

PROCEEDINGS  
SUPERIOR COURT  
STATE OF WASHINGTON  
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No. 84098-9

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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BREEAN BEGGS as Personal Representative for the estate of TYLER DELEON and as Limited Guardian Ad Litem for DENAE DELEON, BREANNA DELEON, LAKAYLA DELEON, ANTHONY BARCELLOS and BRENDEN BURNETT, minor children; FRANCES CUDMORE as Limited Guardian Ad Litem for BECKETT CUDMORE, a minor child, and; AMBER DANIELS, a single individual,

Plaintiffs,

v.

STATE OF WASHINGTON; the DEPARTMENT OF SOCIAL AND HEALTH SERVICES; LORETTA MEE, ROBERT TADLOCK and DWAYNE THURMAN individually and in their official capacity as agents and employees of the State of Washington; DAVID FREGEAU, MD; the ROCKWOOD CLINIC a Washington State corporation; SANDRA BREMNER-DEXTER MD and; JOHN and/or JANE DOES 1-10,

Defendants.  
*PETITIONER'S*

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**APPELLANTS' ANSWER TO AMICUS**

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## TABLE OF CONTENTS

	<u>PAGE</u>
I. THE DUTY TO REPORT CHILD ABUSE IS SEPARATE FROM A PHYSICIAN'S STANDARD OF CARE	1
II. TYLER DELEON'S BROTHERS AND SISTERS ARE STATUTORY BENEFICIARIES UNDER STRICT OR LIBERAL CONSTRUCTION	4

## TABLE OF AUTHORITIES

### CASES

<u>Armijo v. Wesselius</u> 73 Wn.2d 716, 720, 440 P.2d 71 (1968)	4
<u>Klossner v. San Juan County</u> 93 Wn.2d 42, 46-48, 605 P.2d 330 (1980)	4
<u>Whittlesey v. Seattle</u> 94 Wash. 645, 163 Pac. 193 (1917)	4,5,6
<u>Roe v. Ludtke Trucking, Inc.</u> 46 Wn. App. 816, 732 P.2d 1021 (1987)	5
<u>Tait v. Wahl</u> 97 Wn. App. 765, 987 P.2d 127 (1999)	5,6, 7

### STATUTES

Ch. 26.44 RCW	3, 4
Ch. 7.70 RCW	3, 4
RCW 4.20.020	6

RCW 4.20.046	6
RCW 4.20.060	6
RCW 7.70.030(1)	3
RCW 26.44.030(1)(a)	3
RCW 26.44.060(1)(a)	4
RCW 26.44.080	4

**OTHER AUTHORITIES**

Council on Science and Public Health, American Medical Association, <i>Report No. 2: Identifying and Reporting Suspected Child Abuse</i> , at 7:16 (Nov. 2009)	1, 2, 3
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I. THE DUTY TO REPORT CHILD ABUSE IS SEPARATE FROM A PHYSICIAN'S STANDARD OF CARE.

"Child abuse is endemic."<sup>1</sup> Nevertheless, many well-trained physicians underreport suspected abuse.<sup>2</sup> According to a study cited by the American Medical Association ("AMA"), physicians did not report 27% of injuries "likely or very likely" to have been caused by child abuse.<sup>3</sup> Physicians did not report 76% of injuries they thought "were possibly a result of abuse."<sup>4</sup> These figures show that the risk of criminal prosecution is ineffective to motivate doctors to report child abuse. According to the AMA, all 50 states have criminal penalties for failure to report.<sup>5</sup> The AMA estimates:

At present, it is likely that hundreds of thousands of children who are being abused or neglected are not receiving interventions through departments of protective services, in part, because health care

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<sup>1</sup> Council on Science and Public Health, American Medical Association, *Report No. 2: Identifying and Reporting Suspected Child Abuse*, at 7:16 (Nov. 2009) (submitted in appendix to Brief of Amicus Curiae) (hereafter "CSPH").

<sup>2</sup> CSPH at 1:22.

<sup>3</sup> CSPH at 3:28-29.

<sup>4</sup> CSPH at 3:27-28.

<sup>5</sup> CSPH at 5:2-3 (citing Richardson C. Physician/hospital liability for negligently reporting child abuse. *The J Legal Med.* 2002;23:131-150).

professionals are not complying with legal mandates to report suspected child abuse and neglect.<sup>6</sup>

According to the AMA report, various factors unrelated to medical care influence a physician's decision whether or not to report suspected abuse. A doctor is more likely to report abuse if the patient is "unfamiliar to the clinician."<sup>7</sup> Conversely, "Reluctance to report...includes the possibility of irreparable harm to the doctor/patient/family relationship...."<sup>8</sup> These findings are compelling in the context of the case now before the court. Tyler DeLeon (deceased), Beckett Cudmore, and Denae DeLeon were familiar to respondent David Fregeau because Fregeau was their primary care pediatrician. CP 14. Similarly, Tyler was familiar to respondent Bremner-Dexter because she was Tyler's psychiatrist. CP 16.

The AMA cites other non-medical factors that discourage reporting of child abuse by physicians. They include the prospect of spending time in court,<sup>9</sup> previous negative experiences with child protection agencies,<sup>10</sup> skepticism regarding the efficacy of CPS intervention,<sup>11</sup> and the belief that an

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<sup>6</sup> CSPH at 5:15-18.

<sup>7</sup> CSPH at 3:38.

<sup>8</sup> CSPH at 4:25-26.

<sup>9</sup> CSPH at 4:37-38.

<sup>10</sup> CSPH at 4:30-31.

<sup>11</sup> CSPH at 4:22-23.

abuse report may trigger an unnecessary transfer of the child to relatives or a foster home.<sup>12</sup>

The AMA report illustrates that physicians do not conflate the role of providing healthcare with the act of reporting child abuse. Nor has Washington's legislature done so.

RCW Chapters 7.70 and 26.44 are directed to different objectives. The former addresses the public interest in competent healthcare; the latter focuses on the protection of children. With its paramount goal of protecting children, Chapter 26.44 is incompatible with the standards for establishing healthcare negligence under Chapter 7.70. A lower standard triggers the duty to report abuse than for recovering damages for medical negligence.<sup>13</sup> In contrast to proof of medical negligence, the duty to report child abuse is independent of any "accepted standard of care." The standard for reporting abuse applies equally to healthcare providers and non-healthcare providers alike. The liability provisions in Chapter 26.44 are incongruent with medical negligence principles: the physician who reports suspected child abuse in

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<sup>12</sup> CSPH at 4:27-30.

<sup>13</sup> The duty to report child abuse arises when there is "reasonable cause to believe that a child has suffered abuse or neglect." RCW 26.44.030(1)(a). A medical negligence plaintiff must prove by a preponderance of evidence the healthcare provider failed to follow "the accepted standard of care." RCW 7.70.030(1).

“good faith” is “immune from any liability arising out of such reporting.” RCW 26.44.060(1)(a). However, knowing failure to make a report is a gross misdemeanor. RCW 26.44.080.

Plainly, the thrust of Chapter 26.44 is to err on the side of protection of children. The statutes that further this goal are not compatible with the standards governing medical negligence actions under Chapter 7.70. The different interests addressed by these chapters—and the different mechanisms supporting those interests—dictate that the standards for recovering damages for medical negligence do not govern a physician’s duty to report child abuse.

II. TYLER DELEON’S BROTHERS AND SISTERS ARE STATUTORY BENEFICIARIES UNDER STRICT OR LIBERAL CONSTRUCTION.

Amicus Curiae correctly states this court has abandoned strict construction of the statutes defining beneficiaries in wrongful death and survival claims. See *Armijo v. Wesselius*, 73 Wn.2d 716, 720, 440 P.2d 71 (1968); *Klossner v. San Juan County*, 93 Wn.2d 42, 46-48, 605 P.2d 330 (1980). Nevertheless, this Answer clarifies the scope of the former approach as enunciated in *Whittlesey v. Seattle*, 94 Wash. 645, 163 Pac. 193 (1917). Under strict *or* liberal construction, dependent siblings of a deceased are second tier beneficiaries under the wrongful death and survival statutes.

*Whittlesey* held surviving children were not statutory beneficiaries entitled to sue for the wrongful death of their mother. Washington's wrongful death statute at that time limited the right of action to, among others, the decedent's "widow." The court concluded the statute's language indicated "no right of action for the death of a wife and mother." *Whittlesey* at 652-53. The court described its methodology in hybrid terms: "[S]uch statutes should receive a strict construction in determining *the persons or classes of persons* who are entitled to their benefit, and a liberal construction in applying the statute in their favor." *Whittlesey* at 647 (emphasis added, quotation marks and citation omitted).

Court of Appeals decisions applying "strict" construction to beneficiary issues have addressed the "classes of persons" qualifying as beneficiaries. In *Roe v. Ludtke Trucking, Inc.*, 46 Wn. App. 816, 732 P.2d 1021 (1987), the court held an unmarried person was not a statutory beneficiary entitled to sue for loss of consortium as the "wife" of her deceased cohabitant. The court concluded, "To include Roe within the statutory category of 'wife' would require this court to read into the statute something clearly not intended by the Legislature." *Roe* at 819. Similarly, in *Tait v. Wahl*, 97 Wn. App. 765, 987 P.2d 127 (1999), the Court of Appeals cited the rule of strict construction to conclude the decedent's niece and non-

dependent brother did not qualify as second tier beneficiaries in a wrongful death action.<sup>14</sup> *Tait* at 769.

The appellants in the present action do not seek to blur the classes of persons entitled to recover as second tier beneficiaries under RCW 4.20.020, 046 and 060. These statutes define such beneficiaries as the “parents, sisters, or brothers, who may be dependent upon the deceased person for support.” RCW 4.20.020; 4.20.060. The appellants claim a right of recovery under the strict language of these statutes as dependent sisters and brothers of the deceased.

*Whittlesey* instructs that the wrongful death and survival statutes are construed liberally in favor of the classes of persons entitled to their benefit. The appellants are within those classes. It is undisputed they are the brothers and sisters of the deceased, and it undisputed they in fact depended financially on payments from the state made on behalf of Tyler. Those payments were \$717 per month at the time of Tyler’s death. CP 72. In total, the state paid over \$50,000 in foster care and adoption support for Tyler after his initial placement in the DeLeon household. CP 58-78. These facts do not require liberal construction to confirm the appellants’ status as second tier beneficiaries, but Tyler’s brothers and sisters are nevertheless entitled to the

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<sup>14</sup> In *Tait*, it was undisputed that the brother was not dependent on the

benefit of that standard. The appellants should not be precluded as a matter of law from submitting their claims to a jury.

DATED this 18th day of October, 2010.

Respectfully Submitted,

RESSLER & TESH, PLLC

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Allen M. Ressler                      WSBA 5330

/s/ Timothy R. Tesh

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/s/ John C. Dorgan

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deceased. *Tait* at 769.

SUPREME COURT  
OF THE STATE OF WASHINGTON

BREEAN BEGGS as Personal  
Representative for the estate of  
TYLER DELEON and as Limited  
Guardian Ad Litem for DENAE  
DELEON, BREANNA DELEON,  
LAKAYLA DELEON,  
ANTHONY BARCELLOS and  
BRENDEN BURNETT, minor  
children; FRANCES CUDMORE  
as Limited Guardian Ad Litem for  
BECKETT CUDMORE, a minor  
child, and; AMBER DANIELS, a  
single individual,

Plaintiffs,

v.

STATE OF WASHINGTON; the  
DEPARTMENT OF SOCIAL  
AND HEALTH SERVICES;  
LORETTA MEE, ROBERT  
TADLOCK and DWAYNE  
THURMAN individually and in  
their official capacity as agents  
and employees of the State of  
Washington; DAVID FREGEAU,  
MD; the ROCKWOOD CLINIC a  
Washington State corporation;  
SANDRA BREMNER-DEXTER  
MD and; JOHN and/or JANE  
DOES 1-10,

Defendants.

No. 272702-2-III

DECLARATION OF SERVICE

The undersigned for Plaintiffs/Appellants (Petitioners) certifies under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below no later than 10/18/2010 a copy of:

Brief in Response to Amicus/Declaration of Service

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