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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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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY
DEPUTY

APPELLANT'S RESPONSIVE BRIEF

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REVIEW OF CASE AND ISSUES

The briefs of both Appellant and Respondent provide a background as to the facts of this case and the issues raised. The Appellant will therefore focus their brief on the issues raised in the Brief of Respondent. The same designation of the respective parties and entities used in the Brief of Appellant applies to this brief as well.

I. SUMMARY OF ARGUMENT

A. Trial Court Incorrectly Concluded Plaintiff's Claim Was Time-Barred.

i. Tolling Is Appropriate If Plaintiff Was Incapacitated At The Time The Action Accrued And A Guardianship Would Have Been Appropriate

In the Brief of the Appellant filed with this court on November 22, 2006, the plaintiff argued that the daughter, a minor at the time of the Decedent's death, was disabled and unable to be appointed the personal representative ("PR"). Under the Revised Code of Washington, the plaintiff was the second party in line, after the surviving spouse or a person requested to be appointed, to receive letters of administration of the estate. Decedent was without a will or surviving spouse. This was not a situation in which a party was "picked off the street" and asked to be the PR merely to avoid the statute of limitations by using any disability such

person might have to toll the statute of limitations. The plaintiff was a proper and favored appointee for the administration of the estate and tolling would be appropriate.

The courts of this state have looked to toll the statute of limitations where applicable and have not required either a PR to be appointed upon the death of every citizen of this state, nor a determination of incapacity to be made before determining whether the tolling statute is appropriate. In *Rivas v. Eastside Radiology Associates*, 134 Wash. App. 921, 928, 143 P.3d 330 (2006) “a prior determination of incapacity is not necessary to permit tolling under RCW 4.16.190, the plaintiff must show that a guardianship would have been appropriate had one been sought when the cause of action accrued. We hold that the legislature intended to allow the trial court to look back to determine whether, at the time the cause of action accrued, the plaintiff was incapacitated to the degree necessary to permit appointment of a guardian. If so, then tolling is appropriate under RCW 4.16.190. No separate petition for guardianship is required.”

While the present case does not involve a guardianship, it does provide support for the plaintiff's position for the tolling of the statute of limitations. As noted above, a prior determination of disability is not required for the tolling statute to be activated. Instead the plaintiff need only show a guardianship would be appropriate if it had been sought when

the action accrued. The trial court could have easily determined if a guardianship was appropriate. Here the trial court did not, and held that the cause of action began to run on the date of the decedent's death. Such a decision ignored *Rivas* and would appear to require that all minor heirs have a guardian appointed to protect their interests.

The Washington Supreme Court in *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 770 P.2d 182 (1989), provided further guidance when it held that the tolling statute requires the cause of action to vest in the incompetent person directly, not solely in the guardian acting on the person's behalf. If the cause of action is available to the guardian alone, the statute of limitations will apply.

The plaintiff as noted earlier is second in line to obtain letters of administration in an intestate estate. Since only the personal representative is allowed to bring a wrongful death action, and no personal representative was appointed in this case prior to the appointment of the plaintiff, the cause of action would belong to her and her only. Therefore, her disability and the absence of a designated personal representative at the time of her father's death would have tolled the statute of limitations pending the removal of her disability.

ii. Plaintiff Was Unable To Be Appointed Personal Representative At The Time Action Began To Accrue Because Of Her Minority And Was Therefore Unable To Obtain Letters Of Administration

Where there is a PR appointed it would be improper to argue that the three year statute does not apply. It is the PR's duty and obligation to investigate matters that may benefit the estate. However, where no PR is appointed and the favored party to receive letters of administration as well as being the sole heir to an intestate estate is a minor at the time of the death and for a period afterward, to not allow tolling would be to harm the interests of minors and incapacitated persons. If the defendant's argument were favored it would require every minor or incapacitated person to either have a guardian appointed to determine what interests may need protection, or the immediate appointment of a PR to determine if there are interests of the estate which need to be protected.

Courts in Washington have looked to protect the interest of disabled persons. This court has stated that a plaintiff in a wrongful death action may tardily obtain an order making himself or herself the personal representative of the decedent's estate, even though the statute of limitations has run, so long as final judgment has not yet been entered and the defendant is not prejudiced on the merits. *Estate of Rose v. Fritz*, 104

Wash.App. 116, 119, 15 P.3d 1062 (2001). It was also held that the plaintiff in a wrongful death action must be the personal representative of the decedent's estate. *Id.* at 119.

Plaintiff could not be appointed the PR for the estate as that is contrary to Washington law which states that minors are not qualified to act as personal representatives. RCW 11.36.010. Therefore the plaintiff could not have brought this action during her minority but if she had, then under *Estate of Rose* she could have then applied tardily for appointment as the personal representative assuming of course final judgment had not been entered. However, had she brought the action when she was not the personal representative, defendant could have easily won on a motion for summary judgment on the basis that she was barred from bringing the action since she was not the personal representative, the only person entitled to bring a wrongful death action.

The tolling statute clearly states that it applies if the disability exists at the time the person was entitled to bring the action. RCW 4.16.190(1). In the present action, the plaintiff was disabled and unable to bring the action and with no other PR appointed there was no one else entitled to bring the action. Therefore, the statute must be tolled. To accept this argument would not lead to absurd results as the holding here is narrow and is being applied only to a surviving beneficiary who was a

minor at the time of her father's death, who could upon the removal of the disability serve as the PR, and where there was no PR appointed or sought for the intestate estate prior to the appointment of the plaintiff.

iii. Summary

The wrongful death claim brought by the plaintiff is subject to a three-year statute of limitations, but should be tolled due to the minority of the personal representative at the time the action accrued. The personal representative could not be appointed due to her disability and therefore was not entitled to bring the wrongful death action since only the PR may do so. The PR is the child of the decedent, a favored party to receive letters of administration, was named the personal representative and brought the action for wrongful death within three years of the lifting of her disability.

B. The Decision Of The Trial Court Should Not Be Upheld Based On Defendant's Other Two Defenses

i. Plaintiff's Claim Is Not Barred By The Department Of Labor And Industries' Unappealed Final Order

Defendant relies on *Kingery v. Department of Labor and Industries*, 132 Wn.2d 162, 937 P.2d 565 (1997) to argue that the plaintiff is barred from bringing this action since the order by the Department of Labor and Industries (the "Department") was not timely appealed.

However, *Kingery* holds that an unappealed final order is res judicata to the issues encompassed within the terms of the order, which is not applicable to the present matter. The Department held in the order that the decedent's condition was not the result of an industrial injury as defined by Industrial Insurance Act (the "IIA"), was not an occupational disease as contemplated by Section 51.08.140 of the RCW, and the condition was not the result of the exposure alleged. (CP 29)

Plaintiff is not rearguing to the Department the issues encompassed within the order. While the plaintiff argues that the injury was due to exposure in the workplace, the IAA requires that it be an occupational disease for coverage to exist.

Under RCW 51.04.010, no state tort claim may be brought against an employer if those claims arise out of an injury or occupational disease which is compensable under the IIA. In *Goyne v. Quincy-Columbia Basin Irrigation District*, 80 Wn.App. 676, 683, 910 P.2d 1321 (1996), this court held that the distinction between an occupational disease or injury that is within the basic coverage of the IIA and one which, under the facts of a particular case, is not compensable determines whether a common-law action against an employer is barred under the IIA's exclusivity provisions. This court further held that the exclusivity provisions of the IIA apply to occupational diseases as well as workplace injuries and

abolishes judicial jurisdiction over all civil tort actions brought by employees, their families and dependents when those actions are “premised upon the ‘fault’ of the employer vis-à-vis the employee” for workplace injuries compensable under the IIA. *Id.* at 681.

It is also held by this court that to come within coverage of the IIA, a claimant must show not only that his disease arose “proximately” out of the employment, but also that the disease arose “naturally” out of the employment. *McCarthy v. State Dept. of Social & Health Services*, 46 Wash.App. 125, 130, 730 P.2d 681 (1986). As the court further stated, “In our judgment, if *McCarthy* could show that her disease was not an occupational disease, and thus not within the coverage provisions of the Act, her private cause of action should not be barred under the exclusive remedy provisions of 51.32.010.” *Id.* at 131.

In the present case, the Department held that the decedent’s injury was not the result of an industrial injury nor was it an occupational disease. Therefore, the exclusivity provisions of the IIA would not apply to the plaintiff’s current action under the holding of the court in *McCarthy*, and hence it would not be barred as *res judicata*. Plaintiff is not litigating the issues within the order to the Department and thus failing to appeal the order would not bar this action. Plaintiff in her lawsuit does argue that her father’s death is not the result of an occupational disease and, hence, the

private right of action encompassed in the wrongful death action is not barred. Unlike *Kingery*, the plaintiff is not bringing a new claim against the Department and therefore, she may, under the principles announced by Washington courts, bring a private right of action for wrongful death.

While Defendant's position can be appreciated, the final order of the Department, holding that the Decedent's death was not caused by exposure to pesticides while employed by defendant, and the fact that the order was unappealed does not conclusively establish that he did not die due to pesticide exposure. Plaintiff has not had a chance to prove an essential element of her claim and a claim to the Department does not mean all the necessary evidence was provided, reviewed or available for a determination to be made.

ii. Industrial Insurance Act Distinction Between Occupational Disease Or Injury Covered By Act And One Which Is Not Covered Determines Whether Common-Law Action For Wrongful Death Is Barred Under Exclusivity Provisions Of Act

RCW 51.32.010 states that every worker injured in the course or their employment, or their families or dependents in the case of death of the worker, shall receive compensation in accordance with the chapter. This exclusive remedy provision has been held by the courts to bar

common-law actions by employees, their families and dependents when those actions are “premised upon the ‘fault’ of the employer vis-à-vis the employee” for workplace injuries compensable under the IIA. *Goyme* at 681 citing *Reese v. Sears, Roebuck & Co.*, 107 Wash.2d 563, 731 P.2d 497 (1987). It was further held that the exclusive remedy provisions of the Act generally bar private causes of action only when the particular disease is within coverage provisions of the Act. *McCarthy* at 128. To determine whether the exclusivity provision applies, the *McCarthy* court found the operative fact to be actual coverage, not the election to claim coverage in a particular case. *Id.* at 129.

In *McCarthy* the court further found that the plaintiff was not given an opportunity at the trial court level to show that her disease was not covered by RCW 51.08.040, and that her complaint was dismissed after an examination and conclusion by the trial court that the disease was contracted on the job. The court held this was premature, and the plaintiff could possibly show that her disease was not peculiar or inherent to her occupation, and that if she could so prove then she would have a common law right of action for negligence. *Id.* at 132-133.

In the present case the Department denied any claim for coverage in the Order dated April 13, 2001. In the absence of a finding of actual coverage for the alleged exposure, the plaintiff could bring a private right

of action, which is what the personal representative has done. The personal representative in doing so will be required to show that the disease is not particular to his occupation, but she has not yet been able to do so.

**iii. Decedent's Condition Was Not Natural To His Employment
And Was Not Found To Be An Occupational Disease**

Plaintiff maintains that the alleged condition was not an occupational disease as defined by statute. RCW 51.08.140 states “‘Occupational disease’ means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.” The term “naturally” is the determinate factor in the present case.

In *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 745 P.2d 1295 (1987), the court laid out a three-part test to determine whether or not an occupational disease arose as a natural consequence or incident to the distinctive conditions of the worker's particular employment. The three factors, all of which must be met, are: 1) the particular work conditions more probably than not caused the disease or disease-based disability than conditions in everyday life or all employments in general; 2) the disease or disease-based disability must be a natural incident of conditions of that worker's particular employment;

and 3) 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. *Id.* at 481.

The third factor is of importance in this matter since there has not been a showing that the alleged condition is in fact a condition of the worker's particular occupation which would make the condition an occupational disease – assuming for the moment that the first two conditions were met. Plaintiff has alleged that the decedent was exposed to pesticides during his employment, but the exposure was not necessarily a condition of employment as much as a condition which coincidentally occurred within his workplace.

Decedent's condition was not found to be an occupational disease and plaintiff does not contend that it is an occupational disease. Plaintiff agrees that if the Court were to determine that the Department's findings have a preclusive effect with respect to Plaintiff's private right of action, then plaintiff is bound by the Department's finding. Plaintiff has argued that the Department's findings do not affect the private right of action, and that the Court must determine the issue on the allegations put forth earlier and find that the condition is not an occupational disease and therefore not

subject to the Industrial Insurance Act. Plaintiff argues that their claim should not be barred.

II. CONCLUSION

For the reasons set forth above, Appellant, Kaela D. Atchison, respectfully requests that this court overturn the lower court's order barring the cause of action due to the running of the statute of limitations and remand the case for entry of an order consistent herewith.

RESPECTFULLY SUBMITTED THIS 24 day of January, 2007.

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COURT OF APPEALS
DIVISION II

07 JAN 29 11 09 AM

STATE OF OREGON
BY CM
DEPUTY

CERTIFICATE OF SERVICE

I certify that on January 24, 2007, I served the foregoing
APPEALANT'S RESPONSIVE BRIEF on:

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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, fist-class postage-prepaid envelope and deposited with the United States Postal Service at Portland, Oregon to all parties.
- by **courier**.

DATED: January 24, 2007.

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