

ORIGINAL

No. 84098-9

(Court of Appeals Nos. 272702 and 274179)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BREEAN BEGGS, as Personal Representative for the estate of TYLER DELEON and as Limited Guardian Ad Litem for DENAE DELEON, BREANNA DELEON, LAKAYLA DELEON, ANTHONY BARCELLOS and BRENDEN BURNETT, minor children; FRANCES CUDMORE as Limited Guardian Ad Litem for BECKETT CUDMORE, a minor child; and AMBER DANIELS, a single individual,

Plaintiffs/Petitioners

v.

DAVID FREGEAU, M.D.; the ROCKWOOD CLINIC, a Washington State corporation; SANDRA BREMNER-DEXTER, M.D.,

Defendants/Respondents.

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STATE OF WASHINGTON
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RESPONDENT HEALTH CARE PROVIDERS' ANSWER TO BRIEF OF AMICUS CURIAE OF THE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. INTRODUCTION & SUMMARY OF ARGUMENT

The Health Care Respondents, David Fregeau, MD, Sandra Bremner-Dexter, MD and the Rockwood Clinic, file this brief to answer the Brief of Amicus Curiae filed on behalf of the Washington State Association for Justice Foundation (hereinafter “Amicus brief” or “Amicus”).

This case presents no vehicle to entertain Amicus’ invitation to overrule Whittlesey v. Seattle because regardless of whether the Court places a liberal or strict construction on the wrongful death and survival statutes, those statutes cannot be applied to allow plaintiffs to assert damage claims here as beneficiaries because under the statutes they cannot establish any legal right in any recipient of adoption support funds to devote the funds to the dependency of any child other than the adopted child.

Because doctors have reporting requirements under RCW 26.44.030 only because, and to the extent that, they are physicians licensed to practice health care, any harms arising under RCW 26.44.030 are necessarily related to health care and therefore claims for damages for those harms must be pled and proved as prescribed in RCW 7.70.

II. COUNTER-STATEMENT OF ISSUES

1. Under Washington's wrongful death and survival statutes, siblings of the deceased can only bring an action for damages as beneficiaries under the statutes if the siblings were substantially dependent on the deceased for financial support at the time of death. When Tyler died at the age of seven, his adoptive mother, Carole DeLeon, was receiving adoption support funds from the state of Washington, which were specifically allocated for Tyler's exclusive support, aid and care. Regardless of whether this Court applies a strict or liberal construction to the statutes' substantial dependence requirement, can Tyler's adoptive siblings establish an entitlement to be substantially dependent on Tyler for financial support based on the payments his adoptive mother received from the State for Tyler's exclusive benefit without construing the statute to reach an absurd result?

2. All claims for damages resulting from health care fall under the umbrella of RCW 7.70 and its three statutorily prescribed causes of action – negligence, contract or lack of informed consent. Doctors are subject to Washington's abuse and neglect reporting statute, RCW 26.44.030, only to the extent they are providing health services that they are licensed by the State to provide. Is plaintiffs' claim for damages against Dr. Fregeau and Dr. Dexter for failure to suspect and report child neglect and abuse of Tyler, during the course of the doctors' treatment and examination of Tyler, controlled by RCW 7.70 because the doctors were engaged in delivery of health care and would not have been governed by the reporting statute if they had not been delivering health care?

III. STATEMENT OF THE CASE

A. Statement of Facts

Tyler DeLeon (“Tyler”) was adopted by Carole DeLeon after he lived as a foster child in her home for several years.¹ When Tyler died at the age of seven his only heirs were his mother, adult sister, three minor sisters and one minor brother.² Plaintiffs in this action are the estate of Tyler DeLeon, his adopted siblings and his foster siblings who were also living with Carole DeLeon when he died.³

After adopting Tyler, Carole DeLeon received monthly “adoption support” payments from the Washington State Department of Social and Health Services for Tyler.⁴ At the same time, Carole DeLeon was receiving State adoption support payments for some of Tyler’s adopted siblings, as well as State foster care payments for the other foster children living in her home.⁵

Carole DeLeon received the monthly adoption support payment for Tyler in accord with a contract entered into between Carole DeLeon and the State of Washington – a Revised Adoption Support Agreement.⁶ The Agreement specifically incorporated RCW 74.13 and WAC 388-27,

¹ CP 9.

² CP 4, 28-30.

³ CP 3-24 and 28-30.

⁴ CP 58-78.

⁵ CP 61-78.

⁶ CP 83-84; 149-152; 151-152.

pursuant to which the adoption support payments were distributed.⁷ The amount of the adoption support monthly payment for Tyler was ultimately determined by the State.⁸ The agreed upon payment was by law only to be used to cover the ordinary and special needs of the adopted child, in conjunction with the resources available to Carole DeLeon.⁹ Pursuant to the terms of the contract Agreement between Carole DeLeon and the State, the negotiated adoption support payment for Tyler could not exceed the maximum foster care maintenance amount that Tyler would receive if he were in a foster family home instead of an adopted home.¹⁰ “By regulation, the foster care basic reimbursement rate is reimbursement to the foster parent for the costs incurred in the care of the child for room and board, clothing, and personal incidentals.”¹¹ According to the Washington State Department of Social and Health Services, the adoption support payments provided to Carole DeLeon for Tyler DeLeon were intended and allocated exclusively for the support, aid, and maintenance of Tyler.¹²

The remaining defendants in this action are Tyler’s health care providers: Sandra Bremner-Dexter, MD; David Fregeau, MD; and the

⁷ CP 84, 140-142, 152.

⁸ CP 141, ¶ 4; 151-152.

⁹ *Id.*; RCW 74.13; WAC 388-27.

¹⁰ CP 83, 141, 151.

¹¹ CP 141-142, ¶ 4.

¹² CP 142, ¶ 5.

Rockwood Clinic.¹³ Dr. Dexter and Dr. Fregeau are both physicians licensed to practice health care in Washington.¹⁴ Dr. Dexter was Tyler's psychiatrist.¹⁵ Dr. Fregeau was one of Tyler's primary care physicians, and was employed by Rockwood Clinic.¹⁶ The doctors did not have any contact with Tyler other than when they examined and treated Tyler as a patient.¹⁷

Plaintiffs allege that Dr. Fregeau and Dr. Dexter were mandatory reporters of child abuse under Washington's reporting statutes, RCW 26.44, and that during the time that the doctors were providing health care to Tyler, they failed to suspect and report that Tyler was being abused by his adoptive mother, and that this was the proximate cause of Tyler's injuries and death.¹⁸ Plaintiffs sued Dr. Fregeau and Dr. Dexter for statutory medical negligence under RCW 7.70, alleging that the doctors' evaluation, diagnosis, care and treatment of Tyler fell below the required standard of care for health care providers and proximately caused Tyler's death.¹⁹

¹³ The Washington State Department of Social and Health Services was a defendant, but reached a settlement with the plaintiffs.

¹⁴ CP 7.

¹⁵ CP 16 (Complaint, ¶ 12.37).

¹⁶ CP 7, 14 (Complaint, ¶¶ 8.1, 12.28).

¹⁷ See CP 3-24.

¹⁸ CP 21 (Complaint, ¶¶ 18.5, 19.6).

¹⁹ CP 20-21 (Complaint, ¶¶ 18.2, 18.3, 19.2, 19.3).

The only claim against Rockwood Clinic is premised on vicarious liability for the alleged acts and omissions of Dr. Fregeau; plaintiffs contend that Dr. Fregeau was at all times acting within the course and scope of his employment as a physician at the Rockwood Clinic when he was providing health care to Tyler and when he allegedly breached his duties as a health care provider to Tyler.²⁰

Finally, plaintiffs assert claims under Washington's wrongful death and survival statutes, seeking economic and noneconomic damages.²¹

B. Procedural History

The defendant health care providers moved for summary judgment dismissal of plaintiffs' claim under Washington's child abuse reporting statute, RCW 26.44.030, because all claims for damages for injuries related to health care are governed exclusively by the health care statute – RCW 7.70 *et seq.*²² The trial court properly declined to recognize a new cause of action against doctors under the reporting statute and granted summary judgment dismissal of plaintiffs' claims under RCW 26.44.030 on the basis that the plaintiffs' claims for damages for injury as a result of health care can only be asserted as claims under RCW 7.70.²³

²⁰ CP 22 (Complaint, ¶ 20.2).

²¹ CP 20.

²² CP 118-124.

²³ CP 137-139.

The defendant health care providers also moved for summary judgment dismissal of plaintiffs' claims under Washington's wrongful death and survival statutes on the basis that Tyler's siblings did not qualify as second tier beneficiaries under the statutes because they could not be substantially dependent on Tyler for financial support at the time of his death.²⁴ The trial court properly granted summary judgment and found that Tyler's siblings did not qualify as beneficiaries under the statutes because they were not substantially dependent on Tyler for financial support at the time of Tyler's death.²⁵

Plaintiffs moved for discretionary review of both of the trial court's summary judgment orders by Division III of the Court of Appeals.²⁶ The Court granted discretionary review and then certified the issues to the Washington State Supreme Court.

IV. ARGUMENT

A. The Wrongful Death And Survival Statutes Cannot Be Construed To Effect An Absurd Result, Regardless Of Whether They Receive Strict Or Liberal Construction.

The general rule is that any statute giving or creating a right that did not exist at common law will be strictly construed when determining

²⁴ CP 32-40.

²⁵ CP 114-117.

²⁶ CP 153-157.

the person or classes of person who are entitled to their benefit.²⁷ This Court adopted that rule in Whittlesey v. Seattle, and held that because the wrongful death statute created a cause of action that did not exist at common law, it “should receive a strict construction in determining the persons or classes of persons who are entitled to their benefit, and a liberal construction in applying the statute in their favor.”²⁸

The Amicus’ suggestion that this Court has abandoned the general rule and its prior holding in Whittlesey is mistaken; the cases cited by Amicus are not inconsistent with the general rule and the Court should not overrule Whittlesey now.²⁹ Regardless, however, the statutory phrase at issue – substantial dependence – does not require any judicial interpretation in this particular case and the Court does not need to choose

²⁷ Whittlesey v. Seattle, 94 Wash. 645, 163 Pac. 193 (1917).

²⁸ Id., at 647.

²⁹ See e.g., Mitchell v. Rice, 48 P.2d 949, 183 Wn.2d 402 (1935) (the issue was whether the trial court erred in holding the plaintiff made a sufficient prima facie showing of “substantial dependency” to present the case to a jury on the father’s claim under the wrongful death statute and the Court’s holding did nothing to alter the general rule of construction of the wrongful death statute); Armijo v. Wesselius, 440 P.2d 471, 73 Wn.2d 716 (1968) (concluding only that some judicial interpretation was necessary, whether done liberally or strictly, to determine whether illegitimate children could recover under the wrongful death statute because “illegitimate” was neither included nor excluded from the ext of the statute); Cook v. Rafferty, 200 Wash. 234, 93 P.2d 376 (1939) (holding only that since the law was already established that the parents of an adult son need not be wholly dependent upon him to recover for wrongful death, the rule as to an adult daughter must be the same; confirming that a showing of substantial dependence required a showing of need and a financial recognition of it); Klossner v. San Juan County, 93 Wn.2d 42, 48, 605 P.2d 330 (1980) (declining to include stepchildren in the class to be protected by the wrongful death statute because it would require the court to read into the statute something clearly not intended by the legislature, which the court may not do).

between liberal or strict methodologies in order to resolve the meaning of the phrase as it applies to the plaintiffs in this case.

The adoption support money that Carole DeLeon received for Tyler's exclusive support, aid and maintenance, was received pursuant to a contract with the State of Washington and was calculated pursuant to a specific scheme designed to allocate sufficient funds taking into consideration the child's needs.³⁰ Of course the statute and adoption regulations take household income into account and recognize that the adoption payments are commingled with the household income (because the adoptive child lives under a common roof and eats meals in common with the adoptive family) but the focus is always on the sufficiency of resources to care adequately for the adopted child.³¹ Nothing in the statute or regulations suggests that the purpose of the funds is to care for anyone other than the adopted child, and it would certainly be a violation of the regulation to devote state funds to something other than the adopted child's well-being. It is a *non sequitor* to argue that an adoptive parent's permission to commingle state and personal funds for the benefit of the household (which benefits the adoptee) makes the family members automatically dependent on the funds or implies that the adoptive parent

³⁰ CP 83-84 (citing RCW 74.13 and WAC 388-27); CP 142, ¶ 5

³¹ CP 141, ¶ 4; see WAC 388-27.

could deliberately channel state money to some purpose not directly related to the well being of the adoptee.

It is axiomatic that a statute should not be construed so as to lead to absurd results or unintended consequences.³² Here, allowing the plaintiffs to recover as beneficiaries under the wrongful death statute would require the Court to adopt a standard stating or implying that someone other than the adopted child has an entitlement to the state payments intended for the support of adopted children. Such a conclusion would lead to an absurd result, without regard to whether the Court applies a strict or liberal construction, and should therefore be avoided.

B. Because The Reporting Statute, RCW 26.44, Only Applies To Doctors As Doctors, That Is, Licensed Professionals Providing Health Care, Any Claim For Damages Against A Doctor For Violating The Reporting Statute Is Necessarily Within The Health Care Act, RCW 7.70, Which Governs All Causes of Actions for Damages As A Result of Health Care.

- 1. Dr. Fregeau and Dr. Dexter only had duties under the reporting statute if they suspected abuse while they were providing health care services because the reporting statute only applies to doctors when they are practicing health care.**

Washington's reporting statute, RCW 26.44, does not apply to all citizens. It applies only to selected professionals functioning within specified occupational categories. The citizens subject to the reporting

³² Geschwind v. Flanagan, 121 Wn.2d 833, 845, 854 P.2d 1061 (1993) (citation omitted).

requirement are professionals licensed by the state or government employees.³³ The statute applies to those professionals to the extent they are functioning as law enforcement, registered pharmacists, professional school personnel, licensed psychologists, state-licensed agencies that supervise and place children and disabled persons, coroners, registered and licensed nurses, social service counselors, licensed child care providers, and practitioners, which include persons licensed to practice medicine and surgery or to provide health services (includes optometry, chiropractic, nursing, dentistry, and osteopathic medicine).³⁴

The reporting statute defines each of the categories of professionals to which it applies by what they are trained and licensed to do. By its express terms, the statute *only* applies to professionals who are doctors because, and to the extent that, they are delivering health care services.

In the present case, “Mr.” Fregeau and “Mrs.” Dexter could not have had any statutory obligations under RCW 26.44.030; only “Dr.”

³³ RCW 26.44.020 and .030.

³⁴ RCW 26.44.020 and .030; *See* RCW 26.44.030(1)(c) (noting that the legislature was careful to limit the circumstances under which department of corrections personnel are mandated reporters of suspected abuse or neglect to only those circumstances when the information is obtained during the course of their employment).

Fregeau and “Dr.” Dexter could have duties under the statute, if in the delivery of health care services they suspected abuse.³⁵

The Amicus’ reliance on Estate of Sly v. Linville and the unpublished opinion in Bundrick v. Stewart to argue otherwise is misplaced because neither case involved a doctor being sued for providing health care.³⁶ In Bundrick, the plaintiff was suing a doctor for actions that did not involve providing health care; the plaintiff sued on the theory, which Division One of the Court of Appeals accepted, that without a patient’s consent a surgery or any other touching by a doctor is battery, not medical or health care services governed by RCW 7.70.³⁷ In Estate of Sly, the plaintiff sued for a doctor’s misrepresentations about the work of another doctor.³⁸ Division One of the Court of Appeals held that the plaintiff’s claim for misrepresentation was not governed by the health care statute because it did not involve health care; when the doctor was commenting about the patient’s previous physician, the doctor was not utilizing any of the skills he had been taught in examining, diagnosing,

³⁵See e.g., Doe v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints, 141 Wn. App. 407, 428, 167 P.3d 11193 (Div. 1, 2007) (holding that a bishop was not a mandatory reporter under RCW 26.44.030 because the statute does not apply to a volunteer counselor who is not a professional “social service counselor” and not acting in the regular course of employment).

³⁶ Bundrick v. Stewart, 127 Wn. App. 1013 (Div. 1, 2005) and Estate of Sly v. Linville, 75 Wn. App. 431, 878 P.2d 1241 (1994).

³⁷ Bundrick, 127 Wn. App.1013.

³⁸ Estate of Sly, 75 Wn. App., at 433-34.

treating or caring for the patient.³⁹ Similarly, the Amicus' reliance on Wright v. Jeckle is misplaced because in that case the plaintiff's allegation was that the doctor was not practicing medicine but was instead engaged in entrepreneurial sales of diet drugs.⁴⁰

All three of these cases relied on by Amicus involved doctors that were being sued for something other than providing health care. Here, Dr. Fregeau and Dr. Dexter are being sued for failure to make a report that they could only have had a duty under the reporting statute to make to the extent they were functioning as doctors and providing health care. The statute only applies to them to the extent that they were providing health care services as doctors; it does not otherwise apply to them because it does not apply to citizens generally.

Indeed, plaintiffs only complain about the actions of the doctors while they were providing health care to Tyler; they allege that Dr. Fregeau and Dr. Dexter's evaluation diagnosis, care and treatment of Tyler fell below the applicable medical standard of care and that this breach proximately caused Tyler's death.⁴¹ Plaintiffs allege that the doctors were negligent for failing to diagnose abuse or neglect when examining and

³⁹ Estate of Sly, 75 Wn. App., at 439-40.

⁴⁰ Wright v. Jeckle, 104 Wn. App.478, 484, 16 P.3d 1268, 1271 (Div. 3, 2001) ("Reduced to its essence, the plaintiffs' argument here is that Dr. Jeckle was not practicing medicine. He was in the business of selling diet drugs.").

⁴¹ CP 20-21.

treating Tyler, and as a consequence were negligent in failing to report it, and that this was the proximate cause of Tyler's death.⁴² Moreover, plaintiffs' only claim against Rockwood Clinic is premised on vicarious liability for the alleged acts and omissions of Dr. Fregeau, whom plaintiffs allege was acting within the course and scope of his employment as a doctor at all times.⁴³ There is no claim that the doctors opined there was abuse or neglect, but intentionally failed to report it. If the doctors were wrong in failing to diagnose abuse, they were wrong as a matter of medical judgment. Therefore, any claim for violating the reporting statute is necessarily a claim governed by the health care statute, RCW 7.70.

Amicus proposes a way around RCW 7.70 by arguing that a distinction may be drawn between health care and the act of reporting. Amicus acknowledges that "the alleged breach of the duty to report suspect child abuse may be occasioned by the provision of health care, but it is not part of the function of the health care provider in examining, diagnosing, or treating the patient...."⁴⁴ The distinction attempted to be drawn fails for two reasons. First, the duty to report arises only in

⁴² See CP 14-16 and 20-21; see also Berger v. Sonneland, 144 Wn.2d 91, 109, 26 P.3d 257, 267 (2001) (defining "health care" as "the process in which a physician is utilizing the skills which the physician had been taught in examining, diagnosing, treating or caring for the plaintiff as the physician's patient" and noting that that definition is consistent with the dictionary definition of "health care" as "prevention, treatment, and management of illness and the preservation of mental and physical well-being through the services offered by the medical and allied health professions") (citations omitted).

⁴³ CP 22 (Complaint, ¶ 20.2).

⁴⁴ Amicus Brief, at p. 12.

specified occupational contexts. In this case it could only apply to the Health Care Respondents *qua* doctors; there was no possibility of the doctors having a duty to report absent their delivery of health care services. Second, the distinction is too fine; it would work only in cases of deliberate or avowed failure to report where the duty arose and was known to have arisen and was ignored. It would not work in cases like this one, where the plaintiffs claim that the doctors failed – *in the course of rendering health care* – to diagnose abuse, which failure led to a failure to report.

Amicus argues that the reporting statute and the health care statute protect different values and different injuries, but there is no distinction. Plaintiffs' claim is that but for the doctors' failure to report, Tyler would not have suffered injuries. That is indistinguishable from the claim that but for the failure to diagnose the abuse or neglect, Tyler would not have been harmed. The claims are based on the same facts and conclusions. To prevail, the plaintiffs would have to prove that the doctors failed to report abuse because they negligently failed to suspect or diagnose abuse, which is a medical causation issue and would require expert medical testimony.

Amicus concedes that “[i]f a claim is not the result of health care, then Ch. 7.70 RCW clearly does not apply.”⁴⁵ Since the reporting statute only applies to doctors in their professional capacities – i.e., professionals providing health care – any claim for damages against doctors under the reporting statute cannot possibly arise in any context other than that involving delivery of health care services. Therefore, any cause of action against a doctor for violation of the reporting statute must fall under the umbrella of RCW 7.70.

2. The legislature purposefully established the health care statute, RCW 7.77, to cover all actions arising from health care, including all actions then existing or later existing.

The legislature clearly declared that all causes of action arising from the rendition of health care must proceed under RCW 7.70. The Amicus’ assertion that “there is nothing in Ch. 77 RCW that indicates the legislature intended to preempt judicial recognition of an independent cause of action against health care providers based on the mandatory reporting statute”⁴⁶ could not be more wrong: on the contrary, the legislature could not have stated any more plainly that:

⁴⁵ Amicus Brief, at p. 12.

⁴⁶ Amicus Brief, at p. 9-10.

The state of Washington, exercising its police and sovereign power, **hereby modifies** as set forth in this chapter and in RCW 4.16.350, **as now or hereafter amended**, certain substantive and procedural aspects of **all civil actions and causes of action, whether based on tort, contract, or otherwise**, for damages for injury occurring as a result of health care which is provided **after** June 25, 1976.⁴⁷

This Court has held that an implied cause of action against the state exists for parent and child victims of negligent child abuse investigations conducted by state officials pursuant to RCW 26.44.050.⁴⁸ This Court has never held that a private cause of action exists under the reporting part of the statute, RCW 26.44.030.⁴⁹

It was fully and properly within the Judiciary's constitutional duty to declare the common law to recognize a private cause of action against the state in the context of the Tyner case, particularly where the legislature had made no other

⁴⁷ RCW 7.70.010 (emphasis added).

⁴⁸ Tyner v. Dept. of Social & Health Servs., 141 Wn.2d 68, 76-80, 1 P.3d 1148 (2000); but cf., Ducote v. Dept. of Social & Health Servs., 167 Wn.2d 697, 222 P.3d 785 (2009) (holding that a step father did not have standing to bring an action for negligent investigation under RCW 26.44.050 because the legislature did not designate stepparents as members of the class protected by the statute).

⁴⁹ In 2007, Division One of the Court of Appeals assumed in dictum that an implied private cause of action exists under RCW 26.44.030. In that case, however, the Court of Appeals held that the defendant bishop was not a mandatory reporter under the statute because the mandatory reporting statute did not apply to volunteer counselors who are not professional "social service counselors" and not acting in their regular course of employment. Doe v. Corp. of Pres. of Church of Jesus Christ of Latter-Day Saints, 141 Wn. App. 407, 167 P.3d 1193 (Div. 1, 2007).

enactment affecting the manner in which plaintiffs must make and prove claims in such circumstances. This Court, however, has never previously recognized an implied cause of action against doctors under RCW 26.44. It should not do so now because the legislature has already plainly declared its intention to supplant “all” “other” law with RCW 7.70’s carefully designed rules defining liability and establishing procedures for proving it. With the enactment of RCW 7.70, the legislature changed the procedure and substance of causes of action for damages based on injuries from health care.

Amicus concedes that when the legislature enacted the health care statute, RCW 7.70, the reporting statute, RCW 26.44, was already on the books.⁵⁰ Amicus argues, however, that it is “a fiction that the legislature intended, when it adopted Ch. 7.70 RCW in 1976, to include a Ch. 26.44-based cause of action that was not recognized until 30 years later.”⁵¹ That is wrong, for two reasons.

First, the argument implicitly (and erroneously) assumes that if the legislature declares on Wednesday that it is displacing the common law in a given field with a statutory scheme, the courts may on Friday recognize

⁵⁰ Amicus Brief, at p. 8-9.

⁵¹ Amicus Brief, at p. 9.

a common law cause of action in that very field. That is incorrect because the courts owe greater deference to the legislature.⁵²

Second, the argument implicitly assumes that RCW 7.70 was only addressing the status quo and was not forward looking at all. But the statute says otherwise. RCW 7.70 is clear in its expression that it applies in the future, to all civil actions after 1976, “whether based on tort, contract, or otherwise”. Thus, to the extent that the Judiciary’s recognition of a private cause of action under RCW 26.44 “otherwise” provided for liability for health care delivery, it is expressly within the carve-out created by RCW 7.70.⁵³

V. CONCLUSION

This Court should affirm the trial court’s order granting summary judgment for Dr. Fregeau, Dr. Dexter, and the Rockwood Clinic: (1) dismissing plaintiffs’ claim for violation of the reporting statute, RCW 26.44, because that claim is necessarily a claim related to health care and falls under the umbrella of plaintiffs’ claim under the health care statute, RCW 7.70; and (2) dismissing plaintiffs’ claims as second tier

⁵² Baum v. Murray, 23 Wn.2d 890, 896 (1945) (“[W]hen a statute is enacted by the legislature covering generally a certain subject of substantive law it should be followed and applied by the courts wherever applicable irrespective of what the common law or rule of decision may have been theretofore....”).

⁵³ Further, to the extent a private cause of action is deemed to have been implicit in RCW 26.44 since its enactment, the date of the judiciary’s first application of the right is immaterial.

beneficiaries under the wrongful death and survival statutes because they cannot establish any legal right to be substantially dependent on Tyler for financial support at the time of his death.

DATED this 18th day of October, 2010.

Respectfully Submitted,

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ORIGINAL

CERTIFICATE OF SERVICE

On the 18th day of October, 2010, I caused to be served a true and correct copy of the forgoing RESPONDENT HEALTH CARE PROVIDERS' ANSWER TO BRIEF OF AMICUS CURIAE OF THE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION on all interested parties to this action as follows:

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- Facsimile Transmission
- Via Electronic Mail

George M. Ahrend
100 E. Broadway Ave.
Moses Lake, WA 98837

- Hand Delivery
- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile Transmission
- Via Electronic Mail

Bryan P. Harnetiaux
517 E. 17th Avenue
Spokane, WA 99203

- Hand Delivery
- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile Transmission
- Via Electronic Mail

/s/ Emily Rousseau
Emily Rousseau

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ATTACHMENT TO EMAIL