

Postema v. Postema Enters., Inc.

Court of Appeals of Washington, Division One

July 21, 2003, Filed

No. 50718-4-I

Reporter

118 Wn. App. 185 *; 72 P.3d 1122 **; 2003 Wash. App. LEXIS 1557 ***
appellant.

STACY GAUTHIER POSTEMA,
*Individually and as Personal
Representative, Plaintiff,* JEFF
SCARBROUGH, *Appellant,* v. POSTEMA
ENTERPRISES, INC., ET AL.,
Respondents.

*Edwin J. Snook (of Snook & Schwanz) and
Timothy R. Gosselin (of Burgess Fitzer,
P.S.), for respondents.*

Subsequent History: Order Amending
Opinion August 28, 2003.

Review denied by *Postema v. Postema
Enters., Inc., 151 Wn.2d 1011, 89 P.3d 712,
2004 Wash. LEXIS 275 (Wash., Apr. 6,
2004)*

Judges: Written by: Agid, J. Concurred by:
Appelwick, J.; Schindler, J.

Opinion by: AGID

Prior History: [***1] Superior Court
County: Snohomish. Superior Court Cause
No: 00-2-08034-2. Date filed in Superior
Court: June 7, 2002. Superior Court Judge
Signing: Kenneth Cowsert.

Counsel: *Charles K. Wiggins and Kenneth
W. Masters (of Wiggins & Masters,
P.L.L.C.) and Robert K. Dawson and Peter
M. Brown (of Pence & Dawson, L.L.P.), for*

Opinion

[*188] [**1123] Agid, J. -- Jeff
Scarborough brought an action against Albert
Postema for the wrongful death of his three
year old son. Under instructions narrowly
defining "support," a jury determined
Scarborough had not regularly contributed to
the support of his child's financial well-
being and accordingly could not maintain
the wrongful death action. After trial, the
court ruled that the legislature's 1998
amendment [**1124] to the wrongful death

statute stating its intent to expand the definition of support did not make substantive changes in the definition, and it denied Scarbrough's posttrial motions. Although we conclude [***2] that he did not properly object to the court's definition of "support" at trial, we reach the issue because it is critical to this case and the correct statutory construction is necessary to the correct decision. We conclude the trial court erred in its interpretation of the 1998 amendment because it did change the definition of "support" in [RCW 4.24.010](#) and remand for a new trial under *Civil Rule 59(a)(9)*.

FACTS

On March 10, 2000, three-year-old Elijah Gauthier was riding in a 16-ton Peterbilt dump truck with his half-sister, Monique Postema, and her father, Albert Postema. When the passenger door unexpectedly flew open, Elijah fell under the truck and was killed. Elijah's mother, Stacy Postema, sued her ex-husband Albert under [RCW 4.24.010](#), which creates a cause of action for parents of an injured or dead child. Jeff Scarbrough, Elijah's father, joined the action. After Stacy settled with Albert, Jeff's claim proceeded to trial.

[*189] [RCW 4.24.010](#) provides that a parent can maintain an action for the wrongful death of a child only if he or she has "regularly contributed to the support" of the [***3] minor child.¹ Jeff argued in his trial memoranda that the court should decide as a matter of law whether he

regularly contributed to Elijah's support and had standing to bring the claim.² Only after the court makes this threshold determination, he argued, should the jury consider his loss of love, companionship, and the parent/child relationship to assess damages. Although the trial court rejected his motion and submitted the question to the jury, Scarbrough pursued the theory throughout trial that he could bring an action if he regularly contributed to Elijah's *material* well-being. He presented evidence detailing the monetary contributions he made to support Elijah. He also presented damages testimony from several friends and family establishing his close relationship with his son. This testimony suggested Scarbrough fully exercised his visitation rights under the parenting plan and took additional time with Elijah when he could. He took Elijah fishing, to parks, and to the zoo. He and Stacy took Elijah on vacation together to the Oregon Coast. His neighbors, Frank and Betty Green, testified they saw Jeff with Elijah "five or six hundred times" and they considered him an active [***4] father. Frank Green noted that he and his wife raised four children and he "really thought [Jeff] did a little better

²The only evidence Jeff presented on this issue was of his monetary contributions in the form of child support. In so doing, he relied upon our ruling in *Guard v. Jackson*, 83 Wn. App. 325, 921 P.2d 544 (1996), *aff'd*, 132 Wn.2d 660, 940 P.2d 642 (1997).

Where a term is not defined by a statute, the court looks to the statute's subject matter and the context in which the word is used. In the context of statutes dealing with parent-child relations, "support" generally means providing for a child's needs for housing, food, clothing, education and health care. We therefore construe [RCW 4.24.010](#) as requiring the father to contribute regularly to the child's *material* well-being.

¹[RCW 4.24.010](#).

83 Wn. App. at 329 (footnotes omitted).

job with Eli than [he] did with [his] own kids." The owner of the salon where he worked described the relationship between Jeff and his son as "caring" and testified that he had pictures of Elijah at his work [*190] station. His stepmother testified that Jeff and Elijah had a very special bond and he "obviously adored [Elijah]." She noted Jeff was with Elijah every moment he could be. Finally, Jeff presented evidence showing that he was devastated by Elijah's death.

[***5] After he rested his case, Scarbrough moved for judgment as a matter of law that he had standing to bring the claim, arguing that no reasonable jury could find that he failed to regularly contribute to Elijah's *material* support. The trial court again denied the motion. In formulating jury instructions, both counsel and the court discussed in detail jury instruction 6 which defined "regular" support contributions. Scarbrough submitted the following instruction:

[1125]**

INSTRUCTION NO. ____

In order for a parent to recover damages for the death of a child, the parent must have regularly contributed to the support of his or her minor child.

The word "regularly" signifies a frequency which is greater than occasional but less than constant. Contributions may be of money, or of material goods, or of the personal efforts of the parent. ³ No specific amount of

support is required. Nor is it required that the contribution be made according to a fixed periodic timetable. In making your assessment you are to consider all the factors bearing upon this issue over the life of the parent-child relationship. It is sufficient if the parent makes reasonable contributions at such time as the needs of the child are apparent, and with due regard to the financial ability of the parent to contribute.

[***6] The trial court gave the following version of the instruction:

[*191] INSTRUCTION NO. 6

In order for a parent to recover damages for the death of a child, the parent must have regularly contributed to the support of his or her minor child.

"Support" means providing for the child's material well being. This may include the payment of money, or contributing to housing, food, clothing, or healthcare services of the child incurred after his birth. The law does not set a required amount of support.

"Regularly" means consistently, not occasionally or sporadically.

The plaintiff has the burden of proving by a preponderance of the evidence that he regularly contributed to the support of his child. If you find from your consideration of all the evidence that plaintiff has proved that he regularly contributed to the support of the child, your verdict should be for the plaintiff.

³ Although at first glance the phrase "personal efforts of the parent" seems to suggest that nonfinancial contributions could be considered, a discussion between the trial court and the parties clarifies the intended meaning of the phrase. Jeff argued that "personal efforts of

the parent" was intended to include improvements Jeff made to his hair salon so that both parents could work there and make money to support the family. The court rejected this type of labor as "support" and refused to include it in the instruction.

On the other hand, if plaintiff has not proved he regularly contributed to the support of the child, your verdict should [***7] be for the defendant.

Scarborough objected to instruction 6 on the same grounds he argued in his motion for judgment as a matter of law--that whether a parent regularly contributed to his or her child's support is a determination properly made by the court. He also objected to the court's definition of the term "regularly." But he did not object to the definition of the term "support" or the standard a plaintiff must meet to bring a claim under [RCW 4.24.010](#). The court gave the jury a special verdict form asking whether the plaintiff "regularly contributed" to Elijah's support. The jury answered "no" to the question.

After the jury's verdict, Scarborough moved for a new trial under *CR 59* and for a judgment as a matter of law under *CR 50*. He argued that the legislative intent section of the 1998 statutory amendment to [RCW 4.24.010](#) stating that "support" could include "emotional, psychological, or financial support" ⁴ meant that no reasonable jury could conclude that he failed to provide the requisite support. He admitted that he failed to discover this uncodified section until after [*192] the jury rendered its verdict on what he argues [***8] is the wrong legal standard. The trial court denied both motions, and this appeal followed.

ANALYSIS

I. *CR 50* Motions for Judgment as a Matter

of Law Before and During Trial

[1] [2] "'Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or [***1126] reasonable inference to sustain a verdict for the nonmoving party.'" ⁵ "Whether a verdict should have been directed is a question of law." ⁶

[***9] The trial court properly denied Scarborough's motions for judgment as a matter of law at the close of his case and at the conclusion of the evidence because the evidence presented, when viewed in the light most favorable to the nonmoving party, could sustain a verdict that he did not "regularly" contribute to his child's *material* well-being. At this point in the proceedings, Scarborough had not argued that the statute permitted the jury or the court to consider anything other than material support to determine whether he could bring his claim. The evidence showed that he paid child support for 23 of the 39 months Elijah was alive and, except for a short period in August 1999, there was never a child support order in effect. ⁷ His own testimony revealed that Stacy reported him twice to

⁵ *Guijosa v. Wal-Mart Stores*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (quoting *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)).

⁶ *Rhoades v. DeRosier* 14 Wn. App. 946, 948, 546 P.2d 930 (1976).

⁷ Scarborough's own records confirmed only 17 of 38 payments, but Stacy Postema's records reflected 23 payments. Although he claimed he made other payments in cash, Stacy disputed his contention. See *Guard*, 83 Wn. App. at 329 (concluding that a parent who went for months at a time without making payments and missed more payments than he made did not "regularly contribute" to his child's support).

⁴ Laws of 1998, ch. 237, § 1.

the Department of Social and Health Services (DSHS) to enforce the support obligation. [*193] George Smylie, a DSHS employee, testified he did not know whether Scarbrough actually made payments because they were not paid through the State, but he said it would be unacceptable to the State if he provided support only 65 percent of the time.⁸ Because this evidence could sustain a verdict that Scarbrough [***10] did not "regularly" contribute to his child's *material* well-being, the trial court properly refused to grant the motions for judgment as a matter of law under the standard Scarbrough argued at trial.

The critical question is whether the trial court's decision to deny the final posttrial motion, which presented a new theory of the case, was also proper.

II. Preservation for Review

[3] [4] An appellate court may refuse to review any claim of [***11] error which was not raised at the trial court level.⁹ The purpose of this general rule is to give the trial court an opportunity to correct errors and avoid unnecessary retrials.¹⁰ A court normally will not vacate a verdict and grant a new trial for errors of law if the party seeking a new trial failed to object to or invited the error.¹¹

⁸ But the records also show the longest period of time Stacy denies receiving support was during the nine months she and Scarbrough lived together.

⁹ *RAP 2.5(a)*.

¹⁰ *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447, review denied, 145 Wn.2d 1004, 35 P.3d 380 (2001).

¹¹ *In re K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995).

Postema asserts this court cannot review the alleged error of law because Scarbrough failed to argue the "substantial involvement" standard at trial and therefore failed to preserve the issue for appeal. Scarbrough argues that he preserved the issue by objecting to the erroneous definition of "regularly" in instruction 6. He asserts he proposed a jury instruction that properly defined "regularly" and incorporated this theory of the [***12] case because it would have allowed the jury to consider the "personal efforts of the parent" in [*194] determining the amount of "support."¹² He also argues that he preserved the issue by raising it in his posttrial motion, which the trial court improperly denied.

[5] The objection to instruction 6 was inadequate to preserve the question whether "substantial involvement" in a child's life is the appropriate standard to determine whether a parent may bring a claim for [**1127] wrongful death of a child. A general objection or exception is not sufficient because the exception must be sufficient to apprise the trial judge of the nature and substance of the objection.¹³ There is no evidence in the record that Scarbrough made any objection to the definition of the term "support" in instruction 6. In fact, because both parties concede that neither discovered the legislature's statement of intent until after the jury verdict, Scarbrough could not have objected to the instruction on these grounds

¹² See also *supra* note 8.

¹³ *Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334, 339, 878 P.2d 1208 (1994).

or apprised [***13] the trial court of a theory of which he was unaware.

[6] Nor was the objection to the instruction in his posttrial motion sufficient to preserve the issue. In reviewing an instructional error, an appellate court considers the objection at the time of trial and the context in which it was made, but it does not consider statements made in motions for a new trial or reconsideration.¹⁴ Scarbrough correctly argues that failure to object to jury instructions does not preclude an appellate consideration of the trial court's denial of a motion for a judgment as a matter of law. But here he not only failed to object properly to instruction 6, he also argued a position at trial that is inconsistent with the one he advances in his posttrial motion and on appeal.

[***14] [7] The court need not entertain arguments that are patently inconsistent with the positions advanced at trial.¹⁵ The Washington Supreme Court has concluded counsel [*195] cannot set up an error and then complain of it on appeal.¹⁶ By failing to discover the legislature's statement of intent before the end of the proceedings and arguing a different standard throughout trial, Scarbrough invited the error and cannot complain on appeal that his own erroneous arguments at trial resulted in the jury finding for the defendant.

[8] But, all this being said, we conclude that determining the meaning of [RCW](#)

¹⁴ *124 Wn.2d at 340.*

¹⁵ *Kohl v. Zemiller, 12 Wn. App. 370, 373, 529 P.2d 861 (1974).*

¹⁶ *In re K.R., 128 Wn.2d at 147.*

[4.24.010](#) is critical to this case and resolving it is necessary to making a proper decision.¹⁷ In the interest of justice, we will review the question whether the intent statement adopted by legislative amendment in 1998 expanded the definition of "support" to include [***15] non-monetary contributions to a child's life and well-being.

III. Effect of 1998 Amendment

[9] [10] [11] [12] Construction of a statute is a question of law that we review de novo under the error of law standard.¹⁸ [***16] A court's principal objective in interpreting a statute is to give effect to the legislature's intent¹⁹ and its clear language.²⁰ If a term is defined in a statute, we must use that definition.²¹ Absent a statutory definition, the term is generally accorded its plain and ordinary meaning unless there is a [*196] contrary legislative intent.²² A court should avoid construing a statute in a manner

¹⁷ *Falk v. Keene Corp., 113 Wn.2d 645, 659, 782 P.2d 974 (1989)* (permitting review of an instruction despite counsel's inadequate objection because determining the meaning of the act was at the heart of the case and necessary to making a proper decision).

¹⁸ *City of Pasco v. Pub. Employment Relations Comm'n, 119 Wn.2d 504, 507, 833 P.2d 381 (1992).*

¹⁹ *Schumacher v. Williams, 107 Wn. App. 793, 799, 28 P.3d 792 (2001), review denied, 145 Wn.2d 1025, 41 P.3d 484 (2002).*

²⁰ *New Castle Invs. v. City of LaCenter, 98 Wn. App. 224, 229, 989 P.2d 569 (1999)* (citing *People's Org. for Wash. Energy Res. v. Wash. Utils. & Transp. Comm'n, 104 Wn.2d 798, 825, 711 P.2d 319 (1985)*), *review denied, 140 Wn.2d 1019, 5 P.3d 9 (2000).*

²¹ *Id.* (citing *Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 813-14, 828 P.2d 549 (1992)*).

²² *Id.* (citing *Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 479-80, 745 P.2d 1295 (1987)*).

which renders a provision meaningless.²³

[EDITOR'S ****1128**] NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

In *Guard v. Jackson*, we examined the meaning of the term "support" used in [RCW 4.24.010](#).²⁴ We concluded [RCW 4.24.010](#) violated the Equal Rights Amendment by creating an impermissible classification on the basis of gender. And, as discussed above, we interpreted *****17** the meaning of the word "support" in [RCW 4.24.010](#) as being limited to "material well-being." The appellant in *Guard* had argued that "support" meant the "expression of love and affection, expression of concern for a child's well-being, and the duty to provide social and moral guidance."²⁵ Because "'support'

²³ *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

²⁴ 83 Wn. App. 325, 921 P.2d 544 (1996), *aff'd*, 132 Wn.2d 660, 940 P.2d 642 (1997). In relevant part, before it was amended in 1998, [RCW 4.24.010](#) stated as follows:

4.24.010 Action for injury or death of child. The mother or father or both may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either, or both, are dependent for support: PROVIDED, That in the case of an illegitimate child the father cannot maintain or join as a party an action unless paternity has been duly established and the father has regularly contributed to the child's support.

This section creates only *****20** 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 court 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 when the mother of ****1129** an illegitimate child initiates an action, notice shall be required only if paternity has been duly ***198** established and the father has regularly contributed to the child's support.

²⁵ *Guard*, 83 Wn. App. at 329.

generally means providing for a child's needs for housing, food, clothing, education and health care," we construed [RCW 4.24.010](#) "as requiring [a parent] to contribute regularly to the child's *material* well-being," holding that a parent could meet this standard by showing compliance with a support order.²⁶ The Washington Supreme Court ***197** affirmed our decision.²⁷ *****21** In response to *Guard*, the legislature amended the statute, removing the gender-based classification and adding a statement of intent. The amendment stated in part:

NEW SECTION. Sec. 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[, 940 P.2d 642], 132 Wn.2d 660, 940 P.2d 642] (1997). The legislature intends to provide a civil cause of action *****18** 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.

Sec. 2. [RCW 4.24.010](#) 1st ex.s. c 154 s 4 are each amended to read as follows:

((([O> The <O])) A mother or father, or both (([O> may maintain an action as plaintiff for the injury or death of a

²⁶ *Id.*

²⁷ *Guard v. Jackson*, 132 Wn.2d 660, 940 P.2d 642 (1997) (the Supreme Court addressed only the question whether the support requirement violates the equal rights amendment, [Washington Constitution article XXXI, section 1](#), and held that it did).

<O>)), who has regularly contributed to the support of his or her minor child, ([O> or <O>)) and the mother or father, or both, of a child on whom either, or both, are dependent for support([O> : PROVIDED, That in the case of an illegitimate child the father cannot <O>)) may maintain or join as a party an action ([O> unless paternity has been duly established and the father has regularly contributed to the child's support <O>)) as plaintiff for the injury or death of the child.

[***19] 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 ([O> court <O>)) 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 ([O> when the mother of an illegitimate child initiates an action, <O>)) notice shall be required only if ([O> paternity <O>)) parentage has been duly established ([O> and the father has regularly contributed to the child's support <O>)).

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Scarborough argues the history of the statute²⁹ combined with the legislature's statement

²⁸Laws of 1998, ch. 237.

²⁹He notes the statute originally provided a cause of action for a

of intent establishes that it intended to provide a cause of action for parents who provide emotional, psychological, financial or other support for a child, thus superseding Guard's holding that "support" is limited to *material* support. Postema argues that the 1998 amendment did not substantively change the meaning of "support" in the statute. Rather, it cured only the constitutional deficiency. To interpret the statement of intent as making such a change, he argues, violates the rules of statutory construction. We disagree.

[13] [14] [15] When this court interpreted the meaning of the term "support" in *Guard*, the statute provided no guidance about its meaning. This is no longer the case because in the face of our contrary definition, the legislature has now adopted a statement of intent defining [***22] the term. Although a court cannot use a statement of intent to contradict the plain language of a statute, clear statements of intent consistent with the statutory language clarify a statute's meaning.³⁰ And because a court must interpret individual provisions of a statute in

father, unless he died or deserted his family. *Wilson v. Lund*, 80 Wn.2d 91, 102, 491 P.2d 1287 (1971) (Wright, J., concurring) (citing LAWS OF 1869, ch. 1, § 9, p. 4). He asserts the legislature's change from "desertion" to "regular contribution" should not be interpreted as a simple mechanical adherence to complying with a child support order.

³⁰*State v. Wiggins*, 114 Wn. App. 478, 482, 57 P.3d 1199 (2002) (concluding if a statute "is susceptible to two constructions--one of which will promote the purpose of the statute and the second of which will defeat it--[the] courts will adopt the former"); *State, Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (stating that although the plain meaning rule directs a court to construe and apply words according to the meaning that they are ordinarily given, the rule also permits the court to consider underlying legislative purposes, background facts, and statutory context to determine its plain meaning).

the context of the entire act, ³¹ [***24] a clear legislative statement of intent is important to construing [*199] the meaning of statutory language. In this case, the legislature clearly indicated its intent by including in its intent statement a definition for the term "support" that contradicted the *Guard* court's interpretation of that term. Were we to agree with Postema's position, we would render the legislature's statement of intent meaningless. This we cannot do. ³² The statement of intent is consistent with the language of the act, so we must give effect to it. Accordingly, we conclude the legislature's intent provision overrules our definition of "support" in *Guard*. The jury instruction in this case was erroneous, and the trial court erred by concluding, even when presented with this argument, that the instruction properly stated the law. Because this previously unsettled question of law deprived Scarbrough [***23] of his right to recover for his son's death, substantial justice has not been served in this case, and we remand for a new trial under *CR 59*. ³³

Reversed and remanded.

Appelwick and Schindler, JJ., concur.

Review denied at *151 Wn.2d 1011 (2004)*.

³¹ *ITT Rayonier, Inc. v. Dalman*, *122 Wn.2d 801, 807, 863 P.2d 64 (1993)* (a term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole; statutory provisions must be read in their entirety and construed together, not by piecemeal).

³² *Mitchell v. Bd. of Indus. Ins. Appeals*, *109 Wn. App. 88, 91, 34 P.3d 267 (2001)* (concluding that a court is "obliged to construe a statute in a way that is consistent with its underlying purpose").

³³ On remand the trial court is free to determine, as a matter of law and in view of the evidence presented in the first trial, whether Scarbrough provided sufficient support to recover damages.