

FILED
SUPREME COURT
STATE OF WASHINGTON
10/15/2018 11:03 AM
BY SUSAN L. CARLSON
CLERK

No. 96203-1

SUPREME COURT
OF THE STATE OF WASHINGTON

RAMONA C. BRANDES, as Personal Representative of the Estate of
BARBARA J. BRANDES,

Plaintiff-Petitioner,

v.

BRAND INSULATIONS, INC., *et al.*,

Defendant-Respondents.

**PETITIONER'S REPLY TO RESPONDENT PARSONS
GOVERNMENT SERVICE, INC.'S ANSWER**

Matthew P. Bergman
Justin Olson
BERGMAN DRAPER OSLUND
821 Second Avenue, Suite 2100
Seattle, WA 98104
(T) 206-957-9510
Attorneys for Plaintiff-Petitioner

TABLE OF CONTENTS

I. INTRODUCTION 1
II. ARGUMENT 1
III. CONCLUSION..... 5

TABLE OF AUTHORITIES

Cases

Barabin v. AstenJohnson, Inc.,
191 Wn. App. 1007, 2015 WL 6872314 (Div. I 2015).....2

Deggs v. Asbestos Corp. Ltd.,
186 Wn.2d 716, 381 P.3d 32 (2016)..... passim

Euland v. Pengo Hydra-Pull Corp.,
103 Wn.2d 131, 691 P.2d 190 (1984).....5

Hill v. Bartells Asbestos Settlement Tr.,
191 Wn. App. 1027, 2015 WL 7430441 (Div. I 2015).....2

I. INTRODUCTION

Respondent Parsons Government Services, Inc. (“Parsons”) joins Plaintiff in seeking review based on the Court of Appeals’ misapplication of *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 381 P.3d 32 (2016). However, Parsons elevates Respondent Brand’s interpretation of *Deggs* to absurd new heights, arguing that judgment against one defendant in a personal injury claim extinguishes timely wrongful death claims against *other* defendants. Nevertheless, Plaintiff’s and Parsons’s mutual reliance on *Deggs* in seeking review demonstrates why this Court should accept the parties’ invitation to clarify precisely what the holding in *Deggs* says—and what it does not say.

II. ARGUMENT

With very little citation, Parsons argues that “a prior judgment for personal injuries *bars* a later wrongful-death action against *anyone*.” Answer of Resp’t Parsons Government Services, Inc. (“Parsons Answer”) at 7 (emphasis in original). As with the Court of Appeals, Parsons reads too much into the holding of *Deggs*, focusing on dicta over substance. The question in *Deggs* was whether the lapsing of a statute of limitations during the decedent’s lifetime necessarily foreclosed a later wrongful death claim. *Deggs*, 186 Wn.2d at 720, 727. In resolving this narrow issue, the Court discussed the history of wrongful death actions, the

decision by the Washington Legislature to statutorily provide for a new wrongful death cause of action, and the decision of the Courts to enforce two categories of equitable exceptions against such claims. *Id.* at 722-25. The Court did not, as Brand and now Parsons suggest, explore in great detail each avenue of equitable limitation within the two categories.

Since this Court's holding two years ago, the only Washington cases to have substantively applied *Deggs* did so in the context of an expired statute of limitations. *See Hill v. Bartells Asbestos Settlement Tr.*, 191 Wn. App. 1027, 2015 WL 7430441, at *1 (Div. I 2015) (unpublished); *Barabin v. AstenJohnson, Inc.*, 191 Wn. App. 1007, 2015 WL 6872314, at *1 (Div. I 2015) (unpublished). Until the Court of Appeals opinion in the instant case, no court has yet suggested that *Deggs* in any way explored or discussed the "prior litigation" equitable limitation. This is hardly surprising, as the phrase appears just once in the entire opinion. *Deggs*, 186 Wn.2d at 726.

Parsons cites to a footnote in *Deggs* for the rule that there is "something inequitable in allowing the deceased's personal representative to maintain a suit based on injuries that the deceased had already been compensated for." Parsons Answer at 9 (quoting *Deggs*, 186 Wn.2d at 726 n.6). Ironically, the very same footnote contains a precautionary warning that "[u]nfortunate dicta is not unknown at this court." *Deggs*,

186 Wn.2d at 726 n.6. Nevertheless, Parsons insists that this offhand comment in *Deggs*, combined with the lone mention of “prior litigation” as an avenue of equitable limitation, results in a holding that prevents the *accrual* of a cause of action by merely filing a lawsuit. Parsons Answer at 10. From this tortured reading, Parsons makes the extraordinary and unsupported leap to insist “that once the plaintiff pursues prior personal-injury/survival litigation to judgment—no matter the identity of the particular defendants sued or the amount recovered—the limitation bars the wrongful-death claim for *all* potential defendants.” *Id.*

Taken to its logical conclusion, Parsons’s argument leads to absurd results. Under this reading of *Deggs*, a decedent entering into a settlement with one defendant during her lifetime would somehow foreclose wrongful death actions against *all* other non-settling defendants. *See Deggs*, 186 Wn.2d at 726 (listing “prior settlements” as one of the equitable limitations on wrongful death claims). Such a holding cannot be stitched together from any number of footnotes in *Deggs*, especially as the Court’s conclusion cannot be more straightforward: “A wrongful death ‘action accrues at the time of death’ so long as there is ‘a subsisting cause of action in the deceased’ at the time of death.” *Id.* at 732-33 (quotations omitted).

The Court of Appeals concluded that Ms. Brandes had a subsisting cause of action against Parsons at the time of her death. Notably, Parsons does not even attempt to challenge this point, instead arguing that inconsistent judgments may occur from permitting any wrongful death claims against it. Parsons Answer at 11. Contrary to Parsons's fears, the negligence of Brand Insulations shall not be re-litigated in any subsequent litigation. *Id.* The jury already found Brand negligent and the trial court held that this judgment has collateral estoppel effect in the wrongful death proceeding. However, the negligence, if any, of *Parsons* has never been adjudicated and will be addressed for the first time in this proceeding.

Parsons' fear that permitting a wrongful death action would lead to double recoveries is similarly unfounded. As this Court aptly held in *Deggs*, wrongful death claims are derivative of survivorship claims "only in the sense that it derives from the wrongful act causing the death." 186 Wn.2d at 721. In this case, the estate obtained a judgment against Brand for injuries suffered by Ms. Brandes herself prior to her death. In a future wrongful death case, the estate seeks judgment against those defendants against whom Ms. Brandes had a subsisting cause of action at the time of her death. The claims derive from the harm suffered by Ms. Brandes' death itself, and any recovery on the claims shall belong to the statutory beneficiaries, not the estate. *Id.* at 722. There can be no "double

recoveries” for two separate causes of action based on separate harms to separate individuals.

Finally, Parsons advances the peculiar argument that Washington law compels the joining of wrongful death loss of consortium claims with the personal injury claims of a living parent. Parsons Answer at 15 (citing *Euland v. Pengo Hydra-Pull Corp.*, 103 Wn.2d 131, 137, 691 P.2d 190 (1984)). The rule of *Euland* is simply that “claims for loss of parental consortium must be joined with the injured parent’s claim whenever feasible.” 103 Wn.2d at 137. It is thus unclear just what “perverse incentive” Parsons refers to regarding Plaintiffs “strategically reserving the loss-of-parental-consortium claims until after the parent has died.” Parsons Answer at 17. It would be the act of a pessimist to suggest that wrongful death claims, which themselves do not accrue until the plaintiff is deceased, should be joined at the beginning of a living parent’s personal injury claim.

III. CONCLUSION

The equitable limitations on wrongful death actions are few in number and narrow in scope. Certainly, this Court could not have predicted that its thoughtful discussion of the historical underpinnings of wrongful death claims in *Deggs* would result in such confusion. That both Petitioner and Respondent Parsons seek discretionary review is especially

telling. However, the Court of Appeals erred only by expanding the meaning of the “prior litigation” limitation to wrongful death claims. The Court did not err in holding that Ms. Brandes had a subsisting cause of action against Parsons at the time of her death, and thus wrongful death claims against Parsons were not barred.

Just as “*Calhoun* ... contained unfortunate dicta that was promptly clarified in *Grant*,” so too should this Court clarify the “prior litigation” language contained in *Deggs*. *Deggs*, 186 Wn.2d at 726 n.6. Plaintiff-Petitioner requests that the Court grant review of the Court of Appeals’ decision as to its holding regarding defendant Brand only.

RESPECTFULLY SUBMITTED this 15th day of October, 2018.

BERGMAN DRAPER OSLUND, PLLC

By: /s/ Matthew P. Bergman
Matthew P. Bergman, WSBA # 20894
Justin Olson, WSBA # 51332
Attorneys for Petitioner
821 Second Avenue, Suite 2100
Seattle, WA 98104
Phone: (206) 957-9510

CERTIFICATE OF SERVICE

I certify that on October 15, 2018, I caused to be served a true and correct copy of the foregoing document upon:

David A. Shaw
Malika I. Johnson
WILLIAMS KASTNER &
GIBBS, PLLC
601 Union Street, Suite 4100
Seattle, WA 98101

Timothy K. Thorson
Rory D. Cosgrove
Michael B. King
CARNEY BADLEY
SPELLMAN, PS
701 Fifth Avenue, Suite 3600
Seattle, WA 98104

Christopher S. Marks
Erin P. Fraser
Malika Johnson
TANNENBAUM KEALE LLP
601 Union Street, Suite 4253
Seattle, WA 98101

Dated at Seattle, Washington this 15th day of October 2018.

BERGMAN DRAPER OSLUND

/s/ Shane A. Ishii-Huffer

Shane A. Ishii-Huffer

BERGMAN DRAPER OSLUND

October 15, 2018 - 11:03 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96203-1
Appellate Court Case Title: Ramona C. Brandes v. Brand Insulations Inc., et al.
Superior Court Case Number: 15-2-17723-1

The following documents have been uploaded:

- 962031_Answer_Reply_20181015110238SC434462_9045.pdf
This File Contains:
Answer/Reply - Reply to Answer to Petition for Review
The Original File Name was BrandesB_PLD_Petition for Review_Reply to Parsons.pdf

A copy of the uploaded files will be sent to:

- cmarks@tktrial.com
- cosgrove@carneylaw.com
- dbulis@williamskastner.com
- dshaw@williamskastner.com
- efraser@tktrial.com
- glenn@bergmanlegal.com
- justin@bergmanlegal.com
- king@carneylaw.com
- maria.tiegen@sedgwicklaw.com
- mjohnson@tktrial.com
- thorson@carneylaw.com
- wright@sgb-law.com

Comments:

Sender Name: Shane Ishii-Huffer - Email: shane@bergmanlegal.com

Filing on Behalf of: Matthew Phineas Bergman - Email: matt@bergmanlegal.com (Alternate Email: service@bergmanlegal.com)

Address:
821 2nd Avenue
Suite 2100
Seattle, WA, 98104
Phone: (206) 957-9510

Note: The Filing Id is 20181015110238SC434462