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## Torts/Wrongful Death - Should a Wrongful Death Action Expire before the Decedent Does - A Wrong Turn for Wrongful Death - Edwards v. Fogarty

Robert C. Jarosh

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## **TORTS/WRONGFUL DEATH—Should a Wrongful Death Action Expire Before the Decedent Does? A Wrong Turn for Wrongful Death. *Edwards v. Fogarty*, 962 P.2d 879 (Wyo. 1998).**

### INTRODUCTION

Approximately two years and one month after discovering that William A. Fogarty M.D. misdiagnosed a cancerous condition in his neck, Larry Edwards died due to metastasized cancer.<sup>1</sup> Though Edwards never filed a medical malpractice claim against Fogarty, his wife, as personal representative, brought a wrongful death suit against the doctor.<sup>2</sup> Because the statute of limitation on Edwards's underlying claim for medical malpractice expired before he died, the district court held that a wrongful death claim by his personal representative also was time barred.<sup>3</sup> In a three to two decision, the Wyoming Supreme Court affirmed, holding that a "viable" underlying claim is a condition precedent to recovery for wrongful death.<sup>4</sup>

The chain of events that ultimately led to the Wyoming Supreme Court's decision in *Edwards* began in August 1989, when Larry Edwards visited his family physician, Bruce Hayse, M.D., after Edwards's wife discovered a lump on his neck.<sup>5</sup> Hayse referred Mr. Edwards to Norman Roland, M.D., who removed the tissue from one of the salivary glands near his right ear.<sup>6</sup> After the surgery, Roland submitted the tissue to pathologist William A. Fogarty, M.D., who diagnosed the tissue as benign.<sup>7</sup>

In February 1991, Mr. Edwards noticed more swelling on the right side of his neck, prompting him to visit Hayse again. After examining Mr. Edwards, Hayse ordered a CT scan, which revealed that abnormalities in the right parotid gland were suspicious of cancer.<sup>8</sup> As a result, Hayse referred Mr. Edwards to the University of Utah Medical Center in Salt Lake City, where a biopsy revealed a malignant tumor.<sup>9</sup> On March 15, 1991, Dr. R. Kim Davis performed several surgical procedures on Mr. Edwards, includ-

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1. *Edwards v. Fogarty*, 962 P.2d 879, 880 (Wyo. 1998).

2. *Id.* at 880-81.

3. *Id.* at 881.

4. *Id.* at 882-83.

5. Brief of Appellees William A. Fogarty, M.D., an Individual, and William A. Fogarty, M.D., P.C., a Professional Corporation at 4, *Edwards v. Fogarty*, 962 P.2d 879 (Wyo. 1998) (No. 97-40) [hereinafter Brief of Appellees].

6. Brief of Appellants at 3, *Edwards v. Fogarty*, 962 P.2d 879 (Wyo. 1998) (No. 97-40) [hereinafter Brief of Appellants]. The salivary gland from which tissue was removed was the right parotid gland. *Id.*

7. *Edwards*, 962 P.2d at 880. The precise diagnosis was a benign condition known as a pleomorphic adenoma, or a mixed cystic tumor. Brief of Appellants, *supra* note 6, at 3.

8. Brief of Appellants, *supra* note 6, at 3. The precise diagnosis was that Mr. Edwards had abnormalities suspicious of "neoplastic process" (cancer). *Id.*

9. *Id.*

ing the removal of his entire right parotid gland.<sup>10</sup> For a period of time afterward, Mr. Edwards underwent radiation treatments that were ultimately unsuccessful.<sup>11</sup> Larry Edwards died due to metastasized cancer on April 5, 1993.<sup>12</sup>

After performing Mr. Edwards's surgeries on March 15, 1991, Davis procured the pathology slides prepared and interpreted by Fogarty in 1989 and turned them over to Dr. Rueben S. Doggett, a pathologist.<sup>13</sup> Doggett examined the tissue and determined that although no "unequivocally malignant cells [were] present within the gland" the tissue was "suspicious for malignancy" and strongly suggested "mucoepidermoid carcinoma."<sup>14</sup> As a result of all of this, Mr. Edwards became aware, possibly as early as February 21, 1991, and certainly no later than March 1991, that Fogarty may have misdiagnosed the first tissue sample.<sup>15</sup> Regardless, he never filed a medical malpractice claim against Fogarty.<sup>16</sup>

On April 4, 1995, Edwards's widow, as personal representative, filed a wrongful death action alleging that Fogarty negligently failed to properly diagnosis the cancer in 1989 and that the negligence caused her husband's death.<sup>17</sup> Fogarty filed an Answer on April 26, 1995 and filed motions to dismiss and for summary judgment on September 5, 1996.<sup>18</sup> The motions asserted that because Mr. Edwards failed to file a medical malpractice action against Fogarty within the statute of limitations for medical malpractice claims,<sup>19</sup> Ms. Edwards's wrongful death action was time barred.<sup>20</sup> The dis-

10. *Id.* In addition to the right total parotidectomy, Davis performed a radical neck dissection and facial nerve caval grafting on Mr. Edwards. *Id.*

11. *Id.* at 4.

12. *Edwards*, 962 P.2d at 880. "Metastasis" is the process by which malignant cells "spread away from the periphery of the tumor locally through the regional lymphatic network" and to other parts of the body. ROBERT K. AUSMAN, M.D. AND DEAN E. SNYDER, J.D., MEDICAL LIBRARY, LAWYERS EDITION § 25:9, at 540 (1992).

13. Brief of Appellants, *supra* note 6, at 4.

14. *Id.*

15. *Edwards*, 962 P.2d at 881.

16. *Id.* at 880.

17. *Id.* at 880-81. The complaint named William A. Fogarty, M.D., William A. Fogarty M.D., P.C., and St. John's Hospital as defendants, alleging vicarious liability on the part of the hospital. *Id.* at 881. Because the claim against St. John's Hospital was one of vicarious liability and because the arguments against the hospital were the same as those against Fogarty, the defendants are collectively referred to as "Fogarty" for the remainder of this note.

18. *Id.*

19. WYO. STAT. ANN. § 1-3-107(a) (Michie 1997) provided in pertinent part:

A cause of action arising from an act, error or omission in the rendering of licensed or certified professional or health care services shall be brought within the greater of the following times:

(i) Within (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two years after discovery of the alleged act, error or omission, if the claimant can establish that the alleged act, error or omission was:

Not reasonably discoverable within a two (2) year period; or

strict court granted the motion to dismiss, holding that because Mr. Edwards had no "viable action" at the time of his death, any wrongful death action by his survivors was also time barred.<sup>21</sup> Ms. Edwards appealed the decision to the Wyoming Supreme Court, which cited the plain language of Wyoming's wrongful death statute and the "clear majority rule" in other jurisdictions to affirm in a three to two decision.<sup>22</sup>

This note will argue that the Wyoming Supreme Court's decision represents an undesirable interpretation of both the wrongful death cause of action generally and Wyoming's wrongful death statute in particular. The note will first critique the analysis of statutory language employed by the majority in *Edwards* in reading a condition precedent into the wrongful death cause of action. Second, it will analyze the Wyoming Supreme Court's ruling that wrongful death suits are subject to the same defenses that exist against an underlying claim. Third, this note will describe how the majority's analysis of the purposes behind statutes of limitation neglects critical considerations that weigh against applying a condition precedent to the wrongful death cause of action. Finally, this note will conclude that the better rule is that the statute does not include a condition precedent that requires the decedent to have a viable underlying claim at the time of death.

## BACKGROUND

### *The Origin of Wrongful Death Actions in England*

Discussion of wrongful death actions often begins with Lord Ellenborough's opinion in the 1808 case, *Baker v. Bolton*.<sup>23</sup> However, the notion of a wrongful death cause of action can actually be traced back to the early days of Anglo-Saxon law.<sup>24</sup> There, a person who killed another faced judicial proceedings that took on a civil nature and sometimes led to payment of damages to the survivors of the deceased.<sup>25</sup> By forcing the killer to pay

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The claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence.

20. *Edwards*, 962 P.2d at 881. Ms. Edwards did not respond to the motion until 77 days after it was filed. *Id.* As a result, the district court granted the motion to strike her response. *Id.* In addition, Ms. Edwards did not contest the granting of the motion to strike her response. *Id.* As a result, evidence presented in the affidavit and exhibits attached to Fogarty's motion for summary judgment was undisputed, although the Wyoming Supreme Court noted in its decision in *Edwards* that the facts in the briefs of the parties and in Edwards's complaint vary only slightly. *Id.*

21. *Id.* In announcing the appropriate standard of review in *Edwards*, the court noted that because "the district court was presented matters outside the pleadings, appellees' motion is construed to be a W.R.A.P. 56 motion for summary judgment ... even though the district court fashioned its order as one granting a motion to dismiss." *Id.* (citing *Burlington Northern R. Co. v. Dunkelberger*, 918 P.2d 987, 990-91 (Wyo. 1996)).

22. *Id.* at 882-83.

23. 1 Camp. 493, 170 Eng. Rep. 1033 (Nisi Prius 1808).

24. Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1055 (1965) (citing 2 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 43-46 (3d ed. 1923) and 1 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 46-47 (2d ed. 1899)).

25. *Id.*

those damages, which were calculated according to fixed schedules that took into account the status of the deceased, the courts tried to discourage feuding and encourage peace.<sup>26</sup> As time went on and as attitudes changed, homicide came to be viewed less as a civil wrong and more as an offense against the state.<sup>27</sup> By the late thirteenth century, homicide became classified as a criminal offense for which the property of the killer was turned over to the state.<sup>28</sup> Even involuntary or accidental homicides, though not classified as felonies, resulted in forfeitures.<sup>29</sup> Because killers forfeited their property to the state, survivors no longer had a means to recover damages.<sup>30</sup>

Over the course of the next few hundred years the English courts discussed the cause of action for wrongful death sparingly, paying little attention to the subject until Lord Ellenborough's opinion in *Baker v. Bolton*.<sup>31</sup> In *Baker*, the plaintiff's wife died nearly a month after suffering injuries in a stagecoach accident. The plaintiff, who brought suit for loss of consortium and services, was allowed to recover only for the loss that accrued after the accident but before death.<sup>32</sup> As for the loss the plaintiff suffered as the result of his wife's death, Lord Ellenborough observed, "[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."<sup>33</sup> Though accounts of how and why Lord Ellenborough reached his now-famous conclusions vary,<sup>34</sup> at least one commentator notes that the rule that a person's death is not a legal injury was based on neither precedent nor logic.<sup>35</sup>

Regardless, and despite dissent, the decision was widely followed in England until passage of Lord Campbell's Act in 1846.<sup>36</sup> The Act, which created a cause of action for specific relatives of the deceased, was passed

26. STUART M. SPEISER ET AL., *RECOVERY FOR WRONGFUL DEATH AND INJURY* § 1:2, at 1-9 & n.3 (3d ed. 1992).

27. *Id.* at 1-9 to 1-10 (citing Gustavus Hay, Jr., *Death as a Civil Cause of Action in Massachusetts*, 7 HARVARD L. REV. 170 (1893)).

28. *Id.* at 1-10.

29. *Id.*

30. *Id.* at 1-11 to 1-12 (citing T.A. Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 612 (1960)). Speiser suggests that the "merger doctrine," which dictates that a civil action is merged into a felony, originated here. *Id.* at 1-10. Regardless, though the doctrine was modified such that a civil action against a killer was simply suspended rather than merged, civil actions generally could not be enforced. *Id.* at 1-11 to 1-12. This was due to the fact that the punishment for felony murder was the forfeiture of property and execution, leaving survivors without property to recover or a tortfeasor to sue. *Id.*

31. See generally Malone, *supra* note 24, at 1056-58, for an excellent discussion of cases in England prior to *Baker*.

32. See *id.* at 1058 (citing *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (Nisi Prius 1808)).

33. *Id.* at 1058 (quoting *Baker*, 1 Camp. 493).

34. See generally SPEISER ET AL., *supra* note 26, at 1-12 to 1-14, for the various interpretations of what may have led to Ellenborough's decision.

35. SPEISER ET AL., *supra* note 26, at 1-14.

36. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 127, at 945 & n.6 (5th ed. 1984).

in large part due to both the rapid rise of industrialization<sup>37</sup> and the “inherent injustice” in the old rule.<sup>38</sup> Under the rule in *Baker*, “the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without a remedy.”<sup>39</sup> Under Lord Campbell’s Act, a new cause of action for wrongful death was created for the parents, spouse, children, grandparents, and grandchildren of the deceased.<sup>40</sup> Specifically, the Act provided that an action could be maintained for “any wrongful act, neglect or default, of another, such as would (if death had not ensued) have entitled the party injured” to bring suit.<sup>41</sup> It further provided that the wrongful death action by survivors must be brought within twelve months of the death of the decedent.<sup>42</sup> The decision in *Baker* and the subsequent passage of Lord Campbell’s Act eventually had the greatest influence on American courts and legislatures.<sup>43</sup>

### *The Development of Wrongful Death Actions in the United States Common Law*

Before the decision in *Baker*, American courts dating back as far as colonial Massachusetts recognized the right of recovery for survivors when a loved one died.<sup>44</sup> In addition to numerous cases in the Massachusetts courts, decisions by the Supreme Court of Connecticut in 1794 and the Supreme Court of New York in 1838 allowed surviving relatives to recover compensation for wrongful death.<sup>45</sup>

Despite the fact that many American courts consistently ignored the *Baker* decision for nearly 40 years, the Massachusetts Supreme Court in the case of *Carey v. Berkshire*<sup>46</sup> eventually embraced the decision and the rule that no common law cause of action should exist for wrongful death.<sup>47</sup> Almost every state in the Union followed suit, relying on the *Baker* and *Carey*

37. RICHARD A. EPSTEIN, TORTS § 17.11, at 454 (1999).

38. SPEISER ET AL., *supra* note 26, § 1:8 at 1-34.

39. KEETON ET AL., *supra* note 36, at 945.

40. Fatal Accidents Act, 9 & 10 Vict C. 93 (1846) (commonly referred to as Lord Campbell’s Act).

41. *Id.*

42. *Id.*

43. SPEISER ET AL., *supra* note 26, § 1:3 at 1-14, § 1:8 at 1-35.

44. Malone, *supra* note 24, at 1062-63. This right to compensation for the wrongful death of a loved one was in large part the result of a society that relied on a system of “natural justice” rather than English common law. *Id.* (citing FRANCIS ROBERT AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM 3-18 (1940); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 3 (1911); Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 380 (John Henry Wigmore et al. eds., 1907)).

45. SPEISER ET AL., *supra* note 26, § 1:3 at 1-14 to 1-16 (citing *Cross v. Guthery*, 2 Root 90 (Conn. 1794) and *Ford v. Monroe*, 20 Wend 210 (N.Y. Sup. Ct. 1838)).

46. 55 Mass. (1 Cush.) 108 (1851).

47. Malone, *supra* note 24, at 1067 (citing *Carey*, 55 Mass. (1 Cush.) 108).

decisions to extinguish any common law causes of action that existed for wrongful death.<sup>48</sup>

Although wrongful death statutes serve as the basis for most wrongful death actions today, several American courts, including the United States Supreme Court, eventually came to again recognize common law actions for wrongful death.<sup>49</sup> In *Moragne v. State Marine Lines, Inc.*,<sup>50</sup> the U.S. Supreme Court rendered what might be the most significant wrongful death opinion in the history of our country.<sup>51</sup> There the Court held that an action in wrongful death existed under general maritime law.<sup>52</sup> The case is important not so much for the limited rule that it established, but more so for its resounding criticism of the *Baker* case.<sup>53</sup> The Court noted that historians have concluded that the justification for the common law rule expressed in *Baker* was nothing more than the felony-merger doctrine<sup>54</sup>—a doctrine that failed to survive the nineteenth century and never existed in the United States.<sup>55</sup> However, the Court noted Lord Ellenborough made no mention of the doctrine in his opinion in *Baker*, nor did he support his opinion with reasoning or cite other authorities that established a similar rule.<sup>56</sup> Though the Court said adoption of the English rule in the United States likely was a product of “the blessing of age,” it stated, in no uncertain terms, that a “satisfactory justification for applying the rule in this country” never existed.<sup>57</sup> Citing Lord Campbell’s Act as the first evidence of legislative reaction to the rule, the Court detailed how legislatures in both the United States and England “began to evidence unanimous disapproval of the rule against recovery for wrongful death.”<sup>58</sup> It went on to note that the numerous federal and state wrongful death statutes that were adopted after *Baker* illustrate that public policy in the United States favors the recognition of the wrongful death action.<sup>59</sup>

48. SPEISER ET AL., *supra* note 26, § 1:3 at 1-16. According to Speiser, Hawaii is the only state that never overruled an early rejection of *Baker*. *Id.* (citing *Kake v. Horton*, 2 Haw. 209 (1860)). It is important to note that most of the decisions holding that no common law cause of action existed for wrongful death came after the promulgation of state wrongful death statutes. Malone, *supra* note 24, at 1073. They are viewed mostly as examples of judicial reluctance to recognize a common-law right that would compete with the statutes. *Id.*

49. SPEISER ET AL., *supra* note 26, § 1:7 at 1-25 to 1-34.

50. 398 U.S. 375 (1970). In *Moragne*, the Court unanimously held that a common law action under general maritime law existed for wrongful death that resulted from a violation of maritime duties. *Id.* at 409.

51. SPEISER ET AL., *supra* note 26, § 1:7 at 1-25.

52. *Moragne*, 398 U.S. at 409.

53. SPEISER ET AL., *supra* note 26, § 1:7 at 1-25.

54. See *supra* note 30.

55. *Moragne*, 398 U.S. at 382-84 (citing F. POLLOCK, LAW OF TORTS 55 at 52-57 (Landon ed. 1951) and Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L. Q. REV. 431 (1916)).

56. *Id.* at 383 (citing *Baker*, 1 Camp. 493).

57. *Id.* at 385.

58. *Id.* at 389.

59. *Id.* at 390.

### *The Development of Wrongful Death Statutes in the United States*

Federal statutes now provide a cause of action for wrongful death in several specific situations, and every state now has a wrongful death statute.<sup>60</sup> The majority of states have enacted pure wrongful death statutes and modeled them after Lord Campbell's Act, creating an entirely new cause of action for survivors.<sup>61</sup> Pure wrongful death statutes are defined as statutes that compensate survivors for the loss of the support, services, and contributions they would have received had death not ensued.<sup>62</sup> For that reason, pure wrongful death statutes are best understood as operating under a "loss to survivor" regime.

A minority of states, on the other hand, simply expanded survival statutes for the benefit of designated survivors. These "enlarged survival-death" statutes are simply survival statutes that transfer the action a decedent had before his death to a designated beneficiary and add an element of damages for wrongful death.<sup>63</sup> The result is often a "loss to estate" regime, where damages are calculated without respect to the economic loss to survivors but, instead, by calculating some variation of the decedent's lost income minus living expenses and contributions had he lived.<sup>64</sup> These "loss to estate" statutes "may or may not reflect actual losses and may or may not actually benefit dependents."<sup>65</sup>

Although many wrongful death statutes are modeled after Lord Campbell's Act, the provisions of the individual acts often vary, as do the constructions courts attach to these statutes.<sup>66</sup> Most states' wrongful death statutes include their own limitation periods, while some rely on the statutes of limitation for personal injury claims.<sup>67</sup> The limitation periods also vary from statute to statute, as does treatment of the question of when causes of action accrue.<sup>68</sup>

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60. KEETON ET AL., *supra* note 36, at 945. The author's list of federal statutes includes, "FELA, 45 U.S.C.A. § 51-60 (railroad employees in interstate commerce); Jones Act, 46 U.S.C.A. § 688 (seamen); Death on the High Seas Act, 46 U.S.C.A. §§ 761-68 (applying to any person more than a maritime league from shore)." *Id.*

61. KEETON ET AL., *supra* note 36, at 946.

62. *See id.* at 949.

63. SPEISER ET AL., *supra* note 26, § 3:4 at 3:14.

64. KEETON ET AL., *supra* note 36, at 950 and nn.57-59.

65. *See id.* at 950.

66. *Id.* at 946-47.

67. SPEISER ET AL., *supra* note 26, § 11:8 at 22-23.

68. SPEISER ET AL., *supra* note 26, § 1:9 at 1-36.



### *Wrongful Death in Wyoming*

Wyoming's wrongful death statute provides:

Whenever the death of a person is caused by wrongful act, neglect, or default such as would have entitled the party injured to maintain an action to recover damages if death had not ensued, the person who would have been liable if death had not ensued is liable to an action for damages, even though the death was caused under circumstances as amount in law to murder in the first or second degree, or manslaughter. If the person so liable dies, the action may be brought against the executor or administrator of his estate. If he left no estate within the State of Wyoming, the court may appoint an administrator upon application.<sup>69</sup>

In addition, an accompanying provision includes the following limitation period, "[e]very such action shall be commenced within two (2) years after the death of the deceased person."<sup>70</sup> The language in the current statute differs only slightly from that in Wyoming's original wrongful death statute, enacted in 1871.<sup>71</sup>

In *Coliseum Motor Co. v. Hester*, the Wyoming Supreme Court construed the statute for the first time, rejecting the argument that survivors could not recover for wrongful death when the decedent never had a cause of action of his own because he was killed instantly.<sup>72</sup> The Wyoming Supreme Court held that a new cause of action for wrongful death accrues in survivors of a person killed, regardless of whether the death was instantaneous.<sup>73</sup> The action, the court ruled, "is not one transferred from the decedent to the administrator but is one given directly to the administrator for the benefit of certain living relatives."<sup>74</sup> In analyzing whether the statute reflected the "loss to survivor" or "loss to estate" approach,<sup>75</sup> the court compared the Wyoming statute to others "similar" to Lord Campbell's Act.<sup>76</sup> The result was a holding that the statute is a "pure" wrongful death statute under which damages are measured by the loss to survivors, not the loss to the decedent's estate.<sup>77</sup>

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69. WYO. STAT. ANN. § 1-38-101 (Lexis 1999).

70. WYO. STAT. ANN. § 1-38-102 (d) (Lexis 1999).

71. The Wyoming Legislature amended the wrongful death statute in 1920 to eliminate a cap on recovery. *Coliseum Motor Co. v. Hester*, 3 P.2d 105, 106 (Wyo. 1931). That change and other amendments to the statute that followed have not significantly altered the provisions of the statute that are discussed in this note.

72. *Coliseum Motor Co. v. Hester*, 3 P.2d 105, 107 (Wyo. 1931).

73. *Id.* at 107.

74. *Id.*

75. See *supra* notes 61-65 and accompanying text.

76. *Coliseum Motor Co.*, 3 P.2d at 108.

77. *Id.*

In *Parsons v. Roussalis*, the Wyoming Supreme Court refused to allow recovery by survivors under both Wyoming's wrongful death statute and its survival statute.<sup>78</sup> Though the court acknowledged that a cause of action for the underlying personal injuries sometimes survives via the survival statute, it held that recovery when death occurs is limited to the damages stemming from the wrongful death.<sup>79</sup> In doing so, the Wyoming Supreme Court rejected an argument that the decedent's pre-death pain and suffering plays a part in establishing damages for wrongful death.<sup>80</sup>

Eight years later in *DeHerrera v. Herrera*, the Wyoming Supreme Court again examined the relationship between the survival and wrongful death statutes.<sup>81</sup> After determining that Wyoming's survival statute is ambiguous, the court differentiated between the two statutes by holding that damages under the survival statute become part of the decedent's estate while those recovered under the wrongful death statute do not.<sup>82</sup>

In *Corkill v. Knowles*, the Wyoming Supreme Court concluded that the limitation period in the wrongful death statute is an "integral part of the right created by the statute" and is a condition precedent to recovery rather than a true statute of limitations.<sup>83</sup> The court also held that the identification of the decedent is another condition precedent in the wrongful death statute.<sup>84</sup> In doing so, the Wyoming Supreme Court allowed a personal representative to bring suit for wrongful death more than fifteen years after the decedent died but less than two years after her body was identified.<sup>85</sup> The court reasoned that a contrary result could lead to the absurdity of the limitation period expiring on a wrongful death cause of action before a decedent is even identified. The court noted that such a rule would "thwart the legislative purpose of the wrongful death statute."<sup>86</sup> The Wyoming Supreme Court also held that the discovery rule<sup>87</sup> does not apply to the wrongful

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78. 488 P.2d 1050, 1052 (Wyo. 1971). Wyoming's survival statute provides in pertinent part, "An action may be brought notwithstanding the death of the person entitled or liable to the same, but in actions for personal injury damages, if the person entitled thereto dies recovery is limited to damages for wrongful death." WYO. STAT. ANN. § 1-4-101 (Lexis 1999).

79. *Parsons*, 488 P.2d at 1052.

80. *Id.*

81. 565 P.2d 479 (Wyo. 1977).

82. *Id.* at 482.

83. 955 P.2d 438, 442 (Wyo. 1998).

84. *Id.* at 445.

85. In this case, Corkill killed the decedent with her vehicle in 1980, but authorities were unable to identify the victim. *Id.* at 440. After conducting further investigation, authorities finally identified the body as that of Knowles, but not until more than 14 years after her death. *Id.* Sixteen months later, the decedent's father, as personal representative, filed suit for wrongful death. *Id.*

86. *Id.* at 445.

87. The discovery rule, which Wyoming applies to tort claims, starts the statute of limitations ticking once the plaintiff "knows or has reason to know of the existence" of a cause of action. *Id.* at 440 n.1 (citing *Duke v. Housen*, 589 P.2d 334, 336 (Wyo. 1979)). The district court in *Corkill* had applied the discovery rule to hold that the wrongful death suit was not time-barred. *Id.* at 440. The court reasoned that because identification of the decedent did not occur until more than fourteen years after her death, the plaintiff "did not know or have reason to know he had a claim" until that time. *Id.*

death cause of action because the limitation provision in the wrongful death statute "clearly and unambiguously" requires the personal representative to bring suit within two years from the time of the death of the decedent.<sup>88</sup>

### PRINCIPAL CASE

In *Edwards*, the Wyoming Supreme Court held that an injured person must have a viable claim at the time he dies for his survivors to have a cause of action for wrongful death.<sup>89</sup> The court first discussed the viability of any medical malpractice claims Mr. Edwards had against Fogarty at the time of his death.<sup>90</sup> The court concluded, on the basis of evidence both from the record and as presented by Fogarty, that Mr. Edwards was aware of the misdiagnosis of his condition some time between February 21, 1991 and March 21, 1991.<sup>91</sup> As a result, the court held the statute of limitations for filing a medical malpractice claim expired by the time Mr. Edwards died; in other words, at the time of his death Mr. Edwards did not have a "viable claim" against Fogarty.<sup>92</sup>

The Wyoming Supreme Court next turned to what it termed the "only true issue" in the case, namely, whether a wrongful death action is barred because the statute of limitations has expired on the deceased's underlying medical malpractice action.<sup>93</sup> Because the issue was one of first impression in Wyoming, the court first looked to decisions in other jurisdictions for guidance.<sup>94</sup> Citing decisions from Michigan and Wisconsin and an annotation from the American Law Reports, the court concluded that the "clear majority rule is that survivors are precluded from bringing a wrongful death

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88. *Id.* at 443. Note that in rare cases like *Corkill*, the limitation period does not begin until identification of the decedent, and therefore suit may occur more than two years after death.

89. *Edwards v. Fogarty*, 962 P.2d 879, 883 (Wyo. 1998).

90. *Id.* at 881.

91. *Id.*

92. *Id.* The Court noted that whether the statute of limitations for a medical malpractice claim by Mr. Edwards was calculated according to WYO. STAT. ANN. §§ 1-3-107 (a) (i), 1-3-107 (a) (iv), or the "continuous treatment rule" from *Sharsmith v. Hill*, 764 P.2d 667 (Wyo. 1988), the period during which Mr. Edwards could have filed suit expired before he died. *Id.* See *supra* note 19 for the language of WYO. STAT. ANN. § 1-3-107 (a) (i). WYO. STAT. ANN. 1-3-107 (a) (iv) (Michie 1997) read: "If under paragraph (i) or (ii) of this subsection, the alleged act, error or omission is discovered during the second year of the two (2) year period from the date of the act, error or omission, the period for commencing a lawsuit shall be extended by six months." Originally, the "continuous treatment rule" referred to the rule that "the act, error or omission which starts the running of the statute of limitations against medical malpractice actions is the termination of the course of treatment for the same or related illness or injuries." *Sharsmith*, 764 P.2d at 669 (quoting *Metzger v. Kalke*, 709 P.2d 414, 417 (Wyo. 1985)). Subsequent to *Metzger*, the Wyoming Supreme Court extended the reach of the rule by holding that "the continuous treatment of the patient ceased when the treating practitioner referred the patient to another practitioner and no longer assisted in the patient's treatment or associated with the doctors thereafter treating the patient." *Id.* (citing *Echols v. Keeler*, 735 P.2d 730 (Wyo. 1987)). In *Sharsmith*, the court further defined the rule, holding that a doctor's course of treatment should be imputed to doctors whom the original practitioner relied upon in the course of treating the patient, for the purposes of the statute of limitations. *Id.* at 670.

93. *Edwards*, 962 P.2d at 882.

94. *Id.*

action where the deceased does not have a viable malpractice claim at the time of his death."<sup>95</sup>

The Wyoming Supreme Court used another Wisconsin case, *Miller v. Luther*, to demonstrate the rationale behind that rule.<sup>96</sup> The Wisconsin Court of Appeals, in *Miller*, interpreted a wrongful death statute nearly identical to Wyoming's statute. In doing so, the Wisconsin court held that the expiration of the statute of limitations on the decedent's underlying claim barred a claim under the wrongful death statute.<sup>97</sup> The court noted that the Wisconsin court recognized that the wrongful death action is separate and distinct from any right held by the deceased.<sup>98</sup> However, the Wyoming Supreme Court said the action still is subject to "the same infirmities and defenses as would have existed in a suit by the deceased if he were still alive."<sup>99</sup> Based on this interpretation, the Wyoming Supreme Court concluded, a "viable right of action in the deceased at the time of his death is a condition precedent to the existence of a right of action in the survivors."<sup>100</sup>

The Wyoming Supreme Court then analyzed the plain language in Wyoming's wrongful death statute, which reads in part:

Whenever the death of a person is caused by wrongful act, neglect, or default *such as would have entitled the party injured to maintain an action to recover damages if death had not ensued*, the person who would have been liable if death had not ensued is liable in an action for damages.<sup>101</sup>

Emphasizing a plain reading of the italicized portion, the court held that the language of the statute "clearly requires" that the deceased have a viable claim at the time of death for survivors to have a valid claim for wrongful

95. *Edwards*, 962 P.2d at 882 (citing *Turner v. Mercy Hospitals & Health Services of Detroit*, 533 N.W.2d 365, 367 (Mich. 1995); *Johnson v. ABC Ins. Co.*, 532 N.W.2d 130, 134 (Wis. 1995); David P. Chapus, Annotation, Medical Malpractice: Statute of Limitations in Wrongful Death Action Based on Medical Malpractice, 70 A.L.R. 4th 535 (1989)).

96. *Id.* at 882 (citing *Miller v. Luther*, 489 N.W.2d 651 (Wis. 1992)). In *Miller*, Mr. and Mrs. Miller filed a medical malpractice claim against the defendant, alleging that he negligently diagnosed and negligently treated Mr. Miller's cancer. *Miller*, 489 N.W.2d at 652. Eight years later, Mr. Miller died, prompting Mrs. Miller to also file a wrongful death action against the defendant. *Id.* Upon determining that the applicable statute of limitations on that medical malpractice claim had expired, the trial court granted summary judgment for the defendant and dismissed the first suit. *Id.* Subsequently, the trial court denied the defendant's motion for summary judgment of the wrongful death claim. *Id.* The defendant argued that the medical malpractice statute of limitations and the wrongful death entitlement statute barred Mrs. Miller's wrongful death suit. *Id.* The Wisconsin Supreme Court reversed the trial court, holding that the wrongful death statute itself conditioned suit on the decedent having a cause of action at the time of death, and that the wrongful death suit thus should have been dismissed. *Id.* at 654.

97. *Miller*, 489 N.W.2d at 655.

98. *Edwards*, 962 P.2d at 882 (citing *Miller*, 489 N.W.2d at 653).

99. *Id.*

100. *Edwards*, 962 P.2d at 882 (citing *Drake v. St. Francis Hosp.*, 560 A.2d 1059, 1061 (Del. 1989)).

101. WYO. STAT. ANN. § 1-38-101 (Michie 1997) (emphasis added).

death.<sup>102</sup> It also noted that the minority view would “render meaningless the language” of the wrongful death statute.<sup>103</sup>

Last, the Wyoming Supreme Court discussed how the absence of a requirement that the deceased have a viable claim at the time of death might lead to wrongful death actions many years or decades after the alleged negligence that caused the death.<sup>104</sup> That result, the court noted, undermines the very purpose of statutes of limitation.<sup>105</sup> The Wyoming Supreme Court concluded by holding that wrongful death actions in Wyoming are derivative of the underlying cause of action and that actions brought by survivors when the deceased did not have a viable claim at the time of death are barred.<sup>106</sup>

### *Justice Golden's Dissent*

Noting that Ms. Edwards filed her action for wrongful death within the two-year limitation period included as a part of Wyoming's wrongful death statutes, the dissent examined the plain language of the wrongful death entitlement statute.<sup>107</sup> In doing so, Justice Golden opined that the language of the statute does not require the deceased to have a viable claim at the time of death but, instead, simply identifies the type of tortious conduct that entitles survivors to bring a claim for wrongful death:

The plain reading of that language of the statute is that statutory beneficiaries (the survivors) under the wrongful death statute may not recover in those types of cases where the deceased never had a cause of action against the defendants or where there is a substantive defense which could be invoked.<sup>108</sup>

By ignoring this plain meaning, Justice Golden concluded, the majority improperly inserted a condition precedent into Wyoming's wrongful death

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102. *Edwards*, 962 P.2d at 882.

103. *Id.*

104. *Id.* at 882-83 (citing *Cf. Kessinger v. Grefco, Inc.*, 623 N.E.2d 946 (Ill. 1993)).

105. *Id.* at 883.

106. *Id.*

107. *Edwards*, 962 P.2d at 883 (Golden, J., dissenting). Chief Justice Lehman joined Justice Golden's dissent. *Id.*

108. *Id.* (Golden, J., dissenting). Justice Golden directed attention to *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180 (Mo. Ct. App. 1982). *Id.* In *Gramlich*, Mr. Gramlich filed a medical malpractice claim against the defendant for negligent failure to diagnose and treat cancer at an early stage. *Gramlich*, 640 S.W.2d at 182. After his death an amended petition was filed which named Mrs. Gramlich as the plaintiff and included an additional count for wrongful death. *Id.* Subsequently, the trial court dismissed the wrongful death claim, holding that the statute of limitations for the medical malpractice claim had expired before the original suit and thus barred the wrongful death claim. *Id.* at 183. The Missouri Court of Appeals reversed, holding that the cause of action for wrongful death does not accrue until the decedent dies and that wrongful death has its own statute of limitations. *Id.* at 186.

statute. Had the legislature intended for the statute to operate in that fashion, it could have expressed such intent in plain English.<sup>109</sup>

The dissent distinguished the wrongful death claim as one “separate and distinct” from the underlying negligence claim.<sup>110</sup> Justice Golden argued the wrongful death claim is one that results from a survivor’s own “injury” caused by the death of a loved one, not from the injury to the decedent himself.<sup>111</sup> He noted that the Wyoming Supreme Court itself, in *DeHerrera v. Herrera*, distinguished between the underlying claim and the new cause of action that arises upon death.<sup>112</sup> An action for wrongful death cannot arise until after someone has died, Justice Golden added.<sup>113</sup>

Justice Golden also determined that the recoverable damages available in a wrongful death case further differentiate it from the underlying personal injury. Citing *Parsons*, *DeHerrera* and the language of the wrongful death statute itself, Justice Golden detailed how recovery in wrongful death is limited to the damages that result from the wrongful death, “including damages for loss of probable future companionship, society and comfort.”<sup>114</sup> As the Wyoming Supreme Court noted in both *Parsons* and *DeHerrera*, the plaintiff in a wrongful death action cannot recover personal injury damages for injuries suffered by the decedent.<sup>115</sup>

Justice Golden returned to the argument that the statute does not tie the wrongful death claim to the personal injury claim and limitation period. He argued that the court should “heed the legislature’s directive” that “civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action accrues, but where a different limitation is prescribed by statute, that shall govern.”<sup>116</sup> Thus, Justice Golden continued, the statute of limitation in the wrongful death statute, which requires that a personal representative bring the action within two years after the decedent’s death, should govern cases like *Edwards*.<sup>117</sup> Justice Golden concluded his dissent by arguing that the rule embraced by the majority would “nullify the operation” of the wrongful death statute in some circumstances.<sup>118</sup> Citing *DeHerrera*, he noted that it “is contrary to reason to ascribe to a statute a

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109. *Edwards*, 962 P.2d at 883 (Golden, J., dissenting).

110. *Id.* (Golden, J., dissenting) (citing *Gramlich*, 640 S.W.2d at 186).

111. *Id.* (Golden, J., dissenting).

112. *Id.* (Golden, J., dissenting) (citing *DeHerrera v. Herrera*, 565 P.2d 479, 482 (Wyo. 1977)).

113. *Id.* (Golden, J., dissenting) (citing *Gramlich*, 640 S.W.2d at 186).

114. *Edwards*, 962 P.2d at 883 (Golden, J., dissenting) (citing *Parsons v. Roussalis*, 488 P.2d 1050, 1052 (Wyo. 1971); *DeHerrera*, 565 P.2d at 482-83; WYO. STAT. ANN. §1-38-102 (Michie 1997)).

115. *Id.* at 884 (Golden, J., dissenting) (citing *Parsons*, 488 P.2d at 1052 and *DeHerrera*, 565 P.2d at 482-83).

116. *Id.* (Golden, J., dissenting) (citing WYO STAT. ANN. § 1-3-102 (Michie 1997)).

117. *Id.* (Golden, J., dissenting).

118. *Id.* (Golden, J., dissenting) (citing *DeHerrera*, 565 P.2d at 482).

meaning that will nullify its operation, if capable of any other interpretation,” and that statutes should not be read to lead to ridiculous results.<sup>119</sup>

#### ANALYSIS

In *Edwards*, the Wyoming Supreme Court explored the difficult issues that arise in construing the relationship between a decedent's underlying cause of action and the cause of action for wrongful death that accrues once he dies. In particular, the issue of whether a viable underlying claim is a condition precedent to an action for wrongful death has resulted in two distinct schools of thought—one arguing that a viable underlying claim is a condition precedent, the other arguing that it is not.<sup>120</sup> In *Edwards*, the court subscribed to the school of thought that requires the existence of a viable underlying claim. In doing so, the Wyoming Supreme Court ignored the legislative intent behind the statute, the purposes behind the wrongful death action, and important policy considerations guiding promulgation of limitation periods for wrongful death. The result is a rule that unjustly restricts the ability of survivors to recover for wrongful death.

The majority in *Edwards* generally tracked the reasoning in other jurisdictions that have reached the same conclusion: 1) the language of the statute creates the condition precedent; 2) wrongful death claims are subject to the same defenses that existed against the underlying claim; 3) holding otherwise would undermine the purpose behind the personal injury statute of limitation by opening the door to wrongful death claims several years, or possibly decades, after the original tortious conduct.<sup>121</sup> Each contention has

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119. *Id.* (Golden, J., dissenting) (citing *DeHerrera*, 565 P.2d at 482).

120. SPEISER ET AL., *supra* note 26, § 11:17 at 47-49.

121. *Edwards*, 962 P.2d at 882. The majority also purported to follow what it called the “clear majority rule” in other jurisdictions, relying principally on decisions from Michigan and Wisconsin and an annotation from the American Law Reports. *Id.* (citing *Turner v. Mercy Hospitals & Health Services of Detroit*, 533 N.W.2d 365, 367 (Mich. 1995); *Johnson v. ABC Ins. Co.*, 532 N.W.2d 130, 134 (Wis. 1995); David P. Chapus, Annotation, Medical Malpractice: Statute of Limitations in Wrongful Death Action Based on Medical Malpractice, 70 A.L.R. 4th 535 (1989)). Though a survey of wrongful death statutes and the way they are construed in other states is beyond the scope of this note, two points illustrate why the majority's reliance on Chapus is misguided. First, Chapus does not examine whether a viable underlying claim is a condition precedent to a wrongful death cause of action but, instead, examines whether the wrongful death or medical malpractice statute of limitation applies in wrongful death claims based on medical malpractice. See Chapus, *supra*. Second, while Chapus cites several jurisdictions that have held that the condition precedent exists, he does so for the purpose of categorizing those states as jurisdictions in which the relevant statute of limitation is the wrongful death one. See *id.* at 34-36. Chapus makes no comparison of states holding that there is a condition precedent and states that do not, probably because such a comparison is irrelevant to his analysis of which statute of limitation controls. Indeed, some well-respected scholars have announced that the “considerable majority of the courts” hold that the condition precedent does not exist. KEETON ET AL., *supra* note 36, at 957. See also *James v. Phoenix General Hosp. Inc.*, 744 P.2d 695, 701-03 & nn.10-13 (collecting and analyzing cases requiring and not requiring a viable underlying claim). In light of the majority's erroneous reliance on Chapus and authority concluding that the majority rule is that the condition precedent does not exist, the court's contention in *Edwards* that it is following a “clear majority rule” is tenuous, at best.

merit, but all ignore the very nature of and purpose behind wrongful death statutes.

*The Statutory Language is Unclear*

Wyoming's 1997 wrongful death statute read, in part:

Whenever the death of a person is caused by wrongful act, neglect or default *such as would have entitled the party injured to maintain an action to recover damages if death had not ensued*, the person who would have been liable if death had not ensued is liable in an action for damages. . . .<sup>122</sup>

The "crux" of the issue in *Edwards*, according to the majority, was the italicized portion of this excerpt.<sup>123</sup> According to the Wyoming Supreme Court, the plain language of the statute "clearly requires the deceased to have a viable claim at the time of his death in order for his survivors to have a valid wrongful death claim."<sup>124</sup> As such, the majority held that a condition precedent exists.<sup>125</sup> According to the minority, however, the italicized language simply identifies the "types of inequities" that entitle survivors to sue for wrongful death.<sup>126</sup> The minority would have held that the statute simply means survivors "may not recover in those types of cases where the deceased never had a cause of action against the defendants or where there is a substantive defense which could be invoked."<sup>127</sup>

What is most clear in *Edwards* is that the statutory language at issue is not clear. According to the Wyoming Supreme Court, when a statute is "uncertain and susceptible to more than one meaning [it] must be considered ambiguous."<sup>128</sup> Whether a statute is ambiguous is a question of law to be determined by the court.<sup>129</sup> A statute is considered unambiguous only if "its wording is such that reasonable persons are able to agree as to its meaning with consistency and predictability."<sup>130</sup> In *Edwards*, the Wyoming Supreme Court could not agree as to the meaning of the statute with consistency or predictability. Three justices interpreted the statute to include the condition precedent, while two others interpreted it quite differently. The fact that a court may rule that a statute is unambiguous because a majority of justices believe the meaning is clear ignores the very spirit of the

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122. WYO. STAT. ANN. § 1-38-101 (Michie 1997) (emphasis added). The current version of the statute embodies the same language. WYO. STAT. ANN. § 1-38-101 (Lexis 1999).

123. *Edwards*, 962 P.2d at 882.

124. *Id.*

125. *Id.* at 883.

126. *Id.* (Golden, J., dissenting).

127. *Id.* (Golden, J., dissenting).

128. *DeHerrera v. Herrera*, 565 P.2d 479, 481 (Wyo. 1977) (citing *Natrona County v. Casper Air Serv.*, 536 P.2d 142 (Wyo. 1975)).

129. *Allied-Signal, Inc. v. Wyoming State Bd. of Equalization*, 813 P.2d 214, 220 (Wyo. 1991).

130. *Id.*



rule for establishing ambiguity. On the basis of the varying interpretations of the statutory language at issue in *Edwards*, the court should have realized that the relevant portion of the wrongful death statute is ambiguous.

By ignoring this ambiguity, the majority failed to analyze the statutory language "with a view to promoting the apparent object of the legislative enactment," as it did just months earlier in *Corkill v. Knowles*.<sup>131</sup> In that case, the Wyoming Supreme Court announced that the language in an ambiguous provision of the wrongful death statute should be construed in a way that promotes the Legislature's remedial intent in promulgating the statute.<sup>132</sup> Though the court's analysis in *Corkill* focused on a different provision in the wrongful death statute, its methodology still is relevant, particularly because the ambiguous language in *Edwards* also originates in the wrongful death statute.

Applying the logic and methodology from *Corkill* to *Edwards*, one discovers that the Wyoming Legislature, in promulgating the wrongful death statute, "expressed a social policy that favors compensation to ameliorate the certain damage to relational interests resulting from the death of a family member."<sup>133</sup> The Act creates a "new cause of action" for the benefit of those family members who have lost a loved one.<sup>134</sup> Clearly, the Legislature's intent was to apply broadly the remedial brush of the Act, not to place burdensome limitations on recovery for wrongful death. The Wyoming Supreme Court's decision in *Corkill* acknowledged such intent by rejecting a strict construction of the statute in order to allow a wrongful death suit more than fifteen years after the decedent's death.<sup>135</sup> An approach similar to the one used in *Corkill* should have led the *Edwards* court to hold that there is no condition precedent requiring the decedent to have a viable underlying claim at the time of death.

### *Substantive versus Procedural Defenses to the Underlying Claim*

Though the majority in *Edwards* acknowledged that wrongful death claims are separate and distinct from underlying claims, the Wyoming Supreme Court largely ignored that notion in reaching its conclusion.<sup>136</sup> Pure wrongful death acts, unlike the "enlarged survival-death" statutes that exist in a few states, are separate and distinct from any underlying personal injury claim. Pure wrongful death statutes aim to compensate the survivors for the

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131. 955 P.2d 438, 442 (Wyo. 1998) (quoting *United Air Lines v. State Tax Comm'n of Missouri*, 377 S.W.2d 444, 451 (Mo. banc 1964)).

132. *Corkill*, 955 P.2d at 442.

133. *Id.* (quoting *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P.2d 1171, 1175 (Wyo. 1990)).

134. *Id.* (citing *DeHerrera v. Herrera*, 565 P.2d 479, 482 (Wyo. 1977) and *Coliseum Motor Co. v. Hester*, 3 P.2d 105, 107 (Wyo. 1931)).

135. See *supra* notes 83-88 and accompanying text.

136. *Edwards v. Fogarty*, 962 P.2d 879, 882 (Wyo. 1998).

injuries they suffer, not for the injuries to the decedent. Wyoming's statute creates a new cause of action in the decedent's survivors, includes its own limitation period, and indicates what damages may be awarded.<sup>137</sup> Just as the right to recover for his own personal injury existed solely in the decedent during his lifetime, the *new cause of action* for wrongful death exists solely in the survivors after the decedent dies, and not until death occurs.<sup>138</sup>

The majority in *Edwards* contended, as many other jurisdictions have, that wrongful death actions are subject to the same "infirmities and defenses as would have existed in a suit by the deceased if he were still alive."<sup>139</sup> For the most part, this is true for substantive defenses like assumption of risk, consent, contributory negligence, defense of property, and self-defense.<sup>140</sup> However, those defenses often bar subsequent wrongful death suits because they go to the very essence of whether the death involved was legally "wrongful." They help define whether the decedent ever had a cause of action in the first place. If he did not, no cause of action for wrongful death exists.

On the other hand, procedural defenses to the underlying claim, such as statutes of limitation, do not define whether there was anything "wrongful" about the injury that led to death. As a result, procedural defenses should not bar subsequent actions for wrongful death. They are solely a matter between the person who caused the original injury and the person who suffered it. Many death statutes, like the one in Wyoming, contain a separate limitation period and do not tie that period to the statute that controls the underlying claim. As a result, though substantive defenses to the underlying claim normally bar a subsequent wrongful death claim, procedural ones should not.

### *The Purposes of Statutes of Limitation*

The majority in *Edwards* also noted that allowing a wrongful death claim when the decedent did not have a viable underlying claim at the time of his death undermines the purposes of the statute of limitation for medical malpractice.<sup>141</sup> Such a holding, according to the Wisconsin court, "would open the door to actions accruing upon death, even if death occurred twenty years after the causally negligent act."<sup>142</sup> Proponents of this view argue that such a result actually circumvents the statute of limitations that applied to the underlying cause of action.<sup>143</sup> Statutes of limitation are an integral part

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137. WYO. STAT. ANN. § 1-38-101 (Lexis 1999) and WYO. STAT. ANN. § 1-38-102 (Lexis 1999).

138. *Causey v. Seaboard Air Line R. Co.*, 81 S.E. 917, 919 (N.C. 1914).

139. *Edwards*, 962 P.2d at 882 (citing *Miller v. Luther*, 489 N.W.2d 651, 653 (Wis. 1992)).

140. *KEETON ET AL.*, *supra* note 36, at 954-55 & nn.9-14.

141. *Edwards*, 962 P.2d at 882.

142. *Id.* at 882-83 (citing *Kessinger v. Grefco, Inc.*, 623 N.E.2d 946 (Ill. 1993)).

143. *Miller*, 489 N.W.2d at 655.

of our judicial system and are grounded in policy considerations including affording defendants the chance to defend themselves, protecting defendants from the prolonged fear of litigation, and preventing stale claims.<sup>144</sup>

These considerations make for a plausible argument that an underlying claim should be viable at the time of the decedent's death. One easily can envision a scenario where an individual is injured but lives for five or ten years before dying—a medical misdiagnosis is a perfect example. If no viable underlying claim is required to bring suit for wrongful death, the negligent doctor is left wondering whether the patient's family will bring suit, possibly decades after his original misdiagnosis. If they eventually sue, evidence may be lost or altered, memories will have faded, and the witnesses, including the original victim, will have died or disappeared.

However, another critical purpose behind limitation periods is to ensure that plaintiffs have an ample opportunity to bring suit.<sup>145</sup> Analysis of that consideration and others leads to the conclusion that the two-year limitation period in the wrongful death statute should be the sole limitation period governing wrongful death suits. This contention is supported by the fact that the Legislature promulgated a specific limitation period for wrongful death claims. Had the Legislature intended for a different limitation period to govern or for the one in the wrongful death statute to operate in conjunction with other statutes of limitation, it could have crafted the statute to reflect that intention. Instead, in promulgating the general statutes of limitation, the Legislature said, "civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action accrues, *but where a different limitation period is prescribed by statute, that shall govern.*"<sup>146</sup>

In creating a specific limitation period for wrongful death, the Legislature gives survivors ample opportunity to grieve, to adjust to the loss of a loved one, and to consider whether to pursue a lawsuit. According to the rule advanced by the majority, underlying statutes of limitation could bar a wrongful death action, sometimes before death even occurs. Statutes should be read to avoid such absurd results.<sup>147</sup>

Maybe even more compelling is the interest in protecting a dying individual from the undue burden of contemplating a tort action to maintain the viability of a wrongful death action by his survivors. Here, the very situation that Larry Edwards and his family faced serves as a suitable example. Once Larry Edwards discovered the misdiagnosis by Dr. Fogarty, the statute

144. *Turner v. Mercy Hospitals & Health Services of Detroit*, 533 N.W.2d 365, 367 (Mich. 1995).

145. *Id.*

146. WYO. STAT. ANN. § 1-3-102 (Lexis 1999) (emphasis added).

147. *Edwards*, 962 P.2d at 884 (Golden, J., dissenting) (citing *DeHerrera v. Herrera*, 565 P.2d 479, 482 (Wyo. 1977)).

of limitations on his cause of action for medical malpractice began to tick. At the same time, Edwards underwent numerous surgical procedures in an attempt to save his life. He also began the exhaustive and oftentimes debilitating process of radiation treatment. Just after the statute of limitations expired on his medical malpractice claim, Edwards died.

The rule that the majority establishes would have required Edwards to initiate a lawsuit while he was dying so that his family could recover for wrongful death once he died. The notion that the Legislature intended to add such a burden, or that adding such a burden is good social policy, seems absurd.

### CONCLUSION

The reality of the wrongful death action is that neither rule considered by the Wyoming Supreme Court in *Edwards* is entirely satisfactory. Each option results in hardship to a different segment of the population. However, the choice between imposing hardships on a culpable physician or on an innocent patient and his grieving family is quite clear. The language in Wyoming's wrongful death statute and the very nature of the action make the choice even clearer. A viable underlying claim should not be necessary to maintain a suit for wrongful death, so long as the underlying conduct was wrongful. Fortunately, the type of situation that unfolded in *Edwards* is relatively rare. However, it could happen again. The simplest solution for avoiding such future injustices is for the Legislature to amend Wyoming's wrongful death statute to indicate that it does not include the condition precedent. In doing so, the Legislature can protect other families from the obvious injustice that results from the rule announced in *Edwards*. Only then will Wyoming have a wrongful death statute that truly compensates survivors for the loss of a loved one.

ROBERT C. JAROSH