No. 96203-1

SUPREME COURT
OF THE STATE OF WASHINGTON

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

*Plaintiff-Petitioner*,

v.

BRAND INSULATIONS, INC.; CBS CORPORATION, a Delaware corporation, f/k/a VIACOM, INC., successor by merger to CBS CORPORATION, a Pennsylvania Corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION; and PARSONS GOVERNMENT SERVICES, INC.,

*Defendants-Respondents*,

and

SABERHAGEN HOLDINGS, INC., et al.,

*Defendants*.

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# ANSWER OF RESPONDENT PARSONS GOVERNMENT SERVICES, INC.

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## I. IDENTITY OF ANSWERING PARTY

Parsons Government Services, Inc. ("Parsons"), Respondent in the Court of Appeals, hereby answers the petition for review of Ramona C. Brandes, Appellant in the Court of Appeals.

## II. ISSUES PRESENTED FOR REVIEW

Parsons seeks review of two issues:

1. Prior Litigation. Consistent with the majority rule, this Court in *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 381 P.3d 32 (2016), reaffirmed that equitable limitations on the accrual of wrongful-death actions include "prior litigation." This limitation, endorsed by *Deggs* and a majority of jurisdictions, bars a wrongful-death action when the deceased has already recovered a prior judgment for her injuries. The Court of Appeals here diverged from *Deggs* and the majority rule by allowing a wrongful-death action to proceed against new defendants who could have been but were not sued in the decedent's prior personal-injury/survival action, even though the decedent's estate had already recovered a $3.5 million judgment in that prior action and almost $2 million in settlement proceeds. The Court of Appeals acknowledged the "prior litigation" equitable limitation on wrongful-death actions but limited its application only to *the specific defendant* who had been sued in the prior personal-injury/survival action (Brand Insulations), allowing the wrongful-death action to proceed against Parsons, whom plaintiffs had strategically chosen *not* to sue in the prior action. Where there has been a prior recovery on a personal-injury/survival action, does the "prior litigation" limitation bar the

accrual of wrongful-death actions against *all* potential defendants—and not just those who were sued in the prior personal-injury/survival action? This issue warrants review under RAP 13.4(1) and (4).[1]

2. Loss of Parental Consortium Claims. In *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wn.2d 131, 137, 691 P.2d 190 (1984), this Court recognized a loss-of-parental-consortium claim for children under Washington common law. This new right was conditioned on those claims being joined, when feasible, with the parent's underlying personal-injury action. The Brandes children here could have joined, but chose not to join, their loss-of-consortium claims with their mother's personal-injury action. Yet the Court of Appeals reasoned that the *Ueland* joinder requirement was inapplicable because the injured parent in this case later died during trial. Must children assert their loss-of-parental-consortium claims in their parent's personal-injury action, when feasible, regardless of that parent's future course of treatment and eventual fate? This issue warrants review under RAP 13.4(1) and (4).

[1] Petitioner Brandes seeks review of what could be termed the "flip-side" of this issue, *i.e.*, whether the Court of Appeals erred in applying the "prior litigation" limitation to bar even a wrongful-death action against Brand Insulations, *i.e.*, a party from whom there had been an actual judgment and full recovery in a prior personal-injury/survival action.

## III. COUNTERSTATEMENT OF THE CASE

### A. Barbara and Raymond Brandes brought a personal-injury action against seven defendants. They could have sued Parsons in that action, but chose not to. Their children could have joined their parents' action to assert loss-of-parental-consortium claims, but chose not to.

Barbara Brandes was diagnosed with mesothelioma. CP 109-10, 113. She and her husband Raymond brought a personal-injury action (*Brandes I*), in which they alleged that Barbara's mesothelioma was caused by take-home asbestos exposure from her husband's work at the ARCO Cherry Point Refinery. CP 113, 503. They sued seven defendants, including Brand Insulations, who was Parsons' insulation subcontractor at the Refinery. CP 112.

The Brandeses did not sue Parsons, even though their counsel knew of Parsons' role as the general contractor in building the Refinery and had previously sued Parsons in several asbestos cases involving the same products, the same time period, and the same location. CP 411-12. Similarly, the Brandes' children chose not to join as parties in their mother's personal-injury action to assert their own claims for any present or future loss of parental consortium.

**B. Barbara died during trial. The case was immediately converted to a survival action in which Barbara's Estate became the nominal plaintiff. At that time, the Estate could have joined the wrongful-death claims of the Brandes children in the survival action, so that the Estate's survival claims and the children's wrongful-death claims could both be decided at the same time, in the same suit, by the same fact finder—but the Estate and the children chose not to do so. The jury returned a $3.5 million verdict against Brand in the survival action, which was upheld by this Court in a different appeal.**

Raymond died before trial, leaving Barbara's claims to be resolved. CP 117. By the second day of trial, Barbara had settled with every defendant except Brand, for a total of $1,965,710.76. CP 81, 439.

On the day before closing arguments, while Brand was still presenting evidence, Barbara died. CP 119, 124-26. Her counsel asked that the trial proceed as a survival action and filed a motion for substitution of Ramona Brandes, Barbara's daughter, as the plaintiff. CP 123. The trial court granted the motion and appointed Ramona to serve as the personal representative of her mother's estate. CP 123, 128. Ramona's counsel knew that a wrongful-death claim had accrued but told the court that their client was choosing not to pursue it at that time. CP 124.

The case proceeded to verdict as a survival action only. The jury found for the Estate and awarded $3.5 million in damages. CP 81-82, 400. Before the entry of judgment, the Estate filed a motion to allocate 50% of the $1.8 million in prior settlements to the future wrongful-death claims. *Estate of Brandes v. Brand Insulations, Inc.*, 2017 WL 325702, at *2, 7

(Wash. Ct. App. 2017).[2] Brand opposed that allocation and filed a motion for a new trial or, alternatively, a remittitur. CP 752-72. Brand argued that 100% of the prior settlements should be allocated as a setoff to the jury verdict, and zero should be allocated to any future wrongful-death claims. The trial court denied Brand's motion for a new trial but granted a remittitur, reducing the verdict by $1,000,000. CP 796. The trial court allocated 20% of the settlements to any future wrongful-death claims. CP 797. After offsetting 80% of the settlements from the jury verdict, a net judgment of $927,431.39 was entered against Brand. CP 81-82.

Brand appealed on several grounds, including a challenge to the allocation. Ramona cross-appealed the remittitur. The Court of Appeals reversed the remittitur, upheld the allocation, and remanded to the trial court to enter a revised judgment based on the damages award without remittitur. *Estate of Brandes*, 2017 WL 325702, at *9-10.

**C. After entry of the judgment in the survival action, the Estate brought a separate action for wrongful death on the Brandes children's behalf, asserting loss-of-parental-consortium claims. The action again named Brand as a defendant, but added several new defendants who had not been sued in the prior personal-injury/survival action, including Parsons. The trial court dismissed the wrongful-death action.**

One month after the original judgment was entered in the survival action, Ramona, acting as the Estate's personal representative, filed a wrongful-death action against Brand and, for the first time, Parsons, CBS Corporation, and Saberhagen Holdings ("*Brandes II*"). CP 1-4. The

[2] The Estate and Brand both agreed that Barbara released future wrongful-death claims in exchange for settlement proceeds. *Estate of Brandes*, 2017 WL 325702, at *7.

wrongful-death action alleged liability against the defendants based on the same alleged facts and legal theories as the prior survival action in *Brandes I*. *Compare* CP 1-4 (wrongful death), *with* CP 112-15 (survival). The wrongful-death action sought damages for the Brandes children's loss of parental consortium. CP 3-4.

The trial court dismissed the *Brandes II* claims under CR 12(b)(6). CP 17-26, 72-73, 83-84, 155-56, 229-31.

The Estate appealed.[3] The Court of Appeals reversed in part and affirmed in part. The Court of Appeals affirmed Brand's dismissal under the "prior litigation" equitable limitation upon wrongful-death claims, recently reaffirmed in *Deggs*, but declined to uphold Parsons' dismissal under that same limitation, on the ground that, unlike Brand, Parsons and CBS had not been sued in *Brandes I*—even though they could have been. *Slip Op.* at 2, 11, 13.

## IV. SUMMARY OF GROUNDS FOR REVIEW

Parsons agrees with Brandes that this Court should review the Court of Appeals' decision in this case, though for fundamentally different reasons.

The Court of Appeals' interpretation and narrow application of the *Deggs* "prior litigation" equitable limitation—to bar only the wrongful-death action against Brand Insulations, but not against Parsons—conflicts with *Deggs* and the majority rule that a prior judgment for personal injuries

[3] Saberhagen Holdings has since been dismissed and is no longer a party to this appeal. *Slip Op.* at 2 n.2.

*bars* a later wrongful-death action against *anyone*. This limitation prevents a wrongful-death action's *accrual* in the first place. So if a wrongful-death action is barred as to *one* defendant, *e.g.*, Brand Insulations, then it necessarily is barred as to Parsons and any other actual or potential defendants. Contrary to the Court of Appeals' decision, the prior-litigation limitation has never been restricted by Washington appellate courts to just those specific defendants who have already been sued in a prior personal-injury/survival action. As this Court recognized in *Deggs*, there is "something inequitable" in allowing the deceased's personal representative to bring a wrongful-death action "based on injuries that the deceased had already been compensated for." *Deggs*, 186 Wn.2d at 726 n.6. The Court was plainly focused on the *fact* of a prior recovery, not its *source*.

The Court of Appeals' decision also conflicts with and frustrates *Ueland*'s joinder requirement for loss-of-parental consortium claims. This Court in *Ueland* recognized a loss-of-parental-consortium claim under Washington common law, but held that such claims were subject to another equitable limitation: the consortium claim had to be joined with the parent's personal-injury action *whenever feasible*. But the Court of Appeals declined to apply the *Ueland* joinder requirement, instead creating different, case-specific joinder rules depending on whether the injured parent is living, critically ill, or dead—an unworkable distinction that this Court never made in *Ueland*, and which can serve only to reintroduce precisely the same risks of multiple suits and inconsistent results that the *Ueland* Court intended to eliminate.

Review of these issues is warranted under RAP 13.4(b)(1) and (4).

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### A. The Court of Appeals' Decision Refusing to Apply the "Prior Litigation" Limitation to Bar the Brandes Children's Wrongful-Death Claims Against Parsons Conflicts with *Deggs* and with the Majority Rule.

As Brand Insulations has cogently recounted in its opposition,[4] Washington law has applied certain equitable limitations upon wrongful-death claims for over a century now. As early as 1916, this Court took a "substantial step toward limiting our wrongful death statute," establishing that equitable limitations may bar a wrongful-death claim. *See Deggs*, 186 Wn.2d at 716 (citing *Brodie v. Wash. Water Power Co.*, 92 Wash. 574, 576-77 (1916), 726 n.6. One such limitation applies where the decedent, following her fatal injury, pursued a course of conduct making it inequitable to recognize a wrongful-death claim. *Id.* at 726. One such course of conduct is the decedent's pursuit of *prior litigation*. *Id.*

This limitation is embodied in the Restatement (Second) of Judgments and reflects the majority rule: that a judgment for the decedent in a personal-injury action bars a later action for wrongful death resulting from the same injury. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 46 REPORTER'S NOTE (1982); S. SPEISER & J. ROOKS, JR., RECOVERY FOR

[4] Though Parsons urges this Court to accept review, Parsons largely adopts the arguments and reasoning in Brand Insulations' opposition to review. Brand Insulations opposes review because the Court of Appeals' decision happened to reach the correct result *as to Brand Insulations*, *i.e.*, affirmance of the trial court's dismissal of the Brandes children's wrongful-death claims against it, though on faulty reasoning. As set forth below and in Brand Insulations' opposition, the Brandes children's wrongful-death claims are barred against *everyone* (not just Brand Insulations).

WRONGFUL DEATH § 15:22 (4th ed., updated electronically July 2018); D. DOBBS, P. HAYDEN & E. BUBLICK, THE LAW OF TORTS § 380 (2d ed., updated electronically June 2018).[5]

Consistent with the majority rule, this Court in *Deggs* reaffirmed that equitable limitations on the accrual of a wrongful-death action include a judgment recovered in the deceased's favor in a prior personal-injury/survival action. 186 Wn.2d at 726 n.6. *Deggs* recognized that there was "something inequitable in allowing the deceased's personal representative to maintain a suit based on injuries that the deceased had already been compensated for." *Id.*

However, citing the intermediate appellate decision in *Deggs*, the Court of Appeals incorrectly reasoned that the prior-litigation limitation was only "intended to protect a specific defendant that had already been sued," *i.e.*, *Brand Insulations*, but not Parsons or CBS. *Slip Op.* at 12 (*citing Deggs v. Asbestos Corp.*, 188 Wn. App. 495, 510, 354 P.3d 1 (2015)). But nothing in this Court's *Deggs* decision, or in the intermediate *Deggs* decision, or in the Restatement, or in prior Washington law, has ever suggested that the prior-litigation limitation applies only to the *specific defendants* who were sued in the prior personal-injury action. To the

[5] For examples of recent decisions adopting this equitable limitation in cases where the decedent prevailed in the prior action, *see Union Bank of Cal., N.A. v. Copeland Lumber Yards, Inc.*, 160 P.3d 1032, 1037 (Or. Ct. App. 2007) (adhering to "the traditional and dominant view") (holding wrongful-death action barred by prior judgment in decedent's favor for injuries caused by asbestos exposure); *Varelis v. Nw. Memorial Hosp.*, 167 Ill.2d 449, 212 Ill. Dec. 652, 657 N.E.2d 997, 1002 (1995) (adhering to the "great weight" of authority) (holding wrongful-death action barred by prior judgment in decedent's favor); and *Variety Children's Hosp. v. Perkins*, 445 So.2d 1010, 1012 (Fla. 1983) (adhering to "the prevalent view") (same).

contrary, such a restriction would make little sense: As *Deggs* made clear, this limitation prevents a wrongful-death claim's *accrual—i.e.*, its coming into existence in the first place. *Deggs*, 186 Wn.2d at 726 n.6; BLACK'S LAW DICTIONARY 25 (10th ed. 2014) (defining "accrue"). So if the wrongful-death claim does not accrue for one defendant, *i.e.*, Brand Insulations, then that claim necessarily cannot accrue for anyone else, *i.e.*, Parsons or CBS. Either a wrongful-death claim exists or it doesn't exist—for *all* potential defendants. And *Deggs* makes clear that once the plaintiff pursues prior personal-injury/survival litigation to judgment—no matter the identity of the particular defendants sued or the amount recovered—the limitation bars the wrongful-death claim for *all* potential defendants.

In sum, this Court should grant review under RAP 13.4(b)(1) and (b)(4), reaffirm that Washington adheres to the majority rule under the prior-litigation exception, hold that it bars wrongful-death actions against all potential defendants, and reinstate the trial court's dismissal of the wrongful-death claims asserted against Parsons.

### B. Allowing Statutory Beneficiaries to Bring a Wrongful-death Action against New Defendants Who *Could* Have Been, but Were *Not* Sued in the Prior Personal-Injury Action, Risks Inconsistent Results and Double Recovery.

The Court of Appeals concluded that allowing the wrongful-death action to proceed against Parsons would not risk inconsistent results because Parsons is not in privity with Brand Insulations and therefore the Brandes children must still prove Parsons' negligence separately. *Slip Op.* at 12 (the children "will have to prove [Parsons' and CBS's] negligence

separately, thus there is no prior result with which to be inconsistent"). But while Parsons agrees that there is no privity with Brand Insulations, it is precisely this separate proof that risks, rather than prevents, inconsistent results if a wrongful-death case against Parsons is permitted.

The issue of Brand Insulations' negligence in installing asbestos insulation during the construction of the ARCO Cherry Point Refinery—an issue that was litigated to verdict in *Brandes I*—would also be an issue in any *Brandes II* wrongful-death case against Parsons. Parsons was the general contractor for the overall construction of the Refinery, and Brand Insulations was one of its subcontractors. Parsons anticipates that the Brandes children's negligence theory against Parsons may include a claim that Parsons, as the general contractor, failed to properly supervise and monitor its subcontractor's (*i.e.*, Brand Insulations') negligent use of asbestos insulation. Thus, because the children would likely assert *Brand Insulations*' negligence as proof to support *Parsons*' negligence, Brand Insulations' actions, duties, and standards of conduct will almost certainly be relitigated in *Brandes II*. And the jury in *Brandes II* may conclude that Brand Insulations was *not* negligent, contrary to the jury's finding in *Brandes I*. Thus, contrary to the Court of Appeals' reasoning, there *is* a "prior result" from *Brandes I*—such as the finding of Brand Insulations' negligence—with which the result in a *Brandes II* wrongful-death trial could very well be inconsistent. *Cf. Slip Op.* at 12. Similarly, the jury in a *Brandes II* trial might conclude that Barbara's mesothelioma was *not* caused by asbestos from Brand Insulations' activities—or was not caused by

asbestos *at all*, based on evidence that was not available at the time of the *Brandes I* trial[6]—again, contrary to the jury's findings in *Brandes I*.

A *Brandes II* suit could certainly present other opportunities for results that are inconsistent with those in *Brandes I*, including rulings on affirmative defenses to be presented by Parsons that were also presented by Brand Insulations in *Brandes I* (*e.g.*, contractor's statute of repose under RCW 4.16.310), and issues of allocation of settlement proceeds as between the personal-injury claims and the wrongful-death claims. *See Estate of Brandes*, 2017 WL 325702, at *7-8. Following the *Brandes I* verdict, the trial court performed an allocation of the $1.9 million in prior settlements to determine the appropriate setoff to the $3.5 million verdict against Brand Insulations: an allocation that presumably took into account the perceived value of the just-concluded personal-injury/survival suit measured against the perceived value of a hypothetical future wrongful-death suit—*i.e.*, a suit that had not yet been commenced against anyone, with no testimony or other evidence of any wrongful-death liability or damages, or of anyone's defenses to those claims. Not surprisingly given the lack of evidence presented and the parties' competing self-interests, radically different allocations were proposed: Ramona proposed a 50%/50% allocation; Brand Insulations proposed 100%/0%. The trial judge ultimately ordered an allocation of 80%/20%. Of course, because Parsons had no say or

[6] *See e.g.*, Richard L. Attanoos et al., *Malignant Mesothelioma and Its Non-Asbestos Causes*, 142 ARCH. PATHOL. LAB. MED. 753, 758 (June 2018) (very recent literature review concluding that approximately *60% to 90%* of mesotheliomas in U.S. women are likely *unrelated to asbestos*).

representation in the *Brandes I* proceedings, it cannot be bound by the trial court's 80%/20% allocation. That, in turn, means that following a verdict awarding damages in any *Brandes II* wrongful-death suit, the trial court would have to revisit the claims, evidence, and merits of *Brandes I* to consider the comparative values of the two cases so as to reach its own appropriate allocation of the very same settlements that had previously been allocated by the *Brandes I* trial court. And the two allocations would very likely differ, given the different evidence and parties before the two trial courts and, indeed, given the plaintiff's own admission in *Brandes I* that a 50%/50% allocation, not 80%/20%, was appropriate.

Critically, these risks of duplicative trials, double recoveries,[7] and inconsistent results were easily avoidable and followed directly from strategic, *tactical* decisions made by Barbara, Ramona, and their *Brandes I* attorneys: (1) their choice *not* to join Parsons from the outset as a party in *Brandes I*, and (2) later, when Barbara died during the *Brandes I* trial, their choice to proceed to verdict on the personal-injury/survival claims, rather than to immediately amend the suit to include the wrongful-death claims, so that all of the claims, against all potential parties, could be fairly and

[7] This Court in *Deggs* and in previous cases has also acknowledged the risk of double recovery if statutory beneficiaries were allowed to bring a wrongful-death action after the decedent had already pursued a personal-injury action and had recovered a judgment. *E.g.*, *Deggs*, 186 Wn.2d at 726 n.6; *Hinzman v. Palmanteer*, 81 Wn.2d 327, 331, 501 P.2d 1228 (1972) (a "serious question of duplication of damages" could arise when a party brings separate actions for personal injury and wrongful death), *disapproved of on other grounds in Wooldridge v. Woolett*, 96 Wn.2d 659, 638 P.2d 566 (1981); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 47 REPORTER'S NOTE (citing cases) ("The problem of duplicate recovery is eliminated if the two claims [survival and wrongful death] are tried together, or required to be asserted in the same action").

consistently decided in the same action, by the same judge and jury, and based on the same evidence.

While most states permit a party to assert both a survival action and a wrongful-death action, most require the two actions to "be consolidated or joined for trial." SPEISER & ROOKS, RECOVERY FOR WRONGFUL DEATH § 1:13.[8] Here, when the personal-injury action was converted to a survival action upon Barbara's death, Ramona deliberately decided *not* to combine it with a wrongful-death action, and instead to proceed to verdict only with the survival action, notwithstanding the resulting and plainly foreseeable risks of double recovery, inconsistent results, and prejudice to absent parties like Parsons. CP 124. The only equitable response to such inequitable conduct is dismissal of the wrongful-death action against all potential defendants, including Parsons.

This Court should grant review under RAP 13.4(b)(1) and (b)(4), reaffirm that Washington adheres to the prior-litigation exception, hold that it bars wrongful death actions against *any* defendant, and reinstate the trial court's dismissal of the wrongful-death claims against Parsons.

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[8] *See, e.g.*, *Taylor v. Norfolk S. Ry. Co.*, 86 F. Supp. 3d 448, 453 (M.D.N.C. 2015) ("Survivorship and wrongful death actions, though technically separate, bear an important relationship to one another. If both are brought in one complaint, they should be 'stated separately,' and if they are brought in separate actions, they should be 'consolidated for trial.'" (quoting *Bowen v. Constructors Equip. Rental Co.*, 196 S.E.2d 789, 807 (N.C. 1973)); *Tommie v. LaChance*, 412 So.2d 439, 440-41 (Fla. Dist. Ct. App. 1982) (concluding that the trial court should have consolidated the wrongful-death and personal-injury actions to eliminate the risk of inconsistent verdicts); *Doucette v. Bouchard*, 265 A.2d 618, 619 (Conn. Super. Ct. 1970) ("If a personal representative seeks a recovery for both death and ante-mortem injuries, damages for both must be claimed in the same action.").

### C. The Court of Appeals' Decision Conflicts with the Joinder Requirement of Loss-of-Parental-Consortium Claims Announced by This Court in *Ueland*.

Washington has long recognized the public policy against claim splitting. *See Berschauer Phillips Constr. Co. v. Mut. of Enumclaw Ins. Co.*, 175 Wn. App. 222, 228, 308 P.3d 681 (2013). Filing two separate lawsuits based on the same event is precluded. *See Landry v. Luscher*, 95 Wn. App. 779, 780, 782, 976 P.2d 1274 (1999). The rule against claim splitting has no exception for personal-injury claims and wrongful-death/loss-of-parental-consortium claims resulting from the same personal injury.

In *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wn.2d 131, 137, 691 P.2d 190 (1984), this Court recognized a claim for loss of parental consortium under Washington common law. Similar to the equitable limitations placed on wrongful-death actions, this Court required the parental-consortium claim to "be joined to the injured parent's claim whenever feasible." *Ueland*, 103 Wn.2d at 137. Separate parental-consortium claims are allowed only when joinder with the parent's personal-injury action was not feasible. *Id.* The reason for this limitation is the policy against claim splitting and the risk of inconsistent results and double recovery.

Ignoring the *Ueland* rule of "compulsory joinder where feasible," the Brandes children chose *not* to join their loss-of-consortium claims in their mother's personal-injury suit, *Brandes I*, though it is undisputed that doing so would have been feasible. Instead, they chose to bring those claims

later, in a separate suit, *Brandes II*, against new defendants. But rather than affirm the dismissal of those claims for failure to comply with *Ueland*, the Court of Appeals reasoned that the *Ueland* rule applies only to consortium claims resulting from a parent's *non-fatal* injuries, *i.e.*, from a parent's injury that doesn't "culminate in death." *Slip Op.* at 13. There is no meaningful distinction between the consortium lost as a result of a parent's fatal versus non-fatal injuries, and nothing in *Ueland* suggests otherwise.

The concern that prompted this Court in *Ueland* to require joinder of children's consortium claims in the parent's underlying personal-injury action had nothing to do with whether the injured parent was living, or living but terminally ill, or dead, or with any supposed differing natures or degrees of consortium lost. Rather, this Court was primarily concerned with the *prospects of multiple suits*: without a joinder requirement, "there could be as many claims as the injured parent has children." *Ueland*, 103 Wn.2d at 136-37. This Court's concern about multiple suits is obviously just as applicable where the parent has died as where the parent is living.

The Court of Appeals' decision purports to recognize different, and unworkable, joinder rules depending on whether the injured parent is living, critically ill, may eventually die, or is already dead. Indeed, this living-or-dead distinction would lead to anomalous and nonsensical results. When the *Brandes I* suit was filed, Barbara—the injured parent—was *alive*; even under the Court of Appeals' narrow reading of *Ueland*, the children's loss-of-consortium claims were required to be joined with their mother's suit at that time, if "feasible." The fact that Barbara later died during her lawsuit

should not operate in effect to retroactively *excuse* the children's failure to join their loss-of-consortium claims at the outset of *Brandes I* as required by *Ueland*.

Similarly, under the Court of Appeals' decision, joinder of a child's loss-of-consortium claim would *not* be required under *Ueland* if the injured parent *dies* as a result of an injury; but joinder *would* be required if the injured parent lives, albeit in a permanent vegetative state. But *Ueland* itself noted that the child's loss "is nearly the same in both cases." 103 Wn.2d at 134. Despite this Court's interest in resolving such anomalies in *Ueland*, the Court of Appeals' decision creates new ones and injects uncertainty into the basic pleading requirements for personal-injury and wrongful-death suits.

The Court of Appeals' decision now creates a perverse incentive in asbestos and other cases involving fatal or potentially fatal illnesses to *piecemeal* the dispute by strategically reserving the loss-of-parental-consortium claims until after the parent has died. Its decision thus approves—indeed incentivizes—unfair and purely strategic choices by plaintiffs' counsel to bring serial actions against different sets of defendants based merely on a plaintiff's present or predicted future health status. This possible "multiplicity of litigation" is exactly what this Court has cautioned against, and it is precisely the reason why this Court adopted the joinder requirement in *Ueland*. *See Ueland*, 103 Wn.2d at 137.

Had the Brandes children fulfilled their joinder obligation under *Ueland*—either at the outset of *Brandes I* when their mother was alive, or

when their mother later passed away during the *Brandes I* trial and they had the opportunity to assert and join their wrongful-death claims in that case—their loss-of-consortium claims would have been submitted to the same jury that ultimately decided the survival action. That would have served the policy underlying the *Ueland* joinder rule: avoiding multiplicity of suits and the risk of inconsistent results.

*Ueland*'s equitable limitation on asserting parental-consortium claims—requiring that they be joined to the injured parent's action when feasible—serves the same ends as *Deggs*' reaffirmation that wrongful-death actions should continue to be subject to equitable limitations. Both limitations serve to prevent multiplicity of litigation, claim splitting, double recovery, and inconsistent results. This Court should grant review under RAP 13.4(b)(1) and (4), and hold that the *Ueland* joinder requirement bars Brandes' wrongful-death claims.

## VI. CONCLUSION

This Court should grant review because the Court of Appeals' decision conflicts with this Court's decisions in *Deggs* and *Ueland*.

Respectfully submitted: October 3, 2018.

CARNEY BADLEY SPELLMAN, P.S.

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## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 3rd day of October, 2018.

Patti Saiden

Patti Saiden, Legal Assistant

# APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| RAMONA C. BRANDES, as Personal Representative of the Estate of BARBARA J. BRANDES,<br><br>Appellant,<br><br>v.<br><br>BRAND INSULATIONS, INC., CBS CORPORATION, a Delaware corporation, f/k/a VIACOM, INC., successor by merger to CBS CORPORATION, a Pennsylvania Corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION; PARSONS GOVERNMENT SERCIVES, INC.; and SABERHAGEN HOLDINGS, INC.,<br><br>Respondents. | No. 74554-9-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: May 29, 2018 |



MANN, A.C.J. — In general, a wrongful death action accrues at the time of death so long as the deceased had a subsisting cause of action at the time of death. This general rule, however, is subject to exceptions. One exception arises where the deceased, after receiving the injuries that later resulted in death, pursues a course of conduct that makes it inequitable for their heirs to later pursue a cause of action for wrongful death. As our Supreme Court recently affirmed, the inequitable "postinjury

category of extrinsic limitations on the availability of the wrongful death action includes prior litigation, prior settlements, and the lapsing of the statute of limitations." Deggs v. Asbestos Corp., 186 Wn.2d 716, 726, 381 P.3d 32 (2016).

In this case, after being diagnosed with mesothelioma, Barbara Brandes brought a personal injury action against Brand Insulations Inc. (Brand) and other entities. Barbara's action against Brand was converted to a survivorship action after she died during her trial.[1] The jury returned a verdict in favor of the estate. After a judgment was entered, the estate brought the present wrongful death action against Brand, CBS Corporation (CBS), Parsons Government Services (Parsons), and Saberhagen Holdings, Inc.[2] The trial court dismissed the wrongful death action against all the defendants after concluding the claims were extinguished by the prior judgment in the survivorship action.

Because the estate recovered from prior litigation against Brand, we are bound by Deggs and affirm the trial court's dismissal of the wrongful death action against Brand. However, because they were not parties to the estate's prior litigation, we reverse the trial court's dismissal of the wrongful death action against Parsons and CBS and remand for further proceedings.

## FACTS

Barbara Brandes was diagnosed with mesothelioma on June 16, 2014, at the age of 79. In August 2014, she filed a complaint for personal injuries against multiple

[1] Because there are two parties with the name "Brandes" in this case, and because of the similarity of opposing parties' names, Brand and Brandes, we refer to Barbara by her first name. No disrespect is intended.

[2] Saberhagen was dismissed as a party to this appeal on February 14, 2017.

defendants, including Brand. Barbara alleged that Brand negligently sold and installed asbestos thermal insulation products at the Atlantic Richfield Cherry Point refinery where her husband worked, causing her to sustain "take home" exposure to asbestos fibers in Brand's product. Barbara's 2014 complaint did not name CBS, Parsons, or Saberhagen.

A trial began on April 6, 2015. By the second day of trial, Barbara had settled with all defendants except Brand for a total of $1,965,710.76. In each settlement, Barbara specifically released the defendant from all claims arising out of her present personal injury claim as well as any future wrongful death claims. Thirteen days into the trial, Barbara died. The next day was to be the final day of trial, including the final presentation of Brand's evidence and closing arguments.

The trial court granted plaintiff's motion to substitute Barbara's daughter, Ramona Brandes, as personal representative of her mother's estate, and authorized continuation of the trial as a survivorship action for Barbara's personal injury claims. The parties agreed to inform the jurors of Barbara's death, and to eliminate any instructions for Barbara's future damages. The estate confirmed that it was not seeking to add any new claims or evidence, confirming it was not pursuing any potential wrongful death claims at that time.

Following a day of deliberation the jury returned a verdict for the plaintiff, and awarded the estate $3,500,000 in non-economic damages. Brand filed a motion for a new trial, or in the alternative, a remittitur. The trial court granted remittitur, reducing the jury's verdict from $3,500,000 to $2,500,000. The trial court then allocated 20 percent of the settlement proceeds to the future wrongful death claims and reduced the

judgment against Brand by 80 percent in consideration of payments received from the settling defendants. After offsetting the balance of the settlement proceeds from the damages award, the estate was awarded a net judgment of $927,431.39 against Brand. The judgment was entered on June 19, 2015.

Both parties appealed. In an unpublished decision, this court affirmed the jury's verdict but reversed the remittitur, and remanded for "the trial court to reinstate the jury's verdict and damages award." See Estate of Brandes v. Brand Insulations, Inc., No. 73748-1-I, slip op. at 23 (Wash Ct. App. Jan. 23, 2017) (unpublished), http:www.courts.wa.gov/opinions/pdf/737481.pdf.

On July 22, 2015, Ramona Brandes, acting as personal representative of Barbara's estate, filed a complaint for wrongful death against Brand, CBS, Parsons, and Saberhagen on behalf of Barbara's eight children. The estate sought economic damages for lost financial support and non-economic damages for the loss of their parental relationship and consortium with their mother.

On November 3, 2015, Brand filed a motion to dismiss under CR 12(b)(6), and defendants Parsons and Saberhagen joined. Brand argued that under this court's holding in Deggs v. Asbestos Corp., 188 Wn. App. 495, 354 P.3d 1 (2015), the wrongful death claims were extinguished by the judgment entered in Barbara's personal injury action against Brand.

The trial court granted the motion to dismiss on December 16, 2015. The estate filed a "corrected order" requesting that the order be amended to explicitly state it applied to all defendants. CBS filed a notice of non-opposition to the proposed

corrected order. On January 6, 2016, the court entered the corrected order stating that the action was dismissed against all defendants.

The estate appealed. We granted a stay of the appeal pending our Supreme Court's decision in Deggs, which was released on October 6, 2016. The appeal was reinstated.

## ANALYSIS

### *Standard of Review*

A trial court's ruling to dismiss a claim under CR 12(b)(6) is reviewed de novo. Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Under CR 12(b)(6), a complaint can be dismissed if it fails to state a claim upon which relief can be granted. "The court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims." Kinney, 159 Wn.2d at 842. "Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove 'any set of facts which would justify recovery.'" Kinney, 159 Wn.2d at 842 (quoting Tenore v. AT & T Wireless Servs., 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998)). CR 12(b)(6) motions should be granted "sparingly and with care." Orwick v. City of Seattle, 103 Wn.2d 249, 254, 692 P.2d 793 (1984) (internal quotations omitted).

### *Limitations on Wrongful Death Actions*

The estate argues that under the plain language of the statute, a wrongful death action is a new and distinct cause of action solely for the benefit of a decedent's heirs, thus it is unaffected by the prior judgment on the estate's survivorship action based on Barbara's personal injury claim. While we agree that the language of the wrongful

death act creates a separate cause of action on behalf of the statutory beneficiaries, we cannot agree that the judgment in the estate's survival action against Brandes had no effect on the estate's wrongful death claim.[3]

Washington's special survival statute, RCW 4.20.060, allows the executor or administrator of an estate "to recover for the decedent's damages, including any pain and suffering between the time of the injury and the time of death." Bowers v. Fibreboard Corp., 66 Wn. App. 454, 460, 832 P.2d 523 (1992). "Unlike Washington's wrongful death statutes, the survival statutes do not create new cause of action for statutorily named beneficiaries but instead preserve causes of action for injuries suffered prior to death." Otani ex rel. Shigaki v. Broudy, 151 Wn.2d 750, 755, 92 P.3d 192 (2004).

In contrast to a survival action, Washington's wrongful death statutes, RCW 4.20.010 and RCW 4.20.020, create a cause of action for the statutory beneficiaries of the deceased. Broudy, 151 Wn.2d at 755. The wrongful death statute provides, "[w]hen 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." RCW 4.20.010. The distinguishing characteristic between a wrongful death claim and a survival action is "that the wrongful death statutes govern postdeath damages of the deceased and the survival statutes govern predeath damages." Broudy, 151 Wn.2d at 755. "[T]he action for wrongful death is

[3] The beneficiaries of the special survival statute and the beneficiaries of the wrongful death statute are essentially the same. Compare RCW 4.20.020, holding the "action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren," (emphasis added) with RCW 4.20.060 "No action for a personal injury to any person occasioning death shall abate, nor shall such right of action determine, by reason of such death, if such person has a surviving spouse, state registered domestic partner, or child living, including stepchildren." (Emphasis added.)

derivative only in the sense that it derives from the wrongful act causing the death, rather than from the person of the deceased." Deggs, 186 Wn.2d at 721 (quoting Johnson v. Ottomeier, 45 Wn.2d 419, 423, 275 P.2d 723 (1954). "While the wrongful death statute exists for the benefit of the deceased's family, it is not completely separate from actions the deceased could have brought during life. These two types of actions are intertwined with each other and have consequences on each other." Deggs, 186 Wn.2d at 722.

A wrongful death action accrues "'at the time the decedent's personal representative discovered, or should have discovered, the cause of action'" Deggs, 186 Wn.2d at 721 (quoting White v. Johns-Manville Corp., 103 Wn.2d 344, 352-53, 693 P.2d 687 (1985). Thus, unlike a survival action that accrues when the deceased is first injured, a wrongful death action does not ordinarily accrue until their death. However, since the wrongful death statute was enacted in 1875, our Supreme Court has substantially limited the availability of wrongful death actions where the deceased took action post injury, but prior to their death.

Beginning with Brodie v. Washington Water Power Co., 92 Wash. 574, 576, 159 P. 791 (1916), the court held "that a release and satisfaction by the person injured of his right of action for the injury bars the right in the beneficiaries to maintain an action for his death occasioned by the injury." In Brodie, the injured person, Brodie, had settled his underlying personal injury case during his lifetime and released all claims. As a consequence, the court affirmed dismissal of his heirs' subsequent wrongful death action "because of something extrinsic to injury that resulted in their family member's death: the deceased's decision to release the defendant and thus the lack of a

subsisting cause of action at the time of death." Deggs, 186 Wn.2d at 724; Brodie, 92 Wash. at 576.

In Calhoun v. Wash. Veneer Co., 170 Wash. 152, 15 P.2d 943 (1932), the court further limited wrongful death actions through a general procedural, extrinsic limitation: the statute of limitations of the decedent's underlying cause of action. The court concluding that a wrongful death action is not available if the statute of limitations on the underlying claim had run before the deceased died. Calhoun, 170 Wash. at 159-60. The court then elaborated and refined the Calhoun reasoning in Grant. The Grant court recognized that a wrongful death "action accrues at the time of death, and that the statute of limitations then begins to run." Grant, 181 Wash. at 581. But the court concluded that "[t]he rule . . . is subject to a well-recognized limitation; namely, at the time of death there must be a subsisting cause of action in the deceased." Grant, 181 Wash. at 581. The Supreme Court once again reiterated this limitation on subsequent wrongful death actions in Johnson.

More recently, our Supreme Court was asked to overrule Grant, Calhoun, and Johnson, "to the extent they hold that the lapsing of the statute of limitations on the underlying personal injury claim bars the personal representative from bringing a wrongful death claim." Deggs, 186 Wn.2d at 727. While the court recognized that Grant and Calhoun, "may have been incorrect at the time they were announced," a majority, over a vigorous dissent, declined to overrule the prior precedents. Deggs, 186 Wn.2d at 728-729. The court again confirmed that "a wrongful death action 'accrues at the time of death' so long as there is a subsisting cause of action in the deceased' at the time of death, subject to exceptions." Deggs, 186 Wn.2d at 732-33 (quoting Grant, 181

Wash. at 581). The court further confirmed that one of the exceptions to the general rule arises where, "'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.'" Deggs, 186 Wn.2d at 726 (quoting Johnson, 45 Wn.2d at 422-23). Relative to the case before us, the Deggs court reiterated that the inequitable "postinjury category of extrinsic limitations on the availability of the wrongful death actions includes prior litigation, prior settlements, and the lapsing of the statute of limitations." Deggs, 186 Wn.2d at 726.

*Claim Against Brand*

The estate argues that because the statute of limitations on her claim against Brand had not expired prior to her death, because she had not settled or released claims against Brand, she had a subsisting cause of action at the time of her death and the estate is not foreclosed from an action for wrongful death. While we agree that Barbara had a subsisting cause of action at the time of her death, because Barbara engaged in post injury prior litigation against Brand, our Supreme Court's equitable exception applies and forecloses the estate's wrongful death action against Brand.

The estate contends that even if actions in life can foreclose a wrongful death claim, no Washington court has specifically held that a final judgment on a personal injury action is the type of conduct that extinguishes a future wrongful death claim brought by statutory beneficiaries. While the estate is correct that this is the first case specifically addressing this issue, the answer is embedded within many of our prior Supreme Court's decisions. For example, in Brodie, the court stated "a release by the party injured of his right of action, or a recovery of damages by him for the injury is a

complete defense" in a wrongful death action. 92 Wash. at 576 (emphasis added). Then in Grant, the court concluded that an action for wrongful death is extinguished by "well-recognized" exceptions including "a judgment in his favor rendered during his lifetime." Grant, 181 Wn. at 581 (citing Littlewood v. Mayor, etc., of N. Y., 89 N. Y. 24, 42 Am. Rep. 271 (1882) and Hecht v. Ohio & Mississippi Ry. Co., 132 Ind. 507, 32 N. E. 302 (1892)). And most recently, in Deggs, the court reiterated that the "postinjury category of extrinsic limitations on the availability of the wrongful death action includes prior litigation, prior settlements, and the lapsing of the statute of limitations." Deggs, 186 Wn.2d at 726 (emphasis added).[4]

The estate argues finally, that the Supreme Court's inclusion of "prior litigation" in its list of equitable reasons to foreclose wrongful death actions is dicta because it is irrelevant to the final holdings in those cases. The estate is correct that in Brodie the court was considering whether the claim was barred by a settlement and release of all claims, and Grant and Deggs were considering whether the claim was barred because the statute of limitations had run on the personal injury suit. Brodie, 92 Wash. at 574; Grant, 181 Wn. at 580; Deggs, 186 Wn.2d at 733. But while these cases did not dismiss the wrongful death claims due to "prior litigation," each specifically listed "prior litigation" among those events that would extinguish "a subsisting cause of action" in the deceased. Grant, 181 Wash. at 581; Deggs, 186 Wn.2d at 732-33. Thus, even if the inclusion of "prior litigation" was dicta, we cannot simply ignore the clearly stated intent

[4] The accompanying footnote stated that in Johnson, the court held "there was something inequitable in allowing the deceased's personal representative to maintain a suit based on injuries that the deceased had already been compensated for or had decided not to pursue." Deggs, 186 Wn.2d at 743 n.6.

of our Supreme Court to include "prior litigation" as an equitable limitation on the availability of a wrongful death claim.

Because Barbara successfully pursued "prior litigation" against Brand, dismissal of the estate's wrongful death action against Brand was appropriate under Deggs.

*Claims Against CBS and Parsons*

Unlike with Brand, however, none of the postinjury equitable limitations are present to preclude the estate's wrongful death claims against CBS and Parsons. Barbara's claims against CBS and Parsons were not barred by the statute of limitations. Nor had she settled, released, or brought previous litigation against CBS and Parsons. Because Barbara had a subsisting cause of action against CBS and Parson at the time of her death, the estate is not barred from its wrongful death claims.

CBS argues that the estate's claims should be barred by the rule against claim splitting or res judicata. Under the doctrine of res judicata, a plaintiff is barred from litigating claims that either were, or should have been, litigated in a former action. Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 859, 726 P.2d 1 (1986). "Dismissal on the basis of res judicata is appropriate where the subsequent action is identical with a prior action in four respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made." Landry v. Luscher, 95 Wn. App. 779, 783, 976 P.2d 1274 (1999). The parties do not have to be identical in both suits, although "there must be at least privity between a party to the first suit and the party to the second suit." Landry, 95 Wn. App. at 783-84. Because there is no evidence that CBS or Parsons were in privity with Brand or any other entity involved in Barbara's personal injury action res judicata does not apply.

CBS and Parsons also argue that allowing the estate's wrongful death claims to go forward creates the potential risk of "double recovery" and "inconsistent results." Both arguments fail. While this court recognized in Deggs the risk of double recovery as one reason for barring a wrongful death claim when the party has already received a prior judgment, that policy is intended to protect a specific defendant that had already been sued. Deggs, 188 Wn. App. at 510. Because the estate's wrongful death damages are distinct from those in Barbara's personal injury action, the risk of double recovery does not exist. Allowing the parties to pursue a wrongful death claim also would not risk inconsistent results. As Parsons and CBS are not in privity with Brand, Barbara's heirs will have to prove their negligence separately, thus there is no prior result with which to be inconsistent.

Finally, CBS and Parson cite Ueland v. Reynolds Metals Co., 103 Wn.2d 131, 136, 691 P.2d 190 (1984), for the proposition that Barbara's children were required to join their loss of consortium claims with Barbara's personal injury action. In Ueland, our Supreme Court, for the first time, recognized an independent cause of action for loss of parental consortium resulting from nonfatal injuries. In reaching its decision, the court addressed the injustice of denying a consortium claim to a child still reliant upon their parent for physical and emotional care, financial support, and guidance. Ueland, 103 Wn.2d at 134-35. The court noted the incongruity that Washington, at the time, recognized a wrongful death loss of parental consortium right of action, but not for consortium loss resulting from parental injury. Ueland, 103 Wn.2d at 134.

In holding that children should be permitted to recover for loss of parental consortium in cases where the parent is injured, but not killed, the court held that a

child's claim for loss of parental consortium must be joined with the injured parent's claim whenever feasible. Ueland, 103 Wn.2d at 137. Critically, the Ueland court did not explicitly or implicitly consider or require joinder of a loss of consortium wrongful death claim with a parent's action for personal injury that subsequently culminates in death. Ueland does not address claims for loss of parental consortium brought as part of a wrongful death claim, and we decline to extend its ruling here.

In conclusion, recognized limitations to wrongful death claims bar the estate's claim against Brand, and the trial court did not err in dismissing this claim. However, because Barbara has a "subsisting cause of action" against both Parsons and CBS, the trial court erred in dismissing these claims.

We reverse and remand for reinstatement of the actions against CBS and Parsons.

Mann, A.C.J.

WE CONCUR:

Dwyer, J.

Cox, J.

# APPENDIX B

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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|---|---|
| RAMONA C. BRANDES, as Personal Representative of the Estate of BARBARA J. BRANDES,<br><br>Appellant,<br><br>v.<br><br>BRAND INSULATIONS, INC., CBS CORPORATION, a Delaware corporation, f/k/a VIACOM, INC., successor by merger to CBS CORPORATION, a Pennsylvania Corporation, f/k/a WESTINGHOUSE ELECTRIC CORPORATION; PARSONS GOVERNMENT SERCIVES, INC.; and SABERHAGEN HOLDINGS, INC.,<br><br>Respondents. | No. 74554-9-I<br><br>DIVISION ONE<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

Respondents Parsons Government Services, Inc. and CBS Corporation have filed a motion for reconsideration of the court's opinion filed on May 29, 2018. A majority of the panel has determined that the motion for reconsideration should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE PANEL:

Mann, A.C.J.

## CARNEY BADLEY SPELLMAN

## October 03, 2018 - 10:33 AM

## Transmittal Information

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| **Appellate Court Case Title:** | Ramona C. Brandes v. Brand Insulations Inc., et al. |
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