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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellant,

v.

ASBESTOS CORPORATION LIMITED, et al.,

Respondents.

BRIEF OF AMICUS CURIAE
BERGMAN DRAPER LADENBURG PLLC

Matthew P. Bergman, WSBA# 20894
Brian Ladenburg, WSBA# 29531
Colin B. Mieling, WSBA# 46328
Bergman Draper Ladenburg PLLC
821 Second Avenue, Suite 2100
Seattle, WA 98104
(206) 957-9510

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Ronald R. Carpenter
Clerk 

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

RAP 13.4(h) and 10.3(e) require an amicus curiae to describe its interest in a case pending before this Court. Bergman Draper Ladenburg, PLLC (“BDL”) is a Pacific Northwest law firm with offices in Seattle and Portland. Its practice consists of the representation of victims of toxic torts, predominantly arising out of exposures to asbestos. Since inception in 1995, BDL has represented over 1,249 victims of asbestos disease in Washington. The vast majority of the firm’s clients are victims of mesothelioma, a cancer of the lining of the lung that often progresses quickly after diagnosis and is invariably fatal. Because asbestos disease, including mesothelioma, manifests itself only after a long latency window of many decades from exposure, asbestos victims and other victims of toxic exposures often encounter significant difficulty identifying all facts necessary for their cause of action to accrue during their lifetimes. This firm has represented numerous individuals whose claims only reached viability at or after death. Because the vast majority of firm’s clients are mesothelioma victims, and because most mesothelioma victims die from that disease during the course of the firm’s representation, BDL has significant practical experience in the handling of death claims, injury claims, and (most commonly) injury claims that morph into death claims due to the passing of the victim during the course of the case. BDL has a

significant interest, therefore, in resolution of this appeal in a manner that provides for an orderly and fair approach to the question of the timeliness of wrongful death actions, and the issue of whether and to what extent such actions are independent actions for new claims, or derivative actions tied to an injury claim personal to the decedent prior to death.

II. STATEMENT OF THE CASE.

BDL acknowledges the Statement of the Case in the briefs filed by Appellant Deggs and by Respondents Asbestos Corporation Limited (“ACL”), AstenJohnson, Inc. (“AstenJohnson”), and Ingersoll-Rand Company (“Ingersoll Rand”). BDL also acknowledges and adopts the analysis of Appellant Deggs regarding the absurd result that ensues if a wrongful death action cannot ever accrue or is barred instantly upon death. BDL confines its discussion and argument here to Respondents’ respective contentions that “a wrongful death action does not accrue following every death,” Br. of Respondents, at 13; that “if the deceased had no cause of action, none accrues to his heirs or personal representative,” *Id.*; and that Appellant Deggs “has failed to identify any damages that were unavailable in the 1999 lawsuit that would be available in this case.” Br. of Respondents, at 13.

III. ARGUMENT

A. The Approach of the Court of Appeals Would Deprive Family Members of Many Innocent Victims of A Remedy Even in Situations Where the Decedent Engaged in No Inequitable or Dilatory Conduct Before Death.

Appellant Deggs makes a cogent argument that: a wrongful death claim is not derivative of a personal injury claim; the claim may only be brought by a personal representative of the decedent's estate, upon accrual, at death; such a claim is a distinct and "new" cause of action that did not exist until death; and such claim is prosecuted not in favor of the decedent but instead in favor of statutory beneficiaries who until death had no standing to pursue a wrongful death claim. Br. of Appellant, at 4-12. BDL agrees with this in all respects and offers nothing further to bolster these points.

The analysis of the Court of Appeals below and of Respondents here, however, appears to embrace the continued viability of *Calhoun v. Washington Water Veneer Co.*, 170 Wn. 152, 15 P.2d 943 (1932), *Grant v. Fisher Flouring Mills Co.*, 181 Wn. 576, 44 P.2d 193 (1935), and *Johnson v. Ottomeier*, 45 Wn.2d 419, 275 P.2d 723 (1954) in a manner that could potentially sweep much more widely than Respondents acknowledge. In apparent recognition of the absurdity and unfairness of a rule that would deem a claim time-barred before it accrues, Respondents embrace the

flawed reasoning of the Court of Appeals below in arguing that wrongful death claims under Washington's wrongful death act *never* accrue "if the injured party had no valid and existing cause of action based on the same injuries and wrongful conduct at the time of death." Br. of Respondents, at 3. Respondents argue that because of this rule, "if the deceased had no cause of action, none accrues to his heirs or personal representatives," Br. of Respondents, at 14 (citing *Ryan v. Poole*, 182 Wn. 532, 536, 47 P.2d 981 (1935)). The proposed rule of law Respondents urge this Court to embrace would bar claims for wrongful death that are not anchored to some identifiable and viable claim personal to the decedent at the time of death.

Whatever the applicability of such an approach to the facts of this case may be, such a rule is practically impossible in common situations of tortious death and inconsistent with wrongful death litigation in Washington over the many decades since enactment of Washington's wrongful death statute.

The parties have focused on the timing and accrual of the wrongful death action, but have failed to contemplate situations where a personal injury claim never accrued but a death claim did. This law firm in its experience has encountered concrete examples that illuminate this problem. BDL has represented many families of victims of asbestos disease who died before reaching an understanding of the cause of their impending death, for

various reasons, none of them involving the Plaintiff acting in an inequitable or dilatory fashion. It is clear that no personal injury product liability action accrues until the Plaintiff knows, or has reason to know, each of the elements of his cause of action, including the identity of the defendants whose products cause injury. *Orear v. International Paint Company*, 59 Wn. App. 249, 255, 796 P.2d 759 (1990). This is true in asbestos cases where many manufacturers may share responsibility for a joint exposure over a worker's lifetime, and this Court has made clear that this inquiry in the context of asbestos product liability actions is defendant-specific. *Sahlie v. Johns-Manville Sales Corp.*, 99 Wn.2d 550, 552, 663 P.2d 473 (1983). It is not uncommon when investigating and prosecuting an asbestos case to identify manufacturers and suppliers of asbestos products implicated in an asbestos victim's exposure history only after death. For any such claims, clearly there is no "subsisting cause of action in the deceased" at the time of death, but application of that broad rule in such a context would bar such a claim brought by the victim's heirs within three years of the death.

Likewise, many BDL cases over the years have involved decedents who did not know during their lifetimes that they were suffering from an asbestos related disease. Two recent examples illustrate the problem.

In 2012, this firm represented the family of a man, Allen Lee Bedbury, whose physicians suspected he may have mesothelioma in

January, 2010. The modern medical reality is that mesothelioma can be definitively diagnosed only with a tissue biopsy. Unfortunately, Mr. Bedbury was too ill to have a biopsy performed to ascertain whether his ailment was mesothelioma (and, thus, related to his asbestos exposure) or not. Because medicine was unable to answer the question, and through no fault of his own, he was unable to pursue a claim for obvious reasons. He passed away on February 18, 2010. He died with no “valid” or “subsisting” cause of action because he did not know, and could not through any diligence on his part come to know, whether his illness was the result of a toxic tort or not.

An autopsy was performed on Mr. Bedbury, and after extensive analysis of his lung and pleural tissue, a mesothelioma diagnosis was confirmed on November 12, 2012 -- over two years after he died.¹ His heirs commenced a wrongful death action and litigated that action in the tort system on December 12, 2012.²

¹ The delay arose chiefly from the very difficult nature of his tumor and from the challenges pathologically of ascertaining whether it was mesothelioma or not.

² The case was litigated in Oregon, which has a two year statute of limitations, but has a discovery rule similar to Washington. Mr. Bedbury’s heirs prevailed on a motion for summary judgment under Oregon law seeking to dismiss the claim as not having been filed within two years of death. That motion was denied because the heirs did not obtain a confirmation of mesothelioma until November of 2012. *Bedbury v. Honeywell International et. al*, Circuit Court of Oregon, Multnomah County Cause No. 1212-15958. That the case is an Oregon case is immaterial here to the point here: the deceased never had a viable cause of

A second case the undersigned law firm was involved with offers a similar but even more compelling reason to reject the approach of the Court of Appeals below. In 2012 BDL was retained to investigate the case of a Tacoma man, Joseph Johnson, whose breathing was worsening. He had a known occupational history of asbestos exposure and he had some evidence of pulmonary distress, but not sufficient evidence for his physicians to make a diagnosis radiologically of asbestosis or any other asbestos-related condition. As a result, no case was pursued because there was not sufficient medical evidence of any asbestos-related disease.³

Some months later, Mr. Johnson had an unrelated hip replacement surgery and was prescribed a fairly new blood thinner (Xarelto) as part of his follow up care. Several months after the surgery, his condition worsened rapidly. After suffering from increasingly acute shortness of breath and

action when alive, and his heirs only developed a viable death case over two years after he died after a final diagnosis was reached.

³ BDL filed a case in Pierce County on behalf of Mr. Johnson against seven defendants based on what—at the time—appeared to be an asbestos-related illness. *See Johnson v. Ingersoll-Rand Co.*, Pierce County Cause No. 13-2-11239-1. Unfortunately, Mr. Johnson passed away before he was able to provide testimony about his exposure history—one of the primary reasons the case had been filed. Following his passing, an autopsy was conducted to confirm that Mr. Johnson had suffered from an asbestos-related illness. The autopsy instead revealed that Mr. Johnson had died as a result of a pulmonary edema caused by Xarelto poisoning. Plaintiff's counsel thereupon voluntarily dismissed the asbestos case.

edema as a result of overexposure to Xarelto prescribed by the physicians who performed the hip replacement. Mr. Johnson had been unwittingly poisoning himself with Xarelto until he died, with absolutely no reason to suspect his medication was playing any role. Dr. Hammar deemed the case so noteworthy he published the findings of the case in the medical journal *Respiratory Medicine Case Reports*.³ The decedent's widow was referred to other counsel who handle pharmaceutical and medical negligence matters for further evaluation of a potential wrongful death claim against his providers and the manufacturer of the blood thinner.

Both of these cases illustrate the impracticality of tying a wrongful death claim to a “viable” or “subsisting” cause of action in the deceased. Both Mr. Bedbury and Mr. Johnson died without knowing what was killing them. Neither of them had a “subsisting” or “viable” cause of action at death, in any more than a strictly hypothetical sense. If either of them attempted to pursue a claim prior to death, such claims would not have been viable; in Mr. Bedbury's case, because he could not prove his disease was asbestos related, and in Mr. Johnson's case, because he through no fault of his own, he believed he was dying from asbestos, when in fact he was dying from a defective drug, medical negligence, or both.

³ 15 RMCR 66 (2015).

These exposure cases demonstrate the problems with tying wrongful death claims to inchoate, but unaccrued, personal injury claims. The Court should be aware, however, that these difficulties are not limited to toxic exposure cases. Indeed, any case where a person is wrongfully killed instantly, by definition, is a case where there is never a “subsisting” or “viable” cause of action in the deceased. Yet the rule adopted by the Court of Appeals and urged here by Respondents would deprive the families of victims of such wrongful instant death as electrocutions, e.g., *Card v. Wenatch Valley Gas & Elec. Co.*, 77 Wash. 564, 566, 137 P.1047 (1914) (affirming wrongful death verdict for heirs of electrocution victim who was “instantly killed”); *Richardson v. Pacific Power & Light Co.*, 11 Wn.2d 288, 118 P.2d 985 (1941) (same); workplace accidents such as falling logs from a flatcar, e.g., *Miles v. St. Regis Paper Co.*, 77 Wn.2d 828, 829, 467 P.2d 307 (1970) (affirming wrongful death verdict for heirs of man instantly killed when crushed by three logs which rolled off of a flatcar); and even auto-pedestrian accidents, e.g., *Estate of Keck by & Through Cabe v. Blair*, 1 Wash. App. 105, 856 P.2d 740 (1993) (allowing wrongful death claim to proceed for rescuer who was killed instantly by oncoming car). None of these tort victims had any cause of action at all up until the moment of death, because they had sustained no injury until death. Conditioning the right of their heirs to recover on their being some “viable” or “subsisting” cause of

action in the deceased for a wrongful death action to accrue would be an absurd result, and one that Washington courts have clearly not required as a condition precedent of a wrongful death action for over a century since *Card*.

The proposed rule advanced by Respondents makes no accommodation for cases where the elements of a claim are not known or knowable prior to death, or where a tortious death is not preceded by an injury, but is instead instantaneous. A rule that produces such absurd results should not be upheld by this Court, even if doing so requires that this Court abandon ancient precedents.

B. Wrongful Death Claims Involve Damages Claims not Viable Prior to Death.

Respondents make the astonishing claim that Deggs “has failed to identify any damages that were unavailable in the 1999 lawsuit that would be available in this case.” Br. of Respondents, at 16, relying on *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984).

This ignores what should be obvious: one loss that Deggs most certainly could not claim in the 1999 action was a claim for the *permanent loss of her father to death*. The claims for loss of parental consortium available under *Ueland*, are limited to claims of loss of consortium prior to death, i.e., while Deggs’ father was alive. Indeed, one of the reasons behind

the Court's adoption of pre-death consortium claims in *Ueland* was the perceived inequity in allowing consortium claims for children of parents tortuously killed, while not allowing it for children of parents injured. *Id.*, at 134 (indicating a concern that the "state of the law is anomalous in that a child may recover for loss of consortium if the parent dies as a result of another's negligence but not if the severely injured parent remains alive...").

The WPI furnishes separate instructions for damages resulting from wrongful death and damages resulting from injury to a parent under *Ueland*. 6 Wash. Practice, *Wash. Pattern Jury Instructions-Civil*, at 329-365 (WPI 31.01 et seq.) While both are couched in similar language in terms of the elements of the consortium to be considered, to claim they are the same is to ignore the difference between injury and death. Whatever damages Deggs sustained circa 1999 in her relationship with her father (if any), Deggs sustained the permanent and eternal loss of her father when he died. It goes without saying that any jury hearing her hypothetical *Ueland* consortium claim when her father was alive would not consider the hypothetical future death of her father in assessing that claim. Death claims are different from injury claims; the losses are always more devastating, precisely because of their permanence. Equating *Ueland* claims with

wrongful death claims for loss of a parent is unwarranted and unsupported by law.

C. The Specter of Double-Recovery is a Red Herring.

In support of its ruling below, the Court of Appeals raised the issue of the risk of double recovery. To wit, the majority noted that “the settlement effectuated by a decedent during his lifetime *may* have been an estimate and determination of all the damages expected to follow from the initial wrong.” Maj. at 16. This claim, however, demonstrates a fundamental misperception of the practical realities of toxic tort litigation.

In living toxic exposure cases, settling defendants typically insist that the claimant release any potential wrongful death claims. While it may be pointed out that the living claimant does not have a wrongful death claim, and it is therefore doubtful that he or she could release such a claim, in practice this is addressed by having the claimant agree on behalf of his or her estate to indemnify the settling defendant for any potential wrongful death claim filed subsequently by the personal representative. In this way, the settling defendant, as a practical matter, buys its peace not only from the claimant, but also from potential wrongful death statutory beneficiaries. Notably, no defendants here had settled the previous claim—the only defendants were those that had not been named in the 1998 suit and the verdict defendant. This demonstrates that, contrary to the Court of Appeals’

concerns about a potential double recovery, in practice a settling defendant is never asked to pay twice for the same injury. For the verdict defendant, ACL in this case, the risk of double recovery can be eliminated through the use of proper jury instructions and a verdict form that segregates wrongful death damages from damages recoverable by the decedent's estate in a survival action, or to the decedent in the injury action while still living, such as the case may be.

D. The Fortuity That the Deceased Afflicted with an Injury Did Not Maintain a Personal Injury Action During His or Her Lifetime Is Irrelevant to the Harms Suffered by That Individual's Beneficiaries.

While BDL has no problem with the concept that an individual's inaction may cause the statute of limitations to run on any *survivorship* actions a decedent's family could have otherwise maintained in favor of his estate, it is necessary to raise an important practical issue not addressed by the petitioner or the Court of Appeals when considering wrongful death actions. Lost in the all of the materials before this Court is any acknowledgement that the decision of whether or not to litigate a claim during the final years of one's life is incredibly fraught. Individuals afflicted with terminal illnesses caused by occupational exposure to toxic materials frequently hold off from pursuing entirely viable personal injury claims. As any experienced attorney knows, litigation can be physically,

mentally, and emotionally taxing for all parties involved. Those individuals afflicted with a terminal illness may choose to not litigate a particular claim that they may have for a variety of reasons. The decedent's decision to refrain from raising an action that he or she otherwise could have in no way alters the fact that the individual's beneficiaries may want to maintain a wrongful death action after that individual passes away, even if the decedent elected not to pursue claims personal to him or her during the precious time remaining. We have seen this often in asbestos litigation, where an asbestos victim elects not to pursue litigation because of fatigue, infirmity, chemotherapy and radiation side effects, or just a general resolve to spend what precious life remains with family, friends or other loved ones. Not all who elect to refrain from litigating after a diagnosis of terminal cancer caused by asbestos do so because they are dilatory.

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

has encountered this set of facts more than once while litigating mesothelioma cases.

An individual's decision to not spend the last few years of his or her life mired in litigation in no way reduces the harm that the individual's statutory beneficiaries suffer as a result of his or her death. By design, Washington's wrongful death statute *only* governs post-death damages. *See Hatch v. Tacoma Police Dept.*, 107 Wn. App. 586, 27 P.3d 1223 (2001). This category of damages is conceptually distinct from the damages suffered by the decedent -- and should remain so. The Court of Appeals ruling effectively elided these categories, making them contingent upon one another. This implicit limitation precludes otherwise deserving parties from seeking redress from the court for injuries suffered. The beneficiaries of the wrongful death statute should not be precluded from seeking recovery for the harms they have suffered as a result of an individual's death and decision making in his or her final years. The wrongful death statute, by its plain language, allows the decedent's beneficiaries to maintain valid claims, should they so choose, which are wholly independently of any decisions made by the decedent in his or her lifetime. This Court should maintain the vitality of this cause of action and allow the beneficiaries to seek recovery for their post-death damages when they accrue, not on the extra-statutory schedule the majority opinion of the Court of Appeals set forth.

VII. CONCLUSION

For the foregoing reasons, the Court should reverse the Court of Appeals below and, to the extent that their ancient holdings still control, reverse and abandon the rule of *Grant* and *Calhoun*. A clear rule that wrongful death actions only and always accrue no earlier than death, and that statute of limitations run no earlier than three years after death, will simplify wrongful death litigation arising out of toxic torts and otherwise.

Dated: January 25, 2016.

Respectfully submitted,

BERGMAN DRAPER LADENBURG



Matthew P. Bergman, WSBA# 20894
Brian Ladenburg, WSBA# 29531
Colin B. Mieling, WSBA# 46328
Bergman Draper Ladenburg PLLC
Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on January 25, 2016, I caused to be served a true and correct copy of the foregoing document via electronic mail upon:

Mark B. Tuvim
Kevin J. Craig
GORDON & REES LLP
701 Fifth Avenue, Suite 2100
Seattle, WA 98104
asbestos-sea@gordonrees.com

J. Scott Wood
Jan E. Brucker
Bonnie L. Alldredge
Dan Ruttenberg
FOLEY & MANSFIELD, PLLP
999 Third Avenue, Suite 3760
Seattle, WA 98104
Asbestos-sea@foleymansfield.com

Meredith Boyden Good
BRAYTON PURCELL, LLP
806 SW Broadway, Suite 1100
Portland, OR 97205
portland@braytonlaw.com

Philip A. Talmadge
TALMADGE/FITZPATRICK
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
phil@tal-fitzlaw.com

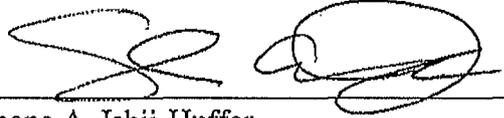
Richard G. Gawlowski
WILSON, SMITH, COCHRAN &
DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, WA 98164
MetLifeAsbestos@wscd.com

Bonnie Lynn Black
1020 N K Street, Apt. D
Tacoma, WA 98403
bonnielablack@gmail.com

Christopher S. Marks
Eliot M. Harris
Rachel Tallon Reynolds
SEDWICK LLP
520 Pike Street, Suite 2200
Seattle, WA 98101
Asbestos.Seattle@sedgwicklaw.com

Dated at Seattle, Washington this 25th day of January 2016.

BERGMAN DRAPER LADENBURG

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a horizontal line.

Shane A. Ishii-Huffer

OFFICE RECEPTIONIST, CLERK

To: Shane Ishii-Huffer
Cc: Alexis Inman; April Magruder; Jolie Counts; Kristen Herndon; Matthew Gonyea; Wil Cabatic; Colin Mieling; Brian Ladenburg
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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Alexis Inman <Alexis@bergmanlegal.com>; April Magruder <April@bergmanlegal.com>; Jolie Counts <Jolie@bergmanlegal.com>; Kristen Herndon <Kristen@bergmanlegal.com>; Matthew Gonyea <mattg@BergmanDraper.onmicrosoft.com>; Wil Cabatic <wil@bergmanlegal.com>; Colin Mieling <Colin@bergmanlegal.com>; Brian Ladenburg <Brian@bergmanlegal.com>
Subject: Deggs v. Asbestos Corporation Ltd., No. 91969-1

Good afternoon,

Please file the following documents on behalf of:

Brian F. Ladenburg
brian@bergmanlegal.com
WSBA # 29531

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

Sincerely,

Shane Ishii-Huffer
Litigation Paralegal



821 2nd Avenue, Suite 2100
Seattle, WA 98104
P: (206) 957-9510
F: (206) 957-9549
www.bergmanlegal.com