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STATE OF WASHINGTON

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NO. 78383-7

CLERK SUPREME COURT OF THE STATE OF WASHINGTON

LIAM STEWART-GRAVES, a minor, and NICHOLE STEWART-
GRAVES, as Guardian Ad Litem, and NICHOLE STEWART-GRAVES
and TODD GRAVES, Individually,

Appellants,

v.

KATHERINE F. VAUGHN, M.D.; THE VANCOUVER CLINIC, INC.,
P.S.; and SOUTHWEST WASHINGTON MEDICAL CENTER,

Respondents.

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION
FOUNDATION

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I. INTRODUCTION

It is important to recognize both what is, and what is not, at issue on appeal. For purposes of this appeal, there is no issue as to whether there was any negligence in the manner in which resuscitation was performed, as plaintiffs voluntarily dismissed any such claim. Second, there is no dispute that, upon Liam's birth by emergency C-section, resuscitation was required. Third, there is no dispute that, at the time resuscitation was begun, an emergency existed. Fourth, there is no dispute that Liam was injured in *utero*.

What is at issue on this appeal is whether the Court should recognize a cause of action for saving (or wrongfully prolonging) the life of a newborn infant, because the infant, if saved, might, or likely will, be defective.

II. ARGUMENT

A. Contrary to WSTLA Foundation's Arguments, This is Not a "Garden Variety" Medical Malpractice Action.

The trial court dismissed Liam's and his parents' respective claims for failure to obtain informed consent to continued resuscitation efforts, and for alleged negligence in continuing resuscitation efforts for more than 10 to 15 minutes after Liam's birth. CP 295-98, 299-302; see CP 291-94. The trial court concluded that the result of the continued resuscitation – "saving Liam's life" – was not actionable and that recognition of a cause

of action for wrongful prolongation of life in this case would be inconsistent with existing Washington law that allows the withholding of life-sustaining medical care only in extreme situations. CP 291-94. The trial court was correct and should be affirmed.

Characterizing respondents' argument as to plaintiffs' negligence claim as constituting no more than a disagreement with Dr. Bodenstein's opinion as to the standard of care, see Amicus Brief at 15, the Washington State Trial Lawyers Association Foundation (WSTLA Foundation) argues that this appeal presents the usual scenario where the only issue before the Court is whether genuine issues of material fact exist to avoid summary judgment, Amicus Br. at 6. WSTLA Foundation is incorrect.

First, contrary to WSTLA Foundation's characterization of respondents' arguments, the two passages to which WSTLA Foundation apparently refers (Joint Resp. Br. at 34-35 and 41) do no more than explain Dr. Vaughn's view of the effects of placing a mandatory time limit on resuscitation. Respondents do not argue that the case should be resolved by adopting Dr. Vaughn's view of the standard of care. Rather, respondents' argument is that Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460, 656 P.2d 483 (1983), recognizing wrongful birth/wrongful life causes of actions, does not support a claim for wrongful prolongation of life, and

that this Court should not recognize such a claim. Joint Br. of Resp. at 25-42.

Second, the contention that this case presents no more than a garden variety dispute over the standard of care is belied, not supported, by the Harbeson court's decision. There, the court had to decide whether to recognize causes of action for wrongful birth and wrongful life. The threshold question the court had to decide was whether parents had the right to prevent the birth of a defective child. Because of advances in medical science, enabling parents to determine the likelihood of genetic defects before conception, and diagnostics, such as amniocentesis and ultrasounds, which could reveal defects after conception in time for the parent to make the difficult moral choice of whether to abort the fetus, the Harbeson court held that parents have a right to prevent the birth of a defective child. Such a right gave rise to a duty on the part of health care providers to (1) inform parents of the likelihood that future children will be born defective and/or (2) use reasonable care in performing medical procedures intended to prevent the birth of a defective child. Harbeson, 98 Wn.2d at 471-72. The parents' right (*pre-utero* or *in utero*) to prevent the birth of a defective child and the health care provider's corresponding duty are the bases of the parents' "wrongful birth" claim, which also extend to

unconceived or unborn children with respect to their “wrongful life” claims. Harbeson, at 478.

Thus, the Harbeson court did not treat plaintiffs’ claims as ones that automatically went to jury if there were competing views of the standard of care. Rather, it was necessary for the court to determine if it would recognize such causes of action at all, and it did not do so until it determined that a right existed that could give rise to a duty.

In this case, whatever plaintiffs may claim, the court is being asked to hold (1) that parents have the right to prevent not only the birth of a defective child, but also the survival of one, and (2) that saving the life of a newly born infant who may or likely will be defective gives rise to an actionable injury. This Court should decline to do so. Allowing a physician’s decision to attempt or not to attempt to resuscitate a newborn, or to do so for a particular period of time, to give rise to an actionable claim against the physician to be resolved in a hindsight battle of experts, puts the physician in an untenable position. Any argument that this Court need do no more than declare that competing expert views necessitate a jury trial, is not well taken and ignores the real issues presented by this case.

B. Plaintiffs’ Claims Are Not “Consistent” with the Wrongful Birth/Wrongful Life Claims Adopted in *Harbeson*.

WSTLA Foundation argues that plaintiffs’ claims are “consistent”

with Harbeson, while acknowledging that the claims do not fall within the definitions of wrongful birth/wrongful life set out in Harbeson. Amicus Brief at 13; *compare* App. Br. at 23-32. Whether the argument is that Harbeson applies directly or by analogy, both plaintiffs and WSTLA Foundation seek to blur, if not obliterate, the distinction between alleged negligence that proximately causes the birth of a child who would otherwise never be born and alleged negligence that proximately causes the survival of a child who *is* born. Contrary to their arguments, that is no small distinction.

The court in Harbeson went to great lengths to set forth very precise descriptions of the “wrongful birth” and “wrongful life” causes of action it recognized. The cause of action for wrongful birth recognized in Harbeson is an action based on a health care provider’s alleged breach of a duty to inform the parents (as patients) of the likelihood of future defective children, or to perform properly on a parent (as a patient) a procedure intended to prevent the conception or birth of a defective child, where such breach proximately causes of the birth of a defective child. Harbeson, 98 Wn.2d at 467, 472. Unlike most courts to have considered the issue,¹ the Harbeson court also recognized a cause of action for

¹ Few jurisdictions have adopted a “wrongful life” cause of action. See Willis v. Wu, 362 S.C. 146, 607 S.E.2d 63, 68-69 and n.3 (2004), and cases cited therein.

“wrongful life,” *id.* at 478-79, based on same grounds, *i.e.*, a failure to inform the parents of the likelihood of future defective children or a failure to perform properly on a parent a procedure intended to prevent the conception or birth of a defective child that proximately causes the life of a deformed child, who would otherwise not be born to experience “the pain and suffering attributable to the deformity.” *Id.* at 478 (citation omitted).

Because the alleged negligence “in every case” occurs before the birth and possibly conception of the plaintiff infant, the Harbeson court held that the duty of care to the parents as patients extended to the unborn or unconceived child so as to give rise to a cause of action for “wrongful life.” *Id.* at 480-81, 483. The causation issue in such a case is “whether [b]ut for the physician’s negligence, the parents would have avoided conception, or aborted the pregnancy, and the child would not have existed.” *Id.* at 482-83 (citation omitted).

WSTLA Foundation argues that *Harbeson* permitted extraordinary expenses for the lifetime of an impaired child, even though the alternative was the child’s nonexistence, and argues that the same should hold true where “recovery presupposes that, had Vaughn acted properly, Liam would not have survived.” Amicus Br. at 13-14. Thus, WSTLA Foundation converts “wrongful life” into “wrongful survival,” even as it

denies that “wrongful prolongation of life” is a proper characterization of what is at issue. Amicus Brief at 14.

WSTLA Foundation claims that characterizing the instant claims as claims for the “wrongful prolongation of life” “merely introduces a new phrase that sheds more heat than light.” *Id.* But it is important to call things by their right name. Liam was born, did live, and does exist. His “life” was not wrongful, as there is no claim that defendants negligently failed to prevent his conception or birth. So what is the nature of plaintiffs’ claims? The nature of those claims is that defendants are alleged to have negligently caused Liam’s survival, *i.e.*, they saved his life, rather than let him die. It is not mere semantics to recognize a fundamental difference between “nonexistence” and death. The Court should refuse plaintiffs’ invitation to expand Harbeson beyond its carefully circumscribed limits.

The only Washington court that has been asked to recognize a claim for wrongful prolongation of life has refused to do so. Benoy v. Simons, 66 Wn. App. 56, 831 P.2d 167, rev. denied, 120 Wn.2d 1014 (1992). There, by analogy to Harbeson, plaintiffs urged the court to adopt a wrongful prolongation of life cause of action against defendants for placing a seriously comprised premature infant on a ventilator. *Id.* at 61-62. WSTLA Foundation criticizes the Benoy court’s discussion of

Harbeson, as discussing only the wrongful birth prong of Harbeson. Amicus Br. at 14 n. 11. Presumably that was what the Benoy plaintiffs argued. Nevertheless, the Benoy court's discussion is equally applicable to both "wrongful birth" and "wrongful life" causes of action.

The Benoy court observed that the "wrongful birth" cause of action was based on two types of claimed negligence: the failure to inform of the risk of future children being born defective, or the failure to perform properly medical procedures undertaken to prevent the conception or birth of a defective child. 66 Wn. App. at 62 (citing Harbeson, at 472).

While the Benoy court's statements were made with respect to the wrongful birth cause of action, the same two grounds (failure to inform parents of the risk of a deformed child or failure to perform properly a procedure, e.g., "sterilization or abortion," intended to prevent the birth of a defective child) are the ones that support a wrongful life cause of action. Harbeson, 98 Wn.2d at 478. Thus, these alleged failures as to the parents are what give rise to the "equivalent" cause of action on the part of the child. Id. The Benoy court in no way misapprehended the Harbeson holding. Rather, it properly noted the absence of the only grounds that support a "wrongful birth" action, 66 Wn. App. at 62, which are also the only grounds that support a "wrongful life" cause of action. Those two

grounds are likewise absent in this case, with respect to both Liam's and his parents' claims.²

WSTLA Foundation also states that Harbeson recognized that a child, independent of the parents, has a claim based on a duty running to the child. Amicus Br. at 14 n. 11. But, as the Benoy court recognized, Harbeson is based on a recognition that parents have a right to prevent the birth of a defective child. Benoy, 66 Wn. App. at 62 (citing Harbeson, 98 Wn.2d at 472). Moreover, the Harbeson court observed that the duty to fully inform the parents of the birth defect risks associated with Dilantin "extends" to the unconceived children. 98 Wn.2d at 483. Thus, any duty to the child is derivative of the duty to the parents, because otherwise there would be no one as to whom the duty could be fulfilled.

Without explanation, WSTLA Foundation claims that the duty running to the patient should be deemed "even stronger" when the child is the patient. Amicus Br. at 14 n. 11. But that assertion ignores what the duties under Harbeson actually are: informing the parents of the risk of having a defective child and properly performing procedures to prevent the birth or conception of a defective child. Is WSTLA Foundation

² In rejecting plaintiffs' claim for infliction of emotional distress and outrage, the Benoy court also observed that "the Benoy's failed to show Dr. Simon acted other than in conformance with his professional obligation to preserve the life of his patient," id. at 64, who was the infant, not the plaintiffs.

claiming that the child of parents as to whom proper counseling was given would have a cause of action against the physician if the parents decided to proceed with conception or birth?

Neither the parents' wrongful birth nor the child's equivalent wrongful life cause of action recognized in Harbeson applies here. The injury claimed here is that Liam survived with physical and mental disabilities as opposed to dying. Plaintiffs' claims are indeed claims for "wrongful prolongation" of life. The Court should not recognize such claims.

C. RCW 7.70.050 Does Not Supplant the State's Interest in Preserving Life.

WSTLA Foundation argues that, because Washington's Natural Death Act, RCW Ch. 70.122, does not apply in this case, RCW 7.70.050 takes its place and gives parents a right to direct that life-saving treatment be withheld as a matter of informed consent. Amicus Br. at 18. It argues that the "reasonably objective person" standard provides the necessary procedural protection to the State's most vulnerable of citizens. WSTLA Foundation is incorrect, because Washington law allows the withholding or withdrawal of life-sustaining treatment only in limited circumstances.

Thus, under the NDA, a competent adult person may execute a directive directing the withholding or withdrawal of life-sustaining

treatment in the event that the adult person is diagnosed to be in a terminal condition³ by the attending physician, or in a permanent unconscious condition⁴ by two physicians. RCW 70.122.030(1), (2).

The NDA does not apply when there is no competent adult who has executed a directive. In re Guardianship of Hamlin, 102 Wn.2d 810, 816, 689 P.2d 1372 (1984). Although “[a]n incompetent person does not lose his right to consent to termination of life supporting care by virtue of his incompetency,” id., the circumstances under which that right can be exercised are limited. See In re Welfare of Colyer, 99 Wn.2d 114, 116-17, 123, 660 P.2d 738 (1983) (affirming grant of a husband’s petition to have life support removed from his 69-year-old wife who was in a persistent vegetative state and unable to breathe on her own); Hamlin, supra, 102 Wn.2d at 814, 817 (allowing guardian to consent to termination of life support of blind and severely retarded patient, who was in a vegetative state, unresponsive to his surroundings and unable to breathe without a respirator). The court in Hamlin stressed “the distinction between

³ “‘Terminal condition’ means an incurable and irreversible condition caused by injury, disease, or illness, that, within reasonable medical judgment, will cause death within a reasonable period of time in accordance with accepted medical standards, and where the application of life-sustaining treatment serves only to prolong the process of dying.” RCW 70.122.020(9).

⁴ “‘Permanent unconscious condition’ means an incurable and irreversible condition in which the patient is medically assessed within reasonable medical judgment as having no reasonable probability of recovery from and irreversible coma or a persistent vegetative state.” RCW 70.122.020(6).

treatment which is expected to result in some measure of recovery and that which merely postpones death,” 102 Wn.2d at 815, and discussed procedural safeguards that must be followed in making such a momentous decision for an incompetent,⁵ id. at 816-20.

The court in In re Guardianship of Grant, 109 Wn.2d 545, 747 P.2d 445 (1987), modified, 757 P.2d 534 (1988), allowed a parent to consent to withhold life-sustaining treatment from her adult daughter who had been institutionalized since the age of 14 due to deterioration from a neurological, degenerative condition of the central nervous system from which most victims die in their teens or early twenties, even though the daughter was not yet in a persistent vegetative state. See id. at 547-50.

The Grant court held that:

[I]n the absence of countervailing state interests,⁶ a person has the right to have life sustaining treatment withheld where he or she (1) is in an advanced stage of a terminal and incurable illness, and (2) is suffering severe and permanent mental and physical deterioration.

Grant, 109 Wn.2d at 556.

⁵ These safeguards include the requirements (1) that attending physicians make a medical diagnosis that the incompetent patient is in persistent vegetative state, with no reasonable chance of recovery, and is being maintained on life support systems, and (2) that the diagnosis be unanimously approved by the hospital’s prognosis committee. Id. at 819. Only if there is unanimous agreement of the immediate family, the treating physicians, and the prognosis committee would court intervention be unnecessary. Id. at 818-19.

⁶ The State’s interests are: “(1) the preservation of life; (2) the protection of interests of innocent third parties; (3) the prevention of suicide; and (4) the maintenance of the ethical integrity of the medical profession.” Grant, 109 Wn.2d at 556 (citations omitted).

The State's interest in preserving life is such that life-saving treatment may be required "for patients who have not consented to it." Grant, 109 Wn.2d at 556; Colyer, 99 Wn.2d at 122. That interest is weakened considerably, however, if the treatment would "merely postpone death for a person with a terminal and incurable condition."⁷ Grant, 109 Wn.2d at 556. As in the earlier decisions, the Grant court set forth procedural and substantive criteria to govern these decisions. 109 Wn.2d at 566-67.

The cases make clear that the State's interest in preserving life may require life-saving treatment, even in the absence of consent, unless the patient's condition is both terminal and incurable. Grant, 109 Wn.2d at 556; Colyer, 99 Wn.2d at 122. WSTLA Foundation's argument that RCW 7.70.050 and 7.70.065 merely provide an alternative method of withholding life-saving or life-sustaining treatment of an incompetent person would make a mockery of the State's interest in preserving life. Contrary to WSTLA Foundation's argument, Amicus Br. at 17-18, the "reasonably prudent patient" standard is not an adequate substitute for the many court-imposed procedural safeguards and substantive criteria that

⁷ The Grant court set forth four criteria, all of which must be met in order to withhold an incompetent's life-sustaining treatment, id. at 566-67, including a determination by the incompetent's attending physician and two other physicians that the patient "is in an advanced stage of a terminal and incurable illness and is suffering severe and permanent mental and physical deterioration." Id. at 566.

govern the determination as to whether to withhold life-saving or life-sustaining treatment from an incompetent patient.⁸

As characterized by WSTLA Foundation, a jury would decide what a reasonably prudent decision maker would decide “on Liam’s behalf.” But how well does an able-bodied person, or an able-bodied jury, understand what value a disabled person, especially at the first instant of life before the extent of disability is even known, can ultimately place on life or what pleasure such a person may derive from a life lived. Jurors might, with benefit of hindsight, determine, in light of the difficulties faced by Liam or by his parents in caring for him, that the option plaintiffs say they would have chosen is “reasonable.”⁹ But what is “reasonable” (decided with benefit of hindsight) is a woefully inadequate basis for deciding whether a newly born infant should or should not be allowed to survive.

Neither the NDA, nor the cases allowing the withholding or withdrawal of an incompetent person’s life-sustaining treatment, would

⁸ The Legislature has determined that a child born alive in the course of an abortion has the same right to medical treatment as an infant born prematurely of equal gestational age. RCW 18.71.240. Thus, even though the parent clearly did not want the child to live at all, the fact that the child is born alive in the course of an abortion trumps the parent’s wishes, no matter how well intentioned those wishes are.

⁹ If actionable at all, the informed consent claim does not belong to Liam’s parents; rather, it belongs to Liam, to be exercised by his parents acting as his representatives. Branom v. State, 94 Wn. App. 964, 973-74, 974 P.2d 335, rev. denied, 138 Wn.2d 1023 (1999).

authorize the withholding or withdrawal of life-saving treatment simply because a newly born viable infant may have, or even likely has, brain damage or some other defective condition. See Montalvo v. Borkovec, 256 Wis. 2d 472, 647 N.W.2d 413, 421 (Wis. App.), rev. denied, 653 N.W.2d 890 (Wis. 2002), cert. denied, 538 U.S. 907 (2003), rejecting a claim that neonatologist was liable for failing to properly obtain informed consent relating to the resuscitation efforts of a significantly premature infant. According to the Montalvo court, such a claim presumed a parent's right to decide not to resuscitate or to withhold life-sustaining care, which did not exist in Wisconsin unless the infant was in a persistent vegetative state. *Id.* at 418-19. Likewise, here, Liam did not come within the Washington-announced criteria for withholding or withdrawing life-saving or sustaining medical treatment. The Court should not allow RCW 7.70.050 and 7.70.065 to supplant those criteria in favor of what a jury in any given case might believe, in hindsight, that a reasonably prudent decision-maker might do.¹⁰

¹⁰ WSTLA Foundation states that RCW 7.70.065(2) does not provide factors or criteria to be used by a parent as surrogate decision maker and suggests that at a given trial parties may present expert testimony or propose jury instructions, Amicus Brief at 18, so that a trier of fact may determine *post hoc*, what a reasonably prudent decision-maker would have decided for the minor. Amicus Br. at 17. The absence of criteria in RCW 7.70.065, however, is an additional reason for holding that RCW 7.70.050 does not supplant the NDA or common law as to criteria governing the withdrawal of life-saving or life-sustaining treatment.

D. Even If Cognizable, Plaintiffs' Informed Consent Claims Were Properly Dismissed.

WSTLA Foundation argues that policy reasons in Harbeson “answer” respondents’ argument that plaintiffs did not produce evidence that the treatment – continuation of resuscitation efforts beyond the 10 or 15 minutes Dr. Bodenstein opined – caused Liam’s mental and physical disabilities. RCW 7.70.050(1)(d). Dr. Bodenstein’s evidence was that with zero Apgar scores at one, five and 10 minutes of life, Liam could not avoid certain severe brain damage and other devastating injuries if resuscitation were successful. CP 202 (¶ 34). Thus, Liam’s brain damage was likely present at the 10-minute mark. The only alternative was Liam’s death. Saving Liam’s life is not and should not be deemed an injury, much less an actionable one.¹¹ If such a claim is not cognizable, any failure with respect to informed consent is immaterial.

The Court should also reject WSTLA Foundation’s contention that a genuine issue of material fact exists as to whether Liam’s father was

¹¹ WSTLA Foundation’s reference, Amicus Brief at 19 n. 15, to Harbeson, 98 Wn.2d at 483, to argue that injury is established in the form of calculable medical and special care expenses, is inapposite. The court there held that the minor plaintiffs, who would not otherwise have been conceived, suffered an actionable injury to the extent they required special medical treatment and training that children born without their condition (fetal hydantoin syndrome caused by their mother’s ingestion of Dilantin) did not need. Contrary to WSTLA Foundation’s implication, there is a difference between choosing not to give birth to a defective child and choosing to let a child born with possible or likely (but as yet unknown) defects die. Indeed, Dr. Vaughn was aware of another infant with Apgars like Liam’s who did well. CP 247 (pp. 22-24).

“readily available” to give informed consent, for purposes of establishing the emergency exception to RCW 7.70.050(4). It is undisputed that an emergency existed and that no informed consent was needed before beginning resuscitation. CP 169; see also RP 13; App. Br. at 14. Therefore, the only question is whether a genuine issue of material of fact is created by virtue of plaintiffs’ expert’s opinion that any emergency ended 10 minutes into the resuscitation, such that Dr. Vaughn could have arranged for Liam’s father to come in and had a discussion with him about potential outcomes, even though Liam would have died had resuscitation been delayed or paused. In light of the fact that Liam would have died had resuscitation efforts been delayed or paused, whether Liam’s father was “readily available” in the hospital is ultimately immaterial.

Even if material, as respondents noted in the Joint Brief of Respondents, “readily available” must mean more than physically in the vicinity. There must be some actual, as opposed to speculative and hypothetical, opportunity, short of risking the patient’s life, to give and obtain a truly informed consent. Where there is no such opportunity, and in light of the emergency circumstances presented by the resuscitation of a newborn, the physician’s duty is and should be to preserve life. To hold otherwise will make physicians think twice before intervening at all, or

may result in injury-causing delay in giving medical care while consent to resuscitate, or to continue resuscitation, is obtained.

III. CONCLUSION

For the reasons set forth above, and in the Joint Brief of Respondents, the trial court's grant of summary judgment dismissing plaintiffs' negligence and informed consent claims premised on the alleged wrongful saving or wrongful prolongation of Liam's life by continued resuscitation should be affirmed.

RESPECTFULLY SUBMITTED this 12th day of January, 2007.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 12th day of January, 2007 I caused a true and correct copy of the foregoing document, "Joint Answer to Brief of Amicus Curiae Washington State Trial Lawyers Association Foundation," to be delivered to the following counsel of record in the manner indicated below:

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