

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

10 JAN -8 PM 4: 26

SUPREME COURT NO. 82474-6 BY RONALD R. CARPENTER

CLERK *R/h*

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GEORGE KELLEY, as guardian for BB, PB, and NB, minor
children

Plaintiffs/Respondents,

v.

CENTENNIAL CONTRACTORS ENTERPRISES, INC.

Defendant/Petitioner.

PETITIONER'S ANSWER TO SUPPLEMENTAL BRIEFING OF
AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR
JUSTICE FOUNDATION

William W. Spencer, WSBA #9592
Daira S. Faltens, WSBA #27469
Of Attorneys for Respondents
MURRAY, DUNHAM & MURRAY
200 West Thomas, Ste. 350
Post Office Box 9844
Seattle, Washington 98109-0844
Phone: (206) 622-2655
Fax: (206) 684-6924

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

I. INTRODUCTION.....1

II. STATEMENT OF CASE.....3

III. ISSUE PRESENTED.....4

IV. ARGUMENT.....4

A. THE RECORD DOES NOT SUPPORT THE ARGUMENT IT WAS NOT FEASIBLE FOR THE MINORS TO HAVE A GUARDIAN AD LITEM APPOINTED DURING THEIR PARENTS' LAWSUIT.....4

B. WSAJF'S ARGUMENTS MERELY SERVE TO ENCOURAGE MULTIPLICITY OF LAWSUITS, WHICH IS AGAINST PUBLIC POLICY.....7

V. CONCLUSION.....10

CERTIFICATE OF SERVICE.....11

TABLE OF AUTHORITIES

STATE CASES

Belcher v. Goins, 184 W.Va. 395, 400 S.E.2d 830(1990).....8

Coleman v Sandoz Pharm. Corp., 74 Ohio.St.3d 492, 394-94, 660 N.E.2d 424 (1996).....8

Hay v. Med. Ctr. Hosp. of Vt., 145 Vt. 533, 496 A.2d 939 (1985).....8

Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (1987).....8

Huggins by Huggins, 710 F.Supp. 243, 250-51 (1989).....8

Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171 (1990).....8

Theama by Bichler v. City of Kenosha, 117 Wis.2d 508, 344 N.W.2d 513 (1984).....8

Ueland v. Reynolds Co., 103 Wn.2d 131, 691 P.2d (1984).....1,2,4,7,8,9

Villareal v. State, Dept. of Transp., 160 Ariz. 474, 774 P.2d 213 (1989).....8

OTHER AUTHORITIES

26 Washington Practice §4.25 (2005).....5

I. INTRODUCTION

The State of Washington is very progressive with respect to children's rights. Washington is one (1) of only fourteen (14) states that allow a child to bring a claim for the loss of consortium of a parent who is injured. Therefore, if a child's rights have been violated, they have a remedy to bring a lawsuit against a third party for the injury caused to them.

This is a decision that was decided by the Supreme Court of the State of Washington in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984).¹ As the highest court in Washington, the Supreme Court took great care in thinking about the interests of children. In balancing the public policy concerns of multiplicity of lawsuits, but still providing a loss of consortium claim for children, the Supreme Court in *Ueland* found a middle ground by holding the minor must join their claim with their parents if feasible.

The minor Respondents' (hereinafter "Respondents") rights in this case have not been ignored. In reality, this is a case where Respondents' parents had representation in their underlying lawsuit through the same attorney they have now. Respondents also had adult parents looking out for their best interests; there is no evidence to the contrary. It was feasible to join the minors' claims in their

¹ The official State Report Title for this case is *Ueland v. Pengo Hydra-Pull Corporation*. However, the parties and the courts have previously referred to this case as *Ueland v. Reynolds Metals Co.* Petitioner chose to continue to use the more familiar title of the case for the sake of continuity.

parents' lawsuit from the beginning, since their father had already been hurt seriously enough prior to commencing litigation that he was no longer able to work and had had one major surgery (two more soon after litigation commenced). However, a tactical decision was made by the minors' parents, on advice of their attorney, not to obtain a guardian ad litem and join the minors' claims with their parents. Petitioner Centennial Contractors Enterprises, Inc. (hereinafter "Petitioner") should not be forced to relitigate and retry a case on the same issues, because of a decision made by the minors' parents and counsel not to join their claims together in the underlying lawsuit. The minor Respondents' remedy is against their attorney and not the Petitioners in this case, since Respondents failed to meet their burden of proving why it was not feasible to join in their parents' lawsuit.

Supplemental briefing by the Washington State Association for Justice Foundation (hereinafter "WSAJF") serves to encourage multiplicity of lawsuits, which is against public policy and the decision by this Supreme Court in the case of *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984). In *Ueland*, the Supreme Court held that a minor must join their claims with their parents "if feasible." The Supreme Court stated public policy behind the *Ueland* decision was to avoid a multiplicity of lawsuits. WSAJF, as well as the Court of Appeals, ignores the public policy outlined in *Ueland*. Multiplicity of lawsuits is a huge burden on the

court system and tremendously increases the cost of litigation. This must be avoided.

II. STATEMENT OF THE CASE

Respondents in the present case are represented by the same attorney that represented their parents in the original lawsuit. CP 19.

In his suit against Centennial, Respondents' father, Phillip Blackshear, claimed injuries to his right knee, right ankle, right foot, low back and right shoulder. CP 6. He was immediately out of work after the accident and throughout the litigation of the parents' claims. CP 55. Early on in his treatment, Mr. Blackshear had right shoulder surgery on October 7, 2003 by John Casey, MD, Orthopaedic Surgeon, prior to even filing the original lawsuit in March 2004. CP 6-7. After filing the original lawsuit, he had right carpal tunnel surgery on November 22, 2004 with Dr. Casey. CP 7. Mr. Blackshear also underwent back surgery with Benjamin Remington, MD, Neurosurgeon, on February 10, 2005 and September 8, 2005. CP 7.

Respondents filed their own lawsuit on April 6, 2006 and filed an Amended Complaint on April 16, 2006. CP 19-25. The Respondents' parents filed a petition to appoint them a guardian ad litem on May 3, 2006, which is approximately one month after the minor children's lawsuit was filed. CP 97-99.

In their lawsuit at the Superior Court level, the minor Respondents listed essentially the same expert witnesses as were

listed in their parents' lawsuit. CP 27, 35. It is also anticipated that the same documentary evidence would be presented at the minor Respondents' trial that was presented at their parents' trial. CP 8. In addition, the minor Respondents only claim general damages and do not plan on presenting any evidence of special damages. CP 44. However, the same medical causation issues would have to be relitigated and retried in the children's lawsuit at considerable expense if their case is allowed to proceed. CP 8.

III. ISSUE PRESENTED

Whether Respondents met their burden of proving it was not feasible to join in their parents underlying lawsuit based on the record according to *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984).

IV. ARGUMENT

A. THE RECORD DOES NOT SUPPORT THE ARGUMENT IT WAS NOT FEASIBLE FOR THE MINORS TO HAVE A GUARDIAN AD LITEM APPOINTED DURING THEIR PARENTS' LAWSUIT.

Nowhere in the record from the Superior Court did the Blackshear children argue or put forth admissible evidence that it was not feasible to obtain a guardian ad litem.

The Declaration of Phillip Blackshear, which was the only evidence presented in response to Plaintiffs' motion to dismiss at the trial court level, does not explain why joinder was not feasible or

why it was not feasible to obtain a guardian ad litem. No other admissible evidence has been presented by the Blackshear children.

Before making a decision to file a guardianship petition, an attorney has an obligation to discuss with the client the reasons why such action may or may not be appropriate, and whether any less restrictive approaches have been or should be considered. 26 Washington Practice Sec. 4.25 (2005). Clients often do not understand the precise nature of guardianships, the purposes of the guardianship statutes, and specific requirements of the law. *Id.*

In this case, Respondents' parents had the responsibility of filing a petition for a guardian ad litem according to RCW 4.08.050. RCW 4.08.050 provides that a guardian shall be appointed as follows:

- (1) When the infant is plaintiff, upon the application of the infant, if he or she be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.

(Emphasis added). The parents did exactly that, eventually, in the minors' case when they petitioned for a guardian ad litem after the minors' lawsuit was filed. The parents were represented by the same attorney as their minor children. The parents, under advice of counsel, made the decision not to appoint a guardian ad litem and join the minor children in their lawsuit. Therefore, their remedy after their case was dismissed at the trial court level is against their

attorney and not Petitioner.

The argument by WSAJF, as well as Respondent, that the minor children were unable to make a decision whether to join in their parents' lawsuit without a guardian ad litem appointed by the court is hypocritical. The record on appeal proves that the minors, along with their parents and attorney, were able to make a decision as to whether to file a lawsuit without a guardian ad litem being appointed by the court. This is evidenced by the fact the minors' lawsuit was originally filed on April 6, 2006 and George Kelley was not even appointed by the court as their guardian until May 8, 2006, which is one month after the minors' lawsuit was even filed. Clearly, the parents and their attorney were making legal decisions for the minor children well before Mr. Kelley was even appointed by the Court.

The argument that defendants should appoint guardian ad litem's for minors with loss of consortium does not take into account the realities of litigation. It is not in the interest of a defendant that his or her attorney proactively seek additional plaintiffs to add to a lawsuit. Defense counsel would, in essence, be violating his or her ethical duty to vigorously defend his or her client if he or she sought to protect the interests of a plaintiff. Litigation is an adversarial process and each party's attorney must only act in the best interests of his or her client. It would be against public policy to put the burden on defendants to add additional plaintiffs to a lawsuit. In the case of a minor, it is his or her parent and attorney that have the

responsibility of deciding for the child whether it is feasible to appoint a guardian ad litem or join a claim.

B. WSAJF'S ARGUMENTS MERELY SERVE TO ENCOURAGE MULTIPLICITY OF LAWSUITS, WHICH IS AGAINST PUBLIC POLICY.

Obtaining a guardian ad litem for a minor is a procedural matter that is routine and expected in the majority of cases involving minors. The courts will be inundated with multiple lawsuits if parties are now allowed to simply plead they did not join in their parents' lawsuit, because they did not have a guardian ad litem. In the case of a minor's loss of consortium claim, such an argument flies in the face of public policy against multiplicity of lawsuits as outlined by this Supreme Court in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984) and other jurisdictions.

In order to balance the public policy issues of a multiplicity of lawsuits and still provide children the right to bring a loss of consortium claim, the Supreme Court devised a compromise. The Supreme Court held in *Ueland*:

...children's claim for loss of parental consortium must be joined with the injured parent's claim whenever feasible. A child may not bring a separate consortium claim unless he or she can show why joinder with the parent's underlying claim was not feasible.

103 Wn.2d at 194 (Emphasis added). The majority of the other 14 States² providing children loss of consortium claims express the same concern. See *Hay v. Medical Center Hosp. of Vermont*, 145 Vt. 533, 496 A.2d 939 (1985) (minor's claim must be joined when feasible to prevent multiple lawsuits arising from same incident); *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P.2d 1171 (1990) (joinder quells concerns over multiplicity of suits); *Belcher v. Goins*, 184 W.Va. 395, 400 S.E.2d 830 (1990) (requiring joinder is a fair and practical solution to concern of multiplicity of actions).

In fact, in the Ohio case of *Coleman v. Sandoz Pharm. Corp.*, 74 Ohio.St.3d 492, 493-94, 660 N.E.2d 424 (1996), the court was not only concerned with multiplicity of lawsuits, but also reasoned claims must be joined if feasible because of concerns that the minor tolling of the statute of limitations impedes the settlement process.

² Of those states that allow loss of consortium claims, the majority of them explicitly hold that the child must join their claims with the parents if feasible. Those states are: Alaska, Arizona, Iowa Ohio, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, See *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 137, 691 P.2d 190 (1984); *Weitl v. Moes*, 311 N.W.2d 259 (1981); *Theama by Bichler v. City of Kenosha*, 117 Wis.2d 508, 344 N.W.2d 513 (1984); *Hay v. Med. Ctr. Hosp. of Vt.*, 145 Vt. 533, 496 A.2d 939 (1985); *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991 (1987); *Villareal v. State, Dept. of Transp.*, 160 Ariz. 474, 774 P.2d 213 (1989); *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P.2d 1171 (1990); *Belcher v. Goins*, 184 W.Va. 395, 400 S.E.2d 830 (1990); *Coleman v. Sandoz Pharm. Corp.*, 74 Ohio.St.3d 492, 660 N.E.2d 424 (1996). None of those States' cases requiring joinder have been overturned; they are all still good law.

In our case, Respondents agree with Petitioner that even if the minors claims had been joined with their parents, essentially the same discovery and litigation plan would have been in place:

1. The same expert witnesses would be called;
2. The same documentary evidence would be presented;
3. That discovery on the children's claims would have been minimal since they are only claiming general damages;
4. The current condition of their father would have to be explored through discovery;
5. The same medical history of their father would be presented, and the same witnesses would be called; and
6. The same medical causation issues would have to be re-litigated.

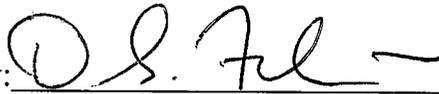
Therefore, it would have been more cost effective and taken less time and resources for Respondents to have included their claims with their parents' lawsuit. It is simply unfair to force Petitioner to try essentially the same case twice with respect to the significant medical issues surrounding Mr. Blackshear's alleged injury claims. This case is a perfect example of why the Supreme Court in *Ueland*, and other states, were concerned with the burden and cost of a multiplicity of lawsuits.

V. CONCLUSION

Petitioner hereby respectfully requests the Court of Appeals decision in this matter be reversed and the trial court's dismissal of this case be reinstated.

Respectfully submitted this 8th day of January, 2010.

MURRAY, DUNHAM & MURRAY

By: 
William W. Spencer, WSBA #9592
Daira S. Faltens, WSBA #27469
Of Attorneys for Petitioner

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

10 JAN -8 PM 4:26

CERTIFICATE OF SERVICE

BY RONALD R. CARPENTER
CLERK

I, Tammy Bolte, hereby declare under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

I certify that on the 8th day of January, 2010, I caused a true and correct copy of Petitioner's Answer to Supplemental Briefing of Amicus Curiae Washington State Association for Justice Foundation to be filed with the Supreme Court via legal messenger.

Copies were also emailed (via agreement of counsel) to

Plaintiff's Attorney

Mr. Darrell Cochran
Gordon Thomas Honeywell
1201 Pacific Avenue, Ste. 2200
Tacoma, Washington 98401-1157

Mr. Stewart A. Estes
Chair, WDTL Amicus Committee
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175

George M. Ahrend
Washington State Association of Justice
Foundation
Post Office Box 2149
Moses Lake, WA 98837



Tammy Bolte