Case No. F080109

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

TERENCE MICHAEL O'CONNOR, *Plaintiff/Appellant,*

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/Respondents.

Appeal from the Fresno County Superior Court
Case No. 18CECG01184
The Honorable Rosemary McGuire, Judge

RESPONDENT'S BRIEF of DONOR NETWORK WEST, INC.

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Rules of Court, Rule 8.208)

Respondent Donor Network West, Inc. is unaware of any persons or entities that must be listed per Rule 8.208(e)(1) or (2). (Cal. Rules of Court, Rule 8.208(e)(3).)

Dated: December 21, 2020

GORDON REES SCULLY MANSUKHANI, LLP

By: /s/ Danny A. Barak
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I. INTRODUCTION

The sole issue on this appeal is the viability of an intentional infliction of emotional distress ("IIED") claim. This case is governed by *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 905 ("*Christensen*"), which like this case involved claims for IIED related to the handling of relatives' bodies after death. *Christensen* ruled that such claims were proper only where (1) "plaintiff was present when the misconduct occurred" or (2) defendants "acted with the intent of causing emotional distress to the plaintiffs or knowledge that the conduct was substantially certain to cause distress to . . . plaintiff." (*Id*. at 903.) *Christensen* pointed out that "[t]he requirement that the defendant's conduct be directed ***primarily*** at the plaintiff is a factor which distinguishes intentional infliction of emotional distress from… negligent infliction." (*Id*. at 904.)

The fifth amended complaint of Appellant Terence Michael O'Connor ("Appellant") alleges no such facts against nonprofit Respondent Donor Network West, Inc. ("DNW"), so this Court should affirm the order sustaining demurrer. Appellant was not present when Brittany's mother made the decision to donate her deceased daughter's organs or when her organs were ultimately removed for donation. He

was not even in the hospital at the time: he had left the day before and does not allege he ever returned. He does not allege any interaction or conversation with anyone from DNW about organ donation or any other topic.

Appellant's complaint is so lacking that throughout his opening brief, he refers the Court to allegations in earlier, since-superseded complaints, which is indisputably improper and barred under the sham pleading doctrine. Additionally, Appellant sets forth a number of inapplicable legal theories in an attempt to circumvent the clear and controlling opinion in *Christensen*. Because the complaint, already amended ***six*** times, does not allege facts establishing the elements required by *Christensen*, the trial court's ruling was correct and should be affirmed.

II. FACTUAL HISTORY [1]

On or about November 17, 2017, Appellant's daughter Brittany O'Connor ("Brittany") was admitted to Co-Respondent Fresno

[1] The following summary of the allegations in this action are taken *solely* from Appellant's Fifth Amended Complaint, which was the version of the complaint upon which the appealed-from order sustaining DNW's demurrer was based, and is therefore the operative complaint in this appeal. (See *Meyer v. State Board of Equalization* (1954) 42 Cal.2d 376, 384.)

Community Hospital and Medical Center ("Community Hospital") having suffered a strangulation injury. Appellant was contacted and informed of his daughter's injury and admission to Community Hospital. (2 C.T. 370, ¶8.) On the same date, Appellant met with Brittany's treating physicians and learned that she was in a deep coma, but still alive. Appellant discussed treatment options with the doctors. (2 C.T. 370, ¶9.) Over the next few days, the medical staff explained to Appellant that his daughter was still alive and still had a chance for survival. Appellant was determined "to keep his daughter alive because he felt Brittany's strangulation was not accidental." Appellant alleges that he was unaware that, at that time, both Community Hospital and DNW had already decided that Brittany's organs should be donated. (2 C.T. 370-371, ¶10.)

On or about November 23, 2017, the medical staff informed Appellant that Brittany was "brain dead." Appellant demanded a second opinion before life support was removed but was told by the medical staff that they had already obtained a second opinion and that Appellant "would not be allowed to do so." Appellant was given three minutes to say goodbye to his daughter and to leave the hospital. Brittany died the next day on November 24, 2017. (2 C.T. 371, ¶11.)

According to Appellant, in addition to wanting to keep his daughter alive, he suspected foul play in her death. Appellant believed a coroner should have performed an autopsy, and if there was no coroner autopsy performed, Appellant wanted to preserve the ability to do a private autopsy. According to Appellant, both Community Hospital and DNW were aware that Appellant suspected foul play in his daughter's death and that Appellant did not want his daughter's body disturbed before an autopsy was performed. Appellant "believed" that operating on Brittany after her death would cause any autopsy results to be inaccurate. (2 C.T. 371, ¶12.)

Furthermore, prior to Brittany's death, DNW approached Brittany's mother (Appellant's ex-wife) about the possibility of donating Brittany's organs and other body parts after her death. Because Appellant was still committed to keeping her alive and wanted to preserve any evidence of foul play, he did not want Brittany's organs or other body parts to be removed. Appellant told Community Hospital's staff that he objected to Brittany being taken off life support and to the removal of her organs and body parts, and wanted to preserve any evidence of foul play. Appellant claims that at no point did he consent to organ removal. However, Appellant's objections to taking

his daughter off life support were "so strong" that the staff had to call for security and police, "essentially threatening to eject [Appellant] from the hospital premises." According to Appellant, both Community Hospital and DNW were aware that Appellant was seeking to keep his daughter alive and that he objected to the removal and donation of her organs and tissue. According to Appellant, despite this knowledge, both Respondents "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 [Appellant's] legal authorization would result in [Appellant's] severe emotional distress." (2 C.T. 371-372, ¶13.)

Appellant alleges that DNW's agents "extracted and harvested" Brittany's organs on the hospital premises with Community Hospital's approval or participation. (2 C.T. 372, ¶14.) Brittany never signed any instructions regarding the donation of her organs after death, and that both Respondents "knew or should have known" that Brittany's organs could not be removed after her death "without the consent of both of her parents." (2 C.T. 372, ¶15.)

III. PROCEDURAL HISTORY

Appellant commenced this action by filing his original complaint in the Fresno County Superior Court on April 5, 2018. (3 C.T. 803.) After filing two amended complaints, on September 4, 2018, by stipulation, Appellant filed his Third Amended Complaint ("3AC"). (3 C.T. 804; see also 2 C.T. 464, ¶¶4-5.) The 3AC asserted causes of action for (1) Negligence, (2) Infringement of Quasi-Property Right, (3) IIED, and (4) Fraud (Concealment). (1 C.T. 18-34.)

On October 9, 2018, DNW filed its demurrer to the 3AC. (1 C.T. 35-44.)[2] The demurrer was directed only to the causes of action for IIED and Fraud. (*Ibid*.) With respect to the IIED claim, DNW first argued that the claim was deficient because Appellant did not and could not plead that DNW's actions were taken with the specific intent and primary goal to cause Appellant to suffer severe emotional distress.

[2] DNW concurrently filed a motion to strike portions of the 3AC. (1 C.T. 45-54.) The basis of the motion to strike was that Appellant's prayer for punitive damages should be stricken as Appellant had failed to present any allegations meeting the standard for punitive damages under Civil Code section 3294 and that the crux of the allegations in the 3AC centered on the professional negligence of a health care provider, and therefore punitive damages were not available. (See *ibid*.) Ultimately, the motion to strike was granted. (1 C.T. 131-132.) The motion to strike, however, is not central to the instant appeal.

Based on the allegations in the 3AC, Appellant alleged that DNW's primary goal was to "sell" his daughter's organs for profit, not to cause him emotional distress. (1 C.T. 38-39, 4:27-5:7.)[3] Moreover, Appellant's IIED claim failed under a recklessness theory because he admitted in his 3AC that he was not present at the hospital when his daughter's organs were donated, and DNW did not accept the gifts in Appellant's presence while knowing he was present. (See 1 C.T. 38, 4:21-26, 1 C.T. 39, 5:8-16.) As to the fraudulent concealment claim, DNW argued that Appellant did not plead facts that would support any of the four disjunctive elements for pleading a cause of action for fraudulent concealment as set forth by the California Supreme Court in

[3] It is worth noting here that it is illegal to sell organs in the United States. (42 U.S.C. §274e; see also Health & Saf. Code, §7150.75.) Appellant alleged ***in his 3AC*** that DNW "decided" to sell his daughter's organs and "valued their goals of removing and selling Brittany's organs for profit above the rights and well-being of her father" (1 C.T. 26, 9:10-11, ¶30; 1 C.T. 29, 12:19-21). However, he also contradicted such allegations by alleging that "Brittany's heart, liver and kidneys were donated to patients of Stanford Medical Center" and her lungs "were given" to UCSF for medical research. (1 C.T. 26, 9:13-15.) Appellant subsequently removed all allegations regarding any intent to sell or any sale of Brittany's organs in his 5AC. Yet, despite the lack of any such allegations regarding organ sales in his 5AC, he continues to argue in his AOB that Respondents intended to sell Brittany's organs. (See AOB, 17 [citing to the 3AC]; 25 [arguing that "Appellant has pled that Defendants' zeal to obtain and sell organs motivated them…" without citation to any allegations in the 5AC.])

Warner Constr. Corp. v. L.A. (1970) 2 Cal.3d 285, 294.

The trial court agreed and sustained the demurrer with leave to file a Fourth Amended Complaint ("4AC"). (See 1 C.T. 128-133.) Although the court had sustained DNW's demurrer to the 3AC as to the IIED and fraudulent concealment claims with leave to amend, Appellant's 4AC (3 C.T. 810) deleted his fraudulent concealment claim, and without leave from the court, added a new cause of action he titled "Intentional Interference with Human Remains." (See 2 C.T. 422, 432-433.)

On February 26, 2019, DNW demurred to the 4AC. (See 3 C.T. 811.) Instead of opposing, Appellant filed a motion seeking leave to file a Fifth Amended Complaint ("5AC") (3 C.T. 812), which the court granted. (3 C.T. 818-819.)[4] Appellant filed his 5AC on April 22, 2019. (2 C.T. 368-384.)

In this final iteration of the Complaint, Appellant now only alleged four causes of action: (1) Negligence, (2) Negligent Interference with Human Remains, (3) IIED, and (4) Intentional

[4] The order granting the motion is not in the record. However, the docket clearly shows that Appellant filed his 5AC soon after the motion was decided, allowing the reasonable inference that leave to file the 5AC was granted. This issue is not central to the issues on appeal.

Interference with Human Remains. (2 C.T. at 368.) DNW filed a demurrer to the 5AC. (2 C.T. 544-553.) The demurrer addressed only Appellant's third and fourth causes of action (IIED and Intentional Interference with Human Remains.) (2 C.T. 544:24-27.) DNW argued that Appellant failed to add any new facts indicating that (1) DNW had an obligation to notify him of any rights he might have under the anatomical gift statutes, (2) DNW's conduct was directed at Appellant, and (3) that Appellant was present when Brittany's organs were procured and donated. (2 C.T. 549:6-551:15.) As to the intentional interference with human remains claim, DNW maintained that because this cause of action is not an independent tort but just a restatement of the IIED claim, and failed for the same reasons. (2 C.T. 551:19-24.)

On July 31, 2019, the trial court heard argument on DNWs demurrer.[5] Once again, the trial court ruled in DNW's favor. The trial court agreed that Appellant's IIED claim did not allege conduct specifically and intentionally directed at Appellant for the purpose of causing him harm. (3 C.T. 783.) Additionally, the claim failed to pass muster under *Christensen's* test for recklessness, which requires

[5] It also heard Co-Respondent Community Hospital's demurrer to the 5AC and motion to strike.

reckless conduct in the presence of the plaintiff and that the defendant was aware of plaintiff's presence. To the contrary, the 5AC makes it clear that Appellant left the hospital the day before Brittany passed away (before any gift could be made) and does not allege that he returned to the hospital. (3 C.T. 783-784.) The trial court also agreed with DNW that the fourth cause of action (intentional interference with human remains) was simply another name for IIED, and sustained the demurrer on that claim on the same grounds as the IIED claim. (3 C.T. 784.)

The trial court sustained both DNW and Community Hospital's demurrers as to the third and fourth causes of action without leave to amend. (See 3 C.T. 782 ("Tentative Ruling").) DNW and Community Hospital were given 10 days to file answers to the remaining two causes of action, which they did. (3 C.T. 824.)

Rather than proceeding to litigate his two remaining negligence claims, on October 4, 2019, Appellant requested dismissal of his 5AC with prejudice in order to secure a final appealable judgment and expedite the instant appeal. (3 C.T. 790-793.) On the same date, Appellant timely filed his notice of appeal. After months of extensions, Appellant filed his Opening Brief ("AOB") on September 2, 2020.

IV. ISSUE PRESENTED ON APPEAL

Did Appellant state a cause of action for Intentional Infliction of Emotional Distress in his Fifth Amended Complaint, where Appellant failed to allege facts demonstrating that DNW primarily directed its conduct towards him, or that Appellant was present at the time of the alleged conduct, and that DNW was aware of his presence?

V. STANDARD OF REVIEW

On appeal from a trial court's order sustaining a demurrer, an appellate court reviews the complaint *de novo* "to determine whether or not the plaintiff's complaint alleges facts sufficient to state a cause of action under any legal theory [citation], or in other words, to determine whether or not the trial court erroneously sustained the demurrer as a matter of law." (*Cantu v. Resolution Trust Co.* (1992) 4 Cal.App.4th 857, 879.) A reviewing court "treat[s] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) The court will "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

VI. ARGUMENT

First, Appellant's 5AC fails under the California Supreme Court's IIED analysis in *Christensen*, because it fails to allege sufficient facts to establish either (1) intentional conduct primarily directed towards him or (2) reckless conduct in his presence, and his presence known to DNW. Second, the alleged denial of Appellant's statutory right to object to the donation of his daughter's organs shows neither sufficient intent nor conduct that is extreme and outrageous. Third, Appellant's other arguments on appeal fail to state a cause of action for IIED under *Christensen*. Fourth, Appellant should not be granted further leave to amend, and no prior causes of action should be "restored." (AOB, 42.)

A. Appellant's 5AC Fails to State a Claim for IIED as a Matter of Law Because Appellant Cannot Allege Either Intentional Conduct Primarily Directed Towards Him or Reckless Conduct for Which He was Present and DNW Was Aware of Such Presence

The elements of the tort of intentional infliction of emotional distress include "extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of

causing, emotional distress; [and] actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Christensen*, *supra*, 54 Cal.3d at 903.)[6] "Outrageous conduct is conduct that is intentional or reckless and so extreme as to exceed the bounds of decency in a civilized community." (*Ragland v. U.S. Bank N.A.* (2012) 209 Cal.App.4th 182, 204.) "The defendant's conduct must be directed to the plaintiff, but malicious or evil purpose is not essential to liability." (*Ibid*.) "[R]eckless disregard of the probability of causing emotional distress" is sufficient. (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494.)

While some courts have ruled that whether conduct rises to the level of "extreme and outrageous" is usually a question of fact, "many cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law." (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 356, citing *Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1609 [denial of insurance benefits for a terminally ill patient for experimental treatment was not

[6] A third element, "the plaintiff's suffering severe or extreme emotional distress," is not at issue in this appeal.

extreme and outrageous conduct as a matter of law on demurrer], *Coleman v. Republic Indemnity Ins. Co.* (2005) 132 Cal.App.4th 403, 416–417 [finding failure to fulfill statutory duties without more insufficient to establish extreme and outrageous conduct].)

This case is controlled by the California Supreme Court's opinion in *Christensen*, *supra*, which involved a dispute over the handling of human remains. The plaintiff class consisted both of individuals who had contracted with a certain mortuary defendant for the post-mortem handling of remains of their deceased family members, and non-contracting but close relatives of the deceased. [7] It was later revealed that the defendants were removing and keeping jewelry and gold from the deceased; removing their organs prior to cremation without securing the consent of plaintiffs holding statutory priority under Health & Safety Code, section 7100 and other statutes; selling organs to a third-party defendant; commingling bodies during cremation; and failing to properly label urns into which remains were deposited so that proper identification was impossible. (*Id*. at 881-886.) Plaintiffs, some of whom had contracted with the defendant and others

[7] In turn, the mortuary defendant contracted with a crematory defendant, and the two contracted with a third party defendant engaged in the buying and selling of human organs. (54 Cal.3d at 877-878.)

who were "only" relatives, claimed both negligent and intentional infliction of emotional distress.

On the IIED claim, the Supreme Court sharply disagreed with the Court of Appeal, which found that because the defendants allegedly mishandled the decedents' remains ***intentionally***, and such conduct was outrageous, all family members and close relatives (none of whom, were present at the mishandling) could recover for emotional distress. (*Christensen*, *supra*, 54 Cal.3d at 902.) "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." (*Id*. at 903.) Thus, ***none*** of the *Christensen* plaintiffs had a valid claim for IIED:

> The complaint does not allege, however, that any plaintiff was present when the misconduct occurred, or that defendants or any of them acted with the intent of causing emotional distress to the plaintiffs or knowledge that the conduct was substantially certain to cause distress to any particular plaintiff.

(*Ibid*.) The court continued:

> The requirement that the defendant's conduct be directed ***primarily*** at the plaintiff is a factor which distinguishes intentional infliction of emotional distress from the negligent infliction of such injury. We explained this distinction in *Ochoa v. Superior Court* [(1985)] 39 Cal.3d 159 [ ]. There, the plaintiffs sought damages for the emotional distress they endured when over the course of

> several days they observed the deteriorating condition of their teenage son and the refusal of defendants to provide or permit them to provide needed medical treatment. Theories of negligent and intentional infliction of emotional distress were among the causes of action pled. This court held that while the complaint stated a cause of action for negligence, the elements of a cause of action for intentional infliction of emotional distress were not stated because the defendant's acts were directed at the child, not the parents.

(*Id*. at 904, emphasis added.)

Christensen agreed with Professors Prosser and Keeton that in order for a plaintiff to recover under a recklessness theory of IIED, the plaintiff should be present at the time of the conduct and the defendant should be aware of the plaintiff's presence. (*Ibid*.)

> Where reckless disregard of the plaintiff's interests is the theory of recovery, the presence of the plaintiff at the time the outrageous conduct occurs is recognized as the element establishing a higher degree of culpability which, in turn, justifies recovery of greater damages by a broader group of plaintiffs than allowed on a negligent infliction of emotional distress theory.

(*Id*. at 906.) Therefore, the California Supreme Court concluded:

> Plaintiffs here have not alleged that the conduct of any of the defendants was directed ***primarily*** at them, was calculated to cause them severe emotional distress, or was done with knowledge of their presence and of a substantial certainty that they would suffer severe emotional injury. We conclude, therefore, that the model complaint does not establish that ***any*** of the plaintiffs has standing to sue for intentional infliction of emotional distress.

(*Ibid*., emphasis added.) Thus, there was no standing to pursue an IIED claim, even for individuals who had statutory rights to consent or object to the manner in which their family members' remains were handled, ***and whose consent was never even sought***. (*Id*. at 880-881.)

1. Appellant Failed to Plead Sufficient Facts to Establish the Requisite Intent for IIED

Under *Christensen*, to state a claim for IIED based on an injury to another person or another person's remains, a plaintiff must allege intentional conduct ***primarily*** directed at the plaintiff. In the alternative, a plaintiff may plead the conduct was reckless, in which case the conduct must be undertaken in the plaintiff's presence and with defendant's awareness of such presence. Neither is alleged here.

Appellant's 5AC alleges he went to the hospital the day his daughter was admitted on November 17, 2017, and discussed his daughter's condition with Community Hospital's medical staff. (2 C.T. 370, ¶10.) Appellant wanted "to keep his daughter alive because he felt that BRITTANY'S strangulation was not accidental." (2 C.T. 371, ¶10.) He alleges that he suspected foul play in her death (which had not yet occurred) and that he wanted either the coroner to perform an autopsy, or that her body be preserved in order that he could perform a

private autopsy. (Compare 2 C.T. 371, ¶12 and ¶13.)

On November 23, 2017, Community Hospital's staff informed Appellant that his daughter was brain dead. He alleges that he demanded a second opinion before she was taken off life support, and was told that Community Hospital had already obtained a second opinion. (2 C.T. 371, ¶11.) Appellant alleges that he was provided with three minutes to "say goodbye" to his daughter and leave the hospital. (2 C.T. 371, ¶11.) Brittany passed away the next day, November 24. (*Ibid*.) At no point does Appellant allege that he ever ***returned*** to the hospital after leaving on November 23.[8]

[8] This final point is significant because it is consistent with the statutory scheme governing the removal of Brittany's organs. Pursuant to Health & Saf. Code, section 7150.15, prior to a donor's death, with certain exceptions, the only people who may make an anatomical gift are (1) an adult donor, (2) an emancipated minor donor, (3) a minor donor between the ages of 15 and 18 with a parent or guardian's consent, or (4) an agent of the donor under the power of attorney for health care or other authorizing record. (Health & Saf. Code, § 7150.15, subds. (a), (b).) The ability for someone else *not listed* in section 7150.15 to make a donation does not vest until ***after*** the donor dies. (Health & Saf. Code, section 7150.40, subd. (a).) That code section, again with certain exceptions, sets forth the priority of individuals who may make an anatomical gift after the decedent's death (assuming the decedent or decedent's agent did not make such a gift while she was still alive.) Therefore, in order for Brittany's mother to have actually been able to make a gift of her daughter's organs and tissue, and thus in order for DNW to actually be able to legally accept and procure such organs and tissue as described in the gift, Brittany had to have been deceased.

Therefore, Appellant's own allegations negate his ability to allege facts to show reckless conduct under *Christensen*. Simply put, Appellant was not present at the hospital at the time the gift was made, accepted, procured, and thereafter donated. Like the *Christensen* plaintiffs, he found out about it later. Consequently, he can also not allege that DNW was aware of his presence, since he does not allege that he was present.

Appellant failed to allege any facts showing the conduct was "primarily directed" at him, sufficient to allege the higher bar of intentional and calculated conduct. (*Christensen*, *supra*, 54 Cal.3d at 904.) As the trial court correctly observed, "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. Indeed, the basic facts of the case show that at most defendants' conduct was undertaken without regard to plaintiff's feelings on the matter." (3 C.T. 783, ¶4.)

Appellant presents a number of arguments in his AOB seeking to undermine the trial court's correct reading of the 5AC. However, none of his arguments or citations to allegations that only appeared in his inoperative 3AC establish the critical fact that he was present in the

hospital when the complained-of conduct ***related to his daughter's body*** occurred. This conduct was primarily directed at Brittany's body, not at Appellant. The trial court not once but twice recognized this fatal absence in the allegations (both as to the 3AC and the 5AC). *Christensen* compels the conclusion that Appellant did not state a viable IIED claim.

2. The Alleged Denial of Appellant's "Right to Object" Fails to Allege The Required Intent Or Extreme and Outrageous Conduct

Appellant argues that the trial court erroneously used a "circumscribed" definition of the relevant conduct in the 5AC. (AOB, 28-31.) Appellant maintains that the donation occurred despite Appellant's statutorily vested right to object, and that the trial court focused ***only*** on the removal of the organs as a means of demonstrating that Appellant could not plead intentional or reckless conduct. Instead, he posits that "the bad faith denial of [Appellant's] right to object to an organ donation is at the heart of his complaint." (AOB, 29.) He then goes on to argue that obtaining the necessary consent "is a vital part of organ donation" and that it is "as vital as the surgeon removing the organs." (AOB, 29-30.) This argument fails to establish IIED for two

important reasons.

First, *Christensen* rejected the same claims. In *Christensen*, certain class members held statutory rights to control the disposition of the remains of a deceased person, etc. (*Christensen*, *supra*, 54 Cal.3d at 876-877.) Their claims included, in part, allegations that certain organs and body parts were sold to a third-party defendant without the consent of those class members who held such statutory rights of consent. [9] *Christensen* recognized that while violation of such statutory rights could be sufficient to establish the ***duty*** element for ***negligence*** (*id*. at 893-894), they were insufficient for IIED because they demonstrated neither intentional conduct (the conduct was not primarily directed at the plaintiffs who held such statutory rights) nor reckless conduct (the plaintiffs were not present when decedents' bodies were allegedly mishandled, and the defendants were therefore not aware of these plaintiffs' presence.)

Second, even if Appellant's IIED claim is based solely on the fact that he had a statutory right to object, the mere deprivation by one party of a statutory right by itself is simply not enough to demonstrate

[9] In fact, the Supreme Court specifically referred to the UAGA as one of the statutory rights that the defendants were alleged to have ignored. (See *Christensen*, *supra*, 54 Cal. 3d at 881.)

both extreme and outrageous conduct ***and*** conduct directed at the party. Here, Appellant argues himself into a dilemma. On the one hand, the only alleged conduct primarily directed at him, as required by *Christensen*, is the alleged deprivation of his statutory right to consent or object. However, a deprivation of a statutory right is not, without more, extreme and outrageous. (See, e.g., *Lee v. Travelers Companies* (1988) 205 Cal.App.3d 691, 695 [an IIED claim failed as a matter of law where it was premised solely on the failure to perform a statutory duty without specifically alleging any other acts that were extreme and outrageous]; see also *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 295 [evidence sufficient to prove retaliation under the FEHA "does not necessarily rise to the 'extreme and outrageous' standard required for" IIED].)

On the other hand, Appellant's allegations about the manner in which his daughter's remains were handled fail to satisfy *Christensen*, because he was not present and the acts were directed ***toward Brittany***, not Appellant. Appellant's IIED claim in its full context exposes Appellant's inability to properly plead intent under *Christensen*, while deprivation of his statutory right to object, devoid of any context, does not constitute extreme and outrageous conduct.

The "right to consent" allegations also fail to demonstrate a sufficient level of ***intent*** to cause Appellant severe emotional distress. The thrust of Appellant's 5AC allegations ***against DNW*** are that:

(1) "[b]oth COMMUNITY HOSPITAL and [DNW] were aware that PLAINTIFF suspected foul play in his daughter's death and that he did not want her body to be disturbed before any autopsy was performed." (2 C.T. 371, ¶12.)

(2) "Before BRITTANY's death, [DNW] approached BRITTANY's mother (PLAINTIFF's ex-wife) about the possibility of donating BRITTANY's organs and other body parts after her death." (2 C.T. 371, ¶13.)

(3) "[Appellant] 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." (*Ibid*.)

(4) "Both Defendants COMMUNITY HOSPITAL and [DNW] 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." (2 C.T. 371-372, ¶13.)

(5) "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 so…". (2 C.T. 372, ¶13.)

(6) "…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." (*Ibid*.)

(7) That DNW acted in concert with Community Hospital to "extract and harvest" Brittany's organs on the premises. (See 2 C.T. 372, ¶14.)

(8) That Defendants knew or should have known that Appellant and his ex-wife had the right to determine the disposition of Brittany's remains and that there could be no removal or donation without the consent of both parents. (See 2 C.T. 372, ¶15.)

Appellant's main objection to the removal and donation of Brittany's organs was that such actions somehow precluded the autopsy he felt

should have been conducted by the Fresno County Coroner so that he could have "emotional closure" as to the cause of her death. (2 C.T. 378-379, ¶¶44, 46.) However, rather than making a case for intentional conduct primarily directed at him, these allegations actually tend to show the opposite. First, Appellant's allegations that DNW was "aware" of his objections are too remote and unsupported by any facts, and are contradicted by his earlier 3AC allegations ***that he never actually objected***. Second, Appellant's alleged basis for his objections – his fear that any donation would interfere with an autopsy – fail, given that no autopsy was ever attempted, thus no intentional interference by DNW.

i. Appellant's Allegations of DNW's "Awareness" of His Objections Fail to Demonstrate Intentional Conduct Primarily Directed Towards Him and Are Subject to the Sham Pleading Doctrine

Appellant never alleges that, prior to his removal from the hospital (2 C.T. 371, ¶13), he ever had a conversation with ***any agent from DNW*** in which he expressed any objection to the donation of her organs. Nor does he provide any indication that he ever directly told

any agents for DNW that his objection was based on his wish to have an autopsy performed. He only alleges that prior to Brittany's death, a DNW agent spoke with Brittany's mother "about the possibility of donating" Brittany's tissue and organs, and that Appellant only expressed his objections to organ donation to ***Community Hospital's staff and Brittany's mother***. (2 C.T. 371, ¶13.) He then alleges in a conclusory fashion and without explanation that DNW was somehow aware of such objections. In short, Appellant seeks to establish intentional and directed conduct on DNW's part based on an unspecific implication that DNW somehow became "aware" of his objections from others.

More importantly, Appellant's allegations in his 3AC, which he subsequently omitted from both his 4AC and operative 5AC, negate any allegation of DNW's "awareness." Under the sham pleading doctrine, a court may look to earlier versions of a complaint if it is clear that the earlier allegations which were subsequently withdrawn would tend to be harmful to the plaintiff's ability to state a cause of action. "'Under the sham pleading doctrine, plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers or

motions for summary judgment.'" (*State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 412, citation omitted.)

Throughout the 3AC, Appellant asserted contradictory allegations regarding whether or not he actually asserted an objection to the donation of Brittany's organs. At times, the 3AC suggests that he explicitly stated that he did not consent to the removal and donation of her organs. (See, e.g., 1 C.T. 25, ¶26.) On the other hand, in order to support his then-existing fourth cause of action for Fraud-Concealment, Appellant alleged that "all Defendants" induced him not to object to the donation by not telling him he had a right to object, and that he relied on this concealment ***by not objecting***. (See, e.g. 1 C.T. 30-31, ¶¶53-55.) In sustaining the demurrer to the fraud cause of action in the 3AC, the trial court noted that these allegations contradicted the earlier allegations that Appellant had explicitly objected to the donation. (1 C.T. 130, ¶8.) Appellant was still granted leave to amend the fourth cause of action. (1 C.T. 128.)

Instead, Appellant removed the fraud claim altogether, including the aforementioned allegations that he never actually objected to the removal of Brittany's organs for donation. Those deleted allegations

directly contradict Appellant's 5AC claims that he ***did*** object to the donation of Brittany's organs, and are therefore the proper subject for a sham pleading analysis. "A plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false." (*Cantu*, *supra*, 4 Cal.App.4th at 877.) Moreover, in his motion for leave to file his 5AC, Appellant failed to provide any explanation as to why the contradictory allegations were deleted. (2 C.T. 509-514.)

If Appellant is held to his contradictory allegations from his 3AC, then there is no viable allegation that DNW was at all aware of Appellant's alleged objections, so DNW's conduct could not have been primarily directed at him.

ii. Appellant's Allegations Regarding the Contingent Nature of His Objection Are Insufficient to Demonstrate Intentional Conduct Primarily Directed at Him

The 5AC alleges that Appellant only communicated that his objection to any organ procurement was contingent upon his belief that a donation would have interfered with the ability to perform an autopsy.

This meritless argument actually helps demonstrate that DNW's conduct was not intentionally directed at Appellant. By definition, an autopsy cannot occur until a person dies. Therefore, no autopsy could have occurred until at least the day ***after*** Appellant left the hospital for the last time.[10] This presents two problems for Appellant.

First, Appellant fails to allege that any autopsy was actually attempted in the two days between the time he left the hospital and the first date upon which any organ removal would have occurred. If such an autopsy did occur, or if the Fresno County Coroner expressly declined to perform an autopsy, that would have negated the only ***specific*** basis Appellant provides in the 5AC for any objections he made with respect to organ donation. Notably, Appellant also never alleges that he hired a private examiner to perform a private autopsy.

Second, Appellant fails to account for the fact that the UAGA accommodates both a coroner's autopsy and a subsequent organ donation. (See Health & Saf. Code, section 7151.15, Health & Saf.

[10] No organ procurement occurred until the day after Brittany passed away. (2 C.T. 378, ¶42 [alleging removal on or about November 25-27, 2017].) Therefore, there would have been ***at least*** a full day between Brittany's death and any organ procurement for either a coroner or a private entity to perform an autopsy.

Code, section 7151.20.)[11] Both statutes seek to create a balance between the needs of a coroner to perform an autopsy where the circumstances require such an inquest, and the needs of the organ procurement organization to safely remove gifted organs and tissue before they become permanently damaged over time. (See, e.g., Health & Saf. Code, § 7151.15, subd. (a) ["A county coroner shall cooperate with procurement organizations to maximize the opportunity to recover anatomical gifts for the purpose of transplantation, therapy, research, or education."].) These statutes effectively diminish the predicate for Appellant's objection: autopsies and subsequent anatomical gifts are not mutually exclusive, and the statutes do account for situations where there is conflict, and the coroner's inquest is still afforded priority. (See Health & Saf. Code, § 7151.20, subd. (d).)

Simply because Appellant may have ***believed*** that an autopsy and donation were somehow in conflict, the fact that he does not allege that DNW somehow ***interfered*** with the statutory scheme for autopsies set

[11] Pursuant to Health & Safety Code, section 7151.20, subdivision (c), if the coroner determines that the removal of the donated organs would not interfere with the autopsy or investigation, the organs will be removed before the autopsy begins. On the other hand, under subdivision (d), a coroner can deny removal or request a biopsy of certain organs if the coroner deems it necessary.

forth in sections 7151.15 and 7151.20 further demonstrates that DNW's actions were not primarily sought to deprive Appellant of any right to object. Because the autopsy issue was the only basis Appellant actually is alleged to have communicated to anyone, because no autopsy was alleged to have been attempted, and because DNW is not alleged to have interfered with any such autopsy, there is no basis to infer intentional conduct directed at Appellant.

B. Appellant's Arguments Do Not Justify Reversal

Appellant's AOB presents four further arguments: (1) he adequately pleaded reckless, outrageous conduct directed towards himself, (2) "Defendants'" conduct took place in his presence and "they" were aware of his presence, (3) statutory interpretations that do not safeguard informed donor consent are bad for public policy reasons, and (4) "Defendants" acted in bad faith towards him. None is meritorious.

1. Appellant Did Not Plead Sufficient Facts Demonstrating Reckless Outrageous Conduct Directed Towards Him

DNW has already demonstrated that the allegations ***in the 5AC*** fail to demonstrate that Appellant was present at the time of the removal

of his daughter's organs for donation, or that the complained-of conduct was either primarily directed towards him or was extreme and outrageous.

Instead, Appellant claims he pled six "facts" that meet the IIED elements, without providing any actual analysis. (See AOB, 25-26.) They do not. Only one of the facts arguably applies to DNW, only three of the six even appear in the 5AC, and none of them satisfies *Christensen's* standards ***as to DNW***.

As to the first fact (that Appellant was at the hospital on November 17, 20, and 23 before he was "ejected" from the hospital and that he spoke with doctors about her prognosis/treatment and advocated using all measures to prolong her life), Appellant once again refers this Court to the allegations in his 3AC, not his 5AC. However his first fact only indicates that (1) Appellant was present at the hospital some number of times up to the day ***before*** Brittany actually passed away, (2) that he discussed her prognosis and treatment ***only with her doctors***, and (3) he was "ejected" from the hospital on November 23, 2017. He alleges no conversations with DNW and no misconduct on DNW's part at all.

Similarly, the third "fact" (that he was given three minutes ***by the***

hospital staff to say good-bye to his daughter) has no impact on ***DNW's*** culpability. As to the fifth "fact" (that Defendants never asked Appellant for his consent to donate Brittany's organs), the allegation that Appellant's consent was not sought is insufficient for IIED under *Christensen*.

The second "fact" is actually a combination of three allegations that culminate in an "allegation" that Brittany's medical records indicate "deliberate behavior" to exclude Appellant and preventing him from halting organ donation: (a) one hospital employee stated that no hospital staff directly discussed organ donation with Appellant at any time, (b) the hospital ethicist determined that Brittany's mother was the ethically appropriate person to solicit for organ donation consent, and (3) "concern was expressed" by hospital/OPO staff about Appellant "seeking court intervention to halt the process of withdrawing treatment/harvesting organs." (AOB, 26.) First, Appellant fails to cite his 5AC at all in referring to these allegations he claims on p. 25 to have pleaded. DNW will address this omission below. Second, DNW is only alleged (though not in the 5AC) to have "expressed concern" which does not constitute actionable conduct.

The fourth "fact" only discusses what an alleged police bodycam

recording of what Appellant said after his ejection from the hospital: that Appellant was aware that Community Hospital intended to remove his daughter's organs against his wishes. Again, there is no conduct alleged against *DNW*. And again, as DNW will discuss below, there is no citation to the 5AC present in the AOB. (AOB, 26.)

Finally, the sixth fact alleges that "Defendants' employees" heard him saying that he believed they wished to "kill his daughter to harvest her organs" and did nothing to intervene or discuss his right to object. Not only does this allegation not appear in the 5AC, as DNW will discuss below, it doesn't seem to appear in any version of the complaint in the record. Moreover, the unalleged "fact" does not indicate that Appellant would have objected to organ donation: only an implication that he objected to ***killing*** his daughter to "harvest" her organs. DNW is not alleged to have been involved in the decision to take Brittany off life support and so this fact has no relationship to DNW whatsoever.

In sum, none of the six facts listed in pages 25-26 of the AOB indicate misconduct on anyone's part, much less DNW's part. More importantly, none of these facts indicate intentional or reckless conduct on DNW's part sufficient to meet the *Christensen* standard as discussed

at length above.

However, Appellant's misleading claim that he "pled the following facts" must again be addressed under the sham pleading doctrine given Appellant's consistent reference to allegations that appeared in his 3AC that he subsequently removed from his 4AC and 5AC. As noted above, the second and fourth "facts" ***only*** appear in his 3AC and do not appear in his 5AC, and the sixth "fact" does not appear in any version of the 3AC or 5AC. (See AOB, 26; compare 1 C.T. 20, ¶4, 1 C.T. 24, ¶22, 1 C.T. 25, ¶¶26-27 with 3 C.T. 369-372, ¶¶1-16, 3 C.T. 378-380, ¶¶42-51.) Those that were in the 3AC but not in the 5AC should be disregarded under the sham pleading doctrine (*State of California ex rel. Metz*, *supra*, 149 Cal.App.4th at 412), and the "fact" not alleged in any complaint should also be disregarded.

Appellant alleges efforts by Community Hospital (not DNW) to "eject" him from the hospital with the aid of the police in order to wrongfully keep him from objecting to any future donation of Brittany's organs. However, under the sham pleading doctrine, those allegations are better understood by ***other*** allegations in the 3AC that were also withdrawn, and that suggest that the hospital did act reasonably.

The 3AC alleges that Brittany's mother had told the hospital staff that Appellant was abusive towards her (his ex-wife) and was estranged from Brittany, and it was on ***that*** basis that Community Hospital determined that Brittany's mother was the ethically appropriate person to make the decision to donate Brittany's organs. (See 1 C.T. 24, ¶22.) Appellant only alleges that Brittany's mother's statements were untrue, and he criticizes the hospital for not conducting a further investigation into her allegations, without identifying any duty to do so. But he does not allege that Community Hospital had any other information about him.

These allegations tend to support an inference that Appellant's behavior coupled with the information relied upon from Brittany's mother about Appellant's prior abusive conduct rendered Community Hospital's reaction towards Appellant reasonable under the circumstances. Not surprisingly, these allegations were clearly deleted from the 5AC in order to avoid raising that inference as those allegations would tend to mitigate any finding of improper intent or extreme and outrageous conduct. And, as discussed previously, since DNW was only alleged to have been made "aware" of any objection, the deleted 3AC allegations that Appellant never actually objected

would mitigate any finding of both intent and extreme and outrageous conduct. (1 C.T. 31, ¶55.)

In short, none of the allegations in the 5AC indicate intentional or reckless conduct on DNW's part.

2. Appellant Did Not Plead Sufficient Facts Demonstrating His Presence and DNW's Awareness of His Presence

Appellant argues that not only did he plead that he was present during DNW's conduct, but that DNW was also aware of his presence. In order to avoid the clear impossibility of his presence during the removal of her organs, as discussed above, he identifies the "primary outrageous conduct pled" as:

> "a combination of active conduct 'conspiring' to prevent him from object 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."

(AOB, 27.) From there, Appellant launches into a discussion of "passive conduct", "deliberate indifference", and "calculated inaction" as a sufficient basis for finding extreme and outrageous conduct under an IIED analysis. Appellant's argument is irrelevant to any discussion of "presence" as understood in *Christensen*, and therefore should be

rejected.

First, Appellant's description of what constituted the "primary outrageous conduct" is misleading. As discussed above, Appellant's attempt to isolate the conduct at issue solely to a right to consent or object under a statute ***without any other context*** is insufficient to demonstrate extreme and outrageous conduct. Again, none of the *Christensen* plaintiffs could state a claim for IIED, even the ones who had legitimate statutory rights under Health and Safety Code section 7100 and the UAGA that were subsequently ignored by the defendants. Implicit in those plaintiffs' claims is that none of the defendants sought their consent before selling their loved ones' organs. Yet *Christensen* still did not consider them "present" for the purposes of establishing reckless intent.

Under *Christensen*, the outrageous conduct related to the bodies of people who were not the plaintiffs, and therefore the conduct was not directed at the plaintiffs. And as to reckless conduct, none of the plaintiffs could plead that they were present when the remains were improperly handled, even though they were technically present when the defendants failed to obtain their consent to sell organs.

Second, if the thrust of Appellant's IIED claim rests on a theory

of DNW's ***inaction***, then his claim fails under established California law. In *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 201, police officers were surveilling a laundromat where stabbings had previously occurred with the goal of "preventing assaults and apprehending the felon." The officers noticed a man who matched the description of the assailant and saw him enter and leave the laundromat several times. (*Ibid*.) They also noticed the plaintiff in the laundromat but failed to warn her once they had determined that they had identified the likely attacker. (*Ibid*.) Eventually, the plaintiff was stabbed and the police were not present to stop the attack. (*Ibid*.) As to her IIED claim, which she based on a theory of reckless intent, the Supreme Court held that because the claim was based on the officers' ***inaction***, "[a]bsent an intent to injure, such inaction is not the kind of 'extreme and outrageous conduct' that gives rise to liability under the '[IIED]' tort." (*Ibid*.) In other words, recklessness is insufficient to state a claim for IIED based on "inaction" or "passive conduct." Here, the 5AC alleges that DNW's goal was to procure Brittany's organs, not to specifically injure Appellant. Therefore, he cannot proceed on a theory of recklessness under allegations of passive conduct based on the controlling opinion in *Davidson*, *supra*.

Third, even if there are some instances in which "passive conduct" might rise to the level of extreme and outrageous conduct, Appellant cannot circumvent the presence requirement when the IIED claim is centered on harm done ***to another person***. Appellant cites to three inapposite cases to support his "passive conduct" theory. He first cites to *Madhani v. Cooper* (2003) 106 Cal.App.4th 412, 415. While *Madhani* involved the deliberate indifference of a landlord in keeping his tenants safe, the claim against the landlord was for ***negligence***, not IIED. The issue of emotional distress stemming from harm to a third person was not even at issue, much less were the presence requirements for reckless conduct under *Christensen*.

Next, Appellant cites to *Grimsby v. Samson*, 85 Wash.2d 52 (1975), for the proposition that "passive conduct is actionable and may be considered outrageous and despicable." (AOB, 28.) *Grimsby*'s holding is neither not controlling in California nor useful to Appellant. In *Grimsby*, the plaintiff was forced to watch his wife die in front of him while the hospital staff and physicians allegedly did nothing to help her or prevent her death. (*Grimsby*, *supra*, 85 Wash.2d at 53-54.) The Washington Supreme Court determined that a close family member could sue for harm directed at another for a claim substantially similar

to IIED (the tort of outrage), and even endorsed the idea that the hospital's alleged deliberate indifference leading to the wife's death could constitute extreme and outrageous conduct. (See *id*. at 60.)

However, the court held that the complained-of conduct must have occurred ***in the presence of the plaintiff-relative***. (See *id*. at 59.) In *Grimsby*, the husband was present to watch his wife die from the hospital's "passive conduct." Here, Appellant was escorted from the hospital the day before Brittany's death – before any donation could have even occurred – and Appellant does not allege that he returned. The "passive conduct" did not substitute for the presence requirement necessary for finding reckless conduct under an IIED (or tort of outrage) theory.

Appellant's reference to "calculated inaction" in reference to *Seaboard Finance Co. v. Carter* (1951) 106 Cal.App.2d 738, 743 is likewise unavailing. While the words "calculated inaction" appear in that decision, they have nothing to do with IIED or the requirement that a close family member must be present to assert IIED.

In short, while passive conduct can be a sufficient predicate for extreme and outrageous conduct when coupled with a specific intent to injure the plaintiff, none of the cases to which Appellant cites treated

such passive conduct as "presence" in the manner Appellant now advocates. Per the holding in *Davidson*, *supra*, absent a specific intent to injure, passive conduct would never lead to a discussion of presence because presence is a requirement for recklessness, and reckless "passive conduct" cannot support a claim for IIED.

3. Appellant's Statutory Arguments Do Not Support a Claim for IIED

Appellant argues that the statute's ultimate goal of facilitating organ donation does not provide organ procurement organizations and hospitals with "a blank check…to do anything in pursuit of obtaining organs from the deceased," and that "[t]he right to refuse organ donation was intended to be protected by the legislature." (AOB, 31.) Similarly, he argues at length (AOB, 32-33) that because there is a safe harbor provision for those who "attempt[] in good faith" to comply with the UAGA (Health & Saf. Code, section 7150.80 ["is not liable for the act in a civil action"]), the statute must permit IIED claims against those alleged to violate the statute in bad faith. Both arguments are unavailing for the same reason. Even if the allegations in the 5AC were sufficient to state a cause of action against DNW for statutory violations of the UAGA, they would at most support a negligence claim, not IIED. The

statutory violation alone does not establish an IIED claim.

Recall that in *Christensen*, the Supreme Court specifically disagreed with the Court of Appeal's decision as to the IIED claims. The Court of Appeal had ruled that "because the mishandling of the remains of plaintiffs' decedents was intentional and outrageous, all family members and close friends of the decedents could recover damages for emotional distress." (*Christensen*, *supra*, 54 Cal.3d at 902.) The Supreme Court explained that "[i] t 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." (*Id*. at 903.) Therefore, while the conduct alleged was sufficient to state a claim for ***negligence***, it was insufficient to state a claim for IIED, even if the statutory violation was outrageous and intentional. This is because the conduct was not directed primarily at the plaintiffs or occurred within their presence.

4. Appellant's "Bad Faith" Argument is Both Improper and Irrelevant

Appellant's bad faith analysis should be rejected for a number of additional reasons. First, it is based on allegations that once appeared in his 3AC and that he thereafter deleted in the later iterations of the

complaint. (See AOB, 32, ¶1 [citing to his 3AC], and AOB, 35 [again listing mostly 3AC allegations].) Appellant points to no ***5AC*** allegations to indicate bad faith against DNW, other than Appellant's context-barren allegations of DNW's general "awareness" of his objections. Moreover, other allegations he deleted after the 3AC (where he alleged that he never actually objected) render any "awareness" allegations in the 5AC a sham. (See pp. 31-33, above.)

Next, Appellant claims that he "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." (AOB, 33.) This is simply false. Again, *Christensen* also included allegations that the defendants brazenly ignored the statutory rights of certain plaintiffs, including the rights of some plaintiffs under the UAGA to consent or object to the removal of organs for donation or sale. (*Christensen*, *supra*, 54 Cal.3d at 881.) While the court agreed these plaintiffs could seek emotional distress damages under a negligence theory, they could not pursue a claim for IIED.

Finally, because the California Supreme Court has directly addressed this issue, Appellant's reliance on three out-of-state opinions

is irrelevant. The California Supreme Court is the last word on how IIED is to be pleaded in California. (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1244 [California Supreme Court precedent "is binding on this court and all state trial courts."]) But the three cases to which he cites are not even helpful to Appellant.

Appellant's reliance on the federal district court's decision in *Perry v. Saint Francis Hosp. and Medical Center, Inc.*, 886 F.Supp. 1551 (D.Kan. 1995) is thoroughly misplaced. First, the district court misconstrued *Christensen's* IIED holding. [12] Second, *Perry* is distinguishable because it identified the intentional conduct as the nurse's ***intentional misrepresentations*** to the family. (See *id*. at 1560, 1561-1562.) As such, the IIED claim was not based on a "bystander" theory of liability, but a direct theory based on the misrepresentations directed at the family. And third, like the two cases below, *Perry*

[12] Although discussing *Christensen's* take on the foreseeability of emotional distress in these types of cases, the district court summarized *Christensen's* holding as such: "mishandling of corpse [sic] is 'likely to cause serious emotional distress…regardless of whether they observe the actual ... conduct or injury to the remains of their decedent.'" (See *Perry*, *supra*, 886 F.Supp. at 1561, quoting *Christensen*, *supra*, 54 Cal.3d at 894.) The quoted language from *Christensen* comes from its discussion of ***negligence***, not IIED. Since the *Perry* court was only concerned with IIED, this summary of *Christensen* was incorrect.

discussed "bad faith" only in the context of the good faith immunity defense raised on summary judgment. (See *id*. at 1557-1560.)

The other two cases (*Siegel v. LifeCenter Organ Donor Network*, 2011-Ohio-6031, 969 N.E.2d 1271, *Sattler v. Northwest Tissue Center*, 110 Wash.App. 689 (2002)) are likewise inapposite. As with *Perry*, good faith was only at issue to determine whether summary judgment was appropriate where the defendants in those cases raised the "good faith" defense similar to the one codified in Health & Saf. Code, section 7150.80, subdivision (a). Neither court analyzed "bad faith" in an IIED context, much less in an intent context.

Finally, neither of the two items for which Appellant requests judicial notice are relevant or determinative here. The New York complaint (Appellant's RJN, Ex. A) is subject to the familiar rule that courts "take judicial notice only as to the existence of [a] complaint [from another action], not as to the truth of any of the allegations contained in it." (*Ross v. Creel Printing & Publ'g Co.* (2002) 100 Cal.App.4th 736, 743, citation omitted.) All those allegations relate to different facts and circumstances than present here, anyway. Similarly, the U.S. Department of Health and Human Services report (3 C.T. 703-735) has nothing to do with the circumstances alleged, and Appellant

argues no other ground for relevance.

In short, Appellant's argument on appeal fails to demonstrate any error in the trial court's assessment of his IIED allegations. Instead, Appellant consistently refers to non-existent allegations, inapposite opinions from non-California authorities, and non-sequitur theories of liability such as "passive conduct" and "bad faith" that fail to overcome the fact that DNW's conduct, as alleged, was not directed at him, nor was Appellant present to witness DNW's alleged conduct, which necessarily means that DNW could not have been aware of his presence.

C. This Court Should Not "Restore" Any Previous Causes of Action

This Court should not entertain Appellant's odd and unexplained request in the very last sentence of his AOB that this Court "restore" other causes of action. (See AOB, 42.) The only issue on appeal is whether the 5AC asserts allegations sufficient to state a cause of action for IIED. That is the only issue briefed (or even discussed) in the AOB. Appellant's "restoration" request raises unanswered questions as to which causes of action he seeks to restore, what the legal basis for such restoration would be, and why Appellant only raised the issue for the

first time in the very last sentence of the conclusion to his appellate brief. In reality, there is no reason to "restore" any such causes of action.

If Appellant is referring to the two causes of action for negligence that were at issue when he freely chose to dismiss them, his request is highly inappropriate. Appellant voluntarily dismissed both of his negligence claims with prejudice in order to manufacture an appealable judgment. "[A] voluntary dismissal with prejudice forecloses appeal of any issues not previously ruled on via a 'judicial act' of the court." (*Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 864.) Because those claims were never the subject of any demurrer in this action, and were actually at issue when Appellant voluntarily dismissed them with prejudice so that he could appeal his dismissed IIED claim, those prior claims may not be revived.

Nor should this Court invoke its power to grant Appellant leave to amend on the grounds that his allegations state a cause of action under a negligence theory. Appellant ***himself*** divested this Court of its inherent authority to allow him to "re-allege" negligence because he voluntarily dismissed those claims in order to attempt to revive his IIED claim. If Appellant's risk is rewarded by allowing him to "restore" all

claims he voluntarily dismissed with prejudice, then there would be no risk at all. Orders sustaining demurrers are final, not merely interlocutory.

Finally, if Appellant's request for "restoration" refers to his "Fraud-Concealment" cause of action from his 3AC, that too should be denied. Appellant was granted leave to amend that claim and chose not to amend, eliminating the claim from his short-lived 4AC. (See 1 C.T. 128-133, 2 C.T. 422.) "[W]here a demurrer is sustained only *in part* and a plaintiff chooses *not* to amend that part in response[,] the plaintiff may then challenge the ruling on that demurrer on appeal from the final judgment." (*People ex rel. Omlansky v. Save Mart Supermarkets* (2019) 39 Cal.App.5th 523, 525, emphasis in original.) However, Appellant has not challenged the ruling as to his Fraud-Concealment claim in his 3AC, has asserted no reason why it was legally sufficient, nor explained in his AOB how such a claim could even be revived based on the allegations existing in the 5AC.

Further, Appellant's 3AC fraud theory affirmatively alleged that no one informed him of his right to consent, and therefore he was "induced" into not objecting to any organ donation. (1 C.T. 31, ¶55.) The trial court found that allegation to contradict the allegations

asserted to support the IIED claim that Appellant ***did*** object and DNW was ***aware*** of his objections. (1 C.T. 130, ¶8.) As a result, and perhaps in recognition of his inability to assert both theories, Appellant clearly abandoned the fraud theory, and in doing so, eliminated the contradictory allegations that would have negated his IIED claim, as well. Because the "restoration" of such a claim would implicitly be an endorsement of further sham pleading, Appellant should not be rewarded in this instance.

D. This Court Should Not Grant Appellant Leave to Amend

In California, "it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) Nevertheless, "[t]he burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank*, *supra*, 39 Cal.3d at 318.) In order to do this, a party "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

DNW's demurrer to Appellant's third and fourth causes of action was sustained without leave to amend, and this appeal is related solely to the order sustaining the demurrer as to the IIED causes of action. (See AOB, 42.) In the trial court, Appellant never requested leave to amend nor did he demonstrate how such amendments might cure any potential deficiencies in his pleadings. Nor does he do so in the AOB.

At most, Appellant has offered two new legal issues – "passive conduct" and "bad faith" – but has failed to show any ***facts*** related to those new issues that he could plead that would overcome the lack of allegations related to the intent requirements for IIED. Both of those new issues would, at best, relate to the nature of the conduct as extreme and outrageous, not the underlying intent necessary for IIED. Appellant has already filed ***six*** versions of this complaint, adding and subtracting both allegations and causes of action along the way, with or without obtaining the court's leave to amend, and should not be allowed to attempt a seventh even if he requests it in his reply brief.

VII. CONCLUSION

Christensen controls the disposition of this appeal. Appellant cannot allege any facts that would cure the same factual deficiencies recognized in *Christensen*. Nothing DNW did in accepting Brittany's

organs for donation as authorized by her mother was primarily directed at Appellant, with whom DNW had no relationship, of whom DNW was essentially unaware, and who was not present at the time of the donation. This Court should affirm.

Dated: December 21, 2020

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204 (c)(1))

I certify pursuant to Cal. Rules of Court, Rule 8.204 (c) that the word count of this brief including tables and certificates is 10,753 words, as calculated by the word processing program used to produce the brief.

Dated: December 21, 2020

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PROOF OF SERVICE
California Court of Appeal, Fifth Appellate District
Case No. F080109

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon Rees Scully Mansukhani, LLP, 3 Parkcenter Drive, Suite 200, Sacramento, CA 95825, Tel: 916-565-2900; Email: cwallin@grsm.com.

On the date below, I served the within document(s):

RESPONDENTS' BRIEF

☒ VIA E-SERVICE (TrueFiling) on the recipients designated on the electronic service list generated by TrueFiling system. That submission also serves to satisfy the requirement of e-filing one copy with the California Supreme Court.

☒ VIA U.S. MAIL: by placing the document(s) listed above in a sealed envelope, with postage thereon fully prepaid, in United States mail in the State of California at Sacramento, addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

Clerk for the Hon. Rosemary McGuire
Fresno County Superior Court
1130 O Street
Fresno, CA 93721

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

Executed on December 21, 2020, at Sacramento, California.

/s/ *Cindy Wallin*

CINDY WALLIN