

No. 71297-7

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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

Appellant,

v.

ASBESTOS CORPORATION LIMITED, et al.,

Respondents.

REPLY BRIEF OF APPELLANT

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APPELLANT'S REPLY BRIEF
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I.
INTRODUCTION

There is no dispute about the facts of this matter or its procedural history. There is a single issue involved – the proper application of the wrongful death statute to the facts of this case. Did the statutory time allowed for Ray Sundberg’s personal representative to bring an action for Sundberg’s wrongful death expire **before** Ray Sundberg’s death? Can an action specifically stated to be a new and separate action “for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren” of the decedent¹ be barred before that death occurs?

A simple logical reading of the issue leads to one inescapable conclusion. No! A wrongful death action cannot accrue before the

¹ RCW 4.20.020

death occurs.² And if it can't accrue until then, the statute of limitations for bringing the action cannot begin to run any earlier than the date of death.

In this matter, the wrongful death action was initiated nineteen months after the date of Ray Sundberg's death – well within the three year statute of limitations. The trial court's determination that the action was barred by the statute of limitations was error. It creates the illogical conclusion that, as a matter of law, Sundberg's personal representative would have had to initiate the action before Sundberg died and before she could legally have been named the personal representative. This is error which must be reversed by this court.

² *Nestelle v. Northern Pac. R. Co.*, 56 F. 261, 262 (9th Cir. 1893); *Rentz v. Spokane Cy*, 438 F. Supp.2d 1252, 1258 (E.D. Wash. 2006); *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 378-79, 166 P.3d 662 (2007) (“the rule is settled: wrongful death actions accrue at the time of death”).

II.

LEGAL ARGUMENT

There is no question that a wrongful death action under RCW 4.20.010, is a creature of statute, that may *only* be brought by the personal representative of the estate of the person tortiously killed. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007).³ It is not a survival action, but rather a distinct statutory cause of action. Obviously, a personal representative will only be appointed once a will is admitted to probate upon a person's death or a person dies intestate.

It has long been the rule in Washington that a wrongful death cause of action does not accrue at least until the death of the person tortiously killed. *Nestelle v. Northern Pac. R. Co.*, 56 F. 261, 262 (9th Cir. 1893); *Rentz v. Spokane Cy*, 438 F. Supp.2d 1252, 1258

³ RCW 4.20.010 states:

When the death of a person is caused by the wrongful act, neglect, or default of another his or her *personal representative* may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony. (emphasis added). RCW 4.20.020 specifies the beneficiaries of this action.

(E.D. Wash. 2006); *Atchison*, 161 Wn.2d at 378-79, (“the rule is well settled: wrongful death actions accrue at the time of death”). In fact, under the discovery rule, the cause of action does not accrue until the personal representative knew or should have known all of the essential elements of the claim, including that the decedent died as a result of exposure to asbestos. *White v. Johns Manville Corp.*, 103 Wn.2d 344, 352-53, 693 P.2d 687 (1985).⁴

There is little question under Washington law that the decedent’s death is an essential prerequisite to a wrongful death claim. *Nelson v. Schubert*, 98 Wn. App. 754, 759-61, 994 P.2d 225 (2000) (holding the plaintiff had no legal right to pursue a wrongful death claim until decedent daughter had been missing for seven years, when the statutory presumption of death arose). In effect, the death of the decedent is a condition precedent to the running of the statute of limitations for wrongful death claims in Washington.

Indeed, in *Wills v. Kirkpatrick*, 56 Wn. App. 757, 762, 785 P.2d 834,

⁴ The statutory limitation period is three years from the accrual of the wrongful death claim. RCW 4.16.080(2); *Atchison*, 161 Wn.2d at 377; *Dodson v. Continental Can Co.*, 159 Wash. 589, 592, 294 Pac. 265 (1930).

review denied, 114 Wn.2d 1024 (1990), the defendant argued that the decedent's personal representative should be barred from pursuing a wrongful death claim. The defendant reasoned that if the decedent had lived, her claim for personal injuries would have been barred under the medical malpractice statute of limitations. The Court of Appeals rejected this argument, ruling that the wrongful death statute of limitations applied exclusively because the medical malpractice statute referred only to "personal injury." The Court held that the statute of limitations began to run *at the date of death*, not the date of the underlying harm, stating:

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.

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.

Id. at 762-63.

A. The Plaintiff's Action is Not Barred by the Statute of Limitations

Despite the clear rule in Washington that death is a condition precedent to the accrual of a wrongful death claim, the respondents rely on old decisions, *Grant v. Fisher Flouring Mills*, 181 Wash. 576, 44 P.2d 193 (1935), and *Calhoun v. Washington Veneer Co.*, 170 Wash. 152, 15 P.2d 943 (1932), in support of their contention that Deggs' wrongful death action was untimely. As shown extensively in Deggs' opening brief, neither of those cases dictate this result. Further, *Dodson v. Continental Can Co.*,^{supra}, an en banc decision of the Supreme Court, clearly concluded that a wrongful death cause of action accrues upon the death of the tortfeasor's victim. 159 Wash. at 598-99.

Respondents' claims, that Washington law in this matter is "clear and longstanding," are definitely refuted by a recent decision by Judge James Robarts in *Barabin v. Asten Johnson, Inc.*, 2014 U.S. Dist. LEXIS 89035 (W.D. Wash. 2014). Judge Robarts observed

that the issue of the accrual of a wrongful death cause of action under RCW 4.20.010 is *unsettled under Washington law*:

The court concludes that, although Defendants may well ultimately prove to have a viable statute of limitations defense, this defense is by no means obvious according to the settled rules of Washington State. *See Ritchey*, 139 F.3d at 1319. The few published cases defendants have marshaled to support their theory are outdated: they were decided 85, 82, and 60 years ago. *See Calhoun*, 15 P.2d at 946; *Grant*, 44 P.2d at 195; *Johnson*, 275 P.2d at 725. Of the three, only *Grant* addresses the issue squarely. The language in *Johnson* is dicta, and therefore not controlling. 275 P.2d at 725. Both *Calhoun* and *Grant* were decided in the context of now-repealed employment laws such as the “Factory Act” and without the benefit of the current wrongful death statute, RCW 4.20.010. *See Calhoun*, 15 P.2d at 946; *Grant*, 44 P.2d at 195.

Most importantly, rather than following *Grant*, the Washington Supreme Court has since stated that the time at which a wrongful death claim accrues to a decedent who was aware of his personal injury claim is an open question. Specifically, in evaluating the application of the discovery rule to wrongful death claims, the Washington Supreme Court clarified:

[W]e 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.

White, 693 P.2d at 690. Inasmuch as defendants have failed to identify a single published opinion since *White* concerning this issue, it appears that the issue remains unresolved.

Id. at *10-12.

Further evidence in support of Deggs' position here is provided by *Wills v. Kirkpatrick*, 56 Wn. App. 757, 785 P.2d 834, 837 (Wash. Ct. App. 1990). As noted above, in that case the court reasoned that the wrongful death statute of limitations must apply because otherwise "we would have the situation where such a claim could be barred even before death triggers accrual of the right to bring the action." *Wills*, 785 P.2d at 837. The court concluded: "Such a result seems to us illogical and unjust." *Id.*

Yet, this is just the illogical and unjust result that the trial court produced here and that respondents seek to have this court

preserve. But that is inconsistent with the statutory scheme created by the legislature and interpreted by the Supreme Court. The Washington Supreme Court has made clear that wrongful death claims are separate and distinct causes of action from survival claims. *Bowers v. Fibreboard Corp.*, 66 Wn. App. 454, 832 P.2d 523, 526 (Wash. 1992). The wrongful death statute, RCW 4.20.010, and the survival statute, RCW 4.20.046, advance different goals and result in different damages. The “purpose of the wrongful death statute is to compensate certain relatives of the deceased for injuries to their pecuniary interest . . . [which includes], in addition to monetary contributions, compensation for the loss of other services such as the love, affection, care, companionship, society and consortium of the deceased spouse.” *Bowers, supra*, 832 P.2d at 526 (internal citations and punctuation omitted). The survival action allows the personal representative, acting on behalf of certain specified surviving relatives, to recover for the **decedent's** damages. In other words, “the survival statute continues the cause of action of the decedent for the damages which the decedent could have claimed had the death not occurred.” *Id.* As the District Court noted in *Barabin*:

The fact that survival actions exist to perpetuate personal injury claims on behalf of a decedent militates against linking the accrual of a wrongful death claim for the benefit of third parties to the accrual of the underlying personal injury claim.

Barabin, supra, at 15-16.

Respondents argue that the trial court properly followed the majority rule that plaintiff's action is barred by the running of the personal injury statute of limitations. RB at 24 *et seq.* For support they rely on *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343 (Tex. 1992) and *Flynn v. New York, New Haven & Hartford R.R.*, 283 U.S. 53; 51 S.Ct. 357; 75 L.Ed. 837 (1931). Deggs already addressed the *Flynn* case in her opening brief and explained why its holding is inapplicable here. But the Respondents' brief highlights a significant fact in both *Flynn* and *Russell* which distinguishes them from Washington cases. In *Russell*, the court explained:

We have consistently held that the right of statutory beneficiaries to maintain a *wrongful death action is entirely derivative* of the decedent's right to have sued for his own injuries immediately prior to his death, and is subject to the same defenses to which the decedent's action would have been subject. (emphasis added)

Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 347 (Tex. 1992)

Similarly, the U.S. Supreme Court in *Flynn*, as cited by the Respondents at page 26 of their brief, stated:

Obviously Flynn's right of action was barred, but it is argued that the right on behalf of the widow and children is distinct; that their cause of action could not arise until Flynn's death, and that therefore the two years did not begin to run until September 1, 1928. But the argument comes too late. It is established that *the present right, although not strictly representative, is derivative* and dependent upon the continuance of a right in the injured employee at the time of his death.

Flynn, supra, 283 U.S. 56. (emphasis added)

This determination that the wrongful death actions created by the Texas wrongful death statute and the Federal Employer's Liability Act are *derivative* actions, is directly contrary to the interpretation given to Washington's wrongful death statute. Our courts have routinely stated the fact that:

"The object and purpose of these [wrongful death] statutes is to provide a remedy whereby the family or relatives of the deceased, who might naturally have expected maintenance or assistance from the deceased, had he lived, may recover compensation from the wrongdoer commensurate with the loss sustained."

By the great weight of authority, such statutes are not "survival statutes," but create a new cause or right of

action. 16 Am. Jur. 48, Death, § 61; 25 C. J. S. 1077, Death, § 15. This court has adopted that principle. *Brodie v. Washington Water Power Co.*, 92 Wash. 574, 159 Pac. 791; *Crevelli v. Chicago, Milwaukee & St. P. R. Co.*, 98 Wash. 42, 167 Pac. 66, 66 L. R. A. 1918A, 206; *Grant v. Fisher Flouring Mills Co.*, 181 Wash. 576, 44 P. (2d) 193; *Ryan v. Poole*, 182 Wash. 532, 47 P. (2d) 981; *Maciejczak v. Bartell*, 187 Wash. 113, 60 P. (2d) 31.

Upchurch v. Hubbard, 29 Wn.2d 559, 563-564 (Wash. 1947)

A claim for damages to a decedent or the decedent's estate is dependent upon the survival statutes to continue the injured person's claim after the death as an asset of his estate. A claim arising out of the same wrongful act, for wrongful death for the benefit of the decedent's heirs or next of kin, is not one that belonged to the decedent, but is a new cause of action created by statute and based upon the death itself. *Warner v. McCaughan*, 77 Wn.2d 178, 460 P.2d 272 (1969).

Though a number of states, as cited by the Respondents, may hold that the derivative action is barred by the decedent's inability to sue, many others do not. As the District Court observed in *Barabin*,

our sister state of Idaho has rejected the argument that the accrual of a wrongful death cause of action is affected by the accrual of a personal injury claim. *Castorena v. Gen. Elec.*, 238 P.3d 209, 220 (Idaho 2010) (finding that the fact the statute of limitations had run against decedent's personal injury claim did not bar a wrongful death suit because "the action created by Idaho's Wrongful Death Act is more than a mere survival action; it provides compensation for the harm that heirs experience due to the decedent's death... As the actionable wrong for a wrongful death action is not complete until the death of the decedent, the statute of limitations does not begin running until that time."⁵)

⁵ See also, *Mummert v. Alizadeh*, 77 A.3d 1049 (Md. 2013) (wrongful death action a distinct statutory cause of action that was not contingent on patient's right to sue physician for malpractice); *Saul ex rel. Heirs of Cook v. S. Cent. Reg'l Med. Ctr., Inc.*, 25 So.3d 1037, 1040 (Miss. 2010) ("The statute of limitations for wrongful-death claims, however, cannot begin to run until, at earliest, the date of death.") (internal punctuation omitted); *Carroll v. W.R. Grace & Co.*, 830 P.2d 1253, 1255 (Mont. 1992) (wrongful death action accrues at death of tort victim); *James v. Phoenix Gen. Hosp., Inc.*, 744 P.2d 695, 705 (Ariz. 1987) ("The wrongful death cause of action can accrue only at the death of the party injured."); *Farmers Bank & Trust Co. of Bardstown v. Rice*, 674 S.W.2d 510, 512 (Ky. 1984) ("[T]he statute of limitations for wrongful death actions runs from the death of the decedent, even though there was no viable action for personal injury or medical negligence or

Because Washington's wrongful death statute is a new cause of action not dependent on the deceased's cause of action, the statute of limitations cannot begin to run until that cause of action accrues -- at the time of death. It is not affected by the status of the decedent's personal injury cause of action or its statute of limitations.

malpractice at the time of death."); *Gilloon v. Humana, Inc.*, 687 P.2d 80, 82 (Nev. 1984) ("The death of the decedent being an essential element of the cause of action for wrongful death, there can be no legal injury until the death has occurred."); *Clark v. Singer*, 298 S.E.2d 484, 486 (Ga. 1983) ("No.....cause of action for wrongful death in Georgia is barred by the statute of limitations before death."); *Larcher v. Wanless*, 18 Cal.3d 646, 557 P.2d 507, 512-13 (Cal. 1976) ("[T]he cause of action for wrongful death...is not merely a continuation or survival of the decedent's claim for personal injuries, but is an entirely new cause of action created in the heirs and based on the death of the decedent as that death inflicted injury upon them. Until that death, the heirs have suffered no "injury" ...and hence have no basis for filing suit."); W. Page Keeton, PROSSER AND KEETON ON TORTS § 127 (5th ed. 1984) ("As to the defense of the statute of limitations, ... the considerable majority of the courts have held that the statute runs against the death action only from the date of death, even though at that time the decedent's own action would have been barred while he was living."); *Restatement (Second) of Torts*, § 899 cmt c (1979) ("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.").

B. Deggs Has Not Claimed Application of the Discovery Rule

Respondents address an unstated argument in their brief when they address an alleged claim that the discovery rule applies to protect plaintiff's cause of action. The opening brief did not assert any such argument and it was never relied upon in the court below. As the opening brief stated in its factual recitation, the trial judge addressed the situation of *White v. Johns Manville Corp.*, 103 Wn.2d 344, 352-53, 693 P.2d 687 (1985) in which the court applied the discovery rule. The judge even continued the hearing for plaintiff's counsel to consult with plaintiff to determine when she, as the daughter of the decedent, knew that her father had asbestos-related disease. That question, as pointed out in the opening brief, was not pertinent. The plaintiff could not have known what caused her father's death until he died. She knew he had asbestos-related disease, but so long as he was alive there was no way to determine the cause of death. He might be killed in an automobile accident or a hunting accident or innumerable other ways. The plaintiff never relied on the discovery rule because the wrongful death action was

filed well within the three year statute of limitations and there was no need to rely on the discovery rule.

C. Respondent's Policy Arguments Against Allowing Plaintiff's Wrongful Death Action Ring Hollow

Respondents claim that the policy behind statutes of limitations dictates that this action not be allowed. They claim that policy is to compel a plaintiff to exercise his right of action within a reasonable time. RB at 33. But this position rings hollow when viewed in light of the facts of this matter. Given, for the sake of argument, that this is the reason for the statute, it is clear that allowing this action would not violate that policy. The statute is three years from the date of death and the action was brought within nineteen months of the death. So Plaintiff has in fact exercised her right within a more than reasonable time.

Application of the Respondent's argument would conflict with the specific policy of the legislature. That policy is to provide an opportunity for heirs of one who is killed as a result of tortious conduct to recover for the damages they incur from the death. If

those heirs are to be deprived of that opportunity before the death even occurs, the legislative policy would be frustrated.

Moreover, the perceived hardships to defendants of having to defend allegedly “stale” claims are equally weighted against plaintiffs. Plaintiffs bear the initial burden to present evidence to support their claims. To the extent that the passage of time fades memories it would affect witnesses for the plaintiff as well as those of the defendants. The idea that the passage of time would produce an unfair result for defendants here is without support.

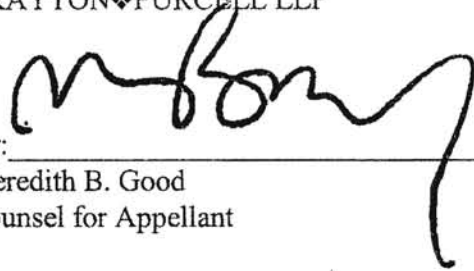
III. CONCLUSION

It is illogical, and contrary to longstanding law, to claim that a wrongful death action can accrue before there is a death. Once there is a death, the personal representative has three years to pursue an action for wrongful death. That happened in this case. Therefore, the court below erred in ruling that the action must be dismissed due to the running of the statute of limitations.

For all those reasons, this court should reverse the decision of the court below and remand this action for trial.

Dated this 29th day of August, 2014

BRAYTON ♦ PURCELL LLP

A handwritten signature in black ink, appearing to read 'M. B. Good', written over a horizontal line.

By: _____
Meredith B. Good
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CERTIFICATE OF SERVICE

JUDY R. DEGGS, as Personal Representative for the Estate of RAY GORDON SUNDBERG,
deceased Appellant v. ASBESTOS CORPORATION LIMITED, et al., Respondents

KCSC Cause No. 12-2-22805-1 SEA
Appellate Court No. 71297-7-1

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

- **REPLY BRIEF OF APPELLANT**

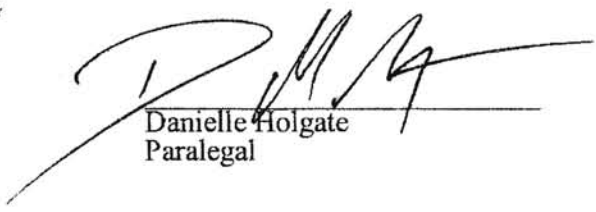
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DATED this 29 day of August, 2014


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