

NO. 734474-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BREWHAHA BELLEVUE, LLC d/b/a MUNCHBAR, a Washington
limited liability company,

Appellant,

v.

WANDA MONTGOMERY, personal representative of the Estate of the
deceased DESHAWN MILLIKEN, and DESTINY MILLIKEN, the sister
of the deceased DESHAWN MILLIKEN,

Respondent.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. Controlling Law and Undisputed Facts Require This Court to Hold That Ta'riyah Is Not DeShawn's Wrongful Death Beneficiary Under RCW 4.20.020.

A. Plaintiffs' Arguments Fail to Address the Wrongful Death Beneficiary Issue on the Merits.

Plaintiffs' legal analysis on the wrongful death issue is analytically misdirected and therefore unhelpful in deciding the issue before this court.

Judge Downing correctly understood the legal question before him on summary judgment¹: in light of the undisputed facts before him, was Ta'riyah DeShawn's "child" within the meaning of Washington's wrongful death statute. RCW 4.20.020. CP 3659-6; CP 3369. As part of reaching his decision, he considered whether the amended birth certificate issued by the Arizona Department of Health was conclusive proof that Ta'riyah was DeShawn's "child" within the meaning of RCW 4.20.020. Judge Downing ruled that the doctrine of full faith and credit required him to take the amended birth certificate as conclusive proof of the identification on the certificate of DeShawn as Ta'riyah's "father". CP

¹ Technically, plaintiffs never moved for summary judgment that Ta'riyah was a statutory wrongful death beneficiary; it was Munchbar that moved for summary judgment that DeShawn did *not* have a wrongful death beneficiary. CP 47-55 (Munchbar's motion); CP116-127 (plaintiff's opposition); CP 144-148 (Munchbar reply). In denying Munchbar's motion, however, Judge Downing also gave "full faith and credit to Arizona's determination of Ta'riyah's . . . parentage and allow[ed] a claim to be pursued on her behalf arising from the death of [DeShawn]." CP 3661. This operated as a grant of partial summary judgment in favor of plaintiffs on the interpretation of RCW 4.20.020. In so ruling, Judge Downing should have treated Munchbar as the non-moving party against whom partial summary judgment was entered. *See*, Opening Br. at 16-17.

3369. He further applied his view of Washington’s “compelling public interest in supporting strong families and encouraging permanency planning for all children” to interpret RCW 4.20.020 broadly to allow a wrongful death to be pursued on her behalf arising from the death of DeShawn. CP 3661. Undisputed facts clearly showed that Ta’riyah was otherwise both biologically and legally unrelated to DeShawn. *Id.* Judge Downing was specifically aware that these rulings would likely be reviewed by the Court of Appeals. CP 3669.

Plaintiffs’ reply brief does not address the legal merits of Judge Downing’s ruling at all. It does not analyze full faith and credit as applied to the facts of this case and plaintiffs refuse to address controlling Washington law requiring strict interpretation of beneficiary status under RCW 4.20.020. Plaintiffs’ arguments about whether Munchbar had standing to contest DeShawn’s Acknowledgement of Paternity have no bearing on wrongful death beneficiary status under RCW 4.20.020. Their legal argument is wholly misdirected.

B. Plaintiffs Fail to Acknowledge or Apply Established Washington Law Requiring Strict Construction of Who is a Beneficiary Under RCW 4.20.020.

Plaintiffs do not even attempt to address the long-standing and extensively discussed line of Washington cases that require this court to strictly construe who is a beneficiary under RCW 4.20.020. Resp. Br. at

27. Munchbar cited and discussed numerous controlling Washington cases, including but not limited to this court's opinion in *Tait v. Wahl*, 97 Wn.App.765, 987 P.2d 127 (1999), review denied, 140 Wn.2d 1015 (2000). Without any analysis whatsoever, plaintiffs simply call those cases "irrelevant." Resp. Br. at 27.

Despite plaintiffs' outright disregard for controlling Washington law, this court, the trial court and the parties are all bound by that long-standing precedent. RCW 4.20.020 is a legislative enactment in derogation of common law. The word "child" must therefore be strictly construed. *See*, Opening Br. at pp. 28-33 and cases cited therein. As a matter of statutory interpretation, Judge Downing construed "child" broadly to effectuate his perception of Washington "public policy," even making factual determinations against Munchbar as a "non-moving" party. *See*, n.1, *infra*. These were errors as a matter of law. *Phillips v. King County*, 87 Wn. App. 468, 476, 943 P.2d 306 (1997) and Opening Br., *passim*.

C. Plaintiffs Failed to Analyze Whether the Acknowledgement of Paternity Form and the Resulting Amended Birth Certificate Were Entitled to Full Faith & Credit.

- 1. For Ta'riyah's alleged status as a "child" under RCW 4.20.020, plaintiffs rely solely on the acknowledgement of paternity form and the resulting amended birth certificate.**

Plaintiffs argue that “Ta’riyah’s Arizona Birth Certificate and the Acknowledgment of Paternity that Denise and DeShawn filed in Arizona establish as a matter of law that she is DeShawn’s ‘child.’” Resp. Br. at 27-28; *see also, id.* at 21. They rely on no other factual evidence and do not dispute that DeShawn and Ta’riyah were otherwise biologically and legally unrelated. Although plaintiffs refer briefly to full faith and credit, they do not analyze whether or not either the amended birth certificate or the form signed by Denise and DeShawn are entitled to full faith and credit. They are not.

2. Full faith and credit applies only to matters that have been substantively decided on the merits by another state.

Article IV, § 1 of the United States Constitution states:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The case of *Onewest Bank, FSB v. Erickson*, __ Wn.2d __, __ P.3d __, 2016 WL 455940 (Wash. No. 91283-1, Feb. 4, 2016), issued after Munchbar filed its Opening Brief, and relied upon by Respondents, states the basic concepts of full faith and credit consistently with authorities cited in Munchbar’s Opening Brief:

¶ 28 Under full faith and credit principles, states are obligated to recognize judgments of sister states and parties can collaterally attack a foreign order “only if the court lacked jurisdiction or constitutional violations were involved.” *State v. Berry*, 141 Wn.2d 121, 128, 5 P.3d 658 (2000). Otherwise, a Washington court “ ‘must give full faith and credit to the foreign judgment and regard the issues thereby adjudged to be precluded in a Washington proceeding.’ ” *Id.* (internal quotation marks omitted) (quoting *In re Estate of Tolson*, 89 Wn.App. 21, 30, 947 P.2d 1242 (1997)). . . . The standard of review is de novo in determining whether a court's refusal to accord full faith and credit to a foreign judgment was improper. *Id.* at 7, 313 P.3d 451.

Id., 2016 WL 455940, at *5, ¶ 28 (underlines supplied for emphasis). “The Full Faith and Credit Clause provides a means for ending litigation by putting to rest *matters previously decided between adverse parties* in any state or territory of the United States.” *State v. Berry*, 141 Wn.2d 121, 127, 5 P.3d 658 (2000), quoting *In re Estate of Tolson*, 89 Wn.App. 21, 29, 947 P.2d 1242 (1997) (italics supplied). *Accord*, *In re Parentage of F.*, 178 Wn.App. 1, 8, 313 P.3d 451 (2013). Article IV, § 1 of the U.S. Constitution imports “the local doctrines of *res judicata*” into national jurisprudence. *Riley v. New York Trust Co.*, 315 U.S. 343, 349, 62 S. Ct. 608, 86 L. Ed. 885 (1942). *Accord*, *In re Parentage of F.*, *supra*.

The consistent theme throughout authorities discussing full faith and credit is that matters *decided on the merits* by courts of another state, are entitled to full faith and credit. Where some record is a mere

administrative recordation and has not been adjudicated on the merits by another state, full faith and credit does not apply. *See, U.S. v. Casares-Moreno*, 122 F. Supp. 375 (S.D. Cal. 1954) (discussed below).

3. A birth certificate is not conclusive evidence of parentage, and an amended birth certificate is especially not conclusive evidence of parentage.

Under well-established law which plaintiffs have not even addressed, much less rebutted, a birth certificate is never conclusive evidence of parentage. *E.g., U.S. v. Casares-Moreno*, 122 F. Supp. 375, 378 (S.D. Cal. 1954); *Ex parte Lee Fong Fook*, 74 F. Supp. 68 (N.D. Cal. 1948), remanded on other grounds, *Lee Fong Fook v. Wixon*, 170 F.2d 245 (9th Cir. 1948); cases cited in *In Re Francisco Cruz Alvarez*, 2011 WL 899600 (BIA 2011) (court-ordered delayed birth registration was not conclusive evidence that respondent's birth had occurred in the U.S.). Munchbar cited these cases in its Opening Brief at pp. 37-38, with extensive discussion of some of them, and restates that argument by reference. Without any substantive analysis or opposition to these cases or to the rules they express, plaintiffs responded only that Munchbar's reliance on those cases was "absurd." Resp. Br. at 34. The reason for that deafening silence is clear: the Arizona documents in this case are not entitled to full faith and credit.

Specifically considering a birth certificate, the court in *Casares-Moreno, supra*, stated the general rule that the record of an instrument which the law requires to be recorded is only *prima facie* evidence of the validity of the instrument and the facts stated therein. 122 F. Supp. at 377 (citing numerous cases). The defendant there, relying on a California birth certificate to conclusively establish that he had been born in the U.S., argued that because his birth certificate “was recorded pursuant to an order of the Superior Court,” that it thereby gained some higher status. “Specifically, defendant says that it is a judgment and that under the ‘full faith and credit’ clause of the Constitution, must be treated as a conclusive adjudication of the facts therein recited.” *Id.* The Court rejected that argument, stating that birth certificates are “never. . . to be taken as irrebuttable evidence”:

A reading of this [California legislative] Chapter in its entirety shows that the intent of the Legislature was to have such belatedly established record [a late-filed birth certificate] take its place alongside the promptly recorded records. There is no indication that the Legislature intended to raise records or parts of records so belatedly established to any greater status than the normally registered records which are never, in cases of birth recordation, to be taken as irrebuttable evidence. In other words, it appears that the role of the Superior Court in ordering the recordation partakes of an administrative function. It is merely an act of recordation which has been permitted by judicial action rather than by an administrative officer. The judgment in such an action is not that the facts so found are absolutely conclusive as between petitioner and the rest of the world,

but rather, the judgment is that the registrar is ordered to make such a recording.

122 F. Supp. at 378 (underlines supplied).

4. ARS 25-812 does not raise the acknowledgement of paternity form or the amended birth certificate to an act of the state of Arizona entitled to full faith and credit.

Here, plaintiffs state that the application and amended birth certificate “plainly state that Ta’riyah is DeShawn’s child”, and argue, “[U]nder Arizona law, this document ‘is a determination of paternity and has *the same force and effect as a superior court judgment.*’ A.R.S. § 25-812(D)[.]” Resp. Br. at 21 (emphasis by respondents). This statement, however, is both incomplete in key regards and does not entitle the documents to full faith and credit in any event. ARS 25-812² describes Arizona procedures for acknowledging paternity. First, the procedures are available only to the state and to the “parent” of a child born out of wedlock. ARS 25-812(A). Even under plaintiffs’ own approach, DeShawn was not a “parent” of Ta’riyah at the time he signed the Acknowledgement of Paternity form. Further, the procedure elected by Denise and DeShawn did not include any appearance before, or filing of any documents with, any Arizona court. CP 135-36. They went to the Arizona Department of Health Services Office of Vital Records, CP

² Copy filed with this Court on January 13, 2016. *See also*, excerpts quoted at n3 and p.10, *infra*.

135:25-26, and, allegedly “following the direction of Arizona’s Department of Health Services”, they “signed the acknowledgement of paternity before a witness at the Office of Vital Records.” CP 136: 2-9. The witness to the acknowledgement signatures indeed gave her address as the “Arizona Department of Health Services Office of Vital Records.” CP 139. The certification at CP 140 certifies only that the acknowledgement is “a true and correct copy from the HPP system, which reflects the official activities of the agency done in the normal course of business.” CP 140. There is no evidence anywhere, nor do plaintiffs aver, that the Acknowledgement of Paternity was ever filed with the Arizona Superior Court.

ARS 25-812(B)³ authorizes the clerk of superior court or “authorized court personnel” to “issue an order establishing paternity.” However, that only occurs if the notarized acknowledgement is “filed with the clerk of the superior court.” *Id.* There is no evidence anywhere in the record that anyone ever filed the acknowledgement with the superior court. Nor is there any “order establishing paternity” issued by the Arizona Superior Court. *See*, ARS 25-812(B). If there were such an

³ “B. On filing a document required in subsection A of this section with the clerk of the superior court, the clerk or authorized court personnel shall issue an order establishing paternity, which may amend the name of the child or children, if requested by the parents. The clerk shall transmit a copy of the order of paternity to the department of health services and the department of economic security.” ARS 25-812(B).

order, plaintiffs undoubtedly would have produced it. Thus, what Denise and DeShawn did was merely go to a government administrative office and fill out a form, swearing under penalty of perjury to untruths, which the administrative office then retained in its records. Even the resulting amended birth certificate was, as described in *Casares-Moreno, supra*, “merely an act of recordation” -- and, in this case, not even recordation by a court or of a court record. This low level of citizen-instigated, non-adjudicative recordation is not a “public Act, Record or judicial Proceeding” entitled to full faith and credit under the U.S. Constitution.

5. ARS 25-812(D) does not raise the administrative form to the level of a judicial proceeding entitled to full faith and credit.

Nor does ARS 25-812(D) raise this act of administrative recordation to the level of a “public act” or “judicial proceeding” described in U.S. Const. Article IV, Section 1. Subsection D in its entirety states:

D. A voluntary acknowledgment of paternity executed pursuant to subsection A, paragraph 1 of this section may be filed with the department of economic security, which shall provide a copy to the department of health services. A voluntary acknowledgement of paternity made pursuant to this section is a determination of paternity and has the same force and effect as a superior court judgment.

Although this administrative procedure may have the same “force and effect” as a judgment between the parties, it is not itself a judgment, nor

did it result from a “judicial proceeding.” The last sentence of subsection D. does not elevate a citizen averment to the level of a state act which is entitled to full faith and credit for the purpose of a wrongful death action.

Full Faith and credit requires only that a sister state’s judgment controls in other states “to the same extent as it does in the state where rendered.” *In re Estate of Tolson*, 89 Wn.App. 21, 30, 847 P.2d 1242 (1997), citing *Riley et al. v. New York Trust Co.*, 315 U.S. 343, 349, 62 S.Ct. 608, 612, 86 L.Ed. 885 (1942). Arizona itself has expressly held that the Arizona paternity statutes are not conclusive of paternity in wrongful death cases:

¶ 8 The wrongful death statutes do not mention the paternity statutes or prescribe a standard or procedure for proving paternity. Neither do the paternity statutes state that they apply to wrongful death proceedings or even to all cases in which paternity is in dispute . . . ¶ 11 . . . The different purposes of the statutes suggest no legislative intent that the paternity statutes apply to paternity determinations in wrongful death cases.

Aranda v. Cardenas, 215 Ariz. 210, 213-214, ¶¶ 8 and 11, 159 P.3d 76 (2007). The Supreme Court of Arizona recognized the unfairness of applying the paternity statutes to a wrongful death case:

The problem we face as to all three statutory methods of determining paternity is that the defendant in the wrongful death action would appear to have no standing to oppose the determination of the question. He would be an outsider. We believe that the defendant in a lawsuit may always question

whether the plaintiff is a proper party if the issue is raised in a timely manner.

Hurt v. Superior Court of Arizona, 124 Ariz. 45, 48, 601 P.2d 1329 (1979)

The Arizona Supreme Court in *Hurt* went on to find at p. 49:

Assuming that the motion for summary judgment did, in fact, raise the issue of capacity to sue, we do not believe it was an abuse of discretion to require a determination of this matter prior to trial. We do not agree, however, that it must be a separate, independent action: it can be determined at a pretrial hearing on the issue of the plaintiff's capacity to sue properly raised by the pleadings.

Plaintiffs are asking Washington to give greater effect to DeShawn's acknowledgement of paternity than Arizona would give to it. This is well beyond the requirements of full faith and credit and it was error for the Washington trial judge to find that Ta'riyah was the "child" of DeShawn within the meaning of RCW 4.20.020 as a matter of law.

D. Cases Cited By Plaintiffs Are Either Inapposite or They Support Munchbar.

Recent cases issued by the Washington Supreme Court and the U.S. Supreme Court do not support full faith and credit on the facts of this case. The full faith and credit analysis in *Onewest Bank, FSB v. Erickson*, ___ Wn.2d ___, 2016 WL 455940 (Wash. No. 91283-1, Feb. 4, 2016), dealt with the power of an Idaho court to issue rulings that affected title to real estate located in Washington. Following *In re Marriage of Kowalewski*, 163 Wn.2d 542, 182 P.3d 959 (2008), the Washington

Supreme Court held that even though a court of general jurisdiction may lack the power to directly transfer title to real property located in another state, that court nonetheless has authority to determine parties' personal interests in out-of-state property. *Id.* at ¶ 46. This application of full faith and credit is not relevant here. Real property is not at issue and no one disputes Arizona's jurisdiction over Ta'riyah. To the extent that *Onewest* may be relevant, it supports Munchbar, not plaintiffs. In *Onewest* there were *substantive adjudications on the merits* by Idaho judges and courts. Here, *no Arizona court ever adjudicated the merits* of any question relating to Ta'riyah's birth or parentage.

The recent U.S. Supreme Court opinion in *V.L. v. E.L.*, 577 U.S. ___, No. 15-648, 2016 WL 854160 (March 7, 2016) considers subject matter more similar to this case but its analysis also supports Munchbar, not plaintiffs. In *V.L. v. E.L.*, one member of a lesbian couple gave birth to three children via artificial insemination during the couple's long-term relationship. The couple went through a formal adoption proceeding in Georgia in which the birth mother (E.L.) appeared and gave her express consent to V.L.'s adoption of the children as a second parent. "The Georgia court determined that V.L. had complied with the applicable requirements of Georgia law, and entered a final decree of adoption allowing V.L. to adopt the children and recognizing both V. L. and E.L. as

their legal parents.” Slip Op. at 2. When the couple subsequently ended their relationship and fought over custody and visitation in the state of Alabama, the Alabama Supreme Court refused to give the Georgia decree of adoption full faith & credit, holding that the Georgia court had no subject-matter jurisdiction under Georgia law. *Id.* The U.S. Supreme Court reversed, holding that Georgia did have subject-matter jurisdiction and that Alabama was therefore required to give effect to the Georgia adoption decree. *Id.* The Court emphasized that “judgments rendered” by the courts of one state are entitled to full faith and credit in other states:

With respect to judgments, “the full faith and credit obligation is exacting.” *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998). “A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.” *Ibid.* A state may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits. On the contrary, “the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based.” *Milliken v. Meyer*, 311 U.S. 457, 462 (1940). . . . “[I]f the judgment on its face appears to be a ‘record of a court of general jurisdiction, such [subject-matter] jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.’”

Slip Op. at 3 (bracketed phrase supplied for clarity, underlines for emphasis). The import of this decision in this case is that *judgments*

rendered on the merits by a court of general jurisdiction are entitled to full faith and credit. *There is no such judgment here.* No court rendered any decision, nor was there an order of paternity, nor was there even a court filing. Had DeShawn gone through the adoption process in Arizona, there would have been a court filing, judicial consideration of the merits of his request to adopt and a decision on the merits. That decision on the merits would be entitled to full faith and credit. Here, however, DeShawn never even attempted to adopt Ta'riyah. Resp. Br. at 30, n.3. It was that very process of judicial evaluation and decision that DeShawn actively circumvented.⁴

Although the Nevada case of *In re Estate of Murray*, 344 P.3d 419, (Nev. 2015) briefly recites an underlying probate commissioner's recommendation that an Arkansas birth certificate be given full faith and credit, 344 P.3d at 421, the Nevada Supreme Court evaluated the case as a conflict between Nevada's probate statutes and Nevada's parentage statutes. *Id.* It went on to evaluate parentage under Nevada's own

⁴ The trial court ruled that "both parents had been led to believe that the acknowledgement of paternity was the equivalent of a full adoption" and that "there were entirely laudable motives and nothing at all fraudulent involved in the way in which Mr. Milliken came to be declared Ta'riyah's father in compliance with the laws of Arizona." CP 3659-60. This was an evaluation of credibility and a determination of disputed facts *against* the "non-moving party" in violation of established Washington law. *E.g., Phillips v. King County*, 87 Wn. App. 468, 476, 943 P.2d 306 (1997). Reversal is required on this basis as well. *See*, Opening Br. at 16-17. The material facts are undisputed and Munchbar is entitled to judgment as a matter of law on this issue. However, if the wrongful death claim is allowed to proceed, this is a question of credibility that must be submitted to the jury.

parentage statute, which is modeled after the Uniform Parentage Act, finding that paternity contests “in intestacy proceedings” are governed by the Nevada Uniform parentage Act. This is not an intestacy proceeding and, as discussed below, Arizona has never adopted the Uniform Parentage Act. Furthermore, the stated facts concerning the parentage issue clearly showed that the decedent was, in fact, the natural parent of the child. Although the child was born when the natural parents were not married (because the father was only 17 and not legally able to marry), the parents had married once the father became of legal age, they remained married until the wife’s death almost 40 years later, they lived as a family raising the child together, and the father’s own obituary identified the child as his only living child. Only after the father’s death did other family members attempt to characterize the (by then adult) child as a “step” child, because under Nevada inheritance statutes, a stepchild may not inherit through an intestate estate. Neither the facts nor the law of this case bear any similarity to DeShawn’s lack of legal or biological relation to Ta’riyah, nor do they shed light on the effect of an amended birth certificate obtained under false pretenses in Arizona.

The Indiana case of *Lucas v. Estate of Stavos*, 609 N.E.2d 1114 (Ind. Ct. App. 1993), is factually distinguishable and also supports the principles behind Munchbar’s position. There were judicial proceedings

on the merits and a substantive ruling by a judge, all of which are missing here. There, a Louisiana court considered on the merits, and granted, a “Petition to Filiate” an illegitimate child. 609 N.E.2d at 1116. The natural father (a resident of Louisiana) had been killed in a car accident in Indiana. Under Louisiana law, the Indiana wrongful death defendants had a right to contest the Petition to Filiate and to intervene in the filiation proceeding; however they neither appeared, intervened, nor did they exercise any post-judgment rights in the Louisiana action, which they were entitled to do. *Id.* at 1117, 1118, 1119. In the Indiana wrongful death action, the wrongful death defendants attacked the Louisiana filiation determination solely on procedural grounds. They did not contest the decision on the merits, nor could they credibly have done so. *Id.* at 1121. In giving full faith and credit to the Louisiana’s determination of filiation, the Indiana court emphasized the facts that the wrongful death defendants had had the opportunity to participate in the filiation proceeding and to contest it, post-entry, both of which they had failed to do, as well as the fact that the actual truth of the child’s paternity could not reasonably be disputed. *Id.* at 1119 (procedural), 1121 (factual). None of those circumstances exist here, and the Indiana court’s reliance on those circumstances favors Munchbar’s analysis of full faith and credit.

The facts of *In re Trust Created by Agreement Dated Dec. 20, 1961*, 166 N.J. 340, 765 A.2d 746 (2001) are also highly distinguishable. There a child was born during wedlock and the husband was named as her father on both her birth certificate and on her baptismal certificate. When the parents later divorced, the husband acknowledged, in the disputed divorce proceeding, that he was the father of the child. The divorce decree issued by the court in 1965 confirmed that the husband was the father of the child. Over the next several decades, the former husband and members of his extended family repeatedly acknowledged that he was the father of this child. Nonetheless, when it was time to distribute a \$350 million trust in this extremely wealthy family, other family members tried to dispute that she was the biological child of the former husband. The New Jersey court reiterated the strong legal presumption that a child born during wedlock is presumed to be the legitimate offspring of the husband, and also noted that both parents had acknowledged paternity “in a judicial proceeding and the issue has been conclusively adjudicated.” 166 N.J. at 353. There was no issue of full faith and credit and there had been a conclusive adjudication of parentage by a court, on the merits. This case lends no support to plaintiffs.

The case of *In re Dallas Group of America, Inc.*, 434 S.W.3d 647 (2014), similarly does not support plaintiffs here. In that case, Virgil

James Stoker had sexual relations with two different women, who each became pregnant. He signed an Acknowledgement of Paternity within 90 days of the birth of each child and in each case a trial court entered an order both establishing Stoker's duty to pay child support and giving him rights of access to the child. 434 S.W.3d at 648-49. Although Stoker later voiced doubt as to whether he was actually the biological father of these children, he took no action to revoke his acknowledgement of paternity and there was no evidence that anyone else was the biological parent. Regardless, his paternity and support obligations had been "adjudicated" by the family courts prior to his death. *Id.* at 648, 654.

Stoker died when the children were ages 19 months and 4 months, and his mother and others sought to compel genetic testing to contest his paternity. *Id.* at 650. Interpreting the Texas Family Code, modeled after the Uniform Parentage Act, the court found that those seeking to compel testing lacked standing under the specific Texas statutes. *Id.* at 653. The Texas statutes considered in this case, however, have never been in effect in Arizona. Further, the facts of *In re Dallas Group* are fundamentally different than those present here. Stoker signed the acknowledgements of paternity because he believed that he was the biological father and a court of general jurisdiction imposed support obligations based on actual

consideration and adjudication of facts and law. None of that has occurred here. This case lends no support to DeShawn.

Nor does *In re Parentage of C.S.*, 134 Wn.App. 141, 139 P.3d 366 (2006) provide any support to plaintiffs. It was a dispute among Washington residents under the Washington Uniform Parentage Act.

E. Plaintiffs' Arguments Regarding the Uniform Parentage Act Are Wholly Inapposite; Arizona Has Not Adopted the Uniform Parentage Act.

Plaintiff's citations to the Uniform Parentage Act and Washington and Nevada parentage laws and cases based on that Act, Br. Resp. at 22-26, 31, are wholly inapposite. Arizona, the state with jurisdiction to establish paternity for Ta'riyah *has never adopted the Uniform Parentage Act.*⁵ Washington's Uniform Parentage Act is also irrelevant. Munchbar is not seeking to "determine parentage." The question before this court is the meaning of the word "child" in Washington's *wrongful death* statute, RCW 4.20.020.

Plaintiffs cite section 203 of the Uniform Parentage Act for the proposition that parentage laws determine parentage "for all purposes." Resp. Br. At 31. However, not only does that misstate section 203 of the

⁵ See, <http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act> (website indicating which states have adopted UPA; Arizona is shown as a non-enacting state). See also, Arizona Statutes Title 25, Chapter 6, contain the acknowledgement of paternity statute, ARS 25-812. The title of that chapter does not refer to the Uniform Parentage Act, and the verbiage of UPA § 203 is not in the Arizona statute.

Uniform Parentage Act in a material regard, the statement itself is contrary to Arizona law and therefore irrelevant to this case.

Section 203 of the Uniform Parentage Act actually states, "... a parent-child relationship established under this [Act] applies for all purposes, except as otherwise specifically provided by other law of this state." *See*, Uniform Parentage Act § 203 (2002) (underlines supplied).⁶ Section 203 does not apply to this case because Arizona has not adopted the UPA. Furthermore, Arizona law triggers the "except as otherwise specifically provided" exception. As discussed in Munchbar's opening brief at pp. 39-40, Arizona has specifically held that the Arizona paternity statute does not control determination of paternity in wrongful death cases. *Aranda v. Cardenas, supra.*

II. The Trial Court Erred in Excluding Lifestyle and Character Evidence Regarding DeShawn and in Admitting Evidence of Calls Regarding Unrelated Incidents Near Munchbar.

If, as Munchbar believes is clearly required by the law and facts, this Court dismisses the wrongful death cause of action as a matter of law, the scope of a retrial will be substantially diminished and the reasons both for and against admissibility of lifestyle evidence regarding DeShawn and Destiny will be somewhat altered. The trial judge will still need to weigh

⁶ The Uniform Parentage Act may be found at http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf. Section 203 is at page 12 of that document.

need for evidence versus undue prejudice, in light of the claims only by Destiny and by the Estate for DeShawn's own suffering. ER 403; *see also, Brundridge v. Fluor Federal Services*, 164 Wn.2d 432, 444-445, 191 P.3d 879 (2008).

Nonetheless, it remains important for this Court to correct the trial court's incorrect applications of ER 404.

A. Munchbar Neither Waived Its Objections Nor Acceded to Exclusion of Lifestyle Evidence Regarding DeShawn.

Respondent's Brief mischaracterizes Munchbar's trial briefing and positions in numerous instances; however the record speaks for itself. For example, citing CP 206, plaintiffs incorrectly suggest that Munchbar agreed to exclusion of lifestyle evidence regarding DeShawn. Resp. Br. at 36-37. In fact, Munchbar stated:

Munchbar agrees that in a vacuum, evidence that DeShawn sold drugs, did not have a job, and had access to large amounts of cash should not be presented to the jury. But this trial will not be conducted in a vacuum.

CP 206 (emphasis supplied). Plaintiffs similarly mischaracterize positions

Munchbar took at CP 212-217. At CP 212, Munchbar wrote:

Evidence of prior criminal conduct would have been relevant had Plaintiff Montgomery sought economic damages for DeShawn's death as originally pled in her Complaint. But the evidence is not relevant exclusively to economic damages and the estate's decision to abandon that portion of her claim cannot preclude Defendants from introducing the evidence.

* * *

Evidence regarding why Destiny, DeShawn and Louis Homes attacked Ja'Mari without provocation is relevant and should be admitted.

CP 212 (emphasis added). Mischaracterizations of Munchbar positions taken at CP 215-217 are similarly rebutted by actual text in the record.

Plaintiff's use in its brief of the novel phrase "guilty tortfeasor"⁷ and its attempt to characterize Munchbar of accusing DeShawn of being "incapable of love", Resp. Br. at 38, are instances of creative writing and argument, at trial and on appeal, to present an intentionally inflammatory picture of Munchbar, to avoid a full picture of actual facts and to distract from controlling rules of law. Munchbar respectfully urges the court not to rely on plaintiffs' characterizations of Munchbar positions, rather to review and rely on actual record content and established law.

B. The Trial Court Misapplied ER 404 to Exclude Evidence of DeShawn's Lifestyle and to Admit Improper "Character Evidence" Regarding Munchbar, Which Had Already Admitted Negligence.

Plaintiffs' discussion of ER 404 and its application in this case is similarly incorrect. Plaintiffs suggest that caselaw regarding ER 404 in custody disputes should be ignored because the rule makes no express reference to such cases. Resp. Br. at 39. Of course caselaw applying and

⁷ For example, at Resp. Br. 40, plaintiffs state, "Nor should this Court create a new exception [to ER 404(b)] that would permit guilty tortfeasors to elicit testimony and argument that the deceased would have been an unfit parent."

interpreting the Evidence Rules is relevant. Plaintiffs further assert that “there were no issues in the case” to which ER 404(b) could possibly apply. Resp. Br. at 40. In fact, Munchbar described significant, relevant, admissible value to evidence of DeShawn’s criminal conduct and lifestyle both to the trial court and in its Opening Brief here.

III. The Trial Court’s Belated Addition of “Guidance” to Jury Instruction No. 11 Was Error, in Light of Its Prior Ruling on Motions In Limine and Its Exclusion of Lifestyle Evidence.

Under the unique facts and rulings of this case, the trial judge did abuse his discretion in belatedly adding “guidance” to Jury Instruction No. 11 when he had affirmatively omitted that element of wrongful death damages from his motion in limine ruling. CP 677; RP 1339-41, RP 1355; CP 677; CP 3214; RP 1339-1341. “Guidance” is an element included in a pattern jury instruction, but it is not required by statute. RCW 4.20.020 states that “the jury may give such damages as, under all circumstances of the case, may to them seem just.” The trial court’s internal inconsistency in its rulings and instructions amounted to an abuse of discretion in this case.

CONCLUSION

The trial court erred in granting summary judgment that Ta’riyah qualified as a statutory wrongful death beneficiary as a matter of law. This was an erroneous interpretation of RCW 4.20.020, and it included an

improper application of full faith and credit. This Court should reverse and remand for entry of summary judgment on that issue in favor of Munchbar. Absent ordering summary judgment in favor of Munchbar, the issue of whether Ta'riyah was DeShawn's "child" must be submitted to the jury based on all the evidence.

In any event, the trial court improperly applied ER 403 and ER 404 to preclude Munchbar from submitting highly relevant evidence, and improperly allowed plaintiffs to submit inflammatory character evidence against Munchbar in violation of ER 404, for no proper purpose. The trial court errors prevented Munchbar from being able to present its case and created an environment that allowed improper remarks in rebuttal closing argument.

DATED this 24th day of March, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

I hereby certify that on March 24 , 2016, I caused to be served a true and correct copy of the foregoing Appellant's Reply Brief on the following named person(s) via E-mail:

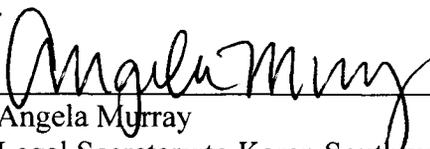
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