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No. 35125-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KAELA D. ATCHISON,

Appellant,

v.

GREAT WESTERN MALTING COMPANY,

Respondent

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DIVISION II
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STATE OF WASHINGTON
BY _____ DEPUTY

BRIEF OF RESPONDENT

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I. INTRODUCTION

Plaintiff/Appellant Kaela Atchison ("Plaintiff") appeals the judgment of the trial court, which dismissed with prejudice a claim by Plaintiff, as personal representative of the Estate of William Arthur Atchison ("Decedent"), against Defendant/Respondent Great Western Malting Company ("Great Western"). Plaintiff's claim alleged that Decedent's exposure to pesticides during his employment with Great Western caused a disease which resulted in his death.

There are several independent grounds for affirming the trial court's judgment of dismissal. Initially, as the trial court correctly held, Plaintiff's claim was time-barred because the applicable limitations period expired long before Plaintiff's complaint was filed.

Moreover, even if Plaintiff's claim had been timely filed it would fail as a matter of law based on two additional defenses. First, in a final, unappealed order, the Department of Labor and Industries ruled that Decedent's alleged condition was not caused by his alleged exposure to pesticides. Under Washington law, this order precludes Plaintiff from relitigating the causation issue before any court. Second, Decedent's alleged disease would be an occupational disease as to which Washington's worker's compensation statute provides the exclusive remedy. Accordingly, Plaintiff's civil claim is barred.

II. STATEMENT OF ISSUES ON REVIEW

1. Is the statute of limitations for a wrongful death claim retroactively tolled by the appointment of a personal representative who was disabled while the statute ran?

2. If this Court rules for the Plaintiff in the first issue on review, this Court should consider two additional reasons for affirming Great Western's motion to dismiss. Does the Department of Labor and Industries' final, unappealed order holding that the Decedent's alleged exposure to pesticides did not cause his alleged condition preclude Plaintiff from relitigating the causation issue?

3. Was Decedent's alleged condition an occupational disease as to which Washington's worker's compensation statute provides the exclusive remedy, thus precluding Plaintiff's civil claim?

III. STATEMENT OF THE CASE

A. Factual Background¹

Between 1978 and 1999, Decedent was employed by Great Western. (CP 5.) According to Plaintiff's complaint, Decedent, in his

¹ The following facts are taken from the allegations in the complaint and documents in the record. Before the trial court, Great Western requested that, pursuant to CR 12(b), its motion be treated as one for summary judgment to the extent the court's resolution of the motion required consideration of matter outside of the pleadings. (CP 11.) Because Great Western presented these materials along with its original moving papers and made its request at the same time, Plaintiff had ample time and opportunity to present any materials that Plaintiff considered relevant to such a motion. *See* CR 12(b). Great Western respectfully restates its request before this Court.

capacity as a Great Western employee, received occupational exposure to pesticides. *Id.* Decedent contracted Stage IIA Diffuse Large Cell Lymphoma, allegedly as a result of this exposure. *Id.* On June 29, 2000, Decedent died, allegedly as a result of this disease. *Id.*

B. Proceedings Before the Department of Labor and Industries

Prior to his death, Decedent had attempted to obtain worker's compensation benefits based on his alleged occupational exposure to pesticides while employed at Great Western.² (CP 22.) The proceedings before the Department of Labor and Industries culminated in an April 13, 2001, Department order rejecting Decedent's claim for benefits. *Id.* One of the Department's express findings was that Decedent's "condition [was] not the result of the exposure alleged." *Id.* Decedent did not appeal this final order.

C. The Present Action

On November 9, 2005, Plaintiff was appointed personal representative of Decedent's estate. (CP 34.) Plaintiff, in this capacity, brought a wrongful death action against Great Western under RCW

² "Self-Insurer Accident Report" dated Dec. 2, 1999 (including Decedent's description of the "nature of [his] injury or disease" as "No[n] Hodgkins Lymphoma (Lg Cell)," and explaining: "I applied pesticides for 21 years (Ficam) (Old BP-100) (Phostoxin)[.] I was exposed daily from cleanup of dust heavily laden with pesticides."). (Gidley Dec. Ex. 2, Supp. CP). All references to "Gidley Dec." refer to the Declaration of James H. Gidley In Support of Defendant's Motion to Dismiss for Failure to State a Claim. The Clerk's Papers will be supplemented by the Clerk to include the "Gidley Dec." pursuant to Respondent's Designation of Clerk's Papers filed December 22, 2006.

4.20.010. (CP 4.) Plaintiff alleged that Decedent was exposed to pesticides applied to grain in his capacity as an employee of Great Western, that Great Western's negligence proximately caused Decedent's exposure, and that Decedent's exposure caused him to contract Stage IIA Diffuse Large Cell Lymphoma, resulting in his death on June 29, 2000. (CP 5.) Plaintiff filed her Complaint on February 9, 2006. (CP 6.)

On March 29, 2006, Great Western moved to dismiss Plaintiff's claim, arguing that: (1) Plaintiff's civil claim was precluded by Washington's worker's compensation statute; (CP 10-11.), (2) Plaintiff's claim was barred due to the lack of any appeal from the Department's order denying Decedent's claim for benefits, (CP 11-12.); and (3) Plaintiff's claim was barred by the statute of limitations. (CP 12-14.) The trial court denied Great Western's motion on the first two grounds, but granted it on the third. (CP 30.)

IV. SUMMARY OF ARGUMENT

A. The Trial Court Correctly Concluded that Plaintiff's Claim Was Time-Barred.

The trial court held that Plaintiff's claim was time-barred, and this holding was correct as a matter of well-settled Washington law. The wrongful death claim alleged by Plaintiff was governed by a three-year limitations period that began and ended long before the complaint in this action was filed.

Plaintiff attempts to revive her claim by invoking the tolling statute, on the theory that the *post-expiration* appointment of a personal representative who was disabled while the statute of limitations ran *retroactively* tolls the statute. This argument is without legal support and contradicts the express language of the tolling statute. Accordingly, the trial court's judgment of dismissal should be affirmed.

B. The Trial Court's Judgment Should Also Be Affirmed Based on Either of Great Western's Two Other Defenses.

Great Western has established two additional defenses on which the trial court's judgment of dismissal should be affirmed. First, the Department of Labor and Industries issued a final order concluding that Decedent's alleged condition was not the result of his alleged pesticide exposure. This order was never appealed. As a matter of Washington law, the Department's express finding has preclusive effect, barring Plaintiff from establishing the causation element of her wrongful death claim.

Furthermore, assuming the truth of Plaintiff's allegations, Decedent's alleged condition was an occupational disease under Washington law. Accordingly, Washington's worker's compensation act provides the exclusive remedy in connection with that alleged condition, and Plaintiff's civil claim is precluded as a matter of law.

V. ARGUMENT

A. Standard of Review on a 12(b)(6) Motion to Dismiss

This Court reviews *de novo* the trial court's ruling on a 12(b)(6) motion to dismiss for failure to state a claim. *Dana v. Boren*, 133 Wn. App. 307, 310, 135 P.3d 963 (2006). While the allegations in the plaintiff's complaint must be taken as true, dismissal is proper "where it is clear from the complaint that the allegations set forth do not support a claim." *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977).

To the extent this Court treats any part of Great Western's motion as a motion for summary judgment, *see supra* n.1, review is also *de novo*, *see, e.g., Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), and the standard is whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c).

B. The Trial Court Correctly Held that the Statute of Limitations Barred Plaintiff's Claim.

The trial court held that the running of the three-year statute of limitations set forth in RCW 4.16.080(2) barred the Plaintiff's claim. This holding was correct as a matter of clear Washington law and should be affirmed.

1. Plaintiff's Claim Is Governed by a Three-Year Limitations Period Which Began Running on the Date of Decedent's Death.

Plaintiff's wrongful death claim is governed by the three-year statute of limitations set forth in RCW 4.16.080(2). *See, e.g., Beal v. City of Seattle*, 134 Wn.2d 769, 776, 954 P.2d 237 (1993) (*en banc*).

A long and unbroken line of Washington authority has held that, absent facts justifying application of the "discovery rule" (which Plaintiff has never contended applies to this case, *see infra* note 3), the limitations period for a wrongful death claim begins to run on the date of the decedent's death, *not* on the date a personal representative is appointed. *See, e.g., Dodson v. Cont'l Can Co.*, 159 Wn. 589, 294 P. 265 (1930) (holding that the statute of limitations for a wrongful death claim begins running on the date of death, and rejecting the plaintiff's argument that the statute does not begin running until a personal representative is appointed); *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 580, 44 P.2d 193 (1935) ("In accord with the great weight of authority, this court has held that the [wrongful death] action accrues at the time of death, and that the statute of limitations then begins to run."); *Beal*, 134 Wn.2d at 776. ("The complaint in the action was filed three years to the day after [the decedent's] death, the last day of the three year statute of limitations period."); *Wills v. Kirkpatrick*, 56 Wn. App. 757, 760, 785 P.2d 834

(1990) ("The three-year provision of RCW 4.16.080(2), measured from the date of death, has been applied to wrongful death claims"); *Nelson v. Schubert*, 98 Wn. App. 754, 761 n.11, 994 P.2d 225 (2000) ("The [*Dodson*] court barred the plaintiff's wrongful death claim on the basis that the limitations period started to run on the date of the decedent's death rather than the date the personal representative was appointed."); *cf. Reading Co. v. Koons*, 271 U.S. 58, 64 (1926), *quoted in Dodson*, 159 Wn. at 596:

Every practical consideration which would lead to the imposition of any period of limitation, would require that the period should begin to run from the definitely ascertained time of death rather than the uncertain time of the appointment of an administrator. . . . No reason appears, if the opinion of the court below [which had held that the statute begins to run when the personal representative is appointed] is followed, why the time might not have been extended indefinitely by the failure to apply for administration.

Before the trial court, Plaintiff did not dispute, and in fact expressly agreed, that a wrongful death claim accrues on the date of the decedent's death. Plaintiff's sole argument with respect to timeliness addressed not the accrual date of the claim, but the analytically distinct issue of whether the statute was *tolled* during any part of the relevant period. (CP 21.) ("RCW 4.16.080(2) requires that wrongful death actions

must be commenced *within 3 years of the date of death*, however, such commencement is tolled pursuant to RCW 4.16.190" (emphasis added). Moreover, Plaintiff's Statement of Issues before this Court refers solely to Plaintiff's tolling argument. *See* Appellant's Br. at 1.

In her brief, however, Plaintiff states that "it is argued that the action did not accrue on June 29, 2000." *Id.* at 7. Plaintiff's sole basis for this argument consists of an attempt to factually distinguish *Dodson*, one of the many Washington cases clearly stating that a wrongful death claim accrues on the date of the decedent's death. *Id.*

Great Western respectfully submits that because Plaintiff did not raise the issue of accrual date below (and in fact expressly conceded the point she now disputes), this Court should not consider that aspect of Plaintiff's argument. *See, e.g., State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) ("Arguments not raised in the trial court generally will not be considered on appeal.").

In any event, Plaintiff's argument must be rejected on its merits. Regardless of whether it can be factually distinguished from the present case, *Dodson* is only one of many Washington cases unequivocally stating that the limitations period for a wrongful death action begins to run on the date of death. Furthermore, to the extent that Plaintiff is attempting to argue that the limitations period should have been tolled after Decedent's

death because Plaintiff, the beneficiary, was a minor, the Washington Supreme Court has explicitly rejected that argument. *See Huntington v. Samaritan Hosp.*, 101 Wn.2d 466, 469, 680 P.2d 58 (1984). ("[T]he statute of limitations [for a wrongful death action] is not tolled by the minority of the statutory beneficiaries.").

Accordingly, as a matter of clear Washington law, the present wrongful death claim accrued on June 29, 2000, the day Decedent died.³ It expired three years later, on June 29, 2003. Because Plaintiff did not bring the claim until February 10, 2006, the trial court correctly held the claim time-barred.

2. The Tolling Statute Does Not Apply to Plaintiff's Claim.

Plaintiff attempts to invoke Washington's tolling statute to avoid the effect of the clear authority discussed above. According to Plaintiff, her appointment as personal representative in November of 2005—*after* the limitations period for the wrongful death claim had begun and ended—

³ Plaintiff has not argued, before either the trial court or this Court, that Washington's "discovery rule" operates to delay the accrual date of her claim. Nor could Plaintiff plausibly make such an argument. The alleged basis for a claim against Great Western was repeatedly and publicly stated long before Decedent's death. *See, e.g., supra* note 2 (describing Decedent's December 1999 allegations regarding his condition); (Gidley Dec. Ex. 3, Supp. CP) (document dated November 23, 1999 containing similar allegations).

retroactively tolled the statute during the period in which Plaintiff had been "disabled" (i.e., underage).⁴

Plaintiff's "retroactive tolling" argument—which is unsupported by any authority from Washington or any other jurisdiction—contradicts the unambiguous line of authority discussed above. Moreover, it radically distorts Washington's tolling statute. Normally understood as a limited exception to a general rule, that statute under Plaintiff's proposed construction becomes a procedural weapon that effectively nullifies the statute of limitations as applied to wrongful death actions.

a. Appointing a Personal Representative Who Was "Disabled" in the Past Does Not Retroactively Toll the Statute.

One obvious flaw in Plaintiff's argument is that the tolling statute is expressly phrased *in the present tense* to protect a person who is "entitled to bring an action . . . at the time the cause of action accrue[s]." RCW 4.16.190(1). If such a person is disabled at that time, the tolling statute delays the onset of the limitations period until that disability is removed. *Id.*

As discussed above, the wrongful death claim at issue here accrued on June 29, 2000. At that time, Plaintiff was not a "person entitled to

⁴ For convenience, Great Western will follow Plaintiff's usage and use the term "disabled" to refer generally to any condition covered in RCW 4.16.190, including minority.

bring [that] action." "[O]nly the personal representative may bring a wrongful death action," *Huntington*, 101 Wn.2d at 4692, and Plaintiff had not been appointed personal representative at that time. Accordingly, the tolling statute is simply inapplicable to this case.⁵

b. Accepting Plaintiff's Argument Would Lead to Absurd Results.

Plaintiff has offered absolutely no legal support for her argument that the appointment of a previously disabled personal representative retroactively tolls the statute of limitations. Moreover, the ridiculous results that would follow from Plaintiff's proposed rule demonstrate that the legislature could not possibly have intended the tolling statute to operate in such a manner.

Plaintiff's rule would enable an untimely wrongful death claimant to avoid the effect of the statute of limitations simply by finding a person who was underage at the time of the decedent's death. As Judge Bennett correctly observed in granting Great Western's motion: "[A] clever strategy by a clever attorney would be to pick somebody—if the statute is

⁵ Plaintiff's brief is phrased in language that blends together the time periods before and after her appointment as personal representative, which tends to obscure the fact that Plaintiff did *not* occupy that capacity at the time she was "disabled." *See, e.g.*, Appellant's Br. at 6 ("In the present case, the personal representative was fifteen at the time of her father's death."); *id.* at 7 ("The personal representative, being a minor and consequently disabled, was unable to bring the action until the disability was lifted"). In fact, there was never a point at which the "personal representative" was "disabled"—Plaintiff was not appointed personal representative until November 9, 2005, when she was twenty years old.

already run, pick someone to be PR [personal representative] who was a minor at the time the statute ran, and I can't imagine the law envisions that" (Appellant's Br. at 2.)

Furthermore, while the personal representative in this case happens to be the decedent's daughter, a wrongful death plaintiff seeking to exploit Plaintiff's proposed rule by finding a "claim-reviving" personal representative would not be limited to the decedent's family members. Washington's probate statute allows the appointment of *any* person as personal representative of an estate. *See* RCW 11.28.120(7). Accordingly, if no family member met the age criteria, the plaintiff could find *any* person who was between zero and 18 years old when the decedent died but is presently less than 21.

Nor does the absurdity end there. The disability definition in the tolling statute is not limited to age, but encompasses mental incompetence as well. *See* RCW 4.16.190(1). Suppose, for example, that John Doe becomes mentally incompetent on January 1, 2007. Jane Roe (unrelated to, and unknown by, Mr. Doe) dies the next day, January 2. Fifty years later, Mr. Doe's treatment finally rehabilitates him from his mental disability. Under Plaintiff's proposed rule, Mr. Doe could be appointed personal representative of Ms. Roe's estate and could prosecute a fifty-year-old wrongful death claim for the benefit of Ms. Roe's statutory

beneficiaries, because once Mr. Doe is appointed, the statute is retroactively tolled throughout the entire period in which he was disabled.⁶

These hypothetical examples demonstrate the illogic of allowing a plaintiff to retroactively toll a limitations period by appointing a personal representative who was disabled while the statute ran, even if the language of the tolling statute permitted such a result—which, as discussed above, it is not.

c. *Huntington v. Samaritan Hospital* Does Not Support Plaintiff's Position.

Plaintiff relies on *Huntington v. Samaritan Hospital*, 101 Wn.2d 466, 469, 680 P.2d 58 (1984), for the proposition that the tolling statute applies to a wrongful death claim when the personal representative is subject to a disability. (Appellant's Br. at 6.) Even if that is generally correct, *Huntington* offers no support for Plaintiff's novel "retroactive tolling" argument.

As an initial matter, the applicability of the tolling statute to a "disabled" personal representative was not part of *Huntington's* holding, as

⁶ Prior to 1993, it would have been even easier to find a suitable personal representative to exploit Plaintiff's "retroactive tolling" rule. The tolling statute used to cover all periods of incarceration for criminal offenses. West's RCWA 4.16.190. An enterprising attorney, therefore, could have simply found someone who had been incarcerated on the day the decedent died, and appointed that person as personal representative of the decedent's estate. In 1993, the statute was amended to apply only to pre-sentence imprisonment, but for several decades the full-sentence tolling provision coexisted with the three-years-from-death limitations period applicable to wrongful death actions. See 1993 Wash. Legis. Serv. Ch. 232 (H.B. 1025) (WEST). It is difficult to imagine any legislature intending that a tolling statute could be used in such a manner.

that issue was not before the Court. The question in that case was whether the statute of limitations for a wrongful death claim is tolled during the minority of the *beneficiary*. The Court held that it is not, because the tolling statute by its terms only applies where the "person entitled to bring the action" is disabled. *See* 101 Wn.2d at 469. Because in a wrongful death action that person is not the beneficiary but the personal representative, the Court held that a beneficiary's disability does not toll the statute. *See id.* Because of the nature of the question before the Court, the language cited by Plaintiff is properly read as meaning that the tolling statute applies, *if at all*, where the personal representative (as opposed to the beneficiary) is disabled.

Regardless, the Court's dicta regarding tolling due to a personal representative's disability supports Great Western's position, and offers absolutely no support for Plaintiff's "retroactive tolling" theory. A personal representative's disability would only toll the statute if the timing of that disability satisfied the statutory requirements—in other words, if the personal representative was disabled at a time when she was a "person entitled to bring [the] action." RCW 4.16.190(1).

Such is not the case here. The wrongful death claim alleged by Plaintiff accrued on June 29, 2000. Plaintiff was not "a person entitled to bring [the wrongful death] action" at that time. Accordingly, her disability

at that time or any other time is simply irrelevant. The Court in *Huntington* certainly never implied that an expired claim can be revived by the appointment of a *previously* disabled person as personal representative after the statute has run.⁷

d. Summary

Plaintiff's wrongful death claim was governed by a three-year statute of limitations that began running on the date of Decedent's death and expired more than two years before Plaintiff filed her claim. The statute was not tolled during any part of that period; Plaintiff's proposed "retroactive tolling" rule is legally unsupported and logically unsound. The trial court correctly granted Great Western's motion to dismiss Plaintiff's claim as time-barred, and that court's judgment should be affirmed.

C. The Trial Court's Judgment Should Also Be Upheld Based on Either of Great Western's Two Other Defenses.

Because the trial court correctly granted Great Western's motion to dismiss based on the statute of limitations, the judgment of dismissal should be upheld on that basis. If this Court rejects the trial court's ruling

⁷ Occasionally, a wrongful death complaint is filed within the limitations period, but by a person who is not a properly appointed personal representative at the time of filing. If that person is then appointed as personal representative after the statute has run, a Washington court may allow that amendment to relate back so that the claim is treated as timely. *See, e.g., Beal*, 134 Wn.2d at 773-84. That approach is not available in this case, however, because nobody filed a complaint within the limitations period.

that the statute of limitations bars Plaintiff's claim, this Court should affirm the judgment of dismissal based on either of Great Western's other two defenses—(1) that the Department of Labor and Industries' final, unappealed order, which stated that Decedent's alleged exposure to pesticides did not cause his alleged condition, bars Plaintiff from relitigating the causation issue; and (2) that Washington's worker's compensation regime provides the exclusive remedy for Decedent's alleged disease. *See, e.g., LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989) ("[A]n appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof"); *Champagne v. Thurston County*, 134 Wash.App. 515, 520, 141 P.3d 72 (2006) ("we can affirm a trial court on any alternative basis supported by the record and pleadings[.]") (citing *Harberd v. City of Kettle Falls*, 120 Wash.App. 498, 508, 84 P.3d 1241, *review denied*, 152 Wash.2d 1025, 101 P.3d 421 (2004)).

1. Plaintiff's Claim Is Barred by the *Res Judicata* Effect of the Department's Unappealed Final Order.

"An unappealed Department order is *res judicata* as to the issues encompassed within the terms of the order, absent fraud in the entry of the order" *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997) (emphasis added); *see also id.* at 170 (under RCW

51.52.050 and .060, a Department order becomes final if no appeal is filed within 60 days).

As discussed *supra* in Part III B, Decedent had filed a claim for worker's compensation benefits based on the same condition that, as alleged by Plaintiff in the present action, caused Decedent's death. On April 13, 2001 the Department issued an Order and Notice denying Decedent's claim. (CP at 22.) One of the issues explicitly "encompassed within the terms of the [Department's] order," *Kingery*, 132 Wn.2d at 169, was whether Decedent's alleged exposure to pesticides had caused his disease. The Department determined that it had not. (CP at 22 ("The claimant's condition is not the result of the exposure alleged.")). The Department's Order and Notice was never appealed.

Under *Kingsley*, the Department's final, unappealed order conclusively establishes that Decedent's alleged disease was *not* caused by his alleged exposure to pesticides while employed by Great Western.⁸ Plaintiff, therefore, cannot prove an essential element of her claim.

⁸ Plaintiff, as personal representative of Decedent's estate, is bound by the preclusive effect of the Department's order to the same extent that Decedent himself would have been. The doctrine of issue preclusion applies to those in privity with the parties to the prior proceeding. *See, e.g., Christensen v. Grant Country Hosp. Dist. No. 1*, 152 Wash.2d 299, 307, 96 P.3d 957 (2004). The relationship between personal representative and decedent is the quintessential privity relationship. *See, e.g., RCW 11.28.010.*

Accordingly, the *res judicata* effect of the Department's order provides an independent basis for affirming the trial court's judgment of dismissal.

2. The Worker's Compensation Regime Precludes Plaintiff's Claim

Finally, Great Western's third defense is that Washington's worker's compensation regime provides the exclusive remedy for the occupational disease alleged in Plaintiff's complaint.

a. The Remedies Provided by the Worker's Compensation Act Are Exclusive and Preclude Plaintiff's Civil Claim.

"The workers' compensation act provides the exclusive remedy for workers injured during the course of their employment; all remedies outside of the act were abolished except as provided for in RCW Title 51." *Wash. Ins. Guar. Ass'n v. Dep't of Labor & Indus.*, 122 Wn.2d 527, 530, 859 P.2d 592 (1993) (*en banc*). "The exclusive remedy provision is sweeping, comprehensive, and of the broadest, most encompassing nature." *Cena v. State*, 121 Wn. App. 352, 356, 88 P.3d 432 (2004), *rev. denied*, 153 Wn.2d 1009, 111 P.3d 1190 (2005). "Although the statutes refer only to injuries, the exclusive remedy provisions apply to occupational diseases as well." *Goyne v. Quincy-Columbia Basin Irrigation Dist.*, 80 Wn. App. 676, 681-82, 910 P.2d 1321 (1996). This exclusivity applies to wrongful death claims. *See* RCW 51.32.010:

Each worker injured in the course of his or her employment, *or his or her family or dependents in case of death of the worker*, shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payment shall be *in lieu of any and all rights of action whatsoever against any person whomsoever* . . . (Emphasis added.)

Plaintiff alleges that Decedent "worked as . . . an Elevator Utility worker at Great Western Malting . . . *in which capacity* he received *occupational exposure* to pesticides," which caused Decedent to contract cancer. (CP 5.) (emphasis added). Plaintiff alleges that Decedent's condition was "proximately caused by the negligent acts of [Great Western]." *Id.*

Plaintiff's claim is precisely the type precluded by the exclusivity provisions of Washington's worker's compensation statute, and Title 51 contains no exception that would save her claim. Accordingly, Great Western's third defense provides another basis on which the trial court's judgment of dismissal should be affirmed.

b. According to Plaintiff's Allegations, Decedent's Alleged Condition Arose Naturally and Proximately out of His Employment.

Before the trial court, Plaintiff argued that her claim was not barred because Decedent's alleged condition was not an "occupational disease." RCW 51.08.140 defines an "occupational disease" as a "disease or

infection [that] arises naturally and proximately out of employment."

Plaintiff agreed that the "proximately" requirement was met, but argued that the "naturally" requirement was not. (CP 19.)

In making this argument, Plaintiff relied on a precedent that has been explicitly overruled by the Washington Supreme Court. *Id.* ("In *Department of Labor & Industries v. Kinville*, 35 Wn. App. 80, 664 P.2d 1311 (1983), the court said that naturally means that a disease must be 'peculiar to, or inherent in, his particular occupation.'"); *cf. Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 478, 745 P.2d 1295 (1987) ("We do not, however, agree with the 'peculiar to, or inherent in' construction used in *Kinville*.").

The proper test for the "naturally" element under Washington law was set forth in detail in *Dennis*:

We hold that[, to satisfy the "naturally" requirement,] a worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her particular employment. The conditions need not be peculiar to, nor unique to, the worker's particular employment. Moreover, the focus is upon conditions giving rise to the occupational disease, or the disease-based disability resulting from work-related aggravation of a nonwork-related disease, and not upon whether the disease itself is common to that particular employment. The

worker, in attempting to satisfy the "naturally" requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general; the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment. Finally, the conditions causing the disease or disease-based disability must be conditions of *employment*, that is, conditions of the worker's particular occupation as opposed to conditions coincidentally occurring in his or her workplace.

109 Wn.2d at 481.

If the allegations in Plaintiff's complaint are true, Decedent's alleged condition is clearly an "occupational disease." Plaintiff alleges that Decedent, in his "capacity" as an "Elevator Utility worker at [Great Western]," "received occupational exposure to pesticides . . . which resulted in [Decedent's alleged condition]." (CP 5.) Plaintiff further alleges that this condition:

was proximately caused by the negligent acts of [Great Western] in failing to provide adequate protective equipment for the application of pesticides, failing to provide adequate ventilation of the premises during the application of the pesticides, using undiluted chemicals, and exposing [D]ecedent to pesticide residue throughout the plant from years of past application.

Id.

If Plaintiff's allegations are true, Decedent's disease satisfies the *Dennis* test. If Decedent's alleged condition was in fact caused by his occupational exposure to pesticides—a "distinctive condition[] of [Decedent's] particular employment"—then his "particular work conditions more probably caused his . . . disease . . . than conditions in everyday life or all employments in general." *Dennis*, 109 Wn.2d at 481. And given Plaintiff's description of the manner in which Decedent was allegedly exposed to pesticides, that alleged exposure would clearly be a "condition[] of *employment* . . . as opposed to [a] condition[] coincidentally occurring in [Decedent's] workplace." *Id.*

Accordingly, if Plaintiff's allegations were true, Decedent's condition would be an "occupational disease" under RCW 51.08.140. The worker's compensation statute would therefore provide the exclusive remedy in connection with Decedent's alleged condition, and Plaintiff's civil claim would be barred.

c. The Department's Order Cannot Save Plaintiff's Claim.

Before the trial court, Plaintiff attempted to preserve her claim by pointing to the Department's finding that Decedent's alleged condition was "not an occupational disease." (CP at 22); (CP 26-27.) This finding, however, cannot ultimately save Plaintiff's claim, because it rests on a

premise—the preclusive nature of the Department's findings—that would defeat Plaintiff's claim under Great Western's *res judicata* defense, discussed *supra* in Part V C(1).

If this Court concludes that the Department's findings have preclusive effect with respect to Plaintiff's claim, then Plaintiff is bound by the Department's finding that Decedent's alleged pesticide exposure did not cause his alleged condition. However, if this Court concludes that the Department's findings are *not* preclusive on that issue—the only conclusion that would require this Court to even consider Great Western's third defense—then neither are they preclusive on the "occupational disease" issue, and this Court must decide that issue on the underlying allegations. As discussed above, the condition described by Plaintiff's allegations is unquestionably an "occupational disease" under Washington law. Accordingly, Plaintiff's claim is barred either way.

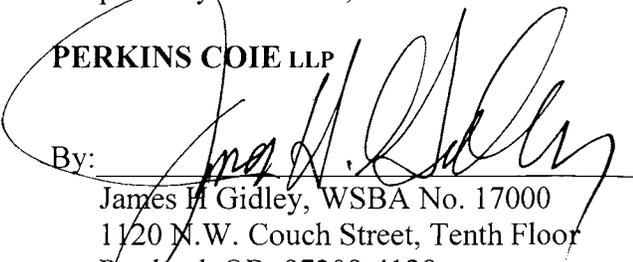
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VI. CONCLUSION

For the reasons discussed above, this Court should affirm the trial court's judgment dismissing Plaintiff's claim.

DATED: December 21, 2006 Respectfully submitted,

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STATE OF WASHINGTON
BY 
DEPUTY

CERTIFICATE OF SERVICE

I certify that on December 21, 2006, I served the foregoing **BRIEF OF RESPONDENT** on:

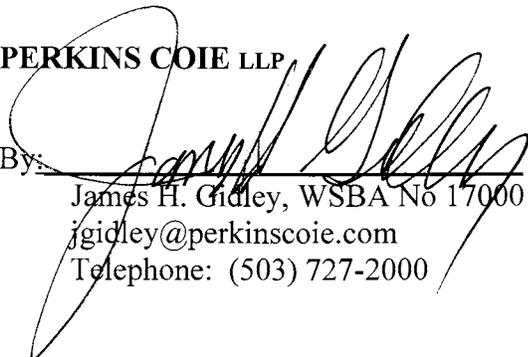
Lawrence S. Merrifield, Jr.
Boyd, Gaffney, Sowards, McCray
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by causing a full, true, and correct copy thereof to be sent by the following methods on the date set forth below:

- by **mailing** in a sealed, first-class postage-prepaid envelope and deposited with the United States Postal Service at Portland, Oregon to all parties.
- by **email**.
- by **overnight courier**.

DATED: December 21, 2006.

PERKINS COIE LLP

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