

No. 94292-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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ALYSSA ARELLANO-HAWKINS, a minor child, and  
DEYANIRA ARELLANO, individually, and as  
legal guardian for the minor child,

*Petitioner,*

vs.

DEACONESS MEDICAL CENTER,  
a Washington Non-Profit Corporation.

*Respondent.*

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**PETITIONER'S REPLY TO ANSWER TO  
MOTION FOR DISCRETIONARY REVIEW**

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## I. ARGUMENT

### A. THE SPOKANE COUNTY SUPERIOR COURT IS DESIROUS OF IMMEDIATE REVIEW

The Honorable Judge John O. Cooney believed his ruling/order dismissing the mother's claim for consortium damages was an immediately appealable order. Pursuant to RAP 2.3(b)(4), the superior court found the order involved a controlling question of law as to which there is substantial ground for a difference of opinion and immediate review of the order may materially advance the ultimate termination of litigation. As a result, Judge Cooney invited and granted the mother's request for certification. In its response to the motion for discretionary review, Deaconess Medical Center advances the same arguments previously rejected by the superior court.

In ruling on certification, Judge Cooney made the following observations and comments:

The case law on point or closest on point deals with spouses. That's substantially different than minors because you wouldn't be tolling the statute of limitations because there wouldn't be a minority with spouses....

We're dealing with a statute authorizing or allowing parents to bring an action for a loss of consortium. Here's where I think there is at least some disagreement. I guess it could be considered substantial. First, I can't find any case law regarding whether a parent's loss of consortium claim would be tolled because of the injured party, that being the minor, being a minor. Maybe there is no case law because it's just that simple, it doesn't toll.

When I read 4.24.010, that statute authorizes a mother or father or both to bring a claim for loss of consortium for an injury or death to their child. And the statute specifically states they may maintain or join as a party an action as a plaintiff. Obviously, they can maintain a separate cause of action, just like a spouse could. But then it says “or join as a party,” and the question is whether or not the legislature intended that to mean that it’s their election as to whether to start their own action or join as a party. If they can join as a party, then is the statute of limitations tolled as it would be for the injured minor?

...

I think there is a substantial disagreement as to whether or not, at the election of the parent, they may join, and if they can join, does that toll the statute of limitations, is that what the legislature intended when they included “or” in there. The Court does find the first prong of Rule 2.3 applies.

Second, will it advance or terminate litigation. It would advance litigation in that clearly the parent’s claim is conditioned upon a finding of negligence for the child. Without this going forward, we’d end up trying the case twice assuming the plaintiff was able to prove the defendant was negligent. So there does appear to be the advancement of litigation if this matter were resolved because the claims could all be tried at once.

Contrary to Deaconess’ opinion, both Ms. Arellano and the Superior Court found a basis to take the issue up on appeal. To interpret a statute involving an important parental right granted by the legislature, direct review is respectfully requested.

(See Appendix attached hereto.)

B. WASHINGTON HAS LONG RECOGNIZED AND VALUED PARENTAL CONSORTIUM CLAIMS

Deaconess Medical Center's position that the law is well settled is based only upon cases articulating spousal consortium claims.<sup>1</sup> In such circumstances spouses are subject to the standard three (3) year statute of limitations just as the underlying injured claimant/spouse would be so subject. The flaw is that the underlying claimant at issue here is an injured child with a larger statute of limitations given her minority/incompetency status. Consequently, there is no marital community nor two adults with separate independent legal rights. Deaconess fails to acknowledge the parent-child relationship is distinct factually and under the law.

In **Harris v Puget Sound Electric Ry**, 52 Wn. 299 (1909), Washington courts first dealt with parental consortium claims. The court found when a minor was injured, two causes of action arise – one in favor of the minor for pain and suffering and permanent injury, the other in favor of the parents for loss of services during the minority, or expenses of treatment. Id. “These causes may be joined or tried in separate actions.” Id.

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<sup>1</sup> See *Reichelt v Johns-Manville Corp*, 107 Wn.2d 761 (1987), *Green v American Pharmaceutical Co.*, 136 Wn.2d 87 (1998), *Oltman v Holland America Line USA, Inc.*, 163 Wn.2d 236 (2008), *Ginochio v Hesston Corp.*, 46 Wn.App. 843 (1987).

The Washington highest court again addressed parental consortium actions in **Flessher v Carstens Packing Co.**, 96 Wn. 505 (1917). The action was tried without including the father's claim for medical attendance and loss of services during the child's minority. The Flessher court again noted that these action may be joined or tried separately and that when a minor is injured two causes arise. Id. The court found:

“Where a minor is injured through the negligence of another, and an action is brought by the parent as a guardian ad litem, and in that action recovery is sought by the complaint, or there are litigated therein any items of damage which belong to the parent, a subsequent action cannot be waged by the parent for the same items, because, by including them in the action in which the parent is guardian ad litem, the minor was authorized to recover such item or items of damage, and the parent is estopped from subsequently recovering therefor.”

**Flessher**, 96 Wn. at 509.

Since the items were not litigated in the underlying action, the court permitted the father to proceed with his parental consortium claim.

Fast forward to 1984, our highest court dealt with a parental consortium claim from a child's perspective in **Ueland v Reynolds**, 103 Wn.2d 131 (1984). The case required the court to decide whether children have a separate cause of action for parental consortium when a parent is injured through the negligence of another. The father was severely injured at work causing significant mental and physical disabilities. The mother

and father were separated and going through a divorce. The father brought action and resolved the underlying negligence claim. Later, the mother, as guardian for the minor children, brought a subsequent action for loss of parental consortium. *Id.* The court cited W. Prosser, Torts § 125, p. 896 (4<sup>th</sup> ed. 1971):

The interest of the child in proper parental care ... has run into a stone wall where there is merely negligent injury to the parent ...

It is not easy to understand and appreciate this reluctance to compensate the child who has been deprived of the care, companionship and education of his mother, or for that matter his father, through the defendant's negligence. This is surely a genuine injury, and a serious one, which has received a great deal more sympathy from the legal writers than from the judges.

The employer argued that allowing the children's claim outside the underlying claim, multiple lawsuits would result. In addressing the concern, the court looked to the Iowa Supreme Court in **Weitl v Moes**, 31 NW.2d 259 (Iowa 1981). The Iowa court conditioned the child's cause of action "on a requirement that the child's claim be joined with his injured parent's claims whenever feasible. If a child's consortium claim is brought separately, the burden will be on the child plaintiff to show why joinder was not feasible." **Weitl**, at 270.

The Ueland court also looked to the Wisconsin Supreme Court in **Theama v Kenosha**, 117 Wis.2d 508, 523 (1984) in adopting the child's cause of action. The court quoted **Theama**:

Although a monetary award may be a poor substitute for the loss of a parent's society and companionship, it is the only workable way that our legal system has found to ease the injured party's tragic loss. We recognize this as a shortcoming of our society, yet we believe that allowing such an award is clearly preferable to completely denying recovery ....

Ultimately, the Ueland court adopted the reasoning of other jurisdictions when holding that a child has an independent cause of action for loss of the love, care, companionship and guidance of a parent tortuously injured by a third party. **Ueland**, at 140. Further, this separate consortium claim must be joined with the parent's underlying claim unless the child can show why joinder was not feasible. *Id.* Indeed, in Washington, a child's parental consortium claim tolls during minority. The reverse should also be true for parents. Washington deeply values the child/parental relationship and in effort to keep all the claims within the same litigation, allowing the statute to toll for parents is seemingly the right approach. At a minimum, courts should be guided by similar relationships using child/parent consortium cases by analogy as opposed to spousal consortium claims as suggested by the Deaconess.

C. STATUTORY LANGUAGE OF RCW 4.24.010 IS  
COMPULSORY NOT PERMISSIVE

Deaconess Medical Center inaccurately classifies language within RCW 4.24.010 as permissively allowing joinder of the parents' consortium damage(s) claim. *See Deaconess Combined Response to Motion for Discretionary Review*, p. 10. Of course, Deaconess omits the remaining portion of the statute for good reason. In fact, RCW 4.24.010 **requires** parents to join their claims of consortium in a single cause of action. The pertinent parts of the statute read as follows:

This section creates **only one cause of action** ...

If one parent brings an action under this section and the other parent is not named as a plaintiff, notice of the institution of the suit together with a copy of the complaint, **shall** be served upon the other parent ...

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

(Emphasis added.) RCW 4.24.010

Hence, the lawmakers were desirous of forcing the parents to a single litigation where both parents (regardless of marital status) could have their damages determined at the same time. For this reason, formal notice was to be served upon the other parent as well as a specified amount of time to join the suit or risk their respective damage claim being barred. Similarly, the lawmakers' use of repetitive and mandatory language most likely suggests a desire to have all claims for damages to be determined in one single action. Ergo, the parents would either "join" the child's underlying claim or "maintain" the child's claim by filing suit on the child's behalf and the parents individually. The mother in the instant case, choose to do the former.

D. RCW 4.24.010 CONTEMPLATES CIRCUMSTANCES  
WHEN A CHILD IS A NECESSARY PARTY UNDER CR  
19.

Contrary to Deaconess' absurd position, the mother could not have filed a separate consortium claim for damages without the daughter's participation in litigation as a named party. Before consortium damages can be assessed by a jury, the underlying tort victim would be required to establish liability, causation, and damages. Following such presentation, the parent(s) would 'piggy-back' by testifying in regards to their loss for purposes of establishing their individual claim for consortium damages. In any case, the tort victim is always going to be a necessary party for a

consortium damage claimant. Likewise, the mother's position in support of tolling comports with CR 19, which states in relevant part:

(a) **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest....

(b) **Determination by Court Whenever Joinder Not Feasible.** If a person joinable under (1) ... cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

Deaconess's position fails to appreciate the child tort victim as a necessary, indispensable party for a just adjudication. "A party is a

necessary party if the party's absence from the proceedings would prevent the trial court from affording complete relief to existing parties to the action or if the party's absence would either impair that party's interest or subject any existing party to inconsistent or multiple liability." CR 19(a); **Coastal Bldg. v City of Seattle**, 65 Wn.App. 1, 5 (1992). A trial court lacks jurisdiction if all necessary parties are not joined. **Treyz v Pierce County**, 118 Wn.App. 458, 462 (1998). Any child negligence claim to which parental consortium damages are available under RCW 4.24.010, requires proof establishing negligence before giving rise to consortium damages. The statutory tolling for minors would be thwarted and rendered completely meaningless, if the law required parents to bring their consortium claims within 3 years, which in turn forces the court to compel children into the litigation through a next friend/GAL.

E. JUDICIAL ECONOMY IS BETTER SERVED BY  
ALLOWING THE PARENT'S DAMAGE CLAIM TO TOLL  
WITH THE MINOR'S NEGLIGENCE CLAIM

Judicial economy is not served by piecemeal litigation. As an opportunist, Deaconess only seeks to eliminate the mother's claim herein and drastically reduce its exposure. Yet, had the mother actually filed suit to pursue her damages within the three (3) year period it suggests, Deaconess would have sought joinder of the child as necessary party. This would have served Deaconess because the child would have been too

young to testify and unable to appreciate the future. Today, Alyssa is well aware of the life her twin sister leads and how unfair it will be for her. Alyssa is also now able to testify and present evidence to support her claim for damages. Indeed, the defense wants it all ways. Nevertheless, public policy supports one action where all claims are determined. Fortunately, other jurisdictions have carefully reviewed and resolved this issue. The Supreme Court of Ohio, in **Fehrenback v O'Malley**, 113 St.3d 18 (2007) is a case nearly on all fours. There, the parents, individually and on behalf of their minor daughter, brought a medical malpractice action against pediatrician and medical clinic, and parents brought parental claim for loss of consortium. Like the instant case, the lower court granted summary judgment to defendants on the consortium claim. The parents did not dispute that the accrual date for the child's injuries was not later than December 1991. Id. Based upon the complaint, filed January 1997, it was not disputed that over five years had passed after the adult's claims accrued. Accordingly, the trial court found the claims for loss of consortium and medical expenses were barred by the statute of limitations. Id.

Not surprisingly, the court of appeals interpreted the law differently. Instead of affirming, the appellate court reversed the judgment of the trial court and held that "the interests of [the child] and her parents

were ‘joint and inseparable’ ” and that “the tolling provisions of R.C. 2305.16<sup>2</sup> inure to the benefit of parents pursuing a claim for loss of consortium and medical expenses.” **Fehrenback v O’Malley**, 164 Ohio App.3d 80, 2005-Ohio-5554. Consequently, discretionary review was sought and accepted.

Similarly, the highest court was asked to answer a question certified to the court as a conflict by the First Appellate District as follows: “Whether the provisions of R.C. 2305.16, which toll a statute of limitations for a minor child’s negligence claim, inure to the benefit of parents bringing derivative claims for loss of consortium and medical expenses by also tolling the statute of limitations for those claims.” **O’Malley**, supra at 19. The Ohio Supremes began their analysis by reviewing the nature of a parent’s loss of consortium claim. **O’Malley**, supra. at 20. In a previous decision, the court held: “A parent may recover damages, in a derivative action against a third-party tortfeasor who

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<sup>2</sup> RC §2305.16 provides: Unless otherwise provided in sections 1302.98, 1304.35, and 2305.04 to 2305.14 of the Revised Code, if a person entitled to bring any action mentioned in those sections, unless for penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority or of unsound mind, the person may bring it within the respective times limited by those sections, after the disability is removed. When the interests of two or more parties are joint and inseparable, the disability of one shall inure to the benefit of all.

Ohio Rev. Code Ann. § 2305.16 (West)

intentionally or negligently causes physical injury to the parent's minor child, for loss of filial consortium. Consortium includes services, society, companionship, comfort, love and solace." **Gallimore v Children's Hosp. Med. Ctr.**, 67 Ohio St.3d 244 (1993). In recognizing a conflict, the court noted that it had previously limited a parent's recovery to loss of services and medical expenses, recognizing the claims as *separate and distinct* from the child's claim for injury. See **Grindell v Huber**, 28 Ohio St.2d 71, 74 (1971).

The court then carefully examined the reverse scenario dealing with a child's ability to claim loss of parental consortium in an action and how the tolling of the statute of limitations for minority applied to render an opposite in the Gallimore case, *supra*. Basically, the court was asked to address whether a minor child's claim for parental loss of consortium should be joined with the parent's claim for damages caused by the injury and whether the filing of the minor's claim was outside the statute of limitations because it had not been originally joined with the parent's claim. *Id.* Like the Washington **Ueland** case, *supra.*, the Ohio Supremes believed the sensible solution was to hold that a child's loss of parental consortium claim must be joined with the injured parent's claim **whenever feasible**. *Id.* (Emphasis added).

The O'Malley court further found there to be "nothing in the record to show that joinder of [the minor child's] cause of action for loss of parental consortium to her mother's cause of action [was] not just and feasible". **O'Malley**, 113 Ohio St.3d at 21. The court reasoned, since the statute of limitations for the child's independent cause of action for loss of parental consortium is majority plus four years, there is no statute of limitations problem. **Coleman v Sandoz Pharmaceuticals, Corp.**, 74 Ohio St.3d 492 (1996). The court observed that requiring a minor child to join with the parent in asserting a loss-of-consortium claim would limit the possibility of multiple suits and different outcomes. **O'Malley**, at 22. It also recognized that the minor's claim was independent of the parent's claim, thereby allowing the minor to take advantage of the tolling provisions. Id.

Most significantly, the court recognized that the independent nature of the loss-of-consortium claim is based on control and ownership of the claim. Id. "In determining whether a husband's waiver of his claim terminated a wife's loss of consortium claim, we held, 'The right is her separate and personal right arising from the damages she sustains as a result of the tortfeasor's conduct.'" Id. However, "[b]ecause the loss-of-consortium claim belongs to the person suffering a physical injury but to another, it is independent, and while the claim may be 'separate' in the

sense that it is a distinct and individual claim, it is a derivative action, arising from the same occurrence that produced the alleged injury to the other familial party.” **O’Malley**, 113 Ohio St.3d at 22.

The court also observed that the civil joinder rules were also at play. Under CR 19, if a minor filed a complaint seeking damages for the injury and the parents have a loss of consortium claim, the parent’s claim must be filed at the same time as the filing of the child’s complaint. Id. Requiring joinder in these cases promotes judicial economy and limits the possibility of conflicting outcomes. Id. The O’Malley court stated:

“Current practice allows plaintiffs, at their option, to separately pursue these claims. When these claims are separately prosecuted defendant is required to defend twice. Much evidence must be repeated and there is useless expenditure of, *inter alia.*, court time. Furthermore, since the claims are related, difficult questions of collateral estoppel and res judicata often arise. Frequently, the results are inconsistent and not compatible.” Id.

This reasoning is especially apropos when applied to the instant case. Requiring Ms. Arellano (a parent) to litigate her loss of consortium claim within three years of the injury (birth) and allowing Alyssa many years to bring her claim subjects the defendants to multiple lawsuits and potentially conflicting and inconsistent results. Allowing the statute of limitations of a parent’s loss of consortium to toll during the underlying claimant’s minority avoids piecemeal litigation and the inherent problems

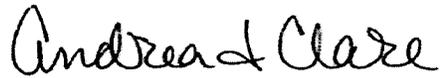
therewith. Since Washington courts have not expressly adopted such tolling, review is ripe and will substantially benefit similarly situated parents with injured children.

## II. CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests this court accept direct review.

Dated this 20<sup>th</sup> day of July, 2017.

TELQUIST McMILLEN CLARE, PLLC  
*Attorneys for Petitioners*



By: \_\_\_\_\_  
ANDREA J. CLARE, WSBA #37889

**CERTIFICATE OF FILING AND SERVICE**

The undersigned hereby declares, under penalty of perjury, under the laws of the State of Washington, that on July 20, 2017, I e-filed the foregoing document for filing with the Supreme Court, State of Washington, and delivered a copy, via e-mail, to

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**DATED** this 20<sup>th</sup> day of July, 2017, at Richland, Washington.

TELQUIST McMILLEN CLARE, PLLC



By: \_\_\_\_\_  
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# APPENDIX

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

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ALYSSA ARELLANO-HAWKINS, a minor )  
child and DEYANIRA ARELLANO, )  
individually, and as legal )  
guardian for the minor child )  
 )  
Plaintiffs, )  
 ) SPOKANE COUNTY  
vs. ) SUPERIOR COURT  
 ) NO. 16-2-00887-3  
DEACONESS MEDICAL CENTER, a )  
Washington Non-Profit Corporation, )  
 )  
Defendant. )

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VERBATIM REPORT OF PROCEEDINGS:  
EXCERPT - COURT'S RULING  
HONORABLE JOHN O. COONEY  
March 17, 2017

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(BEGINNING OF EXCERPT.)

THE COURT: I don't think that I need to go over what was done the last time at the summary judgment motion. There's a number of issues that were brought up. It doesn't seem that the parties dispute that 4.16.080 applies, that being the three-year statute of limitations. That would control any claims brought under 4.24.010, which is the loss of consortium claim that was brought here. The question is whether or not that period was tolled based upon the injured party, that being the child, being a minor until recently. That's essentially the question.

The Court previously found that the loss of consortium claim is not a derivative claim from the minor's injury, rather a separate cause of action, and that's based primarily upon the statute 4.24.010 authorizing that separate cause of action.

The case law on point or closest on point deals with spouses. That's substantially different than minors because you wouldn't be tolling the statute of limitations because there wouldn't be a minority with spouses unless, I guess, they had permission to marry while they were a minor. I guess there could be some tolling if one spouse were incapacitated. I don't know that there's any case law specifically on point with that.

1           We're dealing with a statute authorizing or allowing  
2           parents to bring an action for a loss of consortium.  
3           Here's where I think there is at least some disagreement.  
4           I guess it could be considered substantial. First, I  
5           can't find any case law regarding whether a parent's loss  
6           of consortium claim would be tolled because of the injured  
7           party, that being the minor, being a minor. Maybe there  
8           is no case law because it's just that simple, it doesn't  
9           toll.

10           When I read 4.24.010, that statute authorizes a mother  
11           or father or both to bring a claim for a loss of  
12           consortium for an injury or death to their child. And  
13           that statute specifically says they may maintain or join  
14           as a party an action as a plaintiff. Obviously, they can  
15           maintain a separate cause of action, just like a spouse  
16           could. But then it says "or join as a party," and the  
17           question is whether or not the legislature intended that  
18           to mean that it's their election as to whether to start  
19           their own action or join as a party. If they can join as  
20           a party, then is the statute of limitations tolled as it  
21           would be for the injured minor?

22           This is different than the wrongful death statute where  
23           it has to be brought by a certain person. It's different  
24           than spouses where you don't have the period of the minor  
25           being a minor tolling the statute of limitations.

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I think there is a substantial disagreement as to whether or not, at the election of the parent, they may join, and if they can join, does that toll the statute of limitations, is that what the legislature intended when they included "or" in there. The Court does find that the first prong of Rule 2.3 applies.

Second, will it advance or terminate litigation. It would advance litigation in that clearly the parents' claim is conditioned upon a finding of negligence for the child. Without this going forward, we'd end up trying the case twice assuming the plaintiff was able to prove that the defendant was negligent. So there does appear to be the advancement of litigation if this matter were resolved because the claims could all be tried at once.

With that said, the Court will grant the plaintiff's motion for certification of this issue to the Supreme Court.

(END OF EXCERPT.)

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C E R T I F I C A T E

I, Korina C. Kerbs, do hereby certify:

That I am an Official Court Reporter for the Spokane County Superior Court, sitting in Department No. 9, at Spokane, Washington;

That the foregoing proceedings were taken on the date and place stated therein;

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribe by me or under my direction, including any changes made by the trial judge reviewing the transcript;

I do further certify that I am not a relative of, employee of, or counsel for any parties, or otherwise interested in the event of said proceedings.

WITNESS MY HAND AND DIGITAL SIGNATURE this 11th day of July, 2017.



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Korina C. Kerbs, CCR No. 3288  
Official Court Reporter  
Spokane County, Washington