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No. 72626-9-I

COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

**FILED**

**FEB 11 2016** *CPB*

WASHINGTON STATE  
SUPREME COURT

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

Respondent,

v.

ASTENJOHNSON, INC.; GOULDS PUMPS, INC.; GRINNELL LLC  
(fka GRINNELL CORPORATION, aka GRINNELL FIRE); HARDER  
MECHANICAL CONTRACTORS, INC.; KEYSTONE  
CONTRACTING, INC.; METALCLAD INSULATION  
CORPORATION; METROPOLITAN LIFE INSURANCE COMPANY;  
PARAMOUNT SUPPLY COMPANY; SCAPA DRYER FABRICS,  
INC.; SEQUOIA VENTURES, INC.; TRECO CONSTRUCTION  
SERVICES, INC.; UNITED SUPPLY COMPANY; WRIGHT  
SCHUCHART HARBOR; and FIRST DOE through ONE HUNDREDTH  
DOE,

Petitioners.

PETITION FOR REVIEW

Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

Meredith Good, WSBA #39890  
Brayton Purcell LLP  
806 SW Broadway, Suite 1100  
Portland, OR 97205-3333  
(503) 295-4931  
Attorneys for Respondent Barabin

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SEATTLE WA 98101

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A. IDENTITY OF PETITIONER

Petitioner Geraldine Barabin, personal representative of Henry Barabin, asks this Court to review the decision designated in part B.

B. COURT OF APPEALS DECISION

The Court of Appeals issued its unpublished decision on November 9, 2015. A copy of that decision is in the Appendix. That court denied Barabin's motion for reconsideration or request for stay by its order entered on January 14, 2016. A copy of that order is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

Where a person is exposed to asbestos and subsequently contracts asbestos-related diseases, sues the various defendants responsible for his or her exposure, and recovers against many of those defendants by settlement or judgment, does the separate statutory wrongful death claim under RCW 4.20.010 accrue for purposes of the statute of limitations in RCW 4.16.080 upon the claimant's exposure to asbestos or when that claimant dies?

D. STATEMENT OF THE CASE

Barabin notes two important facts not mentioned in the Court of Appeals' opinion that bear emphasis. First, asbestos is a known cause of many malignancies as well as non-malignant diseases. Not only is there a long latency period between the time of exposure to asbestos and the experience of symptoms by its victims, but such diseases can linger for

many years.<sup>1</sup> As a result, many asbestos victims file an action for asbestos-related personal injuries while they are alive. With respect to such cases, settlement agreements often do not release the claims such tort claimants' beneficiaries may have for statutory wrongful death. The claimants' personal representatives subsequently file a wrongful death action under RCW 4.20.010 when those victims of asbestos exposure eventually die from their asbestos-caused disease.<sup>2</sup>

Here, Henry Barabin filed a personal injuries claim for his asbestos-related harm, and his statutory beneficiaries, through his wife Geraldine as the personal representative, filed the present wrongful death action.

The Court of Appeals filed its decision on November 9, 2015 in which it affirmed the trial court's granting of the defendant/respondents'

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<sup>1</sup> *Walston v. Boeing Co.*, 181 Wn.2d 391, 401-02, 334 P.3d 519 (2014) ("Asbestos is one of the most notorious of hazardous substances injuring workers in cases brought into our courts. In addition to a long latency period, asbestos-related injuries are continuous, progressive, and cumulative. Each exposure builds on the last and can lead to any number of injuries at any given point in time including shortness of breath, asbestosis, mesothelioma, lung cancer, or a number of other late-appearing cancers."); *Lockwood v. AC&S, Inc.*, 109 Wn.2d 234, 239 n.2, 744 P.2d 605 (1987) (recognizing long latency period for asbestosis and establishing relaxed causation standard in asbestos exposure cases).

<sup>2</sup> This is particularly true for mesothelioma, an asbestos-related cancer that is invariably fatal. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 406, 282 P.3d 1069 (2012) (describing mesothelioma as "a deadly type of cancer associated with asbestos exposure"); *Payne v. Saberhagen Holdings, Inc.*, 147 Wn. App. 17, 22, 190 P.3d 102 (2008) (describing mesothelioma as "an invariably fatal cancer closely linked with prior asbestos exposure.") Mesothelioma cases are common in our courts.

motion for summary judgment because Henry Barabin failed to bring a claim for personal injuries against the respondents within three years of discovering his asbestos-related injuries. Citing the decision in *Deggs v. Asbestos Corp. Ltd.*, 188 Wn. App. 495, 354 P.3d 1 (2015), the court concluded that Barabin did not have a claim for wrongful death under RCW 4.20.020. Op. at 1.

The personal representative in *Deggs* filed a petition for review to this Court, which this Court has granted and set for argument on March 10, 2016 (Supreme Court Cause No. 91969-1). Notwithstanding this fact, the Court of Appeals denied Barabin's motion for reconsideration/motion for stay.

#### E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court's ultimate decision in *Deggs* will control the outcome in this case, as the Court of Appeals acknowledges. Op. at 1-2. Review is merited under RAP 13.4(b) for the reasons that were persuasive in *Deggs*.

The *Restatement (Second) of Torts* and high courts in our sister western states of California, Idaho, Nevada, Montana, and most recently, Utah, *reject* the *Deggs* majority's analysis of similar wrongful death statutes. This Court's older jurisprudence on the application of the statute of limitations for claims under RCW 4.20.010 conflicts with more recent decisions of this Court on the nature of statutory wrongful death claims;

the logic of those older cases and that of the *Deggs* court is flawed: somehow, a victim of asbestos exposure must pursue a statutory wrongful death claim before that victim dies, and before a personal representative is appointed, in order to avoid the bar of the statute of limitations.<sup>3</sup>

This Court should grant review and stay the decision in this case pending the disposition of *Deggs*.

(1) The Court of Appeals Decision Conflicts With This Court's Decisions on the Nature of the Statutory Claim for Wrongful Death - RAP 13.4(b)(1)

The core flaw in the Court of Appeals opinion, as was true in *Deggs*, is its belief that Geraldine Barabin's claim under RCW 4.20.010 on behalf of the statutory beneficiaries is somehow derivative of Henry Barabin's personal injuries claims for the wrongful exposure to the respondents' asbestos products. That flaw animates its analysis and is contrary to this Court's recent teachings on the nature of a claim under RCW 4.20.010.

With regard to RCW 4.20.010 statutory claims, this Court explicitly stated in *Johnson v. Ottomeier*, 45 Wn.2d 419, 423, 275 P.2d 723 (1954) and *Gray v. Goodson*, 61 Wn.2d 319, 324, 378 P.2d 413 (1963) that the wrongful death statute is remedial in nature and is to be

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<sup>3</sup> The *Deggs* dissent referred to this notion as "topsy-turvy land." Dissent at 1. Similarly, the Court of Appeals in *Willis v. Kirkpatrick*, 56 Wn. App. 757, 762, 785 P.2d 834, *review denied*, 114 Wn.2d 1024 (1990) described such a result as "illogical and unjust."



liberally construed. The Court of Appeals fails to take this key interpretive principle into account.

A wrongful death action is entirely a creature of statute. *Dodson v. Continental Can Co.*, 159 Wash. 589, 595-97, 294 Pac. 265 (1930); *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007). The terms of that statute thus control. *Id.* *Nothing* in that statute's language evidences any intent that the claim under RCW 4.20.010 is in any way derivative of the underlying personal injuries action of the tort claimant;<sup>4</sup> rather, it is a *distinct statutory cause of action*. *Grant v. Fisher Flour Mills*, 181 Wash. 576, 580, 44 P.2d 193 (1932); *Gray*, 61 Wn.2d at 325; *Warner v. McCaughan*, 77 Wn.2d 178, 179, 460 P.2d 272 (1969).<sup>5</sup>

Under the specific terms of RCW 4.20.010, the claim may *only* be brought by the personal representative of the person tortiously killed. *Atchison*, 161 Wn.2d at 376.<sup>6</sup> The statutory claim does not belong to the

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<sup>4</sup> RCW 4.20.010 is *silent* on whether the expiration of the statute of limitation on the claimant's underlying personal injuries claims, or a settlement or judgment on such claims bars a wrongful death action under RCW 4.20.010. This Court should not imply a condition to a RCW 4.20.010 statutory claim that the Legislature did not see fit to impose.

<sup>5</sup> This is in stark contrast to the statutory survival actions authorized by RCW 4.20.046 and RCW 4.20.060 that *are* derivative of the tort claimant's personal injuries claims. *Parrish v. Jones*, 44 Wn. App. 449, 454-55, 722 P.2d 878 (1986) ("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.").

<sup>6</sup> RCW 4.20.010 states:

decedent, but to the decedent's statutory beneficiaries. *Warner*, 77 Wn.2d at 179. Obviously, a personal representative can only be appointed once a will is admitted to probate upon a person's death or a person dies intestate. The tort claimant's death is a condition precedent to a claim under RCW 4.20.010.<sup>7</sup>

Consistent with the proposition that RCW 4.20.010 is a distinct, independent cause of action is the fact that the damages recoverable under the statute are distinct from those recoverable in the underlying personal injuries action. *Bowers v. Fiberboard Corp.*, 66 Wn. App. 454, 460-61, 832 P.2d 523, *review denied*, 120 Wn.2d 1017 (1992); 6 Wash. Practice,

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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.

<sup>7</sup> Decisions of the Court of Appeals also emphasize 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 wrongful death claim until decedent daughter had been missing for seven years, when the statutory presumption of death arose). Similarly, in *Willis*, *supra*, 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 there 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 to avoid the injustice of a claim being barred before it could even be brought. 56 Wn. App. at 762-63.

*Wash. Pattern Jury Instructions/Civil* at 329-65 (WPI for wrongful death/survivor claims).

Finally, because a RCW 4.20.010 claim is a distinct, non-derivative claim, it does not accrue at least until the death of the person tortiously killed.<sup>8</sup> In fact, the discovery rule applies to asbestos-related claims precisely because of their long latency period so that the cause of action under RCW 4.20.010 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, as this Court held in *White v. Johns Manville Corp.*, 103 Wn.2d 344, 352-53, 693 P.2d 687 (1985).<sup>9</sup>

Despite the clear rule in Washington that death is a condition precedent to the accrual of a wrongful death claim, the *Deggs* court relied on three old decisions of this Court, *Grant, supra*, *Calhoun v. Washington Veneer Co.*, 170 Wash. 152, 15 P.2d 943 (1932), and *Johnson, supra*.

*Dodson*, an en banc decision of this Court, clearly concluded that a wrongful death cause of action accrues upon the death of the tortfeasor's

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<sup>8</sup> *Atchison*, 161 Wn.2d at 378-79 (“the rule is well settled: wrongful death actions accrue at the time of death”); *Dodson*, 159 Wash. at 592-99. This has long been the rule in Washington. *Nestelle v. Northern Pac. R. Co.*, 56 F. 261, 262 (9th Cir. 1893); *Rentz v. Spokane County*, 438 F. Supp.2d 1252, 1258 (E.D. Wash. 2006).

<sup>9</sup> 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*, 159 Wash. at 592.

victim. 159 Wash. at 598-99. *Grant*, a departmental decision,<sup>10</sup> stated that wrongful death actions typically accrue on the date of death, but then stated that this rule is “subject to a well recognized limitation; namely, at the time of death there must be a subsisting cause of action in the deceased.” 181 Wash. at 581. This statement, read in context, simply means that the decedent must have a preserved claim for the preexisting injury. *Id.* The *Grant* court held that the worker's claims were *not* time-barred.

In *Calhoun*, another department decision, this Court held that the statute of limitations for claims personal to the decedent began to run on the date of the injury that ultimately caused the death and/or the date of the negligent act. 170 Wash. at 160. However, a careful reading of *Calhoun* reveals that the personal representative's wrongful death claim did not *accrue* until the death, but that because the decedent had not preserved his right to sue for the preexisting injury, the Court concluded that the wrongful death claim must be dismissed. *Id.* Also, that ruling was at odds with the en banc *Dodson* court's determination that a wrongful death statutory claim accrued at the time of death. *Dodson*, 159 Wash. at 589.

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<sup>10</sup> Prior to the creation of the Court of Appeals in 1969, as this Court knows, the Court often issued decisions by departments of the Court, reserving en banc consideration for only the most important of its decisions.

The *Johnson* court only mentioned *Calhoun* and *Grant* in passing as they were irrelevant to the Court's analysis, but, more critically, this Court applied the accrual rule consistent with the interpretation advanced by *Barabin*. There, a husband murdered his wife and then committed suicide. Under the common law in Washington as it then existed, the wife had no cause of action in tort because of interspousal tort immunity. Despite the fact that the decedent there could not pursue an underlying personal injuries claim *at all*, this Court held that the wife's estate had a distinct claim under RCW 4.20.010 against the husband's estate for wrongful death. The *Johnson* court seemingly *ignored* the prime analytical point of *Grant* – in *Johnson* there was no subsisting cause of action where the decedent's underlying personal injuries claim was barred by interspousal tort immunity.<sup>11</sup>

In tracing the impact of these decisions, this Court should also take cognizance of the recent decision by Judge James Robarts in *Barabin v. Asten Johnson, Inc.*, 2014 WL 2938457 (W.D. Wash. 2014). Judge Robarts observed that the issue of the accrual of a wrongful death cause of

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<sup>11</sup> Arguably, this Court overruled *Grant sub silentio* in *Johnson*.

action under RCW 4.20.010 is *unsettled under Washington law*. *Id.* at \*3-4.<sup>12</sup>

In sum, as in *Deggs*, this Court needs to resolve a conflict among its decisions on the wrongful death statute of limitations. First, the departmental decisions in *Grant* and *Calhoun* conflict with the en banc Court's decision in *Dodson* and with this Court's more recent discussion of wrongful death claims in cases like *White* and *Atchison*. Indeed, the fundamental concept of a discovery rule in asbestos cases as announced in *White* is at odds with the harsh rule adopted in dicta in *Grant*. The rule in *Grant* makes a wrongful death action under RCW 4.20.010 derivative of the decedent's underlying personal injuries claims, a principle *repeatedly rejected* by this Court.

Finally, as noted by the *Deggs* dissent, the practical anomaly of requiring a personal injury claimant, not yet deceased, to include a claim for wrongful death under RCW 4.20.010, a claim that can only be brought by a personal representative who is not yet appointed (and cannot be appointed), is glaring. Only this Court can authoritatively resolve this inconsistency in its decisions.

(2) The Issue Here Is One of Significant Public Importance – RAP 13.4(b)(4)

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<sup>12</sup> Judge Robarts even indicated that certification of the issue to this Court might be appropriate. *Id.* at \*4.

If the Court of Appeals in *Deggs* has correctly interpreted this Court's precedents, this Court should overrule *Grant*, *Calhoun*, and *Johnson*. This Court generally follows principles of *stare decisis*. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). But the common law must necessarily evolve and when a common law principle is incorrect and harmful, it should be abandoned. *See, e.g., Davis v. Baugh Construction Co.*, 159 Wn.2d 413, 150 P.3d 545 (2007) (abandoning common law rule of completion and acceptance in construction cases).

The alleged rule in those three older cases, even if it seemed reasonable then, fails to recognize the prevailing modern principle that a wrongful death claim is a distinct, not derivative, claim that accrues only upon the tort claimant's death. To hold otherwise fails to honor the remedial purpose of RCW 4.20.010 and establishes the illogical proposition that a tort claimant must pursue a wrongful death claim before he/she dies and before a personal representative, the only person who can bring a claim, may commence the action. Ultimately, this simply bars the statutory beneficiaries from pursuing legitimate wrongful death claims, benefitting tortfeasors and rewarding their wrongdoing that results in their victims' deaths.

That these cases have outlived their usefulness is evidenced by the fact that the trend in the law is to the contrary. Comment c to § 899 of the *Restatement (Second) of Torts* states:

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.

*See also*, W. Page Keeton, *Prosser and Keeton on Torts* § 127 (5<sup>th</sup> 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.”).

For cases arising under the Federal Tort Claims Act, federal courts have concluded that when a state statute creates an independent wrongful death claim, such wrongful death claims do not accrue under federal law prior to death. *Washington v. United States*, 769 F.2d 1436, 1438-39 (9th Cir. 1985) (FTCA claim of woman in coma for 14 years not time-barred because family timely filed claim after her death; cause of action accrued at her death, not when she went into coma). *See also*, *Miller v. Phil.*



*Geriatric Ctr.*, 463 F.3d 266, 272 (3d Cir. 2006) (“[W]rongful death claims, for FTCA purposes, cannot accrue prior to death.”).

Throughout the Western United States,<sup>13</sup> the prevailing rule is that a cause of action for wrongful death accrues only upon the tort claimant's death. The Idaho Supreme Court in 2010 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.”).

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<sup>13</sup> See also, *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.”); *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.”); *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.”).

Most recently, in 2014, the Utah Supreme Court in *Riggs v. Georgia Pacific LLC*, 345 P.3d 1219 (Utah 2014) interpreted a nearly identical statute to RCW 4.20.010, concluding in a strict statutory analysis that *nothing* in that statute evidenced an intent to tie a wrongful death action to an underlying personal injuries action. The same is true here, as noted *supra*.

The *Riggs* court also noted that in states where a wrongful death claim was barred if the decedent had obtained a judgment or settlement based on the same injuries, the applicable wrongful death statutes specifically created causes of action that were derivative of the underlying personal injuries claim of the decedent. *Id.* at 1222-23.

Ultimately, the Utah court unambiguously held that a wrongful death claim was available even though the decedent had previously recovered a judgment for asbestos-related injuries:

Utah Code section 78B-3-106 states plainly that “when a death of a person caused by the wrongful act or neglect of another, his heirs...may maintain an action for damages.” The statutory language is clear and unambiguous, and does not indicate that the cause of action is in any way tied to the decedent’s own personal injury action. We therefore conclude that wrongful death is an independent cause of action not barred by the existence of a final judgment in the decedent’s underlying personal injury suit.

*Id.* at 1226.

Treatises, the FTCA case law, and the cases from Washington's sister western states are persuasive authority for the analysis Barabin advocates here.<sup>14</sup>

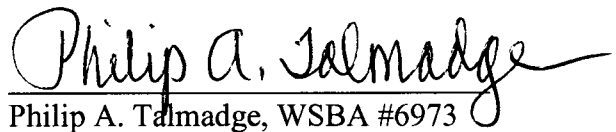
F. CONCLUSION

Because the decision of the Court of Appeals relies on *Deggs* and this Court has granted review in *Deggs*, this Court should grant review under RAP 13.4(b) and stay disposition of this case pending the Court's resolution of *Deggs*.

Ultimately, this Court should reverse the Court of Appeals and trial court decisions. Geraldine Barabin's RCW 4.20.010 claim on behalf of the statutory beneficiaries is not barred. Costs on appeal should be rewarded to Barabin.

DATED this 25th day of January, 2016.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
(206) 574-6661

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<sup>14</sup> *Deggs* predicted in her petition for review that the issue in her case merited review under RAP 13.4(b)(4) because other, similar decisions were coming to this Court. This case and other Court of Appeals decisions applying *Deggs* only confirm that prediction was accurate.

Meredith Good, WSBA #39890  
Brayton Purcell LLP  
806 SW Broadway, Suite 1100  
Portland, OR 97205-3333  
(503) 295-4931  
Attorneys for Petitioner Barabin

# APPENDIX

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

GERALDINE BARABIN, as Personal Representative for the Estate of HENRY BARABIN, Deceased,	)	No. 72626-9-1
	)	(consolidated with
	)	No. 72720-6-1, No. 72721-4-1,
	)	No. 72722-2-1, No. 72724-9-1,
Respondent,	)	and No. 72725-7-1)
	)	
v.	)	
	)	
ASTENJOHNSON, INC.; GOULDS PUMPS, INC.; GRINNELL LLC (fka GRINNELL CORPORATION, aka GRINNELL FIRE); HARDER MECHANICAL CONTRATORS, INC.; KEYSTONE CONTRACTING, INC. METALCLAD INSULATION CORPORATION; METROPOLITAN LIFE INSURANCE COMPANY; PARAMOUNT SUPPLY COMPANY; SCAPA DRYER FABRICS, INC.; SEQUOIA VENTURES, INC.; TRECO CONSTRUCTION SERVICES, INC.; UNITED SUPPLY COMPANY; WRIGHT SCHUCHART HARBOR; and FIRST DOE through ONE HUNDREDTH DOE,	)	
	)	
Appellants.	)	UNPUBLISHED OPINION
	)	
	)	FILED: November 9, 2015

FILED  
COURT OF APPEALS DIV. 1  
STATE OF WASHINGTON  
2016 JAN 25 PM 4:07

VERELLEN, J. — This court recently held in Deggs v. Asbestos Corp. Ltd.<sup>1</sup> that there is no viable cause of action for wrongful death once an individual allows the statute of limitations to expire on his underlying personal injury claim during his lifetime. After Henry Barabin died, his wife filed a wrongful death action against defendants that

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<sup>1</sup> 188 Wn. App. 495, 354 P.3d 1 (2015) (petition for review pending).

Barabin had not sued for personal injuries during his lifetime. We conclude Deggs controls. Because Henry Barabin allowed the statute of limitations to expire on his underlying personal injury claim during his lifetime, his personal representative has no viable cause of action for wrongful death against these new defendants. Accordingly, we reverse.

### FACTS

The material facts are undisputed. In 2006, Henry Barabin and his wife, Geraldine, successfully sued two defendants for injuries related to Henry's asbestos exposure in the workplace.<sup>2</sup> But the judgment was ultimately vacated and remanded to federal district court, where that case remains pending. In 2014, two years after Henry passed away, Geraldine, as personal representative for his estate, filed a wrongful death claim in King County Superior Court against several new defendants.

Before this court issued its opinion in Deggs, the superior court denied the new defendants' motions for summary judgment, ruling that the expiration of the statute of limitations on Henry's underlying personal injury action did not bar Geraldine's wrongful death claim.

This court granted discretionary review.

### ANALYSIS

This appeal presents the question whether the expiration of the statute of limitations on an individual's personal injury action during his lifetime can preclude a wrongful death action based upon the underlying personal injury action.

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<sup>2</sup> Barabin v. AstenJohnson, Inc., C07-1454RSL, 2010 WL 1506430, at \*1 (W.D. Wash. Apr. 14, 2010).

Under substantially the same facts and same legal arguments, this court recently held that there is no viable cause of action for wrongful death once an individual allows the statute of limitations to expire on his underlying personal injury claim during his lifetime: "Wrongful death claims derive from the wrongful act and do not accrue absent a valid subsisting cause of action in the decedent at the time of his death."<sup>3</sup>

We conclude Deggs controls here. Henry passed away over five years after he and Geraldine filed his original personal injury complaint. Neither Henry nor Geraldine filed any claims against the new defendants related to his injuries within the three-year statute of limitations for the personal injury claims. As a result, there was "no subsisting cause of action in the deceased" at the time of Henry's death. We note that the trial court did not have the benefit of the Deggs decision at the time it denied the motions for summary judgment. Accordingly, his personal representative has no viable cause of action under the wrongful death statute against the new defendants.

We reverse.

WE CONCUR:

Spears, C.J.

Walden, J.

Becker, J.

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STATE OF WASHINGTON

<sup>3</sup> Deggs, 188 Wn. App. at 497.





No. 72626-9-1/2

ORDERED that the respondent's motion for reconsideration is denied.

Done this 14<sup>th</sup> day of January, 2016.

FOR THE PANEL:

Veronica ACJ

STATE OF WASHINGTON  
2016 JAN 14 PM 12:22

**Certificate of Service**

GERALDINE BARABIN, as Personal Representative for the Estate of HENRY Barabin,  
deceased, v. METALCLAD INSULATION LLC, et al.

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

I hereby certify that on the below date, I served a true and correct copy of **Respondent's Petition for Review** on the parties in the manner set for below as follows:

<p>Daniel Ruttenberg J. Scott Wood Foley &amp; Mansfield PLLP 999 Third Avenue, Suite 3760 Seattle, WA 98104 <a href="mailto:asbestos-sea@foleymansfield.com">asbestos-sea@foleymansfield.com</a> <b>Attorneys for AstenJohnson, Inc.</b></p>	<p align="center"><b>E-Mail Service Only</b></p>
<p>Barry Mesher Sedgwick LLP 520 Pike Street, Suite 2200 Seattle, WA 98101 <a href="mailto:Asbestos.Seattle@sedgwicklaw.com">Asbestos.Seattle@sedgwicklaw.com</a> <b>Attorneys for Crown Cork &amp; Seal Company, Inc.</b></p>	<p align="center"><b>E-Mail Service Only</b></p>
<p>Ronald C. Gardner Gardner Trabolsi &amp; Associates 2200 Sixth Avenue, Suite 600 Seattle, WA 98121 <a href="mailto:rgardner@gandtlawfirm.com">rgardner@gandtlawfirm.com</a> <a href="mailto:asbestos@gandtlawfirm.com">asbestos@gandtlawfirm.com</a> <b>Attorneys for Grinnell LLC (fka Grinnell Corporation, aka Grinnell Fire)</b></p>	<p align="center"><b>E-Mail Service Only</b></p>
<p>Christine Dinsdale Soha &amp; Lang PS 1325 Fourth Avenue, Suite 2000 Seattle, WA 98101 <a href="mailto:dinsdale@sohalang.com">dinsdale@sohalang.com</a> <a href="mailto:asbestos@sohalang.com">asbestos@sohalang.com</a> <b>Attorneys for Goulds Pumps, Inc.</b></p>	<p align="center"><b>E-Mail Service Only</b></p>
<p>Beth M. Strosky Benjamin J. Lantz Keller Rohrback LLP 1201 Third Avenue, Suite 3200 Seattle, WA 98101 <b>Attorneys for Harder Mechanical Contractors, Inc.</b></p>	<p><b>Fax</b> _____ <b>Email (courtesy)</b> _____ <b>Regular Mail</b> <input checked="" type="checkbox"/> _____ <b>Overnight</b> _____ <b>Hand Delivery</b> _____</p>

<p>Mark Tuvim  Gordon &amp; Rees LLP  701 Fifth Avenue, Suite 2100  Seattle, WA 98104  <a href="mailto:asbestos-sea@gordonrees.com">asbestos-sea@gordonrees.com</a>  <b>Attorneys for Keystone Contracting, Incorporated</b></p>	<p><b>E-Mail Service Only</b></p>
<p>J. Scott Wood  Foley &amp; Mansfield PLLP  800 Fifth Avenue, Suite 3850  Seattle, WA 98104  <a href="mailto:asbestos-sea@foleymansfield.com">asbestos-sea@foleymansfield.com</a>  <b>Attorneys for Lone Star Industries, Inc.</b></p>	<p><b>E-Mail Service Only</b></p>
<p>Richard Gawlowski  Wilson Smith Cochran &amp; Dickerson  901 Fifth Avenue, Suite 1700  Seattle, WA 98164  <a href="mailto:metlifeasbestos@wscd.com">metlifeasbestos@wscd.com</a>  <a href="mailto:reyes@wscd.com">reyes@wscd.com</a>  <b>Attorneys for Metropolitan Life Insurance Company</b></p>	<p><b>E-Mail Service Only</b></p>
<p>Mark Fucile  Daniel Reising  Fucile &amp; Reising LLP  800 NW Sixth Avenue, Suite 211  Portland, OR 97209  <a href="mailto:service@frllp.com">service@frllp.com</a>  <b>Attorneys for Owens-Illinois, Inc.</b></p>	<p><b>E-Mail Service Only</b></p>
<p>Jason Daywitt  Rizzo Mattingly Bosworth  1300 SW Sixth Avenue, Suite 330  Portland, OR 97201  <b>Attorneys for Paramount Supply Co.</b></p>	<p><b>Fax</b> _____  <b>Email (courtesy)</b> _____  <b>Regular Mail</b> <input checked="" type="checkbox"/> _____  <b>Overnight</b> _____  <b>Hand Delivery</b> _____</p>
<p>Kevin Baumgardner  Corr Cronin LLP  1001 Fourth Avenue, Suite 3900  Seattle, WA 98154  <a href="mailto:asbestos@corrchronin.com">asbestos@corrchronin.com</a>  <b>Attorneys for Sequoia Ventures Inc.</b></p>	<p><b>E-Mail Service Only</b></p>
<p>Maria Ruckwardt  Jackson Jenkins Renstrom LLP  701 Fifth Avenue, Suite 4200  Seattle, WA 98101  <a href="mailto:seattleoffice@jjr-law.com">seattleoffice@jjr-law.com</a>  <b>Attorneys for Wright Schuchart Harbor</b></p>	<p><b>E-Mail Service Only</b></p>

<p>Mark Tuvim  Gordon &amp; Rees LLP  701 Fifth Avenue, Suite 2100  Seattle, WA 98104  <u>asbestos-sea@gordonrees.com</u>  <b>Attorneys for Union Carbide Corporation</b></p>	<p><b>E-Mail Service Only</b></p>
<p>Nicole MacKenzie  Williams Kastner &amp; Gibbs PLLC  601 Union Street, Suite 4100  Seattle, WA 98101-2380  <b>Attorneys for Scapa Dryer Fabrics, Inc.</b></p>	<p><b>Fax</b> _____  <b>Email (courtesy)</b> _____  <b>Regular Mail</b> <u>  x  </u>  <b>Overnight</b> _____  <b>Hand Delivery</b> _____</p>
<p>Meredith B. Good  Brayton Purcell LLP  806 SW Broadway, Suite 1100  Portland, OR 97205  <u>mgood@braytonlaw.com</u></p>	<p><b>E-Mail Service Only</b></p>
<p><b><u>Original and One Copy Via ABC</u></b>  Clerk of the Court  Court of Appeals - Division I  One Union Square  600 University St.  Seattle, WA 98101-1176</p>	

Dated: January 25, 2016

*Stephanie Nix-Leighton*  
Stephanie Nix-Leighton, Legal Assistant  
Talmadge|Fitzpatrick|Tribe