

82474-6

No. 36089-6

COURT OF APPEALS, DIVISION TWO
STATE OF WASHINGTON

GEORGE KELLEY

Appellant,

v.

CENTENNIAL CONTRACTORS ENTERPRISES, INC.

Appellees.

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DIVISION II
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STATE OF WASHINGTON
BY DEFENSE

BRIEF of AMICUS CURIAE
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I. INTRODUCTION

COMES NOW Washington Defense Trial Lawyers (“WDTL”), an organization of lawyers representing defendants in civil litigation, which appears on occasion as Amicus Curiae on a pro bono basis, by and through the undersigned, and hereby submits the following brief in support of Defendant Centennial Contractors Enterprises, Inc. Amicus urges this Court to affirm the trial court’s grant of Defendant’s motion to dismiss.

Plaintiff brought suit on behalf of the minor children whose injured father had already sued Defendant and proceeded to trial on those claims, obtaining a favorable verdict. The children simply awaited the termination of that matter, and filed this lawsuit soon thereafter. Plaintiffs failed to meet the burden of proving that joinder in their father’s lawsuit was “not feasible.” The trial court’s decision to that effect does not amount to an abuse of discretion.

II. ANALYSIS

This matter presents a relatively straight forward issue that is easily answered in Defendant’s favor. Plaintiff is the Guardian ad Litem of the minor children of a man, Phillip Blackshear, who was injured in a 2003 workplace accident on Defendant’s premises. A forklift operator accidentally dropped a 1,000 lbs. steel beam on the father, injuring him, and requiring that he undergo several surgeries in 2003, 2004, and 2005.

Appellant's Opening Brief, at 3-5 (citing, CP 47, 48, 62, 63). He was injured so severely that he was unable to return to work. *Id.*

The burden was on the children to establish that it was “not feasible” for them to join in the lawsuit brought by their injured father, which had concluded in a verdict in his favor only months before. CP 55, 75. The trial court concluded that they had failed to meet this burden. Plaintiff now cannot establish that the trial court committed an abuse of discretion in making this fact-intensive decision.

A. Washington's Loss of Parental Consortium Claim.

In 1984, this state joined a distinct minority of jurisdictions when it created a loss of consortium cause of action for a child based on an injury to their parent. *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984). In 1989, only eight states had recognized such a cause of action. *Huggins by Huggins v. Sea Ins. Co. Ltd.*, 710 F. Supp. 243, 248 (E.D. Wisc. 1989). Today, that number has risen to only 14. *Supp. Brief of Defendant, at 8.*

When it created this cause of action, the Washington Supreme Court was concerned about the potential for multiplicity of litigation, specifically children bringing suit separate from their parents. *Ueland*, 103 Wn.2d at 194. To address this concern, the court imposed a strict, but logical, requirement that the children join in their injured parent's lawsuit:

We too are concerned with the possibility of multiple actions, but find the Iowa court's answer to the problem most sensible. We hold that the children's claims for loss of parental consortium must be joined with the injured parents' claim whenever feasible. A child may not bring a separate consortium claim unless he or she can show why the joinder with the parents' underlying claim was not feasible.

*Id.*¹ This decision was reached despite the existence of rules tolling the statute of limitations, and requiring the appointment of a guardian for purposes of pursuing litigation.

B. The Joinder Requirement.

Our Supreme Court in *Ueland* clearly imposed a requirement that the children's claims be joined with that of their injured parents. The only exception is if the child can prove that such joinder was "not feasible." In fashioning this limitation, our Court implicitly borrowed from the joinder provisions of CR 19 and CR 20.

Civil Rule 19 is entitled "Joinder of Persons Needed for Just Adjudication," otherwise known as *indispensable parties*. The rule sets out the factors to determine whether a person must be joined. CR 19(a). However, these factors need not be weighed here, as *Ueland* judicially determined that children are, by definition, "persons to be joined if

¹ The Iowa case referred to by our Court is *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981). There, the court held "If a child's consortium claim is brought separately, the burden will be on the child plaintiff to show why a joinder was not feasible." *Id.* at 270.

feasible.” CR 19(a).²

While CR 19 concerns “necessary” parties -- persons who must be joined because their absence prevents the parties from obtaining complete relief -- CR 20 concerns “permissive” joinder, persons who could, but need not, be joined as parties.

The Washington Supreme Court’s imposition of the joinder requirement therefore creates a unique blend of the provisions of the indispensable party rule, and the permissive joinder rule. CR 19 and CR 20. The joinder of the children’s loss of consortium claims with the parent’s lawsuit is “permissive,” in the sense that the failure to join these claims will not result in the dismissal of the parent’s claims. However, the failure of the children to join when feasible renders their *subsequent* lawsuit subject to dismissal.

The Ninth Circuit has recognized that *dismissal* is the appropriate remedy for the subsequent suit of minor children when they could have joined in the original action brought by their injured parent. *Barber v. Cincinnati Bengals*, 41 F.3d 553 (9th Cir., 1994). The Court addressed the

² Another provision of the rule addresses whether the original lawsuit (here, that of the injured parent) should be dismissed if the non-party (the child) cannot be made party. CR 19(b). That question is not before the court. Rather, the question presented is what to do with a later lawsuit when the children fail to join in the original action, but rather wait and sue after the verdict.

propriety of the dismissal of the children's later action. The trial court based its decision on a very narrow factual issue—that the mother's claim had been finally determined. But this was incorrect. “The district court was apparently misled into the conclusion that a final judgment dismissing [the mother's] personal injury claims had been entered.” *Id.* at 556.

The Ninth Circuit held that this was an erroneous assumption, and remanded the case “with instructions that the District Court determine whether joinder or consolidation of this matter with [the mother's] personal injury claims is feasible since that matter is still pending.” *Id.* at 558. The court expressed no view as to whether joinder was actually feasible. *Id.* (By contrast here, the father's suit was terminated and had been resolved by a favorable jury verdict).

In reaching this result, the Ninth Circuit implicitly reached two conclusions: (1) if the parent's claim has reached final judgment, the children's later suit should be dismissed; and (2) that even if the injured parents' lawsuit remains pending, dismissal is the appropriate remedy if previous joinder was “feasible.”³

³ The minor plaintiffs in *Barber* were represented by the same law firm that brings suit on behalf of the minor plaintiffs in this matter. It is interesting to note that the plaintiffs in that case likewise alleged that they could not join in their mother's claim “until the permanency and severity of her injuries were known.” *Id.* at 555.

Plaintiff here turns this issue on its head by asserting that Defendant's motion to dismiss is "moot" because the injured parent's underlying lawsuit had concluded. *Opening Brief of Appellant, at 14.* That is, Plaintiff claims that Defendant's motion can be made only in that narrow window of time (which may never exist) when the parent's lawsuit is still pending and the children file suit.

Thus, the children here attempt to take advantage of their (perhaps) strategic decision to await the conclusion of their father's lawsuit to bring their own, and then claim that it is not "feasible" to join in their father's suit because they denied filing until after his concluded. But, the proper question is whether it was feasible for these children—who were residing with their father before, during, and after his injury—to join in his lawsuit when he filed it. The trial court concluded that it was factually feasible for them to join. That conclusion appears to be quite sound.

C. The Burden of Proof is on the Minor Children.

The burden of proof to establish the lack of feasibility is clearly upon the children. "A child may not bring a separate consortium claim unless he or she can show why joinder with the parent's underlying claim was not feasible." *Ueland, supra*, at 137 (relying on *Weitl v. Moes, supra*). Or, as the Iowa court held: "If a child's consortium claim is brought separately, the burden will be on the child plaintiff to show why

joinder was not feasible.” *Weitl v. Moes*, 311 N.W.2d at 270.

Plainly the burden of proof is on the plaintiff children. They did not meet it.

D. Standard of Review.

The trial court in this matter rendered a fact-based decision, which is subject to review under the abuse of discretion standard. Interestingly, Plaintiff here advances a detailed factual account of why it was not “feasible” to join the father’s lawsuit, but then requests the Court apply the *de novo* standard usually reserved for questions of law. *Opening Brief of Appellant, at 8.*

As discussed above, in imposing the joinder requirement in *Ueland*, the Supreme Court borrowed from the standard as set forth in CR 19. But, this Court need not guess what standard of review should be applied, as the Supreme Court only recently concluded that it is abuse of discretion. In *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006), the court held:

We agree with the majority of federal courts that have considered the issue and believe that abuse of discretion is the appropriate standard of review [in a dismissal for failure to join an indispensable party under CR 19], with the caveat that any legal conclusions underlying the decision are reviewed *de novo*.

It would seem appropriate here to review the trial court dismissal for failure to join—in the face of a factual “infeasibility” argument—for an abuse of discretion.

E. Implications and Consequences of Joinder.

A defendant in a personal injury action has no legal right to compel the child of an injured parent to become a plaintiff, nor should they. Indeed, forcing children to expose themselves to the implications of a lawsuit may have due process or privacy implications.

A parent is the natural guardian of their child and their child’s interests. The statutory requirement of the appointment of a Guardian ad Litem to commence litigation, RCW 4.08.050, does not alter this fact. A parent retains the right to choose whether making their child a litigant is in the child’s, or the family’s, best interests.

When a parent commences their own action and omits to include their minor child as a party/plaintiff, an inference naturally arises that the parent has made the deliberate decision to not subject their child to the burdens and stresses of litigation. The absence of a child as plaintiff leads to an inference “that the parent has elected against representing the child’s interest.” *Huggins by Huggins, supra*, at 250 (citing, *Nelson v. Ludovissy*, 368 N.W.2d 141, 146 (Iowa, 1985)).

Becoming a personal injury plaintiff has obvious and profound

implications, particularly in the areas of discovery into one's emotional or physical condition. Any tort plaintiff must respond to interrogatories, CR 33, sit for a deposition, CR 30, and perhaps a medical or psychological examination, CR 35. And, many parents may simply not wish to involve their children in litigation for other practical or philosophical reasons, that should not be subject to judicial second-guessing. This is a significant parental decision.⁴ Here, it would seem Mr. Blackshear made the choice to not include his children as plaintiffs, even though it was feasible. (Defendant has already pointed out the difficulties with Plaintiff's argument to the effect that the family was hoping for some miraculous surgical result. *Brief of Respondent, at 3-5.*)

In addition, no procedural mechanism exists to compel their joinder. When an injured parent commences a lawsuit to recover for their own injuries, they are not required to join the claims of their children. The children are not "indispensable" parties, and their parent has a perfect right to proceed without them. Nor is there any provision of CR 19 which would allow the court to grant such a relief.⁵

⁴ Whether, and how, a child may ever override the parent's decision not to bring suit is not before the court. The Blackshears present a cohesive family unit.

⁵ The indispensable party rule contains a provision for making a non-party an "involuntary plaintiff," CR 19(a), but would not apply here as the

Plaintiffs also claim that the tolling of a statute of limitations during a child minority undermines Defendant's position. However, this factor only *increases* the prejudice to a defendant, by the child's waiting in the weeds to sue. That is, not only would a defendant be subject to "as many lawsuits as the injured has children," but also be subject to this litigation for up to twenty-one years. (The three-year statute of limitations is tolled until age 18. RCW 4.16.190 and 4.16.080).

The tolling statute predates the *Ueland* decision. The requirement of a child suing through a guardian also long predates the decision in *Ueland*. See, e.g., *Mezere v. Flory*, 26 Wn.2d 274, 278, 173 P.2d 776 (1946) ("The statutory provision Rem. Rev. Stat., §187 [P.P.C. §3-31] for the appointment of a guardian for minors is mandatory").⁶ Neither statute provides a basis to distinguish *Ueland*.

Lastly, no sound argument can be based upon social policy or changes in the law. It is no answer to say that the restriction in *Ueland* on joinder should be abandoned due to "developments in the law" relating to children. Indeed, it was this very expansion in the legal rights of children which led to the creation of a cause of action to begin with. As the Iowa

joinder of a child is permissive. That is, the parent can obtain complete relief without them.

⁶ This Washington territorial code provision is listed in the Code Revisor's notes as the genesis of the statute relied upon by Plaintiffs. RCW 4.08.050, notes.

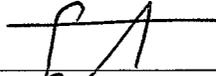
Supreme Court noted in 1981 (in the case relied upon by our Court in *Ueland*), “there has been a growing trend to recognize minor children as having independent identities in possessing certain rights of their own.” *Weitl, supra*, at 268. No body of supposed “children’s rights” laws has developed to change this result in *Ueland* -- joinder is required in almost all instances.

III. CONCLUSION

In conclusion, this Court should affirm the Superior Court’s dismissal of the minor child’s subsequent lawsuit, as that Court’s determination that they failed to meet their burden of proof does not constitute an abuse of discretion.

RESPECTFULLY submitted this 2 day of July, 2008.

KEATING, BUCKLIN & McCORMACK, INC., P.S



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CERTIFICATE OF SERVICE

I certify that I served a copy of *Brief of Amicus Curiae WDTL* upon all parties of record on the 2ND day of July, 2008, via U. S. Mail, postage prepaid as follows:

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

DATED this 2ND day of July, 2008.

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