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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

APPEAL FROM THE SUPERIOR COURT OF CLARK COUNTY
HONORABLE ROGER A. BENNETT
CLARK COUNTY CAUSE NO. 06-2-00732-1

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

The trial court erred in entering an Order of Judgment signed on May 18, 2006, ordering that the personal representative's wrongful death claim on behalf of the estate was barred by the statute of limitations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Is the statute of limitations tolled by the disability of a personal representative who had not yet been appointed due to their disability at the time the action accrued?

II. STATEMENT OF CASE

Kaela D. Atchison ("Appellant"), as personal representative of the Estate of William Arthur Atchison ("Decedent"), brought a wrongful death action against Great Western Malting Company under RCW 4.20.010.

(CP, p. 4) The personal representative alleged that Decedent was exposed to pesticides in his capacity as an employee of Great Western and that this exposure was proximately caused by Great Western's negligence. (CP,

p.5) As a result of this exposure Decedent contracted Stage IIA Diffuse Large Cell Lymphoma, which caused Decedent's death on June 29, 2000.

(CP, p. 5) The complaint was filed on February 10, 2006 in Clark County Superior Court. (CP, p. 4)

The Decedent, who was previously divorced, died intestate and no probate was begun until the appointment of the personal representative on November 9, 2005. (CP, p. 47) The personal representative is the Decedent's daughter and sole surviving issue at the time of his death. (CP, p. 47) The personal representative turned 21 on March 19, 2006. (RP, p. 20)

III. ARGUMENT

THE ORDER OF THE SUPERIOR COURT GRANTING DISMISSAL OF THE ACTION BASED ON THE RUNNING OF THE STATUTE OF LIMITATIONS WAS IN ERROR AND THE DISABILITY OF THE PERSONAL REPRESENTATIVE AT THE TIME THE ACTION ACCRUED TOLLED THE STATUTE OF LIMITATIONS UNTIL THE REMOVAL OF THE DISABILITY

The Order of Judgment was entered by the court on May 18, 2006 (CP, p. 31). The trial judge, Judge Robert Bennett granted the Order and stated that "what a clever strategy by a clever attorney would be to pick somebody - if the statute is already run, pick someone to be PR who was a minor at the time the statute ran, and I can't imagine the law envisions that,..." (RP, p. 19). Probate law in the State of Washington does not require that probate be initiated within a specific time after death, nor that

specific persons are entitled to letters of administration. Instead the statute provides guidance.

A. PERSONS ENTITLED TO LETTERS OF ADMINISTRATION

RCW 11.28.120 states that administration of an estate if the decedent died intestate or if the personal representative or representatives named in the will declined or were unable to serve shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order: (1) The surviving spouse, or such person as he or she may request to have appointed. (2) The next of kin in the following order: (a) Child or children; (b) father or mother; (c) brothers or sisters; (d) grand-children; (e) nephews or nieces.

Appellant is the child of the Decedent and was a minor at the time of death. (CP, p. 22) As a minor she was unable to be granted letters of administration since her disability prevented her from being appointed personal representative.

Granting the Respondent their Order of Judgment ignores the rights of the Appellant who was appointed as the personal representative upon the lifting of her disability.

B. ONLY THE PERSONAL REPRESENTATIVE MAY BRING AN ACTION FOR WRONGFUL DEATH

Wrongful death actions in Washington are strictly statutory.

Schumacher v. Williams, 107 Wn. App. 793, 794 (2001). RCW 4.20.010 holds that when the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death. Id. p. 794. Every such action shall be for the benefit of the wife, husband, child or children, including stepchildren, of the person whose death shall have been so caused. Id. p. 794-795.

The very specificity of the statute as to who may maintain the action - the personal representative - precludes the bringing of a wrongful death action prior to the initiation of probate and the issuance of letters of administration.

In the present case, the Appellant, who was appointed as personal representative on November 9, 2005 (CP, p. 34) brought the action as per the wrongful death statute (CP, p. 4) and for the benefit of the surviving child, who happens to be the personal representative.

C. THE PROVISIONS OF RCW 4.16.190 TOLL THE STATUTE OF LIMITATIONS DURING A PERSON'S DISABILITY

If one is personally disabled, RCW 4.16.190 allows for the tolling of the statute of limitations for such personal disability by stating that the time of such disability shall not be part of the time limited for the commencement of action. The statute in whole states: "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."

Appellant was fifteen years of age (CP, p. 28) at the time the action accrued and was therefore statutorily disabled at the time the action accrued. The statute is quite clear that since she was disabled the statute of limitations is tolled.

**D. THE STATUTE OF LIMITATIONS SHOULD BE TOLLED FOR
THE PERSONAL REPRESENTATIVE WHO WAS
STATUTORILY DISABLED**

The court held in Huntington v. Samaritan Hospital, 101 Wn.2d. 466 (1984) that the tolling statute would control only if the party entitled to bring a wrongful death action, the personal representative, was subject to a disability as defined by the tolling statute.

In the present case, the personal representative was fifteen at the time of her father's death. (CP, p. 28) He was unmarried at the time of death and his immediate next of kin was the appellant. (CP, p. 34) The appellant was disabled as defined by the tolling statute and was unable to bring the action. In the absence of a statutory provision requiring the appointment of the personal representative within a specified time, to hold as improper the fact that the Appellant was appointed within three years after her disability was removed, but after the statute of limitations had run, would quash similar actions by unemancipated minors across this state.

Huntington, states that the tolling statute, RCW 4.16.190, becomes operative only if the personal representative, the "person entitled to bring the action" is disabled. Id. at 469. Thus, the court would apply this statutory tolling provision only if the party entitled to bring the wrongful

death action, the deceased's personal representative, was under a disability as the tolling statute defines that term. Id. at 469.

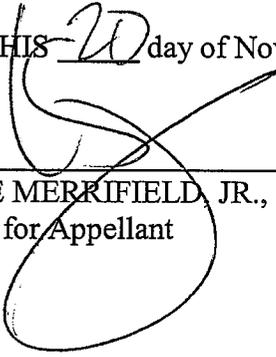
This clearly fits the facts before this court. The personal representative, being a minor and consequently disabled, was unable to bring the action until the disability was lifted, which occurred on her eighteenth birthday and which also began the running of the statute of limitations. Therefore, the statute of limitations did not run until March 29, 2006 when the personal representative turned 21.

In making this argument, the Appellant distinguishes these facts from a prior court ruling. In Dodson v. Continental Can Co., 159 Wash. 589, 294 P. 265 (1930), which Respondent has previously argued bars the present action (CP, p. 40), the Washington Supreme Court held that the general statute of limitations starts the limitation running at the time the cause of action 'accrued'. Id. at 598. A reading of the facts of that case indicates that the ruling turned on the fact that the husband was in a position to file a probate - but for reasons not discussed chose not to. The court discusses it in terms of competency, a competency that is much different from the present facts. Here, there was not a surviving spouse who could have brought the action, only a statutorily disabled child. Therefore, it is argued that the action did not accrue on June 29, 2000.

IV. 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 20 day of November, 2006.



LAWRENCE MERRIFIELD, JR., WSBA #24845
Of Attorneys for Appellant

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 IN AND FOR THE COUNTY OF CLARK

KAELA D. ATCHISON, Personal Representative)	
of the Estate of William Arthur Atchison,)	Cause No. 06 2 00732 1
)	Court of Appeals No. 35125-1
Plaintiff,)	
)	AFFIDAVIT OF SERVICE
vs.)	
)	
GREAT WESTERN MALTING COMPANY,)	
a Washington Licensed Corporation,)	
)	
Defendants.)	

STATE OF WASHINGTON)
 : ss.
 County of Clark)

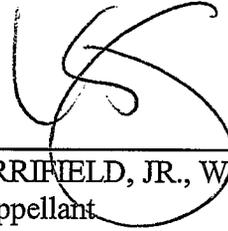
I, LAWRENCE MERRIFIELD, JR., being first duly sworn, upon oath, hereby
 depose and state:

That I am an attorney at the law firm of Boyd & Gaffney. That I did on the 20th
 day of November, 2006, mail a true copy of the following documents in regard to the
 above-entitled matter, to James Gidley, Perkins & Coie LLP, 1120 NW Couch Street, Tenth
 Floor, Portland, Oregon 97209-4128.

DOCUMENTS MAILED: Brief of Appellant, November 20, 2006 letter to Court

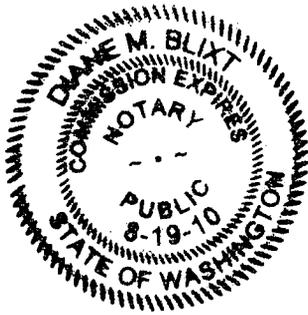
of Appeals

Said document was placed in a sealed and postage prepaid envelope and mailed at
Vancouver, Washington on said date.



LAWRENCE MERRIFIELD, JR., WSBA #24845
Of Attorneys for Appellant

SUBSCRIBED AND SWORN TO before me this 26th day of Nov., 2006.



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