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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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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.

DAVID FREGEAU, MD; the ROCKWOOD CLINIC a Washington State corporation; SANDRA BREMNER-DEXTER MD,

Respondents.

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	Page
A. <u>RCW 26.44.030 IS NOT AN OCCUPATIONAL NEGLIGENCE STATUTE AND DOES NOT CONFLICT WITH CHAPTER 7.70</u>	1
B. TYLER'S FAMILY DEPENDED ON HIS ADOPTION SUPPORT	5
1. THERE IS NO "EXCLUSIVE USE" RULE REGULATING HOW ADOPTION SUPPORT IS SPENT	5
2. THERE IS NO VOLUNTARINESS TEST APPLICABLE TO THE DECEASED'S FINANCIAL CONTRIBUTIONS	8
C. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>Armantrout v. Carlson</i> , 141 Wn. App. 716, 170 P.3d 1218 (2007), <i>review granted</i> , 164 Wn.2d 1024 (2008).....	10
<i>Berger v. Sonneland</i> , 144 Wn.2d 91, 26 P.3d 257 (2001).....	3
<i>Bortle v. N. Pac. Ry. Co.</i> , 60 Wash. 552, 111 P. 778 (1910).....	9
<i>Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints</i> , 141 Wn. App. 407, 4167 P.3d 1193 (2007).....	5
<i>Kanton v. Kelly</i> , 65 Wash. 614, 118 P. 890 (1911).....	9
<i>Masunaga v. Gapasin</i> , 52 Wn. App. 61, 757 P.2d 550 (1988).....	9
<i>Reed v. ANM Health Care</i> , 148 Wn. App. 264, ___ P.3d ___ (2008).....	2, 3, 4
<i>Sly v. Linville</i> , 75 Wn. App. 431, 878 P.2d 1241 (1994).....	3
<i>Whaley v. State</i> , 90 Wn. App. 658, 956 P.2d 1100 (1998).....	1

FEDERAL CASES

<i>Hogan v. Williams</i> , 193 F.2d 220 (5th Cir. 1952)	10
--	----

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>OTHER JURISDICTIONS</u>	
<i>Ditto v. Stoneberger</i> , 145 Md. App. 469, 805 A.2d 1148 (2002).....	9, 10
 <u>RULES, STATUTES AND OTHER</u>	
Chapter 26.44 RCW.....	1, 2, 4
Chapter 7.70 RCW.....	1, 2, 3
RCW 26.44.030	1, 4
RCW 74.13.100	7
RCW 74.13.112	7
RCW 74.13.118	7
WAC 388-27-0170.....	6
WAC 388-27-0195.....	7
WAC 388-27-0220.....	7
WAC 388-27-0230.....	7
WAC 388-27-0280.....	7

A. RCW 26.44.030 IS NOT AN OCCUPATIONAL NEGLIGENCE STATUTE AND DOES NOT CONFLICT WITH CHAPTER 7.70.

The respondents portray RCW 26.44.030 as a statutory scheme addressing “occupational negligence” stemming from a duty to “diagnose” child abuse. Response at 14-15. From this, they reason the reporting statute conflicts with the liability and evidentiary standards for medical negligence provided in Chapter 7.70. *Id.* The doctors also argue that healthcare providers are not on the same footing as other professionals covered by RCW 26.44.030 because “the legislature has not carved out a separate statutory scheme for occupational negligence for other professionals.” Response at 15.

The argument is unpersuasive because RCW 26.44.030 is not an occupational negligence statute. Chapter 26.44 establishes a statutory mechanism for legal intervention by the state to protect children from abuse and neglect. Part of that mechanism is an early warning system mandating that specified professionals report suspected child abuse. The chapter does not speak to “occupational negligence.” It simply imposes a uniform duty on the listed professionals to report abuse to specified government agencies. Under RCW 26.44.030, there is no duty to *investigate* suspected child abuse. *Whaley v. State*, 90 Wn. App. 658, 668, 956 P.2d 1100 (1998). Therefore, there is no “duty to diagnose” child

abuse. Consequently, the mandatory reporting statute is not concerned with “occupational negligence.”

Chapters 26.44 and 7.70 are thus dedicated to different subjects: legal intervention to protect children and medical negligence, respectively. Therefore, no conflict arises from the different liability and evidentiary standards established in these laws. It is also irrelevant whether or not the legislature has enacted occupational negligence laws for other mandatory reporters.

The respondents also argue that reporting child abuse to a government agency is “healthcare” because “making a diagnosis” of child abuse and reporting it to the police are “part of the same process.” Response at 16. They reason that “conveying information about the provider’s diagnosis to others” constitutes healthcare. *Id.* This formulation is overbroad and does not withstand casual scrutiny. It is not healthcare when a doctor conveys medical information to the patient’s health insurer for billing purposes, or when a doctor conveys medical diagnoses to a party in a legal proceeding. It is well established that not every action by a doctor occurring during the course of the physician-patient relationship constitutes “healthcare.” *Reed v. ANM Health Care*, 148 Wn. App. 264, 269, ___ P.3d ___ (2008). As *Reed* sensibly explained,

“healthcare” under Chapter 7.70 consists of “efforts to treat and care for a patient’s *medical needs*. . . .” 148 Wn. App. at 271 (emphasis added).

The focus on medical care is the common thread running through Washington decisions addressing what does or does not constitute “healthcare.” It makes sense that the physician in *Berger v. Sonneland*¹ was providing healthcare when he disclosed confidential information to another doctor, because the disclosure was part of the doctor’s effort to “discover more information” about his patient “so he could treat, diagnose, or care for her.” 144 Wn.2d at 110. In contrast, in *Sly v. Linville*,² a doctor’s discussions with his patient concerning the quality of *previous* care were not part of the doctor’s current efforts to treat and care for the patient. 75 Wn. App. at 440.

Linville underscores an important point: a doctor’s act is not “healthcare” merely because it is causally connected to medical care previously provided. In *Linville*, the defendant doctor’s conversations with his patient undoubtedly stemmed from the corrective surgery performed by the doctor. Nevertheless, this “but for” causal link did not render those conversations “healthcare” under RCW Chapter 7.70. *Reed*

¹ 144 Wn.2d 91, 26 P.3d 257 (2001).

² 75 Wn. App. 431, 878 P.2d 1241 (1994).

v. ANM Health Care reinforces this principle. The conduct examined in *Reed* occurred at the heart of a healthcare-intensive scenario: a dying patient's hospital care. Even in this context, whether a nurse's acts qualified as "healthcare" depended on a factual inquiry into whether they were undertaken to care for the patient's medical needs. *Reed*, 148 Wn. App. at 271.

Washington law does not support the respondents' attempt to lump child abuse reporting together with medical care as "part of the same process." The straightforward question to be asked is whether reporting child abuse to the police or to DSHS is part of a doctor's efforts "to treat and care for a patient's medical needs" *Reed* at 271. The straightforward answer is "no" because police officers and DSHS employees have nothing to do with providing medical care. The purpose of the call, as indicated by the substance and structure of Chapter 26.44, is to invoke state legal protection for children, not to deliver medical care.

In sum, RCW 26.44.030 is not an occupational negligence statute and imposes no duty to provide competent healthcare. Reporting child abuse to law enforcement agencies is not a vehicle for providing medical care, and is therefore not "healthcare." Washington recognizes a private right of action under the mandatory reporting statute. *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 order dismissing the petitioners' claims under RCW 26.44.030 should be reversed.

B. TYLER'S FAMILY DEPENDED ON HIS ADOPTION SUPPORT.

1. THERE IS NO "EXCLUSIVE USE" RULE REGULATING HOW ADOPTION SUPPORT IS SPENT.

The respondents have never contested that Tyler's family members *in fact* depended financially on his adoption support. However, they argue the law bars recognition of that dependence because the money was "intended for the exclusive support" of Tyler.³ Neither the law nor the facts of this case support the doctors' argument.

The doctors' exclusivity theory carries an implication of wrongdoing in the handling of adoption support payments. The doctors appear to argue that the income from adoption support should be disqualified under the wrongful death and claim survival statutes because there was some sort of misconduct associated with it. The argument lacks substance because, as established by the contract between DSHS and the adoptive parent, Tyler's adoption support was lawfully received and lawfully spent.

³ Response at p. 8.

The Revised Adoption Support Agreement placed no restriction on how the money could be spent.⁴ There was therefore no prohibition against using the money to pay family expenses. The Agreement was a binding contract indentifying “the terms and conditions that both parties must follow.” WAC 388-27-0170. The respondents have not claimed there was a breach of the Agreement—indeed, they have resolutely avoided mentioning the document in their Response. The Agreement lays to rest the doctors’ exclusivity argument, and analysis of this issue should end here.

In any event, Washington law does not support the respondents’ exclusivity theory. There is no statute or regulation prohibiting the use of support funds to pay shared expenses. DSHS does not require an accounting of expenditures from the adoptive parent. The parent is not required to purchase groceries for the adopted child in a separate grocery bag, or to request a separate tab at a restaurant, or to sequester purchases of socks and underwear, or to calculate the square footage of the adopted child’s sleeping area in order to prorate the child’s share of the mortgage payment.

⁴ The Agreement is reproduced at CP 83-84 and described in the petitioners’ opening brief at page 6.

The respondents' theory also fails because support for the family is a central theme of the adoption support program. The legislature declared it is the state's policy to encourage adoption of "hard to place children" so they can benefit from the "stability and security of permanent homes in which such children can receive continuous parental care, guidance, protection, and love. . . . RCW 74.13.100. Among the factors governing the amount of adoption support are the size of the family, the living expenses of the family, the "special needs of any family member," and the medical and hospitalization needs of the family. RCW 74.13.112; *accord* WAC 388-27-0230; *see also* WAC 388-27-0220 ("The department bases the amount of support it provides on the child's needs *and the family's circumstances.*") (Emphasis added.) Adjustments to the amount of adoption support are allowed due to "changes in the needs of the child, in the adoptive parents' income, resources, and expenses for the care of such child *or other members of the family.*" RCW 74.13.118 (emphasis added); *see also* WAC 388-27-0195 (adoptive parent may request renegotiation of benefits "whenever *either* the family's economic circumstances *or* the condition of the child changes") (emphasis added); WAC 388-27-0280 (review process allows adoptive parent to describe "changes in the family circumstances *or* the child's condition") (emphasis added).

These statutes and regulations illustrate that adoption support is not calibrated exclusively to expenses for the adopted child. The program also aims to support the family environment surrounding the child. Were this not so, the amount of support would not be affected by the size of the family, the needs of other family members, or changes in the family's economic circumstances.

In summary, the Revised Adoption Support Agreement sinks the doctors' "exclusive use" theory. In addition, there is no Washington law or regulation prohibiting an adoptive parent from spending adoption support on shared family expenses. The adoption support program embraces the family environment in determining the benefits paid. The respondents' argument that adoption support income should be disqualified under Washington's wrongful death and claim survival statutes is without merit.

2. THERE IS NO VOLUNTARINESS TEST APPLICABLE TO THE DECEASED'S FINANCIAL CONTRIBUTIONS.

The respondents urge this court to write a voluntariness requirement into the wrongful death and claim survival statutes. They argue such a test is "implied" by previous Washington decisions. However, these decisions do not address whether knowing, voluntary conduct by the deceased is a mandatory precondition for giving *legal*

effect to financial dependence in fact. Rather, the cases relied on by the respondents⁵ merely assess whether there was *in fact* financial dependence, and they guide the factual inquiry by distinguishing occasional gift giving from regular financial support.

The issue before this court is not whether Tyler's family in fact depended on his \$700 monthly support. The respondents have not contested that claim. The issue is whether the law defining statutory beneficiaries disqualifies that dependence in cases where the deceased did not make knowing and voluntary financial decisions. The relevant statutes contain no such disqualification. The petitioners submit such a rule would discriminate against incapacitated persons and their heirs. It would provide a windfall to tortfeasors who cause the injury or death of those who lack capacity. The rule proposed by the respondents would thus remove the protection of the law from a vulnerable segment of society. This court should not adopt such a rule.

The doctors mischaracterize *Ditto v. Stoneberger*,⁶ claiming the deceased in that case was "voluntarily contributing" financial support to

⁵ *Bortle v. N. Pac. Ry. Co.*, 60 Wash. 552, 111 P. 778 (1910); *Kanton v. Kelly*, 65 Wash. 614, 118 P. 890 (1911); *Masunaga v. Gapasin*, 52 Wn. App. 61, 757 P.2d 550 (1988).

⁶ 145 Md. App. 469, 805 A.2d 1148 (2002).

the household. The deceased in *Ditto* was mentally retarded and never handled his social security checks. Those checks were mailed to a neighbor who deposited them and exercised her discretion to pay family expenses with the funds. Nothing in the opinion suggests the deceased made knowing and voluntary decisions regarding the disposition of his social security benefits. *Ditto* supports the principle that family members can be financially dependent on a deceased who lacks capacity to make informed, voluntary financial decisions.

The doctors also mischaracterize the petitioners' arguments regarding financial dependence. They attribute to the petitioners a claim that Tyler "was not dependent on his adoptive mother." Response at 5. This rhetoric misses the point: financial dependence is not mutually exclusive, and family members can be mutually dependent. *E.g., Ditto v. Stoneberger; Hogan v. Williams*, 193 F.2d 220 (5th Cir. 1952); *see also, Armantrout v. Carlson*, 141 Wn. App. 716, 723, 170 P.3d 1218 (2007), *review granted*, 164 Wn.2d 1024 (2008). The record in this case shows that the DeLeon family depended both on Tyler's adoption support and on Carole DeLeon's earnings.

Finally, the respondents argue there can be no dependence on a child's income. They offer a slippery slope littered with "absurd results" should the law fail to reject a child's government benefits as a source of

family support. Response at 8-9. But the doctors rely on absurd examples to make their case. A “tuition discount from a private school” would not likely form the basis for a claim of financial dependence. The respondents do not elaborate on their “federal economic stimulus payment” example, but a one-time government payment is also not likely to provoke a dependence claim. A parent’s income tax deduction affects the *parent’s* income and is unrelated to income from the child. The WIC program is easily distinguished. That program provides checks to buy up to \$50 of groceries per month. Tyler’s monthly adoption support payments were fourteen times that amount.

C. CONCLUSION

The superior court summary judgment orders should be reversed. Mandatory reporting of child abuse initiates a process of legal care, not “healthcare.”

It is undisputed that Tyler's family in fact depended on his adoption support. The respondents have failed to show why that income should be disqualified for the purposes of determining statutory beneficiaries under the wrongful death and claim surviving statutes.

DATED this 10th day of September, 2009.

Respectfully submitted,

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