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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 274179

No. 272702

**COURT OF APPEALS,
DIVISION III
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,

Petitioners,

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,

Respondents.

PETITIONERS' OPENING BRIEF

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A. INTRODUCTION

This is a personal injury action arising from the abuse and neglect of children by their foster/adoptive parent, Carole DeLeon. On his seventh birthday, Tyler DeLeon died of starvation and dehydration weighing 28 pounds. Other children in the home suffered abuse, neglect, and dramatic weight loss. The plaintiffs/petitioners are the Estate of Tyler DeLeon and former foster and adopted children of Carole DeLeon. They assert causes of action against the respondent health care providers David Fregeau, Sandra Bremner-Dexter, and Rockwood Clinic on claims of professional negligence and breach of the statutory duty to report child abuse.¹

The petitioners appeal the superior court's orders (1) dismissing their wrongful death claims and estate claims for general damages, and (2) dismissing their claims under RCW 26.44.030 for failure to report child abuse.

¹ The petitioners also asserted claims against the State of Washington. Those claims have been settled.

B. ASSIGNMENTS OF ERROR

1. The superior court erred by granting partial summary judgment dismissing the petitioners' claims under the mandatory reporting of child abuse statute, RCW 26.44.030.

2. The Superior Court erred by granting partial summary judgment dismissing the petitioners' wrongful death claims and Estate of Tyler DeLeon general damages claims.

Issues Related to Assignments of Error

1. As a matter of law, are doctors immune from civil liability under RCW 26.44.030?

2. As a matter of law, does reporting child abuse according to the requirements of RCW 26.44.030 constitute "health care" when the report is made by a doctor?

3. As a matter of law, does RCW Chapter 7.70 (regulating medical malpractice claims) govern all claims against doctors for failing to report child abuse?

4. As a matter of law, can siblings and parents of a child who receives adoption support payments from the state be financially dependent on the child for the purposes of wrongful death and survival claims under RCW's 4.20.020, .046, and .060?

C. STATEMENT OF THE CASE

1. THE PETITIONERS' COMPLAINT FOR DAMAGES.

The petitioners allege the following facts and causes of action in their Complaint.

Carole DeLeon was licensed by the State of Washington to provide foster care. CP 9. On the following dates, the state placed the petitioners in the DeLeon foster home: Anthony Barcellos, September 26, 1997; Tyler DeLeon, May 21, 1998; Amber Daniels, November 13, 1998; Denae DeLeon, February 23, 2000; Beckett Cudmore, July 12, 2000; Breanna DeLeon, August 17, 2000; Brenden Burnett, March 16, 2002. CP 9. The state also assisted Carole DeLeon in eventually adopting Tyler, Breanna, Denae, and Anthony. CP 9. The state made foster care and adoption support payments to Carole DeLeon for the children in her home. CP 9.

Tyler was deprived of food and water in the DeLeon home. His weight dropped from the 50th percentile to the 5th percentile. CP 10-11. He died on his seventh birthday, weighing 28 pounds. CP 10.

The other children also suffered. Beckett's weight dropped from the 95th to the 5th percentile. CP 11. Denae dropped from the 40th to the 5th percentile. CP 11. Amber lost 74 pounds in one year. CP 11. On March 23, 2005, two months after Tyler's death, the children were removed from the home. CP 12.

Respondent Fregeau is a physician specializing in pediatric medicine. CP 7. At relevant times he was employed by Respondent Rockwood Clinic, a provider of professional healthcare services. CP 7. Fregeau was the primary care pediatrician for Tyler, Beckett, and Denae. CP 14.

Fregeau had knowledge of numerous injuries suffered by Tyler, and he knew Tyler stated he had been kicked down the stairs in the home. CP 14. Fregeau knew that Carole DeLeon had tied Tyler's hands behind his back. CP 14. Fregeau knew of Tyler's dramatic weight loss. CP 15. He was also aware of injuries suffered by Beckett. CP 15. He knew that Beckett exhibited regressive behavior in the DeLeon home, that Beckett was hospitalized for seizures from unknown causes, and that Carole DeLeon regulated Beckett's access to water. CP 15. Fregeau knew of Beckett's severe weight loss. CP 15. He was also aware of Denae's weight loss from the 40th to the 5th percentile. CP 16.

Respondent Bremner-Dexter was Tyler's psychiatrist. CP 16. She knew of Tyler's injuries and weight loss. CP 16. Bremner-Dexter knew of several CPS referrals for Tyler's injuries. CP 16. She was aware that Tyler at one point gained seven pounds in one week when he was outside the DeLeon home. CP 16. She was aware that Tyler screamed because he was thirsty and exhibited behavioral problems. CP 16. In 2004 Dexter

wrote a letter advising individuals ignore Tyler during his attempts to gain attention. CP 16.

Despite their knowledge of neglect and abuse in the DeLeon home, the respondent doctors failed to report child abuse as required by RCW 26.44.030. CP 21.

The petitioners assert professional negligence claims and claims for failure to report child abuse (RCW 26.44.030) against the respondent doctors. CP 20-21. The Complaint also asserts wrongful death and survival claims relating to Tyler's death. CP 20. The petitioners plead for the recovery of general and special damages relating to all claims. CP 22.

2. ADDITIONAL FACTS.

The State of Washington made substantial payments to Carole DeLeon on behalf of the foster and adopted children in her home. From October 1997 through April 2005, the Department of Social and Health Services (DSHS) paid Carole DeLeon \$221,969 for the children in her care. Of this amount, DSHS paid \$50,369 for Tyler. CP 58-78.² At the time of Tyler's death, DSHS was paying \$717 per month in adoption support for Tyler. CP 72.

² These dollar amounts are compiled from DSHS printouts attached to the Declaration of Connie Lamber-Eckel (dated May 7, 2008).

A Revised Adoption Support Agreement executed by Carole DeLeon and DSHS governed the adoption support payments for Tyler. CP 83-84. The Agreement confirmed that Tyler was eligible for federal adoption assistance benefits and that DSHS would make monthly payments of \$717. CP 83-84. The Agreement stated either party could propose adjustments to the monthly benefit in the event of changes “in the special needs of the child” or “in the circumstances of the adoptive family.” CP 83. It listed seven obligations of the adoptive parent, including duties to submit various forms and information to DSHS. CP 84. The Agreement imposed no restrictions on the use of the adoption support funds, and it did not require the adoptive parent to account in any way for how the money was spent. CP 83-84.

The DeLeon household depended on the DSHS payments to make ends meet. In June 2003 Carole DeLeon wrote a letter to the Office of Administrative Hearings in Olympia regarding her Fair Hearing Request concerning State assistance for Tyler. DeLeon stated:

I love children and have made the decision to adopt, but I also made this decision as a single parent who wants to retire someday, and without the adoption support and special needs pay, I would not be able to care for these children.

CP 88.

In October 2005, seven months after the children were removed from her home, Carole DeLeon refinanced her home mortgage. She provided information about her income and expenses on a Uniform Residential Loan Application. The application indicates her monthly salary was \$6,057. CP 94. Her monthly housing expenses totaled \$1,233, and she had other monthly loan payments totaling \$3,717. CP 94. Inferring a 25% federal income tax rate, these figures suggest DeLeon was unable to meet basic monthly expenses, absent the money received from DSHS.

3. THE SUPERIOR COURT'S PARTIAL SUMMARY JUDGMENT RULINGS.

a. Dismissal Of Petitioners' RCW 26.44.030 Claims.

The respondent doctors moved for partial summary judgment to dismiss the petitioners' RCW 26.44.030 claims for failure to report child abuse. The motion sought relief on purely legal grounds, as the doctors cited no facts other than their status as health care providers to Tyler, Denae DeLeon, and Beckett Cudmore. CP 119. The doctors argued that any act or omission occurring in the context of the physician-patient relationship necessarily constituted "health care." CP 164-165. In other words, "the only thing" they could provide their patients "was healthcare." CP 164. According to the respondents, RCW Chapter 7.70 governing all medical malpractice claims—applies to the petitioners' mandatory

reporting claims. The respondents argued that, as a matter of law, they cannot be held liable for any act or omission under the mandatory reporting statute, RCW 26.44.030. CP 164.

The superior court granted the respondents' motion, finding the doctors were "entitled to judgment as a matter of law." CP 138.

b. Dismissal Of Wrongful Death Claims And Estate Claims For General Damages.

The respondents moved for partial summary judgment dismissing wrongful death claims and Tyler's estate claims for general damages. CP 33, 38-40. They argued Tyler's mother and siblings were not financially dependent on him, and Tyler therefore left behind no statutory beneficiaries to pursue a wrongful death action or recover general damages in a survival action. CP 32-35. Citing *Bortle v. N. Pac. Ry. Co.*, 60 Wash. 552, 111 P. 778 (1910), the respondents argued Tyler's family members were not dependent because Tyler did not "voluntarily" contribute to their financial support. CP 108-09. They also argued that, as a matter of law, adoption support payments cannot be considered financial support because they "are intended for the exclusive financial support of an adoptive child." CP 109.

The superior court granted the motion, finding there were no disputed facts. CP 114-17.

This court granted the petitioners' motions for discretionary review of the two summary judgment orders and consolidated the issues for appeal.

D. ARGUMENT

Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Berger v. Sonneland*, 144 Wn.2d 91, 102, 26 P.3d 257 (2001). The moving party bears the burden of demonstrating there is no genuine dispute as to any material fact, and all facts and reasonable inferences are considered in a light most favorable to the nonmoving party. *Id.* at 102-03. The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

1. THE SUPERIOR COURT ERRED BY DISMISSING THE PETITIONERS' RCW 26.44.030 MANDATORY REPORTING CLAIMS.

Our state legislature has established that reporting child abuse according to Chapter 26.44 is not "health care" according to Chapter 7.70. Commonsense indicates that legal intervention by the state to protect children from abuse and regulation of medical malpractice lawsuits are separate subjects. The legislature confirmed this simple concept by

addressing the two topics in separate, unrelated titles and chapters of the revised code. By demarcating these subjects into separate titles, the legislature established that reporting child abuse to government agencies is separate and distinct from the field of “health care.”

In addition, fulfilling the duty to report child abuse does not meet the definition of “health care” under Chapter 7.70. Placing a phone call to DSHS or to the local police department requires no specialized training, and it is an obligation shared by all mandatory reporters, doctors and non-doctors alike. Reporting child abuse to the appropriate agency is also not “health care” because it is not undertaken for the purpose of providing medical care. It is mandated by the legislature for the purpose of initiating legal intervention by the state.

Finally, even if there are circumstances in which making the call to DSHS or a police department could conceivably be considered “health care,” the superior court erred by dismissing the petitioners’ claims as a matter of law. The court’s ruling depends on the legal conclusion that *all* doctor reports of suspected child abuse are “health care” by virtue of the physician-patient relationship alone. To the extent other facts are relevant in resolving this issue, the court erred by granting partial summary judgment to the doctors.

a. Chapter 26.44 Establishes A System For State Intervention In Cases Of Child Abuse Or Neglect.

RCW 26.44.030 mandates the reporting of child abuse by various persons who, based on their professions, are uniquely situated to detect such abuse. Subsection (1)(a) imposes the duty on doctors,³ medical examiners, law enforcement officers, professional school personnel, nurses, social service counselors, psychologists, pharmacists, employees of the department of early learning, child care providers, DSHS employees, juvenile probation officers, placement and liaison specialists, responsible living skills program staff, HOPE center staff, and the state family and children's ombudsman or any volunteer in the ombudsman's office. Subsection 1(b) imposes the reporting duty on supervisors in organizations working with children generally. Subsection 1(c) includes Department of Corrections personnel who observe offenders or children who have contact with offenders. Under Subsection (1)(d) any adult must report "severe abuse" of a child who resides with them. In 2009 the legislature added guardians ad litem to the list of mandatory reporters. Laws of 2009, ch. 480, § 1. For all mandatory reporters, the duty arises

³ The statute imposes the duty on "practitioners". The term includes those licensed to practice pediatric medicine, "or medicine and surgery or to provide other health services." RCW 26.44.020(3).

when there is “reasonable cause to believe” a child has suffered abuse or neglect. RCW 26.44.030(1)(a)-(d).

The duty to report is immediate. RCW 26.44.040. An oral report must be made by telephone or otherwise to the proper law enforcement agency or the Department of Social and Health Services (DSHS). Id. The initial report must be followed up in writing if requested. Id.

Chapter 26.44 establishes numerous legal procedures, rights, and duties triggered by a report of child abuse. DSHS is charged with investigating such reports to determine whether the allegations are founded or unfounded. RCW 26.44.030 (10), (11). When DSHS receives a report involving death, physical injury, or sexual abuse, the department must in turn report the incident to the proper law enforcement agency. RCW 26.44.030(4). Any law enforcement agency receiving such a report must refer the incident in writing to the proper county prosecutor or city attorney for appropriate action if the agency’s investigation reveals that a crime may have been committed. RCW 26.44.030(5). When there is a risk of harm to the child while an investigation is ongoing, a prosecuting attorney may file a motion to show cause and seek a temporary restraining order to restrict visitation with the child. RCW 26.44.150.

In a judicial proceeding involving an allegation of child abuse, the court must appoint a guardian ad litem for the child. RCW 26.44.053(1). The court may order a medical examination of the person having custody of the child. RCW 26.44.053(2). The court may issue a temporary restraining order prohibiting the accused from entering the child's home and from having contact with the child. RCW 26.44.063. DSHS is required to notify parents, guardians and legal custodians of child abuse allegations made against them, and to notify them of the department's investigative findings. RCW 26.44.100. A person named as the perpetrator in a founded report of child abuse has the right to seek review and amendment of the finding by the department. RCW 26.44.125. If a parent has abused a child and been removed from the home, the court must require the parent to complete treatment and education requirements before returning to the home. RCW 26.44.140.

The legislature mandated child abuse reporting under Chapter 26.44 to facilitate "emergency intervention" by the state. RCW 26.44.010. The reporting requirement is intended to encourage reporting child abuse. *City of Seattle v. Eun Yong Shin*, 50 Wn. App. 218, 223, 748 P.2d 643 (1988). It serves a compelling state interest because "the State cannot combat the evils of child abuse without some means of bringing such abuse to light. . . ." *State v. Motherwell*, 114 Wn.2d 353, 365-66, 788 P.2d

1066 (1990). The duty to report is simply that: there is no duty to *investigate* information giving rise to the suspicion of child abuse. *Whaley v. State*, 90 Wn. App. 658, 668, 956 P.2d 1100 (1998).

b. There Is A Private Cause Of Action For Failure To Report Child Abuse.

In *Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 423, 167 P.3d 1193 (2007), the Court of Appeals held there is a private cause of action for breach of the statutory duty to report child abuse. *Doe* explained “[i]t has long been recognized that a legislative enactment may be the foundation of a right of action.” 141 Wn. App. at 421-22 (quoting *Tyner v. Department of Soc. & Health Servs.*, 141 Wn.2d 68, 77, 1 P.3d 1148 (2000)). Citing *Tyner*, the court concluded RCW 26.44.030 establishes such a foundation because the statute is intended to protect children from child abuse; legislative intent implies a remedy for child abuse victims; and a private remedy is consistent with the underlying intent of the statute. 141 Wn. App. at 422. The court explained: “imposing civil consequences for failure to report motivates mandatory reporters *to take action* to protect victims of childhood sexual abuse.” 141 Wn. App. at 422 (emphasis added).

c. Chapter 7.70 Regulates Medical Malpractice Claims Arising From “Health Care.” Health Care Is Medical Care.

Chapter 7.70 governs all actions for damages “for injury occurring as a result of health care.” RCW 7.70.010. In such an action the plaintiff must prove the healthcare provider failed to follow “the accepted standard of care.” RCW 7.70.030(1).⁴

“Health care” means the process in which a physician is “utilizing the skills which he had been taught in *examining, diagnosing, treating or caring for* the plaintiff as his patient.” *Branom v. State*, 94 Wn. App. 964, 969-70, 974 P.2d 335 (1999) (emphasis added) (quoting *Estate of Sly v. Linville*, 75 Wn. App. 431, 439, 878 P.2d 1241 (1994)). Not all actions that occur during the course of a health care provider and patient relationship constitute “health care.” *Reed v. ANM Health Care*, 148 Wn. App. 264, ___ P.3d ___ (2008 WL 5157869 at 3), citing *Linville*, 75 Wn. App. at 438.

In *Sly v Linville*, the plaintiff estate sued the defendant doctor for alleged misrepresentations made to his patient Sly concerning the quality of medical care provided by Sly’s previous doctor. The previous doctor had performed two surgeries leading to medical complications. Defendant Linville later corrected the problems in a third surgery. Linville assured his patient that what he experienced “sometimes just happens,” and that

⁴ A plaintiff may also recover if the provider promised the injury would not occur, or there was no consent to the health care. RCW 7.70.030(2)-(3).

Sly's previous doctor had provided "the best of care." The court held the doctor's statements to his patient did not constitute "health care," and the maximum eight-year statute of limitations under RCW 4.16.350 therefore did not apply. 75 Wn. App. at 440. The court explained:

Linville's breach of duty did not arise during the process in which he "was utilizing the skills which he had been taught in examining, diagnosing, treating or caring for" Sly, *but arose during his discussions with Sly about Nelson*. The fact that the misrepresentations were made during the course of the physician/patient relationship does not automatically render them "health care" for purposes of the statute of limitation.

75 Wn. App. at 440 (emphasis added, citation omitted).

In *Berger v. Sonneland*, 144 Wn.2d 91, a doctor's discussions did qualify as health care because they were undertaken to treat, diagnose, or care for the patient. Berger sought medical care from physician Sonneland, complaining of abdominal pain, diarrhea, vomiting and weight loss. Berger stated she was taking various drugs, including a narcotic painkiller. Sonneland contacted Berger's former husband, a doctor, and discussed with him Berger's request for a narcotic prescription and her past use of prescription drugs. The former husband then filed a motion to modify the custodial plan for the divorced couple's children.

The Supreme Court distinguished *Linville* and explained, "When the physician in *Linville* commented on the patient's previous physician,

he was not utilizing the skills he had been taught in examining, diagnosing, treating or caring for the patient.” In contrast, “Sonneland’s conduct did constitute “health care” because he disclosed the confidential information *in his effort to discover more information about Respondent’s use of pain medications so he could treat, diagnose, or care for her.*” 144 Wn.2d at 110 (emphasis added).

In *Reed v. ANM Health Care*, a nurse had excluded the plaintiff from a dying patient’s hospital room. The parties disputed whether the exclusion constituted health care. The court held there was a material issue of fact regarding the nurse’s motivation in excluding the plaintiff. If the nurse acted to address the patient’s medical needs, then the plaintiff’s claims arose from “health care.” If the nurse acted for other reasons, the plaintiff’s common law tort claims could proceed. In reaching this conclusion the court reviewed *Linville* and *Berger* and explained succinctly: [W]hen the conduct complained of is part of the health care provider’s *efforts to treat and care for a patient’s medical needs*, the injury occurs as a result of health care. . . .” *Reed*, 2008 WL 5157869 at 4 (emphasis added).

- d. By Addressing State Intervention In Child Abuse Cases And Regulation of Medical Malpractice Claims As Separate Subjects, The Legislature Established That Mandatory Reporting Is Not “Health Care.”

It is self-evident that state intervention in child abuse cases and regulation of medical malpractice lawsuits are separate subjects. The legislature reinforced this simple fact by addressing these subjects in separate titles and chapters of the revised code. Because these statutes speak to different subjects, one does not supersede the other. *See Department of Labor and Industries v. Baker*, 57 Wn. App. 57, 59, 786 P.2d 821 (1990) (where statutes deal with different subjects and contain different language, “the legislature intended each section to deal with a different problem, not that one would override the other”); *see also State v. Smith*, 99 Wn. App. 510, 516, 990 P.2d 468 (1999) (there is no conflict between, and no need to harmonize, statutes dealing with different subjects). The legislature’s treatment of child abuse intervention and medical malpractice actions as separate subjects establishes that mandatory reporting is not “health care” subject to the rules governing medical malpractice lawsuits.⁵

⁵ In their Answer to the petitioners’ Motion for Discretionary Review regarding mandatory reporting, the respondent doctors noted the legislature enacted Chapter 7.70 subsequent to RCW 26.44.030. From this fact the doctors assert the legislature “intended to include a reporting claim under RCW 7.70.” Respondent’s Dexter, Fregeau, & Rockwood Clinic’s Answer to Motion for Discretionary Review (10/17/08) at 7. This argument is incorrect: Washington courts “will not assume that the Legislature intended to effect a significant change in the law by implication.” *E.g., Philippides v. Bernard*, 151 Wn.2d 376, 385, 88 P.3d 939 (2004). It is also worth noting there is no implication that Chapter 7.70 changed the mandatory reporting statute.

- e. By Mandating For All Reporters A Uniform Duty Arising Under A Uniform Standard, The Legislature Further Confirmed That Reporting Child Abuse Is Not “Health Care.”

RCW 26.44.030 groups doctors with police officers, teachers, counselors, DSHS employees, probation officers, and others as mandatory reporters. The legislature thereby established that reporting child abuse is not “health care” subject to the medical malpractice rules mandated in Chapter 7.70. All mandatory reporters, including doctors, are subject to a uniform standard under RCW 26.44.030: the duty to report arises when there is “reasonable cause to believe that a child has suffered abuse or neglect.” This standard and the duty it triggers—making a phone call to DSHS or a law enforcement agency—are facially non-technical and do not involve specialized training and expertise. Thus, in contrast to the medical malpractice parameters established in Chapter 7.70, the reporting statute operates without reference to an “accepted standard of care.” By separating the reporting duty from professional standards of care, RCW 26.44.030 implements the legislature’s intent noted in *Doe*: motivating mandatory reporters “to take action” to protect child abuse victims. 141 Wn. App. at 422. The thrust of the statute is *action*. The statute creates an early detection system, applied to doctors and non-doctors alike, designed to trigger intervention to protect children. It serves a compelling state

interest because “the State cannot combat the evils of child abuse without some means of bringing such abuse to light. . . .” *State v. Motherwell*, 114 Wn.2d 353. Making no distinction between doctors, teachers, and others, RCW 26.44.030 mandates the initiation of legal intervention, not the initiation of “health care.”

f. Reporting Child Abuse To Initiate State Intervention Is Not Medical Care, And Is Therefore Not “Health Care.”

In moving for partial summary judgment, the respondent doctors argued the “only thing” they could provide their patients was “health care.” Their argument does not hold water in light of *Linville, Berger, and Reed* discussed above.

These cases plainly establish not every act taken in the course of the physician-patient relationship is “health care.” *Reed*, 2008 WL 5157869 at 3. Even when a doctor acts on the basis of professionally obtained knowledge, that fact alone does not render the action “health care.” The act *itself* must be part of an effort to examine, diagnose, treat, or care for the patient. Thus, it is *not* health care when a surgeon discusses with his patient the quality of care provided by the patient’s previous surgeon. That conversation is unrelated to any current effort to provide medical care. *Sly v Linville*. It *is* health care when a doctor seeks information about a patient’s prior use of pain medication for the purpose

of diagnosing and treating the patient. *Berger v. Sonneland*. The *Reed* court explained simply and succinctly that “health care” consists of “efforts to treat and care for a patient’s *medical needs*.” 2008 WL 5157869 at 4 (emphasis added).

Reporting child abuse is not health care because its object is not medical care. DSHS and law enforcement agencies are not health care providers: the doctor who places a phone call to DSHS or to the local police department to report child abuse is therefore not acting to treat and care for a patient’s medical needs. Rather, she is performing her statutory duty to bring child abuse to light and initiate the procedures and protections of RCW Chapter 26.44. The phone call is not “health care.” It is the first step in a process designed to provide legal care.

- g. If Facts Other Than The Existence Of The Physician-Patient Relationship Are Required To Resolve This Issue, Then The Summary Judgment Order Should Be Reversed.

The superior court ruled as a matter of law that a doctor’s child abuse report constitutes “health care” by virtue of the physician-patient relationship alone. The petitioners submit the correct legal conclusion is the reverse: that mandatory reporting under RCW 26.44.030 is never “health care” because it is not undertaken for the purpose of providing medical care. If this court holds the answer lies in-between—that

additional facts determine whether the mandatory report is health care—then the superior court’s order should be reversed because the ruling consists of a pure legal conclusion pertaining to the physician-patient relationship. The respondents pointed to no additional facts in their motion for partial summary judgment.

2. THE SUPERIOR COURT ERRED BY DISMISSING THE PETITIONERS’ WRONGFUL DEATH CLAIMS AND ESTATE CLAIMS FOR GENERAL DAMAGES.

The superior court erred in concluding Tyler’s family could not depend financially on Tyler’s adoption support as a matter of law. There is no voluntariness test applied to the deceased’s financial contributions to the family. In addition, there was no restriction against using Tyler’s adoption support money to pay shared family expenses.

a. The Financial Dependence Requirement For Second Tier Statutory Beneficiaries.

In a wrongful death action where there is no surviving spouse or child of the deceased, the action can only be prosecuted for the benefit of parents and siblings who are “dependent upon the deceased person for support.” RCW 4.20.020. The deceased’s surviving claims are similarly limited, and the deceased’s general damages may only be recovered for dependent parents and siblings. RCW 4.20.046, .060.

Whether a parent or sibling was dependent on the deceased is a jury question when substantial evidence supports such a finding.

Armantrout v. Carlson, 141 Wn. App. 716, 723, 170 P.3d 1218 (2007),
review granted, 164 Wn.2d 1024 (2008).

Dependent means financially dependent. *Armantrout* at 722. However, the parent or sibling need not be wholly dependent on the deceased. *Armantrout* at 722; *Estes v. Schulte*, 146 Wash. 688, 689, 264 P. 990 (1928); *Cook v. Rafferty*, 200 Wash. 234, 240, 93 P.2d 376 (1939). “[P]artial but significant dependence will suffice.” *Armantrout* at 722; *accord*, *Cook* at 240. A beneficiary may thus depend on the deceased even though the beneficiary has other sources of income. *Cook v. Rafferty* (dependent parents received income from both the deceased and another relative); *Mitchell v. Rice*, 183 Wash. 402, 48 P.2d 949 (1935) (father depended on son despite owning income-producing real estate). A parent may depend on a child even though the child receives relatively more support from the parent. *Hogan v. Williams*, 193 F.2d 220 (5th Cir. 1952).

A deceased’s government-provided benefits can be a source of financial support for a dependent parent or sibling. In *Armantrout* the plaintiffs’ daughter was receiving Social Security disability benefits of \$588 per month at the time of her death. The daughter lived with her parents and contributed her benefits checks to payment of the family expenses. Given these facts, the *Armantrout* court concluded, “substantial

evidence supports that the Armantrouts financially depended on Kristen's monetary contribution to the family.” 141 Wn. App. at 723.

Household members can be mutually dependent. In *Ditto v. Stoneberger*, 145 Md. App. 469, 805 A.2d 1148 (2002), the court examined Maryland's wrongful death statute which, like Washington, requires that secondary beneficiaries be “substantially dependent” on the deceased. The deceased, Edward, had lived with his sister Mary and niece Candi. Edward and Mary were mentally retarded, and all three household members received Social Security Disability benefits. The Social Security Administration mailed Edward's and Candi's checks directly to a neighbor caretaker who managed the finances for the household. The neighbor deposited the benefits checks into the recipients' respective bank accounts. The neighbor paid the household bills, rotating payments from the three accounts. Candi received less benefits: when her account was used to pay bills the neighbor supplemented the payments with money from either Edward's or Mary's account.

Ditto rejected the defendants' arguments that Mary and Candi were not dependent on Edward:

The Stoneberger household illustrates the fact that three people united under one roof can live, proportionally, more cheaply than two In a practical sense, each of the individuals were dependent on each other because if any of the three

were to leave, fixed costs would decrease, but not nearly as much as total family income.

Ditto also rejected the defendants' argument that Edward's social security benefits could not be "shared". The court examined federal law governing the distribution of disability benefits by the states and concluded the only restriction placed on these funds was that they be used for disability payments and not for other purposes. 805 A.2d at 1161. Thus, "if a recipient of disability benefits wanted to do so, he or she could give to a relative, or any other person, every cent received in disability payments" 805 A.2d at 1161.

In assessing financial dependence, Washington courts have distinguished between the deceased's contributions for the necessities of life versus mere gift giving. In *Bortle v. N. Pac. Ry. Co.*, 60 Wash. 552, the deceased's father earned a monthly income to support himself and his wife. 60 Wash. at 554. The mother and father estimated their son had given them approximately one hundred dollars per year, but they could not specify when or how much their son had provided them with money. *Id.* The mother recalled three occasions when her son gave her money in the amounts of twenty dollars, seven dollars, and five dollars. *Id.* *Bortle* held this evidence did not establish more than gift giving by the deceased:

This evidence does not, in our opinion, establish such a support or dependency as is contemplated by

the statute. It shows nothing more than such gifts as countless sons occasionally bestow upon their parents, with no thought of dependency, nor that it is a gift of necessity.

Id. The court explained that Washington's survival statute does not require complete dependence, but "there must be some degree of dependency, some substantial dependency, a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child."

Id. See also, *Mitchell v. Rice*, 183 Wash. 402 (son's recognition of father's dependence must be shown "not merely by way of casual gifts from a son to a father, but in recognition of the father's dependency").

Washington courts continue to cite *Bortle's* "necessitous want" and "recognition of that necessity" language as the starting point for assessing financial dependence. *E.g. Armantrout* at 722.

b. There Is No Voluntariness Test For A Deceased's Financial Contributions.

In moving for partial summary judgment, the respondents argued that *Bortle's* "recognition of necessity" language implied a voluntariness requirement for a deceased's financial contributions. According to the doctors, there was no dependence because Tyler did not voluntarily provide financial support to his family. This argument is unpersuasive: neither *Bortle* nor any other Washington case addressing financial dependence involves a voluntariness issue. As previously noted, the

Bortle formula is used to distinguish support for the necessities of life versus mere gift giving. Petitioners are aware of no case imposing a voluntariness requirement on a decedent's financial contributions.

In addition, the wrongful death and survival statutes contain no voluntariness requirement. RCW 4.20.020, .046, .060. These laws require *only* that second tier beneficiaries (parents and siblings) be financially dependent on the deceased. To write a voluntariness requirement into these statutes would unfairly penalize those most in need of protection under the law: incapacitated persons who are unable—for whatever reason—to make knowing and voluntary financial decisions. Such a rule would single out these persons and their survivors for diminished protection from the acts of tortfeasors. From the tortfeasor's perspective, to cause injury or death to one who is not competent to make financial decisions would be, all else being equal, a stroke of good luck.

Writing a voluntariness standard into the wrongful death and survival statutes would invite Equal Protection challenges. The Equal Protection Clause “provides a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others, and for contending that general rules are being applied in an arbitrary or discriminatory way.” *Jones v. Helms*, 452 U.S. 412, 423-24, 101 S.Ct. 2434, 69 L.Ed.2d 118 (1981).

Ditto v. Stoneberger is instructive. The deceased, described in the opinion as mentally retarded, did not handle his benefits checks. The checks were mailed directly to the caretaker neighbor who managed the household finances. The caretaker exercised her discretion in withdrawing money from the three bank accounts to pay the household bills. The opinion contains nothing to suggest the deceased's contributions were "voluntary." Yet the Maryland court had no difficulty concluding his sister and niece depended on him for financial support.

c. There Was No Restriction Against Using Tyler's Adoption Support To Help Pay Family Expenses.

The respondents argued below that Tyler's adoption support could not legally be used to pay family expenses. This argument fails because the contract between the state and the adoptive mother placed no restriction on the use of funds.

DSHS regulations confirm the Revised Adoption Support Agreement is binding between the parties and defines their respective obligations:

The adoption support agreement is a binding contract between the adoptive parent(s) and the department that *identifies the terms and conditions that both parties must follow.*

WAC 388-27-0170 (emphasis added).

The Revised Agreement between DSHS and Tyler's adoptive parent specified that DSHS would make monthly adoption support payments of \$717. The Agreement listed the adoptive mother's responsibilities and imposed no restriction of any kind on how the money was spent. It acknowledged that the monthly payments could be adjusted due to changes in the "circumstances of the adoptive family."

Since the Revised Agreement identified "the terms and conditions that both parties must follow," it is clear the adoptive parent could use the money to pay for shared family expenses. Indeed, the state *expects* the funds to be used this way. The clause in the Agreement permitting adjustments for changes in family circumstances echoes state law emphasizing the needs of the family in determining the amount of adoption support. Factors in determining adoption support include:

The size of the family including the adoptive child, the usual living expenses of the family, the special needs of any family member including education needs, the family income, the family resources and plan for savings, the medical and hospitalization needs of the family. . . .

RCW 74.13.112.

The Revised Agreement did not restrict the use of support funds, and adoption support is calibrated in part according to the family's needs.

The respondents' claim that Tyler's support could not legally be applied to family expenses is without substance.

d. Tyler "Owned" His Adoption Support Benefits.

The respondent doctors have also asserted that adoption support payments "were not benefits owned by Tyler."⁶ This statement is incorrect: eligible children are entitled to adoption support, and support payments are made on their behalf. Federal law *requires* adoption support to be paid for eligible children.

WAC 388-27-0120 explains the legal basis for adoption support:

The legal authorities for the program are:

...

(3) The U.S. Department of Health and Human Services (DHHS) policy guidelines for states to use in determining *a child's eligibility* for Title IV-E adoption assistance (contained in DHHS Policy Manual).

(Emphasis added.) The DHHS Policy Manual explains states are required to provide adoption support "*to all eligible children* on whose behalf it is requested." (Emphasis added). DHHS Child Welfare Policy Manual § 8.2B (Question 4) (attached as Appendix).

⁶ Respondents Dexter, Fregeau, & Rockwood Clinics' Answer to Motion for Discretionary Review (10/15/08) at 13.

Washington State regulations further clarify it is the child who qualifies for and receives adoption support. Payments are made “to the adoptive parent(s) on behalf of the child.” WAC 388-27-0175(1). Adoption support agreements must inform the adoptive parent that DSHS may “suspend a child from the program” when changing circumstances “affect the child’s eligibility for program payments.” WAC 388-27-0175(3)(d). Department regulations specify the parameters “for a child to be eligible for participation in the adoption support program.” WAC 388-27-0135. Some adopted children are ineligible for payments:

A child is *not eligible for* adoption support program services and *payments* if the adopting parent is the birth parent or stepparent of the child.

WAC 388-27-0155.

Finally, the Revised Adoption Support Agreement recited that Tyler “is eligible for Federal IV-E Adoption Assistance benefits.” CP 83. Without doubt, Tyler had a property interest in his adoption support benefits.

3. CONCLUSION

The superior court’s order dismissing the petitioner’s RCW 26.44.030 claims should be reversed because mandatory reporting of child abuse is not undertaken to provide health care. The report is the first step in a process designed to facilitate legal intervention by the state. Doctors

are not immune from civil liability under the statute by virtue of the physician-patient relationship.

The dismissal of the petitioners' wrongful death claims and estate claims for general damages should also be reversed. Washington courts have not imposed a voluntariness test on a deceased's financial contributions to the family. Such a test would penalize those who lack capacity to make financial decisions and would likely offend the Equal Protection Clause. In addition, the record establishes unambiguously there were no legal restrictions on how Tyler's adoption support money was spent. Adoption support is calibrated to the family's circumstances, and Tyler's family had every right to depend on his support.

DATED this the 29 day of June, 2009.

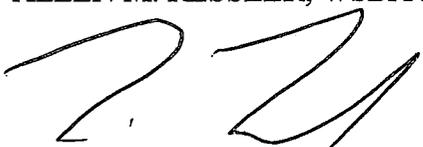
Respectfully submitted,

RESSLER & TESH

By:


ALLEN M. RESSLER, WSBA No. 5330

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APPENDIX



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8.2B TITLE IV-E, Adoption Assistance Program, Eligibility

- 1. Please explain who is eligible for title IV-E adoption assistance.
- 2. Does a child need to be continuously eligible for Aid to Families for Dependent Children (AFDC) during the period s/he is in foster care in order to be eligible for adoption assistance after the termination of parental rights?
- 3. Are children whose legal guardianships disrupt eligible for title IV-E adoption assistance?
- 4. Is the State required to provide title IV-E adoption assistance to all eligible children on whose behalf it is requested?

1. Question: Please explain who is eligible for title IV-E adoption assistance. [Show History](#)

Answer: A State is required to enter into an adoption assistance agreement with the adoptive parents of a child with special needs (as defined in section 473(c) of the Social Security Act (the Act)) and provide adoption assistance if the child meets specific requirements. There are four ways that a child can be eligible for title IV-E adoption assistance:

1. Child is eligible for Aid to Families with Dependent Children (AFDC) and meets the definition of a child with special needs - Adoption assistance eligibility that is based on a child's AFDC eligibility (in accordance with the program rules in effect on July 16, 1996) is predicated on a child meeting the criteria for such at the time of removal. In addition, the State must determine that the child meets the definition of a child with special needs prior to finalization of the adoption.

The method of removal has the following implications for the AFDC-eligible child's eligibility for title IV-E adoption assistance: If the child is removed from the home pursuant to a judicial determination, such determination must indicate that it was contrary to the child's welfare to remain in the home; or if the child is removed from the home pursuant to a voluntary placement agreement, that child must actually receive title IV-E foster care payments to be eligible for title IV-E adoption assistance.

Children placed pursuant to a voluntary placement agreement under which a title IV-E foster care maintenance payment is not made are not eligible to receive title IV-E adoption assistance.

2. Child is eligible for Supplemental Security Income (SSI) benefits and

meets the definition of a child with special needs - A child is eligible for adoption assistance if the child meets the requirements for title XVI SSI benefits and is determined by the State to be a child with special needs prior to the finalization of the adoption.

There are no additional criteria that a child must meet to be eligible for title IV-E adoption assistance when eligibility is based on a special needs child meeting SSI requirements. Specifically, how a child is removed from his or her home or whether the State has responsibility for the child's placement and care is irrelevant in this situation.

Unlike AFDC eligibility that is determined by the State child welfare agency, only a designated Social Security Administration claims representative can determine SSI eligibility and provide the appropriate eligibility documentation to the State.

3. Child is eligible as a child of a minor parent and meets the definition of a child with special needs - A child is eligible for title IV-E adoption assistance in this circumstance if: prior to the finalization of the adoption, the child's parent was in foster care and received a title IV-E foster care maintenance payment that covered both the minor parent and the child of the minor parent and is determined by the State to meet the definition of a child with special needs.

There are no additional criteria that must be met in order for a child to be eligible for title IV-E adoption assistance if the child's eligibility is based on his or her minor parent's receipt of a foster care maintenance payment while placed with the minor parent in foster care. As with SSI, there is no requirement that a child must have been removed from home pursuant to a voluntary placement agreement or as a result of a judicial determination.

4. Child is eligible due to prior title IV-E adoption assistance eligibility and meets the definition of a child with special needs - In the situation where a child is adopted and receives title IV-E adoption assistance, but the adoption later dissolves or the adoptive parents die, a child may continue to be eligible for title IV-E adoption assistance in a subsequent adoption. The only determination that must be made by the State prior to the finalization of the subsequent adoption is whether the child is a child with special needs, consistent with the requirements in section 473 (c) of the Act. Need and eligibility factors in section 473(a)(2)(A) of the Act must not be redetermined when such a child is subsequently adopted because the child is to be treated as though his or her circumstances are the same as those prior to his or her previous adoption. Since title IV-E adoption assistance eligibility need not be re-established in such subsequent adoptions, the manner of a child's removal from the adoptive home, including whether the child is voluntarily relinquished to an individual or private agency, is irrelevant.

- **Source/Date:** ACYF-CB-PA-01-01 (1/23/01); 7/17/2006
- **Legal and Related References:** Social Security Act - sections 473(a)(2) and 473(c) ; The Deficit Reduction Act of 2005

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2. Question: Does a child need to be continuously eligible for Aid to Families for Dependent Children (AFDC) during the period s/he is in foster care in order to be eligible for adoption assistance after the termination of parental rights? [Show History](#)

Answer: No. A child for whom eligibility for title IV-E adoption assistance payments is being established need not have been continuously eligible for AFDC during his or her tenure in foster care. The statute requires that the child be eligible for AFDC only at the time of the child's removal from the home (section 473(a)(2)(A)(i)(I)(bb) of the Social Security Act).

Please see the Child Welfare Policy Manual at 8.2B for an explanation of all the eligibility criteria for the adoption assistance payments program.

- **Source/Date:** 03/14/07
- **Legal and Related References:** Social Security Act - section 473

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3. Question: Are children whose legal guardianships disrupt eligible for title IV-E adoption assistance? [Show History](#)

Answer: If a child who had been receiving title IV-E foster care maintenance payments prior to a legal guardianship returns to foster care or is placed in an adoptive home after disruption of the legal guardianship, the factors below must be considered in determining the child's eligibility for title IV-E adoption assistance:

1) Title IV-E Demonstration Waiver States - In States that have an approved title IV-E demonstration waiver from the Department to operate a subsidized legal guardianship program, the title IV-E terms and conditions allow reinstatement of the child's title IV-E eligibility status that was in place prior to the establishment of the guardianship in situations where the guardianship disrupts. Therefore, if a guardianship disrupts and the child returns to foster care or is placed for adoption, the State would apply the eligibility criteria in section 473 of the Social Security Act (the Act) for the child as if the legal guardianship had never occurred.

2) Non-Demonstration Waiver States - In States that do not have an approved title IV-E demonstration waiver from the Department, the eligibility requirements in section 473 of the Act must be applied to the child's current situation. Therefore, in a situation where the child has returned to foster care from the home of a non-related legal guardian, the child would not be eligible for title IV-E adoption assistance since the child was not removed from the home of a specified relative. If, however, the child has been removed from the home of a related legal guardian, an otherwise eligible child could be eligible for title IV-E adoption assistance.

In either situation, however, if a child meets the eligibility criteria for Supplemental Security Income and meets the definition of special needs prior to the finalization of the adoption, the child would be eligible for title IV-E adoption assistance. If a child meets these criteria, no further eligibility criteria must be met.

- **Source/Date:** ACYF-CB-PA-01-01 (1/23/01); 7/17/2006
- **Legal and Related References:** Social Security Act - sections 473; The Deficit Reduction Act of 2005

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4. Question: Is the State required to provide title IV-E adoption assistance to all eligible children on whose behalf it is requested?

Answer: Yes, if the child meets the criteria in section 473 of the Social Security Act (the Act). Section 473(a)(1)(A) of the Act specifies that "[e]ach State having a plan approved under this part **shall** [emphasis added] enter into adoption assistance agreements (as defined in section 475(3) of the Act) with the adoptive parents of children with special needs." Further, sections 473(a)(1)(B)(i) and (ii) of the Act require States to make payments of nonrecurring adoption expenses incurred by or on behalf of parents in connection with the adoption of a child with special needs and/or adoption assistance payments on behalf of a child who meets the requirements of section 473(a)(2) of the Act.

- **Source/Date:** 04/24/07

- **Legal and Related References:** Social Security Act – sections 473(a) and 475(3)

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