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STATE OF WASHINGTON

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NO. 36089-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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CLERK OF SUPREME COURT
STATE OF WASHINGTON

GEORGE KELLEY, as guardian for BB, PB, and NB, minor
children,

Respondent,

vs.

CENTENNIAL CONTRACTORS ENTERPRISES, INC.,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

I. IDENTITY OF PETITIONER.....1

II. CITATION TO COURT OF APPEALS DECISION.....1

III. ISSUES PRESENTED FOR REVIEW.....1

IV. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY OF PARENTS’ CLAIMS.....1

 1. The Parents Did Not Request an Expedited Track Assignment When Filing Their Lawsuit on March 29, 2004.....1

 2. Mr. Blackshear Already Had One Surgery Prior to Filing Lawsuit and Two Surgeries Prior to the First Trial Date.....2

 B. PROCEDURAL HISTORY OF MINORS’ CLAIMS.3

 1. The Minor Children of the Blackshears Filed Suit 6 Months After Their Parents’ Verdict Claiming it Was Impractical to Join in their Parents’ Lawsuit, But Did Not Provide Evidence Why it Was not Feasible.....3

 2. The Minor Plaintiffs List the Same Expert Witnesses, Rely on Same Documentary Evidence and Same Medical Causation Issues as Their Parents.....4

3.	The Trial Court Held Minor Plaintiffs Did Not Meet Their Burden of Proof; the Court found it Was Feasible for the Minors to Join in Their Parents Lawsuit.....	4
4.	The Court of Appeals Disagreed with the Trial Court and Held Joinder was Not Feasible.....	5
V.	ARGUMENT.....	6
A.	THE COURT OF APPEALS DECISION ENCOURAGES A MULTIPLICITY OF LAWSUITS, WHICH IS AGAINST PUBLIC POLICY.....	6
B.	THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS' CASE, SINCE PLAINTIFFS FAILED TO MEET THEIR BURDEN OF PROVING IT WAS NOT FEASIBLE TO JOIN THEIR CLAIMS WITH THEIR PARENTS' LAWSUIT.....	8
1.	Joinder was Feasible, Because the Fathers' Severe Injuries Were Certainly Known Even Before the Lawsuit was Filed.....	9
2.	Joinder was Feasible Since the Children Would Have Had Ample Opportunity to Move Their Case Along Within Their Parents' Lawsuit.....	10
3.	Financial Harship is a Red Herring and Did Not Make it Unfeasible to Join in the Parents' Lawsuit.....	10

C. THE RECORD DOES NOT SUPPORT THE ARGUMENT IT WAS NOT FEASIBLE FOR THE MINORS TO HAVE A GUARDIAN AD LITEM APPOINTED DURING THEIR PARENTS' LAWSUIT.....11

D. THE BLACKSHEARS' REMEDY IS AGAINST THEIR COUNSEL AND NOT CENTENNIAL.....11

VI. CONCLUSION.....13

APPENDIX.....14

CERTIFICATE OF SERVICE.....15

TABLE OF AUTHORITIES

STATE CASES

Ueland v. Reynolds Metals Company, 103 Wn.2d 131, 137, 691 P.2d 190 (1984).....1,4,5,6,7,8,13

OUT OF STATE CASES

Belcher v. Goins, 184 W.Va. 395, 400 S.E.2d 830 (1990).....7

Coleman v. Sandoz Pharm. Corp., 74 Ohio.St.3d 492, 493-94, 660 N.E.2d 424 (1996).....7

Hay v. Medical Center Hospital of Vermont, 145 Vt.533, 496 A.2d 939 (1985).....7

FEDERAL CASES

Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171 (1990).....7

OTHER AUTHORITIES

RAP 13.4(b)(1).....6

RCW 4.08.050.....11

I. IDENTITY OF PETITIONER

Petitioner is Centennial Contractor Enterprises, Incorporated.

II. CITATION TO COURT OF APPEALS DECISION

This Petition for Review is being filed based on a Court of Appeals decision filed on October 28, 2008 under Docket Number 36089-6 (attached as Exhibit A to Appendix). The Court of Appeals found the trial court abused its discretion in finding it was feasible for the minor Blackshear children to join their claims with their parents' lawsuit.

III. ISSUES PRESENTED FOR REVIEW

Whether the Supreme Court should grant Centennial's Petition for Review, since the Court of Appeals decision in this case is in conflict with the decision of the Supreme Court in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984).¹

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY OF PARENTS' CLAIMS.

1. The Parents Did Not Request an Expedited Track Assignment When Filing Their Lawsuit on March 29, 2004.

Phillip and Monica Blackshear filed a Complaint against Centennial on March 29, 2004 for injuries and damages stemming from Mr. Blackshear being struck by Centennials' steel beam a year

¹ The official State Report Title for this case is *Ueland v. Pengo Hydra-Pull Corporation*. However, the parties and the courts have previously referred to this case as *Ueland v. Reynolds Metals Co.* Petitioner chose to continue to use the more familiar title of the case for the sake of continuity.

earlier on April 7, 2003. CP 10. The Blackshears, then and now, resided in California. CP 6.

Phillip and Monica Blackshear's attorney, Darrell Cochran, had a Track Assignment Request filed on March 29, 2004 requesting the case be given a standard track assignment. CP 15. Plaintiffs did not request an expedited track assignment. CP 15. On March 29, 2004 an Order Setting Case Schedule was issued placing the case on the standard track assignment. CP 17.

2. **Mr. Blackshear Already Had One Surgery Prior to Filing Lawsuit and Two Surgeries Prior to the First Trial Date.**

In his suit against Centennial, the minor Plaintiffs' father, Phillip Blackshear, claimed injuries to his right knee, right ankle, right foot, low back and right shoulder. CP 6. He was immediately out of work after the accident and throughout the litigation of the parents' claims. CP 55.

As an overview of Mr. Blackshear's injury, he first sought treatment at St. Clare Hospital on April 4, 2003. CP 6. He went on to treat with his primary care physician, Arun Duggal, MD. CP 6. Early on in his treatment, Mr. Blackshear had right shoulder surgery on October 7, 2003 by John Casey, MD, Orthopaedic Surgeon, prior to even filing the original lawsuit in March 2004. CP 6-7. After filing the original lawsuit, he had right carpal tunnel surgery on November 22, 2004 with Dr. Casey. CP 7. Mr. Blackshear also underwent back surgery with Benjamin Remington, MD, Neurosurgeon, on February 10, 2005 and September 8, 2005. CP 7.

The original trial date of March 28, 2005 was moved because of court congestion. CP 7. Even though Mr. Blackshear had already undergone one surgery before the lawsuit and had undergone two surgeries prior to the first trial date, Plaintiffs still did not bring a motion to move their case from the standard track assignment to the expedited track assignment. CP 7. It was not until the second appointed trial date of September 6, 2005 had come and gone that the Plaintiffs finally asked for the trial to be heard September 19, 2005 or a date certain as soon as practicable. CP 7. Trial eventually began on September 12, 2005. CP 7.

B. PROCEDURAL HISTORY OF MINORS' CLAIMS.

1. The Minor Children of the Blackshears Filed Suit 6 Months After Their Parents' Verdict Claiming it Was Impractical to Join in their Parents' Lawsuit, But Did Not Provide Evidence Why it Was not Feasible.

A little over six (6) months after the verdict was rendered in their parents' lawsuit, the minor children of Phillip and Monica Blackshear filed their own Complaint on April 6, 2006. CP 7. The minor children are represented by Darrell Cochran, the same attorney that represented their parents in the original lawsuit. CP 19. They allege they suffered, and continue to suffer, a loss of consortium as a proximate result of Centennial's negligence against their parents. CP 19. The Blackshear children further assert that it was impractical to include the minor children's claims with the initial claims of their parents. CP 19. The children claimed in their Amended Complaint that because of the "family's dire need for

resolution of Phillip Blackshear, Sr.'s claim, and the continuing deterioration of Phillip's physical health, it was impractical to include the minor plaintiffs' case with the initial claims." CP 19.

2. **The Minor Plaintiffs List the Same Expert Witnesses, Rely on Same Documentary Evidence and Same Medical Causation Issues as Their Parents.**

In their lawsuit, the minor Plaintiffs listed essentially the same expert witnesses as were listed in their parents' lawsuit. CP 27, 35. It is also anticipated that the same documentary evidence will be presented at the minor Plaintiffs' trial that was presented at their parents' trial. CP 8. In addition, the minor Plaintiffs only claim general damages and do not plan on presenting any evidence of special damages. CP 44. However, the same medical causation issues would have to be retried in the children's lawsuit at considerable expense if their case is allowed to proceed. CP 8.

3. **The Trial Court Held Minor Plaintiffs Did Not Meet Their Burden of Proof; the Court found it Was Feasible for the Minors to Join in Their Parents Lawsuit.**

Centennial brought a motion to dismiss arguing the minor children's claims should have been joined in their injured parents' prior lawsuit. Centennial's motion was based on the case of *Ueland v. Reynolds Metals Company*, 103 Wn.2d 131, 137, 691 P.2d 190 (1984) where the court held:

... children's claim for loss of parental consortium must be joined with the injured parent's claim whenever feasible. 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.

(Emphasis added).

On February 21, 2007 the Superior Court granted Centennial's motion to dismiss. CP 87-88. The court stated that, "...the *Ueland* case has put the burden on plaintiff to show this infeasibility...I'm not persuaded they met their burden." VRP 3: 9-11. The court went on to state:

Mr. Blackshear, the father, never went back to work, so by the time the original lawsuit was filed he'd been out of work for nearly a year. Certainly, the financial hardship issue would have presented itself by that time.

VRP 3:12-16. The court opined, "there's no facts that I determined that made it apparent to the Blackshear family that they ought to withhold claims of the children." VRP 4:2-4.

4. The Court of Appeals Disagreed with the Trial Court and Held Joinder was Not Feasible.

On October 28, 2008 the Court of Appeals Division II ruled that it was not feasible for the children to join in their parents lawsuit. The Court of Appeals reasoned that, "The record shows that no one appeared as guardian or GAL for the children in the parents' suit and that it was not until May 8, 2006, well after the parents' trial was completed, that Kelley was appointed GAL for the children...Thus, as a matter of law, joinder was not legally feasible and was, therefore, impossible."

The court also reasoned that, factually, they agreed with Kelley that, until the results of the father's final surgery were known, it was impractical to answer the children's cause of action for loss of parental consortium.

V. ARGUMENT

RAP 13.4(b)(1) provides that a petition for review will be accepted by the Supreme Court "if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court."

In this case, the Court of Appeals has made a decision that contradicts the decision by the Supreme Court in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984). In *Ueland*, the Supreme Court held that a minor must join their claims with their parents "if feasible." The Supreme Court stated public policy behind the *Ueland* decision was to avoid a multiplicity of lawsuits. The Court of Appeals ignored the public policy outlined in *Ueland*.

A. THE COURT OF APPEALS DECISION ENCOURAGES A MULTIPLICITY OF LAWSUITS, WHICH IS AGAINST PUBLIC POLICY.

Obtaining a guardian ad litem for a minor is a procedural matter that is routine and expected in the majority of cases involving minors. The courts will be inundated with multiple lawsuits if parties are now allowed to simply plead they did not join in their parents' lawsuit, because they did not have a guardian ad litem. In the case of a minor's loss of consortium claim, such an argument flies in the face of public policy against multiplicity of

lawsuits as outlined in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984) and other jurisdictions.

In order to balance the public policy issues of a multiplicity of lawsuits and still provide children the right to bring a loss of consortium claim, the Supreme Court devised a compromise. The Supreme Court held in *Ueland*:

...children's claim for loss of parental consortium must be joined with the injured parent's claim whenever feasible. 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.

103 Wn.2d at 194 (Emphasis added). The majority of the other 14 States providing children loss of consortium claims express the same concern. See *Hay v. Medical Center Hosp. of Vermont*, 145 Vt. 533, 496 A.2d 939 (1985) (minor's claim must be joined when feasible to prevent multiple lawsuits arising from same incident); *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P.2d 1171 (1990) (joinder quells concerns over multiplicity of suits); *Belcher v. Goins*, 184 W.Va. 395, 400 S.E.2d 830 (1990) (requiring joinder is a fair and practical solution to concern of multiplicity of actions).

In fact, in the Ohio case of *Coleman v. Sandoz Pharm. Corp.*, 74 Ohio.St.3d 492, 493-94, 660 N.E.2d 424 (1996), the court was not only concerned with multiplicity of lawsuits, but also reasoned claims must be joined if feasible because of concerns that the minor tolling of the statute of limitations impedes the settlement process.

It would have been more cost effective and taken less time and resources for the minor children to have included their claims with their parents' lawsuit. This case is a perfect example of why the Supreme Court in *Ueland*, and other states, were concerned with the burden and cost of a multiplicity of lawsuits.

It is simply unfair to force Centennial to try essentially the same case twice with respect to the significant medical issues surrounding Mr. Blackshear's alleged injury claims.

B. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS' CASE, SINCE PLAINTIFFS FAILED TO MEET THEIR BURDEN OF PROVING IT WAS NOT FEASIBLE TO JOIN THEIR CLAIMS WITH THEIR PARENTS' LAWSUIT.

The minor children's claims should have been joined in their injured parents' prior lawsuit. As noted previously, in the case of *Ueland v. Reynolds Metals Company*, 103 Wn.2d 131, 137, 691 P.2d 190 (1984) the court held:

... children's claim for loss of parental consortium must be joined with the injured parent's claim whenever feasible. 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.

(Emphasis added).

The Blackshear children did not meet their burden of proof according to *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984), since they provided no admissible evidence as to why joinder was not feasible. Rather, the admissible evidence

proves it was feasible for the minor children to join their claims with their parents' lawsuit. The Declaration of Phillip Blackshear was the only evidence provided, but it does not explain why joinder was not feasible.

1. **Joinder was Feasible, Because the Fathers' Severe Injuries Were Certainly Known Even Before the Lawsuit was Filed.**

As noted above, the father's severe injuries were certainly known even before the parents' lawsuit was filed. It is disingenuous for the Blackshears to state that it was only on April 6, 2005 that they "knew and finally understood their relationship with their father was forever affected." They were immediately aware of severe injuries as of the date of his accident on April 7, 2003, and he had already had one major surgery before the lawsuit was even filed on March 29, 2004. Moreover, the father underwent two more surgeries even before the first trial date.

The Blackshears gloss over these facts and try to confuse the court by focusing only on the last surgery. It is clear, however, from the facts that the father's injuries were severe from the beginning and always getting worse and not better. It was certainly feasible for the children to join their claims with their parents' lawsuit from the beginning, since their father was already severely injured before the parents' lawsuit was even filed.

Finally, the continuing deterioration of Phillip Blackshear, Sr.'s physical health is irrelevant to the feasibility of joining the children's claims with their parents' lawsuit. As noted above, Mr.

Blackshear's condition was already deteriorating when his lawsuit began. Most importantly, the condition of their father, whether deteriorating or not, is just as relevant to the children's claims as to the father's claims.

2. **Joinder was Feasible Since the Children Would Have Had Ample Opportunity to Move Their Case Along Within Their Parents' Lawsuit.**

The family's dire need for resolution of Phillip Blackshear, Sr.'s claim is disingenuous, because they never requested this case be placed on an expedited track. If Plaintiffs were truly in a hurry, they had ample opportunity to try and move this case along. Moreover, joining the children in the parents' lawsuit would not have delayed the trial. Plaintiff would have been given the same trial date based on its standard track request, regardless of whether the children's claims would have been part of the underlying lawsuit.

3. **Financial Harshship is a Red Herring and Did Not Make it Unfeasible to Join in the Parents' Lawsuit.**

The Blackshears' argument that financial hardship made it unfeasible to join the children's claims is illogical. The Blackshears agree with Centennial that 1) they intended to call essentially the same expert witnesses as were listed in their parents' lawsuit, 2) that the same documentary evidence would be presented at the children's trial that was presented at their parents' trial, 3) that discovery on the children's claims would have been minimal since they are only claiming general damages, 4) the same medical history of their father would have been presented, 5) the same witnesses would have

been called, even if the children's claims had been joined and 6) that the same medical causation issues will have to be relitigated in this case at considerable expense. Therefore, it would have been more cost effective and taken less time and resources for the minor children to have included their claims with their parents' lawsuit.

C. THE RECORD DOES NOT SUPPORT THE ARGUMENT IT WAS NOT FEASIBLE FOR THE MINORS TO HAVE A GUARDIAN AD LITEM APPOINTED DURING THEIR PARENTS' LAWSUIT.

Nowhere in the record from the Superior Court did the Blackshear children argue or put forth admissible evidence that it was not feasible to obtain a guardian ad litem. For instance, they could have argued and provided evidence there was a conflict or difference of opinion about whether suit should be filed and that somehow led to infeasibility.

The Declaration of Phillip Blackshear, which was the only evidence presented in response to Plaintiffs' motion to dismiss, does not explain why joinder was not feasible and no other admissible evidence has been presented by the Blackshear children.

D. THE BLACKSHEARS' REMEDY IS AGAINST THEIR COUNSEL AND NOT CENTENNIAL.

In this case, the minors' parents had the responsibility of filing a petition for a guardian ad litem according to RCW 4.08.050. RCW 4.08.050 provides that a guardian shall be appointed as follows:

- (1) When the infant is plaintiff, 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.

(Emphasis added). The parents did exactly that, eventually, in the minors' case when they petitioned for a guardian ad litem after the minors' lawsuit was filed. The parents were represented by Darrell Cochran; the minors' parents had the same attorney in their own lawsuit. The parents, under advice of counsel, made the decision not to appoint a guardian ad litem and join the minor children in their lawsuit. Their remedy after losing their summary judgment is against their attorney.

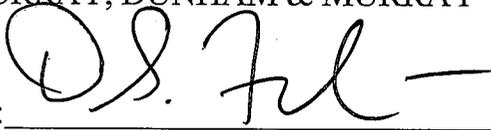
The argument by the Blackshear children that they were unable to make a decision whether to join in their parents' lawsuit without a guardian ad litem appointed by the court is hypocritical. The record on appeal proves that the minors, along with their parents and attorney, were able to make a decision as to whether to file a lawsuit without a guardian ad litem being appointed by the court. The minors' lawsuit was originally filed on April 6, 2006 and George Kelley was not even appointed by the court as their guardian until May 8, 2006, which is one month after the minor children's lawsuit was even filed. Clearly, the parents and their attorney were making legal decisions for the minor children well before Mr. Kelley was even appointed by the Court.

VI. CONCLUSION

Centennial asks the Supreme Court to grant its Petition for Review, since the Court of Appeals decision in this case is in conflict with the decision of the Supreme Court in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984).

Respectfully submitted this 25th day of November, 2008.

MURRAY, DUNHAM & MURRAY

By: 

William W. Spencer, WSBA #9592
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Of Attorneys for Petitioner

APPENDIX

- a. Court of Appeals Decision
- b. RCW 4.08.050

CERTIFICATE OF SERVICE

I, Tammy Bolte, hereby declare under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

I certify that on the 24th day of November, 2007, I caused a true and correct copy of Centennial's Petition for Review to be served on the following via legal messenger:

Clerk of the Court
Court of Appeals, Division II
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Tacoma, Washington 98402

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GEORGE KELLEY, AS GUARDIAN AD
LITEM FOR BRITTNAY BLACKSHEAR, A
MINOR CHILD, PHILLIP BLACKSHEAR,
JR., A MINOR CHILD, AND NICHOLAS
BLACKSHEAR, A MINOR CHILD,

Appellant,

v.

CENTENNIAL CONTRACTORS
ENTERPRISES, INC., A FOREIGN
CORPORATION,

Respondent.

No. 36089-6-II

PUBLISHED OPINION

Van Deren, C.J.—George Kelley, as guardian ad litem (GAL) for the minor children Brittnay Blackshear, Phillip Blackshear, Jr., and Nicholas Blackshear, appeals the trial court's order dismissing with prejudice the minors' loss of parental consortium claim against Centennial Contractors Enterprises, Inc. (Centennial). He asserts that the trial court erred in determining that the issue was moot and joinder with the parents' previously adjudged underlying claim was feasible. We agree that joinder was not feasible but disagree that the issue was moot. We, thus, reverse and remand for trial.

FACTS

On April 7, 2003, while 35-foot, 800-pound steel beams were being delivered to Centennial at a construction site at Fort Lewis, Washington, one of the beams fell off a forklift and landed on Phillip Blackshear's right leg, pinning him against a stack of beams of the same size, where he remained for some time before the beam could be removed. He sustained serious injuries, requiring multiple surgeries from 2003 through September 2005, and has never returned to work. On March 29, 2004, Phillip and Monica,¹ his wife, filed a complaint for damages, asserting permanent disability negligently caused by Centennial. They did not assert a claim for loss of parental consortium on behalf of their three children. The Blackshears requested a jury trial and a standard-track trial assignment.

Trial was first scheduled for March 28, 2005, but was rescheduled and commenced on September 12, 2005, just four days after Phillip's final surgery for lumbar fusion. On September 22, 2005, the jury returned a verdict finding Centennial negligent and liable for damages for Philip's injuries and losses.

On April 17, 2006, the attorney for Monica and Phillip filed a complaint for damages on behalf of their children, based on the loss of parental consortium under *Ueland v. Pengo Hydra-Pull Corp.*,² 103 Wn.2d 131, 691 P.2d 190 (1984). The complaint asserted that it had been "impractical to include the minor [children's] case with the initial claims." Clerk's Papers (CP) at 24. The parents then filed a petition under a different cause number to obtain the appointment of

¹ Because they have the same last name, we refer to Phillip and Monica by their first names. In doing so, we mean no disrespect.

² The clerk's papers, report of proceedings, briefs, and case citations often refer to "*Ueland v. Reynolds' Metals, Inc.*" We refer to the case from Washington Reports 2d, "*Ueland v. Pengo Hydra-Pull Corp.*"

No. 36089-6-II

a GAL to pursue the matter on behalf of their children. A court commissioner appointed George Kelley as GAL for the children on May 8, 2006. Thereafter, Kelley acted as the children's GAL in their action against Centennial for loss of parental consortium.

On February 2, 2007, Centennial filed a motion to dismiss with prejudice, asserting that Kelley failed to meet his burden of showing that joinder of the children's claim with the parents' underlying claim had not been feasible. The trial court granted Centennial's motion and dismissed the children's case with prejudice. Kelley appeals.

Following oral argument, we ordered additional briefing and invited amicus briefing to address what we perceive to be important issues of law regarding joinder of claims for loss of parental consortium, tolling the statute of limitations during minority, and changes in the law relating to minors since *Ueland* was decided in 1984. The order stated

that counsel for appellant and respondent shall file supplemental briefs . . . discussing the . . . effect of the legislative directive providing for tolling of statutes of limitations during minority and the *Ueland* decision requiring mandatory joinder of minor's claims with parental claims during minority "if feasible", the public policy implications of competing legal directives, and the changes that have occurred in protecting children's legal interests since 1984. RCW 4.16.190; *Ueland*[,] 103 Wn.2d 131.

COA order requesting supplemental briefing at 1.

ANALYSIS

Kelley contends that the trial court erred in granting Centennial's motion to dismiss the children's claim with prejudice because the issue was moot and joinder with the parents' underlying claim was not feasible. We agree with Kelley that it was not feasible to join the children's claim with their parents' claim, but disagree with Kelley that the issue was moot.

I. Standard of Review

In briefing, Kelley argued that the standard of review is de novo, while Centennial asserted that the issue of whether joinder with the parents' claim was feasible is a question of fact reviewed for substantial evidence. At oral argument, Centennial agreed with Kelley that our review is de novo.

Although we have not previously considered the standard of review for a trial court's dismissal under *Ueland*, the issue involves a failure to join, similar to a dismissal under CR 12(b)(7) for "failure to join a party under [CR] 19" and, while feasibility is generally a question of fact, the definition of "feasible" and the issue of mootness are questions of law. *See generally Erwin v. Cotter Health Ctrs*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007) (defining "real estate broker"); *Orwick v. Fox*, 65 Wn. App. 71, 80, 828 P.2d 12 (1992) (considering a dismissal under CR 12(b)(6) and CR 19). Thus, this case presents a mixed issue of law and fact that we review for an abuse of discretion "with the caveat that any legal conclusions underlying the decision are reviewed de novo." *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006) (discussing the "standard of review for a trial court's dismissal under CR 12(b)(7) for failure to join an indispensable party under CR 19"). "A [trial] court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons," namely, when the court "relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *Gildon*, 158 Wn.2d at 494.

II. Feasibility and Mootness

A. Loss of Parental Consortium Claim

In *Ueland*, our state Supreme Court recognized a separate cause of action for children's loss of parental consortium because justice so required. 103 Wn.2d at 135-36. The court expressed a concern for a child's "normal and complete mental development" and noted 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." *Ueland*, 103 Wn.2d at 139. But in crafting the new cause of action, the court sought to avoid the "possibility of multiple actions" and held that 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*, 103 Wn.2d at 137.

B. Mootness

Kelley contends that the trial court erred in failing to rule that Centennial's dismissal motion was moot. Kelley argues that because the parents' underlying claim had already proceeded to judgment, joinder of the children's claim was not possible and that the issue was, therefore, moot. Kelley reasons that, once the parents' underlying claim was adjudged, the trial court could "take no action and provide no relief (i.e., order that the children be made parties to the underlying action or dismiss the children from the underlying action)." Br. of Appellant at 15.

But the *Ueland* court specifically created a separate cause of action and established the feasibility rule, placing the burden on the child plaintiff to show that joinder with the parents' underlying claim was not feasible. 103 Wn.2d at 137. Therefore, when the child plaintiff fails to meet this burden, the trial court may dismiss with prejudice, regardless of whether the underlying

claim has been adjudged.

Moreover, if we were to adopt Kelley's reasoning, the feasibility requirement would have no meaning once an underlying claim has been adjudged. In other words, under Kelley's reasoning, because joinder is not possible once a claim has been adjudged, all *Ueland* claims brought after a judgment has been entered would pass the feasibility test because joinder is no longer possible. This result would give no recognition to the *Ueland* court's clear limitation of independent claims to ones where joinder was not feasible. *Ueland*, 103 Wn.2d at 137.

Thus, we find Kelley's argument unavailing and hold that the fact that the parents' underlying claim has been adjudged does not render moot a motion to dismiss a child's later claim for loss of parental consortium for lack of joinder with the parents' claim.^{3, 4}

C. Definition of Feasible

Neither our Supreme Court, in adopting this new rule of law in *Ueland*, nor CR 19, which concerns joinder and also uses the term feasible, specifically define "feasible." Both parties thus discuss *Huggins by Huggins v. Sea Ins. Co.*, 710 F.Supp. 243 (E.D. Wis. 1989).

In *Huggins*, a federal district court sitting in diversity jurisdiction and interpreting

³ In *Ueland*, the court expressed concern that, by creating this new cause of action, it might burden the trial courts with multiple lawsuits. 103 Wn.2d at 136-37. Kelley asserts that the *Ueland* court's multiplicity concern was only with regard to multiple lawsuits by multiple children of the same injured parent, rather than a second lawsuit by the children as a group. Therefore, he argues that the *Ueland* court's concern about multiplicity is not implicated in this case. We disagree. Our Supreme Court clearly wanted to forestall unnecessary subsequent lawsuits because it held that "children's claims for loss of parental consortium must be joined with the injured parent's claim whenever feasible." *Ueland*, 103 Wn.2d at 137. Thus, this argument also fails.

⁴ Moreover, a review of the scant number of appellate cases based on minors' claims for loss of parental consortium suggests that our Supreme Court's concern about multiplicity of litigation can be assuaged.

No. 36089-6-II

Wisconsin law, examined the definition of “feasible” used in cases alleging loss of parental consortium. 710 F.Supp. at 245-46, 248-51. *Huggins* analyzed cases from six states, including Washington, that allow a loss of parental consortium claim but require joinder with the parents’ underlying claims if feasible. See 710 F.Supp. at 248 n.8 (citing *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991, 997 (Alaska 1987); *Dearborn Fabricating & Eng. v. Wickham*, 532 N.E.2d 16, 17 (Ind.App.3 Dist. 1988); *Nelson v. Ludovissy*, 368 N.W.2d 141, 146 (Iowa 1985); *Madison v. Colby*, 348 N.W.2d 202, 209 (Iowa 1984); *Ferriter v. Daniel O’Connell’s Sons, Inc.*, 381 Mass. 507, 517, 413 N.E.2d 690 (1980); *Hay v. Med. Ctr. Hosp. of Vermont*, 145 Vt. 533, 540, 496 A.2d 939 (1985); *Ueland*, 103 Wn.2d at 137-40)).

Relying heavily on *Ueland* and decisions of the Iowa Supreme Court, *Huggins* noted that, to show it was not feasible to join a child’s loss of parental consortium claim with the parents’ claim, “the burden is on the consortium claimant to establish that it was impossible, impractical or not in the child’s best interest for his or her claim to be joined with those of the injured parent.” *Huggins*, 710 F.Supp. at 250-51. This interpretation comports favorably with the ordinary meaning of “feasible,” which is “capable of being done, executed, or effected : possible of realization . . . capable of being managed, utilized, or dealt with successfully : suitable . . . reasonable.” Webster’s Third New International Dictionary 831 (2002).

Our Supreme Court has said, “[I]n the absence of a provided definition, this court will give a term its plain and ordinary meaning ascertained from a standard dictionary.” *State v. Taylor*, 150 Wn.2d 599, 602, 80 P.3d 605 (2003). Therefore, we adopt the “feasibility” definition articulated in *Huggins* and hold that where feasibility of joinder is at issue in a loss of parental consortium claim, the child plaintiff has the burden of showing that joinder was “impossible, impractical or not in the child's best interest for

his or her claim to be joined with those of the injured parent.” *Huggins*, 710 F.Supp. at 250-51.

D. Feasibility of Joinder with Parents’ Claim

Kelley contends that the trial court erred in ruling that he failed to meet his burden of showing that joinder was not feasible.

The record shows that no one appeared as guardian or GAL for the children in the parents’ suit and that it was not until May 8, 2006, well after the parents’ trial was completed, that Kelley was appointed GAL for the children. In Washington, RCW 4.08.050 requires that “when an infant is a party he or she shall appear by guardian.”⁵ Therefore, without a guardian it was legally impossible for the children to have joined their claim with that of their parents. Thus, as a matter of law, joinder was not legally feasible and was, therefore, impossible.

We also address the parties’ arguments on factual feasibility because where a GAL has been appointed, thus making joinder legally feasible, courts must also address whether it was practical for the children’s claims to be joined with the parents’ claims and whether joinder was in the children’s best interests. Impracticality of joinder and a determination of the children’s best interests are questions of fact, and the trial court’s resolution of those questions will not be disturbed on review absent an abuse of discretion. *Gildon*, 158 Wn.2d at 493.

Kelley addresses the impracticality of joinder of the children’s claims, asserting that “the ultimate physical condition of [Phillip] remained unknown at the close of trial.” Br. of Appellant at 11.

Trial began on September 12, 2005, and [Phillip] did not undergo surgery until just four (4) days prior to trial. Only after recuperating from surgery and allowing for recovery time, which meant some time after the adjudication of [Phillip]’s case, was it finally known that the surgery was unsuccessful and [Phillip]

⁵ Because all three children were 14 or younger when they filed their amended complaint, they were “infants” for the purposes of RCW 4.08.050.

No. 36089-6-II

was rendered permanently disabled. Had the Blackshear children brought suit with their parents' claims, there simply was not enough factual evidence to support a favorable finding or award, let alone enough to defend a motion for summary judgment that would have likely been brought by [Centennial].

Br. of Appellant at 11-12 (citations omitted).

The trial court disagreed with Kelley's reasoning and, in granting the motion to dismiss, stated:

[T]he fact is, is that if you look at it, [Phillip]'s medical condition always was deteriorating, was never getting better. . . . There was never a time when [Phillip] could have -- the plaintiffs could have said things are getting better, because they were always getting worse.

So there's no facts that I determined that made it apparent to the Blackshear family that they ought to withhold claims of the children. Everything pointed to . . . joining the children, because things were never getting better; they were always getting worse.

Report of Proceedings (RP) (Feb. 21, 2007) at 3-4.

In his argument addressing the children's best interests in not joining their parents' suit, Kelley asserts that joinder was not feasible "because doing so would have further delayed the Blackshear family's receipt of their judgment award and would have guaranteed their financial collapse." Br. of Appellant at 13. The trial court stated in its oral decision that it believed joinder in the parents' suit was feasible because "[c]ertainly the financial hardship issue would have presented itself by that time." RP (Feb. 21, 2007) at 3. But the Blackshears explained that during the two and a half years before trial, they had used their savings and then relied on extended credit until the lawsuit was resolved.

The trial court was "not persuaded that [the plaintiffs] met their burden" of showing that joinder with the underlying claim was not feasible. RP (Feb. 21, 2007) at 3. We agree with Kelley that, until the results of Phillip's final surgery were known, it was impractical to assert the children's cause of action for loss of parental

No. 36089-6-II

consortium. It is undisputed that Phillip Blackshear's final surgery occurred only four days before trial on the parents' claims. The record also demonstrates that, until well after the completion of the parents' lawsuit, the Blackshears believed that the lumbar fusion surgery would relieve Phillip's pain so that he would be able to return to work. Until it became clear that Phillip could not work, that he could not care for their child who requires 24-hour care and supervision and that his ability to parent his children was diminished, the children's loss of consortium claims did not arise or become legally and factually feasible.

It is also undisputed that, without a favorable resolution of the parents' claims against Centennial, the Blackshears were facing extreme financial hardship. Thus, the family's deteriorating financial condition compelled resolution of the parents' claims as soon as possible in the family's and the children's best interests.

The children's evidence showed that it was impractical for them to assert a loss of parental consortium until it was evident that Phillip was permanently disabled and unable to meet their needs, either financially or physically. Thus, it was both impractical and not in the children's best interests to join their claim for loss of parental consortium with their parents' action before evidence supported the children's claimed losses. If the children had filed such claims prematurely, as Kelley argues, there existed the clear possibility of summary judgment dismissal of their claims or a defense verdict due to lack of evidence that Phillip was unable to financially support the family and provide parental care to the children.

Here, the trial court did not address the impossibility of a lawsuit without an appointed GAL for the children, the impracticality of a lawsuit on behalf of the children while the hope existed of a full recovery by their father, or the children's best interests in first having a financial recovery for the parents' losses so that the

No. 36089-6-II

family was not in financial collapse. Thus, we hold that the record does not support the trial court's decision to dismiss the children's claims based on failure to meet their burden to show that joinder was not feasible. Without consideration of impossibility, impracticality, or the children's best interests in bringing suit with the parents, the trial court abused its discretion. *See Gildon*, 158 Wn.2d at 494.

In sum, where children are not represented by a GAL, it is not legally feasible for the children to join their claim for loss of parental consortium with their parents' tort claims. And when a GAL is timely appointed, evidence of loss of parental consortium must exist before the parents' trial for such joinder to be practical and in the child's best interests. Here, the record is clear that there was no legally feasible way for the children to join their parents' suit, and Kelley satisfied the children's burden to show that joinder was impractical and not in the children's best interests before or at the time of trial on their parents' claims. Thus, the trial court abused its discretion in dismissing the Blackshear children's claim for loss of parental consortium.

No. 36089-6-II

We reverse the trial court's order dismissing the children's action with prejudice and remand for trial.

Van Deren, C.J.

We concur:

Hunt, J.

Penoyar, J.

4.08.040

CIVIL PROCEDURE

Note 4

well. *Grayson v. Platis* (1999) 95 Wash. App. 824, 978 P.2d 1105, review denied 138 Wash.2d 1020, 989 P.2d 1140. Husband And Wife ⇨ 270(10)

In an action on foreign judgment recovered against husband alone, wife may not intervene and set up defenses to the merits. *Crowley v. Baumgartner* (1921) 114 Wash. 193, 194 P. 970.

In replevin action against husband and wife who defend jointly, claiming property as community personalty, wife is entitled to defend in her own right on

issues raised by her answer. *Glass v. Buttner* (1905) 39 Wash. 296, 81 P. 699.

5. Fees and costs

The spouse representing a marital community is entitled to attorney fees where the community prevailed in an action to enforce a contract providing for attorney fees, even though the other spouse's separate estate is found liable. *Grayson v. Platis* (1999) 95 Wash.App. 824, 978 P.2d 1105, review denied 138 Wash.2d 1020, 989 P.2d 1140. Costs ⇨ 194.46

4.08.050. Guardian ad litem for infant

Except as provided under RCW 26.50.020 and 28A.225.035, 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. Said guardian shall be appointed as follows:

(1) When the infant is plaintiff, 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.

(2) When the infant is defendant, upon the application of the infant, if he or she be of the age of fourteen years, and applies within thirty days after the service of the summons; if he or she be under the age of fourteen, or neglects to apply, then upon the application of any other party to the action, or of a relative or friend of the infant.

[1996 c 134 § 7; 1992 c 111 § 9; 1891 c 30 § 1; Code 1881 § 12; 1854 p 132 §§ 6, 7; RRS § 187.]

Historical and Statutory Notes

Severability—1992 c 111: See RCW 26.50.903.

Findings—1992 c 111: See note following RCW 26.50.030.

Laws 1992, ch. 111, § 9, at the beginning of the introductory paragraph; added the exception; and inserted gender neutral references throughout.

Laws 1996, ch. 134, § 7, in the introductory paragraph, inserted "and 28A.225.035".

Source:

Laws 1854, p. 132, §§ 6, 7.
RRS § 187.

Cross References

Guardian ad litem of estate, see § 11:88.090.
Service on guardian, see § 4.28.080.