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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.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	3
	A. <u>Assignments of Error</u>	3
	B. <u>Issues Pertaining to Assignments of Error</u>	4
III.	STATEMENT OF THE CASE	5
	A. <u>Factual Background</u>	6
	B. <u>Relevant Trial and Post-Trial Procedure</u>	10
IV.	ARGUMENT	15
	A. <u>Argument Summary</u>	15
	B. <u>As a Matter of Law, Parents Who Received Gratuitous Services from their Adult Child Are Not Substantially <i>Financially</i> Dependent upon That Child for Purposes of a Wrongful Death Claim</u>	17
	1. Overview of Washington’s wrongful death statutory scheme	17
	2. The wrongful death statutes are to be strictly construed for purposes of determining statutory beneficiaries	19

3.	The Armantrouts’ decision to declare their daughter as a dependent for purposes of taxes, insurance, and disability payments precludes a subsequent finding that they were substantially financially dependent upon her for purposes of the wrongful death statute	21
4.	“Dependent for support” means substantial, <i>financial</i> dependence. The receipt of gratuitous services by parents from an adult child does not make the parents substantially financially dependent upon their child	22
C.	<u>Assuming, Arguendo, that the Gratuitous Provision of Services Constitutes “Support” Within the Meaning of the Wrongful Death Statutes, There Is Nonetheless Insufficient Evidence to Establish That the Armantrouts Were Substantially Financially Dependent upon Kristen</u>	31
V.	CONCLUSION	38

TABLE OF AUTHORITIES

Washington Case Law

Bortle v. Northern Pac R. Co., 60 Wash. 552,
111 P. 788 (1910) 24, 32, 33, 34, 35

Brown v. City of Seattle, 117 Wn. App. 781, 72 P.3d 764 (2003) 15

Brown v. Superior Underwriters, 30 Wn. App 303,
632 P.2d 887 (1980) 32

Cook v. Rafferty, et al., 200 Wash. 234, 93 P.2d 376 (1939) 35, 36

DeAtley v. Barnett, 127 Wn. App. 478, 112 P.3d 540 (2005),
rev. denied, 156 Wn.2d 1021 (2006) 22

Grant v. Libby, McNeill & Libby, 145 Wash. 31,
258 P. 842 (1927) 35

Inniss v. Tandy Corp., 141 Wn.2d 517, 7 P.3d 807 (2000) 15

Johnson v. Allstate Ins. Co., 126 Wn. App. 510,
108 P.3d 1273 (2005) 15

Johnson v. Seattle Elec. Co., 39 Wash. 211, 81 P. 705 (1905) 17

Kanton v. Kelly, 65 Wash. 614, 118 P. 890 (1911) 33, 34, 35

Masunaga v. Gapasin, 57 Wn. App. 624, 790 P.2d 171, *rev. denied*,
115 Wn.2d 1012 (1990) 18, 19, 24, 25, 26, 27, 28, 29

Otani v. Broudy, 151 Wn.2d 750, 92 P.3d 192 (2004) 15,18

<i>Philippides v. Bernard</i> , 151 Wn.2d 376, 88 P.3d 939 (2004)	18, 24, 29, 30
<i>Roe v. Ludtke Trucking, Inc.</i> , 46 Wn. App. 816, 732 P.2d 1021 (1987)	19
<i>Schumacher v. Williams</i> , 107 Wn. App. 793, 28 P.3d 792 (2001), <i>rev. denied</i> , 145 Wn.2d 1025 (2002)	20
<i>Shoemaker v. St. Joseph's Hosp.</i> , 56 Wn. App. 575, 784 P.2d 562, <i>rev. denied</i> , 114 Wn.2d 1025 (1990)	27, 28, 29
<i>Sing v. John L. Scott, Inc.</i> , 134 Wn.2d 24, 948 P.2d 816 (1997)	31
<i>State v. Hall</i> , 74 Wn.2d 726, 446 P.2d 323 (1968)	32
<i>State v. Nolan</i> , 98 Wn. App. 75, 988 P.2d 473 (1999), <i>affirmed</i> , 141 Wn.2d 620, 8 P.3d 300 (2000)	15
<i>State v. Watson</i> , 146 Wn.2d 947, 51 P.3d 666 (2002)	16
<i>Tait v. Wahl</i> , 97 Wn. App. 765, 987 P.2d 127 (1999), <i>rev. denied</i> , 140 Wn.2d 1015 (2000)	18
<i>Warner v. McCaughan</i> , 77 Wn.2d 178, 460 P.2d 272 (1969)	17
<i>Whittlesey v. City of Seattle</i> , 94 Wash. 645, 163 P. 193 (1917) ..	17, 20, 24

Extra-Jurisdictional Case Law

<i>Beaty v. Weinberger</i> , 478 F.2d 300, 305 (5th Cir. 1973), <i>affirmed</i> , 418 U.S. 901 (1974)	21
<i>Duval v. Hunt</i> , 15 South. 879 (Fla. 1894)	24

Statutes and Other Authorities

42 U.S.C. § 402(d)(1)(C) 21

26 U.S.C.A. § 152(c)(1)(A)-(D) 37

RCW.4.20.010 17

RCW 4.20.020 17

Senate Bill 5816 (2007 Session) 30

Black’s Law Dictionary at 630 (6th Ed. 1990) 26

Webster’s Third New International
Dictionary at 851 (1993) 26

I. INTRODUCTION

This case brings before the Court once again the question of under what circumstances may the parents of an adult child recover damages under the wrongful death statutes.¹ Over the Appellant's objections, the trial court allowed the jury to decide the question of whether the Respondents were substantially financially dependent upon their 18 year old daughter.

The trial court's decision to allow the jury to decide the issue of dependency was error as a matter of law for three reasons. First, the issue of the applicability of a statute is a question of law for the trial court to decide. Second, the Respondents' decision to claim their daughter as a dependent upon their federal income tax returns precludes the inconsistent position that instead, the parents were substantially financially dependent on the child. Finally, the transitory services provided by the Respondents' daughter do not rise to the level of dependence necessary to allow them a right to recover under the wrongful death statutes.

The trial court's submission of the Respondents' wrongful death claim to the jury for resolution of the issue of dependence represents a

¹ The parents also brought a companion survivorship action as beneficiaries of the child's estate. Pursuant to this cause of action, the parents recovered the net economic loss of \$200,000. *CP 102*. The defendants have satisfied that judgment and issues relating to that claim are not before this court. *CP 109*.

substantial departure from prior Washington law. The plain language of the wrongful death statutes precludes recovery. Moreover, Washington courts have long interpreted the statutory phrase “dependent for support” in a narrow fashion inconsistent with the trial court’s ruling below.

There is no question the parents here, as in every case involving the death of a child, were profoundly affected by the death of their daughter. Nonetheless, a parent’s right to recover under the wrongful death statutes is strictly a question of statutory interpretation. The claims of the Respondents place them outside the statutorily defined parameters of those statutes. The wisdom of the Legislature’s decision to restrict recovery of parents to those cases where substantial financial dependence exists is an issue addressed to the Legislature, not to the courts. The gratuitous provision of services by an adult child to assist her parents through a transitional time — during which time, unfortunately, the child died — does not constitute substantial financial dependence as contemplated by the wrongful death statutes. The judgment of the trial court sustaining the jury’s verdict to the contrary should be reversed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in allowing testimony from lay witnesses Kris Lawrence, Todd Armantrout, Kay Burroughs, Robert Armantrout, Sylvia Gonzalez, and Josie Armantrout regarding Josie and Todd Armantrout's wrongful death claims.

2. The trial court erred in allowing testimony from expert witness Lowell Bassett regarding Josie and Todd Armantrout's wrongful death claims.

3. The trial court erred in allowing the jury to consider evidence that monies Kristen Armantrout received as a result of her status as a dependent child of a disabled adult could be considered in determining whether she provided financial assistance to her parents.

4. The trial court erred in denying Cascade Orthopaedic's motion for judgment as a matter of law on Josie and Todd Armantrout's wrongful death claims.

5. The trial court erred in giving Instruction No. 13 to the jury.

6. The trial court erred in giving Instruction No. 14 to the jury.

7. The trial court erred in giving Instruction No. 15 to the jury.

8. The trial court erred in allowing questions 5 and 6 regarding Josie and Todd Armantrout's wrongful death claims on the Special Verdict Form.

9. The trial court erred in denying Cascade Orthopaedic's renewed motion to dismiss Josie and Todd Armantrout's wrongful death claims.

10. The trial court erred in entering judgment on the verdict of the jury against Cascade Orthopaedics on Josie and Todd Armantrout's wrongful death claims.

B. Issues Pertaining to Assignments of Error

1. Did the trial court err by delegating to the jury the question of whether the wrongful death statute applied to the facts of this case?

2. Does the parents' decision to claim their adult child as a dependent upon their income taxes up to and including the year of her death preclude their later argument in a wrongful death action that they were substantially financially dependent upon the child?

3. May the jury consider Social Security disability payments given to an adult child as a result of the parent's disability and her own dependency in determining whether the parents were substantially financially

dependent upon the adult child?

4. Are parents substantially financially dependent upon their adult child for purposes of a wrongful death claim where the child makes no financial contributions to the parents' support other than Social Security payments voluntarily surrendered to offset her own expenses and where the child renders gratuitous services to the parents?

5. If the gratuitous provision of services constitutes support within the meaning of the wrongful death statutes, are the parents substantially financially dependent upon those services where the services related to a temporary financial situation of the parents and where the parents were capable of supporting themselves financially?

III. STATEMENT OF THE CASE

This case arises out of the death of 18-year old Kristen Armantrout from a rare complication following ankle surgery. *CP 54-55*. Dr. Robert Carlson, a principal in Cascade Orthopaedics (an orthopaedic surgery group), performed the surgery and attended to Kristen at two postoperative visits. *CP 53*. The jury determined that Dr. Carlson was not negligent in his care of Kristen, but faulted Cascade Orthopaedics for events that occurred after Dr. Carlson saw Kristen on the day of her death. Consequently, Dr. Carlson is

not a party to this appeal and Cascade Orthopaedics is the sole appellant. Josie and Warren “Todd” Armantrout, Kristen’s parents, are the sole respondents.

Josie Armantrout, as personal representative of Kristen’s estate, and Josie Armantrout and Todd Armantrout individually filed their “Complaint for Wrongful Death” against Dr. Carlson and Cascade Orthopaedics on June 17, 2004. *CP 2-8*. The action was brought on behalf of Kristen’s estate under Washington’s survival statute and on behalf of the parents as statutory beneficiaries under Washington’s wrongful death statutes. *CP 5*. The plaintiffs claimed that Dr. Carlson and Cascade Orthopaedics were liable for their daughter’s death because they failed to exercise appropriate care. *CP 7*. Dr. Carlson and Cascade Orthopaedics denied any liability, and alleged that the wrongful death claims of the parents failed to state a claim upon which relief could be granted. *CP 10*.

A. Factual Background

At the time of her death, Kristen Armantrout was 18 years old, living at her parents’ house with her mother, Josie Armantrout, during the summer after she was to have graduated from high school. *RP 7/17 at 15*. For approximately 7 months before Kristen’s death, the Armantrouts were

maintaining two separate households as a result of Todd's decision to take a job in Minnesota following his layoff from Boeing. *RP 7/17 at 16-17.* Todd's take home pay in Minnesota was approximately the same amount that he had taken home while employed with Boeing. *RP 7/17 at 16.* Todd Armantrout provided medical insurance for his wife and for his daughter, Kristen, as his dependent child. *RP 7/17 at 16.* The Armantrouts also claimed Kristen as a dependent on their tax return for the year preceding and the year of Kristen's death. *RP 7/17 at 55-56; RP 7/20 at 20.*

Josie is legally blind. *RP 7/18 at 35.* Prior to becoming blind as a result of complications related to diabetes, Josie was the Confidential Executive Assistant to the Home Delivery Manager of Circulation for the Seattle Times. *RP 7/18 at 39-40.* Following her disability, she attended Evergreen College and was just three credits short of receiving her Associates degree at the time of Kristen's death. *RP 7/18 at 39.* According to Mrs. Armantrout, she received "high honors" for her course work. *Id.* Because she was three credits short, her plan was to complete her degree that fall.

In contrast, Kristen Armantrout struggled with her schooling. Because she had a GPA of 1.29 she was attending summer school and

finishing up her senior year of high school at the time of her death. *RP 7/17 at 15*. Like her mother, she would have been attending school in the fall^{Id.}

Prior to Kristen's death, Mrs. Armantrout was transported by Access services to her various appointments and classes. *RP 7/18 at 56-57*. She also received income in the form of a monthly disability check from the Social Security Administration (SSA). *RP 7/17 at 17*. Kristen, as the dependent child of a disabled person, also received money from the SSA. *RP 7/17 at 18*. While she was still a minor, the money was sent directly to Josie and Todd, who had to account for its disbursement. *RP 7/17 at 18*. Once Kristen turned 18, the money – approximately \$580.00 a month – was sent directly to her. *RP 7/17 at 18*. Kristen turned that money over to her parents, not for their support but to offset her own personal monthly expenses. *RP 7/17 at 19*. Her mother testified at trial as follows:

Q All right. After Kristen turned 18, did she keep that check and spend it herself?

A She wanted to.

Q I understand that. But did she?

A No.

Q Could you tell the jury the circumstances – oh, strike that. Could you tell the jury what she did with that check?

A Well, she turned 18 while Todd was unemployed. We didn't keep things from our children. When we – when there was a crisis, there was – it involved all of us, not just one of us. And I showed her on paper – *I made a little Excel spreadsheet; and I showed her her portion of the privilege of living at home; because after 18, it is no longer your right; it is a privilege.*

And I showed her how expensive she was. She came out in the red. She said, "Oh; well, then, here's my check."

RP 7/18 at 47 (emphasis added). The daughter's SSA check was used solely to account for her expenses for the "privilege" of living at home after the age of 18, because Kristen could not afford to live on her own. *RP 7/20 at 14-15, 18-19.*

While the Armantrouts had financial struggles associated with the father's layoff and the need to temporarily maintain two households, these financial difficulties were anticipated to be temporary. Likewise, the daughter provided temporary services for her mother after her father and brother set up a separate household in Minnesota.²

² For example, Kristen assisted Josie with some of her day-to-day activities, including driving Josie to the grocery store and doctors' appointments, standing in as Josie's "reader" or a transcriber, opening mail, paying bills, and keeping the house ready to show to potential buyers. *RP 7/17 at 20-21; RP 7/18 at 55-59.* The plaintiffs testified that if Kristen had not done these things, they would have had to hire someone to do them. *RP 7/17 at 22; RP 7/18 at 61.* The plaintiffs claimed the

Mrs. Armantrout, unlike her daughter, had substantial resources and abilities which were barely hampered by her disability. She participated in a year-long course at the Colorado Center for the Blind, taking classes on orientation, mobility, and how to walk independently; essentially learning to be independent. *RP 7/18 at 76-78.* She participated in these programs without her daughter or other family members. She was so successful at these course that she eventually was repeatedly elected to a board position with the National Federation of the Blind both before and after her daughter's death. *RP 7/18 at 64.*

B. Relevant Trial and Post-Trial Procedure

The principal damages issue at trial was the parents' right to bring a wrongful death claim. The Armantrouts admitted that Kristen did not provide significant sums of money to them. *CP 49.* They claimed, however, they were dependent upon their daughter because she provided services to them that had "significant monetary value." *CP 48, 49.* Dr. Carlson and Cascade Orthopaedics objected, arguing that substantial financial dependence is a prerequisite for parents to recover for the wrongful death of an adult child and that her parents did not meet these strict standards.

value of these services as justification for their conclusion that they were financially dependent upon their daughter.

There were numerous arguments regarding factual and expert testimony related to Josie and Todd's wrongful death claim. *See RP 7/12 at 3-15; RP 7/17 (transcription date November 9, 2006) at 3-4; RP 7/18 (transcription date November 12, 2006) at 3-7.* Cascade Orthopaedics was given a standing objection to all testimony related to such claims. *Id.* On July 19, the trial court heard extended argument from the parties on whether the Armantrouts' wrongful death claim should go to the jury. *RP 7/19 at 3.* Specifically, the trial court posed two questions to the parties: One, can the statutory requirement of substantial financial dependence be satisfied by the provision of services alone? And two, is this a question of law for the court or a question of fact for the jury? *RP 7/19 at 4-5.*

The Armantrouts answered the trial court's second question first, by relying on an "implication" in a Washington case that the question of beneficiary status was a question of fact for the jury. *RP 7/19 at 5-6, 8.* As to the first question, the Armantrouts claimed that no Washington court had outright rejected the theory that the provision of services cannot make a parent substantially financially dependent on his or her adult child. *RP 7/19 at 9.* The Armantrouts also argued that, based on the wrongful death statute's purportedly remedial purpose, "financial independence [*sic*] can't be read so

narrowly that it includes only those parents of adult children who receive substantial cash payments.” *RP 7/19 at 10.*

Cascade Orthopaedics responded by pointing out that Washington’s wrongful death statutes are unique to Washington and that it is the Legislature, not the courts, that considers the expansion of a beneficiary classification. *RP 7/19 at 15.* Because the wrongful death statutes are in derogation of common law, they must be strictly construed and statutory construction is a question of law for the court, not a question of fact for the jury. *RP 7/19 at 15-16.*

Cascade Orthopaedics also argued that the wrongful death statutes require substantial financial dependence, as opposed to the mere provision of services, in order to distinguish between cases where the parents need the child’s contribution in order to survive and cases where a child’s provision of services might simply make things easier for the parent. *RP 7/19 at 16.* Under the wrongful death statutes, the former is covered; the latter is not: “[S]imple supply of services doesn’t meet dependence, because services, while convenient, vary dramatically from person to person, and don’t fit in with the statutory idea of a bright line and are too subjective.” *RP 7/19 at 19.*

The trial court considered the parties' colloquy to be, essentially, a motion on behalf of the defendants for judgment as a matter of law under CR 50; *i.e.*, that the defendants were asking the trial court to rule as a matter of law that Josie and Todd were not statutory beneficiaries for purposes of a wrongful death claim. *RP 7/19 at 30*. The trial court agreed that, to qualify as statutory beneficiaries, the parents had to be substantially financially dependent upon Kristen for support. *RP 7/19 at 30-31*. The trial court nonetheless denied the defendant's motion, finding that the question of dependence "is a question of fact to be determined by the jury; that a reasonable jury could find from [the] evidence that Mr. and Mrs. Armantrout were substantially dependent upon their daughter for support." *RP 7/19 at 34-35*.

Cascade Orthopaedics excepted to the jury instructions regarding Josie and Todd's wrongful death claims. *RP 7/20 (transcription date November 21, 2006) at 9-11; CP 92 (Instruction No. 13); CP 93 (Instruction No. 14); and CP 94-96 (Instruction No. 15)*.³ Cascade Orthopaedics also excepted to questions regarding those claims on the Special Verdict Form.

³For the Court's reference, copies of these instructions are included in the Appendix at Tab 1.

*RP 7/20 (transcription date November 21, 2006) at 11; CP 101-03.*⁴ Finally, Cascade Orthopaedics asked the trial court to reconsider its decision not to dismiss the Armantrouts' claims as a matter of law. *RP 7/20 (transcription date November 21, 2006) at 9.*

The jury returned its verdict on July 26, 2006, finding that Josie and Todd were substantially financially dependent on Kristen for support and awarding Josie and Todd \$1,150,000.00 in damages. *CP 101-03.* The jury found that Dr. Carlson was not negligent. It found that Cascade Orthopaedics was negligent and that its negligence was a proximate cause of Kristen's death. *CP 101-02.* The jury awarded \$200,000 to Kristen's estate and in excess of one million dollars to the parents for the wrongful death claim. *CP 101.*

Judgments were entered on the verdict on August 11, 2006. *CP 103-08.* As to Cascade Orthopaedics, judgment for \$200,000 was entered against it for Kristen's estate and judgment for \$1,150,000 was entered against it for her parents. *CP 103.* Judgment was also entered in favor of Dr. Carlson, who waived any costs. *CP 106-07.* The judgment against Cascade Orthopaedics was partially satisfied by payment of that portion of the

⁴For the Court's reference, a copy of the Special Verdict Form, as completed by the jury, is included in the Appendix at Tab 2.

judgment in favor of Kristen’s estate and by payment in full of the costs and statutory attorney fees. *CP 109-112*. Cascade Orthopaedics timely appealed that portion of the judgment in favor of the parents. *CP 113-14*.

IV. ARGUMENT

A. Argument Summary

The principal issue in this appeal involves the interpretation of the phrase “dependent for support” in Washington’s wrongful death statutes. A question of statutory interpretation is subject to de novo review. *Otani v. Broudy*, 151 Wn.2d 750, 753, 92 P.3d 192 (2004).

Interpretation of a statute is a question of law. *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 523, 7 P.3d 807 (2000). It is for the courts to determine the purpose and meaning of the law and the courts, not juries, decide the construction of a statute. *Brown v. City of Seattle*, 117 Wn. App. 781, 791, 72 P.3d 764 (2003); *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 515, 108 P.3d 1273 (2005). A court cannot question the wisdom of legislative policy underlying a statute and must enforce the statute as written. *State v. Nolan*, 98 Wn. App. 75, 82, 988 P.2d 473 (1999), *affirmed*, 141 Wn.2d 620, 8 P.3d 300 (2000). Legislative definitions included in a statute are controlling, but in the absence of a statutory definition, a court will give the

term its plain and ordinary meaning ascertained from a standard dictionary.

State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 666 (2002).

Cascade Orthopaedics asks this Court to find that, as a matter of law, Kristen Armantrout's parents do not qualify as statutory beneficiaries as evidenced both by the fact the parents claimed their daughter was a dependent and claimed her dependency status for purposes of obtaining Social Security disability payments. These two important factors are not outweighed by the gratuitous provision of services which Kristen Armantrout provided to her partially disabled mother. Gratuitous services do not satisfy the dependency requirement of the wrongful death statutes. Alternatively, if the gratuitous provision of services may satisfy the dependency requirement, Cascade Orthopaedics asks this Court to find, as a matter of law, that the limited services provided for a temporary period do not make her parents substantially dependent upon their daughter.

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B. As a Matter of Law, Parents Who Received Gratuitous Services from Their Adult Child Are Not Substantially Financially Dependent upon That Child for Purposes of a Wrongful Death Claim

1. Overview of Washington’s wrongful death statutory scheme.

The common law gives no remedy for the wrongful death of a person and any action must be sustained, if at all, under the wrongful death statutes. See *Whittlesey*, 94 Wash. at 646-47. The right of an individual to sue for the wrongful death of another depends entirely upon statutory legislation. *Id.* at 649; *Johnson v. Seattle Elec. Co.*, 39 Wash. 211, 213, 81 P. 705 (1905). Thus, the wrongful death statutes “create the right of action and define those entitled to their benefits.” *Warner v. McCaughan*, 77 Wn.2d 178, 185, 460 P.2d 272 (1969). The question of whether a certain individual ought to recover, or whether the individual’s argument for recovery is a sound one, is a question for “legislative consideration” and not for the courts. *Johnson*, 39 Wn. App. at 213 (rejecting argument regarding the “spirit and intent” of the wrongful death statutes).

Washington’s wrongful death statutes, RCW 4.20.010 and RCW 4.20.020, create causes of action for certain surviving beneficiaries of the

deceased.⁵ *Otani v. Broudy*, 151 Wn.2d 750, 755, 92 P.3d 192 (2004). Within these statutes, the Legislature created a two-tier system of beneficiaries. *Philippides v. Bernard*, 151 Wn.2d 376, 385, 88 P.3d 939 (2004). Recovery under the wrongful death statutes is expressly limited to these two tiers of beneficiaries. *Tait v. Wahl*, 97 Wn. App. 765, 769, 987 P.2d 127 (1999), *rev. denied*, 140 Wn.2d 1015 (2000).

The first tier of beneficiaries includes the spouse and children of the deceased; these beneficiaries need not establish dependence on the deceased. The second tier of beneficiaries, which includes the parents and siblings of the deceased, may recover only if there are no first tier beneficiaries *and* only if the designated beneficiaries were dependent for support on the deceased.

Masunaga v. Gapasin, 57 Wn. App. 624, 630, 790 P.2d 171, *rev. denied*, 115 Wn.2d 1012 (1990) (emphasis in original).

It is undisputed in this case that there are no first tier beneficiaries of Kristen Armantrout. It is Cascade Orthopaedics's position that there are, likewise, no second tier beneficiaries of Kristen Armantrout because her parents were not substantially *financially* dependent upon her for support.

⁵For the Court's reference, Washington's wrongful death and survival statutes are reprinted in the Appendix at Tab 3.

2. The wrongful death statutes are to be strictly construed for purposes of determining statutory beneficiaries.

The Armantrouts acknowledge that their argument that the gratuitous provision of services constitutes substantial financial dependence is based solely on a broad reading of the phrase “dependent for support” in the wrongful death statutes. *RP 7/19 at 9-10*. The Armantrouts argued to the trial court that the wrongful death statutes, as “remedial” statutes, were to be construed broadly for purposes of determining whether they were statutory beneficiaries; *i.e.*, whether they were dependent upon Kristen for support. *RP 7/19 at 10*. This argument is unsound. Washington courts have repeatedly rejected the proposition that these statutes are to be liberally construed in determining who qualifies as a statutory beneficiary.

Thus, Washington courts have held that “liberal construction of wrongful death statutes is appropriate *only after the proper beneficiaries have been determined.*” *Masunaga*, 57 Wn. App. at 631 (emphasis added). Courts are to extend the literal scope of such statutes “ *only* to protect beneficiaries ‘clearly contemplated by the statute.’” *Id.* (emphasis added) (quoting *Roe v. Ludtke Trucking, Inc.*, 46 Wn. App. 816, 819, 732 P.2d 1021 (1987)).

This is consistent with the common law dating back to the turn of the last century. A statute creating a cause of action unknown to the common law will be strictly construed when determining the persons who are entitled to benefit therefrom. *Whittlesey*, 94 Wash. at 653. “A review of the history of the wrongful death and survival of action statutes reflects a consistent conservatism on the part of the Legislature with regard to the beneficiaries of those statutes.” *Schumacher v. Williams*, 107 Wn. App. 793, 801-02, 28 P.3d 792 (2001), *rev. denied*, 145 Wn.2d 1025 (2002).

Financial dependence is a condition precedent to the maintenance of a wrongful death action by parents of an adult child. *Id.* Whether the Armantrouts were substantially financially dependent upon Kristen at the time of her death is a question that is to be answered narrowly, within the strict confines of the demarcation line of financial dependence drawn by the Legislature. The mere fact that the statutory classification of financial dependence does not provide a remedy “for every conceivable type of injury” does not render that classification ambiguous or illogical: “Legislatures must inevitably draw lines that treat that some people differently from others.” *Id.* at 634.

3. **The Armantrouts' decision to declare their daughter as a dependent for purposes of taxes, insurance, and disability payments precludes a subsequent finding that they were substantially financially dependent upon her for purposes of the wrongful death statute.**

The plaintiffs claim that they were dependent upon their daughter for purposes of the wrongful death statute flies the face of the facts that they treated her as a dependent for all other purposes. The undisputed evidence was that the Armantrouts claimed their daughter as a dependent for purposes of obtaining insurance, tax deductions, and additional Social Security benefits.⁶ Indeed, Kristen must be a dependent child in order to receive these SSA benefits. *See* 42 U.S.C. § 402(d)(1)(C). These benefits “are theoretically conditioned upon the loss of support from a disabled parent.” *Beaty v. Weinberger*, 478 F.2d 300, 305 (5th Cir. 1973), *affirmed*, 418 U.S. 901 (1974). Despite these claims that Kristen was the dependent, the parents now want to assert that they were substantially financially dependent upon her in order to qualify as beneficiaries pursuant to the wrongful death statute.

The parents' claims should be rejected. In order to maintain the integrity of the judicial process, parties to litigation are generally not allowed

⁶ Filing a false income tax return, which includes a return which the preparer “does not believe to be true and correct as to every material matter,” constitutes a felony punishable by a \$100,000 fine and up to three years imprisonment. 26 U.S.C. § 7206(1).

to assert significantly inconsistent positions in different legal contexts. In particular, parties cannot use the same facts differently to gain a financial benefit. In Washington, this premise is commonly referred to as judicial estoppel. There are five non-exclusive factors to be considered in the application of this doctrine. See *DeAtley v. Barnett*, 127 Wn. App. 478, 483-84, 112 P.3d 540 (2005), *rev. denied*, 156 Wn.2d 1021 (2006). Applied to the facts of this case, these factors suggest the parents' wrongful death claim is precluded:

1. The parents and the decedent succeeded in obtaining financial benefits from the federal government based on Kristen's status as a *dependent*. The parents then reversed course and used the same situation to obtain a judgment in this action based on their alleged financial dependency in relation to their daughter.

2. These two positions are clearly and statutorily inconsistent, and potentially subject the parents to federal criminal liability.

3. The parents obtained benefits in one legal context and a judgment in another on the same facts, but also on diametrically opposed applications of those facts to the concept of dependency.

4. The parents' identity and the issue of dependency was identical; *i.e.*, the status of the decedent in relation to her family.

5. It is completely unjust to allow the parents to now change their position for the sole purpose of qualifying as second tier beneficiaries under Washington's wrongful death statutes. A defendant, even if negligent, is not responsible for payment of damages to those who are not entitled to recover under the statutes.

The law does not allow the parents to maintain these inconsistent legal positions. Either Kristen Armantrout was substantially dependent upon her parents, thereby justifying the deductions and benefits, or they were substantially dependent upon her, thus allowing them to bring a wrongful death claim. However, the Armantrouts (and the trial court) maintained *both* positions, which are inconsistent and mutually exclusive. Because the Armantrouts' recovery rests upon these inconsistent legal and factual positions, the trial court erred in allowing the recovery.

4. "Dependent for support" means substantial, *financial* dependence. The receipt of gratuitous services by parents from an adult child does not make the parents substantially financially dependent upon their child.

In 1910, the Supreme Court announced that the condition of dependency is established by "a substantial need on one side and a substantial

financial recognition of that need on the other side[.]” *Bortle v. Northern Pac R. Co.*, 60 Wash. 552, 556, 111 P. 788 (1910) (emphasis added). This rule has not changed since. Total dependency is not required, but the dependency must be substantial — “an actual inability to support themselves, and an actual dependence upon some one [*sic*] else for support [.]” *Id.* at 555 (quoting *Duval v. Hunt*, 15 South. 879 (Fla. 1894)).

The requirement of financial dependence was borne out of the Legislature’s recognition that the decedent was “the support of the family.” *Whittlesey*, 94 Wash. at 651. This was based on the antiquated notion, albeit a notion that is still recognized in the law today, that children were an economic asset of the family because of their ability to provide income to the parents. *See, e.g., Philippides, supra*, 151 Wn.2d at 389, 390. While the requirement of financial dependence has been eliminated for minor children, it is a condition precedent to maintenance of a cause of action for the wrongful death of an adult child. *Masunaga, supra*, 57 Wn. App. at 628.

The requirement of financial dependency was carefully analyzed by this Court in *Masunaga, supra*. In that case, the parents of a 32-year old son killed in a car accident brought a wrongful death action, claiming damages for their deceased son’s ““companionship, *assistance, services*, love, counsel,

guidance, and support.” *Id.* at 626 (emphasis added). The action was dismissed on summary judgment and the parents appealed.

The parents conceded they were not financially dependent on their deceased adult son, but nonetheless asked this Court to interpret “support” in the wrongful death statutes to “mean the providing of ‘emotional support *and services.*’” *Id.* at 628 (emphasis added). This Court rejected the parents’ attempt to expand the statutes, noting that “[l]iberal construction of wrongful death statutes is appropriate only after the proper beneficiaries have been determined.” *Id.* at 631. This Court affirmed the summary judgment dismissal:

The ‘dependent for support’ language was added to the predecessor of RCW 4.24.010 in 1927. cases interpreting this requirement and the similar requirement in RCW 4.24.020 have long held that dependence means *financial* dependence and that establishment of dependence is a condition precedent to maintenance of the cause of action. While a parent need not be wholly dependent in order to recover, dependence must be substantial. Dependence within the meaning of the wrongful death statutes has been described as ‘a substantial need on one side and a substantial *financial* recognition of that need on the other side[.]

* * * *

[T]he courts in this state have long interpreted RCW 4.24.010, RCW 4.20.020, and their predecessors to require financial dependence as a condition precedent to maintenance of a wrongful death action by parents of an adult child. Because it is undisputed that the [parents] were not financially dependent on their son, the trial court properly entered summary judgment in favor of the respondents.

Id. at 628, 631 (internal citations omitted; emphasis in original). The Armantrouts contend the word financial cannot be “read so narrowly” as to encompass only the payment of money. *RP 7/19 at 10*. This contention flies in the face of the stated rule that these statutes must be read narrowly.

A strict reading of the statute an application of the common definition of the term weighs against the plaintiff’s position. The term “financial” means, of course, “relating to finance.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 851 (1993). “Finance” is defined as “to provide with necessary funds in order to achieve a desired end”, *id.*, or as “to supply with funds through the payment of cash[.]” BLACK’S LAW DICTIONARY at 630 (6th Ed. 1990). Here, the only funds the daughter provided or supplied her parents with were the funds she received from the SSA by virtue of her being a dependent, that is the dependent child of her mother, a disabled person. Her mother testified that those funds went entirely

to offset Kristen's household expenses and were not used to support either parent. Thus, it is undisputed that the daughter was a dependent of her parents and did not make any financial contribution to the support of her parents. In the absence of any financial contribution, the Armantrouts' wrongful death claim fails as a matter of law.

In accordance with the rules of statutory construction, the only reasonable construction of the dependency requirement is that, in order for parents to qualify as second-tier beneficiaries, the adult child must provide his or her parents with substantial funds necessary for their support. This construction is consistent with prior cases affirming that dependency means financial dependency, and with a strict construction of the phrase "dependent for support." Indeed, how else can an adult child evidence a substantial *financial* recognition of a substantial need by her parents if not by the payment of money? *Masunaga*, 57 Wn. App. at 628. The fact that Kristen gave her parents her SSA checks does not demonstrate such a recognition, because Kristen turned over the checks only upon the understanding that the funds were used to offset her living expenses which she incurred because her parents allowed her the privilege of living at home after she turned 18.

Acceptance of the Armantrouts' position that provision of services can create financial dependency would result in an expansion of the wrongful death statutes beyond its plain language, which courts consistently reject. For example, this Court has previously rejected attempts to expand the definition of "support" to include "emotional support and services." *Id.* at 628. This Court should do the same in this case and reject the attempt to expand the understanding of financial dependence from the provision of funds, money, or cash to the provision of services, even those services capable of being valued monetarily.

The Armantrouts may argue, as they did to the trial court, that the provision of services can constitute financial dependence because personal injury law recognizes that services have compensable value. While that may be true, it does not necessarily mean that an adult child's gratuitous provision of any service capable of being valued by a dollar amount is sufficient to confer standing upon a parent for a wrongful death claim for the death of that child. Such a reading of the wrongful death statutes could also potentially result in revisiting the question of whether emotional support alone confers standing. In the same way that personal injury law recognizes that services have compensable value, it also recognizes that loss of consortium has

compensable value. But courts have consistently rejected any notion that emotional support is the type of support necessary to justify a parent's claim for damages as a result of the wrongful death of an adult child. See *id.*; *Philippides v. Bernard, supra*, 151 Wn.2d at 386, 388. The mere fact that the services can be valued monetarily does not make them "financial" for purposes of a wrongful death claim in the same way that the monetary value of consortium would not allow a parent to bring a wrongful death claim for the death of his or her adult child.

The phrase "dependent for support" is a term of art, requiring that a parent be substantially financially dependent upon his or her adult child in order to bring a claim for the child's death. While a broad and expansive reading of that phrase might indeed encompass the provision of services in lieu of any monetary contribution, that is not a proper judicial function. A claim for wrongful death "involves a cause of action given life entirely through legislation." *Shoemaker v. St. Joseph's Hosp.*, 56 Wn. App. 575, 578, 784 P.2d 562, *rev. denied*, 114 Wn.2d 1025 (1990). Whether the gratuitous provision of services by an adult child makes the parents substantially financially dependent upon that child is a question for the Legislature, not this Court.

In fact, it appears the question has been posed. Senate Bill 5816, proposed during the Legislature's 2007 Regular Session, would eliminate any requirement that second-tier beneficiaries be dependent upon the decedent for support in order to maintain a wrongful death claim.⁷ If the Armantrouts' construction of the statutes is correct, then such a bill would be unnecessary. Senate Bill 5816 shows otherwise.

Parents must be financially dependent upon their adult child in order to recover for that child's death. *Philippides*, 151 Wn.2d at 388. The term "financial" can only be reasonably interpreted to include the provision of funds necessary for the parents' support, and not merely the provision of services capable of being valued monetarily. Because Kristen did not provide her parents with funds upon which they were substantially and financially dependent for support, the Armantrouts' wrongful death claims fail as a matter of law and should be dismissed.

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⁷For the Court's reference, a copy of Senate Bill 5816 is attached in the Appendix at Tab 4.

C. **Assuming, Arguendo, that the Gratuitous Provision of Services Constitutes “Support” Within the Meaning of the Wrongful Death Statutes, There Is Nonetheless Insufficient Evidence to Establish That the Armantrouts Were Substantially Financially Dependent upon Kristen.**

Even if this Court finds that the gratuitous provision of services by an adult child makes her parents substantially financially dependent upon her, the Armantrouts’ wrongful death claim still fails. This is because, as a matter of law, the Armantrouts were not substantially financially dependent upon Kristen’s services as contemplated by the wrongful death statutes. It was improper for the trial court to have submitted the question of the Armantrouts’ dependency to the jury. The Armantrouts’ claims should be dismissed either because the trial court erred in denying Cascade Orthopaedic’s motion for judgment as a matter of law or because substantial evidence does not support the jury’s verdict that the Armantrouts were dependent.

“Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Such a motion should

be granted when, as a matter of law, there is no competent and substantial evidence upon which the verdict can rest. *State v. Hall*, 74 Wn.2d 726, 727, 446 P.2d 323 (1968). “Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Brown v. Superior Underwriters*, 30 Wn. App 303, 306, 632 P.2d 887 (1980).

Here, there is insufficient evidence to support a finding that the Armantrouts were substantially financially dependent upon the services provided by Kristen within the meaning of the wrongful death statutes. The *Bortle* case is particularly instructive on this point. In that case, the parents brought an action to recover for the death of their adult son, killed in an industrial accident. 60 Wash. at 553. At the time of his death, the son was 25 years old and occasionally made financial contributions to his parents in the form of cash payments. *Id.* at 554. Judgment was entered in favor of the parents and the defendant appealed. The Supreme Court reversed the judgment and remanded the case with instructions to dismiss:

They [the parents] were in no sense dependent upon the deceased for support. The father was able to follow a daily vocation, and if his earnings only resulted in an average income of \$40 per month, that was the result of his inability to sell more goods, and not his

inability to solicit the sale. *His necessity must not be judged from his unsuccessful effort to make a larger income, but from his physical ability to make the effort.* Neither does an occasional contribution from a son to a parent establish a condition of dependency. There must be a substantial need on one side and a substantial financial recognition of that need on the other side, to make out a dependency within the meaning of this statute.

Id. at 555-56 (emphasis added).

A similar result was reached in *Kanton v. Kelly*, 65 Wash. 614, 118 P. 890 (1911). In that case, the parents of an adult child killed in an industrial accident brought suit under a predecessor statute which allowed a survival action “if [the decedent] have dependent upon him for support . . . at the time of his death, parents[.]” *Id.* at 615. The child earned \$3 per day and gave all of his earnings to his parents. The father claimed he was dependent upon his son because he had “little work after the 1st of January preceding the trial in April” and that he could not perform physical labor as he once could. *Id.* at 616. The family had, however, accumulated property, although the value of that property was “uncertain” due to a “present slump in real estate values[.]” *Id.* The Supreme Court affirmed the jury’s verdict in favor of the defendant:

Granting that the surviving father now finds it harder to do physical labor than formerly, it cannot be held as a matter of law that a man

46 years of age, who has sufficient business capacity to accumulate a share of property equal to or greater than the acquisitions of the average man . . . and but for the stress of the immediate times would no doubt find employment, is a dependent. As said in the *Bortle* Case, there must be a substantial need on one side and a substantial financial recognition of that need on the other side to make out a case of dependency within the meaning of this statute. No such necessity is here shown. If the deceased turned over all his earnings to his parents, the record raises a more probable inference that it was in keeping with the old country custom of parents taking the earnings of their children. *In any event, it is certain that the earnings of the deceased went not to meet any real necessity, for there was none, but to increase the general prosperity of the family.*

Id. at 617-18 (emphasis added).

Thus, a temporary change in family fortunes due to either a depressed housing market or a temporary downturn in available work (such as what occurred in Mr. Armantrout's industry does not make a parent substantially financially dependent upon their adult child, even if the child devotes his entire earnings to the family (which Kristen did not do in this case). A parent's necessity is to be judged not on temporary or transient circumstances, but on the physical ability to make efforts to support himself independently. *Bortle*, 60 Wash. at 555.

Here, the Armantrouts were more than physically capable of supporting themselves. The fact that Kristen assisted her parents through a temporary economic downturn is not the type of substantial financial dependence contemplated by the wrongful death statutes. The same is true for any contributions Kristen made (whether in the form of money or services) designed to “increase the general prosperity of the family.” *Id.* at 618. As the *Kanton* court recognized, this does not create the type of “necessitous want” on the part of the parent, which is a condition precedent to maintaining a wrongful death action for the death of an adult child. *See also Grant v. Libby, McNeill & Libby*, 145 Wash. 31, 34, 258 P. 842 (1927) (parent not dependent upon child even though parent “may have been necessitous at times”).

Moreover, this case is distinguishable from those cases where dependence was found. For example, in *Cook v. Rafferty, et al.*, 200 Wash. 234, 93 P.2d 376 (1939), the court held that parents were dependent upon their 21-year old adopted daughter for support when the daughter was killed in a car accident. The daughter earned between \$75 and \$90 per month as a stenographer. *Id.* at 239. She lived with her parents and contributed to the expenses of the household, although she did not pay any regular amount for

room and board. *Id.* Her father, though, was an invalid and had been unable to work for over 10 years, and her mother was unemployed. *Id.* Based on these facts, the court found it reasonable to “suppose that had [the daughter] lived she would have continued to contribute to the support of the family and continued to care for her parents, and to conclude that [the parents] suffered a pecuniary loss by reason of her death.” *Id.* at 240.

In contrast to this case, Kristen did not contribute any of her earnings to household expenses. The only money she gave her parents was her Social Security check, which she would only be receiving because she was a dependent and thus it would only be available for another two to three months. The check was given for the purpose of offsetting *Kristen's* living expenses, not her parents. Her father was physically capable of working, and was working at the time of Kristen's death. Indeed, the only testimony at trial regarding Kristen's contributions to her parents related solely to the services she rendered after her father and brother moved to Minnesota. The Armantrouts' decision to maintain two separate households was a voluntary decision that family consciously and deliberately made in order to allow Kristen and Josie to finish school and to realize a greater profit on the sale of their home. There was no testimony at trial that the Armantrouts were

substantially financially dependent upon Kristen's services before Todd and Robert moved, or that they would still remain substantially financially dependent upon Kristen's services after Kristen and Josie moved to Minnesota. The factors necessitating Kristen's assistance were temporary and were created solely by the conscious decisions of the Armantrouts themselves. This does not, as a matter of law, constitute parental dependence on an adult child within the meaning of the wrongful death statutes.

Furthermore, it cannot be said that parents are substantially, financially dependent upon their adult child when the parents claim the child as a dependent on their tax returns. The Armantrouts claimed Kristen as a dependent on their tax returns for both the year preceding and the year of her death. The Internal Revenue Code defines a dependent child as a child for whom the parents have provided over one-half of the child's support for the taxable year. 26 U.S.C.A. § 152(c)(1)(A)-(D). As a matter of law, parents cannot be substantially financially dependent on an adult child where the parents provided over one-half of the child's support and where the child made no financial contributions to the parents.

It is undisputed in this case that, at the time of her death, Kristen was 18 years old, just finishing up high school, claimed as a dependent on her

parents' tax returns, not making enough money to support herself on her own, and not making any financial contributions to her parents for their support. It is also undisputed that Kristen rendered services to her parents that had economic value. But economic value alone is not the condition precedent for a parent's claim for damages resulting from the wrongful death of an adult child. Substantial financial dependency is, and no substantial evidence supports a finding that Josie and Todd were substantially financially dependent upon Kristen. The verdict and judgment against Cascade Orthopaedics in favor of Josie and Todd must be dismissed.

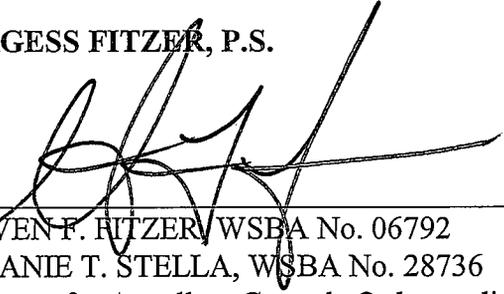
V. CONCLUSION

Before parents of an adult child may recover under the wrongful death statute, they must prove that they were substantially financially dependent upon the child. The unique facts of this case, while sad, do not place the Armantrouts in a different position than that of any other parent of an adult child. While their daughter did provide some services to her mother because of the mother's disability, these services were of a temporary nature and voluntarily given while both women were completing their education and the family relocated to Minnesota. To allow recovery under these facts is to negate the strict statutory construction the wrongful death statutes have been

given in the past. Any remedy to perceived inequities must come from the Legislature, not from this Court. For the foregoing reasons, Cascade Orthopaedics asks this Court to dismiss the Armantrouts' wrongful death claims.

Respectfully submitted this 9th day of April, 2006.

BURGESS FITZER, P.S.



STEVEN F. FITZER, WSBA No. 06792
MELANIE T. STELLA, WSBA No. 28736
Attorneys for Appellant Cascade Orthopaedics

APPENDIX

TAB 1

INSTRUCTION NO. 13

Plaintiff Josie Armantrout, as personal representative of the estate of Kristin Armantrout, brings two separate legal claims:

1. In one claim she represents the estate for the losses suffered by the estate; and
2. In one claim she represents the estate for the personal losses suffered by herself and her husband, Todd Armantrout.

INSTRUCTION NO. 14

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

Substantial financial dependence may be partial, but must be based on current financial contributions, not the promise of future contributions or services.

INSTRUCTION NO. 15

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must determine the amount of money that will reasonably and fairly compensate Kristin Armantrout's estate for such damages as you find were proximately caused by the negligence of the defendant.

If you find for the plaintiff you should consider the following items on the claim of the estate:

1. Economic damages:

- (a) The health care expenses that were reasonably and necessarily incurred.
- (b) The net accumulations lost to her estate. In determining the net accumulations, you should take into account Kristin's age, health, life expectancy, occupation, and habits of industry, responsibility, and thrift. You should also take into account Kristin's earning capacity, including her actual earnings prior to death and the earnings that reasonably would have been expected to be earned by her in the future. Further, you should take into account the amount you find that Kristin reasonably would have consumed as personal expenses during her

lifetime and deduct this from her expected future earnings to determine the net accumulations.

You must then determine whether Kristin's parents were substantially financially dependent on her for support. If you answer that question of the special verdict form in the affirmative, you should consider the following items on the claim of Kristin's parents:

1. Economic Damages:

You should consider what benefits of monetary value, including money, goods and services Kristin would have contributed to her parents had she lived.

2. Noneconomic Damages:

(a) You should also consider what Kristin reasonably would have been expected to contribute to her parents in the way of love, care, companionship, and guidance had Kristin lived.

(b) The pain, suffering, anxiety, emotional distress, humiliation, and fear experienced by her prior to her death as a result of the negligence of either or both defendants.

In making your determination, you should take into account Kristin's age, health, life expectancy, occupation, and habits. You should also take in to account Kristin's earning capacity, including Kristin's actual earnings prior to death and the earnings that reasonably would have been expected to be earned by Kristin in the future. In

determining the amount that Kristin reasonably would have been expected to contribute in the future to her parents , you should also take into account the amount you find Kristin customarily contributed to her parents.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

TAB 2

JUL 26 2006

SUPERIOR COURT CLERK
EILEEN L. MCLEOD-
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

JOSIE ARMANTROUT, Personal Representative
of the Estate of KRISTEN ARMANTROUT;
JOSIE ARMANTROUT and WARREN
ARMANTROUT, husband and wife, and the
marital community composed thereof

Plaintiffs,

vs.

ROBERT CARLSON, M.D., and KARA
CARLSON, husband and wife, and the marital
community composed thereof; and CASCADE
ORTHOPAEDICS, a partnership

Defendants.

No. 04-2-14455-8SEA

SPECIAL VERDICT FORM

We, the jury, answer the following questions submitted by the Court:

QUESTION 1: Was Dr. Robert Carlson negligent?

NO (write "yes" or "no")

QUESTION 2: Was Cascade Orthopaedics negligent?

YES (write "yes" or "no")

Answer Question 3 only if you answered "yes" to either or both Question 1 and 2.

If you answered "no" to both Question 1 and 2, do not answer any further questions. Sign and return this verdict form.

QUESTION 3: Was the negligence of either of the following a proximate cause of the death of Kristen Armantrout:

- a. Dr. Robert Carlson? NO (write "yes" or "no")
- b. Cascade Orthopaedics? YES (write "yes" or "no")

If you answered "yes" to either Question 3, then answer Question 4.

If you answered "no" to both Question 3a and 3b then do not answer any further questions. Sign and return your verdict.

QUESTION 4: What is the net economic loss to the Estate of Kristen Armantrout?

\$ 200,000

QUESTION 5: Were Josie Armantrout and Todd Armantrout substantially financially dependent on Kristin for support?

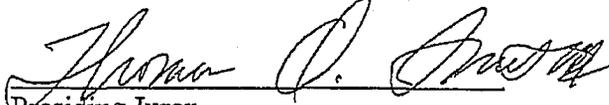
YES (write "yes" or "no")

If you answered "no" then do not answer any further questions. Sign and return your verdict. If you answered "yes," then answer Question 6.

QUESTION 6: What are the damages to Josie and Warren Armantrout?

\$ 1,150,000

DATED this 26 day of JULY, 2006.



Presiding Juror

TAB 3

West's RCWA 4.20.010



West's Revised Code of Washington Annotated Currentness

Title 4. Civil Procedure (Refs & Annos)

▢ Chapter 4.20. Survival of Actions (Refs & Annos)

→ **4.20.010. Wrongful death--Right of action**

When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

CREDIT(S)

[1917 c 123 § 1; RRS § 183. FORMER PARTS OF SECTION: 1917 c 123 § 3 now codified as RCW 4.20.005.
Prior: 1909 c 129 § 1; Code 1881 § 8; 1875 p 4 § 4; 1854 p 220 § 496.]

HISTORICAL AND STATUTORY NOTES

Source:

Laws 1854, p. 220, § 496.

Laws 1875, p. 4, § 4.

Code 1881, § 8.

Laws 1909, ch. 129, § 1.

RRS § 183.

West's RCWA 4.20.020



West's Revised Code of Washington Annotated Currentness

Title 4. Civil Procedure (Refs & Annos)

Chapter 4.20. Survival of Actions (Refs & Annos)

→ 4.20.020. Wrongful death--Beneficiaries of action

Every such action shall be for the benefit of the wife, husband, 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.

CREDIT(S)

[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.

TAB 4

SENATE BILL 5816

State of Washington 60th Legislature 2007 Regular Session

By Senators Kline, Fairley, Kohl-Welles and Weinstein

Read first time 02/01/2007. Referred to Committee on Judiciary.

1 AN ACT Relating to actions for wrongful injury or death; amending
2 RCW 4.20.010, 4.20.020, 4.20.046, 4.20.060, and 4.24.010; and creating
3 new sections.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** It is the intent of this act to overrule
6 *Otani v. Broudy*, 151 Wn.2d 750, 92 P.3d 192 (2004) and *Philippides v.*
7 *Bernard*, 151 Wn.2d 376, 86 P.3d 939 (2004), and to amend Washington's
8 wrongful death and survival statutes by broadening the scope of
9 beneficiaries who may recover under these statutes and by clarifying
10 the scope of damages that may be recovered in wrongful death and
11 survival actions.

12 **Sec. 2.** RCW 4.20.010 and 1917 c 123 s 1 are each amended to read
13 as follows:

14 (1) When the death of a person is caused by the wrongful act,
15 neglect, or default of another or entity, his or her personal
16 representative may maintain an action (~~for damages~~) against the
17 person or entity causing the death (~~and although~~) for the economic
18 and noneconomic damages sustained by the beneficiaries listed in RCW

1 4.20.020 as a result of the decedent's death, in such amounts as
2 determined by a jury to be just under all the circumstances of the
3 case.

4 (2) This section applies regardless of whether or not the death
5 ((shall have been)) was caused under such circumstances as amount, in
6 law, to a felony.

7 **Sec. 3.** RCW 4.20.020 and 1985 c 139 s 1 are each amended to read
8 as follows:

9 Every ~~((such))~~ action under RCW 4.20.010 shall be for the benefit
10 of the wife, husband, child or children, including stepchildren, of the
11 person whose death shall have been so caused. If there be no wife or
12 husband or such child or children, such action may be maintained for
13 the benefit of the parents, sisters, or brothers ~~((, who may be~~
14 ~~dependent upon the deceased person for support, and who are resident~~
15 ~~within the United States at the time of his death))~~ of the deceased.

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

18 **Sec. 4.** RCW 4.20.046 and 1993 c 44 s 1 are each amended to read as
19 follows:

20 (1) ~~((All))~~ Upon a person's death, any cause ~~((s))~~ of action ~~((by a~~
21 ~~person or persons))~~ that the decedent may have had against another
22 person or ~~((persons shall))~~ another person's estate survives to the
23 decedent's personal representative ~~((s of the former and against the~~
24 ~~personal representatives of the latter, whether such actions arise))~~.
25 This section applies regardless of whether or not the action arises
26 on contract or otherwise, and regardless of whether or not such actions
27 would have survived at the common law or prior to the date of enactment
28 of this section ~~((: PROVIDED, HOWEVER, That))~~.

29 (2) In addition to recovering the decedent's economic losses under
30 this section, the personal representative ~~((shall only be))~~ is entitled
31 to recover on behalf of those beneficiaries listed under RCW 4.20.020
32 any noneconomic damages ~~((for pain and suffering, anxiety, emotional~~
33 ~~distress, or humiliation))~~ personal to ~~((and suffered by a deceased on~~
34 ~~behalf of those beneficiaries enumerated in RCW 4.20.020, and such))~~ a
35 decedent including, but not limited to, damages for the decedent's pain
36 and suffering, anxiety, emotional distress, loss of life itself, loss

1 of enjoyment of life, shortened life expectancy, or humiliation, in
2 such amounts as determined by a jury to be just under all the
3 circumstances of the case.

4 (3) Damages under subsections (1) and (2) of this section are
5 recoverable regardless of whether or not the death was occasioned by
6 the injury that is the basis for the action.

7 (4) The liability of property of a husband and wife held by them as
8 community property subject to execution in satisfaction of a claim
9 enforceable against such property so held shall not be affected by the
10 death of either or both spouses; and a cause of action shall remain an
11 asset as though both claiming spouses continued to live despite the
12 death of either or both claiming spouses.

13 ~~((+2))~~ (5) Where death or an injury to person or property,
14 resulting from a wrongful act, neglect or default, occurs
15 simultaneously with or after the death of a person who would have been
16 liable therefor if his death had not occurred simultaneously with such
17 death or injury or had not intervened between the wrongful act, neglect
18 or default and the resulting death or injury, an action to recover
19 damages for such death or injury may be maintained against the personal
20 representative of such person.

21 **Sec. 5.** RCW 4.20.060 and 1985 c 139 s 2 are each amended to read
22 as follows:

23 (1) No action for a personal injury to any person occasioning death
24 shall abate, nor shall such right of action ~~((determine))~~ terminate, by
25 reason of such death, if such person has a surviving spouse or child
26 living, including stepchildren, or if leaving no surviving spouse or
27 ~~((such))~~ children, ~~((if there is dependent upon the deceased for~~
28 ~~support and resident within the United States at the time of decedent's~~
29 ~~death,))~~ the person has surviving parents, sisters, or brothers ~~((; but~~
30 ~~such action may be prosecuted, or commenced and prosecuted, by the~~
31 ~~executor or administrator))~~.

32 (2) An action under this section shall be brought by the personal
33 representative of the deceased, in favor of ~~((such))~~ the surviving
34 spouse, or in favor of the surviving spouse and ~~((such))~~ children, or
35 if no surviving spouse, in favor of ~~((such))~~ the child or children, or
36 if no surviving spouse or ~~((such))~~ a child or children, then in favor

1 of the decedent's parents, sisters, or brothers (~~who may be dependent~~
2 ~~upon such person for support, and resident in the United States at the~~
3 ~~time of decedent's death~~)).

4 (3) In addition to recovering the decedent's economic losses under
5 this section, the persons listed in subsection (1) of this section are
6 entitled to recover any noneconomic damages personal to the decedent
7 including, but not limited to, damages for the decedent's pain and
8 suffering, anxiety, emotional distress, loss of life itself, loss of
9 enjoyment of life, shortened life expectancy, or humiliation, in such
10 amounts as determined by a jury to be just under all the circumstances
11 of the case.

12 **Sec. 6.** RCW 4.24.010 and 1998 c 237 s 2 are each amended to read
13 as follows:

14 (1) A mother or father of a child, or both, (~~who has regularly~~
15 contributed to the support of his or her minor child, and the mother or
16 father, or both, of a child on whom either, or both, are dependent for
17 support)) may maintain or join as a party an action as plaintiff for
18 the injury or death of the child if the mother or father has had
19 significant involvement in the child's life including, but not limited
20 to, either giving or receiving emotional, psychological, or financial
21 support to or from the child.

22 (2) In addition to recovering damages for the child's health care
23 expenses, loss of the child's services, loss of the child's financial
24 support, and other economic losses, damages may be also recovered under
25 this section for the loss of love and companionship of the child, loss
26 of the child's emotional support, and for injury to or destruction of
27 the parent-child relationship, in such amounts as determined by a jury
28 to be just under all the circumstances of the case.

29 (3) An action may be maintained under this section regardless of
30 whether or not the child has attained the age of majority.

31 (4) Each parent is entitled to recover for his or her own loss
32 separately from the other parent regardless of marital status, even
33 though this section creates only one cause of action(~~, but if the~~
34 parents of the child are not married, are separated, or not married to
35 each other damages may be awarded to each plaintiff separately, as the
36 trier of fact finds just and equitable)).

1 (5) If one parent brings an action under this section and the other
2 parent is not named as a plaintiff, notice of the institution of the
3 suit, together with a copy of the complaint, shall be served upon the
4 other parent: PROVIDED, That notice shall be required only if
5 parentage has been duly established.

6 Such notice shall be in compliance with the statutory requirements
7 for a summons. Such notice shall state that the other parent must join
8 as a party to the suit within twenty days or the right to recover
9 damages under this section shall be barred. Failure of the other
10 parent to timely appear shall bar such parent's action to recover any
11 part of an award made to the party instituting the suit.

12 ~~((In such an action, in addition to damages for medical, hospital,
13 medication expenses, and loss of services and support, damages may be
14 recovered for the loss of love and companionship of the child and for
15 injury to or destruction of the parent child relationship in such
16 amount as, under all the circumstances of the case, may be just.))~~

17 NEW SECTION. **Sec. 7.** This act is remedial and retroactive and
18 applies to all claims that are not time barred, as well as any claims
19 pending in any court on the effective date of this act.

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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.

**AFFIDAVIT OF MAILING
BRIEF OF APPELLANT**

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