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NO. 58831-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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CASCADE ORTHOPAEDICS, a partnership,

Appellant,

vs.

JOSIE ARMANTROUT and WARREN ARMANTROUT, husband and  
wife and the marital community composed thereof,

Respondents.

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**RESPONDENTS' BRIEF**

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## **I. INTRODUCTION**

This is a case of first impression for the Court to consider whether the providing of services by an adult child to a parent can be considered in determining whether the parent was financially dependent upon the child for purposes of RCW 4.20.020. The Court is also asked to rule on the sufficiency of the evidence of financial dependency: the degree of need on the part of the parent and the sheer size of the contributions by the child. Finally, the Court is asked whether determining financial dependence is a question of fact for the jury.

The trial court correctly allowed the plaintiffs to present their case for the jury to determine whether Kristen Armantrout's parents were financially dependent upon her for the purposes of RCW 4.20.020. The trial court's jury instructions correctly stated the law of the State of Washington in this regard, and the court correctly denied the defendants' motions to dismiss the wrongful death claims of Josie and Todd Armantrout. This Court should affirm the trial court.

## **II. RESPONDENTS' STATEMENT OF FACTS**

At the time of her death on August 5, 2003, Kristen Armantrout was 18 years old. She was still in high school and living at home with her mother, Josie Armantrout. Kristen had no spouse or children at the time

of her death. Kristen's father, Todd, and brother, Robert, had moved to Bemidji, Minnesota, in early 2003. Todd had previously been laid off from the Boeing Company after 13 years of service and could find no other employment in the Puget Sound area. So, he took the job in Bemidji and moved there with Robert.. RP 7/17 at 14; 7/18 at 43.

Josie and Kristen stayed behind to sell the family home and for the two of them to finish school before joining Todd and Robert in Bemidji. Josie was finishing her degree at Green River Community College, and Kristen had one semester left at Auburn High. Because of her blindness, Josie could not have stayed behind by herself. Without Kristen, Josie would have had to quite school and move, as well. RP 7/17 at 15; RP 7/18 at 43; 45.

#### **Services provided by Kristen**

Kristen did all the driving for the pair. She drove Josie to and from the college, medical appointments, shopping, and other errands. She drove Josie to her meetings for the National Federation of the Blind, in which both Josie and Kristen were active.

Although Josie was eligible to ride the Access bus, there were limitations. Josie could not carry a week's worth of groceries on the Access bus, and the driver would not be able to help her to the door with groceries. RP 7/17 at 22. For grocery shopping, Josie needed a driver, as

well as someone to read labels and find things in the grocery store. RP 7/18 at 58-59.

A ride on the Access bus had to be arranged ahead; Josie could not call for an emergency or other last-minute ride. RP 7/17 at 21.

Sometimes Josie's college classes would end late, and Josie would find that the Access driver had already left. In those cases, Josie needed someone to pick her up. RP 7/18 at 58.

Josie could ride the Metro bus, but in the area where the Armantrouts lived, the Metro bus only came once every hour. RP 7/18 at 59-60. Other alternatives for transportation would have to be hired. RP 7/17 at 22.

Kristen helped her mother with her studies in other ways. Kristen helped her mother find research materials in the library, because not every resource could be accessed by the blind. Kristen did a great deal of reading to her mother. Readers were difficult to find, often failed to show up, and were often terrible. They also had to be paid. RP 7/17 at 21; RP 7/18 at 61-62.

Around the house, Kristen read the mail to Josie and write out checks to pay the bills according to her mother's instructions. RP 7/18 at 55. Kristen helped her mother label the produce, canned goods, and frozen food when they brought them home. Kristen read the labels to

Josie, and Josie made Braille labels with her slate and stylus. RP 7/18 at 55-56.

Kristen learned to help her mother with her medical needs. Josie is a diabetic and sometimes needed help with glucose readings. Kristen also drew Josie's insulin for her injections. If Josie's glucose dropped too much, Kristen could administer a Glucagon shot to raise the glucose. If her glucose was too high, Kristen helped her with that, too. On one occasion, Kristen found her mother when her glucose was so low she would not wake up. Kristen was able to take Josie's glucose reading, give her the Glucagon kit, and wait to see whether she needed to call 911. RP 7/18 at 66-68.

Part of the Armantrout family's decision to divide the household temporarily had to do with selling the family home in Auburn. They decided that Josie should stay behind to sell the house. Kristen would stay with her to take care of the driving and other tasks as described above for which Josie needed a sighted person. Kristen would also take care of getting and keeping the house ready to show. RP 7/18 at 51.

Kristen packed up the clutter in the home into boxes, loaded the boxes onto a U-Haul truck, and drove the truck to the U-Haul. RP 7/18 at 51-52. She made sure the carpet cleaning company found all the spots that needed cleaning. RP 7/18 at 52. She learned how to re-skin an interior

door. She sanded and stained the banister and taped off all the rooms for painting. RP 7/18 at 53.

In the yard, Kristen bought new plants and got the yard in order. RP 7/18 at 52-53.

When the realtor called wanting to show the house, Kristen would make sure everything was in its place and drive herself and her mom somewhere until the realtor was gone. RP 7/18 at 57-58.

Josie and Kristen had their own plans for their new lives in Bemidji. Josie and Kristen were going to take college classes together. Kristen would continue living at home, helping Josie as she had always done. RP 7/18 at 68-69. Kristen was to be Josie's driver and her reader, and Kristen was going to show Josie the "grid" of Bemidji, so that Josie could walk. RP 7/18 at 70.

#### **Monetary contributions made by Kristen**

When Josie Armantrout became a disabled person for Social Security purposes, Kristen was also eligible for payments from Social Security. Before she turned 18, Kristen's payments of \$580 per month were part of her mother's check, and the family had to account for how the money was spent. They had to spend the money on Kristen's needs, keep receipts, and report to Social Security every six months. RP 7/17 at 18.

When Kristen turned 18, she received her own check directly from

the Social Security Administration. RP 7/17 at 18. Josie's check was reduced by \$580 from approximately \$1700 per month to approximately \$1100 per month. RP 7/17 at 18. Kristen deposited the check in her parents' bank account for use for the family. RP 7/18 at 19. Josie had explained to Kristen how much the monthly expenses were in the home and how much her share might be. RP 7/18 at 47. It was also understood that, with Todd unemployed, they were experiencing a family crisis. RP 7/18 at 47-48; RP 7/17 at 19.

#### **Circumstances of the parents**

At the time of Kristen's death, her parents were living apart because of Todd's employment situation. They were trying to maintain two households until they could reunite their family.

After his layoff from Boeing, Todd collected unemployment and had some severance pay from Boeing. However, the severance pay only covered the COBRA payments for medical insurance. All of the household expenses had to be covered by the unemployment check which was less than half of what Todd earned at Boeing. RP 7/17 at 17-18.

When Todd started working again, the family income included Todd's paycheck, Josie's disability check, and Kristen's check from Social Security. Todd made \$18 per hour at his job in Bemidji, and he estimated his checks were approximately \$900 every two weeks. RP 7/17

at 16. Josie's check was approximately \$1100 per month, and Kristen's was \$580 per month.

Todd's expenses in Bemidji were approximately \$1300 to \$1400 per month and the monthly expenses in Auburn were \$4500 per month. RP 7/17 at 17. Their expenses exceeded their income by over \$2300 every month. In addition to monthly bills, there were the expenses for getting the house ready for sale, including repairs, painting, and cleaning. RP 7/17 at 20.

In order to meet their expenses, the Armantrouts had to "rob Peter to pay Paul." RP 7/17 at 17. They put off bills when they could. They also borrowed a significant amount of money from Josie's sister, Sylvia Gonzales. RP 7/17 at 20. In an eight-month period, the Armantrouts borrowed approximately \$15,000 from Sylvia Gonzales. RP 7/17 at 96. Without Kristen's \$580 check every month, the Armantrouts would not have been able to pay their monthly bills without borrowing more money from Mrs. Gonzales. RP 7/17 at 26. Money was so tight that Todd had to borrow the money from his brother for the airfare to come back to Auburn for his daughter's funeral. RP 7/17 at 34.

Without the services provided by Kristen, her parents would have incurred additional expenses for Josie's transportation, readers, and household chores requiring sight, such as labeling groceries and doing

yard work. Indeed, without the services provided by Kristen, Josie had to leave the Auburn house as soon as possible and move to Bemidji. RP 7/17 at 35-36. Todd Armantrout testified at trial that:

Immediately after the funeral and memorial service – we couldn't leave right away, but I had to get back to work and get some things arranged; so I flew back a week and a half after the funeral and started making preparations, making sure I could get the time off from my work, and setting up, getting a truck; because of – we – and this – such a last-minute, and there was no way we could get a – I thought we could get a moving company. I would have preferred it, but it was just – on top of being very expensive, that – so I made further arrangements and then flew back out here September, I think it was the 10th; something like that. And then we just started loading up the house, packing up; and then we drove back. RP 7/17 at 36.

While Todd was making these arrangements, Josie's sister, Carmen, flew up from her home in California and stayed with her for a few weeks. Then, her sister, Blanca, stayed with her until Todd returned. RP 7/17 at 36.

The Armantrouts took their house off the market after Kristen's death. RP 7/17 at 37. After they moved out completely, they relisted their house, but the realtor had to spend her own money for "staging" the house. Yard work had to be done, because no one had watered the yard since Kristen's death. Rental furniture also had to be moved in to make the house look like a home. RP 7/17 at 38-39. It sold for substantially less than they had hoped. 7/18 at 178.

Even after moving to Bemidji, Josie went without many of the services Kristen provided for her. Because she could not go shopping without her husband or son, she sat alone in the apartment until they came home from work. RP 7/18 at 179-180. The transit services in Bemidji could not serve Josie's needs. The drivers would not come to the door, and of course, Josie could not look out the window to see that the bus had arrived. So, Josie had to rely upon her son and her husband to drive her to doctor's appointments. They had to miss time from work. RP 7/17 at 41. Todd did not get paid for the missed work. RP 7/18 at 180. Robert, Kristen's brother, almost lost his job because of the time he took off. RP 7/17 at 83. Sometimes, they would have to cancel appointments because there was no transportation. RP 7/17 at 81.

When Josie's health declined, she had several visits to the Mayo Clinic and a hospital in Fargo, which took several days for each visit. The Armantrouts had to pay for Josie's niece to fly out from California, because Todd could no longer take time off work to take Josie to the Clinic. RP 7/17 at 42. Had Kristen been alive, she could have driven her mother to the Mayo Clinic. RP 7/17 at 43. She also would have been there to help her mother with personal hygiene that she was embarrassed to have her son perform. RP 7/17 at 82.

### **Procedural history of the case**

This case was filed on June 17, 2004. CP 1-7.

The Armantrouts alleged that Dr. Carlson and Cascade Orthopaedics negligently caused the death of their daughter. She dies of a pulmonary embolism 2 weeks after minor ankle surgery and just hours after leaving Cascade Orthopaedics offices.

On July 12, 2006, the third day of trial, defendant sought to exclude some of plaintiffs' witnesses who would testify regarding the plaintiffs' damages in their wrongful death claims for the death of their daughter. RP 7/12 at 3-4. Plaintiffs objected that the defendants had brought what was essentially a motion for summary judgment dismissing their wrongful death claims with no notice. PR 7/12 at 12-13. The trial court described the motion as either a summary judgment without affidavits or CR 50 motion before plaintiffs had rested. The court ruled that neither was appropriate and indicated that the plaintiffs could proceed with their witnesses. RP 7/13 at 4. Defendants continued to object to testimony regarding Josie and Todd Armantrout's damages, and the issue was argued on July 13, 17, and 18. RP 7/13, 7/17, and 7/18.

On July 19, 2006, the issue was again argued by counsel, and the trial court considered several Washington cases, as well as California cases, on the meaning of financial dependence for the purposes of the

wrongful death statutes. There was extensive discussion whether the issue of financial dependence is an issue of fact for the jury and whether the provision of services can be considered in determining financial dependence. RP 7/19. The Court's instructions to the jury included instructions related to financial dependence. CP 91-95.

Exceptions to the court's instructions were made on July 20, 2006.

The jury found in favor of the Armantrouts and awarded them \$1.15 million for the loss of their daughter as the result of Cascade Orthopaedics' negligence.

### III. ARGUMENT

A. **The trial court correctly determined that plaintiffs must be "dependent for support" in order to maintain their wrongful death cause of action.**

At the time of her death, Kristen Armantrout was a single adult woman with no children. The parties agreed that RCW 4.20.020 provides that parents may benefit from a wrongful death action for the death of their adult child if they were "dependent upon the deceased person for support," and the deceased left no surviving spouse or children. Dependent for support means financial dependence.<sup>1</sup>

At trial, Josie and Todd Armantrout argued that they were

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<sup>1</sup> *Masunaga v. Gapasin*, 57 Wn.App. 624, 628, 790 P.2d 171 (1990).

financially dependent upon their daughter, because they received \$588 per month from her, and because she provided Josie with essential services which Josie and Todd could not otherwise afford. The trial court allowed the Armantrouts to present evidence of their financial dependence and instructed the jury regarding financial dependence. The appellants do not appear to challenge the language of the court's instructions, only that the issue was allowed to go to the jury.

**B. The trial court did not err when it determined that the issue of financial dependence was an issue of fact for the jury.**

No case in Washington explicitly holds that the issue of financial dependency is an issue of fact for the jury to decide. However, several Washington cases were appealed from jury verdicts, and the Washington Supreme Court has made an extensive analysis of the *facts* in several cases, including *Mitchell v. Rice*.<sup>2</sup>

In *Mitchell*, the defendant appealed from a jury verdict awarding a father damages for the wrongful death of his son. The trial court had held that there was sufficient evidence of dependency for the case to go to the jury. The Supreme Court agreed, stating that it had considered “the *circumstances of the times* and the depressed condition of real estate,” which the father owned. (Emphasis added.) The Court further observed

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<sup>2</sup> *Mitchell v. Rice*, 183 Wash. 402, 407, 48 P.2d 949 (1935).

about the *Mitchell* case that: “It may be conceded that the *facts* make this a borderline case . . .” Nevertheless, the issue of dependency was one for the jury. Indeed, when the Court articulated the appropriate standard for review, it stated:

In reviewing the action of a trial court, it is not our function to determine the preponderance of the evidence, but rather to determine *whether there was enough evidence to carry the case to the jury* on the question of dependency, resolving all doubt upon the facts in favor of the plaintiff. The degree of dependency required by the rule announced in the cases cited above is to substantial. *But “substantial” is a term having relationship to the circumstances of the plaintiff.* Also, we must not lose sight of the fact that the statute upon which the right of action is based is remedial in character. It creates a right of action not existing at common law and should not, in its application, be so limited by construction as to partially defeat its purpose. (Emphasis added.)<sup>3</sup>

In other Washington cases, the appellate courts have also reviewed the facts before making a ruling. In *Cook v. Rafferty*, the Washington Supreme Court affirmed the verdict of a trial court after a bench trial. The Court stated that:

*Under the facts*, we think it is reasonable to suppose that, had Miss Cook lived, she would have continued to contribute to the support of the family and continued to care for her parents, and to conclude that Mr. and Mrs. Cook suffered a pecuniary loss by reason of her death. It is established in this state that parents of an adult son need not be wholly dependent upon him for support in order to recover damages for his wrongful death. Partial dependency is sufficient . . . [The statutes], being remedial in their nature, are

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<sup>3</sup> *Id.*

liberally construed. We think that there was a showing of need, on the one hand, and a financial recognition of it, on the other . . .”<sup>4</sup> (Emphasis added.)

More recently, in *Masunaga v. Gapasin*, the trial court granted the defendants’ motion for summary judgment, and the appellate court “made the same inquiry as the trial court [to] determine whether the materials submitted demonstrate ‘that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’”<sup>5</sup>

Washington courts have held that a parent need not be wholly dependent upon the adult child, the dependence must be substantial.<sup>6</sup> Dependence within the meaning of the statute means “a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child.”<sup>7</sup> The determination of “want” as in *Bortle v. Northern Pac. R. Co.*, or an examination of the circumstances of the parent, as in *Mitchell* are necessarily questions of fact to be made on a case-by-case basis, and before a court can remove such questions of fact from the jury on a motion for judgment as a matter of law, the court must determine that no reasonable person could have found in favor of the parents claiming

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<sup>4</sup> *Cook v. Rafferty*, 200 Wash. 234, 240, 93 P.2d 376 (1939).

<sup>5</sup> *Masunaga v. Gapasin*, 57 Wn.App. 624, 627, 790 P.2d 171 (1990).

<sup>6</sup> *Id.* at 628.

<sup>7</sup> *Bortle v. Northern Pac. R. Co.*, 60 Wash. 552, 111 P. 788 ()

dependency.<sup>8</sup>

At trial, the trial court not only considered Washington cases, the court also considered a California case, *Chavez v. Carpenter*.<sup>9</sup> In California, parents may sue for the wrongful death of their child “if they were dependent on the decedent.”<sup>10</sup> Financial dependency should be the test for parents who are not heirs of the decedent.<sup>11</sup> In California, financial dependence generally presents a question of fact, which should be determined on a case-by-case basis.<sup>12</sup>

This Court should also hold that whether parents are financially dependent upon a child is an issue of fact for the jury, unless the defendant can prevail on summary judgment or a CR 50 motion for judgment as a matter of law. In the present case, the trial court treated the defendants’ motion as a CR 50 motion and found that the plaintiffs had presented legally sufficient evidence for a jury to find that they were financially dependent upon their daughter.

**C. The trial court did not err in denying defendants’ CR 50 motion for judgment as a matter of law.**

The defendant does not find error with the trial court’s decision to

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<sup>8</sup> CR 50; *Hiner v. Bridgestone/Firestone*, 91 Wn.App. 722, 959 P.2d 1158 (1998).

<sup>9</sup> *Chavez v. Carpenter*, 91 Cal. App. 4th 1433, 1445, 111 Cal. Rptr. 2d 534, 544 (2001).

<sup>10</sup> *Chavez* at 1445; 543.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1445; 544.

treat its motions to exclude plaintiffs' witnesses as a CR 50 motion for judgment as a matter of law. Thus, the Court should review the trial court's determination under the standard of review for a CR 50 motion.

A motion for a directed verdict requires the trial court to view the evidence in a light most favorable to the nonmoving party and to deny the motion if the nonmoving party has presented substantial evidence in support of the verdict, i.e., evidence, or reasonable inferences therefrom, which would convince an unprejudiced and reasonable person of the theory toward which it is directed.<sup>13</sup> On review of a trial court's ruling on a motion for judgment as a matter of law, the reviewing court must view conflicting evidence in the light most favorable to the nonmoving party and determine whether the proffered result is the only reasonable conclusion.<sup>14</sup>

As stated above, in a wrongful death claim by a parent for the death of an adult child, Washington courts have held that the parent may be only partially dependent upon the adult child and still be financially dependent within the meaning of RCW 4.20.020, but the dependence must be substantial.<sup>15</sup>

The Court in *Bortle* stated that:

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<sup>13</sup> *Koker v. Armstrong Cork, Inc.*, 60 Wn.App. 446, 804 P.2d 659 (1991).

<sup>14</sup> *Estate of Borden ex rel. Anderson v. State Dept. of Corrections*, 95 P.3d 764 (2004).

<sup>15</sup> *Masunaga*. at 628.

[W]hile we would not give it such a strict construction as to say it means wholly dependent, or that the parent must have no means of support or livelihood other than the deceased, such a construction being too harsh and not in accordance with the humane purpose of the act. Nevertheless, there must be some degree of dependency, some substantial dependency, a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child.<sup>16</sup>

Although Washington courts have held that the wrongful death statute may be liberally construed only after the proper beneficiaries have been determined, these same courts also point out that the literal scope of the statutes can be extended to protect beneficiaries clearly contemplated by the statute.<sup>17</sup> Parents who are dependent upon their children for support are beneficiaries clearly contemplated by the statute. Once the parents make a prima facie showing of dependence, the Court should construe the term “dependent for support” in accordance with the humane purposes of the act. Indeed, in *Cook*, the Court referred to the remedial purpose of the act when determining whether the dependency issue was properly before the trier of fact.<sup>18</sup>

In the present case, the plaintiffs presented evidence that they were experiencing grave financial circumstances at the time Kristen died. Todd had been laid off from his job at Boeing and was without employment for

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<sup>16</sup> *Bortle v. Northern Pac. R. Co.*, 60 Wash. 552, 111 P. 788 ()

<sup>17</sup> *Masunaga*, 57 Wn.App. at 631.

<sup>18</sup> *Cook*, 200 Wash. at 240.

some period of time. All of his severance pay was used to make the COBRA payments, and the family was forced to live off of his unemployment check which was less than half of his income from Boeing. When Todd returned to work, the family had to support two households: one in Bemidji and one in Auburn. Even with the money Kristen was giving them, they had to borrow from Josie's sister, Sylvia Gonzales. Without the money Kristen gave them, they would have had to borrow even more money from Mrs. Gonzales.

The appellant argues that the Armantrouts' circumstances were the result of their conscious, deliberate decisions, and they cannot, as a matter of law, be dependent upon their daughter under those circumstances. This argument is a form of "Monday morning quarterbacking," and the Court should reject it. The Armantrouts were entitled to take whatever steps they felt necessary in the best interest of their family. At the time, they felt it was in the best interests of their family for Todd to take the Bemidji job, for Josie stay behind to sell the house for the best possible price, and for Kristen to stay in Auburn to finish high school and care for Josie. They made these decisions without contemplating that Kristen would die due to the negligence of Cascade Orthopaedics, and Cascade Orthopaedics should not benefit because these plans did not work out.

The plaintiffs also were able to show that Kristen recognized her

family's financial need. Josie testified that she went over with Kristen their financial circumstances and what their monthly expenses were. Upon hearing how much things cost, Kristen immediately turned her \$588 Social Security check over to her parents. The \$588 had previously been included in Josie's check, and so, the family had been relying on this \$580 for a number of years before Kristen turned 18.

In addition to contributing to the household expenses, Kristen provided valuable services that allowed Josie to stay in the Auburn house. Without Kristen, Todd and Josie would have had to pay for the services Kristen provided, and there was substantial evidence that they could not afford to pay for such services. Without Kristen, Josie had to move to Bemidji as quickly as possible, and while she waited until Todd could move her to Bemidji, Josie had to arrange for her sisters to stay with her temporarily.

That Kristen's services provided to her mother had substantial financial value was established by the testimony of Lowell Bassett, Ph.D., plaintiffs' economist. He testified that Kristen provided over 183 hours per month of services for her mother. Using the going rate for household services in Bemidji, MN, Dr. Bassett testified that the value of Kristen's services to her mother was \$36,553 per year or \$107,101 to the date of trial. RP 7/18 at 19-20.

Appellants claim that Josie's dependence upon her daughter was merely temporary. However, the evidence presented at trial also shows that the Armantrouts would have continued to be dependent upon their daughter, even after the family was reunited in Bemidji. Kristen and Josie were planning to go to school together. Kristen would continue to be Josie's driver and her reader. Instead, because Todd and Robert were working, Josie became a prisoner in her own home. The transit drivers in Bemidji would not go to the door for Josie, and she certainly could not see them arrive. Consequently, she had to wait for her husband or son to drive her places.

Scheduling Josie's medical appointments became a problem. Not only did Todd have to take unpaid leave to take Josie to the Mayo Clinic, the Armantrouts had to pay for their niece to fly out from California to help Josie. Sometimes, there was no one to take Josie to an appointment, and they had to reschedule. These were services that Kristen could have, and would have, provided to her parents.

Because Kristen died before the family could be reunited in Bemidji, it will never be known whether Kristen would have had to seek outside employment to replace her Social Security check. No one can say how temporary the Armantrouts' financial problems were.

Even if the financial need were temporary, Washington law does

not require proof that the parents' financial need be permanent. In fact, Washington courts have held that the dependence necessary to support an action must be based on a current condition, not on a promise of future services or anticipated future dependence.<sup>19</sup>

The Court should rule that the plaintiffs presented ample evidence of financial dependence to send the issue to the jury and affirm the trial court's ruling. In fact, the jury found that the Armantrouts were financially dependent upon their daughter, but the defendant now asks this Court to pick out portions of the evidence and determine as a matter of law that certain kinds of support are insufficient to show dependence. The defendant argues that contribution of services cannot, as a matter of law, be considered when determining financial dependence. The defendant now argues that some kinds of cash contributions should not count as a matter of law because of the source of the money. The defendant now argues that \$588 per month is not enough as a matter of law to create financial dependence. The defendant argues that checking a box on an income tax return is dispositive, regardless of the actual need of the parents. The court should reject these arguments and affirm the trial court's denial of the motion for judgment as a matter of law.

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<sup>19</sup> *Masunaga*, 57 Wn.App. at 629.

**1. The contribution of services should be considered when determining financial dependence.**

No Washington case directly declares whether the provision of services can be considered in determining whether a parent is financially dependent upon their child. However, Washington courts have considered the provision of services in making such a determination.

In *Masunaga*, the Court of Appeals considered the provision of services by the son to his parents in their claim that they were financially dependent upon their son. The Court rejected the claim, not because the son provided services, but because the parents provided no evidence that they needed or were dependent upon the services.<sup>20</sup> There is ample evidence in the present case that Josie and Todd were dependent upon the services provided by her daughter: Josie could not live alone without sighted assistance, and she and Todd could not afford to pay someone else for the services Kristen provided.

In its opening brief, Cascade Orthopaedics consistently refers to the services provided by Kristen as “gratuitous” services. Of course, the services Kristen provided to her mother were gratuitous; they could not afford to pay for such services. That they could not afford to pay for the services is evidence of the necessitous want on the part of Josie and Todd

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<sup>20</sup> *Masunaga*, 57 Wn.App. at 628.

Armantrout that their daughter recognized financially, both with her Social Security check and her time and effort in providing the services.

To exclude, as a matter of law, anything but the payment of money in determining financial dependence would produce absurd and harsh results. One can easily imagine a disabled or elderly parent with no financial resources, residing with an adult child in the adult child's home. The adult child would pay the mortgage, the power bill, the cable bill, the garbage bill, and buy groceries, regardless of whether the parent was living there or not. The adult child would not make one single monetary payment to the parent for support, and yet, it cannot be said that the parent was not dependent upon that child.

One can also imagine a parent living in her own house with an adult child. The child's services in caring for the parent allows the parent to live in her home. She could not afford to pay someone for those services, and without them, she would be forced to leave her home and find another residence, such as a nursing home, where she would have to give up her possessions, her neighbors, her pets, and much of her independence. It cannot be said that this parent is not, at least partially, dependent upon the adult child and the services he provided that she could not otherwise afford.

Other states consider the provision of services when determining

whether a parent is financially dependent upon a child.<sup>21</sup> The Fifth Circuit Court of Appeals ruled in a Georgia case, *Hogan v. Williams*, that services should be considered in determining dependency:

[S]ervices of a child to a mother or of a mother to a child may well be reckoned as contributing substantially to the support of the recipient far beyond any money value which the services may have, and the chief element of dependence may be in respect to personal services of that nature.<sup>22</sup>

The facts in the *Hogan* case are remarkably similar to the facts in the present case:

Both plaintiff's husband and father had been dead for more than fifteen years, her mother was a widow and plaintiff was the oldest child. Plaintiff and her only child, Billie D. Williams, stayed in the home with plaintiff's mother for eleven years before plaintiff when to New York, and plaintiff cared for her mother. Before going to New York plaintiff did domestic work in Waycross and the most she ever earned was \$7/00 per week. Plaintiff when to New York in 1944 so that she could earn more money, and while in New York earned \$30.00per week, besides room and board. The deceased daughter remained in Waycross and took the place of the plaintiff in looking after plaintiff's mother. Decedent slept with plaintiff's mother nightly, helped her with practically everything including washing, ironing, cooking, cleaning house and running errands. From her larger earnings plaintiff sent money to her daughter to be used in supporting the daughter and plaintiff's mother. The daughter did all the writing, wrote plaintiff every week, and plaintiff depended on deceased to keep her informed about plaintiff's mother. While in New

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<sup>21</sup> *Hogan v. Williams*, 193 F.2d 220, 224 (5th Cir. 1951); *Chavez v. Carpenter*, 91 Cal. App. 4th 1433, 1445, 111 Cal. Rptr. 2d 534, 544 (2001); *Deaconess Hospital v. Gruber*, 791 N.E.2d 841, 847 (Ind.App. 2003); *Hines v. Hines*, 32 Or.App. 209, 214, 573 P.2d 1260 (1978).

<sup>22</sup> *Hogan v. Williams*, 193 F.2d at 224 (quoting *Scott v. Torrance*, 25 S.E.2d 120, 126).

York plaintiff would write her daughter to run errands for her which deceased did. The fact that deceased stayed with and looked after plaintiff's mother saved plaintiff from hiring someone else to look after her mother. Plaintiff could not and would not have gone to New York if her daughter had not remained here to look after her mother. The daughter performed all these services for plaintiff and plaintiff was dependent upon her for such services. Since the daughter's death plaintiff had to give up her job in New York and return to Waycross to care for her mother.<sup>23</sup>

In *Hogan*, the deceased child provided no money to her mother, but instead, provided services to enable the mother to go to New York for better employment. Similarly, in the present case, Kristen Armantrout's services made it possible for her father to go to Bemidji for his new job.

A California case, *Chavez v. Carpenter*, was relied upon heavily by the trial court in the present case. The *Chavez* court ruled that:

[I]f a parent receives financial support from their child which aids them in obtaining the things, such as shelter, clothing, food and medical treatment, which one cannot and should not do without, the parent is dependent upon their child. The death of that child in this type of situation results in a distinct pecuniary loss to the parent which requires the parent to find aid elsewhere for the basic things we all need.<sup>24</sup>

In *Chavez*, the Court found that the parents were at least partially dependent upon their adult child. The Court held that:

It appears from this record that appellants received "financial support from their child which aid[ed] them in obtaining . . . shelter, clothing, food . . ." There is evidence

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<sup>23</sup> *Hogan*, 193 F.2d at 223, footnote 4.

<sup>24</sup> *Chavez* at 1446.

that appellants routinely relied on decedent for money to defray their ordinary living expenses, and for help with their cars, land, and business. The reasonable inference from that evidence is that appellants relied on decedent's aid – at least to some extent – for life's necessities. That inference is not overcome by defendant's assertion that appellants had sufficient income to pay their mortgage and other bills without decedent's assistance.<sup>25</sup>

These cases from other states recognize the reality that services have substantial monetary value, and without them, a parent may be required to find aid elsewhere for the basic things she needs. In the present case, Kristen's services allowed Josie to stay in her house to help protect the resale value of the family home and to finish her education. Kristen's services allowed Josie to stay behind with Kristen so that Kristen could finish high school, something that Josie, as Kristen's parent, felt was necessary. The evidence considered by the jury showed that Kristen helped her mother with the house, with transportation, with obtaining and preparing food, and with her medical needs.

Without Kristen there, Josie had to leave her home and find aid elsewhere for her basic needs. Moving under the circumstances that occurred was expensive, disorderly, and required Todd to take even more unpaid leave from his job. Josie had to impose upon her two sisters to live with her until Todd could arrange the move. There was no question that

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<sup>25</sup> *Chavez*, at 1447-1448.

Josie had to leave as soon as possible. Even after paying for someone to do the work around the house that Kristen did to keep the house ready to show, the Armantrout's sold their empty home for substantially less than they could have.

Appellant argues that Josie Armantrout had other alternatives to remaining in Auburn with her daughter, and therefore, as a matter of law, she was not dependent upon her daughter. The law should not be construed so narrowly that the parent of a child, dead through the negligence of others, must show that she was reduced to living on the streets before she can recover from the negligent tortfeasor. Almost everyone has alternatives, such as moving into a nursing home or a state institution, but the court should not measure financial dependence based upon whether the parent was left with no alternative.

Like the court in *Hogan*, the Georgia case, this Court should give weight to the rational decisions made by the parties to live in the best way available to them. In *Hogan*, the mother had gone to New York to find better employment, and she depended upon the services of her daughter to enable her to go to New York. Granted, the mother was capable of returning to Georgia to care for the grandmother, but the court did not hold that, because she had alternatives, the mother was not dependent upon the daughter. The court affirmed the trial court's decision to let the issue go

to the jury, because the daughter's contribution allowed the mother to "go elsewhere and seek and obtain employment with greatly increased compensation."<sup>26</sup> In the present case, Kristen's compensation allowed her parents to try to make the best of a bad financial situation.

The trial court did not err when it allowed the jury to consider the provision of services in determining financial dependence. This Court should affirm the trial court's decision, because the respondents submitted substantial evidence that the Armantrouts were financially dependent upon their daughter.

**2. Kristen's status as a dependent for government purposes should not preclude a finding of financial dependence on the part of her parents.**

Not only do the appellants argue, without authority, that only the payment of substantial sums of money be sufficient as a matter of law for a finding of financial dependence, the appellants argue that Kristen's status as a dependent for governmental purposes precludes her parents' claims under RCW 4.20.020 as a matter of law. Kristen's eligibility for government programs, or her parents claiming her as a tax deduction should not preclude their claims.

First, Kristen's status as the dependent child of a disabled person had been established years before her death. Her mother received the

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<sup>26</sup> *Hogan*, 193 F2d. at 224.

funds as part of her disability check to help her care for her child. When Kristen turned 18, that money was given to her for her own use. She could have used it for whatever she wanted, but she gave it her parents, because she understood the nature of the family crisis and the costs of living. The appellant offers no authority to suggest that Kristen could not have moved out of the family home and still collected that check until two months after she turned 19 years old. But she did not move out. Kristen stayed to care for her mother, because there was no one else to do it.

Second, the Armantrouts claimed Kristen on their tax return for 2002. She had lived at home in 2002. Her father was employed for part of 2002 and lived at home for all of 2002. It was not until 2003 that she was needed to care for her mother full-time so her father could take the job in Bemidji. Circumstances had changed for the Armantrout family since they checked the box on the 2002 income tax return to declare Kristen a dependent.

Furthermore, once again, the appellant argues without any authority that financial dependence under RCW 4.20.020 has the same meaning as dependence in the federal tax code. Although parents must provide more than half of a child's support in order to claim her on their federal income tax return, that does not preclude a finding that the parent is financially dependent upon the child for purposes of RCW 4.20.020,

because partial dependency is sufficient under Washington law.<sup>27</sup>

There is no authority for the proposition that the child be completely independent before the parent can claim financial dependency. In fact, the Court in *Hogan*, the Georgia case, recognized that family members may, in fact, *be dependent upon each other*. The *Hogan* court stated that:

A mother may be dependent on her child for support notwithstanding the fact that she may contribute more to his support than the child contributes to her support. It is immaterial to a determination of a mother's dependency that the child does not earn a sufficient sum to support himself or that he consumes more than he contributes. No fixed, definite rule can be laid down which would be applicable in all cases, but each case must depend upon its own peculiar facts. (Citations omitted.)<sup>28</sup>

In this case, whether or not the parents can apply for benefits or fill out their tax return under U.S. government regulations should not be dispositive in Washington courts in making a determination of financial dependence under RCW 4.20.020. The jury was made aware of the tax return issue and the Social Security check, and appellant was able to argue its theory to jury. RP 7/24 at 80-81.

Finally, appellant argues that the Armantrouts' claims should be precluded on the basis of judicial estoppel. This doctrine is not applicable to the facts of this case, and the Court should reject it.

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<sup>27</sup> *Masunaga*, 57 Wn.App. at 627.

<sup>28</sup> *Hogan*, 193 F.2d at 224.

The rule of judicial estoppel prevents a party who has taken one position in judicial proceedings from assuming an inconsistent position in a later action.<sup>29</sup> There are five essential elements to a claim of judicial estoppel: (1) The inconsistent position first asserted must have been successfully maintained; (2) a judgment must have been rendered; (3) the positions must be clearly inconsistent; (4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; (6) it must appear unjust to one party to permit the other to change.<sup>30</sup>

In the present case, the appellant cannot establish judicial estoppel, because the essential elements are not met. First, there is no judicial estoppel, because the Armantrouts have not taken an inconsistent position in a previous *judicial proceeding*. Filing an income tax return or applying for disability benefits for Josie are not judicial proceedings.

Second, no judgment has been entered, except against the appellant in the case below.

Third, the Armantrouts positions are not clearly inconsistent. As discussed above, the Armantrouts' circumstances in 2003 were different than their circumstances during the 2002 tax year. There is no legal

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<sup>29</sup> *Raymond v. Ingram*, 47 Wn.App.781, 785, 737 P.2d 314, review denied, 108 Wn.2d 1031 (1987).

<sup>30</sup> *Id.*

authority for the proposition that financial dependency under the Washington wrongful death laws is identical to the dependency test for claiming a federal income tax deduction. Appellant's argument in this regard is based solely on the fact that the same word, *dependency*, is used in the three different contexts without analyzing whether the word has the same meaning in all three contexts.

Fourth, the parties and questions are not identical. The appellant cannot claim that its interests are identical to the IRS or the Social Security Administration.

Fifth, the appellant cannot claim that it was misled or changed its position based upon any information provided by the Armantrouts to the IRS or the Social Security Administration. There is no testimony in the record that Cascade Orthopaedics would have treated Kristen Armantrout better if it had known her parents had wrongful death claims.

Sixth, there is no unfairness, because the Armantrouts have not taken inconsistent positions. It may appear unfair to the appellant, because it now has a judgment against it, but there has been no "perversion of the judicial process" that the doctrine of judicial estoppel is meant to prevent.<sup>31</sup>

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<sup>31</sup> *Falkner v. Foshaug*, 108 Wn.App. 113, 124, 29 P.3d 771 (2001).

The Court should reject applying the doctrine of judicial estoppel in this case. The Armantrouts have not taken an inconsistent position anywhere, and certainly not in a previous judicial proceeding. Judicial estoppel is not applicable to this case.

The Court should also reject appellant's argument that the Armantrouts are precluded from claiming they were financially dependent upon their daughter because they claimed her as a dependent on their income tax return in a previous year. The same "bright line" rule should be rejected with respect to the Social Security check. The appellant was able to argue these theories to the jury, but the jury rejected them. The Court should affirm the trial court in this case.

#### **IV. CONCLUSION**

This case presents a number of issues for which there is little guidance in Washington law, such as the degree to which the provision of services can be considered in determining financial independence. There are other issues in which Washington cases provide much guidance. Although appellant argues that Josie and Todd Armantrout had other alternatives for living, other than their daughter, Washington courts have held that *partial* dependence is sufficient. The measure of financial

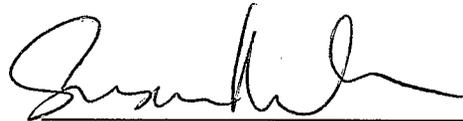
dependence in Washington is not the difference between living and living on the streets.

Another issue for which Washington cases provide a great deal of guidance is whether financial dependence is an issue of fact for the jury. A number of Washington cases are appealed from jury verdicts, indicating that Washington courts have long considered financial dependence as an issue for the jury.

Respondents respectfully request that the Court affirm the trial court's decision to allow the issue of financial dependence to go to the jury.

DATED this 9<sup>th</sup> day of May, 2007.

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NO. 58831-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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CASCADE ORTHOPAEDICS, a partnership,

Appellant,

vs.

JOSIE ARMANTROUT and WARREN ARMANTROUT, husband and wife and the  
marital community composed thereof,

Respondents.

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**AFFIDAVIT OF SERVICE OF  
RESPONDENTS' BRIEF**

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