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Another One Bites the Dust: Missouri Puts to Rest Uncertainty about Anatomical Gift Immunity

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Another One Bites the Dust: Missouri Puts to Rest Uncertainty about Anatomical Gift Immunity

Schembre v. Mid-America Transplant Ass'n[1]

I. INTRODUCTION

In 1968, the Uniform Law Association ("ULA") adopted the Uniform Anatomical Gift Act ("UAGA").[2] In seeking to promote anatomical gifts,[3] the UAGA immunizes medical personnel who procure human tissue, organ, and bone. Legislatures in all fifty states have since enacted some form of the UAGA.[4]

Many state courts interpreted their respective UAGA immunity provisions long ago.[5] But, until recently, Missouri courts had not yet had the opportunity to interpret Missouri's UAGA immunity provision. In *Schembre v. Mid-America Transplant Ass'n*,[6] Missouri's Eastern District Court of Appeals addressed Missouri's UAGA immunity provision for the first time.[7]

This Note explores the methods and analysis employed by the *Schembre* court in implementing the UAGA's immunity provision. This note also dissects the policy underlying Missouri's immunity provision and concludes that the *Schembre* court sacrificed that policy when making its decision.

II. FACTS AND HOLDING

Frank Schembre's ("Mr. Schembre") family brought a negligent infliction of emotional harm[8] action against Mid-America Transplant Services ("MTS"), Jefferson Memorial Hospital ("Hospital"), and Christopher Guel-

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1. 135 S.W.3d 527 (Mo. Ct. App. 2004).

2. Unif. Anatomical Gift Act § 1-11 (1968). The specific immunity statute discussed in this Note is located at § 7.

3. Anatomical gifts occur when a person donates parts of his body for use in the body of another person. These donations typically occur upon the death of the donor.

4. *See* statutes cited *infra* note 150.

5. *See, e.g.*, cases cited *infra* notes 153, 158, 162.

6. 135 S.W.3d 527.

7. *Id.* at 531.

8. Neither the court nor the parties actually labeled the cause of action as negligent infliction of emotional harm; however because the plaintiffs sought recovery for purely emotional injuries caused by defendants' negligence, their cause of action is properly characterized as negligent infliction of emotional distress. *See infra* notes 43-44.

bert, R.N. ("Guelbert"), seeking damages for failing to obtain informed consent from Mr. Schembre's family before harvesting his organs.[9]

On November 28, 1998, Mr. Schembre had a heart attack.[10] In an effort to revive him, an ambulance transported him to the Hospital's emergency room.[11] Shortly thereafter, Thelma Schembre ("Ms. Schembre"), Mr. Schembre's wife, and two of her adult children (collectively with Ms. Schembre, "the Family") arrived at the Hospital.[12] Upon the Family's arrival, the Hospital's staff notified the Family that Mr. Schembre could not be resuscitated and directed the Family to the Hospital's quiet room[13] for emotional recovery.[14]

While in the quiet room, Guelbert, a nurse for the Hospital, asked the Family whether they would donate Mr. Schembre's organs, bone, or tissue.[15] Ms. Schembre initially refused, but after discussing the issue with her children and Guelbert, Ms. Schembre said she was interested in donating Mr. Schembre's corneas and bone.[16]

The Family testified that Guelbert then informed them about the procedure and estimated that the tissue recovery team would remove two to four inches of bone from the area between Mr. Schembre's knees and ankles.[17] The Family also testified that another nurse[18] came to the quiet room to answer additional questions.[19] This nurse allegedly explained that while the tissue recovery team would not remove Mr. Schembre's eyeballs, the team would need to slit them to remove his corneas.[20] The nurse then confirmed that the recovery team would remove two to four inches of bone from Mr. Schembre's legs.[21] The Family testified that the nurse wrote on a clipboard during their conversation, impressing upon them that limitations to their consent were noted.[22]

Guelbert, on the other hand, testified that he informed the Family that Mr. Schembre's leg bones and both of his eyes would be entirely removed.[23]

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9. *Schembre*, 135 S.W.3d at 530-31.

10. *Id.* at 529.

11. *Id.*

12. *Id.*

13. The hospital's quiet room is "an area of the hospital where families [are] allowed to collect themselves upon the death of a loved one." *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. The Family apparently testified that they did not know the name or identity of the nurse. *Id.* As such, the nurse was not made party to the lawsuit. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* The Family did not want the donated organs to be used for research purposes. *Id.*

23. *Id.*

Guelbert's testimony did not indicate that a nurse answered any of the Family's questions.[24]

After discussing the donation at length, Ms. Schembre completed the donation consent form with Guelbert's assistance.[25] The form indicated that Ms. Schembre consented only to donate Mr. Schembre's eyes and bone, but the consent form contained no additional limits to Ms. Schembre's consent.[26] Guelbert read the form to Ms. Schembre and she signed it.[27]

After Ms. Schembre completed the form, Guelbert contacted MTS to arrange for the cornea and bone harvesting.[28] Matthew Thompson ("Thompson"), a compliance manager for MTS, reviewed the consent form and noticed no ambiguity, reason for invalidity, or limitations on the face of the consent form.[29]

Thompson and an MTS tissue recovery team went to the Hospital and removed Mr. Schembre's eyes and entire lower leg bones.[30] MTS and the Hospital then released Mr. Schembre's body for funeral preparation.[31] Upon receiving Mr. Schembre's body, the Family noticed that his eyeballs and lower leg bones were missing.[32]

The Family sued MTS, the Hospital, and Guelbert in Jefferson County, Missouri to recover damages caused by the defendants' negligent infliction of emotional harm.[33] Ms. Schembre alleges that the defendants carelessly removed Mr. Schembre's eyes and leg bones without sufficient consent.[34] After limited discovery, MTS, the Hospital, and Guelbert filed separate motions for summary judgment.[35] The trial court granted each motion.[36] The trial court reasoned that Missouri's UAGA[37] immunized the defendants from civil liability because they acted in good faith.[38]

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24. *See id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 530.
29. *Id.*
30. *Id.* The recovery team's removal of Mr. Schembre's eyes and entire lower leg bones was the traditional and proper procedure for conducting cornea and bone procurement. *Id.*
31. *Id.*
32. *Id.*
33. *See supra* note 8.
34. *Schembre*, 135 S.W.3d at 530.
35. *Id.*
36. *Id.*
37. MO. REV. STAT. § 194.210-.290 (2000). The immunity provision on which the trial court relied is located at MO. REV. STAT. § 194.270.3.
38. *Schembre*, 135 S.W.3d at 533.

The Family appealed to the Court of Appeals for the Eastern District of Missouri.[39] The Family argued that genuine issues of material fact existed regarding MTS's negligence and their immunity under the UAGA.[40] The Family also argued that the discrepancy between Guelbert's and the nurse's explanations of the eye and bone procurement process created a genuine factual issue in their case against the Hospital and Guelbert.[41] The Eastern District affirmed the trial court's summary judgment on MTS's immunity.[42] However, the appellate court reversed the trial court's summary judgment on the Family's claims against the Hospital and Guelbert, and held that the UAGA does not immunize a medical provider from liability for ordinary negligence while procuring body parts.[43]

III. LEGAL BACKGROUND

Missouri common law generally requires that a plaintiff suffering solely emotional injuries[44] caused by the defendant's negligence must prove, in addition to duty, breach, and causation,[45] that the emotional injuries are medically diagnosed and significant.[46] Missouri is committed to this heightened

39. *Id.* at 530. The Eastern District initially entered this opinion on July 22, 2003. No. ED81539 2003 WL 20692986 (Mo. Ct. App. July 22, 2003). However, the Missouri Supreme Court then granted transfer to hear argument on this case. *Id.* After briefs and oral argument, the Missouri Supreme Court re-transferred this case back to the Eastern District. *See Schembre*, 135 S.W.3d 527. The Eastern District then entered its original opinion as the final word in this case. *See id.*

40. *Schembre*, 135 S.W.3d at 530-31.

41. *Id.* at 533.

42. *Id.*

43. *Id.*

44. If a plaintiff sues on a negligence theory to recover for emotional injuries in addition to physical injuries or pecuniary loss, the plaintiff may recover for her emotional injuries without proving that such injuries are medically diagnosed and significant. *See* K.G. v. R.T.R., 918 S.W.2d 795, 799 (Mo. 1996) (en banc) ("'Where the actor's tortious conduct in fact results in the invasion of another legally protected interest, as where it inflicts bodily harm . . . emotional distress, caused either by the resulting invasion or by the conduct may be a matter to be taken into account in determining damages.'") (quoting RESTATEMENT (SECOND) OF TORTS, § 47 cmt. b (1965)).

45. *See* Thornburg v. Fed. Express Corp., 62 S.W.3d 421, 427 (Mo. Ct. App. 2001) ("The tort of negligent infliction of emotional distress is a negligence action [requiring proof of] . . . a legal duty . . . , breach of the duty . . . , proximate cause, and . . . injury.") (citing Pendergist v. Pendergrass, 961 S.W.2d 919, 923 (Mo. Ct. App. 1998)); Spuhl v. Shiley, Inc., 795 S.W.2d 573, 580-81 (Mo. Ct. App. 1990) ("Recovery for emotional distress . . . should be governed by the application of general tort principles, such as foreseeability, duty, breach, and proximate cause.").

46. Bass v. Nooney Co., 646 S.W.2d 765, 772-73 (Mo. 1983) (en banc). Before Missouri required that emotional injuries must be medically diagnosed and signifi-

injury requirement because without it the court could not be assured that the defendant's wrongful conduct caused a bona fide injury.[47] Missouri also maintains its heightened emotional injury requirement to avoid fraudulent claims of emotional harm and to avoid a flood of litigation based on mere emotional injury.[48]

Though Missouri strictly adheres to the heightened injury requirement, it has joined other states[49] in creating an exception when the defendant's misconduct towards a human corpse causes emotional injuries.[50] Because Missouri courts have abrogated the heightened injury requirement in corpse cases and because causation in corpse cases operates essentially the same as causation in traditional negligence actions,[51] the most interesting issues revolve around duty and breach of duty.

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cant, Missouri courts generally required that emotional injuries be caused by a physical impact or a physical injury for plaintiff to recover. *See* Chawkley v. Wabash Ry. Co., 297 S.W. 20, 29 (Mo. 1927) (en banc) ("mental distress . . . may not be recovered for unless directly caused by a physical injury"). However, in 1983, the Missouri Supreme Court refused to continue using the historical impact rule and held that a plaintiff must instead prove that the negligently-caused emotional injuries are medically diagnosed and significant. *Bass*, 646 S.W.2d at 769-73.

Additionally, Missouri law holds that a plaintiff suffering solely emotional injuries may recover by proving that she was "in the zone of danger" when some physical injury occurred to a third party instead of proving that her injuries are medically diagnosed and significant. Bosch v. St. Louis Healthcare Network, 41 S.W.3d 462, 465 (Mo. 2001) (en banc) (applying the zone of danger test recognized in Asaro v. Cardinal Glennon Mem'l Hosp., 799 S.W.2d 595, 598-600 (Mo. 1990) (en banc)). However, Missouri courts have categorically disregarded the zone of danger test on at least one occasion. *See, e.g.*, Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C., 801 S.W.2d 382, 389 (Mo. Ct. App. 1990) ("[T]here is no zone of danger test in Missouri.").

47. *Bass*, 646 S.W.2d at 769.

48. *Id.*

49. VICTOR A. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS 459 (10th ed. 2000). *See also* 25A C.J.S. *Dead Bodies* § 21 (2004).

50. Golston v. Lincoln Cemetery, Inc., 573 S.W.2d 700, 704-05 (Mo. Ct. App. 1978); Crenshaw v. O'Connell, 150 S.W.2d 489, 493 (Mo. Ct. App. 1941) (per curiam). Missouri has not always categorically excepted corpse cases from its heightened injury requirement. In *Wall v. St. Louis & S.F.R. Co.*, the court held that only when "insult, malice and humanity appear as by wanton and willful conduct" can a survivor recover for emotional injuries resulting from misconduct towards a human corpse. 168 S.W. 257, 259 (Mo. Ct. App. 1914).

51. *See* Spuhl v. Shiley, Inc., 795 S.W.2d 573, 580 (Mo. Ct. App. 1990) (stating that proximate cause, as it applies to recovery for negligent infliction of emotional harm, is determined using "general tort principles").

A. Nature of the Duty of Care: The Right of Sepulture

Early Missouri common law indicated that a decedent's surviving spouse or next of kin could recover for misconduct towards the decedent's corpse on a quasi-property theory.[52] But Missouri has since abandoned property-based liability in corpse misconduct cases.[53] Modern Missouri case law creates a tort-based liability regime under which a decedent's relatives may recover for emotional injuries caused when the defendant mishandles the decedent's corpse.[54] However, both traditional and modern Missouri law rec-

52. Rosenblum v. New Mt. Sinai Cemetery Ass'n, 481 S.W.2d 593, 594 (Mo. Ct. App. 1972) (per curiam); Patrick v. Employers Mut. Liab. Ins. Co., 118 S.W.2d 116, 122 (Mo. Ct. App. 1938); *Wall*, 168 S.W. at 259; Wilson v. St. Louis & S.F.R. Co., 142 S.W. 775, 777 (Mo. Ct. App. 1912); Litteral v. Litteral, 111 S.W. 872, 874 (Mo. Ct. App. 1908).

Even early Missouri courts recognized that a corpse was not "property in the commercial sense." *Patrick*, 118 S.W.2d at 122; *Wall*, 168 S.W. at 258-59. *See also Rosenblum*, 481 S.W.2d at 594; *Wilson*, 142 S.W. at 777; *Litteral*, 111 S.W. at 874; Guthrie v. Weaver, 1 Mo. App. 136, 141 (1876) ("There can be no property in a corpse"). Missouri courts historically used this subtle distinction between quasi-property and commercial property to deny a plaintiff's recovery for actual bodily damage to a corpse. *See Patrick*, 118 S.W.2d at 122 ("'The damages recoverable . . . are not for the injury done to the dead body'") (quoting Hill v. Travelers' Ins. Co., 294 S.W. 1097, 1099 (Tenn. 1927)); *but see Wall*, 168 S.W. at 259 (next of kin "may recover for any injury done or indignity committed upon the body of his deceased as though a property right"). Rather, because the next of kin possessed only a quasi-property interest in the decedent's corpse, the next of kin could only recover for her own emotional injuries and not for actual bodily damage to the corpse. *See Patrick*, 118 S.W.2d at 122 ("'The damages recoverable . . . are . . . measured by the mental anguish and suffering of the plaintiff . . . .'") (quoting *Hill*, 294 S.W. at 1099).

However, language in early Missouri court opinions indicates that the next of kin may have a commercial property interest in the casket and garments that surround the buried decedent. *See* State v. Doepke, 68 Mo. 208, 211 (1878) (in addition to "shrouds and ornaments buried with the dead . . . the coffin is the property of the person who buried the deceased"); *but see Guthrie*, 1 Mo. App. at 141 ("When a human body has been interred with the knowledge and consent of those who, up to that moment, may have owned the coffin and shroud, these articles are irrevocably consigned to earth, and all property in the purchasers of them is at an end."). Missouri law does not indicate whether such a property interest in the casket and garments exists under the new tort-based liability regime.

53. Riley v. St. Louis County, 153 F.3d 627, 630 (8th Cir. 1998); Lanigan v. Snowden, 938 S.W.2d 330, 332 (Mo. Ct. App. 1997); Galvin v. McGilley Mem'l Chapels, 746 S.W.2d 588, 591 (Mo. Ct. App. 1987); *Golston*, 573 S.W.2d at 710.

54. *Riley*, 153 F.3d at 630; Sale v. Slitz, 998 S.W.2d 159, 163 (Mo. Ct. App. 1999); *Lanigan*, 938 S.W.2d at 332; *Galvin*, 746 S.W.2d at 591; *Golston*, 573 S.W.2d at 710.

Under the old property-based liability regime, the courts held that only the decedent's surviving spouse or, in other circumstances, the decedent's nearest blood relative could claim a quasi-property interest in the decedent's corpse and recover for

ognize that either theory of recovery entitles at least some of the decedent's relatives to certain rights and subjects them to certain duties.[55] The most obvious of the relatives' rights is the right to possess or control the decedent's corpse.[56] The relatives' right of possession is limited in two ways. First, the decedent's relatives may control the corpse only for the purpose of properly burying the decedent's body.[57] Second, the decedent's relatives must control

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interference with that interest. *Rosenblum*, 481 S.W.2d at 594-95 (citing *Litteral*, 111 S.W. at 873). Because Missouri switched from property-based recovery to tort-based recovery, Missouri courts now permit recovery for all of decedent's "immediate family" members' emotional injuries rather than just the next of kin's emotional injuries when the defendant mishandled the decedent's corpse. *Golston*, 573 S.W.2d at 710. However, language in some more recent corpse mishandling cases appears to abdicate this increased scope of recovery. *See* Jackson v. Christian Hosp. N.E.-N.W., 823 S.W.2d 137, 138 (Mo. Ct. App. 1992) ("Missouri recognizes the right of sepulchre and allows *the next of kin* to bring an action for the negligent handling of a deceased relatives' body.") (emphasis added); *Galvin*, 746 S.W.2d at 591 (Under the new tort based regime, "[t]he gist of the cause of action [for misconduct towards a corpse], as presently evolved, is the emotional distress and anguish to *the nearest kin*.") (emphasis added).

55. The court in *Litteral v. Litteral* applied the historical quasi-property theory and found that certain rights and duties vest in the next of kin upon the decedent's death. 111 S.W. at 873. More specifically, the court in *Litteral* stated:

> [The law] impose[s] a . . . duty on the living, primarily resting on the surviving consort, or next of kin, to provide for the preparation of the body, the funeral, and burial . . . . The imposition of the duty to bury the dead carries with it the conferring on the person charged therewith of such rights as may be necessary to a proper performance.

Id. at 873-74 (partially quoted more recently in *Rosenblum*, 481 S.W.2d at 594). *See also* Caen v. Feld, 371 S.W.2d 209, 212 (Mo. 1963) (per curiam) ("'duty of burial and the right of burial are concomitant so that the duty of burial has been held to rest on the person in whom the right resides'") (quoting 25A C.J.S. *Dead Bodies* §§ 3, 5 (1963) (now located at 25A C.J.S. *Dead Bodies* §§ 4-6 (2004))).

More recently, the court in *Galvin v. McGilley Mem'l Chapels* applied the modern tort theory and recognized that the same rights as existed under property-based liability also exist under tort-based liability. 746 S.W.2d at 591. More specifically, the court in *Galvin* stated: "Our courts by an insistent judicial policy have confirmed the common law right of sepulchre -- the right of the next of kin to perform a ceremonious and decent burial of the nearest relative -- and an action for the breach of that right." *Id.* So the rights regarding misconduct towards a corpse protected by modern tort-based liability and the rights protected by historic property-based liability are essentially the same.

56. *See Rosenblum*, 481 S.W.2d at 594; *Patrick*, 118 S.W.2d at 122; *Wilson*, 142 S.W. at 777; *Litteral*, 111 S.W. at 873-74.

57. *Rosenblum*, 481 S.W.2d at 594 (survivor has the right "to the possession and control of the body for the *single purpose* of decent burial") (emphasis added) (quoting *Litteral*, 111 S.W. at 873). *See also Sale*, 998 S.W.2d at 163; *Galvin*, 746 S.W.2d at 591; *Patrick*, 118 S.W.2d at 122; *Wall*, 168 S.W. at 259 (stating that the next of

the corpse in accord with the decedent's manifest inter vivos intent.[58] Missouri courts call the right to control the decedent's body and the relatives' concomitant rights regarding the decedent's corpse the "right of sepulture."[59]

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kin's quasi-property right "entitles [her] to the possession or control of the body for the purpose of decent sepulcher"); *Wilson*, 142 S.W. at 777.

Interestingly, proper burial operates not only as a limit on the survivor's ability to control the decedent's corpse but it also operates as a duty on the decedent's relatives to properly dispose of the decedent's body. *Caen*, 371 S.W.2d at 212-13; *Rosenblum*, 481 S.W.2d at 594; *Litteral*, 111 S.W. at 873-74.

58. In *Rosenblum v. New Mt. Sinai Cemetery Ass'n*, the court discussed a decedent's inter vivos intent as it related to the location of burial. 481 S.W.2d at 595. Specifically, the court stated:

> [W]hether [the] deceased person, other than by will, has the right to determine in his own lifetime his place of burial, we recognize that such expressed desires, whether oral or in writing, are entitled to consideration and substantial weight, in the light of all facts attending their utterance or publication. . . . How far the desires of decedent should prevail against those of a surviving spouse depends upon the particular circumstances of each case. Estrangement or separation of the spouses at time of death could be a deciding factor. But estrangement or separation is only one factor and must be considered with others.

Id. at 595 (citations omitted). *But see* Guthrie v. Weaver, 1 Mo. App. 136, 137-38, 140-44 (1876) (court paid no credence to evidence that the decedent, immediately before she died, stated where she wanted to be buried).

59. Crenshaw v. O'Connell, 150 S.W.2d 489, 492 (Mo. Ct. App. 1941) (per curiam); Cape Girardeau Bell Tel. Co. v. Hamil, 140 S.W. 951, 954 (Mo. Ct. App. 1911); *Litteral*, 111 S.W. at 873-74.

The courts have frequently referred to the right of sepulture as the right of "sepulchre." *Sale*, 998 S.W.2d at 163, 165; Citizens Ins. Co. of Am. v. Leiendecker, 962 S.W.2d 446, 452 (Mo. Ct. App. 1998); *Lanigan*, 938 S.W.2d at 332; *Jackson*, 823 S.W.2d at 138; *Galvin*, 746 S.W.2d at 591. More infrequently, Missouri courts have referred to the right of sepulture as the right of "sepulcher." *See Wall*, 168 S.W. at 259. The difference is minimal but important. "Sepulchre" is the British spelling of "sepulcher" which, as used in this context, means "to place in a [burial vault]." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1182 (William Morris ed., New College ed. 1980). "Sepulture," on the other hand, means "burial." *Id.*; *see In re* Exhumation of Body of D.M., 808 S.W.2d 37, 37 (Mo. Ct. App. 1991) (per curiam); *Rosenblum*, 481 S.W.2d at 594. Because the law consistently uses the term "sepulture" by stating it as the "right of sepulture," and because the phrase "right of to place in a burial vault" is wholly nonsensical but the phrase "right of burial" makes sense, the correct term to use is "sepulture," not "sepulcher" or "sepulcher" when discussing the right of sepulture.

In a handful of cases, Missouri courts have used the phrase "right of sepulture" differently than it is used in this Note. In *Litteral v. Litteral*, the court held that the "right of sepulture" is a set of rights "left to the dead" rather than being a set of rights vested in the decedent's relatives. 111 S.W. at 873. In *Litteral*, the court opined that the right of sepulture involves the decedent's right "to have the body decently covered and consigned to earth from which it sprung . . . and . . . the right to be suf-

The right of sepulture can be divided into three categories. The first portion of the right of sepulture is the right to conduct a prompt and proper initial burial and traditional ceremony.[60] This right is created at the time of the decedent's death and terminates when the decedent's body is buried.[61] The second portion of the right of sepulture is the right to "'have [the decedent's] corpse remain undisturbed after burial.'"[62] Finally, the right of sepulture includes the decedent's relatives' right to possess the decedent's corpse in "'the same condition it was when death supervened.'"[63] Missouri law generally

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fered to rest undisturbed until the body shall have been resolved into its original elements." *Id.* In this way, the *Litteral* court set forth tenets to justify enjoining the next of kin from exhuming the decedent's body. *Id.* at 874.

Additionally and more recently, the court in *In re Exhumation of Body of D.M.* used language from *Litteral* to state that the right of sepulture is vested in the dead rather than the living and held that the decedent's body could therefore not be exhumed. *In re Exhumation of Body of D.M.*, 808 S.W.2d at 37-38. However, the language in these two cases does not align with the vast majority of Missouri cases regarding the right of sepulture.

60. *See Rosenblum*, 481 S.W.2d at 594-95 (court enjoined decedent's brother from burying decedent and required that he give decedent's body to decedent's wife because she had "'such rights as may be necessary for proper performance'" of burial) (quoting *Litteral*, 111 S.W. at 873). *See generally Sale*, 998 S.W.2d at 163 (court held that the plaintiff stated a claim by alleging that the defendant funeral home lost decedent's incinerated remains and thereby deprived the plaintiff of the ability to properly dispose of those remains); *Lanigan*, 938 S.W.2d at 331 (relatives sued for the defendants' delay in discovering the decedent's dead body, thereby depriving the relatives of the ability to conduct a timely and proper burial and ceremony); Talbert v. D.W. Newcomer's Sons, Inc., 870 S.W.2d 472, 473-74 (Mo. Ct. App. 1994) (court held that a cemetery owner could be held liable for twice burying the same corpse in the wrong location); *Galvin*, 746 S.W.2d at 587 (relatives sued the defendant funeral company for shipping the wrong body to a funeral visitation ceremony); Golston v. Lincoln Cemetery, Inc., 573 S.W.2d 700, 703, 710 (Mo. Ct. App. 1978) (court permitted recovery for improper burial when a corpse was buried less than three feet deep and in a poor quality casket with no vault).

The Missouri courts have limited the right of initial burial by enjoining a person who has that right from disinterring the decedent's corpse when another buried the body without the next of kin's authorization. *See Litteral*, 111 S.W. at 874; *Guthrie*, 1 Mo. App. at 143-44.

61. *Guthrie*, 1 Mo. App. at 141-42 ("whatever right the husband had to bury his wife terminated with the burial").

62. State v. Whiteaker, 499 S.W.2d 412, 417 (Mo. 1973) (overruled on other grounds) (quoting 22 AM. JUR. 2D *Dead Bodies* § 19 (1973) (since deleted)). *But see Guthrie*, 1 Mo. App. at 142 (court stated, in dicta, that the decedent's next of kin, "after interment with his consent, or even without it . . . [has] no right to the body at all").

63. Moloney v. Boatmen's Bank, 232 S.W. 133, 138 (Mo. 1921) (quoting Foley v. Phelps, 1 A.D. 551 (N.Y. App. Div. 1896)). In *Moloney*, the court enunciated the content of this right stating:

does not permit recovery for interference with the right of sepulture outside of these three categories.[64]

As with most rights, the right of sepulture is accompanied by a duty binding the rest of society to refrain from negligently interfering with the decedent's relatives' right to proper sepulture.[65] Consequently, courts hold a person who interferes with the survivor's right of sepulture civilly liable.[66]

B. Breach of the duty of care: Interference with the Right of Sepulture

In stating a cause of action, courts generally term breach of the duty of care in sepulture cases "interference with the right of sepulture."[67] A person interferes with the right of sepulture by prohibiting the decedent's relatives from exercising one or more of the three aforementioned rights.

A person interferes with the right of sepulture by preventing the decedent's relatives from conducting a prompt and proper initial burial and traditional ceremony. In *Golston v. Lincoln Cemetery, Inc.*,[68] the defendant mortuary interfered with the plaintiffs' rights of proper burial by only burying the decedent's corpse thirty-one inches deep and by failing to place the dece-

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> The right is to the possession of the corpse in the same condition it was when death supervened. It is the right to what remains when the breath leaves the body, and not merely to such a hacked, hewed, and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative.

Id. (quoting *Foley*, 1 A.D. at 551). *See also Wall*, 168 S.W. at 258-59 (court held that trial court's striking of a claim that the decedent's body was "disarranged in [the] casket, the head thereof being thrown to one side and the face thereof being bruised" was erroneous because the plaintiff had a right of sepulture); Wilson v. St. Louis & S.F.R. Co., 142 S.W. 775, 777-78 (Mo. Ct. App. 1912) (citing Larson v. Chase, 50 N.W. 238 (Minn. 1891) ("any interference with [the] right [of sepulture] by mutilating or otherwise disturbing the body is an actionable wrong").

64. *See generally* Riley v. St. Louis County, 153 F.3d 627, 630 (8th Cir. 1998) (Applying Missouri law to deny recovery for interference with the right of sepulture when defendant published photographs of decedent without plaintiff's consent because plaintiff "d[id] not allege any physical insult to the deceased nor any interference with the visitation, funeral, or burial"); Lawyer v. Kernodle, 721 F.2d 632, 634-35 (8th Cir. 1983) (Applying Missouri law to deny recovery for interference with the right of sepulture when a coroner negligently misdiagnosed the decedent's death but did not unreasonably mutilate the body or refuse to return the body to the plaintiff for burial without the plaintiff's consent).

65. *Kernodle*, 721 F.2d at 635. *See also Wilson*, 142 S.W. at 778 (citing *Larson*, 50 N.W. at 239) ("any interference with th[e] right [of sepulture] . . . is an actionable wrong").

66. *See* notes and accompanying text *infra* Legal Background part B.

67. Sale v. Slitz, 998 S.W.2d 159, 163 (Mo. Ct. App. 1999) ("interference with the right of sepulcher"); Lanigan v. Snowden, 938 S.W.2d 330, 332 (Mo. Ct. App. 1997) ("interference with the right of sepulcher").

68. 573 S.W.2d 700 (Mo. Ct. App. 1978).

dent's corpse in a box and concrete vault before burial.[69] In *Talbert v. D.W. Newcomer's Sons, Inc.*,[70] the defendant cemetery interfered with the decedent's relatives' right to proper burial by burying the decedent's body in the wrong location on two separate occasions.[71] In *Sale v. Slitz*,[72] the defendant funeral home interfered with the decedent's relatives' right to prompt and proper interment and ceremony by apparently losing the incinerated remains of the plaintiff's husband.[73] Each of these three sepulture cases involves interference with the relatives' right to interment by a party with whom the decedent's relatives have a commercial relationship. However, no such contractual relationship is necessary.[74]

Next, a defendant interferes with the decedent's relatives' right to have the corpse remain undisturbed after burial by exhuming the decedent's body. In *State v. Whiteaker*,[75] the Missouri Supreme Court held that the trial court did not abuse its discretion by refusing to grant a murder defendant leave to exhume the victim's body nearly three years after the victim's burial.[76] Underlying the court's decision was its recognition that "[t]he right of relatives of a deceased person to have his corpse remain undisturbed after burial must yield to the public interests."[77] Likewise, the court in *In re Exhumation of Body of D.M.*[78] held that it would be inappropriate to exhume the body of a dead victim to obtain evidence because of "'the right to be suffered to rest undisturbed until the body shall have been resolved into its original elements.'"[79] Courts recognize that in some cases there are compelling reasons to permit exhumation of the decedent's body against the relatives' wishes.[80] But courts are still very reluctant to allow such exhumation as a general ex-

69. *Id.* at 703, 710.

70. 870 S.W.2d 472 (Mo. Ct. App. 1994).

71. *Id.* at 473.

72. 998 S.W.2d 159.

73. *Id.* at 163.

74. *See* Rosenblum v. New Mt. Sinai Cemetery Ass'n, 481 S.W.2d 593, 594 (Mo. Ct. App. 1972) (per curiam) (defendant, decedent's brother, interfered with the right of prompt and proper burial by simply refusing to allow the plaintiff, decedent's wife, possession of the decedent's body).

75. 499 S.W.2d 412 (Mo. 1973) (overruled on other grounds).

76. *Id.* at 417.

77. *Id.* (quoting 22A AM. JUR. 2D *Dead Bodies* § 19 (1973) (since deleted)).

78. 808 S.W.2d 37 (Mo. Ct. App. 1991) (per curiam).

79. *Id.* at 37-38 (quoting Litteral v. Litteral, 111 S.W. 872, 873 (Mo. Ct. App. 1908)).

80. *Whiteaker*, 499 S.W.2d at 417 (quoting 22A AM. JUR. 2D *Dead Bodies* § 19 (1973) (since deleted)).

ception to the right of sepulture, even when exhumation could lead to legitimate and relevant evidence.[81]

Finally, a party interferes with the right to possess the corpse in the same condition that the corpse was in at the moment of death by mutilating or physically harming the corpse.[82] In *Wilson v. St. Louis & S.F.R. Co.*,[83] the court granted recovery for a plaintiff's emotional and pecuniary injuries when the defendant railroad carelessly permitted baggage to fall on plaintiff's wife's corpse.[84] More recently, in *Jackson v. Christian Hospital Northeast-Northwest*,[85] the court extended recovery for mutilation of a corpse when a funeral home embalmed the decedent without his wife's consent, preventing her from donating the decedent's body to science.[86] These cases make it clear that unauthorized physical intrusions upon the decedent's corpse in the non-medical arena give rise to liability for interference with the right of sepulture.

In *Patrick v. Employers Mutual Liability Insurance Co.*,[87] an unauthorized autopsy case, the court extended recovery for corpse mutilation to the medical arena. In *Patrick*, a coroner and a doctor autopsied the decedent under direct order from the Macon city mayor.[88] The decedent's wife did not consent to the autopsy and did not become aware of it until three weeks after the decedent's burial.[89] The court held that the coroner and aiding doctor interfered with the wife's right of sepulture by autopsying the decedent without the wife's consent.[90] In so holding, the court overcame a statute granting im-

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81. *See id.* (quoting 22A AM. JUR. 2D *Dead Bodies* § 19 (1973) (since deleted)) (even in a murder case, exhumation should be allowed only if it is "'absolutely essential to the administration of justice'").

82. Moloney v. Boatmen's Bank, 232 S.W. 133, 138 (Mo. 1921) ("An action for damages will lie for the unauthorized mutilation of a dead body.").

83. 142 S.W. 775 (Mo. Ct. App. 1912).

84. *Id.* at 776-77, 783. *See also* Wall v. St. Louis & S.F.R. Co., 168 S.W. 257, 257-59 (Mo. Ct. App. 1914) (plaintiff brought a claim when a railroad threw luggage on the decedent's corpse bruising the decedent's face).

Less than a decade after the *Wilson* decision, the Missouri Supreme Court used language evidencing a dramatic extension of the anti-mutilation portion of the right of sepulture by stating that an occupier of land has a duty to rescue dead bodies from debris on her land "as quickly and with as little mutilation as . . . reasonably possible." *Moloney*, 232 S.W. at 139. This surprising duty of rescue principle is apparently premised on the idea that "'[r]espect for the dead is an instinct that none may violate. The democracy of death is superior to the edicts of kings.'" *Id.* at 138 (quoting Kyles v. S. Ry. Co., 61 S.E. 278 (N.C. 1908)). However, no Missouri cases have explicitly held that such a duty of rescue exists.

85. 823 S.W.2d 137 (Mo. Ct. App. 1992).

86. *Id.* at 137-38.

87. 118 S.W.2d 116 (Mo. Ct. App. 1938).

88. *Id.* at 118-19.

89. *Id.* at 120.

90. *Id.* at 121-22.

munity to coroners for conducting autopsies in most situations.[91] Although the coroner claimed that he had authority to conduct the autopsy because it appeared to be immediately necessary, the defendant had obviously not met the conditions necessary to obtain immunity.[92] However, the court held that regardless of whether the coroner realized that he was operating without authority, the absence of the plaintiff's consent renders his autopsy illegal as a matter of law.[93]

Missouri's courts have followed the lead of *Patrick* to extend the tort of interference with the right of sepulture by mutilation into the medical arena in cases like *Crenshaw v. O'Connell*[94] and *Lawyer v. Kernodle*,[95] both of which are autopsy cases. The courts have effectively extended tortious interference with the right of sepulture from the railcar to the emergency room and from the graveyard to the hospital.

C. The UAGA's immunity provision for emotional injuries caused by misconduct to a human corpse.

Because tort liability for misconduct towards human corpses was expanding into the medical arena, drafters of the Uniform Anatomical Gift Act contemplated an immunity provision for all persons involved in the organ donation process.[96] This contemplation lead the ULA to propose UAGA section 7(c) in 1968 stating that "a person who acts in good faith in accord with the terms of [the UAGA] . . . is not liable for damages in any civil action."[97] The ULA indicated that the purpose of the immunity provision was to "encourage and facilitate the important and ever increasing need for human tissue and organs for medical research, education and therapy, including trans-

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91. *Id.* at 122.

92. *Id.* at 123-24.

93. *Id.* at 123-24.

94. 150 S.W.2d 489 (Mo. Ct. App. 1941) (per curiam).

95. 721 F.2d 632 (8th Cir. 1983). In *Kernodle*, the 8th Circuit did not hesitate to state that if the plaintiff had alleged that the coroner "unreasonably mutilat[ed] the body," an interference with the right of sepulture claim would stand against the coroner for his autopsy. *Id.* at 635. However, the court noted that the plaintiff consented to the autopsy. *Id.* Furthermore, the court noted that no cause of action exists for negligent misdiagnosis under right of sepulture law so long as no unreasonable mutilation occurs. *Id.*

96. See the 1968 version of the Uniform Anatomical Gift Act Section 7(c) wherein the ULA adopted an immunity provision that responds to the possibility of tort liability in the context of organ, tissue, and bone donation.

97. Unif. Anatomical Gift Act § 7(c) (1968). Commentary on the UAGA's immunity provision generally holds that the provision "is designed for situations where because of confusion, an organ is removed without genuine consent." 25A C.J.S. *Dead Bodies* § 16 (2003) (citing Ramirez v. Health Partners of S. Ariz., 972 P.2d 658, 663 (Ariz. Ct. App. 1998)).

plantation."[98] The Missouri General Assembly also recognized a need to encourage anatomical gifts, so it adopted a modified version of the UAGA.[99] While the General Assembly apparently desired to protect all persons involved in the organ procurement process from civil liability, it chose to modify UAGA section 7(c) by stating that "a person who acts *without negligence and* in good faith in accord with the terms of [the UAGA] . . . is not liable for damages in any civil action."[100] Though the ULA adopted a revised version of the UAGA in 1987,[101] Missouri's General Assembly has not modified its immunity provision for persons involved in the organ procurement process. Additionally, Missouri courts had not, until *Schembre*, been afforded the opportunity to construe this unique Missouri immunity provision.[102] This left the *Schembre* court with only the bare language of Missouri's version of the UAGA and a few decisions from other state courts[103] to determine the appropriate construction of Missouri's anatomical gift immunity statute.[104]

IV. THE INSTANT DECISION

In *Schembre v. Mid-America Transplant Ass'n*,[105] the Eastern District of Missouri Court of Appeals resolved a dispute involving an organ transplant association's liability for negligent infliction of emotional harm[106] in procur-

98. Unif. Anatomical Gift Act § 7 cmt.

99. MO. REV. STAT. §§ 194.210-.290 (2000). Every state has enacted some form of the UAGA. 22A AM. JUR. 2D *Dead Bodies* § 86 (2003).

100. MO. REV. STAT. § 194.270.3 (2000) (emphasis added) (words in italics are words added to UAGA section 7(c) by the Missouri General Assembly when enacting the section).

101. *See* Unif. Anatomical Gift Act § 11(c) (1987) (stating that "a hospital, physician, surgeon . . . or other person, who acts in accordance with [the UAGA] . . . or attempts in good faith to do so is not liable for that act in a civil action.").

102. Schembre v. Mid-Am. Transplant Ass'n, 135 S.W.3d 527, 531 (Mo. Ct. App. 2004) (in construing Missouri Revised Statutes Section 194.270.3, the court stated that "[t]his is a case of first impression in Missouri.").

103. The *Schembre* court used extreme diligence in searching out the apposite case law of other states and citing to that case law for authority in making its own decision. Specifically, the *Schembre* court cited *Nicoletta v. Rochester Eye & Human Parts Bank, Inc.*, 519 N.Y.S.2d 928 (N.Y. Sup. Ct. 1987); *Hinze v. Baptist Mem'l Hosp.*, 1990 WL 121138 (Tenn. Ct. App. Aug. 23, 1990); *Brown v. Delaware Valley Transplant Program*, 615 A.2d 1379 (Pa. Super. Ct. 1992); *Kelly-Nevils v. Detroit Receiving Hosp.*, 526 N.W.2d 15 (Mich. Ct. App. 1994); *Rahman v. Mayo Clinic*, 578 N.W.2d 802 (Minn. Ct. App. 1998); *Andrews v. Ala. Eye Bank*, 727 So. 2d 62 (Ala. 1999); *Ramirez v. Health Partners of S. Ariz.*, 972 P.2d 658 (Ariz. Ct. App. 1999).

104. *Schembre*, 135 S.W.3d at 532. For a fuller discussion of the UAGA in Missouri, see Lisa E. Douglass, Comment, *Organ Donation, Procurement and Transplantation: The Process, the Problems, the Law*, 65 UMKC L. REV. 201 (1996).

105. *Schembre*, 135 S.W.3d 527.

106. *See supra* note 8.

ing tissue and bone from the plaintiff's husband's dead body.[107] The court also remanded for trial the issue of a hospital and its employees' liability to the plaintiff for negligent infliction of emotional harm in procuring tissue and bone from the decedent's body.[108] The court's main task in *Schembre* was to construe and interpret Missouri's unique UAGA immunity statute as an issue of first impression in Missouri.[109] In an opinion by Judge Draper, the Eastern District of Missouri Court of Appeals held that Missouri's UAGA immunity statute only immunizes a defendant from civil liability if the defendant can prove that he acted in good faith and in a manner that was not ordinarily negligent.[110]

Before proceeding to analyze Ms. Schembre's first point on appeal, the court stated and generally evaluated Missouri Revised Statutes Section 194.270.3, the statutory immunity provision at issue.[111] The court first turned to the exact language of Missouri's UAGA, which grants immunity from civil liability for wrongfully procuring a deceased's body part if the defendant "'acts without negligence and in good faith and in accord with the terms of this act.'"[112] Next, the court examined cases from other jurisdictions adopting the UAGA.[113] The court found that while many states grant immunity under the UAGA on the basis of good faith, only Florida had adopted a UAGA provision comparable to the Missouri statute requiring an absence of negligence in addition to good faith for immunity.[114] Because Florida's law was the only other law also requiring the absence of negligence, and because Florida courts had not published an opinion on their statute, the issue in *Schembre* was one of first impression not only in Missouri but also in the entire United States.[115]

The court then began its review of the substantive claims by analyzing Ms. Schembre's first argument of her first point on appeal - that MTS did not prove facts sufficient to show that it acted without negligence as a matter of

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107. *Schembre*, 135 S.W.3d at 529-30.

108. *Id.* at. 533.

109. *Id.* at 530-31.

110. *Id.* at 527, 531.

111. *See id.* at 531.

112. *Id.* (quoting MO. REV. STAT. § 194.270.3 (2000)). Note that the *Schembre* court misquoted Missouri's immunity statute. The portion of the statute actually states "acts without negligence and in good faith in accord with the terms of this act." MO. REV. STAT. § 194.270.3. The court added the word "and" between the phrases "in good faith" and "in accord with." This misquotation would surely affect the appropriate analysis as it creates a three part test - (1) without negligence, (2) in good faith, and (3) in accord with the terms of the Act - while the statute actually only creates a two part test - (1) without negligence and (2) in good faith in accord with the terms of the Act. But for purposes of discussion, this Note assumes that the misquotation was merely an inadvertent scrivener's error.

113. *Schembre*, 135 S.W.3d at 531-32.

114. *Id.* at 531

115. *Id.*

law.[116] The court recognized that the defendant must prove that it acted both without negligence and in good faith.[117] The court proceeded to address the issue of what Missouri's UAGA immunity provision means by the phrase "without negligence."[118] With duty, breach of duty, causation, and injury as the traditional requirements of negligence, the court noted that MTS, as defendant, must plead and prove that at least one of those four elements does not exist to prove that it acted "without negligence."[119]

The court began its "without negligence" analysis by assigning a duty to MTS to comply with all provisions of Missouri's UAGA.[120] MTS obtained written consent prior to the donation from a person that is allowed to render such consent according to the UAGA.[121] Furthermore, the court noted that there is uncontroverted evidence that the consent form appeared to be facially valid and without limitations.[122] Additionally, the court found it important that MTS executed the bone and tissue procurements pursuant to its standard protocols.[123] Finally, the court observed that no one from the Family ever contacted MTS to make them aware of the fact that they wanted to limit the donations.[124] Given these facts, the court found that the record did not reflect that MTS breached its duty of care to Ms. Schembre in the instant case.[125] Therefore, the court concluded that MTS proved that it acted without negligence.[126]

The court then addressed Ms. Schembre's second argument concerning MTS's summary judgment that MTS did not act in good faith.[127] The court began its review of whether MTS acted in good faith by examining cases from other jurisdictions that have defined and applied the term "good faith" in organ donation contexts.[128] The court paid special attention to the New York case *Nicoletta v. Rochester Eye and Human Parts Bank, Inc.*[129] and noted that several other jurisdictions have adopted *Nicoletta*'s approach.[130] The court quoted *Nicoletta* to state that "good faith is 'an honest belief, the absence of

116. *Id.* at 530-33.
117. *Id.* at 531.
118. *See id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 531-32.
128. *Id.* at 532. For a complete list of the good faith cases from other jurisdictions used by the court in *Schembre v. Mid-Am. Transplant Ass'n*, 135 S.W.3d 527, 531 (Mo. Ct. App. 2004).
129. 519 N.Y.S.2d 928 (1987).
130. *Schembre*, 135 S.W.3d at 532.

malice and the absence of design to defraud or to seek an unconscionable advantage.'"[131] Further, the court relied on *Nicoletta* in remarking that "in this instance, where the legislature has so clearly prescribed a 'standard by which to judge a defendant's conduct,' good faith determinations are a question of law" and may be established at summary judgment without a trial on the merits.[132] The court finally noted that multiple other jurisdictions have adopted the *Nicoletta* good faith definition and have thereby granted immunity to a defendant even though the defendant failed to obtain actual and sufficient consent from the decedent's relatives.[133]

Once the court generally established the "good faith" rule under the UAGA, the court applied the *Nicoletta* good faith standard to the instant case.[134] The court commented that "MTS complied with the UAGA requirements of obtaining a written consent form" signed by Ms. Schembre that appeared facially valid and unambiguous.[135] Further, the court relied on the fact that MTS did not exceed the authority displayed on the consent form.[136] Finally, the court indicated that it was significant that MTS followed its standard protocol in procuring Decedent's eyes, bone, and tissue and that no one contacted MTS in an effort to limit or revoke the anatomical gift.[137] Relying on these facts, the court held that MTS acted without negligence and in good faith in procuring the decedent's eyes, bone, and tissue.[138] Thus, the court held that MTS was entitled to immunity pursuant to Missouri's unique UAGA immunity statute.[139]

After disposing of Ms. Schembre's first point on appeal, the court took up her second point.[140] Ms. Schembre's second point on appeal challenges the summary judgment granted in favor of the Hospital and Guelbert, claiming that a genuine issue of material fact existed regarding whether Guelbert, as an agent for the Hospital, negligently obtained informed consent from the Family.[141] The court began its analysis of Ms. Schembre's second point by noting that Guelbert and the Hospital must prove that they acted without negligence to receive the UAGA's immunity.[142]

The court started its substantive factual analysis of Ms. Schembre's second point by noting that Ms. Schembre initially refused to consent to any

131. *Id.* (quoting Nicoletta v. Rochester Eye & Human Parts Bank, Inc., 519 N.Y.S.2d 928, 930 (N.Y. Sup. Ct. 1987)).
132. *Id.* (quoting *Nicoletta*, 519 N.Y.S.2d at 930).
133. *Id.*
134. *Id.* at 532-33.
135. *Id.*
136. *Id.* at 533.
137. *Id.*
138. *Id.*
139. *Id.*
140. *See id.*
141. *Id.*
142. *Id.*

anatomical donation of decedent's body parts.[143] However, the court found it influential that both parties agreed that after a certain conversation with Guelbert, Ms. Schembre changed her mind.[144] The court then noted that "[b]oth parties give diametrically opposed accounts of the discussion with respect to the explanation of what exactly would be donated."[145] Relying on these facts, the court held that it would not determine the respective credibility for each side of the story and instead left that issue to be resolved by the trier of fact.[146] The court found genuine issues of material fact regarding Guelbert's and the Hospital's requests for UAGA immunity and required a trial on the merits for resolution and disposition.[147]

V. COMMENT

Since Missouri's adoption of the UAGA, *Schembre* is the only Missouri case interpreting the UAGA's immunity provision.[148] As the *Schembre* court correctly pointed out, Missouri's UAGA immunizes a person from liability if she acts "without negligence and in good faith."[149] Furthermore, as the *Schembre* court noted,[150] because Florida is the only state other than Missouri enacting a statute requiring an absence of negligence to obtain protection from liability for wrongfully procuring body parts,[151] and because the Florida courts have not yet interpreted their immunity provision,[152] *Schembre* was a case of first impression not only in Missouri but also in the entire United States.[153] Thus, the court's task in construing the "uniform" immunity statute was understandably difficult.

While Florida is the only state other than Missouri enacting an immunity statute containing a "without negligence" prerequisite for UAGA immunity, 48 states accompanied Missouri in enacting statutes creating UAGA immunity for persons procuring body parts "in good faith."[154] Because Missouri's

143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 531 (stating that "[t]his is a case of first impression in Missouri.").
149. MO. REV. STAT. § 194.270.3 (2000); *Schembre*, 135 S.W.3d at 531.
150. *Schembre*, 135 S.W.3d at 531.
151. *See* FLA. STAT. ANN. ch. 765.517.5 (West Supp. 2005).
152. *Schembre*, 135 S.W.3d at 531.
153. *See id.*
154. Twenty-six states, including Missouri, and the District of Columbia enacted their "good faith" requirement for immunity on the basis of the 1968 version of the UAGA section 7(c). ALA. CODE § 22-19-47(c) (1997); COLO. REV. STAT. § 12-34-108(3) (2004); DEL. CODE ANN. tit. 16 § 2716(d) (1995); D.C. CODE ANN. § 7-1521.07(c) (2004); FLA STAT. ANN. ch. 765.517(5) (West Supp. 2005); GA. CODE ANN. § 44-5-148(c) (1991 & Supp. 2004); 755 ILL. COMP. STAT. 50/5-45(c) (1992);

UAGA contains a uniformity of interpretation provision,[155] the *Schembre* court correctly decided to consult the laws of other states for guidance in interpreting the statute's "good faith" requirement.[156]

While carefully researching the diverse case law and statutory codes of other states, the *Schembre* court likely noticed that states use one or more of three different approaches to implement the UAGA's good faith requirement. The first approach presumes that the defendant acted in good faith, thereby requiring the plaintiff to rebut the presumption by pleading and proving that

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IND. CODE § 29-2-16-7(c) (2000); KAN. STAT. ANN. § 65-3215(c) (2002); KY. REV. STAT. ANN. § 311.225(3) (Michie 2001); ME. REV. STAT. ANN. tit. 22, § 2907.3 (West 2004); MASS. ANN. LAWS ch. 113, § 13(c) (Lexis 2002); MICH. COMP. LAWS § 333.10108(3) (2001); MO. REV. STAT. § 194.270.3 (2000); NEB. REV. STAT. § 71-4807(3) (2003); N.J. STAT. ANN. § 26:6-63(c) (West 1996 & Supp. 2004); PUB. HEALTH LAW § 4306.3 (McKinney 2002) (New York); OKLA. STAT. ANN. tit. 63, § 2208(c) (West 2004); 20 PA. CONS. STAT. ANN. § 8616(c) (Supp. 2004); S.C. CODE ANN. § 44-43-380(c) (2002); S.D. CODIFIED LAWS § 34-26-39 (2004); TENN. CODE ANN. § 68-30-108(c) (2001); TEX. HEALTH & SAFETY CODE ANN. § 692.016 (Vernon's 2003); UTAH CODE ANN. § 26-28-11(3) (1998); VA. CODE ANN. § 32.1-295.D (Michie 2004); W. VA. CODE ANN. § 16-19-13(a) (Michie 2001); WYO. STAT. ANN. § 35-5-107(c) (Michie 2003).

Seventeen states and the Virgin Islands enacted their "good faith" requirement for immunity on the basis of the 1987 version of the UAGA section 11(c). ALASKA STAT. § 13.50.060(c) (Michie 2004); ARK. CODE ANN. § 20-17-611(c) (Michie 2000); CAL. HEALTH & SAFETY CODE § 7155.5(c) (West 1970 & Supp. 2005); CONN. GEN. STAT. § 19a-279j(c) (2003) (signed donor card is prima facie evidence of good faith); HAW. REV. STAT. ANN. § 327-11(c) (Michie 2004); IDAHO CODE § 39-3412(3) (Michie 2002); IOWA CODE § 142C.11.3 (1997); MINN. STAT. ANN. § 525.9221(c) (West 2002); MONT. CODE ANN. 72-17-207(3) (2003); NEV. REV. STAT. § 451.582.2 (2003); N.H. REV. STAT. ANN. § 291-A:12.III (1999); N.M. STAT. ANN. § 24-6A-11.C (Michie 2000); N.D. CENT. CODE § 23-06.2-11.3 (2002); R.I. GEN. LAWS § 23-18.6-11(c) (2001); VT. STAT. ANN. tit. 18 § 5247(c) (2000); 19 V.I. CODE ANN. § 412(c) (Supp. 2004) (Virgin Islands); WASH. REV. CODE ANN. § 68.50.620(3) (West 1997); WIS. STAT. ANN. § 157.06(10)(c) (West 1997 & Supp. 2004).

Additionally, six states evidently base their "good faith" requirement on the general tone of the ULA in writing the UAGA but do not seem to closely identify with either the 1968 or the 1987 version. ARIZ. REV. STAT. ANN. § 36-845.E (West 2003 & Supp. 2004); LA. REV. STAT. ANN. § 17:2357.C (West 2001); MD. CODE ANN., ESTATES AND TRUSTS § 4-508(b) (2001); MISS. CODE ANN. § 41-39-45 (2001); OHIO REV. CODE ANN. § 2108.08 (West 1994 & Supp. 2004); OR. REV. STAT. § 97.964(3) (2003).

Finally, while of little importance to the analysis in *Schembre*, one state has enacted a UAGA immunity provision that does not require good faith as a qualification for immunity. N.C. GEN. STAT. § 130A-409(c) (2003) (requiring "due care" rather than good faith but otherwise deriving its existence from the 1968 version of the ULA's UAGA).

155. MO. REV. STAT. § 194.280 (2000).

156. *Schembre*, 135 S.W.3d at 531.

the defendant acted in bad faith.[157] This burden shifting approach takes the pressure off of the defendant and upholds the UAGA's overall policy of "encourag[ing] and facilitat[ing] the important and ever increasing need for human tissue and organs."[158] Though burden shifting enhances the policy of encouraging organ donees to continue procuring organs, the Missouri statute does not say that courts should use a presumption.[159] Inferring such a presumption would violate rules of statutory construction and case law regarding burden of proof assignment.[160] While policy concerns point towards adopting the presumption of good faith, this policy issue should be addressed by the Missouri legislature and not by the courts.[161] For this reason, the Eastern District of Missouri Court of Appeals correctly applied Missouri's good faith immunity statute as an affirmative defense, requiring that the defendant prove good faith to receive immunity.

The second approach requires that the defendant prove that it actually complied with all provisions of the UAGA to receive good faith immunity from liability.[162] This judicial interpretation of the good faith immunity provi-

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157. *See, e.g.*, ARIZ. REV. STAT. § 36-845(E) (West 2003 & Supp. 2004) (stating that "[a]ll acts and omissions are presumed to be in good faith unless the acts or omissions are done with intent to maliciously cause injury.") (statutory presumption recognized in Ramirez v. Health Partners of S. Ariz., 972 P.2d 658, 663 (Ariz. Ct. App. 1998)); 755 ILL. COMP. STAT. 50/5-45(c) (1992); Seamans v. Harris County Hosp. Dist., 934 S.W.2d 393, 396 (Tex. Ct. App. 1996) (court granted judgment for the defendant summarily because the plaintiff failed to prove that the defendant "acted recklessly and in bad faith"); Fuss v. Lifenet, Inc., No. LP-935-3 2003 WL 1873098, at *2 (Va. Cir. Ct. April 2, 2003) (dismissing the plaintiff's claim because plaintiff failed to plead "facts which would support a judgment for bad faith"); *but see* Kelly-Nevils v. Detroit Receiving Hosp., 526 N.W.2d 15, 20 (Mich. Ct. App. 1994) (stating that "[g]ood-faith compliance with the UAGA constitutes an affirmative defense").

158. Unif. Anatomical Gift Act § 7 cmt. (1968).

159. *See* MO. REV. STAT. § 194.280 (2000) (stating the general purpose of promoting uniformity).

160. As a general rule, the party who states the issue in the affirmative has the burden of proof. Anchor Ctr. Partners, Ltd. v. Mercantile Bank, N.A., 803 S.W.2d 23, 30 (Mo. 1991) (en banc). Here, the defendant states the issue in the affirmative because he must show that he acted in good faith. As such, the defendant should have the burden of proof.

161. *See* Simpson v. Saunchegrow Constr., 965 S.W.2d 899, 905 (Mo. Ct. App. 1998) (stating that the court is "not at liberty to write into [statutes] 'under the guise of construction, provisions which the legislature did not see fit to insert'") (quoting State *ex rel.* Mills v. Allen, 128 S.W.2d 1040, 1046 (Mo. 1939)).

Indeed, some of the states adopting such an approach have done so through legislation and not by judicial statutory construction. *See, e.g.*, ARIZ. REV. STAT. § 36-845(E) (West 2003 & Supp. 2004) (statutory presumption recognized in *Ramirez*, 972 P.2d at 663; 755 ILL. COMP. STAT. 50/5-45(c) (1992). *But see Seamans*, 934 S.W.2d at 396; *Fuss*, 2003 WL 1873098, at *2.

162. *See, e.g.*, CONN. GEN. STAT. § 19a-279j(c) (2003) (defining good faith to create a presumption that a transplant agency who pleads and proves that it acted

sion places the burden of proof on the defendant which, as previously discussed, is more appropriate.[163] However, because the ULA indicated, in promulgating the UAGA in 1968, that the immunity provision is to be interpreted "liberal[ly] . . . to encourage and facilitate . . . human tissue and organ[] . . . transplantation,"[164] and because requiring the defendant to prove actual compliance with all parts of the UAGA places a high burden on the procurer of human tissue and organs, this second approach inadequately supports the policies underlying the UAGA. Courts that seem to require defendants to actually comply with all provisions of the UAGA rely on cases granting immunity when actual compliance is not unequivocally proven.[165] So the courts adopting the second approach are likely to adopt a more lenient good faith requirement when pressed with a case requiring them to do so. For these reasons, the Eastern District of Missouri Court of Appeals correctly rejected the argument that the defendants must prove that they actually complied with all portions of the UAGA to receive good faith immunity.

The third approach for implementing the UAGA's good faith immunity requirement requires that the defendant prove that it acted with the "'honest belief'" that it was procuring the tissue in full compliance with the UAGA and without "'malice,'" a "'design to defraud,'" or a design to "'seek an unconscionable advantage'" in procuring the tissue.[166] This approach also places

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according to a "signed statement by a donor or the donor card" acted in good faith); Gleason v. Noyes, Nos. 96-3194, 96-3196, 96-3197, 1997 WL 539679, at *4 (6th Cir. August 29, 1997) (court operated under the rule stated by the plaintiff, that defendant must prove "compl[iance] with the [UAGA]'s . . . terms"); Andrews v. Ala. Eye Bank, 727 So. 2d 62, 65-66 (Ala. 1999) (held that cornea procurer was immune from liability because it relied on the seemingly valid consent form received from the hospital). *But see* Lyon v. United States, 843 F. Supp. 531, 535 (D. Minn. 1994) (court specifically rejects an argument that "failure to comply with the [UAGA] demonstrates a lack of good faith"); *Ramirez*, 972 P.2d at 662 (court specifically rejects an argument that "fail[ure] to abide by the terms of the [UAGA]" deprives a defendant of its good faith immunity).

163. *See supra* notes 159-61 and accompanying text.

164. Unif. Anatomical Gift Act § 7 cmt. (1968).

165. *See, e.g.*, *Andrews*, 727 So. 2d at 65 (relying on Nicoletta v. Rochester Eye & Human Parts Bank, Inc., 519 N.Y.S.2d 928 (N.Y. Sup. Ct. 1987)).

166. *Nicoletta*, 519 N.Y.S.2d at 930-31 (citing BLACK'S LAW DICTIONARY (5th ed. 1979)). *See* TEX. HEALTH & SAFETY CODE ANN. § 692.016(b) (Vernon's 2003) (defining good faith as requiring that the defendant use "reasonable effort[s]" to comply with the provisions of the UAGA); Perry v. St. Francis Hosp. & Med. Ctr., Inc., 886 F. Supp. 1551, 1557-60 (D. Kan. 1995); *Lyon*, 843 F. Supp. at 533-35; *Ramirez*, 972 P.2d at 662-63; Kelly-Nevils v. Detroit Receiving Hosp., 526 N.W.2d 15, 18-20 (Mich. Ct. App. 1994); Rahman v. Mayo Clinic, 578 N.W.2d 802, 805-06 (Minn. Ct. App. 1998); Sattler v. N.W. Tissue Ctr., 42 P.3d 440, 443-44 (Wash. Ct. App. 2002); Nev. Op. Att'y Gen. No. 2002-16, 2002 WL 508843, at *4 (March 29, 2002). *See also* Brown v. Del. Valley Transplant Program, 615 A.2d 1379, 1383 (Pa. Super. Ct. 1992) (holding that the defendant was not liable because the defendant proved that none of

the burden of proof on the defendant which, as was previously stated, is probably most appropriate.[167] Furthermore, because this third approach grants more leniency to an organ and tissue procurer than the second approach's requirement of actual compliance, this approach furthers the policy objectives underlying the UAGA much more effectively than the second approach.[168] Finally, this third approach is probably the correct means of implementing the good faith requirement because it has been adopted by most states recently deciding cases involving UAGA good faith immunity[169] and because it most closely identifies with common notions of good faith in other areas of law.[170] Given these reasons, the *Schembre* court correctly adopted the third approach for implementing and analyzing the UAGA's good faith immunity requirement.[171]

While the *Schembre* court correctly interpreted and applied the UAGA's good faith requirement, the court incorrectly construed the UAGA's "without negligence" requirement in holding MTS immune from civil liability. While contemplating Missouri's UAGA, the *Schembre* court probably identified many ways to construe the "without negligence" language. Three logical methods of interpreting and applying Missouri's "without negligence" requirement likely emerged. The first of these methods would require that the defendant prove that he was not ordinarily negligent.[172] This appears to be the

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the decedent's family members were available for consent before procuring the organs); Williams v. Hoffman, 223 N.W.2d 844, 848 (Wis. 1974) (holding that good faith under the UAGA proscribes defendant's conduct if it "'evinces a significant disregard of the interests of the [plaintiff],' 'carries with it a suggestion of dishonesty' or is 'a species of fraud'" (citations omitted)).

167. *See supra* notes 159-61 and accompanying text.

168. *See supra* notes 164-65 and accompanying text.

169. *See Sattler*, 42 P.3d at 443-44; Nev. Op. Att'y Gen. No. 2002-16, 2002 WL 508843, at *4 (March 29, 2002). *But see* Fuss v. Lifenet, Inc., No. LP-935-3 2003 WL 1873098, *2 (Va. Cir. Ct., April 2, 2003) (using first approach to place burden on the plaintiff to prove defendant's bad faith).

170. *See, e.g.*, MO. REV. STAT. §§ 400.1-201.19, 400.2-103.1(b) (2000) (Uniform Commercial Code definitions of good faith); BLACK'S LAW DICTIONARY 713 (8th ed. 2004).

171. It should also be noted that the court held that MTS acted in good faith "as a matter of law." Schembre v. Mid-Am. Transplant Ass'n, 135 S.W.3d 527, 531-33 (Mo. Ct. App. 2004). While good faith is usually a question of fact, the *Schembre* court opined that under the UAGA, good faith may be decided as a question of law. *Id. But see* Gleason v. Noyes, Nos. 96-3194, 96-3196, 96-3197 1997 WL 539679, at *4 (6th Cir. Aug. 29, 1997) (court held that under the UAGA, "[t]he issue of good faith should . . . [be] given to the jury to decide"); Brown, 615 A.2d at 1388 (Johnson, J., dissenting) (stating that the UAGA immunity provision creates a question of good faith and "questions of good faith are for the jury"); *Williams*, 223 N.W.2d at 848 (stating that good faith under the UAGA requires "careful analysis of the facts in a particular case").

172. Because there have been no cases handed down in Florida or Missouri regarding the "without negligence" requirement, no judicial body adopted any of these

approach taken by the *Schembre* court.[173] Indeed, this approach seems to be the most literal interpretation of the language of Missouri's UAGA immunity provision. But it is probably not the approach intended by the General Assembly as such an approach would have damaging policy ramifications. Requiring the defendant to prove that he is not guilty of ordinary negligence essentially shifts the burden of proving negligence off of the plaintiff and onto the defendant. This burden shifting drastically increases the cost that the defendant must expend to win a lawsuit that the plaintiff is forcing it to defend. Because the UAGA's immunity provision is to be interpreted "liberal[ly] . . . to encourage and facilitate . . . human tissue and organ[] . . . transplantation,"[174] and because requiring the defendant to prove that it was not ordinarily negligent would drastically increase the burden placed on the procurer of human tissue and organs, this first approach violates the policies expressed by the ULA. As such, the courts must use a more liberal and less obvious interpretation of Missouri's UAGA immunity provision.[175]

The second method of dealing with Missouri's "without negligence" immunity requirement would increase the plaintiff's burden by requiring the plaintiff to prove that the defendant was grossly negligent. The advantage of this approach is that it increases the burden on the plaintiff while decreasing the burden on the defendant, the procurer of tissue and organs. In this way, the policy problems undermining the first approach's shifted burden to the

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three theories for construction of the "without negligence" requirement pre-*Schembre*. However, some states have adopted general theories of negligence into their statutory codes. These ideas tend to take the form of actual negligence that fits most accurately into the first method for interpreting the "without negligence" requirement. *See, e.g.*, 755 ILL. COMP. STAT. 50/5-45(c) (1992) (while not containing a "without negligence" requirement, the statute includes principles of negligence by granting immunity when a person procures an organ while acting "in good faith and according to the usual and customary standards of medical practice in the removal or transplantation of any part of a decedent's body."); S.C. CODE ANN. § 44-43-380(c) (2002) (adds that the immunity provision does not apply to cases of provable malpractice by a physician).

173. *See Schembre*, 135 S.W.3d at 531.

174. Unif. Anatomical Gift Act § 7 cmt. (1968).

175. It should be noted that the only pre-Schembre scholarly production analyzing Missouri's "without negligence" requirement noted that the requirement would likely present the problems that arise under the first approach. *See* Lisa E. Douglass, Comment, *Organ Donation, Procurement and Transplantation: The Process, the Problems, the Law*, 65 UMKC L. REV. 201, *supra* note 104, at 216-17 (1996). Douglass, "hope[d] that the negligence element [would be] interpreted so as not to bar plaintiffs who have been negligently injured in the transplantation process," thereby apparently valuing plaintiff protection over procedure protection. *Id.* Despite Douglass's position, it appears that the policy proffered by the ULA in its comment to the UAGA, that the statute is intended to "encourage and facilitate . . . human tissue and organ[] . . . transplantation," controls, and the UAGA's goal is to protect those dying and in need of an organ above those who have been emotionally injured by the negligence of the organ procurer. Unif. Anatomical Gift Act § 7 cmt. (1968).

defendant are not present in the second approach's heightened burden on the plaintiff.[176] However, because the immunity provision does not contain the phrase "gross negligence," courts would have to implement it under the "guise of construction," and to do so clearly would violate general rules of statutory construction.[177] Additionally, because Missouri's UAGA immunity provision operates to the benefit of the defendant by providing his immunity, it violates legitimate notions of fairness to require anyone other than the defendant to have the burden of proof to establish the existence or absence of that immunity. For these reasons, while the second approach's gross negligence requirement more adequately supports the policies advanced by the UAGA, the approach still lacks the appropriate balance between a literal construction of Missouri's UAGA immunity provision and furtherance of the policies that the UAGA seeks to advance.

The final method, hereinafter called the "non-negligent non-compliance approach," requires that the defendant prove that he was not careless in her failure to comply with the provisions of the UAGA. In other words, this approach would require not only that the defendant did not know that he did not comply with the provisions of the UAGA, but also that the defendant was not in a position where he should have known that his conduct did not comply with the UAGA. Under the non-negligent non-compliance approach, only if a defendant should have known that he was not complying with the UAGA could he be held liable for his failure to comply. This approach appears to overcome the policy problems of the first approach by not requiring that a defendant prove an absolute absence of negligence. Additionally, the non-negligent non-compliance approach appears to overcome the linguistic interpretation problems of the second approach's gross negligence requirement[178] because it views both the phrases "without negligence" and "in good faith" as modifiers of the immediately following phrase, "in accord with the terms of [the UAGA]."[179] For these reasons, the *Schembre* court incorrectly required that the defendants prove that they did not act with ordinary negligence. Instead, the *Schembre* court should have adopted the non-negligent non-compliance approach. While it is unknown whether adopting such an inter-

176. *See supra* notes 159-61, 164-65, 169-70 and accompanying text.

177. *See* Simpson v. Saunchegrow Constr., 965 S.W.2d 899, 905 (Mo. Ct. App. 1998) (stating that the court is "not at liberty to write into [statutes] 'under the guise of construction, provisions which the legislature did not see fit to insert'") (quoting State *ex rel.* Mills v. Allen, 128 S.W.2d 1040, 1046 (Mo. 1939)).

178. *See supra* notes 166-67 and accompanying text.

179. It must be admitted that this is not the most literal interpretation of the statute. As previously mentioned, the first approach is obviously the most literal construction. *See supra* notes 158-63, 168-69 and accompanying text. However, as is stated in the ULA comment to the UAGA, the immunity provision is not to be interpreted in its most literal sense; rather, it is to be interpreted "liberal[ly] . . . to encourage and facilitate . . . human tissue and organ[] . . . transplantation." Unif. Anatomical Gift Act § 7 cmt. (1968).

pretation of the "without negligence" requirement would have changed the outcome in the instant case,[180] the *Schembre* court set poor precedent by endorsing a poorly reasoned interpretation of the "without negligence" requirement.

The *Schembre* court's interpretation and application of the first portion of Missouri's UAGA immunity statute is near-flawless; good faith in the anatomical gift context indeed requires exactly what the *Schembre* court said it does. But the court erred in the approach it used to apply the "without negligence" requirement. Rather than requiring that the defendant prove that he acted without ordinary negligence in procuring a decedent's tissue, the court should have required only that the defendant prove that he did not have a reason to know that his procurement violated the UAGA.

VI. CONCLUSION

Schembre presented a case of first impression for Missouri of unique import. In *Schembre*, the Eastern District of Missouri Court of Appeals had the difficult task of balancing the UAGA's policies of supporting anatomical organ, tissue, and bone harvesting against the policies supporting recovery for emotional injuries caused by interference with the right of sepulture. However, the court's burden was decreased by the fact that Missouri's General Assembly and the ULA had already weighed out these policy concerns and enacted the UAGA. This left the *Schembre* court in a position to simply interpret the UAGA according to the language contained within the statute and in light of the policies the statute expressly claims to uphold.

In so interpreting, the *Schembre* court looked at authority in other states and correctly interpreted the UAGA's good faith immunity requirement. But the *Schembre* court incorrectly interpreted the UAGA's "without negligence" requirement by requiring that the defendant prove that he acted without ordinary negligence. To establish good faith, the *Schembre* court should have first required that the defendants prove that they acted with the honest belief that they were procuring the tissue in full compliance with the UAGA and without malice, a design to defraud, or a design to seek an unconscionable advantage in procuring the tissue. Secondly, to establish that the defendants acted without negligence, the court should have required that the defendants prove that they were not in a position where they should have known that they were not complying with the UAGA. The court analyzed the first requirement correctly, but it analyzed the second requirement incorrectly. Though the court's error in *Schembre* may not be prejudicial or outcome determinative in the instant case, it is error nonetheless and sets inadequate precedent on an issue of first impression.

RYAN DEBOEF

180. Such analysis is beyond the scope of this note.