

82474-6

No. 36089-6

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellant,

vs.

CENTENNIAL CONTRACTORS ENTERPRISES, INC.,

Respondents.

APPELLANTS' REPLY BRIEF

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP
Darrell L. Cochran, WSBA No. 22851
Victor J. Torres, WSBA No. 38781
Attorneys for Appellant

1201 Pacific Ave
Suite 2100
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

FILED
COURT OF APPEALS
DIVISION II
09 JUN 19 PM 2:43
STATE OF WASHINGTON
BY DEPUTY

TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL AUTHORITY AND ARGUMENT..... 5

 A. Respondent Offered and Submitted The
 Wrong Standard of Review To This Court.....5

 B. The Policy Issue of Multiplicity Is Not An
 Issue5

 C. The Issue of Feasibility Is Moot.7

III. CONCLUSION..... 8

TABLE OF AUTHORITIES

State Cases

<i>Hibpshman v. Prudhoe Bay Supply, Inc.</i> , 734 P.2d 991 (Alaska 1987).....	7
<i>Our Lady of Lourdes Hosp. v. Franklin County</i> , 120 Wn.2d 439, 842 P.2d 956 (1993).....	1
<i>State v. Halstien</i> , 122 Wn.2d 109, 128–29, 857 P.2d 270 (1993).....	5
<i>Ueland v. Reynolds Metals Co.</i> , 103 Wn.2d 131, 691 P.2d 190 (1984).....	5, 6, 7, 8

Court Rules

CR 11	7
-------------	---

I. INTRODUCTION

Appellants, minor children of Phillip and Monica Blackshear, file this brief in reply to the brief filed by Respondent Centennial Contractors Enterprises, Inc. The Blackshear children should be allowed to pursue their own claims for the permanent and debilitating injuries to their father because Respondent permanently and seriously injured a man because it was negligent—Respondent dropped a one-thousand pound (1,000 lbs.) steel beam on Mr. Blackshear. The Blackshear children should not suffer the loss of their claims because they exercised prudence initially when there was hope their father would fully recover. It would be an injustice for the Respondent to succeed here because the Blackshear children only seek to exercise their legally recognized right to bring a claim for parental loss of consortium as a result of Respondent’s negligence.

Through its response, Respondent demonstrates its failure to understand the nature and status of Mr. Blackshear’s health, the Blackshear’s financial situation, and the time at which the Blackshear children’s claims ripened. At the summary judgment stage, “[f]acts and the reasonable inferences therefrom are considered in favor of the nonmoving party[.]” *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993). Respondent’s brief fails to recite the facts of this case in this manner.

First, Mr. Blackshear's emergent health status justifies a separate filing. Respondent alleges that it is "disingenuous" for the Blackshear children to state that their claims arose after the adjudication of their parents' underlying suit because "they were immediately aware of severe injuries as of the date of his accident on April 7, 2003" Respondent's Br. at 8. Similarly, the trial court determined the following: "There was never a time when Mr. Blackshear could have — the plaintiffs could have said things are getting better, because they were always getting worse." VRP 3–4. This is erroneous because the record shows that Mr. Blackshear had various surgeries on various parts of his body that his treating physicians deemed successful: right shoulder surgery (CP 47), right wrist surgery (CP 48), and back surgery (CP 48). The record also shows that Mr. Blackshear was able to interact with his wife and children despite the fact that he could not physically work. CP 63. It was not until near the time of trial that Benjamin Remington, M.D. recommended that Mr. Blackshear undergo lumbar fusion surgery to help relieve severe back pain. CP 62. Mr. Blackshear underwent this surgery on September 8, 2005, just four (4) days prior to commencement of trial. The facts and the record show that Mr. Blackshear's health was progressing, not deteriorating. The Blackshear children could not have possibly brought their claims until at least the time of their parents' trial. But, even then, the initial prognosis was that the lumbar fusion surgery, like the other

surgical procedures, was successful and relieved Mr. Blackshear's pain. CP 63. It was not until after months of recovery that Mr. Blackshear's pain reappeared and that he was rendered permanently disabled that the Blackshear children's claims arose. CP 63.

Second, the trial court ignored the Blackshear's financial situation. Respondent states in its response that the Blackshear's financial crisis is "illogical" and a "red herring" without any further explanation or supporting evidence. Respondent's Br. at 10. Similarly, the trial court was certain that "the financial hardship issue would have presented itself" because "by the time the original lawsuit was filed [Philip Blackshear had] been out of work for nearly a year." VRP 3:12-16. This is erroneous because, although Mr. Blackshear was unable to work and provide for his family, the Blackshear family was able to stay afloat until the jury returned a verdict and award in their favor. The record reflects that the Blackshear family relied on their savings until exhaustion. CP 63. After their savings had been depleted, the Blackshear family relied on extended credit until their lawsuit was resolved. CP 63. The issue is not that the Blackshear family was in a stressful financial situation, but that the addition of the Blackshear children's claims on the eve of trial would have delayed the trial.

Third, the Blackshear children could not have legitimately brought their claims until after the adjudication of their parents' claims.

Respondent believes that the Blackshear children should have “join[ed] their claims with their parents’ lawsuit from the beginning.” Respondent’s Br. at 9. The trial court stated that “. . . there’s no facts that I determined that made it apparent to the Blackshear family that they ought to withhold claims of the children.” VRP 4:2–4. This is erroneous because the Blackshear children’s claims did not arise until after the adjudication of their parents’ underlying suit: the various medical treatment and procedures showed promise that he would fully recover and the family was able to stay financially afloat until the trial date. The various surgeries proved successful and only the severe pain in Mr. Blackshear’s back remained unresolved. Subsequently, Dr. Remington recommended the lumbar fusion surgery that took place just four (4) days before trial. Additionally, Mr. Blackshear testified that “Our financial situation was desperate and I am unsure how we would have made it if the judgment award did not come when it did.” CP 63. Had the Blackshear children brought their claims near the time trial which had not yet ripened, trial would have been delayed even further than it already had and it would have sealed the Blackshear family’s financial fate.

As explained in Appellants’ opening brief, the court below erred in dismissing Appellant’s claims for loss of parental consortium.

II. LEGAL AUTHORITY AND ARGUMENT

A. Respondent Offered and Submitted the Wrong Standard of Review to this Court.

Respondent alleges that this Court is to review the trial court's dismissal of the Blackshear children's claims on summary judgment to determine if factual findings are supported by substantial evidence. Respondent's Br. at 5 (citing *State v. Halstien*, 122 Wn.2d 109, 128–29, 857 P.2d 270 (1993)). In *Halstien*, a criminal case of burglary and sexual misconduct, the defendant had his day in court and went through a trial. 122 Wn.2d at 114–15. Indeed, had the Blackshear children's case gone to trial, Respondent knows full well that this would be correct; however, this is the incorrect standard of review after dismissal on summary judgment. The proper standard of review is *de novo* review as submitted and briefed in Appellant's Brief. Appellant's Br. at 8–10.

B. The Policy Issue of Multiplicity is Not an Issue.

It is important to note that the trial court, when it made its ruling, stated the following in relevant part: “Those are all — both sides have very persuasive arguments, and it just gets down to a policy issue, I suppose.” VRP 2. Respondent is quick to point out that the court in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 137, 691 P.2d 190 (1984), expressed concern with the possibility of multiple actions. Respondent's Br. at 6 (quoting *Ueland*, 103 Wn.2d at 137). The possibility of multiple actions, however, is not a concern in this case.

In *Ueland*, the court was concerned with the possibility of multiple lawsuits. However, the issue of multiplicity did not concern the number of lawsuits as between parent and child, but the number of lawsuits that potentially could arise from the number of children that a parent might have. The court stated in relevant part the following:

We next address petitioners' second argument, that allowing the action would result in multiple lawsuits. Petitioners are correct to point out that if this cause of action is adopted **there could be as many claims as the injured parent has children**. This argument is cited by a number of courts as one reason for denying the cause of action.

Ueland, 103 Wn.2d at 137. Thus, as applied to this case, the *Ueland* court was concerned that Brittney Blackshear, Phillip Blackshear, Jr., and Nicholas Blackshear, as a result of this State's adoption of a child's loss of parental consortium claim, would bring three (3) separate and individual claims against Respondent. This is simply not the case in this matter. As the record reflects, on April 6, 2006, George Kelley, as guardian for all three of the Blackshear children, filed suit in Pierce County Superior Court against Respondent for loss of consortium and respondeat superior. CP 7. Accordingly, the "policy issue" that the court below was concerned about was not an issue.

C. The Issue of Feasibility is Moot.

There is no question that Washington State has recognized and established that “a child has a child has an independent cause of action for loss of the love, care, companionship and guidance of a parent tortiously injured by a third party.” *Ueland*, 103 Wn.2d at 140. Respondent’s interpretation, along with that of the court below, renders void the Blackshear children’s recognized legal right. As the court in *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991 (Alaska 1987) recognized, **“Except in special cases that render it impossible for the parties to bring suit together,** joinder appears to be a practical and fair solution to the problem and in our view is mandatory.” *Id.* at 997. This matter is one of those special cases because as the record shows, the Blackshear children’s claims did not become ripe until half a year after adjudication of their parents’ suit. Had the Blackshear children’s claims been ripe to pursue without fear of CR 11 sanctions or dismissal on summary judgment on the merits, certainly their claims would have been joined with those of their parents. In fact, the Blackshear children would have had no choice but to join their claims with their parents’ claims if they were ripe because the court in *Ueland* held that “the children’s claims for loss of parental consortium **must** be joined with the injured parent’s claim whenever feasible.” *Ueland*, 103 Wn.2d at 137. But, the facts show that joining the claims was not even a possibility. Under Respondent’s interpretation,

there would be no facts under which a minor child could ever exercise his/her right to bring a claim for loss of parental consortium under *Ueland*. Dismissal of the Blackshear children's claims on the grounds of "feasibility" when their claims did not arise until after their parents' claims had been adjudicated is error. The court below rendered a decision on a moot issue and this Court should remand this case for trial.

III. CONCLUSION

Summary judgment was not appropriate in this case. Appellant Blackshear children respectfully requests that this Court reverse the trial court and remand this case for trial.

Dated this 18 day of January, 2008.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

By *Darrell L. Cochran* *FMS 18669*
Darrell L. Cochran, WSBA No. 22851
dcochran@gth-law.com
Victor J. Torres, WSBA No. 38781
vtorres@gth-law.com

Attorneys for Appellant
1201 Pacific Avenue, Suite 2100
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

FILED
COURT OF APPEALS
DIVISION II

08 JAN 18 PM 2:43

CERTIFICATE OF SERVICE

STATE OF WASHINGTON
BY Kim Snyder

I, Kim Snyder, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

A. I am a United States Citizen, over the age of 18 years, not a party to this cause, and competent to testify to the matters set forth herein.

B. I am employed by the law firm of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP, 1201 Pacific Avenue, Suite 2100, Tacoma, Washington 98401, attorneys for plaintiff/appellant.

C. On January 18, 2008, I caused a copy of the *Reply Brief of Appellant* to be served upon the following:

Clerk of the Court
COURT OF APPEALS – DIV. II
950 Broadway, #300
Tacoma, WA 98402
 U.S. Mail
 Facsimile
 Overnight Mail
 Messenger Service

William W. Spencer
Daira S. Faltens
Murray, Dunham & Murray
200 West Thomas Street, Suite 350
Seattle, WA 98109
 U.S. Mail
 Facsimile
 Overnight Mail
 Messenger Service

Dated this 18th day of January, 2008.

Kim Snyder
Kim Snyder