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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re: THE ESTATE OF ASHLIE BUNCH:

AMY KOZEL,

Proposed Intervenor/Petitioner,

vs.

MCGRAW RESIDENTIAL CENTER d/b/a
SEATTLE CHILDREN'S HOME,

Defendant/Respondent.

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SUPREME COURT
STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the proper interpretation and application of RCW 4.24.010, which gives parents the right to bring an action for injury or death of their child.

II. INTRODUCTION AND STATEMENT OF THE CASE

Amy Kozel (Kozel) seeks to bring a claim under RCW 4.24.010 against McGraw Residential Center (McGraw) for loss of the parent-child relationship due to the allegedly wrongful death of her 15-year-old daughter, Ashlie Bunch (Ashlie). This review presents questions regarding the proper procedure for joinder of a parent in an action for the death of a minor child under RCW 4.24.010, and the proper interpretation and application of the statutory requirement that the parent "has regularly

contributed to the support of his or her minor child” in order to be eligible to pursue a claim. The underlying facts are drawn from the Court of Appeals decision and the briefing of the parties. See Estate of Bunch ex rel. Bunch v. McGraw Res. Ctr., 159 Wn.App. 852, 248 P.3d 565, *review granted*, 171 Wn.2d 1021 (2011); Kozel Br. at 2-6; McGraw Br. at 1, 3-8; Kozel Pet. for Rev. at 1-3; McGraw Ans. to Pet. for Rev. at 2-6; Kozel Supp. Br. at 1-2; McGraw Supp. Br. at 1.

For purposes of this brief, the following facts are relevant: In 1998, Kozel and Steven Bunch (Bunch), who were then married and living in Florida, adopted Ashlie and her younger sister. In 2001, Kozel and Bunch divorced, and Bunch moved to Washington, while Ashlie and her sister remained in Florida with Kozel. In 2003, Kozel and Bunch agreed that Ashlie should move to Washington to live with Bunch because she began to exhibit abusive behavior toward her sister.

From 2003 to 2007, Ashlie lived in Washington with Bunch. In March 2007, she was involuntarily committed to Kitsap Memorial Hospital for psychiatric treatment, and in May 2007, she was transferred to McGraw for further treatment. In January 2008, while still at McGraw, Ashlie committed suicide. At the time of her death, she was 15 years old.

Bunch filed suit against McGraw for negligence leading to Ashlie’s death, both as the personal representative of Ashlie’s estate and

also individually for loss of parent-child consortium under RCW 4.24.010. Bunch did not join Kozel as a party, although he served her with written notice of the action, as required by RCW 4.24.010.

Kozel moved to join the action filed by Bunch pursuant to RCW 4.24.010 and CR 19. Bunch and McGraw opposed the motion on grounds that Kozel did not regularly contribute to the support of Ashlie, as required by RCW 4.24.010. There appears to be no dispute that Kozel regularly contributed to the support of Ashlie during the last three years of her marriage to Bunch, and for the two years following their divorce, while Ashlie was still living with Kozel. Instead, the dispute centers on whether Kozel regularly contributed to her support after 2003, when Ashlie moved to Washington to live with Bunch.

From 2003 onward, according to Kozel, she spoke with Ashlie by phone at least once per week until she was admitted to inpatient facilities. See Bunch, 159 Wn.App. at 860. However, it is not clear if the reference to inpatient facilities means Ashlie's commitment in March 2007. See id. Apparently, Ashlie was admitted to inpatient facilities several times from the time she moved to Washington in 2003 until March 2007. Kozel did not testify about communications with Ashlie while she was in inpatient facilities from March 2007 until her death in January 2008. According to

Bunch, during this period of time there was only one phone call between Kozel and Ashlie, in December 2007.

There are other factual disputes between the parties regarding the extent of Kozel's involvement with Ashlie. According to Kozel, she sent Ashlie Christmas presents (plural), but did not specify when. According to Bunch, Kozel sent a Christmas present (singular) in December 2004. It does appear from the briefing that Kozel did not contribute financially to Ashlie or her care after Ashlie moved to Washington in 2003.

The superior court ruled that Kozel failed to establish that she regularly contributed to the support of Ashlie after March 2007, when Ashlie entered inpatient facilities, until January 2008, when Ashlie died, and that she was not therefore entitled to join the action under RCW 4.24.010. The Court of Appeals affirmed, over dissent. The majority reasoned that the beneficiaries entitled to recover under RCW 4.24.010 should be strictly construed because the statute is in derogation of the common law, so that parental contributions to support should be assessed at or near the time of the child's death. See Bunch at 865-66. The dissent rejected imposition of a strict temporal limitation on parental contributions to a minor child, and would have held that support should be assessed at any time before the child's death. See id. at 869-73 (Becker, J., dissenting). This Court granted review.

III. ISSUES PRESENTED

1. What is the proper procedure for joinder of the second parent in an action commenced by the other parent for loss of consortium of a minor child under RCW 4.24.010?
2. Is the requirement that a parent "has regularly contributed to the support of his or her minor child" in order to recover damages under RCW 4.24.010 liberally construed because the statute is remedial, so that the relevant time for assessing support is any time before injury or death? Or, is the requirement strictly construed as being in derogation of the common law, so that the relevant time for assessing support is limited to at or near the time of injury or death?

IV. SUMMARY OF ARGUMENT

Re: Procedure For Joinder Under RCW 4.24.010. Joinder of the second parent in an action for loss of consortium of a minor child is a matter of right under RCW 4.24.010, upon filing a pleading that complies with CR 8(a). Imposition of any higher burden deprives the parent of his or her right of access to courts. In addition, it would encourage an unseemly race to the courthouse whenever the parents' interests are not aligned, with the first parent receiving the benefit of the liberal notice-pleading standard for his or her complaint, while the second parent is required to prove he or she is entitled to pursue a claim. Once the parents' claims are joined, their claims are subject to challenge on summary judgment or trial on the merits.

Re: Interpretation Of RCW 4.24.010. The prerequisites for recovery under the wrongful death and survival statutes, including

RCW 4.24.010, should be liberally construed because these statutes are remedial in nature, as this Court recognized in Armijo v. Wesselius, 73 Wn.2d 716, 440 P.2d 471 (1968). Conflicting cases strictly construing the wrongful death and survival statutes as being in derogation of the common law, such as Whittlesey v. Seattle, 94 Wash. 645, 163 Pac. 193 (1917), should finally be disapproved.

Under a liberal construction of RCW 4.24.010, the “has regularly contributed to the support” requirement, which is stated in the present perfect tense, allows a parent to pursue a claim if he or she has regularly contributed to the support of his or her minor child at any time before injury or death of the child. This is in marked contrast to the “are dependent for support” requirement of the same statute, allowing a parent to recover for injury or death of a child without regard to the child’s minority, which is stated in the present tense and requires proof of dependency at or near the time of injury or death.

This approach is supported by the absence of any express temporal limits in RCW 4.24.010 regarding when a parent’s regular contributions must be made. It also avoids the difficulties inherent in drawing fine distinctions between contributions near and not near the time of death, particularly with respect to the intangible forms of support contemplated by the statute, such as emotional support. Any concerns about the extent of

liability exposure are tempered by the requirement to prove damages, and the jury's prerogative to award damages only in such amount as, under all the circumstances, may be just.

V. ARGUMENT

A. Joinder Of The Second Parent In An Action For Loss Of Consortium Of A Minor Child Under RCW 4.24.010 Is A Matter Of Right, And Should Be Automatic Upon The Filing Of A Claim Meeting The Notice-Pleading Requirements Of CR 8(a).

RCW 4.24.010 confers on both parents the right to "maintain or join as a party an action as plaintiff for the injury or death of" a minor child, as well as "the right to recover damages" for such injury or death. RCW 4.24.010.¹ Where one parent brings suit for injury or death of a child under the statute, and the other parent is not also named as a plaintiff, the parent bringing suit must give notice to the other along with a copy of the complaint. See id. The notice must be in compliance with the statutory requirements for a summons, and it must advise the other parent to join within 20 days to preserve his or her rights. See id.

Although the requirement for giving notice to the un-joined parent is delineated in some detail in RCW 4.24.010, there is no clear procedure to join the suit, other than the time limit within which joinder must be accomplished. This lack of clarity is troubling, and it engenders the

¹ The current version of RCW 4.24.010 is reproduced in the Appendix to this amicus curiae brief.

potential for procedural traps regarding both the timeliness and sufficiency of joinder, subverting the goal of determining actions on the merits. See Alexander v. Food Servs. Of Am., Inc., 76 Wn.App. 425, 429 & n.2, 886 P.2d 231 (1994) (noting “RCW 4.24.010 remains unclear to practitioners and the courts”; holding joinder waived by failure to attend trial); Wrenn v. Spinnaker Bay Homeowners Ass’n, 60 Wn.App. 400, 404-06, 804 P.2d 645 (1991) (holding “Notice of Appearance and Joinder ... pursuant to RCW 4.24.010” insufficient and not timely served). To date, this Court has not addressed the joinder requirements of RCW 4.24.010, and the Court of Appeals decisions on the subject do not provide clear guidance to bench and bar.

In the absence of an express reference to motions for joinder under CR 19 or intervention under CR 24, joinder should be automatic under RCW 4.24.010 when the second parent files a pleading seeking to join the other parent’s action. The text of the statute recognizes the second parent’s right to join the action and his or her “right to recover damages.” The only permissible challenges to joinder of the second parent should be for timeliness or sufficiency of the pleading seeking joinder. In this case, there does not appear to be any question regarding the timeliness of Kozel’s attempted joinder.

As far as sufficiency is concerned, the joinder pleading need only comply with the pleading requirements of CR 8(a), containing a short, plain statement showing that the pleader is entitled to relief. See Wrenn, 60 Wn.App. at 404-05 (indicating filing of a notice pleading should suffice). The joinder pleading would be subject to the certification requirements of CR 11, and could be tested by motion practice under CR 12, just as any other pleading stating a claim for relief.²

In this case, the standard for joinder applied by the Court of Appeals is unclear. The detailed comparison of the affidavits submitted by Kozel and Bunch resembles the type of scrutiny that would normally be applied in connection with summary judgment proceedings. See Bunch, 159 Wn.App. at 860-63. However, the court's analysis is couched in terms of the abuse of discretion standard applied to motions under CR 19, and concludes with statements that Kozel provided insufficient evidence to show an abuse of discretion. See id. at 856, 862-63. In any event, the type of showing required by the Court of Appeals for joinder at the pleading stage of the case deprived Kozel of her rights under RCW 4.24.010, and

² A notice-pleading based standard for joinder under RCW 4.24.010 is consistent with intervention practice under CR 24(a), involving intervention as a matter of right. See Westerman v. Cary, 125 Wn.2d 277, 302-03, 892 P.2d 1067 (1994) (stating "[i]n determining whether [the proposed intervenor] satisfies the conditions for intervention as of right, the court must look to the pleadings, accepting the well pleaded allegations therein as true"; internal quotation omitted). However, in the absence of any reference to a motion as a prerequisite for joinder under RCW 4.24.010, the failure to invoke CR 24 should not foreclose joinder.

had the effect of denying her access to courts. See Putman v. Wenatchee Vly. Med. Ctr., P.S., 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (discussing access to courts, including the right to discovery; striking down medical malpractice certificate of merit requirement).

The Court of Appeals approach also seems to foster an unseemly race to the courthouse whenever the interests of the parents are not aligned. This is because, under the court's analysis, the first parent receives the benefit of the liberal notice-pleading standard for his or her complaint, while the second parent is required to prove his or her entitlement to pursue a claim at the pleading stage of the case. To avoid these problems, the Court should hold that the second parent is entitled to joinder as a matter of right under RCW 4.24.010, upon the filing of a pleading that complies with CR 8(a). Nothing more is required by the statute.

B. The Requirements For Qualifying As A Beneficiary Under The Wrongful Death And Survival Statutes, Including RCW 4.24.010, Should Be Liberally Construed Because These Statutes Are Remedial In Nature, And The Court Should Expressly Disapprove Of Prior Case Law Strictly Construing These Statutes As Being In Derogation Of The Common Law.

The Court of Appeals based its determination that Kozel was not entitled to intervene on a strict construction of RCW 4.24.010, reasoning that wrongful death and survival statutes must be construed this way

because they are in derogation of the common law. See Bunch, 159 Wn.App. at 858 & n.17, 865-66 & n.48. The question of strict versus liberal construction has arisen in several recent cases, and will continue to surface until the Court resolves the conflict between divergent lines of authority regarding the correct rule of construction. See e.g. Armantrout v. Carlson, 166 Wn.2d 931, 937 n.1, 214 P.3d 914 (2009) (declining to “choose between liberal or strict methodologies” in interpreting the dependent-for-support requirement of the wrongful death and survival statutes); Beggs v. DSHS, 171 Wn.2d 69, 82, 247 P.3d 421 (2011) (interpreting dependency requirement of wrongful death statute; quoting prior case favoring interpretation in accordance with the humane purpose of the statute as opposed to a strict construction).

The line of cases supporting a strict construction can be traced to Whittlesey v. Seattle, 94 Wash. 645, 647, 163 Pac. 193 (1917) (disallowing action under Rem. Rev. Code § 183 by widower when only widows were listed in the statute). The influence of Whittlesey and its progeny is evident in this case. In the course of strictly construing RCW 4.24.010, the Court of Appeals cites Tait v. Wahl, 97 Wn.App. 765, 770-71, 987 P.2d 127 (1999) (disallowing action under RCW 4.20.010, .020, .046 & .060 for benefit of decedent’s brother who was not dependent for support on decedent, and also disallowing action for benefit of

decedent's niece and niece's children who were dependent), *review denied*, 140 Wn.2d 1015 (2000). See Bunch at 858 n.17. For its strict construction analysis, Tait relies on Masunaga v. Gapasin, 57 Wn.App. 624, 631, 790 P.2d 171 (1990) (disallowing action under RCW 4.24.010 by decedent's parents who were not dependent for support on decedent), and Roe v. Ludtke Trucking, Inc., 46 Wn.App. 816, 819, 732 P.2d 1021 (1987) (disallowing action under RCW 4.20.010-.020 by long term cohabitant), both of which in turn rely on Whittlesey.

The Court of Appeals also mistakenly cites Philippides v. Bernard, 151 Wn.2d 376, 390, 88 P.3d 939 (2004), in support of strict construction. See Bunch at 858 n.17, 867 n.51. Philippides does not involve strict or liberal construction of the wrongful death and survival statutes. See 151 Wn.2d at 388-90. Instead, Philippides involves the separate issue of whether the courts can recognize a common law cause of action for wrongful death when statutory causes of action already exist. See id. Because the legislature adopted a comprehensive set of statutes governing wrongful death and survival actions, the courts are not at liberty to augment those statutes by recognizing independent common law causes of action. See id. In this case, there is no question that Kozel's cause of action is governed by RCW 4.24.010, and she is not asking this Court to recognize an independent common law claim. Ultimately, the Court of

Appeals citation of Philippides seems to conflate the issue of strict versus liberal construction with the separate issue of whether statutory and common law claims may co-exist in this context.³

In any event, the Court of Appeals below (and in Tait, Masunaga and Roe) overlooks the fact that this Court has all but abandoned the Whittlesey approach in favor of liberal construction of wrongful death and survival statutes, given their remedial nature. An early indicator that the rule of strict construction announced in Whittlesey might not stand up is seen in Mitchell v. Rice, 183 Wash. 402, 48 P.2d 949 (1935), where the Court reviewed the sufficiency of the evidence of dependency required for certain beneficiaries to recover for wrongful death. Without referencing Whittlesey, the Court noted that the dependency requirement should be interpreted in light of the statute's remedial character:

The degree of dependency required by the rule announced in the cases cited above is to be substantial. But 'substantial' is a term having relation 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.

Mitchell, 183 Wash. at 407.

³ The Court of Appeals also cites McNeal v. Allen, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980), for the general rule of strict construction of statutes in derogation of common law. See Bunch at 865 n.48. However, McNeal, 95 Wn.2d at 269, involved the interplay of RCW 4.28.360, which governs the pleading of damages for personal injuries, and the common law of defamation.

The force of Whittlesey was next eroded in Cook v. Rafferty, 200 Wash. 234, 240, 93 P.2d 376 (1939), where the Court stated, without reference to Whittlesey, that the then-current wrongful death and survival statutes “being remedial in their nature, are liberally construed,” in connection with its review of the dependency requirement.

More recently, in Armijo v. Wesselius, 73 Wn.2d 716, 720, 440 P.2d 71 (1968), the Court reexamined and distanced itself from the Whittlesey approach:

Respondents cite *Whittlesey v. City of Seattle*, 94 Wash. 645, 163 P. 193 (1917), for the rule that remedial statutes which are in derogation of the common law are to be strictly construed as to their classes of beneficiaries. It is contended that this rule forecloses Toni Marie's chances of becoming a beneficiary under RCW 4.20.020, presumably on the theory that a strict construction of the words ‘child or children’ would not include illegitimates. Respondents' contention, however, is not persuasive. Whether done liberally or strictly, judicial interpretation is necessary even under respondents' rule; illegitimate children are not *necessarily* excluded under the terms of RCW 4.20.020. This being so, we must still engage in a process of weighing and balancing competing values, and, it appears to us that social policy considerations favoring inclusion of illegitimate children as beneficiaries should be given effect. As stated in 3 J. Sutherland, *Statutory Construction* § 7205 (3d ed. 1943):

[M]any of the decisions in the past [construing wrongful death statutes], and a few of the later ones as well, have crippled the operation of this legislation by employing a narrow construction on the basis that these statutes are in derogation of the common law. However, it may now safely be asserted that the better and modern authorities are in agreement that the objectives and spirit of this legislation should not be thwarted by a technical application.⁴

⁴ The dissent in Armijo unsuccessfully invoked the rule of strict construction of Whittlesey. See Armijo, 73 Wn.2d at 726-27 (Hill, J., dissenting).

Under this rule of liberal construction, a beneficiary is entitled to recover under the wrongful death and survival statutes if his or her eligibility is “not *necessarily* excluded” by the terms of these statutes. Id.

The liberal construction applied in Armijo was later reaffirmed by this Court in Klossner v. San Juan County, 93 Wn.2d 42, 46-48, 605 P.2d 330 (1980), which applies the rule of liberal construction, but nonetheless holds that an unadopted stepchild does not fall within the definition of “child” under RCW 4.20.020 and .060. The dissent in Klossner also applied the rule of liberal construction in reaching a different conclusion. See 93 Wn.2d at 48-49 (Dolliver, J., dissenting).⁵

The Court of Appeals below erred in applying a rule of strict construction in determining whether Kozel met the eligibility requirements of RCW 4.24.010. The rule of liberal construction should be applied in analyzing whether a parent “has regularly contributed to the support of his or her minor child” to the same extent as it has been used in interpreting other requirements for eligibility under the wrongful death and survival statutes. See Armijo, supra; Klossner, supra. The Court should overrule

⁵ Cf. Wilson v. Lund, 74 Wn.2d 945, 447 P.2d 718 (1968) (holding divorced mother had standing to maintain action for death of child under former version of RCW 4.24.010, which limited standing to father in most cases; analysis consistent with rule of liberal construction even though the court did not explicitly invoke the rule).

Whittlesey and other cases applying a rule of strict construction to the wrongful death and survival statutes.⁶

C. Properly Construed, RCW 4.24.010 Allows A Parent To Present His or Her Case To The Jury When He Or She Has Regularly Contributed To A Minor Child's Support At Any Time Before The Child's Injury Or Death.

The Court of Appeals strictly construes RCW 4.24.010 to require that a parent's regular contributions to the support of a minor child must have been made at or near the time of death in order for the parent to maintain an action. See Bunch, 159 Wn.App. at 865-66. This Court should liberally construe "has regularly contributed to the support" to mean that the support of a minor child may be made at any time before death. See supra § B.

The language of RCW 4.24.010 does not contain any express temporal limitations regarding when such contributions must be made. The only implicit limitation is the present perfect tense of the statutory language, which indicates that such contributions must have been made before injury or death.⁷ This backward-looking verb tense is in marked

⁶ In addition to the Court of Appeals decisions cited in the main text, see Baum v. Burrington, 119 Wn.App. 36, 41-42, 79 P.3d 456 (2003) (applying rule of strict construction to hold no cause of action for death of unviable fetus under RCW 4.24.010). Baum does not cite Whittlesey, even though it applies the same rule of strict construction.

⁷ Blumenshein v. Voelker, 124 Wn.App. 129, 100 P.3d 344 (2004), seems to involve an application of this implicit pre-death or -injury limitation. The court rejected the plaintiff's contention that her post-injury involvement with her children "reinstated" her right to sue under RCW 4.24.010. See id., 124 Wn.App. at 135. It does not appear that the plaintiff in Blumenshein argued that she had a right to recover based on pre-injury

contrast to the present tense of the other basis for parents' eligibility to maintain an action under RCW 4.24.010, i.e., when they "are dependent for support" on their child, implying that dependency is determined at the time of injury or death. See Armantrout, 166 Wn.2d at 936 (stating "dependency must be based on the situation existing at the time of decedent's death and not on promises of future contributions").

McGraw argues that the present perfect verb tense limits the statute to regular contributions which are ongoing at the time of death, and excludes the possibility of such contributions at any time in the past giving rise to a claim for loss of parent-child consortium under RCW 4.24.010. See McGraw Ans. to Pet. for Rev. at 11-12; McGraw Supp. Br. at 3-4. However, as Kozel points out, the past perfect tense can refer *either* to ongoing *or* completed past action. See Kozel Supp. Br. at 8-9.

The Court of Appeals seems to agree with Kozel in part when it recognizes that regular contributions to support could give rise to a claim for loss of parent-child consortium if the contributions were made "at or near the time of death or injury to the minor child." See Bunch at 865.

involvement with her children. See id. at 132 (noting that injured child did not live with plaintiff-parent, there had not been significant contact for quite some time prior to injury accident, and plaintiff-parent had not paid court-ordered child support); id. at 134-35 (stating "[t]his record shows [the plaintiff] did not have significant involvement in [the injured minor's] life until one and a half years after the accident and did not have contact for quite some time before the accident"); see also Bunch at 872 (Becker, J., dissenting; discussing Blumenshein).

Contributions *near* the time of death would have to be completed past actions, albeit recently completed. However, the court concludes that Kozel's regular contributions to Ashlie's support were not sufficiently near the time of Ashlie's death to give rise to a claim for loss of parent-child consortium under RCW 4.24.010.⁸

Although the Court of Appeals grounds its near-the-time-of-death analysis in a strict construction of the language of RCW 4.24.010, there is no specific language that would support such a construction, whether strictly construed or not. See Bunch at 865. The present perfect verb tense does not imply a sense of nearness, and the adverb "regularly" merely describes the frequency and manner of contributions rather than the temporal proximity of such contributions. In this sense, it appears that the Court of Appeals is imposing a proximity requirement under the guise of strictly construing the statute.

Applying the proper liberal construction of RCW 4.24.010, Kozel should be entitled to present evidence to the jury of regular contributions to Ashlie's support any time before Ashlie's death because the present perfect tense does not necessarily exclude completed past actions,

⁸ See Bunch at 862 (stating "[t]he trial court was entitled to conclude from this record that Kozel failed to establish that she contributed to Ashlie's support ... after March 2007"); id. at 868 (stating "[s]he failed in her burden to show that she '[had] regularly contributed to the support' of Ashlie at the time of the child's death in January 2008"; internal quotation & brackets in original).

regardless of when they occurred. This is consistent with the enacted but uncodified statement of legislative intent for the 1998 amendment to RCW 4.24.010, which is also phrased in the present perfect tense. See Laws of 1998, Ch. 237, § 1 (stating “[t]he legislature intends to provide a civil cause of action ... if the mother or father *has had* significant involvement in the child's life”; emphasis added).⁹

A liberal construction also avoids difficulties in making distinctions between regular contributions near the time of death versus those *not* near the time of death, as well as difficulties in “timing” the intangible forms of support encompassed by RCW 4.24.010. See Laws of 1998, Ch. 237, § 1 (providing that support for minor children includes emotional and psychological support as well as financial support). Here, the Court of Appeals seems to have determined that a lack of regular contributions for approximately 10 months—from March 2007, when Ashlie was hospitalized, until January 2008, when she committed suicide—meant that prior regular contributions were not sufficiently near to Ashlie’s death to sustain a claim for loss of parent-child consortium under RCW 4.24.010. See supra n.8. This naturally raises problematic questions regarding how near in time such contributions must be, and how

⁹ The full text of this provision is reproduced in the Appendix to this brief.

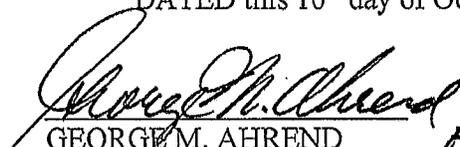
lower courts are supposed to make these fine distinctions as a matter of law in a predictable manner.

Under the liberal construction of RCW 4.24.010 proposed here, these matters would be left to the trier of fact, preserving the jury's role in determining whether the plaintiff-parent in a given case has regularly contributed to the support of his or her minor child. Any concerns about the extent of liability imposed are tempered by the requirement that the parent must prove damages, and the jury's prerogative under the statute only to award damages "in such amount as, under all the circumstances of the case, may be just." RCW 4.24.010; see also Bunch at 871-72 (Becker, J., dissenting, stating "[i]f a parent's involvement with a child has lapsed or diminished over time, that is a consideration a jury can take into account when deciding damages").

VI. CONCLUSION

The Court should adopt the analysis set forth in this brief and resolve this appeal accordingly.

DATED this 10th day of October, 2011.


GEORGE M. AHREND


FOR BRYAN P. HARNETIAUX,
WITH AUTHORITY

On behalf of WSAJ Foundation

APPENDIX

RCW 4.24.010. Action for injury or death of child

A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child.

This section creates only one cause of action, but if the parents of the child are not married, are separated, or not married to each other damages may be awarded to each plaintiff separately, as the trier of fact finds just and equitable.

If one parent brings an action under this section and the other parent is not named as a plaintiff, notice of the institution of the suit, together with a copy of the complaint, shall be served upon the other parent: PROVIDED, That notice shall be required only if parentage has been duly established.

Such notice shall be in compliance with the statutory requirements for a summons. Such notice shall state that the other parent must join as a party to the suit within twenty days or the right to recover damages under this section shall be barred. Failure of the other parent to timely appear shall bar such parent's action to recover any part of an award made to the party instituting the suit.

In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.

[1998 c 237 § 2; 1973 1st ex.s. c 154 § 4; 1967 ex.s. c 81 § 1; 1927 c 191 § 1; Code 1881 § 9; 1877 p 5 § 9; 1873 p 5 § 10; 1869 p 4 § 9; RRS § 184.]

Laws of 1998, Ch. 237, § 1.

It is the intent of this act to address the constitutional issue of equal protection addressed by the Washington state supreme court in *Guard v. Jackson*, 132 Wn.2d 660 (1997). The legislature intends to provide a civil cause of action for wrongful injury or death of a minor child to a mother or father, or both, if the mother or father has had significant involvement in the child's life, including but not limited to, emotional, psychological, or financial support.