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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 272702

NO. 274179

**COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON**

BREEAN BEGGS as Personal Representative
for the estate of TYLER DELEON and as Limited Guardian Ad Litem for
DENA E 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.

STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND
HEALTH SERVICES; LORETTA MEE, ROBERT TADLOCK and
DEWAYNE THURMAN individually and in their official capacity as
agents and employees of the State of Washington; DAVID FREGEAU,
MD; ROCKWOOD CLINIC, a Washington State corporation; SANDRA
BREMNER-DEXTER MD; and JOHN and/or JANE DOES 1-10,

Defendants / Respondents

**RESPONDENTS DEXTER, FREGEAU & ROCKWOOD CLINIC'S
BRIEF**

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I. STATEMENT OF CASE

A. General Nature of Case and Identity of Parties

This is a wrongful death/survival action arising from the death of seven year old Tyler DeLeon on January 13, 2005. *CP 3, 4, 20*. At the time of this death, Tyler lived with this adoptive mother, Carol DeLeon, and six other children, Anthony Barcellos, Amber Daniels, Denae DeLeon, Beckett Cudmore, Breanna DeLeon, and Brenden Burnette. *CP 9*. Carol DeLeon was a licensed foster care provider, and the State of Washington, through the Department of Social and Health Service, made foster care and adoption support payment to Carol DeLeon for the children in her home. *CP 9*. The Plaintiffs/Petitioners are Tyler's estate and the other children who lived in the home. *CP 3-5 and 9*.

Generally, Petitioners claim Tyler's death was caused by neglect he suffered while living in the home. *CP 8-13*. Defendants/Respondents David Fergeau, MD and Sandra Bremner-Dexter, MD were healthcare providers who provided care and treatment to Tyler DeLeon. *CP 14-17*. Dr. Fregeau treated Tyler at Defendant/Respondent Rockwood Clinic. *CP 14*. Generally, Petitioner claims these medical defendants, by failing to diagnose and report child abuse, committed medical malpractice in

violation of RCW 7.70.030(1), and violated RCW 26.44.030, Washington's child abuse reporting statute.¹ *CP 20-23.*

B. Relevant Trial Court Procedure

On review are two summary judgment orders issued by Spokane County Superior Court Judge Terry Eitzen. *CP 114-117, 137-139.* On August 21, 2008, the trial court issued an Order granting the Respondents' Motion for Partial Summary Judgment, dismissing Petitioners' claims under RCW 26.44.030. *CP 137.* On June 19, 2008, the trial court issued an Order granting Respondents Motion for Summary Judgment dismissing Petitioners' claims for wrongful death under RCW 4.20.010 and 4.20.020, Petitioners' claims under the special survival statute, RCW 4.20.060, and all non-economic damage claims under the general survival statute, RCW 4.20.046. *CP 114.*

C. Pertinent Facts Regarding RCW 26.44.030 Claim

Respondents concede that Tyler DeLeon, at one time, was a patient of Dr. Fregeau and the Rockwood Clinic. *CP 14-16.* Respondents also concede that Tyler DeLeon was also a patient of psychiatrist Dr. Dexter for a limited period of time. *CP 16.* Petitioners, in their opening brief, set forth a number of assertions regarding Respondents' purported

¹ The State of Washington Department of Social and Health Services was also a defendant but reached a settlement with Plaintiffs.

knowledge of injuries and abuse suffered by Tyler. *See Petitioners' Opening Brief*, pages 4-5. It is important for the Court to recognize that these "facts" are allegations only, taken from Petitioners' Complaint, and that they were not made part of the summary judgment record via deposition excerpts, interrogatory answers, affidavits or declarations.

D. Facts Pertinent to Wrongful Death/Survival Action Financial Dependency Issue

While Tyler DeLeon was living in Carol DeLeon's home, Ms. DeLeon received payments from the Department of Social and Health Services for the support of Tyler through the DSHS Adoption Support Program. *CP 59*. The amount of an Adoption Support monthly payment is determined through a discussion and negotiation process between the adoptive parent and representatives of DSHS. *Id.* It is expected by DSHS that the payment agreed upon will combine with the parent's resources to cover the ordinary and special needs of the adopted child. *Id.* By regulation, if a child on active status with DSHS's Adoption Support Program is, for whatever reason, taken from the adoptive parent and placed in foster care, group care, or a residential treatment program, the Department must discontinue any cash payments to the adoptive parent during the child's out of home placement, unless the adoptive parent documents continuing expenses directly related to the child's needs. *Id.*

Under no circumstances may the amount of the adoption support monthly cash payment paid by the Department exceed the amount of foster care maintenance payment that would be made if the child were in a foster family home. *Id.* 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. *CP 59, 60-78.* Thus, any money provided to Carol DeLeon for or on behalf of Tyler DeLeon through the DSHS Adoption Support Program was intended and allocated for the exclusive support, aid, and maintenance of Tyler DeLeon. *Id.* The Adoption Support payment was not intended as, and DSHS did not consider the payment as a source of support for Carol DeLeon or any of Tyler DeLeon's natural, adopted or foster siblings who may have also resided in the Carol DeLeon home. *Id.*

Tyler DeLeon died January 13, 2005 at the age of 7. *CP 4.* He left no estate other than claims under the wrongful death and survival statutes. *CP 25-31.* The heirs listed in his estate's Petition for Letters of Administration were Tyler DeLeon's mother, adult sister, three minor sisters and one minor brother. *Id.*

II. ARGUMENT AND AUTHORITIES

A. As a Matter of Law, Carol DeLeon and Tyler DeLeon's Adoptive Siblings Were Not Dependent Upon Tyler DeLeon for Substantial Financial Support. Thus, the Trial Court Properly Dismissed All Damage Claims Other Than Medical, Burial and Funeral Expenses, and Net Accumulations of Tyler DeLeon's Estate.

Petitioners claim Carol DeLeon and Tyler DeLeon's adoptive siblings were dependent upon Tyler DeLeon, because of the adoptive support payments DSHS was making to Carol DeLeon for Tyler. That is, Petitioner's claim that 7-year-old Tyler was not dependent upon his adoptive mother to support him with her own resources and the DSHS support payment. Instead, Petitioners claim 7-year-old Tyler was, instead, supporting his adoptive mother and siblings. This argument was properly rejected by the trial court for a number of reasons.

First, Petitioners' conceded on summary judgment that Carol DeLeon cannot recover anything for the death of Tyler because of the operation of the Slayer Statute, RCW 11.84.020. *See also, Estate of Kissinger v. Hoge*, 142 Wn.App. 76, 173 P.3d 956 (2007) (holding that slayer is disqualified from sharing in wrongful death recovery). Thus, under no circumstances can Carol DeLeon be considered a qualified second tier beneficiary under the wrongful death and survival statutes.

Second, given the novelty of Petitioners' argument, it must be emphasized that because the wrongful death statute is in derogation of common law, it is strictly construed in determining the persons entitled to sue on the cause of action created. *Whittlsey v. Seattle*, 94 Wash. 645, 163 P. 193 (1970); *Roe v. Ludtke Trucking, Inc.*, 46 Wn.App. 816, 819, 732 P.2d 1021 (1987). Here, strict construction of the wrongful death statute does not permit the conclusion that an adoptive parent and/or adoptive siblings can be dependent upon a 7-year-old child for substantial financial support.

Third, the Washington Supreme Court has held that substantial financial dependence by a parent upon a deceased child requires "a necessitus want on the part of the parent, and a financial recognition of that necessity on the part of the child." *Bortle v. N. Pacific Railroad Co.*, 60 Wash. 552, 554, 111 P.788 (1910); *Kanton v. Kelly*, 65 Wash. 614, 121 P. 833 (1911); *see also, Masunaga v. Gapasin*, 57 Wn.App. 624, 790 P.2d 171 (1990). Financial recognition of necessity on the part of a child implies voluntary action to contribute to the financial support of a parent (or sibling). In this case, Tyler DeLeon was not voluntarily contributing financial support to Carole DeLeon or any of Tyler's adoptive siblings. To the contrary, DSHS was making cash payments to Carole DeLeon for the exclusive use and support of Tyler.

Fourth, adoption support payments which, by law, are intended for the exclusive support of an adoptive child, cannot be construed as substantial financial support of the adoptive parent or adoptive siblings. WAC 388-27-0230 sets forth how the Department [DSHS] evaluates a request for adoption support monthly cash payments. It states, in pertinent part.

(1) The amount of the adoption support monthly cash payment is determined through the discussion and negotiation process between the adoptive parents and representatives of the Department based upon the needs of the child and the circumstances of the family. The payment that is agreed upon should combine with the parents' resources to cover the ordinary and special needs of the child projected over an extended period of time.

.....

(3) The Department and the adoptive parents will jointly determine the level of adoption support cash payments needed to meet the basic needs of the child without creating a hardship on the family.

(4) Under no circumstances may the amount of the adoption support monthly cash payment the Department pays for the child exceed the amount of foster care maintenance payments that would be paid if the child were in a foster family home.

The foster care basic rate referenced in WAC 388-27-0230(4) is described in WAC 388-25-0120. That regulation describes the purpose of the foster care basic reimbursement rate as follows:

The foster care basic rate reimburses the foster parent for costs incurred in the care of the child for room and board, clothing, and personal incidentals. The amount of reimbursement varies according to the age of the child. (Emphasis added.)

Under WAC 388-27-0265(2), if an adopted child on active status with Washington's adoption support program is, for some reason, taken from the adoptive parent and placed in foster care, a group home, or residential treatment, the Department "must discontinue any cash payments to the adoptive parent during the child's out-of-home-placement unless the adoptive parent(s) documents continuing expenses directly related to the child's needs. *See CP 140-142.*

These regulations make it abundantly clear that an adoption support payment is exclusively for the care and support of the adopted child. Adoption support payments thus cannot reasonably be construed as a source of financial support for a parent or sibling. Indeed, WAC 388-27-0230 clearly states that an adoption support payment should "combine with the parents' resources" to cover the ordinary and special needs of the child.

Fifth, it is axiomatic that a statute should not be construed so as to lead to absurd results or unintended consequences. *Geschwind v. Flanagan*, 121 Wn.2d 833, 854 P.2d 1061 (1993). The logical extension

of Petitioners' argument is that any money or indirect financial benefit received by a parent or sibling because of the mere existence of a child can constitute financial support within the meaning of wrongful death and survival statutes. Accordingly, under Petitioners' interpretation of the law, such "benefits" as a federal income tax exemption for a dependent child, a federal economic stimulus payment, payments received by a parent under the DSHS WIC program, or even a multiple child tuition discount from a private school, together or separately, could potentially be "substantial financial support" entitling the parent to maintain a wrongful death or survival action should such indirect "benefits" be eliminated because of the child's death. Surely that is not what is meant by the requirement of financial dependency.

Petitioners rely on *Armantrout v. Carlson*, 141 Wn.App. 716, 170 P.3d 1218 (2007), and *Ditto v. Stoneberger*, 145 Md.App. 469, 805 A.2d 1148 (2002). Both are clearly distinguishable, however, because in both cases the adult recipient of a Social Security payment was voluntarily contributing all or part of the payment to the support of the household. In stark contrast, in the instant case, DSHS was not making any payments directly to 7-year-old Tyler DeLeon, which he then voluntarily contributed, in whole or in part, to the support of Carole DeLeon and/or other members of the Carole DeLeon household.

Petitioners argue that the "financial recognition of [necessitous want] on the part of the child" referenced in *Bortle*, and *Kanton*, does not require voluntary action on the part of the child to contribute to the financial support of the parent or sibling. But the language of *Bortle* and *Kanton* is clear. And Petitioners have cited no wrongful death case where financial dependency was found in the absence of the decedents' voluntary contribution, or where decedents' parent or sibling received a financial benefit merely because of the decedents' existence.

Also, it is worth noting that, in *Ditto v. Stoneberger*, 145 Md.App. 469, 805 A.2d 1148 (2002), the Maryland Court of Appeals relied on Maryland Workman's Compensation Jurisprudence for guidance. More specifically, the *Ditto* court cited *Martin v. Beverage Capital Corp.*, 353 Md. 388, 403, 726 A.2d 728 (1999) as establishing the following test for dependency in worker's compensation cases: [it is] "not whether a claimant was capable of supporting himself [or herself] without the earnings of the workman, but whether he [or she] did in fact rely upon such earnings for his [or her] livelihood, in whole or in part, under circumstances indicating an intent on the part of the workman to furnish such support." 805 A.2d 1155 (emphasis added). This "intent on the part of the workman" is analogous to Washington's requirement of recognition

by the decedent of "necessitus want" on the part of his or her purportedly dependent parent or sibling.

Petitioners assert that Tyler DeLeon "owned" the adoption support payments Carol DeLeon was receiving from DSHS. But a minor is legally incapable of owning property, and a minor's parents are legally entitled to and thus "own" all of the earnings of a minor child, unless the child is emancipated. *See Hines v. Cheshire*, 36 Wn.2d 467, 219 P.2d 100 (1950).

Petitioners go on to argue that requiring voluntary or intentional action on the part of the contributing child would raise equal protection issues. But, as emphasized by the court in *Philippides v. Bernard*, 151 F.2d 376, 88 P.3d 939 (2004), the standard of review in a case that does not employ suspect classification or fundamental right is rational basis, also called minimal scrutiny. 151 Wn.2d at 391. Under the rational basis test, the court examines (1) whether the legislation applies alike to all members of the designated class, (2) whether there are reasonable grounds to distinguish between those within and those without the class, and (3) whether the classification has a rational relationship to the purpose of the legislation. *Id.* (citing *Convention Center Coalition v. City of Seattle*, 107 Wn.2d 370, 378-79, 730 P.2d 636 (1986)).

Under Washington's wrongful death and survival action statutory scheme, where qualifying as a second tier beneficiary requires substantial

financial dependency by the purported beneficiary on the decedent, it is reasonable to require that the decedent have been voluntarily contributing to the financial support of the purported beneficiary. Otherwise, as discussed above, substantial financial dependency could be found to exist in any case where the mere existence of the child conferred some indirect financial benefit on the purported beneficiary.

Finally, there is an inherent conflict between Petitioners' negligence claim against DSHS and their financial dependency argument. Petitioners' claim against DSHS was essentially that the Department never should have placed Tyler in Carol DeLeon's home, or at least that the placement should have been discontinued. Yet, in the same breath, Petitioners argue they qualify as Tyler's wrongful death beneficiaries, and have been financially damaged, because the DSHS adoptive support payment for Tyler terminated with his death.

B. The Trial Court Did Not Err in Dismissing Plaintiffs RCW 26.44.030 Claim.

Since 1971, physicians have been mandatory reporters of suspected physical neglect or sexual abuse under RCW 26.44.030. In 1976, the legislature enacted RCW 7.70 et seq., Washington's medical negligence statute. The Declaration of Intent/Preamble to that legislation states:

The State of Washington, exercising its police and sovereign power, hereby modifies...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 healthcare provided which is provided after June 25, 1976.

RCW 7.70.010

The legislature is presumed to enact laws with full knowledge of existing laws. *Thurston County v. Gorton*, 85 Wn.2d 133, 530 P.2d 309 (1975). Thus, when the legislature enacted RCW 7.70 governing all civil actions against healthcare providers for damages occurring as a result of healthcare, it did so knowing that any claim for negligence in the diagnosis and reporting of child abuse would be deemed to be included in RCW 7.70.

In describing the reach of RCW 7.70.010, the court in *Branom v. State*, 94 Wn.App. 964, 974 P.2d 335 (1999) stated:

This section sweeps broadly. It clearly states that RCW 7.70 modifies procedural and substantive aspects of all civil actions for damages for injury occurring as a result of healthcare regardless of how the action is characterized.

The term "healthcare" is not defined in the statute. However, Washington courts define healthcare as:

[T]he process in which [a physician is] utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff as his patient. This definition is consistent with the dictionary definition of healthcare: "The prevention, treatment, management of illness and the preservation of mental and physical well-being through the services offered by the medical and allied health professions.

"*Branom v. State*, 94 Wn.App. 964, 969-970 (1999), *review denied*, 138 Wn.2d 1023 (1999) (citing *Estate of Sly v. Linville*, 75 Wn. App. 431,439 (1994); *Wright v. Jeckle*, 104 Wn. App. 478, 481 (2001).

In the instant case, any medical conclusion on the part of Drs. Dexter and Fregeau as to potential abuse, and any corresponding duty to report it, came about in the "process of utilizing the skills of examining, diagnosing, treating or caring for the patient." Accordingly, Petitioners' claim of failure to diagnose and report child abuse is a claim for negligence in the provision of healthcare within the meaning of RCW 7.70.

Petitioners argue that RCW 26.44.030 establishes a diagnosis and reporting duty independent of a medical negligence claim under RCW 7.70 et seq. But imposition of such a diagnosis and duty would result in conflicting standards of liability and burdens of proof. Under RCW 7.70, a claim of negligent failure to diagnose child abuse as the cause of injury

must be couched in terms of violation of the standard of care, and supported by expert testimony expressed in terms of probability or likelihood. *See Harris v. Groth*, 99 Wn.2d 438, 663 P.2d 113 (1983). But, if under RCW 26.44.030, a physician could be liable if the fact finder determined he or she had a "reasonable cause to believe" that a child's injuries were the result of abuse or neglect, no supporting expert testimony would be necessary. The legislature could not have intended such a result.

Petitioners argue that RCW 26.44.030 mandates the reporting of child abuse by a variety of professionals and that, accordingly, there is an independent cause of action under that statute against healthcare providers for the negligent failure to report actual or suspected abuse. But Petitioners' argument ignores the obvious: the legislature has not carved out a separate statutory scheme for occupational negligence for other professionals.

Petitioners argument that *Doe v. Corp. of President of Church of Jesus Christ of Latter Day Saints*, 141 Wn.App. 47, 167 P.3d 1193 (2007) the Court of Appeals held RCW 26.44.030 establishes a private cause of action for breach of the statutory duty to report is misplaced. The alleged mandatory reporter in *Doe* was not a healthcare provider. Accordingly, *Doe* does not, and cannot, support the proposition that the statute creates a

private right of action against a healthcare provider for negligent failure to diagnose and report child abuse.

Next, Petitioners argue that reporting suspected child abuse to the appropriate authorities is not "healthcare" within the meaning of RCW 7.70. In making this argument, Petitioners are quick to separate the physical act of reporting from the diagnosis of child abuse. But such a separation is illogical and defies the plain language of RCW 26.44.030. That statute imposes a duty to report on any identified professional who has a "reasonable cause to believe" that a child has suffered abuse or neglect. Making a diagnosis of suspected child abuse and conveying information about the provider's diagnosis to others is part of the same process: "examining, diagnosing and caring for" the patient.

Petitioners assert that not all actions that occur during the course of a healthcare provider and patient relationship constitute "healthcare." Drs. Fregeau and Dexter do not quibble with that general proposition. If a physician intentionally misrepresents facts unrelated to his or her treatment, that is not healthcare. *See Estate of Sly v. Linville*, 75 Wn. App. 431, 878 P.2d 1241 (1994). If a physician engages in entrepreneurial activities motivated by financial gain only, that is not healthcare. *See Wright v. Jeckle*, 104 Wn. App. 478, 16 P.3d 1268 (2001). And, because RCW 7.70.30(1) applies to claims of negligence in the provision of

healthcare, the statute does not supersede a claim for the intentional tort of battery. *See Bundrick v. Stewart*, 128 Wn. App. 11, 114 p.3d 1204 (2005).

Petitioners cite the unpublished Court of Appeals case of *Reed v. ANM Healthcare*, 2008 WL 5157863, in support of their argument that diagnosing and reporting child abuse does not constitute healthcare. Petitioners' reliance on that case is misplaced, however, for two reasons.

First, the citation to unpublished opinions is specifically prohibited. GR 14.1(a).

Second, *Reed* is distinguishable because there the court found an issue of fact as to the motive of a healthcare provider in excluding the patient's same sex partner from the patient's room. The healthcare provider argued that excluding the partner was medically necessary. But the patient presented evidence that the nurse's actions were motivated by considerations that had nothing to do with the provision of "healthcare." In the instant case, there is no issue as to whether Drs. Fregeau and Dexter were motivated by considerations separate and apart from their care and treatment of Tyler DeLeon. Indeed, Petitioners alleged in their complaint that the very same conduct which constituted a violation RCW 26.44.030 was, at the same time, a standard of care violation under RCW 7.70 et seq.

Petitioners go to great lengths to demonstrate that RCW 26.44.030 and RCW 7.70 relate to different subjects, and that, accordingly, one

statute does not supersede the other. But in the face of Petitioners' allegation that the very same negligent acts/omissions on the part of Drs. Fregeau and Dexter also constituted a violation of both statutes, how can Petitioners claim these statutes speak to different subjects?

Petitioners next argue that because RCW 26.44.030 groups doctors with police officers, teachers, counselors, DSH employees and other professionals as mandatory reporters, the legislature "established" that reporting child abuse is not "healthcare" within the meaning of RCW 7.70. But again, this argument ignores the obvious: the legislature did not create a separate statutory liability framework for professional negligence for these other individuals.

Finally, Petitioners assert that if this Court holds additional facts are necessary to determine whether diagnosing and reporting child abuse is healthcare, the Superior Court's Order should be reversed because the Court's ruling consisted a "pure legal conclusion pertaining to the physician-patient relationship." By this argument, Petitioners attempt to shift the summary judgment burden. In opposing Drs. Fregeau and Dexter's motion, it was incumbent upon Petitioners to come forward with evidence to defeat the motion. The trial court, based on the evidentiary materials submitted by the parties, concluded that any claim against Drs. Dexter and Fregeau for negligence in the diagnosis and reporting of child

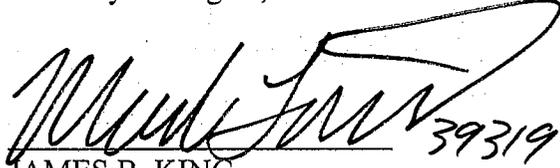
abuse was healthcare within the meaning of RCW 7.70. Petitioners should not be given a second opportunity to develop facts to support their theory.

III. CONCLUSION

The trial court did not err dismissing Petitioners' damage claims (other than medical, burial and funeral expenses and net accumulations of Tyler DeLeon's Estate) because as a matter of law, neither Carol DeLeon nor Tyler DeLeon's adoptive siblings were dependent upon Tyler DeLeon for Substantial financial support. The trial court did not err in dismissing Petitioners' RCW 26.44.030 claim because Petitioners' claim for failure to diagnose and report child abuse is a claim for negligence in the provision of healthcare within the meaning of RCW 7.70. Petitioners' appeal should be denied.

RESPECTFULLY SUBMITTED this 17th day of August, 2009.

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 17th day of August, 2009, the foregoing was delivered to the following persons in the manner indicated:

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