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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)

GERALDINE BARABIN, as Personal Representative for the Estate of HENRY BARABIN, deceased,

Plaintiff/ Respondent,

v.

ASTENJOHNSON INC., et al.,

Defendants/ Appellants.

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 JUL 10 AM 9:47

RESPONSE TO BRIEF OF APPELLANTS

Meredith B. Good, WSBA # 39890
BRAYTON PURCELL, LLP
Attorney for Geraldine Barabin, Respondent
806 SW Broadway, Suite 1100
Portland, OR 97205
503-295-4931

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I.
INTRODUCTION

The Petitioners correctly state the standard of review and then misinterpret the application of that standard. Ignoring the difference between fact and law, they claim that the trial court erred because the facts are undisputed and thus there is no genuine issue of fact that the statute of limitations has run. While that statement is likely very comforting to the defendants, it overstates their case. True, the facts are not in dispute. The date on which Mr. Barabin knew of his disease, the date he died, and the date his personal representative filed the wrongful death case are all undisputed. But the court's decision below did not turn on "facts." The basis for the court's ruling, as plainly stated in the decision, (Clerk's Papers (CP) at 511) was not "disputed facts" but the legal conclusion concerning the statute of limitations which arises from those facts.

Defendants claim the facts demonstrate that the statute of limitations has run on all of plaintiff's claims. (Petitioners' Opening Brief "POB" at 7) They base this conclusion on their interpretation of the law. But the law is not what defendants claim it is, and it does not lead to the conclusion they reach.

Though defendants claim that Washington law holds the statute of limitations on the wrongful death action ran because the decedent knew of the cause of his disease more than three years before his death, the trial court properly concluded that:

> No Washington appellate court, however, has squarely addressed the question that is presented by the facts of this case: whether a wrongful death claim accrues on the date of injury or on the date of death, where the decedent discovered, or should have discovered, the cause of his or her injury prior to death.

(CP 515) While some old Supreme Court cases appear to state that the wrongful death claim is barred if the decedent no longer has a viable personal injury claim, those decisions are contradicted by, and essentially overruled by later decisions of

the Supreme court. Defendants claim that the old case law embodied in *Calhoun*, *Johnson*, and *Grant* "is clear" and mandates the conclusion that the running of the statute of limitations on the decedent's personal injury action bars a wrongful death action by the personal representative. But, as will be shown, *Calhoun* is a case which arose in a very different context, and whose support has been undercut by more recent decisions. As for *Johnson* and *Grant*, both address the matter only in dicta. In fact, both *Johnson* and *Grant* actually support the plaintiffs' position here.

In an attempt to bolster the limited support rendered by the three cases they rely upon, defendants argue that no Washington appellate decisions contradict their chosen interpretation of those three cases. As we show below, that argument fails to address at least three cases in which the appellate courts have either directly contradicted those cases, called into question the cases they relied upon to reach their

holdings, or pointed out the illogic of the defendants' position here. The Washington Appellate Courts have, in effect, overruled *Calhoun* .

Like the case law they rely upon, the "policy" issues defendants fall back on to support their position lend little support. They claim that allowing wrongful death actions to be brought outside of the personal injury statute of limitations would be unjust and unfair. But the argument itself is one sided and without consideration of all the goals of litigation. The heirs who seek compensation have a right of action granted by the legislature to compensate them for their unique losses caused by the death of the decedent. To prevent them from asserting their claims because of the fortuitous happenstance that the defendants' wrongful conduct did not kill the decedent immediately, but allowed him to suffer for three years or more before dying, is not only callous but illogical. Statutes of limitations are intended to avoid "stale" claims. A claim for

wrongful death filed within three years of the death is not stale.

II.
ASSIGNMENT OF ERROR

The trial court did not err when it denied summary judgment in favor of defendants and held that the plaintiff's wrongful death action was not barred by the statute of limitations.

The issue in this assignment of error involves interpretation of the language of the wrongful death statute, R.C.W. § 4.20.010, and its interaction with the applicable three year statute of limitations, R.C.W. § 4.16.080(2). In this case the decedent died on March 30, 2012 and the personal representative filed this wrongful death action on March 19, 2014. The trial court found the action was not barred by the statute of limitations.

Where a wrongful death cause of action cannot, by definition, arise until the occurrence of a **death**, and the law

allows three years in which to bring the cause of action, was it error for the court to find the action time was not time barred, because it was filed well within the three year limitation period?

III.
ARGUMENT

A. The Case Law Does Not Support The Defendants' Position

The defendants claim that three cases, *Calhoun v. Washington Veneer Co.*,[1] *Johnson v. Ottomeier,*[2] and *Grant v. Fisher Flouring Mills,*[3] establish and affirm the rule they would like to have enforced: that the expiration of the statute of limitations on the decedent's personal injury case bars the personal representative from bringing an action on behalf of the

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[1]170 Wn 152, 15 P.2d 943 (1932)

[2]45 Wn.2d 419, 27 P.2d 723 (1954)

[3]181 Wn 576, 44 P.2d 193 (1935)

heirs. But those cases do not support the position they espouse. A review of those cases shows that neither the facts, the holdings, or the policy reasons expressed support the defendants' position here.

1. *Calhoun v. Washington Veneer Co.*

The defendants rely extensively on the case of *Calhoun v Washington Veneer Co.*, 170 Wash. 152, 15 P.2d 943 (1932). In that case the court stated that the wrongful death claim of the spouse was barred by the running of the statute of limitations on the decedent's cause of action. As defendants note in their opening brief, we have previously distinguished *Calhoun* by its context as an employment case and the fact that the statute under which it was decided is now revoked..[4] The court's decision in *Calhoun* is further undermined by the later case of

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[4]"Both *Calhoun* and *Grant* were decided in the context of now-repealed employment laws such as the "Factory Act"[.] *Barabin v. AstenJohnson, Inc.*, 2014 U.S. Dist. LEXIS 89035 (W.D. Wash. 2014).

Gazija v. Nicholas Jerns Co., 86 Wn.2d 215, 219 (1975).

Gazija was an insurance coverage case in which the insured, a fisherman, sought to recover from the insurer the value of his fishing gear and nets lost when his boat sank. When he discovered the policy had been canceled, allegedly without his knowledge, he sued the insurer. The defendant argued that the action was barred by the statute of limitations because it had accrued at the time the policy was canceled, not at the time of the loss. The fisherman claimed his action was based in tort, not contract, and thus his statute did not begin to run until he discovered the harm. The Washington Supreme Court looked back at early cases which had addressed similar issues. Among those was *Shaw v. Rogers & Rogers*, 117 Wash. 161, 200 P. 1090 (1921), in which the insurance agent failed to write the policy with a solvent company and the insured found himself "uninsured" at the time a fire destroyed his building.

> The [*Shaw*] court held the cause of action arose immediately upon failure of the defendant to write insurance with a solvent company. It concluded the action was barred by the 3-year statute of limitations and refused to hold the cause of action accrued when damages arose from the fire that destroyed the building.

Gazija, supra, 86 Wn 2d at 218.

The apparent unfairness of that result caused the Shaw court to observe:

> [T]hat the amount of damages which could have been recovered had the action been brought immediately upon the breach of the duty, and the amount which was susceptible of the recovery after the fire were different, but it is not material that all the damages resulting from the act should not have been sustained at the time the breach of duty occurred, and the running of the statute is not postponed by the fact that actual or substantial damages do not occur until a later date.

Shaw v. Rogers & Rogers, supra at 163.

Looking back at other cases applying the statute of limitations in similar circumstance, and the evolving state of that law, the Supreme Court in *Gazija* stated:

> Subsequent cases are not helpful in determining whether Shaw is to be considered as a tort or contract case. *Robinson v. Davis*, 158 Wash. 556, 560, 291 P. 711 (1930); *Calhoun v. Washington Veneer Co.,* 170 Wash. 152, 160, 15 P.2d 943 (1932); *Peeples v. Hayes*, 4 Wn.2d 253, 255, 104 P.2d 305 (1940). **To the extent the result in *Shaw* can be ascribed to a characterization of the cause of action as one sounding in tort, we believe the result reached there is incorrect.**

Gazija v. Nicholas Jerns Co., 86 Wn.2d 215, 219 (1975) (emphasis added)

The significance of this holding is that *Shaw* is one of the cases relied upon by the Supreme Court when it decided *Calhoun*. (*Calhoun v. Wash. Veneer Co.*, *supra,* 170 Wash. at 160.

The Supreme Court's holding that to the extent *Shaw* was a tort action it was incorrectly decided, is applicable here. This is solely a tort cause of action. There is no element of contract in the facts or in the claims of the plaintiff. That means that *Shaw,* and *Calhoun*, to the extent it relies on *Shaw,*

are inapplicable here. Their holdings, that the tolling of the statute at the time of the incident affects the subsequent action, are no longer good law in Washington.

2. Johnson v Ottomeir

Reliance on *Johnson* is similarly inappropriate because, although the court discussed the effect of statutes of limitations on actions for wrongful death, the decision itself was not based on that point. Any language about the effect of the personal injury statute of limitations on the wrongful death statute was merely **dicta**.

Mr. Ottomeier killed his wife and then killed himself. A personal representative was appointed to administer both estates. Mrs. Ottomeier's son petitioned the court to be appointed representative of his mother's estate. He claimed her estate had a cause of action against the husband's estate and it would be a conflict of interest for the same individual to represent both estates. The trial court denied the petition

because the law in effect at the time prevented a wife from suing her husband. Therefore it was argued, her estate was similarly prevented from suing. Although the statute did not limit the wrongful death action in this way, on appeal, the personal representative took the position that the court had previously adopted a broad policy of exclusion preventing actions which could not have been brought by the decedent. (The same position advocated by the appellants here)

In discussing the application of its case law, the court agreed that "in construing this act, we have held that the action may be maintained 'where the deceased might have maintained it had he lived.'" (45 Wn 2d 419, 421) It listed *Calhoun* and *Grant v. Fisher Flouring Mills Co.*, 181 Wash. 576, 44 P. (2d) 193), as cases which barred the wrongful death action where the statute of limitations had run prior to decedent's death.

This is the only reference to a general rule of exclusion based on the statute of limitations. After that discussion, the

court went on to evaluate the exclusion claimed by the personal representative. The court explained the genesis of its decision as follows:

> It was originally the common view that *Lord Campbell's Act*, 9 and 10 Vict., c. 93, § 1, which first established the right to sue for wrongful death, provided for the survival of a cause of action possessed by the deceased. It is now generally recognized, however, that the act gives to the heirs, or the personal representative on their behalf, a new right of action. Our court accepts this view. (Citations omitted)
>
> Not having as its basis a survival statute, the action for wrongful death is derivative only in the sense that it derives from the wrongful act causing the death, rather than from the person of the deceased. (Citations omitted) Needless to say, the wife's disability to sue is personal to her, and does not inhere in the tort itself. (Citation omitted)
>
> The wife's personal disability necessarily disappears with her death, and hence is not transferable to the personal representative, who has a new cause of action.

Thus, the Court's holding had nothing to do with the statute of limitations for initiating a wrongful death case. It

turned solely on the existence, or non-existence of the marital bar to the claim. The only statute of limitations issue addressed was the dicta in the decision explaining the exclusions the court had previously applied to bar wrongful death actions. That *dicta* referenced *Calhoun* which, as we have shown is inapposite here because of the workmen's compensation context in which it arose and the subsequent case law which has invalidated its underpinnings.

3. *Grant v. Fisher Flowering Mills*

The *Johnson* court's additional comment on *Calhoun*, that it was interpreted in *Grant v. Fisher Flouring Mills*,[5] adds nothing to the precedential value of the *Johnson v. Ottomeier* decision. Also, a closer reading of the *Grant* decision shows that it supports the plaintiff's position here rather than the defendants. The details of *Grant* were recently reported by this

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[5] 181 Wash 576 (1935)

court:

> In Grant, a wife added a wrongful death claim to her husband's complaint while her husband's claim was pending, but after he died. Grant started working as a miller in a flour mill in June 1926. He continued working at the mill until July 26, 1930, when he stopped working because of illness. On August 19,1932, he sued his employer alleging that his illness was caused from exposure to nitricacid and chlorine gas fumes while on the job. As in *Calhoun*. Grant based his action on the factory act. Grant died on August 17, 1933, while his action was pending. Grant's wife, Dorothy, was substituted as plaintiff in Grant's lawsuit. Subsequently, Dorothy filed an amended complaint for both a survival action and a wrongful death action under Rem. Rev. Stat. § 183.
>
> After making the determination that Grant brought his action for personal injuries within the time prescribed by the three year statute of limitations, * * * allowing Dorothy to maintain a wrongful death action, the *Grant* court distinguished the result in *Calhoun*. It reasoned that because Grant brought his action for personal injuries within the time prescribed by the statute of limitations, even though he died more than three years after his cause of action accrued, he left a valid subsisting cause of action against his employer. It concluded that under the circumstances—Grant did not release his claims against his employer during his

> lifetime and Dorothy brought her wrongful death action from within three years from Grant's death—there was no question that Dorothy's wrongful death action could be maintained.

Deggs v. Asbestos Corp. Limited 2015 Wash. App. LEXIS 1324, *7-9 (Wash. Ct. App. June 22, 2015)

Defendants argue here that a wrongful death cause of action may not be brought more than three years after the decedent was aware of his injury even if he has not yet died. But *Grant* itself incorrectly applies the statutes.

What *Grant* does is equate the wrongful death action with the survival action. Requiring the decedent to have a "subsisting" cause of action makes the wrongful death cause of action a survival action. But that is not the statutory scheme in Washington

> [A] wrongful death action and a survival action are distinct causes of action. The survival statutes do not create new causes of action for statutorily named beneficiaries, but instead preserve the decedent's causes of action for injuries suffered prior to death. By contrast, the wrongful death

> statute governs post death damages and allows the personal representative of the decedent to sue on behalf of statutory beneficiaries for their own losses, not the decedent's losses.

Deggs v. Asbestos Corp. Ltd., 2015 Wash. App. LEXIS 1324, *16-17 (Wash. Ct. App. June 22, 2015) Requiring a subsisting action in the decedent is the task of a survival statute. No such requirement exists in the wrongful death statute.

4. Other Cited Cases Similarly Fail to Make Defendants' Case

Defendants are fond of citing cases from other jurisdictions which impose limitations on wrongful death causes of action because of an inability of the decedent to sue. (BOA at 12) But those compilations do not address the key point for those holdings: the statutory language in place in those jurisdictions. Our neighbor Oregon, for example, prohibits a wrongful death suit unless the decedent had a cause of action. But that limitation is directly stated in the statutory language:

When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent, . . . may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the wrongdoer for an injury done by the same act or omission. (O.R.S. § 30.020.)

Obviously, in such jurisdictions, the answer to the question before this court would be different. But here the language of the statute has no similar exclusion. And the action itself is purely a creature of statute; it has no common law precedent.

> According to the common law, no civil action could be maintained by a surviving spouse, child or other close relative of the deceased person against one who wrongfully caused the death.
>
> * * *
>
> It was with the spirit of rejecting the bases of the common law rule and its harsh effects that the wrongful death statutes were enacted. . ..

Gray v. Goodson, 61 Wn.2d 319, 324 (Wash. 1963) The language of the statute must control, and no concepts from the personal injury claim should be used to subvert the intent of the

legislature. As our Supreme Court has stated: "In resolving this issue, we are mindful that the statute, being remedial in nature, is to be liberally construed." *Gray v. Goodson*, 61 Wn.2d 319, 324 (Wash. 1963) citing *Johnson v. Ottomeier*, 45 Wn. (2d) 419, 275 P. (2d) [416] 723 (1954); and *Cook v. Rafferty*, 200 Wash. 234, 93 P. (2d) 376 (1939).

Other neighboring jurisdictions, Idaho and Utah, have recently addressed this identical issue and concluded that the new and distinct wrongful death cause of action is not impaired by a prior action brought by the decedent, or by the decedent's failure to bring an action. In *Riggs v. Georgia Pacific*, 2015 UT 17, the Utah Supreme court held that a judgment in favor of the decedent did not bar the personal representative's subsequent wrongful death action against the same defendants. And in *Castorena v. GE*, 149 Idaho 609 (Idaho 2010) the Idaho Supreme Court determined that state's wrongful death statute did not bar an action in a case in which the decedent's personal

injury statute of limitations had run. The court observed: This interpretation has also found support in the Restatement (Second) of Torts § 899 cmt. c (1979), as it pertains to the statute of limitations:

> A cause of action for death is complete when death occurs. Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the representative or to surviving relatives of the decedent only upon his death; and since the cause of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would have been barred. In some jurisdictions, however, the wrongful death acts take the form of statutes providing for the survival of the decedent's own cause of action, in which case the statute of limitations necessarily runs from the time of his original injury.

Id. at 619. Washington has no such restriction. Mrs. Barabin's action was not time barred.

Defendants' also rely on *Ryan v Poole ,* 182 Wash. 532 (Wash. 1935) for the proposition that heirs cannot recover in a wrongful death action if the decedent could not recover.

(BOA 15) But *Ryan* is not a statute of limitations case. In that case, the decedent was engaged in a crime when he met his death.

> Under the facts stated in the complaint, which, for the purposes of this action, must be accepted as true, the deceased was employed to do an unlawful and criminal act or acts, and, while in the course of such employment, met his death at the hands of another whose rights he was invading and against whom he was committing a criminal act. The general rule is that the courts will not aid either party in litigation growing out of criminal acts. [citations omitted] Had Emmett C. Ryan survived his injury and brought an action therefor, it is clear that he could not have prevailed, because, at the time of the injury, he was engaged in the performance of an unlawful and criminal act.

Ryan v. Poole, 182 Wash. 532, 538 (Wash. 1935)

So, when the *Ryan* court said the personal representative's right of recovery is "dependent upon the right which the deceased would have had had he survived" it meant something other than the lapse of a statute of limitations. It meant he did not have, and never had had a cause of action.

B. The Washington Appellate Courts Have Refuted Defendants' Arguments in More Recent Cases

The defendants claim that no Washington appellate decisions conflict with *Calhoun, Grant,* and *Johnson*, (BOA 15 - 18) and that those three decisions "unequivocally establish" the limitation that there must be a subsisting cause of action in the deceased. As dramatic and convincing as this argument might seem to the defendants, it overstates their case and ignores significant decisions in Washington's jurisprudence. First, As already shown, the Supreme Court's decision in *Gazija* has, in fact, undercut the foundation of *Calhoun.* Next, it ignores the very clear statement of the Court in *Wills v Kirkpatrick*, 56 Wn. App. 757 (1990). In that case plaintiff, the personal representative of his deceased mother, brought a wrongful death action after the death of his mother, allegedly as the result of medical malpractice. The defendants argued that the medical malpractice act applied and that the

statute of limitations under that act began to run at the date of the malpractice and the action was thus time barred. In holding that the wrongful death statute of limitations applied, the Court stated:

> If indeed the medical malpractice statute of limitations applied to wrongful death claims, we would have the situation where such a claim could be barred even before death triggers accrual of the right to bring the action. Such a result seems to us illogical and unjust.

Wills v. Kirkpatrick, 56 Wn. App. 757, 762 (Wash. Ct. App. 1990). If such a result is "illogical and unjust" in the context of a medical malpractice claim, it is equally "illogical and unjust" here.

Defendants attempt to distinguish *Wills* by claiming that it is consistent with *Grant* because the decedent had a subsisting medical malpractice action at the time of her death. But that is not the foundation for the court's decision. The court found that beginning the running of the statute of

limitations at the time of the injury, rather than at the time of the death of the decedent, would be illogical and unjust. But that is just what defendants seek to do here.

Moreover, the defendants' argument, that Washington law is "unequivocally established" and has been for nearly a century, is put in serious dispute by the Supreme Court's decision in *White v. Johns-Mansville Corp*:

> Preliminarily, we note 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 as to whether the wrongful death action of the deceased's representative "accrued" at the time of the decedent's death, when the decedent first discovered or should have discovered the injury, or when the claimant first discovered or should have discovered the cause of death. See *Wilson v. Johns-Mansville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982); *Fisk v. United States*, 657 F.2d 167, 170-72 (7th Cir. 1981); *In re Johns-Mansville Asbestosis Cases,* 511 F. Supp. 1235, 1239 n.6 (N.D. Ill. 1981).

White v. Johns-Mansville Corp., 103 Wn.2d 344, 347, 693 P.2d

687, (1985).

If the Washington law is “unequivocal” since the 1930's, as defendants allege, why did the Supreme Court not say so in this 1985 case? The Supreme Court surely had access to and knowledge of *Calhoun, Grant*, and *Johnson*. If, as defendants contend, those cases answered the question years ago, why didn't the court say so? Why didn't the court say "If the decedent knew the cause of the disease which caused his death, the wrongful death action accrued at that time." That's what defendants claim the law provides. Then why does the Court say there is "a question" as to when the cause of action accrued, cite federal cases for the conflicting potential results of such a claim, and render no opinion on the result? Obviously, the answer to the Supreme Court's question is not at all the pre-determined result defendants would have us believe.

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C. The Defendants' Position Would Invoke a Judicially-Imposed Statute of Repose and Invade the Province of the Legislature

In a related argument, defendants claim that the limitation on a wrongful death cause of action imposed by *Calhoun* and *Grant* is not a "judicially -created statute of repose." This attempt to cut off the dangerous alley into which their arguments lead them is ineffective.

> [A]s our Supreme Court has explained in a series of recent decisions, statutes of limitation do not begin to run until a party has the right to apply to a court for relief—that is, once a claim accrues. *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber. Hunt & Nichols-Kiewit Constr. Co..* 176 Wn.2d 502, 511, 296 P.3d 821 (2013) (hereinafter *MLB)*; *Cambridge Townhomes. LLC v. Pac. Star Roofing. Inc..* 166 Wn.2d 475, 484-85, 209 P.3d 863 (2009); *1000Virginia Ltd. P'ship v. Vertecs Corp..* 158 Wn.2d 566, 575, 146 P.3d 423 (2006).

Because the statute of limitations cannot begin to run until the action accrues, and because a wrongful death cause of action cannot accrue until there is a death, the limitation

imposed by *Calhoun* and *Grant*, if it was based on a statute of limitations, is inconsistent with these recent decisions which make it clear that a statute of limitations cannot be applied to bar a claim that has not yet accrued. *Deggs, supra,* 2015 Wash. App. LEXIS 1324, *29-30 Dwyer, J. (dissenting)

Because the "limitation" in *Calhoun* and *Grant* bar an action before it accrues, it is not a statute of limitations, but rather a statute of repose.

> [A]lthough statutes of limitation cannot terminate the right to file a claim prior to its accrual, statutes of repose can. *MLB,* 176 Wn.2d at 511; accord *Cambridge Townhomes*, 166 Wn.2d at 484; *1000 Virginia*, 158 Wn.2d at 575. "'A statute of repose terminates a right of action after a specified time, even if the injury has not yet occurred.'" *1000 Virginia*, 158 Wn.2d at 574-75 (quoting *Rice v. Dow Chem. Co.,* 124 Wn.2d 205, 211-12, 875 P.2d 1213 (1994)).

It is apparent from these recent Supreme Court decisions that the "limitation" discussed in *Calhoun* and *Grant* was a statute of repose, rather than a statute of limitation. The time

period within which a wrongful death action must accrue, by virtue of this "limitation," is either the lifetime of the injured person or the statutory limitation period imposed upon the tort claims of the injured person. If the action does not accrue within either period, then it may not be maintained. See *Johnson,* 45 Wn.2d 419; *Grant,* 181 Wash. 576; *Calhoun*, 170 Wash. 152.

The legislature could have made wrongful death actions subject to a statutory period of repose. But there is no indication in the wrongful death statute that it has ever chosen to do so. Cf. *Wills, supra* ,56 Wn. App. at 763 ("While the Legislature may have the power to enact such a limitation period barring wrongful death claims even before they accrue, it is obvious to us that the Legislature did not do so here.")

> In the event that the decisions in *Calhoun* and *Grant* were actually based on a statute of limitation analysis, those decisions have not withstood the Supreme Court's more recent decisions clarifying the manner in which statutes

> of limitation function. On the other hand, in the event that *Calhoun* and *Grant* were actually premised upon a statute of repose analysis, they were based on a misperception and are unsupported by an appropriate legislative enactment.

Deggs, supra, 2015 Wash. App. LEXIS 1324, *33.

Defendants claim that the limitation imposed by *Calhoun* and *Grant* is not a statute of repose because "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." This assertion falls on its false premise. Contrary to defendants' argument, the heirs did have a right of action for wrongful death. The legislature gave them that right, without limitation, in R.C.W. 4.20.010. The limitation defendants seek to impose here, the one recognized in *Calhoun*, is a judicially created statute of repose. It would not bar the action because the heirs waited too long after the action accrued to assert their rights. Rather it would deprive

them of that right before it ever accrued. That is the function of a statute of repose. As such, it cannot be applied here because there is no legislative enactment to support such a limitation.

D. The Policy Behind Statutes of Limitations Is Meant to Produce Fairness

Statutes of limitations prevent claimants from sleeping on their rights, and give defendants repose - allowing them to know that the potential for imposition of liability has passed. These statutes, however, are not intended to allow defendants to escape liability which has just newly arisen. Moreover, they are not intended to deprive claimants of their just compensation when they have vigilantly pursued their rights. "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 89 L. Ed. 1628, 65 S. Ct. 1137 (1945).

The policy of judicial economy also is involved. If a

claimant had to file a wrongful death cause of action as soon as an injured party became aware of his or her injury, the court would be faced with nonjusticiable and unprovable cases.

> [I]f such a person is told . . . that a remedy in court will be barred unless an anticipatory action is filed currently, there will be a powerful incentive to go to court, for the consequence of a wait-and-see approach to the commencement of litigation may be too severe to risk. Moreover, a plaintiff's representative in such a case may be motivated to protract and delay once in court so that the full story of his client's condition will be known before the case is set for trial.

Wilson v. Johns-Mansville Sales Corp., 684 F.2d 111, 120-121 (D.C. Cir. 1982) Moreover, the law seeks to take into account the interests generally involved in personal injury and death cases: plaintiff's in obtaining at least adequate compensation, defendant's in paying no more than that. The courts remain courts of justice and apply the law to achieve that justice.

Contrary to defendants' position, the policy behind the statute of limitations is not solely that of repose. If that were

the case, there would be no discovery rule, no abatement of the running of the statute during minority, or any of the other means that extend statutes of limitations. Rather there would be only one statute of limitations for all causes of action, it would be short, and it would have no exceptions. That would insure the defendants' repose; but it would not secure justice.

Justice has competing interests of which repose is only one. The goal of repose is not to allow defendants to avoid newly arisen causes of action. It is to protect them from stale claims brought by claimants who have unnecessarily delayed and sat on their rights. That is not the case here. Mrs. Barabin brought her claim after her husband's death and well within the three years allowed for a wrongful death claim. She had no cause of action for that death until it occurred and she could not have brought her claim until it did.

The multiple policies involved in statutes of limitations seek to reach a balance between discouraging delayed actions

and advancing the cause of justice. They support the interest of claimants in gaining restitution and the interest of defendants in not being subject to stale claims. And they preserve judicial economy by not requiring claimants to file anticipatory claims and then delay their actions awaiting the ultimate death of the injured party. Defendants would tear down that carefully constructed scheme to serve their own goals.

The legislature created a cause of action for the benefit of the decedent's heirs when the death is caused by the "wrongful act, neglect, or default of another." (R.C.W. 4.20.010) The legislature created a statute of limitations of three years to bring such an action. (R.C.W. 4.16.080(2)). That is the law applicable here. Mrs. Barabin did not sit on her rights, she brought the action within the time allotted, and the court below correctly held that the statute of limitations had not run on that action. This court should affirm that ruling.

IV.
CONCLUSION

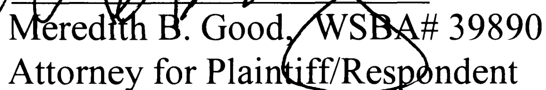
The statutes clearly create a new cause of action for the wrongful death of a person. The statutes also create a three year statute of limitations to bring that wrongful death action. The very dated case law relied upon by defendants to support their position, that the action here was barred by the statute of limitations years before the death occurred, has been shown to be less than convincing. Even the Washington Supreme Court has stated that the issue is an open question.

For all the reasons presented herein this court should affirm the judgment of the trial court and remand this case for trial on the merits.

Dated: July 9th, 2015

Respectfully submitted,

BRAYTON PURCELL, LLP

By: 

Meredith B. Good, WSBA# 39890
Attorney for Plaintiff/Respondent

Certificate of Service

GERALDINE BARABIN, as Personal Representative for the Estate of HENRY Barabin, deceased, v. ASTENJOHNSON, INC., et al.

King County Superior Court Cause No. 14-2-07834-2 SEA
Court of Appeals Division I Cause No. 72626-9-1

I hereby certify that on the below date, I served a true and correct copy of the:

- **RESPONSE TO BRIEF OF APPELLANTS**

on the parties below as follows:

Daniel Ruttenberg, WSBA # 29298 J. Scott Wood, WSBA #41342 Foley & Mansfield PLLP 999 Third Ave., Ste. 3760 Seattle, WA 98104 T: (206) 456-5360 F: (206) 456-5361 asbestos-sea@foleymansfield.com **Attorneys for AstenJohnson, Inc.**	**E-Mail Service Only**
Nicole MacKenzie, WSBA # 45741 Williams Kastner & Gibbs PLLC 601 Union Street, Suite 4100 Seattle, WA 98101-2380 T: (206) 628-6600 F: (206) 628-6611 nmackenzie@williamskastner.com wkgasbestos@williamskastner.com **Attorneys for Scapa Dryer Fabrics, Inc.**	**Fax** ____ **Email (courtesy)** x **Regular Mail** x **Overnight** ____ **Hand Delivery** ____
Court of Appeals - Division I One Union Square 600 University St. Seattle, WA 98101-1176	**Fax** ____ **Email (courtesy)** ____ **Regular Mail** ____ **Overnight** x **Hand Delivery** ____

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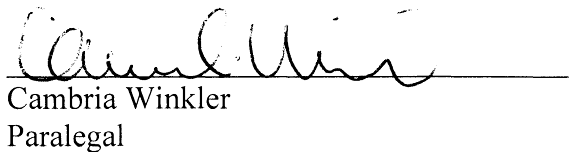
STATE OF WASHINGTON

Dated this 9th day of July, 2015



Cambria Winkler
Paralegal