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No. 91969-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioner,

v.

ASBESTOS CORPORATION LIMITED; ASTENJOHNSON, INC.;
CBS CORPORATION (FKA VIACOM INC., FKA WESTINGHOUSE
ELECTRIC CORPORATION); INGERSOLL-RAND COMPANY,

Respondents,

and

BARTELLS ASBESTOS SETTLEMENT TRUST; GASKET
COMPANY; GENERAL REFRACTORIES COMPANY; JOHN
CRANE, INC.; METROPOLITAN LIFE INSURANCE COMPANY,
and FIRST DOE through ONE HUNDREDTH DOE,

Defendants.

DEGGS' ANSWER TO AMICI BRIEFS

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A. INTRODUCTION

This Court has received amicus curiae briefs from the Washington State Association for Justice Foundation ("WSAJF"), the law firm of Bergman Draper Ladenburg PLLC ("Bergman firm"), and the Washington Defense Trial Lawyers ("WDTL"). Petitioner Judy R. Deggs provides this single brief in response to the three amicus briefs.

These briefs all address the central contentions of the asbestos respondents in seeking to uphold the split decision of the Court of Appeals below, largely echoed by WDTL. Those asbestos respondents assert first that Washington law at least since *Ryan v. Poole*, 182 Wash. 532, 47 P.2d 981 (1935) has held that if the asbestos tort victim's underlying personal injury claim against the asbestos tortfeasor is barred, the wrongful death claim by the victim's personal representative under RCW 4.20.010 is also barred. Second, they assert that the Legislature has acquiesced in this interpretation of the wrongful death statute and only the Legislature, not this Court, must effect any change in the law. Finally, they claim there will be no hardship to the families of asbestos tort victims because they can sue, during the tort victims' lives, for loss of consortium.

These arguments are predicated upon a false, wishful narrative of Washington law that has at least since 1954 *rejected* the very argument the asbestos respondents and WDTL now make. They ignore this Court's

repeated modern holdings that wrongful death claims are distinct, and are in no way derivative of the tort victim's underlying personal injury claims. Moreover, the asbestos respondents offer a flawed understanding of the concept of legislative acquiescence and claims for loss of consortium, as both the WSAJF and the Bergman firm observe.

The rule adopted below by the Court of Appeals majority from this Court's eighty-year old decisions has been undercut by recent decisions of this Court and has been rejected in virtually all of our sister states. The rule is impractical. It forces asbestos tort victims to file wrongful death actions before the tort victims are dead and personal representatives have been appointed for them.¹

This Court should reverse the Court of Appeals.

B. STATEMENT OF THE CASE

Neither the asbestos respondents nor WDTL take issue with the factual point made in Deggs' supplemental brief at 2-3 that asbestos is a known cause of many malignancies as well as non-malignant diseases, and there is a long latency period between the time of exposure to asbestos and the experience of symptoms by its victims.

¹ Under this "topsy turvy land" (dissent at 1) or "illogical and unjust" formulation, *Willis v. Kirkpatrick*, 56 Wn. App. 757, 762, 785 P.2d 834, *review denied*, 114 Wn.2d 1024 (1990), claimants must pursue a statutory wrongful death claim before the victim dies, and before a personal representative is appointed, in order to avoid the bar of the statute of limitations. Neither the asbestos respondents nor WDTL address the fundamental impracticality and unfairness of such a requirement.

Further, the Bergman firm brief does an excellent job of discussing how in the real world of asbestos litigation, asbestos victims address wrongful death claims in the context of personal injury claims. Bergman firm br. at 12-13. Settlement agreements in such cases often do not release the claims such tort victim's personal representative/beneficiaries may have for statutory wrongful death. The victim's personal representative subsequently files a wrongful death action under RCW 4.20.010 on behalf of the statutory beneficiaries when that victim of asbestos exposure eventually dies from their asbestos-caused disease.

C. ARGUMENT

(1) The Court of Appeals Decision Erroneously Treats the Statutory Wrongful Death Claim As Derivative of the Tort Victim's Personal Injuries Claim

The core flaw in the Court of Appeals majority opinion, repeated by the asbestos respondents and WDTL in their briefs, is its belief that Deggs' claim under RCW 4.20.010 on behalf of the statutory beneficiaries is somehow derivative of Ray Sundberg's personal injuries claims for exposure to the respondents' asbestos products. The asbestos respondents and WDTL contend that the law since *Ryan* “clearly” holds that if the underlying personal injury claim of the asbestos tort victim is barred, then any claim under RCW 4.20.010 is also barred. Resp'ts suppl. br. at 3-4; WDTL br. at 3-11. That is not true.

First, *Ryan* stands for the unremarkable proposition that in order to recover for *wrongful* death under RCW 4.20.010, the cause of the death must, in fact, entail *wrongful* conduct by the defendant. In *Ryan*, the decedent was hired to engage in criminal conduct, and, in the course of that criminal activity was himself killed. Washington did not recognize a tort claim for harm arising out of the claimant's criminal conduct. 182 Wash. at 538-39. The *Ryan* court fostered confusion when it spoke in the opinion of the notion that a wrongful death plaintiff could not recover damages for the decedent's death if the decedent could not recover damages for the same conduct when the decedent was alive. The Court acknowledged that no language in the statute itself, or Lord Campbell's Act, compelled such a connection, *id.* at 535, and that a statutory wrongful death action was a "new cause of action and is not a survival statute..." *id.* at 536, and is not therefore derivative of the underlying claim.²

Second, the asbestos respondents/WDTL argument is fundamentally undercut by this Court's decision in *Johnson v. Ottomeier*, 45 Wn.2d 419, 275 P.2d 723 (1954) where this Court seemingly dispensed with the *Ryan* principle entirely. In that case, this Court applied the accrual rule *consistent with the interpretation now advanced by Deggs*.

² It is noteworthy that in *Upchurch v. Hubbard*, 29 Wn.2d 559, 188 P.2d 82 (1947), when it attempted to apply *Ryan*'s language, this Court was compelled to undertake a tortured analysis of host-guest immunity statute to allow the personal representative of a minor killed by the negligence of a mail truck driver to recover.

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 beneficiaries had a distinct claim under RCW 4.20.010 against the husband's estate for wrongful death. The *Johnson* court *ignored* the prime analytical point argued for by the asbestos respondents/WDTL that the statute of limitations had run on the decedent's underlying personal injuries claim so that the RCW 4.20.010 statutory claim was barred.

Simply stated, the narrative offered by the asbestos respondents/WDTL to sustain the Court of Appeals' majority's interpretation of RCW 4.20.010 is just plain wrong in light of *Johnson*.

Third, neither the asbestos respondents nor WDTL effectively explain how their interpretation of RCW 4.20.010 squares with this Court's *repeated* holdings that such a statutory cause of action is distinct and *is not* derivative of the asbestos tort victim's underlying personal injury claims.³ *E.g.*, *Dodson v. Continental Can Co.*, 159 Wash. 589, 595-97, 294 Pac. 265 (1930); *Grant v. Fisher Flour Mills*, 181 Wash. 576, 580,

³ Nor do the asbestos respondents/WDTL explain how such an interpretation comports with this Court's interpretive directive that RCW 4.20.010 is remedial and must be liberally construed. *Gray v. Goodson*, 61 Wn.2d 319, 324, 378 P.2d 413 (1963); *Johnson*, 45 Wn.2d at 423.

44 P.2d 193 (1932); *Gray*, 61 Wn.2d at 325; *Warner v. McCaughan*, 77 Wn.2d 178, 179, 460 P.2d 272 (1969).

That the statutory claim is distinct is only *reinforced* by the fact that a claim under the statute may only be pursued by a personal representative for specified beneficiaries,⁴ and the claim accrues, not at the time the underlying personal injury claims accrue, but, at the earliest, at the time of the decedent's death.⁵

Finally, as articulated in the Bergman firm brief at 4-10, there are fundamental practical problems with the rule espoused by the Court of Appeals majority. The firm points out graphically the circumstances where a personal injury claim for negligence against asbestos defendants did not accrue but a wrongful death claim did.

⁴ Under RCW 4.20.010, the claim may *only* be brought by the personal representative of the estate of the person tortiously killed. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007); *Wood v. Dunlop*, 83 Wn.2d 719, 723, 521 P.2d 1117 (1974). The statutory claim does not belong to the tort victim, but to that victim's specified 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 victim's death is a condition precedent to a claim under RCW 4.20.010.

⁵ *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); *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. 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).

This Court should reaffirm the principle it has repeatedly articulated that a claim under RCW 4.20.010 is distinct from any underlying personal injury claim, and is not derivative of such underlying in any sense.

(2) The Court of Appeals Majority Opinion Cannot Be Sustained on Grounds of Legislative Acquiescence

The asbestos respondents/WDTL seek to persuade this Court that it cannot alter its interpretation of RCW 4.20.010, only the Legislature can do so, and that the Legislature has "acquiesced" in this Court's decision in *Grant and Calhoun v. Washington Veneer Co.*, 170 Wash. 152, 15 P.2d 943 (1932). Resp'ts suppl. br. at 8-10; WDTL br. at 11-12. Such an argument simply misunderstands the role of this Court and misapplies the doctrine of legislative acquiescence.

First, a wrongful death action is entirely a creature of statute. *Dodson*, 159 Wash. at 595-97; *Atchison*, 161 Wn.2d at 376. The terms of that statute control. *Id.* *Nothing* in that statute's language evidences any intent that a claim under RCW 4.20.010 is in any way derivative of the underlying personal injuries action of the tort claimant.⁶ Op. at 4-5;

⁶ The Court of Appeals majority opinion *conceded* that 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. Op. at 4-5; dissent at 3-4. This Court should not imply a condition to a RCW 4.20.010 statutory claim that the Legislature did not see fit to impose. See WSAJF br. at 4-5, 11.

dissent at 3-4. But *the Legislature* never imposed the alleged condition to a RCW 4.20.010 claim -- that the victim's underlying claim must not be barred before a wrongful death claim may be asserted. That condition is a matter of *judicial construction*, which this Court is entirely free to distinguish or alter.⁷ This Court has the ultimate authority to determine the meaning and purpose of a statute. *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 201, 172 P.3d 329 (2007). It need not await legislative action to do so.

This Court has acted to override its own interpretation of a statute that it subsequently deemed incorrect. *State v. Thornton*, 119 Wn.2d 578, 835 P.2d 216 (1992) (Court overruled 1910 decision interpreting spousal privilege statute despite Legislature's apparent acquiescence in 1910 case's interpretation of the privilege).

Second, as for legislative acquiescence, what is the Legislature acquiescing to, according to the asbestos respondents/WDTL? This Court's holdings in *Grant/Calhoun*? This Court's holding in *Johnson*

Similarly, if, as the dissent notes at 5-7, this Court is actually articulating a statute of repose analysis in its older cases, RCW 4.20.010 *nowhere evidences* such an intent to create a statute of repose. Dissent at 6-7.

⁷ An appropriate example of this point is this Court's decision in *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 239 P.3d 544 (2010) in which it revisited the construction of a statute previously interpreted by the Court relating to the scope of the Department's entitlement to reimbursement for benefits paid to an injured worker when that worker obtains a recovery from a third party tortfeasor.

undercutting the holding in those cases? This Court's decisions in *Dodson* or *White* determining that a wrongful claim is distinct and non-derivative of any underlying personal injury claim of the tort victim?⁸

More to the point, the doctrine of legislative acquiescence is inapplicable when the interpretation of the statute is erroneous. Thus, in *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007), this Court declined to apply that interpretive principle. There, the Department of Labor and Industries had a regulation in place for at least 15 years interpreting Washington's overtime wage laws as applied to interstate truck drivers. Notwithstanding the deference ordinarily conferred upon agency interpretation of statutes and the Legislature's apparent long acquiescence in the Department's view, this Court stated "the fact that the Legislature has not acted to correct the Department's rule is irrelevant." *Id.* That is equally so here as to incorrect judicial gloss in *Calhoun/Grant* on RCW 4.20.010.

The doctrine of legislative acquiescence does not bar this Court's proper interpretation of RCW 4.20.010 in this case, nor does it compel the Court to await legislative action.

(3) The Court of Appeals Majority Opinion Cannot Be Sustained on the Basis that Deggs Might Have Filed an Action for Loss of Consortium During Ray Sundberg's Life

⁸ The Legislature's "inaction" as to *Grant/Calhoun* can be readily explained by the Legislature's likely satisfaction with this Court's holdings in *Johnson* and *White*.

The asbestos respondents assert that Deggs could have filed a loss of consortium claim during Sundberg's life, implying that any recovery under RCW 4.20.010 only duplicated recovery in Sundberg's underlying personal injury claims when he was alive. Resp'ts suppl. br. at 16-17. Such an argument is unsupported.⁹

This contention that the damages recoverable by Deggs individually in a loss of consortium claim were synonymous with claims by her as Sundberg's personal representative for wrongful death under RCW 4.20.010 is wrong, and again seemingly conflates a tort victim's personal injuries claims with the distinct damages recoverable in a statutory wrongful death claim. *See Otani, supra* (damages under RCW 4.20.010 relate to post-death damages of deceased).

First, an action for loss of consortium during the tort victim's life cannot capture the damages recoverable in a RCW 4.20.010 action; persons like Deggs have *no standing* to bring claims for post-death loss of

⁹ 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. *Otani ex rel. Shigaki v. Broudy*, 151 Wn.2d 750, 755, 92 P.3d 192 (2004); *Bowers v. Fiberboard Corp.*, 66 Wn. App. 454, 460-61, 832 P.2d 523, *review denied*, 120 Wn.2d 1017 (1992); 6 Wash. Practice, *Wash. Pattern Jury Instructions/Civil* at 329-65 (WPI for wrongful death/survivor claims). The standard WPI for wrongful death and survivor claims effectively lay to rest the fears expressed by the Court of Appeal majority and dissent regarding a risk of double recovery. As the Bergman firm brief indicates at 12-13, this argument is a red herring, as an asbestos defendant has alternatives for resolving all of an asbestos victim's pre-death claims and the separate RCW 4.20.010 claims at one time. *See also*, WSAJF br. at 18-20.

consortium damages. *Hatch v. Tacoma Police Dep't*, 107 Wn. App. 586, 588-89, 27 P.3d 1223 (2001).

Further, as the Bergman firm brief squarely notes at 13-15, it may also have been impractical for Deggs to join any loss of parental consortium claim with Ray Sundberg's personal injuries claims where Ray was still alive for compelling human considerations. *See also, Kelley v. Centennial Contractors Enterprises, Inc.*, 169 Wn.2d 381, 236 P.3d 197 (2010) (addressing feasibility of joinder of child's loss of consortium claim for personal injuries).

This argument is essentially a red herring this Court should disregard.

- (4) If the Court of Appeals Majority Is Correct in Its Interpretation of the Accrual of a Wrongful Death Claim, This Court Should Overrule the Cases and Adopt a More Sensible View of that Issue

The asbestos respondents/WDTL have no real answer for Deggs' argument that the rule they claim applies is harmful because it fails to recognize the prevailing modern principle that a wrongful death claim is a distinct, not derivative, claim that accrues only upon the tort victim's death. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). To hold otherwise fails to honor the remedial purpose of RCW 4.20.010 and establishes the illogical proposition that a tort victim

must somehow 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 on behalf of that victim's statutory beneficiaries. Ultimately, this flawed analysis simply bars the personal representative from pursuing legitimate wrongful death claims, benefitting tortfeasors and rewarding their wrongdoing that results in their victims' deaths.

They simply have *no real response* to the fact that well-regarded treatise authority (comment c to § 899 of the *Restatement (Second) of Torts*; W. Page Keeton, *Prosser and Keeton on Torts* § 127 (5th ed. 1984)); federal court interpretation of the Federal Tort Claims Act (*e.g.*, *Washington v. United States*, 769 F.2d 1436, 1438-39 (9th Cir. 1985) and courts throughout the western United States (Deggs suppl. br. at 15-16) reject the principle allegedly espoused in this Court's *Grant* and *Calhoun* decisions.¹⁰

This Court should adopt the clear principles for wrongful death claims articulated in the *Restatement* and by courts in our sister western states.

D. CONCLUSION

¹⁰ WDTL makes only an off-hand remark about such authority, WDTL br. at 15, and the asbestos respondents make an erroneous assertion regarding the prevailing rule. Resp'ts suppl. br. at 3 n.2.

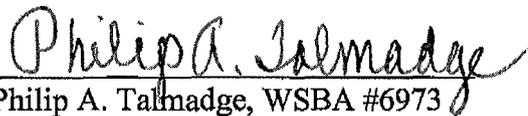
As noted by the WSAJF and Bergman firm amicus briefs, the Court of Appeals majority opinion adopts an interpretation of RCW 4.20.010 that is illogical as there is neither a claim to present under RCW 4.20.010, nor a party to present it, until the tort victim's death. The position taken by the Court of Appeals majority makes an RCW 4.20.010 action derivative of the tort victim's underlying personal injuries claim, and ultimately is illogical and unjust, creating what amounts to a statute of repose by judicial fiat, contrary to any language in RCW 4.20.010 itself.

Ray Sundberg appropriately pursued a remedy against asbestos tortfeasors when he was alive; his personal representative should not be foreclosed from pursuing a distinct statutory claim under RCW 4.20.010 on behalf of his statutory beneficiaries for his wrongful death.

This Court should reverse the Court of Appeals and trial court decisions. The Court should overrule *Calhoun* and *Grant* to the extent their analysis is contrary to the prevailing principle that a claim under RCW 4.20.010 is distinct from a tort victim's underlying personal injuries claims and accrues only upon the death of the tort victim or the discovery of the elements of the statutory wrongful death claim. Deggs' RCW 4.20.010 claim on behalf of Ray Sundberg's statutory beneficiaries is not barred. Costs on appeal should be rewarded to Deggs.

DATED this 25th day of February, 2016.

Respectfully submitted,



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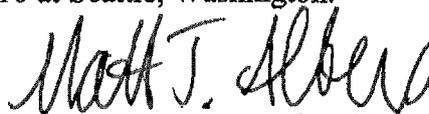
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated: February 25, 2016 at Seattle, Washington.

A handwritten signature in black ink that reads "Matt J. Albers". The signature is written in a cursive style and is positioned above a horizontal line.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

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Good afternoon,

Attached please find the following document for filing with the Court:

Document to be filed: Deggs' Answer to Amici Briefs

Case Name: Judy R. Deggs vs. Asbestos Corporation Limited, et al.

Case Cause Number: 91969-1

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If you have any questions, please feel free to contact me. Thank you!

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