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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ALYSSA ARELLANO-HAWKINS, a minor
child, and DEYANIRA ARELLANO,
individually, and as legal guardian for the
minor child,

Plaintiffs,

vs.

DEACONESS MEDICAL CENTER, a
Washington Non-Profit Corporation;

Defendants.

Supreme Court of
Washington Case No.
94292-7

**MOTION FOR
DISCRETIONARY
REVIEW**

A. IDENTITY OF PETITIONER

Plaintiff, Deyanira Arellano, asks this Court to accept review of the
decision designated in Part B of this Motion.

 ORIGINAL

B. DECISION

Plaintiff requests review of the Honorable Judge John O. Cooney's Order granting Defendant Deaconess Medical Center's Motion to dismiss the mother's, Deyanira Arellano's, loss of consortium claim under RCW 4.24.010, filed March 3, 2017. The decision effectively restricts a parent's right to join their consortium claim with their child's medical malpractice claim for injuries. The court's decision acknowledges the underlying child's claim may be tolled pursuant to RCW 4.16.190, but penalizes the parent for not bringing their consortium claim within three (3) years. A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

- 1) Does the minor tolling provisions set forth in RCW 4.16.190 apply to a parent's right to maintain or join an action for injury of death of their child under RCW 4.24.010?
- 2) Does the general tort catchall statute of limitations under RCW 4.16.080 apply to prohibit a parent's right to claim consortium damages for injury to their child under RCW 4.24.010?
- 3) Is a parent's claim under RCW 4.24.010 a separate and independent cause of action of the parent or a component of damages in the child's underlying liability claim?

- 4) Is the parent's right to recover damages under RCW 4.24.010 a derivative claim to the injured child's claim?
- 5) Is a parent's right to seek reimbursement of medical bills, destruction of the parent-child relationship, and loss of love/companionship of the child which are recoverable under RCW 4.24.010 analogous to a spouses' common law loss of consortium claim?
- 6) Is a common law spousal claim for loss of consortium between two adults analogous to a parent's statutory loss of parent-child relationship between a minor and an adult?

D. STATEMENT OF THE CASE

This is a significant medical malpractice action that arose 18 years ago. On August 25, 1998, the Respondent hospital mistakenly gave a premature baby, Alyssa Arellano-Hawkins, a lethal dose of potassium chloride. (Appx A). Immediately thereafter, baby Alyssa went into cardiac arrest. Id. Approximately 1.5 hours later, she was miraculously resuscitated. Id. Physicians advised the parents that any long term effects were unclear but that the arrest could lead to compromising neurological function which would only be known as Alyssa developed and missed milestones. Id.

Alyssa Arellano-Hawkins is a twin. (Appx A). As the twins continued to grow and gain, their mother, Deyanira Arellano found that

Alyssa fell behind in her motor, cognitive, and social skills in comparison with her twin sibling. Id. Currently, Alyssa is a severely developmentally delayed child that will never be able to live independently. Id. She will be in high school until she is 21 years old. Id. Alyssa's twin, Alexis, is a straight A student, who plans to attend college. Id.

In 2011, when the twins were 12 years old, Alyssa developed signs of a systemic illness. (Appx. A). She was later airlifted to Children's Hospital and diagnosed with end stage renal failure. Id. After one year of dialysis, Alyssa and her mother successfully underwent a kidney transplant surgery. Id. It is believed that the cardiac arrest significantly contributed to Alyssa's renal failure, though the physicians failed to disclose such potential concerns to the mother. Id.

Alyssa and her mother, Deyanira, filed suit against the Respondent hospital in March, 2016. (Appx A). Up until 2014, a statute existed which eliminated medical malpractice actions from tolling of the applicable limitations periods for minors. See RCW 4.16.190(2). The Washington Supreme Court found the statute had potential to burden a particularly vulnerable population not accountable for their minor status when striking RCW 4.16.190(2) as unconstitutional. See **Schroeder v Weighall**, 179 Wn.2d 566 (2014).

Nearly one year after filing suit, the Respondent hospital motioned the court to dismiss the mother's consortium claim under RCW 4.24.010

based on the general tort statute of limitations of three (3) years. (Appx. B, p.1-7). The hospital argued that the three (3) year period commenced from the date of injury, i.e. August 25, 1998 potassium event which caused injury to her parent-child relationship since physicians informed the mother that cognitive deficiencies *may* result. See RCW 4.18.080(2). Id.

The Superior Court found the parental consortium claim under RCW 4.24.010 was silent as to the applicable statute of limitations. (Appx C, p. 27). Nevertheless, the lower court was guided by the permissive language in the statute and cases interpreting the common law spousal consortium claim when dismissing the mother's statutory consortium claim. (Appx C, p. 23-27).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1) The Superior Court Certified Direct Review.

The Superior Court agreed that the order it entered dismissing mother's RCW 4.24.010 claim involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate review of the order may materially advance the ultimate termination of litigation. See RAP 2.3 (b)(4). The Court commented that the "law in this area is gray" and indeed "concerns public policy". (Appx. C, p.23). It was even amazed that given the number of child injuries from medical malpractice, there was no case law addressing the statute of

limitations applicable to RCW 4.24.010. Id. The mother's motion to certify direct review was therefore granted. (Appx. D). The parties are desirous of a single trial adjudicating all the claims, for this reason direct and immediate guidance from the highest authority capable of interpreting RCW 4.24.010 is respectfully requested.

2) Misconstruing RCW 4.24.010 Significantly Impacts Public Policy and Questions Regarding its Proper Interpretation Remain.

When a child dies or becomes injured, RCW 4.24.010 provides a special and unique cause of action to the parents as follows:

“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.

...

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.”

RCW 4.24.010 (emphasis added).

The Legislature specifically created and designed a cause of action for a parent. Namely, parent(s) are able to recover for the loss of their parent-child relationship, medical expenses, and loss of love and companionship when a child dies or becomes injured. Unfortunately, RCW 4.24.010 is silent concerning a statute of limitations for such parental consortium claims. Courts question whether they must look to the underlying liability claim considering the parent's claim is derivative or whether the parent's consortium claim is a separate and independent claim like case law suggests for spousal consortium claims.

Moreover, courts have no guidance for injured children. RCW 4.24.010 contemplates a parental consortium claim when a child is injured or dies. Yet, in the case of a child's death, a parent's consortium claim is connected and interpreted pursuant to the wrongful death statutes. The difference is the date of a child's death is easily determined and readily known by parent's or the child's beneficiaries causing the parent's consortium claim to always be filed with the child's claim. The questions presented herein specifically concern a parent's consortium claim when a child is injured during minority, in the context of medical negligence, and the child files a timely claim. May the parent join the child's action or does the parent lose their claim for not filing the consortium claim within three (3) years? Indeed questions appear to remain as to the proper interpretation of RCW 4.24.010.

3) The Lack of the Guidance Encourages Courts to Use Conflicting Case Law Interpreting Spousal Consortium Claims.

Courts are mistakenly looking to cases interpreting spousal loss of consortium claims which as “separate” and “independent” causes of action for purposes of applying a statute of limitations under RCW 4.24.010 claims. (See Appx. C, p. 24-25 wherein the lower court relied upon the Supreme Court case of **Oltman v Holland American Line USA, Inc.**, 163 Wash.2d 236 (2008)). Courts are seemingly comparing the two claims because they are both identified as consortium claims.

For this reason, Judge Cooney below hung his hat on **Oltman**, supra, wherein this Court held that a “deprived” spouse’s loss of consortium claim is separate and independent from, rather than derivative of, the injured spouse’s claims. When courts look to compare the adult/adult spousal consortium claim to a parent’s consortium claim under RCW 4.24.010 they reach an absurd result by segregating the causes of action and applying the general catch all statute of limitations. Yet this analysis fails to provide any instruction on the applicability of a minor tolling provision (i.e. the spousal consortium claim is always between two adults). Further, the analysis negates the plain language of the statute allowing parents to ‘join [the child’s] action’. Using the spousal consortium comparison, a parent may not join their child’s action,

rendering the plain language of the statute meaningless. Yet substantial case law in Washington encourages courts to find consortium claims separate and independent claims. See **Oltman**, supra; **Reichelt v Johns-Mansville Corp**, 107 Wn.2d 761, 776 (1987); **Christi v Maxwell**, 40 Wn.App. 40, 47-48 (1985).

To the contrary, the Washington Pattern Jury Instructions suggest a parent's statutory loss of consortium claim is a type of derivative damage from the child's injury. See WPI 32.06.01 ("Measure of damages – Injury to Child – Action Brought by Parent (RCW 4.24.010)". Along these lines, such interpretation doesn't force a parent into bringing a consortium claim before the underlying liability case has been tried/presented. Petitioner argued and urged the court to adopt the same derivative damage interpretation below. In **Hinzman v Palmanteer**, 81 Wn.2d 327, 329 (1972), *disapproved of on other grounds in* **Wooldridge v Woolett**, 96 Wn.659 (1981), this Court held the statutory terms 'loss of love and injury to the destruction of the parent-child relationship' were intended by the legislature to add the elements of 'parental grief, mental anguish and suffering' as elements of damages. (Emphasis added). For this reason, there is a damage instruction to issue when a parent has claimed loss of consortium of their child. Qualifying a parent's consortium claim/right to a component of damages in a derivative claim is the correct approach

which gives meaning to the significant statutory right parents have been afforded to recover their economic and noneconomic losses.

F. CONCLUSION.

For the forgoing reasons, this Court should accept direct review and confirm the appropriate statute of limitations period(s) applicable to RCW 4.24.010.

RESPECTFULLY SUBMITTED this 3rd day of May, 2017.
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Appendix

CERTIFICATE OF SERVICE

I, Lori Engelhard, am over the age of eighteen and am competent to testify as to the facts contained in this Declaration.

1. On May 3, 2017, I electronically filed with the Washington State Supreme Court Motion for Discretionary Review with Certificate of Service, Appendix, and Statement of Grounds for Discretionary Review, with Certificate of Service.

2. On May 3, 2017, I e-mailed Motion for Discretionary Review with Certificate of Service, Appendix, and Statement of Grounds for Discretionary Review, with Certificate of Service, to Ryan M. Beaudoin, Steven J. Dixon, and Todd Adolphson of Witherspoon Kelley

DATED this 3rd day of May, 2017.

TELQUIST ZIOBRO McMILLEN CLARE, PLLC

By: Lori Engelhard
Kristi Flyg, *Legal Assistant*

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Subject: Hawkins vs. Deaconess Supreme Court #94292-7

Attached please find Statement of Grounds for Discretionary Review, with certificate of service, and Motion for Discretionary Review, with certificate of service and Appendix.

Kristi



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