

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

SUPERIOR COURT

**NICOLE MACTAGGART and
JANET PIZZI on behalf of
themselves and all others similarly
situated; GLENN WILDER,
JEANINE CUNNINGHAM, et. al,
individually and on behalf of
themselves and all others similarly
situated; IRENE RAY, DARLENE
LYNCH, et. al; ANNE WEISS
individually and on behalf of herself
and all others similarly situated;
DIANE L. DEPALMA, JAMES J.
O’LAUGHLIN, et. al; BENJAMIN
BROPHY, individually and on
behalf of all others similarly
situated; ROBERT JOHNSON,
ARTHUR GAUDET et. al on behalf
of themselves and all others
similarly situated; PATRICIA
BECKETT, individually and on
behalf of all similar persons; and
MARY D. LOMBARDI**

Plaintiffs,

v.

**PRESIDENT & FELLOWS OF
HARVARD COLLEGE, MARK F.
CICCHETTI, TRACEY FAY, et. al**

Defendants.

**CIVIL ACTION NO. 2384CV01389-BLS-2
CIVIL ACTION NO. 2384CV01461-BLS-2
CIVIL ACTION NO. 2384CV01481-BLS-2
CIVIL ACTION NO. 2384CV01602-BLS-2
CIVIL ACTION NO. 2384CV01640-BLS-2
CIVIL ACTION NO. 2384CV01843-BLS-2
CIVIL ACTION NO. 2384CV02002-BLS-2
CIVIL ACTION NO. 2384CV02223-BLS-2
CIVIL ACTION NO. 2384CV02373-BLS-2**

**Motion for Leave to File Consolidate
Memorandum Not to Exceed 25 Pages
ALLOWED on Oct. 27, 2023**

**CONSOLIDATED MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS
OF PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
MARK F. CICCHETTI AND TRACEY FAY**

I. INTRODUCTION

In 1971, recognizing the critical importance of medical education and research, the Massachusetts Legislature enacted the Uniform Anatomical Gift Act, M.G.L c. 113A (“the UAGA” or “Act”), which establishes the legal framework for individuals to donate their

bodies to medical schools and research institutions. To further this important objective, the Act confers immunity from any “civil action” to institutions and individuals who operate anatomical gift programs like that of Harvard Medical School (“HMS”). Under that broad grant of immunity, litigation, including the nine cases that are the subject of these Motions, cannot proceed if a defendant has acted in good faith. Because Plaintiffs in each of the cases listed above fail to allege—and could not plausibly allege—that defendant President and Fellows of Harvard College, which includes HMS (“Harvard”), or either of its two current employees named as defendants, Mark Cicchetti and Tracey Fay, acted in bad faith, the claims against them must be dismissed.¹

II. FACTUAL BACKGROUND

A. Harvard’s Anatomical Gift Program

For decades, Harvard has operated an Anatomical Gift Program (“AGP”) through which individuals can donate their bodies to advance medical education and research following their death. *See, e.g., MacTaggart* Amended Complaint, ¶¶14, 19, 31; *see also*

¹ Undersigned counsel for the defendants filing this motion represent President and Fellows of Harvard College, named as a defendant in each of the nine Complaints, and the two current HMS employees **Mark F. Cicchetti** and **Tracey Fay**, named in four of those cases: *MacTaggart* (No. 2384CV01389-BLS-2); *Wilder* (No. 2384CV01461-BLS-2); *Beckett* (No. 2384CV02223-BLS-2), and *Lombardi* (No. 2384CV02373-BLS-2).

Counsel for the defendants filing this motion do *not* represent former HMS employee **Cedric Lodge**, named as a defendant in *MacTaggart* (No.2384CV01389-BLS2); *Ray* (No. 2384CV01481-BLS2); *Johnson* (No. 2384CV02002-BLS2); *DePalma* (No. 2384CV01640-BLS-2) and *Lombardi* (No. 2384CV02373-BLS-2). Likewise, undersigned counsel do not represent the **Carl Shapiro Institute for Education and Research at Harvard Medical School and Beth Israel Deaconess Medical Center**, named as a defendant in *Wilder* (No. 2384CV01461-BLS-2); *Brophy* (No. 2384CV01843-BLS-2); *Weiss* (No. 2384CV01602-BLS-2); and *Beckett* (No. 2384CV02223).

Ex. 1.² Harvard utilizes donors' remains in the regular course of teaching students and advancing the scientific and medical understanding of human anatomy, an indispensable part of Harvard's educational program. *Id.*, ¶14 & Ex. 1. The Anatomical Gift Program is Harvard's only source of cadavers for this purpose. Ex. 1.

B. Cedric Lodge's Indictment and Harvard's Response

On June 13, 2023, defendant Cedric Lodge, a former Harvard employee who worked in the HMS morgue, was indicted by a federal grand jury for the unlawful interstate transport of stolen human remains. *See, e.g., Wilder* Complaint ¶15, Ex. 1 (copy of Indictment). That same day, the HMS Dean, Dr. George Q. Daley, sent letters to known family members of individuals who had donated their bodies to HMS for medical research, informing them of Lodge's indictment. *See, e.g., MacTaggart* Amended Complaint, ¶¶64-65; Ex. 2. Dean Daley's letter also informed its recipients that, based on information

² The facts asserted in this Memorandum are taken from the nine complaints and from documents they reference. Although not identical, the factual allegations and legal claims asserted in each of the Complaints are substantially similar, and the alleged facts relevant to this Motion may fairly be ascribed to each of the cases.

For example, seven of the nine Complaints rely on public statements made by Harvard Medical School in June 2023, including Exhibit 1, "HMS Anatomical Gift Program & Federal Investigation" (a set of Responses to Frequently Asked Questions HMS posted on its website, <https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>, last updated August 23, 2023); Exhibit 2 (HMS Dean George Daley's letter to donors dated June 14, 2023); and Exhibit 3 (HMS's public statement on June 14, 2023). *See, e.g., MacTaggart* Amended Complaint (No. 2384CV01389-BLS-2), Dkt. No. 3, ¶¶ 28, 39, 64-67; *Wilder* Complaint; (No. 2384CV01461-BLS-2), Dkt. No. 1, ¶25; *Ray* Complaint (No. 2384CV01481-BLS-2), Dkt. No. 1, ¶25; *Weiss* Complaint (No. 2384CV01602), Dkt. No. 1, ¶32; *Brophy* Complaint (No. 2384CV01843-BLS-2), Dkt. No. 1, fn. 1-4; *Beckett* Complaint (No. 2384CV02223), Dkt. No. 1, ¶47; and *Lombardi* (No. 2384CV02373-BLS-2) Dkt No. 1 ¶¶38, 63-66. Because Plaintiffs' Complaints rely on statements in these documents, it is appropriate for Harvard to attach and rely on them in its Motion to Dismiss. *See Marram v. Kabrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.5 (2004).

provided by federal authorities and Harvard's own records, the remains of their loved ones had been "potentially impacted" by Lodge's actions. *Id.*, ¶39; Ex. 2. The Frequently Asked Questions HMS published on its website also explained: "To be clear, it is our understanding that there is not enough evidence at this time to identify anyone's remains as being definitively impacted; we can only say whether they were 'potentially impacted' or 'not believed to be impacted.'" *Id.*, ¶66; Ex. 1.

Harvard explicitly has condemned Lodge's alleged³ actions. Indeed, Dean Daley's letter called that conduct "morally reprehensible and inconsistent with the standards that Harvard Medical School, our anatomical donors, and their loved ones expect and deserve." *See* Ex. 2. Harvard also has expressed deep sorrow "for the pain and uncertainty caused by this troubling news" and offered support to donors' families "through a toll-free information and support center staffed by specially trained counselors." *Id.* Harvard has also provided information to families to help them seek information directly from the U.S. Attorney's Office prosecuting the case. That Office has publicly thanked HMS for its cooperation in the investigation, describing HMS as "also a victim here." Ex. 4.⁴ Moreover,

³ Harvard uses the words "alleged" and "allegedly" throughout with regard to Lodge's conduct because of the constitutionally mandated presumption of innocence. For purposes of this Motion, we assume that the criminal charges against Lodge as alleged in the Complaints are true.

⁴ Because the USAO's statement and Lodge's indictment are public records, it is appropriate for the Court to rely on them in deciding a Motion to Dismiss. *See Schaer v. Brandeis*, 432 Mass. 474, 477 (2000) (relying on "matters of public record"); *City of Springfield v. Purdue Pharma, L.P.*, No. 1984CV01733, 2020 WL 2193690, at *1 (Mass. Super. Feb. 21, 2020) (relying on the "Complaint and relevant public records, including public case information about [a] criminal case in federal District Court.") In addition, the *Wilder* Complaint (No. 2384CV01461-BLS-2) attaches a copy of the Lodge Indictment as an exhibit to the Complaint. *Wilder* Dkt. No. 1.

the criminal indictment explicitly alleges that Lodge acted “without the knowledge or permission of HMS . . .” Ex. 5.

III. PROCEDURAL BACKGROUND

Family members of individuals who donated their bodies to Harvard’s Anatomical Gift Program have filed nine separate Complaints in the Superior Court making claims against Harvard and other defendants arising from the program (collectively, the “Complaints”). The first Complaint was filed as a putative class action against Harvard and Lodge on June 16, 2023. On September 5, 2023, the Administrative Justice of the Business Litigation Session ordered six of the seven cases then pending to be transferred to the Business Litigation Session; the seventh was already pending here. The last two cases filed, *Beckett*, No. 2384CV02223-BLS-2, and *Lombardi*, No. 2384CV02373-BLS-2, have also been transferred to the BLS.

On October 18, 2023, counsel for Harvard, Cicchetti and Fay filed a joint motion to establish a briefing schedule to address the Motions to Dismiss that they planned to file. The Court granted that Motion October 30, 2023, permitting them to file this single, consolidated Memorandum to address a single legal issue common to all the cases: the broad statutory immunity created by the Act, M.G.L c. 113A, §18, which requires that each of the cases be dismissed as a matter of law.

IV. PLAINTIFFS’ ALLEGATIONS

Harvard, Cicchetti and Fay recognize that each person who donates his or her body to the AGP does so for distinct personal reasons. They also recognize that no two plaintiffs have been impacted in precisely the same way by what Harvard has acknowledged was Lodge’s “reprehensible” conduct. However, as relevant to the Motions to Dismiss, the nine Complaints contain similar factual allegations, including about Lodge’s conduct, and make essentially similar legal claims against Harvard, Cicchetti and Fay.

All of the Plaintiffs are family members of individuals who donated their bodies to the AGP for medical research and education. All Plaintiffs allege that they received a letter from Dean Daley following Lodge’s arrest or otherwise allege that their family member may have been impacted by Lodge’s conduct. The Amended Complaint in the earliest of the cases filed, *MacTaggart*, illustrates the factual allegations and legal claims made in each of these nine cases and therefore is summarized below.⁵

Plaintiff MacTaggart alleges that her mother donated her body to Harvard’s AGP. *MacTaggart* Amended Complaint ¶¶77-78. Plaintiff Pizzi, a co-Plaintiff in the *MacTaggart* Amended Complaint, likewise alleges that her uncle donated his body to HMS. *Id.* ¶¶81-82. The *MacTaggart* Plaintiffs further allege, on information and belief, that Lodge “disturbed, mishandled, displayed, dissected, and/or sold hundreds of parts of donated cadavers that had been entrusted to Harvard and HMS for medical research and anatomical study,” *id.* ¶39; allowed two individuals not affiliated with Harvard to “enter the HMS morgue to examine the bodies of plaintiffs’ loved ones to choose what to purchase,” *id.* ¶41; and “removed cadaver remains from HMS and brought them to his residence in Goffstown, New Hampshire where he and his wife Denise Lodge sold the body parts” *Id.* ¶43.

The *MacTaggart* Plaintiffs allege that Lodge worked under Cicchetti and Fay and assert as a legal conclusion that each “had a duty to safeguard the donors’ bodies.” *Id.* ¶¶49, 51. The *MacTaggart* Plaintiffs further assert as a legal conclusion that Harvard, Cicchetti and Fay “breached this duty and were negligent in exercising due care and supervision over the HMS morgue and the Anatomical Gift Program” during Lodge’s alleged criminal activity. *Id.* ¶55.

⁵ For the Court’s convenience, a chart identifying the claims made in each complaint is attached as Appendix A to this Memorandum. Separate facts relating to each Plaintiff are also set out in the individual Motions filed in each of the cases.

The *MacTaggart* Plaintiffs seek damages against Harvard, Cicchetti and Fay based on claims of Negligence (Counts I, IX, and XI) and Negligent Infliction of Emotional Distress (Counts V, X, XII). The MacTaggart Plaintiffs also allege that Harvard breached an alleged Fiduciary Duty (Count II) and, under principles of Respondeat Superior, is liable for the actions of Lodge (Count III) and for the alleged negligence of Cicchetti and Fay (Count IV).⁶ These are among the most common claims made by the Complaints filed. Against Harvard, each of the nine Complaints assert negligence-based claims; seven allege negligent infliction of emotional distress; six allege either liability based on Respondeat Superior or negligent supervision, hiring or retention; and five allege a breach of fiduciary duty. The four Complaints that name Cicchetti and Fay as defendants each allege negligence and negligent infliction of emotional distress against them; two allege breach of fiduciary duty.⁷

⁶ In addition, Count VI purports to assert a “reserved” claim, “Violations of M.G.L. c. 93A—Harvard,” that contains no factual allegations. One of the cases (*Johnson*) asserts a c. 93A claim. As a matter of law, c. 93A has no application here. “Universities and other charitable institutions do not engage in ‘trade or commerce’ when they undertake activities in furtherance of their core mission, rather than in a ‘business context.” *Thornton v. Harvard University*, 2 F. Supp. 2d 89, 95 (D. Mass. 1998) (Harvard’s administration of student financial aid is not ‘trade or commerce’ for purposes of c. 93A); *Shin v. Mass. Inst. of Tech.*, No. 020403, 2005 WL 186901, *8 (Mass. Super. Ct. June 27, 2005). As Plaintiffs acknowledge, medical education is clearly HMS’s core mission. Amended Complaint, ¶14 (alleging that Harvard “utilizes human cadavers in the regular course of teaching students and advancing the scientific and medical understanding of human anatomy”). Finally, the *MacTaggart* Amended Complaint alleges that Lodge is liable for Negligence (Count VII) and Negligent Infliction of Emotional Distress (Count VII). Because undersigned counsel does not represent Lodge, this Memorandum does not address those counts.

⁷ Other claims include tortious interference with remains (*Wilder, Johnson, Beckett*); wrongful autopsy (*Brophy*); interference with a corpse (*Weiss*); intentional infliction of emotional distress (*Weiss, DePalma*); reckless infliction of emotional distress (*Johnson*); unjust enrichment (*Wilder, Johnson, Beckett*).

V. ARGUMENT

Harvard recognizes the anger and uncertainty of those who fear that their loved ones' remains were among those Lodge allegedly stole. But any liability that attaches to Lodge for his alleged criminal activity attaches to him alone. It cannot extend to others at HMS who are not alleged—either in Lodge's criminal case or in the any of Plaintiffs' Complaints—to have participated in Lodge's conduct, or to Harvard as an institution. As noted, the indictment against Lodge specifically alleges that Lodge acted "*without the knowledge or permission of HMS . . .*" Ex. 5 (emphasis added). Plaintiffs' Complaints certainly do not allege, and could not plausibly allege, that Harvard employed Lodge to engage in criminal theft and sale of donor remains or that Lodge acted to benefit Harvard or HMS. Neither do they allege, nor could they plausibly allege, that either Cicchetti or Fay supervised Lodge in carrying out his alleged criminal scheme.

As a matter of law, Plaintiffs' inability to plead complicity on the part of Harvard, Cicchetti or Fay, or even to plead any *facts* plausibly suggesting (contrary to the allegations in the indictment against Lodge) that Harvard, Cicchetti or Fay knew of Lodge's conduct,⁸ requires the dismissal of the claims against them under the UAGA, which protects institutions and individuals from civil litigation absent a determination that they failed to act in good faith. Because the Act expressly provides immunity from suit, rather than simply a defense to liability, dismissal of the claims against Harvard, Cicchetti and Fay is warranted, because otherwise subjecting defendants to prolonged litigation would defeat the purpose of the Act's immunity provision and the legislative policy judgment it embodies.

⁸ Three of the complaints contain conclusory, boilerplate allegations that Harvard "knew or should have known" of Lodge's actions. See *MacTaggart* Amended Complaint at ¶¶42-47, *Weiss* Complaint ¶67, *Lombardi* Complaint ¶¶41, 46-47. As explained below, these are insufficient to avoid dismissal.

A. Plaintiffs' Claims Against Harvard, Cicchetti and Fay Fail to State a Claim and Must Be Dismissed.

1. *Plaintiffs' Allegations Must Plausibly Suggest an Entitlement to Relief.*

To survive a motion to dismiss, a complaint must provide more than “‘labels and conclusions’ What is required at the pleading stage are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.” *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007)). The “threshold requirement” necessitates that “the plain statement possesses enough heft to show that the pleader is entitled to relief.” *Id.* (quoting *Bell Atl. Corp.*, 550 U.S. at 557). Courts must “not accept legal conclusions cast in the form of factual allegations.” *Berkowitz v. President & Fellows of Harvard Coll.*, 358 Mass. App. Ct. 262, 270 (2008) (citations omitted). “It is only when ... conclusions are logically compelled, or at least supported, by the stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that ‘conclusions’ become ‘facts’ for pleading purposes.” *Schaer*, 432 Mass. at 479 (quoting *Dartmouth Rev. v. Dartmouth Coll.*, 889 F.2d 13, 16 (1st Cir. 1989)).

2. *Because Plaintiffs Make No Allegations of Bad Faith Against Harvard, Cicchetti or Fay, All Claims Against Them Must Be Dismissed.*

The Uniform Anatomical Gift Act, M.G.L. c. 113A, creates the legal framework authorizing and regulating anatomical gifts, defined as “a donation of all or part of a human body to take effect after the donor’s death for the purpose of transplantation, therapy, research or education.” *Id.* § 2. The National Conference of Commissioners on Uniform State Laws released the Act in 1968, following three years of intense study by a special committee, and the Massachusetts Legislature adopted it in 1971. *See* Alfred M. Sadler, Jr., et al., *The Uniform Anatomical Gift Act, A Model for Reform*, 206 J. Am. Med. Ass’n 2501 (1968). From the outset, the UAGA was intended to address “the need of society for bodies, tissues and organs for medical education, research, therapy and transplantation.”

UAGA Prefatory Note (1968). *See also Carey v. New England Organ Bank*, 446 Mass. 270, 272 (2006) (“The UAGA was intended, among other things, to ‘encourage the making of anatomical gifts’ by eliminating uncertainty as to the legal liability of those authorizing and receiving anatomical gifts, while respecting dignified disposition of human remains.”) (quoting UAGA Prefatory Note (1968)).

The Act identifies the individuals who lawfully may make an anatomical gift, *id.* §§ 4, 9; describes the circumstances under which an anatomical gift may be amended or revoked, *id.*, § 6; and specifies the form of documentation required to make an anatomical gift. *Id.* §§ 5, 10. Section 11 of the Act identifies which institutions lawfully may receive an anatomical gift—a definition that plainly includes HMS: “An anatomical gift may be made to the following persons named in the document of gift: (1) an accredited medical school, dental school, college or university”

Of central importance here, the Act also contains a broad immunity provision shielding any “person”—defined to include organizations engaged in medical education and research like HMS and individuals like Harvard employees Cicchetti and Fay—from suit or liability absent a determination that they failed to act in good faith. Section 18 of the Act, captioned “**Immunity,**” provides: “A person who acts in accordance with this chapter or with the applicable anatomical gift law of another state *or who attempts in good faith to do so, shall not be liable* for the act *in a civil action*, criminal prosecution or administrative proceeding” (emphasis added). As the Supreme Judicial Court has held, good faith has a very specific meaning under the statute: “an honest belief, the absence of malice, or the absence of a design to defraud or to seek an unconscionable advantage over another.” M.G.L. c. 113A § 18; *Carey*, 446 Mass. at 282-83; *see also* *Mandate*, Docket No. 72, *Favaloro v. President and Fellows of Harvard Coll.*, No. 07-1187 (1st Cir. June 12, 2007) (Ex. 6) (pursuant, to § 18, affirming dismissal of complaint containing “no more than assertions of negligence unaccompanied by allegations of bad faith”).

The UAGA’s immunity provision has been central to the Act since its adoption and is intended to be interpreted broadly. The Act’s 1968 Comments state that the immunity provision “merits genuinely liberal interpretation to effectuate the purpose and intent of the Uniform Act, that is, to encourage and facilitate the important and ever-increasing need for human tissue and organs for medical research, education and therapy, including transplantation.” UAGA § 7, cmts. (1968).⁹

Massachusetts enacted its most recent version of the UAGA in 2012. That revised statute continued to make the broad immunity language a critical provision of the Act. G.L. c. 113A, § 18 (Commentary). Indeed, the Massachusetts Legislature, unlike the legislatures of some other states, has chosen *not* to create a negligence exception to this immunity. *Compare* Fla. Stat. § 765.517(5) (2023) (conferring immunity when a person “acts in good faith *and without negligence*” or attempts to do so in complying with an anatomical gift act) (emphasis added); Mo. Rev. Stat. § 194.285(1) (2022) (same).

Massachusetts courts are bound by that legislative choice. Where the state legislature has made a legislative judgment on a policy matter, as is the case here in conferring an immunity and defining its scope with respect to anatomical gifts, a court’s “obligation is to adhere to the terms of the statute and not, upon imaginary equitable considerations, to escape from the positive declarations of the text.” *Stearns v. Metro. Life Ins. Co.*, 481 Mass. 529, 538 (2019) (internal citations omitted); *Commonwealth v. Leno*, 415 Mass. 835, 841 (1993) (“Our deference to legislative judgments reflects neither an

⁹ Massachusetts courts routinely rely on the Commentary to Uniform Acts in interpreting Massachusetts statutes that adopt those acts. *See e.g.*, *Carey*, 446 Mass. at 272 (citing UAGA Prefatory Note); *Guardianship of D.C.*, 479 Mass. 516, 523, 143, fn. 3 (2018) (citing prefatory note to Uniform Probate Code); *Premier Cap., LLC v. KMZ, Inc.*, 464 Mass. 467, 472 (citing commissioners’ prefatory notes to Uniform Commercial Code); *In re Pelvic Mesh Gynecare Litig.*, No. CIV.A. 13-4903, 2014 WL 4264934, at *5, fn. 3 (Mass. Super. Apr. 9, 2014) (citing prefatory notes to Uniform Interstate and Intentional Procedure Act).

abdication of nor unwillingness to perform the judicial role; but rather a recognition of the separation of powers and the undesirability of the judiciary substituting its notions of correct policy for that of a popularly elected legislature.”) (internal citations omitted).

Equally important is the scope of the nature of the protection that the Legislature has adopted. The Act’s good faith immunity section “provides *immunity from suit*, not simply a defense to liability.” *Rahman v. Mayo Clinic*, 578 N.W.2d 802, 805 (Minn. App. 1998) (discussing the history and structure of the UAGA and not just the version enacted by Minnesota (emphasis added)). Thus, to guard against the immunity being “effectively lost” through prolonged litigation, it is particularly appropriate to address the issue early in a case. *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009) (explaining in the context of qualified immunity for government officials that the Supreme Court has “repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation”). Consistent with this defining feature of civil suit immunity, courts in Massachusetts have not hesitated to dismiss a complaint where the factual allegations are insufficient to overcome an immunity. *See, e.g., Harrington v. Gibson*, 80 Mass. App. Ct. 1114, 2011 WL 5374566 (2011) (affirming grant of motion to dismiss under doctrine of judicial immunity); *Talbot ex rel. Talbot v. Town of Hudson*, 86 Mass. App. Ct. 1124 (2014) (same, where complaint failed to allege facts that would overcome applicable immunity provision of Massachusetts Tort Claims Act); *Langlois v. Pacheco*, No. CV 16-12109-FDS, 2017 WL 2636043, at *8 (D. Mass. June 19, 2017) (same).

In *Carey*, the leading Massachusetts case interpreting the Act, the plaintiffs’ sixteen-year-old son was injured in a car accident and died at a hospital shortly afterwards. 446 Mass. at 274. The plaintiffs alleged that a representative of the defendant organ bank harvested certain of his son’s organs without his consent, failed to make the record necessary to document a proper donation, and ultimately discarded the harvested organs so that “no anatomical gifts were used for [donation to another individual] or for medical education and research.” *Id.* at 276. The plaintiffs alleged that the organ bank repeatedly

and erroneously reported that their son's "right cornea had been successfully transplanted" and wrote to them that "harvested blood vessels were in quarantine and would later be transplanted, although by that time they had been rejected." *Id.* When the plaintiffs learned what had happened, they "asked for the return of [their son's] remains for internment [but] because the remains had already been discarded, that request was never fulfilled." *Id.* at 276-77.

In *Carey*, as here, plaintiffs sued for negligence and negligent infliction of emotional distress. The SJC, relying on the UAGA's immunity provision, M.G.L. c. 113A § 18, affirmed the trial court's pre-trial order entering judgment for the defendants. As the SJC explained, § 18 of the Act confers immunity from suit to any defendant absent allegations that the defendant failed to act in good faith. *Carey*, 446 Mass. at 282-83. The SJC carefully defined what "good faith" meant under the Act:

Good faith is defined in this context, as elsewhere, as an honest belief, the absence of malice, or the absence of a design to defraud or to seek an unconscionable advantage over another.

Id. The SJC further explained that "[l]ack of good faith, 'even though it involves a determination of a state of mind, is not automatically a jury question.'" *Id.* (quoting *Aarco, Inc. v. Boynes*, 391 Mass. 560, 564 (1984)). Moreover, *Carey* made clear that it is the *plaintiff's* burden to establish that a defendant relying on the Act's immunity defense failed to act in good faith. *Id.* Thus, despite finding that the defendant organ bank had not complied with the Act by failing to properly document what tissue plaintiff had agreed (and not agreed) to donate, the SJC affirmed the Superior Court's pre-trial judgment for defendant based on the Act's immunity provision because there was no showing of bad faith in the defendant organ bank's omission. *Id.*

Relying on *Carey*, the First Circuit confirmed the expansive nature of the Act's immunity provision in a case involving the HMS morgue when it issued its Mandate in *Favaloro* (Ex. 6, *supra*). As the Court wrote in affirming dismissal for Harvard:

Appellant's complaint alleged the possible mishandling of the remains of her mother, who had arranged to have her body donated to Harvard, upon her death, under the Massachusetts Anatomical Gift Act . . . The district court determined that both Harvard and . . . a licensed funeral director hired by Harvard, were covered by the statutory provision immunizing persons from liability for actions taken under the statute in good faith. *The court viewed the complaint against the defendants as amounting to no more than assertions of negligence unaccompanied by allegations of bad faith.* The court's decision, based on its interpretation of the Massachusetts Anatomical Gift Act, is fully supported by the subsequent decision of the Massachusetts Supreme Judicial Court in *Carey v. New England Organ Bank*, 446 Mass. 270, 843 N.E.2d 1070 (2006), which analyses the state statute in depth.

Id. (emphasis added).

Moreover, the District Court's discussion of the UAGA's broad grant of good faith immunity in the dismissal order affirmed by the First Circuit provides compelling guidance for how the Court should apply the UAGA here. *See Favaloro v. President and Fellows of Harvard Coll.* No. 05-11594-RCL (Dec. 19, 2005) (transcript attached as Exhibit 7). There, Judge Lindsay recognized that the plaintiff's complaint in that case suffered from precisely the same defect presented by each of the nine Complaints here: the absence of any claim—and certainly none supported by any plausible factual allegations—that the Harvard defendants failed to act in good faith. As Judge Lindsay explained in his ruling:

[W]hat this statute does, as I read it, is to immunize persons acting in good faith from any claim, except a claim of—that the conduct of the defendant was conduct in bad faith. As such, the statute eliminates all causes of action in which there is no allegation of bad faith or the absence of good faith . . . I think that the statute properly read puts the burden of pleading upon the

plaintiff; that is to say, the plaintiff must plead the absence of good faith or lack of good faith against parties that wanted to proceed.

Id. at 32-34. Because the plaintiff’s claim against Harvard was “nothing more than negligence, that they failed fully to investigate the operations of [the crematorium where remains were disposed],” the Court held that Harvard was immune from suit under the UAGA, accepting Harvard’s argument that “the purpose of the immunity is to prevent defendants from being dragged into court when they’re operating an Anatomical Gifts Program [where] there’s no evidence of any bad faith conduct and having to defend a litigation.” *Id.* at 12, 34.

Decisions from other jurisdictions interpreting the UAGA, like the First Circuit and District Court decisions in *Favaloro*, confirm that a plaintiff’s failure to allege plausibly the defendant’s absence of good faith requires the dismissal of claims, including negligence claims, related to a donation program. *See, e.g., Scarbrough v. Transplant Res. Ctr. of Maryland*, 242 Md. App. 453, 472 (2019) (affirming grant of motion to dismiss under UAGA immunity where “complaint does not allege an absence of good faith or any facts that would support such an allegation”); *E.R. v. Mid-Am. Transplant Servs.*, No. 1:18CV148 RLW, 2018 WL 4185376, at *3 (E.D. Mo. Aug. 31, 2018) (granting motion to dismiss where alleged facts did not support a violation of the UAGA even under the most “liberal construction.”).

In another recent decision, *Kennedy-McInnis v. Biomedical Tissue Servs., Ltd.*, 178 F. Supp. 3d 97, 100 (W.D.N.Y. 2016), a group of plaintiffs alleged that they had entrusted family members’ remains to funeral homes for cremation, but those funeral homes instead harvested and sold body parts to tissue banks for transplantation into living persons, without the plaintiffs’ knowledge or permission. The defendants included one tissue bank that specifically had been warned that the individual supplying the body parts had a “checkered past . . . including drug-related convictions, unlawful use of a police uniform or emblem, and practicing dentistry without a license, and that it would not ‘make good

business sense to continue in a relationship with someone with [that] background.” *Id.* at 104, 107. Nonetheless, the court—relying in part on *Carey*, 446 Mass. at 282—concluded that the tissue bank was immune from suit under the UAGA, holding that if a case “fall[s] within the parameters of the UAGA’s good-faith provision, that provision clearly bars all the claims asserted in this suit; the statute does not simply bar suits under the Act itself, but provides complete immunity “for damages in any civil action” within its scope. *Id.* at 106; *see Rahman*, 578 N.W.2d at 805 (UAGA’s good-faith provision “provides immunity from suit, not simply a defense to liability”).

Here, none of the Complaints allege that Harvard, Cicchetti or Fay failed to act in good faith, or in *Carey*’s terms, acted “without honest belief or with malice or a design to defraud or seek unconscionable advantage over another.” And certainly none plead *facts* that plausibly suggest that Harvard, Cicchetti or Fay acted in bad faith—a contention that would run contrary to indictment charging Lodge as acting “without the knowledge or permission of HMS” Ex. 5. The allegations in the *MacTaggart* Amended Complaint again illustrate this point. That Complaint alleges that Harvard employed Lodge (¶33); makes allegations concerning his responsibilities (¶¶35-37); and summarizes the conduct that formed the basis of the federal indictment. The assertion that Harvard “*knew or should have known*” that Lodge “was mishandling donor bodies and allowing unauthorized third parties into the HMS morgue” (¶47), bereft of any factual allegations that would make it plausible and contradicted by the indictment against Lodge, is precisely the kind of broad-brush conclusory allegation that fails to satisfy the well-established pleading requirements of *Iannacchino*, 451 Mass. at 636 (2008). No factual allegations in the *MacTaggart* Amended Complaint support the Plaintiffs’ pronouncement that Harvard had knowledge of Lodge’s alleged criminal conduct, nor could they.

Further, Plaintiffs’ fallback position that Harvard “*should have known*” that Lodge was mishandling donor bodies (¶47) likewise is insufficient to overcome either the *Iannacchino* pleading standard, or the statutory immunity conferred by the Act.

Massachusetts courts have been clear that merely alleging that a party “knew or should have known” about misconduct does not, without more, “raise a right to relief above the speculative level.” *Reeves v. Town of Hingham*, No. 13-P-1454, 2014 WL 6473814, at *2 (Mass. App. Ct. Nov. 19, 2014) (affirming the trial court’s grant of dismissal where mere allegations that defendants “knew or should have known” about the misconduct of others were insufficient to form the basis of a claim without supporting facts) (quoting *Iannacchino*, 451 Mass. at 636). Here, Plaintiffs have failed to provide any facts that “rise [] to what experience indicates is an acceptable level or probability” to support the conclusory allegation that Harvard, Cicchetti or Fay “knew or should have known” about Lodge’s misconduct, *Schaer* 432 Mass. at 479 (citation omitted). Consequently, this allegation alone is insufficient to form the basis of their claims.

In addition, under *Carey*, claims of negligence cannot give rise to liability unless a plaintiff plausibly alleges that a defendant failed to act in good faith, and Plaintiffs here offer no facts to support such a claim. *See Favaloro, supra* (affirming dismissal where the district court correctly “viewed the complaint against the defendants as amounting to no more than assertions of negligence unaccompanied by allegations of bad faith”); *see also Sattler v. NW Tissue Ctr.*, 110 Wash. App. 689, 697 (2002) (a “negligence standard is not used to determine whether good faith immunity will attach”); *Lyon v. United States*, 843 F. Supp. 531, 533-34 (D. Minn. 2004) (defendant’s good faith confers immunity against negligence claims). In the absence of specific and particular facts to plausibly establish that Harvard, Cicchetti or Fay did not act in good faith, the claims against them must be dismissed. *See Carey*, 446 Mass. at 282 (defining good faith in the context of the Act as: “an honest belief, the absence of malice, or the absence of a design to defraud or to seek an unconscionable advantage over another”). And because the statute confers immunity

from *any* “civil action,” the other claims made by the Complaints in these actions, including claims for declaratory and injunctive relief likewise must be dismissed.¹⁰

3. *Plaintiffs’ Vicarious Liability Claims Based on Lodge’s Alleged Criminal Conduct Cannot Defeat Immunity.*

Five of the Complaints (*MacTaggart, Weiss, DePalma, Johnson and Lombardi*) seek to impose vicarious liability on Harvard based on the doctrine of *Respondeat Superior*, based either on Lodge’s alleged criminal conduct or on Cicchetti’s and Fay’s alleged negligent supervision of Lodge. For the reasons stated above, Harvard cannot be held vicariously liable for the alleged negligence of Cicchetti and Fay because, absent plausible allegations of bad faith (which Plaintiffs have not made), Harvard, Cicchetti and Fay all are immune from suit under the Act.

Plaintiffs’ efforts to hold Harvard vicariously liable for Lodge’s alleged criminal actions likewise should fail. The SJC has established a clear, three-part test to determine whether an employer may be held vicariously liable for the conduct of an employee: (1) “whether the conduct in question is of the kind the employee is hired to perform”; (2) “whether it occurs within authorized time and space limits”; and (3) “whether it is motivated, at least in part, by a purpose to serve the employer.” *Berry v. Commerce Ins. Co.*, 488 Mass. 633, 638 (2021) (citing *Clickner v. Lowell*, 422 Mass. 539, 542 (1996)); *Restatement (Second) of Agency*, § 228(2) (1958) (“Conduct of a servant is not within the

¹⁰ So too for the claims of intentional infliction of emotional distress asserted in the *Weiss* and *DePalma* Complaints. Although purporting to be intent-based claims, they rest on the same conclusory allegations as the negligence-based claims. *Weiss* Complaint, Count I, ¶¶ 68-69 (alleging that Harvard “knew or should have known that Defendant Lodge was engaging in the heinous activity described herein” and “is responsible for that conduct under the doctrine of respondeat superior”); *DePalma* Complaint, Count IV, ¶¶ 66, 68 (alleging that Harvard “negligently allow[ed]” Lodge “to have unfettered access to the morgue” and “negligently failed to properly vet, hire, train and supervise” him).

scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master”).

Plaintiffs’ claims that Harvard is responsible for Lodge’s conduct fail to establish at least two of these essential elements. First, Plaintiffs certainly do not, and could not, allege that Lodge was motivated by an intent to benefit Harvard. As the SJC has held: “The fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer’s business.” *Id.* at 640 (citing *Restatement (Second) of Agency* § 235 comment c). Lodge’s alleged criminal conduct perfectly exemplifies the kind of “outrageous or abnormal” behavior that was not “actuated by an intent to perform” HMS’s work. *See, e.g., Berry*, 488 Mass. at 638 (police firearms instructor was not acting in the interests of his employer by “driving fast toward the picnic table, behind the storage container where officers were present, slamming on his brakes, and skidding toward the officers”); *Merlonghi v. United States*, 620 F.3d 50, 56 (1st Cir. 2010) (affirming dismissal of complaint where computer forensics specialist employed to aid in criminal investigations was not acting within scope of his employment when, on his way home from work, he engaged in car chase, unholstered his gun, made threatening gestures, and drove in a dangerous manner, striking a motorcyclist with his government-owned vehicle); *Doe v. Purity Supreme, Inc.*, 422 Mass. 563, 568 (1996) (assistant store manager’s rape of fellow employee was not “furthering the interests of the employer”); *Clickner*, 422 Mass. at 543 (actions of an employee who played golf and attended a function where he consumed enough beer to render him intoxicated were “in the furtherance of his own agenda” rather than employer’s); *Carter-Galica v. Town of Warren*, 76 Mass. App. Ct. 1134, 2010 WL 2160313 (2010) (affirming dismissal of complaint against town-employer where a police officer was acting “from purely personal motives . . . in no way connected with the employer’s interests” when he desecrated a decedent’s body at the death scene, then distributed photographs of the body captioned with racial and

ethnic slurs); *Timpson v. Transamerica Ins. Co.*, 41 Mass. App. Ct. 344, 347-50 (1996) (football player's sexual harassment of female reporter in locker room was not motivated to serve his employer's interest).

Second, Plaintiffs do not allege, and could not allege, that Lodge's alleged conduct was "of the kind" he was "hired to perform." *Berry*, 488 Mass. at 638; see *Burroughs v. Commonwealth*, 423 Mass. 874, 877-78 (National Guard member was not engaged in kind of conduct he was employed to perform while bartending because activity was "neither explicitly nor implicitly ordered or even requested by his supervisors"); *Doe v. Purity Supreme, Inc.*, 422 Mass. 563 at 568 (1996); *Timpson*, 41 Mass. App. Ct. at 347-50. HMS plainly did not employ Lodge to steal and sell body parts on the black market.

Plaintiffs' failure to allege facts sufficient to plausibly show that Lodge was acting within the scope of his employment requires the dismissal of each the Complaints that attempts to hold Harvard, Cicchetti and Fay vicariously liable for Lodge's actions.

VI. CONCLUSION

The Massachusetts Legislature has made the policy judgment that to advance medical education and research, operators of anatomical gift programs shall be immune from suit where they have acted in good faith. Plaintiffs cannot plausibly show that Harvard, Cicchetti or Fay failed to do so. Moreover, under long-established principles of Massachusetts law, Harvard cannot be held vicariously liable for Lodge's alleged criminal actions because HMS did not employ Lodge to steal and sell body parts and his conduct could not conceivably be alleged to benefit Harvard. The Court, therefore, should dismiss the claims against Harvard, Cicchetti and Fay.

**PRESIDENT & FELLOWS OF HARVARD
COLLEGE, MARK F. CICCETTI, and
TRACEY FAY**

By their attorneys,

/s/ Martin F. Murphy

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Dated: November 1, 2023

CERTIFICATE OF SERVICE

I, Martin F. Murphy, hereby certify that this document was served by email on counsel for all parties of record on November 1, 2023.

/s/ Martin F. Murphy
Martin F. Murphy

Appendix A

Claims Against Harvard		
Cause of Action	Cases	No. of Cases
Negligence	MacTaggart, Wilder, Weiss, Ray, Johnson, DePalma, Brophy, Beckett, Lombardi	9
Negligent Infliction of Emotional Distress	MacTaggart, Wilder, Ray, DePalma, Brophy, Beckett, Lombardi	7
Tortious Interference with Remains/ Dead Body/Corpse/Wrongful Autopsy	Wilder, Johnson, Beckett, DePalma, Weiss, Brophy	6
Breach of Fiduciary Duty	MacTaggart, Wilder, Brophy, Beckett, Lombardi	5
Respondeat Superior Liability	MacTaggart, Johnson, DePalma, Lombardi	4
Breach of Contract	Johnson, Brophy, DePalma, Lombardi	4
Equitable (Injunctive and/or Declaratory Relief)	MacTaggart, Wilder, DePalma, Beckett, Lombardi	5
Unjust Enrichment	Wilder, Johnson, Beckett	3
Intentional Infliction of Emotional Distress	Weiss, DePalma	2
Negligent Hiring, Supervision, and/or Retention	Weiss, Johnson	2
Reckless Infliction of Emotional Distress	Johnson	1
Violation of M.G.L. c. 93A, § 2	Johnson	1

Appendix A (cont.)

Claims Against Cicchetti and Fay		
Negligence	MacTaggart, Wilder, Beckett, Lombardi	4
Negligent Infliction of Emotional Distress	MacTaggart, Wilder, Beckett	4
Respondeat Superior Liability	MacTaggart	1
Breach of Fiduciary Duty	Wilder, Beckett	2
Tortious Interference with Remains	Wilder, Beckett	2

INDEX OF EXHIBITS
TO CONSOLIDATED MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Exhibit 1: Harvard Anatomical Gift Program & Federal Investigation Frequently Asked QuestionsE.1

Exhibit 2: Letter Sent from HMS to Anatomical Donors’ Next of Kin..... E.17

Exhibit 3: HMS Statement E.20

Exhibit 4: News Release from U.S. Attorney’s Office, Middle District of Pennsylvania E.24

Exhibit 5: Indictment of Cedric Lodge and Others E.28

Exhibit 6: Mandate of the First Circuit Court of Appeals in *Favaloro v. President and Fellows of Harvard College, et. al.*.....E.44

Exhibit 7: Transcript of Hearing on Motion to Dismiss in in *Favaloro v. President and Fellows of Harvard College, et. al.*.....E.47

EXHIBIT 1

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

HMS Anatomical Gift Program & Federal Investigation

Anatomical Gift Program: General Information

What is the Anatomical Gift Program?

The Anatomical Gift Program is an altruistic, whole-body donation program in which individuals can donate their bodies to Harvard Medical School to advance medical education and research following their death. Each year, these generous donations support the teaching of medical and dental students, postgraduate physicians, and students in related disciplines. Private donation is the sole source of these precious educational and research resources.

How long has the program existed?

HMS has had an anatomical gift program under various names since at least the 1960s.

Why does HMS need an Anatomical Gift Program? What role does it serve in medical education?

The study of the human body in medical schools is an invaluable and indispensable part of medical education and research. Learning anatomy through the dissection of human cadavers continues to be a critical and profound part of a medical student's training and transition to becoming a physician-healer. Our medical and dental students are deeply respectful of and grateful for the anatomical donors, and each year they hold a private memorial service to honor the donors at the conclusion of their studies.

Does HMS receive cadavers from any sources outside of the Anatomical Gift Program?

No, private donation is the only source.

Do other medical schools have similar programs?

Yes, nearly every medical school in the U.S. has an anatomical gift (or willed/donated body) program.

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

Are there costs associated with participation in the program?

Harvard Medical School pays a stipend directly to the funeral home to defray transportation costs within Massachusetts, as well as to reimburse for any necessary permits and authorizations, including the certified copy of the death certificate. The donor's estate is responsible for any costs charged by the funeral director that exceed the stipend paid by HMS. After donated remains have been used for medical education and teaching, HMS carries out the disposition of the remains in accordance with the donor's directives on the Instrument of Anatomical Gift. The options available are to: 1) Reclaim the remains at the expense of the estate or family for private burial. 2) Request that HMS arrange for cremation, which is conducted offsite at a facility approved by the Massachusetts Department of Environmental Protection. Cremated remains can be returned to the donor's designee, picked up by the donor's designee at HMS, or buried in a registered grave at Pine Hill Cemetery in Tewksbury, Massachusetts, at HMS' expense. A memorial service is held every fall to honor donors buried at Pine Hill Cemetery.

Are anatomical donors or designees paid?

No. Massachusetts law prohibits payment for a body donation.

What is the difference between whole-body donation and organ and tissue donation?

Whole-body donation involves a donor choosing to give their whole body, including organs and tissues, to a research university for the advancement of medical education and research. Organ and/or tissue donation focuses on recovering organs and tissues from registered donors to gift to individuals on transplant waiting lists. The Anatomical Gift Program at HMS is a whole-body donation program.

Do you have any background information or demographics on the anatomical donors at HMS?

Anatomical gift donors at HMS represent a range of ages, backgrounds, and every conceivable walk of life. We have an equal number of men and women donors. The majority of donors are White, and we also have some donors who are Black, African American, Asian, and Pacific Islanders.

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

Anatomical Gift Program: Process and Procedures

How do individuals enroll in the HMS Anatomical Gift Program?

In accordance with the Massachusetts Uniform Anatomical Gift Act, individuals can arrange for the donation of their remains by executing the Instrument of Anatomical Gift (pdf). For the Instrument to be valid, the individual must be of sound mind and over 18 years of age, and the Instrument must be signed by two witnesses. The original Instrument is sent to Harvard Medical School, after which the individual will be registered in the program and will receive their letter of acknowledgment and donor card. Individuals may withdraw their donation at any time by notifying the Anatomical Gift Program in writing of their change of intention. For more information, individuals considering donating their remains to the HMS Anatomical Gift Program can email agp@hms.harvard.edu or call 617-432-1735.

How does a registered donor unenroll in the Anatomical Gift Program?

Registered donors who wish to withdraw from the program should send their request in writing to agp@hms.harvard.edu or by mail to: Anatomical Gift Program, Harvard Medical School, Tosteson Medical Education Center Suite 384, 260 Longwood Avenue, Boston, MA 02115. Once the written request is received, the Anatomical Gift Program will send a formal rescind letter to the donor and update our records accordingly.

What happens when a registered anatomical donor dies?

At the time of the donor's death, the person responsible for making final arrangements calls Harvard Medical School ASAP at 617-432-1735 to determine if the donation can be accepted. (Although most donors are accepted, HMS reserves the right to decline bodies not suitable for medical study or other reasons.) HMS must receive the donor remains within 24 hours after death, unless a specific exemption is granted. Once a gift is accepted, a funeral director is chosen by the family and consults with HMS about the transportation of the body to HMS. The donor's remains will stay at HMS for a period of up to approximately 24 months, during which time the remains will be used for medical education and research.

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

Are anatomy labs and donor remains at HMS used by any other education programs?

In addition to educating students at Harvard Medical School and Harvard School of Dental Medicine, the anatomy labs and donor remains at HMS are used for educational purposes by physician assistants, residents, and physical therapists in a limited number of accredited programs representing Beth Israel Deaconess Medical Center, Brigham and Women's Hospital, Massachusetts College of Pharmacy and Health Sciences, Massachusetts General Hospital (MGH), MGH Institute for Health Professions, and Simmons University.

What happens to a donor's remains once studies are complete?

When studies are complete within a period of up to 24 months, Harvard Medical School carries out the disposition of the remains as directed by the donor on the Instrument of Anatomical Gift. The options available to the donor's designee are to: 1) Reclaim the remains at the expense of the estate or family for private burial. 2) Request that HMS arrange for cremation, which is conducted offsite at a facility approved by the Massachusetts Department of Environmental Protection. Cremated remains can be returned to the donor's designee, picked up by the donor's designee at HMS, or buried in a registered grave at Pine Hill Cemetery in Tewksbury, Massachusetts, at HMS' expense. A memorial service is held every fall to honor donors buried at Pine Hill Cemetery.

There have been various efforts and proposals around the country that would put in place new policies or regulations regarding body donation programs at medical schools. What would efforts like this mean for HMS?

We await the report of an external expert panel that will provide constructive, actionable feedback and recommendations on best practices so that we can ensure the integrity and security of our anatomical gift program. We would welcome the opportunity to engage in discussions with the appropriate authorities on whether regulations or other strategies might best achieve these aims.

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

Former Employee Cedric Lodge

How long did he work at HMS?

Cedric Lodge was hired on February 6, 1995, and was terminated on May 6, 2023. During this time, he took two leaves of employment: from Sept. 1, 2021, to Feb. 27, 2022, and from Feb. 14, 2023, until his termination on May 6, 2023. Importantly, the unsealed federal indictment from the U.S. Attorney's Office for the Middle District of Pennsylvania charges Lodge with the unlawful interstate transport of stolen human remains during a specific timeframe – from “in or about 2018 through on or about August 16, 2022” – and not during the entirety of his employment at HMS.

Did he interact with donor families?

No, Cedric Lodge did not interact with donor families.

What was his role at HMS?

Cedric Lodge worked in the morgue as part of the Anatomical Gift Program at HMS. His responsibilities included preparing for and intaking anatomical donors' bodies, coordinating embalming, overseeing the storage and movement of cadavers to and from teaching labs, and, when studies were complete, preparing remains to be transported to and from the external crematorium and, when appropriate, for burial. While he has been referred to as Morgue Manager, he worked under the director of the AGP program and did not manage any other employees.

Was he employed anywhere else in the past that could be connected to this?

As noted above, Cedric Lodge was an employee of Harvard Medical School beginning February 6, 1995, until he was terminated on May 6, 2023. During this time, he took two leaves of employment: from Sept. 1, 2021, to Feb. 27, 2022, and Feb. 14, 2023, until his termination on May 6, 2023. Federal authorities have not indicated that he was employed anywhere else in the past that could be connected to his alleged criminal activity at HMS.

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

Federal Investigation

When did HMS find out about this alleged criminal act? Why are we just hearing about this now if the alleged criminal activity took place between 2018 and 2022?

HMS had no prior knowledge of these alleged criminal activities until we were initially contacted by the FBI in March 2023. Since then, we have been fully cooperating with the FBI as part of its investigation. The FBI requested that we maintain the investigation's confidentiality until an indictment was issued and arrests made. On June 14, the U.S. Attorney's Office for the Middle District of Pennsylvania announced the indictment and arrest of Cedric Lodge for the unlawful interstate transport of stolen human remains from "in or about 2018 through on or about August 16, 2022."

Why weren't donor families notified earlier?

After the indictment was unsealed on June 14 and we became fully aware of the circumstances of the case, HMS immediately communicated with donor families. We launched a webpage with available resources for family members at: <https://hms.harvard.edu/family-resources>. We set up an information and support line for donor families that can be reached at 617-432-1735. And on June 14, we expedited a letter to the documented next of kin to inform them of this alleged crime and share the available resources (we do not have email contacts for the next of kin, and consequently are relying on mailed letters).

If HMS learned about this in March, why was Cedric Lodge not terminated until May?

He was on leave at the time we learned about the investigation. His email and campus access were suspended immediately, and he was terminated when adequate information from the federal investigation was provided to us to justify his termination for cause.

What role has HMS taken in the investigation since the indictment was announced?

HMS is fully cooperating in the investigation and will continue to do so.

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

Is HMS facing any charges or being investigated?

Other than former employee Cedric Lodge, no one at HMS is facing any charges or is suspected of any wrongdoing. As stated in the indictment, these activities were carried out without the knowledge or permission of anyone else at HMS. Additionally, per the indictment, Lodge allegedly conspired with individuals who have no connection to Harvard in carrying out the activity.

Why was the indictment brought by the U.S. Attorney's Office for the Middle District of Pennsylvania?

The U.S. Attorney's Office for the Middle District of Pennsylvania, in coordination with other federal law enforcement authorities, conducted an extensive investigation that led to the charges in this case.

Where can I receive additional information about the criminal case?

Updated July 10, 2023

Please contact the U.S. Attorney's Office (USAO) Victim and Witness Unit at USAPAM.Victim.Information@usdoj.gov or 717-614-4249 to be added to the contact list for this case. The USAO will be providing families with updates about the criminal case.

HMS/Harvard Response

What steps has HMS taken since learning of these allegations?

We identified two top priorities and actions: 1) We immediately conducted an internal review to confirm that all anatomical donors' remains that should be on site currently at HMS are present and accounted for, and 2) We acted quickly to reach out to donor families, as well as to members of the HMS community, to provide information, resources, and supports (see below for the list of steps we have taken). Additionally, Harvard University has appointed an external panel of experts to evaluate our Anatomical Gift Program and morgue policies and practices, with the goal of providing constructive feedback and recommendations to improve security for the program and the generous whole-body donations it receives.

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

What steps has HMS taken with regard to notifying donor families?

We are deeply sorry for the pain and uncertainty caused by this troubling news. HMS pledges to engage and support family members during this distressing time. HMS has launched a webpage with available resources for family members at: <https://hms.harvard.edu/family-resources>. We have set up an information and support line for donor families that can be reached at 617-432-1735. On June 14, we expedited a letter to the documented next of kin to inform them of this alleged crime and share the available resources (we are relying on mailed letters because we do not have email contacts for the next of kin).

Why didn't HMS email donor family members?

We are relying on expedited mailed letters because the Anatomical Gift Program does not collect email contacts for the donors' next of kin.

What steps is Harvard taking going forward?

HMS is fully cooperating with the FBI and federal authorities in the investigation. We are committed to engaging with and supporting donors' families and to sharing any new information we may receive. We are also providing support to members of the HMS community. Harvard University has appointed an external panel of experts to evaluate our Anatomical Gift Program and morgue policies and practices, with the goal of providing constructive feedback and recommendations to improve security for the program and the generous whole-body donations it receives.

Information for Donor Families

What is Harvard doing to help donors' families?

On behalf of the faculty and staff of Harvard Medical School, we are deeply sorry for the pain and uncertainty caused by this troubling news. We pledge to engage with you and support you during this distressing time. HMS has launched a webpage with available resources for family members at: <https://hms.harvard.edu/family-resources>. We have set up an information and support line for donor families that can be reached at 617-432-1735. On June 14, we expedited a letter to the documented next of kin to inform them of this alleged crime and share the available resources

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

(we are relying on mailed letters because we do not have email contacts for the next of kin).

How can I find out if my loved one was impacted? Where can I get more information?

Updated June 27, 2023

Family members can call our information and support line for donor families at 617-432-1735. The individuals answering the phones have a list of Anatomical Gift Program donors, will ask you for the donor's name and month/year of death, and can disclose whether your loved one's remains were potentially impacted or not believed to be impacted based on information supplied by federal authorities and HMS' own records, particularly the logs showing when donor remains were sent to be cremated and when former HMS employee Cedric Lodge was on campus. This is the same information shared in the expedited letters sent on June 14 to the documented next of kin.

Federal authorities continue to investigate, and additional information may emerge. The U.S. Attorney's Office has also informed us it is not likely that positive identifications will ever be possible. Given the nature of the alleged crime, they have indicated that we may never know with certainty which donors in the "potentially impacted" category were in fact affected. If anyone believes they or a family member may have been affected by the conduct charged in the indictments and information, please contact the U.S. Attorney's Office Victim and Witness Unit at USAPAM.Victim.Information@usdoj.gov or 717-614-4249.

Who did HMS send letters to? If I received a letter, does it mean my loved one was impacted or confirmed to be a victim?

Updated June 27, 2023

On June 14, HMS mailed expedited letters to the documented next of kin for all anatomical donors over the last two decades. This is a much broader timeframe than what is included in the indictment ("in or about 2018 through on or about August 16, 2022") because we wanted to be transparent and cast a wide net to inform families about this incident. The letters disclose whether your loved one's remains were "potentially impacted" or "not believed to be impacted" based on information supplied by federal

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

authorities and HMS' own records, particularly the logs showing when donor remains were sent to be cremated and when former HMS employee Cedric Lodge was on campus. To be clear, it is our understanding that there is not enough evidence at this time to identify anyone's remains as being definitively impacted; we can only say whether they were "potentially impacted" or "not believed to be impacted" based on the information detailed above. The U.S. Attorney's Office has stated that they will continue to attempt to identify victims and contact as many of the victims' families affected by this case as possible. The U.S. Attorney's Office has also informed us it is not likely that positive identifications will ever be possible. Given the nature of the alleged crime, they have indicated that we may never know with certainty which donors in the "potentially impacted" category were in fact affected. If anyone believes they or a family member may have been affected by the conduct charged in the indictments and information, please contact the U.S. Attorney's Office Victim and Witness Unit at USAPAM.Victim.Information@usdoj.gov or 717-614-4249.

I did not receive a letter from HMS. How can I get one?

Updated July 10, 2023

The letters from HMS were mailed to documented next of kin. We have since shared the text of the letters on our website, which you can access [here](#). We are unable to provide letters to additional family members beyond next of kin listed by the donor on the form gifting their body. Instead, we direct you to the text of the letter available on our website.

My loved one's body was donated during the timeframe in the indictment (2018 through "on or about Aug. 16, 2022"). Why does the letter I received and/or the call I had with the counselor say that my loved one's remains are not believed to be impacted?

Updated June 27, 2023

The information included in the letters sent to anatomical donors' documented next of kin and used by counselors from our information and support center is based on details supplied by federal authorities in combination with HMS' own records, particularly the logs showing when donor remains were sent to be cremated and when former HMS employee

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

Cedric Lodge was on campus. While Cedric Lodge was employed by HMS during the whole timeframe identified in the indictment, he was not on campus from the beginning of September 2021 through the end of February 2022. Since he was not on campus and did not have access to donor remains sent to be cremated during those six months, we are communicating to certain families and next of kin that we do not believe their loved one's remains were impacted. Federal authorities continue to investigate, and additional information may emerge. The U.S. Attorney's Office has also informed us it is not likely that positive identifications will ever be possible. Given the nature of the alleged crime, they have indicated that we may never know with certainty which donors in the "potentially impacted" category were in fact affected. If anyone believes they or a family member may have been affected by the conduct charged in the indictments and information, please contact the U.S. Attorney's Office Victim and Witness Unit at USAPAM.Victim.Information@usdoj.gov or 717-614-4249.

Will you be able to identify specific anatomical donors who were impacted?

Updated June 27, 2023

The U.S. Attorney's Office has stated that they will continue to attempt to identify victims and contact as many of the victims' families affected by this case as possible. The U.S. Attorney's Office has also informed us it is not likely that positive identifications will ever be possible. Given the nature of the alleged crime, they have indicated that we may never know with certainty which donors in the "potentially impacted" category were in fact affected. If anyone believes they or a family member may have been affected by the conduct charged in the indictments and information, please contact the U.S. Attorney's Office Victim and Witness Unit at USAPAM.Victim.Information@usdoj.gov or 717-614-4249.

My loved one donated their organ(s) and/or tissues to a program that may or may not be affiliated with HMS (for example, the Harvard Brain Tissue Resource Center). Were their organ(s) and/or tissues impacted by the alleged criminal activity?

The Anatomical Gift Program at Harvard Medical School is a whole-body donation program, which means that people donate their entire body,

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

including organs and tissues. We do not accept donations of organs or tissues. Therefore, if your loved one donated a specific organ (such as a brain) or tissues for medical research, that donation must have been made to a separate program that has no connection to the Anatomical Gift Program at HMS and, therefore, would not have been impacted by the alleged criminal activity.

I have received the cremated remains for my loved one, who was an anatomical donor at HMS. Does HMS need the cremated remains back for evidence or can I move forward with burial?

Harvard Medical School does not expect that the government will need any cremated remains as evidence. If you have questions about the investigation, please contact the U.S. Attorney's Office Victim and Witness Unit at USAPAM.Victim.Information@usdoj.gov or 717-614-4249.

How can I be sure that the cremated remains I received belong to my loved one?

We have no indication that the cremated remains you received are anyone's but your loved one's. Our understanding from federal investigators is that while a donor's complete remains may not have been included in the container transported to the external crematorium, there is no indication that any other individual's remains were added to the container. Once the remains are transported to the crematory, the container is immediately labeled with a casket tag that includes the four-digit HMS donor identification number and the crematory identification number. These numbers stay with the container until it is placed in the cremation chamber, at which time the tag is then placed on the outside of the chamber. After the cremation is completed, a tag is placed inside the box of cremated remains with the cremation number. All of the paperwork is kept with the cremated remains. Two staff members from HMS retrieve the cremated remains and verify that all of the numbers match on all of the paperwork, the casket tag, the affidavit of cremation, and the crematory signature sheet (signing for the cremated remains). Once satisfied, HMS staff members sign the crematory verification form stating all of the numbers are correct. The cremated remains are then brought back to HMS, stored in a locked, fireproof cremated remains cabinet, and their location is changed in the database to reflect their storage in the morgue cremated remains cabinet. Depending on the donor's wishes, cremated remains are then returned to the donor's designee, picked up by the donor's designee at HMS, or buried in

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

a registered grave at Pine Hill Cemetery in Tewksbury, Massachusetts, at HMS' expense. A memorial service is held every fall to honor donors buried at Pine Hill Cemetery.

What are the next steps for families?

Families are encouraged to access the resources detailed above, including the resources webpage and information and support center line. Additionally, The U.S. Attorney's Office has and will continue to attempt to identify victims and contact as many of the victims' families affected by this case as possible. If anyone believes they or a family member may have been affected by the conduct charged in the indictments and information, please contact the U.S. Attorney's Office Victim and Witness Unit at USAPAM.Victim.Information@usdoj.gov or 717-614-4249.

Will you continue to communicate with families if/when you know more?

Updated July 10, 2023

HMS is committed to providing transparent information, resources, and support to donor families. We are collecting email and contact information for family members for whom we had no previous records. This will allow us to keep in touch if and when there is new information to share. We also encourage families to reach out to the U.S. Attorney's Office (USAO) Victim and Witness Unit at USAPAM.Victim.Information@usdoj.gov or 717-614-4249 to be added to the contact list for this case. The USAO will be providing families with updates about the criminal case.

Were donor remains allegedly stolen before or after students completed their anatomical studies?

Our understanding, based on information supplied by federal authorities and HMS' own records, is that the alleged thefts occurred after students completed their anatomical studies.

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

Are all anatomical donors' bodies/remains currently at HMS accounted for?

Yes, upon learning about the alleged criminal activity, HMS conducted a thorough review and can confirm that all anatomical donors' bodies/remains that should be at HMS are on site and accounted for.

How can I be confident in the security of the program going forward?

Investigators believe that what occurred was the result of an individual acting alone, without the knowledge or cooperation of anyone else at HMS or Harvard. HMS is dedicated to lifelong learning and to introspection, innovation, and growth, particularly in the face of challenge. These values drive our commitment to do all we can to prevent something like this from happening again. To that end, Harvard University has appointed an external panel of experts to evaluate our Anatomical Gift Program and morgue policies and practices, with the goal of providing constructive feedback and recommendations to improve security for the program and the generous whole-body donations it receives.

External Expert Panel

What is the purpose and scope of the panel?

Harvard University has appointed an external panel of experts to evaluate our Anatomical Gift Program and morgue policies and practices, with the goal of providing constructive feedback and recommendations to improve the security and integrity of the program and of the generous whole-body donations it receives.

Who are the members of the panel?

External experts who have agreed to serve on the panel include:

- Sally S. Aiken, MD, forensic pathologist and former (retired) chief of the Spokane County Medical Examiner's Office in Spokane, Washington, and former president of the National Association of Medical Examiners

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/frequently-asked-questions>

- Robert J. McKeon, MS, PhD, associate professor of cell biology and director of the Body Donor Program at Emory University School of Medicine
- Brandi Schmitt, MS, executive director of anatomical services at University of California Health and former interim director of the donated body program at UCLA David Geffen School of Medicine and curator of the donated body program at UC Davis School of Medicine

What is the timeline for the panel's work?

Updated Aug. 23, 2023: The external panel's work was underway by mid-June, following the announcement of the federal indictment, and a final written report is expected in October.

Will their report be made public?

Yes, we are committed to a transparent process and plan to share the panel's recommendations publicly.

EXHIBIT 2

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/resources-donor-families/text-letters-next-kin>

Letters Sent from HMS to Anatomical Donors' Next of Kin

What follows is the main wording from the letters that were sent via expedited mail on June 14, 2023 from the Dean of Harvard Medical School to the registered next of kin for anatomical donors who generously donated their bodies to the Harvard Medical School Anatomical Gift Program. Unfortunately, email addresses for next of kin are not documented in our system, so we had to rely on printed and mailed letters instead of email.

HMS is sharing this for transparency. While our records include up to two documented next of kin for each anatomical donor, we know that additional family members and loved ones are affected by this news and we want everyone to have access to the information, resources, and supports available.

I am profoundly saddened to report that today the U.S. Attorney's Office for the Middle District of Pennsylvania announced the indictment and arrest of Cedric Lodge, a former HMS employee, for the unlawful interstate transport of stolen human remains. Lodge worked in the morgue as part of the Anatomical Gift Program until HMS terminated his employment on May 6.

The indictment charges Lodge with the unlawful interstate transport of stolen human remains from "in or about 2018 through on or about August 16, 2022." We have been working with information supplied by federal authorities and examining our records, particularly the logs showing when donor remains were sent to be cremated and when Lodge was on campus, to try to determine which donors may have been impacted. *[In each letter, HMS then informed next of kin either that at this time we do not believe their loved one's remains were impacted, or that at this time we cannot rule out the possibility that their loved one's remains may have been impacted.]*

These alleged criminal acts are morally reprehensible and inconsistent with the standards that Harvard Medical School, our anatomical donors, and their loved ones expect and deserve. On behalf of the faculty and staff of Harvard Medical School, we are deeply sorry for the pain and uncertainty caused by this troubling news. We pledge to engage with you and support you during this distressing time.

HMS has created a webpage with available resources for family members and next of kin at: hms.harvard.edu/family-resources. In addition, we have set up a toll-free information and support center you can reach at 1-888-268-1129. This

<https://hms.harvard.edu/news-events/anatomical-gift-program-resources/resources-donor-families/text-letters-next-kin>

line is staffed by specially trained counselors who are currently available daily from 8 a.m. to 8 p.m., excluding holidays, and will do their best to answer your questions based on the information available at the time.

Additionally, the U.S. Attorney's Office has stated that they will continue to attempt to identify victims and contact as many of the victims' families affected by this case as possible. If anyone believes they or a family member may have been affected by the conduct charged in the indictments and information, please contact the U.S. Attorney's Office Victim and Witness Unit at usapam.victim.information@usdoj.gov or 717-614-4249.

An important and meaningful part of how all first-year medical and dental students learn human anatomy is through the dissection and examination of donor cadavers. As an HMS student myself, I learned anatomy in the same dissection laboratory used today. The enormous respect and gratitude I felt toward the donors and the deep reverence I held for the process of dissection remain present with me today. Learning anatomy transforms students from pre-meds to physician-healers; it is an experience that changes your heart and soul, forever. Those values are passed down every fall to our new students who, each year at the conclusion of their studies, hold a poignant, private memorial service to honor the donors.

As a learning community whose mission is to alleviate suffering and improve health and well-being for all, HMS is dedicated to introspection, innovation, and growth, particularly in the face of challenge. These values drive our commitment to do all we can to prevent something like this from happening again. To that end, Harvard University has appointed an external panel of experts to evaluate our Anatomical Gift Program and morgue policies and practices, with the goal of providing constructive feedback and recommendations to improve security for the program and for the generous whole-body donations it receives.

We owe it to you, as well as to our community, our profession, and our patients and their loved ones to ensure that HMS is worthy of the donors who have entrusted their bodies to us for the advancement of medical education and research. There is nothing more sacred and worthy of our attention and respect.

Sincerely,

George Q. Daley
Dean of the Faculty of Medicine
Harvard University

EXHIBIT 3

<https://hms.harvard.edu/about-hms/office-dean/messages/abhorrent-betrayal>

An abhorrent betrayal

June 14, 2023

Dear Members of the HMS and HSDM Communities:

It is with profound sadness and distress that we write to share with you that federal authorities have accused a former Harvard Medical School employee of having engaged in activities that are morally reprehensible.

Today the U.S. Attorney's Office for the Middle District of Pennsylvania announced the indictment and arrest of Cedric Lodge for the unlawful interstate transport of stolen human remains from "in or about 2018 through on or about August 16, 2022." Lodge worked in the morgue as part of the Anatomical Gift Program until HMS terminated his employment on May 6. Investigators believe that Lodge acted without the knowledge or cooperation of anyone else at HMS or Harvard. Lodge was indicted along with other individuals not affiliated with Harvard.

We have been working with information supplied by federal authorities and examining our own records, particularly the logs showing when donor remains were sent to be cremated and when Lodge was on campus, to try to determine which anatomical donors may have been impacted. Federal authorities continue to investigate, and additional information may emerge.

We are appalled to learn that something so disturbing could happen on our campus – a community dedicated to healing and serving others. The reported incidents are a betrayal of HMS and, most importantly, each of the individuals who altruistically chose to will their bodies to HMS through the Anatomical Gift Program to advance medical education and research.

We are so very sorry for the pain this news will cause for our anatomical donors' families and loved ones, and HMS pledges to engage with them during this deeply distressing time. We have established the following specifically for family members and next of kin:

<https://hms.harvard.edu/about-hms/office-dean/messages/abhorrent-betrayal>

- [Webpage with available resources for donor families and next of kin.](#)
- [Answers to frequently asked questions.](#)
- Toll-free information and support center staffed by specially-trained counselors, who are currently available daily from 8 a.m. to 8 p.m. at 1-888-268-1129.
- Letters to be sent today via expedited delivery to documented next of kin.

Additionally, the U.S. Attorney's Office has and will continue to attempt to identify victims and contact as many of the victims' families affected by this case as possible. If anyone believes they or a family member may have been affected by the conduct charged in these indictments and information, please contact the Victim and Witness Unit at USAPAM.Victim.Information@usdoj.gov or 717-614-4249.

Our hearts also ache for the members of our community who work, teach, and learn in our anatomy lab, particularly our students and our anatomy faculty. We encourage you to access the available resources and supports outlined on [this website for HMS and HSDM community members.](#)

An important and meaningful part of how all first-year medical and dental students learn human anatomy is through the dissection and examination of donor cadavers. As HMS students ourselves in the 1980s and early 1990s, we both learned anatomy in the same dissection laboratory used today. The enormous respect and gratitude we felt toward the donors and the deep reverence we held for the process of dissection remain present with us today. Learning anatomy transforms students from pre-meds to physician-healers; it is an experience that changes your heart and soul, forever. Those values are passed down every fall to our new students who, each year, at the conclusion of their studies, hold a poignant, private [memorial service](#) to honor the donors.

HMS prides itself on lifelong learning and is dedicated to introspection, innovation, and growth, particularly in the face of challenge. These values drive our commitment to do all we can to prevent something like this from happening again. To that end, Harvard University has appointed an external panel of experts to evaluate our Anatomical Gift Program and morgue policies and practices, with the goal of providing constructive feedback and recommendations to improve security for the program and for the generous whole-body donations it receives.

<https://hms.harvard.edu/about-hms/office-dean/messages/abhorrent-betrayal>

We owe it to ourselves, our community, our profession, and our patients and their loved ones to ensure that HMS is worthy of the donors who have entrusted their bodies to us for the advancement of medical education and research. There is nothing more sacred and worthy of our attention and respect.

Sincerely,

George Q. Daley
Dean of the Faculty of Medicine
Harvard University

Edward M. Hundert
Dean for Medical Education
Harvard Medical School

EXHIBIT 4

PRESS RELEASE

Six Charged With Trafficking In Stolen Human Remains

Wednesday, June 14, 2023

For Immediate Release

U.S. Attorney's Office, Middle District of Pennsylvania

SCRANTON - The United States Attorney's Office for the Middle District of Pennsylvania announced that Cedric Lodge, age 55, of Goffstown, New Hampshire, Katrina Maclean, age 44, of Salem, Massachusetts, Joshua Taylor, age 46, of West Lawn, Pennsylvania, Denise Lodge, age 63, of Goffstown, New Hampshire, and Mathew Lampi, age 52, of East Bethel, Minnesota, were indicted by a federal grand jury on conspiracy and interstate transport of stolen goods charges. Additionally, Jeremy Pauley, age 41, of Bloomsburg, Pennsylvania, was charged by Criminal Information, and Candace Chapman Scott, of Little Rock, Arkansas, was previously indicted in the Eastern District of Arkansas.

According to United States Attorney Gerard M. Karam, the indictments and information allege that a nationwide network of individuals bought and sold human remains stolen from Harvard Medical School and an Arkansas mortuary. The charges allege that from 2018 through 2022, Cedric Lodge, who managed the morgue for the Anatomical Gifts Program at Harvard Medical School, located in Boston, Massachusetts, stole organs and other parts of cadavers donated for medical research and education before their scheduled cremations. Lodge at times transported stolen remains from Boston to his residence in Goffstown, New Hampshire, where he and his wife, Denise Lodge, sold the remains to Katrina Maclean, Joshua Taylor, and others, making arrangements via cellular telephone and social media websites. At times, Cedric Lodge allowed Maclean and Taylor to enter the morgue at Harvard Medical School and examine cadavers to choose what to purchase. On some occasions, Taylor transported stolen remains back to Pennsylvania. On other occasions, the Lodges shipped stolen remains to Taylor and others out of state.

Maclean and Taylor resold the stolen remains for profit, including to Jeremy Pauley in the Middle District of Pennsylvania. Jeremy Pauley also purchased stolen human remains from Candace Chapman Scott, who stole remains from her employer, a Little Rock, Arkansas mortuary and crematorium. Scott stole parts of cadavers she was supposed to have cremated, many of which had been donated to and used for research and educational purposes by an area medical school, as well as the corpses of two stillborn babies who were supposed to be cremated and returned as cremains to their families. Scott sold the stolen remains to Pauley and shipped them to Pauley in the Middle District of Pennsylvania. Pauley sold many of the stolen remains he purchased to other individuals, including Matthew Lampi. Lampi and Pauley bought and sold from each other over an extended period of time and exchanged over \$100,000 in online payments.

"Some crimes defy understanding," said United States Attorney Gerard M. Karam. "The theft and trafficking of human remains strikes at the very essence of what makes us human. It is particularly egregious that so many of the victims here volunteered to allow their remains to be used to educate medical professionals and advance the interests of science and healing. For them and their families to be taken advantage of in the name of profit is appalling. With these charges, we are seeking to secure some measure of justice for all these victims.

I'd like to thank Harvard Medical School, which is also a victim here, for their cooperation in this investigation. Additionally, this prosecution would not be possible without the close cooperation and hard work of the Federal Bureau of Investigation, the U.S. Postal Inspection Service, and the United States Attorney's Offices in multiple districts, including the Eastern District of Arkansas. From the beginning, this has been a multi-jurisdictional investigation, and our two offices have worked side by side to bring justice for these victims."

"The defendants violated the trust of the deceased and their families all in the name of greed," said FBI Special Agent in Charge Jacqueline Maguire. "While today's charges cannot undo the unfathomable pain this heinous crime has caused, the FBI will continue to work tirelessly to see that justice is served."

"Today, the United States Attorney has announced charges against several individuals who used the United States mail to ship stolen human remains," said Christopher Nielsen, the Inspector in Charge of the Philadelphia Division of the Postal Inspection Service. "Robbing families of the remains of their loved ones is an unconscionable act and confounds our collective sense of decency. Using the United States mail to facilitate the theft and shipment of human remains is a federal crime and the Postal Inspection Service will

do everything in its power to stop it. I want to thank our law enforcement partners and the United States Attorney for working with the Postal Inspection Service to stop this group, and I hope our efforts bring a small amount of relief to the victimized families.”

The United States Attorney's Office has and will continue to attempt to identify and contact as many of the victims and victims' families affected by this case as possible. If anyone believes they or a family member may have been affected by the conduct charged in these indictments and information, please contact our Victim and Witness Unit at USAPAM.Victim.Information@usdoj.gov or (717) 614-4249.

The case was investigated by the Federal Bureau of Investigation, the United States Postal Inspection Service, the East Pennsboro Township Police Department, and the Cumberland County District Attorney's Office. Assistant U.S. Attorney Sean A. Camoni is prosecuting the case.

The maximum penalty under federal law for this offense is 15 years of imprisonment, a term of supervised release following imprisonment, and a fine. A sentence following a finding of guilt is imposed by the Judge after consideration of the applicable federal sentencing statutes and the Federal Sentencing Guidelines.

Indictments and Criminal Informations are only allegations. All persons charged are presumed to be innocent unless and until found guilty in court.

###

Updated June 15, 2023

Component

[USAO - Pennsylvania, Middle](#)

Related Content

PRESS RELEASE

U.S. Attorney's Office For The Middle District Of Pennsylvania Celebrates Funding Announced During Domestic Violence Awareness Month

October 31, 2023

PRESS RELEASE

Inmate Sentenced To 37 Months' Imprisonment For Assault

October 11, 2023

PRESS RELEASE

Lackawanna County Man Charged With Commercial Bribery And Tax Fraud Offenses

October 5, 2023



Middle District of Pennsylvania

William J. Neaton Federal Building and Courthouse

235 N. Washington Avenue, Suite 311

Scranton, PA 18503

Email USAO-MDPA



Telephone: (570) 348-2800

Fax: (570) 348-2037

TTY: (570) 341-2077

EXHIBIT 5

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CR. NO. 4:23-CR-159
	:	
v.	:	
	:	(Chief Judge Brann)
CEDRIC LODGE,	:	
KATRINA MACLEAN,	:	
JOSHUA TAYLOR and	:	
DENISE LODGE,	:	
Defendants.	:	

INDICTMENT

THE GRAND JURY CHARGES:

COUNT 1
18 U.S.C. § 371
(Conspiracy)

FILED
SCRANTON

JUN 13 2023

PER JKC
DEPUTY CLERK

I. Background

At times material to the Indictment:

A. Relevant Individuals and Entities

1. Harvard Medical School (“HMS”), located in Boston

Massachusetts, was the graduate medical school of Harvard University, a private, non-profit educational institution.

2. CEDRIC LODGE resided in Goffstown, New Hampshire, and was employed by Harvard Medical School as the Morgue Manager.

3. DENISE LODGE was married to CEDRIC LODGE and resided in Goffstown, New Hampshire.

4. KATRINA MACLEAN resided in Salem, Massachusetts.

5. Kat's Creepy Creations was a studio and store located in Peabody, Massachusetts, and owned and operated by KATRINA MACLEAN.

6. JOSHUA TAYLOR resided in West Lawn, Pennsylvania.

7. Jeremy Pauley resided in Enola, Pennsylvania, and Bloomsburg, Pennsylvania, both within the Middle District of Pennsylvania.

B. Harvard Medical School Morgue Operations

8. HMS utilizes human cadavers in the regular course of teaching its students.

9. Cadavers are voluntarily donated by individuals who complete an agreement with HMS through the Anatomical Gifts Program.

10. When HMS is finished using the donated cadavers, the donor's remains are typically cremated at a crematorium in Roslindale,

Massachusetts, and are either returned to the donor's family or laid to rest in a cemetery in Tewksbury, Massachusetts, maintained for that purpose.

11. Donors may have elected to specify the final disposition of their remains as part of their donation agreement. If a donor specified that their remains should be returned to their next of kin after cremation, HMS turned over the donor's cremains to the specified family member.

12. Harvard Medical School maintained an onsite morgue facility where donated cadavers were stored until they were used for education, teaching, or research purposes, and again when the school was finished with the cadaver to await final disposition.

13. Harvard Medical School documented the identities of donated cadavers and maintained a database and records associated with each cadaver. HMS assigned each donated body an identification number and identification tags were affixed to the body and the bag in which it was stored. In preparation for final disposition, Harvard Medical School employees, including the Morgue Manager, confirmed

the identity of each cadaver prior to cremation by viewing any identifying marks, if still visible, and assigned identification number.

14. Employees of Harvard Medical School are not permitted to remove, keep, or sell any human remains, in whole or in part, belonging to a donated cadaver.

II. The Conspiracy and its Objects

15. From in or about 2018, the exact date being unknown to the Grand Jury, and continuing thereafter until on or about March 7, 2023, in the Middle District of Pennsylvania, and elsewhere, the defendants,

**CEDRIC LODGE,
KATRINA MACLEAN,
JOSHUA TAYLOR, and
DENISE LODGE,**

knowingly, intentionally, and willfully conspired, combined, confederated, and agreed with Jeremy Pauley and other persons both known and unknown to the Grand Jury, to unlawfully transport, transmit, and transfer, and cause to be transported, transmitted, and transferred in interstate commerce from Boston, Massachusetts to New Hampshire and Pennsylvania, stolen goods, wares and merchandise, that is, human remains, of the value of \$5,000 or more, knowing the

same to have been stolen, converted, and taken by fraud, in violation of Title 18, United States Code, Section 2314.

16. The object of the conspiracy was for the conspirators to profit from the interstate shipment, purchase, and sale of stolen human remains.

III. Manner and Means

The object of the conspiracy was accomplished, in part, by the following manner and means:

17. CEDRIC LODGE was employed as Morgue Manager at Harvard Medical School and, as such, had access to the morgue and the donated cadavers stored in the morgue.

18. At times, CEDRIC LODGE stole dissected portions of donated cadavers, including, for example, heads, brains, skin, bones, and other human remains, without the knowledge or permission of HMS, and removed those remains from the morgue in Massachusetts and transported them to his residence in New Hampshire.

19. CEDRIC LODGE and DENISE LODGE communicated with others, including KATRINA MACLEAN and JOSHUA TAYLOR,

through internet social media websites and cellular telephones regarding the sale of stolen human remains.

20. CEDRIC LODGE and DENISE LODGE sold stolen human remains to KATRINA MACLEAN, JOSHUA TAYLOR, and others, and sometimes shipped those remains through the United States Postal Service to Pennsylvania and elsewhere.

21. At times, CEDRIC LODGE used his access to the morgue to allow KATRINA MACLEAN, JOSHUA TAYLOR, and others to enter the morgue and choose what remains to purchase, after which, CEDRIC LODGE, KATRINA MACLEAN, or JOSHUA TAYLOR would remove the stolen remains and transport them elsewhere.

22. KATRINA MACLEAN sold human remains stolen in this manner to buyers in multiple states, including Jeremy Pauley, in the Middle District of Pennsylvania, and shipped or transported the stolen human remains to those buyers. MACLEAN also stored and sold stolen remains at Kat's Creepy Creations.

23. JOSHUA TAYLOR bought and caused stolen human remains to be shipped to him in Pennsylvania from New Hampshire,

transported stolen human remains from Massachusetts to Pennsylvania, and sold and shipped stolen human remains to buyers, including Jeremy Pauley, in the Middle District of Pennsylvania.

IV. Overt Acts

In furtherance of the conspiracy and to effect the objects of the conspiracy, the following overt acts, among others, were committed in the Middle District of Pennsylvania and elsewhere:

24. On multiple occasions in 2018 and 2019, including on or about April 15, 2019, DENISE LODGE communicated with Individual 1, who resided in Montgomery, Pennsylvania, in the Middle District of Pennsylvania, and agreed to sell him human remains stolen from Harvard Medical School by CEDRIC LODGE. DENISE LODGE shipped the stolen human remains from Manchester, New Hampshire, to Montgomery, Pennsylvania, in a package bearing tracking number ending 3423 03.

25. In or about October 2020, KATRINA MACLEAN agreed to purchase two dissected faces for \$600 from CEDRIC LODGE, and they

agreed to meet at 1:00 p.m. on or about October 28, 2020, at the Harvard Medical School morgue to conduct the transaction.

26. In or about June and July 2021, KATRINA MACLEAN, in Massachusetts, shipped human skin to Jeremy Pauley, in Pennsylvania, and engaged his services to tan the skin to create leather. On or about July 31, 2021, Pauley sent a photograph of the leather and Maclean agreed to provide Pauley with human skin in lieu of monetary payment. KATRINA MACLEAN then contacted CEDRIC LODGE and inquired about obtaining human skin to send to “the dude I sent the chest piece to tan.” CEDRIC LODGE agreed to look for skin at HMS for Maclean to send to Pauley.

27. On or about August 15, 2021, Jeremy Pauley shipped the tanned human skin from the Middle District of Pennsylvania to KATRINA MACLEAN, in Massachusetts.

28. On or about September 20, 2021, Maclean shipped human skin from Massachusetts to Jeremy Pauley in the Middle District of Pennsylvania, in payment for his services. A few days later, Maclean

contacted Pauley to confirm the shipment arrived because she “wanted to make sure it got to you and I don’t expect agents at my door.”

29. Between on or about September 3, 2018, through July 12, 2021, JOSHUA TAYLOR transferred 39 electronic payments to PayPal account Twiam@yahoo.com, operated by DENISE LODGE, totaling \$37,355.56, in payment for human remains stolen by CEDRIC LODGE from Harvard Medical School. For example, on May 19, 2019, Taylor sent DENISE LODGE \$1,000 with a memo that read, “head number 7.” On November 20, 2020, Taylor sent DENISE LODGE \$200 with a memo that read, “braiiiiiiins.”

30. On or about October 19, 2021, Jeremy Pauley transferred \$8,800 in United States currency to KATRINA MACLEAN via PayPal in payment for stolen human remains.

31. Jeremy Pauley transferred 25 payments totaling \$40,049.04 in United States currency to JOSHUA TAYLOR via PayPal, including \$3,500 on April 1, 2021, \$8,250 on October 7, 2021, and \$9,000 on January 13, 2022.

All in violation of Title 18, United States Code, Section 371.

THE GRAND JURY FURTHER CHARGES:

COUNT 2

18 U.S.C. §§ 2314, 2

(Interstate Transport of Stolen Goods, Aid and Abet)

From in or about 2018 through on or about August 16, 2022,
within the Middle District of Pennsylvania and elsewhere, the
defendant,

CEDRIC LODGE,

did unlawfully transport, transmit, and transfer in interstate
commerce, and did aid, abet, induce, and procure the transportation,
transmission, and transfer of, stolen goods, wares, and merchandise,
that is, human remains, of the value of \$5,000 or more, knowing the
same to have been stolen, converted, and taken by fraud.

In violation of Title 18, United States Code, Sections 2314 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 3

18 U.S.C. §§ 2314, 2

(Interstate Transport of Stolen Goods, Aid and Abet)

From on or about July 22, 2021, through on or about October 19, 2021, within the Middle District of Pennsylvania and elsewhere, the defendant,

KATRINA MACLEAN,

did unlawfully transport, transmit, and transfer in interstate commerce, and did aid, abet, induce, and procure the transportation, transmission, and transfer of, stolen goods, wares, and merchandise, that is, human remains, of the value of \$5,000 or more, knowing the same to have been stolen, converted, and taken by fraud.

In violation of Title 18, United States Code, Sections 2314 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 4

18 U.S.C. §§ 2314, 2

(Interstate Transport of Stolen Goods, Aid and Abet)

From in or about September 2018 through in or about July 2021,
within the Middle District of Pennsylvania and elsewhere, the
defendant,

JOSHUA TAYLOR,

did unlawfully transport, transmit, and transfer in interstate
commerce, and did aid, abet, induce, and procure the transportation,
transmission, and transfer of, stolen goods, wares, and merchandise,
that is, human remains, of the value of \$5,000 or more, knowing the
same to have been stolen, converted, and taken by fraud.

In violation of Title 18, United States Code, Sections 2314 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 5

18 U.S.C. §§ 2314, 2

(Interstate Transport of Stolen Goods, Aid and Abet)

From in or about 2018 through on or about March 13, 2020, within the Middle District of Pennsylvania and elsewhere, the defendant,

DENISE LODGE,

did unlawfully transport, transmit, and transfer in interstate commerce, and did aid, abet, induce, and procure the transportation, transmission, and transfer of, stolen goods, wares, and merchandise, that is, human remains, of the value of \$5,000 or more, knowing the same to have been stolen, converted, and taken by fraud

In violation of Title 18, United States Code, Sections 2314 and 2.

FORFEITURE ALLEGATION

The allegations contained in Counts 1 through 5 of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461.

Upon conviction of the offenses in violation of Title 18, United States Code, Section 371, and Title 18, United States Code, Section 2314, the defendants,

**CEDRIC LODGE,
KATRINA MACLEAN,
JOSHUA TAYLOR, and
DENISE LODGE,**

shall forfeit to the United States of America, pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461(c), any property, real or personal, which constitutes or is derived from proceeds traceable to the offense.

If any of the property described above, as a result of any act or omission of the defendant:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited with, a third

party;

- c. has been placed beyond the jurisdiction of the court;
- d. has been substantially diminished in value; or
- e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c).

All pursuant to Title 18, United States Code, Section 981(a)(1)(C), and Title 28, United States Code, Section 2461(c).

A TRUE BILL

GERARD M. KARAM
United States Attorney



SEAN A. CAMONI
Assistant United States Attorney


FOREPERSON

6-13-23
Date

EXHIBIT 6

JSC CMA
John Lindsay
05 11594

MANDATE
United States Court of Appeals
For the First Circuit

No. 07-1187

GERALDINE FAVALORO,

Plaintiff, Appellant,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, ET AL,

Defendants.

Before

Torruella, Lynch and Lipez,
Circuit Judges.

JUDGMENT

Entered: June 12, 2007

This is an appeal from an order of the district court, entered December 19, 2005, granting the motions to dismiss filed by Harvard College and John Gentile. Appellant's complaint alleged the possible mishandling of the remains of her mother, who had arranged to have her body donated to Harvard, upon her death, under the Massachusetts Anatomical Gift Act. Mass. Gen. Laws ch. 113. The district court determined that both Harvard and Mr. Gentile, a licensed funeral director hired by Harvard, were covered by the statutory provision immunizing persons from liability for actions taken under the statute in good faith. The court viewed the complaint against the defendants as amounting to no more than assertions of negligence unaccompanied by allegations of bad faith. The court's decision, based on its interpretation of the Massachusetts Anatomical Gift Act, is fully supported by the subsequent decision of the Massachusetts Supreme Judicial Court in Carey v. New England Organ Bank, 446 Mass. 270, 843 N.E.2d 1070 (2006), which analyses the state statute in depth.

Accordingly, the order of dismissal is affirmed and Mr.

Gentile's motion for summary disposition is granted. 1st Cir. R.
27.0(c).

By the Court:

Richard Cushing Donovan, Clerk.

**Certified and Issued as Mandate
under Fed. R. App. P. 41.**

Richard Cushing Donovan, Clerk



Deputy Clerk

Date: 8/4/07

By: **JULIE GREGG**
Operations Manager.

[cc: David Charlip, Esq., Lisa DeBrosse Johnson, Esq.,
Edward Leibensperger, Esq., Melissa Nott, Esq., Douglas Alexander
Robertson, Esq., Anthony Brighton, Esq., William Smith, Esq.,
William Ahern Jr., Esq., MandiJo Hanneke, Esq.,
Dona Feeney, Esq., Andrew Schulman, Esq.]

EXHIBIT 7

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GERALDINE FAVALORO,
Plaintiff, Civil Action No. 05-11594-RCL
V. December 19, 2005, 3:17 p.m.
PRESIDENT AND FELLOWS OF
HARVARD COLLEGE, ET AL,
Defendants.

TRANSCRIPT OF MOTION HEARING
BEFORE HONORABLE REGINALD C. LINDSAY
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

DEBRA M. JOYCE, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
1 Courthouse Way, Room 5204
Boston, MA 02210
617-737-4410

1 APPEARANCES:

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FOR BAYVIEW CREMATORY:

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Reginald C. Lindsay, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on December 19, 2005.)

THE CLERK: Civil action 05-11594, Geraldine Favaloro v. Harvard College.

THE COURT: All right. Please, may I have appearances?

MR. CHARLIP: David Charlip and Lisa Johnson for the plaintiffs.

THE COURT: One more time?

MR. CHARLIP: David Charlip, Lisa Johnson for the plaintiffs.

THE COURT: Thank you.

MR. ROBERTSON: Hi. If it please the Court. My name is Doug Robertson. I'm from Martin Magnuson. I'm here for Mr. Gentile.

MR. LEIBENSPERGER: Good afternoon. Edward Leibensperger, Lisa Nott from William Emery for Harvard University.

THE COURT: Do you see I have gotten you a discovery master?

MR. LEIBENSPERGER: Yes, we saw the order. Thank

1 you. Appreciate it, your Honor.

2 THE COURT: Okay.

3 MR. SMITH: Your Honor, William Smith. And I've
4 just filed my appearance today as co-counsel for Bayview
5 Crematory, LLC and Linda Stokes as Trustee.

6 THE COURT: Okay.

7 MS. FEENEY: Good afternoon, your Honor. Donna
8 Feeney as co-counsel for Bayview.

9 MR. AHERN: Good afternoon, your Honor. William
10 Ahern. I represent Linda Stokes as Trustee of Dekes Realty
11 Trust.

12 THE COURT: It's Ahern, is it?

13 MR. AHERN: Yes, your Honor.

14 THE COURT: I have two motions, one to remand and
15 one to dismiss. Do I not?

16 MR. LEIBENSPERGER: Your Honor, I believe you've
17 already decided the remand motion, denying it. So I believe
18 we're here on the motion to dismiss.

19 THE COURT: I did?

20 MR. LEIBENSPERGER: Yes.

21 THE COURT: When did I do that?

22 MR. LEIBENSPERGER: It's been at least a month.

23 MR. CHARLIP: There was an electronic order, but I
24 guess I didn't see a written order.

25 THE COURT: I guess I didn't intend to do one.

1 MR. CHARLIP: That explains that.

2 THE COURT: If I intended to give you a written
3 order, I think I would have done it at the time I did the
4 electronic order, and the electronic order would be all I
5 intended.

6 Okay. Then I have the motion to dismiss.

7 MR. LEIBENSPERGER: Your Honor, you have motions to
8 dismiss, I believe, from each of the defendants; but on behalf
9 of Harvard, I'd like to start the argument.

10 THE COURT: Okay.

11 MR. LEIBENSPERGER: Your Honor, this case -- I'm
12 going to make three points as an outline and then come back;
13 but the three points are the following: Harvard is here as a
14 party to this case because in its medical school it runs an
15 Anatomical Gifts Program. And so this case is about the
16 application of the Uniform Anatomical Gifts Act in
17 Massachusetts, which Massachusetts has adopted, Chapter 113, to
18 Harvard's conduct of its Anatomical Gifts Program.

19 As your Honor knows, it arises out of a claim by
20 the plaintiffs -- on behalf of this plaintiff and a punitive
21 class of plaintiffs that remains of individuals who had donated
22 their bodies to Harvard Medical School when they were then sent
23 for cremation to Bayview Crematory in New Hampshire. There's
24 an allegation that those remains were mishandled and that
25 Bayview was unlicensed and so forth with respect to that.

1 Now, Harvard's role in this, as I said, was to run
2 an Anatomical Gifts Program. It did so using bodies in
3 accordance with the donor's understanding, and done with use of
4 the body, turning it over, the body, to a licensed funeral
5 director, who then took the next steps with respect to
6 obtaining the cremation.

7 Once the cremation occurred, the ashes were brought
8 back to Harvard Medical School, and Harvard Medical School
9 delivered the ashes to the next of kin; in this case, the
10 plaintiff, Mrs. Favaloro.

11 The key here is -- for Harvard is that the
12 legislature recognized that anatomical gift programs were a
13 salutary program, and they wanted to encourage the donation of
14 bodies for medical research.

15 THE COURT: May I interrupt you for just a minute,
16 please? I'm sorry. It just occurs to me I -- if someone were
17 to remind me when we're done here, I will -- since the question
18 has been raised about -- it may have been raised why I denied
19 the motion to remand in the -- at least by implication since I
20 had not issued a written order, when we're done here today, I
21 can explain for the record why I did that. And if someone will
22 remind me, I'll try to at least state for the record in summary
23 form why I came to the conclusion I did with respect to the
24 motion to remand.

25 All right?

1 MR. CHARLIP: Certainly.

2 THE COURT: Sorry, Mr. Leibensperger.

3 MR. LEIBENSPERGER: Thank you, your Honor.

4 So my three points, to be brief, are this is an
5 Anatomical Gifts Program run by Harvard, it's covered by the
6 Act. The Act specifically provides that conduct pursuant to
7 the Act is immune from civil liability --

8 THE COURT: Just a quick question about this. Is
9 the immunity question a defense to this claim?

10 MR. LEIBENSPERGER: Yes, your Honor. It could be
11 an affirmative defense.

12 THE COURT: If it is in truth an affirmative
13 defense, can I decide it on a motion to dismiss?

14 MR. LEIBENSPERGER: Yes, you can, your Honor. And
15 I can tell you why I say that and what cases would support
16 that.

17 THE COURT: Okay.

18 MR. LEIBENSPERGER: The main reason you can --
19 that's, actually, my second point here, is that the immunity
20 defense is in the statute. This case, this plaintiff does not
21 allege lack of good faith in her complaint. There's no
22 allegation of bad faith or lack of good faith in the
23 complaint. So the only case in Massachusetts that's addressed
24 this Act is the Carey v. New England Organ Bank case, which
25 held as a matter of law that the question of good faith under

1 this statute is one that can be decided as a matter of law.

2 THE COURT: On a motion to dismiss?

3 MR. LEIBENSPERGER: Carey was on a motion for
4 summary judgment.

5 THE COURT: Right.

6 MR. LEIBENSPERGER: The distinction, though, is in
7 Carey the plaintiff pleaded bad faith. So it raised the issue.

8 THE COURT: Maybe it's not an affirmative defense.
9 Maybe it is that this a failure to state -- your claim is that
10 it's a failure to state a claim because it does not allege an
11 element; namely, bad faith.

12 MR. LEIBENSPERGER: It -- that is our argument,
13 your Honor, that they have to state a claim under each of the
14 elements of the statute.

15 Now, whether or not -- who has the burden to prove
16 good faith, I think, ultimately, if there were an allegation
17 and facts to support it, it would be on the defendant to prove
18 it.

19 THE COURT: The question I'm asking now is who has
20 the burden of pleading?

21 MR. LEIBENSPERGER: That's a different question,
22 and it's our position that the plaintiff has to at least plead
23 facts that would given rise to an inference of bad faith or it
24 could be construed as bad faith or lack of good faith.

25 Here, they knowingly didn't do that. They know

1 what the statute says, and they couldn't plead anything about
2 bad faith or lack of good faith.

3 Now, there's -- I would refer to three other cases
4 with respect to your question about where we are in the
5 process. There's two cases, one from the 1st Circuit called
6 MacKnight that we've cited in our brief; that was a good
7 faith/bad faith case as it related to representation of the
8 employee by the union. And the court in MacKnight upheld the
9 dismissal of that case without allowing the plaintiff to take
10 discovery because the plaintiff couldn't allege enough facts to
11 get to discovery and to proceed through the case.

12 Now, technically I want to be clear that MacKnight
13 was on a summary judgment motion; but it was on a unique kind
14 of summary judgment motion before any discovery took place.
15 So, in essence, it was a motion to dismiss.

16 Another case that we've cited in our reply brief is
17 from the federal court in California in San Francisco, the
18 Northern District, and that's an anatomical gift programs case
19 in which the District Court moved or held that dismissal was
20 warranted on a Rule 12(b)(6) motion where the plaintiff could
21 not allege enough facts to suggest that the conduct of the
22 defendants was unreasonable, which was the word under the
23 California statute as opposed to good faith. So that case,
24 it's called Jacobsen v. Marin County Hospital, is directly on
25 point for a rule 12(b)(6) dismissal for failure to meet the

1 elements of the statute. In that instance, reasonableness; in
2 ours, good faith/bad faith. In fact, I would say ours would be
3 even a higher level for the plaintiff to prove.

4 THE COURT: Now, the plaintiff does allege that the
5 defendants, all of them, including Harvard, engaged in conduct
6 amounting to -- that would lead to a recovery if the plaintiff
7 were successful for the intentional infliction of emotional
8 distress in which the allegation is of outrageous or atrocious
9 or must be outrageous or atrocious conduct, conduct that no
10 person reasonably could endure.

11 Those allegations are made. Do they constitute --
12 are made against the defendants, including Harvard. Do those
13 constitute sufficient basis to infer lack of bad faith, giving
14 the plaintiff the benefit of inferences in her favor?

15 MR. LEIBENSPERGER: Your Honor, at some level, if
16 there were allegations of conduct that would be intentional
17 infliction of emotional distress, it may give rise to bad
18 faith. I could see your point with respect to that. But here
19 the allegations specifically against Harvard are that Harvard
20 failed to investigate what was going on at the crematory.
21 That's the all and end all of what the allegations are against
22 Harvard.

23 So I suggest to your Honor that that doesn't begin
24 to rise to the level of outrageous conduct that would support a
25 claim for intentional infliction; and likewise, wouldn't

1 support a claim for bad faith.

2 The definitions are a little bit different. The
3 definition of bad faith under the Carey case, which was citing
4 a New York case, was -- is specifically good faith, is honest
5 belief, absence of malice and absence of fraud. So that's a
6 little different than what would be intentional infliction of
7 emotional distress. But I would recognize your Honor's point
8 that at some level, if there were facts that could be
9 intentional infliction of emotional distress, you could infer
10 bad faith.

11 They just don't exist here, particularly for
12 Harvard. I suggest they don't exist here for any of the
13 defendants, but particularly for Harvard, whose role is defined
14 in the complaint as the party who didn't investigate what was
15 going on at Bayview.

16 THE COURT: All right.

17 MR. LEIBENSPERGER: My third point, your Honor,
18 just to -- is that the plaintiffs in their brief I would say
19 implicitly concede that they don't have any evidence of bad
20 faith or any facts that would support bad faith because their
21 defense, their argument against this motion to dismiss is that
22 the statute doesn't apply. They say the statute doesn't apply
23 because this is not a consent case. And they argue that all
24 the cases under the Uniform Gift Act relate to when there's a
25 dispute about did the decedent or the decedent's family give

1 consent?

2 Well, your Honor, if you look at the statute, it's
3 absolutely clear that under section 13(c) the immunity is
4 provided for all the acts that can take place with respect to
5 this program, including specifically the disposition of the
6 remains of the plaintiff.

7 So statute -- the statutory construction makes it
8 absolutely clear that it covers all cases, not just consent
9 cases; and, indeed, the Carey case, the only case in
10 Massachusetts, says explicitly it's not a consent case. It's
11 about what happened to the donated organs after consent was
12 already obtained.

13 And in that case the Court held that the good faith
14 immunity did apply, and that allegations of negligence were not
15 sufficient to get around that immunity.

16 So, your Honor, the immunity -- the purpose of the
17 immunity is to prevent defendants from being dragged into court
18 when they're operating an Anatomical Gifts Program when there's
19 no evidence of any bad faith conduct and having to defend a
20 litigation.

21 For that reason, I suggest to your Honor that a
22 motion to dismiss is the most appropriate to rule on this
23 question before there is discovery and expense and time and
24 distraction from the Anatomical Gifts Program.

25 Thank you, your Honor.

1 THE COURT: Okay. Mr. Robertson, you want to speak
2 to this question with respect to Mr. Gentile?

3 MR. ROBERTSON: I do. I won't be duplicative. If
4 you find me duplicative, you should cut me off, please.

5 THE COURT: You should have no doubt.

6 MR. ROBERTSON: Good. To try and answer a few of
7 your questions, we have a motion to dismiss, failure to state a
8 claim, count three. Count three is against Mr. Gentile. It
9 says you should have verified Bayview's business license.
10 There is no actionable tort called failure to verify the
11 existence of a business license.

12 THE COURT: Isn't that simply a more descriptive
13 way of saying that you were negligent in checking on this?
14 Isn't that just what that means?

15 MR. ROBERTSON: It could mean that, but I think we
16 are entitled to know what it means. What it seems to allege --

17 THE COURT: Can I just decide that the allegation
18 of what you did or did not do is really sort of a statement of
19 where your negligence lies allegedly?

20 The complaint might have said failure to act
21 prudently or something like that in determining to give these
22 remains to Bayview or something like that. Instead, it says
23 failure to check. So it's more elaborate than it needs to be
24 in a notice pleading.

25 So let's assume that the allegation is of

1 negligence. The question is: Does this immunity that Harvard
2 has talked about apply to Gentile as well?

3 MR. ROBERTSON: Of course it does, your Honor.
4 There's no question about that. In fact, the gravamen of the
5 complaint, the core of paragraph 42 of the complaint is -- the
6 core issue against Mr. Gentile is he didn't do enough to check
7 on the license or what was going on at Bayview.

8 Assuming that sounds in some broad stroke of
9 negligence, prudence, if you will, he's the link between
10 Anatomical Gifts Program, off the remains go, the remains come
11 back. The claim is, oh, when did people know and what did they
12 know? Well, the whole complaint says you didn't know enough
13 and you should have checked out and found out more.

14 So then we get to the intentional tort allegations
15 in I think count four -- they can't be intent -- it's totally
16 inflicting. It's intentional implies that you knew something
17 and you didn't tell them or you kept something secret. But the
18 whole gravamen of the complaint against the defendants is you
19 didn't know enough. That --

20 THE COURT: You can allege inconsistent theories,
21 can you not?

22 MR. ROBERTSON: You can certainly allege
23 inconsistent theories, but since the allegations here, if taken
24 on their face for the purposes of a motion to dismiss, assume
25 it's true.

1 Assume Mr. Gentile didn't know enough and he should
2 have known more. That puts him out of the box on the whole bad
3 faith issue. I mean, it can only be so inconsistent. Because
4 if we assume it's true for the purposes of the motion to
5 dismiss, they've disproved the rest of the case and they've
6 proven the application of the immunity.

7 There is no allegation here that Mr. Gentile in bad
8 faith or with knowledge that something was going on then failed
9 to inform the plaintiff or didn't do something to follow up.
10 It's that he was blithely ignorant of something.

11 So while you can be inconsistent, you can't have
12 your cake and eat it, too, which is what they've tried to do
13 here. And that's why it's a motion to dismiss.

14 THE COURT: All right. Thank you very much.

15 Does this immunity apply to Bayview as well?

16 MS. FEENEY: No, your Honor.

17 MR. AHERN: Not to Linda Stokes either, your Honor.

18 THE COURT: And to Linda Stokes. But you have a
19 motion to dismiss as well.

20 MS. FEENEY: That's correct, your Honor. We
21 joined, at least in part, with Harvard's motion to dismiss
22 limited exclusively to the dismissal of the negligent
23 infliction of emotional distress counts and the intentional
24 infliction of emotional distress counts as to Bayview. I think
25 they're pled as to all defendants counts four and five, your

1 Honor.

2 THE COURT: And why do you say that the negligent
3 and intentional infliction counts should be dismissed except
4 that they are inconsistent?

5 MS. FEENEY: The inconsistency troubles me less
6 than the fact there's no factual basis or factual predicate for
7 the allegation of either one.

8 There's been no specific statement at all as to
9 what it was that was done. In other words, what the
10 mishandling, in fact, was that gave rise to the negligent or
11 the intentional infliction of emotional distress.

12 THE COURT: Does the plaintiff have to allege there
13 was anymore than a mishandling in the notice pleading
14 environment?

15 MS. FEENEY: I certainly appreciate the breadth of
16 the notice pleading, and the allegation of mishandling is fine;
17 but I think you do have to get more specific about what
18 precisely you claim mishandling was.

19 THE COURT: Why?

20 MS. FEENEY: What does mishandling mean, your
21 Honor? I don't mean to be rhetorical.

22 THE COURT: It's a fair question, but isn't that --
23 would you agree that if it were mishandled, if the remains were
24 mishandled in any way, it might lead to a -- you might have a
25 cause of action?

1 MS. FEENEY: Sure.

2 THE COURT: So isn't that enough of an allegation
3 to survive a motion to dismiss if there was a mishandling,
4 careless mishandling of these remains? This is enough to
5 defeat a motion to dismiss?

6 MS. FEENEY: Not in the general sense, your Honor,
7 I don't agree. I think a mishandling has to be defined. It's
8 no different than saying we were negligent. Take out the word
9 "mishandling." We were negligent. In what way? What
10 specifically did we do, did Bayview do that was part and parcel
11 of a mishandling?

12 THE COURT: Back in, as they say, the day, when I
13 used to look at automobile torts, the automobile tort complaint
14 said that that X so negligently and carelessly drove his
15 automobile as to cause the plaintiff grievous injury, period.

16 MS. FEENEY: That's right.

17 THE COURT: Those cases all survived motions to
18 dismiss. In fact, nobody even brought a motion to dismiss.

19 MS. FEENEY: That's correct.

20 THE COURT: Isn't this like that?

21 MS. FEENEY: If I may make the distinction.

22 THE COURT: Please.

23 MS. FEENEY: You've raised the automobile
24 distinction. If you've driven -- in a long paragraph of the
25 complaint you've driven your vehicle in such a careless and

1 negligent way so as to have caused a collision and to cause
2 injury to the plaintiff, I don't think any of us would disagree
3 that if there was no collision and no injury --

4 THE COURT: I didn't say "collision." I said so
5 negligently and carelessly drove his/her automobile so as to
6 cause the plaintiff injury.

7 MS. FEENEY: You're right, you don't have to have
8 collision to have injury. I could be carelessly driving, not
9 even impact your vehicle --

10 THE COURT: My point really is that that allegation
11 says no more than mishandling, does it?

12 MS. FEENEY: I think it does. I think it does. I
13 think when you say "mishandle," I say in what way? What did we
14 do? Who mishandled?

15 THE COURT: I'd like to know how you caused that
16 accident, particularly since the causing of the accident could
17 have happened in any number of ways.

18 MS. FEENEY: Sure, I could have cut you off.

19 THE COURT: Failure to a stop, you could have been
20 drunk. All kinds of things, just like this, mishandling.

21 MS. FEENEY: But mishandling to me is in such a
22 generic general sense. When we're talking about cremations,
23 what do you mean when you say "mishandling"?

24 THE COURT: What would you have the plaintiff
25 plead?

1 MS. FEENEY: I'd like to know specifically what it
2 is they contend we did. Did we give you the wrong remains?
3 Did we treat the body of the decedent in some inappropriate
4 fashion? Were we disrespectful to the family? I think there's
5 a long laundry list. I'll take one.

6 THE COURT: Okay.

7 Anything else?

8 THE COURT: All right. Mr. Charlip, you may
9 respond to all of these.

10 First tell me is there any reason, any reason why
11 the plaintiffs, Harvard and Gentile, should not be dismissed?

12 MR. CHARLIP: There's a whole host of reasons.

13 THE COURT: All right. Give me that host.

14 MR. CHARLIP: Okay. First, if I could, I'd like to
15 lay a predicate.

16 In this case, my client did not deal with a funeral
17 home, she did not deal directly with Mr. Gentile. When her
18 mother passed away, it was her mother's donative wish to have
19 her remains go to Harvard for anatomical science.

20 THE COURT: I think I got that much.

21 MR. CHARLIP: So Harvard stands in the shoes of the
22 funeral home, as it were, in this case. They made certain
23 promises to her and her mother. They made certain
24 representations about what would be done with her body, how her
25 body would be treated.

1 Harvard now claims, well, under the uniform -- the
2 UG --

3 THE COURT: Anatomical Gifts Act.

4 MR. CHARLIP: Anatomical Gifts Act they're immune.

5 As your Honor correctly recognized, that's a
6 defense. It's an affirmative defense --

7 THE COURT: I was hoping I wasn't recognizing it.
8 I was asking about it.

9 MR. CHARLIP: Well, I think were you correct in the
10 direction you were going; because the case law indicates that
11 that is, in fact, an affirmative defense, and it's
12 appropriate --

13 THE COURT: What if I put it to you that that
14 statute precludes any claim against somebody like Harvard or
15 Gentile unless you can launch -- the absence of bad faith --
16 that the statute says there is no claim against Harvard or
17 Gentile for negligence, for simple negligence. What if I put
18 that proposition to you? Would I be wrong?

19 MR. CHARLIP: I think what the statute indicates is
20 that there has to be some bad faith that if, in fact, Harvard
21 or Gentile -- and I think Gentile isn't immune under the
22 statute, but we'll leave that for a second -- that Harvard has
23 to allege and prove that it had an honest belief -- it's their
24 burden -- they had an honest belief that what they were doing
25 was correct.

1 THE COURT: What do you say that Harvard did that
2 was not within the statute? You say you don't have to plead
3 that?

4 MR. CHARLIP: Well, I think what we pled evinces
5 the actions -- or describes the actions on the part of Harvard.

6 THE COURT: Failure to find out more about Bayview
7 and --

8 MR. CHARLIP: That they acted recklessly, they
9 acted with a careless disregard for my client's rights. They
10 made promises --

11 THE COURT: Those are easy things to say. You
12 know, there's this case where Judge Selya in his usual colorful
13 manner tells me that I don't have to -- even after the more
14 recent decisions of the Supreme Court about notice pleading, I
15 don't have to take bald assertions and what's that,
16 periphrastic circumlocutions I believe he said.

17 Do you know what that is? Do you know what
18 periphrastic circumlocutions is?

19 MR. CHARLIP: I have some idea.

20 THE COURT: Tell me.

21 MR. CHARLIP: I would submit to the Court that we
22 were direct in our pleading, and not only did we allege it in a
23 specific factual standpoint, we attached exhibits that further
24 bolster what we were saying.

25 THE COURT: What I hear -- what the complaint says

1 is that Harvard neglected to look carefully to how the body
2 was -- or the remains were going to be disposed of.

3 MR. CHARLIP: I think the complaint goes a bit
4 further than that. What we're saying in the complaint is both
5 Gentile and Harvard either knew or should have known based on
6 the duties that they undertook that this operation --

7 THE COURT: If they knew -- excuse me, I don't mean
8 to interrupt you.

9 When you start out by saying they knew or should
10 have known, aren't you stating classic negligence construct?
11 Knew or should have known is negligence.

12 MR. CHARLIP: It's actually applicable to
13 recklessness.

14 The case law in this specific setting in the
15 mortuary setting, and particularly the case law that talks
16 about intentional infliction of emotional distress, talks about
17 whether the mortuary or the funeral home knew or should have
18 known that the conduct was going to cause the plaintiff severe
19 emotional distress --

20 THE COURT: But that's about the conduct. The
21 conduct has to be outrageous itself.

22 MR. CHARLIP: Right.

23 THE COURT: And I don't hear any outrageous conduct
24 on the part of Harvard and Gentile.

25 MR. CHARLIP: Well, as I started off saying,

1 Harvard and Gentile stand in the shoes -- in effect, were the
2 funeral home here. There's a long line of cases --

3 THE COURT: You mean whatever mishandling, they did
4 it?

5 MR. CHARLIP: Yes. They're the funeral home. My
6 client didn't pick Bayview; my client didn't deal with Bayview;
7 my client didn't know from Bayview. They're the entities that
8 my client relied upon for the proper disposition of her
9 mother. And as I said, there's a long line of funeral home
10 cases in all -- just about every jurisdiction that says
11 mishandling of a body by a funeral director, by sending -- as
12 in the Tri-State case, when those funeral homes in the
13 Tri-State case, that's the case in Georgia where the crematory
14 ended up throwing the bodies in the back and the woodchuck --
15 you know, that type of situation.

16 THE COURT: Why isn't your client also liable then
17 if your client didn't check out Harvard and that Harvard was
18 doing these terrible things? Isn't it like Harvard not
19 checking out Gentile who didn't check out Bayview?

20 MR. CHARLIP: Well, my client had no basis to check
21 out Harvard. My Harvard --

22 THE COURT: That's what Harvard says. I didn't
23 have any basis to check out Gentile. He's a funeral director,
24 and reputable funeral director, so on.

25 MR. CHARLIP: The difference there is, first of

1 all, Harvard made representations and promises to my client.
2 My client made no representations or promises to Harvard.

3 The second thing alleged in the complaint, that
4 Harvard undertook this duty voluntarily; but beyond that, the
5 statute itself, the UAGA places the duty on Harvard to follow
6 the wishes of the donor and the family and to -- and to do so
7 in a reverend fashion, as Harvard in their own pleadings -- I'm
8 sorry in, their own paperwork indicated they would do.

9 So in this particular case, Harvard undertook
10 certain duties. Gentile, although not directly to my clients,
11 undertook certain duties. He's a licensed funeral director.
12 By virtue of his license, he has the obligation to do certain
13 things and to act in a fashion that, number one, is not
14 negligent; and number two, is certainly not reckless.

15 THE COURT: What was reckless about this conduct?

16 MR. CHARLIP: This conduct was reckless because the
17 very first thing that someone in this situation should do is
18 make sure that the entity that they're dealing with is
19 approved, is licensed. Otherwise you're sending a body to the
20 barbecue house to be burned. It's the same thing. There's no
21 authority to do that which the state allows you and requires
22 you to do.

23 THE COURT: What distinguishes what you just said
24 from negligence?

25 MR. CHARLIP: What distinguishes it is the fact

1 that -- well, there's two things. The first thing is we've
2 alleged this in a class action fashion. This is not a
3 situation where my client had a one-time error, and, oops, in
4 my client's case, Mrs. Favaloro's case, they sent the body to
5 Bayview; it shouldn't have gone there.

6 We allege in this class action complaint a course
7 of conduct that occurs over time again and again and again.

8 THE COURT: Gentile and Harvard sent several bodies
9 over and over again.

10 MR. CHARLIP: In this complaint ten bodies at a
11 time with respect to Mrs. Favaloro's transport went to
12 Bayview. So just on that one trip there are ten bodies.
13 That's happened not one time, not two times, it occurred over
14 months and years.

15 So that's the first thing that takes it from a
16 situation where it's a oops, a one-time negligent mistake, to a
17 situation where we have a substantial and significant course of
18 conduct.

19 THE COURT: But you could have the same mistake
20 made 10, 12, 15, 16, 18, 20 times, couldn't you? Error.

21 MR. CHARLIP: At some point in time protestations
22 that you slipped up or this is one-time problem have to fall on
23 deaf ears.

24 THE COURT: Don't you have to tell me something
25 more that Harvard and Gentile didn't do, for example, something

1 like they found out that these bodies were being mishandled
2 from whatever source and they continued to send bodies?

3 MR. CHARLIP: Well, there are a number of things --

4 THE COURT: Or that they had to deal -- every body
5 you send up here is a kickback or some such thing?

6 MR. CHARLIP: I think the only thing that notice
7 pleading requires us to do is to say they should have known. I
8 could tell you why they should have known.

9 THE COURT: If I say to you that's what you say, I
10 say all you've alleged is negligence.

11 MR. CHARLIP: Well, if I were to tell you or if I
12 was to plead that because of the fact that Bayview was charging
13 well below what other crematories in the area were charging and
14 they were taking the bodies not here locally but going to New
15 Hampshire, that should have put Harvard and Gentile on notice
16 that something was amiss; or that because of the fact that
17 Massachusetts law requires a licensed funeral director to pick
18 up the body and to accompany the body on any transport, but in
19 this case a hurst would come or actually a truck would come to
20 pick up ten bodies at a time and not be accompanied by a
21 licensed funeral director. We can make those allegations, I
22 don't think we have to.

23 THE COURT: You didn't, did you?

24 MR. CHARLIP: No, we didn't. To that degree, we
25 didn't. But I think those are all subsumed under the

1 allegation that Harvard or Gentile either knew or should have
2 known that dealing with Bayview was reckless because it was not
3 a licensed or approved facility and was handling bodies in a
4 manner that amounted to mishandling. I mean, that's the
5 essence of the allegation.

6 THE COURT: What do you say as to Bayview?

7 MR. CHARLIP: Bayview complains that we haven't
8 said the many ways in which they mishandled bodies. Again,
9 there's a litany of ranges of mishandling from the standpoint
10 of them not being licensed and approved from them transporting
11 bodies inappropriately and against the law, from them being
12 formed as part of a conspiracy to evade Massachusetts law. As
13 I say, there's a litany of ways that they mishandled these
14 bodies, and it's unfair for them to take the standpoint, well,
15 we know how we mishandled these bodies but because we prepared
16 fraudulent records, because we didn't provide records, because
17 we've done things that are both illegal, fraudulent, and
18 perjury, committed perjury in preparing records, we challenge
19 you to prove it and find it out.

20 THE COURT: I don't think that's what was said to
21 me this afternoon.

22 MR. CHARLIP: Well --

23 THE COURT: We know how we mishandled the bodies.
24 They said we don't know how. You say we mishandled the
25 bodies. That's what they told me today.

1 MR. CHARLIP: Right.

2 THE COURT: Now, maybe they've said to you in the
3 quiet hallway out there we know how we mishandled the bodies
4 but you didn't say it in your complaint; but that's not what
5 was told to me this afternoon.

6 MR. CHARLIP: I understand that, and I don't think
7 that we need to go into the many ways that they mishandled
8 bodies. I think that certainly will come out in discovery.

9 I think we've indicated in the complaint that
10 they've mishandled bodies by not being licensed, by not being
11 approved, and by handling bodies in a manner -- I think we
12 actually went much further than saying mishandling alone.
13 We've actually said -- used the words the remains have not been
14 preserved as desired, that the remains were tainted and
15 contaminated, that the mishandling amounted to mutilation and
16 desecration.

17 So we've gone into more detail than just say, well,
18 the bodies were mishandled.

19 Once again, we're talking about class action
20 allegations; and so for us to, you know, give you a laundry
21 list of the different ways the bodies were mishandled at this
22 point I think goes well beyond notice pleading and goes well
23 beyond what our requirements are.

24 THE COURT: I don't know that Bayview made this
25 argument. I think Harvard and Gentile may have made the

1 argument that you don't specifically say that the remains of
2 the plaintiff's decedent were mishandled, but that you use the
3 conjunctive and disjunctive in such a way that you may be
4 alleging that whatever happened to the remains of the
5 plaintiff's decedent there is a cause of action because
6 somebody in the class, the remains of someone, someone's
7 decedent in the class were mishandled.

8 MR. CHARLIP: I don't think that's what we pled.
9 My understanding is that the allegation is that Ms. Favaloro's
10 mother's remains were mishandled, and as class representative,
11 she is bringing a claim on her behalf and on behalf of all
12 other class members whose loved ones' remains were mishandled.
13 Mishandling being defined as those things I just mentioned,
14 desecration, contamination, tainting, mutilation. So those
15 allegations are, yes, general allegations; but our allegation
16 is that the remains of Favaloro's mother and the other remains
17 were mishandled.

18 THE COURT: Okay.

19 Anything else, counsel, any of you wish to say to
20 me?

21 MR. LEIBENSPERGER: Your Honor, this is a classic
22 case where you take the plaintiff's complaint and all
23 inferences that you can draw from it and all fairness to the
24 plaintiff at the pleading stage and it still doesn't amount to
25 anything more than a negligence claim against Harvard or even

1 failure to comply with the statute, which Mr. Charlip was
2 referencing.

3 It's those claims that are protected by the
4 immunity; and, therefore, the case has to be dismissed against
5 Harvard.

6 And it's -- the cases that I referenced to your
7 Honor, the MacKnight case in particular, suggest where good
8 faith is involved in the matter, that there's no -- that
9 there's no reason to proceed to discovery unless the plaintiff
10 has some colorable claim that would give rise to an inference
11 of bad faith because, ultimately, that's the issue of the case
12 and it should not proceed unless the plaintiff has some
13 colorable basis for that claim of bad faith.

14 MR. ROBERTSON: Briefly, your Honor. We're in
15 federal court, everybody knows we have Rule 11, there's got to
16 be some basis for going forward here.

17 THE COURT: There's a Rule 11 in state court, too,
18 isn't there?

19 MR. ROBERTSON: There is. It has a little different
20 connotation in my experience. Here we are in federal court.
21 We've yet to hear, "They're not my mom's ashes; they're a
22 mixture of ashes." We've yet to hear anything that actually is
23 wrong about what happened. Be that as it may, we have you
24 should have known more. Anybody who went into the cafeteria
25 downstairs may not have checked for a creamery license, a food

1 license or lots of licenses. Maybe they were negligent, but
2 were they extremely outrageous in their conduct as taking on
3 faith that a business was doing business and they had a
4 transaction?

5 Instead, what we hear is doing business with
6 somebody in New Hampshire is in itself sort of -- there's a
7 presumption of nefariousness. I don't get that. That doesn't
8 come out of any law that I know of. Nor the implication here
9 that there was a better price to be had in New Hampshire.
10 Saving a little money for a program like this to me doesn't
11 seem to involve any nefarious presumption.

12 Instead, where we are is in paragraph 42 of their
13 complaint it says, "The core issue which presents facts and law
14 that predominate over all issues was the failure to make even
15 the slightest investigation about Bayview's authorization to
16 conduct business as a crematory." That's the basis of
17 paragraph 42. That's negligence at its best. It's not bad
18 faith, it's not extreme and outrageous, it's not intentional
19 conduct.

20 So as to Mr. Gentile, I would submit that the
21 statutory provision providing for immunity is directly on
22 point; and the 1st Circuit in the case of Colonial Mortgage
23 Banking pointed out that litigants are not permitted to assert
24 contradictory positions to avoid dismissal.

25 They can't have their cake and eat it, too, here.

1 They can't assert it's really a negligence case at its core
2 issue and then say, oops, maybe we missed, we really have this
3 bad faith case against Mr. Gentile.

4 Thank you, your Honor.

5 THE COURT: Okay.

6 Well, I'm prepared to rule on these motions having
7 heard the argument.

8 Taking Harvard's motion and the motion of Gentile
9 first, the provision in the Uniform Anatomical Gifts Act that
10 is at issue is section 13. This is Massachusetts General Laws
11 Chapter 113 section 13(c).

12 That statute reads, "A person who acts in good
13 faith in accordance with the terms of sections 7 to 13
14 inclusive or under the anatomical gift laws of another state or
15 a foreign country shall not be liable for damages in any civil
16 action or be subject to prosecution in any criminal proceeding
17 for his act.

18 First, let me point out that the immunity created
19 by this statute extends to a person, any person who acts in
20 good faith. That would cover Harvard and Gentile acting in
21 good faith. And what this statute does, as I read it, is to
22 immunize persons acting in good faith from any claim, except a
23 claim of -- that the conduct of the defendant was conduct in
24 bad faith. As such, the statute eliminates all causes of
25 action in which there is no allegation of bad faith or the

1 absence of good faith.

2 So while my initial thought that maybe this is a
3 defense and that it can be raised as an affirmative defense, it
4 should not preclude the progress of this case in the face of a
5 motion to dismiss. I think that the statute properly read puts
6 the burden of pleading upon the plaintiff; that is to say, the
7 plaintiff must plead the absence of bad faith or lack of good
8 faith against parties that wanted to proceed.

9 And Mr. Robertson has put his finger on an
10 important -- and perhaps I think maybe Mr. Leibensperger did as
11 well -- the central allegation of the complaint as it relates
12 to Harvard and Gentile, and that's paragraph 42.

13 Paragraph 42 in full reads: "The unauthorized and
14 illegal operation of the Bayview Crematory, as well as its
15 improper, offensive, and mortifying method of operation,
16 together with its deficient and/or nonexistent recordkeeping
17 practice, as well as the failure of Harvard and Gentile even to
18 make the slightest investigation or determination of Bayview's
19 authorization to conduct business as a crematory, all resulted
20 in offensively irreverent disposition of the anatomical remains
21 of the class members' decedents/donors and resulting damage to
22 Ms. Favaloro and the members of the class. These are the core
23 issues in the case which present issues of fact and law that
24 predominant over all issues in this matter."

25 The core issues then as to Bayview, as I read this

1 complaint, are that Bayview improperly and offensively operated
2 its crematory, had deficient and nonexistent recordkeeping
3 practices. There are other allegations, too, about Bayview
4 here; but as to Harvard and Gentile, the only allegation is
5 that they failed to make even the slightest investigation and
6 determination.

7 In this argument this afternoon Mr. Charlip
8 pronounced Harvard's -- the deficiencies of Harvard and Gentile
9 with the terms that they knew or should have known about
10 Bayview's operation. Again, the construct, the language of
11 negligence.

12 What is alleged in this complaint against Harvard
13 and Bayview (sic.) is nothing more than negligence, that they
14 failed fully to investigate the operations of Bayview.

15 And because only negligence is alleged, lack of
16 good faith is not alleged, I think -- I rule -- not I think
17 that I rule, I mean I do rule that Harvard and Bayview (sic.)
18 are covered by section 13 -- excuse me, Harvard and Gentile --
19 excuse me, Harvard and Gentile are covered by Chapter 113
20 section 13(c) of the Uniformed Anatomical Gifts Act. And as to
21 Harvard and Gentile, the motion to dismiss is granted.

22 As to Bayview, however, the allegations are
23 broader, and read with all the inferences that are appropriate
24 to plaintiff I think they do -- these allegations allege bad
25 faith. Just as an example, I point to paragraph 36 of the

1 complaint, which alleges the following: "Bayview's operation
2 in this crematory was not only unauthorized and illegal, and
3 unauthorized in this complaint means that there is not a
4 license," the complaint goes on, it was not in compliance,
5 "Bayview was not in compliance with and did not observe the
6 standards deemed ordinary and proper for the handling and
7 cremation of decedents. Particularly, Bayview performed
8 multiple cremations simultaneously, left bodies to decompose in
9 non-refrigerated containers, generally failed to properly
10 handle the bodies of decedents, and failed to prepare, keep,
11 and maintain accurate and proper records of its business. This
12 caused Bayview to return to Harvard, and ultimately the
13 families of Ms. Favaloro and other class members, tainted and
14 contaminated remains or remains that were not consistent with
15 the unique identity of the decedent/donor."

16 I think the complaint with that language reads
17 sufficiently to allege the absence of good faith, and the
18 parties have -- counsel for Bayview have acknowledged that the
19 immunity in this statute does not apply to the crematory in any
20 event.

21 So the motion of Bayview to dismiss this complaint
22 is denied.

23 Is there anything else I need to say?

24 Just one second.

25 (Discussion off the record.)

1 THE COURT: I didn't ask about the trustee. Do you
2 want to say anything about the trustee?

3 MR. AHERN: Yes, your Honor. Our argument
4 basically mirrors that set forth in Harvard's brief, and which
5 you've already heard from Attorney Feeney. I don't think
6 there's a sufficient allegation that the trustee herself caused
7 any harm to the only named plaintiff in the case, Favaloro.

8 THE COURT: What does a trustee do?

9 MR. AHERN: The trustee is just the legal entity,
10 the person representing the legal entity that owned the
11 property at the time the complaint was filed, and she is the
12 mother of the owner of some of the funeral parlors in
13 Massachusetts.

14 THE COURT: So the allegation against the trustee
15 simply is that she owns the -- the only allegation against the
16 trustee is that she owned these properties?

17 MR. AHERN: The allegation is that she owned the
18 property. The trust owned the property, she's the trustee of
19 the trust, and that she somehow was involved with Bayview and
20 the operation, daily operation of the crematorium, your Honor.

21 THE COURT: Isn't that enough to keep the trustee
22 in?

23 MR. AHERN: My issue, again, is that I don't think
24 the complaint goes far enough to make a connection between the
25 only named defendant -- only named plaintiff and what the

1 trustee did or didn't do.

2 THE COURT: What do you say about that,
3 Mr. Charlip?

4 MR. CHARLIP: Paragraph 32, we allege that "Stokes
5 was fully cognizant and aware of the fact that Bayview was not
6 a state authorized and approved crematory in the State of New
7 Hampshire and had no official authority to conduct business
8 cremating the remains of decedents under any rule" --

9 THE COURT: Slowly.

10 MR. CHARLIP: I'm sorry. -- "under any rule,
11 regulation, statute or ordinance of any state of the United
12 States of America."

13 Further, we say, "Stokes was fully cognizant and
14 aware that Bayview Crematory had no authority or approval to
15 conduct business in this Commonwealth but had and maintained
16 business relations with funeral homes and funeral directors,
17 including Gentile. Stokes permitted Bayview to operate --
18 improperly operate its unauthorized and unapproved business
19 with full knowledge of the foreseeable consequences and likely
20 effect on Favaloro and the class."

21 So I think that paragraph -- there's some other
22 paragraphs, but I think that paragraph ties in Stokes to the
23 conduct.

24 THE COURT: Yes, sir.

25 MR. AHERN: Your Honor, I think it's a pretty weak

1 broth. I don't think there's enough there to show that Stokes
2 did anything that effected Favaloro. The fact that either
3 there was or there wasn't a license, how did that effect
4 Favaloro or any of these purported class members?

5 THE COURT: Well, the allegation is that Favaloro's
6 body was mishandled and that the mishandling occurred because
7 there was a generalized failure to observe even the minimal
8 standards of a crematory, and that Stokes knew all that was
9 happening and permitted it to happen on her property. That's
10 the allegation as I hear it.

11 It seems to me that's enough to survive this
12 motion. It may not be enough at the end of the day. I leave
13 that to discovery, but to survive this motion that's enough.

14 The motion of Stokes to dismiss is denied.

15 Yes, sir.

16 MR. CHARLIP: As to Harvard and Gentile, is the
17 granting of the motion to dismiss with or without prejudice?

18 THE COURT: Well, do you say that you can make
19 allegations that are sufficient to show that they are not
20 immune under the Uniform Anatomical Gifts Act?

21 MR. CHARLIP: Well, my concern, your Honor, is I
22 listed a bunch of things that I did not specifically plead in
23 answer to some of your Honor's questions here today.

24 THE COURT: Well, as Mr. Robertson points out, if
25 those things were alleged, that still would not make out a

1 case, in my view, of bad faith.

2 What you allege, what you said is that there are
3 lots of things that should have put Gentile, at least, and I'm
4 not sure about Harvard, but Gentile on notice of something
5 wrong at Bayview. They were cheap, they operated out of state,
6 there were a couple of other things. It seems to me that those
7 allegations simply show that there were things that should have
8 put Gentile on notice. Those are the kinds of things that you
9 talk about when you say should have known.

10 MR. CHARLIP: Well, those are both elements of why
11 both Harvard and Gentile should have known, but there are also
12 actionable elements constituting mishandling. For example, if
13 you are a funeral director, as Gentile was, or a funeral home,
14 as Harvard was standing in the shoes of being, you know that
15 it's improper in the State of Massachusetts to be transporting
16 bodies by an unlicensed person. So if Harvard gives bodies and
17 Gentile gives bodies to an unlicensed person, they're
18 committing the act of mishandling themselves, that they're
19 knowingly committing the act of mishandling.

20 And if the standard is that you check on things
21 like that, you don't just willy-nilly give bodies to people who
22 show up and say I'm from Bayview, then, in fact, that's
23 evidence of knowing mishandling.

24 So, yes, we could have gone into more detail about
25 what happened along the way with these bodies and this whole

1 plan to evade the laws of the State of Massachusetts that
2 Harvard either knew or should have known about as Gentile
3 should have -- knew or should have known about.

4 THE COURT: When was this motion to dismiss filed?

5 MR. LEIBENSPERGER: In August, your Honor.

6 MR. ROBERTSON: I served upon them August 16th.

7 THE COURT: That's when you served your response?

8 MR. ROBERTSON: that's when I served my motion.

9 THE COURT: That's when you -- I'm sorry, that's
10 when you served your motion.

11 MR. ROBERTSON: August. Now we're at Christmas.

12 THE COURT: I always take -- I guess I take the
13 position as a general matter that when the papers are filed and
14 deficiencies stated, as a general matter that's the time to
15 think about what amendments you can make.

16 Now, the rule says even after I rule on this you
17 can -- if I allow you, you can amend. But it strikes me that
18 what Mr. Leibensperger said earlier in his argument is that
19 there was some recognition or at least that you hadn't alleged
20 enough to get past the immunity, but you alleged ultimately --
21 that your argument principally was that it didn't apply to
22 these folks.

23 MR. CHARLIP: That's not correct. Our argument is
24 and has been that this is an issue that really is more properly
25 brought by way of summary judgment. It's kind of difficult to

1 allege or say who has an honest good faith belief on the part
2 of Harvard if we don't even know who the actors are or what
3 their contentions are. That's why the cases that we cited
4 indicate that this is not a matter for a motion to dismiss, but
5 instead a matter for summary judgment. And only if the facts
6 are undisputed. But your Honor has ruled --

7 THE COURT: Let's just make sure I understand. You
8 want to amend the complaint to say that Harvard and Gentile
9 were aware that, A, it was illegal to transport bodies outside
10 the state for disposition --

11 MR. CHARLIP: No, no, that's not correct.

12 What I'm suggesting is that the evidence that we're
13 aware of now reflects that the person working for Bayview and
14 that would come and pick up these bodies was not a licensed
15 individual as he was required to be under Massachusetts law.

16 THE COURT: Yes. And are you saying they knew
17 that, Harvard knew that?

18 MR. CHARLIP: They either knew it or should have
19 known it.

20 THE COURT: That's where we are now. They knew or
21 should have known. It seems to me if you're going to allege
22 bad faith, you've got to say they knew it, that they gave those
23 bodies notwithstanding that they knew it.

24 MR. CHARLIP: With all due respect, Judge, I think
25 that's not a correct statement of the law.

1 THE COURT: All right. It's going to be the state
2 of law that governs this case until it gets to the 1st Circuit.

3 MR. CHARLIP: Well, then beyond that, to answer
4 your Honor's question, I don't think we can say they
5 affirmatively knew what they were doing was wrong and they did
6 it anyway.

7 THE COURT: Well, that seems to me -- I know you
8 disagree with it, but that seems to me an allegation of bad
9 faith. To say that they knew or should have known is an
10 allegation, it seems to me it's almost a paradigm of
11 negligence. One knows or should have known.

12 MR. CHARLIP: But, your Honor, if I could respond
13 to that --

14 THE COURT: All right. But I've heard this.

15 MR. CHARLIP: Well, this is a bit different.

16 What I hear the defendant saying, I think what
17 their argument is and what concerns me about your ruling is the
18 following: If what they're saying is true, they can take the
19 ostrich with his head in the sand approach.

20 THE COURT: But that's different, that's different.

21 MR. CHARLIP: But that's should have known.

22 THE COURT: No, no, if you're saying they were
23 willfully, willfully without knowledge, that's a different --

24 MR. CHARLIP: That's what we're saying.

25 THE COURT: This is the very first time I heard you

1 say they were willfully blind. You have said before -- and I
2 don't want to help you out here because I've already made my --
3 ruling, you have said they knew or should have known. You
4 didn't say that they were willfully blind, that they -- there
5 were circumstances -- and this is what willful blindness
6 means -- there were circumstances all around that pointed to
7 the fact that these people were operating an unlicensed
8 facility, all around, and these people, Harvard and Gentile,
9 simply closed their eyes to some realities that open eyes would
10 have found. That's what you have said.

11 MR. CHARLIP: That is the essence of what I thought
12 we pled; but I'm certainly saying that here, that anyone who
13 wanted to know, who had a desire to know would have known.

14 THE COURT: That's different.

15 MR. CHARLIP: They willfully closed their eyes to
16 this so they could take the position if they were ever sued I
17 didn't act in bad faith. I didn't know. You can't do that.

18 THE COURT: I think I made my ruling. We're going
19 in circles, because when I state the problem of willful
20 blindness, I'm talking about -- the concept of willful
21 blindness is an actual substitute for actual knowledge. It
22 says that these parties, Harvard and Gentile, say I don't know
23 and I don't want to know, and notwithstanding the fact that
24 there were all of these circumstances surrounding them, the guy
25 shows up and says, you know, if you look in my truck you'll

1 find that I don't have a license up there, and Harvard says,
2 oh, no, I don't want to look in there, and Gentile says I don't
3 want to look in your truck. That kind of circumstance is an
4 absence of good faith.

5 It isn't the same thing as saying they should have
6 known. That means if they had taken the time to investigate
7 it, they should have done, they would have found out. Not that
8 there were circumstances staring them in the face which they
9 closed their eyes to. That's what I understand willful
10 blindness to mean.

11 I ruled, I'm done. Thank you very much.

12 MR. CHARLIP: My question, Judge, I'm not sure you
13 answered so I could have a clarification, did you rule that
14 they were dismissed with or without prejudice? That was my
15 question.

16 We would like the opportunity to prove what your
17 Honor just said. I'm just asking whether you'll give us that.

18 THE COURT: So you're asking for leave to amend the
19 complaint?

20 MR. CHARLIP: Correct.

21 THE COURT: What do you say, Mr. Leibensperger?

22 MR. LEIBENSPERGER: Well, we would object to that.
23 That's exactly the point that the immunity statute is intended
24 to do, is to prevent this sort of fishing expedition for facts
25 that the plaintiff doesn't have or doesn't even have a good

1 faith ground to assert.

2 I mean, he has Rule 11 obligations. He brought
3 this complaint, he's seen this motion to dismiss now for
4 four-plus months, and now even allegations that I'm hearing
5 that he might want to assert starting to really sound like in
6 negligence anyway.

7 So for example, if we got a motion to amend
8 tomorrow I'm sure that we'd oppose it on the ground that it was
9 futile and it ought not to be allowed.

10 So I would oppose.

11 THE COURT: Let me suggest to you, if I allow this
12 motion and if it's nothing more than negligence, you have your
13 Rule 11 motion. What has been presented to me, is there is a
14 basis for alleging more than negligence here, and we've had a
15 long discussion of what I view is negligence. We have a
16 disagreement about negligence, because I say if the allegation
17 is they knew or should have known, it's negligence.

18 The allegation that I hear that Mr. Charlip is
19 talking about now is that something amounting to bad faith
20 failure when it was obvious what was going on.

21 And I gave the example that there's a license --
22 the guy says look in my truck before you give me these bodies
23 and you'll find something that may stop you from giving me
24 these bodies, and these parties say I don't want to do that
25 because I don't want to know anything. That's what I'm talking

1 about. Allegations along those lines.

2 Now, if you've got something like that and you
3 think you in good faith can make that allegation, then you
4 ought to do it, but if it's just negligence -- you understand
5 that I will not -- I don't want to look at this again if all
6 you're going to tell me is negligence.

7 And what is it you're going to say? Tell me --
8 maybe I should know what it is you're going to allege.

9 MR. CHARLIP: Well, I think what we would allege
10 would be along the lines -- and obviously I can't give you
11 chapter and verse right now --

12 THE COURT: No, no, you should be able to, because
13 you say you want me to not dismiss, give you a chance to
14 amend. That means you know right now what it is you'll say.
15 So tell me.

16 MR. CHARLIP: That there were funeral homes -- I'm
17 sorry, that there were crematories in the State of
18 Massachusetts that under Massachusetts law had to be owned by
19 someone other than a funeral home owner, that it was against
20 Massachusetts law to own a funeral home and a crematory, that
21 it was well-known in the industry that Derek Wallace was a
22 funeral home owner and owned two funeral homes and that he
23 formed Bayview in New Hampshire to evade the requirements of
24 Massachusetts law, that Bayview was charging --

25 THE COURT: And that Harvard and Gentile knew all

1 of this.

2 MR. CHARLIP: Yes.

3 THE COURT: They knew.

4 MR. CHARLIP: It was known in the industry --

5 THE COURT: Excuse me, that Bayview (sic.) and
6 Harvard knew, not known in the industry. That these parties
7 knew -- if they did not know but should have known but was
8 known in the industry, that's negligence again.

9 But the allegation is that somebody formed a
10 crematory in New Hampshire to avoid Massachusetts law and
11 Harvard and Gentile knew that. Now, are you prepared to allege
12 that?

13 MR. CHARLIP: I have not deposed Harvard, I have
14 not deposed Gentile --

15 THE COURT: No, no. At this point can you allege
16 it in good faith? Not that it's known in the industry, because
17 as I say, knowing in the industry means simply -- it may have a
18 different impact on Gentile, but Harvard is not in this
19 industry.

20 MR. CHARLIP: I would submit that Harvard's
21 donative body program acts in the stead of a funeral home.
22 They do -- they do contract --

23 THE COURT: You know, you're talking a legal
24 construct. The question is did Harvard act in bad faith? And
25 bad faith means that they did something knowing the things

1 you're just alleging. Harvard knew all of this.

2 MR. CHARLIP: I don't know what Harvard knew as I
3 stand here right now.

4 THE COURT: Okay. I think I'm done.

5 The motion to dismiss is with prejudice.

6 MR. CHARLIP: Okay.

7 THE COURT: The granting of the motion to dismiss
8 is with prejudice.

9 MR. CHARLIP: Your Honor, I rise only to remind you
10 you asked us to remind you --

11 THE COURT: Thank you very much.

12 On the motion to remand, I have apparently already
13 granted (sic.) that motion, and there are two exceptions to the
14 removal of this case: The local controversy exception and the
15 home state exception.

16 The local controversy exception fails because no
17 other class action was filed within the three-year period
18 within which this action was filed; and there are at least
19 four, I have another one, at least one of them, maybe there are
20 two other ones. How many?

21 MS. FEENEY: Two.

22 MR. AHERN: Two, your Honor.

23 THE COURT: I have two other class actions. And
24 those class actions make the same or similar allegations
25 against at least some of the defendants as is made in this

1 case.

2 The home state exception reads that two-thirds or
3 more of the members of all proposed plaintiff classes in the
4 aggregate and the primary defendants are citizens of the state
5 in which the action was originally filed. And the primary
6 defendants are not citizens of Massachusetts. Bayview being
7 the primary -- and Stokes the primary defendants, they're all
8 citizens of New Hampshire.

9 Now, there's some notion that Harvard and Gentile
10 are the primary defendants, but the primary action alleged in
11 this is the action of Bayview, and besides which, I've
12 dismissed the other two defendants.

13 (Discussion off the record.)

14 THE COURT: I'm reminded I'm using the wrong phrase
15 as between granted and dismissed -- granted and denied.

16 The motion to remand has been denied, and is denied
17 for those reasons.

18 Okay. Anything further?

19 MR. LEIBENSPERGER: Thank you, your Honor.

20 THE COURT: If I had to write this all down, I can
21 get it straight, but since I'm -- I'm doing it from the bench
22 to get it done quickly, I need someone to remind me if I say
23 granted when I mean denied, in particular.

24 Okay. Just to clear things up, the motion to
25 dismiss is granted in as far as it is a motion of Harvard and

1 Gentile and is denied in as far as it is a motion of Bayview
2 and Stokes.

3 The motion to remand I've already denied.

4 Thank you.

5 (Court adjourned at 4:31 p.m.)

6 i i i i i i i

7 CERTIFICATION

8 I certify that the foregoing is a correct
9 transcript of the record of proceedings in the above;entitled
10 matter to the best of my skill and ability.

11

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15 _____
Debra M. Joyce

_____ Date

16 Official Court Reporter

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