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Supreme Court No. 91969-1
Court of Appeals Cause No. 71297-7-I

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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellant,

v.

ASBESTOS CORPORATION LIMITED, et al.,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS
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COMPANY, AND ASTENJOHNSON INC.

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I. INTRODUCTION

Respondents Asbestos Corporation Limited (ACL), AstenJohnson Inc. (AstenJohnson), and Ingersoll Rand Company (Ingersoll Rand) (collectively “Respondents”) jointly submit this supplement brief and request that the Court affirm the decision of the Court of Appeals affirming the trial court’s order granting summary judgment against Appellant Judy R. Deggs, the Personal Representative for the Estate of Decedent Ray Sundberg, her father.

II. ASSIGNMENT OF ERROR

The issue raised by Petitioner is whether the Court of Appeals correctly applied this Court’s precedent in *Calhoun v. Washington Veneer Co.*, 170 Wn. 152, 159-60, 15 P.2d 943 (1932), *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 580-81, 44 P.2d 193 (1935), and *Johnson v. Ottomeier*, 45 Wn.2d 419, 422-23, 275 P.2d 723 (1954), by holding that the trial court properly granted summary judgment on the wrongful death claims because there was no valid cause of action against Respondents at the time of Decedent’s death. A copy of *Deggs v. Asbestos Corp. Ltd.*, 188 Wn. App. 495, 354 P.3d 1 (2015), is included in the Appendix.

III. STATEMENT OF THE CASE

This case involves two virtually identical lawsuits based on the same set of facts, injuries, and legal theories, yet brought nearly thirteen years apart.¹ In September 1999, Decedent Ray Sundberg, later joined by

¹ Respondents incorporate by reference the statement of the facts in the Courts of Appeals decision. *Deggs*, 188 Wn. App. at 497-99.

his spouse, Betty Sundberg, filed the initial personal injury lawsuit against nearly forty defendants (including Respondent ACL) alleging that exposure to asbestos during his work career had caused several asbestos-related diseases that would shorten his life (the “1999 Lawsuit”). *Deggs*, 188 Wn. App. at 497. As Decedent’s daughter, Petitioner Judy R. Deggs could have brought claims against Respondents in her parents’ 1999 Lawsuit under *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 140-141, 691 P.2d 190 (1984), but she elected not to do so. CP 336-381. The 1999 Lawsuit resolved in 2001 when the Sundbergs obtained a verdict in their favor. *Deggs*, 188 Wn. App. at 497-98.

Mr. Sundberg passed away in December 2010. *Id.* at 498. The Sundbergs and their family members failed to bring any claims against Respondents (other than ACL) during Mr. Sundberg’s lifetime. *Id.*

In July 2012, Petitioner, as the estate’s personal representative, filed a second asbestos-related lawsuit asserting survival and wrongful death claims against ACL and fourteen new defendants (including Respondents AstenJohnson and Ingersoll Rand) based on the same set of injuries, facts, and legal theories as the 1999 Lawsuit. *Id.* The lawsuits were virtually identical as both alleged damages based on the same injuries (colon cancer, lymphoma, pleural disease, asbestosis) that were caused by the same asbestos exposures at the same locations at the same time (Long Bell Lumber Company from 1942 to 1944, U.S. Navy from 1944 to 1946, Longview Fiber from 1947 to 1989) and were even brought by the same law firm (Brayton Purcell). *Id.*; CP at 144-243, 336-381.

The trial court granted summary judgment for Respondents on all claims on grounds that the expiration of the three-year statute of limitations on Decedent's personal injury claims before his death barred all of Petitioner's claims. *Deggs*, 188 Wn. App. at 498-99. Appellant appealed only the dismissal of her wrongful death claim, not the survival claims. *Id.* at 499. The Court of Appeals affirmed. *Id.* at 497.

IV. ARGUMENT

A. The Court of Appeals Correctly Applied This Courts Precedent.

Over eighty years ago, this Court decided the exact issue presented here when it held that there was no viable wrongful death action if the injured party had no valid and existing cause of action based on the same injuries and wrongful conduct at the time of death. *Grant v. Fisher Flouring Mills Co.*, 181 Wn. at 580-81; *Calhoun v. Washington Veneer Co.*, 170 Wn. at 159-60; *accord Johnson*, 45 Wn.2d at 422-23.² This Court has consistently recognized that an action under the wrongful death statute is “dependent upon the right the deceased would have to recover for such injuries up to the instant of his death.” *Johnson*, 45 Wn.2d at 422-23; *Grant* 181 Wn. at 581; *Calhoun*, 170 Wn. at 159-60; *see also*

² “The weight of authority in other jurisdictions, unsurprisingly, reaches the same result.” *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 352 (Tex. 1992) (surveying other states' law and concluding that the majority rule is that “if a decedent's action would be barred by limitations, then so would a wrongful death action”); *see, e.g., Flynn v. New York*, 283 U.S. 53, 56 (1931) (applying same rule to federal statute); *Michigan Central R.R. Co. v. Vreeland*, 227 U.S. 59, 70 (1913) (“[I]t has been generally held that [a wrongful death] action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.”).

Ryan v. Poole, 182 Wn. 532, 536, 47 P.2d 981 (1935) (“If the deceased had no cause of action, none accrues to his heirs or personal representatives.”). This principle applies to “situations in which, 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.”³ *Johnson*, 45 Wn.2d at 422-23 (emphasis added). As a result, while acknowledging that wrongful death actions generally accrue at the time of death, this Court has applied a “well-recognized limitation” that “there must be a subsisting cause of action in the deceased” at the time of death and that “the action for wrongful death is extinguished by an effective release executed by the deceased in his lifetime, by a judgment in his favor rendered during his lifetime, [or] by the failure of the deceased to bring an action for injuries within the period of limitation.” *Grant*, 181 Wn. at 581 (emphasis added) (citations omitted). The Court of Appeals correctly applied this precedent here.

The Court first addressed the issue in *Calhoun*, in which the decedent was allegedly injured by exposure to a toxic substance while working at the defendant’s factory. *Calhoun*, 170 Wn. at 153-57. The

³ This follows the principle of equitable estoppel that “a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” *Kramarevcky v. Department of Social & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (citing *Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975)). Here, Decedent and Petitioner took inaction – namely, not bringing suit against Respondents during Decedent’s lifetime. Respondents relied on that inaction by not pursuing a deposition or other discovery from Decedent while he was alive. Respondents are now prejudiced because of Decedent’s and Petitioner’s inaction because they cannot depose Decedent or obtain other discovery from him. *Id.*

decedent failed to bring an action based on his injuries until after the three-year statute of limitations triggered by his last exposure had expired. *Id.* The decedent passed away shortly after filing the tardy personal injury action, and his spouse, as the estate's personal representative, filed an amended complaint to add a claim under the wrongful death statute based on the same exposure as the decedent's action. *Id.* Even though the personal representative's claims for wrongful death, "of course, had not accrued at the time the original complaint was filed," this Court held that the expiration of the applicable three-year statute of limitations precluded the personal representative's wrongful death action. *Id.*

This Court subsequently re-affirmed *Calhoun* in *Grant v. Fisher Flouring Mills Co.* In *Grant*, the decedent had been injured when exposed to hazardous fumes while working at defendant's facility. 181 Wn. at 576-77. But unlike *Calhoun*, the *Grant* decedent had brought an action based on his injuries before the three-year statute of limitations expired. *Id.* at 577, 582. After the decedent passed away but while his action was still pending, his personal representative was substituted in as the plaintiff and amended the complaint to add a wrongful death claim against the same defendants. *Id.* at 577. The issue on appeal was whether the statute of limitations barred the wrongful death claim even though the decedent had a viable cause of action at the time of his death. *Id.* at 577-78.

While acknowledging that a wrongful death cause of action generally accrues at the time of death, this Court held that the right to a wrongful death action is still subject to a "well-recognized limitation" that

the decedent must have a valid cause of action at the time of death:

The action for wrongful death, under [now RCW 4.20.010 -.020], is a distinct and separate action from the survival action, under section 194. In accord with the great weight of authority, this court has held that the 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, *Death by Wrongful Act* (2d 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. Washington Water Power Co.*, [92 Wn. 574, 159 P. 791 (1916)]; *Mellon v. Goodyear*, 277 U.S. 335, 48 S.Ct. 541, 72 L.Ed. 906 [(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 & Mississippi 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. New York, N.H. & H. R. Co.*, 283 U.S. 53, 51 S.Ct. 357, 75 L.Ed. 837 [(1931)]). In this latter class falls the case of *Calhoun v. Washington Veneer Co.*, [170 Wn. 152, 159-60, 15 P.2d 943 (1932)].

Grant, 181 Wn. at 580-81 (emphasis added) (additional citations omitted).

Applying *Calhoun*, the Court concluded that the statute of limitations did not bar the wrongful death claim because the decedent had a timely-filed action for personal injuries that was still pending at the time of his death:

The instant case presents an entirely different problem [than *Calhoun*]. Here, Grant brought his 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 that the action for wrongful death can be maintained.

Id. at 582 (citations omitted). Thus, this Court expressly applied the *Calhoun* rule to the *Grant* facts to reach its holding.

This Court subsequently re-affirmed *Calhoun* and *Grant* in *Johnson v. Ottomeier*. In that case, this Court held that the exclusionary rule barring spouses from suing each other for a tort committed during the marriage did not apply to a wrongful death action brought by a wife's personal representative on behalf of the children against the estate of her husband who had murdered her and then committed suicide. 45 Wn.2d at 420-21. In doing so, this Court discussed other recognized circumstances in which a wrongful death claim could not be maintained:

The second category of cases in which this general rule of exclusion has been applied involves situations in which, 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. Among such cases are *Brodie v. Washington Water Power Co.*, 92 Wn. 574, 159 P. 791, where decedent gave an effective release and satisfaction; and *Calhoun v. Washington v. Veneer Co.*, 170 Wn. 152, 15 P.2d 943, as interpreted in *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 44 P.2d 193, where the statute of limitations had run prior to decedent's death.

Id. at 422-23 (emphasis added). While recognizing that “the action for wrongful death is derivative only in the sense that it derives from the wrongful act causing the death, rather from the person of the deceased,” this Court held that there was no statutory language or principle of law or equity that “warrants the recognition of the wife's personal disability to sue her husband as a defense against her personal representative's action

for wrongful death.” *Id* at 423-24. Thus, the *Johnson* Court re-affirmed that *Calhoun* and *Grant* remained good law.

This instant case presents nothing more than a straightforward application of *Calhoun*, *Grant*, and *Johnson*.⁴ Like *Calhoun* but unlike *Grant*, the Decedent (as well as Petitioner) here failed to bring a personal injury action against Respondents within the three-year statute of limitations.⁵ Because the statute of limitations expired during Decedent’s lifetime, there was “no subsisting cause of action in the deceased” at the time of his death. *Grant*, 181 Wn. at 580-81. As a result, the Court of Appeals correctly held that Petitioner has no viable cause of action under the wrongful death statute. *Id.*; *Calhoun*, 170 Wn. at 159-60.

B. The Court Should Not Overturn *Calhoun*, *Grant*, and *Johnson* Because the Legislature Has Declined To Do So.

The Court should not change the judicial interpretation of the wrongful death statute which it first adopted in *Calhoun*. To the contrary, the Court should presume that the Washington Legislature has been aware of the Court’s interpretation since 1932 yet has declined to amend or alter

⁴ As *Grant* and *Johnson* demonstrate, Washington law recognizes several circumstances in which the decedent’s actions affect potential wrongful death claims brought on behalf of the heirs. Washington law recognizes that if the decedent executes a release in his or her personal injury action, the release bars any subsequent wrongful death action by the personal representative and the statutory beneficiaries based on the same injuries. *Grant*, 181 Wn. at 580-81 (citing *Brodie v. Washington Water Power Co.*, 92 Wn. 574, 159 P. 791 (1916)). Similarly, a verdict in a Decedent’s personal injury action subsequently bars a wrongful death action by the personal representative and the statutory beneficiaries for the same injuries. *Id.* There is no logical reason to treat an expired statute of limitations any differently.

⁵ Petitioner could have brought her own independent claim either in her parents’ 1999 Lawsuit or, if not feasible, in her own action. *Ueland*, 103 Wn.2d at 140-41.

the pertinent language of the underlying statute despite multiple opportunities to do so. This Court has repeatedly recognized that “[it] presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.” *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009); *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *Friends of Snoqualmie Valley v. King Cnty. Boundary Review Ed.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992)). Such deference recognizes and acknowledges the separation of powers between the two branches, and the failure to do so implicates it. *See, generally, Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 509, 198 P.3d 1021 (2009) (upholding retroactive application of Legislature’s amendment abrogating prior interpretation of statute by Washington Supreme Court). Rather, under the doctrine of *stare decisis*, Washington appellate courts “do not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful.” *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (citing *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006)).

Here, the Legislature has known about the rule in *Calhoun* since 1932, yet has done absolutely nothing to change the underlying wrongful death statute despite several minor amendments thereto since then. This Court in *Calhoun* interpreted the exact same wrongful death statute – Rem. Comp. Stat. § 182 (now codified at RCW 4.20.010 and RCW

4.20.020) – at issue in this case. In fact, the wrongful death statute at issue has remained substantively unchanged since 1917. *Compare* 1917 Sess. Laws ch. 123, §§ 1-4 *and* Rem. Comp. Stat. § 183 *with* RCW 4.20.010 (adding gender-neutral language and a comma) *and* RCW 4.20.020 (adding adult brothers, stepchildren, and domestic partners as possible statutory beneficiaries). The Legislature has amended RCW 4.20.020 on a total of four occasions since 1932 – including as recently as 2011 – but only to add a gender-neutral term and new classes of beneficiaries (non-minor brothers, stepchildren, and domestic partners). 2011 Sess. Laws, ch. 336, § 90 (gender-neutral term); 2007 Sess. Laws, ch. 156, § 1 (domestic partners); 1985 Sess. Laws, ch. 130, § 1 (stepchildren); 1973 Sess. Laws, ch. 1543, § 2 (non-minor brothers). Thus, despite several opportunities to do so, the Washington Legislature has declined to modify *Calhoun* or make any other substantive changes to the wrongful death statute. Any change to the wrongful death statute or the *Calhoun* rule is the responsibility of the Legislature, not the courts.

C. There Are No Washington Appellate Decisions That Actually Conflict With *Calhoun*, *Grant*, and *Johnson*.

Petitioner has based this appeal upon the faulty premise that there is a conflict among Washington appellate authorities when none in fact exists. Petitioner has cited several cases stating generally that a wrongful death action is a distinct cause of action and that a personal representative cannot bring a wrongful death action until it accrues upon the decedent's

death, but so did *Grant* and *Calhoun*.⁶ Yet, as this Court further explained in *Grant*, that rule was “subject to a well-recognized limitation” that the deceased must have a viable cause of action at the time of death, *Grant*, 181 Wn. at 580-81, and there are circumstances where “the decedent pursued a course of conduct which makes it *inequitable* to recognize a cause of action for wrongful death,” such allowing the statute of limitations to run during his or her lifetime or giving an effective release, *Johnson*, 45 Wn.2d at 422-23 (emphasis added). Petitioner cannot cite any Washington appellate decision that actually conflicts with *Grant*, *Calhoun*, or *Johnson*. Generalized language concerning the accrual of a wrongful death claim in cases where no exception existed does not create a doctrinal conflict.

Petitioner cites *Wills v. Kirkpatrick*, 56 Wn. App. 757, 785 P.2d 834 (1990), for support, but *Wills* is nothing more than an application of *Grant*. Like *Grant* but unlike *Calhoun* (or this case), the *Wills* decedent had a viable cause of action for personal injuries at the time of death.⁷ In *Wills*, the decedent died from a heart condition her doctor had failed to diagnose during a medical appointment three weeks earlier. *Id.* at 758-59. Like *Grant* but unlike *Calhoun* (or this case), there was no dispute that the

⁶ *Grant*, 181 Wn. at 580-81 (“The action for wrongful death, under section 183, Rem. Rev. Stat., is a distinct and separate action from the survival action, under section 194. In accord with the great weight of authority, this court has held that the action accrues at the time of death, and that the statute of limitations then begins to run.”); *Calhoun*, 170 Wn. at 159-60 (stating that personal representative’s claims for wrongful death, “of course, had not accrued at the time the original complaint was filed”).

⁷ Petitioner makes no attempt to explain how *Wills*, a Court of Appeals decision, can create a conflict with the Supreme Court’s holdings in *Calhoun* and *Grant*.

decedent had a viable cause of action at the time of her death, given that the applicable statute of limitations was three years yet she had died only a matter of weeks after the doctor's allegedly negligent misdiagnosis. *Id.* at 759. Under the circumstances, the court held the claim was timely because the three-year statute of limitations on the wrongful death action began to run at death. *Id.* at 763. This is no different than *Grant* in which the decedent had a viable cause of action at death because he had filed his then-pending personal injury action within the three-year statute of limitations. Thus, the "well-recognized limitation" that "at the time of death there must be a subsisting cause of action in the deceased" was satisfied in both *Wills* and *Grant*, but not in *Calhoun*. *Grant*, 181 Wn. at 580-81. Accordingly, there is no conflict.

Petitioner also cites *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 345, 693 P.2d 687 (1985). However, *White* does not conflict with *Calhoun* or *Grant* because the parties stipulated for purposes of that appeal that "the decedent never knew that he was suffering from any adverse effects of exposure to asbestos-containing materials" before his death. *Id.* at 345. Rather, as the Court of Appeals explained, the *White* Court expressly stated that it was not addressing the issue presented here:

[W]e note we are not faced with, nor do we decide, a case in which the deceased is alleged by the defendant to have known the cause of the disease which subsequently caused his death. In that case there is a question as to whether the wrongful death action of the deceased's representative "accrued" at the time of the decedent's death, when the decedent first discovered or should have discovered the

injury, or when the claimant first discovered or should have discovered the cause of death.

Deggs, 188 Wn. App. at 508 (quoting *White*, 103 Wn.2d at 347) (emphasis added). As a result, *White* merely held that the discovery rule applied to wrongful death actions and thus that such an action may accrue later than the time of death if the personal representative could not have discovered the cause of action at that time.⁸ *Id.* at 352-53. Simply put, there is no conflict among Washington appellate decisions.

D. This Court Has Recognized Numerous Instances In Which Decedents' Actions Or Inactions During Their Lifetimes Extinguish Wrongful Death Claims Despite No Express Language in the Wrongful Death Statute.

Petitioner misses the bigger point that the Court of Appeals implicitly recognized: *a wrongful death action does not accrue following every death*; rather, “a decedent’s inaction as to his claims during his lifetime can preempt the accrual of a personal representative’s wrongful death cause of action.” *Deggs*, 188 Wn. App. at 504 (citing *Grant*, 181

⁸ The Court of Appeals also properly explained why a federal judge’s order granting a motion to remand does not apply here. *Deggs*, 188 Wn. App. at 507-08 & 507 n.5 (discussing *Barabin v. Asten Johnson, Inc.*, 2014 WL 2938457 (W.D. Wash. June 30, 2014)). As a preliminary matter, the order is not a Washington appellate court decision and has no binding authority. Moreover, the order concerned a completely different issue – fraudulent joinder in the context of remand – with a much stricter legal standard in which remand is presumed unless the defendants meet their heavy burden by showing through “clear and convincing evidence” that there is no “doubt” that the complaint “obviously fails” to state a claim and that remand is required if there is any “possibility that a state court would find that the complaint states a cause of action.” *Barabin*, 2014 WL 2938457 at *2. Such a strict standard has no bearing on the summary judgment standard at issue here. In fact, the *Barabin* order primarily relies upon the possibility that the statute of limitations may have been tolled under the discovery rule, as recognized by *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 693 P.2d 687 (1985). The application of the discovery rule, however, is not an issue in this appeal, and there is no evidence in the summary judgment record to support such a claim.

Wn. at 581). While it is true that a wrongful death action cannot accrue until death, not every death creates a wrongful death cause of action.

As this Court has previously recognized, there are numerous instances in which events that occurred before death eliminates or diminishes the right to recover under a wrongful death action, even though the wrongful death statute makes no mention of such circumstances. “If the deceased had no cause of action, none accrues to his heirs or personal representatives.” *Ryan*, 182 Wn. at 536.

First, as this Court in *Johnson* explained, there are circumstances in which the decedent’s conduct *at the time* of the alleged tort precludes a wrongful death cause of action from accruing even though the defendants’ conduct caused the decedent’s injuries which later resulted in death. *Johnson*, 45 Wn.2d at 422-23 (citing, *inter alia*, *Hart v. Geysel*, 159 Wn. 632, 294 P. 570 (1930) (decedent consented to prize fight); *Ryan*, 182 Wn. at 536 (decedent injured while engaged in unlawful and criminal acts)). These cases further establish that the wrongful death action is derivative of the personal injury action in the sense that they are based on the same alleged injury and wrongful action and that the decedent’s conduct may affect the statutory beneficiaries’ right to recover:

A limitation upon such independently created right, recognized by this court and elsewhere generally, is that the wrongful act or default must be of such character as would have entitled the injured person to maintain an action and recover damages, had not death ensued; stated conversely, if the deceased never had a cause of action, no right of action accrues under the wrongful death statute.

Upchurch v. Hubbard, 29 Wn.2d 559, 564, 188 P.2d 82 (1947); *see Ginochio v. Hesston Corp.*, 46 Wn. App. 843, 845, 846, 733 P.2d 551, 553 (1987) (citing Washington State Senate Select Comm. on Tort & Prod. Liab. Reform, *Final Report 1981*, at 48, with respect to diminishment of derivative wrongful death claim based on decedent's contributory fault). Thus, even though the wrongful death statute itself is silent about the decedent's conduct at the time of the alleged injury, this Court has recognized circumstances in which the decedent's conduct precludes or reduces any rights to recovery on a wrongful death claim.

As this Court has also recognized in *Johnson* and elsewhere, there is a "second category of cases" in which the decedent's *post-injury* conduct or inaction "makes it *inequitable* to recognize a cause of action for wrongful death," such as "where decedent gave an effective release and satisfaction," where the decedent obtained a verdict, or "where the statute of limitations had run prior to decedent's death." *Johnson*, 45 Wn.2d at 422-23 (emphasis added) (citing *Grant*, 181 Wn. at 580-81; *Calhoun*, 170 Wn. at 159-60; *Brodie v. Washington Water Power Co.*, 92 Wn. 574, 159 P. 791 (1916)). Thus, even though the wrongful death statute makes no mention of releases or prior verdicts, this Court has held that equity precludes recovery by statutory beneficiaries under the wrongful death statute when the decedent has already provided an effective release or obtained a verdict. This same reasoning applies when

the decedent allows the statute of limitations to run before death.⁹

E. Decedent and Petitioner Could Have Recovered the Same Damages in the 1999 Lawsuit.

Petitioner has failed to identify any damages that were unavailable in the 1999 Lawsuit that would be available in this case.¹⁰ There is no dispute that Petitioner (who is both the personal representative and a statutory beneficiary) could have brought her own claim for damages in the decedent's personal injury action or, if that was not feasible, in her own action. *Ueland*, 103 Wn.2d at 140-141. Petitioner failed to do so. As the Court of Appeal recognized, Petitioner could have sought future damages for the Decedent's shortened life in a personal injury action. *Deggs*, 188 Wn. App. at 510-11; *see* WPI 30.01.01 (providing instruction on future damages); WPI 30.02.01 (same); WPI 34.04 (providing mortality table for determining future damages). Because the same

⁹ If the Court reverses and overrules *Calhoun*, *Grant*, and *Johnson* after more than eighty years despite the Legislature's longstanding acquiescence, the Court's decision would create unintended consequences beyond the situation when the decedent allows the statute of limitations to run. As discussed above, this Court has held that there is no viable wrongful death action as a matter of equity when the decedent had no subsisting cause of action at the time of death. *Johnson*, 45 Wn.2d at 422-23. In other words, the same equitable grounds for the expiration of the statute of limitations apply to the situations when the decedent provided a release or obtained a verdict. If the Court were to overrule this established rule of law as to the expiration of the statute of limitations, this would effectively overrule the rule with respect to prior releases and verdicts as well. Such a result would erase the finality and certainty afforded by every prior case in which a decedent entered into a release or obtained a verdict before death. The Court should not prophylactically invalidate every release and verdict obtained by decedents during their lifetimes just so upon death their statutory beneficiaries get a second bite at the apple.

¹⁰ Petitioner did not appeal summary judgment on the survival claim, which would include the damages personal to the decedent, so none of those damages are at issue. Rather, only damages available under the wrongful death statute are at issue, and those damages are limited to the statutory beneficiaries' damages.

damages would have been available in a personal injury action, allowing Petitioner to proceed with a redundant wrongful death action would merely provide a second bite at the same apple.¹¹

F. The Court Should Affirm Because It Promotes Public Policy and Precludes Depriving Defendants of a Meaningful Opportunity to Defend Themselves.

Washington has long endorsed statutes of limitations as part of the overall administration of justice. The three-year statute of limitations has existed as the State's firm policy since 1854. *See* Laws of 1854, § 4, p. 363; Laws of 1854, § 7, p. 364. Recognizing that statutes of limitations have a long history in English law and are firmly rooted in modern jurisprudence, this Court has concluded that they further Washington public policy because they protect individuals from threatened litigation where their ability to defend is compromised due to the passage of time:

In Washington, the goals of our limitation statutes are to force claims to be litigated while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence. *Summerrise v. Stephens*, 75 Wn.2d 808, 811, 454 P.2d 224 (1969). Our policy is one of repose; the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims. *Ruth v. Dight*, 75 Wn.2d 660, 664, 453 P.2d 631 (1969).

¹¹ While the personal representative is the person who technically files the wrongful death action, the action itself is for the benefit of the decedent's family members, who recover the damages as the statutory beneficiaries. RCW 4.20.020; *see, e.g., Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 377-78, 166 P.3d 662 (2007). The wrongful death beneficiaries – which here include Petitioner herself – are the same family members who could have recovered the same damages in the decedent's personal injury action (or in their own action).

Stenberg v. Pacific Power & Light, 104 Wn.2d 710, 713-14, 709 P. 2d 793 (1985). Given that Petitioner waited over a decade and after Decedent's death to bring any claims against Respondents, this case is a perfect example of why Washington public policy favoring enforcement of statutes of limitations is correct.

The application of this Court's precedent creates no injustice or unreasonable result. Once injured parties and their families have notice of potential personal injury claims against certain defendants, the statute of limitations commences, and they have three years to bring their claims. If the injured parties die before the three years expire, or if they file a lawsuit within the three years and have a viable action pending at the time of death, the personal representatives can bring a valid wrongful death action on behalf of the family because the injured parties had a subsisting cause of action when they passed away. However, no wrongful death action accrues if the decedents (and their family) pursued an inequitable course of conduct during their lifetime – namely, the decedents released their claims, the decedents obtained a verdict, or, as in this case, the decedents allowed the statute of limitations on their claims against the defendants to expire before their death. Here, Decedent and his wife did utilize their rights to bring claims against defendants during his lifetime – and within the statute of limitations – based on the same injury caused by the same alleged wrongful acts to recover the same available damages. The discovery rule is not implicated. There is nothing unfair or unreasonable about the Court of Appeals' decision holding that under such

circumstances, and because Petitioner herself failed to join her parents' original action, there is no valid cause of action for wrongful death..

V. CONCLUSION

For over eighty years, the Legislature has acquiesced in this Court's precedent. Petitioner cannot cite any Washington appellate decisions that actually conflict with this precedent. Accordingly, this Court should affirm the decision below.

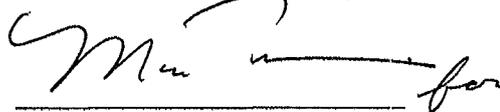
DATED this 19th day of January, 2016.

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APPENDIX

2015 JUN 22 AM 9:17

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JUDY R. DEGGS, as personal representative for the estate of ROY GORDON SUNDBERG,)	No. 71297-7-I
)	(consolidated with
)	No. 71550-0-I)
Appellant,)	
)	DIVISION ONE
v.)	
)	PUBLISHED OPINION
ASBESTOS CORPORATION LIMITED;)	
ASTENJOHNSON, INC.; CBS)	
CORPORATION (FKA VIACOM INC., FKA)	
WESTINGHOUSE ELECTRIC)	
CORPORATION); INGERSOLL-RAND)	
COMPANY,)	
)	
Respondents,)	
)	
BARTELLS ASBESTOS SETTLEMENT)	
TRUST; GASKET COMPANY; GENERAL)	
REFRATORIES COMPANY; JOHN)	
CRANE, INC.; METROPOLITAN LIFE)	
INSURANCE COMPANY, and FIRST)	
DOE through ONE HUNDREDTH DOE,)	
)	
Defendants.)	FILED: June 22, 2015

APPELWICK, J. — Deggs, as personal representative for her father's estate, appeals the dismissal on summary judgment of her wrongful death action. In 1999 her father successfully sued several defendants for injuries related to asbestos exposure. In 2012, two years after her father passed away, Deggs filed a wrongful death action against one

of the same defendants from the 1999 lawsuit and several new defendants. Wrongful death claims derive from the wrongful act and do not accrue absent a valid subsisting cause of action in the decedent at the time of death. Deggs's father had no valid subsisting cause of action at the time of his death. We affirm.

FACTS

Roy Sundberg was exposed to asbestos while working for various employers from 1942 to 1989. Sundberg was diagnosed with colon cancer and lymphoma on July 24, 1998, pleural disease on August 31, 1999, and asbestosis on February 21, 2000.

On September 20, 1999, Sundberg filed a lawsuit against about 40 defendants, including Asbestos Corporation Limited (ACL). Sundberg sought relief in the form of general damages, medical and related expenses, pain and suffering, loss of earnings, loss of wages and future earning potential, emotional distress, and cost of the lawsuit. On April 18, 2001, Sundberg's wife, Betty Sundberg, asserted a claim for loss of consortium in the amended complaint.

The 1999 lawsuit was tried to verdict in 2001. The jury awarded \$451,900 in economic damages, \$700,000 in noneconomic damages, and \$360,000 in loss of consortium damages.

In December 2010, Sundberg died of lymphoma. On July 3, 2012, the personal representative of Sundberg's estate, his daughter, Judy Deggs, filed a second asbestos-related lawsuit against ACL and several new defendants, including respondents Ingersoll-Rand Company, AstenJohnson Inc., and CBS Corporation. The complaint asserted both a survival action and a wrongful death action. The 2012 lawsuit alleged liability against

the defendants based on much of the same asbestos exposure as the 1999 lawsuit. The complaint sought the same relief as the 1999 lawsuit but included funeral expenses.

On March 12, 2013, respondent AstenJohnson moved for summary judgment. AstenJohnson argued that summary judgment was proper, because both the survival action and the wrongful death action were barred by the expiration of the statute of limitations on Sundberg's underlying claims. The trial court granted AstenJohnson's motion for summary judgment. The court noted that the statute of limitations had run on any of Sundberg's remaining personal injury claims. It thus reasoned that Deggs's claims were barred, because there was no remaining cause of action that Sundberg could have brought against AstenJohnson before he died.

In reaching its conclusion, the trial court weighed the competing interests of compensating the qualifying survivors and the important policy reasons behind finality and statutes of limitation. It ultimately reasoned that Sundberg consciously let the statute of limitations run out when he did not sue AstenJohnson in his 1999 personal injury lawsuit. It opined that, because there was no cause of action that Sundberg could have brought against AstenJohnson at the time of his death, there was no cause of action that his personal representative could bring because of Sundberg's death. The trial court then granted summary judgment through a separate order for the remaining defendants—ACL, Ingersoll-Rand Company, and CBS Corporation—because Deggs's claims against them were similarly barred.

Deggs appeals the summary judgment dismissals of her wrongful death claim, but not the survival claim, as to all respondents.

DISCUSSION

This court reviews summary judgment orders de novo. Hadley v. Maxwell, 144 Wn.2d 306, 310-11, 27 P.3d 600 (2001). Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Peterson v. Groves, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). When considering the evidence, the court draws reasonable inferences in the light most favorable to the nonmoving party. Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. Davies v. Holy Family Hosp., 144 Wn. App. 483, 491, 183 P.3d 283 (2008).

The statute of limitations for a personal injury action in Washington is three years. RCW 4.16.080(2). Sundberg passed away over 11 years after he filed his original personal injury complaint without bringing any additional lawsuits related to his injuries. Deggs asserts that Sundberg's actions and inaction during his lifetime—the 1999 lawsuit against ACL and his failure to pursue a personal injury action against the remaining respondents within the statute of limitations period—cannot affect the viability of her wrongful death action. She contends this is so, because the wrongful death action did not accrue until Sundberg passed away.

RCW 4.20.010 is the wrongful death statute:

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.

The issue here is whether the expiration of the statute of limitations for an individual's personal injury claims or a judgment or settlement on those same claims

during his lifetime can preempt the accrual of his personal representative's wrongful death claim. The wrongful death statute is silent on this issue.

Deggs does not dispute that Sundberg won a favorable judgment against ACL in 1999. Nor does she dispute that the statute of limitations for Sundberg's personal injury claims as to the respondents expired prior to Sundberg's death. Because Sundberg pursued his personal injury claims against ACL to judgment, he would have been unable to sue ACL again based on the same cause of action during his lifetime. See Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995) (stating that res judicata prevents litigants from relitigating claims and issues that were litigated, or might have been litigated, in a prior action). To the extent there were any remaining causes of action Sundberg could have brought against ACL, like any potential personal injury claims against AstenJohnson, Ingersoll-Rand, and CBS, they would have been barred by the three year statute of limitations. See RCW 4.16.080(2).

Deggs claims that a cause of action for wrongful death accrued at the time Sundberg died, and that it is wholly unaffected by the resolution of Sundberg's underlying personal injury claims. However, Deggs's position is inconsistent with case law. In Washington, a decedent's inaction as to his claims during his lifetime can preempt the accrual of a personal representative's wrongful death cause of action. See, e.g., Grant v. Fisher Flouring Mills Co., 181 Wash. 576, 581, 44 P.2d 193 (1935); Calhoun v. Wash. Veneer Co., 170 Wash. 152, 160, 15 P.2d 943 (1932). The trial court relied on Grant in

dismissing Deggs's claims on summary judgment. The respondents on appeal rely heavily on Calhoun and Johnson v. Ottomeier, 45 Wn.2d 419, 275 P.2d 723 (1954).¹

In Calhoun, the decedent husband, worked for a manufacturing plant and was exposed to harmful fumes from April 1926 to November 1928. 170 Wash. at 153. In November 1928 he was diagnosed with bisulphide poisoning. Id. Calhoun originally brought an action in September 1931 claiming that his poisoning was a result of his employer's negligence. Id. at 153-54. Calhoun died on October 17, 1931, while his lawsuit was pending. Id. at 154. Calhoun's wife, Cora, as executrix of the estate filed an amended complaint in December and added a claim for wrongful death. Id. The trial court dismissed Cora's complaint. Id. at 155. On appeal, the court considered whether the statute of limitations barred Cora's wrongful death claim. Id.

A common law cause of action against the employer was precluded by the workmen's compensation act, Rem. Comp. Stat., § 7673. 170 Wash. at 158-59. The court noted that under the laws at the time, Calhoun himself would have been able to recover under only the factory act, Rem. Comp. Stat. § 7659, which provided a cause of action with a three year statute of limitations. 170 Wash. at 159. The court then determined that, based on Calhoun's injuries and facts as pleaded in the amended complaint, any injuries received from violation of the statute culminated and accrued

¹ Calhoun and Grant examine the interaction between the statute of limitations on a decedent's claim and a personal representative's wrongful death claim based on an older version of the wrongful death statute. 170 Wash. at 159-60; 181 Wash. at 578, 580. Similarly, Johnson examines an older version of the wrongful death statute. 45 Wn.2d at 421. At the time these cases were decided, the wrongful death statute was very similar to RCW 4.20.010. Compare REM. COMP. STAT. § 183, at 248, and REM. REV. STAT. § 183, with RCW 4.20.010. Except for the addition of gender neutral language and a comma in 2011, RCW 4.20.010 is identical. See LAWS OF 2011, ch. 336, § 89.

about the middle of May 1928. Id. Thus, the statute of limitations on his factory act claim expired in May 1931. Id. 159-60. Because Calhoun did not file his complaint against his employer until September 1931, his claims under the factory act were barred by the three year statute of limitations. Id. at 159.

The court acknowledged that the cause of action for wrongful death had not accrued at the time the original complaint was filed.² Id. at 160. But, importantly, the court stated that Cora would have been entitled to amend the complaint to bring a claim for damages for wrongful death under Rem. Comp. Stat. § 183-1 if the action had commenced within the statute of limitations period set by Calhoun's factory act claim. 170 Wash. at 160. Because both the original and the amended complaint were filed well after the expiration of the statute of limitations on Calhoun's underlying factory act claims, Cora's wrongful death claim was barred. Id.

Calhoun undermines Deggs's argument that a personal representative's claims for wrongful death cannot be affected by the expiration of the statute of limitations on the decedent's underlying personal injury claims. This concept was reinforced and clarified in Grant. See, 181 Wash. at 581.

In Grant, a wife added a wrongful death claim to her husband's complaint while her husband's claim was pending, but after he died. Id. at 576-77. Grant started working as a miller in a flour mill in June 1926. Id. at 576. He continued working at the mill until July 26, 1930, when he stopped working because of illness. Id. at 577. On August 19,

² There is language in Calhoun susceptible of being construed to mean that a wrongful death cause of action accrues at the time of injury to the deceased rather than at the time of death. 170 Wash. at 160. But, the Grant court later clarified that the facts of Calhoun combined with other precedent dictate that Calhoun should not be read that way. 181 Wash. at 581-82.

1932, he sued his employer alleging that his illness was caused from exposure to nitric acid and chlorine gas fumes while on the job. Id. As in Calhoun, Grant based his action on the factory act. Id. at 579. Grant died on August 17, 1933, while his action was pending. Id. at 577. Grant's wife, Dorothy, was substituted as plaintiff in Grant's lawsuit. Id. Subsequently, Dorothy filed an amended complaint for both a survival action and a wrongful death action under Rem. Rev. Stat. § 183. Id.

After making the determination that Grant brought his action for personal injuries within the time prescribed by the three year statute of limitations, the court discussed the interaction between the accrual of a wrongful death action and Grant's claims:

The action for wrongful death, under Rem. Rev. Stat. § 183 [P. C. § 8259], is a distinct and separate action from the survival action, under id. § 194 [P. C. § 8275]. In accord with the great weight of authority, this court has held that the 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. 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, by a judgment in his favor rendered during his lifetime; by the failure of the deceased to bring an action for injuries within the period of limitation.

Id. at 580-81 (emphasis added) (alterations in original) (some citations omitted). The Grant court then placed Calhoun in the category of cases in which a failure of the deceased to bring an action within the statute of limitations period extinguishes a cause of action for wrongful death. Id. at 581. In summarizing the decision in Calhoun, the

Grant court said, "Obviously, at the time of [Calhoun's] death there was no valid action subsisting in his favor, because the statute of limitations had run against it."³ Id. at 582.

In allowing Dorothy to maintain a wrongful death action, the Grant court distinguished the result in Calhoun. Id. It reasoned that because Grant brought his action for personal injuries within the time prescribed by the statute of limitations, even though he died more than three years after his cause of action accrued, he left a valid subsisting cause of action against his employer. Id. It concluded that under the circumstances—Grant did not release his claims against his employer during his lifetime and Dorothy brought her wrongful death action from within three years from Grant's death—there was no question that Dorothy's wrongful death action could be maintained. Id. In so doing, the Grant court explicitly stated that a decedent's inaction or action during his lifetime could preempt future wrongful death claims. See id. at 581.

Deggs attempts to distinguish Grant and its reliance on Calhoun, by focusing on the fact that it is "in the context of a workmen's compensation claim" and a long-since repealed statute. The Calhoun court properly noted that a common law cause of action against the employer was precluded by the workmen's compensation act, Rem. Comp. Stat., § 7673. Calhoun, 170 Wash. at 158-59. But, that determination was not dispositive of Grant, because the factory act provided a basis for Grant's underlying substantive tort

³ The Grant court said that Calhoun fell squarely within a U.S. Supreme Court's decision, Flynn v. New York, N.H. & H.R. Co, 283 U.S. 53, 51 S. Ct. 357, 75 L. Ed. 837 (1931). 181 Wash. at 582. In Flynn, the decedent husband suffered an injury at work on December 4, 1923, and it caused his death on September 1, 1928. Id. at 55. The court opined that because the statute of limitations for Flynn's claim was two years, that it was obviously barred. Id. at 56. The employer argued that the widow's claims were distinct. Id. But, the court ultimately concluded that although her cause of action was not strictly representative of Flynn's claims, it was derivative and dependent upon the continuance of a right in the injured employee at the time of his death. Id.

claim. 181 Wash. at 579. And, like in Calhoun, the substantive provisions of the factory act itself did not preclude a wrongful death claim and had no bearing on the Grant court's decision. Id. at 580. The statute of limitations applicable to Grant's factory act claim was dispositive. Id. at 579-80.

Johnson v. Ottomeier, a more recent Washington Supreme Court decision, involves a limitation on a wrongful death claim in the context of a disability to bringing suit, rather than a limitation based on the decedent's actions or inaction during his lifetime. 45 Wn.2d at 421. Deggs argues that case stands for the proposition that a personal representative's wrongful death claim can accrue and persist even without a viable underlying claim in the decedent at the time of death.

In Johnson, a husband, murdered his wife, Anna, and then committed suicide. 45 Wn.2d at 420. The issue was whether the wife's personal representative could bring a wrongful death action against the husband's estate for the benefit of their remaining children. Id. But, at the time, the law prevented a wife from suing her husband for a tort committed against her. Id. at 424. The Johnson court held that Anna's inability to sue was a disability personal to her. Id. It concluded that once she died, the disability was lifted and the underlying cause of action for wrongful death was no longer barred. Id.

The Johnson court explicitly distinguished itself from Calhoun and Grant. See id. at 422-23. The court cited to those cases and said that there are situations in which, 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. Id. Then, it framed the question before it as a different question, about whether a personal disability in the decedent could be a defense to wrongful death. Id. at 423.

Contrary to Deggs's assertion, Johnson does not stand for the broad proposition that a wrongful death cause of action can persist notwithstanding the lack of a viable underlying claim in the decedent at the time of death. In Johnson, it was not that Anna's claims against her husband were extinguished prior to death by judgment, settlement, waiver, statute of limitations, or other bar. Id. Instead, a disability personal to her would have prevented her from bringing suit on the claims during her lifetime. Id. That disability was removed at the moment of Anna's death and did not transfer to her personal representative. Id. at 424. Thus, she left a viable subsisting cause of action and the cause of action for wrongful death became available to her personal representative. See id. Here, unlike in Johnson, Deggs's claims were not affected by a personal disability. Rather, they were completely extinguished by the expiration of the statute of limitations on the underlying tortious conduct or by Sundberg's previous lawsuit. They had no chance of revival upon Sundberg's death.

Deggs argues that notwithstanding the rule established in Grant and Calhoun and reiterated in Johnson, a decedent's actions or inaction during his lifetime should have no impact on a wrongful death claim. She contends this is so, because unlike a survival action, a wrongful death cause of action is a new and distinct action solely for the benefit of a decedent's heirs. Deggs claims that because Washington courts have repeatedly held that the wrongful death statute creates a new cause of action, the cause of action could not be derivative of the decedent's ability to sue, but is instead derivative of the injury to the claimant—here, death. Consequently, she contends that case law interpreting a wrongful death action as derivative is inapposite.

Deggs is correct that a wrongful death action and a survival action are distinct causes of action. See Estate of Otani v. Broudy, 151 Wn.2d 750, 755, 762, 92 P.3d 192 (2004). The survival statutes⁴ do not create new causes of action for statutorily named beneficiaries, but instead preserve the decedent's causes of action for injuries suffered prior to death. Id. at 755, 762. By contrast, the wrongful death statute governs postdeath damages and allows the personal representative of the decedent to sue on behalf of statutory beneficiaries for their own losses, not the decedent's losses. Id. at 755. But, the different nature of the causes of action does not mean that a wrongful death cause of action cannot be derivative in any sense of the word. In Johnson the court highlighted that a wrongful death action is "derivative":

Not having as its basis a survival statute, the 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.

45 Wn.2d at 423-24. This is consistent with the results in Calhoun (no wrongful death claim available when the decedent had no subsisting claim at death) and Grant (a wrongful death claim properly brought where there was a valid subsisting claim in the decedent at death). 170 Wash. at 160; 181 Wash. at 582. The fact that the survival action and wrongful death action are distinct actions does not disconnect wrongful death actions from the underlying wrongful act 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

⁴ There are two survival states in Washington—RCW 4.20.046, the general survival statute, and RCW 4.20.060, the special survival statute. Otani, 151 Wn.2d at 755-56. RCW 4.20.046 preserves all causes of action that a decedent could have brought if he or she survived. Id. Alternatively, the special survival statute, RCW 4.20.060, is limited to personal injury causes of action that result in death. Id. at 756.

valid subsisting claim in the decedent at death in order for the statutory beneficiaries' wrongful death claims to accrue.

Next, Deggs argues that the case law in Washington is outdated. She advocates we abandon the holdings in Calhoun and Grant. Deggs alternatively argues that the question before us is currently an open question in Washington and urges us to consider and adopt the law in other states.

Deggs references a recent federal remand order which describes Calhoun, Grant, and Johnson as outdated⁵ and which relies on White v. Johns-Mansville Corp., 103 Wn.2d 344, 347, 693 P.2d 687 (1985) to conclude that the issue before us is an "open question" in Washington State. See Barabin v. AstenJohnson, Inc., 2014 WL 2938457, at *3 (W.D. Wash.) (court order). Specifically, the White court stated:

[W]e note we are not faced with, nor do we decide, a case in which the deceased is alleged by the defendant to have known the cause of the disease which subsequently caused his death. In that case there is a question as to whether the wrongful death action of the deceased's representative "accrued" at the time of the decedent's death, when the decedent first discovered or should have discovered the injury, or when the claimant first discovered or should have discovered the cause of death.

103 Wn.2d at 347. The issue in White was whether the wrongful death cause of action accrued at the time of death or if it accrued later—at the time the decedent's wife

⁵ In Barabin v. AstenJohnson, Inc., 2014 WL 2938457 (W.D. Wash.) (court order), the court granted a motion to remand in the Western District of Washington. It evaluated the issue under the standard for fraudulent joinder—a standard more favorable to Deggs's position in this case. Id. at *2. Consequently, the defendant asbestos companies in Barabin had to carry their heavy burden of proving under Washington law that a decedent wife's wrongful death complaint obviously failed to state a claim. Id. at *1. The remand order concluded that a Washington court addressing the issue before us could find that a wrongful death claim is not barred merely because the statute of limitations on the decedent's underlying claim expires prior to the decedent's death. Id. at *3-*4. But, this is the very proposition our case law has rejected.

discovered or should have discovered the cause of death. Id. at 345. The court ultimately rejected the assertion that, as a matter of law, the date of the decedent's death marks the time at which a wrongful death action accrues. Id. at 352. Instead, it held a wrongful death action accrues at the time the decedent's personal representative discovered, or should have discovered, the cause of action. Id. at 352-53.

But, whether the wrongful death cause of action accrues at death or upon discovery of causation is not at issue in this case. Here, under Calhoun and Grant, the accrual of the wrongful death action was preempted either by the earlier judgment against ACL or the expiration of the statute of limitations on Sundberg's underlying claims against the rest of the respondents.

Deggs also points out that other states have reached the opposite conclusion from our Supreme Court in Calhoun and Grant. She cites to Castorena v. Gen. Elec., 149 Idaho 609, 620, 238 P.3d 209 (2010) (holding that the fact the statute of limitations had run against decedent's personal injury claim did not bar a wrongful death suit), Mummert v. Alizadeh, 435 Md. 207, 210, 77 A.3d 1049 (2013) (concluding that a statute of limitations defense against a decedent's claim does not bar a subsequent wrongful death action), and Riggs v. Georgia-Pacific LLC, 2015 WL 404617, at *3, *5 (Utah 2015) (finding that a wrongful death action for asbestos-related death is a separate, nonderivative claim and it is not barred by prior personal injury actions for the same asbestos-related injuries).

Deggs's reliance on authority from other states is unsurprising, because her argument is not new. In fact, courts have been sharply divided on this issue for many years. See 3 STUART M. SPEISER & JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 15:14, at 55 (4th ed. 2005). There have been very few appellate court decisions since

the middle of the Twentieth Century. Id. And, those decisions treat cases dealing with this issue differently depending upon whether the decedent settled his case or brought it to judgment or if he allowed the statute of limitations to expire during his lifetime. See DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 127, at 957 (5th ed. 1984)

Some courts have held that no right of action remains for wrongful death beneficiaries if the decedent compromises his claim with the wrongdoer or executes a release for valuable consideration. RECOVERY FOR WRONGFUL DEATH § 15:14, at 55. Other courts have held that a release by a decedent during his life will not bar a later action for wrongful death. Id. at 56-57. The minority of courts have reasoned that because the cause of action for wrongful death does not arise until a decedent's death, it should be unaffected by acts of the injured person during his lifetime. Id. The logic of this minority position was highlighted in an early South Dakota case, Rowe v. Richards, 35 S.D. 201, 151 N.W. 1001, 1006 (1915). The Rowe court opined:

We must confess our inability to grasp the logic of any course of so called reasoning through which the conclusion is drawn that the husband, simply because he may live to suffer from a physical injury and thus become vested with a cause of action for the violation of his own personal right, has an implied power to release a cause of action—one which has not then accrued; one which may never accrue; one which from its very nature cannot accrue until his death; and one which, if it ever does accrue, will accrue in favor of his wife and be based solely upon a violation of a right vested solely in his wife.

Id.

As a practical consideration, however, a settlement made with the decedent during his lifetime will take into account not only his diminished earning capacity while he does live, but also a decrease in his life expectancy and his earnings he would have made if

he had lived. RECOVERY FOR WRONGFUL DEATH § 15:14, at 59. In other words, the settlement effectuated by a decedent during his lifetime may have been an estimate and determination of all the damages expected to follow from the initial wrong. Id. The same is true of judgments. Depending on the precise allocation of the settlement or judgment, allowing a subsequent wrongful death claim may pose a risk of double recovery.

But, this danger of double recovery is not at issue in situations in which the decedent allowed the statute of limitations on his underlying claim to expire during his lifetime. PROSSER AND KEETON ON TORTS § 127, at 957. In fact, in these situations, many courts have held that the statute runs against the wrongful death action only from the date of death, even though at that time the decedent's own action would have been barred while he was living. Id.

Although the case law in Washington is indeed old, the Washington Supreme Court previously chose between these possible outcomes when it decided Calhoun and Grant in the 1930s.⁶ It chose finality of settlements and judgments and preclusion of stale claims and potential double recovery. The legislature has not seen fit to correct this interpretation of the wrongful death statute. We see no reason to advocate for a change in Washington law.

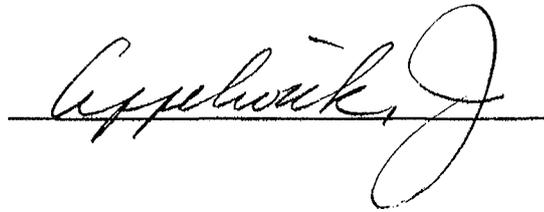
Applying Grant, Deggs's claims against respondents fail as a matter of law. Sundberg had no valid cause of action against respondents at the time of his death,

⁶ While Calhoun, Grant, and the majority of Deggs's claims involve preemption because of the expiration of the statute of limitations on the decedent's underlying claims instead of an earlier judgment or settlement, it is clear that, in Washington, this distinction is immaterial. See Grant, 181 Wash. at 581 (concluding that a cause of action for wrongful death is extinguished by an effective release executed by the deceased in his lifetime, by a judgment in his favor rendered during his lifetime, or by the failure of the deceased to bring an action for injuries within the period of limitation).

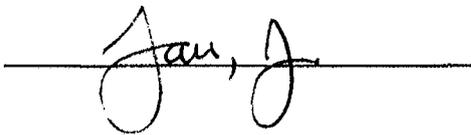
because there was either a judgment rendered in his favor or because he failed to bring an action for injuries within the statute of limitations period during his lifetime. Case law in Washington does not support Deggs's argument that would revive a wrongful death action when an individual dies no matter what was or was not already litigated during his lifetime. Moreover, Deggs's position is at odds with considerations of finality of judgments and preservation of evidence that are particularly relevant in this context.

The trial court did not err in granting respondents' motions for summary judgment.

We affirm.

A handwritten signature in cursive script, appearing to read "Appellate J", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Jau, J", written over a horizontal line.A solid horizontal line.

Deggs v. Asbestos Corp., No. 71297-7-1 (consolidated
with No. 71550-0-1)

DWYER, J. (dissenting). Relying on Calhoun v. Washington Veneer Co., 170 Wash. 152, 15 P.2d 943 (1932), and Grant v. Fisher Flouring Mills Co., 181 Wash. 576, 44 P.2d 193 (1935), the majority concludes that “the accrual of the wrongful death action was preempted either by the earlier judgment against ACL or the expiration of the statute of limitations on Sundberg’s underlying claims against the rest of the respondents.” Majority at 14. Because I believe that these cases have since been overtaken by more recent Supreme Court decisions, and because the majority’s reliance upon Calhoun and Grant both perpetuates the fiction that a wrongful death claim may expire before the decedent does and preserves the “topsy-turvy land” where such illogic exists,¹ I dissent.

I

“In Washington, wrongful death actions are strictly creatures of statute.” Atchison v. Great W. Malting Co., 161 Wn.2d 372, 376, 166 P.3d 662 (2007). Unlike Washington’s survival statutes, which simply preserve *existing* causes of action a person could have maintained had death not occurred, the wrongful

¹ Except in topsy-turvy land, you can’t die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal “axiom,” that a statute of limitations does not begin to run against a cause of action before that cause of action exists, *i.e.*, before a judicial remedy is available to the plaintiff. For a limitations statute, by its inherent nature, bars a cause of action solely because suit was not brought to assert it during a period when the suit, if begun in that period, could have been successfully maintained; the plaintiff, in such a case, loses for the sole reason that he delayed—beyond the time fixed by the statute—commencing his suit which, but for the delay, he would have won.

Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting) (footnotes omitted).

death statute creates a *new and original* cause of action following the decedent's death. Warner v. McCaughan, 77 Wn.2d 178, 179, 460 P.2d 272 (1969); see also Woodall v. Avalon Care Ctr.-Fed. Way, LLC, 155 Wn. App. 919, 930-31, 231 P.3d 1252 (2010); Wills v. Kirkpatrick, 56 Wn. App. 757, 759, 785 P.2d 834 (1990). The right to the benefit of this new and original action, however, does not belong to the decedent's estate. Maciejczak v. Bartell, 187 Wash. 113, 125, 60 P.2d 31 (1936). Instead, the right is given to certain of the decedent's relatives, as a means of compensating them for injuries to their own pecuniary interests, suffered as a consequence of the wrongful death. Gray v. Goodson, 61 Wn.2d 319, 326-27, 378 P.2d 413 (1963); Johnson v. Ottomeier, 45 Wn.2d 419, 423, 275 P.2d 723 (1954).

Although the right belongs to the decedent's relatives, only a personal representative of the decedent may exercise the right on their behalf, which is to say that only the decedent's personal representative has standing to bring a wrongful death action. Atchison, 161 Wn.2d at 378; Huntington v. Samaritan Hosp., 101 Wn.2d 466, 469, 680 P.2d 58 (1984); Wood v. Dunlop, 83 Wn.2d 719, 724, 521 P.2d 1177 (1974); Gray, 61 Wn.2d at 326-27; Maciejczak, 187 Wash. at 125; Dodson v. Cont'l Can Co., 159 Wash. 589, 593, 294 P. 265 (1930). Yet, even a personal representative lacks standing to bring a wrongful death action prior to the death of the decedent. This is so because a wrongful death cause of action cannot accrue before the decedent has died. Atchison, 161 Wn.2d at 379; Dodson, 159 Wash. at 593; cf. White v. Johns-Manville Corp., 103 Wn.2d 344, 352-53, 693 P.2d 687 (1985) (holding that "a wrongful death

action 'accrues' at the time the decedent's personal representative discovered, or should have discovered, the cause of action").² Once a wrongful death action does accrue, the decedent's personal representative must commence the action within the three-year limitation period set forth in RCW 4.16.080(2). Atchison, 161 Wn.2d at 377.

Thus, as a general rule, a wrongful death action may be prosecuted after the action accrues but must be commenced before the applicable limitation period expires. However, in 1935, our Supreme Court noted the existence of a "limitation" on this rule: "namely, at the time of death there must be a subsisting cause of action in the deceased." Grant, 181 Wash. at 581. Where the deceased, whether by action (prevailing on a personal injury claim, for instance) or inaction (failing to bring a personal injury claim within the statutory limitation period) during his or her lifetime, "pursued a course of conduct which makes it inequitable to recognize a cause of action for wrongful death," the "limitation" was said to apply. Johnson, 45 Wn.2d at 422-23 (citing Grant, 181 Wash. 576, and Calhoun, 170 Wash. 152). As announced, the source of this "limitation" was "[t]he wrongful death statute itself and generally recognized equitable principles." Johnson, 45 Wn.2d at 423.

Whereas the Supreme Court located the source of the "limitation" in the wrongful death statute and in equitable principles, the majority opinion herein concedes that "[t]he wrongful death statute is silent" on the question of "whether

² Nor, of course, can there be a personal representative of a decedent's estate prior to the decedent actually bothering to die.

the expiration of the statute of limitations for an individual's personal injury claims or a judgment or settlement on those same claims during his lifetime can preempt the accrual of his personal representative's wrongful death claim."

Majority at 4-5. This concession highlights the uncertainty of the legitimacy of the "limitation" set forth in Calhoun and Grant, and begs this question: is there evidence elsewhere in the revised code of the legislature's intent to bar wrongful death actions, under certain circumstances, before they accrue?

Admittedly, there is evidence of the legislature's intent to subject wrongful death actions to a statute of limitation. Atchison, 161 Wn.2d at 377. See generally Wills, 56 Wn. App. at 759-60 (explaining that, although the wrongful death statute does not contain an express statute of limitation, the three-year limitation period contained in RCW 4.16.080(2) "has been applied to wrongful death claims because such claims qualify as 'any other injury to the person or rights of another not hereinafter enumerated'" (footnote omitted) (quoting Dodson, 159 Wash. at 591-92)). However, as our Supreme Court has explained in a series of recent decisions, statutes of limitation do not begin to run until a party has the right to apply to a court for relief—that is, once a claim accrues. Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co., 176 Wn.2d 502, 511, 296 P.3d 821 (2013) (hereinafter MLB); Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc., 166 Wn.2d 475, 484-85, 209 P.3d 863 (2009); 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 575, 146 P.3d 423 (2006).

Of course, a wrongful death action cannot accrue before death. As a result, a personal representative lacks standing to bring such an action prior to the death of the decedent. It follows, then, that the time period preceding the death of the decedent should not be counted against the decedent's personal representative in considering observance of the three-year statutory limitation period. See Seaman v. Walgren, 82 Wn.2d 771, 775, 514 P.2d 166 (1973) ("When a person is prevented from exercising his legal remedy by some positive rule of law, the time during which he is prevented from bringing suit is not to be counted against him in determining whether the statute of limitations has barred his right even though the statute makes no specific exception in his favor in such cases.") In view of this, it may be reasoned that, in the event that the "limitation" set forth in Calhoun and Grant was, in fact, founded on a *statute of limitation*, Calhoun and Grant are inconsistent with more recent Supreme Court decisions, which have made clear that statutes of limitation cannot be applied so as to bar claims that have not yet accrued.³

These more recent decisions have, in the course of clarifying the manner in which statutes of limitation function, explained that, although statutes of

³ These recent Supreme Court decisions are in accord with the view taken by the Restatement:

A cause of action for death is complete when death occurs. Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the representative or to surviving relatives of the decedent only upon his death; and since the cause of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would be barred. In some jurisdictions, however, the wrongful death acts take the form of statutes providing for the survival of the decedent's own cause of action, in which case the statute of limitations necessarily runs from the time of his original injury. RESTATEMENT (SECOND) OF TORTS § 899(c) at 442 (1979).

limitation cannot terminate the right to file a claim prior to its accrual, statutes of repose can. MLB, 176 Wn.2d at 511; accord Cambridge Townhomes, 166 Wn.2d at 484; 1000 Virginia, 158 Wn.2d at 575. “A statute of repose terminates a right of action after a specified time, even if the injury has not yet occurred.” 1000 Virginia, 158 Wn.2d at 574-75 (quoting Rice v. Dow Chem. Co., 124 Wn.2d 205, 211-12, 875 P.2d 1213 (1994)). In other words, a statute of repose “provides a time period in which the cause of action must *accrue*.” Donovan v. Pruitt, 36 Wn. App. 324, 327, 674 P.2d 204 (1983). Thus, when a cause of action is made subject to both a statute of repose and a statute of limitation, such an action will be barred if it either does not accrue within the repose period or, after it accrues within the repose period, is not commenced within the limitation period. 1000 Virginia, 158 Wn.2d at 575.

It is apparent from these recent Supreme Court decisions that the “limitation” discussed in Calhoun and Grant was in the nature of a statute of repose, rather than a statute of limitation. The time period within which a wrongful death action must *accrue*, by virtue of this “limitation,” is either the lifetime of the injured person or the statutory limitation period imposed upon the tort claims of the injured person. If the action does not accrue within either period, then it may not be maintained. See Johnson, 45 Wn.2d 419; Grant, 181 Wash. 576; Calhoun, 170 Wash. 152.

Although the legislature could, in all likelihood, have made wrongful death actions subject to a statutory period of repose, there is no indication in the wrongful death statute that it has ever chosen to do so. Cf. Wills, 56 Wn. App. at

763 (“While the Legislature may have the power to enact such a limitation period barring wrongful death claims even before they accrue, it is obvious to us that the Legislature did not do so here.”) Furthermore, unlike the statute of limitation—codified in chapter 4.16 RCW—that has been applied to wrongful death actions,⁴ there is no sweeping statute of repose that could be fairly construed to encompass wrongful death actions.

In the event that the decisions in Calhoun and Grant were actually based on a statute of limitation analysis, those decisions have not withstood the Supreme Court’s more recent decisions clarifying the manner in which statutes of limitation function. On the other hand, in the event that Calhoun and Grant were actually premised upon a statute of repose analysis, they were based on a misperception and are unsupported by an appropriate legislative enactment. I would decide the dispute before this court on the basis of our Supreme Court’s most recent pronouncements.

In fairness, the Calhoun-Grant “limitation” was also purportedly founded upon “generally recognized equitable principles.” Johnson, 45 Wn.2d at 423. Notably, though, these equitable principles were not elucidated in Calhoun, Grant, Johnson, or in any other decision. While the equitable defense of laches is comparable to a statute of limitation, equity has no counterpart to a statute of repose. Moreover, as with statutes of limitation, the equitable defense of laches presupposes the existence of an accrued cause of action. See Newport Yacht

⁴ RCW 4.16.080 (“The following actions shall be commenced within three years . . . (2) An action . . . for any other injury to the person or rights of another not hereinafter enumerated.”).

Basin Ass'n of Condo. Owners of Supreme Nw., Inc., 168 Wn. App. 56, 77, 277 P.3d 18 (2012) (“To constitute laches there must not only be a delay in the assertion of a claim but also some change of condition must have occurred which would make it inequitable to enforce it.” (quoting Waldrip v. Olympia Oyster Co., 40 Wn.2d 469, 477, 244 P.2d 273 (1952))). It follows, therefore, that, in the absence of a statute of repose, neither a statute of limitation nor the equitable principle of laches may be applied to bar a wrongful death action before it has accrued.

II

In a recent instructive decision, the Utah Supreme Court considered whether a wrongful death cause of action was foreclosed by virtue of the decedent prevailing in a related personal injury action during her lifetime. Riggs v. Ga.-Pac. LLC, 2015 UT 17, ¶ 8, 345 P.3d 1219. The Riggs court was asked to interpret Utah’s wrongful death statute, which is nearly identical to Washington’s wrongful death statute.⁵ The statute’s language, the court opined, “unambiguously, and without caveat, grants a person’s heirs the right to ‘maintain an action for damages’ if they allege that the decedent’s death was caused by ‘the wrongful act or neglect of another.’” Riggs, 2015 UT 17, ¶ 11 (quoting Utah Code § 78B-3-106(1)). “When faced with such ‘clear and unequivocal’ language,” the court continued, “there is no further need for analysis.” Riggs,

⁵ Compare Utah Code § 78B-3-106(1) (“[W]hen the death of a person is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death”), with RCW 4.20.010 (“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.”).

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2015 UT 17, ¶ 11 (footnote omitted) (quoting Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989)). Thus, the court concluded, “We find nothing in the statute to suggest that the cause of action is tied to the decedent’s underlying personal injury claim.” Riggs, 2015 UT 17, ¶ 11.

The lead opinion dismisses this decision, as well as others, by explaining that, in Calhoun and Grant, our Supreme Court “chose finality of settlements and judgments and preclusion of stale claims and potential double recovery.” Majority at 16. Although the majority describes this as an “interpretation of the wrongful death statute,” it seems better characterized as a choice between policy preferences. This is significant because, while the majority is correct in noting that the legislature “has not seen fit” to overrule Calhoun and Grant, our Supreme Court has directed that “[t]he formulation of a new policy with regard to [a wrongful death] cause of action is the responsibility of the Legislature, not a task for this court.” Huntington, 101 Wn.2d at 470. The point here is that the Riggs decision, and others like it, should not be disregarded on the ground that our Supreme Court has already expressed a policy preference. Riggs should, instead, be considered as persuasive authority because the decision required interpretation of a statutory provision, the language of which is nearly identical to RCW 4.20.010.

Nevertheless, because the majority raises the specter of double recovery, I wish to note that I do not think it necessary to resort to the unforgiving approach

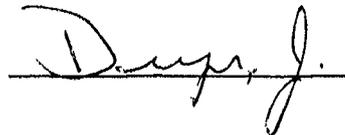
of barring a claim in order to address this issue.⁶ Notably, in Grant itself, the court allowed both a survival action and a wrongful death action to go forward simultaneously, notwithstanding the apparent risk of double recovery.

Presumably, the court was satisfied that this risk could be adequately addressed by the trial court, whether by carefully instructing the jury or otherwise. I see no impediment to this being similarly accomplished in successive actions.

III

In the end, it is the inconsistency between, on the one hand, Calhoun and Grant, and, on the other, decisions such as 1000 Virginia and MLB, which, in my view, requires departure from the ancient set of cases. Calhoun and Grant fail to honor the distinction between statutes of limitation and statutes of repose and, as a result, are inconsistent with more recent Supreme Court pronouncements. While I would decide this matter on the basis of these more recent decisions, I readily admit that only our Supreme Court can definitively declare whether Calhoun and Grant have, indeed, been overtaken.

I would hold that the plaintiff has a cause of action. Accordingly, I would reverse.



⁶ As a practical matter, I believe that the cure for double recovery, as identified by the majority, may be more harmful than the disease—a belief that finds support in Division Two's Wills decision. In Wills, the court condemned “the situation where [a wrongful death] claim could be barred even before death triggers accrual of the right to bring the action” as being “illogical and unjust.” 56 Wn. App. at 762; see also Fast v. Kennewick Pub. Hosp. Dist., No. 31509-6-III, slip op. at 10 (Wash. Ct. App. June 2, 2015) (examining Wills).

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on January 19, 2016, I caused a true and correct copy of the foregoing to be served via e-mail on all counsel of record, as follows:

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