Supreme Court No. 95861-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 75246-4-I (Consolidated with No. 15-4-06640-1 SEA)

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

In re the Estate of
TAYLOR GRIFFITH
Deceased.

KENNETH GRIFFITH and JACKIE GRIFFITH

Petitioners,

v.

BRADLEY J. MOORE,
in his capacity as personal representative,

Respondent,

and

MICHAEL B. KING;
CARNEY BADLEY SPELLMAN, P.S.; *et al.*,

Lawyer Appellants/Petitioners.

LAWYER APPELLANTS' STATEMENT OF ADDITIONAL AUTHORITY

Peter R. Jarvis, WSBA No. 13704
HOLLAND & KNIGHT LLP
111 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97204-3626
peter.jarvis@hklaw.com
(503) 243-2300
Attorneys for Michael B. King, Carney Badley Spellman, P.S., Jacquelyn A. Beatty & Karr Tuttle Campbell

Michael B. King, WSBA No. 14405
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Pro Se

Jacquelyn A. Beatty, WSBA No. 17567
KARR TUTTLE CAMPBELL
701 Fifth Avenue, Suite 3300
Seattle, Washington 98104-7010
JBeatty@karrtuttle.com (206) 224-8090
Pro Se

Michael B. King, Carney Badley Spellman, P.S., Jacquelyn A. Beatty, and Karr Tuttle Campbell submit the additional authorities identified below under RAP 10.8.

On the issue of whether the disqualified attorneys, Beatty and King, could reasonably distinguish between the Estate of Taylor Griffith and the Estate's personal representative for purposes of identifying their client (*see Petition for Review* at 14, 17-18; *Respondent Harris Creditors' Answer to Petition for Review* at 7-8; *Respondent Moore's Answer to Petition for Review* at 13-14), Petitioners contrast the decision that is the subject of the Petition for Review with the Court of Appeals' recent decision by the same panel in a related matter:

Compare In re Estate of Taylor Griffith, no. 75440-8-I, slip opinion at 20 (July 30, 2018) (unpublished opinion by Schindler, J., with Dwyer and Becker, JJ.) (stating that the personal representative, Bradley Moore was a "third part[y]" and could thus pursue, on behalf of the Estate, contribution claims against the decedent's parents premised on parental negligence even though the doctrine of parental immunity would bar the decedent himself from pursuing such claims if he were alive) *with*

Stefanie Harris, et al. v. Kenneth Griffith, et al., no. 75246-4-I, slip opinion at 9-10 (March 5, 2018) (published opinion by Becker, J., with Dwyer and Shindler, JJ.) (petition for review pending) (holding that it was "untenable" for Beatty and King to view Moore and the Estate separately for purposes of identifying their client:

> The appellants argue that the "estate" was their client but Moore was not. This argument is untenable. In probate, the attorney-client relationship exists between the attorney and the personal representative of the estate. *Trask v. Butler*, 123 Wn.2d 835, 840, 872 P.2d 1080 (1994). ***"There is no agency or individual other than the official 'personality' of the administrator or executor which can be pointed to as the 'estate.'"*** *In re Estate of Peterson*, 12 Wn.2d 686, 730, 123 P.2d 733 (1942).

(Emphasis added)).

See also Baughn by Baughn v. Honda Motor Co., 105 Wn.2d 118, 119-20, 712 P.2d 293 (1986) (disallowing contribution action by minor tortfeasor against parents for negligent supervision); *see generally Wooldridge v. Woolett*, 96 Wn.2d 659, 662-63, 638 P.2d 566 (1981) (recognizing that Washington's survival statutes do not create rights of action but rather preserve causes of action that the decedent could have maintained had he not died).

Copies of the cited decisions are attached for the Court's convenience.

Respectfully submitted this 9th day of August, 2018.

HOLLAND & KNIGHT LLP

By: _____
Peter R. Jarvis
WSBA No. 13704
Attorneys for Michael B. King, Carney Badley Spellman, P.S., Jacquelyn A. Beatty, & Karr Tuttle Campbell

By: _____
Michael B. King,
WSBA No. 14405, *Pro Se*

By: _____
Jacquelyn A. Beatty
WSBA No. 17567, *Pro Se*

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email to the following:

William W. Spencer
Murray, Dunham & Murray
200 W. Thomas Street, Suite 350
Seattle, WA 98109-0844
william@murrahdunham.com

David M. Beninger
Luvera Law Firm
701 5th Ave Ste 6700
Seattle, WA 98104-7016
David@luveralawfirm.com

Keith Petrak
Byrnes Keller Cromwell, LLP
1000 2nd Ave Ste 3800
Seattle WA 98104-1062
kpetrak@byrneskeller.com

Jacquelyn Beatty
Karr Tuttle Campbell
701 Fifth Ave., Ste. 3300
Seattle, WA 98104
jbeatty@karrtuttle.com

Joseph D. Hampton
Daniel L. Syhre
Betts Patterson & Mines, PS
701 Pike St Ste 1400
Seattle WA 98101-3927
jhampton@bpmlaw.com
dsyhre@bpmlaw.com

Michael A. Jaeger
Lewis Brisbois Bisgaard & Smith, LLP
1111 3rd Ave Ste 2700
Seattle WA 98101-3224
Michael.Jaeger@lewisbrisbois.com

Howard M. Goodfriend
Catherine Wright Smith
Smith Goodfriend, P.S.
1619 8th Avenue North
Seattle, WA 98109
howard@washingtonappeals.com
cate@washingtonappeals.com

Ann T. Wilson
Law Offices of Ann T. Wilson
999 Third Avenue, Suite 4200
Seattle, WA 98104-4090
ann@atwlegal.com

DATED this 9th day of August, 2018.

Patti Saiden

Patti Saiden, Legal Assistant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Estate of TAYLOR GRIFFITH, Deceased. KENNETH GRIFFITH and JACKIE GRIFFITH, Appellants, v. BRADLEY J. MOORE, in his capacity as personal representative, Respondent.	)	No. 75440-8-I (consolidated with No. 75840-3-I) UNPUBLISHED OPINION FILED: July 30, 2018

SCHINDLER, J. — Kenneth and Jackie Griffith filed a petition under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, to cancel letters of administration and remove and replace the personal representative of the estate of their son Taylor Griffith. We affirm the order denying the TEDRA petition but reverse the award of attorney fees and the judgment against Kenneth and Jackie Griffith.

FACTS

Wrongful Death and Damages Lawsuit

On December 10, 2014, Stefanie Harris as the personal representative of the estate of Steven Harris and her mother Margaret Harris (collectively, Harris) filed a complaint against the estate of Taylor Griffith (the Estate) and his parents Kenneth and Jackie Griffith for wrongful death and damages. The complaint alleged that on August 24, 2014, 16-year-old Taylor was driving a Dodge Dakota pickup truck at a high rate of speed when he crossed the center line and hit a Ford Explorer head on.[1] The driver of the Ford Explorer, Steven Harris, and Taylor died. Steven's spouse Margaret was seriously injured.

The complaint alleged that the defendants were jointly and severally liable for all injuries and damages and that the "fatal and severe injuries and damages claimed by Plaintiffs were the direct and proximate result of the conduct of the defendants and their negligence, recklessness and/or fault." The complaint alleged Kenneth Griffith was the registered owner of the pickup truck, the truck was a family car, and Taylor was "a permissive and entrusted user" of the truck.

The complaint also alleged breach of contract and bad faith claims against the insurance carrier Travelers Home and Marine Insurance Company (Travelers). The complaint alleged Travelers violated insurance regulations and the deliberate failure to respond and disclose liability insurance limits "precluded plaintiffs from timely pursuing their own underinsurance benefits, cut off negotiations," and foreclosed a settlement within policy limits.

---

[1] We refer to some of the parties by their first names for purposes of clarity and mean no disrespect by doing so.

Travelers' insurance attorney Michael Jaeger filed a notice of appearance on behalf of the Estate and Kenneth and Jackie Griffith. The February 23, 2015 answer to the complaint asserts a number of affirmative defenses, including that Taylor Griffith "may have been confronted with a sudden emergency," contributory or comparative fault of the plaintiffs or other entities, and failure to mitigate damages. The answer states, "Pursuant to RCW 4.22.070, the defendants request the trier of fact apportion the fault of all persons, parties, or entities involved herein, with the resultant reduction in defendant's alleged liability."

The court scheduled trial for January 4, 2016. The case scheduling order required the parties to engage in dispute resolution before trial.

Petition to Appoint Personal Representative

Taylor died intestate. His parents are the sole beneficiaries of the Estate. The Griffiths did not file a probate action. If a probate action had been filed within 40 days of death, the statute gives the parents priority to be appointed to administer the Estate. RCW 11.28.120(7), (2)(b).

Approximately six weeks before trial on November 19, 2015, Harris filed a probate action and petition to appoint a personal representative. In re Estate of Taylor Griffith, King County Superior Court No. 15-4-06640-1 SEA.

The petition describes the need to appoint a personal representative for the estate of Taylor Griffith. The petition asserts the parents "have personal liability for the actions of their son under the family car doctrine and other legal

principles" and the Estate is liable for the collision caused by Taylor.

> According to the WSP[2] investigation, Taylor Griffith was the sole cause of the collision. He was living with his parents, returning from assisting his father's business, and was the permissive driver and sole occupant of his parents' Dodge Dakota pickup truck when he crossed the centerline on SR[3] 202 and struck the Harris' vehicle head on in their lane of travel. He also hit another vehicle that was following the Harris SUV[4].

The petition alleges Travelers "refused to disclose the liability insurance policy limits and otherwise negotiate in good faith, forcing the Harris Estate and family to file and pursue a lawsuit." The petition requests the court appoint attorney Brad Moore or "some suitable person" as personal representative of the Estate. Moore is an experienced personal injury and insurance attorney.

The Travelers insurance attorney filed a response on behalf of the Griffiths and the Estate. The Estate and the Griffiths agreed a personal representative must be appointed for the Estate "to allow the Lawsuit to proceed against Decedent, and/or for there to be a person with legal authority on behalf of Decedent." The Griffiths and the Estate requested the court appoint Taylor's father Kenneth Griffith as the personal representative. The response states the parents deny liability for the accident and the allegations against Travelers are not relevant to appointment of a personal representative.

Appointment of Personal Representative

The attorney representing Harris in the wrongful death lawsuit, David Beninger, and probate attorney Carolann Storli represented Harris at the December 8 hearing on the petition to appoint a personal representative.

---

[2] Washington State Patrol.

[3] State Route.

[4] Sport-utility vehicle.

Harris argued the complaint alleged claims against the parents and joint and several liability and bad faith claims against Travelers. Harris argued Moore had the experience and background necessary to act as the personal representative because of the "specialized nature" of wrongful death claims and bad faith claims against an insurance company.

The attorney representing the Griffiths and the Estate conceded Moore is "qualified to be a Personal Representative" but objected to Moore on the grounds that Moore and Beninger worked on a case together a "long time ago." The attorney stated, "I can see a bit of a conflict of interest there . . . . Just don't have a good feeling about it. . . . Not that there is any bad intention. I just feel like it's not independent enough if you're considering" appointing Moore. Beninger told the court he was not "aware of any time [Moore]'s ever worked on a case where we've worked on a case."

The superior court commissioner appointed Moore as the personal representative of the Estate.

> I will appoint Mr. Moore. I think that the potential for conflict or potential for just confusion, if nothing else, if I appointed one of the parents. It just — it — that feels more untenable to me than appointing an individual who is well-known in his field, and has unique qualifications to serve in this particular case.

The order issuing letters of administration and appointing Moore expressly states the "Personal Representative is authorized to participate in litigation and to settle or assign claims on behalf of Decedent's estate." Moore filed an oath to comply with the duties of the personal representative of the Estate:

> I am qualified under RCW 11.36.010 to serve as a Personal Representative . . . .

. . . .

. . . I will perform the duties of Personal Representative according to the law of the State of Washington.

. . . I understand that the basic duties of a Personal Representative are described in RCW 11.48.010, as follows:

RCW 11.48.010 General powers and duties.

"It shall be the duty of every personal representative to settle the estate, including the administration of any nonprobate assets within control of the personal representative under RCW 11.18.200, in his or her hands as rapidly and as quickly as possible, without sacrifice to the probate or nonprobate estate. The personal representative shall collect all debts due the deceased and pay all debts as hereinafter provided. The personal representative shall be authorized in his or her own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character."

On December 15, the Travelers' insurance attorney filed a motion on behalf of the Griffiths in the probate action to revise the commissioner's order appointing Moore as personal representative of the Estate. The parents argued Kenneth Griffith had statutory priority to act as the personal representative. The Griffiths asserted that Moore was not suitable because of "the appearance of conflict" between his duties to the Estate and "his prior relationship and affiliation with Plaintiff's Counsel."

On December 17, Jacquelyn Beatty filed a notice of association of counsel with the Travelers attorneys representing the Estate and defendants Kenneth and Jackie Griffith.

Partial Summary Judgment

On November 20, 2015, Harris filed a motion for partial summary judgment on liability, undisputed medical expenses and lost wages, and dismissal of the affirmative defenses. Harris submitted the WSP investigation of the collision. The WSP concluded there was no evidence that vehicle or roadway defects, weather, visibility, or road conditions contributed to the collision. The WSP report states there were no marks on the road to suggest Taylor crossed the center line to avoid an obstacle. The WSP concluded Taylor was the sole cause of the collision and there was no evidence that Taylor encountered either a mechanical defect, a sudden emergency, or an unavoidable accident. The WSP report states there was no evidence that Steven Harris contributed to the cause of the collision.

The court ruled on the plaintiffs' motion for partial summary judgment approximately two weeks before trial. The court ruled Taylor was liable for the collision. The court ruled Harris established the amount of medical expenses and lost wages. The court found the total amount of the past medical bills and lost wages for Margaret was $314,491.63. The court ruled Harris was entitled to dismissal of the affirmative defenses asserted by the Estate and the parents. But the court denied summary judgment on liability of the parents. On December 18, the court entered "Order on Motion Establishing Liability and Damages."

Notice of Creditors

Moore published notice to creditors of the Estate beginning on December 29, 2015.

Trial

Trial began on January 4, 2016. Attorney Michael King filed a "Notice of Association of Co-Counsel for Defendants" in the wrongful death lawsuit.

The court addressed the motions filed by Harris and the personal representative of the Estate to reconsider denial of summary judgment on liability of the parents. The court denied reconsideration. The court ruled Harris did not "sufficiently" raise the argument in the motion for partial summary judgment.

On the second day of trial, Harris filed a CR 41 motion to voluntarily dismiss the Griffiths without prejudice, change the caption of the case, and preclude making any reference to the jury that the parents had been parties to the lawsuit. Without objection, the court granted the motion and entered an order dismissing the Griffiths without prejudice.

The court and the remaining parties, Harris and the Estate, addressed motions in limine and outstanding discovery.

After the noon recess, Harris and the personal representative of the Estate presented an agreement for arbitration with former Washington Supreme Court Justice Faith Ireland on the amount of general damages. Moore informed the court:

> I'm the personal representative. I'm the client. I chose to arbitrate because I wanted to reduce the risk to the estate and also potentially maximize assets including potentially a bad faith case against Travelers. . . . Mr. Jaeger has a conflict. There is a potential claim that the estate may bring, could bring, and probably will bring against Mr. and Mrs. Griffith.

The attorney representing the Estate and the Griffiths objected to the agreement

to arbitrate. The attorney asserted, "I represent the estate of Taylor Griffith and the beneficiaries Ken and Jackie Griffith."

The court entered an order to arbitrate subject to a decision on the pending motion to revise the commissioner decision to appoint Moore as the personal representative of the Estate.

The Griffiths filed a motion to stay the arbitration and to intervene. The Griffiths noted the pending motion to revise and their objection to Moore serving as the personal representative of the Estate. The court granted the motion to intervene. The court stayed the arbitration pending the hearing on the motion to revise.

TEDRA Petition

On January 27, attorneys Beatty and King filed a petition on behalf of the Griffiths under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, to cancel letters of administration and to remove and replace Moore as personal representative of the Estate. The Griffiths argued Moore breached the fiduciary duty he owed to the Estate and the beneficiaries by (1) disregarding "the legal requirements for creditor's claims against an estate," (2) entering into an agreement to arbitrate and assign bad faith claims to Harris, and (3) threatening to sue the Griffiths on "bogus claims" of "indemnity." The Griffiths asserted Moore had an actual or potential conflict of interest that warranted removal because of his relationship with plaintiffs' attorney and the terms of the compensation agreement. In the alternative, the Griffiths argued the court should

allow discovery "to obtain additional evidence." The court entered an order consolidating the TEDRA petition with the pending motion to revise.

On January 29, Harris filed a creditors' claim against the Estate. The claim states the WSP determined Taylor was at fault for the collision, the court found Taylor liable for the collision and resulting damages, and the court dismissed all affirmative defenses. The stated value of the claim is between $8 million and $24 million. On February 11, 2016, Moore rejected the claims.

Harris and the personal representative filed briefs and declarations in opposition to the TEDRA petition, including the declaration of Harris' attorney Beninger, the personal representative, and expert witness Leland Ripley.

Harris denied there was a conflict of interest. The attorney asserts the personal representative complied with the claim filing requirements and the personal representative did not assign any claims to the plaintiffs.

The personal representative denied there was a conflict of interest and asserts the Estate has potential claims against the insurance carrier Travelers and against the Griffiths. The personal representative states he would be compensated from the assets of the Estate.

Ripley states he is an expert on "legal ethics, lawyer discipline, [and] legal malpractice" retained to "offer opinions on the conflicts of interest of insurance-defense counsel" and "the standards of care and fiduciary duties of Brad Moore, the court appointed Personal Representative of the Estate of Taylor Griffith." Ripley notes the order appointing Moore as the personal representative of the Estate authorizes Moore to " 'participate in litigation and to settle or assign claims

on behalf of Decedent's estate.' " Ripley states that in his opinion, there is no conflict of interest and the personal representative acted reasonably and within the standard of care.

Ripley states that with policy limits of $100,000, "even before trial, the estate's potential liability exceeds the available policy limits." And after the court entered the order establishing liability and damages, "the Estate faces the possibility of a large excessive judgment." In Ripley's opinion, the decision of the personal representative of the Estate to arbitrate was "a proper exercise of his fiduciary duty."

> On January 5, 2016, the plaintiffs non suited without prejudice Kenneth and Jackie Griffin [sic]. This was when the trial for the plaintiffs' damages was to begin . . . . After consulting with John Strait, a well respected professor of ethics at Seattle University, Mr. Moore agreed with the plaintiffs that he would accept arbitration to resolve the damages issues against the Estate. On January 6, 2016, the court entered an order to arbitrate without delay all the issues remaining between the Taylor Griffith Estate and the plaintiffs. Former Washington Supreme Court Justice Faith Ireland was named as the arbitrator.
>
> . . . Retired Justice Faith Ireland is also a former King County Superior Court judge. She is a very experiences [sic] and highly regarded jurist. The decision to arbitrate and her selection as an arbitrator are very reasonable and completely appropriate.
>
> . . . .
>
> . . . [T]he remaining issues that the Estate must resolve are solely the amount of damages that the plaintiffs are entitled to recover.
>
> . . . In this case, binding arbitration provides reasonable certainty regarding the amount of damages and a conservative range of possible damages. It avoids any chance of a "runaway" jury verdict. Thus, arbitration is a reasonable and prudent choice to control the amount plaintiffs can receive as damages against the Estate.
>
> . . . Mr. Moore's decision to agree to binding arbitration was a proper exercise of his fiduciary duty as personal

> representative to both minimize the claims against the Estate and settle the Estate as quickly as possible. . . .
>
> . . . .
>
> . . . Given Mr. Moore's extensive experience as an attorney in complex personal injury and wrongful death matters, and complex insurance cases it is difficult to understand who could replace him and effectively deal with the issues and fiduciary duties involved in this case.

Disqualification Order

On March 31, Harris filed a motion under RPC 1.9 to disqualify Beatty and King from representing the Griffiths. On April 27, the court entered an order prohibiting Beatty and King from representing the Griffiths in the pending TEDRA petition and the probate action and the wrongful death action.[5] On May 2, a probate attorney entered a notice of appearance on behalf of the Griffiths in the probate proceeding and the TEDRA petition.

Order Denying Motion to Revise and TEDRA Petition

The court held a hearing on May 26 on the motion to revise the decision of the commissioner to appoint Moore as the personal representative of the Estate and the TEDRA petition to remove and replace Moore.

The court denied the motion for revision. The court ruled, "Based on the record before the commissioner, I don't see any reason at all to grant the motion for revision."

The court denied the TEDRA petition. The court concluded the Griffiths did not show "a breach of fiduciary duty or mismanagement or waste of assets." The court found, "The fact that Mr. Moore is also a plaintiff's lawyer, I don't find that to even be particularly relevant." The court concluded the evidence that

[5] In a separate appeal, we affirmed the April 27 order. In re Estate of Griffith, 2 Wn. App. 2d 638, 650, 413 P.3d 51 (2018).

Moore and the plaintiffs' attorney worked together "was about a very old case." The court concluded the Griffiths did not show that the decision to arbitrate was a breach of fiduciary duty. The court states the allegations of a potential bad faith claim against the insurance carrier presents "a good reason to have someone with his background rather than someone with just a straight estate's background handle the case." The court pointed out there was "no evidence" that Moore had assigned the potential bad faith claim to Harris. Because the court would review any request for compensation, the court concluded the Griffiths could file an objection when Moore submitted a request for fees. The court entered an order denying the petition to cancel letters of administration and replace Moore as the personal representative of the Estate and lifted the stay of arbitration.

Attorney Fees

Moore filed a motion for an award of attorney fees and costs under RCW 11.96A.150 for $28,380.62. The court found the amount reasonable and necessary.

> The attorneys' fees and costs Mr. Moore has incurred in opposing the Griffiths' Motion for Revision and the TEDRA Petition are reasonable and necessary. Mr. Moore is entitled to compensation for attorneys' fees and costs he incurred in prevailing against these motions pursuant to RCW 11.96A.150.

The court entered a judgment for attorney fees and costs in the amount of $31,910.62.[6] The Griffiths appeal the order denying the TEDRA petition and the order awarding Moore attorney fees.

[6] The court later confirmed the arbitration award and on September 29, 2016, entered judgment against the Estate of $12,130,192.63.

ANALYSIS

Standing To Challenge Personal Representative

Preliminarily, Harris and the personal representative contend the Griffiths do not have standing to challenge denial of the TEDRA petition.[7] We disagree.

Under TEDRA, "any party may have a judicial proceeding for the declaration of rights or legal relations with respect to any matter." RCW 11.96A.080(1). TEDRA defines a "party" as any member of a listed category "who has an interest in the subject of the particular proceeding." RCW 11.96A.030(5). The statutory categories include "heir" and "beneficiary." RCW 11.96A.030(5)(d), (e). The definition of "persons interested in the estate or trust" includes "all persons beneficially interested in the estate or trust." RCW 11.96A.030(6). RCW 11.96A.030(2)(c)(ii) defines "matter" to include a dispute "arising in the administration of an estate" that relates to "a change of personal representative." RCW 11.68.070 gives heirs, devisees, legatees, and creditors of an estate the right to file a petition to remove a personal representative. Here, Taylor Griffith died intestate, and his parents are the only heirs. See RCW 11.04.015(2)(b).

Denial of Petition To Remove and Replace the Personal Representative

The Griffiths contend (1) that Moore acted contrary to the fiduciary duty owed to the Estate and the beneficiaries and (2) that he had an actual or potential conflict of interest.

[7] The Griffiths assert Harris and Moore raise the standing argument for the first time on appeal. But in answer to the TEDRA petition, Harris asserts the Griffiths do not have standing.

We review the decision to deny the petition to remove Moore as the personal representative of the Estate for abuse of discretion. In re Estate of Beard, 60 Wn.2d 127, 132, 372 P.2d 530 (1962); In re Estates of Aaberg, 25 Wn. App. 336, 339, 607 P.2d 1227 (1980); In re Estate of Ardell, 96 Wn. App. 708, 718, 980 P.2d 771, review denied, 139 Wn.2d 1011, 994 P.2d 844 (1999). A trial court abuses its discretion if the decision is based on unreasonable or untenable grounds. In re Estate of Evans, 181 Wn. App. 436, 451, 326 P.3d 755 (2014).

The personal representative "stands in a fiduciary relationship to those beneficially interested in the estate." In re Estate of Larson, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985). The personal representative "is obligated to exercise the utmost good faith and diligence in administering the estate in the best interests of the heirs." Larson, 103 Wn.2d at 521. In performing his or her fiduciary duty, the personal representative must "utilize the skill, judgment, and diligence which would be employed by the ordinarily cautious and prudent person in the management of his own trust affairs." Hesthagen v. Harby, 78 Wn.2d 934, 942, 481 P.2d 438 (1971). A personal representative "must refrain from self-dealing, administer the estate solely in the interest of the beneficiaries, and uphold their duty of loyalty to the beneficiaries." In re Estate of Jones, 152 Wn.2d 1, 21, 93 P.3d 147 (2004).

The petition to remove the personal representative must be supported by an affidavit "which makes a prima facie showing of cause for removal." RCW 11.68.070. The record must support valid grounds to remove a personal representative. In re Estate of Lowe, 191 Wn. App. 216, 229, 361 P.3d 789

(2015). We uphold findings of fact if substantial evidence in the record supports the findings. In re Estates of Kessler, 95 Wn. App. 358, 369, 977 P.2d 591 (1999). "Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding." Jones, 152 Wn.2d at 8.

If the personal representative " 'is subject to removal for any reason specified in [RCW] 11.28.250,' " RCW 11.68.070 gives the court the discretion to remove the personal representative. Jones, 152 Wn.2d at 9 (quoting RCW 11.68.070).[8] RCW 11.28.250 specifically states:

> Whenever the court has reason to believe that any personal representative has wasted, embezzled, or mismanaged, or is about to waste, or embezzle the property of the estate committed to his or her charge, or has committed, or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any acts as such personal representative, or for any other cause or reason which to the court appears necessary, it shall have power and authority, after notice and hearing to revoke such letters. The manner of the notice and of the service of the same and of the time of hearing shall be wholly in the discretion of the court, and if the court for any such reasons revokes such letters the powers of such personal representative shall at once cease, and it

---

[8] RCW 11.68.070 states:

> If any personal representative who has been granted nonintervention powers fails to execute his or her trust faithfully or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, upon petition of any unpaid creditor of the estate who has filed a claim or any heir, devisee, legatee, or of any person on behalf of any incompetent heir, devisee, or legatee, such petition being supported by affidavit which makes a prima facie showing of cause for removal or restriction of powers, the court shall cite such personal representative to appear before it, and if, upon hearing of the petition it appears that said personal representative has not faithfully discharged said trust or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, then, in the discretion of the court the powers of the personal representative may be restricted or the personal representative may be removed and a successor appointed. In the event the court shall restrict the powers of the personal representative in any manner, it shall endorse the words "Powers restricted" upon the original order of solvency together with the date of said endorsement, and in all such cases the cost of the citation, hearing, and reasonable attorney's fees may be awarded as the court determines.

> shall be the duty of the court to immediately appoint some other personal representative, as in this title provided.

1. Breach of Fiduciary Duty

The Griffiths contend the court abused its discretion by denying their TEDRA petition because Moore breached his fiduciary duty. The Griffiths argue Moore breached his fiduciary duty by (1) not complying with the statutory claim filing requirements, (2) agreeing to arbitration, (3) threatening to sue them, and (4) considering the assignment of the potential bad faith claim to Harris.

Under RCW 11.40.010, "[a] person having a claim against the decedent may not maintain an action on the claim unless a personal representative has been appointed and the claimant has presented the claim as set forth in this chapter." A claimant must include a statement of the facts providing the basis for the claim and the amount of the claim. RCW 11.40.070(1)(c), (d).

The record shows Moore followed the statutory procedures on behalf of the Estate. The commissioner appointed Moore as the personal representative of the Estate on December 8, 2015. Beginning December 29, 2015, Moore published a notice to potential creditors of the Estate. Harris filed a claim against the Estate on January 29, 2016. Moore rejected the claim on February 11. Harris refiled the wrongful death lawsuit before the hearing on the TEDRA petition.

The Griffiths claim Moore breached his fiduciary duty by agreeing to arbitration. The personal representative of an estate has the duty to settle the estate "as rapidly and as quickly as possible, without sacrifice to the probate or nonprobate estate." RCW 11.48.010. The record and the expert testimony of

Ripley support the trial court's conclusion that Moore did not breach his fiduciary duty by agreeing to arbitrate.

The court ruled as a matter of law on the liability of Taylor for the head-on collision and death of Steven Harris and dismissed all of the affirmative defenses asserted by the Estate and the Griffiths. After the court granted the motion to dismiss the Griffiths without prejudice on the second day of trial, the Estate was the only remaining defendant, and the only remaining claim against the Estate was the amount of general damages. Ripley states:

> In summary, it is my opinion that Mr. Moore acted reasonably and within the standards of care as a fiduciary in this matter at all times, including his decision to arbitrate the remaining damage amounts owed the Harris claimants before retired former Washington Supreme Court Justice Faith Ireland.

The Griffiths argue Moore breached his fiduciary duty by considering the assignment of potential insurance bad faith claims to Harris. The Griffiths assert that if Moore believed the Estate has a bad faith claim against Travelers, Moore should have pursued the bad faith claim directly rather than assign the claim to Harris. But the court noted below that the record showed Moore had not yet pursued or assigned any potential bad faith claims to Harris. Further, Ripley states the decision to assign any bad faith claim is within the standard of care.

> It is also my opinion that [Moore] would be reasonable and well within the standards of care in this situation to assign the Estate's claims against the insurance company, the attorneys and the Griffith parents in exchange for protection from further suit or execution on the amounts of damages owed.

Next, the Griffiths contend Moore breached his fiduciary duty by threatening to sue them on "bogus claims for 'indemnity.' " As the personal

representative of the Estate, Moore had a fiduciary duty to prosecute potential claims against the Griffiths and the insurance company. RCW 11.48.010. The personal representative has authority to bring a lawsuit on behalf of the estate. RCW 11.48.010.

Harris sued the Estate and Kenneth and Jackie Griffith in the wrongful death action. Harris alleged the parents negligently entrusted Taylor with the truck and were liable under the family car doctrine. Harris alleged the Griffiths and the Estate were jointly and severally liable. Where multiple tortfeasors are responsible for the plaintiff's injuries and the plaintiff was not at fault, the tortfeasors against whom judgment is entered are jointly and severally liable for the sum of their proportionate shares of the plaintiff's damages. RCW 4.22.070(1)(b); Barton v. Dep't of Transp., 178 Wn.2d 193, 202, 308 P.3d 597 (2013). A jointly and severally liable defendant may seek contribution from another defendant against whom judgment has been entered. RCW 4.22.070(2); Barton, 178 Wn.2d at 203.

The expert testimony of Ripley establishes that Moore had a fiduciary duty to "pursue and maximize the Estate's most valuable assets," including claims against the Griffiths under the family car doctrine and bad faith claims against the insurance carrier.

> The Taylor Griffith Estate has limited assets. In addition to resolving the pending claims against the Estate, Mr. Moore has a fiduciary obligation to pursue and maximize the Estate's most valuable assets, its claims against the Griffith's [sic] under the Family Car Doctrine, against the insurer for bad faith, and against the defense attorneys for breaches of their fiduciary duties, and legal malpractice. Mr. Moore must

> fulfill his fiduciary obligations to pursue these assets and obtain a maximum recovery for these claims.
> . . . The Taylor Griffith Estate has unliquidated assets to satisfy a damages judgment above policy limits. As personal representative Mr. Moore must recognize, and I am confident he does recognize, that the actions of the insurance company in this case resulting in suit and excess judgment creates the potential for a bad faith recovery against the insurer.
> . . . Therefore, Mr. Moore must consider negotiating the plaintiffs' covenant not to execute against the Estate to recover any excess damages above the policy proceeds. The plaintiffs would agree to sign a covenant not to sue or execute against the Estate to collect the excess judgment in consideration of an assignment of the Estate's claims against Kenneth & Jackie Griffith under the Family Car Doctrine, the Estate[']s bad faith claims against the insurer, and the Estate's claims against the defense attorneys.
> . . . Because he is the personal representative fiduciary, acting in the best interests of the Estate, Mr. Moore must have the authority to negotiate this option in order to protect the Estate and settle the Estate as quickly and as inexpensively as possible. . . .
> . . . I am not aware of Mr. Moore agreeing to assign any of the Estate's claims, but it is reasonable and the standard of care for him to do so.

Citing Zellmer v. Zellmer, 164 Wn.2d 147, 188 P.3d 497 (2008), the Griffiths contend the parental immunity doctrine bars any claim against the Griffiths for contribution. First, the Griffiths did not assert parental immunity as an affirmative defense. The record also shows Moore did not assert a potential claim on behalf of the Estate against the Griffiths for negligent parenting. Moore stated the Estate had a potential claim against the Griffiths for contribution if judgment were entered against both the Griffiths and the Estate. Second, the parental immunity doctrine does not bar or limit the parents' liability to third parties. See Zellmer, 164 Wn.2d at 154-55.

For the first time on appeal, the Griffiths cite RCW 11.40.060 to argue Moore breached the fiduciary duty owed to the Estate and the beneficiaries by failing to seek a confession of judgment in the amount of the insurance policy limits. The Griffiths assert that when Harris filed a creditors' claim on January 29, 2016, the liability of the Estate was limited by statute to the liability limits of Taylor's insurance policy. We do not consider arguments raised for the first time on appeal. RAP 2.5(a); Heg v. Alldredge, 157 Wn.2d 154, 162, 137 P.3d 9 (2006); see In re Estate of Stover, 178 Wn. App. 550, 555 n.2, 315 P.3d 579 (2013) (The purpose of RAP 2.5(a) is " 'to give the trial court an opportunity to correct errors and avoid unnecessary retrials.' ") (quoting Postema v. Postema Enters., Inc., 118 Wn. App. 185, 193, 72 P.3d 1122 (2003)).

We conclude the court did not abuse its discretion and substantial evidence supports denying the TEDRA petition to remove Moore as the personal representative of the Estate for breach of fiduciary duty.

2. Conflict of Interest

The Griffiths argue (1) the longstanding professional relationship between Moore and Harris' attorney Beninger and (2) Moore's compensation as the personal representative of the Estate created a conflict of interest.

Where a personal representative has a conflict of interest that "would contravene the rights of the beneficiaries and result in waste of the estate," the personal representative should be disqualified. Jones, 152 Wn.2d at 19. "A conflict of interest arises in estate matters whenever the interest of the personal

representative is not harmonious with the interest of an heir." Trask v. Butler, 123 Wn.2d 835, 844, 872 P.2d 1080 (1994).

The Griffiths assert that at the hearing on the motion to appoint a personal representative, Beninger misrepresented his relationship to Moore, stating that he never worked with Moore on a case. Substantial evidence supports the trial court finding there was no conflict of interest between Moore and Beninger that required removal of Moore as personal representative of the Estate.

Beninger and Moore submitted declarations addressing the conflict of interest claim. Beninger states that at the hearing before the commissioner, he "did not recall any prior case and truthfully said so." Beninger said that Moore was not his co-counsel in the case that settled in April 1998 but instead, represented a separate client whose claims were partly adverse to his client. Beninger had no other recollection of associating with Moore on a case. Moore confirmed that he and Beninger have not served as co-counsel on the same case or shared fees in a case. Moore states the work he did on the cases in 1998 was minimal and there was no fee sharing. Moore described his relationship with Beninger as "professional competitors."

The Griffiths assert that Moore's reliance on potential bad faith claims for compensation as the personal representative of the Estate creates a conflict of interest. Moore testified that he "expect[s] to be compensated either by Travelers pursuant to the insurance policy, out of the proceeds of claims against Travelers should it not honor its obligations under the policy, or other revenues the Estate might receive."

Under RCW 11.48.210, the personal representative of an estate may be compensated for his or her services "as the court shall deem just and reasonable." Because the court will review any request for compensation, the court concluded the Griffiths could file an objection when Moore submitted a request.

The trial court did not abuse its discretion in concluding the relationship between Harris' attorney and the personal representative and compensation of the personal representative did not create a conflict of interest that required removal.

Attorney Fee Award

The Griffiths contend the court erred in entering an order and judgment against Kenneth and Jackie Griffith for attorney fees and costs under TEDRA. The Griffiths argue the motion for attorney fees and costs was not timely filed under CR 54(d)(2).

The application of a court rule to a particular set of facts is a question of law reviewed de novo. Kim v. Pham, 95 Wn. App. 439, 441, 975 P.2d 544 (1999). CR 54(d)(2) states that "[u]nless otherwise provided by statute or order of the court," a motion for attorney fees and costs "must be filed no later than 10 days after entry of judgment."

In opposition to the TEDRA petition filed by the Griffiths to remove and replace the personal representative, Moore argued the court should award the Estate and Moore attorney fees and costs under RCW 11.96A.150. Under

TEDRA, the trial court has discretion to award attorney fees:

> Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

RCW 11.96A.150(1).

On May 26, 2016, the court entered an order denying the TEDRA petition to remove and replace the personal representative. The order states, "Petition is denied for all the reasons the Court stated (which are incorporated herein)."

On August 2, 2016, Moore filed a motion for attorney fees and costs and entry of judgment against the Griffiths. Moore argued it was "appropriate, fair, and equitable" to award fees and costs against the Griffiths for "defending against the Motion for Revision and the TEDRA Petition." On August 10, the court entered an order granting Moore's motion for an award of attorney fees and costs and on August 25, entered a judgment in favor of Moore against the Griffiths for $31,910.62.

North Coast Electric Co. v. Signal Electric, Inc., 193 Wn. App. 566, 373 P.3d 296 (2016), does not support Moore's argument that the motion for attorney fees and costs was timely filed under CR 54(d)(2). In North Coast, electrical supplier North Coast Electric Co. filed a lawsuit to recover payment for equipment and materials for a public works project. N. Coast, 193 Wn. App. at

568. North Coast filed a motion for summary judgment on " 'its prima facie claim in the principal amount of $301,851.49' " and " 'costs and reasonable attorney's fees incurred in collecting the amount due in an amount to be determined in further proceedings.' " N. Coast, 193 Wn. App. at 569. In the memorandum in support of the motion for summary judgment, North Coast argued that it was entitled to attorney fees, stating, " 'North Coast's right to recover fees under RCW 39.08.010 and RCW 60.28.030 is indisputable and it will be the ultimate prevailing party even if [the defendant] prevails on its partial defense.' " N. Coast, 193 Wn. App. at 569.

In opposition, the defendant disputed the principal amount owed but "did not respond" to the assertion that North Coast was entitled to attorney fees. N. Coast, 193 Wn. App. at 570. After the court granted the motion for summary judgment and before entry of a judgment, North Coast filed a motion for an award of attorney fees and costs. N. Coast, 193 Wn. App. at 570. The court denied North Coast's motion as untimely under CR 54(d)(2). N. Coast, 193 Wn. App. at 570-71. On appeal, we reversed:

> [W]e hold that North Coast's inclusion of its request for attorney fees in its August 14 motion for summary judgment complied with the plain language of CR 54(d)(2) because it claimed attorney fees and expenses, was made by motion, and provided the facts and law necessary for a court to make a determination, and the motion was filed no later than 10 days after judgment was entered. CR 54(d)(2).

N. Coast, 193 Wn. App. at 573.

Here, an award of attorney fees and costs under TEDRA is discretionary. And unlike in North Coast where the request was included in a motion for

summary judgment, Moore's initial request for attorney fees and costs was not in a motion, it was in a pleading in opposition to the petition to remove and replace the personal representative. Further, the record shows that in denying the TEDRA petition, the court did not address the request for attorney fees. We conclude Moore's motion for an award of attorney fees and costs was not timely filed.[9]

We affirm denial of the TEDRA petition to remove and replace the personal representative of the Estate and reverse the award of attorney fees and the judgment against Kenneth and Jackie Griffith.[10]

WE CONCUR:

[9] Therefore, we need not address the argument that the record is inadequate for review. Nonetheless, we note that because the court did not enter findings of fact and conclusions of law supporting the award of attorney fees, the record is inadequate. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

[10] We decline to award Moore attorney fees and costs on appeal.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEFANIE HARRIS, individually and as Personal Representative of the Estate of STEVEN R. HARRIS (deceased); MARGARET HARRIS; and BRADLEY J. MOORE, in his capacity as Personal Representative of the ESTATE OF TAYLOR GRIFFITH, Respondents, v. KENNETH GRIFFITH and JACKIE GRIFFITH; MICHAEL B. KING, and the law firm of CARNEY BADLEY SPELLMAN, P.S.; and JACQUELYN A. BEATTY, and the law firm of KARR TUTTLE CAMPBELL, Appellants.	No. 75246-4-I DIVISION ONE PUBLISHED OPINION FILED: March 5, 2018

BECKER, J. — An insurance defense lawyer who files a notice of appearance on behalf of an estate may not, after withdrawing from representation of the estate, later act on behalf of another client to remove the personal representative of the estate. The personal representative is a former client, and the lawyer must comply with Rule of Professional Conduct (RPC) 1.9, either by withdrawing from representation of the other client or obtaining consent

from the estate's personal representative. A lawyer who does not comply is properly disqualified for having a conflict of interest.

FACTS

Sixteen-year-old Taylor Griffith was driving a pickup truck on State Route 202 on August 24, 2014. The truck crossed the center line and collided head-on with a car driven by Steven Harris. Both drivers were killed in the crash. Steven's wife, Margaret Harris, a passenger in his car, was seriously injured. Taylor was survived by his parents, Kenneth and Jackie Griffith. The Griffiths were insured by Travelers Home and Marine Insurance Company.

Margaret and her daughter, Stefanie Harris, as personal representative of the estate of Steven Harris, filed suit against Taylor's estate and his parents in December 2014. The complaint alleged that Taylor's estate and his parents were jointly and severally liable for the accident. The complaint further alleged that filing of the lawsuit was necessary because Travelers was not handling the claim in good faith, as evidenced by its failure to disclose the limits of the insurance carried by the Griffiths when requested by the plaintiffs to do so.

Attorney Michael Jaeger filed a notice of appearance on behalf of all defendants at the request of Travelers. In February 2015, Jaeger filed an answer. Trial was scheduled for January 4, 2016.

A personal representative had not been appointed for Taylor's estate. When a person dies intestate, as Taylor did, the next of kin have priority to be appointed to administer the estate so long as they petition within 40 days of the death.

RCW 11.28.120(2), (7). Otherwise, a court may appoint "any suitable person" as personal representative. RCW 11.28.120(7).

The Harris estate filed a petition in probate in November 2015, requesting appointment of Brad Moore as personal representative for Taylor's estate. The petition noted that the wrongful death complaint alleged liability not only on the part of Taylor's estate but also on the part of his parents, under the family car doctrine and other legal principles. The petition also mentioned the complaint's allegation that Travelers had acted in bad faith. The petition nominated Moore, an attorney experienced in matters of personal injury, as a suitable person to evaluate the assets and claims of Taylor's estate.

The Griffith parents, through Jaeger acting as attorney for "defendants," requested that Kenneth Griffith be appointed instead of Moore. The Griffith parents were the sole beneficiaries of their son's estate, which consisted only of his personal possessions and about $1,000. The parents denied having personal liability for Taylor's accident. They asserted that the references to Travelers in the petition were irrelevant to deciding who should be appointed as personal representative because Travelers was not a party to the suit.

At the hearing on the petition, the Harris estate argued that Moore was the more suitable personal representative because of his experience and understanding of the complexities of wrongful death litigation in a case where the estate's only real asset was its potential bad faith claim against its insurance company. The Griffiths objected to Moore, who is known as a plaintiff's attorney.

"I just feel like it's not independent enough . . . if you're considering appointing Brad."

The court commissioner ruled that given the potential for conflict between the Griffith parents and their son's estate, it was more untenable to appoint one of the parents than to appoint Moore. The commissioner expressed confidence that Moore would recognize his obligation as a fiduciary to be independent and impartial. The commissioner appointed Moore as personal representative by order dated December 8, 2015. The order specifically authorized Moore "to participate in litigation and to settle or assign claims" on behalf of Taylor's estate.

Jaeger did not initially acknowledge Moore as a client. Jaeger's first communication to Moore—on December 9, 2015—said he was planning to file a motion for revision of the order appointing Moore so that Kenneth Griffith could serve as personal representative. Moore responded, objecting that Jaeger had not consulted him about that. "I hope you do not take any actions against my interests. As it is, you haven't filed a Notice of Appearance on my behalf and I don't understand why. If you don't believe you represent me, then who do you claim to represent?" Moore asked Jaeger to provide his analysis of the estate's potential exposure in the wrongful death litigation and his strategy to defend the estate.

On December 15, 2015, Jaeger's firm filed the motion to revise, asserting that Moore was not suitable as the personal representative of the estate because he is a "plaintiff's personal injury practitioner."

On December 16, 2015, Jaeger filed an amended notice of appearance, stating he was counsel for the Griffith parents and counsel for Moore as the personal representative of Taylor's estate. On December 22, 2015, Jaeger told Moore that his goal was to protect the interests of the estate and the Griffith parents. He asked Moore to reconsider his refusal to step down as personal representative. He refused Moore's request for strategic advice: "We will not produce any sensitive case information given the pending motion for revision."

Around this time, Travelers appointed attorneys Jacquelyn Beatty and Michael King to serve as additional defense counsel. Beatty filed a notice in the wrongful death action associating herself with Jaeger on behalf of the Griffith parents and Taylor's estate. King filed a notice associating with Jaeger as counsel "for defendants."

On December 18, 2015, the court granted a motion by the plaintiffs for partial summary judgment. The order established that liability and causation were proven as to Taylor's estate, but not as to his parents. The order dismissed affirmative defenses pleaded by the Griffith parents and Taylor's estate.

On January 4, 2016, the first day of trial, Beatty introduced herself to the court as "personal counsel for the Griffiths." King was introduced as a lawyer "with the defense." The court heard argument on motions in limine and then concluded proceedings for the day after determining that a jury was not yet available.

The next day, January 5, 2016, the Harris plaintiffs moved to dismiss the Griffith parents without prejudice. Without objection, it was so ordered. This left

the amount of damages as the only remaining issue for the jury, with Taylor's estate as the only remaining defendant. At the request of plaintiffs, the court required each defense lawyer to identify his or her client in view of the dismissal of the Griffith parents. Jaeger, Beatty, and King all responded that they represented Taylor's estate:

> MR. JAEGER: I represent the estate, Your Honor.
> THE COURT: Okay.
> MS. BEATTY: Likewise.
> Mr. King?
> MR. KING: I also represent the estate. I was retained to represent the estate of Taylor Griffith and the Griffiths for preservation of error matters and prospectively looking down the line for an appeal.
> And since the Griffiths are no longer parties to the case, having been dismissed, now my responsibility is to the estate of Taylor Griffith.

The hearing continued with discussion of motions in limine, including a dispute about whether defense counsel could depose a doctor that evening. King argued that motion for the defense.

At the beginning of the afternoon session, the judge announced that she had been presented with a document signed by Moore and counsel for the plaintiffs by which they agreed to arbitrate any remaining issues between them. Over objection, the court signed an order for arbitration and concluded the trial.

Over the next few days, Beatty, King, and Jaeger filed notices withdrawing as counsel for Taylor's estate in the wrongful death action. The notices filed by Beatty and King stated that they continued as counsel for the Griffith parents. Beatty filed a notice of appearance on behalf of the Griffith parents in the probate action, in which the motion to revise the commissioner's order appointing Moore

was still pending. Represented by Beatty, the Griffith parents moved (1) for permission to participate as intervenors in the wrongful death action and (2) for a stay of the arbitration pending a ruling on whether Moore would be allowed to continue as personal representative. Over the plaintiffs' objection, the court granted both motions.

Represented by King, the Griffith parents filed a petition under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, to remove and replace Moore as personal representative. The court consolidated this petition with the pending motion to revise the commissioner's order appointing Moore. Both were set for consideration on April 29, 2016.

By motions filed on March 31, 2016, the Harrises alleged that under RPC 1.9, Beatty and King could not continue to represent the Griffith parents. Beatty and King responded that the rule did not apply because Moore was not their former client.

The court ruled that Moore was a former client of Beatty and King and that disqualification was warranted because of the conflict of interest. The court entered an order prohibiting Beatty and King from appearing on behalf of the Griffith parents in the wrongful death, probate, and TEDRA actions.[1] The disqualification order entered on April 27, 2016, is the subject of this appeal brought by King, Beatty, and the Griffith parents.

---

[1] A hearing on the TEDRA petition to remove Moore was held in May 2016. The Griffith parents were represented by new counsel. The court denied the petition. That order is the subject of a separate appeal before this court, In re Estate of Taylor Griffith, No. 75440-8-I.

ANALYSIS

A preliminary issue raised by respondents is whether the appellants have standing. Only an aggrieved party may seek appellate review. RAP 3.1. An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. In re Guardianship of Lasky, 54 Wn. App. 841, 848-50, 776 P.2d 695 (1989). The court held in Lasky that an attorney removed as guardian of an incompetent adult had no standing to appeal the order removing him. Lasky does not control the standing issue here because the disqualification order was based on a determination that Beatty and King failed to comply with a rule of professional conduct. A court's formal finding of a lawyer's rule violation carries with it sufficient potential for adverse consequences to the lawyer to make the ruling appealable by the lawyer. United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000). Accordingly, we conclude Beatty and King have standing to appeal the disqualification order. Whether the Griffith parents also have standing need not be decided.

Whether an attorney's conduct violates a relevant rule of professional conduct is a question of law. Eriks v. Denver, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992). The relevant rule in this case is RPC 1.9(a). The rule prohibits lawyers from "switching sides" and representing a party adverse to a former client in the same or a substantially related matter. Teja v. Saran, 68 Wn. App. 793, 799, 846 P.2d 1375, review denied, 122 Wn.2d 1008 (1993). RPC 1.9(a) is based on the attorney's duty of loyalty to a client. Teja, 68 Wn. App. at 798-99. It provides as follows:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a

> substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

RPC 1.9(a).

The sole issue in dispute is whether Moore is a former client of Beatty and King. The trial court correctly determined that he is, in the order quoted below:

> Moore is the client. Beatty and King represented Moore during the time they were counsel of record for the Estate. They entered notices of appearance for the Estate, and affirmed in open court, in answer to this judge's question, that they were, indeed, representing the Estate.
>
> Having represented the Estate, and thus Moore, the former client, Beatty and King could not then represent the Griffiths in the "substantially related" probate matter because the Griffiths' interests were "materially adverse" to those of Moore, who did not give his consent. In the probate matter, Beatty and King, on behalf of the Griffiths, are suing Moore, their former client. These clients' interests could not get any more adverse. . . .
>
> The Griffiths assert various arguments: no confidences were disclosed, Beatty and King never appeared on behalf of Moore, Moore did not regard them as his attorneys, no conflict existed between the Griffiths and the Estate, Moore and the Harris creditors never actually sought disqualification, their motives are tactical, and they waited too long.
>
> All of the above is beside the point. Brad Moore is the PR [personal representative] unless and until this Court removes him.

The appellants argue that the "estate" was their client but Moore was not. This argument is untenable. In probate, the attorney-client relationship exists between the attorney and the personal representative of the estate. Trask v. Butler, 123 Wn.2d 835, 840, 872 P.2d 1080 (1994). "There is no agency or individual other than the official 'personality' of the administrator or executor which can be pointed to as the 'estate.'" In re Estate of Peterson, 12 Wn.2d 686, 730, 123 P.2d 733 (1942). Once Moore was duly appointed as the personal representative of Taylor's estate, he was the client of Jaeger. Moore then also

became the client of Beatty and King when they associated with Jaeger as attorneys for the estate. When Beatty and King withdrew from representing the estate, Moore became their former client.

Beatty and King argue that Moore cannot be their former client because he never had a subjective, reasonable belief that they were his attorneys. They cite Bohn v. Cody, 119 Wn.2d 357, 832 P.2d 71 (1992). In Bohn, parents loaned money to their daughter. When the loan was not repaid, the parents sued the daughter's attorney on several theories, including that he gave them negligent advice about the transaction. The parents held a subjective belief that the attorney formed an attorney-client relationship with them when he discussed the transaction with them, answered questions about it, and prepared a document formalizing the transaction. Bohn, 119 Wn.2d at 363-64. But the attorney told the parents he was not their lawyer, and the parents were unable to show that his actions were inconsistent with that statement. For this reason, the court held the attorney did not represent the parents. The client's subjective belief "does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions." Bohn, 119 Wn.2d at 363.

As evidence that Moore did not believe he was their client, Beatty and King quote from an e-mail sent by Moore to Beatty on the second day of the trial: "Let's be clear: I am the P.R. of the Griffith Estate. You do not represent me or the Estate (in spite of your prior representations to the Court to the contrary). . . . You are not authorized to make any representations on the Estate's behalf. As

you told me yesterday at the courthouse, you represent Mr. and Mrs. Griffith." Moore's peremptory tone is not surprising in view of the continuing effort by the Griffith parents to have Moore removed from administration of their son's estate. Considering the record as a whole, Moore's statement that "you do not represent me" falls short of demonstrating a subjective belief that the lawyers who had appeared for the estate owed him no duty of loyalty. It is more reasonably understood as an expression of Moore's frustration that the attorneys retained by Travelers to represent Taylor's estate were not communicating with him and were taking action on behalf of the estate without consulting him.

In addition, the circumstances did not make it reasonable to doubt that Beatty and King were in an attorney-client relationship with Moore. The issue of Moore's status as their client is controlled by the fact that Beatty and King entered formal notices of appearance in the wrongful death litigation on behalf of the estate.

As soon as Beatty and King filed their notices of appearance, they owed their client the duties discussed in Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 388-89, 715 P.2d 1133 (1986). "Both retained counsel and the insurer must understand that only the *insured* is the client." Tank, 105 Wn.2d at 388. Their client was Moore, the estate's personal representative. Beatty and King acted for the estate when they continued to participate in the wrongful death trial after the Griffith parents were dismissed. In answer to the court's question, they affirmed that they were still involved in the lawsuit as attorneys for the estate. Yet at the same time, they were advocating on behalf of their other

clients, the Griffith parents, to remove Moore as personal representative of their son's estate.

An advisory opinion issued by the Washington State Bar Association addresses the precise situation Beatty and King found themselves in—a potential violation of RPC 1.9 by a lawyer retained by an insurance company:

> The Committee reviewed your inquiry wherein you had been retained by an insurer to represent a city and a police officer employed by the city. You filed a Notice of Appearance on behalf of each of those clients. Subsequently, you learned that there was a conflict of interest between the two clients. You ask whether you can continue to represent the city after proper withdrawal from representing the police officer. *The Committee was of the opinion that for the purposes of RPC 1.9, the fact that you filed a Notice of Appearance means that the police officer is a former client and you must therefore comply with the requirements of RPC 1.9.*

WSBA Rules of Prof'l Conduct Comm., Advisory Op. 1578 (1994) (emphasis added).

We agree with the advice of the Bar. A lawyer appointed by an insurance company to defend two clients, and who files a notice of appearance on behalf of each of them, may not continue to represent only one of those clients without satisfying the requirements of RPC 1.9. Beatty and King could not continue to represent only the Griffith parents without Moore's waiver of the conflict. Because Beatty and King did not comply with the rule, the order disqualifying them was properly entered.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Schindler, J.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Woods v. H.O. Sports Co. Inc., Wash.App. Div. 2, August 19, 2014

105 Wash.2d 118
Supreme Court of Washington,
En Banc.

Certification From the United States Court of Appeals for the Ninth Circuit in Bradley Lester BAUGHN, an incompetent person by Jack G. BAUGHN, his General Guardian; Jack G. Baughn; and Doris L. Baughn, Respondents,
v.
HONDA MOTOR CO., LTD. (HONDA GIKEN KOGYO KABUSHIKI KAISHA), an alien corporation; Honda Research & Development Co., an alien corporation, and American Honda Motor Co., a foreign corporation, Appellants.

No. 50473–3.
|
Jan. 16, 1986.

Synopsis
Question was certified to the Supreme Court by United States Court of Appeals for Ninth Circuit, regarding limits of parental-immunity doctrine. The Supreme Court stated that tort-feasor may not seek indemnity or contribution from parents for tort damages paid to those parents' child on theory that parents' negligent failure to properly supervise child was cause of child's injury.

Question answered.

West Headnotes (2)

[1] Contribution
Particular Torts or Wrongdoers
Indemnity
Torts, in General

Tort-feasor may not seek indemnity or contribution from parents for tort damages paid to those parents' child on theory that parents' negligent failure to properly supervise child was cause of child's injury.

6 Cases that cite this headnote

[2] Contribution
Particular Torts or Wrongdoers
Indemnity
Torts, in General

Tort-feasor could seek indemnity or contribution from parents for tort damages paid to those parents' child if parents' failure to properly supervise child which resulted in child's injury amounted to willful and wanton misconduct.

6 Cases that cite this headnote

Attorneys and Law Firms

****293 *118** Rush, Kleinwachter, Hannula & Harkins, Paul Kleinwachter, Daniel Kyler, Tacoma, for appellants.

Keller, Rohrback, Waldo, Hiscock, Butterworth & Fardal, James Rohrback, Seattle, for appellees.

Opinion

PER CURIAM.

This case requires us to answer a question ***119** regarding the limits of the parental immunity doctrine. The issue has been certified to us by the United States Court of Appeals for the Ninth Circuit pursuant to RCW 2.60.020.

The Ninth Circuit has provided us with the following agreed facts. In 1972 Bradley Lester Baughn, then 9 years old, was injured in an automobile-minibike collision. Baughn was riding on the back of a minibike operated by a friend, also a minor, when the accident occurred.

Baughn sued Honda and one of its distributors under theories of strict liability, negligence, and breach of warranty. Honda filed a third party complaint against Baughn's parents for indemnity. Honda's basis for the indemnity claim was its allegation that the parents had negligently failed to properly supervise Baughn at the time the collision occurred.

The issue certified on these facts is:

> May a tortfeasor seek indemnity or contribution from parents for tort damages paid to those parents' child, on the theory that the parents' negligent failure to properly supervise the child was the cause of the child's injury?

****294** **[1]** **[2]** The answer to the specific question posed is "no". We have recently reaffirmed the vitality of the doctrine of parental immunity with respect to assertions of negligent supervision. *Jenkins v. Snohomish Cy PUD 1,* 105 Wash.2d 99, 713 P.2d 79 (1986). We recognized in *Jenkins,* however, that if parental negligence is such that it amounts to willful and wanton misconduct, the doctrine of parental immunity will not preclude liability. Consequently, if the federal court finds willful and wanton misconduct in the supervision of the child, the answer to the certified question would be "yes".

The rule also has been expressed in *Talarico v. Foremost Ins. Co.,* 105 Wash.2d 114, 295, 712 P.2d 294 (1986) as follows:

> In order for the conduct of parents in supervising their child to be actionable in tort, such conduct must rise to the level of willful and wanton misconduct; if it does not, ***120** then the doctrine of parental immunity precludes liability.

We submit this answer to the federal court for consideration in light of the contentions as established by the pleadings and evidence presented or to be presented pursuant to federal procedure.

All Citations

105 Wash.2d 118, 712 P.2d 293

End of Document

KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in Sadler v. Empire Health Center Group, Wash.App. Div. 3, July 3, 2001

96 Wash.2d 659
Supreme Court of Washington, En Banc.

Stanley WOOLDRIDGE, Administrator of the Estate of Clifford S. Wooldridge, deceased, Petitioner,
v.
Scott Allen WOOLETT, a minor child; Cynthia Ann Sofie, a minor child; Louis E. Sofie and Jane Doe Sofie, husband and wife; and John Judd and Jane Doe Judd, husband and wife, Respondents.

No. 47840-6.
|
Dec. 31, 1981.

Synopsis
Administrator of estate appealed from judgment of the Clallam County Superior Court, Tyler C. Moffett, J., awarding special damages to estate but failing to award any general damages in administrator's action brought against driver and owners of car in which decedent was riding as a passenger when he was killed. The Court of Appeals, Petrie, J., 28 Wash.App. 869, 626 P.2d 1007, affirmed, and appeal was taken. The Supreme Court, Williams, J., held that: (1) value of a person's shortened life expectancy is not a separately recoverable item of damages in survival action; (2) trial court did not err by preventing plaintiff's expert from including value of unearned income and transfer payments in his calculations of decedent's anticipated earned income; and (3) where decedent's work record was "spotty" and he had no record of savings and his educational background included only a high school diploma and a few credit hours of community college course work, it was not unreasonable that jury did not award general damages.

Affirmed.

West Headnotes (7)

[1] Death
Survival of right of action of person injured

Survival statute does not create a separate claim for a survivor, but merely preserves the causes of action a person could have maintained had he not died, other than his pain and suffering, anxiety, emotional distress, or humiliation. West's RCWA 4.20.046.

13 Cases that cite this headnote

[2] Death
Elements of Compensation

Value of person's shortened life expectancy is not a separately recoverable item of damages in survival action. West's RCWA 4.20.046.

6 Cases that cite this headnote

[3] Death
Prospective earnings and accumulations of deceased

Trial court in survival action did not err by preventing plaintiff's expert from including value of unearned income and transfer payments in his calculations of decedent's anticipated earned income, where no evidence was offered to show decedent's savings habits.

10 Cases that cite this headnote

[4] New Trial
Inadequate damages

When a verdict is so low as to unmistakenly indicate passion or prejudice, a new trial should be ordered.

10 Cases that cite this headnote

[5] Appeal and Error
Mistake, passion, or prejudice;shocking conscience or sense of justice

Court will not disturb an award of damages made by jury if the amount is not so disproportionate as to indicate it resulted from passion or prejudice; if damages are within range of evidence they will not be found to have been motivated by passion or prejudice.

20 Cases that cite this headnote

[6] **Appeal and Error**
Inadequate Award;Additur
New Trial
Inadequate Damages

Granting of a new trial on grounds of inadequate damages is particularly within the discretion of the trial court, and denial of such motion will not be disturbed absent a manifest abuse of discretion.

9 Cases that cite this headnote

[7] **Death**
Discretion of jury

Where decedent's work record was "spotty" and he had no record of savings and his educational background included only a high school diploma and a few credit hours of community college course work, it was not unreasonable that jury in survival action failed to award general damages. West's RCWA 4.20.046.

6 Cases that cite this headnote

Attorneys and Law Firms

***660** ****566** Niichel, Rutz & Johnson, John R. Rutz, David V. Johnson, Port Angeles, for petitioner.

****567** Bassett, Gemson & Morrison, R. L. Gemson, Seattle, Johnson & Williams, Kenneth D. Williams, Port Angeles, for respondents.

Daniel F. Sullivan, Donovan R. Flora, Washington Trial Lawyers Assn., Michael Mines, Ingrid W. Hansen, Washington Ins. Council, Seattle, Robert Whaley, Seafirst Financial Center, Spokane, for amicus curiae.

Opinion

WILLIAMS, Justice.

This case presents the question whether the value of a person's shortened life expectancy is a separately recoverable item of damages in a survival action brought pursuant to RCW 4.20.046. The trial court refused to instruct the jury that the reasonable value of Clifford S. Wooldridge's shortened life expectancy was a separate element of damages in this survival action. The Court of Appeals, Division Two, affirmed the trial court in all respects. Wooldridge v. Woolett, 28 Wash.App. 869, 626 P.2d 1007 (1981). We likewise affirm.

The facts are as follows:

Clifford S. Wooldridge, Scott Allen Woolett, and Cynthia Ann Sofie attended a party on January 15, 1977, at the home of John Judd in Port Angeles. At approximately 11:30 p. m., Wooldridge wished to leave and accepted a ride from Woolett and Sofie. Woolett was driving his girlfriend Sofie's car, a 1969 Camaro. The vehicle was registered in the name of her father, Louis E. Sofie, who had cosigned for the purchase of the car and carried it on his own insurance policy. As Woolett accelerated, the car hit a curb at the end of the street and overturned, and Wooldridge was killed instantly. At the time of his death he was almost 22 ***661** years of age, died intestate, and left no dependents.

Appellant Stanley Wooldridge, administrator for his son's estate, brought a survival action naming as defendants Scott Allen Woolett, Cynthia Ann Sofie, her parents Louis E. and Beverly Sofie, and John Judd. The action against Judd was subsequently dismissed on appellant's motion. Woolett answered, admitted liability, and tendered insurance policy limits of $25,000. The Sofies answered, denying any negligence and asserting contributory negligence on the part of Wooldridge. Prior to trial, Louis E. and Beverly Sofie moved for summary judgment on the issue of their liability under the family car doctrine. The motion was granted, and an order on summary judgment was entered. Appellant also moved for summary judgment on the issue of liability of Scott Allen Woolett and Cynthia Ann Sofie prior to trial. The motion was granted. The jury trial, therefore, was concerned only with the issue of damages to be assessed against respondents Woolett and Sofie.

At trial, appellant presented evidence about Wooldridge, including his job history, which appellant's counsel characterized as admittedly "spotty". Appellant called Professor John Eshelman, Dean of the School of Business at Seattle University, who testified that the probable

present net value of Wooldridge's future net earnings, had he lived to his normal life expectancy, would be approximately $67,250. The respondents cross-examined Dr. Eshelman intensely, but presented no other evidence about Wooldridge's earning capacity except the testimony of a restaurant owner for whom he worked as a dishwasher after graduating from high school. The restaurant owner testified that Wooldridge "just didn't come back to work" one day, and failed to give notice.

Appellant excepted to the trial court's refusal to give its proposed instructions Nos. 6B and 6C. Proposed instruction No. 6B reads as follows:

> Your verdict should include the following items:
>
> (1) Funeral and burial expenses in the amount of $2,339.51;
>
> ***662** (2) The reasonable value of the decedent's lost earning capacity; and
>
> (3) The reasonable value of the decedent's shortened life expectancy.

Report of Proceedings, at 202. Proposed instruction No. 6C said that the jury could award compensation for shortened life expectancy as well as for the loss of value of ****568** future earning capacity. The trial court actually instructed the jury as follows:

> Your verdict should include the following items:
>
> (1) Funeral and burial expenses in the amount of $2,339.51;
>
> (2) The decedent's shortened life expectancy resulting in the loss of his future earning capacity to his estate.

Report of Proceedings, at 214.

The jury returned a verdict in the amount of $2,339.51, representing only the funeral and burial expenses. The trial court denied appellant's motion for a new trial based on the inadequacy of the award and allegedly prejudicial statements made by defense counsel in closing argument. This appeal followed.

I.

Damages for shortened life expectancy as a separate item of recovery.

[1] This action is based on the following language of Washington's survival statute:

> (1) All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section: Provided, however, That no personal representative shall be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased.

(Some italics ours.) RCW 4.20.046. This statute does not create a separate claim for the survivors, but merely preserves ***663** the causes of action that a person could have maintained had he not died, other than for pain and suffering, anxiety, emotional distress, or humiliation.

In Harvey v. Cleman, 65 Wash.2d 853, 857-58, 400 P.2d 87 (1965), RCW 4.20.046 was interpreted by this court to preserve all causes of action of the decedent except those specifically enumerated in the proviso to that statute. We again had occasion to interpret the survival statute in Warner v. McCaughan, 77 Wash.2d 178, 182-83, 460 P.2d 272 (1969), and came to a similar conclusion:

> It is urged that the proviso of RCW 4.20.046, supra, excludes all items of damage thought to be personal to a decedent, i.e., permanent injuries, shortened life expectancy, and impaired earning capacity, not just those items expressly excluded by the proviso-pain and suffering, anxiety, emotional distress, or humiliation. We do not agree.

(Some italics ours.) From the above quotation, which implies shortened life expectancy is somehow distinguishable from impaired earning capacity, appellant predicates the right to recover damages for shortened life expectancy as a separate item of damages.

In Hinzman v. Palmanteer, 81 Wash.2d 327, 330, 501 P.2d 1228 (1972), we cited Warner for the proposition that

> (s)hortened life expectancy caused by the child's death and the resulting loss of value of her future earning capacity to her estate are specifically recognized as items of recovery not excluded by the statute.

(Citation omitted. Italics ours.) Appellant further submits that his proposed instruction No. 6B, which would have permitted the jury to award separate damages for shortened life expectancy and lost earning capacity, was based upon an instruction approved by this court in Hinzman, at 329-30, 501 P.2d 1228, where the jury was instructed that it

> shall allow such sum as general damages as in your opinion will fairly and justly compensate her (decedent's) estate for her wrongful death. In this regard you may take into consideration and award compensation for the shortened life expectancy caused by her death, as well ***664** as the loss of the value of her future earning capacity caused by her wrongful death.

****569** (Italics ours.) The above language gives the impression that shortened life expectancy and loss of future earning capacity are separate and distinct elements of damage in a survival action. On the next page of the opinion, however, a very different meaning is imparted by the following language:

> In this suit, the estate of Lauretta Hinzman claimed damages under the survival statute for general damages consisting of loss of value of her future earning capacity as affected by her shortened life expectancy caused by her death.

(Italics ours.) Hinzman, 81 Wash.2d at 331, 501 P.2d 1228.

[2] Appellant fails to define the term "shortened life expectancy" anywhere in his brief, but we note that the Washington State Trial Lawyers Association amicus brief would generally equate that term with the impairment of an ability to enjoy the pleasures of life which a person otherwise would have enjoyed. Brief of Amicus Washington State Trial Lawyers Association, at 10-16. To demonstrate the shortened life expectancy element of damages, appellant cites Reed v. Jamieson Inv. Co., 168 Wash. 111, 10 P.2d 977, 15 P.2d 1119 (1932), and Parris v. Johnson, 3 Wash.App. 853, 479 P.2d 91 (1970), for the proposition that a qualitative loss of life's pleasures is a separate element of damages apart from pain and suffering. Appellant then extends the argument to conclude that such a recognition of qualitative loss of life's pleasures should give rise to a separate element of damages for a quantitative loss of those same pleasures. We disagree.

The cases cited by appellant are distinguishable for at least two reasons. First, Reed and Parris are personal injury cases where the plaintiffs sought recovery for their permanent injuries which prevented them from continuing to enjoy certain activities for the remainder of their lives. Second, appellant ignores the following language of the Parris opinion:

> ***665** Although disability exists as a distinct element of damages, it is frequently a natural concomitant of pain and suffering. The relationship between disability and pain and suffering may be direct or indirect, but the two are so frequently interwoven that a clear distinction cannot be made in many instances.

Parris, 3 Wash.App. at 860, 479 P.2d 91. It seems fairly certain the Parris court considered the lost enjoyment of life's pleasures as merely a component of damages for pain and suffering-items of damage specifically excluded by the proviso to RCW 4.20.046. Likewise, the Court of Appeals in this case found that insofar as damages for shortened life expectancy imply damages for the loss of life's pleasures and amenities, such damages are "but a component of pain, suffering, anxiety, and

distress." (Citation omitted.) Wooldridge v. Woolett, 28 Wash.App. 869, 876, 626 P.2d 1007 (1981).

The case of Willinger v. Mercy Catholic Medical Center, 482 Pa. 441, 393 A.2d 1188 (1978), addresses issues similar to those confronting us in this case. Willinger involved a wrongful death and survival action where plaintiff sought separate damages for the shortened life expectancy of a minor child. Despite the fact that Pennsylvania's survival statute is even broader than RCW 4.20.046 in permitting recovery, the court rejected the separate claim for loss of life's amenities and pleasures. [1] In so holding, the court reasoned:

[1] 20 Pa.Cons.Stat.Ann. s 3373 (Purdon) reads as follows:

> "An action or proceeding to enforce any right or liability which survives a decedent may be brought by or against his personal representative alone or with other parties as though the decedent were alive."

> We discern little or no distinction between seeking to calculate the value of "life itself" and the value of experiencing life's pleasures. Were we to permit compensation for loss of "life itself", undoubtedly this intangible item would have to be measured in terms of the loss of those very opportunities to enjoy family, work, and recreation the trial court directed the jury to consider in measuring the loss of life's pleasures....
>
> ****570** Even where the victim survives a compensable injury, ***666** this Court has never held that loss of life's pleasures could be compensated other than as a component of pain and suffering.... (T)o a large extent it has been the plaintiff's consciousness of his or her inability to enjoy life that we have compensated under the rubric of "loss of life's pleasures". Unlike one who is permanently injured, one who dies as a result of injuries is not condemned to watch life's amenities pass by. Unless we are to equate loss of life's pleasures with loss of life itself, we must view it as something that is compensable only for a living plaintiff who has suffered from that loss.

(Italics ours.) Willinger, at 447, 393 A.2d 1188.

We find Willinger to be persuasive authority in settling the issues before us. The loss of life's amenities should be recoverable only by plaintiffs who survive compensable injuries, since such lost pleasures are personal to that individual and essentially represent pain and suffering. Damages for loss of life's amenities should not be recoverable in a survival action, however, because such damages are a backdoor method of obtaining compensation for pain and suffering, or for obtaining those damages otherwise recoverable in a wrongful death action. See RCW 4.20.010, .020, and RCW 4.24.010. The proper method for determining damages in a survival action as opposed to a wrongful death action, was set out in Criscuola v. Andrews, 82 Wash.2d 68, 507 P.2d 149 (1973). In that case, we stated that the potential for double recovery (not a problem here) can be avoided "if recovery under the survival action is limited to the prospective net accumulations of the deceased." Criscuola, at 70. We believe that the loss of the ability to enjoy life's pleasures and amenities is not an asset to be accumulated by the deceased.

The concept of "shortened life expectancy" was never at issue in the Cleman, Warner, and Hinzman line of cases. Those cases concerned only the recovery of damages for disabilities and loss of value of a decedent's future earning capacity. To the extent that dicta in those cases and our approval of the jury instruction in Hinzman intimate that shortened life expectancy is a separately recoverable element ***667** of damages in a survival action, we now specifically disapprove of that dicta. Instead, we hold that shortened life expectancy is relevant in a survival action only to the extent it affects the loss of value of a decedent's future earning capacity.

II.

Limitation of expert testimony.

The trial court limited the basis of Professor Eshelman's opinion to Wooldridge's anticipated earned income, thus excluding certain income items which formerly had been included in his calculations. In so doing, the court relied on Balmer v. Dilley, 81 Wash.2d 367, 371, 502 P.2d 456 (1972), where we cited Hinzman v. Palmanteer, 81 Wash.2d 327, 501 P.2d 1228 (1972), in stating that the measure of damages for a decedent's lost earning capacity is the probable net worth of the decedent's future net

earnings had he lived to his normal life expectancy. This figure is computed by determining the total of future earnings, less the personal expenses he would have incurred during his lifetime, and reducing the net amount to its present cash value.

[3] Appellant contends that the court erred by preventing his expert, Professor Eshelman, from including the value of unearned income and transfer payments (social security, welfare payments, interest income, etc.) in his calculations. He cites Bryant v. Woodlief, 252 N.C. 488, 114 S.E.2d 241, 81 A.L.R.2d 939 (1960), and Smith v. Lassing, 189 So.2d 244 (Fla.Dist.Ct.App.1966), as authority for the inclusion of all income, earned or unearned, in measuring a decedent's net worth. These cases, however, seem to be clearly distinguishable. In each of those cases, the decedent already possessed passive investments which yielded investment income. In the present case, no evidence seems to have been offered to show Wooldridge's savings habits. In explaining ****571** why evidence of investments should be considered, the Lassing court noted, at 246:

> In our judgment the amount of her investment income and the size and nature of her estate are, indeed, relevant ***668** and material to the issue. Specifically, they bear upon the decedent's habits of industry, means, business, earnings, skill and her reasonable future expectancy, all as found in the court's charge. More fundamentally, they give the jury valuable factors whereby the equation may be solved as to the prospective accumulation that could reasonably have been expected to accrue to the estate except for the death of the decedent.

In this case, consideration of potential income from investments would be highly speculative where no proof was made of Wooldridge's past savings habits, if any. This is not to say that such unearned income should never be considered in computing damages but where, as here, nothing justifies the economist's forecasts of future investments, we find the trial court acted properly.

III.

Inadequate damages.

[4] **[5]** **[6]** When a verdict is so low as to unmistakenly indicate passion or prejudice, a new trial should be ordered. Kellerher v. Porter, 29 Wash.2d 650, 666, 189 P.2d 223 (1948). The court will not disturb an award of damages made by a jury if the amount is not so disproportionate as to indicate it resulted from passion or prejudice. Lundgren v. Whitney's, Inc., 94 Wash.2d 91, 96, 614 P.2d 1272 (1980). If the damages are within the range of evidence they will not be found to have been motivated by passion or prejudice. James v. Robeck, 79 Wash.2d 864, 870-71, 490 P.2d 878 (1971); Cooperstein v. Van Nattler, 26 Wash.App. 91, 98, 611 P.2d 1332 (1980); Johnson v. Marshall Field & Co., 1 Wash.App. 655, 661, 463 P.2d 645 (1969). The granting of a new trial on grounds of inadequate damages is peculiarly within the discretion of the trial court, and a denial of such motion will not be disturbed absent a manifest abuse of discretion. Cowan v. Jensen, 79 Wash.2d 844, 847, 490 P.2d 436 (1971).

[7] As unfortunate as it may seem, the jury's failure to award any general damages for Wooldridge's death seems to have resulted simply from a failure of proof. As noted in the statement of facts above, Wooldridge's work record was ***669** "spotty" and he had no record of savings. His educational background included a high school diploma and a few credit hours of community college course work. From those factors, it does not appear unreasonable that the jury awarded no general damages. The trial court judge indicated this view when he asked, "(C)an't the jury come to the conclusion that he would have spent every dime he earned, just like I do?" Report of Proceedings, at 243. The Court of Appeals summarized this issue as follows:

> The jury's complete denial of any general damages is perhaps unusual, but it is indicative of the jury's determination that if Cliff Wooldridge had lived his savings at the end of his life would have been zero. This was a prerogative of the jury based upon all the evidence; they could have concluded

> his earnings would have been less than the average assumed by the economist, or that his personal expenses would have been greater than the average assumed by the economist. Consequently, we do not disturb the trial judge's denial of the motion for new trial.

Wooldridge v. Woolett, 28 Wash.App. 869, 871, 626 P.2d 1007 (1981). We find this reasoning sound and the decision sustainable.

The Court of Appeals is affirmed.

BRACHTENBACH, C. J., and ROSELLINI, STAFFORD, UTTER, DOLLIVER, HICKS, DORE and DIMMICK, JJ., concur.

All Citations

96 Wash.2d 659, 638 P.2d 566

CARNEY BADLEY SPELLMAN

August 09, 2018 - 10:28 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95861-1
Appellate Court Case Title:	In re the Estate of: Taylor Griffith
Superior Court Case Number:	16-4-00622-9

The following documents have been uploaded:

- 958611_State_of_Add_Authorities_20180809102722SC942746_9941.pdf
  This File Contains:
  Statement of Additional Authorities
  The Original File Name was Lawyer Appellants Statement of Additional Authority.pdf

A copy of the uploaded files will be sent to:

- andrienne@washingtonappeals.com
- ann@atwlegal.com
- cate@washingtonappeals.com
- david@luveralawfirm.com
- howard@washingtonappeals.com
- janet@stiblaw.com
- jbeatty@karrtuttle.com
- kpetrak@byrneskeller.com
- ksagawinia@karrtuttle.com
- kwolf@byrneskeller.com
- peter.jarvis@hklaw.com
- rick@atwlegal.com
- william@murraydunham.com

Comments:

Sender Name: Patti Saiden - Email: saiden@carneylaw.com
Filing on Behalf of: Michael Barr King - Email: king@carneylaw.com (Alternate Email:)

Address:
701 5th Ave, Suite 3600
Seattle, WA, 98104
Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20180809102722SC942746