

No. 84098-9

ALEXANDER, J. (concurring/dissenting)—Although I agree with the majority's conclusion that Tyler DeLeon's siblings are not qualified beneficiaries, I disagree with its holdings that (1) a cause of action against health care providers is implied by RCW 26.44.030, and (2) a medical doctor's duty to report suspected child abuse is not health care. I, therefore, dissent in part for the reasons set forth below.

I. Does RCW 26.44.030 imply a civil remedy?

Pursuant to RCW 26.44.030(1)(a), any "practitioner" who has "reasonable cause to believe that a child has suffered abuse or neglect" shall report the suspected abuse to the Department of Social and Health Services or the proper law enforcement agency. A person licensed by the State of Washington to practice medicine is deemed a "practitioner." RCW 26.44.020(16). A practitioner who knowingly fails to report suspected child abuse "shall be guilty of a gross misdemeanor." RCW 26.44.080.

The majority concedes that the aforementioned statutes do not explicitly provide a civil remedy against a practitioner who fails to report suspected abuse. It, nevertheless, holds that a civil remedy is implied "as a[n additional] means of enforcing

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the mandatory reporting duty.” Majority at 9. This conclusion, it seems to me, flies entirely in the face of what the plain language of the mandatory child abuse reporting statute indicates the legislature intended. I say that because just as we may assume that the legislature is aware of the doctrine of implied statutory causes of action, we can assume that it knows how to explicitly provide a civil cause of action. It declined to do that and, instead, chose to make it a crime to fail to report child abuse.

The result I would have us reach is entirely consistent with our decision in *Tyner v. Department of Social and Health Services*, 141 Wn.2d 68, 1 P.3d 1148 (2000), a case in which we did imply a tort remedy in favor of parents and against the State for negligent investigation of allegations of child abuse. Our decision there turned to a great extent on the fact that the statute was silent as to a remedy. As I have indicated, that is not the case here.

I would, therefore, follow the lead of the majority of jurisdictions in this nation that have found no implied cause of action in state child abuse reporting statutes. See majority at 7 n.9.

II. Is a doctor’s statutory duty to report suspected child abuse health care?

As the majority observes, the exclusive remedy for damages for injuries resulting from health care is under the provisions of chapter 7.70 RCW. Thus, if the physician’s obligation to report suspected child abuse is in the category of health care, the civil remedy the majority says is implied by RCW 26.44.030 is not available to plaintiffs like those in this case. Although “health care” is not defined in chapter 7.70 RCW, the

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Court of Appeals has appropriately defined “health care” as “the process in which [the physician] was utilizing the skills which he had been taught in examining, diagnosing, treating or caring for the plaintiff as his patient.” *Estate of Sly v. Linville*, 75 Wn. App. 431, 439, 878 P.2d 1241 (1994) (quoting *Tighe v. Ginsberg*, 146 A.D.2d 268, 540 N.Y.S.2d 99, 101 (1989)). This definition of “health care,” as the majority acknowledges, is consistent with the dictionary definition. It seems obvious that a physician, or any person in the healing arts, is not caring for a patient if the physician fails to carry out his or her statutory obligation to report suspected child abuse to proper authorities. Indeed, I am of the view that even absent a reporting requirement like that which is set forth in RCW 26.44.030, a caring and honorable physician should report suspected child abuse. I say that because from time immemorial the physician’s obligation has been to heal the sick and injured. For a physician to remain silent in the face of his or her opinion that a child patient will continue to suffer abuse if the child’s home environment remains unchanged undermines the physician’s traditional role to heal those who seek help.<sup>1</sup>

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<sup>1</sup>Physicians have traditionally observed an oath that is based on the teachings of the Greek physician Hippocrates. A modern version of the so-called Hippocratic oath, penned in 1964 by Dr. Louis Lasagna, a former dean of the School of Medicine at Tufts University, indicates that a physician will apply “all measures [that] are required” for the benefit of the sick. *The Hippocratic Oath: Modern Version*, PBS, [http://www.pbs.org/wgbh/nova/doctors/oath\\_modern.html](http://www.pbs.org/wgbh/nova/doctors/oath_modern.html) (last visited Feb. 10, 2011) (alteration in original).

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AUTHOR:

Justice Gerry L. Alexander

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WE CONCUR:

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