Supreme Court No. 91969-1
Court of Appeals Cause No. 71297-7-I

SUPREME COURT
OF THE STATE OF WASHINGTON

JUDY R. DEGGS, as Personal Representative for the Estate of RAY GORDON SUNDBERG, deceased,

Appellant,

v.

ASBESTOS CORPORATION LIMITED, et al.,

Respondents.

RESPONDENTS ASBESTOS CORPORATION LIMITED, INGERSOLL RAND COMPANY, AND ASTENJOHNSON INC.'S ANSWER TO BRIEF OF AMICUS CURIAE BERGMAN DRAPER LADENBURG PLLC

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I. IDENTITY OF RESPONDENTS

Respondents Asbestos Corporation Limited (ACL), AstenJohnson Inc. (AstenJohnson), and Ingersoll Rand Company (Ingersoll Rand) (collectively "Respondents") jointly submit this brief in opposition to the Brief of Amicus Curiae Bergman Draper Ladenburg PLLC regarding Appellant Judy R. Deggs's Petition for Review.

II. COURT OF APPEALS DECISION

A copy of the decision affirming summary judgment for Respondents, dated June 22, 2015, was included in the Appendix to Respondents' Answer to the Petition for Review.

III. ISSUE ON REVIEW

The issue raised by Petitioner is whether the Court of Appeals correctly applied this Court's precedent in *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 44 P.2d 193 (1935); *Calhoun v. Washington Veneer Co.*, 170 Wn. 152, 159-60, 15 P.2d 943 (1932); and *Johnson v. Ottomeier*, 45 Wn.2d 419, 422-23, 275 P.2d 723 (1954) and held that the trial court properly granted summary judgment for Respondents on Petitioner's wrongful death claims because there was no valid cause of action against Respondents at the time of Decedent's death.

IV. STATEMENT OF THE CASE

Respondents incorporate by reference the statement of the facts in the Courts of Appeals decision and their Answer to the Petition for Review. In addition, Respondents note the following key facts.

First, the Bergman firm's suggestion that that the long latency period for asbestos-related diseases and the different types of asbestos-related disease make it difficult for injured parties to know when they have a right to bring a claim for damages is wholly immaterial under the actual facts of this case. *See* Amicus Br. at 1-2, 5. The discovery rule is not at issue in this case, and the Court of Appeal's decision in no way affects the application of the discovery rule. Here, it is undisputed that Decedent, his spouse (who was also a plaintiff in the 1999 personal injury lawsuit and is a potential statutory beneficiary under the wrongful death statute), and Petitioner (who is his daughter, the personal representative of his estate, and also a potential statutory beneficiary under the wrongful death statute) knew or should have known they had claims for damages against Respondents[1] in 1999 when Decedent and his spouse brought their personal injury action. It is also undisputed that Petitioner, as Decedent's daughter, could have brought a claim for her own damages against Respondents in 1999 under *Ueland v. Reynolds Metals Co.*, 103 Wn.2d

[1] Respondent ACL was also a defendant in the 1999 Lawsuit.

131, 140-141, 691 P.2d 190 (1984). Moreover, both the 1999 lawsuit and the 2012 lawsuit were based on the exact same injuries, as both alleged the exact same asbestos-related diseases. CP at 144-163, 182-213, 216-243, 336-381. Thus, the parties in this case knew in 1999 that they had rights to assert claims against Respondents *and* for the same asbestos-related injuries as alleged in the 2012 Lawsuit. Accordingly, this case does not involve the circumstance raised by the Bergman firm where an injured person does not know that he or she has a right to sue a defendant for asbestos-related injuries.

Second, Respondents note that prior to the Court of Appeals' decision, the Bergman firm raised virtually the same arguments in the amicus brief that it previously filed in support of the Petitioner's Motion to Transfer under RAP 4.4 that this Court denied. Thus, this Court has already found those arguments unpersuasive when it previously decided against reviewing this appeal.

V. ARGUMENT

A. There Is No Conflict Among Washington Appellate Decisions.

The amicus brief simply raised the same arguments made by Petitioner in her brief. Like the Petition, the amicus brief rests up on the same false premise that there is a Washington appellate decision which actually conflicts with this Court's long-established precedent that there is

no viable wrongful death action if the injured party had no valid and existing cause of action based on the same injuries and wrongful conduct at the time of death. *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 44 P.2d 193 (1935); *Johnson v. Ottomeier*, 45 Wn.2d 419, 422-23, 275 P.2d 723 (1954); *Calhoun v. Washington Veneer Co.*, 170 Wn. 152, 159-60, 15 P.2d 943 (1932). These cases interpreted the same wrongful death statute that has remained substantively unchanged.[2] The Court of Appeals' decision is a straightforward application of this Court's precedent. This rule of law has existed for over eighty years, and for over eighty years, the Washington Legislature has acquiesced in that precedent. *City of Federal Way v. Koenig,* 167 Wn.2d 341, 348, 217 P.3d 1172 (2009); *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *Friends of Snoqualmie Valley v. King Cnty. Boundary Review Ed.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992)); *see State v. Kier,* 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (recognizing that Washington follows the doctrine of *stare decisis*) (citing *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006)).

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[2] Washington's wrongful death statute, formerly codified as Rem. Comp. Stat. § 183 and now codified as RCW 4.20.010 and RCW 4.20.020, has remained substantively unchanged since its enactment in 1917. *Compare* 1917 Sess. Laws ch. 123, §§ 1-4 *and* Rem. Comp. Stat. § 183 *with* RCW 4.20.010 (adding gender-neutral language and a comma) *and* RCW 4.20.020 (adding adult brothers, stepchildren, and domestic partners as possible statutory beneficiaries).

Again, none of the cases cited by the amicus brief actually conflict with the Court of Appeals' decision or *Calhoun*, *Grant,* and *Johnson.* This is because none of the amicus's case address the situation presented here: a decedent and his or her family fail to bring a personal injury action within the statute of limitations during the decedent's lifetime, and the family later attempts to later bring a wrongful death claim for the same injury. None even purport to address, much less rebut, the "well-recognized limitation" to the general rule that wrongful death actions accrue upon death except where "no subsisting cause of action" exists at the time of the decedent's death. *Grant*, 181 Wn. at 580-81.

The Bergman firm again cites *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 166 P.3d 662 (2007), but the issue of the whether the decedent had a subsisting cause of action at the time of death was not addressed in that case. Rather, the only issue in Atchison was the Court's holding that the three-year statute of limitations for the wrongful death action itself barred the action because the personal representatives had waited to bring the wrongful death claims until more than three years after death. *Id.*

Once again, the Bergman firm also cites *Huntington v. Samaritan Hosp.*, 101 Wn.2d 466, 680 P.2d 58 (1984), but like *Atchison*, that case had nothing to do with whether a decedent had a subsisting cause of action

at the time of death. Rather, the sole issue in *Huntington* was whether the wrongful death statute of limitations tolled during the minority of the statutory beneficiaries. *Id.* In fact, there was no issue regarding whether the statute of limitations had run on the decedent's claims because the decedent died within hours of the negligent act. *Id.* Neither *Atchison* nor *Huntington* nor any other case cited by the Bergman involved the situation here.[3] There is no conflict.

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[3] The Bergman firm once again cites the trial court's order denying summary judgment for defendants in *Dietz v. Crane Co.*, Pierce County Superior Court No. 10-2-14227-1. However, the Bergman firm neglects to note that the grounds on which the Court of Appeals promptly granted discretionary review was that "[t]he superior court has committed an obvious error which would render further proceedings useless" under RAP 2.3(b)(1). *See* Appendix (Ruling Granting Review, dated October 3, 2011, from *Sandra Elton, as Personal Representative for the Estate of Daniel Dietz, et al. v. Crane Co., et al.*, No. 42392-8-II). The Bergman firm also fails to advise the Court that the appeal was dismissed when its clients agreed to dismiss their claims against the appealing defendants once the Court of Appeals granted review. Thus, the single trial court order to which the Bergman firm points in an attempt to create the impression of a conflict on this issue was promptly taken up by the Court of Appeals based on the trial court's "obvious error," at which point the wrongful death claims were voluntarily dismissed.

Moreover, the Ruling Granting Review in *Dietz* rejected the exact same arguments raised here that was a conflict between *Calhoun* line of cases and the cases citing the general rule that wrongful death claims accrue at the time of death:

> Elton responds that several cases after *Calhoun* have stated that a wrongful death claim accrues no sooner than the moment of death, and thus *Calhoun*'s precedential value is limited. Elton is correct that several post-*Calhoun* cases acknowledge the general rule that the "wrongful death action 'accrue[s]' at the time of death." *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 349, 693 P.2d 687 (1985) (quoting *Dodson*, 159 Wn. at 598-99). However, none of those cases address [the] scenario presented here: a decedent's failure to bring a personal injury suit within the statute of limitations during his life, and the attempt to later bring such a claim as a wrongful death claim. This situation was recognized as a "well-recognized limitation" to the rule that a cause of action for wrongful death accrues at death, and that exception has not been disturbed by any court of this state. *Grant*, 181 Wn. at 581. Elton does not point to, nor can this court

B. This Court Has Long Recognized Other Circumstances in Which Decedents' Conduct During Their Lifetime Extinguish or Limit Wrongful Death Actions.

The amicus also fails to acknowledge the other circumstances in which a decedent's action or inaction during his or her lifetime may preempt the accrual of a personal representative's wrongful death cause of action. As this Court has consistently recognized, the expiration of the statute of limitations during the decedent's lifetime is not only the circumstance in which a wrongful death action cannot accrue because there was no "subsisting cause of action in the deceased" at the time of death. *Grant*, 181 Wn. at 580-81. Rather, no wrongful death action can accrue when the deceased executed a release or obtained a judgment during his or her lifetime. *Grant*, 181 Wn. at 580-81; *see Johnson*, 45 Wn.2d at 422-23; *Calhoun*, 170 Wn. at 159-60; *Brodie v. Washington Water Power Co.*, 92 Wn. 574, 159 P. 791 (1916). Moreover, this Court has held that certain conduct by the decedent *at the time* of the alleged tort precludes a wrongful death cause of action from accruing as a matter of law, even though the decedent's injuries later resulted in death. *Johnson*, 45 Wn.2d at 422-23 (citing, *inter alia*, *Hart v. Geysel*, 159 Wn. 632, 294

> find, any Washington case after *Calhoun* addressing this factual scenario. Nor is *Calhoun* undermined by the cases to which Elton cites. Therefore, *Calhoun*, as the sole Washington case to address the factual scenario presented here, appears to control.

Ruling at 5-6 (footnote omitted). The same reasoning applies here.

P. 570 (1930) (decedent consented to prize fight); *Ryan v. Poole*, 182 Wn. 532, 536, 47 P.2d 981 (1935) (decedent injured while engaged in unlawful and criminal acts)). Thus, this Court has recognized that a variety of conduct by the decedent during his or her lifetime may extinguish or diminish the statutory beneficiaries' right to recover. *See, e.g., Upchurch v. Hubbard*, 29 Wn.2d 559, 564, 188 P.2d 82 (1947) ("A limitation upon such independently created right, recognized by this court and elsewhere generally, is that the wrongful act or default must be of such character as would have entitled the injured person to maintain an action and recover damages, had not death ensued; stated conversely, if the deceased never had a cause of action, no right of action accrues under the wrongful death statute."); *Ginochio v. Hesston Corp.*, 46 Wn. App. 843, 845, 846, 733 P.2d 551, 553 (1987) (citing Washington State Senate Select Comm. on Tort & Prod. Liab. Reform, *Final Report 1981*, at 48, with respect to diminishment of derivative wrongful death claim based on decedent's contributory fault). There is no logical reason to treat an expired statute of limitations any differently.

C. This Appeal Presents No Issues of Significant Public Importance.

Finally, contrary to the amicus's arguments, there is no issue of significant public importance because Decedent, Petitioner, and the other

statutory beneficiaries already received a full and fair opportunity to seek the same damages for the same injuries from the same defendants in the 1999 lawsuit. In the 1999 Lawsuit, Decedent, his spouse, and Petitioner had the opportunity to bring an action against Respondents for the same injuries and the same damages as alleged in the wrongful death action, including but not limited to noneconomic damages for *the family members' own loss* due to Decedent's alleged terminal illnesses.[4] Decedent and Petitioner then slept on their rights for over a decade, which substantially prejudiced Respondents by depriving them of their ability to depose Decedent or conduct other needed discovery. The Court of Appeals' decision creates no injustice or unreasonable result. Again, this is a run-of-the-mill application of statute of limitations, not a case of great public importance.

VI. CONCLUSION

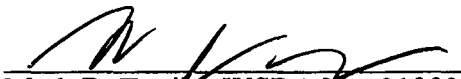
The amicus cannot cite any Washington appellate decisions that actually conflict with the Court of Appeals' decision applying long-established Washington Supreme Court precedent. This Court has recognized several other instances in which decedents' actions or inactions

[4] *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 140-141, 691 P.2d 190 (1984) ("[W]e hold that a child has an independent cause of action for loss of the love, care, companionship and guidance of a parent tortiously injured by a third party. This separate consortium claim must be joined with the parent's underlying claim unless the child can show why joinder was not feasible.").

during their lifetime preclude the accrual of a wrongful death action. As this case only involves the situation where decedents and their families had already received a full and fair opportunity to seek the same damages for the same injuries from the same defendants, there is no issue of significant public importance. Accordingly, review is not warranted.

DATED this 2nd day of November, 2015.

GORDON & REES LLP



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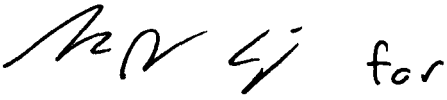

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DATED this 2nd day of November, 2015.

Loida Cifra Gallegos

Supreme Court No. 91969-1
Court of Appeals Cause No. 71297-7-I

SUPREME COURT
OF THE STATE OF WASHINGTON

JUDY R. DEGGS, as Personal Representative for the Estate of RAY GORDON SUNDBERG, deceased,

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ASBESTOS CORPORATION LIMITED, et al.,

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APPENDIX TO RESPONDENTS ASBESTOS CORPORATION LIMITED, INGERSOLL RAND COMPANY, AND ASTENJOHNSON INC.'S ANSWER TO BRIEF OF AMICUS CURIAE BERGMAN DRAPER LADENBURG PLLC

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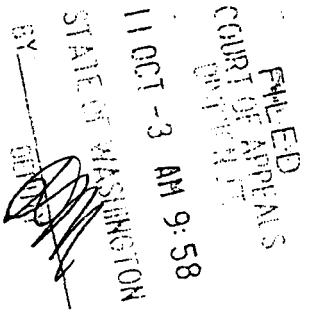
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II



SANDRA ELTON, as Personal Representative of the Estate of DANIEL DIETZ; SHIRLEY D. NALL, individually and as Personal Representative of the Estate of ALVIN W. NALL; and JOHN CARNAHAN, as Personal Representative of the Estate of CHARLES DANIEL SOPER,

Respondent,

v.

CRANE CO., CHAPMAN VALVE CO. and DEMING PUMPS; and SALMON BAY SAND AND GRAVEL COMPANY,

Petitioners.

No. 42392-8-II

RULING GRANTING REVIEW

Salmon Bay Sand and Gravel Company (SBSG) and Crane Co. (Crane) seek discretionary review of the trial court's orders denying their motion for summary judgment and their subsequent motion for reconsideration. Concluding that review is appropriate under RAP 2.3(b)(1), this court grants review.

Daniel Dietz (Dietz) was diagnosed with asbestosis in February 2003. In January 2005, he brought a claim against 28 defendants, not including SBSG

and Crane, for damages for personal injury from his having developed asbestosis. In May 2007, he sued the Bartells Asbestos Settlement Trust alleging the same claims. He died on February 23, 2009.

On October 10, 2010, Sandra Elton, as Dietz's personal representative, brought wrongful death and survivorship actions against SBSG and Crane. SBSG and Crane moved for summary judgment, claiming that the statute of limitations had expired on both Elton's survivorship and wrongful death claims. On May 20, 2011, the trial court granted SBSG and Crane's motion for summary judgment as to the survivorship action, but denied it as to the wrongful death action. The court denied their subsequent motion for reconsideration and they now seek discretionary review.

This court may only grant discretionary review when:

> (1) The superior court has committed an obvious error which would render further proceedings useless;
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

SBSG and Crane seek review under RAP 2.3(b)(1) and (b)(2), arguing that the trial court applied the incorrect accrual date for the wrongful death claims

and thus committed obvious or probable error when it concluded that the statute of limitations on those claims had not yet expired. They contend that if the statute of limitations for a personal injury claim expires within the decedent's lifetime, his personal representative will be barred from bringing the same claim as a wrongful death suit. Elton responds that the trial court did not err because an essential element of a wrongful death claim is a death, and therefore a claim can accrue no earlier than when the decedent dies.

The wrongful death statute allows a decedent's "personal representative [to] maintain an action for damages" when the death "is caused by the wrongful act, neglect, or default of another." RCW 4.20.010. The statute of limitations for such a claim is found at RCW 4.16.080(2), which provides a plaintiff a limit of three years in which to sue. *See Dodson v. Continental Can Co.*, 159 Wn. 589, 592, 294 P. 265 (1930) (citing REM. COMP. STAT. § 155, 159 (1917)). When that three-year period begins is at issue in this case.

The general rule is that the decedent's death triggers the right to bring a wrongful death claim. *Dodson*, 159 Wn. at 596-97. That rule, however, is subject to an exception: "at the time of death there must be a subsisting cause of action in the deceased." *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 581, 44 P.2d 193 (1935). Therefore, a wrongful death claim may be barred as a result of:

> an effective release executed by the deceased in his lifetime . . . [;] a judgment in his favor rendered during his lifetime . . . [; or] the failure of the deceased to bring an action for injuries within the period of limitation.

Grant, 181 Wn. at 581 (internal citations omitted). The Supreme Court recognized that it would be inequitable to allow a wrongful death claim under such circumstances. *Johnson v. Ottomeier*, 45 Wn.2d 419, 422-23, 275 P.2d 723 (1954).

SBSG and Crane argue that the holding of *Calhoun v. Washington Veneer Co.*, 170 Wn. 152, 15 P.2d 943 (1932), compels the conclusion that the statute of limitations in this case began to run upon Dietz's February 2003 asbestosis diagnosis. In that case, Calhoun sued Washington Veneer Company in September 1931, alleging personal injury from carbon bisulphide poisoning he received in May 1928. *Calhoun*, 170 Wn. at 159. Calhoun died on October 17, 1931 as a result of his injuries, and the administrator of his estate was substituted as plaintiff. *Calhoun*, 170 Wn. at 154. An amended complaint asserted wrongful death,[1] among other claims. *Calhoun*, 170 Wn. at 160. The court held that Calhoun's failure to bring a personal injury claim against the defendants within three years of May 1928—the date of his injury—barred the administrator from pursuing the wrongful death action. *Calhoun*, 170 Wn. at 160. The *Calhoun* court looked to a United States Supreme Court case interpreting a similar statute and coming to the same result. *See Flynn v. New York, New Haven & Hartford R.R. Co.*, 283 U.S. 53, 51 S. Ct. 357, 75 L. Ed. 2d 837 (1931).

[1] The statute under which Calhoun's administrator brought the wrongful death action has remained virtually unchanged. *Compare* Rem. Comp. Stat. § 183 *with* RCW 4.12.010.

Elton responds that several cases after *Calhoun* have stated that a wrongful death claim accrues no sooner than the moment of death, and thus *Calhoun*'s precedential value is limited. Elton is correct that several post-*Calhoun* cases acknowledge the general rule that the "wrongful death action 'accrue[s]' at the time of death." *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 349, 693 P.2d 687 (1985) (quoting *Dodson*, 159 Wn. at 598-99). However, none of those cases address scenario presented here: a decedent's failure to bring a personal injury suit within the statute of limitations during his life, and the attempt to later bring such a claim as a wrongful death claim. This situation was recognized as a "well-recognized limitation" to the rule that a cause of action for wrongful death accrues at death, and that exception has not been disturbed by any court of this state. *Grant*, 181 Wn. at 581. Elton does not point to, nor can this court find, any Washington case after *Calhoun* addressing this factual scenario. Nor is *Calhoun* undermined by the cases to which Elton cites.[2]

[2] Elton's reliance on *White v. Johns-Manville Corp.*, 103 Wn.2d at 349, is misplaced because it applied the "discovery rule" to a wrongful death claim, holding that the cause of action accrued after the decedent's death, when the cause of death was discovered. *Wills v. Kirkpatrick*, 56 Wn. App. 757, 760, 785 P.2d 834, *review denied*, 114 Wn.2d 1024 (1990), is also inapposite because it addressed whether the eight-year medical malpractice statute of limitations or the three-year personal injury statute of limitations applied to a wrongful death suit claiming medical malpractice. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 166 P.3d 662 (2007), involved the court's determination of whether the statute of limitations is tolled by the decedent's heir's infancy, and is inapplicable here. Finally, Elton cites to cases involving the murder of a decedent that do not apply here because the statute of limitations for a personal injury claim could not expire before those individuals' deaths. *See In re Estates of Hibbard*, 118 Wn.2d 737, 826 P.2d 690 (1992); *Allen v. State*, 118 Wn.2d 753, 826 P.2d 200 (1992).

Therefore, *Calhoun*, as the sole Washington case to address the factual scenario presented here, appears to control.

Elton next argues that *Grant*'s interpretation of *Calhoun* is dictum. "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." *Pierson v. Hernandez*, 149 Wn. App. 297, 305, 202 P.3d 1014 (2009) (quotations omitted). *Grant*, like *Calhoun*, involved a decedent who had brought a personal injury claim during his lifetime. *Grant*, 181 Wn. at 577. The cause of action was continued as a wrongful death action after he died. *Grant*, 181 Wn. at 577. However, the *Grant* court was compelled to distinguish *Calhoun* because unlike in *Calhoun*, the plaintiff in *Grant* had a "valid subsisting cause of action" as to which the statute of limitations had not run at the time of his death. *Grant*, 181 Wn. at 582. Thus, both cases involved a departure from *Dodson*'s general rule that a wrongful death claim accrues upon the decedent's death. Distinguishing *Calhoun* and reconciling it with *Dodson* was necessary for the *Grant* court to conclude that the wrongful death claim accrued before the decedent's death, but that it was not barred by the statute of limitations. This analysis "relate[d] to an issue before the court" and was necessary to decide the case, and thus it was not dictum. *Pierson*, 149 Wn. App. at 305.

The trial court appears to have determined that the cause of action for Elton's wrongful death claim accrued upon Dietz's death, despite the fact that Dietz, during his lifetime, failed to sue SBSG and Crane within the statute of limitations. If the court erred in denying the motion for summary judgment, then

SBSG and Crane will be required to participate in a trial that will have been useless as to it. That potential supports appellate review at this time. *See Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 883, 652 P.2d 948 (1982). Accordingly, it is hereby

ORDERED that SBSG and Crane's motion for discretionary review is granted. The Clerk will issue a perfection schedule.

DATED this 3rd day of October, 2011.

Eric B. Schmidt
Court Commissioner

cc: Tami Becker Gómez
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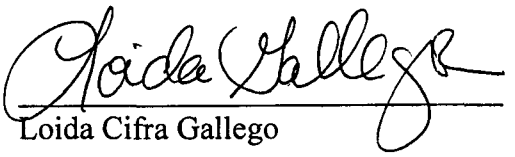
DATED this 2nd day of November, 2015.



Loida Cifra Gallego

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Please find attached Respondents Asbestos Corporation Limited, Ingersoll Rand Company, and AstenJohnson Inc.'s Answer to Brief of Amicus Curiae Bergman Draper Ladenburg PLLC and the Appendix to Respondents Asbestos Corporation Limited, Ingersoll Rand Company, and AstenJohnson Inc.'s Answer to Brief of Amicus Curiae Bergman Draper Ladenburg PLLC. Please let me know if you have any problems with opening the attached.

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