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NO. 58932-6-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON DIVISION 1

THE ESTATE OF PAMELA L. KISSINGER,

Respondent,

v.

JOSHUA HOGE,

Appellant.

2007 MAY 31 11:08
CLERK OF COURT
DIVISION 1
APPELLATE COURT
TACOMA, WA

REPLY BRIEF OF APPELLANT

JEAN O'LOUGHLIN# 14756
Attorney for Appellant
DEPARTMENT OF ASSIGNED COUNSEL
949 Market Street, Suite 334
Tacoma, WA 98402-3696
(253) 798-3980



ORIGINAL

TABLE OF CONTENTS

I. ARGUMENT		1
A.	JOSHUA HOGE'S DELUSIONAL ACTS WERE NOT WILLFUL.	1
B.	JOSHUA HOGE'S DELUSIONL ACTS WERE NOT UNLAWFUL.	6
C.	THE PREDOMINANT THRUST OF AMERICAN LAW FAVORS JOSHUA HOGE.	9
D.	THE PURPOSES OF THE SLAYERS STATUTE DO NOT APPLY TO JOSHUA HOGE.	10
II. CONCLUSION		11

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<i>State v. Box</i> , 109 Wn.2d 320, 745 P.2d 23 (1987)	7
<i>State v. Crenshaw</i> , 98 Wn. 2d 789, 659 P.2d 488 (1983)	7
<i>Cook v. Gisler</i> , 20 Wn. App. 677, 582 P.2d 550 (1978)	6
<i>State v. Hutsell</i> , 120 Wn.2d 913, 845 P.2d 1325 (1993).....	7
<i>New York Life Insurance Company v. Jones</i> , 86 Wn. 2d 44, 541 P.2d 989 (1975)	2

<i>State v. Russell</i> , 73 Wn.2d 903, 442 P.2d 988 (1968).....	3
<i>State v. Spino</i> , 61 Wn. 2d 246, 377 P.2d 868 (1963).....	2-3
<i>State v. White</i> , 60 Wn. 2d 551, 374 P.2d 942, (1962)	7

OTHER STATES CASES

<i>Sobel v. The National Bank and Trust Company of Erie</i> , 71 Pa. D. & C.321(1950)	4, 5
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STATUTES

RCW 9A.04.090	3, 4
9A.32.010	8

I. ARGUMENT

A. JOSHUA HOGE'S DELUSIONAL ACTS WERE NOT WILLFUL.

Mr. Hoge is not arguing that this Court needs to decide this issue as a matter of law. Within the facts of this case, Mr. Hoge's actions when he took the life of his mother cannot be said to be willful. The indisputable facts regarding Mr. Hoge's mental illness include that he has had paranoid schizophrenia for many, many years. His symptoms have remained consistently psychotic: he hears voices, has hallucinations, and lives under the incredibly overwhelming power of demonic delusions. His statements immediately after the killings demonstrate the depth of his irrational and delusional thoughts. He believed his mother and brother were imposters. He thought he was acting to save his daughter, though he has no daughter. He spoke of spaceships, performing magic and time travel. He asked if he had died. Yes, he also made statements about killing Walt and having stabbed a person.

The estate is arguing that Mr. Hoge knew he was killing a human being. The estate, however, cannot rely on one

statement from an entire fabric of an entrenched, chronic delusional system to prove Mr. Hoge's actions were willful, deliberative and designed. This court is not in a position to parse out which statements involved in his delusions are meaningful, rational or resistable and which are not. What the criminal court absolutely did find was that Mr. Hoge was out of his mind at the time of the killings.

However, whether or not Mr. Hoge knew he was killing a person is not the answer to the question before this court. The question before this court is whether his actions were willful. Under the facts of this case, it cannot be said that Mr. Hoge willfully killed his mother.

Willful for purposes of the Slayer's Statute is not equated with intentional as used in the current criminal code. The Washington State Supreme Court has defined willful expressly as it applies to the Slayer's Statute as something more than intentional. In *New York Life Insurance Company v. Jones*, 86 Wn. 2d 44, 541 P.2d 989 (1975), the court looked to several sources for its definition. It looked to *State v. Spino*, 61 Wn.2d

246, 377 P.2d 868 (1963) which said willful meant intentionally and designedly. It looked to *State v. Russell*, 73 Wn.2d 903, 442 P.2d 988 (1968) which said willful means intentionally, deliberately and or designedly. It then looked to *Webster's Third New International Dictionary* 2617 (1968) and *45 Words & Phrases* 313-28 (perm. ed. 1970).

The definition adopted by our Supreme Court that willful means intentional, designed, and deliberate necessarily implies some rational thought processes which is precisely what Mr. Hoge did not possess the day of the killings.

The Slayer's Statute is a civil statute. It is found in the Revised Code of Washington under trust and probate law. It is not a part of the criminal code. The criminal law definitions do not control here.

It makes sense that the current Ch. 9A.04 RCW definitions do not control here because the Slayer's Statute was adopted prior to the enactment of that code. The legislature at the time of adopting the Slayer's Statute could not have intended a definition for willful not yet encoded. Further RCW 9A.04.090

by its terms applies to the definition of offenses. The definition of an offense is not what is at issue when deciding what willful means in the Slayer's Statute. RCW 9A.04.090 says:

9A.04.090. Application of general provisions of the code. The provisions of chapters 9A.04 through 9A.28 RCW of this title **are applicable to offenses defined by this title or another statute**, unless this title or such other statute specifically provides otherwise.

What is at issue here is the definition of the word willful in a civil statute, not the definition of an offense.

The estate makes much of the fact that even though nearly every other state looking at this issue has decided in favor of people in Mr. Hoge's situation, these other states do not use the same language as Washington's. Pennsylvania's statute uses precisely the same language as Washington. Pennsylvania's court, *Sobel v. The National Bank and Trust Company of Erie*, 71 Pa. D. & C.321 (1950) when deciding how to interpret "willful" went through a very thoughtful analysis. That court decided that willful meant more than just intentional. It said that nearly every voluntary act of an individual whether mentally ill or not could be said to be intentional. It determined that willful for purposes

of the Slayer's Statute meant more than that. It said at p. 324:

But in a broad sense every voluntary act of a human being can be said to be intentional and therefore "willful". Is this the interpretation of the word which must be applied in cases of the character involved here? **Is the mere commission of a voluntary act resulting in death to another to be construed as a willful killing where the volition originates in a diseased mind?** Blackstone formulated a general answer to these questions when he said (book 4, ch. II, par.21):

"Where there is no discernment there is no choice, and where there is no choice there can be no act of the will...: he, therefore, that has no understanding can have no will to guide his conduct."
[Emphasis added]

This analysis is consistent with our Supreme Court in the only Washington decision interpreting willful for purposes of the Slayer's Statute. It is also consistent with Washington's adoption of the M'Naghten test for proving insanity.

The undisputed conclusion of the criminal court was that Mr. Hoge was out of his mind when he killed his mother. Inherent in that finding, especially under the particular facts of this case, is the inability to attribute willfulness to Mr. Hoge's

actions. Mr. Hoge was acting under the influence of incredibly strong demons. To attribute willfulness to those actions completely disregards what we know about mental illness.

B. JOSHUA HOGE'S DELUSIONAL ACTS WERE NOT UNLAWFUL.

The estate flip flops the question before this court. The estate would have this court rule as to whether Mr. Hoge has shown his actions to be lawful. The Slayer's Statute does not require innocence, it requires the state to prove unlawfulness. *Cook v. Gisler*, 20 Wn. App. 677, 582 P.2d 550 establishes that distinction when they decided who had the burden of proof. It said at pp. 551-552:

This appeal presents two basic issues, (1) did the trial court apply the proper burden of proof when it required the **defendants to establish by a preponderance of the evidence that the killing was unlawful instead of requiring the plaintiff to prove that it was lawful?** [Emphasis added]

The statute and the *Cook* court prescribe that the estate has the burden of proving that Mr. Hoge's actions were unlawful. This they cannot do.

The established rule of law in Washington is that a finding of not guilty by reason of insanity is a **complete defense** to the crime of murder. It completely absolves a defendant of all criminal responsibility. *State v. Crenshaw*, 98 Wn. 2d 789, 659 P.2d 488 (1983) *State v. White*, 60 Wn. 2d 551, 592, 374 P.2d 942 (1962), *State v. Hutsell*, 120 Wn.2d 913, 845 P.2d 1325 (1993). It also comports with *State v. Box*, 109 Wn.2d 320, 745 P.2d 23 (1987). The issue before the *Box* court was where to attribute the burden of proof in pursuing an insanity defense. The holding in *Box* was that in order to be acquitted by reason of insanity the defendant had the burden of proving his insanity. The *Box* court did not overrule prior case law that insanity is a complete defense. In fact, *Hutsell* was decided after *Box*. *Box* simply apportioned the burden of proof. It did also express that sanity is not an element of the charge needed to be proven by the state. But that is not the issue before this court. Mr. Hoge emphatically met his burden as established by the *Box* court.

The estate looks to two definitions of homicide that are expressly defined as lawful by the legislature. Those two

examples do not erase the body of criminal law with regard to other defenses that allows for other acts not to be termed unlawful. RCW 9A.32.010 does not prescribe what killings are unlawful, but instead describes two situations in which killings are lawful. Although in its brief the estate asserts only excusable and justifiable homicides are not unlawful, it cites no authority for that proposition and it is not accurate. There are defenses to charges which are statutory or the product of case law. A complete defense to a charge absolves a person of criminal responsibility. A finding of diminished capacity can lead to a finding of not guilty to certain charges and hence those actions cannot be termed unlawful. Duress, intoxication in certain circumstances, and entrapment are defenses that would make certain actions not unlawful. A jury's finding of not guilty is an acquittal whatever the jury's basis was. A finding of not guilty by reason of insanity is an acquittal. The actions taken resulting in that finding cannot be termed unlawful.

Insanity is not an all or nothing concept. Some actions on the part of the mentally insane may be rational some may be

irrational. The mind is diseased. These actions cannot be parsed out. However, when a person's insanity is severe enough to meet the McNaghten test, it is a complete defense to the crime charged, including murder.

**C. THE PREDOMINANT THRUST
OF AMERICAN LAW FAVORS
JOSHUA HOGE.**

Although the estate would suggest that because the other states that have looked at this issue and decided in Mr. Hoge's favor do not have identical statutes or jurisprudence as Washington that somehow lessens Mr. Hoge's argument; the opposite is true. Certainly each state has its own jurisprudence. Some states have encoded the slayers statute; some states have looked to the common law. The language of the various slayers statutes include terms common to Washington and some different: terms such as willful, intentional, felonious, unlawful. Some require conviction others do not.

The important piece is that the full force of American jurisprudence in nearly each and every case has been that insanity precludes the invocation of the slayer's statute. This includes

courts that have looked to the common law for guidance, courts that have analyzed statutes and also eminent text authorities. This also includes the one state that has identical language to our own.

**D. THE PURPOSES OF THE
SLAYER'S STATUTE DO NOT
APPLY TO JOSHUA HOGE.**

Mr. Hoge is the victim of an implacable disease. Society does not know how to cure it. Because of the immense severity of his disease, society excuses him from some of the normal consequences of the criminal laws.

One of the primary purposes of the Slayer's Statute is that a person should not do harm in order to profit thereby. Clearly, Mr. Hoge was not doing harm to profit. Mr. Hoge did not even believe he was killing his mother. In fact, statements he made indicate that at some level he was trying to save his mother's money. "They were not my family and they were spending my mom's money." CP 116-118. Further at the time of the killing there was very little if any inheritance. This money is at issue because my client was so severely mentally ill and was not treated properly for that illness. The estate sued the mental health

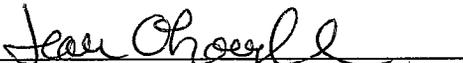
agency essentially claiming Mr. Hoge to be a victim. Mr. Hoge did not kill to profit.

Mr. Hoge's actions were so much the actions of a diseased mind; a diseased mind over which he had no control. A diseased mind that society does not know how to cure.

II. CONCLUSION

It is beyond dispute that schizophrenia is a disease of the mind over which a person has no control. The life of a person with chronic schizophrenia is a living hell. To be found not guilty by reason of insanity a person must have lost all touch with reality. Mr. Hoge's tragic killing of his mother was so much the act of his disease and not his volition. Joshua Hoge killed his mother but was unable to appreciate the nature and quality of his acts and unable to know right from wrong. Mr. Hoge acted neither unlawfully or wilfully. The plaintiffs have not met their burden. Joshua Hoge is a beneficiary of his mother's estate.

Respectfully submitted this 31 day of May, 2007


JEAN O'LOUGHLIN, WSBA# 14756
Attorney for Appellant
949 Market Street, Ste 334
Tacoma, WA 98402
(253) 798-3980

IN THE COURT APPEALS OF THE STATE OF WASHINGTON
DIVISION I

IN RE THE ESTATE OF:

NO. 58932-6-I

PROOF OF SERVICE

PAMELA L. KISSINGER,
Deceased.

PROOF OF SERVICE

I, Justina Pale, a person over 18 years of age, served Mark Leemon, at 2505 2nd Avenue, Ste., 610, Seattle, WA a true copy of the Reply Brief of Appellant on the 31st day of May, 2007.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 31st day of May, 2007, at Seattle, WA.


949 Market St, Suite 334
Tacoma, WA 98402

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