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No. 91969-1

No. 71297-7

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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

Appellant,

v.

ASBESTOS CORPORATION LIMITED, et al.,

Respondents.

OPENING BRIEF OF APPELLANT

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STATE OF WASHINGTON
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ORIGINAL

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I.
INTRODUCTION

Washington courts have long recognized that a wrongful death action is a separate and distinct action for unique damages for the benefit of unique plaintiffs. That action has its own statute of limitations which is in no way affected by the decedent's failure to bring his own action. Relying on cases which impose other restrictions on a plaintiff's ability to bring the action, the defendants moved to dismiss the action because the decedent had not brought his own suit against them during his statute of limitations period. Because Washington courts have not imposed such a limitation, plaintiff and appellant here seeks to have this court overturn the ruling below and allow this case to proceed.

II.
ASSIGNMENT OF ERROR

The trial court erred when it granted summary judgment in favor of defendants and dismissed plaintiff's claims after incorrectly deciding that the plaintiff's wrongful death action was barred by the statute of limitations.

The issue in this assignment of error involves interpretation of the language of the wrongful death statute, R.C.W. § 4.20.010, and its interaction with the applicable three year statute of limitations, R.C.W. § 4.16.080(2). In this case the decedent died on December 10, 2010 and the personal representative filed this wrongful death action on July 3, 2012. The trial court found the action was barred by the statute of limitations because the decedent knew of his injury more than three years before filing of the wrongful death action.

Where a wrongful death cause of action cannot, by definition, arise until the occurrence of a **death**, and the law allows three years in which to bring the cause of action, was it error for the court to find the action time barred, despite the fact it was filed well within the three year limitation period, simply because the decedent was aware of his injury before his death and more than three years before the case was filed?

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III.
STATEMENT OF THE CASE

Mr. Roy Sundberg, the decedent in this matter, had a lengthy work history of exposure to asbestos. He was diagnosed by various doctors at various times with pleural plaques, asbestosis, lymphoma, and colon cancer, all attributable to his years of asbestos exposure. Mr. Sundberg was aware of these diagnoses by at least 1999. (Clerk's Papers ("CP") 125) That year Mr. Sundberg filed an action for personal injury against a number of defendants, alleging their responsibility for his injuries. None of the defendants here were named in that matter.

In December of 2010, Mr. Sundberg died of his asbestos-related diseases. Nineteen months later, the personal representative of his estate, his daughter Judith Deggs, filed an action for wrongful death against fifteen defendants alleging their responsibility for the wrongful death of Roy Sundberg. (CP 1-27; 53-80)

In March of 2013 the defendant Asten Johnson, Inc. filed a motion for summary judgment alleging that the plaintiff's claims

were time barred. Asten asserted that the decedent's knowledge of his injuries in 1999 began the running of the statute of limitations and that knowledge prevented his personal representative from timely asserting wrongful death and survival claims.[1]

Plaintiffs opposed the motion pointing out that the plain language of the wrongful death statute requires first that there be a death. Then, the statute of limitations, R.C.W. § 4.16.080, allows three years from the death to bring the action. At the hearing on the motion, the trial court focused extensively on the question of when the personal representative knew of the asbestos related injury. The Court discussed various scenarios in which it could be argued, despite the prior lawsuit, that the personal representative was not aware of the asbestos causation of the injuries and subsequent death. (Record of Proceedings ("RP") 15-17) The question of notice to the Personal Representative continued to trouble the discussion:

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[1]Plaintiff has acknowledged that any survival claims of Roy Sundberg, under the survival statutes, R.C.W. §§ 4.20.046(1) and 4.20.060 are barred by the three year statute of limitations. But the wrongful death cause of action is not.

THE COURT: Not really. The question -- that is not the question that the *White* court poses, and I don't think that could be the question if we were --even under the discovery rules. If you go back to the language of White, what they are saying is that the wrongful death cause of action accrues when the personal representative discovers or should have discovered that they had a cause of action; that is to say that the death was caused by asbestosis, but -- you know, I really -- I'm really having trouble with the idea that -- that they weren't on notice that the death was caused by asbestosis, or would be caused by asbestosis some time ago.

MS. GOOD: But there hadn't been a death some time ago.

THE COURT: I know.

MS. GOOD: There wasn't a death, so the question of when was the personal representative was

made aware that the death was caused by asbestosis requires that there be a death.

* * *

The wrongful death statute requires that a showing that the injury caused the death and the reading of the statutes, when you read them all together and the case law, is -- you have to figure out when the death was and when the personal representative knew or should have known or could reasonably have known what caused that death.

THE COURT: Well. here's the specific language of the Court, and I agree it is a little vague -- but okay?

"We reject defendant's assertion that as a matter of law the date of the decedent's death marks the time at which a wrongful death action accrues."

The very argument I hear you making to me.

MS. GOOD: Urn-hum.

> THE COURT: "Instead we hold a wrongful death action accrues at the time the decedent's personal representative discovered or should have discovered the cause of action. Whether death marks the time at which a cause of action could have been prosecuted is a question for the trier of fact."
>
> And I'm having trouble here with whether or not we really have a question of fact here. Do you follow me?

(RP 22-24)

After hearing from both parties, and struggling with interpretation of case law, the court, on its own motion, granted a Rule 56f delay in order for plaintiff's counsel to obtain information from the personal representative about when the representative discovered the asbestos causation. (RP 25)

On June 18, 2013 plaintiff's counsel filed the supplemental opposition to defendant's motion. In that opposition plaintiff's counsel provided a sworn declaration that the personal representative

had affirmed that she had no idea her father's death would be caused by his asbestosis until very shortly before his death. Though she knew of the diseases earlier, she did not know that they would lead to his ultimate death. Noting that the question of "when the personal representative knew," was a question of fact, plaintiff again asked the court to deny the summary judgment motion.

In reply, Asten claimed the personal representative's knowledge was irrelevant because the claim was barred by the three year statute of limitations faced by Mr. Sundberg in 1999. Citing additional case law, Asten claimed that the decedent's failure to bring an action against these defendants during his lifetime, and within his three-year statute of limitations, prevented the personal representative from bringing a wrongful death action even though that action was initiated within three years of Sundberg's death. Asten also objected that plaintiff's counsel's declaration was inadmissible hearsay of what the personal representative knew and when she knew it.

The court again heard the matter on June 21, 2013. (RP 29)

After hearing argument from the parties the court commented extensively about the policy reasons supported by the existence of statutes of limitations. She decided that the extensive passage of time between the injury and the bringing of the action mandated granting the motion based on the running of the statute. That same day the court entered an order granting the motion and dismissing the claims against defendant Asten Johnson, Inc. (CP 116-18)

Having rendered her decision as to Asten, she was asked whether the dismissal applied to all defendants remaining in the case. The court responded that only one motion was before her, but that when others heard the result they would want dismissals as well. She then agreed to allow the remaining defendants, if they wanted, to join together to move for dismissal without the need for additional briefing or hearing. (RP 39-42)

The Additional Defendants' Motion

On October 25, 2013 defendants Asbestos Corporation Limited and Ingersoll-Rand, Inc. jointly filed their motion for dismissal on the same grounds. As that motion noted, the parties had

agreed to waive oral argument in light of the prior hearing on the Asten-Johnson motion and the court's stated intent to apply its holding to subsequent motions. On October 31, 2013 defendant CBS Corporation filed a joinder to the motion seeking dismissal based on the statute of limitations. Plaintiff responded to the motion with the same arguments previously made, and the defendants replied, again relying on essentially the same arguments and case law. On November 27, the court entered an order granting summary judgment in favor of Asbestos Corporation Limited and Ingersoll-Rand. (54) CBS filed a motion to modify that order, pointing out that it had joined the motion and requesting that a modified order also grant it summary judgment and dismissal. (57) The court entered the modified order on January 6, 2014. (58) Plaintiff's appeals of the two orders granting dismissal to the four defendants were consolidated by order of this court on April 4, 2014.

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IV.
LEGAL ARGUMENT

A. A wrongful Death Action Cannot Accrue Until there is a Death.

The wrongful death statute, RCW 4.20.010 provides as follows:

> 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.

The language is clear that a death is necessary to invoke the application of the statute. Until the wrongful act produces a death, there can be no wrongful death action. This simple proposition is repeatedly stated in the case law. The Washington Supreme Court has held that an action under the wrongful death statute accrues "at the time of death" even though the deceased had pending at the time of his death an action for the injuries which caused his death. *Grant v. Fisher Flouring Mills Co.,* 181 Wash. 576, 44 P2d 193 (1935).

The statute of limitations for bringing a wrongful death action

is not in dispute here. All parties agree that the limitations period for a wrongful death action is three years. RCW 4.16.080; (34, pg3); (48 pg 5) The dispute concerns the time at which the limitations period begins to run. Defendants take the position that the wrongful death statute begins to run at the time the decedent knew of his injury and the cause thereof. Plaintiff, relying on the language of the statute, takes the position that the statute for wrongful death cannot begin to run until the death occurs.

Washington courts long ago stated: "The general holding of the courts is that the statute of limitations does not begin to run until there is some one to sue or liable to be sued, ..." *McAuliff v. Parker*, 10 Wash. 141, 146; 38 Pac. 744 (1894) In this case, there was no one liable to be sued for the wrongful death of Mr. Sundberg until he died. At that time his personal representative had three years to bring an action for that death. He died in December of 2010 and the wrongful death action was filed 19 months later, well within the three year statute of limitations.

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B. The Wrongful Death Action is Not Barred by the Prior Decisions of the Washington Appellate Courts

1. The Wrongful Death Statute and Survival Statute Differ in Their Application and Effect

Washington law provides that the wrongful death action is not a survival statute, but rather a new cause of action solely for the benefit of the wife, husband, child or children of the person whose death was caused by the wrongful act. *Brodie v. Washington Water Power Co.,* 92 Wash 574, 159 P. 791(1916); *Machek v. City of Seattle,* 118 Wash 42, 203 P. 25 (1921); *Grant v. Fisher Flouring Mills Co.,* 191 Wash 576, 44 P.2d 193 (1935); *Ryan v. Poole*, 182 Wash 532, 47 P.2d 981 (1935); *Maciejczak v. Bartell*, 187 Wash 113, 60 P.2d 31 (1936). The defendants claim the wrongful death action is barred, not by any failing or delay on the part of the personal representatives, or the beneficiaries of the claim (Mr Sundberg's wife and daughter), but by Sundberg's failure to sue them when he was alive.

Plaintiff admitted in their opposition to the defendants'

motions that the survival actions are barred.[2] Survival actions, according to statute, RCW 4.20.046 continue the action of the decedent.[3] Accordingly, they are brought on account of the decedent's injuries and seek to recover compensation for those injures.[4] Because the decedent himself did not bring an action against these defendants for those injuries, his statute of limitations bars bringing a survival action to recover those damages. But the wrongful death claims of the heirs are different. The heirs have a cause of action for their separate and distinct damages - damages resulting from the death of the decedent and unique and solely theirs,

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[2]See Plaintiff's Response in Opposition to Defendant AstenJohnson, Inc. Motion for Summary Judgment

[3]"All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section. . .." RCW § 4.20.046

[4]The limitation to personal damages of the decedent is spelled out in the statute: "[T]he personal representative shall only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation **personal to and suffered by a deceased** . . .." (Emphasis added)

not the decedent's.

The case law has long made clear that the action of the heirs is a new and distinct action solely for their benefit. A claim for damages to a decedent or the decedent's estate is dependent upon the survival statutes to continue the injured person's claim after the death as an asset of his estate. A claim arising out of the same wrongful act, for wrongful death for the benefit of the decedent's heirs or next of kin, is not one that belonged to the decedent, but is a new cause of action created by statute and based upon the death itself. *Warner v. McCaughan*, 77 Wn.2d 178, 460 P.2d 272 (1969). The Statute provides for the recovery of "pecuniary damages" suffered by the heirs as a result of the death. *Blodgett v. Great N. Ry.*, 4 Wn. App. 741, 483 P.2d 1276 (1971). Pecuniary loss includes not only the monetary contributions the decedent would have made to the beneficiaries, but also intangible losses; no damages may be awarded for grief or bereavement, but an award is authorized for the loss of love, affection, care, service, companionship, society, training, and consortium the decedent would have provided to the beneficiaries.

Chapple v. Ganger, 851 F. Supp. 1481 (E.D. Wash. 1994).

2. The Case Law Does Not Support The Defendants' Position or the Court's Decision

The defendants claim that three cases, *Calhoun v. Washington Veneer Co.,*[5] *Johnson v. Ottomeier,*[6] and *Grant v. Fisher Flouring Mills,*[7] establish and affirm the rule they would like to have enforced: that the expiration of the statute of limitations on the decedent's personal injury case bars the personal representative from bringing an action on behalf of the heirs. But those cases do not support the position they espouse. A review of those cases shows that neither the facts, the holdings, or the policy reasons expressed support the conclusion reached below.

a. Calhoun v. Washington Veneer Co.

The essential point to note when evaluating the holding of

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[5]170 Wn 152, 15 P.2d 943 (1932)

[6]45 Wn.2d 419, 27 P.2d 723 (1954)

[7]181 Wn 576, 44 P.2d 193 (1935)

Calhoun is that it was a worker's compensation case. This fact formed the foundation for the court's ultimate holding that the spouse's attempt to bring a wrongful death action was barred by untimely pursuit of the personal injury action.

In that case, Calhoun worked for the veneer company in a closed gluing room exposed to toxic emissions which eventually caused him to develop carbon bisulphide poisoning which he alleged was due to the employer's negligence in not properly ventilating the room. His action was filed in September of 1931 and he died on October 17, of 1931. His spouse, as personal representative amended the complaint to be more specific and added a claim for wrongful death. The spouse asserted that her claim was brought under common law principles based upon a breach of the master's duty to exercise ordinary care in furnishing the servant with a reasonably safe place in which to work. (170 Wn 152, 157)

The court reviewed the cases relied upon by the spouse and then pointed out why this case was different.

In this state, we have a different situation. We have

> the industrial insurance or workmen's compensation act, in which it is provided:
> ". . . that all phases of the premises are withdrawn from private controversy, . . . and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided." (*Id.* at 158)

The court went on to explain that the spouse did not have a cause of action because the only remaining bases for such action were the workmen's compensation act and the portions of the factory act which had not been superceded by the workmen's compensation act. Because the injury was in the realm of employment, the employment statutes governed, and the statute did not permit an action because of death, but only because of the injury attributable to the employer.

> As we have heretofore determined, the cause of action accruing to Claude Calhoun under the factory act necessarily accrued about the middle of May, 1928. 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. Under the statute, the claim for damages accrued, if at all, at the time of the injury to Claude Calhoun.

So, while it is technically true that the court held the action was barred due to the passing of the statute of limitations, the circumstances and facts of the case make the holding inapposite here.

b. Johnson v Ottomeir

Reliance on *Johnson* is similarly inappropriate because, although the court discussed the effect of statutes of limitations on actions for wrongful death, the decision itself was not based on that point. Any language about the effect of the personal injury statute of limitations on the wrongful death statute was merely dicta.

Mr. Ottomeier killed his wife and then killed himself. A personal representative was appointed to administer both estates. Mrs. Ottomeier's son petitioned the court to be appointed representative of his mother's estate. He claimed her estate had a cause of action against the husband's estate and it would be a conflict of interest for the same individual to represent both estates. The trial court denied the petition because the law in effect at the time prevented a wife from suing her husband. Therefore it was

argued, her estate was similarly prevented from suing. Although the statute did not limit the wrongful death action in this way, on appeal, the personal representative took the position that the court had previously adopted a broad policy of exclusion preventing actions which could not have been brought by the decedent.

In discussing the application of its case law, the court agreed that "in construing this act, we have held that the action may be maintained 'where the deceased might have maintained it had he lived.'" (45 Wn 2d 419, 421) But it went on to explain the types of cases which prompted those holdings. The first category included those cases in which the defense was inherent in the tort itself. This included cases involving self defense, contributory negligence, assumption of the risk, and those in which the decedent was engaged in criminal misconduct. (*Id.* at 422) The court then explained that the second category of cases in which the rule of exclusion had been applied involved:

> situations in which, after receiving the injuries which later resulted in death, the decedent pursued a course of conduct which makes it inequitable to recognize a

> cause of action for wrongful death. Among such cases are *Brodie v. Washington Water Power Co.*, 92 Wash. 574, 159 Pac. 791, where decedent gave an effective release and satisfaction; and *Calhoun v. Washington Veneer Co.*, 170 Wash. 152, 15 P. (2d) 943 (as interpreted in *Grant v. Fisher Flouring Mills Co.*, 181 Wash. 576, 44 P. (2d) 193), where the statute of limitations had run prior to decedent's death.

This is the only reference to a general rule of exclusion based on the statute of limitations. After that discussion, however, the court went on to evaluate the exclusion claimed by the representative. The court explained the genesis of its decision as follows:

> It was originally the common view that Lord Campbell's Act, 9 and 10 Vict., c. 93, § 1, which first established the right to sue for wrongful death, provided for the survival of a cause of action possessed by the deceased. It is now generally recognized, however, that the act gives to the heirs, or the personal representative on their behalf, a new right of action. Our court accepts this view. (Citations omitted)
>
> Not having as its basis a survival statute, the action for wrongful death is derivative only in the sense that it derives from the wrongful act causing the death, rather than from the person of the deceased. (Citations omitted) Needless to say, the wife's disability to sue is personal to her, and does not inhere in the tort itself. (Citation omitted)

> The wife's personal disability necessarily disappears with her death, and hence is not transferable to the personal representative, who has a new cause of action.

Thus, the Court's holding had nothing to do with the statute of limitations for initiating a wrongful death case. It turned solely on the existence, or non-existence of the marital bar to the claim. The only statute of limitations issue addressed was the *dicta* in the decision explaining the exclusions the court had previously applied to bar wrongful death actions. That *dicta* referenced *Calhoun* which, as we have shown, is inapposite here because it arose in the context of a workmen's compensation claim.

The court's additional comment on *Calhoun*, that it was interpreted in *Grant v. Fisher Flouring Mills*,[8] adds nothing to the precedential value of the *Johnson v. Ottomeier* decision here. Also, a closer reading of the *Grant* decision shows that it too arose in the context of workmen's compensation. While stating that the action for wrongful death accrues and the statute of limitations begins to run at the time of death, the court there noted:

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[8] 181 Wash 576 (1935)

> The rule, however, is subject to a well recognized limitation, namely, at the time of death there must be a subsisting cause of action in the deceased. Tiffany, Death by Wrongful Act (2d ed.) § 124. Under this limitation, it has been held that the action for wrongful death is extinguished by an effective release executed by the deceased in his lifetime (*Brodie v. Washington Water Power Co., supra; Mellon v. Goodyear*, 277 U.S. 335, 48 S. Ct. 541, 72 L. Ed. 906); by a judgment in his favor rendered during his life time (*Littlewood v. Mayor etc. of N.Y.*, 89 N.Y. 24, 42 Am. Rep. 271; *Hecht v. The Ohio & Mississippi R. Co.*, 132 Ind. 507, 32 N.E. 302); by the failure of the deceased to bring an action for injuries within the period of limitation (*Flynn v. New York, N.H. & H.R. Co.*, 283 U.S. 53, 51 S. Ct. 357, 72 A.L.R. 1311, 75 L. Ed. 837)

Grant, supra, 181 Wash 576 at 581.

This reference, placing reliance on *Flynn v. New York, N.H. & H.R. Co.* for the conclusion that a wrongful death action is barred by the decedent's failure to bring an action for injuries during the limitations period, continues the trend of reliance on employer - employee compensation cases for that holding. *Flynn* was an action brought under the Federal Employer's Liability Act, a statute created by congress to place liability on railroads engaged in interstate commerce for the injuries sustained by their employees. Flynn was

injured in December of 1923 and died on September 1, 1928. The executor's action for his death was brought on May 15, 1929. The Supreme Court's very cursory opinion upholding the defendant's demurrer on statute of limitations grounds avoids explanation. It merely cites to three additional cases to support the holding that the heir's action was barred by the decedent's failure to bring an action within the two year statute of limitations.

One of those cases, *Engel v. Davenport*, 271 U.S. 33 (1926) involved a merchant seaman who sued for injuries incurred while aboard ship. The issue was whether the Merchant Marine Act, under which he sued, had incorporated the two year statute of limitations from Federal Employer's Liability Act or whether the one year California statute of limitations effectively barred his action. The Supreme Court decided the Federal act included the statute of limitations and that the claim was timely. Nothing in the case addressed a wrongful death claim.

The second of the three cases, *Mellon v. Goodyear,* 277 U.S. 335 (1928) was an action brought by an employee of the railroad

under the Federal Employer's Liability Act. In addition to this workmen's compensation element to the case, the decedent had also entered a settlement with the defendant and executed a release. The court held there was no action remaining to the executor. Again, neither of those circumstances are applicable here and there is no statute of limitations ruling here.

Finally, the court cited to *Michigan Central R. Co. v. Vreeland*[9] which also arose under the Federal Employer's Liability Act. In that case the decedent had survived his on-the-job accident for a short time before he died. The employer argued the wrongful death action was barred because the death was not instantaneous and under common law the death of a person was not a compensable injury. The court interpreted the act to create a new cause of action for the benefit of the specified heirs and ruled that the action was not barred by the short interval between injury and death. The holding of *Vreeland* does not apply here.

While not holding on statute of limitations grounds, the

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[9]227 U.S. 59 (1913)

Vreeeland court did contain *dicta* about the application of wrongful death statues and statutes of limitations:

> But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. Tiffany, Death by Wrongful Act, § 124; *Louisville, E. & St. L.R.R. Co. v. Clark,* 152 U.S. 230; *Read v. G.E. Ry., L.R.* 3 Q.B. 555; *Hecht v. O. & M. Ry.*, 132 Indiana, 507; *Fowlkes v. Nashville & Decatur R.R. Co.*, 9 Heisk. 829; *Littlewood v. Mayor*, 89 N.Y. 24; *Southern Bell Tel. Co. v. Cassin*, 111 Georgia, 575.

The cases cited there do limit the heirs' right to bring a wrongful death action, but they do not do so on the basis of the decedent's failure to file an action within the personal injury statute of limitations In *Hecht v. O. & M. Ry.*, 132 Indiana 507, the court held that it was not the intention of the Legislature that where a person guilty of a wrong was once subjected to a lawsuit by the injured party in his lifetime, and compelled to pay all the damages resulting from the injuries sustained by the wrongful act, he should again be liable to an action in favor of the personal representatives of

the injured party after his death, and be again compelled to respond in damages for the same act. That is not the situation here. These defendants have never been held liable for their wrongful acts causing injury to Mr. Sundberg or to his statutory beneficiaries.

Littlewood v. Mayor, 89 N.Y. 24 (1882) involved a case against the city of New York and some of its officials. The decedent had brought suit and obtained a judgment against the defendants. The court in this 132-year-old case held that the legislature had not intended to have a defendant twice be liable for the same wrongful act. Again, that is not relevant here because none of these defendants have previously been held liable for their wrongful acts toward Mr. Sundberg.

Southern Bell Tel. Co. v. Cassin, 111 Georgia 575 (1900), similarly involved an accord and satisfaction. The decedent was injured by the company. He brought an action against the company, and the parties settled and decedent gave a release for all his injuries. After the decedent's death, his widow brought a second action against the company, claiming that the decedent's injuries had caused

his death. The trial court found for the widow. On appeal, the court reversed. The court found that any action the widow might have brought arose out of the dispute between the decedent and the company. She took only so much of the dispute as the decedent left her. Because the decedent had settled with the company before his death, no action remained for the widow to continue. Here, there has been no action against these defendants. The entire action remains in favor of the heirs.

Louisville, E. & St. L.R.R. Co. v. Clark, 152 U.S. 230, does not hold that the wrongful death right of action is based on the decedent's right to have brought an action at the time of his death. It holds the opposite. There, the decedent was injured in an accident while traveling on the defendant's cars on November 25, 1886. His death from those injuries occurred on February 23d, 1888. His spouse bought an action for death on April 28, 1888 under the Indiana wrongful death statute which provided a two year statute of limitations. The defendant demurred because under the common law an action could not be brought more than a year and a day after the

injury unless an action of criminal prosecution had been brought. The U.S. Supreme Court held that rule could not be applied to bar the action. The court said:

> In the light of this construction it would seem to be an unreasonable interpretation of the statute to hold that the personal representative has no right of action, in any case, where a year and a day passes after the injury before death occurs. The statute, in express words, gives the personal representative two years within which to sue. He cannot sue until the cause of action accrues, and the cause of action given by the statute for the exclusive benefit of the widow and children or next of kin cannot accrue until the person injured dies. Until the death of the person injured, the "new grievance" upon which the action is founded does not exist. To say, therefore, that where the person injured dies one year and two days after being injured, no action can be maintained by the personal representative, is to go in the face of the statute, which makes to [*sic*] distinction between cases where death occurs within less than a year and a day from the injury, and where it does not occur until after the expiration of one year and a day. Although the evidence may show, beyond all dispute, that the death was caused by the wrongful act or omission of the defendant, and although the action by the personal representative was brought within two years after the death, yet, according to the argument of learned counsel, the action cannot be maintained if the deceased happened to survive his injuries for a year and a day. We cannot assent to this view. Was the death, in fact, caused by the wrongful act or omission of the defendant? That is the vital inquiry in each case.

> The statute imposes no other condition upon the right to sue. The court has no authority to impose an additional or different one. If death was so caused, then the personal representative may sue at any time within two years from such death.

Louisville, E. & S. L. R. Co. v. Clarke, 152 U.S. 230, 238-239 (U.S. 1894)

In concluding that the spouse's action was not barred by the year and a day rule the court further stated:

> As the statute, according to the construction placed upon it by the highest court of Indiana, allows the personal representative to sue within two years after the death of the testator or intestate, where death was caused by the wrongful act or omission of the defendant, we cannot, by mere construction, restrict that right to cases in which the death occurred within a year and a day after such act or omission. We repeat that, where death was caused by the wrongful act or omission of another, the right of the personal representative, suing for the benefit of the widow and children or next of kin, to recover damages on account of such death, is complete under the statute, and may be asserted by action brought at any time within two years from the death.

Id. at 242

That case, far from acting as a bar to the action here supports it in every regard. The time to bring the action starts at the death.

An exclusion inherent in the tort, such as self defense, assumption of the risk, or the deceased being engaged in criminal conduct at the time may bar a recovery for the reason that the death would therefore not be "wrongful." But the mere passage of time between the wrongful act and the death cannot bar an action which doesn't accrue until death.

C. Policy Considerations Weigh in Favor of the Plaintiff

Strong policy considerations support the position taken by the Sundberg heirs here. The defendants claim policy is on their side because statutes of limitations insure justice and permit finality and certainty for defendants. They seek such finality by hoping to deprive the heirs of compensation for their injuries caused by the defendants' wrongful acts. Such a result would produce finality, but it would be a long way from producing a just result.

The legislature, by statute, intended to provide the personal representative a means to pursue the losses incurred by the heirs. Those losses are distinct and different from the losses suffered by the

injured party. In fact, the statute specifically limits the recoverable damages to those incurred directly by the heirs. Allowing the injured party to deprive the heirs of that right, by either action or inaction, defeats the intent of the legislature.

As shown above the cases which lay the foundation for the interpretation of the wrongful death statutes are very old. They date not to the last century, but to the century before that - a time when marital relations and rights were far different than today. Thus the need to specifically carve out an exception for Mrs. Ottomeier's heirs in the face of the argument that she could not have brought an action because the married couple were one legal entity. The conflict in logic was articulately expressed by the Kansas Supreme Court:

> In some states, where the statute for wrongful death was held to create a new right of action, distinct and independent of any right of action the injured person had in his life time, it has been held that a release executed by the injured person before his death cannot deprive the beneficiary of the right of action for the wrongful death which the statute gives him. In *Rowe v. Richards et al.*, 35 S.D. 201, 215, 151 N.W. 1001, it was said:

> "We must confess our inability to grasp the logic of any course of so-called reasoning through which the conclusion is drawn that the husband simply because he may live to suffer from a physical injury and thus become vested with a cause of action for the violation of his own personal right, has an implied power to release a cause of action--one which has not then accrued; one which may never accrue; one which from its very nature cannot accrue until his death; and one which, if it ever does accrue, will accrue in favor of his wife and be based solely upon a violation of a right vested solely in the wife."
> To the same effect is *Blackwell v. American Film Co.*, 189 Cal. 689, 209 P. 999 (Cal.), citing earlier California cases to the same effect; *Denver Railroad Co. v. Frederic*, 57 Colo. 90, 140 P. 463; *Maguire v. Traction Co.,* 33 Ohio Cir. Ct. 24; *Milwaukee Coke & Gas Co. v. Industrial Commission,* 160 Wis. 247, 151 N.W. 245; *Davis v. Railway*, 53 Ark. 117, 13 S.W. 801. It will be noted that these cases hold that the respective rights of action given by the statute are separate and distinct; just as the supreme court holds the rights of action to be under the statute in question.

Goodyear v. Davis, 114 Kan. 557, 570 (Kan. 1923)

The fact that a decedent previously recovered for his injuries should not bar the statutory heirs from their recovery. The earlier recovery, if any remains, is subject to the distribution dictates that may arise from a will or trust, or simply the payment of the estate's bills, and the heirs would see nothing of that recovery. Should they

not be entitled to a recovery for their injuries, as the legislature has decreed?

To see the injustice of the rule the defendants seek to impose, simple examples will suffice: (1) A married man H has a good job and supports his family economically. But, he has a mistress. That person, M, in the course an angry exchange, shoots him. H refuses to sue her. The bullet can't be removed due to its proximity to H's heart. Three years and one day later H dies when the bullet shifts and impacts his heart. Is W, who is deprived of all support for herself and her children, whose injury is totally separate from that of H, denied a right to compensation for damages because her cheating husband wouldn't sue his mistress?

(2) One person, V, is beaten by two assailants. V sues A1 and recovers for his injuries. Three years and one day after the beating V dies due to his injuries. His spouse sues A1 and A2 for the wrongful death. A1 claims exclusion because of his prior satisfaction of the judgment in favor of V. A2 claims exclusion because the personal injury statute of limitations has run. Is the

spouse to be deprived of her cause of action for her damages because of the actions or inaction of her now deceased husband?

The answers to these uncomfortable examples are to be found in a decision of the California Court of Appeal:

> Some jurisdictions consider the cause of action to be derivative of the injured person's rights. In those instances, the heirs "can sue only if the decedent would still be in a position to sue." (Rest.2d Judgments, § 46, com. b, pp. 17-18.) And, any adjudication of a personal injury claim prior to death, favorable or not, collaterally estops the injured party's heirs from thereafter litigating a wrongful death action. (Ibid.)
>
> However, when a wrongful death statute provides for an independent cause of action in the heirs, the heirs are not precluded from litigating their own damages if the injured party prevailed in the personal injury action. (Rest.2d Judgments, supra, § 46, com. c, p. 19.) In fact, in such an instance, the heirs may assert collateral estoppel against the defendant on the issue of liability. (Ibid.) But if the judgment was adverse to the decedent, the prior action is usually deemed a bar to the heirs relitigating the issue of the defendant's liability. (Rest.2d Judgments, supra, § 46, rptr.'s notes, p. 21.)

Brown v. Rahman, 231 Cal. App. 3d 1458, 1461 (Cal. App. 4th Dist. 1991) fn 3

Washington courts have repeatedly held that the wrongful

death statute creates a new and independent cause of action. The cause of action is not the act of the tortfeasor, but rather the injury to the claimant. When defendants negligently exposed Mr. Sundberg to asbestos and caused him to suffer disease, that conduct created his cause of action. When that negligently caused disease resulted in his death, that death created the heirs' cause of action. That cause of action has not been waived, it has not been barred by the statute of limitations, and it is not precluded by the decedent's case against others who also contributed to his injury. Nothing in Washington law precludes this matter from proceeding to trial.

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CONCLUSION

Neither the precedent of the Washington courts nor public policy hold that this case should be barred by any statute of limitations. Accordingly, appellant requests this court reverse the ruling of the lower court and remand the matter for trial.

Dated: May 30th, 2014

Respectfully submitted,

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By:_____
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CERTIFICATE OF SERVICE

JUDY R. DEGGS, as Personal Representative for the Estate of RAY GORDON SUNDBERG, deceased Appellant v. ASBESTOS CORPORATION LIMITED, et al., Respondents

KCSC Cause No. 12-2-22805-1 SEA
Appellate Court No. 71297-7

I hereby certify that on the below date, I served a true and correct copy of

- APPELLANT'S OPENING BRIEF

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