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SUPREME COURT
OF THE STATE OF WASHINGTON

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GEORGE KELLEY

Respondent,

v.

CENTENNIAL CONTRACTORS ENTERPRISES, INC.

Petitioner.

RESPONDENT'S ANSWER TO BRIEFS OF AMICI CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION AND WASHINGTON DEFENSE TRIAL LAWYERS

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I. AUTHORITY

This brief in answer to the briefs of amici curiae Washington State Association for Justice Foundation (WSAJF) and Washington Defense Trial Lawyers Association (WDTLA) has been requested by the court and is authorized by RAP 10.1(e).

II. ARGUMENT ON BRIEF OF WSAJF

Amicus WSAJF contends that the Blackshear children's joinder without a guardian ad litem (GAL) was legally impossible under RCW 4.08.050, and therefore not feasible as a matter of law. *See* Amicus Br. of WSAJF at 4-5. WSAJF also asserts that Centennial had a safeguard against multiple lawsuits because it could have forced the issue of joinder during the pendency of Mr. Blackshear's trial by seeking appointment of a GAL for the children under chapter 11.88 RCW. *See* Amicus Br. of WSAJF at 6-7. WSAJF is correct but the connection between the two statutes needs to be clarified.

Title 4 RCW is the general chapter on civil actions. RCW 4.08.050 is a general rule prescribing how minors may appear in civil actions. It specifically authorizes appointment of a GAL "upon the application of any other party to the action" when the infant is defendant

in a civil action.¹ As WSAJF notes, specific authority for defendants to seek appointment of a GAL for potential child plaintiffs is found in chapter 11.88 RCW. The legislature's intent in enacting chapter 11.88 RCW was to provide maximum legal protection for legally vulnerable persons, including legal infants:

It is the intent of the legislature to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent The legislature recognizes that . . . some people with incapacities cannot exercise their rights . . . without the help of a guardian.

RCW 11.88.050.² Consistent with that intent, the guardianship rules of chapter 11.88 RCW are detailed and extensive—much more than the general provision in RCW 4.08.050. *See, e.g.*, RCW 11.88.090 (providing detailed procedures related to the appointment of a GAL).

Read together, RCW 4.08.050 provides the baseline requirement that legal infants may only appear in civil actions through appointment of

¹ It is unclear why RCW 4.08.050 does not specifically provide authority for other parties to seek appointment of a GAL when an infant is plaintiff. The difference seems arbitrary in light of the fact that infant plaintiffs may also be defendants in the event of a counterclaim. But the rule of RCW 11.88.030—that any other party may seek appointment of a GAL—provided sufficient authority for Centennial to do so in this case. Any apparent conflict between the two statutes is of no consequence because a more specific statute takes priority over a more general statute. *See Anderson v. State, Dep't of Corrections*, 159 Wn.2d 849, 861, 154 P.3d 220 (2007).

² Although the guardianship rules appear in Title 11 “Probate and trust law,” nothing in the legislature's broad statement of intent suggests that the guardianship rules in chapter 11.88 should not apply in other contexts.

a GAL, and RCW 11.88.030 provides the complete set of procedures and safeguards for that appointment. Since no one—including Centennial—sought appointment of a GAL for the Blackshears’ children in their fathers’ action, under RCW 4.08.050, their joinder was impossible and therefore not feasible. The legislature’s intent in creating the guardianship statutes supports the Court of Appeals’ conclusion that the children should be allowed to exercise their rights in a separate action, because they did not have the benefit of a guardian during the pendency of their fathers’ trial. Why the parents or plaintiffs’ counsel did not seek appointment of a GAL is an issue of no consequence, because Centennial could have sought to protect itself against a separate lawsuit by seeking appointment of a guardian under RCW 11.88.030.

III. ARGUMENT ON BRIEF OF WDTLA

The amicus brief of WDTLA raises three matters.³ The first two are policy matters. WDTLA’s policy arguments are unpersuasive and largely unsupported by authority. The third matter is the merit of the Court of Appeals decision, but WDTLA merely repeats arguments already made by Petitioner, in violation of RAP 10.3(e).

³ The structure of this section parallels the WDTLA’s brief for ease of reading.

A. Joinder Is Not “at the Whim of Parents.”

First, WDTLA asserts that the Court of Appeals substituted its judgment for that of the trial court in deciding whether joinder was “feasible.” *See* Amicus Br. of WDTLA at 4. This is not an argument for overturning the Court of Appeals; rather it is an acknowledgement of the circumstances of appellate review under the abuse of discretion standard. As noted elsewhere, appellate courts give deference to trial courts in determinations of fact and applying those facts in deciding mixed questions of law and fact—but not unlimited deference. The purpose of appellate review is to ensure the trial court’s findings are based in the evidence and legally sound. The trial court in this case abused its discretion, and it was not only proper but necessary that the Court of Appeals substitute its judgment for that of the trial court.

Second, WDTLA asserts the Court of Appeals decision conflicts with *Dependency of A.G.*, 93 Wn. App. 268, 280, 968 P.2d 424 (1998) (holding that a court’s failure to appoint a Guardian ad litem (GAL) is not a jurisdictional defect). *See* Amicus Br. of WDTLA at 4-5. This is a red herring. Amicus WDTLA appears to conflate the concept of jurisdictional defect with the “feasibility” requirement at issue in this case. But there is no discussion of jurisdictional defect in the decision

below, and *Dependency of A.G.* contained no discussion of the feasibility requirement.

There is one way in which *Dependency of A.G.* applies to this case, however. In *A.G.*, the trial court failed to appoint a GAL in a parental rights termination proceeding, which—unlike in Mr. Blackshear’s tort lawsuit—was mandated by statute. 93 Wn. App. at 271, 280. While this omission is not a “jurisdictional defect” (i.e., not normally grounds for reversal), the Court of Appeals made an exception and reversed based on the best interests of the children. 93 Wn. App. at 280-81 (noting that “children’s interests are paramount”). Accordingly, if *Dependency of A.G.* has any persuasive value in this case, it cuts in favor of affirming the decision below, which similarly held that the normal joinder rule should not apply in part because joinder was not in the children’s best interest. *Kelley v. Centennial Contractors Enterprises, Inc.*, 147 Wn. App. 290, ¶ 21 (2008).

Third, WDTLA asserts that the Court of Appeals’ decision “eviscerates” the feasibility requirement because parents may avoid the joinder requirement by not seeking appointment of a GAL. Amicus Br. of WDTLA at 5. But the Court of Appeals decision leaves the joinder requirement undisturbed, and its holding is limited to the circumstances

of this case. If parental discretion to not seek a GAL is an unacceptable barrier to judicial economy, the answer is not to punish the kids. The proper remedy is an administrative order or RPC from this court, or a statute from the legislature, requiring the trial court, the parents or counsel to seek appointment of a GAL in cases such as this.

WDTLA would have child victims bear the loss of their injury because circumstances beyond their control—including the parties' failure to seek appointment of a GAL—make joinder not feasible. Nothing in *Ueland* requires that. See *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wn.2d 131, 136-37, 691 P.2d 190 (1984) (discussing policy behind joinder requirement). To the contrary, the very existence of the “feasibility” exception suggests that this court intended that judicial economy and fairness to defendants should not always be obtained at the expense of injured child victims. Those victims must still make a showing that joinder was not feasible—whether for lack of an appointed GAL, insufficient evidence of injury, parents who object to joinder, or because joinder was not in the best interests of the children at the time of the parent’s suit. When they do make that showing, as they did here, the exception applies to allow a separate suit.

B. Defendants Have Always Had to Choose Between Joining Children and Facing the Possibility of Multiple Lawsuits

First, WDTLA asserts that defendants should not be “saddled” with insuring that children’s claims are considered. Amicus Br. of WDTLA at 6. But the decision below does not impose that requirement. Defendants have faced the possibility of multiple lawsuits based on loss of parental consortium claims since this court recognized that cause of action and the feasibility exception over twenty five years ago. How defendants in cases such as this deal with potential child claimants is a matter of trial strategy. The only way this court could “solve” the dilemma WDTLA complains of is to overrule *Ueland*, which neither the defendant nor WDTLA has asked this court to do.

Second, WDTLA asserts that plaintiffs’ counsel should be responsible for insuring that plaintiff’s children are adequately represented. But WDTLA provides no authority or analysis for this assertion. Moreover, it is not necessary for the disposition of this case for the court to resolve the question of whether anyone (and if so, whom) should be solely responsible for seeking appointment of a GAL or joinder of consortium claimants in future cases like this. As discussed above, the appropriate forum for resolving such policy questions is the legislature, or this court’s administrative or ethics committees.

However, if the court decides to address this policy dispute in its opinion, WDTLA's approach is problematic. In the case of a very small asset pool or coverage limit, there is an inherent conflict between the parents who are the injury victim and the child consortium claimant. The attorney is contracted by the injury-victim and owes a zealous duty to that client, not a potential consortium client. The parent may not want the child to take a piece and further erode the pot with GAL expenses for approving a minor settlement. That inherent conflict is the reason the State developed a system of settlement guardians.

Third, WDTLA complains that defendants have no guarantee against multiple suits when parents are allowed to make informed decisions about what is in the best interests of their children. Amicus Br. of WDTLA at 6-7. This statement is true on its face but unpersuasive as an argument for reversing the Court of Appeals. Defendants have not had such a guarantee since the loss of parental consortium cause of action was recognized by this court. Ever since *Ueland*, children have been able to sue separately, provided they make the requisite showing of non-feasibility. The legal imperative to protect children's interests was the cornerstone of *Ueland*. 103 Wn.2d at 135. It would turn that decision on its head if this court reverses a Court of Appeals decision that was

predicated in part on whether joinder was in the children's best interest, in the name of giving future defendants less to worry about.

C. WDTLA's Argument on the Merits Is Repetitive and Should Be Struck or Disregarded.

RAP 10.3(e) states "Amicus must review all briefs on file and avoid repetition of matters in other briefs." WDTLA devotes the last third of its amicus brief (section "C") to repeating arguments already made by petitioner Centennial on whether the trial court abused its discretion. *Compare* Amicus Br. of WDTLA at 7 ("The trial court did not abuse its discretion when it decided the children did not carry their burden on the feasibility of joinder") *with* Pet. for Review at 8 ("The trial court did not err in dismissing Plaintiffs' case, since Plaintiffs failed to meet their burden of proving it was not feasible to join their claims with their parents' lawsuit"); *compare* Amicus Br. of WDTLA at 8-9 ("the father had been continuously unable to work throughout the time the parents' lawsuit was pending") *with* Pet. for Review at 9 ("Joinder was feasible, because the fathers' severe injuries were certainly known even before the lawsuit was filed").

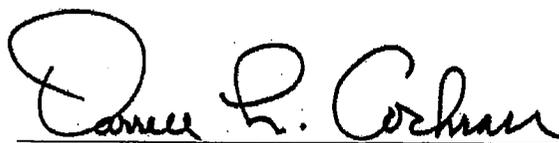
The RAPs do not allow Respondent to reply to such repetitive matters. *See* RAP 10.3(f) ("a brief in answer to a brief of amicus curiae should be limited solely to the *new* matters raised in the brief of amicus

curiae” (emphasis added)). Section “C” of WDTLA’s brief discusses no new matters and offers no new legal arguments. Rather than violating RAP 10.3(f) and wasting the court’s time with more repetitive briefing, Respondent respectfully asks that the court strike or disregard “Section C” of WDTLA’s amicus brief.

IV. CONCLUSION

The Court of Appeals decision in this case does not change the dilemma defendants have faced since this court decided *Ueland*. WDTLA’s policy arguments are unpersuasive and largely unsupported by authority. The balance of WDTLA’s brief merely repeats arguments already made by Petitioner, in violation of RAP 10.3(e), and should be struck or disregarded. The Court of Appeals decision should be affirmed.

DATED this 8th day of January 2010.



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CERTIFICATE OF SERVICE

I, **Michele Ghiselli Owen**, hereby declare under penalty of perjury under the laws of the State of Washington that that I am employed at Pfau Cochran Vertetis Kosnoff PLLC.

1. I am a United States Citizen, overhte age of 18 years, not a party to this cause, and competent to testify to the matters set forth herein.
2. I am employed by the law firm of Pfau Cochran Vertetis Kosnoff, PLLC, 911 Pacific Avenue, Suite 200, Tacoma, WA 98402, attorneys for Respondents.
3. On this 8th day of January, 2010, I served a copy of the RESPONDENT'S ANSWER TO BRIEFS OF AMICI CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AND WASHINGTON DEFENSE TRIAL LAWYERS

via Email / US Regular Mail by directing delivery to the following individuals:

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