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Supreme Court No. 91969-1
(Court of Appeals Cause No. 71297-7-1) RECEIVED BY E-MAIL

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.

FILED
SEP 29 2015

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

CRF

BRIEF OF AMICUS CURIAE
BERGMAN DRAPER LADENBURG PLLC

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 ORIGINAL

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Cases

Atchison v. Great Western Malting Co., 161 Wn.2d 372, 166 P.3d 662 (2007)..... 8, 10

Ballard v. Sw. Detroit Hosp., 119 Mich. App. 814, 817-18, 327 N.W.2d 370, 371 (1982)..... 6

Blythe v. Salmon Bay Sand and Gravel Co., No. 10-2-14259-8 (Pierce County Super. Ct. May 24, 2011)..... 3

Calhoun v. Washington Veener Co., 170 Wn. 152, 15 P.2d 943 (1932) 2, 8, 9

Dietz v. Crane Co., No. 10-2-14221-1 (Pierce County Super Ct.) 4

Grant v. Fisher Flouring Mills Co., 181 Wn. 576, 44 P.2d 193 (1935) 2, 4, 8, 9

Hatch v. Tacoma Police Dept., 107 Wn. App. 586, 27 P.3d 1223 (2001) 13

Huntington v. Samaritan Hosp., 101 Wn.2d 466, 469, 680 P.2d 58, 60 (1984)..... 10

In re Labatt Food Serv., L.P., 279 S.W.3d 640, 644 (Tex. 2009) 7

Johnson v. Ottomeier, 45 Wn.2d 419, 378 P.2d 413 (1963)..... 9

Otani ex rel. Shigaki v. Broudy, 151 Wn.2d 750, 755, 92 P.3d 192 (2004) 8, 9

Pancratz v. Turon, 3 Wn. App. 182, 473 P.2d 409 (1970)..... 8

Ryan v. Poole, 182 Wn. 532, 47 P.2d 981 (1935)..... 10

Warner v. McCaughan, 77 Wn.2d 178, 460 P.2d 272 (1969) 9

Whittlesey v. City of Seattle, 94 Wn. 645, 163 P. 193 (1917)..... 9

Woodall v. Avalon Care Ctr.-Fed. Way, LLC, 155 Wn. App. 919, 936, 231 P.3d 1252, 1261 (2010)..... 6

Statutes

RCW 4.16.080 3, 4

RCW 4.20.010 passim

INTEREST OF AMICUS CURIAE

Bergman Draper Ladenburg PLLC is a private firm which has dedicated its practice to asbestos litigation throughout the Pacific Northwest. Since 1995, the firm has represented numerous plaintiffs affected by mesothelioma and other asbestos-related diseases. The Bergman firm strongly supports the rights of individuals and their families to seek redress for the harms they have suffered as a result of exposure to asbestos products.

ISSUES ADDRESSED BY AMICUS CURIAE

1. Whether the Petitioner's request for review is a matter of public importance that warrants this Court's review?
2. Whether the statute of limitations for a wrongful death action under RCW 4.20.010 claim can accrue *prior* to the death of the individual in question?

STATEMENT OF THE CASE

The Bergman firm concurs with and adopts the statement of the case presented Petitioner's statement of the case. Pet. 1-3.

ARGUMENT

Washington residents have a strong interest in knowing when and if they have rights to redress harms they have personally suffered, be it

through direct harms or those which they suffered as result of an injury to a loved one. Decisions which alter or limit the rights that individuals have under the law merit additional review and consideration.

The Court of Appeals' decision in the instant matter reached a puzzling result. Although Washington jurisprudence has consistently held that wrongful death claims are not derivative in any sense, the Court indicated that an estate's wrongful death claim can somehow be preempted by the actions—or inactions—of the individual whose death was caused by the tortious conduct of others. Relying on the alleged limitations enumerated in *Calhoun v. Washington Veener Co.*, 170 Wn. 152, 15 P.2d 943 (1932) and *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 44 P.2d 193 (1935), the Court determined that Judy Deggs, the personal representative of the estate of her father, Roy Sunderberg, had no valid cause of action against the defendants since there had been a judgment rendered in the her father's favor prior to his death against different defendants, and because the statute of limitations on an action that her father could maintain during his lifetime had lapsed. It did so even though the statutory language of RCW 4.20.010—unlike that of many other states—lacks any kind of limiting language. This Court should accept the Petitioner's request for review to clarify when, and how, a wrongful death action accrues.

1. There is a significant public interest in resolving the existing ambiguity as to when the statute of limitations for wrongful death accrues.

For two decades, the undersigned firm has represented plaintiffs who have been harmed by asbestos products throughout Washington State. Many of the cases have involved claims for survivorship as well as claims for wrongful death. In the undersigned firm's experience, trial courts have struggled mightily in evaluating RCW 4.20.010 and RCW 4.16.080(2) in the context of toxic tort litigation. Rulings on these statutory provisions have been inconsistent despite the clear language of the wrongful death statute.

Some courts have held that the statute of limitations for a wrongful death action begins to accrue *prior* to the death of the party. Others have adhered to the plain language of RCW 4.20.010 in holding that wrongful death actions are distinct remedies that accrue at the time of the death of the individual in question.

The undersigned firm has had to deal with this confusion over the past few years. In *Blythe v. Salmon Bay Sand and Gravel Co.*, No. 10-2-14259-8 (Pierce County Super. Ct. May 24, 2011), the Honorable Susan Serko granted the defendants' motion for summary judgment for the defendants on Ms. Blythe's wrongful death claim on the grounds that the statute of limitations for had accrued *prior* to the her husband's death. Mr.

Blythe had passed away in 2009, and his spouse filed suit in October of 2010. In reaching the conclusion that the wrongful death claim was barred by the statute of limitations, Judge Serko relied on the dicta from *Grant* but did not provide a written ruling detailing her reasoning.

In contrast, in *Dietz v. Crane Co.*, No. 10-2-14221-1 (Pierce County Super Ct.) the Honorable Brian Tollefson denied Crane Co.'s summary judgment motion regarding the same statute of limitations argument based on a similar set of facts. Judge Tollefson also denied Crane Co.'s motion for reconsideration of the summary judgment motion filed shortly thereafter. Defendants thereupon filed a motion for reconsideration with Division II of the Court of Appeals. On October 3, 2011, the Court of Appeals granted defendant's motion for discretionary review to reconsider whether the lower court had correctly determined when the statute of limitations began accruing. However, the appellant dismissed the case before any ruling on the merits was entered by the Court of Appeals. To date, the only court that has considered the interplay between RCW 4.20.010 and RCW 4.16.080(2) is Division I of the Court of Appeals. This resulted in the hotly contested split opinion at issue in this case. The stark division between the majority and dissenting opinions demonstrates how there is a pressing need for resolution of this matter in light of the apparent ambiguity of the wrongful death statute.

- a. **This issue will continue to come up in toxic tort litigation until this Court clarifies when a wrongful death claim accrues.**

Issues related to the timing of the accrual of a particular claim come up frequently in toxic tort litigation. Some substances, like asbestos, have an extended latency periods and the potential to cause multiple distinct harms at different times (e.g., lung cancer, asbestosis, and mesothelioma). Because each one of these illness may involve a distinct injury that may form the basis of a cause of action, asbestos litigation is often characterized by disputes regarding accrual particular claims.

At present, a party filing a wrongful death suit based on exposure to toxic substances within three years of a decedent's passing has no way of knowing whether the trial court will find that the claim is barred statute of limitations despite the clear language of RCW 4.20.010, which indicates that the claim accrues at death. If this Court upholds the Court of Appeals' ruling in the present matter, wrongful death actions will effectively be converted into derivative survivorship actions that can accrue *prior* to the death of the individual in question even though the statutory language contains no such limitation and there is no indication that the legislature ever contemplated such a limitation. Because this Court has repeatedly reasserted that wrongful death claims are independent causes of action that are remedial in nature and should be

construed liberally, it is vitally important that this Court clarify when a wrongful death action accrues under the existing statutory framework.

b. The plain language should control how courts interpret RCW 4.20.010

The plain language of RCW 4.20.010 contains none of the purported limitations that the Court of Appeals read into the statute. The language is perfectly clear as to when a claim arises and which party can maintain that cause of action:

When the death of a person is caused by the wrongful act, neglect, or default of another his or her personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

By design, this statutory remedy cannot accrue until the death of an individual. Moreover, the only party that can maintain a wrongful death action is the personal representative of that individual's estate—someone who cannot exist until the individual in question passes away.

Washington does not precondition a beneficiary's wrongful death claim on the *decedent's* right to maintain a personal injury suit. *See Woodall v. Avalon Care Ctr.-Fed. Way, LLC*, 155 Wn. App. 919, 936, 231 P.3d 1252, 1261 (2010). While some states do place such conditions on wrongful death actions in their statutory schema, *see Ballard v. Sw. Detroit Hosp.*, 119 Mich. App. 814, 817-18, 327 N.W.2d 370, 371 (1982)

(“By its language, the wrongful death act establishes a cause of action where the defendant's negligence or wrongful act would “if death had not ensued, have entitled the party injured to maintain an action and recover damages.”); *see also In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 644 (Tex. 2009) (“Under the Wrongful Death Act as it applies here, wrongful death beneficiaries may pursue a cause of action “only if the individual injured would have been entitled to bring an action for the injury if the individual had lived.”), the Washington legislature has never seen fit to add such limitations or expressed any policy preference in this regard. Instead, it has consistently maintained that the wrongful death statute creates a new cause of action designed to compensate the surviving relatives “for losses caused to them *by the decedent's death.*” *Woodall*, 155 Wn. App. at 932 (emphasis supplied). Any decision that alters the status of this remedy is a matter of public importance as limitations placed on individuals to raise claims may deprive them of meaningful relief that they would be otherwise entitled to.

In ruling that the personal representative may somehow be deprived of this remedy as a result of a decedent's action or inaction, the Court of Appeals significantly restricted an estate's ability to recover for post-death damages resulting from the tortious conduct of others. This ruling is contrary to Washington's jurisprudence which has repeatedly

held that recovery associated with a wrongful death action is for post-death damages and the losses of the beneficiaries, not the injuries of the decedent in question. *See Pancratz v. Turon*, 3 Wn. App. 182, 473 P.2d 409 (1970). The Court of Appeals' ruling that a wrongful death action is somehow derivative wholly undermines the repeated assertions from this Court that wrongful death actions are independent causes of action. Such a dramatic departure from the plain language of the statute merits the additional consideration sought by the Petitioners. Accordingly, the Bergman firm urges the Court to accept the petition to evaluate when a claim accrues under RCW 4.20.010 and what, if any, vitality *Grant* and *Calhoun* have in light of this Court's more recent wrongful death jurisprudence.

2. The Court of Appeals ruling is contrary to this Court's jurisprudence

This Court has consistently maintained that wrongful death actions are purely creatures of statute which create a new cause of action that was not available at common law to permit recovery for statutorily defined beneficiaries. *See Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 166 P.3d 662 (2007); *see also Otani ex rel. Shigaki v. Broudy*, 151 Wn.2d 750, 755, 92 P.3d 192 (2004). Actions for wrongful death are not actions that would have belonged to the decedent had he or she survived,

but rather they are new causes of action that are created by statute and based on the death of the individual in question. *See Warner v. McCaughan*, 77 Wn.2d 178, 460 P.2d 272 (1969). Wrongful death actions are not survivorship actions; instead, they are new causes of actions for the beneficiaries of the individuals that was wrongfully killed. *Gray v. Goodson*, 61 Wn.2d 319, 378 P.2d 413 (1963).

As a remedial statute, this Court has consistently held that the wrongful death statute should be strictly construed with respect to the individuals who can raise claims, but has also maintained that it should be liberally construed in applying the statute to the benefit of those named individuals. *See Whittlesey v. City of Seattle*, 94 Wn. 645, 163 P. 193 (1917); *see also Johnson v. Ottomeier*, 45 Wn.2d 419, 378 P.2d 413 (1963). Importantly, Washington's wrongful death statute only governs post-death damages of the deceased. *See Otani ex rel. Shigaki v. Broudy*, 151 Wn.2d 750, 755, 92 P.3d 192 (2004). As presently designed, death is a necessary precondition before any wrongful death claim can accrue.

Although amicus is mindful that some cases have read in limitations to whether a personal representative may maintain a cause of action for wrongful death, *see Calhoun v. Washington Veener Co.*, 170 Wn. 152, 15 P.2d 943 (1932); *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 44 P.2d 193 (1935); *Ryan v. Poole*, 182 Wn. 532, 47 P.2d 981

(1935), this strand of case law is directly contrary to this Court's more recent jurisprudence which has maintained that wrongful death actions are governed exclusively by the statutory language. See *Atchison*, 161 Wn.2d at 382 (discussing how the wrongful death statutory schema is controlled and defined by the legislature); *Huntington v. Samaritan Hosp.*, 101 Wn.2d 466, 469, 680 P.2d 58, 60 (1984) (noting that wrongful death actions are purely statutory and it is not the Court's role to rewrite clear statutes). In light of this Court more recent wrongful death jurisprudence, this Court should re-evaluate whether the implied extra-statutory limitations enumerated in the cases above are consistent with the existing statutory language. Although the legislature could have conditioned the beneficiaries' rights to maintain wrongful death actions on the decedents' rights to raise a claim had they survived, it did not do so. Because the Washington legislature has already expressed its policy preference, this Court should decline the Court of Appeals' invitation to imply limitations on recovery where none have previously existed in the plain language of the statute.

a. The specter of double-recovery is a red herring

In support of its ruling, the Court of Appeals raised the issue of the risk of double recovery. To wit, the majority noted that "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.” Maj. at 16. This claim, however, demonstrates a fundamental misperception of the practical realities of toxic tort litigation.

In living toxic exposure cases, settling defendants typically insist that the claimant release any potential wrongful death claims. While it may be pointed out that the living claimant does not have a wrongful death claim, and it is therefore doubtful that he or she could release such a claim, in practice this is overcome by having the claimant agree on behalf of his or her estate to indemnify the settling defendant for any potential wrongful death claim filed by the personal representative. In this way, the settling defendant buys its peace not only from the claimant, but also from potential wrongful death statutory beneficiaries. Notably, no defendants in the *Deggs* case had settled the previous claim—the only defendants were those that had not been named in the 1998 suit and the verdict defendant. This demonstrates that, contrary to the Court of Appeals’ concerns about a potential double recovery, in practice a settling defendant is never asked to pay twice for the same injury. For the verdict defendant, ACL in this case, the risk of double recovery can be eliminated through the use of proper jury instructions and verdict form that segregates wrongful death damages.

- b. The mere fact that the individual afflicted with an injury did not maintain a personal injury action during his or her lifetime is irrelevant to the harms suffered by that individual's beneficiaries.**

While amicus has no truck with the fact that an individual's inaction may cause the statute of limitations to run on any *survivorship* actions a decedent's family could have otherwise maintained, the undersigned firm believes that is necessary to raise an important practical issue that was not addressed by the petitioner or the Court of Appeals when considering wrongful death actions. Lost in the all of the materials before this Court is any acknowledgement that the decision of whether or not to litigate a claim during the final years of one's life is incredibly fraught. Individuals afflicted with terminal illnesses caused by occupational exposure to toxic materials frequently hold off from pursuing entirely viable personal injury claims. As any experienced attorney knows, litigation can be physically, mentally, and emotionally taxing for all parties involved. Those individuals afflicted with a terminal illness may choose to not litigate a particular claim that they may have for a variety of reasons. The decedent's decision to refrain from raising an action that he or she otherwise could have in no way alters the fact that the individual's beneficiaries may want to maintain a wrongful death action after that individual passes away.

One can easily picture a scenario in which a husband, diagnosed with a significant progressive illness caused by a toxic exposure, nevertheless decides to refrain from bringing suit due to ill health and a desire to focus on his treatment rather than litigation. If he dies more than three years after his diagnosis, his decision, under the logic of the *Deggs* case, would permanently bar his wife and children (and any other statutory beneficiary) from filing a suit for *their* loss, despite the fact that they had no ability to pursue a claim prior to the death of the decedent. The undersigned firm has encountered this set of facts more than once while litigating mesothelioma cases.

An individual's decision to not spend the last few years of his or her life mired in litigation in no way reduces the harm that the individual's statutory beneficiaries suffer as a result of his or her death. By design, Washington's wrongful death statute *only* govern post-death damages. *See Hatch v. Tacoma Police Dept.*, 107 Wn. App. 586, 27 P.3d 1223 (2001). This category of damages is conceptually distinct from the damages suffered by the decedent and should remain so. The Court of Appeals ruling effectively elided these categories, making them contingent upon one another. This implicit limitation precludes otherwise deserving parties from seeking redress from the court for injuries suffered. The beneficiaries of the wrongful death statute should not be precluded from

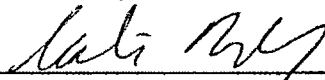
seeking recovery for the harms they have suffered as a result of an individual's death and decision making in his or her final years. The wrongful death statute, by its plain language, allows the decedent's beneficiaries to maintain should they so choose, wholly independently of any decisions made by the decedent in his or her lifetime. This Court should maintain the vitality of this cause of action and allow the beneficiaries to seek recovery for their post-death damages when they accrue, not on the extra-statutory schedule the majority opinion of the Court of Appeals set forth.

CONCLUSION

Amicus respectfully asks this this Court to transfer the case from the Court of Appeals in order to provide guidance to the lower courts as to how wrongful death claims accrue for the purposes of the statute of limitations.

DATED this 5 day of September, 2015.

Respectfully submitted,



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Subject: Deggs v. Asbestos Corporation Limited, et al., Supreme Court No. 91969-1

Good afternoon,

Please file the following documents on behalf of:

Colin B. Mieling
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WSBA #46328

- **Motion for Leave to File Amicus Brief by Bergman Draper Ladenburg, PLLC in Support of Petitioner;**
- **Brief of Amicus Curiae by Bergman Draper Ladenburg, PLLC**

Feel free to let me know if you anything else is required from our office in regards to the attached documents.

Kindest regards,



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