

11-12-2009

Castorena v. General Elec. Appellant's Reply Brief Dckt. 35123

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MILDRED CASTORENA, et al.,

Plaintiffs-Appellants,

vs.

GENERAL ELECTRIC, et al.,

Defendants-Respondents.

WILLIS EUGENE NORTON, SR.,

Plaintiffs-Appellants,

vs.

GENERAL ELECTRIC, et al.,

Defendants-Respondents.

JOHN D. ADAMSON et al.,

Plaintiffs-Appellants,

vs.

FMC CORPORATION, et al.,

Defendants-Respondents.

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Case No. Consolidated Cases:

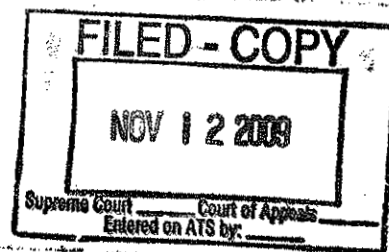
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APPELLANT'S JOINT REPLY BRIEF

Attorneys for Defendants/Respondents as
indicated in the Certificate of Service



PRELIMINARY STATEMENT

Plaintiffs/Appellants filed a joint brief in this consolidated appeal from two trial court orders granting summary judgment to all defendants. A response brief was filed on behalf of Defendants/Appellees Viacom, CBS, Westinghouse, Ingersoll-Rand Company, Henry Vogt Machine Co. and Sterling Fluid Systems (USA) LLC (“Viacom”) addressing the issues raised on appeal in appellants’ brief. Defendant/Appellee Bechtel, Inc. (“Bechtel”) filed a response brief addressing those issues raised by Bechtel, Inc. and co-defendant Sterling Fluid Systems (USA) LLC in the *Adamson* case and joined in the brief filed by Viacom. Plaintiffs reply to the arguments raised in both briefs in this consolidated reply brief.

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REPLY TO ARGUMENT

I. The Condition Precedent Rule Does Not Preclude the Plaintiffs' Claims.

A. The Absence of Condition Precedent Language in Idaho's Wrongful Death Statute Establishes That the Cause of Action Accrues on the Date of Death.

As much as the defendants would like to transform the issues on appeal into a question solely about the application of the condition precedent rule and disregard Idaho's Wrongful Death Statute, they cannot evade the central issue on appeal: Whether, in a wrongful death action brought pursuant to I.C. § 5-311, the statute of limitations begins to run from the date of death or from the date of the injury from which death resulted. The defendants asserted at the trial court level and assert now on appeal that the plaintiffs' wrongful death causes of actions were time-barred because, although they were filed within two years of the decedents' deaths, they should have been filed within two years of the diagnosis of the injury that caused death.

The Idaho Wrongful Death Statute, in unambiguous statutory language, omits any reference to a condition precedent that is required to occur before the heirs of a person who suffered a wrongful death can bring suit. *See* I.C. § 5-311. The defendants even admit, as they must, that the wrongful death statute does not contain the same condition precedent language found in Lord Campbell's Act, or for that matter, wrongful death statutes from other states. They insist, nevertheless, that because the Idaho legislature adopted the "substance" of Lord Campbell's Act, one must read into the wrongful death statute a provision allowing recovery only if the decedent could have maintained an action for damages at the time of death.

“Substance,” as applied to the wrongful death statute, is defined as the “essential nature” or “essence” or “fundamental quality” of the statute.¹ Clearly, the essence or substance of Lord Campbell’s Act was to compensate the heirs of a person who suffered a wrongful death:

Lord Campbell's Act: An Act for compensating the Families of Persons killed by Accidents. 26th August 1846.:Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

Bevan v. Vassar Farms, Inc., 117 Idaho 1038, 1040, 793 P.2d 711, 713 (quoting *Buckley v. Chadwick*, 45 Cal.2d 183, 288 P.2d 12, 16, note 1 (1955)). Just as clearly, the Idaho statute captured that essence, albeit without the condition precedent language.

When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured.

I.C. § 5-311.

In enacting Idaho’s wrongful death statute, the state legislature had at its disposal a statutory model (Lord Campbell’s Act), quoted above, that included condition precedent language. However, neither the condition precedent language contained in Lord Campbell’s Act or anything close to it, was inserted in the Idaho statute. Because the legislature was aware of

¹ <http://www.merriam-webster.com/dictionary/substance>

the entire substance of Lord Campbell's Act, this Court must interpret the existing legislative language "on the assumption that the legislature was aware of existing statutes, of the rules of statutory construction, and of judicial decisions so that if a change occurs in legislative language a change was intended in legislative result." 2A *Sutherland Statutory Construction* § 45:12 (7th ed.). The legislature's choice not to include the condition precedent language in the wrongful death statute is strong evidence that it did not intend to impose the date of injury as the accrual point for a wrongful death cause of action, but rather the date of death. The legislature chose to disregard the condition precedent language in Lord Campbell's Act and chose, instead, to adopt the substance of the Act which, as originally intended, ameliorated the harsh results of the opinion in *Baker v Bolton* authored by Lord Ellenborough which held that "[i]n a civil court, the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence." *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (Nisi Prius 1808).

In arguing that Idaho's wrongful death statute implicitly contains the condition precedent language, the defendants give short shrift to the Idaho rules of statutory construction. Although the defendants would like the plain, unambiguous and literal words of Idaho's Wrongful Death Statute to be ignored, this Court may not do so. See *Mason v. Donnelly Club*, 135 Idaho 581, 586, 21 P.3d 903, 908 (2001) ("Interpretation of such a rule should begin, therefore, with an examination of the literal words of the rule."). While it remains true that the right to maintain a statutory action for death is dependent on the observance of any conditions precedent imposed by the statute, on the other hand, "nothing not required by the statute is a condition precedent." 25A C.J.S. Death § 43 (2009). There is no condition precedent in Idaho's Wrongful Death Statute because the statute specifically omits language mandating that the "act, neglect, or default must

have been such as would have entitled the party injured to maintain an action therefore if death had not ensued.” *Sprouse v. Magee*, 46 Idaho 622, 269 P. 993, 994 (Idaho 1928). This Court should reject the defendants’ attempt to insert a non-existent condition precedent into the wrongful death statute.

B. Although Factual Distinctions Exist, this Court’s Holding in *Chapman v. Cardiac Pacemakers, Inc.*, Is an Unequivocal Pronouncement that the Accrual Date of an Action for Wrongful Death is the Date of Death.

Although the defendants relish the fact that there is a factual distinction in *Chapman* that differs from the facts in the plaintiffs’ cases, i.e, that the decedent in *Chapman* could have sued the defendants for personal injury at the time his death, this is literally a distinction without a difference. This Court in *Chapman v. Cardiac Pacemakers, Inc.*, 105 Idaho 785, 786, 673 P.2d 385, 386 (Idaho 1983) was faced with a straightforward question presented on certification from a federal district court. The question was: “Whether, in a wrongful death action, the statute of limitations begins to run from the date of death or from the date of the injury from which death resulted.” *Id.*

The *Chapman* court observed that the question of what event begins the limitations period is mainly one of **statutory construction**. *Id.* (emphasis added). Looking to the applicable statute of limitations found in I.C. § 5-219(4) governing the recovery of damages for the death of one caused by the wrongful act or neglect of another, this Court found that that statute of limitations began to run on the date of the accrual of the wrongful death cause of action and that the event triggering the period of limitation was either the person’s death or the injury causing the death. *Id.* As this Court explained:

I.C. § 5-219 begins the statutory period of limitation at the time the cause of action accrues, and as noted above, defines accrual as the “time of the occurrence, act or omission complained of.” However, the law is clear that a cause of action

for wrongful death accrues on the death of the injured party, and not before. *Hogan v. Hermann*, 101 Idaho 893, 623 P.2d 900 (1980); *Russell v. Cox*, 65 Idaho 534, 148 P.2d 221 (1944). **This is so because the cause of action did not accrue to the decedent.** As this court stated in *Whitley v. Spokane Ry. Co.*, 23 Idaho 642, 132 P. 121 (1913), *aff'd*, 237 U.S. 487, 35 S.Ct. 655, 59 L.Ed. 1060 (1915),

‘[T]he action is allowed upon the theory that the wrongful death of the ancestor works a personal injury to his heirs, in that it deprives them of some pecuniary or other benefit which they would have received except for the death of the ancestor. The statute *confers this right of action on the heirs*’ 23 Idaho at 659, 132 P. 121. (Emphasis added.)

The cause of action which accrues to an injured person during his lifetime is altogether separate from the cause of action accruing to the person's heirs should he die from that injury. *Russell v. Cox, supra*. Therefore, the “occurrence” giving rise to the cause of action is the decedent's wrongful *death*, and the statute of limitations must date from that event.

Chapman, 105 Idaho at 786-787, 673 P.2d at 386 – 387; *see also, Hogan v. Hermann*, 101 Idaho 893, 895, 623 P.2d 900, 902 (Idaho 1980)(the right to bring the wrongful death action accrued as of the date of death).

It is apparent that the issue of whether or not the decedent could have timely filed a personal injury cause of action on the date of his or her death was of no consequence – wrongful death was the triggering event for the accrual of a wrongful death cause action. In point of fact, this Court in *Chapman* considered the possibility that the decedent’s personal injury cause of action may have been extinguished by limitations at the time of his death based on the “theory” of Lord Campbell’s Act from which the Idaho wrongful death statute was taken. *Id.* Rejecting that argument, this Court held that the rule that heirs can bring an action only if the deceased could have, is merely a means of indicating that Lord Campbell's Act did not enlarge the scope of tort liability but simply created a **new cause of action based on the same conduct.** *Chapman*, 105 Idaho at 787, 673 P.2d at 387; *see also, Whitley v. Spokane & I. Ry.Co.*, 132 P. 121, 126 (Idaho 1913)(“The cause of action is not anything that ever belonged to the decedent or

his estate.”). The majority of states that have enacted wrongful death statutes modeled after Lord Campbell's Act have followed suit and created an entirely new cause of action for survivors. Robert C. Jarosh, “Torts/Wrongful Death--Should a Wrongful Death Action Expire Before the Decedent Does? A Wrong Turn for Wrongful Death. Edwards D. Fogarty, 962 P.2d 879 (Wyo. 1998).” 35 LAND & WATER L. REV. 235, 241 (2000) *citing* W. Page Keeton, et al., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 946 (5th ed. 1984).

Without equivocation and very much aware of the argument that the date of the injury causing the death was urged to be the accrual date, this Court in *Chapman* held:

that the “occurrence, act or omission” which I.C. § 5-219 defines as the accrual of a cause of action refers to the death of the person, caused by the wrongful acts of another, and the running of the statute of limitation on the wrongful death cause of action begins from the date of death.

Id.

In 2001, the Supreme Court of New Jersey was faced with the issue of when a cause of action accrues under the state’s wrongful death statute which, too, was based on Lord Campbell’s Act. *Miller v. Estate of Sperling*, 166 N.J. 370, 376, 766 A.2d 738, 741 (N.J. 2001). Unlike the Idaho wrongful death statute, the New Jersey statute provided that a wrongful death action may be pursued if the decedent, had death not ensued, had been entitled to maintain an action for damages. *Id.* at 381 *citing* N.J.S.A. 2A:31-1. The court in *Miller* observed that the wrongful death act had spawned opinions representing first a gradation, and then a polarization, of various approaches. *Id.* Earlier opinions that found a condition precedent focused on legislative intent rather than “the statutory language of the Wrongful Death Act.” 166 N.J. at 377, 766 A.2d at 742. (citations omitted). Guided by the language of the statute and the remedial purpose of the wrongful death act itself, the court found that the statute accrued on the date of

death because a “different result not only conflicts with the language of the Act, but could extinguish a wrongful death action even before it came into existence. We reject such a result.” 166 N.J. at 387, 766 A.2d at 747.

Under the express terms of the Idaho wrongful death statute, plaintiffs’ complaints were timely filed. Notwithstanding the defendants’ attempt to read into the statute a condition that is not there, the wrongful death cause of actions filed by the plaintiffs were not time-barred because they were filed within two years of the date of death of their respective decedents – exactly as the statute required.

II. Even If, As Defendants’ Contend, the Condition Precedent Bar Is the “Majority Rule,” This Court Is Not Compelled to Follow That Rule.

Defendants, in both briefs, cite to numerous cases in support of their contention that the law, as well as public policy, favor the application of the condition precedent rule to wrongful death statutes. Be that as it may, other courts have found powerful reasons to reject the condition precedent rule in favor of the common sense finding that a wrongful death cause of action is a separate cause of action with its own date of accrual, and that date is the death of the injured person. In fact, in a 2001 decision by the New Jersey Supreme Court, the court remarked that its finding that a wrongful death claim accrued on the date of death was in accord with the national trend:

[T]he considerable majority of the courts have held that the statute runs against the death action only from the date of death, even though at that time the decedent’s own action would have been barred while he [or she] was living. Only a few courts hold that it runs from the time of the original injury, and consequently that the death action may be lost before it ever has accrued.

Miller v. Sperling, 166 N.J. at 382, 766 A.2d at 745 citing *Prosser & Keeton on the Law of Torts* § 127 at 957 (emphasis added).

In *Johnston v. U.S.*, 85 F.3d 217, 219 (5th Cir. 1996), the Fifth Circuit was asked to determine when, as a matter of federal law, a wrongful death claim pursued under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346(b) accrued. The court said that in answering this “troublesome question,” the court would be guided by its own jurisprudence on accrual and the experience of sister circuits. *Id.* The court noted that its task was complicated by the “seemingly incongruous fact that under Texas state law certain wrongful death claims can accrue prior to death.” *See id.* The court ultimately held:

as a matter of federal law . . . a wrongful death claim cannot accrue prior to death. In so doing, we reject the accrual date employed under Texas state law that wrongful death claims premised on medical negligence accrue prior to death.

85 F.3d at 224. The Fifth Circuit quoted the Seventh Circuit’s rationale for arriving at a similar conclusion based on equity determinations:

[t]o hold that a claim for wrongful death somehow accrues before the date of death would place the class protected by the statute in the legally untenable position of speculating about hypothetical or potential future injuries, for the damages awarded under the wrongful death act, which include funeral and burial expenses, are not identical with those available in a personal injury action to the one actually injured, and remain indeterminate until death has occurred.

Id. (quoting *Fisk v. United States*, 657 F.2d 167 (7th Cir. 1981)).

Other courts have similarly held that the date of death is the accrual date of a wrongful death claim. *See Hart v. Eldridge*, 250 Ga. 526, 526, 299 S.E.2d 560, 561 (Ga. 1983)(statute of limitations for a wrongful death action emanating from medical malpractice begins to run from the date of death, not from the date of the negligent act or omission of the practitioner); *Fisk v. United States*, 657 F.2d at 171)(holding that when a state statute creates an independent cause of action for wrongful death, it cannot accrue for FTCA purposes until the date of the death which gives rise to the action); *Farmers Bank & Trust Co. of Bardstown v. Rice*, 674 S.W.2d 510, 512 (Ky. 1984)(electing to continue in the “considerable majority,” court held the statute of

limitations for wrongful death actions runs from the death of the decedent, even though there was no viable action for personal injury or medical negligence or malpractice at the time of death); *Larcher v. Wanless*, 18 Cal. 3d 646, 135 Cal.Rptr. 75 (1976)(it would be inconsistent to conclude that the legislature used the phrase “injury or death” without intending to deny that a “death” could also constitute in “injury” to the heirs); *St. Francis Hosp. v. Thompson*, 159 Fla. 453, 31 So.2d 710, 711 (1947)(en banc)(“It took a wrongful act and death to give plaintiff a cause. The statute of limitations commenced to run upon death.”); *N.O. Nelson Mfg. Corp. v. Dickson*, 114 Ind. App. 668, 53 N.E.2d 640, 670-671 (1944)(court found no reason to overrule a case holding that wrongful death action may be maintained even if decedent's cause of action for the injury which caused the death was barred by the statute of limitations prior to his death); *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180, 185 (Ct. App. Mo. 1982)(finding that case was an action for wrongful death and not an action for malpractice governed by the limitation provided in the wrongful death statute). Given the plain words of the Idaho statute, as well as the absence of language stating that recovery is possible only where the decedent could have maintained a cause of action at the time of his or her death, the accrual date for a wrongful death action under Idaho law is the date of death, not the date of injury.

III. Appellants’ Brief is Sufficient, Complete and Does Not Raise Additional Issues on Appeal.²

A. No Additional Issues Are Needed for This Appeal.

Defendant Bechtel, Inc. filed a separate brief in response to the plaintiffs’ brief on appeal asserting that the brief addressed only those issues raised by Bechtel, Inc. and co-defendant

² As to the first issue raised by Bechtel regarding recovery for pre-death injury claims, the plaintiffs concede that they are not entitled to recover any pre-death damages or expenses of Decedent for which the Estate or Heirs are not liable. Bechtel did not obtain a ruling on this issue.

Sterling Fluid. (Bechtel Br. at 1). Bechtel acknowledges that it was not served with process in the Castorena lawsuits and is not a party in those cases. On appeal, Bechtel seeks to introduce additional issues for this Court's consideration as alternative grounds for affirming the judgment, even though those issues relate only to this single defendant who agreed to a consolidated appeal on the issue of the application of the condition precedent rule in Idaho's wrongful death statute.

Plaintiffs contend that the issues raised in appellants' brief are sufficient and complete and do not raise additional issues for review because the condition precedent rule was recognized by all parties, as well as the trial court, as crucial to the advancement of the litigation and ripe for appeal as a question of first impression. Rule 35(b)(4) of the Idaho Appellate Rules provides that:

(4) *Additional Issues Presented on Appeal.* In the event the respondent contends that the issues presented on appeal listed in appellant's brief are insufficient, incomplete, or raise additional issues for review, the respondent may list additional issues presented on appeal in the same form as prescribed in Rule 35(a)(4) above.

No additional issues are needed for this appeal. The trial court in *Adamson* specifically recited that the defendants' motion for summary judgment should be granted in its entirety based on the application of the condition precedent rule:

Construing the evidentiary record most favorably to the plaintiff, which we must do on summary judgment, there is no genuine issue of material fact that the statute of limitations had tolled on decedents claim. Therefore there can be no genuine issue of material fact that decedent had a valid claim which his heirs could pursue according to the condition precedent doctrine. Furthermore, this Court finds it appropriate to dismiss against all Defendants the entirety of the claims which are dependant [sic] upon the personal injury claim because the Plaintiffs failed to satisfy the applicable statute of limitations. Therefore, any claims pertaining to injuries resulting from alleged asbestos exposure cannot stand.

(R. Vol. XI, 2488). Earlier, the defendants in the *Castorena* case moved for an expedited appeal of the condition precedent issue when the trial court first ruled that the condition precedent rule

did not apply to the wrongful death plaintiffs, based on their assertion that the appeal would involve “a controlling question of law as to which there is substantial grounds for difference of opinion.” (R. Vol. VII, 1540). Although there were different defendants in both the *Castorena* and *Adamson* cases, and different issues in the respective litigations, not one defendant objected to a motion to consolidate appeals filed by Defendants Sterling and Vogt because, as this Court recited in its order granting consolidation, “**the legal issues are the same**, the appeals involve similar factual scenarios, and many of the defendants-respondents are the same in both appeals.” (R. Vol. XI, 2636-2636). Pursuant to Idaho Appellate Rule 35(a)(4), the appellants’ brief fairly states the issues presented for review. I.A.R. 35.

B. Alternatively, the Trial Court Impliedly Found That Plaintiff John D. Adamson Properly Represented the Interests of All Decedent’s Heirs.

On appeal, Bechtel raises an alternative issue for consideration:

Given that Idaho's wrongful death statute, I.C. § 5-311, requires that all heirs be joined as parties or affirmatively consent to representation; that Plaintiff John D. Adamson is one of four heirs of the Decedent, John H. Adamson; that none of the Decedent's other heirs are party to this lawsuit; and that no evidence has been offered as to the other heirs' consent to representation by the Plaintiff in this matter, should Plaintiff's complaint be dismissed as a matter of law?

This issue does not provide the defendant with alternative grounds for appeal because, as quoted above, the order granting summary judgment in favor of the defendants in the *Adamson* case recited “**that the decedent had a valid claim which his heirs could pursue.**” (C. Vol. XI, 2488)(emphasis added). This language represents an implied, if not an explicit finding, by the trial court that the plaintiffs’ claims should not be dismissed as a matter of law because John D. Adamson properly represented the interests of all decedent’s heirs.

In this case, the plaintiff brought his claim as “JOHN D. ADAMSON, individually, and in his capacity as Personal Representative of the Estate of JOHN H. ADAMSON” and submitted

an affidavit that he intended that this lawsuit be brought on behalf of all living heirs. (C. Vol. X, 2331). The Wrongful Death Statute specifically provides that the claims of the heirs can be brought individually or by the personal representative for the estate, who can pursue claims on behalf of the heirs. I.C. § 5-311. *See also, Hagy v. State*. 137 Idaho 618, 623, 51 P.3d 432, 437 (Idaho App. 2002)(“an action may be maintained for wrongful death of a person by the decedent's heirs or the decedent's personal representative on behalf of the heirs”); *Turpen v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (Idaho 1999)(“Under I.C. § 5-311, when the negligence of another causes a person's death, the decedent's heirs or personal representative may maintain an action for damages against the wrongdoer.”). In *Hagy*, the court stated:

[W]e construe I.C. § 5-311 to use “personal representative” to mean the personal representative of the *decedent*, not of the *heirs*. Thus, an action may be maintained for wrongful death of a person by the decedent’s heirs or the decedent’s personal representative on behalf of the heirs.

137 Idaho at 623, 51 P.3d at 437. Furthermore, John D. Adamson represented to the trial court that he had proper evidence that he was acting on behalf and with the approval of all living heirs of his father. Although there is no record of the submission of this evidence, there is no proof either that the trial court did not consider it. This Court should refuse Bechtel’s request to affirm the summary judgment on such a tenuous basis.

IV. Application of the Condition Precedent Rule Violates Article I, Section 18 of the Idaho Constitution.

Plaintiffs asserted that the effect of the application of the condition precedent rule to Idaho’s wrongful death statute is to time-bar a cause of action before it even accrues. Defendants responded that the condition precedent rule does not violate Article I, Section 18 of the Idaho Constitution because the **decedents** had two years to file a claim to recover damages for their injuries and could have done so when they were alive. This argument shows a

fundamental, and fatal, misunderstanding of Idaho's wrongful death statute because the statute created a new cause of action in favor of the **heirs** of the decedents, and gave the heirs two years from the date of the decedents' death to file for their injuries. As this Court noted in *Russell v. Cox*, 65 Idaho 534, 148 P.2d 221, 223 (1944), the cause of action which accrues to an injured person during his lifetime is altogether separate from the cause of action accruing to the person's heirs should he die from that injury.

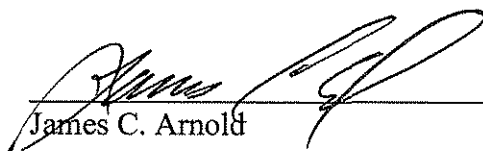
Application of the condition precedent rule robs the heirs of the explicit two-year statute of limitations provided for in the wrongful death act and does nothing to ensure that they have adequate time to pursue legal remedies. If, as in this case, the decedents' underlying causes of action were barred by limitations, the heirs can never avail themselves of their right to bring a wrongful death action even if they brought suit within two years of the date of death. This is an absurd result and one that deprives Idaho citizens of access to the courts of this state.

CONCLUSION

For the reasons set out in this reply brief, and in their appellants' brief, Plaintiffs/Appellants request that this Court reverse the rulings of the trial courts dismissing their claims and deny the defendants' summary judgment motions based on the statute of limitations.

This the 11th day of November, 2009.

Respectfully submitted,


James C. Arnold

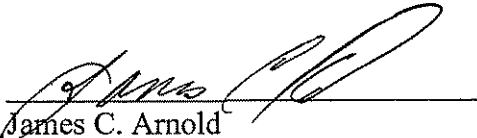
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served upon all counsel of record via email to the following:

DATED this 12th day of November, 2009.

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