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NO. 72626-9-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

(King County Superior Court Cause No. 14-2-07824-2 SEA)

ASTENJOHNSON, INC., et al.,

Appellant(s),

v.

GERALDINE BARABIN, as Personal Representative for the ESTATE OF HENRY BARABIN, deceased,

Respondent(s).

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

STATE CASES

FEDERAL CASES

STATE STATUTES

RULES

SECONDARY SOURCES

I. INTRODUCTION

Respondent Geraldine Barabin ("Respondent") is the personal representative for the estate of Henry Barabin ("Mr. Barabin" or "Decedent"). In the present case, Respondent seeks to recover from the Consolidated Petitioners in wrongful death and survival actions premised on Decedent's alleged asbestos exposures in the workplace. While recognizing that a wrongful death action generally accrues at the time of death, the Washington Supreme Court has long held that the rule is subject to a well-recognized limitation that there is no viable wrongful death cause of action if the decedent did not have his or her own viable cause of action at the time of death, such as when the decedent has allowed the statute of limitations to run on his or her personal injury claims:

> In accord with the great weight of authority, this court has held that the [wrongful death] action accrues at the time of death, and that the statute of limitations then begins to run. *The rule, however, is subject to a well-recognized limitation; namely, at the time of death there must be a subsisting cause of action in the deceased.* Tiffany, Wrongful Death Act (2nd Ed.) § 124. Under this limitation, it has been held that the action for wrongful death is extinguished by an effective release executed by the deceased in his lifetime. *Brodie v. Wash. Water Power Co.*, 92 Wn. 574, 159 P. 791 (1916); *Mellon v. Goodyear*, 277 U.S. 335, 48 S.Ct. 541 (1928) by a judgment in his favor rendered during his lifetime, *Littlewood v. Mayor, etc., of N. Y.*, 89 N.Y. 24, 42 Am. Rep. 271 (1882); *Hecht v. Ohio & Miss. Ry. Co.*, 132 Ind. 507, 32 N.E. 302 (1892), *by the failure of the deceased to bring an action for injuries within the period of limitation*, *Flynn v. N.Y., N.H. & H. R. Co.*, 283 U.S. 53, 51 S.Ct. 357 (1931). In this latter class

> falls the case of *Calhoun v. Wash. Veneer Co.*, 170 Wn. 152, 159-60, 15 P.2d 943 (1932).

Grant v. Fisher Flouring Mills Co., 181 Wn. 576, 580-81, 44 P.2d 193 (1935) (emphasis added) (citations omitted); *accord Johnson v. Ottomeier*, 45 Wn.2d 419, 422-23, 275 P.2d 723 (1954) *Calhoun*, 170 Wn. at 159-60.

The Consolidated Petitioners, including Appellants, filed motions for summary judgment in the trial court, arguing that the claims are untimely. The motions were denied. Appellants respectfully urge this Court to reverse the King County Superior Court's denial of summary judgment.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to follow binding Washington Supreme Court precedent holding that when the statute of limitations on a decedent's personal injury claim expires prior to his death, there is no viable wrongful death action for the same alleged acts and injury.

2. The trial court erred in denying summary judgment on a personal representative's survival action where, prior to his death, the decedent had failed to bring a claim against a defendant within three years

after he knew of his cause of action and where the personal representative for the decedent's estate later admitted that her survival claim was barred.[1]

III. STATEMENT OF THE CASE

On December 18, 2006, Henry and Geraldine Barabin filed a personal injury claim against 22 defendants alleging that Mr. Barabin developed terminal mesothelioma as a result of exposure to asbestos-containing products used at the Crown Zellerbach Mill in Camas, Washington. (Clerk's Papers (CP) at 51-56; 79-80). Mr. Barabin's mesothelioma had been diagnosed one month prior. (CP at 80). None of the Consolidated Petitioners was named in the 2006 lawsuit. (*See* CP 18-22; 51-56). The 2006 lawsuit proceeded to trial in federal court against two defendants—the only two defendants named in the present wrongful death lawsuit who are not part of the Consolidated Petitioners. (CP 262; *see also*, *Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 460-62 (9th Cir. 2014)). The jury found for the plaintiffs and awarded 10.8 million dollars to the Barabins, including a 1.5 million dollar award for loss of consortium to Ms. Geraldine Barabin. American Law of Product Liability (3rd Ed.) § 122:69 Miscellaneous Asbestos Products: Verdicts and Settlements.

[1] The Court of Appeals is reviewing similar issues addressed in this appeal in the *Deggs v. Asbestos Corp.* case, Washington State Court of Appeals for Division I, case no. 71297-7. The Court of Appeals heard oral argument in *Deggs* on March 4, 2015.

Defendants in the Barabin's 2006 lawsuit appealed the final judgment. In 2012, while the case was pending on appeal, Mr. Barabin passed away. (CP at 48.) In January of 2014, the Ninth Circuit Court of Appeals overturned the verdict and remanded the case for a new trial. *Estate of Barabin*, 740 F.3d at 467.

On April 3, 2014, approximately three months after the Ninth Circuit opinion was rendered and nearly eight years after Mr. Barabin's mesothelioma diagnosis and resulting lawsuit, Respondent, as the personal representative of her husband's estate, filed a new lawsuit alleging wrongful death and survival claims against the two defendants who had gone to trial against the Barabins plus the Consolidated Petitioners. (CP at 4-36). The complaint asserts the same allegations as the Barabin's personal injury lawsuit. (CP at 4-36; 51-81). The only difference in the wrongful death complaint is that Respondent names numerous additional defendants, none of whom the Barabins had sued in 2006. Respondent admitted in her Response to Discovery Requests that she was aware as early as 2007 of potential liability against one defendant, Paramount Supply Company. (CP 267-68; 327-29). Respondent had identified Paramount Supply Company as a potential defendant in 2007 after Plaintiffs subpoenaed documents from the Crown Zellerbach Paper Mill as

part of discovery in the original 2006 case. (CP 267-68; 327-29). Nevertheless, Respondent did not bring suit against Paramount until 2014.

All allegations in this current case and the prior case arise out of Decedent's work at the Crown Zellerbach Mill. (CP 267-68; 327-29). Thus, any information related to asbestos-containing products present at that site was available for the Barabins to discover as part of the original case. (CP 267-68; 327-29).

Consolidated Petitioners moved for summary judgment on all claims. (CP at 159-170; 265-75). The basis for summary judgment was the fact that neither the Decedent nor Respondent asserted a claim against any of the Consolidated Petitioners until more than three years after the Decedent indisputably knew of his disease and the cause thereof. (CP at 269-74). Respondent conceded that the statute of limitations on her survival claim had run. (CP 425; CP 461). Although the trial judge concluded that "there are no genuine issues as to material facts," he denied all of the Consolidated Petitioners' motions for summary judgment on both survival and wrongful death claims. (CP 519).

Appellants petitioned this court for discretionary review under RAP 2.3(b)(1), due to obvious error that renders further proceedings useless, and/or (b)(2), probable error that substantially alters the status quo or substantially limits the freedom of a party to act. (*See* Appellant's

Motion for Discretionary review, on file herein.) The Court granted Appellant's motion under RAP 2.3(b)(1) because, "If Metalclad is correct that the action should have been dismissed as barred by the statute of limitations, there would be no trial and further proceedings are useless within the meaning of the rule." *See Estate of Barabin, Respondent v. Metalclad Insulation, Petitioner*, case no. 72626-9-1, dated February 12, 2015, on file herein. The Commissioner noted that the controlling law is clear with respect to the issue, concluding "[i]t may be that this court or the Supreme Court will revisit, refine, or limit the rule set out in Grant, Calhoun, and Ottomeier, but at this point it remains established: the statute of limitations on a wrongful death claim begins to run at the time of death, *subject to the limitation* that at the time of death the decedent had a viable claim. Discretionary review is warranted." *Id.* at 4 (emphasis original).

IV. ARGUMENT

A. Summary Judgment Standard of Review.

Summary judgment orders are reviewed *de novo*. *Heg v. Alldredge*, 157 Wn.2d 154, 160, 137 P.3d 9 (2006); *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 522, 280 P.3d 1133 (2012). This Court should reverse the trial court's order denying summary judgment on Respondent's wrongful death and survival claims.

The trial court erred when it denied Petitioner's motion for summary judgment. Under CR 56(c), a trial court must enter summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The burden is on the moving party to demonstrate there is no genuine dispute as to any material fact and inferences are to be drawn against the party moving for summary judgment. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979). The motion should be granted where the evidence leads a reasonable person to only one conclusion. *Id.* An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment. *Mountain Park Homeowners Ass'n. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). A trial court's conclusions of law are reviewed de novo. *Inland Foundry Co. v. Dep't of Labor & Indus.*, 106 Wn. App. 333, 340, 24 P.3d 424 (2001). Interpretation of a statute is also a question of law and is reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

In this case, there is no genuine issue of material fact that the statute of limitations on all of Respondent's claims has run because: (1) longstanding Washington Supreme Court precedent holds that a party

cannot maintain a wrongful death action where the decedent did not have a valid underlying claim at the time of death; and (2) Respondent conceded that her survival action is barred by the statute of limitations. Because there is no genuine issue of material fact that the period of limitations on all of Respondent's claims has expired, Consolidated Petitioners' motion for summary judgment should have been granted.

B. The Trial Court Erred by Denying Summary Judgment on Respondent's Wrongful Death Claims Against the Consolidated Petitioners Because a Party May Only Maintain a Wrongful Death Claim If the Decedent Had a Viable Personal Injury Claim at the Time of Death.

1. Washington's Wrongful Death Statute

At common law there was no right of action for wrongful death. *Ryan v. Poole*, 182 Wn. 532, 534, 47 P.2d 981 (1935). In England, as well as the United States, the subject is controlled by statutes derived from Lord Campbell's Act. *Id.* The Act was the first to give rise to an action for wrongful death and provided that whenever the death of a person was caused by a wrongful act, negligence or default of another, the person who would be liable if death had not ensued would be liable in an action for damages notwithstanding the death. *Id.* The Washington legislature abrogated the common law rule by passing its version of Lord Campbell's wrongful death statute. The statute contemplated a cause of action for the

tort which produced the death, not for the death caused by the tort. RCW 4.20.010; *Brodie,* 92 Wn. at 576; *Flynn*, 283 U.S. at 56.

2. A Wrongful Death Claim is Predicated on a Viable Cause of Action in the Decedent

Washington Supreme Court precedent holds that a personal representative may not bring a wrongful death claim unless a viable underlying cause of action could have been maintained by the decedent. *See, e.g., Calhoun*, 170 Wn. 152. This rule remains unchanged. For nearly 100 years, the Washington Supreme Court has allowed a wrongful death action only if the decedent could have maintained a suit for his injuries up until the time of his death. See *Brodie*, 92 Wn. at 576.

In *Brodie,* the Washington Supreme Court held that notwithstanding the separate nature of the wrongful death and survival actions, the release and satisfaction by the person injured of his right to action for the injury will preclude the beneficiaries' right to bring a wrongful death claim. *Id.*

> "If the deceased, in his lifetime, has done anything that would operate as a bar to recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representatives for his death. Thus a release by the party injured of his right of action, or a recovery of damages by him for the injury is a complete defense in the statutory action."

Id. (quoting *Death by Wrongful Act* (2d Ed. § 124)). Respondent has conceded that Decedent had no subsisting personal injury claim against the Consolidated Petitioners at the time of his death in 2012. Because Decedent had no viable claim against any of the Consolidated Petitioners at the time of his death, Respondent, as personal representative to the estate, cannot maintain an action for wrongful death against Consolidated Petitioners.

While the wrongful death statute provides a new cause of action and the measure of damages that a personal representative can recover is different from that a decedent could recover had he survived, a wrongful death claim is still derivative:

> It is also generally held, and the decisions of this court are to the same effect, that if a deceased could not have recovered damages for his injury had he survived, his heirs or personal representatives cannot recover, because their right of recovery is dependent upon the right which the deceased would have had had he survived. If the deceased had no cause of action, none accrues to his heirs or personal representatives.

Ryan, 182 Wn. at 536. Because Decedent could not have sustained the present case against Consolidated Petitioners had he survived, the trial court erred in denying Consolidated Petitioners' request for summary judgment on Respondent's wrongful death claims.

C. Washington Supreme Court Precedent as Set Out in *Calhoun*, *Grant*, and *Johnson* is Clear and Should be Applied in this Case to Bar Respondent's Wrongful Death Claim.

A wrongful death action generally accrues at the time of death, not at the time of injury, and the statute of limitations typically begins to run at that time. *See e.g.*, *Dodson v. Cont'l Can Co.*, 159 Wn. 589, 294 P. 265 (1930); *See also, White v. Johns-Manville*, 103 Wn.2d 344, 352-53, 693 P.2d 687 (1985). "But if a wrongful death action does not exist because the decedent could not have maintained an action in his own right immediately prior to his death, for whatever reason, then no wrongful death action ever accrues." *Ryan*, 182 Wn. at 536.

RCW 4.16.080(2) does not create a cause of action or restore one that expired during the decedent's lifetime; it sets forth a time limitation in which statutory beneficiaries must bring suit if they have a claim. If the right to recover no longer exists, a statute of limitations does not revive that expired right.

The running of the period of limitations on a decedent's personal injury claim before his or her death bars a personal representative from asserting an action under the wrongful death statute. *Calhoun*, 170 Wn. at 159-60; *Johnson*, 45 Wn.2d at 422-23; *Grant*, 181 Wn. at 576. This rule applies to "situations in which, after receiving the injuries which later resulted in death, the decedent pursued a course of conduct which makes it

inequitable to recognize a cause of action for wrongful death." *Johnson*, 45 Wn.2d at 422-23. Thus, a wrongful death suit is barred "where the statute of limitations had run prior to decedent's death." *Id.* at 423 (citing *Calhoun*, 170 Wn. at 152; *Grant*, 181 Wn. at 576). The U.S. Supreme Court has long adopted the same rule in construing a federal statute. *See Mich. Cent. R.R. v. Vreeland*, 227 U.S. 59, 70 (1913).

> [A]s the foundation of the right of action [for wrongful death] is the original wrongful injury of the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury;....

Flynn, 283 U.S. at 56. The weight of authority in other jurisdictions reaches the same result. *See Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 352 (Tex. 1992) (wrongful death action is barred where statute of limitations on decedent's injury ran before his death, which is the "majority rule" in the United States).[2]

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[2] In *Russell v. Ingersoll-Rand Co.,* 841 S.W.2d 343, 352 (Tex. 1992), the Supreme Court of Texas surveyed those jurisdictions that adopted the same rule, including *Northington v. Carey-Canada, Inc.*, 432 So.2d 1231, 1232 (Ala. 1983) (citing *Ellis v. Black Diamond Mining Co.,* 109 So. 2d 699, 702 (Ala. 1959)); *Matthews v. Travelers Indem. Ins. Co.,* 432 S.W.2d 485, 488 (Ark. 1968) (action not barred at time of death); *Hicks v. Missouri Pac. R.R. Co.*, 181 F. Supp. 648 (W.D. Ark. 1960); *Drake v. St. Francis Hosp.*, 560 A.2d 1059, 1960 (Del. 1989); *Lambert v. Village of Summit,* 433 N.E.2d 1016 (Ill. 1982); *Mason v. Gerin Corp.*, 647 P.2d 1340, 1344-45 (Kan. 1982); *Ogden v. Berry*, 572 A.2d 1082 (Me. 1990); *Mills v. International Harvester Co.*, 554 F. Supp. 611, 613 (D. Md. 1982); *Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1, 7 (Mich. 1986); *Regie de l'assurance Auto. du Quebec v. Jensen,* 399 N.W.2d 85 (Minn. 1987); *DeRogatis v. Mayo Clinic*, 390 N.W.2d 773 (Minn. 1986); *Stang v. Hertz Corp.*, 463 P.2d 45, 54-55 (N.M. App. 1969), *aff'd*, 467 P.2d 14 (N.M. 1970); *Natseway v. Jojola*, 251 P.2d 274, 276 (N.M. 1952); *Kelliher v. New York Cent. & H. R.R. Co.,* 105 N.E. 824, 825-26 (N.Y.

This rule was enunciated by the Washington Supreme Court in 1932. *Calhoun*, 170 Wn. at 152. Mr. Calhoun's claim accrued in May 1928. *Id.* at 159. He filed a suit for personal injuries in September 1931—more than three years later. *Id.* at 153. He died October of 1931 and his personal representative added a claim for wrongful death in December, 1931. *Id.* at 154, 160. Although the Court noted that the personal representative's cause of action "for wrongful death and to recover funeral expenses...of course, had not accrued at the time the original complaint was filed," the personal representative could not maintain the wrongful death action because Mr. Calhoun had not brought a timely claim. *Id.*

Calhoun was then clarified and upheld by *Grant*, where the Court explained that *Calhoun* had "held that the [wrongful death] action accrues at the time of death, and that the statute of limitations then begins to run. The rule however is subject to a well-recognized limitation" and "the action for wrongful death is extinguished ... by the failure of the deceased

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1914); *Phelps v. Greco.*, 576 N.Y.S.2d 158, 159 (N.Y. App. Div. 1991); *Eldridge v. Eastmoreland Gen. Hosp.*, 769 P.2d 775 (Or. 1989); *Piukkula v. Pillsbury Astoria Flowering Mills Co.*, 42 P.2d 921, 929-31 (Or. 1935); *Howard v. Bell Tel Co.,* 160 A. 613, 615 (Pa. 1932), *Cowgill v. Raymark Indus., Inc.*, 780 F.2d 324, 331 (3rd Cir. 1985); *Whaley v. Catlett,* 53 S.W. 131, 133 (Tenn. 1899) (cause of action accrues at time of injury; injury and death simultaneous); *Street v. Consumers Mining Corp.*, 39 S.E.2d 271, 277 (Va. 1946); *Miller v. United States*, 932 F.2d 301, 303 (4th Cir. 1991) (applying Virginia law); *Calhoun v. Washington Veneer Co.*, 15 P.2d 943, 946 (Wash. 1932); *Holifield v. Setco Indus., Inc.,* 168 N.W.2d 177 (Wis. 1969) (cause of action accrued at time of accident, not at time of product's sale).

to bring an action for injuries within the period of limitation." *Grant*, 181 Wn. at 581 (internal citations omitted). The *Grant* Court's explanation of *Calhoun*'s holding was repeated and endorsed by the Supreme Court in *Johnson*, 45 Wn.2d at 422-23. For over 80 years, this has been the rule of law and the Legislature has not altered the wrongful death statute in response to Supreme Court precedent.

D. The Wrongful Death Statute Interpreted by *Calhoun*, *Grant*, and *Johnson* is Identical to RCW 4.20.010 in all Material Respects.

The language of the earlier wrongful death statute interpreted by the Washington Supreme Court in *Calhoun*, *Grant*, and *Johnson* is identical to the language of Washington's current wrongful death statute, RCW 4.20.010. *Compare App. H with App. I,* p. 126-27, p. 128-29.[3] The Washington Supreme Court has repeatedly "observed that '[t]he Legislature is presumed to be aware of judicial interpretation of its enactments,' and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 236 P.3d 182 (2010) (quoting *Reihl v. Foodmaker, Inc.*, 152 Wn.2d

[3] *See also*, Rem. Comp. Stat. § 183; *McMullen v. Warren Motor Co.*, 174 Wash. 454, 457 (1932) (applying statute); *Mitchell v. Rice*, 183 Wash. 402, 405 (1935) (quoting statute: "Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death. In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.").

138, 147, 94 P.3d 930 (2004). Aside from adding a comma and gender-neutral language, the legislature has made no changes to RCW 4.20.010 in response to *Calhoun*, *Grant*, or *Johnson*. Legislative inaction following a judicial decision interpreting a statute is deemed to indicate legislative acquiescence in or acceptance of the decision. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999). Accordingly, the trial court improperly departed from the well-established rule set forth in those cases.

E. No Washington Appellate Decisions Conflict with *Calhoun*, *Grant*, and *Johnson*.

Calhoun, *Grant*, and *Johnson* unequivocally establish that a wrongful death action generally accrues at the time of death, subject to the limitation that there must be a subsisting cause of action in the deceased. As discussed *supra*, a decedent does not have a subsisting cause of action at the time of his death, if, in his lifetime, he executed a release, obtained a judgment, or failed to timely bring a personal injury action. *Grant*, 181 Wn. at 580-81; *Johnson*, 45 Wn.2d at 422-23; *Calhoun*, 170 Wn. at 159-60. There is no Washington appellate decision that conflicts with these established points of law.

The trial court erroneously analogized this matter to *Wills v. Kirkpatrick* to support denial of Consolidated Petitioners' motion for

summary judgment. *Wills v. Kirkpatrick,* 56 Wn. App. 757, 785, 787 P.2d 834 (1990). (CP 517). *Wills* is nothing more than an application of *Grant* because, like *Grant* but unlike *Calhoun* (or this case), the *Wills* decedent had a viable cause of action for personal injuries at the time of death. *Id.* at 759.[4] In *Wills*, the decedent died on May 16, 1983 from a heart condition that her doctor had failed to diagnose during her last medical appointment on April 28, 1983. *Id.* at 758-59. The decedent's personal representative filed a wrongful death action on May 2, 1986. *Id.* at 759. Like *Grant* but unlike *Calhoun* (or this case), there was no dispute that the decedent had a viable cause of action at the time of her death, given that the statute of limitations for medical malpractice claims was three years yet she had died only a matter of weeks after the doctor's alleged negligent act of failing to disclose the heart condition. *Id.* Under the circumstances, the court held the claim was timely because the three-year statute of limitations on the wrongful death action began to run at death.

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[4] In *Grant*, the decedent suffered injuries due to exposures to noxious gas at his workplace. *Grant*, 181 Wn. at 578-79. Decedent quit his job due to ill health on July 26, 1930 and commenced a personal injury action against his former employer on August 19, 1932. *Id.* at 577. On August 17, 1933, while the action was pending, Mr. Grant passed away. The administratrix of his estate amended the complaint, alleging survival and wrongful death cause of actions. Employer moved for demurrer on the basis that the statute of limitations had run. *Id.* at 577-78. The *Grant* court held that the injury accrued on August 19, 1929 and as such both causes of action were viable because the decedent timely commenced his action for personal injuries. *Id.* at 582. "While he died more than three years after his cause of action accrued, he left a valid subsisting cause of action. Under these circumstances, we think there is no question but that the action for wrongful death can be maintained." *Id.* at 582 (internal citations omitted).

Id. at 763. This is no different than *Grant* in which the decedent had a viable cause of action at death because he had timely filed his pending personal injury action within the three-year statute of limitations. *Wills* and *Grant* are consistent with *Calhoun* because unlike the *Wills* and *Grant* decedents, the *Calhoun* decedent had allowed the statute of limitations to expire before his death. Similarly, the decedent in *Wills* had done nothing during the course of her lifetime that would have acted as a bar to the wrongful death claim; there was no executed release nor had the decedent sought legal redress.

Thus, the "well-recognized limitation" that "at the time of death there must be a subsisting cause of action in the deceased" was satisfied in both *Wills* and *Grant*, but not in *Calhoun.* *Grant*, 181 Wn. at 580-81. Accordingly, there is no conflict.

Judge Ruhl relied on the court's reasoning in *Wills* to conclude that if the Legislature had intended that a wrongful death claim could only be brought if the decedent had a viable claim at the time of death, it would have included such a provision in the wrongful death statute. (CP 517). In addition to *Grant* and *Calhoun*, the Washington Supreme Court specifically addressed that issue in *Ryan*. *Ryan*, 182 Wn. at 534-36. The Court acknowledged that the wrongful death statute, unlike Lord Campbell's Act, was silent as to whether the cause of action was

dependent on a decedent's right to have brought a claim had he lived. *Id.* at 535. Nonetheless, the Court held that it was. *Id.* at 535-36. *Wills* does not conflict with the well-established rules set forth above because the decedent in *Wills* had a viable, subsisting cause of action against the defendant at the time of her death.

F. Recognizing the Equitable Exclusion to the General Rule that a Wrongful Death Claim Accrues upon Death Does Not Create a Judicially-Imposed Statute of Repose or Invade the Province of the Legislature.

The limitation on a wrongful death cause of action articulated by Washington courts in *Johnson* and *Grant* is not a judicially-created statute of repose. Rather, the exception relies on the well-recognized concept that a wrongful death action cannot be maintained where the deceased had no underlying, subsisting cause of action at the time of death. *See Johnson,* 45 Wn.2d at 423. As the Washington Court of Appeals explained, "statutes of repose are of a different nature than statutes of limitations. A statute of limitation bars plaintiff from bringing an already accrued claim after a specific period of time. A statute of repose terminates a right of action after a specified time, even if the injury has not yet occurred." *Harmony v. Madrona Park Owners Ass'n. v. Madison Harmony Dev.*, 143 Wn. App. 345, 353, 177 P.3d 755, 759 (2009), (quoting *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 211-212, 875 P.2d 1213 (1994)). Washington

courts have adopted the rule that a wrongful death claim does not accrue upon the death of the decedent, where the decedent engaged in a course of conduct, which would have prevented him from recovering in his own personal injury suit had he lived. *Johnson,* 45 Wn.2d at 423 (citing *Calhoun*, 170 Wn. at 152 (as interpreted in *Grant*)).

In *Ryan*, the Washington Supreme Court explained that:

> "The common law gave no right of action for wrongful death. In England, as well as, throughout the United States, the subject is controlled by statutes…Lord Campbell's Act (9-10 Victoria 1846)was the first that gave a right of action for wrongful death. It provided that, whensoever the death of a person should be caused by wrongful act, neglect, or default, 'and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof,' then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured."

Ryan, 182 Wn. at 534. By contrast, Washington's wrongful death statute stated "when the death of the person is caused by the wrongful act, neglect, or default of another…his personal representatives may maintain an action against the person causing the death…." *Id.* The Court recognized that, unlike the English statute, nothing in the Washington statute provided that the action could only be maintained if the decedent could have maintained the same action if he had lived. *Id.* Moreover, the

Court conceded that the wrongful death statute creates a new cause of action, is not a survival statute, and that the measure of damages that the heirs can recover under the wrongful death statute differs from what the decedent could have recovered had he survived and brought a suit for personal injury. *Id.* Regardless of these distinctions, the Court held that if a decedent could not have recovered damages for his injury had he survived, his heirs or personal representative are not allowed to bring wrongful death claims based on the injury. *Id.* at 536. The Court concluded, "if the deceased has no cause of action, none accrues to his heirs or personal representatives." *Id.*

In *Brodie*, the Washington Supreme Court held that a release and settlement executed by an injured plaintiff barred his heirs from a bringing a wrongful death claim when he later died from those injuries. *Brodie*, 92 Wn. at 577. The Court noted that Washington's wrongful death statute is confined to such loss and damages as the beneficiaries have suffered by the death of the person injured. *Id.* In contrast, Washington's survival statute preserves the right of action of the injured person and limits recovery to the personal loss sustained by the injured person. *Id.* Thus, the court recognized that wrongful death is a distinct and separate claim brought for the benefit of the decedent's heirs. However, despite the "separate nature" of a survival action and a wrongful death action, the

Court held that if a decedent does anything that operates to bar his damages for his personal injury, his conduct also operates to bar his personal representative from bringing an action for wrongful death. *Id.*

As discussed *supra*, a legislative statute of repose terminates a cause of action regardless of whether the injury has occurred after a specific amount of time has passed. *Harmony*, 143 Wn. App. at 353-54. The Court in *Ryan* recognized that no wrongful death action accrues to the heirs of the decedents, where the injured person had no right to maintain his own action for personal injuries. *Ryan*, 182 Wn. at 535.

The issue in this case is not whether too much time has passed to allow an individual to make a claim for wrongful death, but whether there was ever a right to bring the action in the first place. Decedent's beneficiaries had no right of action for wrongful death; a statute of repose could not limit or terminate a right that never existed in the first place.

The Washington Supreme Court's longstanding rule–that a personal representative cannot bring an action for wrongful death if the decedent had no underlying, subsisting claim at the time of his death–does not invade the province of the legislature. As explained in *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77 n.8, 196 P.3d 691, 696 (2008), the legislative intent to deviate from the common law must be clear and explicit. Washington's wrongful death statute has not been substantively

changed since the court decided *Calhoun*, *Grant*, and *Johnson*. Rather, the legislature has simply modified the terms of the statute to make it gender-neutral. *See* RCW 4.20.010; 2011 Sess. Laws ch. 336 § 89. If the legislature had intended to clarify the date of accrual for wrongful death claims, it has had the opportunity to make its intent explicit.

In *In re Parentage of L.B.*, 155 Wn.2d 679, 695, 122 P.3d 161 (2005), the Washington Supreme Court relied on its equitable powers to recognize the status of *de facto* parents in custody disputes, even though the recognition of such a status was not included in Washington's existing statutory scheme. The Court explained that it must not be presumed that the legislature intended to make any innovation on the common law without clearly manifesting such intent. *Id.* at 696, n.11 (quoting *Green Mountain Sch. Dist. No. 103 v. Durkee*, 56 Wn.2d 154, 161, 351 P.2d 525 (1960)).

Absent clear legislative intent that a wrongful death claim can be maintained even where no underlying cause of action subsists, the equitable exception recognized in *Calhoun*, *Grant*, and *Johnson* remains good law.

G. Public Policy Favors Continuing to Recognize That a Wrongful Death Claim Requires a Subsisting Cause of Action in the Decedent.

Respondent seeks to overrule and depart from well-settled Washington Supreme Court precedent that a personal representative cannot maintain a cause of action where the decedent failed to bring a timely claim prior to his death. *Grant*, 181 Wn. at 580-81; *Johnson*, 45 Wn.2d at 422-23; *Calhoun*, 170 Wn. at 159-60. Public policy does not favor abandoning precedent, nor can it be shown that the established rule of law is incorrect or harmful. A clear showing that an established rule is incorrect and harmful is required before the rule is to be abandoned. *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). The procedure established by *Grant* and *Calhoun* is fair and logical. Once an injured party has notice of a potential claim, the statute of limitations commences and there are three years in which to file a cause of action. If the injured party dies prior to the expiration of the three-year period or if the injured party files a lawsuit within that time, the personal representative may maintain a valid wrongful death action because there is a subsisting cause of action in the decedent at the time of death. However, if the decedent has no viable personal injury claim at the time of death due to a release of claims, obtaining a verdict, or failure to pursue a claim, then the personal representative has no cause of action under the wrongful death statute.

There is nothing unfair about the application of *Grant* and *Calhoun*. The discovery rule is not an issue in this case. In 2006, Respondent and Decedent brought individual claims after learning that Decedent had terminal cancer related to asbestos exposure. As part of the original lawsuit, Respondent subpoenaed documents from the Crown Zellerbach Mill, and learned the nature of her claims against the Consolidated Petitioners. Respondent made a deliberate and strategic choice not to bring suit against the Consolidated Petitioners as part of the original 2006 suit, which was fully litigated in federal district court.

Abandoning *Calhoun* and *Grant* would have far reaching consequences that are neither fair nor reasonable. Allowing a personal representative to recycle stale personal injury claims upon the death of the decedent will open the door to needless litigation. The issue before this Court applies to all types of claims and will not be restricted to asbestos litigation. Respondent's position arguably would allow for the resurrection of litigation in any case where an injured party dies years after the initial injury, in part from complications due to the injury. By that time years or decades may have elapsed, making it impossible to obtain testimony from the decedent or other material witnesses. With the passage of time memories inevitably fade and records will be lost.

The position advocated by Petitioner goes against Washington's public policy favoring statutes of limitation and the finality afforded by them. Washington has long endorsed statutes of limitation as part of the overall administration of justice. Washington's three-year statute of limitations has existed since 1854. *See* Laws of 1854, § 4, p. 363; Laws of 1854 § 7, p. 364. Recognizing that statutes of limitations have a long history in English law and are firmly rooted in modern jurisprudence, the Washington Supreme Court has concluded that statutes of limitation further Washington public policy because they protect individuals from threatened litigation where the ability to defend is compromised by the passage of time.

In Washington, the goals of our limitation statutes are to force litigation of claims while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence. *Summerrise v. Stephens*, 75 Wn.2d 808, 811, 454 P.2d 224 (1969). To allow filing of a wrongful death claim after the expiration of a personal injury limitations period unfairly deprives those named in the belated wrongful death action the opportunity to discover evidence which was available at an earlier time, and which could have been utilized to defend the claim.

H. Washington Supreme Court Jurisprudence Is Binding and Must Be Followed by Lower Courts as it Exists.

In denying the Consolidated Petitioners' motions for summary judgment, Judge Ruhl reasoned, "the statement in the *White* case,

> [we are not faced with, nor do we decide a case in which the deceased is alleged by the defendant to have known the cause of the disease which subsequently caused his death. In that case there is a question to whether the wrongful death action of the deceased's representative "accrued" at the time of the decedent's death, or when the decedent first discovered or should have discovered the cause of death],

means that the question is open for reexamination in Washington." (CP 517) (citing *White*, 103 Wn.2d at 347).

The trial court's reliance on *White* to support denial of summary judgment is misplaced. *White* only concerned a single certified question from a federal district court on whether the discovery rule could apply and toll the statute of limitations for survival and wrongful death claims based on the *personal representative's* lack of knowledge about the cause of death. *White,* 103 Wn.2d at 345. The discovery rule is not at issue in this appeal. Moreover, the parties in *White* stipulated for purposes of the appeal that "the decedent never knew that he was suffering from any adverse effects of exposure to asbestos-containing materials" before his death. *Id.* at 345. As a result, the *White* court expressly declared that "*we are not faced with, nor do we decide, a case in which the deceased is alleged by the defendant to have known the cause of the disease which subsequently caused his death.*" *Id.* at 347 (emphasis added). Because

whether the statute of limitations had run on the decedent's claims was explicitly not at issue, nothing in *White* is inconsistent with *Grant*'s holding that there is no viable wrongful death claim if the deceased lacked a "subsisting cause of action" at the time of death because the deceased failed "to bring an action for injuries within the period of limitation" (or executed an effective release or obtained a judgment during his or her lifetime). *Grant,* 181 Wn. at 580-81. Nor is this a circumstance where the Decedent lacked knowledge of his condition's underlying cause. To the contrary, Respondent and Decedent filed their 2006 personal injury lawsuit based on the same alleged disease, the same allegations of exposure to asbestos-containing products at the same work site, and for the same type of damages as in the 2012 lawsuit filed by Respondent.

Stare decisis is a doctrine developed by the courts to accomplish stability in court-made law that is not an absolute impediment to change. "Without the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office." *In re Stranger Creek and Tributaries in Stevens Co.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The doctrine mandates a clear showing that an established rule is incorrect and harmful before it is to be abandoned. *Id.*

The language of Judge Ruhl's order argues that the *White* Court implicitly overruled or called into question *Grant*, *Calhoun* and *Johnson*

by the above quoted language. However, the reference in *White* set no such precedent. The language quoted by the trial court provides no guidance for interpreting the question governing this appeal. *Broom*, 169 Wn.2d at 238. "[T]he doctrine of stare decisis applies regardless of whether we overrule a prior decision explicitly or implicitly. Therefore, we continue to require 'a clear showing that an established rule is incorrect and harmful.'" *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) quoting *Reihl*, 152 Wn.2d 138. "Where we have expressed a clear rule of law [as in *Grant*, *Calhoun*, and *Johnson*], we will not- and should not- overrule it sub silentio." *Lunsford*, 166 Wn.2d at 280.

A decision by the Washington State Supreme Court is binding on all lower courts in the state. *1000 Va. Ltd. P'ship. v. Vertecs*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). In denying Consolidated Petitioners' summary judgment, the trial court acknowledged the Supreme Court opinions and stated "[y]ou know, I am reminded of a long time ago I read someplace Francis Bacon said, 'precedent is to be followed precisely so far as it makes sense and no further.'" Verbatim Report of Proceedings 34. "It is error for the Court of Appeals [and a trial court] not to follow directly controlling authority by the Supreme Court." *State v. Pedro*, 148 Wn. App. 932, 950, 201 P.3d 398 (2009) (citing *1000 Va. Ltd. P'ship.*,

158 Wn.2d at 579). The Washington Supreme Court has articulated the rule originally set forth in *Calhoun* on more than one occasion and has never overruled it.

The fact that Washington appellate courts have not revisited the rule in *Calhoun* and *Grant* since *Johnson* comes as no surprise because the rule is clear, fair, easily applied, and is the majority rule in the United States. Equally important, the Washington legislature has not substantively revised the Washington Wrongful Death Statute in the almost 80 years since the Washington Supreme Court handed down its decision in *Calhoun* and have therefore adopted the Court's interpretation of the statute.

I. The Trial Court Erred by Denying Consolidated Defendants' Request for Summary Judgment on the Survival Claim Because Respondent Conceded the Statute of Limitations Has Run.

The statute of limitations on survival actions is three years. RCW 4.20.060. The cause of action in a survival claim belongs to the decedent and therefore is subject to any defense that could have been asserted against the decedent had he lived to bring the action. *Ginochio v. Hesston Corp.*, 46 Wn. App. 843, 845, 733 P.2d 551 (1987). Thus, a period of limitations defense may be asserted against the personal representative in a survival action. The statute of limitations on a survival claim begins to run from "the earliest time at which the decedent or his personal

representative knew, or should have known, the causal relationship between the decedent's exposure to asbestos and his ensuing disease." *White*, 103 Wn.2d at 360. The cause of action accrues and period of limitations begins to run even where a plaintiff does not know the identity of each and every defendant that plaintiff intends to sue. *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 771, 733 P.2d 530 (1987). Clearly, Decedent knew or should have known all the elements of his claim by December 18, 2006, when he filed his personal injury claim. Therefore the period of limitations on the survival action expired December 18, 2009, approximately five years before this lawsuit was filed.

In her response to the Consolidated Defendants' motions for summary judgment before the trial court, Respondent conceded that the statute of limitations barred her survival claim because no cause of action was brought against petitioners within the statutory period. CP 425, 461. Because Respondent conceded that the statute of limitations on her survival claim has run, there is no genuine issue of material fact as to whether Respondent's claims are barred. The trial court therefore erred when it failed to rule that Respondent's survival claim was time-barred.

V. CONCLUSION

For these reasons, this Court should vacate the trial court's denial of Appellant's motion for summary judgment and remand for a dismissal of all claims.

RESPECTFULLY SUBMITTED this 11th day of June, 2015.

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