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NO. 96203-1

SUPREME COURT OF
THE STATE OF WASHINGTON

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

Appellant,

v.

BRAND INSULATIONS, INC., et al.,

Respondent.

RESPONDENT BRAND INSULATIONS, INC.'S OPPOSITION
TO PETITION FOR REVIEW

David A. Shaw, WSBA #08788
WILLIAMS, KASTNER & GIBBS
601 Union Street, Suite 2100
Seattle, WA 98101
Phone: (206) 628-6600
Fax: (206) 628-6611
Attorneys for Respondent
Brand Insulations, Inc.

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A. Introduction and Summary of Argument.

Ramona Brandes argues that the Court of Appeals erred when it applied the Washington Supreme Court decision in *Deggs v. Asbestos Corp.*, 186 Wn.2d 716, 381 P.3d 32 (2016) to the facts of this case. Her position is entirely without merit. In fact, her current position is contrary to the position taken by her when the Court of Appeals matter was pending, and this Court had not yet issued its opinion in *Deggs*. On March 8, 2015, petitioner filed a Stipulated Motion to Stay Appeal pending this Court's decision in *Deggs*. The stipulation offered by petitioner stated, in part,

Because the trial court's dismissal of Appellant's claims was based upon this court's reasoning in *Deggs*, because the Supreme Court has accepted review of *Deggs*, and because Appellant and Respondents agree that the Supreme Court's eventual decision in that case will likely bear directly upon the issues raised in the present appeal, the current appeal should be stayed pending the Supreme Court's decision. (Exhibit A)

Now, with the Court of Appeals having relied on this Court's decision in *Deggs* to affirm the trial court's dismissal of her wrongful death action, petitioner seeks to argue that *Deggs* doesn't control at all, and the present case is distinguishable. Petitioner is wrong on all counts.

In *Deggs*, this court identified the controlling Washington rule to be:

If the deceased, in [her] lifetime has done anything that would operate as a bar to recovery by [her] of damages for the personal injury, this will operate equally as a bar in an action by [her] personal representative for [her] death. Thus a release by the party injured of [her] right of action, or **recovery of damages by [her] for the injury** is a complete defense in the statutory action. Citing *Brodie v. Washington Water Power Co.*, 92 Wn.2d 574, 576, 159 P. 791 (1916) quoting *Death by Wrongful Act, Tiffany* (2d. Ed. § 124) (emphasis added).

This is the controlling law in the state of Washington and has been so for over a century. When an individual has obtained a judgment on her personal injury action, any subsequent action brought by the personal representative on behalf of wrongful death statute beneficiaries based on the same wrongful conduct is precluded.

The fact that a survival action and a wrongful death action are distinct causes of action does not disconnect a wrongful death statutory claim from the underlying *wrongful act* of the defendant against the decedent. It is that wrongful act from which the wrongful death claims spring. It is that wrongful act for which there must be a valid subsisting claim in the decedent at death in order for the statutory beneficiaries' wrongful death claim to accrue. *Deggs v. Asbestos Corp. Ltd.*, 188 Wn.App. 495, 507, 354 P.3d 1 (2015).

Wrongful death claims in Washington derive solely from the wrongful act or conduct rather than from the death itself, such that the

resolution of the personal injury claim precludes a subsequent wrongful death action. This is because the primary purpose of Washington's wrongful death statute is to ensure that every wrongful or negligent act has a potential remedy. An important and historical application of this rule, upon which both the Washington Supreme Court majority and dissent in *Deggs* agree, is that prior litigation of the personal injury claim will bar a subsequent wrongful death claim.

This Court's decision in *Deggs* affirmed and upheld the line of cases which explain the applicable limitation petitioner now seeks to avoid. The prior litigation exception to the normal rule that a wrongful death claim accrues on death acts as a complete bar to any wrongful death claim because Barbara Brandes' unabated personal injury action was tried to verdict and a judgment was rendered in her favor. In short, Mrs. Brandes' estate was fully compensated for the alleged wrongful act of Brand Insulation. The fact that full compensation for Mrs. Brandes' personal injury claims was received via the judgment should bar subsequent claims for wrongful death based on the same negligent act.

Moreover, the loss of consortium claims asserted by the statutory beneficiaries under the Wrongful Death Act are identical to loss of consortium they possessed prior to their mother's passing. Those loss of consortium claims could and should have been filed in their mother's

personal injury action. We will demonstrate below that Mrs. Brandes' statutory beneficiaries forfeited their loss of consortium claims by not prosecuting them in their mother's personal injury case.

When the personal representative of Mrs. Brandes' estate commenced a wrongful death action against Brand, that lawsuit sought additional damages from the same defendant previously found liable to Mrs. Brandes in her personal injury action for the same alleged wrongful acts. The trial court below correctly concluded that the claim was barred. The Court of Appeals correctly ruled that the claim was barred. The rule articulated by this Court in *Deggs* bars the suit.

The fundamental flaw in Ms. Brandes' position is that she seeks to focus on individual words in prior decisions¹ to address a factual situation not addressed in any of those cases. In so doing, she necessarily ignores the general concepts supporting the rule affirmed in *Deggs*. The general concepts behind the equitable exception recognized in *Deggs* is that when a plaintiff recovers 100% of her damages via her personal injury action, she has been fully compensated for a defendant's *wrongful act*. Once full compensation is received for the *wrongful act*, *Deggs* recognized it is inequitable to permit further recovery. This is particularly true when one

¹ "the only question here is whether there was a subsisting cause of action against Brand at the time of Barbara Brandes' death" (Petitioner's brief at page 17).

recognizes that those entitled to recovery under the wrongful death statute are also the natural objects of the decedent's bounty. Petitioner's position is that *Deggs* would bar a wrongful death claim if settlement occurred the day before verdict with plaintiff dying one second after signing the agreement, or if she died one second after the verdict was rendered. However, if she died one second before the verdict was rendered, a wrongful death claim would be permitted. Such a nonsensical result cannot be supported by the *equitable* concept of permitting a remedy for every wrong, but permitting only one complete recovery for a *wrongful act*.

B. A Wrongful Death Claim is Derivative of the Wrongful Act that Harmed the Decedent. Appellant Cannot Maintain a Wrongful Death Claim Where the Decedent has Been Made Whole for the Wrongful Act.

At common law there was no right of action for wrongful death. *Ryan v. Poole*, 182 Wn. 532, 534, 47 P.2d 981 (1935). In England, as well as the United States, the subject is controlled by statutes derived from Lord Campbell's Act. *Id.* The Act was the first to give rise to an action for wrongful death and provided that whenever the death of a person was caused by a wrongful act, negligence or default of another, the person who would be liable if death had not ensued would be liable in an action for damages notwithstanding the death. *Id.* The main purpose was to deprive

the wrongdoer of the immunity from civil liability in the event the injury caused death. The Washington legislature abrogated the common law rule by passing its version of Lord Campbell's wrongful death statute. *Upchurch v. Hubbard*, 29 Wn.2d 599, 188 P.2d 82 (1947). The statute contemplated a cause of action for the tort which produced the death, not for the death caused by the tort. RCW 4.20.010; *Brodie v. Wash. Water Power Co.*, 92 Wn. at 576; *Flynn v. N.Y., N.H. & H. R. Co.*, 283 U.S. 53, 56, 51 S.Ct. 357 (1931).

It is the general rule that the wrongful death action accrues at the time of death and the statute of limitations begins to run at that time, or when the heirs discovered or should have discovered the cause of action. *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 352-53, 693 P.2d 687 (1985). The general rule, however, is subject to exceptions. The exceptions, as explained by this Court in *Johnson v. Ottomeier*, 45 Wn.2d 419, 423, 27 P.2d 723 (1954), fall into two categories: where the defense asserted inhered in the tort itself and, where after receiving the injuries, the decedent pursued a course of conduct which makes it inequitable to recognize a cause of action for wrongful death.

For over 100 years, Washington law has provided that wrongful death claims are derivative of the underlying personal injury claim. *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 718, 381 P.3d 32 (2016).

Although the wrongful death claim “exists for the benefit of the deceased’s family, it is not completely separate” from the underlying claim; the “two types of actions are intertwined with each other and have consequences for each other.” *Id.* at 722. In fact, the exclusions derive from this Court’s analysis that the wrongful death cause of action is premised upon the *wrongful act* rather than the actual death. Consequently, the wrongful death statute gives a right to recover against the person who would have been liable had the death not ensued—but only if the injured party himself could have recovered against such person in his lifetime. *See Brodie v. Wash. Water Power Co.*, 92 Wn. 574, 159 P. 751 (1916).

Contrary to the law as set forth by the Washington Supreme Court in *Deggs*, *Johnson*, *Grant*, *Ryan*, *Calhoun* and *Brodie*. Petitioner essentially champions Judge Dwyer’s dissenting opinion in *Deggs*, arguing that unlike Washington’s survival statutes, which simply preserve *existing* causes of action a person could have maintained had death not occurred, the wrongful death statute creates a *new* and *original* cause of action following the decedent’s death. Judge Dwyer’s opinion was rejected by a majority of the Court of Appeals as well as by a majority of justices on the on this Court. Even the dissenting justices on this Court agreed that a wrongful death claim is barred where there has been a prior

judgment or settlement and release of the claim. *Deggs*, 186 Wn.2d at 733 (Stephens, J. dissenting).

The prior litigation rule derives from the legislative purpose behind the wrongful death statute, and the two separate but distinct policies it promotes: ensuring that there is at least some recovery for a wrongful act, and providing a recovery for enumerated statutory beneficiaries for their independent “loss of consortium” damages. While both policies are promoted by a statutory wrongful death claim, the decisions of the Washington Supreme Court reveal that the paramount purpose is the former: ensuring that there is at least some recovery for each wrongful act. *Id.* at 721-722. This purpose is manifested in the way in which the second claim is said to derive from the first. The primacy of the personal injury action is implicit in the very existence of the exception: where the decedent has already fully recovered for the wrongful act, by litigation or settlement, or has intentionally or constructively failed to pursue litigation by allowing the statute of limitations to run, the independent damages of wrongful death statutory beneficiaries are simply cut off. The policy of ensuring a right for every wrong being satisfied, a wrongful death claim is no longer necessary.

While permitting recovery of independent damages sustained by statutory beneficiaries is a policy goal of the wrongful death statute, that

policy is balanced against the important goals of preventing double recoveries and endorsing the finality of judgments and settlements. Both the Court of Appeals and this Court recognized that the Supreme Court has historically had multiple opportunities to weigh the competing policy considerations, and “[i]t chose finality of settlements and judgments and preclusion of stale claims and potential double recovery” over an interpretation focusing on strict compensation for the heirs. *Deggs v. Asbestos Corp. Ltd.*, 188 Wn. App. at 511.

To reflect this policy structure, the statute is understood as only creating something where something was missing. It creates a wrongful death action to prevent a defendant from avoiding the consequences of negligent or wrongful conduct. Where the defendant is held to account, and the injured party made whole, the policy of the statute is satisfied and there is nothing left to accrue to the heirs. *Brodie*, 92 Wn. at 576-577.

One thrust of Petitioner’s argument is that this Court must treat the death of Mrs. Brandes as a new event, entitling her heirs to a subsequent recovery for the death itself rather than the negligent act that caused the injury. In Washington, the wrongful death action only allows recovery for the wrongful act that caused the injury, it does not permit a separate recovery for death. A corollary to that rule is that, once the plaintiff is made whole, statutory beneficiaries no longer have a cause of action.

Both the majority and the dissent in *Deggs* agreed that the “derivative” nature of the wrongful death claim meant that it was subject to the rule that prior litigation would bar a subsequent wrongful death claim. *Deggs*, 186 Wn.2d at 726 (majority) and 733 (dissent). The defense is complete because there is only one negligent act, once that act has been remedied, the plaintiff, decedent, estate or heirs have been made whole.

C. The Prior Litigation of a Personal Injury Action is a Complete Bar to a Subsequent Wrongful Death Action.

The Washington Supreme Court has repeatedly held that the law will not permit the deceased’s personal representative to maintain a suit based on injuries for which the deceased has already been compensated, because to do so would be inequitable. *Johnson*, 45 Wn.2d at 422-23; *Brodie*, 92 Wn. at 576; *Grant*, 181 Wn. at 580-81; *Deggs*, 186 Wn.2d at 726. “A wrongful death ‘action accrues at the time of death’ so long as there is ‘a subsisting cause of action in the deceased’ at the time of death subject to exceptions not present here.” *Deggs*, 186 Wn.2d at 732-33 quoting *Grant*, 181 Wn. at 580-81 and citing *TIFFANY*, supra § 124 which states:

If the deceased, in his lifetime, has done anything that would operate as a bar to recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representatives for his death. Thus a

release by the party injured of his right of action, or a recovery of damages by him for the injury is a complete defense in the statutory action.

Petitioner's counsel conceded at oral argument in the trial court that the Court of Appeals decision in *Deggs* precluded wrongful death claims where the decedent had obtained a judgment on her personal injury claim.

Mr. Draper: This is a recent Court of Appeals decision in this division, it's binding on this Court, and it's dispositive of the issues that are before the Court today.

So let's look at the issue that *Deggs* had, whether there was anything the victim can do during a lifetime, during his or her lifetime, to prevent the accrual of the wrongful death claim. And it's important – the language is important. It prevents the accrual. There are things that the victim can do that prevent the wrongful death claim from accruing.

...

The *Deggs* court concluded that, yeah, there were some things that the decedent could do in his or her lifetime to preempt the accrual of the claim, to stop the wrongful death claim from accruing upon their death.

...

So the *Deggs* case explored three ways that the rule could apply to prevent the accrual of the wrongful death claim. The first was that the decedent may allow the statute of limitations to lapse during his or her lifetime, and that's in fact what happened in *Deggs* ... if the decedent settles with a specific defendant at issue ... [a]nd then the other situation is – that the *Deggs* court discussed, if there is a judgment against “the” defendant while the decedent is alive. In that case, the decedent couldn't bring another claim against that same defendant if he or she wanted to because it would be *res judicata*. There was no valid

subsisting claim at the time of the decedent's death, so – it fits into that rule. There has to be a valid subsisting claim, and if there's not, the claim never accrues.

VRP 10-13.

Recovery of a judgment by the decedent on her unabated personal injury claim should operate as a complete bar to a subsequent wrongful death action because it represents a complete and full recovery on her personal injury claim against the defendant. The completeness of that recovery does not turn on whether or not it is obtained one moment before death or one moment after death. It is complete in either case.

The statutory beneficiaries of Mrs. Brandes' estate are barred from pursuing wrongful death claims because Mrs. Brandes pursued litigation on the underlying claim in her lifetime and that litigation was ultimately resolved by judgment prior to the commencement of the separate wrongful death action. The jury's verdict in Mrs. Brandes unabated personal injury action is no different from a judgment in an action in which the plaintiff survives the verdict. Both should bar a subsequent wrongful death action. It makes no difference to the rights and expectations of the defendants whether Mrs. Brandes died on a Sunday during trial or on a Wednesday after the verdict. The critical feature of this factual scenario is that Mrs. Brandes' personal injury action was pursued unabated and resolved by entry of judgment.

D. Washington Jurisprudence Is Consistent with That of Other States.

Mrs. Brandes brought her personal injury suit against Brand, and it was eventually terminated in a judgment prior to the commencement of the instant wrongful death action. Therefore there is no claim for wrongful death in her heirs.

In accord with the great weight of authority, this court has held that the [wrongful death] 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, *Wrongful Death Act* (2nd 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. Wash. Water Power Co.*, 92 Wn. 574, 159 P. 791 (1916); *Mellon v. Goodyear*, 277 U.S. 335, 48 S.Ct. 541 (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 & Miss. 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. N.Y., N.H. & H. R. Co.*, 283 U.S. 53, 51 S.Ct. 357 (1931). In this latter class falls the case of *Calhoun v. Wash. Veneer Co.*, 170 Wn. 152, 159-60, 15 P.2d 943 (1932).

Grant, 181 Wn. 576, 580-81, 44 P.2d 193 (1935); accord *Johnson*, 45 Wn.2d at 422-23; *Calhoun*, 170 Wn. at 159-60. The basis for the exception to the general rule is easy, the wrongful death action is derivative in nature. See *Deggs v. Asbestos Corp. Ltd.*, 188 Wn.App 495, 354 P.3d 1 (2015). The statute permits redress for the act that caused the

wrong to the decedent not the injury itself. *Brodie*, 92 Wn. at 576; *Flynn*, 283 U.S. at 56.

The salient issue was succinctly analyzed by the *Littlewood* court, cited in *Grant supra*. The question posed in that case: was the wrongful death statute intended to provide a remedy in addition to the injured party's personal injury action (described as a double recovery), or was it intended to provide what would be the sole remedy in situations in which the plaintiff could not or did not assert a viable claim as a result of his or her own death? The *Littlewood* court held the legislature intended that the wrongful death statute apply only in cases where the plaintiff did not receive a full recovery on her personal injury action. *Littlewood*, 89 N.Y. at 27. In so doing, the Littlewood court explicitly rejected the statutory interpretation that would result in a double recovery. *Id.* at 27-28. That is precisely the rationale adopted by Washington courts and affirmed in *Deggs*.

Mrs. Brandes obtained a judgment in her personal injury action. She was made whole for those negligent acts for which she claimed Brand was liable. The judgment extinguished all further claims related to those alleged negligent acts. Consequently, no cause of action accrued to the personal representative of her estate based on those same negligent acts. "In the eyes of the law, the recovery of damages makes a plaintiff whole

for loss or injury suffered.” *McFerron v. Heroux*, 44 Wn.2d 631, 642, 269 P.2d 815 (1954).

When one injured by the wrongful act or neglect of another brings suit and recovers damages for the injury, where death subsequently results from the injury, her personal representatives cannot maintain an action under the wrongful death act. *Littlewood*, 89 N.Y. at 24 (cited in *Grant* for the exact proposition). “Said act was not intended to impose a double liability, but simply to give a right of action where a party, having a good cause of action for a personal injury, was prevented, by death resulting from such injury, from enforcing his right or who omitted in his life-time so to do.”² *Id.* Once a defendant has been called to answer for their alleged negligence, any future action based on that same negligent conduct is extinguished as a matter of law. *Id.*; *Deggs*, 188 Wn.App, at 500.

² Defendant having once responded in damages for the negligent act, which is the foundation of the plaintiff's action, all liability for such act has been extinguished, and compensation therefor cannot be exacted a second time. (Addison on Torts [Dudley & Baylie's ed.], 735, 1156; 1 Sedgwick on Measure of Damages [7th ed.], 705; *Fetter v. Beale*, 1 Ld. Raym. 339; *Bonomi v. Backhouse*, 27 L. J. Q. B. 390; *Whitford v. Panama R. R.*, 23 N. Y. 487; *Hodsoll v. Stollebras*, 11 Ad. & Ell. 301; *Whitney v. Clarendon*, 18 Vt. 252; *Read v. Gt. E. R. Co.*, L. R., 3 Q. B. 555; *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 42; *Curtis v. R. & S. R. R. Co.*, 18 Id. 534; *Drew v. Sixth Ave. R. R. Co.*, 26 Id. 49; Sedgwick on Measure of Damages [7th ed.], 544; *Dibble v. N. Y. & E. Ry.*, 25 Barb. 187; *McGovern v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 417.) The statute should be so construed that its results will be in conformity with the established rules of the common law, and not with the exceptions thereto. (Sedgwick on Construction of Statutes, 270; *Wilbur v. Crane*, 13 Pick. 284, 290; Maxwell's Interpretation of Statutes, 264; Potter's Dwarrris on Statutes, 185; Smith's Commentaries on Stat. and Const. Law, §§ 448-449.). *Id.* at 26.

At least one other court has come to the identical conclusion under identical circumstances: prior litigation commenced during life and concluded as a survivorship action precludes a subsequent wrongful death claim. *Legg v. Britton*, 64 Vt. 652, 24 A. 1016 (1892). Legg's decedent was injured by the negligence of Britton; the decedent brought a lawsuit but died while it was pending. *Id.* The decedent's administrator revived the action and brought it to a final judgment. *Id.* The court held that the subsequent wrongful death action was barred under the prior litigation exception. *Id.* at 1017. Notably, the Vermont court based its decision upon the primary legislative purpose behind the death statutes in that state, a purpose very similar to the view of the Washington courts: to hold the wrongdoer to the same account whether his negligence caused death or only injury: "[w]hether the recovery be in the right of the intestate, or for the benefit of his widow and next of kin, it is for the same wrongful act or neglect." *Id.* at 1018.

As to the effect of the judgment in favor of the administrator in the revived action, the *Legg* court noted there was no reason to treat it differently from an inter vivos judgment:

Although such recovery should be by an executor or administrator in a suit commenced by the intestate, or commenced by such executor or administrator, if the recovery be in the right of the intestate while living, **such recovery, in legal effect, would antedate the death of the**

intestate, exhaust his right of action, and nothing would remain to survive for a subsequent action. It would also exhaust the liability of the wrongdoer, and no liability would remain to be enforced in a subsequent suit.

24 A. at 1017. (Emphasis added). The conclusion here should be the same, given the similar policy, purpose, and treatment of wrongful death claims in Vermont and Washington.

E. Petitioner's Claim is Futile as the Statutory Beneficiaries Wrongful Death Claims are Barred by *Ueland*.

Washington law requires that loss of consortium claims of an injured party's children be asserted in the original personal injury action or they are waived. *Ueland v. Reynolds Metal Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984); *Kelley v. Centennial Contractors Enterprises*, 169 Wn.2d 38, 236 P.2d 197 (2010). In *Ueland*, this court recognized that children of an injured parent have a right to pursue claims for loss of parental consortium. However, that right is not without limitation.

We too hold that the children's claims for loss of parental consortium must be joined with the injured parent's claim whenever feasible. A child may not bring a separate consortium claim unless he or she can show why joinder with the parent's underlying claim was not feasible.

Mrs. Brandes' children seek to have this court resurrect their loss of consortium claims as beneficiaries under Washington's wrongful death statute. Absent from their presentation is any evidence or argument that

Mrs. Brandes' children asserted loss of consortium claims in their mother's personal injury action, or that it was unfeasible for them to have done so. The daughter and personal representative Ramona Brandes attended virtually the entire trial, yet she did not nor did her siblings assert loss of consortium claims in their mother's personal injury action. If this case were remanded, the personal representative's claims would be subject to immediate dismissal under *Ueland*.

F. Conclusion.

The prior litigation exception should include all situations where a plaintiff commences an action while living and that action results in the entry of a judgment against the defendant, irrespective of whether she survives the verdict. Here, Mrs. Brandes commenced an action for personal injuries which resulted in a full and complete recovery for the defendant's wrongful act. There is no basis for not applying the rule adopted by this court in *Deggs* and, consequently, no basis for accepting this petition. The Court of Appeals decision in *Deggs* with respect to this issue was entirely correct.

Respectfully submitted this 19th day of September, 2018.



David A. Shaw, WSBA #08788
Attorneys for Respondent
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Tel: (206) 628-6600
Fax: (206) 628-6611
Email: dshaw@williamskastner.com

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 19th of September, 2018, I caused a true and correct copy of the foregoing document to be delivered via the court efilng system to:

Matthew Bergman
Glenn S. Draper
Kaitlin Tess Wright
BERGMAN DRAPER OSLUND
821 2d Ave., Suite 2100
Seattle, WA 98104-1516
matt@bergmanlegal.com
glenn@bergmanlegal.com
kaitlin@bergmanlegal.com
service@bergmanlegal.com
*Counsel for Ramona C. Brandes
as personal representative for the
estate of Barbara J. Brandes*

Timothy K. Thorson
Michael B. King
CARNEY BADLEY SPELLMAN
701 Fifth Ave, Suite 3600
Seattle, WA 98104
thorson@carenylaw.com
king@carneylaw.com
asbestos@carneylaw.com
*Counsel for Saberhagen Holdings,
Inc. and Parsons Government
Services, Inc.*

Christopher S. Marks
Malika Johnson
Erin Fraser
TANENBAUM KEALE
701 Pike Street, Suite 1575
Seattle, WA 98101
cmarks@tktrial.com
mjohnson@tktrial.com
efraser@tktrial.com
Counsel for CBS Corporation

Signed at Seattle, Washington, this 19th day of September, 2018.



Sandra V. Brown, Legal Assistant

WILLIAMS KASTNER & GIBBS

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