IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIFTH APPELLATE DISTRICT

TERENCE MICHAEL O'CONNOR, an individual, Plaintiff, v. COMMUNITY HOSPITAL AND MEDICAL CENTER, a California Corporation, dba COMMUNITY REGIONAL MEDICAL CENTER; DONOR NETWORK WEST, INC., a California Corporation; and DOES 1-150, inclusive, Defendants.	Court of Appeal No. F080109

APPELLANT'S OPENING BRIEF

Fresno County Superior Court No. 18CECG01184

The Honorable Rosemary McGuire

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CERTIFICATE OF INTERESTED ENTITIES OF PERSONS

Plaintiff/Appellant Terence Michael O'Connor knows of no entity or person that must be listed under rule 8.208(e)(1) or (2) of the California Rules of Court.

TABLE OF AUTHORITIES

California Cases

Federal Cases

Non-California Cases

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INTRODUCTION

In a case of first impression for California and the entire nation, an overzealous Organ Procurement Organization (OPO) and hospital successfully schemed to obtain bodily organs from a dying girl by preventing the father from exercising his statutory right to refuse the removal and donation of his daughter's organs. In doing so, they also denied him the opportunity to assure that his daughter was given every chance to remain alive, and the opportunity to bury her remains according to his wishes. Mr. O'Connor alleges that he suffered severe emotional distress as a direct consequence of Defendants' bad faith conduct.

In evaluating a demurrer related to the cause of action for intentional infliction of emotional distress (IIED), the trial court completely ignored Mr. O'Connor's allegations of significant bad faith conduct regarding his consent and his right to object to the procedure. The trial court accepted an inaccurate characterization put forward by Defendants claiming that their only relevant conduct was the physical removal and donation of the daughter's organs behind closed doors.

This appeal focuses mainly on the single issue that the trial court committed reversible error in defining the scope of Defendants' conduct relative to the cause of action for IIED. With proper credit to the truth of Mr. O'Connor's allegation of bad faith conduct, he clearly states a cognizable claim for IIED and the demurrer should be overruled. Appellant is prepared to concede the other issues in the trial judge's July 2019 ruling.

Since Mr. O'Connor was shocked to see his entire bad faith case ignored at the trial court level, he has included in this appeal a substantial discussion of the issue of good faith as it relates to the Uniform Anatomical Gift Act (UAGA). It is critical for the court to understand the gravity of Defendants' manipulative bad faith behavior, which reflects a widespread problem in the organ procurement "industry." Mr. O'Connor believes that this

can best be seen in the context of bad faith behavior referenced in out-of-state UAGA cases and in other materials for which a Request for Judicial Notice has been provided. Secondly, he is anticipating that Defendants may use a good faith defense, since it arises in the majority of UAGA cases that have been litigated.

This appeal makes clear that Mr. O'Connor has stated a valid cause of action for IIED based upon the reckless conduct prong under the standards set forth in Christensen v. Superior Court (1991) 54 Cal.3d 868, 905. He has adequately pled that he was present in the hospital where he was subjected to a bad faith refusal to solicit his consent to organ donation while his ex-wife was being approached for her consent. He experienced enormous stress and anxiety worrying about whether or not his daughter was being prematurely pulled off of life support in order to harvest her organs; worrying about how it could interfere with an autopsy that he wanted performed; and suffering at the thought of her disfigured corpse.

Appellant asks for the court to overrule the demurrer and remand for further proceedings on the merits of his claim.

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BACKGROUND INFORMATION RELEVANT TO FACTS AND PROCEDRUAL HISTORY OF THE CASE

A. Organ Donation and The Uniform Anatomical Gift Act

California's Health and Safety Code §§ 7100 and 7150 et seq., is known as the Uniform Anatomical Gift Act ("UAGA" or the "Act"). The major goal of the original UAGA, developed in 1968, was to streamline the process for making anatomical gifts. The original UAGA was developed in 1968 and was enacted by all 50 states. In 1987, the UAGA was revised and

updated, but only 26 states adopted the revised version, including California. The latest version of the UAGA was adopted by California in 2007.

Section 7150.40 of the UAGA is a key provision in this controversy. It states,

> a) Subject to subdivisions (b) and (c), and unless barred by Section 7150.30 or 7150.35, an anatomical gift of a decedent's body or part for the purpose of transplantation, therapy, research, or education may be made by any member of the following classes of persons who is reasonably available, in the following order of priority:
>
> (1) An agent of the decedent at the time of death who could have made an anatomical gift under subdivision (b) of Section 7150.15 immediately before the decedent's death.
>
> (2) The spouse or domestic partner of the decedent.
>
> (3) Adult children of the decedent.
>
> (4) Parents of the decedent.
>
> (5) Adult siblings of the decedent.
>
> (6) Adult grandchildren of the decedent.
>
> (7) Grandparents of the decedent.
>
> (8) An adult who exhibited special care and concern for the decedent during the decedent's lifetime.
>
> (9) The persons who were acting as the guardians or conservators of the person of the decedent at the time of death.
>
> (10)(A) Any other person having the authority to dispose of the decedent's body, including, but not limited to, a coroner, medical examiner, or hospital administrator, provided that reasonable effort has been made to locate and inform persons listed in paragraphs (1) to (9), inclusive, of their option to make, or object to making, an anatomical gift.

(B) Except in the case where the useful life of the part does not permit, a reasonable effort shall be deemed to have been made when a search for the persons has been underway for at least 12 hours. The search shall include a check of local police missing persons records, examination of personal effects, and the questioning of any persons visiting the decedent before his or her death or in the hospital, accompanying the decedent's body, or reporting the death, in order to obtain information that might lead to the location of any persons listed.

(b) If there is more than one member of a class listed in paragraph (1), (3), (4), (5), (6), (7), or (9) of subdivision (a) entitled to make an anatomical gift, an anatomical gift may be made by a member of the class unless that member or a person to which the gift may pass under Section 7150.50 knows of an objection by another member of the class. If an objection is known, the gift may be made only by a majority of the members of the class who are reasonably available.

(c) A person shall not make an anatomical gift if, at the time of the decedent's death, a person in a prior class under subdivision (a) is reasonably available to make, or to object to the making of, an anatomical gift. (Emphasis added.) (Health & Saf. Code, § 7150.40.)

In this provision the Act provides that in the absence of an unambiguous advance directive by the decedent, any member of a particular class of persons, including spouses, adult children, either parent, adult siblings, etc., is authorized to make an anatomical gift of all or part of a deceased relative's body. Subdivision B provides an exception to this rule in that if either the donor or the entity to which the gift is made, including an organ procurement organization, "knows of an objection by another member of the class." In that situation a "gift may be made only by a majority of the members of the class who are reasonably available," which means that organ

donation cannot occur if the "particular class" has two members and one member objects.

The other key provision of the Act relevant to this case is the immunity provision, § 7150.80, which states,

> (a) A person that acts in accordance with this chapter or with the applicable anatomical gift law of another state, or attempts in good faith to do so, is not liable for the act in a civil action or criminal prosecution.
>
> (b) Neither the person making an anatomical gift nor the donor's estate is liable for any injury or damage that results from the making or use of the gift.
>
> (c) In determining whether an anatomical gift has been made, amended, or revoked under this chapter, a person may rely upon representations of an individual listed in paragraphs (2)to (8), inclusive, of subdivision (a) of Section 7150.40 relating to the individual's relationship to the donor or prospective donor, unless the person knows that the representation is untrue. (Emphasis added.) (HSC § 7150.80.)

B. Organ Donor Organizations

Defendant Donor Network is the exclusive Organ Procurement Organization ("OPO") for 38 Northern and Central California Counties as designated by the U.S. Department of Health and Human Services ("HHS") through its Organ Procurements and Transplantation Network. As of 2010, the last year for which statistics are available, Donor Network received over 2,200 referrals from approximately 120 medical centers and hospitals (with the most referrals derived from Community Hospital), resulting in the transplant of 952 organs.

C. The Events of Thanksgiving Week, 2017

On or about Friday November 17, 2017, Brittany O'Connor was admitted to Community Hospital with a strangulation injury (2CT 370.)

Brittany had no advance directive regarding "do not resuscitate" instructions or organ donation. (1CT 23.) Her divorced parents, Terence Michael ("Michael") and Shawna, were contacted and informed about what had happened (2CT 370.) Michael went to the hospital and met with Brittany's treating doctors, who told him Brittany was in a deep coma but still alive. Plaintiff discussed treatment options with the doctors. (2CT 370)

On or about Monday November 20, 2017, Michael and Shawna met with Brittany's treating doctors and were told that Brittany was still in a deep coma but alive (1CT 23.) Michael discussed treatment options with the doctors, including placing Brittany on a ventilator for a period of 30 days to determine if she would recover (1CT 23-24.) Shawna wanted Brittany transitioned to comfort care. (1CT 24.) Community Hospital and Donor Network recognized that Michael and Shawna had decidedly different views of Brittany's chances of survival and, correspondingly, what kind of care she should receive. At this time, Community Hospital recognized that both Michael and Shawna were the surrogate decision makers for Brittany (1CT 24.)

Over the course of the next few days, Michael was told by the hospital medical staff that Brittany was still alive and still had a chance of survival. He committed himself to attempting to keep his daughter alive because he felt that Brittany's strangulation was not accidental (1CT 24.)

Defendants' scheme was furthered by its practice of intentionally refusing to advise Plaintiff about the organ donation and his right to object under the Act until after the organ donation has already been made (1CT 20.) Soon after, Community Hospital, through its employees, physicians, and representatives, began receiving information from Mother about her relationship with Plaintiff and his with Brittany, much of which was inaccurate and untrue. Nonetheless, Community Hospital accepted this information regarding Plaintiff's alleged abusiveness toward Mother and

estrangement from Brittany so as to designate Mother as the "Ethically Appropriate" person to make end-of-life decisions for her daughter and to establish grounds for the future organ harvesting. Community Hospital neither confirmed the accuracy of Mother's allegations nor asked Plaintiff about the claims because it served its purposes to have Mother accept that Brittany was already brain dead so that her organs could be harvested and sold (1CT 24.)

As stated in Brittany's medical records, "Given these events, it is Ethically Appropriate NOT to tell the Patient's Father about the plan for organ recovery until after such has been accomplished." (Emphasis in original) (1CT 20.) Brittany's medical records include the following: "[Community Hospital House Supervisor Sharon James] stated that organ donation was never brought up to the father by any hospital staff" (1CT 20.)

In this case, Defendants even suggested in their records (though not to Plaintiff) that despite being removed from the organ donation decision, he could nonetheless "seek Court Intervention" to stop the cessation of life support. At the time, Defendants knew that Court Intervention would be impossible since Brittany would likely be pronounced dead on Friday, November 24, 2017, the day after Thanksgiving, and her organs would then be harvested over that weekend (1CT 20.)

On or about November 23, 2017, Plaintiff was informed by Community Hospital's medical staff that Brittany was brain dead. Plaintiff demanded a second opinion before life support was removed, but the medical staff at Community Hospital informed Plaintiff that they had already obtained a second opinion and Plaintiff would not be allowed to do so. Plaintiff was given three minutes to say goodbye to his daughter and leave the hospital (2CT 371.)

Additionally, as part of its effort to eject Plaintiff from the hospital, Community Hospital security requested assistance from the Fresno Police

Department. During one Police Officer's conversation with Plaintiff, which was recorded by the Officer's body-cam and witnessed by Defendants' representatives, Plaintiff advises him that he is aware that Community Hospital intends to harvest his daughter's organs and that doing so is against his wishes. Mr. O'Connor father, Terence O'Connor (Sr.), also states on the recording that no organ donation can occur because both parents have not agreed to donation. (1CT 25.)

In addition to wanting to keep his daughter alive, Plaintiff suspected foul play in his daughter's death. He believed the coroner should have performed an autopsy, and if the coroner did not perform an autopsy, Plaintiff wanted to preserve the ability to do a private autopsy as to events leading to Brittany's asphyxiation cause of death (2CT 371.)

Both Community Hospital and Donor Network were aware that Plaintiff suspected foul play in his daughter's death and that he did not want his daughter's body disturbed before an autopsy was performed. Plaintiff also believed that operating on Brittany after death would cause any autopsy results to be inaccurate (2CT 370-372.)

Before Brittany's death, Donor Network approached Brittany's mother Shawna (Plaintiff's ex-wife) about the possibility of donating Brittany's organs and other body parts after her death. Plaintiff did not want his daughter's organs or body parts removed as he was still committed to keeping her alive and wanted any evidence of foul play to be preserved. He made clear to Community Hospital's staff and Brittany's mother that he objected to taking Brittany off of life support and to the removal of Brittany's organs or body parts and wanted to preserve any evidence of foul play. At no point did Plaintiff consent to organ removal. His objections to taking his daughter off of life support were strong enough that staff called for security and the police, essentially threatening to eject Plaintiff from the hospital premises (2CT 371.)

Both Defendants Community Hospital and Donor Network were aware that Plaintiff was seeking to keep his daughter alive and that Plaintiff objected to the removal and donation of Brittany's organs and tissue. Knowing this, Defendants determined to accept some of Brittany's organs and tissue as an anatomical gift without obtaining full and proper legal authorization to do so, knowing that accepting such an anatomical gift, necessarily involving intrusion of Brittany's body, without Plaintiff's legal authorization would result in Plaintiff's severe emotional distress (2CT 371-372.)

At all relevant times, Defendants knew or should have known that Plaintiff and Brittany's mother, together, were the persons designated by law as having the legal right to determine the disposition and burial of their daughter Brittany's human remains. (California Health and Safety Code § 7100.) Brittany had never signed any instructions regarding donation of her organs after death. Defendants knew or should have known that Brittany's body parts and organs could not be removed and donated after death without the consent of both of her parents. (California Health and Safety Code § 7150.40)

By reason of the father/daughter relationship of Plaintiff and Brittany, Plaintiff was at all times after Brittany's death entitled to determine in conjunction with Brittany's mother the proper disposition of her remains, including her organs. (2CT 372).

Brittany's death certificate indicates that she died on November 24, 2017 (2CT 371.) By November 24, 2017, and likely prior to such date, Defendants had already decided to sell Brittany's organs and had identified possible recipients through Donor Network. Organ harvesting began on November 25, 2017 and was completed on November 26, 2017. Brittany's heart, liver, and kidneys were donated to patients of Stanford Medical Center; her lungs were given to the University of California at San Francisco for medical research. The amount of money received by Defendants for these

"gifts" was never disclosed. Defendants also billed one or more Federal government insurance programs, including but not limited to Medicaid, for reimbursement for an unauthorized medical procedure when harvesting Brittany's organs (1CT 26.)

D. Procedural History

Appellant filed his original complaint on April 5, 2018, stating a number of claims related to Defendants' refusal to acknowledge and directly confront Michael's objections to the harvesting of organs from his deceased daughter. (1CT 6-14.) Specifically, he alleged Tortious Interference with Human Remains, Negligence, Conversion, Intentional Infliction of Emotional Distress (IIED), and Unfair Business Practices. Appellant filed a First Amended Complaint on April 18, 2018 to correct the spelling of Appellant's name.

Before either Defendant answered or demurred, Appellant filed a Second Amended Complaint in which he changed the Conversion cause of action to Infringement of Quasi Property Right, added a cause of action for Fraud (Concealment), and dropped the Negligence cause of action. Before either Defendant answered or demurred, Appellant filed a Third Amended Complaint on Sept. 4, 2018 that reinstated the Negligence cause of action and removed the claims of Tortious Interference with Human Remains and Unfair Business Practices. (1CT 18-32) Along with Negligence, the remaining claims were Infringement of Quasi Property Right, Intentional Infliction of Emotional Distress, and Fraud (Concealment).

Both defendants demurred to the Third Amended Complaint on October 9, 2018 (1CT-35-54). They specifically demurred to the third and fourth causes of action for IIED and Fraud (Concealment). Donor Network West (DNW) filed a Motion to Strike the punitive damages allegations (1CT 80-84).

On December 11, 2018, Judge Rosemary McGuire sustained both Demurrers and granted the Motion to Strike punitive damages, with leave to file a Fourth Amended Complaint (1CT 127-134). With respect to IIED, the judge ruled that "[p]laintiff fails to allege facts showing that the goal or purpose of the organ donation was to cause plaintiff mental distress....by plaintiff's own admission, the purpose of the organ donation was not to injure him, but to "sell" organs for profit." (1CT 129.) The judge further ruled that Appellant could not qualify for the "reckless" prong of IIED because he was not present in the operating room. (1CT 129.)

With respect to fraud, the judge recited relevant California law that such a cause of action must be plead with "particularity." Citing to Philipson & Simon v. Guls-vig (2007) 154 Cal.App.4th 346, she also enumerated the necessary elements of a fraud cause of action. (1CT 129.) Her ruling repeated Michael's allegations that defendants: 1) concealed his rights under the UAGA, which they had a duty to disclose; 2) concealed that they had no right to make Shawna the decisionmaker as to organ donation; and 3) induced Michael not to act to assert his legal rights and not to seek court intervention. (1CT 130.)

In determining that Michael did not "allege[] damages necessary to support the cause of action for fraud," the judge held that: 1) the mother, not the hospital or organ procurement organization, had the duty to ascertain whether another member objected to the donation; 2) the "gift recipient" had no obligation to notify members of the class as defined by the UAGA of their right to object to the donation; 3) Michael alleged that he objected to the donation and therefore defendants could not have concealed the donation from him; 4) Michael cannot recover solely for emotional distress damages in a fraud cause of action; and 5) the fact that defendants might have profited from the sale of the organs did not mean Michael thereby suffered damages. (1CT 130-131.)

The judge also granted Donor Network's Motion to Strike the TAC's punitive damages allegation on the grounds that: 1) Plaintiff failed to comply with Code of Civil Procedure §425.13(a) in that the court had not allowed him to amend his pleading to allege punitive damages; 2) contrary to Plaintiff's assertion that Donor Network's conduct did not fall within the purview of §425.13, the judge found that since the defendant was classified as a tissue bank under Health & Safety Code §1635, its conduct fell "under the protections of section 425.13." Therefore Plaintiff's claim for punitive damages was stricken. (1CT 131-132.)

Plaintiff filed a Fourth Amended Complaint (4AC) on January 19, 2019, maintaining the same causes of action but attempting to plead additional facts in response to Judge McGuire's ruling. (2CT 422-435.) Following demurrers from both defendants to the 4AC, Plaintiff was granted permission to file a Fifth Amended Complaint, which was accomplished on April 22, 2019. (2CT 368-384.) Defendants demurred to the third cause of action for IIED and the fourth cause of action for Intentional Interference with Human Remains. (2CT 444-459.)

On July 31, 2019, Judge McGuire once again sustained the demurrers to both causes of action. (3CT 781-786.) In spite of the changed pleading language, she ruled once again that the IIED pleading "does not allege facts showing that defendants' conduct was directed at plaintiff for the purpose of causing him harm," and that he was not present in the operating room to be a victim of reckless conduct. She further ruled that the fourth cause of action was duplicative of the third cause of action, based on the Supreme Court's ruling in Christensen v. Superior Court (1991) 54 Cal.3d 868, 905.

Appellant subsequently filed for a voluntary dismissal of all causes of action, with prejudice, on October 3, 2019, for the purpose of expediting an appeal (see Flowers vs Prasad (2015) 238 Cal.App.4th 930, 930–944 and Austin v. Valverde (2012) 211 Cal.App.4th 546, 550–55). (3CT 790-791.)

The Fresno County Superior Court dismissed the case pursuant to this filing, creating a final judgment based on sustaining of a demurrer. Appeal of this judgment is authorized by Code of Civil Procedure, section 904.1, subdivision (a)(1). The notice of appeal was timely filed on October 4, 2019. (3CT 787.)

STATEMENT OF APPEALABILITY

Appellant filed for a voluntary dismissal of all causes of action, with prejudice, on October 3, 2019, for the purpose of expediting an appeal. (See Flowers v. Prasad (2015) 238 Cal.App.4th 930, 930–944, and Austin v. Valverde (2012) 211 Cal.App.4th 546, 550–55). The Fresno County Superior Court dismissed the case pursuant to this filing, creating a final judgment based on sustaining of a demurrer. Appeal of this judgment is authorized by Code of Civil Procedure, section 904.1, subdivision (a)(1). The notice of appeal was timely filed on October 4, 2019.

STANDARD OF REVIEW

Appellate review of a demurrer proceeding is a two-stage process. In the first stage the court reviews the complaint de novo to determine whether or not the complaint alleges facts sufficient to state a cause of action under any legal theory. Cantu v. Resolution Trust Corp. (1992) 4 Cal.App.4th 857, 879. In the second stage, if a trail court sustains a demurrer without leave to amend, the court determines whether or not the plaintiff could amend the complaint to state a cause of action. (*Id.* at p. 879, fn. 9.)

Under the second standard of review, the burden falls upon the plaintiff to show what facts he or she could plead to cure the existing defects in the complaint. (*Cantu, supra,* 4 Cal.App.4th at p. 890) "To meet this burden, a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts establish a cause of action." (*Ibid.*) Boyd v. Freeman (2017) 18 Cal.App.5th 847, 853–854.

The demurrer tests the sufficiency of the complaint as a matter of law, and it raises only questions of law. (Code Civ. Proc., § 589; Schmidt v. Foundation Health (1995) 35 Cal.App.4th 1702, 1706). The court treats the demurrer as admitting all material facts which were properly pleaded, but does not assume the truth of contentions, deductions, or conclusions of fact or law (Aubry v. Tri–City Hospital Dist. (1992) 2 Cal.4th 962, 967, 9 Cal.Rptr.2d 92, 831 P.2d 317.) , In the construction of a pleading, for the purpose of determining its effect, allegations must be liberally construed with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) The court may disregard, however, any allegations that are contrary to the law or to a fact of which judicial notice may be taken. (Ellenberger v. Espinosa (1994) 30 Cal.App.4th 943, 947, 36 Cal.Rptr.2d 360.)

The court reviews the trial court's ruling, not its reasoning. (Rodas v. Spiegel (2001) 87 Cal.App.4th 513, 517.) The trial court's construction of the pleadings is not binding upon the appellate court, which determines

independently whether the complaint states a cause of action. Holiday Matinee, Inc. v. Rambus, Inc. (2004) 118 Cal.App.4th 1413, 1420–1421 The court is also not limited by the plaintiff's theory of liability and may put forward its own theories. (Community Assisting Recovery, Inc. v. Aegis Security Ins. Co. (2001) 92 Cal.App.4th 886, 890–891)

LEGAL ARGUMENT

A. The Trial Court Did Not Evaluate the Full Range of Defendants' Conduct in Relation to the IIED Claim

1. The Complaint Adequately Pled Facts Regarding Reckless,Outrageous Conduct Toward Plaintiff

As cited in the trial court ruling, "[T]he elements of the tort of intentional infliction of emotional distress are: " '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct....' Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (Davidson v. City of Westminster (1982) 32 Cal.3d 197, 209, 185 Cal.Rptr. 252, 649 P.2d 894.) The defendant must have engaged in "conduct intended to inflict injury or engaged in with the realization that injury will result." (*Id.* at p. 210, 185 Cal.Rptr. 252, 649 P.2d 894.)...It is not enough that the conduct be intentional and outrageous. It must be conduct directed at the plaintiff or occur in the presence of a plaintiff of whom the defendant is aware. Christensen v. Superior Court (1991) 54 Cal.3d 868, 903 ("Christensen").

Appellant has pled that Defendants' zeal to obtain and sell organs motivated them to engage in reckless bad faith conduct engaged in with the realization that emotional injury will result. This meets the standard enunciated in Christensen. Specifically, Appellant pled the following facts:

1. Michael was at the hospital no less than three times on Friday Nov. 17, Monday Nov 20, and Thursday Nov. 23 when he was ejected from the hospital. He was speaking with the doctors about her prognosis and treatment and advocating for the use of all available measures to prolong Brittany's life. (1CT 23-24.)

2. Brittany's medical records indicate deliberate behavior to exclude Michael and prevent him from halting organ donation:

a. Sharon James from the hospital stated that no hospital staff directly discussed organ donation with Michael at any time;

b. the hospital "ethicist" determined the mother Shawna was the "ethically appropriate" person to be solicited for an organ donation consent; and

c. concern was expressed by hospital/OPO staff about Michael seeking court intervention to halt the process of withdrawing treatment/harvesting organs.

3. Michael was asked to leave the hospital and given three minutes to say goodbye to his daughter on Thanksgiving Day, November 23.

4. The police bodycam recording of Michael at the time he is being ejected from the hospital shows him clearly stating in front of hospital personnel that he is "aware that Community Hospital intends to harvest his daughter's organs and that doing so is against his wishes. Mr. O'Connor's father, Terence O'Connor Sr., also states on the recording that no organ donation can occur because both parents have not agreed to donation." (1CT 25.)

5. Michael was never asked for his organ donation consent by Defendants.

6. Defendants' employees heard him complaining of their intention to "kill his daughter to harvest her organs" and did nothing to intervene or discuss his right to object to an organ donation.

These actions and statements are facts in the pleading. Under the standard of review, these facts must be taken as true. None of them are "contentions, deductions, or conclusions of fact or law."

Michael did contend that the scheming behavior documented in the medical records is proof that Defendants knew of his objection.

Taken together, the facts paint a portrait of a man who is being railroaded into a premature withdrawal of treatment for his daughter and donation of her organs, without his legally required consent.

2. Defendants' Conduct Took Place in the Presence of Michael, And Defendants Were Well Aware of His Presence

The Christensen standard requires that Defendants' reckless conduct take place in the presence of Michael. He has pled that this in fact occurred. The primary outrageous conduct pled in the complaint was a combination of active conduct "conspiring" to prevent him from objecting to the donation - which cannot at this time be proven to have taken place in his presence (as presence is most commonly defined) - and passive conduct of deliberately ignoring him and his right to object to the donation, which did take place in his presence.

A portion of the passive conduct can already be proven on the video footage and can likely be inferred from his interactions with physicians or nurses who knew that an organ donation was scheduled and remained silent. Michael would likely be able to prove a lengthy period of "deliberate passive conduct" through the discovery process where he could demonstrate a prolonged period of time in the hospital during which he was in the presence of additional medical personnel who did not inform him of his right to object and did not share their knowledge that an organ donation was planned.

Passive conduct is recognized as actionable in many contexts where it is held that the plaintiff has a right and/or the defendant has a duty. Whether it be under the names of "deliberate indifference," excluding, ignoring, inaction (Madhani v. Cooper (2003) 106 Cal.App.4th 412 [landlord failed to act to protect tenant subject to repeated assault]), "calculated inaction,"

passive conduct is actionable and may be considered outrageous and despicable. (Grimsby v. Samson, 85 Wash. 2d 52, 530 P.2d 291 [wife died when doctor would not provide emergency treatment in public place].) It is most frequently seen with various forms of civil rights violations and discriminatory treatment, but has also arisen in business situations where one party uses "calculated inaction" to gain an advantage over the other party (Seaboard Finance Co. v. Carter (1951) 106 Cal.App.2d 738, 743 ["calculated inaction" to not mention deficient foreclosure notice would not be rewarded by the court.]

Passive conduct (or any conduct) is more likely to be considered outrageous when defendants "abuse a position of authority" or a relationship that gave them "real or apparent power over the interests of the plaintiff." (California Jury Instruction 1602 – Intentional Infliction of Emotional Distress.) This is very much the case with the family of a dying patient (3CT 707) ["Families are asked to give their consent at a point in time when they are extremely vulnerable."]

Christensen also requires that the Defendants be aware of Michael's presence at the time of their actions. The scheming comments in the medical records and Defendants' ejection of Michael the day before organ donation adequately prove their awareness of his presence.

3. The Trial Court Erroneously Accepted a Circumscribed Definition of Defendants' Relevant Conduct

The trial court ruled in July 2019,

> The 5AC does not allege facts showing the defendant's conduct was directed at plaintiff for the purpose of causing him harm. (Id. at p. 903.) The requirement that the conduct be primarily directed at the plaintiff is what distinguishes the tort of intentional infliction of emotional distress from the tort of negligent infliction of emotional distress.(Id. at p. 904.)...
>
> Plaintiff has not alleged conduct that was directed at him. The purpose of the donation was to donate organs as anatomical gift....

> Despite allegations that defendants intentionally and knowingly harmed plaintiff and violated laws, (see 5AC ¶ 55) the 5AC still fails to allege facts showing that the purpose of defendants' conduct in donating Brittany's organs was to cause plaintiff mental distress...
>
> Since the 5AC does not show outrageous conduct directed at plaintiff, plaintiff must allege reckless conduct in the presence of plaintiff. (Christensen, supra, 54 Cal.3d at p.905.) Plaintiff does not claim that he was present for the organ donation/harvesting. Instead, he alleges that he was given three minutes to say goodbye before leaving the hospital, and Brittany passed away the following day. (5AC ¶ 11.) paragraph live plaintiff clearly was not present.
>
> Plaintiff cannot state a viable cause of action for IIED. (3CT 783-784.)

Defendants' conduct is described as the organ donation/harvesting. There is no mention of bad faith consent conduct. The trial court's circumscribed definition of the conduct at issue appears to have come from argument presented by the Defendants:

> The crux of Plaintiff's claim is not that he was wrongfully removed from the hospital; rather the crux of plaintiff's claim, and the primary outrageous conduct of which plaintiff complains (without which he would have no claims at all), is that the Defendants removed Brittany's organs and donated them. Plaintiff was not present when Brittany's organs were procured and donated, and the Defendants did not perform these acts in Plaintiff's presence while knowing he was there. (1CT 39.)

This is a complete distortion of the facts by the Defendants in an attempt to claim that none of their conduct took place in Michael's presence. The hidden assumption in the Defendants' claim here, which was picked up by the trial court, is that the bad faith denial of Michael's right to object to an organ donation is somehow not part of the conduct at issue – even though it was constantly repeated by Michael in the complaint. According to Defendants, the only relevant conduct is the physical removal of organs and their subsequent donation.

To the contrary, the bad faith denial of Michael's right to object to an organ donation is at the heart of his complaint. The solicitation and

completion of the consent is a vital part of organ donation, as vital as the surgeon removing the organs. The organ removal and transportation to their ultimate destination is the "back end" of the process. At the front end, there is a great deal of work and coordination focused on obtaining a proper legal consent, creating a treatment plan, and closely monitoring the patient's vital signs - particularly signs of brain death. There may also be discussions of obtaining consent for the withdrawal of life supporting treatment. These are all activities subject to the normal duties of care required of hospitals, organ procurement organizations, and their employees.

The integrated nature of the organ donation process is even reflected in Defendants' own language. They state that "[Plaintiff] was not included in conversations with the decedent's mother, at which time **the treatment plan and organ recovery** was agreed upon." (Emphasis added.) (3CT 621.) The donation consent, treatment plan and the organ recovery go together as essential parts of one single integrated process.

It should be obvious that without the consent of authorized persons under the UAGA, there can be no legal organ donation. In this case where Brittany did not leave any wishes regarding organ donation, the two divorced parents play as essential a role in the organ donation as the doctors removing the organs. Defendants attempt to dismiss their manipulative, bad faith handling of the consent process by labeling the organ removal and transportation as the "crux" of Michael's claim, which allows them to argue that none of their relevant conduct occurred in Michael's presence.

The failure to include all relevant conduct on the part of the trial court in evaluating an IIED claim is reversible error. The facts and allegations supporting bad faith conduct were pled in sufficient detail to state a claim. They must be credited as true for purposes of demurrer. In the second stage of the analysis, the Christensen factors must be applied to all of the Defendants' conduct, including the bad faith conduct regarding Michael's consent. It was

improper to only consider the physical removal and donation of the organs that took place out of Michael's presence when evaluating IIED.

4. Statutory Interpretations That Do Not Safeguard Informed Donor Consent Are Bad Public Policy

As much as the California legislature - like many other state legislatures - may have wished to encourage organ donation by enacting the UAGA, that encouragement was never intended to be a blank check allowing organ procurement organizations and hospitals to do anything in pursuit of obtaining organs from the deceased. As stated by one court,

> The Uniform Anatomical Gift Act is clearly designed to balance two competing policy interests. There is the need for donations of eyes and other organs for transplantation and research purposes. Time is usually of the essence in securing donated organs at the time of the donor's death. The Act allows hospitals and physicians to ascertain with a high degree of certainty when someone is willing to donate organs, and to arrange for the 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.** (Lyon v. United States, 843 F.Supp. 531, 536 (D.Minn.1994)). (Emphasis added.) Sattler v. Northwest Tissue Center (Wash. Ct. App. 2002) 110 Wash.App. 689, 696 [42 P.3d 440, 444]

The right to refuse organ donation was intended to be protected by the legislature, and there is nothing in the legislative history of the latest version of UAGA to suggest otherwise. Another court suggested that a failure to set limits on misbehavior of medical professionals charged with organ procurement could actually backfire and give organ donation a bad reputation instead of a heroic, altruistic reputation. The court observed,

"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 wishes. Moreover, it seems that UAGA's policy goals are served when a 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

publicly 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) Perry v. St. Francis Hospital & Medical Center, Inc., 886 F.Supp. 1551, 1559 (1995).

B. Defendants Acted in Bad Faith Toward Michael

1. Michael Pled Bad Faith Conduct

In Plaintiff's *Opposition to Donor Network's Motion to Strike Portions of the Third Amended Complaint*, Michael argued that "This is the rare case in which we have the proverbial smoking gun: discussions between Defendants' staff members about how to exclude Plaintiff from the decision, as documented in the medical records. (TAC ¶3-5, 22, 25, 29.) Defendants did not make a good faith mistake and were not confused about who had the right to make the organ donation decision. Knowing of Plaintiff's objection to the donation, they intentionally executed a plan to exclude him that was dishonest, manipulative, and illegal." (1CT 88.)

Michael was shocked to see the trial court almost completely ignore his allegations of bad faith conduct, since it is central to his claim of intentional infliction of emotional distress (recklessness). Consequently he is adding two sections

2. Defendants' bad faith is a core element of the outrageousness of their conduct

a. Good faith is a common issue in UAGA litigation

Health and Safety Code § 7150.80 provides a so-called "good faith" immunity defense for health care organizations under the UAGA. It states,

> (a) A person that acts in accordance with this chapter or with the applicable anatomical gift law of another state, or attempts in good faith to do so, is not liable for the act in a civil action or criminal prosecution.

(b) Neither the person making an anatomical gift nor the donor's estate is liable for any injury or damage that results from the making or use of the gift.

(c) In determining whether an anatomical gift has been made, amended, or revoked under this chapter, a person may rely upon representations of an individual listed in paragraphs (2)to (8), inclusive, of subdivision (a) of Section 7150.40 relating to the individual's relationship to the donor or prospective donor, unless the person knows that the representation is untrue. (Emphasis added.)

As a result of this provision, good faith is often the primary issue in the relatively small number of lawsuits that have been adjudicated nationwide regarding organ or tissue donation. In California and the Ninth Circuit there are very few lawsuits over the UAGA or organ donation. "[I]t is well settled that decisions of sister state courts are particularly persuasive when those decisions construe similar statutes or a uniform act. [Citations.]" PGA West Residential Assn., Inc. v. Hulven Internat., Inc. (2017) 14 Cal.App.5th 156, 174, as modified (Aug. 23, 2017) Courts in other states also commonly look to the UAGA decisions from other states for ideas about interpretation of the statute.

Michael has found no lawsuits in any state or federal court regarding the wrongful denial of a person's right to refuse organ donation, either for themselves or for a loved one. This specific fact pattern is a case of first impression for the entire country. Many of the lawsuits, however, do concern alleged bad faith misrepresentations to the family over the extent of the harvesting of body parts.

b. Defendants' conduct indicates bad faith according to multiple definitions of "good faith"

Good faith is not defined in the Act. In one of the first UAGA cases to be decided, a New York court used the definition from Black's Law

Dictionary (1979 edition): Good faith means an " 'honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage.' " (Emphasis added.) Nicoletta v. Rochester Eye & Human Parts Bank, Inc., (1987) 136 Misc.2d 1065, 519 N.Y.S.2d 928, at 930 (1987) ("Nicoletta"). (quoting BLACK'S LAW DICTIONARY 623 (5th ed. 1979)).

Nicoletta's definition of "good faith" has been widely adopted and applied by other courts in deciding cases under the Uniform Act. See, e.g., Lyon v. United States, 843 F.Supp. 531 (D.Minn.1994); Ramirez v. Health Partners of Southern Arizona, 193 Ariz. 325, 972 P.2d 658 (1999); Kelly–Nevils v. Detroit Receiving Hospital, 207 Mich.App. 410, 526 N.W.2d 15 (1995); Rahman v. Mayo Clinic, 578 N.W.2d 802 (1998); Andrews v. Alabama Eye Bank, 727 So.2d 62 (1999)." Sattler v. Northwest Tissue Center (Wash. Ct. App. 2002) 110 Wash.App. 689, 694 [42 P.3d 440, 443].

The Black's Law Dictionary definition of good faith has not been explicitly used in California, but it is consistent with definitions and interpretations in state courts. Discussing good faith related to legal settlements, the Supreme Court held that "Lack of good faith encompasses many kinds of behavior. It may characterize one or both sides to a settlement. When profit is involved, the ingenuity of man spawns limitless varieties of unfairness. Thus, formulation of a precise definition of good faith is neither possible nor practicable." Tech-Bilt, Inc. v. Woodward-Clyde & Associates (1985) 38 Cal.3d 488, 494–495. In an insurance context, good faith was held to encompass duties of disclosure and thorough investigation of claims, and it was also held to be a question of fact for a jury. Safeco Ins. Co. of America v. Parks (2009) 170 Cal.App.4th 992, 1005–1009.

In the instant matter Michael has pled facts indicating significant bad faith on the part of Defendants, in the sense of a "design to defraud or to seek an unconscionable advantage."

Organ procurement organizations and hospitals are charged with knowledge of the Act and the responsibility to obtain organ donations in keeping with its provisions, including the consent provisions in Health and Safety Code § 7150.40 and § 7150.45.

Defendants were clearly seeking an "unconscionable advantage" by:

Seeking consent from only the mother Shawna, knowing that they could not lawfully proceed without seeking consent from Michael;

Having their "medical ethicist" declare behind the scenes that Shawna was the "ethically appropriate" parent to make the organ donation decision;

Instructing staff not to speak with Michael about organ donation;

Strategizing privately over the possibility that Michael would seek court intervention to keep his daughter alive and block the organ donation; and

Scheduling the organ harvesting for Thanksgiving weekend when they knew the courts would be closed; and

Having staff take no action while listening to the concerns of Michael and his father that they were prematurely "killing" Brittany in order to harvest her organs, as he was being escorted from the hospital by police.

In essence, Defendants knowingly watched a parent fret for days over the treatment and prognosis of their dying child without ever offering him the opportunity to give consent or refuse an organ donation.

The 2007 legislative update to the California UAGA added a provision to define a "reasonably available" decision-maker, since cases had arisen where hospitals had to search for relatives or friends of the dying person for donation consent. It reads, "Except in the case where the useful life of the part does not permit, a reasonable effort shall be deemed to have been made when a search for the persons has been underway for at least 12 hours. The search shall include a check of local police missing persons records, examination of personal effects, and the questioning of any persons visiting

the decedent before his or her death or in the hospital, accompanying the decedent's body, or reporting the death, in order to obtain information that might lead to the location of any persons listed." (HSC § 7150.40(a)(10)(B).)

It goes without saying that Michael was completely available to Defendants to solicit his consent for a full week, in and out of the hospital. They were fully capable of finding his ex-wife to obtain her consent. It is obvious that they intentionally excluded Michael because they wanted his daughter's organs and they knew that he objected to the donation.

Given his rights under the Act, this is bad faith conduct seeking an "unconscionable advantage."

It is also a violation of his rights under HSC § 7100, which gives him the right to control the proper burial of his daughter. (HSC § 7100.)

3. Bad Faith Solicitation of Consent for Organ Donation Can Support an IIED Cause of Action

A number of UAGA cases have found judicial support for intentional infliction of emotional distress.

a. Perry v. St. Francis Hospital & Medical Center, Inc., 886 F.Supp. 1551 (1995)

The District Court for Kansas reviewed a summary judgment motion where family members initially opposed tissue donation but were persuaded to sign a consent based upon representations that removal of the corneas and bone marrow could be done without substantially disturbing the body of Kenneth Perry. When the eyes were completely removed and far more bone than expected was removed, the family sued for intentional infliction of emotional distress (tort of outrage), breach of contract, and negligence. The court rejected summary judgment for all three causes of action.

The court acknowledged that good faith could be found as a matter of law where the evidence indicates only "a mere mistake, bad judgment, or understandable confusion," but that the evidence of defendants' conduct

indicated "a conscious or intentional wrongdoing carried out for a dishonest purpose or furtive design." Perry, 886 F.Supp. at 1559.

Summarizing the case for intentional infliction of emotional distress, the court stated,

> Accepting the plaintiffs' testimony, the court believes a reasonable person looking at this situation could exclaim, "Outrageous!" Nurse McDonald's conduct could be said to have exploited a position of trust and respect gained from an emotionally vulnerable family. Nurse McDonald knew the plaintiffs' decision to donate only the corneas and the bone marrow was based on what they perceived Kenneth's wishes would have been had he known about the surgical procedures as explained by Nurse McDonald. She repeatedly lied about the limited surgical procedures, the effect of marking and signing the consent form as they did, and her intention to alert the retrieval team about the limited donation. This deception resulted in not only the mutilation of Kenneth's remains but frustrated the family's effort to act as a guardian over the remains and donate only what they believed Kenneth would have wanted. Of almost equal importance are the conclusions that Nurse McDonald's conduct was an abuse of the organ donation process and a betrayal of a grieving family's trust. Finally, the evidence is sufficient for a finding that Nurse McDonald acted in reckless indifference to the Perrys' trauma. St. Francis is not entitled to summary judgment on the intentional infliction of emotional distress claim. Perry, 886 F.Supp. at pp. 1561-1562.

The Perry case stands for the proposition that a trier of fact could find bad faith conduct in soliciting an organ donation to be egregious and outrageous enough to merit a guilty verdict for IIED.

b. Siegel v. Lifecenter Organ Donor Network, 1st Dist. Hamilton No. C-100777, 2011-Ohio-6031

The Siegel case concerned a solicitation for organ donation following the sudden death of a 16-year-old girl. Her father Daniel Siegel was solicited for his consent on a telephone call from Lynn Beebe at night that was recorded:

> When Beebe spoke with Daniel on the night of Jessica's death, Beebe referred to herself as an "afterlife specialist" and told Daniel that "there is a very good chance that Jessica could be a hero * * * through the gift of

> donation." Beebe explained that Jessica's organs, bones, skin, and her connective tissue could be used to "really change the lives of several families that are in need right now" and asked him, "Is that the kind of gift that you would like to honor your daughter Jessica with?" Daniel replied, "Ah, yes it would." Beebe then read Daniel a consent form. **But she failed to read the first sentence that stated, "I hereby make this anatomical gift from the body parts of Jessica Siegel who died on 8/23/06 in Cincinnati, Ohio." Beebe also did not read the consent form's footnote**. The footnote stated, "Consent for bone of the lower body includes: hemi pelvis, tibia, fibula, femur and iliac crest, talus, patella, fascia, soft tissue." (Emphasis added.)

She said the final step in the donation process was a brief FDA survey and Daniel said he did not want to do that now." So they agreed to speak the next morning and Beebe said, "We will go ahead and start the recovery process, we just won't be able to transplant until that interview." Daniel responded, "No problem. Okay." When they spoke the next morning, Daniel said he had to get his wife's agreement on everything, and in a third phone call the Siegels said they had decided not to donate her organs, but they were told they had given their consent and it was too late.

Once again good faith conduct was a central issue. The Siegels complained that Ms. Beebe:

Did not read key parts of the consent form to Daniel to make clear what he was agreeing to do.

Used the word "would" which sounds like a hypothetical question rather than language of agreement.

Said the FDA questionnaire was the final step in the process and that was not completed, leaving the impression the consent was not finalized. Said the "recovery process" would start but did not explain clearly what that meant.

The Siegels sued for conversion, assault, battery, desecration of a corpse, interference with the right of sepulcher, mental anguish, and emotional distress. The trial court granted summary judgment to the Defendants based

upon good faith conduct, but the appellate court reversed on all state law claims.

The Ohio court ruled that good faith conduct of the Defendants was a question of fact to be decided by the trial court.

c. Sattler v. Northwest Tissue Center (Wash. Ct. App. 2002) 110 Wash.App. 689, 689–701

After his wife died in a tragic accident, Timothy Sattler was approached for a tissue donation. This is another case of a disputed telephone consent conversation. Sattler said he consented to donate bone marrow and bone but said "do not touch her eyes." The Northwest Tissue Center representative claims that he did consent to a cornea donation. The trial court granted summary judgment to the Tissue Center based on a good faith immunity defense. The appellate court reversed, saying that a trial was necessary to resolve differing accounts of the conversation: "Because of the differing versions of the consent conversation, a trial is necessary. Under the Act's objective standard, a reasonable jury could find that Keller lacked an honest belief that Sattler had consented to removal of the corneas; and that she did not attempt in good faith to act in accordance with the provisions of the Act." (Sattler, p. 701.)

Like the Siegel case, this is another case that stands for the proposition that a trier of fact is needed to resolve many factual conflicts over the good faith assertions of the medical organizations involved in organ donation.

C. Organ Donation Is Still A Controversial Practice Balancing the Need to Increase the Organ Supply Against the Concerns of Dying Patients and Families

1. Whistleblower Nurse Accused His OPO Employer of Prematurely Declaring Patients Brain Dead to Get Their Organs

Under Evidence Code 452 (d)(2), the court is requested to take judicial notice of a New York State court record, the first amended complaint in McMahon v. New York Organ Donor Network, Inc., Index No. 156669/2012, filed by plaintiff Patrick McMahon on November 16, 2012. Judicial notice is requested to provide this court with critical background information regarding the practices of the organ donor industry that bear directly on the fears of many Americans such as Mr. O'Connor when dealing simultaneously with the possible death of a loved one and the possible removal/donation of their organs. Plaintiff McMahon's allegations provide a rare look behind the curtain into an industry that attempts to portray itself as serving only noble purposes.

Plaintiff McMahon, a nurse practitioner directly involved in the process of testing patients who might be suitable for organ donation, sued his employer New York Organ Donor Network (NYODN) for retaliatory discharge after he complained about the company's aggressive practice of prematurely declaring patients "brain dead" in order to harvest their organs.

In his complaint McMahon described four instances in which he observed patients falsely declared to be brain dead where he had either personally administered the tests to prove otherwise, or saw other evidence proving they were not yet brain dead. He also described a culture of "aggressive sales and marketing tactics to secure organs" in which the Donor Network "terminates employees if they fall below the required quota by not soliciting and obtaining enough consents" and hired consultants to "coach...transplant coordinators and employees on how to solicit consents by tailoring their solicitation based on the demographic of the patient's next of kin."

McMahon further detailed the process,

> When a hospital declares a patient brain dead and issues a Note, **defendant NYODN uses the note as leverage to procure the Consent from the patient's next of kin**. The note symbolizes the patient is dead even if their physical body is alive via mechanical

support. NYODN uses the Note to appeal to a patient's next of kin's sympathy and current emotional turmoil. NYODN tells the next of kin that their loved one is dead as evidenced by the lack of brain activity. After NYODN obtains the Note from the hospital and Consent from a patient's next of kin, that patient's viable organs are harvested as quickly as possible. Thus, once a Note is obtained declaring a patient brain dead, and once NYODN obtains the Consent from a patient's next of kin, **that patient is literally being sentenced to actual death**, as that patient's organs are almost immediately harvested. Under NYODN practices and procedures described below, **Notes are obtained declaring a patient brain dead even if the patient is still showing clear signs of brain activity**. (Emphasis added.) (McMahon FAC, ¶ 12, p. 5)

2. An HHS Inspector General Report in the Record Called for Industry Reforms in Obtaining Informed Consent for Tissue Donation

The record contains a 2001 report from the Dept. of Health and Human Services Office of the Inspector General Detailing possible reforms in the process of obtaining informed consent for tissue donation. (3CT 703-735)

The report summarized a number of questionable practices whereby the industry was approaching vulnerable families and using a variety of pressure tactics to obtain donation left issue from their loved ones.

REMEDIES AND CONCLUSION

The trial court made a critical error by omitting a large portion of Defendants' outrageous conduct in determining that Michael had failed to state a claim for intentional infliction of emotional distress. Michael properly pled sufficient facts to demonstrate Defendants' bad faith manipulation to obtain Shawna's consent and ignore his objections and his statutory right to object. Such bad faith manipulation is part of a larger "industry problem" wherein aggressive organ procurement organizations overstep ethical boundaries to obtain organs, and it should be up to trial courts to determine the severity and the appropriate damages.

This reviewing court should overrule the trial court's sustaining of Defendants' demurrer with respect to the third cause of action for IIED. Appellant accepts the court's other rulings with regard to the fourth cause of action for intentional interference with human remains and the removal of the specific damages requested. *The court should also restore any causes of action deemed valid under its power to any appropriate basis for relief.*

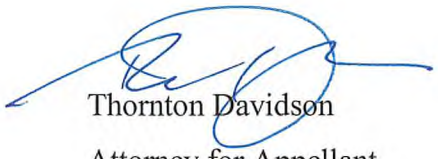
DATED: August 27, 2020

THORNTON DAVIDSON, P.C.

By: Thornton Davidson, Esq.
Co-counsel for Plaintiff

CERTIFICATE OF WORD COUNT (Rule 8.204)

I, Thornton Davidson, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 10,875 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect, and this is the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at Fresno, California, on September 1, 2020.



Thornton Davidson

Attorney for Appellant

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF FRESNO) ss.

I, the undersigned, certify and declare as follows:

I am a citizen of the United States and a resident of the County aforesaid; I am over eighteen years of age and not a party to the within above-entitled action; I am employed in Fresno County, California and my business address is 2520 W. Shaw Lane, Suite 101-C, Fresno, California 93711, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United Stated Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 1, 2020, at my place of business in Fresno, California, I served the within:

- **APPELLANT'S REQUEST FOR JUDICIAL NOTICE**

as follows:

Kat Todd SCHUERING ZIMMERMAN & DOYLE, LLP 400 University Avenue Sacramento, California 95825-6502 Fax: (916) 568-0400	Attorneys for Defendant, COMMUNITY HOSPITAL AND MEDICAL CENTER
Kathy M. Rhoads GORDON & REES SCULLY MANSUKHANI 3 Parkcenter Drive, Suite 200 Sacramento, California 95825 Fax: (916) 920-4402 krhoads@gordonrees.com	Attorneys for Defendant, DONOR NETWORK WEST, INC.
Peter Abrahams Horvitz & Levy, LLP 3601 West Olive Ave, 8th Floor Burbank, CA 91505-4681	Attorneys for Defendant, COMMUNITY HOSPITAL AND MEDICAL CENTER
Fresno Superior Court Civil Division – Judge McGuire 1130 "O" St Fresno, CA 93721	Superior Court

[ ] BY EMAIL: I electronically transmitted a true and correct copy thereof to the interested parties' electronic notification address(es) of record before close of business for the purpose of effecting service and the transmission was reported as complete and without error.

[x] BY U.S. MAIL: I placed a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States at Fresno, California

[ ] BY CERTIFIED MAIL: Receipt Nos.

[ ] RETURN RECEIPT REQUESTED

[ ] BY OVERNIGHT MAIL: I caused each envelope with postage thereon fully prepaid, to be sent by overnight express delivery carrier

[ ] BY FACSIMILE: I caused a true and correct copy thereof to be sent by facsimile transmission to the above-listed numbers.

[ ] BY HAND DELIVERY: I caused a true and correct thereof to be delivered by hand to the person listed above.

[X] BY ECF FILING: I caused a true and correct copy thereof to be sent through the Eastern District Court of Appeals ECF-Filing System.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 1, 2020, at Fresno, California.

Letitia Sanches