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THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT
COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
IN

MARY A. KELLOGG, as Personal Representative of the
ESTATE OF JAMES H. HAMRE,

Respondent/Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
a/k/a AMTRAK, a District of Columbia Corporation; and, DOE
DEFENDANTS 1-50,

Petitioner/Defendants.

**NATIONAL RAILROAD PASSENGER
CORPORATION'S
RESPONSE TO AMICUS CURIAE**

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I. INTRODUCTION

Amicus Washington State Association for Justice Foundation repeats arguments made by Respondent Mary A. Kellogg, and then goes further to ask this Court to overturn well-established law that permits only one cause of action to be brought for a wrongful death. Parties that settle wrongful death suits should not have their contractual rights disrupted by later amendments to the wrongful death statute. Unless the settlement agreement explicitly provides that the parties to a wrongful death suit are bound by future amendments to the law, the settlement agreement is final and binding.

Here, the Release gives Amtrak a vested right in having its liability as to the James Hamre Estate fixed at the time of settlement. Both Mary¹ and Amicus ask this Court to disrupt that vested right and expand the governing statute to permit more than one wrongful death action. Amicus acknowledges black letter

¹ Amtrak has used first names in its briefs to distinguish the individuals. No disrespect is intended.

law that there can only be one right of action under the wrongful death statute and fails to cite any persuasive cases in support of its contention that this rule should not be strictly applied here.

II. ARGUMENT

A. **The Parties Relied On Existing Law At The Time of Execution, and Retroactive Application of Revised RCW 4.20.020 Would Impair Amtrak's Vested Rights.**

Amicus contends that Amtrak is not bound by existing law at the time of execution and that its right to be free from further liability is merely an expectation and nothing more. But none of the cases that Amicus cites support Amicus' contentions.

1. Parties That Settle Their Wrongful Death Suits Are Not Subject to Later Amendments To The Wrongful Death Statute.

Amicus contends that the parties' Release is subject to change based on future amendments to the wrongful death statute. Amicus Br., pp. 13-14. It makes essentially the same arguments that Mary makes in her response brief and, like Mary, overlooks the basic contract principle that existing law is part of the contract at the time it is formed. *Caritas Services, Inc v. Dep't*

of Social and Health Svcs., 123 Wn.2d 391, 405, 869 P.2d 28 (1994) (“Parties are generally deemed to contract in reliance on existing law.”); *Cornish College of the Arts v. 1000 Virginia Ltd. P’ship*, 158 Wn. App. 203, 223 (2010) (“One of the basic principles of contract law is that the general law in force at the time of the formation of the contract is a part thereof.”). Here the parties settled the claims of the Hamre Estate beneficiaries based on the law that existed at the time. Nothing in the Release indicates that the parties intended or expected that the agreement could be undone by later changes to the law.

Amicus’ reliance on *Margola Assocs. v. Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23 (1993) is misplaced. There, the issue was whether Seattle’s multi-housing registration program impaired the obligation of contracts between landlords and tenants and adversely affected the landlords’ ability to evict tenants. The Court recognized that the United States and Washington Constitutions prohibit the enactment of laws impairing the obligations of contracts, but observed that the right

to evict a tenant was a heavily regulated area. *Id.* at 653. “A party who enters into a contract regarding an activity already regulated in the particular to which he now objects is deemed to have contracted subject to further legislation upon the same topic.” *Id.* This is an important observation because landlords entering into residential leases enter into the contracts “subject to further legislation limiting the right to evict, at least to the extent the right is limited in this case.” *Id.*

The Court’s decision in *Margola* is consistent with other highly regulated areas, such as estate taxation and workers compensation. *In re Estate of Hambleton*, 181 Wn.2d 802, 831, 335 P.3d 398 (2014) (“There was no substantial impairment of the trust because it was reasonable for the Estates to expect that the estate tax law would change.”); *Department of Labor and Industries of State v. Lyons Enterprises, Inc.*, 186 Wn. App. 518, 543, 347 P.3d 464 (“Workers compensation insurance is heavily regulated,” and the plaintiff “should have understood before it entered the business that it could be subject to changing workers

compensation regulations.”). In contrast to these highly regulated fields,² the Legislature has set limits on wrongful death actions which parties are entitled to rely upon at the time of settlement.

The fact that revised RCW 4.20.020 now permits additional categories of beneficiaries does not change the analysis that the parties’ Release settled all claims for liability as a result of James Hamre’s death. Neither Thomas (as personal representative) nor Amtrak can be reasonably deemed to have anticipated that the classes of beneficiaries under wrongful death statute would change. More importantly, the Release does not contain any language that the parties would be bound by changes to the law. And regardless of the Legislature’s intent to expand

² Notably, even in a regulated field, this Court has observed in at least one case that an owner may have a vested interest to use his or her land in accordance with the zoning ordinance at the time the building permit application is made and attempts to rezone certain property cannot be retroactively applied if doing so will affect vested rights. “An owner of property has a vested right to put it to a permissible use as provided for by prevailing zoning ordinances. The right accrues at the time an application for a building permit is made.” *State ex. rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 496, 275 P.2d 899, 902 (1954).

the types of beneficiaries, “a remedial statute cannot be retroactively applied if it affects a vested right.” *In Re F.D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303 (1992). Thus, after Thomas executed the Release and Amtrak tendered the settlement check to the Estate, Amtrak had a vested right to be immune from further liability.

2. Amtrak’s Right To Have Its Liability Fixed and Be Free From Further Litigation Is A Vested Right.

Contrary to Amicus’ contention, Amtrak has much more than a “mere expectation” to be free from further liability for damages arising from James Hamre’s death. The Release gives Amtrak a vested right, that is, a legal right to be exempt from any further demands from the Estate. “A vested right . . . must be . . . a demand, or legal exemption from a demand by another.” *Caritas Services, Inc. v. Department of Social and Health Services*, 123 Wn.2d 391, 414, 869 P.2d 28 (quoting *In RE Marriage of MacDonald*, 104 Wn.2d 745, 750, 709 P.2d 1196 (1985)) (other citation omitted). *See also Gillis v. King County*, 42 Wn.2d 373, 377, 255 P.2d 546 (1953) (“[T]he term [vested

right] has been commonly held to connote an immediate, fixed right of present or future enjoyment and an immediate right of present enjoyment, or a present fixed right of future enjoyment.” (internal quotation marks omitted) (*quoting Adams v. Ernst*, 1 Wn.2d 254, 264-65, 95 P.2d 799 (1939)).

There is no question that a vested right can be created by contract. *See Amtrak Op. Br.*, pp. 14-15 (citing cases). Thus, when Amtrak paid a considerable sum in exchange for the Estate’s promise not to seek or bring a suit based on all causes of action arising out of James Hamre’s death, Amtrak’s interest in being free from further litigation was and continues to be much more than “mere expectation”—it became a vested right that is entitled to protection under the contract and due process clauses of the United States and Washington Constitutions. *See Amtrak Op. Br.*, pp. 12-28.

Amicus’ reliance on *Godfrey v. State*, 84 Wn.2d 959, 530 P.2d 630 (1975) is misplaced. There, the issue was whether a statute that removed contributory negligence as a bar to recovery

could be applied retroactively. 84 Wn.2d at 961. The trial court had decided that the statute substituting comparative negligence for contributory negligence could only be applied prospectively. *Id.* The Court reversed, holding that the statutes “apply retrospectively to causes of action having arisen prior to the state’s effective date of April 1, 1974, but in which trials have begun subsequent thereto.” *Id.* at 961, 968. Notably, the Court observed that the amended statute did not affect any **contractual** obligations between the parties, and the respondent made no such contention. *Id.* at 962 (emphasis added). Moreover, the Court observed that there was “no vested right to a common law bar to recovery that is provided by the affirmative defense of contributory negligence.” *Id.*

Godfrey is distinguishable from this case. None of the parties in *Godfrey* executed a settlement agreement that would have created a vested right protected by the contract and due process clauses of the United States and Washington Constitutions. In fact, the defendant in *Godfrey* contended that

he only had a vested right to a common law bar to recovery that was provided by the affirmative defense of contributory negligence. The Court held that there is no such vested right in such a defense because the merits are not determined until trial and could not have been relied upon at the time of the accident. *Id.* at 962. This is markedly different from the vested right at issue here which was created by contract in reliance on the law existing at the time. Unlike *Godfrey*, Amtrak entered into a contract based upon an unambiguous agreement that it had definitively settled all claims related to the Estate for a sum certain.³ Execution of that contract and payment of the agreed upon settlement amount vested Amtrak with the right to be

³ Both Amicus and Mary inexplicably suggest that the agreement between Amtrak and the Hamre Estate would only be re-opened against one-side—Amtrak—leaving the settlement as to the original beneficiary Carolyn Hamre in place. That, of course, would not be so. The agreement was entered as settlement for all of the beneficiaries of Hamre Estate. Allowing the action to be reopened for additional beneficiaries would require nullification of the agreement, return of the settlement funds, and further litigation.

exempt from further demands of the Estate, regardless of any subsequent changes in the law.

3. Amicus Repurposes The Same Arguments As Mary.

Amicus echoes the same arguments made by Mary that Thomas lacked the power to waive claims that did not exist at the time the Release was executed because neither she nor her brother Michael are identified in the Release. *Cf.* Amicus, pp. 14-19 and Resp. Br., pp. 8-9, 19. Like Mary, Amicus does not cite a single case that stands for the proposition that all persons must be named in a Release in order to be bound by it. Again, there would be no reason for either Mary or Michael to be identified in the Release since neither were eligible beneficiaries at the time the Release was executed.

As for the argument that the Release is ineffective as to Mary and Michael, Amicus' reliance on *Nevue v. Close*, 123 Wn.2d 253, 867 P.2d 635 (1994) is misplaced. There, the plaintiff was a passenger in a car that was rear-ended by defendant's truck. *Id.*, at 254. At the hospital, the plaintiff

expressed concern about her pregnancy and also complained of neck and abdominal pain. *Id.*, at 254. Sometime thereafter, the plaintiff executed a release for payment of \$150 plus medicals and waived her right to seek further payment from the insurance carrier. *Id.* Subsequently, the plaintiff complained of back pain, a latent injury that was not known or contemplated by either the plaintiff or the insurance adjuster. *Id.*, at 256.

At issue was whether the plaintiff was entitled to damages for her latent back injury notwithstanding the language contained in the release. The Court held that the release did not automatically bar the plaintiff from seeking compensation for her back pain because there was a question of fact as to whether the parties contemplated payment for pain and suffering, which included unknown injuries. *Id.* at 258 (“[W]here there are known injuries, here the neck sprain, the release is binding as to those injuries and as to the unknown consequences of the known injury. However, as to an injury unknown to the plaintiff, and not within the contemplation of the parties to the release, the release

should not be binding per se. The plaintiff should bear the burden of proving that the injury was reasonably unknown and not within the contemplation of the parties.”). *Id.* The Court then remanded the matter for the trial court for further fact finding. *Id.* at 258-59.

Nevue is inapposite for multiple reasons. First, the holding is limited to the specific parties and facts at issue in that case. *See id.* at 256. The Court explicitly concluded that it did not need to modify or reject prior case law regarding releases and latent injuries because the facts presented were different. *Id.* Second, *Nevue* did not involve a release by a personal representative in a wrongful death action. While questions of fact existed as to whether the parties in *Nevue* contemplated payment for unknown injuries, here it is undisputed that Thomas, the Estate’s prior personal representative, understood the terms of the Release and knowingly entered into it. Finally, the retroactive application of a statute against settled rights was not at issue in *Nevue*. Thus, the case has no application to the issues before this Court.

B. The Single Right of Action Must Be Strictly Applied.

The single right of action under RCW 4.20.020 is an important and strictly followed rule of law that is grounded in both the plain text of the statute and the intent of the Legislature. Amicus acknowledges this, including the long line of cases applying the single action rule. Amicus, p. 20-21. Nonetheless, Amicus invites this Court to re-examine the bases of this rule to allow more than one wrongful death action generally. Amicus, p. 22-23. This Court should decline to consider Amicus' general policy request to reconsider this longstanding precedent. *Cf. Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 495 n. 12, 120 P.3d 564 (2005) (declining to consider issues raised only by amicus, including advocating for the overturn of precedent). Moreover, allowing multiple wrongful death actions would create chaos for the parties and courts, as well as frustrate efforts to resolve such cases expeditiously. At a minimum, no defendant would settle a case before the statute of limitations had expired on any potential action.

For the same reasons, this Court should also reject Amicus' suggestion that this Court should ignore the single cause of action rule to permit Mary and Michael's claims here. Amicus, p. 25. Its discussion of res judicata and collateral estoppel principles does not change the analysis that there can only be one right of action under the wrongful death statute. Moreover, this is not an instance where a "new right" has been created to permit more than one wrongful death action. *See* Amicus, p. 27. This Court has recognized that a wrongful death action accrues at the time of the wrongful death. *Gray*, 61 Wn.2d at 327. Beneficiaries are thus "vested with the right to the benefit" of the **action at that time**. *Id.* Neither Mary nor Michael had any beneficiary rights at the time of James' death when the cause of action accrued, nor at the time when the Estate's Personal Representative settled **all** claims of the Estate on behalf of the eligible beneficiaries. They likewise have no claims now.

III. CONCLUSION

RCW 4.20.020 as amended may not be retroactively applied in this case. Amtrak has a vested right to be free from further liability for all causes of action arising out of James Hamre's death. Amicus fails to cite a single case that there can be more than one right of action under the wrongful death statute. Accordingly, Mary and Michael are precluded from seeking additional damages from Amtrak.

This document contains 2,678 words in compliance with RAP 18.17.

RESPECTFULLY SUBMITTED this 26th day of October 2021.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on the 26th day of October 2021, I caused the opening brief of Petitioner/Defendant to be filed in the Washington State Supreme Court and a true copy of the same to be served to the following person(s) in the manner indicated below at the following address(es):

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