

FILED
SUPREME COURT
STATE OF WASHINGTON
10/2/2018 1:30 PM
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CLERK

No. 96203-1

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiff-Petitioner,

v.

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

Defendant-Respondents.

**PETITIONER'S REPLY TO RESPONDENT BRAND
INSULATION, INC.'S OPPOSITION TO PETITION FOR REVIEW**

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I. ARGUMENT

Respondent Brand Insulations, Inc. (“Brand”) relies on the same legal authority in opposing review that Petitioner relies upon in seeking review base on the Court of Appeals’ erroneous application of Washington precedent. To that end, Petitioner agrees with Brand that wrongful death actions may be barred due to conduct undertaken by “the deceased, in [her] lifetime”. *Id.* (citing *Deggs v. Asbestos Corp. Ltd.*, 188 Wn. App. 495, 507, 354 P.3d 1 (2015)).

The undisputed facts of this case are that Barbara Brandes did not obtain a recovery of damages for her injury during her lifetime. She filed a personal injury suit and litigated her claims until she passed away; thereafter, her estate converted the personal injury action into a survivorship action. Brand repeatedly glosses over this point, claiming that “Mrs. Brandes’ personal injury action was pursued unabated and resolved by entry of judgment.” Opp. Br. at 12.¹

Without exception, the equitable limitations to wrongful death claims apply only to conduct the decedent undertook while still living which prejudiced the rights of defendants after death. *See Deggs*, 186 Wn.2d at

¹ Brand later converts its strained interpretation into a brazen misrepresentation, stating unequivocally that “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.” Opp. Br. at 14. Ms. Brandes died on April 19, 2015. CP 95-96, 119. The jury returned a verdict on April 21, 2015. CP 81-82. Judgment was entered on June 19, 2015. CP 82.

728-28 (wrongful death actions extinguished where decedent allowed Statute of Limitations to run prior to death); *Johnson v. Ottomeier*, 45 Wn.2d 419, 422-23, 275 P.2d 723 (1954) (wrongful death actions extinguished when “decedent pursued a course of conduct which makes it inequitable to recognize a cause of action for wrongful death”); *Grant v. Fisher Flouring Mills Co.*, 181 Wash. 576, 44 P.2d 193 (1935) (wrongful death actions extinguished “by a judgment in his favor rendered during his lifetime”); *Calhoun v. Wash. Veneer Co.*, 170 Wash. 152, 15 P.2d 943 (1932) (wrongful death claim extinguished by plaintiff’s “action not having been commenced within three years”); *Brodie v. Wash. Water Power Co.*, 92 Wash. 574, 576, 159 P. 791 (1916) (wrongful death actions extinguished “[i]f the deceased, in his lifetime, has done anything that would operate as a bar to recovery by him of damages for the personal injury”).

Petitioner acknowledges that “[t]he battle of the string citations can have no winner.” *Smith v. Wade*, 461 U.S. 30, 93, 103 S. Ct. 1625 (1983). Nevertheless, the voluminous Washington authority is critically relevant to the issue in this case. As Brand admits, “This is the controlling law in the state of Washington and has been so for over a century.” Opp. Br. at 2. The day before she passed, Barbara Brandes had done *nothing* to bar recovery for her injuries because she was still engaged in litigation; she had not yet obtained judgment.

Claims for wrongful death, despite deriving from the wrongful act causing death, are “entirely separate and distinct from any personal injury action that arises from the same set of facts *and survives to the decedent’s estate.*” *Deggs*, 186 Wn.2d at 734 (emphasis added). Survivorship damages are deemed assets of the decedent’s estate and pass to individuals or entities named in decedent’s will regardless of whether the heirs are statutory beneficiaries under RCW 4.20.020. *Warner v. McCaughan*, 77 Wn.2d 178, 179, 460 P.2d 272 (1969); *Woodall v. Avalon Care Ctr.-Fed. Way, LLC*, 155 Wn. App. 919, 931, 231 P.3d 1252 (2010); *Federated Servs. Ins. Co. v. Pers. Representative of Estate of Norberg*, 101 Wn. App. 119, 126, 4 P.3d 844 (2000). Conversely, a decedent’s spouse, domestic partner, child, stepchild, or dependent sibling may recover as a beneficiary under the wrongful death statute *regardless* of whether the beneficiary was an heir named in the decedent’s will. *See, e.g., Armijo v. Wesselius*, 73 Wn.2d 716, 719, 440 P.2d 471 (1968) (illegitimate child may recover as statutory beneficiary). The purpose of the wrongful death statute is not, as Brand suggests without citation, “to ensure that every wrongful or negligent act has a potential remedy.” Opp. Br. at 3. Rather, the survivorship and wrongful death statutes serve distinct purposes by compensating separate injuries sustained by different individuals.

Moreover, *Deggs* did not hold, as again Brand argues without citation, that wrongful death claims extinguish “[o]nce full compensation is received for the wrongful act” by the decedent’s estate. Opp. Br. at 4 (emphasis omitted). Instead, this Court made clear that a wrongful death cause of action “accrues . . . no sooner than upon the death of the personal representative’s decedent” and exists solely “for the benefit of statutory heirs, not the decedent or the decedent’s estate.” *Deggs*, 186 Wn.2d at 721, 734. Nevertheless, the Court recognized that actions taken during the decedent’s lifetime may nevertheless make it inequitable to allow a wrongful death case to proceed. *Id.* at 726-27. Yet the only question before the Court in *Deggs* was whether such conduct included the lapsing of a statute of limitations for the decedent’s underlying personal injury claim. *Id.* at 727.

The statute of limitations is an equitable doctrine designed to ensure that the truth-seeking imperative of trial is not undermined by the loss of evidence, disappearance of witnesses, and fading of memory. *Lane v. Dep’t of Labor & Indus.*, 21 Wn.2d 420, 444, 151 P.2d 440 (1944). By allowing the statute of limitations to lapse during her lifetime, the decedent prejudices the ability of defendants in a wrongful death case to protect their rights. Although a wrongful death cause of action carries its own separate statute of limitations, the decedent’s passing does nothing to recover lost evidence,

cause missing witnesses to reappear, or reverse the inevitable fading of memory over time. Thus, in *Deggs* the Court reasoned that it would be inequitable to reset the statute of limitations anew at the time of death to require tort defendants to marshal stale evidence to defend a case after death that would have been time-barred had it been filed when the decedent was still living. *Deggs*, 186 Wn.2d at 732.

Brand suggests that Washington's wrongful death statute "only allows recovery for the wrongful act that caused the injury [and] does not permit a separate recovery for death." Opp. Br. at 9. This is entirely incorrect. At the moment Barbara Brandes passed away, her death was "wrongful" because the injury she suffered that ultimately caused her death had not been compensated. *Deggs*, 186 Wn.2d at 735. The fact that Ms. Brandes's estate recovered for her personal injuries *after* her case was amended into a survivorship claims does not extinguish the right of her statutory beneficiaries to recover for *their* injuries sustained by Ms. Brandes' wrongful death. Their harm arose from the death itself and the damages are measured by "losses to specified beneficiaries" rather than the estate. *Id.* at 734.

Brand cites to both *Brodie* and *Flynn* for the proposition that Washington's wrongful death statute "permits redress for the act that caused the wrong to the decedent." Opp. Br. at 13-14 (emphasis in original).

Neither *Brodie* nor *Flynn* provide any support for Respondent’s claim. In *Brodie*, the Court expressly held that a wrongful death claim, “although originating in the same wrongful act or neglect, begins where the other ends, and is confined to such loss and damage as the beneficiaries named have suffered by the death of the person injured.” *Brodie v. Washington Water Power Co.*, 92 Wash. 574, 576, 159 P. 791 (1916) (emphasis added). In *Flynn*, a case involving the federal Employers’ Liability Act, 45 U.S.C.A. §§ 51-59, the Court held that “[t]he running of the two years from the time when [plaintiff’s] cause of action accrued extinguishes it as effectively as a release.” *Flynn v. New York, N.H. & H.R. Co.*, 283 U.S. 53, 56, 51 S. Ct. 357 (1931).

Even the persuasive authority cited by Brand, a century-old case from Vermont, provides no support for the rule of law that Brand now advances. See Opp. Br. at 16. In *Legg v. Britton*, the Supreme Court of Vermont held that if, “by settlement or recovery by the intestate *in or as of his lifetime*, no liability rested upon the wrongdoer of the deceased, none survived his death against the wrongdoer.” 64 Vt. 652, 24 A. 1016, 1017 (1892) (emphasis added). Moreover, the Court flatly rejected the same double-recovery argument advanced by Brand, pointing out that the “bulk of the damages recovered in the right of the intestate are different from those recovered for the benefit of the widow and next of kin.” *Id.* at 1018.

This Court should accept review to clarify that a wrongful death cases of action created by our Legislature and carefully limited by equitable jurisprudence, does not extinguish so easily. The interpretation of *Deggs* advanced by Brand and seemingly adopted by the Court of Appeals would impermissibly tether the beneficiaries' statutory rights to the estate's *survivorship* claims rather than to the decedent's personal conduct while still living. In so doing, it would effectively render the distinction between wrongful death and survivorship a nullity and force an estate to seek damages either for the decedent's survivorship claims or the heirs' wrongful death claims—but not both. This is not as our Legislature intended, and it is not what this Court set forth in *Deggs*.

II. 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 2nd day of October, 2018.

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October 02, 2018 - 1:30 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96203-1
Appellate Court Case Title: Ramona C. Brandes v. Brand Insulations Inc., et al.
Superior Court Case Number: 15-2-17723-1

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