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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellant,

vs.

CENTENNIAL CONTRACTORS ENTERPRISES, INC.,

Respondents.

RESPONDENT'S SUPPLEMENTAL BRIEFING

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I. ISSUES ON SUPPLEMENTAL BRIEFING

This Court has requested supplemental briefing on issues raised at oral argument about the effect of the legislative directive providing for tolling of the statute of limitations during minority on the *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984) 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.

II. INTRODUCTION

The State of Washington is very progressive with respect to children's rights. Washington is one (1) of only fourteen (14) states that allow a child to bring a claim for the loss of consortium of a parent who is injured. Therefore, if a child's rights have been violated, they have a remedy to bring a lawsuit against a third party for the injury caused to them.

This is a decision that was decided by the Supreme Court in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984). As the highest court in Washington, the Supreme Court took great care in thinking about the interests of children and was aware of the tolling of the statute of limitations for minors when it made its decision. In balancing the public policy concerns of multiplicity of lawsuits, but still providing a loss of consortium claim for children, the Supreme Court in *Ueland* found a middle ground by holding the minor must join their claim with their parents if feasible.

There are no competing legislative and judicial directives with regard to the joinder issue. The tolling of the statute of limitations is not taken away from children because of joinder; it continues to toll if it was not feasible to join in the parents claim.

This Court must not be swayed that somehow the minor Plaintiffs' rights in this case have been ignored. In reality, this is a case where the minor children had representation through the same attorney they have now and had adult parents looking out for their best interests; there is no evidence to the contrary. The decision was made by the minors' parents and their attorney not to obtain a guardian ad litem and join their claims with their parents. The minor Plaintiffs' remedy now is against their attorney and not the Defendant in this case. Therefore, this court must dismiss Plaintiffs' claims and follow the Supreme Court's holding in *Ueland*.

III. STATEMENT OF THE CASE

Appellants in the present case, the minor children, are represented by Darrell Cochran, the same attorney that represented their parents in the original lawsuit. CP 19.

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 would 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.

**IV. BACKGROUND ON STATUTE OF LIMITATIONS,
TOLLING AS TO MINORS AND GUARDIAN AD LITEMS.**

The purpose of this section of Respondent's supplemental briefing is to provide this Court with an overview of the various areas of law that were discussed at oral argument with regard to statute of limitations, tolling and appointment of guardian ad litem and how these areas of the law do or do not apply in this matter.

A. Statute Of Limitations and Tolling

RCW 26.28.015 provides that a person cannot sue until they are 18 without a guardian ad litem. It specifically states:

All persons shall be deemed and taken to be of full age for the specific purposes hereafter enumerated at the age of eighteen years:

(1) To sue and be sued on any action to the full extent as any other adult person in any of the courts of this state, without the necessity for a guardian ad litem.

RCW 4.16.080 goes on to provide for a three (3) year statute of limitations on personal injury claims. RCW 4.16.190(1), though, provides that the statute of limitations is tolled for those under 18; it states:

Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter, be at the time the cause of action accrued either under the age of eighteen years, the time of such disability shall

not be a part of the time limited for the commencement of action.

RCW 4.16.190(1) was enacted by the legislature, because children do not have standing to sue until they are eighteen (18) as noted above. This was not a public policy decision; minors simply are not capable of bringing their own claims. Clearly, though, as outlined below, they still have the ability to present a claim for their loss of parental consortium as long as a guardian ad litem is appointed. Therefore, a minor's rights are not violated.

B. Exceptions to Tolling For Minors

Just because a plaintiff is a minor does not always mean that the statute of limitations is tolled until they become eighteen (18) in the State of Washington. There are exceptions to the tolling of the statute of limitations for children under eighteen (18). The court's decision in *Ueland* is not in conflict with the general rule, but rather has created an exception to the general rule, as in the circumstances outlined below. Examples of those are:

I. Actions Brought In Wrongful Death Of Parent Cases

– An action for wrongful death may be brought only by the decedent's personal representative, and the minority of the beneficiaries to the action has no effect upon the running of the statute of limitations. *Huntington v. Samaritan Hosp.*, 35 Wn. App. 357, 666 P.2d 405 (1983), *affirmed* 101 Wn.2d 466, 680 P.2d 58 (1984).

2. **Actions Brought Against Health Care Providers** – In such actions, the knowledge of the custodial parent or guardian is imputed to the minor, and thus in most malpractice cases, the statute of limitations applies to minors and adults alike. *See* RCW 4.16.350.

3. **When a Minor Employs the Survival Statute** – When a minor brings an action on behalf of a deceased parent, the minority of the plaintiff has no effect upon the running of the statute of limitations. The statute of limitations commences, and continues to run, as if the action were brought by the parent. *See* RCW 4.20.046; 4.20.060.

C. Guardian Ad Litem

A guardian ad litem is someone who, by necessity, represents the best interests of a child or disabled person “in litigation.” *See* RCW 4.08.050 (Emphasis added).

RCW 4.08.050 provides for the appointment of a guardian ad litem (“GAL”) for infants. The first line of that statute states that “where 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.” (Emphasis added).

Further, section (1) of RCW 4.08.050 provides:

where the infant is a plaintiff, the guardian shall be appointed upon application of the minor, or if he or she is fourteen (14) years or younger, the guardian may be appointed by a relative or friend.

(Emphasis added.)

It is important to note that the statute only provides for appointment of a GAL where the minor is a party to a lawsuit. In the present case, the children were not made a party to the underlying lawsuit and, therefore, had no requirement of a GAL until they brought the current lawsuit.

Moreover, nothing in this statute requires an opposing attorney to appoint a GAL for minors who are Plaintiffs, much less for those minors who are not even a party to the lawsuit.¹ It simply would not be in the best interest of a Defendant that his or her attorney proactively seek additional Plaintiffs to add to a lawsuit. Defense counsel would, in essence, be violating his or her ethical duty to vigorously defend his or her client if it sought to protect the interests of a Plaintiff. Reality is that this is an adversarial process and each party's attorney must only act in the best interests of his or her client. In the case of a minor, it is his or her parent and attorney that have the responsibility of deciding for the child whether to appoint a guardian ad litem or join a claim.

Proper procedure in this case would have been for Mr. Cochran to advise his clients whether to appoint a guardian ad litem for the children. This is not the responsibility of defense counsel, as was discussed at oral argument.

¹ In fact, case law dictates that when an attorney represents one party in a case and the other party appears pro se on behalf of himself and a child, the attorney has no particular responsibility to act in the interest of the child, or to seek the appointment of a guardian ad litem for the child. *Harrington v. Pailthorp*, 67 Wn.App. 901, 841 P.2d 1258 (1992).

This case must be decided on the record presented. In this case there is nothing in the record regarding whether a guardian ad litem was appointed for the children in the underlying action. For example, there are no declarations presented on that issue, etc. Plaintiffs' case, as discussed in Respondent's Opening Brief, also simply lacks the adequate evidence in the record to prove that it was not feasible to join in their parents' claim. Therefore, Plaintiffs' case should be dismissed.

D. Settlement Guardian Ad Litem

Guardian ad litem are appointed to investigate the adequacy of a "settlement of a claim" by a minor in a civil case. See SPR 98.16W (Emphasis added). SPR 98.16W provides that in every settlement of a claim, whether filed in court, involving the beneficial interest of an unemancipated minor, the court shall determine the adequacy of the proposed settlement and should appoint a Settlement Guardian ad Litem ("SGAL") to assist the court in determining the adequacy of the proposed settlement.

It should be noted that SPR 98.16(c)(2) allows the court to dispense with the appointment of a SGAL if the court affirmatively finds that the affected person is represented by independent counsel, so long as the independent counsel has the qualifications which would be required for a SGAL and neither has nor represents interests in conflict with those of the affected person which would not be allowed for a SGAL.

In the present case, a settlement was not reached because the children were never made parties to the lawsuit, therefore the SGAL statutes do not apply.

V. **BACKGROUND ON JOINDER OF CHILD'S LOSS OF CONSORTIUM CLAIMS**

Only fourteen (14) states in America allow a child to bring a loss of consortium case. Those states allowing for loss of consortium are Alaska, Arizona, Iowa, Louisiana, Massachusetts, Michigan, Montana, Ohio, Oklahoma, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *See respectively, Ferriter v. Daniel O-Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E.2d 690 (1980); *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 137, 691 P.2d 190 (1984); *Weitl v. Moes*, 311 N.W.2d 259 (1981); *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981); *Theama by Bichler v. City of Kenosha*, 117 Wis.2d 508, 344 N.W.2d 513 (1984); *Hay v. Med. Ctr. Hosp. of Vt.*, 145 Vt. 533, 496 A.2d 939 (1985); *Hibshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991 (1987); *Villareal v. State, Dept. of Transp.*, 160 Ariz. 474, 774 P.2d 213 (1989); *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P.2d 1171 (1990); *Belcher v. Goins*, 184 W.Va. 395, 400 S.E.2d 830 (1990); *Reagan v. Vaughn*, 304 S.W.2d 463 (1990); *Williams v. Hook*, 804 P.2d 1131 (1990); *Higley v. Kramer*, 581 So.2d 273 (La.App.1 Cir 1991); *Pence v. Fox*, 248 Mont. 521, 813 P.2d 429 (1991); *Coleman v. Sandoz Pharm. Corp.*, 74 Ohio.St.3d 492, 660 N.E.2d 424 (1996).

In Washington, the case of *Ueland v. Reynolds Metals Company* was the first to make such a claim possible for a child; it is still sound law today. 103 Wn.2d 131, 137, 691 P.2d 190 (1984) In order to balance the public policy issues of multiplicity of lawsuits and still provide children the right to bring a loss of consortium claim, the Supreme 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.

103 Wn.2d at 194 (Emphasis added).

Of those states that allow loss of consortium claims, the majority of them explicitly hold that the child must join their claims with the parents if feasible. Those states are: Alaska, Arizona, Iowa Ohio, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, *See Weitzl*, 311 N.W.2d at 270; *Ueland*, 103 Wn.2d at 194; *Hay*, 145 Vt. at 540; *Hibpshman*, 734 P.2d at 997; *Huggins by Huggins*, 710 F.Supp. 243, 250-51 (1989); *Villareal*, 160 Ariz. at 431; *Nulle*, 797 P.2d at 1175-76; *Belcher*, 184 W.Va. at 404; *Coleman*, 660 N.E.2d at 493-94.² None of those States' cases requiring joinder have been overturned; they are all still good law.

² Three (3) of the states that allow loss of consortium claims for minors are simply silent on the joinder issue or it is recommended, although not required. *See Pence*, 248 Mont. at 527; *Reagan*, 804 S.W.2d at 468; *Williams*, 804 P.2d at 1131; *Higley*, 581 So.2d at 273; *Ferriter*, 381 Mass. at 507. Only one state says it is not necessarily required. *See Oliver v. Dept. of State Police*, 160 Mich.App. 107, 112, 408 N.W.2d 436, 439 (1987).

As explained in Respondent's Opening Brief, the Supreme Court in *Ueland* was concerned about the public policy implications of multiplicity of lawsuits if joinder was not required if feasible. The majority of the other 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.

In our case, Appellants agree with Respondent that even if the minors claims had been joined with their parents essentially the same discovery and litigation plan would have been in place:

1. They intended to call essentially the same expert witnesses as were listed in their parents' lawsuit;
2. 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, and the same witnesses would have been called; and
5. The same medical causation issues would have to be re-litigated.

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. 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.

**VI. THE COURT IS INCORRECT THAT THERE ARE TWO
COMPETING DIRECTIVES.**

There are not two competing directives with regard to the rights of children with regard to the tolling of statute of limitations and joinder. In reality, if a minor decides to wait because it is not feasible to join, it can wait until the statute of limitations tolls. The only requirement, for public policy reasons explained above, is that the minor prove it was not feasible to join in the parents underlying lawsuit.

The tolling of the statute of limitations was not a public policy decision; rather it was to provide a remedy for minors since they cannot bring a lawsuit until the age of eighteen (18). On the other hand, joinder of a loss of consortium claim is a public policy

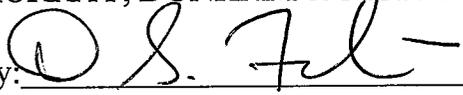
decision, because it protects against the costs and delay of a multiplicity of lawsuits from the derivative claims of children. One is not exclusive of the other.

VII. CONCLUSION

Appellants have not met their burden of proof according to *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984), since they have not met their burden of providing why joinder was not feasible. The Declaration of Phillip Blackshear does not explain why joinder was not feasible and no other admissible evidence has been presented by Appellants. Therefore, this Court has no choice but to affirm the trial court's order granting Centennial's motion to dismiss and follow the holding of the Supreme Court in *Ueland*.

Respectfully submitted this 13th day of June, 2008.

MURRAY, DUNHAM & MURRAY

By: 
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Of Attorneys for Respondent

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 13th day of June, 2008, I caused a true and correct copy of Respondent's Supplemental Briefing to be served on the following individuals via legal messenger:

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