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SUPREME COURT  
STATE OF WASHINGTON

2005 SEP -1 A 9 52

No. 78383-7

BY C. J. HENRITT SUPREME COURT  
OF THE STATE OF WASHINGTON

*hjh*

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 MEDICAL CLINIC, INC., P.S.; and  
SOUTHWEST WASHINGTON MEDICAL CENTER,

Respondents.

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REPLY BRIEF OF APPELLANTS  
LIAM STEWART-GRAVES, NICHOLE STEWART-GRAVES  
AND TODD GRAVES

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## A. INTRODUCTION

In continuing resuscitation efforts on Liam Stewart-Graves for 24 minutes, without communicating to Todd Graves the consequences of resuscitating an infant who was born with no heartbeat or respiratory function and had no heartbeat for the entire 24 minutes, Katherine Vaughn, M.D. and Southwest Washington Medical Center (Hospital) took it upon themselves to make decisions that carried profound and negative implications for Liam and his parents, Nichole Stewart-Graves and Todd Graves.<sup>1</sup> These decisions were Liam's to make through his parents. Dr. Vaughn and the Hospital seized the power to decide for their patients and subverted the concept of patient sovereignty that is the central basis for informed consent and the so-called wrongful life tort. Stripped to its essentials, the argument Dr. Vaughn and the Hospital make is that health care providers have the right to ignore, or choose not to obtain, the consent of their patients as to treatment and decide for themselves the course of treatment for their patients. Such a principle is absolutely at odds with the doctrine of informed consent.

The arguments in the joint brief of respondents Dr. Vaughn and the Hospital are based on a number of false premises. For example, they

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<sup>1</sup> Where appropriate, the appellants will be collectively referred to as "the Stewart-Graves." Dr. Vaughn and her employer, the Vancouver Clinic, will be collectively referred to as "Dr. Vaughn."

argue the Stewart-Graves are asking this Court to recognize a cause of action for “wrongful prolongation of life”; that is simply not correct. Similarly, their assertions that Washington’s Natural Death Act, RCW ch. 70.122, is applicable to the issues presented here, that an emergency existed during the entire 24 minutes of Liam’s resuscitation and no person was readily available to consent on Liam’s behalf, such that they were relieved of the duty to obtain Liam’s informed consent under the emergency exception to the informed consent requirement, are simply untrue.

The Stewart-Graves’ claims against Dr. Vaughn and the Hospital are claims for failure to obtain informed consent and for medical negligence, claims well-recognized in Washington. The Stewart-Graves are not asking this Court to disavow the sanctity of life or hold medical providers liable for saving a patient’s life, as Dr. Vaughn and the Hospital would have this Court believe. Nor are the Stewart-Graves asking this Court to declare that parents have an unfettered right to direct the withholding or withdrawal of life support of their newborn under any and all circumstances. These characterizations of the Stewart-Graves’ claims are not accurate and serve no purpose other than to unnecessarily inject divisive and inflammatory non-issues into this appeal.

The Stewart-Graves are asking this Court to once again affirm that while life, even a less than perfect life, is undoubtedly sacred, the quality of that life is a factor that cannot be ignored. This Court, in recognizing wrongful birth and wrongful life causes of action in *Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 656 P.2d 483 (1983), acknowledged this over 20 years ago. Here, because of the negligence of Dr. Vaughn and the Hospital and Dr. Vaughn's failure to obtain Liam's informed consent, Liam has suffered extreme injury and damage. Under settled principles of Washington law, they have stated claims against Dr. Vaughn and the Hospital.

B. REPLY TO COUNTERSTATEMENT OF THE CASE

The Stewart-Graves' claims against Dr. Vaughn and the Hospital are tort claims. An essential and indispensable element of a tort claim is damage or injury to the plaintiffs. Nonetheless, nowhere but in a footnote in their counterstatement of the case do Dr. Vaughn and the Hospital acknowledge the severe and permanent injuries Liam suffered and the other damages the Stewart-Graves incurred because of their negligence and Dr. Vaughn's failure to obtain Liam's informed consent. See Br. of Resp'ts at 1 n.1. Moreover, even though there is no dispute as to the nature, extent, and severity of Liam's injuries, Dr. Vaughn and the Hospital preface their insultingly superficial discussion of the injuries the

Stewart-Graves suffered with the phrase "According to plaintiffs' expert," thereby insinuating that a dispute as to Liam's injuries exists or the evidence the Stewart-Graves presented as to his injuries is less than accurate. *Id.*

Although Dr. Vaughn and the Hospital pay scant attention to them, the injuries Liam suffered, and will continue to suffer throughout his life, are extensive and tragic, and the damage the Stewart-Graves family has suffered is extreme. It is not disputed that Liam suffers severe cerebral palsy,<sup>2</sup> mental retardation, a seizure disorder, microcephaly,<sup>3</sup> and respiratory distress requiring frequent suctioning. CP 200. Nichole

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<sup>2</sup> Cerebral palsy is "a disability resulting from damage to the brain before, during, or shortly after birth and outwardly manifested by muscular incoordination and speech disturbances." *Medline Plus Medical Dictionary*, <http://www.nlm.nih.gov/medlineplus/plusdictionary.html>, last visited August 15, 2006.

United Cerebral Palsy explains cerebral palsy as follows:

Cerebral palsy is characterized by an inability to fully control motor function, particularly muscle control and coordination. Depending on which areas of the brain have been damaged, one or more of the following may occur: muscle tightness or spasticity; involuntary movement; disturbance in gait or mobility, difficulty in swallowing and problems with speech. In addition, the following may occur: abnormal sensation and perception; impairment of sight, hearing or speech; seizures; and/or mental retardation. Other problems that may arise are difficulties in feeding, bladder and bowel control, problems with breathing because of postural difficulties, skin disorders because of pressure sores, and learning disabilities.

[http://www.ucp.org/ucp\\_generaldoc.cfm/1/9/37/37-37/447](http://www.ucp.org/ucp_generaldoc.cfm/1/9/37/37-37/447), last visited August 15, 2006.

<sup>3</sup> Microcephaly is "a condition of abnormal smallness of the head usually associated with mental retardation." *Medline Plus Medical Dictionary*, *supra*.

Stewart-Graves was asked to describe a typical day in Liam's life. She testified Liam is attached to a pulse-oximeter while he sleeps, and he wakes up "gurgley" and congested.<sup>4</sup> CP 219. It takes Liam "awhile to mellow out after he gets up." *Id.* Liam eats every 45 minutes and is fed through a feeding tube. *Id.* He is on a ketogenic diet for seizures, which provides a large amount of fat and minimal carbohydrates and protein. *Id.*; *see also* Br. of Appellants at 8 n.10 (definition of "ketogenic diet"). The Stewart-Graves must weigh Liam's food at each meal and monitor his intake. CP 219.

The Stewart-Graves must suction Liam every day, anywhere from every 15 to 20 minutes to every four or five hours, depending on the day. *Id.* Liam has a "high tone," meaning he has a high tension or responsiveness to stimuli. *Id.*; Medline Plus Medical Dictionary, <http://www.nlm.nih.gov/medlineplus/mplusdictionary.html>, last visited August 15, 2006. Accordingly, when Liam is stressed, he arches and tenses up, and his hips close together, making it nearly impossible to put a diaper on him. CP 219-20. Also when he is stressed, he shakes. CP 220.

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<sup>4</sup> A pulse oximeter is "a device that determines the oxygen saturation of the blood of an anesthetized patient using a sensor attached to a finger, yields a computerized readout, and sounds an alarm if the blood saturation becomes less than optimal." Medline Plus Medical Dictionary, *supra*.

Automobile travel with Liam is extremely difficult. When he is put in an automobile, Liam shakes, his lips turn white, he rips at his face and gets hysterical, and his palms get sweaty. *Id.* Liam has the same reaction when his parents stop carrying or holding him and put him down for just a few minutes. *Id.* Accordingly, the Stewart-Graves hold Liam nearly 24 hours a day. *Id.* Liam's eyes do not track and he has a severe to profound hearing loss. *Id.* The Stewart-Graves, with much stimulation, can coax a very brief smile out of Liam, but, Nichole Stewart-Graves testified, Liam's reaction is more akin to "a smile and [an] ouch." *Id.*

The health care providers who treat Liam include a physical therapist, an occupational therapist, a sign language instructor, an optometrist, an audiologist, a speech therapist, and a naturopath. *Id.*; CP 221. Only the physical therapist and the sign language instructor come to the Stewart-Graves' home for Liam's treatment; the Stewart-Graves must travel to the other providers' offices, with all the attendant stress vehicle travel with Liam engenders. CP 220.

Liam's condition is permanent. CP 200. His life is profoundly affected by his condition. His parents must give him constant care and attention each day, profoundly affecting their lives.

Finally, Dr. Vaughn and the Hospital would have this Court believe Dr. Vaughn was intrepid in her effort to save Liam. Br. of Resp'ts

at 7-9. However, it is important to note her conduct of the resuscitation was negligent. The trial court denied Dr. Vaughn's summary judgment motion as to her negligence in handling the resuscitation efforts. CP 299-302. Indeed, Dr. Vaughn conceded that the Stewart-Graves showed the existence of a genuine issue of material fact as to whether Dr. Vaughn was negligent in her resuscitation efforts and that if the resuscitation had been performed as deemed appropriate by the Stewart-Graves' expert, Dr. Bodenstein, then Liam would have survived with less brain damage. CP 276-77.

Dr. Vaughn and the Hospital imply that Dr. Bodenstein's opinion regarding the continuation of resuscitation was based on only one article he read that was published in 1991. Br. of Resp'ts at 11 n.10. This a gross misstatement of the basis for Dr. Bodenstein's opinion. Dr. Bodenstein's opinion was based on his familiarity with medical literature regarding neonatal resuscitation and the likely effects on a newborn when resuscitation efforts are continued beyond ten minutes, CP 110; his experience as an instructor of neonatal resuscitation, CP 109; his review of Liam's and Ms. Stewart-Graves' medical records, *id.*; his training and practice as a board certified pediatrician with a subspecialty certification in neonatology, *id.*; as well as the 1991 article, CP 116-17. Further, the 1991 study to which Dr. Bodenstein refers fully supports his opinion that

Dr. Vaughn was required to know that continued resuscitation efforts, if successful, were highly unlikely to result in survival without severe impairment. The study showed that 55 out of 56 infants who had Apgar scores of zero at one, five, and ten minutes of life died, and the one infant who survived suffered severe neurological impairment. CP 117. The study was published in Pediatrics, a widely read peer-reviewed journal for pediatricians and neonatologists and was cited in the Neonatal Resuscitation Textbook. *Id.*

C. ARGUMENT IN REPLY

(1) Introduction

Dr. Vaughn and the Hospital disclaim all liability for the damages the Stewart-Graves suffered because of their conduct. By arguing she was not obligated to obtain Liam's informed consent to the continuation of resuscitation beyond 10 minutes, Dr. Vaughn attempts to turn the doctrine of informed consent on its head, substituting physician sovereignty for patient sovereignty, the fundamental principle underlying the requirement of informed consent. *See Crawford v. Wojnas*, 51 Wn. App. 781, 782, 754 P.2d 1302 (1988). By arguing they are not liable for the damages the Stewart-Graves sustained as a proximate result of their negligence, Dr. Vaughn and the Hospital seek to escape the consequences of their failure to abide by the standard of care. The trial court erred in dismissing the

Stewart-Graves' claims against Dr. Vaughn and the Hospital on summary judgment.

Dr. Vaughn and the Hospital raise three arguments in response to the Stewart-Graves' arguments. They argue the Stewart-Graves have not stated causes of action for wrongful birth or wrongful life; the Stewart-Graves are asking this Court to recognize a cause of action for "wrongful prolongation of life"; and the Stewart-Graves have not raised a claim for failure to obtain informed consent. These arguments are based on false premises, a misreading of case law, particularly *Harbeson*, and a disregard of the facts of this case.

(2) This Action Is Not For Wrongful Prolongation of Life, Nor Is It an Action Under the Natural Death Act

Dr. Vaughn and the Hospital persist in their attempt to recast the Stewart-Graves' claims as claims for wrongful prolongation of life. Simply repeating this assertion again and again does not, however, make it true. The Stewart-Graves' complaint contains three counts. *See* CP 1-15. Count I of the complaint is a claim by Liam and his parents for negligence in the conduct of the resuscitation efforts. CP 7-9. The trial court denied the Hospital's and Dr. Vaughn's motion for summary judgment dismissal of this count, and the Stewart-Graves voluntarily dismissed it. CP 303-04. Count II is a claim by Liam's parents for failure to obtain informed

consent and negligence in the continuation of resuscitation efforts. CP 9-11. Count III is a claim by Liam for failure to obtain informed consent and negligence in the continuation of resuscitation efforts. CP 12-14. The Stewart-Graves' complaint does not allege a cause of action for wrongful prolongation of life. The complaint alleges causes of action for negligence and failure to obtain informed consent.

These are the two grounds upon which this Court based its decision in *Harbeson* recognizing wrongful birth and wrongful life causes of action. As to informed consent, health care providers have a duty to impart material information to their patients as to the likelihood of their future children being born with physical and mental defects. *Id.*, 98 Wn.2d at 472. As to negligence, health care providers have a duty to undertake medical procedures with due care to avoid the conception or birth of defective children. *Id.* Both the parents and the defective child have causes of action for a health care provider's negligence or failure to obtain informed consent. The causes of action described in *Harbeson* are not confined to situations where the birth control fails. They apply more generally than the respondents would have this Court believe.

Dr. Vaughn and the Hospital virtually ignore the wrongful life cause of action this Court recognized in *Harbeson*. The court in *Benoy v. Simons*, 66 Wn. App. 56, 831 P.2d 167, *review denied*, 120 Wn.2d 1014

(1992), likewise ignored the wrongful life cause of action.<sup>5</sup> However, in *Harbeson* this Court adopted wrongful life as a cause of action belonging to the child, separate and distinct from the parents' wrongful birth cause of action. The adoption of a wrongful life cause of action was clearly more than a mere afterthought in *Harbeson*. Justice Pearson's analysis was thorough and thoughtful; the Court concluded that recognition of a wrongful birth cause of action was appropriate. The Court noted the anomaly of allowing only parents, not the child, to recover the extraordinary medical expenses occasioned by the child's physical and mental defects. Rather than allowing this to occur by refusing to recognize a wrongful life cause of action, the court "place[d] the burden of those costs on the party whose negligence was in fact a proximate cause of the child's continuing need for such special medical care and training." *Id.*, 98 Wn.2d at 480. This Court unequivocally recognized the tort of wrongful life as distinct from the tort of wrongful birth and based both torts on principles of negligence and failure to obtain informed consent. These are the bases of the Stewart-Graves' claims; they are not asserting,

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<sup>5</sup> The court in *Benoy* recognized that negligence and failure to obtain informed consent are the bases of a wrongful birth cause of action, 66 Wn. App. at 62, but it failed to acknowledge a wrongful life action, even though a wrongful life action is based on the same two grounds.

or asking this Court to recognize, a tort for "wrongful prolongation of life."

In connection with their argument about wrongful prolongation of life, Dr. Vaughn and the Hospital cite and discuss at length the Natural Death Act, RCW 70.122.010. The Act has, however, no bearing on this case other than to confirm again that patients, not physicians, have the power to make fundamental decisions about their health care and even about the process of death. The Act applies to competent adults, not newborn infants with no heartbeat or respiratory function. See RCW 70.122.030(1). Further, contrary to Dr. Vaughn's and the Hospital's assertion, a health care provider can be terminated for failing to withdraw nutrition or hydration from a patient. *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 807 P.2d 830 (1991).

Dr. Vaughn and the Hospital also argue resuscitation efforts on Liam could have been stopped only if the procedures discussed in *In re Guardianship of Hamlin*, 102 Wn.2d 810, 689 P.2d 1372 (1984) and *In re Guardianship of Grant*, 109 Wn.2d 545, 747 P.2d 445 (1987), are followed. These cases are useful in that they affirm that court intervention in such cases is not mandatory. However, these cases are inapposite to the Stewart-Graves' right to recover for negligence and failure to obtain informed consent. In neither of these cases was it alleged that a health

care provider's actions fell below the standard of care. In neither of these cases did the plaintiffs seek recovery for damages caused by such negligence of a health care provider or were damages sought because of a physician's failure to obtain a patient's informed consent to treatment. Notably, this Court in *Grant* recognized the entitlement of a patient to consent to the withholding of lifesaving treatment. *Grant*, 109 Wn.2d at 556. Dr. Vaughn's and the Hospital's arguments to the contrary notwithstanding, the Stewart-Graves are not asking this Court to recognize a cause of action for wrongful prolongation of life.

Finally, Dr. Vaughn and the Hospital assert that whether Liam had brain damage, or the extent to which his brain damage would impair him was not known at the time Dr. Vaughn and the Hospital staff were performing resuscitation efforts. On the contrary, the standard of care required Dr. Vaughn and the Hospital to know that the resuscitation of newborns after ten minutes without a heart rate is highly unlikely to result in survival or survival without severe physical and mental disability. CP 117.

(3) The Stewart-Graves' Claims of Negligence and Failure to Obtain Informed Consent Were Wrongly Dismissed

As predicted, Dr. Vaughn and the Hospital read this Court's opinion in *Harbeson* too narrowly and ignore the facts of this case in

arguing wrongful life and wrongful birth principles are not implicated here. They also accuse the Stewart-Graves of attempting to extend *Harbeson* "well beyond its carefully circumscribed limits." Br. of Resp'ts at 22. On the contrary, under the sound principles announced in *Harbeson* and under established principles of informed consent and negligence, both Liam and his parents stated claims against Dr. Vaughn and the Hospital.

Underlying this Court's opinion in *Harbeson* is the recognition that parents of a child with serious physical or mental defects, as well as the child himself, are entitled to recover from the health care provider whose negligence or failure to obtain informed consent is a proximate cause of the child's defects. To allow such recovery is not a disavowal of the sanctity of a less than perfect life, as Justice Pearson wrote:

[I]t is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society.

*Id.* at 481 (quoting *Turpin v. Sortini*, 31 Cal. 3d 220, 233, 643 P.2d 954, 182 Cal. Rptr. 337 (1982)). As discussed in the Stewart-Graves' opening brief, Br. of Appellants at 25-26, for purposes of the rights of parents and a child to recover for the failure of health care providers to obtain informed consent and abide by the standard of care, it matters not whether the child is born with lifelong, severe injuries or is born with no heartbeat

or respiratory function and suffers lifelong, severe injuries because of resuscitation after a prolonged period of oxygen deprivation. In both instances, the rights of the parents and the child to recover are based on fundamental principles of tort law. Dr. Vaughn's and the Hospital's narrow reading of *Harbeson* is contrary to this Court's decision to recognize and protect the rights of a child with defects and his or her parents.

Dr. Vaughn and the Hospital claim the Stewart-Graves are attempting to use *Harbeson* as a means of establishing in parents an "unfettered right" to allow their newborn "to die by withholding or terminating life-saving or life-sustaining treatment." Br. of Resp'ts at 21-22. This is a gross mischaracterization of the Stewart-Graves' arguments and claims. The Stewart-Graves are seeking to recover the extraordinary expenses they have been forced to incur, and will continue to incur for the duration of Liam's life, because Dr. Vaughn failed to obtain Liam's informed consent to the continuation of resuscitation efforts after 10 minutes and because Dr. Vaughn and the Hospital were negligent in continuing resuscitation efforts for 24 minutes, a time well beyond that dictated by the standard of care. This Court recognized in *Harbeson* that parents and the child are entitled to recover such extraordinary expenses. Because the evidence established these claims, or at least demonstrated the

existence of a genuine issue of material fact as to them, the trial court erred in dismissing these claims on summary judgment.

(a) Failure to Obtain Liam's Informed Consent

Dr. Vaughn argues Liam's claim for failure to obtain informed consent is not viable because such claim "erroneously presupposes that, under existing law, the parents had the right to dictate the withholding or withdrawal of life-saving or life-sustaining treatment from Liam after 10 minutes of resuscitative efforts." Br. of Resp'ts at 43.<sup>6</sup> Such presupposition is by no means a necessary prerequisite to the Stewart-Graves' informed consent claim. As clearly explained in the Stewart-Graves' brief, their informed consent claim is based on Dr. Vaughn's failure to obtain *Liam's* informed consent to the continuation of resuscitation efforts through Todd Graves, his father and the person closest to Liam entitled to consent on his behalf. This is not a matter of whether Liam's parents had the right to withhold treatment from him. It is a matter of whether Liam himself, through Todd Graves, was entitled to make the decision whether resuscitation efforts should continue or cease

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<sup>6</sup> Respondents' endless repetition of the quotation from *Montalvo v. Borkovec*, 256 Wis. 2d 472, 647 N.W.2d 413, *review denied*, 653 N.W.2d 890 (Wis. 2002), *cert. denied*, 538 U.S. 907 (2003), that "[f]ailure to treat was tantamount to a death sentence," *id.*, 647 N.W.2d at 420, is a blatant and overplayed attempt to transform this appeal into a referendum on the right to life. The Court should reject the respondents' shoddy and transparent tactics.

after 10 minutes after being advised of the material facts. Liam was so entitled.

Washington's informed consent statute is generally based on the policy judgment that patients have the right to make decisions about their own medical treatment. *Backlund v. Univ. of Washington*, 137 Wn.2d 651, 663, 975 P.2d 950 (1999). That is, a physician's liability for failure to obtain informed consent is based on such patient sovereignty. *Crawford*, 51 Wn. App. at 782 (1988).

A physician must give the patient sufficient information to make an informed health care decision. *Smith v. Shannon*, 100 Wn.2d 26, 29, 666 P.2d 351 (1983); *see also Miller v. Kennedy*, 11 Wn. App. 272, 282, 522 P.2d 852 (1974) ("The patient has the right to chart his own destiny, and the doctor must supply the patient with the material facts the patient will need to intelligently chart that destiny with dignity."), *aff'd*, 85 Wn.2d 151, 530 P.2d 334 (1975) (per curiam opinion adopting court of appeals opinion). The patient evaluates the risks of treatment and "the only role to be played by the physician is to provide the patient with information as to what those risks are." *Smith*, 100 Wn.2d at 30. The physician is required to advise the patient of material risks relating to the treatment. RCW 7.70.050(1). A fact is material for purposes of informed consent "if a reasonably prudent person in the position of the patient or his

representative would attach significance to it deciding whether or not to submit to the proposed treatment.” RCW 7.70.050(2).

Under the informed consent statutes, a health care provider is liable for injuries to a patient where the provider fails to obtain appropriate informed consent from a patient with respect to treatment. RCW 7.70.050. Here, the treatment at issue is the continuation of resuscitation efforts on Liam after the initial ten minutes of resuscitation efforts were unsuccessful, at which point severe and permanent brain damage was highly likely and, if subsequent resuscitation efforts proved successful, Liam would be a severely impaired individual. Dr. Vaughn never advised Todd Graves of this information, nor did she seek Liam’s consent to further treatment through Graves. The essence of Dr. Vaughn’s argument is that she was entitled to exercise complete discretion as to the treatment of Liam from the time of his delivery through the entire 24 minutes of resuscitation efforts. She argues she was not required to inform Liam (through Todd Graves) of the material facts regarding resuscitation after such a prolonged period. In so arguing, Dr. Vaughn is attempting to substitute physician sovereignty for patient sovereignty. This is entirely inconsistent with the policy and purpose of the informed consent doctrine:

Unlimited discretion in the physician is irreconcilable with the basic right of the patient to make the ultimate informed decision regarding the course of treatment to which he

knowledgeably consents to be subjected. Indeed, it is the prerogative of the patient to choose his treatment. A doctor may not withhold from the patient the knowledge necessary for the exercise of that right. Without it, the prerogative is valueless.

*Miller*, 11 Wn. App. at 283 (citing *Canterbury v. Spence*, 150 U.S. App. D.C. 263, 464 F.2d 772, 781, 782, 786 (1972)).

Courts uniformly recognize that the necessary corollary to the doctrine of informed consent is a patient's right not to consent, that is, the right to refuse medical treatment and procedures. See, e.g., *Cruzan by Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 270, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990); *Werth v. Taylor*, 190 Mich. App. 141, 475 N.W.2d 426, 428 (1991); *In re Brown*, 478 So.2d 1033, 1040 (Miss. 1985) ("the patient must be informed of the nature, means and likely consequences of the proposed treatment so that he may 'knowingly' determine what he should do—one of his options being rejection"); *Matter of Conroy*, 98 N.J. 321, 486 A.2d 1209, 1222 (1985) ("The patient's ability to control his bodily integrity through informed consent is significant only when one recognizes that this right also encompasses a right to informed refusal."). A patient's right to refuse medical treatment is broad. *Brown*, 478 So.2d at 1040 ("That we would hesitate hardly a moment before holding liable a physician or hospital which proceeded without the patient's informed consent says much regarding the patient's

broad right to refuse treatment.”). Indeed, a patient has the right to refuse medical treatment even if that decision will hasten his or her death. *Matter of Farrell*, 108 N.J. 335, 529 A.2d 404, 410 (1987) (collecting cases from numerous other states recognizing this principle).

The right of a patient to refuse medical treatment even if such refusal will lead to the patient’s death is grounded in the fundamental right of every individual to be let alone. *Brown*, 478 So.2d at 1040. This Court has recognized: “[T]he right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men.” *T.S. v. Boy Scouts of America*, \_\_\_ Wn.2d \_\_\_, \_\_\_, 138 P.3d 1053, 1062 (2006) (quoting *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting)).

Under these fundamental principles, it cannot be disputed that the right to determine whether resuscitation efforts should continue was Liam’s to exercise, even if the discontinuation of resuscitation efforts would lead to Liam’s death. Dr. Vaughn deprived Liam of that right by failing to obtain his informed consent, through his father, to the continuation of resuscitation efforts. By claiming she is not liable for the damages arising from her failure to obtain Liam’s informed consent, Dr. Vaughn seeks to obliterate the precious concept of patient sovereignty and replace it with physician sovereignty.

Dr. Vaughn was not relieved of the obligation to obtain Liam's informed consent by virtue of the emergency exception to the informed consent requirement. Under that exception,

[i]f a *recognized health care emergency exists* and the patient is not legally competent to give an informed consent and/or a *person legally authorized to consent on behalf of the patient is not readily available*, his consent to required treatment will be implied.

RCW 7.70.050(4) (emphasis added).

Here, as to whether a recognized health care emergency existed after 10 minutes, the Stewart-Graves' expert, Dr. Bodenstein testified: "the emergent circumstances of the resuscitation ceased after 10 minutes of resuscitative efforts with continued asystole," or no heart rate. CP 203. Dr. Vaughn dismisses, without analysis, Dr. Bodenstein's expert opinion as "conclusory, illogical, and nonsensical." Br. of Resp'ts at 45. On the contrary, Dr. Bodenstein's opinion is based on his medical expertise, training and experience, review of pertinent medical literature, and review of the file relating to Liam's delivery and resuscitation. CP 194. Medical literature confirms that resuscitation of a newborn after 10 minutes of no heart rate is highly unlikely to result in survival of the newborn or survival without severe and permanent disabilities. CP 201-02. Given this evidence, there was at least a genuine issue of material fact as to whether an emergency continued to exist after 10 minutes of unsuccessful

resuscitation efforts such that the emergency exception to the informed consent requirement did not apply.

Likewise, a genuine issue of material fact exists as to whether, assuming the health care emergency continued to exist after 10 minutes of unsuccessful resuscitation efforts, Todd Graves, indisputably a person authorized to consent on Liam's behalf, was "readily available" to give or withhold Liam's informed consent to the continuation of resuscitation efforts. See RCW 7.70.065(2)(a)(iii) (parents of a minor patient are authorized to give informed consent to health care on behalf of a patient who is incapacitated because he or she is under the age of majority).

The circumstances surrounding Liam's delivery have been well outlined in the briefing. Todd Graves was in a nearby birthing room at the Hospital during Liam's delivery and during the entire 24 minutes of resuscitation efforts. CP 142. A nurse continuously shuttled between Graves and the room in which Dr. Vaughn and the Hospital's code team were attempting to resuscitate Liam, updating Graves on the resuscitation efforts. CP 142-43. Rather, Dr. Vaughn argues it was impossible to obtain Liam's informed consent through Graves because she was engaged in resuscitation efforts and could not distract herself from her efforts and

speak with Graves.<sup>7</sup> She presents, however, no evidence or case law showing that this was the only way she could have obtained Liam's informed consent. Nothing prevented a colleague, or for that matter the nurse who communicated with Graves, from acting on behalf of Dr. Vaughn and the Hospital to obtain his informed consent in the birthing room.<sup>8</sup>

At a minimum, a genuine issue of material fact exists as to whether Graves, although understandably shocked and overwhelmed, was nevertheless "readily available" to give or withhold informed consent on Liam's behalf to the continuation of resuscitation efforts beyond the point at which, if the efforts were successful, Liam would be almost certain to suffer lifelong, severe physical and mental disabilities. As courts have held, it is a jury question both whether the emergency exception to the informed consent requirement applied and whether the physician took sufficient steps to obtain either the patient's informed consent or that of

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<sup>7</sup> Dr. Vaughn testified that had Graves been brought into the room where the resuscitation efforts were ongoing at 10, 15, or 20 minutes, she would not have had "facts and figures at hand to give him an appropriate and informed consent" because she lacked the requisite knowledge. CP 128. Dr Vaughn's lack of this knowledge is itself below the standard of care. CP 203.

<sup>8</sup> A claim for failure to obtain informed consent is premised on the failure of a "health care provider" to inform the patient of material facts relating to treatment. RCW 7.70.050(1). A "health care provider" includes, *inter alia*, physicians, nurses, surgeons, physician's assistants, nurse practitioners, agents or employees of the foregoing, and institutional employers of the foregoing. RCW 7.70.020.

the patient's family member. *Shine v. Vega*, 429 Mass. 456, 709 N.E.2d 58, 65 (1999); *Miller v. Rhode Island Hosp.*, 625 A.2d 778, 787 (R.I. 1993).

Dr. Vaughn argues the Stewart-Graves presented no evidence that the continuation of resuscitation efforts beyond 10 minutes caused Liam or his parents any damage. On the contrary, she argues, continuation saved Liam's life. Accordingly, she claims, to allow a claim for failure to obtain informed consent would equate to a disavowal of the sanctity of a less-than-perfect life. As discussed, however, under informed consent principles, a patient may choose to forego treatment that might extend the patient's life. It is *the patient's choice*, not that of Dr. Vaughn or the Hospital.

Again, the Stewart-Graves reiterate they are not disavowing, or asking this Court to disavow, the sanctity of Liam's life. They are, like every tort plaintiff, asking this Court to recognize their entitlement to compensation from defendants whose failure to act within the standard of care proximately caused them injury. Here, the injury is Liam's and his parents' being forced to endure the pain, suffering, and expense of living with Liam's severe and permanent disabilities.<sup>9</sup> As this Court has held, far

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<sup>9</sup> Dr. Bodenstein testified: "the failure to stop the resuscitation after 15 minutes of no heart rate and failure to obtain Mr. Graves' informed consent to continue the resuscitation, doomed Liam and his parents to a lifetime of severe disability requiring

from disavowing the sanctity of life, an award of damages as compensation for such severe injuries is entirely warranted. *Harbeson*, 98 Wn.2d at 481; *see also Turpin*, 31 Cal.3d at 233.

(b) Negligence

Parents have a cause of action for wrongful birth against a health care provider where the provider breaches the duty to observe the appropriate standard of care, where the breach is a proximate cause of the birth of a defective child. *Harbeson*, 98 Wn.2d at 467. The child with physical and mental defects also has a cause of action for wrongful life against such health care provider. *Id.*, 98 Wn.2d at 481. Breach of this duty is measured by the failure to conform to the appropriate standard of care, skill, or learning. *Id.* at 473, 482. The actionable injury in such cases is the birth of a child suffering defects or disabilities. *Id.* at 473. Allowing the parents and the child to recover the extraordinary expenses for medical care and training attributable to the child's defects or disabilities is entirely appropriate and in no way renounces the sanctity of the child's life. *Id.* at 481-82.

Here, Dr. Vaughn and the Hospital owed Liam and his parents the duty to observe the appropriate standard of care with regard to Liam's

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extensive medical, nursing and rehabilitative care over the course of Liam's lifetime projected to cost millions of dollars." CP 195.

delivery and resuscitation. That standard of care included the discontinuance of resuscitation after 15 minutes of unsuccessful resuscitation efforts.<sup>10</sup> Dr. Bodenstein testified Dr. Vaughn and the Hospital breached this duty and failed to conform to the standard of care by:

    failing to discontinue the resuscitation when no heart rate was obtained after 15 minutes of resuscitative efforts, and by failing after 10 minutes of resuscitation to obtain informed consent from Liam's father, Todd Graves, to continue Liam's resuscitation after the time when any reasonably prudent physician would have stopped resuscitation efforts.

CP 194-95; *see also* CP 200 (continuing Liam's resuscitation for 24 minutes violated the standard of care); CP 201 (the standard of care required Dr. Vaughn to be cognizant of the length of resuscitation and required the Hospital's code team to ensure Dr. Vaughn was aware of the duration of resuscitation). Dr. Vaughn's and the Hospital's failure to stop resuscitation after 15 minutes of unsuccessful attempts "doomed Liam and his parents to a lifetime of severe disability requiring extensive medical, nursing and rehabilitative care over the course of Liam's lifetime projected to cost millions of dollars." CP 194-95. The record establishes the

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<sup>10</sup> As noted, the Stewart-Graves voluntarily dismissed their claim for negligence during resuscitation based on respondents' actions and inactions including their failure to give appropriate doses of epinephrine, fluids, and sodium bicarbonate in a timely manner. *See* CP 7-9, 303-04. The claim before the Court is for negligence in the continuation of resuscitation beyond the time period dictated by the standard of care.

Stewart-Graves' right to recover from Dr. Vaughn and the Hospital the extraordinary expenses they have incurred, and will continue to incur, for Liam's medical and other care attributable to his severe and permanent mental and physical injuries.

D. CONCLUSION

Liam Stewart-Graves and his parents have suffered extraordinary injury and economic damage because of the conduct of Dr. Vaughn and the Hospital. Dr. Vaughn and the Hospital downplay the severity and permanency of Liam's injuries and the extent of the Stewart-Graves' damages. Instead, they attempt to recast the Stewart-Graves' claims for negligence and failure to obtain informed consent as claims requiring the disavowal of the sanctity of life and a determination that death is preferable to a life with disabilities. They erroneously recast the Stewart-Graves' request for relief as a request for a judicial declaration of an unfettered right of a parent to decide to allow their newborn baby to die. Clearly, these arguments are a shoddy effort to distract the Court from the true issues presented.

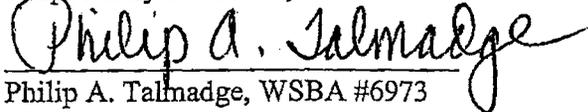
The issue is whether Liam, like all patients, was entitled to approve or reject the medical treatment to which he was subjected. There is no question he was deprived of this right by Dr. Vaughn's choice to become the sole decisionmaker. Under the doctrine of informed consent, it was

Liam, through his father, who should have made such a decision, particularly a decision that had such profound and far reaching consequences on him and his parents. Another issue is whether the Stewart-Graves, like all tort plaintiffs, are entitled to compensation for the injuries and damages they have suffered because Dr. Vaughn and the Hospital failed to act in accordance with the standard of care in connection with Liam's resuscitation, but rather continued resuscitation efforts beyond 15 minutes.

For the reasons set forth here and in the Stewart-Graves' opening brief, the trial court erred by dismissing on summary judgment the Stewart-Graves' claims for negligence in the continuation of resuscitation and failure to obtain informed consent. This Court should reverse the trial court's orders granting Dr. Vaughn's, the Vancouver Clinic's, and the Hospital's motions for summary judgment. Costs on appeal should be awarded the Stewart-Graves.

DATED this 15<sup>th</sup> day of September, 2006.

Respectfully submitted,



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DECLARATION OF SERVICE

On this day said forth below I deposited in the U. S. Mail a true and accurate copy of the following documents: Motion for Over-length Reply Brief and Reply Brief of Appellants in Supreme Court Cause No. 78383-7 to the following parties:

Original filed via email with:

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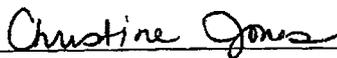
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 1, 2006, at Tukwila, Washington.



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FILED AS ATTACHMENT  
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DECLARATION