Supreme Court No. 89090-9
Court of Appeals No. 30185-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DOROTHY A. MILLICAN, as Personal Representative of the estate of DAREN M. LAFAYETTE, and on her own behalf as statutory beneficiary,

Petitioner/Appellant,

v.

N.A. DEGERSTROM, INC., a Washington corporation,

Respondent,

and

MICO, INCORPORATED, a Minnesota corporation; JAMES R. BONNER and JANE DOE BONNER, husband and wife, and the marital community comprised thereof, d/b/a INDUSTRIAL POWER BRAKE COMPANY,

Defendants.

ON APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
(Hon. Kathleen M. O'Connor)

APPELLANT DOROTHY A. MILLICAN'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is Dorothy Ann Millican, who appears as the personal representative of the estate of her deceased adult son, Daren M. LaFayette, and on her own behalf to assert her rights as a statutory beneficiary of this action.

II. COURT OF APPEALS DECISION

The Court of Appeals, Division Three, issued its partially published decision terminating review on November 15, 2013. A copy of the decision is attached as Appendix A ("*Slip op.*"). Mrs. Millican seeks review of the portion of the decision affirming the summary judgment dismissal of her claim against N.A. Degerstrom, Inc., as a statutory beneficiary of the action for her son's wrongful death. *Slip op.* at 32-36.

III. ISSUE PRESENTED FOR REVIEW

This Court held in *Armantrout v. Carlson*, 166 Wn.2d 931, 214 P.3d 914 (2009), that in determining whether a parent was dependent upon her deceased adult child for support for purposes of being a statutory beneficiary of a wrongful death action under RCW 4.20.020, "support" is not limited to monetary contributions but may include economically valuable services provided by the decedent without compensation. Is the trier of fact restricted to considering only medical care and related direct personal assistance similar to that provided by the deceased adult child in *Armantrout*, or may the trier of fact also consider other economically valuable services such as property maintenance and improvement services upon which the parent can demonstrate financial dependence?

IV. STATEMENT OF THE CASE

A. Daren LaFayette, a Nineteen-Year-Old Worker on a Road Construction Project, Burned to Death after Rescuing Innocent Members of the Public from Imminent Collision with a Runaway Truck.

Daren LaFayette, age 19, was a worker on a project to improve Flowery Trail Road, a steep, mountain road near Chewelah, Washington. RP 251, 473. N.A. Degerstrom, the general contractor, subcontracted with LaFayette's employer, Sharp-Line Industries, Inc., for road striping and sign installation. RP 251, 280, 1305; Exh. P5. N.A. Degerstrom contractually delegated to Sharp-Line sole responsibility for the safety of Sharp-Line employees such as LaFayette, and accordingly did not ensure that Sharp-Line parked its vehicles safely on inclines or used wheel chocks as required by regulation.[1]

On September 12, 2006, LaFayette was assisting a Sharp-Line foreman to install roadside signs. Exh. P23. When the foreman parked their work truck, a 1978 Chevrolet C-65 outfitted with a hydraulic auger for digging post holes, he failed to set the parking brake or chock the

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[1] N.A. Degerstrom's contract with Sharp-Line included the provision, "Subcontractor shall be *solely* responsible for the protection and safety of its employees[.]" Exh. P5 at 6 (emphasis added). N.A. Degerstrom failed to require Sharp-Line to adopt a site-specific accident prevention program or address safe parking of vehicles on an incline. RP 320-21, 480, 1197-98. Although N.A. Degerstrom's own accident prevention program included a wheel chock requirement for equipment, N.A. Degerstrom failed to supervise or enforce compliance with any chock requirement. RP 480; Exh. P4 at 0009. N.A. Degerstrom failed to provide wheel chocks to Sharp-Line or to require that it provide or use wheel chocks as required by WAC 296-155-610(2)(b). RP 480, 1203-05.

wheels. Exhs. P23, P46, D111. With the truck facing downhill and the transmission in neutral, the truck was secured only by a supplemental "lever lock" brake, which relied upon hydraulic pressure. Exh. P23; RP 155, 172. At around 3:30 p.m., N.A. Degerstrom's foreman drove by and observed the parked auger truck but failed to inspect for chock usage. RP 480, 513-14. About an hour later, the truck began to roll downhill toward oncoming traffic. RP 67-69, 480, 513.

Alarmed by the imminent hazard, LaFayette sprinted and caught up with the truck on foot, entered the cab, and immediately diverted it from an imminent collision with an oncoming vehicle occupied by two men. RP 67-72. Though the truck's brakes were inoperable, LaFayette managed to navigate the winding road downhill for a mile and a half before the truck gained too much speed to control it. RP 131. The truck smashed through a guardrail and went airborne before crashing down on its side at the bottom of an embankment and bursting into flames. RP 127-32, 815; *see* Exhs. P52, 53. The resulting inferno precluded any attempt to rescue LaFayette. RP 815-16.

B. Before His Death, LaFayette Provided Necessary and Economically Valuable Property Maintenance and Improvement Services to His Mother and Stepfather, Mr. and Mrs. Millican.

Daren LaFayette was born in 1987. CP 798. He had no spouse or children. He and his older brother and sister grew up in a rustic log cabin on ten acres in a rural area outside the small town of Elk, about 30 miles north of Spokane, Washington. CP 660-61, 753. The home lacked power

or running water until 1993. CP 710, 798. Its only source of heat was, and continued to be, a wood-burning stove. CP 798. Due to the rustic nature and rural location of the home, a substantial amount of physically demanding work was necessary to maintain it in habitable condition. CP 798.

LaFayette's mother, Dorothy Ann Millican, separated from his natural father in 1989. CP 798. In 1992, the year the divorce was finalized, she suffered a massive pulmonary embolism. CP 710, 799. Though she survived, she suffered thereafter with pulmonary hypertension and related permanent physical disabilities. CP 905-06. Her primary symptoms were persistent and severe shortness of breath and fatigue due to restriction of her pulmonary arteries. CP 711, 799, 906-07.

Mrs. Millican's physician, Julie Moran, M.D., diagnosed her with the most severe form of pulmonary hypertension, a progressive condition that causes the heart to weaken and enlarge. CP 906. This condition limited Mrs. Millican's ability to walk more than very short distances, and she was "significantly limited in her ability to do any chores involving aerobic activity." CP 908. Dr. Moran opined that Mrs. Millican's condition restricted her from performing household chores, and that attempting to perform any type of strenuous work "could be dangerous." CP 908. Although Mrs. Millican worked two jobs, neither of them was physically demanding. CP 726-29. She was employed full time as a teacher's assistant with the public school district and part time as an assistant in a foster home. CP 726, 803-04.

Mrs. Millican married LaFayette's stepfather, David Millican, in 1995. CP 661. Like his wife, Mr. Millican lacked the capability to perform even routine home maintenance and repairs. Mr. Millican's physical limitations included asthma, neck and back problems, and arthritis, among others. CP 824-25. Although he worked as an elementary school janitor, his job responsibilities were limited to dusting, mopping, and cleaning restrooms. CP 830. In addition to his janitor job, Mr. Millican worked part time as an assistant in the same foster home where Mrs. Millican worked. CP 833.

Mr. Millican lacked any knowledge of "carpentry, electrical or anything like that." CP 800, 829. Indeed, his maintenance responsibilities at the school were limited to changing light bulbs, and he was "not really allowed to have tools" due to his lack of knowledge or ability to use them. CP 830. In addition, he was restricted from lifting more than 20 to 30 pounds due to his back problems. CP 826. At home, he would clean, change light bulbs, and sometimes use the riding lawn mower, paint, or shovel snow as his health allowed, but the majority of the maintenance was left to his stepson, Daren LaFayette. CP 800-03, 828-31.

Given his parents' limitations, LaFayette was responsible for significant work at the family's rural home and property from an early age. Initially, LaFayette and his two older siblings shared responsibility for the physically demanding chores and maintenance. CP 702. But after his older brother moved out in 2002, LaFayette was at age 15 the only child living at home, and he handled virtually all the work his parents

could not do. CP 702. In addition, that same year he took his first summer job, working for Joe's Mows doing yard maintenance and landscaping, building decks, and installing irrigation systems. CP 665, 670, 672, 673. Having learned some construction skills, LaFayette undertook his first significant projects on his own, building a new deck for his parents and replacing a sliding door with french doors. CP 699, 704, 706.

Shortly after graduating from high school in 2005, LaFayette took a job in construction with a local builder of custom homes, where he learned additional skills such as framing, siding, and roofing. CP 675. He began supporting himself and bought his own tools, but continued living with his parents near Elk until 2006. CP 675, 678, 686.

Before moving out on his own, in the years 2003-2005, LaFayette undertook significant maintenance and improvement projects at his parents' home. For instance, after a tree fell on the dormer over the master bedroom in 2003, punching holes in the roof and breaking windows, LaFayette made the necessary repairs, patching the roof and replacing the windows. CP 695, 696-700. In addition, he improved accessibility by building a deck off the front of the house that wrapped around and connected with the larger, side deck he had built previously. CP 697. He cleaned and stained the existing decks and removed an unused brick chimney. CP 702, 744, 800-801, 815. And he added outdoor power outlets and lighting adjacent to the decks and in areas inside the log home that previously lacked power, such as the dining room. CP 695, 701, 802.

LaFayette did not just maintain and improve the home itself, but did substantial other work to maintain the ten-acre property. The driveway to the house was approximately 100 yards long. CP 745. When there was heavy snow, LaFayette would borrow a neighbor's snow plow and use it to clear the driveway as necessary for ingress and egress. CP 744-45. In addition, he would manually clear the decks and walkways of snow. CP 744. When the driveway washed out due to flooding, LaFayette used a bobcat from Joe's Mows to restore access to the property. CP 801, 815. He also regularly removed fallen trees and repaired or replaced damaged screen doors and television antennas as necessary after storms. CP 801, 802, 815.

LaFayette moved out in March of 2006 and got his own apartment in Spokane after taking the job with Sharp-Line. CP 676-78. But despite establishing his own household as an adult, LaFayette did not stop regularly maintaining and improving his parents' home; he continued performing the necessary maintenance and completed substantial further improvements to the home. *See* CP 800, 802-03. For instance, LaFayette added track lighting in the kitchen, where previously his parents had only lamps hung from nails. CP 693. He refinished the decks, installed ceiling fans, and insulated the floor of the main level of the home. CP 744, 802, 803. And where his parents had only temporary construction stairs leading up to the second story that had been added over ten years earlier, LaFayette finished the stairs with permanent treads. CP 690-92, 707.

The last major project LaFayette undertook for his parents was to replace the old greenhouse where they stored the firewood they burned for heat. CP 688, 815-16. The greenhouse was rotting and partially collapsed, and was too small. CP 688-89, 707-08, 815-16. LaFayette had his parents start buying lumber for a new storage building over a period of months as they could afford it. CP 688-89. During the summer of 2006, LaFayette used a bobcat to level the ground and spread rock for the site, and substantially completed construction of large pole building with plenty of room to store firewood and yard equipment. CP 688-89, 707, 815-16. Unfortunately, LaFayette died before he could pour a concrete floor or add power to the building. CP 689, 816-17.

Before his death, LaFayette had made specific plans to continue providing maintenance as well as construction services to his parents. Among other projects, LaFayette was going to replace all the windows in the house, as it was difficult to keep the house warm in the winter and there were issues with water intrusion and rot in some areas. CP 707-08, 816-18. Mrs. Millican had already started buying windows before her son's death, but he did not get to begin that project. CP 708.

In addition, LaFayette planned to remodel and add onto his parents' home to accommodate their physical disabilities and make it suitable for use as a foster home, which would provide income. CP 804-05, 817-18. Mrs. Millican estimated that she could have earned up to $13,000 a month operating a foster home. CP 752. She had discussed with LaFayette specific plans to add a master bedroom on the main level

and use the upstairs bedrooms for foster children. CP 746-47, 804-05, 816. They also planned to add a handicap-accessible bathroom and build a garage with a studio apartment that could initially be rented for income and later used as living space for a home care assistant. CP 746-47, 804, 816-17. The construction would have been done in phases to make it affordable. CP 747.

Although LaFayette did not provide cash support or medical care to his mother, she testified that the extraordinary assistance that LaFayette had provided with physically demanding labor and chores had helped her avoid exacerbating her shortness of breath and other serious symptoms of pulmonary hypertension. CP 710, 750-51. Mrs. Millican further testified that LaFayette provided services that were "necessary for maintenance and habitability" of her home. CP 801. Mrs. Millican submitted expert testimony that the construction, maintenance, and repair labor provided by LaFayette without compensation before his death would have cost about $13,000 to hire out, and that the services he had planned to provide in the next few years would have cost over $61,000. CP 884-85, 898-902. She testified that with her and Mr. Millican each working two jobs just to get by, their financial circumstances did not enable them to hire contractors to perform the services LaFayette had performed at no charge. CP 752-53, 800, 804.

C. The Trial Court Granted Partial Summary Judgment to the Defendants, Dismissing Mrs. Millican's Claim as a Statutory Beneficiary of the Wrongful Death Claim, and Denied Reconsideration.

Mrs. Millican was named the personal representative of her son's estate and brought a wrongful death and survival action against N.A. Degerstrom and other defendants, naming herself as a statutory beneficiary of the action. CP 7-23. Before trial, all defendants jointly moved for partial summary judgment to dismiss Mrs. Millican's claim as a statutory beneficiary. CP 642-43. The defendants contended that Mrs. Millican was not "dependent upon the deceased person for support" under RCW 4.20.020 and therefore was not a qualified beneficiary of the action. CP 642-43. Presented with evidentiary materials containing the facts set forth above, the trial court granted the motion and dismissed Mrs. Millican's claim. CP 943-45.

Mrs. Millican timely moved for reconsideration based in part on facts arising since the filing of her summary judgment opposition papers. CP 947-48. In a declaration, Mrs. Millican described how she had lost the title to her home of 25 years at a foreclosure sale and had very recently received an eviction notice. CP 961-62. She attributed the loss of her home in large part to the termination of her son's services, stating:

> The services which my son, Daren Lafayette, provided to me were a valuable and important consideration for me in keeping my home. First, my husband and I are unable to physically perform the services he provided. Second, my husband and I are financially unable to pay someone else to perform the tasks necessary for the maintenance and upkeep of our home. Finally, I am unable to have the property maintained at the level it was prior

> to Daren's death. Refinancing a home that is losing value does not make financial sense.

CP 962. The trial court denied the motion for reconsideration, reasoning in part that there was no evidence that LaFayette had contributed to the mortgage payments. CP 1284-87.

D. On Appeal from a Defense Verdict, the Court of Appeals Reversed the Judgment on the Verdict and Ordered a New Trial as to the Estate's Claim against Defendant N.A. Degerstrom, but Affirmed the Summary Judgment Dismissal of Mrs. Millican's Claim as a Statutory Beneficiary.

After a trial, the jury found that none of the defendants was negligent, and the trial court entered judgment on the verdict. CP 3205-07, 3208-11. On behalf of the estate, Mrs. Millican appealed from the judgment on the verdict as to defendant N.A Degerstrom. CP 3288-3321. She also appealed from the summary judgment dismissal of her claim as a statutory beneficiary. CP 3288-3321.

The Court of Appeals reversed the judgment on the verdict and remanded for a new trial on liability and damages as to N.A. Degerstrom. *Slip op.* at 17. The court reasoned that the trial court committed prejudicial error in denying a motion in limine to exclude evidence or argument by N.A. Degerstrom that it did not exercise or retain supervisory control or authority over Sharp-Line during construction operations, including a provision of the subcontract delegating to Sharp-Line sole responsibility for the safety of Sharp-Line's employees. Exh. P5 at 6.

But the Court of Appeals affirmed the summary judgment dismissal of Mrs. Millican's claim as a statutory beneficiary, reasoning

that LaFayette "provided no medical care or monetary support to his mother" and that Mrs. Millican "made no showing of financial dependence" on the services provided by LaFayette. *Slip op.* at 32-36.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals' Holding that the Trier of Fact May Consider Only Monetary Contributions or Medical Care and Related Direct Personal Assistance as "Support" under RCW 4.20.020 Is In Conflict with This Court's Decision in *Armantrout v. Carlson*.

Both economic and noneconomic damages are recoverable as losses suffered by those who qualify under RCW 4.20.020 as statutory beneficiaries of a wrongful death and survival action. *See* RCW 4.20.020; RCW 4.20.046(1); WPI 31.03.02. Absent qualified beneficiaries, an estate may recover economic damages based on the survival of the decedent's cause of action for personal injuries resulting in death, but noneconomic damages will not be available in that action. RCW 4.20.046(1); *see also* WPI 31.01.02. Under the statutes authorizing wrongful death and survival actions, the parents of a deceased adult child may recover as beneficiaries only after demonstrating that they were dependent upon the child for support. *Philippides v. Bernard*, 151 Wn.2d 376, 386, 88 P.3d 939 (2004), citing RCW 4.20.020 (wrongful death); RCW 4.24.010 (injury or death of a child); RCW 4.20.046 (general survival statute); RCW 4.20.060 (special survival statute).

This Court has consistently interpreted "support" as used in these statutes as meaning financial support. *See Philippides*, 151 Wn.2d at 386

(citing cases). In *Philippides*, this Court confirmed that "support" means financial and not emotional support. *Id.* at 388. More recently, in *Armantrout v. Carlson*, 166 Wn.2d 931, 214 P.3d 914 (2009), this Court held that "support" is not limited to monetary contributions but may include economically valuable services.

The plaintiffs in *Armantrout* alleged that the decedent's mother, who was diabetic and blind, was dependent upon direct personal assistance that her deceased adult daughter had provided without compensation. 166 Wn.2d at 933-34. The daughter's services had included transportation, reading, and assisting with medical needs such as glucose readings and insulin injections. *Id.* The jury found that the Armantrouts were dependent on the decedent for support and awarded them damages. 166 Wn.2d at 934. The Court of Appeals reversed and held that the jury had been instructed incorrectly because "conferring services and other benefits does not constitute financial support." *Id.* (citation omitted). This Court reversed the Court of Appeals and held in a unanimous decision that, other than casual gifts or everyday services a child would routinely provide, the trier of fact may consider economically valuable services as "support" under RCW 4.20.020. 166 Wn.2d at 937-38, 940-41.

This Court specifically held in *Armantrout* that "support" under RCW 4.20.020 need not include monetary contributions. 166 Wn.2d at 938. This Court held that, while "everyday services a child would routinely provide" are properly excluded from consideration by the trier of

fact as support, other "services with an economic value" may be considered. *Id.* at 938, 940. This Court reasoned in part that interpreting "support" as limited to monetary contributions would lead to absurd results and unfair application of the right of action for wrongful death, as "parents who received monetary contributions from their adult child to purchase valuable services would qualify as statutory beneficiaries, but parents who received those exact same services from their adult child would not." *Id.* at 940.

The Court of Appeals determined here that the evidence Mrs. Millican presented in opposition to summary judgment failed to demonstrate a genuine issue of material fact because "the services Mr. Lafayette provided are different from the type of support services discussed in *Armantrout*...," and "Mr. Lafayette provided no medical care or monetary support to his mother[.]" *Slip op.* at 35. But this Court in *Armantrout* held that monetary contributions are not required and did not limit the potentially qualifying services to medical care. Indeed, rather than holding that the statute limits the types of services that may be considered as support, this Court plainly held in *Armantrout* that the trier of fact may consider *any* economically valuable services, other than everyday services a child would routinely provide. 166 Wn.2d at 938, 940-41.

Even accepting the Court of Appeals' conclusion that "*[s]ome* services" LaFayette provided were in the nature of everyday services a child would routinely provide, *slip op.* at 35 (emphasis added), other

services he provided clearly did not fall into that category, especially considering that he continued providing them after moving out of his parents' home and establishing his own household. Under *Armantrout*, a jury is not precluded from considering such services as support.

The Court of Appeals' holding that Mrs. Millican was required to present evidence that LaFayette provided medical care or monetary contributions, to demonstrate support, is in conflict with *Armantrout*, and this Court should accept review under RAP 13.4(b)(1).

B. Whether the Trier or Fact May Consider Economically Valuable Services Other than Medical Care and Related Direct Personal Assistance as "Support" under RCW 4.20.020 Is an Issue of Substantial Public Importance that Should Be Determined by the Supreme Court.

Even if the Court of Appeals' decision were not in conflict with *Armantrout*, review would be warranted under RAP 13.4(b)(4) because whether the trier may consider economically valuable services other than medical care and related direct personal assistance, in determining whether a parent is dependent upon her adult child for support, is an issue of substantial public interest that should be determined by the Supreme Court.

The wrongful death statutes, being remedial in nature, are liberally construed to give effect to their "humane purpose." *Armantrout*, 166 Wn.2d at 936, quoting *Bortle v. N. Pac. Ry.*, 60 Wash. 552, 554, 111 P. 788 (1910); *see also Cook v. Rafferty*, 200 Wash. 234, 240, 93 P.2d 376 (1939); *Mitchell v. Rice*, 183 Wash. 402, 407, 48 P.2d 949 (1935).

Accordingly, this Court has not only given effect to the plain language of the statutes, but has extended their literal scope, such as by reading "child or children" in RCW 4.20.020 as including children born outside of wedlock. *Armijo v. Wesselius*, 73 Wn.2d 716, 440 P.2d 471 (1968). Observing that such children were "not necessarily excluded" by the express terms of RCW 4.20.020, this Court was guided by "social policy considerations" in reaching its conclusion. *Id.* at 720.

Support other than medical care and related direct personal assistance is likewise "not necessarily excluded" by the plain language of RCW 4.20.020. Other than to exclude everyday services a child would routinely provide, neither the statute's plain language nor any decision of this Court has placed any limitation on the types of economically valuable services upon which a parent may claim to be dependent for support, for purposes of being a beneficiary of a wrongful death action. "Support" as interpreted by this Court in *Armantrout* simply means contributions of money or economically valuable services. This Court in *Armantrout* adopted a definition of "support" that broadly encompasses contributions that "allow one to live in the degree of comfort to which one is accustomed" or are offered "for the purpose of helping the recipient maintain an acceptable standard of living." 166 Wn.2d at 938, quoting BLACK'S LAW DICTIONARY 1577-78 (9th ed. 2009).

Moreover, other than to exclude everyday services a child would routinely provide, there is no sound reason or public policy basis to limit the types of economically valuable services that may be considered. That

the services provided by LaFayette were "different from the type of support services discussed in *Armantrout*," *slip op.* at 35, does not mean they may not qualify as support. Although the adult child in *Armantrout* provided medical care and direct personal assistance to her mother, while LaFayette provided mainly property maintenance and improvement services, a trier of fact may find that either type of assistance had economic value and provided support to the beneficiary.[2] That the lower courts in this case felt constrained to consider only services similar to those involved in *Armantrout* demonstrates a need for additional guidance on the parameters of the term "support" in the statute.

This Court should accept review under RAP 13.4(b)(4) to decide whether the trier of fact should be permitted to consider support other than medical care and related direct personal assistance in determining whether a parent was dependent on her deceased child for support.

C. Mrs. Millican Submitted Evidence from Which a Jury Could Conclude that She Was Dependent on the Services Her Son, Daren LaFayette, Had Provided as Support Before His Death.

On the issue of dependence, the Court of Appeals concluded, "[W]ith respect to any assistance she had been receiving from Mr. Lafayette that Mrs. Millican might legitimately argue was nonroutine and

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[2] Indeed, while increased urbanization and changing cultural norms have made it less common for any child, much less an adult child, to provide to his parents the types of services LaFayette provided, this kind of support would have been familiar to the 1909 legislature that adopted the "dependent...for support" standard. *See* 1909 WASH. LAWS, ch. 129, § 1.

responded to a real and substantial need, she made no showing of financial dependence on that assistance." *Slip op.* at 36. In reaching this conclusion, the Court of Appeals must have applied a higher standard of dependence than required by the statute, misapplied the summary judgment standard, or misapprehended the record. This Court, after addressing the meaning of "support" under RCW 4.20.020, will have little difficulty concluding that the evidence submitted by Mrs. Millican was sufficient to create a genuine issue of fact regarding whether she was dependent upon the support provided by her son.

The requirement of dependence does not require that the parent was wholly dependent or had no other means of support. *Armantrout*, 166 Wn.2d at 936. Instead, "dependent" is "a term having relation to the circumstances of the plaintiff." *Id.* at 936, quoting *Mitchell v. Rice*, 183 Wash. 402, 407, 48 P.2d 949 (1935). It requires that there be "some degree of dependency, some substantial dependency, a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child." *Id.*, quoting *Bortle v. N. Pac. Ry.*, 60 Wash. 552, 554, 111 P. 788 (1970).

In ruling on a motion for summary judgment, the court's function is not to resolve any existing factual issue, but only to determine whether a genuine issue of material fact exists. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). If reasonable persons could find in favor of the nonmoving party, considering the material evidence and all reasonable

inferences in the light most favorable to that party, then the motion must be denied. *Id.*

This Court observed in *Armantrout*, "[C]ourts have generally allowed claims by beneficiaries who can demonstrate they had a need for the decedent's regular contributions of support." 166 Wn.2d at 936. Mrs. Millican presented ample evidence from which a jury could find she had a need for LaFayette's regular contributions of services as support. She presented evidence that she and her husband lacked the capability to perform for themselves the services that LaFayette provided, which were necessary to maintain their rustic, rural home and property in habitable condition. CP 711, 798-99, 824-26, 830, 906-08, 962. She presented evidence that their financial circumstances did not enable them to hire contractors to perform those services. CP 752-53, 800, 804, 962. She testified that the termination of LaFayette's services was a factor in losing the home to foreclosure. CP 962. And she testified that the extraordinary assistance that LaFayette had provided with physically demanding labor and chores and helped her avoid exacerbating her shortness of breath and other serious symptoms of pulmonary hypertension. CP 710, 750-51.

Considering the facts and all reasonable inferences in the light most favorable to Mrs. Millican, she presented ample evidence from which a jury could find she was dependent on the services provided by her son as support, without compensation, before his death.

VI. CONCLUSION

This Court should accept review of the portion of the Court of Appeals' decision affirming the summary judgment dismissal of Mrs. Millican's claim as a statutory beneficiary of the wrongful death action against N.A. Degerstrom, Inc., and decide whether the trier of fact is restricted to considering only medical care and related direct personal assistance as support under RCW 4.20.020, or may also consider other economically valuable services such as property maintenance and improvement.

Respectfully submitted this 10th day of December, 2013.

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APPENDIX

A

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November 15, 2013

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

DOROTHY A. MILLICAN, as Personal Representative of the Estate of DAREN M. LAFAYETTE, and on her own behalf as statutory beneficiary,	)	No. 30185-1-III
Appellant,	)	
v.	)	
N.A. DEGERSTROM, INC., a Washington corporation,	)	
Respondent,	)	
MICO, INCORPORATED, a Minnesota corporation; JAMES R. BONNER and JANE DOE BONNER, husband and wife and the marital community comprised thereof, d/b/a INDUSTRIAL POWER BRAKE COMPANY; JOHN DOE MANUFACTURER, 1 through 10; JOHN DOE CORPORATIONS, 1 through 10,	)	OPINION PUBLISHED IN PART
Defendants.	)	

SIDDOWAY, A.C.J. — Dorothy Millican's 19-year-old son, Daren Lafayette, was killed in a job related accident while working construction on the Flowery Trail Road, located in Stevens and Pend Oreille counties. As personal representative of her son's

estate and claiming rights as a statutory beneficiary, she brought a wrongful death action against the general contractor, N.A. Degerstrom Inc., and others. The jury returned a defense verdict from which Ms. Millican appeals.

Ms. Millican contends on behalf of her son's estate that the trial court erred in (1) admitting evidence that Degerstrom contractually delegated sole responsibility for the safety of employees to its subcontractors, (2) denying the estate's motion for a new trial, and (3) refusing to instruct the jury that Degerstrom owed a duty to the public traveling through the construction site. She argues individually that the court erred in dismissing her claims on the basis that she did not qualify as a statutory beneficiary.

We conclude that it was an abuse of discretion for the trial court to deny the estate's motion seeking to limit Degerstrom's evidence and argument that it required Mr. Lafayette's employer to assume sole responsibility for the protection and safety of its own employees. Degerstrom's mischaracterization to this effect pervaded its presentation and could not be cured by the concluding instructions to the jury. The estate and Ms. Millican fail to demonstrate any other error, however.

We affirm the trial court's dismissal of Ms. Millican's individual claim but reverse the judgment on the jury's verdict and remand for a retrial of the estate's claims.

FACTS AND PROCEDURAL BACKGROUND

In April 2005, the United States Department of Transportation Federal Highway Administration awarded N.A. Degerstrom Inc. a contract to improve a five-mile stretch

of Flowery Trail Road. Degerstrom subcontracted with Sharp-Line Industries Inc. to install signs and paint road stripes. The subcontract agreement required Sharp-Line to indemnify Degerstrom from any liability it suffered as a result of Sharp-Line's negligence. The subcontract also contained the following provision imposing responsibility on Sharp-Line for work site safety:

> Subcontractor accepts responsibility to prevent accidents to any person who may be close enough to its operation to be exposed to Subcontractor's work-related hazards. Subcontractor shall be solely responsible for the protection and safety of its employees, for final selection of additional safety methods and means, and for daily inspection of its work area and safety equipment. Failure on the part of Contractor to stop unsafe Subcontractor practices shall in no way relieve Subcontractor of its responsibility hereunder. Subcontractor shall conform to Contractor's site-specific safety plan(s) and policies as directed by Contractor in writing or by Contractor's project supervisor.

Clerk's Papers (CP) at 3227.

One of Sharp-Line's vehicles used on the Flowery Road project was a 1978 Chevrolet auger truck used to drill holes in the ground for sign posts. The truck was equipped with outriggers, which were extended to stabilize it while the auger was being used, and a hydraulic tamper that compacted soil around the sign posts. The auger and tamper were powered by a device that used the truck's transmission to transmit power from the engine. To engage the device, the truck's engine had to be running and the transmission had to be in neutral.

On the day Mr. Lafayette was killed, he and Sharp-Line's crew foreman, William Wright, were installing highway signs. Toward the end of the day, Mr. Wright parked the auger truck facing downhill and Mr. Lafayette and Mr. Wright began installing the last sign. Another subcontractor had set up traffic control with pilot cars because the auger truck encroached on the roadway. Mr. Wright put the truck in the parking gear, left the engine on, and engaged a supplemental brake device called a lever lock, which locks hydraulic fluid in the braking system. He did not, however, set the emergency brake or chock the tires. The men walked around behind the truck and Mr. Wright deployed the outriggers as he drilled a hole for the sign post. Mr. Wright then retracted the outriggers while the two men installed the sign post and began compacting soil around the post with the hydraulic tamper.

As he worked, Mr. Wright saw Mr. Lafayette suddenly drop the tamper and begin running after the truck, which was rolling across the road. Mr. Lafayette managed to pull himself into the cab and steer the truck away from a line of vehicles following a pilot car in the opposite lane. One of the drivers of the vehicles later testified that a collision seemed inevitable until Mr. Lafayette turned the wheels. Apparently the brakes had failed, because Mr. Lafayette was unable to slow or stop the truck. The truck continued to accelerate as Mr. Lafayette steered it down the hill where it unavoidably crashed, causing his death.

Dorothy Millican was appointed the personal representative of her son's estate and, on behalf of the estate, sued Degerstrom, Mico Inc. (the manufacturer of the lever lock), and James and Jane Doe Bonner d/b/a Industrial Power Brake (who had done maintenance and repair of the auger truck) for damages for wrongful death. She asserted an individual cause of action as well, "as a statutory beneficiary defined in RCW 4.20.020," a provision of the wrongful death statute. CP at 8.

In suing Degerstrom, she alleged that it had a nondelegable duty as general contractor to ensure Sharp-Line's compliance with health and safety regulations and contractual safety duties, had allowed "illegal, unsafe, ultra-hazardous practices resulting in an unsafe work place," CP at 20, and had thereby proximately caused her son's death.

Before trial, the court granted the defendants' joint motion for partial summary judgment dismissing Ms. Millican's individual wrongful death claim. It found no evidence creating a genuine issue of fact that she was dependent on her son for support qualifying her as a beneficiary under RCW 4.20.020. It denied the estate's motion in limine to exclude evidence or argument by Degerstrom that it did not exercise or retain supervisory control or authority over Sharp-Line during construction operations. At the conclusion of a three-week trial, the jury found none of the defendants liable. The trial court denied the estate's motion for a new trial against Degerstrom and Mr. Bonner. The estate and Ms. Millican appealed.

ANALYSIS

Ms. Millican, on behalf of the estate and individually, makes four assignments of error. In the published portion of this opinion, we address the estate's assignment of error to the trial court's refusal to exclude evidence that Degerstrom delegated sole responsibility for the safety of Sharp-Line's employees to Sharp-Line.

In the unpublished portion, we address the estate's assignment of error to the trial court's denial of its motion for judgment as a matter of law, its refusal to instruct the jury that Degerstrom owed a duty to the public traveling through the construction site, and Ms. Millican's assignment of error to dismissal of her individual claim.

Refusal to limit evidence and argument of delegated responsibility for safety.

Early in the proceedings below, Degerstrom moved for summary judgment, arguing that Sharp-Line had assumed the contractual obligation to comply with all safety laws and plans. The trial court denied the motion on the basis of Degerstrom's nondelegable duty to ensure a safe work environment. In its motions in limine, the estate reminded the trial court of Degerstrom's legal position, which it characterized as "factually inaccurate, legally misleading . . . , and inconsistent with [the] court's prior denials of its motions for summary judgment." CP at 1549. It asked the court to exclude evidence or argument by Degerstrom that it did not exercise or retain supervisory control or authority over Sharp-Line during construction operations.

In orally ruling on the motion, the trial court observed that "the factual issues . . . are all going to get in front of the jury" and that it viewed the parties' disagreement over Degerstrom's *legal duty* as an instructional matter. Report of Proceedings (RP) at 2. Critically, when the estate then sought to clarify whether, in light of that reasoning, its motion to exclude evidence and argument about *duty* was granted, denied, or reserved for later rulings, the trial court responded that the motion was denied. RP at 6. The estate's motion in limine was sufficient to raise and preserve its objection. *State v. McDaniel*, 155 Wn. App. 829, 853 n.18, 230 P.3d 245 (2010) (because the purpose of a motion in limine is to resolve legal issues outside the presence of the jury, a trial court's ruling denying a motion in limine is final and the moving party has a standing objection).[1]

At trial, Degerstrom presented extensive evidence and argument on duty, informing the jury in opening statement, through evidence, and in closing argument that it is "typical," "reasonable," "industry standard," and most important, "appropriate" and "allowable under Washington law" for a general contractor like Degerstrom to delegate its responsibilities, and for subcontractors like Sharp-Line to agree, by contract, to

[1] Degerstrom argues that the estate waived its objection by later questioning witnesses about the contract and its delegation provision. But once the evidence was permitted, it was not a waiver for the estate to try to turn the evidence to its advantage to any extent possible.

assume sole responsibility for the protection and safety of its own employees. RP at 40-54, 845-47.[2]

The general rule in Washington is that a principal is not liable for injuries caused by an independent contractor whose services are engaged by the principal. *Stout v. Warren*, 176 Wn.2d 263, 269, 290 P.3d 972 (2012); RESTATEMENT (SECOND) OF TORTS § 409 (1965). Two categories of exceptions to this rule exist at common law, the first being exceptions that subject the principal to liability for its own negligence and the second being exceptions that subject the principal to liability for its contractor's tortious conduct even if the principal has itself exercised reasonable care. *Compare* RESTATEMENT (SECOND) §§ 410-415 (direct liability) *with* §§ 416-429 (vicarious liability). The latter category of exceptions giving rise to vicarious liability comprise duties said to be nondelegable, as explained by the *Restatement*:

> The rules . . . do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault. They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor. The liability imposed is closely analogous to that of a master for the negligence of his servant.
>
> The statement commonly made in such cases is that the employer is under a duty which he is not free to delegate to the contractor. Such a "non-delegable duty" requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted.

[2] Relevant portions of Degerstrom's opening statement and closing argument are included in an appendix to this published portion of the opinion.

RESTATEMENT (SECOND) ch. 15, topic 2 introductory note. Circumstances that give rise to a principal's nondelegable duty include precautions required by statute or regulation. *Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 283, 635 P.2d 426 (1981) (citing *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978)); RESTATEMENT (SECOND) § 424; *Pettit v. Dwoskin*, 116 Wn. App. 466, 472 n.17, 68 P.3d 1088 (2003) (observing that while § 424 has not been formally adopted in Washington, "[i]t has, however, been frequently discussed and relied upon").[3]

Even where an exception to the general rule of nonliability applies, a principal ordinarily owes its duty to only third parties *other than* the employees of its independent contractors. *Stout*, 176 Wn.2d at 276 (quoting *Epperly v. City of Seattle*, 65 Wn.2d 777, 783, 399 P.2d 591 (1965) for its recognition of "'the distinction between the level of duty to members of the public and the duty of the owner to one engaged to work upon the project as the employee of an independent contractor'"); *Tauscher*, 96 Wn.2d at 281. The policy considerations that are said to support excluding an independent contractor's employees from the protected class are found in the workers' compensation systems in place in most states. The reasoning is that by making contract payments to an

[3] RESTATEMENT (SECOND) § 424 provides:
"One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions."

independent contractor that presumably include workers' compensation premiums as overhead, the principal has already assumed some financial responsibility for the safety of its employees. *Id.* at 281-82; *Stout*, 176 Wn.2d at 276-77.

The prevailing common law on these matters notwithstanding, Washington has long refused to exclude a subcontractor's employees from a general contractor's duty of care on either a "no duty" or "no duty to independent contractor employees" rationale. It has instead found nondelegable duties on the part of the general contractor, meaning that the general contractor is "[held] liable . . . although he has himself done everything that could reasonably be required of him." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 511 (5th ed.1984)). *Prosser* observes that it is difficult to suggest the criterion by which the nondelegable character of a duty may be determined, "other than the conclusion of the courts that the responsibility is so important to the community that the employer [here, the general contractor] should not be permitted to transfer it to another." *Id.* at 512.

Before the enactment and effectiveness of the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW, our Supreme Court held that a general contractor had a duty to provide adequate safety precautions for its subcontractors' employees under exceptions from the general rule of liability based in

common law, statute, and contractual assumption of duty. *Kelley*, 90 Wn.2d at 330.[4] The common law basis of the duty cited by *Kelley* is the duty, within the scope of a principal's retained control, to provide a safe place of work. The test of control is not actual interference with the work of the subcontractor, but the right to exercise such control. *Id.* at 330-31 (citing, among other authority, *Restatement (Second)* § 414). The statutory basis of the duty cited in *Kelley* was former RCW 49.16.030 (1919), which imposed a duty on all employers to furnish a reasonably safe place of work, with reasonable safety devices, and to comply with state safety regulations. *Id.* at 333. *Kelley* held that the statute created a "nondelegable duty" on the part of the general contractor. *Id.*

With WISHA, the legislature revised the statutory duty, providing that "[e]ach employer . . . shall comply with the rules, regulations, and orders promulgated under [chapter 49.17 RCW]." RCW 49.17.060(2). This specific duty to comply with WISHA regulations is owed to all of the employees at work on the job site as members of the protected class. *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 673, 709 P.2d 774 (1985). In *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 463-64, 788 P.2d 545 (1990), the Supreme Court noted that WISHA's predecessor statute created a nondelegable duty on general contractors to provide a safe place to work for employees of subcontractors and that

[4] The accident and injury in *Kelley* took place in December 1972, prior to WISHA's effective date of June 7, 1973. LAWS OF 1973, at ii; 90 Wn.2d at 326.

"[t]he policy reasons behind the court's holdings have not changed and give added force to the language of WISHA." It characterized the general contractor's responsibility, being concurrent with that of its subcontractors but primary, as a duty to "ensure compliance with WISHA and its regulations." *Id.* at 463.

In Washington, then, a general contractor not only has direct liability for a breach of its common law duties arising from retained control, but when it comes to violations of WISHA, vicarious liability for breach of a duty that is nondelegable. A violation of WISHA by a subcontractor's employee is therefore not only chargeable to the subcontractor, it is also chargeable to a general contractor—"the primary employer," whose supervisory authority "places the general in the best position to ensure compliance with safety regulations." *Id.*

The specific duty clause of RCW 49.17.060 is not the only statute reflecting the legislature's intent that a general contractor's duty for WISHA compliance runs to its subcontractors' employees. The legislature has also authorized contractual risk-sharing of damages and defense costs by general contractors who face such workplace injury claims. RCW 4.24.115 declares certain indemnification agreements to be valid and enforceable including, in the construction context, an agreement by a subcontractor to indemnify a general contractor against liability for damages caused by the negligence of the subcontractor or its agents or employees. *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 759-60, 912 P.2d 472 (1996). The subcontractor is only

permitted to indemnify the general contractor to the extent of the subcontractor's negligence. The statute thereby implicitly recognizes that a general contractor may be concurrently liable for its subcontractor's act or omission. And the statute anticipates claims against a general contractor for workplace injury to a subcontractor's employee: it provides that an indemnitor may waive its immunity under industrial insurance, something that would be unnecessary except in the case of a claim by an indemnitor's employee. RCW 4.24.115(1)(b).

Given this statutory authorization of indemnification agreements, the Degerstrom/Sharp-Line contract may well have been "typical" and "industry standard," as Degerstrom drove home during the trial, but not with the legal effect that Degerstrom then suggested to the jury. Indemnification provisions enable the general contractor, if liable to the employee, to recover its defense costs and judgment liability from the culpable subcontractor. They do not enable the general contractor to disavow its primary responsibility for WISHA compliance. *See Moen*, 128 Wn.2d at 753 (enforcing indemnification "allows contractors to allocate 'responsibility to purchase insurance' according to their negotiated allocation of risk and potential liabilities," and set their fees "'founded on their expected liability exposure as bargained and provided for in the contract'" (quoting *McDowell v. Austin Co.*, 105 Wn.2d 48, 54, 710 P.2d 192 (1985); *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 826-27, 881 P.2d 986 (1994))).

The facts of *Moen* illustrate the proper role and relevance of delegation and indemnification agreements. The plaintiff in that case was an ironworker, severely injured when he fell from a beam. The Department of Labor and Industries attributed the accident to a lack of safety equipment. It cited the plaintiff's employer, Island Steel Erectors, which it concluded was responsible for providing fall protection equipment. Given Island's immunity from suit for the workplace injury, the plaintiff sued the general contractor—Moen—and others.

Moen had entered into an agreement with Island that required Island to comply with laws, regulations, and the provisions of Moen's contract with the owner, including to comply with safety regulations. The Moen/Island agreement also included an indemnification addendum under which Island agreed to indemnify Moen for damages resulting from any concurrent negligence of Moen and Island resulting from the negligence of Island and its employees.

Moen did not rely on its agreement with Island to argue (as Degerstrom does) that it fulfilled its duty for WISHA compliance by delegating responsibility to Island. Instead, it settled with the plaintiff and sued Island for indemnification. The court held that the indemnification contract was valid and enforceable to the extent of Moen's and Island's concurrent liability for the negligence of Island. In remanding, it pointed out that what remained to be determined were (1) whether Moen and Island were concurrently

negligent and (2) the extent of Island's negligence for which Moen had been required to pay, but as to which it was entitled to be indemnified by Island.

Sharp-Line's agreement to assume sole responsibility and indemnify Degerstrom has no more and no less significance here. If it complies with statute, then as between Sharp-Line and Degerstrom the agreement is controlling. As between Mr. Lafayette and Degerstrom, for any WISHA violation established by the evidence, it is irrelevant.

Degerstrom nonetheless argues that our decision should turn on the statement in the penultimate paragraph of *Stute* that "[i]t is the general contractor's responsibility to furnish safety equipment *or to contractually require subcontractors to furnish adequate safety equipment relevant to their responsibilities.*" 114 Wn.2d at 464 (emphasis added). From this, it argues that the general contractor's duty for WISHA compliance characterized as nondelegable elsewhere in *Stute* can, in fact, be delegated. In proceedings below, the trial court found the quoted statement from *Stute* to be contradictory.[5] The same statement was the basis for the conclusion of the majority in *Degroot* that a subcontractor's contractual undertaking for safety "appears designed to

[5] The trial court commented, "[I]f you say there is a non-delegable, well, *Stute* says you can enter into a contract with your subcontractor to deal with the safety issues. Then we have the case law that says it is non-delegable. And I understand what Judge Sweeney is talking about [in *Degroot v. Berkley Constr., Inc.*, 83 Wn. App. 125, 133, 920 P.2d 619 (1996) (Sweeney, C.J., concurring)], because it seems like there is a contradiction here." RP at 2.

meet the duty of care outlined in *Stute*." *Degroot v. Berkley Constr., Inc.*, 83 Wn. App. 125, 129, 920 P.2d 619 (1996).

The statement from *Stute* relied upon by Degerstrom cannot reasonably be read to negate *Stute*'s otherwise clear holding that the general contractor's "primary" "nondelegable" duty is to "ensure compliance" with WISHA, however. Read in the context of the entire opinion, the statement conveys only that a general contractor's efforts to ensure compliance with WISHA may include, and in many cases will necessarily include, requiring subcontractors to comply with WISHA. "The label 'nondelegable duty' does not mean that an actor is not permitted to delegate the activity to an independent contractor. Rather, the term signals that the actor will be vicariously liable for the contractor's tortious conduct in the course of carrying out the activity." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 57 cmt. b (2012). Stated differently, "a 'non-delegable duty' requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted." RESTATEMENT (SECOND) ch. 15, topic 2 introductory note. Here, the quotation from *Stute* supports the fact that Degerstrom could enter into its agreement with Sharp-Line and rely on Sharp-Line's *compliance* with WISHA regulations as satisfying its own duty—not that it could discharge its primary responsibility for WISHA compliance by the mere act of entering into the agreement.

We review a trial court's evidentiary rulings for an abuse of discretion. A trial court abuses its discretion if its evidentiary ruling is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. Here, the trial court recognized that Degerstrom had previously advanced a legal position as to the duty of a general contractor that was questionable and it recognized that legal duty should be a matter of instruction. It nonetheless denied the motion in limine. The evidence on duty that Degerstrom chose to offer after the motion was denied did not tend to "make the existence of any *fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401 (emphasis added). More importantly, Degerstrom's evidence and argument that the contract effectively shifted the duty it owed Mr. Lafayette from it, to Sharp-Line, was legally wrong and likely misled and confused the jury. *See Degroot*, 83 Wn. App. at 133 (Sweeney, C.J., concurring). The mischaracterization pervaded Degerstrom's presentation and could not be cured by the concluding instructions to the jury.

The denial of the motion in limine was therefore an abuse of discretion and requires reversal of the judgment and remand for a new trial of the estate's claims.

For this reason and the reasons set forth in the unpublished portion of this opinion, we affirm the trial court's dismissal of Ms. Millican's individual claim, reverse the dismissal of the estate's claim, and remand for a new trial consistent with this opinion.

APPENDIX

Degerstrom's opening statement included the following preview of the evidence it would thereafter present:

> Now, NA Degerstrom's specialty is earth work. They don't carry specialties in other things like . . . signage and striping on the road. So what did they do? They hired specialty subcontractors who have the equipment and the knowledge to do this installation. . . .
>
> . . . .
>
> There's also gonna be a lot of discussion in this case about NA Degerstrom's contract with Sharp-Line. And as I talked to you earlier, there were several subcontractors on this job, and these subcontractors were was [sic] known as specialty subcontractors. They did work that Sharp—excuse me, that NA Degerstrom did not have the expertise to perform. So what they do, typically any sort of job like, this you subcontract it out to those people that are experts in their field. . . .
>
> . . . .
>
> Part of their subcontract agreement, Sharp-Line agreed to comply with all laws and regulations that are applicable to their work with regard to what was being performed at the Flowery Trail Road project. And then I'm gonna show you several safety provisions.

RP at 40-46. Degerstrom's lawyer then made a brief reference to jury instructions that would be given at the end of the case addressing what was allowable under Washington law with regard to delegating duties and regard to safety on the work site. She continued:

> [W]hat I'm going to be providing you today are the several contract provisions that discuss safety between Sharp-Line and NA Degerstrom. And I will again, like Mr. Stocker says, I will be showing you that all these provisions are appropriate and allowable under Washington law, and that safety is allowed to be with regard to a specialty subcontractor, NA Degerstrom could delegate those responsibilities.
>
> And the reason that you're able—the reason it makes sense as far as delegating these responsibilities, again NA Degerstrom is not all knowing and not knowledgeable about everything that's done on this project. It's

> appropriate, it's standard in the industry that you hire specialty subcontractors who have expertise in their field. So they have expertise with regard to preventing accidents regarding their work, and that's what the contract requested.
>
> They also have—we requested that Sharp-Line be solely responsible for providing protection and safety of its employees, again because it knows what the hazards are with regard to its job. They had the responsibility for final selection of the safety methods and means. That means how to—how that safety would be conducted on the project. And then finally they had the responsibility for doing daily inspections on their own work area and safety equipment because Degerstrom doesn't know what their equipment is, how it's specialized. There's been plenty of testimony today about this auger truck and how it was a very specialized piece of equipment. But NA Degerstrom certainly doesn't know, have the expertise to run, or would even be responsible if they ran it.
>
> Another safety provision talked about the site specific safety plans the accident prevention plan that NA Degerstrom had, in fact, for that project, and how Sharp-Line had to comply with those safety requirements. And finally Sharp-Line agreed that they would have a written safety plan for this project, an accident prevention plan, and any other documents with regard to safety that were required for this project.
>
> You're gonna be hearing testimony from a gentleman by the name of Mike Craig. Now, Mike Craig is the president of Sharp-Line, and he's been the president of Sharp-Line since its inception in 1987. Mr. Craig will be testifying that he signed this contract, and that he understood these contract provisions, and that he understood that Sharp-Line was required to furnish their own safety equipment and perform their work under this contract, and that type of safety equipment also included chocks. You'll also be provided testimony that the provisions with regard to safety that were in the [Degerstrom] contract with Sharp-Line, they are typical and they are standard in the industry because, again, if you're a specialty subcontractor, you're the one who's gonna know your equipment and know how to safely operate it.

RP at 46-48. Later in opening statement, Degerstrom's lawyer told the jury:

> You'll hear how Coit Wright was the employee responsible for the truck that day for Sharp-Line. . . . You'll hear how Mr. Wright was a laborer, that he did not have training on this equipment, that he was not the

> employee responsible in the operation of this truck. You'll hear how Mr. Wright made several poor choices that were in contradiction to the training that he received from Sharp-Line, and that at the end of this workday that caused that truck to start rolling.
>
> So what did Mr. Wright fail to do? Mr. Wright provided a statement to the Department of Labor & Industries, and then he also was interviewed by the Department of Labor & Industries. That information he provided to the Department of Labor & Industries, you'll hear testimony about. You'll hear testimony that Mr. Wright failed to set the truck's parking brake. You'll hear testimony that Mr. Wright failed to turn those wheels into the downward slope or the shoulder of the road. You'll hear how Mr. Wright deployed the outriggers, but then for whatever reason brought them back in.
>
> You'll also hear that, although it was not required because the truck was attended—both Mr. Wright and Mr. Lafayette were there and the engine was running—that Coit Wright could have used readily available chocks.

RP at 52-53.

In closing and summarizing the evidence that it had presented, Degerstrom's lawyer argued:

> Now, general contractors, as you know, owe a duty to provide all workers a safe worksite and to ensure safety regulations are complied with. Now Degerstrom, in no way, disputes this. . . .
>
> . . . [O]ne of the ways that Degerstrom and all general contractors ensure a safe worksite is they have their subcontractors—they have their subcontractors, under contract, furnish the safety equipment. And why is that? There's been a lot of discussion. Because subcontractors are the experts in their field, not Degerstrom. They're the ones who know what the hazards are. They're using their equipment, they know what is hazardous and how to protect their employees. Degerstrom's duty is analogous to a forest. Think of the project as being a forest and think of the subcontractors being the trees in that forest. And the subcontractors being responsible for the leaves on those trees, their equipment, their workers, all the things in order to do their job safely as it's contractually required that they do. Now, a general contractor is not able to see all those trees in the forest at one

> time. Nor can it see any of the leaves at any given moment. But it's the subcontractors that have agreed to take care of those leaves.
>
> Recall the testimony of Mark Lawless, that was plaintiff's site safety expert. Both he and Mr. Stranne stated it's not reasonable, or industry standard, to expect a general contractor to follow each subcontractor each and every moment to ensure that subcontractors are performing this [sic] jobs safely and correctly. Therefore general contractors are allowed, under the law, to contractually require their subcontractors furnish safety equipment related to their work.
>
> Ladies and gentlemen of the jury, I'm gonna ask that you look at Exhibit D103 and that safety provision that's cited in that contract. And I want you to look, instead of at the second paragraph, look at that first paragraph on that page, because that talks about the safety requirements and that Sharp-Line was solely responsible for the protection and safety of its employees, for the final selection of additional safety means and methods, and for daily inspection of its work area and safety equipment. It specifically says safety equipment. And as you know from the testimony of Mr. Craig, they agreed to be solely responsible for these items. And all witnesses in this case, from Mr. Craig to Mr. Stranne to Mr. Lawless, all testified this is a typical provision in a subcontract agreement.

RP at 845-47.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. RCW 2.06.040.

Denial of the estate's motion for judgment on liability as a matter of law.

The estate seeks more on appeal than reversal and remand; it asks that we find that the trial court should have granted its posttrial motion for a new trial. The new trial it sought, though, would be limited to damages—the estate wanted the court to instruct the jury that Degerstrom was negligent and its negligence was a proximate cause of Mr.

Lafayette's death. On appeal, it characterizes its posttrial motion as implicitly one for judgment as a matter of law on the issue of liability. It argues that the court erred in denying it.

The estate did not move for judgment as a matter of law at the close of the evidence as contemplated by CR 50(b). In authorizing *postverdict* motions for judgment as a matter of law, CR 50(b) speaks only of renewing an equivalent motion made under CR 50(a) before the case was submitted to the jury. The estate argues that it was excused from moving for the relief at the close of the evidence, however, because the motion would have been futile in light of the trial court's denial of its motion in limine. It cites *Kaplan v. N.W. Mut. Life Ins. Co.*, 115 Wn. App. 791, 804 n.6, 65 P.3d 16 (2003) in support.

Degerstrom's response makes a one-sentence mention of the estate's alleged waiver of its right to move for judgment as a matter of law. Br. of Resp't at 6. But it does not dispute the estate's argument that its posttrial motion was implicitly a CR 50(b) motion or provide any authority or argument in opposition to the estate's claimed excuse of futility. Absent any authority or argument in opposition, we assume without deciding that the estate's posttrial motion was, in part, a motion for judgment as a matter of law and that its failure to move for such relief at the close of the evidence is excused. See RAP 10.3(a)(6) and (b) (a respondent's brief, like the appellant's, must include argument on the issues presented for decision along with citations to legal authority).

Citing *Pudmaroff v. Allen*, 138 Wn.2d 55, 68, 977 P.2d 574 (1999), the estate contends that while violation of a controlling statute or regulation is not negligence per se, evidence of such a violation can be conclusive if the violator fails to present any evidence of excuse or justification. It argues that it presented evidence of WISHA violations for which Degerstrom presented no excuse or justification. It focuses on regulations imposing a requirement to chock a vehicle's tires in certain situations because, it argues, "there is no dispute that the auger truck would never have rolled away had the wheels been chocked." Br. of Appellant at 31. If a requirement for chocking was breached it argues that the "breach was, as a matter of law, a proximate cause of [Mr.] Lafayette's death." *Id.*

The principal WISHA regulation that Degerstrom alleges was not enforced is WAC 296-155-610(2)(b) (entitled "Motor Vehicles on Construction Sites"), which provides:

> (b) Before leaving a motor vehicle unattended:
> (i) The motor must be stopped.
> (ii) The parking brake must be engaged and the wheels turned into curb or berm when parked on an incline.
> (iii) If parking on an incline and there is no curb or berm, the wheels must be chocked or otherwise secured.

Citing evidence that Degerstrom did not require Sharp-Line to use chocks and did not inspect Sharp-Line's vehicles for chock usage, the estate contends that Degerstrom undisputedly violated this WISHA regulation.

Degerstrom's position at trial and on appeal is that the auger truck in which Mr. Lafayette died was not "unattended" and therefore the regulation did not apply.

Degerstrom's first argument that the truck was not unattended before beginning to roll down the incline is a logically fallacious one: Degerstrom argues that "[t]he Washington Administrative Code requires a vehicle's motor to be stopped in order for it to be considered 'unattended.'" Br. of Resp't at 38 (footnote omitted). It infers this proposition from the regulatory language, "Before leaving a motor vehicle unattended: (i) The motor must be stopped." Its construction misconstrues this language as saying something about what makes a motor vehicle "unattended," when it is instead saying something about what operators are required to do when they *leave* a motor vehicle unattended. Were Degerstrom's construction correct, then the WAC would also require a vehicle's parking brake to be engaged for it to be considered "unattended." For that matter, the wheels would have to be turned into a curb or berm when parked on an incline for it to be considered "unattended." And a motor vehicle left remotely overnight, with no operator anywhere in the vicinity, would be considered "attended," rather than "unattended," as long as its motor was running, the parking brake was engaged, or its wheels were turned into a curb or berm and it was parked on an incline. Clearly the regulation is not describing what makes a vehicle "unattended" but only the safety measures that must be taken when it is left unattended.

Elsewhere, Degerstrom's position that a vehicle's motor must be stopped in order for it to be considered "unattended" appears to be based on the fact that the auger and tamper used by Mr. Lafayette and his supervisor were operated using a power take-off (PTO) from the truck's transmission, requiring that the motor be running. Degerstrom considers it obvious that "unattended" cannot include times when the operator of a truck has stepped outside of its cab to operate a PTO-powered piece of equipment. But WISHA regulations are construed liberally to achieve their purpose of providing safe working conditions. *Potelco, Inc. v. Dep't of Labor & Indus.*, 166 Wn. App. 647, 653, 272 P.3d 262 (2012). It is not obvious that the Department of Labor and Industries would be unconcerned that the motor was running, the cab was unattended, and the only potential operators in the vicinity of this truck (pointed downhill), were engaged in other work that could distract their attention or prevent them from reaching the cab in the event of some hazard. The department might well require that a vehicle in this situation be attended by an employee in the cab or one who was not engaged in operating PTO equipment. What we do know from the record (although the evidence appears not to have been admitted at trial) was that the department did cite Sharp-Line for a violation of WAC 296-155-610(2)(b).

The meaning of "unattended" that Degerstrom urges is unambiguous (parked, with the motor stopped, and the operators no longer in the vicinity) is contrary to any meaning

attached to the term under OSHA.[6] In interpreting our WISHA regulations in the absence of state decisions, we may look to OSHA regulations and consistent federal decisions. *Wash. Cedar & Supply Co. v. Dep't of Labor & Indus.*, 137 Wn. App. 592, 604, 154 P.3d 287 (2007) (citing *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 147, 750 P.2d 1257, 756 P.2d 142 (1988)). OSHA's construction of "unattended" has not been uniform, varies depending upon the context, and recognizes that a vehicle that is left running may be considered "unattended." *See, e.g.*, 29 C.F.R. 1910.178(m)(5); Letter from Russell B. Swanson, Director, Directorate of Construction, to Peter Kuchinsky II, Safety Trainer/Consultant, Construction Building Analysts (May 11, 2005), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25067; Letter from Russell B. Swanson, Director, Directorate of Construction, to Paul Hayes, Safety Manager, Skanska (Jan. 14, 2004), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24723 (stating that "when [a construction vehicle is] *left unattended and running*, the parking brake must be set, and if the vehicle is on an incline, in addition to setting the brake, the wheels must be chocked" (emphasis added)).[7]

[6] Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678.

[7] Although only briefly reviewed, OSHA regulations include a definition and requirements for industrial trucks used in general industry (not construction):

> (ii) A powered industrial truck is unattended when the operator is 25 ft. or more away from the vehicle which remains in his view, or whenever

The estate argues for the first time in its reply brief that "[w]hether a safety regulation applies on a particular job site is a question of law for the court." Reply Br. at 20 (citing *Manson v. Foutch-Miller*, 38 Wn. App. 898, 902, 691 P.2d 236 (1984)); *see also Ball v. Smith*, 87 Wn.2d 717, 722-25, 556 P.2d 936 (1976) (it is the province of the trial court, not an expert witness, to interpret a statute or ordinance and determine whether it applies to a party). Its argument that the trial court should have determined whether WAC 296-155-610(2)(b) applied, or at least instructed the jury on a meaning for "unattended," appears worthy of briefing and consideration in the retrial. We will not consider it in this appeal, however, for two reasons: it was not raised in the trial court and

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the operator leaves the vehicle and it is not in his view.

(iii) When the operator of an industrial truck is dismounted and within 25 ft. of the truck still in his view, the load engaging means shall be fully lowered, controls neutralized, and the brakes set to prevent movement.

29 C.F.R. 1910.178(m)(5). In a May 11, 2005 interpretation letter addressed to Peter Kuchinsky II, OSHA referred to this industrial truck regulation in addressing a question about construction equipment, stating:

> Although these provisions do not apply to construction or earth-moving equipment, they address some of the same type of hazards. After considering the approach that was taken in §1910.178(m)(5) and the hazards associated with construction equipment, we have determined that, for construction equipment such as bobcats, backhoes, and trenchers, leaving the motor running with the operator away from the controls will be considered a *de minimis* violation of §1926.600(a)(3) where all of the following are met: the attachment is lowered, the controls are in the neutral position, the brakes are set, all manufacturer provided and recommended safety measures are utilized, and the operator is within 25 feet (and still in view) of the equipment.

Letter to Paul Kuchinsky II, *supra* (footnote omitted).

was raised for the first time in the estate's reply brief. RAP 2.5(a) (appellate courts need not entertain issues not raised in the trial court); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (issue raised for the first time in a reply brief is too late to warrant consideration).

In the trial court, the estate was content to have the jury decide whether the regulation applied. While we reject the two principal arguments Degerstrom offers on appeal as to why its construction of the regulation is correct, the fact remains that the estate allowed the meaning and application of the regulation to be decided by the jury. Both parties' witnesses offered their views as to whether the auger truck was "unattended" when the auger was being operated; the estate's witnesses said that it was unattended and Degerstrom's witnesses testified that it was attended, not unattended. As the case was tried, and viewed in the light most favorable to Degerstrom, the evidence could support a jury determination that the auger truck was not unattended at the time it began rolling down the incline. *Cf. Wieder v. Towmotor Corp.*, 568 F. Supp. 1058, 1063 (E.D. Pa. 1983) (experts' conflicting opinions as to whether forklift was left "unattended" when driver dismounted were submitted to the jury for its determination), *aff'd*, 734 F.2d 9 (3d Cir. 1984).

While placing principal reliance on WAC 296-155-610(2)(b), the estate points to evidence it presented of other alleged violations of WISHA regulations by Degerstrom as well. But that evidence was similarly disputed by Degerstrom's employees and experts at

trial. And with respect to some of the WISHA regulations the estate argued were violated by Degerstrom, the estate did not conclusively demonstrate that any violation was a proximate cause of Mr. Lafayette's death.

The trial court did not err in denying the estate's motion for judgment as a matter of law on liability and a new trial limited to the issue of damages.

Refusal to instruct on a duty owed to the public.

The estate next appeals the trial court's refusal to instruct the jury that the general contractor on a highway construction project has a duty to exercise ordinary care to protect the traveling public from dangerous conditions that may arise within a construction zone. It claims to have relied on an alternative theory of liability that Degerstrom's negligent omissions created a peril to the motorists on Flowery Trail Road who were in the path of the auger truck as it rolled downhill. Its breach of that duty owed the public created liability to anyone injured in a reasonable attempt to rescue the imperiled motorists—in this case, the rescuer happened to be the employee of a subcontractor. *See McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 355, 961 P.2d 952 (1998) (rescue doctrine[8] allows an injured rescuer to sue the party that caused the

[8] A plaintiff relying on the rescue doctrine must prove that (1) the defendant was negligent to the person rescued and that negligence created an appearance that the person rescued was in peril, (2) the peril or appearance of peril was imminent, (3) a reasonably prudent person would have concluded that the peril existed, and (4) the rescuer acted with reasonable care. *McCoy*, 136 Wn.2d at 355-56.

danger that required the rescue). It contends that the court's refusal to give the requested instruction prevented it from arguing this separate theory of negligence.

Jury instructions must allow the parties to argue their theories of the case, must not mislead the jury, and must as a whole inform the jury of the applicable law. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). "Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error." *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266-67, 96 P.3d 386 (2004). "As with a trial court's instruction misstating the applicable law, a court's omission of a proposed statement of the governing law will be 'reversible error where it prejudices a party.'" *Id.* at 267 (quoting *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995)). On appeal, errors of law in jury instructions are reviewed de novo. *Hue*, 127 Wn.2d at 92.

The estate's proposed instruction was not a Washington pattern jury instruction; the authority it cited in proposing the instruction was *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 558 P.2d 811 (1976) and *Cummins v. Rachner*, 257 N.W.2d 808 (Minn. 1977). On appeal, it cites *Argus v. Peter Kiewit Sons' Co.*, 49 Wn.2d 853, 307 P.2d 261 (1957) as additional authority. Degerstrom argues that all three cases involved distinguishable facts: a contractor engaged in road construction who created a hazard in or on the physical roadway being constructed. We agree; the duty of the contractor in each case was identified as being to maintain the streets in a reasonably safe condition and to guard

drivers from reasonably anticipated hazards. *Argus*, 49 Wn.2d at 856; *Smith*, 16 Wn. App. at 393; *Cummins*, 257 N.W.2d at 813. As stated in *Smith*, 16 Wn. App. at 393-94, this duty "is particularly applicable where the conditions complained of arise out of the actual construction, repair, and maintenance of the roadway." Degerstrom is not accused of creating a hazard, but of failing to safeguard against it.

Nonetheless, other evidence presented at trial supported a broader duty owed by Degerstrom to the public. Degerstrom's agreement in its accident prevention program to reasonably ensure that parked, unattended vehicles were chocked on inclines apparently was intended to protect the public as well as employees from hazardous runaway vehicles. The reference in WISHA regulations to vehicles parked at night, after work hours, proves this intent. WAC 296-155-605(1)(a). Degerstrom also agreed to safeguard the public from its operations and to provide adequate warnings of hazards for workers and the public.

This scope of Degerstrom's duty was reflected in other instructions given by the trial court, however, from which the estate could argue that Degerstrom breached a duty of care to the public by failing to require Sharp-Line to use chocks on the auger trucks. The trial court's instructions informed the jury that negligence includes "the failure to do some act that a reasonably careful person would have done under the same or similar circumstances," CP at 3179, and that a violation of a WISHA regulation is evidence of negligence. The estate elicited testimony from several witnesses that it would have been

safer to use chocks under the circumstances of the accident, and argued that the failure to use chocks was both unreasonable and a violation of WISHA safety regulations, creating an imminent threat to the public.

The instructions given enabled the estate to argue a negligent breach of duty to the public. The trial court's refusal to give a more specific instruction was therefore not reversible error.

Dismissal of Ms. Millican's individual claim.

Ms. Millican sued not only as the personal representative of Mr. Lafayette's estate but also individually, as a statutory beneficiary. RCW 4.20.020 identifies a first and second tier of beneficiaries who may recover damages for wrongful death. *Armantrout v. Carlson*, 166 Wn.2d 931, 935, 214 P.3d 914 (2009). The first tier includes a decedent's wife, husband, or registered domestic partner, and any children or stepchildren. If there are no first tier beneficiaries, as in the case of 19-year-old Mr. Lafayette, a wrongful death suit may be maintained for the benefit of second tier beneficiaries, including parents or siblings "who may be dependent upon the deceased person for support." RCW 4.20.020; *Armantrout*, 166 Wn.2d at 935.

The statute does not define "dependent" or "support." It has long been construed to require that second tier beneficiaries prove "'substantial dependency'" and a recognition by the child of the parent's "'necessitous want.'" *Id.* at 936 (quoting *Bortle v. N. Pac. Ry.*, 60 Wash. 552, 554, 111 P. 788 (1910)). The substantial dependency must

be based on the situation existing at the time of the decedent's death, not on a promise of future contributions. *Id.* Emotional dependency alone will not qualify parents for second-tier beneficiary status. *Id.* In *Armantrout*, the Washington Supreme Court held that the trier of fact may consider services provided by the deceased that had a monetary value for which the parents would not otherwise have been able to pay. It may not, however, consider "everyday services a child would routinely provide." *Id.* at 940.

The defendants moved for summary judgment dismissing Ms. Millican's individual claim, arguing that there was no genuine issue that she was dependent on her son for support. It was undisputed that Mr. Lafayette had moved out of his mother's home four months before the accident and had been living independently. The defendants submitted Ms. Millican's deposition in support of their motion, summarizing material concessions made in the deposition as follows:

> Mrs. Millican does not have debilitating health problems requiring necessary care and assistance from her family members. She had a pulmonary embolism nearly twenty years ago and now has hypertension, but she tries not to limit herself in activities. Mr. Lafayette did not offer any medical care to his mother. In fact, Ms. Millican is able to work at two jobs, the Riverside school district administration office and a foster home for at-risk youth. Currently, she is working about 35 hours per week at the school district and 35-40 hours per week at the foster home. Mr. Lafayette did not give his mother any [monetary] support.

CP at 645-46 (footnotes omitted).

In response, Ms. Millican submitted the declaration of her primary care physician that she has class IV pulmonary hypertension that causes shortness of breath with

exertion and significantly limits her ability to do chores involving aerobic activity. She also submitted evidence that her son began working construction at age 12 and had become proficient at construction, household repair, and landscaping. She testified that during his teenage years he had regularly handled household repairs and maintenance and had undertaken a number of improvements to her home and the 10-acre parcel on which it is located. She argued that her physical limitations prevented her, personally, from performing the maintenance required on her home and property.

She testified that her son planned to continue providing these and other maintenance, repair, and home improvement services in the future. In support of a motion for reconsideration she submitted a declaration stating conclusorily that she and her husband were financially unable to pay someone else to perform the tasks necessary for the maintenance and upkeep of their home. Because she and her husband could not keep up the property as well as Mr. Lafayette had, and it did not make sense for her to refinance a home that was losing value, she testified that she lost her home in foreclosure.

Our review of an order of summary judgment is de novo, considering the facts and reasonable inferences in the light most favorable to the nonmoving party. *Beggs v. Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 75, 247 P.3d 421 (2011); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002). Summary judgment is proper if the pleadings and accompanying documentary evidence show that there is no genuine issue of material fact and that the moving party is entitled

to judgment as a matter of law. *Phillips v. King County*, 136 Wn.2d 946, 956, 968 P.2d 871 (1998); CR 56(c).

Viewing the evidence in the light most favorable to Ms. Millican, the services Mr. Lafayette provided are different from the type of support services discussed in *Armantrout* that make a parent "dependent . . . for support" within the meaning of RCW 4.20.020. In that case, the 18-year-old decedent had lived with her mother, who had diabetes and was blind. She acted as her mother's driver and administered her mother's glucose tests and insulin injections. The decedent had contributed her monthly disability benefit checks to the household. *Armantrout* held that these services were the kind for which an economic value could be determined. At the same time, it endorsed the trial court's instruction to the jury that the financial dependence required excluded the everyday services a child would routinely provide. 166 Wn.2d at 939.

Ms. Millican's evidence responding to the summary judgment motion failed to demonstrate a genuine issue of material fact. Mr. Lafayette provided no medical care or monetary support to his mother, who was able to get around on her own and hold more than full-time employment. Some services provided by Mr. Lafayette, such as snow plowing and yard maintenance, were in the nature of everyday services a child would routinely provide. Extensive future home and landscaping improvements accounted for a

large part of her damage claim[9] but they were both hoped-for contributions and not the degree of dependency contemplated by the statute, which "must be real and substantial and will not arise from occasional gifts or gratuities." *Beggs*, 171 Wn.2d at 82 n.12. Finally, with respect to any assistance she had been receiving from Mr. Lafayette that Ms. Millican might legitimately argue was nonroutine and responded to a real and substantial need, she made no showing of financial dependence on that assistance.

The trial court properly granted the defendants' motion for partial summary judgment dismissing Ms. Millican's individual claim.

We affirm the trial court's dismissal of Ms. Millican's individual claim, reverse the dismissal of the estate's claim, and remand for a new trial consistent with this opinion.

Siddoway, A.C.J.

I CONCUR:

Kulik, J.

[9] Summarized at CP 782-87, Ms. Millican's damage claim included the value of the following improvements to her home that she had hoped Mr. Lafayette would undertake in the future: construction of a new two-car garage with studio apartment; a two-story addition to the home; a kitchen remodel; and new lawn, sprinkler, and drip irrigation systems.

No. 30185-1-III

BROWN, J., (concurring in part, dissenting in part) — I agree the trial court correctly dismissed Dorothy Millican's individual claim. But in my view under existing law, the trial court did not abuse its discretion and err in admitting the subcontract between N.A. Degerstrom (NAD) and Sharp-Line Industries, Inc. Pretrial, the Estate of Daren Lafayette (Estate) unsuccessfully moved to exclude any "[a]rgument or inference that Degerstrom did not retain control or exercise supervision over [Sharp-Line's] work," citing ER 401, 402, and 403 and *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990). Clerk's Papers (CP) at 1549. Attached to the motion was the subcontract between NAD and Sharp-Line, which specified in one provision that Sharp-Line

> accepts responsibility to prevent accidents to any person who may be close enough to its operations to be exposed to Subcontractor's work-related hazards. Subcontractor shall be solely responsible for the protection and safety of its employees, for final selection of additional safety methods and means, and for daily inspection of its work area and safety equipment.

CP at 3227. The Estate mistakenly contends this provision impermissibly delegated NAD's responsibility to ensure compliance with the safety regulations of the Washington Industrial Safety and Health Act of 1973 (WISHA), chapter 49.17 RCW.

Evidence must be relevant to be admissible, meaning "it must tend to make the existence of any fact of consequence to the action more or less probable." *Degroot v. Berkley Constr., Inc.*, 83 Wn. App. 125, 128, 920 P.2d 619 (1996). Even relevant evidence may be excluded if its probative value is outweighed by the likelihood that it will mislead the jury. *Id.* The trial court's balancing of probative value versus prejudicial effect is entitled to great deference. *Id.*

The subcontract's safety provision was relevant to NAD's defense that it took all reasonable steps to comply with WISHA regulations. Under RCW 49.17.060, each employer

> (1) Shall furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees . . . ; and
> (2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

This statute is mirrored in WAC 296-155-040, which states in part:

> (1) Each employer shall furnish to each employee a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to employees.
> (2) Every employer shall require safety devices, furnish safeguards, and shall adopt and use practices, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe. Every employer shall do everything reasonably necessary to protect the life and safety of employees.

See Stute, 114 Wn.2d at 457, 459-60. *Stute* held RCW 49.17.060 and WAC 291-155-040 create a two-fold duty for general contractors. *Id.* at 457. Subsection (1) of the statute and regulation imposes a general duty on employers to protect solely their own employees from "recognized hazards not covered by specific safety regulations." *Id.*

Subsection (2) of the statute and regulation, however, "imposes a specific duty to comply with WISHA regulations." *Id.* This specific duty extends to the employees of subcontractors. *Id.* at 458. Thus, a general contractor has a nondelegable duty to ensure compliance with safety regulations for the safety of a subcontractor's employees. *Id.* at 463-64.

In *Stute*, P.B.M.C., Inc., a general contractor, subcontracted with S & S Gutters to install gutters on a condominium complex. Mr. Stute, an employee of S & S Gutters, fell while installing gutters and was injured. The record showed P.B.M.C. knew the employees of S & S Gutters were working on the roof without safety devices. *Id.* at 456. Mr. Stute sued P.B.M.C., alleging the general contractor owed a duty to provide necessary safety devices on the work site. Citing RCW 49.17.060, WAC 296-155-040, and the general contractor's "innate supervisory authority," *Stute*, 114 Wn.2d at 464, the Supreme Court held a general contractor had a specific duty as a matter of law to supply safety equipment for all employees on a work site or to contractually require subcontractors to provide adequate safety equipment relevant to their responsibilities. *Stute*, 114 Wn.2d at 464.

Here, the trial court correctly reasoned *Stute* allowed a general contractor to contractually require subcontractors to furnish adequate safety equipment. *Id.* Thus, in my view, the trial court correctly admitted the subcontract with the understanding it would deal with the legal issues in the jury instructions.

In *Degroot*, a subcontractor's employee was injured while working on a job site and sued the general contractors for negligence and WISHA violations. Before trial, the employee moved to exclude a subcontract safety provision that arguably gave the subcontractor sole responsibility for the safety of its employees:

> "Subcontractor shall, at its own cost and expense, protect its own employees, employees of Contractor, and all other persons from risk of death, injury or bodily harm arising out of or in any way connected with the work to be performed under this Subcontract.
>
> "Subcontractor shall strictly comply with all safety orders, rules, regulations or requirements of all federal, state and local government agencies, exercising safety jurisdiction over said work including, but not limited to, federal OSHA [Occupational Safey and Health Act of 1970, 29 U.S.C. §§ 651-678] and state occupational safety and health regulations."

Degroot, 83 Wn. App. at 128. The employee contended that because the safety provision gave the impression that the general contractors had delegated to the subcontractor the duty to furnish a relatively safe working environment, the safety provision was irrelevant and misleading. *Id.* at 127.

In affirming the trial court's admission of the evidence, the *Degroot* court found the boilerplate language in the safety provision appeared to be designed to meet the duty of care outlined in *Stute*, particularly the general contractor's duty to "'furnish safety equipment or to contractually require subcontractors to furnish adequate safety equipment.'" *Id.* at 129 (quoting *Stute*, 114 Wn.2d at 464). Consequently, the safety provision was "at least relevant to whether [the general contractors] fulfilled their WISHA responsibility for the safety of all employees on the work site." *Id.* The *Degroot* court concluded the safety provision was not misleading, because the general contractors

agreed at trial they had a nondelegable duty to comply with WISHA safety regulations, never argued the subcontract delegated this duty to the subcontractor, and submitted the safety provision solely as "evidence of their attempt to exercise reasonable care to enforce safety regulations on the work site." *Id.* at 131. The trial court in *Degroot* instructed the jury that the provision was not evidence that the general contractors had delegated their WISHA duties to the subcontractor and that the general contractors were required to exercise ordinary care to ensure compliance with safety regulations on the work site. *Id.*

Under *Degroot*, subcontract safety provisions may be admissible as evidence of the steps the general contractor took to comply with WISHA safety regulations, but the provisions are not admissible to show the general contractor delegated its responsibility for compliance with the safety regulations to the subcontractor. *Id.* at 129. As in *Degroot*, the subcontract safety provision here is relevant to whether NAD met its duty to ensure compliance with WISHA safety regulations at the work site. *Id.*; *Stute*, 114 Wn.2d at 464; WAC 296-155-040(2).

The trial court found the relevance of the subcontract safety provision here outweighed the possibility that it might mislead the jury regarding the general contractor's nondelegable duty to comply with WISHA safety regulations. Although the subcontract states Sharp-Line is "solely responsible for the protection and safety of its employees," CP at 3227, NAD acknowledged in its opening and closing statements that

general contractors have a legal duty to provide a safe work site for all employees. No objection was noted to NAD's arguments in the briefing.

In terms of a fair trial, NAD employees testified that the general contractor retained the ultimate responsibility for work site safety. Additionally, NAD provided evidence it had a site specific accident prevention plan, it had a foreman and superintendent performing oversight at the job site daily, as well as a safety director who checked in on occasion, and it ran weekly safety meetings that were required for all workers on the site. NAD's closing statement explained that as the general contractor, it was required to take reasonable steps to ensure the safety of the work site, including contractually requiring its subcontractors to furnish any safety equipment related to their work. The trial court was in the best position to rule on any objections, if they had been made.

Importantly, the jury was instructed that a general contractor has a nondelegable responsibility to ensure the safety of all employees on the work site:

> Under Washington law, a general contractor on a construction project owes a duty to every employee at the job site, including employees of subcontractors, to ensure that it and its subcontractors comply with all applicable safety regulations. The general contractor is the party with innate supervisory authority and per se control over the job site, so it bears the primary, non-delegable duty to provide a safe workplace for subcontractor employees.
>
> In Washington, all general contractors have a non-delegable specific duty to ensure compliance with all Washington state construction safety regulations.

CP at 3182. We assume juries follow the instructions. *Degroot*, 83 Wn. App. at 131.

Accordingly, I concur in affirming the trial court's dismissal of Ms. Millican's individual claim, but because I would affirm the trial court's judgment on the jury's verdict, I respectfully dissent.

Brown, J.

Brown, J.

APPENDIX B

Effective: July 22, 2011

West's Revised Code of Washington Annotated Currentness
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.20. Survival of Actions (Refs & Annos)
4.20.020. Wrongful death--Beneficiaries of action

Every such action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife, husband, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents, sisters, or brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his or her death.

In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.

CREDIT(S)

[2011 c 336 § 90, eff. July 22, 2011; 2007 c 156 § 29, eff. July 22, 2007; 1985 c 139 § 1; 1973 1st ex.s. c 154 § 2; 1917 c 123 § 2; RRS § 183-1.]

Current with all 2013 Legislation

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APPENDIX C

Supreme Court of Washington,
En Banc.
Josie ARMANTROUT, personal representative of the Estate of Kristen Armantrout; Josie Armantrout and Warren Armantrout, wife and husband and the marital community composed thereof, Petitioners,
v.
Robert CARLSON, M.D. and Jane Doe Carlson, husband and wife and the marital community composed thereof; and Cascade Orthopaedics, a partnership, and/or John Does 1–100, partners therein, Respondents.

No. 81195–4.
Argued May 19, 2009.
Decided Sept. 10, 2009.

Background: Patient's parents, individually and as personal representatives for patient's estate, filed medical malpractice and wrongful death claims against physician and medical group after patient died from a pulmonary embolism two weeks after minor ankle surgery. The Superior Court, King County, Palmer Robinson, J., entered judgment on jury verdict that found medical group negligent and awarded parents $1,150,000 in damages and awarded estate $200,000 in damages. Medical group appealed. The Court of Appeals, 141 Wash.App. 716, 170 P.3d 1218, reversed. Parents appealed.

Holding: The Supreme Court, sitting En Banc, Madsen, J., held that jury could consider services patient provided to parents when considering whether parents were dependent for support on patient.

Reversed.

West Headnotes

[1] Death 117 ⚿31(7)

117 Death
117III Actions for Causing Death
117III(A) Right of Action and Defenses
117k31 Persons Entitled to Sue
117k31(7) k. Parent. Most Cited Cases

Jury could consider, in wrongful death action brought by parents of adult daughter who died after ankle surgery, the services, and not just monetary support, that daughter had provided to parents, in determining whether the parents were "dependent for support" on daughter, as a showing required to entitle parents to maintain wrongful death action; daughter had provided mother, a blind diabetic, with a variety of services, including acting as mother's driver and reader, helping with medical needs such as glucose readings and insulin injections, valued, according to trial testimony, at $36,553 per year. West's RCWA 4.20.020.

[2] Death 117 ⚿31(5)

117 Death
117III Actions for Causing Death
117III(A) Right of Action and Defenses
117k31 Persons Entitled to Sue
117k31(5) k. Heirs and next of kin. Most Cited Cases

Death 117 ⚿31(7)

117 Death
117III Actions for Causing Death
117III(A) Right of Action and Defenses
117k31 Persons Entitled to Sue
117k31(7) k. Parent. Most Cited Cases

Dependency on a decedent by a parent, sister, or brother, as a showing required by statute in order to maintain a wrongful death action, must be based on the situation existing at the time of decedent's death and not on promises of future contributions. West's RCWA 4.20.020.

[3] Death 117 ⚿31(5)

117 Death

117III Actions for Causing Death
117III(A) Right of Action and Defenses
117k31 Persons Entitled to Sue
117k31(5) k. Heirs and next of kin. Most Cited Cases

Death 117 ⚷31(7)

117 Death
117III Actions for Causing Death
117III(A) Right of Action and Defenses
117k31 Persons Entitled to Sue
117k31(7) k. Parent. Most Cited Cases

Dependency on a decedent by a parent, sister, or brother, as a showing required by statute in order to maintain a wrongful death action, cannot be created on the basis of emotional support alone. West's RCWA 4.20.020.

[4] Statutes 361 ⚷1091

361 Statutes
361III Construction
361III(B) Plain Language; Plain, Ordinary, or Common Meaning
361k1091 k. In general. Most Cited Cases
(Formerly 361k188)

When interpreting a statute a court looks first to the plain language.

[5] Courts 106 ⚷89

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 k. In general. Most Cited Cases
(Formerly 361k218)

When interpreting a statute, a court gives weight to readings well grounded in prior judicial constructions.

[6] Death 117 ⚷31(6)

117 Death
117III Actions for Causing Death
117III(A) Right of Action and Defenses
117k31 Persons Entitled to Sue
117k31(6) k. Surviving husband or wife. Most Cited Cases

Death 117 ⚷31(7)

117 Death
117III Actions for Causing Death
117III(A) Right of Action and Defenses
117k31 Persons Entitled to Sue
117k31(7) k. Parent. Most Cited Cases

The wrongful death statute does not limit a decedent's "support" of a plaintiff, as a showing required by a parent, sister, or brother to maintain a wrongful death action, to monetary contributions. West's RCWA 4.20.020.

[7] Death 117 ⚷31(6)

117 Death
117III Actions for Causing Death
117III(A) Right of Action and Defenses
117k31 Persons Entitled to Sue
117k31(6) k. Surviving husband or wife. Most Cited Cases

Death 117 ⚷31(7)

117 Death
117III Actions for Causing Death
117III(A) Right of Action and Defenses
117k31 Persons Entitled to Sue
117k31(7) k. Parent. Most Cited Cases

The wrongful death statute, which allows a parent, sister, or brother, to maintain a wrongful death action only after a showing of dependency, allows triers of fact to consider services that have a monetary value when assessing a claimant's dependency on the decedent for support. West's RCWA 4.20.020.

****915** Simeon Osborn, Susan Machler, Osborn Machler, Seattle, WA, for Petitioners.

Steven Frederick Fitzer, Melanie T. Stella, Burgess Fitzer PS, Timothy R. Gosselin, Gosselin Law Office PLLC, Tacoma, WA, for Respondents.

Bryan Patrick Harnetiaux, Spokane, Amicus Curiae on behalf of Washington State Association for Justice Foundation.

MADSEN, J.

***933** ¶ 1 This case involves a wrongful death suit by the parents of an adult child against her medical care provider. We are asked to decide if the provision of services that have an economic value may be considered by the trier of fact when determining whether a parent was "dependent for support" on an adult child as required by RCW 4.20.020 to maintain an action for wrongful death. We now hold that the trier of fact may consider a parent's financial dependence on these services.

FACTS

¶ 2 At the time of her death Kristen Armantrout was 18 and living at home with her mother. She died of a pulmonary ***934** embolism two weeks after having surgery on her ankle. Kristen's mother, Josie, has diabetes and is blind. Kristen provided her mother with a variety of services. Kristen was her mother's driver and reader. She ****916** also helped her mother with medical needs such as glucose readings and insulin injections. The testimony at trial showed that the services Kristen provided to her mother were valued at around $36,553 per year. Kristen also contributed her $588 monthly disability benefits check to the household expenses.

¶ 3 At trial, a jury found that Cascade Orthopaedics (Cascade) was negligent and that their negligence was the proximate cause of Kristen's death. The jury awarded Kristen's estate $200,000. The jury also found that the Armantrouts were "substantially financially dependent on Kristen for support" and awarded them $1.15 million. Br. of Appellant, App., Tab 2 (special verdict form).

¶ 4 The Court of Appeals overturned the jury verdict and held "the jury instruction misstated the law because ... conferring services and other benefits does not constitute financial support." *Armantrout v. Carlson,* 141 Wash.App. 716, 731, 170 P.3d 1218 (2007) (footnote omitted).

¶ 5 The jury instruction defining dependency read:

> The plaintiff has the burden of proving that Kristen Armantrout's mother and father were substantially financially dependent upon her for support. Substantial financial dependence requires a showing of a need or necessity for support on the part of the parents and an agreement by Kristin [sic] to provide such support. In determining whether Josie and Todd Armantrout were substantially financially dependent on Kristen, you should consider the extent of Kristen's financial contributions to her parents and whether or not such support was likely to continue for a period of time. The support may include money, services, or other material benefits, but may not include everyday services a child would routinely provide her parents. You may not consider emotional support Kristin [sic] may have provided her parents.
>
> ***935** Substantial financial dependence may be partial, but must be based on current financial contributions, not the promise of future contributions or services.

Br. of Appellant, App., Tab 1 (instruction number 14).

¶ 6 Earlier in the trial proceedings, Cascade sought judgment as a matter of law on the Armantrouts' wrongful death claim, arguing they could not prove substantial financial dependence on Kristen. The trial court heard argument from both parties and ruled the claim could proceed to trial because the issue of "substantial financial dependence" is "a

question of fact to be determined by the jury; that a reasonable jury could find from [the] evidence that Mr. and Mrs. Armantrout were substantially dependent upon their daughter for support." Br. of Appellant at 13.

¶ 7 On appeal, the Court of Appeals rejected the trial court's definition of "dependence" as including services. The court vacated the jury verdict in favor of the Armantrouts because, it reasoned, the instruction "misstated the law" and "caused actual prejudice" to Cascade. *Armantrout,* 141 Wash.App. at 731–32, 170 P.3d 1218.

ANALYSIS

[1] ¶ 8 RCW 4.20.020 establishes two tiers of beneficiaries in a wrongful death suit. The first tier includes the decedent's "wife, husband, state registered domestic partner, child or children, including stepchildren." If there are no first tier beneficiaries, the wrongful death action "may be maintained for the benefit of the parents, sisters, or brothers, who may be dependent upon the deceased person for support." RCW 4.20.020. As part of the original code of Washington, the wrongful death statute has always required second tier beneficiaries to demonstrate their dependence on the decedent. Rem.Rev.Stat. §§ 183, 183–1.

¶ 9 The words "dependent" and "support" are not defined in the statute. In what appears to be the first case interpreting the meaning of dependency this court wrote:

> ***936** [W]e would not give [the statute] such a strict construction as to say it means wholly dependent, or that the parent must have no means of support or livelihood other than the deceased, such a construction being too harsh and not in accordance with ****917** the humane purpose of the act. Nevertheless, there must be some degree of dependency, some substantial dependency, a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child.

Bortle v. N. Pac. Ry., 60 Wash. 552, 554, 111 P. 788 (1910).

[2][3] ¶ 10 The need for "substantial dependency" expressed in *Bortle* has been further defined as "a term having relation to the circumstances of the plaintiff." *Mitchell v. Rice,* 183 Wash. 402, 407, 48 P.2d 949 (1935) (claimant father was in a difficult financial situation and unable to sustainably support self); *Estes v. Schulte,* 146 Wash. 688, 689, 264 P. 990 (1928) (claimant sister's only income was from funds contributed by decedent). The dependency must be based on the situation existing at the time of decedent's death and not on promises of future contributions. *Grant v. Libby, McNeill & Libby,* 145 Wash. 31, 37, 258 P. 842 (1927). The dependency cannot, however, be created on the basis of emotional support alone. *See Philippides v. Bernard,* 151 Wash.2d 376, 384–85, 88 P.3d 939 (2004) (interpreting RCW 4.24.010 to hold that the legislature's creation of a new support requirement for parents of minors that included emotional support did not abolish the financial support requirements for second tier beneficiaries in RCW 4.20.020).

¶ 11 Under these guidelines, courts have generally allowed claims by beneficiaries who can demonstrate they had a need for the decedent's regular contributions of support. *Estes,* 146 Wash. at 689, 264 P. 990 (though the amounts varied, decedent provided monetary contributions regularly over a course of years); *Mitchell,* 183 Wash. at 406–07, 48 P.2d 949 (decedent gave various sums of money at regular intervals to father over the course of the two years preceding his death). Courts have generally disallowed claims where the claimant cannot "identify evidence suggesting that they ***937** needed or were dependent upon [decedent's] services." *Masunaga v. Gapasin,* 57 Wash.App. 624, 629, 790 P.2d 171 (1990) (emphasis omitted); *see also* David C. Cummins, Comment, *Damages in Washington Wrongful Death Actions,* 35 Wash. L.Rev. 441, 449–50 (1960) ("Contributions which may be characterized

as casual gifts do not achieve the required status.").

¶ 12 All parties in this case agree that Washington courts have long interpreted "dependent for support" to require a showing of financial dependence. Resp'ts' Pet. for Review at 14; Suppl. Br. of Resp't at 2. To be certain, a majority of wrongful death suits by second tier beneficiaries involve assessments of the monetary contributions made by decedents to the parties asserting claims. However, until now, no Washington court has explicitly held that financial dependence must be assessed on the basis of monetary contributions alone. We are asked to do so in this case.[FN1]

> FN1. Cascade attempts to set the stage for our interpretation of RCW 4.20.020 by arguing for strict construction of the statute. It contends that a strict interpretation of the statute mandates proof of dependency through evidence of monetary contributions from the decedent to the beneficiary. However, "[w]hether done liberally or strictly, judicial interpretation is necessary [because dependence on services with a monetary value is] not *necessarily* excluded under the terms of RCW 4.20.020." *Armijo v. Wesselius,* 73 Wash.2d 716, 720, 440 P.2d 471 (1968) (holding that RCW 4.20.020 included illegitimate children as statutory beneficiaries because they were not excluded from the terms of the statute and were within the dictionary definition of the word "child"). As in *Armijo*, the statutory phrase at issue in this case requires judicial interpretation and we need not choose between liberal or strict methodologies in order to resolve its meaning.

[4][5][6] ¶ 13 When interpreting a statute we look first to the plain language. *State v. Armendariz,* 160 Wash.2d 106, 110, 156 P.3d 201 (2007). Further, readings well grounded in prior judicial constructions are given weight. *Fed. Commc'ns Comm'n v. Pacifica Found.,* 438 U.S. 726, 740, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). The operative phrase in RCW 4.20.020 is: "who may be *dependent upon the deceased person for support.* " (Emphasis added.) The statute does not define "dependent" or "support" so we turn to the dictionary. *Garrison v. Wash. State Nursing Bd.,* 87 Wash.2d 195, 196 550 P.2d 7 (1976). "[D]ependent" is defined as "unable to exist, sustain oneself, or act suitably or normally without the ***938** assistance or direction of another or others." Webster's ****918** Third New International Dictionary 604 (2002). "[S]upport" is defined as "[s]ustenance or maintenance; esp., articles such as food and clothing that allow one to live in the degree of comfort to which one is accustomed" and "[o]ne or more monetary payments to a current or former family member for the purpose of helping the recipient maintain an acceptable standard of living." Black's Law Dictionary 1577–78 (9th ed.2009). Plainly, the statute does not limit "support" to monetary contributions.

¶ 14 Cascade argues, however, that our prior construction of RCW 4.20.020 demonstrates that "dependent for support" must be read to require second tier beneficiaries to provide evidence of monetary contributions from the decedent. Specifically, Cascade argues that "[t]he determination that 'substantial financial dependence' is limited to the provision of money or income, and not merely services, is a holding well-grounded in Washington law." Resp. to Pet. for Review at 4.

¶ 15 While it is true that in many reported decisions proof of financial support involved monetary contributions, other cases support the view that providing services with an economic value may be considered as part of the dependency analysis under RCW 4.20.020. *Mitchell,* 183 Wash. at 407, 48 P.2d 949 (substantial dependency should be determined on the basis of "the circumstances of the plaintiff"); *Cook v. Rafferty,* 200 Wash. 234, 240, 93 P.2d 376 (1939) ("[h]ad [the decedent] lived, she would have continued to contribute to the support of the family and continued to care for her parents [.] ... Mr. and Mrs. Cook suffered a pecuniary

loss by reason of her death."). In *Cook,* the adult daughter lived with her mother and her invalid father; she also contributed to the expenses of the household. *Id.* at 239, 93 P.2d 376. Though the case does not detail the exact services she provided by caring for her parents, the court suggested that care for invalid parents amounted to a "pecuniary loss" when the adult child died. *Id.* at 240, 93 P.2d 376. Similarly, the Court of Appeals in *Masunaga* also recognized the possibility that ***939** parents could be *dependent* on an adult child's services for support. 57 Wash.App. at 628–29, 790 P.2d 171.[FN2]

> FN2. Ultimately, the court in *Masunaga* dismissed the accounting services an adult child provided his parents, in part because it was " 'a privilege and an honor' for the *provider.*" 57 Wash.App. at 629, 790 P.2d 171. While the court correctly analyzed the extent to which the parents were *dependent* on their son's services, unfortunately, the court's statement regarding the son's motive indicates a misunderstanding of the cultural mores leading some adult children to care for their parents.

¶ 16 Cascade, though, focuses on our statement in *Philippides* that " 'the value parents place on children in our society is no longer associated with the child's ability to provide income to the parents.' " Resp. to Pet. for Review at 10 (emphasis in original omitted) (quoting *Philippides,* 151 Wash.2d at 390, 88 P.3d 939). Cascade reads too much into this language. The quoted language discusses a legislative change to the wrongful death proof requirements for parents of deceased *minor* children. Proof of financial dependence by parents of deceased adult children was discussed in *Philippides* only as a way to explain the statutory change distinguishing between the proof required by parents of *minor* children versus parents of deceased *adult* children who may qualify as second tier beneficiaries. 151 Wash.2d at 385, 88 P.3d 939 (holding proof of financial dependence was necessary because otherwise, "[a]ll parents who claim to be dependent on their children's love would be able to recover under RCW 4.24.010 on an equal footing with the spouse and children of the decedent, the first tier beneficiaries under RCW 4.20.020").

¶ 17 Our holding in *Philippides,* requiring parents to show something more than emotional dependence on adult children, should not be read to preclude truly dependent parents from claiming beneficiary status. Notably, the jury instruction in this case explicitly excluded the "everyday services a child would routinely provide" and any "emotional support Kristin [sic] may have provided her parents." Br. of Appellant, App., Tab 1 (instruction number 14). This was sufficient to properly guide the jury in considering the value of Kristen's services within the context of the Armantrouts overall financial dependence on her. Kristen Armantrout was able ****919** to support her blind, diabetic mother by providing ***940** valuable services in addition to a cash contribution. The jury decided that provision of these services, valued at $36,533 per year, combined with Kristen's contribution of her monthly disability check was sufficient to establish the Armantrouts' substantial dependence on Kristen for support. The instruction and the jury's subsequent finding of substantial financial dependence accurately employ the language of RCW 4.20.020 and our holdings in *Bortle, Cook, Mitchell,* and *Philippides.*

¶ 18 Reading the statute as Cascade argues, to require proof of a *monetary* contribution by the decedent, would lead to absurd results and unfair application of the long-standing legislatively created right to an action for wrongful death: parents who received monetary contributions from their adult child to purchase valuable services would qualify as statutory beneficiaries, but parents who received those exact same services from their adult child would not. Nothing in the statute indicates the legislature intended such a level of incongruity.

¶ 19 Cascade also warns that if we allow the value of services to be included in the dependency assessment, "parents could qualify as second tier

beneficiaries if they could show only that they were dependent on the services the child provided." Suppl. Br. of Resp't at 6. That is incorrect. *Philippides* clearly holds that parents cannot claim dependency on the basis of emotional support alone. 151 Wash.2d at 388, 88 P.3d 939. The facts of this case demonstrate the kind of services for which an economic value can be determined. The jury here considered the value of the services combined with Kristen's monthly contribution to determine that, in the context of their entire financial situation, the Armantrouts were substantially dependent on Kristen for support and would not otherwise have been able to pay for the services she provided. Resp'ts' Pet. for Review at 6–7; Pet'rs' Suppl. Br. at 10. By excluding the everyday services a child would routinely provide, the trial court clearly established the boundaries within which the jury would be allowed to consider the Armantrouts' financial dependence on valuable services.

[7] ***941** ¶ 20 We now hold that the trial court correctly stated the law: RCW 4.20.020 allows triers of fact to consider services that have a monetary value when assessing a claimant's dependency on the decedent for support. We reverse the Court of Appeals.

WE CONCUR: GERRY L. ALEXANDER, C.J., SUSAN OWENS, CHARLES W. JOHNSON, MARY E. FAIRHURST, JAMES M. JOHNSON, RICHARD B. SANDERS, DEBRA L. STEPHENS and TOM CHAMBERS, JJ.

Wash.,2009.
Armantrout v. Carlson
166 Wash.2d 931, 214 P.3d 914

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Supreme Court No. _____
Court of Appeals No. 30185-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DOROTHY A. MILLICAN, as Personal Representative of the Estate of DAREN M. LAFAYETTE, and on her own behalf as statutory beneficiary, Petitioner/Appellant, vs. N.A. DEGERSTROM, INC., a Washington corporation; Respondent. and MICO, INORPORATED, a Minnesota corporation; JAMES R. BONNER and JANE DOE BONNER, husband and wife and the marital community comprised thereof, d/b/a INDUSTRIAL POWER BRAKE COMPANY, Defendants.	DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date stated below, I caused to be delivered in the manner indicated a copy of *Appellant Dorothy A. Millican's Petition for Review and Declaration of Service* on the following parties:

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DATED this 10th day of December, 2013.

Patti Saiden, Legal Assistant