

No. 78383-7

SUPREME COURT  
OF THE STATE OF WASHINGTON

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LIAM STEWART-GRAVES, a minor, and  
NICHOLE STEWART-GRAVES, as  
Guardian ad Litem, and NICHOLE  
STEWART-GRAVES and TODD  
GRAVES, individually,

Appellants,

v.

KATHERINE F. VAUGHN, M.D.; THE  
VANCOUVER MEDICAL CLINIC, INC., P.S.; and  
SOUTHWEST WASHINGTON MEDICAL CENTER,

Respondents.

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BRIEF OF APPELLANTS  
LIAM STEWART-GRAVES, NICHOLE STEWART-GRAVES  
AND TODD GRAVES

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## A. INTRODUCTION

When Liam Stewart-Graves was delivered at Southwest Washington Medical Center (“the Hospital”) by emergency cesarean section, he had no heartbeat and no respiratory function. His Apgar score was zero at one, five, and ten minutes after delivery. The standard of care required Dr. Katherine Vaughn, the pediatrician who headed resuscitation efforts on Liam, and the hospital’s code team to know that an infant born in Liam’s condition who is resuscitated after more than ten minutes will, almost certainly, suffer lifelong, severe, and permanent mental and physical disabilities.<sup>1</sup> Dr. Vaughn and the code team, however, deviated from the standard of care and continued to attempt to resuscitate Liam after ten minutes without explaining to Liam’s father the consequences of

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<sup>1</sup> The appellants’ expert, Dr. Carl Bodenstein, characterized the likelihood of Liam’s being born with severe disabilities if resuscitated after ten minutes in the following ways:

- “continuing Liam’s resuscitation for 24 minutes . . . was well beyond the point that the medical literature indicates that severe disability would be unavoidable if the infant survived at all.” CP 116
- “the standard of care required Dr. Vaughn to know that resuscitation of newly born infants after 10 minutes of asystole (no heart rate) is highly unlikely to result in survival or survival without severe physical and mental disability.” CP 117.
- “resuscitation after 10 minutes of asystole is highly unlikely to result in survival or survival without severe disability.” CP 118.
- “when Apgar scores are zero at one, five and 10 minutes of life, their child had effectively no chance of avoiding certain severe brain damage and other devastating injuries if their efforts at resuscitation ultimately were successful in reviving Liam.” CP 118.

resuscitation after this prolonged period, so as to allow him to decide whether to permit resuscitation efforts to continue. Dr. Vaughn deviated from the standard of care in failing to obtain Liam's informed consent, through his father acting as his representative, to the continuation of resuscitation efforts where the risk of severe disabling injuries grew ever greater as the unsuccessful resuscitation efforts continued past ten minutes. Defendants were also negligent in the continuation of resuscitation efforts after a point in time when the standard of care was to discontinue resuscitation. Twenty-four minutes after Liam's delivery, his heart spontaneously began to beat. Predictably, he now suffers severe and permanent mental and physical disabilities for which he and his parents, Nichole Stewart-Graves and Todd Graves, are entitled to compensation under RCW 7.70.050 and traditional negligence principles.<sup>2</sup>

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting the motion for summary judgment filed by Dr. Katherine Vaughn and her employer the Vancouver

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For brevity, Dr. Bodenstein's characterization of the likelihood of Liam's being born with severe disabilities if resuscitated after ten minutes will be referred to as "almost certainly" or "virtually certain" or terms to like effect.

<sup>2</sup> Where appropriate, the appellants will be collectively referred to as "the Stewart-Graves."

Clinic on the Stewart-Graves' claims for failure to obtain informed consent and negligence in the continuation of resuscitation efforts.

2. The trial court erred in granting Southwest Washington Medical Center's motion for summary judgment on the Stewart-Graves' claim for negligence in the continuation of resuscitation efforts.

(2) Issues Pertaining to Assignments of Error

1. Does an infant state a cause of action against a health care provider for the provider's failure to secure informed consent, where the infant is born without a heartbeat and medical professionals engage in prolonged resuscitation efforts in violation of the standard of care without the consent of the infant's parents acting on behalf of the infant, where the medical professionals know or reasonably should know that continued resuscitation efforts will almost certainly result in the birth of a child with severe physical and mental disabilities, needing continual care and treatment over the course of the child's life? (Assignment of Error Number 1).

2. Do an infant and his parents state a cause of action for medical negligence against a health care provider, where the infant is born without a heartbeat and the health care provider continues resuscitation efforts beyond the point in time at which the provider knows or should know that, should the resuscitation efforts succeed, the infant will almost

certainly suffer severe physical and mental disabilities? (Assignment of Error Number 1).

3. Does an infant who is born with severe physical and mental disabilities after prolonged resuscitation efforts and the infant's parents state a cause of action for medical negligence against a hospital for its continuation of resuscitation efforts beyond the time dictated by the standard of care and after the point at which the infant, if resuscitated, will almost certainly be born with severe and permanent physical and mental disabilities? (Assignment of Error Number 2).

C. STATEMENT OF THE CASE

On March 2, 2004, at approximately 2:25 p.m., Nichole Stewart-Graves presented to Southwest Washington Medical Center nearly 36 weeks pregnant. CP 103, 112. She had a relatively uncomplicated pregnancy and had been having contractions since 9:00 that morning. CP 103, 112. At the hospital, the staff put Ms. Stewart-Graves on a fetal monitor. CP 103. At one point, she was taken off the monitor so she could walk around the hospital to assist in the labor. *Id.* When Ms. Stewart-Graves was put back on the monitor, it indicated a decreased fetal heart rate. *Id.* The hospital's medical staff decided to perform an emergency cesarean section. *Id.*

The hospital staff notified Katherine Vaughn, M.D., the pediatrician on call for the hospital's neonatal resuscitation unit, of the emergency at approximately 5:30 p.m. CP 244-45. Shortly thereafter and before Dr. Vaughn arrived, the hospital medical staff delivered Liam Stewart-Graves. *Id.* The obstetrician in attendance discovered that Ms. Stewart-Graves had suffered a massive placental abruption. CP 245.<sup>3</sup>

Liam was delivered with no heartbeat and no respiratory function. CP 197. One minute after delivery, Liam's Apgar score was 0, meaning he scored 0 on all five parameters – heart rate, respiratory effort, tone, color, and reflexes. CP 104.<sup>4</sup> Liam's Apgar score continued to be 0 at five minutes after delivery and at ten minutes after delivery. *Id.* Although

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<sup>3</sup> A placental abruption is the premature separation of the placenta from the uterine wall. *Britell v. United States*, 372 F.3d 1370, 1373 n.1 (Fed. Cir. 2004).

<sup>4</sup> An Apgar score is:

An index used to evaluate the condition of a newborn infant based on a rating of 0, 1, or 2 for each of the five characteristics of color, heart rate, response to stimulation of the sole of the foot, muscle tone, and respiration with 10 being a perfect score.

Medline-Plus Medical Dictionary, <http://www.merriam-webster.com/cgi-bin/mwmednlm>, last visited May 25, 2006.

An Apgar score is a newborn's first evaluation and serves as a predictive indicator of any potential problems. *Burless v. West Virginia Hospitals, Inc.*, 215 W.Va. 765, 601 S.E.2d 85, 89 n.2 (2004). A score is given for each characteristic at one minute and five minutes and, if there are problems with the baby, also at ten minutes. <http://childbirth.org/articles/apgar.html>, last visited May 25, 2006. A score of 7-10 is considered normal. A score of 4-7 might require some resuscitative measures. A baby with a score of 3 or below requires immediate resuscitation. *Id.*

Apgar scores are not typically assessed after ten minutes, it is undisputed Liam had no heart rate until 24 minutes after delivery.

After Liam's delivery, the hospital's code team immediately initiated resuscitation efforts, including chest compressions and positive-pressure ventilation. *Id.*<sup>5</sup> Liam did not respond and continued to have no heart rate. CP 197-98. Dr. Vaughn arrived at 5:52 p.m. and took charge of the resuscitation efforts. CP 198, 245. Efforts to resuscitate Liam continued for 24 minutes, at which point his heart spontaneously began to beat. CP 200. By that time, Liam had experienced a profound loss of oxygen to his brain and, as a result, he is severely neurologically impaired. CP 200.

The Stewart-Graves' medical expert, Dr. Carl Bodenstein, testified on summary judgment that the standard of care required Dr. Vaughn and Southwest Washington Medical Center to know that resuscitation attempts on a newborn who has no heartbeat after ten minutes are likely to be unsuccessful or, if the infant survives, are highly likely to result in the birth of an infant with severe physical and mental disabilities. CP 201.<sup>6</sup>

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<sup>5</sup> "A code team is a specially trained team of doctors and nurses who immediately respond when a patient needs resuscitation and advanced cardiac life support." *Becker v. Tampira*, 901 So.2d 1157, 1159 n.9 (La. App.), *writ denied*, 916 So.2d 1059 (2005).

<sup>6</sup> For example, in study published in 1991 by Jain in *Pediatrics*, a widely read peer-reviewed journal for pediatricians and neonatologists, and cited in the Neonatal

No one on the hospital's code team called out the times during the resuscitation efforts or raised with Dr. Vaughn the issue of discontinuing resuscitation efforts due to the passage of time. CP 202, 258. Dr. Vaughn was not watching the clock during the resuscitation efforts, CP 256, and was unaware of the passage of time until 20 minutes had elapsed. CP 258.<sup>7</sup>

Ms. Stewart-Graves was anesthetized during delivery and the resuscitation efforts. CP 202. Liam's father, Todd Graves, was waiting in a birthing center room at the hospital during delivery and the resuscitation efforts. CP 142.<sup>8</sup> A nurse periodically shuttled between the operating room where the resuscitation efforts were taking place and the birthing center room.<sup>9</sup> However, neither she nor anyone else informed Graves that, due to the length of time Liam was without a heartbeat and respiratory function, he had effectively no chance of avoiding severe brain damage and other devastating injuries if the resuscitation efforts were ultimately

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Resuscitation Textbook, 55 out of 56 babies who had zero Apgar scores at one, five, and ten minutes died, and the one surviving baby had severe neurologic impairment. CP 117.

<sup>7</sup> The standard of care required Dr. Vaughn to be cognizant of the duration of the resuscitation efforts. CP 201.

<sup>8</sup> The birthing center room is on the same floor of the hospital as the operating room in which Dr. Vaughn conducted the resuscitation efforts on Liam. CP 251.

<sup>9</sup> The nurse came to Todd Graves in the birthing center room at 8, 13, 17, and 22 minutes after Liam's delivery to report that the resuscitation team had not gotten a

successful. CP 202-03. During one of the nurse's visits to the birthing room, Graves asked her if he could speak to someone who could give him more information than what the nurse was providing. CP 144. The nurse told Graves everyone was busy. *Id.*

Today, Liam suffers severe cerebral palsy, mental retardation, a seizure disorder, microcephaly, and respiratory distress requiring frequent suctioning. CP 200. He must be fed every 45 minutes through a feeding tube. CP 135. His food must be weighed, as he is on a ketogenic diet to control his seizures. *Id.*<sup>10</sup> Liam's eyes cannot track, and he has a severe to profound hearing loss. CP 136.

Liam, through his mother as guardian ad litem, and his parents individually, filed the present action in Clark County Superior Court against Dr. Vaughn, her employer the Vancouver Medical Clinic, and the Southwest Washington Medical Center, alleging medical negligence within the meaning of RCW 7.70.030-.040 and failure to obtain informed consent within the meaning of RCW 7.70.050. CP 3-15.

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heartbeat. CP 142-43. At 24 minutes, the nurse returned to the birthing center room to inform Graves that Liam's heart had started beating. CP 143.

<sup>10</sup> A ketogenic diet is "a diet supplying a large amount of fat and minimal amounts of carbohydrate and protein" used "to produce a ketosis and alter the degree of bodily alkalinity." Medline-Plus Medical Dictionary, <http://www.merriam-webster.com/cgi-bin/mwmednlm>, last visited May 15, 2006.

The defendants moved for summary judgment. CP 28-39, 40-53. Upon defendants' concession that the Stewart-Graves demonstrated the existence of genuine issues of material fact as to negligence during the resuscitation efforts, the trial court, the Honorable John Nichols, denied their motions with respect to this count. CP 291, 295-98, 299-302. However, the trial court granted the defendants' motions and dismissed all claims for failure to obtain informed consent and for damages arising out of negligence in continuing resuscitation efforts beyond the period dictated by the standard of care and for a period after which, if the resuscitation efforts were successful, Liam would be certain to suffer permanent mental and physical injuries. CP 295-98, 299-302. The Stewart-Graves voluntarily dismissed all claims against Dr. Vaughn, the Vancouver Clinic, and the hospital not adjudicated by summary judgment. CP 316-17. The Stewart-Graves timely filed their notice of appeal of the orders on summary judgment and asked this Court to take direct review pursuant to RAP 4.2(a). CP 305-15.

#### D. SUMMARY OF ARGUMENT

Dr. Vaughn violated the standard of care and RCW 7.70.050 by failing to obtain Liam's informed consent, through his father as his representative, to the continuation of resuscitation efforts past the point in time at which, if resuscitated, Liam would more than likely be born into a

life of profound disabilities. Dr. Vaughn was not excused from obtaining Liam's informed consent under the emergency exception to the informed consent requirement because Liam's father was readily available to give or withhold informed consent on Liam's behalf to continued resuscitation. Alternatively, Dr. Vaughn was not relieved of the duty to obtain Liam's informed consent because, after ten minutes of unsuccessful resuscitation efforts, the emergency that arose immediately upon Liam's delivery ceased to exist. The trial court erred in granting Dr. Vaughn's and the Vancouver Clinic's motion for summary judgment on the Stewart-Graves' informed consent claim.

The trial court likewise erred in granting Dr. Vaughn's, the Vancouver Clinic's, and the hospital's motions for summary judgment on the Stewart-Graves' claims for negligence in the continuation of resuscitation efforts beyond the period dictated by the standard of care. The Stewart-Graves' claims are grounded in fundamental principles of negligence. Health care providers have a duty to preserve parents' rights to prevent the birth of a child suffering mental or physical defects and the child's right not to be born with defects. Here, Dr. Vaughn and the hospital breached this duty by continuing efforts to resuscitate Liam beyond the point at which they knew or should have known that successful resuscitation would result in Liam's being born with profound disabilities

and by not affording Todd Graves the opportunity to direct the cessation of resuscitation efforts. The defendants' breach of their duties proximately caused Liam to suffer severe and permanent mental and physical disabilities and proximately caused Liam's parents to incur extraordinary medical and other expenses for the duration of Liam's life. The Stewart-Graves have stated claims against the defendants under traditional principles of negligence.

E. ARGUMENT

(1) Standard of Review

This Court reviews orders on summary judgment de novo. *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 813, 854 P.2d 1072 (1993). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). This Court must consider the facts, and all reasonable inferences from them, in a light most favorable to the nonmoving party. *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 223, 45 P.3d 186 (2002). Summary judgment is appropriate only where no genuine issue of material fact exists and reasonable persons could reach but one conclusion from all the evidence. *In re Estate of Black*, 153 Wn.2d 152, 161, 102 P.3d 796 (2004).

(2) The Stewart-Graves Stated a Cause of Action Against Dr. Vaughn and the Vancouver Clinic for Dr. Vaughn's Failure to Obtain Informed Consent to the Continuation of Resuscitation Efforts Beyond Ten Minutes

Under Washington law, where a health care provider fails to secure appropriate informed consent from a patient, the health care provider is liable for negligence. RCW 7.70.050. There is no dispute that Dr. Vaughn did not ask Todd Graves, as Liam's representative, for Liam's informed consent to the continuation of resuscitation efforts after the initial ten minutes of resuscitation efforts were unsuccessful. Successful resuscitation of newborns after ten minutes of having no heart rate is highly unlikely to result in survival without severe physical and mental disabilities. CP 117.

At issue is whether Dr. Vaughn was discharged from the obligation to obtain informed consent to the continuation of resuscitation efforts under the emergency exception to the informed consent requirement. Under that exception:

*If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his consent to required treatment will be implied.*

RCW 7.70.050(4) (emphasis added).

Under the facts of the present case, there is, at a minimum, an issue of fact as to whether a recognized health care emergency existed after the first ten minutes of resuscitation efforts on Liam were unsuccessful. Additionally, there is, at a minimum, an issue of fact as to whether Todd Graves, a person legally authorized to consent on behalf of Liam, was readily available at this point in time.

Although no Washington case law exists interpreting these provisions of the informed consent statute, this Court has recognized in the context of decisions to terminate life support, where that decision is in furtherance of the incompetent patient's best interests, an immediate member of the patient's family may make that decision on behalf of the patient without seeking the prior appointment of a guardian. *In re Guardianship of Hamlin*, 102 Wn.2d 810, 689 P.2d 1372 (1984); *see also In re Guardianship of Grant*, 109 Wn.2d 545, 565, 747 P.2d 445 (1987). This Court determined guardianship proceedings are not a necessary predicate to effective decisionmaking in situations involving an incompetent patient and the decision to terminate life support. *Hamlin*, 102 Wn.2d at 818.

With regard to whether a recognized health care emergency existed, it is not disputed that such an emergency existed immediately after Liam's delivery, when he had no heartbeat and an Apgar score of

zero. However, as the Stewart-Graves' expert, Dr. Bodenstein, testified, it is a recognized medical fact that resuscitation of a newly born infant after ten minutes of asystole (no heart rate) is highly likely either to be unsuccessful and result in the infant's death or, if successful, to result in the birth of an infant who suffers severe and permanent mental and physical disabilities. CP 201. Accordingly, Dr. Bodenstein testified, the emergency exception to the informed consent requirement ceased to apply because "the emergent circumstances of the resuscitation ceased after 10 minutes of resuscitative efforts with continued asystole." CP 203. Dr. Vaughn failed to provide any expert testimony to the contrary. The only evidence in the record, therefore, establishes that after ten minutes of resuscitation efforts, a recognized medical emergency ceased to exist and Dr. Vaughn was no longer relieved of the duty to obtain informed consent to the continuation of resuscitation efforts.

Further, even assuming the health care emergency continued to exist throughout the duration of the resuscitation efforts, Dr. Vaughn was not relieved of the duty imposed by RCW 7.70.050 to obtain informed consent to the continuation of resuscitation efforts because Todd Graves, a person authorized to consent on behalf of Liam, was readily available. *See* RCW 7.70.050(4); *see also Canterbury v. Spence*, 464 F.2d 772, 788-89 (D.C. Cir.) (the "impracticality of conferring" with either the patient or the

patient's family member is an essential aspect of the emergency exception), *cert. denied*, 409 U.S. 1064 (1972); *cf. Hamlin*, 102 Wn.2d at 818 (a parent may make the decision on behalf of an incompetent child to terminate the child's life support without the prior appointment of a guardian). The undisputed evidence shows Graves was waiting in a birthing room at the hospital while Liam was delivered by emergency cesarean section and during the entire 24 minutes of resuscitation efforts. Dr. Vaughn's testimony that she was unaware of Graves' location during the resuscitation efforts, CP 78, is belied by undisputed evidence that a nurse was continuously shuttling between him and the room in which Dr. Vaughn and the hospital's code team were attempting to resuscitate Liam, updating Graves on the resuscitation efforts. CP 142-43. Further, Dr. Bodenstein testified that the standard of care required the hospital staff to bring Graves to the bedside where Dr. Vaughn could give an informed consent explanation while continuing resuscitation efforts. CP 203.<sup>11</sup> Dr. Vaughn failed to produce evidence that it was not possible to bring Graves into the room and to obtain his informed consent while continuing resuscitation efforts, aside from Dr. Vaughn's self-serving and conclusory

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<sup>11</sup> Dr. Vaughn testified that had Graves been brought to her at 10, 15, or 20 minutes, she would not have had "facts and figures at hand to give him an appropriate and informed consent" because she did not know the statistics. CP 128. Dr. Vaughn's failure to know this information fell below the standard of care. CP 203.

statement, “there was no time to locate and obtain the informed consent of Liam Stewart-Graves’ parents.” CP 78. It is undisputed that, had Graves been informed that if Liam were resuscitated after ten minutes with no heart rate he would most likely be severely disabled, Graves would have directed Dr. Vaughn and the rest of the code team to stop all resuscitation efforts. CP 147-48.<sup>12</sup>

Although no Washington court has addressed the issue, other courts have recognized that it is up to the jury to decide not only whether an emergency existed under the emergency exception to the informed consent doctrine, but also whether “the treating physician took sufficient steps, given all the circumstances, to obtain either the patient’s informed consent, or the consent of a family member.” *Shine v. Vega*, 429 Mass. 456, 709 N.E.2d 58, 65 (1999) (citing *Miller v. Rhode Island Hosp.*, 625 A.2d 778, 787 (R.I. 1993)). Here, it was error to grant summary judgment in favor of Dr. Vaughn and the Vancouver Clinic on the Stewart-Graves’ informed consent claim. If not sufficient to conclusively establish that Dr. Vaughn violated RCW 7.70.050 by failing to obtain informed consent, the evidence at least establishes the existence of a genuine issue of material fact as to this issue.

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<sup>12</sup> Nothing prevented a physician or nurse from going to Todd Graves in the birthing room to apprise him of the situation and to obtain his direction on Liam’s behalf.

In her motion for summary judgment, Dr. Vaughn relied on *Keogan v. Holy Family Hosp.*, 95 Wn.2d 306, 622 P.2d 1246 (1980), which was not decided under RCW 7.70.050, the informed consent statute, but rather under the common law duty of informed consent as it existed prior to the enactment of the statute. In *Keogan*, this Court held an emergency room physician was relieved of the duty to disclose alternative diagnostic procedures to establish and attempt to control the decedent's pain where the decedent arrived in the emergency room in intense pain and spent most of the time on his hands and knees on the hospital bed in an effort to assuage his pain. This Court held:

[the decedent's] intense pain, the need for immediate diagnosis of his condition, and the fact that his condition actually was such that it could lead to irremediable disability and quick death created a medical emergency in which the emergency room physician could not be held to the physician's duty to disclose that is applicable to non-emergency medical care.

*Id.*, 95 Wn.2d at 316-17. The Court concluded the uncontroverted testimony established that the decedent "was interested only in surcease of his pain through any means available to the hospital staff and that he would have agreed to any care relieving such pain." *Id.*, 95 Wn.2d at 316. In marked contrast to the situation in *Keogan*, the undisputed evidence in this case shows that Graves would *not* have agreed, on Liam's behalf, to any and all efforts to resuscitate Liam after ten minutes, had he been

informed of the virtual certainty of Liam's being severely disabled if resuscitated. Also, unlike in this case, it is clear that in *Keogan* a health care emergency existed the entire time the decedent was in the emergency room. Here, the emergency ceased to exist once the code team was unable to resuscitate Liam after ten minutes. *See* CP 203. Further, the Court in *Keogan* failed to discuss whether a person legally authorized to consent on behalf of the decedent was readily available. Here, Todd Graves was readily available to consent on Liam's behalf. *Keogan* does not support the entry of summary judgment in Dr. Vaughn's favor on the informed consent claim.

Dr. Vaughn also relied on *Miller v. HCA, Inc.*, 118 S.W.3d 758 (Tex. 2003), in support of her motion for summary judgment. That case, however, is distinguishable. In *Miller*, the mother had an infection that required her health care providers to induce delivery of her baby at 23 weeks of gestation, or about four months before the mother's due date. The health care providers were unable to ascertain whether the baby would be born alive or dead. Eleven hours before the baby's birth, the parents directed the health care providers not to undertake heroic measures when the baby was delivered and to let nature take its course. The baby was born alive and gasped for air, cried, grimaced, and displayed no malformed features other than being premature. The attending

neonatologist immediately placed the newborn on ventilation, despite the parents' directive to let nature to take its course. The neonatologist explained his reasoning:

Because this baby is alive and this is a baby that has a reasonable chance of living. And again, this is a baby that is not necessarily going to have problems later on. There are babies that survive at this gestational age that—with this birth weight, that later on go on and do well.

*Id.* at 763. A few days after the baby's birth, she suffered a brain hemorrhage, a complication the court stated was not uncommon in infants born so prematurely, leaving her with severe mental and physical impairments.

The court found no liability for the decision to undertake life-sustaining treatment contrary to the parents' directive. The court concluded the neonatologist was faced with emergent circumstances because he was unable to evaluate the baby's condition until she was born and, when she was born alive and in distress, he was forced to make a split-second decision to initiate life-sustaining treatment. *Id.* at 770. The court noted testimony that the sooner life-sustaining treatment was provided, the better chance the baby had for survival without brain damage. *Id.* Also, the evidence was inconclusive as to whether the neonatologist's treatment caused the baby's mental and physical deformities. *Id.*

The circumstances confronting the code team in the present case were quite different than those present in *Miller*. Unlike the baby in *Miller* who was not necessarily going to have medical problems later on, it was highly likely that if Liam were resuscitated after ten minutes with no heartbeat and no oxygen to his brain, he would suffer severe mental and physical disabilities. Further, unlike the baby in *Miller* who was born breathing and with a heartbeat, Liam was delivered with no heartbeat and no respiratory function and remained that way for 24 minutes after his delivery. Without doubt, in the first moments after Liam's delivery, the code team had to make split-second decisions as to resuscitation. However, after ten minutes of unsuccessful resuscitation efforts, the emergent circumstances ceased to exist, and Dr. Vaughn was no longer faced with the need to make split-second decisions. The neonatologist in *Miller* was not forced to consider terminating life support because, unlike Liam, the infant responded positively to the initial treatment. The court's resolution of the issue presented in *Miller* was heavily dependent upon the particular set of facts with which the court was presented. Here, the facts are significantly different, and the court's rationale in *Miller* does not compel the conclusion that Dr. Vaughn was relieved of the informed consent requirement under the emergency exception of RCW 7.70.050(4).

The trial court, in granting Dr. Vaughn's motion for summary judgment on the informed consent claim, failed to address the emergency exception to the informed consent requirement, even though both parties raised and argued it.<sup>13</sup> Rather, the court based its decision on *Benoy v. Simons*, 66 Wn. App. 56, 831 P.2d 167, *review denied*, 120 Wn.2d 1014 (1992). In that case, an infant was born with severe injuries due to his premature birth. Unlike Liam, however, the infant was born with a heartbeat. Shortly after his birth, the infant was placed on a ventilator. His condition declined, and he was taken off the ventilator and died. The infant's mother and grandparents sued the treating neonatologist for failure to obtain their informed consent to the infant's placement on a ventilator. The plaintiffs claimed that *they*, not the infant, suffered personal injuries and other damages as a result of the infant's placement on the ventilator. In affirming the summary judgment dismissal of the informed consent claim, the court stated:

To hold a doctor liable for failure to obtain informed consent from a patient or his representatives, it must be shown the treatment in question proximately caused injury to the *patient*. RCW 7.70.050(1)(d).

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<sup>13</sup> Although this Court's review of a summary judgment is *de novo*, thereby rendering the trial court's opinion superfluous, the Stewart-Graves discuss the court's reasons for granting summary judgment in anticipation of Dr. Vaughn's advancing an argument on appeal based on the trial court's reasoning.

*Id.*, 66 Wn. App. at 61 (emphasis by the court). The court stated the plaintiffs failed to establish that the infant was injured as a result of his placement on the ventilator.

The trial court in the present case based its summary judgment dismissal of the informed consent claim on this statement from *Benoy*. *See* CP 292. While this reasoning may have been sufficient to support the dismissal of the informed consent claim in *Benoy*, it is not sufficient here. Here, the Stewart-Graves' informed consent claim is based on Dr. Vaughn's failure to obtain Liam's informed consent (through Todd Graves acting as Liam's representative) to the continuation of resuscitation efforts and on the damages Liam suffered by virtue of Dr. Vaughn's failure to obtain his informed consent. As discussed, the evidence established that Todd Graves was readily available and it was feasible for the code team to bring him into the room where the resuscitation efforts were underway and to have Dr. Vaughn explain to him the probable outcome of successful resuscitation efforts after ten minutes. Also, the evidence established Liam's severe injuries as a result of Dr. Vaughn's failure to obtain informed consent.<sup>14</sup> This case does not present circumstances similar to

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<sup>14</sup> The trial court entirely ignored the severe injuries Liam sustained due to his being resuscitated after 24 minutes with no heartbeat. Instead, the court stated that the result of the continued resuscitation efforts was saving Liam's life. Undeniably, Liam is alive. However, it cannot be ignored that another significant result of the continued

those in *Benoy*. While the plaintiffs' informed consent claim in *Benoy* may have been rightfully dismissed because the evidence did not establish injury to the patient (the infant) from the treatment at issue, the same is not true in the present case. The evidence shows Liam was injured by the treatment in question and by Dr. Vaughn's failure to obtain the requisite informed consent before administering this treatment.

In sum, the Stewart-Graves demonstrated the existence of genuine issues of material fact as to whether Dr. Vaughn and the Vancouver Clinic are liable for failure to obtain Liam's informed consent to the continuation of resuscitation efforts beyond the point at which it was highly likely he would suffer severe and permanent injuries if resuscitated. The trial court erred in granting Dr. Vaughn's and the Vancouver Clinic's motion for summary judgment as to this claim.

(3) The Stewart-Graves Stated a Cause of Action Against Dr. Vaughn, the Vancouver Clinic, and Southwest Washington Medical Center for Negligence in the Continuation of Resuscitation Efforts

(a) Introduction

Parents have the right to prevent the birth of a child suffering defects. *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 466, 656 P.2d 483 (1983). Health care providers owe the parents a duty to preserve that

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resuscitation efforts is Liam's lifelong suffering from severe, permanent, and disabling injuries.

right. *Id.* A health care provider breaches this duty by failing to impart material information to the parents or by negligence in the performance of a medical procedure. *Id.* Health care providers also owe a corresponding duty to a child born suffering defects caused by the provider's failure to impart material information to the parents or by negligence in the performance of a medical procedure. *Id.*, 98 Wn.2d at 480-82. The parents' and the child's causes of action for the breach of these duties are grounded in traditional principles fundamental to all negligence actions: duty, breach, causation, and damages. *Id.* at 468, 480; *see also id.* at 476 ("An action in negligence claiming damages for the birth of a child suffering congenital defects may be brought in this state.").

The claims of Liam Stewart-Graves and his parents against Dr. Vaughn and the hospital, seeking damages for the injuries Liam and his parents sustained due to the defendants' continuation of resuscitation efforts for 24 minutes and failure to stop resuscitation efforts at a time dictated by the standard of care are grounded in these fundamental negligence principles. The claims are based on the recognized right of parents to prevent the birth of a child suffering mental and physical disabilities and the recognized right of the child not to be born into a life of suffering from mental and physical disabilities.

Dr. Vaughn and the hospital will argue *Harbeson* is not applicable here because the injuries to the infants in *Harbeson* occurred *in utero*, while Liam’s injuries occurred after he was delivered. That is, they will argue that because Liam was not “born” with severe defects, *Harbeson* does not apply. They read *Harbeson* too narrowly and ignore the facts of this case. It is undisputed that Liam was injured *in utero* when he suffered a massive placental abruption. Thus, both in *Harbeson* and this case, the precipitating event occurred *in utero*. Further, it is undisputed that when Liam was delivered, he had no heartbeat and no respiratory function. He showed none of the usual signs of birth and life, such as breathing and a heartbeat, until 24 minutes after his delivery. These facts, coupled with the efforts of Dr. Vaughn and the hospital staff, resulted in Liam being a severely disabled infant, in the same way the infants in *Harbeson* were disabled when they were delivered from the womb. The Stewart-Graves, like the plaintiffs in *Harbeson*, have suffered extraordinary injuries and damage because of the negligence of health care providers.

For purposes of the rights of parents and an infant to recover for the failure of health care providers to abide by the standard of care, there is little meaningful distinction between an infant who is born with lifelong, severe injuries and an infant who is born with no heartbeat or respiratory function and suffers lifelong, severe injuries because he is resuscitated

after a prolonged period of oxygen deprivation. The relevant inquiry for purposes of determining whether the Stewart-Graves have stated causes of action against Dr. Vaughn and the hospital is whether the fundamental elements of a negligence claim are present. All the elements are present in this case, as they were in *Harbeson*. Both in *Harbeson* and here, parents and their infant claim that the infant would not be alive and living in a profoundly disabled condition had the health care provider not been negligent, and the parents and the infant would not be burdened with staggering medical expenses to provide lifelong, round-the-clock care to the infant. In both situations, the parents' and the infant's claims against the health care providers are grounded in principles of negligence.

(b) Parents' Cause of Action

A wrongful birth action is:

an action based on an alleged breach of the duty of a health care provider to impart information or perform medical procedures with due care, where the breach is a proximate cause of the birth of a defective child.

*Id.* at 467. The duty involved in a wrongful birth action is the health care provider's duty correlative to the parents' right to prevent the birth of a defective child. *Id.* at 472. In *Harbeson*, that duty imposed upon the health care provider the obligation to inform the parents that the mother's taking Dilantin during pregnancy posed the risk of birth defects in her

child. Here, that duty imposed upon Dr. Vaughn and the hospital the obligation to inform the parents that if resuscitation efforts were successful after Liam had been deprived of oxygen and was without a heartbeat for more than ten minutes, Liam would be alive, but would most likely be profoundly disabled. The duty also required Dr. Vaughn and the code team to cease resuscitation efforts at a time dictated by the standard of care. The fact that the duty was breached in *Harbeson* while the child was *in utero*, while it was breached in this case after Liam was delivered is not significant. In both cases, had the health care providers not breached the duty owed to the parents to prevent the birth of a defective child, neither the infants in *Harbeson* nor Liam would be alive. If, as this Court held, health care providers have a duty “to impart to their patients material information as to the likelihood of future children’s being born defective, to enable the potential parents to decide whether to avoid the conception or birth of such children,” *id.* at 473, then health care providers should have the analogous duty to impart to parents material information that their child, who was born without a heartbeat and who had no heartbeat after ten minutes of resuscitation efforts, will, if eventually resuscitated, be defective, so as to enable the parents to decide whether to continue resuscitation efforts. The clear message of *Harbeson* is that it is health care providers, who, because of their special training and experience, have

knowledge of likely outcomes their patients do not have. The law has created a duty on the part of the health care providers to share that knowledge and inform the patient or the patient's representative of those likely outcomes. Only then can the patient make informed decisions about treatment options. There is no reason, much less a compelling policy reason, to hold that this duty ceases or lessens where the child is outside the womb.

The Stewart-Graves presented evidence to establish the breach of this duty by Dr. Vaughn and the hospital. *See id.* at 473 (“Breach will be measured by failure to conform to the appropriate standard of skill, care, or learning.”). Dr. Bodenstein opined the health care providers involved in Liam’s resuscitation efforts breached the standard of care by:

    failing to discontinue the resuscitation when no heart rate was obtained after 15 minutes of resuscitative efforts, and by failing after 10 minutes of resuscitation to obtain informed consent from Liam’s father, Todd Graves, to continue Liam’s resuscitation after the time when any reasonably prudent physician would have stopped resuscitative efforts.

CP 194-95; *see also* CP 200 (continuing Liam’s resuscitation for 24 minutes violated the standard of care); CP 201 (the standard of care required Dr. Vaughn to be cognizant of the length of resuscitation and required the hospital’s code team to ensure Dr. Vaughn was aware of the duration of resuscitation).

As to causation, where cause in fact is established in a wrongful birth action, the proximate cause element is likewise satisfied. *Harbeson*, 98 Wn.2d at 476. Dr. Bodenstein testified that both the failure to stop resuscitation after 15 minutes of no heart rate and the failure to obtain Todd Graves' informed consent, on behalf of Liam, after ten minutes "doomed Liam and his parents to a lifetime of severe disability requiring extensive medical, nursing and rehabilitative care over the course of Liam's lifetime projected to cost millions of dollars." CP 194-95.

As to injury, "it is an inevitable consequence of recognizing the parents' right to avoid the birth of a defective child that . . . the birth of such a child is an actionable injury." *Harbeson*, 98 Wn.2d at 473. Recoverable damages for such injury include the medical, hospital, and medication expenses attributable to the birth of the defective child and to its defective condition as well as damages for the parents' emotional injury caused by the birth of the defective child. *Id.* at 475.

The evidence in the record and the case law demonstrate that Todd Graves and Nichole Stewart-Graves have stated a cause of action against both Dr. Vaughn and the hospital for negligence in the continuation of resuscitation efforts beyond the point at which Liam was certain to sustain severe injuries. Further, as this Court recognized in *Harbeson*, the parents also have a cause of action against Dr. Vaughn on a theory of informed

consent. *Id.*, 98 Wn.2d at 477-78. As discussed above, Dr. Vaughn had a duty to disclose to Todd Graves the serious risk of Liam’s suffering severe disabilities if resuscitated after prolonged oxygen deprivation, in order to allow Graves to make an informed decision as to whether to continue the resuscitation efforts. Summary judgment dismissal of the negligence claims against Dr. Vaughn, the Vancouver Clinic, and the hospital was error.

(c) Liam’s Cause of Action

A wrongful life action is the child’s equivalent of the parents’ wrongful birth action. *Id.* at 478. In a wrongful life claim:

“[t]he child does not allege that the physician’s negligence caused the child’s deformity. Rather the claim is that the physician’s negligence—his failure to adequately inform the parents of the risk—has caused the *birth* of the deformed child. The child argues that *but for* the inadequate advice, it would not have been born to experience the pain and suffering attributable to the deformity.”

*Id.* (quoting Comment, “*Wrongful Life*”: *The Right Not To Be Born*, 54 Tul. L. Rev. 480, 485 (1980)) (emphasis by the Court). Like parents’ wrongful birth action, a child’s wrongful life action is analyzed according to the traditional negligence principles of duty, breach, causation, and damage. *Harbeson*, 98 Wn.2d at 480.

With respect to duty, because the alleged negligent act in *Harbeson* occurred before the conception of the defective child, this Court had to decide whether a duty may extend to persons not yet conceived at the time of the negligent act or omission. In holding that a duty may so extend, this Court relied on the traditional concept of foreseeability, which circumscribes all duties in tort. *Id.* Accordingly, a health care provider, like anyone else, will be liable only to those persons foreseeably endangered by his or her conduct. *Id.* Because all duties are defined in this way, Dr. Vaughn and the hospital's liability extends to persons foreseeably endangered by their conduct. It cannot be disputed that Liam was a person foreseeably endangered by Dr. Vaughn's and the hospital's negligence in the continuation of resuscitation efforts.

The duty owed by health care providers is breached by the failure to observe the appropriate standard of care. *Id.* at 482. As Dr. Bodenstein testified, Dr. Vaughn and the hospital's code staff failed to observe the standard of care with respect to resuscitation of newborns by failing to discontinue the resuscitation after no heart rate was obtained after 15 minutes and by failing after 10 minutes to obtain Todd Graves' informed consent to the continuation of the resuscitation efforts. CP 194-95.

As to injury and damage, Liam is not asking this Court to measure damages by weighing the value of his life against his nonexistence. As

this Court has said, such a task is beyond the capability of mortals. *Harbeson*, 98 Wn.2d at 482. But, as in *Harbeson*, one of the almost certain consequences of Liam's birth after 24 minutes of oxygen deprivation is that he is forced to incur extraordinary expenses for medical care and special training. *Id.* Such expenses are calculable and recoverable. *Id.* (stating, further, "[s]uffice it to say here that we do not agree that requiring a negligent party to provide the costs of health care of a congenitally deformed child is a disavowal of the sanctity of human life.").

As to causation, the issue in a wrongful life claim is whether, but for the negligence of the health care provider, the child would not have existed. *Id.* at 482-83. Dr. Bodenstein testified that had Dr. Vaughn and the hospital staff adhered to the standard of care, Liam would not have survived and his severe injuries along with his and his parents' extraordinary medical expenses would have been avoided. CP 195. Further, had Todd Graves been properly informed of the consequences of continuing resuscitation, he would have directed Dr. Vaughn and the code team to stop all resuscitation efforts and would have accepted Liam's death. CP 147-48.

In sum, under the principles announced in *Harbeson*, Liam stated a cause of action against Dr. Vaughn and the hospital for negligence in their

continuation of resuscitation efforts. The trial court's summary judgment dismissal of his claim was error.

The trial court's reliance on *Benoy* to dismiss Liam's negligence claims against Dr. Vaughn and the hospital was misplaced. In *Benoy*, the grandparents and mother of an infant who died after being taken off a ventilator sued the physician for negligence. The plaintiffs asked the court to adopt, under the rationale of *Harbeson*, wrongful prolongation of life as a new cause of action based on the physician's placing the infant on a ventilator. The court in *Benoy* upheld the trial court's dismissal of the plaintiff's claim on the ground that because the infant was the patient, the parents did not have a cause of action for the injuries the infant sustained by placement on the ventilator. The significant flaw in the *Benoy* court's analysis is that it entirely ignored *Harbeson's* adoption of a wrongful life cause of action, which belongs to the infant, and focused solely on a wrongful birth cause of action, which belongs to the parents. As discussed, under wrongful life principles, Liam has a cause of action against Dr. Vaughn and the hospital to recover for the extraordinary expenses for the medical care and special training he will incur throughout his lifetime due to his physical and mental disabilities.<sup>15</sup> His claim is

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<sup>15</sup> It is important to reiterate that Liam is not asserting that his damages are the difference between the value of his impaired life and his nonexistence. As this Court recognized in *Harbeson*, while those damages cannot be measured, the extraordinary

based on the negligence of Dr. Vaughn and the hospital that resulted in Liam's being born to experience the pain and suffering and to incur the attendant costs attributable to the disabilities caused by his resuscitation after prolonged oxygen deprivation.

The trial court, Dr. Vaughn, and the hospital rely on *Montalvo v. Borkovec*, 256 Wis.2d 472, 647 N.W.2d 413 (Wis. App.), *review denied*, 257 Wis.2d 118, 653 N.W.2d 890 (Wis. 2002), *cert. denied*, 538 U.S. 907 (2003), in arguing the Stewart-Graves cannot state a cause of action for negligence in the continuation of resuscitation. In that case, the infant was delivered prematurely at just over 23 weeks of gestation by cesarean section. As soon as the infant was delivered, he was entrusted to a neonatologist who successfully performed life-saving resuscitation measures. The infant's parents sued the delivering physician and the neonatologist, alleging that because the defendants failed to advise the parents of the risks and potential consequences faced by an infant born so prematurely, the parents' consent to the cesarean section was not informed consent. The delivering physician was voluntarily dismissed, and the informed consent claim proceeded only against the neonatologist. The Wisconsin appellate court affirmed the trial court's dismissal of this claim.

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expenses Liam will incur stemming from his disabilities are real, quantifiable, and recoverable.

The court held that under Wisconsin common law providing that the right to refuse life-sustaining treatment does not extend beyond individuals in a persistent vegetative state and under the federal Child Abuse Protection and Treatment Act,<sup>16</sup> the infant's parents "did not have the right to withhold or withdraw *immediate* post-natal care from him." *Id.*, 647 N.W.2d at 419 (emphasis added).

In the present case, the federal statute on which the Wisconsin court relied is not at issue. Further, while Wisconsin extends the right to refuse life-sustaining treatment only to persons in a persistent vegetative state, Washington law confers this right not only to persons in a permanent unconscious condition, but also to persons suffering a terminal condition. *See* RCW 70.122.010 et seq. (Washington's Natural Death Act). Further, underlying the Wisconsin court's decision is the notion that, if the parents were allowed to recover, the court would be disavowing the sanctity of a life with disabilities. This Court rejected this notion in *Harbeson*:

"[I]t is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society."

*Harbeson*, 98 Wn.2d at 481 (quoting *Turpin v. Sortini*, 31 Cal. 3d 220, 233, 643 P.2d 954, 182 Cal. Rptr. 337 (1982)).

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<sup>16</sup> 42 U.S.C. §§ 5101 et seq.

Also, as discussed, the Stewart-Graves are not contending that Dr. Vaughn and the hospital should not have undertaken resuscitative efforts immediately upon Liam's delivery, nor are they contending they had the right to refuse immediate resuscitative efforts. This was the issue confronting the court in *Montalvo*. Rather, the Stewart-Graves' claim is based on the defendants' failure to obtain Liam's informed consent after ten minutes of unsuccessful resuscitation and their failure to stop resuscitation efforts at the point dictated by the standard of care.

The court in *Montalvo* also expressed concern that allowing the parents to recover would place physicians in a "damned if you do, damned if you don't" dilemma. This may have been a valid concern under the circumstances of that case, where the parents wanted no resuscitation efforts undertaken on their infant whatsoever. Here, the Stewart-Graves wanted only that resuscitation efforts be stopped (or Todd Graves be asked to consent to their continuation) once the probability was high Liam would be gravely disabled if resuscitated and the standard of care dictated cessation of resuscitation. Holding health care providers liable for failure to obtain the statutorily-required informed consent and for failure to adhere to the standard of care does not place physicians in a "damned if you do, damned if you don't" dilemma. Rather, it – rightfully – holds health care providers liable under traditional negligence principles.

F. CONCLUSION

Dr. Vaughn was required to obtain Liam's informed consent before continuing resuscitation efforts. Further, she and the hospital's code team breached the standard of care in continuing resuscitation attempts after they were unsuccessful after 15 minutes and in failing to bring Todd Graves to Liam's bedside after ten minutes and informing him of the likely consequences of resuscitating Liam, so as to allow him to decide whether to permit resuscitation efforts to continue. The trial court erred in granting the defendants' motions for summary judgment. This Court should reverse the trial court's orders granting Dr. Vaughn's, the Vancouver Clinic's, and the hospital's motions for summary judgment. Costs on appeal should be awarded the Stewart-Graves.

DATED this \_\_\_ day of June, 2006.

Respectfully submitted,

**FILED AS ATTACHMENT  
TO E-MAIL**

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DECLARATION OF SERVICE

On this day said forth below I deposited in the U. S. Mail a true and accurate copy of the following document: Brief of Appellants in Supreme Court Cause No. 78383-7 to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June \_\_\_\_, 2006, at Tukwila, Washington.

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