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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
REPLY BRIEF**

Tim D. Wackerbarth, WSBA No. 13673
Andrew G. Yates, WSBA No. 34239

LANE POWELL, PC
1420 Fifth Avenue, Suite 4200
P.O. BOX 91302
Seattle, Washington 98111-9402
(206) 223-7000

*Attorneys for Petitioner/Defendant National
Railroad Passenger Corporation
("Amtrak")*

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I. INTRODUCTION

It is black letter law that there can only be one right of action under the wrongful death statute. Amtrak had a reasonable expectation that it would be immune from further liability after it tendered a settlement check to the personal representative of James Hamre's Estate ("Estate") who executed a confidential settlement agreement that released all claims against Amtrak. The amendments to former RCW 4.20.020 do not allow newly created beneficiaries to bypass the single right of action principle. Nor do the amendments allow newly created beneficiaries to infringe a tortfeasor's vested right to be immune from further suits for damages resulting from the same set of facts. The revised RCW 4.20.020 cannot be retroactively applied to this case because it will violate Amtrak's Due Process and Contracts Clause rights. Thus, this Court should find that Respondent Mary Kellogg, as successor personal representative, is bound by the Release and prohibited from bringing a wrongful death action against Amtrak on behalf of newly created beneficiaries.

II. ARGUMENT

A. There Can Only Be One Right of Action under RCW 4.20.020.

Mary¹ is prohibited from bringing a second action against Amtrak because Washington's wrongful death statute permits only a single right of action. RCW 4.20.010. The revisions to RCW 4.20.020 were not intended to allow multiple wrongful death actions. Mary concedes—as she must—that there can only be a single right of action. Response, pp. 44-45. But paradoxically, Mary also contends that she and her brother Michael should be allowed to seek damages for the wrongful death of their brother under the revised RCW 4.20.020. To solve this paradox, Mary argues that Thomas (as prior personal representative) never filed an “action” against Amtrak, and the only suit is the one that Mary brought below. Response, p. 44. In support of that argument, Mary cites only a single case, *Wood v. Dunlop*, 83 Wn.2d 719, 521 P.2d 1177 (1974). But that case does not support Mary's position.

In *Wood*, the decedent died as a result of medical malpractice and was survived by her husband and two-year old son. *Id.*, at 720. Subsequently, an insurance representative contacted the decedent's husband in an effort to settle a claim before he filed suit. *Id.*, at 721. In exchange

¹ Amtrak uses first names in this brief to distinguish the individuals. No disrespect is intended.

for \$18,000, the husband executed a release. *Id.* However, the husband was not appointed guardian of his minor son, and no allocation was made to the minor son. *Id.*, at 721-722. About two years later, the husband, acting as administrator of the decedent's estate, brought an action against the defendants for wrongful death. *Id.*, at 722. The jury found in favor of the defendants, and the Court of Appeals affirmed. *Id.* On appeal, this Court held that the Release was not valid as to the minor son because the statutory requirements that there be an appointed independent guardian and a court approval of the settlement were not met. *Id.*, at 723-25. In so holding, this Court reversed the judgment of dismissal as to the minor child. *Id.*, at 725.

Mary seems to suggest that the *Wood* case is analogous to this case. It is not. The facts and legal basis for the court's decision in *Wood* are distinguishable. Unlike the child beneficiary in *Wood*, neither Mary nor Michael were minors when the decedent died. And since they were not minors, they did not require a guardian. Nor was there any statutory requirement that a court approve the Release between the Estate and Amtrak.

Wood is only helpful in the limited circumstances where a minor child is entitled to recover from the wrongful death of a parent, and the court allows a second action against the tortfeasor because certain statutory requirements were not met. Since none of the unique circumstances and

legal requirements presented in *Wood* apply to this case, it is not helpful to Mary's position.

Not surprisingly, Mary does not address the numerous cases Amtrak cites that hold that there can only be a single right of action under RCW 4.20.010 even if there are multiple beneficiaries. *See* Amtrak Op. Br., pp. 11-12 (citing cases). Since there can only be one right of action, revised RCW 4.20.020 may not be retroactively applied here because the Personal Representative for the Estate already settled the wrongful death action for all beneficiaries of that Estate. The fact that the Legislature amended RCW 4.20.020 to allow additional types of beneficiaries does not change the analysis. Mary is prohibited from bringing a second action against Amtrak on behalf of herself and her brother Michael.

B. Only A Personal Representative May Maintain An Action for Wrongful Death.

Washington law is clear that only the personal representative may bring a wrongful death action. RCW 4.20.010. (“When the death of a person is caused by the wrongful act, neglect, or default of another person, **his or her personal representative** may maintain an action against the person causing the death for the economic and noneconomic damages sustained by the beneficiaries....”) (emphasis added).

Despite the plain language of the statute, Mary urges that this Court “should not myopically focus on the fact that a ‘personal representative is the only party who may maintain an action for wrongful death.’” Response, p. 45 (quoting *Wood*, 83 Wn.2d at 724). This is an express invitation for the Court to disregard unambiguous statutory language and its own settled precedent. As such, Mary cannot and does not cite a single case in support of her contention that any party other than a personal representative may bring a wrongful death action.

It is indisputable that only the personal representative may bring a wrongful death action against another party. RCW 4.20.010. Contrary to Mary’s contentions, the court in *Wood* did not carve out any exception to the statutory requirement that only a personal representative may bring a wrongful death action. Rather, the court in *Wood* held that because certain statutory requirements were not met as to the minor child, the personal representative could bring an action against the defendants once the minor child has had a guardian appointed. 83 W.2d at 725. The *Wood* decision makes this crystal clear: “In short it is the personal representative, not the child, who possesses the claim (as statutory agent or trustee), who is the ‘nominal’ party to the action, and who must maintain it on Behalf of the minor.” *Id.*, at 723. Thus, it is never the beneficiary, but the personal

representative who must bring a wrongful death action against the wrongdoer.

Mary's contention that anyone other than the personal representative may bring a wrongful death action against Amtrak is contrary to law, as it is both not supported by the court's decision in *Wood* or the statute authorizing wrongful death actions. Nothing in the *Wood* decision changes black letter law that only a personal representative may bring a wrongful death action. RCW 4.20.010. Thus, there can be no dispute that Thomas, as personal representative of the Estate, brought and resolved the wrongful death action against Amtrak.

C. As Successor Personal Representative, Mary is Bound by the Release.

As successor personal representative of the Estate, Mary is bound by the Release. Dkt. 8-8, at ¶ 6. ("Anyone who succeeds to Releasor's rights and responsibilities is also bound. This Release is made for Releasees' benefit and all who succeed to Releasees' rights and responsibilities."). Yet, Mary contends that she may bring this wrongful death claim against Amtrak because neither she nor Michael are specifically identified in the Release. Response, pp. 8-9, 19. However, Mary has not cited a single case that stands for the proposition that all parties must be named in a Release in order to bound by it. In any event, there would be no

reason for either Mary or Michael to be identified in the Release since neither were beneficiaries at the time the settlement agreement was executed.

More importantly, however, Mary—as successor personal representative—is bound by the terms of the Release and has an obligation not to bring a wrongful death action against Amtrak. Dkt. 8-8, at ¶ 6. This provision is important because the Release specifically releases and discharges all legal liability against Amtrak. As successor personal representative, Mary must comply with the terms and conditions of the Release and recognize that the Release has specifically discharged all legal liability against Amtrak. *See* Dkt. 8-8, at ¶ 9. Mary does not even address these provisions because they bar her claim herein. In summary, Mary is prohibited from bringing a wrongful death action against Amtrak.

D. The Release Applies to Mary and Michael.

The Release is a contract between the Estate and Amtrak. *Boyce v. West*, 71 Wn. App. 657, 662, 862 P.2d 592 (1993). In exchange for a settlement check, the Estate agreed to release all claims against Amtrak on behalf of all beneficiaries. Dkt. 8-8, at ¶ 9. Nevertheless, Mary contends that the Release is unenforceable as to her or Michael. In support of that contention, Mary cites *Del Rosario v. Del Rosario*, 152 Wn.2d 375, 97 P.3d

11 (2004). Response, pp. 29-30. But the holding of that case does not support Mary's contention.

In *Del Rosario v. Del Rosario*, 152 Wn.2d 375, 97 P.3d 11 (2004), the plaintiff was a non-English speaking passenger who sustained damages as a result of a motor vehicle accident driven by her brother-in-law, who had an automobile insurance policy that included third party liability coverage, as well as first party personal injury protection coverage. *Id.* at 378. An insurance representative negotiated a settlement, and the plaintiff's sister translated the conversation. *Id.*, at 379. After agreeing to the settlement amount—which plaintiff thought included lost wages and pain and suffering—plaintiff executed a release that the insurance representative had prepared in English. *Id.*, at 379-380. Subsequently, plaintiff filed suit against her sister and brother in law for her injuries. *Id.*, at 380. At trial, the defendants requested a jury instruction that “the release is binding were the injuries are known, unless there is clear, cogent, and convincing evidence that the release was induced by fraud, misrepresentation, overreaching, or undue influence, or if there was a mutual mistake by the parties.” *Id.*, at 381. The trial court refused to give these instructions, instead instructing the jury that “[a] release should be set aside if it was not fairly and knowingly made.” *Id.* The jury awarded the plaintiff damages. The defendants appealed, and the Court of Appeals remanded for trial with

appropriate jury instructions. *Id.*, at 381. This Court accepted discretionary review and observed that “Generally, we are loath to vacate properly executed releases because Washington favors finality in private settlements.” *Id.*, at 382. However, an exception to that general rule applies if “(1) there is an unknown or latent injury discovered after the release was executed and (2) the plaintiff proves the release was not fairly and knowingly made.” *Id.*, at 382-83 (citing *Finch v. Carlton*, 84 Wn.2d 140, 145-46, 524 P.2d 989 (1974)). This Court affirmed the Court of Appeals’ holding that it was improper for the trial court to give a *Finch* “fairly and knowingly” made exception instruction and remanded for retrial. *Id.*, at 387.

The *Del Rosario* decision is not applicable to this case. There has been no suggestion that Thomas, as prior personal representative, lacked competency to hold his position. And none of the *Finch* exceptions apply to this case. It is indisputable that Mr. Hamre died as a result of his injuries, so there is no “unknown or latent injury” at issue. Mary’s reliance on other cases regarding unknown and latent injury is unavailing because those cases involve plaintiffs who were physically injured, not beneficiaries seeking damages for the wrongful death of a family member. Furthermore, there cannot be any dispute that Thomas negotiated the settlement and fairly and knowingly executed the Release on behalf of the Estate. In fact, by

executing the Release, Thomas acknowledged that he was competent to enter into the Release, was not under any restraint or duress, and had conferred with legal counsel or waived the right to confer with legal counsel. Dkt. 8-8, at ¶ 15. The fact that Thomas was not represented by tort counsel does not change the analysis, and Mary has not cited any case law suggesting that tort counsel was required. And Mary has not cited any facts or otherwise filed a declaration in support of her claim that there was fraud, misrepresentation, or mutual mistake. Nor did Mary file a declaration in the district court suggesting that the prior representative was an “unsophisticated layperson.” Response, p. 34.

Relatedly, Mary also contends that the Release does not bind her or Michael because Thomas (as prior personal representative) lacked the power to waive claims that did not exist at the time the Release was executed. Response, pp. 21-28. None of the cases cited by Mary supports her contentions. For example, Mary relies on *Gray v. Goodson*, 61 Wn.2d 319, 378 P.2d 413 (1963). There, the decedent died as a result of an automobile accident. *Id.*, at 320. The decedent’s wife brought a wrongful death suit against the defendant who was involved in the automobile accident. *Id.* A judgment was entered in favor of the defendant. *Id.*, at 321. The decedent’s wife appealed and also brought an action against a car manufacturer. *Id.* Two years later, the decedent’s wife passed away, and

this Court subsequently heard the appeal and reversed the judgement in favor of the defendant and remanded the cause for a new trial. *Id.* The decedent's wife's daughter was substituted by appointment as administrator of the estate and thereafter substituted as party plaintiff in both actions. *Id.*, at 321-22. The cases were consolidated and the actions were dismissed because the order discharging the decedent's wife as administratrix was effective to end her power as her husband's personal representative, and the substitution of the daughter was subject to attack. *Id.*, at 322. This Court held "that once a right of action for wrongful death has accrued, the subsequent death of a beneficiary does not abate the action. The benefit of the right of action survives to the beneficiary's estate." *Id.*, at 330.

Nothing in *Gray* stands for what Mary claims. There is no dispute that Mary may be appointed successor personal representative. But as successor personal representative, Mary is bound by the terms of the Release. *Gray* does not change this. In fact, *Gray* does not involve a release and so it is puzzling why Mary even relies on *Gray*. Nowhere in its opening brief did Amtrak dispute that a wrongful death action is for the benefit of statutory heirs; but as the successor personal representative, it is indisputable that Mary is bound by the Release, the terms of which preclude her from subsequently bringing a wrongful death action against Amtrak.

Finally, Mary argues that the Release does not apply to her or Michael because they cannot waive a right that did not exist at the time of execution. Response, p. 21. 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.”). Thus, changes to the law subsequent to the execution of a settlement agreement have no effect unless the agreement contains contrary language. The subject Release contains no such language. Because the Washington constitution prohibits any law impairing the obligation of contracts, Mary’s argument with regard to waiver has no effect. WASH. CONST. art. 1, § 23.

In summary, Thomas negotiated the Release and knowingly executed it on behalf of the Estate. Mary did not allege fraud, misrepresentation, or mutual mistake when the Release was executed. Former RCW 4.20.020 was the law at the time of the execution of the Release, and nothing in either the Release or in the revised version of RCW 4.20.020 permits Mary and Michael to circumvent the terms of the Release,

violate Amtrak's Due Process rights. and impair the parties' contractual obligations in violation of the Contract Clause. *See* Amtrak Op. Brief, pp. 12-28.

E. The Release Does Not Violate Public Policy.

The Release does not violate public policy. To the contrary, permitting Mary to bring a wrongful death action against Amtrak would be against public policy because it undermines the contractual agreement between the Estate and Amtrak and violates Amtrak's Due Process and Contracts Clause rights. *See* Amtrak Op. Br. pp. 12-28. Nevertheless, Mary argues that the Release violates public policy and cites *Wagenblast v. Odessa Sch. Dist. No. 105-157-166*, 110 Wn.2d 845, 758 P.2d 968 (1988). Response, pp. 36-38. There, the public school districts required that its students and their parents sign a release of all potential **future** claims as a condition of participating in certain school-related activities. *Id.*, at 847. In three separate cases, the students and their parents brought suit against the public schools for declaratory and injunctive relief. *Id.*, at 847-48. The sole issue for this Court was to determine whether school district can require public school district students and their parents to sign these prospective exculpatory agreements. After evaluating the test that determines whether exculpatory agreements violate public policy, this Court held that the public school districts' releases violated public policy. *Id.*, at 848.

Mary's reliance on *Wagenblast* is misplaced because it is limited to prospective exculpatory agreements. An exculpatory agreement is essentially a pre-injury waiver that releases an entity from a duty of care. *See generally* 25 Wash. Prac., Contract Law And Practice § 9:20 (3d ed.). The Release at issue is *not* an exculpatory agreement, as it was entered after the accident and Mr. Hamre's death. Thus, *Wagenblast* is not relevant to this case, and Mary's contention that the subject Release violates public policy is frivolous.

F. Amtrak Has A Vested Right To Have Its Liability Fixed.

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. Without citing any authority, Mary argues that Amtrak has no vested rights from the Release with regard to Mary and Michael. Response, pp. 15, 19-21. This makes no sense. Amtrak has a vested right to have its liability fixed for Mr. Hamre's death. Amtrak Op. Br., pp. 13-21. The purpose of the Release is to settle all claims with the Estate for liability as a result of Mr. Hamre's death. The fact that at a later time the law changed to allow additional types beneficiaries does not change the analysis because there is only one right of action.

Mary fails to cite a single case to support her contention that Amtrak does not have a vested right from the Release with regard to either Mary or

Michael. Nor does Mary cite any authority that the Legislature intended to permit personal representatives to breach settlement agreements to obtain a windfall or allow additional potential beneficiaries to make a claim against an alleged tortfeasor despite the existence of a valid settlement agreement binding on the Estate's personal representative and its successors.

As Mary acknowledges, Washington favors finality in private settlements except in limited situations such as when an injury unknown to the plaintiff is not within the contemplation of the parties to the release. Response, pp. 32-32 (quoting *Nevue v. Close*, 123 Wn.2d 253, 867 P.2d 635 (1994)). Amtrak does not disagree with this principle, but *Nevue* is not applicable here because this is not a case where an unknown injury is at issue.

Neither party disputes that Thomas on behalf of the Estate and Amtrak executed the Release in order to settle all claims arising out of Mr. Hamre's death. Once the Release was executed, it was reasonable for the parties to expect that there would not be any further claims or litigation arising out of Mr. Hamre's death. Mary's contention that Amtrak has "simply reached an early settlement with some, but not all, claimants" lacks merit. Response, p. 15. The enactment of revised RCW 4.20.020 does not change Amtrak's vested rights in having its liability fixed for the death of Mr. Hamre.

Allowing Mary to bring a wrongful death action against Amtrak would invalidate the Release in every respect, violate the single right of action principle, and violate Amtrak's vested right to be immune from further suits from the Estate for damages resulting from the derailment. Accordingly, Mary is prohibited from bringing a second action against Amtrak on behalf of other beneficiaries.

G. Mary's Proposed Certified Question is Confusing and Unnecessary to the Resolution of this Case.

Finally, Mary proposes that this Court should consider a third certified question regarding whether a personal representative has the authority to settle wrongful death claims for other parties. Respondent, p. 7. Mary argued below that if the answer to this question was "No," it could moot the other two certified questions before this Court. Dkt. 20, p. 3. Amtrak disagreed and contended that the proposed certified question was confusing and did not squarely address whether the retroactive application of revised RCW 4.20.020 would affect Amtrak's vested substantive rights from a constitutional standpoint. Dkt. 21, p. 1. Furthermore, a "No" answer would further highlight the need to address the two certified questions in order to protect the vested rights of Amtrak and other similarly situated previously released parties. *Id.* Indeed, the district court below declined to certify the third proposed question because Amtrak "could not release

claims that did not exist when it was executed. The core issue is whether the application of revised RCW 4.20.020 to settled cases deprives a tortfeasor of vested rights, violating the Washington Constitution.” Dkt. 22, pp. 2-3.

It appears that Mary’s proposed question now asks whether Thomas may “dispose of” Mary and Michael’s claims by settlement. Respondent, p. 7. This is a confusing question because at the time of execution Mary and Michael did not have any rights under former RCW 4.20.020.

It is also confusing because the estate’s personal representative has an obligation to ensure that all rightful beneficiaries are accounted for and receives a share of the settlement proceeds. Even assuming that Mary and Michael had rights under former RCW 4.20.020 (which they did not), Amtrak could not be held liable for Thomas’ deciding that Mary and Michael should not receive a share of the settlement proceeds. This obviously was a decision made by the personal representative of the Estate and not Amtrak, as Amtrak had no stake in how the settlement proceeds were distributed.

III. CONCLUSION

There can only be a single right of action. That the prior personal representative settled the wrongful death claim before filing suit does not change the analysis. As successor personal representative, Mary is bound

by the Release. Revised RCW 4.20.020 may not be retroactively applied to this case, and permitting Mary to bring an wrongful death action against Amtrak will violate the terms of the Release, infringe upon Amtrak's vested rights in violation of the Due Process Clause, and impair the parties' contractual obligations in violation of the Contract Clause.

In conclusion, this Court should find that revised RCW 4.20.020 cannot be applied retroactively to permit Mary and Michael to assert wrongful death claims against Amtrak. As to the second certified question, this Court should find that neither Mary nor Michael can bring a wrongful death claim against Amtrak under revised RCW 4.20.020 because it will violate Amtrak's vested rights in violation of Washington Constitution's Due Process and Contract Clauses.

RESPECTFULLY SUBMITTED this 23rd day of August 2021.

LANE POWELL PC

By: *s/Tim D. Wackerbarth*

Tim D. Wackerbarth, WSBA No. 13673

Andrew G. Yates, WSBA No. 34239

1420 Fifth Avenue, Suite 4200

P.O. Box 91302

Seattle, Washington 98111-9402

wackerbartht@lanepowell.com

yatesa@lanepowell.com

*Attorneys for Petitioner/Defendant National
Railroad Passenger Corporation (“Amtrak”)*

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on the 23rd day of August 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):

Benjamin T.G. Nivison
Rossi Vucinovich PC
1000 Second Avenue, Ste. 1610
Seattle, WA 98104
Phone: (425) 646-8003
Email: bnivison@rvflegal.com
odoolan@rvflegal.com

- by CM/ECF
- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Overnight Delivery

DATED this 23rd day of August 2021.

s/ Kathryn Savaria
Kathryn Savaria

LANE POWELL PC

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