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Court of Appeals No. 73127-1  
King County Superior Court No. 14-2-21305-1 SEA

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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WILLARD E. BARTEL and DAVID C. PEEBLES, Administrators for  
the Estate of PAUL S. MCCABE,

APPELLANTS,

v.

MATSON NAVIGATION COMPANY, INC., on its own behalf and as  
Successor-In-Interest to THE OCEANIC STEAMSHIP COMPANY, and  
OLYMPIC STEAMSHIP COMPANY, INC.

RESPONDENTS.

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REPLY BRIEF OF APPELLANTS

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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## ARGUMENT

### I. Plaintiffs' Claims Were Eligible For and Deserving of Equitable Tolling.

The ultimate inquiry in this appeal is if the Plaintiffs, at times relevant, operated under a set of facts that would trigger the equitable tolling of their statute of limitations, allowing Plaintiffs to sustain an action in this state. Under the binding precedent announced in *Burnett v. New York Cent. R. Co.*, 380 U.S. 424 (1965), Plaintiffs represent that the answer to that inquiry is affirmative. For the reasons set forth below, the judgment of the trial court must be reversed.

#### **A. Plaintiffs Meet the Elements for Equitable Tolling to Apply.**

In *Burnett*, the Supreme Court unequivocally held that the statute of limitations in a FELA case can be tolled when a plaintiff timely brings a suit in a court of competent jurisdiction and where service of process is made upon the defendant. *Id.* at 428, 432. This is the first step in determining if equitable tolling is available. The Plaintiffs in this case timely filed suit in the United States District Court in Ohio, a court of competent jurisdiction (meaning the court had proper subject matter jurisdiction, *See, e.g., Flores v. Predco Servs. Corp.*, 2011 U.S. Dist. LEXIS 25588 at \*14-18 (D.N.J. March 11, 2011)). Defendants have never contested timely service of process in the Ohio action. Thus, the Plaintiffs

meet the initial analysis under *Burnett* to have their statute of limitations tolled.

*Burnett* further held that if the initial suit is then dismissed for a procedural deficiency, improper venue in *Burnett*, then a plaintiff may bring the same action in a court where that deficiency is cured without the statute of limitations penalizing the plaintiff. *Id.* The Court fashioned their holding based on several factors, all of which are present in the case at bar, and all of which militate in favor of granting Plaintiffs the equitable tolling they deserve.

The *Burnett* Court made much of the fact that in a FELA case, Congress evinced its humanitarian purpose and intent to not deprive a FELA plaintiff of his rights when no policy underlying the statute of limitations is served. *Id.* at 434. In *Burnett*, the defendant was timely sued and served with process in Ohio, although that forum lacked venue. *Id.* at 429. Despite that, the Court held that the plaintiff's timely filing demonstrated that the FELA plaintiff did not sleep on his rights, but rather sought to pursue his claim within the proscribed limitations period. *Id.* This triggered the equitable tolling of his statute of limitations. *Id.* at 436. Plaintiffs in this case are Jones Act plaintiffs, thus FELA and its body of law are incorporated into causes of action arising under the Jones Act. *See* 46 U.S.C. §30104. The Defendants have never put at issue the timeliness

of the Ohio Complaints or that they were properly served, thus meeting *Burnett's* initial analysis.

**A. The Policy Supporting the Application of the Statute Of Limitations is not Present Here.**

As the *Burnett* Court pointed out, the policy behind a statute of limitations is to assure fairness to defendants by preventing stale claims from being filed or claims that surprise the defendants because of a lack of filing by plaintiffs. *Burnett*. 380 U.S. at 428. Again, neither of those policy considerations are found in the case at bar. The Plaintiffs timely filed a Complaint in Ohio against the Defendants in 1998 and then Amended it in 2008. There is no surprise or stale claims presented here; the claims filed in this state had been previously pending against the Defendants for over 16 years in the MARDOC.

The Supreme Court has continually held that the filing of a law suit shows proper diligence on the part of a plaintiff such that his case should not be dismissed on justice-defeating technicalities, like venue. *Id.* at 429-30 (citing *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962) and Congressional passage of 28 U.S.C § 1406(a) to show the intent of the Court and Congress to not punish plaintiffs on “justice-defeating technicalities”). Rather, “the interests of justice” require a case to be transferred to cure such defects. *Id.* Where it is impossible to effect transfer and where the policy behind enforcing a statute of limitations is

not served, then equitable tolling will allow a plaintiff to refile the case in a proper court without the harsh penalty imposed by the applicable statute of limitations. *Id.* at 434-36. Transfer was neither available to the plaintiff in *Burnett* nor the current Plaintiff in this case. *Id.* at 426, CP 1335. Likewise, the policy behind enforcing the statute of limitations could not be found in *Burnett*, nor can it be found here. The Court and Congress prefer plaintiffs to have their rights vindicated in such a scenario. *Id.* at 430-32. Therefore, Plaintiffs have demonstrated that equitable tolling is a remedy available to them.

**B. Like the Plaintiff in *Burnett*, the Plaintiffs in the Present Case Acted Reasonably and in Good Faith at the Time of Filing Their Ohio Complaints.**

In *Burnett*, the Court noted venue can be waived. *Id.* at 429-30. Thus, even if a plaintiff filed their case where venue was improper, a defendant may choose to proceed there despite that. *Id.* This was important to the Court because the defendant in that case had previously waived objections to venue to proceed in Ohio courts. *Id.* This fact further underscored the *Burnett* Court's decision to equitably toll the statute of limitations because the plaintiff was reasonably proceeding in a court where he believed the defendant would not object to venue based upon the defendant's past conduct. *Id.* at 429 and at n.6. Once the defendant in *Burnett* successfully objected to venue, the plaintiff then refiled his case in a Court with proper venue, but after the statute of limitations had run. *Id.*

at 424-26. The Supreme Court was not impacted by the likelihood that the plaintiff knowingly filed his Complaint in a forum lacking venue. *Id.* at 429-30 and n.6. Instead, the Court held that the plaintiff's timely filing of his case, albeit in a court with improper venue, equitably tolled the statute of limitations so that the plaintiff could pursue his rights in the proper court. *Id.* at 430-32. The Court noted the importance of the defendant's past conduct in judging the reasonableness of the plaintiff's action. *Id.* at 429-30 and at n.6. Because the facts in *Burnett* so closely resemble the facts in the case at bar, equitable tolling should have been available and extended to the Plaintiffs here.

Like the plaintiff in *Burnett*, the Plaintiffs in this case reasonably believed that the Defendants would not object to being sued in Ohio. A brief history of this litigation is in order, with only the pertinent facts highlighted to demonstrate why equitable tolling is applicable to the Plaintiffs here.

In May of 1989 the Defendants filed motions to dismiss for a lack of personal jurisdiction in the MARDOC in Ohio in thousands of cases. CP 731. In October of 1989, the District Court held that it lacked personal jurisdiction over these Defendants, but dismissal was not the proper remedy, transfer of the cases was. CP 731, 760. The court then tasked counsel for plaintiffs with notifying the Court which jurisdictions had personal jurisdiction over the Defendants such that transfer could be

accomplished. CP 901-04. Plaintiffs' counsel worked diligently to effect transfer of the cases. Plaintiffs' counsel presented the Court with a list of those jurisdictions to which plaintiffs' actions could be transferred. CP 901-04. Upon request of counsel *for the Defendants*, the Court gave the Defendants the option to stay in Ohio and file answers to the plaintiffs' Complaints or allow the cases to be transferred to jurisdictions where those courts had personal jurisdiction over the Defendants. CP 764.

Plaintiffs further pursued their rights by filing a Motion to Transfer in Toto all of the would-be splintered cases out of the Northern District of Ohio. It bears repeating, the Plaintiffs, *not the Defendants*, sought to cure the defect of lack of personal jurisdiction in the Ohio court by moving the court to transfer all soon-to-be splintered cases out of that district. In response to that Motion, the Defendants, including Matson, having previously filed answers to remain in Ohio and not be transferred, stated on the record:

Several nonresident defendants, although not subject to the personal jurisdiction of this Court, nevertheless **agreed to waive their personal jurisdiction defense as the quid pro quo** to avoid the expense of litigating these cases in as many as 13 different jurisdictions simultaneously, and to take advantage of the consolidated handling available in this Court.

CP 1028-29 (Emphasis supplied).

The Defendants, including Matson, explicitly stated their intended desire to be amenable to suit in Ohio. CP 1028-29 The Defendants further reiterated their position in pleadings to the Ohio court:

Furthermore, some nonresident defendants who are not subject to the personal jurisdiction of this Court **elected to waive that valuable due process right and submit themselves to the Court's jurisdiction** to take advantage of this Court's experience in the handling of mass tort litigation, the consolidated handling of cases available in this Court, and to avoid the inconvenience of litigating these cases simultaneously in 13 scattered jurisdictions.

CP1035-1036 (Emphasis supplied).

Despite the fact that the plaintiffs' actions demonstrated their desire to pursue their rights and cure the personal jurisdiction defect found in the Ohio court, the Defendants continually fought to keep the cases in Ohio. Ultimately the Ohio court denied the plaintiffs' motion and all of the cases remained in Ohio. *In re Asbestos Products Liab. Litig. (No. VI)*, 965 F.Supp2d 612, 617 (E.D. Pa. 2013). Because of this, the Ohio court's docket began to grow. Obviously, once the Defendants, including Matson, signaled their desire to have all MARDOC cases concentrated in Ohio, the plaintiffs filed the vast majority of their cases in that jurisdiction.

As the docket grew, the Ohio court sought to lighten its load and have other federal district courts try the cases that were then ready for trial. CP 1040-41. During a hearing on the proposed transfer of cases for

trial, which Defendants including Matson opposed, counsel for Defendants again stated on the record their intent to keep all cases in Ohio:

I had one point that I wanted to be sure that the Court understood; we did not agree or concede to trials of any of these cases in Detroit. We had put our objection on the record before, **but trials of the Ohio cases in Detroit are something that our clients waived jurisdictional objections to proceed here in Cleveland.** To go to Detroit is something they don't agree to. I just want to be sure that the Court understands that in formulating whatever orders that you are formulating.

CP 1044-45 (Emphasis supplied).

Over the objections of Defense counsel, the court transferred the cases. CP 1047-66. Once in Detroit, the Defendants, including Matson, successfully raised their objections to the transfer order and the cases were transferred back to Ohio. CP 1047-66. The intent of the Defendants was clear: they wanted the MARDOC cases to remain in Ohio.

This intent was ultimately consummated in an agreement between counsel for the Defendants and plaintiffs. CP 1068-69. This agreement was then presented informally to the court and its Special Master, Mr. Hartley Martyn. CP 1068-69. In an affidavit, Mr. Martyn explained that counsel for the Defendants, including Matson and Olympic, and plaintiffs had agreed for present and future cases that the Defendants would not raise the defense that the Ohio court lacked personal jurisdiction over them so that all cases could proceed in Ohio. CP 1068-69. Counsel for

plaintiffs continued to file more and more cases in Ohio with this agreement in mind.

Once the asbestos MDL was established in the Eastern District of Pennsylvania in 1991, the Defendants, again, fought transfer from the Ohio Court. In their brief to the MDL Court opposing transfer, the Defendants stated: "Transfer would not benefit the parties or the courts in these matters." CP 1078. Indeed, the Defendants reasoned: "If transfer is to take place, Shipowner-Defendants request that it be to the Northern District of Ohio. Procedures are already in place for the pretrial management of seamen's asbestos cases, and this is the district in which the largest number of seamen's cases is pending." CP 1079. Defendants' statements are without ambiguity.

All present and future cases filed in Ohio were ultimately transferred to the Asbestos MDL in Pennsylvania for pre-trial proceedings. Plaintiffs continued to file cases in Ohio based upon the agreement with defense counsel and Defendants' stated intentions that these cases were best suited for administration by the Ohio court.

This case is directly analogous to *Burnett* in this respect. Like the defendant in *Burnett*, the Defendants in the present case had a long history of being amenable to suits in Ohio, if not outright inviting cases to be filed in Ohio against them. Plaintiffs in this case were on reasonable footing in thinking that the Defendants would not object on personal jurisdiction

grounds to their case being filed in Ohio in 1998. Plaintiffs did not file cases in Ohio based on some discredited national contacts theory as Defendants contend; rather, plaintiffs continued to file cases in Ohio in large part because of the agreement with defense counsel that Defendants would not raise their defense of personal jurisdiction and because of their many statements on the record evincing their desire to have all of these cases remain in Ohio. Defendants' assertions that Plaintiffs in this case did not act in good faith or reasonably is belied by the above facts.

Under the analysis in *Burnett*, the Plaintiffs are entitled to equitable tolling to defeat the Defendants' motions for summary judgment based on the statute of limitations. Plaintiffs timely pursued their claims against the Defendants in a court of competent jurisdiction. Once the defendants successfully raised their defense of lack of personal jurisdiction, the Plaintiffs refiled their same case against the Defendants in a court that was not lacking in personal jurisdiction. Although the refiling of the case took place after the applicable statute of limitations had run, the Plaintiffs claims should not have been extinguished because of equitable tolling. The policy underlying the statute of limitations is not served in this case because the Defendants were aware of the Plaintiffs claims for 16 years. Rather than this case being decided on justice-defeating technicalities, equity demands that the Plaintiffs' rights be vindicated and the statute of limitations equitably tolled.

The trial court erred in not engaging in any of the analysis it was required to under *Burnett*. Instead, it rested its decision on its mistaken view of the preclusive effects of the MDL court's opinions on whether the Defendants actually waived their defense of lack of personal jurisdiction in the originally-filed case. It never determined or even engaged in an analysis that looked at the Plaintiffs' actions at the time they made them. *Burnett*. This was error. The Plaintiffs were entitled to have their actions analyzed under *Burnett* for equitable tolling purposes.

II. Collateral Estoppel is not at Issue in this Case.

Collateral estoppel is not at issue in this case. Defendants vociferously advocate that collateral estoppel prevents the Plaintiffs from re-litigating the issue of waiver in front of the trial court and in front of this Court. Waiver is not at issue in this case, thus the previous MDL Court's rulings on waiver are of no consequence to any current proceeding.

As *Burnett* makes clear, the reasonableness of a plaintiff's actions are judged at the time he acts. 380 U.S. at 429-30. If a plaintiff timely files and serves a suit against a defendant that is later dismissed on procedural grounds *and* where the policy considerations for employing the statute of limitations are not found, then a plaintiff is eligible for equitable tolling when the claim is refiled. 380 U.S. 434-36. This is exactly what happened in the case at bar and because of that, the doctrine of collateral estoppel

does not even come into play—it is not part of the equitable tolling analysis.

Though not dispositive, the Supreme Court also noted other reasons why equity would favor the tolling of a statute of limitations. The Court noted that there was a history of the defendant in *Burnett* acquiescing to venue in Ohio. *Id.* at 429-30 and n.6. The plaintiff in that case could have reasonably believed that his case would be no different, thus he filed in Ohio. Like the plaintiff in *Burnett*, the Plaintiffs in this case had a very reasonable belief that the Defendants would not raise their defense of lack of personal jurisdiction in the Ohio court. Based on the evidence, outlined above, the Plaintiffs acted reasonably when they filed their case against the Defendants in 1998. The fact that a court later determined that personal jurisdiction did not exist over the Defendants in the Plaintiffs' case, does not somehow change the reasonableness of their actions at the time they filed their case.

Defendants' reliance on this doctrine is somewhat mystifying in that Plaintiffs do not dispute that the MDL court ruled that there was no personal jurisdiction over the Defendants. This fact is why the case was refiled in the state of Washington—to cure that jurisdictional defect. The MDL court's opinion on whether the Defendants actually waived the defense of lack of personal jurisdiction is likewise of no consequence; Plaintiffs are not attempting to convince this Court nor the trial court of

anything different. The analysis under *Burnett* looks to the reasonableness of a plaintiff's actions at the time he acts.

Thus, the issue of waiver and whether the Plaintiffs may “relitigate this issue” is a red herring. Plaintiffs are not seeking a different ruling on waiver in this jurisdiction than that which they received in the MDL. Under *Burnett*, determining if waiver actually occurred is not necessary in any analysis to determine if equitable tolling is available to the Plaintiffs anyway. The only purpose of raising the collateral estoppel argument is to confuse the issues at hand. The Defendants argue, and the trial court believed, that collateral estoppel on the issue of waiver prevents the Plaintiffs from being eligible for the equitable tolling of their statute of limitations. The two inquiries have no legal connection to each other and it is inappropriate to conflate the two doctrines. This was the error the trial court made, and this is the reason why its ruling must be reversed. An analysis under *Burnett* of the actions of the Plaintiffs at the time they made them is the only appropriate inquiry in determining the eligibility of the Plaintiffs for equitable tolling.

Finally, even if collateral estoppel were applicable to an analysis in determining if equitable tolling applied, the MDL court's opinions on waiver are not subject to the doctrine of collateral estoppel. Defendants cite to *Hanson v. City of Snohomosh*, 121 Wn.2d 552; 852 P.2d 295

(1993) and its precedential forefathers in stating the elements of collateral estoppel:

The elements which must be met when applying the doctrine are: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the pleas is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice.

*Id.* at 562 (citing *Malland v. Department of Retirement Sys.*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985)).

Defendants cannot meet three of the four elements of collateral estoppel in this case. Most importantly, the prior adjudication must have been one on the merits (Element No. 2). The MDL court dismissed the Plaintiffs' claims for a lack of personal jurisdiction without prejudice upon a motion to dismiss. CP 1334-37, 1363. Clearly this is not a final judgment on the merits. *Hanson*. There can be no serious argument that motions to dismiss which are then granted without prejudice are ever final judgments on the merits.

Secondly, the issue must be identical with the one presented in the later filing. *Id.* The issue in the first case was a motion to dismiss based upon a lack of personal jurisdiction. The issue in this case is about equitable tolling. Those are not the same issues. They are not even based

upon the same facts. Collateral estoppel is not a viable argument to raise because of that, let alone apply to the case at bar.

Finally, application of the doctrine, if it actually applied in the way the Defendants and trial court believed, would work an injustice on the Plaintiffs. Plaintiffs faithfully prosecuted their claims in a jurisdiction where they believed the Defendants would not raise their defense of a lack of personal jurisdiction. For 16 years, the Plaintiffs' claims were pending until the MDL court dismissed them. Within a reasonable time, the Plaintiffs refiled their case in a court with personal jurisdiction so that the Plaintiffs' claims would be fully heard. If collateral estoppel applies as the Defendants and trial court argue, then it would work an injustice on the Plaintiffs by depriving them of having the merits of their claims heard when there is no legal justification to do so.

Collateral estoppel is not applicable in this case because Plaintiffs are not seeking to relitigate any issue previously decided by any court. The trial court erred when it held that the MDL court's rulings prevented it from reaching the issue of equitable tolling. Further, the trial court never considered or discussed the merits of the Plaintiffs' equitable tolling argument—this was error.

### **CONCLUSION**

For the reasons stated above, Plaintiffs request this Honorable Court to reverse the judgment of the trial court granting the Defendants'

motions for summary judgment and hold that Plaintiffs are entitled to the equitable tolling of their statute of limitations for their claims. In the alternative, Plaintiffs request that this Court reverse the decision of the trial court and remand the matter for further proceedings so that the trial court may reconsider the issue of equitable tolling because Plaintiffs are not precluded from that relief due to the MDL court's previous rulings concerning waiver.

DATED this 8<sup>th</sup> day of September, 2015.

Respectfully submitted,

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**King County Case No. 14-2-21305-1 SEA**  
**Court of Appeals Case No. 73127-1-I**

To Whom It May Concern:

Enclosed for filing with the Court Of Appeals the please find:

1. Appellants' Reply Brief (original version and one copy); and
2. Certificate of Service.

If you have any questions regarding these documents, please do not hesitate to contact our office.

Very Truly Yours,

  
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