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FILED
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CLERK OF SUPREME COURT
STATE OF WASHINGTON

NO. 58831-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CASCADE ORTHOPAEDICS, a partnership,

Appellant,

vs.

JOSIE ARMANTROUT and WARREN ARMANTROUT, husband and
wife and the marital community composed thereof,

Respondents.

RESPONDENTS' PETITION FOR REVIEW

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ORIGINAL

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INTRODUCTION

The petitioners ask the Court to consider whether the providing of services that have economic value by an adult child to a parent can be considered in determining whether the parent was financially dependent upon the child for purposes of RCW 4.20.020. Petitioner Josie Armantrout, who is blind, received services from her now-deceased 18-year old daughter which allowed Josie to live in her house, perform many activities of daily living, and attend college. The evidence at trial showed that Josie and her husband, Todd, could not otherwise afford those services.

The trial court correctly allowed the plaintiffs to present their case for the jury to determine whether Kristen Armantrout's parents were dependent for support upon her for the purposes of RCW 4.20.020. The trial court's jury instructions correctly stated Washington law in this regard and correctly denied the defendants' motions to dismiss the wrongful death claims of Josie and Todd Armantrout. The Court of Appeals disagreed, reversed and remanded the case for a new trial.

A. IDENTITY OF PETITIONERS

Petitioners, Josie and Todd Armantrout, ask this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals' opinion was filed on November 13, 2007 (Appendix "App." 1-17), and the petitioners filed a motion for clarification/ reconsideration, which was denied on December 17, 2007 (App. 18). The Court of Appeals concluded that services that have an economic value do not fall within the meaning of financial support. The Court reversed and remanded for a new trial on the issue of financial dependency based solely upon the receipt by the parents of their daughter's \$588 per month check from Social Security disability.

C. ISSUE PRESENTED FOR REVIEW

1. Whether the provision of services which have an economic or pecuniary value may be considered by the trier of fact when determining whether a parent was financially dependent upon his or her adult child in order to maintain an action for wrongful death under RCW 4.20.020 (App. 24) when there are no "first tier" beneficiaries.

2. Whether the Court of Appeals' decision prejudices the Armantrout's ability to present their damages case and whether remand requires retrial on damages or just the issue of "dependent for support."

D. STATEMENT OF THE CASE

1. Substantive Facts

At the time of her death on August 5, 2003, Kristen Armantrout

was 18 years old. She was still in high school and living at home with her mother, Josie Armantrout. Kristen had no spouse or children at the time of her death. Kristen's father, Todd, and brother, Robert, had moved to Bemidji, Minnesota, in early 2003, after Todd had been laid off from the Boeing Company and could find no other employment in the Puget Sound area. RP 7/17 at 14; 7/18 at 43.

Josie and Kristen stayed behind to sell the family home and for the two of them to finish school before joining Todd and Robert in Bemidji. Josie was finishing her degree at Green River Community College, and Kristen had one semester left at Auburn High. Because of her blindness, Josie could not have stayed behind by herself. RP 7/17 at 15; RP 7/18 at 43, 45.

2. Services provided by Kristen

Kristen did all the driving; she drove Josie to and from the college, medical appointments, shopping, and other errands. Although Josie was eligible to ride the Access bus, there were limitations. Josie could not carry a week's worth of groceries on the Access bus, and the driver would not be able to help her to the door with groceries. RP 7/17 at 22. For grocery shopping, Josie needed a driver, as well as someone to read labels and find things in the grocery store. RP 7/18 at 58-59.

A ride on the Access bus had to be arranged ahead; Josie could not

call for an emergency or other last-minute ride. RP 7/17 at 21. In those cases, Josie needed someone to pick her up. RP 7/18 at 58. Metro bus service was limited. RP 7/18 at 59-60. Other alternatives for transportation would have to be hired. RP 7/17 at 22.

Kristen helped her mother with her studies. Kristen helped her mother find research materials in the library, because not every resource could be accessed by the blind. Kristen did a great deal of reading to her mother. Readers were difficult to find, often failed to show up, and were often terrible. They also had to be paid. RP 7/17 at 21; RP 7/18 at 61-62.

Kristen read the mail to Josie and wrote checks to pay the bills according to her mother's instructions. RP 7/18 at 55. Kristen helped her mother label their food. Kristen read the labels to Josie, and Josie made Braille labels with her slate and stylus. RP 7/18 at 55-56.

Kristen learned to help her mother with her medical needs. Josie is a diabetic and needed help with glucose readings. Kristen also drew Josie's insulin for her injections. If Josie's glucose dropped too much, Kristen administered a Glucagon shot to raise the glucose. If her glucose was too high, Kristen helped her with that, too. On one occasion, Kristen found her mother when her glucose was so low she would not wake up. Kristen was able to take Josie's glucose reading, give her the Glucagon kit, and wait to see whether she needed to call 911. RP 7/18 at 66-68.

Kristen also took care of getting and keeping the house ready to show. RP 7/18 at 51. Kristen cleaned and packed up items for storage. RP 7/18 at 51-52. She made sure the carpet was clean. RP 7/18 at 52. She learned how to do some minor home repairs and tape off all the rooms for painting. RP 7/18 at 53. Kristen bought new plants and got the yard in order. RP 7/18 at 52-53. When the realtor called wanting to show the house, Kristen made sure everything was in its place and drove herself and her mom somewhere until the realtor was gone. RP 7/18 at 57-58.

Josie and Kristen planned to take college classes together after they moved to Bemidji. Kristen would continue living at home, helping Josie as she had always done. RP 7/18 at 68-69. Kristen was to be Josie's driver and her reader, and Kristen was going to show Josie the "grid" of Bemidji, so that Josie could walk. RP 7/18 at 70.

3. Monetary contributions made by Kristen

Because her mother was disabled, Kristen was eligible for payments from Social Security. Kristen gave her \$588 check to her parents for family use. RP 7/18 at 19. It was understood that, with Todd unemployed, they were experiencing a family crisis. RP 7/18 at 47-48; RP 7/17 at 19.

4. Circumstances of the parents

When Todd started working again after his lay-off, the family

income included Todd's paycheck, Josie's disability check, and Kristen's check from Social Security. Their combined income was approximately \$2,580 per month. The expenses for the two households were over \$5,800 per month. RP 7/17 at 17, 20.

In order to meet their expenses, the Armantrout's had to put off bills when they could. In an eight-month period, they had to borrow \$15,000 from Josie's sister, Sylvia Gonzales. RP 7/17 at 20. RP 7/17 at 96. Without Kristen's \$588 check, the Armantrouts would have to borrow even more money from Mrs. Gonzales. RP 7/17 at 26. Todd had to borrow the money from his brother for the airfare to Auburn for his daughter's funeral. RP 7/17 at 34.

Without the services provided by Kristen, her parents would have incurred additional expenses for Josie's transportation, readers, and household chores requiring sight, such as labeling groceries and doing yard work. Indeed, without the services provided by Kristen, Josie had to leave the Auburn house as soon as possible and move to Bemidji. RP 7/17 at 35-36. While Todd was making the hurried arrangements to move her, Josie's sisters had to stay with her. RP 7/17 at 36.

Even after moving to Bemidji, Josie went without many of the services Kristen provided. Because she could not go out without her

husband or son, she sat alone in the apartment until they came home. RP 7/18 at 179-180. The transit services in Bemidji could not serve Josie's needs. The drivers would not come to the door, and of course, Josie could not watch for the bus. So, Josie had to rely upon her son and her husband to drive her to doctor's appointments. They had to miss time from work for which they did not get paid. RP 7/17 at 41; RP 7/18 at 180. Sometimes, they would have to cancel Josie's medical appointments because there was no transportation. RP 7/17 at 81.

When Josie's health declined, she had several visits to the Mayo Clinic or a hospital in Fargo, which took several days for each visit. The Armantrout's had to pay for Josie's niece to fly out from California, because Todd could no longer take time off work to take Josie to the Clinic. RP 7/17 at 42. Had Kristen been alive, she could have driven her mother to the Mayo Clinic. RP 7/17 at 43. She also would have been there to help her mother with personal hygiene that she was embarrassed to have her son perform. RP 7/17 at 82.

5. Procedural history of the case

This case was filed on June 17, 2004. CP 1-7. On July 12, 2006, the third day of trial, defendant sought to exclude testimony regarding plaintiffs' damages in their wrongful death claims for the death of their daughter. RP 7/12 at 3-4. The court ruled that the plaintiffs could proceed

with their witness. RP 7/13 at 4. Defendants continued to object to testimony regarding Josie and Todd Armantrout's damages, and the issue was argued on July 13, 17, and 18. RP 7/13, 7/17, and 7/18.

On July 19, 2006, the issue was again argued by counsel. The trial court considered several Washington and California cases on the meaning of dependent for support. RP 7/19. Exceptions to the court's instructions were made on July 20, 2006.

The jury found Cascade Orthopaedics negligent and awarded \$250,000 to the Estate of Kristen Armantrout and \$1.15 million to Josie and Todd Armantrout after determining they were dependent for support. Cascade Orthopaedics appealed the verdict to Josie and Todd Armantrout.

The Court of Appeals reversed, ruling that services cannot be considered when determining whether a parent is dependent for support. The petitioners now respectfully request this Court accept review and affirm the trial court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The decision of the Court of Appeals is in conflict with a decision of the Supreme Court.

The Court should accept review of this case because the decision of the Court of Appeals in this case is in conflict with the decision of the

Supreme Court in *Cook v. Rafferty*.¹ At the time *Cook* was decided, the statute required that parents prove that they were dependent upon their adult child for support. In that case, the Court affirmed a \$1,000 award for the death of the Cooks' adult daughter². The evidence in that case indicated that the daughter lived with her parents and contributed to the household expenses. Her father was an invalid, and her mother was unemployed. The Court stated that:

Under the facts, we think it is reasonable to suppose that had Miss Cook lived she would have continued to contribute to the support of the family and ***continued to care for her parents***, and to conclude that Mr. and Mrs. Cook suffered a pecuniary loss by reason of her death. (Emphasis added.)³

The Court in *Cook* explicitly considered the ***care*** the daughter was providing her parents, one of whom was disabled like Josie Armantrout. Based upon the contributions and the care, this Court concluded that the Cooks had suffered a pecuniary loss. The Court also referred to the remedial purpose of the wrongful death statute in making its decision.

The Court of Appeals did not explicitly overrule the holding in *Cook v. Rafferty*, and the case was cited as good law by Cascade Orthopaedics. This Court should follow the reasoning of the Court in

¹ *Cook v. Rafferty*, 200 Wash. 234, 93 P.2d 376 (1939) (App. 19-23).

² *Id.* at 239-240.

³ *Id.*

Cook and consider both the contributions and care Kristen Armantrout provided to her family.

2. **The issue of whether services that have economic value can be considered in determining whether a parent is financially dependent upon her adult child is an issue of substantial public interest that should be determined by the Supreme Court.**

This Court should accept review of this case and reverse the Court of Appeals' decision, because the interpretation of RCW 4.20.020 presents issues of substantial public interest. The Court has already recognized the public's interest in the statute by ruling in the case of *Phillipides v. Bernard*.⁴ In that case, the Court ruled that the phrase "dependent for support" in RCW 4.20.020 does not include *emotional support*.⁵

In part, the Court stated that redefining "support" to include emotional support would disrupt the statutory two-tier system of beneficiaries:

On the first tier are the spouse and children of the decedent. On the second tier are the decedent's parents and siblings. Second tier beneficiaries are entitled to recover only if there are no first tier beneficiaries. All 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 4.20.010.⁶

The Court in *Phillipides* also refused to recognize a common law

⁴ *Phillipides v. Bernard*, 151 Wn.2d 376, 88 P.3d 939 (2004).

⁵ *Id.* at 388.

⁶ *Id.* at 385.

cause of action for loss of consortium on behalf of parents of an adult child killed by a negligent defendant. Again, the Court declined to confuse the two-tier statutory scheme of Washington's wrongful death and survival statutes.⁷

In the present case, the petitioners are not asking for the Court to disturb the two-tier beneficiary system. Josie and Todd Armantrout meet both criteria: one, there are no first tier beneficiaries, and two, they were dependent upon their daughter for support. They ask this Court to affirm the trial court's decision to allow the jury to consider services provided by Kristen Armantrout to her parents in determining whether the parents were financially dependent upon her.

To exclude, as a matter of law, anything but the payment of money in determining financial dependence would produce absurd and harsh results. A bright-line rule excluding the provision of services, as a matter of law, would affect elderly and developmentally or otherwise disabled people who may be living with an adult child, brother or sister and dependent upon them for support in the way of services. A bright-line rule would serve only to exclude the neediest and most vulnerable people from suing for wrongful death, if they are "second tier" beneficiaries and no first tier beneficiaries existed. A bright-line rule fails to recognize that

⁷ *Id.* at 390.

families often lack financial resources in the form of money to aid a family member, but they may have the time and skills to offer services that may otherwise have to be paid for.

This is true in the present case, where the evidence showed that Josie had to move from her home as soon as possible after Kristen died. Moreover, Josie had to impose upon her sisters, one of whom had to fly up from California, to live with her until her husband could move her to Bemidji. They, then, abandoned their house in Auburn. Once in Bemidji, Josie became a prisoner in her own home. True, she did not want for food or shelter, but she could not even seek needed medical attention on her own. Her husband and son were working and not available much of the day. Her medical appointments often had to be cancelled because there was no one to take her.

A narrow reading of the statute also ignores the remedial purpose of the statute. Washington Courts have repeatedly acknowledged the remedial purpose of the wrongful death statute and that it is to be liberally construed.⁸ The Court has also stated that:

Also, we must not lose sight of the fact that the statute upon which the right of action is based is remedial in character. It creates a right of action not existing at common law and ***should not, in its application, be so limited by construction as to partially defeat its purpose.*** (Emphasis

⁸ *Id.* at 240.

added.)⁹

This Court has also extended the literal scope of the statutes to protect beneficiaries clearly contemplated by the statute.¹⁰ In *Armijo v. Wesselius*,¹¹ the Court extended the definition of “child or children” under RCW 4.20.020 to include illegitimate children. The Court reasoned that:

Whether done liberally or strictly, judicial interpretation is necessary even under respondents’ rule; illegitimate children are *not necessarily excluded* under the terms of RCW 4.20.020. This being so, we must still engage in a process of weighing and balancing competing values, and it appears to us that social policy considerations favoring inclusion of illegitimate children as beneficiaries should be given effect. As stated in 3 J. Sutherland, *Statutory Construction* §7205 (3d ed. 1943):

“[M]any of the decisions in the past [construing wrongful death statutes], and a few of the later ones as well, have crippled the operation of this legislation by employing a narrow construction on the basis that these statutes are in derogation of the common law. However, it may now safely be asserted that the better and modern authorities are in agreement that the objectives and spirit of this legislation should not be thwarted by a technical application.”¹²
(Emphasis added).

Similarly, in *Wilson v. Lund*,¹³ this Court extended RCW 4.24.010 to allow divorced mothers to initiate an action for the injury or death of a minor child, when the statute allowed a cause of action for the mother only

⁹ *Mitchell v. Rice*, 183 Wash. 402, 407, 48 P.2d 949 (1935).

¹⁰ *Masunaga v. Gapasin*, 57 Wn.App. 624, 631 (1990).

¹¹ *Armijo v. Wesselius*, 73 Wn.2d 716, 440 P.2d 471 (1968).

¹² *Id.* at 720.

¹³ *Wilson v. Lund*, 74 Wn.2d 945, 447 P.2d 718 (1968).

when the father had died or deserted the family or if her child was illegitimate. In its opinion, the Court emphasized the purpose of the act:

The courts, in pursuance of the general object of giving effect to the intention of the legislature, are not controlled by the literal meaning of the language of the statute, but the spirit or intention of the law prevails over the letter thereof.

....

It is a rule of such universal application as to need no citation of sustaining authority that no construction should be given to a statute which leads to gross injustice or absurdity.¹⁴

The *Wilson* Court also cited the following: “A statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one which will carry out and the other defeat such manifest object, it should receive the former construction.”¹⁵ 2 Sutherland, *Statutory Construction* § 4704 (3d ed. Horack).¹⁵

The language of the statute allows “parents, sisters or brothers, *who may be dependent upon the deceased person for support*” to maintain an action for wrongful death.¹⁶ (Emphasis added.) Washington courts have interpreted “dependent for support” to mean financial support, and not emotional support, but the term “financial” *does not necessarily exclude* services which have financial value. More importantly, the actual language of the statute, “dependent for support,” does not necessarily

¹⁴ *Id.* at 947.

¹⁵ *Id.* at 948.

¹⁶ RCW 4.20.020.

exclude services which have financial value. In fact, Washington courts have twice considered services in determining whether or not parents were dependent upon their adult children for support.

First, this Court explicitly considered the adult daughter's *care* of her parents, as well as her monetary contributions, when it affirmed the trial court's award of \$1,000 to her parents in their wrongful death suit in *Cook*, which was discussed above in Part 1 herein.¹⁷

Second, the Court of Appeals considered an adult son's services to his parents in making a determination of dependent for support in *Masunaga*. There, the parents testified that their son provided accounting services for them and prepared their tax returns. The Court of Appeals determined that the Masunagas were not dependent upon their son for support, not because their son provided services and not money, but because the Masunagas did not show that they were *dependent* upon such services.¹⁸ The Armantrouts testified at length how they were dependent upon Kristen's services.

In the present case, the Court of Appeals focused on "financial" and its definition to narrow the interpretation of support to the payment of money. However, the definition of the term actually used in the statute – support – includes services that allow one to live:

¹⁷ *Cook v. Rafferty*, 200 Wash. 234, 93 P.2d 376 (1939).

¹⁸ *Masunaga v. Gapasin*, 57 Wn.App. at 629.

Support, n. That which furnishes a livelihood; a source or means of living; subsistence, sustenance, or living. In a broad sense the term includes all such means of living as would enable one to live in the degree of comfort suitable and becoming to his station of life. It is said to include anything requisite to housing, feeding, clothing, health, proper recreation, vacation, traveling expense, or other proper cognate purposes; also proper care, nursing, and medical attendance in sickness, and suitable burial at death.¹⁹

Parents who are dependent upon their children for support are beneficiaries clearly contemplated by the statute. The petitioners request that the Court include within “support” the provision of services that have an economic value.

That Kristen’s services provided to her mother had substantial financial value was established by the testimony of Lowell Bassett, Ph.D., plaintiffs’ economist. He testified that Kristen provided over 183 hours per month of services for her mother. Using the going rate for household services in Bemidji, MN, Dr. Bassett testified that the value of Kristen’s services to her mother was \$36,553 per year or \$107,101 to the date of trial. RP 7/18 at 19-20.

Other states consider the provision of services when determining whether a parent is financially dependent upon a child.²⁰ The Fifth Circuit

¹⁹ *Black’s Law Dictionary* at 1291 (5th ed. 1979).

²⁰ *Hogan v. Williams*, 193 F.2d 220, 224 (5th Cir. 1951); *Chavez v. Carpenter*, 91 Cal. App. 4th 1433, 1445, 111 Cal. Rptr. 2d 534, 544 (2001); *Deaconess Hospital v. Gruber*,

Court of Appeals, in a Georgia case, *Hogan v. Williams*, considered services in determining dependency. In Georgia, a statute allowed a parent to recover for death of a child on whom the parent is dependent, or who contributes to the parent's support.²¹ The Court stated:

[S]ervices of a child to a mother or of a mother to a child may well be reckoned as contributing substantially to the support of the recipient far beyond any money value which the services may have, and the chief element of dependence may be in respect to personal services of that nature.²²

The facts in the *Hogan* case are remarkably similar to the facts in the present case. In *Hogan*, the deceased child provided no money to her mother, but instead, provided services to enable the mother to go to New York for better employment. Similarly, in the present case, Kristen Armantrout's services enabled her father to go to Bemidji for his new job.

A California case, *Chavez v. Carpenter*, was relied upon by the trial court in the present case. In California, the Code of Civil Procedure allows parents to sue for the wrongful death of their adult child "if they were dependent on the decedent."²³ California courts also interpret "dependent" to mean financial dependence.²⁴ The *Chavez* court ruled that:

791 N.E.2d 841, 847 (Ind.App. 2003); *Hines v. Hines*, 32 Or.App. 209, 214, 573 P.2d 1260 (1978).

²¹ *Hogan*, 193 F.2d at 223.

²² *Id.* at 224 (quoting *Scott v. Torrance*, 25 S.E.2d 120, 126).

²³ *Code Civ. Proc.*, § 377.60.

²⁴ *Chavez*, 91 Cal.App. 4th at 1445.

[I]f a parent receives financial support from their child which aids them in obtaining the things, such as shelter, clothing, food and medical treatment, which one cannot and should not do without, the parent is dependent upon their child. The death of that child in this type of situation results in a distinct pecuniary loss to the parent which requires the parent to find aid elsewhere for the basic things we all need.²⁵

In *Chavez*, the Court found that the parents were at least partially dependent upon their adult child. The Court held that:

It appears from this record that appellants received “financial support from their child which aid[ed] them in obtaining . . . shelter, clothing, food . . .” There is evidence that appellants routinely relied on decedent for money to defray their ordinary living expenses, and for help with their cars, land, and business. The reasonable inference from that evidence is that appellants relied on decedent’s aid – at least to some extent – for life’s necessities. That inference is not overcome by defendant’s assertion that appellants had sufficient income to pay their mortgage and other bills without decedent’s assistance.²⁶

Washington appellate courts have previously relied upon California cases in construing the wrongful death statute and the term “dependent for support.”²⁷

These cases from other states recognize the reality that services have substantial monetary value, and without them, a parent may be required to find aid elsewhere for the basic things she needs. Josie Armantrout was dependent upon her daughter. Indeed, the evidence

²⁵ *Id.* at 1446.

²⁶ *Id.* , at 1447-1448.

²⁷ *Masunaga*, 57 Wn.App. at 628.

showed that Josie’s life depended upon the presence and services of her daughter: Kristen had intervened when Josie suffered the effects of dangerously low glucose levels and could not wake up.

This Court should construe RCW 4.20.020 with reference to its manifest object – to provide a cause of action for the wrongful death of an adult child or brother or sister upon whom the surviving person was dependent for support. This Court should affirm the trial court’s decision, because the respondents submitted substantial evidence that the Armantrouts were financially dependent up, on their daughter.

3. The decision of the Court of Appeals may prevent the Armantrouts from presenting their case upon remand.

The Court should accept review of this case because the decision of the Court of Appeals may prevent the Armantrouts from presenting their case upon remand. The Court of Appeals ruled that the “erroneous jury instruction and *supporting evidence* likely affected the jury’s verdict that the Armantrouts were substantially dependent upon Kristen.” Op. at 16. (Emphasis added; App. 16.) However, this same evidence supports the Armantrout’s damages in their wrongful death claim.²⁸

The trier of fact in a wrongful death case may award damages for the plaintiff’s “pecuniary” loss, which includes monetary contributions, as

²⁸ WPI 31.03.02 (5th ed.).

well as the loss of services, affection, care, companionship, society, and consortium of the deceased.²⁹ The loss of Kristen's services to her parents and the value of those services are damages the Armantrouts are entitled to receive if the jury determines they were dependent upon Kristen for support. Thus, the testimony of the parents regarding Kristen's services and the testimony of the expert regarding the value of those services would still be relevant to the damages claims.

The Court of Appeals did not explain how the evidence regarding Kristen's services to her parents can be excluded without substantially prejudicing the Armantrouts' ability to present their damages case. The Court of Appeals also did not indicate whether the amount of damages should be retried or just the issue of dependency.

F. CONCLUSION

Respondents respectfully request that the Court affirm the trial court's decision to allow the issue of financial dependence to go to the jury.

Respectfully submitted this 15th day of January, 2008.

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²⁹ *Bowers v. Fibreboard Corp.*, 66 Wn.App. 454, 832 P.2d 523, *rev. denied*, 120 Wn.2d 1017, 844 P.2d 436 (1992).

OSBORN MACHLER

A handwritten signature in cursive script, appearing to read "Susan Machler".

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RESPONDENTS' APPENDIX TO PETITION FOR REVIEW

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was a single adult with no children.

Her parents, Josie and Warren Todd Armantrout, as personal representatives of Kristen's estate, sued Cascade Orthopaedics and her attending physician. They also sought to recover under the wrongful death statute on their own behalf as beneficiaries under the provisions of RCW 4.20.020.

At trial, Cascade objected to the wrongful death claim as well as to the testimony relating to the Armantrouts' dependence on Kristen. Cascade also moved for what the trial court characterized as a motion for judgment as a matter of law on that claim, which the trial court denied. Cascade excepted to the jury instructions concerning the Armantrouts' wrongful death claim and substantial financial dependence as well as to the special verdict form.

The jury found Cascade negligent and awarded the Armantrouts \$1,150,000.00 in damages. The jury also awarded Kristen's estate \$200,000, which is not at issue in this appeal. The attending doctor was found not negligent and therefore does not appeal the verdict.

Cascade appeals.

DEPENDENT FOR SUPPORT

Cascade argues that the Armantrouts have no standing as beneficiaries under RCW 4.20.020 to bring a wrongful death action. We agree. The services Kristen provided her parents cannot be considered in assessing whether they were "dependent . . . for support" on her.

Civil Rule 50

A motion for judgment as a matter of law should be granted to dismiss a claim if the evidence presented is insufficient to convince a reasonable jury of the issue.¹ An appellate court reviews a trial court's denial of such a motion only to determine whether substantial evidence supported the claim.² Substantial evidence is evidence sufficient to convince a fair-minded person of the truth of the matter.³ We review all facts and inferences in favor of the non-moving party.⁴

The legislature created a two-tiered system of beneficiaries in Washington's wrongful death statute.⁵ The first tier consists of the decedent's spouse and children, who have automatic standing to bring a wrongful death claim under the statute.⁶ The second tier of the statute includes the decedent's

¹ CR 50(a)(1).

² Queen City Farms, Inc. v. Cent. Nat'l Ins. Co., 126 Wn.2d 50, 98, 882 P.2d 703 (1994), dissenting opinion amended by 891 P.2d 718 (1995).

³ Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 179-80, 116 P.3d 381 (2005).

⁴ Queen City Farms, 126 Wn.2d at 98.

⁵ RCW 4.20.020; Philippides v. Bernard, 151 Wn.2d 376, 385, 88 P.3d 939 (2004).

⁶ RCW 4.20.020; Philippides, 151 Wn.2d at 385.

parents. If a decedent has no spouse or child, a parent may bring a wrongful death claim under the second tier only if the parent is “*dependent upon the deceased for support . . .*”⁷

The parties agree that since the early 1900s, Washington courts have uniformly interpreted this phrase to mean *substantial financial dependence*.⁸ A parent need not be wholly dependent on the deceased; partial but significant dependence will suffice.⁹ But there must be “a necessitous want on the part of the parent, and a [financial] recognition of that necessity on the part of the child.”¹⁰ Dependence should be judged based on the current condition, not anticipated future conditions.¹¹ Emotional support, or providing the types of emotional services one expects from a family member, is outside the scope of the statute.¹²

Cascade argues that the entire question whether the Armantrouts were dependent on Kristen is an issue of law. To the contrary, our supreme court has previously allowed the question to go to the jury if substantial evidence supports

⁷ RCW 4.20.020 (emphasis added).

⁸ E.g., Bortle v. N. Pac. Ry. Co., 60 Wash. 552, 554, 111 P. 788 (1910); Masunaga v. Gapasin, 57 Wn. App. 624, 628, 790 P.2d 171 (1990).

⁹ Grant v. Libby, McNeill & Libby, 145 Wash. 31, 38, 258 P. 842 (1927).

¹⁰ Bortle, 60 Wash. at 554; see also id. at 556 (paraphrasing the earlier stated rule and adding the word “financial”).

¹¹ Masunaga, 57 Wn. App. at 629.

¹² Id. at 628.

a finding of dependence.¹³

Cascade challenges generally the three jury instructions relating to the Armantrouts' wrongful death claim, arguing that there is insufficient evidence as a matter of law to support that the Armantrouts were dependent on Kristen for support. We conclude that substantial evidence supported the instructions generally.

There is substantial evidence in the record that the Armantrouts depended on Kristen for approximately \$588 per month. Josie and Todd both testified that Kristen gave them her disability benefits check each month to help with family expenses. They also testified that at least one reason Kristen relinquished her check each month was to help cover her own living expenses. Despite this fact, Josie and Todd testified that they relied on this money each month to pay family bills, and they would have had to borrow money if Kristen had not given it to them. Thus, substantial evidence supports that the Armantrouts financially depended on Kristen's monetary contribution to the family.

Cascade also argues that the Armantrouts did not truly need this money for support because they created their own hardships by attempting to maintain two different households at the same time. We disagree.

Financial dependence need not be complete dependence, and it is based

¹³ See Mitchell v. Rice, 183 Wash. 402, 48 P.2d 949 (1935) (issue of dependency properly reserved for the jury when there was substantial evidence that the father depended on monetary payments from the deceased).

on the current, not the anticipated future, situation.¹⁴ Mr. Armantrout had lost his job, and the family felt that the proper decision was for his wife and daughter to stay behind to prepare the house for sale while he obtained another job elsewhere. We will not second-guess that decision. The evidence supports the finding, and the jury was properly allowed to determine the significance of the family's decision.

Cascade argues that as a matter of law, a check Kristen received for being dependent upon her mother cannot form the basis for her mother's dependence on Kristen. But Cascade does not identify any legal authority for its argument, and we have found none. The jury was allowed to consider the source and amount of the money and was properly permitted to determine whether it contributed to the Armantrouts being financially dependent on their daughter.

Thus, a jury could reasonably find that the Armantrouts were dependent on Kristen for support within the meaning of the statute and case law based solely on the payments of approximately \$588 per month. But whether a jury actually would is not presently before us and should more properly be addressed after remand for the reasons we explain later in this opinion.

In any event, there was substantial evidence in the record that the Armantrouts were financially dependent on Kristen. The trial court properly denied Cascade's CR 50 motion.

¹⁴ Masunaga, 57 Wn. App. at 628-29.

Judicial Estoppel

Similarly, Cascade argues that the doctrine of judicial estoppel should prevent consideration of the monthly check as financial support, given that the Armantrouts claimed Kristen as a dependent for purposes of social security, tax, and insurance benefits. We disagree because Cascade fails to make out a case for applying judicial estoppel.

The doctrine of judicial estoppel is designed to prevent a party from benefiting by taking inconsistent positions in different litigation proceedings.¹⁵ A court may consider the following six non-exclusive factors in applying this doctrine:

(1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change.¹⁶

Here, there was neither a prior judgment nor any prior litigation from which the Armantrouts benefited from claiming Kristen as a dependent. Cascade was never a party to any prior proceeding involving the Armantrouts. And Cascade cannot show how it was misled into changing its position in response to the Armantrouts' position.

Further, the positions that the Armantrouts take are not "clearly

¹⁵ Johnson v. Si-Cor, Inc., 107 Wn. App. 902, 909, 28 P.3d 832 (2001).

¹⁶ DeAtley v. Barnett, 127 Wn. App. 478, 483, 112 P.3d 540 (2005), review denied, 156 Wn.2d 1021 (2006), cert. denied, 127 S. Ct. 123 (2006).

inconsistent.” Cascade has not shown how the definitions of the word “dependent” in the federal tax code, the federal Social Security Act, the Armantrouts’ insurance policy, or Washington’s wrongful death statute are identical. These definitions exist in different statutes and in different contexts, requiring different proof.

For example, the relevant provision of the Social Security Act allowed Kristen to receive a benefit check as a dependent until she was 19 years old if she still attended school full time.¹⁷ The statute states that a biological or adopted child is “deemed” dependent on his or her disabled parent unless the parent “was not living with *or* contributing to the support of such child”¹⁸

“Dependent” in the tax code means a child who, among other things, “has not provided over one-half of [his or her] own support” during that year.¹⁹ It does not, as Cascade represents, state the reverse — that the parents have necessarily paid for more than half of the child’s support.

We conclude that the reliance by the Armantrouts on these varying definitions is not “clearly inconsistent” with the position that they take in this case.

Jury Instructions

Cascade assigns error to the jury instruction defining financial

¹⁷ 42 U.S.C. § 402(d)(1).

¹⁸ 42 U.S.C. § 401(d)(3) (emphasis added).

¹⁹ 26 U.S.C. § 152(c)(1)(D).

dependence. It implicitly argues that the jury instruction erroneously allowed the jury to consider services in addition to financial support.²⁰ Cascade also argues that the jury should not have been allowed to hear testimony related to services. We agree.

Jury instructions are proper if they adequately state the law, do not mislead the jury, and allow each party to argue its theory of the case.²¹ A party is entitled to a jury instruction only if it has offered substantial evidence to support the instruction.²² We review a trial court's decision to submit jury instructions for an abuse of discretion.²³ We review de novo alleged legal errors in the instructions.²⁴

An erroneous jury instruction only requires reversal if it is prejudicial.²⁵ Thus, instructions that are "merely misleading" only require reversal if they more likely than not affected the outcome of the trial.²⁶ But a "clear misstatement" of the law is presumed prejudicial, unless it affirmatively appears that it was

²⁰ See State v. Olson, 126 Wn.2d 315, 318-19, 893 P.2d 629 (1995) (citing RAP 1.2(a) and concluding that cases should be decided on their merits despite technical violations of the rules).

²¹ Boeing Co. v. Key, 101 Wn. App. 629, 633, 5 P.3d 16 (2000).

²² Stiley v. Block, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

²³ Id.

²⁴ State v. Porter, 150 Wn.2d 732, 735, 82 P.3d 234 (2004).

²⁵ Boeing Co., 101 Wn. App. at 633.

²⁶ Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).

harmless.²⁷

The construction of a statute is an issue of law that we review de novo.²⁸ Our primary goal is to ascertain the legislature's intent.²⁹ If the language of the statute is clear, its plain meaning will reveal that intent.³⁰ If, however, the provision is ambiguous, the reviewing court may look to outside sources such as legislative history to determine legislative intent.³¹ A statute is ambiguous if it is subject to more than one reasonable interpretation.³²

Wrongful death actions in Washington are strictly statutory.³³ We only liberally construe these remedial statutes once the proper beneficiaries have been determined.³⁴

Here, jury instruction 14, discussing financial dependence, stated in pertinent part:

The support may include *money, services, or other material benefits*, but may not include everyday services a child would

²⁷ Blaney v. Int'l Assoc. of Machinists & Aerospace Workers, 151 Wn.2d 203, 211, 87 P.3d 757 (2004).

²⁸ Burns v. City of Seattle, 164 P.3d 475 (Wash. 2007).

²⁹ State v. Sullivan, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001).

³⁰ See id.

³¹ Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

³² Id.

³³ Tait v. Wahl, 97 Wn. App. 765, 771, 987 P.2d 127 (1999).

³⁴ Id. at 770.

routinely provide her parents.^[35]

The trial court here gave this instruction based upon its interpretation of Washington's wrongful death statute, RCW 4.20.020.

The primary issue in this case is whether "[financial] support" under the wrongful death statute includes the rendering of services that have an economic value as well as the payment of money. We conclude that services that have an economic value do not fall within the meaning of financial support.

Since the early 1900s, Washington courts have uniformly interpreted "dependent . . . for support" to mean *financial dependence*.³⁶ The word "financial" means "relating to finance"³⁷ The word "finance" means:

1 . . . : the pecuniary affairs or resources of a state, company, or individual . . . 2: the obtaining of funds or capital . . . 3: the system that includes the circulation of money, the granting of credit, the making of investments, and the provision of banking facilities. . . .^[38]

It is apparent from the words used in these definitions (e.g., "money," "pecuniary," and "funds or capital") that "financial" means "monetary."

The Armantrouts cite no Washington case to the contrary. In discussing the requisite financial support, Washington cases have never suggested that

³⁵ Clerk's Papers at 92 (emphasis added).

³⁶ E.g., Bortle, 60 Wash. at 554.

³⁷ Webster's Third New Int'l Dictionary 851 (1993).

³⁸ Id.

financial support could include the types of services the Armantrouts received from their daughter.

For example, in Bortle v. Northern Pacific Railway Co., the supreme court held that the parents were not financially dependent for support upon their 25-year-old son, who did not live at home but intermittently contributed small gifts of money to his parents, for a total of about \$100 per year.³⁹ And in Mitchell v. Rice, substantial evidence supported that the father was financially dependent on his son for monetary payments throughout the years.⁴⁰ Likewise, in Cook v. Rafferty, financial dependence was established based on the “pecuniary loss” the parents suffered at the death of their daughter, who did not pay rent but “contributed to the expenses of the household.”⁴¹

Moreover, the more recent Washington cases cited by the parties do not support the Armantrouts’ position. Masunaga v. Gapasin merely reaffirmed that financial support, not emotional support, is required under the statute.⁴² The parents in that case conceded that they were not financially dependent on their deceased son, and they unsuccessfully argued that emotional dependence should also qualify.⁴³

³⁹ 60 Wash. 552, 111 P. 788 (1910).

⁴⁰ 183 Wash. 402, 48 P.2d 949 (1935).

⁴¹ 200 Wash. 234, 239-40, 93 P.2d 376 (1939).

⁴² 57 Wn. App. 624, 790 P.2d 171 (1990).

⁴³ Id. at 627-28.

Although the court in that case briefly discussed the provision of services and concluded that the parents were not dependent on those services, it did not state that such dependence would have constituted financial support.

Financial independence was also conceded in Schumacher v. Williams.⁴⁴ So that case does not help define the term.

More recently, in Philippides v. Bernard, the supreme court clarified that certain amendments to the statute did not change the requirement that parents must be financially dependent on the deceased in order to maintain a wrongful death cause of action.⁴⁵ In fact, in rejecting the parents' arguments to the contrary, the court stated:

While we may agree 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; the legislature has defined who can sue for the wrongful death and injury of a child and we cannot alter the legislative directive.^[46]

This sentence suggests that the longstanding test of "financial" dependence or support is limited to the providing of income or money, not services with an economic value. While such a rule may not still be justified in present-day society, that is the rule the legislature has left in place, as our courts have consistently held. We also note that the legislature has had the opportunity to modify this standard, but has chosen to leave in place the existing statute and its

⁴⁴ 107 Wn. App. 793, 796, 28 P.3d 792 (2001).

⁴⁵ 151 Wn.2d 376, 88 P.3d 939 (2004).

⁴⁶ Id. at 390 (emphasis added):

interpretive decisions.⁴⁷

The trial court appears to have relied on out-of-state cases to support its conclusion that financial dependence may include services. For example, in Chavez v. Carpenter, the California state court of appeal held that a factual issue existed as to whether the parents were financially dependent on the decedent when the decedent provided to his parents \$100 a week, groceries, grocery money, a \$9,000 down payment on a car, and completed tasks such as yard work and automobile maintenance.⁴⁸

Contrary to Cascade's argument, the statute in Chavez is quite similar to Washington's. Likewise, it has similarly been interpreted by the California courts to mean financially dependent for support.⁴⁹ But the similarities end there.

We are not persuaded by the reasoning in Chavez because it does not explain why a jury should be allowed to consider services in addition to financial contributions. It also is unclear to what extent the court relied on services for its holding. The court merely concluded that the reasonable inference from all of the evidence taken together is that the parents relied on the decedent's "aid — at least to some extent — for life's necessities."⁵⁰

⁴⁷ See Masunaga, 57 Wn. App. at 629.

⁴⁸ 91 Cal. App. 4th 1433, 111 Cal. Rptr. 2d 534 (2001).

⁴⁹ See id. at 1445 (noting that "dependent on the decedent" in the statute has been interpreted to mean dependent for "financial support"). Thus, as in Washington, to qualify under the statute, a surviving parent must be substantially, financially dependent on the decedent for support.

⁵⁰ Id. at 1448.

More importantly, we reject the reasoning of Chavez because it directly conflicts with Washington's long history of requiring "financial" dependence.

The Armantrouts argue that the services their daughter provided had an economic value. But neither the statute nor the Washington cases construing it include services that have an economic value within the scope of substantial *financial* support. Rather, the cases have consistently focused on the financial nature of the support provided by the adult child to the parent. Despite policy considerations to the contrary, we cannot alter the legislature's determination of beneficiaries under the statute.⁵¹

Here, the jury instruction⁵² misstated the law because, as discussed above, conferring services and other benefits does not constitute financial support. Thus, the trial court committed an error of law.

Although the parties did not address the issue, we must also determine whether this error was prejudicial. We conclude that the instruction is presumed prejudicial because it misstated the law.⁵³

Even were we not to presume prejudice, the instruction caused actual

⁵¹ See Schumacher, 107 Wn. App. at 805 (Ellington, J., concurring) (declining to exercise the legislative function of extending the law to non-dependent survivors "despite strong policy considerations" to do so).

⁵² Jury Instruction 14 states in relevant part, "The support may include money, services, or other material benefits, but may not include everyday services a child would routinely provide her parents." Clerk's Papers at 92.

⁵³ See Keller, 146 Wn.2d at 251 ("... to the extent that the instruction misstated the law, it is presumed to be prejudicial.").

prejudice. As discussed previously in this opinion, substantial evidence supports the determination that the daughter gave financial support to her parents by way of approximately \$588 each month. There is also evidence in the record that her mother depended on her services for support. Josie, the mother, testified that Kristen helped prepare the house for sale, which included doing housework, packing, and yard work. Kristen also acted as Josie's personal assistant, helping her with things a blind person cannot do alone. For example, Kristen ran errands, paid the bills, drove Josie to appointments and other places, helped Josie take notes in class and do other school-related reading, and medically assisted her. Josie would have had to pay someone else to do these activities if Kristen had not, and Josie could not afford to do so. In fact, the expert economist testified that the services Kristen provided for Josie had a value of approximately \$36,553 per year.

Comparing the amount of the purely monetary contribution with the value of services, it is apparent that the erroneous jury instruction and supporting testimony likely affected the jury's verdict that the Armantrouts were substantially dependent on Kristen. Kristen gave her parents about \$588 per month, which would total about \$7,056 per year. In contrast, the value of her services was \$36,553 per year. Based on a comparison of these two values, the inclusion of the clause "services, or other material benefits" in the instruction makes a decidedly more persuasive case for dependence than if that clause had been excluded. We conclude that the erroneous instruction prejudiced the outcome of

No. 58831-1-I/17

the trial.

We reverse the judgment and remand for a new trial.

Cox, J.

WE CONCUR:

Appelwick, C.J.

Grosse, J.

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

JOSIE ARMANTROUT, personal
representative of the estate of KRISTEN
ARMANTROUT; JOSIE ARMANTROUT
and WARREN ARMANTROUT, husband
and wife, and the marital community
composed thereof,

Respondents,

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,

Appellants.

No. 58831-1-I

ORDER DENYING MOTION
FOR CLARIFICATION /
RECONSIDERATION

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 DEC 17 AM 8:55

Respondents, Josie and Warren Armantrout, have moved for clarification / reconsideration of the opinion filed in this case on November 13, 2007. The panel hearing the case has considered the motion and has determined that the motion should be denied. This court hereby

ORDERS that the motion for clarification / reconsideration is denied.

Dated this 17th day of December 2007.

FOR THE PANEL:

COX, J.

Judge

Westlaw

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Page 1

200 Wash. 234, 93 P.2d 376
(Cite as: 200 Wash. 234, 93 P.2d 376)

C

COOK v. RAFFERTY
Wash. 1939

Supreme Court of Washington.
COOK

v.

RAFFERTY et al.
MURPHY

v.

SAME.
No. 27271.

Aug. 17, 1939.

Department 1.

Separate actions by Mrs. William Cook, administratrix of the estate of Cora Nell MacDonald Cook, deceased, against John W. Rafferty and Grace H. Rafferty, his wife, and Wilma Whitner and by Dixon Murphy against John W. Rafferty and Grace H. Rafferty, his wife, and Wilma Whitner, for death of Cora Nell MacDonald Cook and for injuries to Dixon Murphy as result of automobile collision, wherein the defendants filed a counterclaim against Dixon Murphy. From judgment for plaintiffs in each suit, and dismissing the counterclaim against Murphy, the defendants appeal.

Affirmed.

West Headnotes

[1] Automobiles 48A ⚡168(1)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(A) Nature and Grounds of Liability

48Ak168 Excessive Speed, Control, and Racing

48Ak168(1) k. Care Required and Liability in General. Most Cited Cases

While mere skidding of an automobile is not

necessarily evidence of negligence, it is a circumstance which may be taken into consideration in connection with all of the facts and circumstances of the case in determining whether the driver of the automobile was negligent.

[2] Automobiles 48A ⚡244(35)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak241 Evidence

48Ak244 Weight and Sufficiency

48Ak244(35) k. Speed and Control.

Most Cited Cases

In actions for death of guest and injuries to driver of automobile struck by defendants' automobile when defendants' automobile skidded on icy road, trial court, sitting as jury, was justified in finding that driver of defendants' automobile was at fault, notwithstanding testimony of defendant driver and guest in her automobile that defendants' automobile was traveling only 25 miles an hour at time of accident, where defendants' automobile skidded around two and one-half times on straight highway that was practically level, and crossed a 4-foot dirt or gravel strip and passed over to extreme left side of parallel paved strip where collision occurred.

[3] Automobiles 48A ⚡242(4.2)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak241 Evidence

48Ak242 Presumptions and Burden of Proof

48Ak242(4.2) k. Vehicles Meeting; Wrong Lane or Side. Most Cited Cases

(Formerly 48Ak242(4))

Although mere skidding is not necessarily evidence of negligence, where an automobile traveling on a

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highway consisting of two parallel strips of pavement, each 18 feet wide with 4-foot dirt or gravel strip between them, skidded from one of the strips of pavement across the 4-foot strip onto the other strip of pavement and collided with another automobile, the burden was on driver of skidding automobile to show that she was not negligent.

[4] Automobiles 48A ⇨244(42)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak241 Evidence

48Ak244 Weight and Sufficiency

48Ak244(41) Contributory

Negligence

48Ak244(42) k. Vehicles

Meeting. Most Cited Cases

In actions for death of guest and injuries to driver of automobile struck by defendants' automobile when defendants' automobile skidded on icy road, evidence that plaintiff driver was driving at between 30 and 35 miles an hour, that he saw defendants' automobile commence to spin when it was approximately 200 feet from him, and that he immediately applied his brakes, was sufficient to show that plaintiff driver was not guilty of contributory negligence.

[5] Automobiles 48A ⇨195(5.1)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(A) Nature and Grounds of Liability

48Ak183 Persons Liable

48Ak195 Owner's Liability for Acts of Member of Family

48Ak195(5) Vehicle Kept for Use of Family

48Ak195(5.1) k. In General.

Most Cited Cases

(Formerly 48Ak195(5))

Where adult daughter had resided at home of her parents since death of her husband, had been treated as member of family, and had been permitted to use her parents' automobile freely and on many

occasions, parents were liable for accident resulting from daughter's negligence while using automobile under the "family purpose doctrine," notwithstanding that daughter paid for her room and board.

[6] Death 117 ⇨75

117 Death

117III Actions for Causing Death

117III(G) Evidence

117k74 Weight and Sufficiency of Evidence

117k75 k. In General. Most Cited Cases

In action by foster mother as a dependent, to recover for death of 21 year old adopted daughter, evidence that at time of accident adopted daughter was earning between \$75 and \$90 a month as a stenographer, that she resided at home of foster parents, that she contributed to the expenses of household, that foster father was an invalid and unable to work, and that foster mother was unemployed, was sufficient showing of dependency to support recovery of \$1,000. Rem.Rev.Stat. §§ 183, 183-1, 194.

[7] Death 117 ⇨18(3)

117 Death

117III Actions for Causing Death

117III(A) Right of Action and Defenses

117k12 Grounds of Action

117k18 Loss or Injury Resulting from Death

117k18(3) k. Dependency on

Decedent for Support. Most Cited Cases

The parents of an adult child need not be wholly dependent on him for support in order to recover damages for his wrongful death, but partial dependency is sufficient. Rem.Rev.Stat. §§ 183, 183-1, 194.

[8] Death 117 ⇨9

117 Death

117III Actions for Causing Death

117III(A) Right of Action and Defenses

117k9 k. Constitutional and Statutory Provisions. Most Cited Cases

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The statutes giving right of action for wrongful death are remedial in their nature and must be liberally construed. Rem.Rev.Stat. §§ 183, 183-1, 194.

*235 **377 Appeal from Superior Court, King County; Malcolm Douglas, judge.

Newman H. Clark and Leo J. Brand, both of Seattle, for appellants.

McMicken, Rupp & Schweppe, Bernard Reiter, and Frank M. Preston, all of Seattle, for respondents. ROBINSON, Justice.

The collision out of which these actions arose occurred on the Pacific Highway between Tacoma and Olympia about a mile and a half south of the entrance to Fort Lewis. Dixon Murphy, plaintiff in one of the suits, was driving his father's car south toward Olympia. Mrs. Wilma Whitner, one of the defendants, was driving her father's car north toward Seattle. There are two parallel strips of pavement, each 18 feet wide, with a 4 foot gravel or dirt strip between them. The pavement was covered *236 with a thin coating of ice, and the Whitner car skidded from the east strip of pavement across the dirt or gravel strip to the west side of the west strip of pavement in front of the oncoming Murphy car, turning completely around two and a half times before the collision occurred. Miss Cora Cook, a passenger in the car that was being driven by Dixon Murphy, received injuries from which she died two months later. The gasoline tank of the Whitner car was punctured and the car was enveloped in flames, but its occupants were not seriously injured.

Mrs. Cook, administratrix of the estate of Cora Cook, deceased, brought suit against Mrs. Whitner and her parents, the Raffertys, who owned the car which she was driving, to recover damages for Miss Cook's alleged wrongful death. Dixon Murphy also brought suit against the same defendants to recover damages for personal injuries received by him and damages to his father's car. Mrs. Whitner counterclaimed against Murphy, and the Raffertys also counterclaimed against him for damages to their car. The two suits were **378 tried together before the court sitting without a jury. The court entered findings, conclusions and judgment for the

plaintiffs in each suit, and dismissed the counterclaims against Murphy. The causes were consolidated on appeal.

Appellants contend that the skidding of the Whitner car was not due to any negligence on the part of Mrs. Whitner, and that the driver of the Murphy car was negligent in the operation of the car, and that his negligence was the sole, proximate cause of the collision.

[1] While it is true that the mere skidding of a car is not necessarily evidence of negligence (*Wilson v. Congdon*, 179 Wash. 400, 37 P.2d 892), it is a circumstance which may be taken into consideration in connection with all of the facts and circumstances of *237 the case in determining whether or not the driver of the car was guilty of negligence.

[2] While Mrs. Whitner and Mrs. Doris Bates, who was a passenger with her in the car, testified that Mrs. Whitner was driving at only 25 miles an hour, the court was not bound to accept their testimony. The fact that the car turned completely around two and a half times on a straight highway that was practically level, the grade being but 0.122 per cent, a drop of a little more than 1 foot in a thousand feet, and crossed a 4 foot dirt or gravel strip and passed over to the extreme west side of the west 18 foot pavement, indicates that the driver of the car was at fault, and we think that, under all the facts and circumstances, the court was justified in so finding. It had been snowing, but was not snowing at the time of the accident. There was snow on either side of the highway and on the dirt strip between the two pavements. Mrs. Whitner testified that she was not aware of the ice on the pavement until the car began to skid, but other witnesses, called by the defendants themselves, testified that there was ice on the highway for some distance south of that point.

[3] Although mere skidding is not necessarily evidence of negligence, where a car traveling on a highway, such as this, skids from one of the strips of pavement across a 4 foot dirt or gravel strip onto the other strip of pavement, the burden is on the driver of that car to show that he was not negligent. *Weaver v. Windust*, 195 Wash. 240, 80 P.2d 766. That burden has not been met in this case. The trial

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judge, in orally giving his opinion, said:

'I am satisfied that the icy condition of the pavement existed for a sufficient space and for a sufficient distance to put anyone on warning that they were driving on a dangerous surface. The Bowers testified that they noticed it the moment they came down into that part *238 of the road, where it is divided. Mrs. Whitner testified that she didn't notice it, but Mrs. Bates admitted that she did; so there was a quarter to a half a mile, I am satisfied, of icy pavement, which should have put Mrs. Whitner upon warning that the surface was such that she must proceed with extreme care.

'Now, she proceeds apparently with what she considered due care, but at a rate which caused the car not merely to skid, but to go into a double if not a triple circular skid, where it executed I gather two and a half complete circles, and ended up clear over on the west strip after having crossed this dirt or gravel strip between the two strips of paving.

'It seems to me that, while a skidding case cannot be considered a case of *res ipsa loquitur*, it seems to me that in connection with the warning of the icy surface, that fact that the car did go into an icy skid, of that duration and of that many revolutions, is sufficient evidence to outweigh the effect of the testimony of the defense witnesses.'

We think that these views of the trial court are supported by the evidence.

[4] The driver of the Murphy car testified that he was driving at between 30 and 35 miles an hour; that he saw the Whitner car when it commenced to spin; and that it was approximately 200 feet from him at that time. He further testified that he immediately applied his brakes, and that the Whitner car covered more of the 200 feet than he did. We do not think that the evidence shows that the driver of the Murphy car was guilty of contributory negligence or negligence that proximately caused the accident.

[5] Appellants contend that the parents of Mrs. Whitner are not liable. The evidence shows that Mrs. Whitner was an adult daughter of Mr. and

Mrs. Rafferty; that her husband died in 1933; and that, since, then, she has resided with her parents as a member of *239 their household. She paid for her room and board, but the evidence**379 shows that she was treated as a member of the family, and that her parents permitted her to use the car freely and on many occasions. Under these circumstances, we think that the parents were liable under the 'family purpose doctrine,' which has been the settled law of this state since the decision in *Birch v. Abercrombie*, 74 Wash. 486, 133 P. 1020, in 1913. The reasons why the court has so steadily adhered to the doctrine have recently been restated in *Werker v. Knox*, Wash., 85 P.2d 1041.

[6][7][8] Appellants also contend that the parents of Miss Cook were not dependent upon her for support, and that, therefore, there can be no recovery by them. The evidence shows that Miss Cook was a daughter of a deceased sister of Mrs. Cook. She was adopted by the Cooks when she was ten years of age, shortly after the death of her mother, and was twenty-one years of age at the time of the accident. She had attended the College of Puget Sound and the University of Washington, and, after leaving the University, had attended a business college. Mr. and Mrs. Cook and a sister of Mrs. Cook who resided in the East paid the expenses of her tuition. At the time of the accident, she was earning between seventy-five and ninety dollars a month as a stenographer. She lived with her parents, and, although she did not pay any regular amount for room and board, she contributed to the expenses of the household. Mr. Cook was an invalid, and had been unable to work for ten or twelve years. Mrs. Cook was unemployed. A sister of Mrs. Cook, who resided in the East, for several years had been sending her money, approximately \$70 a month, for her support. It appears that these payments were entirely voluntary, *240 and that they were reduced somewhat after Miss Cook obtained permanent employment. Under the facts, we think it is reasonable to suppose that had Miss Cook lived she would have continued to contribute to the support of the family and continued to care for her parents, and to conclude that Mr. and Mrs. Cook suffered a pecuniary loss by reason of her death. It is established in this state that parents of an adult son need not be wholly dependent upon

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him for support in order to recover damages for his wrongful death. Partial dependency is sufficient. *Mitchell v. Rice*, 183 Wash. 402, 48 P.2d 949. The rule as to an adult daughter must be the same. Rem.Rev.Stat. §§ 183, 183-1, and 194, being remedial in their nature, are liberally construed. We think that there was a showing of need, on the one hand, and a financial recognition of it, on the other, within the spirit and meaning of such decisions as *Bortle v. Northern Pac. R. Co.*, 60 Wash. 552, 111 P. 788, Ann.Cas.1912B, 731, and *Grant v. Libby*, *McNeill & Libby*, 145 Wash. 31, 258 P. 842, and that the rather modest allowance of \$1,000 should be sustained.

The judgments appealed from are affirmed.

BLAKE, C. J., and STEINERT, JEFFERS, and
MAIN, JJ., concur.
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APP. 23

4.20.010

Note 48

Administrator has power to compromise action for wrongful death and bind infant beneficiaries without appointment of guardian ad litem, unless allot-

ment to infant is involved in compromise. Hansen v. Stimson Mill Co. (1938) 195 Wash. 621, 81 P.2d 855

4.20.020. Wrongful death—Beneficiaries of action

Every such action shall be for the benefit of the wife, husband, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife or husband 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 death.

In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just. [1985 c 139 § 1; 1973 1st ex.s. c 154 § 2; 1917 c 123 § 2; RRS § 183-1]

Historical and Statutory Notes

Severability—1973 1st ex.s. c 154: See note following RCW 2.12.030.

Laws 1973, 1st Ex.Sess., ch. 154, § 2, in the second sentence of the first paragraph, deleted "minor" preceding "brothers".

Laws 1985, ch. 139, § 1, in the first paragraph, in the first sentence, inserted "including stepchildren"; and, in the second sentence, inserted "such"

Source: RRS § 183-1.

Cross References

Action for injury or death of child, see § 4.24.010.

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