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NO. 72626-9-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

(King County Superior Court Cause No. 14-2-07824-2 SEA)

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ASTENJOHNSON, INC., et al.,

Appellant(s),

v.

GERALDINE BARABIN, as Personal Representative for the ESTATE  
OF HENRY BARABIN, deceased,

Respondent(s).

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REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

Between the filing of Consolidated Petitioners' Opening Brief and Ms. Barabin's Response Brief, this Court issued its decision in *Deggs v. Asbestos Corp.*, which involves the identical issue presently before the Court. *See Deggs v. Asbestos Corp.*, No. 71297-7-1, 2015 WL 3833831 at \*1 (Wn. App. June 22, 2015). When an individual's personal injury action would have been barred by the statute of limitations at the time of his death, any potential actions brought by the personal representative on behalf of decedent's heirs that are based on the same wrongful conduct also are precluded: "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." *Id.* at 2. This is the controlling law in the State of Washington.

*Deggs* confirms that *Grant*, *Calhoun*, and *Johnson* are controlling precedent and rejects Respondent's argument that these "old" and "very dated" cases should be considered "essentially overruled." *See* RB at 2, 34. Nevertheless, Respondent inexplicably continues rehashing the same arguments rejected in *Deggs*.<sup>1</sup> Because Respondent makes no effort to provide the Court

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<sup>1</sup> This is particularly surprising considering that Ms. Deggs and Respondent are represented by the same attorneys, who also represented both decedents in the preceding personal injury lawsuits.

with a reason to depart from *Deggs*<sup>2</sup>, this Court should reverse the trial court's order denying Consolidated Petitioners' Motions for Summary Judgment.

## II. ARGUMENT

### A. **A Wrongful Death Claim is Derivative of the Wrongful Act that Harmed the Decedent. Respondent Cannot Bring a Wrongful Death Claim Where the Decedent Had No Subsisting Claim Against Consolidated Petitioners for Alleged Wrongful Acts Against the Decedent.**

Respondent asserts that the action or inaction of the decedent cannot affect the rights of the statutory beneficiaries because the wrongful death action did not, and cannot, accrue until Mr. Barabin's death. In support of her position, Respondent argues that case law which holds otherwise is "no longer good law," distinguishable, or *dicta*.

On June 22, 2015, this Court issued its *Deggs* decision following and reaffirming the validity of *Grant*, *Calhoun* and *Johnson*. See *Deggs*, 2015 WL 3833831. *Deggs*, as personal representative of the estate of her father (decedent Mr. Sundberg) appealed the trial court's dismissal on summary judgment of her wrongful death claim. *Id.* at \*1. In 1999, Mr. Sundberg prosecuted his asbestos-related personal injury action to judgment.

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<sup>2</sup> In two places, she does support her arguments with language from *Deggs*—but in both instances, her cherry-picked quotes are actually from the *dissenting* opinion. See *id.* at 26-27 & 28-29.

*Id.* Mr. Sundberg passed away in 2010. In 2012, Deggs filed a wrongful death action against one of the defendants to the prior lawsuit and several new defendants. This Court's reasoning in affirming the trial court's dismissal on summary judgment is dispositive:

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

*Id.* at \*6 (emphasis original). The derivative nature of the wrongful death claim was clearly addressed by the Supreme Court in the early line of cases relied upon by the Consolidated Petitioners.

It is the general rule, under the wrongful death statutes of the various states, and it is the holding of this court, that such a statute creates a new cause of action and is not a survival statute . . . . It is also generally held, and the decisions of this court are to the same effect, that, if a deceased could not have recovered damages for his injury had he survived, his heirs or personal representatives cannot recover, because their right of recovery is dependent upon the right which the deceased would have had he survived. If the deceased had no cause of action, none accrues to his heirs or personal representatives.

*Ryan v. Poole*, 182 Wn. 532, 536, 47 P.2d 981 (1935); *see also Johnson v. Ottomeier*, 45 Wn.2d 419, 423-24, 27 P.2d 723 (1975).

The question before the court in *Ryan* was whether the limitation on the right of action in a wrongful death claim—that the decedent could have maintained a cause of action against the wrongful party—is held to exist even if not expressly imposed by statute. The *Ryan* court answered that question affirmatively:

The words ‘wrongful act or neglect,’ used in [wrongful death] statutes . . . in defining the quality of the act causing the injury and death, it seems to be universally agreed by the courts, mean wrong or neglect as against the deceased; that is, in the sense that the deceased could have recovered damages for the injury resulting in his death.

*Ryan*, 182 Wn. at 538. Under Washington law, the rights of the heirs are dependent upon the actions or inactions of the decedent, “whether the statute expressly so provides or not.” *Id.* *Ryan* explained that the derivative nature of the claim was the basis for the rule of exclusion. The exclusions, as explained by *Johnson*, fall into two categories: where the defense asserted inhered in the tort itself and where after receiving the injuries, the decedent pursued a course of conduct which makes it inequitable to recognize a cause of action for wrongful death. *Johnson*, 45 Wn.2d at 423. Both categories derive from the Supreme Court’s interpretation that the wrongful death cause of action is premised upon the wrongful act rather than the actual death and therefore gives a right to recover against the person who would have been



liable had the death not ensued—but only if the injured party himself could have recovered against such person in his lifetime. *See Brodie v. Wash. Water Power Co.*, 92 Wn. 574, 159 P. 751 (1916).

**B. Washington Supreme Court Precedent Precludes Respondent’s Wrongful Death Claims Against Consolidated Petitioners Because Decedent Did Not Have a Viable Underlying Claim Against any Consolidated Petitioner at the Time of His Death.**

1. The Washington Court of Appeals in *Deggs* recently held that *Calhoun*, *Grant*, and *Johnson* remain good law.

Respondent contends that Consolidated Petitioners’ reliance upon *Calhoun*, *Grant*, and *Johnson* is misplaced, arguing that “neither the facts, the holdings, or the policy reasons expressed [in those cases] support [Consolidated Petitioners’] position . . . .” RB at 7. However, the Response fails to support this contention in its analysis of the cases. *Calhoun* and *Grant* definitively establish that a personal representative cannot bring a claim for wrongful death if no subsisting cause of action remained in the decedent at the time of his death. *Calhoun*, 170 Wn. at 160; *Grant*, 181 Wn. at 580-81.

In *Deggs*, this Court found that the rule established in *Calhoun* and *Grant* is binding Washington Supreme Court precedent. *Deggs*, 2015 WL 3833831, at \*16. In doing so, this Court noted that *Johnson* specifically affirmed the rule established in *Calhoun* and *Grant*, and then distinguished those cases from the facts before it in *Johnson*. *Id.* at 11; *Johnson*, 45 Wn.2d at 423.

Respondent claims *Calhoun* is distinguishable because it was decided as an employment case and the statute at issue in the case, the Factory Act, has long since been repealed. RB at 7. *Calhoun*, however, involved the interaction between the statute of limitations on the decedent's underlying claim (in that case, the Factory Act) and the statute of limitations on a wrongful death claim. *See generally Calhoun*, 170 Wn. at 152. Respondent's argument misses the holding of the case, which is directly on point here: that a personal representative's wrongful death claims are dependent upon the viability of the decedent's underlying claim. *Id.* at 160. Because Mr. Calhoun had not brought a timely claim, there was no wrongful death claim to accrue to his wife upon his death. *Id.* "Appellant did not have a cause of action against respondent because of the death of her husband, but because of the

negligence of respondent. The negligence was the cause; the death was the result.” *Id.* As explained in *Deggs*, “*Calhoun* undermines *Deggs*’ 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.” *Deggs*, 2015 WL 3833831, at \*4. The Washington Supreme Court held that Mrs. Calhoun could not bring a claim for wrongful death, because the decedent filed his original complaint after the expiration of the statute of limitations on his claim. *Calhoun*, 170 Wn. at 159-60.

As the Court in *Deggs* explained, *Calhoun* was clarified and reinforced in *Grant*. *Deggs*, 2015 WL 3833831, at \*4. In *Grant*, a mill worker was injured from his exposure to toxic fumes. *Grant*, 181 Wn. at 576-77. He brought a claim for his injuries within the applicable three-year statute of limitations. *Id.* at 577. The mill worker later died of his injuries while his complaint was pending. *Id.* His widow filed to amend the complaint to wrongful death; however, she filed her amended complaint more than three years from the date of her husband’s injury. *Id.* at 580-81. Thus, her claim would be time barred if the court held that her wrongful

death claim ran from the date of her husband's original injury, and not the date of his death. The Supreme Court in *Grant* explained that an action for wrongful death is a distinct and separate cause of action from a survival action and a wrongful death action generally accrues at the time of death. *Id.* at 580. However, the *Grant* court went on to qualify this rule:

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 judgment in his favor rendered during his lifetime; by the failure of the deceased to bring an action for injuries within the period of limitations.

*Id.* at 581 (citations omitted). As the Court in *Deggs* explained, "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." *Deggs*, 2015 WL 3833831, at \*4. Thus, the *Grant* court reaffirmed the holding in *Calhoun* that a cause of action for wrongful death is not allowed where no subsisting cause of action remained in the decedent at the time of death. *Grant*, 181 Wn. at 581. In *Grant*, the decedent's original complaint had been timely

brought, and therefore the decedent had a subsisting cause of action at the time of his death, enabling his widow to properly amend the complaint to wrongful death. *Id.* Accordingly, the wrongful death action was permitted to go forward precisely because none of the limitations recognized in *Calhoun* applied to the case. *Id.*

As this Court made clear in *Deggs*, “the *Grant* court **explicitly** stated a decedent’s inaction or action during his lifetime could preempt wrongful death claims.” *Deggs*, 2015 WL 3833831 at \*4 (emphasis added). Respondents cannot credibly argue that the holding in *Grant* should be discarded by this Court because the Washington Supreme Court misunderstood the distinction between Washington’s survival and wrongful death statutes. RB at 16. The *Grant* court explicitly recognized the differences between the two causes of action, but went on to cite multiple examples of limitations to the general rule that a wrongful death statute accrues only upon death because of the prior conduct of the decedent. *See Grant*, 181 Wn. at 580-81. In doing so, the *Grant* court reinforced that a decedent’s failure to file his claim within the appropriate statute of limitations period prohibits his beneficiaries from filing a

later claim for wrongful death, even though a wrongful death claim is distinct from survival claims. Respondent's wrongful death claim is impermissible because it falls squarely into the limitations articulated in *Grant* and *Calhoun*.

2. Contrary to Respondent's Argument, *Calhoun* was not implicitly overruled by *Gazija v. Nicholas Jerns Co.*

*Calhoun* has not been overruled, either explicitly or implicitly. According to Respondent, *Gazija* implicitly overturned the *Calhoun* decision (and presumably *Grant* as well). See *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 543 P.2d 338 (1975). However, *Gazija* is an insurance case in which the court opted to apply a discovery rule to the alleged tortious conduct because of the fiduciary relationship of the parties. *Id.* at 221. In *Gazija*, a commercial fisherman brought suit against his insurance agent for wrongful cancellation of his insurance policy. *Id.* The insurance company claimed that the statute of limitations on the claim had expired, because the fisherman did not bring suit within three years of the wrongful cancellation. *Id.* The fisherman argued that the claim ran from date that he discovered his injury. *Id.* The Washington Supreme Court held the discovery rule should be

extended to an action for negligent cancellation of an insurance policy, and the extension was deemed “a judicial policy determination.” *Id.* at 221. The court determined the application of the discovery rule was warranted due to the fiduciary relationship between the parties. *Id.* at 222.

Respondent argues that *Gazija* is significant because the court looked to the *Shaw* case to decide whether the statute of limitations in an insurance case sounding in tort runs from the point that insurance coverage has been compromised by the act of the defendant, or from the point that the injured party incurs damages from the lost coverage. *Id.*; *Shaw v. Rogers & Rogers*, 117 Wash. 161, 200 P. 1090 (1921). In *Shaw*, the court ruled that the statute of limitations ran from the time that insurance-agent defendant failed to properly write an insurance policy, not the date that the insured suffered damaged when the insured’s property was destroyed. *Shaw*, 117 Wn. 163. The *Gazija* court did not know if the *Shaw* decision sounded in tort or contract, but to the extent that it failed to apply the discovery rule, the result was held incorrect. *Gazija*, 86 Wn.2d at 218. With respect, to *Calhoun*, the court explained that the decision was not helpful for determining

whether the *Shaw* decision was based in tort or contract law. *Id.* at 219. The *Gazija* court made no other mention of *Calhoun*.

Respondent writes “[t]he significance of this holding is that *Shaw* is one of the cases relied upon by the Supreme Court when it decided *Calhoun* . . . that means . . . Their holdings, that the tolling the statute at the time of incident affects the subsequent action, are no longer good law in Washington.” RB at 10.

Respondent’s argument fails on multiple levels. First, Respondent misunderstands the *Gazija* ruling. *Gazija* simply found that a discovery rule applied to the insurance claim asserted in that case. Respondent’s brief completely omits that the application of a discovery rule was the central issue decided in that case, not whether a wrongful death claimant can bring an action where no underlying cause of action remained in the decedent at the time of death. Discovery is not an issue in this case. Here, Consolidated Petitioners do not argue that the statute of limitations began to run on the date Mr. Barabin suffered asbestos exposure. Respondent had the benefit of a discovery rule when Respondent and Mr. Barabin brought their original asbestos action in 2006 upon Mr. Barabin’s discovery that he had terminal mesothelioma



years after his alleged asbestos exposure. Respondent chose not to bring claims against the Consolidated Petitioners within the statute of limitations period, and their inaction caused the statute of limitations to expire prior to bringing this current wrongful death action. Nothing in the *Garzija* opinion addresses whether a personal representative can bring a wrongful death claim where no underlying claim remains in the decedent at the time of death.

Second, Respondent misstates the holding of *Calhoun*, and thereby misunderstands its reliance on *Shaw*. *Calhoun* did not hold that “the tolling of the statute at the time of the incident affects the subsequent action.” Rather, *Calhoun* establishes that a wrongful death claim is extinguished by the failure of a decedent to bring a timely claim during the course of his lifetime. As the Court of Appeals in *Deggs* explained:

. . . *Calhoun* . . . [held] a failure of the deceased to bring a cause of action within the statute of limitations period extinguishes a cause of action for wrongful death. In summarizing *Calhoun*, the *Grant* court said, ‘Obviously, at the time of death there was no valid action subsisting in his favor, because the statute of limitations had run against it.’

*Deggs*, 2015 WL 3833831, at \*4. As the *Grant* court noted, *Calhoun* cited to *Flynn v. New York, N.H. & H.R. Co*, 283 U.S. 54,

51 S.Ct. 357 (1931), a United States Supreme Court case in which a widow was barred from bringing a wrongful death claim where her deceased husband did not bring a personal injury claim within the statute of limitations prior to his death. Thus, the *Grant* court was correct when it held that *Calhoun* represented a limitation on the general rule that a wrongful death action accrued upon death. *Grant*, 181 Wn. at 581.

*Calhoun* remains and has been upheld as good law, regardless of the fact that the *Gazija* court held that discovery rules apply in unrelated insurance tort actions.

3. *Grant* and *Johnson* have precedential value and are not mere *dicta*.

*Dictum* is defined as a “statement made during the course of delivering a judicial opinion, but one that is not necessary to the decision in the case and therefore not precedential (though it may be considered persuasive).” *Black’s Law Dictionary* 1100 (7th ed. 1999). “Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute *obiter dictum*, and need not be followed.” *Grundy v. Thurston Co.*, 155 Wn.2d 1, 9-10, 117 P.3d 1089 (2005), (quoting *State v. Potter*, 68 Wn. App. 134, 149 n. 7, 842 P.2d 481 (1992)).

In *Johnson*, the trial court dismissed the wrongful death petition, finding that because a wife could not sue a husband in tort for a wrong committed against her, and the personal representative was similarly barred from bringing a wrongful death claim on those grounds. *Johnson*, 45 Wn.2d at 420. On appeal, in support of the judgment, respondent argued that the above noted defense “is available to the tortfeasor under the rule that, in an action for wrongful death, the defendant is entitled to the benefit of all the defenses he would have had to an action by the deceased had she lived.” *Id.* at 421. The court’s discussion of *Calhoun* and *Grant* was in response to the defendant’s urged disposition of the issue. That discussion is not *dictum*. A court’s rejection of a party’s argument is not *dicta*. *Satterlee v. Snohomish Co.*, 115 Wn. App 229, 235-36, 62 P.3d 896 (2002). The court specifically held that the exclusionary rule established in *Grant*, *Brodie*, and *Calhoun* did not apply to a personal disability in the decedent:

In our view, the general exclusionary rule referred to under (2) above has no application to defenses based upon personal disability to sue, as distinguished from defenses which inhere in the tort, or which are based upon decedent's course of conduct after the injury and before death.

*Johnson*, 45 Wn.2d at 421.

In *Grant*, the analysis distinguishing the facts before the court from the decision in *Calhoun* was related to the issues and arguments before the court, was necessary to decide the case, and therefore was not *dictum*. *Grudy*, 155 Wn.2d at 9-10. *Grant* and *Calhoun* both involved decedents who brought personal injury actions in their lifetimes. *Grant*, 181 Wn. at 577. The respective personal representatives then sought to continue the wrongful death claims after the plaintiffs had died. *Id.* Both cases involved a departure from the general rule that a wrongful death claim accrues upon the decedent's death. *Id.* at 581. The respondent in *Grant* argued on appeal that the rule established in *Calhoun* was that a wrongful death claim begins to run when the deceased person sustains the injury through the negligence of the party charged. *Id.* Therefore, the widow's action would be barred because she sought amendment of the decedent's personal injury action more than three years after he sustained his injury, even though the decedent had a valid subsisting claim at the time of the widow's amendment. As discussed above, a court's rejection of a party's argument is not *dicta*.

The *Grant* court rejected the respondent's interpretation of *Calhoun*, finding instead that case held that a decedent must have a valid subsisting cause of action at the time of his death in order for a wrongful death claim to accrue. *Id.* at 582. *Grant* then distinguished the facts before it from those set forth in *Calhoun*:

The instant case presents an entirely different problem. 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 what the action for wrongful death can be maintained.

*Id.* *Grant* and *Johnson* affirmed the holding articulated in *Calhoun*. The interpretations are not *dictum*.

3. Respondent's Reliance on *White v. Johns Manville* and *Wills v. Kirkpatrick* is Misplaced.

As discussed in Consolidated Petitioners' opening brief, *Wills* is nothing more than an application of *Grant*. OB 15-18. *Wills* and *Grant* both had viable causes of action at the time of their deaths. Thus, upon death, the wrongful death cause of action accrued to their heirs. Because the decedent in *Wills* had done nothing in the course of her lifetime that would preclude a wrongful death action by her heirs, the well-established exceptions to the general rule that a wrongful death action accrues upon the

death of the decedent did not apply. *Wills* declined to adopt the medical malpractice statute of limitations which generally begins to run upon the last date of injury. *Wills v. Kirkpatrick*, 56 Wn. App. 757, 760, 785 P.2d 834 (1990). Instead, the Court concluded that the wrongful death statute of limitations applies. *Id.* Respondent argues that “[t]he court found that beginning the running of the statute of limitations at the time of the injury, rather than the time of the death of the decedent, would be illogical and unjust. But that is just what defendants seek to do here.” RB 24. *Grant*, as noted above, clearly set forth the general rule that the statute of limitations on a wrongful death claim begins to run upon the death of the decedent. *Grant*, 181 Wn. at 581. However, the general rule is subject to the limitation that the decedent must have a viable subsisting cause of action at the time of death. *Id.* at 582. Because Ms. Wills had a viable cause of action at the time of her death, once the court determined the wrongful death statute of limitations applied over the medical malpractice statute, there was no need to address the exceptions to the general rule.

Likewise, *White v. Johns-Manville Corp.* is irrelevant to the issue before this Court for the reasons set forth in our opening

brief. OB 26-17; *White v. Johns-Manville*, 103 Wn.2d 344, 693 P.2d 687 (1985).<sup>3</sup> Our position is supported by the recent decision in *Deggs*: “The issue in *White* was whether the wrongful death action accrued at the time of death or if it accrued later--at the time the decedent’s wife should have discovered the cause of death.” *Deggs*, 2015 WL 3833831, at \*7. “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.” *Id.*

**C. The Limitation on Wrongful Death Claims Established in *Calhoun*, *Grant*, *Johnson* and Recently Affirmed in *Deggs* is Not Akin to a Statute of Repose.**

Respondent’s argument that the exceptions noted in the cases cited by Consolidated Petitioners effectively create a judicial

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<sup>3</sup> The *White* the parties stipulated for purposes of the appeal that “the decedent never knew that he was suffering from any adverse effects of exposure to asbestos-containing materials” before his death. *White*, 103 Wn.2d at 345. Thus, the Court expressly declared that “*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.*” *Id.* at 347 (emphasis added).

statute of repose on wrongful death claims misses the import of Washington Supreme Court authority. Consolidated Petitioners do not argue, and the cases cited do not hold, that the statute of limitations begins to run prior to the accrual of a wrongful death claim. In Washington, the wrongful death claim is derivative in nature. It is the wrongful act, not the death itself that provides for a remedy under the statute. If the decedent has, during the course of his lifetime, done anything that would operate as a bar to his recovery for that wrongful act, so too shall it operate as a bar to the rights of his heirs. Whether a statute of repose may preclude a cause of action before it accrues is not at issue in this case because there is no cause of cause of action to accrue to Respondent. As a matter of law, because the Barabins allowed the statute of limitations on their underlying personal injury claims to run as against the Consolidated Petitioners, upon Mr. Barabin's death, no wrongful death action could accrue to the statutory beneficiaries. Respondent takes issue with the Washington Supreme Court's interpretation of the wrongful death statute, and ignores 80 years of legislative silence on the issue following the Court's decision in *Calhoun*.



**D. The Limitation on Wrongful Death Claims Recognized in *Calhoun, Grant, and Johnson* Promotes Fairness and Judicial Economy.**

Following this Court's recent decision in *Deggs*, upholding longstanding Washington Supreme Court precedent will promote fairness and judicial economy. The general rule of exclusion set forth by the Washington Supreme Court and upheld by *Deggs* ensures judicial economy, fairness to the parties, and finality of judgments. The rule is applied in situations 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." *Johnson*, 45 Wn.2d at 422. Mrs. Barabin brought a loss of consortium claim in the original personal injury action. Her children, if they so chose, could have maintained their own loss of consortium claims in that same action. Mr. Barabin's family had the opportunity to recover damages for the wrongful acts of those defendants that caused Mr. Barabin's injuries. However, Respondent elected not to name Consolidate Petitioners as defendants in the personal injury action; Respondent is now barred from asserting those stale claims. To

hold otherwise would perpetrate the inequity the *Johnson* court sought to avoid.

As in *Grant*, if an injured party dies during the prosecution of his original claim and he has an underlying, subsisting cause of action, his personal representative may amend the complaint to add a wrongful death claim against already named defendants, even if the amendment takes place more than three years after the injured party originally discovered his claim. Plaintiffs are protected in cases where a subsisting case remains at death, and there is no need to file a premature, anticipatory action to preserve a claim. Consolidated Petitioners' position promotes fairness by extinguishing stale claims where the decedent took no action in his lifetime to bring a claim.

There is no dispute in this case that Respondent knew the necessary elements of her cause of action against Consolidated Petitioners and chose not to bring a cause of action against them within the three-year limitation period. Delay prejudices a defendant's access to discovery and evidence. To allow a personal representative to revive extinguished claims runs afoul of

Washington's preference for finality and preemption of stale claims. *See Deggs*, 2015 WL 3833831, at \*8.

CONCLUSION

For these reasons, Consolidated Petitioners respectfully request that this Court reverse the trial court's denial of their Motions for Summary Judgment and remand for a dismissal of all claims.

RESPECTFULLY SUBMITTED this 10th day of August, 2015.

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I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 10th day of August, 2015, I caused a true and correct copy of the foregoing document, "Reply Brief of Appellants," to be delivered in the manner indicated below to the following counsel of record:

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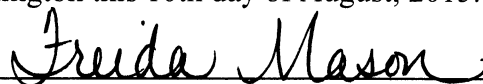
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