4.20.020. Likewise, actions for personal injuries occasioning in death may be brought by the spouse or partner and children through the estate. RCW 4.20.060. In both instances, a suit for wrongful death and personal injury, only if there is no spouse, partner, or children, can parents or siblings bring suit. These statutes represent the well-established principle that not "any close relative" has standing to sue for damages caused to a loved

one. Even in an action for wrongful death, certainly the greatest loss a family member could experience, the law limits standing to sue.

Further, as argued in the City's Opening brief, Washington does not allow "bystander" liability. See *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 176 P.3d 497 (2008). A family member who was not present when the tort was committed has no standing to bring suit. See *Id.* at 57 – 58. This, again, demonstrates that allowing a free-for-all by conferring standing on anyone who claims to be a "close relative" and was not present when the tort was committed, is a radical departure from existing tort law.

Additionally, Plaintiff incredulously argues that he does not need to establish that the City owed him a duty because this case involves an intentional tort. Pl. Resp. Br. at p. 17. Contrary to the Plaintiff's argument, in cases of intentional torts brought by a family member, that family member only has standing if they were present for the commission of the tort. See *Reid v. Pierce County*, 136 Wn. 195, 202, 961 P.2d 333 (1998) (for intentional infliction of emotional distress, the plaintiff must be present at the time of the tortious conduct). If it were otherwise, any family member of a victim of an intentional tort would have standing. Under the Plaintiff's argument, if a living sibling of the Plaintiff was the victim of the intentional tort of

battery, the Plaintiff would have standing to sue the wrongdoer simply because of the intentional tort. This of course is absurd and, as demonstrated by *Reid*, not the law.

Finally, the Plaintiff's proposed standard for standing – that any “close relative” has standing – is bad policy and an unworkable standard. It is bad policy because, as stated above, it is contrary to established tort principles that seek to limit standing to foreseeable plaintiffs. Without foreseeability limits, there would be limitless lawsuits and liability.

The standard is unworkable and untenable because “any close relative” is vague and subjective. If the Court were to confer standing on any “close relative”, any family member could bring suit by simply alleging they were close to the deceased. The more sensible and predictable standard is what we have now: only next of kin, those charged with the burial of the deceased, have standing.

Because the Plaintiff is advocating for a stark departure from standard tort principles and because he is advocating for an unworkable and untenable standard for standing, the Court should reject his arguments.

**D. The Plaintiff improperly cites to and relies on inadmissible evidence that should be disregarded by the Court.**

The Court should disregard the citations and references to the investigative report in the Plaintiff's brief because it is inadmissible hearsay. See *Docket #17 and #18*; and Fed. R. Civ. Pro. 56(c)(2); and *Anheuser-Busch, Inc. v. Natural Beverage Distributers*, 69 F.3d 337, 345 n. 4 (9<sup>th</sup> Cir. 1995) (hearsay inadmissible at summary judgment). The City objected to the admissibility of the report to the trial court and there is no colorable argument that the unsworn investigative report is admissible. *Docket #19* at p. 8-9.

Further, in addition to citing to inadmissible evidence, the Plaintiff exaggerates the evidence in the investigative report by suggesting that several employees were high-fiving and behaving in a boorish manner. See Pl. Resp. Br. Contrary to the Plaintiff's exaggerations, the report notes that only two employees "discretely high-fived" and that the atmosphere during the event was professional and treated as a serious training.

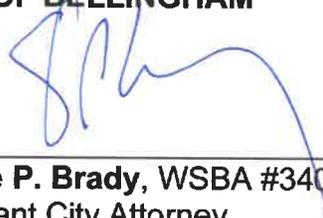
For these reasons, the Court should disregard the investigative report and the Plaintiff's declaration submitted and cited to by the Plaintiff.

### III. CONCLUSION

For the reasons stated above, and for the reasons stated in the City's Opening Brief, the Court should answer the first certified question "yes" and the second certified question "no."

Respectfully submitted this 14<sup>th</sup> day of July, 2020.

**CITY OF BELLINGHAM**



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**Shane P. Brady, WSBA #34003**  
Assistant City Attorney

## DECLARATION OF SERVICE

I declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. I am an employee of the City of Bellingham. My employment address is 210 Lottie Street, Bellingham, Washington 98225.

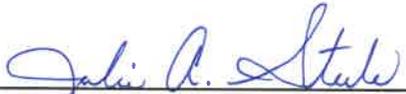
On July 14, 2020, I served a true and correct copy of the following documents on the parties listed below in the manner indicated:

1. **Defendant City of Bellingham's Reply Brief**
2. **Declaration of Service (contained herein)**

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DATED this 14<sup>th</sup> day of July, 2020.

**CITY OF BELLINGHAM**

  
\_\_\_\_\_  
Julie A. Steele  
Paralegal

# CITY OF BELLINGHAM

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