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SUPREME COURT
STATE OF WASHINGTON

No. 82474-6 2009 MAY 29 2:58

BY RONALD R. CARPENTER

SUPREME COURT
OF THE STATE OF WASHINGTON
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GEORGE KELLEY, as guardian for BB, PB, and NB, minor children,

Respondents,

vs.

CENTENNIAL CONTRACTORS ENTERPRISES, INC.,

Petitioner.

Supplemental Brief of Respondents

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ISSUE ON APPEAL.....	2
III.	STATEMENT OF THE CASE.....	2
IV.	ARGUMENT.....	5
	1. This Court Should Apply De Novo Review.	5
	2. All Claims Belonging To The Blackshear Children Were Tolloed Pursuant To RCW 4.16.190, Which Was Modified After <i>Ueland</i>	6
	3. The Blackshear Children Were Legally Unable To Join Their Claims With Their Father’s Lawsuit.	10
	4. Factually, The Blackshear Children Did Not Have A Sufficient Basis To File Suit Until The Time Of Their Father’s Trial.	12
V.	CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases

<i>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	9
<i>Gilbert v. Sacred Heart Medical Center</i> , 127 Wn.2d 370, 900 P.2d 552 (1995).....	9
<i>Kelley v. Centennial Contractors Ent. Inc.</i> , 147 Wn. App. 290, 194 P.3d 292 (2008).....	4, 5, 6
<i>Merrigan v. Epstein</i> , 112 Wn.2d 709, 773 P.2d 78 (1989).....	9
<i>Ohler v. Tacoma General Hospital</i> , 92 Wn.2d 507, 598 P.2d 1358 (1979).....	8, 9
<i>St. Michelle v. Robinson</i> , 52 Wn. App. 309, 759 P.2d 467 (1988).....	8
<i>State ex rel. Royal v. Board of Yakima County Comm'rs</i> , 123 Wn.2d 451, 869 P.2d 56 (1994).....	9
<i>State v. Thetford</i> , 109 Wn.2d 392, 745 P.2d 496 (1987)	6
<i>Ueland v. Reynolds Metals Co.</i> , 103 Wn.2d 131, 691 P.2d 190 (1984).....	1, 2, 6, 8, 13
<i>Williamson, Inc. v. Calibre Homes, Inc.</i> , 147 Wn.2d 394, 54 P.3d 1186 (2002).....	5
<i>Young v. Estate of Snell</i> , 134 Wn.2d 267, 948 P.2d 1291 (1997).....	9

Statutes

RCW 4.08.050 10, 11
RCW 4.08.060 10, 11
RCW 4.16 9, 10
RCW 4.16.190 *passim*
RCW 4.16.350 8, 9
RCW 5.60.050(2)..... 7
RCW 11.88 8
RCW 11.88.005 7
RCW 11.88.010 10
RCW 11.88.010(1)..... 10
RCW 26.28.010 10
RCW 26.28.015(b)..... 11

Other Authorities

Laws of 1854, p. 186, § 293..... 7
Laws of 1987, ch. 212 §1401..... 9
Laws of 2006, ch. 8 § 303..... 8
Medical Malpractice, Patient Safety, and Health care Liability
Reform Act of 20068

Rules

CR 12(c)..... 5
PCLR 1..... 13
Tegland, 2A Washington Practice, Rules Practice RAP 2.5 (6th ed.)..... 6

I. INTRODUCTION

This case raises the question of when joining a child's claim for loss of consortium with that of their parent's tort claim is "unfeasible" within the meaning of *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984). Here, the Court of Appeals correctly determined that Respondents ("Blackshear Children") demonstrated that joining in their father's personal injury action was both legally and factually unfeasible. While the father's lawsuit was pending, the children were not represented by a Guardian ad Litem ("GAL") and the financial and physical impact from the underlying accident was not sufficiently known until the father was forced to undergo a significant and debilitating surgery just days before his trial.

In the decision below, the Court of Appeals correctly applied *Ueland* where this Court recognized a child's cause of action for loss of parental consortium, which is separate from the parent's underlying tort claim. 103 Wn.2d at 135-36. In reaching its holding, the *Ueland* Court noted the need to protect children and reasoned that while "a monetary award will not enable a child to regain the loss of a parent's love, companionship, and guidance . . . such an award may enable the child to lessen the impact of the loss." *Id.* at 139. The court, however, also acknowledged a concern about the possibility of multiple lawsuits, and therefore, added a condition that children join with the parent's tort claim

“unless he or she can show why joinder with the parent’s underlying claim was not feasible.” *Id.* at 137. In this case, the Court of Appeals applied *Ueland* to the particular facts of this case where: (1) a surgery at the time of the father’s trial created the need to assert a claim for loss of consortium by the children; (2) the family’s financial condition changed necessitating the claim; and (3) a GAL was appointed only after the father’s trial. The Court of Appeals correctly applied *Ueland*, and therefore, the Blackshear Children ask that this Court affirm and remand this case for trial.

II. ISSUE ON APPEAL

Whether it was unfeasible for minor children to join their claim for loss of consortium with that of their parents when a GAL was not appointed and the need for the minors’ lawsuit only became apparent after a surgery which occurred days before their father’s trial?

III. STATEMENT OF THE CASE

On April 7, 2003, Phillip Blackshear was transporting a load of steel beams and was injured when a forklift operator lost control of a beam which landed on Mr. Blackshear. CP 12. This beam fell off the forklift, struck Mr. Blackshear in the right leg, and pinned him against a stack of previously unloaded beams. *Id.*

On March 29, 2004, Mr. Blackshear and his wife filed suit in Pierce County Superior Court against Centennial Contractors Enterprises, Inc. (“Centennial”) for damages resulting from the accident. CP 10–13.

Trial was originally set for March 28, 2005. CP 17. However, because of court congestion, the trial was rescheduled to September 6, 2005. CP 7. Although the trial did not start on the date set, it did eventually begin on September 12, 2005 and resulted in an award for Mr. Blackshear. *Id.*¹

After the initial trauma from the incident subsided, Mr. Blackshear continued to experience discomfort, underwent several medical procedures, but was able to interact with his wife and children. CP 6, 63. However, as time progressed, it became clear that the back pain Mr. Blackshear was suffering from would require lumbar fusion surgery. CP 62. On September 8, 2005, just four days prior to the commencement of his trial, Mr. Blackshear underwent back surgery. CP 63. The initial observations were that the surgical procedure successfully relieved the pain suffered by Mr. Blackshear. *Id.* However, after a few months of recovery, it became clear that the surgery was not successful. *Id.* In fact, after the surgery, Mr. Blackshear's condition was such that he could not financially or emotionally care for his family. *Id.*

Respondents in this case are the three minor children of Mr. Blackshear – Brittney Blackshear, Phillip Blackshear, Jr., and Nicholas Blackshear. CP 71. Phillip Blackshear, Jr., has childhood rheumatoid arthritis that requires 24-hour care and supervision. After

¹ Ms. Blackshear dismissed her claim prior to trial.

Mr. Blackshear's back surgery, he was no longer able to provide this care for his son. CP 63.

On April 6, 2006, the Blackshear children, filed suit in Pierce County Superior Court against Centennial for loss of consortium. CP 7. George Kelley's appointment as GAL was confirmed by an Order entered May 8, 2006. CP 98.

After the lawsuit was filed, Centennial moved for dismissal on the basis that the Blackshear Children "may not bring a separate consortium claim unless he or she can show why joinder with the parents' underlying claim was not feasible." CP 46. On February 21, 2007, the trial court granted Centennial's motion and dismissed the children's claims. CP 87.

The Blackshear Children appealed, and on October 28, 2008, the Court of Appeals reversed, remanding the matter for trial. Specifically, the Court of Appeals concluded that it was not feasible for the children to join their claim with that of Mr. Blackshear. *Kelley v. Centennial Contractors Ent. Inc.*, 147 Wn. App. 290, 301, 194 P.3d 292 (2008). The Court reached this decision for two reasons. First, the Blackshear Children were not represented by a GAL until after Mr. Blackshear's trial, and therefore, they were not legally able to pursue or evaluate whether they had a claim to pursue until after their father's trial. *Id.* Second, the need to file suit for loss of consortium arose only after Mr. Blackshear's September 2005 back surgery. It was after this procedure that

Mr. Blackshear was unable to provide for his family physically, financially, and emotionally. *Id.* This Court granted review.

IV. ARGUMENT

1. This Court Should Apply De Novo Review.

Procedurally, this case comes before the Court on an appeal from a ruling on a motion for summary judgment. Although the motion is styled as a motion to dismiss, both parties presented evidence outside the pleadings which converted the motion to a motion for summary judgment. CR 12(c). In reviewing decisions on summary judgment, it is well established that this Court applies de novo review. *Williamson, Inc. v. Calibre Homes, Inc.*, 147 Wn.2d 394, 398, 54 P.3d 1186 (2002) (“Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as matter of law.”). For example, this Court has stated, unequivocally, that “[a]n appellate court reviewing a grant of summary judgment engages in the same inquiry as the trial court; we review questions of law de novo, and view the facts of the case and all reasonable inferences therefrom in a light most favorable to the nonmoving party.” *Id.* This standard of review is persuasive because even outside the summary judgment procedure, there is no basis to afford greater weight to a trial court’s decision based solely on documentary evidence because issues of credibility are not resolved and the appellate court is in the same position to review the record as the trial

court. *E.g.*, *State v. Thetford*, 109 Wn.2d 392, 396, 745 P.2d 496 (1987) (reviewing a motion to compel brought in a criminal proceeding and noting that “[t]his court is freer to review factual findings based *solely* on documentary evidence, as the trial court was in no better position than the appellate court to make observations of demeanor.”) (emphasis in original). Washington Practice explains that “[i]f the trial court has determined a case solely on the basis of affidavits, as is often done in declaratory judgment actions, appellate review will be on a de novo basis.” Tegland, 2A Washington Practice, Rules Practice RAP 2.5 (6th ed.) (Author’s Note 34). Even Centennial agreed at oral argument that the appropriate review is de novo. *Kelley*, 147 Wn. App. at 294 (“At oral argument, Centennial agreed with Kelley that our review is de novo.”).

Assuming, arguendo, that this Court were to give deference to findings of fact by the trial court, in this case there were no “findings” made by the trial court. The order of dismissal simply shows that Centennial’s motion was granted; no findings of fact or conclusions of law were entered. CP 88. For these reasons, this Court should apply a de novo standard of review.

2. All Claims Belonging To The Blackshear Children Were Tolled Pursuant To RCW 4.16.190, Which Was Modified After *Ueland*.

There are a number of Washington statutes enacted to protect the interest of minor children. The obvious policy reason for each of these

statutes is that minor children lack the ability, knowledge and wherewithal to protect their own legal rights. The legislature explains the purpose of these statutes:

The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian.

RCW 11.88.005. Although many of the statutes related to minor children have changed over time, this same basic principle of competency runs through each statute. *Compare* RCW 5.60.050(2) (providing “[t]he following persons shall not be competent to testify: . . . (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.”) *with* Laws of 1854, p. 186, § 293 (providing “[t]he following persons shall not be competent to testify: . . . 2d. Children under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.”).

Washington law, RCW 4.16.190, provides for the tolling of the statute of limitations for the claims of minor children and states as follows:

Statute tolled by personal disability (1) Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature

of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW, or imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action. (2) Subsection (1) of this section with respect to a person under the age of eighteen years does not apply to the time limited for the commencement of an action under RCW 4.16.350.

RCW 4.16.190 (emphasis added).

The applicability of this statute to the claims belonging to minor children is well established. *E.g.*, *St. Michelle v. Robinson*, 52 Wn. App. 309, 311, 759 P.2d 467 (1988) citing RCW 4.16.190 and holding that “the statute of limitations on a civil action for damages is tolled until the victim reaches the age of majority, 18 years.”).

By the statute’s explicit language, it applies to all claims, “unless otherwise provided in this section[.]” RCW 4.16.190. This introductory clause was added, long after *Ueland*, in 2006 as part of the Medical Malpractice, Patient Safety, and Health Care Liability Reform Act of 2006. Laws of 2006, ch. 8 § 303.

A review of the history behind this statute is instructive. In 1979, the Supreme Court was called upon to interpret RCW 4.16.350, which at that time also allowed for the tolling of the statute of limitations when there was a legal disability, just like RCW 4.16.190. *Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 510-11, 598 P.2d 1358 (1979). There, the *Ohler* Court determined that a parent or guardian’s knowledge

regarding an act of medical malpractice was not imputed to a minor child. *Id.* Disagreeing with this decision, the legislature later eliminated the statutory language from RCW 4.16.350. Laws of 1987, ch. 212 §1401. However, notwithstanding this change, the Supreme Court later held that a minor's medical malpractice claim was still tolled by RCW 4.16.190 as the statutory change to RCW 4.16.350 failed to impact RCW 4.16.190. *Merrigan v. Epstein*, 112 Wn.2d 709, 716, 773 P.2d 78 (1989); *Gilbert v. Sacred Heart Medical Center*, 127 Wn.2d 370, 375, 900 P.2d 552 (1995). These decisions were abrogated by the 2006 legislative action.

Here, there is no provision within RCW Chapter 4.16 that limits the tolling provided by RCW 4.16.190 in this context. The statute therefore applies. "The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). In this regard, "[w]here statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself." *Young v. Estate of Snell*, 134 Wn.2d 267, 279, 948 P.2d 1291 (1997) (quoting *State ex rel. Royal v. Board of Yakima County Comm'rs*, 123 Wn.2d 451, 458, 869 P.2d 56 (1994)). Because The Blackshear Children are minors, and there is no

provision of RCW Chapter 4.16 that provides otherwise, their claims are tolled by RCW 4.16.190.

3. The Blackshear Children Were Legally Unable To Join Their Claims With Their Father's Lawsuit.

Under Washington law, the Blackshear children could not file suit without a GAL to represent their interests. Pursuant to RCW 11.88.010, “[t]he superior court of each county [has the] power to appoint guardians for the persons and/or estates of incapacitated persons, and guardians for the estates of nonresidents of the state who have property in the county needing care and attention.” RCW 11.88.010(1). This statute expressly defines “incapacitated persons” as those who are “under the age of majority as defined in RCW 26.28.010.” *Id.* at (1)(d). To complete this analysis, RCW 26.28.010 explains that “[e]xcept as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years.” RCW 26.28.010.

Other Washington statutes, RCW 4.08.050 and RCW 4.08.060, also explain that minor children are not competent to proceed with a legal action without the appointment of a guardian. Specifically, RCW 4.08.050 states, in relevant part, that “when an infant is a party he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act.” RCW 4.08.050 (emphasis added). This statute goes

on to explain that “[w]hen the infant is plaintiff” the appointment of a guardian is done “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.” *Id. See also*, RCW 26.28.015(b).

RCW 4.08.060 is also applicable if a minor is deemed incapacitated by reason of his or her age. This statute provides that “[w]hen an incapacitated person is a party to an action in the superior courts he or she shall appear by guardian, or if he or she has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act as guardian ad litem.” RCW 4.08.050 (emphasis added).

In the case of the Blackshear Children, a GAL was not appointed until after their father’s trial. CP 7.² Centennial had the ability to request that the Court appoint a guardian to represent the interests of these children prior to their father’s trial. This did not occur. Because the Blackshear Children lacked capacity to bring suit and there was no GAL representing the Blackshear Children’s interest until after their father’s trial, this Court should affirm.

² Centennial filed a declaration stating that the father’s trial began on September 12, 2007. CP 7. This was in error as the declaration two paragraphs later explains that the children’s lawsuit was filed approximately six months after the father’s trial. *Id.* at ¶ 10.

4. Factually, The Blackshear Children Did Not Have A Sufficient Basis To File Suit Until The Time Of Their Father's Trial.

Trial began on September 12, 2005, and Mr. Blackshear did not undergo surgery until just four days prior to trial. CP 62–63. Only after recuperating from surgery and allowing for recovery time, which extended well past the trial, was it finally known that the surgery was unsuccessful and Mr. Blackshear was rendered permanently disabled. CP 63. If the Blackshear Children had brought suit with their father's claim, there simply was not enough factual evidence to support a favorable finding or award, let alone enough to defend against a motion for summary judgment. Instead, the Blackshear Children brought their independent cause of action as soon as practicable and within a short period of time thereafter, approximately seven months from Mr. Blackshear's surgery of September 8, 2005. The Blackshear Children asserted their claims when his health was more accurately measured and their losses reasonably determined. CP 63, 70–76. The Blackshear Children were faced with the reality that their father will never be able to work and provide for them, will never be able to participate in activities with them as he once did, will never be able to love and care for them as they may want him to, and other joys that children with non-disabled parents take for granted. CP 63.

Centennial may argue that the Blackshear Children could have sought to join Mr. Blackshear's lawsuit within the four days after his surgery. If this argument is made, this Court should reject it for several

reasons. First, Pierce County Local Rules set a precise Case Schedule that provides for the “Joinder of Parties,” “Discovery Cutoff,” and witness lists for both parties. PCLR 1; CP 17. At the time of his surgery, each deadline had passed. Second, the Blackshear family was already under extreme financial distress as a result of the various trial delays due to court congestion. CP 63. The family’s savings were gone and they had exhausted all available credit resources. CP 63. After the second trial delay, Mr. Blackshear requested that trial begin on September 19, 2005, or a date certain as soon as practicable because they could not financially afford further delays. CP 7, 63. The family faced financial peril in light of their mounting debt without any inflow of cash, and as Mr. Blackshear stated, “I am unsure how we would have made it if the judgment award did not come when it did.” CP 63. Joining their father’s lawsuit at that late juncture would have sealed the financial fate of the Blackshear family. Third, it was not until Mr. Blackshear was further along in his healing process that the true extent of his disability was recognized.

The factual circumstances and situations offered by the Blackshear Children as to why joinder with their father’s underlying suit was not feasible satisfy *Ueland*. Therefore, this Court should affirm.

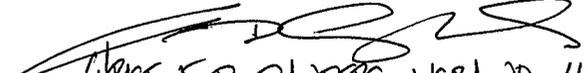
V. CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court affirm the decision below and remand this case for trial.

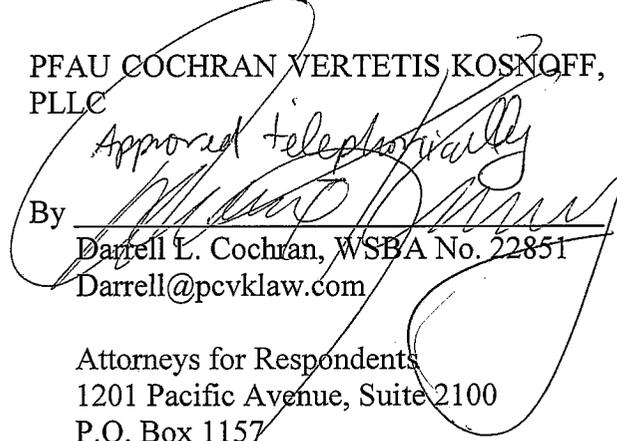
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CERTIFICATE OF SERVICE

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I, Becky Niesen, certify under penalty of perjury under the laws of
the State of Washington that the following is true and correct:
BY RONALD R. CARPENTER

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.
CLERK

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