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NO. 71297-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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

Appellant,

v.

ASBESTOS CORPORATION LIMITED, et al.,

Respondents.

JOINT BRIEF OF RESPONDENTS ASBESTOS CORPORATION LIMITED, ASTENJOHNSON INC., AND INGERSOLL RAND COMPANY

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I. INTRODUCTION

Respondents Asbestos Corporation Limited (ACL), AstenJohnson Inc. (AstenJohnson), and Ingersoll Rand Company (Ingersoll Rand) (collectively "Respondents") jointly submit this brief in response to Appellant's Opening Brief. Because the trial court properly applied long-standing Washington law, the Court should affirm the trial court's orders granting summary judgment for the Respondents.

For over 80 years, Washington law has held that the expiration of the statute of limitations on a decedent's personal injury action before his or her death also bars a personal representative from asserting a wrongful death action based on the same injuries. *Calhoun v. Washington Veneer Co.*, 170 Wn. 152, 159-60, 15 P.2d 943 (1932); *accord Johnson v. Ottomeier*, 45 Wn.2d 419, 422-23, 275 P.2d 723 (1954); *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 44 P.2d 193 (1935). Here, Decedent Ray Gordon Sundberg[1] actually brought a personal injury action himself in 1999 alleging that he was injured by contracting specific diseases purportedly caused by his exposure to asbestos during his work career (the "1999 Lawsuit"). Of the current Respondents, only ACL was named in the 1999 Lawsuit. For whatever reason, Decedent did not assert claims

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[1] In her opening brief, Appellant referred to her father as Roy Sundberg. All prior briefing in this matter, as well as the 1999 case records, refers to her father as Ray Sundberg.

against the other Respondents in the 1999 Lawsuit, and Appellant did not assert a claim therein at all. However, the 1999 action was amended to include a loss of consortium claim for Betty Sundberg. CP__ (Supplement).[2] Because Decedent was aware of his possible causes of action by 1999, the statute of limitations on any personal injury claims against Respondents expired no later than 2002. Neither Decedent nor anyone on his behalf brought an action against the Respondents before he died in 2010.

Nearly thirteen years after the first lawsuit, Appellant filed the present wrongful death and survival action in 2012 based on the very same underlying asbestos-related conditions but against different defendants. Appellant has since conceded that Washington's three-year statute of limitations bars any survival action. CP at 93. Appellant has not otherwise acknowledged the full scope of the action previously initiated by her father in 1999 and the full record of the 1999 lawsuit. Applying the *Calhoun* rule that the expiration of the statute of limitations on a decedent's personal injury claims before his or her death also bars any subsequent wrongful death claims based on the same injury, the trial court

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[2] Respondent AstenJohnson Inc. has requested supplementation of the Clerk's Papers to include the Declaration of Bonnie Alldredge, submitted in support of its Motion for Summary Judgment. Attached as Exhibit D to Ms. Alldredge's declaration is a copy of the court docket for *Ray Sundberg and Betty Sundberg v. ACandS, Inc., et al,* King County Superior Court Cause Number 99-2-21756-0.

properly granted summary judgment for all defendants. Appellant has offered no compelling argument as to why this Court should ignore the doctrine of *stare decisis* and overrule the long-standing precedent set by *Calhoun*, *Grant*, and *Johnson*. The same wrongful death statute at issue here was at issue in *Calhoun*. Washington Courts presume that the State Legislature has been aware of the 80+ year old *Calhoun* rule interpreting the wrongful death statute and that its failure to amend the statute indicates "legislative acquiescence in that decision." *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)). Washington follows the majority rule adopted by other jurisdictions. Appellant's policy arguments are the province of the Legislature, not the courts. Accordingly, this Court should affirm the trial court's orders granting summary judgment for Respondents.

II. ASSIGNMENT OF ERRORS

The only issue on appeal is whether the statute of limitations bars a wrongful death claim when the statute of limitations has already run on the personal injury claim prior to the decedent's death and when both arise from the same alleged acts and injury.

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

For purposes of this appeal, the facts are undisputed. This case involves two virtually identical lawsuits based on the same set of facts, yet were brought nearly thirteen years apart. The Decedent, Mr. Sundberg, filed an asbestos-related lawsuit in 1999. CP at 336-381. The complaint was later amended to include the loss of consortium claim for Betty Sundberg.[3] CP at ____ (Supplement). The 1999 Lawsuit was tried to verdict in 2001. CP at ___ (Supplement). Decedent then passed away in 2010 without suing any of the Respondents. CP at 240. In 2012, Appellant filed an asbestos-related lawsuit against all new defendants (other than ACL) based on the exact same set of facts and asbestos-related diseases as the Decedent's prior 1999 personal injury action. CP at 216-243.

1. The 1999 Lawsuit.

On September 20, 1999, Mr. Sundberg filed the first asbestos-related lawsuit against nearly forty defendants (including Respondent ACL). CP at 336-381. The 1999 Complaint asserted claims for "product liability," "negligence," and "civil conspiracy." *Id.* The 1999 Complaint alleged that Mr. Sundberg was exposed to asbestos while working at Long

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[3] *See supra* note 2. Supplementation of the Clerk's Papers has been requested.

Bell Lumber Company in Longview, Washington from 1942 to 1944, while in the U.S. Navy aboard the vessels *CHRISTY MATHEWSON*, *SANTA ISABEL*, *SEA HYDRA*, and *LAVACA* from 1944 to 1946, and while working at Longview Fiber in Longview from 1947 to 1989. *Id.* Decedent's spouse, Betty Sundberg, asserted a claim for loss of consortium in the amended complaint. CP at ___ (Supplement). For whatever reasons, Appellant did not bring a loss of consortium claim in her father's lawsuit. CP at 336-381. The 1999 Lawsuit was tried to verdict. CP at ___ (Supplement). Judgment was entered on September 14, 2001. CP at ___ (Supplement).

Medical records produced in the course of the 1999 Lawsuit indicate that Mr. Sundberg had been diagnosed with colon cancer in 1998, lymphoma in 1998, pleural plaques and pleural thickening as early as 1996, and asbestosis as early as 1999. CP at 144-163. During a deposition conducted as part of the 1999 Lawsuit, Mr. Sundberg admitted that he was aware of these diagnoses, that he had been exposed to asbestos associated with the insulation, pipes, and machinery during his work in the Navy and the mills, and that he believed that the asbestos exposure at these locations caused his medical conditions. CP at 182-213. Thus, as early as 1999, Mr. Sundberg admitted that he was aware of the connection between his alleged asbestos-related diseases, on the one hand, and his

exposure to asbestos during his work career in the Navy and at Long Bell Lumber Company and Longview Fiber, on the other. CP at 182-213, 336-381.

2. The 2012 Lawsuit Was Based on the Exact Same Facts and Injuries.

In December 2010, Mr. Sundberg passed away without any claims brought against nearly all of the defendants in this case by him or anyone on his behalf. CP at 240. On July 3, 2012, Appellant, the personal representative of Decedent's estate, filed a second asbestos-related lawsuit against ACL and fourteen new defendants (including AstenJohnson and Ingersoll Rand) for damages based on the same alleged injuries to Mr. Sundberg incurred while working at the same locations. CP at 216-243. The 2012 Lawsuit was brought by the same law firm (Brayton Purcell) as the 1999 Lawsuit. CP at 216-243, 336-381. Like the 1999 Lawsuit, the 2012 Lawsuit alleged that Mr. Sundberg was exposed to asbestos while working at Long Bell Lumber Company in Longview from 1942 to 1944, while serving aboard the vessels *CHRISTY MATHEWSON*, *SANTA ISABEL*, *SEA HYDRA*, and *LAVACA* in the U.S. Navy from 1944 to 1946, and while working at Longview Fiber from 1947 to 1989. *Compare* CP at 234-39 *with* CP at 374. Thus, the 2012 Lawsuit alleged liability based on the exact same asbestos exposure at the exact same

locations as the 1999 Lawsuit. CP at 216-243, 336-381.

The 2012 Lawsuit also alleged liability based on the same asbestos-related diseases as alleged in the 1999 Lawsuit. CP at 144-163, 182-213, 216-243, 336-381. Specifically, the 2012 Lawsuit alleged that Mr. Sundberg had been diagnosed with the same diseases on the following dates:

Colon Cancer	. . .	July 24, 1998
Lymphoma	. . .	July 24, 1998
Pleural Disease	. . .	August 31, 1999
Asbestosis	. . .	February 21, 2000

CP at 240-41. These diagnoses are consistent with his medical records and his deposition testimony from the 1999 Lawsuit. CP at 144-63, 187-95, 212-13. Thus, the 1999 Lawsuit and the 2012 Lawsuit are based on the same claims involving the same asbestos exposure at the same work locations that allegedly caused the same diseases for which damages are sought. CP at 216-243, 336-381.

3. The Trial Court Granted Summary Judgment for Respondents

On June 21, 2013, the trial court granted Respondent AstenJohnson Inc.'s motion for summary judgment on all claims based on the statute of limitations. CP at 116-18. In its order, the trial court referenced its consideration of the evidence AstenJohnson Inc. submitted

in support of its motion. CP at 116.[4] The trial court then granted summary judgment for the remaining defendants on the same ground that the expiration prior to Decedent's death of the applicable three-year statute of limitations on his personal injury claim bars all of Appellant's claims herein. CP at 396, 408. Appellant has appealed only the issue of whether the court should have granted summary judgment on her wrongful death claim.[5]

IV. ARGUMENT

For nearly a century, Washington law has held that the running of the statute of limitations on a personal injury action similarly bars any wrongful death claims based on the same injury. The Washington Legislature has known about this rule of law since 1932, yet has declined to change it. This is in fact the same rule of law held by the U.S. Supreme Court in determining federal law as well as the rule in the vast majority of other states. Public policy considerations favoring finality and equity also compel affirmance.

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[4] That evidence included the Exhibits attached to the Declaration of Bonnie Alldredge. CP at 116. A Washington court may take judicial notice of actions and pleadings filed in other Washington courts, as such pleadings are public records "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b); *see also Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008). Supplementation of the Clerk's Papers has been requested.

[5] Appellant has conceded that the trial court properly granted summary judgment on the survival claims under RCW 4.20.046 and 4.20.060. Appellant's Br. at 4 n.1.

A. The Trial Court Properly Granted Summary Judgment Because the Statute of Limitations Bars Appellant's Wrongful Death Claim as a Matter of Law.

1. Washington Law Is Well-Settled That the Running of the Personal Injury Statute of Limitations Bars Any Wrongful Death Action.

Under well-settled Washington law, the statute of limitations bars a personal representative from asserting a wrongful death action when the statute of limitations on a decedent's personal injury claim expired prior to his or her death. *Calhoun v. Washington Veneer Co.*, 170 Wn. 152, 159-60, 15 P.2d 943 (1932); *accord Johnson v. Ottomeier*, 45 Wn.2d 419, 422-23, 275 P.2d 723 (1954); *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 44 P.2d 193 (1935). The Washington Supreme Court has long recognized that a wrongful death action is "dependent upon the right the deceased would have to recover for such injuries up to the instant of his death." *Johnson*, 45 Wn.2d at 421. This principle applies to "situations in which, after receiving the injuries which later resulted in death, the decedent pursued a course of conduct which makes it inequitable to recognize a cause of action for wrongful death," such as "where the statute of limitations had run prior to decedent's death." *Id.* at 422-23. As a result, while a wrongful death action generally accrues at the time of death, the Washington Supreme Court has applied a "well-recognized limitation" to this general rule in that "*the action for wrongful death is*

extinguished . . . by the failure of the deceased to bring an action for injuries within the period of limitation." *Grant*, 181 Wn. at 581 (emphasis added). "The weight of authority in other jurisdictions, unsurprisingly, reaches the same result." *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 352 (Tex. 1992) (surveying other states' law and concluding that the majority rule is that "if a decedent's action would be barred by limitations, then so would a wrongful death action"); *see Flynn v. New York*, 283 U.S. 53, 56 (1931) (applying same rule to federal statute); *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59, 70 (1913) ("[I]t has been generally held that [a wrongful death] action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.").

Appellant apparently ignores the doctrine of *stare decisis* and binding Washington Supreme Court precedent that the right to a wrongful death action is "dependent upon the right the deceased would have to recover for such injuries up to the instant of his death." *Johnson*, 45 Wn.2d at 421. Rather, Appellant essentially asks this Court to overrule the Supreme Court decisions in *Calhoun*, *Johnson*, and *Grant*, and create a new rule of law that a wrongful death plaintiff may bring a claim against a defendant even if the decedent's right to recover for his or her injuries against that defendant expired well before his or her death. But under

stare decisis, Washington appellate courts "do not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful." *State v. Kier,* 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (citing *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006)). Here, Appellant makes no real attempt to meet this heavy burden, and fails to do so.

2. The Washington Supreme Court Already Decided That the Statute of Limitations Bars Claims Brought Under the Wrongful Death Statute When the Limitations Period on a Decedent's Personal Injury Claims Expired Prior to His or Her Death.

The Washington Supreme Court previously decided in *Calhoun v. Washington Veneer Co.*, 170 Wn. 152, 159-60, 15 P.2d 943 (1932), the exact same issue raised by Appellant here. *Calhoun* remains binding Washington Supreme Court precedent. Appellant fails to acknowledge that in *Calhoun*, the Supreme Court interpreted the exact same wrongful death statute – Rem. Comp. Stat. § 182 (now codified at RCW 4.20.010 and RCW 4.20.020) – at issue in this case. In doing so, the Court ruled that because the statute of limitations had run on the decedent's personal injury claim before his death, the statute of limitations similarly barred his spouse's wrongful death claims filed more than three years after his alleged injury even though a wrongful death action could not accrue until his death. *Id.* at 159-60.

Calhoun is materially indistinguishable from this case. In *Calhoun*, the decedent had worked at the defendant's veneer manufacturing plant between 1926 and 1928. *Id.* at 153-57. In September 1931, the decedent filed a personal injury action against the defendant after developing an occupational disease known as carbon bisulphide poisoning. *Id.* Decedent included a claim under the Factory Act[6] that his disease was caused by exposure to carbon bisulphide fumes while working in the factory's improperly ventilated glue room from April 1926 to May 1928. *Id.* at 155-57. In October 1931, he passed away. *Id.* at 154. In December 1931, his spouse, as the personal representative of his estate, filed an amended complaint to add a claim under the wrongful death statute based on the same exposure to carbon bisulphide as the decedent's personal injury action. Even though the personal representative's claims for wrongful death, "of course, had not accrued at the time the original complaint was filed," the Washington Supreme Court held that the applicable three-year statute of limitations barred not only the decedent's untimely personal injury action but also the spouse's claim under the wrongful death statute. *Calhoun*, 170 Wn. at 159-60.

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[6] The claim under the Factory Act, Rem. Comp. Stat. § 7659, was neither subject to nor preempted by the workers' compensation act's exclusive remedy provision. *Calhoun*, 170 Wn. at 158-59 (citing *Depre v. Pacific Coast Forge Co.*, 151 Wn. 430, 276 P. 89 (1927); *Pellerin v. Washington Veneer Co.*, 163 Wn. 555, 2 P.2d 658 (1931)).

Calhoun controls here. Like *Calhoun*, the Decedent in this case had his own personal injury action. Here, Decedent brought his personal injury action (which Decedent's spouse joined) based on his alleged asbestos exposure in 1999 shortly after his various diagnoses. Appellant here could have brought her own claims in that lawsuit but failed to do so. *See Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 140-141, 691 P.2d 190 (1984) (recognizing children's right of claim for damages based on injury to parent). Like *Calhoun*, more than three years lapsed between the time that Decedent's personal injury claims accrued, which was no later than 1999, and his death, which occurred in 2010. Like *Calhoun*, even though Appellant's claim under the wrongful death statute, "of course, had not accrued at the time the original complaint was filed," the statute of limitations nonetheless bars Appellant's wrongful death claim because the statute of limitations had already run on any claims the Decedent may have had against Respondents. *Calhoun*, 170 Wn. at 159-60. This is, of course, because any right to a wrongful death claim is "dependent upon the right the deceased would have to recover for such injuries up to the instant of his death." *Johnson*, 45 Wn.2d at 421.

Appellant misconstrues *Calhoun* by attempting to incorrectly distinguish it on the basis that "it was a worker's compensation case." Appellant's Br. at 16-17. Contrary to Appellant's suggestion, the *Calhoun*

personal representative's claim was under the same wrongful death statute at issue here, and the decedent had a personal injury claim independent of the worker's compensation system. *Calhoun*, 170 Wn. at 158-60. Specifically, the decedent had a personal injury claims under the Factory Act, Rem. Comp. Stat. § 7659, which was neither subject to, nor preempted by, the workers' compensation act's exclusive remedy provision. *Id.* at 158-59 (citing *Depre v. Pacific Coast Forge Co.*, 151 Wn. 430, 276 P. 89 (1927); *Pellerin v. Washington Veneer Co.*, 163 Wn. 555, 2 P.2d 658 (1931)). The worker's compensation act had absolutely nothing to do with the Court's holding that the expiration of the statute of limitations on the decedent's personal injury claim similarly barred the personal representative's claim under the wrongful death statute. *Id.* at 158-60. Even Appellant concedes, as she must, that "it is technically true that the [*Calhoun*] court held the action was barred due to the passing of the statute of limitations." Appellant's Br. at 19. The worker's compensation act was both factually and legally immaterial to the Supreme Court's decision in *Calhoun*.

Because *Calhoun* controls, this Court should affirm the trial court's summary judgment for Respondents.

3. The Washington Supreme Court Re-Affirmed *Calhoun* in *Grant* and *Johnson*.

The Washington Supreme Court has examined and re-affirmed the *Calhoun* rule in two subsequent cases. In *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 44 P.2d 193 (1935), the decedent had been exposed to hazardous fumes and brought a personal injury claim under the Factory Act – the same statute upon which the *Calhoun* decedent had brought his claim.[7] *Id.* at 576-77. Unlike *Calhoun*, however, the decedent brought his personal injury action within the three-year statute of limitations. *Id.* at 577, 582. After decedent passed away but while the personal injury action was still pending, his personal representative was substituted as the plaintiff and filed an amended complaint adding a claim under the wrongful death statute against the same defendants. *Id.* at 577. The issue on appeal was whether the statute of limitations barred the wrongful death claim. *Id.* at 577-78.

The Supreme Court initially re-stated the rule of law in Washington State that while a wrongful death claim is a separate and distinct claim that accrues at the time of death, the right to a wrongful

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[7] Again, Appellant misconstrues *Grant* by noting that "it arose in the context of workmen's compensation" even though the *Grant* plaintiff's claims were under the same Factory Act from *Calhoun* that was neither subject to, nor preempted by, the applicable worker's compensation act. *See* Appellant's Br. at 22. As in *Calhoun,* the worker's compensation act had nothing to do with the Supreme Court's holding in *Grant*. *Grant*, 181 Wn. at 577, 581-82.

death action is subject to a "well-recognized limitation" that "at the time of death there must be a subsisting cause of action in the deceased":

> The action for wrongful death, under section 183, Rem. Rev. Stat., is a distinct and separate action from the survival action, under section 194. In accord with the great weight of authority, this court has held that the action accrues at the time of death, and that the statute of limitations then begins to run. *The rule, however, is subject to a well-recognized limitation; namely, at the time of death there must be a subsisting cause of action in the deceased.* Tiffany, Death by Wrongful Act (2d Ed.) § 124. Under this limitation, it has been held that the action for wrongful death is extinguished by an effective release executed by the deceased in his lifetime (*Brodie v. Washington Water Power Co.*, [92 Wn. 574, 159 P. 791 (1916)]; *Mellon v. Goodyear*, 277 U.S. 335, 48 S.Ct. 541, 72 L.Ed. 906 [(1928)]); by a judgment in his favor rendered during his lifetime (*Littlewood v. Mayor, etc., of N. Y.*, 89 N.Y. 24, 42 Am. Rep. 271 [(1882)]; *Hecht v. Ohio & Mississippi Ry. Co.*, 132 Ind. 507, 32 N.E. 302 [(1892)]); *by the failure of the deceased to bring an action for injuries within the period of limitation* (*Flynn v. New York, N.H. & H. R. Co.*, 283 U.S. 53, 51 S.Ct. 357, 75 L.Ed. 837 [(1931)]). In this latter class falls the case of *Calhoun v. Washington Veneer Co.*, [170 Wn. 152, 159-60, 15 P.2d 943 (1932)].

Grant, 181 Wn. at 580-81 (emphasis added) (citations omitted). Although the Court could have overruled *Calhoun* and held that the statute of limitations always begins to run at the time of death, as Appellant urges here, the Court instead applied the *Calhoun* rule that the statute of limitations would bar the wrongful death unless the decedent had a viable personal injury claim at the time of his or her death. *Id.* at 581-82. Applying *Calhoun*, the Court concluded that the statute of limitations did

not bar the wrongful death claim because the decedent's timely personal injury action was still pending at the time of his death:

> The instant case presents an entirely different problem [than *Calhoun*]. Here, Grant brought his action for personal injuries within the time prescribed by the statute of limitations. While he died more than three years after his cause of action accrued, he left a valid subsisting cause of action. Under these circumstances, we think there is no question but that the action for wrongful death can be maintained.

Id. at 582 (citations omitted). Thus, contrary to Appellant's suggestion of dicta, the *Grant* Court expressly applied the *Calhoun* rule to the *Grant* facts to reach its holding.

Appellant similarly misapplies *Johnson v. Ottomeier*, 45 Wn.2d 419, 422-23, 275 P.2d 723 (1954). In *Johnson*, the issue was whether a wife's personal representative may bring a wrongful death action on behalf of the children when her husband murdered her and then committed suicide. *Id.* at 420. The Court rejected the argument by the husband's estate that the exclusionary rule barring spouses from suing each other for a tort committed during the marriage applied in the wrongful death context. *Id.* at 420-21. In doing so, the Court discussed other recognized circumstances in which a wrongful death claim could not be maintained:

> The second category of cases in which this general rule of exclusion has been applied involves situations in which, after receiving the injuries which later resulted in death, the decedent pursued a course of conduct which makes it

> inequitable to recognize a cause of action for wrongful death. Among such cases are *Brodie v. Washington Water Power Co.*, 92 Wn. 574, 159 P. 791, where decedent gave an effective release and satisfaction; and *Calhoun v. Washington v. Veneer Co.*, 170 Wn. 152, 15 P.2d 943, as interpreted in *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 44 P.2d 193, where the statute of limitations had run prior to decedent's death.

Id. at 422-23. Again, rather than overruling these prior cases, the Court held that there was no statutory language or principle of law or equity that "warrants the recognition of the wife's personal disability to sue her husband as a defense against her personal representative's action for wrongful death." *Id.* at 423-24. Thus, the *Johnson* Court re-affirmed that *Calhoun* and *Grant* remained good law. Accordingly, this Court should follow *Calhoun*, *Grant*, and *Johnson*,[8] and affirm the trial court's order granting summary judgment for Respondents.

4. The Wrongful Death Statute Has Not Substantively Changed Since *Calhoun.*

The Washington wrongful death statute has not changed in any material way since the Washington Supreme Court decided *Calhoun* in

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[8] As *Grant* and *Johnson* demonstrate, Washington law recognizes several circumstances in which conduct by a decedent affects potential wrongful death claims brought on behalf of the heirs. Washington law recognizes that if the Decedent executes a release in his or her personal injury action, the release bars any subsequent wrongful death action by the personal representative and the statutory beneficiaries based on the same injuries. *Grant*, 181 Wn. at 580-81 (citing *Brodie v. Washington Water Power Co.*, 92 Wn. 574, 159 P. 791 (1916)). Similarly, a verdict in a Decedent's personal injury action subsequently bars a wrongful death action by the personal representative and the statutory beneficiaries by the same injuries. *Id.* There is no logical reason to treat an expired statute of limitations any differently.

1932. In *Calhoun*, the personal representative brought her claim under the wrongful death statute, which was then codified as Rem. Comp. Stat. § 183 and is now codified as RCW 4.20.010 and RCW 4.20.020. The 1932 version of the wrongful death statute provided as follows:

> When the death of a person is caused by the wrongful act, neglect or default of another his 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.

Rem. Comp. Stat. § 183(1). Except for the addition of gender-neutral language and a comma in 2011, the current wrongful death statute is identical:

> 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.

RCW 4.20.010; *see also* 2011 Sess. Laws ch. 336, § 89 (adding a comma between "neglect" and "or" and adding "or her" between "his" and "personal representative"). Thus, the wrongful death statute has not changed substantively since the Supreme Court decided *Calhoun* in 1932.

Similarly, the other sections of the wrongful death statute have not materially changed since 1932. RCW 4.20.005, which defines the application of singular/plural and masculine/feminine terms, has been

unchanged since 1932. RCW 4.20.020, which designates the beneficiaries of a wrongful death action, has also not substantively changed other than to add stepchildren and registered domestic partners as possible beneficiaries. The current statute provides as follows:

> Every such action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife, husband, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents, sisters, or brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his or her death. In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.

RCW 4.20.020. In 1932, the statute was virtually and substantively identical:

> Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death. In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just.

Rem. Comp. Stat. § 183(2). In 1973, the Legislature merely deleted the word "minor" in front of the word "brothers." 1973 Sess. Laws, ch. 1543, § 2 (changing "for the benefit of the parents, sisters or minor brothers" to "for the benefit of the parents, sisters or brothers"). In 1985, the

Legislature merely added "stepchildren" to the list of possible beneficiaries. 1985 Sess. Laws, ch. 130, § 1 ("Every such action shall be for the benefit of the wife, husband, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife or husband or such child or children, . . ."). In 2007, the Legislature added domestic partnerships. 2007 Sess. Laws, ch. 156, § 1 ("Every such action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife ((or)), husband, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents, sisters, or brothers . . . ."). In 2011, the Legislature made a term gender neutral. 2011 Sess. Laws, ch. 336, § 90 (changing "at the time of his death" to "at the time of his or her death"). Again, none of these changes were substantive.

Thus, even though the Legislature has amended the wrongful death statute a total of four times since 1932 – most recently as 2011 – it has declined to make any changes that affect the Supreme Court's ruling in *Calhoun* or otherwise substantively alter the wrongful death statute as it has existed since 1932.

5. Under the Doctrine of *Stare Decisis*, The Court Should Not Change the *Calhoun* Rule Because the Legislature Has Declined To Do So.

The Court should not change the *Calhoun* rule because it must presume that the Washington Legislature has known about it since 1932 yet has declined to change it despite several minor amendments to the wrongful statute. "This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." *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)). Rather, under the doctrine of *stare decisis*, Washington appellate courts "do not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful." *State v. Kier,* 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (citing *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006)).

Here, the Legislature has known about the rule in *Calhoun* since 1932, yet has done absolutely nothing to change it despite several minor amendments to the wrongful death statute since then. As discussed in the

previous section, the wrongful death statute has remained substantially unchanged since the *Calhoun* decision in 1932. The Legislature amended RCW 4.20.010 as recently as three years ago, but only added a comma and a gender-neutral term. 2011 Sess. Laws ch. 336, § 89. The Legislature has amended RCW 4.20.020 on a total of four occasions since 1932, but only to add a gender-neutral term and new classes of beneficiaries (non-minor brothers, stepchildren, and domestic partners). 2011 Sess. Laws, ch. 336, § 90 (gender-neutral term); 2007 Sess. Laws, ch. 156, § 1 (domestic partners); 1985 Sess. Laws, ch. 130, § 1 (stepchildren); 1973 Sess. Laws, ch. 1543, § 2 (non-minor brothers). Thus, despite several opportunities to do so, the Washington Legislature has declined to modify *Calhoun* or make any other substantive changes to the wrongful death statute. Accordingly, any change to the wrongful death statute or the *Calhoun* rule is the responsibility of the Legislature, not the Courts.

6. Trial Courts Have Routinely and Consistently Applied *Calhoun* to Reach the Same Conclusion in Other Asbestos Cases.

This is not a situation where Washington trial courts have struggled with interpreting the law and applying it to wrongful death cases. Rather, Washington Superior Courts have routinely and consistently applied *Calhoun*, *Johnson*, and *Grant* in asbestos cases to hold that the statute of limitations bars wrongful death claims when the

limitations period on decedents' personal injury claims have expired prior to their death.[9] *Calhoun* and its progeny establish a clear rule of law that trial courts have reliably applied. There is no basis to overrule *Calhoun*.

7. Washington Follows the Majority Rule That the Running of the Statute of Limitations on a Decedent's Action Similarly Bars Any Wrongful Death Action.

Washington follows the majority of other jurisdictions recognizing that the statute of limitations bars a wrongful death action when it would also bar the decedent's personal injury action. "The weight of authority in

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[9] For example, in the recent case of *Darlene Blythe, individually and as Personal Representative of the Estate of James Blythe, Sr. v. Salmon Bay Sand and Gravel Co.*, Pierce County Superior Court No. 10-2-14259-8 (Honorable Susan K. Serko), the trial court granted summary judgment against the plaintiff personal representative's wrongful death claims on the same statute of limitations grounds. CP 249-264. The decedent in that case had been diagnosed with asbestosis no later than January 2007 (with medical and other records indicating earlier dates). *Id.* In August 2008, the decedent and his wife brought a personal injury lawsuit alleging that the asbestosis was caused by exposure to asbestos during his work aboard ships and at shipyards. *Id.* After the decedent died, a wrongful death action was filed in October 2010 by the wife individually and as a personal representative alleging the same exposure. *Id.* Because the wrongful death action was brought more than three years after the asbestosis diagnosis in January 2007, the trial court granted summary judgment and dismissed the wrongful death claim with prejudice. *Id.*

Other Superior Courts granted summary judgment dismissals in similar cases where the deceased either litigated their case prior to death or permitted the expiration of the applicable statute of limitations prior to their death, thereby precluding a subsequent wrongful death action by the heirs. CP at 266-327. *Farnham v. A.W. Chesterton Co., et. al.,* King County Superior Court, No. 12-2-201391-1 SEA, involved a decedent whom originally brought an action in 2001. He died June 9, 2009, and the heirs brought a cause of action for wrongful death in King County Superior Court on June 8, 2012. The 2012 action was dismissed on summary judgment. *Wagner v. Atlantic Richfield Company, et. al.,* Pierce County Superior Court, No. 11-2-07355-1, involved a decedent who was originally diagnosed with an asbestos-related mesothelioma in February 2007. He brought suit in King County Superior Court on March 30, 2007. The case was dismissed. The decedent died on June 29, 2010 and decedent's wife brought suit on March 15, 2011 alleging both wrongful death and survivorship. Both claims were dismissed on summary judgment in Pierce County Superior Court

The same result is compelled here.

other jurisdictions, unsurprisingly, reaches the same result" that "if a decedent's action would be barred by limitations, then so would a wrongful death action." *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 351-52 (Tex. 1992) (surveying other states' law and concluding that consistent with the majority rule, the expiration of the statute of limitations on a decedent's personal injury action similarly bars a wrongful death action based on the same injuries due to exposure to silica).

In *Calhoun*, the Washington Supreme Court relied upon the United States Supreme Court's adoption of the same rule in *Flynn v. New York, New Haven & Hartford R.R.*, 283 U.S. 53, 56, 51 S.Ct. 357, 75 L.Ed. 837 (1931). While *Flynn* involved a federal instead of state statute, the difference is immaterial as it applied the same principles to a statute that, like the Washington wrongful death statute, gave a right of action to the decedent's personal representative for the benefit of the spouse and children in case the injury caused death. *Id.* at 55-56. *Flynn* presented the same fact pattern as here. In *Flynn*, the decedent was injured in 1923. *Id.* at 55. The applicable statute of limitations for decedent to bring his own action expired in 1925. *Id.* at 55-56. In 1929, the executor brought a wrongful death claim alleging that the injury that the decedent had sustained in 1923 caused his death in 1928. *Id.* The *Flynn* plaintiffs made the exact same argument as Appellant here that the wrongful death

claim was "distinct" and "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." *Id.* at 56.

In an opinion written by Justice Oliver Wendell Holmes, the U.S. Supreme Court rejected this argument outright:

> 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. *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59, 70 [(1913)]. On this ground, an effective release by the employee makes it impossible for his administrator to recover. *Mellon v. Goodyear*, 277 U.S. 335, 344 [(1928)]. The running of the two years from the time when his cause of action accrued extinguishes it as effectively as a release, *Engel v. Davenport*, 271 U.S. 33, 38 [(1926)], and the same consequence follows. Our conclusion that this action could not be brought is required by the former decisions of this Court.

Id.[10] Thus, the U.S. Supreme Court held that the statute of limitations

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[10] The *Flynn* Court cited *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 70, 33 S.Ct. 192, 57 L.Ed. 417 (1913), for the rule of law that "as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." *Id.* This is in accord with Washington law that the rule that a wrongful death action accrues at the time of death "is subject to a well-recognized limitation; namely, at the time of death there must be a subsisting cause of action in the deceased." *Grant*, 181 Wn. at 580-81.

The *Flynn* Court also cited *Mellon v. Goodyear*, 277 U.S. 335, 344, 48 S.Ct. 541, 72 L.Ed. 906 (1928), because it held in the analogous situation that a decedent's release in his or her personal injury action bars a wrongful death action by the personal

barred the wrongful death claim because it was "derivative and dependent upon the continuance of a right in the injured employee at the time of his death." This case is no different.

Not surprisingly, *Flynn* represents the majority rule in jurisdictions other than Washington. *Russell*, 841 S.W.2d at 351-52. For example, in *Russell*, the decedent was diagnosed in 1981 with heart disease allegedly caused by his exposure to silica during his work career as a sandblaster and painter. *Id.* at 344. In 1982, the decedent sued numerous defendants for his injuries. *Id.* In 1988, the decedent passed away before the case went to trial, and the personal representative added several new defendants that the decedent previously had not sued. *Id.* Affirming summary judgment for the new defendants, the Texas Supreme Court held that the statute of limitations barred any wrongful death claims against the new defendants because the statute of limitations had run with respect to those defendants during the decedent's lifetime. *Id.* at 352. In doing so, the court surveyed other jurisdictions and concluded that the "weight of

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representative based on the same injury. *Id.* Again, this is identical to Washington law. *Grant*, 181 Wn. at 580-81 (citing *Mellon* and *Brodie v. Washington Water Power Co.*, 92 Wn. 574, 159 P. 791 (1916)). In fact, the *Grant* court recognized that a prior release by the decedent, just like when the decedent allowed the statute of limitations to run prior to his or her death, was one of the "well-recognized limitation[s]" in which it was fair to bar a wrongful death action based on the decedent's actions (or inaction) regarding his or her own personal injury claims. *Id.*; *see Johnson v. Ottomeier*, 45 Wn.2d 419, 422-23, 275 P.2d 723 (1954) (citing a prior release under *Brodie* and the running of the statute of limitations under *Calhoun* and *Grant* as two of the examples under Washington law in which "the decedent pursued a course of conduct which makes it inequitable to recognize a cause of action for wrongful death").

authority in other jurisdictions, unsurprisingly, reaches the same result." *Id.* at 350 n. 14, 351-52.[11] This case is no different.

The Court should apply the doctrine of *stare decisis* and decline Appellant's invitation to overrule *Calhoun* and adopt the minority rule. Accordingly, the Court should affirm the trial court.

B. Appellant's Argument That She Has a Remaining Wrongful Death Claim Due to Lack of Notice is Likewise Not Supported by Washington Authorities.

1. The Discovery Rule Does Not Apply.

Appellant's assertion that her wrongful death claim remains, due to lack of notice of her possible claim or of other possible defendants, despite the bar of the survival claim, is not compelling, and has no support in

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[11] In addition to Washington, Texas, and the U.S. Supreme Court, other jurisdictions holding that the expiration of the statute of limitations on the decedent's claims prior to death bars a wrongful death claim based on the same injuries includes the following: **Alabama**, *Northington v. Carey-Canada, Inc.*, 432 So.2d 1231, 1232 (Ala. 1983) (citing *Ellis v. Black Diamond Mining Co.*, 268 Ala. 576, 109 So.2d 699, 702 (1959)); **Delaware**, *Drake v. St. Francis Hosp.*, 560 A.2d 1059, 1060-61 (Del.1989) (citing *Milford Memorial Hosp. Inc. v. Elliott*, 58 Del. 480, 210 A.2d 858, 860-61 (1965)); **Illinois**, *Lambert v. Village of Summit*, 104 Ill. App. 3d 1034, 1037, 433 N.E.2d 1016 (1982); **Kansas**, *Mason v. Gerin Corp.*, 231 Kan. 718, 647 P.2d 1340, 1344-45 (1982); **Maine**, *Ogden v. Berry*, 572 A.2d 1082 (Me.1990); **Maryland**, *Mills v. International Harvester Co.*, 554 F. Supp. 611, 613 (D. Md.1982); **Michigan**, *Larson v. Johns-Manville Sales Corp.*, 427 Mich. 301, 399 N.W.2d 1, 7 (1986); **Minnesota**, *Regie de l' assurance Auto. du Quebec v. Jensen*, 399 N.W.2d 85 (Minn.1987); **New Mexico**, *Stang v. Hertz Corp.*, 81 N.M. 69, 463 P.2d 45, 54-55 (App. 1969), *aff'd*, 81 N.M. 348, 467 P.2d 14 (1970); *Natseway v. Jojola*, 56 N.M. 793, 251 P.2d 274, 276 (1952); **New York**, *Kelliher v. New York Cent. & H. R.R. Co.*, 212 N.Y. 207, 105 N.E. 824, 825-26 (1914); *Phelps v. Greco*, 177 A.D.2d 559, 576 N.Y.S.2d 158, 159 (1991); **Oregon**, *Eldridge v. Eastmoreland Gen. Hosp.*, 307 Or. 500, 769 P.2d 775 (1989); *Piukkula v. Pillsbury Astoria Flouring Mills Co.*, 150 Or. 304, 42 P.2d 921, 929-31 (1935); **Pennsylvania**, *Howard v. Bell Tel. Co.*, 306 Pa. 518, 160 A. 613, 615 (1932); **Tennessee**, *Craig v. R.R. Street & Co.*, 794 S.W.2d 351, 355 (Tenn. App.1990); **Virginia**, *Street v. Consumers Mining Corp.*, 185 Va. 561, 39 S.E.2d 271, 277 (1946); *Miller v. United States*, 932 F.2d 301, 303 (4th Cir.1991) (applying Virginia law).

modern jurisprudence. Appellant has failed to discuss or distinguish modern cases in Washington, as to the applicable statute of limitation in asbestos litigation. In *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772-73, 733 P.2d 530 (1987), the Washington Supreme Court recognized that the discovery rules do not require detailed knowledge of every element of a cause of action for the accrual thereof:

> Mr. Reichelt would have us adopt a rule that would in effect toll the statute of limitations until a party walks into a lawyer's office and is specifically advised that he or she has a legal cause of action; that is not the law. A party must exercise reasonable diligence in pursuing a legal claim. If such diligence in not exercised in a timely manner, the cause of action will be barred by the statute of limitations.

Id.; *see also Green v. A.P.C.*, 136 Wn.2d 87, 97, 960 P.2d 912 (1998); *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603, 123 P.3d 465 (2005). There is nothing in the record on appeal establishing that Decedent, Decedent's spouse, or Appellant were not aware that Decedent's alleged diseases were caused by asbestos exposure during his work around the Respondents' products. To the contrary, the fact that Decedent brought his own personal injury action in 1999 (which his spouse subsequently joined) based on the same diseases and same exposure as alleged here establishes as a matter of law that Decedent and his family were on notice of potential claims against Respondents. *Reichelt*, 107 Wn.2d at 772-73.

Appellant's reliance upon *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 581, 44 P.2d 193 (1935), as well as the other authorities cited, is misplaced. These cases certainly do not overrule *Reichelt*. Moreover, the discovery rule is not new. As noted in *Clare v. Saberhagen*, 129 Wn. App. at 603, the discovery rule and corresponding duty of reasonable inquiry, has been the law in Washington since 1909:

> The general rule in Washington is that when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered. "[O]ne who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose." *Hawkes v. Hoffman*, 56 Wash. 120, 126, 105 P. 156 (1909).

Id. Appellant has conceded that "she knew of the diseases" and does not dispute that she knew or should have known of her father's lawsuit based on the same alleged diseases and exposure. *See* Appellant's Br. at 8.[12]

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[12] There is no admissible evidence in the record regarding Appellant's knowledge or lack thereof. Before the trial court, Appellant only submitted an inadmissible declaration of counsel containing hearsay of what her client told her. CP at 107-108 ("During this conversation, Ms. Deggs stated that [she] was not aware at the time that her father was diagnosed that he would ultimately die from his conditions caused as a result of exposure to asbestos."). It is well-settled under Washington law and CR 56(e) that a declaration from an attorney is inadmissible when based on hearsay and a lack of personal knowledge, and thus cannot be considered on summary judgment. *Melville v. State*, 115 Wn.2d 34, 36, 793 P.2d 952 (1990) (statements in plaintiff's lawyer's affidavit summarizing facts from various records and reports were inadmissible on summary judgment because they were hearsay and not based on personal knowledge in violation of CR 56(e)); *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 618 P.2d 96 (1980) (hearsay statements in attorney's declaration are inadmissible on summary judgment); *Welling v. Mount Si Bowl, Inc.*, 79 Wn.2d 485, 489, 487 P.2d 620 (1971) (attorney's affidavit which merely relates certain factual assertions that have been made to him by his client is

Rather, her only argument before the trial court was that she did not know that his diseases could lead to his death. *Id.*; CP at 107-08. That is inufficient.

2. Appellant Could Have Brought a Claim in the 1999 Lawsuit.

The Court should disregard Appellant's attempts to create a legal fiction that neither she nor her mother could have brought a claim for damages while Decedent was still alive.[13] Both Appellant and her mother could have brought claims for damages in the 1999 Lawsuit – in fact, her mother did. Appellant has not disclosed to the Court that her father's original 1999 Lawsuit was amended to include the loss of consortium claim of Betty Sundberg. CP ___ (Supplement).[14]

Appellant cannot explain her failure to bring a claim for damages in the 1999 Lawsuit. In 1984, well before her father's lawsuit and the amendment to add her mother's loss of consortium claim, the Washington

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hearsay and inadmissible under CR 56(e)); *Mostrom v. Pettibon*, 25 Wn. App. 158, 607 P.2d 864 (1980) (declarations submitted in summary judgment proceeding must set forth facts based upon personal knowledge admissible as evidence to which the affiant is competent to testify)

[13] As a preliminary matter, the Court should disregard Appellant's attempts to raise this argument for the first time on appeal, as she never argued to the trial court that she was unable to bring a claim for damages based on her father's alleged asbestos-related diseases prior to his death. "An issue, theory or argument not presented at trial will not be considered on appeal." *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978) (citing *Boeing v. State*, 89 Wn.2d 443, 450-51, 572 P.2d 8 (1978)).

[14] *See supra* note 2. Supplementation of the Clerk's Papers has been requested.

Supreme Court held that children may maintain a loss of consortium claim for damages based on injuries to a parent:

> [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.*

Ueland v. Reynolds Metals Co., 103 Wn.2d 131, 140-141, 691 P.2d 190 (1984) (emphasis added). Thus, Appellant not only had a right to bring a loss of consortium claim in the 1999 Lawsuit, she was *required* to bring her claim in the 1999 Lawsuit absent a showing that "joinder was not feasible." *Id.*

Appellant has made no effort to set forth any evidence that it was, at any time, infeasible to bring her own claim for damages in the 1999 Lawsuit along with her mother's own claims.[15] As established in *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772-73, 733 P.2d 530 (1987), she must be held to the same duty of inquiry and due diligence as her parents. Because Appellant could have brought a claim for damages in the 1999 Lawsuit, the application of the statute of limitations under *Calhoun* works no injustice.[16]

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[15] As noted above, the same law firm, Brayton Purcell, represented her father and mother in the 1999 action.

[16] Because Respondent ACL was a named party to the 1999 Lawsuit, the resolution of the 1999 Lawsuit bars Appellant's claim against ACL under the principles

C. Allowing the Filing of a Wrongful Death Action as Advocated by Appellant Deprives Defendants Therein of a Meaningful Opportunity to Defend Themselves.

Washington Courts have uniformly endorsed statutes of limitations as part of the overall administration of justice. Respondents have cited to *Johnson v. Ottomeier*, 45 Wn.2d, 419, 421, 275 P.2d 723 (1954), wherein the court recognized there are situations in which it becomes inequitable to recognize a cause of action for wrongful death. One of those situations is the expiration of the statute of limitations.

The general policy of any statute of limitations is to compel a plaintiff to exercise his right of action within a reasonable time, thereby assuring the availability of evidence and eliminating unreasonable burdens upon potential defendants. In *Stenberg v. Pacific Power & Light*, 104 Wn.2d 710, 709 P. 2d 793 (1985), the Washington Supreme Court addressed the policies and purpose of the three-year statute of limitations codified in RCW 4.16.080. The Court recognized that while, by their very nature, statutes of limitations are arbitrary, they are firmly rooted in modern law, and have a long history in English law:

> To put the use and application of the statutes in perspective, we need to look to the purposes and policies of statutes of limitation.

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of res judicata. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P. 2d 898 (1995); *Landry v. Luscher*, 95 Wn.App. 779, 784-85, 976 P.2d 1274 (1999).

> The Limitation Act, 1623, 21 Jac. 1, ch. 16 (7 Chitty's Eng. Stats., at 619 (6th ed.1912)), marked the beginning of the modern law of limitations on personal actions in the common law. The purposes behind the act were to keep out inconsequential claims and to minimize hardships on poor defendants. *Developments in the Law—Statute of Limitation*, 63 Harv.L.Rev. 1177 (1950).
>
> Today, all states have limitation statutes for the majority of actions before their courts. The purposes have remained intact; courts apply limitation statutes to compel the exercise of a right of action within a reasonable time so opposing parties have fair opportunity to defend. 51 Am.Jur.2d *Limitation of Actions* § 17 (1970).
>
> Statutes of limitation are in their nature arbitrary. They rest upon no other foundation than the judgment of a State as to what will promote the interests of its citizens. Each determines such limits and imposes such restraints as it thinks proper.

Stenberg, 104 Wn.2d at 713-14 (citing *Tioga R.R. v. Blossburg & Corning R.R.*, 87 U.S. (20 Wall.) 137, 150, 22 L.Ed. 331 (1873) (Hunt, J., concurring)). The Court concluded that statutes of limitations further Washington public policy because they protect individuals from threatened litigation where their ability to defend is compromised due to the passage of time:

> In Washington, the goals of our limitation statutes are to force claims to be litigated while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence. *Summerrise v. Stephens*, 75 Wn.2d 808, 811, 454 P.2d 224 (1969). Our policy is one of repose; the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims. *Ruth v. Dight*, 75 Wn.2d 660, 664, 453 P.2d 631 (1969).

Id. at 714; *see Russell*, 841 S.W.2d at 352 ("A [wrongful death action] exception for limitations is logically inconsistent, in fact, with the principle underlying limitations – that actions should be timely asserted or not at all – since it would permit wrongful death beneficiaries to sue within two years of the death of their family member, regardless of how long before his death he may have been injured.").

This case is a perfect example of why the *Calhoun* rule is correct. The defendants in his 1999 personal injury lawsuit had the opportunity to depose Mr. Sundberg. The defendants named in this action brought only after Decedent's death more than ten years later have no such opportunity. Moreover, the memories of witnesses (if any) still available are tarnished by the passage of time. To allow the filing of a wrongful death claim after the expiration of a personal injury limitations period (here, eight years after it expired – under Appellant's argument, it could be even longer, even multiple decades) deprives those named in the wrongful death action the opportunity to discover evidence available at an earlier time which they could have used to defend themselves.[17]

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[17] Appellant's citation to *Goodyear v. Railway Co.*, 114 Kan. 557, 220 P. 282 (1923), which had nothing to do with the issue presented here, is puzzling. Like Washington, Kansas follows the majority rule that "where the injured party could not have brought an action for his personal injuries because the statute of limitations had run against his claim prior to his death, a wrongful death action cannot be maintained." *Mason v. Gerin Corp.*, 231 Kan. 718, 647 P.2d 1340, 1344-45 (1982). In fact, the *Mason* court stated that such a rule served public policy because "[t]he possibility that the injured person may die five, ten or even twenty years after the injuries were sustained

Washington's three-year statute of limitations has existed as the State's firm policy since 1854.[18] Our courts' needs for the efficient administration of justice have not changed. There remains a sound policy for enforcement of this three-year statue of limitations for wrongful death actions.

V. CONCLUSION

The Court should affirm the trial court's orders granting summary judgment for all Respondents. There is no reason to adopt the interpretation of law urged by Appellant, which would have the effect of giving virtually every heir the right to re-litigate and revive cases where the statute of limitations has passed as to the original plaintiffs. Washington law has long held that the expiration of the statute of limitations on a decedent's personal injury claims prior to death also bars a wrongful death action based on the same injuries. Despite the opportunity to change this rule of law – which is consistent with the majority rule around the country – the Legislature has left it unchanged for over 80 years. Decedent had the opportunity to bring claims against Respondents for damages allegedly caused by his exposure to asbestos in his 1999

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without having filed suit or otherwise settling the case would force the party responsible for the wrongful act or omission to defend acts long forgotten and for which evidence and witnesses may no longer be available." *Id.* at 1345. The same rationale applies here.

[18] *See* Laws of 1854, § 4, p. 363; Laws of 1854, § 7, p. 364.

Lawsuit. His spouse had the same opportunity and did in fact join the 1999 Lawsuit. Appellant also could have brought a claim for damages in the 1999 Lawsuit, yet failed to do so and has offered no explanation why she did not. Allowing Appellant to sit idly by for over a decade, deprive Respondents of the opportunity to depose her father and conduct other essential discovery, and now assert claims based on the same alleged asbestos exposure and injury from the 1999 Lawsuit would be an injustice. The Court should affirm the trial court's orders granting summary judgment and dismissing all claims against all Respondents with prejudice.

DATED this 30th day of July, 2014.

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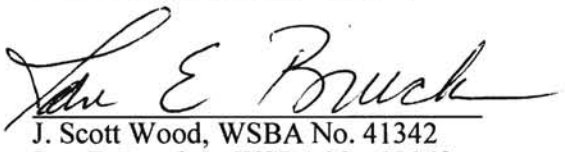

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I caused a true and correct copy of the foregoing to be served via e-mail on all counsel of record, addressed as follows:

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DATED this 30th day of July, 2014.

Loida Cifra Gallegos