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No. 74554-9-I

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

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

Plaintiff-Petitioner,

v.

BRAND INSULATIONS, INC., *et al.*,

Defendant-Respondents.

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**PETITION FOR DISCRETIONARY REVIEW**

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## **I. IDENTITY OF PETITIONER**

Plaintiff-Petitioner Ramona C. Brandes (“Plaintiff”), daughter of Barbara Brandes and Personal Representative of her Estate, is the Petitioner.

## **II. COURT OF APPEALS’ DECISION**

The Court of Appeals issued its unpublished opinion on May 29, 2018. *See* App. 1-13.

## **III. ISSUES PRESENTED FOR REVIEW**

1. Whether this petition involves issues of substantial importance that should be determined by this Court and therefore warrants review under RAP 13.4(b)(4) because the Court of Appeals’ unpublished opinion misapplies the “prior litigation” exception that extinguishes statutory wrongful death actions under Washington law?

2. Whether the Court of Appeals’ unpublished opinion conflicts with this Court’s precedent and therefore warrants review under RAP 13.4(b)(1) because it misinterprets this Court’s holding in *Deggs v. Asbestos Corp.*, 186 Wn.2d 716, 381 P.3d 32 (2016)?

## **IV. STATEMENT OF THE CASE**

### **A. Barbara Brandes’ Personal Injury/Survivorship Case.**

Barbara Brandes was diagnosed with mesothelioma on June 16, 2014, at the age of 79. CP 109-10. In August 2014, she filed a Complaint

for Personal Injuries against several defendants including Brand Insulations, Inc. CP 112-15. Ms. Brandes alleged that Brand negligently sold and installed asbestos thermal insulation products at the Atlantic Richfield Cherry Point refinery where her husband worked, causing her to sustain “take home” exposure to Brand’s products. CP 40. Ms. Brandes settled with all defendants except Brand by the second day of trial. *See* CP 81. In consideration for a monetary payment, Ms. Brandes explicitly released each settling defendant from all claims arising out of her present personal injury claim *and* any future wrongful death claims asserted by her statutory beneficiaries. CP 725.

Barbara Brandes succumbed to her mesothelioma on April 19, 2015, the night before closing arguments. CP 95-96, 119. Thereafter, the trial court granted Plaintiff’s motion to substitute Ms. Brandes’ daughter as Personal Representative of her mother’s estate and authorized the continuation of the trial as a survivorship action. CP 95-97, 122-28. As the following colloquy between Plaintiff’s counsel and Brand’s counsel make clear, all parties understood that the case was proceeding solely as a survivorship action and that any potential wrongful death claims would not be submitted to the jury:

PLAINTIFF’S COUNSEL: I believe the matter can go forward and that the only matter addressed would be the caption as well as a minor change in damages. And it

would just be eliminating it from your instructions, the future damages.

\*\*\*

THE COURT: Okay. But without doing anything more in terms of evidence to --

PLAINTIFF'S COUNSEL: Correct, because -- There are no claims. There are no wrongful death ... claims being ... pursued now. ...

THE COURT: Okay. Good. Mr. Shaw, your thoughts?

\*\*\*

DEFENSE COUNSEL: Well, we're here. We've got a witness. And I ... would agree with counsel that there's you know, I don't think there's any reason not to proceed.

CP 123-26.

The trial court informed the jurors of Ms. Brandes' death and instructed them that this change in no way affected the limited issues in the case. CP 127-28. The jury instructions were likewise clear that the only damages at issue were those sustained by Ms. Brandes prior to her death, making no mention of any damages sustained by her children.<sup>1</sup> Following a day of deliberation, the jury reached a verdict in favor of the

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<sup>1</sup> On the issue of damages, the jury was instructed as follows:

If you find for the plaintiff, in making a damage award, you should consider the following elements of non-economic damages:

- (1) The nature and extent of the injuries;
- (2) The disability, inconvenience and loss of enjoyment of life experienced by Barbara Brandes; and
- (3) The pain and suffering, both mental and physical, experienced by Barbara Brandes.

CP 131.

Plaintiff, awarding Ms. Brandes' estate \$3,500,000 in non-economic damages for the personal injuries arising out of her mesothelioma diagnosis. CP 81.

**B. The Brandes Children's Wrongful Death Case.**

On July 22, 2015, the Personal Representative of Barbara Brandes' estate filed a Complaint for Wrongful Death against Brand as well as CBS Corporation, Parsons Government Services Inc., and Saberhagen Holdings who had not been named in Ms. Brandes' personal injury action. CP 3. Ms. Brandes' eight surviving children sought economic damages for lost financial support and non-economic damages for the loss of their parental relationship and consortium with their mother. CP 3-4.

On November 3, 2015, Brand filed a Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted, in which defendants Parsons and Saberhagen joined. CP 17-58. Brand argued that under this Court's recent holding in *Deggs v. Asbestos Corp.*, 188 Wn. App. 495, 354 P.3d 1 (2015), *aff'd*, 381 P.3d 32 (2016), the wrongful death claims of Ms. Brandes' children against all defendants were extinguished by the judgment entered in her personal injury action against Brand. CP 17. At oral argument, Brand argued that there was "really only one salient fact," which was "that Ms. Brandes got a verdict in a trial in a personal injury action," and, under Washington case law, "it's very clear that that



recovery in a case in which the potential wrongful death beneficiaries did not file personal injury actions—or their own personal injury actions in that principal action—bars a subsequent wrongful death action.” VRP 3. On January 5, 2016, the trial court signed a Corrected Order granting the motion to dismiss as to all defendants and further specifying that, “The basic operative facts are undisputed and the core issue is one of law.” CP 234-36.

The Brandes Estate timely filed a Notice of Appeal with Division One of the Court of Appeals on January 8, 2016. CP 232-33. After a stipulated stay pending a decision from this Court in the *Deggs* case, the Court of Appeals issued its unpublished opinion on May 29, 2018. Relying heavily on this Court’s opinion in *Deggs*, the Court of Appeals issued the following holding with regard to defendant Brand:

Because the estate recovered from prior litigation against Brand, we are bound by Deggs and affirm the trial court’s dismissal of the wrongful death action against Brand. However, because they were not parties to the estate’s prior litigation, we reverse the trial court’s dismissal of the wrongful death action against Parsons and CBS and remand for further proceedings.

App. at 2.

#### **V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

The Court of Appeals properly held that Ms. Brandes had a subsisting cause of action at the time of her death as to the unnamed

defendants CBS and Parsons. App. at 11, 13. As to defendant Brand, the crux of the appellate court's analysis is found within its conclusion that "because Barbara engaged in post injury prior litigation against Brand, our Supreme Court's equitable exception applies and forecloses the estate's wrongful death action against Brand." App. at 9. In reaching this portion of its holding, the Court of Appeals committed several fundamental legal errors warranting this Court's review pursuant to RAP 13.4(b)(1) and RAP 13.4(b)(4).

First, the appellate court's ruling misconstrues Washington's wrongful death jurisprudence. Although wrongful death claims are provided for by statute, this Court has developed several limitations where the decedent engaged in conduct that renders a later wrongful death claim inequitable including the lapse of a statute of limitations and the entry into a settlement with the defendant. However, the appellate court determined that the existence of pending personal injury litigation was sufficient to foreclose future wrongful death claims, even when the decedent expires prior to entry of a judgment and the jury's verdict expressly excluded wrongful death damages. Such a sweeping limitation on a statutory cause of action raises an issue of substantial public interest that should be reviewed by this Court.

Second, the Court of Appeals erred in construing this Court's holding in *Deggs v. Asbestos Corporation Limited* to foreclose all wrongful death actions against any defendants named in a prior lawsuit. In *Deggs*, the Court was called upon to determine whether "the lapsing of the statute of limitations on the underlying personal injury claim bars the personal representative from bringing a wrongful death claim." 186 Wn.2d at 727. Nevertheless, the Court of Appeals relied on dicta to conclude that filing a lawsuit that later results in judgment after the decedent has passed is an equitable limitation on the availability of wrongful death claims. App. at 10-11. In reaching this conclusion, the decision by the Court of Appeals conflicts with the decision of this Court in *Deggs*, warranting review under RAP 13.4(b)(1).

**A. Barbara Brandes' Survivorship Claim is Legally and Analytically Distinct from the Wrongful Death Claims Asserted by Her Statutory Beneficiaries.**

"[C]auses of action for wrongful death are strictly a matter of legislative grace and are not recognized in the common law." *Tait v. Wahl*, 97 Wn. App. 765, 771, 987 P.2d 127 (1999). In 1854, the Legislative Assembly of the Territory of Washington enacted the special survival statute, now codified at RCW 4.20.060, which allows the executor or administrator of a decedent's estate "to recover for the decedent's damages, including any pain and suffering between the time of

the injury and the time of death.” *Bowers v. Fibreboard Corp.*, 66 Wn. App. 454, 460, 832 P.2d 523 (1992). Washington’s general survival statute—also known as the death by personal injury statute—“does not create a separate claim for the decedent’s survivors” but “merely preserves the causes of action a person could have maintained had he or she not died.” *Cavazos v. Franklin*, 73 Wn. App. 116, 119, 867 P.2d 674 (1994).

In 1875, the territorial legislature enacted the Washington wrongful death statute in substantially the form it has today:

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. This Court has held that a wrongful death action “is not truly a derivative action: “[T]he action for wrongful death is derivative only in the sense that it derives from the wrongful act causing the death, rather than from the person of the deceased.” *Deggs*, 186 Wn.2d at 721 (quoting *Johnson v. Ottomeier*, 45 Wn.2d 419, 423, 275 P.2d 723 (1951)); see also *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 378-79, 166 P.3d 662 (2007) (“the rule is well-settled: wrongful death actions accrue at the time of death”). Consequently, wrongful death claims never belong to the decedent and under no circumstances does the decedent’s estate

benefit from the action. *Maciejczak v. Bartell*, 187 Wash. 113, 125, 60 P.2d 31 (1936).

Because wrongful death claims are created entirely by statute, they encapsulate the legislature's intent that family members be afforded a remedy for the wrongful deaths of their loved ones. "The court's fundamental objective is to ascertain and carry out the legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Thus, any equitable limitations on the Legislature's clear intent must be narrowly construed. *See Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 448, 395 P.3d 1031 (2017) (Open Public Meetings Act exceptions must be narrowly construed); *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 521, 326 P.3d 688 (2014) (Public Records Act exemptions must be narrowly construed). In this case, the Court of Appeals frustrated the intent of the Legislature by effectively repealing the Wrongful Death Statute in any situation where the decedent obtains judgment in a personal injury action irrespective of whether the judgment encompassed wrongful death claims.

There is no indication that our Legislature intended the remedies for survivorship actions and wrongful death actions to be mutually

exclusive. On the contrary, the Court of Appeals has previously recognized the profound distinctions between survivorship and wrongful death rights of action:

Survival actions and wrongful death actions, though often brought together, are conceptually distinct. The wrongful death statute, RCW 4.20.010, provides that when the death of a person is caused by the wrongful act of another, his personal representative may maintain an action for damages against the person causing the death. The wrongful death statutes create new causes of action for the benefit of specific surviving relatives to compensate for losses caused to them by the decedent's death...

In contrast, Washington's general survival statute, RCW 4.20.046(1), does not create a separate claim for the decedent's survivors, but merely preserves the causes of action a person could have maintained had he or she not died. Stated differently, the survival statute allows the decedent's existing causes of action to survive and continue as an asset of his estate.

*Woodall v. Avalon Care Ctr.-Fed. Way, LLC*, 155 Wn. App. 919, 930-31, 231 P.3d 1252 (2010) (quotations and citations omitted).

In *Woodall*, the resident of a nursing care facility signed an agreement requiring arbitration of all disputes "arising from personal injury or medical care." *Id.* at 922. The resident subsequently died and, when his children brought wrongful death and survivorship claims, the facility moved to compel arbitration. *Id.* Division One of the Court of Appeals affirmed the trial court's decision to compel arbitration of the survivorship claims, holding that such claims originated as the decedent's

“existing causes of action, which survived his death and continued as an asset of his estate.” *Id.* at 931 (quotations omitted). However, the court held that the arbitration agreement was not binding on the wrongful death beneficiaries, none of whom had signed the arbitration agreement. *Id.* at 926, 936. In rejecting the defendant’s argument that the wrongful death claims were merely “derivative” of the survivorship claims, the court observed that the wrongful death right of action is uniquely available to a decedent’s statutory beneficiaries and, as such, could not be restricted by the decedent who holds “no right to those claims.” *Id.* at 929-30.

Even the measure of damages is distinct between survivorship and wrongful death actions. The Washington Pattern Jury Instructions (“WPI”) states that damages for survivorship actions should include health care and funeral expenses, net accumulations lost to the estate, and noneconomic damages experienced by the decedent prior to his or her death. WPI 31.01.01. In contrast, damages for wrongful death claims are measured by the value of goods, money, and services the beneficiary would have received from the decedent, as well as the noneconomic losses “in the way of love, care, companionship, and guidance” from the decedent. WPI 31.03.01. The Court has expressly held that any problems of double compensation where remedies are sought under both survival and wrongful death actions are avoided “if recovery under the survival

action is limited to the prospective net accumulations of the deceased.”  
*Criscuola v. Andrews*, 82 Wn.2d 68, 70, 507 P.2d 149 (1973).

These conceptual and legal distinctions between survival and wrongful death actions are particularly salient in the instant case where Ms. Brandes litigated a personal injury claim during her lifetime, which was converted to a survivorship claim upon her death, but prior to entry of judgment. CP 95-97, 122-28. The record demonstrates that the parties explicitly discussed—and the trial court endorsed—Plaintiff’s decision to proceed to verdict exclusively on a survivorship claim in order to preserve the work expended by the attorneys, the jury, and the judge over the two-week-long personal injury trial. CP 123-26. All parties were aware that wrongful death claims were being reserved for a future action. *See id.* Moreover, the judgment entered by the trial court explicitly references the jury’s verdict and award of damages for injuries personal to Barbara Brandes, and unequivocally related *only* to her survivorship claim. CP 82.

**B. Barbara Brandes Did Not Attain Judgment During Her Lifetime.**

Even if the Court of Appeals correctly construed *Deggs* to bar statutory beneficiaries from prosecuting wrongful death claims in cases where the decedent attained judgment on her personal injury claim during her lifetime, because judgment was entered after Ms. Brandes’ death, the



wrongful death action should have been allowed to proceed. “[W]hile the wrongful death action exists for the benefit of the deceased’s family, it is not completely separate from actions the deceased could have brought during life.” *Deggs*, 186 Wn.2d at 722. Washington law has long recognized several distinct circumstances can extinguish a future wrongful death claim notwithstanding the statutory language. In *Deggs v. Asbestos Corporation Limited*, this Court considered one such exception, whether “the lapsing of the statute of limitations on the underlying personal injury claim bars the personal representative from bringing a wrongful death claim.” *Id.* at 727. Writing for the majority of the Court, Justice Gonzalez surveyed Washington’s wrongful death jurisprudence dating back to the English Lord Campbell’s Act of 1846. *Id.* at 722-23. In so doing, the Court identified “two categories of wrongful death suits that had been dismissed based on the status or conduct of the deceased.” *Id.* at 725-26.

Relevant to this petition is the second category of exclusion, in which the decedent pursued a course of conduct that makes it inequitable to recognize a cause of action for wrongful death. *Deggs*, 186 Wn.2d at 726. This Court described the second category to include “prior litigation, prior settlements, and the lapsing of the statute of limitations.” *Id.* (citing *Johnson*, 45 Wn.2d at 422-23). The Court of Appeals in the instant case relied upon this language from the Court’s holding in *Deggs*, reasoning

that it “cannot simply ignore the clearly stated intent of our Supreme Court to include ‘prior litigation’ as an equitable limitation on the availability of a wrongful death claim.” App. at 10-11.

However, there is no “clearly stated intent” regarding prior litigation in *Deggs* as the Court of Appeals described. Rather, the focus of the Court’s analysis centered on the statute of limitation and its effect upon wrongful death claims. *Deggs*, 186 Wn.2d at 729 (considering whether “the lapsing of the statute of limitations on the underlying personal injury claim bars the personal representative from bringing a wrongful death claim”). In contrast to the instant case, there exists lengthy Washington jurisprudence espousing the benefit of statutes of limitation in disposing of stale claims. *See, e.g., N. Coast Air Servs., Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 330, 759 P.2d 405 (1988). Statutes of limitation preserve the availability of evidence, the trustworthiness of witness’ memories, and the certainty in the business operations of defendants. *Id.* at 330-31. None of these principles apply to the “prior litigation” equitable limitation to wrongful death claims, where a decedent has timely filed suit for personal injuries.

Moreover, the Court of Appeals misconstrued what this Court referred to as “prior litigation.” Washington law has long held that the existence of a *pending* personal injury action against a tortfeasor at the

time of the plaintiff's death does not foreclose a wrongful death action. *Grant v. Fisher Flouring Mills Co.*, 181 Wash. 576, 44 P.2d 193 (1935). In *Grant*, the Court recognized three circumstances that can extinguish wrongful death actions: (1) an effective release executed by the decedent during his or her lifetime; (2) a judgment in the decedent's favor during his or her lifetime; and (3) the failure of the decedent to bring an action for injuries within the period of limitation. *Id.* at 581. Under this framework, the Court held that a wrongful death action could be maintained after the decedent had timely filed a personal injury action during his lifetime but before a judgment had been rendered:

Here, Grant brought this 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 what the action for wrongful death can be maintained.

*Id.* at 582. This Court in *Deggs* expressly declined to overrule the holding in *Grant*. *Deggs*, 186 Wn.2d at 728, 732-33. Thus, the Court of Appeals erred in deriving a "clearly stated intent" that the mere *filing* of prior litigation is what gives rise to the inequities in permitting a wrongful death action to proceed.

Instead, the correct interpretation of the "prior litigation" limitation is distilled from the context in which it was used and the precedent upon

which this Court relied. In *Deggs*, the Court cited to *Johnson v. Ottomeier* for its description of the second category of equitable exclusions to wrongful death actions. 186 Wn.2d at 726. Yet in *Johnson*, the Court identified just two problematic courses of conduct undertaken by decedents: giving an effective release and satisfaction and allowing the statute of limitations to run prior to the decedent's death. 45 Wn.2d at 422-23 (citing *Brodie v. Washington Water Power Co.*, 92 Wash. 574, 159 P. 791 (1916); *Grant*, 181 Wash.). Examining these cases, this Court pointed out that "there was something inequitable in allowing the deceased's personal representative to maintain a suit based on injuries that the deceased had already been compensated for or had decided not to pursue." *Deggs*, 186 Wn.2d at 726 n.6. The Court of Appeals seemingly agreed, making reference to the Court's analysis in *Grant* that one of the "well-recognized" exceptions to wrongful death actions is "a judgment in his favor *rendered during his lifetime*." App. at 10 (quoting *Grant*, 181 Wash. at 581) (emphasis added). Accordingly, much like a prior settlement, it is only prior litigation resulting in a judgment during the decedent's lifetime that terminates any potential wrongful death actions as to those defendants bound by the judgment.

Although her passing occurred on the eve of closing arguments, there is no dispute that Ms. Brandes's personal injury action was still

pending at the time of her death. Judgment was entered in favor of the estate as to the survivorship claims one month later. There is no rule of law requiring beneficiaries to bring wrongful death claims within the intervening time between the decedent's passing and the ultimate entry of judgment on the survivorship claims; after all, wrongful death claims carry an independent three-year statute of limitations accruing at the time of death. *Deggs*, 186 Wn.2d at 721-22. Rather, the only question here is whether there was a subsisting cause of action against Brand at the time of Barbara Brandes' death. The answer is an unequivocal yes.

It is not difficult to imagine the negative impacts that flow from the Court of Appeals' holding, in particular the chilling effects on the pursuit of justice by terminal plaintiffs. For example, imagine a single father critically injured in a motor vehicle accident who worries about the financial wellbeing of his six-year-old daughter. If the father opts not to file suit before his injuries claim his life, then his estate may pursue a survivorship action (seeking compensation for his own suffering) while his daughter may bring a wrongful death claim (seeking compensation for her own loss). Yet if the father were to file suit during his lifetime, he would instantly deprive his daughter of her statutory right to compensation for her own losses. Neither the Legislature nor this Court could have intended such a Hobson's choice merely to preserve the remedies afforded

by statute for the separate and distinct injury to a minor child of the wrongful death of her parent.

Moreover, the Court of Appeals' analysis in this case would erect absurd procedural barriers for both litigants and trial courts. At the time of her passing, Ms. Brandes had presented all of the evidence of her personal injuries, and her estate was prepared to submit her survivorship claims to the jury. How then, under the appellate court's analysis, were the Brandes children to have preserved their statutory wrongful death actions? The claims did not accrue until their mother's passing; thus, the only method of preservation would have been to, suspend the trial, send the jury home, join the children as plaintiffs to the existing litigation, conduct discovery on their damages, bring the jury back, and re-open the presentation of evidence as to the new wrongful death claims. Neither the Legislature nor this Court could have envisioned that such procedural contortions would be necessary.

Insofar as wrongful death actions are expressly provided by statute, any judicial limitations must be narrowly construed. If the mere filing of a personal injury litigation were sufficient to extinguish wrongful death claims, the result would be an exception that swallows the rule. This is plainly an issue of substantial public interest and should be determined by the Supreme Court under RAP 13.4(b)(4).

**C. This Court Should Grant Review to Correct the Court of Appeals' Improper Expansion of Dicta in *Deggs*.**

The Court of Appeals held that while *Grant*, *Brodie*, and *Deggs* “did not dismiss the wrongful death claims due to ‘prior litigation,’ each specifically listed ‘prior litigation’ among those events that would extinguish ‘a subsisting cause of action’ in the deceased.” App. at 10. Nevertheless, the appellate court erred in relying on these authorities, which did not examine or analyze the “prior litigation” exception to any degree. This is hardly surprising, as there exists *no* Washington authority analyzing the “prior litigation” exception to wrongful death claims beyond the reference in *Grant* to litigation resulting in a judgment in the decedent’s favor. *Grant*, 181 Wash. at 581. As a result, the Court of Appeals improperly relied on dicta to conclude that, “[b]ecause Barbara successfully pursued ‘prior litigation’ against Brand, dismissal of the estate’s wrongful death action against Brand was appropriate under Deggs.” App. at 11.

Where a remark by the court is not essential to the resolution of the case at bar, such comments are relegated to the status of *obiter dictum*. *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954). “[G]eneral expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then

decided and to the points actually involved.” *Peterson v. Hagan*, 56 Wn.2d 48, 53, 351 P.2d 127 (1960). Included in these general expressions are statements made in the course of the court’s reasoning. *D’Amico v. Conguista*, 24 Wn.2d 674, 683, 167 P.2d 157 (1946) (refusing to announce adherence to a rule of law where the question was not present in any prior cases). Generally speaking, the doctrine of stare decisis does not bind the Court to dicta. *State ex rel. Todd v. Yelle*, 7 Wn.2d 443, 450-51, 110 P.2d 162 (1941).

It is undisputed that the “prior litigation” exception to wrongful death actions was not at issue in any of the cases relied upon by the Court of Appeals. *Brodie* dealt with a release and satisfaction entered into by the decedent during his lifetime. 92 Wash. at 576. Both *Deggs* and *Grant* dealt with the statute of limitations on the underlying injury. *Deggs*, 186 Wn.2d at 720; *Grant*, 181 Wash. at 582. The Court of Appeals acknowledges the same, yet nevertheless relies on dicta to evince a “clearly stated intent” by the Court. App. at 10. If the appellate court’s opinion were to stand, it would effectively disregard the holding in *Grant* that a valid subsisting cause of action exists at the time of the decedent’s passing when litigation is still pending and no judgment has been entered. This Court in *Deggs* expressly declined to overturn *Grant*, yet the appellate court’s reliance on dicta achieves the very same result.



Accordingly, the Court of Appeals' unpublished opinion warrants review under RAP 13.4(b)(1) as well as RAP 13.4(b)(4).

## VI. CONCLUSION

Plaintiff-Petitioner requests that the Court grant review of the Court of Appeals' decision as to its holding regarding defendant Brand.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of August, 2018.

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# APPENDIX



category of extrinsic limitations on the availability of the wrongful death action includes prior litigation, prior settlements, and the lapsing of the statute of limitations." Deggs v. Asbestos Corp., 186 Wn.2d 716, 726, 381 P.3d 32 (2016).

In this case, after being diagnosed with mesothelioma, Barbara Brandes brought a personal injury action against Brand Insulations Inc. (Brand) and other entities. Barbara's action against Brand was converted to a survivorship action after she died during her trial.<sup>1</sup> The jury returned a verdict in favor of the estate. After a judgment was entered, the estate brought the present wrongful death action against Brand, CBS Corporation (CBS), Parsons Government Services (Parsons), and Saberhagen Holdings, Inc.<sup>2</sup> The trial court dismissed the wrongful death action against all the defendants after concluding the claims were extinguished by the prior judgment in the survivorship action.

Because the estate recovered from prior litigation against Brand, we are bound by Deggs and affirm the trial court's dismissal of the wrongful death action against Brand. However, because they were not parties to the estate's prior litigation, we reverse the trial court's dismissal of the wrongful death action against Parsons and CBS and remand for further proceedings.

### FACTS

Barbara Brandes was diagnosed with mesothelioma on June 16, 2014, at the age of 79. In August 2014, she filed a complaint for personal injuries against multiple

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<sup>1</sup> Because there are two parties with the name "Brandes" in this case, and because of the similarity of opposing parties' names, Brand and Brandes, we refer to Barbara by her first name. No disrespect is intended.

<sup>2</sup> Saberhagen was dismissed as a party to this appeal on February 14, 2017.

defendants, including Brand. Barbara alleged that Brand negligently sold and installed asbestos thermal insulation products at the Atlantic Richfield Cherry Point refinery where her husband worked, causing her to sustain "take home" exposure to asbestos fibers in Brand's product. Barbara's 2014 complaint did not name CBS, Parsons, or Saberhagen.

A trial began on April 6, 2015. By the second day of trial, Barbara had settled with all defendants except Brand for a total of \$1,965,710.76. In each settlement, Barbara specifically released the defendant from all claims arising out of her present personal injury claim as well as any future wrongful death claims. Thirteen days into the trial, Barbara died. The next day was to be the final day of trial, including the final presentation of Brand's evidence and closing arguments.

The trial court granted plaintiff's motion to substitute Barbara's daughter, Ramona Brandes, as personal representative of her mother's estate, and authorized continuation of the trial as a survivorship action for Barbara's personal injury claims. The parties agreed to inform the jurors of Barbara's death, and to eliminate any instructions for Barbara's future damages. The estate confirmed that it was not seeking to add any new claims or evidence, confirming it was not pursuing any potential wrongful death claims at that time.

Following a day of deliberation the jury returned a verdict for the plaintiff, and awarded the estate \$3,500,000 in non-economic damages. Brand filed a motion for a new trial, or in the alternative, a remittitur. The trial court granted remittitur, reducing the jury's verdict from \$3,500,000 to \$2,500,000. The trial court then allocated 20 percent of the settlement proceeds to the future wrongful death claims and reduced the

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judgment against Brand by 80 percent in consideration of payments received from the settling defendants. After offsetting the balance of the settlement proceeds from the damages award, the estate was awarded a net judgment of \$927,431.39 against Brand. The judgment was entered on June 19, 2015.

Both parties appealed. In an unpublished decision, this court affirmed the jury's verdict but reversed the remittitur, and remanded for "the trial court to reinstate the jury's verdict and damages award." See Estate of Brandes v. Brand Insulations, Inc., No. 73748-1-1, slip op. at 23 (Wash Ct. App. Jan. 23, 2017) (unpublished), <http://www.courts.wa.gov/opinions/pdf/737481.pdf>.

On July 22, 2015, Ramona Brandes, acting as personal representative of Barbara's estate, filed a complaint for wrongful death against Brand, CBS, Parsons, and Saberhagen on behalf of Barbara's eight children. The estate sought economic damages for lost financial support and non-economic damages for the loss of their parental relationship and consortium with their mother.

On November 3, 2015, Brand filed a motion to dismiss under CR 12(b)(6), and defendants Parsons and Saberhagen joined. Brand argued that under this court's holding in Deggs v. Asbestos Corp., 188 Wn. App. 495, 354 P.3d 1 (2015), the wrongful death claims were extinguished by the judgment entered in Barbara's personal injury action against Brand.

The trial court granted the motion to dismiss on December 16, 2015. The estate filed a "corrected order" requesting that the order be amended to explicitly state it applied to all defendants. CBS filed a notice of non-opposition to the proposed

corrected order. On January 6, 2016, the court entered the corrected order stating that the action was dismissed against all defendants.

The estate appealed. We granted a stay of the appeal pending our Supreme Court's decision in Deggs, which was released on October 6, 2016. The appeal was reinstated.

## ANALYSIS

### *Standard of Review*

A trial court's ruling to dismiss a claim under CR 12(b)(6) is reviewed de novo. Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Under CR 12(b)(6), a complaint can be dismissed if it fails to state a claim upon which relief can be granted. "The court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims." Kinney, 159 Wn.2d at 842. "Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove 'any set of facts which would justify recovery.'" Kinney, 159 Wn.2d at 842 (quoting Tenore v. AT & T Wireless Servs., 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998)). CR 12(b)(6) motions should be granted "sparingly and with care." Orwick v. City of Seattle, 103 Wn.2d 249, 254, 692 P.2d 793 (1984) (internal quotations omitted).

### *Limitations on Wrongful Death Actions*

The estate argues that under the plain language of the statute, a wrongful death action is a new and distinct cause of action solely for the benefit of a decedent's heirs, thus it is unaffected by the prior judgment on the estate's survivorship action based on Barbara's personal injury claim. While we agree that the language of the wrongful

death act creates a separate cause of action on behalf of the statutory beneficiaries, we cannot agree that the judgment in the estate's survival action against Brandes had no effect on the estate's wrongful death claim.<sup>3</sup>

Washington's special survival statute, RCW 4.20.060, allows the executor or administrator of an estate "to recover for the decedent's damages, including any pain and suffering between the time of the injury and the time of death." Bowers v. Fibreboard Corp., 66 Wn. App. 454, 460, 832 P.2d 523 (1992). "Unlike Washington's wrongful death statutes, the survival statutes do not create new cause of action for statutorily named beneficiaries but instead preserve causes of action for injuries suffered prior to death." Otani ex rel. Shigaki v. Broudy, 151 Wn.2d 750, 755, 92 P.3d 192 (2004).

In contrast to a survival action, Washington's wrongful death statutes, RCW 4.20.010 and RCW 4.20.020, create a cause of action for the statutory beneficiaries of the deceased. Broudy, 151 Wn.2d at 755. The wrongful death statute provides, "[w]hen 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." RCW 4.20.010. The distinguishing characteristic between a wrongful death claim and a survival action is "that the wrongful death statutes govern postdeath damages of the deceased and the survival statutes govern predeath damages." Broudy, 151 Wn.2d at 755. "[T]he action for wrongful death is

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<sup>3</sup> The beneficiaries of the special survival statute and the beneficiaries of the wrongful death statute are essentially the same. Compare RCW 4.20.020, holding the "action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren," (emphasis added) with RCW 4.20.060 "No action for a personal injury to any person occasioning death shall abate, nor shall such right of action determine, by reason of such death, if such person has a surviving spouse, state registered domestic partner, or child living, including stepchildren." (Emphasis added.)



derivative only in the sense that it derives from the wrongful act causing the death, rather than from the person of the deceased.” Deggs, 186 Wn.2d at 721 (quoting Johnson v. Ottomeier, 45 Wn.2d 419, 423, 275 P.2d 723 (1954)). “While the wrongful death statute exists for the benefit of the deceased’s family, it is not completely separate from actions the deceased could have brought during life. These two types of actions are intertwined with each other and have consequences on each other.” Deggs, 186 Wn.2d at 722.

A wrongful death action accrues “at the time the decedent’s personal representative discovered, or should have discovered, the cause of action” Deggs, 186 Wn.2d at 721 (quoting White v. Johns-Manville Corp., 103 Wn.2d 344, 352-53, 693 P.2d 687 (1985)). Thus, unlike a survival action that accrues when the deceased is first injured, a wrongful death action does not ordinarily accrue until their death. However, since the wrongful death statute was enacted in 1875, our Supreme Court has substantially limited the availability of wrongful death actions where the deceased took action post injury, but prior to their death.

Beginning with Brodie v. Washington Water Power Co., 92 Wash. 574, 576, 159 P. 791 (1916), the court held “that a release and satisfaction by the person injured of his right of action for the injury bars the right in the beneficiaries to maintain an action for his death occasioned by the injury.” In Brodie, the injured person, Brodie, had settled his underlying personal injury case during his lifetime and released all claims. As a consequence, the court affirmed dismissal of his heirs’ subsequent wrongful death action “because of something extrinsic to injury that resulted in their family member’s death: the deceased’s decision to release the defendant and thus the lack of a

subsisting cause of action at the time of death.” Deggs, 186 Wn.2d at 724; Brodie, 92 Wash. at 576.

In Calhoun v. Wash. Veneer Co., 170 Wash. 152, 15 P.2d 943 (1932), the court further limited wrongful death actions through a general procedural, extrinsic limitation: the statute of limitations of the decedent’s underlying cause of action. The court concluding that a wrongful death action is not available if the statute of limitations on the underlying claim had run before the deceased died. Calhoun, 170 Wash. at 159-60. The court then elaborated and refined the Calhoun reasoning in Grant. The Grant court recognized that a wrongful death “action accrues at the time of death, and that the statute of limitations then begins to run.” Grant, 181 Wash. at 581. But the court concluded that “[t]he 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.” Grant, 181 Wash. at 581. The Supreme Court once again reiterated this limitation on subsequent wrongful death actions in Johnson.

More recently, our Supreme Court was asked to overrule Grant, Calhoun, and Johnson, “to the extent they hold that the lapsing of the statute of limitations on the underlying personal injury claim bars the personal representative from bringing a wrongful death claim.” Deggs, 186 Wn.2d at 727. While the court recognized that Grant and Calhoun, “may have been incorrect at the time they were announced,” a majority, over a vigorous dissent, declined to overrule the prior precedents. Deggs, 186 Wn.2d at 728-729. The court again confirmed that “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.” Deggs, 186 Wn.2d at 732-33 (quoting Grant, 181

Wash. at 581). The court further confirmed that one of the exceptions to the general rule arises where, “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.” Deggs, 186 Wn.2d at 726 (quoting Johnson, 45 Wn.2d at 422-23). Relative to the case before us, the Deggs court reiterated that the inequitable “postinjury category of extrinsic limitations on the availability of the wrongful death actions includes prior litigation, prior settlements, and the lapsing of the statute of limitations.” Deggs, 186 Wn.2d at 726.

#### *Claim Against Brand*

The estate argues that because the statute of limitations on her claim against Brand had not expired prior to her death, because she had not settled or released claims against Brand, she had a subsisting cause of action at the time of her death and the estate is not foreclosed from an action for wrongful death. While we agree that Barbara had a subsisting cause of action at the time of her death, because Barbara engaged in post injury prior litigation against Brand, our Supreme Court's equitable exception applies and forecloses the estate's wrongful death action against Brand.

The estate contends that even if actions in life can foreclose a wrongful death claim, no Washington court has specifically held that a final judgment on a personal injury action is the type of conduct that extinguishes a future wrongful death claim brought by statutory beneficiaries. While the estate is correct that this is the first case specifically addressing this issue, the answer is embedded within many of our prior Supreme Court's decisions. For example, in Brodie, the court stated “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 a wrongful death action. 92 Wash. at 576 (emphasis added).

Then in Grant, the court concluded that an action for wrongful death is extinguished by “well-recognized” exceptions including “a judgment in his favor rendered during his lifetime.” Grant, 181 Wn. at 581 (citing Littlewood v. Mayor, etc., of N. Y., 89 N. Y. 24, 42 Am. Rep. 271 (1882) and Hecht v. Ohio & Mississippi Ry. Co., 132 Ind. 507, 32 N. E. 302 (1892)). And most recently, in Deggs, the court reiterated that the “postinjury category of extrinsic limitations on the availability of the wrongful death action includes prior litigation, prior settlements, and the lapsing of the statute of limitations.” Deggs, 186 Wn.2d at 726 (emphasis added).<sup>4</sup>

The estate argues finally, that the Supreme Court’s inclusion of “prior litigation” in its list of equitable reasons to foreclose wrongful death actions is dicta because it is irrelevant to the final holdings in those cases. The estate is correct that in Brodie the court was considering whether the claim was barred by a settlement and release of all claims, and Grant and Deggs were considering whether the claim was barred because the statute of limitations had run on the personal injury suit. Brodie, 92 Wash. at 574; Grant, 181 Wn. at 580; Deggs, 186 Wn.2d at 733. But while these cases did not dismiss the wrongful death claims due to “prior litigation,” each specifically listed “prior litigation” among those events that would extinguish “a subsisting cause of action” in the deceased. Grant, 181 Wash. at 581; Deggs, 186 Wn.2d at 732-33. Thus, even if the inclusion of “prior litigation” was dicta, we cannot simply ignore the clearly stated intent

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<sup>4</sup> The accompanying footnote stated that in Johnson, the court held “there was something inequitable in allowing the deceased’s personal representative to maintain a suit based on injuries that the deceased had already been compensated for or had decided not to pursue.” Deggs, 186 Wn.2d at 743 n.6.

of our Supreme Court to include "prior litigation" as an equitable limitation on the availability of a wrongful death claim.

Because Barbara successfully pursued "prior litigation" against Brand, dismissal of the estate's wrongful death action against Brand was appropriate under Deggs.

*Claims Against CBS and Parsons*

Unlike with Brand, however, none of the postinjury equitable limitations are present to preclude the estate's wrongful death claims against CBS and Parsons. Barbara's claims against CBS and Parsons were not barred by the statute of limitations. Nor had she settled, released, or brought previous litigation against CBS and Parsons. Because Barbara had a subsisting cause of action against CBS and Parson at the time of her death, the estate is not barred from its wrongful death claims.

CBS argues that the estate's claims should be barred by the rule against claim splitting or res judicata. Under the doctrine of res judicata, a plaintiff is barred from litigating claims that either were, or should have been, litigated in a former action. Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 859, 726 P.2d 1 (1986).

"Dismissal on the basis of res judicata is appropriate where the subsequent action is identical with a prior action in four respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made." Landry v. Luscher, 95 Wn. App. 779, 783, 976 P.2d 1274 (1999). The parties do not have to be identical in both suits, although "there must be at least privity between a party to the first suit and the party to the second suit." Landry, 95 Wn. App. at 783-84. Because there is no evidence that CBS or Parsons were in privity with Brand or any other entity involved in Barbara's personal injury action res judicata does not apply.

CBS and Parsons also argue that allowing the estate's wrongful death claims to go forward creates the potential risk of "double recovery" and "inconsistent results." Both arguments fail. While this court recognized in Deggs the risk of double recovery as one reason for barring a wrongful death claim when the party has already received a prior judgment, that policy is intended to protect a specific defendant that had already been sued. Deggs, 188 Wn. App. at 510. Because the estate's wrongful death damages are distinct from those in Barbara's personal injury action, the risk of double recovery does not exist. Allowing the parties to pursue a wrongful death claim also would not risk inconsistent results. As Parsons and CBS are not in privity with Brand, Barbara's heirs will have to prove their negligence separately, thus there is no prior result with which to be inconsistent.

Finally, CBS and Parson cite Ueland v. Reynolds Metals Co., 103 Wn.2d 131, 136, 691 P.2d 190 (1984), for the proposition that Barbara's children were required to join their loss of consortium claims with Barbara's personal injury action. In Ueland, our Supreme Court, for the first time, recognized an independent cause of action for loss of parental consortium resulting from nonfatal injuries. In reaching its decision, the court addressed the injustice of denying a consortium claim to a child still reliant upon their parent for physical and emotional care, financial support, and guidance. Ueland, 103 Wn.2d at 134-35. The court noted the incongruity that Washington, at the time, recognized a wrongful death loss of parental consortium right of action, but not for consortium loss resulting from parental injury. Ueland, 103 Wn.2d at 134.

In holding that children should be permitted to recover for loss of parental consortium in cases where the parent is injured, but not killed, the court held that a

child's claim for loss of parental consortium must be joined with the injured parent's claim whenever feasible. Ueland, 103 Wn.2d at 137. Critically, the Ueland court did not explicitly or implicitly consider or require joinder of a loss of consortium wrongful death claim with a parent's action for personal injury that subsequently culminates in death. Ueland does not address claims for loss of parental consortium brought as part of a wrongful death claim, and we decline to extend its ruling here.

In conclusion, recognized limitations to wrongful death claims bar the estate's claim against Brand, and the trial court did not err in dismissing this claim. However, because Barbara has a "subsisting cause of action" against both Parsons and CBS, the trial court erred in dismissing these claims.

We reverse and remand for reinstatement of the actions against CBS and Parsons.

Mann, A.C.J.

WE CONCUR:

Vandenberg

Cox, J.

**CERTIFICATE OF SERVICE**

I certify that on August 20, 2018, I caused to be served a true and correct copy of the foregoing document upon:

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BERGMAN DRAPER OSLUND

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